UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 96-79381-W
Geraldine Crawford Thomas,	**JUDGMENT**
Debtor.	Chapter 13

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the April 23, 1997 motion of Arcadia Financial Ltd. to amend the confirmation order and to modify the valuation of Arcadia's claim is denied.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
July 11, 1997.

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IN RE:	C/A No. 96-79381-W
Geraldine Crawford Thomas,	**ORDER**
Debtor.	Chapter 13

THIS MATTER comes before the Court by way of a motion filed by Arcadia Finance Ltd., ("Arcadia" or "the Creditor") on April 23, 1997 to amend the Court's previous order of confirmation and the related valuation of Arcadia's secured claim. Arcadia asserts that the value of their collateral, a 1993 Pontiac Legrand Automobile ("Vehicle"), is $17,275.00 and not the $10,875.00 value as provided in the Debtor's confirmed plan. Arcadia seeks the amendment of the plan treatment and valuation of its claim pursuant to 11 U.S.C. §105, Rule 9024 of the Federal Rules of Bankruptcy Procedure and Rule 60(b) of the Federal Rules of Civil Procedure. Based upon the arguments of counsel and the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The facts are straightforward and undisputed. Arcadia holds a first lien on the Vehicle which the Debtor proposed to retain in her original plan of December 18, 1996. The Debtor proposed to value the claim at $10,875.00 to be repaid at $250.00 per month until the value of the collateral plus 8.25% interest had been paid in full. Pursuant to Local Rule 3015-1 (the "Local Rule") effective December 1, 1996, the Debtor served a combined Notice, Chapter 13 Plan and Related Motions ("Plan") upon Arcadia which Arcadia admits receipt thereof. No

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objection to confirmation or the valuation of its secured claim was filed or served by Arcadia within the required time prescribed by the Plan and Local Rules. The Plan was later amended by Notice, Amended Chapter 13 Plan and Related Motions ("Amended Plan") on January 27, 1997 but Arcadia's treatment thereunder remained the same as that under the Plan of December 18, 1996. Arcadia asserts that it did not receive notice of the Amended Plan.

The first meeting of creditors was held, pursuant to notice filed on January 6, 1997, on January 23, 1997 in Columbia, South Carolina. The notice of the first meeting of creditors was served upon Arcadia on December 31, 1996. This notice stated in part as follows: "Confirmation Hearing . . . If no objection is timely filed in accordance with Local Rule 9014, the Plan may be confirmed on recommendation of the trustee. Should this happen the Confirmation Hearing may be cancelled."

By letter to Debtor's counsel dated February 5, 1997, Arcadia's attorney indicated that the Plan proposed a valuation of Arcadia's claim but indicated he had not yet received a motion to that effect. It also asserted an objection to any valuation motion. The letter was not filed with the Court or provided to the Trustee by either counsel for Arcadia or for the Debtor before confirmation. On February 7, 1997, Arcadia's attorney filed a Notice of Appearance and served the Debtor's Counsel and Chapter 13 Trustee.

An Order Confirming Plan and Resolving Motions was entered on February 11, 1997 pursuant to Local Rule 3015-1(a) which provides in part:

> If an objection is filed within twenty-five (25) days after the date of service and such timely objection is filed before the confirmation hearing, the objection will be heard at the confirmation hearing, notice of which is given in the 11 U.S.C. § 341 notice. If an objection is filed within twenty-five (25) days after the date of

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> service and such timely objection is filed after the confirmation hearing, a hearing on the objection will be scheduled and notice of such hearing will be given.
>
> If no objection is timely filed in accordance with SC LBR 9014-1, the Court, upon the recommendation of the Trustee and without further hearing or notice, may enter an order confirming the plan following the meeting of creditors (11 U.S.C. § 341 meeting).

Arcadia asserts that its failure to timely object, if any, is excusable due to its lack of knowledge of the change in Local Rules 3015 which was effective in all bankruptcy cases in this District as of December 1, 1996. It also asserts that the Amended Plan provided it a new opportunity to object which it did by counsel's letter of February 5, 1997. The Court disagrees.

