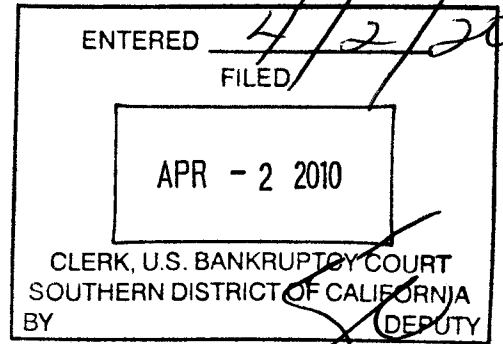


1 WRITTEN DECISION - FOR PUBLICATION



8 UNITED STATES BANKRUPTCY COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10

11 In re ) Case No. 08-08519-PB13

12 HEATHER BURNETT, )

13 Debtor. )

14 )

15 By entered Order, a judge of this court granted debtor's

16 Motion to Value Collateral and avoid a junior trust deed on the

17 debtor's residence. That Order provided in relevant part:

18 3) Upon confirmation and completion of the

19 Debtor's Chapter 13 plan, said lien will be deemed

20 void pursuant to 11 U.S.C. § 1322(b)(2), and JP

21 Morgan Chase, N.A., Chase Home Finance shall take

all steps necessary and appropriate to release

their security interest and remove their lien from

the San Diego County Recorder's Office; . . . .

22 Thereafter, disagreement arose between debtor's counsel and

23 the Chapter 13 Trustee concerning the correct language to be

24 included in the Confirmation Order. The Trustee filed a Case

25 Status Statement which stated:

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1           The Trustee rejected as defective the  
2 Application for Initial Fees and Order Approving  
3 Plan because such proposed order lacked an  
4 addendum referring to Paragraph 19 of the plan and  
5 among other things failed to indicate that upon  
6 completion of the plan and debtor's discharge the  
7 debt of the junior deed of trust would be deemed  
8 satisfied. . . .

9           Debtor's counsel and the Chapter 13  
10 Trustee disagree as to when the lien strip  
11 becomes effective. The Chapter 13 Trustee  
12 takes the position that debtor must complete  
13 the plan and obtain a discharge.

14 Paragraph 19 of debtor's proposed plan states:

15           19. Other Provisions: Debtors will be commencing  
16 a lien stripping action against the creditor named  
17 below pursuant to 11 USC 1322 and 11 USC 506(d)  
18 since the lien is completely undersecured since  
19 the first deed of trust exceeds the fair market  
20 value of the property. Upon confirmation,  
21 creditor will be deemed to accept the allowed  
22 secured value and Fair Market Value of its  
23 security interest set forth below and pursuant to  
24 this provision will be binding, unless creditor  
25 timely objects and the court orders otherwise.  
26 This provision is in no way meant to contest the  
validity, extent, or priority of the creditor's  
lien, but rather, solely in furtherance of an  
action to be filed to strip off a creditor's  
wholly unsecured lien through a valuation process  
under 506(a), 1322(b)(2) and Rules 3012 and 9014.  
See In re Millspaugh, 302 B.R. 90, 2003 Bankr.  
LEXIS 1779 (Bankr. D. Idaho 2003).

(Emphasis added.)

          The Chapter 13 Trustee thereafter lodged his own proposed  
form of Confirmation Order which recited that the debt to the  
senior lienholder exceeded the value of the debtor's residence  
and:

(d) as a result and pursuant to section 1322(b)(2)  
the Creditor's lien may be modified and stripped  
by this Plan;

1 (e) under the Plan, the Creditor will be treated  
and paid as unsecured creditor; and  
2 (f) upon completion of the Plan and Debtor's  
3 discharge, the debt to Creditor secured by  
Creditor's Second Trust Deed shall be deemed  
4 fully satisfied and Creditor shall take all steps  
necessary and appropriate to reconvey and release  
5 the Second Trust Deed against the Home.

