



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

Chief Judge Fredrick E. Clement
Sacramento Federal Courthouse
501 I Street, 7th Floor
Courtroom 28, Department A
Sacramento, California

DAY: TUESDAY
DATE: AUGUST 29, 2023
CALENDAR: 9:00 A.M. CHAPTER 13 CASES

Unless otherwise ordered, all matters before Chief Judge Fredrick E. Clement shall be heard simultaneously: (1) **IN PERSON** in Courtroom 28, (2) via **ZOOMGOV VIDEO**, (3) via **ZOOMGOV TELEPHONE**, and (4) via **COURTCALL**.

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1. Review the [Pre-Hearing Dispositions](#) prior to appearing at the hearing.
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PRE-HEARING DISPOSITION INSTRUCTIONS

RULINGS

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

"No Ruling" means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

"Tentative Ruling" means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. However, non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

"Final Ruling" means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: **"[Since posting its original rulings, the court has changed its intended ruling on this matter]"**.

ERRORS IN RULINGS

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("\$880," not "\$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. [23-22000](#)-A-13 **IN RE: JEFFERSON/KRISTINE AGUIRRE**
[KMM-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY TOYOTA MOTOR CREDIT
CORPORATION
7-31-2023 [\[17\]](#)

THOMAS AMBERG/ATTY. FOR DBT.
KIRSTEN MARTINEZ/ATTY. FOR MV.
WITHDRAWN BY M.P.

Final Ruling

This matter has been withdrawn by the objecting creditor, Fed. R. Civ. P. 41. Accordingly, the objection will be removed from the calendar. No appearances are required.

2. [23-21308](#)-A-13 **IN RE: RICHARD/LYNDA BYERS**
[CK-1](#)

MOTION TO MODIFY PLAN
7-18-2023 [\[22\]](#)

CATHERINE KING/ATTY. FOR DBT.
RESPONSIVE PLEADING

Final Ruling

Motion: Modify Chapter 13 Plan
Disposition: Denied without prejudice
Order: Civil minute order

The debtors seek modification of their Chapter 13 plan. For the following reasons the motion will be denied without prejudice.

NOTICE

"The due process requirements for notice are relatively minimal; they merely require notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *In re 701 Mariposa Project, LLC*, 514 B.R. 10, 15 (B.A.P. 9th Cir. 2014) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

LBR 9014-1(f)

In the Eastern District of California notice of a motion must comply with the requirement of LBR 9014-1(f)(1), (2). The rule allows a choice of two different notice periods. LBR 9014-1(f)(1) requires 28 days' notice of the motion and written opposition to be filed with the court and served on the moving party not later than 14 days prior to the hearing on the motion. Conversely, LBR 9014-1(f)(2) requires only 14 days' notice of the motion and does not require the

opposing party to file and serve written opposition prior to the hearing on the motion. See, LBR 9014-1(f)(1), (2).

LBR 9014-1(d)(3)(B)(i)

The notice of hearing shall advise potential respondents *whether and when written opposition must be filed*, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition.

. . .

LBR 9014-1(d)(3)(B) (emphasis added).

The notice filed and served in this matter states that the motion was filed pursuant to "Local Rule of Practice 9014(f)(2)". See, *Notice*, 1:18, ECF No. 23.

The notice further provides as follows.

Opposition, if any, to the granting of the motion shall be in writing and shall be served and filed with the Court by the responding party at least fourteen (14) days preceding the date or continued date of the hearing.

Id., 2:1-3.

The notice contains conflicting provisions as it indicates that it is brought pursuant to LBR 9014-1(f)(2) which does not require written opposition and allows opposition at the hearing, but also states that in this matter written opposition is required.

The court cannot determine whether the motion is brought under LBR 9014-1(f)(1) or (f)(2). Nor will the court presume the conclusion an opposing party might reach about whether written opposition is necessary. The notice given in this matter does not satisfy the requirements of LBR 9014(d)(3)(B).

Creditors and parties in interest have not received "notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *SEC v. Ross*, 504 F.3d 1130, 1138 (9th Cir. 2007) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

The court will deny the motion without prejudice.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

The debtor's motion to modify has been presented to the court. Given the procedural deficiencies discussed by the court in its ruling,

IT IS ORDERED that the motion is denied without prejudice.

3. [23-21112](#)-A-13 **IN RE: JANET ROBERTS**
[DPC-2](#)

MOTION TO DISMISS CASE
7-27-2023 [\[35\]](#)

BRIAN COGGINS/ATTY. FOR DBT.
RESPONSIVE PLEADING

Final Ruling

Motion: Dismiss Case

Notice: LBR 9014-1(f)(1); written opposition filed by the debtor

Disposition: Granted

Order: Civil minute order

Opposition Due: August 15, 2023

Opposition Filed: August 15, 2023 - timely

Cause: 11 U.S.C. § 1307(c)(1) - Plan Delinquency; failure to attend meeting of creditors; failure to file amended plan

Best Interests of Creditors/Estate: Dismiss

The chapter 13 trustee moves to dismiss this case, asserting that cause exists under § 1307(c)(1) as the debtor has failed to make all payments due under the plan. The trustee contends that the plan payments are delinquent in the amount of \$973.00, with another payment of \$973.00 due August 25, 2023.

