

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

August 27, 2013 at 3:00 p.m.

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1. 13-28203-E-13 LANCE/LISA MCKINNEY OBJECTION TO DEBTORS' CLAIM OF
NLE-1 Jason Borg EXEMPTIONS
7-25-13 [[14](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 25, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

Final Ruling: The Objection to Debtors' Claim of Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Debtors' Claim of Exemptions is sustained. No appearance required.

The Chapter 13 Trustee objects to Debtors exemption to checking accounts, savings accounts and money market accounts on Schedule C under Cal. Code Civ. P. § 706.050 in the total amount of \$1,992.45. Trustee argues that this does not appear to be a proper claim of exemption, as this section limits the amount of earnings subject to a wage order except in a bankruptcy, and is not a bankruptcy exemption. Trustee states that Schedule I shows that Debtor is self-employed and does not show any wages, salary, commissions, bonuses, pension or retirement income.

No opposition has been filed by the Debtor.

DISCUSSION

California Code of Civil Procedure ("CCP") section 706.050 states,

Except as otherwise provided in this chapter, the amount of earnings of a judgment debtor exempt from the levy of an

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earnings withholding order shall be that amount that may not be withheld from the judgment debtor's earnings under federal law in Section 1673(a) of Title 15 of the United States Code.

In California, with the exception of earning assignment orders for support, the Wage Garnishment Law ("WGL") (CCP §§ 706.010 et seq.) is the exclusive judicial method for compelling an employer to withhold earnings. CCP § 706.020. The WGL "limits the amount of earnings which may be garnished in satisfaction of a judgment and establishes certain exemptions from earnings which may not be garnished." *Cal. State Employee's Assoc. v. California*, 198 Cal. App. 3d 374, 243 Cal. Rptr. 602, 604 (Ct. App. 1988); see CCP §§ 706.050-706.052.

Here, there is no evidence that this section is applicable to Debtors' checking accounts, savings accounts and money market accounts, as Debtor is self-employed and does not show any wages, salary, commissions, bonuses, pension or retirement income. The Trustee's objection is sustained.

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 Debtors' Claim of Exemptions filed by The Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is sustained and Debtors' exemptions under California Code of Civil Procedure § 706.050 in the total amount of \$1,992.45 are disallowed.

2. [09-45606-E-13](#) CHARLES/KATHLEEN HIGGINS MOTION TO MODIFY PLAN
SDB-3 Scott de Bie 7-16-13 [[34](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 16, 2013. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm the 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). The Trustee having filed an opposition, 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 court's tentative decision is to deny the Motion to Confirm the Modified Plan. 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, the court will make the following findings of fact and conclusions of law:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Trustee objects to confirmation on the basis that he is unsure if the proposed modified plan has been properly signed. The signature of Kathleen Higgins is typed "Kathleen Higgins, Co-Debtor (deceased) signed by Charles Higgins pursuant to Calif. Probate Code Sec. 13101." Trustee contends that no motion to substitute parties has been filed pursuant to Federal Rule of Bankruptcy Procedure 7025.

The Trustee is also concerned that there may be life insurance policy and the estate has insurance proceeds which have not been disclosed. The Debtor's statement of monthly income filed on November 23, 2009, reflects \$74.00 for life insurance.

DEBTOR'S RESPONSE

Debtor filed a supplemental declaration asserting that there have been no life insurance proceeds received and none are anticipated as the life policy for which the expenses is listed is for a policy on his life and not of that of his spouse.

Debtor responds that he has standing to pursue the Chapter 13 case pursuant to California Probate Code § 13100.

DISCUSSION

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event the Debtor passes away, in the case pending under chapter 11, chapter

12, or chapter 13 "the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in chapter 13 dies. *Id.*

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

California Probate Code § 13100 addresses the management of a decedent's property worth \$150,000 or less, including management of decedent's debt. However, the California Probate Code does not supplant the requirements of the Federal Rules of Civil Procedure. At this point in time, there is nobody who has been substituted into this federal court proceeding to prosecute the rights of the decedent. Debtor has not supplied case law demonstrating that this state law provision governs the process for addressing death of a debtor under the Bankruptcy Code.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, §7025.02, which states [emphasis added],

Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.

The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not

incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**

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

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

Therefore, the motion is denied.

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

3. [09-45606-E-13](#) CHARLES/KATHLEEN HIGGINS MOTION TO VALUE COLLATERAL OF
SDB-4 Scott de Bie CWHEQ, INC.
7-25-13 [[41](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 25, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Value Collateral has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion is granted and creditor's secured claim is determined to be \$0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 9289 Rock Spring Rd., Newcastle, California. The Debtor seeks to value the property at a fair market value of \$430,000.00 as of the petition filing date. As the owner, the 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).

The first deed of trust secures a loan with a balance of approximately \$547,799.45. Creditor CWHEQ, Inc. dba CWHEQ Revolving Home Equity Loan Trust, Series 2006-H's second deed of trust secures a loan with a balance of approximately \$127,000.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See 11 U.S.C. § 506(a); Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

The court shall issue 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 for Valuation of Collateral filed by Debtor(s) 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 CWHEQ, Inc. dba CWHEQ Revolving Home Equity Loan Trust, Series 2006-H's secured by a second deed of trust recorded against the real property commonly known as 9289 Rock Spring Rd., Newcastle, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$430,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

4. [13-28807](#)-E-13 CHRISTOPHER/ANGELA MOTION TO VALUE COLLATERAL OF
SJS-1 JOHNSON WELLS FARGO BANK, N.A.
Scott Sagaria 7-24-13 [[18](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 24, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Value Collateral has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. Cf. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion is granted and creditor's secured claim is determined to be \$0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 8613 El Sobrante Way, Orangevale, California. The Debtor seeks to value the property at a

fair market value of \$187,794.00 as of the petition filing date. As the owner, the 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).

The first deed of trust secures a loan with a balance of approximately \$191,692.00. Creditor Wells Fargo Bank, N.A.'s second deed of trust secures a loan with a balance of approximately \$34,915.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. See 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

The court shall issue 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 for Valuation of Collateral filed by Debtor(s) 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 Wells Fargo Bank, N.A. secured by a second deed of trust recorded against the real property commonly known as 8613 El Sobrante Way, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$187,794.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

5. [13-22312-E-13](#) DEBRA MCCASTLE
DEF-5 David Foyil

MOTION TO CONFIRM PLAN
7-10-13 [[69](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 8, 2013. By the court's calculation, 50 days' notice was provided. 42 days' notice is required.

Final Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is granted. No appearance required.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. 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 Chapter 13 Plan filed by the 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, Debtor's Chapter 13 Plan filed on July 10, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

6. [11-44820-E-13](#) **RODEL MAULINO AND MIMSY** **MOTION TO SELL**
MLA-9 **ABARA-MAULINO** **8-7-13 [116]**
Mitchell Abdallah

Local Rule 9014-1(f)(2) Motion.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 7, 2013. By the court's calculation, 20 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Motion to Sell Property has not been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to deny the Motion to Permit Debtor to Sell Property. 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, the court will make the following findings of fact and conclusions of law:

The Bankruptcy Code permits the Debtor to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b) and 1303.

Here, the Debtor proposes to sell the real property commonly known as 6520 Beamer Way, Rio Linda, California. The sales price is \$115,000.00 and the named buyer is Brevis Inc. The terms are set forth in the Purchase Agreement, filed as Exhibit A in support of the Motion. Dckt. 119.

SERVICE

However, Debtors have not provided the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2), which is 21 days. By the court's calculation, 20 days' notice was provided.

TRUSTEE'S OPPOSITION

The Chapter 13 Trustee opposes the motion on the grounds that Debtor does not provide supporting documents from the lienholders indicating their willingness to release their liens for less than the full amount owed.

The Trustee also notes that the real estate agent obtained is Abdallah Real Estate, which has the same name as the attorney representing

debtors. Trustee states that the records indicate that counsel may be the licenced real estate broker in this transaction. The motion proposes to approve a 6% commission for Abdallah Real Estate without disclosing whatever relationship may exist between the agency and counsel to allow if the transaction can be approved under 11 U.S.C. § 327.

SELECT PORTFOLIO SERVICING'S OPPOSITION

Creditor Select Portfolio Servicing, as servicer for U.S. Bank, N.A., successor trustee to Bank of America, N.A. successor in interest to LaSalle Bank, N.A., as trustee on behalf of the holders of the Washington Mutual Mortgage Pass-Through Certificates, WMALT Series 2006-AR4 ("Creditor") filed a limited opposition to the motion on the grounds that the motion does not clarify that it will be paid in full from the proceeds of the sale. Creditor does not oppose the sale if is paid in full immediately upon the close of escrow.

Creditor states Debtors appear to be moving to sell the subject real property pursuant to 11 U.S.C. § 363(f)(#) which permits the debtor to sell the property if the price at which the property is to be sold is greater than the aggregate value of all liens on such property. Creditor states its lien is in the amount of \$94,602.60 and the proposed price is \$115,000.00. Creditor consents to the sale upon the condition that the payoff amount is paid in full.

