

1 explained below, the Court grants the IRS's motion to dismiss and
2 denies Plaintiff's motion for summary judgment.

3
4 **I. FACTS**

5 In this adversary proceeding, Debtor seeks a determination of
6 the extent of the IRS' interest in the proceeds of Debtor's real
7 property. Debtor's originally filed schedules listed the value of
8 his real property at 520 St. Claire Drive, Palo Alto, CA (the
9 "Property") as \$950,000 as of the petition date of December 6,
10 2011. Schedule D shows a first deed of trust in the amount of
11 \$980,190.24. Debtor also listed personal property worth \$10,000.

12 The IRS filed a proof of claim on January 4, 2012 in the total
13 amount of \$214,520.27, based on taxes due for the years 2003-2006.
14 The IRS listed \$10,000 as secured and \$204,520.27 as unsecured. The
15 IRS's valuation of its secured claim was based entirely on the
16 value of Debtor's personal property, because the schedules
17 indicated there was no equity in the Property to which the IRS's
18 lien attached. Attached to the proof of claim was a copy of a
19 federal tax lien that was recorded on August 13, 2009. The IRS has
20 been paid \$10,000 on its original secured claim.

21 Debtor's Second Amended Plan filed January 18, 2012 was
22 confirmed by order entered February 29, 2012. The plan lists the
23 IRS in paragraph 2(b) as a creditor with an allowed secured claim,
24 with collateral valued at \$10,000. The plan provides, with respect
25 to the allowed secured claims listed in paragraph 2(b):

26 The valuations shown above will be binding unless a
27 timely objection to confirmation is filed. Secured claims
28 will be allowed for the value of the collateral or the
amount of the claim, whichever is less, and will be paid
the adequate protection payments and the interest rates
shown above. If an interest rate is not specified, 7% per

1 annum will be paid. The remainder of the amount owing, if
2 any, will be allowed as a general unsecured claim paid
under the provisions of 2(d).

3 The Second Amended Plan provided that property of the estate
4 would re-vest in Debtor upon discharge or dismissal and did not
5 provide for the sale of the Property. On May 14, 2014, Debtor filed
6 a second amended motion to modify the plan, which the Court granted
7 on June 6, 2014. Among other things, the modified plan provided for
8 the Property to be sold within eight months from the date the
9 modification was approved, and for estate property to re-vest in
10 the Debtor upon confirmation. Shortly thereafter, Debtor filed a
11 motion to sell the Property for \$2,175,000, \$1,039,919.84 of which
12 was to be disbursed to Debtor. The IRS immediately amended its
13 proof of claim to provide that the entire amount of its claim was
14 secured. Debtor objected to the amended proof of claim. The parties
15 agreed to let the sale close, with proceeds to be distributed
16 pending further order of this court. Thereafter, Debtor filed this
17 adversary proceeding.

18 The IRS moves to dismiss the complaint on the grounds that as
19 a matter of law, the confirmation of the modified plan did not bind
20 the IRS to the value of its original claim because Debtor gave no
21 notice in the motion to modify that the sale was for a price
22 sufficient to satisfy the IRS's lien or that Debtor intended to
23 avoid the IRS's lien.

24 Debtor contends that the IRS is bound by the confirmation of
25 the Debtor's plan, which fixed the amount of the secured claim at
26 \$10,000.

1 drawn against the moving party. Adickes v. S.H. Kress & Co., 398
2 U.S. 144, 158-59 (1970); United States v. Diebold, Inc., 369 U.S.
3 654, 655 (1962). Where a rational trier of fact could not find for
4 the non-moving party based on the record as a whole, there is no
5 "genuine issue for trial." Matsushita Elec. Indus. Co., 475 U.S.
6 at 587.

