Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
May 15, 2020

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	)	Case No.: 16-15980-MKN
	)	Chapter 13
DONALD E. BRASHER aka TRIPLE D. CONSTRUCTIONS AND DEVELOPMENT, LLC and STEPHANIE D. BRASHER,	)	Date: April 1, 2020
	)	Time: 2:30 p.m.
Debtors.	)	

ORDER ON MOTION TO VALUE RESIDENTIAL REAL PROPERTY UNDER 11 USC § 506(a)(1)[1]

On April 1, 2020, the court heard the Motion to Value Residential Real Property Under 11 USC § 506 (a)(1) ("Valuation Motion") filed in the above-captioned case. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

Donald E. Brasher and Stephanie D. Brasher ("Debtors") filed a voluntary Chapter 13 petition on November 7, 2016 ("Petition Date"). (ECF No. 1). The case was assigned for administration to panel trustee Rick Yarnall ("Chapter 13 Trustee"). On December 19, 2016, Debtors filed their schedules of assets and liabilities ("Schedules") along with their statement of financial affairs. (ECF No. 12). On their property Schedule "A/B," Debtors listed a single-

[1] In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to provisions of the Bankruptcy Code, 11 U.S.C. § 101, et seq. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure.

family residence located at 5970 Sierra Bonita Court, Las Vegas, Nevada 89149-3970 ("Residence"). (ECF No. 12). Debtors attested that the then-current value of the Residence was $453,000. On their Schedule "C," Debtors claimed a Nevada homestead exemption in the Residence in the amount of $22,782.35.[2] On their secured creditors Schedule "D," Debtors attested that the Residence was encumbered by a lien in favor of Bank of America ("BOA") securing a loan in the amount of $339,740, a second mortgage also in favor of BOA securing a loan in the amount of $90,477.65, and a lien in favor of the Internal Revenue Service ("IRS") securing a claim in the amount of $34,008.70. Debtors also scheduled a lien against the Residence in favor of Tropical Estates HOA securing a claim in the amount of $1,000.

On November 17, 2016, the IRS filed a proof of claim ("POC") in the amount of $241,519.35, of which $227,207.21 was asserted to be secured by all of the Debtors' interests in real and personal property. Attached to the POC is a list setting forth multiple years of federal income tax liability, including the tax assessment dates, the tax lien notice dates, and the accrued penalties and interest.[3]

On December 19, 2016, Debtors filed a proposed Chapter 13 Plan #1 ("Plan #1"). (ECF No. 20). Section 1.03 of Plan #1 specifies an applicable commitment period of 5 years. Section 1.05 of Plan #1 states that the liquidation value of all non-exempt assets is $0.00.[4] Section

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[2] Debtors claimed an exemption in the specific dollar amount, rather than "100% of fair market value, up to any applicable statutory limit." The exemption is therefore limited to the dollar amount claimed. See Schwab v. Reilly, 560 U.S. 770, 794-95 (2010) ("Where…a debtor accurately describes an asset subject to an exempt interest and on Schedule C declares the 'value of [the] claimed exemption' as a dollar amount within the range the Code allows, interested parties are entitled to rely upon that value as evidence of the claim's validity. Accordingly, we hold that [the bankruptcy trustee] was not required to object to [the debtor's] claimed exemptions…in order to preserve the estate's right to retain any value in the [asset] beyond the value of the exempt interest.").

[3] Under Section 522, property claimed as exempt is not liable for a prepetition debt except, *inter alia*, "a debt secured by a lien that is…not avoided…and…not…a tax lien, notice of which is properly filed." 11 U.S.C. §522(d)((2)(A)(i, ii, and iii). The IRS tax lien amounts therefore are not precluded by the Debtors' homestead exemption.

[4] Liquidation value of a Chapter 13 debtor's non-exempt assets is important because a proposed plan may be confirmed only if the court finds that "as of the effective date of the plan"

2.13.B of Plan #1 places the IRS in secured Class 3B as a secured claim in the amount of $34,008.70 to be paid in the amount of $566.81 for sixty months. Section 2.17A of Plan #1 places the IRS in priority unsecured Class 7A as a priority unsecured claim in the amount of $39,645.83 to be paid in full. Section 2.19 provides that claimants in non-priority unsecured Class 9 will be paid an unspecified percentage over the life of the plan. Section 5.03 of Plan #1 provides that any scheduled property of the estate vests in the Debtors upon confirmation of the plan.

On December 20, 2016, Debtors' meeting of creditors was concluded. (ECF No. 25).

On December 21, 2016, the Chapter 13 Trustee filed an objection to confirmation of Plan #1. (ECF No. 26).

On January 9, 2017, BOA filed an objection to confirmation of Plan #1. (ECF No. 28).

On January 23, 2017, an initial hearing on confirmation of Plan #1 was held (ECF No. 32), but hearing has been continued throughout the case.

On June 8, 2017, Debtors filed an objection to the POC ("Claim Objection"). (ECF No. 42). By the Claim Objection, Debtors sought a determination that the allowed amount of the IRS secured claim was $34,008.00 based solely on the Debtors' asserted value of the real and personal property assets set forth in their Schedules.

On June 23, 2017, the IRS filed a response to the Claim Objection requesting a specific analysis of the basis for the Debtors' objection. (ECF No. 54).[5]

On February 13, 2018, an order was entered overruling the Claim Objection ("Claim Objection Order"). (ECF No. 71).

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the value of property distributed on account of each allowed unsecured claim "is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7…" 11 U.S.C. § 1325(a)(4). Known as the "best interest of creditors" test, this confirmation requirement assures that a debtor's attempt to reorganize rather than liquidate its assets does not prejudice the debtor's unsecured creditors. Inasmuch as an individual debtor's exempt assets would not be distributed in a Chapter 7 liquidation proceeding, the value of the assets that a Chapter 13 debtor does not exempt is included in the amount that the debtor must pay to confirm a plan.

[5] On October 17, 2017, the IRS filed an amended POC in the total amount of $241,546.72, of which $112,115.46 was claimed as secured, and $129,431.26 was unsecured.

On February 22, 2018, Debtors filed a proposed amended Chapter 13 Plan #2 ("Plan #2"). (ECF No. 72). Section 2.2 of Plan #2 specifies an applicable commitment period of 60 months. Section 2.4 of Plan #2 states no liquidation value of the bankruptcy estate. Section 4.4 of Plan #2 provides for the IRS to have a secured claim in the amount of $12,116.35 to be paid in full. Section 5.1 of Plan #2 provides for the IRS to have a priority unsecured claim in the amount of $29,845.84 to be paid in full. Section 5.4 of Plan #2 provides that non-priority unsecured claims will be paid an unspecified percentage over the life of the plan. Section 8.3 of Plan #2 provides that any scheduled property of the estate vests in the Debtors upon confirmation of the plan.

On March 9, 2018, Debtors filed the instant Valuation Motion. (ECF No. 78). Debtors asserted that the value of the Residence was $453,500, based on an appraisal dated December 16, 2016. Id. at ¶¶ 8 and 9. In the prayer of their motion, Debtors request a judgment as follows:

> 1. That the Internal Revenue Services Secured Claim, Court claim number 3-5, be adjudicated as partially genral (sic) unsecured and its debt treated as partially general unsecured claim in the amount of $199,584.53;
> 2. That the Internal Revenue Service's lien, Court claim number 3-5, have modified force and effect as a secured lien in the amount of $12,116.35 against the Debtors' real property located at 5970 Sierra Bonita Court, Las Vegas, NV 89149;
> 3. That the Internal Revenue Service's lien be adjudicated as an unsecured lien and treated as an unsecured claim through Debtors' Plan;
> 4. For such other and further relief this Court deems just and appropriate.

Valuation Motion at 4-5. The motion was noticed to be heard on April 19, 2018. (ECF No. 79).

On April 5, 2018, the IRS filed a response to the Valuation Motion. (ECF No. 83).

On April 12, 2018, Debtors filed a reply in support of the Valuation Motion. (ECF No. 85).

On April 19, 2018, the first of several status hearings was conducted on the Valuation Motion.[6]

On May 25, 2018, the IRS filed a supplemental response to the Valuation Motion. (ECF No. 92).

On December 7, 2018, Debtors filed an amended Schedule "D" listing the IRS as having a claim in the amount of $112,115.46 secured by the Residence. (ECF No. 107). Debtors attested that the value of the collateral securing the IRS claim was $22,138.35.

On April 17, 2019, Debtors filed a proposed amended Chapter 13 Plan #3. (ECF No. 128). Section 2.2 of Plan #3 specifies an applicable commitment period of 60 months. Section 2.4 of Plan #3 states no liquidation value of the bankruptcy estate. Section 4.4 of Plan #3 provides for the IRS to have a secured claim in the amount of $112,115.46 to be paid in full. Section 5.1 of Plan #3 provides for the IRS to have a priority unsecured claim in the amount of $29,845.84 to be paid in full. Section 5.4 provides that non-priority unsecured claims will be paid an unspecified percentage over the life of the plan. Section 8.3 of Plan #3 provides that any scheduled property of the estate vests in the Debtors upon confirmation of the plan.

On January 10, 2020 ("Stipulation Date"), Debtors and the IRS filed a stipulation regarding the Valuation Motion ("Valuation Stipulation"). (ECF No. 168).[7] The parties agreed, *inter alia*, that the value of the Residence was $500,000 on the Petition Date (November 7, 2016), and $650,000 as of the Stipulation Date (January 10, 2020) ("Stipulated Value(s)"). The parties also agreed that on the Petition Date, the total amount owed on the two mortgages was

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[6] Counsel for the Debtors and the IRS acknowledged that after completion of discovery an evidentiary hearing would be required to resolve various factual issues, including the amounts owed to the mortgage claimants.

[7] Between the initial hearing date on April 19, 2018, and the Stipulation Date on January 10, 2020, the Debtors and the IRS agreed to multiple continuances to resolve as many issues as possible. Unfortunately, during the middle of that hiatus, the parties' good faith efforts were interrupted by the federal government shutdown that occurred in December 2018. See Motion for a Stay of Pending Motion in Light of Lapse of Appropriations filed January 18, 2019. (ECF No. 112).

$441,354.19, and that the total amount owed on the Stipulation Date was $399,424.45.[8] The parties also agreed that the value of any personal property securing the IRS claim, at all relevant times, is $10,000.[9]

On February 11, 2020, Debtors filed their opening brief in support of the Valuation Motion ("Debtors Brief"). (ECF No. 172).

On March 10, 2020, the IRS filed its opposition brief ("IRS Brief"). (ECF No. 176).

On March 30, 2020, Debtors filed their reply brief. (ECF No. 178).

DISCUSSION

The parties having stipulated to the value of the Residence as of the Petition Date and the Stipulation Date, their only remaining dispute is which of those dates applies to determine the allowed amount of the IRS claim.[10] Section 506(a) specifies that a secured claim is allowed "to the extent of the value of such creditor's interest in the [bankruptcy] estate's interest" in the subject property. If the Petition Date applies, then taking $500,000 and subtracting the combined mortgage balances of $441,354.19 on the Petition Date leaves a balance of $58,645.81 of value in the Residence to secure the IRS claim. According to the amended POC, the total amount of the IRS claim is $241,546.72. See note 5, supra. Under Section 506(a), the allowed amount of

[8] The parties agreed that the holder of the first mortgage was owed $350,906.54 on the Petition Date and was owed $308,976.80 on the Stipulation Date, i.e., a reduction of $41,929.74 during the Chapter 13 proceeding. Additionally, the holder of the second mortgage was owed $90,447.65 on the Petition Date and was owed the same amount on the Stipulation Date, i.e., no reduction during the Chapter 13 proceeding.

