

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

October 24, 2023 at 2:00 p.m.

1. **18-25700-E-13**
DPC-3

JONNELL DEEN-CHASE
Peter Macaluso

**OBJECTION TO CLAIM OF GMAC
MORTGAGE, CLAIM NUMBER 7
8-21-23 [69]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Debtor, Debtor's Attorney, and parties requesting special notice on August 21, 2023. By the court's calculation, 64 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

<p>The Objection to Proof of Claim Number 7-1 of GMAC Mortgage is sustained, and the claim is disallowed in its entirety.</p>
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NOTICE OF ERRATA

Federal Rules of Bankruptcy Procedure 7004(b)(9) requires service on the Debtor and his attorney; service on the Debtor's attorney alone is insufficient to require the Debtor to answer and defend. *In re Cossio*, 163 B.R. 150, 154 (B.A.P. 9th Cir. 1994)), *aff'd*, 56 F.3d 70 (9th Cir. 1995); *In re*

Bloomington, 137 B.R. 351, 354 (Bankr.C.D.Cal.1991); *In re Cole*, 142 B.R. 140, 143 (Bankr. N.D. Tex. 1992); *In re Love*, 242 B.R. 169, 171 (E.D. Tenn. 1999), *aff'd*, 3 F. App'x 497 (6th Cir. 2001); *In re Hall*, 222 B.R. 275, 277 (Bankr. E.D. Va. 1998).

Counsel for the Chapter 13 Trustee, David P. Cusick, failed to check the box on page 2 of the Proof of Service. Proof of Service, Dckt. 73. Counsel filed a Notice of Errata informing the Court of the error, but noted that the Proof of Service reflects it was served on the Debtor and the Debtor's Attorney on Page 5.

David P. Cusick, the Chapter 13 Trustee, ("Objector") requests that the court disallow the claim of GMAC Mortgage ("Creditor"), Proof of Claim No. 7-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of \$7,000.00. Objector asserts that Claim 7-1 does not include any attachments to show that any debt is owed to GMAC Mortgage. There is no contract, no invoice, no judgment, or declaration by the Debtor explaining the nature of the Debt. The Claim describes the basis of the claim as "Secured PMSI" but did not describe the collateral. POC 7-1.

The Debtor's Plan describes the collateral with the address of the Debtor's residence, which is the description of the collateral in Schedule D. Dckt. 12. Objector cannot determine if any debt is owed or how much is owed from the claim filed. Declaration, Dckt. 71.

Additionally, Objector noted that he has attempted to serve GMAC Mortgage and no bank exists by that name in the FDIC Bank Finder. There is an entry for GMAC Commercial Mortgage Bank which was the prior name of Capmark Bank, which closed, or will be closing soon. Declaration, Dckt. 71.

Further the Objector states that the California Secretary of State shows no active GMAC Mortgage, but includes an address for GMAC Mortgage of IOWA, which appears to be the address on the Proof of Claim. The Objector claims the company has since merged out, and the Iowa Secretary of State shows no active GMAC Mortgage entities. Declaration, Dckt. 71.

Review of Proof of Claim 7-1

Proof of Claim 7-1 states that the creditor to be "GMAC Mortgage" and that notices should be sent to it at 3451 Hammond Avenue, Waterloo, Iowa. POC 7-1 ¶¶ 1,3. Proof of Claim 7-1 is executed by Peter Macaluso, Esq., the attorney for Debtor in this case.

As the Trustee states, the Debtor and Debtor's counsel do not attach the copy of deed of trust, other security instrument, note, or document under which the obligation is asserted to arise.

Basic Internet Research

The court ran a simple internet search for the address 3451 Hammond Avenue, Waterloo, Iowa. The result for Zillow.com provides information that this is a single family residence. However, Realtor.com states that this is a 1.67 acre lot. Remax.com lists this as a 18.58 acre lot. It appears that this address is part of commercial property.

Information about GMAC Mortgage is provided on onlinemortgagehub.com/gmac-mortgage includes the following:

GMAC Residential Capital Mortgage

GMAC Mortgage refers to the mortgages originated at General Motors Acceptance Corporation, which is now known as Ally Financial. It was a part of GMAC ResCap, which no longer exists and has been sold in parts to different companies, such as Ocwen, Green Tree and ditech. Even Green Tree servicing has now been merged with ditech.

My mortgage was with GMAC? How can I contact my servicer now?

Your lender must notify at least 15 days before transfer of your loan to another servicer. Chances are you already know who took over your GMAC mortgage loan. If not, then you need to find out who your servicer is. You can follow these steps.

1. Call the customer service department of Ally Financial at 1-877-247-2559 to ask who owns the servicing rights to your loan.
2. Check with Ocwen if it has acquired your loan portfolio. The customer service phone number is 800-746-2936. For mortgage login and payment address with Ocwen, visit this page.
3. Get in touch with ditech to confirm if it has bought your GMAC mortgage loan. For mortgage login and payment address with ditech, visit this page.

It was in May, 2012 when GMAC filed for Chapter 11 bankruptcy and went out of business. Its new owner Ally Financial wanted to get out of the risky subprime lending business and focus on auto financing instead. It subsequently sold the mortgage unit of the company to Ocwen Financial Corp. and ditech Financial LLC.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial evidence to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin*, 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

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

The Objector has presented substantial and relevant evidence to overcome the prima facie validity of the Creditor's Proof of Claim. Neither the Creditor nor the Debtor explained the nature of the debt sufficient for the Objector to determine if any debt is owed, and neither provided information sufficient to

determine the nature of the collateral of the Claim. Objector's inability to locate the Creditor to serve Notice upon it also brings doubt to the validity of the Claim.

Based on the evidence before the court, Creditor's claim is disallowed in its entirety. The Objection to the Proof of Claim is sustained, without prejudice to the actual creditor filing, or having filed for it, a proof of claim.

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

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

The Objection to Claim of GMAC Mortgage ("Creditor"), filed in this case by David P. Cusick, the Chapter 13 Trustee, ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 7-1 of Creditor is sustained, and the claim is disallowed in its entirety, without prejudice.

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, attorneys of record who have appeared in the Bankruptcy Case, the Adversary Proceeding, or contested matter, creditors, parties requesting special notice, and Office of the United States Trustee on September 8, 2023. By the court’s calculation, 46 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days’ notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

The Motion to Sell Property 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.

<p>The Motion to Sell Property is granted.</p>

The Bankruptcy Code permits Robert Matthew Ceasar Heredia, Chapter 13 Debtor, (“Movant”) to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the personal property commonly known as 2016 Mazda 3 Hatchback. (“Property”).

The proposed purchaser of the Property is Mohammed Ahemdi, and the terms of the sale are:

A. The Property has already been sold for \$6,000 in cash.

Declaration, Dckt. 18.

Movant previously owned a 2020 Toyota Corolla that was financed through Andrew’s Federal Credit Union. *Id.* That vehicle was involved in a car accident. The Movant’s insurance company estimated it would be \$8, 300.00 to repair, and sent the Movant a check for that amount. *Id.* After taking the vehicle to the shop, the Movant was told that the vehicle was irreparable. After being told this, Movant purchased a replacement vehicle, the Property, with the check given by the insurance company. *Id.*

In July 2023, the insurance company contacted the Movant to inform him that the check was sent to him erroneously, and that the check should have been sent to Andrew’s Federal Credit Union.

Declaration, Dckt. 18. Movant was informed that he either needed to send back the money, or give it directly to Andrew's Federal Credit Union. *Id.* In a panic, the Movant sold the Property for \$6,000 cash, with the intention to send that money to the insurance company. *Id.* After speaking to counsel, the Movant was informed that the Court needed to approve the sale of the Property, so Movant has since retained the money waiting for the court's ruling. *Id.*

TRUSTEE'S NON-OPPOSITION

The Chapter 13 Trustee, David P. Cusick, filed a Non-Opposition on October 6, 2023. Dckt. 22.

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: **XXXXXXX** .

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the Movant valued the Property at \$7,500 and exempted the full value of the vehicle on Schedule C. Schedule, Dckt. 1. The Property was sold for \$6,000.00 which is reasonable in light of the value estimated on the Schedules.

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 Robert Matthew Ceasar Heredia, 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 Robert Matthew Ceasar Heredia, Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Mohammed Ahemdi or nominee ("Buyer"), the Property commonly known as 2016 Mazda 3 Hatchback ("Property"), on the following terms:

- A. The Property shall be sold to Buyer for \$6,000.00, and as further provided in this Order.
- B. Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.

IT IS FURTHER ORDERED that this authorization is granted retroactively for the transaction which was previously conducted by Debtor.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 18, 2023. By the court’s calculation, 35 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

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

The Motion to Confirm the Modified Plan is XXXXXXXXXXXX

The debtor, Michael Charles Clark and James David Ling (“Debtor”) seeks confirmation of the Modified Plan to become current in Plan payments. Declaration, Dckt. 39. The Modified Plan provides **\$43,852.59 to be paid through July 2023, followed by monthly payments of \$5,869.00** for the remainder of the Plan. Modified Plan, Dckt. 38. 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 1, 2023. Dckt. 47. Trustee opposes confirmation of the Plan on the basis that:

1. Feasibility
 - a. The Plan terms are conflicting.

- b. Debtor does not adequately explain missed payments in February, March, and April.
 - c. Post-Petition Arrearages -
 - i. Debtor does not propose to cure post-petition arrearages.
 - d. Pre-petition Arrearages -
 - i. Debtor misstates the amount of mortgage arrearages.
 - e. Trustee calculates the percent to unsecured creditors will total 86.58%, while the Plan only proposes 30%.
2. Particularity
- a. The Motion does not cite applicable codes, and fails to cite the legal grounds for modifying.

DISCUSSION

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

- 1. The Plan provides for monthly payments of \$5,869.00 for 60 months, which would cause Debtor to need to pay roughly \$18,000 more than what Debtor has paid. The nonstandard provisions, however, provides for different provisions, including: \$43,852.59 to be paid through July 2023, followed by monthly payments of \$5,869.00 for the remainder of the Plan. The terms are conflicting, therefore, Debtor cannot comply with the Plan.
- 2. Debtor does not adequately explain missed payments in February, March, and April. Therefore, the court is unable to assess the feasibility of the Plan and whether Debtor can remain current for the remainder of the Plan.
- 3. Post-Petition Arrearages - Debtor does not propose to cure post-petition arrearages owed to a Mr. Cooper.
- 4. Pre-petition Arrearages - Debtor misstates the amount of mortgage arrearages. Additionally, US Bank National Association, serviced by Nationstar Mortgage LLC, filed a secured claim. Therefore, it is unclear if Trustee should pay a Mr. Cooper, or Nationstar Mortgage LLC.
- 5. Trustee calculates the percent to unsecured creditors will total 86.58%, while the Plan only proposes 30%.

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

Motion fails Particularity Requirements

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 In re Weatherford*, 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

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

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

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

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

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

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

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

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

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

Grounds Stated in Motion

Debtor has not provided any grounds, merely unsupported conclusions of law. The insufficient statements made by Debtor are:

- A. Debtor moves this court to confirm the First Modified Plan.
- B. The Motion is based on the facts in the Motion, the Joint Declaration of Debtor, and the Exhibits filed in support.
- C. Debtor submits the Motion in good faith and believe they can make all future payments in a timely manner.

Those “grounds” are merely a conclusion of law by Debtor. Presumably, Debtor believed that the court would make those conclusions, but the “grounds” cannot merely state the anticipated conclusions. Debtor provides no legal grounds, as required by Local Bankruptcy Rule 9014-1(d)(3)(A). Movant is reminded that “[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of default, finding of contempt,

imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions." LOCAL BANKR. R. 1001-1(g) (emphasis added).

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

Supplement to Debtor's Motion

The Debtor filed a Supplement to Debtor's Motion to Confirm First Amended Plan to include references to the relevant law in support of that Motion on September 4, 2023. Dckt. 55. The Debtor cites to 11 U.S.C. § 1329, quoting the Statute. The Supplement does not state factual grounds/allegations which are required under 11 U.S.C. § 1325, 1322 for a modification under § 1329.

Trustee's Supplemental Response

The Chapter 13 Trustee, David P. Cusick, filed a Supplemental Response to the Motion to Modify on September 19, 2023. Dckt. 57. The Trustee responds recommending approval of the modified plan, with the following changes:

- A. Since the Plan is silent about the amount paid prior to August 1, 2023, and where the Debtor has actually paid \$52,076.96, the Trustee asks the order confirming include the total paid in under the plan is amended as Plan payments shall be \$57,076.96 through July 2023, then \$5,869.00 thereafter.
- B. The Order confirming should require the Debtor to provide 2023 February, March, and April Golden 1 checking statements to the Trustee.
- C. Where the Class 1 Claim, Claim 23, asks for mortgage payments be sent to Nationstar Mortgage, the Trustee asks the Order confirm that future payments to the Class 1 Creditor shall be based on the name of Claim 23.
- D. The Order confirm that the prior payments to the Class 1 Creditor are approved.

Dckt. 57.

