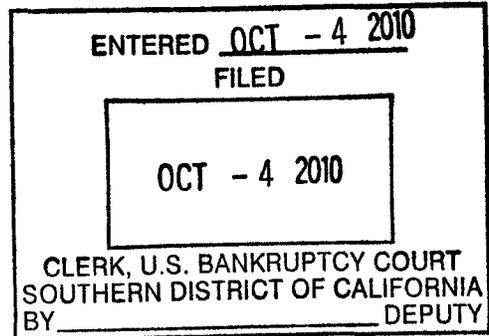


WRITTEN DECISION - NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re:

GEORGE THOMAS HALE, III  
LONE HALE

Debtors.

) BK. No. 10-06988-MM13

) MEMORANDUM DECISION ON LIEN  
) STRIP MOTION

Debtors George Thomas Hale III and Lone Hale ("Debtors") filed a Chapter 13 bankruptcy petition on April 27, 2010. Debtors filed a Motion<sup>1</sup> for Stripping Wholly Unsecured Junior Deed of Trust in connection with confirmation of their Chapter 13 Plan (the "Lien Strip Motion"). PNC Bank, N.A. ("Lender") filed a response, and the disputed issue was the valuation of Debtors'

<sup>1</sup> This Court allows debtors to obtain a valuation determination under § 506(a) in aid of a section 1322(b)(2) lien strip by motion, but requires that debtors serve such motion as required by Rule 7004. See, *In re Pereira*, 394 B.R. 501, 506-507 (Bankr. S.D. Cal. 2008).

1 primary residence located at 1411 Welsh Way in Ramona, California ("Residence").<sup>2</sup> The Court  
2 held an evidentiary hearing on this matter on September 22, 2010.

3 Debtors allege in the Lien Strip Motion that the value of the Residence is \$329,000, less  
4 than the amount owed to the first trust deed holder in the undisputed amount of \$341,255. The  
5 Debtors request that this Court confirm this valuation pursuant to Fed. R. Bankr. P. 3012. Debtors'  
6 Chapter 13 plan filed April 27, 2010 calls for retention of the Residence and for Lender's second  
7 priority deed of trust to be determined to be unsecured, and "stripped" under 11 U.S.C.  
8 § 1322(b)(2).<sup>3</sup>

9 Lender disputes Debtors' valuation, alleging that it holds an undersecured rather than  
10 unsecured claim, since the value of Debtors' Residence as of September 7, 2010 is \$400,000 and the  
11 first lien totals \$341,255. Lender argues Debtors cannot strip or otherwise modify its second trust  
12 deed because it is not a wholly unsecured creditor.

13 The parties presented the testimony of expert appraisers Diane Brown and Derek Parkes.  
14 Each qualified as an expert and provided expert written opinions regarding the value of the  
15 Residence. Parkes' opinion of the value of the Residence as of September 7, 2010 was \$400,000  
16 and Brown's opinion of the value of the Residence as of April 27, 2010 was \$329,000.

17 The Court has carefully reviewed the evidence contained in the written appraisal reports and  
18 the testimony of the appraisers at the valuation hearing. The Court has also analyzed what date  
19 should be the valuation date under applicable law. The Court now renders its decision on value and  
20 the Lien Strip Motion.

### 21 I. Legal Analysis

22 The Bankruptcy Code expressly provides that a chapter 13 plan may "modify the rights of  
23 holders of secured claims, other than a claim secured only by a security interest in real property that  
24 is the debtor's principal residence, . . ." 11 U.S.C. § 1322(b)(2). In *Nobelman v. American Savings*  
25 *Bank et al*, 508 U.S. 324 (1993), the Supreme Court confirmed that section 1322(b)(2) modification

26 <sup>2</sup> That the Residence is the Debtors' primary residence was not disputed at trial.

27 <sup>3</sup> References to code sections refer to Title 11 of the United States Code, also referred to as  
28 the "Bankruptcy Code" unless otherwise specified. References to a "Rule" refer to the Federal  
Rules of Bankruptcy Procedure, unless otherwise indicated.

