**This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.**

**IT IS SO ORDERED.**

Guy R. Humphrey
United States Bankruptcy Judge

**Dated: September 30, 2009**

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**UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**WESTERN DIVISION AT DAYTON**

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| In re: MARSHALL BIVENS<br>BRENDA L. BIVENS,<br><br>*Debtors* | Case No. 08-31447<br>Adv. No. 08-3361 |
| MARSHALL BIVENS<br>BRENDA L. BIVENS,<br><br>*Plaintiffs*<br><br>v.<br><br>M&I BANK FSB,<br><br>*Defendant* | Judge Humphrey<br>Chapter 13 |

**Decision Denying Plaintiffs' Motion for Summary Judgment**

## I. Introduction

This decision concerns whether a Chapter 13 debtor can use a value for real property listed in a confirmed Chapter 13 plan to ultimately strip off a junior mortgagee's lien as "wholly unsecured" in a separate adversary proceeding. In other words, is an uncontested value placed on real property in a Chapter 13 plan binding on a creditor holding a lien on the property pursuant to 11 U.S.C. § 1327(a) for purposes of later proceedings, such as an adversary proceeding to strip off a mortgage lien? Based upon the facts of this case and, in particular the specific language of the plan involved in this case, the court finds that a mere reference to a value in a plan is not sufficient to preclude a creditor from later contesting that value in a separate adversary proceeding or valuation hearing.

## II. Facts and Procedural Background

On March 28, 2008 the debtors, Marshall Bivens and Brenda L. Bivens (the "Debtors"), filed a voluntary petition for relief under Chapter 13 of Title 11 of the United States Bankruptcy Code (the "Bankruptcy Code" or the "Code").[1] (Estate Doc. 1). On Schedule D the Debtors scheduled M&I Bank FSB (the "Bank") as holding a secured claim on their principal residence at 119 S. Miami Avenue, Miamisburg, Ohio (the "Property"). The Debtors scheduled the Bank's claim as second in position to a lien of Select Portfolio Servicing[2] and entirely unsecured. *Id*. The Debtors' original Chapter 13 plan listed a monthly payment of $300 to be disbursed directly by the Debtors to the Bank (Estate Doc. 2). On

[1] Unless otherwise noted, all statutory references are to the Bankruptcy Code of 1978, as amended, 11 U.S.C. §§ 101-1532 (the "Code"), cited hereinafter in this decision as "§ ____".

[2] Select Portfolio Servicing is the servicing agent for the mortgagee, EquiCredit Corporation of America. *See* Proof of Claim 6-1.

March 31, 2008 the Debtors filed an appraisal of the Property with a value of $42,000 (Estate Doc. 7).

By agreed order, confirmation of the plan was denied and the Debtors were ordered to file an amended plan by April 30, 2008 (Estate Doc. 16). On April 30, 2008 the Debtors proposed to amend the original plan as follows:

> The debtor owns real estate located at **119 S. Miami Ave. Miamisburg OH 45342.** The property is valued at **$42,000.** There is a first mortgage on the property held by **Select Portfolio Servicing** . . . . The payoff on the first mortgage is $**49,000.00.**
>
> There is no arrearage on this mortgage. There is a second mortgage on this property held by **M&I Bank FSB** . . . . The balance on the second mortgage is **$32,787.74. M&I Bank FSB** is to be paid as a Class five creditor with zero interest. There is no equity in the property to support paying the debt to **M&I Bank FSB** as a secured creditor. Debtors will object to any claim of **M&I Bank FSB** on this property that is filed as a secured creditor. Debtors will file an adversary complaint to strip off this mortgage from the property and have the mortgage cancelled of record. Upon completion of the debtor's Chapter 13 plan the debt to **M&I Bank FSB will be discharged and the mortgage will be cancelled of record.**

(Estate Doc. 15; bold in original). On May 22, 2008 the Debtors filed a further amended plan which contained the same language as the prior amendment relating to treatment of the Bank's claim and included an unrelated amendment (this amendment coupled with the original plan and prior amendment shall collectively be referred to as the "Plan"). The Bank did not file an objection to confirmation of the Plan and the Plan was confirmed through an order entered September 26, 2008 (Estate Doc. 27).

