UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 8, 2021 at 2:00 p.m.

The court will not call Matters 10 through 18 until 3:00 p.m. No appearance for those matters is required before 3:00 p.m.

1. 18-24637-E-13 MRL-1 | **JASON TEAL** | **Mikalah Liviakis** | **MOTION TO MODIFY PLAN** | **4-29-21 [16]**

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—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on April 29, 2021. By the court's calculation, 40 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).

According to Trustee, Movant failed to serve the United States Attorney for the Internal Revenue Service for the Sacramento division. A review of Debtor's proof of service certificate, and the mailing matrix attached, shows that Debtor did not serve the Sacramento Division for the Internal Revenue Service as required by the local rules. At the hearing, xxxx.

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rule 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of

the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Jason Wayne Teal ("Debtor"), has filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response indicating non-opposition on May 25, 2021. Dckt. 22. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

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

~~**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on April 29, 2021, 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 Trustee will submit the proposed order to the court.~~

2. **16-21392-E-13 MET-3** | **SCOTT/PAULINE FERTEY** **Mary Ellen Terranella** | **MOTION TO VALUE COLLATERAL OF INTERNAL REVENUE SERVICE 5-25-21 [80]**

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 and Creditor on May 25, 2021. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Value Collateral and Secured Claim 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 Value Collateral and Secured Claim of the Internal Revenue Service is granted, and Creditor's secured claim is determined to have a value of $3,138.00.

The Motion filed by Scott Andre Pierre Fertey and Pauline Teress Fertey ("Debtor") to value the secured claim of the Internal Revenue Service ("IRS" or "Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 82. Debtor is the owner of 1996 Chevrolet C1500 Pickup, 1996 GMC Yukon, 2001 Honda Civic GX, 1996 Marlin pleasure boat, household goods, rifle, clothing, wedding rings, 2 dogs, 2 cats, deposits in Travis Credit Union bank account ("Property"). Debtor seeks to value the Property at a replacement value of $3,138 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Creditor filed Proof of Claim No.1-1 o n March 12, 2016. The Proof of Claim asserts that $3,138.00 is secured by the Property, that $20,341.73 is a priority unsecured claim, and that $67,426.08 is a general unsecured claim.

As has been disclosed, in filing proofs of claim, the IRS makes its own calculation for purposes of 11 U.S.C. § 506(a) based upon Debtor's assets and then bifurcates the secured and unsecured portions of its claim. The IRS appears to have followed that procedure here.

Upon review of the evidence and the statement of the secured claim for the IRS in Proof of Claim No. 1-1, the court determines the value of the secured claim to be $3,138.00, with the balance to be treated as unsecured claims (whether priority or general unsecured claims).

The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Scott Andre Pierre Fertey and Pauline Teress Fertey ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of the Internal Revenue Service ("IRS" or "Creditor") secured by an asset described as 1996 Chevrolet C1500 Pickup, 1996 GMC Yukon, 2001 Honda Civic GX, 1996 Marlin pleasure boat, household goods, rifle, clothing, wedding rings, 2 dogs, 2 cats, deposits in Travis Credit Union bank account ("Property") is determined to be a secured claim in the amount of $3,138.00, and the balance of the claim is an unsecured claim (whether priority or general unsecured claim) to be paid through the confirmed bankruptcy plan.

3.	**21-21020-E-13 DPC-1**	**FORYST HUTCHINSON Jason Vogelpohl**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 5-12-21 [14]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on May 12, 2021. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is overruled.

The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that debtor failed to attend the Meeting of Creditors held on May 6, 2021.

DISCUSSION

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).

The Continued Meeting of Creditors was held on June 3, 2021, and Trustee's Report indicates Debtor appeared and the meeting was concluded as to Debtor. Trustee's June 4, 2021 Docket Report.

Trustee has filed nothing further, and the court therefore determines that Debtor's appearance has resolved this Objection.

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 is overruled, and Foryst Ralph Hutchinson's ("Debtor") Chapter 13 Plan filed on March 23, 2021, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

4. **19-25086-E-13** **THUAN TRAN** **MOTION TO INCUR DEBT**
AVN-2 **Anh Nguyen** **5-20-21 [38]**
4 thru 5

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, and Office of the United States Trustee on May 19, 2021. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Motion to Incur Debt is granted.

Thuan Tan Tran ("Debtor") seeks permission to apply and accept a loan from the U.S. Small Business Administration ("SBA") in the amount of $12,800.00. The SBA has offered the debtor a loan between $1,000 to $12,8000.00 for a term of 30 years, with an interest rate of 3.75%. The payments to start 18 months after closing will be $65.00 per month.

Trustee's Response

Trustee filed a Response on May 25, 2021. Dckt. 43. Trustee informs the court that Debtor is delinquent $70.00 and that given Debtor will not be modifying the plan at this time, the Debtor should be required to file a supplemental Schedule I and J with the court in order to monitor any changes. *Id.* Trustee further notes that Debtor did not file a Declaration in support of the motion to authenticate the copy of the SBA loan terms. *Id.*

Debtor's Declaration

On May 28, 2021 a Supplemental Declaration was filed by Debtor. Dckt. 46. Debtor testifies that Debtor would like to accept the loan amount of $12,800.00 to help him maintain his rideshare/delivery business after his income declined due to the COVID-19 pandemic. *Id*. Debtor also filed a copy of the loan terms which was authenticated through his Declaration. *See* Exhibit 1, Dckt. 47. Debtor also provides properly authenticated copies of the TFS payments made to Trustee in the amount of $70.00 and in the amount of $420.00. Exhibits 2 & 3, Dckt. 47.

DISCUSSION

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." FED. R. BANKR. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. *Id.* at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

The court finds that the proposed credit, based on the unique facts and circumstances of this case, is reasonable. There being no opposition from any party in interest and the terms being reasonable, the Motion 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 Incur Debt filed by Thuan Tan Tran ("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 Thuan Tan Tran is authorized to incur debt pursuant to the terms of the agreement, Exhibit 1, Dckt. 47.

5. 19-25086-E-13 AVN-2 | **THUAN TRAN** | **Anh Nguyen** | **MOTION TO INCUR DEBT** | **5-20-21 [38]**

This has been placed on the Calendar in error and is a duplicate of Item 19 above.

6.	**19-24587-E-13 GEL-2**	**TOMAS PEREZ URIBE AND MARICELA PEREZ Gabriel Liberman**	**MOTION TO APPROVE LOAN MODIFICATION 5-4-21 [73]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 4, 2021. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Tomas Perez Uribe and Maricela Perez ("Debtor") requests retroactive approval for a 3-month mortgage payment deferral awarded for months April, May, and June 2020 due to hardship arising from the COVID-19 pandemic. Wells Fargo Home Mortgage ("Creditor"), whose claim the Plan provides for in Class 4, agreed to the forbearance with the deferred payments being added to the maturity date of the mortgage, interest will not be charged on the deferred amount, and the payment deferral will not change any other terms of the mortgage.

The Motion is supported by the Declaration of Tomas Perez Uribe and Maricela Perez. Dckt. 75. The Declaration does not explain the reasons for this forbearance, except for that Debtor suffered COVID-19 related hardship and obtained the forbearance under the CARES Act.

Trustee's Non-Opposition

Trustee does not oppose the relief requested, and notes that Creditor having been included in the plan as a Class 4 claim, Trustee has not disbursed any funds to Creditor. Dckt. 80.

DISCUSSION

This post-petition deferral in mortgage payments allows Debtor to continue to fund the Plan. There being no objection from the Chapter 13 Trustee or other parties in interest, and the Motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification 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 Approve Loan Modification filed by Tomas Perez Uribe and Maricela Perez ("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 court retroactively authorizes Tomas Perez Uribe and Maricela Perez to defer mortgage payments for the months of April, May, and June 2020 with said payments to be added to the maturity of the mortgage as approved by Wells Fargo Home Mortgage ("Creditor"), holder of the mortgage loan, which is secured by the real property commonly known as 2364 Maple Street, Sutter California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion (Dckt. 76).

7. 18-27716-E-13 APRIL BRYANT MOTION TO MODIFY PLAN
GEL-2 Gabriel Liberman 5-4-21 [44]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 4, 2021. By the court's calculation, 35 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 xxxxx.

The debtor, April Renell Bryant ("Debtor") seeks confirmation of the Modified Plan to address plan payment defaults after losing her employment of 20 years due to the COVID-19 pandemic. Declaration, Dckt. 46. The Modified Plan provides:

1. Payment of $13,820.00 for months 1 through 28 (April 2021)

2. Payments of $208.00 per month for months 29 through 84 (May 2021-December 2025), and

3. a zero percent dividend to unsecured claims totaling $30,170.90.

Modified Plan, Dckt. 49. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

The Declaration of Tameera Koetke has been filed in support of the Motion. Dckt. 47. Debtor's daughter testifies to the ability to assist Debtor with her living expenses. *Id.*

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on May 25, 2021. Dckt. 58. Trustee does not oppose the plan but notes the Debtor changed the interest to Class 2 (B) creditor Mechanic's Bank to 4.75%, where the confirmed plan calls for 6%. The secured claim has been paid in full with 6% interest. The plan may be contrary to law and the Court's prior ruling, (11 U.S.C. §1325(a)(1), Dckt. 20).

DISCUSSION

Trustee notes that the plan has changed the interest rate of creditor Mechanics Bank. No explanation is provided for this change.

At the hearing, xxxxxxxx

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

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

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

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

~~**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on May 4, 2021, as amended,~~

~~the interest rate of 6% to Class 2 (B) creditor Mechanic's Bank~~

~~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.~~

8. 19-24916-E-13 MWB-3 — ERIC FLEMING, Mark Briden — MOTION TO MODIFY PLAN — 4-20-21 [46]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 20, 2021. By the court's calculation, 49 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 xxxxx.

The debtor, Eric Lawrence Fleming ("Debtor") seeks confirmation of the Modified Plan to account for changes in financial circumstances where Debtor was placed on disability from August 2020 through January 2021 and his son is now living with Debtor which results in increased expenses. Declaration, Dckt. 49. The Modified Plan provides plan payments of $750.00 for 38 months (the remainder of the plan), and a zero percent dividend to unsecured claims totaling $39,112.91. Modified Plan, Dckt. 55. 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 25, 2021. Dckt. 64. Trustee opposes confirmation of the Plan on the basis that:

A. Debtor's Plan contains errors.

B. Debtor may not be able to make plan payments.

DISCUSSION

Errors in Plan

Debtor's proposed plan contains errors. According to Trustee, Debtor did not check in Section 1.02 that nonstandard provisions were attached in the Modified Plan filed at Dckt. 48. However, the second Modified Plan, Dckt. 55, with the word "Modification" written in the title does have the box checked.

Moreover, both plans (Dckt. 48 and Dckt. 55) contain errors in Section 7.01. The period September 25, 2019 through May 25, 2021 is 21 months not 22 months as stated. The term of the $750.00 payment should be 39 months not 38 as stated.

The court notes that Debtor filed a "new" plan on April 29, 2021. Dckt. 67. In their Response to Trustee's Opposition, Debtor informs the court that this "new" plan is not in lieu of the one filed on April 20, 2021 (Dckt. 48) but with the purpose of checking the box that had been left unchecked. Dckt. 67. As noted by Trustee, however, this "new plan" contains the error regarding the month number for the payment periods.

