No. 11-6012

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE EIGHTH CIRCUIT

In re: MICHAEL JAMES FISETTE,

Debtor.

MICHAEL JAMES FISETTE,

Debtor-Appellant,

v.

JASMINE Z. KELLER,

Trustee-Appellee.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA
Bankruptcy Case No. 10-32295-DDO

BRIEF OF APPELLANT, MICHAEL JAMES FISETTE

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JURISDICTIONAL STATEMENT

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 157(a) and (b), and 1334(a), to issue its order dated December 9, 2010, denying confirmation of Michael Fisette's originally filed chapter 13 plan, and to issue its order dated February 10, 2011, confirming Mr. Fisette's modified chapter 13 plan. Mr. Fisette appeals to this court from the order of the bankruptcy court confirming his chapter 13 plan, which order was issued February 10, 2011. That order was a final order. *In re Zahn*, 526 F.3d 1140 (8th Cir. 2008). Mr. Fisette filed a Notice of Appeal on February 21, 2011, which is timely under 28 U.S.C. sections 158(a) and (c)(2) and Rule 8002, Federal Rules of Bankruptcy Procedure. This court has appellate jurisdiction under 28 U.S.C. sections 158(a)(1) and (b).

STATEMENT OF ISSUES ON APPEAL

There are two issues on appeal:

First, whether a chapter 13 debtor may avoid, or "strip," a wholly unsecured junior mortgage upon real estate which is the debtor's principal residence.

Second, may a chapter 13 debtor avoid, or "strip," a wholly unsecured junior mortgage upon real estate which is the debtor's principal residence, in a chapter 13 case in which the debtor is ineligible for a discharge by reason of having obtained a discharge in a chapter 7 case commenced within the four years preceding the date of the filing of the chapter 13 proceeding, pursuant to section 1328(f).

STANDARD OF REVIEW

A bankruptcy court's findings of facts are reviewed for clear error and its conclusions of law are reviewed *de novo*. *In re Litzinger*, 332 B.R. 108, 112 (8th Cir. BAP 2005). In this case, the bankruptcy court's interpretation of 11 U.S.C. section 1322(b)(2), and 11 U.S.C. section 1325(a)(5)(B)(i)(I), are conclusions of law subject to *de novo* review.

STATEMENT OF THE CASE

Mr. Fisette filed a voluntary chapter 13 case on April 1, 2010. [Docket Entry No. 1]. Mr. Fisette's originally filed chapter 13 plan, dated April 12, 2010, provided that the first mortgage upon his homestead real estate held by BAC Home Loans in the amount of approximately $176,312.00, would remain as a secured claim, and that he would pay the regular monthly mortgage payments as they came due directly to BAC Home Loans. The plan also provided that the second mortgage held by Principal Bank in the amount of approximately $89,914.00 and the third mortgage held by BAC Home Loans Servicing in the amount of approximately $48,552.00 would be avoided, or "stripped," pursuant to 11 U.S.C. section 506, due to the homestead's fair market value being $145,000.00. [Chapter 13 Plan, No. 9, Page 2-3.].

A confirmation hearing was held on December 9, 2010, before the Honorable Dennis D. O'Brien. The court expressed its belief the debtor was not permitted to strip a wholly unsecured second or third mortgage secured by a lien on the debtor's homestead. [Transcript, No. 50, Page 6, Lines 3-7.] The court also expressed skepticism that it was appropriate for a chapter 13 plan, to strip junior mortgages where the debtor was not eligible for a discharge in the chapter 13 case. [Transcript, No. 50, Pages 10-12.] Although the bankruptcy court's Order dated December 9, 2010, does not specify the reasons for denial of confirmation, the transcript of the proceedings

had on December 9, 2010, makes clear that the reasons for the denial of confirmation for were twofold: first, that avoidance of an unsecured junior mortgage was not allowable in Minnesota due to lack of Eighth Circuit precedent, [Transcript, No. 50, Page 6, Lines 3-7.] and second, an unsecured junior mortgage could not be avoided unless a discharge was available to the debtor. [Order Denying Confirmation of Chapter 13 Plan, No. 26.] [Transcript, No. 50, Page 12, Lines 5-6.]

Mr. Fisette timely filed a Notice of Appeal, on December 22, 2010, and a Motion for Leave to Appeal, on December 22, 2010. [Notice of Appeal, No. 33.] [Motion for Leave to Appeal, No. 32.] This motion for leave to appeal was denied without hearing. [Judgment on Appeal, No. 38.]

On January 4, 2011, Mr. Fisette filed a modified chapter 13 plan dated January 4, 2011. [Modified Chapter 13 Plan, No. 40.] On January 31, 2011, the debtor filed a "Notice of Motion and Motion Objecting to Chapter 13 Plan." [Objection to Chapter 13 Plan, No. 42.] In this motion, Mr. Fisette explained that due to the bankruptcy court's denial of confirmation of his original lien stripping chapter 13 plan, and due to the action of the Bankruptcy Appellate Panel in refusing to consider his appeal from that order, he felt he had no choice but to propose a modified chapter 13 plan which did not propose to strip either the second or third mortgages from his homestead real estate. [Objection to Chapter 13 Plan, No. 42.]

The debtor's attorney appeared for the confirmation hearing on February 10, 2011, regarding the modified plan. He argued that Mr. Fisette should not have had to propose the modified chapter 13 plan, which did not provide for wholly unsecured junior mortgage lien stripping. The bankruptcy court stated that it understood the reasons why the debtor felt compelled to propose such a modified chapter 13 plan, and that the modified plan would be

confirmed. [Transcript, No. 51, Page 5.] Accordingly, the bankruptcy court ordered that the modified chapter 13 plan be confirmed. [Order Confirming Chapter 13 Plan, No. 44.]

Because the debtor was aggrieved by the order confirming the modified chapter 13 plan, as the plan contains no second or third mortgage lien stripping provisions, the debtor timely filed a Notice of Appeal to this court on February 21, 2011. [Notice of Appeal, No. 46.] *See In re Zahn*, 526 F.3d 1140 (8th Cir. 2008).

SUMMARY OF ARGUMENT

Reversal of the bankruptcy court in this case is mandated by the plain language of the bankruptcy code and the Supreme Court's decision in *Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993). The bankruptcy court denied confirmation of Mr. Fisette's originally filed chapter 13 plan because, according to the court, 11 U.S.C. §1322(b)(2) prevents a chapter 13 debtor from avoiding a wholly unsecured junior mortgage upon real estate which is the debtor's principal residence. This position in unsupported by the statute or *Nobelman.*

The Supreme Court stated that in determining whether a home mortgage secured claim is entitled to protection from modification under section 1322(b)(2) a court must first look to section 506(a) for a determination of the claim's secured and unsecured components. If the lien is supported by at least some value, the lien holder is the "holder of a secured claim" under the bankruptcy code, and its claim may be entitled to protection under section 1322(b)(2). On the other hand, if the lien has no true economic value based on the underlying collateral, and is therefore totally unsecured, then the exception does not come into play and the claim may be modified. Under *Nobelman*, the mortgage creditors here do not have "allowed secured claims"

and are, therefore, not entitled to protection under the anti-modification provision of section 1322(b)(2).

Here, the bankruptcy court implicitly rejects the application of 506(a) to determine the secured or unsecured status of the lien. Instead, the court relies merely on the existence of a lien to find the mortgage creditor is protected by the anti-modification provision of section 1322(b)(2). The vast majority of courts, including seven Circuit Courts of Appeals, two Bankruptcy Appellate Panels, and bankruptcy courts from all districts in the Eighth Circuit except for Minnesota, have rejected the position espoused by the court in this case.

Second, in denying confirmation of Mr. Fisette's originally proposed chapter 13 plan, the bankruptcy court questioned Mr. Fisette's ability to strip off the third mortgage because he was ineligible for discharge pursuant to section 1328(f). However, a discharge is not a prerequisite to stripping off a wholly unsecured lien in chapter 13. Cases holding otherwise rest on a weak foundation that cannot support the requirement that a chapter 13 discharge is necessary to avoid a valueless lien. Further, section 1325(a)(5) has no applicability in cases such as this where the mortgage creditors do not hold "allowed secured claims" as determined by *Nobelman*. Lastly, allowing a debtor to strip off a lien that is secured in name only and that is not supported by any true economic value is not unfair to junior mortgagees.

ARGUMENT

I. The right to modify secured claims in chapter 13 is universally accepted, and that right, combined with claim bifurcation, permits debtors to strip off wholly unsecured mortgages.

Since the bankruptcy code was enacted in 1978, debtors' ability to modify creditors' rights in chapter 13 has been explicit and broad. The plain language of section 1322(b)(2)

permits debtors to "modify the rights of holders of secured claims…or holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." In creating this section of the Code, Congress made a definitive and significant departure from the former Chapter XIII of the Bankruptcy Act of 1898, which gave debtors no effective way for dealing with secured creditors.[1]

This ability to modify creditors' rights in chapter 13 is constrained by a limited exception for claims only secured by a security interest in real property that is the debtor's principal residence. 11 U.S.C. § 1322(b)(2). This special protection for residential mortgages applies only if the creditor has an "allowed secured claim" as determined by section 506(a). *See Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993). The rights protected by anti-modification provision of section 1322(b)(2) include the "right to repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against [debtor's] residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure." *Nobelman*, 508 U.S. at 329. Conversely, absent special protection, section 1322(b)(2) permits a debtor to modify any of the listed rights. Thus, chapter 13 explicitly allows debtors to modify the rights of junior mortgage holders, including avoiding the lien attached to the collateral, if the anti-modification provision of section 1322(b)(2) does not apply.

[1] Under Chapter XIII of the Bankruptcy Act of 1898, a repayment plan could not be approved unless every secured creditor that would receive payments in the plan consented to it. *See* Bankruptcy Act of 1898, §§ 651–52, 11 U.S.C. §§ 1051–52 (1976).

II. The debtor's ability to strip off a wholly unsecured lien is supported by the plain language of the bankruptcy code, the Supreme Court's decision in the *Nobelman* case, and the overwhelming majority of relevant case law.

Seven Circuit Courts of Appeals have directly addressed the first question presented in this case, and all seven have ruled that a completely unsecured mortgage, such as those at issue in this case, may be modified in a chapter 13 plan. *In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Pond*, 252 F.3d 122 (2d Cir. 2001); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *In re McDonald*, 205 F.3d 606 (3d Cir. 2000); *see also Suntrust v. Millard*, 2010 WL 5158561 (4th Cir. Dec. 15, 2010). In addition, the Bankruptcy Appellate Panels in the First and Tenth Circuits have adopted this majority view. *In re Griffey*, 335 B.R. 166 (B.A.P. 10th Cir. 2005); *In re Mann*, 249 B.R. 831 (B.A.P. 1st Cir. 2000). Though the Eighth Circuit Court of Appeals has not decided the issue, bankruptcy courts from every district, except the District of Minnesota, have adopted the majority position. *See, e.g., In re Reed*, 2011 WL 1045070 (Bky. D.S.D. Mar. 16, 2011); *In re Krapfl*, 2010 WL 4338475 (Bky. N.D. Iowa Oct. 27, 2010); *Black v. Conseco Financial Servicing Corp.*, 260 B.R. 134 (Bankr. E.D. Ark. 2001); *In re McCarron*, 242 B.R. 479 (Bky. W.D. Mo. 2000); *In re Sanders*, 202 B.R. 479 (Bky. D. Neb. 1996); *In re Mitchell*, 177 B.R. 900 (Bky. E.D. Mo. 1994). In determining whether the anti-modification provision of section 1322(b)(2) applies, each of these courts properly began their analyses with the application of section 506(a). The Supreme Court in *Nobelman* makes clear that section 506(a) is essential to the preliminary determination of whether the anti-modification protections should be invoked at all.

