

NOT FOR PUBLICATION

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APR 10 2018

CLERK U.S. BANKRUPTCY COURT
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FERNANDO VALLEY DIVISION

In re:

RODICA STOIAN,

Debtor.

Case No.: 1:17-bk-10234-MB

Chapter 13

AMENDED MEMORANDUM OF
DECISION RE: MOTION TO AVOID
JUNIOR LIEN ON PRINCIPAL
RESIDENCE

On January 31, 2017 (the "Petition Date"), debtor Rodica Stoian (the "Debtor") commenced this chapter 13 case. On February 9, 2017, the Debtor filed the *Debtor's Notice of Motion and Motion to Avoid Junior Lien on Principal Residence* [11 U.S.C. § 506(d)] (Dkt. 14) (the "Motion"). The Motion seeks to avoid, contingent on the Debtor's receipt of a chapter 13 discharge in this case, the second priority deed of trust (the "2nd DOT") held by secured creditor NuLevel Partners Inc. ("NuLevel") against the Debtor's primary residence, located at 8445 Costello Avenue, Panorama City, CA 91402 (the "Real Property").¹

¹ It is undisputed that a first priority deed of trust (the "1st DOT") is held against the Real Property by HSBC Bank USA, National Association, as Trustee for Ownit Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2005-4 (the "Senior Lender").

1 The Debtor seeks this relief pursuant to the holdings in *Zimmer v. PSB Lending Corp.* (*In re*
2 *Zimmer*), 313 F.3d 1220 (9th Cir. 2002) and *Lam v. Investors Thrift* (*In re Lam*), 211 B.R. 36
3 (B.A.P. 9th Cir. 1997), which held that a wholly unsecured lien is not protected by the anti-
4 modification clause of Bankruptcy Code section 1322(b)(2). NuLevel, the holder of the 2nd DOT,
5 objects to the Motion.

6 There is no dispute over the basic legal principles. The parties agree that the Debtor may
7 avoid the 2nd DOT if the value of the Real Property does not exceed the amount of the debt owing
8 under the 1st DOT. They agree further that the relevant date for valuation of the Real Property is
9 the Petition Date. The parties disagree, however, on the amount of the Senior Lender's claim and
10 the fair market value of the Real Property as of the Petition Date.

11 The Debtor argues, as of the Petition Date, that (i) the secured claim of the senior lender
12 was \$467,248.46, and (ii) the value of the Real Property was \$445,000.00–\$460,000.00. Motion at
13 3; Trial Exs. 1, 7. The Debtor contends that the senior secured claim against the Real Property
14 exceeded the value of the Real Property at the Petition Date, rendering the second-position secured
15 claim of NuLevel valueless.

16 NuLevel argues, as of the Petition Date, that (i) the secured claim of the senior lender was
17 \$464,204.25, as set forth in Proof Claim No. 7-1, filed by Ocwen Loan Servicing, LLC on behalf of
18 the Secured Lender (the "POC"), and (ii) the value of the Real Property was \$480,000. In other
19 words, NuLevel contends that it holds a secured claim with a positive value, which precludes the
20 avoidance of NuLevel's lien against the Real Property under *In re Zimmer* and *In re Lam*.

21 For all of the reasons set forth below, the Court determines that (i) the amount of the Senior
22 Lender's claim as of the Petition Date was **\$464,204.25**, and (ii) the fair market value of the Real
23 Property was **\$480,000.00**. Based on these findings, the Court concludes that the secured claim of
24 NuLevel has a positive value and may not be avoided under *In re Zimmer* and *In re Lam*. The
25 Motion, therefore, will be denied.

26 I. JURISDICTION

27 The court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157(a) and
28 1334(b). Venue is proper pursuant to 28 U.S.C. § 1409(a). This matter is a core proceeding under

1 28 U.S.C. § 157(b)(2)(A) and (K). Moreover, the Court has the constitutional authority to enter a
2 final judgment on the Motion. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Stern*
3 *v. Marshall*, 131 S. Ct. 2594 (2011).

