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3 UNITED STATES BANKRUPTCY COURT  
4 EASTERN DISTRICT OF CALIFORNIA  
5 SACRAMENTO DIVISION  
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8 In re: )  
9 ) Case No. 07-29527-B-13J  
10 LARRY GUTIERREZ, )  
11 Debtor. ) Docket Control No. JLG-2  
12 ) Date: March 18, 2008  
 ) Time: 9:30 a.m.

13 On or after the calendar set forth above, the court issued  
14 the following ruling. The official record of the ruling is  
appended to the minutes of the hearing.

15 Because the ruling constitutes a "reasoned explanation" of  
16 the court's decision under the E-Government Act of 2002 (the  
17 "Act"), a copy of the ruling is hereby posted on the court's  
Internet site, [www.caeb.uscourts.gov](http://www.caeb.uscourts.gov), in a text-searchable  
18 format, as required by the Act. However, this posting does not  
constitute the official record, which is always the ruling  
appended to the minutes of the hearing.

19 **DISPOSITION AFTER ORAL ARGUMENT**

20 This matter came on for final hearing on March 18, 2008, at  
21 9:30 a.m. Appearances are noted on the record. The following  
22 constitutes the court's findings of fact and conclusions of law  
23 pursuant to Federal Rule of Bankruptcy Procedure 7052.

24 Neither the respondent within the time for opposition nor  
25 the movant within the time for reply has filed a separate  
26 statement identifying each disputed material factual issue  
27 relating to the motion. Accordingly, both movant and respondent  
28 have consented to the resolution of the motion and all disputed

1 material factual issues pursuant to FRCivP 43(e). LBR 9014-  
2 1(f)(1)(ii) and (iii).

3 The motion is granted to the extent set forth herein. The  
4 automatic stay is modified pursuant to 11 U.S.C. § 362(d)(1) in  
5 order to permit the movant to foreclose on the real property  
6 located at 309 Jasmine Court, Roseville, California 95678 (APN  
7 477-210-060-00) (the "Residence") and to obtain possession of the  
8 Residence following the sale, all in accordance with applicable  
9 non-bankruptcy law.

10 Both the movant and the debtor misunderstand the situation.  
11 The present facts create multiple separate obligations. The  
12 movant alleges without dispute that on or about October 8, 2004,  
13 several agreements were executed by Pachanga, Inc., a corporation  
14 of which the debtor is Secretary ("Pachanga") and others in favor  
15 of the movant. First, Pachanga borrowed money in the principal  
16 amount of \$150,000.00 from the movant and executed a promissory  
17 note in favor of the movant (the "Note") for that amount.  
18 Second, Pachanga also executed a Commercial Security Agreement  
19 granting to the movant a security interest in certain of  
20 Pachanga's personal property to secure repayment of the Note.  
21 Third, the debtor executed a U.S. Small Business Administration  
22 Unconditional Guarantee (the "Debtor Guaranty") in which he  
23 guarantied repayment of the Note. The terms of the Debtor  
24 Guaranty require the debtor to "pay all amounts due under the  
25 note when Lender makes written demand upon Guarantor." (Dkt. 36  
26 at 12). Fourth, Teresita Gutierrez executed a U.S. Small  
27 Business Administration Unconditional Guarantee (the "T.

1 Gutierrez Guaranty") in which she guaranteed repayment of the  
2 Note. Fifth, Erin Simpson executed a U.S. Small Business  
3 Administration Unconditional Guarantee in which she guaranteed  
4 repayment of the Note. Sixth, Christopher Simpson executed a  
5 U.S. Small Business Administration Unconditional Guarantee in  
6 which he guaranteed repayment of the Note. Seventh, the debtor  
7 and Teresita Gutierrez executed a deed of trust (the "Gutierrez  
8 Deed of Trust") encumbering the Residence to secure performance  
9 of their obligations under the Debtor Guaranty and the T.  
10 Gutierrez Guaranty. Eighth, Erin and Christopher Simpson  
11 executed a deed of trust encumbering their real property located  
12 at 1783 Toby Drive, El Dorado Hills, CA 95762 to secure  
13 performance of their obligations under their guaranties.

14 Generally speaking, the following obligations flowed from  
15 the foregoing events. Pachanga was obligated to pay the Note  
16 according to its terms. The debtor was obligated to pay the  
17 movant an amount equal to the then outstanding balance on the  
18 Note if Pachanga defaulted on the Note and the movant made demand  
19 under the Debtor Guaranty. Teresita Gutierrez, Erin Simpson and  
20 Christopher Simpson were also obligated to pay the movant an  
21 amount equal to the outstanding balance on the Note if Pachanga  
22 defaulted on the Note and the movant made demand under their  
23 guaranties.

