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Entered on Docket
April 28, 2011

Bruce A. Markell

Hon. Bruce A. Markell
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re: STEPHEN C. OKOSISI and SUSAN O. NWOGBE, <p style="text-align: center;">Debtors.</p>	}	Case No.: BK-S-09-27113-BAM Chapter 13 Date: September 28, 2010 Time: 2:30 p.m. Courtroom: 3
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MEMORANDUM DECISION ON LIEN AVOIDANCE AND PLAN CONFIRMATION

I. Introduction

Stephen C. Okosisi and Susan O. Nwogbe (the "Debtors") filed for chapter 13 bankruptcy after having previously received a discharge in chapter 7. The Debtors admit they are not eligible for a discharge in this chapter 13 case; however, they are still seeking to reorganize through bankruptcy. Earlier in the case, the court granted the Debtors' motion to avoid the second priority, and wholly unsecured, lien on their primary residence. They now seek to confirm a plan which incorporates this avoidance. The chapter 13 bankruptcy trustee opposes confirmation.

The court here determines: (1) that the Debtors, on these specific facts and so long as the order confirming their plan is effective, are permitted by the Bankruptcy Code to permanently avoid the junior lien on their primary residence; and (2) the instant chapter 13

1 case was commenced in good faith. Therefore, the court will confirm the Debtors' chapter
2 13 plan.

3 II. Background

4 The Debtors filed for bankruptcy under chapter 13 on September 14, 2009.
5 According to the court's ECF System, sixteen other chapter 13 cases were filed in this
6 district on that day, and over 500 chapter 13 bankruptcies were filed in this district during
7 September 2009. What makes the Debtors' case different than the majority of other chapter
8 13 cases is that the Debtors received a discharge under chapter 7 less than two years prior
9 to filing.¹ Other than this wrinkle, nothing about this case appears to be anything other
10 than typical.

11 The Debtors addressed a substantial amount of unsecured debt through their
12 previous chapter 7 case, almost all of which was associated with a failed restaurant. The
13 Debtors' purpose for seeking relief in this chapter 13 case was to address the arrearages
14 and outstanding liens on their primary residence and to pay priority tax claims over time.
15 According to the schedules filed with their petition, their primary residence had an
16 estimated value of \$342,000 at the time of filing. This property was encumbered by a first
17 priority mortgage in favor of Citimortgage for \$383,000 and a second priority mortgage in
18 favor of Nevada State Bank for \$302,125. Citimortgage's claim was thus undersecured,
19 and Nevada State Bank's claim was wholly unsecured.

20 The Debtors filed a motion to avoid the lien attributable to Nevada State Bank's
21 second priority mortgage on November 25, 2009. This motion was unopposed and was
22 granted on February 4, 2010. The current version of the Debtors' chapter 13 plan was filed
23 on June 23, 2010. Although the chapter 13 trustee opposed the plan, Nevada State Bank

24
25 ¹The Debtors obtained a chapter 7 discharge on September 29, 2008, and filed the
26 current bankruptcy case on September 14, 2009. The Debtors' present chapter 13 case is what
is colloquially known as a "chapter 20."

1 did not. As no facts are in dispute, the court took the matter under submission to decide
2 the legal issues.

3 III. Lien Avoidance and the Primary Residence in Chapter 13

4 The Bankruptcy Code provides for different treatment of claims depending on
5 whether the particular claim is secured or unsecured. When the collateral securing the
6 claim is worth less than the amount of debt, a debtor is able to split an otherwise secured
7 claim into a secured and an unsecured claim. *See* 11 U.S.C. § 506(a)(1) (“An allowed claim
8 of a creditor secured by a lien on property in which the estate has an interest . . . is a
9 secured claim to the extent of the value of the creditor’s interest in the estate’s interest . . .
10 and is an unsecured claim to the extent that the value of such creditor’s interest . . . is less
11 than the amount of such allowed claim.”). After this bifurcation, the creditor has a secured
12 claim to the extent of the value of its collateral and an unsecured claim as to that portion of
13 the debt which exceeds the collateral’s value. *Id.*

14 “Secured claim” is a term of art within the Bankruptcy Code, and means something
15 different than it does for a creditor to have a security interest or lien outside of bankruptcy.
16 Furthermore, the defined term “claim” means something different than does the term of
17 art “secured claim.” *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330-31 (1993) (finding that a
18 claim, whether secured or unsecured, is defined by [Section] 101(5), while the subset of
19 claims defined as secured claims are “determined by application of [Section] 506(a)”).
20 Outside of bankruptcy, if a creditor has a valid security interest, regardless of the
21 collateral’s value, it may be thought of as a secured creditor. However, in bankruptcy, a
22 creditor is only a secured creditor if its claim is so classified. If the claim is not so
23 classified, the once-secured creditor will have an unsecured claim and will thus be an
24 unsecured creditor for purposes of the bankruptcy case.

25 However, a chapter 13 creditor enjoys additional protection if the collateral securing
26 its claim is the debtor’s primary residence. 11 U.S.C. § 1322(b)(2) (A chapter 13 plan may

1 “modify the rights of holders of secured claims, other than a claim secured only by a
2 security interest in real property that is the debtor’s principal residence . . .”). Because
3 Section 1322(b) prohibits the modification of the “rights” of the secured creditor, as
4 distinguished from the modification of the secured creditor’s “claim,” the chapter 13
5 debtor cannot avail themselves of Section 506(a) to reduce the undersecured claim to the
6 primary residence’s fair market value. See *Nobelman*, 508 U.S. at 329-32. However, the
7 antimodification protection of Section 1322(b)(2) only operates to benefit creditors who
8 may be classified as secured creditors *after* operation of Section 506(a). See *In re Zimmer*,
9 313 F.3d 1220, 1226 (9th Cir. 2002).

