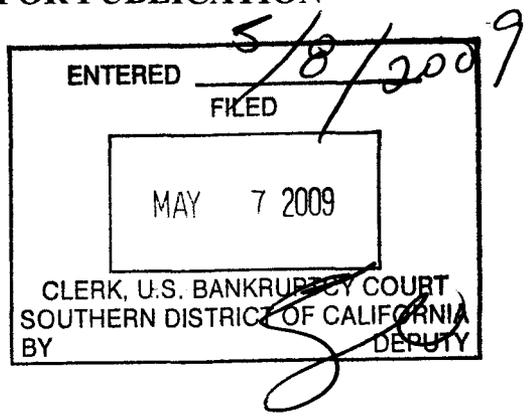


WRITTEN DECISION - NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:
Lane Mitsuo Manriki and Sue Valerie
Manriki,

Debtor.

BK. No. 08-09707-JM13

MEMORANDUM DECISION

Chapter 13 debtors, Lane and Sue Manriki, seek a court order establishing the value of their residence (the "Property") as of the petition date pursuant to their motions filed under section 506(a) of the Bankruptcy Code.¹ If the Property is appropriately valued at \$470,000, which has not been disputed, and the holder of the first mortgage is owed \$480,000, which also has not been disputed, then the second and third mortgages, both held by Wells Fargo Bank ("Creditor"), are wholly unsecured. Because Creditor's two liens are wholly unsecured, the Manrikis also seek a court order avoiding the liens. The Manrikis argue that the avoidance flows naturally from the section 506(a) valuation; is authorized by

¹ Unless otherwise indicated, all references to sections herein are to Title 11 of the United States Code, also referred to as the "Bankruptcy Code".

1 section 506(d); and automatically results in treatment of Creditor's claims as general
2 unsecured claims under paragraph 13 of their confirmed chapter 13 plan.²

3 The Manrikis gave timely and proper notice of their motions to value the Property
4 and avoid Creditor's two junior liens (hereinafter, the "Motions"). Creditor did not file
5 opposition, nor did the chapter 13 trustee. After the time to oppose had fully run, but before
6 the hearing on the Motions could be held, the order confirming the Manrikis' chapter 13
7 plan was entered.³ Although the Manrikis gave notice to Creditor before the plan was
8 confirmed of the Manrikis' intent to strip the two junior liens and to classify Creditor's
9 claims as general unsecured claims, the plan itself did not contain any reference to the
10 pending Motions.⁴

11 At the hearing on the Motions, the Court questioned counsel for the Manrikis and the
12 chapter 13 trustee about the propriety of stripping the liens, which is authorized in
13 conjunction with chapter 13 plans under section 1322(b)(2), where the plan failed to
14 specifically refer to or incorporate the pending Motions.

15 The Court gave Manrikis' counsel authority to file a supplemental brief and also
16 invited the chapter 13 trustee, who had not opposed the Motions, to file a brief.⁵ After
17 briefing was completed, the Court heard oral argument.

18 The trustee argues primarily that the confirmed plan is binding on the Manrikis,
19 should be given res judicata effect as to Creditor's junior liens, and may not be modified

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22 ² The Manrikis' plan is a zero percent plan.

23 ³ Initially the trustee objected to the Manrikis' proposed plan, however, the trustee withdrew his
24 objection prior to the scheduled hearing, all issues having been resolved by an earlier filed amended
25 plan.

26 ⁴ Creditor filed proofs of claim with respect to its two junior mortgages prior to the service of the
27 Motions. On both proofs of claim Creditor annotated the amount of the secured claim with "or as
28 allowed under Section 506(a)." Both claims also estimated the value of the Property collateral as
\$460,000, whereas the Manrikis' scheduled value is \$470,000.

⁵ The trustee had in progress a brief in another chapter 13 case with similar issues (a decision on
which was mooted when the case converted to chapter 7).

