



1           The holders of the second lien, Walter R. Harman & Mary N.  
2 Harman, Trustees for the Harman Family Trust, oppose debtor's  
3 efforts to avoid their lien, and they also seek relief from the  
4 automatic stay to proceed to foreclosure for nonpayment.

5           At the evidentiary hearing, debtor offered the testimony of  
6 an appraiser, Mr. Dicker, who opined that the value of the  
7 property as of February 15, 2010 was \$200,000. The petition  
8 was filed October 21, 2009. Mr. Dicker testified he performed  
9 an external examination by drive-by, both of the subject and the  
10 comparables he chose. He recognized that the zoning for the  
11 area was Central Commercial, while the "subject property is a  
12 single-family home that has been converted into a commercial  
13 storefront. It has been grandfathered into current zoning."

14           Mr. Dicker testified that the scope of his assessment of  
15 the subject property was for its use as a single family  
16 residence. He recognized that it is a small residence on an  
17 above-average size lot of almost 14,000 square feet. His  
18 understanding was that the property has 768 square feet of gross  
19 living area. Consistent with the scope of his appraisal of the  
20 property as a single family residence, all of his comparable  
21 sales were residences, located off major thoroughfares, not in  
22 commercial zones, and in the Chula Vista area.

23           The creditor's appraiser, Mr. Brock, opined that the highest  
24 and best use of the property was commercial use, such as a used  
25 car lot or small service business. Mr. Brock's opinion of value  
26 was \$300,000, and his date of value was January 11, 2010.

1 Interestingly, the pictures taken by both appraisers reflect a  
2 two-story property. It appears, however, that Mr. Dicker did not  
3 include any of the first floor space as part of the gross living  
4 area. Mr. Brock testified that he did both an external and  
5 internal examination of the property and he measured the spaces.  
6 On the first floor there is an office of 360 square feet and a  
7 280 square foot carport. He measured the second floor as having  
8 781 square feet of gross living area. When he visited the  
9 property, it was a fully functioning used car operation with  
10 approximately 40 vehicles on the lot. Debtor testified that it  
11 has since been closed down for nonpayment of rent.

12 Mr. Brock's comparable sales were very different from  
13 Mr. Dicker's. As noted, Mr. Dicker's were all residences, and  
14 all were in the Chula Vista area. Mr. Brock's were all  
15 commercial properties and were 3 to 13.65 miles away from the  
16 subject property. Mr. Brock testified, however, that after  
17 determining highest and best use, he sought comparables with  
18 similar structure and lot size in areas of similar zoning,  
19 neighborhood, economic climate and competing neighborhood  
20 demographics. So while the distance was a consideration, he  
21 concluded it was overcome by the similarities listed.

22 Based on a review of the testimony of both appraisers and  
23 consideration of their appraisals, the Court is persuaded that  
24 the highest and best use of the property is for a used car lot or  
25 small service-type business. The above-average lot size, coupled  
26 with commercial zoning, urges commercial use of the property.

1 The Court also notes that if residential were to be the highest  
2 use of the property, it has a significant amount - 50% or more -  
3 of more gross living area than Mr. Dicker included in his  
4 analysis. Arguably, that factor alone would adjust his opinion  
5 of value to an amount in excess of \$218,005.

6 The Court finds and concludes that the market value of the  
7 subject property, at its highest and best use, is approximately  
8 \$300,000. The applicable statute, 11 U.S.C. § 1322(b)(2),  
9 provides in relevant part:

10 (b) . . . the plan may -

11 . . .  
12 (2) modify the rights of holders of  
13 secured claims, other than a claim  
14 secured only by a security interest in  
real property that is the debtor's  
principal residence . . .

15 Review of the language of the statute brings forth an interesting  
16 issue not directly focused on by either party, and touched on  
17 only obliquely in the questioning of the debtor and Mr. Brock.  
18 The significance of the issue is as follows: Because of the value  
19 of the property the Court has found - \$300,000 - there is value  
20 to which the second trust deed attaches. Therefore, if the  
21 property is the "debtor's principal residence", then the rights  
22 of the second trust deed holder cannot be modified. In re  
23 Nobelman, 508 U.S. 324 (1993). No part of the second trust deed  
24 obligation would be avoidable in Chapter 13. However, if the  
25 property is not the debtor's principal residence, then the debtor  
26 is empowered by § 1322 to modify the rights of the secured

1 creditor. That would permit the debtor to split the Harman Trust  
2 claim into two parts, secured and unsecured.

3 At the evidentiary hearing, it was brought out that the  
4 address debtor listed on his petition was 1353 5<sup>th</sup> Street,  
5 Imperial Beach, California, while the subject property is at 1169  
6 3<sup>rd</sup> Avenue, Chula Vista. Debtor testified that the Imperial  
7 Beach address is where his wife and son live, and he lives there  
8 from time to time when he is in town. He hires out to work out  
9 of town, so is not always around. Interestingly, he claimed on  
10 the stand that the Chula Vista address was his residence, that  
11 he inherited it from his mother, and that he went there from time  
12 to time when he was in town. As noted, if it is his primary  
13 residence, he cannot avoid any part of the security interest held  
14 by the Harman Trust. Conversely, the creditor pressed debtor to  
15 acknowledge that it was not his primary residence. If it is not,  
16 then a portion of the Herman Trust claim may be treated as  
17 unsecured in a Chapter 13 plan.

18 Because the parties have not addressed this issue, they  
19 should be afforded the opportunity to do so. Accordingly, the  
20 Court will give notice of a status conference to allow the  
21 parties to advise the Court how they choose to proceed to resolve  
22 this issue.

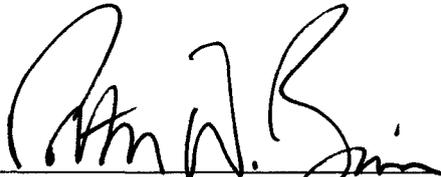
23 Meanwhile, as noted at the outset, the Harman Trust has  
24 moved for relief from the stay to proceed with foreclosure  
25 because debtor has not made post-petition payments on the debt.  
26 Debtor requested a hearing in conjunction with the lien strip

1 motion, but did not otherwise counter any of the creditor's  
2 factual assertions. Accordingly, the Court finds and concludes  
3 that relief from stay should be, and hereby is, granted for  
4 cause, for lack of adequate protection because debtor has not  
5 made post-petition payments to the creditor. Even if the secured  
6 portion of the debt were reduced in accordance with the foregoing  
7 discussion, debtor's failure to make any of the payments on this  
8 debt leave the creditor without adequate protection. It is  
9 noted, in passing, that debtor testified he received rent from  
10 the operator of the used car lot as recently as December 2009,  
11 which would have been the cash collateral of the lender.

12 For all the foregoing reasons, the Court fixes the value of  
13 the subject property at \$300,000 as of the petition date.  
14 Therefore, the security interest of the Harman Trust is not  
15 avoidable in its entirety. Whether it is avoidable in part  
16 depends on resolution of the remaining issue. However, because  
17 the debtor has not made post-petition payments on the Harman  
18 Trust obligation, relief from the automatic stay is granted.

19 IT IS SO ORDERED.

20 DATED: APR 19 2010

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23 PETER W. BOWIE, Chief Judge  
24 United States Bankruptcy Court  
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