



1
2
3
4 UNITED STATES BANKRUPTCY COURT
5 EASTERN DISTRICT OF CALIFORNIA
6 SACRAMENTO DIVISION
7

8 In re) Case No. 09-48595-E-13L
9) Docket Control No. PPR-1
10 PHILIP LESLIE FRAZIER and)
11 JENNIFER JO FRAZIER,)
Debtors.)

12 ORDER

13 The Memorandum Opinion and Decision dated January 10, 2011,
14 filed January 11, 2011, and reported at 2011 WL 96836 and 2011
15 Bankr. LEXIS 78, is amended as follows:

16 The penultimate sentence in the first full paragraph on the
17 first page of the opinion is amended to read:

18 Bank of America holds a claim in this case secured by
19 the first (senior) deed of trust against property
20 identified by the parties as the "Illinois Avenue
Property."

21 The last sentence of the second paragraph of the opinion
22 (which spans the first and second page) is amended to read:

23 Upon the completion of the plan, the Debtors would
24 demand the reconveyance of the deed of trust securing
25 that claim based upon the secured claim of \$0.00 having
been paid in full.

26 The last sentence of the second paragraph on page 12 of the
27 opinion (lines 21-25) is amended to read:
28

1 See *Nobelman*, 508 U.S. at 328-331; see also *Zimmer*, 313
2 F.3d at 1222-1223 (giving effect to the language chosen
3 by Congress to interpret the anti-modification
4 provisions of 11 U.S.C. §1322(b)(2)).

5 The last sentence of the first full paragraph on page 15 of
6 the opinion is amended to read:

7 This does not include housing expenses, which are paid
8 through the Plan as a Class 1 claim.

9 Legal publishers are requested to make these corrections.

10 Dated: March 31, 2011

11 
12 RONALD H. SARGIS, Judge
13 United States Bankruptcy Court
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 SACRAMENTO DIVISION
6

7 In re) Case No. 09-48595-E-13L
8 PHILIP LESLIE FRAZIER and) Docket Control No. PPR-1
9 JENNIFER JO FRAZIER,)
10 Debtors.)

11 **MEMORANDUM OPINION AND DECISION**
12 **Opposition to Motion to Value and Objection to Plan**
13 **Confirmation by Real Time Resolutions, Inc.**

14 The court has been presented with two matters relating to the
15 confirmation of the Debtors' proposed Chapter 13 Plan. The first
16 is a Motion to Value the secured claim held by Real Time
17 Resolutions, Inc. ("Real Time"). The second matter is the Real
18 Time Objection to Confirmation of the Debtor's Chapter 13 Plan.
19 Confirmation of the Debtors' proposed Chapter 13 Plan is dependent
20 upon the determination of value of the Real Time secured claim.
21 Bank of America holds a claim in this case secured by the first
22 (senior) deed of trust against property identified by the parties
23 as the "Illinois Avenue Property." The Real Time claim is secured
24 by a second (junior) deed of trust against the Illinois Avenue
25 Property.

26 Based on the undisputed value advanced by the Debtors, the
27 Real Time secured claim would be valued at \$0.00 pursuant to 11
28 U.S.C. §506(a). Under the terms of the proposed Plan, the Debtors
would pay \$0.00 on this secured claim. Upon the completion of the

1 plan, the Debtors would demand the reconveyance of the deed of
2 trust securing that claim based upon the secured claim of \$0.00
3 having been paid in full.

4 In response to the motion to value, Real Time filed an
5 opposition asserting that bifurcation of its claim into a secured
6 claim and an unsecured claim pursuant to 11 U.S.C. §506(a) is
7 meaningless because both the secured and unsecured portions must be
8 paid in full under any Chapter 13 Plan. Real Time advances the
9 argument that its claim must be paid in full because the Debtors
10 obtained a discharge in the Chapter 7 case filed on August 3, 2009,
11 case number 09-36325, ("Chapter 7 Case"). The Debtors having
12 obtained a discharge in the 2009 Chapter 7 Case, they are now
13 barred from obtaining a discharge in any subsequent Chapter 13 case
14 filed within four years of August 3, 2009. See 11 U.S.C.
15 §1328(f)(1).

