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

Honorable Christopher D. Jaime
Bankruptcy Judge
Sacramento, California

**August 23, 2016 at 1:00 p.m.**

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1. 16-24602-B-13 ROSEANNA RODRIGUEZ — MOTION FOR RELIEF FROM AUTOMATIC STAY
RTD-1 Seth L. Hanson — 8-9-16 [13]

SACRAMENTO CREDIT UNION VS.

**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. If there is opposition offered at the hearing, the court may reconsider this tentative ruling.

The court's decision is to grant the motion for relief from stay.

Sacramento Credit Union ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2007 Acura (the "Vehicle"). The moving party has provided the Declaration of Mary Leyva to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Leyva Declaration provides testimony that Debtor has not made 1 post-petition payments, with a total of $188.51 in post-petition payments past due. The Declaration also provides evidence that there are 1 pre-petition payments in default, with a pre-petition arrearage of $188.51.

From the evidence provided to the court, and only for purposes of this motion, the debt secured by this asset is determined to be $8,680.41, as stated in the motion, while the value of the Vehicle is determined to be $8,300.00, as stated in Schedules B and D filed by Debtor.

**Discussion**

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor and the estate have not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Additionally, once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2).

And no opposition or showing having been made by the Debtor or the Trustee, the court determines that the Vehicle is not necessary for any effective reorganization in this Chapter 13 case.

The court shall issue an order terminating and vacating the automatic stay to allow Sacramento Credit Union, and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

There also being no objections from any party, the 14-day stay of enforcement under Rule 4001(a)(3) is waived.

No other or additional relief is granted by the court.

The court will enter an appropriate minute order.

2. 12-25203-B-13 DAVID/HEATHER RIGGS MOTION TO MODIFY PLAN
CJY-1 Christian J. Younger 7-13-16 [45]

**Final Ruling:** No appearance at the August 23, 2016, hearing is required.

The Debtors' Motion to Confirm First Modified Chapter 13 Plan has been set for hearing on the 35-days' 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's decision is to permit the requested modification and confirm the modified plan.

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 filed on July 13, 2016, complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

The court will enter an appropriate minute order.

3. 13-35804-B-13 BRENDA BRUESSARD MOTION TO MODIFY PLAN
SS-5 Scott D. Shumaker 7-19-16 [100]

**Tentative Ruling:** The Motion for Order Confirming Third Modified Chapter 13 Plan Filed July 19, 2016, has been set for hearing on the 35-days' notice required by Local Bankruptcy Rules 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). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to not permit the requested modification and not confirm the modified plan.

First, the plan proposes a total plan length of 65 months to complete, which exceeds the maximum length of 60 months pursuant to 11 U.S.C. § 1322(d) and which results in a commitment period that exceeds the permissible limit imposed by 11 U.S.C. § 1325(b)(4).

Second, pursuant to Local Bankr. R. 2016-1(b), 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 fees and/or costs. The motion for approval of attorney's fees in this case is set to be heard on September 13, 2016. The Trustee cannot pay the Debtor's attorney $200.00 per month as stated in the plan until the fees and/or costs have been approved by the court.

Third, the plan fails to properly account for all payments the Debtor has paid to the Trustee to date.

Fourth, the Debtor is delinquent to the Chapter 13 Trustee in the amount of $350.00, which represents approximately 1 partial plan payment. The Debtor does not appear to be able to make plan payments proposed and has not carried the burden of showing that the plan complies with 11 U.S.C. § 1325(a)(6).

Fifth, the plan payment in the amount of $350.00 does not equal the aggregate of the Trustee's fees, monthly post-petition contract installments due on Class 1 claims, the monthly payment for administrative expenses, and monthly dividends payable on account of Class 1 arrearage claims, Class 2 secured claims, and executory contract and unexpired lease arrearage claims. The aggregate of the monthly amounts plus the Trustee's fee is $498.00. The plan does not comply with Section 4.02 of the mandatory form plan.

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

The court will enter an appropriate minute order.

