

1 the ultimate burden of persuasion to demonstrate, by a preponderance
2 of the evidence, the value of the collateral which secures its claim.
3 In re Southmark Storage Associates Ltd. Partnership, 130 B.R. 9, 10
4 (Bankr. D. Conn. 1991).

5 Both parties' expert witnesses used the sales comparable method
6 to estimate the fair market value of the Property at the time of
7 Debtors' bankruptcy petition. The hearing on the matter lasted
8 roughly four hours wherein both experts and Debtors testified. The
9 Court considered all the evidence admitted at trial, including the
10 testimony of both experts. In addition, the Court prepared its own
11 statistical analysis based solely upon the appraisal reports
12 submitted by the two experts. (Attached as Exhibits A-J).²

13 Debtors' expert, Ordaz, analyzed four comparable properties that
14 were located between .14 and .80 miles from the Property. The
15 properties Ordaz included in Ordaz's report were all sold between
16 September 25, 2009, and January 13, 2010. Three of Ordaz's
17 properties were bank-owned properties and one was sold through
18 a short sale. Ordaz emphasized during his testimony that all of his
19 comparables had closed escrow at the time of Debtors' bankruptcy
20 petition. Based on these comparables, Ordaz concluded that the
21 Property had a fair market value of \$370,000 on the petition date.
22 The Court calculated the average sales price of Ordaz's four
23 comparable properties and found the average to be \$375,091.00.
24 (Exhibit C). Debtors' have presented evidence sufficient to overcome
25 the presumption of value within the Giffords claim.

27 ² The Court does not imply that the fair market value of any
28 property is purely a statistical calculation, but it recognizes
that such analysis can be instructive when confronted with
conflicting and multifaceted data.

1 Giffords' expert, Chtchetinin, analyzed three comparable
2 properties that were located .11 and .49 miles from the Property.
3 The properties Chtchetinin included in Chtchetinin's report were all
4 sold in December 2009. However, unlike Ordaz, none of Chtchetinin's
5 properties closed before Debtors' bankruptcy petition date. Two of
6 Chtchetinin's comparables were bank-owned properties and one was
7 a private sale. The private sale sold for the highest price.
8 Chtchetinin concluded that the fair market value of the Property was
9 likely \$395,000 on the petition date. The Court notes that the
10 average of Chtchetinin's comparables was also \$395,000. (Exhibit C).

11 The difference between the first lien holder's proof of claim
12 and both appraisers' estimates of fair market value is very narrow.
13 Debtors contend that the fair market value, based on the sales
14 comparison approach, was \$370,000; \$17,435.68 **below** the amount owed
15 to the first lien holder. The Giffords respond that the fair market
16 value was actually \$395,000; \$7,564.34 **above** the amount of the first
17 lien holder. The Court's statistical analysis of the combined data
18 presented by the experts proved to be even closer with an average of
19 all comparables of \$383,623.43, an average excluding the highest and
20 lowest comparables of \$383,100.80, and a median of \$387,000 leading
21 differences of \$3,812.20, \$4,334.83, and \$435.63, respectively.
22 (Exhibits A, B and F). The average of all comparables, the average
23 excluding the highest and lowest comparables, and the median are all
24 **below** the first lien holder's proof of claim. Moreover, the Court
25 found the average selling price of the three closest properties by
26 distance to be \$383,953.33 and the three properties with the sales
27 date closest to the petition date to be \$383,548.00 leading to
28 differences of \$3,482.30 and \$3,977.63, respectively. (Exhibits D

1 and E). Again, both of these averages are **below** the first lien
2 holder's proof of claim. Thus when the comparables are analyzed
3 statistically as a whole, the comparables generally indicate average
4 and median values below that of the first lien holder's proof of
5 claim. Based on the testimony at trial and this additional analysis,
6 the Court finds that the Giffords' expert's testimony insufficient to
7 persuade the Court that the preponderance of the evidence supports a
8 value above that of the first deed of trust holder. Rather, it
9 appears based on the fact four of the seven comparables are below the
10 value of the first lien holder's proof of claim and the averages and
11 medians of the data as a whole are below the first lien holder's
12 proof of claim, the preponderance of the evidence demonstrates that
13 the value of the Property was **below** the first lien holder's proof of
14 claim.

15 The Giffords rely on a decision of the Bankruptcy Court for the
16 Eastern District of California which expressed concerns regarding the
17 inclusion of bank-owned properties within appraisal reports for
18 determining the fair market value of property. See Serda, 395 B.R.
19 at 454. The Court in Serda noted the potential different motivations
20 for sale between private party sales and bank-owned sales, stating
21 that banks had the motivation to liquidate inventory quickly for low
22 prices whereas private parties had the motivation to wait for higher
23 prices. However, the Ninth Circuit in Taffi stated, "Valuation must
24 be accomplished within the actual situation presented." Taffi, 96
25 F.3d at 1192. Debtor's expert, Ordaz, testified that bank-owned
26 property sales and short sales were the predominant form of sale
27 within the area of the Property. Giffords' expert, Chtchetinin, also
28

1 included two bank-owned properties -- out of the three comparables he
2 used within his appraisal report.

