

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

**Honorable Ronald H. Sargis**  
Bankruptcy Judge  
Sacramento, California

**November 1, 2022 at 2:00 p.m.**

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1. [22-21966-E-13](#)  
[TBG-1](#)

**JUDITH MOSHER**  
**Stephan Brown**

**MOTION FOR COMPENSATION BY THE  
LAW OFFICE OF THE BANKRUPTCY  
GROUP, P.C. FOR STEPHAN M. BROWN,  
DEBTORS ATTORNEY(S)  
9-30-22 [[22](#)]**

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

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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 30, 2022. By the court's calculation, 32 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). The defaults of the non-responding parties and other parties in interest are entered.

<p><b>The Motion for Allowance of Professional Fees is granted.</b></p>
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The Bankruptcy Group, P.C., the Attorney ("Applicant") for the debtor, Judith Ann Mosher ("Client"), makes a first Interim Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period August 6, 2022, through September 30, 2022. Applicant requests fees in the amount of \$7,539.00 and costs in the amount of \$114.57.

## **TRUSTEE'S RESPONSE**

Trustee filed a Response to this Application on October 12, 2022. Dckt. 37. Trustee states that Trustee does not oppose the motion, but notes discrepancies in the Application. Exhibit A shows only \$82.57 in Expenses, rather than the \$114.57 amount requested in the Application, and total fees in the amount of \$7,421.00, rather than \$7,539.00. Dckt. 22. However, Trustee also recognizes that Applicant is requesting a reduced fee. Trustee also notes that the requested fees would be paid at the end of Debtor's Plan, since the Plan lists the monthly payment for Administrative Expenses at \$0.00, so the treatment of unsecured claimants would not suffer.

## **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)).

A review of the application shows that Applicant’s services for the Estate include case administration, asset analysis, 341 hearings, and motions. The court finds the services were beneficial to Client and the Estate and were reasonable.

### **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 23.80 hours in this category. Applicant communicated with the client and trustee, held meetings, serviced documents, performed research on case deadlines and docket maintenance.

Asset Analysis: Applicant spent 2.20 hours in this category. Applicant prepared, filed, and served emergency petition, schedules, and the proposed plan.

341 Hearings: Applicant spent 0.40 hours in this category. Applicant included the projected amount of time in attending and preparing for the 341 Meeting(s).

Motions: Applicant spent 5.40 hours in this category. Applicant prepared, filed, and served the motion to confirm the Plan and Application for Fees, with supporting documents.

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:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Stephan M. Brown Attorney	0.6	\$450.00	\$270.00
Daniel J. Griffin Attorney	6.50	\$350.00	\$2,275.00
Eric T. Welch Legal Administrator	0.6	\$260.00	\$156.00
Devin Picciano Associate Attorney	0.3	\$250.00	\$75.00
Roslyn Pomeroy Paralegal	23.80	\$200.00	<u>\$4,760.00</u>
<b>Total Fees for Period of Application</b>			<b>\$7,536.00</b>

The court notes, as Trustee points, fees documented on Exhibit A, Dckt. 24, only total \$7,421.00. However, Applicant is only requesting \$5,885.43, so, this discrepancy appears trivial.

### **Costs & Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$114.57 pursuant to this application.

The costs requested in this Application are,

<b>Description of Cost</b>	<b>Per Item Cost, If Applicable</b>	<b>Cost</b>
Filing fee for case completion documents	\$32.00	\$32.00
Filing fee for Notices of Stay	\$82.57	\$82.57
<b>Total Costs Requested in Application</b>		<b>\$114.57</b>

The court notes, as Trustee points, costs documented on Exhibit A, Dckt. 24, only total \$82.57. Therefore, Applicant is only allowed costs in the amount of \$82.57.

## **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 \$5,885.43 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 under the confirmed Plan.

### **Costs & Expenses**

First Interim Costs in the amount of \$82.57 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 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	\$5,885.43
Costs and Expenses	\$82.57

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 The Bankruptcy Group, P.C. (“Applicant”), Attorney for Judith Ann Mosher, (“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 The Bankruptcy Group, P.C. is allowed the following fees and expenses as a professional of the Estate:

The Bankruptcy Group, P.C., Professional employed by Debtor,

Fees in the amount of \$5,885.43  
Expenses in the amount of \$82.57,

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 100% of the fees and 100% of the costs allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

2. [22-21314-E-13](#)  
[DPC-2](#)

**NADIA ZHIRY**  
**Peter Macaluso**

**CONTINUED OBJECTION TO  
CONFIRMATION OF PLAN BY  
DAVID P. CUSICK  
7-15-22 [56]**

**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.

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and parties requesting special notice on July 15, 2022. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

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

<b>The hearing on the Objection to Confirmation of Plan is continued to <span style="color: red;">XXXXXXX</span></b>
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The Chapter 13 Trustee, David Cusick ("Trustee") opposes confirmation of the Plan on the basis that:

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

**Trustee's Status Report**

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

1. Debtor remains delinquent \$500.
2. Debtor appeared at the continued First Meeting of Creditors and the Meeting has been continued to October 13, 2022.
3. Trustee does not believe Debtor knows enough about their finances to accurately testify to matters pertaining to the real properties.
4. The Plan does not provide for the claim of Gerard F. Keena II, Receiver, which was filed as secured and priority.