8 IV. ANALYSIS

9 Although framed in different ways - one as a motion to dismiss
10 under Fed. R. Civ. P. 12(b)(6) and the other a motion for summary
11 judgment under Fed. R. Civ. P. 56, the parties' motions both
12 require this Court to determine, on undisputed facts, the legal
13 effect of the confirmed plan on the IRS's lien. As explained below,
14 confirmation of Debtor's plan did not modify the IRS's *in rem* lien
15 rights when no notice was given that the value of the Property had
16 substantially increased or that Debtor intended to avoid the
17 balance of the IRS's statutory lien. In re Brawders, 503 F.3d 856
18 (9th Cir. 2007); see also United Student Aid Funds, Inc. v.
19 Espinosa, 559 U.S. 260 (2010).

20 The issue here is whether, under the provisions of Debtor's
21 confirmed plan, the IRS is entitled to any of the proceeds of the
22 sale of Debtor's real property based on the federal tax lien
23 recorded August 13, 2009, when the IRS has already been paid the
24 full amount of its allowed secured claim as set forth in the
25 confirmed plan.

26 The Court finds that binding Ninth Circuit authority, as set
27 forth in Brawders, controls the outcome. In Brawders, the Ninth
28 Circuit BAP reversed and remanded the bankruptcy court's finding

1 that, upon plan confirmation, debtors' residence re-vested in them
2 free of any lien interest held by Ventura County on account of its
3 pre-petition claims, where the plan provided for the County's
4 secured claim but did not purport to affect the County's lien. In
5 re Brawders, 325 B.R. 405 (9th Cir. BAP 2005). The Ninth Circuit
6 Court of Appeals affirmed the BAP and adopted the BAP's opinion
7 and reasoning. Brawders, 503 F.3d at 859.

8 The BAP reasoned that although principles of *res judicata* and
9 finality can make even "illegal" provisions of a Chapter 13 plan
10 binding, this proposition is subject to "major limitations."

11 First, a debtor asserting *res judicata* "has the burden of
12 proof on all elements and bears the risk of non-persuasion." Id. at
13 867 (citation omitted).

14 Second, a plan must clearly state its intended effect; if it
15 fails to do so, the plan may not have *res judicata* effect. If the
16 plan provisions are ambiguous, any ambiguity is interpreted against
17 the debtor and may reflect that the court that originally confirmed
18 the plan did not make a final determination of the matter. Id.

19 Third, under principles of due process, the affected creditor
20 must have adequate notice that its interests are being impacted.
21 Id.

22 These limitations are especially important when secured claims
23 are involved because "liens ordinarily pass through bankruptcy
24 unaffected, regardless whether the creditor holding that lien
25 ignores the bankruptcy case, or files an unsecured claim when it
26 meant to file a secured claim, or files an untimely claim after the
27 bar date has passed." Id. at 867-68 (citing In re Bisch, 159 B.R.
28 546, 550 (9th Cir. BAP 1993)) (additional citations omitted).

1 In Brawders, based on the foregoing principles, the BAP (and
2 the Ninth Circuit) held that the confirmed plan affected only the
3 County's claim against the bankruptcy estate, but did not affect
4 the County's *in rem* rights. This holding was based on the fact that
5 the plan did not explicitly put the County on notice that its *in*
6 *rem* rights were being affected, nor did the debtors bring an
7 adversary proceeding seeking a declaratory judgment or partial lien
8 avoidance limiting the County's *in rem* rights.

9 Here, the lien at issue is based on a Notice of Federal Tax
10 Lien recorded against the Property, which secures the IRS's claim
11 for approximately \$214,552 in unpaid income taxes. Once the lien
12 was properly recorded against the Property, the Property itself
13 became liable for the underlying tax debt. Bisch, 159 B.R. at 549.