Despite this weight of authority, bankruptcy courts in the District of Minnesota have repeatedly held that wholly unsecured junior mortgage may not be stripped off. *See, e.g., In re*

Loban, 2010 WL 1292787 (Bky. D. Minn. Apr. 2, 2010); *In re Frame*, No. 09-41010 (Bky. D. Minn. Sept. 23, 2009); *In re Hughes*, 402 B.R. 325 (Bky. D. Minn. 2009); *In re Mattson*, 210 B.R. 157 (Bky. D. Minn. 1997). In this case, the court relied on the jurisprudence of the district, to deny confirmation of the Debtor's plan, which included a provision to strip the wholly unsecured second and third mortgages. *See* Transcript of Confirmation Hearing, No. 50, pp. 6-8 (Dec. 9, 2010); ("But you agree that the law of this jurisdiction clearly does not allow the debtor to strip second or third mortgage[sic] secured by a lien on the debtor's homestead.").

Contrary to the reasoning of the court below and of other cases from the bankruptcy courts in the District of Minnesota, the plain language of the statute and the Supreme Court's decision in *Nobelman*, support the debtor's right to strip off wholly unsecured mortgages.

The general rule set forth in section 1322(b)(2) is that a debtor's chapter 13 plan may "modify the rights of a holder of a secured claim." This general rule permitting modification of the rights of a holder of a secured claim is followed by a limited exception for secured claim holders whose claims are "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2). Based on the plain language of the statute, the narrowly drawn language that follows the general rule and contains the anti-modification provision can apply only to a holder of a "secured claim." Thus, before reaching the question of whether the claim is "secured only by a security interest in real property that is the debtor's principal residence," the creditor must hold a secured claim. *Zimmer*, 313 F.3d at 1226-27.

The Supreme Court in *Nobelman* clearly recognized the need to turn to section 506(a) first to determine whether the creditor has a secured claim:

> Petitioners were correct in looking to § 506(a) for a judicial valuation of the collateral to determine the status of the bank's secured claim. It was permissible for petitioners to seek a valuation in proposing their Chapter 13 plan since § 506(a) states that '[s]uch value shall be determined…in conjunction with any hearing…on a plan affecting such creditor's interest. But

> even if we accept petitioners' valuation, the bank is still the 'holder' of a 'secured claim,' because petitioners' home retains $23,500 of value as collateral.

Nobelman, 508 U.S. at 328-29.

Nobelman correctly states that after conducting a section 506(a) valuation, a partially secured claim will be divided into its secured and unsecured claim components. *Nobelman*, 508 U.S. at 329 ("The portion of the bank's claim that exceeds $23,500 is an 'unsecured claim componen[t]' under § 506(a), *United States v. Ron Pair Enterprises, Inc.* 489 U.S. 235, 239 n.3, 109 S.Ct. 1026, 1030 n.3, 103 L.Ed.2d 290 (1989)"). The vast majority of bankruptcy courts and appellate courts have understood that a claim having no secured component cannot be a secured claim entitled to the protection of the anti-modification provision. *See Zimmer*, 313 F.3d at 1227 (improper to jump forward to the last step in analysis—determining what is entitled to protection from modification—without considering whether the creditor even qualifies for such protection in the first place); *Mitchell*, 177 B.R. at 901-02; *see also* 8-1322 Collier on Bankruptcy ¶ 1322.06[1][a][i]. As a matter of common sense, a lien that attaches to nothing provides no security to the lien holder.

The bankruptcy court's determination dismisses the role of section 506(a). The court essentially concludes that that the "rights" of a home mortgage creditor contained in the mortgage instruments must be unequivocally enforced; that the mere existence of a lien controls rather than the creditor's status as a "holder of a secured claim" under the bankruptcy code. *See Hughes*, 402 B.R. at 326. This position, however, cannot be reconciled with the *Nobelman* directive that courts are "correct in looking to § 506(a) for judicial valuation" of the collateral. *Nobelman*, 508 U.S. at 328-29; *Bartee*, 212 F.3d at 289-91 ("The minority courts insist that the focus remain on the existence of a lien regardless of whether there is even a penny of value to which it can attach…. We find the minority to be a misreading of *Nobelman*."). If the "rights" of a home mortgage holder are protected in all circumstances, as the court would have it, then what

purpose would such a valuation serve? "[T]he § 506(a) analysis approved of by the court would be superfluous if any claim secured by a lien on the debtor's principal residence were protected by the anti-modification provision. In other words, there would be no need for a § 506(a) analysis if fully secured, partially secured, and totally unsecured home mortgage lienholders all received the protection of the anti-modification provision." *Sanders*, 202 B.R. 986 (Bky. D. Neb. 1996); *see Zimmer*, 313 F.3d at 1226-27 ("The [minority viewpoint] ignores the order in which the Supreme Court proceeded in Nobeman."). For the statement in *Nobelman* to have any meaning at all, it must follow that a section 506(a) valuation to determine whether a claim is at least partially secured is a necessary prerequisite before turning to section 1322(b)(2). *See McDonald*, 205 F.3d at 611.

To the extent "rights" are to be protected under section 1322(b)(2), they must attach to a lien having at least some minimum economic value. *See In re Lane*, 280 F.3d at 664. Here there is no question that the second and third mortgages are liens to which not a penny can attach. Accordingly, under *Nobelman*, mortgage creditors do not have "allowed secured claims," and they are not protected by the anti-modification provision of section 1322(b)(2).

Based on the foregoing, Mr. Fisette asks that this court hold that the anti-modification provision of section 1322(b)(2) does not prevent the avoidance, or "stripping," of a wholly unsecured junior mortgage upon a chapter 13 debtor's residential real estate.

III. Debtor may modify mortgage creditor's claim by avoiding the lien even if no discharge is available to him.

The only limitation on the debtor's ability to modify the rights of the mortgage creditor in chapter 13 is the anti-modification provision of section 1322(b)(2). Nothing in the code prevents

the debtor, who is ineligible for a discharge, from enjoying all the rights of a chapter 13 debtor, including the right to avoid liens. *See In re Davis,* No. 09-26768 (Bky. D. Md. Mar. 30, 2011) (Addendum A); *In re Frazier,* 2011 WL 1206198 (Bky. E.D. Cal. Mar. 31, 2011); In re Hill, 2010 WL 4873054 (Bky. S.D. Cal. Nov. 29, 2010); *In re Tran*, 431 B. R. 230 (N.D. Cal. 2010); *In re Coryell*, No. 09-54760 (Bky. E.D. Mich. Sept. 2, 2009), Hearing Transcript at 8, Addendum D ("The Court concludes as a matter of law that a discharge is not a necessary prerequisite to a lien strip." Rhodes, J.). Rather, the right to strip off a wholly unsecured junior lien "is conditioned on the debtor's obtaining confirmation of, and performing under, a chapter 13 plan that meets all the statutory requirements." *Id.*

The availability of a discharge under section 1328(f) is not relevant to whether the debtor may modify creditors' claims in chapter 13. The bankruptcy discharge eliminates the debtor's personal liability for a discharged debt. 11 U.S.C. 524(a). It prevents creditors from beginning or continuing actions against the debtor to collect the amount owed to it by the debtor prior to bankruptcy. The discharge has no effect on liens one way or another. Because the discharge only affects personal liability and has no effect on liens, it can not be a precondition for modifying liens if a chapter 13 debtor has satisfied all statutory requirements for plan confirmation and successfully performs that plan.

IV. The reasoning of *Dewsnup*—involving lien stripping in a chapter 7 case—is not applicable in chapter 13.

Courts have consistently held that *Dewsnup* is not applicable in the reorganization chapters—chapters 11, 12 and 13. *Nobelman*, which was decided after *Dewsnup*, and its progeny never consider *Dewsnup* as a barrier to stripping off wholly unsecured junior mortgages

in chapter 13. *See, e.g.*, *In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000). As noted by the Ninth Circuit in *In re Enewally*, 368 F.3d 1165, 1170 (9th Cir. 2004):

> The rationales advanced in the *Dewsnup* opinion for prohibiting line stripping in Chapter 7 bankruptcies, however, have little relevance in the context of rehabilitative bankruptcy proceedings under Chapter 11, 12, and 13, where lien stripping is expressly and broadly permitted, subject to very minor qualifications. The legislative history makes clear that lien stripping is permitted in the reorganization chapters.

Courts relying on *Dewsnup* in the chapter 13 context fail to consider the limited nature of the decision and the fundamental historical differences that preclude applying *Dewsnup* in chapter 13 cases. *See In re Fenn*, 428 B.R. 494 (Bky. N.D. Ill. 2010) (suggesting 506(d) cannot apply in chapter 13 because it does not apply in chapter 7). In *Dewsnup*, the majority was reluctant to depart from established pre-code practice without clearer direction and comment by congress. 502 U.S. at 419. Prior to *Dewsnup*, for nearly a hundred years, lien stripping in chapter 7 was not permitted. *See In re Gibbons*, 164 B.R. 717, 718 (Bky. D.N.H. 1993). By contrast, in enacting the bankruptcy code, congress evinced a clear intent to change the way chapter 13 debtors could deal with secured creditors. The historic principles that applied in *Dewsnup* in chapter 7 do not apply in chapter 13.

Furthermore, the holdings of *Dewsnup* and *Nobelman* are not inconsistent. In *Dewsnup*, a chapter 7 debtor sought to avoid the portion of a $120,000 loan that exceeded the $39,000 value of the property. Thus, the debtor sought to "strip down" a partially secured first lien, rather than "strip off" a wholly unsecured junior lien. The Supreme Court rejected debtor's argument and stated that "the words [in 506(d)] should be read term-by-term to refer to any claim that is, first, allowed, and, second, secured." *Dewsnup*, 502 U.S. at 415. In the Supreme Court's view, the existence of some collateral sufficed to render the lien a secured claim. Thus, the Court

concluded that section 506(d) did not permit a chapter 7 debtor to strip down a creditor's lien to the judicially determined value of the underlying collateral. The Supreme Court in *Dewsnup* did not decide whether a completely unsecured lien would be void under section 506(d). Rather the *Dewsnup* court specifically contemplated a narrow interpretation of its decision. *Id*. at 417 ("We therefore focus upon the case before us and allow other facts to await their legal resolution on another day.").

V. *Jarvis*, and the cases that follow it, rest on a weak foundation because *Jarvis* misapplies both *King* and *Lilly* in reaching its conclusion that a chapter 13 discharge is necessary to strip a lien.

In re Jarvis, 390 B.R. 600 (Bky. C.D. Ill. 2008), was the first case to address the issue of lien stripping in a no-discharge chapter 13. Subsequently, several courts have followed *Jarvis* in holding that a discharge is necessary to strip a lien in chapter 13. *See In re Gerardin*, 2011 WL 1118495 (Bky. S.D. Fla. Mar 28, 2011)*; In re Trujillo*, 2010 WL 4669095 (Bky. M.D. Fla. Nov. 10, 2010); *In re Colbourne*, 2010 WL 4485508 (Bky. M.D. Fla. Nov. 8, 2010); *In re Mendoza*, 2010 WL 736834 (Bky. D. Colo. Jan. 21, 2010). However, an analysis of the court decisions underlying *Jarvis* demonstrates that these cases rest on a shaky foundation.