6 Debtor's counsel promptly filed opposition to the Trustee's  
7 proposed order, and submitted an alternative. The Opposition  
8 stated in relevant part:

9 3. The Trustee presents a falsity before this  
Court by misrepresenting the prior Court Order  
10 dated 11/17/08. Specifically, the Trustee alleges  
a new requirement of "debtors' discharge," when in  
11 fact no such provision was previously entered by  
the Court and which now contradicts the previous  
12 Court Order. Paragraph "f" of that previous order  
specifically provided:

13 "Upon confirmation and completion of the  
14 Debtor's Chapter 13 plan, said lien will be  
deemed void pursuant to 11 USC 1322b2, and JP  
15 Morgan Chase, N.A., Chase Home Finance shall  
take all steps necessary and appropriate to  
16 release their security interest and remove  
their lien from the San Diego County  
17 Recorder's Office;"

18 4. There has never been a motion to reconsider  
the previous order or appeal on the same, thus it  
19 is a final order and can not be modified.

20 Of some considerable irony, and inconsistency, immediately after  
21 asserting the lien strip order was final and could not be  
22 modified - an order that recited that upon confirmation and  
23 completion of the plan, the lien would then be stripped pursuant  
24 to 11 U.S.C. § 1322(b) - debtor's counsel then argues that the  
25 final, unappealed, non-modifiable order is wrong because:

26 ///

1 5. Debtor's position is that lien stripping takes  
2 place by 506(d) and not by plan provision. Debtor  
3 asserts that 1322(b)(2) does not trigger lien  
4 avoidance at all, but merely does not prohibit  
5 lien avoidance, since the junior lien is not a  
6 secured claim at all per In re Zimmer, 313 F.3d  
7 1220 at 1223 (9<sup>th</sup> Cir. Cal. 2002). 506(d)  
contains no requirements for plan completion,  
. . . , or discharge, and is consistent with the  
Supreme Court cases of Dewsnup v. Timm and  
Nobelman v. American Savs. Bank. Debtor requests  
to further brief the court on this matter if the  
Court disagrees 506(d) applies.

8 Debtor's proposed Confirmation Order was silent as to the lien  
9 strip Order or paragraph 19 of debtor's plan, except as to  
10 attorney's fees.

#### 11 Jurisdiction

12 This Court has subject matter jurisdiction over this  
13 proceeding pursuant to 28 U.S.C. § 1334 and General Order  
14 No. 312-D of the United States District Court for the Southern  
15 District of California. This is a core proceeding under  
16 28 U.S.C. § 157(b)(2)(A), (O).

17 A threshold question is raised by debtor's assertion that  
18 the lien strip order is a final nonmodifiable order. If it is,  
19 then neither the debtor nor the Chapter 13 Trustee can now argue  
20 its provisions, and the debate which has ensued is academic, for  
21 purposes of this case.

22 The Court concludes, however, that the lien strip order is  
23 not a final order, but rather interlocutory. Debtor proposed in  
24 paragraph 19 of her plan to seek a lien strip. The lien strip  
25 granted was pursuant to § 1322(b), and contemplated that it was  
26 part of debtor's plan (specifically paragraph 19). Further, the

1 lien strip order provided that the strip would be effective upon  
2 completion of the plan. Consequently, the debtor's proposed  
3 plan, as well as the court's lien strip order contemplated it was  
4 subsumed by and included within the four corners of the plan and  
5 plan confirmation process. The plan confirmation order - or its  
6 denial - becomes the appealable order in such a situation.  
7 Accordingly, the Court will address the issues raised by the  
8 parties.

9 The issues raised by the Trustee are: 1) the Chapter 13 plan  
10 is the operative vehicle for a lien strip; 2) where a debtor is  
11 eligible for a discharge the debtor must complete the plan and  
12 receive a discharge. The debtor argues: 1) the lien strip occurs  
13 under § 506(d); 2) the lien strip is effective when the order is  
14 entered or the date of confirmation; 3) discharge is not required  
15 for lien strip.

