

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 16, 2022 at 2:00 p.m.

1. [17-21382-E-13](#) **MICHAEL/MICHELLE KINCAID** **MOTION TO COMPEL ABANDONMENT**
 [PLC-3](#) **Peter Cianchetta** 7-27-22 [[109](#)]

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, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 27, 2022. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----
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<p>The Motion to Compel Abandonment is granted.</p>
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After notice and a hearing, the court may order a trustee to abandon property of the Estate that is burdensome to the Estate or is of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b).

Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Michael William Kincaid and Michelle Halle Kincaid (“Debtor”) requests the court to order David Cusick (“the Chapter 13 Trustee”) to abandon property commonly known as 8791 Mesa Brook Way in Elk Grove, California (“Property”). The Property is encumbered by the lien of Vitek Mortgage Group, securing a claim with a balance of \$246,574.73. Declaration of Debtor, Dckt. 112. The Declaration of Debtor has been filed in support of the Motion and values the Property at \$320,000.00.

Based on the value of the property (\$320,000.00), minus the secured claim of Vitek (\$246,574.73), minus Debtor’s claimed exemption of \$28,208.04, there appears to be equity in the amount of \$45,217.23. However, given Debtor has completed Plan payments, Dckt. 99, the court finds the Property has no benefit to the Estate. The court orders the Chapter 13 Trustee to abandon the property.

CHAMBERS PREPARED ORDER

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 Compel Abandonment filed by Michael William Kincaid and Michelle Halle Kincaid (“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 Compel Abandonment is granted, and the Property identified as 8791 Mesa Brook Way in Elk Grove and listed on Schedule A / B by Debtor is abandoned by the Chapter 13 Trustee, David Cusick (“Trustee”) to Michael William Kincaid and Michelle Halle Kincaid by this order, with no further act of the Trustee required.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor (*pro se*) on July 20, 2022. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

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

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

- A. Plan filed in bad faith
- B. Plan not feasible
- C. Possible liquidation issue

DISCUSSION

Trustee's objections are well-taken.

PLAN PROPOSED IN BAD FAITH

Trustee alleges that the Plan was proposed in bad faith. 11 U.S.C. § 1325(a)(3). Debtor's Mother, Mary Carter, filed a third bankruptcy proceeding as a Chapter 11, Case No. 22-20805 on April 1, 2022, which was converted to Chapter 7 on June 2, 2022. As the third such bankruptcy proceeding, the property 147 Glacier Street, Woodland, CA 95695 ("Property") was not subject to an automatic stay. Case No. 22-20805, Dckt. 27 at 32. Trustee found that Ms. Carter transferred a 15% interest in the Property to Debtor on May 31, 2022 without court authorization. Trustee is unable to determine if Debtor has a valid interest in the Property and whether the Property would be in Debtor's bankruptcy estate.

Trustee further alleges that Debtor likely filed the Plan in bad faith when considering the totality of the circumstances. *In re Warren*, 89 B.R. 87, 90 (B.A.P. 9th Cir. 1988). "The Debtor appeared at the Meeting of Creditors and testified that she was told she had to file bankruptcy by her mom and her mom helped her fill out her paperwork but that she was not sure why she filed or what the case was about." Objection, Dckt. 13, at 3:15-17.

The Plan may not be confirmed unless the Plan was proposed in good faith. 11 U.S.C. § 1325(a)(3). In light of the totality of the circumstances and the questionable ownership of the Property, the Plan cannot be confirmed.

INFEASIBLE PLAN

Insufficient Plan Payments

Trustee alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). Trustee estimates that it will take an estimated 134+ months to complete the Plan, as opposed to the 60 months proposed. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d) and which results in a commitment period that exceeds the permissible limit imposed by 11 U.S.C. Section 1325(b)(4). Schedule J shows the Debtor's net monthly income is \$ 12.53 per month. Dckt. 1 at 23: 23. This amount is insufficient to make a Plan payment of \$550.00 per month, let alone a higher payment that will ultimately be necessary to successfully complete this plan. Thus, the Plan may not be confirmed.

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). The Debtor has failed to identify the Codebtor's case in the Voluntary Petition and file a Notice of Related Case pursuant to Local Rule 1015-1. The Debtor admitted at the First Meeting of Creditors, that the Codebtor is Mary Carter. The Voluntary Petition, Question #10, asks if there are any bankruptcy cases pending by affiliate, (Page 3), and the Debtor marked "No", and failed to identify Ms. Carter's case that is currently pending. The Trustee's review of the Court's Docket does not reflect the Debtor has filed Notice of Related case either. A variety of Schedule issues are also presented:

(1) Schedule A/B, (DN 1, Pages 9-13): The Debtor is marked "No" to every question, except for her residence, (Page 9, #1.1), and the 2020 Toyota Corolla, (Page 10, #3.1.) The Trustee is not clear if the Debtor actually has basic assets such a household goods, electronics, clothing, bank accounts, etc., or if she only has these two items.

In substance, Debtor states under penalty of perjury she has no household goods, no clothing, no electronic devices, no jewelry, no cash, no bank accounts, and no other assets of any kind.

(2) Schedule E/F (DN 1, Page 18): The Debtor has not listed any creditors. The Trustee is not certain if that was oversight or if the Debtor does not have any priority or unsecured creditors.

(3) Schedule H, (DN 1, Page 20): Question #2 identifies that she has a spouse or legal equivalent; however, gives no further information regarding this person.

(4) Schedule I, (DN 1, Page 21): The Debtor fails to list any deductions from her wages or the net monthly income she receives. It appears to the Trustee that the Debtor did not file Page 2 of Schedule I.

Debtor does state that she works at a waitress, and has \$2,106.00 in monthly gross wages. She further states that there is no withholding for income or Social Security taxes.

