Concurrent Session

Consumer Track: Keeping the Home Fires Burning:
Residential Loans and Insolvency

Randy Nussbaum, Moderator
Nussbaum Gillis & Dinner, P.C.
Scottsdale, Ariz.

Hon. Randall L. Dunn
U.S. Bankruptcy Court (D. Ore.); Portland

David Krieger
Haines & Krieger, LLC; Las Vegas

Allan D. NewDelman
Allan D. NewDelman; Phoenix

19TH ANNUAL SOUTHWEST BANKRUPTCY CONFERENCE

Allan D. NewDelman, Esq.

A. *CONDOMINIUM ASSOCIATIONS, COOPERATIVES & HOA'S - ARE THEY "ALL POWERFUL"? (APPLICATION OF 11 U.S.C. § 523(a)16)*

INTRODUCTION:

The materials presented herein will explore the dichotomy between the current case law and the practical aspects of a debtor's obligation to continue to service the various association fees and assessments post petition. Interestingly, the Chapter filed by the debtor will have a major impact on the requirement to pay post petition assessments and dues to condominium associations, cooperatives and homeowner's associations. There is no doubt that 11 U.S.C. § 523(a)(16), as revised by the 2005 Amendments under BAPCPA, enlarges the rights of such associations but, are there ways around the issues for debtors? In this economy many debtors are walking away from their homes and other real estate investments. Many of those homes and investments have associations tied to them and, until such time as the mortgage holders foreclose, the liability to pay dues and assessments remain that of the debtor who is the titled owner of the property.

Before one can begin combing through the various decision throughout this Country, we must look at the applicable Code provisions. What do they say?

1. 11 U.S.C. § 523(a)16 provides that "a discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt - for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable or possessory ownership interest in such unit, such corporation , or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;"

2. 11 U.S.C. § 1141(d)(2) provides that "A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title."

3. 11 U.S.C. § 1228(a) provides that ". . .after completion by the debtor of all payments under the plan. . . the court shall grant the debtor a discharge of all debts provided for by the plan allowed under section 503 of this title or disallowed under section 502 of this title except any debt - (2) of the kind specified in section 523(a) of this title."

4. 11 U.S.C. § 1228(b) provides that ". . .at any time after confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if - (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable; (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and (3) modification of the plan under section 1229 of this title is not practicable."

5. 11 U.S.C. § 1228(c) provides that "A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt - (2) of the kind specified in section 523(a)of this title.

6. 11 U.S.C. § 1328(a) provides that ". . .as soon as practicable after completion by the debtor of all payments under the plan. . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt - . . . (2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);

7. 11 U.S.C. § 1328(b) provides that ". . .at any time after confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if - (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable; (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and (3) modification of the plan under section 1329 of this title is not practicable."

8. 11 U.S.C. § 1328(c) provides that "A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt - (2) of the kind specified in section 523(a)of this title".

A simplistic reading of the above provisions would bring one to conclude that in the context of a Chapter 7, Chapter 11 and a Chapter 12, association dues and assessments that were delinquent as of the petition date are dischargeable. Any dues and assessments incurred after the petition date, until such time as the debtor no longer has either a legal, equitable or possessory interest in the property, must be paid.

As it relates to Chapter 13 cases, association dues and assessments that were delinquent as of the petition date may be dischargeable. One would think that if the debtor secures a Discharge under §1328(a), post petition dues and assessments are also dischargeable since §523(a)(16) is not included in one of the enumerated sections that are not subject to such a discharge order. If the debtor secures a Discharge under 1328(b) (a "hardship discharge"), any dues and assessments incurred after the petition date, until such time as the debtor no longer has either a legal, equitable or possessory interest in the property, must be paid.

Case law throughout the Country is rather uniform as it relates to the application of §523(a)(16) in Chapter 7 and 11 cases. There does not appear to be any cases interpreting the provision in Chapter 12. However, one must assume that the application of the Code section would be similar to the Chapter 7 and 11. In all of the reported decisions, from the onset of BAPCPA through today, post petition assessments are the responsibility of the debtor until such time as title to the property changes hands, usually through the loss of the property to a foreclosure. The dichotomy occurs when we look at how association assessments, fees and dues are treated in the context of a Chapter 13.

ASSOCIATION FEES UNDER 523(a)(16)

It is clear by the language of the Code that 11 U.S.C. § 523(a)(16) excepts from discharge in cases filed under Chapter 7, 11 and 12, any "fee or assessment that becomes due and payable after

the order for relief. . . for as long as the debtor or the trustee has a legal, equitable or possessory ownership interest" in the property. This is a change from the pre BAPCPA provision which limited a debtor's liability for post petition assessments for so long as the debtor either resided in or collected rents from the property. Clearly, Congress's intent was to make debtors responsible for all post petition assessments until such time as the debtor no longer had any interest in the property whatsoever. Debtors and debtors' counsel alike have tried to find ways around this inability to obtain a "fresh start" especially when the debtors intend to surrender the property to the mortgage holder(s). To date, there are no reported decisions supporting the debtor's position.

ARGUMENTS DEFEATED: A CASE-BY-CASE STUDY:

In re Ames (April 15, 2011):

In the Kenneth Ames case, out of the District of Massachusetts (*In re Ames*, Case Number 11-40040 MSH), the debtor, after filing his Chapter 7 petition, filed his Statement of Intentions which purported to "surrender" his condominium unit, not only to the mortgage holder, but also to the Condominium Association. The Association filed its Motion For Relief From Stay.

The debtor, through counsel, filed a limited objection to the Motion asserting that based upon the Statement of Intentions the debtor's surrender of the property was effective as of the petition date therefore he was not responsible for post petition assessments regardless of the language of §523(a)(16). Surrendering the property by removing all possessions from it and no longer having any physical contact with it may have been accomplished. However, the debtor failed to address the issue of legal ownership. He would remain the legal owner until such time as titled passed from him to another. This argument was not overlooked by the Association.

In its response, the Condominium Association argued that, regardless of a debtor's Statement of Intentions, the debtor remained responsible for all common area expenses that arose post petition

based upon the plain meaning of the language contained in §523(a)(16) until such time as the debtor no longer had legal, equitable and/or a possessory interest in the property. The mere intention to surrender was not enough. Legal title to the property remained in the debtor's name until a deed transferring title was recorded in accordance with Massachusetts' law. The court agreed. "When a debtor surrenders collateral pursuant to Bankruptcy Code § 521(a)(2)(B), he relinquishes only his possessory interest in the property. Section 523(a)(16), on the other hand, deals with more than mere possessory interest and provides that if a debtor retains either a legal or equitable ownership interest in a condominium unit, any postpetition fees and assessments remain nondischargeable." (See page 3 of the Memorandum of Decision On Motion For Relief From Stay attached hereto as Supplement 1.)

In re Heck (January 13, 2011)

In the Timothy and Varda Heck case, (*In re Heck*, Case Number 09-31512 TEC) the court sitting in the Norther District of California, denied the debtors' *pro se* motion to reopen the case.

The debtors, who "surrendered" the property, sought, not only to have the court rule that the Homeowner's Association violated the Discharge Injunction by attempting to collect post petition assessments, they also sought an Order of the court directing the mortgage company to complete its Trustee Sale which had been postponed for months. The court denied the Motion asserting that there was no cause to reopen the case. The debtors were responsible for all post petition HOA assessments as they were the "legal" owners of the property. The court further stated that it did not have jurisdiction to enter an order requiring the mortgage lender to complete the Trustee Sale. "(T)he court does not have subject matter jurisdiction to enter injunctive or declaratory relief against Chase (the mortgage lender). . . (Further) the Code does not impose a duty on the affected secured creditor to act upon Debtors' statement of intention". (See Page 3 of the Memorandum Re Debtors' Motions

to Reopen" attached hereto as Supplement 2.) The court, however, did suggest that until such time as the property was taken back by the lender, the debtors "should consider hiring an attorney to help them limit their financial exposure, as there undoubtedly exist inexpensive, practical means by which Debtors can use the Properties to pay the homeowners due until Chase forecloses." (*Id.* at page 4.) Sounds like this helpful comment was an invitation to attempting to rent the property for the short term.

In re Liversidge (December 3, 2010):

In the Beverly Liversidge case (*In re Liversidge*, Case Number 10-16342 DHS), the Bankruptcy Court sitting in New Jersey had to address an new twist on the interpretation of 523(a)(16). Debtor's counsel attempted to argue that the language of that section allowed for the discharge of all fees and assessments up to and including the closing of the case.

Ms. Liversidge filed her Chapter 7 on March 5, 2010. Her Discharge was entered on June 11, 2010 and her case was closed on July 1, 2010. A review of her Schedules shows that she resided in a condominium that was subject to a mortgage. The Statement of Intentions showed that her intent was to retain the property. On Schedule F she listed the Condominium Association with a balance due through August, 2010 in the amount of $4,500.00. There is no explanation as to why she included the post petition months of April through August, 2010 in that Schedule F calculation.

While the record is not clear, it appears that upon entry of the Discharge the Association's attorney advised the Association to write down all pre petition amounts and only bill for post petition amounts beginning as of April, 2010. The Association, not updating its records quickly enough sent a statement that included pre petition amount. The record reflects that it quickly corrected its mistake and began billing for amounts due as of April, 2010. Counsel for the debtor took exception to the action of the Association and asserted that it was improperly attempting to collect fees through

and including July, 2010 which corresponded with the closing of the Chapter 7.

The court declined to hold the Association in contempt for its attempt to collect the pre petition debt as it quickly corrected its records thus following the advise of its counsel. As it related to the debtor's clever attempt to expand the protection of the Discharge to include fees and assessments through the closing of the Chapter 7, the Court pointed out that §523(a)(16) excepts from discharge any "fee or assessment that becomes due and payable **after** the order for relief". The court stated that "it is clear that Congress intended the exception to apply immediately following the petition date". (See Page 3 of the Letter Opinion dated December 2, 2010 attached hereto as Supplement 3.) The court further pointed out that it could find no case law to support the debtor's contention.

The bottom line from the above cases and the litany of others, is that where 11 U.S.C. § 523(a)(16) applies, a debtor is responsible for all fees and assessments owed to a condominium association, a cooperative corporation association and/or a homeowners association from the moment the bankruptcy petition is filed until the moment title to the property changes hands and the debtor is divested of all legal, equitable and/or possessory rights to the property.

PRACTICE POINTER - ADVISING CLIENTS TO COMPLY WITH NON-MONETARY REQUIREMENTS OF THE CC&R's

We all know that in today's economic times lenders are deliberately delaying completing foreclosures of properties. As referenced above, the bankruptcy court's can do little to force a lender's hand. The court has no authority to demand that the lender take back its property and lenders would rather allow the properties to remain in the debtor's name thus, at least for a time, absolving them of any responsibility to care for the property. Debtors are left, not only with dealing

with the requirement to pay association dues and assessments post petition, but they are also left with caring for the property to avoid any added fines and penalties. Even efforts by Associations prior to the entry of the discharge, to get the debtor to maintain the property are not a violation of the Automatic Stay. Case in point is *In re Johnson* out of the District of Arizona (Case Number 08-13937 SSC). Ms. Johnson filed her Chapter 7 (*pro se*) in October, 2008. Despite the filing she continued to receive notices from her Homeowner's Association demanding that she keep her yard free from debris. She had notified both the HOA and the lender that she was abandoning the property. The lender obtained stay relief. The debtor received a discharge in January, 2009 and the lender eventually foreclosed in March, 2009. Ms. Johnson, perceiving the notices to be a violation of her bankruptcy rights, asked the court to intervene. The court concluded that the Association was doing nothing more than attempting to protect the health and safety of others. Therefore, their post petition/pre discharge demands were not a violation of the Automatic Stay. Nor was such a violation of the Discharge Injunction. The court further reminded the debtor that "to the extend that the Homeowners' Association was pursuing the debtor for any post-petition fines or assessments that arise prior to the Trustee Sale on the unit, the debtor would be responsible for those fines or assessments." (See Page 2 of the Memorandum Decision Clarifying Court's Ruling on the Record attached hereto as Supplement 4.)

ASSOCIATION FEES AND CHAPTER THIRTEEN

By the language of 11 U.S.C. § 1328, the non-dischargeability provisions under §523(a)(16) only apply in the context of a Chapter 13 when a debtor seeks a "hardship" discharge under §1328(b). Should a debtor obtain a discharge (as normally contemplated) under §1328(a), one would think that all pre and post petition association fees and dues would be subject to discharge. This assumption is not entirely accurate and will depend upon the district where the bankruptcy is

filed.

Clearly, association type creditors should not be opposing Chapter 13 Plans under the guise of an assertion that post petition assessments must be paid pursuant to §523(a)(16). Nor should debtors attempt to assert that pre petition assessments need not be provided for in a Chapter 13 Plan especially if they wish to keep the property. They must first determine if those assessments are "secured".

I. FROM THE DEBTOR'S SIDE: DO I OR DON'T I PAY THROUGH THE PLAN PRE PETITION DUES IF I AM NOT SURRENDERING THE PROPERTY?

Generally a debtor who wishes to keep real property will provide for payment through the Plan of any pre petition assessments owed to a condominium, cooperative or homeowner's association. In addition, the debtor will make normal post petition payments. However, there is one consideration in evaluating the need to "cure" the pre petition assessments: "Is the Association secured?". If the Association is not secured then those pre petition assessments should be listed on Schedule F and simply treated as all other general unsecured creditors. However, if those assessments are secured by a lien (judicial or statutory) then one must decide if the Plan needs to provide for the claim or if there is some way to eliminate the secured status.

To determine the secured status of an association for payment of past due assessments, one must look at the association's master deed, bylaws and other documents. Even if those documents are silent as to the imposition of a lien, one would also look to state law. A case in point is *In re Danastorg*, 382 B.R. 585 (Bankr. Mass. 2008) where a debtor attempted to ignore the "secured" status of an association for payment of its pre petition assessments. Ms. Danastorg, through counsel, argued that based upon §523(a)(16) "the debtor is not obligated to pay any prepetition condominium association fees, late fees, costs or attorney's fees". *Id.* at 587. The court quickly shot down that

argument stating that §523(a)(16) is not mentioned in §1328 and is therefore "inapplicable to Chapter 13 cases, where the Debtor has an ongoing duty to pay postpetition obligations... Moreover, section 523(a)(16) is not relevant because it pertains to unsecured debts, and the Condo Trust... has a statutory lien against the Property which the Debtor must address in accordance with the provisions of Chapter 13." *Id.* at 588. The Court went on at length discussing the statutory scheme provided under state law that created a lien in favor of the association the moment the assessments became due. The claim was fully secured and needed to be paid.

Now that we have determined that one must verify if an association is entitled to a lien, we must look to see if there is any value to support that lien. The "strip off" craze that is prevalent throughout all of the Circuits as it relates to junior, wholly unsecured, mortgages, applies to association liens unless a particular state's statutory scheme entitles the association to prime the recorded mortgages.

