UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 31, 2021 at 2:00 p.m.

1.	**21-22504-E-13** **MAC-1**	**CLARENCE/DIEDRA MOORE** **Marc Caraska**	**MOTION TO DISMISS CASE** **8-13-21 [17]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 13, 2021. By the court's calculation, 13 days' notice was provided. 14 days' notice is required.

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

The Motion to Dismiss Case is xxxxxxx.

The Chapter 13 debtors, Clarence Junior Moore and Diedra Ann Moore ("Debtor"), seeks dismissal of the case because they do not believe that completion of this case is in their best interest.

Review of Minimum Pleading Requirements for a Motion

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

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

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

Grounds Stated in Motion

Movant has not provided any grounds, merely unsupported conclusions of law. The insufficient statement made by Movant is:

> A. 2. Upon further reflection, Debtors do not believe that completion of this case is in their best interests.

That "ground" is merely a conclusion of law by Movant. Presumably, Movant believed that the court would make those conclusions, but the "grounds" cannot merely state the anticipated conclusions.

This simple statement may well be based on Debtor having an almost absolute, but not absolute right, to dismiss a Chapter 13 case. Congress provides in 11 U.S.C. § 1307(b) (emphasis added):

> § 1307. Conversion or dismissal
> . . .
> (b) **On request of the debtor at any time**, if the case has not been converted under section 706, 1112, or 1208 of this title, the **court shall dismiss a case under this chapter.** Any waiver of the right to dismiss under this subsection is unenforceable.

While appearing mandatory, the Supreme Court and Ninth Circuit Court of Appeals in addressing apparent absolute rights to convert or dismiss, have held that such must be requested in good faith.

As determined by the Ninth Circuit Court of Appeals in *Rossen v. Fitzgerald (In re Rosson)*, 545 F.3d 764, 773-774 (9th Cir. 2008), the right of a debtor to dismiss a Chapter 13 case is qualified:

> "We agree, and accordingly we conclude that the Court's rejection of the 'absolute right' theory as to § 706(a) applies equally to § 1307(b). Therefore, in light of *Marrama* [*Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007)], we hold that the debtor's right of voluntary dismissal under § 1307(b) is not absolute, but is qualified by the authority of a bankruptcy court to deny dismissal on grounds of bad-faith conduct or 'to prevent an abuse of process.' 11 U.S.C. § 105(a).

The Motion does not provide the court with any basis or grounds showing that Debtor is requesting the dismissal in good faith, and not for some improper purpose to abuse the Bankruptcy Code and Federal Courts.

In looking through the court's files, debtor Clarence Moore, represented by the same counsel as in this case, filed a Chapter 7 case in 2018 and received his discharge on May 13, 2019. Case 18-27657. In 2005 debtor Clarence Moore and debtor Diedra Ann Moore filed a Chapter 13 case, and received their Chapter 13 discharge on August 22, 2011.

In the instant case, Debtor's case was built around curing a $31,389.62 arrearage on the loan secured by their residence. Plan, Class 1; Dckt. 5. All other claims were to be paid in full. *Id*. However, for the proofs of claim filed, Claim 1-1 filed by the Internal Revenue Service asserts a priority unsecured claim for $15,385.64. The proposed plan only provides for $5,291.45 in priority unsecured claims. Plan, ¶ 3.14; *Id*.

Additionally, the creditor holding the claim secured by the Debtor's residence has filed an Objection to Confirmation, asserting the pre-petition arrearage to be $55,710.76 (Dckt. 22), substantially greater than the $31,389.62 as the amount provided for in the Plan.

Though the First Meeting of Creditors' notice was sent and attended by the Chapter 13 Trustee on August 12, 2021, neither of the two debtors appeared, though their counsel attended the First Meeting. Trustee's August 12, 2021 Docket Entry Report.

Debtor filed this Motion pursuant to Local Bankruptcy Rule 9014-1(f)(2), allowing for opposition to be presented orally at trial. At the hearing **xxxxxxx**

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

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

~~The Motion to Dismiss filed by Clarence Junior Moore, and Diedra Ann Moore ("Movants") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion to Dismiss is denied without prejudice.~~

2.	**21-22220-E-13** **DPC-1** **2 thru 4**	**KENNETH FALJEAN** **Gabriel Liberman**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **7-28-21 [17]**

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 28, 2021. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Kenneth John Faljean's ("Debtor") chapter 13 documents are inaccurate.

B. Plan relies on a motion to value collateral not yet filed.

DISCUSSION

Trustee's objections are well-taken.

Failure to Afford Plan Payment / Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to Trustee, Debtor admitted at the Meeting of Creditors that:

A. The child support arrears listed on Schedule E/F in the amount of $85,797.00 was recently increased to approximately $151,000.00.

Trustee notes that the nonstandard provisions of the plan (DN 4, page 7) calls for payments of $674.20 for months 1-12 and $1,179.85 for months 13-60 to the Sacramento County Department of Child, Family and Adult Services. Thus, it does not appear this creditor will be paid in full within the term of the plan and they have not consented to this treatment.

B. Debtor owes $10,000.00 to Randy Shauffele, the original owner of Shauffele's Body & Paint.

Trustee argues that Debtor has failed to fully and accurately provide all information required by the petition, schedules and Statement of Financial Affairs. The plan has not been proposed in good faith as required pursuant to 11 U.S.C. Section 1325(a)(3) and the debtor has failed fully comply with the duty imposed by 11 U.S.C. Section 521(a)(1).

C. Schedule I Issues

Schedule C lists Debtor as "President" of Shauffele's Body & Paint, Inc. According to Trustee, Debtor admitted that he took over the business on June 1, 2021. The monthly income of $5,200.00 is anticipated and Debtor has not received any business compensation to date and does not anticipate any income until August 1, 2021. He admitted the $5,200.00 anticipated monthly income is based on historical revenue of the business.

Trustee asserts having advised Debtor that he needs to provide the Trustee with Business Documents including: Questionnaire, 2 years of tax returns, 6 months of profit and loss statements, 6 months of bank statements, proof of license and insurance or written statements that no such documentation exists. 11 U.S.C. §521(e)(2)(A); FRBP 4002(b)(3). The Meeting of Creditors was continued to August 12, 2021 at 1:00 p.m.

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

Debtor's Reliance on Motions to Value Secured Claim

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Harley Davidson Credit Corp. and the secured claim of San Mateo Credit Union. Debtor has failed to file Motions to Value the Secured Claim of these creditors, however. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

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

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

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

3.	**21-22220-E-13 KMM-1**	**KENNETH FALJEAN Gabriel Liberman**	**OBJECTION TO CONFIRMATION OF PLAN BY HARLEY-DAVIDSON CREDIT CORP. 6-30-21 [11]**

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

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, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on June 29, 2021. By the court's calculation, 63 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

Harley-Davidson Credit Corp. ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. Debtor's plan does not provide for Creditor's secured claim.

B. Debtor has failed to file a Motion to Value the collateral.

DISCUSSION

Creditor's objections are well-taken.

Failure to Provide for a Secured Claim

Creditor asserts a claim of $29,336.96 in this case. Debtor's Schedule D estimates the

amount of Creditor's claim (secured by a 2018 Harley-Davidson FLHTK Ultra Limited, VIN # 8154 ("Vehicle")) as $26,667.32, with a value of $22,470.00, and an unsecured portion of $4,197.32. The Plan provides for treatment of this as a Class 2(B) claim, but (because Debtor asserts that it is subject to a claims valuation pursuant to 11 U.S.C. § 506(a)), proposes to pay a $425.99 monthly dividend on account of the claim.

Creditor alleges that the Plan violates 11 U.S.C. § 1325(a)(5)(B) because the value of the Property to be distributed to the Creditor is less than the allowed amount of the Creditor's claim. Creditor asserts that the Debtor must therefore provide for the Creditor's claim in full in the amount of $26,754.00.

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 Harley Davidson Credit Corp. Debtor has failed to file Motion to Value the Secured Claim for this creditor, however. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

Trustee's Objection having been sustained, the Plan also does not comply with 11 U.S.C. §§ 1322 and 1325(a) on Creditor's grounds as well. 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 Harley-Davidson Credit Corp. ("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.

4. **21-22220-E-13 RDW-1** **KENNETH FALJEAN** **Gabriel Liberman** **OBJECTION TO CONFIRMATION OF PLAN BY SAN MATEO CREDIT UNION 7-29-21 [21]**

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, Debtor's Attorney, Chapter 13 Trustee, creditor, and Office of the United States Trustee on July 29, 2021. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

San Mateo Credit Union ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. Debtor's bankruptcy was filed in bad faith.

B. The Plan fails to provide for Creditor's claim.

C. The Plan is not feasible.

DISCUSSION

Creditor's objections are well-taken.

Good-Faith Filing

Creditor alleges that the Plan was not filed in good faith. *See* 11 U.S.C. § 1325(a)(3). Good faith depends on the totality of the circumstances. *In re Warren*, 89 B.R. 87 (9th Cir. BAP 1988). Thus, the Plan may not be confirmed. Factors to be considered in determining good faith include, but are not limited to:

> 1) The amount of the proposed payments and the amounts of the debtor's surplus;
>
> **2) The debtor's employment history, ability to earn, and likelihood of future increases in income;**
>
> 3) The probable or expected duration of the plan;
>
> **4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;**
>
> 5) The extent of preferential treatment between classes of creditors;
>
> 6) The extent to which secured claims are modified;
>
> 7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;
>
> 8) The existence of special circumstances such as inordinate medical expenses;
>
> **9) The frequency with which the debtor has sought relief under the Bankruptcy code;**
>
> **10) The motivation and sincerity of the debtor in seeking Chapter 13 relief;** and
>
> 11) The burden which the plan's administration would place upon the trustee.

In re Warren, 89 B.R. 87, 93 (B.A.P. 9th Cir. 1988) (quoting *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (emphasis added).

Creditor argues the bankruptcy was filed in bad faith on the basis that:

1. This is the third bankruptcy affecting the Property in the last two years that Debtor has filed to prevent Creditor from exercising rights over the Vehicle after obtaining relief from the automatic stay due to Debtor's failure to perform in the prior bankruptcies.

2. Debtor has provided inaccurate information in his bankruptcy schedules regarding his income and debts.

Failure to Provide for a Secured Claim

Creditor asserts a claim of $29,336.96 in this case. Debtor's Schedule D estimates the amount of Creditor's claim (secured by a 2017 Toyota Highlander ("Vehicle")) as $33,618.83, with a value of $28,700. The Plan provides for treatment of this as a Class 2(B) claim, but (because Debtor asserts that it is subject to a claims valuation pursuant to 11 U.S.C. § 506(a)), proposes to pay a $544.10 monthly payments on account of the claim.

Creditor alleges that the Plan violates 11 U.S.C. § 1325(a)(5)(B) because the value of the Property to be distributed to the Creditor is less than the allowed amount of the Creditor's claim. Creditor asserts that the Debtor must therefore provide for the Creditor's claim in full in the amount of $38,461.03.

Failure to Afford Plan Payment / Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Creditor asserts that Debtor is relying on $900.00 per month in contributions from family contributions in order to fund the proposed payments in the Plan but no evidence has been provided that such contributions are legitimate or will occur on a regular basis. According to Creditor, at the Meeting of Creditor, Debtor admitted that he was not receiving this income, but rather paying this amount to a family member each month. Thus, confirmation of the Plan is simply not possible with Debtor's lack of income and his expenses. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Trustee's Objection having been sustained, the Plan also does not comply with 11 U.S.C. §§ 1322 and 1325(a) on Creditor's grounds as well. 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 San Mateo Credit Union ("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.

5. **19-26029-E-13** **DEBRA THOMPSON** **MOTION TO MODIFY PLAN**
PGM-3 **Peter Macaluso** **7-23-21 [124]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 23, 2021. 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 Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Confirm the Modified Plan is xxxxx.

The debtor, Debra LaChele Thompson ("Debtor") seek confirmation of the Modified Plan after suffering hardship due to the COVID-19 pandemic where the State of California adjusted her pay and cut it approximately by $700.00, while her brother had a heart attack and passed away. Declaration, Dckt. 126. The Modified Plan provides Plan payments of $770.00 per month will commence August 25, 2021 for 62 months, and a zero (0.00) percent dividend to unsecured claims totaling $53,461.29. Modified Plan, Dckt. 128. 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 August 10, 2021. Dckt. 134. Trustee opposes confirmation of the Plan on the basis that:

A. Debtor's Plan payment is understated.

B. Debtor failed to serve the Internal Revenue Service as required by the local rules.

DISCUSSION

Failure to Afford Plan Payment / Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to Trustee, the proposed plan payment appears understated. Debtor filed a supplemental Schedule I reflecting gross wages of $6,426.52 as of July 19, 2021, stating in item 13 a $700.00 COVID pay deduction that will be reinstated and start paying in August. The debtor's plan payment of $770.00 is based on gross wages of $6,426.52 not the reinstated amount. Thus, Trustee argues that with this increased income, it appears that the Debtor can afford a higher plan payment. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Debtor filed a Reply on August 23, 2021 noting that Debtor has filed Amended Schedule I which now reflects that there has been an increase and thus will be increasing the plan payments to $853.00. Dckt. 138. Debtor requests that the Order confirming the modified plan state:

"Plan payments of $853.00 will commence August 25, 2021."

Reply, at 2.

A review of the docket shows that Debtor filed Amended Schedule I on August 23, 2021. Dckt. 137.

Insufficient Service

Local Bankruptcy Rule 2002-1(c) requires:

> (c) *Notice to the Internal Revenue Service.* In addition to addresses specified on the *Roster of Governmental Agencies* maintained by the Clerk, notices in adversary proceedings and contested matters relating to the Internal Revenue Service shall be sent to all of the following addresses:
>
> 1) United States Department of Justice
> Tax Division
> Civil Trial Section, Western Region
> Box 683, Ben Franklin Station
> Washington, D.C. 20044;
>
> 2) United States Attorney as specified in LBR 2002-1(a) above; and
>
> 3) Internal Revenue Service at the addresses specified on the *Roster of Governmental Agencies* maintained by the Clerk.

LOCAL BANKR. R. 2002-1(c).

According to Trustee, the Internal Review Service was not served per the Roster of

Governmental Agencies. The United States Attorney for Internal Revenue Service and The United States Department of Justice were not served as is required. That failure to provide notice violates Local Bankruptcy Rule 2002-1(c).

In the Reply, Debtor requests that the hearing on this motion be continued to October 12, 2021 so as to provide for notice and service for the Internal Revenue Services as prescribed by the local rules.

At the hearing xxxxxxxx

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, Debra LaChele Thompson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan is xxxxx.

6. **19-25451-E-13 PSB-2** **MONICA PEREZ** **Paul Bains** **MOTION FOR COMPENSATION BY THE LAW OFFICE OF BAINS LEGAL, PC FOR PAULDEEP BAINS, DEBTORS ATTORNEY(S)**
8-2-21 [62]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 2, 2021. By the court's calculation, 29 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

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

The Motion for Allowance of Professional Fees is granted.

Pauldeep Bains of Bains Legal, PC, the Attorney ("Applicant") for Monica Del Rocio Perez, 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 October 14, 2020, through July 19, 2021. Applicant requests reduced fees in the amount of $2,865.50.

Trustee does not oppose the fees requested but notes there is a clerical error in one instance stating the fees requested for $1,841.50 where the remaining body of the motion, declaration, and Attorney Invoice all state $2,865.50 as total fees requested. Dckt. 67. Trustee also notes that Applicant does not include the detail the court expects but that the information is provided in the summary and invoice. *Id.* Lastly, Trustee informs the court that Debtor is delinquent $431.00 in plan payments. *Id.*

Applicant filed a Response on August 18, 2021 agreeing with Trustee on the clerical error and confirms that the correct amount sought is $2,865.50. Dckt. 69. However, Applicant disagrees that not enough detail was provided and points the Trustee to the details provided on pages 2 and 3 of the Application, as well as the Exhibits and the Declaration. *Id.*; see also Dckts. 64, 65.

APPLICABLE LAW

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

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

11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Reasonable Fees

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

A. Were the services authorized?

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

C. Are the services documented adequately?

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

E. Did the attorney exercise reasonable billing judgment?

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

Reasonable Billing Judgment

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

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

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

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

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

A review of the application shows that Applicant's for the Estate include preparing and filing

Plan and Motion to Confirm Modified Plan, review of Motion to Dismiss, and preparing Motion for Compensation. 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. 60. Applicant prepared the order confirming the Plan.

Lodestar Analysis

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

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

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Motion to Modify: Applicant spent 12.0 hours in this category. Applicant reviewed case, communicated with client, drafted modified Plan, filed and served Motion to Confirm; reviewed objection, prepared and filed Reply, and attended hearing.

Motion to Dismiss: Applicant spent 0.7 hours in this category. Applicant reviewed Trustee's Motion to Dismiss, prepared and filed a Response, and reviewing ruling.

Motion for Compensation: Applicant spent 2.5 hours in this category. Applicant prepared and filed Motion for Compensation.

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**
Pauldeep Bains	8.9	$300.00 $325.00	$2,670.00
Paralegal	6.3	$185.00	$1,165.50
Total Fees for Period of Application			$3,835.50

Applicant only charged 6.9 of the 8.9 hours of attorney time and 4.3 of 6.3 hours of paralegal time. Exhibit, Dckt. 64 at 6.

Costs and Expenses

Applicant is not seeking the recovery of costs and expenses pursuant to this application.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The unique facts surrounding the case, including preparing and filing Plan and Motion to Confirm Modified Plan, review of Motion to Dismiss, and preparing Motion for Compensation, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of $2,865.50 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.

The court authorizes the Chapter 13 Trustee under the confirmed plan to pay 100% of the fees and costs allowed by the court.

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

Fees	$2,865.50
Costs and Expenses	$0.00

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

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

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

hearing.

The Motion for Allowance of Fees and Expenses filed by Pauldeep Bains of Bains Legal, PC ("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 Pauldeep Bains of Bains Legal, PC is allowed the following fees and expenses as a professional of the Estate:

Pauldeep Bains of Bains Legal, PC, Professional Employed by Monica Del Rocio Perez ("Debtor")

Fees in the amount of $2,865.50
Expenses in the amount of $0.00,

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

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

7.	**20-24563-E-13** **RLC-1**	**JOURDON SLONE** **Stephen Reynolds**	**MOTION FOR SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY** **7-29-21 [28]**

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

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

Sufficient Notice Not 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 30, 2021. By the court's calculation, 62 days' notice was provided. 28 days' notice is required.

The Motion for Sanctions for Violation of the Automatic Stay 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).

The Motion for Sanctions for Violation of the Automatic Stay is xxxxxxx.

The present Motion for Sanctions for Violation of the Automatic Stay provided by 11 U.S.C. § 362(a) and for damages pursuant to 11 U.S.C. § 362(k) and the inherent power of this court has been filed by Jourdon Soonie Slone ("Movant" / "Debtor"). The claims are asserted against FasTrak ("Respondent" / "Creditor").

LEGAL STANDARD

A request for an order of contempt by a debtor, United States Trustee, or another party in interest is made by motion governed by Federal Rule of Bankruptcy Procedure 9014. FED. R. BANKR. P. 9020. A bankruptcy judge has the authority to issue a civil contempt order. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283–85 (9th Cir. 1996). The statutory basis for recovery of damages by an individual debtor is limited to willful violations of the stay, and then typically to actual damages, including attorneys' fees; punitive damages may be awarded in "appropriate circumstances." 11 U.S.C. § 362(k)(1). The court may also award damages for violation of the automatic stay (a Congressionally-created injunction) pursuant to its inherent power as a federal court. *Sternberg v. Johnston*, 595 F.3d 937, 946 (9th Cir. 2009). FN.1.