(5) Schedule J, (DN 1, Pages 22-23): The Trustee is not certain if the Debtor's budget is accurate, and, if it is, then it is unrealistic. The Debtor shows she has a 5-year-old dependent, (#2), yet indicates that food is \$200.00 per month, (#7); Clothing \$30.00 (#9); transportation \$110.00 (#12); and, a car payment of \$324.00 (#17a.) The Trustee is also not clear if the car payment is the vehicle listed in Class 2 of the Plan.

Objection, Dckt. 13 at 6: 10-26.

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

Failure to Provide Pay Advices

Debtor has not provided Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). While Debtor has provided some pay stubs, Debtor has failed to provide all necessary pay stubs. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Failure to Provide Tax Returns

Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(I); FED. R. BANKR. P. 4002(b)(3). Debtor has failed to provide the tax transcript. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

DEBTOR FAILS LIQUIDATION ANALYSIS

Debtor's plan fails the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Trustee states that Debtors propose a Plan that will pay no less than 0% to unsecured. Dckt. 3 at 5. The Plan may not pay unsecured at least what they would receive in the event of a Chapter 7. (11 U.S.C. §1325(a)(4.)

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

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

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

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 21, 2022. By the court’s calculation, 26 days’ notice was provided. 14 days’ notice is required.

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

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

Lakeview Loan Servicing, LLC (“Creditor”) holding a secured claim opposes confirmation of the Plan on the basis that:

- A. Debtor’s Plan appears to have been filed with a lack of good faith.
- B. Debtor’s Plan does not provide for payment in full of Creditor’s secured Claim.

DISCUSSION

Creditor’s objections are well-taken.

Plan Proposed in Bad Faith

Creditor alleges that the Plan was proposed in bad faith. 11 U.S.C. § 1325(a)(3). Debtor's Mother, Mary Carter, filed a third bankruptcy proceeding as a Chapter 11, Case No. 22-20805 on April 1, 2022, which was converted to Chapter 7 on June 2, 2022. As the third such bankruptcy proceeding, the property 147 Glacier Street, Woodland, CA 95695 ("Property") was not subject to an automatic stay. Case No. 22-20805, Dckt. 27 at 32. Trustee found that Ms. Carter transferred a 15% interest in the Property to Debtor on May 31, 2022 without court authorization. Trustee is unable to determine if Debtor has a valid interest in the Property and whether the Property would be in Debtor's bankruptcy estate.

The Plan may not be confirmed if the Plan was proposed in bad faith. In light of the totality of the circumstances and the questionable ownership of the Property, the Plan cannot be confirmed.

Modification of an Obligation Secured Only by Principal Residence

Debtor's Plan was not filed in good faith and is an improper modification of a claim secured only by a security interest in real property that is Debtor's principal residence. Creditor has filed a Proof of Claim indicating a secured claim in the amount of \$289,656.00, secured by a first priority deed of trust against the property commonly known as 147 Glacier Street, Woodland, California 95696. Debtor's Schedules indicate that this is Debtor's primary residence. This modification violates 11 U.S.C. § 1322(b)(2), which prohibits the modification of an obligation secured only by Debtor's residence.

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 Lakeview Loan Servicing, LLC ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on July 20, 2022. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

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

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

- A. Payments do not appear feasible.
- B. Discriminatory treatment of creditors in the same class.

DISCUSSION

Trustee's objections are well-taken.

Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6).

Debtor may be overstating the tax refunds they will receive after taking into account claims due to the Internal Revenue Service.

Additionally, Debtor has failed to provide why Debtor should treat the mortgage Creditor in both Class 1 and 4 and the nonstandard provisions and why Debtor will not continue to default. Debtor is more than a year in arrears to creditor Land Home Financial. Plan, Dckt. 12 at 3, 4, 8. Debtor has provided insufficient evidence to show why the fault occurred and why it will not reoccur once Debtor is to make the ongoing payment.

Also, there is a discrepancy in Debtor's Schedule I and J compared with their pay advices. The pay advices show a gross income of \$24,628.20. Debtor's Schedules indicate a monthly income of \$12,000 and a monthly net income of \$4,500. Dckt. 1 at 30 ¶ 13. Debtor has not addressed the large discrepancy compared to Schedule I filing. Schedule I, Dckt. 1 at 29-30. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Disparate Treatment of Secured Creditors in the Same Class

Trustee alleges that Debtor's plan provides that Class 2 Creditors Bridgecrest and Stanford FCU start receiving monthly payments immediately while Class 2 Creditor Sunrun, Inc. does not start receiving payments until the 5th month of the Plan. Plan, Dckt. 12 at 7. Debtor's plan must provide for the same treatment of each claim within a particular class. 11 U.S.C. § 1322(a)(3). The Plan cannot be confirmed because secured creditors in the same class are given disparate treatment.

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.

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

Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Chapter 13 Trustee, and Office of the United States Trustee on July 1, 2022. By the court’s calculation, 46 days’ notice was provided. 44 days’ notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days’ notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days’ notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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 Proof of Claim Number 1-2 of Viebella LLC and Hercules Fitness, Inc. is overruled without prejudice.~~

Richard Christian Fonbuena, Chapter 13 Debtor, (“Objector”) requests that the court disallow the claim of Viebella LLC and Hercules Fitness, Inc. (“Creditor”), Proof of Claim No. 1-2 (“Claim”), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of \$192,902.71. Objector asserts that Creditor has not provided proper evidence of the claim in the form of a copy of the arbitration award or proof the award was confirmed. FED. R. BANKR. P. 3001(f) .

Once a party has objected to a proof of claim, the creditor asserting the claim may not withdraw the claim except on order of the court. FED. R. BANKR. P. 3006.

