

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

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

**November 22, 2022 at 2:00 p.m.**

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1. <a href="#"><u>20-20351</u></a> -E-13	EFREN/ELENA OLIVAN	MOTION FOR COURT APPROVAL OF
<a href="#"><u>AP-1</u></a>	Steele Lanphier	PAYMENT DEFERRAL AGREEMENT
		10-24-22 <a href="#"><u>[31]</u></a>

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 24, 2022. By the court’s calculation, 29 days’ notice was provided. 28 days’ notice is required.

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

<b>The Motion to Approve Payment Deferral Agreement is <span style="color:red">XXXXX</span>.</b>
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The Motion to Approve Payment Deferral Agreement filed by Creditor Wells Fargo Bank, N.A. (“Creditor”) seeks court approval for Debtor to incur post-petition credit. Creditor, whose claim the Plan

provides for in Class 4, has agreed to a payment deferral that will defer four (4) unpaid principal and interest payments to the maturity date of the mortgage.

There is no declaration by Creditor nor Debtor in support of the Motion indicating Debtor's desire to defer the payments. Additional, the Payment Deferral Agreement, Exhibit 1, Dckt. 33, is not signed by Debtor.

Pursuant to Local Bankruptcy Rule 3015(1), the court may approve refinancing of loans, such as loan modifications, pursuant to motions brought by a debtor. Here, this Motion was unilaterally brought by the Creditor, with no joining of Debtor.

The court recognizes, however, according to the State Bar website, Debtor's Attorney has been ordered inactive as of July 1, 2022.<sup>FN 1</sup> Debtor's Attorney is still listed as representing Debtor. As Debtor's Attorney cannot file on behalf of Debtor, Creditor appears to be acting reasonably and in their and Debtor's best interest in filing this Motion.

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FN.1. <https://apps.calbar.ca.gov/attorney/Licensee/Detail/146163>  
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At the hearing, ~~XXXXXXXXXX~~

~~This post-petition financing is consistent with the Chapter 13 Plan in this case and with Debtor's ability to fund that Plan. There being no objection from the Chapter 13 Trustee or other parties in interest, and the Motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.~~

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

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

~~The Motion to Approve Loan Modification filed by Creditor Wells Fargo Bank, N.A. ("Creditor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing;~~

~~**IT IS ORDERED** that the court authorizes Efren Olivan and Elena Olivan ("Debtor") to amend the terms of the loan with Creditor, which is secured by the real property commonly known as 4086 La Tarriga Wy, California, on such terms as stated in the Modification Agreement filed as Exhibit 1 in support of the Motion (Dekt. 33).—~~

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney, on September 28, 2022. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

**The Objection to Confirmation of Plan is XXXXXXXXXX.**

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

- A. The debtor, Prakhong Jimmy Chanthorn ("Debtor"), failed to appear and the First Meeting of Creditors held on September 22, 2022,
- B. Debtor is delinquent in Plan payments to the Trustee,
- C. Debtor has failed to provide Business Documents to the Trustee. While Debtor mailed something to Trustee, Debtor's counsel was advised that the Trustee does not accept secure documents by physical mail, and such must be uploaded to the Trustee's secure online portal,

- D. Debtor has failed to provide payment advices related to Debtor's non-filing spouse's employment, with the State of California, to the Trustee,
- E. Debtor's Schedule C lists improper exemptions for funds and earnings. California Code of Civil Procedure § 704.070.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Failure to Appear at 341 Meeting**

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

### **Delinquency**

Debtor is \$3,000.00 delinquent in plan payments, which represents one month of the \$3,000.00 Plan payment. Before the hearing, another plan payment will be due. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **Failure to File Documents Related to Business**

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

- A. Questionnaire,
- B. Two years of tax returns,
- C. Six months of profit and loss statements,
- D. Six months of bank account statements, and
- E. Proof of license and insurance or written statement that no such documentation exists.

11 U.S.C. §§ 521(e)(2)(A)(I), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with Trustee. 11 U.S.C. § 521(a)(3). Without Debtor submitting all required documents, the court and Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

### **Failure to Provide Pay Advices**

Debtor has not provided Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). The Trustee's Objection states that Debtor is married and Schedule I reflects that his non-filing spouse is, and has been employed with the State of California for the past 19 years. While Debtor has provided some pay stubs, Debtor has failed to provide all necessary pay stubs. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

## **Improper Use of California Code of Civil Procedure § 704.070**

Trustee states that Debtor's Schedule C shows an attempt to exempt funds held in Debtor's checking accounts in the total amount of \$5,200.00. Trustee disputes the exemption claimed as Debtor's Schedule I shows that Debtor is self-employed and may only claim 75% of paid earnings as exempt. However, trustee does not provide sufficient legal support for this objection.

At the Hearing the Parties agreed to continue the hearing until after the continued First Meeting of Creditors to allow Debtor to continue to address the issues raised by the Trustee.

### **Amended Schedule C**

On November 3, 2022, Debtor filed an Amended Schedule C. Dckt. 32. Debtor is not claiming an exemption on funds held in checking accounts in the amount of \$5,200.00.

### **341 Meeting**

The 341 Meeting was held on November 3, 2022 according to David Cusick, Chapter 13 Trustee. Debtor appeared.

### **November 9, 2022 Status Report**

Trustee filed a status report dated November 9, 2022, and filed on November 10, 2022. Dckt. 35. Trustee requests the court grant the confirmation with the clarification that the order confirming include language that all tax refunds greater than \$2,000.00 be submitted to Trustee as an additional payment.

### **November 22, 2022 Hearing**

At the hearing, **xxxxxxx**.

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

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

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

**IT IS ORDERED** that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on August 25, 2022, as amended to provide:

(1) All future tax refunds greater than \$2,000.00 shall be submitted to Trustee as an additional payment

is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, which states the above amendments, transmit the proposed order

to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

3. [15-20002-E-13](#)  
[FF-11](#)

**BRIAN SANCHEZ**  
**Gary Fraley**

**MOTION FOR COMPENSATION BY THE  
LAW OFFICE OF FRALEY & FRALEY,  
PC FOR GARY RAY FRALEY, DEBTORS  
ATTORNEY(S)  
10-19-22 [\[199\]](#)**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 19, 2022. By the court's calculation, 34 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

<b>The Motion for Prevailing Party Fees is denied.</b>
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Attorney for Debtor Gary Ray Fraley, Esq. ("Attorney") filed this Motion personally (not as an attorney for his client) seeking prevailing party fees in the amount of \$10,822.45, citing Federal Rule of Civil Procedure 54(d) and Federal Rules of Bankruptcy Procedure 7054 and 9020 as the statutory basis for Movant being awarded attorney's fees. Additionally, Attorney is seeking costs in the amount of \$139.45.

As noted above it is not the Debtor, as the prevailing party in the Motion for Contempt, who is seeking the award of attorneys' fees. As clearly stated in the Order imposing damages and sanctions for violation of the discharge injunction (Order, Dckt 198), it is the Debtor Brian Sanchez who is the prevailing party and it is Brian Sanchez who seeks attorney's fees and costs, if any, as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.

No reference is made in the order stating that Attorney is granted a right, or has any legal basis for seeking, an award of attorney's fees and costs as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.

In Eastern District of California District Court Local Rule 293, which is incorporated into the Local Bankruptcy Rule 1001-1, the moving party for the award of fees must be the "prevailing party." ED Cal Local Rule 293b)(1), (2). Attorney provides no statutory grounds for an attorney representing a party in federal court litigation to have an independent right to be paid attorney's fees by the losing party, bypassing the real prevailing party in the litigation. The Movant is not the prevailing party.

The fourteen day period for the prevailing party Debtor to seek the award of attorney's fees expired on October 19, 2022, the fourteenth day after the October 5, 2022 docketing of the judgment in this contested matter. The prevailing party Debtor has not filed a motion for award of attorney's fees. Thus, Prevailing Debtor cannot now timely request an award of reasonable attorney's fees and costs to recover what Prevailing Party Debtor has paid or is asserted to owe Attorney.

In the Motion Attorney states with particularity (FED. R. BANKR. P. 9011) the following grounds in support of the Motion:

1. Debtor filed a Motion for Contempt against MGI Motors, MAMI Group, Inc., and Ahmed Mami, individually and jointly and severally ("Creditors"). Motion, Dckt. 199 ¶ 5.
2. The Court granted Debtor's motion for contempt. *Id.* at ¶ 6.
3. "As Debtor was the prevailing party, the court further granted attorney's fees and costs, in an amount to be determined through this motion." *Id.*

The court notes, from review of the Order (Dckt. 198) and the Civil Minutes (Dckt. 197) from the hearing on the Motion for Contempt, the court did not "grant" attorney's fees and costs. Rather, the court stated:

No evidence is presented as to there being any attorney's fees and expenses as part of Movant-Debtor's damages. Rather, to the extent that Movant-Debtor seeks to recover attorney's fees and costs, they will be as a prevailing party for this Motion.

Attorney's fees and costs, if any, shall be requested as provided by Federal Rule of Civil Procedure 54 and Federal Rules of Bankruptcy Procedure 7054, 9020, and 9014.

Civil Minutes, Dckt. 197 at 16. The court properly guided Debtor by informing them if they were to seek attorney's fees, it would not be granted at the hearing on the Motion for Contempt, but rather, by separate motion. Additionally, the court Order on the Motion for Contempt, Order, Dckt. 198, states (emphasis added):

**IT IS FURTHER ORDERED** that Movant shall seek the award of attorney's fees and costs, **if any**, for this Motion for Contempt as provided in Federal Rule of

Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054, 9014(c). The allowed costs and attorneys' fees, if any, shall be enforced as part of the monetary award under this order MGI Motors.

