

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

May 2, 2023 at 2:00 p.m.

1. <u>23-20775-E-13</u>	RENEE LANE	MOTION TO EXTEND AUTOMATIC
<u>BB-1</u>	Bonnie Baker	STAY
		4-10-23 <u>[23]</u>

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 10, 2023. By the court's calculation, 1 day notice was provided for the original scheduled April 11, 2023 hearing. The court set the hearing for May 2, 2023. Dckt. 28.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing -----
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The Motion to Extend the Automatic Stay is granted.

Renee Lane (“Debtor”) seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor’s second bankruptcy petition pending in the past year. Debtor’s prior bankruptcy case (No. 22-23209) was dismissed on December 30, 2022, after Debtor failed to file documents. *See* Order, Bankr. E.D. Cal. No. 22-23209, Dckt. 14, December 30, 2022. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because it was a skeletal filing to prevent foreclosure and Debtor had no ability to prepare schedules nor funds to retain an attorney. Debtor provides a detailed Declaration explaining her unfortunate financial history, how she has now retained counsel to assist her in prosecuting the case, and details for why she is hopeful as to the success of this case.

TRUSTEE’S NONOPPOSITION

Trustee filed a nonopposition on April 25, 2023. Dckt. 54. Trustee states Debtor has provided a sufficient explanation for the dismissal of the prior case and filing of the current case. Trustee requests the Motion be granted. Dckt. 54.

DISCUSSION

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor’s cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

In re Elliot-Cook, 357 B.R. at 814–15.

Debtor has sufficiently demonstrated the case was filed in good under the facts of this case and the prior case for the court to extend the automatic stay.

The Motion is granted, and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Extend the Automatic Stay filed by Renee Lane (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditors holding Priority Claims on March 22, 2023. By the court’s calculation, 41 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

<p>The Motion to Confirm the Modified Plan is denied.</p>

The debtor, Marc A. Wilkie (“Debtor”) seeks confirmation of the Modified Plan to cure defaults in Plan payments. Declaration, Dckt. 80. The Modified Plan provides \$23,799.00 to be paid as of April 2023, followed by Plan payments of \$877.00 per month, commencing May 2023, for the remainder of the Plan. Modified Plan, Dckt. 79. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE’S OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on April 11, 2023. Dckt. 88. Trustee opposes confirmation of the Plan on the basis that:

- A. The Plan is overextended by possibly three months.
- B. Debtor’s change of address has not been filed using the court approved form, even though Debtor’s Declaration states he used to live in Kings Beach but moved to Napa in November 2022.

DEBTOR’S RESPONSE

Debtor filed a Response on April 21, 2023. Dckt. 92. Debtor states:

1. They agree that the Plan is overextended. Therefore, they propose to increase the Plan by \$60.00 per month in order to complete within the sixty (60) month period.

It appears Debtor is proposing that Trustee's concerns be resolved by an order that amends the proposed Plan to increase payments to \$937.00 per month. However, Debtor's monthly net income is only \$877.00 per month. Supplemental Schedule J, Dckt. 84. Therefore, Debtor's Plan as amended does not appear feasible. At the hearing, ~~XXXXXXXXXX~~

2. Debtor has moved to Napa, however, they have kept their P.O. Box at the Kings Beach address and will continue using it as their mailing address.

Upon reviewing Form EDC 2-085, the "CHANGE OF NAME AND/OR ADDRESS" form is for mailing addresses only. Therefore, if Debtor continues using their P.O. Box, which is the same address listed in their original petition documents, Dckt. 1 at p.2, it does not appear that Debtor needs to file the change of address form.

~~_____ The Modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.~~

~~The court shall issue an order substantially in the following form holding that:~~

~~_____ Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~_____ The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Marc A. Wilkie ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~_____ **IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.~~

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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 23, 2023. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Motion to Substitute was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion

The Motion to appoint a Successor Representative is granted, and the Motion for Further Administration of this Chapter 13 case notwithstanding the debtor having passed away is denied. The court shall issue a separate order to show cause for the dismissal of this case.

Joan Dougherty ("Successor-in-Interest"), wife of deceased debtor John Scott Dougherty ("Deceased Debtor"), seeks an order approving the motion to substitute for the Deceased Debtor. This motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 1016.

Deceased Debtor filed for relief under Chapter 13 on November 10, 2022. Deceased Debtor does not yet have a Chapter 13 plan confirmed. On January 28, 2023, Deceased Debtor passed away. Successor-in-Interest asserts that she is the lawful successor and representative of Deceased Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1016, Successor-in-Interest requests authorization to be substituted in for the Deceased Debtor and to perform the obligations and duties of the deceased party. A Suggestion of Death was filed on February 23, 2023. Dckt. 80. Successor-in-Interest is the deceased party's heir and lawful representative. Successor-in-Interest states that she will continue to prosecute this case in a timely and reasonable manner.

REQUEST TO SUBSTITUTE

DISCUSSION

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event a debtor passes away in a case "pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads (In re Eads)*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in Chapter 13 dies. *Id.*

While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." FED. R. BANKR. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the Deceased Debtor.

Local Bankruptcy Rule 5009-1(b) requires the filing with the court of Form EDC3-190 Debtor's 11 U.S.C. § 1328 Certificate. LOCAL BANKR. R. 1016-1 permits a movant, in a single motion, to request for the substitution for a representative, the authority to continue the administration of a case, and waiver of post-petition education requirement for entry of discharge.

Here, Joan Dougherty has not provided sufficient evidence to show that administration of the Chapter 13 case is possible by administration of the property of the bankruptcy estate. Rather, from the evidence it appears that the Successor-in-interest is the one to have her interests in property protected by and administered in a bankruptcy case for which she is not a debtor.

The Motion was filed within the ninety-day period specified in Federal Rule of Bankruptcy Procedure 1016, combined with the notice of death. Dckt. 80. The court concludes that appointment of the Successor-in-Interest as the Successor Representative is appropriate. In doing so, counsel for the Deceased Debtor has a client to represent in these and any other proceedings in this case. Though the Successor-in-Interest may have standing to bring this Motion, she would not necessarily have standing to be a party in interest for other proceedings, if any, that she and counsel determine appropriate.

REQUEST FOR FURTHER ADMINISTRATION

CREDITOR'S OPPOSITION

Creditor Cheryl Henry ("Creditor") filed an Opposition to allow further administration on March 22, 2023. Dckt. 99. Creditor argues that since the Deceased Debtor died before a plan was confirmed, the

court should deny confirmation pursuant to Federal Rules of Bankruptcy Procedure 1016. Creditor cites *In re Waring*, 555 B.R. 754 (Bankr. D. Colo. 2016) to support their argument.

SUCCESSOR-IN-INTEREST'S REPLY

Successor-in-Interest filed a reply on April 14, 2023. Dckt. 107. Successor-in-Interest states Creditor relies on a Colorado decision that is not in line with the facts at hand. Successor-in-Interest states the court should look to a Illinois Southern Bankruptcy Court bankruptcy court decision, a Fifth Circuit decision, a Eastern District of California Bankruptcy Court decision, and an Eastern District of Pennsylvania Bankruptcy Court decision to determine that the bankruptcy case should proceed. *In re Perkins*, 381 B.R. 530 (Bankr. S.D. Ill. 2007); *Querner v. Querner (In re Querner)*, 7 F.3d 1199 (5th Cir. 1993); *Hawkins v. Eads*, 135 B.R. 380 (Bankr. E.D. Cal. 1991); and *In re Terry*, 543 B.R. 173 (E.D. Pa. 2015).

