

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**  
**Chief Bankruptcy Judge**  
**Sacramento, California**

**May 11, 2021 at 2:00 p.m.**

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1. <a href="#"><u>20-25605-E-13</u></a> <a href="#"><u>DPC-1</u></a> 1 thru 2	CURTIS/CARMEN BURKS Candace Brooks	<b>CONTINUED AMENDED OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE DAVID P. CUSICK 1-28-21 <a href="#"><u>[28]</u></a></b>
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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).**

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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 and Debtor's Attorney on January 28, 2021. By the court's calculation, 26 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.

<b>The Objection to Confirmation of Plan is <span style="color: red;">XXXXX</span>.</b>
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The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that:

- A. Debtor cannot afford to make the payments or comply with the plan.
- B. Debtor improperly uses an exemption pursuant to C.C.P. § 704.70.

## **DISCUSSION**

Trustee's objections are well-taken.

### **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). According to Trustee, Debtor's Plan relies on a forbearance agreement with the creditor holding the first deed of trust over their primary residence. Debtor lists Creditor Dovenmuehle as a Class 4 claim; yet, the Non-Standard Provisions indicate that Debtor is currently in forbearance due to COVID-19 emergency relief and intends to either modify their loan or commence ongoing payments, directly to Creditor in the amount of \$2,734.44 beginning July 2021. Thus, the Plan cannot be confirmed unless Creditor agrees to this treatment.

Additionally, Trustee argues that Debtor may have improperly classified Creditor Village Capital & Investments, LLC, as a Class 4 claim, where Creditor Village has filed a proof of claim identifying ongoing payments of \$2,813.19 and arrears of \$29,454.08. Proof of claim, 7-1. Moreover, Trustee points to Creditor Village's Objection to the plan stating Debtor's forbearance ended October 31, 2020 and no further forbearance has been extended. Dckt. 19, 2:7. Trustee is unclear if this claim is misclassified as Class 4, with nonstandard provisions, or if Creditor should be listed as Class 1 in the Plan.

Trustee also argues that Debtor's budget is insufficient to pay mortgage. Schedule I indicates Debtor's monthly income is \$4,948.34, and Schedule J shows Debtor's net monthly income after expenses is \$908.00. Dckt. 1. Debtor's Schedule J is silent on Debtor's making any monthly mortgage payment. Debtor's income is insufficient to fund the plan and pay Village Capital & Investments, LLC the ongoing mortgage payment and the arrears identified in their proof of claim.

### **Exemption**

Lastly, Trustee states that Debtor has overused the exemptions they may be entitled to under C.C.P. § 704.070. Debtor has claimed the full amounts of their JP Chase Bank checking and savings accounts as exempt. Pursuant to C.C.P. § 704.070, Debtor may claim only 75% of the paid earnings that can be traced to deposit accounts as exempt.

The hearing is continued to allow Debtor's Counsel and Counsel for Village Capital & Investment, LLC to determine who is not processing the Debtor's COVID forbearance request.

### **March 9, 2021 Hearing**

On March 5, 2021, Debtor filed a Supplemental Response to the Village Capital & Investments, LLC Opposition. Dckt. 47. It is reported that Debtor will have to seek a further forbearance in April 2021, and that such forbearance will be through July 2021.



maintenance of the correct ongoing post-petition monthly payment as required by 11 U.S.C. §1322(b)(5).

## **DISCUSSION**

### **Infeasible Plan**

Creditor alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). Debtor sought and received forbearance, due to Covid-19, from Creditor for the dates August 2, 2020, through October 31, 2020. That period has expired and no further forbearance has been offered to Debtor.

However, under the Non-Standard Provisions of the Plan, Debtor's plan proposes forbearance to continue until July, 2021 and does not provide for payments through that date. Thus, according to Creditor, Debtor's plan does not provide for adequate protection of Creditor's interest.

Creditor further claims that a Proof of Claim, to be timely filed, will show arrearage of approximately \$70,000. A review of Debtor's disposable income shows Debtor has insufficient income to make the correct post-petition monthly payment to Creditor. As such, the Plan may not be confirmed.

## **DEBTOR'S RESPONSE**

Debtor disputes the date upon which monthly mortgage payment are to resume and asserts a right to forbearance pursuant to the CARES Act. Debtor points the court to Section 4022(b) ("CARES Act") which states:

### **(b) FORBEARANCE.—**

(1) IN GENERAL.—During the covered period, a borrower with a Federally backed mortgage loan experiencing a financial hardship due, directly or indirectly, to the COVID–19 emergency may request forbearance on the Federally backed mortgage loan, regardless of delinquency status, by—

(A) submitting a request to the borrower's servicer; and

(B) affirming that the borrower is experiencing a financial hardship during the COVID–19 emergency.

(2) DURATION OF FORBEARANCE.—Upon a request by a borrower for forbearance under paragraph (1), such forbearance shall be granted for up to 180 days, and shall be extended for an additional period of up to 180 days at the request of the borrower, provided that, at the borrower's request, either the initial or extended period of forbearance may be shortened.

(3) ...

### **(c) REQUIREMENTS FOR SERVICERS.—**

(1) IN GENERAL.—Upon receiving a request for forbearance from a borrower under subsection (b), the servicer shall with no additional

documentation required other than the borrower's attestation to a financial hardship caused by the COVID-19 emergency and with no fees, penalties, or interest (beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract) charged to the borrower in connection with the forbearance, provide the forbearance for up to 180 days, which may be extended for an additional period of up to 180 days at the request of the borrower, provided that, the borrower's request for an extension is made during the covered period, and, at the borrower's request, either the initial or extended period of forbearance may be shortened.

Section 4022(b) of the CARES Act.

Debtor contends that the loan in question is a federally backed Veterans Administration loan, and thus qualifies for forbearance under the CARES Act. Declaration, Dckt. 36, ¶ 15. Debtor's declaration states Debtor's employment has been affected by COVID-19. *Id.* at ¶¶ 4-9, 15. Debtor requested and was granted initial forbearance from August 1, 2020, through October 31, 2020. *Id.* at ¶ 10. Both Creditor and Debtor agree as to this specific period of forbearance.

Debtor testifies, under penalty of perjury, that on October 23, 2020 Creditor was contacted, through the mortgage servicer (Dovenmuehle), to request further forbearance entitled under the CARES Act. *Id.* at ¶ 11. Debtor further testifies they were advised by the representative that the forbearance would be extended for an additional three months, until January 31, 2021. *Id.* at ¶ 11.

Debtor adds that the mortgage servicer verbally confirmed such extension through January 31, 2021 when they received a call on December 3, 2020 from a representative informing them that their account had been updated and accurately reflected the extension to January 31, 2021. *Id.* at ¶ 13.

Debtor also testifies that on January 19, 2021 they requested in writing, and were granted, further extension through May 31, 2021. *Id.* at ¶ 14. Creditor states that no further forbearance has been offered to Debtor after the period which expired on October 31, 2020. Lopez Declaration, Dckt. 21.

Debtor provides a copy of the forbearance granted to them by Creditor for the period of March 1, 2020 through August 1, 2020. Exhibit A, Dckt. 37.

While it seems that Debtor may be entitled to the protection of Section 4022(b) of the CARES Act, Debtor does not provide the court with such request for an extension. Debtor testifies that they requested an extension in writing on January 19, 2021 and that it has already been approved. Yet no evidence has been presented showing that Creditor or the mortgage servicer has in fact received the application or that they have approved or denied such an extension.

With respect to this Creditor, if Debtor has requested and is entitled to further forbearance, but is improperly being denied such by Creditor, then such may have to be addressed through adversary proceeding litigation, with can be made part of a Chapter 13 plan.

The hearing is continued to allow Debtor's Counsel and Counsel for Village Capital & Investment, LLC to determine who is not processing the Debtor's COVID forbearance request.

### **March 9, 2021 Hearing**

On March 5, 2021, Debtor filed a Supplemental Response to the Village Capital & Investments, LLC Opposition. Dckt. 47. It is reported that Debtor will have to seek a further forbearance in April 2021, and that such forbearance will be through July 2021.

At the hearing counsel for the Debtor stated that the loan servicer has confirmed that the forbearance has been extended through April 2021. Creditor's counsel confirmed.

### **May 11, 2021 Hearing**

As of the court's drafting of this pre-hearing disposition, no further pleadings or documents have been filed with the court.

At the hearing 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.

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

Sufficient Notice **Not** Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 12, 2021. By the court's calculation, 29 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

Movant did not provide sufficient notice as required under the Bankruptcy Code and the local rules. At the hearing **xxxxxxx**

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).

<b>The Motion to Confirm the Amended Plan is <b>xxxxx</b>.</b>
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The debtor, Keith Richard Henry and Beverly Dawn Henry ("Debtor"), seek confirmation of the Amended Plan. The Amended Plan provides for plan payments of \$1,100 for 60 months and a 34 percent dividend to unsecured claims totaling \$67,550.00. Amended Plan, Dckt. 26. 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 26, 2021. Dckt. 36. Trustee opposes confirmation of the Plan on the basis that Debtor is delinquent in plan payments.

## DISCUSSION

### Delinquency

The Chapter 13 Trustee asserts that Debtor is \$1,100.00 delinquent in plan payments, which represents one month of the \$1,100.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

~~————— 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, Keith Richard Henry and Beverly Dawn Henry (“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.~~



**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).**

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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 Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 27, 2021. By the court’s calculation, 45 days’ notice was provided. 14 days’ notice is required.

The Motion to Employ 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. At the hearing, -----

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**The Motion to Employ is granted.**

Jack Allen Elder and Rebecca Rene Elder (“Debtor”) seeks to employ Compass (“Broker”) pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks the employment of Broker to list the property commonly known as 300 E L Street, Benicia, California (“Property”).

Debtor argues that Broker’s appointment and retention is necessary to assist Debtor in the marketing, negotiating, and selling of the Property. Broker has been retained to market and sell the property for a commission of 5.0% of the purchase price.

Steve Ridge, a real estate agent of Compass, testifies that he and Jessica Evans will assist Debtor in marketing and selling the Property. Steve Ridge testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to

engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Compass as Broker for the Chapter 13 Estate on the terms and conditions set forth in the Listing Agreement filed as Exhibit A, Dckt. 95. Approval of the commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 Employ filed by Jack Allen Elder and Rebecca Rene Elder ("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 Employ is granted, and Debtor is authorized to employ Compass as Broker for Debtor on the terms and conditions as set forth in the Listing Agreement filed as Exhibit A, Dckt. 95.

**IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

**IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

**IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by broker in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

**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.

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

Sufficient Notice **Not** Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and parties requesting special notice on March 25, 2021. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Certificate of Service, Dckt. 58, lists a number of persons served. As noted by the Trustee (Opposition, Dckt. 59), no addresses for service are provided for the Internal Revenue Service. For at least one federal insured financial institution, the pleadings were served on it as a post office box and not as required by Federal Rule of Bankruptcy Procedure 7004, 9014.

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).