[9] In light of these stipulated values and stipulated lien amounts, there is no dispute that on the Petition Date, the IRS had at least a partially secured claim, and has never held a secured claim that is wholly-unsecured.

[10] The Stipulation Date was January 10, 2020. Briefing on the Valuation Motion was completed on March 30, 2020, and the matter was argued on April 1, 2020. During the intervening period of time, the COVID-19 pandemic arose, and the Governor of Nevada declared a public health emergency throughout the State of Nevada. Various orders and decrees have been entered by various governmental entities providing relief from certain monthly mortgage payment obligations and also imposing a moratorium on real property foreclosure activity. It is unknown whether these developments have significantly impacted the current value of the Residence.

the IRS secured claim against the Residence would be $58,645.81 on the Petition Date, and its remaining $182,900.91 would be unsecured as to the Residence.[11]

If the Stipulation Date applies, then taking $650,000 and subtracting the combined mortgage balances of $399,424.45 on the Stipulation Date leaves a balance of $250,575.55 of value in the Residence to secure the IRS claim. Under Section 506(a), the allowed secured amount of the IRS claim against the Residence would be $241,546.72. In other words, the IRS claim would be allowed as fully secured under Section 506(a) and the IRS would have no allowed unsecured claim.[12]

Section 506(a) also provides that the value of the creditor's interest "shall be determined in light of the purpose of the valuation and the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

Section 1325 sets forth the requirements to confirm a proposed Chapter 13 plan. Section 1325(a)(5) sets forth three options for treatment of secured claims. One of the options is for the plan to provide that the secured claimant retains its lien, that the value distributed to the claimant not be less than the allowed amount of the secured claim, and that any periodic payments be in equal monthly amounts. 11 U.S.C. §1325(a)(5)(B)(i)-(iii).

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[11] The IRS claim also is secured by personal property of the Debtors. Under the Valuation Stipulation, that personal property is valued at $10,000 at all times (including the Petition Date). The total value of the real and personal property assets securing the IRS claim would therefore be $68,645.81. Because the entire $500,000 value on the Petition Date would be exceeded by the two mortgages and the IRS liens, there also would be no equity in the Residence available for the Debtors' homestead exemption.

[12] Because the entire $650,000 value on the Stipulation Date would not be encompassed by the two mortgages and the IRS lien, there would be approximately $29,028.83 of equity in the Residence available for the Debtors' homestead exemption. This assumes that the $10,000 in personal property assets are applied to the total amount of the IRS claim. As previously mentioned at 2 and n.2, supra, Debtors claimed a homestead exemption in the amount of $22,782.35 in their Schedule "C." Applying that amount to the available equity in the Residence as of the Stipulation Date, the non-exempt interest in the Residence would have a liquidation value of $6,246.48.

In the instant case, the purpose of the Valuation Motion is clear: to determine the amount that the Debtors will need to pay the IRS under a Chapter 13 plan designed to retain their Residence. Identifying the purpose of the instant valuation, however, is no epiphany. As the leading Chapter 13 treatise author observes:

> There is little agreement in the reported cases on the date for fixing the value of collateral in Chapter 13 cases. Consistent with § 506(a), the purpose for which value is being determined pushes around the date on which the process focuses. This guarantees a moving target because value is at issue in Chapter 13 cases to determine the extent of secured claims for eligibility purposes, for exemptions, for adequate protection, on motions for stay relief before and after confirmation, for various purposes at confirmation, on claims objections, at modification after confirmation, at conversion and even after completion of payments. Some of the reported decisions simply disagree about the timing for valuation even with respect to the same purpose. (footnotes omitted)

Keith M. Lundin, LUNDIN ON CHAPTER 13, §76.3, at ¶ 3, LundinOnChapter13.com (last visited May 7, 2020).[13]

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[13] As if to prove the treatise author's point, counsel for the Debtors and the IRS cite a number of divergent cases – both under Chapter 13 and Chapter 11 – none of which are controlling, and none of which are comparable to the factual and procedural circumstances of the instant case. See Debtors' Brief at 4-7, citing Chase Manhattan Bank USA NA v. Stembridge (In re Stembridge), 394 F.3d 383 (5th Cir. 2004) (value of truck used in Chapter 13 debtor's business determined as of petition date to provide secured creditor with adequate protection from depreciating value); In re Graves, 2019 WL 6170789, at *4 (Bankr. S.D. Miss. 2019) (Chapter 13 parties stipulated to valuing residence as of the petition date); Benafel v. One West Bank, FSB (In re Benafel), 461 B.R. 581 (B.A.P. 9th Cir. 2011) (Chapter 13 debtor's principal residence determined as of petition date rather than prepetition purchase date); Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220 (9th Cir. 2002) (Chapter 13 debtor may avoid a wholly unsecured junior lien against a principal residence); Lam v. Investors Thrift and U.S. Trustee (In re Lam), 211 B.R. 36 (9th Cir. 1997) (value of Chapter 13 debtor's principal residence undisputed on motion for default judgment); In re Gutierrez, 503 B.R. 458 (Bankr. C.D. Cal. 2013) (Chapter 13 petition date used to value debtor's principal residence to determine wholly unsecured status of junior mortgage); In re Montiel, 572 B.R. 758 (Bankr. W.D. Wash. 2017) (same for postconfirmation determination of wholly unsecured status); Marsh v. U.S. Dep't Housing & Urb. Dev. (In re Marsh), 929 F.Supp.2d 852, 858 (N.D.Ill. 2013) (Chapter 13 petition date used to value debtor's principal residence to allocate creditor risk of depreciation and appreciation); Dean v. LaPlaya Investments, Inc. (In re Dean), 319 B.R. 474, 478-79 (Bankr. E.D. Va. 2004) (Chapter 13 petition date used to value debtor's residence to avoid giving secured creditor a windfall from postpetition appreciation in value); In re Gomes, 2020 WL 556279 (Bankr. M.D. Fla. Feb. 3, 2020) (Chapter 13 petition date used to value debtor's interest in a

In this matter, the parties stipulated that the value of the Residence increased from $500,000 on the Petition Date to $650,000 on the Stipulation Date, i.e., a $150,000 postpetition appreciation in value.[14] Because the Debtors never confirmed their proposed Plan #1, the vesting language under Section 5.03 thereof, see discussion at 3, supra, does not apply.[15] As a result, the postpetition appreciation in the value of the Residence remains part of the bankruptcy estate and does not belong to the Debtors. See Black v. Leavitt (In re Black), 609 B.R. 518, 529 & n.9 (B.A.P. 9th Cir. 2019). See also In re Johnson, 2020 WL 265914, at *8 (Bankr.D.Alaska Jan. 17, 2020). Additionally, the bankruptcy estate's interest in the Residence has not been abandoned by way of a motion or otherwise under Section 554. Accordingly, both the Residence as well as any appreciation in its value, remain property of the Chapter 13 estate.[16]

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residence being constructed during bankruptcy proceeding), and Debtors Rep. at 2, citing TD Bank, N.A. v. Landry), 479 B.R. 1 (D.Mass. 2012) (Chapter 13 petition date used to value debtor's primary residence to determine wholly unsecured status of junior mortgage); Chagolla; Hernandez v. JP Morgan Chase Bank, N.A. (In re Chagolla), 544 B.R. 676 (B.A.P. 9th Cir. 2016) (postdischarge lien avoidance motion was proper where creditor's wholly unsecured junior claim was discharged by completion of Chapter 13 plan). Compare IRS Brief at 3, citing In re Dheming, 2013 WL 1195652 (Bankr. N.D. Cal. 2013) (individual Chapter 11 plan confirmation date used to value commercial real property); In re Williams, 480 B.R. 813 (Bankr. E.D. Tenn. 2012) (Chapter 13 approximate plan confirmation date used to value debtor's principal residence to determine wholly unsecured status); Roach v. The Bank of Missouri (In re Roach), 2010 WL 234959 (Bankr. W.D. Mo. 2010) (Chapter 13 plan confirmation date should be used to value debtor's residence).

[14] Debtors claimed an exemption in the Residence in the amount of $22,782.35. After the meeting of creditors concluded on December 10, 2016, parties in interest had until January 9, 2017, to object to any exemptions. See Fed.R.Bankr.P. 4003(b)(1). No objections were filed, and the property claimed as exempt is exempt under Section 522(l).

[15] Under Section 1322(d)(2), a Chapter 13 plan may not propose to make plan payments for more than 60 months after the case is filed. Because the Debtors commenced their proceeding on November 7, 2016, they are now approximately 42 months along without a confirmed plan. Absent a confirmed plan, they are ineligible to request a two-year extension of the maximum five-year payment period as a result of a "material financial hardship" due directly or indirectly to the COVID-19 pandemic. See 11 U.S.C. §1329(d)(1) [eff. March 27, 2020]. At best, Debtors would have approximately 18 months remaining to complete Chapter 13 plan payments.

[16] As previously discussed in note 4, supra, at plan confirmation, Debtors have the burden of proving that their proposed Chapter 13 plan pays at least liquidation value to allowed

That the Residence and the appreciation in its value are property of the estate is significant. Whenever any bankruptcy petition is filed, the automatic stay under Section 362 gives the non-repeat debtor a breathing spell from creditors. The value of the assets included in the bankruptcy estate typically dictates the treatment of secured claims in the case. A fortunate creditor whose collateral value exceeds the amount of its claim enjoys treatment under Section 506(b), while the unfortunate creditor whose collateral value is less than or equal to the amount of its claim has serious concerns. The fortunate secured creditor may be allowed postpetition interest and reasonable attorney's fees under its contract, while the unfortunate secured creditor typically obtains neither. Both secured creditors, however, are concerned about fluctuations in the value of the collateral during the bankruptcy case.

