UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

IN RE: DAVID MARK POOLE & MARY LOUISE POOLE FIRST NATIONAL BANK OF MIDDLE TENNESSEE	)	
Appellant,	)	Case No. 4:17-cv-8 Bankruptcy Case No: 4:16-bk-12638
v. DAVID MARK POOLE & MARY LOUISE POOLE,	)	Judge Mattice Magistrate Judge Steger
Appellees.	)	

ORDER

Appellant First National Bank of Middle Tennessee ("FNB") appeals two orders of the Bankruptcy Court pursuant to 28 U.S.C. § 158(a). The first order issued on January 30, 2017, and overrules FNB's Objection to Confirmation of the Debtors' Chapter 13 Bankruptcy Plan. (Docs. 5-4, 5-5, 5-6). The second order issued on May 2, 2017, and confirms the Debtors' Chapter 13 Bankruptcy Plan, including those portions objected to by FNB. (Doc. 57 in E.D. Tenn. Bankruptcy Case No. 4:16-bk-12638). For the reasons stated herein, the Court concludes that the Bankruptcy Court did not err and its rulings will be **AFFIRMED**.

I. STANDARD OF REVIEW

In an appeal from a bankruptcy court, the Court must uphold the findings of fact made by the bankruptcy court unless such findings are clearly erroneous. *In re Gardner*, 360 F.3d 551, 557 (6th Cir. 2004); Fed. R. Bankr. P. 8013. The Court reviews *de novo* the bankruptcy court's conclusions of law. *Gardner*, 360 F.3d at 557; Fed. R. Bankr. P. 8013.

The Court has the authority to affirm, modify, or reverse a judgment or order of the bankruptcy court and may remand the case to the bankruptcy court for further proceedings. Fed. R. Bankr. P. 8013.

II. PROCEDURAL HISTORY

The Bankruptcy Court's order overruling FNB's objection outlined the relevant facts of this case and the legal questions at issue. Neither party objects to the Bankruptcy Court's recitation of the underlying facts or issues, and thus, for ease of reference, the Court will recount them here:

> Debtors own real property, commonly known as 104 Henegar Street, McMinnville, TN 37110, which is their principal residence. (See Doc. no. 37, Reply of First National Bank in Support of its Objection to Confirmation of the Debtors' Plan 1.) Solely for the purposes of the court's consideration of this objection, the parties have stipulated that the value of the property is less than $44,000.
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> FNB made three loans to the Debtors. At the time of the chapter 13 filing, FNB filed a proof of claim for a total debt of $57,796.14. (Proof of Claim 2) Based on FNB's proof of claim filed in the case, the three loans are more specifically described as follows:
>
> (a) loan number 7623 ("Note One") is evidenced by promissory note dated April 26, 2005, in the original principal amount of $61, 232.08. It was secured by a Deed of Trust on the Debtors residence in Warren County, Tennessee. The Deed of Trust was recorded on April 29, 2005, in Book 126, Page 649-653 in the Office of the Register of Warren County, Tennessee. On June 19, 2015, the Debtors executed a Change in Terms Agreement related to Note One which reflected the current principal amount to be $43,535.97 . . . .
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> (b) loan number 1002 ("Note Two") is evidenced by a promissory note dated June 19, 2015, in the original principal amount of $5,723.80 . . . . It has a balance of $6,243.05. (Proof of Claim 2, Ex. B.) The note states that the loan is secured by the collateral described "in the security instrument listed herein: a Mortgage or Deed of Trust to a trustee in favor of Lender on real property located in Warren County, State of Tennessee." (Proof of Claim 2, Ex. B.) . . .
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> (c) loan number 1054 ("Note Three") is evidenced by promissory note dated June 19, 2015, in the original principal amount of $6,431.56 . . . . It has a

balance of $6,801.17. Note Three states that the loan is secured "by the collateral described in the security instrument listed herein: a Mortgage or Deed of Trust to a trustee in favor of Lender on real property located in Warren County, State of Tennessee." (Proof of Claim 2, Ex. B.) . . .