1 post-confirmation to change the classification of Creditor's claims.⁶ Manrikis' counsel
2 argued that modification of the plan is not necessary because the Motions were fully and
3 properly noticed pre-confirmation and unopposed after the full period of time to oppose had
4 run – prior to plan confirmation – and, implicitly, were thus part of the Manrikis' unopposed
5 plan.

6 As discussed more fully below, under the totality of circumstances in this case and
7 with particular focus on the lack of any opposition by Creditor to either the plan or the
8 Motions despite full and adequate notice, the Court views the Manrikis' plan and the
9 Motions together as one cohesive proposal for the treatment of Creditor's claims as wholly
10 unsecured claims in the Manrikis' chapter 13 case and, contingent on a clarifying plan
11 modification as discussed herein and satisfactory completion of the confirmed plan and the
12 Manrikis' resultant discharges, will grant the Motions, value the Property at \$470,000, and
13 order avoidance of Creditor's two junior liens in conjunction with the Manrikis' chapter 13
14 plan.

15 16 DISCUSSION 17

18 The Manrikis' purpose in seeking a section 506(a) valuation is to strip off Creditor's
19 2nd and 3rd trust deed liens against the Property. Thus: "[the] valuation under
20 section 506(a), [] appears to be linked to its identified purpose – e.g., a plan of
21 reorganization. Section 506(a) instructs the bankruptcy court to value the property 'in light
22 of the purpose of the valuation and of the proposed disposition or use of such property.'"
23 *Gold Coast Asset Acquisition, L.P. v. 1441 Veteran Street Co. (In re 1441 Veteran Street*
24 *Co.)*, 144 F.3d 1288, 1291-92 (9th Cir. 1998). Further, the valuation shall be determined "in
25 conjunction with any hearing on such disposition or use or on a plan affecting such
26 creditor's interest." 11 U.S.C. §506(a).

27
28 ⁶ The confirmed plan, in fact, contains no mention of Creditor or classification of its claims. The chapter 13 trustee sent out one notice classifying one of Creditor's claims as "outside the plan."

1 Before addressing valuation, however, the Court must determine whether the
2 Manrikis may strip this Creditor's liens under the circumstances of this case, as otherwise
3 valuation would serve no purpose.

4 **1. Section 506(d) Does Not Provide Stand Alone Lien Stripping Authority.**

5 The Bankruptcy Code expressly provides that a chapter 13 plan may "modify the
6 rights of holders of secured claims, other than a claim secured only by a security interest in
7 real property that is the debtor's principal residence, . . ." 11 U.S.C. §1322(b)(2). The
8 United States Supreme Court, in *Nobleman v. American Savings Bank et al*, 508 U.S. 324
9 (1993), focusing on the "rights" of mortgagees, affirmed the lower court's disallowance of
10 section 1322(b)(2) modification where the lender's claim against the debtor's principal
11 residence was determined to be partially secured based on valuation of the property as
12 provided for in section 506(a). After *Nobleman*, however, the Ninth Circuit Court of
13 Appeals, along with the majority of other circuit courts, held that the anti-modification
14 protection in section 1322(b)(2) does not prohibit modification of the rights of a creditor
15 whose lien on a debtor's primary residence is wholly unsecured (commonly referred to as
16 "lien stripping"). *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir.
17 2002).

18 The Manrikis' brief acknowledged the restriction contained in section 1322(b)(2) on
19 modification of the rights of partially unsecured mortgage lienholders and, thus, focused on
20 section 506(d). As clearly settled by the Supreme Court in *Dewsnup v. Timm*, 502 U.S. 410,
21 415-16 (1992), the function of section 506(d) is to void "a lien whenever a claim secured by
22 the lien itself has not been allowed." The Supreme Court held that "§506(d) does not allow
23 [debtor/]petitioner to 'strip down' [creditor/]respondent's lien, because respondents' claim is
24 secured by a lien and has been fully allowed pursuant to §502." *Dewsnup*, 502 U.S. at 417.
25 Thus, in *Dewsnup*, the Supreme Court majority narrowly construed section 506(d). While
26 *Dewsnup* arose in a chapter 7 case, section 506 is a statute generally applicable to all
27 chapters of Title 11. Thus, the *Dewsnup* holding applies squarely and its narrow
28 interpretation does not support a lien strip under section 506(d) in this case.