Under Section 506(a), the allowed amount of either secured creditor's claim does not diminish during a bankruptcy if the value of the collateral is increasing. If, however, the value of the collateral is decreasing, then the fortunate creditor eventually may lose the beneficial

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unsecured claims. The best interests of creditors test under Section 1325(a)(4) focuses on the value of property to be distributed on each allowed unsecured claim "as of the effective date of the plan." The appreciated value of the Residence is property of the Chapter 13 estate. Debtors have not confirmed a Chapter 13 plan and their Plan #1 asserts that the liquidation value of their non-exempt assets is $0.00. Debtors filed a Plan #2 and a Plan #3 but neither state a liquidation value of the Debtors' non-exempt assets. If the appreciated value of $650,000 exists the time of plan confirmation, but the Chapter 13 plan treats the secured claims in amounts that would be allowed as of the Petition Date based on a $500,000 value, see discussion at 6-7, supra, there will be substantial equity in the Residence beyond the allowed secured claims at the time of plan confirmation. Debtors' claimed exemption in the Residence is only $22,782.35. If the allowed secured claims under a proposed Chapter 13 plan, i.e., the two mortgages and IRS lien, are deducted from the $650,000 value, see discussion at 6-7, supra, there may be up to $191,929.74 remaining. Deducting the Debtors' claimed homestead amount, there would be up to $169,147.39 in non-exempt value of the Residence. In a hypothetical Chapter 7, the Residence would be liquidated, those allowed secured claims would be paid, and the Debtors would receive their claimed homestead amount. The remaining sale proceeds, less costs of sale, would be available for distribution to unsecured creditors. Unfortunately, the Value Stipulation does not address the time at which the liquidation analysis is to be applied. If it looks to a hypothetical Chapter 7 liquidation conducted on the Petition Date, then does the Valuation Stipulation assume that the Residence would be sold, if at all, for $500,000? Or does the liquidation analysis assume that the Residence would be sold near the plan confirmation date, if at all, for $650,000? The leading treatise on Chapter 13 matters describes in detail the breadth of cases that reach different conclusions. See LUNDIN ON CHAPTER 13, supra, § 90.1, at ¶¶ 3 to 32.

treatment provided by Section 506(b), and the allowed amount of the unfortunate creditor's secured claim simply diminishes. In the decreasing value scenario, both types of creditors may be entitled to seek "adequate protection" of their allowed secured claims in the form of periodic payments or additional collateral. Without adequate protection, both types of creditors may be granted relief from the automatic stay under Section 362(d)(1) to exercise their nonbankruptcy remedies against their collateral.

A Chapter 13 debtor is required under Section 1326(a)(1) to commence "plan payments" no later than 30 days after filing the bankruptcy petition whether or not a plan has been confirmed. As previously mentioned, a plan may not be confirmed if it seeks to make plan payments for more than five years. The Chapter 13 debtor who wants to retain a creditor's collateral prior to confirming a Chapter 13 plan must meet its regular contractual obligations to the secured creditor, e.g., monthly mortgage or car payments. The Chapter 13 debtor who wants to retain the collateral after confirming a plan must meet its contractual obligations to the secured creditor, or, pay the allowed amount of the secured claim. The Chapter 13 debtor who wants to pay only the allowed amount of the secured claim, rather than the contractual balance, can do so through the process of "cramdown." See 11 U.S.C. §1322(b)(2) (Chapter 13 plan can include a provision to modify the rights of holders of secured claims); 11 U.S.C. §1325(a)(5)(B)(ii) (value distributed to holder of secured claim is not less than the allowed amount of the claim). Because the value of the collateral determines the allowed amount of the secured claim under Section 506(b), the Chapter 13 debtor may benefit from a lower valuation at plan confirmation while the detriment of a lower valuation may be visited upon the secured creditor. Until plan confirmation, however, the Chapter 13 debtor benefits from a higher valuation as it may reduce the amount, form or even the requirement of providing adequate protection to a secured creditor during the bankruptcy process.

But plan confirmation does not fix the date upon which the amount of a secured claim may be determined. Under FRBP 3012(a)(1), any party in interest may seek a determination of the amount of a secured claim under Section 506(a). Under FRBP 3012(b), a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a

proposed Chapter 13 plan. If the request to determine the amount of the secured claim is made in a proposed Chapter 13 plan, a copy of the proposed Chapter 13 plan must be served on the claimant. Under FRBP 3012(c), however, a different process applies to requests to determine the amount of a secured claim of a governmental unit. Instead, the request must be made only by a motion or claim objection, and only after the governmental unit has filed a proof of claim, or the deadline to do so has expired.[17] FRBP 3012(c) excludes such a request from being made in a Chapter 13 plan. Thus, any party in interest can seek a determination of the allowed amount of any secured claim at virtually any time during a case, but the requested determination of a government claim may be sought only after a proof of claim is filed or time barred, and only by a motion or claim objection that is not included a proposed Chapter 13 plan.[18] Because the POC in this case was filed by the IRS on November 17, 2016, the Debtors, the IRS, and any party in interest were authorized under FRBP 3012(c) after that date to seek a determination of the amount of the IRS's secured claim under Section 506(a).

In this case, Debtors timely objected to the POC after it was filed. Debtors were unsuccessful. After the Debtors filed their Claim Objection, but before the Claim Objection Order was entered, the IRS filed an amended proof of claim in the total amount of $241,546.72, attesting that it has a secured claim in the amount of $112,115.46 and an unsecured claim in the amount of $129,431.26. See note 5, supra. The Valuation Stipulation does not address whether the parties have stipulated to the IRS filing a further amended POC to reflect its secured and unsecured claims as of the Petition Date or the Stipulation Date.

This fluctuation of the dates and valuations is further skewed when the underlying collateral is the Chapter 13 debtor's principal residence. For all other assets, a Chapter 13 plan may modify the rights of a secured creditor through cramdown treatment under Section

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[17] Under FRBP 3002(c)(1), a government unit has 180 days to file a proof of claim after the bankruptcy petition is filed. In the instant case, the IRS had a deadline of May 8, 2017, to file its POC. See Notice of Chapter 13 Bankruptcy Case at § 8. (ECF No. 4).

[18] It is not clear why the amount of a governmental unit's secured claim cannot be determined, like non-governmental claimants under FRBP 3012(b), in connection with a proposed Chapter 13 plan.

1325(a)(5), but the proposed Chapter 13 plan is prohibited from doing so under Section 1322(b)(2) with respect to a secured creditor whose claim is secured only by "real property that is the debtor's principal residence." 11 U.S.C. §1322(b)(2). This prohibition against modifying the rights of holders of certain secured claims is mirrored in Chapter 11 cases filed by individual debtors. See 11 U.S.C. §1123(b)(5). Unfortunately, this "anti-modification" language has led to disputes as to whether an individual debtor's real property is in fact the debtor's principal residence. See, e.g., In re Schayes, 483 B.R. 209 (Bankr.D.Ariz. 2012) (single family home where Chapter 11 debtors resided was their principal residence even if it was purchased with the intention of resale). More important, these anti-modification restrictions on individual debtors in Chapter 13 and Chapter 11 have also led to decisions that are similarly disparate as to the time a debtor's principal residence is established: as of the loan date, see, e.g., In re Abrego, 506 B.R. 509 (Bankr. N.D. Ill. 2014) (debtor's principal residence under Section 1322(b)(2) is based on date when creditor's security interest is created); as of the bankruptcy petition date, Benafel, 461 B.R. at 588 (Chapter 13 debtor's principal residence under Section 1322(b)(2) determined as of petition date); or as of the plan confirmation date, In re Nieto, Case No. 09-26688-BAM, "Memorandum on Modifications of Property Under 11 U.S.C. §1322(b)(2)," Docket No. 59 (Bankr.D.Nev. Oct. 25, 2010) ("Nieto Memorandum"), aff'd on other grounds, 2012 WL 6097983, at *2 (B.A.P. 9th Cir. Nov. 28, 2012) (Chapter 13 debtor's principal residence under Section 1322(b)(2) determined as of the plan confirmation hearing).[19]

These dynamics are magnified by the unique nature of the Chapter 13 process. Because Chapter 13 proceedings are entirely voluntary, a Chapter 13 debtor may dismiss the case at any time under Section 1307(b), unlike individuals who seek protection under Chapter 7 or Chapter 11. See 11 U.S.C. §707 (dismissal of Chapter 7 case only after notice and a hearing); 11 U.S.C. § 1112(b)(1) (dismissal of Chapter 11 case only after notice and a hearing). When a Chapter 13 case does not proceed as planned, the debtor can simply dismiss the proceeding. But Chapter 13

[19] Unlike Section 1322(b)(2) that specifically refers to real property that is the debtor's principal residence when a proposed plan is considered, see Nieto Memorandum at 7:8-13, there is no temporal language in Section 506(a) specifying when its method of secured claim allowance is to be applied.

relief is available only to individuals and individuals need a place to live for themselves and their dependents. Thus, retaining a personal residence is perhaps the most common reason for individuals to seek Chapter 13 protection over any other form of bankruptcy relief. See LUNDIN ON CHAPTER 13, supra, §8.12, at ¶¶ 6 and 7 ("In a Chapter 7 case,…the lender will require…, at least, that the debtor will become current on the lenders's terms. The debtor with even a substantial mortgage arrearage can cure the default over time and rehabilitate the mortgage without creditor cooperation in a Chapter 13 case…Because few individual debtors can also qualify as 'family farmers' or 'family fishermen' for purposes of Chapter 12, and because, after the 1994 amendments, Chapter 11 provides no obvious advantages with respect to management of a residential mortgage, Chapter 13 remains the chapter of choice to rehabilitate an individual debtor's home mortgage.").

Because there is no language in any applicable statute specifying the date at which the value of a debtor's principal residence is to be determined, and no dispositive legislative history, courts have reached different results based on various policy considerations[20] that point in different directions. In Gutierrez, the bankruptcy court discussed many competing policy considerations before concluding that the Chapter 13 petition date should apply. The court explained as follows:

> Whatever date is used for valuation, an argument can be made that either the debtor or the junior lienholder will receive a "windfall" depending on whether the property appreciates or depreciates after that date. For the following reasons, however, using the petition date appears to be better from a policy perspective.
>
> Various scenarios are possible: as of the petition date, the junior lien could be partially secured or fully underwater, and thereafter the property could depreciate or appreciate. Each scenario is examined below.
>
> Suppose that on the petition date the junior lienholder has a secured claim, of any dollar amount. In that event the junior lienholder is entitled to demand "adequate protection," failing which the bankruptcy court "shall" grant relief from the automatic stay (11

[20] Identifying policy considerations applicable to a particular statute, of course, is difficult when meaningful legislative history is absent.

U.S.C. § 362(d)(1)), so the junior lienholder has legal protections against any "down side" after the petition date. Conversely, if the collateral appreciates then the partially secured junior lienholder will gain the benefits of increased collateral value, such as the right in the event of a sale of the property to collect up to the full dollar amount of its debt including attorney fees and other charges. *See* Alpine Group, Inc., 151 B.R. 931, 933–36.

On the other hand, if the junior lien is entirely underwater as of the petition date then by definition the junior lienholder would receive no present economic value if it were free to exercise its nonbankruptcy rights and foreclose. This also means that the debtor, who is paying senior liens in order to retain the property, is investing substantial funds in property that is fully encumbered, which is a risky investment from a purely economic perspective. If the junior lienholder thereafter could use an increased value to prevent the debtor from modifying its debt, then the financial restructuring would essentially allocate all of the risk to the debtor and all of the benefits to the junior lienholder. "Heads I win, tails you lose."

It makes sense to interpret ambiguous provisions of the Bankruptcy Code equitably and consistent with reorganization and fresh start policies of the Code. As one court put it, the question is whether "the junior lienor should enjoy the benefit ... when it no longer bears the risk," to which "the answer must be 'no.'" Marsh, 929 F.Supp.2d 852, 858.

In addition, it is not just the debtor's interests that are at stake. If the debtor is forced to pay more to the junior lienholder, that will have to come out of disposable income, which generally means at the expense of unsecured claims. If the debtor lacks any disposable income then the debtor likely will have to surrender the property. That affects not only the debtor but also the senior lienholder who no longer will receive monthly payments, and instead will have the costs associated with a nonperforming loan and foreclosure. The only marginal benefit may be to the junior lienholder: it might prefer to take its chances with foreclosure, but that is a small benefit in exchange for the likely costs to all other parties in interest.

