

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

December 15, 2020 at 2:00 p.m.

1.	<u>20-23901</u>-E-13	WENDY MORGAN Michael Hays	CONTINUED ORDER TO SHOW CAUSE FAILURE TO PAY FEES 10-16-20 [62]
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. 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 to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 13 Trustee as stated on the Certificate of Service on October 18, 2020. The court computes that 31 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$77.00 due on October 13, 2020.

The Order to Show Cause is sustained and the case is dismissed.
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The court's docket reflects that the default in payment that is the subsection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: \$77.00.

November 18, 2020 Hearing

At the November 18, 2020 hearing, the hearing was continued to allow for the filing of any motions relating to the dismissing of the case and disbursement of monies held by the Trustee. Civil Minutes, Dckt. 76.

December 15, 2020 Hearing

On December 8, 2020, Debtor filed a Response. Dckt. 77. Debtor asserts having made a \$79.00 payment but notes that \$231.00 remain as the balance. *Id.*, at 1. Debtor explains that she filed this case to avoid a foreclosure, but that she has sold the residence prior to a plan being confirmed. *Id.*

Debtor has been dealing with serious health issues and having to find a new place to live and so she requests that the court authorize the Trustee to pay the court fees from the funds he is currently holding. *Id.*

Moreover, Debtor requests the case be dismissed as there is no reason for her to continue the case. *Id.*, at 2. Debtor also notes that no governmental claims have been filed and the total unsecured claims filed by the bar date were \$1,657.30. *Id.*, at 2. If the court does not authorize the Trustee to pay the court fees, Debtor's counsel will advise her to pay the \$231.00 when she receive her check from the Trustee. *Id.*

DISCUSSION

Here, the reason for Debtor filing the case was to avoid a foreclosure. Debtor informs the court that the residence has been sold with the lienholder having been fully paid and Trustee now holding proceeds. Moreover, Debtor is dealing with serious medical issues. Debtor would like to dismiss the case now that the residence has been sold and only \$1,657.30 have been filed in unsecured claims.

The case is set to be dismissed for the default in the payment of the filing fees. While the Debtor may want to pay the filing fee notwithstanding the dismissal of the case, the court does not order payment of such.

The Order to Show Cause is discharged, and the case is dismissed.

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 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 discharged and no sanctions ordered.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 2, 2020. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended 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>The Motion to Confirm the Amended Plan is granted.</p>
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11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The debtor, Kenneth Lee Smithour ("Debtor") has provided evidence in support of confirmation.

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response indicating non-opposition on November 25, 2020. Dckt. 66. However, Trustee notes that Debtor is delinquent \$150.00 in plan payments. Further, Trustee notes that Debtor failed to date his declaration in support of the Motion.

At the hearing, xxxxxxxxxxxxxxxx

The Amended 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 Amended Chapter 13 Plan filed by the debtor, Kenneth L. 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 the Motion is granted, and Debtor’s Amended Chapter 13 Plan filed on November 2, 2020, 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.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney on November 25, 2020. By the court’s calculation, 20 days’ notice was provided. 14 days’ notice is required.

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

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

- A. The Non-Standard Provision of Section 7.01 fails to provide adequate protection payments.
- B. Debtor failed to provide Trustee with the Domestic Support Obligation checklist.

DISCUSSION

Trustee’s objections are well-taken.

Lack of Adequate Protection Payment Under the Plan

Trustee opposes confirmation due to lack of adequate protection payment to Wescom Central Union. According to the Trustee, under Debtor's Non-Standard Provisions, Debtor fails to provide adequate protection payments for the first four months of the plan to the claim secured by a 2015 Lexus ES. This conflicts with 11 U.S.C. §1326(a) which provides that a Debtor must commence making payments not later than 30 days after filing of the plan. Thus, the plan does not comply with 11 U.S.C. §1325(a)(1).

No Domestic Support Obligation Checklist

Pursuant to Local Bankruptcy Rule 3015-1(b)(6), a debtor is required to serve upon the trustee no later than fourteen (14) days after the filing of the petition a Domestic Support Obligation Checklist. Debtor's Schedule J states Debtor owes a domestic support obligation. According to Trustee, Debtor has failed to provide the Trustee with the Domestic Support Obligation Checklist, thereby hindering the Trustee from performing his duties pursuant to 11 U.S.C. §§1302(b)(6) and (d)(1).

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 a minute order substantially in the following form holding that:

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

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

IT IS ORDERED that the 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 and Debtor's Attorney, on November 24, 2020. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

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<p>The Objection to Confirmation of Plan is XXXXX.</p>
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The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that Debtor has failed to file tax returns.

DISCUSSION

Trustee's objections are well-taken.

Failure to File Tax Returns

Debtor admitted at the Meeting of Creditors that the federal income tax return for the 2018 tax year has not been filed still. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Trustee requests the court continue the hearing until after the continued Meeting of Creditors scheduled for 1:00 p.m. on January 7, 2021 to allow Debtor time to file the return.

At the hearing, xxxxxxxxxxxxxxxx

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

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

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

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

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

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

Sufficient Notice **Not** Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Chapter 13 Trustee, and Office of the United States Trustee on November 2, 2020. **By the court’s calculation, 43 days’ notice was provided. 44 days’ notice is required.** FED. R. BANKR. P. 3007(a) (requiring thirty days’ notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days’ notice for written opposition).

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

The Objection to Proof of Claim Number 1 of Employment Development Department is sustained, and the claim is disallowed as a secured claim, and such allowed claim is an unsecured claim in its entirety.

