

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

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

DAY: TUESDAY
DATE: NOVEMBER 22, 2022
CALENDAR: 9:00 A.M. CHAPTER 13 CASES

RULINGS

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

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

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

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

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

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

ERRORS IN RULINGS

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

1. [21-23601](#)-A-13 **IN RE: POLLEN HEATH**
[JNV-3](#)

MOTION TO APPROVE LOAN MODIFICATION
10-25-2022 [\[64\]](#)

JASON VOGELPOHL/ATTY. FOR DBT.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Approval of Mortgage Loan Modification

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

Disposition: Granted in part, denied in part

Order: Civil minute order

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

The debtor seeks an order approving a loan modification. On November 1, 2022, the Chapter 13 trustee filed opposition to the motion contending that the changes to the loan require that the debtor file Supplemental Schedules I and J to show the impact of the loan modification on the plan and, as the payment on the debtor's mortgage was in Class 1 of the currently confirmed plan, a modified plan. See Response, ECF No. 78.

Although likely not yet posted to the docket at the time the trustee opposed the motion, the debtor had already filed Supplemental Schedules I and J on October 26, 2022, see ECF No. 74. Similarly, the debtor had already filed a Modified Plan, ECF No. 75 and a motion to modify the plan, which is currently set for hearing on December 6, 2022, at 9:00 a.m.

The court has reviewed the Supplemental Schedules I and J which show a mortgage payment consistent with the loan modification. The proposed modified plan requires correction in that it fails to provide for, and allow, payments previously tendered under the currently confirmed plan by the Chapter 13 trustee on the Class 1 mortgage claim. However, the trustee may raise any such objections in his review of the proposed motion to modify.

Absent further objection by the trustee at the hearing the court will grant the motion to approve the modification as indicated below.

LOAN MODIFICATION

The court construes the present motion as requesting two forms of relief. First, the motion requests approval of a loan modification

agreement. While the ordinary chapter 13 debtor has some of the rights and powers of a trustee under § 363, such a debtor does not have the trustee's right to obtain credit or incur debt under § 364. See 11 U.S.C. § 1303. *But cf.* 11 U.S.C. § 1304 (providing that a chapter 13 debtor engaged in business has the rights and powers of a trustee under § 364). The court's local rules address this situation and require court authorization before a chapter 13 debtor obtains credit or incurs new debt. LBR 3015-1(h)(1)(E).

Second, the motion impliedly requests stay relief under § 362(d)(1) to insulate the secured lender from any claim of liability for "any act to collect, assess, or recover a claim against the debtor." See 11 U.S.C. § 362(a)(6), (d)(1).

The court will grant the motion in part to authorize the debtor and the secured lender to enter into the loan modification agreement subject to the parties' right to reinstatement of the original terms of the loan documents in the event conditions precedent to the loan modification agreement are not satisfied. The court will also grant relief from the stay of § 362(a) to allow the secured lender to negotiate and enter into the loan modification agreement with the debtor. 11 U.S.C. § 362(d)(1).

By granting this motion, the court is not approving the terms or conditions of the loan modification agreement. The motion will be denied in part to the extent that the motion requests approval of the terms and conditions of the loan modification agreement or other declaratory relief.

CIVIL MINUTE ORDER

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

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

The court has reviewed the present motion for approval of a mortgage loan modification agreement between the debtor and the secured creditor named in the motion. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted in part and denied in part. The court authorizes the debtor and the secured creditor to enter into the loan modification agreement subject to the parties' right to reinstatement of the original terms of the loan documents in the event conditions precedent to the loan modification agreement are not satisfied. The court denies the motion to the extent it requests approval of the terms and conditions of the loan modification or any other declaratory relief. To the extent the modification is inconsistent with the confirmed chapter 13 plan, the debtor shall continue to perform the plan as confirmed until it is modified.

IT IS FURTHER ORDERED that the court grants relief from the automatic stay to allow the secured lender to negotiate and enter into the loan modification agreement with the debtor. 11 U.S.C. § 362(d)(1). The automatic stay remains in effect for all acts not described in this order.

2. [22-22307](#)-A-13 **IN RE: CARPIO GUINTU AND MARIA LAQUINDANUM**
[DPC-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-27-2022 [\[27\]](#)

ARASTO FARASAD/ATTY. FOR DBT.

Tentative Ruling

Objection: Trustee's Objection to Confirmation of Plan

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

Disposition: Sustained and confirmation denied

Order: Civil minute order

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

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

PLAN FEASIBILITY

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

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

Plan Delinquency

The trustee indicates that the plan payments are delinquent in the amount of \$900.00. The plan cannot be confirmed if the plan payments are not current.

Plan Overextension

The trustee calculates that the plan will exceed the maximum length of 60 months allowed under 11 U.S.C. § 1322(d). This is caused by the claim filed by the Internal Revenue Service, Claim No. 15. The claim includes secured and priority debt in the amounts of \$67,193.42, and \$158,117.26 respectively. The secured portion of the claim is not provided for in the debtors' plan, ECF No. 17. Neither does the plan estimate or contemplate any amount for priority obligations, *id.*

Therefore, the plan is not feasible under 11 U.S.C. § 1325(a)(6).

Failure To Provide Financial/Business Documents

The debtors have failed to provide the trustee with required or requested documents. See 11 U.S.C. § 521(a)(3)-(4).

The trustee requested that the debtor provide him with documents which are required under § 521 of the Bankruptcy Code and with additional documents which the trustee required to properly prepare for the 341 meeting of creditors. The debtors failed to produce the following documents: (1) Business Questionnaire; (2) 2021 tax returns; (3) 6 individual months of profit and loss statements, from March 13, 2022, through September 13, 2022; (4) Bank of Stockton statements for March 13, 2022, April 2022, May 2022, June 2022, and August 2022; and (5) sixty days of pay advices for Carpio Guintu.

The failure to provide income information makes it impossible for the chapter 13 trustee to accurately assess the debtors' ability to perform the proposed plan. As such, the trustee cannot represent that the plan, in his estimation is feasible, under 11 U.S.C. § 1325(a)(6).

Inconsistent Information in Bankruptcy Documents

The debtors have provided information regarding rental/mortgage payments in the Schedules (\$2,582.00) and in Profit and Loss Statements (\$6,100.00). The information is inconsistent between the two documents and the trustee cannot determine the correct amount.

The Statement of Financial Affairs also appears to indicate incorrect information regarding income derived from the debtors' business.

Without complete information regarding both income and expenses the trustee cannot determine the plan is feasible under 11 U.S.C. § 1325(a) (6).

The court will sustain the objection.

CIVIL MINUTE ORDER

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

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

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

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

3. [22-22110](#)-A-13 **IN RE: MANUEL SAUCEDO GONZALEZ AND REGINA SAUCEDO**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
10-27-2022 [[36](#)]

11/4/22 INSTALLMENT FEE PAID \$79

Final Ruling

As the installment fee has been paid, the order to show cause is discharged. The case will remain pending.

4. [22-20718](#)-A-13 **IN RE: TIMOTHY/EVANGELINA HERNANDEZ**
[CRG-5](#)

CONTINUED OBJECTION TO CLAIM OF CAVALRY SPV I, LLC, CLAIM
NUMBER 1
9-7-2022 [\[69\]](#)

CARL GUSTAFSON/ATTY. FOR DBT.

Final Ruling

Objection: Objection to Claim

Notice: Continued from November 1, 2022

Disposition: Sustained

Order: Prepared by objecting party

Unopposed objections are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c); LBR 9001-1(d), (n) (contested matters include objections). Written opposition to the sustaining of this objection was required not less than 14 days before the hearing on this objection. None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

The debtor objects to the claim of Cavalry SPV I, LLC, Claim No. 1. The hearing on this objection was continued to allow proper service of the objection on parties which filed a request for special notice. The debtor has properly served the special notice parties, although the Attachment to the Certificate of Service in this case should be labeled "Attachment 6B2" as the debtor did not use the Clerk's Official Matrix for Special Notice Creditors as indicated in the certificate. See Certificate of Service, ECF No. 88.

CLAIM OBJECTION

One basis for disallowing a claim filed by a creditor is that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). If a claim cannot be enforced under state law, then the claim cannot be allowed after objection under § 502(b)(1). *In re GI Indus., Inc.*, 204 F.3d 1276, 1281 (9th Cir. 2000).

A statute of limitation under state law is an affirmative defense that is a proper basis for objection to a proof of claim. *Claudio v. LVNV Funding, LLC*, 463 B.R. 190, 195 (Bankr. D. Mass. 2012). Although a creditor may file a proof of claim under § 501(a) based on a stale claim, the claim will not be allowed under § 502(b) when an objection to claim raises an applicable statute of limitations as an affirmative defense. See *In re Andrews*, 394 B.R. 384, 388 (Bankr. E.D.N.C. 2008) (citing *In re Varona*, 388 B.R. 705 (Bankr. E.D. Va. 2008)).

In a different context, the Supreme Court has held that enforceability is not a prerequisite for having a claim in bankruptcy. "The word 'enforceable' does not appear in the Code's definition of 'claim.'" *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1412 (2017) (holding that filing a stale claim in bankruptcy does not violate the FDCPA). "[T]he running of a limitations period constitutes an affirmative defense, a defense that the debtor is to assert after a creditor makes a 'claim.'" The law has long treated unenforceability of a claim (due to the expiration of the limitations period) as an affirmative defense." *Id.* (citations omitted).

The applicable statutes of limitations in California bar an action (1) on a contract, obligation or liability founded on an instrument in writing after four years, see Cal. Civ. Proc. Code §§ 312, 337(1), or (2) on an oral contract after two years, see Cal. Civ. Proc. Code § 339.