Another policy concern comes from the fact that, as noted above, "value is only one side of the § 1322(b)(2) coin" and the dollar amount of the senior debt is important to determine whether the junior lien is entirely underwater. *Sarno*, 463 B.R. 163, 165. Any negotiated reduction of the senior debt might transform a junior lien that is entirely underwater on the petition date into a lien that is at least partially secured as of the confirmation hearing, which is a

disincentive to enter into any loan modification that would reduce the debt. It seems contrary to the purposes of the Bankruptcy Code to interpret it in a way that discourages consensual loan reduction.

There are some countervailing policy considerations. The foregoing discussion contemplates valuation as of the petition date for some purposes but as of the confirmation hearing date for other purposes, which potentially could lead to duplicative litigation and perhaps inconsistent results. As noted above, however, valuation already can occur as of multiple dates for different purposes, and it is not necessarily inconsistent to reach different results under different sections of the Bankruptcy Code.

Another potential problem is that valuation as of the petition date will be retroactive, which is more challenging than a present valuation. Appraisers may be reluctant to opine as to historical value, and it is difficult for appraisers and the court not to look back with "20/20 hindsight" that distorts what the court would have found if the issue had been presented at the historical time—*e.g.*, if the real estate market has subsequently rebounded from low values as of the petition date, then a low valuation may seem unduly pessimistic in hindsight, even if it would have been accurate at the time. These are real concerns, but they are not insurmountable and bankruptcy courts deal with similar issues all the time.

Nor is it an insurmountable problem that a debtor at least theoretically could file a bankruptcy petition when the property has reached its lowest value, so as to retain all the anticipated appreciation. First, other considerations such as job loss, major illness, or divorce generally play a much larger role in whether and when to file a bankruptcy petition. Second, anticipated trends in real estate values are uncertain. Third, any fixed valuation date theoretically can be manipulated—if the date of the confirmation hearing controls then debtors or junior lienholders may attempt to delay that hearing when that would suit their needs—so this concern does not necessarily have much bearing on whether the court should use the petition date or the date of the confirmation hearing. Fourth, any manipulation can be addressed using some of the many other tools available to the bankruptcy court, including good faith requirements. *See* Abdelgadir, 455 B.R. 896, 900 (quoting bankruptcy court's comments that "[g]ood faith is always an issue," in addressing the possibility that a debtor's purported change in principal residence is a sham to be able to modify liens against the property).

> On balance, policy considerations appear to point in the same direction as the statutory analysis. The petition date appears to be the most appropriate date to determine whether the junior lienholder's claim is or is not subject to modification under section 1322(b)(2).

503 B.R. at 464-466.

The policy concerns cogently articulated and balanced in Gutierrez do not necessarily apply in the present case. Here, the IRS lien has never been wholly-unsecured at any point during the case, even according to the Debtors' original schedules. Indeed, the Stipulated Value of the Residence on the Petition Date is even higher than the value to which the Debtors' attested in their schedules. Debtors have reduced the principal amount owed to the holder of the first mortgage by over $40,000, apparently by making most, if not all, of their regular postpetition installment loan payments, but have not reduced the amounts owed to any junior lienholders. Moreover, no evidence suggests that the Debtors have been discouraged from negotiating a loan modification with either mortgage lender. Indeed, the Mortgage Modification Mediation ("MMM") Program in this judicial district was adopted "as a forum for individual debtors to explore mortgage modification options with their lenders" with the goal "to facilitate communication and exchange of information in a confidential setting and encourage parties to finalize a feasible and beneficial agreement." Mortgage Modification Mediation (MMM) Program Procedures, "Purpose," United States Bankruptcy Court, District of Nevada, Effective 5/1/17, https://www.nvb.uscourts.gov/mortgage-modification-mediation/procedures/. Nothing in the record indicates that the Debtors have ever sought to participate in the MMM Program, but their reasons for not doing so is also not in the record. In essence, Debtors' payments to the first mortgage holder is not the same type of risky investment described in Gutierrez.

Through the Valuation Stipulation, the Debtors and the IRS also have avoided any evidentiary difficulties attendant to retroactively valuing the Residence. They have agreed that the Residence has increased in value after commencement of this Chapter 13 proceeding. This additional distinction from Gutierrez is not significant, but the parties'

agreement has additional consequences. Although the Valuation Stipulation is not binding on any other parties, it does suggest that neither the two mortgage lenders nor the IRS would be able to obtain relief from stay for cause under Section 362(d)(1). See, e.g., First Federal Bank of California v. Weinstein (In re Weinstein), 227 B.R. 284, 296-97 (B.A.P. 9th Cir. 1998) (moving party must demonstrate that the subject property has declined in value after the bankruptcy proceeding was commenced).

Based on the Valuation Stipulation, it appears that the total debt secured by the Residence has never exceeded its value. Under the Valuation Stipulation, the secured claim of the IRS was undersecured but not wholly unsecured as of the Petition Date. Under the Valuation Stipulation, all of the secured claims are oversecured as of the Stipulation Date. Thus, none of the lienholders would be able to obtain relief from stay based on lack of equity in the Residence under Section 362(d)(2). See 11 U.S.C. §362(d)(2)(A) (the moving party must demonstrate that "the debtor does not have an equity in such property"); 11 U.S.C. §362(g)(1) ("the party requesting relief [under Section 362(d)] has the burden of proof on the issue of the debtor's equity in property").[21]

Under the unusual facts of this case, the Debtors have been in Chapter 13 for approximately 42 months without confirming a Chapter 13 plan, but no one has sought dismissal of the proceeding. See 11 U.S.C. §1307(c)(1) ("on request of a party in

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[21] Because the Debtors always have had at least some equity in the Residence, the burden would never shift to the Debtors to demonstrate that the Residence is "necessary to an effective reorganization." 11 U.S.C. §362(d)(2)(B). See also 11 U.S.C. §362(g)(2) ("the party opposing [relief from stay under Section 362(d)] has the burden of proof on all other issues"). This might be an insurmountable burden for the Debtors under the present circumstances. To demonstrate that the Residence is necessary to an effective reorganization, the Debtor would have to prove that there is a reasonable possibility of a successful reorganization in a reasonable amount of time. See generally United Savings Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 376 (1988). Unfortunately, Debtors have been in Chapter 13 for more than three and a half years and have never confirmed a plan. Even the amended plans they filed, which never have been noticed for confirmation, would have to be further amended. Inasmuch as plan payments under a Chapter 13 plan may not exceed 60 months, the Debtors have only 18 months left to complete payments if they ever confirm a plan.

interest…and after notice and a hearing, the court may…dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including…unreasonable delay by the debtor that is prejudicial to creditors…").[22] Without confirming and completing payments under a plan, the Debtors cannot obtain a Chapter 13 discharge of their personal liability for any of their prepetition debts. Absent a confirmed plan that vests title to the Residence in the Debtors, or an abandonment of the Residence, it remains property of the bankruptcy estate. As a further result, the post-bankruptcy appreciation in the value of the Residence also belongs to the estate. Due to the appreciating value of the Residence, the two mortgage holders and the IRS are unable to obtain relief from the automatic stay. This standoff exists between the Debtors and their secured creditors, while general unsecured await payment, if at all, through a confirmed plan.

Under the current circumstances, the court concludes that any windfall to the Debtors from using the Petition Date or to the IRS from using the Stipulation Date may be largely illusory because the Debtors may not be able to confirm a Chapter 13 plan at all[23] and may not be able to complete payments under a confirmed plan.[24] While the

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[22] Whether there has been an "unreasonable delay by the debtor" in this case is uncertain. As previously discussed at 2-4, supra, the Valuation Motion was required because the parties disagreed as to value of the Residence and therefore the allowed amount of the IRS secured claim. Over a considerable period of time, the parties attempted in good faith to resolve as many of the factual disputes as possible, e.g., the amount of the mortgage debts and the disparate values. See discussion at note 7, supra. Such efforts should be encouraged, and the Valuation Stipulation apparently reflects the results.

[23] In addition to best interest and feasibility concerns under Sections 1325(a)(4) and (6), as well as the cramdown requirements under Section 1325(a)(5), any party in interest is free to raise, *inter alia*, good faith concerns under Sections 1325(a)(3) and (5).

[24] A Chapter 13 debtor who is unable to complete payments under a confirmed plan still may be able to obtain a "hardship discharge" under Section 1328(b), but only if, *inter alia*, the value of the property "actually distributed" on allowed unsecured claims is not less than what would be received in a Chapter 7 liquidation. Compare 11 U.S.C. §1325(a)(4) (plan confirmation requires a finding that the value of property "to be distributed" is not less than in a Chapter 7 liquidation). As discussed in note 16, supra, the liquidation value of the Debtors' non-exempt interest in the Residence may be as much as $169,147.39.

Debtors may voluntarily dismiss this Chapter 13 proceeding at any time, and any party in interest (including the Chapter 13 Trustee) may seek dismissal of this Chapter 13 proceeding for cause (including unreasonable delay), there appears to be no desire to terminate this case short of attempting plan confirmation.

Given that the value of the Residence as of the Stipulation Date actually may be different from its value when confirmation of an amended Chapter 13 plan is considered in this unusual case, the court adopts the Petition Date in the interest of certainty. There are many decisions from other courts reaching a similar conclusion, and perhaps just as many decisions arriving at a different date. Agreeing with the result reached in one case over the result reached in another case may simply be an acceptance of a particular result "dubitante." See Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1151 (9th Cir. 2005) (Berzon, J., acquiescing dubitante) ("[B]ecause I cannot conclude with any reasonable certainty that the result…is necessarily wrong given the above-articulated concerns, the only prudent course of action for me is to set out my views in detail, as I have done, and to concur in the judgment, while remaining *dubitante*…"). See also United States v. Campbell II, 937 F.3d 1254, 1259 (9th Cir. 2019) (Berzon, J., dubitante); Karczewski v. DCH Mission Valley LLC, 862 F.3d 1006, 1017 & n. 1 (9th Cir. 2017) (Bybee, J., acquiescing dubitante). Accordingly, the court appreciates the thoughtful discussions in each of the other decisions but adopts none of them at this time. In this instance, the Petition Date provides greater certainty as to how this case goes forward in the statutory time remaining.

IT IS THEREFORE ORDERED that the Motion to Value Residential Real Property Under 11 USC § 506(a)(1), Docket No. 78, be, and the same hereby is, **GRANTED AS FOLLOWS**:

1. That the Stipulation Re: Motion to Value Residential Real Property, Docket No. 168, shall remain in effect, specifically including Paragraphs 2, 3, 4, 5, 6, 7, 8 and 9, thereof; and

2. That the value of the real property commonly known as 5970 Sierra Bonita Court, Las Vegas, NV 89149, shall be established as of the date of filing the petition commencing the above-captioned Chapter 13 proceeding.

