

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

May 23, 2023 at 2:00 p.m.

1. [23-21470-E-13](#) **RENE MAXON** **MOTION TO EXTEND AUTOMATIC**
[GC-1](#) **Julius Cherry** **STAY**
 5-8-23 [8]

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 May 8, 2023. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Extend 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 to Extend the Automatic Stay is granted.

Rene Sylvia Maxon (“Debtor”) seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor’s second bankruptcy petition pending in the past year. Debtor’s prior bankruptcy case (No. 20-23299) was dismissed on February 26, 2023, after Debtor was delinquent in Plan payments. *See* Order, Bankr. E.D. Cal. No. 20-23299, Dckt. 32, February 26, 2023. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor’s previous roommate-tenant moved out, causing a loss of income of \$600 per month. This caused Debtor to be unable to make Plan payments. Debtor states they have a new roommate, as well as an increase in Social Security income, both of which will allow Debtor to make Plan payments under the current case.

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

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

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

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

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

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

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

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

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

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

2. 23-21480 -E-13 MET-1	MANUEL GONZALEZ AND REGINA SAUCEDO Mary Ellen Terranella	MOTION TO IMPOSE AUTOMATIC STAY O.S.T. 5-12-23 [9]
--	---	---

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on May 12, 2023. By the court’s calculation, 11 days’ notice was provided. The court required 11 days’ notice. Dckt. 13.

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

The Motion to Impose the Automatic Stay is XXXXXXX .

Manuel Saucedo Gonzalez and Regina Rodriguez Saucedo (“Debtor”) seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) imposed in this case. This is Debtor’s third bankruptcy petition pending in the past year with the prior two cases having been dismissed. Debtor’s prior bankruptcy cases (Nos. 22-21490 and 22-22110) were dismissed on July 5, 2022, and April 20, 2023, respectively. *See* Order, Bankr. E.D. Cal. No. 22-21490, Dckt. 13, July 5, 2022; Order, Bankr. E.D. Cal. No. 22-22110, Dckt. 132, April 20, 2023. Therefore, pursuant to 11 U.S.C. § 362(c)(4)(A)(I), the provisions of the automatic stay did not go into effect upon Debtor filing the instant case.

Here, Debtor states that the instant case was filed in good faith and explains that the previous cases were dismissed because for their first case, debtor Regina filed in her name only without the assistance of an attorney and did not realize the procedural requirements for keeping a case pending. For Debtor’s second case, debtor Manuel’s health caused Debtor to fall behind in Plan payments. Debtor states they are confident they will be able to successfully prosecute a Chapter 13 case, as they have filed the case with the assistance of counsel from start and their financial situation has become more stable.

APPLICABLE LAW

When stay has not gone into effect pursuant to 11 U.S.C. § 362(c)(4), a party in interest may request within 30 days of filing that the stay take effect as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B).

For purposes of subparagraph (B), a case is presumptively filed not in good faith as to all creditors if:

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor’s attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; . . .

11 U.S.C. § 362(c)(4)(D).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second

case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

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

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

DISCUSSION

Debtor’s prior cases were dismissed after Debtor failed to file documents (No. 22-21490) and after Debtor fell delinquent in Plan payments (No. 22-22110).

A review of the court’s files discloses that in addition to the two cases in the past year, Debtor has also filed and had dismissed these additional recent cases:

21-24161 - Chapter 13 Case

- A. Represented by Experienced Chapter 13 Counsel
- B. Filed December 14, 2021
 - 1. Dismissed March 22, 2022
- C. Denial of Confirmation of Chapter 13 Plan. In Case 21-24161, the court denied confirmation of Debtor’s Plan based on the following:
 - 1. Debtor failing to attend First Meeting of Creditors.
 - 2. Debtor being in default in the required Plan payments.
 - 3. Debtor did not propose how to cure the post-petition arrearages.

21-24161; Civil Minutes, Dckt. 38.

- D. In dismissing the case, the court’s findings included that Debtor made no plan payments in case 21-24161. *Id.*; Civil Minutes, Dckt. 37.

19-20238 - Chapter 13 Case

- A. Represented by Experienced Chapter 13 Counsel
- B. Filed January 15, 2019
 - 1. Dismissed September 27, 2019

- C. Debtor confirmed the Chapter 13 Plan in case 19-20238 on March 18, 2019, and the Chapter 13 Trustee filed a Motion to Dismiss that case on May 22, 2019. The Motion to Dismiss asserted that Debtor had defaulted in two monthly plan payments. 19-20238; Motion to Dismiss, Dckt. 28. Debtor attempted to confirm a modified plan, but such was denied. *Id.*; Order, Dckt. 68. When the court dismissed case 19-20238 in September 25, 2019, Debtor was at least \$14,085 (as of the time of the Trustee filing the Motion to Dismiss) in default in monthly plan payments (four-plus months). *Id.*; Civil Minutes, Dckt. 73.

Case 18-20217 - Chapter 13 Case

- A. Debtor Represented by Experienced Bankruptcy Counsel
- B. Filed January 16, 2018
1. Dismissed December 6, 2018
- C. Debtor confirmed the Chapter 13 Plan in March 2018, and in August 2018, the Chapter 13 Trustee filed a Motion to Dismiss case 18-20217. The Trustee's Motion to Dismiss asserted there was a \$7,491.62 default in Plan payments (two and one-half months of payments). 18-20217; Motion to Dismiss, Dckt. 23. At the hearing on the Motion to Dismiss, counsel for Debtor in Case 18-20217 reported to the court that he had been unable to communicate with Debtor. The court continued the hearing on the Motion to Dismiss several times. At the second continued hearing, Debtor's counsel reported that the defaults had been caused by medical condition of a family member. *Id.*; Civil Minutes, Dckt. 39.

From a review of the court's files, it appear that Debtor has been "living" in bankruptcy since 2018, getting the benefits under the Bankruptcy Code, but has repeatedly failed to fulfill Debtor's obligations – fun the Plan which they committed to pay. This is not a "simple," debtor tried in pro se and stumbled, learned how hard it is, and then hired an attorney. Debtor tried in the second case with the assistance of counsel, but an extraordinary event intervned that cause the second stumble. That unique event is not likely to occur again, the debtor has stable income, and now can make all the payments as promised.

Rather, history shows that Debtor repeatedly has "extraordinary events" occur, stumbles in payments, and better things to use their monies on than the Plan payments that they promised to pay.