REVIEW OF MOTION AND SUPPORTING EVIDENCE SUPPORTING ASSERTION OF WHY AND HOW FURTHER ADMINISTRATION IS POSSIBLE AND PROPER

Beginning with the Motion, Dckt. 80, counsel for the Deceased Debtor, and presumably for the purposed successor representative (because if not, then such counsel does not have a client real party in interest in this Bankruptcy Case), the basis for continuing the administration of the Deceased Debtor's Bankruptcy Estate, assets, and case (not administration of Successor-in-Interest's assets and providing bankruptcy protection for the Successor-in-Interest's assets), the basis for such continued administration were stated as:

"2. Debtor's 341 meeting of creditors has been continued to March 2, 2023.

3. Debtor's plan has not yet been confirmed."

"5. Mrs. Dougherty [Successor-in-Interest and proposed Successor Representative] intends to appear at the continued meeting of creditors on March 2, 2023."

Successor-in-Interest "requests the Court allow further administration of her husband's case, and substitute her as her husband's representative so that she may complete the Chapter 13 plan and obtain a discharge for his estate." Mtn, p. 2:8-1.

This further administration of the Bankruptcy Estate "will allow [successor-in-interest] to retain the residence in which she resides with the couple's daughter." *Id.*, p. 2:10-12.

Motion, quotations identified by paragraph number used in the Motion or by the page and line numbers; Dckt. 80. The Motion does not state how such administration would be accomplished or what property of the Debtor/Bankruptcy Estate will be used to fund such administration.

Joan Dougherty, the Successor-in-Interest and proposed Successor Representative provides her Declaration (Dckt. 82) in support of the Motion. Her testimony includes the following (identified by paragraph number used in the Declaration or the page and line number):

“3. My husband’s plan was filed primarily to provide for addressing secured debt and priority tax debt.”

“I request the Court allow further administration of the case and substitute me as my husband's representative so that I may complete the Chapter 13 plan and receive a discharge for his estate.”

Dec.; Dckt. 82.

Joan Dougherty provides a Supplemental Declaration (Dckt. 109) in response to the Opposition. She testifies that while the Deceased Debtor was alive he received Social Security benefits and Long Term Disability Benefits from his former employer. Dec., ¶ 5; Dckt. 109. She states that these benefits totaled \$7,170.00 a month. *Id.* The Successor-in-Interest states that she has been a Realtor in Solano County. Additionally, that her (not the Deceased Debtor’s) survivor’s benefit will be \$7,000 a month. *Id.*

She provides testimony of what she is doing to pay the secured claims and work on preparing tax returns for years that the Deceased Debtor did not file returns.

She also testifies of attempting to refinance the house that is subject to Creditor’s *lis pendens* and pay Creditor, but that Creditor would not cooperate.

She closes by stating that since she, the Successor-in-Interest, will be receiving a substantial survivor’s benefit, she (and not the Bankruptcy Estate) would fund the Plan in this case. *Id.*, p. 3:2-13.

REVIEW OF SCHEDULES, CLAIMS, AND PROPOSED PLAN IN THIS CASE

The proposed Chapter 13 Plan filed by the Debtor prior to his death required a \$2,320.00 a month Plan payment. Plan, ¶ 2.01; Dckt. 3. There are no Class 1 claims (secured claims with defaults to be cured) provided for in the Plan. *Id.*, ¶ 3.07.

For Class 2, there is only one secured claims (with a vehicle as the collateral) that was to be paid through the Plan. *Id.*, ¶ 3.08.

Class 4, secured claims for which there are no defaults, are provided to be paid outside the Plan. *Id.*, ¶ 3.10.

For the Class 5 priority claims, Debtor listed (\$110,000) as owed and to be paid through the Chapter 13 Plan. *Id.*; ¶ 3.12.

For the Class 7 general unsecured claims, it provides for not less than a 0.00% dividend to creditors holding general unsecured claims. *Id.*; ¶ 3.14.

Schedules

On Schedule A/B, Debtor states under penalty of perjury that he is the sole owner of the Vintage Court property, which has a value of \$847,000. Dckt. 1 at 11. He further states that this is no community property. Looking through Schedule A/B, there are no other assets of any significant value.

On Schedule D, Debtor lists a series of creditors (including Creditor) having claims secured by the Vintage Court Property, which secured claims are not disputed. On Schedule D Debtor states that these non-disputed secured claims total (\$619,924). *Id.*, at 19-22. The Plan filed by Debtor does not provide for some of these secured claims.

Additionally, the IRS has filed Proof of Claim 13-1 in the amount of (\$202,116.78), of which (\$39,294.24) is asserted to be secured. Additionally, it asserts that (\$104,341.98) is a priority claim. This priority amount is for the 2020 and 2021 tax years for which tax returns have not yet been filed.

Creditor's Proof of Claim 16-1 has been filed in the amount of (\$258,379.67), asserting that it is fully secured.

DISCUSSION

Creditor cites *In re Waring*, 555 B.R. 754 (Bankr. D. Colo. 2016). In *Waring*, debtor passed away 26 days after filing for bankruptcy, prior to proposing a plan. *Id.* at 755. Debtor's surviving spouse proposed a five-year plan on behalf of herself and husband. *Id.* at 756. The court found that the debtor died too quickly after filing that they could not obtain the fresh start. *Id.* However, the court found the surviving spouse may amend their petition, statements, and schedules, and continue by themselves, in a solo bankruptcy case. *Id.*

Successor-in-Interest first cites *In re Perkins*. *In re Perkins*, 381 B.R. 530 (Bankr. S.D. Ill. 2007). In *Perkins*, the debtor filed and confirmed a Chapter 13 plan over two years before the debtor passed away. *Id.* at 531. About a year and a half after the debtor passed away, an amended plan was filed on behalf of the debtor which proposed to shorten the life of the plan. *Id.*

The Illinois Southern Bankruptcy Court ("Illinois Court") however, does not address what occurs when a debtor proposes a Chapter 13 Plan, the Plan is denied confirmation, and then the debtor passes away prior to proposing a new confirmable plan. Rather, the Illinois Court grapples with whether a deceased debtor can receive a discharge under 11 U.S.C. § 1328(a) and Federal Rules of Bankruptcy Procedure 1016. The Illinois Court found that as explicitly stated in Rule 1016, the court must determine whether further administration is in the best interest of parties. *Id.* at 537. Of interest, the Illinois Court notes, "[m]any courts have held that confirmation of a plan is *res judicata* on the issue of a debtor's eligibility, and thus the issue may not be raised after the plan has been confirmed." *Id.* at 536. This suggests a debtor may be *per se* eligible post-confirmation, however, opens a question that there may be eligibility issues pre-confirmation, such as the case here, and a debtor passes away.

The second decision Successor-in-Interest cites is a Fifth Circuit decision, *Querner v. Querner* (*In re Querner*), 7 F.3d 1199 (5th Cir. 1993). In *Querner*, the Chapter 13 debtor died before the reorganization was complete. *Id.* at 1200. The facts of the case do not state when debtor died, however, it states about ten (10) months after the filing of the case, the court confirmed a Plan. *Id.* The decision suggests debtor died prior to confirmation, however, it is not clear to the court. Regardless, the decision does not focus on whether a deceased debtor's bankruptcy case can proceed when the debtor died pre-confirmation. Rather, it focused on the bankruptcy court improperly retaining jurisdiction of the deceased debtor's probate estate. *Id.* at 1203.