At the hearing xxxxxxxx

Failure to Afford Plan Payment / Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to Trustee, Debtor filed Amended Schedules I and J, which implies that the original schedules were in error, not that Debtor's income has changed since the case was filed. However, Debtor's Declaration states that household expenses have increased due to his adult son now living with him. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

In the response Debtor explains that the Amended Schedules filed April 20, 2021, should have stated that these are Supplemental Schedules because the schedules reflect Debtor's actual income and expenditures for the current amounts and are not amendments. Debtor's expenses have increased by about $476.00 a month due to his son moving in with him and the rent has also increased from $1,100 to $1,200.

At the hearing xxxxxxxx

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

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

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

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

IT IS ORDERED that the Motion is xxxxx.

9.	**20-20390-E-13** **DPR-3**	**LANE/DENISE MILDE** **David Ritzinger**	**CONTINUED MOTION TO MODIFY PLAN** **3-1-21 [66]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 2, 2021. By the court's calculation, 49 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, ~~as amended at the June 8, 2021 hearing, is granted.~~

The debtors, Lane Christian Milde and Denise Rene Milde ("Debtor") seek confirmation of the Modified Plan to become current in plan payments after Debtor Denise suffered a heart attack and was off from work from August 2020 through December 2020 affecting their income. Declaration, Dckt. 68. The Modified Plan provides for the following:

1. $4,189.21 per month for 13 months,

2. $6,300.00 per month for 30 months,

3. $6,602.00 per month for 17 months, and

4. a 3 percent dividend to unsecured claims totaling $52,156.75.

Modified Plan, Dckt. 71. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 5, 2021. Dckt. 76. Trustee opposes confirmation of the Plan on the basis that Debtor has not filed Supplemental Schedules I and J in support of their current income and expenses.

DISCUSSION

On April 13, 2021 Debtor filed Amended/Supplement (checking both boxes and giving a supplemental effective date) Schedules I and J reflecting Debtor Denise's income at $7,540.26, which together with Debtor Lane's income at $4,280.00, Debtor's income totals $11,820.26. Dckt. 79. Schedule J reflects expenses totaling $5,505, resulting in a monthly net income of $6,315.26. *Id.*

Though the court has addressed this issue with various counsel a number of times, making a minor theatrical production of it, Debtor and counsel in this case have chosen to file a Janus face Amended (Dating all the way back to the filing of the case)/Supplement (effective only as of August 14, 2020) Amended/Supplemental Schedule I and Schedule J. They cannot be both. The court cannot fathom why both the amended and the supplemental boxes are checked and a supplemental effective date are checked by a debtor who is prosecuting a case in good faith and carefully reads schedules, whether original, amended, or supplemental, before signing them under penalty of perjury.

At the hearing the Parties agreed to continue the hearing and afford Debtor the opportunity to file Supplemental Schedules I and J, and evidence of the totality of the financial circumstances, including pension plans of both debtors.

SUPPLEMENTAL PLEADINGS

Debtor's Supplement to the Motion states the following:

1. In order to address the IRS claim filed on March 5, 2021, Debtor propose that the First Modified plan filed March 1, 2021, be further modified, to increase their plan payments, as follows:

   $4,189.21 per month for 13 months, commencing February 25, 2020;

   $6,300.00 per month for 2 months, commencing March 25, 2021;
   $6,639.45 per month for 28 months, commencing May 25, 2021; and

$6,941.45 per month for 17 months, commencing September 25, 2023.

2. Debtors' confirmed plan paid 5% to the unsecured creditors. Debtors' modified plan with the proposed increase in plan payments will pay an approximate 8.5% dividend to the unsecured creditors.

Dckt. 84.

Debtor filed Supplemental Declaration explaining:

1. Their two adult children do not work and rely on Debtor's for food and shelter and they do not receive any funds from them.

2. Denise Milde had increased her voluntary retirement contributions based on advice from her plan administrator, but has now reduced the monthly contribution back down to 4%. Debtor Denise has now worked for Kaiser four years and will not be eligible for the pension benefit until she has 10 years in service.

3. This reduction will provide the funds necessary to repay the IRS tax debt and to pay a higher dividend to the unsecured creditors.

4. Debtor restates the modification of plan payments as stated in the Supplement to the motion.

Dckt. 85.

TRUSTEE'S RESPONSE

Trustee filed a Response on May 19, 2021 indicating non-opposition now that Debtor have addressed the various concerns indicated in the original Opposition and at the hearing. Dckt. 89.

DECISION

The Debtor has resolved the opposition with the following amendments to the Plan:

A. **xxxxxxx**

B. **xxxxxxx**

C. **xxxxxxx**

The proposed Modified Chapter 13 Plan, amended as stated above, above complies with 11 U.S.C. § 1322, § 1325, and § 1329; the Motion is granted and the Plan 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, Lane and Denise Milde ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on March 1, 2021, as amended to provide **xxxxxxx**, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, which states the above amendment, 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.

10. 21-20216-E-13 TAM-1 | **MARIVIC/ELBERT GARCIA** | **MOTION TO CONFIRM PLAN**
Thomas Moore | **4-21-21 [31]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 21, 2021. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is xxxxx.

The debtors, Marivic G. Garcia and Elbert E. Garcia, Jr. ("Debtor"), seek confirmation of the Amended Plan. The Amended Plan provides for monthly plan payments in the amount of $1,427.00 for 60 months, and a 100 percent dividend to unsecured claims totaling $3,165.16. Amended Plan, Dckt. 35. 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 25, 2021. Dckt. 45. Trustee opposes confirmation of the Plan on the basis that Debtor has incorrectly classified a secured claim with pre-petition arrearage. The pre-petition arrearage is $64,840.92, which the Debtor provides in the additional provisions to be paid directly by Debtor, countermanding the direct payment requirements for Class 4 direct debtor payment secured claims.

Debtor's Plan expressly provides for the Select Portfolio Servicing secured claim to be paid as a Class 1 claim, the post-petition current payment of $2,430.23, as well as an arrearage cure payment of $1,080 a month. 1st Modified Plan, ¶ 3.07(c); Dckt. 35. This treatment requires the payment to be made

through the Plan by the Trustee. Debtor then placed a conflicting statement in the Additional Provisions that ¶ 3.07 is "modified" to have the Debtor make all the payments directly. *Id*., § 7.

Review of Minimum Pleading Requirements for a Motion

In looking at the Motion to Confirm to see what grounds were stated with particularity as to why Debtor was seeking to amend the mandatory Eastern District Plan, not only does the Motion fail to state any grounds for Debtor modifying the mandatory Plan, but there are no grounds stated with particularity, as required by Federal Rule of Bankruptcy Procedure 9013, upon which Debtor asserts confirmation is proper. Rather, the Motion merely states the Debtor's legal and factual conclusion that:

> 4. The amended plan complies with all the provisions of the Bankruptcy Code §1325(a), as described in the Debtor's and attorney's declarations.

Motion, ¶ 4; Dckt. 31. This does not state grounds, but a mere legal conclusion dictated to the court.

As this court has addressed previously, the Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion." That "state with particularity" requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Federal Rule of Bankruptcy Procedure 9013 incorporates the "state with particularity" requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for "particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Movant is reminded that "[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions." LOCAL BANKR. R. 1001-1(g) (emphasis added).

DISCUSSION

First, as addressed above, the Motion fails to state any grounds with particularity upon which the requested relief could be granted.

Additionally, Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to Trustee, the plan may not be feasible where the Debtor has proposed to continue paying the mortgage payment directly to Wilmington Savings Fund Society/Select Portfolio Servicing while paying the pre-petition arrearage as a Class 1 claim.

Trustee believes that Debtor is more likely to succeed in this case by having the mortgage payment also be paid through the plan by the Trustee. Additionally, Trustee notes that Debtor fails to address what caused the delinquency and why it will not reoccur. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

At the hearing, xxxxxxxxx

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, Marivic G. Garcia and Elbert E. Garcia, Jr. ("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.

11. 21-21150-E-13 DPC-1 | **BETTY MUSTARD** Peter Macaluso | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 5-12-21 [19]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on May 12, 2021. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that Debtor is delinquent.

DISCUSSION

Delinquency

The Chapter 13 Trustee asserts that Debtor is $1,610.00 delinquent in plan payments, which represents one month of the $1,610.00 plan payment. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

12. 21-21037-E-13 PGM-2 12 thru 14 | **LERIDA/EDWIN DIAZ Peter Macaluso** | **MOTION TO VALUE COLLATERAL OF ALLY BANK 5-11-21 [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—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on May 11, 2021. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Ally Bank ("Creditor") is granted, and Creditor's secured claim is determined to be $19,333.00.

The Motion filed by Lerida Garcia Diaz and Edwin Obinque Diaz ("Debtor") to value the secured claim of Ally Bank ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 32. Debtor is the owner of a 2017 Subaru WRX STI ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $15,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

DISCUSSION

It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). As part of its burden of producing substantial evidence to rebut the presumptive validity, the objecting party bears the burden of producing substantial evidence as to the value of the collateral securing any portion of the claim. *In re Austin,* 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support

a conclusion, and requires financial information and factual arguments. *Id.* Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

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

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

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

Proof of Claim No. 2-1 in which it is asserted that the claim is a secured claim in the amount of $9,950.00 is based upon that amount being stated in the Proof of Claim. The Proof of Claim is signed by Anupama Singh, an Claims Processor of AIS Portfolio Services, LP. As opposed to the books and records of AIS Portfolio Services, LP. in which the amount of the debt and the various transactions are maintained, there is nothing to indicate a high probative value as to the statement of the value of this four year old model 2017 Subaru WRX STI.

Debtor, as the owner of the vehicle, states her opinion as to value and provides details statements of vehicle's condition, concluding that it is $15,000. Declaration, Dckt. 32. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004). Debtor made an effort in their testimony to describe the condition of the vehicle, any deferred maintenance, damage, and required clean-up. The condition of the vehicle is stated in the Declaration as follows:

> 4. At the time of the filing of our Chapter 13 Bankruptcy, there were approximately 97,000 miles reading on the odometer. . .
>
> . . .

6. The following items are broken, damaged, and/or in need of repair:

A. Car was sent to dealer for many times due to "check engine lights". Shifting gear replacement. Engine oil consumption test, engine replaced 3 times, right now its on break in period in which dealer said it was not properly break in after the replacement.

B. There is a paint chip on rear bumper

C. Dent on front passenger side fender

D. Dent on door passenger side

E. Scratch/dent on rear driver side door

F. Front bumper is damaged on driver side near fog light

G. Interior a pillar driver side does not meet flush with dashboard.

H. The fuel was replaced due to it being faulty, light on trunk is out right now.

Declaration, ¶¶ 4,6; Dckt. 32.

Creditor asserts in the Opposition that based on the NADA valuation guide (a recognized value guide used in the vehicle industry) the retail value is $25,900.00. Opposition, p. 2:2-4. A copy of the NADA valuation is filed as Exhibit D.