There was no such grant of attorney's fees at the prior hearing or under any prior order.

4. "Federal Rule of Civil Procedure 54(d), Federal Rules of Bankruptcy Procedure 7054 and 9020 provide for the award of reasonable legal fees and costs to the prevailing party in contempt proceedings." *Id.* at ¶ 14.

## **STATUTORY BASIS FOR ATTORNEY'S FEES**

The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court. *Fed. R. Bank P.* 7054(b)(1).

Movant states the statutory basis for attorney's fees includes Federal Rules of Civil Procedure 54(d) and Federal Rules of Bankruptcy Procedure 7054 and 9020.

### *Federal Rules of Bankruptcy Procedure 9020*

Starting with Federal Rules of Bankruptcy Procedure 9020, Rule 9020 provides:

Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest.

This concise Rule provides no provision awarding attorney's fees in contempt proceedings. Rather, it simply incorporates Rule 9014.

After reviewing Rule 9014, Rule 9014 incorporates various rules governing adversary proceedings into contested matters. The court finds in relevant part under 9014(c) that Federal Rules of Bankruptcy Procedure 7054 applies to matters governed by Rule 9014. Since contempt matters under Rule 9020 are governed by Rule 9014, Federal Rules of Bankruptcy Procedure 7054 applies.

However, neither Rule 9020 nor Rule 9014, under their plain language, awards prevailing parties attorney's fees in contempt matters.

### *Federal Rules of Bankruptcy Procedure 7054 and Federal Rules of Civil Procedure 54(d)*

Federal Rules of Bankruptcy Procedure 7054(b), as incorporated in this matter by Federal Rules of Bankruptcy Procedure 9020 and 9014, incorporates Federal Rules of Civil Procedure 54(d). Federal Rules of Civil Procedure 54(d)(2) governs motions for attorney's fees. The plain language of Federal Rules of Civil Procedure 54(d)(2) states, in relevant part (emphasis added):

(2) Attorney's Fees.



(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses **must be made by motion** unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) **specify the judgment and the statute, rule, or other grounds entitling the movant to the award;**

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

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*Collier on Bankruptcy* addresses the requirements for prevailing party attorney's fees in federal court proceedings, stating:

Civil Rule 54(d)(2)(B)(ii) requires the motion to specify the judgment, as well as any statute, rule, or other grounds that would entitle the movant to the award. This conforms to the standard in the United States, known as the 'American Rule' that individual attorney's fees are, without a statute, contract, or special circumstances stating otherwise, the responsibility of the litigants who hire those attorneys.

10 *Collier on Bankruptcy* P 7054.06 (16th 2021).

The ability of a prevailing party to recover attorney's fees is discussed in depth in Moore's *Federal Practice Treatise*, which includes:

§ 54.170 "American Rule" Generally Prohibits Recovery of Attorney's Fees

The so-called "American Rule" on attorney's fees **generally prohibits the recovery of any attorney's fees in federal court.**<sup>1</sup> It is called the American Rule to contrast it with the civil courts of much of the rest of the industrialized world, including the courts of England, which operate on a "loser pays" system in which the prevailing litigant recovers attorney's fees from the opponent as a matter of course.<sup>2</sup> Under the American Rule, the **loser may be required to pay only when an award of attorney's fees is authorized by contract, statute, or equitable grounds** constituting an exception to the rule.<sup>3</sup>

1. **American rule.** *Peter v. NantKwest, Inc.*, 589 U.S. —, 140 S. Ct. 365, 205 L. Ed. 2d 304, 309 (2019) (when considering attorney's fees award, American Rule is Court's "basic point of reference": "Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise"); *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 241, 95 S. Ct.

1612, 44 L. Ed. 2d 141 (1975) (courts could not authorize an exception to the “American Rule” that attorney’s fees are not ordinarily recoverable by prevailing litigant in federal litigation); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967) (the rule here has long been that attorney’s fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefore); *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 1 L. Ed. 613 (1796).

2. *See generally* Goodhart, Costs, 38 Yale L.J. 849 (1929).

3. **American rule allows recovery of fees only when authorized by contract, statute, or on equitable grounds.** *See generally* *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 241–267, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975).

10 MOORE'S FEDERAL PRACTICE - CIVIL § 54.170 (2022) (emphasis added).

No contractual, statutory, or equitable grounds legal basis has been shown by Attorney (even if he were a real party in interest who could assert the personal right to recover attorney’s fees and costs from the non-prevailing party.

### **Experience of Attorney**

In the Motion, Dckt. 199, Attorney who is asserting the personal right to obtain an award of attorney’s fees and costs states his extensive experience, which include (identified by paragraph number in the Motion):

8. Counsel has practiced Bankruptcy law for over 44 years and is a California State Bar Certified Bankruptcy Law Specialist, one of only 153 in California, only 4 of whom, including Counsel, are in Sacramento.

9. For many years Counsel has taught California State Bar Certified Bankruptcy CLE courses through the National Business Institute and the National Association of Consumer Bankruptcy Attorneys.

Attorney repeats the above in his Declaration. Dckt. 202.

### **Denial of Motion**

Attorney has provided the court with no legal basis why he is a real party in interest seeking attorney’s fees personally in connection with the Motion For Contempt. Debtor Brian Sanchez is the prevailing party and is the real party in interest who has objected the order awarding him damages for the violation of the Discharge Injunction. Order, Dckt. 198.

Further, even if he was a real party in interest, Attorney has shown no legal basis (whether contract, statute or equitable grounds) by which attorney’s fees may be awarded using the procedure

established by the United States Supreme Court in Federal Rule of Bankruptcy Procedure 7054 and Federal Rule of Civil Procedure 54.

Attorney's Motion for Attorney's Fees is denied.

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

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

The Motion for Prevailing Party Fees filed by Attorney for Debtor Gary Ray Fraley, Esq. ("Attorney"), in the Motion for Contempt (violation of the Discharge Injunction), Debtor Brian Sanchez being determined the prevailing party in the Motion For Contemp and being awarded monetary damages (Order, Dckt. 198), Attorney "merely" being counsel for Debtor for the Motion for Contempt, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing.

**IT IS ORDERED** that Motion is denied.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 20, 2022. By the court's calculation, 33 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

<p><b>The Motion for Allowance of Professional Fees is granted.</b></p>
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Scott M. Johnson of Gale, Angelo, Johnson & Patrick, P.C., the Attorney ("Applicant") for Danny Lee Kelly and Marisa Leigh Kelly, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period January 2, 2020, through October 18, 2022. Applicant requests fees in the amount of \$2,000.00 and costs in the amount of \$0.00.

#### **TRUSTEE'S RESPONSE**

Chapter 13 Trustee, David P. Cusick ("Trustee"), filed a response stating the confirmed Plan can only fund approximately \$430.74 of the requested fees. Dckt. 55.

#### **APPLICANT'S RESPONSE**

Applicant filed a response on November 15, 2022. Dckt. 59. Applicant states they acknowledge the lack of Plan funds to support the full amount of fees requested and consent to the additional fees of only \$430.74.

## **APPLICABLE LAW**

### **Statutory Basis For Professional Fees**

Pursuant to 11 U.S.C. § 330(a)(3),

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

(A) the time spent on such services;

(B) the rates charged for such services;

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

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

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

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

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not—

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

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). An attorney must “demonstrate only that the services were reasonably likely to benefit the estate at the time rendered,” not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswick Drug Co. (In re Mednet)*, 251 B.R.

103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

### **Reasonable Fees**

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

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

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

### **Reasonable Billing Judgment**

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

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

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

A review of the application shows that Applicant’s Unanticipated Work for the Estate includes unanticipated work of modifying two Plans as a result of both debtors moving to disability and having

changes in their income and budget. The court finds the services were beneficial to Client and the Estate and were reasonable.

### **“No-Look” Fees**

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

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

...

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

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

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

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

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed \$4,000.00 in attorneys’ fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 16. Applicant prepared the order confirming the Plan.

### **Lodestar Analysis**

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

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

## **FEES AND COSTS & EXPENSES REQUESTED**

### **Fees**

Applicant does not provide a task billing analysis breaking down the categories in which they seek additional fees.

The court finds helpful, and in most cases essential, for professionals to provide a basic task billing analysis for the services provided and fees charged. This has long been required by the Office of the U.S. Trustee, and it is nothing new for professionals in this District. The task billing analysis requires only that the professional organize his or her task billing. The simpler the services provided, the easier it is for Applicant to quickly state the tasks. The more complicated and difficult to discern the tasks from the raw billing records, the more evident it is for Applicant to create the task billing analysis to provide the court, creditors, and U.S. Trustee with fair and proper disclosure of the services provided and fees being requested.

Included in the Motion is Applicant’s raw time and billing records, which have not been organized into categories. Rather than organizing the activities that are best known to Applicant, it is left for the court, U.S. Trustee, and other parties in interest to mine the records to construct a task billing. The court declines the opportunity to provide this service to Applicant, instead leaving it to Applicant who intimately knows the work done and its billing system to correctly assemble the information. FN.1.



FN.1. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than twenty years ago a bright young associate (not the present judge) developed a system in which he used different color highlighters to code the billing statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number, the time entries were given a code on which the billing system could sort the entries and automatically produce a billing report that separates the activities into the different tasks.

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Instead of giving a breakdown of the fees for the substantial and unanticipated services that Applicant performed, Applicant provides the court with a spreadsheet of all hours billed for their Client.