XXXXXX

~~Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior cases for the court to impose the automatic stay.~~

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

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

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

~~The Motion to Impose the Automatic Stay filed by Manuel Saucedo Gonzalez and Regina Saucedo (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion is granted, and the automatic stay is imposed pursuant to 11 U.S.C. § 362(c)(4)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.~~

3.	<u>22-21817-E-13</u> <u>DPC-1</u>	GARY SPARKS Mary Ellen Terranella	CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 9-7-22 [13]
----	--	--	---

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)©.

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 September 9, 2022. 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 Objection to Confirmation of Plan is sustained.

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

1. Debtor failed to appear at the First Meeting of Creditors and the meeting was continued to October 6, 2022, and
2. The Plan is not feasible, nor does Debtor appear to be able to comply with the Plan.
 - a. Debtor’s budget is unrealistic. Schedule J does not reflect any expenses for a vehicle or medical insurance;
 - b. Debtor failed to file tax returns;
 - c. Debtor fails to provide for the full claims of the Internal Revenue Service (“IRS”) and Franchise Tax Board (“FTB”);
 - d. Including the IRS and FTB’s claims would cause completion of the Plan to take approximately 85 months.

DISCUSSION

Trustee’s objections are well-taken.

Failure to Appear at 341 Meeting

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

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 asserts that Debtor is self-employed, earning a net monthly income of \$6,933.00, but Debtor’s Schedule J does not reflect medical insurance or vehicle expenses. Debtor has failed to explain the lack of expense for these items. Without an accurate picture of Debtor’s financial reality, the court cannot determine whether the Plan is confirmable.

Failure to File tax returns

The IRS and FTB’s claims indicate tax returns were not filed for numerous years prior to filing for bankruptcy. Trustee’s declaration asserts that Trustee has only received Debtor’s 2013 tax return, to date. Declaration, Dckt. 15, filed on September 7, 2022. 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 Provide for a Secured Claim

Debtor's Plan does not provide for the secured claim of FTB. Additionally, there is no indication Debtor plans to provide for FTB outside of the Plan. FTB may request relief from stay which could impact Debtor's ability to finance the Plan.

Failure to Provide for a Priority Claim

Trustee asserts that the IRS filed a claim with a priority amount of \$81,063.29 in priority unsecured debt but Debtor only estimated and scheduled the IRS as priority for \$30,000.00, and \$25,544.00 as unsecured nonpriority. Proof of Claim 9-1, filed on August 29, 2022. The Plan does not provide for all priority debt as required by 11 U.S.C. § 1322(a)(2).

Plan Term is More than 60 Months

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to Trustee, the Plan will complete in 85 months due to proofs of claims filed by the IRS and Franchise Tax Board. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

DECEMBER 13, 2022 HEARING

The Chapter 13 Trustee filed a Status Report on December 5, 2022. Dckt. 21. The Trustee reports that the Meeting of Creditors has been completed. However, at the December 1, 2022 Meeting of Creditors, the Debtor stated that he had not yet filed his tax returns, and the Meeting of Creditors has been continued to January 26, 2023.

At the hearing, counsel for the Debtor reported that Debtor attended the First Meeting of Creditors and is working on his tax returns (needing to get additional records from his bank). The First Meeting has been continued to January 2023.

The Trustee reported that the Debtor is current on Plan payments Trustee reported and concurs with there being a continuance of the hearing on this Objection.

FEBRUARY 13, 2023 HEARING

The Trustee's February 9, 2023 Docket Entry Report states that the First Meeting of Creditors has now been concluded.

However, on January 30, 2023, the Chapter 13 Trustee filed a Motion to Dismiss this Bankruptcy Case. Dckt. 26. The grounds stated in the Motion are:

- a. Debtor is delinquent \$9,538.38 in Plan payments (2 months).
- b. The Tax Returns have not yet been provided.
- c. The Internal Revenue Service proof of claim states that tax returns have not been filed by Debtor for the 2016 to 2022 tax years. The California Franchise Tax Board proof

of claims states that State tax returns have not been filed for the same period. State tax obligations are not provided for in the Plan.

At the hearing, counsel for the Trustee believes that all issues have been resolved, except the over extension. Counsel for Debtor reports that the 2016 through 2022 tax returns have been filed, and it is anticipated that the taxing agencies will be amending their claims.

The Parties agreed to a further continuance to allow the taxing agencies to see the returns and amend the claims.

TRUSTEE'S STATUS REPORT

Trustee filed a Status Report on April 4, 2023. Dckt. 40. Trustee states the IRS and FTB still have not amended their proofs of claim, and thus, the Plan is still overextended.

DEBTOR'S STATUS REPORT

Debtor filed a Status Report on April 4, 2023. Dckt. 42. Debtor states they have communicated with the IRS and FTB and expect them to amend their proofs of claims prior to the hearing.

APRIL 11, 2023 HEARING

At the hearing, the Trustee and the Debtor's counsel agreed to a continuance in light of the amended returns having been filed and it being reported that the taxing agencies amended proofs of claim being in process.

IRS AND FTB AMENDED PROOF OF CLAIMS

The IRS and FTB have filed amended proofs of claims.

The IRS filed an Amended Proof of Claim on May 17, 2023. Proof of Claim 9-4. The Amended Claim is for an amount of \$114,670.14, of which \$81,591.95 is priority and \$33,078.19 is unsecured.

The FTB filed an Amended Proof of Claim on April 7, 2023. Proof of Claim 7-2. The claim is for \$4,648.68, of which \$2,474.73 is secured, \$1,607.32 is unsecured priority, and \$566.63 is unsecured general.

The Plan does not provide for FTB's secured claim. FTB may request relief from stay which could impact Debtor's ability to finance the Plan.

Additionally, it only provides for \$35,000.00 in priority claims, which is not all priority debt as required by 11 U.S.C. § 1322(a)(2). Providing for all priority debt exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

MAY 23, 2023 HEARING

At the hearing, **XXXXXXXXXXXX**

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

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

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

IT IS ORDERED that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

4. [20-25523-E-13](#) **THOMAS KNOERNSCHILD** **MOTION TO MODIFY PLAN**
[RPH-5](#) **Robert Huckaby** **4-25-23 [103]**

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 Not 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 25, 2023. By the court’s calculation, 28 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).

Under the facts and circumstances of this Motion, the court shortens the time to the **28** days given.

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

The Motion to Confirm the Modified Plan is denied.