### **Debtor's Reply**

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

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

### **AUGUST 9, 2022 UPDATES AND SUPPLEMENTAL PLEADINGS**

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

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

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

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

Dckt. 86.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Infeasible Plan**

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

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

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



Electricity, heat, natural gas.....	\$200.57
Water, sewer, garbage collection.....	\$140.00
Telephone, cell phone, Internet, satellite, and cable services.....	\$50.00
Food and housekeeping supplies.....	\$400.00
Clothing, laundry, and dry cleaning.....	\$10.00
Personal care products and services.....	\$20.00
Medical and dental expenses.....	\$25.00
Transportation. Include gas, maintenance, bus or train.....	\$100.00
Entertainment, clubs, recreation, newspapers, magazines, and books..	\$10.00
Vehicle insurance.....	\$50.00

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

### **Delinquency**

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

### **Not Best Effort**

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

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

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

### **Trustee's Status Report**

Trustee filed a Status Report on October 18, 2022. Dckt. 123. Trustee states Debtor is current on Plan payments. However, the Motion by the State Court Receiver to Excuse Turnover, KSR-1, was continued to January 10, 2023 and the Meeting of Creditors was continued to February 2, 2023. Therefore, Trustee requests the court continue the hearing to after February 2, 2023.

**November 11, 2022**

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 Objection to Confirmation filed by David Cusick, the Chapter 13 Trustee, having been presented to the court, the Debtor working to finalize the construction contract for the remedial work to the Property and deposit of the funding for that contract into the blocked account, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the hearing on the Objection to Confirmation of Plan is continued to 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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 17, 2022. By the court's calculation, 45 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

**The Motion to Confirm the Modified Plan is denied.**

The debtor, James Roy Johnson ("Debtor") seeks confirmation of the Modified Plan because Debtor would like to secure a reverse mortgage to stay in their home and pay off their plan. Declaration, Dckt. 31. There is no indication Debtor has been approved for a reverse mortgage.

The Modified Plan provides that Debtor will pay \$12,835.00 into the Chapter 13 Plan as of September 2022. Starting October 2022, Debtor will pay \$2,567.00 per month continuing to the fourteenth month. On the fifteenth month, Debtor will pay a lump sum payment of \$107,688.00. Modified Plan, Dckt. 33. 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 October 19, 2022. Dckt. 36. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor's proposed Plan is overextended and will take longer than the fifteen (15) months proposed.

## **DISCUSSION**

### **Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to Trustee's calculation, the Plan will take more than the proposed 15 months to complete. Debtor would need to increase the plan payment from \$2,567.00 to \$3,135.00 for months 6 through 14 or increase lump sum payment in month 15 from \$107,688.00 to \$112,800.00. However, Debtor's Schedules show a monthly net income of \$2,567.00. Debtor would need to rely on an increased lump sum to comply with the proposed modified plan. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, James R. Johnson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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

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

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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 October 12, 2022. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

- A. Debtor is delinquent in Plan payments to the Trustee.

## DISCUSSION

Trustee's objections are well-taken.

### Delinquency

Debtor is \$1,675.00 delinquent in Plan payments, which represents one month of the \$1,675.00 Plan payment. Before the hearing, another plan payment will be due. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

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

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

**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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 20, 2022. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

<p><b>The Motion to Confirm the Modified Plan is denied.</b></p>
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The debtor, James Caston and Deborah Clark-Caston ("Debtor") seeks confirmation of the Modified Plan because debtor took legal custody of their grandchildren and subsequently had to move to a bigger house, resulting in increased rent. Declaration, Dckt. 65. The Modified Plan provides Plan payments total \$28,150.00 through and including August 2022 followed by payments of \$730.00 per month starting from September 25, 2022, for 20 months. Modified Plan, Dckt. 64. 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 October 18, 2022. Dckt. 73. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent under the terms of the proposed modified plan
- B. Proposed Plan may not be Debtor's best effort.

## DEBTOR'S REPLY

Debtor filed a reply on October 25, 2022. Dckt. 76. Debtor states they intend to be current by the date of the hearing, they paid off their first loan, and Debtor's Counsel requires more time to address the best efforts assertions.

## DISCUSSION

### Delinquency

The Chapter 13 Trustee asserts that Debtor is \$230.00 delinquent in plan payments, which represents less than one month of the \$730.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### Not Best Effort

The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

The Plan proposes to reduce plan payments from \$950.00 to \$730.00 while continuing to budget monthly retirement loan repayments of \$462.06. Supplemental Schedule J, Dckt. 60. Debtor originally scheduled the retirement loan repayments to be paid off by April 2021. Schedule J, Dckt. 14.

The court is not clear why Debtor is still budgeting retirement loan repayments. If it is a new retirement loan, Debtor has not obtained the court's permission to incur debt. If not, it appears Debtor gave a false statement under penalty of perjury in their previous filings. At the hearing, **XXXXXXXXXX**

The court notes that Supplemental Schedule I does not include any contributions or benefits that are being received for Debtor accepting the responsibility of caring for their grandchildren. In Debtor's Declaration in support of the Motion, they testify that they are receiving \$819.00 a month from Cal Works. Dec. ¶ 2; Dckt. 65.

At the hearing, **XXXXXXX**

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

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



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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, James W. Caston and Deborah L. Clark-Caston (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

6. <a href="#"><u>22-22240-E-13</u></a> <a href="#"><u>DPC-1</u></a>	SUSAN ENGLISH Mikalah Liviakis	<b>OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK</b> 10-12-22 <a href="#"><u>[15]</u></a>
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney, on October 12, 2022. By the court’s calculation, 20 days’ notice was provided. 14 days’ notice is required.

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

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

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

A. Debtor's plan fails Chapter 7 liquidation analysis.

## DISCUSSION

Trustee's objections are well-taken.

### Debtor Fails Liquidation Analysis

Debtor's plan fails the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Trustee states that Debtor's Plan proposes to pay a dividend of no less than 1% toward unsecured claims, which are estimated to total \$36,507.00 (Dckt. 3), which would pay \$365.07 within 60 months. Dckt. 15.

