

**UNITED STATES BANKRUPTCY COURT
Eastern District of California**

Honorable Christopher D. Jaime
1200 I Street, Suite 200
Modesto, California

PRE-HEARING DISPOSITIONS COVER SHEET

DAY: TUESDAY

DATE: May 30, 2023

CALENDAR: 1:00 P.M. CHAPTER 13

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule, or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters and no appearance is necessary. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within seven (7) days of the final hearing on the matter.

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher D. Jaime
Bankruptcy Judge
Modesto, California

May 30, 2023 at 1:00 p.m.

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1. [23-90107](#)-B-13 ARMANDO/STACY CARRILLO ORDER TO SHOW CAUSE - FAILURE
 T. Mark O'Toole TO PAY FEES
 4-19-23 [[20](#)]

DEBTORS DISMISSED: 4/25/23

Final Ruling

The case having previously been dismissed, the Order to Show Cause is discharged as moot with no sanctions ordered.

The order to show cause is ORDERED DISCHARGED AS MOOT for reasons stated in the minutes.

The court will issue an order.

2. [23-90074](#)-B-13 MARK/MAUREEN BOULLION
[MWP](#)-1 Mark S. Nelson

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY LOUIS
ANTHONY CONTER, JR., MAUREEN
CONTER AND JERALD RUSS, TRUSTEE
OF THE RUSS FAMILY TRUST
4-25-23 [[14](#)]

Final Ruling

The objection was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). Parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). A written reply has been filed to the objection.

Because the plan is not confirmable and the objection is not one that may be resolved in the confirmation order, further briefing is not necessary. See Local Bankr. R. 9014-1(f)(2)(C). The court has also determined that oral argument will not assist in the decision-making process or resolution of the objection. See Local Bankr. R. 9014-1(h), 1001-1(f). This matter will therefore be decided on the papers.

The court's decision is to sustain in part and overrule in part the objection and deny confirmation of the plan.

Creditors Louis A. Conter, Jr., Maureen Conter and Jerald Russ, Trustee of the Russ Family Trust Coastal Capital Group LLC (hereinafter "Creditors") hold a deed of trust secured by the Debtors' residence. The Creditors, through their servicing agent FCI Lender Services, Inc., have filed a timely proof of claim that asserts \$276,869.12 in pre-petition arrearages. Creditors oppose confirmation on grounds that Debtors' proposed payment of 7.75% interest on the secured claim is insufficient and the payments are not made in equal monthly amounts per 11 U.S.C. § 1325(a)(5)(B)(iii)(I).

Debtors filed a response stating that the 7.75% interest rate is sufficient since it was the Wall Street Journal Prime Rate at the time Debtors filed their bankruptcy case on February 23, 2023. Debtors also acknowledge that the plan proposes a monthly dividend of \$1,300.00 and thereafter a lump sum payment to Creditors from the net proceeds of the sale of the residence on or before month 12 of the plan.

Discussion

First, the court takes judicial notice of the prime rate of interest as published in a leading newspaper. *Bonds, Rates & Credit Markets: Consumer Money Rates*, Wall St. J., May 26, 2023, http://online.wsj.com/mdc/public/page/mdc_bonds.html. The current prime rate is 8.25%.¹ To set the appropriate rate, courts utilize the "formula approach" of *Till v. SCS Credit Corp.*, 124 S.Ct. 1951 (2004), which takes into consideration the national prime rate and adjusts it for a greater risk of default posed by a debtor. Courts have typically adjusted the interest rate by 1% to 3%. The court finds that an interest rate of 9.75% to be appropriate. If either party disputes the interest rate, it may request an evidentiary hearing in either the subsequent motion to confirm or any opposition/objection thereto. The request shall appear in the caption of the document in which it is made. If an evidentiary hearing is requested, the document(s) shall also identify the interest rate expert(s). The court may also appoint its own interest rate expert, Fed. R. Evid. 706(a), and if it does it may allocate the expert's compensation among the parties as appropriate. Fed. R. Evid. 706(c). All parties, attorneys, and witnesses will be required to appear in person for the evidentiary hearing. Telephonic and/or video appearances will not be permitted.

¹Debtors have filed as an exhibit evidence of Bankrate.com's Wall Street Journal prime rate at 7.75% dated February 21, 2023, the date in which the petition was filed in this case. However, the exhibit is not authenticated and cannot be relied on by the court.

Second, the proposed sale of Debtors' residence on or before month 12 of the plan is speculative. Although Debtors state that they have hired a broker, listed the residence for sale with a listing price of \$435,000.00, and state that their real estate agent is confident that the property is properly marketed and will easily sell for the listing price due to it being located in a desirable area, this is still speculative and confirmation will be denied. See *In re Gavia*, 24 B.R. 573, 574 (9th Cir. BAP 1982); see also *In re Colosi*, 2018 WL 2972342 at *6 (Bankr. D. N.J. June 8, 2018) ("In a situation where a debtor's ability to make payments under the proposed Chapter 13 plan relies on the refinancing of assets or the selling of properties, a court should deny confirmation when it considers the contingency too speculative."); *In re Werden*, 2000 WL 33679431 at *4 (Bankr. D. N.H. Feb. 8, 2000) ("Numerous courts have held that a Chapter 13 plan is not feasible when it envisions the sale or refinancing of significant property sometime in the future when such a sale or refinancing appears highly speculative.").

For the aforementioned reasons, plan filed February 23, 2023, does not comply with 11 U.S.C. §§ 1322 and 1325(a). Creditors' objection is sustained as to the unequal and speculative step up plan payments, but overruled as to the requested interest rate. The plan is not confirmed.

The objection is ORDERED SUSTAINED IN PART AND OVERRULED IN PART for reasons stated in the minutes.

The court will issue an order.

3. [19-90854](#)-B-13 CHRISTOPHER/THERESA
ATKINS
Thomas P. Hogan

MOTION TO SELL
5-15-23 [[46](#)]

Final Ruling

The motion has been set for hearing on less than 28-days notice. Local Bankruptcy Rule 9014-1(f)(2). Parties in interest were not required to file a written response or opposition.

The court has determined that oral argument will not assist in the decision-making process or resolution of the motion. See Local Bankr. R. 9014-1(h), 1001-1(f). This matter will therefore be decided on the papers.

The court's decision is to deny the motion to sell.

The Bankruptcy Code permits Chapter 13 debtors to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b) and 1303. Debtors propose to sell the property described as 1234 Purdue Avenue, Modesto, California ("Property").

The Chapter 13 Trustee opposes the sale of the Property on numerous grounds: the motion lacks a docket control number as required pursuant to Local Bankr. R. 9014-1(c)(1), no declaration was filed in support of the motion, there is no indication that the sale will yield sufficient proceeds to pay the case in full, the motion is premature since there is no buyer or offer to buy the Property, and no estimated closing statement is attached. The court agrees.

Due to the deficiencies in the motion, the motion to sell is denied without prejudice.

The motion is ORDERED DENIED WITHOUT PREJUDICE for reasons stated in the minutes.

The court will issue an order.