14 Debtor cites a number of cases, none of which are controlling
15 here, in support of his position that, because the IRS was bound by
16 the provisions of the confirmed plan and was paid the full amount
17 of its secured claim as set forth in the plan, the IRS is not
18 entitled to be paid any of the proceeds from the sale of the home.
19 In re Hebert, 61 B.R. 44 (Bankr. W.D. La. 1986) (IRS bound by
20 provisions of confirmed plan; therefore, attempting to collect
21 interest violated automatic stay); In re Campbell, 180 B.R. 686
22 (M.D. Fla. 1995) (where amount of secured claim had been litigated,
23 IRS was required to release its lien after payment of its allowed
24 secured claim even where unsecured claim remained unpaid); In re
25 Fox, 142 B.R. 206 (Bankr. S.D. Ohio 1992) (where creditor did not
26 object to confirmation, value of property set forth in schedules is
27 final determination of value); In re Black, No. 99-0267-PHX-PGR,
28 2000 U.S. Dist. LEXIS 5880 (D. Ariz. Mar. 30, 2000) (district court

1 affirmed bankruptcy court's order granting chapter 12 debtor's
2 motion to set aside tax lien where order confirming plan stated
3 that all tax liens were extinguished).

4 Debtor also cites a number of cases holding that valuation is
5 to be done as of the petition date, regardless of any change in
6 value of collateral over the course of the chapter 13 case. In re
7 Dean, 319 B.R. 474 (Bankr. E.D. Va. 2004) (in context of adversary
8 proceeding to determine value of residential property, valuation is
9 as of petition date); In re Evora, 242 B.R. 560 (Bankr. D. Mass.
10 1999), aff'd, 255 B.R. 336 (D. Mass. 2000) (denying motion to
11 reconsider order valuing creditor's collateral, which had increased
12 in value); In re Meeks, 237 B.R. 856, 860 (Bankr. M.D. Fla. 1999)
13 (court would not permit debtors to reduce amount of claim secured
14 by automobile, because secured claims are fixed as of petition
15 date); In re Warren, 499 B.R. 914 (Bankr. S.D. Ga. 2013)
16 (bankruptcy court would not reduce amount of creditor's secured
17 claim due to post-confirmation decline in real property value); In
18 re Rutt, 457 B.R. 97, 101 (Bankr. D. Colo. 2010) (same); In re
19 Moncree, 511 B.R. 922 (Bankr. E.D. Wis. 2014) (same); In re
20 Chiapetta, 2009 WL 2821527 (Bankr. N.D. Cal. Jun. 8, 2009) (same,
21 citing In re Nolan, 232 F.3d 528 (6th Cir. 2000); and In re Adkins,
22 425 F.3d 296, 302 (6th Cir. 2005) (where secured claim has been
23 valued as part of a confirmed plan, value cannot be altered by
24 subsequent amendment).

25 Debtor attempts to distinguish Bisch and Brawders. In Bisch,
26 the Ninth Circuit BAP defined the issue on appeal as whether a
27 federal tax lien, which was not listed as secured in an otherwise
28 timely filed proof of claim, and not provided for in a Chapter 13

1 plan, remains valid despite confirmation of the plan. Debtor
2 contends that the facts here are distinguishable because the IRS's
3 proof of claim included a secured claim and the Debtor's plan
4 provided for payment of the IRS's allowed secured claim. Debtor
5 points out that Brawders involved a first position statutory lien
6 for property taxes which could not be bifurcated, while here, the
7 IRS lien is behind the consensual liens on the Property. These
8 arguments miss the critical distinction - the issue here is not the
9 treatment of the IRS claim, but whether confirmation could affect
10 the IRS's *in rem* rights, where the plan did not explicitly put the
11 IRS on notice that its *in rem* rights were being affected.

12 Debtor contends that the IRS had notice, relying on the fact
13 that the declaration in support of Debtor's application to employ a
14 real estate broker included a copy of the listing agreement showing
15 the listing price to be \$1,800,000. This contention is meritless.
16 First, there is no evidence in the record that the IRS was served
17 with the application to employ or the supporting declaration - the
18 Certificate of Service filed May 13, 2014 (docket no. 95) shows
19 service on the chapter 13 trustee and the United States Trustee
20 only. Second, neither the application to employ nor the motion to
21 modify mentioned the sale price or any intent to strip or otherwise
22 affect the IRS's lien.