24 If Pachanga defaulted on its obligation on the Note, the  
25 movant could also foreclose on the collateral covered by the  
26 Pacahanga Commercial Security Agreement to secure payment of the  
27 Note. If the debtor, Teresita Gutierrez, Erin Simpson and/or  
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1 Christopher Simpson defaulted on their obligations on their  
2 guaranties, the movant could foreclose on the deeds of trust  
3 securing performance of the guaranty obligations.

4 From all of the foregoing, two things are clear: the debtor  
5 had one obligation - the obligation on the Debtor Guaranty - and  
6 that obligation was secured by one thing - a deed of trust on the  
7 Residence. These conclusions are supported by the terms of the  
8 deed of trust executed by the debtor and Teresita Gutierrez on  
9 October 8, 2004 contains the following provision:

10 This deed of trust, including the assignment of  
11 rents and the security interest in the rents and  
12 personal property, is given to secure (A)  
13 performance of a guaranty from trustor to lender,  
14 and does not directly secure the obligations due  
15 lender under the note, (B) payment of the  
indebtedness, and (C) performance of any and all  
obligations due lender under the note, the related  
documents, and this deed of trust.

16 Dkt. 36 at 22 (emphasis added). The deed of trust also  
17 defines the term "note" as the promissory note dated October 8,  
18 2004, in the original principal amount of \$150,000.00, which note  
19 defines the obligation of Pachanga to the movant. The court  
20 construes these provision as evidence that the Gutierrez Deed of  
21 Trust secures only the obligations under the Debtor Guaranty and  
22 the T. Gutierrez Guaranty (Dkt. 36 at 12-16). Therefore, the  
23 court finds that the movant's secured claim in this case, based  
24 on the debtor's liability on the Debtor Guaranty, is a claim  
25 "secured only by a security interest in real property that is the  
26 debtor's principal residence." 11 U.S.C. § 1322(b)(2).

27 The court has yet to confirm a plan in this case. Prior to  
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1 confirmation cause for relief from the automatic stay under  
2 Section 362(d)(1) exists if the movant's interest is not  
3 adequately protected. The debtor's proposed plan erroneously  
4 treats the movant's claim as a class 1 claim, to be paid by the  
5 chapter 13 trustee from the debtor's plan payments. This  
6 treatment is based on a misunderstanding of the obligations  
7 involved. The debtor confuses Pachanga's Note obligation with  
8 his Debtor Guaranty obligation. The class 1 treatment is based  
9 on the repayment terms of the Note, not on the immediately due  
10 obligation on the Debtor Guaranty. The movant makes the same  
11 mistake of adopting the Pachanga Note obligation by alleging that  
12 since the filing of this case on November 8, 2007, it has only  
13 received one post-petition payment from the trustee, while three  
14 have come due. The chapter 13 trustee has confirmed in his  
15 response that as of March 3, 2008 the debtor is delinquent to the  
16 trustee in the amount of \$9,700.00, or 1.69 plan payments. The  
17 trustee also confirms that he has been unable to pay all post-  
18 petition contract installment payments since they have come due,  
19 and has only made one post-petition installment payment to  
20 movant. Assuming that the movant's claim were correctly  
21 classified and that the parties accurately stated the facts  
22 regarding the payment obligations and payment history, the  
23 debtor's failure to provide for post-petition payments to movant  
24 would not adequately protect the movant's interest, and that  
25 would constitute cause for relief from the automatic stay.

26       Unfortunately, the movant's claim is not properly  
27 classified. Substituting someone else's (Pachanga's) repayment  
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1 terms as the basis for class 1 treatment constitutes a  
2 modification of a claim secured only by the Residence that is  
3 prohibited by section 1322(b) (2) and not "saved" by section  
4 1322(b) (5). The debtor might have attempted to provide for the  
5 movant's claim in class 2 as a claim that matured before the  
6 final plan payment is due, thus allowing modification pursuant to  
7 section 1322(c) (2), but the debtor did not do so. The failure to  
8 provide for the movant's claim in any permissible way denies the  
9 movant's claim adequate protection and constitutes cause for  
10 relief from the automatic stay.