10 In order to determine whether a secured creditor qualifies for the antimodification
11 protection of Section 1322(b)(2), courts first determine whether a creditor has a secured
12 claim under Section 506(a). *Id.* (citing *Nobelman*, 508 U.S. at 328). If the creditor is the
13 holder of a secured claim in bankruptcy, as determined by application of Section 506(a),
14 then “the rights of such a creditor [are] protected,” and “in order to protect such rights,”
15 the antimodification clause applies to the entire claim of the creditor. *Id.* (citing *Nobelman*,
16 508 U.S. at 328).

17 If, however, after applying Section 506(a) to determine the status of the claim, the
18 claim is determined to be wholly unsecured, the rights of the “creditor holding only an
19 unsecured claim may be modified under [Section] 1322 (b)(2),” and the creditor’s lien may
20 be avoided, notwithstanding the antimodification protection provided for in Section
21 1322(b)(2). *Id.*, at 1227. This logic is “compelled by the Supreme Court’s decision in
22 *Nobelman*,” and has been embraced by each of the six circuit courts that have considered
23 this question. *Zimmer*, 313 F.3d at 1227; *In re Lane*, 280 F.3d 663, 667-69 (6th Cir. 2002); *Pond*
24 *v. Farm Specialists Realty (In re Pond)*, 252 F.3d 122, 126 (2nd Cir. 2001); *Tanner v. FirstPlus*
25 *Fin., Inc. (In re Tanner)*, 217 F.3d 1357, 1359-60 (11th Cir. 2000); *In re Bartee*, 212 F.3d 277,
26 288, 295 (5th Cir. 2000); *McDonald v. Master Fin. Inc. (In re McDonald)*, 205 F.3d 606, 611 (3rd

1 Cir. 2000). Bankruptcy Appellate Panels have also reached this same result. *Griffey v. U.S.*
2 *Bank (In re Griffey)*, 335 B.R. 166, 167-68 (B.A.P. 10th Cir. 2005); *In re Mann*, 249 B.R. 831, 836
3 (B.A.P. 1st Cir. 2000).

4 Applied to the Debtors' case, the Debtors' unopposed motion to avoid, supported
5 by an appraisal, stated that the first priority lien on their principal residence exceeded the
6 value of the property. This court agreed and entered an order preliminarily avoiding the
7 lien. Thus, applying Section 506(a) as interpreted by *Nobelman* and *Zimmer* to Nevada
8 State Bank's claim, the claim was wholly unsecured and should be so classified in the
9 Debtors' plan. Following further the rationale of *Nobelman* and *Zimmer*, Nevada State
10 Bank's claim did not qualify for the antimodification protection of 1322(b)(2). This
11 potential lien avoidance, initially at least, is not affected by the no-discharge nature of the
12 Debtors' case. The issue, then, is determining what affect this lien avoidance has on the
13 chapter 13 plan given the no-discharge nature of the case and the lasting effect, if any, of
14 the lien avoidance at plan completion.²

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²While the trustee does not argue that the Debtors are ineligible to file a chapter 13 case because of their previous case under chapter 7, implied within the trustee's argument is the idea that most of the restructuring tools typically available in chapter 13 should be unavailable in this case simply because of their previous chapter 7 bankruptcy.

Congress has determined that some types of repeat bankruptcy filings are completely inappropriate, and thus the debtor is ineligible to file another bankruptcy case for a certain period of time. *See, e.g.*, 11 U.S.C. § 109(g). Congress has also limited the availability of the discharge to repeat bankruptcy debtors. *See, e.g.*, 11 U.S.C. § 727(a); 11 U.S.C. § 727(a)(9). However, the absence of a blanket "prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions," is convincing evidence "that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization" to previous chapter 7 debtors. *Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991). The Debtors' chapter 20 bankruptcy is permissible under the Code, and they may take advantage of all available chapter 13 restructuring tools.

1 **IV. Lien Avoidance and the No-Discharge Chapter 13**

2 *A. In a Typical Chapter 13 Case, Lien Avoidance is Permanent Upon Discharge*

3 The typical chapter 13 debtor is granted a discharge at the end of their payment
4 plan. 11 U.S.C. § 1328 (granting discharge “as soon as practicable after completion by the
5 debtor of all payments under the plan”). Unlike the chapter 7 discharge, which is typically
6 granted relatively quickly, the chapter 13 debtor must, in most situations, successfully
7 complete all plan payments before they may be granted a discharge. *Compare* 11 U.S.C. §
8 727 *with* 11 U.S.C. § 1328. The requirement to make all plan payments can represent a
9 serious burden to the chapter 13 debtor.³

10 For those debtors who successfully confirm and complete a chapter 13 plan, the
11 chapter 13 discharge operates as a permanent injunction against the collection of debts to
12 the extent of the debtor’s personal liability on the debt. 11 U.S.C. § 524. It is important to
13 note, however, that just because a debtor receives a discharge in bankruptcy, the debt does
14 not simply vanish. The debt remains, but personal liability on the debt has been removed.
15 *Id.* Liens on property of the chapter 13 bankruptcy estate, if not properly addressed
16 during the chapter 13 plan, remain on the encumbered property, and once the automatic
17 stay is lifted by entry of the discharge, the creditor is free to exercise any nonbankruptcy
18 collection remedies attributable to its valid security interest in the property. In the normal
19 chapter 13 case, when the debtor avoids the lien through a confirmed plan and also
20 receives a discharge after completing all plan payments, the debt also remains; however,
21 both the personal liability for the debt and the lien allowing the creditor to proceed against
22 the property have been removed, making the debt uncollectible.