The debtor, Thomas Edwin Matlock Knoernschild (“Debtor”) seeks confirmation of the Modified Plan to make up for missed payments due to lost employment. Declaration, Dckt. 105. The Modified Plan provides monthly payments of \$318.00 from 1/25/2021 through 3/25/2023, followed by \$374.79 for the remainder of the Plan, with 0% to unsecured claims. Modified Plan, Dckt. 107. 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 May 9, 2023. Dckt. 109. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor has not provided sufficient notice.
- B. The Plan is overextended.
- C. Debtor is delinquent in Plan payments.
- D. Schedules I and J are only filed as an exhibit with no cover sheet.
- E. Debtor’s Declaration is based on expert legal knowledge.
- F. Payments not authorized have been disbursed.

DISCUSSION

Insufficient Notice

The court has addressed Debtor’s deficient notice. Under the facts and circumstances, the court allows the notice of only 28 days.

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 65 months due to after 60 months of the Plan, \$1,267.49 would still remain outstanding and due to Creditors. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Delinquency

The Chapter 13 Trustee asserts that Debtor is \$374.79 delinquent in plan payments, which represents one month of the \$374.79 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Schedule I and J Not Filed as Supplemental Schedules (Only as Exhibits in Support of Motion)

Although Debtor has provided a supplemental Schedule I and J as an Exhibit (Dckt. 106), Debtor has failed to file each of these documents separately on to the Court’s docket. Filing a schedule I and J as

an exhibit is not sufficient for it to be considered a supplement. Debtor must file the supplemental schedules separately on the Court's docket and properly notice them to parties in interest. Federal Rule of Bankruptcy Procedure 1009(a). Additionally, Debtor must include a cover sheet pursuant to Local Bankruptcy Rule 9004-1(c).

Debtor's Legal Knowledge

Debtor states "I am informed and therefore believe and declare that the First Modified Chapter 13 Plan complies with applicable law;" "I believe the Plan is proposed in good faith and not by any means forbidden by law," and "All secured creditors have either accepted the Plan, or their collateral has been surrendered to them, or the Plan provides to pay them pursuant to Section 1325(a)(5)(B)." Declaration, Dckt. 105.

The court has been presented with a declaration in which the witness provides testimony based on "information and belief." That declaration is the testimony of a witness presented in writing in lieu of the witness being put on the stand. Non-expert witness testimony must be based on the personal knowledge of the witness. FED. R. EVID. 602. As discussed in Weinstein's Federal Evidence § 602.02:

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

The Debtor is improperly providing legal conclusions to the court instead of factual assertions. This is not proper as a non-expert witness.

Payments Not Authorized

Trustee has disbursed \$1,637.22 to Consumer Portfolio Services, who was treated as a Class 2 claim in Debtor's prior Plan. Debtor now treats this Creditor as a Class 3 claim. Debtor has not authorized the prior payments to Creditor. Absent this authorization, Trustee cannot comply with the Plan.

DEBTOR'S REPLY

On May 17, 2023 The Debtor filed is Reply. Dckt. 114. Debtor asserts:

1. The payments under the Modified Plan total the same as under the confirmed Second Amended Plan, with the increased monthly payments to cure the post-petition defaults that have now occurred.
2. Payments should not have been made pre-confirmation to Consumer Portfolio Services on its secured claim prior to confirmation of the Second Amended Plan because under that Plan the secured claim is provided for as a Class 3 surrender claim.
3. The First Modified Plan cures the defaults that have occurred under the confirmed Second Amended Plan.

4. The required Schedules I and J were filed, and the exhibits are not supplemental schedules, but the Debtor reaffirming that the information in the existing Schedules I and J are current and correct at this time.

With respect to the original Schedules I and J as exhibits, the court notes that in the Declaration of Debtor filed with the Motion to Confirm the First Modified Plan are the “amended Schedules I and J which show my current income and expenses.” Dec., ¶ 11; Dckt 105.

Looking at these “amended” schedules filed as Exhibits shows conflicting information. Exhibit 1 is listed to be “Updated Schedule 1.” Exhibit Cover Page; Dckt. 106.

Looking at Exhibit 1, the box is checked stating it is “A supplement showing postpetition Chapter 13 income as of the following date:04/01/2023.” Exhibit 1, *Id.* at 2. This states it is not a copy of the prior filed schedule, is not an amended schedule (which relates back to the start of the case), but is a supplemental schedule showing the income and expenses as of April 1, 2023 (to reflect changes that have occurred since the 2020 filing of this Bankruptcy Case.

Looking at Exhibit 2, “Updated Schedule J,” it states that it is a supplemental Schedule J showing the changed expense information as of April 1, 2023. *Id.* at 4.

At the hearing, **XXXXXXX**

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

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 the Modified Chapter 13 Plan filed by the debtor, Thomas Edwin Matlock Knoernschild (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

Attorney: Stacie L. Power

Notes:

5/14/23 - Granted order on Motion/Application for Compensation for DNLC and issued Memorandum Opinion and Decision [Dckts. 249, 251]

The Status Conference is ~~xxxxxxx~~

This Bankruptcy Case was filed on April 19, 2021, as a voluntary Chapter 7 Case by Jamie Howell, the Debtor. As one can see, the Chapter 7 case became quite turbulent as between Debtor, creditors (at least one), and the Chapter 7 Trustee. The Chapter 7 Trustee pursued assets that the Debtor had transferred into a Trust, which Debtor purported to make irrevocable prior to the Bankruptcy Case being filed. Much litigation ensued over the Trustee's Motion to Turn Over property (real property in the Debtor's Trust) and the Debtor's responding Motions to Convert this Case to one under Chapter 13.

On October 29, 2022, the Hon. Christopher M. Klein, the judge to whom the Chapter 7 Case was assigned, converted it to one under Chapter 13. A review of the Docket and the audio files of hearings on the Docket (no transcripts having been prepared) make it clear that with the conversion to Chapter 13 the Debtor was to promptly prosecute a Plan and move the case forward.

After conversion this case was assigned to the undersigned judge. Several hearings have occurred, but no Plan has been confirmed. In reviewing what has been filed and the proceedings, the court notes the following.