CONCLUSIONS OF LAW

The Bankruptcy Court in this District, pursuant to the authorization granted by Rule 29 of the United States District Court for the District of South Carolina, has on a longstanding basis promulgated its own Local Rules. Such Rules are annually reviewed and necessary amendments enacted with the assistance of a Committee made up of members of the South Carolina Bar, Trustees, and representatives of the Office of U.S. Trustees and Clerk of Court. Local Rule 3015 was amended in 1996 by Order executed by all of the Judges of the United States Bankruptcy Court filed October 25, 1996 with a prospective date of December 1, 1996 for application to all pending and future cases and proceedings in this Court. Notice of the Rules was provided by dissemination to parties who had appeared in pending cases, by publication in the South Carolina Bar News and the Disclosure Statement (a publication of the South Carolina Bankruptcy Bar Association) and by notices posted at all Bankruptcy Court locations. The Court provided a month long comment period before entering the Order enacting the Rules and held many

informational seminars on the Rules.

A full copy of Local Rule 3015-1 as promulgated to be effective on December 1, 1996 is attached hereto and incorporated fully within. It provides for a comprehensive notice, motion and plan procedure and requires service upon creditors and other parties in interest. Ironically, one of the new changes to this Rule is that it increases the time period for objecting to motions to value claims from 15 days to a period of 25 days.

The Notice, Chapter 13 Plan and Related Motions filed and served by the Debtor in this case on December 18, 1996 and received by the creditor appears to comply with the requirement of the Local Rule. By a simple viewing, Arcadia should have been alerted to its importance. Arcadia admits receiving these documents but apparently did not read them and therefore did not timely object or otherwise respond to the valuation of its claim or object to confirmation. Arcadia asserts that it was unaware of any change in procedures or change in Local Rules and was awaiting a separate motion to value its claim and for this reason its motion should be granted upon a showing of excusable neglect. However, the Plan documents received by Arcadia very clearly indicate a valuation of its claim and proposed plan treatment and, in this Court's view, provided adequate notice and opportunity to respond to Arcadia. Additionally, reviewing the standard set forth by the Fourth Circuit when it is the party at fault and not solely the parties attorney, the Court cannot find excusable neglect.

> In Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808 (4th Cir.1988), we recognized that default judgments pit the court's strong preference for deciding cases on the merits against countervailing interests in finality and in preserving the court's ability to control its docket. We established two analytical approaches under Rule 60(b) in cases of default: (1) those that involve a blameless party and a blameworthy attorney, and (2)

> those that involve a blameworthy party.
>
> We stated that "when [a] party is blameless and the attorney is at fault, the [court's interest in reaching the merits] control[s] and a default judgment should ordinarily be set aside." Augusta, 843 F.2d at 811. That is, "when the party is blameless, his attorney's negligence qualifies as a 'mistake' or as 'excusable neglect' under Rule 60(b)(1)." Id.; see also United States v. Moradi, 673 F.2d 725 (4th Cir.1982); Lolatchy v. Arthur Murray, Inc., 816 F.2d 951 (4th Cir.1987). However, when dismissal is caused by the negligence of a party, vacatur is not granted as freely. See Augusta, 843 F.2d at 810-12. As we noted in Augusta, the stricter analysis of Park Corp. v. Lexington Insurance Co., 812 F.2d 894 (4th Cir.1987), then applies: "When the party is at fault, the [court's interest in finality and efficiency] dominate[s] and the party must adequately defend its conduct in order to show excusable neglect." Augusta, 843 F.2d at 811 (citing Park, 812 F.2d at 897).

Heyman v. M.L. Marketing Co., 1997 WL 324382 (4th Cir.(Md.)).