The claimant has filed a proof of claim based on a credit account that is stale. The objection's well-pleaded facts show that the debtor has made no payments or other transactions on this credit account within the four years prior to the petition date. Under either the statute of limitations for an oral contract or the statute of limitations for a written contract, the claimant's claim based on this loan account is time barred and unenforceable under state law. The objection will be sustained. The claim will be disallowed.

5. [22-20718](#)-A-13 **IN RE: TIMOTHY/EVANGELINA HERNANDEZ**
[CRG-6](#)

CONTINUED OBJECTION TO CLAIM OF LVNV FUNDING, LLC, CLAIM
NUMBER 3
9-7-2022 [\[73\]](#)

CARL GUSTAFSON/ATTY. FOR DBT.

Final Ruling

Objection: Objection to Claim

Notice: Continued from November 1, 2022

Disposition: Sustained

Order: Prepared by objecting party

Unopposed objections are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c); LBR 9001-1(d), (n) (contested matters include objections). Written opposition to the sustaining of this objection was required not less than 14 days before the hearing on this objection. None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

The debtors object to the claim of LVNV Funding, LLC, Claim No. 3. The hearing on this objection was continued to allow proper service of the objection on parties which filed a request for special notice. The debtor has properly served the special notice parties, although the Attachment to the Certificate of Service in this case should be labeled "Attachment 6B2" as the debtor did not use the Clerk's Official Matrix for Special Notice Creditors as indicated in the certificate. See Certificate of Service, ECF No. 90.

CLAIM OBJECTION

One basis for disallowing a claim filed by a creditor is that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). If a claim cannot be enforced under state law, then the claim cannot be allowed after objection under § 502(b)(1). *In re GI Indus., Inc.*, 204 F.3d 1276, 1281 (9th Cir. 2000).

A statute of limitation under state law is an affirmative defense that is a proper basis for objection to a proof of claim. *Claudio v. LVNV Funding, LLC*, 463 B.R. 190, 195 (Bankr. D. Mass. 2012). Although a creditor may file a proof of claim under § 501(a) based on a stale claim, the claim will not be allowed under § 502(b) when an objection to claim raises an applicable statute of limitations as an affirmative defense. See *In re Andrews*, 394 B.R. 384, 388 (Bankr. E.D.N.C. 2008) (citing *In re Varona*, 388 B.R. 705 (Bankr. E.D. Va. 2008)).

In a different context, the Supreme Court has held that enforceability is not a prerequisite for having a claim in bankruptcy. "The word 'enforceable' does not appear in the Code's definition of 'claim.'" *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1412 (2017) (holding that filing a stale claim in bankruptcy does not violate the FDCPA). "[T]he running of a limitations period constitutes an affirmative defense, a defense that the debtor is to assert after a creditor makes a 'claim.'" The law has long treated unenforceability of a claim (due to the expiration of the limitations period) as an affirmative defense." *Id.* (citations omitted).

The applicable statutes of limitations in California bar an action (1) on a contract, obligation or liability founded on an instrument in writing after four years, see Cal. Civ. Proc. Code §§ 312, 337(1), or (2) on an oral contract after two years, see Cal. Civ. Proc. Code § 339.

The claimant has filed a proof of claim based on a credit account that is stale. The objection's well-pleaded facts show that the debtor has made no payments or other transactions on this credit account within the four years prior to the petition date. Under either the statute of limitations for an oral contract or the statute of limitations for a written contract, the claimant's claim based on this loan account is time barred and unenforceable under state law. The objection will be sustained. The claim will be disallowed.

6. [21-20025](#)-A-13 **IN RE: HAROLD DEAN**
[DPC-1](#)

CONTINUED MOTION TO DISMISS CASE
7-18-2022 [\[43\]](#)

LUCAS GARCIA/ATTY. FOR DBT.

Final Ruling

Motion: Dismiss Case

Notice: Continued from September 27, 2022

Disposition: Denied

Order: Civil minute order

The hearing on this motion was continued from September 27, 2022, to coincide with the hearing on the debtor's motion to modify the Chapter 13 plan. The motion to modify, LBG-203, has been granted

The trustee consented to the court denying the dismissal motion, without further notice or hearing, if the debtor's motion to confirm was granted. See ECF No. 65.

CIVIL MINUTE ORDER

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

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

The trustee's motion to dismiss has been presented to the court. Having considered the motion, the opposition, responses, and good cause appearing,

IT IS ORDERED that the motion is denied.

7. [21-20025](#)-A-13 **IN RE: HAROLD DEAN**
[LBG-203](#)

MOTION TO MODIFY PLAN
10-14-2022 [\[68\]](#)

LUCAS GARCIA/ATTY. FOR DBT.
TRUSTEE NON-OPPOSITION

Final Ruling

Motion: Modify Chapter 13 Plan

Notice: LBR 3015-1(d)(2), 9014-1(f)(1); non-opposition filed by trustee

Disposition: Granted

Order: Prepared by movant, approved by the trustee

Subject: Third Modified Chapter 13 Plan, filed October 14, 2022

DEFAULT OF RESPONDENT

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

The debtor seeks modification of his Chapter 13 plan. The plan is supported by Supplemental Schedules I and J filed October 14, 2022, ECF No. 73. The Chapter 13 trustee has filed non-opposition to the motion, ECF No. 75.

MATRIX

While the matrix used in support of the certificate of service appears to include all creditors it does not comply with LBR 7005-1(d). The rule requires that the mailing matrix "shall be downloaded not more than 7 days prior to the date of the filing of the pleadings." The matrix in this case was downloaded on March 22, 2022, and the motion was filed October 14, 2022. Future failure to comply with the provisions of the Local Rules may result in a denial of relief and/or sanctions, LBR 1001-1(g).

CHAPTER 13 PLAN MODIFICATION

Chapter 13 plan modification is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. "[T]he only limits on modification are those set forth in the language of the Code itself, coupled with the bankruptcy judge's discretion and good judgment in reviewing the motion to modify." *In re Powers*, 202 B.R. 618, 622 (B.A.P. 9th Cir. 1996).

Chapter 13 debtors seeking plan modification have the burden of proving that all requirements of § 1322(a) and (b) and § 1325(a) have been met. See 11 U.S.C. §§ 1322(a)-(b), 1325(a), 1329(b)(1); see also *In re Powers*, 202 B.R. at 622 ("[Section] 1329(b)(1) protects the parties from unwarranted modification motions by ensuring that the proposed modifications satisfy the same standards as required of the initial plan."); see also *In re Barnes*, 32 F.3d 405, 407 (9th Cir. 1994); *In re Andrews*, 49 F.3d 1404, 1408 (9th Cir. 1995).

The court finds that the debtor has sustained this burden of proof. The court will grant the motion and approve the modification.

8. [22-20730](#)-A-13 **IN RE: ALICE RANSOM**
[DPC-3](#)

MOTION TO DISMISS CASE
10-20-2022 [\[31\]](#)

ANH NGUYEN/ATTY. FOR DBT.

Final Ruling

Motion: Dismiss Case

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

Disposition: Granted

Order: Civil minute order

Opposition Due: November 8, 2022

Opposition Filed: Unopposed

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

Best Interests of Creditors/Estate: Dismiss

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

CASE DISMISSAL

The chapter 13 trustee moves to dismiss this chapter 13 case for delinquency in payments under the chapter 13 plan. For the reasons stated in the motion, cause exists under § 1307(c)(1) to dismiss the case. Payments under the plan are delinquent in the amount of \$19,576.00 with a further payment of \$3,916.00 due October 25, 2022.

Additionally, the trustee argues for dismissal because there is no plan pending after the court sustained objections to confirmation of the previous plan on June 9, 2022.

The court finds that cause exists for unreasonable delay which is prejudicial to creditors under 11 U.S.C. 1307(c)(1) to dismiss the case.

11 U.S.C. § 1307(c)

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

...

11 U.S.C. § 1307(c).

The court finds that dismissal is in the best interests of the creditors and the estate. This case has not been previously converted from a chapter 7.

SERVICE AND NOTICE

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

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

The Chapter 13 trustee filed a certificate of service in this case using EDC 7-005, ECF No. 34. The trustee has correctly served both the debtor and the creditors which requested special notice by first class mail. However, Form EDC 7-005 is incorrectly completed.

Service under Fed. R. Bankr. P. 7004, 9014(b), 3015(f) is correctly indicated in the certificate of service as to the debtor.

Special Notice Parties

Conversely, service of the objection to confirmation on the special notice parties is made under Fed. R. Civ. P. 5, *as incorporated by* Fed. R. Bankr. P. 7005. Service is not made under Rule 7004, nor has it been accomplished under Rule 7004 in this case. Rule 5 allows for service on parties by first class mail. Thus, the trustee has properly served the objection on the special notice parties.

While the trustee has properly served the special notice creditors, he has not properly memorialized the service in the Certificate of Service. Box 6B should have been checked on page 3 indicating Rule

5 service as Rule 7004 is not applicable. In this case box 6B is left blank.

Attachments

Finally, while the certificate properly includes Attachment 6A1 describing Rule 7004 service on the debtor, it improperly includes or identifies the special notice creditor on the same list. The special notice creditors must be indicated in a separate attachment labeled Attachment 6B3 using the Clerk's Matrix of Special Notice Creditors. To properly memorialize service combining the parties (up to 6 parties) on one list, "Attachment 6B2" is the proper label for the attachment.

Outdated Form Certificate

The trustee has used an outdated form of the new certificate of service. The most recent version of Form EDC 7-005 was posted to the court's website on October 6, 2022. General Order 22-04, indicating the revised Form EDC 7-005 was also posted to the court's website on October 6, 2022.

CIVIL MINUTE ORDER

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

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

The trustee's motion to dismiss this chapter 13 case has been presented to the court. Having entered the default of respondent debtor for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted because of the delinquency under the chapter 13 plan in this case. The court hereby dismisses this case.