Original Plan Filed

On November 21, 2022, the Debtor filed her Chapter 13 Plan. Dckt. 171. The provisions of the November 21, 2022, filed plan include:

- A. Debtor will fund the Plan with monthly Plan Payment of \$3,650.00 for a period of sixty (60) months.
- B. Debtor's attorney was paid prior to filing the case and no further money is to be paid Debtor's attorney through the Plan unless approved pursuant to a subsequent application of Debtor's counsel.
- C. For Secured Claims

1. Class 1 provides for a current monthly post-petition of \$1,937.96 and an additional \$333.33 to cure a \$333,33 arrearage on the claim secured by the 9 Charley Lynd property.
 2. For Class 2, Tri Counties Bank is to be paid \$0.00 on its secured claim. (See additional provisions below.)
- D. The Debtor shall make direct payments to Earl Clark Schlieff 2018 Trust and Shasta Boardman on their respective secured claims.
- E. Debtor will pay at least a 25% dividend to creditors holding general unsecured claims.
- F. In the additional provisions, it states that the Tri Counties judgment lien is an avoidable preference, which may be avoided pursuant to 11 U.S.C. § 547.

This Plan caught Objections filed by U.S. Bank National Trust Association, Trustee, and the Chapter 13 Trustee. Dckts. 181, 184. The U.S. Bank National Trust Association, Trustee, objection asserted that the amount of the arrearage to be cured is \$66,032.09 and not the \$20,000.00 stated by Debtor. The Chapter 13 Trustee's Objection was based on: (1) the First Meeting of Creditor not yet being completed; (2) document filed having a "DocuSign signature," and not an actual signature or a "/s/ signature" as required by the Local Bankruptcy Rules; (3) Debtor not providing the Chapter 13 Trustee with pay advices and tax returns; (4) Debtor's failure to list secured claims on Schedule D and several secured claims having been filed; (5) Debtor not stating the amount of a claimed exemption; (6) the Debtor's Schedule J showing that she has only \$980.61 of projected disposable income; (7) the Trustee's liquidation analysis showing that is \$514,612.50 in non-exempt equity but Debtor only provided a dividend of \$48,436.43 on general unsecured claims. The court sustained the Objection to Confirmation (no appearance for Debtor at the hearing). Civil Minutes; Dckt. 192. Confirmation was denied on January 24, 2023.

First Amended Plan Filed

On March 6, 2023, the Debtor filed her First Amended Plan. Dckt. 202. However, Debtor did not file a Motion to Confirm. Under the Amended Plan (Dckt. 202), the basic terms include:

- A. Debtor will fund the Plan with monthly payments of \$1,250 a month for 60 months, and there will be a lump sum payment of \$92,000 in month 6 of the Plan. The lump sum payment is to be from the sale of the Charles Lynd Way property "which is to be listed and marketed for sale immediately." Amd Plan, ¶ 2.02; Dckt. 202.
- B. Debtor's counsel will be paid an additional \$3,500.00 in fees through the Plan.
- C. Class 1 secured claims to be paid are stated to be:
1. Earl Clark Schlieff 2018 Trust.....\$408.00 per month
 2. Shasta Boardman.....\$526.00 per month
- D. There are no Class 2 Claims

- E. For Class 3 surrender,
 - 1. Debtor surrenders the 9 Charley Wynds Way property to U.S. Bank, N.A., Trustee, so that it may foreclose on the property. This is the property that is to be sold to fund the Plan.
 - 2. Debtor surrenders a 2019 Chevy Camaro to Wells Fargo Bank
- F. Class 4 Direct pays,
 - 1. Jesse Roberson, a co-owner will make \$0.00 to Harley Davidson Credit Corp for a 2020 Harley Davidson Road Glide with 195,000 miles on it.
- G. Class 5 priority unsecured claims of \$2,467.82 will be paid.
- H. Class 7 general unsecured claims will received a dividend of not less than 30% on \$294,318.04 in claims. This 30% would be not less than \$88,295.40.

No motion to confirm having been set, no oppositions to the proposed Amended Plan were, or were required, to be filed.

Motion for Relief From the Automatic Stay

On April 7, 2023, U.S. Bank Trust National Association, Trustee, filed a Motion for Relief From the Automatic Stay so that it could foreclose on 9 Charley Lynds Way, Forbestown, California Property. Dckt. 229. The grounds asserted include: (1) arrearages of approximately (\$59,185); (2) this Creditor's claim totaling \$270,721; (3) the value of the Property being \$515,000; and the Debtor not making payments on the claim. Debtor has filed an opposition (and with a value of \$515,000 rightly so), asserting that: (1) a real estate agent has been engaged, (2) the property is to be sold under Debtor's Plan, and the value of the Property provides adequate protection. Dckt. 245. Additional, Debtor informs the court that no notice of default has yet been filed by this Creditor.

Filing of Second Amended Plan

On May 2, 2023, in apparent response to the U.S. Bank Trust National Association, Trustee, Motion for Relief From the Stay Debtor filed her Second Amended Plan. Dckt. 244. However, Debtor did not file a Motion to Confirm. Under the Amended Plan (Dckt. 244), the basic terms include:

- A. Debtor will fund the Plan with monthly payments of \$3,650.00 for two months and then \$1,250 a month for 58 months, and there will be a lump sum payment of \$92,000 in month 9 of the Plan. The lump sum payment is to be from the sale of the Charles Lynd Way property "which is to be listed and marketed for sale immediately." Amd Plan, ¶ 2.02; Dckt. 202.
- B. Debtor's counsel will be paid an additional \$3,500.00 in fees through the Plan.
- C. Class 1 secured claims to be paid are stated to be:

1. Earl Clark Schleif 2018 Trust.....\$408.00 per month
 2. Shasta Boardman.....\$526.00 per month
 3. U.S. Bank, Trust, N.A., Trustee
 - a. \$80,961 Arrearage.....\$0.00 (presumably paid from sale)
 - b. Current Monthly Payment...\$0.00
- D. There are no Class 2 Claims
- E. For Class 3 surrender,
1. Debtor surrenders a 2019 Chevy Camaro to Wells Fargo Bank
- F. Class 4 Direct pays,
1. Jesse Roberson, a co-owner will make \$800.00 to Harley Davidson Credit Corp for a 2020 Harley Davidson Road Glide with 195,000 miles on it.
- G. Class 5 priority unsecured claims of \$2,467.82 will be paid.
- H. Class 7 general unsecured claims will received a dividend of not less than 32% on \$294,318.04 in claims. This 30% would be not less than \$94,181.76.

No Motion to Confirm, and the necessary supporting pleadings have been filed.