Creditor provides the Declaration of Laura Joslin, who states that she is "employed as [Creditor's] representative for Ally Servicing, LLC. . . ." Declaration, p. 1:21; Dckt. 40. It is not clear if Ms. Joslin is an employee of Creditor, an employee of Ally Servicing, LLC, or a person hired to make declarations.

Ms. Joslin further testifies as to her duties, by whomever she is employed, stating under penalty of perjury:

> My duties as a representative include overseeing the treatment of the claims of Secured Creditor in various bankruptcy cases and monitoring those accounts in bankruptcy for lapses in payments and other contractual defaults. Presently, I oversee the account of the above captioned debtor(s), Lerida Garcia Diaz and Edwin Obinque Diaz (hereinafter "Debtors").

Id., p.1:23-27. This testimony sounds in the nature of a paralegal or lawyer - someone who is not an employee of a creditor with personal knowledge of the creditor's business practices, but someone who is told information by such an employee and is then tasked to tell the court what she heard the employee say.

Ms. Joslin further continues with her testimony under penalty of perjury, further elucidating on her representative role:

> 2. In my capacity as an authorized representative for Secured Creditor, my duties include serving as custodian of records on behalf of Secured Creditor with respect to contracts and leases with customers who have filed for bankruptcy protection. I am familiar with the manner and procedures by which the records, letters, and memoranda contained in Secured Creditor's files are prepared and maintained and am able to certify the authenticity thereof. Those records, letters, and memoranda are prepared by agents or employees of Secured Creditor in performance of their regular business duties. Those records, letters and memoranda are made either by persons with knowledge of the matters they record or from information supplied by persons with such knowledge. It is Secured Creditor's regular business practice to maintain such records, letters, or memoranda in the course of its business.

Id., p. 2:1-10.

In considering the above description, Ms. Joslin appears to testify that:

1. She is a custodian of records for Creditor, but does not testify how the records come into her custody as a third-party representative. Implicit in this testimony is that some knowledgeable employee of Creditor sends them to Ms. Joslin and tells them what they are.

2. While stating that she is "familiar" with the manner by which the records, letters, and memoranda contained in Creditor's (not Ms. Joslin's or her company or law firm) files are prepared.

3. She then testifies that the records, letters and memoranda "are made either by persons with knowledge of the matters they record or from information supplied by persons with such knowledge." However, Ms. Joslin does not testify how she knows this is done by employees of Creditor. It appears that she has heard someone say this is how it is done by Creditor's employees.

4. Further, she testifies under penalty of perjury that "It is Secured Creditor's regular business practice to maintain such records, letters, or memoranda in the course of its business." Again, Ms. Joslin does not testify as to how she has personal knowledge of this, or again, that it is something that she heard someone else say.

With respect to the NADA report, Ms. Joslin testifies that she personally obtained the NADA report, using the information concerning the vehicle provided to her, whether by her client or the Debtor. Ms. Joslin authenticates the NADA report filed as Exhibit D.

Federal Rules of Evidence 601 and 602 state the long standing and well known by every attorney requirements for a witness (Ms. Joslin not purporting to be an expert witness) to be qualified to provide testimony in federal court under penalty of perjury. Federal Rule of Evidence 601 states the requirement

that the witness must have actual personal knowledge of what he or she is testifying about, and not merely parroting what someone else told him or her.

> Rule 602. Need for Personal Knowledge
>
> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Fed. R. Evid. 602. In providing testimony, there must be "[e]vidence . . .introduced sufficient to support a finding that the witness has personal knowledge of the matter." That evidence can include the witness' testimony, which is commonly seen by the court.

Here, all Ms. Joslin can testify is that "she knows" these things. She hasn't testified how "she knows" what she is testifying about or that she has personal knowledge, as opposed to merely repeating what she heard someone say.

Repeating what a witness heard someone else say is defined in the Federal Rules of Evidence as hearsay.

> Rule 801. Definitions that Apply to This Article; Exclusions from Hearsay
>
> (a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
>
> (b) Declarant. "Declarant" means the person who made the statement.
>
> (c) Hearsay. "Hearsay" means a statement that:
>
> > (1) the declarant does not make while testifying at the current trial or hearing; and
> >
> > (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Fed. R. Evid. 801. It is then provided in Federal Rule of Evidence 802 that hearsay is expressly not admissible testimony in federal court:

> Rule 802. The Rule against Hearsay
>
> Hearsay is not admissible unless any of the following provides otherwise:
>
> > • a federal statute;
> >
> > • these rules; or
> >
> > • other rules prescribed by the Supreme Court

There is no federal statute, other Federal Rule of Evidence (such as the exceptions to hearsay) or other rules prescribed by the Supreme Court to override the inadmissibility dictated by the Supreme Court in Rule 802.

While most of Ms. Joslin's testimony under penalty of perjury is inadmissible, and if admitted determined by this court to not be credible, she does sufficiently authenticate (Fed. R. Evid. 901 et seq.) the NADA report filed as Exhibit D.

The NADA report provides, in its entirety, the following information:

NADA Used Cars/Trucks

Vehicle Information

Vehicle:	2017 Subaru WRX Sedan 4D STI AWD 2.5L H4 Turbo
Region:	California
Period:	March 30, 2021
VIN:	JF1VA2M62H9823748
Mileage:	97,000
Base MSRP:	$35,195
Typically Equipped MSRP:	$36,015

NADA Used Cars/Trucks Values

	Base	Mileage Adj.	Option Adj.	Adjusted Value
Monthly Trade-In				
Clean	$25,125	-$1,575	N/A	**$23,550**
Clean Retail	$27,475	-$1,575	N/A	**$25,900**

Exhibit D, Dckt. 41. What this tells us is the value of the Vehicle is stated to be $25,900.00 for the clean, showroom ready, used car lot retail buyer. It is this retail value that the court uses in computing the value of a secured claim as required by 11 U.S.C. § 506(a)(2). In addition, Congress requires that the court make adjustments in this retail value "[c]onsidering the age and condition of the property at the time value is determined." *Id.*

Here, Movant and Ms. Joslin stop at the first part of the statutorily required valuation, merely providing the Clean Retain Value of $25,900. No adjustment is made for the damage, condition issues, and mechanical issues identified by the Debtor. These issues include repeated "check engine light" warning, a shifting gear replacement, and the engine having to be replaced three times. The front passenger side fender is dented, as well as the passenger side door and a scratch or dent on the rear driver side door. The front bumper is damaged and the interior pillar is out of alignment with the dashboard.

Clearly, any responsible car dealer would have to make extensive disclosures of the multiple engine replacements and shift problems. Then, the dealer would either have to make repairs to the dents and scratches, because if not, selling a dented, scratched up care is not one in "clean retail condition."

Necessarily the retail value of a scratched, dented, three time replaced engine vehicle is less that the "clean" retail value.

Debtor has not provided the court with photographs of the "dents" and "scratches." It is not clear if they are wide, long scratches and dents, or a scratch by a bird's claw when landing on the car or the dent from the padded corner of a shopping cart hitting it.

Movant has provided the starting point of the value analysis with the $25,900.00 clean retail value. While Debtor provides a conclusion that taking the multiple engine replacements, shift replacement, dents, and scratches into account Debtor concludes that the replacement value if $15,000.00, that does not dictate such a conclusion to the court.

The court concludes that the "as-is" replacement value for the vehicle is $19,333.00. The court considers all of the evidence presented in coming to this conclusion. Merely because the Movant does not address these damages and Debtor does not provide evidence of repairs, the court has to make the determination.

Decision

The lien on the Vehicle's title secures a purchase-money loan incurred on January 9, 2017, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $29,633.82. Proof of Claim, No. 2-1. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of $19,333.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Lerida Garcia Diaz and Edwin Obinque Diaz ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Ally Bank ("Creditor") secured by an asset described as 2017 Subaru WRX STI ("Vehicle") is determined to be a secured claim in the amount of $19,333.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $19,333.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

13. 21-21037-E-13 SW-1 | **LERIDA/EDWIN DIAZ** | **Peter Macaluso** | **OBJECTION TO CONFIRMATION OF PLAN BY ALLY BANK** | **4-19-21 [25]**

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 Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on April 19, 2021. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

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

The Objection to Confirmation of Plan is ~~overruled~~.

Ally Bank ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. Plan's interest rate fails to cover present value of Creditor's secured claim.

B. Proposed monthly payments do not adequately protect Creditor.

C. Plan's vehicle valuation fails to provide present value of Creditor's secured claim.

DISCUSSION

Lack of Adequate Protection Under the Plan

The objecting Creditor, who holds a security interest in personal property, alleges that the Plan violates 11 U.S.C. § 1325(a)(5)(B)(iii) because the amount of the periodic payments it proposes to pay Creditor are insufficient to provide it with adequate protection during the period of the Plan.

Neither the Ninth Circuit nor any of its sister circuits has considered the meaning of the phrase "adequate protection" as it is used in 11 U.S.C. § 1325 (perhaps unsurprisingly because the phrase was only

added to the section by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005). Several bankruptcy courts that have considered the issue, however, have found that payments to creditors with secured claims under § 1325 must always at least equal the amount of depreciation of the collateral. *See, e.g.*, *In re Sanchez*, 384 B.R. 574, 576 (Bankr. D. Or. 2008); *Royals v. Massey (In re Denton)*, 370 B.R. 441, 448 (Bankr. S.D. Ga. 2007). The court will apply this rule.

Creditor alleges that its collateral declines in value, without stating the percent or dollar amount per month. Creditor asserts it is entitled to a $518.00 monthly payment because it estimates the value of its collateral at $25,900.00. The Plan provides only for a $285.00 monthly payment.

However, no evidence is provided in support of its allegation regarding depreciation. Based on the lack of evidence, the Objection is overruled on this basis. Rather, Creditor's counsel only asserts that every four year old model vehicle suffers rapid and massive depreciation that is greater than the financing and loan repayment terms made by Creditor. Such would clearly not be a responsible, commercially reasonable business practice by a good faith creditor making loans.

Further, it is a well established principle, known far and wide, that a new car purchased depreciates rapidly the minute it is driven off the lot. That rapid depreciation occurs for the first three years, and then stabilizes beginning in the fourth year of ownership. This Vehicle was purchased in January 2017 (Proof of Claim 2-1, Attachment 2, Copy of Purchase Contract.) So, after being purchased new in January 2017, and suffering rapid depreciation in 2017, 2018, and 2019, Creditor is sitting in the sweet spot of the rapid depreciation being behind them and having a stable valued vehicle. [Fn.1.]

FN. 1. Looking at the Contract, it states that Debtor purchases an 84 months, 100,000 mile extended service contract which is there to held this troubled vehicle. If that had not been purchased, it may have been that Debtor would have looked Creditor, handed back the defectively, multiple engine replaced vehicle and said, "here you go, now your unsecured claim will be discharged with a 0.00% dividend." It appears that Creditor has been a beneficiary of this decision to obtain the extended warranty.