Trustee further states that Debtor's Statement of Financial Affairs reflects a transfer of Debtor's 50% interest in a 1979 mobile home, to her sister, Linda Beach, in January of this year. Dckt. 1, p. 39, ¶ 18. Debtor admitted, at the 341 Meeting, that the mobile home was inherited jointly, with her sister, from their late mother's estate, and that Debtor's sister is actively looking to sell the mobile home. Dckt. 15. Trustee believes that Debtor's 50% interest in the property should be paid to unsecured creditors, but cannot accurately determine the amount until the supportive documentation requested from the Debtor has been provided. *Id.*

If Debtor's interest in the Property can be paid to unsecured creditors, it appears Debtor fails the Chapter 7 liquidation analysis as unsecured creditors would receive more than \$365.07.

At the hearing, ~~XXXXXXXXXXXX~~

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

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

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

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

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

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

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

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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 October 12, 2022. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

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

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

- A. The Plan is not in Debtor's best efforts as it appears they have additional disposable income to pay toward the Plan.

## DEBTOR'S RESPONSE

Tony Aguayo Duran and Erika Medina Duran ("Debtor") filed a response on October 26, 2022. Dckt. 23. Regarding Trustee's objections, Debtor states:

- 1. Debtor Tony Duran's retirement contributions are \$151 for a two week pay period. This is roughly \$300 per month. Debtor states this is 3% of their pay.

2. Debtor Erika Duran and their son has substantial medical costs, totally approximately \$600 out of pocket per month.
3. Debtor spends about \$270 per month for phone and an additional \$50 per month for home internet.
4. Debtor was spending \$105 per month for their son's soccer and \$75 per month for school supplies. Now, Debtor's son no longer plays soccer.

## **DISCUSSION**

Trustee's objections are well-taken.

### **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 is above median income. It is not clear to Trustee whether the \$610.78 per month in retirement contributions is mandatory or voluntary.

However, Debtor's Amended Schedule I reflects Debtor has mandatory retirement contributions of \$330.00. Therefore, it appears to the court the retirement contributions are mandatory. This seems consistent with Trustee indicating Debtor's paystubs have \$309.39 per check taken out for retirement.

Debtor is also deducting amounts \$375.00 for additional healthcare expenses, \$240.00 optional telephone and telephone services, and \$180.00 education expenses. Trustee has not received documentation of these expenses and if they are proper and necessary. If they are not necessary, Debtor could possibly contribute almost \$800 more per month to their Plan payments. However, Debtor's Response indicates good faith in these expenses.

At the hearing, **XXXXXXXXXX**

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

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

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

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

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

8.	<a href="#"><u>17-28343-E-13</u></a> <a href="#"><u>CLH-5</u></a>	<b>SHAWN BARTLETT</b> Cindy Hill	<b>MOTION TO APPROVE SETTLEMENT AND LOAN MODIFICATION</b> 9-27-22 <a href="#"><u>[71]</u></a>
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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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 September 27, 2022. By the court’s calculation, 35 days’ notice was provided. 28 days’ notice is required.

The Motion to Approve Loan Modification 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><b>The Motion to Approve Settlement and Loan Modification is granted.</b></p>
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The Motion to Approve Settlement and Loan Modification filed by Shawn Bartlett (“Debtor”) seeks court approval for Debtor to settle claims with Servis One, Inc. Dba BSI Financial Services (“Creditor”), whose claim the Plan provides for in Class 4.

Debtor and Creditor seek to resolve numerous errors on a first attempted loan modification by means of settlement. The settlement resolves disputes in the underlying state court action, Placer

Country Superior Court Case No. S-SV-0048560, in which Debtor filed a complaint to resolve issues surrounding the loan, payments due, and servicing of the loan.

The Motion is supported by the Declaration of Shawn Bartlett. Dckt. 73. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms. The full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 74.

The settlement provides the following key provisions:

1. Debtor will request a Dismissal with Prejudice of the state court action.
2. Debtor will execute a notarized corrective statement in which it corrects the spelling error in Shawn Bartlett's name.
3. Creditor pays Debtor the sum of \$15,000.00 in release of claims and full dismissal.

Debtor claims the loan payment decreases from the current \$2,600.00 per month to \$2,300.00 per month. The court cannot locate where these terms are in the proposed settlement. Additionally, the most recent Schedule I/J, from June 24, 2019, indicates Debtor's mortgage expenses were \$2,000.00, not \$2,600.00. Dckt. 49. At the hearing, **XXXXXXXXXX**

A breakdown of Debtor's "questionable" change in expenses is detailed further below.

### **Multiple Requests for Relief**

The court notes that this Motion attempts to join multiple claims for relief in one motion. The first being Motion to Approve Modification of Loan. The second motion is for Motion to Approve Settlement as provided in Federal Rule of Bankruptcy Procedure 9019.

Movant joined the Loan Modification motion with the Motion to Approve Settlement request. Upon review of the local rules, these two requests for relief are not an "automatic exception" that would allow for them to be joined as one motion.

However, given how intertwined the two requests would be, as the settlement includes as terms a loan modification, the court waives the requirement of two separate motions this one time.

### **Trustee's Opposition**

#### *Settlement Proceeds*

David Cusick, Chapter 13 Trustee, filed an opposition on October 18, 2022. Dckt. 76. Trustee indicates any nonexempt funds from the \$15,000.00 settlement should be used to fund the Plan.

#### *Schedules I & J Filed as Exhibits Only*

Additionally, Trustee points out that Schedule I & J were filed as Exhibits and not as amendments. Amended and supplemental schedules need to be filed on the docket separately, not as exhibits. This avoids confusion and ensures the court and parties are always looking at the most recent schedules, instead of pining through all filings in the form of exhibits and otherwise to try and find the most recent schedules

The court notes the attached exhibits do not include whether they are an amended or supplemental filing.

*Unexplained Increase in Expenses*

Trustee also notes several unexplained discrepancies like increased expenses. Trustee asserts these excessive expenses might indicate bad faith since Debtor is not proposing to pay creditors in full.