TRUSTEE’S RESPONSE

Trustee filed a response on July 19, 2022 , Dckt. 37, agreeing with Debtor that Creditor lacked the proper evidentiary showing for their proof of claim.

DEBTOR’S SUPPLEMENTAL RESPONSE

Debtor filed a supplemental response on July 22, 2022. Dckt. 40. After Creditor amended their proof of claim with a host of exhibits, Debtor maintains that Creditor has not provided any proof that the arbitration award has been confirmed against Debtor.

CREDITOR’S OPPOSITION

Creditor filed an opposition on July 28, 2022. Dckt. 42. Creditor has since amended their proof of claim to contain the Decision of Arbitrator as evidence of the validity of the claim. The hearing to enforce the Decision of Arbitrator is set for August 3, 2022, at the Contra Costa Superior Court. Opposition, Dckt. 42. Creditor alleges that this evidence satisfies the requirements of a Rule 3001(f) and constitutes a sufficient *prima facie* showing of evidence.

The court notes that Creditor’s “Opposition” consists of a four page opposition and then fifty-six pages of exhibits attached. The Local Bankruptcy Rules require that the motion, objection, opposition, each declaration, and the exhibits (which may be combined into one indexed document) must be filed as separate pleadings. L.B.R. 9004-2(c). Failure to properly organize pleadings and file them in compliance with the Local Bankruptcy Rules may result in the court not identifying such hidden pleading for consideration

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial evidence 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). 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. *In re Austin*, 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). 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.

Despite Creditor’s lack of exhibit etiquette, the Decision of Arbitrator attached to Creditor’s Proof of Claim 1-2 demonstrates *prima facie* evidence of the proof of claim. The Decision of the Arbitrator is dated February 17, 2021. POC 1-2, p. 16. No order of the Superior Court confirming or adopting the Decision of the Arbitrator and a judgment entered thereon is included with Amended Proof of Claim 1-2.

—————Based on the evidence before the court, the Objection to the Proof of Claim is overruled without prejudice.

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

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

The Objection to Claim of Viebella LLC and Hercules Fitness, Inc. (“Creditor”), filed in this case by Richard Christian Fonbuena, Chapter 13 Debtor, (“Objector”) 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 Proof of Claim Number 1-2 of Creditor is overruled without prejudice.

6. 22-21130-E-13 **RICHARD FONBUENA**
DPC-1 **Thomas Amberg**

**CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY
DAVID P. CUSICK
6-15-22 [22]**

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)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on June 15, 2022. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is XXXXXXXX

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

- A. Debtor underestimated the amount of unsecured claims and thus, his plan proposing a 100% dividend will not complete in sixty months.

DEBTOR'S RESPONSE

Debtor filed a response on June 28, 2022 stating they will be filing an objection to Proof of Claim 101 by Viabella, LLC and Hercules Fitness, LLC. Debtor would like the hearing on this objection continued to the hearing on the objections to claims. Upon review of the docket, no objections to claims have been filed yet.

DISCUSSION

Trustee's objections are well-taken.

Plan Term is Greater Than 60 months

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to Trustee, the Plan will complete in more than sixty months due to underestimating the unsecured claims by roughly \$200,000. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

In light of the pending Objection to Claim, the court continues the hearing on this Objection to Confirmation to be conducted in conjunction with the Objection to Claim.

AUGUST 16, 2022, HEARING:

At the hearing, **XXXXXXX**

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

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

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on July 20, 2022. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

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

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

- A. Failure to provide tax returns
- B. Failure to cure arrearage of creditor
- C. Failure to provide for a secured claim
- D. Failure to afford plan payment

DISCUSSION

Trustee's objections are well-taken.

Failure to Provide Tax Returns

Debtor did not provide either a tax transcript or a federal income tax return with attachments for the preceding four tax years for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(I); FED. R. BANKR. P. 4002(b)(3). Debtor has failed to provide the tax transcript. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Failure to Cure Arrearage of Creditor

FCI Lending Services holds a deed of trust secured by Debtor's residence. Dckt. 1. Creditor has filed a timely proof of claim in which it asserts \$470.76 in pre-petition arrearages. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

Failure to Provide for a Secured Claim

Shasta County Tax Collector asserts a claim of \$5,263.10 in this case. Debtor's Schedule D fails to provide for this claim.

Trustee alleges that the Plan is not feasible and violates 11 U.S.C. § 1322(b)(2) because it contains no provision for payment of Creditor's matured obligation, which is secured by Debtor's residence. *See* 11 U.S.C. § 1325(a)(6).

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

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

If a debtor elects to provide for a secured claim, 11 U.S.C. § 1325(a)(5) gives the debtor three options:

- A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),
- B. Provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or

- C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

Those three possibilities are relevant only if the plan provides for the secured claim, though.

When a plan does not provide for a secured claim, the remedy is not denial of confirmation. Instead, the claimholder may seek termination of the automatic stay so that it may repossess or foreclose upon its collateral. The absence of a plan provision is good evidence that the collateral for the claim is not necessary for the debtor's rehabilitation and that the claim will not be paid. This is cause for relief from the automatic stay. *See* 11 U.S.C. § 362(d)(1).

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, the fact that this Plan does not provide for respondent Creditor's secured claim raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). That is reason to sustain the Objection.

Failure to Afford Plan Payment

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). \$500 loan payments from an individual Frank Stahlschmidt are listed as an asset on Schedule B. Dckt. 12 at 8. These payments have been sporadic since 2008. Trustee is not clear how the Debtor will make the monthly Plan payments if, or when, the loan defaults and payment is not received as part of the Debtor's net monthly income. Furthermore, Debtor's expenses are \$2,475.00, which may be extremely tight for his household, as it only allows the Debtor \$150.00 in food expenses, (#7); \$10.00 in clothing, (#9); \$0.00 in personal care (#10), \$0.00 in medical or dental, (#11); and, \$75 in transportation, (#12). Trustee is not certain if the Court would agree that these amounts are realistic, and sustainable, over the life of the Plan. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney on August 3, 2022. By the court’s calculation, 13 days’ notice was provided. 14 days’ notice is required.