<p><b>The Motion to Confirm the Amended Plan is <b>XXXXX</b>.</b></p>
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The debtor, Felicia Lynn Hicks ("Debtor"), seeks confirmation of the Amended Plan. The Amended Plan provides for:

1. 12 monthly payments in the amount of \$450 from March 2020 to February 2021,
2. 35 monthly payments of \$227.87 from March 2021 through January 2024 and one final payment of \$93.43 in February 2024, and
3. A two percent dividend to unsecured claims totaling \$31,085.89.

Amended Plan, Dckt. 51. 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 26, 2021. Dckt. 59. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in plan payments.
- B. Service does not comply with the local rules.
- C. Debtor has not filed supplemental schedules reflecting current income and budget.

### **DISCUSSION**

As Trustee points out, review of Debtor's certificate of service shows that Debtor did not serve the Internal Revenue Service or the Office of the U.S. Trustee. The Internal Revenue Service filed Proof of Claim 7-2 for priority in the amount of \$12,429.33. Thus, service must be provided to the Internal Revenue Service. Debtor having failed to provide service, the court cannot confirm the plan.

#### **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$2,827.74 delinquent in plan payments, which represents multiple months of the plan payment. Trustee believes Debtor intended payments to be \$2,800.00 total paid in through February 2021 then 35 at \$227.87 and one at \$93.43.

Trustee also notes that Debtor placed Section 7.01 additional Provisions on page 6 of the plan. Instead of a separate sheet as required and that "Nonstandard provisions placed elsewhere are void."

#### **Schedules I and J**

Trustee notes that Debtor has not filed supplements to Schedules I & J reflecting Debtor's current income and budget but only Amended Schedules I and J. In reviewing the amended Schedules, Trustee points the court to a car payment in the amount of \$385.00, which is not reflected in the proposed plan or on the Schedules filed February 2020, and thus it seems that Debtor has incurred new debt without authorization from this court.

#### **Review of Proposed Modified Plan**

Debtor filed the Proposed Modified Plan on March 2, 2021. Dckt. 51. The Proposed Modified Plan first has buried at the bottom of page 6, in the margin below the signature lines, a paragraph 7.01. *Id.* at 6. The Second 7 provisions just above the signature lines clearly states that "All nonstandard plan provisions shall be on a separate pieced of paper appended to this plan." *Id.* Debtor and counsel have chosen not to do that. Paragraph 7.01 buried at the bottom of page 6 appears to be part of a motion stating reasons for need for a modification, what the Debtor proposes to do, and then some plan payments.

It appears that Debtor is to extend the plan term to 48 months, with the following payments required to be made:

Debtor has paid into the Plan.....\$2,800

Debtor will make 12 monthly payments  
commencing March 2020 of.....\$450 each

Debtor will make 35 monthly payments  
commencing March 2021 of.....\$227.87 each

Debtor will make one final payment in  
February 2024 of.....\$ 93.43

These payment would total \$16,268.88.

In addition to the Chapter 13 Trustee's 10% fees, Debtor's counsel is to be paid \$3,500 through the Plan, \$1,844.46 priority unsecured, and a 2% dividend on \$31,085.89 in general unsecured claims. There are no Class 4 secured claims to be paid directly by Debtor, though such appears to be for a vehicle loan.

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, Felicia Lynn Hicks ("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.

**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.

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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 November 11, 2020. By the court's calculation, 62 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).

<b>The Motion to Confirm the Modified Plan is <del>XXXXX</del>.</b>
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The debtor, Bethany Elaine Sanders-Johnson ("Debtor") seeks confirmation of the Modified Plan to begin remitting payments now that she has obtained full time employment as a COVID nurse for Nightingales list. Declaration, Dckt. 89. The Modified Plan provides for plan payments of \$3,150.00 per month commencing November 25, 2020 for 70 months, and a 100 percent dividend to unsecured claims totaling \$39,665.22. Modified Plan, Dckt. 90. 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 December 9, 2020. Dckt. 94. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in plan payments.
- B. Debtor states an incorrect amount in post-petition arrears.

C. Debtor may not have the ability to make plan payments.

## **DISCUSSION**

### **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$3,150.00 delinquent in plan payments, which represents one month of the \$3,150.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **Post-Petition Arrearage**

Trustee asserts that due to Debtor's failure to make plan payments, Trustee had been unable to make class 1 creditor Freedom Mortgage Corporation installment payments for the months of June, July, August, September and October of 2020 for the first deed. Trustee's accounting shows that the amount due for the unpaid installments is \$6,278.65.

Trustee argues that while the modified plan attempts to specify a cure of the post-petition arrearage for the first deed, the Debtor appears to have combined the first arrears amount of \$4,522.18 and the second arrears amount of \$6,278.65 into one proposed claim and has not specified the months in arrears. According to Trustee, the Debtor has increased the second deed claim to \$405.00, which is incorrect because there has not been any delinquency on the second deed since confirmation. Thus, the amount should remain at \$324.00.

### **Ability to Pay and Good Faith**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Trustee asserts that Debtor has failed to file Supplemental Schedules I and J to account for her new employment as a nurse, where the original schedules were last filed in August 2019. Trustee further argues that Debtor has not complied with the order confirming to notify the Trustee in writing of any termination, reduction of, or other change in employment. The Debtor has also failed to provide current pay advices.

Moreover, Debtor has failed to make the November 2020 payment and has a history in the case which shows that Debtor is not likely to pay the plan.

Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Debtor filed a Reply requesting the court continue the hearing on this motion so that Debtor and counsel may meet to discuss Trustee's Opposition. Dckt. 97. Debtor explains that as a frontline healthcare employee working with COVID-19 patients and due to the recent holidays, she has been unable to meet with her counsel. *Id.*

At the hearing, Debtor's counsel reported that a little more time is needed for the Trustee to review the new information. The Trustee concurred in the request for a continuance.

## January 26, 2020 Hearing

Debtor filed “Janus-faced”<sup>FN.1</sup> Amended/Supplemental Schedules I and J and the Declaration of Bethany Sanders-Johnson in support of the Amended Schedules on January 20, 2020. Dckts. 101, 102. The court says “Janus-faced” because Debtor states under penalty of perjury that the Schedules are both amended, with the changes backward looking, dating back to the filing of this case, and supplemental, with the same changes being forward looking, effective only from a post-petition date.

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FN. 1.

Janus-faced  
Definition of Janus-faced  
: having two contrasting aspects  
especially : DUPLICITOUS, TWO-FACED

### Synonyms

artificial, backhanded, counterfeit, double, double-dealing, double-faced, fake, feigned, hypocritical, insincere, jive [slang], left-handed, lip, mealy, mealymouthed, Pecksniffian, phony (also phoney), phony-baloney (or phoney-baloney), pretended, two-faced, unctuous

### Antonyms

artless, candid, genuine, heartfelt, honest, sincere, undesigning, unfeigned

<https://www.merriam-webster.com/dictionary/Janus-faced>  
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The court has repeatedly addressed with counsel, his other clients, and, through counsel, his office staff that embrace a “check every box possible and let the judge figure it out” strategy. Though repeatedly addressed, the present Amended/Supplemental Schedules I and J demonstrate that counsel’s client, counsel, and his staff intentionally chose not to comply with the law and continue to file Janus-faced, “*whatever*,” pleadings.

Debtor stating under penalty of perjury that the changes relate all the way back to the filing of this case, and also are effective at a post-petition date in 2021 demonstrates either an intentional false statements under penalty of perjury or an incompetence to provide testimony under penalty of perjury.

Debtor also provides her Declaration (Dckt. 102) in support of the present Motion. Debtor testifies under penalty of perjury that during the COVID lockdown her job as a dental assistant was terminated as non-essential, she completed her education, and she found employment as a nurse at Nightgale’s List, which is a contract agency for traveling nurses. Declaration, ¶¶ 2,3; Dckt. 102. She works six days a week with COVID-19 patients. *Id.*, ¶ 3. Debtor also explains that due to this job her expenses have increased as she is required to travel long distances and stay overnight; she is also not provided with meals and sometimes she has to pay for those. *Id.*

Debtor then goes to explain the changes in her expenses, specifically the increases in home



maintenance, utilities (electricity and internet), food, education, personal care, gas, entertainment and vehicle costs. *Id.*, ¶ 3.

A review of Debtor's Amended Schedule I now accounts for Debtor's new income as a nurse, with a gross monthly income in the amount of \$9,533.33, with a total monthly take home pay of \$8,229.39 after accounting for payroll deductions. Dckt. 101, Schedule I, at p. 5. Debtor's Amended Schedule J reflects increases for home maintenance, utilities, food and housekeeping supplies, childcare and children's education costs, clothing, personal care products, transportation, entertainment, vehicle insurance, and other (travel costs in support of COVID-19 overtime). *Id.*, Schedule J, at p. 7. The Amended/Supplemental states a total of monthly expenses in the amount of \$5,078.95, where the original Schedule J filed in August of 2019 stated a total in monthly expenses of \$1,459.81. *Id.*; *see also* Dckt. 1.

Beginning with Amended/Supplemental Schedule I, Debtor shows that her dedication and hard work have paid off, and she is now employed by Nightingale's List, with monthly wages or salary of \$9,533.33 a month - which is \$114,399.96 a year. Well in excess of her income, which included family support and Lyft driving. <sup>FN.2.</sup>

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FN. 2. It is not clear whether Nightingale's List is an employer or a job placement service, temporary staffing agency, or both.  
-----

From the \$114,399.96 annual income, Debtor has a monthly withholding of \$1,303.94 for her federal and state income taxes and Social Security taxes. That leaves \$8,229.39 in take home income. Dckt. 101. Amended/Supplemental Schedule I does not include the \$1,929.42 listed on the original Schedule I for alimony, spousal support, maintenance received (family and friends support being listed on line 8h). Dckt. 1 at 33. On Amended/Supplemental Schedule J Debtor lists having five minor children dependents (one having turned 18 during this case, with the youngest two now 3 years old). Even with her new income, it would be surprising that the children's father(s) would automatically have his/their support obligations terminated.

Debtor does show on Amended/Supplemental Schedule J the increases in non-mortgage, property taxes, property insurance (which are provided for in the Plan) expenses. Dckt. 101 at 6-7. With respect to some of the substantial increases, Debtor's conclusion that "this is what they are" or her explanation that they are immediately obviously "reasonable."

Debtor states that she has increased her phone/internet from (\$100) a month to (\$450) due to "upgrading" her internet that costs an additional (\$350) a month. This increase is stated to be due to "home schooling." A (\$350) a month increase for an upgrade to an existing service seems high.

Debtor states that her monthly food billing has increased from (\$500) a month to (\$1,700) a month due to home schooling and Debtor having to travel for job and having to pay for her own food while traveling. Looking at the original Schedule J, it does not appear reasonable that Debtor and her five dependants had a monthly food and housekeeping supplies expense of only (\$500) a month. Deducting (\$100) a month for housekeeping supplies for six persons, a (\$400) food budget would have

been only (\$0.74) per person per meal in a thirty-day month. Such does not appear credible, and such “expense” was either a “creative” number to make the plan “work,” or Debtor had additional income for that expense.

