

MAY 18 2015

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NV-14-1375-KuDJu
)
 GWENDOLYNE F. PACK,) Bk. No. 13-19702
)
 Debtor.)
)
)
 BELLA SERA HOMEOWNERS')
 ASSOCIATION,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
)
 GWENDOLYNE F. PACK; BANK OF)
 NEW YORK MELLON; OCWEN LOAN)
 SERVICING, LLC,)
)
 Appellees.)
)

Argued and Submitted on March 19, 2015
at Las Vegas, Nevada

Filed - May 18, 2015

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Laurel E. Davis, Bankruptcy Judge, Presiding

Appearances: Huong X. Lam of Alessi & Koenig, LLC argued for
appellant Bella Sera Homeowners' Association;
Steven L. Yarmy argued for appellee Gwendolyne F.
Pack.**

*This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

**Appellees Bank of New York Mellon and Ocwen Loan
Servicing, LLC did not actively participate in this appeal.

1 Before: KURTZ, DUNN and JURY, Bankruptcy Judges.

2
3 **INTRODUCTION**

4 Bella Sera Homeowners' Association appeals from the
5 bankruptcy court's order granting debtor Gwendolyne Pack's motion
6 to "strip off" Bella Sera's wholly unsecured lien. Bella Sera
7 also appeals from the court's order confirming Pack's chapter 11¹
8 plan.

9 Both the strip off order and the confirmation order were
10 founded on an incorrect interpretation of Nevada law regarding
11 the priority of liens arising from homeowners association
12 assessments and charges under Nevada Revised Statutes ("NRS")
13 § 116.3116. After the bankruptcy court entered the orders on
14 appeal, the Nevada Supreme Court issued a decision interpreting
15 the priority of homeowners association liens under NRS § 116.3116
16 that is inconsistent with the bankruptcy court's interpretation.
17 See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408
18 (2014). We must follow the Nevada Supreme Court's interpretation
19 of Nevada law. Therefore, we VACATE the bankruptcy court's strip
20 off and confirmation orders, and we REMAND so that the bankruptcy
21 court can consider Bella Sera's lien rights in light of SFR Invs.
22 Pool 1.

23 **FACTS**

24 Pack, an elderly widow, lives on retirement income and
25

26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 income from the rental of two parcels of real property located on
2 Notte Calma Street in Las Vegas, Nevada. At the time of her
3 bankruptcy filing, both properties were significantly
4 overencumbered. In her chapter 11 plan, Pack hoped to partially
5 relieve herself from the economic burdens associated with these
6 overencumbered properties, while at the same time using the
7 rental income from the properties to fund her plan.

8 To accomplish her goals, Pack's plan as amended proposed to
9 modify the rights of her creditors whose claims under applicable
10 nonbankruptcy law were secured by liens against the Notte Calma
11 properties. In relevant part, with respect to the rental
12 property located at 11330 Notte Calma Street, the amended plan
13 proposed to modify the rights of the three lienholders of record.
14 The identity of each of these lienholders, and the amount and
15 type of lien each of them held were described in Pack's strip off
16 motion as follows:

17 a. Wells Fargo Bank, NA as Trustee for Securitized
18 Asset Backed Receivables LLC, . . . MPTC Series
19 2004-OP2 . . . (First Deed of Trust) in an estimated
20 amount of \$437,285.00. . . .

21 b. US Bank, NA as Trustee for Structured Asset
22 Securities Corp, MPTC Series 2004-S4 . . . (Second Deed
23 of Trust) in an estimated amount of \$122,436.59. . . .

24 c. Bella Sera Homeowners Association, (HOA Lien) in an
25 estimated amount of \$12,971.34.

26 Motion to Value Collateral, "Strip Off" and Modify Rights of
27 Wells Fargo Bank, etc., et. al. (May 28, 2014) at p. 2.

28 According to Pack, Wells Fargo's security interest was the
senior lien on the property and was the only lien on the property
that was not wholly unsecured, given the value of the real
property collateral. Consequently, Pack reasoned that both

1 U.S. Bank's second deed of trust and Bella Sera's homeowners
2 association lien, as wholly unsecured liens, could be stripped
3 off and avoided in their entirety in accordance with §§ 506 and
4 1123(b)(5).