16 Real Time asserts that since the Debtors are barred from
17 obtaining a discharge, 11 U.S.C. §1325(a)(5)(B) requires the
18 Chapter 13 Plan must provide that both the secured and unsecured
19 portions of the Real Time claim be paid in full. Because the
20 proposed Plan does not provide for paying the secured and unsecured
21 portions of this claim in full, Real Time objects to confirmation.
22

23 Real Time also asserts that even if valuation of its secured
24 claim is proper, the Plan is not proposed in good faith. The
25 Debtors were previously barred from valuing the Real Time secured
26 claim and having the lien removed in the Chapter 7 case. The
27 Debtors having obtained their Chapter 7 discharge just three days
28 before commencing this Chapter 13 case, the substance of the

1 Chapter 13 case is merely an improper attempt to obtain the
2 heretofore barred removal of the Real Time lien.

3 The Debtors reply, asserting that both confirmation of the
4 proposed Plan and a valuation of the Real Time secured claim
5 pursuant to §506(a) are proper because obtaining a Chapter 13
6 discharge is not required for the claim valuation or payment of the
7 allowed secured claim in this case. 11 U.S.C. §1325 only applies
8 to a creditor's secured claim, which is only that portion of the
9 claim determined secured pursuant to §506(a), which in this case is
10 \$0.00. The proposed Chapter 13 Plan provides for payment of the
11 \$0.00.

12 The Debtors further assert that the proposed Chapter 13 Plan
13 is necessary and in good faith. Under the proposed Chapter 13 Plan
14 the Debtors are curing an arrearage in excess of \$20,000.00 secured
15 by the first deed of trust to Bank of America, paying the
16 restructured \$4,500.00 claim secured by their vehicle, and paying
17 in full the delinquent \$16,417.00 Internal Revenue Service claim.
18 Absent the Chapter 13 Plan, the Debtors would be unable to cure the
19 arrearage and would lose their home.

20 In addition to the substantive response, the Debtors contended
21 that Real Time does not have standing to oppose the motion to value
22 or object to confirmation of the Chapter 13 Plan. The lack of
23 standing is asserted based on Real Time not providing any evidence
24 in these proceedings that it has been assigned the Countrywide
25 Credit Line. The court ruled at the time of the hearing that Real
26 Time had provided a minimal showing that it had an interest in the
27 claim at issue to assert an objection to confirmation in this case
28 based on the testimony provided at the hearing.

1 **VALUATION OF SECURED CLAIMS AND CONFIRMATION OF CHAPTER 13**
2 **PLANS FOLLOWING THE DEBTOR OBTAINING A CHAPTER 7 DISCHARGE**

3 The court is presented with several issues in this case. The
4 cornerstone issue in this case is whether the Debtors can confirm
5 a plan in this case which does not provide for payment in full Real
6 Times secured and unsecured claims. If the plan cannot be
7 confirmed as a matter of law, then there is no reason to rule on
8 the motion to value, since the reason for making a §506(a) secured
9 claim determination is for the purpose of treatment under a
10 confirmed Chapter 13 Plan.

11 **History of Bankruptcy Filings by the Debtors.**

12 On August 3, 2009, Philip Leslie Frazier and Jennifer Jo
13 Messerall Frazier filed a voluntary Chapter 13 case, no. 09-36325,
14 which was converted to a Chapter 7 case on August 17, 2009 (the
15 "Chapter 7 Case"). The scheduled general unsecured claims in that
16 case exceeded the debt limits imposed by 11 U.S.C. §109(e) and the
17 Debtors were not eligible to proceed under Chapter 13. Schedule D
18 filed in the Chapter 7 case lists Bank of America as the creditor
19 with a secured claim in the amount of \$275,681.00, with a first
20 deed of trust against the Illinois Avenue Property securing that
21 claim. Bank of America is also scheduled as having a second
22 secured claim in the amount of \$47,400.00, with a second deed of
23 trust against the Illinois Avenue Property securing the second
24 claim.¹ The Debtors' discharge was entered on December 21, 2009.

