

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

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

DAY: TUESDAY
DATE: OCTOBER 4, 2022
CALENDAR: 9:00 A.M. CHAPTER 13 CASES

RULINGS

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

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

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

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

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

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

ERRORS IN RULINGS

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

1. [22-21331](#)-A-13 **IN RE: RODNEY/CAROL YIP**
[BLG-2](#)

MOTION TO CONFIRM PLAN
8-23-2022 [\[29\]](#)

CHAD JOHNSON/ATTY. FOR DBT.
TRUSTEE NON-OPPOSITION

Final Ruling

Motion: Confirm Chapter 13 Plan

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

Disposition: Granted

Order: Prepared by the movant, approved by the trustee

Subject: First Amended Chapter 13 Plan, filed July 13, 2022

DEFAULT OF RESPONDENT

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

The debtors seek confirmation of their First Amended Chapter 13 Plan, ECF No. 19. The plan is supported by Schedules I and J filed at the inception of the case on May 26, 2022. The chapter 13 trustee has filed a non-opposition to the motion, ECF No. 36.

CHAPTER 13 PLAN CONFIRMATION

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

The court finds that the debtor has sustained that burden, and the court will approve confirmation of the plan.

LIMITED NOTICING AND STANDARDIZED CERTIFICATE OF SERVICE

As of July 5, 2022, this court adopted Local Bankruptcy Rules 2002-3 (limiting notice for Rule 2002(a)(6) (motions for compensation), Rule 9036-1 (electronic service) and Rule 7005-1 (requiring attorneys and trustees to use a standardized Certificate of Service, EDC 7-005).

The form certificate of service is intended to allow parties to memorialize service efficiently and accurately, and to aid the court in ensuring sufficient service is achieved in each proceeding.

In support of this motion, attorney Chad Johnson filed a Certificate of Service, ECF No. 34. The Certificate of Service represents a textbook example of the proper use of the new local rules and form Certificate of Service. Sections 3, 4, 5 and 6 are properly completed. Section 6(B)(2) is supported by the Clerk's Matrix of Creditors, dated August 23, 2022.

The court notes that this matter was eligible for limited notice under Fed. R. Bankr. P. 2002(h), LBR 2002-3 because more than 70 days has passed since the order for relief was entered. However, additional notice to all creditors is still proper. Counsel is to be commended on his precise and skillful application of the new local rules.

2. [22-20532](#)-A-13 **IN RE: KELLI SIMPSON**
[BLG-1](#)

MOTION FOR COMPENSATION FOR CHAD M JOHNSON, DEBTORS
ATTORNEY(S)
8-30-2022 [[26](#)]

CHAD JOHNSON/ATTY. FOR DBT.
TRUSTEE NON-OPPOSITION

Final Ruling

Motion: Allowance of Interim Compensation and Expense Reimbursement

Notice: LBR 9014-1(f)(1), non-opposition filed by the trustee

Disposition: Approved

Order: Civil minute order

Compensation Approved: \$4,239.00

Reimbursement of Expenses: \$7.83

Confirmed Plan Pays Unsecured Creditors: 0%

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

COMPENSATION AND EXPENSES

In this Chapter 13 case, Chad Johnson has applied for an allowance of interim compensation and reimbursement of expenses. The application requests that the court allow compensation in the amount of \$4,239.00 and reimbursement of expenses in the amount of \$7.83.

The chapter 13 trustee has filed a non-opposition to the motion, see ECF No. 32. The currently confirmed plan calls for a 0% distribution to unsecured creditors. See *Plan*, ECF No. 12.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a debtor's attorney in a Chapter 13 case and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on an interim basis. Such amounts shall be perfected, and may be adjusted, by a final application for compensation and expenses, which shall be filed prior to case closure.

BEST INTERESTS OF CREDITORS

Plan Modification

Debtors and creditors are bound by "[t]he provisions of a confirmed plan." 11 U.S.C. § 1327(a). Modification of a confirmed plan must satisfy the best interests of creditors test. 11 U.S.C. § 1329(b)(1). "[T]he requirements of section 1325(a) of this title apply to any modification under § 1329(a)." *In re Gould*, 2022 WL 4353593, at *2 (9th Cir. Sept. 20, 2022).