1 is not available when a section 506(a) valuation establishes that a lender's claim is partially secured.  
2 After *Nobleman*, however, the Ninth Circuit Court of Appeals, along with the majority of other  
3 circuit courts, held that the anti-modification protection of section 1322(b)(2) does not prohibit  
4 modification of the rights of a junior creditor holding a lien on a debtor's primary residence where  
5 senior liens exceed the value of the residence such that the junior creditor is wholly unsecured.  
6 *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9<sup>th</sup> Cir. 2002).<sup>4</sup>

7 In this case, Debtors seek to modify the rights held by Lender pursuant to section 1322(b)  
8 and request that the Court determine the secured status of Lender's claim pursuant to section 506(a).  
9 This requires that the Court determine the market value of the Residence "in light of the purpose of  
10 the valuation and of the proposed disposition or use of such [Residence], and in conjunction with  
11 any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C.  
12 §506(a)(1). Market value is "[t]he most probable price which a Residence should bring in a  
13 competitive and open market under all conditions requisite to a fair sale, the buyer and seller each  
14 acting prudently and knowledgeably and assuming the price is not affected by undue stimulus."  
15 *United States ex rel. Farmers Home Admin. v. Arnold & Baker Farms (In re Arnold & Baker*  
16 *Farms)*, 177 B.R. 648, 657 (9<sup>th</sup> Cir. BAP 1994), *aff'd*, 85 F.3d 1415 (9th Cir. 1996), *cert. den.* 519  
17 U.S. 1054 (1997).

## 18 II. Date of Value

19 The parties have not disputed that the Petition Date is the appropriate date for  
20 valuation of the Residence. The petition date is the "watershed date of a bankruptcy proceeding."  
21 *Johnson v. GMAC (In re Johnson)*, 165 B.R. 524,528 (S.D. Ga. 1994.) In addition, "...creditors'  
22 rights are fixed (as much as possible)" as of this date. *Id.* This approach is: "clearly supported by  
23 11 U.S.C. § 502 (b) which states the general rule that, when an objection to a claim is raised ...the  
24 court, after notice and a hearing, shall determine the amount of such claim as of the date of the  
25 filing of the petition..." *Brager v. Blum (In re Brager)*, 39 B.R. 441, 443 (Bankr. E.D. Pa. 1984).  
26 Neither party argued nor submitted evidence that an adjustment to either appraised value or  
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28 <sup>4</sup> Such modification is commonly referred to as "lien stripping."

1 comparables used was necessary due to an increase or decrease in property values in relation to the  
2 petition date and the date of the appraisals. The Court therefore did not consider this factor in  
3 making its adjustments to the comparables described above.

### 4 **III. Analysis of Valuation Evidence.**

5 Each appraisal was professionally conducted and each appraiser was well qualified. Both  
6 relied most heavily on the comparable sales method of determining value, and only secondarily  
7 used the cost valuation method. To differentiate between the two appraisers' opinions, the Court  
8 considered the quality of the different appraisal reports, their testimony on direct and cross  
9 examination, and the appraisers' respective ability to substantiate the basis for their valuations.

10 The Court found each expert generally to be credible and competent in the rendering of their  
11 opinions. Since the Court cannot differentiate between the appraisers on this basis, this finding  
12 would favor the Debtors valuation evidence since the Lender bears the burden of proof on the  
13 valuation issue in this context. *In re Sneijder*, 407 B.R. 46, 55 (Bankr. S.D. N.Y. 2009).

14 The Court's determination of value is based primarily upon its resolution of the experts'  
15 primary points of disagreement on the valuation factors of location, condition of the Residence, and  
16 age of the comparable sales to determine the value of the Residence.

#### 17 **A. Valuation Factors**

##### 18 **a. Location and Age**

19 Brown testified her comparable sales were primarily selected to reflect the inferior location  
20 of the Residence in downtown Ramona, rather than in more desirable locations on the outskirts of  
21 town in newer developments. Parke agreed that this factor was germane to the value analysis.

22 Parke used several newer comparable sales which were of properties closer in age to the  
23 Residence that Brown did not use because these sales had not yet occurred when Brown's analysis  
24 was done. Parke's appraisal was dated September 7, 2010, while Brown's appraisal was dated April  
25 2, 2010. Brown's failure to use these new sales did not discredit her analysis since they were not  
26 available for her review when her appraisal was performed.