1 Here, Creditor filed proofs of claim, and no one filed any objection thereto. The
2 claims are thus deemed allowed claims, secured by the liens, and pursuant to *Dewsnup*,
3 section 506(d) does not apply.

4 The Manrikis are correct that *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d
5 1220 (9th Cir. 2002) and *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (9th Cir. BAP
6 1997) support a lien strip where the creditor is wholly unsecured notwithstanding the
7 prohibition in section 1322(b)(2) against the modification of claims secured by a debtor's
8 residence. *Lam* and *Zimmer*, however, reach this result without reliance on or even mention
9 of section 506(d). Instead, both opening courts relied upon section 1322(b)(2) for lien
10 stripping authority.

11 The Manrikis also rely heavily on a few words in *In re Geyer*, where the Court, after
12 careful discussion and analysis of section 1322(b)(2) lien stripping, concluded that "[a]
13 chapter 13 debtor may 'strip-off' a lien on his or her primary residence under the plan or
14 under section 506(d) when the lienholder's interest is totally unsecured." *In re Geyer*,
15 203 B.R. 726, 729-30 (Bankr. S.D. Cal. 1996) (emphasis added). Contrary to the Manrikis'
16 argument, however, the reference in this sentence to section 506(d), does not follow directly
17 from the court's detailed analysis which involved only section 1322(b)(2) and was not
18 necessary to the *Geyer* decision. The statement merely correctly notes, consistent with
19 *Dewsnup*, that section 506(d) would also apply in chapter 13 cases under the right
20 circumstance (when the claim itself has been disallowed). The decision does not analyze
21 section 506(d)'s applicability under the facts of *Geyer* and does not support application of
22 section 506(d) as argued by the Manrikis.

23 Recognizing that the Manrikis' reliance on section 506(d) is misplaced, the Court,
24 notwithstanding, has discretion and may yet grant the requested relief under other relevant
25 authority.

1 **2. The Unopposed Requested Lien Stripping Is Appropriate In Conjunction**
2 **With And As Part Of The Confirmed Plan Pursuant To Section 1322(b)(2).**

3 The chapter 13 trustee correctly notes that the Manrikis are bound by the terms of
4 their confirmed plan (the "Plan"). He also argues that modification of the Plan would be
5 barred by res judicata. This Court does not view the Motions as the Manrikis' attempt to
6 evade the binding effect of the Plan nor as an improper post-confirmation modification⁷ that
7 should be barred under the preclusion doctrine.

8 Pursuant to section 1327(a), "[t]he provisions of a confirmed plan bind the debtor and
9 each creditor, whether or not the claim of such creditor is provided for by the plan, . . . "
10 11 U.S.C. §1327(a); and see *Espinosa v. United Student Aid Funds, Inc.*, 545 F.3d 1113
11 (9th Cir. 2008). Further, it is a "bedrock principle of bankruptcy law in the Ninth Circuit"
12 that confirmation orders are final. *Great Lakes Higher Education Corp. v. Pardee (In re*
13 *Pardee)*, 218 B.R. 916, 925 (9th Cir. BAP 1998). Thus, *res judicata* precludes raising of
14 issues which could or should have been raised during the pendency of the case and prohibits
15 a post-confirmation collateral attack on such issues. *Id.*