The court notes that Debtor’s counsel has appended a Certificate of Service form to the Second Amended Chapter 13 Plan. Not only do the Local Bankruptcy Rules required that the Certificate of Service must be filed as a separate document, but that the required Certificate of Service form for the Eastern District of California must be used. E.D. Cal. L.B.R. 7005-1, 9014-1(c).

Amended Schedules Filed

On May 2, 2023, Debtor filed another set of Amended Schedules (amending prior Amended Schedules) providing the court and parties in interest with the current statement of this information. These Amended Schedules include the following information (much of which is included in prior Amended Schedules):

- A. Amended Schedule A/B
1. 9 Charley Lynds Way
 - a. Debtor’s Interest..... “Equitable Interest”
 - b. Value of Debtor’s Interest.....\$385,000

- c. Value of the Property.....\$385,000
 - d. Debtor and at least one other person have an interest in the property. Based on the above, the other person interest has \$0.00 value, as Debtor states having all of the economic interest in the Property.
2. 5404 Forbestown Rd
- a. Debtor's Interest..... "Equitable Interest"
 - b. Value of Debtor's Interest.....\$50,401.50
 - c. Value of the Property.....\$100,803
 - d. Debtor and at least one other person have an interest in the property.
3. 5403 Forbestown Rd
- a. Debtor's Interest..... Fee Simple
 - b. Value of Debtor's Interest.....\$65,774
 - c. Value of the Property.....\$65,774
 - d. Debtor is the sole owner of the Property.
4. In response to Question 25 on Schedule A/B, Debtor states under penalty of perjury that she no interests in any Trusts, equitable or future interests in property.

Dckt. 243 at 1-10

B. Supplemental Schedule I

- 1. Debtor and Non-Debtor Spouse each have monthly income of \$2,686.66 from the same employer.
- 2. Debtor also has \$1,650.00 in monthly IHSS income.
- 3. Debtor and Non-Debtor Spouse's monthly take home income (after taxes and withholding) is \$5,871.08.

Id. at 11-13.

C. Supplemental Schedule J

- 1. On Schedule J Debtor lists for her family unit Debtor, Non-Debtor Spouse, and three minor children.

2. Debtor states on Schedule J having monthly expenses of (\$4,491.83). In reviewing the Schedule J, the court notes the following:
 - a. Debtor lists having no rent or home ownership expense, no property insurance, and no real estate taxes to be paid for Debtor's residence.
 - b. Medical and Dental expenses of (\$50) a month for the family unit of five persons.
 - c. Transportation Expense - gas, maintenance, repair, and registration of (\$350) a month.
 - (1) Allocating (\$20) a month for registration and (\$75) a month for maintenance and repairs, that leaves (\$255) a month for gas.
 - (a) Divided between the Debtor and Non-Debtor Spouse that is (\$127) for gas for each of the two of them.
 - i) At \$4.50 a gallon, that allows for purchasing 28 gallons a month for each of the two adults.
 - ii) Assuming that a vehicle gets 30 miles a gallon, that allows each adult to drive 210 miles a week (averaging 30 miles per day).
 - d. Non-Debtor Spouse is paying \$800 a month (13.6% of the monthly take-home income) for a Harley Davidson
 - e. For other real property, Debtor states having real estate taxes of (\$178), Insurance of (\$100), and Maintenance of (\$150) monthly expenses.

Id. at 14-16.

D. After Schedule J there is a sheet with the following information:

1. Gross Consulting Fee.....\$5,200
 - a. Cell Phone.....(\$230)
 - b. Internet.....(\$168)
 - c. Office Supplies.....(\$ 50)
 - d. Gas.....(\$250)
 - e. Net Income.....\$4,502.00

Id. at 16. No Consulting Fee income is shown on Supplemental Schedule I.

The court also notes that no Declaration About an Individual Debtor's Schedules (Official Form 106 Dec) is provided for the Amended and Supplemental Schedules filed on May 2, 2023, and they are not attested to under penalty of perjury by the Debtor as being true and correct.

Chapter 13 Status Conference

This case was converted to one under Chapter 13 on October 29, 2022. Order, Dckt. 154. The record is clear that the Debtor was under the gun, and would proceed, with promptly getting a plan confirmed and the case prosecuted under Chapter 13. Debtor is represented by counsel, and is not a *pro se* adrift turbulent judicial proceedings.

The Case has been in Chapter 13 for seven months. Debtor filed an initial plan which caught the objection of the Chapter 13 Trustee and creditors. The Plan was denied confirmation. Debtor has filed a First Amended Plan and a Second Amended Plan, but has failed to file the required motion and supporting pleadings to prosecute confirmation of such plans.

Debtor's Plan talks about a real estate broker being engaged to market and sell property of the bankruptcy estate. However, the court has not authorized such employment as required by 11 U.S.C. § 327 (the Debtor exercising the power of a trustee to sell property of the Bankruptcy Estate, 11 U.S.C. § 1303, which includes hiring a Broker), thus resulting in the real estate broker not being entitled to any compensation for the sale.

This failure of the Debtor to prosecute a Plan in this case and the apparent inaction by Debtor cause the court concern. The Debtor could be facing a substantial financial loss due to her inaction. It may be that Debtor is not legally capable of prosecuting this case as a Chapter 13.

May 23, 2023 Status Conference

At the Status Conference, **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 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 May 2, 2023. 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, -----.

The Motion to Sell Property is granted.

The Bankruptcy Code permits Yaminah Aisha Head, Chapter 13 Debtor, (“Movant”) to sell property of the estate or under the confirmed plan after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 8357 Largo Way, Elk Grove, California (“Property”).

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

- A. Purchase Price: \$709,500.
- B. Net Proceeds: \$122,048.52.
- C. Close of Escrow: April 26, 2023
- D. Initial Deposit: \$1,250

- E. Service Charge Credit: Movant agrees to credit Buyer \$35,475 at the close of escrow for “Opendoor Service Charge”
- F. Commissions - \$1,773.75 to Opendoor Brockerage Inc.
- G. Payoffs - \$473,679.06 to First Mortgage, Carrington Mortgage Services, LLC; \$65,504.00 to Chapter 13 Trustee

Motion, Dckt. 88; Estimated Closing Statement, Exhibit B, Dckt. 91.

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: **XXXXXXX** .

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it allows Debtor to use the net proceeds from sale to pay the Chapter 13 Plan at 100% to unsecured claims.