DISCUSSION

In addition to the service deficiency, Debtor has failed to provide the legal authority in which it seeks relief, leaving the court and the parties to guess. The motion states that the purchase amount of \$115,000.00 is less than the amount owed and both trust deed holders will voluntarily agree to release their liens for less than the full amount owed. However, Select Portfolio Servicing, based on its filing with the court, has not agreed to voluntarily take less than the amount owed. It seeks full payment of the obligation. No evidence has been shown that the second deed of trust holder has agreed to take less than the full amount owed.

The court is also concerned that Counsel for Debtor has not disclosed a connection with the real estate company used for this proposed transaction. Counsel shall address this at the hearing.

DEBTORS' ATTEMPTED TO "WITHDRAW" THE MOTION

When faced with the opposition, the Debtors filed a pleading titled "Notice of Withdrawal of Motion to Sell Real Property." Dckt. 124. The "Notice" does not state any legal basis or right the Debtors have to preclude the court considering the opposition and addressing the questions raised by the Trustee.

Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rule of Bankruptcy Procedure 7041 and 9014 allow a movant to unilaterally dismiss a motion only when an answer, opposition, or responsive pleading has not been filed

Based on the foregoing, the motion is denied without prejudice.

A minute order substantially in the following form shall be prepared and issued by the court:

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

The Motion to sell property filed by the 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 without prejudice.

7. 11-29624-E-13 JACQUELINE LEWIS MOTION TO MODIFY PLAN
SDB-2 Scott de Bie 7-19-13 [[51](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Withdrawn.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 19, 2013. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

Final Ruling: The Motion to Confirm the 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). The court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The court's decision is to grant the Motion to Confirm the Modified Plan.
No appearance required.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. 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 Chapter 13 Plan filed by the 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, Debtor's Chapter 13 Plan filed on July 19, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

8. [09-27025-E-13](#) NILTON/MELISSA SAAVEDRA MOTION TO MODIFY PLAN
BLG-8 Chad Johnson 6-14-13 [[151](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 14, 2013. By the court's calculation, 74 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm the 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). The Trustee having filed an opposition, 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 court's tentative decision is to deny the Motion to Confirm the Modified Plan. 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, the court will make the following findings of fact and conclusions of law:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee objects to Debtor's motion on the grounds that the plan on file is missing page 2 of 5 but includes two pages 5 of 5. Dckt. 157. The Trustee notes the debtors' previous motion to modify was withdrawn on June 14, 2013 because the plan was missing page 1 of 5.

The Trustee also argues that the proposed plan is not the Debtor's best effort under 11 U.S.C. § 1325 or the plan has not been proposed in good faith. Trustee argues that Debtor filed an amended Schedule I reflecting the debtor's net monthly take home pay of \$4,536.34, but Debtor's paystub from April 1, 2013, shows year-to-date reported earnings of \$28,271.64, which would represent gross monthly earning average of \$7,067.91, not \$5,997.52 as reported. The Trustee states he has not received any paystubs from the spouse.

The court is unable to determine if the plan complies with 11 U.S.C. §§ 1322 and 1325(a), as the plan on file is missing pages. Furthermore, the Trustee raises a valid objection regarding the Debtor's reported income. Based on the foregoing, the motion is denied.

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

9. [10-32525-E-13](#) KATHERINE MENDOZA MOTION TO MODIFY PLAN
RAC-6 Patricia Chapman 7-19-13 [[83](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 19, 2013. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm the 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). The Trustee having filed an opposition, 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 court's tentative decision is to deny the Motion to Confirm the Modified Plan. 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, the court will make the following findings of fact and conclusions of law:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee objects to the Debtor's motion on the grounds that the Motion and Declaration do not provide sufficient information regarding certain details that requires the parties to review the records to determine what is being proposed and why. The Trustee argues

that the motion should disclose the pertinent terms of the prior plan and the changes that are now proposed. While Debtor provides testimony for the reason for change in income and reasons for delinquency and change of expenses, it does not indicate the monetary amounts involved and does not authenticated the Schedule I and J.

The Trustee also argues that he is uncertain if the Debtor has demonstrated the ability to make payments, even though reduced from the confirmed plan. The Trustee states that unless other parties are contributing to the household and their income has not been disclosed, the decreased expenses do not appear to be realistic based on the original Schedule J.

Lastly, Trustee argues that Debtor should provide for pre and post petition arrears separately and propose a monthly dividend for each. The monthly dividend proposed to BAC Home Loans Servicing LP is \$291.15. It is unclear if Debtor meant for the difference between the proposed payment and the confirmed payment to be the proposed monthly dividend for post-petition arrears.

After a review of the declaration and Amended Schedule I and J, the court agrees that Debtor has not provided sufficient evidence to support confirmation of the modified plan. See *Amfac Distribution Corp. v. Wolff (In re Wolff)*, 22 B.R. 510, 512 (9th Cir. B.A.P. 1982) (holding that the proponent of a Chapter 13 plan has the burden of proof as to confirmation). Debtor has not provided sufficient detail for the reason for change in income and change of expenses, as no monetary amounts are included. The court and interested parties are left to guess at how Debtor's circumstances have changed. Debtor has also not provided any evidence of how the "Amended Schedule J" expenses are reasonable under the circumstances.

Amended Schedules I and J Contain Stale Information

On July 19, 2013, the Debtor filed amended Schedules I and J to correct error in the information as to the Debtor's income and expenses as of the May 13, 2010 commencement of this case. (Schedules I and J clearly state on their face that the information is the income and expenses information as of the commencement of the case.) Now, three years later, the Debtor must provide her testimony as to the current expenses and income, the reason for the changes, and how those changes effect a plan in this case.

Based on the foregoing, the modified Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) and is not confirmed.

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

10. [12-36225-E-13](#) **MAXIMO/MILAGROS SINNUNG** **MOTION TO MODIFY PLAN**
PGM-7 **Peter Macaluso** **7-19-13 [104]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 19, 2013. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

Final Ruling: The Motion to Confirm the 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted. No appearance required.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. 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 Chapter 13 Plan filed by the 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, Debtor's Chapter 13 Plan filed on July 19, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order

confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

11. [10-32529-E-13](#) PATRICK/CARRIE MCDONALD MOTION TO INCUR DEBT
WW-8 Mark Wolff 8-13-13 [[113](#)]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on August 13, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion Incur Debt has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the 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 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Incur Debt. 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, the court will make the following findings of fact and conclusions of law:

The motion seeks permission to purchase real property located at 521 Galileo Drive, Madison, Wisconsin, which the total purchase price is \$298,763.00, a down payment of \$1,000.00, with monthly payments of \$2,289.09 a month. Debtor states the interest rate will be 3.875% and the term of the loan will be for 30 years.

Debtors state that after they purchase the property, they will have to make improvements to make the home wheelchair accessible for Patrick. These will include ramps, counters, lighting and other minor improvements. Debtors state that they have included these expenses in their budget. Debtor also provide explanations for their amended income and expenses. Debtors state they are able to afford the home and increase their plan payment by \$200.00.

The Trustee filed a statement of non-opposition to the motion. Dkt. 118.

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at *1

(Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. Id. at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

Here, the proposed purchase of real property is sufficiently described in the motion and supporting pleadings. The court finds that the proposed purchase of real property is reasonable. Debtors are able to afford the payment, in addition to paying \$200.00 more per month to the Chapter 13 plan. There being no opposition from any party in interest and the terms being reasonable, the motion 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 Incur Debt filed by 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 Patrick and Carrie McDonald, Debtors, are authorized to incur debt pursuant to the terms in Exhibit A, Dckt. 116.

12. [13-22231-E-13](#) BRENT SNYDER
PLC-3 Peter Cianchetta

CONTINUED MOTION TO CONFIRM
PLAN
6-10-13 [[45](#)]

CONT. FROM 7-23-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 10, 2013. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

Final Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is denied as moot. No appearance required.

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on July 29, 2013. The filing of a new plan is a *de facto* withdrawal of the pending Plan.

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor 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 as moot.

13. [13-25737-E-13](#) EDDIE/JACKYE RAIGER
CAH-3 C. Anthony Hughes

MOTION TO CONFIRM PLAN
7-11-13 [[31](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 11, 2013. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The Trustee and a creditor having filed an opposition, the court will address the merits of the motion. 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 court's tentative decision is to deny the Motion to Confirm the Plan.