16 A plan, however, "can have no preclusive effect on matters that have been
17 specifically reserved for resolution by way of an ongoing adversary proceeding" or that are
18 not addressed in the plan. *Espinosa*, 545 F.3d at 1119; and see *Alonso v. Summerville (In re*
19 *Summerville)*, 361 B.R. 133, 137 (9th Cir. BAP 2007) ("chapter 13 plan and confirmation
20 order did not bar the debtor from contesting an obligation based on a debt being paid outside
21 the plan"). Here, the doctrine of preclusion does not prevent the Manrikis from seeking
22 final resolution of their pre-confirmation Motions; Motions that are integral to the treatment
23 of Creditor's claims under the Plan. The Motions are not disguised post-confirmation
24 modifications to the Plan and, having been fully and adequately noticed pre-confirmation,
25 are, by no means, "lien stripping by ambush." Further, the proposed lien strip is not

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27 ⁷ The Court acknowledges and agrees with the trustee's well-taken point that section 1329 does not
28 permit post-confirmation modifications for other than the purposes specifically stated therein, which
purposes do not include modification of claim classification.

1 inconsistent with any express provision of the Plan as the Plan does not provide for any
2 specific treatment of Creditor's claims.

3 Although lien stripping may be provided for by inclusion within a proposed
4 chapter 13 plan, it may also be accomplished procedurally by noticed motion. *In re Pereira*,
5 394 B.R. 501, 504 (Bankr. SD Cal. 2008). A creditor's non-objection to plan confirmation
6 is an implied acceptance of the plan terms. *In re Pardee*, 218 B.R. at 926; and *Andrews v.*
7 *Loheit (In re Andrews)*, 49 F.3d 1404, 1409 (9th Cir. 1995). In addition, a creditor's non-
8 opposition to a lien strip motion may be deemed by the court to be consent to the granting of
9 the motion. BLR 9014-4(f).

10 In this case, the Manrikis gave notice of their treatment of claims under the Plan first
11 by service of the Plan. And the Plan did not treat Creditor as a secured creditor. Before the
12 Plan was confirmed, the Manrikis also gave notice to Creditor of their specific intent to strip
13 Creditor's two liens in the chapter 13 case. Creditor chose not to oppose either Plan
14 confirmation or the Motions. In fact, the Creditor's proofs of claim indicate that Creditor
15 was aware that its claims might be deemed unsecured under section 506(a).

16 Thus, under the narrow facts of this case,⁸ the Plan and the Motions can and should
17 be taken together as the operative Plan document in the Manrikis' chapter 13 case.

18 When the Motions and the Plan are viewed as an integrated whole and given the
19 requirement of clarifying modification discussed below, the result here does not run afoul of
20 the pre-confirmation responsibility of the trustee and the Court to verify that the chapter 13
21 Plan complies with Bankruptcy Code provisions. The Motions were duly noticed, drew no
22 objection (other than the Court's initial concerns relative to timing and lack of specific
23 provision in the Plan or confirmation order regarding lien stripping), and are granted in
24 conjunction with and pursuant to section 1322(b)(2) as an allowed feature of the Plan. The
25

26 ⁸ The Court finds critical to this ruling the combination of pre-confirmation filing and notice of the
27 Motions, full opportunity for the Creditor to file opposition, the fact that the plan did not provide
28 any treatment of Creditor's secured claims, and the fact that Creditor filed proofs of claim with a
dual classification.

1 Court also is convinced after review that the Court's initial confirmation decision under
2 section 1325 was and is appropriate.

3 In particular, the Court finds the Motions to be proposed in good faith as part of the
4 Plan. The Manrikis value the Property as of the petition date and consistent with their
5 schedules. Thus, they are not improperly taking advantage of market value decline since
6 filing bankruptcy. In addition, the Manrikis' valuation is not inconsistent with the Creditor's
7 estimation of value. Further, the Motions were duly noticed and the Creditor received a full
8 and fair opportunity to object before the Plan was confirmed. The Court, hence, expressly
9 finds that the Manrikis acted in good faith in this chapter 13 case.

