

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus  
Chief Bankruptcy Judge  
Modesto, California

August 18, 2008 at 2:00 p.m.

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THIS CALENDAR IS DIVIDED INTO TWO PARTS. THEREFORE, TO FIND ALL MOTIONS AND OBJECTIONS SET FOR HEARING IN A PARTICULAR CASE, YOU MAY HAVE TO LOOK IN BOTH PARTS OF THE CALENDAR. WITHIN EACH PART, CASES ARE ARRANGED BY THE LAST TWO DIGITS OF THE CASE NUMBER.

THE COURT FIRST WILL HEAR ITEMS 1 THROUGH 17. A TENTATIVE RULING FOLLOWS EACH OF THESE ITEMS. THE COURT MAY AMEND OR CHANGE A TENTATIVE RULING BASED ON THE PARTIES' ORAL ARGUMENT. IF ALL PARTIES AGREE TO A TENTATIVE RULING, THERE IS NO NEED TO APPEAR FOR ARGUMENT. HOWEVER, IT IS INCUMBENT ON EACH PARTY TO ASCERTAIN WHETHER ALL OTHER PARTIES WILL ACCEPT A RULING AND FOREGO ORAL ARGUMENT. IF A PARTY APPEARS, THE HEARING WILL PROCEED WHETHER OR NOT ALL PARTIES ARE PRESENT. AT THE CONCLUSION OF THE HEARING, THE COURT WILL ANNOUNCE ITS DISPOSITION OF THE ITEM AND IT MAY DIRECT THAT THE TENTATIVE RULING, AS ORIGINALLY WRITTEN OR AS AMENDED BY THE COURT, BE APPENDED TO THE MINUTES OF THE HEARING AS THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IF A MOTION OR AN OBJECTION IS SET FOR HEARING PURSUANT TO GENERAL ORDER 05-03, ¶ 3(c), LOCAL BANKRUPTCY RULE 3007-1(c)(2), OR LOCAL BANKRUPTCY RULE 9014-1(f)(2), RESPONDENTS WERE NOT REQUIRED TO FILE WRITTEN OPPOSITION TO THE RELIEF REQUESTED. RESPONDENTS MAY APPEAR AT THE HEARING AND RAISE OPPOSITION ORALLY. IF THAT OPPOSITION RAISES A POTENTIALLY MERITORIOUS DEFENSE OR ISSUE, THE COURT WILL GIVE THE RESPONDENT AN OPPORTUNITY TO FILE WRITTEN OPPOSITION AND SET A FINAL HEARING UNLESS THERE IS NO NEED TO DEVELOP THE WRITTEN RECORD FURTHER. IF THE COURT SETS A FINAL HEARING, UNLESS THE PARTIES REQUEST A DIFFERENT SCHEDULE THAT IS APPROVED BY THE COURT, THE FINAL HEARING WILL TAKE PLACE ON SEPTEMBER 29, 2008 AT 2:00 P.M. OPPOSITION MUST BE FILED AND SERVED BY SEPTEMBER 15, 2008, AND ANY REPLY MUST BE FILED AND SERVED BY SEPTEMBER 22, 2008. THE MOVING/OBJECTING PARTY IS TO GIVE NOTICE OF THE DATE AND TIME OF THE CONTINUED HEARING DATE AND OF THESE DEADLINES.

THERE WILL BE NO HEARING ON THE ITEMS IN THE SECOND PART OF THE CALENDAR, ITEMS 18 THROUGH 41. INSTEAD, EACH OF THESE ITEMS HAS BEEN DISPOSED OF AS INDICATED IN THE FINAL RULING BELOW. THAT RULING WILL BE APPENDED TO THE MINUTES. THIS FINAL RULING MAY OR MAY NOT BE A FINAL ADJUDICATION ON THE MERITS; IF IT IS, IT INCLUDES THE COURT'S FINDINGS AND CONCLUSIONS. IF ALL PARTIES HAVE AGREED TO A CONTINUANCE OR HAVE RESOLVED THE MATTER BY STIPULATION, THEY MUST ADVISE THE COURTROOM DEPUTY CLERK PRIOR TO HEARING IN ORDER TO DETERMINE WHETHER THE COURT VACATE THE FINAL RULING IN FAVOR OF THE CONTINUANCE OR THE STIPULATED DISPOSITION.

IF THE COURT CONCLUDES THAT FED. R. BANKR. P. 9014(d) REQUIRES AN EVIDENTIARY HEARING, UNLESS OTHERWISE ORDERED, IT WILL BE SET ON SEPTEMBER 2, 2008, AT 2:30 P.M.

August 18, 2008 at 2:00 p.m.