The Deed of Trust reflects that it is given to secure certain obligations. It refers specifically to the obligation due under Note One under the heading "Present Indebtedness." It also states under a heading "Open-End Mortgage Clause" that:

In addition to the above-described indebtedness, this Deed of Trust shall and does by these presents, secure: (1) any and all existing indebtedness or other obligations of the Borrowers, or either of them, now held by Lender, and all extensions and renewals thereof regardless of amount or maturity included the above described indebtedness, and (2) any and all future indebtedness or other obligations regardless of amount or maturity which may hereafter be created by the Borrowers, or either of them, and be held by Lender, together with any and all extensions and renewals thereof regardless of amount or maturity, with a period of twenty (20) years from date up to an amount not exceeding $61,232.08, whether said indebtedness or other obligation is evidenced by note or notes, draft, check, guaranty or otherwise. (Proof of Claim 2, Ex. C.)

In the event of a default, the Deed of Trust authorizes the trustee to sell the property and creates a priority scheme for the application of the proceeds to the debtor, calling for the payment of expenses and the trustee first, then to the debt described as the "Present Indebtedness," and then to all other debts including those obligations referred to under the "Open End Mortgage Clause." There is no priority assigned to the other obligations referred to under the "Open End Mortgage Clause. (Proof of Claim 2, Ex. C.)

The Modification and Extension Agreement to the Deed of Trust executed on June 19, 2015, provided that the Debtors acknowledge that the amount that they were loaned was $61,282.08 on April 26, 2005 and that the debt was secured by the same Deed of Trust discussed above. The Modification extended the statute of limitations for enforcement of the Deed of Trust by ten years and changed the description of the "Present Indebtedness" to the balance owed on Note One at time of the execution of Change in Terms Agreement. It also extended the period for including future indebtedness in the paragraph under the heading Open End Mortgage. No other provision of the Deed of Trust was modified. (Proof of Claim 2, Ex. D.)

On June 24, 2016, the Debtors filed a chapter 13 bankruptcy case. (Doc. no. 1.) The Debtors' chapter 13 plan proposes to pay $800 a month for 48 months plus any federal tax refunds received by the Debtors after confirmation less all applicable tax credits. (Doc. No. 2.) The applicable

> commitment period for these Debtors is 36 months. The plan apparently exceeds 36 months because the Debtors do not have sufficient income to cure the arrearage within that period of time. Under the heading "Long-Term Mortgages" the Debtors are proposing a $80 a month payment toward FNB's arrearage of $3800.00 and a maintenance payment of $516.00 through the plan for Note One. (Doc. no. 2.) The plan provides for pro rata treatment of unsecured creditors. The plan treats Notes Two and Three as unsecured debts. (*Id.*) Over the course of the plan there is approximately $9600 available for administrative creditors, priority and unsecured creditors. There Debtors' attorney is seeking an additional $2000 of the $9600. Based on the claims filed in the case, the remaining $7600 will not pay all the creditors in full, including the claims of FNB for Notes Two and Three. FNB asserts Notes Two and Three are secured by the Deed of Trust on the Debtors' residence and may not be modified under 11 U.S.C. § 1322(b)(2).

(Doc. 5-5 at 2-5).

As stated by the Bankruptcy Court, the central issue in this case is whether FNB holds one lien, as opposed to three, on the Debtors' residence. The answer to this question determines whether Notes Two and Three are protected from bifurcation by the Debtors' Chapter 13 plan pursuant to 11 U.S.C § 1322(b)(2). (*Id.* at 5).[1]

The Bankruptcy Court ultimately decided that the three loans are separate liens, and therefore, separate claims. (*Id.* at 5-6). In making this decision, the Bankruptcy Court relied on basic definitions and principles contained in the Bankruptcy Code. (*Id.* at 5). The Court further found that Notes Two and Three are unsecured claims pursuant to 11 U.S.C. 506(a)(1),[2] as the value of the Debtors' home did not exceed the amount loaned in

[1] As will be explained more fully below, Section 1322(b)(2) specifies that a Chapter 13 debtor may not propose a plan modifying a creditor's claim "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2).