FN.1. Bankruptcy courts have jurisdiction and authority to impose sanctions, even when the

bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548–49 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); *see* 11 U.S.C. § 105(a). A bankruptcy judge is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see In re Lehtinen*, 564 F.3d at 1058.

Attorneys' fees may be recovered for work involved in bringing about an end to the stay violation and for pursuing an award of damages. *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095, 1101 (9th Cir. 2015). A monetary penalty may not be imposed on a creditor unless the conduct occurred after the creditor receives notice of the order for relief as provided by § 342. 11 U.S.C. § 342(g)(2).

The automatic stay imposes an affirmative duty of compliance on the non-debtor. *State of Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151–52 (9th Cir. 1996). A party who acts in violation of the stay has an affirmative duty to remedy the violation. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191–92 (9th Cir. 2003).

In addition, Congress provides in 11 U.S.C § 362(a) & (k) additional relief for violation of the automatic stay, which may be requested by an individual debtor.

REVIEW OF MOTION

In asserting this claim pursuant to 11 U.S.C. § 362(a) & (k), Movant states with particularity (Federal Rule of Bankruptcy Procedure 9013) the following grounds for relief:

A. Debtor has been unable to register her vehicle due to FasTrak's refusal to lift the hold on her vehicle registration despite attorney's written requests. See Exhibits 1 thru 4, Dckt. 30.

B. FasTrak was listed as a creditor in this case and received notice of the bankruptcy case.

C. Both Debtor and Debtor's attorney have contacted the Department of Motor Vehicles ("DMV") and FastTrak to have the hold removed to no avail.

D. Debtor's inability to register her vehicle has been aggravating and stress-inducing due to potential legal and financial consequences of driving without registration.

E. Debtor needs her vehicle for work and to take care of her family as she is a single mother.

F. Attorney fees are a measure of damages. Debtor's attorney estimates that

researching and drafting the current motion, meeting with client, unsuccessfully attempting to communicate with defendant, and estimating the time required to prepare and appear at the hearing on this motion has required attorney fees of $3,500.00.

G. Debtor requests: release of the hold on her vehicle, $10,000.00 in damages and $3,500.00 in attorney's fees.

Review of Evidence

Movant has provided the Declaration of Jourdon Soonie Slone in support of the Motion. Dckt. 32. In the Declaration, Debtor testifies under penalty of perjury that she has been suffering from serious emotional stress and anxiety due to her inability to register her vehicle as she needs it to travel to work, go to the grocery store, pick up her children from school, run other errands. Declaration, ¶ 3. Debtor also testifies to having visited the DMV for purposes of registering her vehicle and after 5 hours of waiting she was told her registration had not been released has caused stress and anxiety. *Id.*, ¶ 3, at 2:1-4. Debtor adds that she is constantly nervous while driving because she knows that if she is pulled over she will be in trouble and will otherwise found to be driving without a license she will suffer financial and legal consequences. *Id.* at 2:4-9.

Movant has also provided the Declaration of Stephen M. Reynolds in support of the Motion. Dckt. 31. In his Declaration, Debtor's attorney testifies under penalty of perjury having communicated with FasTrak and the DMV regarding the registration hold and properly authenticates the communications and form filed as exhibits in support of the motion. *Id.* Debtor's attorney also testifies that he has not received any responses, written, telephonic or other wise from FasTrak before or since sending the letter and fax on April 9, 2021; and has also attempted to communicate via phone but the phone calls have gone unanswered. *Id.*, ¶ 6.

Movant has provided four exhibits in support of the Motion. Dckt. 30.

1. Exhibit 1 is a Letter to Department of Motor Vehicles dated April 9, 2021 where Debtor's attorney communicates with the Department of Motor Vehicles to allow Debtor to register her Vehicle since her FasTrak claims had been addressed. Attorney also informs them that she is prepared to pay all registration fees due and that any hold on Debtor's registration is a violation of the automatic stay. The letter is accompanied by Debtor's bankruptcy petition.

2. Exhibit 2 is a Letter to FasTrak dated May 12, 2021 where Debtor's attorney communicates with FasTrak to allow Debtor to register her Vehicle since their claims had been addressed. Attorney also informs them that she is prepared to pay all registration fees due and that any hold on Debtor's registration is a violation of the automatic stay. Debtor's attorney also request that he'd be informed immediately when the Registration Hold has been released and the Department of Motor Vehicles has ben informed of such action.

3. Exhibit 3 is the Fax cover letter to FasTrak dated May 12, 2021.

4. Exhibit 4 is the FasTrak DMV Registration Hold Request for Review Form dated

May 12, 2021. The form signed by Debtor's attorney states that Debtor has filed for bankruptcy with the Eastern District of California providing for the FasTrack violations where FasTrack was listed as a creditor and received notice of the case. Debtor's attorney also requests that Debtor be provided with a release of her registration immediately to and her and her attorney once such action is taken. Attached to this Form is a copy of the Order Confirming Debtor's Plan and a copy of Notice of Bankruptcy filing.

TRUSTEE'S NON-OPPOSITION

Trustee filed a Non-Opposition on August 16, 2021. Dckt. 34. Trustee notes that Debtor is current under the confirmed plan and although Debtor listed Creditor under Schedule F, Creditor did not file a proof of claim.

DISCUSSION

Debtor alleges that she unable to register her vehicle because Respondent-Creditor refuses to lift the hold on her vehicle registration. Debtor has provided evidence showing that Respondent-Creditor has failed to comply with the Bankruptcy Code.

However, in the Motion no legal authorities or analysis is provided as to how the specific conduct, the failure to waive the suspension of registration due to failure to pay tolls is a violation of the automatic stay. The only legal authorities provided relate to the damages that can be awarded when the stay has been violated.

Debtor fails to provide any testimony as to when the FastTrak violations occurred. Given that the Motion states that "since the filing of this case, Debtor has been unable to register her vehicle due to FastTrak's refusal to lift the hold on her vehicle registration. . ." (Motion, ¶ 3, Dckt. 28), Debtor had pre-petition FastTrak violations predating the September 29, 2020 commencement of this case.

It is not clear what is the basis for FasTrak having a claim in this case. Debtor does not provide copies of any letters, correspondence, or violation notices indicating the contractual or statutory basis for the California Department of Motor Vehicles refusing to renew Debtor's vehicle registration.

Additionally, the Certificate of Service states that the pleadings have been filed on the person(s) asserted to be violating the stay as follows:

Department of Motor Vehicles
Officer, General or Managing Agent
1312 Cullen Street
Vacaville, CA 95688

Office of the Director
Officer, General or Managing Agent
Department of Motor Vehicles
2415 1st Ave., Mail Station Fl0l
Sacramento, CA 95818-2606

FasTrak Customer Service Center
Officer, General or Managing Agent
P.O. Box 26925
San Francisco, CA 94126

Bay Area FasTrak
Officer, General or Managing Agent
P .0. Box 26926
San Francisco, CA 94126

With this Motion and sanctions request, Debtor is seeking to serve the California Department of Motor Vehicles and obtain relief against an entity known as "Fastrak." The California Secretary of State lists 18 entities with the work "FasTrak in their name, but all but three (3) are suspended or dissolved. [Fn. 1.] For those three corporations, they are identified as an Credit Corporation, Insurance Solutions, and Manufacturing Services. The Secretary of State also identifies eight (8) limited liability companies with FastTrak in their names, with all being suspended or inactive except, which are identified as a Dispatch LLC, Express LLC, and a Software Partnership.

FN. 1.
https://businesssearch.sos.ca.gov/CBS/SearchResults?filing=&SearchType=CORP&SearchCriteria=fastrak&SearchSubType=Keyword.

In addition to not appearing to have a business relating to bridge tolls and toll road access, none appear to tie to the Post Office Box which Plaintiff has used in an attempt to complete service of process as required by Federal Rule of Civil Procedure 4, Federal Rule of Bankruptcy Procedure 7004, 9014.

Service by mailing something to a Post Office Box is not proper service. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); see also *Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

Additionally, if Debtor is attempting to serve the State of California, the Roster of Governmental Agencies does not identify bankruptcy specific service instruction given for service of motions, applications, summonses, and complaints. California Code of Civil Procedure § 416.50 provides:

> § 416.50. Service on public entity
>
> (a) A summons may be served on a public entity by delivering a copy of the summons and of the complaint to the clerk, secretary, president, presiding officer, or other head of its governing body.

> (b) As used in this section, "public entity" includes the state and any office, department, division, bureau, board, commission, or agency of the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in this state.

Such service may have been accomplished by mailing the pleadings to 2415 1st Ave., Mail Station Fl0l Sacramento, CA 95818-2606, though the Certificate of Service does not identify Steve Gordon or the Director of the California Department of Motor Vehicles. [Fn.2.]

FN. 2.
https://www.dmv.ca.gov/portal/about-the-california-department-of-motor-vehicles/dmv-executive-leadership/

In requesting sanctions, Debtor seeks them against "FasTrak," whomever that is. However, all that is alleged is that "FasTrak" sent notice of Debtor failing to pay the amounts billed for failure to pay tolls. It is not asserted that "FasTrak" is the governmental department or agency that registers vehicles in California. It is asserted that "FasTrak" refuses to "lift its hold on her vehicle registration," but the Motion does not state how "FastTrak" controls the California Department of Motor Vehicles.

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 Motion for Sanctions for Violation of the Automatic Stay by Jourdon Soonie Slone, Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is xxxxx.

8. **21-22265-E-13 DPC-1** **BRENDA SHORT**
Timothy Walsh

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
7-28-21 [16]

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

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 28, 2021. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. The Chapter 13 debtor, Brenda Lee Short ("Debtor"), failed to appear at the first Meeting of Creditors.

B. Debtor failed to submit tax returns to Trustee.

C. Plan is overextended.

D. Debtor may not be able to comply or make Plan payments as proposed.

E. Debtor is delinquent in Plan payments.

DISCUSSION

Trustee's objections are well-taken.

Failure to Appear at 341 Meeting

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by the Chapter 13 Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Continued Meeting of Creditors was held on August 5, 2021, and the Chapter 13 Trustee's Report indicates Debtor appeared. The Chapter 13 Trustee has filed nothing further, and the court therefore determines that Debtor's appearance has resolved this ground for opposing confirmation.

Failure to Provide Tax Returns

The Chapter 13 Trustee argues that 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).

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 64 months due to claims being filed for amounts higher that the Debtor scheduled. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Failure to Afford Plan Payment / Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to Trustee, Schedule I, line 8h, identifies $1,800.00 "Son's and Daughters Contributions." Debtor has failed to provide any Declarations from son and daughters as part of her income over the duration of Plan. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Delinquency

The Chapter 13 Trustee asserts that Debtor is $3,605.28 delinquent in plan payments, which represents one month of the $3,605.28 plan payment. Before the hearing, another plan payment will be due. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

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

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

9. 20-24469-E-13 DBL-1 — LEEANNA ATTERBERRY — Bruce Dwiggins — MOTION TO MODIFY PLAN — 7-27-21 [28]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 21, 2021. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

The debtor, Leeanna May Atterberry ("Debtor") seeks confirmation of the Modified Plan to account for missed payments after becoming ill with Covid-19 and being off work from March through June. Declaration, Dckt. 30. The Modified Plan provides payments of $1,245.00 for months 42 through 60, and a 100 percent dividend to unsecured claims totaling $300.00. Modified Plan, Dckt. 32. 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 August 11, 2021. Dckt. 36. Trustee opposes confirmation of the Plan on the basis that:

A. The Plan's Additional Provisions contain inaccurate statements regarding: Debtor's mortgage and Class 2 creditor.

B. Debtor's Schedule I and J are filed as exhibits only.

DISCUSSION

Additional Provisions

Debtor cannot comply with the Plan. According to Trustee, the additional provisions indicate the mortgage will be paid off in month 41 and proposes that for months 42 – 60 the mortgage arrears should receive payments in the amount of $15,253.00 at a monthly dividend of $802.79 with 0% interest. However, Trustee calculates the mortgage will not be paid off by month 42 (March 2024) where a total of $24,787.37 ($5,441.13 (amount paid to date) + $18,741.67 (months 11-41) + $604.57 (post arrears for July 2021) should have disbursed in mortgage payments by then on a claim of $46,279.37. Thus, Debtor's plan will not be sufficient to pay the mortgage, Trustee's fees, monthly dividends, and attorney's fees.

Schedules Filed as Exhibits

Debtor's Schedule I and J filed July 27, 2021 are filed as an Exhibit only and are otherwise not identified on the Court's docket as an amended or supplemental schedule of expenses, potentially making it difficult for parties to find the Debtor's most recent budget on file with the Court

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Leeanna May Atterberry ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

10. 20-23675-E-13 TLA-2 — WALTER/ADREENA ISLAND — Thomas Amberg — MOTION TO MODIFY PLAN — 7-14-21 [51]

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 Debtors, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 14, 2021 By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is xxxxx.

The debtors, Walter Edward Island and Adreena Christine Island ("Debtor"), seek confirmation of the Modified Plan to account for their 2020 taxes to be paid through the plan. Declaration, Dckt. 53. The Modified Plan provides for monthly Plan payments of $2,944.00, and a thirty (30) percent dividend to unsecured claims totaling $43,836.94. Modified Plan, Dckt. 54. 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 August 11, 2021. Dckt. 58. Trustee opposes confirmation of the Plan on the basis that Trustee cannot comply with Section 7.02 of the proposed plan.

DISCUSSION

2020 Taxes

According to Trustee, Debtor's propose to pay their post-petition 2020 federal and state taxes through the Plan, where no amended claims have been filed incorporating the 2020 tax year. Trustee notes that the Internal Revenue Service filed an amended claim Proof of Claim 8-1 on June 23, 2021 in the amount of $63,767.04 ($53,412.22 priority, $10,354.82 unsecured). According to the attachment to

the Proof of Claim, these amounts encompass tax years of 2016 through 2019. Franchise Tax Board filed Proof of Claim 9-1 on August 27, 2020 in an amount to be determined for a period through December 31, 2019. Neither the Internal Revenue Service or Franchise Tax Board have amended their claims to include taxes due for the 2020 tax year. Thus, Trustee is unable to comply with Section 7.02 of the Plan.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the debtors, Walter Edward Island and Adreena Christine Island ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

11. **18-21488-E-13 CLH-12** | **DANIEL/ALLISON BRENNAN** **Charles Hastings** | **CONTINUED MOTION TO MODIFY PLAN** **4-30-21 [243]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 30, 2021. By the court's calculation, 53 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is xxxxx.

The debtors, Daniel Lawrence Brennan and Allison Lyn Brennan ("Debtor") seek confirmation of the Modified Plan due to a significant reduction in income as a result of the COVID-19 pandemic. Declaration, Dckt. 245. The Modified Plan provides for the following:

1. $1.00 for 1 month,
2. $5,000.00 for 13 months,
3. $5,450.00 for 13 months,
4. $252,672.94 for 1 month,
5. $5,450.00 for 3 months,
6. then $1,000.00 for 1 month,
7. $2,500.00 for 3 months,
8. 3,094.08 for 15 months,
9. then $3,644.08 for 29 months, and
10. a zero (0) percent dividend to unsecured claims totaling $7,740.73.

Modified Plan, Dckt. 246. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on May 25, 2021. Dckt. 250. Trustee opposes confirmation of the Plan on the basis that:

A. Plan Payments to date are not correct.

B. Trustee is uncertain if priority creditors will object to Debtor's special provision regarding priority claims.

DISCUSSION

Plan Payments

According to Trustee, plan payments should be whatever has been paid to date and then $3,094.08 from May 2021 to May 2022, then $3,664.08 from June 2022. Trustee states that May 2021 is the 38th Month of the Plan, and the Plan payments through May 2021 total $399,772.94.

Trustee asserts that the Modified Plan should clearly provide just that the Plan payments through May 2021 total aggregate amount of $399,772.94, rather than a series of payments for a month or two at a time.

Priority Claims Provision

According to Trustee the plan would take 79 months to complete if Debtor were to pay priority claims in full. However, Debtor has added a special provision regarding priority claim where they state that "Any amount owing remaining on the priority claims following completion of the Plan will not be discharged and will remain due by the Debtors." Proposed Plan, Section 7, at 9. Trustee is uncertain if the relevant priority creditors object to the proposed plan.

The Trustee does not direct the court to any statutory provision concerning a Chapter 13 plan and the treatment of priority unsecured claims. The apparent provision could be 11 U.S.C. § 1322(a)(2), in which Congress specifies (emphasis added):

> § 1322. Contents of plan
>
> (a) **The plan**—
> . . .
> (2) **shall provide for the full payment**, in deferred cash payments, **of all claims** entitled to **priority** under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;

This is discussed in Collier on Bankruptcy as follows:

> ¶ 1322.03 Payment of Priority Claims; § 1322(a)(2)
>
> Section **1322(a)(2) requires that every chapter 13 plan propose payment in full of all priority claims.** There are **only two exceptions** to this requirement.

> **First, the holder of the priority claim may consent to different treatment.** Second, if the priority claim is a domestic support obligation that has been assigned to a governmental unit, or is owed directly to a governmental unit, the debtor need not pay that obligation in full provided the plan provides that all of the debtor's projected disposable income over five years will be devoted to the plan. Otherwise, by virtue of section 1322(a)(2), the plan must propose that all allowed claims entitled to priority under section 507, including filing fees and allowed administrative expenses, wage claims, consumer debt claims, and tax claims, be paid in full.

8 Collier on Bankruptcy P 1322.03 (16th 2021) (emphasis added).

Debtor's Modified Plan states that there are $283,828.17 in priority unsecured claims. Mod. Plan, ¶ 3.12; Dckt. 246. These include priority unsecured claims of the California Franchise Tax Board and the Internal Revenue Service. Proof of Claim 1-3 and Proof of Claim 2-3. The court cannot identify any consents to incomplete payment of the priority claims having been filed in support of the present Motion and confirmation of the Modified Plan.

July 27, 2021 Hearing

As of the court's drafting of this pre-hearing disposition, no further supplemental pleadings or documents updating the court have been filed.

At the hearing, Counsel for Debtor reports that he has not consented as of yet, and requests a further continuance.

August 31, 2021 Hearing

No further supplemental documents have been filed.

At the hearing xxxxxxxx

12. **19-20688-E-13 PSB-1** **12 thru 13**

DAWN/DOUGLAS NEAL
Paul Bains

MOTION TO EMPLOY REALTY ONE GROUP COMPLETE AS BROKER(S)
8-10-21 [21]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 10, 2021. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Employ is granted.

Dawn Erin Neal and Douglas Ryan Neal ("Debtor") seeks to employ Realtor Sunny Methner, of Realty One Group Complete, Broker, ("Broker") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks the employment of Broker to list the property commonly known as 2616 Marie Ann Ln, Carmichael, California ("Property").

Debtor argues that Broker's appointment and retention is necessary to market, list, and sell the Property. Broker will also represent Debtor in negotiating a sale of the Property.

