

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 16, 2021 at 2:00 p.m.

1.	<u>20-23595</u> -E-13 <u>DPC-2</u>	JESUS AVILA Douglas Jacobs	CONTINUED MOTION TO DISMISS CASE 9-22-21 <u>18</u>
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Items 1 thru 2

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on September 22, 2021. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss is XXXX.
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The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that:

1. The Debtor, Jesus Avila ("Debtor"), is delinquent in plan payments.
2. Debtor's Plan will exceed the 60 month commitment period provided for in the confirmed plan.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on October 4, 2021. Dckt. 22. Debtor states the delinquency will be cured prior to the hearing date and will be filing a modified plan to raise his monthly plan payments

in order to complete the plan within 60 months.

DISCUSSION

Delinquent

Debtor is \$400.00 delinquent in plan payments, which represents one month of the \$400.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Material Default for Exceeding Sixty Months

Debtor is in material default under the Plan because Debtor will not complete the Plan within the required 60 months. A total of 47 months remain under the confirmed Plan where Debtor will pay \$400.00 per month. This would leave Debtor paying a total of \$18,800.00. However, \$23,289.92 is needed, less Trustee fees, to pay secured and priority claims and attorney fees. Therefore, the Plan will complete in 74 months as opposed to 60 months pursuant to the confirmed Plan. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d).

Amended Plan and Motion to Confirm Filed

Debtor has filed an Amended Plan (Dckt. 26) and Motion to Confirm (Dckt. 25) have been filed. Upon review of the Motion to Confirm, the court notes that it fails to comply with the basic pleading requirements established by the United States Supreme Court in Federal Rule of Bankruptcy Procedure 9013 (which parallels Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 for adversary proceedings) requiring that the grounds upon which the relief is based must be stated with “particularity.” The court has clearly and repeatedly addressed this basic pleading requirement and uniformly applied it for many years.

Here, the grounds upon which Debtor bases relief in the form of an order confirming the Amended Chapter 13 Plan consist of:

The Debtor proposes that the Chapter 13 Plan filed herewith be approved as the Debtor's plan.

Debtor is amending his plan to increase his monthly plan payments in order to insure that all creditors, fees, and expenses are paid so that the plan can complete in 60 months.

The existing plan was confirmed on 9/5/2020 (see Docket# 15).

A true and correct copy of the proposed Amended plan is filed herewith and made a part hereof.

Motion, Dckt. 25.

The court first notes that Debtor is not seeking to merely confirm an amended plan, but is seeking to modify an existing confirmed plan pursuant to 11 U.S.C. § 1329. Considering the above

grounds, even if taken as true based on the mere assertion, such do not provide a basis for confirming a modified plan which requirements therefore are in 11 U.S.C. §§ 1329, 1325, 1322.

Debtor states in his Declaration (which is not the Motion) that he can now increase his plan payment by 24%, from \$400 to \$496, “because my take-home income is greater than it was when I filed this case.” Declaration, ¶ 7; Dckt. 28. Debtor does not explain how his take-home income has increased.

Debtor also states that he will file “Amended” Schedules I and J to show the greater income and how he can increase his Plan payment by 24%. *Id.* Such Amended Schedules would correct the “error” in the original Schedules and date back to the July 23, 2020 filing of this case. If there was a post-petition change, then Debtor would be signing under penalty of perjury Supplemental Schedules documenting such post-petition change in income or expenses. Amended Schedules were filed on October 13, 2021, correcting the “error” in the original Schedules and documenting that Debtor had this extra take-home income since this case was filed in July 2020.

On original Schedule I (Dckt. 1, 29-30) Debtor stated having monthly gross income of \$5,971.33. His deductions include (\$268.67) for insurance and (\$1,061.67) for Domestic support obligations.

On Amended Schedule A, Debtor states having monthly gross income of \$6,153.86, a difference of \$182.53. However, there are no deductions for rent or Domestic support obligations.

On the First Amended (relied upon by the court for confirmation of the Plan in this case), Dckt. 14) and Second Amended Schedules J, Dckt. 31, Debtor reports having three minor dependants. On First Amended Schedule J, the court notes that Debtor states under penalty of perjury:

- A. He has \$0.00 for rent/mortgage, utilities, home maintenance or repairs. However, on Schedule I, Dckt. 1, Debtor states that he has (\$827.67) deducted from his paycheck, as well as (\$970.67) for “Apt Taxbl (deduction for rent paid by employer).”
- B. For food and housekeeping supplies for Debtor and three children, the total expense was \$550.
 - 1. Allowing (\$50) a month for housekeeping supplies, that leaves (\$500) for food for the four family members. In a thirty day month, that is (\$4.16) per person per meal.
- C. For clothing for one adult and three children, their clothing expense is (\$75) a month. That would be (\$225) a year per person (including three growing children) for the five years of the Plan.
- D. For medical and dental expenses, Debtor states they are (\$45) a month.
- E. Debtor lists (\$300) a month for transportation, consisting of fuel, maintenance, repairs, and registration.

With the Second Amended Schedule J, Dckt. 41, Debtor now states having various different costs and expenses, which include:

- A. Rent expenses of (\$1,300) is given.
- B. Renter's insurance of (\$10) is now stated.
- C. Debtor now lists having (\$120) in electricity and (\$50) in water/sewer/garbage, the First Amended Schedule J stated that those expenses were (\$0.00).
- D. Debtor states having slashed food and housekeeping expenses to (\$300) a month.
 - 1. Allowing (\$50) a month for housekeeping expenses, that leaves \$250 a month for the Debtor and three minor children. For a thirty day month, this is only (\$2.08) per person per meal.
- E. Debtor has now stated he has (\$50) a month in childcare costs, while on First Amended Schedule J it was stated to be (\$0.00) a month.
- F. Debtor reduces the monthly clothing expense for Debtor and the three growing child dependants to (\$50) a month, which is (\$12.50) a month for Debtor and the three children.
- G. Debtor now states that his monthly medical and dental expenses are (\$200), a 344% increase from the (\$45) a month stated on First Amended Schedule J.
- H. Debtor decreases his fuel, maintenance, repair, and vehicle registration expense to (\$250) a month. Allowing (\$20) a month for registration and (\$40) a month for maintenance/repairs, Debtor then has (\$190) a month for fuel. At \$4.25 a gallon, that allows Debtor to purchase 44 gallons of gas a month. Assuming that Debtor averages 18 miles to the gallon in his 2007 GMC Denali with 200,000 miles on it, which indicates that the monthly repair and maintenance expenses for the 14 year old vehicle may be higher, (Schedule A/B, Dckt. 1 at 11), that allows Debtor to drive 729 miles a month, averaging 190 miles a week (24 miles a day).
- I. Debtor now lists life and health insurance on Second Amended Schedule J rather than as a deduction on Amended Schedule I.
- J. Debtor also lists a child support obligation of (\$1,100) a month as an expense on Second Amended Schedule rather than as a deduction on Amended Schedule I.

These Amended Schedules make some very substantial changes in expenses without any explanation provided by Debtor for such changes/errors. Also, some expenses, such as fuel and food, appear to be unreasonably low. It makes it appear that the Schedules are drafted to reach the preordained necessary monthly net income number for Debtor to state under penalty of perjury, rather than accurate income and expense number.

It appears Debtor needs a "reset" to meet with counsel, come up with accurate income and

expense number from the start of the case (rather than multiple “amendments” to correct errors).

The Trustee agreed to a continuance to allow Debtor and Debtor’s counsel to prosecute confirmation of a plan to address these issues.

November 16, 2021 Hearing

At the hearing, ~~XXXXXXXXXX~~

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

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

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

~~**IT IS ORDERED** that the hearing on the Motion to Dismiss is ~~xxxx~~.~~

Final Ruling: No appearance at the November 16, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 7, 2021. By the court's calculation, 40 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>The Motion to Confirm the Modified Plan is dismissed without prejudice.</p>

The debtor, Jesus Avila ("Debtor") seeks confirmation of the Modified Plan to increase his monthly plan payments in order to insure all creditors, fees, and expenses are paid so the plan can complete in sixty (60) months. Declaration, Dckt. 28. The Modified Plan provides \$23,289.00 to be paid through forty-seven (47) payments of \$500.00 for forty-seven (47) months, and a 0% percent dividend to unsecured claims totaling \$28,058.00. Modified Plan, Dckt. 26. 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 November 2, 2021. Dckt. 36. Trustee opposes confirmation of the Plan on the basis that:

- A. Delinquent - Debtor is delinquent \$1,000.00 under the terms of the proposed modified plan, where \$6,300.00 has come due through October 2021, (month 15 where Debtors Petition was filed 7-23-20), and Debtor has paid to date a total of \$5,300.00. The Nonstandard Provisions propose a fifty-nine (59) month plan, which is not consistent with Section 2.03 of the Plan the Motion, and the Declaration, which proposes sixty (60) months.

- B. Feasibility - Plan will complete in more than the 60 months proposed, possibly taking 63 months. Debtor would need to increase their plan payment from \$500.00 to \$520.00 per month over the remaining 46 months to be feasible with 0% to unsecured creditors.
- C. Secured IRS Claim - Debtor's proposed modified Plan does not provide for the secured portion of the claim by the Internal Revenue Service.
- D. Legal Basis - Motion does not cite applicable code such as 11 U.S.C. § 1329, which is required under Local Bankruptcy Rule § 9014-1(d), and Federal Rules of Bankruptcy Procedure § 9013.
- E. Schedules I and J - Schedules I and J filed October 13, Dckt. 31, are marked amended rather than supplemental.