[2] Section 506(a)(1) provides, in pertinent part:

> 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.

Note One. (*Id.* at 6). On this basis, the Bankruptcy Court concluded that Notes Two and Three are modifiable claims and do not qualify for the protection provided by § 1322(b)(2), as provided in the Debtors' Chapter 13 plan. (*Id.*).

Importantly, the Bankruptcy Court discussed at length FNB's argument that it has a single, unmodifiable claim as to the Debtors' residence because only a single mortgage document exists. (*Id.* at 6-9). After considerable analysis, the Bankruptcy Court found that the number of debt obligations, rather than the number of mortgage instruments, controlled the issue. (*Id.*). The Court will include further discussion of the Bankruptcy Court's order, as is necessary, in its analysis below.

FNB filed the instant appeal on February 12, 2017, and submitted its Appellant's Brief on September 23, 2017. (Docs. 1 & 8). In its brief, FNB challenges the Bankruptcy Court's decision on several different fronts. It first argues that the Bankruptcy Court should have looked to Tennessee state law in deciding the number of liens on the Debtors' residence instead of federal bankruptcy law. (Doc. 8 at 10-15). Next, FNB asserts that the Bankruptcy Court ignored the "independent status" of the mortgage instrument, which constitutes a single secured "claim," and improperly focused on the number of payment obligations. (*Id.* at 15-18). Finally, FNB contends that the Bankruptcy Court misapplied the rule of law set forth in the United States Supreme Court decision *Nobelman v. American Savings Bank*, 508 U.S. 322 (1993). (Doc. 8 at 19-21).

Although the Court provided the Debtors/Appellees with no fewer than five extensions of time in which to file their brief, they have made no substantive submission to date. (Docs. 10, 12, 14, 16, 20). On February 10, 2018, FNB filed its Motion (Doc. 21)

11 U.S.C. § 506(a)(1).

requesting that the Court consider the merits of the appeal without the benefit of a response from the Appellees. FNB requests no other sanction.

Several courts have held that when a bankruptcy appellee fails to file a brief in federal district court, the only consequence is that the appellee will not be allowed to participate in oral argument in the event such a hearing is necessary. *See, e.g., Shafer Redi-Mix, Inc. v. Craft*, 414 B.R. 165, 170 n.1 (W.D. Mich. 2009); *Silk Plants, Etc. v. Franchise Systems, Inc. v. Register*, 100 B.R. 360, 363 (M.D. Tenn. 1989) (holding that Bankruptcy Rule 8009(a), which sets forth the briefing schedule on appeal, does not specify any consequence for an appellee's failure to file its brief and that, at most, appellees are merely barred from oral arguments). An appellee's failure to file a brief does not result in an automatic reversal of the bankruptcy court, but the Court may consider the merits of an appeal without an appellee's participation. *Id.*

Because the Court finds that a hearing is unnecessary in this case, it appears that the only sanction Appellees will receive is consideration of FNB's appeal without their input. Accordingly, FNB's Motion (Doc. 21) is **GRANTED**, and the Court will review the appeal relying only on FNB's brief (Doc. 8) and its own analysis of the record and applicable law.

III. ANALYIS

a. Whether the Bankruptcy Court Should Have Relied on Tennessee Law

As referenced above, the Bankruptcy Court commenced its analysis of how many liens FNB had against the Debtors' residence by relying on the basic definitions of "lien" and "security interest" as provided by the Bankruptcy Code. (Doc. 5-5 at 5). The Bankruptcy Court also looked to precedent originating from federal courts, including the

United States Court of Appeals for the Sixth Circuit. (*Id*. at 5-9). FNB now argues that the Bankruptcy Court erred in this regard, and that the number of liens on the Debtors' residence should have been decided pursuant to Tennessee state law.

