

**NO. 09-10145**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

In the Matter of VANCE COLE CHESNUT,  
Debtor.

---

**MARK T. BROWN and  
TEMPLETON MORTGAGE CORPORATION,**  
Appellants,

**V.**

**VANCE COLE CHESNUT,**  
Appellee.

Appeal from the United States District Court  
for the Northern District of Texas

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**BRIEF OF APPELLEE**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Vance Cole Chesnut, Appellee;
2. Jacqueline Chesnut, wife of Appellee;
3. Mark T. Brown, Appellant;
4. Templeton Mortgage Corporation, Appellant;
5. James M. Morrison, Attorney for Appellee;

6. Dennis Olson, Robert Nicoud, and Olson, Nicoud & Gueck, LLP,  
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## **STATEMENT REGARDING ORAL ARGUMENT**

Appellee requests oral argument in this cause. Appellee believes that the Court's decision in this matter may have a significant impact on the scope and finality of the confirmation and administration of the plans of thousands of Chapter 13 bankruptcy cases pending in this circuit.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

MARK T. BROWN AND TEMPLETON	§	
MORTGAGE CORPORATION,	§	
Appellants,	§	
	§	Civil No. 4-08-CV-578-A
VS.	§	(Bankruptcy Appeal)
	§	
VANCE COLE CHESNUT,	§	
Appellee.	§	

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**BRIEF OF APPELLEE VANCE COLE CHESNUT**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

COMES NOW Vance Cole Chesnut, Appellee, and respectfully submits this Brief of Appellee Vance Cole Chesnut.

**STATEMENT OF JURISDICTION**

Jurisdiction is proper in this Court pursuant to 28 U.S.C. §158.

**STATEMENT OF ISSUES**

Issue No. 1: Whether the Bankruptcy Court erred in holding that the Doctrine of *Res Judicata* barred Appellants from arguing that their liens should not be released or that the property is not property of the bankruptcy estate.

Issue No. 2: Whether the Bankruptcy Court erred in ordering the release of Appellants' liens on the property.

Issue No. 3: Whether the Bankruptcy Court erred in not conducting an additional trial of the original adversary proceeding after the decision of the Fifth Circuit Court of Appeals.

### **STANDARD OF APPELLATE REVIEW**

On appeal, the decision of the Bankruptcy Court with respect to findings of fact can be reversed only if this Court determines that they are clearly erroneous; however, the Bankruptcy Court's conclusions of law are subject to *de novo* review. *Matter of Sadkin*, 36 F.3d 473, 475 (5th Cir.1994), *rehearing denied*; *Haber Oil Co. v. Swinehart* (In re Haber Oil Co.), 12 F.3d 426, 434 (5th Cir.1994); *Matter of Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1252 (5th Cir.1986); Fed. R. Bankr. P. 8013. Thus, the lower courts' findings of fact are reviewed for clear error, conclusions of law are reviewed *de novo* and matters left to the lower courts' discretion are reviewed for abuse. *In re Cueva*, 200 Fed. Appx. 334, 335 (5th Cir.2006).

Regarding mixed questions of law and fact, factual premises being subject to review on clearly erroneous standard, and legal conclusions being subject to *de novo* review. *Matter of T-H New Orleans Ltd. Partnership*, 116 F.3d 790, 800 (5<sup>th</sup> Cir. 1997).

## **STATEMENT OF THE CASE**

### *Nature of the case*

This is an appeal of the order entered in the Chapter 13 Bankruptcy Case, *In re Chesnut* (case no. 03-41050), requiring Mark T. Brown and Templeton Mortgage Corporation comply with the terms of the Debtor's confirmed Chapter 13 Plan by releasing their liens on the subject property after the Debtor fully performed under the plan and fully paid their claim.

### *Course of proceedings*

On January 31, 2003, Vance Cole Chesnut filed his voluntary Chapter 13 bankruptcy petition. [Resp. Ex. 5, p. 2<sup>1</sup>] Appellee's Final Chapter 13 Plan was confirmed and the value of Templeton's claim was established by order of the Court on December 8, 2004. [Vol. 2, p. 66] On April 22, 2008, Appellee filed his Motion to Enforce Confirmed Plan and Order Confirming Plan. [Vol. 2, p. 68] On July 29, 2008, the United States Bankruptcy Court (J. Lynn) entered its Memorandum of Opinion. [R. 15] On August 12, 2008, Appellants filed notice of appeal. [R. 1] On January 6, 2009, the District Court entered its Memorandum Opinion and Order

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<sup>1</sup>The record in this matter consists of three sequentially marked volumes and two additional volumes containing exhibits introduced at trial. Each volume has its own pagination, however. Therefore, Appellee will refer to the record by volume, exhibit number and page number as applicable. A portion of the District Court record appears not have not been included in this Court's record. Those documents will be referred to as they were in the district court "R.\*".

affirming the bankruptcy court as corrected by subsequent order on January 16, 2009.