25 The Debtors commenced the present Chapter 13 case on
26 December 30, 2009, case no. 09-48595, (the "Chapter 13 Case") nine

27 ¹ Real Time asserts its claim in this case as the successor
28 in interest to the Bank of America claim secured by the second
 deed of trust scheduled by the Debtors in their Chapter 7 case.

1 days after the entry of their discharge in the Chapter 7 Case. The
2 Debtors admitted that the Chapter 13 case was filed due to a
3 pending foreclosure sale by Bank of America on the first deed of
4 trust.

5 **Lien Stripping and Chapter 20 Cases Prior to the BAPCPA.**

6 The filing of a Chapter 7 case to discharge debts and
7 subsequent filing of a Chapter 13 case and plan providing to modify
8 a secured claim which rode through the prior Chapter 7 case is
9 commonly referred to as a "Chapter 20." Prior to the enactment of
10 The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
11 ("BAPCPA"), 119 Stat. 23, a Chapter 20 was a useful tool for a
12 debtor who exceeded the monetary limits for a Chapter 13 case. See
13 11 U.S.C. §109(e). By filing the Chapter 7 case to discharge
14 unsecured indebtedness, debtors could reduce their debts to be
15 within the monetary limits for the filing a subsequent Chapter 13
16 case. Then, through the subsequent Chapter 13 plan debtors could
17 save their residence from foreclosure by curing any arrearage
18 through the plan or establish a court enforced repayment plan for
19 nondischargeable debt, such as tax obligations. Additionally,
20 debtors could seek to have the claim secured by a junior lien
21 valued pursuant to §506(a) for treatment under the confirmed
22 Chapter 13 plan. Through such valuation the debtor would disburse
23 payments for only the actual value in the collateral for the
24 secured claim. Valuation of the claim and payment of the secured
25 value resulted in the creditor having to reconvey upon payment of
26 the amount determined to be the §506(a) secured claim.

27 The secured claim treatment under the Chapter 13 plan to
28 reconvey a junior lien for a payment equal to the value of the

1 collateral is commonly called a "lien strip." At the completion of
2 the plan and payment of the secured claim in the amount determined
3 under §506(a), the debtor demands and obtain a release of the lien
4 because the secured claim has been paid.

5 The short hand reference to a "lien strip" is not an accurate
6 statement of the legal effect of the Chapter 13 plan, Bankruptcy
7 Code, and order of the court. By the §506(a) valuation the court
8 does not remove or "strip" the lien from the property. Rather,
9 upon the completion of the Chapter 13 plan and payment of the value
10 in the collateral securing the claim, there is no obligation
11 remaining to be secured by the lien. With the obligation
12 satisfied, the creditor is required under the terms of the note,
13 deed of trust, and applicable state law to reconvey the deed of
14 trust.² In addition, §506(d) provides that to the extent that a
15 claim against the debtor is not an "allowed secured claim" and the
16 lien securing the claim is void.

17 As correctly cited in Real Time's Opposition to Motion and
18 Objection to Confirmation, most courts addressing this issue to
19 date have concluded that the debtor must obtain a discharge in the
20 Chapter 13 case in order to obtain the release of a lien based on
21

22 ² Upon payment of the secured obligation the lien is
23 extinguished and the trustor/mortgagor is entitled to a
24 certificate of discharge, the mortgage cancelled or satisfied as
25 of record, and the deed of trust reconveyed. 4 WITKIN SUMMARY OF
26 CALIFORNIA LAW, TENTH EDITION, §117, citing California Civil Code
27 §2939 et seq.; Rest.3d, Property (Mortgages) §6.4; 4 Powell
28 §37.33; C.E.B., 2 Mortgage and Deed of Trust Practice 3d, §8.84;
and 13 Am.Jur. Legal Forms 2d, §179:511. The lien is accessory
to the debt it secures and does not have any additional,
independent validity. See WITKIN SUMMARY OF CALIFORNIA LAW, Id.,
§47, and California Civil Code §2909.