An award of compensation which alters the terms of a confirmed plan is a modification of the plan. Any modification of a plan is required to satisfy the best interests test of 11 U.S.C. § 1325(b)(4). In this case the confirmed plan calls for a 0% distribution to unsecured creditors.

The court is required to make findings that the compensation award will not modify the terms of the confirmed plan. Henceforth, the trustee shall include in his response to compensation applications: 1) the percentage to be paid to unsecured creditors under the confirmed plan; 2) whether the requested award of compensation will alter the percentage paid to unsecured creditors; and 3) if appropriate, the amount of any change to unsecured creditors.

Chapter 13 Attorney Fees Not Included in Liquidation Analysis

"Because attorney fees are not an administrative expense under Chapter 7, they should not be included in a hypothetical Chapter 7 liquidation analysis." *In re Gould*, 2022 WL 4353593, at *2 (9th Cir. Sept. 20, 2022). See 8 *Collier on Bankruptcy* ¶¶ 1325.05[2][a]; 1329.05[3] (Richard Levin & Henry J. Sommer eds., 16th ed. 2022).

As this court has previously ruled and as *Gould* states, Chapter 13 attorney fees may not be included as an administrative expense in a hypothetical Chapter 7 liquidation analysis.

In this case the liquidation analysis cannot be impacted by the allowance of compensation as the confirmed plan calls for 0% to be

paid to the unsecured creditors. As such, the court finds that the approved compensation will not modify the rights of unsecured creditors under the plan, 11 U.S.C. §§ 1325(a)(4), 1329.

LIMITED NOTICING AND STANDARDIZED CERTIFICATE OF SERVICE

As of July 5, 2022, this court adopted Local Bankruptcy Rules 2002-3 (limiting notice for Rule 2002(a)(6) (motions for compensation), Rule 9036-1 (electronic service) and Rule 7005-1 (requiring attorneys and trustees to use a standardized Certificate of Service, EDC 7-005).

In support of this application, Chad Johnson filed a Certificate of Service, ECF No. 31. The Certificate of Service represents a textbook example of the proper use of the new local rules and form Certificate of Service. The applicant has properly limited notice of the application to those creditors that have filed claims. Fed. R. Bankr. P. 2002(h); LBR 2002-3. Section 4 properly lists the documents served. Section 5 is supported by the Clerk's official list of those parties that have filed a Request for Special Notice. Section 6(B)(1) properly attaches the Clerk's Official Matrix of Registered Users of the Court's electronic-filing system. Section 6(B)(2) is supported by a properly filtered list of creditors, e.g., those that have filed a Proof of Claim. Counsel is to be commended on his precise and skillful application of the new local rules.

CIVIL MINUTE ORDER

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

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

Chad Johnson's application for allowance of interim compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on an interim basis. The court allows interim compensation in the amount of \$4,239.00 and reimbursement of expenses in the amount of \$7.83. The aggregate allowed amount equals \$4,246.83. As of the date of the application, the applicant held a retainer in the amount of \$542.00. The amount of \$3,704.83 shall be allowed as an administrative expense to be paid through the plan, and the remainder of the allowed amounts, if any, shall be paid from the retainer held by the applicant. The applicant is authorized to draw on any retainer held.

IT IS FURTHER ORDERED that the fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330. Such allowed amounts shall be perfected, and may be adjusted, by a final application for allowance of compensation and reimbursement of expenses, which shall be filed prior to case closure.

IT IS FURTHER ORDERED that the trustee is authorized to pay the fees allowed by this order from the available funds of the plan in a manner consistent with the terms of the confirmed plan.

3. [22-21833](#)-A-13 **IN RE: CORNELIUS HARRELL**
[DPC-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
9-7-2022 [\[16\]](#)

PETER MACALUSO/ATTY. FOR DBT.

Tentative Ruling

Objection: Trustee's Objection to Confirmation of Plan

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

Disposition: Sustained and confirmation denied

Order: Civil minute order

No responding party is required to file written opposition to the objection; opposition may be presented at the hearing. LBR 3015-1(c)(4), 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

The chapter 13 trustee objects to confirmation of the debtor's plan.