Debtor's strip off of an association lien was squarely addressed by the Eastern District of Virginia in the Johnnie B. Cook, Lisa A. Williams case. (*In re Cook* Administrative Case Number 10-10113 SSM, Adversary Case Number 10-1300). Debtors owed approximately $8,000.00 in pre petition assessments to which a judgment lien for approximately $6,600.00 had been recorded. The Association argued it was entitled to a secured status based upon the judgment lien, however, it admitted that such lien was junior to the first position deed of trust and that there was no equity in the property after consideration of that deed of trust. The Association, without citing any authority, argued that it would be "unfair" to allow for the strip off of its lien as the property, at some point, would increase in value and once again support the lien. It also argued that Congress clearly intended to protect associations by making post petition assessments non dischargeable under §523(a)(16). The court did not buy either argument. "Put simply, the Bankruptcy Code provides no

special status, even in the area of dischargeability, for unpaid pre-petition assessments. The post-petition assessments are fully provided for by the debtors' plan and would be unaffected by avoidance of the liens relating to the prepetition assessments". (See Page 5 of the Memorandum attached hereto as Supplement 5.)

II. FROM THE ASSOCIATION'S SIDE: SHOULD WE EXPECT POST PETITION PAYMENTS REGARDLESS OF WHETHER OR NOT THE PROPERTY IS TO BE SURRENDERED?

A. Debtor's Plan Surrenders the Property:

In the *Spencer* Chapter 13, (*In re Spencer*, 437 B.R. 563 (Bankr. E.D. Mich. 2010)) Mr. Spencer's Chapter 13 Plan called for the surrender of a condominium unit to the two mortgage holders and the condominium association. The Plan further stated that he would not be making any post petition payments related to the property and that each of the three creditors were free to amend any secured claims to unsecured status within one year of confirmation of the Plan. The Condominium Association filed a complaint seeking a determination as to the non-dischargeability of post petition (pre foreclosure) payments for fees and assessments pursuant to §523(a)(16). In addition, it sought a ruling that the debtor was responsible for the post petition damage that occurred to the property due to his failure to maintain and "winterize" it. The parties proceeded in the adversary by summary judgment motions and, while the eventual ruling on the Motions are on appeal to the District Court, a review of the bankruptcy court's holding is insightful.

The court noted that the Association did not rely on §523(a)(16) when it brought its Motion for Summary Judgment. The Association's Motion did not explain why post petition assessments should be deemed non-dischargeable. Instead it focused "on the damage alleged to have occurred to the condominium as a result of the Debtor's failure to maintain (the unit). . . (And) that the Debtor's purported surrender of the condominium was ineffective to divest the Debtor of legal or

equitable titled. . . ." *Id.* at 568. Based upon the debtor's legal and equitable ownership interest, the Association argued that the debtor was responsible for all post petition damage to the unit. It further argued that the Chapter 13 debtor was required to file a "Statement of Intention" and act upon the intention in accordance with 11 U.S.C. §521. For his part, the debtor argued that post petition dues and assessments are pre petition claims, arising from a pre petition ownership interest or contract relating to the property and, since §523(a)(16) does not apply, such post petition dues or assessments are dischargeable. The debtor further argued that the Association failed to point to any authority showing the debtor had a legal duty to maintain the condition of the unit.

The parties and the court in *Spencer* readily recognized that, as is typical, the condominium complex is subject to a recorded "master deed" and is governed by certain bylaws both of which permit the association to assess dues and fees against a titled owner of a unit within the complex. Further, they recognized that the State of Michigan had created "a statutory framework governing condominium projects, and the relationship between condominium associations and condominium unit owners".[1]

In determining if the Chapter 13 debtor was responsible for post petition fees, assessments and damage to the unit, the court looked at whether or not such claims were considered part of a pre petition obligation based upon the definition of "claim". The court, looking at the definition of "claim" under §101(5)(A) noted that the term "claim" includes a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured" *Id.* at 570. Citing to "the most widely adopted test" the court determined that it should look "at whether there was a pre-petition

[1]It should be noted that many States have implemented statutes that govern not only condominium associations but other kinds of real property common ownership associations. One should review the statutory requirements for associations based upon each individual State.

relationship between the debtor and the creditor. . . such that 'a possible claim is within the fair contemplation of the creditor at the time the petition is filed'" *Id.* at 570. In determining such a relationship the court noted that there was a split in authority going back to before the enactment of BAPCPA and, based upon state law, "whether the debt arose out of a property right or as a matter of contract". *Id.* at 571. Based upon this analysis, the *Spencer* court concluded that the obligation to pay pre and post petition association dues arose out of a pre petition relationship, which, under Michigan law could "run with the land" but there was no evidence before the court that the payment of dues was a "personal" liability in connection with the allowance that such can "run with the land". Simply, the master deed and the portions of the bylaws presented to the court did not contain "a restriction or covenant that (made) the Debtor's obligation to pay condominium associations dues. . . continue post-petition as a personal liability of the Debtor, unaffected by a Chapter 13 discharge". *Id.* at 572. As a result, both pre and post petition assessments were dischargeable in the context of the Chapter 13.

As it related to the damage to the unit and the Associations assertions that the debtor was responsible for such damage, the *Spencer* court determined that there were issues of fact that needed to be tried and therefore, could not make a ruling based upon a Motion for Summary Judgment. Noting that the bylaws imposed a duty upon the owner (debtor) to maintain the unit and pay for all repairs not otherwise covered by insurance, the court determined that there was insufficient evidence as to when, where, how and why such damage may or may not be recoverable against the debtor as a pre or post petition obligation.

Lastly, the *Spencer* court looked at the issue of the Plan provision surrendering the property to the two mortgage holders and the Association. The court determined that there had to be something more than just a provision surrendering the property. There had to be an affirmative act.

Citing to an Ohio case, the court noted that "Surrender is a contractual act and occurs as a result of the consent of both parties. It appears that an abandonment may include a surrender, although a surrender may not necessarily constitute a total abandonment". *Id.* at 577. In addition, the court questioned ones ability to surrender property to a wholly unsecured lien holder and how one surrenders property to three different lien holders. "The Debtor's purported surrender of the condominium raises more questions than it answer. But one thing is clear: just because the Debtor's plan stated that the Debtor would 'surrender' the condominium does not somehow extinguish all claims against the Debtor relating to the condominium." *Id.* at 577.

One must ask if there is a way out of this predicament. Like Chapter 7 debtors who walk away from the property but are subject to the whims of lenders as to if and when they will foreclose, debtors surrendering property in Chapter 13 (or Chapter 11) cases cannot simply rely on an argument that §523(a)(16) does not apply. If the obligation to pay post petition assessments "run with the land" then the only way to eliminate the obligation is to get the title (legal and equitable) out of the debtor's name. One Judge, in the District of Arizona, while cautioning about any Rule 11 issues, has suggested creating a plan that plainly, on its face, states that the plan will discharge "all such post-petition HOA fees and the HOA failed to object at confirmation despite adequate notice, that plan provision and express discharge would be *res judicata* and binding on the HOA pursuant to (the Code) and the Supreme Court's opinion in Espinosa". . (See Page 3 of the Opinion And Order Denying Discharge Of Poet Petition HOA Fees And Attorney's Fees dated May 26, 2011 in *In re Burgueno*, Case Number 09-10375 RJH, District of Arizona, attached hereto as Supplement 6.) Further, the Judge opines the possibility of a debtor quit claiming the property to either the bank or the HOA. The issue then becomes whether, under state law, such action effectively transfers property or whether or not the recipient must accept the transfer.

B. Debtor's Plan Retains the Property:

It would seem obvious that if one were to propose a Plan where they continue to reside or retain real property that is subject to an association, that one would agree that post petition assessments must be paid. However, at least one debtor has taken the position that post petition assessments, even if the property is to be retained, need not be paid and are dischargeable in the context of a Chapter 13. The case in point is out of the Ninth Circuit and was decided just over one year ago. In *In re Foster*, 435 B.R. 650 (9th Cir. BAP 2010), the debtor attempted to Confirm a Plan that did not cure the pre petition association arrears or provide for the payment of post petition assessments. The debtor argued that his obligation to pay post petition assessments stemmed from a pre petition contract and is therefore dischargeable especially in light of the fact that §523(a)(16) did not apply in Chapter 13 cases. The Association, relying on pre BAPCPA case authority, asserted that since the obligation ran with the land the requirement to pay post petition assessments was not cloaked in a contract action but, rather was part and parcel of the debtor's ownership interest in the property and had to be paid.

The Bankruptcy Appellate Panel, like the court below, recognized that the Association's "Declaration of Covenants" provides that each owner is "personally liable" for assessments and that, "under Washington law, the Declaration was not a contract but a 'document that unilaterally (created) a type of real property'" interest that ran with the land. *Id.* at 434. Following the reasoning in *Danastorg* the Court determined that in cases where an individual contemplated remaining in the property thus benefitting from the property, he or she could not discharge post petition assessments.

CONCLUSION

In the vast majority of cases, be it a Chapter 7, 11 or 13, a debtor will remain responsible for

post petition assessments until such time as the debtor no longer has any interest in the property whatsoever. A debtor who wishes to keep the property, unless there is no enforceable lien, will also have to provide for payment of delinquent pre petition assessments.

B. STRIP OFF OF 2ND MORTGAGES AND ITS IMPLICATION ON DEBT LIMITS FOR CHAPTER 13 CASES

Much discussion has taken place as it relates to the ability of a Chapter 13 debtor to "strip off" a wholly unsecured mortgage and stay "qualified" for a Chapter 13. The vast majority of jurisdictions hold that the amount "stripped off" must be added to the total unsecured debt amount. By doing this, these jurisdictions have denied many, otherwise eligible individuals, the ability to reorganize under a Chapter 13. This, in turn, forces those same struggling consumers into the more complex and expensive Chapter 11. This is counter-intuitive and counter-productive. One has to wonder how this could happen. Logic would not lead one down this path. If the very thing creating the controversy has no legal effect until the completion of a plan and the entry of a discharge how can it be used to deny a debtor the ability to file a Chapter 13? The following pages will attempt to sort through this mess by concentrating on the cases coming out of the Ninth Circuit. But, first, it needs to be pointed out that the arguments put forth by debtors and debtors' counsel in recent times seems a bit of a red herring as the issue of what to do with the unsecured portion of a wholly unsecured or bifurcated secured claim has been addressed over-and-over again as far back as 1984. See, *In re Day*, 747 F.2d 405 (7th Cir. 1984) which held as follows:

> "Courts have consistently examined the true value of collateral securing a debt when evaluating a debtor's eligibility for Chapter 13 relief under 11 U.S.C. Sec. 109(e). In *In re Bobroff*, 32 B.R. 933 (Bankr. E.D.Pa. 1983), the court converted a proceeding under Chapter 13 to one under Chapter 7 for failure to meet the eligibility requirements of section 109(e). Debtor owned real estate worth $125,000. Three perfected security interests, in the amounts of $58,600, $197,327, and $12,300, encumbered the property. No unsecured debts were scheduled. Nevertheless, the court, applying section 506(a), concluded that since the three "secured" loans totaling $268,227 were secured by collateral worth only $125,000, the debtor

> actually had unsecured debts in excess of $100,000. . .These decisions avoid the temptation to raise form over substance and represent a common-sense solution to a statutory interpretation problem not considered by Congress. As noted. . . a contrary interpretation of section 109(e) could lead, at the limit, to the absurd situation where a prospective Chapter 13 debtor with $449,998 in unsecured debts creates a security interest for $349,999 in property with little or no value. If courts cannot look beyond the mere existence of documents creating such an interest, this maneuver produces secured debts of $349,999 and unsecured debts of $99,999--amounts within section 109(e). Surely Congress did not intend for debtors to so easily circumvent the $100,000 limitation on unsecured debts in Chapter 13 proceedings." *Id.* at 407.

The controversy stems from the interpretation of what is an allowed "secured" claim based upon the following definitions provided by the Bankruptcy Code:

> 1) a "debt" is a "liability on a claim" (11 U.S.C. §101(12));
>
> 2) a "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured". (11 U.S.C. §101(5)(A));
>
> 3) an "allowed secured claim" is a claim "secured by a lien on property in which the estate has an interest. . . (It is) a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. . . and is an unsecured claim to the extent that the value of such creditors interest is less than the amount of such allowed claim" (11 U.S.C. §506(a)(1)).

As we all know, debtors who exceed the statutory dollar limits under 11 U.S.C. §109(e) are not eligible to file a Chapter 13. It is the unsecured debt limit threshold that has become a thorn in one's side. In our recent past home values were unrealistically inflated. Buyers were willing to pay such high amounts since many were not required to put any money down. There were "sold" mortgages that were affordable for a few years and told that they could refinance to fixed rates before the unaffordable payments would begin. What they were not told was that the market would eventually correct itself and the bubble would burst. Those same homes would drop to their correct values, typically half of what they were sold for. This left many with mortgages they could not afford. No equity meant no refinancing. For those who purchased during the boom under the "100%

financing" scams, they were saddled with a first and a second mortgage (typically your "80/20" or "75/25" financing deal). For those who capitalized on the over-inflated values of their homes, they used those homes as "ATMs" and drained the equity by taking out second mortgages (true HELOCs). They too became saddled with homes that were severely underwater. For many, their only option was to seek relief by filing a bankruptcy. Since the Bankruptcy Code did not allow one to modify the rights of a lender secured solely by a debtor's principal residence a cottage industry was created as it relates to the now wholly unsecured second mortgages. So long as there was absolutely no equity in the property after consideration of the amount owed to the senior lender(s), junior lenders could be relegated to an unsecured status and "stripped" of their lien rights. While this concept was not new, what was different was the amount of debt being stripped off. Necessarily, since the homes were over-inflated in value, so too was the amount of the loans obtained. Instead of stripping off a $20,000.00 "credit union" second mortgage, debtors were attempting to strip off second mortgages that were in the $200,000.00 plus range. Adding that high amount to their already high unsecured debts, meant that they would exceed the unsecured debt limits of §109(e). Apparently ignore the well established case law interpreting how one accounts for the unsecured portion of a bifurcated or wholly unsecured claim, many debtors and debtors' counsel began filing Chapter 13 cases in an effort to strip off the junior liens. This tactic was successful for a time but eventually, bankruptcy trustees, creditors and judges caught on and from here we evaluate some recent case law.

While cases interpreting the application of §506(a) on eligibility date back many years, the more recent history in the Ninth Circuit appears to be representative of the evolution of determining §109(e) eligibility.

The 1999 Bankruptcy Appellate Panel (BAP) decision in *In re Scovis*, 231 B.R. 336 (9th Cir.

BAP 1999) cloaks the eligibility issue in terms of when a "secured" claim should be included in the calculation of unsecured debt. While this case was eventually appealed to the Ninth Circuit Court of Appeals and reversed, the reversal did not change, but actually solidified the holding as it relates to this issue.