The third decision Successor-in-Interest cites is a case from this district ("California Eastern District"). *Hawkins v. Eads*, 135 B.R. 380 (Bankr. E.D. Cal. 1991). Successor-in-Interest admits this case

is not directly on point. Response, Dckt. 107 at 3. Successor-in-Interest states the California Eastern District “identifies certain standards to be applied in determining whether to dismiss or proceed with a case under Chapters 11, 12, and 13 if a debtor dies.” *Id.* at 4. Successor-in-Interest states the California Eastern District does not mention whether a Chapter 13 plan is confirmed prior to death is one of those standards. Upon this court’s review of the case, no standards are identified. The California Eastern District only mentions that it should be considered whether administration is possible and in the best interest of the parties. *Hawkins* 135 at 383.

The fourth decision Successor-in-Interest cites is an Eastern District of Pennsylvania case, *In re Terry*, 543 B.R. 173 (E.D. Pa. 2015). In the case, a debtor filed an amended Chapter 13 plan about four months prior to their death. *Id.* at 177. The court found that since the proposed plan provided for payment in full to creditors and was not dependent on deceased debtor’s income, the case could proceed as further administration was possible and in the best interest of creditors. *Id.* at 182.

The facts at hand diverge from the cases Successor-in-Interest provided. Here, Deceased Debtor proposed a Plan on November 10, 2022. Dckt. 3. Deceased Debtor then passed away on January 28, 2023. Dckt. 80. On February 9, 2023, the court entered an order sustaining Chapter 13 Trustee’s Objection to Confirmation of Plan. Order, Dckt. 71. There is currently no confirmable Plan on file.

Additionally, the original proposed Plan did not provide for payment in full of Creditors and the Plan relied on Debtor’s disposable income, unlike *Terry*. Nonpriority unsecured claims were expected to receive no less than a zero percent dividend and the Plan provided payments of \$2,320.00 per month, which was equivalent to Deceased Debtor’s disposable income at the time of filing the petition. Plan, Dckt. 3 § 3.14; Schedule J, Dckt. 1. Successor-in-Interest, however, declares under penalty of perjury that they would be more than able to perform Deceased Debtor’s Plan. Dckt. 109.

As stated in the leading treatise on bankruptcy, Collier on Bankruptcy:

[I]n many cases, **unless a plan was confirmed prior to the debtor’s death, the case will be dismissed even if the debtor’s estate has sufficient income to fund a plan.** Indeed, it has been held that **if the originally proposed plan cannot be confirmed after a debtor’s death, the case must be dismissed** because no one but the debtor may propose a plan under section 1321.

9 Collier on Bankruptcy P 1016.04 (16th 2023). Here, no plan was confirmed prior to Deceased Debtor’s death. The original proposed Plan was denied, and no amended plan was proposed prior to Deceased Debtor’s death.

Under 11 U.S.C. § 1323(a), only the debtor may modify the Plan at any time prior to confirmation. As the Ninth Circuit Bankruptcy Appellate Panel has addressed, a chapter 13 debtor is the only entity that may file a Plan. *Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth)*, 455 B.R. 904, 916 (B.A.P. 9th Cir. 2011).

Decision

Under the plain language of 11 U.S.C. § 101(13), debtor means “person or municipality concerning which a case under this title has been commenced.” If Deceased Debtor’s probate estate were seeking substitution, they are not a “person or municipality,” and as such, would not be able to propose a

plan, making further administration impossible. However, it is not the probate estate who is substituted. Rather, it is the Successor-in-Interest, surviving spouse of Deceased Debtor. Therefore, it needs to be determined whether a substituted party can be considered the “debtor.”

The “opportunity to seek bankruptcy and the discharge that results from it are personal to the debtor.” *In re Shepherd*, 490 B.R. 338, 342 (Bankr. N.D. Ind. 2013). No other individual, including debtor’s heirs, become liable to debtor’s obligations when a debtor dies. *Id.* Additionally, it is the debtor, and only the debtor, not their heirs and successors, who receives the discharge after the completion of the Plan. 11 U.S.C. § 1328(b). From this, it is clear that a debtor in a Chapter 13 case is the individual who holds the liabilities and receives the discharge under which the case that is filed. This is not the heir, or successor-in-interest.

In this Bankruptcy Case, there are no assets or income from which any Plan would be funded. Rather, the Successor-in-Interest will fund the Plan from her personal money she receives as a survivor benefit. The only significant asset is the Vintage Court Property, for which there are no co-owners or other persons asserting that they now own it. Rather, it may be that Deceased Debtor’s daughter would inherit through a State Court probate proceeding. Or it may be that a will provides for the Successor-in-Interest to inherit and personally own the Property (and it not being part of a bankruptcy estate).

A conclusion that the court draws from the evidence presented is that the Successor-in-Interest seeks to retain the Vintage Court property and use it as a residence for herself and Debtor’s daughter. In substance, the Successor-in-Interest seeks to be a bankruptcy debtor by proxy, having the bankruptcy case being administered by her as a Successor Representative and the Successor Representative avoiding the “hassle” of being a debtor.

This is a situation where these various disputes, determination of interests, probating a will or an intestate probate proceeding, should be prosecuted in the State Court. The Successor in Interest can assert her, and the Deceased Debtor’s rights and interest in the probate proceeding. If a dispute exists with Creditor over the amount of her secured debt (half of being asserted to be attorney’s fees due on the Note), the probate judge can adjudicate that.

Taking into consideration Federal Rules of Bankruptcy Procedure 1016 and 11 U.S.C. § 1328(b), this court finds further case administration is not possible, as there is no confirmable plan on file, there is no income of the Bankruptcy Estate to fund a Plan, and that only the Deceased Debtor may propose a plan. The Motion for Continued Case Administration is denied.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Appoint a successor representative for Deceased Debtor John Scott Dougherty is granted and Joan Dougherty is appointed as the Successor Representative in this Bankruptcy Case for the Deceased Debtor.

IT IS FURTHER ORDERED that the Motion to continue the administration of this Chapter 13 case pursuant to Federal Rule of Bankruptcy Procedure 1016 is denied.

IT IS FURTHER ORDERED that the court determining under Federal Rule of Bankruptcy Procedure 1016 that no further administration of this case is possible, the Bankruptcy Case should be dismissed. The court shall issue a separate Order to Show Cause to provide and clearly document the pending dismissal before entering an order thereon.

CHERYL HENRY VS.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor’s Attorney on December 16, 2022. By the court’s calculation, 39 days’ notice was provided. 28 days’ notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is denied without prejudice.

Cheryl Henry’s (“Movant”) seeks relief from the automatic stay with respect to John Scott Dougherty’s (“Debtor”) real property commonly known as 1096 Vintage Court, Vacaville, California (“Property”). Movant has provided the Declaration of Cody S. Fischer (“Movant’s Counsel”) to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues that they have a third-position Deed of Trust in the amount of \$191,645.00 secured by Debtor’s property. Declaration, Dckt. 22.

TRUSTEE’S RESPONSE

The Chapter 13 Trustee, David P. Cusick, (“Trustee”) filed a reply on January 4, 2023. Dckt. 44. Trustee states Debtor’s proposed Plan does not provide for Movant. Additionally, Debtor is delinquent in Plan payments on the proposed Plan.

DEBTOR’S OPPOSITION

Debtor filed an Opposition on January 10, 2023. Dckt. 47. Debtor asserts that Creditor does not have a Deed of Trust because Debtor did not consent or agree to sign any Note or Deed of Trust. Rather, Debtor argues Creditor's secured claim is based on an Abstract of Judgment, which is a nonconsensual lien subject to avoidance. Therefore, Creditor's interest is not subject to adequate protection.

From the court's review of Movant's exhibits in support of the Motion, Debtor never signed a promissory note or deed of trust that would give Creditor a consensual lien on Debtor's Property. Dckt. 23. However, Movant provides the declaration of Movant's Counsel to testify under penalty of perjury that the Promissory Note and Deed of Trust were signed and notarized on June 9 and 20, 2022, respectively.