While Creditor offers no evidence of the assertion that "In this particular case, the Vehicle is a rapidly depreciating asset," in the Objection, when one does a web search, one website that pops up is Nerdwallet, which provides the following explanation of the rapid depreciation in the first few years of a new vehicle purchase ownership:

> **New-car depreciation**
>
> Depreciation begins as soon as you drive off the lot.
>
> Your car's value decreases around 20% to 30% by the end of the first year. From years two to six, depreciation ranges from 15% to 18% per year, according to recent data from Black Book, which tracks used-car pricing. As a rule of thumb, in five years, cars lose 60% or more of their initial value.
>
> However, not all vehicles depreciate at the same rate, meaning certain makes or models hold their value better than others. And depreciation rates can also change over time.

For instance, when gas prices spike, the value of large SUVs or pickup trucks may plummet, because fewer buyers are willing to pay for a gas guzzler. Or, when returned lease vehicles flood the market, depreciation rates on those models can accelerate because there's such a large supply of them.

In fact, leasing offers another helpful way to think about depreciation. When you lease a car, the price is based on the portion of the car's value that you'll use, which is essentially the depreciation.

The residual value is what the car will be worth when you've finished your lease term. After three years, cars generally have residual values of around 40% to 60% of their original price (though the market value may be higher).

. . .

BUYING USED

A brand-new car will depreciate the most because of the steep first-year drop. Buying a car that is just one year old avoids this first hit from depreciation and saves you a significant amount of money on a nearly new car. And, of course, waiting past the three-year mark could save the owner around half of the car's original price.

https://www.nerdwallet.com/article/insurance/car-depreciation.

If one were to use this as a guide, here the Vehicle is now four and one-half years old. That means the value today should have depreciated by 30% in the first year, and then 15% each year thereafter. Using that for the four and one half year old Vehicle that is at issue:

Nerdwallet New Car Depreciation Schedule For Vehicle

January 2017 Purchase Price			$36,916.00	Attachment 2 to Proof of Claim 2-1
			Value Computed Using Nerdwallet Depreciation Schedule	
2017	20%	($7,383.00)	$29,533.00	
2018	15%	($4,430.00)	$25,103.00	
2019	15%	($3,765.00)	$21,337.00	
2021	15%	($3,201.00)	$18,137.00	

Depreciation over the Five Years of the Chapter 13 Plan

Starting Value Per 506(a) Valuation		$ 19,333	Plan Disbursements During Calendar Year	Number of $364.84 Payments to Creditor	Dollar Amount That Plan Payment Exceeds Nerdwallet Depreciation		Percentage Plan Payment In Excess of Nerdwallet Depreciation
		Value of Vehicle Per Nerdwallet Depreciation Schedule					
2021	15%	($2,174.96)	$17,158.04	$3,283.56	9	$1,108.60	50.97%
2022	15%	($2,573.71)	$14,584.33	$4,378.08	12	$1,804.37	70.11%
2023	15%	($2,187.65)	$12,396.68	$4,378.08	12	$2,190.43	100.13%
2024	15%	($1,859.50)	$10,537.18	$4,378.08	12	$2,518.58	135.44%
2025	15%	($1,580.58)	$8,956.60	$4,378.08	12	$2,797.50	176.99%
2026	15%	($335.87)	$8,620.73	$1,094.52	3	$1,430.39	(Debt Paid In Full In March 2026) 425.87%

Total Paid to Creditor	Total Months of Payments
$21,890.40	60

Contrary to the unsupported statement in the Motion (made with the certifications arising under Fed. R. Bankr. P. 9011) that the rapid depreciation on this four and one-half year old vehicle will leave Creditor and its claim in peril, the payments to be made under the Chapter 13 Plan significantly outstrip the annual depreciation, at the least being 51% more than the loss in value to depreciation, to 425% in the closing months of the Plan. Most years the plan disburse the depreciation by more than 100%.

These payments more than adequately protect Creditor and its secured claim.

Interest Rate

Creditor Objection calls for adjusting the interest rate on its secured claim from the 5.00% provided in the Plan, to 6.25%. Creditor's argues that the 5% interest rate is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. As shown above, with a 5% interest rate, the payoff of the loan outstrips any annual depreciation by more than 100% each year. Because the

creditor has only identified risk factors common to every bankruptcy case, the court would fix the interest rate as the prime rate in effect at the commencement of the case, 3.25%, plus a 1.25% risk adjustment, for a 4.50% interest rate. The Debtor is more generous, apparently believing that Creditor and its counsel would appreciate the little bonus in the interest. Though Creditor did not, the court will not reduce the proposed 5% interest rate in the Plan.

~~The Objection is overruled.~~

~~The Plan, as amended to provide for Creditor's secured claim as determined by the court pursuant to 11 U.S.C. § 506(a), does comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is overruled and the Plan, as amended, is confirmed.~~

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

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

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

~~**IT IS ORDERED** that the Objection to Confirmation of the Plan is overruled, and the proposed Chapter 13 Plan, as amended to provide for payment of Creditor's secured claim in the amount determined by the court pursuant to 11 U.S.C. § 506(a) is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, stating the forgoing amendment, 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.~~

14. 21-21037-E-13 DPC-1 | **LERIDA/EDWIN DIAZ** | **Peter Macaluso** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** | **5-12-21 [35]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtors's Attorney on May 12, 2021. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is overruled.

The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that Debtors have failed to file a Motion to Value Collateral.

DISCUSSION

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Ally Bank. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

On May 11, 2021, Debtor filed a Motion to Value Collateral of Ally Bank ("Creditor"). Dckt. 30. The Motion was set for hearing on the same date and time as the instant Objection. The court granted the Motion valuing the secured claim at $19,333.00.

As drafted, the Plan is premised on a secured claim of only $15,000.00. Using the Microsoft Loan Calculator, a $19,333.00 secured claim, with the proposed 5% interest (discussed below) amortized

over 60 months of the plan requires a monthly plan distribution of $364.84. That is greater than the $285.00 provided in the proposed plan.

The proposed plan provides for a 0.00% dividend to creditors with general unsecured claims, so that cannot be a source for the additional $80 a month for Creditor. The monthly plan payment is stated to be $4,150.00, which over sixty months totals $249,000.00 in plan payments. The chart below shows a total of the plan payments by Debtor and required administrative expenses and distribution to creditors (adjusted for the $19,333.00 claim of Creditor).

	Amount of Payment	Months	
Plan Payment	$ 4,150.00	60	$ 249,000.00
CH 13 Trustee Fees 10% of Plan Payments			$ (24,900.00)
Debtor's Counsel's Remaining Fees			$ (2,500.00)
Class 1 Secured Claim			
Current Monthly Mtg Payment	$ (2,385.50)	60	$ (143,130.00)
Arrearage Cure	$ (360.00)	60	$ (21,600.00)
Class 2 - Auto with 5% Interest	$ (76.00)	60	$ (4,560.00)
Class 2 - Creditor Auto with 5% nterest	$ (364.84)	60	$ (21,890.40)
Class 5 Priority Claims			
IRS Proof of Claim 8-1			$ (40,360.53)
Over/(Under) Funding of Proposed Plan			$ (9,940.93)

As proposed the Plan is under funded by $9,940.00. When the Chapter 13 Trustee's fees are included, it would rise to approximately $11,000.00. That would be an additional $184.00 a month.

Looking at the financial information provided by Debtor on Schedules I and J (Dckt. 1 at 36-39), it appears that Debtor can squeeze $184.00 a month out of the expenses on Schedule J. First, Debtor's 24 year old dependent is a child who is stated to be a student. It is not unplausible for the student to graduate in the next year or so and be earning money and not having to depend on his parents.

Only one of the debtors is working and the other is not employed. No unemployment or other benefits are shown.

In looking at expenses, Debtor's could trim a little out of their food and housekeeping supplies and their cell phones and cable to make a plan work pending their dependent son graduating and not being a dependent.

At the hearing, **xxxxxxx**

~~Based on the foregoing, the Objection is overruled and the proposed plan, as amended, is confirmed.~~

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

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

~~The 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 overruled, and the proposed Chapter 13 Plan filed on March 24, 2021, as amended to increase the plan payment to $ **xxxxxxx** effective **xxxxxxx**, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, which shall stated the above amendment, 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.~~

15. 20-25057-E-7 DAVID FLETCHER CONTINUED MOTION TO SELL
DBJ-2 Douglas Jacobs 3-26-21 [159]

CONVERTED TO CHAPTER 7 ON 5/21/2021

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 7 Trustee, Chapter 13 Trustee, and Office of the United States Trustee on March 26, 2021. By the court's calculation, 25 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.

The Motion to Sell Property is xxxxx.

The Bankruptcy Code permits David S Fletcher, Chapter 13 Debtor, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 1641 Campos Drive, The Village, Florida ("Property").

The proposed purchaser of the Property is not stated in the Motion; however the Closing Disclosure Statement filed with this motion shows the borrower of record as Joan M. Alderman, and the Property sale closed on February 16, 2021. Movant has not provided a purchase agreement and the following summary is based on the Closing Disclosure Statement and Movant's Declaration:

A. The sale of the Property closed on February 16, 2021 with a purchase price of $199,000.00. Exhibit A, Dckt. 162.

B. Total due to seller at closing was $200,588,08. *Id.*

C. From this amount seller paid $157,653.78 in total to the following: closing costs, $18,291.23; payoff of seller's first mortgage, $138,649.49; seller's credit to buyer, $500.00; and an adjustment to county taxes of $213.06, leaving $42,934.30 as proceeds to seller from the sale. *Id*.

D. Broker's commissions of 6 percent, totaling $11,490.00, were paid from the total closing costs of $18,291.23.

E. Seller has transmitted the proceeds of the sale $42,934.30 to Trustee. Declaration, Dckt. 161.

E. The sale was not approved by the Bankruptcy Court prior to closing with Debtor stating that "it did not occur to [him] that the sale of the property should not proceed. It just seemed like the right thing to do since by selling the property, the plan in the Chapter 13 bankruptcy would not have to include payments on that mortgage and there would be an immediate cash dividend sent to the trustee to make the plan payments." *See Id*.

Movant's Motion further states that "it did not occur to Debtor that the sale would be completed by the escrow company in Florida without the consent or approval of the bankruptcy court. Thus, he did not seek prior approval for the sale." Dckt. 159 at ¶ 5. Despite failing to receive approval, Debtor argues that this will not prejudice Debtor's creditors because they will receive a dividend as per the plan, and may receive a higher amount because the Florida property will not have to be paid through the plan. *Id*. at ¶ 7.

TRUSTEE'S RESPONSE

Trustee filed a Response on April 5, 2021 asking the court consider the following:

1. Debtor is current on plan payments.

2. The Property is not provided for in the plan, but is listed in Schedule A/B.

3. Debtor proceeded without court approval but notes that Debtor proceeded with the sale because it "seemed like the right thing to do so as to not have to include the mortgage payments in his Chapter 13 plan and funds could be sent to the Trustee for plan payments.

4. Trustee received the sale proceeds of $42,934.30 on March 26, 2021.

Dckt. 166.

DISCUSSION

This Motion causes the court some concern for this Debtor who is represented by experienced bankruptcy counsel. The Motion explains that while this was a Chapter 7 case, the Chapter 7 Trustee had marketed the property for sale and had received an offer on the Property. Motion, ¶ 1; Dckt. 159. Then when the case was converted, "[t]he Debtor took it upon himself to complete the sale

and pay off the secured Deed of Trust." *Id*., ¶ 3. There are excess funds "paid for the property" in the amount of $42,934.00. *Id.*, ¶ 4.

