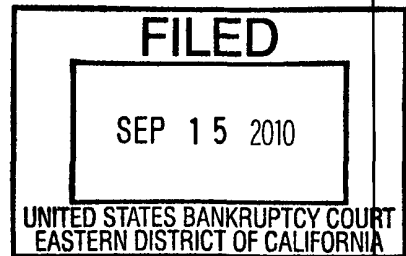


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2 NOT FOR PUBLICATION



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4 UNITED STATES BANKRUPTCY COURT  
5 EASTERN DISTRICT OF CALIFORNIA  
6 SACRAMENTO DIVISION  
7

8 In re ) Case No. 10-20818-E-13L  
9 ROBERT EUGENE RUSSELL and ) Docket Control No. APN-1  
10 RACHEL GOQUINGCO RUSSELL, )  
11 Debtors. )

12 This memorandum decision is not approved for publication and may  
13 not be cited except when relevant under the doctrine of law of the  
case or the rules of claim preclusion or issues preclusion.

14 MEMORANDUM OPINION AND DECISION  
15 Objection to Confirmation of Plan  
16 and  
17 Motion to Value Secured Claim of Wells Fargo Bank

18 Two related matters have been presented to the court in  
19 connection with the proposed Chapter 13 Plan in this case. Wells  
20 Fargo Bank, N.A. ("Wells Fargo") has filed an Objection to  
21 confirmation of the proposed Chapter 13 Plan filed by Robert and  
22 Rachel Russell, the Chapter 13 debtors ("Debtors"). This objection  
23 to confirmation is based on Wells Fargo's opposition to the Debtors'  
24 motion to value the Wells Fargo secured claim pursuant to 11 U.S.C.  
25 §506(a). The total Wells Fargo claim is \$113,108.77, of which the  
26 Debtors assert \$0.00 is Wells Fargo's secured claim. Both matters  
27 were set for an evidentiary hearing. The court issues this  
28 Memorandum Opinion and Decision, which shall constitute the  
findings of fact and conclusions of law in support of the orders it

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1 issues confirming the Debtors' Chapter 13 Plan and determining the  
2 value the Wells Fargo secured claim.

3       The ultimate dispute of the parties is the value of the  
4 Debtors' real property commonly known as 6312 Di Lusso Drive,  
5 Elk Grove, California (the "Di Lusso Property"). This is the  
6 Debtors' residence. The Debtors value the Di Lusso Property at  
7 \$135,000.00 and Wells Fargo values the Di Lusso Property at  
8 \$178,000.00. Wells Fargo holds a claim secured by a second trust  
9 deed against the Di Lusso Property. The senior trust deed against  
10 the Di Lusso Property secures a claim in the amount of \$159,465.00.  
11 If the Debtors are correct in their valuation, then under 11 U.S.C.  
12 §506(a) Wells Fargo's secured claim would be valued at \$0.00.  
13 *Zimmer v. PSB Lending Corp.*, 313 F.3d 1220 (9th Cir. 2002); and *In*  
14 *re Lam*, 211 B.R. 36 (9th Cir. BAP 1997), appeal dismissed, 192 F.3d  
15 1309 (9th Cir. 1999). However, if Wells Fargo is correct, then the  
16 claim is treated as a secured claim for the full \$113,108.77.  
17 11 U.S.C. §1322(b)(2).

#### 18 **Valuation of the Di Lusso Property**

19       The Debtors provided the testimony of Scott Miller, an  
20 appraiser, for the value of the Di Lusso Property. Mr. Miller  
21 testified that the value of the Di Lusso Property is \$135,000.00.  
22 This valuation opinion was based on his personal inspection of the  
23 Di Lusso Property, consideration of comparable properties, and his  
24 experience in the industry. Mr. Miller's appraisal report was  
25 admitted into evidence as Exhibit "A."

26       Three comparables identified by Mr. Miller were for similar  
27 single family homes within .22 miles to .58 miles from the Di Lusso  
28 Property. For the comparables, one was an REO sale by the lender

1 and two were short sales. Before adjustments, the gross sales  
2 prices for these properties ranged from \$137,000.00 to \$150,000.00.

3 In describing the Di Lusso Property, Mr. Miller testified in  
4 his appraisal report that: "There are no physical inadequacies.  
5 The property is average(-) condition. No functional obsolescence.  
6 Recommend new paint and carpeting. Some minor repair to sheetrock  
7 needed." He further testified, "There is evidence of structural  
8 settlement, water leakage around top of door frames. Recommend GHE  
9 inspection."

10 In coming to his opinion as to value, Mr. Miller considered an  
11 estimated \$32,188.00 in remodel and repair expense which the  
12 Debtors disclosed to Mr. Miller. Copies of the estimates were  
13 attached to the appraisal, but no evidence was submitted to the  
14 court as to the actual repairs and costs.

15 Wells Fargo presented the testimony of Theresa M. Huffman, an  
16 appraiser, in support the bank's valuation of the Di Lusso  
17 Property. Ms. Huffman testified that the Di Lusso Property has a  
18 value of \$178,000.00. Ms. Huffman's appraisal report was admitted  
19 as Exhibit "5." Her testimony was based upon her inspection of the  
20 Di Lusso Property and considering other properties to generate  
21 relevant comparables.<sup>1</sup> This was an increase of \$3,000.00 from her  
22

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24 One day before the hearing, Wells Fargo filed an amended appraisal for Ms. Huffman which  
25 included properties and information not properly submitted for the evidentiary hearing as set forth  
26 in the court's evidentiary hearing scheduling order. The original appraisal and testimony statement  
27 were filed pursuant to the order of this court establishing the evidentiary hearing schedule. Wells  
28 Fargo explained the new appraisal as a "corrected" appraisal, because Ms. Huffman's original  
appraisal valued the Di Lusso Property as of January 2009. The court denied the admission of this  
late filed appraisal. The 2010 appraisal did not merely "correct" a typographical or other clerical  
error, but attempted to introduce a different appraisal report the day before the evidentiary hearing.

Wells Fargo was allowed to present Ms. Huffman's rebuttal testimony and counsel for Wells

1 January 2009 opinion that the Di Lusso Property had a value of  
2 \$175,000.00.

3 Ms. Huffman testified that the market for the Di Lusso  
4 Property was relatively stable, but declining slightly. Her  
5 adjustment to the comparables for time of sale was a one percent  
6 per month reduction since the 2009 appraisal. She concurred that  
7 foreclosure sales should be included in an appraisal, and are  
8 considered as a factor, but not determinative, in the valuation of  
9 real property.

10 For comparables, Ms. Huffman identified several properties not  
11 included in the Miller appraisal. These are identified as  
12 6418 Di Lusso Drive (December 1, 2009 - \$192,000.00 sale) and  
13 6967 Storia Way (November 11, 2009 - \$183,000.00 sale). The court  
14 was not presented with the specifics for these properties or  
15 adjustments which should be made as part of the necessary  
16 comparable property analysis.

17 Ms. Huffman's comparables included properties sold during the  
18 period December 2008 through January 2009. The unadjusted sales  
19 for these properties ranged from \$175,000.00 to \$200,000.00. When  
20 adjusted for condition and structural differences, Ms. Huffman's  
21 comparables are in a value range of \$170,000.00 to \$193,000.00.  
22 The adjustments do not include any for the condition of or repairs  
23 to the Di Lusso Property. Her appraisal report states that there  
24 were no physical deficiencies or adverse conditions to the Di Lusso  
25

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26 Fargo effectively presented in that rebuttal testimony Ms. Huffman's opinion of valuation changes  
27 since January 2009. Additionally, both appraisers testified that values in the area of the Di Lusso  
28 Property were relatively stable, and that there was a modest downward pressure (1% per month  
adjustment by Ms. Huffman) on values. The January 2009 appraisal by Ms. Huffman provided  
relevant information to the determination of value.

1 Property.

2 The rebuttal testimony provided by Ms. Huffman and the  
3 cross-examination of Mr. Miller included consideration of the  
4 adjustments not made by Mr. Miller for the 9042 Duovo Way and  
5 9085 Duovo Way properties. These two properties are across the  
6 street from a high school. The Di Lusso Property is not located  
7 across from the high school, but several blocks down in an area  
8 consisting only of residential homes. Mr. Miller's appraisal does  
9 not make an adjustment for the location of the comparables.

10 The court ultimately must determine the value of the Di Lusso  
11 Property, and not merely choose one appraisal or the other. In  
12 this case, both appraisals and the testimony of the witnesses  
13 provide valuable information to the court, and neither appear to  
14 fully make the necessary adjustments to the comparables. The court  
15 determines the value of the Di Lusso Property to be \$145,000.00.

16 Starting with Ms. Huffman's testimony and appraisal, the best  
17 comparables are those with an adjusted value, as of December  
18 2008/January 2009 period, in the \$170,000.00 to \$180,000.00 range.  
19 The court also concurs that the real estate market for the Di Lusso  
20 Property has continued to decline, and anyone attempting to sell  
21 property faces competition from lenders selling REO properties and  
22 short sales from home owners attempting to avoid having a  
23 foreclosure as part of their credit history. Ms. Huffman's  
24 testimony was that approximately seventy-two percent of the sales  
25 or marketed properties were bank owned or foreclosure properties.  
26 Due to the downward pressure on prices during 2009 and into 2010,  
27 the court finds that a further downward adjustment of \$20,000.00  
28 from the earlier sales prices identified by Ms. Huffman is

1 warranted.

2       The court also finds that an adjustment needs to be made to  
3 the value of the Di Lusso Property for the necessary repairs (not  
4 remodeling). Mr. Miller testified to specific repair items for  
5 structural settlement, water leakage around doors, paint,  
6 carpeting, and minor sheetrock work. Though structural settlement  
7 and water leakage around doors may be indicative of more  
8 significant problems, no such evidence was presented and the court  
9 will consider them to be cosmetic issues. Addressing the cosmetic  
10 repairs is a valuation factor to be considered by the court (and  
11 any buyer) in adjusting the comparable values. The court concludes  
12 that a \$10,000.00 downward adjustment for these condition and  
13 quality repair items is appropriate.

14       Making a \$30,000.00 adjustment to Ms. Huffman's comparables,  
15 yields a range of \$140,000.00 to \$150,000.00. The court finds the  
16 value of the Di Lusso Property to be \$145,000.00.

17       The court has also considered the analysis from Mr. Miller's  
18 appraisal. The two comparables which are of the closest in nature,  
19 quality, and substance to the Di Lusso Property have adjusted  
20 values of \$131,550.00 and \$140,050.00. However, these properties  
21 are located across the street from the high school, and Mr. Miller  
22 did not make any adjustment for this location difference in  
23 concluding that the value for the Di Lusso Property was  
24 \$135,000.00. Based upon the testimony of Ms. Huffman and utilizing  
25 the information in her appraisal, it appears that the correct  
26 upward adjustment for the location difference is \$10,000.00. This  
27 increases the amount under Mr. Miller's appraisal to \$145,000.00.

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1 **Valuation of Wells Fargo Secured Claim**

2       The determination of a secured claim is made pursuant to  
3 11 U.S.C. §506(a). Under this section, the court must determine  
4 the value of the Debtors' interest in the Di Lusso Property, and  
5 then determine Wells Fargo's interest in the Debtors' interest.  
6 The Debtors' interest is \$145,000.00. The senior lien on the  
7 Di Lusso Property is \$159,465.00. After accounting for the senior  
8 lien, which exceeds the value of the Di Lusso Property, Wells  
9 Fargo's interest in the Di Lusso Property is \$0.00, and therefore  
10 its secured claim under §506(a) is determined to be \$0.00.

11       The court shall enter a separate order determining that Wells  
12 Fargo's secured claim is \$0.00, and the balance of its claim shall  
13 be paid as an unsecured claim under the Chapter 13 Plan.

14 **Confirmation of Chapter 13 Plan**

15       Wells Fargo's first objection to confirmation is that the  
16 Debtors' Plan improperly classifies the Wells Fargo claim as a  
17 Class 2 claim. As a Class 2 claim, there would be a total payment  
18 of \$0.00 made on the Wells Fargo secured claim under the Plan.  
19 Based on a Wells Fargo's alleged value of \$178,000.00 for the  
20 Di Lusso Property, the Bank asserts that its claim is at least  
21 partially secured. Therefore, no modification can be made to the  
22 Wells Fargo claim since that claim is secured only by the Debtors'  
23 residence. However, since the actual value of the Di Lusso  
24 Property is determined by the court to be \$145,000.00, and that  
25 value is completely exhausted by the senior lien, then Wells Fargo  
26 holds a completely unsecured claim. A completely unsecured claim  
27 may be valued under 11 U.S.C. §506(a). *Zimmer v. PSB Lending*  
28 *Corp.*, 313 F.3d 1220 (9th Cir. 2002); and *In re Lam*, 211 B.R. 36

1 (9th Cir. BAP 1997), appeal dismissed, 192 F.3d 1309 (9th Cir.  
2 1999). This objection is overruled.

3 The second objection raised by Wells Fargo is that it  
4 interprets the Plan to immediately remove the Wells Fargo trust  
5 deed from the Di Lusso Property upon confirmation. The court does  
6 not read the Plan to so provide, nor understand that the Debtors  
7 contend that the Plan does such. To avoid any confusion, the order  
8 confirming the Plan shall include the following provision,

9 **IT IS FURTHER ORDERED** that the valuation of the Wells  
10 Fargo Bank secured claim to be \$0.00 does not alter or  
11 impair the lien rights of the creditor pending completion  
12 of the Plan and entry of the Debtors' discharge. Upon  
13 entry of the Debtors discharge, the Debtors shall make  
demand and enforce such rights as may exist under the  
Note, Trust Deed, loan agreement, and applicable law to  
demand and obtain a reconveyance of the Trust Deed.

14 The balance of objections stated by Wells Fargo are variants  
15 of Wells Fargo asserting that it has a secured claim in excess of  
16 \$0.00, and the Debtors' Plan does not provide for paying such  
17 amounts in excess of \$0.00. The court having determined the value  
18 of the Di Lusso Property and that the Wells Fargo secured claim is  
19 \$0.00 for payment under the Chapter 13 Plan, the balance of  
20 objections are overruled.

21 The Plan complies with the provisions of 11 U.S.C. §1322 and  
22 §1325 and is confirmed.

23 Counsel for the Debtors shall prepare an appropriate order  
24 confirming the amended Chapter 13 Plan, transmit the proposed order  
25 to the Chapter 13 Trustee for approval as to form, and if so

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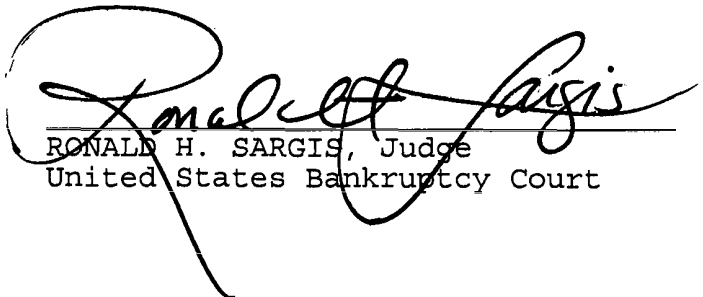
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1 approved, the Chapter 13 Trustee will submit the proposed order to  
2 the court.

3 Dated: September 14, 2010

  
4 RONALD H. SARGIS, Judge  
5 United States Bankruptcy Court  
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