From the court's review of the exhibits (Dckt. 23) filed in support of the Motion, Movant provides the following:

Exhibit B - Promissory Note

Date: October __, 2020, whereas Debtor promises to pay Creditor the principal sum of \$100,000.00.

Payment terms:

- (1) November 1, 2020 - May 1, 2022 - Debtor to pay Trustee, Horner Law Group, P.C., monthly payments of at least \$500.00.
- (2) On or before the May 1, 2022 payment, Debtor is to pay the remaining \$100,000.00
- (3) Late payment - \$50.00 late fee if not received by the 10th day of the month
- (4) Acceleration Clause - If Debtor fails to make a payment after the 15th day of the monthly payment is due, all outstanding settlement proceeds will become due and payable immediately and Creditor may proceed with all of their legal rights and remedies, including foreclosure proceedings.
- (5) Attorney's fees - Debtor promises to pay all reasonable costs and expenses incurred by Creditor in connection with the enforcement of the Note.

Signature: The Promissory Note is signed by a "Brian Taylor," a Clerk of Court, in lieu of Debtor, on June 9, 2022. The signature is notarized.

Exhibit C - Recorded Deed of Trust

Date: November 1, 2020

Trustor: Debtor, John Scott Dougherty

Beneficiary: Creditor, Cheryl Henry

Trustee: Horner Law Group, P.C.

Transferred Interest: Debtor irrevocably grants, transfer, and assigns to Trustee in Trust with power of sale the property commonly described as 1096 Vintage Court, Vacaville ("Property").

Signature: The Deed of Trust is signed by a "Robert Oliver," a Clerk of Court, in lieu of Debtor, on June 20, 2022. The signature is notarized.

Recording Information:

Date: June 27, 2022

County: Solano County

Document Number: 202200043969

Movant provides evidence that a Deed of Trust was recorded, securing their interest. In addition to this evidence, however, Debtor provides evidence a judgment was entered against Debtor in favor of Creditor in the amount of \$127,783.17. *Id.* An abstract of judgment was recorded with Solano County on January 24, 2022, which is prior to the date the Deed of Trust was recorded. *Id.* This would create a nonconsensual interest for Creditor on Debtor's Property.

MOVANT'S REPLY BRIEF

In response to Debtor's opposition, Movant filed a Reply Brief. Dckt. 58. As evidence in support of the reply brief, Movant provides the Declaration of Movant's Counsel, Cody S. Fischer. Dckt. 59. Movant's Counsel testifies much of the same facts testified in their prior Declaration, however, provides further evidence for the court. Dckt. 22. Under penalty of perjury, Movant's Counsel states they have personal knowledge that:

1. The underlying secured interest arises from enforcing Debtor and Movant's settlement agreement from September 30, 2020. Declaration, Dckt. 58 ¶ 3.
2. The settlement agreement arose from a Solano County Superior Court Case between the Movant and Debtor, Case No. FCS052751. *Id.*
3. After Debtor failed to comply with the terms of the settlement agreement, Movant filed a Motion to Enforce Settlement Agreement. *Id.* ¶ 4.

4. On November 30, 2021, Solano County Superior Court entered its Judgment in favor of Movant. Judgment was filed by the court on December 13, 2021. *Id.* ¶ 5.
5. As part of the Judgment, the court ordered Debtor to execute a Promissory Note and Deed of Trust, no later than December 29, 2021. *Id.* ¶ 6.
6. Debtor failed to comply with the court order. *Id.* ¶ 7.
7. In May of 2022, Debtor stated, with notary present, “Well I guess I’m going to jail then, because I’m not signing.” *Id.* ¶ 7. The court notes, Movant’s Counsel has not made it clear whether Movant’s Counsel was present for this statement. If Movant’s Counsel were present, the statement would be admissible evidence as an opposing party statement. Federal Rules of Evidence Rule 801(d)(2).
8. Movant requested an appointment of an Elisor (person authorized by the court to sign documents for another person; *see Blueberry Properties, LLC v. Chow*, 230 Cal. App. 4th 1017, 1020-1021 (2014)) to have the Note and Deed of Trust signed and notarized. *Id.* ¶ 8.
9. The Note and Deed of Trust were signed and notarized, and the Deed of Trust was recorded in Solano County on June 27, 2022. *Id.* ¶ 11.

It is not clear to the court how Movant’s Counsel has personal knowledge as to the facts above. As discussed in Weinstein's Federal Evidence § 602.02:

A witness may testify only about matters on which he or she has first-hand knowledge. Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences. The witness’s testimony must be based on events perceived by the witness through one of the five senses.

Movant’s Counsel has not informed the court whether they represented Movant and was present at the time of the listed events.

JANUARY 24, 2023 HEARING

At the hearing, counsel for the Debtor reported that Debtor is suffering from a serious medical condition and that the appointment of a personal or successor representative may be required.

The court addressed with counsel for Movant the need for supplemental pleadings which would include the Settlement Agreement and the Tentative Ruling in granting Movant’s Motion to Enforce Settlement which was adopted by the State Court Judge in issuing the State Court Judgment (Exhibit A; Dckt. 23 at 3-4).

At the hearing, the parties agreed to continue the hearing to March 7, 2023 to allow for the supplemental briefing.

MOVANT’S SUPPLEMENTAL BRIEF

Movant filed a Supplemental Brief on February 10, 2023. Dckt. 74. Movant states the following in support of their Motion for Relief:

1. Movant promised to sign the Note and Deed of Trust but did not do so. *Id.* at 6.
2. Movant was forced to seek court intervention to order Debtor to sign the document. *Id.*
3. The Elisor’s signature has the legal effect as if Debtor had signed the Note and Deed of Trust. *Id.* at 7 (citing *Blueberry Props., LLC v. Chow*, 230 Cal. App. 4th 1017, 1021 (2014)).
4. Liens created by settlement agreements are consensual liens. *Id.* (citing *Naqvi v. Fisher*, 192 B.R. 591, 596 (Bankr.D.N.H. 1995)).
5. The signing, originating from a consensual settlement agreement, indicates the Note and Deed of Trust are valid, enforceable, and consensual. *Id.*

DEBTOR’S SUPPLEMENTAL OPPOSITION

Debtor filed supplemental opposition on February 24, 2023. Dckt. 85. Debtor states:

1. Movant’s claim that she is not adequately protected is not supported by evidence. *Id.* at 2.
2. Debtor passed away on January 28, 2023. *Id.* at 3.
3. An amended plan will be filed once Deceased Debtor’s spouse is substituted as representative which will fully address Movant’s claim. *Id.*

COURT’S ORDER CONTINUING HEARING

On March 1, 2023, the court issued an order continuing the hearing on the Motion for Relief to 2:00 p.m. on March 21, 2023, to be conducted in conjunction with the Motion to Appoint the Successor Representative.

MARCH 21, 2023 HEARING

The court not yet having ruled whether the case may continued to be prosecuted by the successor representative of the late Debtor (Fed. R. Bankr. P. 1016). The hearing is continued pending completion of the briefing and ruling on whether the case should be allowed to continue with the successor representative.

MAY 2, 2023 HEARING

The court determined on May 2, 2023, in connection with a related motion that this Chapter 13 Case cannot continued to be administered after the death of John Scott Dougherty, the Debtor. The court shall issue an order to show cause, for which there will be a prompt hearing at which any opposition may be presented to afford all persons their Due Process rights.

The pending dismissal renders this Motion moot. Additionally, with the death of the Debtor, then parties in interest should be promptly be proceeding with any probate actions or other state court proceedings concerning the property and other assets of the Deceased Debtor. Those parties in interest may have been lulled into a unwarranted sense of security that no action was necessary because the Deceased Debtor's Bankruptcy Case would provider "bankruptcy benefits" for all of such non-debtors.