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24 ³Indeed, many chapter 13 bankruptcy debtors fail either to achieve confirmation of a
25 chapter 13 plan or to successfully complete all plan payments and, thus, do not receive a
26 discharge of their debts. *See Till v. SCS Credit Corp.*, 541 U.S. 465, 493 n.1 (2004) (Scalia, J.,
dissenting) (citing Scott F. Norberg, *Consumer Bankruptcy’s New Clothes: An Empirical Study
of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 440-41 (1999)).

1 Liens, other than those on a debtor's primary residence, are often avoided through
2 the chapter 13 plan. 11 U.S.C. § 1322(b)(2). Section 1322(b)(2) allows a chapter 13 debtor
3 to "modify the rights of holders of secured claims . . . and of unsecured claims." Thus, it is
4 permissible for a debtor to provide that a lien will be avoided through the chapter 13 plan,
5 making such permanence final upon successful completion of the chapter 13 plan and so
6 long as confirmation of the plan is not subsequently set aside. This is the result that was
7 approved of in *Zimmer*, 313 F.3d at 1226, and is exactly what the Debtors' plan of
8 reorganization provides.

9 It is easy, then, to see why debtors who wish to save their homes choose chapter 13
10 and attempt to avoid a wholly unsecured second priority lien. However, any permanence
11 of this action is not available until all plan payments have been completed. If the debtor
12 fails to complete all plan payments, the case will be dismissed or converted to one under
13 chapter 7. 11 U.S.C. § 1307 (providing for conversion or dismissal, "whichever is in the
14 best interests of creditors and the estate, for cause"). One consequence of this dismissal or
15 conversion is that any lien avoidance that was accomplished will be undone. 11 U.S.C. §
16 349(b)(1); *Dewsnup v. Timm*, 502 U.S. 410, 417-18 (1992). Thus, in the typical chapter 13
17 case, lien avoidance cannot be permanent until all plan payments are made.

18 *B. Characterizing Mortgage Debt in a Chapter 20 Bankruptcy*

19 As discussed above, bankruptcy affects the availability of different collection
20 remedies, without affecting the existence of the debt itself. Indeed, even after the
21 bankruptcy discharge has been granted, so long as a viable means of collection remains,
22 such as the pursuit of collateral for the discharged debt, a creditor will be able to collect
23 some, if not all, of the debt.

24 The security for a debt in real property is typically evidenced by a mortgage or deed
25 of trust on the property. These security devices give the creditor the right to proceed
26 against that specific property in satisfaction of the underlying debt, and a properly

1 recorded mortgage or deed of trust gives the creditor priority over subsequent creditors
2 who take an interest in that land, whether that interest be a mortgage, deed of trust,
3 judgment lien, mechanic's lien, or any other type of security interest. This stands in
4 contrast to the unsecured creditor, who extends credit to the borrower and takes no
5 security interest in any of the borrower's property. If an unsecured creditor sues on the
6 debt, they must sue the borrower personally, and any judgment won will be satisfiable
7 only from the debtor's nonexempt assets.

8 There is a third type of debt of importance to chapter 20 debtors: nonrecourse debt.
9 Nonrecourse debt exists when the creditor has contractually given up its right to satisfy
10 the indebtedness personally against the borrower and, in the event of nonpayment by the
11 borrower, agrees to seek collection of the debt only through foreclosure of its collateral.⁴
12 This species of debt can also exist if a debtor purchases property subject to an existing lien.

13 The bankruptcy discharge creates something akin to nonrecourse debt. After the
14 discharge is granted, personal liability on a debt is removed. 11 U.S.C. § 524(a)(2)
15 (Discharge "operates as an injunction against the commencement or continuation of an
16 action, the employment of process, or an act, to collect, recover or offset any such debt *as a*
17 *personal liability of the debtor.*") (emphasis added). However, the discharge itself has no
18 affect on liens, and the creditor is free to foreclose upon the case's conclusion without
19 violating the discharge injunction. *Johnson*, 501 U.S. at 84 ("[A] bankruptcy discharge
20 extinguishes only one mode of enforcing a claim-namely, an action against the debtor *in*
21 *personam*-while leaving intact another-namely, an action against the debtor *in rem*"). Any
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23 ⁴By example, if a creditor agrees to finance the purchase of a certain parcel of real
24 estate through a nonrecourse loan, and the borrower subsequently defaults on the obligation,
25 the creditor will be able to foreclose on the land as allowed by state law, but the creditor's
26 recovery will be limited to the proceeds of the foreclosure sale. In the event of a deficiency,
the creditor will not be able to proceed personally against the borrower, and this deficiency
will represent an uncollectible debt.

1 deficiency that remains after the creditor forecloses on its liens and sells the property
2 continues to exist, but is an uncollectible debt. Thus, following the discharge, the debt
3 becomes nonrecourse debt. *Id.* at 86 (“Insofar as the mortgage interest that passes through
4 a Chapter 7 liquidation is enforceable only against the debtor’s property, this interest has
5 the same properties as a nonrecourse loan.”); *In re Hill*, 440 B.R. 176, 182 (Bankr. S.D. Cal.
6 2010).