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

PLAN FEASIBILITY

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

proposed by the plan."); *In re Wilkinson*, 99 B.R. 366, 369 (Bankr. N.D. Ohio 1989) ("[D]ebtors will not be able to comply with the plan and make all payments thereunder."). *In re Buccolo*, 397 B.R. 527, 530 (Bankr. D.N.J. 2008), *aff'd*, 2009 WL 2132435 (D.N.J. July 13, 2009).

Plan Delinquency

The trustee indicates that the plan payments are delinquent in the amount of \$1,750.00, with another payment of \$1,750.00 due September 25, 2022. The plan cannot be confirmed if the plan payments are not current.

MEETING OF CREDITORS

The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, any trustee or examiner in the case, or the United States trustee may examine the debtor. The United States trustee may administer the oath required under this section.

11 U.S.C. § 343.

All debtors are required to attend the meeting of creditors. The debtor did not attend the scheduled meeting on September 1, 2022. Thus, the trustee was unable to examine the debtor regarding the issues raised in this motion. The court will sustain the objection

CIVIL MINUTE ORDER

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

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

The chapter 13 trustee's objection to confirmation has been presented to the court. Having considered the objection, oppositions, responses and replies, if any, and having heard oral argument presented at the hearing,

IT IS ORDERED that the objection is sustained. The court denies confirmation of the chapter 13 plan.

4. [22-22343](#)-A-13 **IN RE: CHRISTIE LEWIS**
[MS-1](#)

MOTION TO EXTEND AUTOMATIC STAY
9-20-2022 [\[8\]](#)

MARK SHMORGON/ATTY. FOR DBT.

Tentative Ruling

Motion: Extend the Automatic Stay

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Granted

Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

The debtor seeks an order extending the automatic stay under 11 U.S.C. § 362(c)(3). This is the debtor's second chapter 13 case within the last year, and notably the debtor's second filing ever. All statements, schedules and the plan have been filed.

EXTENSION OF THE STAY

Upon request of a party in interest, the court may extend the automatic stay where the debtor has had one previous bankruptcy case that was pending within the 1-year period prior to the filing of the current bankruptcy case but was dismissed. See 11 U.S.C. § 362(c)(3)(B). Procedurally, the automatic stay may be extended only "after notice and a hearing *completed* before the expiration of the 30-day period" after the filing of the petition in the later case. *Id.* (emphasis added). To extend the stay, the court must find that the filing of the *later case* is in good faith as to the creditors to be stayed, and the extension of the stay may be made subject to conditions or limitations the court may impose. *Id.*

For the reasons stated in the motion and supporting papers, the court finds that the filing of the current case is in good faith as to the creditors to be stayed. The motion will be granted.

CIVIL MINUTE ORDER

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

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

A motion to extend the automatic stay has been presented to the court in this case. Having considered the motion, oppositions, responses and replies, if any, and having heard oral argument presented at the hearing,

IT IS ORDERED that the motion is granted, and the automatic stay of § 362(a) is extended in this case. The automatic stay shall remain in effect to the extent provided by the Bankruptcy Code.

5. [22-20046](#)-A-13 **IN RE: LARHONDA SAUNDERS**
[DPC-1](#)

AMENDED MOTION TO DISMISS CASE OR MOTION TO CONVERT CASE
FROM CHAPTER 13 TO CHAPTER 7
8-29-2022 [\[46\]](#)

MARK SHMORGON/ATTY. FOR DBT.
RESPONSIVE PLEADING

Final Ruling

Motion: Convert Case

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

Disposition: Granted

Order: Civil minute order

Opposition Due: September 20, 2022

Non-Opposition Filed: September 19, 2022 - timely

Cause: 11 U.S.C. § 1307(c)(1), (6) - Plan Delinquency

Best Interests of Creditors/Estate: Convert to Chapter 7

The chapter 13 trustee moves to convert this case to Chapter 7, asserting that cause exists under § 1307(c)(1) and (6) as the debtor has failed to make all payments due under the confirmed plan. The trustee contends that plan payments are delinquent in the amount of \$ \$7,146.00. See ECF No. 46. The trustee has requested conversion as the bankruptcy statements and schedules list causes of action which are not exempt.