The Motion is denied without prejudice.

ISSUANCE OF A COURT-DRAFTED ORDER

An order substantially in the following form shall be prepared and issued by the court:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay by the late John Scott Dougherty ("Debtor") having been presented to the court, the court not yet having ruled whether the case may continued to be prosecuted by the successor representative of the late Debtor (Fed. R. Bankr. P. 1016), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Relief From the Stay is denied without prejudice.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on January 3, 2023. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

<p>The Motion to Avoid Judicial Lien is denied without prejudice.</p>

This Motion requests an order avoiding the judicial lien of Cheryl Henry ("Creditor") against property of the debtor, John Scott Dougherty ("Debtor") commonly known as 1096 Vintage Court, Vacaville, California ("Property").

CREDITOR'S OPPOSITION

Creditor filed an opposition on January 10, 2023. Dckt. 49. Creditor states Debtor's Motion conceals that Creditor has a valid, enforceable, Deed of Trust in the third position against the Property.

From the court's review, Debtor is only trying to avoid a judicial lien. Debtor provides evidence of the judicial lien as Exhibit A, Dckt. 41. Creditor does not address how having a consensual lien renders a judicial lien immune to the avoidance of avoiding of that lien as provided in 11 U.S.C. § 522(f).

Creditor's Opposition is rich with judgmental, condemning language directed at Debtor. These include: (1) "Dougherty omits and conceals from this Court that Creditor Henry has a valid, enforceable, Deed of Trust . . . ;" (2) "Dougherty essentially commits fraud on this Court by stating under penalty of perjury . . . ;" (3) "Dougherty's entire argument in his Motion is premised on omitting the Henry Note and Deed of Trust . . . ;" (4) "He intentionally and fraudulently omits Henry's third-position Note and Deed of Trust secured interest . . . ;" (5) "Dougherty's indisputably perjurious representations in his Declaration belie his credibility . . . ;" (6) a long recitation of how Creditor asserts Debtor failed to comply with orders of the State Court judge; and (7) "Dougherty is well aware that his perjurious statements are intentionally misleading" In reading this Opposition and all of the extraneous personal attacks, the court is reminded of that famous quote from William Shakespear's Hamlet:

The lady doth protest too much, methinks.

In the opposition Creditor asserts both its judgment lien and the deed of trust. In this Motion Debtor only takes action against the judgment lien asserted by Creditor and not a deed of trust.

DEBTOR'S RESPONSE

Debtor filed a response on January 17, 2023. Dckt. 56. Debtor states that attached as exhibits to their Motion was an unsigned Promissory Note and unsigned Deed of Trust. The Abstract of Judgment was recorded on January 24, 2022, and was not a consensual lien. This was two-hundred and ninety (290) days before the commencement of this Bankruptcy Case.

Debtor argues that the deed of trust lien, which Debtor consented to and then refused to sign, is a "mere" judgment lien merely because the court appointed someone else to sign for Debtor the deed of trust which Debtor agreed to give pursuant to the settlement and then was ordered to be done in the State Court Judgment. A copy of the Judgment is provided as Exhibit A by Debtor (Dckt. 41 at 5-6). The State Court Judgment includes a mandatory injunction for Debtor to execute the promissory note and deed of trust which Debtor has agreed to under the Settlement Agreement. The Note and Deed of Trust are included as attachments to the State Court Judgement.

From what Debtor presents, Debtor agreed to and gave a security interest in the property in the form of a deed of trust. Merely because he later refused to comply with the Settlement Agreement or the State Court Judge's order, and someone had to be appointed to do the ministerial task of signing the note and deed of trust.

DISCUSSION

The State Court Judgment (Dckt. 41) makes reference to there being a tentative ruling and the State Court adopting that ruling. Here is what is ordered in the State Court Judgment:

- A. Creditor is awarded a monetary judgment of \$127,783.17 against Debtor.
- B. Further, that within 30 days after the date of the State Court Judgment, Debtor will:
 - 1. Execute and notarize a promissory note and deed of trust as described in the Settlement Agreement, with a copy of the note and deed of trust being attached to the State Court Judgment.

- C. The note is in the principal sum of \$100,000 and:
1. no interest accrues on the \$100,000,
 2. Monthly payments are specified, with a balloon payment to be paid on May 1, 2022.
 3. Late fees of \$50 apply.
- D. The deed of trust secures the note (not the judgment).

Creditor provides the declaration of Creditor's Counsel to testify under penalty of perjury that the state court appointed an elisor on June 20, 2022 to sign the Deed of Trust. Declaration, Dckt. 50. Creditor's Counsel insists the Deed of Trust was recorded in Solano County on June 27, 2022. Creditor's Counsel has not provided the recorded Deed of Trust in the form of an exhibit to verify this information.

Upon review of Creditor's Proof of Claim 16-1, Creditor provides the following attachments as evidence of a valid Note and Deed of Trust:

Attachment 2 - Recorded Deed of Trust

Date: November 1, 2020

Trustor: Debtor, John Scott Dougherty

Beneficiary: Creditor, Cheryl Henry

Trustee: Horner Law Group, P.C.

Transferred Interest: Debtor irrevocably grants, transfer, and assigns to Trustee in Trust with power of sale the property commonly described as 1096 Vintage Court, Vacaville ("Property").

Signature: The Deed of Trust is signed by a "Robert Oliver," a Clerk of Court, in lieu of Debtor, on June 20, 2022. The signature is notarized.

Recording Information:

Date: June 27, 2022

County: Solano County

Document Number: 202200043969

Attachment 3 - Promissory Note

Date: October __, 2020, whereas Debtor promises to pay Creditor the principal sum of \$100,000.00.

Payment terms:

- (1) November 1, 2020 - May 1, 2022 - Debtor to pay Trustee, Horner Law Group, P.C., monthly payments of at least \$500.00.
- (2) On or before the May 1, 2022 payment, Debtor is to pay the remaining \$100,000.00
- (3) Late payment - \$50.00 late fee if not received by the 10th day of the month
- (4) Acceleration Clause - If Debtor fails to make a payment after the 15th day of the monthly payment is due, all outstanding settlement proceeds will become due and payable immediately and Creditor may proceed with all of their legal rights and remedies, including foreclosure proceedings.
- (5) Attorney's fees - Debtor promises to pay all reasonable costs and expenses incurred by Creditor in connection with the enforcement of the Note.

Signature: The Promissory Note is signed by a "Brian Taylor," a Clerk of Court, in lieu of Debtor, on June 9, 2022. The signature is notarized.

Creditor provides evidence that a Deed of Trust was recorded, securing their interest. This creates a consensual interest that would not be avoidable.

Debtor, however, provides evidence a judgment was entered against Debtor in favor of Creditor in the amount of \$127,783.17. *Id.* An abstract of judgment was recorded with Solano County on January 24, 2022, which is prior to the date the Deed of Trust was recorded. *Id.* This would create a nonconsensual interest for Creditor on Debtor's Property.

Proof of Claim 16-1 filed by Creditor is in the amount (\$258,379.68). POC 16-1, § 7. Creditor then states that the claim is fully secured by a deed of trust. *Id.*, ¶ 9.

Attachment 1 to Proof of Claim 16-1 computes this claim as consisting of the following component parts:

1. Obligation secured by Deed of Trust.....(\$100,000)
2. Plus Attorney's Fees.....(\$114,174.42)

3. Plus Costs.....(\$ 44,205.25)

What is not clear to the court is whether there is a judgment obligation secured by a judgment lien and a separate promissory note obligation secured by a deed of trust, or that the note and deed of trust replaced the judgment.