Sunny Methner, a Real Estate Agent of Realty One Group Complete, testifies that she will assist Debtor in marketing and selling the Property. Sunny Methner testifies she and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out

the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

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

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Realty One Group Complete as Broker for the Chapter 13 Estate on the terms and conditions set forth in the Listing Agreement filed as Exhibit A, Dckt. 23. Approval of the commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by Dawn Erin Neal and Douglas Ryan Neal ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted, and Debtor is authorized to employ Realtor Sunny Methner, who is employed by Realty One Group Complete, Broker, on the terms and conditions as set forth in the Listing Agreement filed as Exhibit A, Dckt. 23.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.
>
> **IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by broker in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.
>
> **IT IS FURTHER ORDERED** that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing

account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

13. 19-20688-E-13 PSB-2 — DAWN/DOUGLAS NEAL — Paul Bains — MOTION TO SELL — 8-10-21 [25]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 10, 2021. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits Dawn Erin Neal and Douglas Ryan Neal, the Chapter 13 Debtors, ("Movant") to sell property of the estate under the confirmed plan after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 2616 Marie Ann Lane, Carmichael, California ("Property").

The proposed purchaser of the Property is Anna Cole and Marek Modelski, and the terms of the sale are:

A. Purchase price is $415,000.00, with an initial deposit of $5,000.00.

B. Buyer and Seller to pay escrow fee. Seller to pay for: natural hazard

disclosure report, smoke alarm/carbon monoxide device installation and water heater bracing, owner's title insurance to be issued by Chicago Title Company, county transfer tax/fee, and one-year home warranty plan.

C. Stove can be included in the sale.

Creditor Wells Fargo Bank, N.A. holding the first deed of trust for the Property ("Creditor") filed a Non-Opposition on August 17, 2021 stating Creditor does not oppose Debtor's Motion so long as the lien of Wells Fargo is paid off in full satisfaction of the debt. Dckt. 33.

The Chapter 14 Trustee, David Cusick (Trustee"), filed a Non-Opposition on August 17, 2021 stating Trustee does not oppose the terms of the sale of Debtors' real property and recommends the Order state any excess funds over and above the amount in the Trustee's demand can be disbursed directly to the Debtors where proceeds appear more than needed to complete the plan. Dckt. 37.

DISCUSSION

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: xxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it will allow Debtors to fund their plan at 100% of the allowed claims.

Movant has estimated that a five (5) percent broker's commission from the sale of the Property to be divided to pay the Chapter 13 Debtor's Broker, Realty One Group Complete / Sunny Methner a commission of 2.5 percent in the amount of $10,375.00, and pay Buyer's Broker Coldwell Banker Realty a commission of 2.5 percent in the amount of $10,375.00. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than five percent commission.

The Motion is granted.

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

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

The Motion to Sell Property filed by Dawn Erin Neal and Douglas Ryan Neal, the Chapter 13 Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Dawn Erin Neal and Douglas Ryan Neal, the Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Anna Cole and Marek Modelski or nominee ("Buyer"), the Property commonly known as 2616 Marie Ann Lane, Carmichael, California ("Property"), on the following

terms:

A. The Property shall be sold to Buyer for $415,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 28, and as further provided in this Order.

B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.

C. The Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.

D. The Chapter 13 Debtor is authorized to pay a real estate broker's commission in an amount not more than five (5) percent of the actual purchase price upon consummation of the sale. The five (5) percent commission shall be divided to pay the Chapter 13 Debtor's Broker, Realty One Group Complete / Sunny Methner a commission of 2.5 percent, and pay Buyer's Broker Coldwell Banker Realty a commission of 2.5 percent.

E. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

14. **21-22190-E-13 DPC-1** **KENNETH SNOWDER** **James Keenan** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 7-28-21 [13]**

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

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(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 28, 2021. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Debtor failed to provide business documents at the Meeting of Creditors.

B. Trustee is unable to assess the feasibility of the plan.

C. The Plan is overextended.

D. Debtor failed to provide declaration from non-filing spouse.

DISCUSSION

Trustee's objections are well-taken.

Failure to File Documents Related to Business

Debtor has failed to timely provide the Chapter 13 Trustee with business documents including:

A. Questionnaire,
B. Two years of tax returns,
C. Six months of profit and loss statements,
D. Six months of bank account statements, and
E. Proof of license and insurance or written statement that no such documentation exists.

11 U.S.C. §§ 521(e)(2)(A)(i), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with the Chapter 13 Trustee. 11 U.S.C. § 521(a)(3). Without Debtor submitting all required documents, the court and the Chapter 13 Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

According to Trustee, the Meeting of Creditor was continued due to the failure to submit such documents. The Continued Meeting of Creditors was held on August 12, 2021, and the Chapter 13 Trustee's Report indicates Debtor appeared and the meeting was concluded. The Chapter 13 Trustee has filed nothing further, and the court therefore determines that Debtor's appearance has resolved this ground for opposing confirmation.

At the hearing xxxxxxxx

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 claims being filed for amounts higher that the Debtor scheduled, the plan is overextended. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Failure to Afford Plan Payment / Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to Trustee, at the Meeting of Creditors, Debtor testified that the non-filing spouse might have debt that is not listed in the Schedules but was unsure. Trustee requested that the Debtor provide a Declaration from the non-filing spouse stating whether she has debt or not that is not listed in the Schedules. Debtor has failed to provide any Declaration from the non-filing spouse. 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"), 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.

15. 21-22299-E-13 DPC-1 — ADRENIA DESPANIE — Christian Younger — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK — 8-11-21 [18]

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 11, 2021. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

What is identified at Dckt. 18 as the Objection to Confirmation by the Chapter 13 Trustee, David Cusick ("Trustee"), is actually the Notice of Hearing on the Objection. No Opposition has been filed.

The court notes that on August 13, 2021, the court signed an order substituting Christian Younger, Esq., as counsel for the Debtor. Dckt. 22. This is after the "Objection" was filed on August 11, 2021.

A Declaration in support of the "Objection" was filed by the Trustee. This provides some light into the grounds of the Objection (which the court presumes was not filed on the Docket due to a clerical error). The Declaration raises issues concerning the Debtor's current employment, amount of income, the required Profit and Loss Statement for Exhibit I concerning Debtor's business, and the Debtor being delinquent in property taxes. Also, that Debtor failed to provide the Trustee with a copy of her 2020 tax return and employer payment advices. Additionally, that while the Plan provides for the PHH Mortgage secured claim as a Class 4 Claim, that Creditor filed proofs of claim stating a small pre-

petition arrearage.

DISCUSSION

At the August 31, 2021 hearing, **xxxxxxx**

~~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.~~

16. **20-21910-E-13** **TIMOTHY TROCKE**
16 thru 18 **Gary Fraley**

MOTION FOR DETERMINATION OF PREVAILING PARTY STATUS, MOTION FOR COMPENSATION BY THE LAW OFFICE OF PRENOVOST, NORMANDIN, DAWE & ROCHA FOR TOM R. NORMANDIN, CREDITORS ATTORNEY(S)
8-3-21 [274]

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)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on August 3, 2021. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

No Notice of Hearing has been filed by Creditor stating whether the present Motion has been filed under the 28 day notice provision for which written opposition is required, or the 14 day notice period for which opposition may be presented orally at hearing. LBR 9014-1(f)(1) and (f)(2). Debtor having filed an Opposition, the court treats this as having been filed pursuant to Local Bankruptcy Rule 9014-1(f)(1).

The Motion for Prevailing Party Attorney's 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). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion for Prevailing Party Fees is denied.

Creditor Roger Anderson ("Movant" / "Creditor") filed this Motion seeking prevailing party fees in the amount of $21,135.00 pursuant to written attorney fee provision in paragraph 9 of the Promissory Note Secured by Deed of Trust (Proof of Claim 2-1, pages 7 - 14), and Federal Rule of Civil Procedure 54, as incorporated into the Federal Rules of Bankruptcy Procedure, and Federal Rules of

Bankruptcy Procedure 7054 and 9014(c).

Movant states with particularity (FED. R. BANKR. P. 9013) the following grounds in support of the Motion, Dckt. 274:

1. The Chapter 13 debtor, Timothy Trocke, filed an objection to Creditor Roger Anderson's Proof of Claim and requested the court sustain his objection to all of Creditor's attorney's fees and costs.

2. After eight months of litigation, the court disallowed $13,186.00 of the attorney fees included in Proof of Claim 2. Of this $13,186.00, $8,683.50 consisted of amount Creditor in connection with Debtor's objections to the claim. So in practical terms, the court permanently reduced Creditor's attorney fee by $4,502.50, or 12.9%. This $4,502.50 reduction represents just 2.45% of Creditor's overall claim.

3. The court's order sustaining Debtor's "Phase 1" objection is not relevant to the analysis here because the court's interim order was "logically equivalent to an order granting a demurrer with leave to amend - i.e., it was not a 'final resolution' of the parties' claims." Creditor points the court to *Hsu v. Abbara* (1995) 9 Cal.4th 863, for the proposition that the "prevailing party" determination is made only upon the final resolution of the parties' contract claims. *HSBC Bank USA v. DJR Props.* (E.D.Cal. Apr. 12, 2011, No. 1:09-CV-01239 AWI SKO) 2011 U.S.Dist.LEXIS 41650, at 8*. The court's interim order expressing that the hearing on Debtor's objection would be continued "for the court to conduct further proceedings on these Objection...." Order, Dckt. 213. Creditor citing to *In re Locklin* (Bankr. C. D. Cal. Dec. 5, 2014, No. 6:13-bk-24951-MH) 2014 Bankr. LEXIS 5401, at 12* ["While the disposition on the order on the initial claim objection is 'grated' [Creditor] was provided leave to amend its claim. Therefore, it does not appear that Debtor was the prevailing party on that first claim objection, as the Court granted leave for [Creditor] to file an amended claim. Thus, any attorneys' fees sought in connection with the previous claim objection should be disallowed."]

4. Movant argues Creditor is the prevailing party because the amount of fees that the court disallowed in its July 16, 2021 order represented just a small fraction of Creditor's overall claim (where Debtor sought to disallow ALL of Creditor's claim) when taking into account that the total legal fees sought as part of Creditor's claim was $34,731.71. Thus, by allowing $21,135.00, the court's order allowed the majority of those fees as part of Creditor's claim.

5. Creditor incurred $21,135.00 in reasonable attorney fees in connection with the claim objection proceedings because the rates requested by Creditor are commensurate with the attorneys' experience, level of skill, and the complexities of the case.

6. Creditor requests an award of reasonable attorney fees in the amount of $21,135.00 incurred by Creditor in connection with the objection proceedings.

STATUTORY BASIS FOR ATTORNEY'S FEES

The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the Unites States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court. *Fed. R. Bank P.* 7054(b)(1)

Statutory Basis - Contract

California Civil Code § 1717 (emphasis added) addresses substantive state law making contractual attorney's fees provisions reciprocal, stating:

> (a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then **the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees** in addition to other costs.
> . . .
> (b)
> (1) **The court**, upon notice and motion by a party, **shall determine** who is **the party prevailing** on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2) [dismissals], the **party prevailing** on the contract **shall be the party who recovered a greater relief in the action** on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

In *Witkin California Procedure,* the law relating to the prevailing party is discussed in several sections. These include the following:

> (a) [§ 194] Party Recovering Greater Relief.
>
> (1) In General. The party prevailing on the contract is the party who recovered a greater relief in the action on the contract. (C.C. 1717(b)(1); see C.E.B., Attorney Fee Awards 2d, § 6.18 et seq.; Cal. Civil Practice, 4 Procedure, § 33:47 . . . Cases discussing when a party is the prevailing party under this rule include the following:
>
> *Artesia Med. Dev. Co. v. Regency Associates, Ltd.* (1989) 214 C.A.3d 957, 965, 966, 266 C.R. 657 [in plaintiff lessor's unlawful detainer action against defendant lessee and defendant assignee, judgment of forfeiture of lease made plaintiff the prevailing party, even though court allowed defendant assignee to remain in

possession as lessee subject to conditions].

Mustachio v. Great Western Bank (1996) 48 C.A.4th 1145, 1150, 56 C.R.2d 33 [although plaintiff's claim for punitive damages was rejected on appeal, she was party prevailing on contract because she received damages for breach of contract and conversion].

. . .

Biren v. Equality Emergency Med. Group (2002) 102 C.A.4th 125, 139, 140, 125 C.R.2d 325 [defendant who was awarded judgment on its cross-complaint was not prevailing party; judgment was to be applied as credit against larger amount owed to plaintiff, and defendant obtained only "mixed" result on its various claims].

. . .

(4) "Greater Relief" Is Not Necessarily Same as "Net Monetary Recovery". In *Sears v. Baccaglio* (1998) 60 C.A.4th 1136, 1139, 1155, 70 C.R.2d 769, defendant, the lessor of a building, secured a personal guaranty from plaintiff, the principal shareholder of the company to whom the building was leased. The guaranty guaranteed the lessee's performance of the lease and required payment of reasonable attorneys' fees to the prevailing party in any legal action concerning the guaranty. After the lessee company filed for bankruptcy and defaulted on the lease, plaintiff paid defendant $112,000 under protest. Defendant eventually also received payments from the lessee's bankruptcy estate, rent in mitigation, and the security deposit, totaling, with plaintiff's payment under the guaranty, $359,386. Plaintiff sued defendant for breach of contract and other claims, alleging that the guaranty no longer existed, and requested $112,000 in damages. Defendant cross-complained for an additional $5,461. The trial court found plaintiff liable on the guaranty, but awarded plaintiff over $67,000 in damages, representing the amount that defendant had recovered from the various payment sources exceeding what the lessee had owed to defendant on the lease. The trial court awarded defendant nothing on his cross-complaint. The trial court then awarded defendant attorneys' fees, finding that he had prevailed on the contract issue. Held, affirmed.

(a) C.C. 1717 applies here. The statute plainly applies to contracts including bilateral fee provisions. (60 C.A.4th 1146.) Thus, it permits fees to be awarded in contract actions where the contract provides for an award to the prevailing party, not just to those where the contract purports to permit fees only to a specified party. (60 C.A.4th 1149.)

(b) C.C. 1717 gives the trial court discretion to determine the prevailing party, regardless of which party received the greater amount of damages. The trial court may apply equitable principles and conclude that the person receiving the greater monetary judgment may not be the party recovering "greater relief" on the contract action. (60 C.A.4th 1151.) "In the event one party received earlier payments, settlements, insurance proceeds, or other recovery, the court has discretion to determine whether the party required to pay a nominal net judgment is nevertheless the prevailing party" entitled to attorneys' fees under C.C. 1717. (60 C.A.4th 1154, 1155.)

. . .

SUPPLEMENT

. . .
(4) “Greater Relief” Is Not Necessarily Same as “Net Monetary Recovery”. *See Zintel Holdings, LLC v. McLean* (2012) 209 C.A.4th 431, 438, 147 C.R.3d 157 [although tenant was prevailing party for award of costs under C.C.P. 1032, she was not prevailing party for award of fees under C.C. 1717; citing *Sears*]; *Douglas E. Barnhart v. CMC Fabricators* (2012) 211 C.A.4th 230, 239, 149 C.R.3d 440 [subcontractor who successfully defended against contractor's breach of contract claim by showing that no contract existed was prevailing party, even though contractor was awarded monetary relief on promissory estoppel claim; because promissory estoppel claim was not claim “on a contract” within meaning of C.C. 1717(a), subcontractor prevailed on only contract claim in action; citing *Zintel Holdings*].

Witkin California Procedure, Fifth Edition, § 194.

(b) [§ 195] No Requirement of Final Judgment.
. . .

(2) Revised Definition. The definition of a prevailing party for purposes of C.C. 1717 was revised in 1981. The court, on a party's notice and motion, must determine who is the party prevailing on the contract, whether or not the action proceeds to final judgment. (C.C. 1717(b)(1).) However, final disposition is required. (*See infra*, § 196.)

SUPPLEMENT

(2) Revised Definition. The definition of a prevailing party for purposes of C.C. 1717 was revised in 1981. The court, on a party's notice and motion, must determine who is the party prevailing on the contract, whether or not the action proceeds to final judgment. (C.C. 1717(b)(1).) However, final disposition is required. (See infra, § 196.)

In *Elms v. Builders Disbursements* (1991) 232 C.A.3d 671, 283 C.R. 515, plaintiffs' action was dismissed for failure to bring it to trial within 5 years. Held, defendant was the prevailing party and was entitled to fees. *Winick Corp. v. Safeco Ins. Co.* (1986) 187 C.A.3d 1502, 232 C.R. 479, involved a dismissal for failure to serve and return summons within 3 years. There, plaintiff's claim was thrown out completely. “In any practical sense of the word, the defendant ‘prevailed.’ ” (232 C.A.3d 674.) “So it is here. [Defendant] obtained all the relief it requested, and [plaintiffs] were denied all of their demands.” (232 C.A.3d 675.)
(3) Determination on Motion of Losing Party Is Not Required. The provisions of C.C. 1717 requiring the court to determine the prevailing party and to fix reasonable attorneys' fees on motion of “a party” do not necessarily give the losing party the power to force the court to take that action. In *De La Cuesta v. Superior Court* (1984) 152 C.A.3d 945, 200 C.R. 1, plaintiffs bought property subject to deeds of trust issued by defendant, which contained due-on-sale provisions. When defendant exercised its rights under those provisions, plaintiffs sought to enjoin the resulting nonjudicial foreclosure. After a summary judgment for defendant

was entered and affirmed on appeal, plaintiffs filed a motion to require the trial judge to determine the prevailing party and fix reasonable attorneys' fees under C.C. 1717. This was done to ensure judicial scrutiny of the amount of attorneys' fees, incurred in enforcing the right of foreclosure, that defendant would add to the amount necessary to pay off the loan. The motion was denied, and plaintiffs sought mandamus. Held, writ denied.

(a) The amount of fees incurred by defendant in the injunction action would not necessarily be coextensive with the fees incurred in connection with its overall effort to foreclose. Hence, in the absence of a showing of the services performed and their value, it is doubtful that the court could properly make orders for attorneys' fees. (152 C.A.3d 949.)

(b) In any event, plaintiffs have misconceived their remedy. They must allow defendant to set the amount of attorneys' fees, which they can then challenge in a new action for declaratory relief or injunction in which they will be entitled to attorneys' fees if they prevail. (152 C.A.3d 950.)

SUPPLEMENT

(2) Revised Definition. See Profit Concepts Management v. Griffith (2008) 162 C.A.4th 950, 953, 76 C.R.3d 396 [former employee was prevailing party in employer's action for breach of contract and was entitled to recover reasonable attorneys' fees, where trial court granted employee's motion to quash service for lack of personal jurisdiction; citing Elms v. Builders Disbursements (1991) 232 C.A.3d 671, 283 C.R. 515, text, p. 747]; *PNEC Corp. v. Meyer* (2010) 190 C.A.4th 66, 69, 118 C.R.3d 730 [defendant was prevailing party entitled to fees, where trial court dismissed contract action on *forum non conveniens* grounds; neither contract's fee provision nor C.C. 1717 required decision on merits, and whether action would be refiled in other state was speculative; citing *Profit Concepts* and distinguishing *Estate of Drummond* (2007) 149 C.A.4th 46, 56 C.R.3d 691, text, § 196].

Profit Concepts and *PNEC Corp*. were disapproved in *DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 C.5th 968, 979, 216 C.R.3d 109, 391 P.3d 1181, to the extent that they state the prevailing party determination must be made without regard to the contract litigation's continuation in another forum.

(b) [§ 195]No Requirement of Final Judgment., 7 Witkin, Cal. Proc. 5th Judgm § 195 (2020)

Id., § 195.