FNB did not make this argument to the Bankruptcy Court in its initial objection or subsequent briefing. (Doc. 5-4; E. D. Tenn. Bankruptcy Case No. 4:16-bk-12638 Docs. 29 & 37). Rather, FNB advanced arguments based exclusively on federal law, relying upon portions of the bankruptcy code and opinions issued by federal courts. (*Id.*).[3] "Arguments not raised before the bankruptcy court are waived on appeal." *In re Schwartz*, 2014 WL 1028960, at *13 (E.D. Mich. March 14, 2014) (citing *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir.2008); *Bonner v. Sicherman (In re Bonner)*, 330 B.R. 880, at *5 (B.A.P. 6th Cir.2005) (unpublished)). Because FNB failed to present this particular objection before the Bankruptcy Court, the Court declines to address the issue here.

The Court notes that there are exceptions to the general rule that appellate courts shall decline to consider arguments not raised below. *See In re White Motor Corp.*, 731 F.2d 372, 375 (6th Cir. 1984) ("There is an exception to the rule when a pure question of law is involved and a refusal to consider the issue would result in a miscarriage of justice.") (citations omitted); *United States v. Hayes*, 218 F.3d 615, 619-20 (6th Cir. 2000) ("Ordinarily, courts of appeals do not consider claims or arguments that were not raised in the district court. But this is a prudential rule, not a jurisdictional one."). However, FNB offers no justification for its failure to include this argument in its submissions to

[3] FNB briefly cited language from the Supreme Court's decision in *Nobelman* in its Reply stating that a creditor's rights "are reflected in the relevant mortgage instruments, which are enforceable under Texas law." (E.D. Tenn. Bankruptcy Case No. 4:16-bk-12638 Doc. 37 at 5); *Nobelman*, 508 U.S. at 329. "Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *United States v. Layne*, 192 F.3d 556, 566 (6th Cir. 1999). This brief quote is the only mention of state law in FNB's submissions to the Bankruptcy Court. FNB included no further discussion of this portion of *Nobelman* in its Reply and did not attempt to development any argument whatsoever, perfunctory or otherwise.

the Bankruptcy Court. Moreover, FNB does not argue that its objection falls under any available exception to the general rule that issues not raised below are waived on appeal. Accordingly, the Court will not entertain these arguments at the current juncture.

b. Whether the Deed of Trust Constitutes a Single "Claim"

FNB next challenges the Bankruptcy Court's finding that the multiple loans constituted multiple claims, some of which are unsecured, despite the fact that there is only one mortgage instrument. Specifically, the Bankruptcy Court held in this regard:

> The issue in this case turns on whether FNB holds one or three liens on the Debtors' principal residence. The definitions of the terms used in the relevant code sections are important to the analysis of this question. The Bankruptcy Code defines lien as a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101 (37). A "security interest" means a "lien created by an agreement." *Id*. at (51). The right to payment of the debt or the right to performance of the obligation secured by the lien is the "claim." *Id*. at (5). In this case there are three notes, each of which creates an obligation for the Debtors to pay FNB specific amounts. Note One is accompanied by a security agreement in the form of the Deed of Trust which grants a security interest in the residence and thereby creates a charge against the property for the amount of that mortgage loan.
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> Notes Two and Three were executed separately for additional amounts and each contains an acknowledgment that the note is secured by the residence described in the Deed of Trust. The Deed of Trust contains a provision under the Open End Mortgage heading that a future indebtedness will also be secured by the residence. Each time the debtors created an obligation to FNB a claim arose; and because of the future indebtedness clause in the Deed of Trust, an additional right to charge the property to secure the payment of the additional debt arose. This reasoning leads the court to conclude that there are three liens.
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> Having determined that there are three claims and three liens, the court must next determine whether those claims are secured or unsecured. The Bankruptcy Code states that
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> "an allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."