5 In asserting that Bella Sera's lien was junior to Wells
6 Fargo's first deed of trust, Pack relied on the mortgage savings
7 clause in the Amended Declaration of Covenants, Conditions and
8 Restrictions ("CC&Rs") recorded against the property and other
9 properties within the common interest planned community of which
10 Pack's property is a part. The mortgage savings clause indicated
11 that all homeowners association assessment liens would be
12 subordinate to any first deed of trust or mortgage held against
13 any lot or unit within the community.

14 Pack also relied on NRS § 116.3116(2), which spells out the
15 priority of homeowners association liens. Because of the pivotal
16 role played by NRS § 116.3116(2) in this appeal, we quote that
17 provision in its entirety, as follows:

18 **2. A lien under this section is prior to all other**
19 **liens and encumbrances on a unit except:**

20 (a) Liens and encumbrances recorded before the
21 recordation of the declaration and, in a cooperative,
22 liens and encumbrances which the association creates,
23 assumes or takes subject to;

24 (b) **A first security interest on the unit recorded**
25 **before the date on which the assessment sought to be**
26 **enforced became delinquent** or, in a cooperative, the
27 first security interest encumbering only the unit's
28 owner's interest and perfected before the date on which
the assessment sought to be enforced became delinquent;
and

(c) Liens for real estate taxes and other governmental
assessments or charges against the unit or cooperative.

The lien is also prior to all security interests
described in paragraph (b) to the extent of any charges

1 **incurred by the association on a unit pursuant to NRS**
2 **116.310312 and to the extent of the assessments for**
3 **common expenses** based on the periodic budget adopted by
4 the association pursuant to NRS 116.3115 **which would**
5 **have become due in the absence of acceleration during**
6 **the 9 months immediately preceding institution of an**
7 **action to enforce the lien,** unless federal regulations
8 adopted by the Federal Home Loan Mortgage Corporation
9 or the Federal National Mortgage Association require a
10 shorter period of priority for the lien. If federal
11 regulations adopted by the Federal Home Loan Mortgage
12 Corporation or the Federal National Mortgage
13 Association require a shorter period of priority for
14 the lien, the period during which the lien is prior to
15 all security interests described in paragraph (b) must
16 be determined in accordance with those federal
17 regulations, except that notwithstanding the provisions
18 of the federal regulations, the period of priority for
19 the lien must not be less than the 6 months immediately
20 preceding institution of an action to enforce the lien.
21 This subsection does not affect the priority of
22 mechanics' or materialmen's liens, or the priority of
23 liens for other assessments made by the association.

13 NRS § 116.3116(2) (West) (emphasis added). Under Pack's reading
14 of the statute, the last paragraph of NRS § 116.3116(2) did not
15 grant to Bella Sera a superior lien but rather merely afforded
16 Bella Sera a right to payment equal to nine months of assessments
17 in the event that Wells Fargo as the first trust deed holder
18 completed foreclosure proceedings against the property.

19 Bella Sera filed an opposition to Pack's strip off motion.
20 In its opposition, Bella Sera construed NRS § 116.3116(2)
21 differently than Pack. Bella Sera asserted that, under the
22 statute, the entire amount that Pack owed it (roughly \$13,000,
23 plus additional collection fees and costs) was secured by a
24 statutory lien of equal priority to Wells Fargo's first deed of
25 trust. As Bella Sera put it, the priority between itself and
26 Wells Fargo only could be determined by a race to the auction
27 block: whoever foreclosed first would have priority, except that
28 even if Wells Fargo successfully foreclosed first, Bella Sera

1 still would be entitled to "nine months worth of assessments
2 before anyone else gets a cut of the [foreclosure sale]
3 proceeds." Objection to Strip Off Motion (May 30, 2014) at
4 3:26-27.