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| 4. | 13-21606-B-13<br>JPJ-2 | JOHN/JENNIFER SCHMIT<br>Catherine King | NOTICE OF DEFAULT AND MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS<br>6-30-16 [54] |

**Tentative Ruling:** The court issues no tentative ruling.

The Notice of Default and Application to Dismiss was issued on June 30, 2016, for Debtors' failure to make all payments due under the plan. The Debtors have filed a response asserting that they have cured all default in payments in the amount of $5,775.00.

The matter will be determined at the hearing.

5. 11-43807-B-13 AJESH/REETA KUMAR MOTION TO MODIFY PLAN
PGM-8 Peter G. Macaluso 7-14-16 [191]

**Final Ruling:** No appearance at the August 23, 2016, hearing is required.

The Motion Modify Chapter 13 Plan After Confirmation Filed on July 14, 2016, has been set for hearing on the 35-days' 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's decision is to permit the requested modification and confirm the modified plan.

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 filed on July 14, 2016, complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

The court will enter an appropriate minute order.

6. 16-22507-B-13 MARK/CAROL RHYNE MOTION TO CONFIRM PLAN
PGM-2 Peter G. Macaluso 7-11-16 [33]

**Tentative Ruling:** The Motion to Confirm Debtors' First Amended Plan Filed on July 11, 2016, has been set for hearing on the 35-days' notice required by Local Bankruptcy Rules 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). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to not permit the requested modification and not confirm the modified plan.

The plan does not comply with 11 U.S.C. § 1325(b)(1)(B) because the Debtors' projected disposable income is not being applied to make payments to unsecured creditors. The amended Calculation of Disposable Income (Form 122C-2) filed May 31, 2016, includes an inflated expense on line 16 "Taxes" in the amount of $6,605.21. However, the Debtors' Schedule I filed April 10, 2016, lists taxes in the amount of $4,736.66. Using the figure on Schedule I, the Debtors' correct monthly disposable income is or should be $1,322.85 and the Debtors must pay no less than $79,361.48 to general unsecured creditors. The current proposed plan pays $0.00 to general unsecured creditors.

The Debtors filed a response stating that the total taxes deducted are in error. The Debtors state that they will file an amended Statement of Current Monthly Income (Form 122C-1) prior to the date of this hearing and increase deductions. Nothing new has been filed.

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

The court will enter an appropriate minute order.

7. 15-29510-B-13 OSCAR/LILIA BARROGA MOTION TO MODIFY PLAN
FF-3 Gary Ray Fraley 7-15-16 [50]

**Tentative Ruling:** The Motion to Confirm First Modified Plan Dated July 15, 2016, has been set for hearing on the 35-days' notice required by Local Bankruptcy Rules 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). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to permit the requested modification and confirm the modified plan provided that the order properly account for all payments made by the Debtors to date by stating the following: "The Debtors have paid a total of $2,376.00 to the Trustee through June 2016. Commencing July 2016, monthly plan payments shall be $396.00 for one month, then $340.00 for the remainder of the plan.

The modified plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

The court will enter an appropriate minute order.

8. 16-23420-B-13 IVAN SYTAY
JPJ-3 Pro Se

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
8-2-16 [30]

**Tentative Ruling:** The Trustee's Objection to Debtor's Claim of Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and Federal Rule of Bankruptcy Procedure 4003(b). 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.

The court's decision is to sustain the objection and the exemptions are disallowed in their entirety.

First, the Debtor is entitled to an exemption on his residence of no more than $100,000.00 pursuant to California Code of Civil Procedure § 704.730(a)(2) since the Debtor is less than 65 years old, is married, and is not mentally or physically disabled or otherwise unable to engage in substantial gainful employment.

Second, the Debtor may not claim the entirety of his 2007 Lexus vehicle as exempt under California Code of Civil Procedure § 704.010 since the maximum amount of the exemption is only $3,0650.00.

Third, the Debtor uses the California Code of Civil Procedure § 704.070 to exempt the full amounts of Debtor's cash on hand and a bank account with Heritage Community Credit Union. This exemption only allows the Debtor to exempt 75% of the value.