DEBTOR'S RESPONSE

Debtor filed a response on November 8, 2021. Dckt. 39. Debtor states they will be current by the time of this hearing. Additionally, Debtor states Trustee's objections are well taken and Debtor will file a new plan and motion to confirm.

Debtor Request For Motion Not to Be Granted

Debtor requests this plan not be confirmed as he is addressing Trustee's concerns with a new modified plan. The new Modified Plan was filed on November 11, 2021. Dckt. 46.

Debtor having filed a Response requesting this plan not be confirmed, which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on November 16, 2021, Dckt. 39; no prejudice to the responding party appearing by the dismissal of the Motion; Debtor having the right to request dismissal of the Motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by Trustee; the Ex Parte Motion is granted, Debtor's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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 Plan filed by Jesus Avila ("Debtor") having been presented to the court, Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 39, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm the Modified Plan is dismissed without prejudice.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 7, 2021. By the court’s calculation, 40 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

The debtor, Heidi Francis Adcock Arasomwan (“Debtor”), seeks confirmation of the Amended Plan. The Amended Plan provides for adequate protection of New Rez LLC, dba Shellpoint Mortgage Servicing’s, (“Creditor”), interest in the real property commonly known as 170 Aviator Circle, Sacramento, CA 95835, pending either the consensual modification of the Secure Claim or termination of the automatic stay and surrender of the collateral. Upon denial of the loan modification and Debtor’s failure to timely file and serve a proposed modified plan and motion to confirm, Creditor’s secured claim is a Class 3 Claim, with the added requirement that an order modifying the automatic stay must be obtained. During the loan modification process Creditor shall be paid \$2,238.00 a month as an adequate protection payment for its secured claim through this Chapter 13 plan. Amended Plan, Dckt. 77. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE’S OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on November 1, 2021. Dckt. 84. Trustee opposes confirmation of the Plan on the basis that:

The Plan’s additional **provisions may improperly try to alter the**

rights of a claim secured only by an interest in debtor's principal residence to New Rez LLC, dba Shellpoint Mortgage Servicing, contrary to 11 U.S.C. §1322(b)(2.) (Page 8; NonStandard Provisions for Section 2.01 §7.01 &, §7.02)

The Debtor proposes a Plan **calling for adequate protection payments to a debt to Shellpoint** who is secured solely by Debtor's principal residence, (see Claim #7.) While the Debtor uses terms the Court will usually consider, ("Ensminger Provisions"), **this provision seems to be a modification** of the creditor's secured claim through confirmation of the Plan and the Trustee is uncertain if the creditor has approved this modification and it **remains unclear to the Trustee, if the Court will want to approve** the terms as proposed by the Debtor.

Opposition, p. 1:26-27, 2:1-9; Dckt. 84 (emphasis added). ^{Fn.1.} The above is the total basis stated by the Trustee for opposing confirmation of the Plan.

The personal knowledge testimony declaration (Fed. R. Evid. 601, 602) provided by the Trustee with the opposition consists of:

1. Declarant is over 18 years of age.
2. Declarant is employed by the Trustee.
3. Declarant has reviewed the Trustee's records.
4. Debtor is current on Plan payments, having paid \$51,448.00.

The Debtor proposes a Plan calling for adequate protection payments to a debt to New Rez LLC, dba Shellpoint Mortgage Servicing, (DN 77, (Page 8; NonStandard Provisions for Section 2.01 §7.01 &, §7.02), who is secured solely by Debtor's principal residence, (Claim #7). The Debtor appears to be using terms the Court will usually consider, "Ensminger Provisions"; although this provision seems to be a modification of the creditor's secured claim through confirmation of the Plan. A review of the Court's Docket, does not indicate the creditor has approved this modification

Declaration, Dckt. 85. The Declarant provides factual testimony that Debtor, based on the Trustee's records, is current and has paid \$51,448.00 into the Plan. With respect to the "may try to alter" and "unclear" if the court "wants" to confirm the Plan, no testimony is provided as to facts and matters relating to such.

FN. 1. The Trustee's pleading does not appear to be an opposition, but only a question, in which the Trustee is unsure whether he should oppose the motion or not. It merely states that the plan "may" try to improperly modify the right of creditor on a loan secured only by the Debtor's residence.

It appears that the Trustee has concluded that Congress providing in 11 U.S.C. § 361 an adequate protection requirement/option to protect a creditor's interest in collateral to actually be a

modification of a creditor's loan documents.

Looking at the Opposition and the Declaration provided in Opposition, the Trustee only provides the court with a conclusion that there could possibly, maybe a modification of Creditor's claim.

There is no legal analysis of what the asserted modification terms are in the Plan, the applicable law, and the terms of the loan that are modified by the Plan. Further, it appears that the Trustee assigns to the court the "research assignment" to determine if the Trustee has a basis to oppose the motion, and then write a "research memo" for the Trustee.

DISCUSSION

Modification of an Obligation Secured Only by Principal Residence

Trustee questions whether or not (not asserting it does or providing the Fed. R. Bankr. 9011 certifications that such position is based on proper research and application of the law) the Chapter 13 Plan was filed in good faith and whether it is an improper modification of a claim secured only by a security interest in real property that is Debtor's principal residence. Creditor has filed a Proof of Claim indicating a secured claim in the amount of \$473,397.61, secured by a first deed of trust against the property commonly known as 170 Aviator Circle, Sacramento, California 95835.

Reading the plan language of the Plan, it provides that there is no modification of Creditor's claim. It provides that Debtor will seek a loan modification from Creditor while Debtor performs the Plan. Rather than providing for no payments to Creditor while seeking the loan modification, adequate protection payments are required.

The Plan, § 7.02.1 expressly states that the Plan does not modify Creditor's secured claim. It requires, pursuant to 11 U.S.C. § 361 as enacted by Congress, for the payment of a monthly adequate protection payment of \$2,238.00, while Debtor diligently pursues a loan modification.

Additionally, the Plan provides for the in the event of the denial of a loan modification, Debtor must promptly (14 days) file a motion to modify the plan or creditor is entitled to relief from the automatic stay (as created by Congress, not the Plan, in 11 U.S.C. § 362(a)). Additionally, Creditor will have relief from the stay for any other non-monetary post-petition default grounds, failure to diligently pursue the loan modification, default in adequate protection payments, and failure to prosecute a loan modification after denial of a requested loan modification.

The proposed Amended Chapter 13 Plan complies with 11 U.S.C. § 1322, § 1325; and the Motion is granted and the Plan is confirmed.

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by the debtor, Heidi Adcock ("Debtor") having been presented to the court, and upon

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

IT IS ORDERED that the Motion is granted , and Debtor's Amended Chapter 13 Plan filed on October 6, 2021, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

4. [21-23315-E-13](#) **ANTIONETTE WOODS** **OBJECTION TO CONFIRMATION OF**
[DPC-1](#) **Matthew DeCaminada** **PLAN BY DAVID P. CUSICK**
 10-27-21 [31]
4 thru 5

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, on October 27, 2021. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

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

- A. The Debtor is delinquent \$450.00 in plan payments to the Trustee. The next scheduled payment of \$450.00 is due November 25, 2021, and the Debtor has paid \$0.00 into the Plan to date.
- B. Feasibility of the plan depends on the granting of a motion to avoid lien held by Northern California Collection Service, however, to date the debtor has failed to file, set for hearing, and serve on the respondent creditor and the trustee a stand-alone motion to avoid lien.
- C. The Trustee cannot assess the feasibility of the plan.
- D. The claim of Bank of America, N.A. is misclassified as a Class 4 claim.
- E. The Trustee calculates the plan will take approximately ninety-five (95) months to complete rather than sixty (60) months due claims of the IRS, Post City Financial Credit Union, and Bank of America, N.A. being filed for amounts higher than scheduled.

DISCUSSION

Trustee's objections are well-taken.

Delinquency

Debtor is \$450.00 delinquent in plan payments, which represents one month of the \$450.00 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).

Failure to Afford Plan Payment

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Feasibility of the plan depends on the granting of a motion to avoid lien held by Northern California Collection Service, however, to date the debtor has failed to file, set for hearing and serve on the respondent creditor and the trustee a stand-alone motion to avoid lien. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Looking at Debtor's Schedule C, Debtor has seven dependants - 25 year old daughter, 27 year old daughter's fiancé, 30 year old daughter, 31 year old son-in-law, 49 year old brother, 49 year old brother, and 74 year old mother. Dckt. 1 at 34. On Schedule I, Debtor lists \$1,260 of IHHS Net Income (not indicating what it is net of). *Id.* at 33. There is no contribution by any of Debtor's seven adult dependants.

Schedule J looks unrealistically small in expenses for a family unit of eight persons - Debtor and his seven adult dependants.

Bad Faith: Failure to Disclose Prior Bankruptcy Case

Trustee reports that Debtor failed to disclose a prior bankruptcy case (Case No. 20-20813, filed on February 13, 2020) on the petition. Debtor was required to report any bankruptcy cases filed within the prior eight years.

Failure to Provide for a Secured Claim

Creditor Bank of America, N.A. (“Creditor”) asserts a claim with a pre-petition arrearage of \$60,840.11 in this case. The Plan provides for treatment of this as a Class 4 claim, but the secured claim should be classified as a Class 1 claim. Creditor filed an Objection to Confirmation of Debtor’s Chapter 13 Plan on October 13, 2021 (Dckt. 24), and a proof of claim (Claim 5-1) stating that there are pre-petition arrears of approximately \$60,840.11.