(1) [§ 197] In General. [Discretion of Judge]

A trial judge has wide discretion in determining who is the prevailing party. (*Hunt v. Fahnestock* (1990) 220 C.A.3d 628, 633, 269 C.R. 614, infra, § 198; see 16 California Lawyer 60 (July 1996) [determining prevailing party for purposes of

C.C. 1717].) Hence, where **plaintiff guarantors failed to prevail on causes of action for damages, but were exonerated from any further liability on their guaranties, the trial judge did not abuse his discretion in awarding them fees**. (*Krueger v. Bank of America* (1983) 145 C.A.3d 204, 217, 193 C.R. 322.)

In *Nasser v. Superior Court* (1984) 156 C.A.3d 52, 202 C.R. 552, plaintiff lessee filed a declaratory judgment action to validate his 3-year option to renew the lease and to set the rent for the option period. **The trial judge validated the option but set the rent at an amount higher than that which plaintiff had requested in his declaratory judgment action or previously offered; then the judge ruled that neither party had prevailed and awarded no attorneys' fees**. Held, there was no abuse of discretion, because the judgment was both "good news and bad news" for each party. (156 C.A.3d 60; on determination of no prevailing party, see infra, § 199.)

Cases discussing the trial court's discretion to determine the prevailing party include the following:

Foothill Properties v. Lyon/Copley Corona Associates (1996) 46 C.A.4th 1542, 1554, 54 C.R.2d 488 [trial court did not abuse discretion in awarding fees to defendant who obtained "simple, unqualified win," even though plaintiff arguably prevailed on claim for right to certain documents; right was never seriously contested and plaintiff received documents before trial; following Hsu v. Abbara (1995) 9 C.4th 863, 39 C.R.2d 824, 891 P.2d 804, infra, § 199].

Acree v. General Motors Acceptance Corp. (2001) 92 C.A.4th 385, 402, 403, 112 C.R.2d 99 [substantial evidence supported finding that plaintiffs obtained "greater relief" in class action against corporation that provided financing for purchase of automobiles; **although defendant prevailed on majority of contract claims, plaintiffs prevailed on most significant claim, defendant took nothing on its cross-complaint**, and defendant made "weighty" changes in business practices after action was filed].

Jackson v. Homeowners Assn. Monte Vista Estates-East (2001) 93 C.A.4th 773, 786, 788, 113 C.R.2d 363 [trial court did not abuse discretion in awarding fees to plaintiffs who **achieved main litigation objective, which was amendment of covenants, conditions, and restrictions** to allow renting of property, **even though plaintiffs received only nominal "nuisance value payment**" for settling case and did not obtain most of requested relief].

*Ajaxo v. E*Trade Group* (2005) 135 C.A.4th 21, 57, 59, 37 C.R.3d 221 [trial court did not abuse discretion in determining that plaintiff, who won "simple, unqualified verdict" on breach of contract claim and established damages over $1 million, was prevailing party, even though plaintiff recovered only fraction of damages it initially sought].

SUPPLEMENT

The following are among the numerous cases discussing the trial court's discretion to determine the prevailing party:

Ritter & Ritter, Pension & Profit Plan v. Churchill Condominium Assn. (2008) 166 C.A.4th 103, 125, 82 C.R.3d 389 [homeowners were prevailing parties in action against condominium association and individual directors, where jury awarded damages for association's failure to take remedial action; homeowners also prevailed on request for injunctive relief, forcing association to obtain membership vote on need to perform remediation].

Federal Deposit Ins. Corp. v. Dintino (2008) 167 C.A.4th 333, 355, 84 C.R.3d 38 [borrower was entitled to fees incurred in defending against bank's breach of contract claim; **trial court erred in considering bank's success on noncontract causes of action, such as unjust enrichment**, when *determining which party prevailed on sole contract cause of action; citing Hsu v. Abbara* (1995) 9 C.4th 863, 39 C.R.2d 824, 891 P.2d 804, text, § 199].

Kachlon v. Markowitz (2008) 168 C.A.4th 316, 349, 85 C.R.3d 532 [home buyers were prevailing party in action against company that home sellers substituted in as trustee to conduct nonjudicial foreclosure; substituted trustee consistently allied itself with sellers on essential issues relevant to claims on promissory note and deed of trust, was not neutral in litigation, and did not limit itself to defending against damage claims based in tort; moreover, trustee's immunity from liability under C.C. 47 (5 Summary (11th), Torts, § 662) did not prevent it from being liable for attorneys' fees under C.C. 1717].

In re Tobacco Cases I (2013) 216 C.A.4th 570, 578, 156 C.R.3d 755 [trial court **did not abuse "broad" discretion in determining that People of State of California prevailed** in action against tobacco company to enforce consent decree; People accomplished **main litigation objective of stopping company's use of cartoons in advertising in California**, even **though their secondary claim that advertisement adjacent to publisher's cartoons was unlawful did not succeed**].

Holguin v. DISH Network LLC (2014) 229 C.A.4th 1310, 1327, 178 C.R.3d 100 [trial court did not abuse discretion in determining that homeowners sufficiently prevailed on breach of contract claim against installers and providers of telecommunications services; homeowners prevailed on every element of contract action and were awarded economic damages; trial court did not have to make finding of damages specific to breach of contract, nor did plaintiffs have to propose verdict form that specifically addressed contract damages].

In re Marriage of Nassimi (2016) 3 C.A.5th 667, 697, 207 C.R.3d 764 [where dissolution judgment provided for attorneys' fees in proceeding brought "to interpret or enforce any of the provisions of this judgment," remand was necessary to determine who, if anyone, was prevailing party in action to determine whether former spouses had to share obligation for third-party claim].

San Diego County Water Authority v. Metropolitan Water Dist. of Southern Calif. (2017) 12 C.A.5th 1124, 1164, 220 C.R.3d 346 [reversal of judgment for water authority necessitated redetermination of prevailing party on remand; water authority no longer possessed simple, unqualified win].

Pont v. Pont (2018) 31 C.A.5th 428, 443, 242 C.R.3d 616 [family law court properly determined that husband, who obtained dismissal of wife's action in another court alleging that husband had dissipated community assets and then defeated wife's attempt to amend her defective complaint, was prevailing party; **husband achieved his litigation objective of defeating wife's attack on stipulated marital dissolution judgment**].

Id., § 197.

In *Hsu v. Abbara*, 9 Ca.4th 863, 875-876 (1995), the California Supreme Court discussed prevailing parties, stating (emphasis added):

> Since the 1987 amendment of section 1717, the appellate courts have continued to recognize the trial court's authority to determine that there is no party prevailing on the contract for purposes of contractual attorney fees, but **for the most part these have also been cases in which the opposing litigants could each legitimately claim some success in the litigation.** One case, for example, involved cross-actions by neighboring landowners for breach of covenants, conditions, and restrictions (CC & R's) containing an attorney fees provision. (*Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 11 Cal.Rptr.2d 723.) **Because ultimately no relief was awarded to any party under the CC & R's, the Court of Appeal found, as a matter of law, that there was no party prevailing on the contract under section 1717.10** (*Bankes v. Lucas, supra*, 9 Cal.App.4th at p. 369, 11 Cal.Rptr.2d 723; *see also McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn*. (1991) 231 Cal.App.3d 1450, 1456, 282 Cal.Rptr. 828.)
>
> As one Court of Appeal has explained, **"[t]ypically, a determination of no prevailing party results when both parties seek relief, but neither prevails, or when the ostensibly prevailing party receives only a part of the relief sought.**" (*Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1398, 16 Cal.Rptr.2d 816.) By contrast, when the results of the litigation on the contract claims are not mixed—that is, when the decision on the litigated contract claims is purely good news for one party and bad news for the other—the Courts of Appeal have recognized that a trial court has no discretion to deny attorney fees to the successful litigant. Thus, when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a matter of law. *(See, e.g., Melamed v. City of Long Beach* (1993) 15 Cal.App.4th 70, 84, 18 Cal.Rptr.2d 729; *Deane Gardenhome Assn. v. Denktas, supra*, 13 Cal.App.4th 1394, 1398, 16 Cal.Rptr.2d 816; *Elms v. Builders Disbursements, Inc., supra*, 232 Cal.App.3d 671, 674–675, 283 Cal.Rptr. 515; *Manier v. Anaheim Business Center Co.* (1984) 161 Cal.App.3d 503, 505–509, 207 Cal.Rptr. 508.) Similarly, a plaintiff who obtains all relief requested on the only contract claim in the action must be regarded as the party prevailing

on the contract for purposes of attorney fees under section 1717. *(E.g., Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1247, 34 Cal.Rptr.2d 155; *Smith v. Krueger* (1983) 150 Cal.App.3d 752, 757, 198 Cal.Rptr. 174.)

We are persuaded that this construction of section 1717 properly reflects and effectuates legislative intent. It is consistent with the underlying purposes of the statute—to achieve mutuality of remedy—and it harmonizes section 1717 internally by allowing those parties whose litigation success is not fairly disputable to claim attorney fees as a matter of right, while **reserving for the trial court a measure of discretion to find no prevailing party when the results of the litigation are mixed.**

Accordingly, we hold that in deciding whether there is a "party prevailing on the contract," the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. **The prevailing party determination is to be made only upon final resolution of the contract claims and only by "a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions**." (*Bank of Idaho v. Pine Avenue Associates* (1982) 137 Cal.App.3d 5, 15, 186 Cal.Rptr. 695.)

It is also discussed in Witkin that there may be multiple prevailing parties, if there are multiple independent contracts. Witkin California Procedure, Fifth Edition, § 197.

Computation of Prevailing Party Attorney's Fees

Unless authorized by statute or provided by contract, attorney's fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party must establish that a contractual provision exists for attorney's fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), amended, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "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). An attorney's fee 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 County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). Having this discretion is appropriate "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.

DISCUSSION

In considering this request, the court first notes that Creditor argues that the court having sustained the original Objection to Confirmation and not issuing a final order thereon, but instead continuing the proceedings to allow Creditor to file an amended proof of claim that complies with the Bankruptcy Code and Federal Rule of Bankruptcy Procedure means that sustaining that Objection has to be considered as part of the final order and cannot be a separate prevailing party determination for Debtor. Motion, p. 3:23-28, 4:1-3; Dckt. 274. The phasing of these proceedings came about due to Creditor's failure to file a proof of claim that complied with the Bankruptcy Code.

As clearly stated in the Civil Minutes from the February 2, 2021 hearing on the Objection to Proof of Claim 2-1, the consideration of Amended Proof of Claim 2-2 filed by Creditor on the eve of the hearing on the Objection to Proof of Claim 2-1, and the multiple Notices of Post-Petition Fees, Creditor had not filed the Proofs of Claims and Notices with the information required under the applicable Bankruptcy Law.

> Federal Rule of Bankruptcy Procedure section 3001(c)(2) requires that creditor include or attach certain documents with their proof of claim in order to substantiate their claim. Specifically, FRBP section 3001(c)(2)(A) requires a creditor to provide "an itemized statement of the interest, fees, expenses, or charges." Additionally, pursuant to FRBP 3001(c)(2)(B) requires a creditor to provide "a statement of the amount necessary to cure any default as of the date of the petition." Finally, section 3001(c)(2)(C) requires a creditor with a secured claim over a debtor's principal residence, must attach the "appropriate official form."
>
> **Here, Proof of Claim 2-1 did suffer from failure to itemize the various expenses and charges.**
>
> For a Notice of Postpetition Mortgage Fees, Expenses and Charges, the Bankruptcy Rules impose a similar requirement. Federal Rule of Bankruptcy Procedure 3002.1(c) provides:
>
> > (c) Notice of Fees, Expenses, and Charges. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.
>
> **Here, a review of the Notice filed on December 21, 2020 shows that, though including the amounts allegedly owed, the Notice does not contain supplemental documents itemizing the fees, expenses or charges. Thus, the December 21, 2020 Notice fails to meet the requirements of FRBP 3002.1.**
>
> In the responsive pleadings, there appears to be itemizations for Debtor

and his counsel to review.

> **Creditor filed Amended Proof of Claim 2-2 on January 26, 2021. The Official Form for a mortgage is still not properly completed**, but is followed by six (6) pages breaking down account activity from August 7, 2018 through January 21, 2021. Creditor also filed an Amended Notice of Postpetition, Mortgage Fees, Expenses, and Charges on January 19, 2021. This amended Notice, also attached to amended Proof of Claim 2-2, provides a billing summary of attorney's fees and an invoice listing the different charges related to the loan since August 2019 through December 2020.
>
> **As addressed above, Proof of Claim 2-1 suffers from shortcomings and some clearly inaccurate statements under penalty of perjury (such as the entire obligation must be paid to cure the pre-petition arrearage).** Creditor, and counsel, may feel frustrated that Debtor has elected to go through multiple bankruptcies, but such is not an excuse.

Civil Minutes, p. 9; Dckt. 211-212.

The Civil Minutes continue, with the court explaining why the court is continuing the hearing rather than entering an order sustaining the Objection and authorizing Creditor to file a motion to file amended claim after objection to claim was sustained.

> At the hearing, the court addressed with the Parties bifurcating the current objections. Phase 1, the Objection to Proof of Claim 2-1 and the **"Notice of Postpetition Mortgage Fees, Expenses, and Charges** being sustained due to the failure of Creditor to provide the required itemizations in support of both.
>
> However, in light of Creditor having now provided such itemizations in Opposition to this Objection, to save the Parties the cost in time and money of sustaining the objection with leave to file an amended claim, then having a possible second objection and all of the pleadings already filed by Creditor recreated, the court, with the Parties concurrence, has set further hearing on "Phase 2" of the Objections - that being the Debtor filing objections, if any, to the Proof of Claim based on the itemizations provided in the Opposition.

Id., p. 11 (bold emphasis in original, underlined emphasis added).

Though the court was attempting, with the concurrence of the Parties, to reduce the cost, expense and delay (incorrectly believing that with the original hearing a reality as to what the law requires and allows had set in with the Parties), the ruling on the Phase 1 portion, in which Debtor knocked out Proof of Claim 2-1 and Amended Proof of Claim 2-2, is not part of the totality of the circumstances, claims asserted, and claims prevailed on for determination of the prevailing party on this dispute arising under the contract (the Note).

Creditor cites back to this court's Memorandum Opinion and Decision in which the court stated the final ruling that sustained Debtor's Objection to $21,541.71 of Creditors First and Second

Amended Proofs of Claim 2-2, 2-3 (Creditor having asserted the claim in various proofs of claim and other documents filed in a rolling format during the Objection to Claim Contested Matter), plus $353.06 in interest thereon (for a total disallowed amount of $21,894.77). The court determined that there remained $48,076.29 due Creditor on his secured claim in this case. Mem. Op. and Dec., p. 36:10-17; Dckt. 268. The court also sustained the Debtor's Opposition and Objection to Creditor asserting that the disallowed amount of the claim totaling $21,894.77 was required to be allowed as an unsecured claim. In effect, the court has sustained the Objection, disallowing $21,894.77 as part of Creditor's secured claim, and an additional $21,894.77 Creditor asserted as a general unsecured claim. As stated in the Memorandum Opinion and Decision, the court did not disallow the $21,894.77 as part of the secured claim due to there not being sufficient value in the collateral or as an unsecured claim based on the "equities," but determined that Creditor had no right under the applicable law and contract terms to the $21,894.77. *Id*., p. 2:10-13.

The reason there was "only" $69,971.06 of the claim remaining is that court ordered that $115,000 of the proceeds from the sale of Creditor's collateral be immediately disbursed to Creditor to not only reduce the claim, but so that such substantial amounts not in dispute would not be held "hostage" over a dispute concerning a "minor amount of the total claim." Creditor's lien attached to a portion of the proceeds sufficient to protect Creditor's secured claim.

In the Memorandum Opinion and Decision, the court "summarized" the various amounts claimed by creditor that were the subject of the Supplemental Objection. The court first addressed the objection based on alleged improper Block Billing. These amounts totaled $6,917.50. *Id*., Addendum B. The court overruled the blanket objection based on "Block Billing," noting that these items were billings by Creditor's counsel, some of which would be addressed under other objection grounds:

> Though there are some issues to be addressed with respect to the legal fees sought, neither Ms. Nagata nor Mr. Normandin, and their respective firms, have committed the billing sin of Block Billing. The court overrules Debtor's Objection based on "Block Billing."

Id., p. 16:16-18.

The court then addressed the Objection based on improperly billing for administrative and clerical work done by Creditor's attorney's office (the vast majority of the billings being by non-attorneys). The court disallowed all (100%) of the administrative and clerical work fees billing, which totaled $3,002.5. *Id*., p:18:1-21:6; Addendum C-1.

Next, the court disallowed the legal fees and costs relating December 22, 201 hearing and Creditor's Counsel drafting deficient proofs of claim which resulted in the filing of the Objection(s) to claim. Debtor's Objection the court disallowed all (100%) of the objected to fees for the Phase 1 portion of this Objection and a portion of the fees billed by Creditor's counsel for the December 22, 2020 hearing on the Motion to Sell Creditor's collateral, which totaled $8,683.50. *Id*., p. 21:15 - 23:21; Addendum C-2.

The total disallowed fees are shown in the table on pages 24 and 25 of the Memorandum Opinion and Decision. *Id*., p. 24:1-25:18. Creditor requested $34,731.71 in legal fees, of which the court allowed $21,545.71. Thus, Debtor successfully reduced the attorney's fees advocated for by Creditor and Creditor's counsel through the final hearing by 37.9%. *Id*., p. 25:1-18.

In addition, the court reduced this by an additional $353.06 for the interest Creditor included in his Claim for the legal fees which the court did not allow. *Id*., p. 25:22-27:4; Addendum D.

While Debtor did a shotgun "Objection to all legal fees," for the ones specifically identified, Debtor was able to reduce the total legal fees claimed by Creditor by $21,545.71, 37.9% of the total amount claimed by Creditor. This is not an insignificant reduction, either in dollar amount or percentage. Creditor's assertion that this was merely a 12.9% reduction or a minor 2.45% of Creditor's overall claim is an invalid assertion. Creditor had pocketed in January of 2021 $115,000, leaving at issue the $34,731.71 of fees in dispute. Creditor attempting to assert that the battles were over the total claim, when Creditor had that money in his pocket to use as he wished, there being no restrictions thereon, is not based upon the facts in this case, nor applicable law.

Additionally, Debtor prevailed in objecting to 100% of the $21,894.77 unsecured claim that Debtor asserted. *Id*., p. 30:24 - 35:6. Though Creditor slipped this in the non-lawyer Creditor's Declaration, Dckt. 249, that does not mean Creditor was not asserting that as part of the Claim. As the court stated in the Memorandum Opinion and Decision, such assertion was based on incorrectly citing Georgia law that does not apply to this Claim and ignoring California law that applies to this Claim. In considering this asserted unsecured claim, the court noted:

> In addition to making this legal analysis under penalty of perjury, Mr. Anderson and his counsel also certify that "[t]he claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; . . . ." Fed. R. Bankr. P. 9011(b)(2).
> . . .
> The court does not understand the basis for Mr. Anderson's and his counsel's certification that the *Welzel* case supports Creditor being able to demand and be paid as an unsecured claim unreasonable attorney's fees for which Debtor is not obligated to pay under the "reasonable" contractual provisions of the Note and California law

Id., p. 31:9-12, 33:7-10. There was no valid legal basis for Creditor and his Counsel to assert that Creditor would be given an unsecured claim for attorney's fees that were not owed to Creditor under the contract and applicable California law. In asserting this, Creditor necessitated that Debtor proceed with that part of the Objection.

In substance Creditor had 37.1% of the secured claim at issue not allowed. In addition, Creditor had 100% of the unsecured claim Creditor asserted not allowed.