However, given Applicant is only requesting \$430.74, and the total amount of unanticipated work totaled \$2,247.50, the court waives the task billing requirement for this one time.

## **FEES ALLOWED**

### **Fees**

The unique facts surrounding the case, including modifying two plans, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of \$430.74 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick (“the Chapter 13 Trustee”) from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees	\$430.74
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pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Scott M. Johnson of Gale, Angelo, Johnson & Patrick, P.C., (“Applicant”), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Scott M. Johnson of Gale, Angelo, Johnson & Patrick, P.C. is allowed the following fees and expenses as a professional of the Estate:

Scott M. Johnson of Gale, Angelo, Johnson & Patrick, P.C.,  
Professional Employed by Danny Lee Kelly and Marisa Leigh  
Kelly (“Debtor”)

Fees in the amount of \$430.74,

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on October 31, 2022. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

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

**The Motion to Value Collateral and Secured Claim of Travis Credit Union  
("Creditor") is granted.**

The Motion filed by Matthew D. King and Michele E. Prather King ("Debtor") to value the secured claim of Travis Credit Union ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 18. Debtor is the owner of a 2006 Ford F-150 pickup truck ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of \$2,500.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

## DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred in 2013, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$5,867.00. Declaration, Dckt. 18. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of \$2,500.00, the

value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion to Value Collateral and Secured Claim filed by Matthew D. King and Michele E. Prather King (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Creditor Travis Credit Union (“Creditor”) secured by an asset described as 2006 Ford F-150 pickup truck (“Vehicle”) is determined to be a secured claim in the amount of \$2,500.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$2,500.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

6 thru 7

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on September 8, 2022. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

<b>The Motion to Dismiss is <span style="color: red;">XXXXXXXXXX</span>.</b>
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The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that:

1. The debtor, Kimberli Beth Heck and David Keith Heck, Jr. ("Debtor"), is delinquent in Plan payments to the Trustee.
2. Due to Debtor's delinquency, Trustee has been unable to maintain Class 1 payments.

## DEBTOR'S RESPONSE

Debtor filed a Response on September 28, 2022. Dckt. 129. Debtor states that they fell behind on Plan payments due to various unforeseen circumstances and intend to file a modification prior to the date of the hearing on this Motion to Dismiss.

## DISCUSSION

### Delinquent

Debtor is \$12,855.00 delinquent in plan payments, which represents multiple months of the \$5,625.30 plan payment. Additionally, due to the delinquency under a prior confirmed Plan, Trustee has been unable to maintain Class 1 payments. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

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

At the hearing, the Chapter Trustee reported that Debtor is still delinquent. On October 11, 2022, Debtor filed a Modified Plan and Motion to Confirm. Dckt. 137, 131. In light of the amount of the default, the Trustee requested that the hearing on this Motion be continued to be heard in conjunction with the Motion to Confirm Modified Plan. Debtor's counsel concurred in this request.

### **November 22, 2022 Hearing**

At the hearing, **xxxxxxx**.

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

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 11, 2022. By the court’s calculation, 42 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

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

<p><b>The Motion to Confirm the Modified Plan is denied.</b></p>
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The debtor, Kimberli Beth Heck and David Keith Heck, Jr. (“Debtor”) seeks confirmation of the Modified Plan because there were increased expenses over the summer months which caused Debtor to fall behind in payments. Declaration, Dckt. 136. Additionally, Debtor has additional income to go towards funding the Plan. The Modified Plan provides \$275,505.54 to be paid through month fifty-two and \$6,483.00 per month for months fifty-three through sixty. Modified Plan, Dckt. 137. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### CHAPTER 13 TRUSTEE’S / CREDITOR’S OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on November 8, 2022. Dckt. 141. Trustee opposes confirmation of the Plan on the basis that:

- A. The Modified Plan does not indicate which months mortgage payments were missed.

- B. The Proposed Plan may not be Debtor's best efforts under 11 U.S.C. § 1325(b).

## **DISCUSSION**

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

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

Due to Debtor's failure to make timely Plan payments, trustee was unable to stay current on post-petition mortgage installments to Creditors Fay Servicing and Wells Fargo. The Modified Plan attempts to cure the post-petition arrearage, Modified Plan, Dckt. 137, but does not indicate which months mortgage payments were missed.

Additionally, Debtor may have obtained a retirement loan without court permission as their original Schedule I, Dckt. 1, indicates no retirement loan repayment and their current Schedule I, Dckt. 134, indicates loan repayments of \$637.61.

Also, Creditor Cab West, LLC was granted relief from the automatic stay. Order, Dckt. 55. However, Supplemental Schedule J, Dckt. 134, continues to repay the vehicle. It is not clear to the court if Creditor has exercised their rights to repossess the vehicle, if Debtor exercised a purchase option, or Debtor purchased another vehicle.

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

### **Best Effort**

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

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

Debtor states on their Declaration, Dckt. 133 at 3:1-2, "I will cease my 401(k) deduction to accommodate our new plan payment." However, Debtor's Supplemental Schedule I, Dckt. 134 at 2, indicates an increase in voluntary contributions, totaling \$428.39. The Modified Plan decreases the percentage to unsecured creditors from 13.03% to 7.32%. There appears to be more disposable income if Debtor ceased the amount of voluntary contributions to their retirement funds.

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



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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Kimberli Beth Heck and David Keith Heck, Jr. (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

8. [19-26529-E-13](#)      **PAUL/JESSICA WILSON**      **MOTION TO MODIFY PLAN**  
[MJD-5](#)      **Matthew DeCaminada**      **10-11-22 [125]**

8 thru 9

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and parties requesting special notice on October 11, 2022. By the court’s calculation, 42 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

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

<b>The Motion to Confirm the Modified Plan is denied.</b>
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The debtor, Paul Wilson and Jessica Lucia Mainvoille-Wilson (“Debtor”) seeks confirmation of the Modified Plan to bring Plan payments current and account for Debtor Jessica’s reduced working hours due to undergoing medical treatment. Declaration, Dckt. 127. The Modified Plan provides \$51,506.00 to Chapter 13 Trustee through September of 2022 and payments of \$2,179.00 for the remainder of the Plan. Modified Plan, Dckt. 129. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## **CHAPTER 13 TRUSTEE’S OPPOSITION**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on November 8, 2021. Dckt. 134. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in Plan payments.
- B. The Plan will complete in more than sixty (60) months.
- C. The Plan payment is insufficient to fund required payments.
- D. The Plan does not specify a cure for post-petition arrearages.
- E. There is conflicting information of who Debtor Jessica’s current employer is.

## **DISCUSSION**

### **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$679.00 delinquent in plan payments, which represents less than one month of the \$2,179.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 66 months due Debtor proposing to pay \$52,296.00 over the remaining twenty-four months of the Plan, however, \$53,351.75 is required to pay Creditors, plus additional Trustee fees. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

### **Insufficient Plan Payments**

Trustee alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). The proposed Plan payment is \$2,179.00. However, this is insufficient to fund the mortgage payment, prepetition mortgage arrears, and monthly payment for administrative expenses, which Trustee estimates will require payments of \$2,434.80. Thus, the Plan may not be confirmed.

### **Failure to Cure Arrearage of Creditor**

Trustee lacked sufficient funds to pay two post-petition mortgage payments to Creditor Shellpoint Mortgage Servicing in the amount of \$2,680.38. Creditor holds a deed of trust secured by Debtor's residence. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

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

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). It is unclear whether Debtor Jessica's employer is San Juan Unified School District, as indicated on Debtor's Supplemental Schedule I, Dckt. 130 at 5, or the State of California, Declaration, Dckt. 127 at 2:10-11. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Paul Wilson and Jessica Lucia Mainvoille-Wilson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on September 8, 2022. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

<b>The Motion to Dismiss is <span style="color: red;">XXXXXXXXXXXX</span>.</b>
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The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that:

1. The debtor, Paul Wilson and Jessica Lucia Mainvoille-Wilson ("Debtor"), is delinquent in Plan payments to the Trustee.
2. The Trustee is unable to fully assess the feasibility of the Plan or effectively administer the Plan as Trustee lacked sufficient funds to pay the post-petition contract installments to Class 1 Claimant.

## DEBTOR'S OPPOSITION

Debtor filed an Opposition on September 28, 2022. Dckt. 122. The Opposition states that Debtor reduced her working hours at her job, due to cancer treatment(s). Additionally, Debtor and counsel will prepare a Modified Chapter 13 Plan to bring Debtors current on payments, prior to the hearing on this Motion to Dismiss. Dckt. 122.

## DISCUSSION

### Delinquent

Debtor is \$8,744.00 delinquent in plan payments, which represents multiple months of the \$2,624.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1)

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

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Plan is not feasible because Debtor's failure to make Plan payments timely resulted in insufficient funds for Trustee to pay post-petition contract installments to Class 1 Claimant, Newrez LLC dba Shellpoint Mortgage for the total amount of \$1,340.19. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable

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

At the hearing, counsel for the Trustee says that Debtor is still delinquent.

A Modified Plan and Motion to Confirm has been filed and set for hearing. An issue exists whether the proposed Modified Plan provides for the cure of the full arrearage. The Trustee requested that the hearing on the Motion to Dismiss be continued to be heard in conjunction with the Motion to Confirm. Debtor did not oppose the requested continuance.

### **November 22, 2022 Hearing**

At the hearing, **xxxxxxxxxx**.

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

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

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

**IT IS ORDERED** that **xxxxxxxxxxxxxxxxxxxxxx**.

**DEBTOR DISMISSED: 12/21/2021**

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

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The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, Chapter 13 Trustee, and U.S. Trustee as stated on the Certificate of Service on October 28, 2022. The court computes that 25 days' notice has been provided.