Sheryl Jean McLamb, the Chapter 13 Debtor, (“Objector”) requests that the court disallow the claim of Employment Development Department (“Creditor”), Proof of Claim No. 1 (“Claim”), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of \$20,017.99. Objector asserts that the Proof of Claim states the claim is secured but Debtor having no ownership interest in any real property for the Judicial Lien to attach, Creditor’s claim is unsecured.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial evidence to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor’s proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student*

Funds, Inc. v. Wylie (In re Wylie), 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin*, 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

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

The court turns to Creditor's Proof of Claim No.1. The basis for this claim is "California unemployment / State Disability overpayment." Proof of Claim 1 at 2. Under penalty of perjury, Creditor states that the secured claim is in the amount of \$20,017.99 where Creditor checks the box for "Other" for the nature of the property by which it is secured. *Id.* This "Other" is described as "recorded lien on benefit overpayment." *Id.* According to paragraph 9 of the proof of claim, the recording information was attached. No such attachment was attached. The attached document is a Summary Itemization of Proof of Claim which states:

Note: Abstract of Judgment was filed with the SACRAMENTO County Recorder of 09-Jul-2014 with the document recording number of 201407090701

Id., at 4. It seems that an Abstract of Judgment exists but it was not provided by Creditor.

Debtor argues that Creditor's claim is unsecured because she does not owe any real property for Creditor's lien to attach. A review of Debtor's petition, filed under penalty of perjury, states that Debtor does not have any interest in real property. Petition, Dckt. 1.

On December 2, 2020, Creditor filed Proof of Claim No. 8-1. Proof of Claim 8-1 states that it amends Proof of Claim No. 1. POC 8, ¶ 4. This amendment was filed on December 2, 2020. It appears that this amendment was filed in response to this Objection.

Once an objection to claim (a contested matter) is filed, the creditor cannot remove it from the court. However, such amendment is a proactive act consistent with the objection.

No collateral is identified in Proof of Claim No. 1. As Debtor asserts, there is no real property in which Debtor had, or has, an interest in any real property to which an abstract of judgment could attach. Creditor appears to recognize that, filing Proof of Claim No. 8, amending its claim in this case and states only an unsecured claim.

Therefore, upon review of the Objection, evidence presented, Creditor having amended Proof of Claim No. 1 to no longer assert a secured claim, the court sustains the Objection to Proof of Claim No. 1 and disallows it as a secured claim. This is without prejudice to Creditor's unsecured claim as asserted in Proof of Claim No. 8.

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 Claim of the California Employment Development Department (“Creditor”), filed in this case by Sheryl Jean McLamb, Chapter 13 Debtor, (“Objector”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, Creditor filing and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 1 of Creditor is sustained, and the claim is disallowed as a secured claim.

IT IS FURTHER ORDERED that Proof of Claim Number 1 has been replaced in its entirety by Proof of Claim Number 8, which expressly states that it amends Proof of Claim Number 1, and that Proof of Claim Number 1 is of no force and effect to state Creditor’s claim in this case.

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 and 9014.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on November 23, 2020. By the court's calculation, 25 days' notice was provided. 14 days' notice is required.

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

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

- A. Meeting of Creditors not yet conducted.
- B. Debtor has failed to provide social security number.
- C. Debtor is a serial filer.
- D. First plan payment will be due before the hearing on this objection.

DISCUSSION

Trustee filed a Status Report on December 8, 2020 informing the court that Debtor appeared at the continued First Meeting of Creditors and that three out of the four objections have been addressed.

Dckt. 18. According to Trustee, Debtor submitted proof of her social security number at the meeting; Debtor satisfactorily explained why this case will work when previous cases have not; and Debtor is current in plan payments.

However, Trustee informs the court that at the Meeting of Creditors Debtor admitted that her 2017 tax returns have not been filed but that she would file them over the weekend. As of the filing of Trustee's Status Report, Trustee has not received a copy of the returns and is uncertain if they have been filed.

At the hearing, xxxxxxxxxxxxxxxx

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

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

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor and Debtor’s Attorney, on October 29, 2020. By the court’s calculation, 47 days’ notice was provided. 30 days’ notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days’ notice); LOCAL BANKR. R. 3007-1(b)(2).

The Objection to Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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 Objection to Proof of Claim Number 12 of Prosper Marketplace Inc. is overruled.

David Cusick, the Chapter 13 Trustee, (“Objector”) requests that the court disallow the claim of Prosper Marketplace Inc. (“Creditor”), Proof of Claim No. 12 (“Claim”), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of \$13,968.61. Objector asserts that Proof of Claim #12, filed by Creditor on May 5, 2020, is a duplicate of Proof of Claim #7, filed earlier in this case.

On Proof of Claim No. 12 filed by Creditor, it is stated that Creditor obtained this claim from an entity stated to be “WebBank.” POC No. 12, ¶ 2. No assignment documents are attached to Proof of Claim No. 12.

On April 9, 2020, Proof of Claim No. 7 was filed by a creditor named “Quantum3 Group, LLC as agent for Velocity Investments, LLC.” While Quantum3 Group, LLC is the agent, possibly a

loan servicer or debt collector.

DISCUSSION

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

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

Trustee argues that Proof of Claim 12 is a duplicate of Proof of Claim No. 7 on the basis that both claims assert a debt of \$13,967.61 (Proof of Claim No. 12) and \$13,967.62 (Proof of Claim No. 7).

Creditor states that the claim for Proof of Claim No. 12 was "WebBank" as stated in proof of Claim No. 12, ¶ 2.

In Proof of Claim No. 7, creditor "Quantum3 Group as agent for Velocity Investments LLC states it received the claim from someone named "Prosper Funding LLC Assignee of Webbank." POC No. 7, ¶ 2.

Both proofs of claim assert a last payment date of August 16, 2019 with a last purchase date of July 16, 2019. Thus, Trustee concludes there are multiple claims filed for the same debt.

Additionally, Trustee argues that there is a dispute as to the ownership of the debt. Debtor asserts the debt is owed to Creditor, Proof of Claim No. 12 asserts the debt was purchased from "WebBank." But Proof of Claim No. 7 asserts the debt was acquired by "Quantum3 Group LLC as agent for Velocity Investments LLC." Neither proof of claim attaches any assignment documents.

After reviewing both claims, the information provided for Proof of Claim No. 12 appears to be the same as that of Proof of Claim No. 7.

Transfer of Claim

On November 13, 2020 Creditor filed a Transfer of Claim Other Than For Security. Dckt. 37. Through this document, Prosper Marketplace, Inc., as transferor, assigns Proof of Claim No. 12 to Creditor. The document provides that payments for this claim should be sent to Creditor.