The expense now jumps to \$1,700 a month, a 240% increase. While stating that she has to pay for her meals while traveling, Debtor had to pay for her meals while being at home. There may be an increase due to having some meals at restaurants, it is not clear that Debtor is not being reimbursed for meals or Debtor is incurring reasonable “dining out” expense. If the (\$500) food and household supplies expense was real, then it is not clear that a 240% increase is real.

Debtor doubles the “personal care” expense from (\$150) a month to (\$500) a month. Her explanation is that this is due to COVID-19 orders requiring her and her family to stay at home. It is unclear how staying at home causes a 100% increase in personal care expenses. The news reports have repeatedly reported how many personal care providers (such as hair, manicuring, and the like) have been shut down or out of business, and people have not been using such services.

At the hearing, Debtor’s counsel requested a continuance to allow the Debtor to file Supplemental Schedules and a new plan. The Trustee did not oppose the continuance.

### **March 9, 2021 Hearing**

As of the court’s March 4, 2020 preparation of this pre-hearing disposition, no further pleadings or documents have been filed for this matter.

Debtor not having been able to address filling Supplemental Schedules, the serious issues raised by the prior Janus-Schedules, and it appearing that Debtor needs a “fresh start” in advancing a plan, the Motion is denied without prejudice.

At the hearing, counsel for Debtor pleaded with the court to continue the hearing to address these issues, due to his client having been ill, and if the motion is denied, the Debtor may not be able to prosecute an 84 month extended plan. The Trustee did not oppose the continuance.

### **May 11, 2021 Hearing**

As of the court’s drafting of this pre-hearing disposition, no further pleadings or documents have been filed with the court.

At the hearing **xxxxxxx**

**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 and Debtor's Attorney on April 21, 2021. By the court's calculation, 20 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. At the hearing -----  
-----.

<b>The Objection to Confirmation of Plan is sustained.</b>
--

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

- A. Debtor may not be providing all income.
- B. Debtor failed to list non-filing spouse debt.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Failure to Afford Plan Payment**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Trustee asserts that Debtor may have additional disposable income to pay toward the Plan,

where Debtor's Plan calls for payments of \$557.00, but Schedule J indicates Debtor has a monthly budget surplus of \$3,189.94. Thus, if Debtor were to increase the Plan payment, to \$2,850.00, then the Plan would complete in approximately 12 months, as opposed to the 60 months proposed.

According to Trustee, Debtor admitted at the First Meeting of Creditors, held on April 15, 2021, that the non-filing spouse has credit card debt, which was not listed on Schedule J. Debtor has failed to file amended Schedules to include this debt.

Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan 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 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 the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

**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 and Debtor's Attorney on April 20, 2021. 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. At the hearing -----  
-----.

<b>The Objection to Confirmation of Plan is <span style="color: red;">XXXXX</span>.</b>
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The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that the Debtor may not have filed in good faith as Debtor has failed to explain the disposition of \$56,000.00 in SBA loan proceeds Debtor received.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Good-Faith Filing**

Trustee alleges that the petition was not filed in good faith. According to Trustee, Debtor admitted at the First Meeting of Creditors that he had received an SBA Loan of \$56,000.00 around July 28, 2020 not the July 2015 date listed on Schedule E/F. Trustee contends that Debtor has provided written accounting of how the \$56,000.00 was spent over the course of a few months but did not provide any receipts, although apparently a medical issue occurred and various hospital charts of the Debtor's

health, (in Serbian), were provided. Thus, Trustee argues that without having additional information providing a medical diagnosis or prognosis with more detail, including receipts, Trustee is not certain if the action of the debtor in filing the petition was in good faith. A plan may not be confirmed if the petition was not filed in good faith. *See* 11 U.S.C. § 1325(a)(7).

Debtor filed a Response on April 22, 2021 stating that he has corrected the petition by filing amended Schedules E/F correcting the date the loan was received. Dckt. 22. Debtor also filed his Declaration explaining, under penalty of perjury, that the loan funds were spent in medical services for his cardiological and gastrological problems in Serbia. Dckt. 23. Debtor has also included Exhibit A, which is a Hospital Price List in Serbian and has highlighted the services he received in Serbia. Dckt. 24.

At the hearing, **XXXXX**

~~The Plan complies / does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan 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 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 the Plan is **XXXXX**.

**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.

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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, and Office of the United States Trustee on March 25, 2021. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion to Sell Property 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.

<p><b>The Motion to Sell Property is granted.</b></p>
---

The Bankruptcy Code permits Scott Andre Pierre Fertey and Pauline Teress Fertey, the Chapter 13 Debtor, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 200 Juniper Street, Vacaville, California ("Property").

The proposed purchaser of the Property is Dinisha Lowery, and the terms of the sale are:

- A. Purchase price of \$530,000, with an initial deposit of \$2,000.
- B. Seller to pay for the natural hazard zone disclosure report, County transfer tax or fee, and one-year home warranty plan.
- C. Buyer to pay for escrow fee, owner's title insurance policy, and transaction coordinator.
- D. The sale includes the stove, refrigerator, and washer.

Trustee does not oppose the sale. Dckt. 67.

## DISCUSSION

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: **XXXXXXXXXXXXXXXXXX**.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the sale will alleviate Debtor's continued liability on the two mortgage loans and pay off Debtor's case.

Movant has estimated that a 4.5 percent broker's commission from the sale of the Property will equal approximately \$23,850.00, with 2.5 commission to the seller's broker totaling \$13,250 and 2.0% commission to buyer's broker totaling \$10,600. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than 4.5 percent commission.

### **Request for Waiver of Fourteen-Day Stay of Enforcement**

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because it will reduce costs of drawing up new documents in the event of delays.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h), and this part of the requested relief is granted.

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 Sell Property filed by Scott Andre Pierre Fertey and Pauline Teress Fertey, the Chapter 13 Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Scott Andre Pierre Fertey and Pauline Teress Fertey, the Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Dinisha Lowery or nominee ("Buyer"), the Property commonly known as 200 Juniper Street, Vacaville, California ("Property"), on the following terms:

- A. The Property shall be sold to Buyer for \$530,000, on the terms and conditions set forth in the Purchase Agreement, Exhibit B, Dckt. 63, and as further provided in this Order.
- B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and



expenses incurred to effectuate the sale.

- C. The Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.
- D. The Chapter 13 Debtor is authorized to pay a real estate broker's commission in an amount not more than 4.5 percent of the actual purchase price upon consummation of the sale. The 2.5 percent commission shall be paid to the Chapter 13 Debtor's broker, Coldwell Banker Kappel Gateway Realty, and 2.0 percent commission shall be paid to buyer's broker, Session Real Estate, Inc.
- E. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

**IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 6004(h) is waived for cause.

**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 and Debtor's Attorney on April 21, 2021. By the court's calculation, 20 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. At the hearing -----  
-----.

<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
---

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

- A. Debtor has failed to provide § 521 business documents.
- B. Debtor has failed to file the Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
- C. The plan is overextended.
- D. Debtor has failed to file the Statement of Financial Affairs for Individuals filing for Bankruptcy and the Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period with an electronic or wet signature from the Debtor.

- E. Debtor failed to provide proof of her social security number.
- F. Debtor failed to disclose and exempt a PG&E lawsuit.
- G. Debtor failed to file a detailed statement showing gross receipts and ordinary and necessary expenses for rental property and/or operation of a business.
- H. Debtor failed to provide the Trustee with a copy of the federal income tax return for the most recent tax year a return was filed.
- I. Debtor has failed to file an amended petition correcting and including additional required information.
- J. Debtor's income is higher than listed on Schedule I.
- K. Trustee is not certain how much the Debtor's Attorney was paid prior to filing.
- L. Debtor failed to include nonstandard provisions that appear to be integral to the administration of the plan.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Failure to Provide Social Security Number**

Every individual debtor shall bring to the meeting of creditors under 11 U.S.C. § 341 evidence of social security number(s), or a written statement that such documentation does not exist. FED. R. BANK. P. 4002(b)(1)(B). Without the required documents, the Trustee is unable to properly examine the Debtor at the meeting of creditors.

Trustee filed the report for the Meeting of Creditors on May 6, 2021. The meeting has been continued to June 10, 2021. At the hearing **xxxxxxx**

### **Petition Documents**

Debtor filed several documents on April 28, 2021. Debtor filed an amended Petition and Schedules A/B, C, D, E/F, G, H, and J. Dckt. 34. Debtor also filed an Amended Statement of Financial Affairs. *Id.* Debtor filed Official Form 122C-1. Dckt. 35. The Disclosure of Compensation of Attorney for Debtor and Summary of Assets and Liabilities were also filed that same day. Dckts. 37, 38. Debtor also filed the Rights and Responsibilities of Debtor and Attorney. Dckt. 39. Debtor also filed Amended Schedule I with profit and loss statement for March 2021. Dckt. 40.

### **Failure to Complete Plan Within Allotted Time**

Debtor is in material default under the Plan because the Plan will complete in more than the

permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 89 months due to claims being filed for amounts higher than the Debtor scheduled. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan 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 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 the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

**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 April 27, 2021. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Incur Debt 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. At the hearing, -----

<b>The Motion to Incur Debt is <span style="color: red;">XXXXX</span>.</b>
--

Monica Lynn Maria ("Debtor") seeks permission to purchase a 2014 Mazda 3, with a total purchase price of \$13,921.90 and monthly payments of \$283.01 to Carmax over 66 months with a 10.95% fixed interest rate.

Trustee filed a Response on May 4, 2021 requesting the court take into consideration that Debtor has failed to explain why the purchase of a 7 year old car is in her best interest and noting that Debtor also has a 2012 VW Beetle that was paid off in June 2020. Dckt. 96. Trustee also notes that Debtor has not filed supplemental Schedules I and J showing that she can afford the vehicle payment.

## DISCUSSION

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at \*1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." FED. R. BANKR. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. *Id.*

at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

## Reasonableness

Debtor did not file any pleadings in Reply to the Trustee's Response. Debtor testifies in her Declaration in support of the motion that her current vehicle has significant issues and she can no longer afford continuously fixing it. Dckt. 94. She also testifies that she is in need of a reliable car for work and that this is the most affordable car that she could find that would be safe and reliable. *Id.* Debtor does not identify what vehicle she is referring to as not being reliable.

Debtor also testifies that she will be adjusting her budget (by lowering her phone bill, auto insurance and groceries) to make sure that she can make the plan payment and the new vehicle loan. *Id.*

However, Debtor does not address the reasonableness of incurring debt to purchase a well used (now more than 7 years old) vehicle while seeking the extraordinary relief under Chapter 13 to discharge debts. Moreover, according to the Used Vehicle Bill of Sale (Exhibit, Dckt. 93) the used vehicle has 77,520 miles.

Debtor filed on May 5, 2021, amended Schedules I and J, which date back to March 1, 2017 filing of this case. Dckt. 99. (An amended Schedule corrects an error in the prior filed Schedule, while a Supplemental Schedule updates the financial information for post-petition changes.)