Although the Debtor filed an amended Schedule C on August 17, 2016, the Debtor still attempts to exempt the entirety of his cash on hand and checking account. Oddly, the vehicle is no longer listed on the amended schedule.

The Trustee's objection is sustained and the claimed exemptions are disallowed.

The court will enter an appropriate minute order.

9. 16-22826-B-13 DEBBIE BARKER MOTION TO CONFIRM PLAN
MRL-1 Mikalah R. Liviakis 6-27-16 [23]

**Tentative Ruling:** The Motion to Confirm Debtor's Chapter 13 Plan has been set for hearing on the 35-days' notice required by Local Bankruptcy Rules 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). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to not permit the requested modification and not confirm the modified plan.

First, the Debtor has not served upon the Trustee a Class 1 Checklist and Authorization to Release Information. The Debtor has not complied with 11 U.S.C. § 521(a)(3) and Local Bankr. R. 3015-1(b)(6).

Second, Wells Fargo Bank, N.A. holds a deed of trust secured by the Debtor's residence. The creditor has filed a timely proof of claim in which it asserts $25,180.68 in pre-petition arrearages. The plan does not propose to cure these arrearages. Because the plan does not provide for the surrender of the collateral for this claim, 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 arrearages, the plan cannot be confirmed.

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

The court will enter an appropriate minute order.

10. 16-24335-B-13 BRANDON MCDONALD — MOTION FOR RELIEF FROM AUTOMATIC STAY
BHS-1 Ted A. Greene — 7-26-16 [13]

SUSAN DIDRIKSEN VS.

**Tentative Ruling:** The Motion for Relief From the Automatic Stay to File an Unlawful Detainer Action in State Court 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). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to grant the motion for relief from stay.

Susan Didriksen ("Movant"), the court-appointed trustee of the Carolyn McDonald Trust Dated January 27, 2007 ("Trust"), seeks relief from the automatic stay with respect to real property commonly known as 3712 Laguna Way, Sacramento, California (the "Property"). Movant has provided the Declaration of Susan Didriksen and Declaration of Robin C. Bevier to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Declaration states that the Property is part of the Trust and that the Debtor merely has a possessory interest in the Property subject to paying monthly expenses such as mortgage and utilities. Movant asserts that the Debtor is in arrears of $12,705.47 and, as a result of this, the subject property has received pre-foreclosure notices for the two mortgages on the property. Movant seeks to proceed with an unlawful detainer action in state court to preserve the Property or its fair market value for the benefit of the Debtor's minor child.

Debtor has filed an opposition asserting that he has a possessory interest in the property, specifically a "right to reside" in the Property until his minor daughter reaches 18 years of age based on the terms of the Trust. Dkt. 26, Exh. A. The Debtor further asserts that the Property is part of the bankruptcy estate due to his possessory interest. The Debtor also states that the Chapter 13 plan will provide for adequate protection payments and disputes the arrearage amount claimed by the Movant but nonetheless acknowledges that there are approximately $8,875.00 in past-due payments.

**Discussion**

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

While the Trust provides the Debtor with a possessory interest in the property, the Debtor fails to note that Article VI, Section C, Paragraph 4 states that the Debtor "shall have the right to reside in the [Property] . . . in consideration of payment of monthly rent at least equal to the monthly mortgage payments, real property taxes, insurance, and general upkeep." Dkt. 26, Exh. A. The Debtor has not satisfied this condition, regardless of whether his daughter has not yet reached the age of majority. Because the Debtor is not the legal owner of the property and has failed to cure post-petition payments, cause exists to terminate the automatic stay.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, to exercise its rights to obtain possession and control of property including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

The 14-day stay of enforcement under Rule 4001(a)(3) is not waived.

No other or additional relief is granted by the court.

The court will enter an appropriate minute order.

11. 16-24336-B-13 CEBRON TADEMY — MOTION TO AVOID LIEN OF CHASE MANHATTAN BANK, USA, N.A.
HLG-1 Kristy A. Hernandez — 7-19-16 [15]

**Final Ruling:** No appearance at the August 23, 2016, hearing is required.

The Motion to Avoid Judicial Lien Held by Chase Manhattan Bank, USA, N.A. has been set for hearing on the 28 days' 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 non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The court's decision is to grant the motion to avoid judicial lien.