Under the facts and circumstances of this Motion, the court shortens the time to the 13 days given.

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

The Objection to Confirmation of Plan is XXXXXXXXXXXX.
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The Chapter 13 Trustee, David Cusick (“Trustee”), opposes confirmation of the Plan on the basis that:

A. The Plan may not be Debtors’ best efforts.

Debtor’s Response

Debtor filed a response on August 10, 2022 (Dckt. 20) stating Trustee should look to Debtor’s schedules to determine whether the Plan is in their best effort, not Debtor’s year to date income. Debtor was able to work substantial overtime between March and June “2021,” but has since not worked additional overtime nor does Debtor anticipate overtime reaching anything near the March to June levels.

The Debtor also notes that the Plan contains a typo, stating that the general unsecured claim dividend will not be less than 2%. Debtor states that the correct amount is not less than 20%.

DISCUSSION

Trustee's objections are well-taken

Failure to Provide Disposable Income / Not Best Effort

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

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

Debtor John Michael Hoffman lists his gross income as \$8,159.58. After expenses, Debtor John Michael Hoffman's net income is \$1,453.68. However, Debtor John Michael Hoffman's June 28, 2022 pay advice reflects a year-to-date gross income of \$59,215.34. This reflects a monthly gross income of \$9,869.22, rather than \$8,159.58. Trustee has calculated an additional \$1,263.04 per month the Debtors could pay to creditors which would allow unsecured claims to receive a 100% dividend. It is not clear to the court where the \$1,263.04 figure came from.

However, Trustee acknowledges that at the Meeting of Creditors, Debtor John Michael Hoffman has stopped working overtime. It is unclear to the court, without overtime payments, whether Debtors can afford the extra \$1,263.04 per month, or whether the proper figure should be based on Debtor's Schedules. At the hearing, **XXXXXXXXXX**

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

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

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

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

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 July 21, 2022. By the court’s calculation, 26 days’ notice was provided. 14 days’ notice is required.

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

The Objection to Confirmation of Plan is XXXXXXXXXXXXXXXX

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

Debtor had not physically signed the documents filed at the start of the case. Debtor has now signed the documents, but Trustee is not certain whether the court wants Debtor to file a declaration and the original signature pages with the court or whether the court wants a declaration explaining why certain parties believed DocuSign documents are acceptable.

Trustee has been provided signature pages but does not believe they are original documents as they had both a manual signature and a “DocuSign” signatures.

Federal Rules of Bankruptcy Procedure 1008 states:

All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. §1746.

Federal Rules of Bankruptcy Procedure 9011 states:

Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Local Bankruptcy Rule 9004-1(c) states:

All pleadings and non-evidentiary documents shall be signed by the individual attorney for the party presenting them, or by the party involved if that party is appearing in *propria persona*. Affidavits and certifications shall be signed by the person offering the evidentiary material contained in the document. The name of the person signing the document shall be typed underneath the signature.

. . .

(1)(A) . . . Unless the electronically filed document has been scanned and shows the registered user's original signature or bears a software-generated electronic signature thereof, an "/s/" and the registered user's name shall be typed in the space where the signature would otherwise appear.

Both the Federal Rules and Local Rules require an original signature on all pleadings and non-evidentiary documents. Here, evidence shows that the documents filed may not have been originally signed. At the hearing, **XXXXXXXXXX**

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

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

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

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

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 May 31, 2022. By the court's calculation 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

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

The debtor, Kenneth W Johnson ("Debtor") seeks confirmation of the Third Modified Plan because Debtor fell behind on plan payments due to a loss of income resulting from military deployment and loss of overtime income related to Covid-19. In addition, Debtor is being deployed from August 2022 through January 2023, further reducing Debtor's income. Declaration, Dckt. 96.

The Modified Plan provides all missed payments through and including April 25, 2022 are excused, total paid as of May 16, 2022 is \$146,427.00, payments of \$3,050.00 per month for 9 months, then \$4,700.00 for 12 months, and a 100 percent dividend to unsecured claims totaling \$11,970.00. Modified Plan, Dckt. 97. 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 June 28, 2022. Dckt. 101. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in Plan payments,
- B. Proposed Plan payments are insufficient to pay the claims.

DISCUSSION

Delinquency

The Chapter 13 Trustee asserts that Debtor is \$3,050.00 delinquent in plan payments, which represents one month of the \$3,883.58 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

At the hearing, the Trustee reported that the delinquency has been cured.

Failure to Complete Plan Within Allotted Time

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 69 months due to insufficient payment amount. Trustee calculates that the plan must increase by at least an additional \$693.55 to pay the set monthly payments as proposed. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

The Debtor explained that Debtor's income will increase with overtime and that if the hearing is continued this can be documented. Additionally, Debtor can propose amendments to properly state the treatment of the claims based on the funding of the Plan.

AUGUST 16, 2022, HEARING:

At the hearing, **XXXXXX**

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Kenneth W Johnson ("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 Modified Plan is **XXXXXXXXXX**

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

Below is the court’s tentative ruling, rendered on the assumption that there will be no opposition to the 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, Debtor’s Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 19, 2022. By the court’s calculation, 28 days’ notice was provided. 14 days’ notice is required.

The Motion to Refinance 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, -----.

<p>The Motion to Refinance is granted.</p>

The Motion to Refinance filed by Austin Lee Pickering (“Debtor”) seeks court approval for Debtor to incur post-petition credit. Debtor requests the court approve a refinance loan through Janus Mortgage Corporation (“Creditor”) on the real property known as 232 Aerie Court, Roseville, California 95661.