4 **II. BACKGROUND**

5 **A. Procedural Background**

6 The Court held an evidentiary hearing on the Motion on November 28, 2017. David M.
7 Kritzer and Karen Dion appeared for the Debtor. Jamie Hanawalt and Todd S. Garan appeared for
8 NuLevel. By stipulation of the parties, the Court treated the written declaration testimony of the
9 parties' witnesses as direct testimony. The evidentiary hearing therefore was comprised of live
10 cross-examination and live redirect examination of the declarants. The Court heard live testimony
11 from: (i) the Debtor, (ii) Jennifer Bosco, the Debtor's first valuation expert, (iii) Laurie Powell, the
12 Debtor's second valuation expert, and (iv) Jonathan Goldrich, NuLevel's valuation expert. As
13 such, the Court had the opportunity to observe each of the witnesses, evaluate their demeanor,
14 consider their testimony, and assess their credibility. The Court also admitted into evidence 15 trial
15 exhibits by stipulation of the parties. Following the live testimony and admission of the exhibits,
16 the Court heard legal argument from the parties and provided a limited opportunity for
17 supplemental briefing.² That briefing is now complete and the Motion is ripe for decision.

18 **B. Amount of the Senior Lender's Claim**

19 The evidence offered by the parties on the question of the amount of the Senior Lender's
20 claim was limited. The Debtor offered a mortgage account statement dated January 2, 2017, from
21 the Senior Lender's servicer, showing a principal balance of \$467,248.46 and an escrow balance of
22 \$1,688.85. Stoian Decl., Trial Ex. 1 (Ex. A. thereto). Nulevel offered the POC, which shows a
23 claim amount of \$464,204.25. Trial Ex. 8 at 2. Like the mortgage statement, the attachments to
24

25 ² During legal argument, counsel for NuLevel referenced several case authorities that had
26 not been identified in its moving papers or pre-trial briefing. Thus, neither the Debtor nor the
27 Court were given an opportunity to review these authorities in advance of argument. Rather than
28 disregard these authorities, the Court provided the Debtor a limited opportunity to respond in
writing to these authorities, and provided NuLevel a limited opportunity to reply in writing to the
Debtor's submission.

1 the POC show a principal balance of \$467,248.46 and an escrow balance of \$1,688.85, but
2 ultimately calculate the amount of the claim differently.

3 The attachments to the POC show a total claim amount of \$464,204.25, calculated by
4 taking the principal balance of \$467,248.46, adding \$752.85 in interest due, and subtracting
5 \$3,797.06 in "funds on hand." Trial Ex. 8 at 4.³ In addition to the escrow balance of \$1,688.85, the
6 attachment to the proof of claim suggests there is an "Unapplied Funds Balance of \$2,108.21." *Id.*
7 This appears to explain the total "funds on hand" amount used in the Senior Lender's proof of claim
8 calculation. However, no testimony was adduced from the Senior Lender, its servicer, or any other
9 witness to explain the mortgage account statement, the POC, or the manner in which the
10 calculations in those documents were made.

11 **C. Competing Appraisals**

12 The Real Property is a single family residence located in Panorama City, California. A
13 portion of the residence has been partitioned to create an unpermitted residential unit, with its own
14 bedroom/living areas, kitchen area, bathroom, and separate entrance. Three experts conducted
15 appraisals of the Real Property. Two were offered by the Debtor in support of the Motion. The
16 third was offered by NuLevel in opposition to the Motion. The Court finds that all of the expert
17 witnesses were qualified to provide expert testimony and that all of them were credible. As
18 discussed *infra* in Section IV.B, however, the Court ultimately finds NuLevel's expert valuation
19 opinion to be the most persuasive.

20 Jennifer Bosco ("Bosco") conducted the first of the appraisals for the Debtor. Relying on
21 public records, Bosco appraised the house based on the existence of 2,588 square feet of gross
22 living area and the existence of a total of five bedrooms. *See* Trial Ex. 1. Using the comparable
23 sales approach, Bosco compared the Real Property to five prior completed sales of homes within
24 one mile of the Real Property, which closed less than six months prior to the Petition Date. *Id.*

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26
27 ³ The Court notes the inconsistency between this calculation and the face of the POC, which
28 asserts that the total claim amount of \$464,204.25 does *not* include any interest.

Two of the comparables are noted as "short sales"⁴ and one is noted as a bank-owned property ("REO"). Bosco made certain adjustments to come up with an adjusted sale price for each comparable, but did not make adjustments for differences in gross living area, the number of bedrooms, or the short sale or REO status of the comparables. The adjustments she did make included consideration of \$34,000 in deferred maintenance. Bosco concluded that the value of the Real Property on or about the Petition Date was \$445,000. *See* Trial Exs. 1 & 13.