1 a §506(a) secured claim valuation. The discharge in a Chapter 13
2 case is issued upon completion of the Chapter 13 Plan. The entry
3 of the discharge signifies that the debtor has successfully
4 completed the Chapter 13 Plan by paying all creditors the amount
5 required under this new contract embodied in the Plan. What some
6 courts concluded to be a "discharge requirement" for a lien strip
7 was comprehensively discussed by several judges in the combined
8 cases addressed in the *In re Winitzky*, 2009 Bankr. LEXIS 2430,
9 decision.

10 The analysis in *Winitzky* cites back to one of the earliest
11 decisions addressing this question, *In re Akram*, 259 B.R. 371
12 (Bankr. C.D. Cal. 2001). The *Akram* decision is based upon that
13 court's reading of the holding by the Ninth Circuit Court of
14 Appeals in *In re Veteran Street Co.*, 144 F.3d 1288 (9th Cir. 1998),
15 to be that a §506(a) secured claim determination in that case did
16 not have "res judicata effect" until after a Chapter 11 plan was
17 confirmed. Because the debtor in a Chapter 11 case commonly
18 receives a discharge at time of confirmation, the *Akram* court
19 concluded that obtaining the discharge was a necessary event for
20 the lien to be released based on a §506(a) valuation of the
21 creditor's secured claim.

22 This court does not concur with conclusions in prior decisions
23 that, unless the affected creditor accepts the proposed plan
24 treatment, the debtor must be able to obtain a discharge in the
25 Chapter 13 case for there to be a §506(a) valuation and a "lien
26 strip" through a Chapter 13 Plan. In coming to this conclusion,
27 this court begins with the holding of the Ninth Circuit Court of
28 Appeals in *Veteran Street Co.* that a §506(a) valuation is effective

1 and used in the bankruptcy case consistent with the purposes for
2 which the valuation was made by the court. *In re Veteran Street*
3 *Co., Id.*, at pg. 1291.

4 In *Veteran Street Co.*, the valuation was made for the purpose
5 of the Chapter 11 debtor's proposed plan of reorganization. When
6 confirmation of the debtor's proposed Chapter 11 plan of
7 reorganization was denied by the court, the debtor in possession
8 was not allowed to use the valuation for other purposes. The debtor
9 in *Veteran Street* attempted to use the §506(a) valuation as a basis
10 for the use of cash collateral to pay the debtor-in-possession's
11 attorneys' fees. When the debtor-in-possession could not confirm
12 the Chapter 11 plan, the *Veteran Street* court ruled that the
13 §506(a) valuation became irrelevant. *Id.*, at pg. 1291-1292. The
14 ruling was not based on the debtor not obtaining a discharge.³

15 Another case cited in *Winitzky* is *In re Jarvis*, 390 B.R. 600
16 (Bankr. C.D. Ill. 2008). Under the terms of the plan in *Jarvis*,
17 the debtor proposed to make aggregate payments of \$1,051.08 only
18 a period of twelve months. The payments were sufficient to make
19 only the current monthly payments on loans secured by the senior
20 lien on the debtor's residence and for the debtor's car, neither of
21

22 ³ *In re Veteran Street, Id.*, ,

23 In the present case, the bankruptcy court valued the
24 Property in light of Veteran's proposed plan of
25 reorganization. Since the bankruptcy court rejected the
26 plan, the valuation of the Property served no purpose
27 under the Bankruptcy Code. Therefore, the valuation
should not affect Gold Coast's rights to postpetition
rents under section 552.

28 The word "discharge" was not used by the Ninth Circuit in the
Veteran Street decision. The only time it appears is in the text
of 11 U.S.C. §349 which is cited in footnote 2.

1 which were in default. Under the *Jarvis* Chapter 13 plan, no
2 payments were made to creditors holding priority or general
3 unsecured claims, and no arrearage was being cured to prevent a
4 foreclosure. One of the grounds for denying confirmation in *Jarvis*
5 was a finding that the plan was not in good faith, but merely
6 contrived camouflage to make zero payments to the creditor whose
7 lien was being stripped. *In re Jarvis, Id.*, pg. 606.⁴ That plan
8 not being proposed in good faith, confirmation was denied.