The terms of the agreement include:

1. Principal Balance: \$666,000.00
2. Loan Terms: Thirty (30) Years
3. Estimated Interest Rate: 4.75%, but not “locked in” until court order
4. Monthly Payment Plan: \$3,474.17
5. Modified Plan Changes:

- a. Debtor has filed a Modified Plan. Dckt. 30. The Modified Plan is attached as Exhibit 3, Dckt. 23.
- b. Creditor will be treated as Class 4, modified from Class 1 under the current Plan.
- c. Debtor additionally proposes to pay a lump sum of \$30,000.00 to Chapter 13 Trustee directly from escrow toward the Plan as a result of the loan agreement.
- d. Debtor will continue making monthly payments to Trustee to pay all remaining claims.

The refinance will reduce Debtor's mortgage payment from the current \$3,893.01 post-petition monthly payment and \$1,833.00 per month for mortgage arrears to \$4,190.00 per month.

The Motion is supported by the Declaration of Debtor. Dckt. 24. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms.

Trustee's Response

Multiple Requests for Relief in One Motion

Trustee filed a response claiming the transaction appears to be in the best interest of Debtor. Trustee notes, however, Debtor is attempting to refinance and approve a modified plan. This is in violation of Local Bankruptcy Rule 9014-1(d)(5), which states that "[e]very application, motion, contested matter or other request for an order, shall be filed separately from any other request, except (1) that relief in the alternative based on the same statute or rule may be filed in a single motion; and (2) as otherwise provided by these rules." The Local Bankruptcy Rules have exceptions, under Rule 9014-1(d)(5)(B), which allow multiple requests in one motion for certain matters. A motion to confirm and motion to refinance are not one of the exceptions. Debtor should file a separate motion to confirm and set it for hearing as required by Local Bankruptcy Rule 3015-1(d).

Delinquency

Additionally, Trustee states Debtor is delinquent in Plan payments. Although delinquency is a reason to deny confirmation, the \$30,000 lump sum Debtor is proposing will bring Debtor current. Trustee still recommends approval of the refinance. The court agrees.

Supplemental Schedule I and J Needed

Trustee states Debtor should file Supplemental I and J as the transaction decreases Debtor's monthly mortgage payment. The court agrees.

Interest Rate

Trustee is uncertain if the interest rate is not locked in at 4.75%, whether the transaction will be in Debtor's best interest. At the hearing, Debtor/Creditor confirmed the interest rate would be ~~XXXXXXXXXX~~

Modified Plan Filed

On August 1, 2022, a proposed First Modified Plan was filed. Dckt. 30. The proposed First Modified Plan provides for payments to the Class 1 claim to terminate after the 16th month of the Plan. First Mod Plan, § 7.02 Additional Provisions; Dckt. 30 at 10. Then payments will be made to the creditor holding the new secured claim as a Class 4 Claim. *Id.*, § 7.04.

For other claims, beginning in Month sixteen, Debtor's plan payments will be \$3,340.00 a month, and it is projected that all claims and expenses will be paid in full in twenty-two months. *Id.*, § 7.01.

However, in the proposed First Modified Plan, § 3.14, it provides that the dividend to creditors holding general unsecured claims will not be less than 0.00%, not 100%.

No Motion, noticed or *ex parte*, to confirm a modified plan has been filed.

This post-petition financing is consistent with the Chapter 13 Plan in this case and with Debtor's ability to fund that 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 Refinance filed by Austin Lee Pickering ("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 authorizes Austin Lee Pickering to refinance their mortgage and incur debt pursuant to the terms of the agreement, Exhibit 1, Dckt. 23.

IT IS FURTHER ORDERED the interest rate for the above agreement shall be ~~xxx%~~.

IT IS FURTHER ORDERED all other relief requested in the Motion is denied without prejudice, including any modification of the current confirmed plan.

FINAL RULINGS

12. [21-23102-E-13](#) AUSTIN JAMES MERRITT MOTION TO CONFIRM PLAN
[DEF-2](#) David Foyil 5-31-22 [71]

WITHDRAWN BY M.P.

Final Ruling: No appearance at the August 16, 2022 hearing is required.

The Motion to Confirm Plan is dismissed without prejudice.

Austin James Paul Merritt (“Debtor”)] having filed a “Withdrawal of Motion”, which the court construes to be an *Ex Parte* Motion to Dismiss the pending Motion on July 28, 2022, Dckt. 92; no prejudice to the responding party appearing by the dismissal of the Motion; the Debtor having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by David Cusick (“ the Chapter 13 Trustee”); the Ex Parte Motion is granted, the Debtor’s Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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

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

The Motion to Conform Plan filed by Austin James Paul Merritt (“the Debtor”) having been presented to the court, the Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 92, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

Final Ruling: No appearance at the August 16, 2022 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 Debtor, Debtor’s Attorney, and parties requesting special notice on July 15, 2022. By the court’s calculation, 32 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 10:30 a.m. on August 18, 2022 (specially set day and time), to be conducted in conjunction with the hearing on the Receiver’s Motion regarding the automatic stay and Motion to Employ Contractor filed by Debtor.

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

- A. Infeasible Plan
- B. Delinquency
- C. Not Best Effort

Trustee’s Status Report

On August 9, 2022, Trustee filed a Status Report (Dckt. 84) indicating:

- 1. Debtor remains delinquent \$500.

2. Debtor appeared at the continued First Meeting of Creditors and the Meeting has been continued to October 13, 2022.
3. Trustee does not believe Debtor knows enough about their finances to accurately testify to matters pertaining to the real properties.
4. The Plan does not provide for the claim of Gerard F. Keena II, Receiver, which was filed as secured and priority.