**Matters to be Argued**

1. 08-90807-A-13G ROBERTO/MARTHA MENDOZA HEARING - MOTION FOR  
MDE #1 RELIEF FROM AUTOMATIC STAY  
LITTON LOAN SERVICING, VS. 7-10-08 [39]
- Telephone Appearance
  - Trustee Agrees with Ruling

**Tentative Ruling:** The motion will be dismissed as moot.

A plan was confirmed in this case on July 17, 2008. That plan provided for the movant's claim as a Class 3 secured claim. This means that the plan provided for the surrender of the movant's collateral in order to satisfy its secured claim. It also provides at section 3.14:

*"Entry of the confirmation order shall constitute an order modifying the automatic stay to allow the holder of a Class 3 secured claim to repossess, receive, take possession of, foreclose upon, and exercise its rights and judicial and nonjudicial remedies against its collateral."*

Thus, the stay has already been terminated and the motion is moot. To the extent the plan's description of the movant's identity or of the surrendered collateral is not accurate or as comprehensive as in the movant's security documentation, the order may recite that the collateral identified in the motion has been, or will be, surrendered to the movant pursuant to the terms of a confirmed plan and, as a result, the automatic stay was previously terminated.

The movant shall bear its own fees and costs.

2. 07-91139-A-13G ROMAN/GLORIA OMEGA HEARING - MOTION FOR  
MBB #1 RELIEF FROM AUTOMATIC STAY  
MTG. ELECTR. REGIS. SYS., INC., VS. 7-10-08 [48]
- Telephone Appearance
  - Trustee Agrees with Ruling

**Tentative Ruling:** The motion will be dismissed as moot.

The court confirmed a plan on July 17, 2008. That plan provides for the movant's claim in Class 4. Class 4 secured claims are long-term claims that are not modified by the plan and that were not in default prior to the filing of the petition. They are paid directly by the debtor or by a third party. The plan includes the following provision at section 3.15:

*"Class 4 claims mature after the completion of this plan, are not in default, and are not modified by this plan. These claims shall be paid by Debtor or a third person whether or not the plan is confirmed. Entry of the confirmation order shall constitute an order modifying the automatic stay to allow the holder of a Class 4 secured claim to exercise its rights against its collateral in the event of a default under the terms of its loan or security documentation provided this case is then pending under chapter 13."*

Because the plan has been confirmed and because the case remains pending under chapter 13, the automatic stay has already been modified to permit the movant to proceed against its collateral.

The movant shall bear its own fees and costs.

3. 08-90916-A-13G BARBARA AVILA HEARING - MOTION TO  
FW #1 CONFIRM CHAPTER 13 PLAN  
6-26-08 [22]
- Telephone Appearance  
 Trustee Agrees with Ruling

**Tentative Ruling:** The motion will be denied and the objection will be sustained.

The debtor admitted at the meeting of creditors that the debtor failed to file income tax returns for 2003 through 2007. These returns are delinquent.

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 becoming effective, the Bankruptcy Code did not require chapter 13 debtors to file delinquent tax returns. If a debtor did not file tax returns, the trustee might object to the plan on the grounds of lack of feasibility or that the plan was not proposed in good faith. See, e.g., Greatwood v. United States (In re Greatwood), 194 B.R. 637 (9th Cir. B.A.P. 1996), *affirmed*, 120 F.3d. 268 (9th Cir. 1997).

Since BAPCPA became effective, a chapter 13 debtor must file most pre-petition delinquent tax returns. See 11 U.S.C. § 1308. Section 1308(a) requires a chapter 13 debtor who has failed to file tax returns under applicable nonbankruptcy law to file all such returns if they were due for tax periods during the 4-year period ending on the date of the filing of the petition. The delinquent returns must be filed by the date of the meeting of creditors.

In this case, the meeting of creditors has not yet been concluded. Nonetheless, the debtor has filed this motion seeking confirmation of a plan. As a result, the failure to file the pre-petition returns is relevant even though the debtor may file the returns within the period required by section 1308.

One consequence of a failure to comply with section 1308 is the inability to confirm a plan. 11 U.S.C. § 1325(a)(9) and an uncodified provision of BAPCPA found at section 1228(a) of the Act provide that the court cannot confirm a plan if delinquent returns have not been filed with the taxing agency and filed with the court. This has not been done and so the court cannot confirm any plan proposed by the debtor.

4. 08-90042-A-13G LAWRENCE/EDEAN SIZAR HEARING - MOTION TO  
FW #1 MODIFY DEBTORS' CONFIRMED  
CHAPTER 13 PLAN  
6-27-08 [19]
- Telephone Appearance  
 Trustee Agrees with Ruling

**Tentative Ruling:** The motion will be denied and the objection will be sustained.

The plan is not feasible as witnessed by the failure of the debtor to make plan payments totaling \$730. The plan does not comply with 11 U.S.C. § 1325(a)(6).

5. 08-90042-A-13G LAWRENCE/EDEAN SIZAR  
FW #2

HEARING - MOTION TO  
SELL REAL PROPERTY  
7-29-08 [27]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given by the debtor, this motion is deemed brought pursuant to 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 motion will be denied. Until a plan is confirmed, the court will not authorize the sale because there is no plan in place providing for the payment of the sale proceeds to creditors.

6. 08-91446-A-13G JOCK/IIENE BALLOWE

HEARING - ORDER TO SHOW  
CAUSE RE DISMISSAL OF CASE OR  
IMPOSITION OF SANCTIONS  
7-24-08 [6]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** The case will be dismissed.

11 U.S.C. § 521(a)(1), Fed. R. Bankr. P. 1007(b) & (c), and Fed. R. Bankr. R. 3015(b) required that the debtor file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts, a statement of current monthly income, and a proposed plan no later than 15 days after the filing of the petition. The documents were not filed by the deadline. By failing to timely file these documents, the debtor has delayed the prosecution of the case to the detriment of creditors. This is cause for dismissal. See 11 U.S.C. § 1307(c)(1).

7. 08-91248-A-13G RUBEN HIRISCAU

HEARING - ORDER TO SHOW  
CAUSE RE DISMISSAL OF CASE OR  
IMPOSITION OF SANCTIONS  
7-29-08 [19]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** The case will be dismissed.

The debtor was given permission to pay the filing fee in installments pursuant to Fed. R. Bankr. P. 1006(b). The installment in the amount of \$68.50 due on July 24 was not paid. This is cause for dismissal. See 11 U.S.C. § 1307(c)(2).

8. 08-90952-A-13G MICHAEL/JANETTE TODD  
SW #1  
GMAC, VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
7-31-08 [28]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, 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 motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit the movant to repossess and to obtain possession of its personal property security, and to dispose of it in accordance with applicable nonbankruptcy law. The movant is secured by a vehicle. The debtor has proposed a plan that will surrender the vehicle to the movant in satisfaction of its secured claim. That plan has not yet been confirmed. Nonetheless, the terms of the proposed plan makes two things clear: the movant's claim will not be paid and the vehicle securing its claim is not necessary to the debtor's personal financial reorganization. This is cause to terminate the automatic stay.

Because the movant has not established that the value of its collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The 10-day stay of Fed. R. Bankr. P. 4001(a)(3) is ordered waived.

9. 08-90070-A-13G RICHARD/RITA MARTORANO  
PLG #3

HEARING - MOTION TO  
VALUE COLLATERAL OF DELL FINANCIAL  
8-4-08 [44]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given by the debtor, this motion is deemed brought pursuant to 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 valuation motion pursuant to Fed. R. Bankr. P. 3012 and 11 U.S.C. § 506(a) is granted. The motion is accompanied by the debtor's declaration. The debtor

is the owner of the subject property. In the debtor's opinion, the subject property had a value of \$200 as of the date the petition was filed and the effective date of the plan. Given the absence of contrary evidence, the debtor's opinion of value is conclusive. See Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165 (9<sup>th</sup> Cir. 2004). Therefore, \$200 of the respondent's claim is an allowed secured claim. When the respondent is paid \$200 and subject to the completion of the plan, its secured claim shall be satisfied in full and the collateral free of the respondent's lien. Provided a timely proof of claim is filed, the remainder of its claim is allowed as a general unsecured claim unless previously paid by the trustee as a secured claim.

10. 08-90160-A-13G DAVID/MICHELLE STURTEVANT HEARING - MOTION FOR  
PD #2 RELIEF FROM AUTOMATIC STAY  
WASHINGTON MUTUAL BANK, VS. 7-24-08 [75]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, 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 motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject real property following sale. The movant is secured by a deed of trust encumbering the debtor's real property. The debtor has proposed a plan that will surrender the subject property to the movant in satisfaction of its secured claim. That plan has not yet been confirmed. Nonetheless, the terms of the proposed plan makes two things clear: the movant's claim will not be paid and the real property securing its claim is not necessary to the debtor's personal financial reorganization. This is cause to terminate the automatic stay.

Because the movant has not established that the value of its collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The 10-day stay of Fed. R. Bankr. P. 4001(a)(3) is ordered waived.

11. 08-90963-A-13G ISAIAS/MARTHA CASTELLANOS HEARING - DEBTORS' MOTION TO  
JCK #3 CONFIRM FIRST AMENDED CHAPTER 13  
PLAN  
7-9-08 [18]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** The motion will be denied and the objection will be sustained.

The plan is not feasible as witnessed by the failure of the debtor to make plan payments totaling \$3,870. The plan does not comply with 11 U.S.C. § 1325(a)(6).

12. 07-90164-A-13G ROSILIND THOMAS HEARING - MOTION TO  
FW #2 MODIFY DEBTORS' CONFIRMED  
CHAPTER 13 PLAN  
6-6-08 [35]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** The motion will be denied and the objection will be sustained.

The plan is not feasible as witnessed by the failure of the debtor to make plan payments totaling \$623. The plan does not comply with 11 U.S.C. § 1325(a)(6).

13. 08-90070-A-13G RICHARD/RITA MARTORANO HEARING - MOTION FOR  
PLG #1 CONFIRMATION OF DEBTORS'  
MODIFIED CHAPTER 13 PLAN  
6-25-08 [24]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** The motion will be granted on condition that the plan is further modified to provide for the secured claim of U.S. Bank (second deed of trust) in Class 2. While the debtor is valuing the collateral of the claim at \$0, the plan must still provide for the claim by classifying it in Class 2.

14. 08-91070-A-13G JOSE/ALMA MEZA HEARING - MOTION TO  
FW #1 INCUR DEBT  
7-18-08 [17]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given by the debtor, this motion is deemed brought pursuant to 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.

While there is no confirmed plan, the deadline for objecting to the proposed plan has expired without anyone filing an objection. Confirmation of a plan, then, is imminent.

Because repayment of the loan will be made by someone other than the debtors, it does not appear that the repayment will jeopardize the feasibility of the plan. Therefore, this motion to borrow money will be granted on the condition that the loan proceeds are used to purchase the vehicle. The trustee shall approve the form of the order.

15. 08-91370-A-13G MYRA/ARNOL RODRIQUEZ HEARING - ORDER TO SHOW  
CAUSE RE DISMISSAL OF CASE OR  
IMPOSITION OF SANCTIONS  
7-16-08 [10]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** The case will be dismissed.

11 U.S.C. § 521(a)(1), Fed. R. Bankr. P. 1007(b) & (c), and Fed. R. Bankr. R. 3015(b) required that the debtor file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts, a statement of current monthly income, and a proposed plan no later than 15 days after the filing of the petition. The documents were not filed by the deadline. By failing to timely file these documents, the debtor has delayed the prosecution of the case to the detriment of creditors. This is cause for dismissal. See 11 U.S.C. § 1307(c)(1).

16. 08-90285-A-13G TERESA FIELDS HEARING - MOTION TO  
TMF #1 APPROVE CHAPTER 13 PLAN  
6-25-08 [50]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** The motion will be denied and the objection will be sustained.

First, the plan does not provide for payment in full of the priority claim of the IRS as required by 11 U.S.C. § 1322(a)(2).

Second, even though the debtor has surrendered collateral to Kia Financial Services, the plan fails to provide for this treatment. See 11 U.S.C. § 1325(a)(5)(C).

Third, the plan is not feasible as witnessed by the failure of the debtor to make plan payments totaling \$1,069.89. The plan does not comply with 11 U.S.C. § 1325(a)(6).

17. 07-90094-A-13G BENITO/DORA MATA  
FW #3

HEARING - MOTION TO  
MODIFY DEBTORS' CONFIRMED  
CHAPTER 13 PLAN  
6-6-08 [85]

- Telephone Appearance
- Trustee Agrees with Ruling

**Tentative Ruling:** The motion will be denied and the objection will be sustained.

The plan is not feasible as witnessed by the failure of the debtor to make plan payments totaling \$1,740. The plan does not comply with 11 U.S.C. § 1325(a)(6).

**FINAL RULINGS BEGIN HERE**

18. 08-91205-A-13G NICK/AM SIMMALY HEARING - MOTION TO  
FW #1 VALUE COLLATERAL OF BANK OF  
AMERICA  
6-24-08 [11]

**Final Ruling:** The court continues the hearing to September 2, 2008 at 2:00 p.m. so that the hearing will coincide with the hearing on any objections to the confirmation of the plan. Because there is insufficient time to give reasonable notice of a deadline for written opposition 14 days prior to the hearing, the September 2 hearing will be a preliminary hearing and the respondent is not required to file written opposition. Instead, the respondent may appear at the hearing and voice its opposition. If potentially meritorious, the court will continue the hearing on this motion and on any objection to confirmation. No later than August 19, counsel for the debtor shall give notice to the respondent of this continuance.

19. 08-91113-A-13G JAMES/KAREN LUZINSKI CONT. HEARING - MOTION TO  
DN #1 VALUE COLLATERAL OF FIRST  
INVESTORS FINANCIAL SERVICES  
6-27-08 [9]

**Final Ruling:** This valuation motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the trustee and the respondent creditor 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 as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the defaults of the trustee and the respondent creditor are entered and the matter will be resolved without oral argument.

The valuation motion pursuant to Fed. R. Bankr. P. 3012 and 11 U.S.C. § 506(a) is granted. The motion is accompanied by the debtor's declaration. The debtor is the owner of the subject property. In the debtor's opinion, the subject property had a value of \$11,600 as of the date the petition was filed and the effective date of the plan. Given the absence of contrary evidence, the debtor's opinion of value is conclusive. See Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165 (9<sup>th</sup> Cir. 2004). Therefore, \$11,600 of the respondent's claim is an allowed secured claim. When the respondent is paid \$11,600, and subject to the completion of the plan, its secured claim shall be satisfied in full and the collateral free of the respondent's lien. Provided a timely proof of claim is filed, the remainder of its claim is allowed as a general unsecured claim unless previously paid by the trustee as a secured claim.

20. 07-90814-A-13G GLORIA GARCIA HEARING - MOTION FOR  
PD #2 RELIEF FROM AUTOMATIC STAY  
AMERICA'S SERVICING CO., VS. 7-14-08 [72]

**Final Ruling:** This motion for relief from the automatic stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor and the trustee 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 as consent to the granting of the motion. Cf. Ghazali v. Moran,

46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). While the trustee has filed a response to the motion, it confirms the debtor has defaulted under the plan and he does not oppose the granting of the motion. Because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. The movant is secured by a deed of trust encumbering the debtor's real property. The plan classifies the movant's claim in Class 1 and requires that the post-petition note installments be paid by the trustee to the movant. Because the debtor has failed to make all plan payments, the trustee was unable to make at least three monthly post-petition monthly mortgage payments to the movant as required by the plan. This default is cause to terminate the automatic stay. See Ellis v. Parr (In re Ellis), 60 B.R. 432, 434-435 (B.A.P. 9<sup>th</sup> Cir. 1985).

The loan documentation contains an attorney's fee provision and the movant is an over-secured creditor. The motion demands payment of fees and costs. The court concludes that a similarly situated creditor would have filed this motion. Under these circumstances, the movant is entitled to recover reasonable fees and costs incurred in connection with prosecuting this motion. See 11 U.S.C. § 506(b). See also Kord Enterprises II v. California Commerce Bank (In re Kord Enterprises II), 139 F.3d 684, 689 (9<sup>th</sup> Cir. 1998).

Therefore, the movant shall file and serve a separate motion seeking an award of fees and costs. The motion for fees and costs must be filed and served no later than 14 days after the conclusion of the hearing on the underlying motion. If not filed and served within this deadline, or if the movant does not intend to seek fees and costs, the court denies all fees and costs. The order granting the underlying motion shall provide that fees and costs are denied. If denied, the movant and its agents are barred in all events and circumstances, in connection with this bankruptcy case or otherwise, from recovering any fees and costs incurred in connection with the prosecution of the motion.

If a motion for fees and costs is filed, it shall be set for hearing pursuant to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). It shall be served on the debtor, the debtor's attorney, the trustee, and the United States Trustee. Any motion shall be supported by a declaration explaining the work performed in connection with the motion, the name of the person performing the services and a brief description of that person's relevant professional background, the amount of time billed for the work, the rate charged, and the costs incurred. If fees or costs are being shared, split, or otherwise paid to any person who is not a member, partner, or regular associate of counsel of record for the movant, the declaration shall identify those person(s) and disclose the terms of the arrangement with them.

Alternatively, if the debtor will stipulate to an award of fees and costs not to exceed \$750, the court will award such amount. The stipulation of the debtor may be indicated by the debtor's signature, or the debtor's attorney's signature, on the order granting the motion and providing for an award of \$750.

The 10-day period specified in Fed. R. Bankr. P. 4001(a)(3) is not waived. That period, however, shall run concurrently with the 7-day period specified in

Cal. Civ. Code § 2924g(d) to the extent section 2924g(d) is applicable to orders terminating the automatic stay.

21. 05-91218-A-13G GERALD/DIANE PRASAD HEARING - DEBTORS' MOTION TO  
JCK #6 MODIFY CONFIRMED CHAPTER 13 PLAN  
7-9-08 [59]

**Final Ruling:** This motion to confirm a modified plan proposed after confirmation of a plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1), General Order 05-03, ¶ 8(b), and Fed. R. Bankr. R. 3015(g). The failure of the trustee, the U.S. Trustee, creditors, and any other party 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 as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted. The modified plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.

22. 08-91127-A-13G SEAN/APRIL PIEDRA CONT. HEARING - MOTION TO  
FW #1 VALUE COLLATERAL OF HOMECOMINGS  
FINANCIAL  
6-11-08 [12]

**Final Ruling:** The motion will be dismissed without prejudice.

This motion was originally set for hearing on July 11. In connection with that hearing, the court ruled:

*"The court continues the hearing to August 18, 2008 at 2:00 p.m. so that the hearing will coincide with the hearing on any objections to the confirmation of the plan. Opposition to this motion shall be filed and served no later than July 30 (the same date that objections to confirmation are due). Counsel for the debtor shall give notice to the respondent of this continuance and of the revised deadline for a response to the motion."*

A review of the docket reveals no proof of service indicating that counsel for the debtor gave notice of the continued hearing. Accordingly, notice is insufficient.

23. 08-91127-A-13G SEAN/APRIL PIEDRA CONT. HEARING - MOTION TO  
FW #2 VALUE COLLATERAL OF WFNNB/SAMUELS  
6-11-08 [16]

**Final Ruling:** The motion will be dismissed without prejudice.

This motion was originally set for hearing on July 11. In connection with that hearing, the court ruled:

*"The court continues the hearing to August 18, 2008 at 2:00 p.m. so that the hearing will coincide with the hearing on any objections to the confirmation of the plan. Opposition to this motion shall be filed and served no later than July 30 (the same date that objections to confirmation are due). Counsel for*



The motion will be granted. 11 U.S.C. § 1323 permits the debtor to amend the plan any time prior to confirmation. The amended plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is therefore confirmed.

27. 08-91242-A-13G RICHARDO/GABRIELA SALVADOR HEARING - MOTION TO  
FW #1 VALUE COLLATERAL OF HOMECOMINGS  
FINANCIAL  
7-3-08 [13]

**Final Ruling:** The court continues the hearing to September 29, 2008 at 2:00 p.m. so that the hearing will coincide with the hearing on any objections to the confirmation of the plan. Opposition to this motion shall be filed and served no later than September 15. No later than August 19, counsel for the debtor shall give notice to the respondent of this continuance and of the revised deadline for a response to the motion.

The court also notes that the debtor has set a hearing on confirmation of an amended plan for September 2 at 2:00 p.m. This conflicts with the confirmation hearing given in the notice of the commencement of the case for the original plan. Setting a hearing on the second plan filed in a case before the scheduled hearing on the original plan is calculated to confuse creditors. Therefore, counsel for the debtor shall give notice to all parties in interest that the hearing on September 2 is canceled and that the court will take up confirmation of the amended plan on September 29 at 2:00 p.m. This notice shall apprise parties in interest that opposition to confirmation shall be filed and served by September 15.

28. 08-91242-A-13G RICHARDO/GABRIELA SALVADOR HEARING - MOTION TO  
FW #2 VALUE COLLATERAL OF WAMU  
7-3-08 [17]

**Final Ruling:** The court continues the hearing to September 29, 2008 at 2:00 p.m. so that the hearing will coincide with the hearing on any objections to the confirmation of the plan. Opposition to this motion shall be filed and served no later than September 15. No later than August 19, counsel for the debtor shall give notice to the respondent of this continuance and of the revised deadline for a response to the motion.

The court also notes that the debtor has set a hearing on confirmation of an amended plan for September 2 at 2:00 p.m. This conflicts with the confirmation hearing given in the notice of the commencement of the case for the original plan. Setting a hearing on the second plan filed in a case before the scheduled hearing on the original plan is calculated to confuse creditors. Therefore, counsel for the debtor shall give notice to all parties in interest that the hearing on September 2 is canceled and that the court will take up confirmation of the amended plan on September 29 at 2:00 p.m. This notice shall apprise parties in interest that opposition to confirmation shall be filed and served by September 15.

29. 07-91253-A-13G TAMMY YARBROUGH HEARING - MOTION TO  
FW #1 MODIFY DEBTOR'S CONFIRMED  
CHAPTER 13 PLAN  
7-14-08 [29]

**Final Ruling:** This motion to confirm a modified plan proposed after confirmation of a plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1), General Order 05-03, ¶ 8(b), and Fed. R.

Bankr. R. 3015(g). The failure of the trustee, the U.S. Trustee, creditors, and any other party 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 as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted. The modified plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.

30. 08-91164-A-13G TERRY/JACQUELINE HOPKINS HEARING - MOTION TO  
FW #1 VALUE COLLATERAL OF AMERICA'S  
SERVICING COMPANY  
6-24-08 [9]

**Final Ruling:** The court continues the hearing to September 2, 2008 at 2:00 p.m. so that the hearing will coincide with the hearing on any objections to the confirmation of the plan. Because there is insufficient time to give reasonable notice of a deadline for written opposition 14 days prior to the hearing, the September 2 hearing will be a preliminary hearing and the respondent is not required to file written opposition. Instead, the respondent may appear at the hearing and voice its opposition. If potentially meritorious, the court will continue the hearing on this motion and on any objection to confirmation. No later than August 19, counsel for the debtor shall give notice to the respondent of this continuance.