Laurie Powell ("Powell") conducted the second of the appraisals for the Debtor. Relying on her own measurements and inspection of the Real Property, Powell appraised the house based on the existence of 2,523 square feet of gross living area and the existence of a total of five bedrooms. *See* Trial Ex. 7. Using the comparable sales approach, Powell compared the Real Property to five prior completed sales of homes within 1.14 miles of the Real Property. Five of the sales were completed less than six months before the Petition Date. One was completed approximately 11 months before the Petition Date. Two of the five comparables include the same two "short sales" utilized by Bosco. Powell made certain adjustments to come up with an adjusted sale price for each comparable, including adjustments in gross living area. Powell did not make adjustments for room count or short sale status. Powell's valuation opinion considered the need for \$35,000 in deferred maintenance to be made to the Real Property. Powell concluded that the value of the Real Property on the Petition Date was \$460,000. *See* Trial Ex. 7.⁵

Jonathan K. Goldrich ("Goldrich") conducted an appraisal of the Real Property for NuLevel. Relying on his own measurements and inspection of the Real Property, Powell appraised the house based on the existence of 2,587 square feet of gross living area and the existence of a

⁴ A short sale is a sale outside of bankruptcy in which a property is sold, with the secured lender's permission, for less than the entirety of the secured debt.

⁵ Powell's appraisal shows what appears to be a corroborating valuation of \$460,000 using the cost approach to value. *See* Trial Ex. 7 at 7. The appraisal states on the prior page that the cost approach was "considered but was not utilized due to insufficient rental data." *Id.* at 6. The appraisal also states that the sales comparison approach "is the best indicator of market value." *Id.*

1 total of six bedrooms. Tr. at 57:7-58:12; 60:25-61:6.⁶ Using the comparable sales approach,
2 Goldrich compared the Real Property to four prior completed sales of homes within .85 miles of
3 the Real Property. Trial Ex. 6. One of those sales was completed about three months before the
4 Petition Date. The other three sales were completed approximately 16-17 months before the
5 Petition Date. None of the sales was a short sale or an REO. Goldrich made certain adjustments to
6 come up with an adjusted sale price for each of the comparables, including adjustments in gross
7 living area. Goldrich did not make adjustments for room count. Goldrich's valuation opinion
8 considered the need for \$30,000 in deferred maintenance to be made to the Real Property.
9 Goldrich concluded that the value of the Real Property on the Petition Date was \$480,000. *See*
10 Trial Ex. Trial Ex. 6.⁷

11 **III. APPLICABLE LAW**

12 The value of a secured claim may be determined pursuant to a noticed motion under
13 Bankruptcy Code section 506(a), and the valuation incorporated into the debtor's proposed plan.
14 *See* 11 U.S.C. § 506(a); Fed. R. Bankr. P. 3012; *see also In re Reyes*, 401 B.R. 910 (Bankr. C.D.
15 Cal. 2009). Under Bankruptcy Code section 506(d), a claim secured by a lien typically is
16 bifurcated into a secured claim and unsecured claim, based on the value of the estate's interest in
17 the property that is subject to that lien. The process of bifurcating a claim into secured and
18 unsecured claims, and treating the claims differently under a plan, is commonly referred to as "lien
19 stripping."

20 Generally, "lien stripping" is prohibited on a debtor's principal residence in chapter 13. A
21 chapter 13 plan may not modify the rights of a creditor whose claim is secured "only by a security
22 interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2); *see*

23 ⁶ The discrepancy with the other appraisals in respect of the bedroom count derives from
24 Goldrich's conclusion that the partitioned portion of the house contained two bedrooms. Tr. at
25 57:7-58:12.

26 ⁷ Similar to Powell's appraisal, Goldrich's appraisal shows a valuation of \$478,000 using the
27 cost approach to value, but ultimately rejects the cost approach as unreliable and declines to rely on
28 it. *See* Trial Ex. 6 at 4.