This is a request for an order avoiding the judicial lien of Manhattan Bank, USA, N.A. ("Creditor") against the Debtor's property commonly known as 6201 Charwood Lane, Citrus Heights, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $2,398.95. An abstract of judgment was recorded with Sacramento County on March 16, 2010, which encumbers the Property. All other liens recorded against the Property total $89,792.95.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $141,162.00 as of the date of the petition.

Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $75,000.00 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

The court will enter an appropriate minute order.

12. 15-22442-B-13 JASWINDER/KULWINDER DULAI MOTION TO INCUR DEBT
WW-2 Mark A. Wolff 7-26-16 [35]

**Final Ruling:** No appearance at the August 23, 2016, hearing is required.

The Motion for Authorization to Incur Debt has been set for hearing on the 28-days' 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 non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The court's decision is to permit the loan modification requested.

Debtors seeks court approval to incur post-petition credit. EverBank("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment from the current $1,896.00 a month to $1,628.00 a month. The modification will be a 15-year term, which is less than the Debtors' current 16.5 years remaining on their current loan. The reduction in monthly payments will also help the Debtors since their expenses will increase beginning in or about October 2016 when the Debtors will be required to pay for Medicare. The total cost for the insurance through Medicare is approximately $260.00.

The motion is supported by the Declaration of Jaswinder Dulai. The Declaration affirms Debtors' desire to obtain the post-petition financing. Although the Declaration does not state the Debtors' ability to pay this claim on the modified terms, the court finds that the Debtors will be able to pay this claim since it is a reduction from the Debtors' current monthly mortgage payments.

This post-petition financing is consistent with the Chapter 13 plan in this case and Debtors' ability to fund that plan. 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 is granted.

The court will enter an appropriate minute order.

13. 14-32364-B-13 MICHAEL/PAULA RHOADES MOTION TO AMEND
15-2045 PLC-6 7-21-16 [66]
RHOADES ET AL V. GUARDIAN HOME
BROKERS, INC. ET AL

**Tentative Ruling:** The Motion to Amend Scheduling Order has been set for hearing on the 28-days 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). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to grant in part the motion to amend scheduling order.

Plaintiffs, Debtors Michael Rhoades and Paula Rhodes, seek to amend the scheduling order on the basis that they received from the Defendants additional documents of over 500 pages on April 11, 2016, they received the name of the Defendants' "personal most knowledgeable" in July 2016 making it impossible to analyze the discovery provided and take depositions of necessary parties before the August 15, 2016, cut-off date for expert discovery, and because the mother of Plaintiffs' counsel passed away on June 23, 2016.

Defendants have filed an opposition asserting that, while they sympathize with Plaintiffs' counsel, the Plaintiffs have not been diligent in completing whatever discovery they now contend they need to do. Defendants assert that this adversary proceeding has been pending since February 25, 2015, there have been three scheduling orders that have been amended, and that they have met the deadlines imposed by the most recent amended scheduling order dated April 8, 2016.

Defendants acknowledge that they provided the Plaintiffs with 528 pages of files related to the subject property on April 11, 2016, but state that this was within the discovery deadline of the amended scheduling order and that these files completed the production of all the documents in their possession concerning the subject property and the Plaintiffs. As to Plaintiffs' allegation that the Defendants provided the name of a "person most knowledgeable" last minute, the Defendants argue that Plaintiffs never requested to depose a "person most knowledgeable" until Plaintiffs' June 24, 2016, email. Defendants further assert that their counsel was not able to respond to this email until July 5, 2016, after he returned from his vacation. However, the court notes there are two attorneys of record in this case and listed on the opposition to Plaintiffs' motion. Defendants nevertheless state that the Plaintiffs have had over one year to conduct discovery, and still had through August 15, 2016, to conduct expert and "person most knowledgeable" discovery. Because of this, Defendants argue that the Plaintiffs have not been diligent and there is no good cause for amending the scheduling order or extending the discovery deadlines.