Debtor now wants to have the sale approved and pay the monies over to the Trustee as Debtor pursues confirmation of a Plan. *Id*. ¶ 6.

While appearing to seek retroactive approval for having violated Federal law, the Bankruptcy Code, Debtor does not identify the grounds stated with particularity in the motion and does not request with particularity (Fed. R. Bankr. P. 9013) retroactive relief from the court.

While Debtor testifies under penalty of perjury that the Chapter 7 Trustee was preparing to close escrow on the sale (Declaration, ¶3; Dckt. 161), such is not accurate. When Debtor testifies under penalty of perjury that "The court ordered the sale stopped and the property was not sold" (*Id.*, ¶ 4) when Debtor converted the case to one under Chapter 13 is not accurate.

A review of the court's file is that the Chapter 7 Trustee never got an order authorizing the sale of the property, but the motion to sell filed by the Trustee was denied as moot. Order, Dckt. 71.

On March 26, 2021, the Chapter 13 Trustee has filed a motion to reconvert this case to one under Chapter 7. Dckt. 159. The grounds stated by the Trustee include:

- Debtor has not funded the Plan by the sale of the Property.
- Debtor has not confirmed a plan, and no plan has been pending since the March 12, 2021 sustaining the objection to confirmation.
- Debtor and Debtor's counsel failed to appear at the February 11, 2021 First Meeting of Creditors in the Chapter 13 case.
- The continued First Meeting of Creditors could not be conducted on March 11, 2021, because Debtor's audio connection for the Zoom meeting failed.
- The 2019 tax records indicate that there were the sale of a number of assets by Debtor, which was within two years of the filing of the bankruptcy case, and none of those sales were disclosed on the Statement of Financial Affairs.
- Debtor has failed to commence making payments under the Chapter 13 Plan.
- Debtor may not be eligible for relief under Chapter 13, having liquidated non-contingent unsecured claim in the amount of ($419,275). On the original schedules Debtor listed ($445,649) in unsecured Debt, while on the Amended Schedule E/F lists ($399,409) in general unsecured claims and ($201,732) in priority unsecured claims.

Congress provides in 11 U.S.C. § 109(e) provides

> (e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, **unsecured debts of less than $419,275**

> and noncontingent, liquidated, secured debts of less than $1,257,850 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850 may be a debtor under chapter 13 of this title.

11 U.S.C. § 109(e) (emphasis added). On the April 14, 2021 filed Amended Schedule E/F, Debtor states under penalty of perjury having $369,334 in unsecured claims. Dckt. 172, see p. 27 for totals. This is less than the ($445,649) on the earlier Schedule E/F.

Looking at the proofs of claim filed, the unsecured claims total $484,032, which is consistent with the original Schedules filed by Debtor and grossly different than Debtor's Amended Schedule E/F which comes in just under the statutory maximum of ($419,275) to qualify as a Chapter 13 debtor.

- The Trustee points to Debtor having transferred property to his non-debtor spouse just prior to filing.

- The Trustee notes the unauthorized sale of the Florida Property and that Debtor is retaining the monies, not turning them over to the Chapter 13 Trustee.

The present Motion to Sell was filed March 26, 2021, which was one week after the March 19, 2021 filing of the Motion to Reconvert the case to one under Chapter 7.

Denial of Motion and
Sequestering of the Sales Proceeds

The present Motion raises serious concerns. The Debtor, as the fiduciary of the bankruptcy estate, has purported to sell property of the bankruptcy estate without obtaining authority as required by 11 U.S.C. § 363(b) and § 1303. The Debtor was aware that the Chapter 7 Trustee had sought an order from the court to sell the property, and that Debtor thwarted such a sale by having the case converted.

The Motion and supporting Declaration do not provide the court with a good faith basis for Debtor having proceeded with the a sale of property without court authorization. Debtor's declaration does not address how, being involved in a federal judicial proceeding, clearly knowing that the bankruptcy estate owned the property, that the Chapter 7 Trustee sought authorization to sell the Property, and being represented by counsel, Debtor, as the fiduciary of the bankruptcy estate, just figured the "right thing to do" would be to go out and sell the Property.

It appears that the court will have to address some serious issues concerning whether this case continues as a Chapter 13 case or gets reconverted to Chapter 7 and the Chapter 7 trustee, as the fiduciary of the bankruptcy estate, properly administers the property of the bankruptcy estate.

In choosing to unilaterally sell the Property, not only has Debtor violated federal law, but removed the Property from the transparency of an in-court sale authorization process to a behind the scenes sale. The in-court process includes competitive bidding at the hearing. While most sales get approved with the buyer on the terms of the original contract, sometimes there becomes competitive bidding. A recent example is one in which there was a $2.7 MM contract price that the debtor in

possession thought was a "good deal," but after the hearing was continued, a real estate broker hired, and the live in-court sale conducted, the price was bid up to $8.3 MM.

The court is also concerned that if the private purported sale conducted by the Debtor is approved and the case is converted to one under Chapter 7, then if the Chapter 7 trustee discovers any "sale shenanigans," the wrongdoers might seek to use such an order as a shield to any action by the Chapter 7 trustee or U.S. Attorney.

Debtor has notified the court that he is holding at least $40,850.00 in monies of the bankruptcy estate from the unauthorized sale. Debtor having chosen to do what "seemed like the right thing" and sell the Property without complying with the law, it is necessary to have that money delivered immediately to the Chapter 13 Trustee to hold pending further order of the court. Debtor states in his Declaration under penalty of perjury that these proceeds are being sent to the Chapter 13 Trustee, who will have them before the April 20, 2021 hearing on this Motion.

At the hearing on April 20, 2021, the Trustee confirmed that Debtor has delivered said monies to the Trustee.

DEBTOR'S SUPPLEMENTAL DECLARATION & EXHIBITS

On May 11, 2021, Debtor filed a Supplemental Declaration and Exhibits 2, 3, and 4. Dckts. 195, 196, & 197. Debtor authenticates a copy of the Residential Contract for the Sale and Purchase of the Florida Property, and testifies under penalty of perjury that he used the same realtor and realty company, Alex Scopino of Black Tie Real Estate and Investments, as that Trustee Husted had employed when she first sought to sell the Property. Exhibit 2, Dckt. 196; see also, Exhibit 3, Dckt. 197.

JUNE 8, 2021 HEARING

By order of the court, on May 21, 2021, this case was converted to one under Chapter 7. Dckt. 203. Kimberly J. Husted is the Chapter 7 Trustee and the successor to this Motion and the relief sought therein. The court does not see on the Docket any response from the Chapter 7 Trustee and does not know if the Chapter 7 Trustee is aware of this sale that needs to be authorized.

At the hearing, **xxxxxxx**

16. 19-25021-E-13 MMP-4 16 thru 18 | **STEPHEN/KAREN GINGOLD Michele Poteracke** | **CONTINUED MOTION TO MODIFY PLAN 2-22-21 [105]**

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 February 22, 2021. By the court's calculation, 36 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 xxxxx.

The debtor, Stephen Anthony Gingold and Karen Michelle Gingold ("Debtor") seek confirmation of the Modified Plan for the following reasons:

1. In May 2020, in response to COVID-19, Mr. Gingold's employer initiated monthly one-week furloughs which affected Debtor's income.

2. Debtor's home required urgent repairs.

3. A family vehicle was totaled in an accident.

4. Debtor received an unexpected property tax assessment that is currently in dispute.

Declaration, Dckt. 109. The Modified Plan provides payments of $3,845.00 for 42 months, and a 0 percent dividend to unsecured claims totaling $19,741.26. Modified Plan, Dckt. 107. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S QUALIFIED NON-OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an statement of Non-Opposition on March 12, 2021. Dckt. 118. Trustee does not oppose confirmation of the Plan and states that Debtor is current under the proposed plan. *Id*.

In an Amended Response, Dckt. 154, the Trustee Requests that Debtor amend the Plan, in the order confirming, to expressly authorize the payments already made to GM Financial for its claim secured.

Additionally, the Trustee requests that the Order confirming the plan expressly identify the Plan being confirmed, identifying by Docket Control Number.

MARCH 30, 2021 HEARING

The Parties agreed to continuing the hearing to allow for Debtor to amend the treatment of Creditor's Claim.

APRIL 20, 2021 HEARING

As of the court's preparation of this pre-hearing disposition, no further documents have been filed.

At the hearing, counsel for the Debtor reported that headway has been made between Debtor and Creditor. They have agreed to modify the plan to extend the plan and provide for payment of creditors' claims.

SECOND AMENDED PLAN FILED

Subsequent to the filing of this Motion and various continued hearings, the debtors, Stephen Anthony Gingold and Karen Michelle Gingold ("Debtor"), filed a Second Amended Plan on April 29, 2021. Dckts. 143. No Motion to Confirm this Second Amended Plan was filed.

Non-Opposition filed by Creditor

On May 25, 2021, Creditor Provident Trust Group, successor to Polycomp Trust Company, Custodian FBO Brian L. Kraft IRA ("Creditor"), filed a Statement of Non-Opposition to Debtor's Motion to Approve the Second Modified Plan. [FN.1] Dckt. 150. Creditor informs the court that Debtor have cured the property tax default and Creditor does not oppose the treatment of its Class 1 claim provided in the Second Modified Plan.

FN.1 This Statement was filed as part of the instant motion requesting the court confirm Debtor's first amended plan.

Trustee's Amended Response

On May 25, 2021 Trustee filed an amended response informing the court that Debtor has filed a second modified plan and they are now current pursuant to that plan and noting that the plan should complete timely. Dckt. 154.

Trustee requests the order confirming authorize payments made by the Trustee under the confirmed plan to creditor GM Financial for the secured claim on a 2013 Toyota Corolla which was totaled in an accident. There being two plan pending confirmation, Trustee further requests that the order confirming the plan refer to the Docket Number of the plan being confirmed so as to avoid confusion.

Decision

Normally, Debtor's filing of a new plan is a de facto withdrawal of the pending plan. Such would render a motion for confirmation of the prior plan moot. However, Debtor, the Trustee, and creditors have been on a long confirmation trek, successfully resolving their disputes.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. As to the Second Amended Plan, Debtor did not file a Motion to Confirm. However, neither Creditor Kraft nor Trustee oppose confirmation of the Second Amended Plan (Dckt. 143). Debtor have provided evidence in support of confirmation of the Second Amended Plan by way of the Declaration of Stephen Gingold filed on May 3, 2021 through the instant motion. Dckt. 144.

While it may be that Debtor has proposed a plan that will allow them to succeed, the plan was not set for hearing. The court cannot verify who has received service where 12 proofs of claim have been filed. No certificate of service has been filed documenting that the Amended Plan and Supplemental Declaration have been served on anyone.

At the hearing, **xxxxxxx** .

~~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 Second Modified Chapter 13 Plan (Dckt. 143) filed by the debtor, Stephen Anthony Gingold and Karen Michelle Gingold ("Debtor"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion is xxxxx.~~

17. 19-25021-E-13 DPC-3 | **STEPHEN/KAREN GINGOLD** Michele Poteracke | **CONTINUED MOTION TO DISMISS CASE** 2-1-21 [97]

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, and Office of the United States Trustee on February 1, 2021. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. The defaults of the non-responding parties in interest are entered.