The debtor has filed a timely response which is accompanied by the Declaration of the Debtor, ECF Nos. 52, 53. The debtor's declaration states that the debtor supports the conversion to Chapter 7. See *Declaration*, ECF No. 53.

As such the court will grant the trustee's motion and convert the case to Chapter 7.

11 U.S.C. § 1307(c)

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

...

11 U.S.C. § 1307(c).

The court finds that conversion is in the best interests of the creditors and the estate. The court will convert the case to Chapter 7.

REQUEST FOR NOTICE

The court notes that the following parties have filed a request for special notice: Deutsche Bank National Trust Company Select Portfolio Servicing, Inc.; Trinity Financial Services, LLC c/o S. Christopher Yoo. The chapter 13 trustee did not serve the motion to dismiss on these creditors as required by LBR 9014-1(d)(3)(B)(iv).

In this instance the court finds that the failure to serve the creditors requesting special notice is non-material as the court is ordering the case converted to Chapter 7.

CIVIL MINUTE ORDER

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

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

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

IT IS ORDERED that the motion is granted. The debtor has failed to make all payments due under the confirmed chapter 13 plan in this case. Delinquency constitutes cause to convert this case. 11 U.S.C. § 1307(c)(1), (6). The court hereby converts this case to Chapter 7.

6. [22-21747](#)-A-13 **IN RE: YULANDA HAYWOOD**
[DPC-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
9-8-2022 [\[13\]](#)

MOHAMMAD MOKARRAM/ATTY. FOR DBT.

Tentative Ruling

Objection: Trustee's Objection to Confirmation of Plan

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

Disposition: Sustained and confirmation denied

Order: Civil minute order

No responding party is required to file written opposition to the objection; opposition may be presented at the hearing. LBR 3015-1(c)(4), 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

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

PLAN FEASIBILITY

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

Plan Overextension

The trustee calculates that the plan will take 103 months to complete. This exceeds the maximum length of 60 months allowed under 11 U.S.C. § 1322(d). Therefore, the plan is not feasible under 11 U.S.C. § 1325(a)(6).

The overextension is caused by a claim filed by the Internal Revenue Service, in the amount of \$39,667.00. See Claim No. 10. The priority portion of the claim totals \$24,660.76. Moreover, the claim indicates that the 2019 tax return has not been filed. The debtor scheduled the Internal Revenue Service as a priority creditor in the amount of \$11,000.00. With the increase in the priority portion of the claim the plan does not fund in 60 months.

FAILURE TO FILE TAX RETURNS

Together 11 U.S.C. §§ 1308 and 1325(a)(9) prohibit confirmation of a chapter 13 plan if the debtor has not filed all tax returns due during the 4-year period prior to the filing of the petition.

The court may not confirm a plan unless "the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308."

11 U.S.C. § 1325(a)(9).

(a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition.

11 U.S.C. § 1308(a).

If the debtor has not filed a 2019 tax return, and was required to do so, then the plan may not be confirmed as this contravenes the provisions of 11 U.S.C. §§ 1325(a)(9) and 1308.

CIVIL MINUTE ORDER

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

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

The chapter 13 trustee's objection to confirmation has been presented to the court. Having considered the objection, oppositions, responses and replies, if any, and having heard oral argument presented at the hearing,

IT IS ORDERED that the objection is sustained. The court denies confirmation of the chapter 13 plan.

7. [19-20048](#)-A-7 **IN RE: THOMAS HARDER**
[DPC-1](#)

MOTION TO DISMISS CASE
8-29-2022 [\[48\]](#)

CHAD JOHNSON/ATTY. FOR DBT.
CASE CONVERTED: 8/30/22

Final Ruling

This case was converted to Chapter 7 on August 30, 2022. As such the hearing on this matter is removed from the calendar as moot. No appearances are required.

8. [18-23651](#)-A-13 **IN RE: THOMAS HURST**
[PGM-3](#)

MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTOR'S
ATTORNEY(S)
9-2-2022 [\[82\]](#)

PETER MACALUSO/ATTY. FOR DBT.
TRUSTEE NON-OPPOSITION

Final Ruling

Application: Allowance of Additional Compensation

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

Disposition: Continued to November 1, 2022, at 9:00 a.m.