With no direct precedent to work from, the *Jarvis* court relied on *In re King*, 290 B.R. 641, 646 (Bky. C.D. Ill. 2003), and *In re Lilly*, 378 B.R. 232 (Bky. C.D. Ill. 2007), to reach its conclusion. *King* is cited for the proposition that lien avoidance is contingent upon the debtor completing the plan ***and receiving a discharge.*** *Jarvis*, 390 B.R at 604. However, the *Jarvis* court acknowledges that pre-BAPCPA debtors who completed their plans as a matter of course received a general discharge. In other words, the discharge, except in the case of hardship, followed automatically from the completion of the chapter 13 plan. In interpreting *King*, *Jarvis*

mistakenly creates two necessary conditions to lien avoidance (plan completion and discharge) when previously the second condition (the discharge) was purely derivative of the first (plan completion). Other pre-BAPCPA cases, not cited by *Jarvis*, simply leave off the derivative condition (discharge) and state that lien avoidance only requires completion of the debtor's chapter 13 plan. *See In re Feher*, 202 B.R. 996 (Bky. S.D. Ill. 1996) (cram down premised on "debtors' successful completion of their chapter 13 plan payments"); *In re Gibbons*, 164 B.R. 207 (Bky. D.N.H. 1993) (lien avoidance "contingent on full performance of the plan"). As noted above, the discharge determines only whether any personal liability on a debt is eliminated. 11 U.S.C. 524(a). It has no effect on liens one way or the other. Thus, *Jarvis* overreaches in concluding that "modification has traditionally only been achieved through a discharge."

Similarly, *Jarvis* relies on *In re Lilly*, 378 B.R. 232 (Bankr. C.D. Ill. 2007), for the proposition that, without a discharge, modifications to a creditor's rights imposed by the plan are not permanent and have no binding effect once the term of the plan ends. As with *King*, the *Jarvis* court acknowledges that *Lilly* is distinguishable because the decision rests on section 1325(a)(5) which relates to the treatment of allowed secured claims. *Jarvis*, 390 B.R. at 605. The *Jarvis* court correctly recognized that *Lilly* involved a creditor with an allowed secured claim, whereas junior liens unsupported by value in the collateral do not achieve the same status. *Id*. Nevertheless, the *Jarvis* court found persuasive *Lilly*'s analysis of the modification of creditor's rights. *Lilly*'s analysis, in turn, relied on three cases—*Place, Holway, and Ransom*—to support the proposition that modifications to a creditor's rights without a discharge were not permanent. However, as explained below, the cases relied on by *Lilly* do not support that conclusion reached by *Lilly*, and thus *Lilly* provides a weak legal basis for *Jarvis* and its followers.

In re Place, 173 B.R. 911 (Bky. E.D. Ark 1994), deals with lien stripping in a chapter 7 case, not a chapter 13 case, as indicated in the *Lilly* citation to *Place*. *See Lilly*, 378 B.R. at 236. The *Place* court found the matter governed by *Dewsnup* and denied the debtor's motion to avoid the lien. *Place*, 173 B.R. at 912. *Place* does not stand for the longstanding principle related to the modification of creditor's rights in chapter 13 that *Lilly* claims and *Jarvis* relies upon. *In re Ransom*, 336 B.R. 790 (9th Cir. BAP 2005), addresses the ability of a debtor to discharge a student debt in a chapter 13 plan and had nothing to do with liens. [2] Lastly, in *In re Holway*, 237 B.R. 217 (Bky. M.D. Fla. 1999), the debtors received a discharge after converting to chapter 7, but did not complete their plan payments. The *Holway* court states that only debtors who successfully complete their chapter 13 plans enjoy the unique ability to pay their tax liability without the penalties and interest normally associated with tax debt. *Id.* at 219. As in *King*, *Holway* treats the chapter 13 discharge and completion of chapter 13 plan payments as interchangeable concepts. It does not follow from *Holway* that modification of a creditor's rights is necessarily conditioned upon a chapter 13 discharge, as opposed to completion of chapter 13 plan payments. AS noted above, the majority of cases holding lien avoidance is contingent on eligibility for a discharge rely on *Jarvis*, which in turn relies on *King* and *Lilly*, which rely on *Place*, *Ransom*, and *Holway*. At bottom, the weak foundation upon which this stack of cases is built cannot support a requirement that a chapter 13 discharge is necessary to avoid lien for which is not supported by value in the collateral.

Pre-BAPCPA case law demonstrates that plan completion was the critical condition for lien avoidance and that discharge was often sloppy shorthand for plan completion. Post-

[2] Subsequent to *Lilly*, the BAP decision in *Ransom* was vacated in light of the Ninth Circuit's opinion in *Espinosa v. United Student Aid Funds*, 553 F.3d 1193 (9th Cir. 2008), *aff'd*, 130 S.Ct 1367 (2010), which held that provisions of the confirmed plan have a preclusive effect and may modify a creditor's rights.

BAPCPA, plan completion (or a finding of hardship under 1328(b)) remains necessary, but not always sufficient for a discharge. 11 U.S.C. 1328(f). It is logical error, however, to assume lien avoidance now depends on a discharge rather than plan completion.

VI. Section 1325(a)(5) has no applicability in cases, such as this, where the creditor does not hold an "allowed secured claim" as determined under *Nobelman*.

Section 1325(a)(5) sets forth the criteria for the treatment of allowed secured claims provided for by the plan. A plan is entitled to confirmation if, with respect to each allowed secured claim provided for in the plan, (1) the creditor accepts the plan; (2) the debtor surrenders the collateral; or (3) the debtor treats the claim as provided for in section 1325(a)(5)(B). To confirm a plan over the objection of a *holder of an allowed secured claim*, the plan must provide that (1) the holder retains the lien until the underlying debt in paid or discharge under section 1328, (2) the debtor must pay present value on the allowed secured claim, and (3) distribution of property under to plan to holders of allowed secured claims must be in equal monthly payments and sufficient to provide adequate protection if the collateral is personal property. 11 U.S.C. 1325(a)(5)(B).

In this case, the junior mortgage creditors are not holders of allowed secured claims, and therefore their claims need not be treated in accordance with section 1325(a)(5)(B). As discussed above, in the reorganization chapters, the Supreme Court has been clear that the application of section 506(a) determines whether a creditor has an allowed secured or unsecured claim, or both. *See Nobelman*, 508 U.S at 329; *Ron Pair Enter., Inc*., 489 U.S. at 241. Courts holding otherwise have disregarded more than a decade of consistent jurisprudence in chapter 13

cases. *See, e.g.*, *In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *In re McDonald*, 205 F.3d 606 (3d Cir. 2000).

For example, in *In re Woolsey*, 2010 WL 4249216 (Bky. D. Utah Oct. 8, 2010), the court denied confirmation of a plan proposing to strip down a wholly unsecured junior mortgage because the plan did not provide for lien retention until the underlying debt was paid in full or a discharge was granted. *Id*. at 3, *see* 11 U.S.C. § 1325(a)(5)(B). In holding the junior mortgage holder had an "allowed secured claim," the *Woolsey* court never mentions *Nobelman* and its universal application in chapter 13. Instead, without clear explanation, the court relies heavily on *Dewsnup*—the chapter 7 case—even though that case, too, is distinguished because it involved a partially secured claim. *Id*. at 2.

Similarly, in *In re Fenn*, 428 B.R. 494 (Bky. N.D. Ill. 2010), the court erroneously denied plan confirmation because the debtor's plan did not provide for lien retention as required by section 1325(a)(5)(B) despite the fact that the junior mortgagee did not have an allowed secured claim. Unlike *Woolsey*, the *Fenn* court acknowledges the applicability of *Nobelman*. *Id*. at 503. Despite acknowledgment that *Nobelman* is controlling, the *Fenn* court, nevertheless, finds that confirmation requires compliance with 1325(a)(5)(B). *See also Gerardin*, 2011 WL 1118495 (Bankr. S.D. Fla. Mar. 28, 2011). The court does not explain why a provision concerning allowed secured claims is relevant to a claim that is not an allowed secured claim.

Contrary to these decisions, other courts have correctly found that in chapter 13 the holder of an unsecured junior mortgage does not have an allowed secured claim, and therefore neither the anti-modification provision of 1322(b)(2) or the lien retention provision of 1325(a)(5)(B) apply. *See In re Hill*, 2010 WL 4873054 (Bankr. S.D. Cal. Nov. 29, 2010); *In re Jarvis*, 390 B.R 600, 605 (Bankr. C.D. Ill. 2008) (finding 1325(a)(5) not applicable to unsecured

junior mortgagee because mortgagee not holder of an allowed secured claim); *see also* *Nobelman*, 508 U.S. at 329 (1993); *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010).

In *Hill*, the court recently observed that:

> Because section 1325(a)(5) only applies to holders of secured claims, this Court respectfully disagrees that the statute imposes the condition of discharge to allow a Chapter 20 lien strip. Section 1325(a)(5) has no applicability to unsecured claims, which are separately governed by the confirmation requirements of section 1325(a)(4). Controlling Ninth Circuit precedent treats CIT's claim as an unsecured claim in this Chapter 13 case under section 1322. *Zimmer*, 1313 F.3d at 1226-27. To remain true to the holding of *Zimmer*, 1313 F.3d at 1226-27, CIT's unsecured claim cannot logically be treated differently under section 1325 than it is treated under section 1322.

Hill, 2010 WL 4873054 at 6. The *Hill* court also noted that because "the Debtor's Chapter 7 simply brought about a change in recourse status, the discharged [mortgage] debt does not spring back to life in their Chapter 20 case such that any unpaid amount become due upon completion of the Plan."

Based on the foregoing, Mr. Fisette asks that this court rule that the unavailability of a discharge does not prevent the avoidance, or "stripping," of a wholly unsecured junior mortgage, and that section 1325(a)(5) is inapplicable where the mortgage creditor does not hold an allowed secured claim as determined by the application of section 506(a).

VII. Allowing debtor to strip off a lien that is secured in name only and that is not supported by any true economic value is not unfair to junior mortgagees.

Courts have repeatedly noted a distinction between the first and second mortgage markets. Starting in the mid-1990's the second mortgage market expanded rapidly as lenders pushed high loan-to-value (LTV) mortgages. In issuing a warning to lenders about the risks involved with such loans in comparison to traditional mortgage loans, the Office of Thrift Supervision described the practice as follows:

> An increasing number of lenders are aggressively marketing home equity and debt consolidation loans, where the loans, combined with any senior mortgages, are near or exceed the value of the security property… Until recently, the high LTV home mortgage market was dominated by mortgage brokers and other less regulated lenders. Consumer groups and some members of Congress have expressed concern over the growth of these loans, and the mass marketing tactics used by some lenders.

Thrift Bulletin TB 72, Office of Thrift Supervision, Department of the Treasury, August 27, 1998, at 1. Lenders who make such high LTV loans, or no equity loans, take their illusory security in the debtor's home not for its economic value or the ability to foreclose, but for the threat of foreclosure.