5 Bella Sera further argued that an adversary proceeding was
6 necessary under Rule 7001(2) if Pack sought to avoid Bella Sera's
7 lien. Finally, Bella Sera pointed out that Pack's reliance on
8 the mortgage savings clause in the CC&Rs was misplaced because,
9 to the extent the mortgage savings clause was inconsistent with
10 NRS § 116.3116(2), the statute controlled and prohibited the
11 parties from deviating from the lien rights and priorities
12 provided for in the statute.²

13 After multiple hearings and supplemental briefing, the
14 bankruptcy court granted Pack's strip off motion, in the process
15 holding that both the second deed of trust held by U.S. Bank³ and
16 Bella Sera's homeowners association lien were junior to Wells
17 Fargo's first deed of trust. Based on the agreed-upon valuation
18 of the property at \$419,500, and the undisputed amount owed to
19 Wells Fargo - in excess of \$437,000 - the bankruptcy court
20 further held that U.S. Bank's and Bella Sera's liens were wholly
21 unsecured and thus the liens could be stripped off and avoided as
22

23
24 ²Bella Sera cited NRS § 116.1206 as supporting this
25 proposition. In contrast, in SFR Invs. Pool 1 v. U.S. Bank,
26 334 P.3d at 419, the Nevada Supreme Court relied on NRS
27 § 116.1104 in the process of holding that a similar mortgage
28 savings clause was ineffective to the extent that clause
conflicted with NRS § 116.3116(2).

³U.S. Bank did not actively oppose Pack's proposed treatment
of its second deed of trust.

1 part of Pack's chapter 11 plan, thereby relegating both U.S. Bank
2 and Bella Sera to the status of unsecured creditors for plan
3 distribution purposes.

4 In so holding, the bankruptcy court determined that NRS
5 § 116.3116(2) does not grant to homeowners associations a
6 superior lien for nine months' worth of assessments or for any
7 other amount. Instead, the bankruptcy court construed
8 § 116.3116(2) as merely granting to homeowners associations a
9 limited right to payment - of up to nine months' worth of
10 assessments - in the event the holder of the first trust deed
11 forecloses.

12 In light of these holdings, the bankruptcy court entered
13 orders granting Pack's strip off motion and confirming Pack's
14 amended chapter 11 plan. Bella Sera timely filed a notice of
15 appeal.

16 **JURISDICTION**

17 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
18 §§ 1334 and 157(b) (2) (K) and (L). We have jurisdiction under
19 28 U.S.C. § 158.

20 **ISSUE**

21 Did the bankruptcy court err in determining under Nevada law
22 that Bella Sera's lien was junior to Wells Fargo's deed of trust
23 lien?

24 **STANDARDS OF REVIEW**

25 The bankruptcy court's decision hinged on its interpretation
26 of Nevada law. We review its interpretation of state law de
27 novo. Trishan Air, Inc. v. Fed. Ins. Co., 635 F.3d 422, 426-27
28 (9th Cir. 2011).

1 **DISCUSSION**

2 In the Ninth Circuit, debtors may through a chapter 11 or a
3 chapter 13 plan strip off wholly unsecured liens. Zimmer v. PSB
4 Lending Corp. (In re Zimmer), 313 F.3d 1220, 1223-27 (9th Cir.
5 2002); BAC Home Loans Servicing, LP v. Abdelgadir
6 (In re Abdelgadir), 455 B.R. 896, 901-02 (9th Cir. BAP 2011). As
7 we explained in In re Abdelgadir, before confirming a chapter 11
8 plan proposing to avoid a creditor's lien pursuant to §§ 506 and
9 1123(b) (5), the bankruptcy court must determine, among other
10 things, "whether the value of the creditor's claim makes it
11 secured or wholly unsecured." Id. at 902. Before it can make
12 that determination, the bankruptcy court must first know the
13 relative priority of the lien to be avoided in relation to other
14 liens held against the same property. If there is another lien
15 senior to the lien to be avoided and if the senior lien is
16 partially undersecured because the property is of insufficient
17 value to fully satisfy the senior lien, then the lien to be
18 avoided - as the junior lien - necessarily is wholly unsecured
19 and may be avoided through the plan process. See In re Zimmer,
20 313 F.3d at 1223-27.⁴

21 Under certain circumstances, the Code restricts the extent
22 to which a chapter 11 debtor can modify lien rights under §§ 506
23 and 1123(b) (5). For example, partially undersecured creditors
24

25 ⁴While In re Zimmer involved a chapter 13 plan instead of a
26 chapter 11 plan, we held in In re Abdelgadir, 455 B.R. at 901
27 n.7, that §§ 1123(b) (5) and 1322(b) (2) are identical, that both
28 provisions permit debtors to modify the lien rights of secured
creditors and hence that case law examining § 1322(b) (2) is
persuasive in interpreting § 1123(b) (5).

1 can make an election under § 1111(b) to force the debtor to treat
2 the value of the undersecured creditor's lien as equal to the
3 total amount of its claim for plan confirmation purposes. See
4 First Fed. Bank of Cal. v. Weinstein (In re Weinstein), 227 B.R.
5 284, 294 (9th Cir. BAP 1998). But § 1111(b) affords no relief to
6 wholly unsecured creditors because the statute bars relief to
7 creditors holding liens of "inconsequential value." In re 500
8 Fifth Ave. Assocs., 148 B.R. 1010, 1016 (Bankr. S.D.N.Y. 1993)
9 aff'd, 1993 WL 316183 (S.D.N.Y. May 21, 1993); see also Tuma v.
10 Firstmark Leasing Corp. (In re Tuma), 916 F.2d 488, 491 (9th Cir.
11 1990).

12 Nor does § 1111(b) improve the rights of wholly secured
13 creditors. If the value of the real property collateral exceeds
14 the amount of the creditor's lien, then the creditor's entire
15 claim is secured and is entitled to the type of plan treatment
16 reserved for secured creditors. See §§ 506(a), 1123(b)(5),
17 1129(a)(7) and 1129(b)(2)(A).⁵

18 In short, Bella Sera's lien rights in Pack's bankruptcy case
19 hinged on whether Bella Sera's homeowners association lien was
20 junior or senior in priority to Wells Fargo's first deed of
21

22 ⁵Some creditors alternately might be able to prevent
23 avoidance of their liens by invoking the exception to lien right
24 modification set forth in § 1123(b)(5). This exception prohibits
25 avoidance of "liens in real property that is the debtor's
26 principal residence." However, this exception does not apply to
27 liens in property that is not used by the debtor as his or her
28 residence on the date of his or her bankruptcy filing.
In re Abdelqadir, 455 B.R. at 903. Here, it is undisputed that
Pack was not using 11330 Notte Calma Street as her principal
residence on the date of her bankruptcy filing. Thus, the
§ 1123(b)(5) modification exception does not support Bella Sera's
contention that its lien should not have been stripped off.

1 trust. If, as the bankruptcy court determined, Bella Sera's lien
2 was junior to Wells Fargo's deed of trust, then Bella Sera's lien
3 was wholly unsecured, and the bankruptcy court correctly
4 confirmed Pack's plan proposing to strip off Bella Sera's lien.
5 On the other hand if, as Bella Sera contends, Bella Sera's lien
6 was senior to Wells Fargo's deed of trust, then Bella Sera's
7 lien was wholly secured, and the court erred in stripping off
8 Bella Sera's lien and in confirming Pack's plan, which treated
9 Bella Sera as an unsecured creditor for plan distribution
10 purposes.

11 In holding that Bella Sera's lien was junior to Wells
12 Fargo's deed of trust, the bankruptcy court relied on two
13 bankruptcy court decisions from Florida, which has a homeowners
14 association lien statute the bankruptcy court considered similar
15 to Nevada's. See In re Plummer, 484 B.R. 882, 887 (Bankr. M.D.
16 Fla. 2013); In re Gonzales, 2010 WL 1571172, at *2-*3 (Bankr.
17 S.D. Fla. Apr. 20, 2010).⁶

18 Relying on In re Plummer and In re Gonzales, the bankruptcy
19 court here held that homeowners associations do not hold any lien
20 superior in priority to the first deed of trust unless they
21 record a notice of delinquent assessments before the first trust
22

23 ⁶The bankruptcy court indicated that both Florida and Nevada
24 had adopted their homeowners association assessment statutes from
25 the same source: the Uniform Common Interest Ownership Act of
26 1982. However, the adoption tables accompanying this version of
27 the Uniform Act do not indicate that Florida ever adopted it.
28 Nor does the Florida statute at issue in In re Plummer and
In re Gonzales - Florida Statute § 781.116 - strike us as being
that similar to the statute at issue in this appeal - NRS
§ 116.3116(2).

1 deed is recorded. In further reliance on In re Plummer and
2 In re Gonzales, the bankruptcy court additionally held that the
3 last paragraph of NRS § 116.3116(2) did not grant a lien to Bella
4 Sera superior to Wells Fargo's. Rather, the bankruptcy court
5 interpreted the last paragraph of NRS § 116.3116(2) as granting
6 to Bella Sera, in the event of foreclosure by the first trust
7 deed holder, a mere right to payment equal to nine months worth
8 of homeowners association dues.

9 As it turns out, the bankruptcy court's reliance on
10 In re Plummer and In re Gonzales was misplaced. Yet this only
11 became clear when the Nevada Supreme Court decided SFR Invs.
12 Pool 1. That decision involved a priority dispute between a
13 homeowners association - the Southern Highlands Community
14 Association - and the holder of a first deed of trust - U.S.
15 Bank. To enforce its homeowners association lien, Southern
16 Highlands commenced nonjudicial foreclosure proceedings and
17 completed those proceedings before U.S. Bank could complete its
18 own competing nonjudicial foreclosure sale. SFR Invs. Pool 1,
19 334 P.3d at 409-10. The successful bidder at Southern Highlands'
20 sale - SFR Investments Pool 1 - subsequently filed an action
21 against U.S. Bank seeking to enjoin the bank from completing its
22 nonjudicial foreclosure sale. Id. at 410.

23 In that action, SFR asserted that Southern Highlands' lien
24 was superior to U.S. Bank's first deed of trust, so Southern
25 Highlands' nonjudicial foreclosure sale extinguished U.S. Bank's
26 lien. The state court ultimately denied SFR any injunctive
27 relief and dismissed SFR's action, in the process holding that
28 even if Southern Highlands' lien was superior to U.S. Bank's

1 first deed of trust, Southern Highlands should have foreclosed by
2 way of judicial foreclosure proceedings and that Southern
3 Highlands' nonjudicial foreclosure sale consequently did not
4 extinguish U.S. Bank's first deed of trust. Id.

5 On appeal, the Nevada Supreme Court reversed. In so ruling,
6 the SFR Invs. Pool 1 court in relevant part held that NRS
7 116.3116(2) effectively split homeowners association liens into
8 two pieces, with each piece having a different priority in
9 relation to a first deed of trust:

10 As to first deeds of trust, NRS 116.3116(2) thus splits
11 an HOA lien into two pieces, a superpriority piece and
12 a subpriority piece. **The superpriority piece,
13 consisting of the last nine months of unpaid HOA dues
14 and maintenance and nuisance-abatement charges, is
15 "prior to" a first deed of trust. The subpriority
16 piece, consisting of all other HOA fees or assessments,
17 is subordinate to a first deed of trust.**

18 Id. at 411 (emphasis added).

19 Based on its interpretation of NRS 116.3116(2), the
20 SFR Invs. Pool 1 court rejected U.S. Bank's argument that the
21 statute granted Southern Highlands a mere "payment priority"
22 which arose only if U.S. Bank completed its foreclosure
23 proceedings. Id. at 412. After painstaking consideration of the
24 plain language of the statute, the existing case law, the
25 official comments to the Uniform Common Interest Ownership Act of
26 1982 (from which Nevada adopted its homeowners association
27 statutes) and several other secondary sources, the SFR Invs.
28 Pool 1 court ultimately concluded that the superpriority piece of
Southern Highlands' lien conferred upon Southern Highlands a
"true priority" lien superior to U.S. Bank's first deed of trust.
Id. at 413.

1 Here, the bankruptcy court's interpretation of NRS
2 116.3116(2)'s lien priority provisions is fatally inconsistent
3 with SFR Invs. Pool 1's interpretation of the same provisions.
4 Applying, as we must, SFR Invs. Pool 1's interpretation of the
5 statute, we hold that the bankruptcy court should have
6 acknowledged that Bella Sera had a (superpriority) wholly secured
7 lien to the extent that the lien secured up to "nine months of
8 unpaid HOA dues," as well as any "maintenance or
9 nuisance-abatement charges" that Pack owed Bella Sera. See id.
10 at 412, 416. In addition, the bankruptcy court should have
11 acknowledged that Bella Sera had a separate (subpriority) wholly
12 unsecured lien for the remainder of the charges, fees and
13 assessments that Pack owed Bella Sera. See id. at 411-13.

14 Accordingly, we must vacate the bankruptcy court's strip off
15 order and confirmation order. On remand, in accordance with
16 SFR Invs. Pool 1, the bankruptcy court will need to determine how
17 much (if any) of Bella Sera's lien qualifies for superpriority
18 (wholly secured) status and how much qualifies for subpriority
19 (wholly unsecured) status. The bankruptcy court also will need
20 to determine whether Pack's alternate proposed treatment of Bella
21 Sera's lien provided for on page 21 of Pack's plan satisfies all
22 plan confirmation requirements applicable to the wholly secured
23 portion of Bella Sera's lien.

24 Bella Sera makes a number of arguments in its appeal brief
25 in an attempt to persuade us that the entire amount it is owed is
26 secured by a lien superior to Wells Fargo's first deed of trust.
27 For instance, Bella Sera attempts to argue that NRS 116.31164 -
28 which governs the distribution of foreclosure sale proceeds -

1 somehow supports the notion that the entire amount it is owed is
2 secured by a superpriority lien. Bella Sera further posits that
3 the priority dispute between itself and Wells Fargo only can be
4 resolved by a race to the auction block. Neither of these
5 arguments can be reconciled with SFR Invs. Pool 1, so we reject
6 them.

7 Bella Sera also argues that there is something so
8 exceptional about homeowners association liens that its lien
9 rights should not be subject to modification under § 1123(b)(5).
10 This argument cannot be reconciled with the plain language of
11 § 1123(b)(5). Congress obviously knew how to create exceptions
12 to the debtor's entitlement to modify lien rights as evidenced by
13 the exception in the statute for security interests in
14 residential real property, but Congress chose not to enact any
15 exception for homeowners association liens. On that basis, we
16 reject Bella Sera's anti-modification argument.

17 As for Pack, she makes a number of arguments attempting to
18 support the bankruptcy court's ruling that the entirety of Bella
19 Sera's lien is junior to Wells Fargo's deed of trust and hence
20 wholly unsecured. For example, she suggests that it would be a
21 severe hardship to holders of first trust deeds if any part of a
22 homeowners association lien was granted superpriority. But
23 SFR Invs. Pool 1 addressed this policy concern and found it
24 unpersuasive. See id. at 414.

25 Pack also points out that the CCRs purported to give the
26 holders of first deeds of trust priority over homeowners
27 association liens in virtually all instances. As we explained
28 above, to the extent the mortgage savings clause in the CCRs is

1 inconsistent with NRS § 116.3116(2), the mortgage savings clause
2 is invalid. See footnote 2, supra. Simply put, none of Pack's
3 arguments can be reconciled with SFR Invs. Pool 1, so we reject
4 them.

5 Finally, at the end of her appeal brief, Pack attempts to
6 make a conflict preemption argument in which she suggests that
7 NRS § 116.3116(2) somehow is inconsistent with the Bankruptcy
8 Code. It suffices for us to say that we perceive no conflict
9 between the Bankruptcy Code and NRS § 116.3116(2).

10 The only other issue we must address is procedural. The
11 controlling issue in the dispute between Bella Sera and Pack was
12 the relative priority of Bella Sera's lien and Wells Fargo's
13 first deed of trust. Whereas the bankruptcy court resolved this
14 priority dispute as part of its disposition of Pack's strip off
15 motion and Pack's confirmation proceedings, Rule 7001(2) dictates
16 that priority disputes should be resolved by adversary
17 proceeding. Bella Sera raised the issue of whether an adversary
18 proceeding was necessary in its initial objection to Pack's strip
19 off motion. However, Bella Sera later abandoned this issue by
20 not addressing it in its appeal brief. See Christian Legal Soc'y
21 v. Wu, 626 F.3d 483, 487-88 (9th Cir. 2010) (stating that
22 appellate courts generally may treat as forfeited issues "not
23 specifically and distinctly argued in appellant's opening
24 brief."). Even so, on remand, the bankruptcy court should
25 ascertain to what extent a priority dispute still exists between
26 the parties and, to the extent one still exists, should determine
27 whether it should be resolved by adversary proceeding.

CONCLUSION

For the reasons set forth above, we VACATE the bankruptcy court's strip off order and its confirmation order, and we REMAND for further proceedings consistent with this decision.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28