The trustee also requests dismissal because the debtor has failed to file an amended plan after the court sustained the trustee's objection to confirmation of the initial plan on June 27, 2023. Finally, the trustee contends that the debtor's failure to attend the meeting of creditors also constitutes unreasonable delay which is prejudicial to creditors under 11 U.S.C. § 1307(c)(1).

A review of the court's docket shows that the debtor failed to appear at three scheduled meetings of creditors: May 18, 2023; June 22, 2023; and July 20, 2023. Neither has the debtor filed an amended plan.

LBR 9014-1(f)(1)(B)

Opposition. Opposition, if any, to the granting of the motion shall be in writing and *shall be served and filed with the Court* by the responding party at least fourteen (14) days preceding the date or continued date of the hearing. *Opposition shall be accompanied by evidence establishing its factual allegations.*

Without good cause, no party shall be heard in opposition to a motion at oral argument if written opposition to the motion has not been timely filed. Failure of the responding party to timely file written opposition may be deemed a waiver of any opposition to the granting of the motion or may result in the imposition of sanctions.

LBR 9014-1(f)(1)(B) (emphasis added).

The debtor filed a timely opposition which consists solely of an unsworn statement by debtor's counsel. The opposition is not accompanied by any admissible evidence. Moreover, no proof of service was filed which evidences that the opposition was served on all interested parties as required. Opposition, ECF No. 39.

The opposition does not comply with LBR 9014-1(f)(1)(B). A declaration is required to prove the contentions in the opposition and to provide additional relevant information. For example, there is no evidence explaining the reasons the plan payments became delinquent or when they were brought current as the debtor contends. There is no explanation why an amended plan has not yet been filed. Most importantly the opposition contains no explanation for the debtor's failure to attend all three of the scheduled 341 meetings of creditors. The opposition states that the "[p]rior 341 hearing was missed due to an error in communication from her attorney." Opposition, 1:28-29, ECF No. 39. This does not explain why the debtor failed to appear at any of the 3 meetings which were scheduled. Nor does it explain why counsel failed to appear at all three of the meetings.

The debtor's opposition does not fully resolve the grounds for dismissal. An amended plan has not yet been filed.

Moreover, the court gives no weight to an opposition which fails to provide sworn testimony by the party opposing the motion. Unsworn statements by counsel are not evidence and will not be considered.

The debtor has failed to file any admissible evidence in opposition to the motion. The debtor has failed to file an amended plan or to attend 3 scheduled meetings of creditors. The court finds that this constitutes unreasonable delay which is prejudicial to creditors under 11 U.S.C. § 1307(c)(1). The court will dismiss the case.

11 U.S.C. § 1307(c)

Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including—

...

11 U.S.C. § 1307(c).

The court finds that dismissal is in the best interests of the creditors and the estate. This case has not been previously converted from a chapter 7. The court will dismiss the case.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The trustee's motion to dismiss has been presented to the court. Having considered the motion, the opposition, responses, and oral argument at the hearing, if any, and good cause appearing,

IT IS ORDERED that the motion is granted. The debtor has failed to file an amended plan, and has failed to attend 3 scheduled meetings of creditors. Each of these bases constitutes cause to dismiss this case. 11 U.S.C. § 1307(c)(1). The court hereby dismisses this case.

4. [23-20616](#)-A-13 **IN RE: LINDA CATRON**

OBJECTION TO CONFIRMATION OF PLAN BY THE BANK OF NEW YORK
MELLON
7-10-2023 [\[60\]](#)

KRISTIN ZILBERSTEIN/ATTY. FOR MV.
DEBTOR DISMISSED: 7/28/23
RESPONSIVE PLEADING

Final Ruling

This case was dismissed on July 28, 2023. Accordingly, this objection will be removed from the calendar. No appearances are required.

5. [19-22719](#)-A-13 **IN RE: JOSEPH HYLER AND ANDREA GERBER**
[PLG-1](#)

MOTION TO MODIFY PLAN
7-20-2023 [\[68\]](#)

RABIN POURNAZARIAN/ATTY. FOR DBT.
RESPONSIVE PLEADING

Final Ruling

Motion: Modify Chapter 13 Plan

Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition filed by the trustee

Disposition: Continued to October 3, 2023, at 9:00 a.m.

Order: Civil minute order

The motion requests modification of the Chapter 13 plan in this case. See 11 U.S.C. §§ 1322, 1325, 1329; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(2). The Chapter 13 trustee opposes the motion, objecting to the modification.

