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6 UNITED STATES BANKRUPTCY COURT
7 EASTERN DISTRICT OF CALIFORNIA

8 In re Case No. 01-13146-A-13K
9 JAMES R. EATON and DC No. SMS-6
10 JANICE L. EATON DC No. SMS-7

11 Debtors. MEMORANDUM DECISION
12 REGARDING DEBTORS' MOTION
TO VALUE COLLATERAL

13 A hearing was held April 21, 2005, on the motions of debtors
14 James and Janice Eaton (the "Debtors") to value collateral of
15 California Fidelity, Inc. ("California Fidelity"). The court
16 allowed additional briefing, and the matter was deemed submitted
17 as of April 29, 2005. This memorandum contains findings of fact
18 and conclusions of law required by Federal Rule of Bankruptcy
19 Procedure 7052 and Federal Rule of Civil Procedure 52. This is a
20 core proceeding as defined in 28 U.S.C. §157(b)(2)(A) and (O).

21 The Debtors filed a chapter 13 case on April 2, 2001. Prior
22 to filing their case, they had obtained an appraisal dated in
23 March of that year which valued their home at \$70,000. On
24 January 18, 2001, they had received a discharge in a prior
25 chapter 7 case.

26 The Debtors filed their chapter 13 plan on April 13, 2001.
27 They also filed a master address list which includes Compulink at
28 3900 Capital Blvd., Lansing, Michigan 48906, and The Money Store

1 at P. O. Box 96053, Charolle, North Carolina 28296-0053. The
2 master address list was filed on April 2, 2001. The plan
3 contains two motions to value collateral. There is a motion to
4 value the collateral of The Money Store, which held a claim of
5 \$22,113 secured by a third deed of trust on the Debtors'
6 residence. There is also a motion to value the collateral of
7 Compulink, which held a claim of \$36,664.77 secured by a second
8 deed of trust on the Debtors' residence. Each motion to value
9 collateral reflected that Wells Fargo Bank, which held the first
10 deed of trust on the Debtors' residence, was owed \$70,582. Each
11 motion to value collateral contains the declaration of each of
12 the Debtors that facts set forth in the motion are true and
13 correct. Each motion to value collateral is dated March 12,
14 2001.

15 Thus, at the time the plan was filed, the Debtors asserted
16 that the amounts owed to the second and third trust deed holders
17 were entirely unsecured because the value of the residence was
18 worth less than the amount owed to the holder of the first deed
19 of trust. The Debtors checked the box in the title of the plan
20 that indicates it contains motions to value collateral.

21 On April 23, 2001, the office of the chapter 13 trustee
22 caused to be served a "Notice of Chapter 13 Bankruptcy Case,
23 Meeting of Creditors, & Deadlines." The notice states that the
24 hearing on confirmation will be pursuant to General Order 01-02.
25 The notice was served on Compulink and The Money Store at the
26 addresses provided on the master address list. On May 16, 2001,
27 the Debtors caused to be filed a "Notice of Meeting of Creditors
28 and Motion to Value Collateral of TMS Mortgage, Inc. dba The

1 Money Store, Combined with Proof of Service Thereof." This
2 notice informed The Money Store that the Debtors had filed a plan
3 that sought to value the collateral of The Money Store and that
4 if The Money Store wanted to object to the plan, it needed to
5 file an objection and set it for hearing within the time set
6 forth in the notice. The notice was served on, according to the
7 certificate of service attached to it, the following:

- 8 • William S. Templeton, President
9 TMS MORTGAGE, INC.
703 3rd Street
W. Sacramento, CA 95605
- 10 • The Money Store
11 4837 Watt Avenue, Suite 200
12 North Highlands, CA 95660
- 13 • Katherine M. Bandy
14 BRICE, VANDER LINDEN & WERNICK
9441 LBJ Freeway, Suite 350
Dallas, TX 75243
- 15 • TMS Mortgage
16 Post Office Box 160101
Sacramento, CA 95816
- 17 • Corporation Service Corp
18 dba CSC-Lawyers Incorporation Service
2730 Gateway Oak Drive, Ste 100
19 Sacramento, CA 95833
- 20 • M. Nelson Enmark
3447 W. Shaw Avenue
21 Fresno, CA 93711