7 Generally speaking, chapter 13 provides a means to address a wide variety of
8 claims, including claims which are nonrecourse debt. 11 U.S.C. § 102(2) (“claim against
9 the debtor includes claim against property of the debtor”). Even though the chapter 13
10 debtor faces no personal liability on the debt, the debtor may use Section 506(a) to
11 determine that the claim is not supported by the value of any collateral, avoid the lien
12 through the chapter 13 plan, and thereby treat the debt as unsecured debt. *In re Metz*, 820
13 F.2d 1495, 1498 (9th Cir. 1987); *In re Akram*, 259 B.R. 371, 374-75 (Bankr. C.D. Cal. 2001).
14 Once the lien is so avoided, the unsecured claim that is represented by this nonrecourse
15 debt becomes an unsecured claim in the bankruptcy case. *Hill*, 440 B.R. at 182; *In re Tran*,
16 431 B.R. 230, 237 (Bankr. N.D. Cal. 2010); 11 U.S.C. 506(a). A creditor who asserts this
17 unsecured claim by filing a proof of claim is further entitled to participate in the pro-rata
18 distribution made to general unsecured creditors, if any. *Hill*, 440 B.R. at 183; *Akram*, 259
19 B.R. at 374.

20 C. Propriety of Lien Avoidance in Chapter 20 Cases

21 Some courts have concluded that a chapter 13 debtor is prohibited from confirming
22 a chapter 13 plan which removes a lien from real property when the debtor has previously
23 filed a chapter 7 case and received a discharge. *In re Gerardin*, — B.R. —, 2011 WL 672050,
24 *5-6 (Bankr. S.D. Fla. 2011) (holding that chapter 20 debtor could not avoid lien because of
25 ineligibility for discharge); *In re Fenn*, 428 B.R. 494, 500 (Bankr. N.D. Ill. 2010) (holding that
26 by virtue of Section 1325(a)(5) holder of secured claim retains the lien until the underlying

1 debt is paid in full); *In re Jarvis*, 390 B.R. 600, 605-06 (Bankr. C.D. Ill. 2008) (finding
2 discharge a necessary prerequisite to permanency of lien avoidance); *In re Lily*, 378 B.R.
3 232, 236-37 (Bankr. C.D. Ill. 2007) (holding that by virtue of Section 1325(a)(5) holder of
4 secured claim retains the lien until the underlying debt is paid in full). The court
5 respectfully declines to reach the same result on the facts of this case, and the remainder of
6 this memorandum explains why.

7 Turning first to the statutory text, Section 1325(a)(5) provides that:

8 (5) with respect to each allowed secured claim provided for by the plan-

9 (A) the holder of such claim has accepted the plan;

10 (B)(i) the plan provides that-

11 (I) the holder of such claim retain the lien securing such claim
12 until the earlier of-

13 (aa) the payment of the underlying debt determined under
14 nonbankruptcy law; or

15 (bb) discharge under section 1328; and

16 (II) if the case under this chapter is dismissed or converted
17 without completion of the plan, such lien shall also be retained by
18 such holder to the extent recognized by applicable
19 nonbankruptcy law;

20 11 U.S.C. 1325(a)(5).

21 Courts believing that this statute prohibits lien avoidance in chapter 20 cases have
22 focused on Section 1325(a)(5)(B)(i). "Code section 1325(a)(5) requires that [the chapter 13
23 plan] provide that the holder of a secured claim retain the lien securing the claim until the
24 earlier of the payment of the underlying debt determined under nonbankruptcy law or
25 discharge under section 1328." *Fenn*, 428 B.R. at 500. If the debtor is not eligible for a
26 chapter 13 discharge due to a previous chapter 7 discharge, the avoidance cannot occur,
because lien "avoidance occurs at discharge."⁵ *Id.*

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24 ⁵*Tran* considered Section 1325(a)(5)(B)(i)(II), and determined that because a chapter 20
25 case is not converted or dismissed at the successful conclusion of plan payments, Section
26 1325(a)(5) is not implicated. *Tran*, 431 B.R. at 235. This discussion is somewhat problematic,
however, because Sections 1325(a)(5)(B)(i)(I) and 1325(a)(5)(B)(i)(II) are joined by the
conjunctive "and" rather than the alternative "or." Therefore, if Section 1325(a)(5)(B)(i) is

1 Considering the statutory text, it would seem that a prerequisite to the application
2 of Section 1325(a)(5)(B) is that the claim first be classified as “an allowed secured claim”
3 within the meaning of Section 1325(a)(5).⁶ Under *Nobelman* and *Zimmer*, as discussed
4 above, when a creditor is wholly unsecured after application of Section 506(a), the creditor
5 has only an unsecured claim for purposes of Section 1322(b)(2). The creditor is not the
6 holder of a secured claim, and as such, Section 1325(a)(5), which, by its language applies
7 only to secured claims, does not apply to the wholly unsecured creditor.

8 *Hill*, when considering this issue, reached this very conclusion. After considering
9 many of the same decisions that this court has considered, and after the same analysis of
10 the statutory text that this court has engaged in, the court found that Section 1325(a)(5)
11 “has no applicability to unsecured claims, which are separately governed by the
12 confirmation requirements of [Section] 1325(a)(4).” *Hill*, 440 B.R. at 183. The application of
13 “[c]ontrolling Ninth Circuit precedent” required that the creditor’s claim be treated as an
14 unsecured claim for purposes of Section 1322. *Id.* “To remain true to the holding of
15 *Zimmer* . . . [the creditor’s] unsecured claim cannot logically be treated differently under

16 _____
17 implicated, both subparts must be satisfied. The *Tran* court does not explicitly state that
18 Section 1325(a)(5) is not implicated when the claim is wholly unsecured, although it does
appear to reach that result. *Id.* at 236.