On November 19, 2020, Creditor filed a Withdrawal of Claim authorizing the court to withdraw from the official claims register Proof of Claim No. 7. Dckt. 40. The withdrawal is signed by

Nicole Marshall, who purports to be the authorized agent for Creditor.

Decision

The Withdrawal of Proof of Claim No. 7 resolves the valid objection that the Trustee has to Proof of Claim No. 12. However, this Objection was necessary and proper because Proof of Claim No. 12 was a duplicate of Proof of Claim No. 7, and if not objected to there would have been a double payments on this one debt.

The Objection is overruled, Proof of Claim No. 7 having been withdrawn, after this Contested Matter was commenced, and is of no legal effect as a claim to be paid in this case.

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 Claim Proof of Claim No. 12 of Prosper Marketplace Inc (“Creditor”), filed in this case by David Cusick, the Chapter 13 Trustee, (“Objector”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 12 of Creditor is overruled.

IT IS FURTHER ORDERED that Proof of Claim No. 7 filed Quantum3 Group LLC as agent for Velocity Investments LLC having been withdrawn, but only after this Objection was filed, is no longer a claim in this case.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, and Debtor's Attorney on October 29, 2020. By the court's calculation, 47 days' notice was provided. 30 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(2).

The Objection to Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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, -----

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The Objection to Proof of Claim Number 7 of Quantum3 Group LLC as agent for Velocity Investments LLC is sustained, and the claim is disallowed in its entirety.

David Cusick, the Chapter 13 Trustee, ("Objector") requests that the court disallow the claim of Quantum3 Group LLC as agent for Velocity Investments LLC ("Creditor"), Proof of Claim No. 7 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of \$13,968.61. Objector asserts that Proof of Claim #7, filed by Creditor, is a duplicate of Proof of Claim #12, filed by Prosper Marketplace Inc., and there is a question as to the ownership of the debt.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting

to a proof of claim has the burden of presenting substantial evidence to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin*, 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

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

Trustee argues that Proof of Claim 7 is a duplicate of Proof of Claim No. 12 on the basis that both claims assert the substantially similar debt amount of \$13,967.61 (Proof of Claim No. 12) and \$13,967.62 (Proof of Claim). Additionally, claims were acquired by "WebBank" as stated in proof of Claim No. 12 and "Prosper Funding LLC Assignee of Webbank" as stated in Proof of Claim No. 7. Both proofs of claim assert a last payment date of August 16, 2019 with a last purchase date of July 16, 2019. Thus, Trustee concludes there are multiple claims filed for the same debt.

Moreover, Trustee argues that there is a dispute as to the ownership of the debt. Debtor asserts the debt is owed to Creditor, Proof of Claim No. 12 asserts the debt was purchased from "WebBank" and Proof of Claim No. 7 asserts the debt was acquired by Quantum3 Group LLC as agent for Velocity Investments LLC. The Proof of Claim does not attach documents proving the debt was sold or assigned by "WebBank."

The information provided for Proof of Claim No. 12 appears to be the same as that of Proof of Claim No. 7.

On November 13, 2020 Creditor filed a Transfer of Claim Other Than For Security. Dckt. 37. Through this document, Prosper Marketplace, Inc., as transferor, seeks to assign Proof of Claim No. 12 to Creditor. The document provides that payments for this claim should be sent to Creditor.

On November 19, 2020, Prosper Marketplace, Inc., as the assignee of Creditor, filed a Withdrawal of Claim authorizing the court to withdraw from the official claims register Proof of Claim No. 7. Dckt. 40. The withdrawal is signed by Nicole Marshall, who purports to be the authorized agent for Creditor.

Decision

Proper Marketplace, Inc., assignee of Creditor has, after the filing of this Objection, withdrawn Proof of Claim No. 7. This was seven months after Prosper Marketplace Inc. filed its claim and Creditor no longer had a claim. It was necessary, and proper, for the Trustee to object to this Claim.

Proof of Claim No. 7 is disallowed in its entirety. This is without prejudice to the claim of Prosper Marketplace Inc. set forth in Proof of Claim No. 12.

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 Claim of Quantum3 Group LLC as agent for Velocity Investments LLC (“Creditor”), filed in this case by David Cusick, the Chapter 13 Trustee, (“Objector”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 7 of Creditor is sustained, and the claim is disallowed in its entirety.

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 and 9014.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 17, 2020. By the court's calculation, 59 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>The Motion to Confirm the Amended Plan is denied.</p>

The debtor, Demetrius Bellamy ("Debtor"), seeks confirmation of the Amended Plan. The Amended Plan provides for:

1. payments of \$2,950.00 for months 1 thru 3,
2. payments of \$3,050 for months 4 thru 5,
3. payments of \$3,100 for months 6 thru 60 months, and
4. a 100 percent dividend to unsecured claims totaling \$4,297.43.

Amended Plan, Dckt. 31. 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 30, 2020. Dckt. 34. Trustee opposes confirmation of the Plan on the basis that:

- A. The Plan may still not be proposed in good faith.
- B. Debtor continues to unfairly discriminate against unsecured claims.
- C. Debtor is delinquent in plan payments.
- D. Additional Provisions of the Plan are in conflict with the bankruptcy code and the federal rules of bankruptcy procedure.

Debtor filed a Reply to Trustee's Opposition on December 8, 2020. Dckt. 37. The Reply is discussed below.

DISCUSSION

Good Faith Filing

Trustee alleges that the Plan was not filed in good faith. *See* 11 U.S.C. § 1325(a)(3). Good faith depends on the totality of the circumstances. *In re Warren*, 89 B.R. 87 (9th Cir. BAP 1988). Thus, the Plan may not be confirmed. Factors to be considered in determining good faith include, but are not limited to:

- 1) The amount of the proposed payments and the amounts of the debtor's surplus;
- 2) The debtor's employment history, ability to earn, and likelihood of future increases in income;**
- 3) The probable or expected duration of the plan;
- 4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;**
- 5) The extent of preferential treatment between classes of creditors;
- 6) The extent to which secured claims are modified;
- 7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;
- 8) The existence of special circumstances such as inordinate medical expenses;
- 9) The frequency with which the debtor has sought relief under the Bankruptcy code;**
- 10) The motivation and sincerity of the debtor in seeking Chapter 13 relief;**
and
- 11) The burden which the plan's administration would place upon the trustee.