October 24, 2023 Hearing

At the hearing, xxxxxxxxxxxxxx

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Michael Charles Clark and James David Ling ("Debtor") having been presented to

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

IT IS ORDERED that the Motion to Confirm the Modified Plan is **xxxxxxx**

4. [22-21906-E-13](#) **MICHAEL CLARK AND JAMES** **CONTINUED AMENDED MOTION TO**
[DPC-2](#) **LING** **DISMISS CASE**
 Patricia Wilson **6-16-23 [31]**

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

Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, parties requesting special notice, and Office of the United States Trustee on June 16, 2023. By the court’s calculation, 33 days’ notice was provided. 28 days’ notice is required.

The Amended Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Amended Motion to Dismiss is xxxxxxxxxxxxxxxx

The Chapter 13 Trustee, David Cusick (“Trustee”), seeks dismissal of the case on the basis that the debtors, Michael Clark and James Ling (“Debtor”) are delinquent in plan payments.

DEBTOR’S OPPOSITION

Debtor filed an Opposition on July 5, 2023. Dckt. 35. Debtor states they will file a Modified Plan prior to the July 19, 2023 hearing date.

Lack of Certificate of Service

Although Debtor timely filed an Opposition to Trustee’s motion, Debtor is required to provide a certificate of service to Trustee and all other parties in interest. Local Bankruptcy Rule 9014-1(d)(1). Debtor has failed to file a certificate of service with his Opposition to Trustee’s motion. It is not clear whether Trustee properly notice of Debtor’s Opposition.

DISCUSSION

Delinquent

Debtor is \$14,003.04 delinquent in plan payments, which represents multiple months of the \$5,548.00 plan payment. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Unfortunately for Debtor, a promise to file a modified plan is not evidence that resolves the Motion.

By the time of the hearing, Debtor has filed a Modified Plan and Motion to Confirm. The Chapter 13 Trustee requested that this hearing be continued to be heard in conjunction with the Motion to Confirm.

AUGUST 22, 2023 HEARING

At the hearing, the Trustee concurred with the request to continue the hearing on the Amended Motion to Dismiss, to be heard in conjunction with the hearing on Debtor's Motion to Confirm Modified Plan.

October 24, 2023 Hearing

At the hearing, **xxxxxxxxxxxx**

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

IT IS ORDERED that the Amended Motion to Dismiss is **xxxxxxxxxxxx**

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, all creditors and parties in interest, parties requesting special notice, and Office of the United States Trustee on August 10, 2023. 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 Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Confirm the Amended Plan is XXXXXXXX
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The debtor, Jo Ann Brazil (“Debtor”), seeks confirmation of the Amended Plan. The Amended Plan provides for curing Debtor’s home mortgage arrears of \$36,403.97 and to remit plan payments of \$1,785.00 starting August 25, 2023 for 60 months. No less than 1% will be paid to nonpriority general unsecured claims. The Internal Revenue Service (“IRS”) will be paid a monthly dividend of \$1,553.11 for a total secured claim of \$93,186.42. Amended Plan, Dckt. 19. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE’S OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”) filed an Opposition on September 6, 2023. Dckt. 26. Trustee opposes confirmation of the Plan on the basis that:

1. The IRS is listed in Class 1 of the Amended Plan. There is a delinquency in the amount of \$93,186.42. The Amended Plan says the Trustee shall pay the arrears to the IRS, but authorizes \$0.00 per month to pay the arrears.

2. The IRS' claim does not appear to mature after the completion of the Plan, which is a requirement for Class 1 treatment. The ongoing payments appears sufficient to pay the IRS' secured claim where 0% interest is proposed.
3. Debtor states she applied for and was accepted into the California Mortgage Relief Program ("CMRP"), and Debtor asserts CMRP will cure the \$36,403.97 in mortgage arrears. Debtor has not provided any evidence that she was accepted into the CMRP.
4. The amended Plan proposes that Debtor will be paying the student loan directly and not through the Amended Plan. However, Schedule J does not identify any payments for student loans. If the proposed student loan payments are made outside the Amended Plan, Debtor should specifically identify which creditors will be affected.

Dckt. 26.

DISCUSSION

Cannot Comply with the Plan. 42 secured claim and \$33,397.13 unsecured claim.

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Although Debtor asserts CMRP will pay off her mortgage arrearages, without documentation or evidence showing Debtor's acceptance into the program, the court cannot approve the Amended Plan. The Amended Plan should further clarify how Debtor plans to pay IRS arrearages. Finally, it would be helpful for Trustee if Debtor listed which creditors will be affected by Debtor's payments to her student loan provider. Without tying up these loose ends and addressing Trustee's concerns, the court is unable to confirm the Amended Plan.

Proof of Claim 1-1 has been filed by the Internal Revenue Service, which states that it has a \$93,186.42 is secured and \$33,397.13 is unsecured. This appears to be an "ordinary" tax obligation and not a loan with regular monthly installments for which there is a pre-petition arrearage to be cured. The attachment to Proof of Claim 1-1 states that these are income tax obligations for 2013, 2014, 2015, 2019, and 2022. POC 1-1 at 4.

At the hearing, Debtor requested a short continuance to address the IRS issue. The Trustee concurred.

October 24, 2023 Hearing

At the hearing, xxxxxxxxxxxxxx

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.

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, parties requesting special notice, and Office of the United States Trustee on September 28, 2023. By the court’s calculation, 26 days’ notice was provided. 14 days’ notice is required.

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

The Motion to Value Collateral and Secured Claim of OneMain Financial Group, LLC (“Creditor”) is granted, and Creditor’s secured claim is determined to have a value of \$7,725.00.

The Motion filed by James and Irma Weldon (“Debtor”) to value the secured claim of OneMain Financial Group, LLC (“Creditor”) is accompanied by Debtor’s declaration. Declaration, Dckt. 19. Debtor is the owner of a 2012 Buick Enclave (“Vehicle”). Debtor seeks to value the Vehicle at a replacement value of \$7,725.00 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the asset’s value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

DISCUSSION

The lien on the Vehicle’s title secures a purchase-money loan incurred on March 16, 2023, which is less than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$14,481.00. Declaration, Dckt. 19. Therefore, Creditor’s claim secured by a lien on the

asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of \$7,725.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion to Value Collateral and Secured Claim filed by James and Irma Weldon ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of OneMain Financial Group, LLC ("Creditor") secured by an asset described as 2012 Buick Enclave ("Vehicle") is determined to be a secured claim in the amount of \$7,725.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$7,725.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

7 thru 8

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, and parties requesting special notice on August 21, 2023. By the court's calculation, 36 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is XXXXX.

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

- A. Tax returns were not provided to the Trustee, the Debtor has not filed all tax returns required under 11 U.S.C. § 1308, and the priority claims by the Internal Revenue Service and the Franchise Tax Board will not allow the Plan to be completed in 36 months.
- B. The Debtor failed to provide documents as requested by the Plan. Debtor is self-employed, and owns two LLCs. The Debtor only provided the Trustee with a 6-month Profit and Loss Statement for one LLC.
- C. Debtor may be unable to make the payments called for by the Plan. Schedule I does not appear to contain accurate business income. The Debtor

admitted at the Meeting of Creditors that his ex-wife resides with the debtor and helps with the expenses. The Debtor had failed to comply with the Plan as the non-standard provision calls for an adversary to be filed within 30 days of filing, and no adversary appears filed. Wells Fargo Bank, N.A., had filed a proof of claim identifying that the Debtor is delinquent, and it was misclassified in Class 4 and should be listed in Class 1 of the Plan.

- D. The Plan payment may not be the Debtor's best efforts under 11 U.S.C. § 1325(b). The Trustee believes 60 months is required and the Debtor may have a required payment to unsecured creditors other than 0%.

Dckt. 33.

DISCUSSION

Trustee's objections are well-taken.

Failure to Provide Tax Returns

Debtor did not provide either a tax transcript or a federal income tax return with attachments for the 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 File Tax Returns

Claims by two different tax entities show tax returns have not been filed. The Internal Revenue Service shows years 2017, 2018, 2019, 2020, 2021 or 2022 returns have not been filed. Claims by the Franchise Tax Board show 2013, 2016, 2017, 2019, 2020, 2021, and 2022 tax returns have not been filed. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Failure to File Documents Related to Business

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

- A. The business questionnaire,
- B. Two years of tax returns from 2022 and 2021, and
- C. Six months of bank statements for all bank accounts

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 Trustee. 11 U.S.C. § 521(a)(3). Without Debtor submitting all required documents, the court and Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

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).

- A. Schedule I does not appear to contain accurate business income as Line #8a lists debtors net business income as \$4,500 and the business income and expenses list the debtors average net monthly income as \$4,000. Dckt. 14. The Statement of Affairs does not list any year-to-date income. It is not clear to the Trustee if the Debtor is generating income from the real property in Naples, Texas, if any income is being produced from this property and if the debtor is receiving any income from the property, or if the Debtor actually intends to surrender the property.
- B. The Debtor admitted at the Meeting of Creditors that his ex-wife resides with him and helps with the expenses.
- C. The Debtor has failed to comply with the Plan. The non-standard provision calls for an adversary to be filed within 30 days of filing. Debtor's voluntary petition was filed July 5, 2023; no adversary appears filed.
- D. Wells Fargo Bank, N.A., has filed a proof of claim, identifying that the debtor is delinquent \$988.45 (Claim 3-1). It appears this creditor is misclassified in Class 4 and should be listed in Class 1 of the Plan.

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

Not Best Effort

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

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

The Debtor claims to be below median income and lists \$4,500 of calculated monthly disposable income on Form 122C-1. Dckt. 14. The Plan proposes to pay a 0% percent dividend to unsecured claims. The debtor failed to list his gross business income of approximately \$12,625.00 on Form 122C-1. The Trustee believes with this income, the Debtor is above median and a 60 month term may be required. Thus, the court may not approve the Plan.

At the hearing, Debtor's counsel requested additional time to address these issues. Rather than sustaining the objection, the court continues the hearing to afford Debtor and Debtor's counsel a little more flexibility in putting forward and amended plan.

October 2024, 2023 Hearing

At the hearing, **XXXXXXXXXX**

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

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

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

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

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 July 26, 2023. By the court's calculation, 62 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is XXXXX.

MEB Loan Trust IV, U.S. Bank Trust National Association, acting as trustee serviced by Specialized Loan Servicing LLC ("Creditor") holding a secured claim, opposes confirmation of the Plan on the basis that:

- A. The Creditor has a claim secured by the property commonly known as 3704 Larkspur Lane, Cameron Park, California 95682 ("Property"). The Creditor will file its proof of claim by the deadline of September 13, 2023. In the mean time, Creditor will file a copy of the note, deed of trust, and assignment of deed of trust to evidence the claim. A review of the docket on October 18, 2023 shows Creditor did file its Proof of Claim on September 13, 2023.

- B. The Plan fails to provide for the curing of the default on the Creditor's claim pursuant to 11 U.S.C. § 1322(b)(5).

Objection, Dckt. 23.

DEBTOR'S REPLY TO CREDITOR'S OPPOSITION

- A. Creditor has no standing as no proof of claim has been filed.

The court notes that while failing to file a proof of claim, which is *prima facie* evidence of the obligation, or a declaration providing testimony of the facts alleged (such as the amount of the debt and alleged defaults) may render the Objection evidentiary insufficient, it does not deprive Creditor of standing to object to how Debtor proposes to deal with the obligation owed to Creditor. In any case, Creditor now has its proof of claim on file.

- B. Creditor's note, deed of trust, and assignment have not been authenticated.
- C. Creditor's alleged claim was forgiven in 2019.

Reply, Dckt. 37.

CREDITOR'S RESPONSE TO DEBTOR'S REPLY

Creditor filed its Response to Debtor's Reply on September 22, 2023. Dckt. 40. In its Response, Debtor states:

- A. On September 13, 2023, Creditor filed its Proof of Claim as Claim 25-1 in the amount of \$200,726.02 with arrears in the amount of \$113,388.60.
- B. The lien referred to by Debtor (previous servicer, Bank of America) has not been released by either Creditor or Bank of America.
- C. Creditor is in contact with Bank of America and is obtaining signed declarations of individuals who are familiar with the situation.

Dckt. 40.

DISCUSSION

Failure to Provide for a Secured Claim

Creditor asserts a claim of \$200,726.02 in this case, including arrearages in the amount of \$113,388.60. Debtor's Schedule D estimates the amount of Creditor's claim as \$0.00 and indicates that he was released from this obligation on September 27, 2019. The Plan does not provide for this claim.

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

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

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

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

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

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

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

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

Alleged Claim was Allegedly Forgiven

The Debtor claims that the alleged claim was forgiven by the previous servicer, Bank of America, in 2019. The Debtor attached exhibits to this effect (Dckt. 38), but failed to file any declaration supporting its contention.

Unauthenticated Exhibits 2 and 3 are stated to be Bank of America's release of the obligation that is the basis of the claim and the Bank of America Tax Statement documenting the forgiveness of the obligation, respectively. Dckt. 38.

Exhibit 2 is dated September 16, 2019, states that the Bank “will release the obligation from your home equity line of credit.” Exhibit 3 is a 2019 Tax Statement from Bank of America stating that the obligation of Debtor in the amount of \$188,462.28 was discharged in 2019 by Bank of America.