Performing the “simple” 11 U.S.C. § 522(f) calculation, the number appear to line up as follows:

FMV of the Property.....\$874,000

Rocket Mortgage Deed of Trust.....(\$294,815) POC 7-1
(March 16, 2017 Recording)

IRS Secured Claim.....(\$ 36,294) Amd. POC 13-2
(Nov. 26, 2013 Tax Lien Recorded)

Pacific Service Credit Union
Deed of Trust.....(\$99,670) [No Proof of Claim Filed]

Renew Financial PACE Loan.....(\$ 20,000) [No Proof of Claim Filed]

Value of Property For Judgment Lien
and Exemption Avoidance Calculation.....\$572,891 [Assumes valid secured claims of
Pacific Service CU and Renew Financial]

American Express Abstract of Jdgt.....(\$ 3,609) [No Proof of Claim Filed]

Credit’s Judgment Lien.....(\$127,783) [principal amount of Judgment]
[Recorded January 24, 2022]

Creditor’s Deed of Trust.....(\$258,379)
[Recorded August 27, 2022]

Debtor’s bankruptcy case was filed on November 10, 2022. Creditor’s Deed of Trust was recorded on August 27, 2022 - Seventy-Six (76) days before this Bankruptcy Case was filed.

What is not clear to the court is what claim or claims that Creditor has in this case. It is not clear if there is both an abstract of judgment securing a judgment or “just” a note secured by a deed of trust in place of the judgment.

Continuance of January 24, 2023 Hearing

At the hearing, counsel for the Debtor reported that Debtor is suffering from a serious medical condition and that the appointment of a personal or successor representative may be required.

The court has continued the hearing on the Motion for Relief From the Stay to March 7, 2023, to allow for the filing of supplemental pleadings.

The Parties agreed to continue the hearing on this Motion to Avoid Judicial Lien to 1:30 p.m. on March 7, 2023, with Debtor filing and serving supplemental pleadings on or before February 24, 2023. No supplemental response pleadings are required, with the court to set a further filing schedule at the continued hearing if such are requested to be filed.

Debtor's Supplement to Motion

Debtor filed a Supplement to Motion on February 24, 2023. Dckt. 87. Debtor states the following encumbrances are current against the Property:

- A. A first note and deed of trust in favor of Rocket Mortgage, in the amount of \$305,000.00;
- B. A second note and deed of trust in favor of Pacific Service Credit Union, in the amount of \$99,670.00;
- C. A PACE Loan through Renew Financial, in the amount of \$20,000.00;
- D. Abstract of Judgment in favor of American Express, in the amount of \$3,609.00;
- E. A third note and deed of trust in favor of Cheryl Henry, in the amount of \$100,000.00; and
- F. A secured Federal Tax Lien in the amount of \$39,294.24

Debtor requests the court grant the Motion to Avoid Judicial Lien.

COURT'S ORDER CONTINUING HEARING

On March 1, 2023, the court issued an order continuing the hearing on the Motion to Avoid Judicial Lien to 2:00 p.m. on March 21, 2023, to be conducted in conjunction with the Motion to Appoint the Successor Representative.

MARCH 21, 2022 HEARING

At the hearing, the Parties did not have an agreement as to how and address this judgment lien. The court not yet having ruled whether the case may continued to be prosecuted by the successor representative of the late Debtor (Fed. R. Bankr. P. 1016). The hearing is continued pending completion of the briefing and ruling on whether the case should be allowed to continue with the successor representative.

MAY 2, 2023 HEARING

In preparing for this hearing, the court went back to the Bankruptcy Code to review the statutory definitions provided by Congress in 11 U.S.C. § 101. With respect to liens and judicial liens, these include:

(28) The term “indenture” means mortgage, deed of trust, or indenture, under which there is outstanding a security, other than a voting-trust certificate, constituting a claim against the debtor, a claim secured by a lien on any of the debtor’s property, or an equity security of the debtor.

(36) The term “judicial lien” means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

(37) The term “lien” means charge against or interest in property to secure payment of a debt or performance of an obligation.

11 U.S.C. § 101.

In the dispute before the court, it has been presented that the State Court entered a judgment and supporting orders enforcing (sounding like specific performance) pre-petition the obligations of Deceased Debtor to comply with his agreement to sign a note and deed of trust. While there was a specific performance judgment, which Deceased Debtor refused to perform, and the necessity for the court to appoint an authorized representative of Deceased Debtor to sign the deed of trust and note.

These do not sound in the nature of a judicial lien - meaning a judgment, levy or lien imposed by the court. Rather it sounds in then nature of an “indenture,” a deed of trust which was voluntarily given by the Deceased Debtor (though he attempted to renege on his contractual obligation for what he had voluntarily granted.

The nature of this dispute shows clearly it is not one that can be adjudicated through a “mere” motion to avoid lien. This court would need to determine the validity, extent, and priority of Creditor’s interest in the Property. That requires an Adversary Proceeding to adjudicate such interests, not a motion to avoid what would be an undisputed judgment lien. Fed. R. Bankr. P. 7001(2).

Thus, the court denies without prejudice for two grounds. First, the court has determined that this Chapter 13 case cannot continue to be administrated following the death of the Deceased Debtor. Therefore, there is no claim or interest to be adjudicated for this case. Even if the court were to determine that it was an avoidable “judgment lien,” such determination would be automatically rescinded upon the dismissal of this case.

The Motion is denied is without prejudice.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Avoid the Judicial Lien of Cheryl Henry having been presented to the court, the court not yet having ruled whether the case may continued to be prosecuted by the successor representative of the late Debtor (Fed. R. Bankr.

P. 1016) and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Avoid Judicial Lien is denied without prejudice. The court has made no adjudications of either Cheryl Henry's or John Scott Dougherty, or any of his successors in interests; based on: (1) the court ordering that this Bankruptcy Case be dismissed, and (2) that the claims and interests at issue would have to be adjudicated in an Adversary Proceedings and not by a motion (Fed. R. Bank. P. 7001(2)).

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 22, 2023. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

Though notice was provided, Movant has not complied with Local Bankruptcy Rule 7005-1 which requires the use of a specific Eastern District of California Certificate of Service Form (Form EDC 007-005). This required Certificate of Service form is required not merely to provide for a clearer identification of the service provided, but to ensure that the party providing the service has complied with the requirements of Federal Rule of Civil Procedure 5, 7, as incorporated into Federal Rule of Bankruptcy Procedure 7005, 7007, and 9014(c).

At the hearing, **XXXXXXX**

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Confirm the Modified Plan is XXXXXXX .

The debtor, Jesse Farley ("Debtor") seeks confirmation of the Modified Plan because Debtor fell behind in prior Plan payments for various, unfortunate, personal reasons. Declaration, Dckt. 50. The Modified Plan provides \$14,207.00 to be paid through month 17 of the Plan, followed by Plan payments of \$1,045.00 for the remainder of the Plan and a 100% dividend to unsecured claims totaling \$573.63. Modified Plan, Dckt. 52. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 17, 2023. Dckt. 60. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor may not be able to make Plan payments, as Debtor's declaration indicates increased expenses, however, Debtor has not provided a Supplemental Schedule J.
- B. Debtor's declaration contains legal conclusions.

DEBTOR'S REPLY

Debtor filed a Reply on April 25, 2023. Dckt. 63. Debtor states:

- 1. Debtor's winter gas bill was higher than normal. However, Debtor expects the gas bill to be lower in spring and summer months. Therefore, Debtor did not change the utility expenses on Schedule J.

Debtor's explanation appears to have resolved Trustee's concerns. At the hearing, ~~XXXXXXXXXX~~

- 2. Debtor withdraws testimony that relies on expert legal knowledge. The Declaration is in substantial compliance with 28 U.S.C. § 1746(2), even though it contains legal conclusions.