In *Scovis*, the debtor's homestead residence had a value of $325,000.00. The property was subject to a consensual lien in the amount of $249,026.91 and a non-consensual judgment lien of $208,000.00. However, since the home was subject to a homestead exemption of $100,000.00, under California law, the judgment creditor could not claim an interest in the property. Despite state law making the judgment lien ineffective, the debtor listed the creditor on Schedule D and argued that until such time as the bankruptcy court avoided the lien under 11 U.S.C. §522(f), the creditor was secured. Interestingly, the creditor filed an unsecured claim for the total amount of the judgment.

The bankruptcy court, ignoring the effect of the homestead exemption, stated that the judgment creditor was partial secured since there was equity in the property after deducting the amount owed to the consensual lien holder. As a result, the debtor was not over the §109(e) unsecured debt limit. Both the debtor and the creditor, recognizing the ramification of §506(a), agreed that the unsecured portion of the judgment should be included in the calculation of unsecured debt. The BAP, noted that "the bankruptcy court should look past the schedules to other evidence submitted when a good faith objection to the debtor's eligibility has been brought by a party in interest" *Id. at* 273. What was at issue was the effect of the homestead exemption which, as a matter of state law, made the judgment lien unenforceable and, as a matter of bankruptcy law, could be avoided under §522(f). The BAP concluded that by removing the homestead portion of the value of the home, §506(a) would necessarily make the entire judgment claim unsecured. "As a debt is a

liability on a claim. . . and a secured claim is a claim 'secured by a lien on property in which the estate has an interest. . .'. . . it follows that a claim 'secured' by exempt property is unsecured to the extent of the exemption". *Id.* at 342. Based upon this analysis, the BAP remanded the case back to the bankruptcy court for further determination as to the other amounts of the debtor's unsecured debt.

Scovis was appealed and, in 2001, the Ninth Circuit Court of Appeals addressed the ruling by the BAP but between the time of the BAP decision and the higher court's ruling, two other distinct cases were decided that framed the issue of eligibility in more tenuous terms.

1. In *In re Soderlund*, 236 B.R. 271 (9th Cir. BAP 1999), which was decided less than 3 months after the BAP's ruling in *Scovis*, the BAP expanded the concept of looking at a debtor's schedules to include the effect of §506(a). "The overwhelming majority of courts, including every circuit that has considered the question, have concluded that the undersecured portion of a secured creditor's claim should be counted as unsecured debt for §109(e) purposes. . . The majority view advocates importing a §506(a) analysis to §109(e) to define 'secured' and 'unsecured'. This prevents raising form over substance and manipulation of the debt limits." *Id.* at 273. "We have recently signaled in dicta our view that the majority position is correct (citing to *Scovis*). We now expressly join the three circuits, and the overwhelming majority of bankruptcy courts, that have considered the question and hold that the undersecured portion of a secured creditor's claim is counted as unsecured debt for §109(e) eligibility purposes. We expressly reject the contrary minority view". *Id.* at 275.

2. One month after *Soderlund*, the Ninth Circuit Court of Appeals decided *Slack v. Wilshire Insurance Company (In re Slack),* 187 F.3d 1070 (9th Cir. 1999). *Slack*, which became widely cited in future cases, solidified the notion that one does not look to post petition events to determine the amount owed on the petition date. It further reiterated the prior Ninth Circuit holding that a debt is liquidated for the purposes of §109(a) so long as it is "readily ascertainable, notwithstanding the fact

that the question of liability has not been finally decided". *Id.* at 1075. *Slack* purportedly "implicitly adopted the Sixth Circuit's holding in Pearson that the bankruptcy court should normally look to the petition to determine the amount of debt owed, checking only to see that the schedules were made in good faith". *Scovis v. Henrichsen,* 249 F.3d 975, 984 (9th Cir. 2001).

In May, 2001 the Ninth Circuit Court of Appeals rendered its decision in *Scovis v. Henrichsen*, 249 F.3d. 975 (9th Cir. 2001). The BAP ruling mentioned above, despite its directive for a remand back to the bankruptcy court for further findings, was appealed by the debtor to the Court of Appeals. The Court of Appeals was asked to look at three issues. The first issue was whether or not the BAP correctly determined that due to the application of the homestead exemption, the judgment lien was rendered unsecured. The second issue was whether or not a relatively small($4,126.00) family loan, initially thought to be secured, but proven to be unsecured, should be used in calculating the total unsecured debt when, post petition, the debt was forgiven. The third issue revolved around a tax claim that was "erroneously" included in the schedules.

The Court, looking at the application of §109(e), framed its decision based upon whether or not a bankruptcy court may "look beyond the originally filed schedules" in determining eligibility. The Court focused on its confusion as to how the BAP came up with its calculations and whether or not the family obligation, which all agreed was owed on the petition date but was later "withdrawn" should or should not be included in determining §109(e) eligibility. The Court noted that while the BAP purported to adhere to the proposition that one only looks to the debtor's schedules checking to see if the schedules were submitted in good faith it expanded that concept by indicating that the Bankruptcy Court should look beyond the schedules to outside sources when a question of eligibility was raised. As a result of this confusion, the Court drew a line in the sand holding, "We now simply and explicitly state the rule for determining Chapter 13 eligibility under

§109(e) to be that eligibility should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith". *Id.* at 982. The Court, citing to the *Soderlund* decision then noted that to determine a secured claim one must look to a §506(a) analysis. Further, based upon the "readily ascertainable" standard enumerated in *Slack*, taking the leap to bifurcate an undersecured claim or simply find that a creditor is wholly unsecured as of the petition date did not go beyond reviewing the schedules. "Although we were defining the term 'liquidated' (in *Slack*) and not 'secured', we included in the eligibility determination readily ascertainable amounts, even though liability on the debt had not been finally decided. This principal of certainty carries equal force in the present context, where the homestead exemption's effect on the status of Debtors' debt as secured or unsecured is readily ascertainable". *Id.* at 984.

Finally, the history of the cases in the Ninth Circuit brings us to a clear rule (at least until the Ninth Circuit Court of Appeals holds otherwise) that the stripping off of a wholly unsecured junior mortgage necessarily requires one to include that debt in the unsecured calculation for Chapter 13 purposes. In July, 2010 the BAP came down with its decision in *In re Smith*, 435 B.R. 647 (9th Cir. BAP 2010). Consisting of two Chapter 13 cases that were consolidated for the purpose of the appeal, the Bankruptcy Court in both cases determined that the debtors were not eligible for Chapter 13 relief due to the strip off of junior mortgage liens. Relying on *Scovis v. Henrichsen*, 249 F.3d. 975 (9th Cir. 2001) the Bankruptcy Court determined that, on the filing date and based upon the application of §506(a) the both debtors were over the allowed unsecured debt limit regardless of how the debtors' schedules classified the claim. The BAP agreed. "*Scovis*. . . was intended to ensure a straightforward and realistic application by incorporating into eligibility determinations the concept that a debt's 'status' could be as readily ascertainable as to its 'amount' no matter in which schedule the debt appears." *In re Smith,* at 646. The BAP was not persuaded by the debtors' argument that

the avoiding of the lien needed to be accomplished through and adversary proceeding thus making a determination as to the unsecured status of the claim as of the petition date was in violation of *Slack's* prohibition to look at future events. It was simply sufficient for a court to take notice from the schedules when it was evident that a junior lien holder was wholly unsecured as of the petition date.

CONCLUSION

Debtors who wish to use the bankruptcy courts to strip off wholly unsecured junior liens will have to look at the effect of such action. Until such time as appellate courts and/or Congress take the initiative to except from a §109(e) analysis the ramifications of strip offs, many consumers will be shut out from filing Chapter 13 cases. This truly is a sign of our times. Could the next hurdle be that even consumers who do not attempt to strip off wholly unsecured liens or consumers who decide to surrender real estate in Chapter 13 cases also be denied eligibility? One would hope not but it does sound like this is the path we are about to take.

SUPPLEMENT "1"

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
CENTRAL DIVISION

In re:	Chapter 7
	Case No. 11-40020-MSH
KENNETH AMES	
Debtor.	

MEMORANDUM OF DECISION ON MOTION FOR RELIEF FROM STAY

Kenneth Ames, the debtor in this Chapter 7 case, is the record owner of condominium unit number 262 at 178 Wellman Avenue, Chelmsford, Massachusetts. The condominium is managed by the Williamsburg Condominium No. 1 Trust (the "Trust"). Prior to December 30, 2010, when he filed his petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101-1532, the debtor ceased making monthly payments to the Trust for his share of common areas fees and assessments and vacated the unit. On January 2, 2011 the debtor filed a statement of intent in accordance with Bankruptcy Code § 521(a)(2)(A) stating his intention to surrender the unit. On January 10, 2011, the Trust filed a motion seeking relief from the automatic stay provisions of Bankruptcy Code § 362 to exercise its contractual and statutory rights against the unit and the debtor, including (i) establishing its statutory lien on the unit for unpaid condominium fees and assessments under Mass. Gen. Laws ch. 183A, § 6,[1] (ii) realizing on its lien by public auction sale

[1] Mass. Gen. Laws ch. 183A, § 6 provides that a condominium association such as the Trust acquires a lien against the units in the condominium for its fees and assessments from the time they become due. The association may begin collection efforts after a fee or assessment has been delinquent for 60 days, and may enforce its lien by filing a civil action in superior court in accordance with Mass. Gen. Laws ch. 254, §§ 5-5A and, assuming certain preliminaries are accomplished, the lien will have priority over all liens on the unit except tax liens, a first mortgage recorded before the delinquency arose and liens which pre-date the condominium master deed. The portion of the lien that represents up to six months of common area expenses plus reasonable

and (iii) seeking to hold the debtor personally liable for all postpetition common expense obligations to the Trust in connection with the unit. The debtor opposes the motion with respect to the Trust's third request.[2]

Bankruptcy Code § 523(a)(16) provides that a debtor shall not receive a discharge for condominium fees and assessments that become due and payable after the bankruptcy petition is filed as long as the debtor or the trustee "has a legal, equitable or possessory ownership interest" in the unit.[3] This section applies to Chapter 7 and Chapter 11 debtors generally and to Chapter 12 and Chapter 13 debtors only in the event of a "hardship discharge" under §§ 1228(b) and 1328(b), respectively. *See In re Danastorg*, 382 B.R. 585, 588 (Bankr. D. Mass. 2008). The Trust argues that because the debtor remains the record owner of the unit, any fees and assessments arising since the date of the Chapter 7 petition remain his personal obligation and are not dischargeable.

The debtor maintains that his interest in the unit terminated on January 2, 2011, when he declared his intention to surrender it, and that any subsequent fees and assessments are dischargeable. To support his argument the debtor cites *Pratt v. GMAC (In re Pratt)*, 462 F.3d 14,

---

costs and attorneys' fees up to $2500 has priority even over the first mortgage on the unit. This priming lien does not, however, include amounts owed for special assessments, late charges, penalties and the like.

[2] By order dated February 17, 2011, I granted the Trust's motion for relief from stay in part, permitting it to proceed with its collection efforts for the purpose of establishing its lien and selling the unit, while reserving judgment on the Trust's request to hold the debtor personally liable for postpetition fees and assessments.

[3] This seems patently obvious since § 727(b) limits discharge to debts arising prior to the date of the order for relief and the condominium fees and assessments which are subject to the § 523(a)(16) exception to discharge are limited to postpetition assessments. It appears that § 523(a)(16) was intended to preempt any argument that postpetition fees and assessments should be considered prepetition obligations because they relate to the prepetition past when the debtor acquired the condominium unit and accepted responsibility to pay assessments. *See In re Rivera*, 256 B.R. 828, 832 (Bankr. M.D. Fla. 2000).

18-19 (1st Cir. 2006), in which the First Circuit Court of Appeals held that a debtor is not required to take any affirmative action to effectuate the surrender of secured property beyond merely making the collateral available to the secured creditor. The debtor argues that by stating his intention to surrender the condominium unit and making it available to the Trust and his mortgage lender, he effectively surrendered his legal, equitable and possessory interest in the property within the meaning of Bankruptcy Code § 523(a)(16), rendering any subsequent condominium fees and assessments dischargeable.

Pratt does not go where the debtor attempts to take it. In *Pratt* the First Circuit was called upon to determine how a debtor carried out his or her duty to surrender collateral pursuant to Bankruptcy Code § 521(a)(2). Neither *Pratt* nor § 521(a)(2) has anything to say about title, whether legal or equitable, to the collateral. As the First Circuit observed:

> the most sensible connotation of "surrender" in the present context is that the debtor agreed to make the collateral available to the secured creditor–viz., to cede his *possessory* rights in the collateral–within 30 days of the filing of the notice of intention to surrender possession of the collateral.

Pratt, 462 F.3d at 18-19 (emphasis added). Thus, the First Circuit held that when a debtor surrenders collateral pursuant to Bankruptcy Code § 521(a)(2)(B), he relinquishes only his possessory interest in the property. Section 523(a)(16), on the other hand, deals with more than mere possessory interest[4] and provides that if a debtor retains either a legal or equitable ownership interest in a condominium unit, any postpetition fees and assessments remain nondischargeable.

---

[4] Section 523(a)(16) was amended in 2005 to significantly broaden the exception to discharge with respect to condominium fees. Prior to the amendment, postpetition fees were dischargeable as long as the debtor did not occupy or rent the property. The legislative history of the 2005 amendment indicates Congress' intention to render postpetition condominium fees nondischargeable "[i]rrespective of whether or not the debtor physically occupies such property. . . during the period the debtor or the trustee has a legal, equitable, or possessory ownership interest." H.R. Rep. No. 109-31, at 88 (2005). The amendment was enacted to prevent the discharge of

The debtor in this case has failed to identify any authority suggesting a connection between the surrender provisions of Bankruptcy Code § 521(a)(2) and the exception to discharge established by § 523(a)(16). The fact that the debtor stated the intent to surrender the condominium unit in accordance with § 521(a)(2)(A) and has acted on that intent in accordance with § 521(a)(2)(B) does not alter his status as the title holder of the unit and thus postpetition condominium fees and assessments arising while he remains the record owner of the unit are not dischargeable under § 523(a)(16).

Having concluded that the debtor's liability for postpetition condominium fees and assessments may not be dischargeable does not necessarily mean the Trust is entitled to unconditional relief from stay to pursue the debtor now, especially where the debtor has surrendered the unit and stay relief has been granted with respect to the unit. Bankruptcy Code § 362(d) states that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or *conditioning* such stay" (emphasis added). *See In re Unanue-Casal*, 159 B.R. 90, 94 (D.P.R. 1993) (bankruptcy courts have full discretion in "fashioning the grant of relief" from stay). I previously granted the Trust partial relief on its motion to enable the Trust to take the steps necessary under state law to enforce its lien on the condominium unit. In light of the foregoing discussion, I will also grant the Trust relief from the stay to seek to hold the debtor liable for non-dischargeable postpetition condominium fees and assessments but with the caveat that the Trust first seek recovery through a sale of the condominium unit. In other words, the Trust will be given relief from the stay to proceed against the debtor individually for any

---

postpetition condominium fees and assessments that arise while a debtor who, as in this case, continues to own the unit after vacating it.

postpetition fees and assessments which are subject to § 523(a)(16) but only for amounts which remain unpaid after a sale of the debtor's condominium unit.