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

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

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

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

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

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

When a plan does not provide for a secured claim, the remedy is not denial of confirmation. Instead, the claimholder may seek termination of the automatic stay so that it may repossess or foreclose upon its collateral. The absence of a plan provision is good evidence that the collateral for the claim is not necessary for the debtor’s rehabilitation and that the claim will not be paid. This is cause for relief

from the automatic stay. *See* 11 U.S.C. § 362(d)(1).

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

Plan Term is More Than 60 months

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 ninety-five (95) months due to claims of the IRS, Post City Financial Credit Union, and Bank of America, N.A. being filed for amounts higher than scheduled. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Motion to Modify Secured Debt

On October 28, 2021, Debtor filed a Motion for the court to authorize Debtor to consummate a loan modification with Bank of America, N.A. Dckt. 35.

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 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).

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 13, 2021. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

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The Objection to Confirmation of Plan is sustained.

Bank of America, N.A. ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

- A. Debtor's Chapter 13 Plan understates the secured creditor's pre-petition arrears. The Creditor filed a Proof of Claim on October 12, 2021 with pre-petition arrears in the amount of \$60,840.11. Debtor states in her initial Chapter 13 Plan that the pre-petition arrears owed to Secured Creditor is \$0.00.
- B. Debtor is unable to fund a feasible plan because the Debtor's average monthly income is \$7,184.07 and monthly expenses are \$6,775.36, leaving a monthly net disposable income of \$408.71 when the Debtor's monthly plan payment is \$450.00.

DISCUSSION

Creditor's objections are well-taken.

Failure to Cure Arrearage of Creditor

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts \$60,840.11 in pre-petition arrears. The Plan does not propose to cure those arrears. 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 arrears.

Failure to Afford Plan Payment

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor is unable to fund a feasible plan because the Debtor's average monthly income is \$7,184.07 and monthly expenses are \$6,775.36, leaving a monthly net disposable income of \$408.71 when the Debtor's monthly plan payment is \$450.00. 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 Bank of America, N.A. ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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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).

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 18, 2021. By the court's calculation, 29 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>The Objection to Confirmation of Plan is sustained.</p>

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

- A. Debtor's Plan may not be Debtor's best effort because Debtor appears to be over the Median Income and does not appear to be committing all projectable income into the Plan.
- B. Debtor's first Plan payment of \$1,750.00 will be due on October 25, 2021, which is before the hearing on this Objection.

DISCUSSION

Trustee's objections are well-taken.

Failure to Provide Disposable Income / Not Best Effort

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

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or the plan provides that all of 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.

Form 122C-1 indicates Debtor is above median income. Line 45 on Form 122C-2 shows Debtor has projected disposable income of \$168.34. The Trustee disputes Debtor's allowable expenses, and believes the income may be positive by at least \$1,271.34. This amount includes:

- (1) a Capital One Auto Finance payment of \$403.00;
- (2) Education for \$200.00; Optional telephone services \$300.00; and,
- (3) Education expense for dependent children under 18 of \$200.00.

Further, Debtor has two vehicles, 2016 Audi and 2020 Honda Accord. Debtor is surrendering the 2016 Audi, which eliminates the \$403.00 payment to Capital One Auto Finance thereby increasing Debtor's projected disposable income by at least \$403.00.

Debtor admitted at the First Meeting of Creditors that both of her dependents have moved out and are living independently. However, Debtor is claiming \$200.00 as Education expense for dependent children who are younger than 18. Yet, Schedule J shows both dependents as 19 and 20 years old. Additionally, Debtor is claiming another \$200.00 for Education and a deduction of \$400.00 for "Continuing education required for work." Debtor has not provided any detailed explanation of the special circumstances, along with documentation for any education expense. Therefore, the reasons for Debtor claiming \$800.00 per month in education expenses are not clear.

Debtor is seeking to deduct \$300.00 for optional telephone service but Schedule J indicates a total deduction of \$290.00 for cell phone, internet, and cable service. The Trustee is unsure why Debtor is claiming an additional \$300.00 per month in additional phone service in the Means Test.

Form 122C-1 reflects Debtor's monthly gross wage income as \$13,467.83, however, a review of Debtor's pay advice, dated August 23, 2021, covering pay period September 12, 2021 through September 18, 2021, indicated a monthly gross income of \$128,620.84 or \$15,131.86 per month. Debtor admitted at the First Meeting of Creditors she received a one-time bonus in January 2021, evidence by pay advice dated January 4, 2021, in the amount of \$5,612.85 (\$467.73 per month). Debtor's average income would be \$14,715.20 (\$15,131.86-\$467.76), which is \$1,247.37 more than what is listed on Schedule I. Additionally, Debtor admitted receiving overtime payments, indicated by pay advice dated August 9, 2021. The amount of overtime received by Debtor is calculated to be \$1,329.58 ($\$1,329.58 / 7.25 = \183.39 per month). Deducting the monthly overtime income from the monthly income Debtor's income would be \$14,531.81 (\$14,715.20-\$183.39), which is \$1,098.48 more than listed on Schedule I. Lastly, Schedule I does not reflect any tax refunds, but Debtor received tax refunds

in 2020 of \$6,744.00 or \$562.00 per month.

Debtor's calculated monthly disposable income deducts \$4,433.00 for taxes but Schedule I indicates Debtor is withholding \$4,506.67, which appears the withholding about thirty-two percent (32%), (\$4,433.00/\$13,467.38), on Form 122-C and thirty-three percent (33%), (\$4,607.67/\$13,433.33), on Schedule I. Debtor has provided her 2020 Tax Returns indicating she owes the IRS \$4,985.00, however, she received a refund of \$11,729.00 from the Franchise Tax Board, for a total refund of \$6,744.00, (\$11,729.00-\$4,985.00), or \$562.00, (\$6,744.00/12), of additional income that could be paid to unsecured creditors thereby giving a higher dividend than seven percent (7%). Additionally, Debtor's pay advice period of December 20, 2020 to December 26, 2020, shows Debtor's gross pay was \$161,789.23 and the tax withholding was \$48,112.79, (29%). Debtor increased the tax withholding in 2021, when there was a substantial refund paid in 2020.

Schedule J shows expenses based on two dependents when Debtor admitted at the First Meeting of Creditors that one dependent moved out three months ago and the other three weeks ago. Additionally, Debtor admitted that the storage unit, listed under Question #21 for \$250.00, has now increased to \$280.00 but will not be an expense starting around March 2022. Therefore, Debtor will be able to pay a higher dividend to unsecured creditors.

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 Ruling: No appearance at the November 16, 2021 hearing is required.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor’s Attorney on October 20, 2021. By the court’s calculation, 27 days’ notice was provided. 28 days’ notice is required.

Under the facts and circumstances of this objection to discharge, the court shortens the time to the 27 days given. The court has determined that oral argument will not be of assistance in rendering a decision in this matter.

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.

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee (“Objector”) objects to Donna Louise Heischober’s (“Debtor”) discharge in this case. Objector argues that 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 August 14, 2019. Case No. 19-25117. Debtor received a discharge on May 13, 2021. Case No. 19-25117, Dckt. 187.

The instant case was filed under Chapter 13 on September 13, 2021.

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 May 13, 2021, which is less than

four years preceding the date of the filing of the instant case. Case No. 19-25117, Dckt. 187. 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. 21-23224), 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. 21-23224 the case shall be closed without the entry of a discharge.

8. [21-23224](#)-E-13 **DONNA HEISCHOB** **OBJECTION TO CONFIRMATION OF**
[DPC-2](#) **Mikalsh Liviakis** **PLAN BY DAVID P. CUSICK**
DUPLICATE FILING BY M.P. **10-20-21** [[27](#)]

The Objection to Confirmation is denied without prejudice.

The Chapter 13 Trustee, David Cusick (“Trustee”), opposes confirmation of the Plan.

The court notes this is a duplicate filing of the above matter.

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

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

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

IT IS ORDERED that the Objection to the Chapter 13 Plan is denied without prejudice as it is a duplicate filing.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 26, 2021. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Substitute is granted.

Angela Cotrone ("Movant-Debtor") seeks an order approving the motion to substitute Movant-Debtor for the Deceased-Debtor, Marlene Marie Cotrone.

Movant-Debtor filed for relief under Chapter 13 on July 28, 2016. On April 17, 2018 Debtor's Chapter 13 Plan was confirmed. Dckt. 44. On October 4, 2019, Deceased- Debtor passed away. Movant-Debtor asserts that she is the lawful successor and representative of Deceased-Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, Movant-Debtor requests authorization to be substituted in for the Deceased-Debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. A Suggestion of Death was filed on October 26, 2021. Dckt. 53. Movant-Debtor is the Daughter of the Deceased-Debtor and is the successor's heir and lawful representative. Movant-Debtor states she will continue to prosecute this case in a timely and reasonable manner.