In the early 2000's, lenders aggressively pitched "piggyback" loans to borrowers unable to come up with a larger down payment, or any down payment at all. Piggyback loans feature two mortgages—an 80 percent first mortgage and a second mortgage for 10, 15 or 20 percent of the purchase price. The structure typically combined a traditional fixed-rate or adjustable-rate first mortgage with either a closed-end second lien or a home equity line of credit. The risks of piggyback loans were well known to the second mortgage industry by mid-2005. *See* Broderick Perkins, Piggyback Loan Growth Poses Mortgage System, Realty Times (July 13, 2005), available at http://realtytimes.com/rtpages/20050713_piggyback.htm. ("The potential for risk is that already over-extended home buyers will be left with an upside down mortgage should the bubble burst and price drop.") The additional risks borne by piggyback and other high LTV lenders caused them to charge higher interest rates on these second mortgages. Now that the housing bubble has burst and home values have dropped, creditors can hardly argue that they were not aware of the potential risk that debtors would be left with upside down junior mortgages—risk that they priced into their products

Lastly, debtors do not receive a "windfall" at the expense of high LTV lenders. Markets are uncertain, and it is not certain if, or when, the value of debtor's property will increase. Secondly, mortgage creditors' right to foreclose will not currently result in any monetary gain. Bankruptcy is not intended to benefit either the creditor in securing a potential increase in property value, or the debtor. However, where the future is uncertain, the lien should be avoided. *In re Cook,* 2010 WL 4687953 (Bky. E.D. Va. Nov. 10, 2010) (no statutory or case authority stands for the proposition that lien avoidance may be denied solely based on anticipated future increase in the value of the secured creditor's collateral).

Bankruptcy policy should not be used to protect piggyback and high LTV lenders who would not otherwise be protected outside of bankruptcy and who knowingly made riskier loans. Any other result will create a perverse incentive for lenders to make high LTV loans knowing that they will gain an unfair advantage in bankruptcy.

CONCLUSION

First, Mr. Fisette asks that this court hold that a chapter 13 debtor may avoid, or "strip," a wholly unsecured junior mortgage from the debtor's residential real estate consistent with sections 506(a) and 1322(b)(2).

Second, Mr. Fisette asks that this court hold that he may do so in a chapter 13 case in which he is not eligible for a discharge by reason of section 1328(f).

Third, Mr. Fisette requests that in light of the foregoing, that this court reverse the order of the bankruptcy court denying confirmation of his originally filed chapter 13 plan, which provided that the two wholly unsecured junior mortgages upon his residential real estate were to be avoided and "stripped" upon completion of his payments under the plan.

Respectfully submitted,

April 7, 2011
Date

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RELEVANT BANKRUPTCY COURT DOCUMENTS

(Filed in lieu of an appendix pursuant to L.R.BAP 8th Cir. 8009A)

Document, Minnesota Chapter 13 case 10-32295-DDO	Docket Number
Voluntary Chapter 13 Petition	1
Chapter 13 Plan	9
Support Brief/Memorandum	24
Transcript, December 9, 2010	50
Order Denying Confirmation of Chapter 13 Plan	26
Notice of Appeal	28
Judgment on Appeal	31
Notice of Appeal	33
Motion for Leave to Appeal	32
Judgment on Appeal	38
Modified Chapter 13 Plan	40
Objection to Chapter 13 Plan	42
Transcript, February 10, 2011	51
Order Confirming Chapter 13 Plan	44
Notice of Appeal	46

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid to the following non-CM/ECF participants:

Bank of America Home Loans
PO Box 5170
Simi Valley, CA 93062-5170

Principal Bank
PO Box 587
Des Moines, IA 50304

BAC Home Loans Servicing, LP
Mail Stop: CA6-919-01-23
400 National Way
Simi Valley, CA 93065

Michael James Fisette
7575 Hyde Avenue South
Cottage Grove, MN 55016

Certification Required by L.R.BAP 8th Cir. 8008(a):

The undersigned, Craig W. Andresen, counsel of record for the Appellant, certifies that the original of the foregoing Brief of Appellant was signed by Craig W. Andresen, counsel of record for Appellant.

/s/ Craig W. Andresen

Certificate Required By L.R.BAP 8th Cir. 8010A(c):

The undersigned, Craig W. Andresen, counsel of record for the Appellant, certifies that the body of the foregoing brief, exclusive of the table of contents and table of authorities contains 6,491 words. I relied upon the word count tool provided by my word processing program, Microsoft Word 2010, to obtain the word count.

/s/ Craig W. Andresen

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Craig W. Andresen

Date signed March 30, 2011

WENDELIN I. LIPP
U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
at Greenbelt

In re:	:	
	:	
Bryan Matthew Davis,	:	Case No.: 09-26768-WIL
Carla Denise Bracey-Davis,	:	Chapter 13
	:	
Debtors.	:	
	:	
Bryan Matthew Davis,	:	
Carla Denise Bracey-Davis,	:	
	:	
Movants,	:	
	:	
v.	:	
	:	
TD Bank, N.A.,	:	
	:	
Respondent.	:	

MEMORANDUM OF DECISION IN SUPPORT OF ORDERS GRANTING AMENDED MOTION TO AVOID LIEN AND CONFIRMING PLAN

Before the Court is the Debtors' Amended Motion to Avoid Lien (the "Motion"), which seeks to avoid the third-priority lien held by TD Bank, N.A. ("TD Bank") against the Debtors' principal residence located at 9726 Natalie Drive, Upper Marlboro, MD 20772. TD Bank filed an Opposition to the Motion and both parties filed supplemental briefs. Also before the Court is

confirmation of the Debtors' proposed Amended Chapter 13 Plan (the "Amended Plan") and the objections thereto filed by the Chapter 13 Trustee and TD Bank. The Court has considered all of the pleadings filed by the parties, the oral arguments made by counsel and Mrs. Bracey-Davis' testimony. The Court has also analyzed the decisions rendered by other courts since the enactment of BAPCPA[1] regarding the propriety of lien stripping in a Chapter 13 case where a debtor is ineligible to receive a discharge. For the reasons set forth herein, the Motion is granted and the Amended Plan is confirmed.

I. Undisputed Facts

The Debtors, Bryan Davis and Carla Bracey-Davis, filed their Chapter 13 petition on September 4, 2009 (the "Petition Date"). The Debtors previously filed a petition under Chapter 7 of the Bankruptcy Code on June 7, 2008, and received a Chapter 7 discharge on September 17, 2008. Accordingly, the Debtors are ineligible to receive a discharge in this case pursuant to 11 U.S.C. § 1328(f)(1).[2] The Debtors' Schedule A lists their principal residence as 9726 Natalie Drive, Upper Marlboro, MD 20772 (the "Property"). The fair market value of the Property is $270,000.00, established as of December 17, 2009, pursuant to an appraisal obtained by the Debtors and not disputed by TD Bank. The Property is encumbered by three liens as reflected in the Debtors' Schedule D. TD Bank has conceded that the balance owed on the first-priority lien held by Wells Fargo Bank, N.A. is $275,373.59 and the balance owed on the second-priority lien held by Bank of America, N.A. is $115,138.58. TD Bank recorded a third-priority lien against the Property pursuant to an Indemnity Commercial Deed of Trust for Residential Property

[1] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") was enacted on April 20, 2005. The relevant provision of BAPCPA became effective on October 17, 2005.

[2] Hereafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

executed by the Debtors on August 22, 2007. Pursuant to the proof of claim filed by TD Bank, the outstanding balance owed on its loan is $117,603.31. TD Bank has stipulated that the balances owed on the first and second-priority liens exceed the fair market value of the Property and renders TD Bank's lien wholly unsecured.

II. Questions Presented

The Motion seeks to avoid TD Bank's wholly unsecured junior lien pursuant to 11 U.S.C. § 506. TD Bank raised the following issues in opposition to the Motion and/or in its objection to confirmation of the Amended Plan:

> (i) Whether the Debtors' ineligibility to receive a discharge pursuant to 11 U.S.C. § 1328(f)(1)[3] precludes them from stripping off TD Bank's lien *per se*; and
>
> (ii) If there is no *per se* prohibition, was the Amended Plan proposed in good faith and was the Debtors' case filed in good faith pursuant to 11 U.S.C. §§ 1325(a)(3) and (7)[4] where the Debtors are attempting to strip off a lien that could not be stripped off in their prior Chapter 7 case?[5]

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[3] Section 1328(f) provides:

> Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge–
>
> (1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or
> (2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

[4] Section 1325 provides, in relevant part:

> (a) Except as provided in subsection (b), the court shall confirm a plan if–
> (3) the plan has been proposed in good faith and not by any means forbidden by law; [and]
> (7) the action of the debtor in filing the petition was in good faith....

[5] TD Bank also questioned whether the Debtors are required to commence an adversary proceeding to avoid its lien. After a hearing on this matter held on April 6, 2010, TD Bank filed a Line withdrawing this procedural objection to the Motion.

The Chapter 13 Trustee has also objected to confirmation of the Amended Plan. In his objection, the Trustee argues that Section 1325(a)(5)[6] requires entry of a discharge to strip off a lien. Lastly, the Debtors have challenged TD Bank's standing to object to confirmation because the Debtors' *in personam* liability to TD Bank was discharged in their prior bankruptcy case.

The Court will summarily dispense with the standing issue before addressing the other issues presented. This Court finds that TD Bank has standing to challenge confirmation because it has a claim against property of the estate. Section 102(2) establishes, as a "rule of construction," that the phrase "claim against the debtor," as used in Section 506(d), includes a claim against property of the debtor. 11 U.S.C. § 102(2); *see also Johnson v. Home State Bank*, 501 U.S. 78, 85 (1991). "A fair reading of § 102(2) is that a creditor who, like the Bank in this case, has a claim enforceable only against the debtor's property nonetheless has a 'claim against the debtor' for purposes of the Code." *Id.* Moreover, the Motion caused TD Bank to be a party to these proceedings.

III. Procedural Posture

The Court held combined hearings on the Motion and confirmation of the Amended Plan on January 26, 2010 and April 6, 2010. At the January 26, 2010 hearing, TD Bank and the

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[6] Section 1325(a)(5) provides, in relevant part:

> (a) Except as provided in subsection (b), the court shall confirm a plan if--
>
> (5) with respect to each allowed secured claim provided for by the plan--
>
> (A) the holder of such claim has accepted the plan;
>
> (B)(i) the plan provides that--
>
> (I) the holder of such claim retain the lien securing such claim until the earlier of--
>
> (aa) the payment of the underlying debt determined under nonbankruptcy law; or
>
> (bb) discharge under section 1328; and
>
> (II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law....

11 U.S.C. § 1325(a)(5).

Debtors proceeded on the issue of the Debtors' good faith in filing their Chapter 13 case and proposed plan. The sole witness to testify in support of confirmation was Carla Bracey-Davis, one of the Debtors in this case. Although the Motion was set for hearing for January 26, 2010, TD Bank filed a Memorandum of Law in support of its opposition to the Motion and to confirmation on January 25, 2010— one day before the hearing. Because the Debtors were not given sufficient time to review TD Bank's Memorandum of Law prior to the hearing, the Court continued the matter to April 6, 2010 for final argument. The Court also permitted the parties to file additional briefs on the legal issues raised in TD Bank's Memorandum regarding the Debtors' ability to strip off its lien.

On April 2, 2010, four days before the continued hearing, the Chapter 13 Trustee filed a supplemental objection to confirmation addressing the lien avoidance issue. Although the Trustee filed an initial objection to confirmation prior to the January 26, 2010 hearing, his initial objection dealt with the Debtors' failure to provide him with proper documentation, failure to file amended schedules, and failure to dedicate all of their disposable income to their plan. The Trustee's supplemental objection raised, for the first time, whether Section 1325(a)(5) bars a debtor from confirming a plan that strips off a wholly unsecured lien where the debtor has received a discharge in a prior bankruptcy case within the proscribed period set forth in Section 1328(f). Although TD Bank had previously argued that the Debtors' ability to strip off its lien was contingent upon the entry of a discharge order, TD Bank did not rely on Section 1325(a)(5).