22 Service was made on May 11, 2001.

23 Also on May 16, 2001, the Debtors caused to be filed a
24 "Notice of Meeting of Creditors and Motion to Value Collateral of
25 United National Bank, Combined with Proof of Service Thereof."
26 This notice informed United National Bank that the Debtors had
27 filed a chapter 13 plan that included a motion seeking to value
28 the collateral of United National Bank, and that if United

1 National Bank wanted to oppose the motion to value collateral, it
2 needed to file and set for hearing an opposition pursuant to
3 information contained in the notice. This notice was served on
4 May 11, 2001, according to the certificate of service attached to
5 it, on the following:

- 6 • United National Bank
7 c/o Celink
8 P. O. Box 40795
9 Lansing, MI 48901
- 10 • Compulink
11 3900 Capital Blvd
12 Lansing, MI 48906
- 13 • M. Nelson Enmark
14 3447 W. Shaw Avenue
15 Fresno, California 93711-3204
- 16 • Office of the U.S. Trustee
17 Federal Building
18 1130 "O" Street
19 Fresno, California 93721

20 The copy of each of the notices of motion to value
21 collateral described above that was filed with the court did not
22 include a copy of the plan. General Order 01-02 ¶ 2(b) required
23 that debtors serve along with the Notice of Meeting of Creditors
24 and Motion to Value Collateral, a copy of the plan.¹ That
25 requirement was not met by the Debtors here.

26 On June 27, 2001, the proposed "Order Confirming Plan,
27 Valuing Collateral and Avoiding Lien" (the "Proposed Order") was
28 submitted to the court. The court signed the order on June 27,
2001, but struck the language in the order valuing collateral
because a copy of the Plan had not been attached to the Notices

¹On July 1, 2003, General Order 03-03 replaced General Order
01-02. The change did not effect this requirement.

1 of Motions to Value Collateral.

2 The Debtors' counsel did not realize that the motions had
3 been denied because the front of the order had not been altered
4 to eliminate the words "valuing collateral and avoiding liens."
5 (There were, in fact, no motions to avoid liens in the plan.) At
6 that time, neither the Debtors nor their attorney realized that
7 the Order Confirming Plan did not also constitute an order
8 valuing collateral.

9 United National Bank filed a proof of claim on April 23,
10 2001. The address on the proof of claim is "c/o Celink, P. O.
11 Box 40795, Lansing, MI 48901." The claim is shown as a claim
12 secured by real estate, and attached to the claim is a copy of a
13 promissory note and a deed of trust on real property located at
14 2200 Oriole Street, Bakersfield, California 93309. This is the
15 address of the Debtors' residence.

16 On May 25, 2001, HomeEq/The Money Store filed a Proof of
17 Claim as a claim secured by the Debtors' residence. The Proof of
18 Claim states that the name and address where notices should be
19 sent is:

20 HomeEq/The Money Store
21 c/o Weinstein, Manley, Riley et al.
22 Attn: Dhar Sandhu
2101 4th Ave., Ste. 900
Seattle, WA 98121

23 On February 9, 2004, California Fidelity filed a Request for
24 Notice, by its attorney David Leventhal. This notice requested
25 that all notices required to be given to California Fidelity be
26 served on:

27 David Leventhal, Esq.
28 Law Offices of Leventhal & Associates
24300 Town Center Drive, Suite 240

1 Santa Clarita, California 91355

2 On February 9, 2004, California Fidelity filed a Proof of
3 Claim showing the name and address where notices should be sent
4 as David Leventhal at the address in Santa Clarita set forth
5 above. The claim is stated to be secured by the real property on
6 Oriole Street. The claim is stated to be in the total amount of
7 somewhat over \$54,000.