Chapter 13 plan modification is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. "[T]he only limits on modification are those set forth in the language of the Code itself, coupled with the bankruptcy judge's discretion and good judgment in reviewing the motion to modify." *In re Powers*, 202 B.R. 618, 622 (B.A.P. 9th Cir. 1996).

PLAN FEASIBILITY

The proposed plan must be feasible. 11 U.S.C. § 1325(a)(6). Feasibility is a "factual determination" as to the plan's "reasonable likelihood of success." *First Nat'l Bank of Boston v. Fantasia (In re Fantasia)*, 211 B.R. 420, 423 (B.A.P. 1st Cir. 1997). The bankruptcy court needs to "be satisfied that the debtor has the present as well as the future financial capacity to comply with the terms of the plan." *Id.* As one court summarized feasibility, "Thus, a plan is not feasible and is not confirmable if a debtor's income will not support the plan's proposed payments. *In re Barnes*, 275 B.R. 889, 894 (Bankr. E.D. Cal.2002) ("[T]he debtors showed no disposable income with which to fund a plan.... [T]he debtors have been unable to actually pay the amount projected ... to the trustee."); *In re Bernardes*, 267 B.R. 690, 695 (Bankr. D.N.J. 2001) ("While the feasibility requirement is not rigorous ... the plan proponent must, at minimum, demonstrate that the Debtor's income exceeds expenses by an amount sufficient to make the payments proposed by the plan."); *In re Wilkinson*, 99 B.R. 366, 369 (Bankr. N.D. Ohio 1989) ("[D]ebtors will not be able to comply with the plan and make all payments thereunder."). *In re Buccolo*, 397 B.R. 527, 530 (Bankr. D.N.J. 2008), *aff'd*, 2009 WL 2132435 (D.N.J. July 13, 2009).

The trustee opposes the motion on multiple bases contending that the proposed plan: 1) contains conflicting plan provisions which render

it not feasible; 2) fails to provide for payments which the trustee has made to Class 2 creditors pursuant to the confirmed Chapter 13 plan; 3) fails to provide a legal basis for the motion; and 4) presents conflicting information regarding the debtors' income and expenses.

IMPROPER AND UNCLEAR BASIS FOR OPPOSITION

Opposition Fails to Cite Applicable Code Sections

Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

11 U.S.C. § 1329(b) (1) (emphasis added).

The trustee's opposition states:

II. BEST EFFORT. The Debtors' Plan is *not the Debtors' best effort under 11 U.S.C. § 1325(b)* or in the alternative the Plan has not been proposed in good faith under 11 U.S.C.

Opposition, 2:27-28, ECF No. 80 (emphasis added).

The trustee cites 11 U.S.C. § 1325(b) as a basis to oppose this motion to modify. Section 1325(b) is inapplicable in motions to modify under 11 U.S.C. § 1329(b) (1). The trustee pleads in the alternative that the plan is not proposed in good faith but fails to cite any applicable code section.

In support of his contention that the plan is not the debtors' best effort or proposed in good faith the trustee argues that the debtors have failed to cite appropriate authority as required stating:

The motion does not cite applicable code sections such as 11 U.S.C. §1325 and 1329, which are required under LBR 9014-1(d), and FRBP 9013. While the legal authority is not novel or unique, the reason counsel should include it is to alert all parties to the basis for the proceeding.

Opposition, 3:1-5, ECF No. 80.

The court agrees with the trustee and finds that the pleading requirements of LBR 9014-1(d) (3) (A) and Fed. R. Bankr. 9013 are *applicable to both parties*. Accordingly, the court will require both parties to amend their pleadings. The court will continue the hearing on this matter to allow the trustee and the debtors to amend their pleadings in this matter.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

IT IS ORDERED that the hearing on the motion shall be continued to October 3, 2023, at 9:00 a.m. Not later than September 5, 2023, the trustee shall file and serve amended opposition: 1) restating each basis for opposition to the motion; 2) providing argument and evidence in support of his position; and 3) in compliance with this court's ruling. Any amended opposition shall comply with Fed. R. Bankr. P. 9013, LBR 9014-1(d)(3)(A), and shall not cite authority which is inapplicable as indicated in this court's ruling.

IT IS FURTHER ORDERED that unless this case is voluntarily converted to chapter 7, or dismissed, the debtor(s) shall file and serve a written reply, if any, to the opposition not later than September 19, 2023. The reply shall specifically address each issue raised in trustee's amended opposition, state whether the issue is disputed or undisputed, include admissible evidence, and identify any amended schedules, in support of the debtors' position. The reply shall comply with Fed. R. Bankr. P. 9013, LBR 9014-1(d)(3)(A).