9. [22-22837](#)-A-13 **IN RE: KYLE FARRIS AND GRACIELA
JARAMILLO-FARRIS**
[RK-1](#)

MOTION TO EXTEND AUTOMATIC STAY
11-2-2022 [\[10\]](#)

RICHARD KWUN/ATTY. FOR DBT.

Tentative Ruling

Motion: Extend the Automatic Stay

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

Disposition: Denied

Order: Civil minute order

The debtors request an order extending the automatic stay under 11 U.S.C. § 363(c)(3).

STAY EXTENSION

Upon request of a party in interest, the court may extend the automatic stay where the debtor has had one previous bankruptcy case that was pending within the 1-year period prior to the filing of the current bankruptcy case but was dismissed. See 11 U.S.C. § 362(c)(3)(B). The motion and notice of hearing must be filed before the expiration of the 30-day period following the date of the petition. The hearing on such motion must also be completed before the expiration of this period. 11 U.S.C. § 362(c)(3)(B). The court must find that the filing of the later case - not the previous case - is in good faith as to the creditors to be stayed. *Id.*

This statute further provides that "a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)" in cases in which "a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to - [(i)] file or amend the petition or other documents as required by this title or the court without substantial excuse . . . ; [(ii)] provide adequate protection as ordered by the court; or [(iii)] perform the terms of a plan confirmed by the court." *Id.* § 362(c)(3)(C)(i)(II).

Additionally, "a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)" in cases in which "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 chapter 7, 11 or 13 or any other reason to conclude that the later case will be concluded - [(i)] if a case under chapter 7, with a discharge; or [(ii)] if a case under chapter 11 or 13, with a confirmed plan that will be fully performed." *Id.* § 362(c)(3)(C)(i)(III).

DISCUSSION

Judicial Notice

A court may take judicial notice of documents "on file in federal and state courts," as they are undisputed matters of public record. See *Harris v. County of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (citing *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)).

The court takes judicial notice of the debtors' chapter 13 plan and its contents, as well as the bankruptcy schedules which appear on its docket. Fed. R. Evid. 201(b)(2). The court also takes judicial notice of the information appearing on the dockets of the debtors' previously filed Chapter 13 cases, identified below.

Evidence Does Not Support Extending Stay

This is the debtors' third Chapter 13 case filed in the Eastern District since 2021. The previous two cases are as follows: (1) Case No. 2021-20117 filed on January 15, 2021, and dismissed on August 5, 2021; and (2) Case No. 2021-23014, filed on August 25, 2021, and dismissed on August 26, 2022. The most recently filed case was dismissed for plan delinquency as follows.

Debtor did not commence making plan payments as required under the modified plan, confirmed on April 25, 2022, and has not made any payment since December 29, 2021. Debtor is \$19,080.00 delinquent in plan payments, which represents multiple months of the \$4,770.00 plan payment. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments.

Civil Minutes, Case No. 2021-23014, E.D. Cal. Bankr. (2021), ECF No. 69.

The testimony in support of the instant case is sparse. The sole basis argued by the debtors in support of the motion is their intention to apply for a modification of their mortgage loan. Yet, the evidence does not show that the debtors have applied for a loan modification.

The declaration in support of the motion states:

I applied for a home loan modification but was denied due to timing problems. I was instructed to reapply again after I filed for bankruptcy. I (sic) all paperwork ready to submit.

Declaration, 4:23-25, ECF No. 12.

The information in the debtors' Schedule I is also questionable. Schedule I shows that Kyle Farris is employed as a corrections officer whose income is as follows: \$10,087 gross monthly income from employment, with \$3,053.00 of this amount categorized as

overtime. See Schedule I, ECF No. 1. A review of the previously filed Schedule I in Case No. 21-23014 (filed on January 28, 2022) shows Kyle Farris' income as: \$8,215.00 gross with \$1,680.00 attributed to overtime. See Case No. 2021-23014, E.D. Cal. Bankr. (2021), Schedule I, ECF No. 51. The declaration in support of this motion is silent regarding the changes to the debtor's income. It does not explain how or why the debtor's overtime has increased so significantly nor does it explain how long this amount of overtime is expected to last. Moreover, a further comparative review of the two income schedules shows that Graciela Farris has had a significant and detrimental change in her monthly income. The current Schedule I shows no monthly income and the previous schedule shows gross monthly income of \$ 4,385.33. The declaration does not address this significant change either.

The debtors have offered insufficient evidence that the current case was filed in good faith as to the creditors to be stayed. See 11 U.S.C. § 362(c)(3)(B). A presumption, moreover, that the current case was not filed in good faith arises. Insufficient evidence has been offered to rebut this presumption. The supporting declaration does not point to any substantial change in the personal and financial affairs of the debtors since the dismissal of their previous case. A loan modification does not appear to have been offered and the evidence does not show it has been requested. The motion will be denied.

CIVIL MINUTE ORDER

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

The debtors' Motion to Extend the Stay has been presented to the court. Having considered the motion together with papers filed in support and opposition, and having heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied.

10. [22-21239](#)-A-13 **IN RE: MYRNA STICKLING**
[PGM-2](#)

MOTION TO CONFIRM PLAN
10-5-2022 [\[48\]](#)

PETER MACALUSO/ATTY. FOR DBT.
RESPONSIVE PLEADING

Final Ruling

Motion: Confirm Chapter 13 Plan

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

Disposition: Denied

Order: Civil minute order

The motion requests confirmation of the Chapter 13 plan in this case. See 11 U.S.C. §§ 1322, 1323, 1325; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(1)-(2). The Chapter 13 trustee opposes the motion, objecting to confirmation.

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

JUDICIAL NOTICE

A court may take judicial notice of documents "on file in federal and state courts," as they are undisputed matters of public record. See *Harris v. County of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (citing *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)).

The court takes judicial notice of the debtors' chapter 13 plan and its contents, as well as the bankruptcy schedules which appear on its docket. Fed. R. Evid. 201(b)(2).

PLAN FEASIBILITY

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

("While the feasibility requirement is not rigorous ... the plan proponent must, at minimum, demonstrate that the Debtor's income exceeds expenses by an amount sufficient to make the payments proposed by the plan."); *In re Wilkinson*, 99 B.R. 366, 369 (Bankr. N.D. Ohio 1989) ("[D]ebtors will not be able to comply with the plan and make all payments thereunder."). *In re Buccolo*, 397 B.R. 527, 530 (Bankr. D.N.J. 2008), *aff'd*, 2009 WL 2132435 (D.N.J. July 13, 2009).

Schedules I and J

The trustee contends that the debtor has not supported the feasibility of the plan with adequate evidence of her income. The debtor is self employed as a tax preparer. The court finds no evidence of the required attachments to Schedules I and J which would detail the debtor's income from self-employment and the expenses associated with operating her business. The court considers this part of the debtor's prima facie case for plan confirmation. This is information which is required at the outset of the motion and not in response to the trustee's opposition to the motion or the court's ruling.

The court notes that it addressed feasibility concerns in connection with the trustee's objection to confirmation as follows:

The debtor provided the trustee with consecutive monthly Profit and Loss statements, from July 2021 through, and including, May 2022. The trustee analyzed the statements and determined that the average monthly net income equals approximately \$469.00. See Objection to Confirmation, ECF No. 20, 2:23-28. See also, Declaration of Kristin Koo, ECF No. 22, 3:3-8.

Conversely, Schedule I, filed at the inception of the case, projects net income from the operation of the debtor's business at \$1,700.00 per month. Schedule I identifies only two sources of income: Social Security and income from the operation of the debtor's tax preparation business. Contributions from third parties are not contemplated in Schedule I. See Schedule I, ECF No. 1.

In addition, Form 122C-1, also filed at the inception of the case, shows that the debtor's gross average monthly income from the operation of her business during the six-month period prior to the filing of the case was \$1,355.83. See Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period, ECF No. 1. Neither Schedule I nor Form 122C-1 have been amended.

Civil Minutes, ECF No. 46.

The court notes that despite this ruling, and the inconsistencies between the debtor's schedules and Form 122C-1, the debtor has not amended any schedules or statements

since the last hearing. The declaration submitted in support of this motion to confirm fails to adequately resolve the issues raised by the trustee or to explain the discrepancies noted. The declaration states:

While my gross income has increased as expected, which allows me to pay my projected taxes and avoid using my social security during the busy season ends on October 17th, the day the extensions end, and in these same (4) months since I filed Chapter 13, my expenses changed allowing me to be able to make my payments independently for this chapter 13 plan.

Declaration, 4:5-10, ECF No. 51.

This evidence lacks the specificity required to show the debtor has sufficient income to fund her plan for the duration. It lacks information regarding the seasonality associated with the debtor's income, such as the number of months when income is increased, how much the income is increased and how the debtor has projected her average income. The declaration fails to explain how the projected expenses have changed and without the attachment to Schedules I and J there is no evidence regarding those expenses.

DEBTOR REPLY

On November 15, 2022, the debtor filed a reply, ECF No. 57. The reply consists of an unsworn statement filed by debtor's counsel. It states:

The Debtor acknowledges that the monthly income varies on "Off tax season" periods, as was the last (8) eight months, and resulting in the Trustee's calculation of \$1,355.83. *As such, the Debtor has amended the Business Income and Expenses to reflect the average of \$1,200.00, and expenses of \$200.00, thus netting \$1,000.00.*

Reply, 1:23-26, 2:1-2, ECF No. 57 (emphasis added).

The allegation in the reply is incorrect. The court is unable to locate any Business Income and Expense schedules on the docket, and the reply fails to cite any reference to this information. Moreover, the court is unable to locate any Schedules I and J other than those which were filed at the inception of this case, ECF No. 1.

The debtor has failed to prove the feasibility of her plan under 11 U.S.C. § 1326(a)(6). The court will deny the motion.