[USCA 131-156]

Disposition in the court below

On May 12, 2008, the Court conducted an evidentiary hearing on the merits of Appellee's Motion to Enforce Confirmed Plan and Order Confirming Plan. [R. 107]

On July 29, 2008, the United States Bankruptcy Court (J. Lynn) entered its Memorandum of Opinion. [R. 15] On August 12, 2008, Appellants filed notice of appeal. [R. 1] On January 6, 2009, the District Court entered its Memorandum Opinion and Order affirming the bankruptcy court as corrected by subsequent order on January 16, 2009. [USCA 131-156]

**STATEMENT OF FACTS**

Appellee filed for relief under Chapter 13 of the Bankruptcy Code on January 31, 2003. [Resp. Ex. 5, p. 2] On March 7, 2003, Appellee served his Original Chapter 13 Plan [Vol. 3, p.155] alleging that Templeton Mortgage Corporation<sup>2</sup> was a creditor holding a secured claim [Vol. 3, p.153] and that Appellee was intending to require that Appellant must release its lien upon full payment of its allowed secured claim in the case. [Vol. 3, p.154] On March 10, 2003, Appellee filed his Schedule A claiming a

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<sup>2</sup>Hereinafter, Appellants will be referred to collectively as "Appellants"; Templeton Mortgage Corporation will be referred to individually as "TMC"; and Mark T. Brown will be referred to individually as "Brown".

Community Interest in the real property located at 400 East I-20, Ranger, Texas (hereinafter referred to as “the property”). [Vol. 3, p.157] On March 10, 2003, Appellee filed his Schedule C claiming the property as exempt. [Vol. 3, p. 158] On March 10, 2003, Appellee filed his Schedule D alleging that Appellant was a creditor holding a secured claim. [Vol. 3, p.159] On March 10, 2003, Appellee filed his Original Chapter 13 Plan alleging that Appellant was a creditor holding a secured claim [Vol. 3, p.153] and that Appellee was intending to require that Appellant must release its lien upon full payment of its allowed secured claim in the case. [Vol. 3, p.154]

On July 17, 2003, Appellee filed a claim on behalf of Appellant in the amount of \$22,000.00. [Debtor’s Exhibit A] The Appellee was not personally obligated on the note held by Appellant which was signed only by the Appellee’s spouse. [R. 97, Appellant’s Exhibit A, Sub-Exhibit 7, p.5; R. 50] Templeton received actual notice of the filing of this claim and its contents. [Vol. 2, p. 118] Appellant did nothing to protect its interests or object to this claim despite this notice. [Vol. 2, p. 118]

In August 2003, Appellee filed an adversary proceeding related to this bankruptcy case against Brown and Templeton Mortgage asserting that they willfully violated the automatic stay provisions of 11 U.S.C. § 362 which was vigorously defended by Appellants. [Vol. 2, p.38-61 and see *In re Chesnut*, 422 F.3d 298, 300-

301 (5<sup>th</sup> Cir.2005).] On August 28, 2003, Brown participated in the bankruptcy case by filing a motion seeking relief from the co-debtor stay (11 U.S.C. §1301). [Vol. 3, p. 162] Brown's motion alleged grounds indicating that he not only understood the terms and effect of Appellee's plan, but also understood and capitulated to the claim filed on behalf of TMC. [Vol. 3, p. 162]

On March 3, 2004, Appellee filed his Final Chapter 13 Plan and Motion for Valuation which contained provisions fully providing for Appellant's claim and clearly requiring the release of liens upon full payment of secured claims by two separate, specific provisions. [Vol. 2, p. 62, 63] On March 10, 2004, Appellant received actual notice of the filing of the Final Chapter 13 Plan and Motion for Valuation, its contents, and notice of the hearing thereon. [Vol. 3, p. 178-181] Appellant did nothing to protect its interests or object to this Final Chapter 13 Plan and Motion for Valuation despite this notice. Appellee's Final Chapter 13 Plan was confirmed and the value of Appellant's claim was established by order of the Court on December 8, 2004. [Vol. 2, p. 66] Appellant did not appeal that order. Appellee has completed the payments required under his plan and the Standing Chapter 13 Trustee has paid Appellant's claim in full. [Vol. 2, p. 114] Appellee made demand for a release of Appellant's lien; however, Appellant have refused to execute a release of the lien despite the clear terms of Appellee's confirmed plan.