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, the court will make the following findings of fact and conclusions of law:

TRUSTEE'S OBJECTION

The Chapter 13 Trustee objects on the grounds that Debtors have not properly treated the Wells Fargo Home Mortgage claims in the proposed plan. Trustee states Wells Fargo has filed two claims, one for a senior mortgage and one for a junior mortgage. Trustee states that Debtors admitted that they had not made a mortgage payment for approximately 30 months. The Trustee states that the treatment of the first and second deeds of trust is not clear under the plan and argues that the first deed of trust is not current and should be provided in Class 1 of the plan. The plan provides for Wells Fargo Claim for \$150,000.00 as Class 2(c) to be reduced to \$0.00 and describes the collateral as "First Deed of Trust" and the other as a Class 4 claim to be paid directly with the description as "First Deed of Trust."

The Trustee also states that the Debtors propose to value the secured claim of Sunset Ventures Trust, but have not filed a motion to value collateral to date.

Lastly, the Trustee argues that Debtor may not be able to make the proposed plan payment because Debtor failed to make their ongoing mortgage payment for an extended amount of time, possibly as long as 34 months, and now Debtor proposes to pay it directly without evidence of why they became delinquent and how they are able to make the payments currently.

CREDITOR'S OBJECTION

Creditor Wells Fargo Bank, N.A. opposes the motion on the basis that Debtor's proposed plan fails to provide for the pre-petition arrears stated in their proof of claims in the sum of \$75,498.50.

DISCUSSION

Because the Plan does not provide for the surrender of the collateral of Wells Fargo Bank, N.A. for its secured claim on the Debtor's primary residence, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. See 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of the arrearage, the plan cannot be confirmed.

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

14. [10-48648-E-13](#) LENOR NUNEZ
PLC-2 Peter Cianchetta

MOTION TO MODIFY PLAN
7-17-13 [[26](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 17, 2013. By the court's calculation, 41 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm the 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). The Trustee having filed an opposition, 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 court's tentative decision is to deny the Motion to Confirm the Modified Plan. 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, the court will make the following findings of fact and conclusions of law:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee argues that the motion does not comply with Federal Rule of Bankruptcy Procedure 9013. The motion must state with particularity the grounds upon which the relief is based. This Motion states with particularity the following grounds:

- A. The bankruptcy case was filed on October 29, 2010.
- B. The first meeting of creditors was completed on January 26, 2011.
- C. Since confirmation "the financial circumstances of the Debtor and/or the legal circumstances may have changed (See the Declaration in Support of Motion for Order Confirming the Debtor's First Modified Chapter 13 Plan, filed concurrently with this Motion)." FN.1.

FN.1. It appears that rather than stating the grounds, the Debtors have assigned that task to the Chapter 13 Trustee, Creditors, and the court to draft that portion of the Motion.

- D. The Proposed Plan is attached as an exhibit.
- E. The Plan has been proposed in good faith.

August 27, 2013 at 3:00 p.m.

- F. The Plan provides to pay creditors at least as much as they would get through a Chapter 7 liquidation.
- G. The Debtor has no domestic support obligations.
- H. The Debtor has filed all applicable federal, state, and local tax returns.

Motion, Dckt.26.

The declaration provided by the Debtor provides only the following testimony.

- a. She filed her first Chapter 13 Plan on October 29, 2010.
- b. The Chapter 13 Plan was confirmed on January 26, 2011.
- c. Since confirmation of that plan, "certain legal and/or financial events have occurred that require modification of my Plan. These events were unforeseen and could not have been expected."
- d. One "event" includes the Debtor "distinctly remember purchasing and mailing several money orders (made payable to the Chapter 13 Trustee) that have not been received and posted to the Trustee's records." The Debtor states that she (nor apparently was she counseled by her attorney) to maintain records of these cashier's checks).
- e. She instructed her attorney to prepare a motion to modify her Chapter 13 Plan.
- f. She concludes that she will be able to comply with the terms of the modified plan.

Declaration, Dckt. 28.

Trustee also argues that the Declaration provided does not provide sufficient evidence regarding the explanation for the delinquency. Trustee states Debtor has not provided details regarding the money orders.

Lastly, Trustee stats that Debtor has incorrectly included the total amount paid in, as their records reflect Debtor has paid \$2,355.81 through June 2013, and \$2,436.95 to date.

DISCUSSION

After a review of the declaration and motion, the court agrees that Debtor has not provided sufficient evidence to support confirmation of the modified plan. See *Amfac Distribution Corp. v. Wolff (In re Wolff)*, 22 B.R. 510, 512 (9th Cir. B.A.P. 1982) (holding that the proponent of a Chapter 13 plan has the burden of proof as to confirmation). Debtor has not provided sufficient detail for the reason for the delinquency. The plan also includes the incorrect amount paid in to the Trustee.

While one might try and argue that the Motion is a "wobbler" when it comes to the Rule 9013 issue, the testimony is devoid of providing the court with the necessary evidence to confirm a modified plan pursuant to 11 U.S.C. § 1329, 1325, and 1322. No current financial information is provided for the court, Chapter 13 Trustee, and creditors to determine if confirmation is proper. There is no Chapter 7 liquidation analysis. All the court, Chapter 13 Trustee, and creditors are provided with is stale financial information that is now three years old.

At best, the testimony is, "Judge, I have made all the necessary findings of fact for you, and I'm throwing in the conclusions of law, so just shut your eyes and sign the piece of paper my attorney will put in front of you." It should be no surprise to any attorney appearing in this court that penning a declaration for a client which merely provides conclusions of law and findings of fact is not sufficient.

The Chapter 13 Trustee and U.S. Trustee may address at this hearing whether there has been a significant unnecessary expenditure of time and resources in connection with the present motion for which they intend to seek recovery. Additionally, they may address for the court whether this Debtor may have now so demonstrated a lack of good faith, other action is contemplated by them in connection with this bankruptcy case.

Based on the foregoing, the modified Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) and is not confirmed.

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

15. [13-27151-E-13](#) FRANK TERRAZAS
SJJ-2 Stephen Johnson

MOTION TO CONFIRM PLAN
7-12-13 [[25](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 12, 2013. By the court's calculation, 46 days' notice was provided. 42 days' notice is required.

Final Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The Trustee having filed an opposition, 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 court's decision is to continue the hearing on the Motion to Confirm the Amended Plan to 3:00 p.m. on September 24, 2013. No appearance at the August 27, 2013 hearing is required.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Chapter 13 Trustee objects on the grounds that the motion depends on a Motion to Value Collateral which is set for hearing September 24, 2013.

The Debtor responds, requesting that the motion be continued to be heard with the pending Motion to Value Collateral on September 24, 2013.

Based on the foregoing the court continues the hearing on the Motion to Confirm the Amended Plan to 3:00 p.m. on September 24, 2013 to be heard with the pending Motion to Value Collateral.

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Confirm the Plan is continued to 3:00 p.m. on September 24, 2013.

16. [10-41154-E-13](#) J.C./JUDY SKINNER
MWB-2 Mark Briden

MOTION TO INCUR DEBT
7-29-13 [[45](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on July 29, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion Incur Debt has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995).

The court's decision is to deny the Motion to Incur Debt. No appearance at the August 27, 2013 hearing is required.

The motion seeks permission to purchase a 2010 Honda Accord, for the sum of \$16,241.00, a \$1,000.00 down payment, with monthly payments of approximately \$375.00 a month for 72 months. Debtors state they need a new vehicle as their 2002 Lincoln needs a new clutch and the cost of repair would negate any value of the vehicle in its present condition.

TRUSTEE'S OPPOSITION

The Chapter 13 Trustee opposes the motion on the basis that the motion and declaration do not provide the interest rate, which the purchase contract reveals to be 18.25%.

The Trustee states he is not certain this purchase is in the best interest of Debtors or the estate because the interest rate is so high, a *Kelley Blue Book* valuation of a similar vehicle is worth approximately \$13,225.00 in excellent condition, no evidence has been presented regarding the cost of replacing the clutch on the Lincoln, and Debtors have not explained why they need another vehicle when their schedules show a total of five vehicles, a motorcycle and a camper. The Trustee also questions the updated budget.

DISCUSSION

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). In re Gonzales, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. Id. at 4001(c)(1)(A). The court must know the details of the collateral as well as

the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

The Debtor does not address the reasonableness of incurring debt to purchase a 2010 Honda Accord while seeking the extraordinary relief under Chapter 13 to discharge debts. The debtor has not provided the court with evidence of repairing their prior vehicle or explanation on why they cannot use their other five vehicles.

Furthermore, the transaction does not appear to be in the best interests of the Debtor or the estate. The loan calls for a substantial interest charge – 18.25%. A debtor driven to seek the extraordinary relief available under the Bankruptcy Code is hard pressed to provide a good faith explanation as to how to borrow money at a 16% interest rate.

The motion is denied. FN.1.

FN.1. On July 30, 2013, the Debtors filed an amended Schedule J. Dckt. 50. This corrected errors in the original Schedule J for their expenses at the time this case was commenced on August 10, 2010. (Both Schedules I and J clearly state on their face that they are statements under penalty of perjury of the income and the expenses of the Debtors as of the commencement of this case.) The Debtors now state, under penalty of perjury, that their real expenses as of the commencement of this case were \$4,083.00 a month, including a \$376.00 heretofore undisclosed automobile installment payment.