On May 20, 2008 the Bank filed a proof of claim, listing its claim as being in the amount of $33,150.15 and secured by an open end mortgage on the Property (Proof of Claim 5-1) ("Proof of Claim"). The Proof of Claim does not provide any value for the Property. On

November 6, 2008 the Debtors objected to the Proof of Claim seeking to have it reclassified as a non-priority unsecured claim (Estate Doc. 30). The claim objection states, in part, that:

> The Debtors object to the secured claim of M & I Bank because there is no equity in the property to support paying the debt **to M&I Bank** as a secured creditor. Debtors will file an adversary proceeding asking the court to determine this debt unsecured and strip as a mortgage from the Debtors' real estate. This debt should be treated as a class 5 claim.[3]

*Id.* (bold in original). On December 2, 2008 the Bank responded, stating that the valuation of the Property did not support the claim objection and the Bank's claim should remain an allowed secured claim (Estate Doc. 31).

On December 17, 2008 the Debtors filed the complaint initiating this adversary proceeding seeking to strip off the Bank's mortgage lien on the Property as "wholly unsecured." (Adv. Doc. 1). On January 15, 2009 the Bank filed an answer (Adv. Doc. 4) and on January 26, 2009 the parties entered into an agreed order to resolve the claim objection through the adversary proceeding (Estate Doc. 34). On April 27, 2009 the Debtors filed a motion for summary judgment (Adv. Doc. 14), the Bank filed a response on May 18, 2009 (Adv. Doc. 15), and the Debtors filed a reply brief on May 25, 2009 (Adv. Doc. 17).

## III. <u>Legal Analysis</u>

### A. Jurisdiction

This court has jurisdiction pursuant to 28 U.S.C. § 1334 and the standing order of reference in this District. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K).

[3] Under the model Chapter 13 plan used in the Dayton location of the Bankruptcy Court for the Southern District of Ohio, Class 5 claims include "[a]ll other pre-petition claims, including unsecured claims not otherwise part of another class, the under secured portion of secured claims and . . . non-priority tax claims . . . ." (Estate Doc. 2, ¶ 5, p. 5).

**B. Summary Judgment Standard**

Federal Rule of Civil Procedure (FRCP) 56(c), made applicable to adversary proceedings through Bankruptcy Rule 7056, sets forth the standard to address the parties' filings. It states, in part, that a court must grant summary judgment to the moving party if:

> the pleadings, the discovery and disclosure statements on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.

In order to prevail, the moving party, if bearing the burden of persuasion at trial, must establish all elements of its claim. *Celotex Corp. v. Catrett,* 477 U.S. 317, 331 (1986). If the burden is on the non-moving party at trial, the movant must: 1) submit affirmative evidence that negates an essential element of the nonmoving party's claim or 2) demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Id.* at 331-32. Thereafter, the opposing party "must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (citations omitted); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986). All inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita,* 475 U.S. at 587-88.

**C. Discussion**

The issue before the court on the Debtors' motion for summary judgment arises out of the Sixth Circuit's adoption of the majority position that mortgages to which no value can be attributed pursuant to 11 U.S.C. § 506(a) can be stripped off through a Chapter 13 bankruptcy case upon successful completion of the payments under the Chapter 13 plan.

*See Lane v. Western Interstate Bancorp. (In re Lane)*, 280 F.3d 663 (6th Cir. 2002) (Despite the language of § 1322(b)(2), a Chapter 13 debtor can modify a "wholly unsecured mortgage" (i.e. where there is no value in the property in excess of superior liens on a debtor's principal residence)) and 11 U.S.C § 506(a)(1). Thus, the value of a debtor's principal residence is significant in a Chapter 13 case involving more than one mortgage on that property.