**The Order to Show Cause is XXXXXXXXXXXXXXXXXX**

On November 30, 2021, Peter L. Nisson, Esq. ("Counsel") filed the Bankruptcy Petition and commenced a voluntary Chapter 13 Case for Victor Judd. This Chapter 13 case was dismissed on December 21, 2021. The Case was dismissed due to the failure of Debtor and Counsel to file a Chapter 13 Plan, Schedules, Statement of Financial Affairs, and other documents by the December 1, 2021 deadline set in the Notice of Incomplete filings (Dckt. 8). No request for further extension of time was made by Counsel or Debtor.

On December 19, 2021, a series of documents and a Chapter 13 Plan was filed, almost three weeks after the deadline had expired.

In reviewing the California State Bar online records, the court notes that Counsel was ordered by the California State Bar to Inactive Status as an Attorney by an order entered January 25, 2022 (State Bar Case SBC-21-O-30473-PW), and disbarred by the California Supreme Court by Order entered on June 1, 2022 (S273495).

On April 14, 2022, the court entered an order (the "Prior Order") providing that \$2,500.00 in fees paid to Counsel be disgorged and paid by Counsel to the Chapter 13 Trustee within ten days of the entry of the order.

On September 13, 2022, the Chapter 13 Trustee filed a Motion for an Order to Show Cause why Counsel should not be sanctioned for failure to comply with this court's Prior Order to pay the \$2,500.00 in disgorged attorney's fees within ten days of April 14, 2022. Upon review of the Motion for an Order to Show Cause, the supporting evidence, and files in this Bankruptcy Case, the court determined that the Order to Show Cause should be issued.

Therefore, upon review of this court's Prior Order disgorging fees paid to Counsel (Order, Dckt. 31), the court found cause exists for this court to issue an Order to Show Cause as to why imposition of sanctions is not proper for Counsel's failure to comply with the Prior Order.

**November 22, 2022 Hearing**

At the hearing, **XXXXXXXXXX**

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

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

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Order to Show Cause is **XXXXXXXXXXXXXXXX**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on October 18, 2022. By the court’s calculation, 35 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

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

The debtor, Tammy Lynn Randolph (“Debtor”), seeks confirmation of the Amended Plan. The Amended Plan provides for monthly payments of \$600 for 24 months, selling real property located in Trinity County, and a one-hundred percent dividend to unsecured claims. Amended Plan, Dckt. 24. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### CHAPTER 13 TRUSTEE’S OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on November 8, 2022. Dckt. 29. Trustee opposes confirmation of the Plan on the basis that:

- A. The Plan is vague and Trustee cannot assess its feasibility.
- B. Schedules A/B appear inaccurate.
- C. The Motion fails the particularity requirement under Federal Rules of Bankruptcy Procedure 9013.



## Review of Minimum Pleading Requirements for a Motion

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to “read every document in the file and glean from that what the grounds should be for the motion.” That “state with particularity” requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court’s repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. See 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. See 556 U.S. 662 (2009).

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

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

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

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

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

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental*

*Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

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

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

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

### **Grounds Stated in Motion**

Movant has not provided any grounds, merely “requests” to the court. The insufficient statements made by Movant are:

- A. Debtor has filed a First Amended Plan requested is hereby made to the Court to take Judicial Notice of Said First Amended Plan.
- B. This Motion seeks an Order Confirming First Amended Plan.

Those “grounds” are merely requests to the court.

Movant is reminded that “[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of default, finding of contempt, imposition of monetary sanctions or attorneys’ fees and costs, and other lesser sanctions.” LOCAL BANKR. R. 1001-1(g) (emphasis added).

### **DISCUSSION**

#### **Failure to Afford Plan Payment / Cannot Comply with the Plan**

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

Trustee states the Plan does not specify what piece of property Debtor intends to sell. However, the Plan indicates the Property is “155 W” and located in Trinity County. Amended Plan, Dckt. 24 §§ 2.02, 7.03-7.06. Upon review of Debtor’s Amended Schedule A/B, Dckt. 25, Debtor only owns one piece of property in Trinity County, 155 West Oak Ave, Hayfork, California. Therefore, it appears Debtor intends to sell this property. The Plan should be more clear, however, and indicate the complete address of the Property to avoid confusion.

It is not clear from Debtor’s Amended Schedule J, Dckt. 25, which properties Debtor is paying real estate taxes and property insurance on. Additionally, the \$300.00 in taxes and \$85.00 in insurance is likely insufficient for all seven properties.

In Debtor’s Amended Schedule A/B, Dckt. 25, Debtor marks “No” for jewelry and electronics. It is unlikely Debtor has no electronics or jewelry.

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

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

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

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 18, 2022. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

**The Motion for Allowance of Professional Fees is granted, with Applicant allowed \$3,482.50 in fees and \$48.00 in costs.**

Dmitriy Schebenko, the Attorney ("Applicant") for Guadalupe Valencia, the Chapter 13 Debtor ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period April 22, 2021, through October 13, 2022. Applicant requests fees in the amount of \$7,470.00 and costs in the amount of \$84.00.

#### **Trustee's Response**

David Cusick, Chapter 13 Trustee, filed a response on November 1, 2022. Dckt. 69. Trustee asserts that the fees are reasonable at \$7,470.00 and that the Plan is funded to pay the fees.

## **APPLICABLE LAW**

### **Reasonable Fees**

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

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

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

### **Lodestar Analysis**

For bankruptcy cases in the Ninth Circuit, “the primary method” to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

### **Reasonable Billing Judgment**

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

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

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

A review of the application shows that Applicant's services for the Estate include representing her Dissolution of Marriage Case in Santa Clara County as it relates to her Chapter 13 case. The court finds the services were beneficial to Client and the Estate and were reasonable.

## **FEES AND COSTS & EXPENSES REQUESTED**

### **Fees**

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

Litigating the Dissolution Case: Applicant spent 24.9 hours in this category. Applicant corresponded with opposing attorneys and Debtor's Attorney, Mark Schmorgon, prepared Notice of Pendency of Action and traveled to Santa Clara Recorder's office

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

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Dmitriy Shchebenko Attorney	24.9	\$300.00	<u>\$7,470.00</u>
<b>Total Fees for Period of Application</b>			\$7,470.00

After review of the exhibits in support of this Motion, the court questions the reasonableness of two charges for attorney's fees in the amounts of \$2,250.00 and \$2,100.00 on July 20, 2021, and October 13, 2022, respectively. The Applicant is requesting 14.5 hours at the normal attorney billing rate of \$300/hour for traveling to Santa Clara Recorder's Office. If granted, more than half of Applicant's fees would be incurred from travel alone.

The entries for both of these travel billed at \$300 an hour are stated to be "AT THE INSISTENCE OF CLIENT." July 20, 2021, and October 13, 2022 billing entries; Exhibit A, Dckt. 66 (emphasis in original). Applicant's declaration does not explain what this "insistence" consisted of,

Applicant explaining the cost and expense of paying an attorney to drive for 7 hours, and the alternative that Applicant presented to Debtor. Further, in providing legal services to a bankruptcy debtor, what Applicant told Debtor was the proper method of obtaining such documents in light of Debtor's fiduciary duties as the Chapter 13 Debtor.

As shown in Debtor's Plan (Dckt. 3), he is suffering from grievous financial distress and can muster funding a Plan that provides for a 0.00% dividend for general unsecured claims.

For the July 20, 2021 and October 13, 2022 billings, no legal services were provided for which Applicant can bill his time as an attorney. At best, Applicant chose to be a courier.

For the Attorney's Fees, the court allows \$3,120.00 for such legal services provided.

For the 14.5 hours of courier service, the court allows \$25.00 an hour, for a total of \$362.50 for courier services.

The court disallows all fees in excess thereof.

### **Costs & Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$84.00 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Court-certified copies of the Release of Notice of Pendency of Action	\$84.00	\$84.00
<b>Total Costs Requested in Application</b>		<b>\$84.00</b>

### **FEES AND COSTS & EXPENSES ALLOWED**

#### **Fees**

##### **Hourly Fees**

The court finds that the hourly rates are reasonable and that Applicant generally used appropriate rates for the services provided. Final Fees in the amount of \$3,482.50 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

### **Costs & Expenses**

First Interim Costs in the amount of \$84.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Chapter 7 Trustee from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

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

Fees	\$3,482.50
Costs and Expenses	\$ 84.00

pursuant to this Application in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Dmitriy Shchebenko (“Applicant”), Attorney for Guadalupe Valencia, Chapter 13 Debtor (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Dmitriy Shchebenko is allowed the following fees and expenses as a professional of the Estate:

Dmitriy Shchebenko, Professional employed by Chapter 13 Debtor

Fees in the amount of \$3,482.50 and  
Expenses in the amount of \$84.00,

as an interim allowance of fees and expenses pursuant to 11 U.S.C. § 331 and subject to final review and allowance pursuant to 11 U.S.C. § 330. The court does not allow any fees in excess of the amount stated above.



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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and parties requesting special notice, on October 27, 2022. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

- A. Debtor may not be able to afford the Plan payment, but the plan lacks enough information regarding Debtor's real property and any potential sale thereof.