3 Based on Ordaz's testimony that bank-owned property sales were
4 the predominant form of sale within the area and the fact that two
5 out of three of Chtchetinin's comparables were bank owned properties,
6 the Court finds there is sufficient evidence to conclude that bank-
7 owned property sales are relevant in determining the fair market
8 value of the Property at the time of Debtors' bankruptcy petition.
9 Allowing the sales prices of bank-owned properties to be considered
10 as comparables does not require any subjective determination of the
11 motivation of the parties. The advertised prices of bank-owned
12 properties would have been available to potential buyers and would
13 have shaped buyers' price expectations because bank-owned properties
14 are also competing against owner occupied properties within the real
15 estate market. The appraiser merely includes the bank-owned property
16 sales along with any other relevant properties in the appraiser's
17 value analysis. This is analogous to how bank-owned properties are
18 equally available on the real estate market for buyers. Because
19 bank-owned properties were the predominant form of transfer of real
20 estate within the area of the Property, willing buyers would have
21 considered these properties within buyers' purchase calculations.
22 Therefore, it is appropriate to include bank-owned properties in
23 determining the fair market value of the Property because these types
24 of properties were available on the market and were actively
25 competing against private sales in the real estate market.

26 Even though there is the potential argument that bank owners of
27 foreclosed property are under different motivations than private
28 party owners of owner occupied homes, there is no objective method to

1 determine the value of the potential difference of motivation. Ordaz
2 testified that it is not common appraisal practice to make
3 adjustments based on whether a home is owner-occupied or bank-owned
4 because of the impossibility of making an objective valuation of the
5 different motivations of the parties. A valuation of an adjustment
6 for the different motivations of the parties would require the
7 appraiser to devine the subjective intentions of the parties. Such
8 an adjustment is unworkable in appraisal practice and cannot be used
9 adjust value here. Moreover, two out of three of Chtchetinin's
10 comparables were also bank-owned properties indicating that
11 Chtchetinin believed bank-owned properties were highly relevant to
12 the valuation of the Property. Therefore, based on testimony that
13 bank-owned properties predominated in the subject real estate market
14 and that both appraisers included bank-owned properties in their
15 respective appraisal reports, the Court finds sufficient evidence to
16 conclude that willing buyers would have certainly considered bank-
17 owned properties in their purchase calculations and making objective
18 adjustments for differences in sellers' motivations is not practical
19 or even possible.

20 Debtors raised additional issues claiming that these issues
21 could have influenced the fair market value of the Property. The
22 expert appraisers differed on the appropriateness of using comparable
23 sales that did not close prior to the bankruptcy petition. As the
24 two experts disagreed, the Court frankly does not know whether it is
25 appropriate in the appraiser profession for Chtchetinin to rely on
26 these properties as comparables. However, for the purpose of this
27 decision only, with no precedential value intended, the Court will
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1 assume that the use of these properties as comparables is allowed in
2 the profession.

3 Neither party cited, and the Court did not find any law
4 expressly permitting or prohibiting such use and it appears that the
5 Serda decision may have used such sales. The Giffords' expert
6 testified that all of the sales used in his report did eventually
7 close for the prices stated in the appraisal report. Debtors argued
8 that Debtors would not have known that these homes were sold for
9 these prices at the time of the bankruptcy petition and thus would
10 not have known -- in deciding how to price Debtors' home for sale --
11 to consider those homes.

12 The Court's only objective is to determine the fair market value
13 of the Property at the time of the bankruptcy petition. The Court
14 agrees with Debtors that unclosed sales -- which Debtors and other
15 parties in the market for homes at the time would not have known --
16 are sales which could not have been used by Debtors to determine the
17 market price at the time of the bankruptcy petition. However, these
18 comparables are the only comparables used by the Giffords expert.
19 Because, even considering these comparables, this Court finds that
20 the fair market value of the Property at the time of Debtors'
21 bankruptcy petition was less than the amount of the senior secured
22 debt owed to US Bank, the Court will consider the unclosed
23 comparables, notwithstanding this Court's reservations.

24 Debtors testified regarding the condition and surroundings of
25 the subject property. Debtors testified to the appearance of mold,
26 a leaking sink in one of the home's bathrooms and that the water had
27 caused discoloration on the floor of the bathroom. Debtors also
28 testified the Property is located near a park and a school where the

1 for these factors. While the appearance of mold, leaks and water
2 discoloration are likely to have had a negative impact on the
3 potential selling price of the Property, the park and school may have
4 had positive impacts. Without additional evidence, any adjustment
5 based on these factors is speculative. The Court chooses to focus on
6 the comparables and the central tendency of the values found in the
7 appraisal reports.

8 Based on the evidence admitted at the hearing and the arguments
9 of counsel, the Court finds that the fair market value of the
10 Property at the time of Debtors' bankruptcy petition was less than
11 \$387,435.63, the amount of the senior secured debt owed to US Bank.

13 III.

14 CONCLUSION

15 For the foregoing reasons, Debtors' Motion to determine the
16 value and status of the Giffords Lien as wholly unsecured and void is
17 granted. The Court finds that the value of the Property was less
18 than the amount secured by the first deed of trust. Accordingly, the
19 Giffords' secured claim is wholly unsecured and is not entitled to
20 the protection of Bankruptcy Code section 1322(b)(2). Counsel for
21 Debtors shall prepare a proposed form of order, serve it on counsel
22 for the Giffords, and submit it to the Court.

23
24
25 Dated: 1/31/11

26 
27 ARTHUR S. WEISSBRODT
28 UNITED STATES BANKRUPTCY JUDGE

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