How then should the value of that principal residence be established for purposes of stripping off a mortgage lien under *Lane*? On the one hand, the Debtors posit that the value can be established through the Chapter 13 plan and that any uncontested value for the real property placed in the Chapter 13 plan is binding on any mortgagee through § 1327(a) in subsequent proceedings, including in any proceeding to strip off the mortgage lien.[4] On the other hand, the Bank argues that an adversary proceeding is required to strip off a lien and, moreover, the Debtors' own plan requires such an adversary proceeding.[5] The Bank asserts that by giving preclusive effect to the valuation of the Property stated in the Plan, the

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[4] Of course this assumes proper service of the plan and notice of the confirmation hearing on the mortgagee and the mortgagee's failure to file a timely objection to confirmation of the plan contesting that value, none of which is at issue in this case.

[5] This judge and the Dayton location of the United States Bankruptcy Court for the Southern District of Ohio have construed BR 7001(2) to require that an adversary proceeding be commenced and prosecuted to strip off a mortgage lien under *Lane*. The courts across the country, and even the bankruptcy judges within this District, are split on whether an adversary proceeding is required to strip off such a lien. Some reported decisions have held that an adversary proceeding is not required, either determining a plan provision is sufficient or only requiring a motion, rather than an adversary proceeding. See, *e.g.*, *In re Hill*, 304 B.R. 800, 804-05 (Bankr. S.D. Ohio 2003) ("[T]he court holds that a Chapter 13 debtor can avoid a mortgage, on the sole basis that the mortgage is alleged to be wholly unsecured, without initiating an adversary proceeding or objecting to a proof of claim timely filed by the mortgagee. The debtor can accomplish this objective through the plan confirmation process pursuant to § 1327(c)."); *In re Hudson*, 260 B.R. 421, 433 (Bankr. W.D. Mich. 2001) (An adversary proceeding is not required to value a creditor's collateral, determine secured status, or to modify a secured creditor's rights in Chapter 13) and *In re Bennett*, 312 B.R. 843, 848 (Bankr. W.D. Ky. 2004) (An adversary proceeding is not required to strip off a wholly unsecured mortgage, but the debtor should file a separate motion with the plan of reorganization). However, other courts have held that an adversary proceeding is required to strip a mortgage lien. *See SLW Capital, LLC v. Mansaray-Ruffin* (*In re Mansaray-Ruffin*), 530 F.3d 230 (3rd Cir.2008); *Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 93 (4th Cir. 1995) and *In re Burner*, 321 B.R. 432, 434-36 (Bankr. N.D. Ohio 2004).

adversary proceeding becomes a mere formality without any substantive purpose with the Bank's due process rights effectively trampled.

The court agrees with the Bank that the primary lens through which the issue presented to the court must be analyzed is due process. The United States Constitution, and in particular the due process requirement under the Fifth Amendment, trumps the Bankruptcy Code and Bankruptcy Rules and those "may not be used to circumvent constitutional due process requirements." *Flynn v. Bankowski* (*In re* Flynn), 402 B.R. 437, 445, n. 11 (B.A.P. 1st Cir. 2009). "Due process sets a floor on what will pass constitutional muster." *Id.*

1. An Adversary Proceeding Is Not Required to Determine Value for Lien Stripping Purposes Under *Lane*

A central premise of the Bank's argument is that an adversary proceeding is required to establish the value of real property for lien stripping purposes. The court disagrees with this premise. Value undoubtedly can be established for lien stripping and other purposes without an adversary proceeding.

The Bank relies on *Ruehle v. Educ. Credit Management Corp. (In re Ruehle)*, 412 F.3d 679 (6th Cir. 2005), to argue that an adversary proceeding is required to strip a mortgage and that since the value of a debtor's residence is the primary, if not sole, issue relating to stripping such mortgage, it must be established through an adversary proceeding. However, the analysis in *Ruehle* and other decisions requiring that adversary proceedings be filed to obtain certain relief in bankruptcy cases does not require that the value of a debtor's

residence be ascertained through an adversary proceeding for purpose of determining whether a lien should be stripped pursuant to *Lane*.[6]

In *Ruehle*, the Sixth Circuit affirmed the bankruptcy court in determining that a student loan cannot be discharged through a Chapter 13 plan even if the creditor fails to object to such a provision in a plan.[7] *Ruehle*, 412 F.3d at 681; *See also Educ. Credit Mgmt. Corp v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007) (A debtor cannot establish "undue hardship" by adding language to a Chapter 13 plan without filing an adversary proceeding). The court found that confirming a plan that discharged a student loan was not simply a violation of BR 7001, but that the "discharge by declaration" language in the Chapter 13 plan raised fundamental issues of due process. *Ruehle*, 412 F.3d at 684-85. The *Ruehle* decision emphasized the importance of an adversary proceeding as providing a higher form of notice in the "tidal waves" of bankruptcy notices. *Id.* at 684. Ultimately, the court concluded that "[d]ue process demands a complaint and a summons. The rule is clear. The rule is no less clear with regard to student loans, and so, we must not engage in complex rationalizing to dignify a denial of fundamental rights." *Id.* at 685.

*Ruehle* and other decisions like *SLW Capital, LLC v. Mansaray-Ruffin* (*In re Mansaray-Ruffin*), 530 F.3d 230 (3rd Cir. 2008) and *Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 93 (4th Cir.

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[6] The issue presented in this proceeding is different than in *Ruehle* and this difference does not require any "complex rationalizing" to be understood. *See Ruehle*, 412 F.3d at 685. Contrary to the debtor in *Ruehle*, the Debtors filed an adversary proceeding to strip off the Bank's mortgage lien. Thus, an adversary proceeding has been filed in this case. Accordingly, the Debtors are not attempting to strip off the Bank's junior lien by the confirmation of the Chapter 13 plan alone. Instead, the Debtors want the valuation of the Property, as set forth in the Plan to bind the Bank.

[7] The Ninth Circuit Court of Appeals reached the opposite conclusion in *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193 (9th Cir. 2008). The Supreme Court granted a writ of certiorari on June 15, 2009. *United Student Aid Funds, Inc. v. Espinosa*, 129 S.Ct. 2791 (2009).

1995), mandating that adversary proceedings be filed to strip mortgage liens, focus on the requirements of the Bankruptcy Code and Rules that adversary proceedings be filed to obtain that particular relief. In *Ruehle* the court stated: "The proposed discharge violated both the Bankruptcy Code, U.S.C. § 523(a)(8), and Federal Rule of Bankruptcy Procedure 7001(6). These provisions require that to justify the discharge of a student loan debt, a debtor must establish undue hardship by filing a complaint for an adversarial hearing and serving the creditor with a summons." *Ruehle*, 412 F.3d at 681. Citing *Hanson v. Educ. Credit Mgmt. Corp.* (*In re Hanson*), 397 F.3d 482, 487 (7th Cir. 2005), the Sixth Circuit went on to state that "where the Bankruptcy Code and Bankruptcy Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect." *Ruehle*, 412 F.3d at 683. Similarly, in *Mansaray-Ruffin* the court stated "we hold only that, where the Rules require an adversary proceeding -- which entails a fundamentally different, and heightened, level of procedural protections -- to resolve a particular issue, a creditor has the due process right not to have that issue resolved without one." *Mansaray-Ruffin*, 530 F.3d at 242.

With respect to valuation of property, the Bankruptcy Code and Rules do not require that an adversary proceeding be filed. Section 506(a) and BR 3012 provide for value determinations to be made through contested matters.[8] Section 506(a)(1) provides that:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in

[8] "Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter." Advisory Committee Note (1983) to BR 9014.

> light of the purpose of the valuation and of the proposed disposition or use of such property, **and in conjunction with any hearing on** such disposition or use or **on a plan affecting such creditor's interest**.

11 U.S.C. § 506(a)(1) (emphasis added). Thus, § 506(a) anticipates that the value of property will be determined "in conjunction with any hearing . . . on a plan affecting [a] creditor's interest", including in conjunction with a confirmation hearing on a Chapter 13 plan. *See Green Tree Acceptance, Inc. v. Calvert* (*In re Calvert*), 907 F.2d 1069, 1072 (11th Cir. 1990) (Valuation of property may be conducted in conjunction with confirmation of plan; there is no requirement of a separate hearing); *In re Holmes*, 225 B.R. 789, 793 (Bankr. D. Colo. 1998) (Value of property may be determined as part of the Chapter 13 confirmation hearing).