Looking at Amended Schedule J, a couple things stand out. First, Debtor has modest transportation expenses- which include registration, gas, repairs and maintenance - of only \$200 a month. Allocating \$20 a month for registration and \$25 a month for maintenance, Debtor has only \$155 a month for fuel. Assuming \$3.75 a gallon for gas, that allows for purchasing 41 gallons of gas a month. That gives Debtor 10 gallons a week to use. Assuming 25 miles to the gallon, Debtor can drive 250 miles a week, which is 35 miles a day. Debtor does not demonstrate a significant transportation need.

Debtor also chooses to "assist niece with school expenses" and provide for a \$250 expense on Amended Schedule J. Debtor's First Modified Plan provides for a 100% dividend for creditors holding general unsecured claims.

Debtor also states on Schedule J that she has a monthly expense of \$65.00 for "post filing credit cards." *Id.* at 8. This appears to state that Debtor has obtained post-petition credit (without court authorization), is having to borrow money to pay expenses, and is now generating increasing post-petition debt.

At the hearing, **XXXXXXX**

~~The Motion is **xxxxxx**.~~

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 Incur Debt filed by Monica Lynn Maria (“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 ~~xxxxx~~, and Monica Lynn Maria is authorized to incur debt pursuant to the terms of the agreement, Dckt. 93.

**Final Ruling:** No appearance at the May 11, 2021 hearing is required.  
-----

Local Rule 9014-1(f)(2) Objection—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on April 13, 2021. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
---

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

- A. Debtor did not provide social security number at the Meeting of Creditors.
- B. The Chapter 13 documents are inaccurate.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Failure to Provide Social Security Number**

Every individual debtor shall bring to the meeting of creditors under 11 U.S.C. § 341 evidence of social security number(s), or a written statement that such documentation does not exist. FED. R. BANK. P. 4002(b)(1)(B). Without the required documents, the Trustee is unable to properly examine the Debtor at the meeting of creditors.

### **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). According to Trustee, Debtor admitted at the First Meeting of Creditors that her middle name is spelled, "Lynn", and that she recently found her Social Security card in the her deceased father's belongings that states her name as, "Valerie Lynn Urge." The name as stated in the petition is "Valerie Lyn Lutes.

Additionally, Debtors listed a "Car Accident tow trucker v AAA," valued at \$50,0000, but no causes of action in the petition and Debtor has admitted that their personal injury attorney recently advised them that this lawsuit may be valued between \$100,000 to \$500,000.



Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Debtor has filed an Amended Plan and Motion to Confirm. Such constitutes a *de facto* withdrawal of the original Plan.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan 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 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 the Plan is sustained, and the proposed Chapter 13 Plan, Dckt. 4, is not confirmed.

**Final Ruling:** No appearance at the May 11, 2021 hearing is required.  
-----

Local Rule 9014-1(f)(2) Objection—No 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 April 14, 2021. By the court’s calculation, 27 days’ notice was provided. 14 days’ notice is required.

**The Objection to Confirmation of Plan is deemed to be an Opposition to Debtor’s Motion to Confirm (DCN: PGM-1) and considered in the court’s ruling on that Motion.**

U.S. BANK, NATIONAL ASSOCIATION AS LEGAL TITLE TRUSTEE FOR TRUMAN 2016 SC6 TITLE TRUST (“Creditor”) holding a secured claim filed an Objection to Debtor’s proposed amended plan on April 14, 2021. The court takes such Objection as an Opposition to the Amended Plan and it is discussed as part of Debtor’s Motion to Confirm.

**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.

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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, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 24, 2021. By the court's calculation, 48 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).

<p><b>The Motion to Confirm the Amended Plan is <del>XXXXX</del>.</b></p>
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The debtor, Douglas Matthew Lutes and Valerie Lyn Lutes ("Debtor"), seek confirmation of the Amended Plan. The Amended Plan provides for the following:

1. \$35,000.00 lump sum from proceeds from inheritance (payment mailed to Trustee 3-23-21 by Counsel),
2. \$4,555.00 per month x 5 starting April 2021,
3. \$50,000.00 x 1 on or before September 2021 from proceeds of inheritance,
4. \$4,555.00 x 54 starting October 2021, and
5. a 100% dividend for unsecured claims totaling \$41,193.74.

Amended Plan, Dckt. 32. 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 26, 2021. Dckt. 49. Trustee opposes confirmation of the Plan on the basis that:

- A. Trustee is uncertain of the origination of the lump sum payments.
- B. Debtor has failed to provide proof of social security number.
- C. Debtor's Chapter 13 documents are inaccurate.

## **CREDITOR'S OPPOSITION**

U.S. BANK, NATIONAL ASSOCIATION AS LEGAL TITLE TRUSTEE FOR TRUMAN 2016 SC6 TITLE TRUST ("Creditor") holding a secured claim filed an Objection, which the court takes to be an Opposition to this Motion to Confirm. Dckt. Dckt. 46. Creditor opposes confirmation of the Plan on the basis that:

- A. Debtor will not be able to make the plan payments.
- B. The Plan does not provide for equal monthly installments.

## **DISCUSSION**

Trustee's and Creditor's objections are well-taken.

### **Failure to Provide Social Security Number**

Every individual debtor shall bring to the meeting of creditors under 11 U.S.C. § 341 evidence of social security number(s), or a written statement that such documentation does not exist. FED. R. BANK. P. 4002(b)(1)(B). Without the required documents, the Trustee is unable to properly examine the Debtor at the meeting of creditors.

Debtor filed a Reply to Trustee's and U.S. Bank's Opposition / Objections on May 4, 2021. Dckt. 54. Debtor states having applied for a replacement card with the Social Security Administration and will provide the Trustee with a copy of the replacement card as soon as it is received.

### **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). Trustee points the court to the plan which calls for a \$35,000.00 lump sum payment from proceeds from an inheritance as well as a future \$50,000.00 lump sum payment in September 2021, and asserts that Debtor does not identify whether these lump sum payments are from the Chase Bank checking account, or if other money has come in from the probate.

Moreover, as previously asserted by Trustee in his Objection to Confirmation (Dckt. 42), Debtor has failed to identify an alternate name in the petition and failed to list a potential cause of action valued between \$100,00 to \$500,00 in the petition.

Creditor argues that Debtors' Schedules reveal that their net disposable income is not sufficient to fund the on-going mortgage payment and pre-petition arrearage, and the Probate payments are speculative and not supported by evidence.

Additionally, Creditor argues that Debtor is in violation of 11 U.S.C. § 1325(a)(5)(b)(iii) on the basis that Debtor's Plan does not provide for equal monthly payments of Creditor's claim.

In the Reply Debtor explains that the initial lump sum payment of \$35,000 was made from the Chase Bank account, which were funds received from the probate and Debtor expects additional funds from the probate which will be used for the \$50,000 lump sum payment in September 2021. No evidence is provided as to these funds coming from the probate proceeding.

Moreover, Debtor asserts that amended schedules will be filed addressing the name and potential personal injury case.

As to Creditor's objection, Debtor requests that the following language be added to the order confirming the plan to address the Class 1 Post-Petition Monthly Mortgage payments and Pre-petition Arrears:

"The claim of creditor U.S. Bank, N.A./Fay Servicing shall be provided for as a Class 1 claim with an arrearage amount of \$46,966.73, interest rate on arrears at 0%, and Post-Petition Monthly Payments of \$2,060.78."

Thus, Debtor seeking to amend the plan terms to provide for the U.S. Bank secured claim as a Class 1 claim, with post-petition monthly payments and a (\$46,966.73) arrearage to cure. Debtor further seeks to have \$7,000.00 of the \$35,000 disbursed as a lump sum payment on the arrearage to show Debtor's "good faith."

Debtor's counsel states that Debtor is living off of \$100,000 of probate monies held in savings and not disbursed.

While Debtor appears to have a large six figure inheritance that is used to support the Plan, no evidence of such (other than significant monies appearing from bank accounts) is provided.

At the hearing ~~XXXXXXX~~

~~The Amended Plan complies / 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, Douglas Matthew Lutes and Valerie Lyn Lutes ("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~~

~~xxxxxx.~~

**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 **Not** Provided. No Proof of Service was filed with the instant Objection. Thus, the court is unable to determine whether the proper parties have been served.

At the hearing **xxxxxxx**

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. At the hearing -----  
-----.

<b>The Objection to Confirmation of Plan is sustained.</b>
--

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

- A. Debtor has failed to provide proof of social security number.
- B. Plan may not be Debtor's best effort.

## **DISCUSSION**

Trustee's objections are well-taken.

## **Failure to Provide Social Security Number**

Every individual debtor shall bring to the meeting of creditors under 11 U.S.C. § 341 evidence of social security number(s), or a written statement that such documentation does not exist. FED. R. BANK. P. 4002(b)(1)(B). Without the required documents, the Trustee is unable to properly examine the Debtor at the meeting of creditors.

## **Not Best Effort**

The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Trustee argues that the plan is not Debtor's best effort as they may have additional disposable income because Debtor appears to be over the median income and according to the Form 122C-2, their disposable income is \$5,709.54 a month.

Additionally, Trustee points the court to Debtor's Schedule I and J which show that Debtor is deducting \$1,373.00 for voluntary contributions for retirement plans and is putting \$150 a month into Savings which could be used to pay unsecured claims totaling \$128,681.62.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan 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 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 the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.



**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, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 1, 2021. By the court's calculation, 50 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 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).

<b>The Motion to Confirm the Plan is <span style="color: red;">XXXXX</span>.</b>
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The debtor, Kelly Faye Stevens ("Debtor") seeks confirmation of the Chapter 13 Plan. The Plan provides monthly plan payments of \$400.00 for 60 months and a nine (9) percent dividend to unsecured claims totaling approximately \$150,250.00. Plan, Dckt. 35. Additional provisions of the plan include car payments of \$300.00 to Debtor's brother in law and payments of \$445.00 to Matadors Credit Union. *Id.*, at § 7.01. 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, 2021. Dckt. 41. Trustee opposes confirmation of the Plan on the basis that:

- A. According to Proof of Claim 7, Debtor is delinquent on payments to creditor Matadors Credit Union and the addition of nonstandard provisions to pay the long term debt of Claim 7 is reasonable only if Debtor is current.

## **DISCUSSION**

Trustee's concerns are well-taken.

Debtor seeks to make payments directly to creditor Matadors Community Credit Union as a Class 4 creditor. However, according to their Proof of Claim, Debtor has defaulted and thus this claim should be paid through the plan.

Debtor filed a Response on April 13, 2021 stating that Debtor was unaware that Creditor's claim was secured by solar equipment when the case was filed. Dckt. 43. Debtor notes that Debtor is \$1,334.79 delinquent and Debtor's Counsel has been negotiating with Creditor's Counsel for Creditor to place the delinquent payments at the end of the loan and will request Creditor to sign off approval to the proposed Order Confirming Plan. *Id.*

### **April 20, 2021 Hearing**

At the hearing the Trustee reported that opposition stands.

Debtor's counsel reported that an agreement has been reached with Matadors Community Credit Union to modify the loan and place all delinquent payments to the end of the loan. Debtor requested that the hearing be continued so the loan modification can be documented.