16 At the outset, the Court notes that both parties and courts  
17 around the country are attempting to find their way through the  
18 multiple, sometimes conflicting provisions of the Bankruptcy  
19 Code, which have been made even more confusing by court decisions  
20 such as Dewsnup v. Timm, 502 U.S. 410 (1992).

21 That said, much of debtor's Supplemental Brief is focused  
22 on arguing that notwithstanding the language of the lien strip  
23 order entered in this case, the lien strip really was made  
24 pursuant to 11 U.S.C. § 506(d). Putting aside for the moment the  
25 issue of whether § 506(d), alone, can effectuate a lien strip in  
26 a Chapter 13 case after Dewsnup (a Chapter 7 case) because of the

1 express provision of 11 U.S.C. § 103, in this case the debtor  
2 chose her path towards a lien strip as a part of her Chapter 13  
3 plan by express inclusion in paragraph 19 of her plan, as well  
4 as her invocation both in her plan and her lien strip motion of  
5 § 1322(b). As already noted, paragraph 19 of debtor's proposed  
6 plan states in relevant part:

7           This provision is in no way meant to contest  
8           the validity, extent, or priority of the  
9           creditor's lien, but rather, solely in  
10          furtherance of an action to be filed to strip  
11          off a creditor's wholly unsecured lien  
12          through a valuation process under 506(a),  
13          1322(b)(2) and Rules 3012 and 9014. See In  
14          re Millspaugh, 302 B.9.90, 2003 Bankr. LEXIS  
15          1779 (Bankr. D. Idaho 2003)

16 In her pleadings moving for avoidance of the lien, the debtor  
17 invoked her paragraph 19, as well as § 1322(b). In other words,  
18 debtor chose the plan process as the path to lien avoidance. In  
19 her Supplemental Brief, debtor states:

20           Presently, extensive authority exists in  
21           this Circuit for lien avoidance in Chapter 13  
22           either by 1322(b)2 or 506(d). Movants do not  
23           disagree that 1322(b)(2) is one possible method  
24           for avoidance, and which arguably would require  
25           plan completion.

26           Whatever may be the merits of debtor's argument that  
27 § 506(d) provides a separate and independent path to lien  
28 avoidance in a Chapter 13 case, debtor chose to travel the path  
29 of her Chapter 13 plan and § 1322(b)(2). Having done so - and  
30 succeeded - debtor cannot now be heard to say "no, I meant to  
31 take the other route". The § 506(d) issue debtor attempts to  
32 ///

1 raise in this case will have to await a case that squarely  
2 presents the issue. This case does not.

3 As noted, the lien strip order provided that the lien would  
4 be avoided pursuant to § 1322(b)(2) upon confirmation and  
5 completion of the plan. As quoted above, debtor acknowledges  
6 that if she traveled the § 1322(b)(2) path, avoidance "arguably  
7 would require plan completion", which is what the lien avoidance  
8 order provides. The issue here is really raised by the Chapter  
9 13 Trustee's insistence on adding a requirement of resulting  
10 discharge, at least where there is no legal impediment to a  
11 discharge (e.g., § 1328(f)).

12 This Court believes discharge is a desirable condition for  
13 a § 1322(b)(2) lien strip, but the Court does not have the  
14 authority to impose it. In the Court's view, the Trustee's  
15 argument defeats itself because it separates cases where a debtor  
16 is eligible for a discharge from those where a debtor is not.  
17 If there were a requirement that a debtor had to be eligible for  
18 a discharge in order to file a Chapter 13 case, much less a lien  
19 strip motion within a Chapter 13 case, it is for Congress to  
20 impose via amendment to 11 U.S.C. § 109. Indeed, the Trustee  
21 regularly files motions in Chapter 13 cases for a determination  
22 that a debtor is not eligible for a discharge because the debtor  
23 had received a discharge in another case within the time  
24 parameters of § 1328(f). Nowhere in those motions has the  
25 Trustee contended the debtor is ineligible to file at all.