> 11 U.S.C. § 506(a)(1). Chapter 13 provides that a chapter 13 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." 11 U.S.C. § 1322(b)(2). These two sections operate in tandem. In order for a creditor holding a security interest against real property that is the debtor's principal residence to be protected under § 1322(b)(2), the creditor must hold a secured claim as defined in § 506(a)(1). In order for a creditor to hold a secured claim, the property of the estate that serves as that claim's collateral must have enough worth to give the creditor's security interest some economic value. *Lane v. W. Interstate Bancorp (in Re Lane)*, 280 F.3d 663, 664 (6th Cir. 2002). For purposes of this hearing, the parties have agreed that the property's value does not exceed the amount owed on Note One. Therefore, Notes Two and Three are unsecured.

(Doc. 5-5 at 5-6).

FNB argues that the Bankruptcy Court's reasoning on this issue is improper because it "runs counter to mandatory authorities controlling the definitions of 'lien' and 'claim,'" and "fail[s] to recognize the independent status of the deed of trust itself as constituting a secured 'claim' against the Debtors." (Doc. 8 at 16). Said another way, FNB insists that the underlying mortgage instrument is the "source" of the debt obligation, and thus, it constitutes a single claim, no matter the number of subsequent loans. In support of its argument, FNB first points to *Johnson v. Home State Bank*, 501 U.S. U.S. 78 (1991).

In *Johnson*, the Supreme Court held that mortgage lien was a "claim" for purposes of a Chapter 13 bankruptcy even where the debtor's personal liability was discharged pursuant to a previous Chapter 7 bankruptcy. In its reasoning, the Court outlined the definition of "claim" pursuant to 11 U.S.C. § 101(5),[4] and stated that "Congress intended .

[4] According to § 101(5), the word "claim" when used in the Bankruptcy Code means:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

. . to adopt the broadest possible definition of 'claim.'" *Id.* at 83 (internal citations omitted). According to the Court, any "right to payment" comprises an "enforceable obligation" under the Bankruptcy Code. *Id.* Applying these rules to facts presented in *Johnson*, the Court reasoned: "[A prior] bankruptcy discharge extinguishes only one mode of enforcing a claim – namely, an action against the debtor *in personam* – while leaving intact another – namely, an action against the debtor *in rem*." *Id.* at 84.

FNB also cites a similar case from the Sixth Circuit, *In re Glance,* 487 F.3d 317 (6th Cir. 2007). In *Glance*, the Sixth Circuit held that a debtor owed "secured debts" within the meaning of the Bankruptcy Code based solely upon the existence of mortgage instruments. Specifically, the debtor in *Glance*, prior to filing for bankruptcy, signed the security instruments on a property but not the promissory notes extending the loans. *Id.* at 319-322. The court nonetheless found that the creditor had a claim, reasoning:

> *Johnson* controls us here. If, as *Johnson* concludes, a lien is a "claim against the debtor," then it follows, under the Code's equivalent treatment of the terms, that a lien is a "debt" owed by the debtor . . . . Much like the individual in *Johnson*, Glance does not have personal liability on the promissory notes but he continues to have *in rem* liability on the liens. Nor need the debtor be personally liable on a claim for it to be valid; the Code provides that a "claim against the debtor" "includes [a] claim against property of the debtor." 11 U.S.C. § 102(2); *see Johnson*, 501 U.S. at 85[.]

Id. at 321.

According to FNB, *Johnson* and *Glance* stand for the proposition that a security instrument is a "secured claim" for purposes of bifurcation under presumably any circumstance. (Doc. 8 at 17-18). The Court finds flaw in this argument in several respects. First, FNB's argument fixates too intensely on the broad definition of a "claim" under the Bankruptcy Code. Indeed, no one disputes that FNB possesses viable "claims" against the

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11 U.S.C. § 101(5)(A)-(B).

Debtors, but that is a separate question from whether it has a secured claim protected from bifurcation under 11 U.S.C. § 1322(b)(2). Moreover, the Bankruptcy Court in this case outlined and applied the same definition of "claim" provided by 11 U.S.C. § 101(5) as the courts in *Johnson* and *Glance*. (Doc. 5-5 at 5). The Court finds no error in this respect.