The Motion to Dismiss is xxxxx.

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that the debtors, Stephen Anthony Gingold and Karen Michelle Gingold ("Debtor"), are delinquent in plan payments.

DEBTOR'S OPPOSITION

Debtors filed an Opposition on February 16, 2021. Dckt. 101. Debtor will file a modified plan prior to the hearing.

TRUSTEE'S RESPONSE

Trustee states that Debtor made a February 18, 2021 payment, and has a Motion to Modify pending. Dckt, 114. Trustee requests the court continue the Motion to Dismiss to allow the Motion to Modify to be heard.

FILING OF MODIFIED PLAN

Debtor filed a Modified Plan and Motion to Confirm on February 22, 2021. Dckt. 105. The court has reviewed the Motion to Confirm the Modified Plan and the Declaration in support filed by Debtor. Dckt. 109. The Motion appears to comply with Federal Rule of Bankruptcy Procedure 9013 (stating grounds with particularity), and the Declaration appears to provide testimony as to facts to support confirmation based upon Debtor's personal knowledge. FED. R. EVID. 601, 602.

The Trustee requests, in light of the pending Motion to Confirm that this hearing be continued (rather than the court's usual practice of denying a motion to dismiss without prejudice when a debtor appears to be actively prosecuting a plan to address the basis of the motion to dismiss). The Trustee does not indicate why continuing this hearing in light of Debtor's prosecution of the Motion to Confirm a Modified the Plan is necessary.

The court notes that the Declaration provided by Debtor in support of the Motion to Confirm is rich in factual details (and not merely parroted legal opinions drafted by an attorney).

This time, presuming that the Trustee has a reason for a continuance, the court continues the hearing. It will be conducted in conjunction with the hearing on the Motion to Confirm. If the Motion to Confirm is not granted, the court will then further continue the hearing on this Motion to Dismiss, affording the Debtor, Trustee, and creditors to focus just on the confirmation issues, and not be distracted by the threat/opportunity of dismissal.

In the future, if the Trustee has a reason to continue the hearing on a motion to dismiss in light of the debtor having a plan on file, motion to confirm, and appropriate supporting declaration, the Trustee should identify those grounds, if he wants the court to continue the hearing rather than dismissing or denying the motion to dismiss without prejudice.

MARCH 3, 2021 HEARING

The hearing on the Motion to Dismiss was continued to 2:00 p.m. on March 30, 2021, (specially set date and time) to be conducted in conjunction with the Debtor's Motion to Confirm the proposed modified plan.

If the proposed modified plan is not confirmed, the court will then set the Motion to Dismiss for hearing on a later date, so that the Debtor, Trustee, and creditors can focus on confirmation issues and not have a sword of Damocles threat of dismissing hanging over them.

MARCH 30, 2021 HEARING

The Parties agreed to continue the hearing as Debtor proposes amendments to the Plan.

APRIL 20, 2021 HEARING

As of the court's preparation of this pre-hearing disposition, no further documents have been filed.

At the hearing the Trustee agreed to the continuance of the hearing in light of the settlement being reached to confirm a Plan.

FILING OF SECOND AMENDED PLAN

Debtor filed a Second Amended Plan on April 29, 2021. Dckt. 143. Debtor did not file a Motion to Confirm this Amended Plan. The Declaration of Stephen Gingold in support of the Plan seems to have been filed as a Supplement to Debtor's motion to confirm the first amended plan. Dckt. 144.

At the hearing xxxxxxx

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 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 xxxxx.

18. 19-25021-E-13 BJI-1 | **STEPHEN/KAREN GINGOLD** **Michele Poteracke** | **CONTINUED COUNTER MOTION FOR REMEDIES UPON DEFAULT AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY, MOTION FOR RELIEF FROM AUTOMATIC STAY 3-16-21 [122]**

WITHDRAWN BY M.P.

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(i).

Local Rule 9014-1(i) Countermotion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 16, 2021. By the court's calculation, 14 days' notice was provided. 14 days' notice is required. LOCAL BANKR. R. 9014-1(i) (requiring filing and service by the last day that opposition to the original motion is due).

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

The Countermotion for Remedies Upon Default, Motion to Confirm Termination of the Stay and/or Relief from Stay is dismissed without prejudice.

Provident Trust Group, successor to Polycomp Trust Company, Custodian FBO Brian L. Kraft IRA ("Movant / Creditor") seeks remedies upon default pursuant to Section 6.4 of the confirmed plan and relief from the automatic stay with respect to Stephen Anthony Gingold and Karen Michelle Gingold's ("Debtor") real property commonly known as 236 E. Kentucky, Fairfield, California ("Property"). Movant has provided the Declarations of Mark Gorton and Brian Kraft to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant provides evidence that there are eight (8) pre-petition payments in default, with a pre-petition arrearage of $16,181.30. Declaration, Dckt. 127. Movant also argues Debtor has incurred an unpaid late charge in the amount of $144.67 as part of the post-petition payments due. *Id*.

Additionally, Creditor asserts that Debtor are delinquent in the real property taxes in the sum of $6,402.21, which he advanced in order to protect the priority of his Deed of Trust. *Id.*

Two declarations are filed in support of the present Countermotion. The first is by Brian Kraft, a person who is not the Movant. Dckt. 127. In the Declaration he testifies:

1. He owns an IRA, and one of the IRA investments he made was a loan to Debtor. Declaration, ¶ 2; Dckt. 127.

2. He has an "IRA custodian" who handles Mr. Kraft's "nontraditional investments" and the IRA custodian provides "alternative asset custody. *Id*.

3. The loan was actually made by "Polycomp Trust Company, Custodian FBO Brian L. Kraft IRA," with Polycomp having now been acquired by Provident Trust Group, which is not the current IRA custodian. *Id*.

4. In the Declaration, Mr. Kraft defines the word "I," when referencing himself to actually mean "Polycomp Trust Company" acting in its fiduciary capacity as the custodian of the IRA. *Id*.

5. Polycomp Trust, as custodian (Mr. Kraft referring to that entity as "I") made the loan in the principal amount of $217,000. Id, ¶ 3.

6. It is asserted that Karen Gingold "led me [not clear if it that references Polycomp Trust, which entity made the loan, or Mr. Kraft] to believe that the residence was being acquired so they could flip it." [Other than the conclusion as being "led to believe," no testimony is provided as how Polycomp Trust or Mr. Kraft was "led" into making the loan.] *Id*.

7. Mr. Kraft testifies that "I," presumably Polycomp Trust, received only one of the first nine payments due on the loan before this bankruptcy case was filed. *Id*. ¶ 5.

8. Mr. Kraft further testifies that "I," presumably Polycomp Trust (to be consistent with the Notice of Default exhibits) rescinded the initial Notice of Default filed without knowledge of Debtor's first bankruptcy case and filed a second Notice of Default before Debtor filed the current case. *Id*. ¶ 6.

9. Mr. Kraft testifies that he "understands" that the pre-petition arrearage is to be cured through the Plan, but that the payments are in default $1,787.90 or $2,1-4.23 "based on the Trustee's Report." *Id*. ¶ 12. Mr. Kraft does not testify what default in the arrearage payments exist based on the IRA custodian's or Mr. Kraft's records.

10. Mr. Kraft testifies that he authorized the IRA custodian to advance $6,402.21 to bring the real property taxes current by March 31, 2021. *Id*. ¶ 13.

11. Mr. Kraft computes the post-confirmation defaults and arrearage to be cured to be $12,682.51.

Counsel for Provident Trust Group, the successor IRA custodian from Polycomp Trust Company, has filed his declaration. Dckt. 125. In it, the counsel states that the $2,712.21 shortfall in payments is not that due to Provident Trust Group, IRA custodian, but what is computed to be the total payments due to the Trustee under the confirmed plan. Declaration, ¶ 5; Dckt. 125.

CHAPTER 13 TRUSTEE'S RESPONSE

David P. Cusick ("the Chapter 13 Trustee") filed a Response on March 23, 2021. Dckt. 130. Trustee asserts that according to Trustee's records, Debtor is not delinquent in post-petition Class 1 contract payments to Creditor. Trustee explains that the total disbursement to ongoing mortgage will be $27,506.06 as of that date.

According to Trustee's records, Debtor are not delinquent in post-petition Class 1 contract payments where Trustee has paid 18 mortgage payments to the Creditor thru February 2021 which is what has come due since the case was filed in August 2019 (making the first payment due September 2019 and that would make February 2021 month 18 in the case). Trustee does note that Creditor is due $2,273.14 for the pre-petition arrears dividends that the Trustee has not been able to disburse due to the Debtor's delinquency.

Trustee requests the court take into consideration that according to Creditor, the loan made to Debtor was meant for investment purposes with the intent for it to be "flipped," but that Debtor has made this property their sole residence as evidenced in Schedules A/B and C.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $233,181.30 (Declaration, Dckt. 127), while the value of the Property is determined to be $315,000.00, as stated in Schedules A/B and D filed by Debtor.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

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

foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

Creditor argues that such cause exists where Debtor has defaulted in post-confirmation payments pursuant to Section 6.04 of the confirmed Plan. Creditor presents evidence and Trustee has confirmed, that Debtor has failed to cure pre-petition arrearage dividend due. Moreover, Creditor has presented evidence that Debtor has failed to pay real property taxes due.

11 U.S.C. § 362(j)

The Bankruptcy Code states the following:

> (j)On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

11 U.S. C. § 362(j). Here, Creditor requests the court such order where the stay expired without extension as to the Debtor under section 362(c)(3), the property of the estate revested in the Debtor by the terms of the confirmed Plan and the Debtor is in default of their obligations under the confirmed Plan and their real property tax obligation.

DEBTOR OPPOSITION

Debtor's written opposition, filed on March 29, 2021, asserts that the proposed modified plan will provide Mr. Kraft (presumably the fiduciary Provident Trust Group, IRA custodian) with the same result as under the current plan. Dckt. 133.

Additionally, Debtor requests that the court continue the hearing to early May 2021 so Debtor can document the "cure of the property tax issue."

The Opposition is supported by debtor Karen Gingold's declaration. Dckt. 134. She testifies that the loan was a "hard money loan" so that Debtor could purchase the house from their aunt, fix it up, and live in the house. Declaration, ¶ 2; Dckt. 134. Ms. Gingold references the court to a email thread between her and Mr. Kraft in September 2018. Exhibit 1, Dckt. 135.

In an email dated September 30, 2018, from Ms. Gingold to Mr. Kraft, Ms. Gingold states:

> thank you Brian we do not plan on moving we plan on retiring here, question can we send a little each month like 200 to reduce principal so when the 5 years comes up it is a little less to refinance and pay off.

Exhibit 1, p. 3; Dckt. 134. It appears that a September 30, 2018 email from Mr. Kraft to Ms. Gingold is in response to the above, in which he states that he does not accept occasional principal payments, but Ms. Gingold can deposit the money in an account and let the balance build up. *Id*. at 7.