**Debtor's Response**

Debtor filed a response on October 25, 2022. Dckt. 79. Debtor states they agree to pay the non-exempt portion of the settlement agreement into the Plan. This will equate to roughly \$14,132.00. Debtor states the objection to Debtor's expenses are not relevant to the loan modification and settlement.

When comparing Debtor's current Schedule I/J, amended June 24, 2019, Dckt. 49, to Debtor's proposed Schedule I/J attached to this Motion, filed as Exhibit D, Dckt. 74, the court notes the following expense changes:

	<b>Amended Schedule I, Dckt. 49</b>	<b>Schedule I as Exhibit D, Dckt. 74</b>	<b>Difference</b>
Debtor Monthly Income	\$12,174.70	\$15,752.18	\$3,550.48
Non-filing Spouse Monthly Income	\$0.00	\$1,400.00	\$1,400.00
Monthly income of Debtor and Non-filing Spouse	\$8,698.74	\$11,839.20	<b>\$3,140.46</b>

Therefore, some time in the past three years since the most recent Schedule I was filed, Debtor and their non-filing spouse appear to have increased their income by an additional \$3,140.46 per month to fund the Plan. It is not clear to the court when this increase began, as the schedules are not marked as either supplemental or amended.

The Trustee's Opposition does not state whether Debtor was obligated to report increases in income, whether Debtor provided copies of annual tax returns that did not accurately state income, or other information provided the Trustee was inaccurate.<sup>FN.1.</sup>

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FN. 1. As stated in Section 6, ¶ 6.02 of the Confirmed Plan (Dckt. 48), which incorporated Local Bankruptcy Rule 3015-1(b)(5) in this case, "Upon the trustee's request, the debtor shall provide the

trustee with a copy of any tax return, W-2 form, and 1099 form filed or received while the case is pending, and furnish the trustee with periodic financial information regarding the debtor's business or financial affairs."

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When reviewing the expenses between the two schedules:

	<b>Amended Schedule I/J, Dckt. 49</b>	<b>Schedule I/J as Exhibit D, Dckt. 74</b>	<b>Difference</b>
Mortgage Expenses	\$2,000.00	\$2,293.75	\$293.75
Real Estate Taxes	\$0.00	\$60.00	\$60.00
Home Maintenance, repair, and upkeep expenses	\$100.00	\$200.00	\$100.00
Additional Mortgage Payments	\$0.00	\$150.00	\$150.00
Electricity, Heat, Natural Gas	\$350.68	\$600.00	\$249.32
Water, sewer, garbage collection	\$150.00	\$275.00	\$125.00
Food and Housekeeping Supplies	\$1,400.00	\$2,000.00	\$600.00
Childcare and children's education costs	\$920.00	\$1,700.00	\$780.00
Clothing, laundry, and dry cleaning	\$350.00	\$400.00	\$50.00
Transportation	\$650.00	\$1,000.00	\$350.00
Entertainment	\$100.00	\$400.00	\$300.00
Charitable Contributions	\$10.00	\$50.00	\$40.00
Vehicle Insurance	\$181.00	\$311.00	\$130.00
Taxes	\$27.00	\$15.00	\$(12.00)
Solar Lease	\$150.00	\$0.00	\$(150.00)



<b>Total additional expenses</b>	<b>\$3,066.07</b>
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The additional expenses are roughly equal to the amount of additional income the two spouses have. This is perplexing to the court, as it is not clear why expenses have increased so drastically. The court notes, on Debtor's 2019 Schedule J, Debtor had four dependents, all under the age of eighteen (18). The new Schedule J indicates Debtor only has one dependent under the age of eighteen (18). The other three dependants include a twenty year old stepdaughter, a twenty year old step son, and Debtor's non-filing spouse.

Even with inflation, the rapid increase of expenses indicates possible bad faith on behalf of the Debtor. Although the Plan is nearly complete, the Plan only accounts for a four percent dividend to nonpriority unsecured claims. Amended Plan, Dckt. 48. It appears within the last three years since filing an updated schedule, at some point Debtor may have been able to increase their Plan payment and pay more to unsecured claims.

At the hearing, **XXXXXXXXXX**

## **DISCUSSION**

~~Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:~~

- ~~1. The probability of success in the litigation;~~
- ~~2. Any difficulties expected in collection;~~
- ~~3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and~~
- ~~4. The paramount interest of the creditors and a proper deference to their reasonable views.~~

~~*In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986); see also *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).~~

### **Probability of Success**

~~Debtor argues this factor is met as Debtor is receiving the modification they originally requested. Litigation is uncertain and this settlement resolves the uncertainties.~~

### **Difficulties in Collection**

~~Debtor argues this factor is neutral.~~

### **~~Expense, Inconvenience, and Delay of Continued Litigation~~**

~~Debtor argues this fact weighs in favor of approving the settlement as it allowss Debtor to enter the modification they originally agreed to without incurring fees, costs, delays, and stress that comes with litigation.~~

### **~~Paramount Interest of Creditors~~**

~~Debtor argues this factor weighs in favor of approving the settlement as it allows Debtor to remain in their residence without incurring expenses from moving and possibly failing to make Plan payments.~~

### **~~Consideration of Additional Offers~~**

~~At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing~~

~~Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because it allows Debtor to receive the modification originally requested, reduces their mortgage payment by \$300, and allows proceeds from the settlement to be paid into the Plan. The Motion is granted.~~

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

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

~~The Motion to Approve Compromise filed by Shawn Bartlett (“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 for Approval of Compromise between Debtor and Service One, Inc. dba BSI Financial Services (“Creditor”), is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit 1 in support of the Motion (Dckt. 74) to amend the terms of the loan with which is secured by the real property commonly known as 6320 Westwood Drive, Rocklin, California 95677.~~

**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).**

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on October 12, 2022. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

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

- A. Debtor is delinquent in Plan payments to the Trustee,
- B. Debtor failed to provide proof of Debtor's social security number to the Trustee at the First Meeting of Creditors, which was continued to November 3, 2022, and
- C. Debtor's Schedules filed are inaccurate or missing information because Debtor admitted at the First Meeting of Creditors to having a Venmo account.