In addition, the Bankruptcy Court addressed this very argument in its decision overruling FNB's objection, discussing *Johnson* at length and finding that the case actually supported the opposite conclusion:

> The Supreme Court [in *Johnson*] announced that "a mortgage interest that survives the discharge of a debtor's personal liability is a 'claim' within the terms of § 101(5)" when the debtor files a subsequent chapter 13. *Id.* at 84. This would seem to indicate that a mortgage instrument can meet the definition of claim in the Bankruptcy Code; however, the Court continued in its analysis, stating that "a [prior] bankruptcy discharge extinguishes only **one mode of enforcing a claim** – namely, an action against the debtor *in personam* – while leaving intact another – namely, an action against the debtor *in rem*." *Id.* (emphasis added). This reasoning associates the claim not with the mortgage instrument itself but with the underlining debt obligation. The mortgage was a claim not because the mortgage instrument met the definition of claim but because it provided a means for a creditor to enforce the debt obligation that continued to exist in an amount up to the value of the property of the debtor. The actual right to payment arose from the original note.

(Doc. 5-5 at 8-9) (emphasis in original). The Court's *de novo* review of this issue does not yield a different result. The Supreme Court's decision in *Johnson* clearly indicates that the controlling fact was the debtor's payment obligation, not the mortgage instrument itself. The same is true for the Sixth Circuit's decision in *Glance*, which relied upon identical reasoning. In this case, there are three separate payment obligations, albeit all secured by a single mortgage instrument. Accordingly, although this issue perhaps presents a novel question of law, the Court agrees with the Bankruptcy Court that a new "claim" arose with each payment obligation.

Finally, and although this is a minor note, the Court takes notice that neither *Johnson* nor *Glance* considered whether the claim at issue was protected from bifurcation under § 1322(b)(2)—those Courts were merely deciding whether a claim existed at all. Thus, even if the Court were to find fault in the Bankruptcy's reasoning, FNB's reliance on these authorities would not necessarily compel a different result. Accordingly, for the reasons outlined above, the Court finds that the Bankruptcy Court did not err in this regard.

c. Whether the Bankruptcy Court Misapplied the United States Supreme Court's Decision in *Nobelman*

FNB's final objection is a challenge to the Bankruptcy Court's interpretation and application of *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993). In *Nobelman*, the Supreme Court held that a debtor may not bifurcate a claim secured by a lien on his principal residence into secured and unsecured portions. *Id.* at 328-30. The debtor in *Nobelman* had one promissory note secured by a lien established by a single mortgage document—the value of the debtor's property, however, was considerably less than the amount of the loan. *Id.* at 326. In his Chapter 13 bankruptcy plan, the debtor sought to divide the obligations into secured and unsecured portions. *Id.* The Supreme Court ultimately refused, reasoning that because the single promissory note was secured, at least in part, by the value of property, the claim was protected by the provisions of 11 U.S.C. § 1322(b)(2). *Id.* at 328-30.

In its decision, the Bankruptcy Court reasoned that *Nobelman* did not foreclose a conclusion that only one lien existed. First, the Bankruptcy Court distinguished *Nobleman* from the instant case on a factual basis: In *Nobelman*, the debtor had executed one note secured by a lien created by one mortgage instrument, while in this case, the

Debtors have multiple notes with the same creditor, secured by liens all contained in a single deed of trust. (Doc. 5-5 at 7). This factual distinction casts doubt on FNB's insistence that *Nobelman* requires a finding in its favor.