The Original Schedule J misstated the Debtors' expenses to be \$4,083.00, without the undisclosed automobile installment payment. Dckt. 1 at 27. Original Schedule J misstated that the Debtors had \$850.00 in food expenses, when they now tell the court, under penalty of perjury, that it really was only \$550.00. The Debtors also misstated that they had a clothing expense of \$250.00 a month, when they now state to the court under penalty of perjury that it was only \$150.00 a month.

This court takes seriously statements made under penalty of perjury made by parties and witnesses. The fact that they are made under penalty of perjury provides them with the air of credibility. When such testimony is cast aside without explanation, it raises serious doubts as to the credibility of any testimony by the person, and in this case, whether the Debtors have, can, and will prosecute the case 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 Incur Debt filed by 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 without prejudice.

17. [10-32857-E-13](#) DEAN NYLAND
ACK-7 Aaron Koenig

MOTION TO VALUE COLLATERAL OF
DEUTSCHE BANK NATIONAL TRUST
COMPANY
7-25-13 [[109](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 25, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Value Collateral has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion is granted and creditor's secured claim is determined to be \$0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 9170 Oak Ave., Orangevale, California. The Debtor seeks to value the property at a fair market value of \$524,500.00 as of the petition filing date. As the owner, the 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).

The first deed of trust secures a loan with a balance of approximately \$572,952.74. Creditor Deutsche Bank National Trust Company's second deed of trust secures a loan with a balance of approximately \$110,631.67. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See 11 U.S.C. § 506(a); Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

The court shall issue 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 for Valuation of Collateral filed by Debtor(s) 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 Deutsche Bank National Trust Company, as Trustee for Home Equity Loan Asset-Backed Trust, Series INDS 2006-3 secured by a second deed of trust recorded against the real property commonly known as 9170 Oak Ave., Orangevale, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$524,500.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

18. [12-35358-E-13](#) WILLIAM/METTE NAGEL MOTION TO MODIFY PLAN
EJS-1 Eric Schwab 7-23-13 [[50](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 23, 2013. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

Final Ruling: The Motion to Confirm the 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted. No appearance required.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. 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 Chapter 13 Plan filed by the 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, Debtor's Chapter 13 Plan filed on July 23, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

19. [11-33759](#)-E-13 ANTHONY/DAWN BASURTO CONTINUED MOTION TO MODIFY PLAN
PGM-4 Peter Macaluso 6-14-13 [[79](#)]

CONT. FROM 7-23-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 14, 2013. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm the 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). The Trustee having filed an opposition, 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 court's tentative decision is to deny the Motion to Confirm the Modified Plan. 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, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Trustee opposes confirmation offering evidence that the Debtor is \$1,100.00 delinquent in plan payments. This is strong evidence

that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

Debtors respond asserting that they will be current with plan payments on or before the hearing date. However, Debtors have failed to provide the court with evidence that Debtor is in fact current with plan payment.

Additionally, the Debtors fail to provide any testimony as to where there will find an additional \$1,100.00 to cure the arrearage. As set forth in their current statement of expenses and Monthly Net Income (Exhibit 2, Dckt. 82), the Debtor's Monthly Net Income is \$3,500.00 a month. This full amount is required each month for the plan payment, exhausting all of the Debtors' disposable monthly income.

The Debtors offer no explanation as to why they defaulted. Possibly it is because their expenses are wholly unrealistic and any plan based thereon doomed to failure. This court has described testimony in which unrealistic expenses are created to mislead the court into confirming a plan to be a "liar declarations."

CONTINUANCE

The court continued the hearing to allow Debtors to file evidence that they are current on their plan payments. No evidence has been presented to the court regarding the status of the Debtor's plan payments. Therefore, the motion is denied.

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

20. 13-29759-E-13 JEFFREY/NANCY CARDINAL MOTION TO VALUE COLLATERAL OF
RJB-1 Robert Busch PATELCO CREDIT UNION
7-25-13 [8]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 25, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Value Collateral has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to continue the hearing on the Motion to Value Collateral to 3:00 p.m. on October 8, 2013. 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, the court will make the following findings of fact and conclusions of law:

Debtor seeks to value the collateral of Creditor Patelco Credit Union ("Creditor"). The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 1043 Mission Bay Drive, Vacaville, California. The Debtor seeks to value the property at a fair market value of \$280,000.00 as of the petition filing date. As the owner, the 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).

CREDITOR'S OPPOSITION

Creditor filed an opposition to the motion, arguing that the Debtor's valuation is inaccurate and seeks the opportunity to perform its own analysis in order to determine the value of the real property. Creditor filed a Broker's Price Opinion valuing the property at \$355,000.00. Creditor states that this is a valuation based on the exterior of the home and requests the opportunity to have a complete appraisal of the property done.

DISCUSSION

The court grants the request for a continuance to allow the parties to conduct appraisals on the subject real property. The hearing on the motion to value collateral is continued to 3:00 p.m. on October 8, 2013.

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 for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Value is continued to 3:00 p.m. on October 8, 2013.

21. [08-34960-E-13](#) **THELMA/EDWARD RHEA** **CONTINUED MOTION TO MODIFY PLAN**
PGM-8 **Peter Macaluso** **6-18-13 [[161](#)]**

CONT. FROM 7-23-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 18, 2013. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm the 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). The Trustee having filed an opposition, 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 court's tentative decision is to deny the Motion to Confirm the Modified Plan. 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, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee objects on the grounds that the plan fails the Chapter 7 liquidation analysis as Debtor's non-exempt equity totals \$29,050.00 and the Debtor proposes to pay the unsecured creditors a 9.8% dividend.

The Trustee also argues that the Debtors' plan was not proposed in good faith as debtor reports monthly gross income of \$10,078.56 but filed a paystub indicating the hourly rate is \$69.99. The Trustee argues that this equates to gross wage of approximately \$12,131.00, which is \$2,052.44 more than reported.

Lastly, the Trustee states that the declaration provided by the Debtor does not address changes in income or expenses.

DEBTOR'S RESPONSE

Debtors respond, stating they have amended their exemption to the amount reasonably necessary for the surviving spouse in the amount of \$29,113.01. Debtors state the wild card exemption has also been amended. Debtor contends that now the payment to unsecured creditors is sufficient for confirmation and above the liquidation amount required under the Code.

Debtor states that trustee's analysis is incorrect and based on the assumption of straight hours, not differential payments for different hours. Debtors assert that they would be agreeable to an increase for the three remaining months, but not the \$2,052.44. Debtor agrees to increase the last three monthly payments by \$500.00 each month, which would come from the insurance proceeds.

Lastly, the Debtor states that the changes in income were addressed in the Motion Substituting Party and are based on the death of the co-debtor.

CONTINUANCE

The court continued the hearing to allow Debtors to submit evidence addressing the Trustee's objections.

SUPPLEMENTAL DECLARATION

The Debtor filed a supplemental declaration on August 16, 2013, explaining how Debtor has disbursed the life insurance proceeds of \$50,000.00.

DISCUSSION

While Debtor has provided evidence regarding how she disbursed the life insurance proceeds, these explanations raise significant questions concerning the conduct of this above median income Debtor during the almost five years of the Chapter 13 case. First, she states that she had to pay \$11,000.00 in post-petition past due taxes. The Debtor altered her exemptions to increase her net paycheck, and underpay her taxes. This change was not consistent with (1) the financial information upon which the Chapter 13 plan was confirmed and (2) the Chapter 13 Debtor, as the fiduciary of the estate, appears to have intentionally under funded taxes to divert the monies to other uses not provided for by the Chapter 13 Plan.

Next, the Debtor says that she gifted \$10,000.00 to her children because her late husband "requested it in his will." The Debtor in this case reported on Schedule I having \$11,748.75 in gross income, plus her husband's \$987.00 in Social Security. After deductions for payroll taxes, Social Security taxes, retirement, and insurance, the Debtors reported \$8,968.33 a month in Average Monthly Income. Schedule I, Dckt. 1 at 32.

These Debtors were, and the current Debtor is, well over median-income debtors. Though being over-median income Debtors, under their bankruptcy plan, they have "struggled" to eek out a 9.8% dividend to

August 27, 2013 at 3:00 p.m.

creditors holding general unsecured claims. Along the way the Debtors retained their BMW 530i, seek to lien strip a lien from their home, cure both a pre- and post-petition arrearage on their home, and maintain a \$3,079.16 monthly mortgage payment. Notwithstanding obtaining these significant benefits under the Bankruptcy Code and freeing themselves from substantially all of their debt, the Debtor and her late spouse also sought to under pay taxes, divert those monies to other purposes, and then divert insurance money to family members rather than properly applying it to the little payment they were making to creditors.

The Debtor states that she paid \$7,000.00 for funeral expenses. No breakdown of the expenses has been provided. FN.1.