8 In May 2004, having finally realized that the original
9 motions to value collateral had been denied, the Debtors filed
10 three new motions to value collateral. These were a motion to
11 value collateral of United National Bank (DCN No. SMS-3); a
12 motion to value collateral of California Fidelity (DCN No. SMS-
13 4); and a motion to value collateral of The Money Store (DCN No.
14 SMS-5).

15 The Motion to Value Collateral of The Money Store/HomeEq was
16 served on the following persons as relevant:

- 17
- 18 • Homeq Servicing Corporation
2711 Centerville Road, Ste 400
Wilmington, DE 19808
 - 19 • CSC-Lawyers Incorporating Service
20 (Agent for Service of Process)
2730 Gateway Oaks Drive, Ste 100
21 Sacramento, California 95833
 - 22 • Homeq/The Money Store
c/o Weinstein, Manley, Riley
23 2101 Fourth Avenue, Ste 900
Seattle, WA 98121

24 The Motion to Value Collateral of United National Bank was served
25 on the following parties as relevant via certified mail:

- 26
- 27 • United National Bank
114 1st Street, Northeast
Cairo, GA 39827
- 28

1 • Michael Chastain President
United National Bank
2 114 1st Street, Northeast
Cairo, GA 39827

3 and on the following parties as relevant via regular mail:
4

5 • United National Bank
c/o Celink
6 P. O. Box 40795
Lansing, MI 48901

7 • United National Bank
8 Post Office Box 150
114 1st Street, NE.
9 Cairo, Georgia 39828

10 The motion to value collateral of California Fidelity was served
11 on the relevant parties at the following addresses:

12 • California Fidelity, Inc.
37 Old Courthouse Square, E202
13 Santa Rosa, CA 95404

14 • Charles E. Sims
(Agent for Service of Process)
15 37 Old Courthouse Square, E202
Santa Rosa, CA 95404

16 • California Fidelity, Inc.
17 c/o David Leventhal, Esq.
24300 Town Center Drive, Suite 240
18 Santa Clarita, California 91355

19 Among other persons, it was served on David Leventhal, at the
20 address set forth on the proof of claim and in the request for
21 notice which had been filed on February 9, 2004. These motions
22 were granted, and orders granting the motions were entered June
23 24, 2004. The Debtors received their discharge on September 24,
24 2004.

25 In November 2004, The Money Store assigned its claim to
26 California Fidelity, as set forth above, and a notice of transfer
27
28

1 of this claim was filed April 6, 2005.²

2 In November 2004, the Debtors' counsel informed the holders
3 of the second and third deeds of trust, who had been engaged in
4 collection activity, that their activity was in violation of the
5 discharge injunction. California Fidelity's counsel then
6 informed Debtors' counsel that he believed the motions to value
7 collateral served in May 2004 had not been properly served.
8 Debtors then agreed to vacate the June 24, 2004 orders.

9 In November 2004, the Debtors and David Leventhal, on behalf
10 of California Fidelity, entered into a "Stipulation and Proposed
11 Order to Reopen Case, Vacate Orders Entered on June 24, 2004, and
12 Set Evidentiary Hearing Date." This document was filed November
13 30, 2004. As the stipulation was originally worded, it provided
14 at paragraphs 4 and 5 that:

15 "4. On ____, 2004 (a date not less than thirty days after
16 entry of an Order approving this stipulation), the parties
17 shall file with this Court and serve upon each other and all
18 parties entitled to notice their respective appraisals,
19 opinions of value, expert reports, and other evidence of the
20 value of the real property known as 2200 Oriole Street,
Bakersfield, California 93309 (the "Property"); along with
declarations and points and authorities relating to the
Motions to Value Collateral that were previously filed by
the debtors and entered on the court docket on May 19, 2004.

21 ²On April 6, 2005, California Fidelity filed a Notice of
22 Transfer of Claim, asserting that the claim previously held by
23 United National Bank had been transferred to it. The Assignment
of Deed of Trust attached to the Notice of Transfer was recorded
February 2, 2004.