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 to allow Trustee to issue a demand and fund the Plan from the proceeds of sale.

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 Yaminah Aisha Head, 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 Yaminah Aisha Head, Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Opendoor Property Aquisition LLC or nominee (“Buyer”), the Property commonly known as 8357 Largo Way, Elk Grove, California (“Property”), on the following terms:

- A. The Property shall be sold to Buyer for \$709,500.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 91, 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 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.
- D. 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.

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, and Office of the United States Trustee on April 12, 2023. By the court’s calculation, 41 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

The debtor, Joanne Aspiras Davis (“Debtor”), seeks confirmation of the Amended Plan. The Amended Plan provides for \$1,314.00 for sixty months and a 0% dividend to unsecured claims. Amended Plan, Dckt. 68. 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 May 1, 2023. Dckt. 77. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in Plan payments.
- B. Attorney’s Fees provision appears inaccurate.

DISCUSSION

Delinquency

The Chapter 13 Trustee asserts that Debtor is \$1,142.00 delinquent in plan payments, which represents less than one month of the \$1,314.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Cannot Comply with the Plan - Attorney's Fees Provision

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Plan indicates Debtor's Attorney will be paid a total of \$4,085.00, of which \$85.00 has been paid thus far. This is \$85.00 over the limit as set forth in Local Bankruptcy Rule 2016-1(c). Additionally, the Plan states Debtor will contribute \$0.00 per month to administrative expenses, including attorney's fees. This results in \$0.00 more to be received by Debtor's Attorney, not \$4,000.

Debtor should either file a new Plan, or in the order confirming, clarify the attorney's fees provision (§ 3.05) and administrative expenses provision (§ 3.06) of the Plan.

At the hearing, **XXXXXXX**

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

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

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

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

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

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)©.

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 September 9, 2022. 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 Objection to Confirmation of Plan is XXXXXXXXXX

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

1. Debtor failed to appear at the First Meeting of Creditors and the meeting was continued to October 6, 2022, and
2. The Plan is not feasible, nor does Debtor appear to be able to comply with the Plan.
 - a. Debtor’s budget is unrealistic. Schedule J does not reflect any expenses for a vehicle or medical insurance;
 - b. Debtor failed to file tax returns;

- c. Debtor fails to provide for the full claims of the Internal Revenue Service (“IRS”) and Franchise Tax Board (“FTB”);
- d. Including the IRS and FTB’s claims would cause completion of the Plan to take approximately 85 months.

DISCUSSION

Trustee’s objections are well-taken.

Failure to Appear at 341 Meeting

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

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 asserts that Debtor is self-employed, earning a net monthly income of \$6,933.00, but Debtor’s Schedule J does not reflect medical insurance or vehicle expenses. Debtor has failed to explain the lack of expense for these items. Without an accurate picture of Debtor’s financial reality, the court cannot determine whether the Plan is confirmable.

Failure to File tax returns

The IRS and FTB’s claims indicate tax returns were not filed for numerous years prior to filing for bankruptcy. Trustee’s declaration asserts that Trustee has only received Debtor’s 2013 tax return, to date. Declaration, Dckt. 15, filed on September 7, 2022. 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 Provide for a Secured Claim

Debtor’s Plan does not provide for the secured claim of FTB. Additionally, there is no indication Debtor plans to provide for FTB outside of the Plan. FTB may request relief from stay which could impact Debtor’s ability to finance the Plan.

Failure to Provide for a Priority Claim

Trustee asserts that the IRS filed a claim with a priority amount of \$81,063.29 in priority unsecured debt but Debtor only estimated and scheduled the IRS as priority for \$30,000.00, and \$25,544.00 as unsecured nonpriority. Proof of Claim 9-1, filed on August 29, 2022. The Plan does not provide for all priority debt as required by 11 U.S.C. § 1322(a)(2).

Plan Term is More than 60 Months

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to Trustee, the Plan will complete in 85 months due to proofs of claims filed by the IRS and Franchise Tax Board. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

DECEMBER 13, 2022 HEARING

The Chapter 13 Trustee filed a Status Report on December 5, 2022. Dckt. 21. The Trustee reports that the Meeting of Creditors has been completed. However, at the December 1, 2022 Meeting of Creditors, the Debtor stated that he had not yet filed his tax returns, and the Meeting of Creditors has been continued to January 26, 2023.

At the hearing, counsel for the Debtor reported that Debtor attended the First Meeting of Creditors and is working on his tax returns (needing to get additional records from his bank). The First Meeting has been continued to January 2023.

The Trustee reported that the Debtor is current on Plan payments Trustee reported and concurs with there being a continuance of the hearing on this Objection.

FEBRUARY 13, 2023 HEARING

The Trustee's February 9, 2023 Docket Entry Report states that the First Meeting of Creditors has now been concluded.

However, on January 30, 2023, the Chapter 13 Trustee filed a Motion to Dismiss this Bankruptcy Case. Dckt. 26. The grounds stated in the Motion are:

- a. Debtor is delinquent \$9,538.38 in Plan payments (2 months).
- b. The Tax Returns have not yet been provided.
- c. The Internal Revenue Service proof of claim states that tax returns have not been filed by Debtor for the 2016 to 2022 tax years. The California Franchise Tax Board proof of claims states that State tax returns have not been filed for the same period. State tax obligations are not provided for in the Plan.

At the hearing, counsel for the Trustee believes that all issues have been resolved, except that the over extension. Counsel for Debtor reports that the 2016 through 2022 tax returns have been filed, and it is anticipated that the taxing agencies will be amending their claims.

The Parties agreed to a further continuance to allow the taxing agencies to see the returns and amend the claims.

TRUSTEE'S STATUS REPORT

Trustee filed a Status Report on April 4, 2023. Dckt. 40. Trustee states the IRS and FTB still have not amended their proofs of claim, and thus, the Plan is still overextended.

DEBTOR'S STATUS REPORT

Debtor filed a Status Report on April 4, 2023. Dckt. 42. Debtor states they have communicated with the IRS and FTB and expect them to amend their proofs of claims prior to the hearing.

APRIL 11, 2023 HEARING

At the hearing, the Trustee and the Debtor's counsel agreed to a continuance in light of the amended returns having been filed and it being reported that the taxing agencies amended proofs of claim being in process.