Order: Civil minute order

Confirmed Plan Pays Unsecured Creditors: 100%

In this chapter 13 case, Peter Macaluso, attorney for the debtors, has applied for an allowance of additional compensation. The applicant requests that the court allow compensation in the amount of \$1,260.00. The chapter 13 trustee has filed a non-opposition to the application stating:

The Trustee has reviewed the fee application and believes the services were needed and fees are reasonable. The Plan is adequately funded to pay the additional attorney fees that are being requested.

Non-Opposition, ECF No. 87, 1:23-25.

The confirmed plan pays unsecured creditors 100%. See *Plan*, ECF No. 68.

BEST INTERESTS OF CREDITORS

Plan Modification

Debtors and creditors are bound by "[t]he provisions of a confirmed plan." 11 U.S.C. § 1327(a). Modification of a confirmed plan must satisfy the best interests of creditors test. 11 U.S.C. § 1329(b)(1). "[T]he requirements of section 1325(a) of this title apply to any modification under § 1329(a)." *In re Gould*, 2022 WL 4353593, at *2 (9th Cir. Sept. 20, 2022).

An award of compensation which alters the terms of a confirmed plan is a modification of the plan. Any modification of a plan is required to satisfy the best interests test of 11 U.S.C. § 1325(b)(4). In this case the confirmed plan calls for a 100% distribution to unsecured creditors. The report filed by the chapter 13 trustee lacks specificity in that it states only that the plan is adequately funded to pay the fees requested. It is unclear whether the plan continues to meet the liquidation test.

The court is required to make findings that the compensation award will not modify the terms of the confirmed plan. Henceforth, the trustee shall include in his response to compensation applications: 1) the percentage to be paid to unsecured creditors under the confirmed plan; 2) whether the requested award of compensation will alter the percentage paid to unsecured creditors; and 3) if appropriate, the amount of any change to unsecured creditors.

The court will continue the hearing on this motion for the trustee to file and serve additional evidence consistent with this ruling.

Chapter 13 Attorney Fees Not Included in Liquidation Analysis

"Because attorney fees are not an administrative expense under Chapter 7, they should not be included in a hypothetical Chapter 7 liquidation analysis." *In re Gould*, 2022 WL 4353593, at *2 (9th Cir. Sept. 20, 2022). See 8 *Collier on Bankruptcy* ¶¶ 1325.05[2][a]; 1329.05[3] (Richard Levin & Henry J. Sommer eds., 16th ed. 2022).

As this court has previously ruled and as *Gould* states, Chapter 13 attorney fees may not be included as an administrative expense in a hypothetical Chapter 7 liquidation analysis.

CIVIL MINUTE ORDER

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

IT IS ORDERED that the motion is continued to November 1, 2022, at 9:00 a.m. No later than 14 days prior to the hearing date the chapter 13 trustee shall file and serve a status report providing the information requested, consistent with this ruling.

9. [22-21365](#)-A-13 **IN RE: RAFAEL/VIANA LARA**
[APN-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY FIFTH THIRD BANK, N.A.
9-6-2022 [\[56\]](#)

KIM BEATON/ATTY. FOR DBT.
KIRSTEN MARTINEZ/ATTY. FOR MV.

Final Ruling

Matter: Objection to Confirmation of Chapter 13 Plan

Notice: LBR 9014-1(f)(2)

Disposition: Overruled as moot

Order: Civil minute order

Objecting creditor Fifth Third Bank, N.A. objects to the chapter 13 plan proposed by the debtor. It is unclear to which plan the creditor objects.

On September 1, 2022, the court overruled as moot the Chapter 13 trustee's Objection to Confirmation (DPC-1) as the debtor filed an amended plan after the trustee raised his objection. See *Amended Plan*, filed July 28, 2022, ECF No. 48.

LBR 3015-1(d)(1) requires that the debtor file and serve any motion to confirm a modified plan prior to confirmation. The debtor has not yet filed and served a motion to confirm the amended plan. As such the court will overrule the objection to confirmation as moot.

The court notes that on September 26, 2022, the debtor filed a further amended plan and a motion to confirm the plan. As such the objecting creditor will have the opportunity to weigh in on the amended plan.