IV. Discussion

A. Jurisdiction and Venue

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157, and Local Rule 402 of the United States District Court for the District of Maryland. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(K) and (L).

B. Is there a *per se* rule against lien stripping in a "Chapter 20" case where the debtor is not entitled to receive a discharge?

A so-called "Chapter 20" case involves a debtor who files a Chapter 7 case, receives a discharge, and thereafter files a Chapter 13 case. The Bankruptcy Code permits this type of serial filing as "Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief." *Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991); *see also Branigan v. Bateman (In re Bateman)*, 515 F.3d 272 (4th Cir. 2008)(holding that notwithstanding a debtor's inability to obtain a Chapter 13 discharge, a debtor is nonetheless eligible to file a Chapter 13 case). A debtor may not, however, receive a Chapter 13 discharge in a bankruptcy case filed within four years of filing an earlier Chapter 7 petition that resulted in a discharge. *See* 11 U.S.C. §1328(f)(1).

Although Chapter 20 cases are permitted, TD Bank and the Trustee encourage this Court to adopt a *per se* rule making lien stripping in a Chapter 20 case contingent upon the entry of a Chapter 13 discharge. A general review of lien stripping is instructive. "In a 'strip off' the entire lien is removed, whereas in a 'strip down' a lien is bifurcated into secured and unsecured claims with only the unsecured claim component being removed.'" *Johnson v. Asset Management Group, LLC*, 226 B.R. 364, 365 n.3 (D. Md. 1998)(*citing In re Lam*, 211 B.R. 36, 37 n. 2 (B.A.P. 9th Cir. 1997)). It is well established that a debtor is precluded from lien stripping in Chapter 7 cases. *See Dewsnup v. Timm*, 502 U.S. 410 (1992) (holding that Section 506(d) does not permit the strip down of a partially secured lien); *see also Ryan v. Homecomings Financial Network*,

253 F.3d 778, 781-83 (4th Cir. 2001) (holding that an allowed, wholly unsecured consensual junior lien may not be stripped off in a Chapter 7 case). However, there is no prohibition against lien stripping in Chapter 13 cases. Rather, in Chapter 13 cases, a debtor's ability to strip off an unsecured junior mortgage lien is governed by two Bankruptcy Code provisions; namely, Sections 506 and 1322(b). Section 506(a) provides:

> (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 setoff 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). Section 506(d) provides:

> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--
>
> > (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
> >
> > (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 506(d). 11 U.S.C. § 1322(b)(2) provides:

> (b) Subject to subsections (a) and (c) of this section, the plan may–
>
> > (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

11 U.S.C. § 1322(b)(2). Despite the anti-modification provision of Section 1322(b)(2), courts in this District permit Chapter 13 debtors to strip off a wholly unsecured junior mortgage lien

against their principal residence. *See Johnson v. Asset Management Group, LLC*, 226 B.R. 364. This issue was revisited recently in *First Mariner Bank v. Johnson*, 411 B.R. 221 (D. Md. 2009), *aff'd*, 2011 WL 52358 (4th Cir. Jan. 06, 2011). In a decision that was affirmed by the United States Court of Appeals for the Fourth Circuit, the United States District Court for the District of Maryland confirmed that the United States Supreme Court's holding in *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993), did not prohibit the strip off of a wholly unsecured junior lien on a debtor's principal residence in a Chapter 13 case. *Id.*[7] The District Court explained that the proper starting point in the Chapter 13 lien-stripping analysis is with a valuation under Section 506(a) rather than with the anti-modification provision in Section 1322(b)(2).[8] *First Mariner Bank v. Johnson*, 411 B.R. at 224 (*citing Bartee v. Tara Colony Homeowners Ass'n*, 212 F.3d 277, 290 (5th Cir. 2000); *Tanner v. FirstPlus Fin., Inc.*, 217 F.3d 1357, 1360 (11th Cir. 2000) ("the only reading of both sections 506(a) and 1322(b)(2) that renders neither a nullity is one that first requires bankruptcy courts to determine the value of the homestead lender's secured claim under section 506(a) and then to protect from modification any claim that is secured by any amount of collateral in the residence")). In other words, a creditor must demonstrate that it has an allowed secured claim under Section 506(a) before it can invoke the anti-modification

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[7] *Nobelman* prohibited the bifurcation of a single undersecured lien on a principal residence into secured and unsecured components (or a strip down of the unsecured component).

[8] The conclusion reached in *Johnson v. Asset Management* and *First Mariner Bank v. Johnson* is consistent with the decisions rendered by the six Courts of Appeals and two Bankruptcy Appellate Panels that have directly considered the issue. *See Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lane v. W. Interstate Bancorp (In re Lane)*, 280 F.3d 663 (6th Cir. 2002); *Pond v. Farm Specialist Realty (In re Pond)*, 252 F.3d 122 (2d Cir. 2001); *Tanner v. FirstPlus Fin., Inc. (In re Tanner)*, 217 F.3d 1357 (11th Cir. 2000); *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277 (5th Cir. 2000); *McDonald v. Master Fin., Inc.*, 205 F.3d 606 (3d Cir. 2000); *Domestic Bank v. Mann (In re Mann)*, 249 B.R. 831 (B.A.P. 1st Cir. 2000); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997).

provision of Section 1322(b)(2). *See id.* Of key importance to this analysis is that Section 506 is not contingent on a debtor's eligibility to receive a chapter 13 discharge.

In this case, as of the Petition Date, TD Bank had in *in rem claim* against the Debtors' bankruptcy estate in the form of a lien against the Debtors' real property. TD Bank's *in rem* claim has been valued at $0.00 because there is no value in the Debtors' real property to which it could attach in light of the existing liens with higher priority. Accordingly, TD Bank's *in rem* claim is wholly unsecured in the Debtors' Chapter 13 case pursuant to Section 506(a) and can be avoided pursuant to Section 506(d).[9] *See First Mariner Bank v. Johnson*, 411 B.R. at 223-24. This determination is consistent with the plain language of Section 506(a), and with the procedures established by this Court, which require debtors to complete the lien valuation/ stripping process prior to confirmation.[10]

The Court acknowledges but declines to follow the weight of authority that favors TD Bank's argument that lien stripping pursuant to Section 506 is contingent on a debtor's eligibility to receive a Chapter 13 discharge. *See Prairie v. Picht (In re Picht)*, 428 B.R. 885 (B.A.P. 10th Cir. 2010); *In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. 2010); *In re Jarvis*, 390 B.R. 600 (Bankr.

[9] A Section 506(a) valuation must occur prior to confirmation, but the subject lien will not be avoided pursuant to Section 506(d) until plan completion. Local Bankruptcy Rule 3012-1 for the United States Bankruptcy Court for the District of Maryland, as Amended by Administrative Order No. 10-02, provides in subsection (e), that the proposed order granting the avoidance of a lien on the debtor's principal residence under 11 U.S.C. § 506 shall conform to Local Bankruptcy Form H and "[i]f granted, avoidance of the lien shall occur at such time as debtor completes performance of debtor's confirmed Chapter 13 plan and receives a discharge under 11 U.S.C. § 1328(a)." The Court notes that pursuant to Local Bankruptcy Rule 9009-1, Local Bankruptcy Forms can be altered as may be appropriate.

[10] When a Chapter 13 petition is filed, the Clerk issues a "Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines" (the "Official Form 9I"). In this District, the Official Form 9I sets forth the date and time of the meeting of creditors and other deadlines, including a deadline to file motions to value collateral, motions to avoid liens, and all other motions that may impact a debtor's plan. In the instant case, the deadline for filing motions to value collateral and motions to avoid liens was October 15, 2009, the same date as the meeting of creditors. *See* Docket No. 6. The Debtors timely filed the Motion.

C.D. Ill. 2008); *In re Mendoza*, 2010 WL 736834 (Bankr. D. Colo. Jan. 21, 2010); *In re Blosser*, 2009 WL 1064455 (Bankr. E.D. Wis. Apr. 15, 2009). This Court finds these cases distinguishable, as detailed below, and agrees with the current minority of decisions holding that the Bankruptcy Code does not condition a Chapter 13 debtor's right to strip off a wholly unsecured junior lien on the debtor's eligibility for a discharge. *See, e.g., In re Hill*, 440 B.R. 176 (Bankr. S.D. Cal. 2010); *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010) (holding that a debtor's right to strip off a wholly unsecured lien is conditioned on the debtor's obtaining confirmation of, and performing under, a Chapter 13 plan that meets all of the statutory requirements rather than on a debtor's discharge); *In re Casey*, 428 B.R. 519 (Bankr. S.D. Cal. 2010).

The case of *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272 (4th Cir. 2008), binding precedent on this Court, gives some guidance on why a debtor might need Chapter 13 protection notwithstanding the debtor's inability to obtain a discharge. In *Bateman*, the Fourth Circuit opined, "a Chapter 13 debtor ineligible for a discharge may 'file a Chapter 13 case and utilize the tools in chapter 13 to cure a mortgage, deal with other secured debts, or simply pay debts under a plan with the protection of the automatic stay.'" *Bateman*, 515 F.3d at 283 (*citing* 8 *Collier* P 1328.06[2]). The *Bateman* Court recognized that in many Chapter 13 cases, "it is the ability to reorganize one's financial life and pay off debts, not the ability to receive a discharge, that is the debtor's 'holy grail.'" *Id.* Other courts have found that Chapter 13 debtors who are ineligible for discharge under Section 1328(f) may still "enjoy all of the rights of a chapter 13 debtor, including the right to strip off liens." *In re Tran*, 431 B.R. at 237. Those courts have held that lien stripping in a Chapter 20 case is to be dealt with at confirmation. *Id.* This Court agrees.

TD Bank asks this Court to follow the ruling in *In re Jarvis*, 390 B.R. 600 (Bankr. C.D. Ill. 2008). In *Jarvis*, the United States Bankruptcy Court for Central District of Illinois, followed Illinois precedent in holding that when a Chapter 13 debtor is ineligible for discharge pursuant to 1328(f), the plan cannot strip off or void a wholly unsecured second mortgage lien. In *Jarvis*, the debtor's Chapter 13 plan provided for the strip off of the creditor's lien. Thus, the lien avoidance issue was dealt with in the context of confirmation of the debtor's plan. The *Jarvis* Court relied heavily on the earlier decision of *In re Lilly*, 378 B.R. 232 (Bankr. C.D. Ill. 2007), in which the Bankruptcy Court "[f]ound that, although a debtor could obtain confirmation of a no-discharge Chapter 13 plan which modified a creditor's interest rate from the contact rate for purposes of calculating plan payments, such modification was not permanent and, in the absence of a discharge, the collateral securing the debt would still be encumbered by the balance due on the debt calculated at the contract rate." *In re Jarvis*, 390 B.R. at 605 (*citing In re Lilly*, 378 B.R. at 237). The *Jarvis* Court distinguished *Lilly* because in *Lilly*, the Court focused its analysis on 1325(a)(5)(B) and determined that the creditor had an "allowed secured claim." *In re Jarvis*, 390 B.R. at 605. In contrast, the *Jarvis* Court determined that the creditor's claim was not an "allowed secured claim" because the second mortgage was not secured by any value. *Id.* The *Jarvis* Court found that the debtor could only accomplish the temporary treatment of the mortgage as unsecured during the life of the plan. *In re Jarvis*, 390 B.R. at 605-06. The Court concluded:

> A no discharge Chapter 13 case may not, however, result in a permanent modification of a creditor's rights where such modification has traditionally only been achieved through a discharge and where such modification is not binding if a case is dismissed or converted. This Court can find no evidence that, by adding new § 1328(f), Congress intended to expand debtors' remedies in the way that the Debtor here proposes.