**Discussion**

A party seeking leave to amend pleadings after the deadline specified in the scheduling order must first satisfy Federal Rule of Civil Procedure 16(b)'s "good cause" standard. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608–09 (9th Cir. 1992). Rule 16(b)(4) states that a "schedule may be modified only for good cause and with the judge's consent." This good cause evaluation "is not coextensive with an inquiry into the propriety of the amendment under . . . Rule 15." *Johnson*, 975 F.2d at 609. Distinct from Rule 15(a)'s liberal amendment policy, Rule 16(b)'s good cause standard focuses primarily on the diligence of the moving party, *id.*, and that party's reasons for seeking modification, *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 984 (9th Cir. 2011).

If good cause exists, the party must next satisfy Rule 15(a). *Cf. Johnson*, 975 F.2d at 608 (citing with approval *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987), for its explication of this order of operations). Federal Rule of Civil Procedure 15(a)(2) states "[t]he court should freely give leave [to amend its pleading] when justice so

requires" and the Ninth Circuit has "stressed Rule 15's policy of favoring amendments." *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). "In exercising its discretion [regarding granting or denying leave to amend] 'a court must be guided by the underlying purpose of Rule 15 — to facilitate decision on the merits rather than on the pleadings or technicalities.'" *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). However, "the liberality in granting leave to amend is subject to several limitations. Leave need not be granted where the amendment of the complaint would cause the opposing party (1) undue prejudice, (2) is sought in bad faith, (3) constitutes an exercise in futility, or (4) creates undue delay." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) (citations omitted).

Rule 16(b) "Good Cause" Standard

The court must first determine whether there is "good cause" under Rule 16(b) to modify the scheduling order. The court finds that there is "good cause" because the Plaintiffs were diligent in pursuing their case between the date of the last scheduling order issued April 8, 2016, up to June 23, 2016.

The last scheduling order was amended on April 6, 2016. Five days after this, the Defendants provided the Plaintiffs with additional documents. The Plaintiffs thereafter served additional interrogatories on April 29, 2016, and served a request for admission on May 2, 2016. The Defendants took the deposition of Plaintiffs on June 15, 2016. Plaintiffs' counsel emailed Defendants' counsel on June 24, 2016, to request an extension of the discovery deadlines. Defendants' counsel responded back on July 5, 2016, after his vacation. That delay of almost two weeks is somewhat unreasonable given that there are two attorneys of record for Defendants assigned to this case.

The fact that Plaintiffs served interrogatories, served a request for admission, and participated in a deposition show that they were diligent in pursuing their case. But for the passing of Plaintiffs' counsel's mother, compounded by the delay in Defendants' response to the June 24, 2016, email, the Plaintiffs would have had all of July and half of August to conduct expert discovery before the deadline of August 15, 2016. However, this was not possible given the unique circumstances. Therefore, there is "good cause" to modify the scheduling order.

Rule 15(c) Leave to Amend a Pleading When Justice So Requires

Rule 15 must be analyzed for factors of prejudice, bad faith, futility, and undue delay. Defendants argue that extending the deadline for discovery would be prejudicial and cause undue delay and that the Plaintiffs are not acting in good faith. Defendants assert that they would be prejudiced to have to re-open discovery for an adversary proceeding that has been pending for over one year since February 25, 2015, and that the Plaintiffs are not acting in good faith since it was their own failure to properly pursue discovery for over one year. The Plaintiffs do not raise futility in their opposition.

The court does not find prejudice, bad faith, or undue delay. While the court agrees that this case is long pending since the adversary was filed on February 25, 2015, the Defendants did stipulate to amend the scheduling order twice. The court does not find that modifying the scheduling order to allow for any lost time due to the circumstances referenced above would prejudice the Defendants. Nor does the court find bad faith since the Plaintiffs were diligent in pursuing the case during the last stipulated extension. The court need not address futility since this was not raised by the Defendants.