In addition to § 506(a) authorizing the value of property to be determined at a confirmation hearing, BR 3012 allows the value of property to be determined by motion. That Rule provides that:

> The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.

BR 3012. The 1983 Advisory Committee Note to BR 3012 states that:

> The valuation of secured claims may become important in different contexts, e.g. to determine the issue of adequate protection under § 361, impairment under § 1124, or treatment of the claim in a plan . . . .
>
> * * * *
>
> An adversary proceeding is commenced when the validity, priority, or extent of a lien is at issue as prescribed by Rule 7001. That proceeding is relevant to the basis of the lien itself while valuation under Rule 3012 would be for the purposes indicated above.

Thus, the Advisory Committee Note confirms that an adversary proceeding is not required to establish the value of property.

Furthermore, judicial precedents on stripping mortgages, in particular in the Southern District of Ohio and in the Sixth Circuit, reveal that courts consistently allow the value of real property to be established through the plan confirmation process at either the confirmation hearing or a separate valuation hearing. Shortly prior to the Sixth Circuit's decision in *Lane*, this court issued two similar decisions recognizing a debtor's ability to strip wholly unsecured mortgages. In both of those decisions the court stated that "where a § 506(a) valuation establishes that there is no equity to secure a junior mortgagee's lien, a plan of reorganization that proposes to treat such a creditor as wholly unsecured may be confirmed." *In re Callander*, 263 B.R. 567, 573 (Bankr. S.D. Ohio 2001); *Ernst v. Bank One, N.A.* (*In re Ernst*), 270 B.R. 707, 710 (Bankr. S.D. Ohio 2001). In *In re Fox*, 142 B.R. 206, 207-09 (Bankr. S.D. Ohio 1992), this court determined that the value of the debtors' residence could be determined at the confirmation hearing. See *also In re Hill*, 304 B.R. 800, 805 (Bankr. S.D. Ohio 2003) (Debtor can avoid a wholly unsecured mortgage "through the plan confirmation process").

Thus, the Bankruptcy Code and the Bankruptcy Rules explicitly provide, and case law interpreting § 506(a) and BR 3012 confirms, that valuation of property need not be through an adversary proceeding and that due process does not require an adversary proceeding to strip off a lien on a debtor's principal residence.

2. The Bank Did Not Receive Appropriate Notice Under the Language of the Plan and the Circumstances of this Case to Give Preclusive Effect to the Value Ascribed to the Property by the Debtors in the Plan

However, while due process does not require that the value of a residence for lien stripping purposes be accomplished through a separate adversary proceeding, the court finds that the Debtors' Plan did not provide sufficient notice to the Bank to serve as a valuation hearing for purposes of § 506(a) or BR 3012 and, therefore, did not satisfy due process requirements. The fundamental premise of the *Ruehle* decision can be loosely stated as prohibiting Chapter 13 plans to be used to "ambush" creditors and obtain substantive relief without appropriate notice to the affected creditor or party in interest. Accordingly, the critical question becomes whether the Plan adequately apprised the Bank that the confirmation hearing was going to be a valuation hearing so that the Bank knew or should have known that the value of the Property was being determined at the confirmation hearing. This question is critical not only from a due process standpoint, but also because BR 3012 allows the court to determine the value of property only "after a hearing on notice to the holder of the secured claim . . . ." The court determines that the bank was not adequately apprised.

The Debtors rely on § 1327(a) to argue that the value that they listed in their Plan binds the Bank for later proceedings. Section 1327(a) provides that: "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." This section binds a creditor and debtor from re-litigating any issue which was decided or could have been decided at confirmation. *Cline v. Welch (In re*

*Welch*), 1998 WL 773999, at *2 (6th Cir. Oct. 11, 1998); *In re Szostek*, 886 F.2d 1405, 1408-09 (3rd Cir. 1989); *In re Woods*, 406 B.R. 293, 296 (Bankr. N.D. Ohio 2009) and *Flynn*, 402 B.R. at 445. *See also Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 463 (6th Cir. 1991) (Applying this principle to the analogous provision in Chapter 11, § 1141). Thus, the Debtors argue that because they listed the $42,000 value in the Plan, that value was or should have been litigated and, therefore, is binding on the Bank in an adversary proceeding to strip off the Bank's lien.