11 The debtor's opposition to the motion is not persuasive. In  
12 his written opposition the debtor asserts that he intends to  
13 refinance the subject real property within six months and that  
14 "if need be" he will make adequate protection payments to the  
15 movant while the refinancing is moving forward. The debtor's  
16 position is not persuasive principally because, as set forth  
17 above, it misapprehends the nature of the obligations among the  
18 parties. Furthermore, despite his stated intention to refinance  
19 the subject real property, he has not proposed an amended plan  
20 that does so. The debtor has also not demonstrated an ability to  
21 make adequate protection payments to any creditor where he is  
22 presently delinquent in chapter 13 plan payments.

23 At oral argument on this matter the debtor also argued that  
24 Section 1322(b) (2) does not prevent him from modifying the  
25 creditor's secured claim because the movant is secured by more  
26 than one item of collateral. The debtor argued that the movant  
27 was also secured by a deed of trust on the residence of  
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1 guarantors Erin and Christopher Simpson as well as by the  
2 equipment of Pachanga Inc. The debtor cited three cases, In re  
3 Cummings, 214 B.R. 126 (D.N.J. 1997), In re Bouvier, 160 B.R. 24  
4 (Bankr. D.R.I. 1993), and In re Reeves, 65 B.R. 898 (N.D. Ill.  
5 1986).

6 The debtor's contention at oral argument focuses on the  
7 wrong "claim." Pachanga's obligation on the Note is not the  
8 relevant "claim;" rather, the debtor's obligation on the Debtor  
9 Guaranty is the relevant claim. The Debtor Guaranty is secured  
10 only by the Gutierrez Deed of Trust on the Residence. In any  
11 event, the court has reviewed the cases cited by the debtor at  
12 the oral argument and does not find them persuasive. The  
13 holdings in these cases are not binding on this court. They are  
14 also distinguishable from the instant case.

15 For example, in Cummings a lender made a loan to a  
16 corporation of which the chapter 13 debtor was the sole  
17 stockholder. The loan was secured by the corporation's  
18 "machinery, equipment, inventory, accounts and assignment of the  
19 corporate leasehold. The loan was also secured by an assignment  
20 of a life insurance policy on one joint debtor] and a second  
21 mortgage on the principal residence of [the debtors]." Cummings,  
22 214 B.R. at 127. The Cummings court also pointed out that the  
23 mortgage granted to the mortgagee the property together with all  
24 buildings, fixtures, improvements, rents, issues, and profits.  
25 Id. The Cummings court held that the debtors could modify the  
26 lender's secured claim because the mortgage was secured by the  
27 debtors' personal property, including principal property with  
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1 fixtures, rents, issues, and profits, the life insurance policy,  
2 and the assets of a corporation controlled by the debtors. The  
3 Cummings court held that the additional property securing the  
4 loan made the lender's claim one that was secured by more than  
5 just real property that was the debtor's principal residence.  
6 Id. at 128-29. The court also held that Section 1322(b)(2) did  
7 not require the debtors themselves to give the lender additional  
8 security in order to permit modification. Id. at 130. The  
9 problem for the debtor with Cummings is that there the debtors'  
10 deed of trust directly secured the corporate debt obligation,  
11 which was also secured by collateral other than the debtors'  
12 residence. That is not the case here.

13 The Bouvier court also addressed the issue of whether a  
14 corporation's pledge of personal property as security for a  
15 business loan in addition to the debtors' pledge of a second  
16 mortgage on their residence could permit modification. Like the  
17 Cummings court the Bouvier court also held that the debtors could  
18 modify the lender's secured claim because Section 1322(b)(2) did  
19 not require that all of the security be given only by the  
20 debtors. Bouvier, 160 B.R. at 25. Again, this case involved a  
21 corporate debt directly secured by a second mortgage on the  
22 debtors' residence and other collateral. That is not the case  
23 here.

24 In Reeves, the debtor entered into a retail installment  
25 contract with a creditor, under which the creditor made certain  
26 improvements to the debtor's home, including work on the roof,  
27 gutters, walls and porch. The contract was secured by a second  
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1 mortgage on the debtor's residence. The contract terms also  
2 provided that the creditor would take a security interest in the  
3 goods and accessories, parts and property sold to the debtor and  
4 installed or affixed to the real property. Reeves, 65 B.R. at  
5 901. The Reeves court read the retail installment contract "as  
6 creating two different security interests: one attaching only to  
7 fixtures under Article 9, and the other attaching to 'real  
8 property that is the debtor's principal residence,' including  
9 fixtures, under the trust deed mortgage and real estate law."  
10 Reeves, 65 B.R. at 901. Similarly to the Cummings court, the  
11 Reeves court also held that the fixtures retained a separate  
12 status as personal property, based in part on the doctrine under  
13 Illinois law that personal property attached to real property  
14 remains personalty where an intent that it remains so can be  
15 gathered from the conduct or action of the parties. Id. As a  
16 result, the Reeves court held that the creditor was not protected  
17 by Section 1322(b)(2).