The court will grant in part the Plaintiffs' motion to amend scheduling order. Based on the unique facts and circumstances stated above, non-expert discovery for both parties shall be extended through and shall close on September 15, 2016, and expert discovery shall be extended to, and shall close on, October 30, 2016. The deadline for hearing disposition motions is vacated. The pretrial conference set for October 18 2016, at 11:00 a.m. is vacated and a pretrial conference is set for December 13, 2016, at 11:00 a.m. Plaintiffs shall file a pretrial statement on or before November 29,

2016, and Defendants shall file a pretrial statement on or before December 6, 2016. Plaintiffs and Defendants must file a final joint statement of undisputed facts at least seven (7) days before the pretrial conference. No further extension shall be granted.

The court will enter an appropriate minute order.

14. 16-24365-B-13 LEAH OLAGUEZ — MOTION TO VALUE COLLATERAL OF
MMM-1 Mohammad M. Mokarram — PNC BANK, N.A.
8-9-16 [24]

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given by the debtor, Motion to Value Collateral of PNC Bank, N.A. is deemed brought pursuant to 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. If there is opposition, the court may reconsider this tentative ruling.

The court's decision is to value the secured claim of PNC Bank, N.A. at $0.00.

The motion to value filed by Debtor to value the secured claim of PNC Bank, N.A. ("Creditor") is accompanied by the Debtor's declaration. Debtor is the owner of the subject real property commonly known as 9558 Dominion Wood Lane, Elk Grove, California ("Property"). Debtor seeks to value the Property at a fair market value of $245,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is some 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 valuation of property which secures a claim is the first step, not the end, result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (emphasis added). For the court to determine the creditor's secured claim (rights and interest in collateral), the creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2; case or controversy requirement for the parties seeking relief from a federal court.

**No Proof of Claim Filed**

The court has reviewed the Claims Registry for this bankruptcy case. No proof of claim has been filed by Creditor for the claim to be valued.

**Discussion**

The first deed of trust secures a claim with a balance of approximately $252,689.00. Creditor's second deed of trust secures a claim with a balance of approximately $73,170.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. 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 will enter an appropriate minute order.

15. 16-21082-B-13 SERGIO DE LA CRUZ MOTION TO MODIFY PLAN
RWH-1 Ronald W. Holland 7-14-16 [39 ]

**Tentative Ruling:** The Motion to Confirm First Modified Plan Dated July 1, 2016, has been set for hearing on the 35-days' notice required by Local Bankruptcy Rules 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). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to not permit the requested modification and not confirm the modified plan.

First, modified plan does not specify the exact amount of the pre-petition mortgage arrears or the post-petition mortgage arrears and does not cure the post-petition arrearage, interest rate, and monthly dividend owed to Evergreen Home Loans.

Second, the plan payment in the amount of $1,355.00 for months 5 through 60 does not equal the aggregate of the Trustee's fees, monthly post-petition contract installments due on Class 1 claims, the monthly payment for administrative expenses, and monthly dividends payable on account of Class 1 arrearage claims, Class 2 secured claims, and executory contract and unexpired lease arrearage claims. The aggregate of the monthly amounts plus the Trustee's fee is $1,367.00 The plan does not comply with Section 4.02 of the mandatory form plan.

Third, because the plan payment does not equal the aggregate payment and because the secured claim of Springleaf Financial Services was filed for an amount higher than what was scheduled ($6,798.53 filed versus $5,709.00 scheduled), the plan will take approximately 87 months to complete, which exceeds the maximum length of 60 months pursuant to 11 U.S.C. § 1322(d) and which results in a commitment period that exceeds the permissible limit imposed by 11 U.S.C. § 1325(b)(4).

Although the Debtor has filed a response stating that all these issues can be resolved in the order confirming, the court finds that these are extensive changes and that the Debtor should instead file a modified plan.

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

The court will enter an appropriate minute order.

16. 16-22790-B-13 ALVIN/JOAN MENDIOLA MOTION TO CONFIRM PLAN
SNM-5 Stephen N. Murphy 7-8-16 [59]

**Final Ruling:** No appearance at the August 23, 2016, hearing is required.

The Motion to Confirm First Amended Chapter 13 Plan has been set for hearing on the 42-days' 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 court's decision is to confirm the first amended plan.

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 filed on July 8, 2016, complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

The court will enter an appropriate minute order.