19 ⁶When undertaking statutory interpretation, this court starts with “the presumption
20 . . . that Congress intended the accepted and plain meaning of the words it used.” *In re Shat*,
21 424 B.R. 854, 864 (Bankr. D. Nev. 2010). When “discerning congressional intent” the court’s
22 “starting point . . . is the existing statutory text It is well established that when the
23 statute’s language is plain, the sole function of the courts—at least where the disposition
24 required by the text is not absurd—is to enforce it according to its terms.” *Lamie v. United*
25 *States Trustee*, 540 U.S. 526, 534 (2004), (quoting *Hartford Underwriters Ins. Co. v. Union Planters*
26 *Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted), in turn quoting *United*
States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United*
States, 242 U.S. 470, 485 (1917)). “In conjunction with this general examination, . . . a court
should also examine, in the case of an integrated and cohesive statute such as the Bankruptcy
Code, how that code uses or employs the words or phrase in dispute.” *Shat*, 424 B.R. at 865.
(citing *Am. Bankers Ass’n v. Gould*, 412 F.3d 1081, 1086 (9th Cir. 2005) (citations omitted).

1 [Section] 1325 than it is treated under [Section] 1322." *Id.*

2 This court agrees that "[a] creditor who [does] not hold a secured claim pursuant to
3 [Section] 506(a)" does not have the "right to other benefits of 'secured status in the
4 bankruptcy proceeding.'" *Id.* (quoting *United States v. Snyder*, 343 F.3d 1171, 1179 (9th Cir.
5 2003)); *In re Fair*, — B.R. —, 2011 WL 1486021, *3 (E.D. Wis. 2011) (holding that because
6 creditor's claim was unsecured after application of Section 506(a) and because Section
7 1325(a)(5) "does not apply to unsecured claims," creditor's lien could properly be
8 avoided); *In re Davis*, — B.R. —, 2011 WL 1460433, *6 (Bankr. D. Md. 2011) (holding that if
9 "claim is not an allowed secured claim pursuant to Section 506(a), by its terms, Section
10 1325(a)(5)(B) is inapplicable"); *In re Frazier*, — B.R. —, 2011 WL 1206198, *6 (Bankr. E.D.
11 Cal. 2011) (holding that where there was "no collateral to secure the claim" after
12 application of Section 506(a), creditor did "not hold a secured claim and therefore lacked
13 "basis for asserting rights under 11 U.S.C. § 1325(a)(5)". Accordingly, these unsecured
14 creditors' rights are subject to modification through the chapter 13 plan—pursuant to
15 Section 1322(b)(2)—and do not qualify to be treated as secured creditors for purposes of
16 Section 1325(a)(5).⁷

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⁷Nevada State Bank has not submitted a claim in this case, nor did they object to the plan. The Debtors may successfully avoid Nevada State Bank's second priority lien through their chapter 13 plan. However, Section 506(a) does not determine the allowed amount of a claim, only whether the claim is to be treated as secured or unsecured. 11 U.S.C. § 506. Given the lien avoidance order, if Nevada State Bank were to submit a claim in the case, under Section 502(a), that claim would be "deemed allowed, unless a party in interest" were to object. 11 U.S.C. § 502(a). If Nevada State Bank were to file a claim, that claim would be unsecured. However, unless the claim is disallowed under Section 502, Nevada State Bank would be entitled to share in the pro-rata distribution to general unsecured creditors made under the Debtors' chapter 13 plan.

1 *D. In a No-Discharge Chapter 13, Lien Avoidance is Permanent Upon Completion of the Plan*⁸

2 Having determined that nothing in the Bankruptcy Code prevents the chapter 20
3 debtor from avoiding a lien, the court now turns to the question of when this avoidance
4 becomes permanent. Prior to the enactment of the Bankruptcy Abuse Prevention and
5 Consumer Protection Act ("*BAPCPA*") by Congress in 2005, chapter 13 cases could end in
6 one of three ways: conversion, dismissal, or discharge. *In re Leavitt*, 171 F.3d 1219, 1223
7 (9th Cir. 1999). Furthermore, actions taken to avoid a lien are undone if a case is dismissed
8 or converted prior to the successful completion of all plan payments, as discussed above.

9 However, *BAPCPA* added Section 1328(f), and thus opened up the possibility of a
10 fourth option, the completion of all plan payments without a discharge. In this post-
11 *BAPCPA* regime, lien avoidance actions are still undone if the chapter 13 case is converted
12 or dismissed, as the operation of those Code provisions was not changed. In cases where
13 the chapter 13 debtor is not eligible for a discharge because of Section 1328(f), the proper
14 determination of the permanency of any action to avoid a lien is less settled.

15 At the successful completion of all payments in a no-discharge chapter 13 case, no
16 order discharging the debtor will be entered because the debtor is not eligible for a
17 discharge. 11 U.S.C. 1328(f). The court finds that in this situation the proper result is for
18 the court to close the case without discharge. 11 U.S.C. 350(a) ("After an estate is fully
19 administered . . . , the court shall close the case."); FED. R. BANKR. P. 5009 ("If in a . . .