IT IS FURTHER ORDERED that if the debtors elect to file a further modified plan in lieu of filing a reply, then a modified plan shall be filed, served, and set for hearing not later than September 19, 2023. The evidentiary record will close after September 19, 2023. If the debtors do not timely file a modified plan or a written reply, this motion will be denied on the grounds stated in the trustee's amended opposition without further notice or hearing.

6. [22-21422](#)-A-13 **IN RE: MARTIN/MONIQUE ARCHULETA**
[DPC-2](#)

CONTINUED MOTION TO DISMISS CASE
6-21-2023 [\[58\]](#)

MARK BRIDEN/ATTY. FOR DBT.
RESPONSIVE PLEADING

No Ruling

7. [22-22222](#)-A-13 **IN RE: RODERICK SINGLETON**
[KLG-3](#)

MOTION TO CONFIRM PLAN
7-18-2023 [\[81\]](#)

ARETE KOSTOPOULOS/ATTY. FOR DBT.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Confirm Chapter 13 Plan

Notice: LBR 3015-1(d)(1), 9014-1(f)(1); written opposition filed by the trustee

Disposition: Denied

Order: Civil minute order

The motion requests confirmation of the Chapter 13 plan in this case. See 11 U.S.C. §§ 1322, 1323, 1325; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(1)-(2). The Chapter 13 trustee opposes the motion, objecting to confirmation.

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1325 and by Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 3015-1. The debtor has the burden of proving that the plan complies with all statutory requirements of confirmation. *In re Andrews*, 49 F.3d 1404, 1407-08 (9th Cir. 1995); *In re Barnes*, 32 F.3d 405, 407-08 (9th Cir. 1994).

PLAN FEASIBILITY

The proposed plan must be feasible. 11 U.S.C. § 1325(a)(6). Feasibility is a "factual determination" as to the plan's "reasonable likelihood of success." *First Nat'l Bank of Boston v. Fantasia (In re Fantasia)*, 211 B.R. 420, 423 (B.A.P. 1st Cir. 1997). The bankruptcy court needs to "be satisfied that the debtor has the present as well as the future financial capacity to comply with the terms of the plan." *Id.* As one court summarized feasibility, "Thus, a plan is not feasible and is not confirmable if a debtor's income will not support the plan's proposed payments. *In re Barnes*, 275 B.R. 889, 894 (Bankr. E.D. Cal.2002) ("[T]he debtors showed no disposable income with which to fund a plan.... [T]he debtors have been unable to actually pay the amount projected ... to the trustee."); *In re Bernardes*, 267 B.R. 690, 695 (Bankr. D.N.J. 2001) ("While the feasibility requirement is not rigorous ... the plan proponent must, at minimum, demonstrate that the Debtor's income exceeds expenses by an amount sufficient to make the payments proposed by the plan."); *In re Wilkinson*, 99 B.R. 366, 369 (Bankr. N.D. Ohio 1989) ("[D]ebtors will not be able to comply with the plan and make all payments thereunder."). *In re Buccolo*, 397 B.R. 527, 530 (Bankr. D.N.J. 2008), *aff'd*, 2009 WL 2132435 (D.N.J. July 13, 2009).

Plan Delinquency

The trustee indicates that the plan payments are delinquent in the amount of \$307.70. The plan cannot be confirmed if the plan payments are not current.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The debtor's motion to confirm a chapter 13 plan has been presented to the court. Having considered the motion together with papers filed in support and opposition to it, and having heard the arguments of counsel, if any, and good cause appearing, presented at the hearing,

IT IS ORDERED that the motion is denied. The court denies confirmation of the chapter 13 plan.

8. [23-21724](#)-A-13 **IN RE: MARK/CYRIL SENORES**

OBJECTION TO CLAIM OF CEFCU, CLAIM NUMBER 9
7-12-2023 [\[23\]](#)

TRACY WOOD/ATTY. FOR DBT.
8/14/2023 INSTALLMENT FEE PAID \$80

Final Ruling

Objection: Claim

Disposition: Overruled without prejudice

Order: Civil minute order

The debtors object to the claim of CEFCU, Claim No. 9. For the following reasons the objection will be overruled without prejudice.

SERVICE AND NOTICE

As of November 1, 2022, the court adopted Local Bankruptcy Rules 2002-3, 9036-1 and 7005-1 (requiring attorneys and trustees to use a standardized Certificate of Service, EDC 7-005).

Use of Form EDC 7-005 is Mandatory

The service of pleadings and other documents in adversary proceedings, contested matters in the bankruptcy case, and all other proceedings in the Eastern District of California Bankruptcy Court by *either attorneys, trustees, or other Registered*

Electronic Filing System Users shall be documented using the Official Certificate of Service Form (Form EDC 007-005) adopted by this Court.

LBR 7005-1 (emphasis added).

The form certificate of service is intended to allow parties to memorialize service efficiently and accurately, and to aid the court in ensuring sufficient service is achieved in each proceeding. Pursuant to LBR 7005-1 use of Form EDC 7-005 is mandatory in this matter.