CIVIL MINUTE ORDER

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

Fifth Third Bank, N.A.'s Objection to Confirmation of Plan has been presented to the court. Given the procedural deficiencies discussed by the court in its ruling,

IT IS ORDERED that the objection is overruled as moot.

10. [22-21369](#)-A-13 **IN RE: STEPHANIE/ERIC POLDERVAART**
[CK-1](#)

MOTION TO CONFIRM PLAN
8-29-2022 [\[25\]](#)

CATHERINE KING/ATTY. FOR DBT.
TRUSTEE NON-OPPOSITION

Final Ruling

Motion: Confirm Chapter 13 Plan

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

Disposition: Granted

Order: Prepared by the movant, approved by the trustee

Subject: Amended Chapter 13 Plan, filed August 29, 2022

DEFAULT OF RESPONDENT

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

The debtors seek confirmation of their Amended Chapter 13 Plan, ECF No. 30. The plan is supported by Schedules I and J filed at the inception of the case on May 31, 2022. The chapter 13 trustee has filed a non-opposition to the motion, ECF No. 34.

CHAPTER 13 PLAN CONFIRMATION

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

The court finds that the debtors have sustained that burden, and the court will approve confirmation of the plan.

11. [22-21669](#)-A-13 **IN RE: LINDSAY/LISA BRAKEL**
[AHW-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-26-2022 [\[41\]](#)

MARK BRIDEN/ATTY. FOR DBT.
ARNOLD WUHRMAN/ATTY. FOR MV.
LORI LESTER VS.
TRUSTEE NON-OPPOSITION

Final Ruling

Motion: Stay Relief to Pursue State-Court Litigation
Notice: LBR 9014-1(f)(1); non-opposition filed by the trustee
Disposition: Granted only to the extent specified in this ruling
Order: Civil minute order

Subject: Pending state-court litigation described in the motion

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

Movant, Lori Lester, seeks relief from the automatic stay of 11 U.S.C. § 362(a) to allow the movant to continue pursuit of state court personal injury litigation against the debtor, Lindsay John Brakel, and to obtain full or partial payment of any judgment obtained therein from available insurance covering the debtor's liability. The chapter 13 trustee has filed a non-opposition to this motion, ECF No. 63.

STAY RELIEF

Section 362(d)(1) authorizes stay relief for cause. Cause is determined on a case-by-case basis and may include the existence of litigation pending in a non-bankruptcy forum that should properly be pursued. *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1169 (9th Cir. 1990).

The Ninth Circuit Bankruptcy Appellate Panel has "agree[d] that the *Curtis* factors are appropriate, nonexclusive, factors to consider in deciding whether to grant relief from the automatic stay to allow pending litigation to continue in another forum." *In re Kronemyer*, 405 B.R. 915, 921 (B.A.P. 9th Cir. 2009).

These factors include: "(1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been

established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms." *Sonnax Indus., Inc. v. TRI Component Prods. Corp. (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1286 (2nd Cir. 1990) (citing *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984)).

Courts may consider whichever factors are relevant to the particular case. See *id.* (applying only four of the factors that were relevant in the case). The decision whether to lift the stay is within the court's discretion. *Id.*

Having considered the motion's well-pleaded facts, the court finds cause to grant stay relief subject to the limitations described in this ruling.

The moving party shall have relief from stay to pursue through judgment the pending state-court litigation identified in the motion. The moving party may also file post-judgment motions and appeals. But no bill of costs may be filed without leave of this court, no attorney's fees shall be sought or awarded, and no action shall be taken to collect or enforce any judgment, except: (1) from applicable insurance proceeds; or (2) by filing a proof of claim in this court.

The motion will be granted to the extent specified herein, and the stay of the order provided by Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:
Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Lor Lester's motion for relief from the automatic stay has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted to the extent specified in this order. The automatic stay is vacated to allow the movant to pursue through judgment the pending state-court litigation described in the motion. The movant may also file post-judgment motions and appeals. But the movant shall not take any action to collect or enforce any judgment, or pursue costs or attorney's fees against the debtor, except (1) from applicable insurance proceeds; or (2) by

filing a proof of claim in this case. The 14-day stay of the order under Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived. No other relief is awarded.