9 Though the *Winitzky* line of cases focus on the discharge as
10 the requirement for the lien being removed, there is no dispute
11 that a discharge, in and of itself, does not exonerate the debtor
12 of the obligation or remove a lien. The discharge imposes a
13 statutory injunction preventing the creditor from enforcing the
14 discharged debt against the debtor personally or against specified
15 assets. *Johnson v. Home State Bank*, 501 U.S. 78 (1991). The
16 discharge does not release a lien from the Debtor's property, and
17 the lien may continue to be enforced against the debtor's property
18 which is subject to that lien.

19 In *Dewsnup v. Timm*, 502 U.S. 410 (1992), the Supreme Court
20 addressed whether a debtor could obtain from the court a §506(a)
21 secured claim value determination in a Chapter 7 case and then have
22 §506(d) work to statutorily avoid the lien for any amounts in
23 excess of the §506(a) secured claim. The Court in *Dewsnup*
24 concluded that §506(d) could not be used to avoid a lien in a
25 Chapter 7 case, notwithstanding a valuation of the secured claim

27 ⁴ The court in *Jarvis* also denied confirmation on the
28 alternative grounds that the debtor was barred a discharge in the
Chapter 13 case and the plan did not provide for payment of the
secured and unsecured portions of the creditor's claim.

1 under §506(a). *Id.* at 417. This decision was not based on the
2 plain reading of the statute, but the Supreme Court concluding that
3 there was not a clear Congressional intent to change well-
4 established law that a bankruptcy discharge does not affect a
5 creditor's lien.

6 The Supreme Court followed with the decision in *Nobelman v.*
7 *American Savings Bank*, 508 U.S. 324 (1993), addressing the question
8 of whether §506(a) could be used to bifurcate a claim into a
9 secured and unsecured claim for payment through a Chapter 13 plan.
10 The debtor in *Nobelman* sought to have the claim secured by their
11 residence reduced to the value of the property, and the balance of
12 the claim paid as an unsecured claim through the plan. The Supreme
13 Court concluded that "Section 1322(b)(2), the provision at issue
14 here, allows modification of the rights of both secured and
15 unsecured creditors, subject to special protection for creditors
16 whose claims are secured only by a lien on the debtor's home." *Id.*
17 at 327.

18 The Supreme Court rejected the proposed valuation,
19 confirmation, and potential lien reconveyance in *Nobelman* because
20 of the specific limitation stated in 11 U.S.C. §1322(b)(2) which
21 prohibits modifying the rights of the creditor holding a claim
22 secured only by the debtor's residence. Because the plan could not
23 be confirmed, there was no reason to proceed with a valuation of
24 that creditor's secured and unsecured claims.

25 The Ninth Circuit Court Appeals subsequently held in *Zimmer v.*
26 *PSB Lending Corporation (In re Zimmer)*, 313 F.3d 1220 (2002), that
27 the §1322(b)(2) debtor's primary residence limitation does not
28 apply when there is no value in the residence to secure the lien at

1 issue.⁵ If there is no value for the secured claim as determined
2 under §506(a), then the creditor's claim is not secured and the
3 anti-modification provisions do not apply.

4 The modification of the rights of a creditor holding a secured
5 claim through a §506(a) valuation and Chapter 13 Plan occurs
6 through a series of events. First, the secured and unsecured
7 claims are valued under §506(a). Second, the debtor confirms a
8 Chapter 13 Plan. It is the Chapter 13 Plan, by which the debtor
9 commits him or herself to a plan, which becomes the new contract
10 between the debtor and creditors. *In re Than*, 215 B.R. 430 (9th
11 Cir. B.A.P. 1997). Third, the debtor pays the full amount of the
12 §506(a) secured claim amount through the Chapter 13 Plan, resulting
13 in there being no remaining obligation secured by the lien.
14 Fourth, upon completion of the Chapter 13 Plan (new contract with
15 the creditors) and payment of the §506(a) claim, the debtor then
16 demands reconveyance of the deed of trust or release of the lien
17 pursuant to the terms of the underlying note, deed of trust,
18 security instrument, applicable law, or 11 U.S.C. §506(d).

