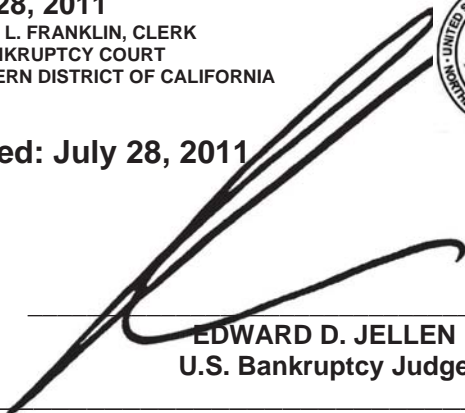




Signed: July 28, 2011

A large, handwritten signature in black ink, which appears to be "Edward D. Jellen", is written over a horizontal line. The signature is slanted upwards from left to right.

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 11-41332 EDJ
Chapter 13
AMIR E. SHENAS AND
AZADEH VAEZIZADEH,
Debtors.

DECISION: OBJECTION TO DEBTORS' ELIGIBILITY

Creditor Green Tree Servicing, LLC, servicer for GMAC Mortgage, LLC ("Green Tree") has filed an amended objection to confirmation of the chapter 13 plan proposed by Amir Shenan and Azadeh Vaezizadeh (the "Debtors") and an amended objection to the Debtors' motion to value its collateral. In each objection, Green Tree argues that the Debtors are ineligible to proceed under chapter 13 of the Bankruptcy Code because they exceed the \$360,475 unsecured debt limit of 11 U.S.C. § 109(e).¹ For the reasons hereinafter discussed, the court

¹ All future section references, unless otherwise noted, are to Title 11 of the United States Code (the "Bankruptcy Code").

Decision

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1 will issue its order overruling Green Tree's objection.

2 Green Tree holds a junior lien against the Debtors' primary
3 residence. See Schedule D, doc. no. 16. Subsequent to executing
4 the promissory note with Green Tree, Debtors filed a chapter 7
5 petition, case no. 09-71668 LJT, and received a discharge on March
6 16, 2010. On February 7, 2011, Debtors filed the current chapter 13
7 petition. The chapter 13 plan proposed by the Debtors provides for
8 the avoidance of Green Tree's lien because it is wholly unsecured.
9 Chapter 13 Plan, doc. no. 15; In re Zimmer 313 F. 3d 1220, 1226-27
10 (9th Cir. 2002).

11 In Scovis v. Henrichsen, the Ninth Circuit held that
12 eligibility for chapter 13 should be determined by the debtor's
13 originally filed schedules, and that the undersecured portion of a
14 secured debt is to be counted as unsecured debt for purposes of the
15 § 109(e) calculation.² Scovis v. Henrichsen, 249 F.3d 975, 982-84
16 (9th Cir. 2001). Debtors herein scheduled Green Tree's claim as
17 entirely unsecured, based upon the value of their primary residence
18 and the amount of the first priority lien against the residence.³
19 See Schedules A and D, doc. no. 16. As Green Tree applies the
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21 ² Section 109(e) provides, in part, "Only an individual with
22 regular income that owes, on the date of the filing of the
23 petition, noncontingent, liquidated, unsecured debts of less than
24 \$360,475 . . . may be a debtor under chapter 13 of this title."

25 ³ Green Tree does not dispute that the amount of the first
26 lien against the Debtor's residence exceeds its value. According
to the Debtors' schedules, their residence is valued at \$967,500,
and Bank of America holds a first priority lien of \$1,264,327.41.

1 Scovis holding, its \$392,927 claim should be characterized as
2 unsecured, rendering Debtors ineligible for relief under chapter 13.

3 The court disagrees. The debtors received a chapter 7
4 discharge before they filed the current chapter 13 case. That
5 discharge operated to render their debt to Green Tree unenforceable
6 as a personal liability of the Debtors. Section 524(a). Being
7 unenforceable as a personal liability, the debt is not allowable as
8 an unsecured claim in this case. Sections 502(b) and 506(a). It
9 follows that the Debtors do not owe any unsecured debt to Green Tree
10 for purposes of the unsecured debt limitation of § 109(e).

11 Cavaliere v. Sapir, 208 B.R. 784, 787 (D. Conn. 1997) (holding that
12 a secured claim discharged in a prior chapter 7 case, and
13 unenforceable under § 502(b)(1) in the current chapter 13 case,
14 should not be included in the § 109(e) eligibility calculation); In
15 re Osborne, 323 B.R. 489 (Bankr. D. Or. 2005)(holding similarly in
16 the context of a chapter 12 petition).

17 Quintana v. IRS, 915 F.2d 513 (9th Cir. 1990), is not to the
18 contrary. In that case, the Ninth Circuit held that the entire
19 amount of a creditor's claim must be included in the eligibility
20 determination, despite the creditor's waiver of a deficiency
21 judgment in an upcoming foreclosure action, and the potential for
22 offset by damages alleged by the debtor. Id. at 517. However,
23 Quintana is readily distinguished from the present case because the
24 chapter 7 discharge that rendered the Green Tree claim unenforceable
25 as a personal liability against the Debtors was entirely consummated
26 prior to the filing of the petition herein. See In re Osborne, 323

1 B.R. at 492.

2 At the July 21, 2011 hearing, counsel for Green Tree argued
3 that because the Debtors have not yet filed their motion to avoid
4 its lien through their chapter 13 plan, Green Tree held an extant
5 lien on the petition date, and its lien must be included in the
6 § 109(e) calculation under Scovis. The court is not persuaded.
7 Bankruptcy Code § 502(b)(1) provides that a claim shall not be
8 allowed if it is unenforceable "under any agreement or applicable
9 law". The legal bases for avoiding a wholly unsecured lien against
10 real property are well-established. Green Tree does not have an
11 enforceable claim in this case, and did not have one at the petition
12 date. See, e.g., Scovis, 249 F.3d at 983 ("a claim secured only by
13 a lien which is avoidable by a declared exemption is unsecured for
14 § 109(e) eligibility purposes.").

15 The court holds that the \$392,927 claim asserted by Green Tree
16 is not properly included in the unsecured debt calculation for
17 purposes of § 109(e) eligibility because it is not enforceable
18 against the debtors. See Cavaliere v. Sapir, 208 B.R. at 787.

19 The objection to eligibility raised by Green Tree is therefore
20 OVERRULED. The court will issue its order accordingly.

21 **END OF DECISION**
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COURT SERVICE LIST

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