## DISCUSSION

### Failure to Afford Plan Payment / Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor does not provided adequate details as to the Alameda County Property and the sale of the Property. Debtor claims the sale of the Property will pay all secured and unsecured claims in full, however, does not provide the court any material details on the sale including the address of the property,

the date, time, and estimated proceeds of the sale, and more. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

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

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

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

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

-----

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and parties requesting special notice on October 27, 2022. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

- A. Debtor is delinquent in Plan payments to the Trustee,
- B. Debtor failed to appear at the 341 Meeting of Creditors,
- C. Debtor has failed to provide business documents requested by the Trustee, including:
  - 1. List of Accounts Receivables,
  - 2. Six individual months of Profit and Loss Statements (from March 2022 through August 2022),

3. Bank Statements for Debtor's Chase Bank account ending in 0176 for September 2022, May 2022, and April 2022,
4. Bank Statements for Debtor's Chase Bank account ending in 1132) for September 2022, May 2022, and April 2022, and
5. A Comprehensive list of equipment and inventory.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Delinquency**

Debtor is \$4,995.00 delinquent in plan payments, which represents one month of the \$4,995.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **Failure to Appear at 341 Meeting**

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

### **Failure to File Documents Related to Business**

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

1. Six months of profit and loss statements,
2. Six months of bank account statements,
3. Lists of Accounts Receivables; and
4. Comprehensive list of equipment and inventory.

11 U.S.C. §§ 521(e)(2)(A)(I), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with Trustee. 11 U.S.C. § 521(a)(3). Without Debtor submitting all required documents, the court and Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

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

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

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 29, 2022. By the court's calculation, 54 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

<p><b>The Motion to Confirm the Modified Plan is denied.</b></p>
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The debtor, Kenneth Lee Smithour ("Debtor") seeks confirmation of the Modified Plan because they were not able to increase plan payments as anticipated due to unforeseen circumstances. Declaration, Dckt. 62. The Modified Plan provides \$3,930.75 per month for 12 months, \$4,872.00 per month for 6 months, and \$7,475.00 per month for 42 months, and a zero percent dividend to unsecured claims totaling \$130,646.00. Modified Plan, Dckt. 61. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on November 1, 2022. Dckt. 68. Trustee opposes confirmation of the Plan on the basis that:

- A. The Plan will take more than sixty months to complete.
- B. Debtor is delinquent in Plan payments.

- C. The Modified Plan fails to cure post-petition mortgage arrearages.
- D. The Modified Plan may not be in Debtor's best efforts as Debtor contributes \$1,200.00 per month for Debtor's non-filing spouse's voluntary retirement contributions while decreasing the percentage to unsecured claims. Additionally, Debtor has not provided business income for Debtor's non-filing spouse nor has an income and expense statement been provided.

## **DISCUSSION**

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

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 63 months due to Trustee projecting only \$309,366.63, after Trustee's fees, will be available to pay creditors after sixty months when \$322,137.56 is required. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

### **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$14,615.99 delinquent in plan payments, which represents multiple months of the \$4,872.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **Failure to Cure Arrearage of Creditor**

Trustee lacked sufficient funds to pay three post-petition mortgage payments to Creditor Select Portfolio Servicing, Inc. in the amount of \$10,776.62. Creditor holds a deed of trust secured by Debtor's residence. The Plan does not propose to cure those post-petition arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

### **Failure to Provide Disposable Income / Not Best Effort**

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

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

The Plan proposes to pay a zero percent dividend to unsecured claims, which total \$130,646.00. According to Debtor's Amended Schedule I and J, Debtor's Spouse is contributing \$1,200.00 per month

for voluntary contributions for retirement funds. Additionally, Debtor's spouse recently started an "in-home nursery business." Declaration, Dckt. 62 at 3:1-3. Debtor has not provided business income for Debtor's non-filing spouse nor has an income and expense statement been provided.

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

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

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

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

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



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

-----

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 11, 2022. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

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

The debtor, Miguel Angel Luna and Teresita Jesus Luna ("Debtor") seek confirmation of the Chapter 13 Plan. The Amended Plan provides for \$1,625.00 monthly payments to the Trustee for no more than 60 months in total, with 0% dividend to unsecured claims totaling \$91,594.00. Amended Plan, Dckt. 27. Administrative Expenses would be increased to \$600.00 of the monthly Plan payment. Section 7.01 includes additional nonstandard payment provisions: \$1,625.00 per month for 4 months, \$1,575.00 per month for 20 months, and \$1,800.00 per month for 36 months. Further, Debtor's proposed Amended Plan provides for the surrender of a 2018 Ford 150 XL vehicle as collateral. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on November 7, 2022. Dckt. 30. Trustee opposes confirmation of the Amended Plan on the basis that:

- A. Debtor is delinquent in Plan payments to the Trustee,
- B. Debtor failed to file tax returns,

- C. Debtor cannot afford the Plan payment, and
- D. The Plan payment may not reflect Debtor's best efforts, as Debtor may have additional disposable income, as reflected on Amended Schedule J (Dckt. 24, p. 6), to support elderly parents.

## **DISCUSSION**

### **Delinquency**

Debtor is \$1,625.00 delinquent in plan payments, which represents one month of the \$1,625.00 plan payment. According to Trustee, the Plan in § 2.01 calls for payments to be received by Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **Failure to File Tax Returns**

Debtor's Motion (Dckt. 25) indicates Debtors have filed all tax returns and were not required to file certain quarterly "WT-FICA returns from 2016 through 2021 and "FUTA" returns for 2016 through 2022. However, no evidence is provided to support that assertion by Debtor, and the Proof of Claim filed by the Internal Revenue Service indicate they may be required. Proof of Claim 8-3. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

### **Failure to Afford Plan Payment**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Plan may not be feasible because Debtor may not be able to afford the Plan payments and has not adequately explained why Debtor's Amended Plan is effectively lowering Debtor's monthly payment amount by \$253.67, on average, taking into account the different amounts proposed for various monthly periods throughout the Plan. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable

### **Not Best Effort**

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

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

The Plan proposes to pay a 0.00 percent dividend to unsecured claims, which total \$91,594.00. Debtors are lowering their monthly payments by an average of \$253.67. Debtor does not explain why this reduction is needed.

Additionally, Debtor's Amended Plan still proposes to provide support to elderly parents. Debtor has not adequately explained why this \$800.00 should not be paid to unsecured claimants.

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by the debtor, Miguel Angel Luna and Teresita Jesus Luna ("Debtor"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

17. [22-22864-E-13](#)

**NATHANIEL SOBAYO**  
**Pro Se**

**MOTION TO EXTEND AUTOMATIC  
STAY  
11-8-22 [10]**

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

-----

The Order for Initial Hearing on the Motion to Extend the Automatic Stay was served by the Clerk of the Court on Debtor, Creditors, and Chapter 13 Trustee as stated on the Certificate of Service on November 11 and 12, 2022. The court computes that 10 and 11 days' notice has been provided.

<b>The Motion to Extend the Automatic Stay is <span style="color: red;">XXXXXXX</span></b>
--------------------------------------------------------------------------------------------

**ORDER FOR INITIAL HEARING ON MOTION  
TO EXTEND THE AUTOMATIC STAY – 11 U.S.C. § 362(c)(3)(B)**

On November 3, 2022, Debtor Nathaniel Sobayo (“Debtor”) commenced this Chapter 13 Case *in pro se*. On November 8, 2022, Debtor filed an *Ex Parte* Motion to Extend the Automatic Stay as provided in 11 U.S.C. § 362(c)(3)(B). Dckt. 10. No declaration or other evidence was filed in support of the *Ex Parte* Motion. In the *Ex Parte* Motion, Debtor identifies having filed the prior bankruptcy cases, some with the assistance of counsel:

- a. Eastern District of California Case 22-20063; filed with counsel who substituted out, and then by Debtor *in pro se*.
  - i. Filed.....January 11, 2022
  - ii. Dismissed.....September 14, 2022
  - iii. Grounds for Dismissal
    - (1) The court’s findings stated in the Civil Minutes (22-20063; Dckt. 89) include:
      - (a) Debtor has failed to file tax returns.
      - (b) Debtor failed to file an amended Chapter 13 Plan after denial of confirmation of original Plan filed.
      - (c) Debtor had not obtained an attorney to represent him during the period from the August 2, 2022 first hearing date on the Motion to Dismiss and the continued hearing on September 13, 2022.
      - (d) Business Questionnaire, bank statements, and non-filing spouse financial statements had not been provided by Debtor.
      - (e) The Schedules and Statement of Financial Affairs, which did not disclose non-filing spouses:
        - (i) income,
        - (ii) credit card debt,
        - (iii) co-debtor obligations,
        - (iv) payments made to Carrington Mortgage,
        - (v) lawsuits, and
        - (vi) property being repossessed;
    - 1)and such Schedules and Statement of Financial Affairs had not been amended during the nine months the case was pending.
- b. Northern District of California Chapter 13 Case 19-50887, represented by William Winters Esq. (for a portion of the case).

- i. Filed.....April 30, 2019
  - ii. Dismissed.....August 26, 2019
  - iii. Grounds for Dismissal
    - (1) Trustee’s Motion alleged grounds that Debtor was not providing proof of making pre-confirmation payments on secured claims. 19-50887; Motion, Dckt. 31.
- c. Northern District of California Chapter 13 Case 18-52672, represented by William Winters, Esq.
- i. Filed..... December 5, 2018
  - ii. Dismissed.....February 4, 2019
  - iii. Grounds for Dismissal
    - (1) Though granted extensions, Debtor had not filed required documents or provide the Trustee with most recent tax returns. 18-52672; Order, Dckt. 33, and Order Denying Motion to Vacate, Dckt. 40.

Based on the above information, Debtor in the year preceding the November 3, 2022 commencement of the current Chapter 13 case in the Eastern District of California.