CIVIL MINUTE ORDER

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

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

The debtor's motion to confirm a chapter 13 plan has been presented to the court. Having considered the motion together with papers filed in support and opposition to it, and having heard the arguments of counsel, if any, and good cause appearing, presented at the hearing,

IT IS ORDERED that the motion is denied. The court denies confirmation of the chapter 13 plan.

11. [20-22143](#)-A-13 **IN RE: JODI/ROBERT GALLAGHER**
[MC-5](#)

MOTION TO EMPLOY TESS MULLIN AS SPECIAL COUNSEL
10-25-2022 [\[96\]](#)

MUOI CHEA/ATTY. FOR DBT.
TRUSTEE NON-OPPOSITION

Final Ruling

Application: Retroactive Employment of Special Counsel

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

Disposition: Approved

Order: Prepared by the applicant pursuant to the instructions below

Compensation Approved: \$12,000.00 as follows - [\$6,000.00 (MC-6); \$6,000.00 (MC-7)]

Reimbursement of Costs: \$349.00

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

The debtor seeks an order approving the retroactive employment of special counsel, Tess Mullin of Bond Legal, under 11 U.S.C. § 327(e). Ms. Mullin represented debtor, Jodi Gallagher in a cause of action arising out of a post-petition personal injury suffered by the debtor. The agreement between the debtors and Ms. Mullin show that counsel is to be employed on a contingent fee basis as follows: 33.3% to be paid if the matter is settled within 60 days of signing the attorney/client agreement; 40% if the matter is resolved after the 60-day period; and 45% if a complaint is required. The Agreement is filed as Exhibit A, served concurrently with this motion. See Exhibit A, ECF No. 99.

The Chapter 13 trustee has reviewed the motion and has filed a non-opposition to the motion. See Non-Opposition, ECF No. 106.

The court presumes, given the unique circumstances of this case, that the motion approving employment is also a request for approval of compensation and reimbursement of costs under 11 U.S.C. § 330. This motion is a companion motion to two motions to approve settlements on behalf of the debtor: MC-6, and MC-7. Each of the motions has been approved by the court, including the amounts of the contingency compensation awards.

RETROACTIVE EMPLOYMENT

In a previous case, this court has set forth the standards for retroactive approval of special counsel under § 327(e) of the Bankruptcy Code and Ninth Circuit decisional law:

"The bankruptcy courts in this circuit possess the equitable power to approve retroactively a professional's valuable but unauthorized services." *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970, 973 (9th Cir.1995) (citing *Halperin v. Occidental Fin. Grp. (In re Occidental Fin. Grp.)*, 40 F.3d 1059, 1062 (9th Cir.1994)). *Nunc pro tunc* approval of an attorney's unauthorized services under § 327(e) requires two distinct showings. First, a showing must be made that the applicant "does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed," and that the employment is "in the best interest of the estate." 11 U.S.C. § 327(e); see also *Mehdipour v. Marcus & Millichap (In re Mehdipour)*, 202 B.R. 474, 479 (9th Cir. BAP 1996) ("Applying for *nunc pro tunc* approval does not alleviate the professional from meeting the requirements of § 327...."). The attorney must continually qualify under the statutory conflict-of-interest standards throughout the entire period of representation. See 11 U.S.C. §§ 327(e), 328(c); see also *Rome v. Braunstein*, 19 F.3d 54, 57-58, 60 (1st Cir.1994) (holding that compensation may be disallowed if at any time a disqualifying conflict arises and recognizing the need for counsel to avoid such conflicts throughout their tenure).

Second, the applicant must show "exceptional circumstances" that justify *nunc pro tunc* approval. *Atkins*, 69 F.3d at 974; *Mehdipour*, 202 B.R. at 479. "To establish the presence of exceptional circumstances, professionals seeking retroactive approval must ... (1) satisfactorily explain their failure to receive prior judicial approval; and (2) demonstrate that their services benefitted the bankrupt estate in a significant manner." *Atkins*, 69 F.3d at 975-76; accord *Occidental Fin. Grp.*, 40 F.3d at 1062; *In re Gutterman*, 239 B.R. 828, 830 (Bankr.N.D.Cal.1999).

In re Grant, 507 B.R. 306, 309-10 (Bankr. E.D. Cal. 2014).

For the reasons discussed in the application, the court will approve the employment of special counsel. Special counsel satisfies the standards of § 327(e). Further, special counsel has shown exceptional circumstances that justify retroactive employment.

COMPENSATION AND EXPENSES

In this Chapter 13 case, Tess Mullin, special counsel for the debtor, also seeks allowance of final compensation and reimbursement of expenses. The applicant requests that the court allow compensation in the amount of \$12,000.00 and reimbursement of expenses in the amount of \$349.00.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis. The award is consistent with the employment application which requests approval of the compensation on a contingent fee basis of 40%.

CIVIL MINUTE ORDER

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

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

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

IT IS ORDERED that the court approves the retroactive employment of Tess Mullin as special counsel to the debtors in their post-petition personal injury cause of action pursuant to the terms of the attorney/client contingency agreement filed concurrently with the motion at Exhibit A, ECF No. 99.

IT IS FURTHER ORDERED that the compensation application is approved on a final basis. The court allows final compensation in the amount of \$12,000.00 and reimbursement of expenses in the amount of \$349.00.

12. [20-22143](#)-A-13 **IN RE: JODI/ROBERT GALLAGHER**
[MC-6](#)

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH TANGELA GIBSON AND ALEXANDER TAYLOR AND
DISBURSEMENT OF SETTLEMENT PROCEEDS FROM 21ST CENTURY
INSURANCE
10-25-2022 [\[101\]](#)

MUOI CHEA/ATTY. FOR DBT.
TRUSTEE NON-OPPOSITION

Final Ruling

Motion: Approve Compromise of Controversy
Notice: LBR 9014-1(f)(1); non-opposition filed by trustee
Disposition: Granted
Order: Civil minute order

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

The debtors seek approval of a personal injury settlement. The settlement arises out of a post-petition personal injury suffered by debtor, Jodi Gallagher. The debtor has claimed the proceeds of the settlement as exempt. The Chapter 13 trustee has reviewed the settlement terms, the debtors' plan and schedules and subsequently filed a non-opposition to the proposed settlement and the debtor's retention of the proceeds. See Non-Opposition, ECF No. 108. The settlement is memorialized in an agreement filed in support of the motion as Exhibit A, ECF No. 104.

APPROVAL OF COMPROMISE

In determining whether to approve a compromise under Federal Rule of Bankruptcy Procedure 9019, the court determines whether the compromise was negotiated in good faith and whether the party proposing the compromise reasonably believes that the compromise is the best that can be negotiated under the facts. *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986). More than mere good faith negotiation of a compromise is required. The court must also find that the compromise is fair and equitable. *Id.* "Fair and equitable" involves a consideration of four factors: (i) the probability of success in the litigation; (ii) the difficulties to be encountered in collection; (iii) the complexity of the litigation, and expense, delay and inconvenience necessarily attendant to litigation; and (iv) the paramount interest of creditors and a proper deference to the creditors' expressed wishes, if any. *Id.* The party proposing the compromise bears the burden of

persuading the court that the compromise is fair and equitable and should be approved. *Id.*

The movant requests approval of a compromise. The compromise is reflected in the settlement agreement filed concurrently with the motion as Exhibit A, ECF No. 104. Based on the motion and supporting papers, the court finds that the compromise presented for the court's approval is fair and equitable considering the relevant *A & C Properties* factors. The compromise or settlement will be approved.

CIVIL MINUTE ORDER

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

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

The debtor's motion to approve a compromise has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted. The court hereby approves the compromise that is reflected in the settlement agreement filed concurrently with the motion as Exhibit A and filed at docket no. 104.

13. [20-22143](#)-A-13 **IN RE: JODI/ROBERT GALLAGHER**
[MC-7](#)

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH ALLSTATE INSURANCE
10-25-2022 [\[91\]](#)

MUOI CHEA/ATTY. FOR DBT.
TRUSETTEE NON-OPPOSITION

Final Ruling

Motion: Approve Compromise of Controversy

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

Disposition: Granted

Order: Civil minute order

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

The debtors seek approval of a personal injury settlement. The settlement arises out of a post-petition personal injury suffered by debtor, Jodi Gallagher. The debtor has claimed the proceeds of the settlement as exempt. The Chapter 13 trustee has reviewed the settlement terms, the debtors' plan and schedules and subsequently filed a non-opposition to the proposed settlement and the debtor's retention of the proceeds. See Non-Opposition, ECF No. 110. The settlement is memorialized in an agreement filed in support of the motion as Exhibit A, ECF No. 94.

APPROVAL OF COMPROMISE

In determining whether to approve a compromise under Federal Rule of Bankruptcy Procedure 9019, the court determines whether the compromise was negotiated in good faith and whether the party proposing the compromise reasonably believes that the compromise is the best that can be negotiated under the facts. *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986). More than mere good faith negotiation of a compromise is required. The court must also find that the compromise is fair and equitable. *Id.* "Fair and equitable" involves a consideration of four factors: (i) the probability of success in the litigation; (ii) the difficulties to be encountered in collection; (iii) the complexity of the litigation, and expense, delay and inconvenience necessarily attendant to litigation; and (iv) the paramount interest of creditors and a proper deference to the creditors' expressed wishes, if any. *Id.* The party proposing the compromise bears the burden of persuading the court that the compromise is fair and equitable and should be approved. *Id.*

The movant requests approval of a compromise. The compromise is reflected in the settlement agreement filed concurrently with the motion as Exhibit A, ECF No. 94. Based on the motion and supporting papers, the court finds that the compromise presented for the court's approval is fair and equitable considering the relevant *A & C Properties* factors. The compromise or settlement will be approved.