In addition, the Bankruptcy Court relied on language contained later in the *Nobleman* opinion indicating that the single promissory note was a definitive factor in the Supreme Court's decision. Specifically, the Supreme Court held:

> Petitioners propose to reduce the outstanding mortgage principal to the fair market value of the collateral, and, at the same time, they insist that they can do so without modifying the bank's rights "as to interest rates, payment amounts, and [other] contract terms." That appears to be impossible. **The bank's contractual rights are contained in a unitary note that applies at once to the bank's overall claim, including both the secured and unsecured components. Petitioners cannot modify the payment and interest terms for the unsecured component, as they propose to do, without also modifying the terms of the secured component.** Thus, to preserve the interest rate and the amount of each monthly payment specified in the note after having reduced the principal to $23,500, the plan would also have to reduce the term of the note dramatically. That would be a significant modification of a contractual right.

Id. at 331 (internal citations omitted) (emphasis added). Based on this language, the Bankruptcy Court reasoned:

> While not explicit, the highlighted sentences seem to indicate that the Supreme Court might have gone the other way had the bank's contractual rights been contained in multiple notes, because it would have then been possible to modify the terms of the unsecured note without affecting the secured note. The court is convinced that this is the case and that the natural conclusion to this line of reasoning is that it is the payment obligation and not the security instrument that defines the claim.

(Doc. 5-5 at 8).

FNB argues that the Bankruptcy Court relied too heavily on the "unitary note" language in *Nobelman*. FNB contends that the controlling language in *Nobelman* is the

Supreme Court's emphasis on the importance of preserving a creditor's bargained-for contractual rights. Earlier in the *Nobelman* decision, the Supreme Court stressed that:

> The [creditor's] "rights" . . . are reflected in the relevant mortgage instruments, which are enforceable under Texas law. They 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 [debtors'] residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure . . . . These are rights that were "bargained for by the mortgagor and the mortgagee" . . . and are rights protected from modification by § 13322(b)(2).

Id. at 329-30. According to FNB, the Supreme Court's language regarding the "unitary notes" is not "essential" to its decision. (Doc. 8 at 20). Moreover, FNB argues that due to its contractual rights to recover the full amount of the debt, its claims are protected by § 13322(b)(2), similar to the creditor in *Nobelman*. (*Id*.). Finally, FNB asserts that there is "no reason to believe the Court [in *Nobelman*] would have found in favor of a plan provision that strips the lender of . . . [its rights]." (*Id*. at 20-21).[5]

The Court finds these arguments unpersuasive. Arguing that a certain portion of a court's decision carries more precedential value than another is a precarious endeavor without additional authority or reasoning supporting that position, which FNB fails to offer. Nothing in the *Nobelman* opinion suggests that the section discussing the unitary nature of the promissory note was mere *dicta* or of less importance than its discussion of a creditor's rights.

The Court also finds that the Bankruptcy Court's interpretation of *Nobelman* rests on solid footing. To be certain, the *Nobelman* Court held that a creditor's rights, at least regarding secured claims, must be protected during Chapter 13 bankruptcy proceedings.

[5] FNB also reiterates its argument that state law controls this issue. (Doc. 8 at 20). For the same reasons as those set forth above, the Court will not consider those arguments here.

The Supreme Court also thought it imperative to note, however, that the unsecured portion of the creditor's claim could not be altered without affecting the secured portion. Once again, this was the case in *Nobelman* because the debt at issue was extended by a single promissory note. In this case, there is no such concern because there are multiple, clearly divisible promissory notes. For this reason, FNB's liens that are unsecured may be modified without affecting the first, secured loan. Accordingly, the Court finds no error in the Bankruptcy Court's application of *Nobelman* to the instant case.

IV. CONCLUSION

Having reviewed the Bankruptcy Court's factual findings for clear error and legal conclusions *de novo*, the Court finds no error for the reasons outlined herein. Accordingly, Appellant FNB's objections are **OVERRULED**, and the Bankruptcy Court's Order (Doc. 5-5) overruling FNB's objections and Order (Doc. 57 in E.D. Tenn. Bankruptcy Case No. 4:16-bk-12638) confirming the Debtors' Chapter 13 Bankruptcy Plan are hereby **AFFIRMED**. A separate judgment shall enter.

SO ORDERED this 19th day of March, 2018.

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE