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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. WW-14-1395-JuKiF
)
MICHAEL PAUL FREE and HAK SUK) Bk. No. 3:14-bk-41876-PBS
FREE,)
)
Debtors.)

MICHAEL PAUL FREE; HAK SUK)
FREE,)
)
Appellants,)

v.) O P I N I O N
)

MICHAEL G. MALAIER, Chapter 13)
Trustee,*)
)
Appellee.)

Argued and Submitted on September 25, 2015
at Seattle, Washington

Filed - December 17, 2015

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Paul B. Snyder, Bankruptcy Judge, Presiding

Appearances: Dorothy A. Bartholomew argued for appellants
Michael Paul Free and Hak Suk Free; Samuel J. Dart
argued for appellee K. Michael Fitzgerald.

Before: JURY, KIRSCHER, and FARIS, Bankruptcy Judges.

* On May 15, 2015, the BAP Clerk's Office entered an order substituting K. Michael Fitzgerald as the successor chapter 13 trustee in place of the former chapter 13 trustee, David M. Howe. After the appeal was heard and submitted, Michael G. Malaier was appointed the successor chapter 13 trustee to Fitzgerald.

1 JURY, Bankruptcy Judge:

2
3 Appellants Michael Paul Free and Hak Suk Free (Debtors)
4 filed a chapter 7¹ petition and received their § 727 discharge.
5 The discharge released them from personal liability on two
6 wholly-unsecured junior liens that encumbered their real
7 property. Before their chapter 7 case was closed, Debtors filed
8 this chapter 13 case intending to strip off the two junior liens
9 from their real property through their chapter 13 plan. The
10 chapter 13 trustee, David M. Howe (Trustee), moved to dismiss
11 their case, arguing that Debtors were ineligible for chapter 13
12 relief because their unsecured debt, which included the two
13 wholly-unsecured junior liens, exceeded the statutory limit for
14 eligibility under § 109(e). The bankruptcy court agreed and
15 entered an order dismissing Debtors' case. This appeal followed.
16 For the reasons set forth below, we REVERSE and REMAND.

17 **I. FACTS**

18 The facts are undisputed. Debtors filed a chapter 7
19 bankruptcy petition on December 23, 2013. Debtors scheduled
20 their real property located on Taylor Street in Milton,
21 Washington as having a current value of \$425,000. Such real
22 property is encumbered by three liens: first deed of trust in the
23 amount of \$438,621.93 held by Deutsche Bank Trust Company
24 Americas, as Trustee for Residential Accredit Loans, Inc.,
25

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

1 Mortgage Asset-backed Pass-through Certificates, Series 2003-QS9
2 (Deutsche); second deed of trust in the amount of \$348,481.01
3 held by Timberland Savings Bank (Timberland); and third deed of
4 trust in the amount of \$186,705.68 held by Boeing Employees
5 Credit Union (BECU). Debtors received their § 727 discharge on
6 April 1, 2014.

7 Before their chapter 7 case was closed, Debtors filed this
8 joint chapter 13 case on April 3, 2014, intending to strip off
9 the wholly-unsecured junior liens of Timberland and BECU
10 (collectively, Junior Lienholders) through their chapter 13 plan.
11 In Schedule A, Debtors listed the value of their real property on
12 Taylor Street as \$425,000 encumbered with secured claims in the
13 amount of \$990,069.03. In Schedule D, Debtors listed creditors
14 holding secured claims in the amount of \$1,018,280.54. In
15 Schedule E, Debtors listed \$3,204.76 in unsecured business taxes
16 and in Schedule F listed a student loan creditor holding an
17 unsecured claim in the amount of \$4,000. BECU filed a proof of
18 claim asserting a secured claim in the amount of \$180,187.80.

19 Trustee moved to dismiss Debtors' case, arguing that the
20 unsecured debt, including the wholly-unsecured Junior
21 Lienholders' debt totaling \$535,186.69, exceeded the unsecured
22 debt limit of \$383,175 for chapter 13 eligibility under § 109(e).
23 Relying on In re Shenan, 2011 WL 3236182 (Bankr. N.D. Cal.
24 July 28, 2011), Debtors asserted that the unsecured junior liens
25 should not be included in the unsecured debt calculation of
26 § 109(e) when the claims were unenforceable against Debtors due
27 to their chapter 7 discharge.

28 At the July 31, 2014 hearing on the matter, the bankruptcy

1 court ruled that Debtors were ineligible to be debtors under
2 chapter 13 since their unsecured debts exceeded the statutory
3 limit. The court invited Debtors to submit additional authority
4 supporting their position. The court continued the matter to
5 August 7, 2014, for the purpose of entering a dismissal order.
6 On August 6, 2014, Debtors filed a motion for reconsideration of
7 the July 31, 2014 oral ruling. Because the bankruptcy court had
8 not yet entered an order on Trustee's motion to dismiss, the
9 court construed Debtors' motion for reconsideration as a
10 supplemental memorandum in opposition to Trustee's motion.

11 On August 14, 2014, the bankruptcy court entered the order
12 dismissing Debtors' case. The court noted that there were cases
13 within the Ninth Circuit that addressed components of the issue
14 before it, but acknowledged that there was no controlling case
15 directly on point. Relying on the holdings in Johnson v. Home
16 State Bank, 501 U.S. 78 (1991), and Quintana v. Commissioner
17 (In re Quintana) (Quintana II), 915 F.2d 513 (9th Cir. 1990),
18 aff'g (Quintana I), 107 B.R. 234 (9th Cir. BAP 1989), and the
19 analysis set forth in Davis v. Bank of America (In re Davis)
20 (Davis I), 2012 WL 3205431 (9th Cir. BAP Aug. 3, 2012)²
21 (Quintana I, Quintana II, and Davis I were all chapter 12 cases),
22 and In re DiClemente, 2012 WL 3314840 (D.N.J. Aug. 13, 2012), the
23 bankruptcy court included the Junior Lienholders' unsecured debt
24 in its eligibility calculation despite Debtors' chapter 7
25 discharge. Therefore, because Debtors were not eligible for
26 chapter 13 due to their unsecured debt exceeding the statutory

27
28 ² Aff'd (Davis II), 778 F.3d 809 (9th Cir. 2015).

1 limit under § 109(e), the bankruptcy court granted Trustee's
2 motion to dismiss their case. Debtors filed a notice of appeal
3 from the order on the same day.

4 Debtors subsequently filed a motion to vacate the order of
5 dismissal and impose a stay pending appeal. The bankruptcy court
6 denied their motion.

7 **II. JURISDICTION**

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
9 §§ 1334 and 157(b)(2)(A) and (O). We have jurisdiction under 28
10 U.S.C. § 158.

11 **III. ISSUE**

12 Did the bankruptcy court err when it counted the wholly-
13 unsecured Junior Lienholders' debt as unsecured debt for purposes
14 of determining chapter 13 eligibility under § 109(e)?

15 **IV. STANDARD OF REVIEW**

16 Eligibility determinations under § 109 involve issues of
17 statutory construction and conclusions of law, including
18 interpretation of Bankruptcy Code provisions, which we review de
19 novo. Smith v. Rojas (In re Smith), 435 B.R. 637, 642 (9th Cir.
20 BAP 2010).

21 **V. DISCUSSION**

22 **A. The bankruptcy court erred in relying upon inapplicable and**
23 **distinguishable case law.**

24 Section 109(e) limits eligibility for chapter 13 relief to
25 those individuals with regular income who owe on the date of the
26 filing of the petition, noncontingent, liquidated, unsecured
27 debts of less than \$383,175 and noncontingent, liquidated,
28

1 secured debts of less than \$1,149,525.³ Eligibility debt limits
2 are strictly construed. Soderlund v. Cohen (In re Soderlund),
3 236 B.R. 271, 274 (9th Cir. BAP 1999).

4 On appeal, Debtors ask the Panel to hold that wholly-
5 unsecured liens are not "unsecured debts" for eligibility
6 purposes in a so-called chapter 20 case (a chapter 13 case filed
7 after the debtor receives a chapter 7 discharge). Debtors assert
8 that they do not "owe" Timberland or BECU unsecured "debt" for
9 the purpose of establishing chapter 13 eligibility under § 109(e)
10 because any unsecured debts Debtors owed to their creditors were
11 discharged.

12 We begin with the relevant words of § 109(e), "unsecured
13 debts." "The term 'debt' means liability on a claim."
14 § 101(12). "The term 'claim' means . . . right to payment
15" § 101(5)(A). Thus, there is no "unsecured debt" unless
16 the creditor has a "right to payment" on an unsecured basis.

17 Next, we turn to the relatively simple analysis of what
18 occurred in Debtors' prior chapter 7 case. Debtors discharged
19 their personal liability to Timberland and BECU in that case when
20 they received their § 727 discharge. Under applicable law,
21 § 524(a)(2), the discharge "operates as an injunction against the
22 commencement or continuation of an action, the employment of
23 process, or an act, to collect, recover or offset any such debt
24 as a personal liability of the debtor." The discharge injunction
25 "provides for a broad injunction against not only legal

26
27
28 ³ Under § 104, these monetary limits are periodically
adjusted for inflation.

1 proceedings, but also any other acts to collect a discharged debt
2 as a personal liability of the debtor It extends to all
3 forms of collection activity” 4 Collier on Bankruptcy,
4 ¶ 524.02[2] (Alan N. Resnick and Henry J. Sommer, eds. 16th ed.
5 2010). Simply put, no creditor can demand payment on a
6 discharged debt, and the debtors have no personal liability to
7 pay such a debt.

8 The references to “personal liability” in § 524(a) preserve
9 any *in rem* rights a creditor might have in the debtor’s property.
10 This is the source of the dogma that liens “ride through”
11 bankruptcy. But the discharge bars any claims that are not
12 secured. Thus, applying the statutory definitions to the words
13 of § 109(e), debts that were discharged in chapter 7 are not
14 “unsecured debts.”

15 The analysis of Shenas, which Debtors cited to the
16 bankruptcy court, is persuasive. In Shenas, chapter 13 debtors
17 who had previously received a chapter 7 discharge sought to strip
18 off a wholly unsecured junior lien against their primary
19 residence. The creditor argued that treating its claim as
20 unsecured rendered debtors ineligible for relief because the
21 debtors’ unsecured claims would then exceed the § 109(e)
22 limitation. The bankruptcy court disagreed, ruling that the
23 discharge operated to render the debtors’ debt to the creditor
24 unenforceable as a personal liability.

25 Being unenforceable as a personal liability, the debt
26 is not allowable as an unsecured claim in this case.
27 Sections 502(b) and 506(a). It follows that the
28 [d]ebtors do not owe any unsecured debt to Green Tree
for purposes of the unsecured debt limitation of
§ 109(e).

1 In re Shenas, 2011 WL 3236182, at *1.

2 The bankruptcy court here rejected Debtors' contentions and
3 found that Shenas was not persuasive. Instead, it stated that
4 its decision on this issue of first impression was controlled by
5 the Supreme Court's ruling in Johnson, the Ninth Circuit's
6 decision in Quintana II, and this Panel's rulings in Quintana I
7 and Davis I. We disagree that those cases control the outcome of
8 the question before us for the reasons stated below and hold that
9 debts for which the *in personam* liability was discharged in a
10 prior chapter 7 should not be counted toward the unsecured debt
11 limit for eligibility under § 109(e).

12 **1. Johnson's limited holding does not support the**
13 **bankruptcy court's ruling.**

14 We think the bankruptcy court (and other courts reaching a
15 similar conclusion) erred partly because it misread Johnson, so
16 we begin with that Supreme Court case. If anything, we find the
17 words of the Supreme Court supportive of our position that the
18 prior discharge means these "stripped" mortgages do not revert to
19 unsecured debt for eligibility purposes.

20 In Johnson, the debtor, who had previously discharged his *in*
21 *personam* liability on his mortgage in a chapter 7 case, filed a
22 subsequent chapter 13 case with the intent to pay an *in rem*
23 judgment based on foreclosure litigation through the terms of the
24 plan. Although the bankruptcy court found such use of chapter 13
25 proper, the district and circuit courts both held otherwise,
26 ruling that because the *in personam* liability for the lien had
27 been discharged, no "claim" remained to be reorganized through
28 the chapter 13 plan. Based on a circuit split, the Supreme Court

1 granted certiorari and framed the issue before it: "The issue in
2 this case is whether a mortgage **lien** that secures an obligation
3 for which a debtor's personal liability has been discharged in a
4 Chapter 7 liquidation is a 'claim' subject to inclusion in an
5 approved Chapter 13 reorganization plan." Id. at 82 (emphasis
6 added). Following rules of statutory construction, the Court
7 determined that the mortgage lien was a claim within the terms of
8 § 101(5) because the mortgage lien holder retained a "right to
9 payment" in the form of its right to the proceeds from the sale
10 of the debtor's property. Id. at 84. In observing that this
11 holding was consistent with other parts of the Code, including
12 § 502(b)(1), the Court stated: "In other words, the court must
13 allow the claim if it is enforceable against **either** the debtor **or**
14 his property." Id. at 85 (emphasis in the original).

15 In sum, the Court reached the conclusion that the *in rem*
16 right to proceeds from a sale of its collateral meant the secured
17 creditor held a claim which could be addressed in a chapter 13
18 plan. That is the only determination the Court made. In fact,
19 the Court reinforced the effect of the chapter 7 discharge with
20 regard to an unsecured liability of the debtor: "The Court of
21 Appeals thus erred in concluding that the discharge of
22 petitioner's **personal liability** on his promissory notes
23 constituted the complete termination of the Bank's **claim** against
24 petitioner. Rather, a bankruptcy discharge extinguishes only one
25 mode of enforcing a claim - namely, an action against the debtor
26 *in personam* - **while leaving intact another - namely, an action**
27 **against the debtor *in rem*.**" Id. at 84 (last emphasis added).

28 ///

1 **2. The Quintana and Davis line of cases concerning**
2 **chapter 12 are distinguishable and do not control**
3 **the current case.**

3 The Ninth Circuit and BAP cases relied on by the bankruptcy
4 court, two before Johnson and two after, reach similar
5 conclusions that, because of the "right to payment" based on a
6 secured lien, a claim - and therefore a debt - exists even though
7 *in personam* liability is unenforceable. However, they apply that
8 holding in the context of determining whether a chapter 12
9 debtor's "aggregate debts" exceeded the statutory limitation as
10 set by §§ 109(f) and 101(18).⁴ We find that Quintana I,
11 Quintana II, Davis I, and Davis II, which speak of "aggregate
12 debts," are distinguishable from the separately calculated
13 secured and unsecured debt limits for a chapter 13 case.

14 In Quintana I and Quintana II, as pertinent here, a judgment
15 creditor of the debtors had agreed to waive any right to a
16 deficiency judgment against the debtors after sale of the real
17 property subject to its judgment lien, which property was
18 purportedly worth far less than the amount of the judgment. In
19 seeking relief in chapter 12, the debtors asserted that because
20 any personal liability had been waived by the judgment creditor,
21 making it a nonrecourse obligation, only the secured value of the

22
23 ⁴ Section 109(f) provides: "Only a family farmer or family
24 fisherman with regular annual income may be a debtor under
chapter 12 of this title."

25 "Family farmer" is defined by § 101(18)(A) as an "individual
26 or individual and spouse engaged in a farming operation whose
27 aggregate debts do not exceed \$4,031,575" (This debt
28 limit is as currently effective and has been adjusted
periodically under § 104. Also, § 101(18) was § 101(17) prior to
2005.)

1 judgment lien, as measured by the value of the property, should
2 count toward the aggregate debt limit for a family farmer. By
3 measuring its debt against only this secured value, debtors
4 contended they were under the debt limit. After the bankruptcy
5 court disagreed and found the debtors ineligible, debtors
6 appealed to the BAP. Observing that the term "aggregate debts"
7 includes "all types of debts," the BAP looked to the definitions
8 of debt and claim in § 101 and determined that "debt" had the
9 same broad meaning as "claim." Quintana I, 107 B.R. at 237. It
10 then observed that under the provisions of § 102(2), a claim
11 against property of the debtor is treated as a claim against the
12 debtor.⁵ It follows that

13 [b]ecause the term claim is coextensive with the term
14 debt, this obligation is a debt of the debtors which is
15 defined by the amount of the claim against the
16 property. Connecticut General's claim against the
17 property is approximately \$1.528 million because it has
18 the right to payment of that amount from the property
19 or from the proceeds of the sale of the property.

17 Id. at 239. The Panel limited its reasoning to the secured
18 nature of the debt; nowhere does it state that any portion
19 survives as an unsecured liability. Quintana I does not suggest
20 the deficiency claim is an unsecured obligation, nor did it need
21 to, since it was looking at only "aggregate debts."

22 In affirming the BAP, the Ninth Circuit took a more limited
23 approach. After determining that debt and claim were equivalent,
24 it looked to Idaho law to determine the effect of Connecticut
25 General's waiver of deficiency and found that "there had not yet

27 ⁵ The BAP's reasoning in Quintana I is similar to the
28 Supreme Court's in Johnson but it should be noted that this
decision in 1989 predated Johnson which was issued in 1991.

1 been any determination of a deficiency, as the property had not
2 yet been sold.” Quintana II, 915 F.2d at 516. Therefore, only
3 after an actual sale would the waiver have any relevance.
4 Debtors were not released from any liability and the entire claim
5 counted against the aggregate debt limit. Id. at 517. Like our
6 Panel in Quintana I, the appellate court did not address what
7 would happen to any remaining claim after the *in rem* liability
8 was exhausted.

9 The Davis cases are similarly distinguishable. After
10 discharging her personal liability in a chapter 7, Ms. Davis
11 filed a chapter 12 case in which she scheduled secured debt which
12 exceeded the § 101(18) aggregate debt limit. In her amended
13 plan, she proposed to pay her secured creditors only the value of
14 their collateral, which collectively was substantially less than
15 the debt limit.⁶ This plan drew an objection from secured
16 creditor Bank of America, arguing among other things that the
17 debtor was ineligible based on the scheduled debt. Ms. Davis
18 countered that because her personal liability had been
19 discharged, the aggregate debt was only that secured by the
20 property as valued, substantially less than the debt limit. The
21 bankruptcy court agreed with Bank of America and debtor appealed
22 to the BAP, Davis I. The BAP looked to the prior holdings in
23 Quintana I and Quintana II and reasoned that because the entire
24 amount of the debt was part of the secured liens:

25 the full amount owed continues to be a claim against
26 the collateral, and hence a ‘debt’ under the Bankruptcy

27 ⁶ Because of her prior chapter 7 discharge, she scheduled no
28 unsecured debt.

1 Code, unless and until the collateral is sold.
2 Furthermore, as stated in Johnson, a prior chapter 7
3 discharge only extinguishes one 'mode of enforcing' the
claim but does not extinguish the claim itself (or any
portion thereof).

4 Davis I, 2012 WL 3205431, at *5. Davis I looked only at the
5 aggregate debt, not an unsecured deficiency.

6 The Ninth Circuit in Davis II focused the inquiry: "whether
7 the term 'aggregate debts' in § 101(18)(A) includes the unsecured
8 portion of a creditor's claim from which the debtor has been
9 discharged in an earlier chapter 7 bankruptcy proceeding."

10 Davis II, 778 F.3d at 812. Relying on Johnson and an earlier
11 Supreme Court decision, Pennsylvania Department of Public Welfare
12 v. Davenport, 495 U.S. 552 (1990), it concluded:

13 Johnson and Davenport teach that the meaning of "debt"
14 is coextensive with the meaning of "claim" and, in
15 turn, that "claim" is broadly defined to include any
16 right to payment or any right to an equitable remedy
17 giving rise to a right of payment. A creditor retains
18 a right to payment, enforceable *in rem*, on the
19 unsecured portion of a loan for which *in personam*
liability may have been discharged. We therefore agree
with the BAP that Davis' "aggregate debts" include the
unsecured portions of the undersecured mortgage loans
that remain enforceable against Davis' property, even
though the loans are not enforceable against Davis
personally.

20 Davis II, 778 F.3d at 813. The court of appeals very carefully
21 distinguished between the available *in rem* relief and the
22 unavailable *in personam* liability, so to stretch its holding to
23 mean the debt revives as an unsecured claim is inconsistent with
24 the decision.

25 In sum, because these four cases are chapter 12 cases that
26 consider only the aggregate debt limit, and none of them speak to
27 reviving discharged *in personam* liability, they are not
28 controlling here.

1 **3. Scovis and Smith are also distinguishable and would**
2 **lead to an inequitable result.**

3 Under the holding of Scovis v. Henrichsen (In re Scovis),
4 249 F.3d 975 (9th Cir. 2001), and Smith v. Rojas (In re Smith),
5 435 B.R. 637 (9th Cir. BAP 2010), when determining a debtor's
6 chapter 13 eligibility, the undersecured portion of a secured
7 creditor's claim should be counted as unsecured debt. In re
8 Scovis, 249 F.3d at 983. Although Scovis was speaking about the
9 unsecured portion of a partially secured obligation, its holding
10 was extended to wholly unsecured junior trust deeds in Smith. In
11 re Smith, 435 B.R. at 648-49. However, in both of these cases,
12 the chapter 13 case was not preceded by a prior chapter 7 where
13 the *in personam* liability had been discharged;⁷ the obligation of
14 the debtor to pay the undersecured or wholly unsecured claims in
15 *pari passu* with other unsecured creditors through the plan was
16 intact. If one makes that reclassification of debt in the
17 chapter 20 context, one is reviving the liability which has been
18 discharged. It makes no sense that a creditor whose *in personam*
19 claim is unenforceable in any other context due to the § 727
20 discharge should fare better in the subsequent chapter 13 case.⁸

21
22 ⁷ Although the chapter 13 proceeding in Scovis had been
23 preceded by a chapter 7, the debt at issue had been found
24 nondischargeable and therefore the effect of the discharge
injunction was not in play.

25 ⁸ The Ninth Circuit's recent decision by which it confirmed
26 the ability of a chapter 20 debtor to strip wholly unsecured
27 junior liens, HSBC Bank USA v. Blendheim (In re Blendheim), 803
28 F.3d 477 (9th Cir. 2015), carefully distinguishes a discharge
from *in rem* avoidance provisions: a strip off of a lien is not the
same as receiving a discharge because the discharge releases *in*
(continued...)

1 **B. Debts for which the *in personam* liability was discharged in**
2 **a prior chapter 7 cannot be counted toward the unsecured**
3 **debt limit for eligibility under § 109(e).**

4 Although in a slightly different context - that of the
5 allowability of an unsecured claim filed by a creditor with a
6 stripped off second where personal liability had been previously
7 discharged in a chapter 7 - the well-reasoned decision of the
8 bankruptcy court in In re Rosa, 521 B.R. 337 (Bankr. N.D. Cal.
9 2014), supports our opinion. In Rosa, the chapter 20 debtor,
10 similar to the debtors here, used § 506(a) to value her residence
11 to determine whether EMC Mortgage, LLC (EMC) had an allowed
12 secured claim in her chapter 13 case. After the court determined
13 that, based on its valuation, the EMC claim was not supported by
14 an equity in the property, the debtor objected to EMC's unsecured
15 claim in conjunction with plan confirmation. She argued that her
16 chapter 7 discharge terminated her personal liability and that
17 the claim should be disallowed. The chapter 13 trustee objected
18 to plan confirmation, asserting that the unsecured claim was
19 resurrected after the valuation motion found the secured claim
20 wholly unsecured.

21 The court observed that although § 101(5)(A) defines a claim
22 and § 506(a) prescribes how a secured claim is to be treated,
23 neither determined whether such claim was allowed for payment
24 purposes. That determination was to be made if an objection was
25 filed under § 502(b), as the debtor filed here. Because the

26 ⁸(...continued)
27 *personam* liability but does not affect the *in rem* rights of the
28 lien. Id. at 494. The Circuit says nothing about resurrecting
unsecured liability after the lien strip.

1 personal liability had been discharged in the prior chapter 7,
2 the court applied the discharge injunction provided by
3 § 524(a)(2) to come to the unremarkable conclusion that no
4 allowed claim remained for payment purposes in the chapter 13.
5 In arriving at this conclusion, the bankruptcy court found that
6 its analysis did not run afoul of Johnson: "The Supreme Court did
7 not hold nor suggest that this allowed secured claim would, by
8 definition, be an allowed, unsecured claim if a § 506(a)(1)
9 motion renders the secured claim valueless." In re Rosa, 521
10 B.R. at 342.

11 We recognize that Dewsnup v. Timm, 502 U.S. 410 (1992), held
12 that a chapter 7 debtor could not "strip down" - or reduce - a
13 partially underwater lien under § 506(d) to the value of the
14 collateral. Id. at 412-13, 417. This prohibition was recently
15 extended to a wholly unsecured junior lien by the Supreme Court
16 in Bank of America v. Caulkett, 135 S. Ct. 1995, 1999 (2015).
17 Parties have argued against allowing a chapter 20 debtor to "two-
18 step" around the Dewsnup/Caulkett restrictions - i.e., first
19 filing a chapter 7 to discharge the personal liability, then
20 following it with a chapter 13 to value the property and strip
21 the remaining *in rem* claim - as bad faith. And it well may be,
22 but that argument is better addressed by filing an objection to
23 confirmation based on bad faith rather than eligibility. If such
24 an objection is made, then the bankruptcy court must consider on
25 a case-by-case basis the totality of the circumstances standard,
26 as directed in Leavitt v. Soto (In re Leavitt), 171 F.3d 1219,
27 1224 (9th Cir. 1999), and Drummond v. Welsh (In re Welsh), 711
28 F.3d 1120, 1127-30 (9th Cir. 2013), in determining whether such

1 bad faith exists.

2 That serial filings are not per se bad faith was first
3 addressed by the Supreme Court in Johnson where the creditor
4 maintained that such filings evaded the limits that Congress
5 intended to place on these remedies. The Court disagreed:
6 "Congress has expressly prohibited various forms of serial
7 filings. . . . The absence of a like prohibition on serial
8 filings of Chapter 7 and Chapter 13 petitions, combined with the
9 evident care with which Congress fashioned these express
10 prohibitions, convinces us that Congress did not intend
11 categorically to foreclose the benefit of Chapter 13
12 reorganization to a debtor who previously has filed for Chapter 7
13 relief." Johnson, 501 U.S. at 87.

14 The Ninth Circuit earlier embraced the substance of this
15 holding in Downey Savings and Loan Association v. Metz (In re
16 Metz), 820 F.2d 1495, 1497 (9th Cir. 1987), and recently
17 reiterated it in In re Blendheim, 803 F.3d 477, where the court
18 went so far as to find no *per se* bad faith even if a chapter 13
19 petition was filed while the chapter 7 was still pending. There,
20 the court recognized that a debtor should be allowed to use the
21 tools in the tool box if done so with a good-faith purpose. 803
22 F.3d at 500.

23 Finally, we do not see how the purposes of a chapter 13
24 reorganization are met by counting the discharged unsecured
25 obligations of the chapter 20 debtor in the eligibility
26 calculation. Assuming the case is filed in good faith and proper
27 chapter 13 purposes - such as curing an arrearage on a first
28 mortgage or paying priority tax debt - are present, it makes no

1 sense to include in the debt limit calculation a claim for which
2 the right to payment has been discharged. Neither the Code nor
3 case law compels inclusion of the discharged *in personam*
4 liability in such calculation.

5 **VI. CONCLUSION**

6 For the reasons stated above, we REVERSE the decision of the
7 bankruptcy court dismissing the chapter 13 for ineligibility and
8 REMAND with instructions to vacate the dismissal and reinstate
9 the case.