31. 08-90066-A-13G EDWARD/LAURIE BORELLI HEARING - DEBTORS' MOTION TO  
JCK #2 MODIFY CONFIRMED CHAPTER 13 PLAN  
7-15-08 [18]

**Final Ruling:** This motion to confirm a modified plan proposed after confirmation of a plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1), General Order 05-03, ¶ 8(b), and Fed. R. Bankr. R. 3015(g). The failure of the trustee, the U.S. Trustee, creditors, and any other party 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 as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted. The modified plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.

32. 08-90070-A-13G RICHARD/RITA MARTORANO HEARING - MOTION TO  
PLG #2 VALUE COLLATERAL OF US BANK  
6-26-08 [33]

**Final Ruling:** This valuation motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the trustee and the respondent creditor 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

as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the defaults of the trustee and the respondent creditor are entered and the matter will be resolved without oral argument.

The motion will be granted.

The debtor seeks to value the debtor's residence at a fair market value of \$275,000 as of the date the petition was filed. It is encumbered by a first deed of trust also held by U.S. Bank. The first deed of trust secures a loan with a balance of approximately \$334,000 as of the petition date. Therefore, U.S. Bank's other claim secured by a junior deed of trust is completely under-collateralized. No portion of this claim will be allowed as a secured claim. See 11 U.S.C. § 506(a).

Any assertion that the respondent's claim cannot be modified because it is secured only by a security interest in real property that is the debtor's principal residence is disposed of by In re Zimmer, 313 F.3d 1220 (9<sup>th</sup> Cir. 2002) and In re Lam, 211 B.R. 36 (B.A.P. 9<sup>th</sup> Cir. 1997). See also In re Bartee, 212 F.3d 277 (5<sup>th</sup> Cir. 2000); In re Tanner, 217 F.3d 1357 (11<sup>th</sup> Cir. 2000); McDonald v. Master Fin., Inc. (In re McDonald), 205 F.3d 606, 611-13 (3<sup>rd</sup> Cir. 2000); and Domestic Bank v. Mann (In re Mann), 249 B.R. 831, 840 (B.A.P. 1<sup>st</sup> Cir. 2000).

Because the claim is completely under-secured, no interest need be paid on the claim except to the extent otherwise required by 11 U.S.C. § 1325(a)(4). If the secured claim is \$0, because the value of the respondent's collateral is \$0, no interest need be paid pursuant to 11 U.S.C. § 1325(a)(5)(B)(ii).

Any argument that the plan, by valuing the respondent's security and providing the above treatment, violates In re Hobdy, 130 B.R. 318 (B.A.P. 9<sup>th</sup> Cir. 1991), will be overruled. The plan is not an objection to the respondent's proof of claim pursuant to Fed. R. Bankr. P. 3007 and 11 U.S.C. § 502. The plan makes provision for the treatment of the claim and all other claims, and a separate valuation motion has been filed and served as permitted by Fed. R. Bankr. P. 3012 and 11 U.S.C. § 506(a). The plan was served by the trustee on all creditors, and the motion to value collateral was served by the debtor with a notice that the collateral for the respondent's claim would be valued. That motion is supported by a declaration of the debtor as to the value of the real property. There is nothing about the process for considering the valuation motion which amounts to a denial of due process.

To the extent the respondent objects to valuation of its collateral in a contested matter rather than an adversary proceeding, the objection is overruled. Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are contested matters and do not require the filing of an adversary proceeding. Further, even if considered in the nature of a claim objection, an adversary proceeding is not required. Fed. R. Bankr. P. 3007. It is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's deed of trust will remain of record until the plan is completed. This is required by 11 U.S.C. § 1325(a)(5)(B)(I). Once the plan is completed, if the respondent will not reconvey its deed of trust, the court



A review of the docket reveals no proof of service indicating that counsel for the debtor gave notice of the continued hearing. Accordingly, notice is insufficient.

35. 08-90979-A-13G STEVEN/DAWN DICKERSON HEARING - MOTION TO  
DEF #1 CONFIRM INITIAL CHAPTER 13 PLAN  
6-27-08 [18]

**Final Ruling:** This motion to confirm a plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1), General Order 05-03, ¶¶ 3(a)(2) & 8(a), and Fed. R. Bankr. R. 2002(b). The failure of the trustee, the U.S. Trustee, creditors, and any other party 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 as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted. The plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is therefore confirmed.