21 ⁸Other courts considering this issue have concluded that a debtor may not employ
22 506(d) to avoid the lien, as this would constitute an end-run around the Supreme Court's
23 holding in *Dewsnup*. *Gerardin*, 2011 WL at *4-5 (finding lien modification under Section
24 506(d) improper if claim it secures is a secured claim); *Hill*, 440 B.R. at 181 (holding that
25 allowing lien avoidance solely under Section 506(d) "would run afoul of *Dewsnup*"); This
26 court agrees that 506(d) may not be used independently of another code section to avoid a
lien. However, this interpretation in no way affects the Ninth Circuit requirement that
Section 506(a) be used to sort claims based on secured or unsecured status prior to
application of Sections 1322 and 1325. See *Zimmer*, 313 F.3d at 1226.

1 chapter 13 case the trustee has filed a final report . . . and certified that the estate has been
2 fully administered . . . there shall be a presumption that the estate has been fully
3 administered.”); *Tran*, 431 B.R. at 235.

4 The enactment of BAPCPA created a fourth option for the end result of a chapter 13
5 case, and *Leavitt*, as a result, is now incomplete.⁹ To the available options of discharge,
6 dismissal, and conversion, the fourth option of closed without discharge must now be
7 added.

8 Because the no-discharge case is closed without discharge, rather than dismissed,
9 the code sections that reverse any lien avoidance actions contained within a chapter 13
10 plan upon conversion or dismissal are not implicated, and, thus, do not act to prevent the
11 permanence of the lien avoidance. See 11 U.S.C. § 349(b)(1); *Dewsnup*, 502 U.S. at 417-18.
12 Once a debtor successfully completes all plan payments required by a chapter 13 plan, the
13 provisions of the plan become permanent, and the lien avoidance is, similarly,
14 permanent.¹⁰

15 Support for this conclusion is found in Section 1327, which governs the effect of
16 plan confirmation. Under Section 1327, a confirmed plan is binding “on the debtor and
17 each creditor . . . whether or not such creditor has objected to, has accepted, or has rejected
18 the plan.” 11 U.S.C. § 1327(a). Furthermore, confirmation of a chapter 13 plan “vests all of
19

20 ⁹While other courts have determined that dismissal is the appropriate outcome upon
21 the completion of plan payments, this is inappropriate because dismissal of a chapter 13 case
22 is only to occur either voluntarily or for cause. 11 U.S.C. § 1307. Because dismissal is
23 addressed in Section 1307, and because the successful completion of all plan payments does
24 not constitute cause for dismissal under subsection (c) of section 1307, it is inappropriate for
25 the case to be dismissed upon the successful completion of all plan payments.

26 ¹⁰Or at least as permanent as the order confirming the plan.

In the Debtors’ present chapter 20 case, because personal liability on the claim was
already extinguished by the discharge entered in the prior chapter 7 case, a discharge is
unnecessary to prevent subsequent in personam collection actions. *Hill*, 440 B.R. at 182; *Tran*,
431 B.R. at 237.

1 the property of the estate in the debtor,” and this property vests in the debtor “free and
2 clear of any claim *or* interest of any creditor provided for by the plan.” *Id.* (emphasis
3 added).

4 This language refers to both claims and interests. A claim, whether secured or
5 unsecured, is defined by the Bankruptcy Code as a right to payment. *See* 11 U.S.C. §
6 101(5). While “interest” is not a defined term, because it is included in the same section as
7 claim, it must have a meaning distinct from the defined term “claim.” In the context of
8 chapter 13, which is concerned primarily with addressing and reorganizing a creditor’s
9 rights to repayment and security interests in a debtor’s property, interest encompasses
10 liens on real property. *See* 8 Collier on Bankruptcy ¶ 1327.04 (Alan N. Resnick & Henry J.
11 Sommer eds., 16th ed. 2011). Therefore, liens avoided through a confirmed chapter 13 plan
12 remain avoided so long as the plan and the order confirming it remain in effect. This is
13 because an order confirming a chapter 13 plan is binding, and *res judicata* precludes a
14 creditor from bringing a collateral attack of that order. *In re Brawders*, 503 F.3d 856, 867
15 (9th Cir. 2007) (citing *In re Ivory*, 70 F.3d 73, 75 (9th Cir. 1995)).

16 This *res judicata* effect, and, thus, the treatment afforded to a creditor under a
17 confirmed chapter 13 plan, can only be undone if plan confirmation is revoked, 11 U.S.C. §
18 1330, or if the case is converted or dismissed.¹¹ 11 U.S.C. § 349(b); *see also In re Nash*, 765
19 F.2d 1410, 1413 (9th Cir. 1985). As discussed above, assuming all plan payments are made,
20 confirmation will not be revoked and the case will not be converted or dismissed. It will
21 be closed, and the *res judicata* effect of the confirmed chapter 13 plan will remain in place.

22
23
24

25 ¹¹The treatment might also be affected by any successful challenge to the confirmation
26 order under Bankruptcy Rule 9024, which incorporates Civil Rule 60.

1 *E. The Misnomer of the so-called "De-Facto Discharge"*

2 There is concern that allowing debtors in a no-discharge chapter 13 case to take
3 advantage of chapter 13 restructuring tools, and allowing the changes effectuated thereby
4 to become permanent on the successful completion of the chapter 13 plan, amounts to a
5 "de-facto discharge." The argument continues that because Section 1328(f) prevents
6 discharge in cases such as this, and any action affecting the debtor's debt liability or
7 structure operates as a discharge, Congress could not have intended to allow this practice.