23 Further, Debtor relies on language in the confirmed plan,
24 quoted previously, providing that the valuations of secured claims
25 will be binding unless a timely objection to confirmation is filed,
26 and that any amount owing above and beyond the secured amount will
27 be paid as an unsecured claim. However, such general language
28 regarding the amount and treatment of claims is insufficient to

1 affect a secured creditor's *in rem* lien rights. See In re Shook,
2 278 B.R. 815, 824 (9th Cir. BAP 2002) ("a plan can effectively
3 determine value and/or avoid a lien only if the creditor receives
4 clear notice that the plan will do so.").

5 It makes no difference that the IRS submitted a proof of claim
6 in which it asserted a \$10,000 secured claim, relying on the
7 valuations in Debtor's schedules. See Brawders, 503 F.3d at 867-68
8 (liens pass through bankruptcy unaffected even if a secured
9 creditor incorrectly files an unsecured claim that should have been
10 secured). See also Bisch, 159 B.R. at 549 (IRS could rely on
11 federal tax lien for satisfaction of underlying tax debt despite
12 the fact that the IRS had filed an unsecured proof of claim).

13 Debtor also cites § 1327(c), which provides that "the property
14 vesting in the debtor under subsection (b) of this section is free
15 and clear of any claim or interest of any creditor provided for by
16 the plan." Debtor interprets this provision as meaning that the
17 Property vested in the Debtor upon confirmation free and clear of
18 the IRS's lien. This is incorrect.

19 Claims and interests are not the same thing. Brawders, 503
20 F.3d at 872 (citing In re Work, 58 B.R. 868 (Bankr. D. Or. 1986)).
21 The Brawders court adopted the analysis in Work that the term
22 "claim" does not include claims against property of the debtor but
23 the term "interest" does, concluding that "a plan that provides for
24 a claim but does not provide for an interest in property securing
25 that claim does not affect the interest of the creditor in the
26 property." Id. at 872. Accordingly, the court held that debtors'
27 property vested free of the tax claim, but not free of the lien.
28 Id.

1 Debtor has cited no controlling authority contrary to
2 Brawders. Debtor argues that once the amount of the secured claim
3 is fixed, the amount cannot be changed, citing numerous decisions
4 from outside the Ninth Circuit. Even if this is the rule, the
5 issue, as noted above, is not the amount of the IRS's secured
6 claim, but whether the IRS's lien remained attached to the Property
7 after confirmation. The plan may have limited the amount that the
8 IRS would receive from Debtor's plan. However, the plan does not
9 limit the *in rem* rights of the IRS to recover the entire debt
10 directly against the Property. See Brawders, 503 F.3d at 871;
11 Shook, 278 B.R. at 824 ("Although a secured creditor is bound by
12 the plan, this does not mean that a debtor can void or otherwise
13 extinguish a creditor's lien without addressing the lien in the
14 plan.").

15 Because Debtor has never stripped or modified the IRS lien
16 against the Property, either by motion or through his plan, under
17 controlling Ninth Circuit authority, the IRS's lien was not
18 affected by plan confirmation, and the IRS had a valid lien against
19 the Property at the time of sale. That lien was enforceable to the
20 full extent of the underlying unpaid tax assessment and should be
21 paid from the proceeds of the sale being held by the Trustee.

22 23 V. CONCLUSION

24 For these reasons, the IRS's motion to dismiss is granted, and
25 Debtor's motion for summary judgment is denied. The Trustee shall
26 be the disbursing agent on the IRS's amended secured claim.

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Counsel for the IRS may submit proposed forms of orders for
both motions.

***** END OF MEMORANDUM DECISION *****

Court Service List

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Parties to be served electronically.