19 It is the completion of the plan and performance under the new
20 contract created under the Bankruptcy Code which result in the
21 debtors having the right to demand and receive the release of the
22 lien. The granting or denying of a discharge does not alter or
23 remove the lien, and is not the basis for the court to denying a
24 motion to value a creditor's secured claim.

25
26 ⁵ This ruling was consistent with the five other Courts of
27 Appeals and two Bankruptcy Appellate Panels which had previously
28 addressed the issue, and represents the majority view that a
claim for which there is no value in the collateral is a
completely unsecured claim for valuation and Chapter 13 plan
purposes.

1 **THE BACPA AMENDMENTS DO NOT REQUIRE THE DEBTORS**
2 **OBTAIN A DISCHARGE FOR A CHAPTER 20 LIEN STRIP TO BE EFFECTIVE**

3 With the 2005 amendments to the Bankruptcy Code, Congress
4 altered the landscape for a debtor attempting to utilize Chapter
5 13 of the Bankruptcy Code. Before a debtor may attempt to enforce
6 the provisions of the new contract embodied in a Chapter 13 plan,
7 the debtor must first obtain confirmation of the plan. The BAPCPA
8 included an amendment to 11 U.S.C. §1325(a)(5) concerning treatment
9 of secured claims under a Chapter 13 plan. A condition of
10 confirmation is that for each allowed secured claim provided for by
11 the plan (1) the holder of such claim accept the Plan or (2) the
12 holder retains the lien securing such claim until the earlier of
13 (a) payment of the underlying debt determined under non-bankruptcy
14 law or (b) a discharge being granted under section 1328, with the
15 value of payments under the plan to be not less than the allowed
16 amount of the such claim.⁶

17 To address Real Time's contention that the amendment to 11
18 U.S.C. §1325(a)(5) mandates payment of both the secured and
19 unsecured portions of its claim because the Debtors cannot obtain
20 a discharge, the court must carefully consider the words used by
21 Congress in crafting 11 U.S.C. §1325(a)(5). *See Nobelman*, 508 U.S.
22 at 328-331; *see also Zimmer*, 313 F.3d at 1222-1223 (giving effect
23 to the language chosen by Congress to interpret the anti-
24 modification provisions of 11 U.S.C. §1322(b)(2)).

25 A creditor entitled to assert the provisions of 11 U.S.C.

26
27 ⁶ Prior to the 2005 amendments, a debtor was only required
28 to provide in the plan that the creditor retain the lien and the
payments on the claim to be not less than the allowed amount of
such claim.

1 §1325(a)(5) must be the holder of an "allowed secured claim." A
2 "secured claim" is a term of art under the Bankruptcy Code,
3 *Nobelman*, at pg. 331,⁷ and is the secured claim determined
4 pursuant to §506(a). As the Ninth Circuit has concluded in *Zimmer*,
5 for the creditor to have a "secured claim" there must be value for
6 the creditor's interest in the collateral. If there is no value,
7 then the creditor has a lien and an unsecured claim. *In re Zimmer*,
8 *Id.*, at pg. 1225

9 As directed by the Ninth Circuit Court of Appeals in *In re*
10 *Zimmer, Id.*, pg. 1226, if there is no value in the collateral to
11 secure the claim, then Real Time does not hold a secured claim and
12 therefore does not have a basis for asserting rights under 11
13 U.S.C. §1325(a)(5). The court must now make the U.S.C. §506(a)
14 valuation determination of the Real Time secured and unsecured
15 claims.