8 Section 1328(f) only prohibits discharge. Because Section 1328(f) is clear, the court
9 declines any invitation to guess Congress's intention when it passed BAPCPA. If
10 Congress's goal was to limit the operation of Sections 1322(b)(2) and 1327 as well as
11 discharge, it could have explicitly drafted the statute to achieve this goal. As it did not, the
12 court will not read any further restrictions into the Bankruptcy Code.

13 The Debtors filed for chapter 13 having received a chapter 7 discharge within the
14 two years prior, and concede that they are ineligible for a discharge in the present case.
15 They seek to avoid the second lien of creditor Nevada State Bank through their chapter 13
16 plan, as allowed by the Bankruptcy Code. The Debtors are seeking to confirm a chapter 13
17 plan that reflects this lien avoidance and makes it permanent upon successful completion
18 of their chapter 13 plan. Because the Code allows debtors who are not eligible for a
19 discharge under Section 1328(f) to take advantage of the other restructuring tools
20 contained within chapter 13, this action is proper under the Code.

21 Some may argue that allowing bankruptcy debtors to take advantage of these
22 restructuring tools, even when ineligible for a discharge, allows the evasion of "limits that
23 Congress intended to place on these remedies." *Johnson*, 501 U.S. at 87. However,
24 "Congress did not intend categorically to foreclose the benefit of Chapter 13
25 reorganization to a debtor who previously . . . filed for Chapter 7 relief." *Id.* Furthermore,
26

1 this argument “fails to apprehend the significance of the full range of Code provisions
2 designed to protect Chapter 13 creditors.” *Id.*; *Fair*, 2011 WL at *3 (finding “Congress did
3 not intend to prevent lien stripping through § 1328(f)(1), and it is inaccurate to characterize
4 lien stripping as a de facto discharge under the bankruptcy code”). A bankruptcy court
5 can only confirm a chapter 13 plan if it complies with all the requirements contained
6 within Section 1325. While serial filings may implicate “any or all of” the provisions
7 contained within Section 1325, *Johnson*, 501 U.S. at 88, these provisions, to which the court
8 now turns, are adequate to safeguard the rights of chapter 13 creditors.

9 V. Good Faith

10 The court has determined that the Debtors’ plan complies with Sections 1322(b)(2)
11 and 1325(a)(5). The court must also consider the chapter 13 trustee’s allegation of bad
12 faith.¹² One factor that must be present before a chapter 13 plan can be confirmed is that
13 the “plan has been proposed in good faith and not by any means forbidden by law.” 11
14 U.S.C. § 1325(a)(3). Good faith in the chapter 13 context is to be determined on a case by
15 case basis, after an examination of the totality of the circumstances. *In re Warren*, 89 B.R.
16 87, 93 (B.A.P. 9th Cir. 1988). The factors affecting a finding of good faith that are relevant
17 to the analysis in the present case are the same that were relevant to the court in the *Hill*
18 case, and these will be discussed in detail. *Id.*; *Hill*, 440 B.R. at 184-85.¹³

19
20 ¹²Even if bad faith were not being alleged by the Trustee, this court has an independent
21 duty in chapter 13 cases to ensure that all elements of Section 1325 are met before it enters an
22 order confirming a chapter 13 plan. *United Student Aid Funds, Inc. v. Espinosa*, – U.S. –, 130
23 S.Ct. 1367, 1381 (2010) (finding that “bankruptcy courts have the authority–indeed, the
obligation–to direct a debtor to conform his plan to the requirements of [the Bankruptcy
Code]”).

24 ¹³The court also finds instructive the analysis of good faith contained within *In re*
25 *Frazier*, – B.R. –, 2011 WL 1206198, *7-8. There the court found that curing an arrearage and
26 restructuring debt to save the debtors’ family residence represented “a real, substantial plan
of financial reorganization” that was “proposed in good faith, and not by any means

1 A. *The Debtors Have a Need for Bankruptcy Other Than the Lien Avoidance Action*

2 The *Tran* court, after finding that lien avoidance in a chapter 20 was permissible,
3 nevertheless dismissed one of the subject cases after finding that the debtor's sole purpose
4 in filing the case was to "unfairly manipulate the Bankruptcy Code to skirt the Supreme
5 Court's holding in *Dewsnup*," through the lien avoidance action. *Tran*, 431 B.R. at 238.
6 This is not the situation here. In the present case, the Debtors are insolvent. According to
7 the Debtors' chapter 13 plan, they have an arrearage of \$14,243.87 on their primary
8 residence that will be cured through the chapter 13 plan. The Debtors' chapter 13 plan
9 further addresses priority claims such as federal taxes in the amount of \$7,891.94 owed to
10 the Internal Revenue Service and sales taxes in the amount of \$13,151.43 owed to the
11 Nevada Department of Taxation. According to the Debtors' Chapter 13 Statement of
12 Current Monthly Income, the debtors have a negative disposable income. However, in an
13 effort to cure the arrearage on their home, to continue paying debt attributable to their
14 automobiles, and to address their outstanding tax liability, the Debtors' chapter 13 plan
15 obligates them to make monthly payments of \$850.00.¹⁴ The Debtors have a valid
16 bankruptcy purpose in filing the present chapter 13 case, as the plan accomplishes a
17 reorganization that was not possible in their previous chapter 7 and "represents their best
18 effort[s] to pay creditors." *Hill*, 440 B.R. at 184 (citing *In re Villanueva*, 274 B.R. 836, 841
19 (B.A.P. 9th Cir. 2002)).