26 ///

1           This Court agrees with those other courts that have  
2 concluded that the unavailability of a discharge is not an issue  
3 of eligibility to file a Chapter 13 case. See, e.g., In re  
4 Lewis, 339 B.R. 814 (Bankr. S.D. GA 2006); In re Bateman, 515  
5 F.3d 272 (4<sup>th</sup> Cir. 2008).

6           The Trustee cites to In re Jarvis, 390 B.R. 600 (Bankr. C.D.  
7 IL 2008), to In re King, 290 B.R. 641 (Bankr. C.D. IL 2003), and  
8 In re Akram, 259 B.R. 371 (Bankr. C.D. CA 2001) in support of his  
9 argument that a discharge is required. Those cases are important  
10 cases to the circumstance when a debtor is not eligible for a  
11 discharge, but they actually support the proposition that  
12 eligibility for a discharge is not an eligibility prerequisite to  
13 being able to file a Chapter 13 case, whether under 11 U.S.C.  
14 § 109 or otherwise. Rather, they speak to the relief a debtor  
15 can seek in a Chapter 13 when no discharge is available, most  
16 commonly in what is colloquially called a "Chapter 20" case.  
17 That is, the debtor has received a discharge in a Chapter 7 case,  
18 then files a Chapter 13 within the time period set in 11 U.S.C.  
19 § 1328(f) prohibiting a further discharge.

20           The instant case is not a "Chapter 20", and the Court is not  
21 aware of any reason why this debtor would not be eligible for a  
22 discharge after completion of her plan. If she does not complete  
23 her plan and earn the resulting discharge, and her case is at  
24 some point dismissed, all her less than fully paid obligations  
25 spring back as on-going liabilities, with all accruals under  
26 applicable non-bankruptcy law of interest and the like, as if no



1 bankruptcy had been filed. In re Pardee, 218 B.R. 916 (9<sup>th</sup> Cir.  
2 BAP 1998); In re Lilly, 378 B.R. 232 (Bankr. C.D. IL 2007).

3 All Chapter 13 cases are required to have been filed in good  
4 faith (§ 1325(a)(7)), and any plan must be proposed in good faith  
5 to be eligible for confirmation (§ 1325(a)(3)). To the extent a  
6 debtor seeks to use a Chapter 13 plan to obtain some form of  
7 relief, such as a lien strip pursuant to § 1322(b)(2), a court is  
8 obliged to assess a debtor's good faith both in filing the case  
9 and proposing a plan. Where a debtor is eligible for a discharge  
10 and has otherwise met the confirmation requirements of § 1325  
11 that should only occasionally involve challenges to the debtor's  
12 good faith. Where a debtor is not eligible for a discharge,  
13 however, the analysis of both facets of the debtor's good faith  
14 may be more exhaustive.

#### 15 Conclusion

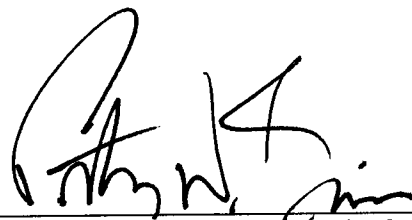
16 For all the foregoing reasons, the Court finds and concludes  
17 that debtor voluntarily chose to take the plan route via her  
18 paragraph 19 and invocation of 11 U.S.C. § 1322(b)(2) to avoid the  
19 junior trust deed. Therefore, debtor's argument concerning the  
20 availability of § 506(d) will have to await a case in which the  
21 issue is squarely presented. Further, the Court finds and  
22 concludes that the availability of a discharge in Chapter 13 is  
23 not, in itself, a requirement for eligibility to file a Chapter  
24 13 case or, within that case to seek a lien avoidance pursuant to  
25 § 1332(b)(2).

26 ///

1           Accordingly, the Court will sign an order of confirmation  
2 consistent with the foregoing and with the lien strip order if  
3 one is presented within thirty (30) days of the date of entry of  
4 this Memorandum Decision.

5           IT IS SO ORDERED.

6           DATED: APR -2 2010

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9           PETER W. BOWIE, Chief Judge  
10 United States Bankruptcy Court

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