Dismissal of Action for Failure to Comply with Local Rules

Failure of counsel or of a party to comply with these Rules, with the Federal Rules of Civil Procedure or the Federal Rules of Bankruptcy Procedure, or with any order of the Court may be grounds for imposition of any and all sanctions authorized by statute or rule or within the inherent power of the Court, including, without limitation, *dismissal of any action*, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions.

LBR 1001-1(g) (emphasis added).

The debtors have failed to use Form EDC 7-005 in memorializing service in this matter. The objection will be overruled without prejudice.

PROOF OF SERVICE NOT FILED AS SEPARATE DOCUMENT

Local Bankruptcy Rule 9014-1(e)(3) provides, "The proof of service for all pleadings and documents filed in support or opposition to a motion shall be filed as a separate document and shall bear the Docket Control Number. Copies of the pleadings and documents served shall not be attached to the proof of service. Instead, the proof of service shall identify the title of the pleadings and documents served." The proof of service is attached to the notice of objection, ECF No. 23.

The court finds the manner of service to violate Local Bankruptcy Rule 9014-1(e)(3). In the future, failure to following local rules may result in denial of the motion or other sanctions. LBR 1001-1(g).

OBJECTION VIOLATES LBR 9014-1(c)(1)

The lack of a docket control number on the papers filed in this matter violates the court's local rules. LBR 9014-1(c)(1) mandates the use of docket control numbers to be used on each document filed with the bankruptcy court in this district, including proofs of service.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

The debtors' Objection to Claim has been presented to the court. Given the procedural deficiencies discussed by the court in its ruling,

IT IS ORDERED that the objection is overruled without prejudice.

9. [23-22232](#)-A-13 **IN RE: MARVIN SINGLETON AND NICOLE SMITH**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
8-11-2023 [\[21\]](#)

THOMAS AMBERG/ATTY. FOR DBT.

Final Ruling

As the installment fee has been paid, the order to show cause is discharged. The case will remain pending.

10. [22-22935](#)-A-13 **IN RE: ANTON NEMTYSHKIN**
[DPC-1](#)

CONTINUED MOTION TO DISMISS CASE
7-14-2023 [\[29\]](#)

MARK SHMORGON/ATTY. FOR DBT.

Final Ruling

Motion: Dismiss Case

Notice: Continued from August 22, 2023

Disposition: Denied

Order: Civil minute order

The hearing on this motion was continued from August 22, 2023, to allow for hearing on the debtor's motion to modify the chapter 13 plan. The motion to modify, (MS-2) has been granted. Accordingly, the court will deny the motion.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The trustee's motion to dismiss has been presented to the court. Having considered the motion, the opposition, responses, and good cause appearing,

IT IS ORDERED that the motion is denied.

11. [22-22935](#)-A-13 **IN RE: ANTON NEMTYSHKIN**
[MS-2](#)

MOTION TO MODIFY PLAN
7-21-2023 [\[38\]](#)

MARK SHMORGON/ATTY. FOR DBT.
RESPONSIVE PLEADING

Final Ruling

Motion: Modify Chapter 13 Plan

Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition filed by the trustee

Disposition: Granted

Order: Civil minute order

The motion requests modification of the Chapter 13 plan in this case. See 11 U.S.C. §§ 1322, 1325, 1329; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(2). The Chapter 13 trustee opposes the motion, objecting to the modification.

Chapter 13 plan modification is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. "[T]he only limits on modification are those set forth in the language of the Code itself, coupled with the bankruptcy judge's discretion and good judgment in reviewing the motion to modify." *In re Powers*, 202 B.R. 618, 622 (B.A.P. 9th Cir. 1996).

PLAN FEASIBILITY

The proposed plan must be feasible. 11 U.S.C. § 1325(a)(6). Feasibility is a "factual determination" as to the plan's "reasonable likelihood of success." *First Nat'l Bank of Boston v. Fantasia (In re Fantasia)*, 211 B.R. 420, 423 (B.A.P. 1st Cir. 1997). The bankruptcy court needs to "be satisfied that the debtor has the present as well as the future financial capacity to comply with the terms of the plan." *Id.* As one court summarized feasibility, "Thus, a plan is not feasible and is not confirmable if a debtor's income will not support the plan's proposed payments. *In re Barnes*, 275 B.R. 889, 894 (Bankr. E.D. Cal.2002) ("[T]he debtors showed no disposable income with which to fund a plan.... [T]he debtors have been unable to actually pay the amount projected ... to the trustee."); *In re Bernardes*, 267 B.R. 690, 695 (Bankr. D.N.J. 2001)

("While the feasibility requirement is not rigorous ... the plan proponent must, at minimum, demonstrate that the Debtor's income exceeds expenses by an amount sufficient to make the payments proposed by the plan."); *In re Wilkinson*, 99 B.R. 366, 369 (Bankr. N.D. Ohio 1989) ("[D]ebtors will not be able to comply with the plan and make all payments thereunder."). *In re Buccolo*, 397 B.R. 527, 530 (Bankr. D.N.J. 2008), *aff'd*, 2009 WL 2132435 (D.N.J. July 13, 2009).