20 B. *The Debtors Acted Equitably in Proposing the Plan*

21 The Debtors filed their previous chapter 7 case to address substantial debt
22 associated with a failed restaurant. The Debtors filed the present case to reorganize the
23 _____
24 forbidden by law."

25 ¹⁴The chapter 13 trustee did not object to confirmation of the Debtors' plan on
26 feasibility grounds. The trustee must have been convinced, then, that the Debtors could
make this payment.

1 remaining priority unsecured debt and to address arrearages on their primary residence.
2 The Debtors' plan calls for them to pay \$43,352.00 in plan payments over the course of the
3 plan. Given this significant repayment and the valid reorganization purpose, "the Debtors
4 acted equitably and with good intentions in proposing their plan." *Id.* (citing *In re*
5 *Chinichian*, 784 F.2d 1440, 1444 (9th Cir. 1986)).

6 *C. The Debtors Are Devoting All of Their Income to the Plan*

7 The Debtors' plan requires substantial payments for five years; however, the
8 expected dividend for unsecured creditors remains small. The "fact that [a debtor's] plan
9 provides for no payment to unsecured creditors is not sufficient to conclude that the plan
10 was submitted in bad faith." *Metz*, 820 F.2d at 1498 (citations omitted). It is only required
11 that "the amount to be paid on unsecured claims" be "as much as the unsecured creditors
12 would have received under chapter 7." *Id.* Here there is no expected payment to
13 unsecured creditors in a hypothetical liquidation under chapter 7, because the Debtors
14 have no equity in any non-exempt assets, as evidenced by their schedules. The Debtors'
15 decision to file for chapter 13 binds them to the terms of the plan for five years. The
16 permanence of the lien avoidance is conditioned upon the successful completion of all plan
17 payments. Income tax refunds, if any, for the years of 2009 through 2013 are to be remitted
18 to the Trustee. All of the Debtors' disposable income, and then some, is devoted to the
19 plan, and, therefore, the plan was proposed in good faith.

20 *D. The Debtors Did Not Use Serial Filings to Avoid Payment to Creditors*

21 The Debtors' previous case was a "no asset" chapter 7, ending with no distribution
22 to unsecured creditors. Nevada State Bank's lien was wholly unsecured, both then and
23 now. Absent a miraculous recovery in the housing market, it would be impossible for
24 Nevada State Bank to seek repayment through a foreclosure sale of their collateral. For
25 those creditors still holding secured claims, the Debtors will be able to cure arrearages and
26

1 continue debt payments. The Debtors will be able to address priority tax liability through
2 this chapter 13 plan. Simply put, no creditor is in a worse position because of the chapter
3 13 bankruptcy, and some may actually be in a more favorable position if all payments are
4 successfully made. *See Hill*, 440 B.R. at 185 (citing *In re Goeb*, 675 F.2d 1386, 1391 (9th Cir.
5 1982) (finding that when unsecured creditors would receive no distribution in chapter 7, a
6 chapter 13 plan providing for even a 1% distribution was not cause to find bad faith)).

7 As discussed at length, the Debtors had a valid bankruptcy purpose in filing the
8 present chapter 13 case. The Debtors' plan was not proposed in contravention of the
9 Bankruptcy Code and is not unfairly prejudicial to creditors. After carefully considering
10 the above enumerated factors, as well as the other pertinent subsections of Section 1325
11 concerning plan confirmation, the court concludes that there is no barrier to confirmation
12 of the Debtors' chapter 13 plan.

13 VI. Conclusion

14 As so many living in the Greater Las Vegas area have recently found necessary, the
15 Debtors in this case are attempting to reorganize their debts, and ultimately their lives,
16 through bankruptcy. A few short years ago, in better economic times, it would have been
17 unthinkable to most that housing prices would decline to such a degree that second
18 mortgages would be wholly unsecured and "lien stripping" would become part and parcel
19 of the chapter 13 case. Unfortunately, the court confronts this reality every day.

20 Before adoption of BAPCPA, the Supreme Court of the United States held that filing
21 what is colloquially known as a chapter 20 bankruptcy was not improper. The United
22 States Court of Appeals for the Ninth Circuit held that there is nothing improper about
23 avoiding a wholly unsecured lien on a debtor's primary residence in chapter 13. Nothing
24 in BAPCPA changes these results. As discussed at length above, this court holds that there
25 is nothing improper about making lien avoidance permanent upon the successful
26

1 completion of the chapter 13 plan, even if there is no discharge. The simple fact is that lien
2 avoidance under *Zimmer* is independent of the granting of a discharge, and the
3 permanence of such avoidance is assured by Section 1327. Nothing in BAPCPA changed
4 this outcome.

5 The Debtors, through their plan of reorganization, have proposed a plan which
6 complies with the applicable provisions of the Bankruptcy Code. The plan was proposed
7 in good faith and for a proper bankruptcy purpose. The court will thus allow confirmation
8 of the Debtors' chapter 13 plan.

9 * * *

10 Pursuant to Federal Rule of Bankruptcy Procedure 7052, applicable here pursuant
11 to Federal Rule of Bankruptcy Procedure 9014, this memorandum decision constitutes the
12 court's findings of fact and conclusions of law.

13 It is hereby ORDERED that the Debtors' chapter 13 plan is CONFIRMED.

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16 Copies to:

17 CM/ECF ELECTRONIC NOTICING
18 BNC MAILING MATRIX

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