FN.1. The court appreciates that the death of a family member, and especially a spouse, is a traumatic event. Looking into the actual funeral expenses is not a callous attempt by the court to "pick at the wound," but arises from actual judicial experience. This court has and is addressing a case in which the surviving debtor has "funeral expenses" which included substantial expenses for travel of various family members, without regard as to whether they were necessary or reasonable.

The Debtor also spent \$2,000.00 for a "trip back home" to deal with family issues. No explanation is provided for this expense.

The Debtor then spent \$2,000.00 to repair her vehicle and \$1,000.00 to replace carpeting in her house. No testimony is provided as to the necessity or reasonableness of these expenses.

Finally, the Debtor reports that she has invested the remaining \$19,953.35 with Metlife. No explanation is provided as to the nature of this investment, why the money has been invested, and how this investment is reasonable and necessary.

The Debtor, in light of this asset disclosure, has amended her Schedule C to claim a \$29,113.01 exemption in the insurance proceeds pursuant to California Code of Civil Procedure § 703.140(b)(11)(c) and an additional \$20,950.00 pursuant to California Code of Civil Procedure § 703.140(b)(5). Dckt. 173. This has caught the objection of the Chapter 13 Trustee, who challenges the exemption claimed under California Code of Civil Procedure § 704(b)(11)(c) because there is no showing that the insurance proceeds are necessary for the support of this over-median income Debtor, with a retirement plan and Social Security benefits, or any dependant of the Debtor. FN.2.

FN.2. When this case was filed in 2008 the Debtors listed not only this Debtor's pension with her employer, but also a 401K with a balance of \$90,000. Schedule B, Dckt. 1 at 22.

Debtor offers no evidence in response to the other issues raised in the Trustee's Objection to Confirmation. The Trustee raises significant issues as to the Debtor's true income and whether the financial information provided is accurate. It would have been quite simple for the Debtor to provide copies of actual paystubs to document the alleged "confusion" between "straight hours" and "differential payments for different hours."

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The surviving Debtor has gross income of \$11,934.34 a month. In addition to having this income, the Debtor contends that making voluntary 401K contributions is reasonable. The Fourth Modified Plan does provide for substantial payments over the life of the plan, but the annualized income for the two Debtors was \$166,677. Form B22C, Dckt. 1 at 10. Though proposing to make approximately \$313,000.00 in plan payments, creditors holding general unsecured claims (\$297,170) are to receive only a 9.8% dividend. The Debtors' Plan has been to paid secured claims to retain real and personal property assets.

The Debtor also does not address the strict computation of projected disposable income as mandated by the Ninth Circuit Court of Appeals in *Drummond v. Welsh*, 711 F.3d 1120, 1128-1130, 1133-1135 (9th Cir. 2012). For over-median income debtors, the expenses which may be deducted from income are those permitted by the Internal Revenue Service Guidelines pursuant to 11 U.S.C. § 707(b). (The lower of the Guidelines or actual expense.)

Good Faith of Debtor

The Debtor's conduct in this case raises substantial good faith issues. For the confirmation of any plan, a debtor must show not only that the case was filed in good faith, but that the plan was proposed in good faith. 11 U.S.C. § 1325(b)(a)(3), (a)(7). Pursuant to 11 U.S.C. § 1325(a)(3) a plan must be proposed in good faith. Courts apply the totality of the circumstances test in making a good faith determination and consider several factors in determining whether a plan was proposed in good faith, including:

1. Whether the proposed plan accurately states debtor's secured and unsecured debts;
2. Whether the proposed plan accurately states debtor's expenses;
3. Whether the proposed plan accurately states the percentage repayment of unsecured claims;
4. Whether the proposed plan has deficiencies and whether the inaccuracies amount to an attempt to mislead the bankruptcy court;
5. Whether the proposed payments indicate a fundamental fairness in dealing with one's creditors.

In re Powers, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991)(citing *In re Smith*, 848 F.2d 813, 818 (7th Cir. 1984). Although good faith in a Chapter 13 proceeding is determined on a case by case basis, a debtor must at minimum show that he or she has an honest intention. *In re Powers* at 992. One factor courts consider is whether the debtor acted equitably in proposing the Chapter 13 plan and whether a debtor has misrepresented facts in the plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed a plan in an inequitable manner. *Id.* at 992.

Under the totality of the circumstances, this Debtor has operated her finances under the cloak of bankruptcy protection other than as she and the co-debtor testified to under penalty of perjury. Tax payments were changed and significant post-petition taxes were incurred. The bankruptcy case appears to be one filed solely to preserve a residence for this over-

median income debtor, with little, if any, other debt restructure - other than discharging the debts for a small dividend.

Not being satisfied with that result, when she received a \$50,000.00 windfall (which the court recognizes arise from the very unfortunate circumstances of the death of her spouse), rather than properly addressing the \$50,000.00 asset under the Bankruptcy Code, the Debtor chose to spend first and then justify the expenses later. Rather than properly providing for her post-petition income tax arrearage through a modified plan, she tried to secretly pay them with a portion of the \$50,000.00 and hide the tax arrearage (and that she had a greater net income) from the court, creditors, and Chapter 13 Trustee.

The Debtor then decided that it was proper for her, as the fiduciary of the bankruptcy estate, to gift \$10,000.00 to her children because that is what her late husband wanted to happen. The Debtor believes that this "desire" trumped the Bankruptcy Code.

The Debtor reports having \$7,000.00 in funeral expenses, for which no documentation is provided. As this court has addressed in another, unrelated case, a debtor believed that reasonable and necessary funeral expenses included flying family members in for the funeral so that the family members did not have to incur the expenses (adopting a "its free money, so let's use it instead of paying creditors" attitude).

The Debtor also reports that she spent \$2,000.00 for a "trip back home." The court has no idea where is "back home," or why the trip was a necessary expense for this over-median income Debtor (one person household with more than \$11,000 income) to be paid from these monies.

Finally, the Debtor attempts to retain the money she was unable to expend, contending that it is "necessary for her support." This over-median income debtor provides no explanation why her more than \$11,000 a month income, retirement plan, Social Security benefits, and 401K (which was \$90,000.00 five years ago) do not reasonably provide for her support.

The court finds that this bankruptcy plan has not been proposed in good faith or that the case has been prosecuted in good faith in connection with the present motion and proposed plan. The conduct of the Debtor goes beyond merely this plan, and may so taint the case that she does not and cannot be found to have good faith for any plan in this case.

Many of the issues arising in connection with this contested matter may well be relevant under 11 U.S.C. § 1307(b) relating to the dismissal of the bankruptcy case. The Bankruptcy Code provides that the court, on request of a party in interest (including the U.S. Trustee) dismiss or convert the case "for cause." Examples of cause stated in § 1307(b) include (a) unreasonable delay which is prejudicial to creditors and (b) material default by the debtor with respect to terms of a confirmed plan. In addition, the issue of whether the Debtor has breached her fiduciary duties by diverting the monies of the estate to make gifts to her children, pay heretofore undisclosed post-petition tax arrearage (because the Debtor increased her exemptions to increase her monthly income beyond that testified to under penalty of perjury to the court and creditors to confirm prior plans in this case), remodel expenses (new carpet) for her home, and

personal travel is before the court. If such a motion is filed, the Debtor will have the full and fair opportunity to address these concerns.

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

22. [10-42361](#)-E-13 SHARRAAZ KHAN MOTION TO APPROVE LOAN
PGM-8 Peter Macaluso MODIFICATION
7-23-13 [[133](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 23, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Approve the Loan Modification is granted. No appearance required.

Debtor owns the real property commonly known as 10276 Alta Mesa Road, Wilton, California. Wells Fargo Bank, N.A., whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce

the Debtor's monthly mortgage payment from the current \$1,786.04 to \$1,255.41. The modification will capitalize the pre-petition arrears and provides for stepped increases in the interest rate from 2.875% to 4.0% over the next 40 years.

There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

The court shall issue 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 Approve the Loan Modification filed by Sharraaz Khan having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Debtor Sharraaz Khan is authorized to amend the terms of the loan with Wells Fargo Bank, N.A., which is secured by the real property commonly known as 10276 Alta Mesa Road, Wilton, California, and such other terms as stated in the Modification Agreement filed as Exhibit "A," Docket Entry No. 136, in support of the Motion.

23. [10-20363-E-13](#) KRISTI LEWIS MOTION TO MODIFY PLAN
DEF-2 David Foyil 7-3-13 [[51](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 3, 2013. By the court's calculation, 55 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm the 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). The Trustee having filed an opposition, 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 court's tentative decision is to deny the Motion to Confirm the Modified Plan. 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, the court will make the following findings of fact and conclusions of law:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee objects to the motion on the basis that the plan is not feasible, as it will complete in more than the 60 months proposed, possibly taking 107 months. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d). The appears to be due to Debtor's proposed reduction in plan term, reduction in plan payment and increased percentage rate to unsecured creditors.