However, a provision of a Chapter 13 plan only has preclusive effect if: a) the notice of the plan is satisfactory under the circumstances and does not deny due process (*Calvert*, 907 F.2d at 1072; *Piedmont Trust Bank v. Linkous* (*In re Linkous*), 990 F.2d 160, 162 (4th Cir. 1993) and *Flynn*, 402 B.R. at 445); and b) the pertinent plan provision is clear and unambiguous (*County of Ventura Tax Collector v. Brawders* (*In re Brawders*), 325 B.R. 405, 411 (9th Cir. BAP 2005); *In re Mershon*, 2005 WL 4030035 (Bankr. S.D. Ohio 2005); *Turek v. Dehart* (*In re Turek*), 346 B.R. 350, 355 (Bankr. M.D. Pa. 2006)). The Debtors' Plan fails on both of these accounts.

First, notice that the confirmation hearing was going to serve as a valuation hearing was not sufficient under due process considerations. In *Linkous*, a secured creditor filed a motion to revoke a confirmation order confirming a plan which bifurcated its claim into a secured claim and an unsecured claim. The creditor did not object to confirmation of the plan, claiming that a clerical error prevented the plan summary from being brought to the attention of the appropriate person. The bankruptcy court denied the creditor's motion to revoke, but the district court reversed the bankruptcy court in part finding that the creditor

had not received adequate notice of what would occur through the confirmation process. Upon appeal to the Fourth Circuit, the creditor argued that although it received the debtors' plan summary and a notice of the confirmation hearing, it did not receive adequate notice that the bankruptcy court would make a valuation under § 506(a) at the confirmation hearing. In discussing the due process considerations relating to the finality of orders confirming Chapter 13 plans, the court referring to § 1327(a) stated that:

> [A] bankruptcy court confirmation order generally is treated as *res judicata*. However, we cannot defer to such an order on *res judicata* grounds if it would result in a denial of due process in violation of the Fifth Amendment of the United States Constitution. The United States Supreme Court has concluded that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950) (citations omitted).

*Linkous*, 990 F.2d at 162. The court further stated that:

> In order to satisfy due process requirements, "the notice [of the proceedings] must be of such nature as reasonably to convey the required information. . . ." *Mullane*, 339 U.S. at 314 (*citing Grannis v. Ordean*, 234 U.S. 385, 58 L. Ed. 1363, 34 S. Ct. 779 (1918)). In the present case, the information required by statute is that Linkous plans to hold a section 506 valuation hearing. Therefore, in order "reasonably to convey the required information," Linkous' notice to creditors must state that such a hearing will be held.

*Id.* at 162-63.

Both in *Calvert* and in *Linkous*, the courts held that if the creditor whose lien was being attacked did not receive specific notice that the confirmation hearing would serve as a § 506(a) or BR 3012 valuation hearing, then the creditor's due process rights had been violated and the confirmation order was not binding on the creditor for lien stripping purposes. *See Linkous*, 990 F.2d at 163. In *Calvert* the court remarked that: "Mere notice that

the bankruptcy court will hold a confirmation hearing on a proposed bankruptcy plan, without inclusion of notice specifically directed at the security valuation process, does not satisfy the requirement of Rule 3012." *Calvert*, 907 F.2d at 1072. The court added that notice of "a mere possibility that they will consider collateral valuation" is not sufficient to avoid a due process violation. *Id.* at 1072, n. 3.