36. 08-91180-A-13G ROBERT/LUISA SALINAS HEARING - MOTION TO  
FW #1 VALUE COLLATERAL HELD BY HFC  
6-24-08 [9]

**Final Ruling:** The court continues the hearing to September 2, 2008 at 2:00 p.m. so that the hearing will coincide with the hearing on any objections to the confirmation of the plan. Because there is insufficient time to give reasonable notice of a deadline for written opposition 14 days prior to the hearing, the September 2 hearing will be a preliminary hearing and the respondent is not required to file written opposition. Instead, the respondent may appear at the hearing and voice its opposition. If potentially meritorious, the court will continue the hearing on this motion and on any objection to confirmation. No later than August 19, counsel for the debtor shall give notice to the respondent of this continuance.

37. 08-90285-A-13G TERESA FIELDS HEARING - TRUSTEE'S OBJECTION TO  
RDG #4 DEBTORS' CLAIM OF EXEMPTIONS  
7-7-08 [60]

**Final Ruling:** This objection to the debtor's exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor 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 as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the objecting party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the debtor's default is entered and the matter will be resolved without oral argument.

The objection will be sustained. The debtor has impermissibly claimed exemptions pursuant to Cal. Code of Civ. Proc. § 703.140 and Cal. Code of Civ. Proc. § 704, *et seq.* These are alternative sets of exemptions. The debtor is limited to one or the other, but not both. Therefore, all exemptions are

disallowed without prejudice to claiming amended exemptions.

38. 08-91087-A-13G MICHAEL/STACY FRENCH CONT. HEARING - MOTION TO  
FW #1 VALUE COLLATERAL OF CITIMORTGAGE  
6-9-08 [11]

**Final Ruling:** The motion will be dismissed without prejudice.

This motion was originally set for hearing on July 11. In connection with that hearing, the court ruled:

*"The court continues the hearing to August 18, 2008 at 2:00 p.m. so that the hearing will coincide with the hearing on any objections to the confirmation of the plan. Opposition to this motion shall be filed and served no later than July 30 (the same date that objections to confirmation are due). Counsel for the debtor shall give notice to the respondent of this continuance and of the revised deadline for a response to the motion."*

A review of the docket reveals no proof of service indicating that counsel for the debtor gave notice of the continued hearing. Accordingly, notice is insufficient.

39. 08-91087-A-13G MICHAEL/STACY FRENCH CONT. HEARING - MOTION TO  
FW #2 VALUE COLLATERAL OF VALLEY FIRST  
CREDIT UNION  
6-9-08 [15]

**Final Ruling:** The motion will be dismissed without prejudice.

This motion was originally set for hearing on July 11. In connection with that hearing, the court ruled:

*"The court continues the hearing to August 18, 2008 at 2:00 p.m. so that the hearing will coincide with the hearing on any objections to the confirmation of the plan. Opposition to this motion shall be filed and served no later than July 30 (the same date that objections to confirmation are due). Counsel for the debtor shall give notice to the respondent of this continuance and of the revised deadline for a response to the motion."*

A review of the docket reveals no proof of service indicating that counsel for the debtor gave notice of the continued hearing. Accordingly, notice is insufficient.

40. 07-91090-A-13G CURTIS/SHEILA CREEKMORE HEARING - OBJECTION TO  
FW #3 CLAIM OF AURORA LOAN SERVICES  
7-3-08 [49]

**Final Ruling:** This objection to the proof of claim of Aurora Loan Services has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(c)(1)(ii). The failure of the claimant to file written opposition at least 14 calendar days prior to the hearing is considered as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the objecting party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the claimant's default is entered and the objection will be resolved without oral argument.

The objection will be sustained. The last date to file a timely proof of claim was February 19, 2008. The proof of claim was filed on February 25, 2008. Pursuant to 11 U.S.C. § 502(b)(9) and Fed. R. Bankr. P. 3002(c), the claim is disallowed because it is untimely. See In re Osborne, 76 F.3d 306 (9<sup>th</sup> Cir. 1996); In re Edelman, 237 B.R. 146, 153 (B.A.P. 9<sup>th</sup> Cir. 1999); Ledlin v. United States (In re Tomlan), 907 F.2d 114 (9<sup>th</sup> Cir. 1989); Zidell, Inc. V. Forsch (In re Coastal Alaska), 920 F.2d 1428, 1432-33 (9<sup>th</sup> Cir. 1990).

41. 08-90096-A-13G KAREN MOORE  
FW #1

HEARING - MOTION TO  
MODIFY DEBTOR'S CONFIRMED  
CHAPTER 13 PLAN  
7-11-08 [18]

**Final Ruling:** This motion to confirm a modified plan proposed after confirmation of a plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1), General Order 05-03, ¶ 8(b), and Fed. R. Bankr. R. 3015(g). The failure of the trustee, the U.S. Trustee, creditors, and any other party 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 as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Further, because the court will not materially alter the relief requested by the debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted. The modified plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.