**Scope of Termination of Automatic Stay  
as Provided in 11 U.S.C. § 362(c)(3)(A)**

As this court recently addressed (as it had in prior rulings over the past decade), Congress provides in 11 U.S.C. § 362(c)(3)(A) for the termination of the automatic stay as to the debtor, and not termination of the case in the bankruptcy case or as it applies to property of the bankruptcy estate. Thus, this court has held in several published decisions that even if the stay as to the debtor terminates as provided in 11 U.S.C. § 362(c)(3)(A), the automatic stay continues in full force and effect with respect to the property of the bankruptcy estate. Rather than copying and pasting portions of that Decision, the court attaches hereto as Addendum A its Decision on the scope of 11 U.S.C. § 362(c)(3)(A); *In re Madsen (Burns)*, 639 B.R. 761, 763, 764, 766 -772, (Bankr. E.D. Cal. 2022).

Thus, this court’s (and the majority of courts) conclusion is that even if the automatic stay is not extended as to the Debtor pursuant to 11 U.S.C. § 362(c)(3)(B), all property of the Bankruptcy Estate continues to be protected by the automatic stay.

**Grounds Stated in *Ex Parte* Motion  
to Extend the Automatic Stay**

In the *Ex Parte* Motion, Debtor states grounds upon which the Extension of the Automatic stay is sought, which are summarized by the court to include in substantial part:

- A. “[B]ECAUSE PRIOR TO THE ABOVE IDENTIFIED FILING [current case] HE [sic] THE DEBTOR NATHANIEL BASLOA SOBAYO PAID AND HIRED 4 LAW FIRMS AND LICENSED ATTORNEYS TO REPRESENT HIS LEGAL CASES, BUT WITHOUT EXCEPTION THEY ALL PROVIDED TO BE UNWILLING TO ZEALOUSLY AND COMPETENTLY GET THE JOB DONE, . . . THEY ALL ABANDONE [sic] THIS DEBTOR’S CASES, MAKING DEBTORS [sic] FINANCIAL CONDITIONS FAR WORSE THAT [sic] BEFORE HIRING THEM. DEBTOR KNOWS THAT THESE SITUATION [sic] CONSTITUTES AN EXTREME ELDER CITIZEN’S ABUSES, THESE ACTS WILL BE SEPARATELY LITIGATED WHEN DEBTORS [sic] CONDITIONS BECOME ENABLED TO DO SO.” Dckt. 10 at 1-2. (Emphasis in original.)
- B. “The attorneys and law firms failed to file to correct their errors and mistakes in order to amend the petition or other documents as required.” *Id.* at 3.
- C. “NO PRIOR MOTION TO EXTEND AUTOMATIC STAY HAS BEEN EVER FILED BY THIS DEBTOR.” *Id.* (Emphasis in original.)
- D. “Debtors [sic] filed the pending case in good faith. A substantial change in the financial and personal affairs of the Debtor has occurred and will continue to occur since the dismissal of the previous case.” *Id.*
- E. “Specifically, CHANGES IN CIRCUMSTANCES HAVE OCCURRED, THEY ARE:

A\*

SUBSTANTIAL STUDIES, RESEARCHES AND DUE DILIGENCE HAS BE DONE BY THIS DEBTOR,

B\*

SUBSTANTIAL MONTHLY INCOME INCREASED AND IMPROVED MONTHLY CASH IN-FLOWS FOR DEBTOR.

C\*

KNOWLEDGE OF ALL REQUIRED TAX PREPARATIONS AND FILINGS, BOTH AT FEDERAL AND STATE OF CALIFORNIA LEVELS, HAS BEEN SELF ACQUIRED BY DUE DILIGENCES, OF THIS DEBTOR, BUT NOT LIMITED TO THE KNOWLEDGE AND REQUIREMENTS OF A SUCCESSFUL AND EFFICACIOUS CHAPTER 13 BANKRUPTCY PETITION AND SHOULD CONTINUE TO INCREASE BY THE RELENTLESS EFFORTS OF THIS DEBTOR'S EFFICACIOUS EFFORTS THROUGH THE MOTIVES AND ACTIONS OF THIS DEBTOR. IT WILL PERSIST AND IT WILL BE SUSTAINED FOR FULL PERFORMANCES [sic] OF THE TERMS OF A CONFIRMED [sic] CHAPTER 13 PETITION PLAN OF THIS CASE.

*Id.*, at 3-4. (Emphasis in original).

- F. “Debtor will enthusiastically and fully perform the terms of a confirmed plan in this subject pending chapter 13 petition case, Debtor pleads for the grace and the mercy of the Presiding Judge, to grant the approval of this motion.” *Id.*, at 4.
- G. “This motion is not made for the purposes of delay. Debtor is enthusiastically determine to avoid dying extreme poor at his current real age of getting closer to the age of 77 by December 09, 2022. Debtor also, fervently desire and intend to become financially independent within the next 7 years.” *Id.*

### **Review of Documents Filed in Current Case**

Debtor has filed his Petition in the Current Case (Dckt. 1), but no Schedules or Statement of Financial Affairs.

Looking at Debtor’s recently dismissed Chapter 13 Case, 22-20063, the following financial information was provided:

A. Schedule A/B, which includes:

1. 519 Granite Way Property.....\$680,100
2. 2112 Lincoln Street.....\$987,400
3. 2020 Mitsubishi.....\$ 24, 913
4. Artwork.....\$ 25,500
5. Topgunn Security Services Int. Corp...\$ 0.00
6. Back rent.....\$160,000
7. Multiple Claims Against Third Parties....Unknown

22-20063; Dckt. 10 at 3-8.

B. Schedule D, Secured Claims, including:

1. Carrington Mortgage.....(\$248,959).....Granite Way Property
2. Select Portfolio Servicing.....(\$724,671)....Lincoln St Property

*Id.*, at 12-13.

C. Schedule I, Income:

1. Topgunn Security Services Int.....\$3,000 (net monthly income)
2. Social Security.....\$1,137

*Id.*, at 24-25.

D. Schedule J information includes:

1. No dependants or other person in Debtor’s household listed.

2. Debtor's expenses are (\$3,987) a month, leaving only \$150 a month in monthly net income as computed by Debtor.
3. Debtor does not list any expenses for real property that is not the Debtor's residence.

*Id.*, at 26-27.

E. Statement of Financial Affairs information includes:

1. Debtor is married.
2. No income is shown for Debtor's spouse on the Statement of Financial Affairs or Schedules.
3. It states that Debtor has a rental property (for which no expenses are shown on Schedule J or attachment to Schedule I).

*Id.*, at 29 - 35.

#### **Application of 11 U.S.C. § 362(c)(3)(B) Extension of Stay**

11 U.S.C. § 362(c)(3)(B) provides that a party in interest may request that the automatic stay as to the Debtor not terminate thirty (30) days after the second bankruptcy case was commenced. It must be demonstrated to the court that the second case has been filed in good faith. 11 U.S.C. § 362(c)(3)(B). The order extending the stay must be entered before the thirtieth (30<sup>th</sup>) day after the filing of the second case has expired.

Here, Debtor commenced the Current Chapter 13 Case on November 3, 2022. The thirtieth day would be December 5, 2022 (taking into the thirtieth day being on Saturday December 3, 2022, and the first court day thereafter being Monday December 5, 2022).

Debtor having promptly filed the Motion, the court can set an initial hearing day, receive initial comments from the Parties, and enter an initial order extending the stay (which would be of little consequence if the stay at issue actually is the one that applies to property of the Bankruptcy Estate) if proper.

At the hearing, **XXXXXXXXXXXX**



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

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

The Motion to Extend the Automatic Stay having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Extend the Automatic Stay is  
**XXXXXXX**

# FINAL RULINGS

18. [22-22405](#)-E-13  
[DPC-1](#)

BARBARA MANNING  
Ashley Amerio

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
10-27-22 [[14](#)]

**Final Ruling:** No appearance at the November 11, 2022 hearing is required.  
-----

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on October 27, 2022. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. The defaults of the non-responding parties in interest are entered.

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

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

- A. Plan is not signed by Debtor or the Debtor's attorney
- B. Schedules are Inaccurate or Incomplete
  - 1. Debtor may not have listed all her assets on Schedule A/B
  - 2. Debtor failed to cite authority for claimed exemptions on Schedule C
- C. Debtor cannot comply with Plan

## FILING OF AMENDED PLAN

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Objection, Debtor filed an Amended on November 8, 2022. Dckt. 23. Debtor, however, has not filed a Motion to Confirm the Amended Plan. Pursuant to Local Bankruptcy

Rule 3007-1(d)(2), Debtor must file a Motion to Confirm along with the Amended Plan. Absent filing a motion to confirm, it may be grounds to deny the Amended Plan.

However, filing a new plan is a *de facto* withdrawal of the pending plan. Therefore, the Objection is sustained, and the plan is not confirmed.

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

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

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

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

**Final Ruling:** No appearance at the November 22, 2022 hearing is required.

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Local Rule 9014-1(f)(1) Motion—Nonopposition filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 12, 2022. By the court’s calculation, 41 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

<p><b>The Motion to Confirm the Plan is granted.</b></p>
----------------------------------------------------------

The debtor, Bryce Renee Beckman and Nathan Dewayne Beckman (“Debtor”) seeks confirmation of the Chapter 13 Plan, as amended. The Plan provides for the interest rates proposed by USAA Federal Savings Bank, lienholder on Debtor’s two vehicles, namely 5.89% for the 2013 Toyota Tundra, and 6.0% for the 2009 Toyota Camry. Declaration, Dckt. 14; Amended Plan, Dckt. 17. Therefore, the monthly payment to the Trustee has been increased by \$32.00 per month, bringing the total to \$682.00 per month, for 60 months. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### CHAPTER 13 TRUSTEE’S NON-OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on November 1, 2022. Dckt. 19. Trustee opposed confirmation of the Plan on the basis that it appears the Plan fails the Chapter 7 liquidation analysis. However, the court notes that Trustee subsequently filed an Amended Trustee’s Non-Opposition to Debtors Motion to Confirm, on November 8, 2022. Trustee’s Non-Opposition states that Debtor has paid into the Plan and provided a Chapter 7 liquidation analysis.