12. [22-21871](#)-A-13 **IN RE: CLAIR/BARBARA CRAWFORD**
[DPC-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
9-7-2022 [\[15\]](#)

TIMOTHY WALSH/ATTY. FOR DBT.

Tentative Ruling

Objection: Trustee's Objection to Confirmation of Plan

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

Disposition: Sustained in part; Overruled in part; and confirmation denied

Order: Civil minute order

No responding party is required to file written opposition to the objection; opposition may be presented at the hearing. LBR 3015-1(c)(4), 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

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

CAPACITY

The trustee objected to confirmation citing his inability to determine whether the plan satisfies the requirements of 11 U.S.C. § 1325(a) as debtor, Clair Crawford, appeared confused, and unaware that he had filed a bankruptcy case at the 341 meeting of creditors. As the debtor was unable to meaningfully answer his posed questions the trustee contends that the debtor, Clair Crawford, lacks capacity such that Fed. R. Bankr. P. 1004.1 might require special orders protecting the debtor.

An order dismissing this case only as to the debtor Clair Crawford was entered on September 20, 2022. *See Order of Dismissal of Debtor Clair Crawford, Sr.*, ECF No. 20. As such the court overrules this objection as moot.

The remaining objections are discussed as they relate to Mrs. Crawford's prosecution of the Chapter 13 Plan as the sole debtor in this proceeding.

PLAN FEASIBILITY

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

Plan Delinquency

The trustee indicates that the plan payments are delinquent in the amount of \$576.74, with another payment of \$576.74 due September 25, 2022. The plan cannot be confirmed if the plan payments are not current.

Budget Does Not Support Plan Payment

The debtor filed Schedules I and J at the inception of the case. These documents are offered in support of the debtor's plan. The trustee contends that the monthly amount of \$200.00 projected for a family of two is insufficient and unrealistic. The court agrees that this expense is too meager to support the debtor's performance of the plan over a projected term of 60 months. The court also agrees with the trustee's contention that the allowance of \$0 in the categories of clothing and medical expenses; and only \$60 for transportation renders the plan not feasible under 11 U.S.C. § 1325(a)(6).

CIVIL MINUTE ORDER

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

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

The chapter 13 trustee's objection to confirmation has been presented to the court. Having considered the objection, oppositions, responses and replies, if any, and having heard oral argument presented at the hearing,

IT IS ORDERED that the objection is sustained in part, and overruled in part. The court denies confirmation of the chapter 13 plan.

13. [22-21072](#)-A-13 **IN RE: TOM/EVERLYN NELSON**
[DPC-1](#)

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P.
CUSICK
6-14-2022 [\[38\]](#)

RICHARD KWUN/ATTY. FOR DBT.
RESPONSIVE PLEADING

Final Ruling

Motion: Trustee's Objection to Confirmation of Chapter 13 Plan

Notice: Continued from August 30, 2022

Disposition: Overruled as moot

Order: Civil minute order

THE CHAPTER 13 PLAN HAS BEEN SUPERSEDED

Chapter 13 debtors may modify the plan before confirmation. 11 U.S.C. § 1323(a). If the debtor files a modification of the plan under § 1323, the modified plan becomes the plan and supersedes the prior plan. 11 U.S.C. § 1323(b). Filing a modified plan renders moot any motion to confirm a prior plan.

On September 21, 2022, the debtors filed an amended plan, ECF No. 70. Because a modified plan has superseded the plan objected to by the trustee, the court will overrule the objection as moot.

CIVIL MINUTE ORDER

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

IT IS ORDERED that the trustee's objection to confirmation will be overruled as moot.

14. [22-21483](#)-A-13 **IN RE: TERRY/PATRICIA OETZEL**
[DPC-1](#)

MOTION TO DISMISS CASE AND/OR MOTION TO CONVERT CASE FROM
CHAPTER 13 TO CHAPTER 7
9-6-2022 [\[23\]](#)

DAVID CUSICK/ATTY. FOR MV.
DEBTORS DISMISSED: 9/14/22

Final Ruling

This case was dismissed on September 14, 2022. The hearing on this motion is removed from the calendar as moot. No appearances are required.