In re Warren, 89 B.R. 87, 93 (B.A.P. 9th Cir. 1988) (quoting *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (emphasis added).

Debtor has been unemployed for the last nine months and offers no evidence of actively seeking employment. As stated in his Amended Schedule I, Debtor relies on the unemployment compensation he is currently receiving in the amount of \$1,300 and an additional \$300.00 a week COVID-19 stimulus (although not included as part of his income). Trustee asserts that Debtor's income is vague and Trustee is uncertain, given Debtor's history of previously dismissed cases, that Debtor can make plan payments for the next 60 months.

Trustee asserts that Debtor is a serial filer. Debtor still fails to address why this case will work when the previous ten cases did not. A review of Debtor's name for associations in this court shows that Debtor has filed eleven prior Chapter 13 cases since 2000, and four of those cases have been filed since 2016. Debtor only addresses the last case he filed, Case No. 19-22042.

Unfair Discrimination Against Unsecured Claims

Trustee also opposes confirmation due to possible unfair discrimination to unsecured claims under 11 U.S.C. § 1322(b)(1). Debtor proposes to pay \$2,950.00 per months 1 thru 3, then \$3,050.00 for months 4 through 5 to "start covering 100% of the allowed nonpriority to unsecured claims," followed by payments of \$3,100 for months 6 thru 60 months. However, the nonstandard provisions of the Plan indicate that Debtor is to make payments directly to Educational Credit Management Corp. for a student loan that totals approximately \$24,135.23 according to Proof of Claim 3-2. Thus, by starting to make payments to unsecured by month 4 where the student loans are being directly paid by Debtor, Debtor is unfairly discriminating against creditors with unsecured claims.

Delinquency

The Chapter 13 Trustee asserts that Debtor is \$2,950.00 delinquent in plan payments, which represents one month of the \$2,950.00 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 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). According to Trustee, Debtor's Additional Provisions refer to an interest rate increase pursuant to a loan modification agreement that Trustee is unaware of. Trustee is unclear what loan modification Debtor is referring to where no terms or information have been provided in either the Motion or the Declaration in support of the confirmation.

Furthermore, Trustee argues that the additional provision under Section 7.01 of the Plan seeks an improper modification of a claim secured only by a security interest in real property that is Debtor's principal residence. The Additional Provisions state that Trustee is not to increase plan payment to that Class 1 creditor even if creditor filed a notice of payment change, unless the payment is over \$50.00 per month as stated in the "original proof of claim", with the provision adding that if the payment is over \$50.00 per month, then "only in an amount the exceeding the \$50.00 per month that Debtor has already provided." Moreover, Trustee argues that the provision's language also violates Federal Rule of Bankruptcy Procedure 3002.1 which provides that a plan payment must increase to

cover the increased mortgage payment if a Notice of Mortgage Payments is filed with the court.

This modification violates 11 U.S.C. § 1322(b)(2), which prohibits the modification of an obligation secured only by Debtor's residence.

Debtor's Reply

According to Debtor, a cashier's check for \$6,000 was sent to Trustee on November 30, 2020. Dckt. 37 at 1:21-22. However, counsel finds Trustee's doubts as to Debtor's ability to make payments is reasonable and has advised his client to sell his house so that Debtor can use the equity instead of losing it via a foreclosure. *Id.*, at 2:1-2. However, Debtor has refused this course of action and instead has moved out of the residence and plans to rent it out to tenants at \$2,000.00 per month. *Id.*, at 2:3-5. Debtor will continue making payments beginning with the December 2020 payment due. *Id.*, at 2:6-7.

Debtor further requests that, in light of Debtor having decided to rent the house and now being current in plan payments and showing good faith, Debtor be allowed time to file the amended schedules and further address the Trustee's concerns with an amended plan and a motion to confirm it. *Id.*, at 2:10-13.

Debtor and Debtor's counsel have addressed this situation, advising the court and parties in interest that a further amended plan will be filed and Debtor will substantially restructure his finances. That the court denies the present Motion does not prevent from Debtor and Debtor's counsel to continue in the prosecution of the case.

In this type of situation where the Chapter 13 Plan and case have substantial financial restructuring, communication between Debtor's counsel and the Trustee is critical.

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

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by the debtor, Demetrius Bellamy ("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. 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 to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, Creditor, and Chapter 13 Trustee as stated on the Certificate of Service on November 25, 2020. The court computes that 20 days' notice has been provided.

The court issued an Order to Show Cause based on Creditor Flagstar Bank, FSB's failure to pay the required fees in this case: \$25.00 due on November 3, 2020.

The Order to Show Cause is sustained, and Flagstar Bank, FSB is ordered to pay \$250.00 in corrective sanction, plus all costs, attorney's fees, and expenses in enforcing the payment of the \$250.00 sanction amount.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Creditor Flagstar Bank, FSB's: \$25.00.

The Order to Show Cause clearly states that Flagstar Bank, FSB shall show cause why the Notice of Assignment should not be stricken, sanctions ordered, or other relief.

The court concludes that for a Federal Savings Bank merely striking the Notice of Assignment would not be sufficient. The monies would merely go to the assignor and then through the back door to Flagstar Bank, FSB.

Therefore the court concludes that a \$250.00 monetary sanction is ordered. All monies that are to be disbursed on Flagstar Bank, FSB claim in this case will be paid to the Clerk of the Court until the full \$250.00 sanction has been paid. Additionally, the sanction may be enforced in the same manner as a judgment, including assignment to a collection agency or collection attorney, and offset against any other disbursements to be made by the Trustee in any other case in this District. Additionally, the court orders that Flagstar Bank, FSB also pay all costs and expenses in enforcing the \$250.00 sanction ordered.