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1 While Brown attempted to dispute this point, the Court finds the newer comparable sales of  
2 properties closer in age to the Residence are important to the value determination. The Court finds  
3 Parke's testimony to be more credible on this point.

4 b. Condition of Residence

5 The Residence contains an empty pool in the backyard. Both of the debtors testified that the  
6 pool does not hold water and that the pump is broken. Debtors do not know what the cost would be  
7 to repair the pool. According to George Hale, the pool would most likely need to be re-plastered  
8 after repaired. Brown did not give any value to the pool, given its condition. Parke gave it a value  
9 of \$15,000, and adjusted his comparables accordingly. The Court agrees with Brown's opinion that  
10 the pool does not provide any value to the Residence since the evidence is that the pool is not  
11 functional.

12 There was also testimony from Parke regarding damage to the dining room floor which  
13 possibly related to a cracked slab. This damage was not noted in Brown's appraisal, and may have  
14 occurred after her appraisal was completed. Neither appraiser tied this problem to a specific value  
15 adjustment, so neither does the Court.

16 B. Reconciliation of Factors

17 The Court determines the value of the Residence by adjusting the three most comparable  
18 sales to reflect the age, location and condition of the Residence. Based upon all of the testimony,  
19 the Court gives the most weight to the three most comparable sales to the Residence based upon  
20 their proximity, similar age and similar condition: 1) 1366 Hanson Way (Parke's Comp 2 and  
21 Brown's Comp 5); 2) 1307 Welsh Avenue (Parke's Comp 1); and 3) 1006 9th Street (Brown's Comp  
22 1). Other than these three, all other comparable sales were not as relevant due to either being  
23 outside a mile radius of the Residence, or being significantly older than the Residence.

24 The Hanson property was the only comparable used by both appraisers. Brown's value after  
25 adjustments is \$321,270. Parke's value after adjustments is \$391,500. Since the Lender bore the  
26 burden of proof, the Court makes the relevant adjustments to the Brown appraisal. The Hanson  
27 property was sold after Brown's appraisal was completed, so she used the listing price less a 5%  
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1 adjustment, a methodology used by both appraisers. Since the actual sales price was \$359,000, or  
2 \$10,000 more than the sales price Brown used, the Court has adjusted Brown's value to reflect this  
3 actual sales price, by adding back \$10,000, and by also adding back the \$24,430 adjustment Brown  
4 gave for the pending sale. This analysis derives to a value for the Residence of \$355,700.

5 The Welsh property used by Parke alone has a value of \$412,000 after his adjustments. This  
6 comparable sale was closest in location and age to the Residence, but sold after the Brown appraisal  
7 was completed. The Court gives this comparable sale significant weight, but makes adjustments  
8 based upon the uncontradicted testimony. The Debtors each testified that the Welsh property  
9 actually appraised at \$380,000, despite a sales price of \$395,000, because the buyers were  
10 influenced by a desire to live near other residents. The Court has adjusted Parke's value downward  
11 by \$15,000 to account for this non-market factor. The Court has also reduced Parke's value by  
12 \$15,000 for Parke's pool adjustment, and by an additional \$15,000 to reflect the superior condition  
13 of this property to the Residence, especially given the damaged flooring in the dining room.  
14 Therefore, Parke's value is reduced by \$45,000 total, which derives to a value of \$367,000 for the  
15 Welsh comparable sale.

16 The 9th Street Property used by Brown alone has a value of \$351,800 after adjustments.  
17 This comparable sale was also similar in both age and location to the Residence. Parke testified that  
18 this was an appropriate comparable to use and there was no testimony indicating a need to adjust  
19 this price. The Court therefore accepts Brown's value of the 9th Street Property based upon its  
20 determination of the applicable burden of proof.

21 The Court then averaged the values derived from adjusting these three comparable sales.  
22 This process determines a value of the Residence of \$358,166.67, which the Court will round to  
23 \$358,000.

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**IV. Conclusion**

The Court values the Residence at \$358,000. Therefore, the Lender is an undersecured creditor and its lien may not be stripped from the Residence. Debtors' Lien Strip Motion is denied. The Court requests Lender's counsel to submit the order accordingly.

IT IS SO ORDERED.

DATED: 10/4/10

  
MARGARET M. MANN, JUDGE