CIVIL MINUTE ORDER

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

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

The debtor's motion to approve a compromise has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted. The court hereby approves the compromise that is reflected in the settlement agreement filed concurrently with the motion as Exhibit A and filed at docket no. 94.

14. [22-21245](#)-A-13 **IN RE: ROBERT MURRAY**
[DPC-2](#)

MOTION TO DISMISS CASE
10-25-2022 [\[45\]](#)

RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss Case

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

Disposition: Granted

Order: Civil minute order

Opposition Due: November 8, 2022

Opposition Filed: Unopposed

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

Best Interests of Creditors/Estate: Dismiss

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

CASE DISMISSAL

Plan Delinquency

The chapter 13 trustee moves to dismiss this chapter 13 case for delinquency in payments under the chapter 13 plan. For the reasons stated in the motion, cause exists under § 1307(c)(1) to dismiss the case. Payments under the plan are delinquent in the amount of \$9,074.02 with a further payment of \$3,058.53 due October 25, 2022.

Failure to Provide Tax Returns and Pay Advices

The debtor has failed to provide the trustee with a required tax return (for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed) no later than 7 days before the date first set for the first meeting of creditors. 11 U.S.C. § 521(e)(2)(A)-(B).

Similarly, the debtor has failed to provide the trustee with required pay advices. See 11 U.S.C. § 521(a)(3)-(4).

Failure to File Plan

The court sustained an objection to confirmation of the debtor's plan on August 17, 2022, yet the debtor has failed to file an amended plan.

The court finds that each of these bases support dismissal of the debtor's case for unreasonable delay which is prejudicial to creditors under 11 U.S.C. § 1307(c)(1). The court will grant the motion.

11 U.S.C. § 1307(c)

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

...

11 U.S.C. § 1307(c).

The court finds that dismissal is in the best interests of the creditors and the estate. This case has not been previously converted from a chapter 7.

CIVIL MINUTE ORDER

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

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

The trustee's motion to dismiss this chapter 13 case has been presented to the court. Having entered the default of respondent debtor for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted because of the delinquency under the chapter 13 plan in this case. The court hereby dismisses this case.

15. [22-22746](#)-A-13 **IN RE: JEFFREY WOODWARD**
[MOH-1](#)

MOTION TO VACATE
11-8-2022 [\[18\]](#)

MICHAEL HAYS/ATTY. FOR DBT.

Final Ruling

Motion: Vacate Foreclosure of Real Property
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied without prejudice
Order: Civil minute order

This is the debtor's motion to vacate the foreclosure sale conducted on the debtor's real property. The motion contends that the foreclosure sale was not properly conducted.

RULE 7001

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

- (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;
- (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, but not a proceeding under Rule 3012 or Rule 4003(d);

Fed. R. Bankr. P. 7001(1)(2).

Rule 7001 requires that the relief sought by the debtor must be obtained by filing an adversary proceeding and not by motion.

CIVIL MINUTE ORDER

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

The debtor's Motion to Vacate Foreclosure has been presented to the court. Having considered the motion together with papers filed in support and opposition, and having heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied without prejudice.

16. [20-21047](#)-A-13 **IN RE: PAUL DENNO AND SANDRA MURRAY**
[MWB-6](#)

MOTION TO MODIFY PLAN
9-26-2022 [\[162\]](#)

MARK BRIDEN/ATTY. FOR DBT.

Final Ruling

Motion: Modify Chapter 13 Plan

Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition filed by the trustee

Disposition: Denied without prejudice

Order: Civil minute order

The motion requests modification of the Chapter 13 plan in this case. See 11 U.S.C. §§ 1322, 1325, 1329; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(2). The Chapter 13 trustee opposes the motion, objecting to the modification.

Chapter 13 plan modification is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. "[T]he only limits on modification are those set forth in the language of the Code itself, coupled with the bankruptcy judge's discretion and good judgment in reviewing the motion to modify." *In re Powers*, 202 B.R. 618, 622 (B.A.P. 9th Cir. 1996).

SERVICE AND NOTICE

The debtors filed a certificate of service with the motion. See Certificate of Service, ECF No. 166. The certificate is insufficient as it fails to attach a mailing matrix showing that anyone, other than the Chapter 13 trustee or the United States Trustee, was served with the moving papers. Thus, service of the motion fails to comply with Fed. R. Bankr. P. 2002.

VIOLATION OF LBR 9014-1(c)

The docket control number given for this matter violates the court's Local Rules, LBR 9014-1(c), regarding proper use of docket control numbers. When using a docket control number, a party must use both letters (usually initials of the attorney for the movant) and a number. The numerical portion of the docket control number must be "the number that is one number higher than the number of motions previously filed by said attorney" in that particular case. LBR 9014-1(c)(3). Thus, a party may not use the same docket control number on separate matters filed in the same case.

The docket control number used in this motion was used in a previous motion filed by the debtors - a motion to sell property filed on November 18, 2021, ECF No. 98.

Debtors' counsel is cautioned that future failure to comply with local rules may result in denial of relief and/or sanctions, LBR 1001-1(g).

CIVIL MINUTE ORDER

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

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

The debtors' motion to modify a chapter 13 plan has been presented to the court. Having considered the motion together with papers filed in support and opposition to it, and having heard the arguments of counsel, if any, and good cause appearing, presented at the hearing,

IT IS ORDERED that the motion is denied without prejudice. The court denies modification of the chapter 13 plan.

17. [22-22749](#)-A-13 **IN RE: MICHAEL WYCLIFFE AND REBECCA WEAVER**
[PGM-1](#)

MOTION TO EXTEND AUTOMATIC STAY
11-4-2022 [\[12\]](#)

PETER MACALUSO/ATTY. FOR DBT.

Tentative Ruling

Motion: Extend the Automatic Stay

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

Disposition: Granted

Order: Civil minute order

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

The debtors seek an order extending the automatic stay under 11 U.S.C. § 363(c)(3).

EXTENSION OF THE STAY

Upon request of a party in interest, the court may extend the automatic stay where the debtor has had one previous bankruptcy case that was pending within the 1-year period prior to the filing of the current bankruptcy case but was dismissed. See 11 U.S.C. § 362(c)(3)(B). Procedurally, the automatic stay may be extended only "after notice and a hearing *completed* before the expiration of the 30-day period" after the filing of the petition in the later case.

Id. (emphasis added). To extend the stay, the court must find that the filing of the *later case* is in good faith as to the creditors to be stayed, and the extension of the stay may be made subject to conditions or limitations the court may impose. *Id.*

This is the second Chapter 13 case filed by the debtors. The previous case was dismissed after the debtors failed to make plan payments under a confirmed plan.

The debtors' circumstances have changed since the filing of the previous case. Mr. Wycliffe has obtained new employment and has held the new job for 3 months prior to filing this case. Each of the debtors has recovered from COVID-19. Moreover, the debtors were previously caring for elderly family members. Those circumstances have changed, and the debtors no longer have the expenses associated with this care.

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

CIVIL MINUTE ORDER

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

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

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

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

18. [22-20062](#)-A-13 **IN RE: CHARMAINE RAY**
[APN-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-24-2022 [\[50\]](#)

DIANA CAVANAUGH/ATTY. FOR DBT.
AUSTIN NAGEL/ATTY. FOR MV.
TOYOTA MOTOR CREDIT CORPORATION VS.

RESPONSIVE PLEADING

Final Ruling

Motion: Stay Relief

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

Disposition: Denied as moot

Order: Civil minute order

Subject Property: 2017 LEXUS NX200

Toyota Motor Credit Corporation seeks an order for relief from the automatic stay of 11 U.S.C. § 362(a). The Chapter 13 Plan in this case was confirmed on June 22, 2022. The confirmed Plan provides for the movant's claim in Class 4. See Plan, ECF No. 36.

STAY RELIEF

Federal courts have no authority to decide moot questions. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67-68, 72 (1997). "Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id.* at 68 n.22 (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)) (internal quotation marks omitted).

The confirmed chapter 13 plan in this case provides for the movant's claim in Class 4. Class 4 secured claims are long-term claims that mature after the completion of the plan's term. They are not modified by the plan, and they are not in default as of the filing of the petition. They are paid directly by the debtor or a third party. Section 3.11(a) of the plan provides: Upon confirmation of the plan, the automatic stay of 11 U.S.C. § 362(a) and the co-debtor stay of 11 U.S.C. § 1301(a) are . . . modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract"

Because the plan has been confirmed, the automatic stay has already been modified to allow the moving party to exercise its rights against its collateral. No effective relief can be awarded. The movant's personal interest in obtaining relief from the stay no longer exists because the stay no longer affects its collateral. The motion will be denied as moot.

CIVIL MINUTE ORDER

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

Toyota Motor Credit Corporation's Motion for Relief from Stay has been presented to the court. Having considered the [motion/application/objection] together with papers filed in support and opposition, and having heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied as moot.

19. [22-21663](#)-A-13 **IN RE: TIMOTHY/ASHLEY GOETZ**
[MRL-1](#)

MOTION TO CONFIRM PLAN
10-15-2022 [\[34\]](#)

MIKALAH LIVIAKIS/ATTY. FOR DBT.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Confirm Chapter 13 Plan

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

Disposition: Denied

Order: Civil minute order

The motion requests confirmation of the Chapter 13 plan in this case. See 11 U.S.C. §§ 1322, 1323, 1325; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(1)-(2). The Chapter 13 trustee opposes the motion, objecting to confirmation.