24 On April 8, 2005, California Fidelity filed another Notice
25 of Transfer of Claim, stating that the claim previously held by
26 HomeEq/The Money Store had been transferred to California
Fidelity. This Notice of Transfer also is accompanied by an
27 Assignment of Deed of Trust which has not been recorded. The
notary statement on the document is dated November 9, 2004. The
28 Assignment of Deed of Trust is from HomeEq/The Money Store to
Rockwest, Inc.

1 5. The Court sets an evidentiary hearing regarding the
2 value of the Property on _____, 2005, at _____m.,
3 (a date not less than thirty days after the date specified
4 in the preceding paragraph), in Courtroom ____ of the United
5 States Bankruptcy Court, located at California, 1300 18th
6 Street, Bakersfield, California 93301."

7 However, prior to signing the order approving the
8 stipulation, the court deleted paragraphs 4 and 5 and entered a
9 new paragraph 4 providing that "The Debtor may file and serve a
10 motion to value pursuant to Gen. Order 03-03 and LBR 9014-1, as
11 applicable."

12 Since the case was filed and the plan confirmed, the value
13 of the Debtors' residence has increased dramatically, as has
14 California residential real estate in general. In November 2004,
15 the Debtors refinanced their first deed of trust by obtaining a
16 new loan from Countrywide Lending, Inc. ("Countrywide"). In
17 connection with their loan application, they furnished to
18 Countrywide copies of the June 24, 2004 orders valuing
19 collateral, which indicated a value of zero for the second and
20 third trust deeds. The collateral analysis performed by
21 Countrywide in connection with this new loan showed a value in
22 November 2004 of \$186,000. Countrywide funded a loan to the
23 Debtors in the amount of \$153,000. Based on Countrywide's
24 reliance on the June 2004 orders valuing collateral, no amounts
25 were paid to the holders of the first and second deeds of trust.

26 According to California Fidelity, the Debtors' obtaining a
27 new loan from Countrywide constitutes loan fraud when they knew,
28 or should have known, that there were serious questions about the
29 valuation of collateral or that service of the motions to value
30 collateral had been improper. On the other hand, according to

1 the Debtors, there was no loan fraud and no bad faith.

2 California Fidelity has also argued that Debtors may not now
3 value collateral after their case has been closed. However,
4 California Fidelity stipulated with the Debtors that an
5 evidentiary hearing on the valuation of the property could take
6 place. The language of that stipulation, which is on Mr.
7 Levantahl's pleading paper, anticipates a hearing on valuation of
8 collateral relating to the motions "previously filed by the
9 Debtors"

10 The court finds that it was the intent of California
11 Fidelity that the Debtors could renotice the original motions to
12 value collateral that were filed and served in May 2004, a time
13 at which the case was open. Further, the case was reopened
14 solely for these motions to be filed and served. The prior
15 closing of the case is, in the court's view, irrelevant under the
16 present circumstances.

17 The Countrywide escrow closed November 29, 2004. However,
18 the Debtors' attorney signed the stipulation to reopen case and
19 vacate orders entered June 24, 2004, on November 19, 2004. On
20 November 16, 2004, Debtors' counsel had written to the attorney
21 for California Fidelity stating that he stood by the certificate
22 of service filed in connection with the motions to value
23 collateral. It was not until later that he concluded that there
24 had been a problem with service and agreed to vacate the orders.
25 The refinance closed one day before the order vacating the orders
26 valuing collateral was entered. Based on the declarations of the
27 Debtors and their attorney, the court can discern no bad faith in
28 the proceedings by the Debtors.

1 California Fidelity also argues that this is really a
2 proceeding to modify a plan, which cannot be done after the
3 Debtors have received their discharge and the case has been
4 closed. However, these are motions to value collateral. The
5 plan has already been confirmed. There is no motion before the
6 court to revoke confirmation or to modify plan.

7 The facts and circumstances here, while unfortunate, do not
8 rise to bad faith on the Debtors' part. The Debtors and their
9 attorneys were careless. They failed to observe the language of
10 the court's Order Confirming Plan. However, despite the
11 procedural deficiencies in the initial motions to value
12 collateral included with the plan when the case was filed, they
13 were served on each creditor in question in a manner calculated
14 to give them notice of the motions to value. In fact, each of
15 those creditors timely filed proofs of claim.