The trustee contends the plan is not feasible because the amounts proposed have not been paid. Specifically, the plan states that payments totaling \$22,610.00 were paid through month 7. Chapter 13 Plan, Section 7.01, ECF No. 42. The trustee indicates that \$25,060.00 has come due during this same period, and therefore the plan payments are delinquent.

The debtor has filed a reply which concedes the trustee's opposition. Reply, ECF No. 47. The debtor states that the delinquency was caused by a drafting error by debtor's counsel who intended that month 8 is the period during which a total of \$22,610.00 was to be paid. The debtor offers to correct this by providing that \$22,610.00 is due as of month 8 in the order confirming the modified plan.

Ordinarily the court would not allow the change in the order to correct the error. However, in this case the percentage to be paid to the unsecured creditors is 0%, and it appears to the court that the other provisions of the plan will fund even with the adjustment in the order. The court will hear from the trustee regarding the plan calculation and whether the minor change in the order will resolve his opposition.

TRUSTEE STATUS REPORT

The trustee filed a status report in his motion to dismiss (DPC-1), ECF No. 56. In his report the trustee concurs with the debtor's proposal to correct the error in the modified plan through the order confirming the modified plan.

Because the trustee has agreed to the debtor's proposed changes to the modified plan the court will grant the motion with the following change in the order confirming the modified plan: "As of month 8 Debtor has paid a total of \$22,610.00, and then shall pay \$2,450.00 for months 9 through 60."

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The debtor's motion to modify a chapter 13 plan has been presented to the court. Having considered the motion together with papers filed in support and opposition to it, and having heard the

arguments of counsel, if any, and good cause appearing, presented at the hearing,

IT IS ORDERED that the motion is granted. The debtor shall submit an order, signed by the Chapter 13 trustee which is consistent with the court's ruling.

12. [23-22042](#)-A-13 **IN RE: CASSANDRA LUTTRELL**
[DPC-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
7-27-2023 [\[12\]](#)

PAULDEEP BAINS/ATTY. FOR DBT.

Final Ruling

Objection: Trustee's Objection to Confirmation of Plan

Notice: LBR 3015-1(c)(4), 9014-1(f)(2); no written opposition required

Disposition: Withdrawn by the moving party

Order: Civil minute order

The Chapter 13 trustee objects to confirmation of the debtor(s) plan.

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1325 and by Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 3015-1. The debtor has the burden of proving that the plan complies with all statutory requirements of confirmation. *In re Andrews*, 49 F.3d 1404, 1407-08 (9th Cir. 1995); *In re Barnes*, 32 F.3d 405, 407-08 (9th Cir. 1994).

TRUSTEE WITHDRAWAL OF OBJECTION – Fed. R. Civ. P. 41

The trustee filed a timely request to dismiss his motion under Fed. R. Civ. P. 41; Fed. R. Bankr. P. 9014, 7041.

Federal Rule of Civil Procedure 41 governs the circumstances where a party may withdraw a motion or objection. Fed. R. Civ. P. 41, *incorporated by* Fed. R. Bankr. P. 7041, 9014(c) (applying rule dismissal of adversary proceedings to contested matters). A motion or objection may be withdrawn without a court order only if it has not been opposed or by stipulation "signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A). In all other instances, a motion or objection may be withdrawn "only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2).

Here, the Chapter 13 trustee has signaled his abandonment of his objection to confirmation. Neither the debtor(s), nor any creditor, has expressed opposition to the withdrawal of the trustee's objection. No unfair prejudice will result from withdrawal of the objection and the court will accede to the trustee's request.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

IT IS ORDERED that the trustee's objection to confirmation is withdrawn.

13. [20-21047](#)-A-13 **IN RE: PAUL DENNO AND SANDRA MURRAY**
[MWB-8](#)

CONTINUED MOTION TO MODIFY PLAN
4-24-2023 [\[209\]](#)

MARK BRIDEN/ATTY. FOR DBT.

Final Ruling

Motion: Modify Chapter 13 Plan

Notice: Continued from June 27, 2023

Disposition: Denied

Order: Civil minute order

The motion requests modification of the Chapter 13 plan in this case. See 11 U.S.C. §§ 1322, 1325, 1329; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(2). The Chapter 13 trustee opposes the motion, objecting to the modification.

Chapter 13 plan modification is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. "[T]he only limits on modification are those set forth in the language of the Code itself, coupled with the bankruptcy judge's discretion and good judgment in reviewing the motion to modify." *In re Powers*, 202 B.R. 618, 622 (B.A.P. 9th Cir. 1996).