1 *Nobelman v. American Sav. Bank*, 508 U.S. 324, 327-28 (1993). In *Nobelman*, the Supreme Court
2 held that this provision precluded the modification of a claim secured by a lien that was partially
3 secured and partially unsecured. However, when the claim of a lien holder secured only by the
4 debtor's principal residence is a completely or wholly unsecured claim, the anti-modification
5 provision in section 1322(b)(2) does not apply; in that circumstance, a debtor may utilize section
6 506(a) under a chapter 13 plan to effectively "strip off" a wholly unsecured lien. *In re Zimmer*, 313
7 F.3d at 1226-27; *In re Lam*, 211 B.R. at 40-41.

8 A lien is wholly or completely unsecured if there is not one dollar of value securing that
9 lien. See *In re Lam*, 211 B.R. at 41 ("[A] one dollar difference in property value could have a
10 profound effect on a secured creditor's rights. If property valued at \$50,000.00 is encumbered by a
11 first mortgage of \$50,000.00 and a second mortgage of \$20,000.00, the second mortgage has no
12 secured claim under section 506(a)."). If the lien is "stripped," the lienholder's claim is treated as
13 an unsecured debt under the proposed plan and the lien remains on the debtor's property until the
14 debt is paid off or the debtor obtains a discharge. See 11 U.S.C. § 1325(a)(5)(B).

15 Notwithstanding a debtor's ability to "strip off" a wholly unsecured junior lien on a
16 principal residence, the general anti-modification provision of Bankruptcy Code section 1322(b)(2)
17 still applies to a partially secured lien. If even one dollar secures the lien on the principal
18 residence, a debtor may not modify the rights of the creditor and "strip off" the lien. Thus, for
19 example, if a chapter 13 debtor's principal residence is valued at \$50,001.00 and is encumbered by
20 a first mortgage of \$50,000.00, and a second mortgage of \$20,000.00, Bankruptcy Code section
21 1322(b)(2) precludes the second mortgage from being stripped off. In that circumstance, the
22 second mortgage holder holds a secured claim of \$1 and under *Nobelman* no modification is
23 permissible under section 1322(b)(2). See *In re Lam*, 211 B.R. at 41.

24 On a chapter 13 debtor's motion to establish the value of property under Bankruptcy Code
25 section 506(a), for the purpose of "stripping" an allegedly unsecured junior lien, the debtor bears
26 the ultimate burden of proof. See, e.g., *In re Henderson*, 2010 Bankr. LEXIS 5014, *10-11 (Bankr.
27 C.D. Cal. Nov. 5, 2010) (citing burden of proof authorities under section 506(a)). In accordance
28 with the foregoing discussion, the Debtor's burden is to demonstrate that the value of the property,

as of the Petition Date, i.e., January 31, 2017, was equal to or less than the amount of the senior secured claim on the property. *Id.*⁸

IV. ANALYSIS

A. The Amount of the Senior Secured Claim.

The Debtor contends that the Court should disregard the total claim amount set forth in the POC, \$464,204.25, because it reflects a reduction of certain funds that the Senior Lender had "on hand." *See* Dkt. 58 at 3-4.⁹ In its trial brief, the Debtor argues that the amounts held by the Senior Lender were for use to pay taxes and insurance only, and therefore should not be set off against the principal balance owing to the Senior Lender, i.e., \$467,248.46. *Id.* To support its argument, the Debtor cites to several authorities arguing that a proof of claim creates only a rebuttable presumption of the allowed amount and that the ultimate burden of proof is on the claimant. *See In re Garner*, 246 B.R. 617, 623 (B.A.P. 9th Cir. 2000); *Sierra Steel, Inc. v. Totten Tubes, Inc. (In re Sierra Steel, Inc.)*, 96 B.R. 275, 277 (B.A.P. 9th Cir. 1989); *Spencer v. Pugh (In re Pugh)*, 157 B.R. 898, 900-01 (B.A.P. 9th Cir. 1993). NuLevel responds by arguing that there is no pending objection to the POC and it is therefore deemed allowed in the amount stated. *See* 11 U.S.C. § 502(a) (claim deemed allowed absent objection).

The Court is persuaded on the record presented that the amount stated in the POC is the correct amount to use as the allowed secured claim of the Senior Lender, for purposes of determining the value of the secured claim of the junior lender, NuLevel. The Court believes that there is merit to NuLevel's legal argument. Although the Debtor contends that it would be unusual for a debtor to object to a proof of claim on the grounds that the claim amount stated is too low¹⁰—

⁸ Irrespective of this allocation of burdens, the Court concludes below that NuLevel has itself demonstrated by a preponderance of the evidence both the amount of allowed secured claim of the Senior Lender and the fair market value of the Real Property.