## ARGUMENT AND AUTHORITIES

**Issue No. 1: Whether the Bankruptcy Court erred in holding that the Doctrine of *Res Judicata* barred Appellants from arguing that their liens should not be released or that the property is not property of the bankruptcy estate.**

Appellants raised the issue of jurisdiction for the first time in their brief on appeal to the District Court. While Appellants' brief addresses this issue separately, Appellee avers that the jurisdictional questions raised are inexorably intertwined with the *Res Judicata* arguments. Appellants correctly cite 28 U.S.C. § 1334 as the source of the Bankruptcy Court's jurisdiction, but they mistakenly discuss such jurisdiction in terms of whether the property was property of the estate or whether Appellants were creditors. In fact, 28 U.S.C. § 1334(a) provides the district courts with "original and exclusive jurisdiction of all *cases* under title 11." (Emphasis supplied) 28 U.S.C. § 1334(b) likewise confers jurisdiction of "all civil *proceedings* arising under title 11 or arising in or related to cases under title 11." (Emphasis supplied) The district courts, pursuant to 28 U.S.C. § 157(a), have provided that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges by issuing general order of reference, automatically referring bankruptcy cases to the bankruptcy judges.

The Fifth Circuit has previously determined that § 1334(b) provides the district

courts (and, by extension, the bankruptcy courts) with three distinct categories of jurisdiction over proceedings: (1) “arising under” the Bankruptcy Code, (2) “arising in” bankruptcy cases, or (3) “related to” bankruptcy cases. *Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir.1987); *In re Wilborn*, 401 B.R. 872, 878 (Bkrcty. S.D. Tex. 2009); *In re Rodriguez*, 396 B.R. 436, 448 (Bkrcty. S.D. Tex. 2008); *In re Brook Mays Music Company*, 363 B.R. 801, 807-808 (Bkrcty. N.D. Tex. 2007). The Fifth Circuit has also articulated the differences between each of § 1334(b)'s three jurisdictional categories: Proceedings “arise under” the Bankruptcy Code where they “invoke a substantive right provided by title 11.” *In re Wood* at 97; *In re Wilborn*, 401 B.R. at 878; *In re Rodriguez*, 396 B.R. at 449; *In re Brook Mays Music Company*, 363 at 807-808. Proceedings “arise in” bankruptcy cases where they “could only arise in the context of a bankruptcy case.” *In re Wood* at 97; *In re Wilborn* at 878; *In re Rodriguez*, at 449; *In re Brook Mays Music Company*, 363 at 807-808. And proceedings are “related to” bankruptcy cases where “the outcome of [the] proceeding could *conceivably* have any effect on the estate being administered in bankruptcy.” *In re Wood* at 93 (emphasis in original); *In re Wilborn* at 878; *In re Rodriguez*, at 448; *In re Brook Mays Music Company*, 363 at 807-808.

Appellants assertion that the bankruptcy court did not have jurisdiction over the property in question on account of their belief that it was not property of the estate

because it may have constituted the community property of the debtor under the sole management of his spouse is not consistent with 28 U.S.C. § 1334(e)(1) which confers jurisdiction “of all property, wherever located, *of the debtor* as of the commencement of the case, *and* of property *of the estate*; ...” (Emphasis supplied)

A further distinction that needs to be made is that this present appeal is not an appeal of the confirmation order, but rather, it is an appeal of an order enforcing the confirmation order. Jurisdictional issues do not live indefinitely; even subject-matter jurisdiction, however, may not be attacked collaterally. *Kontrick v. Ryan*, 540 U.S. 443, 456, 124 S.Ct. 906, 916, 157 L.Ed.2d 867 (2004)[n.9]; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U.S. 552, 8 S.Ct. 217, 31 L.Ed. 202 (1887).