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

PLAN FEASIBILITY

The proposed plan must be feasible. 11 U.S.C. § 1325(a)(6). Feasibility is a "factual determination" as to the plan's "reasonable likelihood of success." *First Nat'l Bank of Boston v. Fantasia (In re Fantasia)*, 211 B.R. 420, 423 (B.A.P. 1st Cir. 1997). The bankruptcy court needs to "be satisfied that the debtor has the present as well as the future financial capacity to comply with the terms of the plan." *Id.* As one court summarized feasibility, "Thus, a plan is not feasible and is not confirmable if a debtor's income will not support the plan's proposed payments. *In re Barnes*, 275 B.R. 889, 894 (Bankr. E.D. Cal.2002) ("[T]he debtors showed no disposable income with which to fund a plan.... [T]he debtors have

been unable to actually pay the amount projected ... to the trustee."); *In re Bernardes*, 267 B.R. 690, 695 (Bankr. D.N.J. 2001) ("While the feasibility requirement is not rigorous ... the plan proponent must, at minimum, demonstrate that the Debtor's income exceeds expenses by an amount sufficient to make the payments proposed by the plan."); *In re Wilkinson*, 99 B.R. 366, 369 (Bankr. N.D. Ohio 1989) ("[D]ebtors will not be able to comply with the plan and make all payments thereunder."). *In re Buccolo*, 397 B.R. 527, 530 (Bankr. D.N.J. 2008), *aff'd*, 2009 WL 2132435 (D.N.J. July 13, 2009).

Plan Delinquency

The trustee indicates that the plan payments are delinquent in the amount of \$4,565.06. The plan cannot be confirmed if the plan payments are not current.

FAILURE TO FILE TAX RETURNS

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

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

11 U.S.C. § 1325(a)(9).

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

11 U.S.C. § 1308(a).

The Franchise Tax Board has filed an amendment to its claim, Claim No. 2. The attachment to the claim indicates that the debtors have not filed a 2018 tax return. While the debtors have provided a copy of the 2018 tax return to the trustee, he is unable to verify whether the return has been filed.

If the debtors have not filed the 2018 tax return, and were required to do so, then the plan may not be confirmed as this contravenes the provisions of 11 U.S.C. §§ 1325(a)(9) and 1308.

CIVIL MINUTE ORDER

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

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

The debtors' motion to confirm a chapter 13 plan has been presented to the court. Having considered the motion together with papers filed in support and opposition to it, and having heard the arguments of counsel, if any, and good cause appearing, presented at the hearing,

IT IS ORDERED that the motion is denied. The court denies confirmation of the chapter 13 plan.

20. [19-21064](#)-A-13 **IN RE: ANGELA KERWIN**
[APN-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-24-2022 [\[24\]](#)

SETH HANSON/ATTY. FOR DBT.
AUSTIN NAGEL/ATTY. FOR MV.
WELLS FARGO BANK, N.A. VS.

Final Ruling

The motion was withdrawn by the moving party on November 9, 2022, ECF No. 32. Accordingly, this matter will be removed from the calendar as moot. No appearances are required.

21. [22-21365](#)-A-13 **IN RE: RAFAEL/VIANA LARA**
[KMB-2](#)

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY BOSCO CREDIT, LLC
9-20-2022 [\[63\]](#)

KIM BEATON/ATTY. FOR DBT.
KELLI BROWN/ATTY. FOR MV.

Final Ruling

Motion: Objection to Confirmation of Plan

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

Disposition: Overruled without prejudice

Order: Civil minute order

Bosco Credit, LLC, objects to confirmation of the debtors' First Amended Plan. As the debtors have filed multiple amended plans the objecting creditor should identify the plan which it opposes by date and docket number.

This objection is incorrectly filed as such and is raised prematurely. Instead, it should be filed as opposition once the debtors file a motion to confirm the most recently amended plan filed on October 26, 2022, ECF No. 95. See LBR 3015-1(d)(1). Because the debtors have filed an amended plan they are required to file and serve a motion to confirm the amended plan on all creditors to obtain confirmation under Fed. R. Bankr. P. 2002, LBR 3015-1(d)(1).

The creditor's objection is premature as no motion to confirm has yet been filed by the debtors.

Counsel is encouraged to review LBR 3015-1. Future failure to properly comply with the Eastern District's Local Bankruptcy Rules may result in the denial of relief or the imposition of sanctions. LBR 1001-1(g).

CIVIL MINUTE ORDER

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

IT IS ORDERED that the hearing on the objection is overruled without prejudice.

22. [22-20967](#)-A-13 **IN RE: JONATHAN EMMONS**
[MWB-1](#)

MOTION TO CONFIRM PLAN
10-3-2022 [\[34\]](#)

MARK BRIDEN/ATTY. FOR DBT.
RESPONSIVE PLEADING

Final Ruling

Motion: Confirm Chapter 13 Plan

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

Disposition: Denied

Order: Civil minute order

The motion requests confirmation of the Chapter 13 plan in this case. See 11 U.S.C. §§ 1322, 1323, 1325; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(1)-(2). The Chapter 13 trustee opposes the motion, objecting to confirmation.

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

PLAN FEASIBILITY

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

Incorrect or Incomplete Plan Provisions

The trustee contends the plan is not feasible as it purports to contain additional provisions which were not appended to the plan. The proposed plan indicates that additional provisions are appended. See Chapter 13 Plan, Section 1.02, ECF No. 27. However, there are no additional provisions appended to the plan. A blank support document is filed at ECF No. 37.

Thus, all creditors have been served with a plan which is either incorrect or incomplete. As such, the motion will be denied. This is a defect which cannot be remedied absent the filing of an amended plan. The court finds the plan is not feasible under 11 U.S.C. 1325(a)(6).

The court need not address the remaining issues raised by the Chapter 13 trustee. The court will deny the motion.

CIVIL MINUTE ORDER

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

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

The debtor's motion to confirm a chapter 13 plan has been presented to the court. Having considered the motion together with papers filed in support and opposition to it, and having heard the arguments of counsel, if any, and good cause appearing, presented at the hearing,

IT IS ORDERED that the motion is denied. The court denies confirmation of the chapter 13 plan.

23. [22-21669](#)-A-13 **IN RE: LINDSAY/LISA BRAKEL**
[KMT-2](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY
11-4-2022 [[105](#)]

MARK BRIDEN/ATTY. FOR DBT.
GABRIEL HERRERA/ATTY. FOR MV.
NICHOLAS LOPER VS.

Final Ruling

Motion: Stay Relief to Pursue State-Court Litigation
Notice: LBR 9014-1(f)(2); non-opposition filed by the debtors
Disposition: Granted only to the extent specified in this ruling
Order: Civil minute order

Subject: Pending state-court litigation described in the motion

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

Movant, Nicholas Loper, seeks an order for relief from the automatic stay of 11 U.S.C. § 362(a) to allow him to proceed to judgment in his personal injury lawsuit against, among others, the debtors in the Circuit Court of the State of Oregon for the County of Multnomah Case No. 20CV39371. Movant further seeks relief from the automatic stay to allow full or partial payment from any available insurance coverage.

The debtors have filed a response to the motion indicating that they have no opposition to the motion for purposes of continuing the litigation. See Response, ECF No. 121.

STAY RELIEF

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

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

These factors include: "(1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms." *Sonnax Indus., Inc. v. TRI Component Prods. Corp. (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1286 (2nd Cir. 1990) (citing *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984)).

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

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

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

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

CIVIL MINUTE ORDER

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

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

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

IT IS ORDERED that the motion is granted to the extent specified in this order. The automatic stay is vacated to allow the movant to pursue through judgment the pending state-court litigation described in the motion. The movant may also file post-judgment motions and appeals. But the movant shall not take any action to collect or enforce any judgment, or pursue costs or attorney's fees against the debtor, except (1) from applicable insurance proceeds; or (2) by filing a proof of claim in this case. No other relief is awarded.

24. [22-21669](#)-A-13 **IN RE: LINDSAY/LISA BRAKEL**
[MWB-3](#)

MOTION TO CONFIRM PLAN
10-12-2022 [\[87\]](#)

MARK BRIDEN/ATTY. FOR DBT.
RESPONSIVE PLEADING

Final Ruling

Motion: Confirm Chapter 13 Plan

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

Disposition: Withdrawn by moving party

Order: Civil minute order

The motion requests confirmation of the Chapter 13 plan in this case. See 11 U.S.C. §§ 1322, 1323, 1325; Fed. R. Bankr. P. 2002(b); LBR 3015-1(d)(1)-(2). The Chapter 13 trustee opposes the motion, objecting to confirmation. Opposition was also filed by creditor Nicholas Loper.

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

On November 14, 2022, the debtor filed a notice of withdrawal of the proposed plan. See Withdrawal, ECF No. 122.

FRCP 41

Federal Rule of Civil Procedure 41 governs the circumstances where a party may withdraw a motion or objection. Fed. R. Civ. P. 41, *incorporated by* Fed. R. Bankr. P. 7041, 9014(c) (applying rule dismissal of adversary proceedings to contested matters). A motion or objection may be withdrawn without a court order only if it has not been opposed or by stipulation "signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A). In all other instances, a motion or objection may be withdrawn "only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2).

Here, the debtors have signaled their abandonment of the currently proposed plan. The objecting creditor has been granted relief from the automatic stay (KMT-2) and will not be prejudiced by the withdrawal of the motion to confirm. Neither the trustee, nor any creditor, has expressed opposition to the withdrawal of the proposed plan. No unfair prejudice will result from withdrawal of the objection and the court will accede to the debtors' request in this instance.

CIVIL MINUTE ORDER

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

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

The debtors' motion to confirm a chapter 13 plan has been presented to the court. Having considered the motion together with papers filed in support and opposition to it, and having heard the arguments of counsel, if any, and good cause appearing, presented at the hearing,

IT IS ORDERED that the motion is withdrawn by the moving party.

25. [21-22570](#)-A-13 **IN RE: NENITA ANTONIO**
[TJW-4](#)

CONTINUED MOTION TO CONFIRM PLAN
9-13-2022 [\[85\]](#)

TIMOTHY WALSH/ATTY. FOR DBT.