Dated: April 15, 2011

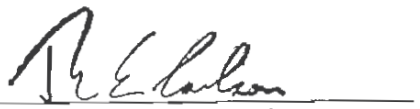
By the Court,

Melvin S. Hoffman
U.S. Bankruptcy Judge

SUPPLEMENT "2"

Entered on Docket
January 14, 2011
GLORIA L. FRANKLIN, CLERK
U.S BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Signed and Filed: January 13, 2011



THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re	Case No. 09-31512 TEC
TIMOTHY R. HECK and VARDA TREIBACH-HECK,	Chapter 7
Debtors.	

MEMORANDUM RE DEBTORS' MOTIONS TO REOPEN

Upon due consideration, for the reasons stated below, the court denies Debtors' motions to reopen their bankruptcy case. This memorandum constitutes the court's findings of fact and conclusions of law.

FACTS

On June 2, 2009, Debtors filed a no-asset chapter 7 bankruptcy case. On June 23, 2009, Debtors filed a statement of intent to surrender overencumbered real properties located at 12604 Carmel Country Road and 18064 Ivy Hill Drive #8, San Diego, California (collectively, the Properties). On July 9, 2009, the chapter 7 trustee filed a report of no distribution. On September 10, 2009, the court entered Debtors' discharge pursuant to 11 U.S.C. § 727. The bankruptcy case was closed on September 25, 2009.

On June 3, 2010, August 31, 2010, and October 8, 2010, Debtors filed three separate motions to reopen their bankruptcy case, and paid a $260 reopening fee. Debtors seek to enforce the discharge injunction against Elysian Community Association RB 214 (Elysian), a homeowners association that Debtors contend is attempting to collect *postpetition* homeowners dues.[1] Debtors also seek to compel the mortgagee (Chase) to take legal title to the Properties, effective as of the bankruptcy petition date, to assume financial responsibility for the Properties, and to remove from county records and Debtors' credit reports delinquencies reported against Debtors with respect to the Properties.

LAW

A bankruptcy case may be reopened for cause. 11 U.S.C. § 350(b). The court determines that Debtors' motions to reopen should be denied, because no cause exists to reopen Debtors' bankruptcy case.

First, Elysian's collection efforts do not violate the discharge injunction, because Debtors continue to hold legal title to the Properties, and because a discharge under section 727 does not discharge a debtor with a "legal, equitable, or possessory ownership interest" from any debt for homeowners association assessments due and payable postpetition. 11 U.S.C. § 523(a)(16).[2]

---

[1] Debtors acknowledge that they were current on their homeowners dues as of the petition date.

[2] Section 523(a)(16) provides in relevant part as follows:

> A discharge under section 727 . . . of this title does not discharge an individual from any debt for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, . . . or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit . . .

Debtors themselves acknowledge that the HOA fees Elysian seeks to collect came due postpetition.

Second, the court does not have subject matter jurisdiction to enter injunctive or declaratory relief against Chase. Such claims for relief do not "arise under" the Bankruptcy Code or "arise in" the bankruptcy case. Although the Bankruptcy Code requires individual debtors to file a statement as to whether they intend to retain or surrender property encumbered by secured debt,[3] the Code does not impose a duty on the affected secured creditor to act upon Debtors' statement of intention. Nor are such claims "related to" the bankruptcy case, because the outcome of a lawsuit for injunctive or declaratory relief would not have any conceivable effect on Debtor's bankruptcy estate. The complained-of conduct occurred postpetition, and the Properties are no longer property of the bankruptcy estate. 11 U.S.C. §554(c); 28 U.S.C §§ 157(b), 1334(b).

Because no cause exists to reopen Debtors' bankruptcy case and the motion to reopen is denied, the Clerk shall refund to Debtor the $260 reopening fee paid by Debtors.

Debtors should consider hiring an attorney to help them limit their financial exposure, as there undoubtedly exist inexpensive, practical means by which Debtors can use the Properties to pay the homeowners dues until Chase forecloses.

****END OF MEMORANDUM****

[3] 11 U.S.C. § 521(a)(2)(B).

COURT SERVICE LIST

Varda Treibach-Heck
784 Vespucci Ln.
Foster City, CA 94404-2921

Timothy R. Heck
784 Vespucci Ln.
Foster City, CA 94404-2921

SUPPLEMENT "3"

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY
M.L. KING, JR FEDERAL BUILDING
50 WALNUT ST., 3RD FLOOR
NEWARK, NEW JERSEY 07102

DONALD H. STECKROTH
BANKRUPTCY JUDGE

(973) 645-4693
Fax: (973) 645-2606

NOT FOR PUBLICATION

December 3, 2010

LETTER OPINION
ORIGINAL FILED WITH THE CLERK OF THE COURT

Law Offices of Edward P. Azar, L.L.C.
Edward P. Azar, Esq.
2840 Route 23 South
Newfoundland, New Jersey 07435
Counsel for Debtor

Berman, Sauter, Record & Jardim, P.C.
Katherine L. Mikalanis, Esq.
222 Ridgedale Avenue
P.O. Box 2249
Morristown, New Jersey 07962
Counsel for Creditor, Heritage Lakes at the Quarry Condominium Association, Inc.

Re: Beverly Liversidge, Debtor
Case No. 10-16342 (DHS)

Dear Counsel:

Before the Court is a motion by the Debtor, Beverly Liversidge ("Debtor"), to hold one of her creditors, Heritage Lakes at the Quarry Condominium Association, Inc. ("Association"), in contempt for its attempts to collect post-petition condominium fees and expense assessments. The Debtor argues that that the Association violated the Order of Discharge granted by this Court on June 11, 2010, and therefore seeks sanctions and attorneys fees in connection with this

motion for contempt. In reply, the Association argues that collection attempts were made in good faith, within its rights granted by 11 U.S.C. § 523(a)(16), and that the relief sought by the Debtor is severe and unwarranted. Accordingly, the Association requests that the Court deny the motion with prejudice.

For the reasons that follow, the motion is denied. The Court has jurisdiction over this motion pursuant to 28 U.S.C. § 1334 and the Standing Order of Reference from the United States District Court for the District of New Jersey dated July 23, 1984. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (I). Venue is proper under 28 U.S.C. § 1409(a). The following shall constitute the Court's findings of fact and conclusions of law as required by Federal Rule of Bankruptcy Procedure 7052.

STATEMENT OF FACTS

The Debtor filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on March 5, 2010. The Debtor received a discharge on June 11, 2010. At the time of her filing and continuing through the present, the Debtor has resided in a condominium located within the Heritage Lakes at the Quarry development. (Debtor's Cert., ¶¶ 2-5) The Debtor's condominium is under the auspices of the Association's Master Deed and By-Laws. (Cert. of Mikalanis, ¶ 5) On her schedules, the Debtor listed a debt owing to the Association for common expense assessments.

At filing, the Debtor owed the Association $2,883.83 in pre-petition fees. (*Id.* at ¶ 6) By a letter dated June 22, 2010, the Association's attorneys directed that all pre-petition debts be "written off" the Debtor's account. (*Id.* at ¶8) The Association continued to bill the Debtor for pre-petition debts through August 17, 2010. (*Id.*) However the Debtor's account presently reflects action taken by the Association in accordance with the June 22 directive.[1] (*Id.* at ¶ 9)

As of April 1, 2010, the Association began billing the Debtor for post-petition common expense assessments. (*Id.* at 11) The Debtor has failed to make any post-petition payments and presently owes the Association a post-petition balance of $1,948.08, including late fees and legal fees in connection with its collection efforts for post-petition fees. (*Id.*) The Debtor argues that although section 523(a)(16) of the Bankruptcy Code excepts post-petition condominium fees from discharge, this section only applies after the administration of the case. Accordingly, the Debtor argues that the Association is in contempt for its efforts to collect on the aforementioned fees, both pre-petition and post-petition.

[1] The Court is cognizant of the fact that the Association continued to bill the Debtor for pre-petition debts following the petition date, including two invoices that were sent on July 20, 2010 and August 17, 2010 *after* the directive to write off the Debtor's account. However, the Court is satisfied that these invoices were merely the result of a lag in the Association's accounting system and not a malicious attempt to collect on discharged debts, nor did the Debtor suffer damages because of such conduct.

DISCUSSION

Section 523 of the Bankruptcy Code creates exceptions to the global discharge granted to individual debtors by section 727. *See* 11 U.S.C. §§ 523 and 727. Section 523(a)(16) specifically addresses condominium fees:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--
>
> (16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership . . . for as long as the debtor . . . has a legal, equitable, or possessory ownership interest in such unit . . .[.]

11 U.S.C. § 523(a)(16). In a voluntary bankruptcy case, the filing of a petition constitutes an order for relief. 11 U.S.C. § 301(a)-(b).

Thus, section 523(a)(16) applies to *post-petition* condominium fees and excepts them from discharge, as long as the debtor continues to reside in or own the unit. Vol 4. COLLIER ON BANKRUPTCY ¶ 523.24 (Alan N. Resnick & Hanry J. Sommer eds., 16th ed.) ("Section 523(a)(16) excepts from discharge fees and assessments that become due and payable postpetition . . . These fees and assessments are excepted from discharge for the period that the debtor has an ownership interest in the unit."); *See also In re Hawk*, 314 B.R. 312, 316 (Bankr. D.N.J. 2004); *Montclair Prop. Owners Ass'n v. Reynard (In re Reynard)*, 250 B.R. 241, 244 n.5 (Bankr. E.D. Va. 2000). In the legislative histories to the Bankruptcy Reform Act of 1994, which added subsection (16) to section 523(a), and to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, it is clear that Congress intended the exception to apply immediately following the petition date. *See In re Rosteck,* 899 F.2d 694 (7th Cir. 1990) (citing 140 Cong. Rec. H10764 (daily ed. October 4, 1994) (reprinted in E App. Collier on Bankruptcy at App. Pt. 9-97 to 98) ("This section amends section 523(a) of the Bankruptcy Code to except from discharge those fees that become due . . . *after the filing of a petition* . . .") *and* H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 88, *reprinted in* App. Pt. 10(b) (2005 amendment was intended "to broaden the protections accorded to community associations with respect to . . . fees that accrue *postpetition* . . . ").

At oral argument, the Debtor's attorney alluded to case law that would indicate § 523(a)(16) does not apply until "after discharge and the administration of the case." However, the Court can find no case law to support this reading of the statute, nor has the Debtor's attorney cited to any such cases in his filings before the Court. A plain reading of the sub-section, specifically the phrase "after the order for relief," as that term is defined by § 301(b), makes it clear that § 523(a)(16) makes all post-petition condominium fees payable and non-dischargeable as soon as a debtor files a voluntary petition.

Accordingly, it is clear that the Debtor should have been making post-petition payments of fees. The applicable fines and legal fees incurred by her failure to make these payments are appropriate. The Debtor continues to reside in the condominium and derives the benefits therefrom. The Association is within its rights to seek payment on post-petition fees and assessments for this period. To the extent the Association may have billed for pre-petition fees, this was quickly remedied and the Debtor suffered no harm as a result.

CONCLUSION

In light of the foregoing facts and law, the Debtor's motion for contempt is denied. She remains obligated to pay all post-petition fees, fines, and expenses due and owing to the Association. An Order in conformance with this Opinion has been entered by the Court and a copy attached hereto.

Very truly yours,

Donald H. Steckroth

DONALD H. STECKROTH
UNITED STATES BANKRUPTCY JUDGE

Enclosure

SUPPLEMENT "4"

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re MONICA EMILIE JOHNSON. Debtor.	Chapter 7 Case No. 2:08-bk-13937-SSC (Not for Publication- Electronic Docketing ONLY) MEMORANDUM DECISION CLARIFYING COURT'S RULING ON THE RECORD

On April 29, 2009, this court conducted a hearing on whether Sherwood Park Homeowners Association ("Homeowners' Association"), had violated the discharge injunction under 11 U.S.C. §524. Ms. Elise Saadi appeared on behalf of the Homeowners' Association, and Ms. Johnson appeared telephonically.

After reviewing the letters sent to Ms. Johnson, the Court concludes that the Homeowners' Association was requesting that Ms. Johnson remove debris or other items from the front of her condominium unit which might have caused a health and/or safety issue. To the extent that these actions were done prior to the entry of her discharge order, they are not a violation of the automatic stay. 11 U.S.C. § 362(b) (4). Section 524, after the entry of the discharge injunction, focuses on the prohibition by a creditor of collection on an obligation that is a personal liability of the debtor. However, the discharge injunction does not prohibit a creditor from stopping or prohibiting a health or safety violation. In re Price, 383 B.R. 411 (Bankr. N.D. Ohio 2007). Thus, the Court cannot conclude that any action by the Homeowners'

Association was a violation of the discharge injunction.

A separate issue arose as to the post-petition collection efforts of the Homeowners' Association to recover fines or assessments due and owing by the debtor, and whether those actions were a violation of the discharge injunction. Ms. Johnson stated that at the Section 341 Meeting of Creditors, she notified her chapter 7 trustee that she would no longer retain possession of her condominium unit. However, neither the Homeowners' Association nor the creditor with the first lien on the condominium unit was present at the Meeting. The secured creditor independently took action to foreclose its interest in the unit. The debtor stated that she notified the Homeowners' Association by a letter dated February 17, 2009, that she had vacated the condominium unit and that it should cease collection efforts against her. Counsel for the Homeowners' Association advised the Court that the trustee's sale of the debtor's property occurred on March 23, 2009, or the Trustee's deed upon sale was recorded on March 23, 2009, but that she had no record of any letter received from the debtor as to the debtor's abandonment of the unit.

The Court advised the parties at the hearing that if a creditor has a valid, pre-petition lien, that lien "carries through" the bankruptcy proceedings. Dewsnup v. Timm, 502 U.S. 410, 112 S. Ct. 773 (1992). The Court also stated that the anti-deficiency judgment statute in Arizona prohibits a lien creditor from pursuing a personal liability against a debtor, if the creditor is not paid in full after a foreclosure sale of the real property. A.R.S. § 33-729. The Court also cited the parties to 11 U.S.C. §523(a)(16), which states that certain post-petition fines and assessments from a homeowners' association shall not be discharged under Section 727 of the Bankruptcy Code. Thus, the Court concluded that to the extent that the Homeowners' Association was pursuing the debtor for any post-petition fines or assessments that arose prior to the Trustee's Sale on the unit, the debtor would be responsible for those fines or assessments. However, to the extent that those fines or assessments arose pre-petition, they would be

discharged.[1] Although the pre-petition fines and assessments may have been a lien against the real property at the time of the Trustee's Sale, counsel for the Homeowners' Association believes that the Association was not entitled to a lien priority under Arizona law and the pre-petition liability would have been extinguished, as a lien, as result of the Trustee's Sale. That pre-petition liability also would have been extinguished as a personal liability of the debtor. 11 U.S.C. §523(a)(16).