⁹ Curiously, the Debtor's argument on this issue in its trial brief mentions only the \$2,108 in "Unapplied Funds" shown in the POC and not the \$1,688.85 in "Escrow Funds" on deposit that are shown on both the POC and the mortgage account statement offered by the Debtor. Nor does the Debtor's argument address the \$752.85 added to the total claim amount in the POC. Oral argument did not clarify this discrepancy.

¹⁰ Tr. at 100:18-24, 101:13-102:9.

1 and the Court agrees—that does not mean that the Debtor could not have done so here to avoid the
2 deemed allowance of the claim under Bankruptcy Code section 502(a). Although the POC was
3 filed on June 7, 2017, the evidentiary hearing on the Motion was not held until November 28, 2017.
4 Moreover, the cases cited by the Debtor involve the manner in which a proof of claim may be
5 rebutted in the context of an objection to such claim. Nothing in the those cases speaks to the legal
6 question of whether a junior secured claim holder, in the context of a lien-stripping motion, may
7 challenge the amount of a senior secured claim to which no objection has been filed.

8 Ultimately, however, the Court does not need to reach this legal question. Even if the Court
9 assumes that the Debtor, for purposes of a motion to strip a junior lien, may challenge the allowed
10 amount of the senior lender's secured claim without actually filing an objection to that claim, the
11 Debtor has failed to rebut the presumed validity of the Senior Lender's claim. The Debtor insists
12 that the mortgage account statement somehow resolves the issue in favor of the principal balance
13 stated in that document. But the Debtor does not point the Court to any evidence or legal authority
14 establishing why it is not proper for the Senior Lender to offset its debt by the \$1,688.85 in escrow
15 funds reflected in that document. Nor does the Debtor point the Court to any evidence or legal
16 authority establishing why it is not proper for the Senior Lender to offset its debt by the additional
17 \$2,108 in "unapplied funds" reflected in the POC.

18 At closing argument, in contending that the mortgage account statement should somehow
19 "control," counsel for the Debtor stated, "It was the last mortgage statement before filing so, you
20 know, I suppose it is possible that amounts changed in between if a payment was received or
21 something. . . ." Tr. 101:22-25. The implication of the argument is that the \$2,108 in "unapplied
22 funds" that are reflected in the POC *may* have been paid to Senior Lender after the Petition Date.
23 This argument directly contradicts the POC, which states that the unapplied funds balance existed
24 as of January 31, 2017. *See* Trial Ex. 8 at 4. But argument is not a substitute for evidence. The
25 Debtor provides no evidence establishing that the unapplied funds balance should have been
26 disclosed in the mortgage account statement or that those funds were actually paid by the Debtor
27 postpetition.

1 Thus, even if it is assumed that the Debtor may rebut the presumption of validity accorded
2 the POC without formally objecting to it, the Debtor has failed to do so. Stated alternatively,
3 NuLevel's introduction of the POC demonstrates by a preponderance of the evidence that the
4 secured claim of the Senior Lender is \$464,204.25.

5 **B. Value of the Real Property.**

6 After considering all of the evidence and argument presented, the Court finds that the expert
7 opinion of the value of the Real Property offered by Goldrich, \$480,000, is the most persuasive.
8 The principal reason is that Goldrich gave a persuasive explanation for why the short sale and REO
9 comparables utilized by Bosco and Powell were not appropriate in assessing the fair market value
10 of the Real Property and why he excluded them from his own appraisal. *See* Tr. at 66:22-68:2,
11 68:19-71:4. Goldrich identified this issue in his Supplemental Declaration, criticizing the Bosco
12 and Powell appraisals for including short sales and REO sales among the comparables used without
13 including adjustments for these types of sales or providing an analysis on the impact of these types
14 of sales. Trial Ex. 12, ¶¶ 29.d, 30.d.