In re Jarvis, 390 B.R. at 605-06. This Court declines to follow *Jarvis*. Although the Jarvis Court recognized that a wholly unsecured claim is not an allowed secured claim under Section 1325, it ignored the consequence of that determination. Once it is determined that the claim is not an allowed secured claim pursuant to Section 506(a), by its terms, Section 1325(a)(5)(B) is inapplicable.

In *In re Mendoza,* 2010 WL 736834, the United States Bankruptcy Court for the District of Colorado relied on *Jarvis* in finding that a Chapter 13 debtor who was ineligible for a discharge under 1328(f) could not strip off a wholly unsecured mortgage. In so holding, the *Mendoza* Court disregarded the Tenth Circuit Bankruptcy Appellate Panel case of *Griffey v. U.S. Bank (In re Griffey)*, 335 B.R. 166 (B.A.P. 10th Cir. 2005), which held that Section 1322(b)(2) does not prohibit the modification of a wholly unsecured claim. In an unreported decision, the *Mendoza* Court found that the creditor's second lien "appears to be void under § 506(d), because it secures a claim that, at the time of petition, is not an allowed secured claim." *In re Mendoza*, 2010 WL 736834 at *2. The *Mendoza* Court also noted that Section 1325(a)(5) was "inapplicable to this case because it relates solely to allowed secured claims under a Chapter 13 plan." *In re Mendoza*, 2010 WL 736834 at *2 n. 1. However, the Court favorably cited *Jarvis* and *Blosser* and found that "[a]llowing a debtor to file Chapter 7, discharge all dischargeable debts, and then immediately file Chapter 13 to strip off a second mortgage lien would not be much different than simply avoiding the mortgage lien in the Chapter 7 itself." *Id.* at *3 (*quoting In re Blosser*, 2009 WL 1064455 at *1) (internal quotations omitted). The *Mendoza* Court held that allowing the debtors to avoid a wholly unsecured second mortgage lien in a Chapter 20 case

would be akin to granting the debtors a discharge of that debt, rendering the bar set forth in Section 1328(f) inoperable. *In re Mendoza*, 2010 WL 736834 at *4.

Similarly, in this case, TD Bank asserts that the holdings in *Dewsnup* and *Ryan* prevent the Debtors from filing the instant Chapter 13 case for the sole purpose of stripping off its lien. TD Bank argues that because a debtor cannot lien strip in a Chapter 7 case, a debtor cannot obtain the benefit of a Chapter 7 discharge and then file a Chapter 13 case to accomplish what they were unable to do in Chapter 7. This Court disagrees. The debt owed to TD Bank was discharged in the Debtors' Chapter 7 case. As such, the Debtors' personal liability to TD Bank was eliminated and TD Bank would have no right to collect in state court from the Debtors. Further, if the Debtors' sole purpose in filing the instant case was to strip off TD Bank's lien, then the Debtors would have to overcome any allegations of bad faith at the plan confirmation stage pursuant to Section 1322(b). *In re Tran*, 431 B.R. at 237-38.

Another case adopting the majority view is *In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. 2010). In *Fenn*, the United States Bankruptcy Court for the Northern District of Illinois determined that "[w]hether a lien can be avoided under § 506(d) should turn on whether its underlying claim has been disallowed." *In re Fenn*, 428 B.R. at 498. The distinction between valuation under Section 506(a) and disallowance of a claim is critical to *Fenn's* analysis. The *Fenn* Court agreed with the debtors that the junior lien could be valued at zero for confirmation purposes, but the lien could not be avoided until completion of the plan and entry of a Chapter 13 discharge order. *Id.* at 500. The debtors in *Fenn* argued that the junior mortgage lien had been disallowed due to its treatment under Section 506(a). *Id.* at 499. The Court disagreed, finding that Section 506(a) does not by its terms or operation disallow claims and since the junior

mortgage claim was not objected to and disallowed by court order, the claim was not disallowed pursuant to Section 506(a). *Id.* at 499. The Court found that "[a]llowing the avoidance of mortgage liens solely under Section 506(d) in the Chapter 13 context could make Section 1325(a)(5) superfluous." *Id.* at 501. The Court further found that Section 1325(a)(5) controls the retention of a lien in the context of Chapter 13 plans and "that Sections 1322(b)(2), 1325(a)(5) and 506(d) can be reconciled to mean that Section 506(d) allows lien avoidance where the claim secured by the lien has been disallowed." *Id.* at 501. Therefore, if a debtor is ineligible for a discharge pursuant to Section 1328(f), the *Fenn* Court held that the plan cannot be confirmed if it fails to retain the wholly unsecured lien until payment of the underlying debt as required by Section 1325(a)(5)(B)(i)(I).

This Court does not find the reasoning in *Fenn* persuasive. It is unclear from *Fenn's* analysis how the unsecured lienholder can establish an "allowed secured claim" to trigger the application of Section 1325(a)(5) where there is no value to support its lien. Retaining an *in rem* claim following a Chapter 7 discharge does not produce an allowed secured claim for purposes of Section 1325(a)(5) where there is no value to support the lien. It is also important to note that the Seventh Circuit has not ruled on whether Section 1322(b)(2) prohibits the avoidance of wholly unsecured liens. *In re Fenn*, 428 B.R. at 502. The conclusion in *Fenn* that lien avoidance under Section 506(d) turns on whether the underlying claim has been disallowed is also inconsistent with the holding of *Johnson v. Asset Management* and those cases following *Johnson* as previously discussed. *See supra* note 8. The *Fenn* Court addressed this issue noting that the decisions that followed *Johnson* were issued before the specific lien retention provisions of §§ 1325(a)(5)(B)(i)(aa) and (bb) were added to the Code by the BAPCPA. However, the

analysis in *Johnson* permitting lien avoidance under Section 506(d) was recently upheld by the Fourth Circuit Court of Appeals in two post-BAPCPA decisions. *See, e.g., Suntrust Bank v. Millard (In re Millard)*, 414 B.R. 73 (D. Md. 2009), *aff'd*, 2010 WL 5158561 (4th Cir. Dec. 15, 2010); *First Mariner Bank v. Johnson*, 411 B.R. 221 (D. Md. 2009), *aff'd*, 2011 WL 52358 (4th Cir. Jan. 06, 2011).

Although this Court rejects TD Bank and the Trustee's position that lien avoidance in a Chapter 20 case is contingent upon a debtor's eligibility to receive a discharge, TD Bank is still afforded some protection by another provision of the Bankruptcy Code.[11] Namely, Section 349(b)(1)(C), which provides that if the Debtors' case is dismissed (or the plan is not completed), TD Bank's lien will "spring back." Specifically, Section 349(b)(1)(C) provides that dismissal of a case other than under Section 742 reinstates any lien voided under Section 506(d). The delay in the legal effect of a valuation under Section 506(a), *i.e.* lien avoidance, until plan completion and the closing of the case merely incorporates the consequences of Section

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[11] In *In re Tran*, 431 B.R. 230 (Bankr. N.D. Cal. 2010), the Bankruptcy Court analyzed section 1325(a)(5)(B)(i)(II), a step that this Court finds to be inapplicable to TD Bank's claim, and found:

> Permitting a chapter 13 debtor in a no-discharge case to strip off of a junior lien would not deprive the lienholder of its right of redemption during the course of the chapter 13 proceeding, if for example, the holder of a senior lien were to obtain relief from § 362(a)'s automatic stay. This is so because, as stated above, the court can condition any permanent modification or stripping on the debtor's performance and completion of the debtor's chapter 13 plan. And if such a chapter 13 case is dismissed or converted to chapter 7 prior to full plan performance, the lien would remain intact, under § 349(b)(1)(C) in the case of a dismissal, or under *Dewsnup* in the case of a conversion to chapter 7.

Id. at 236-37 (footnote omitted). This analysis, however, is not dependent on section 1325(a)(5)(B)(i)(II) as the protections afforded under section 349(b)(1)(C) automatically arise upon dismissal. The *Tran* court further found, as this Court has, that nothing in section 1325 conditions confirmation of a debtor's plan on the eligibility of the debtor for a discharge. *Id.* at 235 ("Moreover, nothing in § 506, §1322, or any other section of the Bankruptcy Code provides that a chapter 13 debtor's right to modify or strip off liens is conditioned on the debtor being eligible for a discharge.").

349(b)(1)(C) and does not alter the fact that the lien is void under Section 506(d) for purposes of confirmation.

For these reasons, the Court finds that TD Bank's claim is not an allowed secured claim. Consequently, Section 1325(a)(5) does not apply to its claim and the Debtors' eligibility for discharge is not required to confirm their plan. TD Bank is protected in the event the Debtors' plan is not confirmed or if their case is dismissed prior to plan completion because the lien will revert back to its original status under Section 349(b)(1)(C). The same is true upon conversion to Chapter 7 because the lien avoidance does not occur until plan completion and *Dewsnup* and *Ryan* prevent lien stripping in Chapter 7.

C. Was the Amended Plan proposed in good faith and not by any means forbidden by law and was the Debtors' petition filed in good faith, as required by 11 U.S.C. § 1325(a)(3) and (7), respectively?

It does not automatically follow from the foregoing analysis that the Amended Plan should be confirmed. Section 1325(a)(3) provides: "…the court shall confirm a plan if– the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3). Courts consider "the totality of circumstances on a case by case basis" when determining whether a Chapter 13 plan meets the good faith requirement of Section 1325(a)(3). *Deans v. O'Donnell*, 692 F.2d 968 (4th Cir. 1982). The *Deans* Court set forth a suggested and non-inclusive list of factors to be considered when examining the totality of circumstances, including:

(1) The percentage of proposed repayment.
(2) The debtor's financial situation.
(3) The period of time payment will be made.
(4) The debtor's employment history and prospects.
(5) The nature and amount of unsecured claims.
(6) The debtor's past bankruptcy filings.
(7) The debtor's honesty in representing facts.
(8) Any unusual or exceptional problems facing the debtor.

Deans, 692 F.2d at 972. "These factors were supplemented in *Neufeld v. Freeman*, 794 F.2d 149 (4th Cir.1986), to add an inquiry into whether a major portion of the claims sought to be discharged arises out of pre-petition fraud or other wrongful conduct and the debtor proposes only minimal repayment of those claims; and whether, despite even the most egregious pre-filing conduct, the plan nevertheless represents a good faith effort by the debtor to satisfy creditors' claims." *In re Cushman*, 217 B.R. 470, 476 n.3 (Bankr. E.D. Va. 1998)(*citing Neufeld v. Freeman*, 794 F.2d at 152-53). Courts should consider additional factors in a Chapter 20 case; namely:

> (1) The proximity in time of the Chapter 13 filing to the Chapter 7 filing.
> (2) Whether the debtor has incurred some change in circumstances between the filings that suggests a second filing was appropriate and that the debtor will be able to comply with the terms of the Chapter 13 plan.
> (3) Whether the two filings accomplish a result that is not permitted in either Chapter standing alone.
> (4) Whether the two filings treat creditors in a fundamentally fair and equitable manner or whether they are rather an attempt to manipulate the bankruptcy system or are an abuse of the purpose and spirit of the Bankruptcy Code.

Cushman, 217 B.R. at 477.

This Court has considered the totality of circumstances in its good faith analysis. With respect to the factors enunciated in *Deans*, the Court finds that the balance of these factors favors a finding of good faith. Mrs. Bracey-Davis testified on the issue of good faith at the January 26, 2010 hearing. Her testimony was uncontroverted and the Court found her to be a credible witness. Mrs. Bracey-Davis testified that their Chapter 7 case was filed to (i) discharge unsecured debt, (ii) strip down or cram down liens from their primary residence and rental property, and (iii) obtain a loan modification to address the mortgage arrears that had accrued

prior to filing.[12] She further testified that after learning that lien stripping is not available in a Chapter 7 case, the Debtors considered converting their case to Chapter 13; however, they had insufficient income to fund a Chapter 13 plan at that time.[13] Accordingly, the Debtors proceeded with their Chapter 7 case with the hope that their pending loan modifications would be approved. Lastly, Mrs. Bracey-Davis testified that she was unemployed at the time the Chapter 7 case was filed; however, she and her husband obtained gainful employment in the fifteen months between bankruptcy filings, thereby dramatically improving their financial situation.[14]

With respect to the Amended Plan, the Debtors propose to pay the Trustee $1,110.00 per month for months 1-5, and $1,550.00 per month for months 6-60. Their total plan funding is $90,800.00 to be paid over 60 months. Debtors' bankruptcy schedules reflect that all of the Debtors' disposable income is being paid into their plan. Additionally, the proposed five-year plan term is the maximum period proscribed by the Bankruptcy Code. Both of these factors support a finding of good faith. As for distributions under the Amended Plan, a significant portion of the Debtors' plan payments will be applied to their prepetition mortgage arrears and approximately $10,000.00 will be distributed to those creditors who filed unsecured claims. This is not a case where the Debtors are attempting to strip off liens and not pay anything to unsecured creditors. The Debtors are applying all of their disposable income to the Amended Plan and paying a portion of their unsecured debt. Moreover, Debtors' Schedule C reflects that the Debtors have no non-exempt property that would be available for distribution to creditors.

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[12] Mrs. Bracey-Davis testified that their counsel in the Chapter 7 case assured them that these goals could be accomplished in a Chapter 7 case.

[13] The Debtors' Schedule J filed in their Chapter 7 case listed monthly income of $5,993.33 and expenses of $10,486.00, leaving a monthly deficit of $4,492.67.

[14] Debtors' current Amended Schedules I and J [Docket No. 65] list net monthly income of $1,171.87.

In considering the Debtors' past bankruptcy filings, the Debtors are not "serial filers" in the abusive sense of the term. This is only the Debtors' second case, the first of which was filed 15 months earlier and resulted in a Chapter 7 discharge. The Court also finds the Debtors' situation to be exceptional. When they filed for Chapter 7, they were in need of the protections afforded by the Bankruptcy Code. Mrs. Bracey-Davis testified that after the Debtors obtained their discharge, their mortgage modification was denied and additional mortgage arrears accrued. The Debtors also incurred new consumer debt to cover their living expenses. The Debtors filed their Chapter 13 case to deal with their mortgage arrears and other new debt, and to take advantage of the Chapter 13 lien stripping provisions. Although lien stripping after a Chapter 7 discharge in and of itself may be an indication of bad faith, when considered with other factors, it may be a legitimate reason to seek bankruptcy protection. *See In re Bateman*, 515 F.3d at 283 ("The availability of a discharge is only one factor relevant in considering whether a plan was proposed in bad faith, and that factor standing alone is insufficient to support a finding of bad faith."). Moreover, because the Debtors are ineligible for discharge, the additional inquiry required by *Neufeld* is inapplicable. The Court notes, however, that there was no pre-petition fraud or other wrongful conduct by the Debtors and their plan represents a good faith effort to satisfy creditors' claims.

In applying the four factors specific to Chapter 20 cases, the Court finds that this case was filed in good faith. As discussed above, the fifteen-month period that elapsed between the Debtors' Chapter 7 and Chapter 13 filings does not indicate a lack of good faith. During that time, the Debtors found new employment and also incurred new consumer debt and mortgage arrears. These changed circumstances justify a second filing and the Debtors' increased income indicates that the Debtors will be able to comply with the terms of the Amended Plan. Lastly, as

previously stated, although the Debtors are seeking to strip off TD Bank's lien in their current case, which they could not do in their prior case, that element, standing alone, is not enough to find a lack of good faith under the circumstances of this case.

The fourth *Cushman* element is similar to the requirement of Section 1325(a)(7) that a debtor's petition be filed in good faith (as opposed to the requirement of Section 1325(a)(3) that a debtor's plan be proposed in good faith). Here, as already detailed, the Debtors have legitimate claims to be paid through their Chapter 13 plan, including significant mortgage arrears and student loan debt. The Debtors' inability to fund a 100% plan weighs against them but not enough to find bad faith under the facts of this case. *See, e.g., In re Hill*, 440 B.R. 176, 185 (Bankr. S.D. Cal. 2010) (the Bankruptcy Court found no evidence of bad faith where the debtors had no equity in their non-exempt assets and were devoting a sum greater than their disposable income to their plan to provide for a minimal dividend to their unsecured creditors). There is no evidence that the Debtors are attempting to manipulate the bankruptcy system or abuse the purpose and spirit of the Code. This is not a case where the Debtors were capable of funding a plan, but chose to take advantage of the benefits of Chapter 7, and shortly thereafter filed Chapter 13 to attempt to avoid a lien. Rather, the Debtors had insufficient income to fund a plan when they received their Chapter 7 discharge and are now proposing a plan payment that devotes all of their disposable income. Further, in their Chapter 7 case, the Debtors had no non-exempt property available for liquidation to creditors. Thus, TD Bank received nothing. In this case, TD Bank does not dispute that its lien is unsecured based on the existing liens with higher priority. Accordingly, if TD Bank pursued foreclosure, it would still receive nothing. There is no inequity for TD Bank or the claims of Debtors' other creditors.

In sum, after considering the totality of circumstances, the Court finds that the Amended Plan was proposed in good faith and the Debtors' petition was filed in good faith, as required by Sections 1325(a)(3) and (a)(7).

V. Conclusion

For the above-stated reasons, the Motion is granted and the Amended Plan is confirmed. Separate orders shall issue.

cc: Debtors
Debtors' Counsel
Respondent
Respondent's Counsel - Mark A. Cronin, Esq.
Chapter 13 Trustee

End of Memorandum

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: JOHN D. AND DALE A. CORYELL,	.	Docket No. 09-54760
	.	Detroit, Michigan
Debtors.	.	September 2, 2009
. . . . .		2:10 p.m.

HEARING RE. CONFIRMATION HEARING
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

MS. CARROLL: John and Dale Coryell, 09-54760. This is the adjourned time for confirmation in this matter. And, your Honor, we were before you on August the 5th previously, and your Honor had -- at that time debtor's counsel had indicated that they were seeking to have the claim -- the second mortgage of Bank of America treated as -- really not to be treated in the Chapter 13 and that an adversary had been filed asking that the lien be stripped, that Bank of America had not filed a response, and that essentially they were asking that Bank of America not be a creditor for the purposes of this case. They provided at that time for the first time an unpublished decision from California that I believe that the Court was given a copy of at that time. Our office also received a copy of that unpublished opinion at that time, and your Honor offered my office an opportunity to file a brief and gave us a three-week deadline to do that.

We did file a brief in that matter. Debtor's counsel had not actually requested to file a brief at the time of the last hearing, and -- but did so apparently in response to my brief outside of the three-week period, which I did receive late last week also along with some amended -- some amendments by debtor's counsel which appears to change the request from the earlier hearing.

An amended plan was filed late last week in addition to amended Schedules BVJ, an amended means test, and I will

tell you that while I did make the determination to read through the brief, I have not made a full review of the plans and schedules and amended means test to report to the Court today, so what I will say is that the amended plan still treats Bank of America as a claim. Bank of America is still listed as a claim on Schedule D, is still asking that the lien be stripped and is also -- because this was -- this was also the case in the first plan -- is still asking that Bank of America's claim be treated as a Class 8 general unsecured claim, which was also the language in their original plan but was different than what was argued on the record at the last time. I assume from the filing of this now amended plan that they are conceding that point and asserting that they do not -- they are not wishing to treat Bank of America as though no plan exists, and they do not need to be treated for the purposes of an unsecured claim in this matter, but I guess I would have the debtor clarify that for me because it wasn't clear to me.

The second part of this is part of the issue was feasibility, was the plan -- whether or not there'd been appropriate notice given to Bank of America that they were -- that their claim is not being treated at all. They were not even being offered Class 8 treatment pursuant to the plan. Now we have -- with this amended plan -- and they are still offering that -- that's not an issue any longer. Apparently

they do plan to have that secured claim that's currently on file and has not been objected to treated as an unsecured claim.

They did not respond to the adversary that was filed in this matter, and after the time of the last hearing, based upon the fact that I didn't think there was sufficient notice in the plan, I actually tried to contact somebody from Bank of America based upon the claim that was filed. They didn't appear to be represented by counsel. It was someone in-house, and our office did contact whoever the person was on the proof of claim that had signed it just to advise them of what had happened at the hearing; that this was -- that we were going forward on this issue. And at the time, they indicated that they would refer it to legal; that someone would be filing an appearance. However, to date, I've not seen that that has occurred, and I don't believe that the creditor present here is representing the second claim of Bank of America. Is that correct, before I go any further, or not --

MS. DAVIS: That is correct. I'm the first lien.

MS. CARROLL: -- in my recitations? So on that basis, it would appear that while I think I have authority for -- I think I've set forth authority in the brief that we filed with the Court that a lien strip is not appropriate in a case where a discharge is not going to be granted by the

debtor based upon previous discharges that the debtor has received. Bank of America appears to be really tacitly agreeing to this treatment by their failure to appear in these proceedings or respond, so I'm prefacing my remarks with that. I would have the debtor set forth -- or debtor's counsel really set forth that I am interpreting the plan that they filed correctly and what their argument is and what changes have been made to their argument at this point before we address any of the legal issues or if your Honor would have us address further legal issues at this time.

MS. TSE: Good afternoon, your Honor. Katherine Tse for Richard Nahabedian on behalf of the debtors.

MR. ROOKARD: And Brian Rookard from the Financial Law Group appearing on behalf of the debtors as well. Your Honor, I was brought in -- I came into the case afterwards, after I had -- Ms. Tse is a friend of mine, and she had called me and told me the issue, and I said, "Hey, I'm doing a brief on this, and I can help you out, I think," and so what I did was I actually prepared the brief in this, and the debtors have agreed to ask me to represent them during this proceeding.

THE COURT: And good briefs from both sides. Thank you.

MR. ROOKARD: Okay.

THE COURT: Thank you.

MR. ROOKARD: No problem, your Honor. Appreciate that. Your Honor, I want to address the legal issue because that's primarily --

THE COURT: No. I don't want you to address the legal issue. I want you to answer the question that Ms. Carroll raised.

MR. ROOKARD: Oh, all right. As far as what we're actually intending in the plan? Okay.

THE COURT: Right.

MR. ROOKARD: It's just like any other regular Chapter 13 lien strip, your Honor. As is well known, Johnson versus Home State Bank says even where a debt has been discharged --

THE COURT: Please just answer my question.

MR. ROOKARD: It's going to be treated as an unsecured claim, your Honor. There is --

THE COURT: So what's the amount of the claim?

MR. ROOKARD: About 84,000, I think it was.

THE COURT: And you're going to pay six percent of that?