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 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 sustained, and Flagstar Bank, FSB is ordered to pay \$250.00 in corrective monetary sanctions to the Clerk of the Bankruptcy Court for the Eastern District of California of which the first \$25.00 will be paid to the Clerk of the Court for the delinquent filing fee, and all other monies recovered on the sanctions in excess of \$250.00 deposited in the U.S. Treasury general funds. This corrective sanction may be enforced in the same manner as a federal judgment, see Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.

IT IS FURTHER ORDERED that David Cusick, the Chapter 13 Trustee in this case, or his successor, shall make all disbursements on any claims of Flagstar Bank, FSB in this case to the Clerk of the Court for application to these sanctions until they are paid in full. Additionally, the Chapter 13 Trustee may offset these sanctions against any disbursements to be made Flagstar Bank, FSB on any claims in other cases being administered by the Chapter 13 Trustee until the sanctions, including any attorney's fees and costs, are paid in full.

IT IS FURTHER ORDERED that in addition to the \$250.00, the corrective sanctions include all costs, attorney's fees, and expenses in enforcing this order to pay sanctions.

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 to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, Creditor, and Chapter 13 Trustee as stated on the Certificate of Service on November 25, 2020. The court computes that 20 days' notice has been provided.

The court issued an Order to Show Cause based on Creditor Flagstar Bank, FSB's failure to pay the required fees in this case: \$25.00 due on November 9, 2020.

The Order to Show Cause is sustained, and Flagstar Bank, FSB is ordered to pay \$250.00 in corrective sanction, plus all costs, attorney's fees, and expenses in enforcing the payment of the \$250.00 sanction amount.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Creditor Flagstar Bank, FSB's: \$25.00.

The Order to Show Cause clearly states that Flagstar Bank, FSB shall show cause why the Notice of Assignment should not be stricken, sanctions ordered, or other relief.

The court concludes that for a Federal Savings Bank merely striking the Notice of Assignment would not be sufficient. The monies would merely go to the assignor and then through the back door to Flagstar Bank, FSB.

Therefore the court concludes that a \$250.00 monetary sanction is ordered. All monies that are to be disbursed on Flagstar Bank, FSB claim in this case will be paid to the Clerk of the Court until the full \$250.00 sanction has been paid. Additionally, the sanction may be enforced in the same manner as a judgment, including assignment to a collection agency or collection attorney, and offset against any other disbursements to be made by the Trustee in any other case in this District. Additionally, the court orders that Flagstar Bank, FSB also pay all costs and expenses in enforcing the \$250.00 sanction ordered.

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 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 sustained, and Flagstar Bank, FSB is ordered to pay \$250.00 in corrective monetary sanctions to the Clerk of the Bankruptcy Court for the Eastern District of California, of which the first \$25.00 will be paid to the Clerk of the Court for the delinquent filing fee, and all other monies recovered on the sanctions in excess of \$250.00 deposited in the U.S. Treasury general funds. This corrective sanction may be enforced in the same manner as a federal judgment, see Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.

IT IS FURTHER ORDERED that David Cusick, the Chapter 13 Trustee in this case, or his successor, shall make all disbursements on any claims of Flagstar Bank, FSB in this case to the Clerk of the Court for application to these sanctions until they are paid in full. Additionally, the Chapter 13 Trustee may offset these sanctions against any disbursements to be made Flagstar Bank, FSB on any claims in other cases being administered by the Chapter 13 Trustee until the sanctions, including any attorney's fees and costs, are paid in full.

IT IS FURTHER ORDERED that in addition to the \$250.00, the corrective sanctions include all costs, attorney's fees, and expenses in enforcing this order to pay sanctions.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 29, 2020. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is Denied.

The debtors, Ruben Calderon Hernandez and Hermina Hernandez ("Debtor"), seek confirmation of the Amended Plan. The Amended Plan provides for payments of \$1,124.00 for 47 months, followed by \$901.00 for 13 months, and zero percent dividend to unsecured claims totaling \$16,407.00. Amended Plan, Dckt. 28. 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 30, 2020. Dckt. 38. Trustee opposes confirmation of the Plan on the basis that:

- A. Plan is not Debtor's best effort.
- B. Debtor proposes to reduce percentage to unsecured creditors.
- C. Plan states incorrect amount of total paid in plan payments.
- D. Declaration in support of the Motion is illegible.

DISCUSSION

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.

Trustee asserts that Debtor's income has reduced from \$7,037.00 to \$6,287, yet Debtor has increased her voluntary retirement contribution from \$90.00 to \$481.00. Trustee opposes the increased contribution where Debtor is proposing a reduction to the plan payment and percentage to unsecured creditors.

Debtor filed a response addressing Trustee's concerns on December 8, 2020. Dckt. 41. Debtor explains that although Debtor's voluntary retirement contribution has increased, Debtor's mandatory retirement deduction has decreased. *Id.*, at 2. Debtor filed Exhibit A, copies of two of Debtor Hermina's most recent pay advices. Dckt. 42. According to Debtor, the pay advices show that the mandatory retirement deduction is now only \$22.51 per pay period, or \$48.77 a month, where it was \$107.00 a month at the time the case was filed in 2016. Dckt. 41, at 2:14-16. Debtor Hermina argues that she is trying to supplement her retirement by increasing her voluntary TSP contributions for a successful retirement. *Id.*, at 2:19-21. The combined mandatory and voluntary contributions are approximately 8% of her gross income per pay period, which Debtor Hermina contends is not excessive where her husband has already retired and she is 48 years of age. *Id.*, at 2:22-24.

Percentage to Unsecured Creditors

Debtor's plan proposes to reduce unsecured claims dividend from 20 percent to zero percent. Debtor does not provide authorization of prior disbursements. Thus, Trustee requests that Debtor add language stating that the percentage to the unsecured creditors be no less than 9.38% and authorize all prior disbursements.