Looking at Exhibit 2, it does not state that the obligation was determined uncollectible and Bank of America deemed a bad debt with little likelihood of payment, but states “Amount of Debt Discharged 188,462.28.”

While not authenticated, it is helpful information for Creditor in tracking down whether the obligation has previously been discharged and is no longer enforceable.

In its Reply, Movant states that it is obtaining declarations from Bank of America concerning the alleged forgiveness of the obligation and its claim in this case. Movant requests that the hearing on the Objection be continued.

At the hearing, Creditor states that it is asserting a claim in this case.

The court continues the hearing to allow Debtor and Creditor to investigate the claim and prior 1099 Statement of Debt Forgiveness.

October 24, 2023 Hearing

At the hearing, **XXXXXXXXXX**

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

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

The Objection to the Chapter 13 Plan filed by MEB Loan Trust IV, U.S. Bank Trust National Association, not in its individual capacity but solely as trustee as serviced by Specialized Loan Servicing LLC (“Creditor”) holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on September, 2023. 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.

Wilmington Savings Fund Society, FSB ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

- A. It is impermissible to for a Plan to modify the rights of a creditor whose claims is secured only by a security interest in real property that is Debtor's principal residence. 11 U.S.C. §1332(b)(2).
- B. The proposed Plan does not establish a reasonable schedule or time period of the payment of arrearages owed to Creditor for the amount of \$2,627.86.

CREDITOR'S STIPULATION

Wilmington Savings Fund Society, FSB ("Creditor"), after discussion with Ana and Francisco Corral ("Debtor"), agrees to withdraw the Objection to the Confirmation of Plan with the following stipulations:

- A. The pre-petition arrearage claim of \$2,627.86 shall be paid directly by Debtor outside of Chapter 13 Plan.
- B. Creditor may adjust Debtor's monthly mortgage payment to recover the amount of pre-petition arrearage identified in its proof of claim, and payment or collection of the pre-petition arrearage shall not be deemed a violation of 11 U.S.C. §362 or 1301.
- C. Creditor does not waive its obligations under Federal Bankruptcy Procedure 3002.1.
- D. Creditor's claim shall remain as a Class 4 claim in the Plan.
- E. Creditor's objection to Confirmation of the Plan shall be deemed withdrawn upon the entry of an order approving the stipulation.

Dckt. 21

DISCUSSION

Creditor's objections are well-taken.

Failure to Cure Arrearage of Creditor

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts \$2,627.86 in pre-petition arrearages. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). Without providing for the full payment of arrearages, the Plan cannot be confirmed.

However, Creditor and Debtor filed a Stipulation on October 11, 2023. Stipulation, Dckt. 21. In their Stipulation, the parties agree that Debtor will cure the pre-petition arrearages outside of the bankruptcy case. The Stipulation indicates the pre-petition arrearage payment will be made in addition to the regular mortgage payments. Creditor or Debtor have not filed a Motion for Approval of the Stipulation ahead of the October 24, 2023 hearing, nor have they indicated to the court how Debtor can afford the \$2,627.86 payment while simultaneously making plan payments.

Requirements Under Chapter 13 Plan

The Chapter 13 Plan which has long been in place in the Eastern District of California provides for a secured claim that is in default, and which would otherwise mature after the term of the Plan, to be provided for in Class 1, with the current post-petition installment and the arrearage payment to be made through the Plan. This arose from the practical reality that if left to their own devices, a debtor who had "other things" to spend the mortgage money on and the creditor who "was too busy" to promptly address defaults would continue those practices after confirmation of a plan. This then created huge messes, waste of time and money for the parties, and some gamesmanship by parties with the court.

Though provided for in Class 1, with the payments being made through the Plan, the additional provisions could include a future modification that once the arrearage was cured, then the secured claim with no default would be moved to Class 4, with the modification being done by *ex parte* joint motion of the Debtor and Chapter 13 Trustee.

Chapter 13 Plan Finances

In this case, the proposed Chapter 13 Plan requires a monthly payment of \$2,800.00 by the Debtor for 60 months. Plan, ¶ 2.01; Dckt. 3. The Plan requires that counsel for the Debtor is to be paid \$1,600.00 through the Plan. *Id.*, ¶ 3.05. This is to be funded by \$150.00 a month. *Id.* ¶ 3.06. The proposed Chapter 13 Plan provides for the following distributions from the \$2,800 a month Plan payment:

	Monthly Payment and 60 Month Amortized Claim Distribution
Chapter 13 Plan Payment	\$2,800.00
Chapter 13 Trustee Fees - Est. 8%	(\$224.00)
Debtor's Attorney's Fees (If amortized over 60 months)	(\$26.00)
Class 2 Claim - Capital Benefit	(\$2,230.00)
Class 2 Claim - Toyota Financial Services	(\$180.00)
Class 7 Claim - General Unsecured Totaling (\$132,137.66) at least a 6.5% Dividend	(\$143.20)
	=====
Over/(Under) Funding of Plan Monthly	(\$3.20)

Thus, based on the financial information provided, the Plan is underfunded by (\$3.20) a month, which over the sixty (60) months of the Plan would total (\$192).

On Schedule I (Dckt. 1), Debtor lists having \$9,572.88 in monthly take-home income. From their monthly wages of \$7,999, Debtor's state and federal taxes, Social Security, and other withholding is (\$814). Additionally, Debtor runs a dog sitting business for which there does not appear to be self-employed taxes being paid. This is only 8% of the income for these multiple taxes.

With family support, the dog sitting business, and Debtor's Mother's Social Security being contributed to the family financial pot, Debtor achieves the \$9,572 take-home amount.

On Schedule J, in addition to the two Debtors, the family unit includes three children and the Debtor's mother, for a family unit of six persons. After the reasonable and necessary expenses as computed by Debtor (which appear realistic, but some a bit low), Debtor has \$2,835.66 in projected disposable income.

The Chapter 13 Plan payment consumes all of Debtor's projected disposable income, leaving nothing with which to do an outside the Plan cure in abrogation of the Class 1 terms of the Chapter 13 Plan.

Interestingly, the Stipulation filed by Creditor and Debtor does not state how and when the (\$2,627.86) arrearage, which appears to be one monthly payment, is to be cured. It appears that this financial information is being kept secret from the court, Chapter 13 Trustee, and parties in interest.

Thus, based on the financial information provided by Debtor under penalty of perjury, Debtor is unable to cure the (\$2,627.86) arrearage from the income and expense information provided under penalty of perjury.

Stipulation Seeks an Improper Order Confirming Plan Term Outside of Confirmation of the Plan

The Stipulation between Creditor and Debtor states that Creditor will withdraw its objection only when the court approves the Stipulation – not when the court enters an order confirming the Chapter 13 Plan with the amended terms as provided in the Stipulation. It appears that Debtor and Creditor are seeking a special, standalone, confirmation order setting the terms for creditor's claim.

The court does not enter piecemeal orders confirming different parts of a plan for various creditors.

OCTOBER 24, 2023 HEARING

At the hearing, **XXXXXXXXXX**

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

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

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

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

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

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 parties requesting special notice on September 20, 2023. By the court's calculation, 34 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 Reconvert the Chapter 13 Bankruptcy Case to a Case under Chapter 7 is granted, and the case is converted to one under Chapter 7.

This Motion to Convert the Chapter 13 bankruptcy case of Jamie Howell ("Debtor") has been filed by David Cusick ("Movant"), the Chapter 13 Trustee. Dckt. 306. Movant's motion has been joined by creditor Tri Counties Bank ("Creditor") who filed a Response in support of Movant's Motion. Dckt. 312. Movant asserts that the case should be dismissed or reconverted based on the following grounds:

1. Debtor is delinquent \$47,130.00 in plan payments, and another plan payment of \$210.00 was due on September 25, 2023.
2. Debtor's delinquency is so high in comparison to his plan payment because the proposed Plan stated Debtor was going to sell unexempt real property by month nine, which was August of 2023, and pay a lump sum into the Plan. Debtor has not sold the Property as of October 18, 2023.
3. Reconversion to a case under Chapter 7 is in the best interests of the creditors because Debtor has approximately \$469,056.50 in non-exempt equity in his assets.

Dckt. 306.

CREDITORS RESPONSE IN SUPPORT OF TRUSTEE’S MOTION

On October 4, 2023, Creditor filed its Response in support of Trustee’s Motion. Dckt. 312. In its Response, Creditor states:

1. The Debtor has had almost a year since the case converted from a Chapter 7 case to a Chapter 13 case, and Debtor has still failed to propose a confirmable Plan.
2. Debtor has made no payments to Creditor for years.
3. Reconverting the case to one under Chapter 7 would allow the Creditor to finally be paid. In the alternative, if the court dismisses, Creditor would be able to pursue possible remedies in state court.

Dckt. 312.

DEBTOR’S OPPOSITION

Debtor filed an Opposition on October 10, 2023. Dckt. 318. Debtor states that:

1. Debtor has listed its unexempt real property for sale to make the lump sum payment but has not received good offers.
2. Because Debtor’s proposed real estate broker for the sale was a corporation owned by Debtor’s attorney, Debtor will file an amended motion to employ using a new real estate broker.

Dckt. 318.

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

A review of the Docket in this case shows that Debtor’s original Motion to Convert the case from a case under Chapter 7 to one under Chapter 13 was granted on October 26, 2022, and effectively converted to a case under Chapter 13 on November 3, 2022. Dckt. 149. Debtor filed its first proposed Plan on November 11, 2022, and the court sustained objections to that Plan on January 26, 2023. Dckts. 171, 196. Debtor drew up a new Plan on March 6, 2023, this time calling for a sale of “Charles Lynd Way,” which was expected to generate approximately \$92,000.00 for the bankruptcy estate. Dckt. 202. That Plan called for the lump sum payment of \$92,000.00 to be made in month six, which would be in September, 2023, resulting from the sale of Charles Lynd Way.

The Charles Lynd Way property was never sold, and for a third time Debtor went to the drawing board for a Plan. The third Plan was filed with the court on May 19, 2023. Dckt. 268. The third Plan was denied by this court on July 13, 2023. Dckt. 305. Now in October 2023, Debtor has not sold the Property or filed a new Plan with the court.

Debtor’s Opposition and Testimony Does Not Divert Responsibility for Inaction From Debtor

Debtor’s Opposition, Dckt. 318, seeks to blame others for Debtor inability to sell the property as required under the Plan. The Opposition makes reference to Debtor having filed a month to employ Power West Properties to market the Property for sale. But, Debtor argues that the court suggested a Stipulation be circulated to list the property, but none was obtained. Then, that “the court took issue with the lack of a declaration” being filed in support of the Motion to Employ. Though counsel for Debtor had prepared the declaration, it did not get e-filed “in error” and the Motion was denied.

Review of Motion to Employ

The Motion to employ Power West Properties was filed on May 22, 2023. Dckt. 274. The Motion discloses that Debtor’s attorney is the broker of record for Power West Properties, but there can be no conflict since everyone wants to sell the Property for the highest value possible. *Id.*, ¶ 12.

The hearing on the Motion to Employ was conducted on June 13, 2023, approximately 133 days before the hearing on this Motion to Convert the Case. Looking at the Docket for this Bankruptcy Case, no motion to authorize the employment of the real estate broker was made by Debtor.

Debtor’s Declaration in Opposition

Debtor has provided her Declaration in Opposition to the Motion to Reconvert this Case to one under Chapter 7. Dec., Dckt. 319. This Declaration consists of five paragraphs, which state in their entirety:

1. I previously filed a motion to employ Power West Properties to list the Charly Lynds Way property.

2. The Court suggested that a stipulation was circulated to list the property but signatures were not obtained prior to the hearing.
3. The Property has been listed, but no offers other than that from wholesalers has been received.
4. I will amend the plan to extend period to allow the property more time to sell.
5. I have made all my payments for the plan to date

Id. Though having the “luxury” of time in preparing a declaration to clearly provide evidence of the reasons for the delay and inability to Debtor to sell the Property, Debtor can merely provide some conclusions. A massive void with respect to Debtor fulfilling her fiduciary duties in exercising the powers of a bankruptcy trustee for the sale of the Property (11 U.S.C. § 1303). All that the court and parties in interest are told that since the October 29, 2022 Conversion of this Bankruptcy Case to one under Chapter 13 (Order; Dckt. 154) is that Debtor and her professionals have not received any offers “other than that from wholesalers. . . .” (The court interprets the term “wholesalers” to mean someone who seeks to buy property at a substantial discount and then “flip it” for sale to a purchaser who desires to live in the property.)

Looking at the Amended Schedule A/B filed by Debtor on September 28, 2022, just prior to the conversion of this case to Chapter 13, Debtor stated under penalty of perjury that she held only an “equitable interest” in the Property and there was at least one other owner. Dckt. 134.

Though stating that Debtor holds an equitable interest and there is at least one other owner of the Property, Debtor states that the Property is worth \$385,000 and that Debtor’s portion of that value is \$385,000 (Debtor claims 100% of the value, with the co-owner’s interests having a value of \$0.00).

Debtor offers no testimony about the commercially reasonable efforts to market the Property. Debtor offers no testimony about why only “wholesalers” are interested in the Property.

No Pending Plan / Delay of Confirmation

Debtor did not file a Plan or a Motion to Confirm a Plan following the court’s denial of confirmation to Debtor’s prior Plan on July 13, 2023. A review of the docket shows that Debtor has not yet filed a new plan or a motion to confirm a plan. Debtor offers no explanation for the delay in setting a plan for confirmation, which would be the fourth plan in this case. Debtor has had almost a year since this case was converted to one under Chapter 13 to file a confirmable plan, but has repeatedly failed to do so. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Though this Case was converted by Order of the Court entered on October 29, 2022, the Debtor’s path to prosecuting a Chapter 13 Plan was winding and not diligently prosecuted. On November 21, 2022, Debtor filed her first Chapter 13 Plan. Dckt. 171. That first Plan caught Objections to Confirmation filed by U.S. Bank Trust, N.A. and the Chapter 13 Trustee. Dckts. 181, 184. The court’s Civil Minutes on the two Objections lays out some very fundamental defects with the first proposed Chapter 13 Plan. Civ. Minutes; Dckts. 193, 192. Debtor offered no opposition to the two Objections.

Then, on March 6, 2023 - two months after the Objections to Confirmation were sustained – Debtor filed her second Chapter 13 Plan. Dckt. 202. Debtor failed to file a Motion to Confirm the second Chapter 13 Plan, and it languished not being prosecuted by Debtor.

On May 5, 2023, the court issued an Order for Status Conference, requiring Debtor to explain how this case was being diligently prosecuted given that no Motion to Confirm the second Chapter 13 Plan had been filed. Order, Dckt. 247. On May 19, 2023, Debtor filed a Status Report advising the court and parties in interest (identified by paragraph number used in the Status Report):

1. A Third Amended Plan was filed and served on May 19, 2023.
2. Debtor filed and served the Motion to Confirm the Third Amended Plan on May 19, 2023.
3. Debtor prepared a Motion to employ Power West Properties, which Motion would be filed on or before May 22, 2023.
4. Debtor prepared a Motion to Avoid the Lien of Tri Counties Bank, which Motion would be filed on or before May 22, 2023.

Status Report; Dckt. 272.

Though Debtor states that there is a Motion to Avoid the Tri Counties Bank, none appears on the Docket for this Bankruptcy Case.

A review of the Civil Minutes for the July 13, 2023 hearing on the Motion to Confirm the Third Amended Plan shows that the denial of confirmation of the proposed Plan was based on some very fundamental and basic defects in Debtor prosecuting of that Plan. Civil Minutes; Dckt. 303. This include the following Findings and Conclusions by the court:

Debtor Fails Liquidation Analysis

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee states that the plan calls for no less than 20% to unsecured claims. The amended plan's nonstandard provision notes an estimated \$49,000 lump sum through sale of house, but it does not change the minimum percentage guaranteed to creditors. Based on the prior Chapter 7 Trustee's findings, as evidenced in their Motion for Turnover, Dckt. 104, there may be substantial non-exempt assets that would allow unsecured claims to recover more than in this Plan.

Id., p. 3.

Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The majority of the funding for the plan comes for the sale of a house which is not currently listed for sale. Debtor has failed to take steps

to sell the property. Therefore, the feasibility of the Plan is unclear. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Id.

Failure to Provide for a Secured Claim

Tri Counties Bank ("Creditor") asserts a secured claim in the amount of \$114,117.76. Proof of Claim 2-1. Debtor's Schedules indicate Creditor holds an unsecured claim, rather than a secured claim. Schedule E/F, Dckt. 1.

Under the additional provisions of the Amended Plan, Debtor is asserting Creditor's claim is an avoidable preference, subject to avoidance under 11 U.S.C. § 547. From review of Creditor's Proof of Claim, Creditor's claim is perfected by an abstract of judgment, recorded February 8, 2021. Proof of Claim 2-1. The bankruptcy case was filed April 19, 2021. Debtor has not taken steps to avoid the treatment of Creditor's claim.

If Debtor believes they can avoid Creditor's secured interest, Debtor should treat Tri Counties Bank's Claim as a Class 2 claim. While Debtor is seeking to avoid the action, Debtor should continue to provide adequate protection payments to the Trustee, who would hold the funds until the outcome of the avoidance action. Once the avoidance action is decided, any transfer avoided would be preserved for the benefit of the estate, unless there is a homestead exemption. 11 U.S.C. §§ 522(i)(2), 547, 551. If the claim is subject to a homestead exemption, upon Debtor's successful avoidance, the funds held by Trustee shall be preserved for the benefit of the debtor.
Id

Id.; p. 3-4.

Delinquent

According to Trustee, Debtor is \$47,130.00 delinquent in plan payments for failing to sell his non exempt property and make the required lump sum payment. The court notes part of the delay in failing to sell the property results from Debtor's attorney attempting to use her own brokerage firm to list the property and collect a 6% commission on the sale. Dckt. 274. With the court not willing to approve such an arrangement, Debtor now petitions the court for more time to sell its property so it can list a new real estate broker. A year into this case has resulted in delinquencies and delays with no end in sight. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Cause exists to convert this case pursuant to 11 U.S.C. § 1307(c). Debtor has been trying to prosecute this Chapter 13 Case and proceed with the prompt commercially reasonable sale of the Property for eleven (11) months. Unfortunately, Debtor has been unable to prosecute this case, unable to hire a real estate broker, and has failed to market and sell the Property. It may be that Debtor believes that the Property is worth (at least to her) well in excess of the fair market value of the Property. However, that is not a reason for a fiduciary - whether Chapter 13 Debtor exercising the powers of a bankruptcy trustee or serving as the

plan administrator for a confirmed Chapter 13 Plan - to fail to sell the Property in a commercially reasonable manner.

The Debtor has demonstrated that she is not able to prosecute this Chapter 13 Case. While promising to do things, Debtor has not fulfilled such promises. Debtor's delay in marketing the Property in a commercially reasonable manner to generate fair market value offers may well have resulted in the value of the Property declining as interest rate have continually risen over the past year.

Reconversion of this Case to one under Chapter 7 does not deprive the Debtor of the value of the Property in the Bankruptcy Estate. The Chapter 7 Trustee must market and sell the property of the bankruptcy estate in a commercially reasonable manner. The Trustee is not a desperate seller, such as the Debtor may become, in trying to stave off a foreclosure sale.

Any proposed sale by the Trustee must be approved by this court, the hearing for which Debtor is a party in interest and her attorney can present *bona fide* opposition, if any. Additionally, Debtor's Real Estate Broker lawyer can try to generate buyers to present to the Chapter 13 Trustee to achieve a fair market value price for the property being sold (rather than merely the "wholesaler" offers that Debtor has been able to generate).

The Motion is granted, and the case is converted to a case under Chapter 7.

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 Reconvert the Chapter 13 case filed by David Cusick, the Chapter 13 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Reconvert is granted, and the case is converted to a proceeding under Chapter 7 of Title 11, United States Code.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 8, 2023. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is XXXXX.

The debtor, Jim Allen Hickerson ("Debtor") seeks confirmation of the Modified Plan because creditor Class 2(A), School Financial Credit Union, had a claim for a 2019 Ford Escape SEL, and the vehicle was totaled in an accident. Declaration, Dckt. 22. Insurance proceeds have subsequently been paid to the Ch. 13 Trustee, which have been used to satisfy Class 2(A)'s claim. Declaration, Dckt. 22. The Modified Plan provides that the remaining unsecured creditors will be paid no less than 7% during the life of the Modified Plan, totaling at least \$23,138.00. Modified Plan, Dckt. 23. 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 21, 2023. Dckt. 26. Trustee opposes confirmation of the Plan on the basis that:

1. Certain procedural issues prevent confirmation, such as typographical errors on the certificate of service and a lack of a proper cover sheet accompanying Supplemental Schedules I and J.
2. The modified plan proposes to reduce the percentage paid to unsecured creditors from not less than 55% to not less than 7%.

Dckt. 26.

DEBTOR'S REPLY TO TRUSTEE'S OPPOSITION

Debtor filed a Reply to Trustee's Opposition on August 29, 2023. Debtor responds to Trustee's opposition by asserting that:

1. Debtor's attorney, Mo Mokarram, will correct the typographical errors and amend the previous filing by refiling the appropriate cover sheet.
2. The Modified Plan states that unsecured creditors shall receive no less than a 7% dividend, but the Plan is likely to pay an 11% dividend to unsecured creditors.

Dckt. 29.

DISCUSSION

Debtor proposes a plan modification that purports to eliminate the secured debt of Class 2(A) due to the secured asset having been destroyed, and the insurance proceeds generated will be used to pay Class 2(A) in full. Declaration, Dckt. 22. However, as the U.S. Trustee notes in his Opposition to Debtor's Motion to Confirm First Modified Plan, Debtor also attempts to modify the Plan so that the unsecured class of creditors receives not less than 7%, a 48% decrease from the original plan's distribution of not less than 55%. Dckt. 26.

Supplemental Schedule I was filed by Debtor on August 29, 2023. Dckt. 31. Debtor states having monthly take home income of \$12,389.00. On Supplemental Schedule J Debtor shows expenses, adjusts for the non-debtor spouses Social Security income, and shows monthly net income of \$1,263. *Id.*

The proposed Modified Plan, Dckt. 23, is funded with a monthly Plan payment of \$800.00, not the apparent \$1,263 of projected disposable income.

Debtor has not given any justification for such a large decrease in plan payments to the unsecured creditors, even if the Modified Plan actually pays closer to an 11% dividend.

Furthermore, Debtor has provided documentation authenticating Debtor's projected disposable income is greater than the \$800.00 a month proposed monthly Plan payment. 11 U.S.C. § 1325(b)(1).

Counsel for the Trustee reported that in light of Debtor's response, the Trustee will have a supplemental issue to address with respect to confirmation. To facilitate this process, the Trustee shall file and serve Supplemental Opposition Pleadings on or before September 29, 2023; Debtor's Supplemental

Reply Pleadings shall be filed and served on or before October 6, 2023; and the hearing is continued to 2:00 p.m. on October 24, 2023.

TRUSTEE'S SUPPLEMENTAL OPPOSITION PLEADINGS

Trustee filed its Supplemental Opposition Pleadings with the court on September 28, 2023. Dckt. 36. In its Supplemental Opposition, Trustee states:

1. Debtor filed Supplemental Schedules I and J (Dckt. 31) on August 29, 2023. Debtor's prior Schedules I and J were filed on August 8, 2023 (Dckt. 24) without the required amendment cover sheet. Both sets of Schedules indicate they are a supplement showing post petition income as of August 8, 2023; however, there exist discrepancies between the Schedules. The later Schedules reflect increased income and expenses.
2. Putting the discrepancies aside, in either case, Debtor does not appear to be paying all of their disposable monthly income into the Plan.
3. Although the Plan states unsecured creditors will receive no less than a 7% dividend, if all of Debtor's monthly disposable income were committed to the plan payments, unsecured creditors would actually receive approximately 13.53%.
4. Trustee has been informed by a creditor's attorney in this case that Debtor may have hidden several assets and not disclosed them in the Schedules. Trustee has just become aware of this allegation and needs time to investigate it.

Dckt. 36.

DEBTOR'S REPLY TO TRUSTEE'S SUPPLEMENTAL OPPOSITION PLEADINGS

Debtor filed its Reply to Trustee's Supplemental Opposition Pleadings on October 5, 2023. Dckt. 39. In its Reply, Debtor states:

1. Debtor is willing to increase its monthly payment to \$1,263.00 to reflect its monthly disposable income.
2. The percentage to unsecured creditors was reduced from 55% to 7% due to the \$300,000.00 disputed claim filed by creditor.

Dckt. 39.

October 24, 2023 Hearing

At the hearing, **XXXXXXXXXX**

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor, Jim Allen Hickerson, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm the Modified Plan is **xxxxx**.

12. [23-22433-E-13](#)
[DPC-1](#)

PAMELA AMBUNAN
Peter Macaluso

**CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY DAVID
P. CUSICK
8-30-23 [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, Debtor's Attorney, and parties requesting special notice on August 30, 2023. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

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

1. Debtor failed to appear and be examined at the 11 U.S.C. § 341 Meeting of Creditors held on August 22, 2023. Chapter 13 Trustee does not have sufficient information to determine if the Plan complies with 11 U.S.C. §1325.
2. Debtor has not provided the following 11 U.S.C. § 521 Documents: Pay Advices and Tax Return.
3. Debtor has not provided the Chapter 13 Trustee with any of the employer's payment advices received within 60 days prior to the filing of the petition, particularly, the pay advices from her employment at Kaiser.
4. Debtor has not provided Chapter 13 Trustee with a copy of her Federal Income Tax Return, with attachments, for the most recent pre-petition tax year. This document was required 7 days before the date first set for the meeting of creditors. 11 U.S.C. §521(e)(2)(A)(I).

Dckt. 16.

DEBTOR'S REPLY TO TRUSTEE'S OBJECTION

1. Debtor appeared at the continued 11 U.S.C. § 341 Meeting of Creditors held on September 14, 2023.
2. Debtor has provided the 11 U.S.C. § 521 documents on September 11, 2023, which is within the 7 day period before the continued 11 U.S.C. § 341 Meeting of Creditors held on September 14, 2023.

Dckt. 20.

DISCUSSION

Appearance at 341 Meeting

Debtor did not appear at the Meeting of Creditors held on August 22, 2023, pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1). However, Debtor did appear at the continued Meeting of Creditors held on September 14, 2023, as reported in Debtor's Reply. Dckt. 20.

Debtor Provided Pay Advices

Debtor reports in its Reply that it provided Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). Dckt. 20.

Debtor Provided Tax Returns

Similarly resolving this concern, Debtor reports it provided 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). Dckt 20.

September 26, 2023 Hearing

At the hearing, counsel for the Trustee confirmed that the documents have been received. However, the 341 Meeting has been continued to October 5, 2023. The Parties agreed to continue the hearing on the Objection.

TRUSTEE'S AMENDED OBJECTION TO CONFIRMATION OF PLAN

After the meeting of Creditors on October 5, 2023 had concluded, Trustee filed with the court an Amended Objection on October 17, 2023. Dckt. 27. In its Amended Objection, Trustee states:

1. Debtor has likely misclassified claims. Two vehicle loan claims are listed as Class 4 claims; however, the debts could be listed in Class 3 of the Plan, thereby surrendering her interest in the vehicles and allowing the non-filing estranged spouse to continue to pay creditors directly.
2. Debtor's Schedules and other documents filed are missing information or contain inaccurate information. For example, Debtor is claiming three dependants and has allocated \$1,450.00 in expenses to care for them. However, one of the claimed dependents is 18 and has moved out. Furthermore, the Bankruptcy Allowable Living Expenses – National Standards allows \$1,200.00 for three dependents. Debtor has not offered an explanation of why she requires more money to care for her dependents than the Bankruptcy Allowable Living Expenses – National Standards allows.
3. It appears to Trustee that Debtor may have additional monthly income of \$750.00 or more.

Dckt. 27.

Trustee's concerns are well-taken. Without these issues addressed, the court cannot confirm the Chapter 13 Plan as the Plan does not comply with 11 U.S.C. § 1325(a)(6).

October 24, 2023 Hearing

At the hearing, **XXXXXXXXXX**

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

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

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

IT IS ORDERED that the Objection to Confirmation of Plan is sustained.

13. [22-21935-E-13](#)
[MWB-4](#)

TAMMY RANDOLPH
Mark Briden

MOTION TO SELL
9-7-23 [79]

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 September 7, 2023. By the court’s calculation, 47 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days’ notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

The Motion to Sell Property 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.

<p>The Motion to Sell Property is XXXXX.</p>
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The Bankruptcy Code permits Tammy Randolph, the Chapter 13 Debtor, (“Movant”) to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 155 West Oak Avenue, Hayfork, California 96041 (“Property”).

The proposed purchaser of the Property is Fred Schoelen (“Buyer”), and the terms of the sale are:

1. Sales price shall be \$155,000.00.

2. Buyer shall pay title and escrow fees.
3. Buyer shall pay the Natural Hazard Disclosure report.
4. Buyer shall pay the transfer tax.

Exhibit 1-2, Dckt. 82.

Movant supports her Motion with her own Declaration (Dckt. 81) and supporting exhibits (Dckt. 82). In her Declaration, Movant states she entered into the real estate purchase agreement to sell her residence, the Property, for \$155,000.00. Dckt. 81. She testifies that after real estate commissions, liens of record, and closing costs have been paid in full, the net proceeds shall be paid to Trustee to fund the Plan. *Id.*

In her supporting exhibits, Movant shows a “Buyer Counter Offer No. 1,” and “Seller Multiple Counter Offer No. One.” Dckt. 82. These exhibits outline the deal, showing Movant will receive \$155,000.00 for the Property. *Id.* Buyer signed the Seller Multiple Counter Offer No. One. *Id.*

TRUSTEE’S OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”), submitted an Opposition to the Motion to Sell on October 6, 2023. Dckt. 92. In his Opposition, Trustee states:

1. Trustee cannot determine if the sale will actually pay 100% to unsecured creditors as the Motion states because Movant has not filed a closing statement, only offers and counter offers.
2. Debtor has not filed Supplemental Schedules I and J, so the Trustee cannot determine what Movant’s income and expenses will be in the event the sale does not pay off the Plan in full.

Dckt. 92.

DEBTOR’S SUPPLEMENTAL FILINGS

On October 17, 2023 Debtor filed with the court a supplemental Declaration and supporting exhibits entering into evidence the closing statement, addressing that concern of the Trustee. Dckts. 96, 98. In this Declaration, Debtor attests that the sale is for \$155,000.00 cash. Dckt. 96. After payment of the first mortgage of approximately \$60,000.00 and commissions and closing costs, there remains approximately \$80,000.00 for the Trustee to pay off the Plan in full. *Id.* Debtor’s supporting exhibits show the details of the closing sale, confirming the \$155,000.00 sales price. Dckt. 98.

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: **XXXXXXX**

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the proceeds from the sale will be enough to pay the Plan in full. According to the confirmed Plan, Debtor was to make \$600.00 monthly payments from September 25, 2022 through September 25, 2024. Plan, Dckt. 61. The Plan then called for the sale of the Property by December 31, 2024, to fund the Plan and pay creditors in full. *Id.* In accordance with the confirmed Plan, the court is willing to approve such sale, especially as Debtor has now addressed Trustee concerns. Debtor has submitted to the court the closing statement showing that the real estate purchase agreement's final details, explaining how the sale will pay off the Plan in full.

Movant has stated that her real estate broker, Top Properties, will receive a 6 percent commission from the sale of the Property. Dckt. 88. However, Movant has not stated what percent, if any, Buyer's broker shall receive. The court requires Movant to submit evidence of the commission Buyer's real estate broker expects to receive.

At the hearing, **XXXXXXXXXX**

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

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

The Motion to Sell Property filed by Tammy Randolph, 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 Tammy Randolph, the Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. §§ 363(b) and 1303 to Fred Schoelen ("Buyer"), the Property commonly known as 155 West Oak Avenue, Hayfork, California 96041 ("Property"), on the following terms:

1. Sales price shall be \$155,000.00.
2. Buyer shall pay title and escrow fees.
3. Buyer shall pay the Natural Hazard Disclosure report.
4. Buyer shall pay the transfer tax.
5. Movant shall use the proceeds of the sale to pay real estate commission fees, liens of record in full, and closing costs.
6. The net proceeds shall be paid to Trustee to fund the confirmed Chapter 13 Plan.
7. Any remainder shall be paid to Movant.

14. [23-21552-E-13](#)
[PLG-3](#)

RONALD RATLIFF
Rabin Pournazarian

**OBJECTION TO CLAIM OF U.S. BANK
NATIONAL ASSOCIATION, CLAIM
NUMBER 2
9-22-23 [\[55\]](#)**

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

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

Sufficient Notice Not Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Chapter 13 Trustee, other parties in interest, and Office of the United States Trustee on September 22, 2023. By the court's calculation, 32 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The Objection to Proof of Claim Number 2-1 of U.S. Bank National Association
is **XXXXXXX**.**

INSUFFICIENT NOTICE OF MOTION

Movant provided 32 days' notice of this Motion. Federal Rule of Bankruptcy Procedure 3007(a) requires a minimum of 31 days' notice of the hearing, and Local Bankruptcy Rule 3007-1(b)(1) requires an additional fourteen days for parties to file written opposition. Those time periods do not run concurrently. Those two minimums total 44 days. Movant has provided twelve fewer days than the minimum. Therefore, the Motion is denied without prejudice.

Ronald Ratliff, the Chapter 13 Debtor, ("Objector") requests that the court disallow the claim of U.S. Bank National Association ("Creditor"), Proof of Claim No. 2-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the full amount, according to the UCC-1 Financing Statement. Dckt. 58. Objector asserts that Creditor has written this particular debt off with a 1099-C tax form, and so it is not now entitled to pursue the Claim in bankruptcy.

Objector supports his Objection with his own Declaration (Dckt. 57) and supporting exhibits (Dckt. 58). Objector informs the court that he received a 1099-C form from the Creditor notifying him that the debt was cancelled. Dckt. 57. Objector disclosed the 1099-C in his 2021 tax returns, paying federal income tax on the cancellation of debt. *Id.* Creditor claims it "has discharged off this debt, but the [Objector] remains legally responsible for the debt." Exhibit 5, Dckt. 58.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial evidence to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin*, 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

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

1099-C and Debtor "Writeoff"

Debtor has provided the court with Exhibit 2 which is identified as the "Debt Cancellation." Dckt. 58. Looking at the exhibit, the banner line at the top states:

THIS DOCUMENT ISSUED AS A TAX STATEMENT FOR A 1099
INFORMATION RETURN STATEMENT - READ CAREFULLY

Id. at 18. The Exhibit states that it is for the 2021 tax year and states that in Box 2 the Amount of Debt Discharges was \$37,611.55. The Exhibit states in one part there was a "Charge-Off."

At the bottom of Exhibit 2 it identifies a Form 1099-C as a Cancellation of Debt form.

The court has not found cases in the 9th Circuit that have squarely addressed this issue; however, some bankruptcy courts that have seen similar facts have held that a creditor may not pursue its claim in bankruptcy if it has canceled the debt with a 1099-C form. *See, e.g., In re Reed*, 492 B.R. 261, 271 (Bankr. E.D. of Tenn. May 14, 2013) (“It is inequitable to require a debtor to claim cancellation of debt income as a component of his or her gross income and subsequently pay taxes on it while still allowing the creditor, who has reported to the Internal Revenue Service and the debtor that the indebtedness was cancelled or discharged, to then collect it from the debtor.”).

On the other hand, some courts have held that filing a 1099-C is not evidence that a debt is actually discharged. *See, e.g., F.D.I.C. v. Cashion*, 720 F.3d 169, 179 (4th Cir. 2013) ([T]he filing [of] a 1099-C is a creditor’s required means of satisfying a reporting obligation to the IRS; it is not a means of accomplishing an actual discharge of the debtor. . .). The IRS has weighed in on the issue in a Letter Ruling, stating that it “does not view a Form 1099-C as an admission by the creditor that it has discharged the debt and can no longer pursue collection.” I.R.S. Info. 2005-0207, 2005 WL 3561135 (Dec. 30, 2005).

Debtor provides discussion of Treasury Regulation § 1.6050P-1(a) that the 1099-C is treated as a discharge of debt for tax purposes, resulting in taxable income for the Debtor and income deduction for Creditor. Motion, ¶ 5; Dckt. 55.

Exhibit 2 provided by Debtor is not the Form 1099-C that Debtor received, but an information sheet that would go with such form. See www.irs.gov/Form1099C. The instructions with this form state that the discharge of the debt may be due to the debt being “canceled or forgiven.”

On the IRS Website providing instructions for 1099-A and 1099-C, it provides explanations for the various codes for the 1099-C as to why the debt was discharged, which on the 1099-C at issue it is stated to be Event Code “G:”

7. A discharge of indebtedness because of a decision or a defined policy of the creditor to discontinue collection activity and cancel the debt. A creditor's defined policy can be in writing or an established business practice of the creditor. A creditor's established practice to stop collection activity and abandon a debt when a particular nonpayment period expires is a defined policy. Enter "G" in box 6 to report this identifiable event.

<https://www.irs.gov/instructions/i1099ac#idm139650410701696>. This is to “Stop Collection Activity” due to the creditor’s policy and “abandon” the debt. In this information the word “abandon” is used when the creditor elects to forgo proceeding against collateral securing the debt.

Reviewing the email exchange between Debtor’s counsel and the Creditor, the response from Creditor was that “it appears” that the debt was “charged off,” i.e. believed to not be collectable, but not forgiven or the Debtor released. In such situations, if the debt or some portion is paid, then the creditor must report it as income and the Debtor then gets a deduction.

The court notes that Creditor’s response is not in the active, knowledgeable voice, but in the passive, it appears that it could have been, that the debt was just “charged off.”

As of the court's review of the Docket on October 22, 2023, no opposition had been filed. However, Debtor did not comply with the service requirements so as to require written opposition to be filed in advance.

At the hearing, **XXXXXXX**

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

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

The Objection to Claim of U.S. Bank National Association ("Creditor"), Proof of Claim No. 2-1, filed in this case by Ronald Ratliff, the Chapter 13 Debtor ("Objector"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 2-1 of Creditor is **XXXXXXX**.

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 Not 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 September 22, 2023. By the court's calculation, 32 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

Though three days short of the required 35 days notice, the court notes that the proposed sale is in the best interest of the bankruptcy estate because it would allow the Debtor to complete their Chapter 13 Plan and pay dividends to their creditors. Motion to Sell, Dckt. 28. The court also notes that the issue is time sensitive, with closing being required by November 11, 2023. Exhibit A, Dckt. 30. In light of the sale being in the best interest of the bankruptcy estate, the court shortens the notice period to the 32 days given. However, the court reminds Movant of the requirement for adequate notice as provided in Federal Bankruptcy Procedure 2002(a)(2) and Local Bankruptcy Rule 9014-1(f)(2).

The Motion to Sell Property 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 Sell Property is granted.
--

The Bankruptcy Code permits Manny and Chaysavanh Suvankham, Chapter 13 Debtor, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 7855 Detroit Blvd., Sacramento, California ("Property").

The proposed purchaser of the Property is Vo Tran ("Buyer"), and the terms of the sale are:

A. Price: \$535,000.00. Exhibit A, Dckt.30.

- B. Sale is as-is with no seller credit or repairs. Exhibit A, Dckt.30. Escrow will be with Chicago Title Elk Grove. *Id.* Buyer is to pay county and city transfer taxes and fees. *Id.* Movant will not provide income and expense statements. *Id.*
- C. The Debtor proposes to sell the Property and use the proceeds from the sale to complete the Chapter 13 Plan. Declaration, Dckt. 31
- D. The net proceeds of the sale are estimated at \$332, 931.21. Exhibit B, Dckt. 30.
- E. The sale shall be approved provided that all liens are paid in a manner consistent with the Plan, notwithstanding relief from stay having been entered. Motion, Dckt. 28.
- F. The Chapter 13 Trustee must approve of the Title Company and Escrow Company to be used in connection with the sale. Motion, Dckt. 28.
- G. The Chapter 13 Trustee must approve the estimated closing statement to be prepared in connection with the sale, and when approved, disbursement may only be made in accordance with the approved closing statement. Motion, Dckt. 28.
- H. An extension of time amendment was made to schedule the close of escrow to be extended to November 11, 2023. Exhibit A, Dckt. 30.

TRUSTEE'S NON-OPPOSITION

David P. Cusick, the Chapter 13 Trustee ("Trustee"), filed a Non-Opposition on October 3, 2023. Dckt. 33. The Trustee does not oppose the sale of the Property where:

- A. The Debtor proposes to sell the Property and have accepted a proposed offer of \$535,000.00. Exhibit A, Dckt.30.
- B. The Debtor is to receive \$332,931.21 net proceeds and intends to use the funds to pay the Chapter 13 Plan in full at 100% dividend to all creditors. Motion, Dckt. 28.
- C. Specialize Loan Servicing is listed in Class 4 of the Debtor's Plan. Dckt. 3.

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: **XXXXXXX** .

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the Debtor plans to use the proceeds of the sale to complete the Chapter 13 Plan, and to provide for 100% dividends to each creditor. Motion, Dckt. 28.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court to allow the Trustee to issue a demand and immediately fund the Plan from the proceeds of the sale.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h), and this part of the requested relief 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 Manny and Chaysavanh Suvankham, 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 Manny and Chaysavanh Suvankham, Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Vo Tran or nominee (“Buyer”), the Property commonly known as 7855 Detroit Blvd., Sacramento, California (“Property”), on the following terms:

- A. The Property shall be sold to Buyer for \$535,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 30, 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. 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.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 6004(h) is waived for cause.

16. [20-24563](#)-E-13

JOURDON SLONE

**CONTINUED MOTION TO MODIFY
PLAN**

[RLC](#)-4

Stephen Reynolds

7-17-23 [[66](#)]

16 thru 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.

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 and creditors on July 17, 2023. By the court's calculation, 57 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 Confirm the Modified Plan XXXX.

The debtor, Jourdon Soonie Slone ("Debtor") seeks confirmation of the Modified Plan because Debtor experienced a period of unemployment and requests extra time to complete her Ch. 13 Plan. Declaration, Dckt. 68. The Modified Plan provides for an extension of four months to complete the plan, totaling the same monthly payment of \$279.00 required in the previously confirmed Plan. Modified Plan, Dckt. 69. 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 21, 2023. Dckt. 74. Trustee opposes confirmation of the Plan on the basis that:

1. Trustee cannot accurately assess feasibility of the proposed Modified Plan because Debtor has not filed Supplemental Schedules I and J reflecting Debtor's current financial situation after acquiring her new job.
2. Although the proposed Modified Plan calls for a four month extension of completing the plan in 52 months instead of 48 months, Trustee's calculations show that the plan may take as long as 57 months to complete.
3. The Modified Plan is not feasible because the proposed plan payment of \$279.00 is insufficient to fund the \$75.00 monthly payment for administrative expenses and Trustee's fees.
4. The Modified Plan calls for a total amount paid of \$13,392.00; however, because the plan likely requires 57 months to complete, Debtor would actually pay a total of \$14,814.98 throughout the life of the plan.
5. There exist procedural issues with the proposed Modified Plan that include improperly reclassifying a Class 2 creditor to Class 1, and not timely filing a Certificate of Service.

Dckt. 74.

DEBTOR'S RESPONSE TO TRUSTEE'S OPPOSITION

Debtor filed a Response on September 5, 2023. Dckt. 77. Debtor responds that:

1. Debtor has made steady or always regular progress toward completion of plan payments, and Debtor only requests a modification due to her lapse in employment in 2022.
2. Debtor simply seeks to extend the Plan so as to make all required payments in full to the secured priority claims in her case, regardless of whether the Plan life extends for 52 months or longer.
3. Debtor has subsequently filed a Certificate of Service, amending that procedural defect.
4. Debtor's attorney, Stephen M. Reynolds, is foregoing any further attorney's fees on this case to allow Debtor to complete the Plan.

Dckt. 77.

DISCUSSION

Failure to Afford Plan Payment

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor has failed to submit documentation proving her ability to make the required monthly

plan payments. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable. Accordingly, Trustee alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). The proposed \$279.00 monthly payments for the balance of the plan term are insufficient to pay the Chapter 13 Trustee's fee, administrative fees, and the Class 2 dividends.

Debtor's counsel states that there have been some communication challenges with the Client and supplemental schedules have not been filed.

Trustee's counsel reported that the Debtor has been making payments and the hearing should be continued. The Trustee concurred with Debtor's request for a continuance.

Supplemental Schedules I and J

On October 10, 2023 Debtor filed her Supplemental Schedules I and J. Dckt. 84. Debtor informs the court of her new employment and reports her monthly net income as \$301.92. *Id.* at 3. Therefore, Debtor should be able to commit this entire amount to her plan payments regularly, thereby addressing Trustee's concerns.

October 24, 2023 Hearing

At the hearing, **XXXXXXXXXX**

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Jourdon Soonie Slone, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm the Modified Plan is **xxxxxx**.

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

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, parties requesting special notice, and Office of the United States Trustee on June 16, 2023. By the court’s calculation, 33 days’ notice was provided. 28 days’ notice is required.

The Motion to Dismiss 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 respondent and other parties in interest are entered.

The Motion to Dismiss is XXXXX.

The Chapter 13 Trustee, David Cusick (“Trustee”), seeks dismissal of the case on the basis that:

1. The debtor, Jourdon Slone (“Debtor”), is delinquent in plan payments.

DISCUSSION

Delinquent

Debtor is \$1,088.02 delinquent in plan payments, which represents multiple months of the \$279.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Though the court authorized the filing of a late Opposition to the Motion (which was filed on July 17, 2023), the court did not “catch” that when preparing the final rulings for the July 19, 2023 calendar.

The court continued the hearing on the Motion to Dismiss to 2:00 p.m. on August 12, 2023, to afford the Debtor the opportunity to prosecute the opposition and the Trustee to determine whether he wants to prosecute this Motion in light of Debtor having filed a Modified Plan and Motion to Confirm.

September 12, 2023 Hearing

At the hearing, the Trustee agreed to a continuance of the hearing in light of Debtor's prosecution of the Motion to Confirm the proposed Modified Plan.

October 24, 2023 Hearing

At the hearing, **XXXXXXXXXX**

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

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

The Motion to Dismiss the Chapter 13 case filed by The Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, the court not "catching" that a late filed Opposition was filed pursuant to an order of the court, the Debtor having filed a Modified Plan and Motion to Confirm which is set for hearing in conjunction with this matter, and upon review of the pleadings, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss **XXXXX**.

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.

Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion states that a hearing will be held to value the collateral of Ally Financial, Inc., and the hearing will be based upon submitted pleadings as well as argument at the hearing. Based upon language that there may be submissions at the hearing, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2). Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(1).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 10, 2023. By the court’s calculation, 14 days’ notice was provided. 14 days’ notice is required.

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

The Motion to Value Collateral and Secured Claim of Ally Financial, Inc. (“Creditor”) is granted, and Creditor’s secured claim is determined to have a value of \$20,211.00.

The Motion filed by Joi Gonzalez (“Debtor”) to value the secured claim of Ally Financial, Inc. (“Creditor”) is accompanied by Debtor’s exhibit. Exhibit 1, Dckt. 17. Debtor is the owner of a 2016 Chevrolet Suburban (“Vehicle”). Debtor seeks to value the Vehicle at a replacement value of \$20,211.00 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the asset’s value. *See*

FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred on September 25, 2020, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$27,557.00. Exhibit 1, Dckt. 17. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of \$20,211.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion to Value Collateral and Secured Claim filed by Joi Gonzalez ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Ally Financial, Inc. ("Creditor") secured by an asset described as 2016 Chevrolet Suburban ("Vehicle") is determined to be a secured claim in the amount of \$20,211.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$20,211.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

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 August 7, 2023. By the court’s calculation, 50 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 Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

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

The debtor, Renee Lane (“Debtor”) seeks confirmation of the Modified Plan because Debtor’s previous Plan failed to provide for the secured claim of creditor U.S. Bank Trust National Association (“Creditor”). Declaration, Dckt. 89. Creditor filed their proof of claim on May 18, 2023 in the amount of \$103,428.72. The loan was previously in Debtor’s husband’s name; however, Debtor’s husband has passed away, and Debtor is in the process of assuming that loan. The Modified Plan includes Creditor’s claim, as well as a small priority tax debt owed to the State Franchise Tax Board and the IRS for her 2022 taxes. Modified Plan, Dckt. 91. 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 September 1, 2023. Dckt. 95. Trustee opposes confirmation of the Plan on the basis that:

- A. All sums required by the Plan have not been paid. Debtor is \$7,314.16 delinquent in plan payments to the Trustee, having missed three payments for June, July, and August.

- B. The Modified Plan does not appear feasible. The Modified Plan calls for an increase in payments monthly of \$141.00, but Debtor is delinquent in the current Plan.

Dckt. 95.

DEBTOR'S REPLY TO TRUSTEE'S OPPOSITION

Debtor submitted a Reply to Trustee's Opposition on September 21, 2023. In her Reply, Debtor states:

- A. Trustee's objections are misplaced as he is objecting to a previous plan as part of a prior bankruptcy that was closed on February 28, 2023.
- B. Debtor has cured her delinquency by making a payment on September 5, 2023 for \$1,800, and another payment of \$2,600 on September 19, 2023. Debtor has added any additional delinquent amounts to be paid off at the end of the Modified Plan.

Dckt. 98.

Debtor filed with the court Supplemental Schedules I and J on October 19, 2023. Dckts. 110, 111. According to Debtor in her Declaration, she now has \$2,647.00 in disposable income as reflected in her Supplemental Schedules I and J. Declaration, Dckt. 109. She intends to put all of this income toward plan payments, enabling her to catch up on any delinquency. *Id.*

DISCUSSION

Delinquency

In the Opposition the Trustee makes reference to the Bankruptcy case having been filed on March 14, 2023. That is the correct date for the filing of this Case. The Trustee does reference that Debtor had a prior case.

The Opposition clearly states that the default is being computed based on the first payment having come due in April 2023.

The Chapter 13 Trustee asserts that Debtor is \$7,314.16 delinquent in plan payments, which represents multiple months of the \$2,161.00 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13.

Debtor asserts she has cured her delinquency, alleging Trustee has received \$4,400.00 in payments toward that deficiency since Trustee's September 1 Objection. By the court's calculation, that leaves \$2,914.16 in unpaid plan payments with another \$2,161.00 due just before this hearing.

Debtor proposes the \$2,914.16 is added to the end of the Modified Plan, thus being accounted for; however, adding this sum to the end of a Modified Plan does not cure the current delinquency. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6). In Debtor's most recent Declaration, she tells the court she intends to correct the delinquency by committing her increased disposable income to plan payments.

At the hearing, **XXXXXXX**

CREDITOR OPPOSITION

After the hearing on September 26, 2023, creditor U.S. Bank Trust National Association as Owner Trustee for RCF2 Acquisition Trust ("Creditor") filed an Opposition on October 6, 2023. Dckt. 106. In its Opposition, Creditor states:

1. David Lane executed a promissory note in the original principal sum of \$98,000.00 made payable to Bank of America, N.A. on October 1, 2008.
2. The note is secured by a deed of trust executed by David Lane and Renee Winslow (Debtor).
3. Creditor owns the beneficial interest under the Deed of Trust.
4. Debtor's amended Plan proposes an interest rate of 5.1% on Creditor's claim, but Creditor contends that the contractual rate of 5.75% is appropriate.

Dckt. 106.

Creditor objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with Debtor to 5.1%. Creditor's claim is secured by a Deed of Trust encumbering the real property located at 11008 Quartz Ave., Montague, California 96064. Creditor argues that this interest rate is unreasonable considering the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)). The court finds that 5.75% is a reasonable interest rate, especially considering how high interest rates have reached in recent months. In her Declaration submitted to this court on October 19, 2023, Debtor's attorney says she intends to submit to the court a stipulation approving the 5.75% interest rate. Declaration, Dckt. 112.

At the hearing, **XXXXXXXXXXXX**

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, Renee Lane (“Debtor”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm the Plan is **xxxxxx**.

20. [23-21584-E-13](#)
[MS-2](#)

CASSANDRA VISCIA
Mark Shmorgon

**MOTION FOR COMPENSATION FOR
MARK SHMORGON, DEBTORS
ATTORNEY(S)
9-8-23 [41]**

20 thru 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.

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 September 8, 2023. By the court’s calculation, 46 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days’ notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

The Motion for Allowance of Chapter 13 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

The Motion for Allowance of Chapter 13 Attorney’s Fees is granted.
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Mark Shmorgon, the Attorney (“Applicant”) for Cassandra Eliene Viscia, the Chapter 13 Debtor (“Client”), makes a Request for the Allowance of Additional Fees and Expenses in this case.

Fees are requested for the period August 25, 2023, through September 8, 2023. This court entered its order substituting in Applicant as Debtor’s counsel on September 11, 2023. Dckt. 40.

No Chapter 13 Plan has yet to have been confirmed in this case. Debtor’s First Amended Plan filed on September 8, 2023, provides that Applicant is not requesting the no-look fee but will file fee application. The Plan further states that Debtor’s prior counsel was paid \$2,750.00 up front to represent Debtor in this case. The Disclosure of Compensation states that Debtor’s counsel was paid \$2,750.00 which prior to filing prior counsel withdrew from his client trust account, deeming himself having earned the fees for services in connection with this Bankruptcy Case.

Such fees of prior counsel have not been approved by this court.

Applicant requests fees in the amount of \$4,000.00 and does not request approval for any costs or expenses.

Tentative Ruling and Hearing

Though no opposition has been filed, the court sets this Motion for hearing to address the related attorney’s fee issue for Debtor’s prior counsel. The court has not approved such fees and it is not clear how much of the fees relate to the filing of this Case, drafting of the original Plan, and other services for which court approval would be required.

At the hearing, **XXXXXXX**

APPLICABLE LAW

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)).

Lodestar Analysis

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). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (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)).

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 demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. 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 [professional 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, or other professional as appropriate, is obligated to consider:

- (a) Is the burden of the probable cost of legal [or other professional] 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)).

TRUSTEE’S NON- OPPOSITION

The Chapter 13 Trustee filed a Statement of Non-Opposition to the requested fees on October 6, 2023. Dckt. 50.

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.

General Case Administration: Applicant spent 3.0 hours in this category. Applicant's services included discussion with the Debtor about the case. Declaration, Dckt. 44.

Substitution of Attorney: Applicant spent 1.0 hours in this category. Applicant prepared and filed the substitution of attorney with the court. Declaration, Dckt. 44.

Amendments: Applicant spent 1.0 hours in this category. Applicant reviewed the notice of filed claims, and amended the schedules as necessary when reviewing the entire docket. Declaration, Dckt. 44.

Motion to Confirm: Applicant spent 2.0 hours in this category. Applicant drafted a motion to modify the Chapter 13 Plan. Declaration, Dckt. 44.

Amended Chapter 13 Plan: Applicant spent 2.0 hours in this category. Applicant drafted a modified Chapter 13 Plan. Declaration, Dckt. 44.

First Interim Motion for Fees: Applicant spent 1.0 hours in this category. Applicant prepared an accounting and corresponding First Interim Motion for Fees. Declaration, Dckt. 44.

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
Mark Shmorgon	10.00	\$400.00	\$4,000.00
Total Fees for Period of Application			\$4,000.00

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Additional Fees in the amount of \$4,000.00 are approved pursuant to 11 U.S.C. § 331, and subject to final review pursuant to 11 U.S.C. § 330, and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees	\$4,000.00
Costs and Expenses	\$00.00

pursuant to this Application as additional fees pursuant to 11 U.S.C. § 331 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 Mark Shmorgon (“Applicant”), Attorney for Cassandra Elliene Viscia, Chapter 13 Debtor (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Mark Shmorgon is allowed the following fees and expenses as a professional of the Estate:

~~_____ Mark Shmorgon, Attorney the Chapter 13 Debtor~~

~~_____ Fees in the amount of \$4,000.00~~

~~_____ Costs and Expenses in the amount of \$00.00,~~

~~_____ as additional fees and expenses pursuant to 11 U.S.C. § 331 and subject to final review and allowance pursuant to 11 U.S.C. § 330.~~

~~_____ **IT IS FURTHER ORDERED** that the Chapter 13 Trustee is authorized to pay the fees and costs allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.~~

Final Ruling: No appearance at the October 24, 2023 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 September 8, 2023. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the 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, Cassandra Viscia ("Debtor"), has provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee, David Cusick ("Trustee"), or by creditors. The Chapter 13 Trustee filed a Non-Opposition on October 3, 2023. Dckt. 48. Debtor is current on plan payments, the Plan complies with 11 U.S.C. §§ 1322 and 1325(a), and it 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, Cassandra Viscia ("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 September 8, 2023, 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.

22. [23-22186-E-13](#)
[JGD-2](#)

CALVIN/JOANNA MITCHELL
John Downing

MOTION TO CONFIRM PLAN
9-19-23 [24]

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, attorneys of record who have appeared in this case, and Office of the United States Trustee on September 19, 2023. By the court's calculation, 35 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 Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

<p>The Motion to Confirm the Amended Plan is denied.</p>

The debtor, Calvin and Joanna Mitchell ("Debtor") seeks confirmation of the Amended Chapter 13 Plan. The Plan provides for monthly payments on a gradual increase. Plan, Dckt 25. The Amended Plan calls for \$2000.00 per month for three months, \$5,000.00 per month for nine months, \$6,700.00 per month for 47 months, and \$59,000.00 per month for one month. *Id.* In its Declaration filed in support of its Amended Plan, Debtor states the conclusion that Debtor will be able to make all plan payments in the Amended Plan, including the lump sum payment either through retirement funds or through the sale of their residence. Declaration, Dckt. 27. Debtor does not explain how they can make the growing payments or when the lump sum payment must be made and the source of such payment. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee") filed an Opposition on October 4, 2023. Dckt. 30. Trustee opposes confirmation of the Plan on the basis that:

1. Debtor does not explain how its original Plan called for payments totaling \$117,000.00 and the Amended Plan calls for payments totaling \$424,900.00.
2. Debtor does not show evidence how it can afford the payment increase in its Amended Plan payment schedule.
3. Debtor has not submitted sufficient documentation to allow a \$36,539.00 business expense deduction.
4. Debtor Calvin Mitchell has reported that he is a contractor, but the evidence is not clear whether Debtor Calvin Mitchell has outstanding obligations that prevent him from doing business.

Dckt. 30.

DEBTOR'S SUPPLEMENTAL DECLARATION

Debtor Calvin Mitchell filed a Supplemental Declaration with the court on October 11, 2023. Dckt. 35. In his Declaration, Debtor states:

1. Debtor does not have plans to operate his construction contracting business until after April, 2024.
2. Debtor has a full time job at Palisades Tahoe for the winter.
3. Debtor plans to also work odd jobs.
4. If Debtor cannot make plan payments, there is sufficient equity in the house to pay off the IRS lien.

Dckt. 35.

DISCUSSION

Trustee's concerns are well-taken. The court requires further documentation explaining why the Amended Plan calls for such a drastic increase in total plan payments. Debtor filed supplemental Schedules I and J showing a net disposable monthly income of \$5,058.88. Dckt 34. This increase in monthly disposable income may be sufficient to allow Debtor to afford its Amended Plan, coupled with Debtor's \$214,776.00 interest in a retirement or pension account. Schedule A/B, Dckt. 21. However, Debtor should clarify whether the additional Schedules filed on October 11, 2023 are supplemental or amended, as Debtor has checked both boxes. The previous Schedules I and J provided for \$4,064.00 in net monthly disposable

income, approximately \$1,000.00 less than what Debtor has shown on its Supplemental Schedules I and J. Dckts. 21, 34. The court cannot confirm a Plan with such discrepancies remaining unexplained.

Debtor has also failed to timely provide Trustee with the necessary business documents to validate its claimed business expense deduction. 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.

~~The Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.~~

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

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

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

~~**IT IS ORDERED** that the Motion to Confirm the Plan is denied, and the proposed Chapter 13 Plan is not confirmed.~~

23 thru 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 September 29, 2023. By the court's calculation, 25 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

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

<p>The Motion to Sell Property is granted.</p>

The Bankruptcy Code permits Bonita Melendez, Chapter 13 Debtor, ("Movant") to sell property of the estate or 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 8158 Visalia Way, Sacramento, California ("Property").

The proposed purchaser of the Property is Tenly and Louise Fong ("Buyer"), and the terms of the sale are:

- A. Price: \$380,000.00. Exhibit 1, Dckt. 45.
- B. Items included in the sale of the Property include the refrigerator and the bathroom mirrors. Exhibit 1, Dckt. 45.

- C. The sale proceeds will be deposited to the Chapter 13 Trustee, who will use the proceeds pay the Movant's creditors. Motion, Dckt. 43.
- D. All the costs of sale, including escrow fees, title insurance, and broker's commission, will be paid in full from the sale proceeds by the title company handling the transaction. Motion, Dckt. 43.
- E. The Movant will not relinquish title to or possession of the subject property prior to payment in full of the purchase price. Motion, Dckt. 43.
- F. The sale is an arm's length transaction. Motion, Dckt. 43.
- G. The Movant should receive approximately \$192,101.79 in net proceeds from the sale after paying all liens, closing costs, and realtor fees. Exhibit 2, Dckt. 46.
- H. The Movant would like to sell the property to repay 100% of the creditors in her Chapter 13 case. Declaration, Dckt. 47.

TRUSTEE'S RESPONSE

David Cusick, Chapter 13 Trustee ("Trustee"), filed a Response to the Movant's Motion on October 4, 2023. Dckt. 56. The Trustee does not oppose the sale of the Property where:

- A. The amount of \$69,800.00 should be sufficient to payoff the Plan at 100%. The Trustee notes however, that the government bar date for claims has not passed. Response, Dckt. 56. The date is November 13, 2023. *Id.* Scheduled government claims include the Franchise Tax Board, which has already filed a claim, and the Internal Revenue Service which was scheduled for only \$1.00, and no claim filed to date. *Id.*
- B. The Trustee is to pay \$60,393.91 in arrears back to Bank of America as required by the confirmed Plan and is prepared to do a check swap with the escrow company. Response, Dckt. 56.
- C. The escrow instructions and closing statement ensure that the Trustee's demand is paid and a "check exchange" occurs with the Title Company so the arrears claim is paid as ordered. Response, Dckt. 56.
- D. The Court order that the Debtor provide the Trustee with a copy of the escrow closing statement after the close of escrow. Response, Dckt. 56.

Dckt. 56.

CREDITOR'S NON-OPPOSITION

Bank of America, N.A. ("Creditor"), filed a Non-Opposition to the Movant's Motion on October 18, 2023. Dckt. 58. The Creditor does not oppose the sale of the Property where:

- A. The Creditor is entitled to receive payments per the terms of a Promissory Note dated July 5, 2005 in the original principal amount of \$150,000.00 which is secured by a first Deed of Trust for the Property.
- B. Pursuant to 11 U.S.C. § 363(f) the Creditor is paid off in full satisfaction of the debt.

Dckt. 58.

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: **XXXXXXX** .

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the sale will provide for 100% payoff to the creditors, and the secured Creditor of the Property is to be paid arrears as required by the Plan. Dckt. 3.

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 Bonita Melendez, 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 Bonita Melendez, the Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Tenly and Louise Fong or nominee (“Buyer”), the Property commonly known as 8158 Visalia Way, Sacramento, California (“Property”), on the following terms:

- A. The Property shall be sold to Buyer for \$380,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit 1, Dckt. 45, 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, and 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. 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 or paying the fees and costs as allowed by this order shall be disbursed to the Chapter 13 Trustee directly from escrow.

24. [23-21588-E-13](#)
[MMM-3](#)

BONITA MELENDEZ
Mo Mokarram

**MOTION TO EMPLOY EXP REALTY OF
CALIFORNIA, INC. AS BROKER(S)**
10-2-23 [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.

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 October 2, 2023. By the court's calculation, 22 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.

Bonita Melendez ("Debtor") seeks to employ eXp Realty of California, Inc. ("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 and sell the real property located at 8158 Visalia Way, Sacramento, California 95828 ("Property").

Debtor argues that Broker's appointment and retention is necessary to effectively market and sell the property because the agent, Alisha Woodward, has extensive knowledge and familiarity with the area where the Property is located. Declaration, Dckt. 53.

Declarant Alisha Woodward, a licensed real estate sales person in the state of California with eXp Realty of California, Inc., testifies that she is very familiar with the real estate market in the Sacramento area. Ms. Woodward testifies she and the firm do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

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 eXp Realty of California, Inc. as Broker for the Chapter 13 Estate on the terms and conditions set forth in the California Residential Purchase Agreement filed as Exhibit, Dckt. 54. 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 Bonita Melendez ("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 eXp Realty of California, Inc. as Broker for Debtor on the terms and conditions as set forth in the California Residential Purchase Agreement filed as Exhibit, Dckt. 54.

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 counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

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

25. [23-21588-E-13](#)
[DPC-1](#)

BONITA MELENDEZ
Mo Mokarram

CONTINUED MOTION TO DISMISS
CASE
9-15-23 [39]

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

Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, persons who have filed a Request for Notice, and Office of the United States Trustee on September 15, 2023. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The hearing on the Motion to Dismiss is XXXXX.
--

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that:

1. The debtor, Bonita Melendez (“Debtor”), \$2,300.00 delinquent in plan payments.
2. There will be another plan payment of \$2,300.00 due before the hearing.

DEBTOR’S OPPOSITION

Debtor filed an Opposition on September 29, 2023. Dckt. 49. Debtor states she will cure the delinquency pending the sale of her home. A motion to sell is pending on the court’s calendar for October 24, 2023.

DISCUSSION

Delinquent

Debtor is \$2,300.00 delinquent in plan payments, which represents one month of the \$2,300.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Debtor informs the court that she will pay off any delinquency pending the sale of her home. The hearing on the Motion to Sell is set for October 24, 2023.

The hearing on the Motion to Dismiss is continued to October 24, 2023, at 2:00 p.m. to be conducted in conjunction with the Motion to Sell.

October 24, 2023 Hearing

At the hearing, **XXXXXXXXXX**

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

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

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

IT IS ORDERED that the Motion to Dismiss is **xxxxxx**.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and parties requesting special notice on August 16, 2023. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is XXXXXX.
--

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

1. Debtor is delinquent in Plan payments.
2. The Plan may not be feasible.
3. Tax returns have not been filed.
4. The Plan may not be in Debtor's best efforts.

DEBTOR'S REPLY

Debtor filed a Reply on September 5, 2023. Dckt. 34. Debtor's counsel argues in the Reply to the Trustee's Objection to Confirmation that:

1. Debtor is current under the Plan.
2. Debtor has filed all missing tax returns.
3. Debtor has amended Form 122C-1.
 - a. Debtor states they were the victim of fraud and did not file the prior two cases.
 - b. Debtor does not have an interest in the real property commonly known as 1724 Chesapeake, Arroyo Grande, California.
 - c. Debtor does not know the debtors listed in the Motion.
4. Debtor's Plan relies on the Amended Proof of Claims of the Internal Revenue Service and Franchise Tax Board. The Plan is not ready for confirmation at this time.

No evidence is provided in support of the Reply. Debtor offers no testimony concerning the contention that the prior two bankruptcy cases were not filed by him. In the current case, it appears that all of the Debtor's signatures are typed "/s/ name" signatures, so the court cannot compare Debtor's signature with those in prior cases.

TRUSTEE'S RESPONSE

Trustee filed a Response to Debtor's Reply on September 28, 2023. Dckt. 47. In its Response, Trustee states:

1. Debtor has cured the delinquency.
2. Trustee still opposes confirmation because Debtor never filed an amended Form 122C-1, despite informing the court it did so.
3. Trustee is still missing tax returns.
4. Trustee is still unsure whether the Gilgunn Way property was actually foreclosed prior to the filing and whether or not there is a renter. If there is a renter, Trustee is unsure whether Debtor is receiving rental income from that property.

Dckt. 47.

DISCUSSION

Trustee's objections are well-taken.

Delinquency

Debtor is no longer delinquent in plan payments, so this portion of Trustee's objection is resolved.

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).

1. Debtor admitted at the Meeting of Creditors that the real property located at 5501 Gilgunn Way is misclassified as a Class 4, when it should be Class 3.
2. Debtor admitted at the Meeting of Creditors that they receive \$500 per month in rental income. Debtor's Schedule I, however, lists rental income as \$1,645.00. Dckt. 11.

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

Failure to File Tax Returns

Debtor admitted at the Meeting of Creditors that the federal income tax return has not been filed still. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Failure to Provide Disposable Income / Not Best Effort

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

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

Debtor's Form 122C-1 fails to identify rental income for three real properties. Trustee states that with this income included, Debtor is over the median income and needs to complete the entire Form 122C-1.

At the hearing, counsel for the Trustee reported that Debtor is current in Plan payments, but believes that the Objection should be sustained because of changes in Debtor's finances. A review of the Docket on October 19, 2023 shows Debtor has not filed an updated Form 122C-1 or all relevant tax documentation.

October 24, 2023 Hearing

At the hearing, **XXXXXXXXXX**

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

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

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

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

FINAL RULINGS

27. [23-23197](#)-E-13
[PLG-1](#)

MORGAN BRYNNAN
Steven Alpert

MOTION TO CONFIRM PLAN
9-21-23 [[11](#)]

WITHDRAWN BY M.P.

Final Ruling: No appearance at the October 24, 2023 hearing is required.

Morgan Brynnan (“Debtor”) having filed a Notice of Dismissal, Dckt. 23, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Confirm Plan was dismissed without prejudice, and the matter is removed from the calendar.**

Final Ruling: No appearance at the October 24, 2023 Hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney], Chapter 13 Trustee, other parties in interest, parties requesting special notice, and Office of the United States Trustee on July 25, 2023. By the court’s calculation, 63 days’ notice was provided. 28 days’ notice is required.

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

This Contested Matter has been transferred to the Hon. Fredrick Clement (Order, Dckt. 76). The Parties have filed a Stipulation resolving this matter (Stipulation; Dckt. 73), a proposed order is to be lodged with Judge Clement, and which order Judge Clement may enter without scheduling a hearing.

The hearing on the Motion to Value Collateral and Secured Claim of Golden 1 Credit Union is continued to 2:00 p.m on November 2, 2023, for case management purposes.

The Motion filed by Jason and Sarah Nesbit (“Debtor”) to value the secured claim of Golden 1 Credit Union (“Creditor”) is accompanied by Debtor’s declaration. Declaration, Dckt. 54. Debtor is the owner of a 2014 Subaru Outback vin ending in 2159 (“Vehicle”). Debtor seeks to value the Vehicle at a replacement value of \$11,500.00 as of the petition filing date.

On October 16, 2023, the parties filed a Stipulation with the court. Dckt 71. In the Stipulation, the parties agree:

1. The value of the 2014 Subaru Outback at the time Debtor’s bankruptcy filing is \$13,799.00.

2. Golden 1 Credit Union shall have a secured claim of \$13,799.00 and the balance of their \$18,303.80 claim shall be unsecured.

Dckt. 71.

The hearing is continued to allow Judge Clement to enter the order pursuant to the Stipulation or set such hearing as he determines appropriate.

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

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

The Motion to Value Collateral and Secured Claim filed by Jason and Sarah Nesbit (“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 hearing on the Motion to Value Collateral and Secured Claim of Golden 1 Credit Union (“Creditor”) is continued to **2:00 p.m on November 2, 2023**, for case management purposes.

Final Ruling: No appearance at the October 24, 2023 Hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Office of the United States Trustee, and persons who have filed a Request for Notice on September 13, 2023. By the court’s calculation, 41 days’ notice was provided. 28 days’ notice is required.

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

The Objection to Claimed Exemptions is sustained, and the exemptions are disallowed in their entirety, without prejudice.

The Chapter 13 Trustee, David Cusick (“Trustee”) objects to David Karleskint’s (“Debtor”) claimed exemptions pursuant to California Code of Civil Procedure §704.070 in the amount of \$750.00 in a US Bank checking account and \$2,250.00 in a US Bank savings account. As addressed below, California Code of Civil Procedure § 704.070 provides for an exemption in earnings that were paid to the employee in the 30 day period prior to a judgement creditor levying on the earnings.

A claimed exemption is presumptively valid. *In re Carter*, 182 F.3d 1027, 1029 at fn.3 (9th Cir.1999); *See also* 11 U.S.C. § 522(l). Once an exemption has been claimed, “the objecting party has the burden of proving that the exemptions are not properly claimed.” FED. R. BANKR. P. RULE 4003(c); *In re Davis*, 323 B.R. 732, 736 (9th Cir. B.A.P. 2005). If the objecting party produces evidence to rebut the presumptively valid exemption, the burden of production then shifts to the debtor to produce unequivocal evidence to demonstrate the exemption is proper. *In re Elliott*, 523 B.R. 188, 192 (9th Cir. B.A.P. 2014). The burden of persuasion, however, always remains with the objecting party. *Id.*

California Code of Civil Procedure § 706.011 defines “earnings” for purposes of claiming paid earnings exempt under Cal. Civ. P. Code §704.070. “Earnings” is defined as “compensation payable by an

employer to an employee for personal services performed by such employee, whether denominated as wages, salary, commission, bonus, or otherwise.” Cal Civ. P. Code §706.011(b).

California Code of Civil Procedure § 704.070(b)(1) exempts paid earnings “that were paid to the employee during the 30-day period ending on the date of the levy.” The “levy date” for bankruptcy purposes is the petition date. Therefore, Debtor must show that, to claim certain funds as exempt under Cal. Civ. P. Code §704.070(b)(1), the funds were not only received by the Debtor under an employer/employee relationship, but that the funds were received for the period within 30 days of the petition date.

No Opposition Filed by Debtor

Debtor has not filed any opposition to this Objection. The Trustee directs the court to Debtor’s Statement of Financial Affairs in which Debtor states that he has had no wage income for 2022 or 2023 (this case having been filed on July 14, 2023. Stmt of Financial Affairs, ¶ 4; Dckt. 1. Debtor does list \$8,550 in rental income in 2023 and \$5,000 in rental income in 2022. *Id.*; ¶ 5.

On the Chapter 13 Statement of Current Income, Debtor states that in the six months preceding the filing of this Bankruptcy Case, Debtor had \$0.00 in wage, salary, commission income and \$1,458 in gross rental income. *Id.*; p. 42. Debtor states on Schedule having monthly net rental income of \$1,750.00. *Id.* at 30-31.

Debtor has not submitted documents to suggest he received the money from an employer as an employee, and Debtor has not shown the court that he received the funds for the 30-day period leading up to the petition date.

The Objection is sustained and the claimed exemptions in the amount of \$750.00 in a US Bank checking account and \$2,250.00 in a US Bank savings account, and each of them, is sustained and the claimed exemptions are disallowed in their entirety.

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 Claimed Exemptions 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 Objection is sustained, and the claimed exemptions of \$750.00 in a US Bank checking account and \$2,250.00 in a US Bank savings account, and each of them, are disallowed in their entirety.

Final Ruling: No appearance at the October 24, 2023 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 September 8, 2023. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

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

Chad M. Johnson, the Attorney ("Applicant") for Romualdo Somera Guillermo and Myra Cristina Guillermo, the Chapter 13 Debtor ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case. The Confirmation Order provides for Debtor's counsel to seek the allowance of fees pursuant to 11 U.S.C. § 330, Applicant having opted out of the no-look Chapter 13 fee provisions. Order, Dckt. 17.

Fees are requested for the period June 6, 2023, through October 24, 2023. Applicant requests fees in the amount of \$4,640.00 and costs in the amount of \$15.17.

APPLICABLE LAW

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)).

Lodestar Analysis

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). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (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)).

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 demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. 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 [professional 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, or other professional as appropriate, is obligated to consider:

- (a) Is the burden of the probable cost of legal [or other professional] 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)).

TRUSTEE’S NON- OPPOSITION

The Chapter 13 Trustee filed a Statement of Non-Opposition to the requested fees. Dckt. 26.

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.

General Case Administration: Applicant spent 10.4 hours in this category. Applicant consulted with Debtor, prepared the draft petition and accompanying schedules, reviewed and updated the petition and schedules with Debtor, communicated and coordinated with the Trustee, and attended the 11 U.S.C. § 341 meeting.

First Interim Motion for Fees: Applicant spent 1.2 hours in this category. Applicant prepared an accounting and corresponding First Interim Motion for Fees.

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
Chad M. Johnson	11.6	\$400.00	\$4,640.00
Total Fees for Period of Application			\$4,640.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$15.17 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
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Postage		\$9.42
Printing and Envelopes		\$5.75
Total Costs Requested in Application		\$15.17

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First Interim Fees in the amount of \$4,640.00 are approved pursuant to 11 U.S.C. § 331, and subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Costs & Expenses

First Interim Costs in the amount of \$15.17 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees	\$4,640.00
Costs and Expenses	\$15.17

pursuant to this Application as interim fees pursuant to 11 U.S.C. § 331 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 Chad M. Johnson, (“Applicant”), Attorney for Romualdo Somera Guillermo and Myra Cristina Guillermo, Chapter 13 Debtor (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Chad M. Johnson is allowed the following fees and expenses as a professional of the Estate:

Chad M. Johnson, Attorney the Chapter 13 Debtor

Fees in the amount of \$4,640.00
Expenses in the amount of \$15.17,

as an interim allowance of fees and expenses pursuant to 11 U.S.C. § 331
and subject to final review and allowance pursuant to 11 U.S.C. § 330.

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