Debtor's Reply

On August 9, 2022, Debtor filed a reply (Dckt. 86) stating:

- A. Debtor's daughter, Vera Zhiry, makes the \$500 Plan payment and Debtor's other daughter, Lubyia Iyzoshuk, pays the mortgage payments.
- B. Debtor "intends to be current" on Plan payments.
- C. Lubyia is current on the mortgage payments.
- D. The Motion to Approve Contractor is pending.
- E. Debtor's Counsel has received cashier's checks and obtained releases from Richard Sanders, the Contractor. Bank of Marin is creating a blocked account as ordered by the court.
- F. Debtor has worked with the City, the general contractor, the Receiver's project manager and managing director, and discussed the scope of work necessary to abate the properties.

AUGUST 9, 2022 UPDATES AND SUPPLEMENTAL PLEADINGS

On August 8, 2022, the Chapter 13 Trustee filed an updated Status Report. Dckt. 84. The Trustee reports that the Debtor has made one \$500.00 plan payment and is delinquent \$500.00. The court notes that the Plan as proposed does not adequately address the Debtor's actual "plan" to fund, promptly make repairs to, and resolve all outstanding issues with the State Court Receiver. An amended plan will be necessary.

The Trustee also states that the First Meeting of Creditors could not be concluded because Debtor lacked knowledge of her finances as they relate to the Claire Avenue Properties. The First Meeting has been continued for Debtor to assemble the information for financing of the repairs, payment of taxes and insurance, and prosecution of a plan in this case.

On August 9, 2022, the Debtor filed her Reply to the Trustee's Objection to Confirmation, stating the following points:

- A. It is the Debtor's daughter, Vera Zhiry, who is to make the \$500.00 a month plan payment and Luyba Iyzoshuk who is to make the monthly house payments.
- B. It is Debtor's intention to be current on the Plan payments as of August 15, 2022.
- C. Debtor's daughter, Luyba Iyzoshuk, is the person who is the primary obligor on the two notes secured by the Claire Avenue Properties.
- D. A Motion has been filed to employ Richard Sanders, as the contractor, to do the necessary repairs. The hearing on the Motion is set for August 18, 2022, to be heard in conjunction with the hearing of the Receiver's Motion to allow him to take control of the Claire Avenue Properties.
- E. Debtor has obtained the cashier's checks for funds to be used for funding of the remedial work on the property and they are being deposited in a blocked account at the Bank of Marin.
- F. The Receiver, Receiver's Counsel, Receiver's Project Manager, Debtor's Contractor, Debtor's counsel, and the City's Building Inspector met on August 1, 2022, to discuss the scope of work to remediate the problems on the Claire Avenue Properties.
- G. The Reply includes a more detailed scope of work for remediation of the problems on the Properties.

Dckt. 86.

DISCUSSION

Trustee's objections are well-taken.

Infeasible Plan

Trustee alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). The plan calls for the mortgages due to JP Morgan Chase Bank to be paid as Class 4 by "Debtor's Daughter." Dckt. 29 at 4. Debtor does not name the daughter, nor provide any proof these payments have been paid by the daughter, and will be paid by the daughter.

According to the Trustee's best calculation with the available information it will take over 134 months to complete the Plan.

Trustee further alleges that Debtor's budget is unrealistic. Trustee cites Debtor's Schedule I. Upon the court's review, Debtor lists their husband as a dependent. Additionally, Debtor lists the following expenses:

Electricity, heat, natural gas.....\$200.57

Water, sewer, garbage collection.....	\$140.00
Telephone, cell phone, Internet, satellite, and cable services.....	\$50.00
Food and housekeeping supplies.....	\$400.00
Clothing, laundry, and dry cleaning.....	\$10.00
Personal care products and services.....	\$20.00
Medical and dental expenses.....	\$25.00
Transportation. Include gas, maintenance, bus or train.....	\$100.00
Entertainment, clubs, recreation, newspapers, magazines, and books..	\$10.00
Vehicle insurance.....	\$50.00

The court agrees with Trustee. The above budget appears particularly low for two individuals.

Delinquency

Debtor is \$500.00 delinquent in plan payments, which represents one month of the \$500.00 plan payment. Before the hearing, another plan payment will be due. According to Trustee, the Plan in § 2.01 calls for payments to be received by Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Not Best Effort

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

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

The Plan, (DN 29) proposes payments of \$500.00 per month for 36 months, which includes an "Additional Provision" to §7.01 of either the "ADULT CHILDREN" purchasing the "SUBJECT PROPERTY" or Debtor selling the "SUBJECT PROPERTY" within 18 months. The plan is dated June 8, 2022. The "ADULT CHILDREN" are not identified. The "SUBJECT PROPERTY" is not identified where Debtor shows on Schedule A/B they have ownership of two different real properties: 1049 Claire Ave and 1039 Claire Ave. Dckt. 28 at 3-4. Debtor does not identify what sale price is expected, so Trustee cannot determine if sufficient proceeds would be generated from the plan to pay claims. Debtor has no requirement in the plan to attempt to list and sell the property as early as possible, so that Debtor would not default under this provision if they did nothing for 17 months, which is unreasonable. Thus, the court may not approve the Plan.

Final Ruling: No appearance at the August 16, 2022 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 Office of the United States Trustee on July 8, 2022. By the court’s calculation, 39 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 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.

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Justin Leif Erickson and Elisabeth Grace Erickson (“Debtor”), have filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick (“Trustee”), filed a Non-Opposition on August 2, 2022. Dckt. 88. 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, Justin Leif Erickson and Elisabeth Grace Erickson (“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 July 8, 2022, 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.