### **May 11, 2021 Hearing**

As of the court's drafting of this pre-hearing disposition, no further pleadings or documents have been filed with the court.

At the hearing **xxxxxxx**

**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).**

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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 and Debtor's Attorney on April 7, 2021. By the court's calculation, 20 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 XXXXX.**

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

- A. Debtor failed to provide proof of his social security number at the meeting of creditors.
- B. Debtor failed to file a detailed statement showing business receipts and expenses.
- C. Debtor failed to provide the Trustee with business documents.

## DISCUSSION

Trustee's objections are well-taken.

### **Failure to Provide Social Security Number**

Every individual debtor shall bring to the meeting of creditors under 11 U.S.C. § 341 evidence of social security number(s), or a written statement that such documentation does not exist. FED. R. BANKR. P. 4002(b)(1)(B). Without the required documents, the Trustee is unable to properly examine the Debtor at the meeting of creditors.

Trustee reported this has been provided.

### **Failure to File Business Documents Required by Schedule I**

Debtor has failed to file a statement of gross business income and expenses attached to Schedule I. Line 8a of Schedule I requires Debtor to “[a]ttach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income.” Debtor is required to submit that statement and cooperate with Trustee. 11 U.S.C. § 521(a)(3). Debtor has not provided the required attachment.

### **Failure to File Documents Related to Business**

Debtor has failed to timely provide Trustee with business documents including:

- A. Questionnaire,
- B. Two years of tax returns,
- C. Six months of profit and loss statements,
- D. Six months of bank account statements, and
- E. Proof of license and insurance or written statement that no such documentation exists.

11 U.S.C. §§ 521(e)(2)(A)(i), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with Trustee. 11 U.S.C. § 521(a)(3). Without Debtor submitting all required documents, the court and Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

### **April 27, 2021 Hearing**

At the hearing Debtor’s counsel reported that the documents have been electronically transmitted to the Trustee in the last several days, noting that an earlier attempt was subsequently identified as being sent to an incorrect email address. The Trustee concurred with Debtor in having this matter continued in light of Debtor and Debtor’s counsel continuing efforts in prosecuting this case.

### **May 11, 2021 Hearing**

The Trustee filed an updated Status Report on May 5, 2021. Dckt. 29. The Trustee reports that an email from Debtor’s counsel was received that appeared to include the documents, but that they could not be accessed by the Trustee because they had to be accessed via a Google drive link that the Trustee could not access. The Trustee notified Debtor’s counsel of this on April 29, 2021, but as of May 5, 2021, had not been provided the documents by Debtor’s counsel.

18. [20-24768](#)-E-13      **MILLER LE**      **CONTINUED MOTION TO CONFIRM**  
[MRL-1](#)      **Mikalah Liviakis**      **PLAN**  
2-28-21 [[29](#)]

**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.

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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, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 1, 2021. By the court’s calculation, 50 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 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).

<p><b>The Motion to Confirm the Plan is <b>xxxxx</b>.</b></p>
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The debtor, Miller Hongphong Le (“Debtor”) seeks confirmation of the Chapter 13 Plan. The Plan provides monthly payments of \$880.00 for 60 months and a 100 percent dividend to unsecured claims totaling approximately \$39,000. Plan, Dckt. 2. 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, 2021. Dckt. 35. Trustee opposes confirmation of the Plan on the basis that Debtor has not filed all required tax returns.

## **DISCUSSION**

### **Failure to File Tax Returns**

Debtor admitted at the Meeting of Creditors that the federal income tax return for the 2018 tax year has not been filed still. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Trustee concurred with the continuance of the hearing to allow Debtor and Debtor's counsel additional time to address this matter.

### **May 11, 2021 Hearing**

As of the court's drafting of this pre-hearing disposition, no further pleadings or documents have been filed with the court.

At the hearing 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 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 Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 20, 2021. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Employ 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. At the hearing, -----

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**The Motion to Employ is granted.**

Ernest Hardison and Kristey Sue Hardison ("Debtor") seeks to employ Monarch Real Estate Group ("Broker") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks the employment of Broker to list the property commonly known as 2031 Dover Avenue, Fairfield, California ("Property").

Debtor argues that Broker's appointment and retention is necessary to assist Debtor in the marketing, negotiating, and selling of the Property. Broker has been retained to market and sell the property for a commission of 6.0% of the purchase price.

Michael Damman, a real estate agent of Monarch Real Estate Group, testifies that he will assist Debtor in marketing and selling the Property. Michael Damman testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Monarch Real Estate Group as Broker for the Chapter 13 Estate on the terms and conditions set forth in the Listing Agreement filed as Exhibit A, Dckt. 24. Approval of the commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 Employ filed by Ernest Hardison and Kristey Sue Hardison ("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 Employ is granted, and Debtor is authorized to employ Monarch Real Estate Group as Broker for Debtor on the terms and conditions as set forth in the Listing Agreement filed as Exhibit A, Dckt. 24.

**IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

**IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

**IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by broker in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.



**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 Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on April 20, 2021. By the court’s calculation, 21 days’ notice was provided. 21 days’ notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days’ notice).

The Motion to Sell Property 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. At the hearing, -----

<b>The Motion to Sell Property is granted.</b>
--

The Bankruptcy Code permits Ernest Hardison and Kristey Sue Hardison, the Chapter 13 Debtor, (“Movant”) to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 2031 Dover Avenue, Fairfield, California (“Property”).

The proposed purchaser of the Property is Jimizzy, LLC, and the terms of the sale are:

- A. Purchase price of \$350,000, with an initial deposit of \$2,000.
- B. This is an all cash purchase.
- C. Seller to pay for the natural hazard zone disclosure report, County transfer tax or fee,
- D. Buyer to pay for escrow fee, owner’s title insurance policy, and waives one-year home warranty plan.

## Trustee's Response

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on April 28, 2021 pointing the court to te Preliminary Report (Exhibit C, Dckt. 28) which states that the a person by the name of "Kusum Lata Prasad" with a life estate and a vested interest in the form of a joint tenancy on the Property between Ernest Hardison Jr., Germaïne L. and Hardison and Leora Eliza Hardison. Dckt. 31. Yet Debtor's Motion and Declaration are silent as to these interests and owners. As such Trustee asserts that it is uncertain whether the Debtor has authority to sell this Property and no supporting documentation has been filed from the individuals with interests.

Trustee also notes that the Estimated Seller's Statement states that the proceeds of the sale are to go to Debtor, without accounting for the individuals with fractional interests, and that even if Debtor were to receive a 1/4 interest in the Property, the funds would be sufficient to pay off Debtor's case.

## Debtor's Reply

Debtor filed a Reply, their Declaration, and the Declarations of Germaïne L. Hardison, Leora Eliza Hardison, and Kusum Lata Prasad in support of the sale. Dckts. 35, 36, 37, 38, 39. According to the Debtor and the additional three individuals with an interest in the Property, all testifying under penalty of perjury, that they have been "wanting to sell The Property for over a year now and all are on board with the current proposed sale." *Id.* Moreover, they have "all agreed to evenly splitting the net proceeds after both the bankruptcy and closing costs are paid in full." *Id.*

## DISCUSSION

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: xxxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the sale will pay off Debtor's case in full.

Movant has estimated that a six (6) percent broker's commission from the sale of the Property will equal approximately \$20,000.00. Broker acting as both the buyer's and the seller's broker. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than six (6) percent commission.

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 Sell Property filed by Ernest Hardison and Kristey Sue Hardison, the Chapter 13 Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Ernest Hardison and Kristey Sue Hardison, the Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Jimizzy, LLC or nominee (“Buyer”), the Property commonly known as 2031 Dover Avenue, Fairfield, California (“Property”), on the following terms:

- A. The Property shall be sold to Buyer for \$350,000, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 28, and as further provided in this Order.
- B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.
- C. The Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.
- D. The Chapter 13 Debtor is authorized to pay a real estate broker’s commission in an amount not more than six (6) percent of the actual purchase price upon consummation of the sale. The six (6) percent commission shall be paid to the Chapter 13 Debtor’s broker, Monarch Real Estate Group.
- E. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

**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.

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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, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on April 12, 2021. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

<p><b>The Motion to Dismiss is granted, and the case is dismissed.</b></p>
--

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that:

1. the debtor, Gregory Roger Borgerson and Cherie Marquez ("Debtor"), have failed to provide tax returns in a case that has been open for over a year.
2. Debtor has engaged in unreasonable delay that is prejudicial to creditors, after resulting in no confirmed plan for over a year.

## DISCUSSION

### Failure to Provide Tax Returns

Debtor did not provide either a tax transcript or a federal income tax return with attachments

for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(i); FED. R. BANKR. P. 4002(b)(3).

### **Failure to Confirm a Plan**

According to Trustee, Debtor's failure to confirm a plan is prejudicial to creditors. Debtor's case was filed on April 14, 2020. Dckt. 1. Since then, Debtor has filed four plan with the first three having been denied confirmation. The hearing on the fourth proposed plan, filed December 23, 2020, has been continued twice with the latest hearing scheduled for May 11, 2021, the same date and time as this Motion to Dismiss. Trustee notes that Debtor's Ensminger provisions continue to be objected to by the affected Creditors and by Trustee, with the court having sustained their objections. As noted by Trustee, Debtor has indicated having applied for loan modifications yet no evidence has ever been provided.

Lack of plan confirmation is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Based on the foregoing, cause exists to dismiss this case. The Motion is granted, and the case is dismissed.

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 Dismiss the Chapter 13 case 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 Motion to Dismiss is granted, and the case is dismissed.

**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.

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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 December 23, 2020. By the court's calculation, 48 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 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).

<p><b>The Motion to Confirm the Plan is <span style="color: red;">XXXXX</span>.</b></p>
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The debtor, Gregory Roger Borgerson and Cherie Marquez Borgerson ("Debtor") seeks confirmation of the Third Amended Chapter 13 Plan. The Plan provides eight (8) payments of \$2,530.00, followed by 52 payments of \$3,764.00, and a zero (0) percent dividend to creditors with unsecured claims totaling \$18,313.15. Plan, Dckt. 89. 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 January 26, 2021. Dckt. 109. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor has not filed tax returns.
- B. Plan exceeds the 60 months maximum under the Bankruptcy Code.
- C. Debtor has not submitted a loan modification.

## **DISCUSSION**

### **Failure to File Tax Returns**

Debtor admitted at the Meeting of Creditors that the federal income tax returns for the 2015, 2017, and 2019 tax years have not been filed still. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

### **Failure to Complete Plan Within Allotted Time**

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 70 months because priority claims total \$57,213.01, where Debtor estimated \$21,053.71. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

### **No Loan Modification Documents Provided**

Trustee points the court to the Plan's "Ensminger Provisions" included in the Plan providing for adequate protection payments to PHH Mortgage and Bosco/Franklin Financial Management Corp., as it did the prior three plans, but Creditor Bosco's objection reveals that Debtor have not submitted a loan modification since February 2019.

Trustee adds that Debtor could have provided documents as an exhibit showing the application has been made or submitted, which the court may have considered for the purpose of confirmation and yet Debtor failed to do so.

Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Parties agreed to continue the hearing while Debtor and Debtor's counsel address communications relating to the reported loan modifications.

### **March 5, 2021 Status Report**

On March 5, 2021 Trustee filed a Status Report informing the court that Debtor is current in plan payments; however, Debtor has not provided evidence that all tax returns have been filed. Dckt. 118.

The Franchise Tax Board has filed an amended Proof of Claim indicating that Debtor owes \$3,608.28 priority claim and \$2,740.56 unsecured claim, where the proof of claim also indicates that no tax returns have been filed for years 2015, 2017, and 2019. *Id.* See Proof Claim 9-2. Moreover, Trustee notes that Debtor has not provided the loan modification documents or proof that such application has been made. *Id.*

### **March 23, 2021 Hearing**

At the hearing counsel for the Debtor stated that the FTB has filed a reduced proof of claim. However, the "missing" returns have not been found.

The Trustee states that while the Debtor has stated “things” are happening, but these “things” are not documented.

The hearing is continued ONE FINAL TIME to allow Debtor to address these shortcomings. The hearing is continued to 2:00 p.m. on May 11, 2021

### **May 11, 2021 Hearing**

As of the court’s drafting of this pre-hearing disposition, no further pleadings or documents have been filed with the court as it pertains to this matter.

The Chapter 13 Trustee has filed a Motion to Dismiss this case, set for hearing on May 11, 2021. The Trustee’s motion was granted, and thus the case has been dismissed.

At the hearing 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.

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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, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on December 10, 2020. By the court's calculation, 33 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 XXXXX.**

HSBC Bank USA, N.A., as Trustee on behalf of ACE Securities Corp. Home Equity Loan Trust and for the registered holders of ACE Securities Corp. Home Equity Loan Trust, Series 2006-ASAP6, Asset Backed Pass-Through Certificates ("Movant") seeks relief from the automatic stay with respect to Gregory Roger Borgerson and Cherie Marquez Borgerson's ("Debtor") real property commonly known as 2105 Pimlico Court, Lincoln, California ("Property"). Movant has provided the Declaration of Miguel Baque to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made three (3) post-petition payments, with a total of \$4,192.96 in post-petition payments past due. Declaration, Dckt. 77.

## **CHAPTER 13 TRUSTEE'S RESPONSE**

David P. Cusick ("the Chapter 13 Trustee") filed a Response on December 16, 2020. Dckt. 81. Trustee points out that Debtor have no confirmed plan and informs the court that Debtor are delinquent in plan payment under their last proposed plan. *Id.*, at 1. Trustee further states having disbursed a total of \$9,515.14 towards Debtor's mortgage where Movant has filed Proof of Claim 7-1 for

the secured amount of \$353,696.28 and \$27,534.93 in arrearage. *Id.*, at 2.

## DEBTOR'S OPPOSITION

Debtor filed an Opposition on December 29, 2020. Dckt. 94. Debtor asserts that the motion should be denied on the basis that Debtor has filed a third amended plan which provides for on-going mortgage payments and post-petition arrearage payments to Movant and that a loan modification application is currently being considered by Movant. *Id.*, at 1-2. Adding that a loan modification has also been submitted with the creditor that has a second deed of trust on the Property. *Id.*, at 2.

According to Debtor, final decisions on both loan modifications are still pending and Debtor should be allowed to continue making adequate protection payments. *Id.* Moreover, Debtors argue that a small equity cushion exists if the court disallows Movant's collection of the \$10,126.49 of cost arrearage claimed in Movant's motion. *Id.*

Debtor filed their Declaration in support of the Opposition. Dckt. 95. Debtors testify that their income position has improved dramatically and have filed new Schedules I and J which show that they are capable of making the mortgage payments on the two loans if they are provided loan modification relief on the arrearage. *Id.*, ¶ 7.

## DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$331,270.11 (Declaration, Dckt. 77). Debtor values the Property at \$575,179.00, as stated in Schedules A/B and D filed by Debtor, whereas Movant's Broker's Price Opinion values the Property at \$558,900.00 (Dckt. 78).

### 11 U.S.C. § 362(d)(1)

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][i] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may

exceed a property's equity. *Id.* In this case, the equity cushion in the Property for Movant's claim provides adequate protection for such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004).

Here, there are adequate protection payments in the plan proposed by Debtor and filed on December 23, 2020. Dckt. 89. A motion to confirm has been set for hearing on February 9, 2021. Dckt. 85. The plan provides for adequate protection payments to Movant in the amount of \$1,958.30.<sup>FN.1.</sup>

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FN.1. In the plan, both creditors with liens on the Property are provided Janus treatment, where both creditors are listed under Class 1 and under Section 7.02 of the Additional Provisions Debtor stating that the actual treatment are adequate protection payments pending determination of the loan modification.

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Moreover, Debtor testifies that they are pursuing loan modifications with both creditors submitted August 2020 which are still pending. The court notes that Movant does not address this in their motion for relief. Counsel for Debtor reports that documentation is submitted and awaiting a response.

At the hearing, counsel for Movant reported that his client has not processed a loan modification application. However, conflicting information was provided by Movant.

### **11 U.S.C. § 362(d)(2)**

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized).

Based upon the evidence submitted to the court, it appears that there may be some equity and Debtor are addressing it through adequate protection payments.

### **Request for Attorneys' Fees**

In the Motion, Movant requests that it be allowed attorneys' fees. The Motion alleges contractual grounds for such fees, in that under the loan documents Movant is entitled to its costs and expenses in enforcing its interest to the extend not prohibited by applicable law. Specifically, Page 2 Section 7(E) of the Note states:

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note, whether or not a lawsuit is brought, to the extent not prohibited by Applicable Law. Those expenses include, for example, reasonable attorneys' fees.

Movant is seeking \$1,231 in attorney's fees as a result of the fees incurred in the filing of this motion. Part of those fees include a \$181 filing fee while the remaining balance can be attributed to the amount incurred by Movant's attorneys in drafting this Motion.

At the hearing, Movant agreed to continue the hearing in light of the ongoing loan modification application efforts.

### **February 9, 2021 Hearing**

As of the preparation of this pre-hearing disposition, no further documents have been filed updating the court regarding the loan modification.

At the hearing, the Parties agreed to continue the hearing, and have it conducted in conjunction with the continued hearing on the Motion to Confirm the Plan in this case.

### **March 23, 2021 Hearing**

As of the preparation of this pre-hearing disposition, no further documents have been filed updating the court regarding the loan modification.

At the hearing, the Parties agreed to one final continuance to allow the Debtor to document the diligent prosecution of a loan modification.

### **May 11, 2021 Hearing**

As of the court's drafting of this pre-hearing disposition, no further pleadings or documents have been filed with the court as it pertains to this matter.

The Chapter 13 Trustee has filed a Motion to Dismiss this case, set for hearing on May 11, 2021. The Trustee's motion was granted, and thus the case has been dismissed.

### **Dismissal of the Case**

The instant case was dismissed on **May 11, 2021**, for failure to provide tax returns and failure to confirm a plan.

The applicable Bankruptcy Code provision for the matter before the court is 11 U.S.C. § 362(c)(1) and (2). That section provides:

In relevant part, 11 U.S.C. § 362(c) provides:

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such **property is no longer property of the estate**;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) *the time the case is dismissed*; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

11 U.S.C. § 362(c) (emphasis added).

When a case is dismissed, 11 U.S.C. § 349 discusses the effect of dismissal. In relevant part, 11 U.S.C. § 349 states:

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) *revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.*

11 U.S.C. § 549(c) (emphasis added).

~~Therefore, as of May 11, 2021, the automatic stay as it applies to the Property, and as it applies to Debtor, was terminated by operation of law. At that time, the Property ceased being property of the bankruptcy estate and was abandoned, by operation of law, to Debtor.~~

~~The court shall issue an order confirming that the automatic stay was terminated and vacated as to Debtor and the Property on May 11, 2021.~~

~~The court shall issue a minute 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 Relief from the Automatic Stay filed by HSBC Bank USA, N.A., as Trustee on behalf of ACE Securities Corp. Home Equity Loan Trust and for the registered holders of ACE Securities Corp. Home Equity Loan Trust, Series 2006-ASAP6, Asset Backed Pass-Through Certificates (“Movant”) 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 denied without prejudice as moot, this bankruptcy case having been dismissed on **May 11, 2021**. The court, by this Order, confirms that the automatic stay provisions of 11 U.S.C. § 362(a) were terminated as to Gregory Roger Borgerson and Cherie Marquez Borgerson (“Debtor”) pursuant to 11 U.S.C. § 362(c)(2)(B) and the real property commonly known as 2105 Pimlico Court, Lincoln, California, pursuant to 11 U.S.C. § 362(c)(1) and § 349(b)(3) as of the **May 11, 2021** dismissal of this bankruptcy case.~~

**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).**  
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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, Debtor's Attorney, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on April 27, 2021. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Sanctions for Violation of the Automatic Stay 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. At the hearing, -----.

**The Motion for Sanctions for Violation of the Automatic Stay is xxxxx.**

The present Motion for Sanctions for Violation of the Automatic Stay provided by 11 U.S.C. § 362(a) and for damages pursuant to 11 U.S.C. § 362(k) and the inherent power of this court has been filed by Jason Diven ("Movant"). The claims are asserted against Numa Corp. aka Cedarville Rancheria of No. Paiute Indians and its counsel, Jack Duran, Esq. ("Respondent").

## LEGAL STANDARD

A request for an order of contempt by a debtor, United States Trustee, or another party in interest is made by motion governed by Federal Rule of Bankruptcy Procedure 9014. FED. R. BANKR. P. 9020. A bankruptcy judge has the authority to issue a civil contempt order. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283–85 (9th Cir. 1996). The statutory basis for recovery of damages by an individual debtor is limited to willful violations of the stay, and then typically to actual damages, including attorneys' fees; punitive damages may be awarded in "appropriate circumstances."

11 U.S.C. § 362(k)(1). The court may also award damages for violation of the automatic stay (a Congressionally-created injunction) pursuant to its inherent power as a federal court. *Sternberg v. Johnston*, 595 F.3d 937, 946 (9th Cir. 2009). FN.1.

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FN.1. Bankruptcy courts have jurisdiction and authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548–49 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see 11 U.S.C. § 105(a). A bankruptcy judge is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); see *In re Lehtinen*, 564 F.3d at 1058.

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Attorneys' fees may be recovered for work involved in bringing about an end to the stay violation and for pursuing an award of damages. *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095, 1101 (9th Cir. 2015). A monetary penalty may not be imposed on a creditor unless the conduct occurred after the creditor receives notice of the order for relief as provided by § 342. 11 U.S.C. § 342(g)(2).

The automatic stay imposes an affirmative duty of compliance on the non-debtor. *State of Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151–52 (9th Cir. 1996). A party who acts in violation of the stay has an affirmative duty to remedy the violation. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191–92 (9th Cir. 2003).

In addition, Congress provides in 11 U.S.C § 362(a) & (k) additional relief for violation of the automatic stay, which may be requested by an individual debtor.