Trustee's Response

On November 1, 2021, David Cusick, Chapter 13 Trustee, filed a Response to Movant-Debtor's Motion to Substitute, Dckt. 58. The Response states Movant-Debtor has not provided a legal basis for the motion under Local Bankruptcy Rule 1016. However, the Trustee indicates that the Movant-Debtor has been making plan payments since Deceased-Debtor passed away on October 4, 2019, and a reasonable basis exists to allow the substitution. Additionally, the Trustee believes that further administration is possible and is not requiring additional plan payments. Lastly, Local Bankruptcy Rule § 1016-1(a) requires Notice of Death be filed within sixty days by counsel or the person seeking substitution. It does not state what occurs in the event the sixty days is not met. Movant-Debtor has modest income from a pension or retirement plan and her main asset is her home, with no one else in the household. Therefore, the Trustee does not oppose the Motion.^{FN.1.}

FN. 1. The Trustee is correct in that Movant has not stated what legal basis exists or why such a substitution is proper. At the hearing the court will take oral argument whether continuance of this hearing is proper to allow Movant to file a supplemental points and authorities (not less than twenty-five (25) pages in length (not counting the title page and the signature page), and then conduct live, in court oral argument (no telephonic appearances permitted).

DISCUSSION

Federal Bankruptcy Procedure 1016

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event a debtor passes away in a case “pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.” Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads (In re Eads)*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in Chapter 13 dies. *Id.*

Federal Rule of Bankruptcy Procedure 7025 incorporates Federal Rule of Civil Procedure 25, which provides that “[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent’s successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.” *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16th Edition, § 7025.02, which states:

Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in**

accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005 and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.

The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**

The motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004

(emphasis added); *see also Hawkins v. Eads, supra*. While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether “[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.” FED. R. BANKR. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

Here, Movant-Debtor has provided sufficient evidence to show that administration of the Chapter 13 case is possible and in the best interest of creditors after the passing of the debtor. The Motion was filed within the ninety-day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Suggestion of Death. Dckt. 53. Based on the evidence provided, the court determines that further administration of this Chapter 13 case is in the best interests of all parties, and that Movant-Debtor, Angela Cotrone, as the Daughter of the deceased party and as the successor’s heir and lawful representative, may continue to administer the case on behalf of the Deceased-Debtor, Marlene Marie Cotrone. The court grants the Motion to Substitute Party.

Lastly, the Motion suggests in passing that the court also issue an order granting Deceased-Debtor, Marlene Marie Cotrone, a discharge. This is improper under Local Bankruptcy Rule 1016-1,

however, because it is not one of the reliefs permitted to be requested in a single Motion. The granting of the discharge is governed by the procedure in Local Bankruptcy Rule 5009-1. The requirements of that Rule are not bypassed by Local Bankruptcy Rule 9016-1, and Federal Rule of Civil Procedure 18 has not been incorporated into allowing the joinder of discharge relief into the relief that may be combined in one motion pursuant to Local Bankruptcy Rule 1061-1(b). Therefore, Movant-Debtor's request for the entry of discharge for Deceased-Debtor, Marlene Marie Cotrone, is denied without prejudice.

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 Substitute filed by Marlene Marie Cotrone ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Substitute is granted and Movant-Debtor, Angela Cotrone, as the Daughter of the deceased party and as the successor's heir and lawful representative, may continue to administer the case on behalf of the Deceased-Debtor, Marlene Marie Cotrone

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 21, 2021. By the court's calculation, 26 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits Roylee Woolford and Florence Maureen Woolford, Chapter 13 Debtor, ("Movant") to sell property of the estate or under the confirmed plan after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 4397 Monhegan Way, Mather, California 95655 ("Property").

The proposed purchaser of the Property is Mark Lloret, and the terms of the sale are:

- A. Sale price is \$490,000.00
- B. Sale is subject to Real Estate Agent commissions of approximately \$26,950.00 that will be paid through escrow from the proceeds of the sale.
- C. Closing costs of approximately \$10,213.59 paid through escrow.

- D. Based on the liens on the property and projected closing costs, Debtor expects to receive approximately \$173,080.77 in net proceeds from the sale.
- E. This sale is subject to overbidding and adjustments. If there are no overbids, Buyer will purchase the property.
- F. Buyer has made a \$4,900.00 deposit. Buyer will pay the remainder of the purchase price withing forty-five (45) days of October 9, 2021.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because Debtors no longer wish to have the Property and the Property generates no revenue for the estate, it is in the best interest of the estate for Debtors to sell the Property to Buyer for \$490,000.00.

Movant has estimated that a 3.00 percent broker's commission from the sale of the Property will equal approximately \$14,700.00 to Lyon Real Estate Sierra Oaks. Additionally, a 2.50 percent broker's commission from the sale of the Property will equal approximately \$12,250.00 to Open Door Realty. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than 5.50 percent commission.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because the Buyer has negotiated a short term close of escrow in return for the purchase price offered. Debtors might lose the purchase offer from this Buyer if the sale is not concluded expeditiously.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h), and this part of the requested relief is granted.

The court shall issue 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 Sell filed by Roylee Woolford and Florence Maureen Woolford ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Roylee Woolford and Florence Maureen Woolford, Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) and (f)(x) to Mark Lloret or nominee (“Buyer”), the Property commonly known as 4397 Monhegan Way, Mather, California 95655 (“Property”), on the following terms:

- A. The Property shall be sold to Buyer for \$490,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit B, Dckt. 56, and as further provided in this Order.
- B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.
- C. Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.
- D. Chapter 13 Debtor is authorized to pay a real estate broker’s commission in an amount not more than 5.50 percent of the actual purchase price upon consummation of the sale. The 3.00 percent broker’s commission from the sale of the Property will equal approximately \$14,700.00 to Lyon Real Estate Sierra Oaks. Additionally, a 2.50 percent broker’s commission from the sale of the Property will equal approximately \$12,250.00 to Open Door Realty. .
- E. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.
- F. The Chapter 13 Debtor is authorized to receive the \$3,000.00 HAFA Incentive Program monies, but no other fees, compensation, or other monies in connection with this sale. Within fourteen days of the close of escrow, Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 8, 2021. By the court’s calculation, 39 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Plan is denied.

The joint debtors, Michael Roland Stanford and Carol Ann Stanford (“Debtor”) seek confirmation of the Chapter 13 Plan. The Plan provides for payments of \$3,840.00 for the first four months, then \$7,468.00 from October 2021 through May 2026, and the Plan further contests the secured claim of Planet Home Lenders, LLC. Plan, Dckt. 45. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE’S OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”) filed an Opposition on November 2, 2021. Dckt. 58. Trustee opposes confirmation of the Plan on the basis that:

- A. The Debtor is Delinquent
- B. The Debtor’s Schedule I has inconsistencies

DISCUSSION

Delinquency

The Chapter 13 Trustee asserts that Debtor is \$3,588.05 delinquent in plan payments, which represents less than one month of the \$7,468.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Failure to File Amended Business Documents Required by Schedule I

Debtor has failed to file an amended statement of gross business income and expenses attached to Schedule I. Line 8a of Schedule I requires Debtor to “[a]ttach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income.” Debtor is required to submit that statement and cooperate with Trustee. 11 U.S.C. § 521(a)(3). Debtor has provided a previous schedule I filed 10/18/2021, but in said form, the Debtor lists no longer having Social Security income of \$4,700.00 without any indication as to why it stopped or if it was accidentally omitted from the schedule.

CREDITOR’S OPPOSITION

Planet Home Lending LLC (“Creditor”) holding a secured claim filed an Opposition on October 28, 2021. Dckt. 56. Creditor opposes confirmation of the Plan on the basis that:

- A. Debtor, in Section 7.0, claims that Secured Creditor’s claim is disputed on fallacious grounds

DISCUSSION

Failure to Provide for a Secured Claim

Creditor asserts a claim of \$282,783.92 in this case. Debtor’s Schedule D estimates the amount of Creditor’s claim as \$174,144.00 and indicates that it is secured by a secured deed of trust on Debtor’s residence. Dckt. 11. The Plan does not provide for the claim at all and asserts that the claim is manufactured on Section 7.0 of their plan.

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

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to the Chapter 13 Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

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

While Debtor may dispute Creditor's claim, believes that it is a "manufactured" claim, and such a "manufactured" claim could never be supported by evidence, Debtor cannot just "stiff a creditor" who has filed a claim, contending that Debtor doesn't believe it is a debt.

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

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

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

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

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

Review of Proof of Claim 6-1

Creditor filed Proof of Claim 6-1 on June 16, 2021. In the one hundred fifty-three (153) days that have lapsed since Proof of Claim 6-1 was filed, Debtor has not filed an opposition or sought to challenge the *prima facie* proof of such debt.

Looking at the attachments to Proof of Claim 6-1, the Note is dated December 8, 2006. No modification to that Note is attached.

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by the debtor, Michael Roland Stanford and Carol Ann Stanford (“Debtor”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

12. [21-23045-E-13](#) **CURTIS/PEGGY COWGILL** **AMENDED MOTION TO SELL**
[MRL-1](#) **Mikalah Liviakis** **10-27-21 [34]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 25, 2021. By the court’s calculation, 22 days’ notice was provided. 21 days’ notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days’ notice).

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

The Motion to Sell Property is granted.
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The Bankruptcy Code permits Curtis Cureton Cowgill and Peggy Jean Cowgill, Chapter 13 Joint Debtors, (“Movant”) to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 1340 Blossom Hill Way, Roseville, California (“Property”).

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

- A. Subject to overbid, Property will be sold to Buyer for \$459,000.00 in an all cash offer 30 days after approval of this motion, and the sale comes with the additional provision to lease the Property to Debtors to live in for 23 months at \$2,600.00 per month
- B. Real Estate Agent Commission of approximately \$25,245 will be paid through escrow from the proceeds of the sale, and other closing costs to be paid through escrow of approximately \$5,571.63 include: county tax, Homeowner’s Association Dues/Fees, recording fees, natural hazard disclosure, title and escrow fees, home warranty, property report, and transfer tax
- C. Sale of the Property is subject to adjustments and overbid, and based on the liens on the property and projected closing costs, Debtors expect to receive approximately \$107,797.15 in net proceeds from the sale.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the proceeds of the sale, as noted in the Trustee’s non-opposition (Dckt. 35), can and will be used to pay off the Debtor’s plan in full.

