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If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

Attorney for the Debtor

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF CALIFORNIA

In re
JOHN JONES,
Debtor.

MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO AVOID
LIEN OF SWIFT COLLECTION
AGENCY, INC.

Chapter 7
Case No. 001

Date:
Time:
Room:

Debtor John Jones’ motion is based on the fact that Swift Collection Agency’s lien impairs the debtor’s homestead exemption and may therefore be avoided under Bankruptcy Code § 522(f). Claiming lack of notice, Swift seeks to have the property’s value determined as of the date of the filing of the amended petition, and seeks to deny the debtor the full amount of the homestead exemption. The proper date for determining the property’s value is the date of the filing of the original petition. Swift raises no new facts to support any claimed prejudice that would add to those already deemed insufficient to deny debtor the reopening of this case to avoid the lien. Accordingly, the motion should be granted and Swift’s lien avoided in its entirety.

1 **FACTS**

2 Debtor John Jones filed bankruptcy under Chapter 7 of the Bankruptcy Code on
3 April 27, 2010. Declaration of Joan Green ¶ 2. Swift’s attorney was inadvertently listed
4 in lieu of Swift itself in the original petition. *Id.*, ¶ 3. Debtor claimed a homestead
5 exemption of \$8,885 in the schedules filed with the petition. *Id.*, ¶ 4, Ex. A. An amended
6 schedule was filed on Debtor’s behalf on July 31, 2010, in which the homestead
7 exemption was corrected to exempt the equity in his house in the amount of \$37,000. *Id.*,
8 ¶ 5, Ex. B. This amount of equity was determined by subtracting the total amount of liens
9 from the market value of the house. When the original petition was filed, Debtor claimed
10 a market value of \$215,000. Declaration of John Jones In Support of Motion to Avoid
11 Lien ¶ 2. A discharge was granted to Debtor on August 8, 2010. Green Decl. ¶ 6, Ex. C.

12 Debtor moved to reopen the bankruptcy case by motion filed in March 2012 (*id.*,
13 ¶ 7) after he discovered that Swift’s lien had not been avoided (*id.*, ¶ 8). It appeared that
14 Swift may not have been served with the Amended Petition, which increased the amount
15 of the claimed homestead exemption. *Id.*, ¶ 9. The Motion to Reopen was granted by this
16 Court on May 5, 2012. *Id.*, § 10. The instant motion to avoid Swift’s lien was then filed.

17
18 **ARGUMENT**

19 **1. Swift’s lien impairs Debtor’s homestead exemption and should be**
20 **avoided.**

21 Debtor seeks to avoid the lien against his residence under 11 U.S.C. § 522(f),
22 which provides that a “debtor may avoid the fixing of a lien on an interest of the debtor in
23 property to the extent that such lien impairs an exemption to which the debtor would have
24 been entitled under subsection (b) of this section, if such lien is- (A) a judicial lien. . . .”

25 Debtor claimed an exemption as to the equity in his residence under applicable California
26 law, Code of Civil Procedure § 704.730(a)(2), which provides for a homestead exemption
27 of \$75,000. Swift’s judicial lien in the amount of \$18,100 may be avoided to the extent
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1 that it impairs Debtor’s homestead exemption, in this case in its entirety.

2 The Bankruptcy Appellate Panel of the Ninth Circuit recently noted that:

3 Section 522(f)(2) provides a formula for calculating the extent to which a lien
4 impairs an exemption: add the lien, all other liens on the property, and the
5 “amount of the exemption that the debtor could claim if there were no liens
6 on the property,” and then subtract from that amount the value of the debtor’s
7 property in the absence of any liens.

8 *In re Pike*, 243 B.R. 66, 71 (Bankr. 9th Cir. 1999).

9 Applying the formula contained in § 522 to the facts of this case, Swift’s lien—\$18,000—
10 is added to the mortgage of World Mortgage—\$176,000—and then added to the
11 homestead exemption—\$75,000. The sum of these figures is \$269,000. The property’s
12 market value when the petition was filed—\$215,000—is then subtracted from that figure.
13 This leaves an impairment in the amount of \$54,000. Since Swift’s lien is less than that
14 figure, it may be avoided in its entirety.