## REVIEW OF MOTION

In asserting this claim pursuant to 11 U.S.C. § 362(a) & (k), Movant states with particularity (Federal Rule of Bankruptcy Procedure 9013) the following grounds for relief:

- A. The request is made pursuant to 11 U.S.C. § 362(k) based on Creditor's actual knowledge of the Chapter 13 petition filed.
- B. Respondent has continued legal proceedings in tribal court case no. CEO-CI-2019-002 by requesting a status conference and briefing schedule to determine the scope of the automatic stay in the tribal court.
- C. The case has been continued despite Debtor's attempt to meet and confer and the stipulation to file any request for relief in the bankruptcy court.

Debtor requests the following relief:

- 1. An award actual damages of attorney's fees totaling \$9,579;



2. An award for emotional distress damages of \$2,657;
3. An award for punitive damages in an amount necessary to punish the willful acts of Creditor and its counsel, and to deter any further action without further order from this Court.

Motion, Dckt. 84.

### **Review of the Memorandum of Points and Authorities**

In the Memorandum of Points and Authorities, Debtor argues that violations of the automatic stay are actionable against not only the client, but the attorney for that client that willfully violates the automatic stay on behalf of that client; pointing the court to *In re LeGrand*, 612 B.R. 604, 612 (Bankr. E.D. Cal. 2020) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396–97 (1993); *Link v. Wabash R. Co.*, 370 U.S. 626, 633–34 (1962); *Smith v. Ayer*, 101 U.S. 320, 325–26 (1879)).

Debtor alleges that both Creditor and counsel violated the automatic stay and are thus subject to damages by continuing litigation in the Tribal Case, despite actual knowledge of the bankruptcy proceedings.

Moreover, Debtor argues that Creditor is not entitled to raise sovereign immunity as a defense where courts have found that Indian Tribes cannot assert sovereign immunity in bankruptcy actions and the filing of a proof of claim constitutes waiver of sovereign immunity with respect to the entity's claim.

### **Evidence Presented**

Movant has provided the Declaration of Jason Diven in support of the Motion. Dckt. 90. In his Declaration, Debtor testifies under penalty of perjury that he has spent \$2,657.00 on mental health care due to Respondent's efforts at the Tribal Court; adding that he is "stressed, losing sleep, and ha[s] anxiety as a direct result of [Respondent]'s efforts to continue litigation" against him. *Id.*

Movant has also provided the Declarations of Daniel J. Griffin and Bonnie Baker in support of the Motion. Dckts. 86, 87. In their declarations, Counsels Griffin and Baker testify under penalty of perjury as to the attorney's fees and costs incurred to meet and confer, file pleadings in the tribal court case to preserve Debtor's rights and in connection with the instant motion, and appearances at the trial court.

### **DISCUSSION**

Although Debtor's motion is bare in details encompassing only two pages, Debtor has pleaded with sufficient particularity that Respondent has violated the automatic stay by continuing litigation in a tribal court. Moreover, the declaration have properly authenticated the documents filed at the tribal court showing that the litigation continues and that orders have been issued by the Tribal Court while Debtor is under the protection of this bankruptcy court.

In this case, Respondent had the opportunity of seeking relief from the automatic stay and yet they did not do so. A review of the court's docket for this case shows that Respondent filed a Motion to Dismiss requesting an order from this court to grant relief from the automatic stay on the basis of the court's lack of subject matter jurisdiction over Respondent. *See* Dckt. 10. However, after the court rejected the proposed order and provided instructions for counsel to follow for filing a new motion, Respondent did not file any new pleadings. *See* Dckt. 21. Thus, Respondent has not been granted relief so that they may pursue the Tribal Court case.

~~—————The Motion is granted.~~

~~The court shall issue a minute 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 Sanctions for Violation of the Automatic Stay by Jason Diven, the Chapter 13 Debtor, ("Movant") 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 ~~xxxxx~~.~~

~~—————**IT IS FURTHER ORDERED** that the court finds that Numa Corp. aka Cedarville Rancheria of No. Paiute Indians and its counsel, Jack Duran, Esq. has willfully violated the automatic stay provisions of 11 U.S.C. § 362(a).~~

~~—————**IT IS FURTHER ORDERED** that Movant is awarded and shall recover from Numa Corp. aka Cedarville Rancheria of No. Paiute Indians and its counsel, Jack Duran, Esq. ~~\$xxxx.xx~~ in damages. The damages consist of ~~\$9,579~~ in compensatory damages, ~~\$2,657~~ in emotional distress damages, ~~\$xxxx.xx~~ in punitive damages.~~

~~—————**IT IS FURTHER ORDERED** that Movant shall file and serve on or before ~~xxxx, 201x~~, a cost bill and motion for allowance of professional fees, if any, incurred in connection with, and which were necessary to rectify the violation of the automatic stay pursuant to 11 U.S.C. § 362(k), or for which there is a legal or contractual right to fees. The allowed costs and attorneys' fees, if any, shall be enforced as part of the monetary award under this order against Numa Corp. aka Cedarville Rancheria of No. Paiute Indians and its counsel, Jack Duran, Esq.~~

~~—————This Order constitutes a judgment (Federal Rule of Civil Procedure 54(a) and Federal Rules of Bankruptcy Procedure 7054 and 9014) and may be enforced pursuant to the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure (including Federal Rule of Civil Procedure 69 and Federal Rules of Bankruptcy Procedure 7069 and 9014).~~

## FINAL RULINGS

25. [21-21211](#)-E-13 **WILLIE NORMAN** **MOTION TO VALUE COLLATERAL OF**  
[MJD-2](#) **Matthew DeCaminada** **MECHANICS BANK**  
4-13-21 [\[17\]](#)

**Final Ruling:** No appearance at the May 11, 2021 hearing is required.

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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on April 12, 2021. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Value Collateral and Secured Claim 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion to Value Collateral and Secured Claim of Mechanics Bank ("Creditor") is 6,232.00, and Creditor's secured claim is determined to have a value of \$6,232.00.**

The Motion filed by Willie Jean Norman ("Debtor") to value the secured claim of Mechanics Bank ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 19. Debtor is the owner of a 2008 Mercedes Benz SLK280 ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of \$6,232.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Trustee does not oppose the relief requested but notes that the caption states claim of Westlake Services but the claim being valued as stated in the rest of the Motion is the Mechanics Bank claim. Moreover, Trustee informs the court that Creditor filed a Proof of Claim and that Trustee has not

disbursed any payments to Creditor.

### Proof of Claim

Creditor filed Proof of Claim 7-1 on April 16, 2021. Creditor asserts a claim in the amount of \$11,280.61, where \$7,525.00 is secured, and \$3,755.61 is unsecured. Proof of Claim 7-1.

### **DISCUSSION**

While Proof of Claim No. 7-1 is *prima facie* evidence of a claim, the Creditor has the actual burden of proof on the claim if that *prima facie* evidence is rebutted. It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the *prima facie* validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); see also *United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

“Inasmuch as Rule 3001(f) and section 502(a) provide that a claim or interest as to which proof is filed is “deemed allowed,” the burden of initially going forward with the evidence as to the validity and the amount of the claim is that of the objector to that claim. In short, the allegations of the proof of claim are taken as true. If those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, they *prima facie* establish the claim. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves. But the ultimate burden of persuasion is always on the claimant. Thus, it may be said that the proof of claim is some evidence as to its validity and amount. It is strong enough to carry over a mere formal objection without more.”

*Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991) (quoting 3 L. King, Collier on Bankruptcy § 502.02, at 502-22 (15th ed. 1991)). The presumptive validity of the claim may be overcome by the objecting party only if it offers evidence of equally probative value in rebutting that offered by the proof of claim. *Holm* at 623; *In re Allegheny International, Inc.*, 954 F.2d 167, 173-74 (3rd Cir. 1992). The burden then shifts back to the claimant to produce evidence meeting the objection and establishing the claim. *In re Knize*, 210 B.R. 773, 779 (Bankr. N.D. Ill. 1997).

Proof of Claim No. 7-1 in which it is asserted that the claim is a secured claim in the amount of \$7,525.00 is based upon that amount being stated in the Proof of Claim. The Proof of Claim is signed by Michelle Morris, an Associate Bankruptcy Specialist of Mechanics Bank Auto Finance. As opposed to the books and records of Mechanics Bank Auto Finance in which the amount of the debt and the various transactions are maintained, there is nothing to indicate a high probative value as to the statement of the value of this thirteen year old model 2008 Mercedes Benz SLK280.

Debtor, as the owner of the vehicle, states her opinion as to value, concluding that it is \$6,232.00. Declaration, Dckt. 19. As the owner, the Debtor's opinion of value is evidence of the asset's value. See Fed. R. Evid. 701; see also *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004). While Debtor could have made more of an effort in her testimony to describe the condition of the vehicle, any deferred maintenance, damage, required clean-up, such lack of attention to

her testimony does not render it irrelevant or not probative. It is akin to Creditor not bothering to include a KBB or NADA authenticated valuation with the Proof of Claim, which would enhance the probative value to be overcome.

The lien on the Vehicle's title secures a purchase-money loan incurred on September 11, 2018, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$11,280.61. Proof of Claim, No. 7-1. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of \$6,232.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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 Value Collateral and Secured Claim filed by Willie Jean Norman ("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 pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Mechanics Bank ("Creditor") secured by an asset described as 2008 Mercedes Benz SLK280 ("Vehicle") is determined to be a secured claim in the amount of \$6,232.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$6,232.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

**Final Ruling:** No appearance at the May 11, 2021 hearing is required.

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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on April 8, 2021. By the court’s calculation, 33 days’ notice was provided. 28 days’ notice is required.

The Motion to Avoid Judicial Lien 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

<p><b>The Motion to Avoid Judicial Lien is granted.</b></p>
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This Motion requests an order avoiding the judicial lien of Kelkris Associates, Inc. dba Credito Bureau Associates (“Creditor”) against property of the debtor, Michael Alan Davis and Kimberly Renee Davis (“Debtor”) commonly known as 1100 Almeria Avenue, Winters, California (“Property”).