15. [22-21435-E-13](#) **BRADLEY NYDEGGER** **OBJECTION TO CONFIRMATION OF**
[DPC-1](#) **Matthew DeCaminada** **PLAN BY DAVID P. CUSICK**
7-21-22 [25]

15 thru 16

Final Ruling: No appearance at the August 16, 2022 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 Debtor and Debtor's Attorney on July 21, 2022. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court has determined that oral argument will not be of assistance in rendering a decision in this matter.

The Objection to Confirmation of Plan is overruled.
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The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that:

A. Plan relies on pending motion to avoid lien

DISCUSSION

Reliance on Pending Motion

Trustee alleges the Debtor cannot afford to make Plan payments or comply with the Plan. 11 U.S.C. §1325(a)(6). The Debtor's Plan relies on the Motion to Avoid Lien of Petterson Dental Supply, which is set for hearing on August 16, 2022, the same day as this motion.

The Motion to Avoid Lien having been granted, Trustee's objection is moot.

IRS CLAIM

The Trustee also notes that while the Plan lists the Internal Revenue Service as having a Class 2(C) secured claim, which are secured claims reduced to \$0.00 pursuant to 11 U.S.C. § 506(a), the Internal Revenue Service has now filed Amended Proof of Claim 4-4 stating that its claim is unsecured. With the Proof of Claim controlling the amount asserted as secured, then the 0.00 amount does not conflict with Class 2(C) in the proposed plan.

The Objection having been overruled, counsel for Debtor shall deliver to the Chapter 13 Trustee a proposed order confirming the Plan, for the Trustee to approve and lodge with the court.

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

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

The 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 Bradley Stuart Nydegger's ("Debtor") Chapter 13 Plan filed on June 6, 2022, 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.

Final Ruling: No appearance at the August 16, 2022 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, Creditor, creditors, and Office of the United States Trustee on July 13, 2022. By the court’s calculation, 34 days’ notice was provided. 28 days’ notice is required.

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

<p>The Motion to Avoid Judicial Lien is granted.</p>

This Motion requests an order avoiding the judicial lien of Patterson Dental Supply Inc. (“Creditor”) against property of the debtor, Bradley Stuart Nydegger (“Debtor”) commonly known as 2306 Carmelo Way, Yuba City, California 95991 (“Property”).

A judgment was entered against Debtor in favor of Creditor in the amount of \$12,185.27. Exhibit A, Dckt. 23. An abstract of judgment was recorded with Sutter County on May 5, 2017, that encumbers the Property. *Id.*

Pursuant to Debtor’s Schedule A, the subject real property has an approximate value of \$420,000.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total \$16,225.27 as of the commencement of this case are stated on Debtor’s Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$420,000.00 on Schedule C. Dckt. 1.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Bradley Stuart Nydegger ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of Patterson Dental Supply Inc., California Superior Court for Sacramento County Case No. 06AM02907, recorded on May 5, 2017, Document No. 2017-0005729, with the Sutter County Recorder, against the real property commonly known as 2306 Carmelo Way, Yuba City, California 95991, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

Final Ruling: No appearance at the August 16, 2022 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 Debtor, Debtor’s Attorney on June 15, 2022. By the court’s calculation, 27 days’ notice was provided. 14 days’ notice is required.

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

The court has determined that oral argument will not be of assistance in rendering a decision in this matter.

<p>The Objection to Confirmation of Plan is overruled.</p>

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

- A. Debtor may not be able to afford Plan payments as their gross monthly income appears to be less than what is stated on their schedules.
- B. Debtor is delinquent on Plan payments.
- C. Debtor’s Plan relies on Valuing Collateral.

DISCUSSION

Trustee’s objections are well-taken.

Failure to Afford Plan Payment

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Trustee states, on Schedule I Debtor reports a gross monthly income of \$5,867.20. Dckt. 12. However, at the First Meeting of Creditors, held June 9, 2022, Debtor states he has been staying in Tennessee temporarily to care for his terminally ill parent. Additionally, Trustee received pay advices dated May 4, 2022 stating year-to-date Debtor has a gross income of \$7,990.20. Trustee is not clear on the current financial state of the Debtor to make Plan payments. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Counsel for the Debtor stated at the hearing that Debtor is working and can fund the Plan, now being back to regular work.

The court continues the hearing to allow Debtor the opportunity to file a Declaration providing his updated financial information.

Delinquency

Debtor is \$511.00 delinquent in plan payments, which represents one month of the \$511.00 plan payment. Before the hearing, another plan payment will be due. According to Trustee, the Plan in § 2.01 calls for payments to be received by Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

At the hearing, counsel for the Trustee reported that the delinquency remains.

Counsel for Debtor stated that his client has told him that the payments have been made on the eve the July 12, 2022 hearing.

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 Ally Financial. Debtor has filed a Motion to Value the Secured Claim of Ally Financial, Dckt. 18, set for hearing and granted on the same date as this objection. Therefore, this objection is resolved.

The Trustee concurred with Debtor's request for a continuance to afford the Debtor the opportunity to clear up the delinquency.

Trustee's Status Report

On August 1, 2022, Trustee filed a status report indicating Debtor is now current in Plan payments and requests the court deny Trustee's objection and confirm the "case." Dckt. 37.

AUGUST 16, 2022, HEARING:

The Trustee having requested that the court deny the Objection to Confirmation without prejudice in light of Debtor's and Debtor's counsel prosecution of this case and the default having been cured, the Objection to Confirmation is denied without prejudice.

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

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

The 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 Shannon Todd Butler’s (“Debtor”) Chapter 13 Plan filed on April 26, 2022, 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.