The Trustee, in their non-opposition motion, notes that there was an Ex Parte Application to Employ Lisa McKee as Realtor granted on October 4, 2021 (Dckt. 26) with no compensation.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because the sale was premised on a short term close of escrow in return for the purchase price offered, and the Debtors might lose the purchase offer from this Buyer if the sale is not concluded expeditiously.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h), and this part of the requested relief is granted.

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

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

The Motion to Sell Property filed by Curtis Cureton Cowgill and Peggy Jean Cowgill, Chapter 13 Debtors, (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Curtis Cureton Cowgill and Peggy Jean Cowgill, Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) and (f)(3) to Patrick Ippolito or nominee (“Buyer”), the Property commonly known as 1340 Blossom Hill Way, Roseville, California (“Property”), on the following terms:

- A. The Property shall be sold to Buyer for \$459,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 31, and as further provided in this Order.
- B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.
- C. The Chapter 13 Debtors is authorized to execute any and all documents reasonably necessary to effectuate the sale.
- D. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on October 20, 2021. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

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

- A. Debtor has failed to file the 60 days of employer pay advices required by 11 U.S.C. § 521(a).
- B. Debtor has failed to file her tax transcript or copy of her Federal Income Tax Return from the most recent pre-petition tax year as required by 11 U.S.C. § 521(e).
- C. Debtor's non standard provision provides adequate protection payments to a loan that appears to have matured in August of 2021.
- D. Debtor likely cannot afford plan without refinancing her property, which no evidence of which has been submitted.

- E. Debtor's plan is overextended, and it will take 101 months to complete.
- F. Debtor has failed to file an amended Voluntary Petition with the correct filing date of a previous bankruptcy filing(s).
- G. Debtor has two prior recent cases that were dismissed, and she has not explained why this case will work when the previous two have not.

DISCUSSION

Debtor Trustee's Debtor objections are well-taken.

Failure to Provide Pay Stubs or Pay Advices

Debtor has not provided Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). Debtor has failed to provide all necessary pay stubs. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Failure to Provide Tax Returns

Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(I); FED. R. BANKR. P. 4002(b)(3). Debtor has failed to provide the tax transcript. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Adequate Protection Payments

Debtor's plan has nonstandard provisions providing for adequate protection payments to USRE Trust, patterned as provisions locally referred to as "Ensminger Provisions". This debt does not appear to be a long-term debt, and the Creditor has filed an objection to confirmation on the grounds that the loan matured in August 2021.

Failure to Afford Plan Payment

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The ability to afford the plan for Debtor will depend on their ability to refinance her property by the end of November 2022. At the meeting of Creditors, Trustee asked Debtor if she has begun this process, and they have not. Furthermore, no evidence of such refinancing has been filed, and with this in mind, Debtor has failed to carry their burden of proving they can afford their plan. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Plan Term is Greater Than 60 months

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 101 months due to the claim of Superior Loan Servicing coming in at an amount higher than the amount the Debtor scheduled. The

Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Failure to Provide Bankruptcy Information

Debtor has failed to provide an amended voluntary petition with the correct filing dates of their previous case(s).

Previous Chapter 13

Debtor filed a previous Chapter 13 petition, 20-22540, on May 15, 2020, and said case was dismissed on August 6, 2021. Debtor filed another Chapter 13 petition, 20-21739, on March 24, 2021, and said case was dismissed on April 22, 2021. Debtor's recent bankruptcy cases have implications for the duration of the automatic stay, *see* 11 U.S.C. § 362(c)(3), but is not by itself reason to deny confirmation.

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 Debtor 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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 5, 2021. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

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

The debtor, Kenneth W. Johnson ("Debtor") seeks confirmation of the Chapter 13 Plan. The Plan provides a \$3,883.58 per month payment for 31 months and \$2,365.00 per month after September 25, 2021 for 25 months, and the plan provides a 100% dividend for unsecured claims. Plan, Dckt. 72. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on November 2, 2021. Dckt. 77. Trustee opposes confirmation of the Plan on the basis that:

- A. Monthly Dividend to Class 2 Secured Creditor is not provided
- B. Debtor is required to file a new, amended or supplemental, or both Schedules I and J need to be filed.

DISCUSSION

Failure to Provide for a Secured Claim

Trustee asserts that the claim of Creditor Quality Acceptance lacks a dividend of \$237.00 in this case. Debtor's Schedule D estimates the amount of Creditor's claim as \$12,000.00 and indicates that it is secured by a lien on Debtor's car. The Plan provides for treatment of this as a Class 2 claim, but the Debtor appears to have forgotten to put a value amount for the monthly dividend.

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

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to the Chapter 13 Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

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

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

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

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

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

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

Failure to File Business Documents Required by Schedule I and J

The Chapter 13 Trustee argues that Debtor has failed to file a statement of gross business income and expenses attached to Schedule I and J. Line 8a of Schedule I requires Debtor to “[a]ttach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income.” Debtor is required to submit that statement and cooperate with the Chapter 13 Trustee. 11 U.S.C. § 521(a)(3). Debtor has not provided the required attachments.

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by the debtor, Kenneth W. 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 the Motion to Confirm the 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.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 13, 2021. By the court's calculation, 34 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

Under the facts and circumstances of this Motion, the courts shortens the time to the 34 days given.

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

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

The debtors, Nadine Ann Muench and Steven Edwin Muench ("Debtor"), seek confirmation of the Amended Plan. The Amended Plan provides for monthly plan payments of \$2,233.51, with monthly payments of \$1,920.55 commencing October 25, 2021, and a 0% dividend to unsecured claims totaling 64,619.00. Amended Plan, Dckt. 45. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on November 2, 2021. Dckt. 49. Trustee opposes confirmation of the Plan on the basis that:

- A. The Plan is not feasible.
- B. Debtors have failed to provide sixty (60) day pay advices.

C. Debtors have failed to provide their 2020 tax returns.

DISCUSSION

Failure to Afford Plan Payment

Debtors may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). It is unclear to the court whether the Debtors are receiving sufficient income to support plan payments of \$1,920.55. Debtors filed Supplemental Schedule I which lists Nadine Muench's current employers as EGUSD and Homegoods. Dckt. 48. Trustee points out that there are large discrepancies in her income. Debtors list her monthly gross income from Homegoods as \$560.00, but then lists her total gross income as \$1,018.78, creating an unexplained increase of \$458.78. Furthermore, Debtors state that Nadine Muench's income from EGUSD has been temporarily increased due to the pandemic, but the motion and Debtors Declaration do not provide for how long the increase will last, nor how much the increase is.

The Debtors also state that Nadine Muench will be working as an usher for the Sacramento Kings once the season begins. However, Trustee points out that the Sacramento Kings season started on October 4, 2021, which was nine days before Debtors filed this motion. Also, Debtors do not provide further details on how much income Nadine Muench will derive from her employment with the Sacramento Kings.

Debtors' Declaration states that Nadine Muench's mother, Sandie Howell, has agreed to pay monthly on behalf of the Debtors. Dckt. 46. However, this family support income is not provided for on Debtors' Schedule I, nor did Debtors provide the court with a declaration from Sandie Howell's to support Debtors' claim that she has agreed to make the Plan payments.

Trustee states that a review of Debtors' Schedules shows the following discrepancies:

1. Debtors' Schedule B has not been amended to list any cash or bank accounts.
2. Debtors' Supplemental Schedule J includes Debtors' mortgage payments in the amount of \$1,071.25 and \$722.54, which are the exact same amounts listed in Class one (1) of the Plan.
3. Debtors' Supplemental Schedule J does not identify any food and veterinary expenses for the animals listed on Schedule B, nor do the Debtors provide the court with any information on how those expenses are being paid.
4. Form 122C has not been amended and does not include any EDD payments that were paid six months prior to the filing of the case. However, the court notes that even though Steven Muench was unemployed, there is no indication Debtors were receiving unemployment payments.

The court notes that Debtors' Schedule I originally stated that Nadine Muench's only employer was Homegoods. Dckt. 25. However, Debtors' Supplemental Schedule I states that Nadine Muench has been employed at EGUSD for four years.

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

the Plan is confirmable.

Failure to Provide Pay Stubs & Tax Returns

Debtors have not provided the Chapter 13 Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). Also, the Chapter 13 Trustee argues that Debtors did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(I); FED. R. BANKR. P. 4002(b)(3). While Debtors have provided pay stubs for Nadine Muench from Homegoods, however, the pay stubs provided from EGUSD and Sacramento Downtown Arena, LLC were not within the sixty (60) day time period. Debtors did not provide pay advices for Steven Muench. Debtors have failed to provide all necessary pay stubs and have failed to provide the tax transcript. Those are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) 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 Amended Chapter 13 Plan filed by the debtors, Nadine Ann Muench and Steven Edwin Muench (“Debtors”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm the Amended 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).

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 20, 2021. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

-----.

<p>The Hearing on the Objection to Confirmation of Plan is continued to xxxx.</p>

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

- A. Debtor failed to provide proof of his social security number.