The hearing on this motion was continued to allow the debtors to augment the evidentiary record in support of the motion. The hearing was further continued because the debtors' attorney experienced a medical emergency.

PLAN FEASIBILITY

The proposed plan must be feasible. 11 U.S.C. § 1325(a)(6). Feasibility is a "factual determination" as to the plan's "reasonable likelihood of success." *First Nat'l Bank of Boston v. Fantasia (In re Fantasia)*, 211 B.R. 420, 423 (B.A.P. 1st Cir. 1997). The bankruptcy court needs to "be satisfied that the debtor has the present as well as the future financial capacity to comply with the terms of the plan." *Id.* As one court summarized feasibility, "Thus, a plan is not feasible and is not confirmable if a debtor's

income will not support the plan's proposed payments. *In re Barnes*, 275 B.R. 889, 894 (Bankr. E.D. Cal.2002) ("[T]he debtors showed no disposable income with which to fund a plan.... [T]he debtors have been unable to actually pay the amount projected ... to the trustee."); *In re Bernardes*, 267 B.R. 690, 695 (Bankr. D.N.J. 2001) ("While the feasibility requirement is not rigorous ... the plan proponent must, at minimum, demonstrate that the Debtor's income exceeds expenses by an amount sufficient to make the payments proposed by the plan."); *In re Wilkinson*, 99 B.R. 366, 369 (Bankr. N.D. Ohio 1989) ("[D]ebtors will not be able to comply with the plan and make all payments thereunder."). *In re Buccolo*, 397 B.R. 527, 530 (Bankr. D.N.J. 2008), *aff'd*, 2009 WL 2132435 (D.N.J. July 13, 2009).

Sale of Real Property

The feasibility of the proposed plan depends upon the successful sale of real property located at 24 Whippoorwill Circle, Shingletown, California, in an amount which completes the plan payments.

The proposed modified plan calls for the sale of property by December 31, 2023. Chapter 13 Plan, Section 7.01, ECF No. 212. This leaves the debtors only 4 months to market and sell the property, and to close escrow. Without successfully closing the sale by December 31, 2023, the plan will not fund.

The debtors filed supplemental declarations and exhibits on July 17, 2023, ECF Nos. 232, 233. The information provided in the declaration and exhibits is cursory and not easily understood.

The declarations submitted by the debtors do not provide any of the following relevant information: 1) whether the property is currently listed for sale; 2) the name of the real estate broker/agent marketing the property; 3) the listed price.

The exhibits provide a chart which shows that one buyer demonstrated interest in the property in June 2023, but it is unclear if any further efforts have been made to market the property. Moreover, as the trustee has observed, the debtors have not filed any motion to approve employment of a real estate broker in this matter.

DEBTOR REPLY

On August 21, 2023, the debtors filed a declaration and exhibit which described their desire to complete their Chapter 13 plan, ECF Nos. 241, 242. The court does not doubt the debtors' desire to do so. However, the Chapter 13 trustee has called into question the feasibility of the plan based upon the proposed sale of the real property described above in this ruling. The debtors' reply does not provide sufficient information. The court and the trustee must evaluate the proposed plan and determine if it is feasible under 11 U.S.C. § 1325(a)(6). It is impossible to do so without an understanding of the amounts which could likely be paid into the plan. Basic facts surrounding the proposed sale of the real property are fundamental to this determination and they have not

been provided. Without knowing the list price, how and with whom the property is listed, as indicated above the court cannot evaluate the plan's feasibility.

The court finds that the evidence proffered is insufficient to support the feasibility of the proposed plan.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The debtors' motion to modify a chapter 13 plan has been presented to the court. Having considered the motion together with papers filed in support and opposition to it, and having heard the arguments of counsel, if any, and good cause appearing, presented at the hearing,

IT IS ORDERED that the motion is denied. The court denies modification of the chapter 13 plan.

14. [23-21564](#)-A-13 **IN RE: TAMARA NELSON**
[DPC-2](#)

MOTION TO DISMISS CASE
7-27-2023 [\[21\]](#)

BRUCE DWIGGINS/ATTY. FOR DBT.

Final Ruling

Motion: Dismiss Case

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Civil minute order

Opposition Due: August 15, 2023

Opposition Filed: Unopposed

Cause: 11 U.S.C. § 1307(c)(1) - Plan Delinquency; failure to attend meeting of creditors; failure to file amended plan

Best Interests of Creditors/Estate: Dismiss

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

CASE DISMISSAL

The chapter 13 trustee moves to dismiss this chapter 13 case for delinquency in payments under the chapter 13 plan. For the reasons stated in the motion, cause exists under § 1307(c)(1) to dismiss the case. Payments under the plan are delinquent in the amount of \$4,308.22 with a further payment of \$2,154.11 due August 25, 2023.