18. [21-23439-E-13](#) **JOLIE/MICHAEL BARKALOW** **MOTION TO CONFIRM PLAN**
[SLH-2](#) **Seth Hanson** **6-24-22 [55]**

Final Ruling: No appearance at the August 16, 2022 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 June 24, 2022. By the court’s calculation, 53 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy 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 Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The successor to debtors Jolie Ann Barkalow and Michael Allen Barkalow, Sean Percival, (“Successor to Debtor”), has provided evidence in support of confirmation. The Chapter 13 Trustee, David Cusick (“Trustee”), filed a Response indicating non-opposition on July 26, 2022. Dckt. 60. The 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 Chapter 13 Plan filed by the successor to debtors Jolie Ann Barkalow and Michael Allen Barkalow, Sean Percival, (“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 Chapter 13 Plan filed on June 24, 2022, 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.

Final Ruling: No appearance at the August 16, 2022 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 July 1, 2022. By the court's calculation, 46 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.

<p>The Motion for Allowance of Professional Fees is granted.</p>

Mary Ellen Terranella, the Attorney ("Applicant") for Judy Marie Sypnieski, 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 February 7, 2022, through June 13, 2022. Applicant requests fees in the amount of \$690.00. David Cusick the Chapter 13 Trustee, ("Trustee"), filed a Non Opposition. Dckt. 81.

APPLICABLE LAW

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not—

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

(II) necessary to the administration of the case.

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

Reasonable Fees

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

A. Were the services authorized?

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

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

Reasonable Billing Judgment

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

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

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

A review of the application shows that Applicant’s for the Estate include reviewing Trustee’s Motion to Dismiss, and filing of Opposition and preparing and filing Modified Plan and Motion to Approve Modified Plan. The court finds the services were beneficial to Client and the Estate and were reasonable.

“No-Look” Fees

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

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

...

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

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

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

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

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

Lodestar Analysis

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). The attorney may file a fee application, and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. For bankruptcy cases in the Ninth Circuit, “the primary method” to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v.*

Fitzsimmons (In re Yermakov), 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). “This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles Cty. Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional’s fees. *Gates v. Deukmejian*, 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.

Prepare and File Modified Plan and Motion to Approve Modified Plan: Applicant spent 6.05 hours in this category. Applicant prepared and filed the modified plan and the motion to approve the modified plan, responded to Trustee’s Opposition, and submitted the Order Modifying.

Review Trustee’s Motion to Dismiss and File Opposition: Applicant spent 1.75 hours in this category. Applicant reviewed the motion to dismiss and prepared to oppose the motion.

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
Mary Ellen Terranella	7.8	\$350.00	\$2,730.00
Total Fees for Period of Application			\$2,730.00

FEES ALLOWED

Fees

The unique facts surrounding the case, including the Debtor's unforeseen delinquency in Plan payments, and the windfall of a shortened plan, 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 \$690.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick ("the Chapter 13 Trustee") from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees	\$690.00
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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 Mary Ellen Terranella ("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 Mary Ellen Terranella is allowed the following fees and expenses as a professional of the Estate:

Mary Ellen Terranella , Professional Employed by Judy Marie
Sypnieski ("Debtor")

Fees in the amount of \$690.00

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 in a Chapter 13 case.

Final Ruling: No appearance at the August 16, 2022 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 Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 3, 2022. By the court's calculation, 56 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 court has determined that oral argument will not be of assistance in rendering a decision in this matter.

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

The debtor, Marc Anthony Diab ("Debtor") seeks confirmation of the Modified Plan because they lost their job and are now only working part-time, and because Debtor didn't initially fully realize the impact that the loss of income from Debtor's wife, who died shortly before Debtor filed this case, would have on his financial situation. Declaration, Dckt. 26.

The Modified Plan provides for \$1,600.00 monthly payments for the remaining life of the Plan, and a zero percent (0%) dividend to general unsecured claims totaling \$0.00. Modified Plan, Dckt. 24. 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 June 14, 2022. Dckt. 28. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in Plan payments.
- B. Debtor has ongoing mortgage payment issues.

DEBTOR'S REPLY

Debtor filed a reply on June 21, 2022 requesting the matter be continued to July 26, 2022 at 2:00 pm in order for Debtor to become current on their First Amended Chapter 13 Plan. Dckt. 31.

Although this would resolve the delinquency issue, there are still outstanding issues as discussed below.

DISCUSSION

Delinquency

The Chapter 13 Trustee asserts that Debtor is \$3,150.00 delinquent in plan payments under the modified plan, which represents multiple months of the plan payment, which proposes payments of \$2,100.00 through February 2022, then \$1,600.00 for each remaining month of the plan. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Ongoing Mortgage Payment Issues

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

Debtor must continue with the ongoing payment of \$1,314.16, not \$1,315.00. Debtor's Plan should be amended to reflect the proper ongoing payment.

The Trustee also notes that the Plan, as currently funded, will be insufficient for the ongoing mortgage for the 36th and 37th month. The Trustee states in the Opposition:

Trustee has \$2,807.98 balance on hand and shows the ongoing mortgage is due two payments before the payment is due in June 2022, (the 36th month), and July 2022, (the 37th month.) The balance on hand will pay the past due payments, but if only one more plan payment is paid of \$1,600.00, the Trustee will need and additional sum of approximately \$1,150 to pay the remaining ongoing mortgage payments.

Dckt. 28 at 2:17-23. At the hearing, counsel for the Trustee reported that the delinquency remains. Debtor requested a short continuance to try and address this in light of the facts

The hearing is continued to August 16, 2022 at 2:00 p.m.

Trustee's Status Report

On August 2, 2022, Trustee filed a status report indicating Debtor is current on the pending Plan. Dckt. 35. Trustee, therefore, no longer opposes this Motion.

AUGUST 16, 2022, HEARING:

The Trustee having confirmed that the Debtor is current and that the Trustee no longer opposes the Motion, the Motion is granted and the proposed Chapter 13 Plan 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, Marc Anthony Diab ("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 Marc Anthony Diab's ("Debtor") Chapter 13 Plan filed on May 3, 2022, 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.