On December 8, 2020 Debtor filed a copy of the proposed order confirming the plan as Exhibit B. Dckt. 42. The proposed order provides for the authorization of prior disbursements with a dividend allowed to unsecured claims of no less than 9.28%. As stated by Trustee, the dividend calculated is 9.38%.

With respect to Debtor Mrs. Hernandez increasing her voluntary retirement contribution from \$90.00 to \$481.00 a month, Debtor's counsel states that Mrs. Hernandez desires to enhance her future retirement benefits by not having the decrease expense be included in her projected disposable income.

Mrs. Hernandez is 48 years of age and clearly has a number of years after this five year plan

ends in November 2021 - less than a year from now - to supplement her retirement. Rather than recognizing the need to fund the plan with her projected disposable income for eleven more months and then “flush away” (discharge) the vast majority of her unsecured debt and go forward at 49 years of age to supplement her retirement, she has chosen to divert the monies now while still also wanting to pocket the extraordinary relief and benefits from her Chapter 13 bankruptcy case.

A review of Amended Schedule I discloses that Mrs. Hernandez has been employed by the United States Postal Service since 2000. Dckt. 29 at 1. Thus, Mrs. Hernandez is in that limited group of persons who have defined benefit pension plans, and this one is by the federal government.

Debtor’s new Exhibit A is illegible. It offers nothing of evidentiary value to the court. Dckt. 42 at 2-3.

Debtor offers no testimony with the Reply to the Trustee’s Opposition.

While Debtors assert, and testify under penalty of perjury that goosing up Mrs. Hernandez’s voluntary retirement from \$90.00 a month to \$481.00 - a 434% increase - for the last month of the Plan is in good faith, the court concludes to the contrary. The Debtors are opportunistically attempting to divert projected disposable income from properly being paid into the plan into their own pockets to the detriment of creditors.

The court concludes that Debtors are not providing their projected disposable income into the Plan. Further, that Debtors have not proposed this Modified Plan in good faith and are not prosecuting this case in good faith. Debtor’s attempt to divert projected disposable income into their own pockets by a 434% increase of voluntary retirement savings to augment debtor Mrs. Hernandez’s federal defined benefit pension is in bad faith. Why Mrs. Hernandez, who is only 48 years old and decades from retirement, now decides that a 434% increase must be done now rather than a year from now when she has discharged her debt and is free from her bankruptcy obligations.

Total Paid in Plan Payments

According to Trustee’s records Debtor has paid a total of \$52,846.00. Debtor’s Motion states Debtor has paid \$52,847.00 through October, where the Plan states a total of \$52,828.00. Trustee does not oppose Debtor correcting the plan payments to provide for a total paid in of \$52,846.00 through month 47 (October 2020), then \$901.00 for 13 months.

The proposed order confirming the plan filed as Exhibit also provides for the correction of the total amount paid. *Id.*

Declaration Illegible

Trustee correctly points out that Debtor’s Declaration is not legible where page four is blurry and the signatures are not clearly discernable.

Debtor filed a new copy of their Declaration as Exhibit C. *Id.* The Declaration is now clear and signatures are discernible.

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

confirmed. The Modified Plan has not been proposed in good faith, does not provide for funding the plan with Debtor's projected income, and the case is not being prosecuted in good faith.

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by the debtors, Ruben Calderon Hernandez and Hermina Hernandez ("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 denied.

FINAL RULINGS

13. [20-24700-E-13](#) **WILLIAM REDDIN** **OBJECTION TO CONFIRMATION OF**
[DPC-1](#) **Timothy Hamilton** **PLAN BY DAVID P. CUSICK**
13 thru 14 11-25-20 [\[43\]](#)

Final Ruling: No appearance at the December 15, 2020 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, Debtor's Attorney, and creditors, on November 25, 2020. 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.

Pursuant to order of the court, and as stipulated by the parties, the hearing on the Objection to Confirmation of Plan is continued to 2:00 p.m. on January 12, 2020.

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

- A. Debtor failed to provide his Social Security number.
- B. Debtor failed to file documents related to business.
- C. Debtor failed to file business documents required by Schedule I.
- D. Debtor failed to provide accurate amount of disposable income.
- E. Debtor inaccurately completed a Schedule I field.

DISCUSSION

Trustee's objections are well-taken.

Failure to Provide Social Security Number

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

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 File Business Documents Required by Schedule I

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

Failure to Provide Disposable Income

The Plan may not comply with 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.

Trustee argues that Debtor's Calculation of Disposable Income (Form 122C-1) includes an improper expense at line 5 for ordinary and necessary business expenses of \$20,006.00. Trustee points the court to *Drummond v. Wiegand (In re Wiegand)*, 386 B.R. 238 (B.A.P. 9th Cir. 2008), where the Bankruptcy Appellate Panel for the Ninth Circuit concluded that a chapter 13 Debtor may not deduct business expenses from gross receipts to calculate current monthly income.

Trustee further notes that based on the gross receipts of \$22,784.00, Debtor's annualized current monthly income is \$274,488.00, placing Debtor over the applicable median family income of \$60,360.00.

Trustee requests that Debtor file new and accurate Forms 122C-1 and C-2 so that it may be determined if the plan complies with 11 U.S.C. Section 1325(b)(1)(B).

Inaccurate Schedule I field

11 U.S.C. § 1325(a)(1) provides for confirmation of a plan if it complies with Chapter 13 provisions and other applicable Code provisions. According to Trustee, at the Meeting of the Creditors, Debtor testified that he has a monthly income of \$5,243.00 instead of \$2,778.00 as listed on Schedule I. Debtor amended his Schedule J to reflect the income of \$5,243.00 but has failed to file an amended Schedule I to list \$5,243.00 monthly income instead of \$2,778.00. Trustee requested that Schedule I be amended to update the income information. The Amended Schedule has not yet been filed. The Plan does not comply with 11 U.S.C. § 1325(a)(1).

Final Ruling: No appearance at the December 15, 2020 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, Debtor’s Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on November 30, 2020. By the court’s calculation, 15 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.