Final Ruling

Motion: Confirm Chapter 13 Plan

Notice: Continued from October 18, 2022

Disposition: Denied

Order: Civil minute order

The hearing on the debtor's motion to confirm Chapter 13 plan was continued to allow the debtor to file Supplemental Schedules I and J in support of the plan. In its prior ruling the court stated its position regarding the feasibility of the proposed plan:

The debtor has not supported the plan by filing recently amended Schedules I and J. The most recently filed Schedule J was filed on November 10, 2021, nearly 11 months ago, ECF No. 26. The most recently filed Schedule I was filed at the inception of the case on July 15, 2021, ECF No. 1. Without current income and expense information the court and the chapter 13 trustee are unable to determine whether the

plan is feasible or whether the plan has been proposed in good faith. See 11 U.S.C. § 1325(a)(3), (6).

The court will continue this matter to allow the debtor to augment the evidentiary record and file supplemental Schedules I and J. However, counsel is cautioned that the court considers current budget schedules to be part of a debtor's prima facie case for confirmation of a Chapter 13 plan. In the future the schedules should be filed at the outset of a motion and not in response to the court's ruling or a party's opposition.

Civil Minutes, ECF No. 97.

The court ordered the debtor to file the schedules no later than November 1, 2022. See Order, ECF No. 98. The debtor has filed no further evidence in support of the motion to confirm plan. The court finds the plan is not feasible under 11 U.S.C. § 1325(a)(6). The court will deny the motion.

TRUSTEE STATUS REPORT

On November 15, 2022, the Chapter 13 trustee filed a Status Report as ordered by the court. See Status Report, ECF No. 99. The report indicates that the trustee has not received any further information regarding the required amended schedules.

CIVIL MINUTE ORDER

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

The debtor's Motion to Confirm Plan has been presented to the court. Having considered the motion together with papers filed in support and opposition, and having heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied.

26. [22-21270](#)-A-13 **IN RE: ADAM/KRISTIN STERIO**
[MRL-2](#)

MOTION TO CONFIRM PLAN
10-1-2022 [\[33\]](#)

MIKALAH LIVIAKIS/ATTY. FOR DBT.
TRUSTEE NON-OPPOSITION

Final Ruling

Motion: Confirm Chapter 13 Plan

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

Disposition: Granted

Order: Prepared by the movant, approved by the trustee

Subject: Chapter 13 Plan, filed October 1, 2022

DEFAULT OF RESPONDENT

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

The debtors seek confirmation of their Chapter 13 Plan filed October 1, 2022, ECF No. 34. The plan is supported by Supplemental Schedules I and J filed October 1, 2022, ECF No. 36. The Chapter 13 trustee has filed non-opposition to the motion, ECF No. 39.

CHAPTER 13 PLAN CONFIRMATION

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

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

27. [22-22071](#)-A-13 **IN RE: SERGEY/ELENI MALKO**
[DPC-1](#)

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P.
CUSICK
9-28-2022 [\[21\]](#)

MIKALAH LIVIAKIS/ATTY. FOR DBT.
RESPONSIVE PLEADING

Final Ruling

Objection: Trustee's Objection to Confirmation of Plan

Notice: Continued from October 18, 2022

Disposition: Sustained and confirmation denied

Order: Civil minute order

The hearing on the trustee's objection to confirmation was continued to allow the trustee to properly serve parties which had filed requests for special notice, and for the debtors to file a written response to the trustee's objection. The parties have complied with the court's orders.

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

PLAN FEASIBILITY

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

Ambiguities in Bankruptcy Documents

The trustee contends the plan is not feasible under 11 U.S.C. § 1325(a)(6). The debtors operate two businesses. The trustee is unable to reconcile the debtors' income from each of the businesses as they are not properly identified on Schedule I, the Business Attachments to Schedules I and J, and Form 122C. Thus, the trustee is unable to determine how projected increases are forecast when comparing the various documents filed in this case. The trustee also contends that the debtors project an increase in monthly income of \$4,411.00, which is significant, without explanation.

Additionally, the trustee is unable to reconcile the Profit and Loss Statements provided by the debtors with bank statements, due in large part to missing bank statements for an account which the debtors failed to list in Schedules A/B.

GOOD FAITH

To determine bad faith a bankruptcy judge must review the "totality of the circumstances." *In re Goeb*, 675 F.2d 1386, 1391 (9th Cir.1982). "A bankruptcy court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in an inequitable manner." *Id.*, at 1390.

Failure to File Accurate and Complete Schedules

Debtors are required to propose a plan in good faith under 11 U.S.C. § 1325(a)(3). Filing inaccurate schedules and statements and failing to promptly amend documents does not evidence that the plan is proposed in good faith.

The trustee notes that the debtors failed to list a bank account in Schedules A/B and failed to identify the source of funds for this account.

Additionally, the debtors failed to include the full name of debtor Eleni Malko in the petition.

DEBTOR RESPONSE/TRUSTEE REPLY

The debtors filed a response, accompanied by a declaration, an Exhibit consisting of the October 2022 Profit and Loss Statement, and amended Petition and Schedules.

While the amendments to the Petition and Schedules A/B resolve part of the trustee's objection, additional information in the Schedules and Exhibit give rise to new questions.

First, the filing of the October 2022 profit and loss statement shows an increase in income which the trustee contends is even greater than that projected by the debtors. The trustee has requested further information as the projected income is based on average income and information for the months of August and

September 2022, has not been provided, and this information is necessary to determine the average income.

Second, the debtors have failed to amend Schedules I and J, or the Business Attachments to Schedules I and J to clarify the income and expenses for each of the debtors' businesses. Without this information the trustee cannot reconcile the information provided in the profit and loss statements he has received, or for the anticipated statements he has requested.

Finally, the debtors added two bank statements when they amended Schedule A/B. See ECF No. 20. The trustee has requested 6 months of bank statements for each of the two accounts.

The debtors have failed to sustain their burden of proof. Correctly completed and unambiguous Schedules I and J, with corresponding Attachments, are part of the debtors' prima facie case for confirmation. This information is required at the outset of the case, ideally before the meeting of creditors, and not in response to the trustee's objection to confirmation. Moreover, the debtors have not yet provided sufficient additional information to the trustee proving the average projected monthly income for each of the businesses which they operate. The debtors have not proven the proposed plan is feasible under 11 U.S.C. § 1325(a)(6).

The court will sustain the trustee's objection.

CIVIL MINUTE ORDER

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

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

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

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

28. [22-22376](#)-A-13 **IN RE: CAMERON/DEBORAH ENGLISH**
[KMB-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY U.S. BANK NATIONAL
ASSOCIATION
10-27-2022 [\[19\]](#)

MIKALAH LIVIAKIS/ATTY. FOR DBT.
KELLI BROWN/ATTY. FOR MV.

Final Ruling

Objection: Creditor's Objection to Confirmation of Plan

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

Disposition: Continued to December 13, 2022, at 9:00 a.m.

Order: Civil minute order

U.S. Bank National Association objects to confirmation of the
debtor's plan.

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

NOTICE

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

Objection to Confirmation

This objection is brought pursuant to Rule 9014 which requires that
notice and an opportunity to be heard shall be "afforded the party
against whom relief is sought." Moreover, an objection to the
confirmation of a Chapter 13 plan is governed by Fed. R. Bankr. P.
2002(b). The court has determined that notice shall be given to
parties who have filed a request for special notice as follow.

Rules 9013 and 9007

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

time determined under Rule 9006(d). The moving party shall serve the motion on:

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

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

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

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

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

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

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

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

In the Eastern District the court has ordered that parties which have filed requests for special notice must receive notice of motions. LBR 9014-1(d)(3)(B)(iv) includes creditors which have filed requests for special notice as parties who must be served with all motions, objections, and supporting papers.

In this case creditor AIS Portfolio Services, LP, filed requests for special notice. See Request for Notice, ECF No. 12. Thus, the objecting creditor, which also filed a request for special notice, is bound to serve its objection to confirmation on creditors who have filed requests for special notice.

The Certificate of Service filed in support of this motion by the objecting creditor does not list the AIS Portfolio Services, LP as a party served with the notice as required. See Certificate of Service, ECF No. 21.

The court will continue the hearing on the objection to confirmation to allow for notice to the special notice party, and for the debtors to file a response to the objection.

CIVIL MINUTE ORDER

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

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

U.S Bank National Association's objection to confirmation has been presented to the court. Having considered the objection, oppositions, responses and replies, if any, and having heard oral argument presented at the hearing,

IT IS ORDERED that the hearing on the objection is continued to December 13, 2022, at 9:00 a.m. Not later than November 29, 2022, the objecting creditor shall file and serve the objection and an amended notice of hearing on the debtor and all parties which have filed a special notice in this case.

IT IS FURTHER ORDERED that not later than December 6, 2022, the debtors shall file and serve written opposition, if any, to the objecting creditor's objection. Should the debtors fail to file opposition the court will rule on the objection without further notice or hearing.

29. [22-21078](#)-A-13 **IN RE: JOSE CARDONA AND VANESSA PADILLA**
[PSB-3](#)

MOTION TO CONFIRM PLAN
10-4-2022 [\[39\]](#)

PAULDEEP BAINS/ATTY. FOR DBT.
TRUSTEE NON-OPPOSITION

Final Ruling

Motion: Confirm Chapter 13 Plan

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

Disposition: Granted

Order: Prepared by the movant, approved by the trustee

Subject: Second Amended Chapter 13 Plan, filed October 4, 2022

DEFAULT OF RESPONDENT

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

The debtors seek confirmation of their Chapter 13 Plan. This motion is a companion motion to the Debtors' Motion to Approve Loan Modification (PSB-4). The budget schedules filed in support of this motion align with the information proffered in the Motion to Approve Loan Modification. See Schedules I and J, ECF No. 1. The Chapter 13 trustee has filed a non-opposition to the motion. See Non-Opposition, ECF No. 53.