Arcadia further asserts that the Debtor's amendment of the Plan on January 27, 1997 provided it with a new opportunity to object, which Arcadia posits, it did by its attorney's letter to the Debtor's attorney on February 5, 1997. Initially, the Court finds that the letter did not constitute a timely objection in as much as it was not filed with the Court nor served upon the Trustee as required by the Amended Plan, Local Rules, and F.R. Bankr.P.3015(f). Furthermore, Local Rule 3015-1(d) does not require service on, and therefore does not provide for a new opportunity to object for, creditors or parties who are not adversely effected by the amendment to the Plan. Considering the frequency of amendments to plans and the speed of the confirmation process which benefits all parties in Chapter 13 cases, this is reasonable.

Furthermore, 11 U.S.C. § 1323(c) states:

> Any holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless the modification provides for a change in

> the rights of such holder from what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection.

With regard to 11 U.S.C. § 1323(c), one commentator has stated: "If the court finds that a modified plan does not adversely affect a creditor's rights, it may be confirmed without notice of the modification to the creditor pursuant to the terms of Section 1323(c). Collier on Bankruptcy, ¶1323.05 at p. 1323-5 (15th ed. 1996).

Another commentator has stated:

> Most courts that have considered the issue have held that a secured creditor's failure to object to a chapter 13 plan constitutes acceptance of that plan under § 1325(a)(5)(A). *See Andrews v. Loheit (In re Andrews)*, 49 f.3d 1404, 1409 (9th Cir. 1995) ("Here, § 1325(a)(5) is fulfilled because subsection (A) was satisfied when the holders of the secured claims failed to object."); *In re Szostek*, 886 F.2d 1405, 1413 (3d Cir. 1989) (In chapter 13 case, secured creditor's "failure to make a timely objection constitutes acceptance of the plan."); *In re Brown*, 108 B.R. 738, 740 (Bankr. C.D. Cal. 1989) ("As no mechanism for plan acceptance by creditors exists in a chapter 13 case [unlike in a chapter 11 case where the creditors may vote for plan confirmation], acceptance is implied when an objection is not raised."); *In re Fitak*, 92 B.R. 243, 253 (Bankr. S.D. Oh. 1988) (Creditor's acceptance of chapter 13 plan was "deemed by virtue of its failure to affirmatively accept or reject the Plan . . ."); *In re Hebert*, 61 B.R. 44, 47 (Bankr. W.D. La. 1986) ("A secured creditor who is provided for by a chapter 13 plan, and who fails to object to his treatment under the plan, may find himself bound by that plan." IRS was bound by a confirmed plan which did not pay interest on tax lien).

Butler, Bankruptcy Handbook, ¶12.70 at p. 12-78 (1996).

With respect to 11 U.S.C. § 1323(c), the legislative history reveals that:

> A holder of a secured claim that accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless the modification provides for a change in the rights of the holder of the secured claim that is different from any

> change proposed under the original plan. The holder of the claim may then change his acceptance or rejection.

H.R. Rep. No. 95-595, 95th (ong., 1st Sess. 429 (1977)) (emphasis added).

Since Arcadia did not object to the original plan, and the Amended Plan did not contain a change which was different from the treatment proposed for Arcadia under the original plan, Arcadia was not required to be served with the Amended Plan, and Arcadia does not have a new opportunity to object to the Amended Plan. 11 U.S.C. § 1323(c); Local Rule 3015-1(d).

Finally, the Local Rule and the notice of first meeting of creditors expressly provided for the prospect of confirmation of the Amended Plan before and without a formal confirmation hearing, a procedure of which Arcadia's attorney should have been aware upon his appearance before confirmation in the case.

In conclusion, while this Court is concerned that the speed and efficiencies of the Chapter 13 confirmation process do not outweigh any parties' opportunity to object and have a fair hearing, the Court cannot grant relief from its orders merely because the effected parties do not choose to read the clear notices which prescribe their necessary action to preserve such rights.

For these reasons, the Motion of Arcadia Financial, Ltd. is denied.

AND IT IS SO ORDERED.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
July 11, 1997.

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