At the conclusion of the hearing, counsel for the Homeowners' Association stated that approximately $700 was due and owing by the debtor to the Association. The Court wishes to clarify that counsel should advise the debtor solely of the liability for fines or assessments which has accrued after the debtor filed her bankruptcy petition on October 9, 2008 up to the date of the Trustee's Sale, which counsel believes to be March 23, 2009. Any other liability has been discharged.

Based upon the foregoing, the Court concludes that Sherwood Park Homeowners Association did not violate the discharge injunction of 11 U.S.C. §524.

DATED this 1st day of May, 2009

Honorable Sarah Sharer Curley
United States Bankruptcy Judge

Notice of this Decision Mailed To:

Maxwell & Morgan
Elise V. Saddi
2500 S. Power Road, Suite 103
Mesa, Arizona 85209

---

1. The Court specifically read into the record the language that "nothing in this paragraph [Section 523(a)(16)] shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before the entry of the order for relief in a pending or subsequent bankruptcy case. . ."

Attorneys for Respondent

Sherwood Park Homeowners Association
2345 S. Alma School Road Ste 210
Mesa, AZ 85210
Respondent

Monica Johnson
91 Bluff Rd.
Bath, ME 04530
Debtor

SUPPLEMENT "5"

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
JOHNNIE B. COOK	)	Case No. 10-10113-SSM
LISA A. WILLIAMS	)	Chapter 13
	)	
Debtors	)	
	)	
JOHNNIE B. COOK, *et al.*	)	
	)	
Plaintiffs	)	
	)	
vs.	)	Adversary Proceeding No. 10-1300
	)	
MONTCLAIR PROPERTY OWNERS ASSOCIATION, INC.	)	
	)	
Defendant	)	

MEMORANDUM OPINION

Before the court is the motion of the plaintiffs, Johnnie B. Cook and Lisa A. Williams ("the debtors"), for summary judgment "stripping off" liens against their residence for unpaid homeowners association assessments on the ground that there is no equity in the property to which the liens can attach. A hearing was held on October 19, 2010, at which the court heard the contentions of the parties and took the issues under advisement. For the reasons stated, the motion will be granted.

Background

The debtors, who are husband and wife, filed a joint voluntary petition in this court on January 7, 2010, for relief under chapter 13 of the Bankruptcy Code. Among the assets listed on

their schedules was their residence located at 4749 Shadow Oak Court, Dumfries, Virginia. The property is valued on the schedules at $288,367, subject to a deed of trust in the amount of $450,611 and judgment liens totaling $7,477.

After two earlier plans were denied confirmation and one was withdrawn, the debtors filed on July 1, 2010, the plan that is currently before the court. It requires the debtors to pay the chapter 13 trustee $160 per month for 36 months and projects a zero percent dividend on unsecured claims.[1] Under the plan and the present adversary proceeding, that would include the claim of Montclair Property Owners Association, Inc. ("Montclair") for $8,118.73 in unpaid homeowner assessments. Of that amount, $6,696.82 is claimed by Montclair as secured based on filed homeowners association liens and on docketed judgment liens. It is those liens that the present action seeks to void under § 506(d), Bankruptcy Code, on the ground that they are junior to a deed of trust that exceeds the value of the property, so that there is no equity to which they can attach. Specifically, the debtors allege that the property is worth no more than $300,000,[2] while the first-lien deed of trust currently held by Deutsche Bank National Trust Company has a balance of $474,817. Although Montclair denies the specific value asserted by the debtors, it concedes that the property is worth less than the amount owed on the deed of trust and that its liens are junior to the deed of trust.

---

[1] Based on the filed claims, the actual dividend may be closer to 5%.

[2] The motion itself alleges a value of $290,600, based on the current real estate tax assessment. *See Christopher Phelps & Assocs. LLC v. Galloway*, 492 F.3d 532 (4th Cir. 2007) (holding that real estate tax assessment was admissible to prove value of partially-completed home under Fed. R. Evid. 803(8) agency records exception to hearsay rule). However, in affidavits submitted by the debtors in support of the summary judgment motion, they value the property at $300,000.

Discussion

A.

Although outside of bankruptcy a secured creditor is entitled to retain its lien until the underlying debt is paid, in bankruptcy a secured claim is limited to the value of the debtor's interest in the collateral and is otherwise unsecured. § 506(a)(1), Bankruptcy Code. Additionally, to the extent that a lien secures a claim against the debtor that is not an allowed secured claim, the lien is void. § 506(d), Bankruptcy Code. Although there are certain exceptions that apply in chapter 13 cases, none of them is applicable here.[3] Thus, when prior liens against a creditor's collateral fully exhaust its value, any junior liens are void, and the creditor's claim is properly treated for the purposes of the bankruptcy as unsecured.[4] Montclair concedes that the Deutsche Bank deed of trust fully encumbers the property, and it also concedes

---

[3] Specifically, a claim secured solely by a security interest in the debtor's principal residence cannot be bifurcated into secured and unsecured components. § 1322(b)(2); *Nobleman v. American Savings Bank*, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). This prohibition applies only to security interests (i.e., consensual liens); it does not extend to judgment liens or statutory liens, which may be modified even if they attach to the debtor's principal residence. *In re Williams*, 166 B.R. 615 (Bankr. E.D. Va. 1994). Nor does it apply even to a security interest if there is no value to which the lien can attach. *Wright v. Commercial Credit Corp. (In re Wright)*, 178 B.R. 703 (E.D. Va. 1995), *appeal dismissed*, 77 F.3d 472 (4th Cir. 1996). Additionally, a claim secured by a purchase-money security interest in an automobile purchased for personal use within 910 days before the bankruptcy filing or by other personal property purchased within 1 year before the bankruptcy filing cannot be bifurcated. § 1325(a) "hanging paragraph" [unnumbered paragraph following § 1325(a)(9)].

[4] In a chapter 7 case, the Supreme Court has held that a debtor may not use Section 506(d) to "strip down" a lien to the value of the collateral. *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). The Fourth Circuit has similarly held that a subordinate mortgage that is unsupported by any equity in the property nevertheless cannot be "stripped off" by the debtor in a chapter 7 case. *Ryan v. Homecomings Financial Network*, 253 F.3d 778 (4th Cir. 2001). However, those rulings have no applicability to reorganization cases under chapters 11, 12, or 13.

that its liens are subordinate to the deed of trust. Under settled principles, therefore, the filed liens are void, and Montclair's claim is properly treated as unsecured.

B.

Montclair argues, however, that such a result is unfair because the only reason its claim is not secured at the present time is because real estate values are artificially low as a result of the economic crisis that was triggered by the sub-prime mortgage loan meltdown. Montclair posits that at some future time real estate values will rebound to a level that would support its liens, and it contends that avoidance would provide an unjustified windfall to the debtors. Of course, whether and when real estate values will ever return to their former values is entirely speculative.[5] But more fundamentally, Montclair cites no statutory or case authority for the proposition that lien avoidance may be denied based solely on an anticipated future increase in the value of a secured creditor's collateral. It is true that in a chapter 11 reorganization case, a creditor may protect itself against a temporarily distorted market by making an election to have its claim treated as fully secured. § 1111(b)(2), Bankruptcy Code. But even in chapter 11 the

---

[5] A chart showing the real estate tax assessments for the property since 2000, as reported on the Prince William County government website, reflects that the value of the property has fluctuated rather widely over that period:

Year	Land	Improvements	Total	Change
2000	$ 51,800	$ 131,400	$ 183,200	
2001	$ 57,100	$ 137,000	$ 194,100	6%
2002	$ 64,000	$ 161,000	$ 225,000	16%
2003	$ 73,000	$ 190,200	$ 263,200	17%
2004	$ 84,900	$ 218,500	$ 303,400	15%
2005	$ 108,300	$ 263,400	$ 371,700	23%
2006	$ 134,400	$ 336,800	$ 471,200	27%
2007	$ 144,400	$ 266,100	$ 410,500	-13%
2008	$ 129,900	$ 214,400	$ 344,300	-16%
2009	$ 98,700	$ 161,300	$ 260,000	-24%
2010	$ 105,600	$ 185,000	$ 290,600	12%

election is available only to a creditor that is undersecured, and not to one whose secured claim has "inconsequential value." § 1111(b)(1)(B)(i), Bankruptcy Code. In any event, chapter 13 has no provision for an election corresponding to the § 1111(b) election in chapter 11 cases.

Montclair also argues that its liens should somehow be insulated against avoidance because Congress, in making *post-petition* condominium and property-owner assessments non-dischargeable in chapter 7 cases, *see* § 523(a)(16), Bankruptcy Code,[6] evinced an intent to protect fellow owners against the unfair burden that would result from debtors not paying their share of the common expenses and operating costs. To this, there are several responses. First, whether a debt is *dischargeable* and whether it is *secured* are completely different issues. Second, the plain language of § 523(a)(16) does not prevent a debtor from discharging liabilities for *pre-petition* assessments, only for *post-petition* assessments so long as the debtor remains the owner of, or continues to occupy, the property. And third, the § 523(a)(16) exception to discharge does not apply in chapter 13. *See* § 1328(a), Bankruptcy Code. Put simply, the Bankruptcy Code provides no special status, even in the area of dischargeability, for unpaid pre-

---

[6] Specifically, the cited statute excludes from discharge in a chapter 7 case a debt—

> for a fee or assessment that becomes due and payable *after the order for relief* to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising *before entry of the order for relief* in a pending or subsequent bankruptcy case[.]

§ 523(a)(16), Bankruptcy Code (emphasis added).

petition assessments. The post-petition assessments are fully provided for by the debtors' plan and would be unaffected by avoidance of the liens relating to the prepetition assessments. Although there may well be policy arguments favoring preservation of liens for pre-petition assessments when debtors in reorganization cases propose to retain the property, such arguments are properly addressed to Congress, as this court must apply the Bankruptcy Code as it is written.

A separate order will be entered granting the motion for summary judgment and avoiding the liens.

Date: Nov 9 2010

Alexandria, Virginia

/s/ Stephen S. Mitchell
Stephen S. Mitchell
United States Bankruptcy Judge

Copies to:

Entered on Docket: November 10, 2010

Lois Ilaine Upton, Esquire
Robert A. Ades & Associates PC
5419-B Backlick Road
Springfield, VA 22151
Counsel for the plaintiffs

Elizabeth Marie Crego, Esquire
Segan, Mason & Mason, P.C.
7010 Little River Turnpike Suite 270
Annandale, VA 22003
Counsel for the defendant

Thomas P. Gorman, Esquire
300 N. Washington St., Suite 400
Alexandria, VA 22314
Chapter 13 Trustee

SUPPLEMENT "6"

SIGNED.

Dated: May 26, 2011

RANDOLPH J. HAINES
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re	Chapter 11
SHAWN BURGUENO,	CASE NO. 2:09-bk-10375-RJH
Debtor.	OPINION AND ORDER DENYING DISCHARGE OF POST PETITION HOA FEES AND ATTORNEYS' FEES

The issue here is whether an individual debtor remains liable for post-petition homeowner association assessments and attorneys' fees even though he does not occupy the property and stipulated to stay relief so the lender could foreclose. Because stay relief does not transfer legal title, the Court concludes the post-petition homeowner association ("HOA") fees, and the legal fees incurred in litigating them, are nondischargeable pursuant to Code § 523(a)(16)[1]

Background Facts

Debtor Shawn Burgueno is an individual employed as a loan officer with a mortgage company. When he filed this Chapter 11 case two years ago, he also owned his home, a vacant lot and five single-family residential properties. According to his schedules, all of the investment properties were worth less than the debts secured by them. One of the Debtor's investment properties was a condominium located in Scottsdale. It was subject to homeowner association or condominium assessments by two homeowner or condominium associations, the Edge at Grayhawk Condominium Association and the Grayhawk Community Association.

In February, 2010, the Debtor stipulated for stay relief with Wells Fargo Bank so

[1] Except as otherwise indicated, all chapter, section and rule references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

that it could immediately foreclose on the condominium. The stipulation provided: "The automatic stay of § 362 shall be immediately terminated as to the Bank regarding its interest in the Property, with a waiver of the 14-day stay of Bankruptcy Rule 4001(a)(3)."[2] The stipulation was approved by the Court on March 8, 2010.[3]

The Debtor's plan was confirmed in August, 2010.[4] The order confirming the plan expressly incorporated the stipulation with Wells Fargo "for treatment of its claim regarding" the Scottsdale condominium.

At least until early April of 2011, however, Wells Fargo did not conduct a foreclosure or trustee sale of the condominium. During that time, the two HOAs sought to collect post-petition HOA fees from the Debtor. In April, Debtor filed motions seeking orders determining that the HOAs were bound by the confirmed plan and therefore limited to their allowed pre-petition claims. The HOAs responded, maintaining that the confirmed plan did not, and could not, discharge their post-petition assessments for so long as the Debtor held legal title to the condominium, and that neither the stipulated stay relief nor the confirmation of the plan terminated the Debtor's legal title.

By April, 2011, the combined total of the post-petition HOA fees was approximately $8,000.

Analysis

Because this individual Chapter 11 Debtor has not yet received his discharge,[5] the

---

[2] *See*, Stipulation for Adequate Protection and Claim Treatment (Wells Fargo), at 2 (filed and entered on Bankr. Docket on February 16, 2010 at # 154).

[3] *See*, Order Granting Stipulation for Adequate Protection and Claim Treatment (Wells Fargo) (filed March 8, 2010 and entered on Bankr. Docket on March 9, 2010 at # 170).

[4] *See*, Order Confirming Plan (filed August 31, 2010 and entered on Bankr. Docket on September 1, 2010 at # 231).

[5] In general, Code § 1141(d)(5)(A) provides that an individual Chapter 11 debtor does not receive a discharge until "completion of all payments under the plan." An earlier discharge may be granted pursuant to § 1141(d)(5)(B) once the property distributed under the plan equals the amount that would have been paid on liquidation under Chapter 7 and if modification is not practicable, but it is unclear whether this also requires a showing of cause or hardship as does the similar provision in § 1328(b)(1). *See, e.g., In re Necaise*, 443 B.R. 483 (Bankr. S.D. Miss. 2010) (citing cases).

issue of whether these post-petition HOA fees are dischargeable notwithstanding Code § 523(a)(16) may technically not yet be ripe for decision. Nonetheless, § 523(a)(16) does control the issue of whether the only claims that the HOAs could assert are the pre-petition claims whose treatment is governed by the plan.

What the plain language of § 523(a)(16) does appear to establish for this individual Debtor's Chapter 11 case is that the nondischargeable personal liability for HOA fees continues post-petition for so long as the debtor or trustee has *either* a legal interest, an equitable interest, or a possessory ownership interest in the property. As explained by the Ninth Circuit BAP's opinion in *Foster*,[6] the § 523(a)(16) exception to discharge originally applied only when the debtor occupied the property, but the 2005 BAPCPA amendment expanded the exception so that it applies regardless of possession so long as the debtor or trustee retains a legal or equitable ownership interest.