Creditor, through the failure to comply with the Bankruptcy Code and Rules necessarily required Debtor to file and then prosecute the Objection to Claim. Creditor made that even more challenging by filing one amended claim after the other, trying to derail (at least in the court's eye) the Contested Matter before the court.

In looking at the gross deficiencies in the proofs of claim filed, the repeated failure to document the attorney's fees in dispute, the law office's clerical and administrative expense (enumerated as billed on Addendum C-1 to the Memorandum Opinion and Decision, Dckt. 268) and how this Contested Matter was liquidated from the Creditor's side, there could be two possible reasons. First,

Creditor is an unsophisticated person who makes six figure loans with 18% interest who hires unskilled lawyers. Alternatively, Creditor and Creditor's lawyers could view filing claims in Federal Court and the proceedings relating thereto as an opportunity to "fatten the calf," demand amounts that are not owed, and litigate, litigate, and litigate figuring that everything comes Creditor's way because it is a secured claim with collateral well in excess of the value of the claim. Having read Creditor's Declaration, pleadings prepared by Creditor's various counsel, and listening to Creditor's various counsel in open court, it appears that the latter would be most likely.

Creditor is not the prevailing party, having 31.7%, which is $21,541.71 (including $353.06 of interest on the disallowed fees) of the $34,731.71 in fees Creditor sought in the Proof of Claim. He was substantially knocked down from what he was claiming/demanding as his Secured, and then Unsecured, Claim in this case.

Creditor seems to ignore the fiduciary duties of a Chapter 13 debtor, exercising the powers and having the responsibilities of a trustee as provided in 11 U.S.C. § 1303 for the proper distribution of monies to creditors for their allowable claims. As discussed in Collier on Bankruptcy, 11 U.S.C. § 1303 is not an exclusive list of powers of a Chapter 13 debtor. 8 Collier on Bankruptcy P 1303.04 (16th 2021). Additionally, Debtor claimed an exemption in the property sold, and proceeds thereof, (Schedule C, Dckt. 11) resulting in Debtor having to object to unsupported, proofs of claim and notices of postpetition expenses that did not comply with the Bankruptcy Code, and not to "just trust" Creditor and the amounts included in the Proof of Claim to rake off from the proceeds from the sale of the collateral or the amount that would have to be paid through a plan for Creditor's secured claim.

Creditor's noncompliance with the law conduct necessarily required the filing of the Objection to Claim, which Creditor did not succeed on in the Phase 1 hearings due to the defective proofs of claim and ultimately advocating for/demanding amounts which Creditor was not entitled to receive under the contract and applicable California law.

The court does not make a determination of whether Debtor was the prevailing party in this litigation. Such will be addressed in connection with Debtor's Motion for Prevailing Party Attorneys' fees. Dckt. 278. This appears to be one of those unfortunate circumstances were "each party deserved his opponent."

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 Prevailing Party Fees filed by the creditor, Roger Anderson, ("Movant"), in the Contested Matter and prevailing party on the Objection to 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 Movant is determined not to be the prevailing party and is not awarded contractual attorney's fees as provided in California Civil Code § 1717.

17. **20-21910-E-13 FF-9** **TIMOTHY TROCKE**
Gary Fraley

AMENDED MOTION FOR DETERMINATION THAT DEBTOR IS THE PREVAILING PARTY IN MOTION, AMENDED MOTION FOR CREDITOR TO PAY DEBTOR'S ATTORNEY'S FEES
8-17-21 [296]

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 Creditor Roger Anderson, counsel for Creditor Roger Anderson, the Chapter 13 Trustee, U.S. Trustee, and several parties requesting special notice on August 3, 2021. By the court's calculation, 28 days' notice was provided. 28 days' notice is required. LOCAL BANKR. R. 9014-1(f)(1).

The Motion for Prevailing Party 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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Prevailing Party Fees by Debtor Timothy Trocke is granted.

The Chapter 13 debtor, Timothy Tobias Trocke ("Movant" / "Debtor") filed this Motion seeking prevailing party fees in the amount of $26,790.00 pursuant to Federal Rules of Bankruptcy Procedure 7054 and 9014(c) and based on the Note & Deed of Trust as applied under California Civil Code § 1717. Dckt. 278. Debtor filed an amended motion to reduce the attorney's fees to $24,185.58 to match Creditor Roger Anderson's ("Creditor") charges, after Creditor filed a Opposition arguing that Debtor's original amount for fees are excessive. Dckt. 296.

Movant states with particularity (FED. R. BANKR. P. 9011) the following grounds in support of the Motion:

1. The attorney's fees requested are related solely to Debtor's Objection to Proof of Claim of Creditor Roger Anderson (RWA Trust), Docket Number FF-8. The Objection was based on the lack of Creditor to amend the claim to provide the necessary documents: history of the promissory note payments and a breakdown of the fees that had been charged.

2. Debtor argues that had Creditor corrected the failure, the attorney's fees incurred by Debtor and Creditor could have been avoided and would resulted in a fraction of what they are now. Further arguing that Creditor chose to litigate instead of addressing the problems.

3. Debtor sought to settle the matter with Creditor but such attempts met with refusal to fix the problematic documents.

4. Debtor requests that he be determined as the prevailing party in both "Phase 1" and Phase 2" of the objection proceedings in FF-8 Objection to Proof of Claim of Creditor Roger Anderson (RWA TRUST).

5. Debtor also requests reasonable attorney's fees to be paid to Debtor's attorney, Gary Ray Fraely, in the sum of $26,790.00 and that said fees to be disbursed directly from funds belonging to Creditor based on the Order of this court filed July 16, 2021 and held by Chapter 13 Trustee David Cusick.

6. On August 17, 2021, Debtor amended the motion, in order to address Creditor's opposition arguing the attorney's fees were excessive, and reduces the attorney's fees to $24,185.58 to match Creditor Roger Anderson's ("Creditor") charges.

Counsel for Debtor has provided printout of all the billings by the three attorneys providing services to Debtor with respect to the Objection to Claim. Exhibit A is for billings totaling $26,790, for the period December 14, 2020 through July 21, 2021. Exhibit B provides copies of several emails in which Debtor's counsel makes various assertions concerning the conduct of Creditor and Creditor's various counsel. These are reflective of the dysfunctional interaction between the Parties and their Counsel, but do not bear on who is the prevailing party and any award of prevailing party attorney's fees.

OPPOSITION BY CREDITOR

Creditor begins with the assertion that Debtor's motion cites no authority for why Debtor should be the prevailing party. Dckt. 290. Creditor correctly asserts that while the court at the end of Phase 1 of the proceedings used the term "prevailing party," since the court did not issue a final order at that time, the misuse of that term was corrected in the Memorandum Opinion and Decision on the Objection to Claim (Dckt. 268, p. 35:24 - 36:1). The question of who, if either, of the Parties is the prevailing party is being made now in connection with this Motion and the Motion filed by Creditor. The court now uses the term "successful" for the Phase 1 proceedings, stating that Debtor's Objection to Proof of Claim 2-1 and the Notice of Postpetition Costs and Expenses was successful, from which the court ordered further pleadings to consider Amended Proof of Claim 2-2 and Second Amended Claim 2-3 filed by Creditor while this Contested Matter was before the court.

Creditor then asserts that the success of Debtor in Phase 1 is of no relevance in determining the prevailing party. As in the cases cited by Creditor and by the court above, the court looks at the whole proceeding to determine who, if anyone, has prevailed as that term is used in California Civil Code § 1717. Though Debtor was successful in the Phase I, that does not dictate that Debtor is the

prevailing party for this Contested Matter.

Creditor then asserts that Debtor cannot be the prevailing party for various grounds, which the court summarizes as follows:

A. It is an abuse of discretion for the trial court to determine someone a prevailing party if that party "prevailed on a minor 'battle' but lost the 'war' (the main issue in the action)." Opposition, p. 3:17-18; Dckt. 290.

B. Debtor has been "almost wholly unsuccessful in his proof of claim objections." *Id*., p. 3:21.

C. "The amounts of fees that the court disallowed in its July 16, 2021 order represented just a small fraction of Creditor's overall claim." *Id*., p. 3:21-23.

D. Even if the court were to consider the $34,731.71 in legal fees at issue (that being the subjection of the Supplemental Objection to Claim, after Creditor filed Amended Proof of Claim 2-2 and Second Amended Claim 2-2), "the court's order allowed the majority of those fees as part of Creditor's claim." *Id*., p. 3:23-25.

The court notes that Creditor fails to state what the majority is or how "insignificant" a reduction in the fees claimed/demanded in the Proofs of Claim was obtained through the Objection to Claim. The court addresses those numbers below.

E. Because Debtor sought to have all $34,731.71 of Creditor's Claim disallowed, but the court did not disallow all of the Claim (as amended and re-amended), Creditor is the prevailing party. *Id*., p. 3:25-28.

STATUTORY BASIS FOR ATTORNEY'S FEES

The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the Unites States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court. *Fed. R. Bank P.* 7054(b)(1)

Statutory Basis - Contract

California Civil Code § 1717 addresses substantive state law making contractual attorney's fees provisions reciprocal, stating:

> (a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then **the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees** in addition to other costs.
> . . .

(b)
(1) **The court**, upon notice and motion by a party, **shall determine** who is **the party prevailing** on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2) [dismissals], the **party prevailing** on the contract **shall be the party who recovered a greater relief in the action** on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

In Witkin California Procedure the law relating to the prevailing part is discussed in several section. These include the following:

(a) [§ 194] Party Recovering Greater Relief.

(1) In General. The party prevailing on the contract is the party who recovered a greater relief in the action on the contract. (C.C. 1717(b)(1); see C.E.B., Attorney Fee Awards 2d, § 6.18 et seq.; Cal. Civil Practice, 4 Procedure, § 33:47 . . . Cases discussing when a party is the prevailing party under this rule include the following:

Artesia Med. Dev. Co. v. Regency Associates, Ltd. (1989) 214 C.A.3d 957, 965, 966, 266 C.R. 657 [in plaintiff lessor's unlawful detainer action against defendant lessee and defendant assignee, judgment of forfeiture of lease made plaintiff the prevailing party, even though court allowed defendant assignee to remain in possession as lessee subject to conditions].

Mustachio v. Great Western Bank (1996) 48 C.A.4th 1145, 1150, 56 C.R.2d 33 [although plaintiff's claim for punitive damages was rejected on appeal, she was party prevailing on contract because she received damages for breach of contract and conversion].
. . .
Biren v. Equality Emergency Med. Group (2002) 102 C.A.4th 125, 139, 140, 125 C.R.2d 325 [defendant who was awarded judgment on its cross-complaint was not prevailing party; judgment was to be applied as credit against larger amount owed to plaintiff, and defendant obtained only "mixed" result on its various claims].
. . .
(4) "Greater Relief" Is Not Necessarily Same as "Net Monetary Recovery". In *Sears v. Baccaglio* (1998) 60 C.A.4th 1136, 1139, 1155, 70 C.R.2d 769, defendant, the lessor of a building, secured a personal guaranty from plaintiff, the principal shareholder of the company to whom the building was leased. The guaranty guaranteed the lessee's performance of the lease and required payment of reasonable attorneys' fees to the prevailing party in any legal action concerning the guaranty. After the lessee company filed for bankruptcy and defaulted on the lease, plaintiff paid defendant $112,000 under protest. Defendant eventually also received payments from the lessee's bankruptcy estate, rent in mitigation, and the security deposit, totaling, with plaintiff's payment under the guaranty, $359,386. Plaintiff sued defendant for breach of contract and other claims, alleging that the guaranty no longer existed, and requested $112,000 in damages. Defendant

cross-complained for an additional $5,461. The trial court found plaintiff liable on the guaranty, but awarded plaintiff over $67,000 in damages, representing the amount that defendant had recovered from the various payment sources exceeding what the lessee had owed to defendant on the lease. The trial court awarded defendant nothing on his cross-complaint. The trial court then awarded defendant attorneys' fees, finding that he had prevailed on the contract issue. Held, affirmed.

(a) C.C. 1717 applies here. The statute plainly applies to contracts including bilateral fee provisions. (60 C.A.4th 1146.) Thus, it permits fees to be awarded in contract actions where the contract provides for an award to the prevailing party, not just to those where the contract purports to permit fees only to a specified party. (60 C.A.4th 1149.)

(b) C.C. 1717 gives the trial court discretion to determine the prevailing party, regardless of which party received the greater amount of damages. The trial court may apply equitable principles and conclude that the person receiving the greater monetary judgment may not be the party recovering "greater relief" on the contract action. (60 C.A.4th 1151.) "In the event one party received earlier payments, settlements, insurance proceeds, or other recovery, the court has discretion to determine whether the party required to pay a nominal net judgment is nevertheless the prevailing party" entitled to attorneys' fees under C.C. 1717. (60 C.A.4th 1154, 1155.)

. . .

SUPPLEMENT

. . .

(4) "Greater Relief" Is Not Necessarily Same as "Net Monetary Recovery". *See Zintel Holdings, LLC v. McLean* (2012) 209 C.A.4th 431, 438, 147 C.R.3d 157 [although tenant was prevailing party for award of costs under C.C.P. 1032, she was not prevailing party for award of fees under C.C. 1717; citing *Sears*]; *Douglas E. Barnhart v. CMC Fabricators* (2012) 211 C.A.4th 230, 239, 149 C.R.3d 440 [subcontractor who successfully defended against contractor's breach of contract claim by showing that no contract existed was prevailing party, even though contractor was awarded monetary relief on promissory estoppel claim; because promissory estoppel claim was not claim "on a contract" within meaning of C.C. 1717(a), subcontractor prevailed on only contract claim in action; citing *Zintel Holdings*].

Witkin California Procedure, Fifth Edition, § 194.

(b) [§ 195] No Requirement of Final Judgment.

. . .

(2) Revised Definition. The definition of a prevailing party for purposes of C.C. 1717 was revised in 1981. The court, on a party's notice and motion, must determine who is the party prevailing on the contract, whether or not the action proceeds to final judgment. (C.C. 1717(b)(1).) However, final disposition is required. (*See infra*, § 196.)

SUPPLEMENT

(2) Revised Definition. The definition of a prevailing party for purposes of C.C. 1717 was revised in 1981. The court, on a party's notice and motion, must determine who is the party prevailing on the contract, whether or not the action proceeds to final judgment. (C.C. 1717(b)(1).) However, final disposition is required. (See infra, § 196.)

In *Elms v. Builders Disbursements* (1991) 232 C.A.3d 671, 283 C.R. 515, plaintiffs' action was dismissed for failure to bring it to trial within 5 years. Held, defendant was the prevailing party and was entitled to fees. *Winick Corp. v. Safeco Ins. Co.* (1986) 187 C.A.3d 1502, 232 C.R. 479, involved a dismissal for failure to serve and return summons within 3 years. There, plaintiff's claim was thrown out completely. “In any practical sense of the word, the defendant ‘prevailed.’ ” (232 C.A.3d 674.) “So it is here. [Defendant] obtained all the relief it requested, and [plaintiffs] were denied all of their demands.” (232 C.A.3d 675.)
(3) Determination on Motion of Losing Party Is Not Required. The provisions of C.C. 1717 requiring the court to determine the prevailing party and to fix reasonable attorneys' fees on motion of “a party” do not necessarily give the losing party the power to force the court to take that action. In *De La Cuesta v. Superior Court* (1984) 152 C.A.3d 945, 200 C.R. 1, plaintiffs bought property subject to deeds of trust issued by defendant, which contained due-on-sale provisions. When defendant exercised its rights under those provisions, plaintiffs sought to enjoin the resulting nonjudicial foreclosure. After a summary judgment for defendant was entered and affirmed on appeal, plaintiffs filed a motion to require the trial judge to determine the prevailing party and fix reasonable attorneys' fees under C.C. 1717. This was done to ensure judicial scrutiny of the amount of attorneys' fees, incurred in enforcing the right of foreclosure, that defendant would add to the amount necessary to pay off the loan. The motion was denied, and plaintiffs sought mandamus. Held, writ denied.

(a) The amount of fees incurred by defendant in the injunction action would not necessarily be coextensive with the fees incurred in connection with its overall effort to foreclose. Hence, in the absence of a showing of the services performed and their value, it is doubtful that the court could properly make orders for attorneys' fees. (152 C.A.3d 949.)

(b) In any event, plaintiffs have misconceived their remedy. They must allow defendant to set the amount of attorneys' fees, which they can then challenge in a new action for declaratory relief or injunction in which they will be entitled to attorneys' fees if they prevail. (152 C.A.3d 950.)

SUPPLEMENT

(2) Revised Definition. See Profit Concepts Management v. Griffith (2008) 162 C.A.4th 950, 953, 76 C.R.3d 396 [former employee was prevailing party in employer's action for breach of contract and was entitled to recover reasonable attorneys' fees, where trial court granted employee's motion to quash service for

lack of personal jurisdiction; citing *Elms v. Builders Disbursements* (1991) 232 C.A.3d 671, 283 C.R. 515, text, p. 747]; *PNEC Corp. v. Meyer* (2010) 190 C.A.4th 66, 69, 118 C.R.3d 730 [defendant was prevailing party entitled to fees, where trial court dismissed contract action on *forum non conveniens* grounds; neither contract's fee provision nor C.C. 1717 required decision on merits, and whether action would be refiled in other state was speculative; citing *Profit Concepts* and distinguishing *Estate of Drummond* (2007) 149 C.A.4th 46, 56 C.R.3d 691, text, § 196].

Profit Concepts and *PNEC Corp.* were disapproved in *DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 C.5th 968, 979, 216 C.R.3d 109, 391 P.3d 1181, to the extent that they state the prevailing party determination must be made without regard to the contract litigation's continuation in another forum.

(b) [§ 195]No Requirement of Final Judgment., 7 Witkin, Cal. Proc. 5th Judgm § 195 (2020)

Id., § 195.

(1) [§ 197] In General. [Discretion of Judge]

A trial judge has wide discretion in determining who is the prevailing party. (*Hunt v. Fahnestock* (1990) 220 C.A.3d 628, 633, 269 C.R. 614, infra, § 198; see 16 California Lawyer 60 (July 1996) [determining prevailing party for purposes of C.C. 1717].) Hence, where **plaintiff guarantors failed to prevail on causes of action for damages, but were exonerated from any further liability on their guaranties, the trial judge did not abuse his discretion in awarding them fees**. (*Krueger v. Bank of America* (1983) 145 C.A.3d 204, 217, 193 C.R. 322.)

In *Nasser v. Superior Court* (1984) 156 C.A.3d 52, 202 C.R. 552, plaintiff lessee filed a declaratory judgment action to validate his 3-year option to renew the lease and to set the rent for the option period. **The trial judge validated the option but set the rent at an amount higher than that which plaintiff had requested in his declaratory judgment action or previously offered; then the judge ruled that neither party had prevailed and awarded no attorneys' fees**. Held, there was no abuse of discretion, because the judgment was both “good news and bad news” for each party. (156 C.A.3d 60; on determination of no prevailing party, see infra, § 199.)

Cases discussing the trial court's discretion to determine the prevailing party include the following:

Foothill Properties v. Lyon/Copley Corona Associates (1996) 46 C.A.4th 1542, 1554, 54 C.R.2d 488 [trial court did not abuse discretion in awarding fees to defendant who obtained “simple, unqualified win,” even though plaintiff arguably prevailed on claim for right to certain documents; right was never seriously contested and plaintiff received documents before trial; following Hsu v. Abbara (1995) 9 C.4th 863, 39 C.R.2d 824, 891 P.2d 804, infra, § 199].