16
17 **REAL TIME DOES NOT HOLD A SECURED CLAIM AND
THE OBJECTION TO CONFIRMATION IS OVERRULED**

18 In the present case, the evidence before the court establishes
19 that the Illinois Ave Property has a value of \$240,000.00 and is
20 subject to a first deed of trust to secured a \$275,681.00 claim
21 held by Bank of America. The Bank of America deed of trust is
22 senior in priority to the deed of trust securing the Real Time
23

24 ⁷ In *Nobelman*, the Supreme Court found significance in
25 Congress choosing to use the phrase "claim secured only by a
26 security interest in real property..." in carving out an
27 exception to 11 U.S.C. §1322(b)(2), and concluded that such
28 language referenced rights and interests other than those
relating to a secured claim. In 11 U.S.C. §1325(a)(5) Congress
limited that section to each "allowed secured claim." Thus, the
creditor attempting to assert rights under 11U.S.C. §1325(a)(5)
must have a secured claim.

1 claim. This court finds persuasive the opinions of value stated by
2 the Debtors as the owners of the property. Further, no opposition
3 to the value asserted by the Debtors or counter evidence was
4 introduced by Real Time to support any other value for the Illinois
5 Avenue Property.

6 The court finds that with the Illinois Avenue Property has a
7 value of \$240,000.00, the senior lien held by Bank of America
8 secures an obligation of \$275,681.00, and that the Bank of America
9 senior lien exhausts all value in that property. There is no value
10 in the Illinois Avenue Property to secure the Real Time claim.
11 Pursuant to 11 U.S.C. §506(a) the court determines that the value
12 of the Real Time secured claim is \$0.00 and the Real Time general
13 unsecured claim is \$53,591.82.

14
15 **THE DEBTORS' PLAN IS PROPOSED IN GOOD FAITH
AND MAY BE CONFIRMED**

16 Real Time has objected to confirmation on several grounds.
17 The first objection to confirmation is based on the assertion that
18 the Debtors are barred from confirming a plan without paying Real
19 Time's claims (secured and unsecured) in full because of the
20 discharge they received in the recent Chapter 7 case. As set forth
21 above, Real Time's objections based on 11 U.S.C. §1325(a)(5) are
22 overruled because Real Time does not hold a secured claim to raise
23 such objection in this case.

24 Real Time further objects asserting that the Debtors are not
25 proceeding in good faith with the proposed Plan because the
26 Debtors' food budget is \$350, their phone/internet/TV/cell phone
27 expense is \$370, and the Debtors' business expense attachment
28 includes an additional expense for cell phone. See Debtors'

1 Schedule J, Exhibit "2" filed by Real Time.

2 Schedule J filed by the Debtors lists \$5,261.19 in total
3 expenses for a month. Of these, \$2,612.19 are for business
4 expenses. For the Debtors' family of two persons (Schedule I),
5 their personal expenses are \$2,649 a month. This does not include
6 housing expenses, which are paid through the Plan as a Class 1
7 claim.

8 The Business Income and Expense attachment to Schedule J lists
9 the following business expenses:

10	Fuel	\$ 600.00
	Liability Insurance	\$ 100.00
11	Workers' Comp Insurance	\$ 100.00
	Cell Phone	\$ 250.00
12	Labor Ready	\$1,000.00
	Supplies	\$ 550.00

13
14 In response to this objection, the Testimony of Jennifer
15 Frazier has been provided. She states, under penalty of perjury,

16 i. The Phone/Internet/TV service are bundled services
17 for which the total charges are \$140 a month.

18 ii. The \$600.00 a month in fuel expenses are necessary
19 for Mr. Frazier's work as a self employed cabinet
20 installer. His current job is working at Fairchild
21 Air Force Base in Washington State and is
22 anticipated to continue for at least the next four
23 and one-half (4½) years.

24 The court finds the testimony of the Debtor persuasive and
25 sufficient to explain the reasonable and necessary expenses for the
26 Debtors. The objection of Real Time based on the Debtors' expenses
27 is overruled.