DEBTOR'S REPLY

Debtor filed a Reply on May 9, 2023. Dckt. 67. Debtor states:

1. Debtor are proposing a 100% Plan with a Federal Judgment Interest Rate of 1/4%.
2. Debtor proposes to pay annual lump sum bonuses and all future tax refunds to complete the Plan.
3. Debtor agrees in utilizing the Car Insurance monies as a lump sum payment, without the use of any cash collateral.
4. Debtor intends to use \$9,342.61 from car insurance proceeds to the Plan.
5. Debtor has applied for an *ex parte* application for a replacement vehicle.
6. Debtor has used the bonus of \$13,518.30 for payment of the new vehicle.
7. Debtor has paid \$24,917.61 thru May 2023.

TRUSTEE'S STATUS REPORT

Trustee filed a status report on May 16, 2023. Dckt. 74. Trustee states the Reply is vague in the amount of bonus income being paid. Trustee notes, however, the Declaration states "all tax refunds."

The proposed Plan only states Debtor will pay \$25,000 a year lump sum from bonuses. It does not indicate where Debtor gets these bonuses. However, based on information provided to Trustee, Debtor received \$78,000 in bonus income and \$10,000 in tax refunds in the last year.

Trustee believes Debtor can complete their Plan in a much shorter time than the 60 months proposed. Debtor is delinquent \$3,217.38 in Plan payments.

MAY 23, 2023 HEARING

At the hearing, **XXXXXXXXXXXX**

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

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

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

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

9. 23-20188-E-13 DPC-2	PORTIA STEWART Peter Macaluso	OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS 4-20-23 [32]
---	--	---

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, and parties requesting special notice on April 20, 2023. By the court’s calculation, 33 days’ notice was provided. 28 days’ notice is required.

The Objection to Claimed Exemptions 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>The Objection to Claimed Exemptions is sustained.</p>

The Chapter 13 Trustee, David Cusick (“Trustee”) objects to Portia Merie Stewart’s (“Debtor”) claimed exemptions under California law because Debtor is exempting \$23,700 under California Code of

Civil Procedure § 704.070, however, fails to provide evidence of whether these funds are acquired from wages and whether they have been subject to a levy.

California Code of Civil Procedure § 704.070 exempts (emphasis added):

....

(b) **Paid earnings** . . . are exempt in the following **amounts**:

(1) **All of the paid earnings are exempt if** prior to payment to the employee they were **subject to an earnings withholding order or an earnings assignment order** for support.

(2) Disposable earnings that would otherwise **not be subject to levy under Section 706.050** that are levied upon or otherwise sought to be subjected to the enforcement of a money judgment are exempt if prior to payment to the employee they were not subject to an earnings withholding order or an earnings assignment order for support.

Section 706.050 provides:

(a) . . . the maximum amount of disposable earnings of an individual judgment debtor for any workweek that is subject to levy under an earnings withholding order shall not exceed the lesser of the following:

(1) **Twenty-five percent** of the individual's disposable earnings for that week.

(2) **Fifty percent** of the amount **by which** the individual's disposable earnings for that week **exceed 40 times the state minimum hourly wage** in effect at the time the earnings are payable. If a judgment debtor works in a location where the local minimum hourly wage is greater than the state minimum hourly wage, the local minimum hourly wage in effect at the time the earnings are payable shall be used for the calculation made pursuant to this paragraph.

Reading California Code of Civil Procedure § 704.070 and § 706.050 together, paid earnings can be exempt in their entirety if they were already subject to an earnings withholding order. If not, earnings can be exempt in the amount of 75%, or 50% if an individual's disposable income exceeds 40 times the state minimum hourly wage.

Debtor's Response

Debtor filed a response on May 9, 2023. Dckt. 38. Debtor states the funds arise from a settlement between the California Department of Social Services. Debtor states these are wages that have been subject to a levy.

Debtor provides the court with the Declaration of Debtor and two exhibits to support their argument. Dckts. 39, 40. Debtor's Declaration, Dckt. 39, states:

1. On September 15, 2022, Debtor settled a lawsuit with the California Department of Social Services.
2. The claim was for unpaid wages owed to Debtor.
3. Debtor received a settlement for these unpaid wages, in the amount of \$28,000, evidenced as Exhibit B.

Upon review of Debtor's submitted exhibits, Debtor has provided a correspondence from the Department of Social Services dated December 20, 2022. Dckt. 40. The correspondence is not a settlement agreement. Rather, it appears to be a letter from Staff Counsel at the State Personnel Board, writing to Debtor and the Department of Social Services regarding the status of payment. Additionally, Debtor provides a copy of a check for \$28,000, but the check has no indication of what it is for.

Debtor provides no evidence supporting that the wages have been subject to a levy.

Rather, Debtor's testimony is that she asserted she was owed wages by the State of California, she then reached an agreement and the State paid Debtor \$28,000.00 in wages due Debtor, and that there was no "levy." Declaration; Dckt. 39.

Trustee's Response

Trustee filed a response on May 16, 2023. Dckt. 42. Trustee states Debtor has not provided a copy of the settlement nor the original action. Additionally, the exhibits do not make it clear what the proceeds derive from.

DISCUSSION

The court agrees with Trustee. Debtor has not provided sufficient evidence to determine where these proceeds came from. Additionally, Debtor provides no evidence supporting that the proceeds have already been subject to a levy.

The Chapter Trustee's Objection is sustained, and the claimed exemptions are disallowed.

A claimed exemption is presumptively valid. *In re Carter*, 182 F.3d 1027, 1029 at fn.3 (9th Cir.1999); *See also* 11 U.S.C. § 522(l). Once an exemption has been claimed, "the objecting party has the burden of proving that the exemptions are not properly claimed." FED. R. BANKR. P. RULE 4003(c); *In re Davis*, 323 B.R. 732, 736 (9th Cir. B.A.P. 2005). If the objecting party produces evidence to rebut the presumptively valid exemption, the burden of production then shifts to the debtor to produce unequivocal evidence to demonstrate the exemption is proper. *In re Elliott*, 523 B.R. 188, 192 (9th Cir. B.A.P. 2014). The burden of persuasion, however, always remains with the objecting party. *Id.*

Debtor's Reply provides no legal analysis, no legal discussion, or no legal information as to what constitutes "All of the paid earnings are exempt if prior to payment to the employee they were subject to an earnings withholding order or an earnings assignment order for support."

All the Debtor has given the court is a legally and evidentially unsupported assertion that “Debtor keeps the monies because we say so. That is insufficient.

Given the Debtor clearly has had the opportunity to assemble the facts and law before filing the Amended Schedule A/B and C, and now to respond here, the lack of any evidence and legal support clearly demonstrates that none exists.

The Objection is sustained and the exemptions claimed in the \$32,700.00 are disallowed in its entirety.

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 Claimed Exemptions 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 Objection is sustained, and the claimed exemptions for Description under California Code of Civil Procedure § 704.070 are disallowed in their entirety.

10 thru 11

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 5, 2023. By the court’s calculation, 48 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).

The Motion to Confirm the Modified Plan is ~~XXXXXXX~~ .

The debtor, Derwin Darby and Gloria Ann Darby (“Debtor”) seeks confirmation of the Modified Plan due to a temporary loss in income causing Debtor to fall behind in Plan payments. Declaration, Dckt. 40. The Modified Plan provides allows Debtor to become current. *Id.* The Modified Plan provides \$122,500.00 to be paid through month 36, followed by monthly payments of \$3,350.00 for the remainder of the Plan. Modified Plan, Dckt. 39. 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 May 8, 2023. Dckt. 46. Trustee opposes confirmation of the Plan on the basis that:

- A. The Plan appears to contain inadvertent typographical errors.

DISCUSSION

Plan Section 3.08 - Class 2 Claims

The Modified Plan states the value of AmeriCredit/GM Financial's interest in the collateral described as a 2015 Mitsubishi Outlander is \$4,206.14. The Plan should state the value is \$9,800.00, as the court determined in the Order granting Debtor's Motion to Value Collateral on July 20, 2020. Order, Dckt. 26.

Plan Section 3.14 - Dividend to Nonpriority Unsecured Claims

The Trustee has estimated that the Plan will pay as much as 15.7% to unsecured claims, rather than the 0% Debtor is proposing. Therefore, the Plan should be amended to reflect this more accurate percent.

At the hearing, ~~XXXXXXX~~

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

~~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 the Modified Chapter 13 Plan filed by the debtor, Derwin Darby and Gloria Ann Darby ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan, as amended:~~

~~1. Section 3.08 - Class 2(B)~~

~~a. The Value of Creditor AmeriCredit/GM Financial's interest in its collateral, described as a 2015 Mitsubishi Outlander, is \$9,800.00.~~

~~2. Section 3.14 - Dividend to Nonpriority Unsecured Claims~~

~~a. Nonpriority unsecured claims will receive no less than a 15.7% dividend.~~

~~filed on April 5, 2023, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13~~

~~Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

11. [20-21299-E-13](#) **DERWIN/GLORIA DARBY** **CONTINUED MOTION TO DISMISS**
[DPC-1](#) **Justin Kuney** **CASE**
 3-1-23 [30]

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—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Persons who have filed a Request for Notice, and Office of the United States Trustee on March 1, 2023. By the court’s calculation, 35 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). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Dismiss is denied without prejudice, and the bankruptcy case shall proceed in this court.
--

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

1. the debtors, Derwin Darby and Gloria Ann Darby (“Debtors”), is delinquent on plan payments.

DEBTORS’ OPPOSITION

Debtors filed an Opposition on March 22, 2023. Dckt. 34. Debtors state they will present a viable modified plan at the hearing.

DISCUSSION

Delinquent

Debtor is \$11,100.00 delinquent in plan payments, which represents multiple months of the \$3,700.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Plan and Motion to Confirm Filed

Debtor has filed a Modified Plan and Motion to Confirm to address the defaults. From the court's preliminary review, it appears that the Motion states grounds with particularity upon which relief is based and that the Declaration in support states personal knowledge testimony in support of the Motion to Confirm.

The Trustee concurred in the request for a continuance.

Trustee's Status Report

The Trustee filed a Status Report on May 15, 2023. Dckt. 49. Trustee states they filed an opposition to Debtor's Motion to Modify Plan. Trustee notes that both issues subject to the opposition can be fixed with clarifying language. If the Motion to Modify is granted, Trustee requests this Motion be dismissed.

May 23, 2023 Hearing

At the hearing, Debtor's Motion to Modify was granted. Therefore, the Motion to Dismiss is denied without prejudice.

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

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

The Motion to 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 denied without prejudice, and the bankruptcy case shall proceed in this court.

FINAL RULINGS

12. [20-24441-E-13](#)
[CK-1](#)

CARRIE CHARLTON
Catherine King

MOTION TO MODIFY PLAN
4-14-23 [23]

Final Ruling: No appearance at the May 23, 2023 hearing is required.

The Motion to Modify is dismissed without prejudice.

Carrie Lynn Charlton (“Debtor”) having filed a “Withdrawal of Motion”, which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on May 15, 2023, Dckt. 34; no prejudice to the responding party appearing by the dismissal of the Motion; 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, Debtor’s Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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 Modified Plan filed by Carrie Lynn Charlton (“Debtor”) having been presented to the court, 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. 34, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm Modified Plan is dismissed without prejudice.

Final Ruling: No appearance at the May 23, 2023 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, and parties requesting special notice on April 24, 2023. By the court’s calculation, 29 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 June 13, 2023 at 2:00 p.m.

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

- A. Debtor was not sworn in or examined at the First Meeting of Creditors.

DISCUSSION

Failure to be Examined

Debtor appeared, but was not sworn in or examined at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. An examination under oath is required. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to be questioned by the Chapter 13 Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Continued Meeting of Creditors will be held on June 8, 2023 at 1:00 p.m. The court continues the hearing on the Objection to Confirmation to June 13, 2023 at 2:00 p.m, to be heard after the continued Meeting of Creditors.

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 **June 13, 2023 at 2:00 p.m.**

14. 23-20698-E-13 DPC-1	CODY/TARA ULBERG Catherine King	OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 4-26-23 [16]
--	---	---

Final Ruling: No appearance at the May 23, 2023 hearing is required.

Local Rule 9014-1(f)(2) Objection

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor’s Attorney and parties requesting special notice on April 26, 2023. 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.

<p>The Objection is sustained, and the proposed Chapter 13 Plan is not confirmed.</p>
--

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Objection, Debtor filed an Amended and corresponding Motion to Confirm on April 26, 2023. Dckts. 26, 20. Filing a new plan is a de facto withdrawal of the pending plan. The Objection is sustained, and the plan is not confirmed.

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 Objection to Confirmation 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 is sustained, and the proposed Chapter 13 Plan is not confirmed.