MR. ROOKARD: Six percent, your Honor. That's correct.

THE COURT: Does that answer your question, Ms. Carroll?

MS. CARROLL: Yes, your Honor.

MS. DAVIS: Good afternoon, your Honor. Laura Davis on behalf of Mortgage Electronic Registration Systems. Your Honor, we are the first lien in this matter, and we're standing before you today -- in the event that there is an adjournment, I would request adequate protection payments going forward.

MR. ROOKARD: And we indicated that we were not opposed to that.

THE COURT: All right. The Court concludes as a matter of law that a discharge is not a necessary prerequisite to a lien strip. In so concluding, the Court relies primarily on the Sixth Circuit's decision in Lane, which outlined the structural mechanism for lien strip, and it appears to the Court that there's nothing about that mechanism that invokes or involves the discharge whatsoever.

Now, having said that, I want to ask you again to clarify for the record --

MR. ROOKARD: Um-hmm.

THE COURT: -- is it the debtor's intent that the lien strip will be effective upon plan completion or upon plan confirmation?

MR. ROOKARD: That's a good question, your Honor.

THE COURT: I just want an answer.

MR. ROOKARD: Well, technically, the --

THE COURT: Please, just an answer.

MR. ROOKARD: The plan --

THE COURT: What is the debtor's position?

MR. ROOKARD: The debtor's position is the plan states that lien strip is effective upon confirmation, and that's in line with Section 1327(c). That's the model plan. The model plan says that itself, that the property vests free and clear in the debtor at the time of confirmation.

You know, we're also willing to -- and I don't have a problem with this necessarily -- that the property vests free and clear at the time of plan completion as well. I would point out to the Court that actually the Central District of California actually required --

THE COURT: I was just asking you your position.

MR. ROOKARD: Oh, okay. That's my position.

THE COURT: The Court cannot and will not construe the Bankruptcy Code to permit the debtor to have a lien strip upon confirmation because it would be grossly inequitable to do so. If the debtor dismisses the case a week after confirmation, it would be intolerable to have a lien strip take effect, and that's true despite Section 1348 and 1349 --

MR. ROOKARD: Um-hmm.

THE COURT: -- because, frankly, those Code provisions are ambiguous about whether this lien avoidance is itself then avoided upon dismissal or conversion. So I want the order confirming plan -- to the extent the plan doesn't

specifically provide for it, the order confirming plan to specifically state that the lien strip is effective upon plan completion.

MR. ROOKARD: Okay.

MS. CARROLL: That's fine, your Honor. And I would also say that the judgment that was entered in the adversary also states that it is upon the completion of the plan, that --

THE COURT: All right. So then there's --

MS. CARROLL: -- that would be effectuated, so that would all then be --

THE COURT: There's law of the case there as well. All right. Now, Ms. Carroll, do you want time -- is that what you're requesting -- to review the --

MS. CARROLL: I am, your Honor.

THE COURT: -- second amended plan?

MS. CARROLL: I am, your Honor, and also the means test and just to verify that -- otherwise I think that upon review of those additional documents that were filed, that this -- that this case is probably in a condition that we could resolve it prior to the next hearing, but I'm not ready to say that I'm -- or that we can agree to that today.

THE COURT: All right. Is September 23rd enough time?

MS. CARROLL: I believe so, your Honor, and if

creditor's counsel would be -- would go ahead and submit a proposed order and we can review the amount, I'm not opposed to the request for adequate protection.

THE COURT: For adequate protection. Is that all right?

MR. ROOKARD: That sounds fine by me.

THE COURT: All right. Again, counsel, thank you for your excellent briefs.

MR. ROOKARD: Thank you very much.

MS. CARROLL: Thank you, your Honor.

(Proceedings concluded at 2:21 p.m.)

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WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett — March 4, 2010

Lois Garrett

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	Chapter 13
KRISTEN NICOLE FRAME,	BKY. 09-41010
Debtor.	

ORDER DENYING DEBTOR'S MOTION TO RECLASSIFY THE SECOND-PRIORITY MORTGAGE ON DEBTOR'S HOME AND TO AVOID THE RESULTING LIEN

At Minneapolis, Minnesota, September 23, 2009.

This matter came before the court on the motion by Debtor Kristen Frame for an order valuing property of the estate, reclassifying the claim of First Franklin Financial Corp. as an unsecured claim, and avoiding its lien pursuant to 11 U.S.C. § 506(d). Pursuant to a stipulation of the parties, the court took the matter under advisement without oral argument.

STIPULATED FACTS

Mortgage Electronic Registration Systems, Inc. ("MERS") has a security interest in Debtor's principal residence in the form of a second-priority mortgage.[1] MERS asserts a pre-petition junior secured claim of $77,357.31. On behalf of the owner and holder of the first mortgage, Bank of America, N.A. as Trustee (and successor by merger to LaSalle Bank, N.A., Trustee) asserts a pre-petition secured claim of $291,356.62. The parties stipulate that the fair market value of the property is not greater than $291,356.62.

CONCLUSIONS OF LAW

[1]MERS is a nominee for First Franklin Financial Corporation to whom the loan was executed. The loan is serviced by Home Loan Services, Inc.

Based upon the stipulated facts, Debtor contends that since the second mortgage is not supported by any value in excess of the first mortgage, the second mortgage is wholly unsecured allowing Debtor to modify MERS's rights in her chapter 13 plan. This issue is the same addressed by the court in In re Hussman, 133 B.R. 490 (Bankr. D. Minn. 1991), and later by the court in In re Hughes, 402 B.R. 325 (Bankr. D. Minn 2009), "whether the debtors may use § 506(a) to modify the rights of holders of a claim secured only by a security interest in real property that is the debtors' homestead without violating § 1322(b)(2)." Hussman, 133 B.R. at 491; see also Hughes, 402 B.R. at 326 ("The core issue here is whether a debtor may essentially strip the lien of a valid mortgage holder, whose debt is secured only by a lien on the debtor's homestead, because there is no equity in the property covering the lien.").

Section 1322(b)(2) provides that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." 11 U.S.C. § 1322(b)(2).

In Hughes, the court, in granting relief from the automatic stay to TCF Bank, noted that the debtor's proposed Chapter 13 plan did not provide "any payment to TCF other than as part of a distribution to general unsecured creditors which held a perfected second mortgage in the debtor's principal residence which was not supported by equity in the property." Hughes, 403 B.R. at 326. Similarly to the issue at hand, the debtor in Hughes attempted to treat TCF's claim as unsecured, as her valuation of the property indicated there was not even sufficient collateral coverage for the holder of the first mortgage. In rejecting this argument, the court stated that "[t]he prevailing law in this jurisdiction is unequivocal" and "[m]oreover, the Supreme Court

thoroughly examined this issue and determined that 'Section 1322(b)(2) prohibits [a § 506(a)] modification where ... the lender's claim is secured only by a lien on the debtor's principal residence.'" Id. (quoting Nobelman v. Am. Sav. Bank, 508 U.S. 324, 329-32 (1993)).

In discussing strategies like Frame's, the court in Hussman, a case pre-dating Nobleman, reasoned that,

> [d]etermination of the secured claim under § 506(a) is irrelevant to § 1322(b)(2). Section 1322(b)(2) deals with modifying the rights of *holders* of certain claims. Section 1322(b)(2) protects creditors whose claims are secured by a security interest in real property that is the debtor's principal residence. This language does not limit the protection to a secured claim secured only by a security interest in such real property. Debtors need only look to the holder of the claim to determine if they may modify that claim. [...] The holders of claims secured by an interest in real property which is the debtors' principal residence can be modified only to the extent that defaults may be cured within a reasonable time. 11 U.S.C. § 1322(b)(5).

Hussman, 133 B.R. at 492-93 (emphasis added). I acknowledge that other courts have disagreed with this interpretation, holding that the rights of holders of perfected second mortgages insufficiently covered by collateral may be modified. *See*, In re Pond, 252 F.3d 122, 126 (2d Cir. 2001) ("We therefore join the Third, Fifth, and Eleventh Circuits, as well as the Bankruptcy Appellate Panels of the First and Ninth Circuits, in holding that a wholly unsecured claim, as defined under Section 506(a), is not protected under the antimodification exception of Section 1322(b)(2)." (citing McDonald v. Master Fin., Inc. (In re McDonald), 205 F.3d 606, 610 nn. 2-3 (3d Cir. 2000)), *cert. denied*, 531 U.S. 822 (2000); Domestic Bank v. Mann (In re Mann), 249 B.R. 831, 834 n.6, 835 n.8, 836 n.9 (B.A.P. 1st Cir. 2000) (collecting treatises and cases); Bartee v. Tara Colony Homeowners Ass'n (In re Bartee), 212 F.3d 277 (5th Cir. 2000); Tanner v. FirstPlus Fin., Inc. (In re Tanner), 217 F.3d 1357 (11th Cir. 2000); Lam v. Investors Thrift (In re

Lam), 211 B.R. 36 (B.A.P. 9th Cir. 1997), appeal dismissed on other grounds, 192 F.3d 1309 (9th Cir. 1999).

I understand the concerns raised by Pond and the cases cited therein. The claim discussed in Nobelman was supported by value and not, as was the case in Hussman, entirely unsupported by any additional value in the residence above the amount of the first mortgage. Congress, however, with the amendment of § 1322(c) to the Code, partially overruled Nobelman, at least to the extent that it allowed for the modification of short-term and balloon mortgages. *See discussion in* In re Paschen, 296 F.3d 1203 (11th Cir. 2002); *see also*, 11 U.S.C. § 1322(c) and the historical and statutory notes to § 1322. Congress failed to address the problem raised by Hussman. Congress is presumed to be aware of existing case law pertinent to the legislation it enacts and could have resolved the issue when it amended § 1322(c), but did not. *See, e.g.*, Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988). It should also be noted that Judge Kressel reiterated his conclusion in Hussman six years later in Mattson when considering the impact of the amendment to § 1322(c). In re Mattson, 210 B.R. 157, 158 (Bankr. D. Minn. 1997) ("A creditor with a mortgage is secured by the underlying property even if, for bankruptcy purposes, it has no allowed secured claim and therefore is entitled to the protection afforded home mortgages by 11 U.S.C. § 1322(b).").

I agree with the Hussman and Hughes analysis. As noted in Nobelman, a valuation under § 506(a) that establishes insufficient collateral to support the claim "does not necessarily mean that the 'rights' the bank enjoys as a mortgagee, which are protected by § 1322(b)(2), are limited by the valuation of its secured claim." Nobelman v. Am. Sav. Bank, 508 U.S. at 329. While Debtor is free to seek a valuation under § 506(a), no finding of negative equity will allow Debtor

to modify MERS's rights under its claim secured only by a security interest in Debtor's principal residence.

As a result, Debtor's motion seeking an order valuing property of the estate, reclassifying MERS's claim as unsecured pending the results of valuation, and avoiding the lien shall be denied. It must also follow that Debtor's plan, which assumes the right to modify MERS's claim, cannot be confirmed.

IT IS ORDERED:

1. Debtor's motion for an order valuing property of the estate, reclassifying the claim of MERS, and avoiding its lien, and objecting to the claim is DENIED.

2. Confirmation of Debtor's plan dated July 8, 2009 is DENIED.

/e/ Nancy C. Dreher

Nancy C. Dreher
Chief United States Bankruptcy Judge

NOTICE OF ELECTRONIC ENTRY AND FILING ORDER OR JUDGMENT
Filed and Docket Entry made on *09/23/2009*
Lori Vosejpka, Clerk, by KN