The trustee further contends that the debtor: 1) failed to attend the meeting of creditors on July 20, 2023; and 2) failed to file an amended plan after the trustee's objection to the initial plan was sustained on June 25, 2023.

A review of the docket shows that an amended plan has not been filed.

The court finds that each of the trustee's contentions is a basis for dismissal under 11 U.S.C. § 1307(c)(1). The court will grant the motion.

11 U.S.C. § 1307(c)

Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including—

...

11 U.S.C. § 1307(c).

The court finds that dismissal is in the best interests of the creditors and the estate. This case has not been previously converted from a chapter 7.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The trustee's motion to dismiss this chapter 13 case has been presented to the court. Having entered the default of respondent debtor for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted because of the delinquency under the chapter 13 plan in this case, the debtor's failure to file an amended plan, and the debtor's failure to attend the meeting of creditors. The court hereby dismisses this case.

15. [20-22267](#)-A-13 **IN RE: KEVIN NORMAN**
[RDW-1](#)

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
6-21-2023 [\[180\]](#)

MARY TERRANELLA/ATTY. FOR DBT.
REILLY WILKINSON/ATTY. FOR MV.
SUTTER COMMERCIAL CAPITAL INC. VS.

No Ruling

16. [18-27876](#)-A-13 **IN RE: WILLIAM/TONJA JARRELL**
[MMM-2](#)

MOTION TO MODIFY PLAN
7-24-2023 [\[48\]](#)

MOHAMMAD MOKARRAM/ATTY. FOR DBT.
TRUSTEE NON-OPPOSITION

Final Ruling

Motion: Modify Chapter 13 Plan

Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by movant, approved by the trustee

Subject: Chapter 13 Plan, filed July 24, 2023

DEFAULT OF RESPONDENT

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).

The debtor(s) seek approval of the proposed modified Chapter 13 Plan. The plan is supported by Schedules I and J filed on July 24, 2023, ECF No. 52. The Chapter 13 trustee has filed a non-opposition to the motion, ECF No. 56.

CHAPTER 13 PLAN MODIFICATION

Chapter 13 plan modification is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. "[T]he only limits on modification are those set forth in the language of the Code itself, coupled with the bankruptcy judge's discretion and good judgment in

reviewing the motion to modify.” *In re Powers*, 202 B.R. 618, 622 (B.A.P. 9th Cir. 1996).

Chapter 13 debtors seeking plan modification have the burden of proving that all requirements of § 1322(a) and (b) and § 1325(a) have been met. See 11 U.S.C. §§ 1322(a)-(b), 1325(a), 1329(b)(1); see also *In re Powers*, 202 B.R. at 622 (“[Section] 1329(b)(1) protects the parties from unwarranted modification motions by ensuring that the proposed modifications satisfy the same standards as required of the initial plan.”); see also *In re Barnes*, 32 F.3d 405, 407 (9th Cir. 1994); *In re Andrews*, 49 F.3d 1404, 1408 (9th Cir. 1995).

The court finds that the debtor has sustained this burden of proof. The court will grant the motion and approve the modification.

17. [23-21989](#)-A-13 **IN RE: CATHRYN KINGSBURY**
[DPC-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
7-26-2023 [\[15\]](#)

BRUCE DWIGGINS/ATTY. FOR DBT.

Final Ruling

Objection: Trustee’s Objection to Confirmation of Plan

Notice: LBR 3015-1(c)(4), 9014-1(f)(2); no written opposition required

Disposition: Continued to October 3, 2023, at 9:00 a.m.

Order: Civil minute order

The Chapter 13 trustee objects to confirmation of the debtor(s) plan.

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1325 and by Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 3015-1. The debtor has the burden of proving that the plan complies with all statutory requirements of confirmation. *In re Andrews*, 49 F.3d 1404, 1407-08 (9th Cir. 1995); *In re Barnes*, 32 F.3d 405, 407-08 (9th Cir. 1994).

The court will continue the hearing on this objection to allow the parties to augment the evidentiary record.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

IT IS ORDERED THAT the hearing on this objection will be continued to October 3, 2023, at 9:00 a.m.

IT IS FURTHER ORDERED that unless this case is voluntarily converted to chapter 7, dismissed, or the trustee's objection to confirmation is withdrawn, the debtor(s) shall file and serve a written response to the objection not later than September 12, 2023. The response shall specifically address each issue raised in trustee's objection to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence in support of the debtor's position. If the debtors elect to file a modified plan in lieu of filing a response, then a modified plan shall be filed, served, and set for hearing not later than September 12, 2023.

IT IS FURTHER ORDERED that the trustee shall file and serve a reply, if any, no later than September 19, 2023. The evidentiary record will close after September 19, 2023. If the debtors do not timely file a modified plan or a written response, this objection will be sustained on the grounds stated in the objection without further notice or hearing.