Non-expert witness testimony must be based on the personal knowledge of the witness. FED. R. EVID. 602. As a debtor is not an attorney, a debtor should not be providing legal conclusions to the court.

The court agrees with Trustee in that "I am informed and believed that the Plan complies with Title Eleven Section 1325(a)(1) of the United States Code . . ." is an improper legal conclusion. Declaration, Dckt. 50 ¶ 22. The Debtor having withdraw their legal conclusions, the court agrees with Debtor, and the Declaration is in substantial compliance, containing enough factual evidence to support the Modified Plan.

In stating that the Debtor is "informed and believes" legal conclusions and statements in his case may be a waiver of the attorney-client privilege by voluntarily disclosing what Debtor's attorney has told Debtor.

Though the Debtor has worked to address the Trustee's concerns, the court is left with Debtor having failed to use the required Certificate of Service form. While this judge has not been a prophylactic in denying without prejudice motions when the required Certificate of Service form has not been used (as several other judges in this District have been), the court using the hearing to address the failure with various counsel as a Former President Obama "Teachable Moment" has come to an end.

Thus, ~~XXXXXXX~~

~~—————The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.~~

~~The court shall issue an order substantially in the following form holding that:~~

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Jesse Farley ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on March 22, 2023, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

7. [23-20038-E-13](#)
[PLC-3](#)

JOANNE DAVIS
Peter Cianchetta

MOTION TO CONFIRM PLAN
3-21-23 [\[54\]](#)

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 20, 2023. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Confirm the Amended Plan is denied.

The debtor, Joanne Aspiras Davis (“Debtor”), seeks confirmation of the Amended Plan. The Amended Plan provides for \$1,314.00 per month for sixty months. Amended Plan, Dckt. 57. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE’S OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on April 6, 2023. Dckt. 61. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in Plan payments.
- B. Debtor does not indicate a monthly payment to attorney.

DISCUSSION

Delinquency

The Chapter 13 Trustee asserts that Debtor is \$2,628.00 delinquent in plan payments, which represents multiple months of the \$1,314.00 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor fails to indicate the monthly dividend to attorney’s fees, even though Debtor’s Plan indicates Debtor’s attorney will e paid through the Plan. Without an accurate picture of Debtor’s financial reality, the court cannot determine whether the Plan is confirmable.

The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Amended Chapter 13 Plan filed by the debtor, Joanne Aspiras Davis (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm the Amended Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and parties requesting special notice on February 28, 2023. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection.

The Objection to Confirmation of Plan is XXXXXXXXXXXX

The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent.
- B. Debtor failed to submit evidence of social security number.
- C. Debtor cannot comply with the plan.

DISCUSSION

Trustee's objections are well-taken.

Delinquency

Debtor is \$135.00 delinquent in plan payments, which represents one month of the \$135.00 plan payment. Before the hearing, another plan payment will be due. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Failure to Provide Proof of Social Security Number

Debtor is required by Federal Rule of Bankruptcy Procedure 4002(b)(1)(B) to provide adequate evidence of their social security number at the meeting of creditors. Debtor failed to submit such proof at the meeting, held February 23, 2023. The meeting was continued to March 16, 2023, and it is unclear if the Debtor submitted the required proof on that date.

Failure to Provide for Creditor

Debtor's current plan provides for no amount in monthly protection payments to PHH Mortgage Services. Dckt. 3. Rather, the plan provides for a one-time lump sum payment financed by the sale of the mortgaged property. Dckt. 3.

11 U.S.C. § 1322(b) specifies the provisions that a plan may include at the option of the debtor. With reference to secured claims, the debtor may not modify a home loan but may modify other secured claims (11 U.S.C. § 1322(b)(2)), cure any default on a secured claim—including a home loan—(11 U.S.C. § 1322(b)(3)), **and maintain ongoing contract installment payments** while curing a pre-petition default (11 U.S.C. § 1322(b)(5)).

However, 11 U.S.C. 1325 (a)(5)(A) states that the court may confirm a plan if the holder of a secured claim provided for by the plan has accepted the plan. This gives room for a secured creditor to consent to its treatment in a plan that otherwise would not be approved, if they so wish. Here, there is no indication that PHH Mortgage Services consented to modification of payments on their claim. Rather, Creditor objects to the Plan on the grounds that the Plan fails to provide for Creditor's claim at all. Objection, Dckt. 13 at 2.

The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B).

It is common for a Debtor to confirm a plan and sell real property in order to pay off the plan in a shorter period than the anticipated plan time. Therefore, Debtor can properly propose to sell their Property in order to pay off the Plan. However, the sale of the Property is not guaranteed. The "cleanest" way for Debtor to propose a plan would be for the entire sixty-month period, under the worst case that the Property does not sell. Debtor should not propose a twelve month Plan unless Debtor is able to pay all creditors within the twelve month period based on future earnings.

At the hearing, Counsel for the Debtor reported that the court has entered the order authorizing the sale of the Property and requested a continuance to allow escrow to close and Creditor's secured claim paid.

The Parties and the Trustee agreed to a continuance.

May 2, 2023 Hearing

At the hearing, XXXXXXXXXXXX

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick (“Trustee”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation of Plan is XXXXXXXX

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 13, 2023. By the court's calculation, 43 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection.

The Objection to Confirmation of Plan is XXXXXXXXXX

Mortgage Assets Management, LLC ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

- A. Plan does not cure Creditor's pre-petition arrears.

DISCUSSION

Creditor's objections are well-taken.

Failure to Cure Arrearage of Creditor

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts \$1,904.53 in pre-petition arrearages. The Plan does not propose to cure those arrearages. Rather, the Plan proposes a one-time lump sum payment financed by the sale of the Property.

11 U.S.C. § 1322(b) specifies the provisions that a plan may include at the option of the debtor. With reference to secured claims, the debtor may not modify a home loan but may modify other secured claims (11 U.S.C. § 1322(b)(2)), cure any default on a secured claim—including a home loan—(11 U.S.C. § 1322(b)(3)), **and maintain ongoing contract installment payments while curing a pre-petition default** (11 U.S.C. § 1322(b)(5)).

However, 11 U.S.C. 1325 (a)(5)(A) states that the court may confirm a plan if the holder of a secured claim provided for by the plan has accepted the plan. This gives room for a secured creditor to consent to its treatment in a plan that otherwise would not be approved, if they so wish. Here, Creditor has not consented to modification of payments on their claim.

The Plan does not provide for payment of the current post-petition installments and then a cure of the default. The Plan provides for there to be further post-petition defaults, and then a lump sum payment . See 11 U.S.C. §§ 1322(b)(2) & (5), 1322(c)(1), and 1325(a)(5)(B).

Review of Schedules I and J, Chapter 13 Plan

On Schedule I Debtor states that she has monthly income of \$1,480. Dckt. 1 at 24-25. On Schedule J, Debtor lists minimal expenses of only (\$1,355), for which Debtor has only \$145 of projected disposable income. On Schedule A/B Debtor lists the Property having a value of \$600,000. *Id.* at 11.

Creditor's secured claim is filed in the amount of (\$422,520) and Summerset I at Brentwood Association has filed a junior lien secured claim in the amount of (\$24,123.21). With a value of \$600,000, the net proceeds for Debtor would be estimated (including rough interest calculation) as follows:

Value.....	\$600,000
Costs of Sale.....	(\$ 48,000)
1 st DOT.....	(\$430,500)
2 nd DOT.....	(\$ 27,000)

Projected Net Proceeds for Debtor.....\$94,500

This is a substantial sum for Debtor to diligently and promptly prosecute a sale of the Property.