IT IS FURTHER ORDERED that a status conference in this Chapter 13 proceeding shall be scheduled for Courtroom 2 on **May 27, 2020, at 2:30 p.m.**

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:

DONALD E. BRASHER
STEPHANIE D. BRASHER
5970 SIERRA BONITA CT.
LAS VEGAS, NV 89149

# # #

Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
May 15, 2020

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	)	Case No.: 16-15980-MKN
	)	Chapter 13
DONALD E. BRASHER aka TRIPLE D. CONSTRUCTIONS AND DEVELOPMENT, LLC and STEPHANIE D. BRASHER,	)	Date: April 1, 2020
	)	Time: 2:30 p.m.
Debtors.	)	

ORDER ON MOTION TO VALUE RESIDENTIAL REAL PROPERTY UNDER 11 USC § 506(a)(1)[1]

On April 1, 2020, the court heard the Motion to Value Residential Real Property Under 11 USC § 506 (a)(1) ("Valuation Motion") filed in the above-captioned case. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

Donald E. Brasher and Stephanie D. Brasher ("Debtors") filed a voluntary Chapter 13 petition on November 7, 2016 ("Petition Date"). (ECF No. 1). The case was assigned for administration to panel trustee Rick Yarnall ("Chapter 13 Trustee"). On December 19, 2016, Debtors filed their schedules of assets and liabilities ("Schedules") along with their statement of financial affairs. (ECF No. 12). On their property Schedule "A/B," Debtors listed a single-

[1] In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to provisions of the Bankruptcy Code, 11 U.S.C. § 101, et seq. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure.

family residence located at 5970 Sierra Bonita Court, Las Vegas, Nevada 89149-3970 ("Residence"). (ECF No. 12). Debtors attested that the then-current value of the Residence was $453,000. On their Schedule "C," Debtors claimed a Nevada homestead exemption in the Residence in the amount of $22,782.35.[2] On their secured creditors Schedule "D," Debtors attested that the Residence was encumbered by a lien in favor of Bank of America ("BOA") securing a loan in the amount of $339,740, a second mortgage also in favor of BOA securing a loan in the amount of $90,477.65, and a lien in favor of the Internal Revenue Service ("IRS") securing a claim in the amount of $34,008.70. Debtors also scheduled a lien against the Residence in favor of Tropical Estates HOA securing a claim in the amount of $1,000.

On November 17, 2016, the IRS filed a proof of claim ("POC") in the amount of $241,519.35, of which $227,207.21 was asserted to be secured by all of the Debtors' interests in real and personal property. Attached to the POC is a list setting forth multiple years of federal income tax liability, including the tax assessment dates, the tax lien notice dates, and the accrued penalties and interest.[3]

On December 19, 2016, Debtors filed a proposed Chapter 13 Plan #1 ("Plan #1"). (ECF No. 20). Section 1.03 of Plan #1 specifies an applicable commitment period of 5 years. Section 1.05 of Plan #1 states that the liquidation value of all non-exempt assets is $0.00.[4] Section

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[2] Debtors claimed an exemption in the specific dollar amount, rather than "100% of fair market value, up to any applicable statutory limit." The exemption is therefore limited to the dollar amount claimed. See Schwab v. Reilly, 560 U.S. 770, 794-95 (2010) ("Where…a debtor accurately describes an asset subject to an exempt interest and on Schedule C declares the 'value of [the] claimed exemption' as a dollar amount within the range the Code allows, interested parties are entitled to rely upon that value as evidence of the claim's validity. Accordingly, we hold that [the bankruptcy trustee] was not required to object to [the debtor's] claimed exemptions…in order to preserve the estate's right to retain any value in the [asset] beyond the value of the exempt interest.").

[3] Under Section 522, property claimed as exempt is not liable for a prepetition debt except, *inter alia*, "a debt secured by a lien that is…not avoided…and…not…a tax lien, notice of which is properly filed." 11 U.S.C. §522(d)((2)(A)(i, ii, and iii). The IRS tax lien amounts therefore are not precluded by the Debtors' homestead exemption.

[4] Liquidation value of a Chapter 13 debtor's non-exempt assets is important because a proposed plan may be confirmed only if the court finds that "as of the effective date of the plan"

2.13.B of Plan #1 places the IRS in secured Class 3B as a secured claim in the amount of $34,008.70 to be paid in the amount of $566.81 for sixty months. Section 2.17A of Plan #1 places the IRS in priority unsecured Class 7A as a priority unsecured claim in the amount of $39,645.83 to be paid in full. Section 2.19 provides that claimants in non-priority unsecured Class 9 will be paid an unspecified percentage over the life of the plan. Section 5.03 of Plan #1 provides that any scheduled property of the estate vests in the Debtors upon confirmation of the plan.

On December 20, 2016, Debtors' meeting of creditors was concluded. (ECF No. 25).

On December 21, 2016, the Chapter 13 Trustee filed an objection to confirmation of Plan #1. (ECF No. 26).

On January 9, 2017, BOA filed an objection to confirmation of Plan #1. (ECF No. 28).

On January 23, 2017, an initial hearing on confirmation of Plan #1 was held (ECF No. 32), but hearing has been continued throughout the case.

On June 8, 2017, Debtors filed an objection to the POC ("Claim Objection"). (ECF No. 42). By the Claim Objection, Debtors sought a determination that the allowed amount of the IRS secured claim was $34,008.00 based solely on the Debtors' asserted value of the real and personal property assets set forth in their Schedules.

On June 23, 2017, the IRS filed a response to the Claim Objection requesting a specific analysis of the basis for the Debtors' objection. (ECF No. 54).[5]

On February 13, 2018, an order was entered overruling the Claim Objection ("Claim Objection Order"). (ECF No. 71).

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the value of property distributed on account of each allowed unsecured claim "is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7…" 11 U.S.C. § 1325(a)(4). Known as the "best interest of creditors" test, this confirmation requirement assures that a debtor's attempt to reorganize rather than liquidate its assets does not prejudice the debtor's unsecured creditors. Inasmuch as an individual debtor's exempt assets would not be distributed in a Chapter 7 liquidation proceeding, the value of the assets that a Chapter 13 debtor does not exempt is included in the amount that the debtor must pay to confirm a plan.

[5] On October 17, 2017, the IRS filed an amended POC in the total amount of $241,546.72, of which $112,115.46 was claimed as secured, and $129,431.26 was unsecured.

On February 22, 2018, Debtors filed a proposed amended Chapter 13 Plan #2 ("Plan #2"). (ECF No. 72). Section 2.2 of Plan #2 specifies an applicable commitment period of 60 months. Section 2.4 of Plan #2 states no liquidation value of the bankruptcy estate. Section 4.4 of Plan #2 provides for the IRS to have a secured claim in the amount of $12,116.35 to be paid in full. Section 5.1 of Plan #2 provides for the IRS to have a priority unsecured claim in the amount of $29,845.84 to be paid in full. Section 5.4 of Plan #2 provides that non-priority unsecured claims will be paid an unspecified percentage over the life of the plan. Section 8.3 of Plan #2 provides that any scheduled property of the estate vests in the Debtors upon confirmation of the plan.

On March 9, 2018, Debtors filed the instant Valuation Motion. (ECF No. 78). Debtors asserted that the value of the Residence was $453,500, based on an appraisal dated December 16, 2016. Id. at ¶¶ 8 and 9. In the prayer of their motion, Debtors request a judgment as follows:

> 1. That the Internal Revenue Services Secured Claim, Court claim number 3-5, be adjudicated as partially genral (sic) unsecured and its debt treated as partially general unsecured claim in the amount of $199,584.53;
> 2. That the Internal Revenue Service's lien, Court claim number 3-5, have modified force and effect as a secured lien in the amount of $12,116.35 against the Debtors' real property located at 5970 Sierra Bonita Court, Las Vegas, NV 89149;
> 3. That the Internal Revenue Service's lien be adjudicated as an unsecured lien and treated as an unsecured claim through Debtors' Plan;
> 4. For such other and further relief this Court deems just and appropriate.

Valuation Motion at 4-5. The motion was noticed to be heard on April 19, 2018. (ECF No. 79).

On April 5, 2018, the IRS filed a response to the Valuation Motion. (ECF No. 83).

On April 12, 2018, Debtors filed a reply in support of the Valuation Motion. (ECF No. 85).

On April 19, 2018, the first of several status hearings was conducted on the Valuation Motion.[6]

On May 25, 2018, the IRS filed a supplemental response to the Valuation Motion. (ECF No. 92).

On December 7, 2018, Debtors filed an amended Schedule "D" listing the IRS as having a claim in the amount of $112,115.46 secured by the Residence. (ECF No. 107). Debtors attested that the value of the collateral securing the IRS claim was $22,138.35.

On April 17, 2019, Debtors filed a proposed amended Chapter 13 Plan #3. (ECF No. 128). Section 2.2 of Plan #3 specifies an applicable commitment period of 60 months. Section 2.4 of Plan #3 states no liquidation value of the bankruptcy estate. Section 4.4 of Plan #3 provides for the IRS to have a secured claim in the amount of $112,115.46 to be paid in full. Section 5.1 of Plan #3 provides for the IRS to have a priority unsecured claim in the amount of $29,845.84 to be paid in full. Section 5.4 provides that non-priority unsecured claims will be paid an unspecified percentage over the life of the plan. Section 8.3 of Plan #3 provides that any scheduled property of the estate vests in the Debtors upon confirmation of the plan.

On January 10, 2020 ("Stipulation Date"), Debtors and the IRS filed a stipulation regarding the Valuation Motion ("Valuation Stipulation"). (ECF No. 168).[7] The parties agreed, *inter alia*, that the value of the Residence was $500,000 on the Petition Date (November 7, 2016), and $650,000 as of the Stipulation Date (January 10, 2020) ("Stipulated Value(s)"). The parties also agreed that on the Petition Date, the total amount owed on the two mortgages was

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[6] Counsel for the Debtors and the IRS acknowledged that after completion of discovery an evidentiary hearing would be required to resolve various factual issues, including the amounts owed to the mortgage claimants.

[7] Between the initial hearing date on April 19, 2018, and the Stipulation Date on January 10, 2020, the Debtors and the IRS agreed to multiple continuances to resolve as many issues as possible. Unfortunately, during the middle of that hiatus, the parties' good faith efforts were interrupted by the federal government shutdown that occurred in December 2018. See Motion for a Stay of Pending Motion in Light of Lapse of Appropriations filed January 18, 2019. (ECF No. 112).

$441,354.19, and that the total amount owed on the Stipulation Date was $399,424.45.[8] The parties also agreed that the value of any personal property securing the IRS claim, at all relevant times, is $10,000.[9]

On February 11, 2020, Debtors filed their opening brief in support of the Valuation Motion ("Debtors Brief"). (ECF No. 172).

On March 10, 2020, the IRS filed its opposition brief ("IRS Brief"). (ECF No. 176).

On March 30, 2020, Debtors filed their reply brief. (ECF No. 178).

DISCUSSION

The parties having stipulated to the value of the Residence as of the Petition Date and the Stipulation Date, their only remaining dispute is which of those dates applies to determine the allowed amount of the IRS claim.[10] Section 506(a) specifies that a secured claim is allowed "to the extent of the value of such creditor's interest in the [bankruptcy] estate's interest" in the subject property. If the Petition Date applies, then taking $500,000 and subtracting the combined mortgage balances of $441,354.19 on the Petition Date leaves a balance of $58,645.81 of value in the Residence to secure the IRS claim. According to the amended POC, the total amount of the IRS claim is $241,546.72. See note 5, supra. Under Section 506(a), the allowed amount of

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[8] The parties agreed that the holder of the first mortgage was owed $350,906.54 on the Petition Date and was owed $308,976.80 on the Stipulation Date, i.e., a reduction of $41,929.74 during the Chapter 13 proceeding. Additionally, the holder of the second mortgage was owed $90,447.65 on the Petition Date and was owed the same amount on the Stipulation Date, i.e., no reduction during the Chapter 13 proceeding.