Therefore, Trustee states that Trustee no longer wishes to pursue his opposition, and does not oppose this matter. Dckt. 22.

## **DISCUSSION**

The court notes Trustee's Non-Opposition and that all issues raised by the Trustee appear to have been resolved between the parties.

The Plan complies with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is confirmed.

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

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

The Motion to Confirm the Chapter 13 Plan filed by the debtor, Bryce Renee Beckman and Nathan Dewayne Beckman ("Debtor"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on October 12, 2022, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

**Final Ruling:** No appearance at the November 22, 2022 hearing is required.

-----

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2022. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

<p><b>The Motion to Confirm the Modified Plan is granted.</b></p>
-------------------------------------------------------------------

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Amy Green ("Debtor"), has filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Non-Opposition on November 1, 2022. Dckt. 29. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on October 6, 2022, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.

21. [22-22063-E-13](#)  
[SMJ-1](#)

**LYLE/SHARON SHEPHERD**  
**Scott Johnson**

**MOTION TO CONFIRM PLAN**  
**10-12-22 [36]**

**Final Ruling:** No appearance at the November 22, 2022 hearing is required.

-----

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 12, 2022. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

<p><b>The Motion to Confirm the Plan is granted.</b></p>
----------------------------------------------------------

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The debtor, Lyle William Shepherd and Sharon Ann Shepherd ("Debtor"), have provided evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response indicating non-opposition to Debtor's Motion, and Trustee's support of confirmation of such, on November 7, 2022. Dckt. 49. The Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, and Debtor’s Chapter 13 Plan filed on October 12, 2022, is confirmed. Debtor’s Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

22. [22-22276-E-13](#)  
[DPC-2](#)

**COREY/GLORIA PARKS**  
**Matthew DeCaminada**

**OBJECTION TO DISCHARGE BY**  
**DAVID P. CUSICK**  
**10-19-22 [22]**

**Final Ruling:** No appearance at the November 22, 2022 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor’s attorney on October 19, 2022. By the court’s calculation, 34 days’ notice was provided. 28 days’ notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

<b>The Objection to Discharge is sustained.</b>
-------------------------------------------------



David P. Cusick, the Chapter 13 Trustee, (“Objector”) objects to Corey Richard Parks and Gloria Jean Parks’s (“Debtor’s”) discharge in this case. Objector argues that Debtor is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on February 11, 2019. Case No. 19-20818. Debtor received a discharge on May 13, 2019. Case No. 19-20818, Dckt. 17.

The instant case was filed under Chapter 13 on September 7, 2022.

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

Here, Debtor received a discharge under 11 U.S.C. § 727 on May 13, 2019, which is less than four years preceding the date of the filing of the instant case. Case No. 19-20818, Dckt. 17. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No. 22-22276), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

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

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

**IT IS ORDERED** that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 22-22276, the case shall be closed without the entry of a discharge.

**Final Ruling:** No appearance at the November 22, 2022 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on October 20, 2022. By the court’s calculation, 33 days’ notice was provided. 28 days’ notice is required.

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

**The Motion to Value Collateral and Secured Claim of OneMain Financial Group LLC (“Creditor”) is granted, and Creditor’s secured claim is determined to have a value of \$5,970.00.**

The Motion filed by Regina Jarrott-Briggs (“Debtor”) to value the secured claim of OneMain Financial Group LLC (“Creditor”) is accompanied by Debtor’s declaration. Declaration, Dckt. 11. Debtor is the owner of a 2012 Ford Fusion SEL Sedan 4D (“Vehicle”). Debtor seeks to value the Vehicle at a replacement value of \$5,970.00 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the asset’s value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

#### **TRUSTEE’S NONOPPOSITION**

Chapter 13 Trustee, David P. Cusick (“Trustee”), filed a nonopposition stating the Trustee believes Debtor can value the vehicle under 11 U.S.C. § 1325(a) to the extent it is a non-purchase money mortgage. Dckt. 13.

#### **DISCUSSION**

According to Debtor's Declaration, the lien on the Vehicle's title secures a non-purchase-money loan in the amount of \$10,016.00 incurred in August of 2020. Dckt. 11. Debtor has not provided in the form of exhibits or otherwise a copy of the loan agreement. Additionally, Creditor has not filed a Proof of Claim.

According to Debtor's Schedules, Motion, and Declaration, there is a balance on the loan of approximately \$10,016.00. Schedule D, Dckt. 1; Motion and Declaration, Dckts. 9, 11. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized.

Under 11 U.S.C. § 506(a), a secured claim can be determined as equivalent to the value of the collateral. However, under 11 U.S.C. § 1325(a)(5), § 506 does not apply to a claim described in § 506(a) if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

Here, the debt was incurred within the 910 day period, but before the 1-year period preceding the filing. Since this is a non-purchase money loan preceding the 1-year period, the value can be determined as the value of the collateral.

Creditor's secured claim is determined to be in the amount of \$5,970.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

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

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of OneMain Financial Group LLC ("Creditor") secured by an asset described as 2012 Ford Fusion SEL Sedan 4D ("Vehicle") is determined to be a secured claim in the amount of \$5,970.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$5,970.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

**Final Ruling:** No appearance at the November 22, 2022 hearing is required.  
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Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, and parties requesting special notice on October 27, 2022. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

Upon review of the Objection and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Objection.

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

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

- A. The Plan payment may not reflect Debtor's best efforts because Debtor claimed impermissible marital deductions,
- B. The Plan may not be feasible because Debtor has failed to provide all information required by the petition, schedules, and Statement of Financial Affairs,
- C. Debtor's claimed exemptions exceed the amount allowed for personal property under California Code of Civil Procedure § 703.140 et seq.

#### **DEBTOR'S RESPONSE**

Debtor filed a response on November 15, 2022, Dckt. 29, requesting *ex parte* to dismiss the case. Dckt. 29. Debtor states they will be refiling to add their spouse as a co-debtor. On request of debtor at any time, if the case has not been converted, the court shall dismiss the case under this chapter. 11 U.S.C. § 1307(b).

There is a pending Motion to dismiss filed on November 15, 2022. Dckt. 27. The court generally waits ten (10) days prior to entering voluntary dismissals. Therefore, the case will be dismissed in the coming days.

## DISCUSSION

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

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

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

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

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

25. [22-21978-E-13](#)  
[APN-1](#)

LILLIAN DEANER  
Cindy Hill

**CONTINUED OBJECTION TO  
CONFIRMATION OF PLAN BY MEB  
LOAN TRUST VI, U.S. BANK  
NATIONAL ASSOCIATION  
9-2-22 [28]**

**Final Ruling: No appearance at the November 22, 2022 Hearing is required.**

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Local Rule 9014-1(f)(2) Motion. - No Continued Hearing Required

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, and Office of the United States Trustee on September 2, 2022. By the court’s calculation, 46 days’ notice was provided. 14 days’ notice is required.

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

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

MEB Loan Trust VI, U.S. Bank National Association dba Specialized Loan Servicing LLC (“Creditor”) holding a secured claim opposes confirmation of the Plan on the basis that:

- A. Proposed interest rate is lower than the rate in the loan agreement
- B. Motion to value property not filed
- C. Cannot comply with plan

### **Debtor’s Response**

Debtor filed a response on October 4, 2022. Dckt. 52. Debtor asserts she will amend the interest rate back to the agreed 9.25%. Debtor further notes that the secured liens by FHL and MEB Loan Trust will be paid in full from sale and refinance. Debtor also asserts that a motion to value is irrelevant because the claim will be paid in full from the sale or refinance of the property. Lastly, Debtor asserts that she will make plan payments because her income is projected to increase due to lower mortgage payments starting September 2023.

### **DISCUSSION**

#### **Interest Rate**

Creditor objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with Debtor to 5.00%. Creditor’s claim is secured by \$121,031.65. Creditor argues that this interest rate is impermissibly modified from the agreed upon rate of 9.250% and violates 11 U.S.C. § 1322(b)(2).

However, Debtor agreed in her reply that she will amend the plan back to the original interest rate of 9.25%. Dckt. 52.

#### **Debtor’s Reliance on Motion to Value Secured Claim**

A review of Debtor’s Plan shows that it relies on the court valuing the secured claim of MEB Loan Trust VI, U.S. Bank National Association dba Specialized Loan Servicing LLC . Debtor has failed to file a Motion to Value the Secured Claim of MEB Loan Trust VI, U.S. Bank National Association dba Specialized Loan Servicing LLC , however. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

#### **Failure to Afford Plan Payment / Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor plans to make monthly payments of \$2,550.00 for 5 months then \$2,720.00 for 6 months even though Debtor has a monthly new income of \$2,555.10. Without an accurate picture of Debtor’s financial reality, the court cannot determine whether the Plan is confirmable.

At the hearing Debtor requested a thirty (30) day continuance to allow for the drafting of several simple amendments to the Plan which resolve the confirmation issues. The Trustee and Creditor concurred in the request for a continuance.