The Trustee calculates that the proposed increase to 9.3% to unsecured creditors, with \$83,291.12 having been filed and allowed, \$7,746.08 will disburse to unsecured creditors, not the \$1,807.80. Trustee notes that the difference appears to be the unsecured claim allowed for Chase Home Finance, filed as secured, provided as secured and valued.

The Trustee also argues that the plan proposes to reclassify Wachovia Dealer Services from Class 2 secured claim to Class 3 surrender, but does not authorize payments to this creditor under the confirmed plan. The Trustee has paid \$9,757.67 to this creditor.

Lastly, the Trustee objects to the modified plan proposing to reduce the commitment period from 60 months to 43 months. No reason is provided other than they are eligible to shorten the plan term based on the statement of current monthly income and calculation of commitment period.

Based on the foregoing, the modified Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) and is not confirmed.

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

24. [10-45765-E-13](#) GREGORY/LYNN MURDOCK
JLK-4 James Keenan

MOTION TO APPROVE LOAN
MODIFICATION
7-24-13 [[61](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 24, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Approve the Loan Modification is granted. No appearance required.

Debtor owns the real property commonly known as 9515 Sea Cliff Way, Elk Grove, California. Wells Fargo Home Mortgage, whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce the Debtor's monthly mortgage payment from the current \$2,483.79 to \$1,504.76. The modification will capitalize the pre-petition arrears and provides for an interest rate of 4.0% over the next 40 years. FN.1.

FN.1. The moving party filed the motion and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

The court shall issue 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 Approve the Loan Modification filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Debtors are authorized to amend the terms of their loan with Wells Fargo Home Mortgage, which is secured by the real property commonly known as 9515 Sea Cliff Way, Elk Grove, California, and such other terms as stated in the Modification Agreement filed as Exhibit "A," Docket Entry No. 61, in support of the Motion.

25. [13-27567-E-13](#) DEBORAH DECKER MOTION TO CONFIRM PLAN
SJS-1 Scott Sagaria 7-15-13 [[24](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 15, 2013. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

Final Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is granted. No appearance required.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. 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 Chapter 13 Plan filed by the 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, Debtor's Chapter 13 Plan filed on July 15, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

26. [11-39275](#)-E-13 MARK/DIANE WERNER CONTINUED MOTION TO MODIFY PLAN
RK-1 Richard Kwun 6-29-13 [[96](#)]

CONT. FROM 8-6-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 29, 2013. By the court's calculation, 38 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm the 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). The Trustee having filed an opposition, 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 court's tentative decision is to grant the Motion to Confirm the Modified Plan. 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, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Trustee objects to the motion on several grounds. First, the Trustee argues that the proposed plan is only signed by the joint

debtor. The court notes that the motion to substitute party is set to be heard on August 26, 2013. The court having granted the motion, this objection is overruled.

The Trustee also states the debtor incorrectly stated the amount paid in and checked there were no additional provisions when appended additional provisions exist. The Trustee also states the debtor is proposing to treat creditor Bank of America, N.A. pursuant to a loan modification which has not been approved by the court to date. The court having granted the Motion to Approve Loan Modification, the court overrules this objection.

The Debtor responded, addressing the amount paid in and the additional provisions can be amended per the Order Confirming.

CONTINUANCE

The court continued the hearing on the Motion to Confirm to 3:00 p.m. on August 27, 2013, to be heard in conjunction with the Motion to Substitute Party and Motion to Approve Loan Modification.

The court having granted the Motion to Substitute Party and the Motion to Approve Loan Modification, the Trustee's objection is overruled.

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Confirm is granted, Debtor's Chapter 13 Plan filed on June 29, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

27. [11-39275-E-13](#) MARK/DIANE WERNER
RK-2 Richard Kwun

CONTINUED MOTION TO APPROVE
LOAN MODIFICATION
7-9-13 [[102](#)]

CONT. FROM 8-6-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 9, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

Final Ruling: The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's decision is to grant the Motion to Approve the Loan Modification. No appearance at the August 27, 2013 hearing is required.

PRIOR HEARING

Bank of America, N.A., serviced by Specialized Loan Servicing, whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce the Debtor's monthly mortgage payment from the current \$2,085 to \$969.99. The modification will capitalize the pre-petition arrears and provides for an interest rate of 2.0% per annum. Debtors state to obtain the permanent loan modification, they must make three direct payments of \$969.99 with each payment due June 1, 2013, July 1, 2013, and August 1, 2013.

Creditor Specialized Loan Servicing, LLC, as servicer for the Bank of New York Mellon FKA The Bank of New York, as Trustee for the certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2006-15, filed a limited opposition, stating that Debtors are not eligible for the permanent loan modification until they make all three preliminary payments, one which is still outstanding, the August 1, 2013 payment.

CONTINUANCE

At the hearing, Counsel for Debtor was unable to present evidence that the pending trial loan modification payment was made. The court

continued the hearing to allow counsel to file evidence that the payment had been made.

SUPPLEMENTAL DECLARATION

On August 14, 2013, Debtor filed a supplemental declaration testifying that she made the final trial loan payment on August 1, 2013, and provided a receipt of the payment.

Based on the foregoing, the court grants the motion for the Debtor to enter into a permanent loan modification, the motion complying with the provisions of 11 U.S.C. § 364(d) and the terms set forth being reasonable.

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 Approve the Loan Modification filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Mark and Diane Werner, Debtors, are authorized to amend the terms of their loan with Specialized Loan Servicing, LLC, as servicer for the Bank of New York Mellon FKA The Bank of New York, as Trustee for the certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2006-15, which is secured by the real property commonly known as 4821 El Camino Avenue, Sacramento, California, and such other terms as stated in the Modification Agreement filed as Exhibit "A," Docket Entry No. 105, in support of the Motion.

28. [11-39275-E-13](#) MARK/DIANE WERNER
RK-3 Richard Kwun

MOTION FOR SUBSTITUTION OF
PARTIES
7-26-13 [[113](#)]

Local Rule 9014-1(f)(1) Motion - Response Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on July 26, 2013. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion for Substitution of Party has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to grant the Motion for Substitution of Party. 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, the court will make the following findings of fact and conclusions of law:

Debtors seek to substitute debtor Diane R. Werner for her deceased husband Mark D. Werner. Mr. Werner passed on March 19, 2013 and Debtor asserts that she is capable of substituting herself as she has been offered a HAMP loan modification which cures the arrears, reduces principal and lowers monthly payments. Debtor also asserts the plan is feasible based on her income and proposal to pay 11 cents on the dollar to unsecured creditors.

Debtor states the term life insurance policy paid by Mr. Werner while he was an employee of California terminated or lapsed when he retired on June 6, 2012 and that no benefits were paid on account of his death. Debtor requests that the case not be dismissed because further administration is possible and is in the best interest of creditors.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee responds stating that the policy referred to by Debtor was not included on the original Schedules B & C filed August 8, 2011, though an expense in the amount of \$25.74 was listed on Schedule I filed the same day. The Trustee states that he is uncertain if there were any other insurance policies not previously disclosed.

DEBTOR'S REPLY

Debtor replies, stating the life insurance policy was not included on Schedule B because it was specifically an employer offered term life insurance policy with no inherent cash surrender value. The expense of

\$25.47/month was the term life insurance premium payable at the time Mr. Werner was working for the State of California. Debtor states after his retirement in 2012, he no longer had life insurance coverage, because he thought an insurer would not accept him due to his significant pre-existing health conditions.

DISCUSSION

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

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

Based on the evidence provided by Debtor, the court finds that it is in the best interest of the parties for the case to proceed with co-debtor Mrs. Werner substituted in for deceased co-debtor Mr. Werner.

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 for Substitution of Party filed by 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 co-debtor Mrs. Werner substituted in for deceased co-debtor Mr. Werner.

29. [13-27085-E-13](#) STEVE/KARI AICHER
RMD-1 Scott Hughes

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY SAFE
CREDIT UNION
7-5-13 [[29](#)]

CONT. FROM 7-23-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on July 5, 2013. By the court's calculation, 18 days' notice was provided. 14 days' notice is required.

Tentative Ruling: This objection to Plan confirmation was not properly set for hearing pursuant to the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The court's tentative decision is to sustain the Objection to Confirmation. 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, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

Local Bankruptcy Rule 9014-1(c)(4), provides, "An objection [to a Plan] and a notice of hearing must be filed and served upon the debtor, the debtor's attorney, and the trustee within seven (7) days after the first date set for the meeting of creditors held pursuant to 11 U.S.C. § 341(a)." In this case, the first date set for the Meeting of Creditors was June 27, 2013. The objection to the confirmation of the Plan was filed on July 5, 2013, more than 7 calendar days after the Meeting of Creditors. In filing the untimely objection, the creditor did not request authorization to file a late objection or provide any basis for the court extending the time for filing an objection. FN.1.