In the Declaration, Ms. Gingold further testifies that while there has been a default in taxes, it is being addressed through the modified plan, and further Mr. Gingold is a withdrawal from his 401k to

pay the taxes due. Declaration, ¶ 6; Dckt. 134. She further testifies that when talking with Solano County, she has heard they say to her that Mr. Kraft has not actually paid the taxes.

APRIL 20, 2021 HEARING

As of the court's preparation of this pre-hearing disposition, no further documents have been filed. The Parties report that a comprehensive settlement has been reached, which will be achieved through a Chapter 13 Plan.

WITHDRAWAL OF COUNTER MOTION

Creditor having filed a "Withdrawal of Counter Motion", which the court construes to be an Ex Parte Motion to Dismiss the pending Countermotion on May 25, 2021, Dckt. 152; no prejudice to the responding party appearing by the dismissal of the Countermotion; the Creditor having the right to request dismissal of the Countermotion 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 Stephen Anthony Gingold and Karen Michelle Gingold ("Debtor"); the Ex Parte Motion is granted, the Creditor's Countermotion is dismissed without prejudice, and the court removes this Countermotion 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 Countermotion for Remedies Upon Default, Motion to Confirm Termination of the Stay and/or Relief from Stay filed by Provident Trust Group, successor to Polycomp Trust Company, Custodian FBO Brian L. Kraft IRA ("Creditor") having been presented to the court, Creditor having requested that the Countermotion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 152, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Countermotion for Remedies Upon Default, Motion to Confirm Termination of the Stay and/or Relief from Stay is dismissed without prejudice.

FINAL RULINGS

19. 21-21606-E-13 MS-2 | **GUADALUPE VALENCIA** **Mark Shmorgon** | **MOTION TO EMPLOY DMITRIY SHCHEBENKO AS SPECIAL COUNSEL 5-4-21 [15]**

Final Ruling: No appearance at the June 8, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 4, 2021. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Employ is granted.

Guadalupe Valencia ("Debtor") seeks to employ Dmitriy Shchebenko ("Special Counsel") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks the employment of Special Counsel to advise and represent her in connection with a family law case (2013-6-FL010686).

Debtor argues that Special Counsel's appointment and retention is necessary because it will allow her to possibly recover $130,000.00 in equalization payments owed to her from divorce and said funds would allow for a greater distribution to the unsecured creditors. Special Counsel will represent Debtor and intends to apply to the court for a reasonable fee at an hourly rate of $300.00 plus $900.00 for each court appearance.

Dmitriy Shchebenko, from the Law Offices of Dmitriy Shchebenko, testifies that he has been retained by the Debtor top represent her in the family law proceeding and will apply to the court for a reasonable fee for his services. Dmitriy Shchebenko testifies he and the firm do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Trustee's Response

The Chapter 13 Trustee, David Cusick ("Trustee") filed a Response on May 25, 2021. Dckt. 39. Trustee points the court to Debtor's belief that she may recover $130,000 in payments owed to her from divorce which would allow for a greater distribution to unsecured creditors. *Id.* But Trustee notes that Debtor's Plan may need to be modified where Debtor's Special Counsel will apply to the court for a reasonable fees, and Debtor's plan does not account for this potential debt. *Id.*

DISCUSSION

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

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

Taking into account all of the relevant factors in connection with the employment and compensation of Special Counsel, considering the declaration demonstrating that Special Counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Dmitriy Shchebenko, as Special Counsel for the Chapter 13 Estate on the terms and conditions set forth in the Attorney Fee Agreement filed as Exhibit A, Dckt. 18. Approval of the reasonable attorney's fees and costs is subject to the provisions of 11 U.S.C. § 330 and § 331.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Guadalupe Valencia ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted, and Debtor is authorized to employ Dmitriy Shchebenko as Special Counsel for Debtor on the

for the legal services as set forth in the Attorney Fee Agreement filed as Exhibit A, Dckt. 18.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330, § 331, and subject to the provisions of 11 U.S.C. § 328.

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

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

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

20. 19-28013-E-13 GEL-1 | **JOSHUA MIRELES** Gabriel Liberman | **MOTION TO APPROVE LOAN MODIFICATION** 4-23-21 [17]

Final Ruling: No appearance at the June 8, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, creditors, and Office of the United States Trustee on April 23, 2021. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

The Motion to Approve Loan Modification has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Joshua Juan Diego Mireles ("Debtor") requests retroactive approval for a 3-month mortgage payment forbearance awarded for months June, July, and August 2020 due to hardship arising from the COVID-19 pandemic. Wells Fargo Home Mortgage ("Creditor"), whose claim the Plan provides for in Class 4, agreed to the forbearance with the deferred payments being added to the maturity date of the mortgage, interest will not be charged on the deferred amount, and the payment deferral will not change any other terms of the mortgage.

The Motion is supported by the Declaration of Joshua Juan Diego Mireles. Dckt. 19. The Declaration fails to explain the reasons for this forbearance except for that he suffered COVID-19 related hardship and fails to explain or provide evidence on his ability to continue making mortgage payments. However, under the COVID statutes a consumer may request that is entitled to the forbearance.

Trustee does not oppose the motion and states that Creditor is included as a Class 4 claim in Debtor's confirmed plan and Trustee has not disbursed any funds to this Creditor. Dckt. 24.

This post-petition deferral in mortgage payments allows Debtor to continue to fund the Plan. There being no objection from the Chapter 13 Trustee or other parties in interest, and the Motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

The court also grants the relief retroactively. While not stated in the Motion and Declaration, it appears that the parties addressed the forbearance and then tacking those payments on the end not as a "modification," but mere COVID forbearance. Now the Creditor believes that approval is a loan modification, which it appears to be rather than a "mere" temporary COVID forbearance.

The court retroactive authorizes Debtor to enter into the Agreement. The agreement demonstrates a rational, prudent method of addressing the economic disruption by COVID and providing Creditor with a current loan at a minimal cost.

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 Approve Loan Modification filed by Joshua Juan Diego Mireles ("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 court retroactively authorizes Joshua Juan Diego Mireles to defer mortgage payments for the months of June, July, and August 2020 with said payments to be added to the maturity of the mortgage as approved by Wells Fargo Home Mortgage ("Creditor"), holder of the mortgage loan, which is secured by the real property commonly known as 2507 Drummond Drive, Yuba City, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion (Dckt. 20).

21. 21-21036-E-13 DPC-1 | **JEFFREY/YELENA MAYHEW** **Peter Macaluso** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 5-12-21 [32]**

Final Ruling: No appearance at the June 8, 2021 hearing is required.

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 Debtors and Debtors' Attorney on May 12, 2021. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The hearing on the Objection to Confirmation of Plan is continued to 2:00 p.m. on June 29, 2021.

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

A. Debtor has failed to file a motion to value a secured claim.

B. Debtor's mortgage payment is slightly delinquent.

DISCUSSION

Feasability

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to Trustee, Debtor is delinquent in plan payments because Debtor's mortgage payment is greater than what is provided for under the plan resulting in a delinquency that will persist through the term of the plan. Debtor's plan provides for mortgage payments of $2,787.74 where $2,813.62 are needed according to the proof of claim.

Addressing this concern, Debtor requests that the order confirming the plan state the following language: "Chapter 13 Plan payments shall be $4,478.00 for 60 months." Dckt. 41.

Debtor's Reliance on Motion to Value Secured Claim

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Jefferson Capital Systems. Debtor has failed to file a Motion to Value the Secured Claim of Jefferson Capital Systems, however. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

Debtor filed a Reply on May 31, 2021 requesting that the court continue the hearing on this motion to June 29, 2021 the same day that Debtor has set for the hearing on the Motion to Value the Secured Claim of Jefferson Capital Systems, LLC. Dckt. 41. A review of the docket for this case shows that the Debtor filed the motion on May 27, 2021 and has been set for hearing on June 29, 2021 at 2:00 p.m.

In light of Debtor prosecuting this case to address the Trustee's objection, the hearing is continued.

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 Plan is continued to **2:00 p.m. on June 29, 2021.**

22. 21-20245-E-13 JGD-7 | **AMY MCCLELLAN** | **MOTION TO CONFIRM PLAN**
John Downing | **5-4-21 [85]**

Final Ruling: No appearance at the June 8, 2021 hearing is required.

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

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 May 3, 2021. By the court's calculation, 36 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 Rule 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The debtor, Amy Mary McClellan ("Debtor") has provided evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Non-Opposition on May 25, 2021. Dckt. 94. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by the debtor, Amy Mary McClellan ("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 Amended Chapter 13 Plan filed on May 4, 2021, 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.

23. 21-21243-E-13 DAVID/MELANIE CHAO
23 thru 24 Michael Noble

OBJECTION TO CONFIRMATION OF PLAN BY U.S. BANK NATIONAL ASSOCIATION
5-6-21 [20]

Final Ruling: No appearance at the June 8, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on May 7, 2021. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

The Objection To Confirmation has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(2), 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)(2)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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

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 Plan and corresponding Motion to Confirm on May 18, 2021. Dckts. 32, 37. 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 U.S. Bank National Association ("Creditor"), 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.

24. 21-21243-E-13 DPC-1 | **DAVID/MELANIE CHAO** **Michael Noble** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 5-12-21 [24]**

Final Ruling: No appearance at the June 8, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney, on May 12, 2021. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Objection To Confirmation has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(2), 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)(2)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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

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 Plan and corresponding Motion to Confirm on May 18, 2021. Dckts. 32, 37. 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 P. 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.

25. 19-23781-E-13 BB-6 | **VERLIN JOHNSON** **Bonnie Baker** | **MOTION FOR HARDSHIP DISCHARGE** **4-30-21 [89]**

Final Ruling: No appearance at the June 8, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on April 30, 2021. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Hardship Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings

The Motion for Entry of Hardship Discharge is granted.

Martine Johnson, Debtor's surviving spouse and personal administrator ("Debtor Representative") of the estate of Verlin K. Johnson ("Debtor") moves for entry of a hardship discharge on the ground that debtor has now passed away. Debtor argues hardship is appropriate on the following grounds:

1. Debtor's failure to complete the plan payments was through no fault of his own since he passed away;

2. The value of the property as of the effective date of the plan actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor would have been liquidated under Chpater 7 of this title on such date.

3. Modification of the plan is not practicable due to Debtor's death.

4. Debtor has met all of the requirements of 11 U.S.C. 1328(b) and is entitled to a hardship discharge.

Motion, Dckt. 89, at p. 2.

Trustee does not oppose the relief requested but points the court to Trustee's Motion to Dismiss which was set to be heard on May 19, 2021. Dckt. 98. The matter was continued to allow for the court to heard the instant motion which would resolve Trustee's Motion to Dismiss. Dckt. 98.

APPLICABLE LAW

Section 1328(b) of the Bankruptcy Code states:

> Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if–
>
> > (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
> >
> > (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
> >
> > (3) modification of the plan under section 1329 of this title is not practicable.