There is no question that the Bankruptcy Court had jurisdiction over this Chapter 13 case and accordingly over issues involving whether a particular item of property was property of the estate, and confirmation of a plan and the effect of the confirmed plan. Furthermore, in the instant case Appellant participated, and at times vigorously, in the case. Appellants complain about being dragged into the case, but they *were* in it and involved. Likewise, the bankruptcy court has subject matter jurisdiction over actions to enforce its own confirmation order. *In re National Gypsum*, 118 F.3d 1056, 1062-1063 (5th Cir.1997); *In re Rodriguez*, 396 B.R. 436, 448 (Bkrtcy. S.D. Tex. 2008).

It is well settled that an issue that could have or should have been raised in connection with the confirmation of a plan is *res judicata* by virtue of a confirmation order. *In re Dorsey*, 505 F.3d 395, 398-399 (5<sup>th</sup> Cir. 2007); *In re Layo*, 460 F.3d 289, 293 (2d Cir.2006); *In re Szostek*, 886 F.2d 1405, 1408 (3d Cir.1989); *In re Braune*, 385 B.R. 167 (Bkrcty. N.D. Tex. 2008); *See Eubanks v. FDIC*, 977 F.2d 166, 173 (5th Cir.1992); *In re Howe*, 913 F.2d 1138, 1143 (5th Cir.1990) (“The law in this circuit is well settled that a plan is binding upon all parties once it is confirmed and all questions that could have been raised pertaining to such plan are *res judicata*.”); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir.1987). Although these cases are chapter 11 cases, the doctrine of *res judicata* applies equally with respect to orders confirming chapter 13 plans. *In re Braune*, 385 B.R. 167 (Bkrcty. N.D. Tex. 2008); and *See In re Chappell*, 984 F.2d 775, 781 (7th Cir.1993) (citing *In re Gregory*, 705 F.2d 1118, 1121 (9th Cir.1983)); *In re Rincon*, 133 B.R. 594, 596 (Bankr.N.D.Tex.1991); *In re Euler*, 251 B.R. 740, 746 (Bankr.M.D.Fla.2000).

A bankruptcy confirmation order is entitled to the effect of *res judicata* where the well-settled elements necessary to its application are present: (1) the parties must be identical in both actions; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must have been a final judgment on the merits; and (4) the same cause of action must be involved. *In re Colon*, 376 B.R. 33, 37 (10th Cir.

BAP 2007); *In re Talbot*, 124 F.3d 1201, 1209 (10th Cir.1997); *In re Linkous*, 990 F.2d 160, 162 (4th Cir. 1993); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1051 (5th Cir. 1987); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984); *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 559 (5th Cir. 1983). In the instant case, both the Debtor and Appellant were involved in the valuation and confirmation actions and the filing of the claim; the Bankruptcy Court had and has jurisdiction over all of these matters; the order confirming the Debtor's plan and valuing collateral was a final judgment on the merits; and the same claim is involved in all these matters. Therefore, Appellant is estopped from collaterally attacking the order confirming the Appellee's plan and valuing collateral. *Matter of Pence*, 905 F.2d 1107, 1110 (7th Cir. 1990).

The facts that form the basis for the Appellant's present challenges were available to it, and it had clear opportunities to object to the validity of the claim, its secured status and the lien as listed in the confirmed Chapter 13 plan when the Debtor filed the claim and when the Debtor included that claim in his final Chapter 13 plan. Therefore, Appellant had both a motive and opportunity to confirm the status of the claim and real estate liens affecting the debtor's estate at or before the time that the plan was confirmed; the confirmation proceedings and any subsequent adversary proceedings to challenge the claim and real estate liens are thus considered identical

for purposes of *res judicata* analysis. *In re Layo*, 460 F.3d 289, 293 (2d Cir.2006).

Appellants preface every issue in this appeal with the assumption that a determination characterizing the property as property of the estate has not been made. That assumption is incorrect. A Chapter 13 plan confirmation order is *res judicata* as to the matters necessarily determined by the confirmation order. *In re Colon*, 376 B.R. 33, 37 (10th Cir. BAP 2007). Appellee's schedules clearly identified his claim in the property and Appellant's lien thereon. Appellee elected to exempt the property. The only property capable of being "exempted" is property of the estate. 11 U.S.C. §522<sup>3</sup>. Appellee's Schedules, Original Plan, Amended Plan and Final Plan very clearly identified the property interest of Appellee, identified TMC as a creditor and its claim, and identified Appellee's intent to require that the lien be released upon full payment of the claim. Appellants could have objected to the plan. They chose not to.