Acree v. General Motors Acceptance Corp. (2001) 92 C.A.4th 385, 402, 403, 112 C.R.2d 99 [substantial evidence supported finding that plaintiffs obtained "greater relief" in class action against corporation that provided financing for purchase of automobiles; **although defendant prevailed on majority of contract claims, plaintiffs prevailed on most significant claim, defendant took nothing on its cross-complaint**, and defendant made "weighty" changes in business practices after action was filed].

Jackson v. Homeowners Assn. Monte Vista Estates-East (2001) 93 C.A.4th 773, 786, 788, 113 C.R.2d 363 [trial court did not abuse discretion in awarding fees to plaintiffs who **achieved main litigation objective, which was amendment of covenants, conditions, and restrictions** to allow renting of property, **even though plaintiffs received only nominal "nuisance value payment**" for settling case and did not obtain most of requested relief].

*Ajaxo v. E*Trade Group* (2005) 135 C.A.4th 21, 57, 59, 37 C.R.3d 221 [trial court did not abuse discretion in determining that plaintiff, who won "simple, unqualified verdict" on breach of contract claim and established damages over $1 million, was prevailing party, even though plaintiff recovered only fraction of damages it initially sought].

SUPPLEMENT

The following are among the numerous cases discussing the trial court's discretion to determine the prevailing party:

Ritter & Ritter, Pension & Profit Plan v. Churchill Condominium Assn. (2008) 166 C.A.4th 103, 125, 82 C.R.3d 389 [homeowners were prevailing parties in action against condominium association and individual directors, where jury awarded damages for association's failure to take remedial action; homeowners also prevailed on request for injunctive relief, forcing association to obtain membership vote on need to perform remediation].

Federal Deposit Ins. Corp. v. Dintino (2008) 167 C.A.4th 333, 355, 84 C.R.3d 38 [borrower was entitled to fees incurred in defending against bank's breach of contract claim; **trial court erred in considering bank's success on noncontract causes of action, such as unjust enrichment**, when *determining which party prevailed on sole contract cause of action; citing Hsu v. Abbara* (1995) 9 C.4th 863, 39 C.R.2d 824, 891 P.2d 804, text, § 199].

Kachlon v. Markowitz (2008) 168 C.A.4th 316, 349, 85 C.R.3d 532 [home buyers were prevailing party in action against company that home sellers substituted in as trustee to conduct nonjudicial foreclosure; substituted trustee consistently allied itself with sellers on essential issues relevant to claims on promissory note and deed of trust, was not neutral in litigation, and did not limit itself to defending against damage claims based in tort; moreover, trustee's immunity from liability under C.C. 47 (5 Summary (11th), Torts, § 662) did not prevent it from being liable for attorneys' fees under C.C. 1717].

In re Tobacco Cases I (2013) 216 C.A.4th 570, 578, 156 C.R.3d 755 [trial court **did not abuse "broad" discretion in determining that People of State of California prevailed** in action against tobacco company to enforce consent decree; People accomplished **main litigation objective of stopping company's use of cartoons in advertising in California**, even **though their secondary claim that advertisement adjacent to publisher's cartoons was unlawful did not succeed**].

Holguin v. DISH Network LLC (2014) 229 C.A.4th 1310, 1327, 178 C.R.3d 100 [trial court did not abuse discretion in determining that homeowners sufficiently prevailed on breach of contract claim against installers and providers of telecommunications services; homeowners prevailed on every element of contract action and were awarded economic damages; trial court did not have to make finding of damages specific to breach of contract, nor did plaintiffs have to propose verdict form that specifically addressed contract damages].

In re Marriage of Nassimi (2016) 3 C.A.5th 667, 697, 207 C.R.3d 764 [where dissolution judgment provided for attorneys' fees in proceeding brought "to interpret or enforce any of the provisions of this judgment," remand was necessary to determine who, if anyone, was prevailing party in action to determine whether former spouses had to share obligation for third-party claim].

San Diego County Water Authority v. Metropolitan Water Dist. of Southern Calif. (2017) 12 C.A.5th 1124, 1164, 220 C.R.3d 346 [reversal of judgment for water authority necessitated redetermination of prevailing party on remand; water authority no longer possessed simple, unqualified win].

Pont v. Pont (2018) 31 C.A.5th 428, 443, 242 C.R.3d 616 [family law court properly determined that husband, who obtained dismissal of wife's action in another court alleging that husband had dissipated community assets and then defeated wife's attempt to amend her defective complaint, was prevailing party; **husband achieved his litigation objective of defeating wife's attack on stipulated marital dissolution judgment**].

Id., § 197.

In *Hsu v. Abbara*, 9 Ca.4th 863, 875-876 (1995), the California Supreme Court discussed prevailing parties, stating (emphasis added):

> Since the 1987 amendment of section 1717, the appellate courts have continued to recognize the trial court's authority to determine that there is no party prevailing on the contract for purposes of contractual attorney fees, but **for the most part these have also been cases in which the opposing litigants could each legitimately claim some success in the litigation.** One case, for example, involved cross-actions by neighboring landowners for breach of covenants, conditions, and restrictions (CC & R's) containing an attorney fees provision. (*Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 11 Cal.Rptr.2d 723.) **Because ultimately no relief was awarded to any party under the CC & R's, the Court**

of Appeal found, as a matter of law, that there was no party prevailing on the contract under section 1717.10 (*Bankes v. Lucas, supra*, 9 Cal.App.4th at p. 369, 11 Cal.Rptr.2d 723; *see also McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn*. (1991) 231 Cal.App.3d 1450, 1456, 282 Cal.Rptr. 828.)

As one Court of Appeal has explained, **"[t]ypically, a determination of no prevailing party results when both parties seek relief, but neither prevails, or when the ostensibly prevailing party receives only a part of the relief sought.**" (*Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1398, 16 Cal.Rptr.2d 816.) By contrast, when the results of the litigation on the contract claims are not mixed—that is, when the decision on the litigated contract claims is purely good news for one party and bad news for the other—the Courts of Appeal have recognized that a trial court has no discretion to deny attorney fees to the successful litigant. Thus, when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a matter of law. *(See, e.g., Melamed v. City of Long Beach* (1993) 15 Cal.App.4th 70, 84, 18 Cal.Rptr.2d 729; *Deane Gardenhome Assn. v. Denktas, supra*, 13 Cal.App.4th 1394, 1398, 16 Cal.Rptr.2d 816; *Elms v. Builders Disbursements, Inc., supra*, 232 Cal.App.3d 671, 674–675, 283 Cal.Rptr. 515; *Manier v. Anaheim Business Center Co.* (1984) 161 Cal.App.3d 503, 505–509, 207 Cal.Rptr. 508.) Similarly, a plaintiff who obtains all relief requested on the only contract claim in the action must be regarded as the party prevailing on the contract for purposes of attorney fees under section 1717. *(E.g., Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1247, 34 Cal.Rptr.2d 155; *Smith v. Krueger* (1983) 150 Cal.App.3d 752, 757, 198 Cal.Rptr. 174.)

We are persuaded that this construction of section 1717 properly reflects and effectuates legislative intent. It is consistent with the underlying purposes of the statute—to achieve mutuality of remedy—and it harmonizes section 1717 internally by allowing those parties whose litigation success is not fairly disputable to claim attorney fees as a matter of right, while **reserving for the trial court a measure of discretion to find no prevailing party when the results of the litigation are mixed.**

Accordingly, we hold that in deciding whether there is a "party prevailing on the contract," the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. **The prevailing party determination is to be made only upon final resolution of the contract claims and only by "a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions**." (*Bank of Idaho v. Pine Avenue Associates* (1982) 137 Cal.App.3d 5, 15, 186 Cal.Rptr. 695.)

It is also discussed in Witkin that there may be multiple prevailing parties, if there are multiple independent contracts. Witkin California Procedure, Fifth Edition, § 197.

Computation of Prevailing Party Attorney's Fees

Unless authorized by statute or provided by contract, attorney's fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party must establish that a contractual provision exists for attorney's fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), amended, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "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). An attorney's fee 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 County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). Having this discretion is appropriate "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.

DISCUSSION

The court has issued a Ruling determining that Creditor is not the prevailing party in this Contested Matter. The court restates the analysis that is in that Ruling below in considering whether Debtor is the prevailing party as that term is used in California Civil Code § 1717 and the decisional law of the State of California.

In considering this request, the court first notes that Creditor argues that the court having sustained the original Objection to Confirmation and not issuing a final order thereon, but instead continuing the proceedings to allow Creditor to file an amended proof of claim that complies with the Bankruptcy Code and Federal Rule of Bankruptcy Procedure means that sustaining that Objection has to be considered as part of the final order and cannot be a separate prevailing party determination for Debtor. Motion, p. 3:23-28, 4:1-3; Dckt. 274. The phasing of these proceedings came about due to Creditor's failure to file a proof of claim that complied with the Bankruptcy Code.

As clearly stated in the Civil Minutes from the February 2, 2021 hearing on the Objection to Proof of Claim 2-1, then consideration of Amended Proof of Claim 2-2 filed by Creditor on the eve of the hearing on the Objection to Proof of Claim 2-1, and the multiple Notices of Post-Petition Fees, Creditor had not filed the Proofs of Claims and Notices with the information required under the applicable Bankruptcy Law.

> Federal Rule of Bankruptcy Procedure section 3001(c)(2) requires that creditor include or attach certain documents with their proof of claim in order to substantiate their claim. Specifically, FRBP section 3001(c)(2)(A) requires a

creditor to provide "an itemized statement of the interest, fees, expenses, or charges." Additionally, pursuant to FRBP 3001(c)(2)(B) requires a creditor to provide "a statement of the amount necessary to cure any default as of the date of the petition." Finally, section 3001(c)(2)(C) requires a creditor with a secured claim over a debtor's principal residence, must attach the "appropriate official form."

Here, Proof of Claim 2-1 did suffer from failure to itemize the various expenses and charges.

For a Notice of Postpetition Mortgage Fees, Expenses and Charges, the Bankruptcy Rules impose a similar requirement. Federal Rule of Bankruptcy Procedure 3002.1(c) provides:

> (c) Notice of Fees, Expenses, and Charges. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

Here, a review of the Notice filed on December 21, 2020 shows that, though including the amounts allegedly owed, the Notice does not contain supplemental documents itemizing the fees, expenses or charges. Thus, the December 21, 2020 Notice fails to meet the requirements of FRBP 3002.1.

In the responsive pleadings, there appears to be itemizations for Debtor and his counsel to review.

Creditor filed Amended Proof of Claim 2-2 on January 26, 2021. The Official Form for a mortgage is still not properly completed, but is followed by six (6) pages breaking down account activity from August 7, 2018 through January 21, 2021. Creditor also filed an Amended Notice of Postpetition, Mortgage Fees, Expenses, and Charges on January 19, 2021. This amended Notice, also attached to amended Proof of Claim 2-2, provides a billing summary of attorney's fees and an invoice listing the different charges related to the loan since August 2019 through December 2020.

As addressed above, Proof of Claim 2-1 suffers from shortcomings and some clearly inaccurate statements under penalty of perjury (such as the entire obligation must be paid to cure the pre-petition arrearage). Creditor, and counsel, may feel frustrated that Debtor has elected to go through multiple bankruptcies, but such is not an excuse.

Civil Minutes, p. 9; Dckt. 211-212.

The Civil Minutes continue, with the court explaining why the court is continuing the hearing rather than entering an order sustaining the Objection and authorizing Creditor to file a motion to file amended claim after objection to claim was sustained.

> At the hearing, the court addressed with the Parties bifurcating the current objections. Phase 1, the Objection to Proof of Claim 2-1 and the **"Notice of Postpetition Mortgage Fees, Expenses, and Charges** being sustained due to the failure of Creditor to provide the required itemizations in support of both.
>
> However, in light of Creditor having now provided such itemizations in Opposition to this Objection, to save the Parties the cost in time and money of sustaining the objection with leave to file an amended claim, then having a possible second objection and all of the pleadings already filed by Creditor recreated, the court, with the Parties concurrence, has set further hearing on "Phase 2" of the Objections - that being the Debtor filing objections, if any, to the Proof of Claim based on the itemizations provided in the Opposition.

Id., p. 11 (bold emphasis in original, underlined emphasis added).

Though the court was attempting, with the concurrence of the Parties, to reduce the cost, expense and delay (incorrectly believing that with the original hearing a reality as to what the law requires and allows had set in with the Parties), the ruling on the Phase 1 portion, in which Debtor knocked out Proof of Claim 2-1 and Amended Proof of Claim 2-2, is not part of the totality of the circumstances, claims asserted, and claims prevailed on for determination of the prevailing party on this dispute arising under the contract (the Note).

Creditor cites back to this court's Memorandum Opinion and Decision in which the court stated the final ruling that sustained Debtor's Objection to $21,541.71 of Creditors First and Second Amended Proofs of Claim 2-2, 2-3 (Creditor having asserted the claim in various proofs of claim and other documents filed in a rolling format during the Objection to Claim Contested Matter), plus $353.06 in interest thereon (for a total disallowed amount of $21,894.77). The court determined that there remained $48,076.29 due Creditor on his secured claim in this case. Mem. Op. and Dec., p. 36:10-17; Dckt. 268. The court also sustained the Debtor's Opposition and Objection to Creditor asserting that the disallowed amount of the claim totaling $21,894.77 was required to be allowed as an unsecured claim. In effect, the court has sustained the Objection, disallowing $21,894.77 as part of Creditor's secured claim, and an additional $21,894.77 Creditor asserted as a general unsecured claim. As stated in the Memorandum Opinion and Decision, the court did not disallow the $21,894.77 as part of the secured claim due to there not being sufficient value in the collateral or as an unsecured claim based on the "equities," but determined that Creditor had no right under the applicable law and contract terms to the $21,894.77. *Id*., p. 2:10-13.

The reason there was "only" $69,971.06 of the claim remaining is that court ordered that $115,000 of the proceeds from the sale of Creditor's collateral be immediately disbursed to Creditor to not only reduce the claim, but so that such substantial amounts not in dispute would not be held "hostage" over a dispute concerning a "minor amount of the total claim. Creditor's lien attached to a portion of the proceeds sufficient to protect Creditor's secured claim.

In the Memorandum Opinion and Decision the court "summarized" the various amount claimed by creditor that were the subject of the Supplemental Objection. The court first addressed the objection based on alleged improper Block Billing. These amounts totaled $6,917.50. *Id*., Addendum B. The court overruled the blanket objection based on "Block Billing," noting that these items were billings by Creditor's counsel, some of which would be addressed under other objection grounds:

> Though there are some issues to be addressed with respect to the legal fees sought, neither Ms. Nagata nor Mr. Normandin, and their respective firms, have committed the billing sin of Block Billing. The court overrules Debtor's Objection based on "Block Billing."

Id., p. 16:16-18.

The court then addressed the Objection based on improperly billing for administrative and clerical work done by Creditor's attorney's office (the vast majority of the billings being by non-attorneys). The court disallowed all (100%) of the administrative and clerical work fees billing, which totaled $3,002.5. *Id*., p:18:1-21:6; Addendum C-1.

Next, the court disallowed the legal fees and costs relating December 22, 201 hearing and Creditor's Counsel drafting deficient proofs of claim which resulted in the filing of the Objection(s) to claim. Debtor's Objection the court disallowed all (100%) of the objected to fees for the Phase 1 portion of this Objection and a portion of the fees billed by Creditor's counsel for the December 22, 2020 hearing on the Motion to Sell Creditor's collateral, which totaled $8,683.50. *Id*., p. 21:15 - 23:21; Addendum C-2.

The total disallowed fees are show in the table on pages 24 and 25 of the Memorandum Opinion and Decision. *Id*., p. 24:1-25:18. . Creditor requested $34,731.71 in legal fees, of which the court allowed $21,545.71. Thus, Debtor successfully reduced the attorney's fees advocated for by Creditor and Creditor's counsel through the final hearing by 37.9%. *Id*., p. 25:1-18.

In addition, the court reduced this by an additional $353.06 for the interest Creditor included in his Claim for the legal fees which the court did not allow. *Id*., p. 25:22-27:4; Addendum D.

In the Original and Supplemental Objection, Debtor did ask the court to disallow all of the legal fees claimed/demanded by Creditor. In the Objection to Claim filed on December 18, 2021, (Dckt. 170) and incorporated into the first Supplemental Objection filed on December 29, 2020 (Dckt. 182), the grounds asserted for disallowing the claim in full are stated as follows:

> 8. The Debtor further asserts that the claim and the attachments, if any, appended to the claim do not sufficiently authenticate and substantiate the asserted balance and class of the underlying debt. Specifically, the claim fails to satisfy the document requirements of Federal Rule of Bankruptcy Procedure §3001 (c)(2) et seq.
>
> 9. Debtor objects to the claim because it does not comply with FRBP §3001 (c)(2)(A) which provides in part
>
> " ... an **itemized statement** of the interest, fees, expenses, or

> charges shall be filed with the proof of claim." [italics & bold added for clarity.]

10.No such itemized statement was filed with this claim. Therefore, it is impossible for Debtor or Debtor's counsel to determine the accuracy of the claim by RWA. Therefore, the claim should be denied in its entirety.

11. Further, Debtor objects to the claim because it does not comply with FRBP §3001 (c)(2)(B) which provides in part:

> "a statement of the amount necessary to cure any default as of the date of the petition shall be filed with the proof of claim." [italics & bold added for clarity.]

No such cure statement was filed with this claim by RWA. Therefore, the claim should be denied in its entirety.

12. Further, Debtor objects to the claim because it does not comply with FRBP §3001 (c)(2)(C) which provides in part:

> "(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim."

13. Here, while the appropriate form was used, that form requires creditor to completely and properly complete the form. Instead, Creditor chose to ignore both the form and the FRBP by stating across the front of the document where the information was to be provided the following:

> "Secured Creditor's Claim is approximately $126,635.02, plus 18% interest. This loan is set to mature on 9/1/2021, during the pendency of Debtor's instant Chapter 13 Case."

For all intents and purposes, the form may as well be a blank sheet of paper and should be treated as if the form itself had not been filed.

Objection to claim, ¶¶ 9-13; Dckt. 170.

Here, Debtor took a broad brush compliance with the law argument to try and swat away Creditor's claim. It did not involve detailed evidence, extensive legal arguments, and protracted proceedings. It was more of a, "let's take a swing at it." The court was not inclined to summarily disallow or dismiss the claim in light of Creditor, having a secured claim, not having to file any claim at all to the extent the claim was secured. See Federal Rule of Bankruptcy Procedure 3002(a) and discussion in 4 Collier on Bankruptcy ¶ 501.01 (16th 2021). There being no dispute as to Creditor having a lien on the Property of the Debtor, inclusion of such to deny the Claim in its entirety was something that experienced bankruptcy creditor attorneys make short work of and don't take seriously.