The provisions of 11 U.S.C. § 1328(b) are written conjunctively and must all be satisfied to grant a hardship discharge. *See, e.g.*, *In re Cummins*, 266 B.R. 852, 855 (Bankr. N.D. Iowa 2001). Debtor has the burden or proving each of those elements. *Spencer v. Labarge (In re Spencer)*, 301 B.R. 730, 733 (B.A.P. 8th Cir. 2003). "Unsubstantiated and conclusory statements" about a debtor's inability to afford plan payments anymore are insufficient when considering a motion for a hardship discharge. *See, e.g.*, *In re Dark*, 87 B.R. 497, 498 (Bankr. N.D. Ohio 1988).

Some courts have looked for a catastrophic event to justify a hardship discharge, but others have relied upon the plain meaning of 11 U.S.C. § 1328(b) to determine whether a "debtor is justly accountable for the plan's failure." *In re Bandilli*, 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999). Determining whether a debtor is justly accountable is fact-driven, and some considerations include:

A. Whether the debtor has presented substantial evidence that he or she had the ability and intention to perform under the plan at the time of confirmation;

B. Whether the debtor did materially perform under the plan from the date of confirmation until the date of the intervening event or events;

C. Whether the intervening event or events were reasonably foreseeable at the time of confirmation of the Chapter 13 plan;

D. Whether the intervening event or events are expected to continue in the reasonably foreseeable future;

E. Whether the debtor had control, direct or indirect, of the intervening event or events; and

F. Whether the intervening event or events constituted a sufficient and proximate cause for the failure to make the required payments.

Id.

At least one court has found that an economic hardship (i.e., lost business revenue and increased expenses) is not the kind of event "such as death or disability which prevent[s] a debtor, through no fault of his or her own, from completing payments." *In re Nelson*, 135 B.R. 304, 306 (Bankr. N.D. Ill. 1991).

Sub-section 11 U.S.C. § 1328(b)(1) "requires that the circumstances leading to the debtor's failure to make payments be beyond the debtor's control." *In re Cummins*, 266 B.R. at 855. Such aggravating circumstances need to be "truly the worst of the awfuls—something more than just the temporary loss of a job or a temporary physical disability." *In re Nelson*, 135 B.R. at 307 (citation omitted).

The second portion of 11 U.S.C. § 1328(b) requires that unsecured claims receive no less than they would have through Chapter 7 liquidation. That is called the "best interests" test that is identical to Chapter 13 plan confirmation in 11 U.S.C. § 1325(a)(4). *In re Cummins*, 266 B.R. at 856 (citations omitted). If an unsecured claim would not receive a distribution through Chapter 7, then any payment from a Chapter 13 plan satisfies that requirement. *Id.* (citing *In re Nelson*, 135 B.R. at 308).

Finally, 11 U.S.C. § 1328(b)(3) requires that modifying the Chapter 13 plan not be practicable. Proposing a modified plan "is not 'practicable' if there is no source of income to fund the modified plan." *Id.* (citing *In re Bond*, 36 B.R. 49, 51 (Bankr. E.D.N.C. 1984)).

The Ninth Circuit has instructed that "[n]othing in the Code compels a bankruptcy court to close, rather than dismiss, a Chapter 13 case when a debtor fails to complete [a] plan." *HSBC Bank USA, N.A. v. Blendheim (In re Blendheim)*, 803 F.3d 477, 496 (9th Cir. 2015). Furthermore, "the availability of case closure does not eliminate a bankruptcy court's duty to ensure that a debtor complies with the Bankruptcy Code's 'best interests of creditors' test, 11 U.S.C. § 1325(a)(4), and the good faith requirement for confirming a Chapter 13 plan." *Id.* The Ninth Circuit found explicitly that a "bankruptcy court [had] properly conditioned permanent lien-voidance upon the successful completion of the Chapter 13 plan payments. If the debtor fails to complete the plan as promised, the bankruptcy court should either dismiss the case or, to the extent permitted under the Code, allow the debtor convert to another chapter." *Id.*

DISCUSSION

Debtor has demonstrated to the court that the elements of 11 U.S.C. § 1328(b) have been met. While some courts have required that a debtor face a catastrophe, that is not a requirement. In this case, however, there has been a clear catastrophe in Debtor's life that prevents Debtor from complying with and completing the Plan. The Motion is granted, and a hardship discharge under 11 U.S.C. § 1328(b) is entered for Debtor in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Hardship Discharge filed by Verlin K. Johnson ("Debtor Representative") having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the court shall enter a "hardship" discharge pursuant to 11 U.S.C. § 1328(b) for Verlin K. Johnson in this case based on the Plan as performed as of the June 8, 2021 hearing date on this Motion.

26. 16-25490-E-13 MJD-12

WILLIAM/TONYA HERKEL
Matthew DeCaminada

MOTION FOR COMPENSATION BY THE LAW OFFICE OF STUTZ LAW OFFICE, P.C. FOR MATTHEW J. DECAMINADA, DEBTORS ATTORNEY(S)
5-3-21 [164]

Final Ruling: No appearance at the June 8, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and on May 3, 2021. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Stutz Law Office, P.C., the Attorney ("Applicant") for William John Herkel and Tonya Mae Herkel, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period January 2020, through May 2021. Applicant requests fees in the amount of $2,500.00 and costs in the amount of $0.00.

Trustee does not oppose the fees requested; however, notes that the additional requested fees might not have been contemplated in the modified plan filed September 2020 and that a further modified plan may be needed to address these additional fees. Dckt. 172. Trustee will wait a reasonable time for a modified plan to be filed before taking corrective action. *Id.*

APPLICABLE LAW

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (i) unnecessary duplication of services; or
> (ii) services that were not—
> (I) reasonably likely to benefit the debtor's estate;
> (II) necessary to the administration of the case.

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

Reasonable Fees

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

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

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

Reasonable Billing Judgment

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

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

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

A review of the application shows that Applicant's for the Estate include preparing a motion to modify plan and motion to incur debt. The court finds the services were beneficial to Client and the Estate and were reasonable.

"No-Look" Fees

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

> (a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."
> . . .
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed $4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 158. Applicant prepared the order confirming the Plan.

Lodestar Analysis

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

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

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Case Management: Applicant spent 5.50 hours in this category. Applicant met with Debtors to discuss their payments under the second modified Chapter 13 plan and their possible remedies and corresponded and met with the clients to maintain the case.

Notice of COVID-19 Impact: Applicant spent 0.5 hours in this category. Applicant prepared and filed of a notice of COVID-19 impact.

Motion to Confirm Modified Chapter 13 Plan: Applicant spent 5.40 hours in this category. Applicant prepared, filed, and served a second modified Chapter 13 plan along with a motion to confirm said plan.

Motion to Incur Debt: Applicant spent 1.4 hours in this category. Applicant prepared, filed, and served a Motion to Incur Debt.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Matthew DeCaminada	12.80	$250.00	$3,200.00
Total Fees for Period of Application			$3,200.00

Costs and Expenses

Applicant does not seek costs and expenses through this Application.

Fees

The unique facts surrounding the case, including a Motion to Confirm Modified Plan and a Motion to Incur Debt, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of $2,500.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick ("the Chapter 13 Trustee") from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Applicant does not seek costs through this application.

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

Fees	$2,500.00
Costs	$0.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Stutz Law Office, P.C. ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Stutz Law Office, P.C. is allowed the following additional fees and expenses as a professional of the Estate:

Stutz Law Office, P.C., Professional Employed by William John Herkel and Tonya Mae Herkel ("Debtor")

Fees in the amount of $2,500.00
Costs in the amount of $0.00,

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

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

27. 20-20868-E-13 MET-2 | **DESHAUNNA PAYNE** Mary Ellen Terranella | **MOTION TO CONFIRM PLAN** 4-23-21 [49]

Final Ruling: No appearance at the June 8, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 23, 2021. By the court's calculation, 46 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 hearing on the Motion to Confirm the Amended Plan is continued to 2:00 p.m. on June 22, 2021, to be conducted in conjunction with Debtor's Motion to Value the Secured Claim of Aaron's, Inc.

The debtor, Deshaunna Tranise Payne ("Debtor"), seeks confirmation of the Amended Plan. The Amended Plan provides for plan payments of $1,731.00 per month for 14 months, followed by $2,150.00 per month for 46 months, and a zero percent dividend to unsecured claim totaling $33,470.00. Amended Plan, Dckt. 54. 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 25, 2021. Dckt. 56. Trustee opposes confirmation of the Plan on the basis that:

A. Debtor is delinquent in plan payments.

B. Plan relies on a Motion to Value Collateral not yet filed.

C. Debtor may not be able to make the plan payments.

DISCUSSION

Delinquency

The Chapter 13 Trustee asserts that Debtor is $1,717.00 delinquent in plan payments, which represents a portion of the monthly payment of the $2,150.00 plan payment. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor filed a Reply on June 1, 2021. Dckt. 63. Debtor asserts having made a payment in the amount of $2,300 on May 28, 2021. Moreover, Debtor explains that the calculation of payments made into the plan as of April 2021 was slightly inaccurate and states that the correct plan payments are $1,608.00 per month for 14 months and $2,150 per month for 46 months. Debtor has attached a proposed order correcting the plan payments. Dckt. 65.

Debtor's Reliance on Motion to Value Secured Claim

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Aaron's Inc. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

A review of the docket shows that Debtor has filed, on June 1, 2021, the Motion to Value the Secured Claim. Dckt. 59. The Motion has been set for hearing at 2:00 p.m. on June 22, 2021.

Failure to Afford Plan Payment / Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to Trustee, Amended Schedule I, line 8h, identifies $2,290.00 as "Contributions from daughter," yet, Debtor has failed to file a declaration from the daughter declaring that she can afford and is willing to make that contribution for the duration of the Plan. For the final 46 months of the Plan, this equals Debtor's daughter contributing $105,340 for this Plan. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Debtor filed the Declaration of Mya Thomas on June 1, 2021. Dckt. 64. Debtor's daughter testifies to the following:

1. Daughter and her son reside with Debtor.

2. Daughter has a full-time job and contributes $1,000 per month towards household expenses.

3. Daughter has the financial ability to continue provide this financial support to Debtor for as long as Debtor is in her Chapter 13 plan.

Debtor notes that the Schedule states daughter's contribution is $1,000 and not the $2,290 indicated by Trustee. The proposed Amended Plan requires monthly plan payments of $2,150.00 for the

final 46 months of the Plan. On Supplemental Schedule J, Debtor shows having monthly income (the projected disposable income) after having monthly expenses of only ($1,782) for a family unit of two adults and one child. Dckt. 53. Some the expenses shown on Supplemental Schedule J appear questionable, including: ($315.00) for food and housekeeping supplies, ($20.00) for medical and dental expenses.

On Supplemental Schedule I, Debtor computes having $3,932 in monthly net income, which includes a $1,000 a month "Contribution From Daughter." Dckt. 52. It appears that the Opposition is a clerical error, with the Declaration being consistent with Supplemental Schedule I.

This part of the Objection is overruled.

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 Chapter 13 Plan filed by Deshaunna Payne, the Debtor, having been presented to the court, and upon review of the pleadings, a hearing on a Motion to Value Secured Claim which must be resolved before the Plan can be confirmed, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Confirm the Amended Plan is continued to **2:00 p.m. on June 22, 2021**, to be conducted in conjunction with Debtor's Motion to Value the Secured Claim of Aaron's, Inc.