In this case, the appellee was not personally obligated on the note; therefore, the only justification for the Appellee filing a claim on behalf of Appellants was due to its lien against property in which the Appellee claimed an ownership interest. See, *Johnson v. Home State Bank*, 501 U.S. 78; 111 S. Ct. 2150; 115 L. Ed. 2d 66 (1991). Therefore, the Bankruptcy Court implicitly found that Appellant was a creditor by

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<sup>3</sup>11 U.S.C. §522 (b)(1) in pertinent part provides: "Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate ..."

confirming the plan; and Bankruptcy Court implicitly found that the property was property of the estate by confirming the plan and valuing the collateral pursuant to 11 U.S.C. §506. Furthermore, exactly what constitutes a “creditor” is a matter broadly defined by the code as a entity that has a claim against the debtor, a claim against the estate, or a community claim. 11 U.S.C. §101(10). Because Appellants had a lien against the debtor’s property, at the very least they had a claim against his property even though there was no personal liability. *Johnson v. Home State Bank*, 501 U.S. 78; *111 S. Ct. 2150*; *115 L. Ed. 2d 66* (1991). Therefore, Appellants are creditors in the case.

Another key factor here is that, pursuant to Bankruptcy Rule 3012, Appellee filed a motion for valuation pursuant to 11 U.S.C. §506(a) simultaneously with the Final Plan. [R. 65] Rule 3012 specifies that “[t]he 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 ... [emphasis supplied].” Likewise, 11 U.S.C. §506(a) deals with the valuation of claims of creditors secured by a lien on property in which the estate has an interest, ... [emphasis supplied].”

As the Fifth Circuit stated in *In re Howe*, 913 F.2d 1138, 1146 n. 28 (5th Cir.1990), the “critical question for *res judicata* purposes is whether the party could or should have asserted the claim in the earlier proceeding *In re Layo*, 460 F.3d 289,

292 (2d Cir.2006) (involving the asserted invalidity of the mortgage lien listed in the confirmed Chapter 13 plan). Appellants' dispute in complying with the plan provisions are in reality an objection to the confirmation of the Debtor's plan and motion for valuation; however, since that plan has been confirmed, its terms are binding on Appellant. *In re Rincon*, 133 B.R. 594, 598 (Bkrctcy. N.D. Tex. 1991). Appellants could have objected to the claim filed on their behalf. It has been said that the filing of a proof of claim is tantamount to the filing of a complaint in a civil action and the formal objection to the claim, the answer. *In re Simmons*, 765 F.2d 547, 552 (5<sup>th</sup> Cir. 1985). Appellants chose not to answer.

The argument advanced by Appellant is an end run around its failure to object to confirmation of the Plan and its failure to timely appeal the order confirming the Plan. *In re Colon*, 376 B.R. 33, 37 (10th Cir. BAP 2007). Failure to timely object has been found to constitute a deemed acceptance of the plan for purposes of confirmation. *In re Averhart*, 372 B.R. 441, 444 (Bkrctcy. E.D.Wis. 2007). Appellant is a sophisticated creditor. It either knew or should have known that it had a duty to object to any plan containing terms detrimental to its position. In fact, Appellant's failure to object was a calculated, if ill-advised, strategy based on a District Court opinion that lacked finality. A secured creditor cannot ignore proceedings which affect its rights; it is perfectly reasonable to expect that interested creditors review the

terms of a proposed plan and object if they find that those proposed terms are unacceptable, vague, or ambiguous. *In re Averhart*, 372 B.R. 441, 444 (Bkrctcy. E.D.Wis. 2007).

Appellants nonetheless assert that it has the right to rely upon its lien, not participate in the bankruptcy proceedings, and is not bound by the provisions of the Debtor confirmed plan. Although not specifically citing authority for that proposition, Appellants relied upon *Matter of Howard*, 972 F.2d 639 (5th Cir. 1992) in the court below. In *Matter of Howard*, the Debtor's plan sought to reduce the secured claim of a creditor, but did not provide adequate notice to the creditor of the terms of the plan and did not file an objection to the claim of the creditor. *Matter of Howard* is a case originating from the Eastern District of Louisiana. The Fifth Circuit did not provide in its opinion the complete text of the plan, but seems to suggest that no valuation pursuant to 11 U.S.C. §506 (a) took place in connection with the confirmation of the plan. *Matter of Howard*, 972 F.2d at 640. The Court held that a debtor who wishes to challenge the amount of a secured claim by disputing the amount or validity of the lien must file an objection to the creditors' claim in order to put the creditor on notice that it must participate in the bankruptcy proceedings. *Id.* at 642. The Fifth Circuit reasoned that "this right to stay outside the bankruptcy process **by relying solely on the value of one's lien** would be meaningless, however, if the creditor's claim can be

compromised away without further notice and he is bound by that compromise. [emphasis supplied]" *Id.* at 641.