Pursuant to order of the court, and as stipulated by the parties, the hearing on the Objection to Confirmation of Plan is continued to 2:00 p.m. on January 12, 2020.

James D. Price and Sharee E. Price (“Creditor”) holding a secured claim oppose confirmation of the Plan on the basis that:

- A. Debtor fails to provide disposable income.
- B. Debtor’s plan discriminates against creditors.
- C. Debtor’s plan should provide for payments for 60 months.
- D. Debtor is not prosecuting this bankruptcy case in good faith.

DISCUSSION

December 2, 2020 Joint Stipulation

On December 12, 2020, Debtor, Creditor, and Trustee filed a joint stipulation to continue the hearing on this Objection to January 12, 2021 due to scheduling conflicts of Debtor’s counsel. Dckt. 54.

On December 5, 2020, the court issued an Order to continue the hearing to January 12, 2021. Dckt. 55.

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

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

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

IT IS ORDERED that the Objection to Confirmation of the Plan is continued to 2:00 p.m. on January 12, 2021.

15.	<u>19-27459-E-13</u> <u>MWB-6</u>	CYNTHIA ROSS Mark Briden	CONTINUED MOTION FOR RETROACTIVE ORDER TO EMPLOY CENTURY 21 AS REALTOR(S) 11-4-20 [118]
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Final Ruling: No appearance at the December 8, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, (most of the) creditors, parties requesting special notice, and Office of the United States Trustee on November 4, 2020. By the court’s calculation, 34 days’ notice was provided. 28 days’ notice is required.

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

The Motion to Employ is granted.

Cynthia Leeann Ross (“Debtor”) seeks retroactive authorization to employ Ellen Nielsen of Century 21 Hilltop (“Realtor”). Realtor assisted Debtor in selling Debtor’s residence located at 5900 Bell Road Redding (“Property”) for \$300,000.

Ellen Nielsen, a realtor of Century 21 Hilltop, testifies that she assisted Debtor in selling the Property for \$300,000, sale which was approved by the court on October 27, 2020. Declaration, Dckt. 119. Ellen Nielsen further testifies she and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys. *Id.*

Debtor requests judicial notice of the California Residential Estate Contract and Joint Escrow Instructions filed as Exhibit 1, Dckt. 98, filed in connection with the Motion to Sell (DCN: MWB-5) to supplement the information regarding Realtor's commission and terms of employment. Response, Dckt. 132.

Debtor has estimated that a six (6) percent broker's commission from the sale of the Property will equal approximately \$18,000. Realtor acted as realtor for both Debtor and Buyer.

Trustee filed a Response where Trustee does not oppose the employment but requests the court consider that not enough information has been provided by Debtor regarding Realtor's compensation and that the Exhibits referred to were not served in conjunction with the motion. Dckt. 128.

DISCUSSION

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

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

However, in this case, Debtor seeks retroactive authorization for employing Realtor but fails to provide this court with the applicable law that permits a bankruptcy court to take such retroactive actions. Debtor also fails to provide the court with the Employment Agreement. Debtor refers to a six (6) percent commission of \$18,000 and argues that creditors were informed of such commission but the court is unable to locate any such information in the relevant pleadings related to this sale.

Looking back at the Purchase Agreement filed in support of the motion to sell, Dckt. 98, the court notes that it is not the entire Agreement, but merely select pages. It is unclear why only select pages would be provided to the court and parties in interest, and other pages would be kept "secret" from the court. In the pages provided, no provision is made for the payment of any real estate commissions (either for the sellers' or the buyers' real estate brokers).

Further, no written contract for Debtor to employ a real estate broker has been provided in support of the Motion. It is not clear if such contractual relationship exists and who will be seeking to be paid such amounts.

In Ellen Nielsen's declaration, Dckt. 119, she testifies that she is a real estate agent, employed "with" Century 21 Hilltop," the apparent real estate broker. Ms. Nielsen states that she (not Century 21 Hilltop) entered into an Agreement with the Debtor to sell the Property. However, she does not provide such Agreement. The Declaration does not provide testimony of what the sought compensation is and who will share in the monies.

As referenced above, the Motion does not state any grounds upon which retroactive approval of the employment agreement that is not provided can be authorized retroactively. Only that there was some agreement, a copy of which is not provided, and that relief should be granted.

The Motion expressly requests that the court authorize compensation as provided in Exhibits 1 through 5 filed in support of the Motion to Sell. Those Exhibits, Dckt. 98, do not provide for any compensation to be paid. Exhibits 1 through 5 consist of the following:

Exhibit 1 – Page 1 of 10 of Residential Purchase Agreement and Joint Escrow Instructions

On Page 1 it is disclosed that Century 21 Hilltop is the broker and Ellen Nielsen is the agent, representing both the Debtor as seller and the buyer. No provision is made for any commission, fees, or expenses are provided for the real estate broker or agent. Dckt. 90 at 3.

Exhibit 2 – Page 2 of 10 of Residential Purchase Agreement and Joint Escrow Instructions

On Page 2 no provision is made for the payment of any commission, fees, or expenses for a real estate broker or agent. *Id.* at 4.

Exhibit 3 – Page 3 of 10 of Residential Purchase Agreement and Joint Escrow Instructions

On Page 3 provision is made for the payment of various escrow costs and expenses, but no provision is made for the payment of any commission, fees, or expenses for a real estate broker or agent. *Id.* at 5.

Exhibit 4 - Page 1 of 1 of Text Overflow Addendum No. 1

On this page, a contingency of buyer having to sell buyer's home is stated. *Id.* at 6.

Exhibit 5 – Page 1 of 1 of Addendum

On this page, one of the buyers named in the Purchase Agreement is removed for the stated reason of complying with the requirements for a 1031 exchange. *Id.* at 7.

For the documents cited by Debtor in the Motion for Retroactive Employment, no basis of compensation is shown.