16 The motion to value collateral of California Fidelity that
17 the Debtors filed in May 2004 was served on California Fidelity
18 c/o David Leventhal, at the address in the Request for Notice
19 which California Fidelity had filed on February 9, 2004. It is
20 the same address as the address on California Fidelity's proof of
21 claim.

22 Additionally, the May 2004 motion to value collateral of
23 California Fidelity was served at an agent for service of process
24 in Santa Rosa, California. This is, in fact, the agent for
25 service of process shown for a suspended California corporation
26 named California Fidelity, Inc. in the California Business Portal
27 page provided by the California Secretary of State for
28 information about agents for service of process.

1 Additionally, the Notice of Transfer of Claim filed April 6,
2 2005, with respect to transfer of the claim of Homeq/The Money
3 Store to California Fidelity requested that:

4 "Henceforth, all notices, motions, payments, and other
5 documents affecting or concerning the aforementioned claim
6 shall be directed to CALIFORNIA FIDELITY, INC.'s legal
7 counsel at the following address:

8 David Leventhal, Esq.
9 Law Offices of Leventhal & Associates
10 24300 Town Center Drive, Suite 240
11 Santa Clarita, California 91355"

12 Under those circumstances, the court cannot find that David
13 Leventhal's declaration admitted as Exhibit AH is credible. In
14 that declaration, he states that when he received a letter from
15 Mr. Stanley, the Debtors' attorney, dated November 10, 2004, "I
16 reviewed the docket for this case on PACER, and learned for the
17 first time of the orders issued by this Court on June 17, 2004."
18 In fact, the motion to value collateral of California Fidelity
19 had been served on Mr. Leventhal at the address he requested in
20 the Request for Notice, and that he used on the proof of claim.

21 Mr. Leventhal also states in his declaration, admitted as
22 Exhibit AH, that:

23 "Among other defects the motions [the ones the Debtors
24 served in May 2004] were purportedly served upon California
25 Fidelity, Inc., a *California corporation*, located in Santa
26 Rosa, California. Said company has no relation to this
27 proceeding. My client, and the holder of the notes at issue
28 in this proceeding, is California Fidelity, Inc., a *Nevada*
corporation."

29 Federal Rule of Bankruptcy Procedure 7004(b)(3) provides
30 that one method of service by first class mail upon a corporation
31 is by mailing to the attention of an officer, a managing or
32 general agent, or to any other agent authorized by appointment or
33 by law to receive service of process. At the time the May 2004

1 motions to value collateral were filed and served, the only
2 address the Debtors could possibly have had for California
3 Fidelity was the address in the Request for Notice and in the
4 proof of claim filed in February 2004, an address to which they
5 directed the motion to value collateral of California Fidelity.

6 The Debtors took the additional step of researching the
7 agent for service of process of California Fidelity, Inc., and
8 came up with the name of an agent for service of process for a
9 California corporation. This court will not hold Debtors to the
10 task of searching every state for agents for service of process
11 when this court is located in California, and the creditor has
12 filed both a request for notice and a proof of claim requesting
13 notice at an address at which service was made. The court also
14 observes that the transfers of claim of United National Bank and
15 of Homeq/The Money Store were not filed until April 2005, well
16 after the motions to value collateral had been granted.

17 Debtors' attorney could have saved himself and his client a
18 great deal of time and expense by litigating more vigorously the
19 notice issue in the first place instead of stipulating to vacate
20 the order valuing collateral. In fact, notice of the motions
21 filed and served in May 2004 was perfectly adequate and
22 calculated reasonably to give notice to the parties affected
23 thereby. Of course, he also should have read the original order
24 confirming the plan more carefully. But those problems do not
25 dictate the result here.