The court finds that the Bank did not receive specific notice that the confirmation hearing would serve as a valuation hearing under § 506(a) or BR 3012 and, therefore, under the due process standards enunciated in *Calvert* and *Linkous*, the confirmation order did not bind the Bank to the value placed in the Plan for the Property. The notice of the confirmation hearing (Estate Doc. 9) did not advise the Bank that the confirmation hearing would include a valuation hearing under § 506(a) or BR 3012 relating to the Property. The only possible reference in the Plan to the confirmation hearing serving as a valuation hearing is the following language on the first page of the form Dayton Chapter 13 plan which states in bold print as follows:

> **You should read this Plan carefully. Confirmation of this Plan by the Bankruptcy Court may modify your rights by providing for payment of less than the full amount of your claim, by setting the value of the collateral securing your claim, by providing for a treatment of your claim contrary to your current status, and/or by setting the interest rate on your claim. The Court may confirm this case if no objection to confirmation is filed within ten (10) days after the §341 Meeting of Creditors is concluded (L.B.R. 3015-3(a)).**

Estate Doc. 2, p. 1. The description of the treatment of the Bank's claim on that document reflected that the Debtors would directly make $300 monthly payments to the Bank and did not indicate that the mortgage lien would be stripped or that the Property would be valued for strip down or other purposes. *See* Estate Doc. 2, ¶ 18, p. 8. The court views the above-

quoted prefatory warning language on the first page of the Dayton form Chapter 13 plan as in the vein of the "mere possibility" language that the *Calvert* court held was not sufficient and not specific enough to provide adequate notice to the Bank that the confirmation hearing would serve as a valuation hearing under § 506(a) or BR 3012. *Calvert*, 907 F.2d at 1072, fn. 3. In their April 30, 2008 amendment to the Plan (Estate Doc. 15), the Debtors provided for the stripping of the Bank's mortgage lien and noted that the Property "is valued at $42,000." However, this provision in this amendment did not specifically state that the confirmation hearing would include a § 506(a) or BR 3012 valuation hearing if the Bank disputed that value or that the value stated in the Plan would be binding absent an objection and, rather, stated that an objection to any claim filed by the Bank as a secured claim would be filed and that an adversary proceeding would be filed to strip the mortgage lien. The amendment of the Plan filed on May 22, 2008 did not change anything as relates to treatment of the Bank's claim (Estate Doc. 22). Accordingly, the court finds that the Bank did not receive sufficient due process notice that the confirmation hearing would serve as a valuation hearing or that failure to object to the value placed in the April 30, 2008 amendment would constitute a valuation of the Property under § 506(a) and BR 3012.[9]

[9] In *In re Fox*, 142 B.R. 206 (Bankr. S.D. Ohio 1992), the court held that an uncontested value in a Chapter 13 plan was binding on the creditor, distinguishing *Calvert*. In distinguishing *Calvert*, the court noted that: "First, the Order sent to and assumably received by TransOhio regarding the confirmation hearing does advise TransOhio that the issue of valuation will be determined at the confirmation hearing. Second, the notice in this case is clear and is not a suggestion of a possibility of a value determination, as in the *Calvert* case. As previously quoted, the notice sent to TransOhio provides that the Court will hear evidence of value, as appropriate, at the confirmation hearing. Third, a timely objection to the claim filed by TransOhio was made by the Trustee, unlike the Green Tree claim which received no objection." *Id.* at 208. As set forth above, such facts are not present in this case. Rather, this case is more similar to *In re Woods*, 406 B.R. 293 (Bankr. N.D. Ohio 2009) in which the court allowed the creditor's unsecured deficiency claim despite a provision in the plan eliminating the deficiency claim construing ambiguous language in the plan against the debtor and finding a lack of due process as a result of that ambiguity.

In addition, the value placed in the Plan did not have preclusive effect because the Plan was ambiguous as to whether the confirmation hearing was serving as a valuation hearing and whether the Plan was setting the value of the residence for lien stripping purposes. Because a plan is a contract between a debtor and his creditors, any ambiguity in the terms of the plan must be construed against the debtor. As stated in *Brawders*:

> [A] plan should clearly state its intended effect on a given issue. Where it fails to do so it may have no *res judicata* effect for a variety of reasons: any ambiguity is interpreted against the debtor, any ambiguity may also reflect that the court that originally confirmed the plan did not make any final determination of the matter at issue, and claim preclusion does not apply to a "claim" that was not within the parties' expectations of what was being litigated.