## DISCUSSION

Trustee's objections are well-taken.

### **Delinquency**

Debtor is \$7,679.32 delinquent in plan payments, which represents more than one month of the \$7,550.00 plan payment. Before the hearing, another plan payment will be due. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **Failure to Provide Social Security Number**

Debtor has failed to submit proof of their social security number to Trustee as required by Federal Rules of Bankruptcy Procedure 4002(b)(1)(B). Attempting to confirm a plan while failing to provide proof of identification 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).

### **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). Trustee states that the Plan may not be feasible because Debtor admitted at the First Meeting of Creditors that Debtor has a Venmo account. The Venmo account was not listed as an asset on Debtor's Schedule A/B, and has not filed an amendment to add it. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

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

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

**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).**

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**NOTICE AS A MOTION UNDER LBR 9014-1(f)(1) OR (f)(2) IS UNCLEAR**

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 on the Motion for Order to Show Cause and Evidentiary Hearing. Based upon no indication that written opposition is required, the court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2). Movant 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)(l).

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, creditor, and creditor's counsel on October 18, 2022. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

**The Motion for Order to Show Cause and Evidentiary Hearing is XXXXX.**

On October 18, 2022, the debtors, Michael Anthony Carter and Torrie Gidget Conn ("Debtor"), filed this Motion for an Order to Show Cause and Evidentiary Hearing, Dckt. 95, to require David P. Cusick, Chapter 13 Bankruptcy Trustee ("Trustee") to show cause why they should not be sanctioned.

Debtor seeks to resolve the issue whether:

1. Trustee's duties are biased and unfair choosing "the fate of one creditor over other creditors";
2. Trustee is refusing to recognize all creditors;
3. Trustee falsely allege facts of Debtor being "subpar";
4. Trustee allows and blesses a Creditor with defects and deficiencies to move forward with relief from the automatic stay;
5. Trustee justified a creditor for not filing a proof of claim;
6. Trustee failed to protect property of the Debtor's interest as creditors and the bankruptcy estate;

As the court has noted in other related proceedings, the Debtors are asserting that they are creditors of themselves as debtors. The legal foundation for Debtors to be creditors of themselves will need to be developed in this case. As of now, they have filed proofs of claim and no objection thereto has been filed.

7. And other allegations of misconduct.

### **Factual Assertions**

Debtor claims:

1. Trustee is an officer of the court.
2. Trustee acted with collusion and negligence by filing a nonopposition in a Motion for Relief by Federal National Mortgage Association ("Creditor").
3. Trustee, in their nonopposition, implies there were deficiencies with Creditor's Motion.
4. Trustee acted with bias towards Creditor by filing a nonopposition and not requiring a Proof of Claim.

### **Debtor's Prayer**

Debtor requests the court issue an Order to Show Cause and Evidentiary Hearing for Trustee to regain the confidence of Debtor as being unbiased into their affairs.

### **November 1, 2022 Hearing**

The court has previously addressed with Debtors the requirement that parties are responsible for prosecuting their matters, and the court then rules on disputes being litigated. Additionally, the court does not have the power to address failure of person to comply with orders of the court, failing to comply with

the laws and rules governing the practice in federal court, violations of the certifications made pursuant to Federal Rule of Bankruptcy Procedure 9011. (This a non-exhaustive statement of powers of the court.)

At a prior hearing and in response to the pleading filed by Debtors titled “Object to Judge’s Order to Lift Automatic Stay” (which the court construed to be a Motion to Vacate Order Modifying the Automatic Stay and setting it for an initial hearing), the court some of the extraordinary tools that parties have in bankruptcy court proceedings, including the ability to conduct 2004 Examinations. In the Object/Motion to Vacate, Debtors concluded that they could not use Federal Rule of Bankruptcy Procedure 2004 to conduct examinations to investigate and obtain evidence to address their concerns that rogue (the court’s terminology) attorneys are filing pleadings and prosecuting contested matters (as well as the State Court Unlawful Detainer Action) in the name of Federal National Mortgage Association, but actually are not attorney engaged to represent the Federal National Mortgage Association. Additionally, Debtors asserted that they could not conduct 2004 Examinations of attorneys.

In the court’s order setting the Initial Hearing for the Object/Motion to Vacate, the court addressed the language of Federal Rule of Bankruptcy Procedure 2004 and providing a short excerpt from COLLIER ON BANKRUPTCY. The court addressed the broad scope of Rule 2004 and that there was no attorney exemption. The court also noted that it was likely that Debtors would not be examining the believed rogue attorneys, but would be going to Federal National Mortgage Association.

In this Motion, Debtors continue to assert that a proof of claim is required to be filed before relief may be sought in this court. A proof of claim as provided for in Federal Rule of Bankruptcy Procedure 3002 (cited to the court by Debtors) requires that a “creditor” must file a proof of claim for a claim or interest to be allowed in the bankruptcy case. However, if it is a secured claim, a proof of claim is not required.

Congress defines a claim to be a right to payment or a right to an equitable remedy for a breach of performance, if that breach gives a right to payment. 11 U.S.C. § 101(5). The term “interest” is not defined in 11 U.S.C. § 101, but it is used in that Section is defining rights someone would have a right to payment (such as a lien to secure a claim, an interest in an oil/gas/minerals lease, or an interest in a limited partnership, an interest in a security. (Examples of, and not an exclusive statement of the use of the word interest in 11 U.S.C. § 101).