10 Notwithstanding this conclusion, the Manrikis must take one additional step prior to
11 finalizing the lien strip pursuant to the Plan. This Court generally requires resolution of lien
12 strip issues prior to confirmation.⁹ Otherwise, it is difficult and in some cases impossible to
13 properly determine a plan's compliance with section 1325. Because the Manrikis' Motions
14 were not resolved before confirmation, they must modify the Plan to expressly integrate the
15 Motions into their Plan and obtain a modified confirmation order that clarifies that lien
16 stripping occurred pursuant to the Plan. These modifications are consistent with this Court's
17 practice requiring that lien stripping language be specifically included in a confirmation
18 order. They are also ministerial and clarifying – not substantive.

19 **3. The Manrikis' Property Is Properly Valued Under Section 506(a) In**
20 **Conjunction With The Confirmed Plan.**

21 The Manrikis properly served their Motions and all related documents to support
22 their valuation of the Property at \$470,000 as of the petition date. Notwithstanding proper
23 service, Creditor failed to timely respond and oppose.¹⁰ The Motions provide clear and
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25 ⁹ In fact, the trustee now regularly files objections to chapter 13 plan confirmation solely for
26 purposes of delaying entry of confirmation orders until such time as pending motions to value and
27 lien strip have been determined by the Court, and the Court has attempted to accommodate the
parties by continuing the hearings on valuation and lien stripping to coincide with plan
confirmation.

28 ¹⁰ As previously mentioned, Creditor's estimate of value in its filed proofs of claim is \$10,000 less
than Debtors' value.

1 appropriate notice that failure to oppose will result in valuation of the Property at \$470,000
2 and the loss of Creditor's liens as a result thereof. The Motions also are supported by
3 adequate evidence.

4 The Court therefore values the Property at \$470,000 as of the petition date,
5 determines that Creditor's claims are entirely unsecured under section 506(a) given the value
6 of the Property and the amount of the lien senior to Creditor's liens secured thereby, and,
7 accordingly as discussed above, will avoid Creditor's liens under section 1322(b)(2) as part
8 of and in conjunction with the Manrikis' confirmed Plan contingent on appropriate
9 clarifying modification to the Plan, entry of a modified confirmation order on the modified
10 plan, and completion of the modified Plan and Debtors' resultant discharge. The Plan must
11 be modified to expressly incorporate the Motions into the Plan by Docket Number
12 reference. The modified confirmation order, must include the following (completed with
13 the relevant data):

14
15 Consistent with this Court's Memorandum Decision dated May 7, 2009 (Docket No.
16 ____): (a) the value of Debtors' residence located at _____
17 _____ (the "Home") is \$470,000.00; (b) the balance owing to the
18 holder of the first trust deed against the Home is greater than \$470,000.00; (c) the
19 Second and Third Trust Deeds of Wells Fargo Bank ("Creditor") [recorded with the
20 _____ County Recorder on _____ as Document No. _____ and on
21 _____ as Document No. _____] (the "Junior Trust Deeds") are each
22 wholly unsecured as a result; (d) as a result and pursuant to section 1322(b)(2) the
23 Creditor's liens may be modified and stripped by this Plan; (e) under the Plan the
24 Creditor will be treated and paid as an unsecured creditor; and (f) upon completion of
25 the Plan and Debtors' discharge, the debt to Creditor secured by the Junior Trust
26 Deeds shall be deemed fully satisfied and Creditor shall take all steps necessary and
27 appropriate to reconvey and release the Junior Trust Deeds against the Home.
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The Manrikis are directed to: (1) promptly file and serve documents providing for a clarifying modification to the Plan; and (2) to promptly submit an order confirming the Plan as so modified and containing the language set forth herein.

DATED: May 7, 2009


LAURA S. TAYLOR, JUDGE
United States Bankruptcy Court

In re Lane Mitsuo Manriki and Sue Valerie Manriki
Bankruptcy No. 08-09707-JM13

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

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Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on May 7, 2009.



Regina A. Fabre, Judicial Assistant