15 At trial, Goldrich testified that he excluded short sales and REO sales because they
16 generally result in lower sales prices than a typical arm's length transaction. *See* Tr. at 66:22-68:2,
17 68:19-71:4. With respect to short sales, Goldrich explained that because the seller in a short sale
18 does not have the final decision on whether to approve the sale, and the motivations of the bank
19 and seller are different, the purchase offer that the seller is able to negotiate from a buyer is not
20 typically the highest and best price. Goldrich acknowledged that because of "an inventory issue,"
21 the market "is becoming less interested in the differences" between arm's length sales and short
22 sale/REO sales. But he testified that during the time frame of the sales included in the Debtor's
23 appraisals "it was obvious that they had sold at a discount when I reviewed them." Tr. at 67:19-
24 68:2.

25 In contrast, Bosco expressed at trial the opinion that it was appropriate to use short sale and
26 REO comparables, that they were representative of true arm's length transactions, and that they did
27 not result in lower sale prices. Tr. at 27:8-28:13. But she failed to persuade the Court of her
28 opinions or demonstrate any infirmity in Goldrich's critique. During cross-examination, in

1 response to a question about whether short sales resulted in a discount, Bosco answered, "Not in
2 this market." Tr. at 27:23-28:6. Bosco's qualified answer actually lends support for Goldrich's
3 opinion. Goldrich opined that although *current* market forces have rendered the price impact of
4 short sales and REOs less meaningful, these factors were nevertheless meaningful at the time of the
5 subject comparable sales. Further, when Bosco was asked whether she had supplemented her
6 appraisal with any evidence of the impact of short sales or REO sales in the area, she responded
7 simply that she had not been asked to do so. Tr. at 28:7-13.¹¹

8 The cases cited by NuLevel lend support to Goldrich's expert opinion. In *Taffi v. United*
9 *States (In re Taffi)*, 96 F.3d 1190 (9th Cir. 1996), the court of appeals held that that "fair market
10 value" for purposes of valuation under Bankruptcy Code section 506(a) means "the price which a
11 willing seller under no compulsion to sell and a willing buyer under no compulsion to buy would
12 agree upon after the property has been exposed to the market for a reasonable time." *Id.* at 1192.
13 Applying *Taffi*, the bankruptcy court in *In re Serda*, 395 B.R. 450 (Bankr. E.D. Cal. 2008), rejected
14 the methodology of an appraiser who used several comparable sales of bank-owned properties to
15 develop a value for a residential property—like the one here—which was to be occupied by the
16 owner pursuant to the owner's chapter 13 plan. *Id.* at 454.

17 The Court in *In re Serda* observed: "Generally, an owner-occupant will try to realize the
18 highest and best price for her property in an open market. Conversely, a bank-owned property is
19 marketed to liquidate the bank's inventory of foreclosed properties and minimize the bank's losses
20 in a time of economic stress." *Id.* Relying on expert testimony that bank-owned properties
21 comprised 30-50% of the relevant real estate market, and inferring that lenders were therefore
22 under pressure to liquidate homes, the court held that it could not assume that the bank was a
23 "willing seller under no compulsion to sell" within the meaning of *Taffi*. *Id.* at 455. The court
24 further observed that "[a] bank simply does not have the same incentive to market a foreclosed
25 property as patiently as an owner-occupant, or to necessarily realize the highest and best price." *Id.*

26
27 ¹¹ Even less testimony on this issue was adduced from Powell, who merely acknowledged
28 that she had used two short sale comparables in her appraisal. *See* Tr. at 33:23-25

1 Here, the evidence does not specifically address how much of the relevant real estate market
2 is bank owned, as was the case in *In re Serda*. But there is expert testimony from Goldrich in the
3 case at bar indicating that short sales and REO sales during the relevant period yielded significantly
4 less than ordinary sales, i.e., independent sales by an owner occupant. Goldrich's expert testimony
5 is supported by the court's reasoning in *In re Serda* that an owner occupant making a decision to
6 sell, and a lender making a decision to sell, may have different objectives and motivations with
7 respect to that decision—which result in lower prices in the case of the latter. Further, Goldrich's
8 acknowledgement that this phenomenon is subject to market forces and currently on the wane is
9 consistent with *In re Serda's* market-oriented analysis.¹²

10 The Debtor contends that Goldrich's opinion of value is inferior for myriad other reasons,
11 but the Court is not persuaded by these arguments.¹³ Chief among these arguments is the
12 complaint that Goldrich's appraisal relies on comparable sales that are 16 to 17 months prior to the
13 Petition Date. The Debtor argues that Goldrich should not have relied on comparable sales that old
14 and should have made adjustments to those comparables to account for their age. But the Court is
15 not persuaded by these arguments. The Court found credible and persuasive Goldrich's testimony
16 that he selected the comparables he did in order to find homes with similar characteristics to the
17 Real Property, including gross living area. Although it is true that Bosco and Powell found more
18 recent comparable sales, those comparables included short sales and an REO sale, which the Court
19 is persuaded were not appropriate. Moreover, the uncontroverted testimony of Goldrich was that
20