15. [18-22996](#)-A-13 **IN RE: BARRY/TSICHLIS DUNN**
[DPC-3](#)

MOTION TO DISMISS CASE
8-29-2022 [\[59\]](#)

MARY TERRANELLA/ATTY. FOR DBT.
DAVID CUSICK/ATTY. FOR MV.

Final Ruling

Motion: Dismiss Case

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

Disposition: Denied without prejudice

Order: Civil minute order

The chapter 13 trustee moves to dismiss this case for delinquent plan payments.

The motion will be denied without prejudice as the trustee has failed to properly provide notice to all parties as required. The following parties filed a request for special notice: Capital One Auto Finance AIS Portfolio Services; Synchrony Bank c/o PRA Receivables Management. Neither of these parties was served with the trustee's motion. *See Certificate of Service*, ECF No. 62.

NOTICE

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

Motions under 11 U.S.C. § 1307(c)

A motion to dismiss a chapter 13 case is not included in Fed. R. Bankr. P. 2002. Thus, the motion is brought pursuant to Rule 9014 which requires that notice and an opportunity to be heard shall be "afforded the party against whom relief is sought."

Rules 9013 and 9007

A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). The moving party shall serve the motion on:

- (a) the trustee or debtor in possession and on those entities specified by these rules; or
- (b) *the entities the court directs if these rules do not require service or specify the entities to be served.*

Fed. R. Bankr. P. 9013 (emphasis added).

When notice is to be given under these rules, the court shall designate, if not otherwise specified herein, the time within which, *the entities to whom*, and the form and manner in which the notice shall be given. When feasible, the court may order any notices under these rules to be combined.

Fed. R. Bankr. P. 9007 (emphasis added).

Rules 9013 and 9007 allow the court to designate additional parties which must receive notice of a motion and opportunity to be heard.

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

When notice of a motion is served without the motion or supporting papers, the notice of hearing shall also succinctly and sufficiently describe the nature of the relief being requested and set forth the essential facts necessary for a party to determine whether to oppose the motion. *However, the motion and supporting papers shall be served on those parties who have requested special notice and those who are directly affected by the requested relief.*

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

In the Eastern District the court has ordered that parties which have filed requests for special notice must receive notice of motions. LBR 9014-1(d)(3)(B)(iv) includes creditors which have

filed requests for special notice as parties who must be served with all motions and supporting papers.

LBR 9014-1(d)(3)(B)(iv) does not limit the notice required (to special notice creditors) to Rule 2002 motions. Thus, the trustee is required to serve his motion to dismiss or convert under 11 U.S.C. § 1307(c) on creditors who have filed requests for special notice.

CIVIL MINUTE ORDER

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

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

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

IT IS ORDERED that the motion is denied without prejudice.

16. [21-22096](#)-A-13 **IN RE: KANI JAHNKE**
[DPC-1](#)

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P.
CUSICK
8-3-2022 [\[59\]](#)

DAVID FOYIL/ATTY. FOR DBT.
DAVID CUSICK/ATTY. FOR MV.

Tentative Ruling

Objection: Trustee's Objection to Confirmation of Plan

Notice: Continued from August 30, 2022

Disposition: Overruled

Order: Civil minute order

The hearing on the trustee's objection to confirmation was continued to allow the debtor to file documents and for the chapter 13 trustee to file a status report apprising the court of his position regarding his objection. The trustee's status report was due not later than September 20, 2022. *See Order*, ECF No. 65.

At the prior hearing the court ordered the debtor to file a Rights and Responsibilities Statement, a Spousal Waiver and clarification regarding whether debtor's counsel would be opting-in to the attorney fee guidelines. *Id.*

On September 13, the debtor filed a Rights and Responsibilities Statement, ECF No. 68. The document shows that debtor's counsel has

opted-in to the attorney fee guidelines. A Spousal Waiver was previously filed on June 30, 2022, ECF No. 22.

The chapter 13 trustee has failed to file a status report as ordered by the court. Absent further objection by the trustee the court will overrule the trustee's objection.

CIVIL MINUTE ORDER

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

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

The chapter 13 trustee's objection to confirmation has been presented to the court. Having considered the objection, oppositions, responses and replies, if any, and having heard oral argument presented at the hearing,

IT IS ORDERED that the objection is overruled. A confirmation order shall be submitted by the debtor after approval by the chapter 13 trustee.