FN.1. The rejection of this objection may be but a Pyrrhic victory for the Debtors. If this asserted creditor is correct and an unprovided for arrearage exists, the court can envision shortly seeing a motion for relief from the stay. However, at the July 16, 2013 hearing the court granted the Debtors' motion to value a secured claim of Safe Credit Union to be \$0.00. Civil Minutes, Dckt. 33.

CONTINUANCE

The court continued the hearing to allow the Debtor and objecting creditor to address with the Trustee the one time cure payment on creditor's secured claim and its proper classification as a Class 4 Claim.

No evidence or supplemental pleadings have been filed to date. Though the Debtor and Creditor have had since the July 23, 2013 hearing, the court is left in the dark as to what may or may not have been done.

The Objection is sustained and confirmation of the plan is denied without prejudice.

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

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

The Objection to the Chapter 13 Plan filed by Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is sustained and confirmation of the plan is denied without prejudice.

30. [13-27085-E-13](#) STEVE/KARI AICHER CONTINUED OBJECTION TO
TSB-1 Scott Hughes CONFIRMATION OF PLAN BY DAVID
P. CUSICK
7-3-13 [[25](#)]

CONT. FROM 7-23-13

Final Ruling: The Chapter 13 Trustee having filed a Withdrawal of the Objection to Confirmation, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Objection to Confirmation of Plan was dismissed without prejudice, and the matter is removed from the calendar.**

31. [13-27986-E-13](#) DEBORAH CANDATE
MET-1 Mary Ellen Terranella

MOTION TO VALUE COLLATERAL OF
CAL HFA MORTGAGE ASSISTANCE
CORP.
7-26-13 [[21](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 26, 2013. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Value Collateral has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion is granted and creditor's secured claim is determined to be \$0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 248 Kathy Ellen Drive, Vallejo, California. The Debtor seeks to value the property at a fair market value of \$74,925.00 as of the petition filing date. As the owner, the 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).

The first deed of trust secures a loan with a balance of approximately \$211,000.00. Creditor CAL HFA Mortgage Assistance Corp.'s second deed of trust secures a loan with a balance of approximately \$7,108.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See 11 U.S.C. § 506(a); Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

The court shall issue 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 for Valuation of Collateral filed by Debtor(s) 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 CAL HFA Mortgage Assistance Corp. secured by a second deed of trust recorded against the real property commonly known as 248 Kathy Ellen Drive, Vallejo, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$74,925.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

32. [13-30488](#)-E-13 KIM BUONOCORE MOTION TO EXTEND AUTOMATIC STAY
ALF-1 Ashley Amerio 8-9-13 [8]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all creditors, Debtor, Chapter 13 Trustee, and Office of the United States Trustee on August 9, 2013. By the court's calculation, 18 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Extend Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the 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 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion to Extend the Automatic Stay. 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, the court will make the following findings of fact and conclusions of law:

Debtors seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtors' second bankruptcy petition pending in the past year. The Debtors' prior bankruptcy case (No. 12-40455-C-13C) was dismissed on June 13, 2013, after Debtors defaulted on their plan payments. See Order, Bankr. E.D. Cal. No. 12-40455-C-13C, Dckt. 29, June 13, 2013. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); see also Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209-210 (2008). Courts consider many factors – including those used to determine good faith under §§ 1307(c) and 1325(a) – but the two basic issues to determine good faith under § 362(c)(3) are:

1. Why was the previous plan filed?
2. What has changed so that the present plan is likely to succeed?

Elliot-Cook, 357 B.R. at 814-815.

Here, Debtor states that the instant case was filed in good faith and that she has fulfilled all of her duties and obligations as a Debtor in this bankruptcy and fully intends to complete her responsibilities as a debtor. No allegation is made in the Motion as to (1) who may not have adequately advised the Debtor and (2) how this led to the prior case being dismissed. No other well pleaded allegations are set forth with particularity in the Motion as the grounds (Fed. R. Bankr. P. 9013) upon which the requested relief is based.

Debtor testifies that the dismissal of the prior case was not due to the willful inadvertence or negligence on her part and she is unable to determine if she was properly advised as to her rights and responsibilities to the court and the Trustee in the prosecution of her prior case.

While "laying the blame" for the dismissal of the prior case on some unidentified person not adequately advising the Debtor of her obligations and duties in a Chapter 13 case, the court review of the file in the Debtor's prior case, 12-40455, discloses that the person failing to properly advise the Debtor was a different attorney than her counsel in the present case. But no explanation is provided as to what may not have been adequately advised for the Debtor. The Debtor successfully confirmed a plan in the prior case, which is indicative of a debtor receiving competent advice.

The Debtor does not address what has changed in her circumstances so that this bankruptcy case will succeed. The order dismissing the prior bankruptcy states Debtor failed to make plan payments. The Notice of Default in the prior case states that the Debtor was \$4,908.00 in default, with another plan payment of \$3,386.00 coming due. 12-40455, Dckt. 24. The proposed plan in the present case requires monthly plan payments of \$3,715.00, even more than the payment the Debtor defaulted on in the prior case.

Debtor does not address this failure to make plan payments or how she is now able to make plan payments. To the extent that the "Debtor" was not advised of an obligation in the prior case, the court has not been presented with any evidence that she did not know that she was obligated to make a \$3,386.00 monthly payment to the Chapter 13 Trustee.

For the present Motion, Debtor has not sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

The motion is denied without prejudice.

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

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

The Motion to Extend the Automatic Stay filed by the 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 without prejudice.

33. [09-20289-E-13](#) JENNIFER SHIVEL
JT-3 John Tosney

MOTION TO MODIFY PLAN
7-12-13 [[66](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 12, 2013. By the court's calculation, 46 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm the 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). The Trustee having filed an opposition, 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 court's tentative decision is to deny the Motion to Confirm the Modified Plan. 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, the court will make the following findings of fact and conclusions of law:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee objects on the basis that Debtor incorrectly states in section 6.01 that Debtor has paid a total of \$21,506.00 into the plan as of month 53. The Trustee states his records reflect that \$21,096.00 has been paid in as of month 53.

Based on the foregoing, the modified Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) and is not confirmed.

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

34. [09-39989-E-13](#) PATRICK/TIFFANY DEWEES MOTION FOR COMPENSATION FOR
PGM-5 Peter Macaluso PETER G. MACALUSO, DEBTORS'
ATTORNEY(S), FEES: \$1,000.00,
EXPENSES: \$0.00
7-30-13 [[88](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 30, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The First and Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Law Offices of Peter G. Macaluso, Counsel for Debtor, files an Application for the Allowance of Additional Fees and Expenses in this case. Counsel requests the court approve \$1,000.00 in additional fees in this Chapter 13 case for services provided from August 6, 2012 through July 16, 2013.

Counsel states the additional fees are actual, reasonable, necessary and unanticipated as a motion to sell and motion to modify plan was unanticipated as a result of the Debtor impending divorce. Counsel asserts he spent 5.0 hours at a rate of \$200.00 per hour.

DISCUSSION

The Local Bankruptcy Rules expressly address the process by which an attorney may seek approval of fees for representing a Chapter 13 debtor. Local Bankruptcy Rule 9012-1(a) and (b) provide,

(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.

(b) Court Approval Required. After the filing of the petition, a debtor's attorney shall not accept or demand from the debtor or any other person any payment for services or cost reimbursement without first obtaining a court order authorizing the fees and/or costs and specifically permitting direct payment of those fees and/or costs by the debtor.

Congress addressed the pre and post-petition fees of counsel for a debtor for services relating to a bankruptcy case.

§ 329. Debtor's transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to-

(1) the estate, if the property transferred--

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

11 U.S.C. § 329.

The Chapter 13 Trustee filed a statement of non-opposition on August 5, 2013.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$200.00/hour for counsel for 5.0 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$1,000.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 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 Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

Law Offices of Peter G. Macaluso, Counsel for the Debtor
Applicant's Fees Allowed in the amount of \$ 1,000.00

IT IS FURTHER ORDERED that this the Trustee is authorized to pay such fees from funds of the Estate as they are available as provided under the confirmed Chapter 13 Plan.

35. [13-26192-E-13](#) RICHARD/RHONDA SAMPOGNARO MOTION TO VALUE COLLATERAL OF
SJS-2 Scott Sagaria JPMORGAN CHASE BANK, N.A.
7-16-13 [[29](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 16, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Value Collateral has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion is granted and creditor's secured claim is determined to be \$0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 5343 Maui Way, Fair Oaks, California. The Debtor seeks to value the property at a fair market value of \$254,425.00 as of the petition filing date. As the owner, the 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).

Debtors also offer the Declaration of Cynthia Collis, a licensed real estate broker, who opines that the value of the property is \$254,425.00.