The instant case is distinguishable from *Matter of Howard*. Here the Debtor, through the Chapter 13 Trustee and Clerk of Court, served a copy the Claim filed on Appellants' behalf, plan and a motion for valuation on Appellant. The claim, plan and motion for valuation were accompanied by proper notices regarding the date, time and location of the hearings thereon and the need for Appellant to properly and timely object to the plan and valuation, and the effect of failing to do so. In this case, the Debtor provided for the payment of Appellant's entire claim through the plan. The Debtor detrimentally relied on the accuracy of the Proof of Claim filed on behalf of Appellant and its failure to amend that claim or dispute the claim by changing the provisions of the plan to accommodate the claim as filed and, in so doing, materially altered his position with respect to the claim.

In addition, a motion for valuation was served on Appellant, and it agreed to the value of the collateral, and thereby the claim, by failing to object to the motion for valuation. Therefore, Appellant is also bound by the doctrine of accord and satisfaction. *In re Calder*, 171 B.R. 36 (Bkrtcy. N.D. Tex. 1994). In *Calder* the Honorable Robert C. McGuire held that the doctrine of accord and satisfaction and the filing of a motion for valuation made *Matter of Howard* inapplicable. *In re Calder*,

171 B.R. at 38.

### 11 U.S.C. §1327(a)

The 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. 11 U.S.C. §1327(a). Section 1327(a) generally codifies the doctrine of *res judicata* with respect to confirmed Chapter 13 plans. *In re Dorsey*, 505 F.3d 395, 398-399 (5<sup>th</sup> Cir. 2007); *In re Gellington*, 363 B.R. 497, 502 (Bkrtcy. N.D. Tex. 2007); *Hutchinson v. Delaware Savings Bank FSB*, 410 F. Supp. 2d 374, 378 (D.N.J.2006).

The order confirming a chapter 13 plan represents a binding determination of all the rights and liabilities of the parties as ordained by the plan. *In re Gellington*, 363 B.R. 497, 502 (Bkrtcy. N.D. Tex. 2007.); *In re Colon*, 376 B.R. 33, 37 (10th Cir. BAP 2007); *In re Layo*, 460 F.3d 289, 294 (2d Cir.2006); *In re Talbot*, 124 F.3d 1201, 1209 (10th Cir.1997). A confirmed Chapter 13 plan is a new and binding contract, sanctioned by the court, between the debtors and their pre-confirmation creditors. *In re Murphy*, 474 F.3d 143, 148 (4<sup>th</sup> Cir. 2007); *In re Padilla*, 379 B.R. 643, 663 (Bkrtcy. S.D. Tex. 2007); *Matter of Penrod*, 169 B.R. 910, 916 (Bankr.N.D.Ind.1994).

Absent timely appeal, the confirmed plan is *res judicata* and its terms are not subject to collateral attack, and creditors may not take actions that are inconsistent

with the method of payment provided for in the plan. *In re Gellington*, 363 B.R. 497, 502 (Bkrcty. N.D. Tex. 2007.); *In re Colon*, 376 B.R. 33, 37 (10th Cir. BAP 2007); *In re Talbot*, 124 F.3d 1201, 1209 (10th Cir.1997).

Since § 1327(a) prohibits any creditor from asserting any additional interest than those provided for in the plan after confirmation, § 1327(a) and the general doctrine of *res judicata* serve the same purpose; the confirmation order must provide finality so that all parties may rely on it without concern that later actions could result in a subsequent change or revocation of the order. *In re Gellington*, 363 B.R. 497, 502 (Bkrcty. N.D. Tex. 2007); *In re Layo*, 460 F.3d 289, 293 (2d Cir.2006). This is the objective of the confirmation process, to achieve finality. *In re Gellington*, 363 B.R. 497, 502 (Bkrcty. N.D. Tex. 2007). “ ‘Confirmation is the bright line in the life of a Chapter 13 case at which all the important rights of creditors and responsibilities of the debtor are defined and after which all rights and remedies must be determined with reference to the plan.’ ” *In re Sanders*, 243 B.R. 326, 331 (Bankr.N.D.Ohio 2000) (quoting Keith M. Lundin, CHAPTER 13 BANKRUPTCY, § 6.9, 6-4 and 6-5 (2d ed.1997)).