[9] In light of these stipulated values and stipulated lien amounts, there is no dispute that on the Petition Date, the IRS had at least a partially secured claim, and has never held a secured claim that is wholly-unsecured.

[10] The Stipulation Date was January 10, 2020. Briefing on the Valuation Motion was completed on March 30, 2020, and the matter was argued on April 1, 2020. During the intervening period of time, the COVID-19 pandemic arose, and the Governor of Nevada declared a public health emergency throughout the State of Nevada. Various orders and decrees have been entered by various governmental entities providing relief from certain monthly mortgage payment obligations and also imposing a moratorium on real property foreclosure activity. It is unknown whether these developments have significantly impacted the current value of the Residence.

the IRS secured claim against the Residence would be $58,645.81 on the Petition Date, and its remaining $182,900.91 would be unsecured as to the Residence.[11]

If the Stipulation Date applies, then taking $650,000 and subtracting the combined mortgage balances of $399,424.45 on the Stipulation Date leaves a balance of $250,575.55 of value in the Residence to secure the IRS claim. Under Section 506(a), the allowed secured amount of the IRS claim against the Residence would be $241,546.72. In other words, the IRS claim would be allowed as fully secured under Section 506(a) and the IRS would have no allowed unsecured claim.[12]

Section 506(a) also provides that the value of the creditor's interest "shall be determined in light of the purpose of the valuation and the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

Section 1325 sets forth the requirements to confirm a proposed Chapter 13 plan. Section 1325(a)(5) sets forth three options for treatment of secured claims. One of the options is for the plan to provide that the secured claimant retains its lien, that the value distributed to the claimant not be less than the allowed amount of the secured claim, and that any periodic payments be in equal monthly amounts. 11 U.S.C. §1325(a)(5)(B)(i)-(iii).

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[11] The IRS claim also is secured by personal property of the Debtors. Under the Valuation Stipulation, that personal property is valued at $10,000 at all times (including the Petition Date). The total value of the real and personal property assets securing the IRS claim would therefore be $68,645.81. Because the entire $500,000 value on the Petition Date would be exceeded by the two mortgages and the IRS liens, there also would be no equity in the Residence available for the Debtors' homestead exemption.

[12] Because the entire $650,000 value on the Stipulation Date would not be encompassed by the two mortgages and the IRS lien, there would be approximately $29,028.83 of equity in the Residence available for the Debtors' homestead exemption. This assumes that the $10,000 in personal property assets are applied to the total amount of the IRS claim. As previously mentioned at 2 and n.2, supra, Debtors claimed a homestead exemption in the amount of $22,782.35 in their Schedule "C." Applying that amount to the available equity in the Residence as of the Stipulation Date, the non-exempt interest in the Residence would have a liquidation value of $6,246.48.

In the instant case, the purpose of the Valuation Motion is clear: to determine the amount that the Debtors will need to pay the IRS under a Chapter 13 plan designed to retain their Residence. Identifying the purpose of the instant valuation, however, is no epiphany. As the leading Chapter 13 treatise author observes:

> There is little agreement in the reported cases on the date for fixing the value of collateral in Chapter 13 cases. Consistent with § 506(a), the purpose for which value is being determined pushes around the date on which the process focuses. This guarantees a moving target because value is at issue in Chapter 13 cases to determine the extent of secured claims for eligibility purposes, for exemptions, for adequate protection, on motions for stay relief before and after confirmation, for various purposes at confirmation, on claims objections, at modification after confirmation, at conversion and even after completion of payments. Some of the reported decisions simply disagree about the timing for valuation even with respect to the same purpose. (footnotes omitted)

Keith M. Lundin, LUNDIN ON CHAPTER 13, §76.3, at ¶ 3, LundinOnChapter13.com (last visited May 7, 2020).[13]

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[13] As if to prove the treatise author's point, counsel for the Debtors and the IRS cite a number of divergent cases – both under Chapter 13 and Chapter 11 – none of which are controlling, and none of which are comparable to the factual and procedural circumstances of the instant case. See Debtors' Brief at 4-7, citing Chase Manhattan Bank USA NA v. Stembridge (In re Stembridge), 394 F.3d 383 (5th Cir. 2004) (value of truck used in Chapter 13 debtor's business determined as of petition date to provide secured creditor with adequate protection from depreciating value); In re Graves, 2019 WL 6170789, at *4 (Bankr. S.D. Miss. 2019) (Chapter 13 parties stipulated to valuing residence as of the petition date); Benafel v. One West Bank, FSB (In re Benafel), 461 B.R. 581 (B.A.P. 9th Cir. 2011) (Chapter 13 debtor's principal residence determined as of petition date rather than prepetition purchase date); Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220 (9th Cir. 2002) (Chapter 13 debtor may avoid a wholly unsecured junior lien against a principal residence); Lam v. Investors Thrift and U.S. Trustee (In re Lam), 211 B.R. 36 (9th Cir. 1997) (value of Chapter 13 debtor's principal residence undisputed on motion for default judgment); In re Gutierrez, 503 B.R. 458 (Bankr. C.D. Cal. 2013) (Chapter 13 petition date used to value debtor's principal residence to determine wholly unsecured status of junior mortgage); In re Montiel, 572 B.R. 758 (Bankr. W.D. Wash. 2017) (same for postconfirmation determination of wholly unsecured status); Marsh v. U.S. Dep't Housing & Urb. Dev. (In re Marsh), 929 F.Supp.2d 852, 858 (N.D.Ill. 2013) (Chapter 13 petition date used to value debtor's principal residence to allocate creditor risk of depreciation and appreciation); Dean v. LaPlaya Investments, Inc. (In re Dean), 319 B.R. 474, 478-79 (Bankr. E.D. Va. 2004) (Chapter 13 petition date used to value debtor's residence to avoid giving secured creditor a windfall from postpetition appreciation in value); In re Gomes, 2020 WL 556279 (Bankr. M.D. Fla. Feb. 3, 2020) (Chapter 13 petition date used to value debtor's interest in a

In this matter, the parties stipulated that the value of the Residence increased from $500,000 on the Petition Date to $650,000 on the Stipulation Date, i.e., a $150,000 postpetition appreciation in value.[14] Because the Debtors never confirmed their proposed Plan #1, the vesting language under Section 5.03 thereof, see discussion at 3, supra, does not apply.[15] As a result, the postpetition appreciation in the value of the Residence remains part of the bankruptcy estate and does not belong to the Debtors. See Black v. Leavitt (In re Black), 609 B.R. 518, 529 & n.9 (B.A.P. 9th Cir. 2019). See also In re Johnson, 2020 WL 265914, at *8 (Bankr.D.Alaska Jan. 17, 2020). Additionally, the bankruptcy estate's interest in the Residence has not been abandoned by way of a motion or otherwise under Section 554. Accordingly, both the Residence as well as any appreciation in its value, remain property of the Chapter 13 estate.[16]

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residence being constructed during bankruptcy proceeding), and Debtors Rep. at 2, citing TD Bank, N.A. v. Landry), 479 B.R. 1 (D.Mass. 2012) (Chapter 13 petition date used to value debtor's primary residence to determine wholly unsecured status of junior mortgage); Chagolla; Hernandez v. JP Morgan Chase Bank, N.A. (In re Chagolla), 544 B.R. 676 (B.A.P. 9th Cir. 2016) (postdischarge lien avoidance motion was proper where creditor's wholly unsecured junior claim was discharged by completion of Chapter 13 plan). Compare IRS Brief at 3, citing In re Dheming, 2013 WL 1195652 (Bankr. N.D. Cal. 2013) (individual Chapter 11 plan confirmation date used to value commercial real property); In re Williams, 480 B.R. 813 (Bankr. E.D. Tenn. 2012) (Chapter 13 approximate plan confirmation date used to value debtor's principal residence to determine wholly unsecured status); Roach v. The Bank of Missouri (In re Roach), 2010 WL 234959 (Bankr. W.D. Mo. 2010) (Chapter 13 plan confirmation date should be used to value debtor's residence).

[14] Debtors claimed an exemption in the Residence in the amount of $22,782.35. After the meeting of creditors concluded on December 10, 2016, parties in interest had until January 9, 2017, to object to any exemptions. See Fed.R.Bankr.P. 4003(b)(1). No objections were filed, and the property claimed as exempt is exempt under Section 522(l).

[15] Under Section 1322(d)(2), a Chapter 13 plan may not propose to make plan payments for more than 60 months after the case is filed. Because the Debtors commenced their proceeding on November 7, 2016, they are now approximately 42 months along without a confirmed plan. Absent a confirmed plan, they are ineligible to request a two-year extension of the maximum five-year payment period as a result of a "material financial hardship" due directly or indirectly to the COVID-19 pandemic. See 11 U.S.C. §1329(d)(1) [eff. March 27, 2020]. At best, Debtors would have approximately 18 months remaining to complete Chapter 13 plan payments.

[16] As previously discussed in note 4, supra, at plan confirmation, Debtors have the burden of proving that their proposed Chapter 13 plan pays at least liquidation value to allowed

That the Residence and the appreciation in its value are property of the estate is significant. Whenever any bankruptcy petition is filed, the automatic stay under Section 362 gives the non-repeat debtor a breathing spell from creditors. The value of the assets included in the bankruptcy estate typically dictates the treatment of secured claims in the case. A fortunate creditor whose collateral value exceeds the amount of its claim enjoys treatment under Section 506(b), while the unfortunate creditor whose collateral value is less than or equal to the amount of its claim has serious concerns. The fortunate secured creditor may be allowed postpetition interest and reasonable attorney's fees under its contract, while the unfortunate secured creditor typically obtains neither. Both secured creditors, however, are concerned about fluctuations in the value of the collateral during the bankruptcy case.