Additionally, in the hearing on the Motion to Sell Property (the Creditor's collateral) on December 12, 2020, at which hearing Creditor's counsel was present, the Civil Minutes clearly state that Creditor's claim and right to payment is not in *bona fide* dispute, just the attorney's fees sought to be recovered as part of it:

> The court approves the sale free and clear, with Creditor's lien attaching to the proceeds. **The *bona fide* dispute does not run to all of the obligation, but as to attorney's fees of approximately $25,000.00.** Presumably both Movant and Creditor, which ever is the prevailing party, would claim the right to contractual attorney's fees relating to litigation over the attorney's fees that properly are part of Creditor's claim.
>
> From escrow the net sales proceeds after the payment of costs of escrow, commission, and fees, which is projected to be approximately $217,000.00 will be disbursed as follows:
>
> > A. **$115,000 shall be disbursed directly to Creditor and applied to the principal balance and interest on the principal balance of Creditor's claim**;
> >
> > B. $29,000 to Debtor pursuant to the exemption claimed in the Property sold; and
> >
> > C. **the balance, estimated to be $73,000.00+**, to which Creditor's lien attaches, **shall be disbursed to the Chapter 13 Trustee to hold pending resolution of the *bona fide* dispute concerning the legal fees that may be included in Creditor's secured claim**. Debtor shall file and serve an objection to claim on or before January 31, 2021, and if not timely filed and served, the Chapter 13 Trustee may file an *ex parte* motion to disburse from said proceeds the amount necessary to pay the balance of Creditor's secured claim as stated in Proof of Claim 2-1 and the October 21, 2020 Notice of Postpetition Mortgage Fees, Expenses and Charges, and to disburse the balance of the monies to Debtor as exempt proceeds claimed in this case.

Civil Minutes, Dckt. 179, p. 4. This payment of $115,000 to Creditor to apply to the principal balance and interest on the principal balance is also clearly stated in the court's order granting the motion and approving the sale free and clear. Dckt. 180. The order further expressly states that the objection to claim filed by Debtor was for the bona fide dispute concerning the amount of legal fees Creditor could recover as part of his secured claim. Order, p. 2:3-8; Dckt. 180.

The Objection to Claim stating the "disallow all of the claim" was filed on December 18, 2020, four days before the hearing on the Motion to Sell, at which time the court determined and ordered that the objection to claim was only for the amount of attorney's fees that could be included by Creditor – not the entire claim. Thus, after December 22, 2020, there was no objection seeking to disallow Creditor's claim in its entirety.

For the legal fees specifically identified in the Objection, Debtor was able to reduce the total

legal fees claimed by Creditor by $21,545.71 – 37.9% of the total amount claimed by Creditor. This is not an insignificant reduction, either in dollar amount or percentage. Creditor's assertion that this was merely a 12.9% reduction or a minor 2.45% of Creditor's overall claim is an invalid assertion. Creditor had pocketed in January of 2021 $115,000, leaving at issue the $34,731.71 of fees in dispute. Creditor attempting to assert that the battles were over the total claim, when Creditor had that money in his pocket to use as he wished, there being no restrictions thereon, is not based upon the facts in this case, nor applicable law.

Additionally, Debtor prevailed in objecting to 100% of the $21,894.77 unsecured claim that Debtor asserted. *Id*., p. 30:24 - 35:6. Though Creditor slipped this in the non-lawyer Creditor's Declaration, Dckt. 249, that does not mean Creditor was not asserting that as part of the Claim. As the court stated in the Memorandum Opinion and Decision, such assertion was based on incorrectly citing Georgia law that does not apply to this Claim and ignoring California law that applies to this Claim. In considering this asserted unsecured claim, the court noted:

> In addition to making this legal analysis under penalty of perjury, Mr. Anderson and his counsel also certify that "[t]he claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; . . . ." Fed. R. Bankr. P. 9011(b)(2).
> . . .
> The court does not understand the basis for Mr. Anderson's and his counsel's certification that the *Welzel* case supports Creditor being able to demand and be paid as an unsecured claim unreasonable attorney's fees for which Debtor is not obligated to pay under the "reasonable" contractual provisions of the Note and California law

Id., p. 31:9-12, 33:7-10. There was no valid legal basis for Creditor and his Counsel to assert that Creditor would be given an unsecured claim for attorney's fees that were not owed to Creditor under the contract and applicable California law. In asserting this, Creditor necessitated that Debtor proceed with that part of the Objection.

In substance Creditor had 37.1% of the secured claim at issue not allowed. In addition, Creditor had 100% of the unsecured claim Creditor asserted not allowed.

Creditor, through the failure to comply with the Bankruptcy Code and Rules, necessarily required Debtor to file and then prosecute the Objection to Claim. Creditor made that even more challenging by filing one amended claim after the other, trying to derail (at least in the court's eye) the Contested Matter before the court.

The Creditor's noncompliance with the law conduct necessarily required the filing of the Objection to Claim, which Creditor did not succeed on in the Phase 1 hearings due to the defective proofs of claim and ultimately advocating for/demanding amounts which Creditor was not entitled to receive under the contract and applicable California law.

As discussed in Witkin California Procedure, § 194, in doing the prevailing party analysis the court looks to see who, if either party, recovered a greater relief in the action on the contract. As noted by the Court of Appeal in *Krueger v. Bank of America*, 145 C.A.3d 204, 217 (1983), "merely" because

the plaintiff guarantors did not prevail on causes of action for affirmative relief, the trial judge did not abuse his discretion in determining the plaintiff to be the prevailing party based on the court exonerating plaintiff from further liability on the personal guaranty. The court in *Krueger* stated the general analysis of California Civil Code § 1717 prevailing party when there are multiple grounds for relief asserted as:

> "As a general rule, where claims and counterclaims arise in connection with a contract containing an attorney's fees provision, **the party who obtains a favorable judgment is deemed to be the prevailing party, even though he did not successfully obtain all the relief which he sought in the action**." (*Epstein v. Frank* (1981) 125 Cal.App.3d 111, 124.) The Kruegers fall within the parameters of this rule. **Although they failed to prevail on virtually all causes of action stated in their complaint, they were exonerated from any further liability on the guarantees**. **This was no hollow victory**. By obtaining a declaratory judgment in their favor, the Kruegers were relieved of a significant liability that otherwise would have continued to exist. (*Cf. Wilhite v. Callihan* (1982) 135 Cal.App.3d 295.)
>
> Since an award of contractual attorney's fees is to be governed by equitable principles (*International Industries, Inc. v. Olen, supra,* 21 Cal.3d at p. 224), we deem the Kruegers to be prevailing parties in the underlying action and find unpersuasive the authority relied upon by Bank of America to support a contrary conclusion.

Krueger v. Bank of America, 145 C.A.3d at 217. In *Acree v. General Motors Acceptance Corp.*, 92 C.A.4th 385, 402 (2001), even though the defendant prevailed on the majority of contract claims, plaintiff prevailed in defending the counter claim and got the defendant to "make weighty changes" in its business practice, the Court of Appeals affirmed the trial judge's determination that the plaintiff was the prevailing party.

While Creditor treats the sustaining of the Objection to 37.1% of the portion of the claim in dispute as minimal, the court finds disallowing $13,186.00 of the $34,731.71 in legal fees sought by Creditor as part of its secured claim to be a substantial economic victory for Debtor. Additionally, Debtor has also prevailed in other phases of this Contested Matter, which significantly include prevailing on the Objection to force Creditor to comply with the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. It appears that Creditor treated filing proofs of claim in this case as a "game to be played" to try and see how much could be slipped by a sleepy debtor (which was not in this case) or a court that would figure whatever a creditor stated he was owed, the creditor was entitled to.

Creditor was aware of the specific grounds for the Objection to the attorney's fees portion of the claim, and Creditor elected to plow ahead claiming he was entitled to the full $34,731.71, while making it clear that Creditor was also asserting the right to pocket attorney's fees from the proceeds in opposing the Objection.

Creditor lost substantially, having 37.1% of his claimed disallowed. Given the substantial amount of attorney's fees claimed, that resulted in a substantial amount, $13,186.00, in being disallowed.

Debtor is the prevailing party having obtain an order on the Objection to Claim not allowing

a weighty part of the attorney's fees requested by Creditor. This order is a "favorable judgement" obtained by Debtor, even if Debtor did not get all of Creditor's legal fees not allowed (if such could be inferred from the pleading following the December 22, 2020 order requiring payment of $115,000 to Creditor to apply to the principal and interest on the principal of his claim), Debtor prevailed on substantial monetary rights, which resulted in Creditor losing substantial monetary rights.

Determination of Reasonable Prevailing Party Attorney's Fees

Debtor has provided detailed billing statements for the fees requested. Exhibit A, Dckt. 281. The billing entries are appropriately detailed and are not done as "block billing." The time entries for the legal services billed are reasonable. The Opposition by Creditor does not call into question or challenge any of the entries, the time billed or the dollar amount requested.

On August 17, 2021, Debtor voluntarily reduced the fees requested $24,185.58, which is stated to be the $21,135.00 requested by Creditor in his Motion for Prevailing Party Attorney's Fees, Dckt. 274, plus $2,637.09 and $112.50 which was charged by Creditor's prior counsel to discuss the Objection to Claim, plus $300 which is equal to the court disallowing fees for Creditor's prior counsel in connection with the December 22, 2020 hearing on the Motion to Sell Property.

The legal fees documented by Debtor's counsel are $26,790.00. Debtor states that he reduces his fees to $24,185.58. Dckt. 296. While Debtor has a somewhat convoluted reduce to $21,135.00 and then add back for legal fees that were not allowed Creditor, the court concludes (and Creditor has not challenged as to amount) that $26,790.00 would be reasonable and accepts Debtor's voluntary reduction to $24,185.58.

The court having determined that Movant is the prevailing party and that California Civil Code § 1717 provides that the prevailing party shall be awarded attorneys' fees, the court determines that the requested $24,185.58 in attorneys' fees is reasonable in this Contested Matter for services provided in litigating the objection proceedings with respect to Debtor's objection to Creditor's Proof of Claim 2.

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 Prevailing Party Fees filed by the Chapter 13 debtor, Timothy Trocke ("Movant" / "Debtor"), in this Contested Matter and prevailing party on the objection proceedings having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing.
>
> **IT IS ORDERED** that Movant, is awarded prevailing party attorney's fees against Creditor Roger Anderson, in the amount of $24,185.58, pursuant to California Civil Code § 1717.
>
> **IT IS FURTHER ORDERED** that this order for award of attorney's fees to the prevailing party Timothy Trocke and against Roger Anderson may be

enforced as a monetary judgment as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 9001(7), 7054, 9014(c).

18. 20-21910-E-13 FF-6 | **TIMOTHY TROCKE** | **Gary Fraley** | **CONTINUED MOTION TO CONFIRM PLAN** | **12-17-20 [149]**

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 17, 2020. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm Plan is xxxxx.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The debtor, Timothy Tobias Trocke ("Debtor") has provided evidence in support of confirmation. The Amended Plan provides for payments of $100.00 commencing December 25, 2020 and all net proceeds from the sale of the real property commonly known as 1671 Rosalind Street, Sacramento, California to be turned over directly to the Chapter 13 Trustee after fees and costs, sufficient to pay all creditors proposed to be paid through the plan and will complete the plan. Amended Plan, Dckt. 151. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

On January 19, 2021, the Chapter 13 Trustee, David p. Cusick ("Trustee") filed a Non-opposition noting that the court granted Debtor's Motion to Seel Free and Clear of Liens on December 22, 2020 and that the Escrow Closing Statement submitted by the title company showed the Trustee was to receive his demand of all net proceeds, approximately $72,000. Dckt. 199.

HISTORY OF THE MOTION

The hearing on this Motion has been continued several times since the original hearing on February 2, 2021 in order to address Debtor's Objections to the Claim of Roger Anderson, Trustee of the RWA Trust dated March 14, 2014 ("Creditor").

On April 6, 2021 Trustee filed an Amended Response requesting the court take into consideration that Debtor has paid $80,512.03, which $72,297.03 was paid from Chicago Title Company from proceeds of sale of real property, into the Plan and the Debtor is now current in plan payments. Dckt. 239.

The Objection was decided in two phases. In Phase 1, the court sustained Debtor's Objection to Creditor's original Proof of Claim finding that Proof of Claim 2-1 was deficient in many ways, including: (1) failing to provide itemizations, and (2) failing to provide the loan payment history, failing to state the cure amount (and instead stating that the full obligation that was not yet due was the cure amount). Creditor filed a First Amended Proof of Claim while the Objection to Original Proof of Claim 2-1 was still a contested matter in front of the court. In Phase 2, Debtor filed a claim objection to Creditor RWA's Amended Claim 2 filed on January 26, 2021 where Creditor increased the claim from $126,635.02 to $180,264.76.

Then, on April 19, 2021, the day before the scheduled April 20, 2021 hearing on Phase 2 of the Objection, Creditor filed a Second Amended Proof of Claim 2-3, continuing in the rolling filing notwithstanding there being the pending Contested Matter in which the Parties were providing their evidence and legal arguments concerning Creditor's claim. The amended Proof of Claim 2-3 states a secured claim in the amount of $183,094.13.

The court further continued the April 27, 2021 to 2:00 p.m. on May 25, 2021 having taken under submission the Objection to the Claim of Roger Anderson and allowing a reasonable time for the parties to engage in constructive settlement talks in light of what was addressed at that hearing.

Additionally, the Debtor and Chapter 13 Trustee had identified several "tweaks" that Debtor may be making to the Plan.

The objection to the Second Amended Claim 2-3 was further continued to June 29, 2021, to allow for the court to finalize its ruling on the Objection.

June 29, 2021 Hearing

At the hearing, the court will review the decision being issued on the claim objection and address how the parties want to proceed.

As addressed at the hearing, the court continues this matter to allow for the court to issue the Decision and Order on the Objection to Claim and for the parties to file their post-judgment motions relating to that Decision and Order, with the hearing on such motions to be conducted at 2:00 p.m. on August 31, 2021. The court continues the hearing on this Motion to that time and date so that the Debtor may have it as a vehicle for any amendments that may be required resulting from the court's rulings.

No additional documents have been filed in support of this motion. A review of the Proofs of Claim filed shows that Creditor Roger Anderson has not yet filed an amended Proof of Claim after the court issued its decision which reflected a reduction of their claim.

At the hearing xxxxxxxx

19.	**21-22545-E-13** **SMJ-4** **19 thru 21**	**DARYLL DESANTIS** **Scott Johnson**	**MOTION TO DISMISS CASE** **8-17-21 [89]**

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 Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditor, and Office of the United States Trustee on August 18, 2021. By the court's calculation, 13 days' notice was provided. 14 days' notice is required.

Movant did not provide the notice required per the local the rules. At the hearing xxxxxxxxxxx

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

The Motion to Dismiss Case is xxxxx.

This Motion to Dismiss this Chapter 13 bankruptcy case has been filed by Daryll Desantis ("Movant"), the Chapter 13 Debtor. Movant asserts that the case should be dismissed or converted based on the following grounds:

A. The Debtor has not previously converted this case to Chapter 13 from Chapter 7, Chapter 11, or Chapter 12.

B. The Debtor has the right to dismiss this case under the provisions of 11 U.S.C. §1307(b), which states that: "[o]n request of the debtor at any time, if the case has not been converted under §§706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable."

C. Debtor has not previously filed any other bankruptcy cases.

D. The Debtor has no liquidated, non-contingent debts. The only potential creditor is MedMen Enterprises, Inc. ("MedMen"), a marijuana retailer.

E. Debtor's largest asset is claims against MedMen for securities and MedMen securities, which is traded on a Canadian stock exchange because such businesses are illegal under U.S. federal law.

F. Although §1307(b) provides an "absolute" right to voluntarily dismiss a chapter 13 case, where other motions are pending the Court has the discretion to grant such other motions. Notwithstanding the "absolute" right, dismissal is in the best interest of creditors and the estate as this bankruptcy case is ultimately just a two party dispute between Debtor and MedMen and should be litigated in state court.

G. Furthermore, based on the prevalence of marijuana, cause would likely exist to dismiss this case if this case were converted to chapter 7.

The Declaration of Daryll Desantis was filed in support of the Motion testifying, under penalty of perjury, that as of the date of filing his bankruptcy petition, Debtor had no credit card debt, no medical bills, no other potential judgments outstanding, and there is no final judgment in my case against MedMen. Declaration, ¶ 27. According to Debtor, to the extent that MedMen is a "creditor" in this case, its claim relates directly to proceeds from the sale of two medical marijuana businesses and their inventory. *Id.*, ¶ 28. Debtor testifies that the largest asset is my securities fraud against Medmen and MedMen stock, which is traded on a Canadian stock exchange. *Id.*, at ¶ 29.

Trustee's Non-Opposition

On August 24, 2021 Trustee filed a Non-Opposition to Debtor's voluntary dismissal stating that no creditors have filed a Proof of Claim, including MedMen Enterprises, Inc. whom Debtor has an ongoing litigation in Superior Court of Arizona. Dckt. 102. Trustee further adding that Debtor failed to appear at the Meeting of Creditors held on August 19, 2021 (which was continued to September 2, 2021) and has failed to file and serve a plan. The first plan payment is due on August 25, 2021, and to date, no plan payments have been made. *Id.*

APPLICABLE LAW

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis:

"[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> On request of the debtor at any time, if the case has not been converted under §§706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

11 U.S.C. § 1307(b). The court engages in a "totality of circumstances" test, weighing facts on a case-by-case basis and determining whether cause exists, and if so, whether conversion or dismissal is proper. *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120, 1123 (9th Cir. 2013) (citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219 (9th Cir. 1999)). Bad faith is one of the enumerated "for cause" grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 112 n.4 (B.A.P. 9th Cir. 2011) (citing *In re Leavitt*, 171 F.3d at 1224).

DISCUSSION

Here, Debtor seeks to dismiss this case and continue pursuing his claims against MedMen in the Superior Court of Arizona. MedMen being the only potential creditor of Debtor. It seems Debtor filed this case to prevent potential incarceration after being unable to pay $10.3 million pursuant to an order from the Superior Court of Arizona which required Debtor to deposit over $10.3 million in the court registry or face potential incarceration if the trial court so determined. Declaration, ¶ 23. This particular transaction is based on the sale of two medical marijuana business owned and operation by Debtor and third party Charles Michael Colburn. (The court notes that marijuana is a controlled substance and its sale is illegal under federal law, but is legal, when properly registered and operated, in the State of California.)

There are several pending issues in this case. MedMen filed a Motion to Convert from Chapter 13 to Chapter 7 on July 28, 2020, SW-4, set for hearing the same day as this Motion to Dismiss. Dckt. 28. Debtor opposes such conversion on the basis that the prevalence of marijuana in this case warrants dismissal rather than conversion as the related activities are against federal law; the case is nothing more than a two-party dispute that is better dealt with in the state court; Debtor did not file the case in bad faith; and Debtor is not eligible for Chapter 13 relief under § 109(e).

Then on August 3, 2021, MedMen filed a Motion to Transfer Case/Proceeding to Another District, SW-5; also set for hearing on the same day as this Motion to Dismiss. Dckt. 43. Through that Motion, Creditor seeks to transfer Debtor's bankruptcy case to Arizona alleging that Debtor purchased his Folsom residence with proceeds of the marijuana sale now in dispute at the State Court Action in Arizona. Creditor further alleges that Debtor is a resident of Arizona because he still has an Arizona driver's license and Creditor believes that Debtor remains registered to vote in Arizona. Lastly, transfer is consistent with judicial economy because there are significant overlapping issues between Debtor bankruptcy case and third party Mr. Colburn's bankruptcy case which was filed in Arizona, and Creditor's counsel and potential witnesses are primarily located in Arizona.

Both Trustee and Debtor oppose the Motion to Transfer. Trustee opposes on the grounds that

Debtor properly filed in this District since he has been a resident for at least 180 days before the filing of the Petition and transfer to another district is not in the best interests of Debtor or creditors. Dckt. 75. Debtor opposes on the grounds that Debtor was domiciled in Folsom, California for at least 180 days prior to filing the petition; transfer is not convenient where the parties and potential assets are both in California. Dckt. 86.