17. 16-22891-B-13 DANIEL/NANCY BALAGUY
JPJ-2 Dale A. Orthner

OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS
7-14-16 [27]

**Final Ruling:** No appearance at the August 23, 2016, hearing is required.

The Trustee's Objection to Debtors' Claim of Exemption has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 as consent to the granting of the motion. *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 Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

The court's decision is to sustain the objection and the exemption is disallowed in its entirety.

The Trustee objects to the Debtors' use of the California Code of Civil Procedure § 704.070 to exempt the full amounts of Debtors' cash on hand, checking account with First US Community Credit Union, and business checking account with First US Community Credit Union. This exemption only allows the Debtors to exempt 75% of the value.

Although the Debtors filed an amended Schedule C on August 16, 2016, listing new values for their cash on hand and two checking accounts, the Debtors still attempt to exempt the entirety of these values.

The Trustee's objection is sustained and the claimed exemption is disallowed.

The court will enter an appropriate minute order.

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| 18. | 12-32199-B-13<br>CYB-5 | BEVAN PERRITON AND AMY SUE BESTE-FONG<br>Candace Y. Brooks | MOTION FOR COMPENSATION BY THE LAW OFFICE OF BROOKS AND CARPENTER FOR CANDACE Y. BROOKS, DEBTORS' ATTORNEY(S)<br>7-26-16 [71] |

**Final Ruling:** No appearance at the August 23, 2016, hearing is required.

The Application for Additional Attorney 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 non-responding parties 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 court's decision is to grant the motion for compensation.

**REQUEST FOR ADDITIONAL FEES AND COSTS**

As part of confirmation of the Debtors' Chapter 13 plan, Candace Brooks ("Applicant") consented to compensation in accordance with the Guidelines for Payment of Attorney's Fees in Chapter 13 Cases (the "Guidelines"). The court authorized payment of fees and costs totaling $4,000.00, which was the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dkt. 31. Applicant now seeks additional compensation in the amount of $2,825.00 in fees and $0.00 in costs.

Applicant provides a task billing analysis and supporting evidence of the services provided. Dkt. 75, Exh. B, C.

To obtain approval of additional compensation in a case where a "no-look" fee has been approved in connection with confirmation of the Chapter 13 plan, the applicant must show that the services for which the applicant seeks compensation are sufficiently greater than a "typical" Chapter 13 case so as to justify additional compensation under the Guidelines. *In re Pedersen*, 229 B.R. 445 (Bankr. E.D. Cal. 1999)(J. McManus). The Guidelines state that "counsel should not view the fee permitted by these Guidelines as a retainer that, once exhausted, automatically justifies a fee motion. . . . Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation." Guidelines; Local Rule 2016-1(c)(3).

The Applicant asserts that it provided services greater than a typical Chapter 13 case because it was unanticipated that the Debtors would default in plan payments resulting in four separate Notices of Default and Applications to Dismiss, numerous telephone and email communications with the Debtors and Trustee in connection to the application to dismiss, and having to prepare two motions to modify Chapter 13 plan after confirmation to cure the delinquency in plan payments. The court finds the hourly rates reasonable and that the Applicant effectively used appropriate rates for the services provided. The court finds that the services provided by Applicant were substantial and unanticipated, and in the best interest of the Debtor, estate, and creditors.

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

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| Additional Fees | $2,825.00 |
| Additional Costs and Expenses | $0.00 |

The court will enter an appropriate minute order.

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| 19. | 16-23970-B-13<br>JPJ-1 | RUSSELL/VICTORIA THOMPSON<br>Cindy Lee Hill | CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE<br>7-27-16 [16] |

**Tentative Ruling:** The court issues no tentative ruling.

The Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case was originally filed at least 14 days prior to the hearing on the motion to confirm a plan. *See* Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtors, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

This matter was continued from August 16, 2016, to provide the Debtors additional time to serve upon the Trustee a Class 1 Checklist for the HOA. If the Trustee confirms receipt of the Class 1 Checklist for the HOA and there are no other objections, the plan may be confirmed.

The matter will be determined at the scheduled hearing.