DEBTOR'S OPPOSITION

Debtor filed an opposition to Trustee's Objection on October 28, 2021. Dckt. 21. Debtor states that the only basis for Trustee's Objection is that Debtor failed to provide proof of his social security number at the First Meeting of Creditors that was held on October 14, 2021. Due to Debtor not having proof of his social security number, the meeting was continued until November 18, 2021. After the First Meeting of Creditors, Debtor was able to obtain a new social security card and will be able to present it at the continued meeting. Accordingly, Debtor requests this matter be continued until after the 341 meeting held on November 18, 2021.

DISCUSSION

Trustee's objections are well-taken.

Failure to Provide Social Security Number

Every individual debtor shall bring to the meeting of creditors under 11 U.S.C. § 341 evidence of social security number(s), or a written statement that such documentation does not exist. FED. R. BANK. P. 4002(b)(1)(B). Without the required documents, the Trustee is unable to properly examine the Debtor at the meeting of creditors.

The court continues the Motion until after the 341 meeting on November 18, 2021 for Debtor to present their social security card at the continued hearing. The continuance will be set for **xxxxxx**

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 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 Hearing on the Objection to Confirmation of the Plan is continued to **xxxx**.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 4, 2021. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

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

The debtors, Ronald Samuel Abercrombie and Sabrina Marcell Abercrombie ("Debtors") seek confirmation of the Chapter 13 Plan. The Plan provides monthly plan payments of \$1,985.00 and a 100% dividend to unsecured claims totaling \$56,402.00. Plan, Dckt. 33. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on November 2, 2021. Dckt. 41. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtors are delinquent in plan payments.
- B. Debtors incorrectly classify the claim of On Q Financial Inc.
- C. Debtors include nonstandard provisions, but failed to check the box at section 1.02.

DEBTOR'S REPLY

On November 9, 2021, Debtor filed a reply stating: (1) the Chapter 13 Plan payments are current; (2) the mortgage creditor is filing an amended proof of claim to show zero arrears on the mortgage proof of claim; and (3) Debtor requests to correct the Non-Standard Provision box at § 1.02 in the Order Confirming to resolve this issue. Dckt. 45.

DISCUSSION

Delinquency

The Chapter 13 Trustee asserts that Debtor is \$1,985.00 delinquent in plan payments, which represents one month of the \$1,985.00 plan payment. Before the hearing, another plan payment will be due. According to the Plan, § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

At the hearing, **XXXXXXX**

Classification of On Q Financial's Claim

Trustee asserts that the Plan incorrectly lists On Q Financial's ("Creditor") claim in Class 4. § 3.10 of the Plan states that Class four includes all secured claims paid directly by Debtor or third party, and these claims mature after the completion of the Plan, are not in default, and are not modified by the Plan. Creditor's Proof of Claim filed on April 23, 2021, states that Debtors are \$15,679.44 delinquent. Trustee states that an amended Proof of Claim has not been filed to indicate that the delinquency has been cured. Accordingly, Creditor's claim should be provided for in Class one to comply with 11 U.S.C. §§ 1322, 1325(a)(1) and 1325(a)(6).

Nonstandard Provision

Trustee asserts that Debtors include nonstandard provisions that may be integral to the administration of the Plan. However, Debtors failed to check the box in § 1.02, which is required for any nonstandard provision to be given effect. Trustee cannot determine whether the plan is feasible due to Debtors failure to check the box in § 1.02.

At the hearing, **XXXXXXXXXXXX**

The Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) 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 Chapter 13 Plan filed by the debtor, Ronald Samuel Abercrombie and Sabrina Marcell Abercrombie ("Debtor"), having been presented to the court, and upon review of the pleadings, evidence, arguments of

counsel, and good cause appearing,

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

18. [21-22581](#)-E-13 **JONATHAN WIENEKE** **CONTINUED OBJECTION TO**
[DPC-1](#) **Len Reynoso** **CONFIRMATION OF PLAN BY DAVID**
 P. CUSICK
 9-8-21 [17]

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

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

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 September 8, 2021. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is XXXXXXX.

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

- A. Debtor failed to submit sixty-day pay advices.
- B. Debtor has failed to file business documents.
- C. Debtor has failed to cooperate with Trustee.

D. The Plan is not Debtor's best effort.

Status Report

On November 9, 2021, Trustee provided a status report regarding their Objection to Confirmation. Dckt. 31. Trustee states:

- (1) Sufficient pay advices have now been submitted.
- (2) Documents requested have been received with the exception of the 2020 federal tax return.
- (3) Wiegand matter was resolved by amendment.
- (4) Schedule H matter was resolved by amendment.
- (5) SBA Loan has yet to be scheduled.
- (6) Where the Trustee had objected based on \$610 of expenses that appeared unnecessary and where the latest FORM 122C-2 shows \$684.17 of calculated monthly disposable income, the Trustee's objection has not been resolved. Trustee may reconsider whether a reporting requirement is in place if Debtor can show a reasonable prospect of profit at the business.

DISCUSSION

Debtor has corrected some of the shortcoming in the Trustee's Objection, but two remain.

Failure to Schedule SBA Claim

Trustee contends that the Debtor has failed to comply with Trustee's request for Debtor to amend his schedules to include a SBA loan creditor and any other creditors that were not listed. Further, Debtor failed to identify his wife as a co-debtor for a parcel of real property and requests Schedule H to be amended to include his wife as a co-debtor.

In Debtor's response, he states that he does not have a good paper trail for the SBA loan that was received in 2020. Debtor states the loan was approximately \$75,000.00 and was used for the businesses ran by Debtor and his spouse. Further, Debtor amended Schedule H to identify his wife as a co-debtor of two debts listed in Schedule D. Dckt. 24, Exhibit O.

At the hearing, **XXXXXXX**

Not Best Effort

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

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the

effective date of the plan the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

The Debtor admitted at the Meeting of Creditors that the businesses he and his wife run have had negative income. Trustee asserts that Schedule I states a combined average negative income of - \$610.00 a month. Further, the Debtor stated at the Meeting of Creditors that they will continue to run the businesses but are unsure if they will earn income. Accordingly, there is at least \$610.00 that is being used every month to keep both businesses running that could be paid into the Plan to be disbursed to unsecured creditors.

In Debtor's response, he states that he pulled funds from other expenses to cover the loss of the businesses. Due to the objections, Debtor has reallocated his monthly expenses and has amended Schedules I and J to treat the business as if it did not exist. Dckt. 24, Exhibit P.

At the hearing, **XXXXXXX**

~~_____ The proposed Chapter 13 Plan does not meet the requirements for confirmation in 11 U.S.C. §§ 1322, 1325, and the Objection is sustained. The Chapter 13 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.~~

19 thru 20

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

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

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 28, 2021. By the court's calculation, 19 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00).

Under the facts and circumstances of this Motion, the court shortens the time to the 19 days given.

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

The Motion for Allowance of Professional Fees is granted.

John Downing, the Attorney ("Applicant") for Brad Alan Hamilton and Cherise Cathleen Williams, the Chapter 13 Debtor ("Client"), makes a Request for the Supplemental Allowance of Fees and Expenses in this case.

Fees are requested for the period July 6, 2021, through October 27, 2021. Applicant requests fees in the amount of \$2,770.00.

Trustee's Nonopposition

On November 8, 2021, Trustee, Kristen A. Koo, filed a nonopposition informing the court of the following:

- (1) Debtors' Motion for Sale of Property regarding 6013 Semaphore Road, Portola, California was granted on September 3, 2021.
- (2) The Trustee received these funds from the close of escrow and is currently holding them pending the outcome of this hearing.

Dckt. 152.

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 preparing a Motion to Sell and Motion to Confirm Modified Plan. 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.

Motion to Sell: Applicant spent 6.5 hours in this category. Applicant reviewed sale documents, prepared the motion to sell, declaration and exhibits, and attended the hearing.

Motion to Confirm Modified Plan: Applicant spent 3.8 hours in this category. Applicant prepared the motion, declarations, and Modified Plan.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
--	-------------	--------------------	--

John Downing	10.3	\$300.00	\$3,090.00
Total Fees for Period of Application			\$2,770.00

Applicant states that he is reducing the amount requested to \$2,770.00 in accordance with the First Modified Plan. Applicant also states that the accounting of hours understates the total number of hours he spent because he did not charge for multiple communications.

Pursuant to prior Interim Fee Applications the court has approved pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330. The court notes that Applicant does not state whether this application is interim or final.

Application	Interim Approved Fees	Interim Fees Paid
First Interim	\$5,730.00	\$5,730.00
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331		

Costs & Expenses

Applicant does not request costs and expenses in this application.

FEES ALLOWED

Fees

Reduced Rate

Applicant seeks to be paid a single sum of \$2,770.00 for its fees incurred for Client. Second Interim Fees and Costs in the amount of \$2,770.00 are approved pursuant to 11 U.S.C. § 331, and subject to final review pursuant to 11 U.S.C. § 330, and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution in a under the confirmed Plan.

The court authorizes the Chapter 13 Trustee to pay 100% of the fees allowed by the court.

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

Fees	\$2,770.00
------	------------

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 John Downing (“Applicant”), Attorney for Brad Alan Hamilton and Cherise Cathleen Williams, Chapter 13 Debtors, (“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 John Downing is allowed the following fees and expenses as a professional of the Estate:

John Downing, Professional employed by Chapter 13 Debtors

Fees in the amount of \$2,770.00,

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 28, 2021. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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

The Motion seeks retroactive relief, seeking both the authorization to employ the Realtor and pay the Realtor a commission from the proceeds of a sale that has already been approved by the court and which has closed.