21 ¹² In response to NuLevel's citation to *In re Serda*, the Debtor cites *In re Casas*, 2014
22 Bankr. LEXIS 4515 (Bankr. N.D. Cal. Sep. 5, 2014), arguing that the court there determined the
23 value of the real property without discounting the certain short sales that were used as comparables.
24 But the Court does not find *In re Casas* persuasive. In that case, there was testimony from one
25 expert that during the relevant period, short sales comprised 75% to 80% of all sales in the relevant
26 market, *id.* at *12, and from another expert that during the relevant period, approximately 69% of
27 all sales in the relevant market either were short sales or REOs. *Id.* at *18-19. In either case, these
28 kinds of distressed sales appeared to be driving the relevant markets. *Id.* There is no comparable
evidence in the record before this Court.

¹³ The Court addresses here only the most notable of these arguments. Irrespective of
whether they are mentioned here, the Court has considered and rejected all of the alleged
infirmities in the Goldrich appraisal argued by the Debtor.

1 the relevant market was stable during that 16- to 17-month period, making it unnecessary to adjust
2 his comparable sales based on their age. The Court was persuaded by this explanation.

3 Another series of complaints centers on Goldrich's assumption that the Real Property has
4 six bedrooms, and that his square footage number is slightly higher than those of the Debtor's
5 appraisers. The Debtor contends that Goldrich's appraisal is flawed because he assumed that there
6 were two bedrooms in the partitioned unit, and a total of six bedrooms in the entire house. The
7 Debtor and Powell testified, based on their personal observations, that the house only has a total of
8 five bedrooms. On cross examination, Goldrich stood by his room count but explained the
9 difficulty in characterizing the partitioned portion of the house where it appeared that rooms were
10 converted from other uses to create a partitioned "suite." Tr. at 57:7-58:12. But even if it is
11 assumed that Goldrich was incorrect in his room count, the Court is persuaded that this does not
12 render his appraisal infirm. In adjusting comparable sales to conform to the Real Property,
13 Goldrich did not make adjustments for room count. He only made adjustments for differences in
14 gross living area. This is consistent with the approach utilized by Powell.

15 The Debtor also contends that Goldrich's appraisal is flawed because it is based on a
16 measurement of 2,587 square feet of gross living area, as compared to the measurement of 2,523
17 square feet by Powell. The Court is not persuaded that this difference of 64 square feet is material
18 or indicative of a flawed methodology. On cross examination, Powell acknowledged that even
19 when an appraiser measures a home there will be different methodologies which lead to different
20 results. Tr. 43:4-21. One of those recognized differences in approach pertains to whether the
21 appraiser includes a stairwell in the total area, which Powell also acknowledged might have
22 explained the discrepancy between her gross living area measurement and that of Goldrich.
23 Tr. 49:24-50:18. Moreover, although obtained from public records rather than her own
24 measurement, Bosco relied on a total gross living area of 2,588 square feet, which is only one
25 square foot more than Goldrich's measurement. On this record the Court cannot conclude that
26 Goldrich's measurement is wrong or indicative of a flawed methodology.

V. CONCLUSION

The Court concludes that the Debtor has failed to meet her burden to demonstrate by a preponderance of the evidence that, as of the Petition Date, the value of the Real Property was equal to or less the allowed secured claim that is secured by the 1st DOT. To the contrary, the Court concludes that NuLevel has demonstrated by a preponderance of the evidence that the allowed secured claim that is secured by the 1st DOT was \$464,204.25 and that the fair market value of the property was \$480,000.00. Accordingly, the 2nd DOT against the Real Property is not wholly unsecured. As such, the 2nd DOT is subject to the anti-modification clause of Bankruptcy Code section 1322(b)(2) and may not be modified or "stripped" pursuant to *In re Zimmer* and *In re Lam*. The Court will enter a separate order denying the Motion.

###

Date: April 10, 2018



Martin R Barash
United States Bankruptcy Judge