*In re Brawders*, 325 B.R. 405, 411 (B.A.P. 9th Cir. 2005). "If there is any doubt as to whether the plan language forecloses a creditor's rights on a particular issue, the language is to be construed against the debtor who drafted the same." *Mershon*, 2005 WL 4030035 at *2. Accord *Turek*, 346 B.R. at 355; *In re Fawcett*, 758 F.2d 588, 591 (11th Cir. 1985).

First, the reference to the value of the Property in the Plan constitutes a simple, bare statement that the Property "is valued at $42,000." *See* Estate Doc. 15 and Estate Doc. 22. This is nothing more than a statement of fact from the Debtors' perspective. It did not give notice to the Bank that the confirmation hearing was going to be the valuation hearing contemplated by § 506(a) and BR 3012 or that failure to object to that amount would result in a preclusive determination of the value of the Property. The fact that some of the words in the provision dealing with treatment of the Bank's claim are in "bold" does not bolster any argument that the Bank was put on notice that the Plan would conclusively determine the value of the Property. The only items in that provision in bold are: the name of the

Bank, the address of the Property, "$42,000.00", "$49,000.00," and the statement that "M&I Bank FSB will be discharged and the mortgage will be cancelled of record." (Estate Doc. 15). The terms that are in bold appear to be simply the blanks in a form that were filled in by Debtors' counsel – not any type of statement that the confirmation hearing would constitute a § 506(a) or BR 3012 valuation hearing or that failure to object to the Debtors' valuation number in that paragraph would result in a preclusive determination of value of the Property.

Second, the provision of the Plan addressing the treatment of the Bank's claim specifically indicated that the Debtors were going to file an adversary proceeding to strip the mortgage lien and would file an objection to any proof of claim filed by the Bank as a "secured" claim.[10] This language would reasonably lead the Bank and its counsel to believe that the issues pertaining to whether it was secured would be litigated through a subsequent proceeding. Since the value of the Property was the primary issue, if not the sole issue, which was determinative of whether the Bank was secured, it naturally follows that the valuation issue would be determined in one of those later proceedings described in that provision of the Plan.

Finally, this court's own local rules provide for setting the valuation of personal property within a Chapter 13 plan, but there is no such provision in the court's local rules for the confirmation hearing serving as a valuation hearing for real property. See Local Bankruptcy Rule 3012-1. The court is not concluding that the absence of this provision

[10] The Dayton Model Chapter 13 plan contemplates an adversary proceeding to strip off a wholly unsecured mortgage. *See* Doc. 2, p. 8 ("If the intent of the Debtor is to file an adversary proceeding to cram down a wholly unsecured junior mortgage, said adversary proceeding should be filed within thirty (30) days of confirmation . . . .").

prohibits the confirmation hearing from serving as a valuation hearing under BR 3012, but merely that the lack of such provision, coupled with the language of the Plan and the notice of confirmation hearing, failed to put the Bank on notice that the confirmation hearing would be a valuation hearing for the Property.

Based upon these facts, the court finds that the notice of confirmation hearing provided no notice that the confirmation hearing would serve as a valuation hearing under § 506(a) or BR 3012 and the Plan was ambiguous as to that issue and, therefore, the Bank had little, if any, reason to believe that the value of Property was going to be set through confirmation of the Plan. Conversely, the court finds that the Bank had reason to believe that the value of the Property would be determined at a later proceeding, whether through the adversary proceeding or through the contested claims process. The court does not believe that the Debtors intended to "ambush" the Bank; however, they cannot benefit from the ambiguity of the Plan concerning whether the Bank would be bound by the value of the Property set forth in the Plan and that ambiguity must be construed against them. In short, the confirmation process and confirmation hearing did not serve as a valuation hearing for the Debtors' residence because neither the notice of the confirmation hearing, the language of the Plan, nor any other document served on the Bank provided the Bank with "a hearing on notice to the holder of the secured claim" as required by BR 3012 and elementary principles of due process.

## IV. Conclusion

Accordingly, the Debtors' motion for summary judgment is **denied**. A separate order will be entered simultaneously with the filing of this decision.

**IT IS SO ORDERED.**

c:

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