Though not expressly requested in the Motion, the court makes the provisions of Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 applicable to this Motion, authorizing the requests for multiple relief - employment and compensation - to be made in this one Motion.

The Motion to Employ is granted and the Motion for Compensation is granted.
--

Brad Alan Hamilton and Cherise Cathleen Williams ("Debtors") seek to employ Doug Schroeder, the Realtor, of Dickson Realty, the Broker, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtors seek the employment of Broker to sell Debtors' real property at 6013 Semaphore Road, Portola, California.

Debtors argues that Broker's appointment and retention is necessary to represent the Estate in the sale of Debtors' real property. The Residential Listing Agreement provides Debtors are to pay Broker five (5) percent of the purchase price as compensation and Broker is authorized to compensate other brokers participating through the multiple listing service two and a half percent of the purchase price.

Doug Schroeder, a Real Estate Broker of Dickson Realty, Inc., testifies that he represented Debtors in the sale of their real property. Debtors' real property was sold pursuant to court approval on June 25, 2021. Doug Schroeder testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

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

Taking into account all of the relevant factors in connection with the employment and compensation of Broker, considering the declaration demonstrating that Broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Doug Schroeder as Broker for the Chapter 13 Estate on the terms and conditions set forth in the Residential Listing Agreement filed as Exhibit 1, Dckt. 141. Approval of the commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

The compensation is computed to be \$3,875.00, which is 2.5% of the gross sales price, to be paid Broker for representing Debtor as the seller of the property. Compensation of \$3,875.00 is approved and authorized to be paid.

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

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

The Motion to Employ filed by Brad Alan Hamilton and Cherise Cathleen Williams ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted, and Debtors are authorized to employ Doug Schroeder, the Realtor, of Dickson Realty, the

broker, for representing Debtors in the sale of the 6013 Semaphore Road, Portola, California Property (the “Property”), on the terms and conditions as set forth in the Residential Listing Agreement filed as Exhibit 1, Dckt. 141.

IT IS FURTHER ORDERED that compensation in the amount of \$3,875.00 is authorized for Realtor Doug Schroede, of Dickson Realty, the Broker, and authorized to be paid.

FINAL RULINGS

21. [21-23236-E-13](#)
[DPC-1](#)

GLENDIA MCLEOD
Colby LaVelle

OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK
10-20-21 [\[16\]](#)

Final Ruling: No appearance at the November 16, 2021 hearing is required.

Local Rule 9014-1(f)(2) Objection—No 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 20, 2021. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

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

The Objection to Confirmation of Plan is sustained.
--

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

A. Debtor utilized the wrong plan form required by LBR 3015-1(a)

First Amended Chapter 13 Plan filed November 4, 2021

On November 4, 2021, Debtor filed an Amended Chapter 13 Plan. Dckt. 20. Debtor filed a subsequent Motion to Confirm First Amended Chapter 13 Plan in which Debtor states they are using the correct Chapter 13 Plan form. Dckt. 22. The hearing date is January 11, 2022.

DISCUSSION

Trustee's objections are well-taken.

Wrong Plan Form

Trustee argues that the Plan is based upon a plan form that is no longer effective now that the court has adopted a new plan form as of December 1, 2017. The Plan is based on a prior plan form, which is a violation of Federal Rule of Bankruptcy Procedure 3015.1(a) and General Order 18-03, Official Local Form EDC 3-080.

Debtor's counsel has taken steps to correct this oversight, and has filed an amended plan and motion to confirm (Dckt. 22), which is set for hearing on January 11, 2022.

Unfortunately, the Motion to Confirm the First Amended Plan fails to comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 and does not state grounds with particularity by which the court could determine that confirmation is proper under 11 U.S.C. § 1322 and § 1325. The Motion merely states the following grounds:

1. The correct Chapter 13 Plan form was used. This case was submitted on an outdated form and now we are submitting the correct Chapter 13 form, revised/approved 11/9/2018.

Now, Debtor and counsel can take further corrective action to get on file a motion to confirm that complies with the Bankruptcy Code and Rules. Additionally, Debtor will also have to provide evidence to support the Motion to Confirm (such as the Debtor's declaration).

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 Ruling: No appearance at the November 16, 2021 hearing is required.

The case having previously been dismissed, the Motion to Sell Property is dismissed as moot.

The case having previously been dismissed, the Motion is dismissed 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 Motion to Sell Property having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is dismissed as moot, the case having been dismissed.

Final Ruling: No appearance at the November 16, 2021 hearing is required.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 19, 2021. By the court's calculation, 28 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).

Under the facts and circumstances of this Motion, the court shortens the time to the 28 days given.

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

The Motion for Allowance of Professional Fees is granted.

Carl R. Gustafson, the Attorney ("Applicant") for William Matthew Freeman and Carla Elise Tavormina Freeman, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period December 2020, through October 2021. Applicant requests fees in the amount of \$16,175.00.

APPLICABLE LAW

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). An attorney must “demonstrate only that the services were reasonably likely to benefit the estate at the time rendered,” not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Reasonable Fees

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

A. Were the services authorized?

- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

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

Reasonable Billing Judgment

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

- (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

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

A review of the application shows that Applicant’s for the Estate include general correspondences, emails telephone calls, file reviews, counsel regarding home sale, income review, preparing and filing Motions to Modify, budget review, scheduled amendments, lengthy negotiations with the Trustee, a Motion to Amend Order to Sell Property, and a Motion to Compel Trustee to Distribute property. The court finds the services were beneficial to Client and the Estate and were reasonable.

“No-Look” Fees

In this District, the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a

plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.”

...

(c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

(1) The maximum fee that may be charged is \$4,000.00 in nonbusiness cases, and \$6,000.00 in business cases.

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor’s attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed \$6,000.00 in attorneys’ fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 8. Applicant prepared the order confirming the Plan.

Lodestar Analysis

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). The attorney may file a fee application, and the court will consider the fees to be awarded

pursuant to 11 U.S.C. §§ 329, 330, and 331. For bankruptcy cases in the Ninth Circuit, “the primary method” to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). “This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

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

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Motion to Modify: Applicant spent 5.10 hours in this category. Applicant prepared the motion and attended the hearing.

Third Application for Additional Attorney Fees: Applicant spent 0.30 hours in this category. Applicant prepared the application.

Motion to Sell: Applicant spent 11.90 hours in this category. Applicant communicated with Debtor regarding the sale of their home and prepared the Motion to Sell.

Amended Order on the Motion to Sell: Applicant spent 5.10 hours in this category. Applicant communicated with the Trustee’s office regarding a stipulation to amend the Order on the Motion to Sell Property.

Order Denying Motion to Sell: Applicant spent 10.10 hours in this category. Applicant followed up on the order denying the motion to sell.

Motion to Modify: Applicant spent 6.80 hours preparing a second Motion to Modify.

Motion to Release Funds: Applicant spent 5.70 hours preparing a Motion to Release Funds to the Debtors upon the sale of their home and performing case presentation work.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Attorney's Richard W Suh or Carl R Gustafson	33.2	\$425.00	\$14,110.00
Paralegal Karen Alvarez	11.8	\$175.00	\$2,065.00
Total Fees for Period of Application			\$16,175.00

FEES AND COSTS & EXPENSES ALLOWED

Fees

The unique facts surrounding the case, including Drafting, Communicating, and Amending various motions, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of \$16,175.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick ("the Chapter 13 Trustee") from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees	\$16,175.00
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pursuant to this Application as additional fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Carl R. Gustafson ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Carl R. Gustafson is allowed the following fees and expenses as a professional of the Estate:

Carl R. Gustafson, Professional Employed by William Matthew Freeman and
Carla Elise Tavormina Freeman (“Debtor”)

Fees in the amount of \$16,175.00

as additional expenses of fees pursuant to 11 U.S.C. § 330 as counsel for
Debtor.

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

24. [18-24658](#)-E-13 **WILLIAM FREEMAN/CARLA** **MOTION TO COMPEL**
[CRG-11](#) **TAVORMINA FREEMAN** **10-19-21 [147]**
 Carl Gustafson

Final Ruling: No appearance at the November 16, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 19, 2021. By the court’s calculation, 28 days’ notice was provided. 28 days’ notice is required.

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

<p>The Motion to Compel Release of Funds is granted.</p>

The Motion filed by William Matthew Freeman and Carla Elise Tavormina Freeman (“Debtor”) requests the court to order David P. Cusick (“the Chapter 13 Trustee”) to release all excess funds (“Property”). The motion notes that there is \$397,139.96 in excess funds, and that \$35,090.00 of said funds are to be applied to pay off the plan. The remaining \$362,049.95, after paying all other necessary balances aside from the aforementioned \$35,090.00, should be released to Debtor.

Debtor has confirmed a Modified Chapter 13 Plan (Dckt. 133) in this case to accelerate the plan payments using proceeds from the sale of property (which had appreciated post-confirmation) that the Debtor maintained during the performance of the plan. Order, Dckt. 141.

The Trustee reports that the amount of surplus monies after payment of creditors as provided in the Modified Plan and additional fees for Debtor's counsel approved by the court, is \$362,049.95, and that is the amount ordered to be turned over. Response, Dckt. 153. Debtor filed a Reply, concurring in this computation of the amount to be released to Debtor by the Trustee. Dckt. 156.

Debtor having fully funded the plan and the Trustee holding surplus monies of the Debtor, 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 Compel Abandonment filed by William Matthew Freeman and Carla Elise Tavormina Freeman ("Debtor") having been presented to the court, the Chapter 13 Plan having been fully funded in this case, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Release of Funds is granted, the Chapter 13 Trustee is authorized to immediately release to Debtor surplus monies in the amount of \$362,049.95 held by the Trustee.