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 Motion to Dismiss the Chapter 13 case filed by Daryll Desantis ("the Chapter 13 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 Dismiss is xxxxx.~~

20. 21-22545-E-13 SW-4 | **DARYLL DESANTIS** **Scott Johnson** | **MOTION TO CONVERT CASE FROM CHAPTER 13 TO CHAPTER 7 7-23-21 [28]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 23, 2021. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The Motion to Convert the Chapter 13 Bankruptcy Case to a Case under Chapter 7 is xxxxxxx.

This Motion to Convert the Chapter 13 bankruptcy case of Daryll Desantis ("Debtor") has been filed by MedMen Enterprises, Inc. ("Movant" / "Creditor"), a creditor. Movant asserts that the case should be dismissed or converted based on the following grounds:

A. Debtor is not eligible for Chapter 13 relief because on the judgment obtained by Movant/Creditor in the State Court Action in the amount of $10,384,288, plus pre- and post-judgment interest, which exceeds § 109(e) amounts of $419,274 for unsecured debts and $1,257,850 for secured debts.

B. Debtor's bankruptcy case was filed in bad faith misrepresented key facts to this Court, including, but not limited to, that his debts are $1,000,000-$10,000,000 when he personally owes the $10.3 million plus Judgment to MedMen.

C. Additionally, Debtor represented to the Court that his assets are just $0-$50,000 despite having just recently purchased the Folsom Residence

for over $1.5 million, and having just received $9 million in cash from the wire transfer from ATEK (a company owned by Colburn, Debtor's partner in the marijuana businesses) to Delsantro (an Arizona limited liability company with Debtor as its sole member and manager up until July 2021).

D. Moreover, Debtor filed for bankruptcy in an inequitable manner to delay an evidentiary hearing on his contempt (for failure to deposit the $10.3 million minimum surplus proceeds in the court's registry) in the Arizona State Court Action.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on August 17, 2021. Dckt. 81. Debtor opposes such conversion on the basis that the prevalence of marijuana in this case warrants dismissal rather than conversion as the related activities are against federal law; the case is nothing more than a two-party dispute that is better dealt with in the state court; Debtor did not file the case in bad faith; and Debtor is not eligible for Chapter 13 relief under § 109(e).

APPLICABLE LAW

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n 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 . . . .

11 U.S.C. § 1307(c). The court engages in a "totality of circumstances" test, weighing facts on a case-by-case basis and determining whether cause exists, and if so, whether conversion or dismissal is proper. *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120, 1123 (9th Cir. 2013) (citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219 (9th Cir. 1999)). Bad faith is one of the enumerated "for cause" grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 112 n.4 (B.A.P. 9th Cir. 2011) (citing *In re Leavitt*, 171 F.3d at 1224).

DISCUSSION

Here, Creditor MedMen seeks to convert the case to a Chapter 7 case arguing that Debtor is not eligible for Chapter 13 relief due to the over $10 million judgment obtained in the Arizona State Court Action. Creditor also argues that Debtor is acting in bad faith because the bankruptcy case was filed with the purpose of delaying contempt proceedings at the state court action. As explained in the Motion to Dismiss, the dispute between Creditor and Debtor arise from the sale of two medical

marijuana business owned and operation by Debtor and third party Charles Michael Colburn.

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 Motion to Convert the Chapter 13 case filed by MedMen Enterprises, Inc. (" a creditor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

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

21. **21-22545-E-13 SW-5** **DARYLL DESANTIS** **Scott Johnson** **MOTION TO TRANSFER CASE/PROCEEDING TO ANOTHER DISTRICT** **8-3-21 [43]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 3, 2021. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Transfer Case/Proceeding to Another District is xxxxx.

MedMen Enterprises, Inc. ("Creditor") seeks to transfer Debtor's bankruptcy case to Arizona alleging on the basis that Debtor improperly filed the case in this district in order to avoid sanctions imposed upon Debtor and third party Michael Colburn after Debtor failed to comply with the Arizona's Superior Court order to deposit over $10 million allegedly belonging to Creditor on the state court's registry.

The Motion states with particularity the following grounds for relief:

1. Debtor purchased his Folsom residence with proceeds of the marijuana sale now in dispute at the State Court Action in Arizona.

2. Creditor further alleges that Debtor is a resident of Arizona because he still has an Arizona driver's license and Creditor believes that Debtor remains registered to vote in Arizona.

3. Transfer is consistent with judicial economy because there are significant overlapping issues between Debtor bankruptcy case and third party Mr. Colburn's bankruptcy case which was filed in Arizona, and Creditor's counsel and potential

witnesses are primarily located in Arizona.

Trustee's Opposition

Trustee opposes on the grounds that Debtor properly filed in this District since he has been a resident for at least 180 days before the filing of the Petition and transfer to another district is not in the best interests of Debtor or creditors. Dckt. 75. Trustee notes that Creditor has failed to provide evidence that Debtor has a residential address or owns a residence in Arizona; and points to the court that Creditor acknowledges that Debtor a residence in Folsom, which the Debtor is also alleging as his residence.

As it pertains to Debtor, Trustee informs the court that Debtor has failed to provide § 521 documents and tax transcripts or a copy of her Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, or a written statement that no such documentation exists.

Trustee believes that it i sin the best interest of creditors and the convenience of the Debtor that the case remains in the Eastern District of California.

Debtor's Opposition

Debtor opposes on the grounds that Debtor was domiciled in Folsom, California for at least 180 days prior to filing the petition; transfer is not convenient where the parties and potential assets are both in California. Dckt. 86. In his Declaration, Debtor testifies that he has lived in California for more than two years. Dec., ¶ 3; Dckt. 87.

APPLICABLE LAW

The proper venue for the commencement of a case under title 11 is set forth in section 1408 of title 28, United States Code. That section states that a case, other than a case ancillary to a foreign proceeding (which is governed by section 1410 of title 28), may be commenced in the district

> •in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the 180 days immediately preceding such commencement, or for a longer portion of such 180-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district;

9 Collier on Bankruptcy P 1014.02 (16th 2021).

Federal Rule of Bankruptcy Procedure 1014(a) authorizes a court in which a petition has been properly filed to transfer the case to another district "if the court determines that the transfer is in the interest of justice or for the convenience of the parties." Fed. R. Bankr. P. 1014(a).

Where a case has been filed in an improper district, the Federal Rules of Bankruptcy Procedure 1014(a)(2) provides that "the court … may dismiss the case or transfer it to any other district if the court determines that transfer is in the interest of justice or the convenience of the parties." Fed. R. Bankr. P. 1014(a)(2).

As analyzed in *Collier on Bankruptcy*,

> The standard to be applied in deciding whether to transfer an improperly filed case is whether the transfer would be "in the interest of justice or for the convenience of the parties." If not, the case probably must be dismissed. Since the standard is the same as the standard applied to the transfer of a properly filed case, presumably similar considerations will come into play in determining when a transfer is appropriate. Since retention of the improperly filed case is probably no longer an option, however, a court will also have to consider whether the burdens imposed by dismissal will outweigh any inconvenience of a transferred venue. For example, if the case is dismissed and must be refiled, potential preference or fraudulent conveyance recoveries may be lost. Moreover, certain benefits of the automatic stay may be lost as well.

9 Collier on Bankruptcy P 1014.03 (16th 2021).

The criteria traditionally employed in determining whether to transfer a case are:

- the proximity of creditors of every kind to the court;
- the proximity of the debtor to the court;
- the proximity of the witnesses necessary to the administration of the estate;
- the location of the assets;
- the economic administration of the estate; and
- the necessity for ancillary administration if liquidation should result.

In re Commonwealth Oil Refining Co., 596 F.2d 1239 (5th Cir. 1979), cert. denied, 444 U.S. 1045 (1980). Accord *In re Dodart Props., LLC*, 2009 U.S. Dist. LEXIS 92522 (D. Utah Sept. 30, 2009) (assets, most creditors and witnesses in district to which case transferred); *In re Enron Corp.*, 274 B.R. 327 (Bankr. S.D.N.Y. 2002); *In re MacDonald*, 73 B.R. 254 (Bankr. N.D. Ohio 1987); *In re Baltimore Food Sys., Inc.*, 16 C.B.C.2d 578, 71 B.R. 795 (Bankr. D.S.C. 1986); *In re Walter*, 47 B.R. 240 (Bankr. N.D. Fla. 1985); *In re Almeida*, 37 B.R. 186 (Bankr. E.D. Pa. 1984).

DISCUSSION

Here, the court has been presented with three different Motions all with different outcomes as to this case. Debtor who has a right to dismiss, seeks dismissal of this case, and seems that he will continue litigating the Arizona start action. The court also has an overzealous Creditor who seeks conversion and then transfer. Both outcomes are meant to be convenient to Creditor.

Debtor filed his Schedule A/B on August 26, 2021, fifty-four days after this case was filed. Dckt. 109. Debtor's significant assets appear to be his ownership of restricted MedMen Enterprises, Inc. and Delanstro, LLC claims against MedMen Enterprises, Inc. valued at $31,000,000 (including the stock and note payable). Debtor affirmatively states under penalty of perjury that he has no interest in any real property. Schedules A/B, Dckt. 109 at 3.

On Schedule D, Dckt. 51, Debtor states he has no creditors with secured claims. Debtor lists only one creditor, that is MedMen Enterprises, Inc., with a disputed claim relating to the ongoing Arizona litigation.

While filing Schedules, Debtor has not filed the required Statement of Financial Affairs. In the Motion to Convert this case to one under Chapter 7, Creditor states that on January 14, 2021, Debtor purchased a $1,500,000 home, that being 382 Serpa Way, Folsom, California (which Debtor states on the Petition is his residence address). Motion to Convert, ¶ 52; Dckt. 28. Creditor directs the court to Exhibit 36, which is identified as the deed transferring the Serpa Way property to Debtor. Dckt. 33. In the upper right hand corner of the deed is a January 14, 2021 recording date. It list Debtor as having the property granted to him as a single man.

While Debtor asserts that filing of bankruptcy in the Eastern District of California is improper because Weed is at the heart of his assets, Creditor provides the court with a deluge of documents. It appears that Debtor and Creditor seek to have extensive litigation.

While the Weed aspect does not cause the court great concerns given rulings of the Ninth Circuit Court of Appeals, what does cause concerns is that if the case is converted, a bankruptcy trustee with no identifiable assets will be facing the fire hose of pleadings from Creditor.

If Debtor is sincere in stating that filing bankruptcy anywhere is improper (even Weed loving California) because it is illegal under federal law, then one possible solution is Debtor consent to a five year ban on filing another bankruptcy case, freeing Debtor up to litigate his rights and claims against Creditor. If filing bankruptcy is improper as a matter of federal law as Debtor contends, then such a five year bar is of no consequence to Debtor.

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 Motion to Transfer Case/Proceeding to Another District filed by MedMen Enterprises, Inc. ("Creditor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Transfer Case/Proceeding to Another District is **xxxxxxxxxx**

FINAL RULINGS

22.	**17-20405-E-13** **DBJ-11**	**EFREN/ELIZABETH MEMORACION** **Douglas Jacobs**	**MOTION FOR HARDSHIP DISCHARGE** **7-30-21 [228]**

Final Ruling: No appearance at the August 31, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 30, 2021. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

This is the continued hearing on the Motion. Debtor has refiled several documents, including the Motion. For the original hearing, the court noted that Debtor filed a Certificate of Service which lists only 14 names. According to the Mailing Matrix generated through ECF, there are 89 recipients listed.

It appeared that Debtor has presumed that if an attorney has appeared in a bankruptcy case in connection with one contested matter for a client, then the attorney is the agent for service of process for all contested matters in the bankruptcy case. That is not correct. The party in interest must properly be served. Federal Rule of Bankruptcy Procedure 9014(b) requires that service for a contested matter be made in the same manner as a summons and complaint as provided in Federal Rule of Bankruptcy Procedure 7004 and Federal Rule of Civil Procedure 4.

At the hearing, counsel for the Debtor requested a continuance to see whether the Certificate of Service contains a clerical error or if additional service is required. Those shortcomings have been addressed.

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

The Motion for Entry of Hardship Discharge is granted.

Elizabeth Gastrock Memoracion ("Debtor") moves for entry of a hardship discharge on the grounds that co-debtor Efren Feliciano Memoracion is now deceased. Debtor argues that with Mr. Memoracion's passing, Debtor can no longer effectively manage their business, make plan payments, and provide for herself. Debtor is 69 years old and without the help of her husband she is struggling to make ends meet. *Id.*

APPLICABLE LAW

Section 1328(b) of the Bankruptcy Code states:

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

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

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

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

B. Whether the debtor did materially perform under the plan from the date

of confirmation until the date of the intervening event or events;

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

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

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

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

Id.

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

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

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

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

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

DISCUSSION

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Hardship Discharge filed by Efren Feliciano Memoracion and Elizabeth Gastrock Memoracion ("Debtor") having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the court shall enter a "hardship" discharge pursuant to 11 U.S.C. § 1328(b) for Efren Feliciano Memoracion and Elizabeth Gastrock Memoracion in this case based on the Plan as performed as of the August 31, 2021 hearing date on this Motion.

23. **21-22307-E-13** **LEE NEWTON** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Nima Vokshori** **PLAN BY DAVID P. CUSICK**
23 thru 24 **8-12-21 [36]**

Final Ruling: No appearance at the August 21, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on August 12, 2021. By the court's calculation, 19 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 is sustained, and the proposed Chapter 13 Plan is not confirmed.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Objection, Debtor filed an Amended Plan and corresponding Motion to Confirm on August 24, 2021. Dckts. 42, 43. Filing a new plan is a *de facto* withdrawal of the pending plan. The Objection is sustained, and the plan is not confirmed.

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

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

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

24. **21-22307-E-13 EAT-1** **LEE NEWTON** **Nima Vokshori** **OBJECTION TO CONFIRMATION OF PLAN BY WILMINGTON SAVINGS FUND SOCIETY, FSB** **8-11-21 [32]**

Final Ruling: No appearance at the August 21, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Non-Filing Obligor, Chapter 13 Trustee, and Office of the United States Trustee on August 11, 2021. By the court's calculation, 20 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.

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Objection, Debtor filed an Amended Plan and corresponding Motion to Confirm on August 24, 2021. Dckts. 42, 43. Filing a new plan is a *de facto* withdrawal of the pending plan. The Objection is sustained, and the plan is not confirmed.

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

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

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

25. **21-20310-E-13 JV-2** **TIESHA FISHER** **Jason Vogelpohl** **MOTION TO CONFIRM PLAN** **7-2-21 [61]**

Final Ruling: No appearance at the August 31, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 2, 2021. By the court's calculation, 60 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 debtor, Tiesha Fisher ("Debtor"), has provided evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response indicating non-opposition on July 20, 2021. Dckt. 69. 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 debtor, Tiesha Fisher ("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 March 18, 2021, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to

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

26.	**20-25523-E-13 RPH-3**	**THOMAS EDWIN KNOERNSCHILD Robert Huckaby**	**CONTINUED MOTION TO CONFIRM PLAN 6-2-21 [62]**

Final Ruling: No appearance at the August 31, 2021 hearing is required.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on parties as listed in the "Mailing List Attached". However, no such matrix was included or attached or filed. Thus, the court is unable to determine whether service was properly done.

At the hearing, Debtor's counsel reported that he will either document service having been made or provide new service for the continued hearing date and time.

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

The Motion to Confirm the Amended Plan is denied as moot.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Motion, the debtor, THOMAS EDWIN MATLOCK KNOERNSCHILD ("Debtor"), filed a Third Amended Plan and corresponding Motion to Confirm on August 16, 2021. Dckts. 79, 81. Filing a new plan is a *de facto* withdrawal of the pending plan. The Motion to Confirm the Amended Plan is denied as moot, and the plan is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by the debtor, THOMAS EDWIN MATLOCK KNOERNSCHILD ("Debtor"), having

been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied as moot, and the proposed Chapter 13 Plan is not confirmed.

27. **21-21341-E-13 PGM-1** **IVAN VAN DYKE** **Peter Macaluso** **MOTION TO CONFIRM PLAN** **7-14-21 [27]**

Final Ruling: No appearance at the August 31, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 14, 2021. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The debtor, Ivan C. Van Dyke ("Debtor") has provided evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"),filed a Non-Opposition on August 3, 2021. Dckt. 37. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on July 14, 2021, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"),for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

28. 18-24868-E-13 TLA-1 — SHARON PATTERSON — Thomas Amberg — MOTION TO MODIFY PLAN — 7-21-21 [69]

Final Ruling: No appearance at the August 31, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 21, 2021. By the court's calculation, 41 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.

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Sharon Mary Patterson ("Debtor"), has filed evidence in support of confirmation. The Chapter 13 Trustee,

David Cusick ("Trustee"), filed a Non-Opposition on August 12, 2021. Dckt.81. 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, Sharon Mary Patterson ("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 21, 2021, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.

29. 18-20067-E-13 WW-3 | **ROBERT GODFREY** / **Mark Wolff** | **MOTION TO MODIFY PLAN** / **7-27-21 [92]**

Final Ruling: No appearance at the August 31, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 27, 2021. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Robert E. Godfrey ("Debtor"), has filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Non-Opposition on August 12, 2021. Dckt. 98. 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, Robert E. Godfrey ("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 27, 2021, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.

30. 17-23777-E-13 TLA-1 — DOLLY/CESAR PEIG — Thomas Amberg — MOTION TO MODIFY PLAN — 7-27-21 [43]

Final Ruling: No appearance at the August 31, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 27, 2021. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The court has determined that oral argument will not be of assistance in rendering a decision in this matter.

The Motion to Confirm the Modified Plan is granted.

The debtors, Dolly Ramos Peig and Cesar Peig ("Debtor"), seek confirmation of the Modified Plan to account for Mrs. Peig's transition to long term disability due to significant medical issues and thus unable to continue working. Declaration, Dckt. 45. The Modified Plan provides payments of $1,163.00 per month for the remainder of the plan, and a 14 percent dividend to unsecured claims totaling $37,018.44. Modified Plan, Dckt. 47. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

DISCUSSION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Limited Opposition on August 11, 2021. Dckt. 52. Trustee opposes confirmation of the Plan on the basis the Plan incorrectly states that Debtor has paid through month 49 (July 2021) a total of $81,029.00 ($1,163 x 49), but Debtor has actually paid to date a total of $83,402.00, a difference of $2,373.00. Thus, according to Trustee, Debtor

is paid ahead under the proposed modified Plan by $2,373.00.

Trustee would have no opposition if the Order Confirming provided language indicating the total amount paid in through month 49 (July 2021) is $83,402.00, with payments beginning in August 2021 of $1,163.00 for the remaining 11 months of the Plan.

Debtor filed a Response on August 13, 2021 informing the court that Debtor submitted a copy of a proposed Order Confirming Plan to counsel for the Trustee correcting the dollar amount paid into the plan and would read,

> "The Debtors shall pay a total of $83,402.00 through July 2021. Beginning with the August 2021 plan payment, the Debtors shall pay $1,163.00 per month for the remainder of the plan."

Dckt. 55.

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 debtors, Dolly Ramos Peig and Cesar Peig ("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 27, 2021, as amended
>
> > "The Debtors shall pay a total of $83,402.00 through July 2021. Beginning with the August 2021 plan payment, the Debtors shall pay $1,163.00 per month for the remainder of the plan."
>
> 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.