Under Section 506(a), the allowed amount of either secured creditor's claim does not diminish during a bankruptcy if the value of the collateral is increasing. If, however, the value of the collateral is decreasing, then the fortunate creditor eventually may lose the beneficial

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unsecured claims. The best interests of creditors test under Section 1325(a)(4) focuses on the value of property to be distributed on each allowed unsecured claim "as of the effective date of the plan." The appreciated value of the Residence is property of the Chapter 13 estate. Debtors have not confirmed a Chapter 13 plan and their Plan #1 asserts that the liquidation value of their non-exempt assets is $0.00. Debtors filed a Plan #2 and a Plan #3 but neither state a liquidation value of the Debtors' non-exempt assets. If the appreciated value of $650,000 exists the time of plan confirmation, but the Chapter 13 plan treats the secured claims in amounts that would be allowed as of the Petition Date based on a $500,000 value, see discussion at 6-7, supra, there will be substantial equity in the Residence beyond the allowed secured claims at the time of plan confirmation. Debtors' claimed exemption in the Residence is only $22,782.35. If the allowed secured claims under a proposed Chapter 13 plan, i.e., the two mortgages and IRS lien, are deducted from the $650,000 value, see discussion at 6-7, supra, there may be up to $191,929.74 remaining. Deducting the Debtors' claimed homestead amount, there would be up to $169,147.39 in non-exempt value of the Residence. In a hypothetical Chapter 7, the Residence would be liquidated, those allowed secured claims would be paid, and the Debtors would receive their claimed homestead amount. The remaining sale proceeds, less costs of sale, would be available for distribution to unsecured creditors. Unfortunately, the Value Stipulation does not address the time at which the liquidation analysis is to be applied. If it looks to a hypothetical Chapter 7 liquidation conducted on the Petition Date, then does the Valuation Stipulation assume that the Residence would be sold, if at all, for $500,000? Or does the liquidation analysis assume that the Residence would be sold near the plan confirmation date, if at all, for $650,000? The leading treatise on Chapter 13 matters describes in detail the breadth of cases that reach different conclusions. See LUNDIN ON CHAPTER 13, supra, § 90.1, at ¶¶ 3 to 32.

treatment provided by Section 506(b), and the allowed amount of the unfortunate creditor's secured claim simply diminishes. In the decreasing value scenario, both types of creditors may be entitled to seek "adequate protection" of their allowed secured claims in the form of periodic payments or additional collateral. Without adequate protection, both types of creditors may be granted relief from the automatic stay under Section 362(d)(1) to exercise their nonbankruptcy remedies against their collateral.

A Chapter 13 debtor is required under Section 1326(a)(1) to commence "plan payments" no later than 30 days after filing the bankruptcy petition whether or not a plan has been confirmed. As previously mentioned, a plan may not be confirmed if it seeks to make plan payments for more than five years. The Chapter 13 debtor who wants to retain a creditor's collateral prior to confirming a Chapter 13 plan must meet its regular contractual obligations to the secured creditor, e.g., monthly mortgage or car payments. The Chapter 13 debtor who wants to retain the collateral after confirming a plan must meet its contractual obligations to the secured creditor, or, pay the allowed amount of the secured claim. The Chapter 13 debtor who wants to pay only the allowed amount of the secured claim, rather than the contractual balance, can do so through the process of "cramdown." See 11 U.S.C. §1322(b)(2) (Chapter 13 plan can include a provision to modify the rights of holders of secured claims); 11 U.S.C. §1325(a)(5)(B)(ii) (value distributed to holder of secured claim is not less than the allowed amount of the claim). Because the value of the collateral determines the allowed amount of the secured claim under Section 506(b), the Chapter 13 debtor may benefit from a lower valuation at plan confirmation while the detriment of a lower valuation may be visited upon the secured creditor. Until plan confirmation, however, the Chapter 13 debtor benefits from a higher valuation as it may reduce the amount, form or even the requirement of providing adequate protection to a secured creditor during the bankruptcy process.

But plan confirmation does not fix the date upon which the amount of a secured claim may be determined. Under FRBP 3012(a)(1), any party in interest may seek a determination of the amount of a secured claim under Section 506(a). Under FRBP 3012(b), a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a

proposed Chapter 13 plan. If the request to determine the amount of the secured claim is made in a proposed Chapter 13 plan, a copy of the proposed Chapter 13 plan must be served on the claimant. Under FRBP 3012(c), however, a different process applies to requests to determine the amount of a secured claim of a governmental unit. Instead, the request must be made only by a motion or claim objection, and only after the governmental unit has filed a proof of claim, or the deadline to do so has expired.[17] FRBP 3012(c) excludes such a request from being made in a Chapter 13 plan. Thus, any party in interest can seek a determination of the allowed amount of any secured claim at virtually any time during a case, but the requested determination of a government claim may be sought only after a proof of claim is filed or time barred, and only by a motion or claim objection that is not included a proposed Chapter 13 plan.[18] Because the POC in this case was filed by the IRS on November 17, 2016, the Debtors, the IRS, and any party in interest were authorized under FRBP 3012(c) after that date to seek a determination of the amount of the IRS's secured claim under Section 506(a).

In this case, Debtors timely objected to the POC after it was filed. Debtors were unsuccessful. After the Debtors filed their Claim Objection, but before the Claim Objection Order was entered, the IRS filed an amended proof of claim in the total amount of $241,546.72, attesting that it has a secured claim in the amount of $112,115.46 and an unsecured claim in the amount of $129,431.26. See note 5, supra. The Valuation Stipulation does not address whether the parties have stipulated to the IRS filing a further amended POC to reflect its secured and unsecured claims as of the Petition Date or the Stipulation Date.

This fluctuation of the dates and valuations is further skewed when the underlying collateral is the Chapter 13 debtor's principal residence. For all other assets, a Chapter 13 plan may modify the rights of a secured creditor through cramdown treatment under Section

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[17] Under FRBP 3002(c)(1), a government unit has 180 days to file a proof of claim after the bankruptcy petition is filed. In the instant case, the IRS had a deadline of May 8, 2017, to file its POC. See Notice of Chapter 13 Bankruptcy Case at § 8. (ECF No. 4).

[18] It is not clear why the amount of a governmental unit's secured claim cannot be determined, like non-governmental claimants under FRBP 3012(b), in connection with a proposed Chapter 13 plan.

1325(a)(5), but the proposed Chapter 13 plan is prohibited from doing so under Section 1322(b)(2) with respect to a secured creditor whose claim is secured only by "real property that is the debtor's principal residence." 11 U.S.C. §1322(b)(2). This prohibition against modifying the rights of holders of certain secured claims is mirrored in Chapter 11 cases filed by individual debtors. See 11 U.S.C. §1123(b)(5). Unfortunately, this "anti-modification" language has led to disputes as to whether an individual debtor's real property is in fact the debtor's principal residence. See, e.g., In re Schayes, 483 B.R. 209 (Bankr.D.Ariz. 2012) (single family home where Chapter 11 debtors resided was their principal residence even if it was purchased with the intention of resale). More important, these anti-modification restrictions on individual debtors in Chapter 13 and Chapter 11 have also led to decisions that are similarly disparate as to the time a debtor's principal residence is established: as of the loan date, see, e.g., In re Abrego, 506 B.R. 509 (Bankr. N.D. Ill. 2014) (debtor's principal residence under Section 1322(b)(2) is based on date when creditor's security interest is created); as of the bankruptcy petition date, Benafel, 461 B.R. at 588 (Chapter 13 debtor's principal residence under Section 1322(b)(2) determined as of petition date); or as of the plan confirmation date, In re Nieto, Case No. 09-26688-BAM, "Memorandum on Modifications of Property Under 11 U.S.C. §1322(b)(2)," Docket No. 59 (Bankr.D.Nev. Oct. 25, 2010) ("Nieto Memorandum"), aff'd on other grounds, 2012 WL 6097983, at *2 (B.A.P. 9th Cir. Nov. 28, 2012) (Chapter 13 debtor's principal residence under Section 1322(b)(2) determined as of the plan confirmation hearing).[19]

These dynamics are magnified by the unique nature of the Chapter 13 process. Because Chapter 13 proceedings are entirely voluntary, a Chapter 13 debtor may dismiss the case at any time under Section 1307(b), unlike individuals who seek protection under Chapter 7 or Chapter 11. See 11 U.S.C. §707 (dismissal of Chapter 7 case only after notice and a hearing); 11 U.S.C. § 1112(b)(1) (dismissal of Chapter 11 case only after notice and a hearing). When a Chapter 13 case does not proceed as planned, the debtor can simply dismiss the proceeding. But Chapter 13

[19] Unlike Section 1322(b)(2) that specifically refers to real property that is the debtor's principal residence when a proposed plan is considered, see Nieto Memorandum at 7:8-13, there is no temporal language in Section 506(a) specifying when its method of secured claim allowance is to be applied.

relief is available only to individuals and individuals need a place to live for themselves and their dependents. Thus, retaining a personal residence is perhaps the most common reason for individuals to seek Chapter 13 protection over any other form of bankruptcy relief. See LUNDIN ON CHAPTER 13, supra, §8.12, at ¶¶ 6 and 7 ("In a Chapter 7 case,…the lender will require…, at least, that the debtor will become current on the lenders's terms. The debtor with even a substantial mortgage arrearage can cure the default over time and rehabilitate the mortgage without creditor cooperation in a Chapter 13 case…Because few individual debtors can also qualify as 'family farmers' or 'family fishermen' for purposes of Chapter 12, and because, after the 1994 amendments, Chapter 11 provides no obvious advantages with respect to management of a residential mortgage, Chapter 13 remains the chapter of choice to rehabilitate an individual debtor's home mortgage.").

Because there is no language in any applicable statute specifying the date at which the value of a debtor's principal residence is to be determined, and no dispositive legislative history, courts have reached different results based on various policy considerations[20] that point in different directions. In Gutierrez, the bankruptcy court discussed many competing policy considerations before concluding that the Chapter 13 petition date should apply. The court explained as follows:

> Whatever date is used for valuation, an argument can be made that either the debtor or the junior lienholder will receive a "windfall" depending on whether the property appreciates or depreciates after that date. For the following reasons, however, using the petition date appears to be better from a policy perspective.
>
> Various scenarios are possible: as of the petition date, the junior lien could be partially secured or fully underwater, and thereafter the property could depreciate or appreciate. Each scenario is examined below.
>
> Suppose that on the petition date the junior lienholder has a secured claim, of any dollar amount. In that event the junior lienholder is entitled to demand "adequate protection," failing which the bankruptcy court "shall" grant relief from the automatic stay (11

[20] Identifying policy considerations applicable to a particular statute, of course, is difficult when meaningful legislative history is absent.

U.S.C. § 362(d)(1)), so the junior lienholder has legal protections against any "down side" after the petition date. Conversely, if the collateral appreciates then the partially secured junior lienholder will gain the benefits of increased collateral value, such as the right in the event of a sale of the property to collect up to the full dollar amount of its debt including attorney fees and other charges. *See* Alpine Group, Inc., 151 B.R. 931, 933–36.

On the other hand, if the junior lien is entirely underwater as of the petition date then by definition the junior lienholder would receive no present economic value if it were free to exercise its nonbankruptcy rights and foreclose. This also means that the debtor, who is paying senior liens in order to retain the property, is investing substantial funds in property that is fully encumbered, which is a risky investment from a purely economic perspective. If the junior lienholder thereafter could use an increased value to prevent the debtor from modifying its debt, then the financial restructuring would essentially allocate all of the risk to the debtor and all of the benefits to the junior lienholder. "Heads I win, tails you lose."

It makes sense to interpret ambiguous provisions of the Bankruptcy Code equitably and consistent with reorganization and fresh start policies of the Code. As one court put it, the question is whether "the junior lienor should enjoy the benefit ... when it no longer bears the risk," to which "the answer must be 'no.'" Marsh, 929 F.Supp.2d 852, 858.

In addition, it is not just the debtor's interests that are at stake. If the debtor is forced to pay more to the junior lienholder, that will have to come out of disposable income, which generally means at the expense of unsecured claims. If the debtor lacks any disposable income then the debtor likely will have to surrender the property. That affects not only the debtor but also the senior lienholder who no longer will receive monthly payments, and instead will have the costs associated with a nonperforming loan and foreclosure. The only marginal benefit may be to the junior lienholder: it might prefer to take its chances with foreclosure, but that is a small benefit in exchange for the likely costs to all other parties in interest.