A judgment was entered against Debtor in favor of Creditor in the amount of \$17,316.84. Exhibit A, Dckt. 72. An abstract of judgment was recorded with Yolo County on May 14, 2013, that encumbers the Property. *Id.*

Pursuant to Debtor’s Schedule A, the subject real property has an approximate value of \$258,855.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total \$483,481.00 as of the commencement of this case are stated on Debtor’s Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of \$1.00 on Amended Schedule C. Dckt. 74.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor’s exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

## 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 to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Michael Alan Davis and Kimberly Renee 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 judgment lien of Kelkris Associates, Inc. dba Credito Bureau Associates, California Superior Court for Solano County Case No. FCM129861, recorded on May 14, 2013, Document No. 2013-0015987-00, with the Yolo County Recorder, against the real property commonly known as 1100 Almeria Avenue, Winters, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

27.	<a href="#">20-24239-E-13</a> <a href="#">RLC-3</a>	<b>ROBIN/THOMAS HARLAND</b> Stephen Reynolds	<b>OBJECTION TO CLAIM OF INTERNAL REVENUE SERVICE, CLAIM NUMBER 12 3-26-21 [43]</b>
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**WITHDRAWN BY M.P.**

**Final Ruling:** No appearance at the May 11, 2021 hearing is required.

**The Objection to Claim was dismissed without prejudice, and the matter is removed from the calendar.**

Robin Arlene Harland and Thomas Scott Harland (“Debtor”) having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Claim was dismissed without prejudice, and the matter is removed from the calendar.**

**Final Ruling:** No appearance at the May 11, 2021 hearing is required.  
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**The Motion to Confirm Plan is dismissed without prejudice, and the plan is not confirmed.**

Amy Mary McClellan (“the Chapter 13 Debtor”) having filed a “Withdrawal of Motion”, which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on May 4, 2021, Dckt. 90; no prejudice to the responding party appearing by the dismissal of the Motion; the Chapter 13 Debtor having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by David Cusick (“the Chapter 13 Trustee”); the *Ex Parte* Motion is granted, the Chapter 13 Debtor’s Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

The court shall issue a minute 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 Plan filed by Amy Mary McClellan (“the Chapter 13 Debtor”) having been presented to the court, the Chapter 13 Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 90, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Confirm Plan is dismissed without prejudice, and the Plan is not confirmed.



**Final Ruling:** No appearance at the May 11, 2021 hearing is required.  
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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 and Debtor’s Attorney on April 14, 2021. By the court’s calculation, 27 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 hearing on the Objection to Confirmation of Plan is continued to 2:00 p.m. on May 25, 2021, to be conducted in conjunction with the Debtor’s Motion to Value Secured Claim.**

The Chapter 13 Trustee, David Cusick (“Trustee”), opposes confirmation of the Plan on the basis that the Plan depends on the granting of a Motion to Value Collateral.

## **DISCUSSION**

A review of Debtor’s Plan shows that it relies on the court valuing the secured claim of OneMain Financial Group, LLC. Debtor filed a Motion to Value the Secured Claim of OneMain Financial Group, LLC on April 15, 2021. The Motion has been set for hearing on May 25, 2021. Dckt. 27. Trustee has filed a Non-Opposition to Debtor’s Motion.

The court continues the hearing to 2:00 p.m. on May 25, 2021 to be heard in conjunction with the Motion to Value the secured claim of OneMain Financial Group, LLC.

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 hearing on the Objection to Confirmation of the Plan is continued to 2:00 p.m. on May 25, 2021.

30. [19-22078-E-13](#) **EDUARDO/MARIE ORTEGA** **MOTION FOR COMPENSATION FOR**  
[PGM-4](#) **Peter Macaluso** **PETER G. MACALUSO, DEBTORS**  
**ATTORNEY(S)**  
**3-31-21 [143]**

**Final Ruling:** No appearance at the May 11, 2021 hearing is required.

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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 31, 2021. By the court’s calculation, 41 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days’ notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

The Motion for Allowance of Professional Fees 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

<b>The Motion for Allowance of Professional Fees is granted.</b>
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Peter G. Macaluso, the Attorney (“Applicant”) for Eduardo M. Ortega and Marie E. Ortega, the Chapter 13 Debtor (“Client”), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period June 3, 2020, through November 2, 2020. Applicant requests reduced fees in the amount of \$1,500.00 and costs in the amount of \$0.00.

## **APPLICABLE LAW**

### **Statutory Basis For Professional Fees**

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). An attorney must “demonstrate only that the services were reasonably likely to benefit the estate at the time rendered,” not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

### **Reasonable Fees**

A bankruptcy court determines whether requested fees are reasonable by examining the

circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

### **Reasonable Billing Judgment**

Even if the court finds that the services billed by an attorney are “actual,” meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided because the court’s authorization to employ an attorney to work in a bankruptcy case does not give that attorney “free reign to run up a [fees and expenses] tab without considering the maximum probable recovery,” as opposed to a possible recovery. *Id.*; see also *Brosio v. Deutsche Bank Nat’l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) (“Billing judgment is mandatory.”). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

- (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

*In re Puget Sound Plywood*, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant’s for the Estate include reviewing Motion to Dismiss, drafting and filing the Opposition, appearing at the hearing, filing a Motion to Modify Plan, preparing Amended Schedules, and meeting with client. The court finds the services were beneficial to Client and the Estate and were reasonable.

## **“No-Look” Fees**

In this District, the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.”

...

(c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

(1) The maximum fee that may be charged is \$4,000.00 in nonbusiness cases, and \$6,000.00 in business cases.

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor’s attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed \$4,000.00 in attorneys’ fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 141. Applicant prepared the order confirming the Plan.

## **Lodestar Analysis**

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). The attorney may file a fee application, and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. For bankruptcy cases in the Ninth Circuit, “the primary method” to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). “This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles Cty. Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional’s fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion “in view of the [court’s] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.” *Hensley*, 461 U.S. at 437. Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate. *See In re Placide*, 459 B.R. at 73 (citing *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

## **FEES AND COSTS & EXPENSES REQUESTED**

### **Fees**

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Motion to Dismiss: Applicant spent 1.75 hours in this category. Applicant reviewed Motion to Dismiss; prepared and filed Opposition to Motion to Dismiss; appeared at the hearing and at the continued hearing; and met with clients to discuss the Motion to Dismiss and formulate new plan.

Motion to Modify: Applicant spent 4.95 hours in this category. Applicant prepared and filed Motion to Modify; prepared and filed Amended Schedules and Declaration; reviewed Trustee Opposition to Motion to Modify; prepared and filed Response to Opposition to Motion to Modify; met with clients; and appeared at the hearing.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Peter G. Macaluso	6.3	\$300.00	\$1,890.00
	0.4	\$75.00	\$30.00
<b>Total Fees for Period of Application</b>			\$1,920.00

### **Costs and Expenses**

Applicant does not seek costs and expenses through this application.

### **FEES AND COSTS & EXPENSES ALLOWED**

#### **Fees**

The unique facts surrounding the case, including drafting and filing an Opposition to the Motion to Dismiss, appearing at the hearing, filing a Motion to Modify Plan, preparing Amended Schedules, and meeting with the client, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the reduced amount of \$1,500.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick (“the Chapter 13 Trustee”) from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Applicant is allowed, and the Chapter 13 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	\$1,500.00
Costs and Expenses	\$0.00

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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 Allowance of Fees and Expenses filed by Peter G. Macaluso (“Applicant”), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Peter G. Macaluso is allowed the following fees and expenses as a professional of the Estate:

Peter G. Macaluso, Professional Employed by Eduardo M. Ortega and

Marie E. Ortega (“Debtor”)

Fees in the amount of \$1,500.00  
Expenses in the amount of \$0.00,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330  
as counsel for Debtor.

**IT IS FURTHER ORDERED** that David Cusick (“the Chapter 13  
Trustee”) is authorized to pay the fees allowed by this Order from the available  
Plan Funds in a manner consistent with the order of distribution under the  
confirmed Plan.

31.	<a href="#"><u>17-26581</u></a> -E-13 <a href="#"><u>PGM</u></a> -3	<b>BRIAN/PEGGY WINSHIP</b> <b>Peter Macaluso</b>	<b>MOTION FOR COMPENSATION FOR PETER G MACALUSO, DEBTORS ATTORNEY(S) 3-31-21 [82]</b>
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**Final Ruling:** No appearance at the May 11, 2021 hearing is required.

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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 31, 2021. By the court’s calculation, 41 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days’ notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

The Motion for Allowance of Professional Fees 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

<b>The Motion for Allowance of Professional Fees is granted.</b>
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Peter G. Macaluso, the Attorney (“Applicant”) for Brian Edward Winship and Peggy Diane Winship, the Chapter 13 Debtor (“Client”), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period August 21, 2020, through November 23, 2020. Applicant requests reduced fees in the amount of \$1,500.00 and costs in the amount of \$0.00.

## **APPLICABLE LAW**

### **Statutory Basis For Professional Fees**

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). An attorney must “demonstrate only that the services were reasonably likely to benefit the estate at the time rendered,” not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P.

9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

### **Reasonable Fees**

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

### **Reasonable Billing Judgment**

Even if the court finds that the services billed by an attorney are “actual,” meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney “free reign to run up a [fees and expenses] tab without considering the maximum probable recovery,” as opposed to a possible recovery. *Id.*; see also *Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) (“Billing judgment is mandatory.”). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

- (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

*In re Puget Sound Plywood*, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's for the Estate include reviewing Motion to Dismiss, drafting and filing the Opposition, appearing at the hearing, filing a Motion to Modify Plan, preparing Amended Schedules, and meeting with client. The court finds the services were beneficial to Client and the Estate and were reasonable.

### **"No-Look" Fees**

In this District, the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."

...

(c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

(1) The maximum fee that may be charged is \$4,000.00 in nonbusiness cases, and \$6,000.00 in business cases.

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed \$4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 80. Applicant prepared the order confirming the Plan.

### **Lodestar Analysis**

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). The attorney may file a fee application, and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles Cty. Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437. Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate. *See In re Placide*, 459 B.R. at 73 (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

### **FEES AND COSTS & EXPENSES REQUESTED**

#### **Fees**

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Motion to Dismiss: Applicant spent 1.75 hours in this category. Applicant reviewed Motion to Dismiss; prepared and filed Opposition to Motion to Dismiss; appeared at the hearing and at the continued hearing; and met with clients to discuss the Motion to Dismiss and formulate new plan.

Motion to Modify: Applicant spent 5.0 hours in this category. Applicant prepared and filed Motion to Modify; prepared and filed Amended Schedules and Declaration; reviewed Trustee Opposition to Motion to Modify; prepared and filed Response to Opposition to Motion to Modify; met with clients; and appeared at the hearing.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Peter G. Macaluso	6.1	\$300.00	\$1,830.00
	0.65	\$75.00	\$48.75
<b>Total Fees for Period of Application</b>			\$1,878.75

### **Costs and Expenses**

Applicant does not seek costs and expenses through this application.

### **FEES AND COSTS & EXPENSES ALLOWED**

#### **Fees**

The unique facts surrounding the case, including drafting and filing an Opposition to the Motion to Dismiss, appearing at the hearing, filing a Motion to Modify Plan, preparing Amended Schedules, and meeting with the client, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the reduced amount of \$1,500.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick (“the Chapter 13 Trustee”) from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Applicant is allowed, and the Chapter 13 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	\$1,500.00
Costs and Expenses	\$0.00

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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 Allowance of Fees and Expenses filed by Peter G. Macaluso (“Applicant”), Attorney for 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 Peter G. Macaluso is allowed the following fees and expenses as a professional of the Estate:

Peter G. Macaluso, Professional Employed by Brian Edward Winship and Peggy Diane Winship (“Debtor”)

Fees in the amount of \$1,500.00  
Expenses in the amount of \$0.00,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor.

**IT IS FURTHER ORDERED** that David Cusick (“the Chapter 13 Trustee”) is authorized to pay the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.