### **JUDICIAL ESTOPPEL**

Related to the doctrine of *Res Judicata*, the doctrine of judicial estoppel is used to “prevent a party from assuming inconsistent position in litigation”. *In re Superior*

*Crewboats, Inc.*, 374 F.3d 330, 334 (5th Cir.2004) (citing *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988)); *In re Padilla*, 379 B.R. 643, 669 (Bkrtcy. S.D. Tex. 2007). Judicial estoppel can be invoked if three elements are shown: “(1) the party is judicially estopped only if its position is clearly inconsistent with the previous one; (2) the court must have accepted the previous position; and (3) the non-disclosure must not have been inadvertent”. *In re Superior Crewboats, Inc.*, 374 F.3d at 335; *In re Padilla*, 379 B.R. at 669. As shown above, all three factors are present. Taking the position that there has not been a determination of whether the property is property of the estate or not is inherently inconsistent with the real and implied findings of the Bankruptcy Court in relation to Appellants’ claim, Appellants’ motion for relief, confirmation of Appellee’s final plan and motion for valuation. Appellant would also be judicially estopped from being able to take issue with the terms of the Debtor’s plan at this stage.

The Court having ruled that Appellant would be allowed a secured claim in the amount of \$22,000.00, on the terms that such would be paid, and conditions upon which the lien would be released has made such the Law of the Case, and therefore, the Court is prohibited from making any ruling that would be inconsistent with that previous ruling. To deny Debtor’s motion would be inconsistent with the Court’s order confirming the Debtor’s plan and valuing collateral.

## LACHES

The laches doctrine “prohibits a party from asserting a claim that has been unreasonably delayed until such time as other parties have acted, or circumstances have changed resulting in severe prejudice because of the delay”. *In re Fein*, 22 F.3d 631, 634 (5th Cir.1994) (citing *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 233 (5th Cir.1984)); *In re Padilla*, 379 B.R. 643, 669 (Bkrcty. S.D. Tex. 2007). Here, Appellant has waited to raise this issue until the Debtor has made all of his payments, and therefore, no modification of his plan is possible. 11 U.S.C. §1329. Appellant has accepted all of the benefits of the Debtor’s confirmed plan, but now at the last minute refuses to abide by its obligations.

**Issue No. 2: Whether the Bankruptcy Court erred in ordering the release of Appellants’ liens on the property.**

Based on the foregoing arguments, the Bankruptcy Court was correct to order the release of Appellants’ liens on the property. Because the Appellee was not personally liable to Appellants, Appellee filed a claim on behalf of Appellants seeking to establish a valuation of the claim. Appellee’s final plan and motion for valuation in fact established the value of the lien, and hence the value of the claim, as well as the conditions under which that lien would be extinguished. The plan and motion for valuation, therefore, were implemented ultimately by the Bankruptcy Court’s order

confirming the plan and valuing collateral. Despite the order of the court and the provisions of 11 U.S.C. §1327(a), Appellants have refused to comply with same. This blatant disregard for the prior order of the court justified the Bankruptcy Court in issuing the order to release the Appellants' liens on the property. 11 U.S.C. §105(a).

**Issue No. 3: Whether the Bankruptcy Court erred in not conducting an additional trial of the original adversary proceeding after the decision of the Fifth Circuit Court of Appeals.**

Appellant suggests that the Bankruptcy Court was required to use the prior adversary proceeding to litigate the issues involving the nature of Appellee's interest in the property, its characterization as property of the estate, and the future of Appellants' liens on the property. No such requirement exists. The adversary that was filed was initiated with a complaint. The complaint specified that its subject matter concerned only the issue of whether or not Appellants violated the automatic stay pursuant to 11 U.S.C. §362(a). That issue was tried to judgment and appealed, and is now final. The case file may have remained open administratively or to enforce the final judgment, but it cannot substantively or procedurally be a vehicle for the issues that Appellants want to relitigate.