Another policy concern comes from the fact that, as noted above, "value is only one side of the § 1322(b)(2) coin" and the dollar amount of the senior debt is important to determine whether the junior lien is entirely underwater. *Sarno*, 463 B.R. 163, 165. Any negotiated reduction of the senior debt might transform a junior lien that is entirely underwater on the petition date into a lien that is at least partially secured as of the confirmation hearing, which is a

disincentive to enter into any loan modification that would reduce the debt. It seems contrary to the purposes of the Bankruptcy Code to interpret it in a way that discourages consensual loan reduction.

There are some countervailing policy considerations. The foregoing discussion contemplates valuation as of the petition date for some purposes but as of the confirmation hearing date for other purposes, which potentially could lead to duplicative litigation and perhaps inconsistent results. As noted above, however, valuation already can occur as of multiple dates for different purposes, and it is not necessarily inconsistent to reach different results under different sections of the Bankruptcy Code.

Another potential problem is that valuation as of the petition date will be retroactive, which is more challenging than a present valuation. Appraisers may be reluctant to opine as to historical value, and it is difficult for appraisers and the court not to look back with "20/20 hindsight" that distorts what the court would have found if the issue had been presented at the historical time—*e.g.*, if the real estate market has subsequently rebounded from low values as of the petition date, then a low valuation may seem unduly pessimistic in hindsight, even if it would have been accurate at the time. These are real concerns, but they are not insurmountable and bankruptcy courts deal with similar issues all the time.

Nor is it an insurmountable problem that a debtor at least theoretically could file a bankruptcy petition when the property has reached its lowest value, so as to retain all the anticipated appreciation. First, other considerations such as job loss, major illness, or divorce generally play a much larger role in whether and when to file a bankruptcy petition. Second, anticipated trends in real estate values are uncertain. Third, any fixed valuation date theoretically can be manipulated—if the date of the confirmation hearing controls then debtors or junior lienholders may attempt to delay that hearing when that would suit their needs—so this concern does not necessarily have much bearing on whether the court should use the petition date or the date of the confirmation hearing. Fourth, any manipulation can be addressed using some of the many other tools available to the bankruptcy court, including good faith requirements. *See* Abdelgadir, 455 B.R. 896, 900 (quoting bankruptcy court's comments that "[g]ood faith is always an issue," in addressing the possibility that a debtor's purported change in principal residence is a sham to be able to modify liens against the property).

> On balance, policy considerations appear to point in the same direction as the statutory analysis. The petition date appears to be the most appropriate date to determine whether the junior lienholder's claim is or is not subject to modification under section 1322(b)(2).

503 B.R. at 464-466.

The policy concerns cogently articulated and balanced in Gutierrez do not necessarily apply in the present case. Here, the IRS lien has never been wholly-unsecured at any point during the case, even according to the Debtors' original schedules. Indeed, the Stipulated Value of the Residence on the Petition Date is even higher than the value to which the Debtors' attested in their schedules. Debtors have reduced the principal amount owed to the holder of the first mortgage by over $40,000, apparently by making most, if not all, of their regular postpetition installment loan payments, but have not reduced the amounts owed to any junior lienholders. Moreover, no evidence suggests that the Debtors have been discouraged from negotiating a loan modification with either mortgage lender. Indeed, the Mortgage Modification Mediation ("MMM") Program in this judicial district was adopted "as a forum for individual debtors to explore mortgage modification options with their lenders" with the goal "to facilitate communication and exchange of information in a confidential setting and encourage parties to finalize a feasible and beneficial agreement." Mortgage Modification Mediation (MMM) Program Procedures, "Purpose," United States Bankruptcy Court, District of Nevada, Effective 5/1/17, https://www.nvb.uscourts.gov/mortgage-modification-mediation/procedures/. Nothing in the record indicates that the Debtors have ever sought to participate in the MMM Program, but their reasons for not doing so is also not in the record. In essence, Debtors' payments to the first mortgage holder is not the same type of risky investment described in Gutierrez.

Through the Valuation Stipulation, the Debtors and the IRS also have avoided any evidentiary difficulties attendant to retroactively valuing the Residence. They have agreed that the Residence has increased in value after commencement of this Chapter 13 proceeding. This additional distinction from Gutierrez is not significant, but the parties'

agreement has additional consequences. Although the Valuation Stipulation is not binding on any other parties, it does suggest that neither the two mortgage lenders nor the IRS would be able to obtain relief from stay for cause under Section 362(d)(1). See, e.g., First Federal Bank of California v. Weinstein (In re Weinstein), 227 B.R. 284, 296-97 (B.A.P. 9th Cir. 1998) (moving party must demonstrate that the subject property has declined in value after the bankruptcy proceeding was commenced).

Based on the Valuation Stipulation, it appears that the total debt secured by the Residence has never exceeded its value. Under the Valuation Stipulation, the secured claim of the IRS was undersecured but not wholly unsecured as of the Petition Date. Under the Valuation Stipulation, all of the secured claims are oversecured as of the Stipulation Date. Thus, none of the lienholders would be able to obtain relief from stay based on lack of equity in the Residence under Section 362(d)(2). See 11 U.S.C. §362(d)(2)(A) (the moving party must demonstrate that "the debtor does not have an equity in such property"); 11 U.S.C. §362(g)(1) ("the party requesting relief [under Section 362(d)] has the burden of proof on the issue of the debtor's equity in property").[21]

Under the unusual facts of this case, the Debtors have been in Chapter 13 for approximately 42 months without confirming a Chapter 13 plan, but no one has sought dismissal of the proceeding. See 11 U.S.C. §1307(c)(1) ("on request of a party in

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[21] Because the Debtors always have had at least some equity in the Residence, the burden would never shift to the Debtors to demonstrate that the Residence is "necessary to an effective reorganization." 11 U.S.C. §362(d)(2)(B). See also 11 U.S.C. §362(g)(2) ("the party opposing [relief from stay under Section 362(d)] has the burden of proof on all other issues"). This might be an insurmountable burden for the Debtors under the present circumstances. To demonstrate that the Residence is necessary to an effective reorganization, the Debtor would have to prove that there is a reasonable possibility of a successful reorganization in a reasonable amount of time. See generally United Savings Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 376 (1988). Unfortunately, Debtors have been in Chapter 13 for more than three and a half years and have never confirmed a plan. Even the amended plans they filed, which never have been noticed for confirmation, would have to be further amended. Inasmuch as plan payments under a Chapter 13 plan may not exceed 60 months, the Debtors have only 18 months left to complete payments if they ever confirm a plan.

interest…and after notice and a hearing, the court may…dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including…unreasonable delay by the debtor that is prejudicial to creditors…").[22] Without confirming and completing payments under a plan, the Debtors cannot obtain a Chapter 13 discharge of their personal liability for any of their prepetition debts. Absent a confirmed plan that vests title to the Residence in the Debtors, or an abandonment of the Residence, it remains property of the bankruptcy estate. As a further result, the post-bankruptcy appreciation in the value of the Residence also belongs to the estate. Due to the appreciating value of the Residence, the two mortgage holders and the IRS are unable to obtain relief from the automatic stay. This standoff exists between the Debtors and their secured creditors, while general unsecured await payment, if at all, through a confirmed plan.

Under the current circumstances, the court concludes that any windfall to the Debtors from using the Petition Date or to the IRS from using the Stipulation Date may be largely illusory because the Debtors may not be able to confirm a Chapter 13 plan at all[23] and may not be able to complete payments under a confirmed plan.[24] While the

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[22] Whether there has been an "unreasonable delay by the debtor" in this case is uncertain. As previously discussed at 2-4, supra, the Valuation Motion was required because the parties disagreed as to value of the Residence and therefore the allowed amount of the IRS secured claim. Over a considerable period of time, the parties attempted in good faith to resolve as many of the factual disputes as possible, e.g., the amount of the mortgage debts and the disparate values. See discussion at note 7, supra. Such efforts should be encouraged, and the Valuation Stipulation apparently reflects the results.

[23] In addition to best interest and feasibility concerns under Sections 1325(a)(4) and (6), as well as the cramdown requirements under Section 1325(a)(5), any party in interest is free to raise, *inter alia*, good faith concerns under Sections 1325(a)(3) and (5).

[24] A Chapter 13 debtor who is unable to complete payments under a confirmed plan still may be able to obtain a "hardship discharge" under Section 1328(b), but only if, *inter alia*, the value of the property "actually distributed" on allowed unsecured claims is not less than what would be received in a Chapter 7 liquidation. Compare 11 U.S.C. §1325(a)(4) (plan confirmation requires a finding that the value of property "to be distributed" is not less than in a Chapter 7 liquidation). As discussed in note 16, supra, the liquidation value of the Debtors' non-exempt interest in the Residence may be as much as $169,147.39.

Debtors may voluntarily dismiss this Chapter 13 proceeding at any time, and any party in interest (including the Chapter 13 Trustee) may seek dismissal of this Chapter 13 proceeding for cause (including unreasonable delay), there appears to be no desire to terminate this case short of attempting plan confirmation.

Given that the value of the Residence as of the Stipulation Date actually may be different from its value when confirmation of an amended Chapter 13 plan is considered in this unusual case, the court adopts the Petition Date in the interest of certainty. There are many decisions from other courts reaching a similar conclusion, and perhaps just as many decisions arriving at a different date. Agreeing with the result reached in one case over the result reached in another case may simply be an acceptance of a particular result "dubitante." See Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1151 (9th Cir. 2005) (Berzon, J., acquiescing dubitante) ("[B]ecause I cannot conclude with any reasonable certainty that the result…is necessarily wrong given the above-articulated concerns, the only prudent course of action for me is to set out my views in detail, as I have done, and to concur in the judgment, while remaining *dubitante*…"). See also United States v. Campbell II, 937 F.3d 1254, 1259 (9th Cir. 2019) (Berzon, J., dubitante); Karczewski v. DCH Mission Valley LLC, 862 F.3d 1006, 1017 & n. 1 (9th Cir. 2017) (Bybee, J., acquiescing dubitante). Accordingly, the court appreciates the thoughtful discussions in each of the other decisions but adopts none of them at this time. In this instance, the Petition Date provides greater certainty as to how this case goes forward in the statutory time remaining.

IT IS THEREFORE ORDERED that the Motion to Value Residential Real Property Under 11 USC § 506(a)(1), Docket No. 78, be, and the same hereby is, **GRANTED AS FOLLOWS**:

1. That the Stipulation Re: Motion to Value Residential Real Property, Docket No. 168, shall remain in effect, specifically including Paragraphs 2, 3, 4, 5, 6, 7, 8 and 9, thereof; and

2. That the value of the real property commonly known as 5970 Sierra Bonita Court, Las Vegas, NV 89149, shall be established as of the date of filing the petition commencing the above-captioned Chapter 13 proceeding.

IT IS FURTHER ORDERED that a status conference in this Chapter 13 proceeding shall be scheduled for Courtroom 2 on **May 27, 2020, at 2:30 p.m.**

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:

DONALD E. BRASHER
STEPHANIE D. BRASHER
5970 SIERRA BONITA CT.
LAS VEGAS, NV 89149

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