Ex Parte Motion to Amend Order Authorizing Sale of Property

On November 18, 2020, Debtor filed an *Ex Parte* Motion to Amend the Order Authorizing the Sale of the Property. Dckt. 125. The requested amendment is modest, to provide that the Chapter 13 Trustee hold the \$18,000.00 set aside for payment of real estate commissions, if any, if the court

authorizes the employment of a real estate broker and approves compensation. It is stated that the escrow has advised Debtor that it would not hold the monies as stated in the order authorizing the sale.

No proposed order was lodged with the court and the Clerk's Office left a telephonic message for Debtor's counsel that such a notice was required. November 23, 2020 Docket Entry. As of the court's December 6, 2020 review of the proposed order inbox, no order had been lodged with the court.

At the hearing, counsel reported that the additional documents would be uploaded and requested a short continuance.

Upon the court's review of the additional documents, in light of no opposition being asserted, the court may issue the order without further hearing.

December 15, 2020 Hearing

Debtor filed the complete Residential Listing Agreement on December 9, 2020. Dckt. 134. The Agreement provides for a six (6) percent commission to the broker. Agreement, at 1, ¶ A.

Debtor having filed the Agreement with the court, the Motion is granted, Ellen Nielsen is retroactively employed, and Broker's commission of six (6) percent is authorized.

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 Employ filed by Cynthia Leeann Ross ("Chapter 13 Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted, and Chapter 13 Debtor is retroactively authorized to employ Ellen Nielsen of Century 21 Hilltop as Realtor for Debtor on the terms and conditions as set forth in the Residential Listing Agreement filed as Docket 134.

IT IS FURTHER ORDERED that the Chapter 13 Debtor is authorized to pay a real estate broker's commission in an amount not more than six (6) percent of the actual purchase price upon consummation of the sale that has been authorized by the court. The six (6) percent commission shall be paid to Ellen Nielsen of Century 21 Hilltop as Realtor.

Final Ruling: No appearance at the December 15, 2020 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 and Debtor’s Attorney, on November 10, 2020. By the court’s calculation, 35 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.

The Objection to Discharge is sustained.

David Cusick, the Chapter 13 Trustee, (“Objector”) objects to Rolando F. Wijangco and Irene A. Wijangco’s (“Debtor”) discharge in this case. Objector argues that Debtor is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on January 22, 2018. Case No. 2018-20343. Debtor received a discharge on May 7, 2018. Case No. 2018-20343, Dckt. 15.

The instant case was filed under Chapter 13 on September 28, 2020.

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 7, 2018, which is less than four years preceding the date of the filing of the instant case. Case No. 2018-20343, Dckt. 15. 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. 20-24518), 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 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 Discharge filed by David Cusick, the Chapter 13 Trustee, (“Objector”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Objection to Discharge is sustained, and upon successful completion of the instant case, Case No. 20-24518, the case shall be closed without the entry of a discharge.

Final Ruling: No appearance at the December 15, 2020 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 13 Trustee, Creditor, and Office of the United States Trustee on November 16, 2020. By the court's calculation, 29 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 \$5,548.00.

The Motion filed by Levester Jackson and Jennifer Renee Jackson ("Debtor") to value the secured claim of Onemain Financial Group, LLC ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 18. Debtor is the owner of a 2004 Chevy Suburban ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of \$5,548.00 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 does not oppose the valuation. Dckt. 22.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred on November 19, 2019 to secure a debt owed to Creditor with a balance of approximately \$15,837.00. Proof of Claim, No. 2-1. 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 \$5,548.00, 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 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 Value Collateral and Secured Claim filed by Levester Jackson and Jennifer Renee Jackson (“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 2004 Chevy Suburban (“Vehicle”) is determined to be a secured claim in the amount of \$5,548.00, 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 \$5,548.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

Final Ruling: No appearance at the December 15, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 9, 2020. By the court's calculation, 36 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>The Motion to Confirm the Modified Plan is granted.</p>

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtors, David Leroy Keller and Connie Jane Keller ("Debtor"), have filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Non-Opposition on November 30, 2020. Dckt. 102. 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 debtors, David Leroy Keller and Connie Jane Keller ("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 November 9, 2020, 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.

19. [16-26652-E-13](#)
[MRL-3](#)

RONALD MARKS
Mikala Liviakis

**MOTION FOR COMPENSATION BY
THE LAW OFFICE OF LIVIAKIS LAW
FIRM FOR MIKALAH RAYMOND
LIVIAKIS DEBTORS ATTORNEY(S)
11-3-20 [44]**

Final Ruling: No appearance at the December 15, 2020 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 November 3, 2020. By the court's calculation, 42 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.
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Mikalah R. Liviakis, the Attorney ("Applicant") for Ronald Ernest Marks, 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 September 17, 2020, through November 2, 2020. Applicant requests fees in the amount of \$2,310 and costs in the amount of \$0.00.

Trustee does not oppose Applicant's request for fees. Dckt. 49.

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 for the Estate include sale of Debtor’s residence. 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. 14. Applicant prepared the order confirming the Plan.

Lodestar Analysis

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

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

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Asset Disposition: Applicant spent 4.5 hours in this category. Applicant drafted an Application to Employ a Realtor and a Motion to approve sale of real property.

Application for Compensation: Applicant spent 1.0 hour in this category. Applicant prepared application for compensation.

Chapter 13 Plan: Applicant spent 0.5 hours in this category. Applicant analyzed claims and feasibility of plan related to the sale of real estate in Debtor’s case.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Mikalah R. Liviakis	6.0	\$385.00	\$2,310.00
Total Fees for Period of Application			\$0.00

Costs and Expenses

Applicant does not seek allowance and recovery of costs and expenses in this Application.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The unique facts surrounding the case, including the sale of Debtor's residence, 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 \$2,310.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick ("the Chapter 13 Trustee") from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

The court authorizes the Chapter 13 Trustee under the confirmed plan to pay 100% of the fees and costs allowed by the court.

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

Fees	\$2,310.00
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pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Mikalah R. Liviakis ("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 Mikalah R. Liviakis is allowed the following fees and expenses as a professional of the Estate:

Mikalah R. Liviakis, Professional Employed by Ronald Ernest Marks ("Debtor")

Fees in the amount of \$2,310.00,

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.