Final Ruling: No appearance at the November 16, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 22, 2021. By the court's calculation, 55 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The debtor, Cindy Suzanne Ronquist ("Debtor"), has provided evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Non-Opposition on November 2, 2021. Dckt. 73. The Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, and Debtor's Chapter 13 Plan filed on September 22, 2021, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and

if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

26. [19-21278-E-13](#) **ALBERT GIL** **MOTION TO MODIFY PLAN**
[WW-2](#) **Mark Wolff** **10-5-21 [41]**

Final Ruling: No appearance at the November 16, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 5, 2021. 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 Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.
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11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Albert A. Gil ("Debtor"), has filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Non-Opposition on November 2, 2021. Dckt. 50. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is 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, Albert A. Gil ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

[illegible]

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

The Motion for Allowance of Professional Fees is granted.

Fees are requested for the period October 31, 2020, through July 30, 2021. Applicant requests fees in the amount of \$2,500.00.

David Cusick (“the Chapter 13 Trustee”) filed a non-opposition on October 26, 2021. Dckt. 146.

APPLICABLE LAW

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). An attorney must “demonstrate only that the services were reasonably likely to benefit the estate at the time rendered,” not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Reasonable Fees

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

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

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

Reasonable Billing Judgment

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

- (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

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

A review of the application shows that Applicant’s for the Estate include preparing two different Motions to Modify and reviewing and responding to a Motion for Relief from Automatic Stay. The court finds the services were beneficial to Client and the Estate and were reasonable.

“No-Look” Fees

In this District, the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.”

...

(c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

(1) The maximum fee that may be charged is \$4,000.00 in nonbusiness cases, and \$6,000.00 in business cases.

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor’s attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed \$4,000.00 in attorneys’ fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 78. Applicant prepared the order confirming the Plan.

Lodestar Analysis

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

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

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Motion to Modify: Applicant spent 6.05 hours in this category. Applicant prepared and filed two Motions to Modify, reviewed the courts rulings, reviewed opposition filed and responded to the opposition.

Motion for Relief from Automatic Stay: Applicant spent 3.75 hours in this category. Applicant reviewed the Motion for Relief and Trustee’s response, prepared a response to the Motion and attended the hearing for the Motion.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Peter G. Macaluso	9	\$300.00	\$2,700.00
Legal Assistant	0.8	\$75.00	\$60.00
Total Fees for Period of Application			\$2,500.00

FEES ALLOWED

Fees

The unique facts surrounding the case, including the need for Debtor to file a Modified Plan in order to extend the term of the case to eighty-four (84) months due to Covid-19 and the mortgage lender filed for relief from the automatic stay, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. Further, the court notes that Applicant's services rendered actually amount to \$2,760.00, but in the best interest of the Debtors he is only requesting an additional \$2,500.00. The request for additional fees in the amount of \$2,500.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick ("the Chapter 13 Trustee") from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees	\$2,500.00
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pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Peter G. Macaluso ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Peter G. Macaluso is allowed the following fees and expenses as a professional of the Estate:

Peter G. Macaluso, Professional Employed by David L. Keller and Connie J. Keller ("Debtors")

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

28.	<u>21-23683</u> -E-13 <u>TJW</u> -1	ANGELA BEASLEY-BAKER Timothy Walsh	MOTION TO EXTEND AUTOMATIC STAY 10-27-21 [8]
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The Hearing on the Motion to Extend the Automatic Stay has been Rescheduled for 1:30 p.m. on November 23, 2021 (Order, Dckt. 18).

Subsequent to the filing of the Motion to Extend, Debtor filed with the court a stipulation (hereinafter “Stipulation”) between Debtor and Creditor AJX Mortgage Trust II (“Creditor”). Dckt. 14. In the Stipulation, the Debtor and Creditor state that the proper Bankruptcy Code Section at issue, 11 U.S.C. § 362(c)(4)(B). In the Stipulation, Creditor and Debtor recognize no automatic stay has been imposed due to previous bankruptcy filings in the past year. The Stipulation states that these Parties are

seeking relief pursuant to 11 U.S.C. § 362(c)(4)(B) – imposition of the automatic stay. The court treats the Stipulation as an amendment to the Motion.

APPLICABLE LAW

When stay has not gone into effect pursuant to 11 U.S.C. § 362(c)(4)(A), a party in interest may request within 30 days of filing that the stay take effect as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B).

For purposes of subparagraph (B), a case is presumptively filed not in good faith as to all creditors if:

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; . . .

11 U.S.C. § 362(c)(4)(D)(I).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

In re Elliot-Cook, 357 B.R. at 814–15.

Debtor has asserted that the prior cases were not prosecuted and were then dismissed due to the conduct provided by her prior counsel. Debtor has new counsel in this case, who is now responsible for assisting Debtor in the diligent prosecution of this case.

DISCUSSION

The Stipulation includes the following terms which the Parties seek to include in the order extending the stay. To the extent that this constitutes as compromise, no motion to approve compromise (Fed. R. Bankr. P. 9019) has been filed. These Stipulation terms include:

1. The automatic stay shall be imposed and remain in effect as to the Creditor, its successors and/or assigns, and the Property.
2. The Stipulation supersedes the terms and conditions of Debtor's Plan, only where the terms conflict with the Stipulation.

In reading this position, it appears that the Parties eschew the requirements imposed by Congress for confirmation of a Chapter 13 Plan and seek by this Stipulation to have the court "confirm" these pre-confirmation plan terms, and such "confirmed" pre-confirmation terms shall bind all parties in interest, whether or not they comply with 11 U.S.C. § 1325.

3. Debtor agrees and shall dismiss with prejudice the State and District Court Cases that names Creditor, its servicer, or any of its affiliates, within ten days of entry of an order on this Stipulation.

It appears that Debtor will compromise rights of the Bankruptcy Estate (11 U.S.C. § 541(a)), presumably in good faith, by Debtor. This is requested as part of a Motion to Impose the Stay and the Debtor and Creditor do not seek to have the court approve the compromise after full and sufficient notice has been provided to all parties in interest.

4. Failure to dismiss pending litigation cases shall be a default.
5. Debtor agrees to amend the pending Chapter 13 Plan to include payment of pre-petition property tax arrears owed to the Solano County Assessor and Tax Collector, and Debtor shall file a proof of claim on behalf of the Assessor in order to ensure the Property Taxes are paid by the Chapter 13 Trustee.
6. Creditor will tender post-petition property taxes as long as this case is not dismissed or converted to another chapter.
7. Debtor shall continue maintaining insurance on the Property.
8. Debtor will ensure the Creditor is paid in accordance with their proof of claim by the Chapter 13 Trustee.

It is not clear what "Debtor will ensure" payment to Creditor, and what that means beyond Debtor stating that she will in good faith fulfill her duties and obligations under a confirmed plan.

9. The Stipulation is binding while there is an automatic stay against the Property during the bankruptcy case.
10. Creditor is entitled to immediate relief if the instant case is dismissed or converted to another Chapter.
11. If the Debtor defaults, Creditor shall request termination of the stay.
12. Creditor may accept any and all payments without prejudice to or waiver of any rights or remedies to which Creditor would otherwise have been entitled to under applicable non-bankruptcy law.
13. Parties agree the Stipulation does not change terms or conditions contained within the Note and/or Deed of Trust.
14. Parties agree Debtor is liable for attorneys' fees and costs associated with the Stipulation, not to exceed 5.0 hours at \$275.00 per hour.

NOVEMBER 10, 2021 COURT ORDER

On November 10, 2021, the court issued an order to (1) treat Debtor's Motion to Extend the Automatic Stay as an *Ex Parte* Amended Motion; (2) Impose an Automatic Stay on an Interim Basis; and (3) Set the Motion for Final Hearing. The court noted that since there is no stay in this case and the grounds stated, the court treats the motion as an *ex parte* motion and entered interim relief imposing the 11 U.S.C. § 362(a) stay for all persons and purposes pending final hearing.

The Motion was granted on an interim basis, with the automatic stay imposed pursuant to 11 U.S.C. § 362(c)(4)(B) for all parties and purposes through and including 11:59 p.m. on November 30, 2021, unless extended or terminated sooner by subsequent order of the court.

The final hearing on the Amended Motion to Extend the Automatic Stay shall be conducted at **1:30 p.m. on November 23, 2021**. Debtor to file and serve on or before November 12, 2021, a Notice of Final Hearing for the Amended Motion to Impose the Automatic Stay, and that oppositions, if any, may be presented orally at the hearing. If such opposition is presented, the court will determine if material grounds to oppose exist and whether the filing of opposition and further hearing is necessary (applying the standards for such opposition as for a motion filed using the notice provisions of Local Bankruptcy Rule 9014-1(f)(2)).

Final Ruling: No appearance at the November 16, 2021 hearing is required.

The Motion to Confirm Plan is dismissed without prejudice.

Elisei Brandusa (“Debtor”) having filed a “Withdrawal of Motion”, which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on October 8, 2021, Dckt. 38; no prejudice to the responding party appearing by the dismissal of the Motion; Debtor having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by David Cusick (“the Chapter 13 Trustee”); the *Ex Parte* Motion is granted, Debtor’s Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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

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

The Motion to Confirm Plan filed by Elisei Brandusa (“Debtor”) having been presented to the court, Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 53, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm Plan is dismissed without prejudice.