The first deed of trust secures a loan with a balance of approximately \$261,907.00. Creditor JPMorgan Chase Bank, NA's second deed of trust secures a loan with a balance of approximately \$50,838.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

The court shall issue 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 for Valuation of Collateral filed by Debtor(s) 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 JPMorgan Chase Bank, NA secured by a second deed of trust recorded against the real property commonly known as 5343 Maui Way, Fair Oaks, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$254,425.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

36. [13-26192](#)-E-13 RICHARD/RHONDA SAMPOGNARO MOTION TO CONFIRM PLAN
SJS-3 Scott Sagaria 7-16-13 [[35](#)]

Final Ruling: The Debtor having filed a "Withdrawal of Motion" for the pending Motion to Confirm, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Confirm, and good cause appearing, **the court dismisses without prejudice the Debtor's Motion to Confirm.**

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.

A Motion to Confirm having been filed by the Debtor, the Debtor having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

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

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all creditors, Debtor, Chapter 13 Trustee, and Office of the United States Trustee on August 7, 2013. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Extend Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the 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 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Extend the Automatic Stay. 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, the court will make the following findings of fact and conclusions of law:

Debtors seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtors' second bankruptcy petition pending in the past year. The Debtors' prior bankruptcy case (No. 10-31190-A-13J) was dismissed on July 14, 2013, after Debtor voluntarily dismissed her case. See Order, Bankr. E.D. Cal. No. 10-31190-A-13J, Dckt. 36, July 14, 2013. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); see also Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209-210 (2008). Courts consider many factors - including those used to determine good faith under §§ 1307(c)

and 1325(a) – but the two basic issues to determine good faith under § 362(c)(3) are:

1. Why was the previous plan filed?
2. What has changed so that the present plan is likely to succeed?

Elliot-Cook, 357 B.R. at 814-815.

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed. Debtor states that she faced some unanticipated family issues, as well as a break down in communication with her former attorney. Debtor states since the dismissal of her prior case, she has met with new counsel, assessed her budget, and prepared a proposed Chapter 13 plan with a payment of \$1,700.00. Debtor testifies that this represents her best efforts to prosecute a successful case.

The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

The motion is granted and the automatic stay is extended for all purposes, unless terminated by further order of this court.

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 Extend the Automatic Stay filed by the 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 the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes, unless terminated by further order of this court.

38. [13-22995-E-13](#) DANIEL/MARIA BASHAM
ADR-3 Justin Kuney

MOTION TO VALUE COLLATERAL OF
GE CAPITAL RETAIL BANK
7-19-13 [[57](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 19, 2013. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Value Collateral has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion is granted and creditor's secured claim is determined to be \$0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 8290 Medeiros Way, Sacramento, California. The Debtor seeks to value the property at a fair market value of \$282,169.00 as of the petition filing date. As the owner, the 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).

The first deed of trust secures a loan with a balance of approximately \$300,000.00. Creditor Bank of America N.A.'s second deed of trust secures a loan with a balance of approximately \$72,142.00. Creditor GE Capital Retail Bank, formerly GE Money Bank, third deed of trust secures a loan with a balance of approximately \$41,930.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See 11 U.S.C. § 506(a); Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

adversary proceeding entitled *Yu v. Everhome*, Case No. 12-02301. The gravamen of the complaint was that the trustee's sale was defective and should be set aside. The court approved the employment of counsel on July 26, 2012. Counsel now seeks allowance of its fees and costs incurred in representing the Debtors during the adversary proceeding from and including July 9, 2012 to and including March 27, 2013.

DEBTOR'S OPPOSITION

Debtor Michael Yu filed a hand written opposition on August 9, 2013, which states,

"I, Michael Yu objected to the fees that my Lawyer charge. I will attend the court hearing to explain why."

Dckt. 54.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee states he has no opposition to the granting of the Debtors' motion for additional fees. The Trustee notes that if the attorney fees are granted, the Debtor will need to promptly modify the plan.

DISCUSSION

Task Billing Analysis

The Motion seeks for the court approve \$6,675.00 in attorneys fees. Counsel provides the following task billing analysis.

Administrative Matters, \$2,675.00. Counsel sates that in this category of services the "Administrative Matters" are:

- A. Preparation of a five page Complaint.
- B. Reviewed answer to Complaint.
- C. Attend an objection to confirmation of Chapter 13 Plan based on the pending adversary proceeding.
- D. Preparation of five page supplemental brief and related documents in support of confirmation.
- E. Communication with Client and Everhome (creditor) regarding return of funds to Trustee.

While denominated "Administrative Matters," it appears that these are actually substantive litigation. The court cannot ascertain why or how these services constitute "Administrative Matters."

Attorney Employment, \$250.00. These fees relate to obtaining court authorization for the Chapter 13 Debtor to employ counsel to prosecute the adversary proceeding.

Discovery, \$525.00. These services related to the Rule 26 disclosures and proposing a discovery plan. Counsel communicated with counsel for the defendant concerning the discovery plan in the adversary proceeding.

Injunction, \$2,350.00. These services are for preparing a motion and supporting pleadings for a preliminary injunction, review of opposition, and meeting with the Client to address the motion. Counsel prepared a reply to the opposition, attended the hearing on the motion for preliminary injunction, and the status conference in the adversary proceeding.

Settlement, \$875.00. These fees are for communications with the Client and opposing counsel regarding potential settlement of the adversary proceeding. A settlement was achieved, but the dismissal of the adversary proceeding was delayed until counsel for the defendant executed the stipulation.

Review of Adversary Proceeding

The legal services were provided by Counsel for *Yu v. EverHome Mortgage*, Adv. Pro. 12-2301. The adversary proceeding was commenced on July 10, 2012. The adversary proceeding asserted a claim that Everhome Mortgage, the creditor, and the trustee under the deed of trust which secured Everhome's claim, refused to provide the Debtor with the amount necessary to cure the default and stop the non-judicial foreclosure sale. Further, that the non-judicial foreclosure purported to have been conducted for Everhome Mortgage was void. The Complaint also requested an award of attorneys' fees.

The court denied the motion for a preliminary injunction on September 11, 2012. 12-2301 Dckt. 30. As reflected in the Civil Minutes, the parties failed to provide the court with competent, admissible, properly authenticated evidence of any foreclosure sale having been conducted. *Id.* Dckt. 32.

On March 28, 2013, a Stipulation Dismissing the Adversary Proceeding, with each party to bear its own attorneys' fees and costs, was filed. *Id.* Dckt. 35. Pursuant to the Stipulation, the court issued an order dismissing the adversary proceeding. *Id.* Dckt. 37.

From the present Motion, the court has no idea of what transpired in the adversary proceeding or the impact (benefit) to the Debtors and the estate. However, in reviewing the bankruptcy case file, the court first identifies a Stipulation filed on March 13, 2013, in the bankruptcy case which contains the following terms:

- A. The Debtors' Chapter 13 Plan shall provide for the payment of a \$34,620.38 arrearage on the Everbank secured claim, with monthly payments of \$578.00 to that creditor. The Debtors further committed to making monthly Chapter 13 Plan payments of \$2,485.00.
- B. Everbank shall not record the trustee's deed from the non-judicial foreclosure sale occurring on or about June 27, 2012.

- C. The adversary proceeding shall be dismissed, with each party bearing its own attorneys' fees, costs, and expenses.

Stipulation, Dckt. 43, and Order Approving Stipulation, Dckt. 47.

On May 24, 2013, the court filed its order confirming the Debtors' Chapter 13 Plan which provides for the payment of the Everbank secured claim as provided in the Stipulation.

Fee Request

Here, counsel for the Chapter 13 Debtors request court approval of fees for service provided the Debtors in connection with the adversary proceeding challenging Everbank's contention that it purchased the Debtors' residence at a non-judicial foreclosure sale. That litigation (which not clearly stated in the Motion) was successful, with the Debtors retaining the property and Everbank having a secured claim to be paid through the plan. Further, Everbank agreed not to record any purported trustee's deed from such non-judicial foreclosure sale of the Debtors' residence.

The hourly rates for the fees billed in this case are \$250.00/hour for counsel for 26.70 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$6,675.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

Counsel is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Attorneys' Fees	\$6,675.00
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For a total final allowance of \$6,675.00 in Attorneys' Fees 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 Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Scott Coben & Associates is allowed the following fees and expenses as a professional of the Estate:

Scott Coben & Associates, Counsel for the Debtor
Applicant's Fees Allowed in the amount of \$ 6,675.00.

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is

authorized to pay such fees from funds of the Estate as they are available.

40. [11-43497-E-13](#) JEFFREY/SUE SANDS MOTION TO MODIFY PLAN
WW-3 Mark Wolff 7-22-13 [[34](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Withdrawn.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 22, 2013. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

Final Ruling: The Motion to Confirm the 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). The court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The court's decision is to grant the Motion to Confirm the Modified Plan.
No appearance required.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. 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 Chapter 13 Plan filed by the 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, Debtor's Chapter 13 Plan filed on July 22, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.