No language in that section or in § 1141 suggests that post-petition liability is terminated either by stay relief or by confirmation of a plan. Of course the post-petition, pre-confirmation fees are also administrative expenses that should be governed by the plan because § 1129(a)(9)(A) requires that they be paid in full on the effective date. But here that plan treatment does not apply because the HOAs neither filed a proof of claim nor an application for allowance of administrative expense. And if for whatever reason the estate does not actually pay such administrative claims in full on the effective date, Code § 1141(d)(2) makes clear that individual Chapter 11 debtors are not discharged from any debts that are excepted from discharge under § 523.

Of course if the plan expressly stated that it discharged all such post-petition HOA fees and the HOA failed to object at confirmation despite adequate notice, that plan provision and express discharge would be *res judicata* and binding on the HOA pursuant to Code §

---

[6] *Foster v. Double R Ranch, Ass'n (In re Foster)*, 435 B.R. 650, 658 (9th Cir. BAP 2010). *Foster*'s analysis of a covenant running with the land may provide a basis for nondischargeability in this case wholly independent of § 523(a)(16), but none of the parties has argued it.

1141(a) and the Supreme Court's opinion in *Espinosa*.[7] But this plan did not do so, and Chapter 11 debtors and their attorneys should take heed of the Supreme Court's warning that the "specter" of Rule 11 penalties "should deter bad-faith attempts to discharge" otherwise nondischargeable debts by such an attempted ambush.[8]

The problem here is that the bank failed to foreclose for over a year after it obtained stay relief to do so. Judging from the recently reported decisions, this is a problem occurring with increasing frequency.[9]

While the stay relief order may have effectively signaled the Debtor's "surrender" of possession of the property, that termination of the possessory interest does not terminate the Debtor's liability under § 523(a)(16) as long as the Debtor remains in title. The Court must agree with the recent decision of the Massachusetts Bankruptcy Court that such surrender "does not alter [the debtor's] status as the title holder of the unit and thus postpetition condominium fees and assessments arising while he remains the record owner of the unit are not dischargeable under § 523(a)(16)."[10]

Thus to terminate the Debtor's post-petition liability for HOA fees, the Debtor would have to quit claim[11] the property to either the bank or to the HOA. Because this would be

---

[7] *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010) (absent creditor objection and appeal, confirmation of plan that purports to discharge student loan without adversary proceeding or determination of undue hardship is *res judicata* even though it violates §§ 523(a)(8) and 1328(a)(2) and should not have been confirmed).

[8] *Id.* at 1382; *see also In re Webber*, 251 B.R. 554, 557-58 (Bankr. D. Ariz. 2000).

[9] *E.g., In re Ames*, 2011 WL 1457750 (Bankr. D. Mass. April 15, 2011); *In re Brown*, 2011 WL 1322311 (Bankr. D.N.J. April 6, 2011); *In re Heck*, 2011 WL 133015 (Bankr. N.D. Cal. Jan. 13, 2011) (court lacks subject matter jurisdiction to reopen a closed chapter 7 case to require Chase Bank to foreclose).

[10] *Ames*, 2011 WL 1457750, at *2.

[11] A quit claim deed is a form of conveyance recognized by Arizona law, Arizona Revised Statutes ("A.R.S."), § 33-402. The quit claim deed conveys to the grantee only the rights the grantor then possessed, and does not constitute a muniment of title. *Lake Havasu Cmty. Hosp., Inc. v. Arizona Title Ins. and Trust Co.*, 687 P.2d 371(Ariz. Ct. App. 1984), *overruled on other grounds by Barmat v. John and Jane Doe Partners A-D*, 747 P.2d 1218 (Ariz. 1987). In some counties and perhaps some other states it might be called a "grant deed." A quit claim deed need only be signed by the grantor

an out-of-the-ordinary course of business transaction for a Chapter 11 debtor in possession, it would require a motion, notice, hearing, and court order pursuant to Code § 363(b)(1). Alternatively, the Debtor's plan could presumably transfer title of the property to the bank pursuant to Code § 1123(a)(5)(B). But until there is such a transfer of legal title, the Debtor's post-petition, nondischargeable liability under § 523(a)(16) continues until the bank forecloses.

At oral argument on Debtor's motion to deem the HOA claims controlled by the confirmed plan, the objecting HOAs also sought attorneys' fees. Because that issue had not been addressed by the parties' memoranda, the Court requested supplemental briefing on the issue of whether attorneys' fees may be included in the debt that is deemed nondischargeable by § 523(a)(16).

The HOAs argue that their debts for the HOA fees arise under applicable declarations of covenants, conditions and restrictions, which Arizona law regards as a contract between the owner and the HOA.[12] And although Arizona law grants courts discretion to award attorneys' fees to the successful party in any action on a contract,[13] courts lack discretion to deny fees when the contract specifically provides for them.[14] The HOAs also rely on the Supreme Court decisions in *Travelers*,[15] holding that attorneys' fees may be included as part of an allowed

---

pursuant to A.R.S. § 33-401(B), and Arizona statutes do not require acceptance by the grantee as do some methods of conveyance, such as a joint tenancy. *See Bostwick v. Jasin*, 821 P.2d 282 (Ariz. Ct. App. 1991) ("a joint tenancy is not created in Arizona unless it clearly appears that the grantees have agreed to accept the conveyances as joint tenants"). Query, though, whether the common law of Arizona still requires both a "delivery" and an "acceptance" by the grantee for any conveyance of real property to be effective, *see Parker v. Gentry*, 154 P.2d 517 (Ariz. 1944), or whether delivery and acceptance are not required for a quit claim deed because it "is not a conveyance." *Adamson v. Doornbos*, 587 S.W.2d 445, 447 (Tex. Civ. App. 1979), cited in Lake Havasu Cmty. Hosp., supra. Or does the recording of a deed satisfies these requirements if they do apply? *See Roosevelt Sav. Bank v. State Farm Fire & Cas. Co.*, 556 P.2d 823, 825 (Ariz. Ct. App. 1976). And if the bank or HOA fails to object to the debtor's motion for authority to quit claim the property, or if the court overrules their objection, would that satisfy the common law requirement for acceptance if it continues to exist?

[12] *Pinetop Lakes Ass'n v. Hatch*, 659 P.2d 1341, 1343 (Ariz. Ct. App. 1983).

[13] A.R.S. § 12-341.01.

[14] *Chase Bank of Ariz. v. Acosta*, 880 P.2d 1109, 1121 (Ariz. Ct. App. 1994).

[15] *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007).

unsecured claim against an estate, and *Cohen*,[16] holding that treble damages and attorneys' fees may also be nondischargeable as a liability arising from fraud.

Debtor argues that attorneys' fees are awardable under A.R.S. § 12-341.01 only when the contract is the substantive predicate to the action, which is not the case here where the issue is § 523(a)(16) rather than the CC&Rs. Debtor also argues that § 523(a)(16) does not expressly include attorneys' fees, and that exceptions to the discharge should be strictly construed in favor of the Debtor.[17]

Debtor may be entirely correct that A.R.S. § 12-341.01 would not allow attorneys' fees here, where although the existence of a contract is a necessary predicate to the action, it is not the central issue in the litigation. But, as noted, the HOAs' request for attorneys' fees rests not only on A.R.S. § 12-341.01, but also on the express terms of the contract itself. The declarations of CC&Rs are clear that the HOAs may recover fees incurred by the association in any litigation with the homeowner in collecting or attempting to collect delinquent assessments.

In § 523(a)(16), the discharge exception is not limited to HOA "assessments," but also includes "a fee." Even a narrow construction of this discharge exception cannot yield the conclusion that attorneys' fees do not constitute such "a fee." The Ninth Circuit BAP has reached the same conclusion with respect to an HOA's attorneys' fees incurred on appeal,[18] and the Seventh Circuit has similarly concluded that attorneys' fees incurred in litigating dischargeability of a student loan may be awarded when the loan contract provides for them.[19]

Conclusion

The Court therefore finds and concludes that the post-petition HOA fees and assessments, including the attorneys' fees incurred in attempting to collect them, are

---

[16] *Cohen v. De La Cruz*, 523 U.S. 213 (1998).

[17] *Snoke v. Riso (In re Riso)*, 978 F.2d 1151 (9th Cir. 1992).

[18] *Foster*, 435 B.R. at 662-63.

[19] *Busson-Sokolik v. Milwaukee Sch. of Eng'g (In re Busson-Sokolik)*, 635 F.3d 261 (7th Cir. 2011).

nondischargeable pursuant to §§ 523(a)(16) and 1141(d).

Although the Ninth Circuit has recognized that a bankruptcy court has jurisdiction to enter a money judgment on a debt determined to be nondischargeable,[20] the Court will not do so here. The HOAs have not asked for entry of a judgment, and this is not a nondischargeability action, for which Bankruptcy Rule 7001(6) would require an adversary proceeding.

IT IS THEREFORE ORDERED denying the Debtor's motion to compel the HOAs to comply with the confirmed plan.

DATED AND SIGNED ABOVE

[20] *Cowen v. Kennedy (In re Kennedy)*, 108 F.3d 1015, 1017-18 (9th Cir. 1997).

19th Annual Southwest Bankruptcy Conference
Chapter 11 Track: Getting Crammed: Up or Down?
Recent Developments in New Value Plans, Competing Plans, and Plan Classification

Nancy A. Peterman, Shareholder
Greenberg Traurig, LLP
Chicago, IL
petermann@gtlaw.com

-and-

Whitney S. Baron, Associate
Greenberg Traurig, LLP
New York, NY
baronw@gtlaw.com

It is not uncommon for equity holders to wish to retain control of a debtor after its reorganization in chapter 11, and one common way for equity holders to attempt to do so is by proposing a "new value" plan, whereby the equity holders retain interests pursuant to the plan in exchange for contributing new capital (or "new value") under such plan. In order to confirm a "new value plan," the existing equity holders typically have two large hurdles to overcome - meeting the cramdown requirements of the Bankruptcy Code (in particularly if a secured creditor is objecting) and ensuring that there is at least one impaired accepting class. The recent cases discussed below address each of these topics and may provide the debtors with additional options when seek to confirm a new value plan.

I. New Value Plans and Competing Plans

In order to confirm a plan over the objections of a creditor or equity holder, a debtor or plan proponent must satisfy the "fair and equitable" standards set forth in section 1129(b)(2) of the Bankruptcy Code.[1] These sections set forth a central tenet of

[1] 11 U.S.C. §§ 1129(b)(2)(B), (C).

bankruptcy law - the "absolute priority rule" - and provide that a plan is "fair and equitable" with respect to a particular class of claims or interests if it provides that the holder of any claim or interest in a class junior to the claims or interests of that particular class will not receive a distribution or retain any rights under the plan on account of such junior claim or interest in property.[2]

However, the new value exception may permit a junior creditor or interest holder to circumvent the absolute priority rule to receive or retain property (*e.g.*, ownership interests) under a proposed chapter 11 plan where such creditor or interest holder has contributed value or infused new capital into the reorganized entity.[3] The seminal case on the issue is the Supreme Court of the United States case *Bank of America Nat'l Trust and Sav. Assoc. v. 203 North LaSalle St. P'ship*.[4] In *203 North LaSalle St.*, Bank of America made a non-recourse loan to 203 North LaSalle Street Partnership (the "Partnership"), secured by a mortgage on the Partnership's interest in an office building, the value of which was less than the balance due to Bank of America.[5] After the Partnership defaulted on the loan, Bank of America began state court foreclosure

[2] *See* 11 U.S.C. § 1129(b)(2)(B)(ii) and (C)(ii); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (the absolute priority rule, "provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan.") (citations omitted); *Bank of America Nat'l Trust and Sav. Assoc. v. 203 North LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999) ("As to a dissenting class of impaired unsecured creditors, such a plan may be found to be 'fair and equitable' only if the allowed value of the claim is to be paid in full, § 1129(b)(2)(B)(i), or, in the alternative, if 'the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest any property,' § 1129(b)(2)(B)(ii). That latter condition is the core of what is known as the 'absolute priority rule.'").

[3] It should be noted that, although numerous courts discuss the new value exception, the Supreme Court has not affirmatively recognized it.

[4] 526 U.S. 434 (1999).

[5] 526 U.S. 434.

proceedings, which were then stayed by the Partnership's filing for bankruptcy.[6] The Partnership then proposed a reorganization plan under which certain partners would have the exclusive right to infuse new capital and in exchange receive 100% of the equity in the reorganized debtor entity. Bank of America, whose claim was separately classified, objected to the plan and, among other objections, argued that the plan was not "fair and equitable."[7] The bankruptcy court approved the plan, and the district court and Seventh Circuit affirmed, on the grounds that the old equity holders were not retaining their equity interests "on account of" the prior ownership, but rather "on account of" a new, substantial, necessary and fair infusion of capital.[8]

The Supreme Court, however, overturned the Seventh Circuit, holding that a plan that provides a junior interest holder with the exclusive opportunity to infuse new capital and obtain the equity of a reorganized debtor free from competition and without the benefit of any market valuation, is not fair and equitable and fails the absolute priority rule.[9] The Supreme Court reasoned that, while the exclusive right to file a plan is not "property," the Partnership proposed a plan that provided the opportunity to obtain equity ownership in no one other than old equity partners.[10] If such a plan were to be confirmed, those partners would be in the same position as if they held "an exclusive option under the plan to buy the equity under the reorganized entity . . . ."[11]

---

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] 526 U.S. at 454.

Consequently, no one else could propose an alternative plan, and after its acceptance, no one else could obtain equity in the Partnership. This exclusive opportunity, the Supreme Court reasoned, should be treated as an item of property in its own right. As property, it must have some value, which necessarily must go to the senior class under the plan. Once the equity is market tested, the old equity no longer holds a benefit necessitating the "protection of exclusiveness."[12] Therefore, the Supreme Court determined that "the exclusiveness of the opportunity, with its protection against the market's scrutiny of the purchase price by means of competing bids or even competing plan proposals, renders the partners' right a property interest extended 'on account of' the old equity position and therefore subject to an unpaid senior creditor class' objection."[13] In sum, the Supreme Court held that, even assuming that a new value exception exist, a plan that provides junior interest holders with an exclusive opportunity free from any competition and without the benefit of market valuation fails the absolute priority requirement of section 1129(b)(2)(B)(ii) of the Bankruptcy Code. After the Supreme Court's ruling, if a debtor proposed a new value plan, the right to acquire the equity in the reorganized debtor was typically market tested by (i) terminating exclusivity; or (ii) auctioning off the equity to the market.[14]

---

[12] *Id.* at 456.

[13] *Id.*

[14] *Id.*; *see also H.G. Roebuck & Son, Inc. v. Alter Commc'ns, Inc.*, No. RDB-11-0157, 2011 WL 2261483, at *7 (D. Md. June 3, 2011) (finding that these were the only methods of testing the market, because "[a]n expert's valuation of a company, of the type conducted in this case, simply cannot suffice as it does not expose the stock in the reorganized debtor to the actual market, as *LaSalle* requires").

Recent cases have continued to support and expand on the Supreme Court's holding in *203 North LaSalle St.* For example, in *In re Red Mountain Mach. Co.*,[15] since old equity did not have an "exclusive" right to propose a plan after the section 1121(b) exclusivity period had expired, the Court held that a "new value" plan of reorganization under which old equity retained its ownership interest could be confirmed without violating the "absolute priority rule" because the absence of an exclusive option to propose a plan meant that old equity was not receiving any property on account of its prior equity interest. In this case, the debtor's secured creditor objected to confirmation of the debtor's proposed plan of reorganization, because it argued, *inter alia*, that the plan did not satisfy the new value corollary to the absolute priority rule with respect to such creditor's deficiency claim. The creditor argued that the old equity holders' receipt of equity under the plan gave old equity property "on account of" their prior interests instead of "on account of" their $480,000 contribution on the effective date of the plan in violation of section 1129(b)(2)(B)(ii) of the Bankruptcy Code. However, the Court found that the plan did not violate the absolute priority rule, because the old equity satisfied the new value corollary requiring that the new value be: (i) new; (ii) substantial; (iii) money or money's worth; (iv) necessary for a successful reorganization; and (v) reasonably equivalent to the value or interest received. The Court noted that the $480,000 contribution by old equity was a new, substantial amount of money that was necessary for a successful reorganization. Most significant, the Court found that no value could be "retained by equity interests due to retention of control of an insolvent enterprise," such as an exclusive option to propose a plan, once the debtor's exclusivity period had

[15] 448 BR 1 (Bankr. D. Ariz. 2011).

expired.[16] Accordingly, the new value corollary was satisfied at that time, as the exclusive option to propose a plan no longer had any value and the $480,000 of new value was reasonably equivalent to the interest received. The Court's reasoning in *Red Mountain Machinery Co.* amplifies the earlier holding in *203 North LaSalle St.*, and further clarifies the meaning of the reasonable equivalence prong of the new value corollary.

Similarly, in *In re Philadelphia Rittenhouse Developer, L.P.*,[17] a single asset real estate debtor proposed a chapter 11 plan whereby the debtor would retain control of the its sole asset, a real estate project, and would sell the remaining condominium and commercial units to third-party purchasers over a three to four year period. The proposed plan would pay to the debtor's secured creditor a certain amount per square foot of the sale proceeds of each residential unit, and all net proceeds from the sale of the commercial units, which would be deposited into a plan fund, from which the debtor would pay its operating expenses and administrative costs. When the secured creditor objected that the plan was filed in bad faith because the plan was unconfirmable, the Court found that the plan violated the absolute priority rule by allowing the old ownership to retain control of the real estate project through the sales period and permitting such owners to use the proceedings during such time to pay operating and administrative expenses without restriction.[18]

---

[16] *Id.* at 17.

[17] Case No. 10-31201 (SR) (Bankr. E.D. Pa. May 25, 2011).

[18] *Id.*

The Court's reasoning in *Red Mountain Machinery Co.* and *Philadelphia Rittenhouse Developer, L.P.* expands upon the earlier holding in *203 North LaSalle St.*, and further clarify the meaning of the reasonable equivalence prong of the new value corollary. In doing so, these decisions encourage old equity holders to protect themselves in order to ensure their new value plan will pass muster by a court, including terminating the debtor's exclusivity period to file a plan earlier in the case, waiting until after exclusivity expires to propose a plan where they seek to obtain property under the plan pursuant to the new value corollary or auctioning the equity.

II. Classification Issues

Section 1129(a)(1) of the Bankruptcy Code provides that a court may confirm a plan of reorganization only if "[t]he plan complies with the applicable provisions of [the Bankruptcy Code]."[19] A principal objective of section 1129(a)(1) is to assure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a plan. Accordingly, the determination of whether the Plan complies with section 1129(a)(1) requires an analysis of the compliance, *inter alia*, with section 1122 of the Bankruptcy Code.

Specifically, section 1122(a) of the Bankruptcy Code provides that the claims or interests within a given class must be "substantially similar."[20] Section 1122(a),

[19] 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) explains that this provision encompasses the requirements of sections 1122 and 1123, which govern the classification of claims under the plan and the contents of the plan, respectively. *See* H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see also In re Century Glove, Inc.*, 1993 WL 239489, at *6 (D. Del. Feb. 10, 1993); *In re Resorts Int'l, Inc.*, 145 B.R. 412, 446-47 (Bankr. D.N.J. 1990); *In re Elsinore Shore Assocs.*, 91 B.R. 238, 256 (Bankr. D.N.J. 1988).

[20] 11 U.S.C. § 1122(a).

however, does not mandate that "substantially similar" claims be classified together.[21] Courts have generally permitted the separate classification of substantially similar claims so long as the claims were not classified to "gerrymander" an accepting impaired class.[22] While gerrymandering claims in order to create an impaired accepting class is not permissible, section 1122 provides debtors with a great degree of flexibility in classifying claims and interests and courts are offered broad discretion to approve a proponent's classification scheme and to properly consider the specific facts of each case before rendering a decision.[23]

Recently, two bankruptcy courts in Arizona have stretched the flexibility in classifying claims. Specifically, these courts considered whether the classification of a secured creditor's deficiency claim as separate from other unsecured claims constitutes a permissible gerrymandering. *See In re LOOP 76, LLC*[24]; *Red Mountain Mach. Co.*[25] In both *LOOP 76, LLC* and *Red Mountain Mach. Co.*, secured creditors had deficiency claims for which non-debtor third parties had provided guaranties on such amounts. The debtor in each case classified the deficiency claims in a separate class from other

[21] *See id.*; *see also In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1061 (3d Cir. 1987) (agreeing that section 1122 permits the grouping of similar claims in different classes); *In re Coram Healthcare Corp.*, 315 B.R. 321, 348 (Bankr. D. Del. 2004) (noting that "section 1122 . . . provides that claims that are not 'substantially similar' may not be placed in the same class; it does not expressly prohibit placing 'substantially similar' claims in separate classes").

[22] *See In re Greystone III Joint Venture*, 995 F.2d 1274, 1279 (5th Cir. 1991) ("Thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan."); *see also John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assoc.*, 987 F.2d 154, 158 (3d Cir. 1993).

[23] *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060-61 (3d Cir. 1987) ("Congress intended to afford bankruptcy judges broad discretion [under section 1122] to decide the propriety of plans in light of the facts of each case"); *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co., Inc. (In re U.S. Truck Co.)*, 800 F.2d 581, 586 (6th Cir. 1986) (noting the "broad discretion" of courts to determine proper classifications).

[24] 442 B.R. 713 (Bankr. D. Ariz. 2010).

[25] 448 B.R. 1.

unsecured creditors. The secured creditors in each case objected to the classification scheme in the plans, because they argued that the deficiency claims were substantially similar to other unsecured claims in violation of section 1122 of the Bankruptcy Code. Moreover, such classification would result in gerrymandering of the votes since the unsecured class of claims voted in favor of the plan and provided the needed an impaired accepting class. Had deficiency claims been included in the class with the other unsecured claims, the other class would have objected and otherwise blocked confirmation of the plan.

The courts found that dissimilar claims cannot be classified together and similar claims need only a business justification to be separately classified pursuant to section 1122 of the Bankruptcy Code. The deficiency claims and unsecured claims in these cases were not substantially similar due to the fact that the deficiency claims had guaranties by non-debtor third parties. These guaranties differentiate the deficiency claims from all of the other unsecured claims such that the secured lender "need not be concerned about whether the plan maximizes the value of the estate and the return to creditors because it is assured of payment from nondebtor sources."[26] In contrast to many other decisions that focus solely on the creditor's rights against the debtor, these cases considered the rights of third parties in the classification analysis.[27]

These cases suggest that courts may be more lenient in approving the separate classification of unsecured deficiency claims, which may assist debtors in obtaining confirmation of a plan over a secured lender's objection. As secured lenders frequently

[26] *Loop 76, LLC*, 442 B.R. at 718.

[27] *See, e.g.*, *In re Woodbrook Assocs.*, 19 F.3d 312 (7th Cir. 1994) (holding that mortgage deficiency claims should be separately classified from other unsecured claims).

obtain guarantees, and the presence of a guarantee appears to be enough to justify separate classification, debtors may seek to classify deficiency claims separately disenfranchising secured lenders.

III. Conclusion

New value plans, cramdown, and separate classification are powerful tools that a debtor may use to structure a plan and obtain confirmation of a plan over a creditor's objection. The cases above appear to show a court's willingness to allow a debtor some flexibility in satisfying confirmation standards. These tools should be considered and understood by both debtors and their creditors when determining the best terms of a plan or potential proposal of any competing plan for the creditors of the debtor's estate.

Loan Modifications in Chapter 13 Bankruptcy

David Krieger, Esq.
Haines & Krieger
Las Vegas, Nevada
dkrieger@hainesandkrieger.com

Often exigent circumstances dictate that a debtor file bankruptcy before a loan modification can be fully negotiated and final terms agreed. In instances where a debtor has already negotiated a "trial period" loan modification under the Home Affordable Modification Program (HAMP) a bankruptcy filing must not be grounds to disqualify a debtor from a final loan modification approval pursuant to HAMP Directive 10-2.

That said, many debtors are in some stage of foreclosure and have not begun the loan modification process. In many instances this will result in chapter 13 filings to stop an impending trustee sale of the debtor's residence. Often, the debtors cannot afford to "cure and resume"; nor can the debtors often simply resume regardless of their trustee payment.

In these cases, an interim solution may resolve this quandary: an "Adequate Protection" (AP) Plan. In a typical Chapter 13, 11 U.S.C. § 1325(b)(3) permits the debtor to "provide for the curing or waiving of any default." However, a debtor may not modify the rights of a secured creditor who is "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1325(b)(2).

So, how does a debtor propose a plan where she cannot afford to "cure and resume"? Does the debtor have to "surrender" the home back to bank? When answering these questions for clients, our firm spends considerable time gauging the debtor's attachment to their home. The costs and time involved in attempting to restructure a loan, particularly while a chapter 13 is pending, can be cost prohibitive.

Once the "home-saving" goal is established, the plan needs to be formulated based on the debtor's ability to pay. In many circumstances, the problems which brought the debtor to file bankruptcy are the same impediments to proposing a cure and resume plan.

a. Cure and Resume Plan

In a "cure and resume" plan, the debtor proposes a chapter 13 plan providing for all "must pay" (priority, administrative, secured, hypothetical chapter 7 liquidation value, etc.) claims. The debtor typically also "resumes" monthly mortgage payments the month after the chapter 13 case is filed. If this plan is "feasible" and affordable, then regardless of any post-petition loan modification results (approval/denial), the debtor may be safely assured they will retain their home assuming their financial circumstances do not change significantly.

In a cure and resume plan, the debtors can enjoy the best of both worlds typically: 1) a discharge and restructuring of their debt and 2) potentially lowering their mortgage payment through a negotiated loan modification outside the bankruptcy. This is the ideal "home-saver" plan.

When the debtor's loan modification is complete and results in a reduction in payment and recapitalization of pre-petition arrears, the debtor's plan is typically modified to reflect those new terms and remove any pre-petition arrears. If this occurs in the pre-confirmation context, the Chapter 13 trustee will likely request new schedules I/J (a budget) reflecting the new loan payments. At this point the debtor's budget may yield extra disposable income resulting from a lower mortgage payment. The debtor should accordingly carefully review their income and expenses and make any changes to reflect the new pre-confirmation circumstances (as proof of the changes may be requested from the Chapter 13 trustee). Further, the Debtor should understand this concept from inception of their case, so they are not later blindsided by such demands.

However, the "cure and resume" plan is ideal, since a loan modification "denial" will not result in loss of the debtor's home regardless of the loan modification outcome.

b. The "Adequate Protection" (AP Plan)

Unfortunately, many debtors are not in a position to propose a "cure and resume" plan, but have a deep attachment to their residence and want to try to retain the home notwithstanding their present inability to the afford the property. Without detailing the causes of default or unaffordability, the balance of this paper will focus on the Chapter 13 plan which has been filed to assist the homeowner who cannot afford their home.

In these instances, the debtor's attachment to the real estate needs to be scrutinized. Is the home underwater? Will the debtor's financial circumstances change in the near future? Is it more sensible to simply surrender the property and move into a new residence or rental and manage the debt through a chapter 7? The Chapter 13 loan modification process may require several years to complete, and without gauging the debtor's commitment to the process, debtors quickly become frustrated with loan modification "wait time" and repetitive document requests which may result.

In these instances, an Adequate Protection (AP) Plan may be the optimal plan for the debtor. An AP Plan (an example of which is attached hereto), does not provide for a cure and resume of the debtor's pre-bankruptcy obligations. Alternatively, the AP Plan proposes to "pay in" the debtor's "disposable income" as determined by schedules I and J, but does not provide for resuming monthly mortgage payments to the mortgagee while a loan modification negotiation is pending.

Alternatively, the debtor's chapter 13 plan provides "adequate protection" payments to the mortgagee while a loan modification offer is being considered. Attached is a sample AP Plan. Of specific relevance are sections 1.08 (Monthly Payments), 2.12.2 CLASS 2A and 2B

(Secured RX Mortgage - Pre-petition Claim), 2.20 CLASS 10 (General non-priority unsecured Claims) and 6.02 (Loan Modification Plan language).

Section 1.08, "Plan Payments", is funded to pay the debtor's "disposable income" (DI). Jurisdictional differences aside, DI must minimally provide for all "must pays" in the chapter 13 plan (such as priority taxes, administrative claims, vehicles arrears, liquidation value, and in some instances mortgage arrears).

However, the AP Plan is also funded for a hypothetical loan modification result. To determine this amount, the debtor's gross monthly income is multiplied by 31%. The resulting amount would be treated as the debtor's hypothetical loan modification payment. Why 31%? Because most servicers will first analyze the debtor under the HAMP formula to determine debtor's loan modification eligibility. The HAMP guidelines provide that the debtor's trial period payments and (hopefully) permanent modification will be determined by 31% of the debtor's gross income. [On a side note, if during your initial client interview you determine the client's income does not support a HAMP modification then the debtor may only be considered for an "internal" modification, which may not be offered]. Accordingly, the AP Plan assumes the debtor will be HAMP eligible and funded accordingly.

So, in a hypothetical case where the debtor is above median income (and therefore in a 60 month plan "commitment period") with gross monthly income of $6,000 per month, a pre-bankruptcy mortgage payment of $3,000, and owed the following debts at the time the chapter 13 was filed:

1. Mortgage Arrears: $25,000
2. Priority IRS Claim: $10,000
3. Debtor's Atty Fee's $ 5,000
4. Unsecured Claims: $20,000

under these facts, The AP Plan would be funded to pay:

1. Priority IRS Claim: $10,000
2. Debtor's Atty Fees: $ 5,000
3. AP Payments: $111,600 (.31 x $6,000 = 1,860, $1860 x 60)
4. Trustee Exp (10%) $14,067

Accordingly, the debtor's monthly payment in this plan would be approximately $2,345 per month for 60 months. The AP Plan has further not provided for pre-petition mortgage arrears, since those are expected to be recapitalized into a final loan modification; nor does the plan make provision for unsecured creditors, since the debtor's ability to pay may not be determinable until a loan modification is approved or denied. This is the most basic AP Plan and many variations can flow (at least through our office).