Looking at the Docket, this bankruptcy case was filed on January 17, 2023. Now, seventy (70) days later, a review of the Docket discloses that Debtor has sought authorization by a motion filed on March 20, 2023, to hire a real estate broker and get this property marketed to be sold.

While stating in the Other Payments Paragraph that the Property will be sold and that Creditor and the junior secured claim will be paid from the proceeds, Creditor's claim is not provided in Class 1, Class 2, or the additional provisions.

At the hearing, Counsel for the Debtor reported that the court has entered the order authorizing the sale of the Property and requested a continuance to allow escrow to close and Creditor's secured claim paid.

The Parties and the Trustee agreed to a continuance.

May 2, 2023 Hearing

At the hearing, XXXXXXXXXXXX

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by Mortgage Assets Management, LLC ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation of Plan is
XXXXXXXXXX

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and parties requesting special notice on February 1, 2023. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection.

The Objection to Confirmation of Plan is XXXXXXXXXX

The Chapter 13 Trustee, David Cusick ("Trustee") opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent on plan payments.
- B. Debtor misclassified a claim.
- C. Debtor has not obtained real property insurance coverage.

DISCUSSION

Trustee's objections are well-taken.

Delinquency

Debtor is \$1,180.00 delinquent in plan payments, which represents one month of the \$1,180.00 plan payment. Before the hearing, another plan payment will be due. According to Trustee, the Plan in § 2.01 calls for payments to be received by Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Misclassified Claim

Trustee states that creditor Mary Drader is improperly classified. Debtor lists Mary Drader as a creditor who has claims secured by property in her Petition. (Schedule D, Dckt 1, Pg 22). Mary Drader is listed as a Class 4 creditor in Debtors Plan; however, Debtor admitted in a meeting of creditors that she has not paid the January mortgage payment. Debtor is now delinquent on her mortgage payments and therefore Mary Drader should be listed as a Class 1 Creditor. Failure to properly classify claims indicates a failure to be able to comply with the Plan under 11 U.S.C. § 1325(a)(6).

Real Property Insurance

Trustee states that Debtor does not have real property insurance coverage.

At the hearing, counsel for the Trustee reported that the Debtor has made payments, but there is still a \$1,210.00 delinquency. Debtor's counsel reported that on February 27, 2023 the cure payment has been made via TFS.

With respect to the insurance, Debtor's counsel reports that since she is in a fire area, Debtor has been unable to get it (having contacted forty insurance companies). The asset to be insured is a \$10,000 mobile home on the property.

The Trustee and the Debtor agreed to continuing the hearing to allow Debtor to pursue a new insurance option, as well as to provide the court with supplemental pleadings relating to the insurance and how the property provides adequate protection for the creditor (who has also been unable to get insurance for the mobile home).

Supplemental Declaration by Debtor

On April 26, 2023, the Debtor filed a Supplemental Declaration (Dckt. 22) and Exhibits (Dckt. 23) relating to the issues raised by the Trustee. The Declaration provides detailed testimony of what information is and has been provided.

MAY 2, 2023 HEARING

At the hearing, **XXXXXXXXXX**

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick (“Trustee”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation of Plan is **xxxxxxx**

11. [17-27360](#)-E-13
[PGM-2](#)

MARTHA GARCIA
Peter Macaluso

**CONTINUED MOTION/OPPOSITION TO
RESPONSE TO NOTICE OF FINAL
CURE
2-27-23 [63]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on February 27, 2023. By the court’s calculation, 29 days’ notice was provided. 28 days’ notice is required.

The Opposition to Response to Notice of Final Cure has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Response to Notice of Final Cure is xxxxxxx

Debtor filed the pending Opposition, Dckt. 63, opposing Deutsche Bank National Trustee Company, as Trustee for GSAMP Trust 2005-WMC1’s (“Creditor”) Response to Trustee’s Notice of Final Cure. Response, filed February 8, 2023. Pursuant to Federal Rules of Bankruptcy Procedure 3002.1(h), the Debtor can, by motion, request the court to determine whether the Debtor has cured the default and paid all required postpetition amounts. Federal Rules of Bankruptcy Procedure 3002.1(h); 9 Collier on Bankruptcy P 3002.1.04 (16th 2023).

All though filed as an “Opposition,” the court treats the opposition as an Objection to Creditor’s Response.

DISCUSSION

Within 21 days after service of the notice of final cure payment, the holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with the Federal Bankruptcy Code 1322(b)(5). Federal Rules of Bankruptcy Procedure 3002.1(g). The statement shall itemize the required cure or post-petition amounts, if any, that the holder contends remain unpaid as of the date of the response.

Trustee's Notice of Final Cure

The Chapter 13 Trustee, David P. Cusick, ("Trustee") filed a Notice of Final Cure Payment on January 30, 2023. The Notice of Final Cure indicates that Debtor has paid Creditor's arrearages in full.

Creditor's Response

Creditor filed a response to notice of final cure payment on February 8, 2023. Response, filed February 8, 2023. Creditor indicated that Debtor has not cured arrears, still owing \$5,750.28.

Debtor's Opposition

Debtor opposes Creditor's Response on the following grounds:

- A. Debtor has completed the Plan, paying creditor a total of 61 payments.
- B. Creditor's claim that Debtor is \$5,750.28 delinquent incorrectly reflects the payments received and is a unsubstantiated assertion.

Creditor's Response to Debtor's Opposition

Creditor filed a Response on March 14, 2023. Dckt. 67. Creditor states, "[a]fter the Response to Notice of Final Cure was filed, Debtor made additional payments, Creditor has determined the account is now due for March 1, 2023. However, the Post-Petition Fee in the amount of \$900.00 remains unpaid." Further, Creditor indicates they prepared an Amended Response that was filed on March 14, 2023. Upon review of the docket, no Amended Response has been filed.

It appears that Creditor may be conceding that the \$5,750.28 has been satisfied. However, Creditor indicates that there is an additional \$900 "Post-Petition Fee." Dckt. 67. It is not clear to the court what this additional fee is for.

At the hearing, counsel for Creditor reported that there was still \$900 owed based on a 2018 Notice of Post-Petition Mortgage expenses. Debtor's counsel stated that the Debtor had made the payments and that the Objection to Notice of Cure was inaccurate and required Debtor to respond. Thus, Debtor argues that he is entitled to recover his attorney's fees.

It appears that both the Debtor and Creditor need to provide the other with documentation of the alleged defaults and payments. Creditor's counsel stated that the default, all but the \$900.00 was cured. However, nobody could tell the court when those payments were made by Debtor.

The court continues the hearing so that the attorneys can obtain documentation of their assertions, provide it to the other side, and determine what bona fide disputes actually exist(ed).

Debtor's Supplemental Opposition

Debtor filed a Supplemental Opposition on April 11, 2023. Dckt. 74. Debtor states Creditor has failed to support their claim of post-petition delinquency and requests the claim be deemed current as of December 1, 2022.^{FN. 1.}

FN. 1. Debtor's attorney makes an additional claim that they are the prevailing party. Additionally, Debtor's attorney discusses an attorney's fees provision in Creditor's Proof of Claim. Also, Debtor states they have billed \$3,475.00. Debtor's attorney, however, does not make a specific request for attorney's fees. Rather, in their "Conclusion" they simply request the claim be deemed current. It is not clear whether Debtor's attorney is seeking an award of attorney's fees.

May 2, 2023 Hearing

At the hearing, **XXXXXXXXXX**

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to Creditor's Response to Notice of Final Cure filed by the Chapter 13 debtor, Martha Suarez Garcia ("Debtor"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Response to Notice of Final Cure is **XXXXXXXXXX**