28 Real Time has articulated a further objection to confirmation,

1 asserting that commencing the Chapter 13 case on the heels of the
2 Chapter 7 discharge is *per se* not in good faith. Good faith,
3 under 11 U.S.C. §1325(a)(3), is determined based on an examination
4 of the totality of the circumstances. *Fidelity & Casualty Co. of*
5 *New York v. Warren (In re Warren)*, 89 B.R. 87, 92 (9th Cir. B.A.P.
6 1988) (citing *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1389-1390
7 (9th Cir. 1982)). Factors to consider include:

- 8 1) The amount of the proposed payments and the amounts of the
9 debtor's surplus;
- 10 2) The debtor's employment history, ability to earn, and
11 likelihood of future increases in income;
- 12 3) The probable or expected duration of the plan;
- 13 4) The accuracy of the plan's statements of the debts,
14 expenses and percentage of repayment of unsecured debt, and
15 whether any inaccuracies are an attempt to mislead the
16 court;
- 17 5) The extent of preferential treatment between classes of
18 creditors;
- 19 6) The extent to which secured claims are modified;
- 20 7) The type of debt sought to be discharged, and whether any
21 such debt is nondischargeable in Chapter 7;
- 22 8) The existence of special circumstances such as inordinate
23 medical expenses;
- 24 9) The frequency with which the debtor has sought relief under
25 the Bankruptcy Reform Act;
- 26 10) The motivation and sincerity of the debtor in seeking
27 Chapter 13 relief; and
- 28 11) The burden which the plan's administration would place upon
the trustee.

25 *In re Warren*, 89 B.R. at 93 (citing *In re Brock*, 47 B.R. 167, 169
26 (Bankr. S.D. Cal. 1985) (quoting *U.S. v. Estus (In re Estus)*, 695
27 F.2d 311, 317 (8th Cir. 1982))).

28 The Real Time objection implicates the ninth, and tenth non-

1 exclusive factors. In substance, Real Time asserts that the
2 Debtors are merely attempting to do indirectly through a Chapter 20
3 which the Supreme Court has barred in a Chapter 7 case - using 11
4 U.S.C. §506(a) to "strip a lien" through a confirmed plan. Real
5 Time's arguments are unpersuasive and not supported by the evidence
6 in this case.

7 The Debtors in this case are not merely filing a perfunctory
8 Chapter 13 Plan where no creditors are paid or arrearage cured.
9 This is not a situation as in *In re Jarvis*, and *In re Tran* and *In*
10 *re Bennett* with nominal payments and no substantive reorganization
11 by the consumer debtor. In those cases the courts concluded that
12 the Chapter 13 case was filed solely for the purpose of obtaining
13 a lien strip, with the incidental effect of paying nominal
14 attorneys' fees for filing the Chapter 13 case.

15 The present case provides an entirely different situation.
16 The Debtors have committed to a 60-month plan and payments of
17 \$2,743.00 a month, with plan payments totaling \$164,580.00.
18 Through the plan the debtors will cure a \$20,000.00 arrearage on
19 the Bank of America secured claim and save their residence from
20 foreclosure. The Debtors will also pay the prepetition claim of
21 \$4,500.00 secured by the Debtors' car and an Internal Revenue
22 Service prepetition nondischargeable claim of \$16,417.00. The
23 estimated Debtors' attorneys fees are only \$2,000 to be paid
24 through the plan and the Chapter 13 trustee fees are projected to
25 be \$13,166.40. An additional \$104,280.00 will be paid through the
26 plan for post-petition installments on the Bank of America secured
27 claim.

28 The curing of the arrearage and saving their family residence,

1 and payment of several pre-petition claims represent a real,
2 substantial plan and financial reorganization for these Debtors.
3 The court finds that the plan has been proposed in good faith, and
4 not by any means forbidden by law. Further, that the plan complies
5 with the provisions of 11 U.S.C. §1322 for the contents of a plan
6 and 11 U.S.C. §1325(a) and (b) for confirmation of the plan
7 proposed in this case.

8 The Real Time objections to confirmation are overruled, and
9 the plan is confirmed by the court.

10 This Memorandum Opinion and Decision constitutes the Findings
11 of Fact and Conclusions of law in support of the order determining
12 the value of the Real time secured claim to be \$0.00, and the order
13 overruling the objection to confirmation of the Chapter 13 Plan.

14 Dated: January 10, 2011

15 /s/ Ronald H. Sargis
16 RONALD H. SARGIS, Judge
17 United States Bankruptcy Court
18
19
20
21
22
23
24
25
26
27
28