Additionally, in a Chapter 13 case, the trustee is not a trustee as in a Chapter 7 or Chapter 11 case. Congress provides in 11 U.S.C. § 1302 for a Chapter 13 trustee to do the following (the court restructuring the format of the Code section for clarity with the inserts provided for cross referenced Code sections):

(b) The trustee shall—

(1) perform the duties specified in sections

704(a)(2) [“(2) be accountable for all property received”],

704(a)(3) [“(3) ensure that the debtor shall perform his intention as specified in section 521(a)(2)(B) of this title”],

704(a)(4) [“(4) investigate the financial affairs of the debtor”],

704(a)(5) [“(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper”],

704(a)(6) [“(6) if advisable, oppose the discharge of the debtor”],

704(a)(7) [“(7) unless the court orders otherwise, furnish such information concerning the estate and the estate’s administration as is requested by a party in interest”], and

704(a)(9) [“(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee”]

of this title;

(2) appear and be heard at any hearing that concerns—

(A) the value of property subject to a lien;

(B) confirmation of a plan; or

(C) modification of the plan after confirmation;

(3) dispose of, under regulations issued by the Director of the Administrative Office of the United States Courts, moneys received or to be received in a case under chapter XIII of the Bankruptcy Act;

(4) advise, other than on legal matters, and assist the debtor in performance under the plan;

(5) ensure that the debtor commences making timely payments under section 1326 of this title [11 USCS § 1326]; and

(6) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (d).

In a Chapter 13 case, similar to that in a Chapter 11 case or a Chapter 12 case, it is the debtor who exercises the powers of a trustee concerning not only prosecution of the case, but the administration of assets of the bankruptcy estate, adjudicate property interests of the bankruptcy estate, and address creditor claims.

Congress provides in 11 U.S.C. § 1303 for the powers of a Chapter 13 debtor in Chapter 13 cases as follows (the court restructuring the format of the Code section for clarity with the inserts provided for cross referenced Code sections):

§ 1303. Rights and powers of debtor



Subject to any limitations on a trustee under this chapter [11 USCS §§ 1301 et seq.], the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections

363(b),

(b) (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332 [11 USCS § 332], and after notice and a hearing, . . .the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

. . . [provisions relating to Clayton Act]

363(d)

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362 [automatic stay]. ,

363(e) [adequate protection for interest of other entity that has an interest in the property],

363(f) [sale free and clear of interests of other entity],

363(l)

(l) Subject to the provisions of section 365 [assumption of lease, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property. ,

of this title.

11 U.S.C. § 1304 includes further powers granted a Chapter 13 debtor relating to operation of a business in a Chapter 13 case, which do not appear to be at issue for the matters before the court.

The powers of a Chapter 13 debtor to “run the bankruptcy case,” and not limited merely to 11 U.S.C. § 1303 is discussed in 8 COLLIER ON BANKRUPTCY ¶ 1303.04 (16<sup>TH</sup> EDITION):

¶ 1303.04 Section 1303 Not Exclusive Listing of Chapter 13 Debtor's Rights and Powers

Section 1303 lists certain powers that a chapter 13 debtor has, exclusive of the chapter 13 trustee. It is not by any means a complete listing of the chapter 13 debtor's powers. The legislative history of the section states: “[Section 1303] does not imply that the debtor does not also possess other powers concurrently with the trustee. For example, although section 1323 [*sic*] is not specified in section 1303, certainly it is intended that the debtor has the power to sue and be sued.”<sup>1</sup>

The legislative history of section 323 gives the same message:

[Section 323(b)] grants the trustee the capacity to sue and be sued. If the debtor remains in possession in a chapter 11 case, section 1107 gives the debtor in possession these rights of the trustee: the debtor in possession becomes the representative of the estate, and may sue and be sued. The same applies in a chapter 13 case.<sup>2</sup>

Relying upon this legislative history, courts have granted chapter 13 debtors the right to bring lawsuits that are property of the estate.<sup>3</sup> They have recognized that there are many rights and powers that a chapter debtor must have, simply because it would be impossible for chapter 13 to work without them.<sup>4</sup>

Certain rights, such as the right to bring a lawsuit and the right to use property of the estate in the ordinary course of the debtor's financial affairs, are implicit in section 1306(b), which allows the debtor to retain possession of all

property of the estate, except as provided in a confirmed plan or order confirming a plan.<sup>5</sup> Obviously, a chapter 13 debtor must be able to continue using his or her home, car and household possessions. Section 1304(b), recognizing that some restriction is needed with respect to a debtor operating a business who may wish to use, sell or lease property out of the ordinary course of business, subjects that debtor to certain provisions of section 363(c) that are applicable to trustees and chapter 11 debtors in possession.<sup>6</sup>

Some courts have held that chapter 13 debtors have the same powers as a debtor in possession to assert the trustee's avoiding powers.<sup>7</sup> However, other courts have rejected this view,<sup>8</sup> and permitted debtors to bring avoidance actions only when permitted by section 522(h).<sup>9</sup> In any event, a debtor's possible lack of standing can be cured by the addition of the chapter 13 trustee as a party<sup>10</sup> or by a provision in a confirmed plan allowing the debtor to exercise the trustee's avoiding powers. Such a provision is not prohibited by the Code and therefore should be permissible under section 1322(b)(11).<sup>11</sup>

#### Footnotes

1 124 Cong. Rec. H11106 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards), reprinted in App. Pt. 4(f)(i) *infra*.

2 H.R. Rep. No. 595, 95th Cong., 1st Sess., 326 (1977), reprinted in App. Pt. 4(d)(i) *infra*.

3 *Smith v. Rockett*, 522 F.3d 1080 (10th Cir. 2008); *Crosby v. Monroe County*, 394 F.3d 1328 (11th Cir. Ala. 2004); *Cable v. Ivy Tech State College*, 200 F.3d 467 (7th Cir. 1999); *Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513 (2d Cir. 1998).

4 *In re Griner*, 240 B.R. 432 (Bankr. S.D. Ala. 1999) (giving as examples the filing of tax returns and the avoiding of liens); see also *In re Janoff*, 54 B.R. 741 (Bankr. D.N.J. 1985) (debtor has right to seek sale of property under section 363(h)).

5 11 U.S.C. § 1306(b); see ¶ 1306.03 *infra*.

6 11 U.S.C. § 1304(b); see ¶ 1304.03 *infra*.

7 E.g., *Countrywide Home Loans v. Dickson (In re Dickson)*, 427 B.R. 399 (B.A.P. 6th Cir. 2010), *aff'd* on other grounds, 655 F.3d 585 (6th Cir. 2011); *In re Cohen*, 305 B.R. 886 (B.A.P. 9th Cir. 2004); *United States v. Dewes*, 315 B.R. 834 (N.D. Ind. 2004); *Thacker v. United Companies Lending Corp.*, 256 B.R. 724 (W.D. Ky. 2000); *In re Ottaviano*, 68 B.R. 238 (Bankr. D. Conn. 1986).

8 *E.g., Stangel v. United States (In re Stangel)*, 219 F.3d 498 (5th Cir. 2000); *Hansen v. Hansen (In re Hansen)*, 332 B.R. 8, 11 (B.A.P. 10th Cir. 2005); *In re Merrifield*, 214 B.R. 362 (B.A.P. 8th Cir. 1997).

9 11 U.S.C. § 522(h); *see* ¶ 522.12[2] *supra*.

10 *Wood v. Mize (In re Wood)*, 301 B.R. 558 (Bankr. W.D. Mo. 2003); *Bell v. Instant Car Title Loans (In re Bell)*, 279 B.R. 890 (Bankr. N.D. Ga. 2002).

11 *See* ¶ 1322.15[3] *infra*.

At the hearing, XXXXXXXXXXXX

11. [21-22581-E-13](#)  
[LRR-2](#)

JONATHAN WIENEKE  
Len ReidReynoso

MOTION TO MODIFY PLAN  
9-12-22 [\[57\]](#)

**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.

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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 September 12, 2022. By the court's calculation, 50 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).

<b>The Motion to Confirm the Modified Plan is denied.</b>
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The debtor, Jonathan Douglas Wieneke (“Debtor”) seeks confirmation of the Modified Plan because debtor would like to make up two previous past due payments at the end of the plan to not interrupt the current plan payments. Declaration, Dckt. 59. The Modified Plan provides the plan payment to be \$4,134.13 for months 1-4, then \$4,099.00 for months 5-12, then \$4,348.50 for months 13-62. Modified Plan, Dckt. 60. 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 October 12, 2022. Dckt. 62. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in Plan payments;
- B. The proposed Plan will take more than 60 months;
- C. The proposed Plan fails to cure post-petition arrearage;
- D. Debtor failed to file current schedules I and J; and
- D. Debtor does not state grounds for modification of Plan.

## **DISCUSSION**

### **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$12,450.16 delinquent in plan payments, which represents multiple months of the \$4,134.13 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **Failure to Complete Plan Within Allotted Time**

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 62 months in Section 2.03 of the Plan. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

### **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). There are no current Schedules I & J filed with motion to prove that debtor can comply with Plan. Without an accurate picture of Debtor’s financial reality, the court cannot determine whether the Plan is confirmable.

### **Failure to Cure Post-Petition Arrearage**

Select Portfolio Servicing, Inc. (“Creditor”) holds a deed of trust secured by Debtor’s residence. Debtor failed to make timely payments under the previous Plan so trustee lacked sufficient funds to pay Creditor. The Modified Plan claims the same amount of arrears (\$11,090.04) as stated in

the prior confirmed Plan, Dckt. 39. Therefore, the proposed Plan has not been updated to reflect the current amount of arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

### **Failure to State Grounds for Modification of Plan**

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. According to Local Bankruptcy Rule 9014-1(d)(3)(D), “every motion or other request for relief shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested.”

Here, while Debtor provided a declaration that can be used as evidence establishing its factual allegations, Debtor fails to assert reasons for why they are requesting to modify their Plan. Simply stating that Debtor will catch up on Plan payments at the end is not sufficient evidence for the relief requested.

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Jonathan Douglas Wieneke (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

**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).**

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney, on October 13, 2022. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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

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

- A. Debtor's proposed plan does not reflect Debtor's best efforts, and
- B. Debtor may not be able to afford the Plan payments or comply with the Plan.

## DISCUSSION

Trustee's objections are well-taken.

## Not Best Effort

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

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

The Plan proposes to pay a 0% percent dividend to unsecured claims, which total \$106,977.00. Debtor's Schedule I reflects a total gross income of \$79,305.00. However, based on Debtor's July 2022 profit and loss statement, Trustee estimates Debtor's gross income of \$112,964.32. Therefore, Debtor appears to have under reported her gross income by \$33,659.32. Trustee also indicates expenses and net income appear underreported. This also indicates Form 122C-1 and 2 may not be accurately reported.

Thus, the court may not approve the Plan.

### **Plan Term is More Than 60 months**

Trustee Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to Trustee, the Plan will complete in 72 months due to the priority claim filed by the Internal Revenue Service for the amount of \$144,638.18. Proof of Claim, 1-5. Debtor's Schedule E/F reflects only \$104,000.00 owed. Therefore, the Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d)

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

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

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

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

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



# FINAL RULINGS

13. [22-22202-E-13](#)  
[DPC-1](#)

EDGARDO HERNANDEZ  
Gabriel Liberman

OBJECTION TO DISCHARGE  
OF DEBTOR UNDER 11 U.S.C.  
SECTION 1328(f)  
9-26-22 [\[13\]](#)

**Final Ruling:** No appearance at the November 1, 2022 hearing is required.

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

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 September 26, 2022. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). 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><b>The Objection to Discharge is granted.</b></p>
--

David Cusick, the Chapter 13 Trustee, ("Objector") filed the instant Objection to Discharge on September 26, 2022. Dckt. 13.

Objector argues that Edgardo Alea Hernandez ("Debtor") is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on July 20, 2021. Case No. 21-22627. Debtor received a discharge on October 22, 2021. Case No. 21-22627, Dckt. 17.

The instant case was filed under Chapter 13 on August 31, 2022.

11 U.S.C. § 1328(f) provides that a court shall not grant a discharge if a debtor has received a discharge “in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter.” 11 U.S.C. § 1328(f)(1).

Here, Debtor received a discharge under 11 U.S.C. § 727 on October 22, 2021, which is less than four years preceding the date of the filing of the instant case. Case No. 21-22627, Dckt. 17. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No. 22-22202), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant 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 Objection to Discharge filed by David 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 Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 22-22202, the case shall be closed without the entry of a discharge.

**Final Ruling: No appearance at the November 1, 2022 Hearing is required.**

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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, Creditor, and Office of the United States Trustee on September 13, 2022. By the court's calculation, 35 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). 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 to Value the Secured Claim of Comerica Bank ("Creditor") is granted.**

The Motion to Value filed by Danny Richard Horsfall and Debra Sue Horsfall ("Debtor") to value the secured claim of Comerica Bank ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 68. Debtor is the owner of the subject real property commonly known as 1119 East 19th Street, Marysville, California ("Property"). Debtor seeks to value the Property at a fair market value of \$134,000.00 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).

Debtor offers the Declaration of James Chausee, a licensed real estate appraiser with 38 years' experience, who opines that the value of the Property is \$134,000.00. Exhibit A, Dckt. 67.

The valuation of property that secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

(a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (emphasis added). For the court to determine that creditor's secured claim (rights and interest in collateral), that creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2 (case or controversy requirement for the parties seeking relief from a federal court).

### **Proof of Service**

Debtor's Proof of Service indicates a detailed search on the Secretary of State to locate the address of Creditor. Dckt. 70. Creditor was served at their Principal Address, also indicated as their Mailing Address in Dallas, Texas. Additionally, Debtor served a "Thomas J. Colven III," a Marina Del Rey address, appearing to be where their agent is located, a Sacramento Branch, and a PO Box in Dallas Texas. It appears, therefore, creditor had adequate notice to appear before the court.

### **No Proof of Claim filed**

The court has reviewed the Claims Registry for this bankruptcy case. No Proof of Claim has been filed by a creditor that appears to be for the claim to be valued.

### **Evidence to Support the Secured Interest**

Comerica was listed on Debtor's Schedule F as an unsecured nonpriority claim in the "unknown" amount. Dckt. 1 p. 39. Therefore, at the time of filing the petition, it appears Debtor believes Comerica was unsecured, not secured. Aside from being listed on Schedule F as an unsecured claim, there is no evidence of Comerica's interest. Debtor did not provide the court with any evidence in the form of a deed of trust, recorded abstract, or otherwise, evidencing Creditor has a secured interest in Debtor's Property. It is unclear to the court whether Comerica had a secured interest at the date of filing and Debtor did not know it was secured, or if Comerica secured their claim after the date of filing.

The declaration of Debtor indicates Comerica, at the time of filing, had a fourth position note and Deed of Trust in the amount of \$465,000.00. Declaration, Dckt. 68. Debtor provides no copy of the Deed of Trust, or an further evidence beyond their Declaration.

As of this time, there is no secured claim in this case for the court to value such claim. Creditor has not filed a proof of claim. Debtor has not filed a proof of claim for Creditor. Debtor has not provided the court with a certified copy of the lien, the loan documents, and evidence of amount of the debt (like a statement from the creditor or documentation obtained through a 2004 exam or discovery in this Contested Matter).

At the hearing, the Parties agreed to continue the hearing to allow Debtor to supplement the record and document what claim of Comerica is being valued in this case.

### **Debtor's Supplemental Documents**

Debtor filed a UCC Financing Statement which has, as attached, a copy of the recorded Deed of Trust, establishing Comerica's secured claim on the Real Property on October 18, 2022. Exhibit B, Dckt. 71.

### **DISCUSSION**

The senior in priority first, second, and third deed of trusts, at the time of filing, secured claims in the amounts of approximately \$168,505.32, \$35,912.25, and \$51,156.74, respectively. Declaration, Dckt. 68. Creditor's fourth deed of trust continues to secure a claim with a balance of approximately \$465,000.00. *Id.* Therefore, at the time of filing, Creditor's claim secured by a junior deed of trust was completely under-collateralized. Creditor's secured claim is determined to be in the amount of \$0.00, the value of the collateral, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). 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 Danny R. Horsfall and Debra Horsfall ("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 Comerica Bank ("Creditor") secured by a fourth in priority deed of trust recorded against the real property commonly known as 1119 East 19<sup>th</sup> Street, Marysville, CA 95901, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$134,000.00 and is encumbered by a senior lien securing a claim in the amount of \$465,000.00, which exceeds the value of the Property that is subject to Creditor's lien.

15. [22-22225](#)-E-13  
[DPC](#)-1

ROBERTO PADILLA  
Scott Johnson

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
10-12-22 [[16](#)]

**Final Ruling:** No appearance at the November 1, 2022 hearing is required.  
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David Cusick (“the Chapter 13 Trustee”) having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation of Plan was dismissed without prejudice, and the matter is removed from the calendar.**

16. [22-22092](#)-E-13  
[DPC](#)-1

HEATH FULKERSON  
Pro Se

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
10-12-22 [[22](#)]

**DEBTOR DISMISSED: 10/13/22**

**Final Ruling:** No appearance at the November 1, 2022 hearing is required.  
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The case having previously been dismissed, the Objection is overruled as moot.

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

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

The Objection to Confirmation of Plan having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection is overruled as moot, the case having been dismissed.