15
16 **2. Debtor is entitled to the full homestead exemption.**

17 Swift contends that Debtor should not be allowed to take advantage of the
18 homestead exemption as contained in the amended schedules because of the delay in
19 asserting it. Swift argues that Debtor should be limited to the \$8,885 he claimed in the
20 original petition. Swift made this precise argument in opposition to the Motion to
21 Reopen, and this Court implicitly rejected it in its Order to Reopen. Swift’s claim of
22 prejudice is not supported by any additional facts, and should not be reconsidered now.
23 Swift has not even attempted to set forth the factors for the equitable defense of laches—
24 not surprising given that the delay in the assertion of the full homestead exemption was
25 less than two years. *See Hassler v. Assimos*, 53 B.R. 453, 455-458 (D.Del. 1985) (setting
26 forth elements of defense of laches, and holding that no prejudice shown where more than
27 two years had elapsed before motion to avoid lien was filed.) Indeed, the judgment

1 creditor bears the burden to establish both inexcusable delay and prejudice. *Id.* at 457.

2 Swift points to no prejudice from the delay.

3 Swift plainly has suffered no prejudice, since the primary complaint of a creditor
4 in its situation would be the inability to procure an appraisal of the property as of the
5 relevant time. Indeed, Swift has filed a “declaration” by Amy Black that purports to do
6 just that. But that document should not be considered competent evidence properly
7 before the Court because it has not been notarized nor was it sworn to under penalty of
8 perjury. Under Local Rule 11B of the Local Rules for the Western District of California,
9 any “[f]actual contentions made in support or opposition to any motion should be
10 supported by an affidavit or declaration. . . .” The declaration of Amy Black is neither
11 notarized nor sworn to under penalty of perjury, and thus does not qualify as a substitute
12 for an affidavit under 28 U.S.C. § 1746. *See Nissho-Iwai American Corp. v. Kline*, 845
13 F.2d 1300, 1306-1307 (5th Cir. 1988). Thus, it does not comply with the local rule and
14 should be disregarded.

15 Even if the Black Declaration were to be accepted as evidence, Swift’s lien must
16 still be avoided in its entirety. Black estimates the property’s value on April 27, 2010, the
17 date the petition was filed, as being \$250,000. Black Decl. ¶ 6. Applying the same
18 formula as above, the total of liens and exemptions—\$269,000—less the market value of
19 \$250,000 yields an impairment of \$19,000. Since this figure still exceeds Swift’s lien of
20 \$18,000, the lien impairs the exemption and can and should be avoided in its entirety.¹
21 The property’s value is determined as of the time the petition was filed.

22 Swift seeks to have the court use the property’s value when this motion was filed
23 instead of its value as of the filing date in the calculations under § 522(f). This argument,

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25 ¹Using the \$215,000 figure stated in his petition, Debtor only claimed \$37,000 in
26 the amended schedules as the “exempt amount.” It is plain that he was entitled to *up to*
27 \$75,000 for the exemption under California Code of Civil Procedure § 704.730, and
28 should be able to use the full amount if the property is revalued to take into account a
higher market value.

1 which is contrary to the Code’s “fresh start” policy, has been rejected. *See, e.g., In re*
2 *Herman*, 120 B.R. 127, 130 (Bankr. 9th Cir. 1990); *In re Dvoroznak*, 38 B.R. 178, 182
3 (Bankr. E.D.N.Y. 1984). *Dvoroznak*’s facts are strikingly similar to those herein. The
4 debtors moved to reopen their Chapter 7 bankruptcy case in order to avoid liens against
5 their homestead. The liens had been docketed before the bankruptcy, and the debtors’
6 motion to avoid them was filed fourteen months later. The motion to reopen was granted,
7 and the lienholders opposed the motion to avoid the lien. They argued “that the value of
8 the debtors’ homestead should be measured as of the return date of the motion,” and thus
9 claimed “the benefit of accretions in the equity subsequent to the date of the filing of the
10 petition.” *Id.* at 181. The court noted extensive authority on the subject in holding that
11 the proper date for the valuation of the property claimed to be exempt “is as of the filing
12 of the petition.” *Ibid.* The court found that “to allow creditors to defeat a motion under
13 § 522(f) by claiming the right to equity in exempt property accrued post-petition will
14 thwart a debtor in his ‘fresh start.’” *Ibid.* The liens were found to impair the homestead,
15 valued as of the date of the petition, and were avoided. *Ibid.*