First of all, Appellants fail to recognize that an adversary proceeding is not the exclusive means by which a secured creditor may be stripped of its liens in a

bankruptcy case. They mistakenly rely on *In re Kleibrink*, 2007 WL 2438359 (N.D. Tex.2007), which is currently on appeal and readily distinguishable from the instant case for the reasons cited herein. The Fifth Circuit line of cases including *Howard*, *Simmons* and *Shoaf*<sup>4</sup> and their progeny recognize at least three ways in which a secured creditor may be stripped of its liens in a bankruptcy case.

One such method would be through an objection to claim pursuant to 11 U.S.C. §506(d). *In re Simmons*, 765 F.2d at 558-559 (5<sup>th</sup> Cir. 1985). Here, the filing of the claim by a debtor invokes a similar set of notices and procedural safeguards as if the debtor had objected to a claim filed by a creditor.

Further, the Debtor had no reason to dispute the amount of the claim, having filed it himself, or the validity or extent of the lien other than its valuation pursuant to 11 U.S.C. §506. Therefore, no objection to Appellant's claim was required and no adversary proceeding was required. While Appellant may have the right to rely on the value of its lien, the entire value of that lien has been judicially determined and paid through the Debtor's confirmed Chapter 13 plan. See, *In re Session*, 128 B.R. 149 (Bkrcty. E.D. Tex. 1991).

Appellee filed a Proof of Claim showing that the claim was secured by a lien

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<sup>4</sup>*Matter of Howard*, 972 F.2d 639 (5th Cir. 1992); *In re Simmons*, 765 F.2d 547 (5<sup>th</sup> Cir. 1985); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987).

on property of the Debtor. That claim was allowed as filed pursuant to 11 U.S.C. §502 (a). Where an allowed claim of a creditor secured by a lien on property of the Debtor, that claim is a secured claim only to the extent of the value of the Debtor's interest in such property and is unsecured for any remainder if the value of the Debtor's interest is less than the amount of the allowed claim. 11 U.S.C. §506 (a); Bankruptcy Rule 3012. Again, no objection to the creditor's claim is required by §506 (a); in fact, §506 (a) assumes the existence of an "allowed claim". To require that an objection to the claim also be filed would completely eviscerate the terms of §506 (a) and Bankruptcy Rule 3012 which was exactly what the Fifth Circuit was trying to avoid in *Matter of Howard*.

In the alternative, the Court should consider that the Motion for Valuation, to the extent that it valued the collateral and limited the secured claim of Appellant to that value, would be in essence an "objection to claim" for the purposes expressed by the Fifth Circuit in *Matter of Howard*. Fed. R. Civ. P. 8(f). A motion pursuant to 11 U.S.C. §506 (a) and Bankruptcy Rule 3012 has been viewed as an action upon a claim. *In re Simmons*, 765 F.2d 547, 553 (5th Cir. 1985).

Therefore, a second method is to file a motion for valuation pursuant to 11 U.S.C. 506(a) and pay the resulting claim as valued in full through the plan. *Matter of Howard*, 972 F.2d 639, 642 (5th Cir. 1992); *See Matter of Pence*, 905 F.2d 1107

(7th Cir.1990).

The third method is to file an adversary proceeding pursuant to Bankruptcy Rule 7001 to litigate the issue. However, having demonstrated above that Appellee has pursued the first two courses of action, he did not need to pursue them all. Finally, Appellants seem to take the position that only the debtor is capable of filing the adversary proceeding. Such proceedings can be filed by any party in interest. Having ignored the claim filed on their behalf, having ignored the confirmation process, having ignored the motion for valuation, if Appellants wanted to resolve their issues by adversary proceeding, they should have filed one.

### **CONCLUSION**

The Appellants are bound by the terms of the chapter 13 plan and the Bankruptcy Court correctly enforced its provisions. Therefore, the ruling of the Bankruptcy Court must be affirmed on all points.

Respectfully submitted,

/s/ Jim Morrison

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### **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing Brief of Appellee Vance Cole Chesnut was served on each party listed below, by United States first class mail, postage prepaid, on May 29, 2009:

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**CERTIFICATE OF COMPLIANCE**

This is to certify that the above and foregoing brief complies with the type/volume limitations of Fed. R. App. P. 32(a)(7). The brief consists of no more than 36 pages, 789 lines of text and 7,216 words as determined by the properties function of Corel WordPerfect 11.

/s/ Jim Morrison \_\_\_\_\_  
JAMES M. (JIM) MORRISON