CHAPTER 13 PLAN CONFIRMATION

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

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

30. [22-21078](#)-A-13 **IN RE: JOSE CARDONA AND VANESSA PADILLA**
[PSB-4](#)

MOTION TO INCUR DEBT
10-4-2022 [\[45\]](#)

PAULDEEP BAINS/ATTY. FOR DBT.
TRUSTEE NON-OPPOSITION

Final Ruling

Motion: Approval of Mortgage Loan Modification

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

Disposition: Granted in part, denied in part

Order: Civil minute order

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

The debtors seek permission to modify the mortgage on their real property residence located at 816 11th Street, Williams, California. The debtors had negotiated the loan modification prior to proposing their Chapter 13 Plan and the motion is consistent with the debtors' Motion to Confirm Chapter 13 Plan (PSB-3). The Chapter 13 trustee has filed a non-opposition to the motion. See Non-Opposition, ECF No. 51.

LOAN MODIFICATION

The court construes the present motion as requesting two forms of relief. First, the motion requests approval of a loan modification agreement. While the ordinary chapter 13 debtor has some of the rights and powers of a trustee under § 363, such a debtor does not have the trustee's right to obtain credit or incur debt under § 364. See 11 U.S.C. § 1303. *But cf.* 11 U.S.C. § 1304 (providing that a chapter 13 debtor engaged in business has the rights and powers of a trustee under § 364). The court's local rules address this situation and require court authorization before a chapter 13 debtor obtains credit or incurs new debt. LBR 3015-1(h)(1)(E).

Second, the motion impliedly requests stay relief under § 362(d)(1) to insulate the secured lender from any claim of liability for "any act to collect, assess, or recover a claim against the debtor." See 11 U.S.C. § 362(a)(6), (d)(1).

The court will grant the motion in part to authorize the debtor and the secured lender to enter into the loan modification agreement subject to the parties' right to reinstatement of the original terms of the loan documents in the event conditions precedent to the loan modification agreement are not satisfied. The court will also grant relief from the stay of § 362(a) to allow the secured lender to negotiate and enter into the loan modification agreement with the debtor. 11 U.S.C. § 362(d)(1).

By granting this motion, the court is not approving the terms or conditions of the loan modification agreement. The motion will be denied in part to the extent that the motion requests approval of the terms and conditions of the loan modification agreement or other declaratory relief.

CIVIL MINUTE ORDER

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

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

The court has reviewed the present motion for approval of a mortgage loan modification agreement between the debtor and the secured creditor named in the motion. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted in part and denied in part. The court authorizes the debtor and the secured creditor to enter into the loan modification agreement subject to the parties' right to reinstatement of the original terms of the loan documents in the event conditions precedent to the loan modification agreement are not satisfied. The court denies the motion to the extent it requests approval of the terms and conditions of the loan modification or any other declaratory relief. To the extent the

modification is inconsistent with the confirmed chapter 13 plan, the debtor shall continue to perform the plan as confirmed until it is modified.

IT IS FURTHER ORDERED that the court grants relief from the automatic stay to allow the secured lender to negotiate and enter into the loan modification agreement with the debtor. 11 U.S.C. § 362(d)(1). The automatic stay remains in effect for all acts not described in this order.

31. [22-21984](#)-A-13 **IN RE: ANDREW KNIERIEM**
[RMP-2](#)

OBJECTION TO CONFIRMATION OF PLAN BY REAL TIME RESOLUTIONS,
INC.
10-17-2022 [\[37\]](#)

RENEE PARKER/ATTY. FOR MV.

Final Ruling

Motion: Objection to Confirmation of Plan

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

Disposition: Overruled without prejudice

Order: Civil minute order

Real Time Resolutions, Inc., objects to confirmation of the debtor's Amended Plan, filed October 14, 2022.

This objection is incorrectly filed as such. Instead, it should be filed as opposition once the debtor files a motion to confirm the most recently amended plan, ECF No. 35. See LBR 3015-1(d)(1). Because the debtor has filed an amended plan he is required to file and serve a motion to confirm the amended plan on the trustee and all creditors to obtain confirmation under Fed. R. Bankr. P. 2002, LBR 3015-1(d)(1).

The creditor's objection is premature as no motion to confirm has yet been filed by the debtor. Once a motion to confirm is filed and served the creditor should file any opposition to the motion with the same motion control number assigned to the matter by the moving party. LBR 3015-1, 9014-1(c).

Counsel is encouraged to review LBR 3015-1 and 9014(c). Future failure to properly comply with the Eastern District's Local Bankruptcy Rules may result in the denial of relief or the imposition of sanctions. LBR 1001-1(g).

CIVIL MINUTE ORDER

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

IT IS ORDERED that the hearing on the objection is overruled without prejudice.

32. [22-22189](#)-A-13 **IN RE: FLORA BROUGHTON**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
11-4-2022 [\[43\]](#)

PETER MACALUSO/ATTY. FOR DBT.
CASE DISMISSED: 11/8/22

Final Ruling

This case was dismissed on November 8, 2022. This order to show cause is removed from the calendar as moot. No appearances are required.

33. [22-21996](#)-A-13 **IN RE: GUADALUPE JOHNSON**
[DPC-1](#)

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P.
CUSICK
9-28-2022 [\[19\]](#)

DAVID FOYIL/ATTY. FOR DBT.
RESPONSIVE PLEADING

Final Ruling

Objection: Trustee's Objection to Confirmation of Plan

Notice: Continued from October 18, 2022

Disposition: Sustained in part; overruled in part; confirmation denied

Order: Civil minute order

The hearing on the Chapter 13 trustee's objection to confirmation was continued to allow for service on the special notice creditors and for the debtor to file written opposition, if any, to the objection. The trustee has served the objection on the special notice parties and the debtor has filed opposition to the trustee's objection.

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

PLAN FEASIBILITY

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

Plan Delinquency

The trustee indicates that the plan payments are delinquent in the amount of \$3,030.00 with another payment in the same amount due on October 25, 2022. The plan cannot be confirmed if the plan payments are not current.

Third Party Contributions Not Substantiated

The trustee contends the plan is not feasible under 11 U.S.C. § 1325(a)(6) as the plan relies upon monthly contributions in the amount of \$1,200.00 from the debtor's son. The debtor has provided no evidence supporting the third party's willingness or ability to pay this significant amount in to the plan and the plan is not feasible without the monthly contribution.

TAX REFUNDS

The trustee argues that the debtor, who is under the median income, is not contributing all available monies into the plan. The trustee cites no legal authority for this argument. The court will overrule this portion of the trustee's objection, without prejudice.

DEBTOR RESPONSE

Plan Payments

The debtor has filed a declaration in support of her plan. The declaration states only that the debtor is current with plan payments. See, ECF No. 78. The debtor does not state how much has been paid to the trustee, when payments were tendered, if payments were made through October 2022, or how

payments were tendered to the trustee. The declaration is sparse and lacking in evidentiary value. The court gives no weight to the evidence proffered.

Third Party Contributions

Two declarations were filed which addressed the issue of third-party contributions to the debtor. The debtor's declaration states that she receives monies from her son, Marcus Johnson. See *id.*

The debtor's son has also filed a declaration which states:

2. I am the son to the Debtor in the above-entitled action. 3. I give my mother one thousand two hundred dollars (\$1,200) every month to help pay for bills. 4. I will continue to pay my mother one thousand two hundred dollars (\$1,200) every month for the next six years.

Declaration of Marcus Johnson, 1:25-27, 2:1-2, ECF No. 32.

This declaration is sparse and conclusory. The court gives it little weight. Given the significant sum which is required each month the court requires evidence which shows not only the third party's willingness to make contributions to the plan but also his ability to do so. The preferred method of proving this information is a format which mirrors the information in Schedules I and J and which is submitted under oath. This will provide the necessary detail for the court to determine that the plan is feasible under 11 U.S.C. § 1325(a)(6).

This hearing has been continued once for evidence and argument. The court views the feasibility information to be part of the debtor's prima facie case for plan confirmation. Future motions should include this information at the outset of the case and not in response to the trustee's objection to confirmation.

The court finds that the debtor has failed to prove the feasibility of her proposed plan under 11 U.S.C. § 1325(a)(6). The court will sustain the objection in part and overrule the objection in part. The court denies confirmation of the plan.

SERVICE AND NOTICE

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

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

The Chapter 13 trustee filed a certificate of service in this case using EDC 7-005, ECF No. 30. The trustee has correctly served both the debtor and the creditors which requested special notice by first class mail. However, Form EDC 7-005 is incorrectly completed.

Service under Fed. R. Bankr. P. 7004, 9014(b), 3015(f) is correctly indicated in the certificate of service as to the debtor.

Special Notice Parties

Conversely, service of the objection to confirmation on the special notice parties is made under Fed. R. Civ. P. 5, *as incorporated by* Fed. R. Bankr. P. 7005. Service is not made under Rule 7004, nor has it been accomplished under Rule 7004 in this case. Rule 5 allows for service on parties by first class mail. Thus, the trustee has properly served the objection on the special notice parties.

While the trustee has properly served the special notice creditors, he has not properly memorialized the service in the Certificate of Service. Box 6B should have been checked on page 3 indicating Rule 5 service where Rule 7004 was not applicable. In this case box 6B is left blank.

Finally, while the certificate properly includes Attachment 6A1 describing Rule 7004 service on the debtor, it improperly includes or identifies the special notice creditor on the same list. The special notice creditor must be indicated in a separate attachment. To properly memorialize service Attachment 6B2 must be included listing the special notice parties, while indicating the appropriate parties in interest in the certificate. Alternatively, the trustee could use the Clerk's Matrix of special notice creditors and attach that list as Attachment 6B3, again checking the corresponding boxes in the certificate.

CIVIL MINUTE ORDER

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

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

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

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