16 Swift’s citation to *In re Hyman*, 967 F.2d 1316 (9th Cir. 1992) for the proposition
17 that post-petition appreciation “enures to the bankruptcy estate, not the debtor” is
18 misleading and does not apply in this context. Indeed, the quoted language is actually
19 from *In re Reed*, 940 F.2d 1317, 1323 (9th Cir. 1991), quoted in passing in *Hyman*.
20 *Hyman*, 967 F.2d at 1321. The *Reed* court noted in the same paragraph that “[n]o doubt
21 Debtor’s argument that appreciation enured to him would have merit if his entire interest
22 in the residence had been set aside or abandoned to him.” *Reed*, 940 F.2d at 1323. *Reed*
23 also cited to the district court opinion in *Hyman*, which makes it clear that the case was
24 considering only postpetition appreciation of assets with *nonexempt equity*. *Reed*, 940
25 F.2d at 1323; *see In re Hyman*, 123 B.R. 342, 346 (Bankr. 9th Cir. 1991).

26 In *Hyman*, the trustee had elected to sell the debtors’ real property. The
27 bankruptcy petition listed a value for the property that exceeded the sum of the liens and
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1 the homestead exemption. Thus, the forced sale was held to be proper under California
2 Code of Civil Procedure § 704.800(a). *Hyman*, 967 F.2d at 1320. The debtors in *Hyman*
3 argued that they were entitled to any appreciation in the real property in the time between
4 the filing of the petition and the forced sale. The Ninth Circuit opinion noted that the
5 argument was premature, as the sale had not yet taken place, but also that it was only in
6 bankruptcy that the delay would be an issue. *Id.* at 1321. Furthermore, the court noted
7 that the exemption comes into play “only if and when the trustee attempts to sell the
8 property.” *Ibid.*

9 This case does not involve an actual forced sale, where the proceeds would be
10 distributed among the creditors. In such a case, there would be no issue of protecting the
11 debtor’s fresh start, and it would not involve appreciation of nonexempt equity. Where,
12 as here, there is no nonexempt equity, and the debtor moves to avoid the liens against the
13 property, the homestead exemption removes the property from the bankruptcy estate and
14 the debtor can avail himself of any appreciation as part of his fresh start.

15 In contrast to *Hyman*, on a motion to avoid a judicial lien, “the filing of a
16 bankruptcy petition constitutes a hypothetical attempt by the trustee to levy on the
17 property.” *In re Mulch*, 182 B.R. 569, 574 (Bankr. N.D. Cal. 1995) (Grube, J.). Since
18 there would never be an actual sale of the property where a motion to avoid is successful,
19 using the petition’s date for the determination of the value is appropriate and consonant
20 with long-established case law. *See In re Finn*, 151 B.R. 25, 27 (Bankr. N.D.N.Y 1992).

21 The situation here is distinguishable from that in *In re Hanger*, 217 B.R. 592
22 (Bankr. 9th Cir. 1997), because there the bank’s total lien *exceeded* the amount of the
23 impairment by \$33,183. *Hanger* therefore held that only the amount impairing the
24 exemption could be avoided. This holding does not apply here because Swift’s lien is
25 *less* than the impairment as calculated, and can therefore be avoided in its entirety.
26 *Accord, In re Mulch, supra*, 182 B.R. at 569. Indeed, *Hanger* noted expressly that the
27 1994 amendments to § 522 adopted a formula that is “more favorable for debtors by
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1 *allowing them the full benefit of any post-avoidance appreciation in the value of the*
2 *property.” 217 B.R. at 596 (emphasis added).*

3 The real property should be valued as of April 27, 2010, the date of the filing of
4 the petition. Since the Black declaration is not competent evidence, that value should be
5 \$215,000 as claimed in the petition.

6
7 **CONCLUSION**

8 Swift’s lien impairs the exemption to which Debtor is entitled. Swift has shown
9 no prejudice, and the law is clear that the property must be valued as of the date of filing
10 of the petition. Since even under Swift’s own appraisal that value leaves Debtor’s
11 exemption impaired, the lien should be avoided in its entirety.

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13 Dated:

Respectfully submitted,

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16 **JOAN GREEN**
17 Attorney for Debtor JOHN JONES
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