18 In each case cited by the debtor a single obligation to a  
19 creditor was secured by the debtors' residence and other  
20 collateral. Here, however, there are multiple obligations. The  
21 Note obligation is secured by personal property belonging to  
22 Pachanga, but not by the debtor's residence. A separate  
23 obligation, the debtor's liability on the Debtor Guaranty, is  
24 secured by the Gutierrez Deed of Trust on the Residence, but not  
25 by any other collateral. The Gutierrez Deed of Trust does not  
26 secure the Note.

27 The court also disagrees with Cummings and Reeves to the  
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1 extent they would hold that because a deed of trust executed by  
2 the debtor granted an interest in the Residence "together with  
3 all existing or subsequently created or affixed buildings,  
4 improvements, and fixtures; all assessments, rights of way, and  
5 appurtenances, all water, water rights, and ditch rights . . . .;  
6 and all other rights, royalties, and profits relating to the real  
7 property" (Dkt. 36 at 22), the movant's claim is not protected by  
8 Section 1322(b)(2). The Ninth Circuit Bankruptcy Appellate Panel  
9 has held that the addition of the boilerplate phrase "all the  
10 improvements now or hereafter erected on the property, and all  
11 easements, rights, appurtenances, rents, royalties, mineral, oil  
12 and gas rights and profits, water rights and stock and all  
13 fixtures now or hereafter a part of the property" to a deed of  
14 trust did not remove a secured creditor's claim from the  
15 protection of Section 1322(b)(2). See In re Lievsay, 199 B.R.  
16 705, 708-09 (9<sup>th</sup> Cir. BAP 1996). The additional language in the  
17 deed of trust in the instant case is similar boilerplate language  
18 that does not extend the movant's security interest "beyond  
19 items which are inextricably bound to the real property itself as  
20 part of the possessory bundle of rights.'" Id. at 708 (citing In  
21 re Davis, 989 F.2d 208, 213 (6<sup>th</sup> Cir. 1993).

22 Also unavailing is the debtor's argument in his written  
23 opposition that the Note is guarantied by the United States Small  
24 Business Administration (the "SBA") and "no matter what this  
25 debtor does, there is no way that the moving party can lose any  
26 money whatsoever" (Dkt. 64 at 2). First, it is irrelevant. The  
27 debtor has cited no authority for the proposition that either SBA  
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1 loans or loans where the creditor "cannot lose" are exempted from  
2 the operation of section 1322(b)(2). Second, section 7(a) of the  
3 Small Business Act (Pub. L. 85-536), the section that governs the  
4 majority of small business loans made and guarantied by the SBA,  
5 provides that

6 (2) LEVEL OF PARTICIPATION IN GUARANTEED LOANS.—

7 (A) IN GENERAL.—Except as provided in subparagraph  
8 (B), in an agreement to participate in a loan on a  
9 deferred basis under this subsection (including a  
10 loan made under the Preferred Lenders Program), such  
participation by the Administration shall be equal  
to—

11 (i) 75 percent of the balance of the financing  
12 outstanding at the time of disbursement of the loan,  
if such balance exceeds \$150,000; or

13 (ii) 85 percent of the balance of the financing  
14 outstanding at the time of disbursement of the loan,  
if such balance is less than or equal to \$150,000.

15 Small Business Act, Pub. L. 85-536, § 7(a)(2) (codified in 15  
16 U.S.C. § 636(a)(2)(A)) (emphasis added). The debtor has not  
17 provided any evidence regarding the type of SBA loan he has or  
18 the level of the SBA's participation in it, other than his own  
19 self-serving assertion. The debtor has not shown that the loan  
20 is fully guarantied.

21 Movant shall serve a copy of the order granting relief on the  
22 holders of all junior liens, if any.

23 The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is  
24 not waived, as the subject real property is the debtor's  
25 residence.

26 Except as so ordered, the motion is denied.

27 The court will issue a minute order.