26 Collateral is valued in connection with plan confirmation as
27 of the date the case was filed. The court comes to this
28 conclusion for three reasons. First, collateral is valued

1 pursuant to 11 U.S.C. § 506(a) in order to determine the amount
2 of a secured claim. Claims are determined as of the date of the
3 petition. 11 U.S.C. § 502(b). Section 506(a) also specifies
4 that the valuation should be "in conjunction with" "a plan
5 affecting [a] creditor's interest."

6 Second, 11 U.S.C. § 1325(a)(5)(B) requires that a chapter 13
7 plan pay the present value of a secured claim. This value must
8 be calculated "as of the effective date of the plan."

9 Calculating present value requires that the court determine the
10 value of the security for a secured creditor because that value
11 determines the amount of the secured claim. 11 U.S.C. § 506(a).
12 Since present value is calculated as of the effective date, so
13 must value. Accord In re Davis, 215 B.R. 824, 825-26 (Bankr.
14 N.D. Tex. 1997). In this court, the standard plan provides that
15 its effective date is the date the case was filed.

16 Third, courts have valued collateral as of the petition
17 date, the confirmation date, the effective date of the plan, the
18 confirmation hearing date, the filing date of the plan, the date
19 of the motion to value collateral, and the date of sale. In re
20 Wood, 190 B.R. 788, 790-792 (Bankr. M.D. Pa. 1996) (cases
21 collected); Patrick Fitzgerald, "Bankruptcy Code Section 506(a)
22 and Undersecured Creditors: What Date Valuation?" 34 UCLA L.Rev.
23 1953 (1987). Most courts conclude that collateral should be
24 valued at the time of confirmation or at the plan's effective
25 date. See e.g., In re Kennedy, 177 B.R. 967 (Bankr. S.D. Ala.
26 1995). As noted above, in this court these two dates are the
27 same.

28 The only evidence about the value of the residence in 2001

1 is that submitted, absent objection or rebuttal, by the Debtors.
2 According to Daryl Breese, a certified realtor, the value of
3 the property was \$58,145.57 as of June 27, 2001. Mr. Breese
4 bases this value on \$55.01 per square foot which he testified
5 corresponds to the comparable properties from the area, sold
6 at that time. James Eaton has testified that in his opinion
7 his house was worth less than \$70,000 at the time the chapter
8 13 plan was confirmed. Dana Bryan, a state certified real
9 estate appraiser, has testified that the fair market value of
10 the property was \$70,000 as of March 2001. Based on this
11 evidence, which was uncontroverted, the court finds that the
12 value of the collateral as of the date the petition was filed
13 was \$70,000. The court also finds that as of the date the
14 petition was filed the Debtors owed the holder of the first deed
15 of trust, Wells Fargo Bank, \$70,582. Therefore, at that time,
16 there was no value to support the second or the third trust
17 deeds. Pursuant to Bankruptcy Code § 506(a), Federal Rule of
18 Bankruptcy Procedure 3012, and In re Lam, 211 B.R. 36 (BAP 9th
19 Cir. 1997), the Debtors ask the court to determine that the
20 replacement value of their home at the date they filed their
21 petition was \$70,000, and that California Fidelity does not hold
22 a secured claim because its collateral after deducting the senior
23 encumbrance held by Wells Fargo Bank at the date of filing has no
24 value.

25 In Lam, the Bankruptcy Appellate Panel determined that the
26 provision in 11 U.S.C. § 1322(b)(2) barring the modification of a
27 claim secured only by a debtor's residence did not apply whenever
28 the residence had no value after deducting all senior

1 encumbrances. That is the situation here.

2 Because the claims that had been secured by the second and
3 third deeds of trust on the residence were discharged in a prior
4 chapter 7 case, the present holder of the second and third deeds
5 of trust, California Fidelity, has no unsecured claim in this
6 case.

7 For the above reasons, the court grants the motions to value
8 collateral. Counsel for the Debtors may submit a proposed form
9 of order in respect to each motion.

10 DATED: June 6, 2005

11
12 /S/_____
13 WHITNEY RIMEL, Judge
14 United States Bankruptcy Court
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