## **Debtor's Supplemental Response**

Debtor filed a supplemental response on October 28, 2022. Dckt. 75. Debtor submitted a proposed order to amend the plan to Trustee and objecting creditors. Debtor has received tentative approval from the Trustee and is in discussion with objecting parties. Debtor will submit the order approved as form upon receipt. The amendments are:

- A. MEB shall be paid at an interest rate of 9.25% as a Class 2 Claim
- B. Section 7: Debtor will pay \$2550 per month for up to 12 months until the sale or refinance of Debtor's residence. Debtor will use the proceeds of the refinance or sale to pay the claims on the first and second deeds of trust. Any amount over the homestead exemption will also be paid into the plan. After the sale or refinance, plan payment will decrease to \$338 per month for a minimum of 48 months.

### **November 8, 2022 Hearing**

At the hearing, the two objecting Creditors, Trustee, and Debtor, through their respective counsel, agreed to have the above amendments stated in the order confirming the plan. The court conditionally granted the Creditors' and Trustee's oral motion to dismiss the Objections upon the proposed order confirming the plan being transmitted to the Trustee and lodged with the court. The objecting Creditors and the Trustee shall lodge with the court proposed orders dismissing (or denying without prejudice) the Objections.

### **November 16, 2022 Order**

On November 16, 2022, the court entered the Proposed Order, Dckt. 89, confirming the Plan. The court order, however, did not dismiss this Objection, as the court requested at the prior hearing.

### **November 22, 2022 Hearing**

The court having entered the Order Confirming the Plan as stipulated by Debtor and Objector the Objection is dismissed.

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

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

The Objection to the Chapter 13 Plan filed by MEB Loan Trust VI, U.S. Bank National Association dba Specialized Loan Servicing LLC (“Creditor”) holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

26. [22-21978](#)-E-13  
[DPC-1](#)

LILLIAN DEANER  
Cindy Hill

**CONTINUED OBJECTION TO  
CONFIRMATION OF PLAN BY  
DAVID P. CUSICK  
9-21-22 [37]**

**Final Ruling: No appearance at the November 22, 2022 Hearing is required.**  
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Local Rule 9014-1(f)(2) Objection— No Continued Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s attorney on September 21, 2022. By the court’s calculation, 27 days’ notice was provided. 14 days’ notice is required.

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

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

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

- A. Cannot Make Payments
- B. Plan Relies on Pending Motion



- C. Schedule B is not Accurate
- D. Amended Mailing Matrix has no Attachment
- E. Plan Payment Coming Due

### **Debtor's Response to Trustee's Objection to Confirmation**

Debtor filed a response to Trustee's objection on October 4, 2022. Dckt. 49. Debtor states that the Plan relying on Pending Motion is true. Debtor will also correct the typographical error.

Debtor also states that the bank accounts on Schedule B are closed and that Debtor sent the bank statement for the new account. Debtor also states that the amended Mailing Matrix is filed on Dckt. 8 instead of Dckt. 11. Debtor also made her first plan payment. Lastly, Debtor states that Trustee is not questioning her ability to make plan payments but rather the sale of property.

### **DISCUSSION**

Trustee's objections are well-taken in part.

#### **Failure to Afford Plan Payment / Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Plan relies on sale or refinance of the residence by month 13 to pay the arrearages on first and second mortgage. Additionally, there is a secured claim of Citi Bank of an unknown amount. Also, there are significant liens on the property which may or may not be paid off with the sale of the Property.

It is unclear to the court and Trustee whether there is sufficient equity given the "unknown" amount owed to Citi Bank. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

#### **Plan Relies on Pending Motion**

Trustee asserts that compliance with the plan rests on the Motion to Value Collateral of Cavalry SVP LLC that is set for hearing on the same day. If motion to value is not granted, Trustee asserts that Debtor cannot comply with plan.

The court has granted that Motion to Value Secured Claim.

#### **Various Concerns**

Trustee directs the courts to various issues with Debtor's Chapter 13 documents, which, on their own, does not give rise to denial of the Plan, but should be addressed by Debtor:

##### **Schedule B is not Accurate**

Debtor failed to provide account numbers for their two US bank accounts.

### **Amended Mailing Matrix has no Attachment**

Debtor filed an Amended Verification of Creditor Matrix on August 12, 2022 but it appears that no creditor addresses were attached.

### **Plan Payment Coming Due**

Debtor's first Plan payment of \$2,550.00 was due on September 25, 2021. Trustee fails to articulate how this is grounds for denying confirmation of plan.

At the hearing Debtor requested a thirty (30) day continuance to allow for the drafting of several simple amendments to the Plan which resolve the confirmation issues. The Trustee and Creditor concurred in the request for a continuance.

### **Trustee's Supplemental Response**

Trustee filed a Supplemental Response on October 28, 2022. Dckt. 74. Trustee states Debtor is working with Trustee and Objecting Parties to propose an order amending the Plan.

### **Debtor's Supplemental Response**

Debtor filed a supplemental response on October 28, 2022. Dckt. 74. Debtor submitted a proposed order to amend the plan to Trustee and objecting creditors. Debtor has received tentative approval from the Trustee and is in discussion with objecting parties. Debtor will submit the order approved as form upon receipt. The amendments are:

- A. MEB shall be paid at an interest rate of 9.25% as a Class 2 Claim
- B. Section 7: Debtor will pay \$2550 per month for up to 12 months until the sale or refinance of Debtor's residence. Debtor will use the proceeds of the refinance or sale to pay the claims on the first and second deeds of trust. Any amount over the homestead exemption will also be paid into the plan. After the sale or refinance, plan payment will decrease to \$338 per month for a minimum of 48 months.

### **November 8, 2022 Hearing**

At the hearing, the two objecting Creditors, Trustee, and Debtor, through their respective counsel, agreed to have the above amendments stated in the order confirming the plan. The court conditionally granted the Creditors' and Trustee's oral motion to dismiss the Objections upon the proposed order confirming the plan being transmitted to the Trustee and lodged with the court. The objecting Creditors and the Trustee shall lodge with the court proposed orders dismissing (or denying without prejudice) the Objections.

### **November 16, 2022 Order**

On November 16, 2022, the court entered the Proposed Order, Dckt. 89, confirming the Plan. The court order, however, did not dismiss this Objection, as the court requested at the prior hearing.

### **November 22, 2022 Hearing**

The court having entered the Order confirming the Plan as stipulated (Confirmation Order, Dckt 89), the Objection is dismissed.

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

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

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

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

**Final Ruling: No appearance at the November 22, 2022 Hearing is required.**

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Local Rule 9014-1(f)(2) Objection—No Continued Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on September 21, 2022. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

<p><b>The Objection to Confirmation of Plan is dismissed.</b></p>
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Federal Home Loan Mortgage Corporation ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

- A. Fails to cure default on Secured Creditor's claim.
- B. Cannot make all payments or comply with Plan.

#### **Debtor's Response**

Lillian Deaner ("Debtor") filed a response on October 4, 2022. Dckt. 54. Debtor asserts that she will pay off the arrearages within 1 year of filing and that her income will increase, allowing her to comply with the payment plan. Debtor also notes that the sale or refinance of property will help her comply with plan.

#### **DISCUSSION**

Trustee's objections are well-taken.

## **Failure to Cure Arrearage of Creditor**

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts \$75,964.90 in pre-petition arrearages. Although Debtor states their income will increase and they will pay off the arrearages in a year, the Plan only proposes to pay \$65,385 of arrearages, not the total amount. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

## **Failure to Afford Plan Payment / Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor proposes to make monthly payments of \$2,550.00 for 5 months, \$2,720.00 for months 6 through 12, and then sell or refinance the property. However, Debtor only has a monthly net income of \$2,555.20, which the creditor asserts is insufficient to fund the plan and the pre-petition arrearages. Creditor is also concerned that Debtor has not filed a motion to sell or refinance real property at the time the objection was filed. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

At the hearing Debtor requested a thirty (30) day continuance to allow for the drafting of several simple amendments to the Plan which resolve the confirmation issues. The Trustee and Creditor concurred in the request for a continuance.

## **Debtor's Supplemental Response**

Debtor filed a supplemental response on October 28, 2022. Dckt. 76. Debtor submitted a proposed order to amend the plan to Trustee and objecting creditors. Debtor has received tentative approval from the Trustee and is in discussion with objecting parties. Debtor will submit the order approved as form upon receipt. The amendments are:

- A. MEB shall be paid at an interest rate of 9.25% as a Class 2 Claim
- B. Section 7: Debtor will pay \$2550 per month for up to 12 months until the sale or refinance of Debtor's residence. Debtor will use the proceeds of the refinance or sale to pay the claims on the first and second deeds of trust. Any amount over the homestead exemption will also be paid into the plan. After the sale or refinance, plan payment will decrease to \$338 per month for a minimum of 48 months.

## **November 8, 2022 Hearing**

At the hearing, the two objecting Creditors, Trustee, and Debtor, through their respective counsel, agreed to have the above amendments stated in the order confirming the plan. The court conditionally granted the Creditors' and Trustee's oral motion to dismiss the Objections upon the proposed order confirming the plan being transmitted to the Trustee and lodged with the court. The

objecting Creditors and the Trustee shall lodge with the court proposed orders dismissing (or denying without prejudice) the Objections.

### **November 16, 2022 Order**

On November 16, 2022, the court entered the Proposed Order, Dckt. 89, confirming the Plan. The court order, however, did not dismiss this Objection, as the court requested at the prior hearing.

### **November 22, 2022 Hearing**

The court having entered an order confirming the Plan as stipulated (Confirmation Order, Dckt. 89), the Objection is dismissed.

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

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

The Objection to the Chapter 13 Plan filed by Federal Home Loan Mortgage Corporation (“Creditor”) holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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