Additionally, the funded plan should also provide for adequate protection. Adequate protection payments would be paid **from** the "AP Payments" (the $1,860) each month upon stipulation with the mortgagee or confirmation, whichever occurs first. However, $1,860 is **not** the amount of adequate protection the plan proposes to pay; this is merely the amount the debtor will need to pay in the event the loan is modified. In other words, this is the amount need to demonstrate the debtor proposed a feasible chapter 13 plan post loan modification.

Adequate protection payments the Mortgagee will receive are determined under plan section 6.02 (B)(1) through (5). Section (B)(2)(b) defines how AP payments will be determined. The plan looks to the home value as the date of filing which is multiplied by 0.25% (3% per year) to determine the amount of AP to be set aside as provision for the mortgagee while the loan modification process ensues. Although not often the case, the AP payment must be equal to or less than the AP Payments (31% of debtor's DI) to confirm a feasible plan. Assuming mortgagees accept this treatment then the plan is funded to be both feasible for confirmation and

provides a response to mortgagee's adequate protection concerns under 11 U.S.C. § 361 (or relief from stay motion).

Although 0.25% may seem arbitrary, our local Courts have enforced plan provision 6.02 Section (B)(2)(b) in relief from stay proceedings. As a consequence, most Creditor's counsel have withdrawn confirmation objections notwithstanding the non-resumption of regular mortgage payments during the loan modification process. In fact, with very few exceptions, local creditor's counsel representing every major servicer has embraced this plan and agreed to confirmation (or withdrawn their confirmation objections while not being paid regular payments).

c. Default Mitigation Management Web-Portal & Submitting the Loan Modification Package

Whether in or out bankruptcy, debtors counsel can struggle with "submitting" loan modification requests to Debtor's mortgagee. It is often more challenging to determine where to send the debtor's loan modification request than compiling the information needed to make a request.

However, there is an indispensible online tool which can greatly assist debtor's counsel with loan modification submissions. Specifically, the Default Mitigation Management (DMM) Portal (https://www.dclmwp.com/) is such a tool. DMM is an interactive online forum where loan modification submissions can be sent through a web-portal. Over 80% of our client's are serviced by participants on the DMM portal.

Debtor's counsel can avoid the "guesswork" of where to submit packages by simply logging in and creating a submission through the portal. Moreover, each servicer's specific document requirements are made available on the site. As your debtor's servicer is selected

additional or servicer-specific forms will "appear" which can be easily downloaded, completed and submitted with your client's package.

Further, the portal provides total transparency into the loan modification process. In a "traditional" submission, where Counsel relies on non-web-based interaction with the a servicer, it can be very difficult to determine a status of a pending loan modification submission. Again, DMM removes this guess work and in fact provides "prompts" when a file lingers, allowing counsel to simply click a button to inspire action on the servicer's end.

The DMM is accessible to judges, trustees, attorneys, pro se and creditors. In a relief from stay context, many issues regarding loan modification submissions can be quickly resolved should the Court choose to review a DMM submission. Servicer inactivity in processing the loan modification request will be clearly visible to the Judge; as would Debtor's counsel's loan modification efforts. However, if debtor's counsel aggressively responds to Servicer requests then the portal would reflect such activity. The DMM portal has assisted many debtors in prevailing on a motion for relief from stay where judges log into the portal and find servicer inactivity.

More importantly, the portal is an expedient way to locate debtor's mortgagee and move the loan modification process forward.

For further information, please email David Krieger at dkrieger@Hainesandkrieger.com.

FINANCIAL STATEMENT

Borrower Name:	
Co-Borrower Name:	
Lender & Loan #	
Subject Property:	
Last Four of SSN:	Borrower: xxx-xx- / Co-Borrower: xxx-xx-

	Monthly GROSS Income		Monthly NET Income		Notes
INCOME:	Borrower	Co-Borrower	Borrower	Co-Borrower	
Regular Monthly Income:					
Disability:					
Social Security:					
Alimony:					
Child Support;					
Rental Income # 1:					
Rental Income # 2:					
Other:					
Totals:		$0.00	$0.00		
Total Combined Income:	**$0.00**		**$0.00**		

Monthly Expenses	Homeowner's Existing Mortgage & Expenses
1. Primary Home Mortgage	
2. Escrow impound: Monthly Property Tax	Included
3. Escrow impound: Monthly Hazard Insurance	Included
4. HOA	
5. 2nd Mortgage on Primary Home	
6. Bankruptcy Trustee payment plan	
7. 1st Mortgage on 2nd property (if any)	
8. 2nd mortgage on this property	
9. Escrow impound: Monthly Tax and Hazard Insurance	
10. HOA	
11. 1st Mortgage payment on 3rd property (if any)	
12. 2nd mortgage on this property	
13. Escrow impound: Monthly Tax and Hazard Insurance	
14. HOA	
15. Rent (if not occupying primary property)	
16. Maintenance on home(s)	
17. Auto loan payment	
18. Other loans (personal, etc.)	
19. Credit cards, total minimum payments	
20. Utilities (gas, electric,water, sewer, garbage,propane)	
21. Telephone - Home	
22. Telephone - Cell	
23. Cable TV	
24. Internet	
25. Entertainment	
26. Child Care	
27. School Tuition	

FINANCIAL STATEMENT

Borrower Name:	
Co-Borrower Name:	
Lender & Loan #	
Subject Property:	
Last Four of SSN:	Borrower: xxx-xx- / Co-Borrower: xxx-xx-

28. Child Support	
29. Alimony	
30. Vehicle - Gas	
31. Vehicle - Maintenance	
32. Insurance - Health, if not deducted from paycheck	
33. Insurance - Vehicle	
34. Insurance - Life	
35. Groceries and Toiletries	
36. Other - specify	
37. Other - specify	
38. Other - specify	
Total Monthly Expenses	

Monthly Net Income	$0.00
EXISTING Mortgage & Expenses	$0.00
Surplus/Deficit	$0.00

Home Affordable Mortgage Modification Estimator	
Total primary home mortgage PITIA payment:	$0.00
Total GROSS Income (do not put NET Income here)	$0.00
Total DTI	#DIV/0!

Reason(s) why the homeowner is having difficulty paying their mortgage payment.
Homeowner is requesting the following for their Loan Modification
The homeowner(s) is requesting for a their loan be modified with a lower interest, fixed, extension of the terms of their loan, and if possible a principal reduction.
COMMENTS
Please help the homeowner. We are asking for your assistance. Any help from my end, please do not hesitate to call or e-mail me. I will provide you all that you will ask the homeowner in order for them to achieve a Loan Modification.

Thank you in advance,

(Negotiator Name)
Haines & Krieger, LLC
Contact #: (702) 880-5554
E-mail address:
Today's Date:

Authorization Form

1st Deed of Trust (as applicable)

Mortgage Company: _____

1st Loan Number: _____

2nd Deed of Trust (as applicable)

Mortgage Company: _____

2nd Loan Number: _____

We/ I, the undersigned, hereby authorize my above mortgage companies to discuss my request for payment assistance with the Haines & Krieger, LLC Attorneys at Law and their agents ("hereinafter the Designated Agent ") Further, you are authorized to workout the terms of a payment agreement / Loan Modification with my Designated Agent and / or their assignees, to deliver documents to my Designated Agent, which concern my request for payment assistance / Loan Modification. I understand that I be fully responsible for reviewing any information that is sent by my mortgage company to my designated Agent. This authorization will remain effective until I specifically notify my mortgage companies' loss mitigation department(s) in writing that this authorization is no longer in effect. **Please note this in your system**.

My Designated Agents are:
Haines & Krieger, LLC Attorneys at Law
8985 S. Eastern, Suite 130, Las Vegas, NV 89123
(702) 880-5554

_____	_____	_____	_____
Borrower name (Printed)	Borrower's Signature	Borrower's Social Security Number	Date
_____	_____	_____	_____
Co-Borrower's Name (Printed)	Co-Borrower's Signature	Co-Borrower's Social Security Number	Date

Property Address: _____

Home Phone Number: _____

Haines & Krieger, LLC Attorneys at Law
8985 S. Eastern, Suite 130, Las Vegas, NV 89123
phone: 702-880-5554, fax: 702-385-5518

Current User: George Haines
Law Firm: Haines

Member Since: May. 17th, 2009

Search (Last Name or Loan #):

ADD NEW BORROWER

Step 1 - Complete the Following Forms for Each Servicer:

1. Borrower Authorization - signed and dated by each Borrower
2. HAMP Request for Modification and Affidavit (RMA) - signed and dated by each Borrower
3. IRS Form 4506T-EZ - signed and dated by each Borrower
4. Dodd-Frank Certification - signed and dated by each Borrower
5. *Optional (but strongly recommended)*: Additional Servicer Information - review and complete as necessary

---Select Servicer---

Helpful Tips

Short Sales & Deeds in Lieu

Why you should complete the Additional Servicer Information

* Freddie Mac-owned loans must also submit the Form 1126. To find out if your loan is owned by Freddie Mac, click here.

Step 2 - Gather the Following Documentation:

1. Proof of Income
    a. Most Recent Two (2) Pay Stubs*
    b. Most Recent Two (2) Month's Complete Bank Statement
    c. Most Recent Tax Return
2. Proof of Occupancy - i.e., utility bill or phone bill

* Self-employed borrowers and/or borrowers with other sources of income such as social security, disability or death benefits, pension, adoption assistance, public assistance, or unemployment, click here to determine the documentation you need.

Step 3 - Scan and Upload:

After you have completed and gathered all of the requisite forms and documents, please scan them and use the Add New Borrower Wizard to upload and submit them directly to the Servicer. **Please see important restrictions on all attachments submitted through the Portal - here**.

FAILURE TO SUBMIT ANY OF THE REQUIRED DOCUMENTS MAY RESULT IN YOUR SUBMISSION BEING DELAYED OR REJECTED.

If you have any questions, please check the FAQs or contact DMM at support@defaultmitigation.com with any questions.

Begin Add New Borrower Wizard

DEFAULT MITIGATION MANAGEMENT

Current User: George Haines
Law Firm: Haines

Member Since: May. 17th, 2009

Search (Last Name or Loan #):

TOOLS

- REPORTS
- FAQS
- VIEW MY ARCHIVES
- CONTACT DMM
- SERVICER REQUIREMENTS
- CURRENT PORTAL SERVICERS
- USER MANUAL
- DMM DOCU*MENTOR*™
- TRAINING VIDEO

Frequently Asked Questions (FAQs)

Attorney FAQs

Which servicers are currently using the DMM Web Portal?

Currently, the following servicers are on the DMM Web Portal:

- 21st Mortgage Corporation
- America's Servicing Company (ASC)
- Bank of America
- Chase
- Countrywide (n/k/a Bank of America)
- EMC
- GMAC Rescap Homecomings - BK Only
- Kentucky Housing Corporation
- Litton Loan Servicing - BK Only
- New South Federal Savings Bank
- Ocwen Loan Servicing, LLC
- Resurgent Capital Services
- Saxon
- Select Portfolio Servicing
- Washington Mutual
- Wells Fargo

Please check back regularly. More servicers are being added.

What if my servicer is not on the DMM list?

DMM is constantly working with other servicers to bring them on board. We expect our list of servicers to continue to grow. If there is a particular servicer you wish to receive more information about, simply email us at **support@defaultmitigation.com**.

Can I submit borrowers that haven't filed bankruptcy?

Yes. Although some of the servicers on the DMM Web Portal will not accept files where the borrower has not filed for bankruptcy, the majority of them will. Some servicers have split their submissions between their BK and Non-BK departments so make sure you submit your file to the correct department. Submitting your file to the wrong department could delay your review.

To submit your file for review if bankruptcy has not been filed, simply enter "00-00" as the BK Case Number and select "Not filed yet" under Bankruptcy Status (Chapter 13 or Chapter 7; it does not matter which). You will still need to select the Bankruptcy district because the Bankruptcy Trustees have access to the files submitted in their districts whether or not a bankruptcy has been filed at the time the file is submitted through the Portal.

Can I submit short sales and/or other non-retention requests through the DMM Portal?

Yes. Just make sure to identify your intentions when you add the borrower so the servicer can properly direct and review the file.

I can't find my password...what should I do?

You can recover your password by simply clicking the "Forgot Your Password?" link on the home page – **www.dclmwp.com**.

NOTE: in order to recover your password, you will need to have a Password Recovery Question and a Password Recovery Answer on file. To verify that you do, please go to the 'My Profile' link at the top of the page. If you have not selected a Password Recovery Question and a Password Recover Answer (or wish to change it), please click the pencil icon to the right to edit your information.

How should I submit my files?

The easiest and best format to use is .pdf. When you scan your documents, however, make sure you are scanning in black and white at a resolution no greater than 200 DPI. This should produce a document that is easy to read and will keep the file size down.

If the file size is too big, your file may be rejected as some systems prohibit the downloading of large files.

Also, make sure that your packages are complete and include all of the information the servicer has requested. You should always include a borrower authorization and a hardship letter. Make sure your packages are neat and well organized. The better and more complete package you submit, the easier you make it for the servicer to review and get back to you promptly.

Can other people use my password?

The DMM Web Portal allows you to add authorized users to your account. Simply go to the 'My Profile' page and click the "Add Authorized User" button at the bottom of the screen. You will be prompted to enter the person's name and email address. An account will be created for this person and they will be sent instructions on how to login.

NOTE: before access will be granted to any new users through your account, you will be asked to acknowledge that you are taking responsibility for this person's actions.

Is there any advice you can give me to make sure I'm successful?

The single best piece of advice is to make sure you **download the forms the servicer has provided and read and complete them carefully and submit them in a neat and orderly fashion**. We cannot stress this enough. If you don't provide the servicer the exact information they need, your file may not get the attention it needs and it will be your fault, not the servicers. The instructions and documents the servicers post on the Portal are there for a reason. Use them!

I still need to get some documents from my client. Should I submit the file with what I have and just add the documents later?

DMM strongly advises against doing this. **Your initial submission should be complete**. If it is not, the servicer will not be able to complete the review anyway. Sending an incomplete package will not give you any advantage. In fact, it is more likely to create confusion and delay than anything else.

If I know my mortgage servicer has been acquired by another company, should I submit my information to the original servicer or the new one?

As many of you know, Chase acquired Washington Mutual and EMC. Each of these servicers is listed individually because at this point, each is still reviewing submissions under the original servicer name. Accordingly, you should submit your loan for review to the original servicer. DMM will advise if this changes. Please note: Bank of America and Countrywide are listed as one company – "Bank of America". All submissions are handled by the same department.

In the Message Center, I see an "Account Transfer Request" message from the Servicer. What does this mean?

In order to ensure that your file is directed to the correct department as quickly as possible, some servicers have registered multiple departments on the Portal. If your file was inadvertently submitted to the wrong department, the servicers can transfer the file to the correct department without you having to re-submit it. When a servicer requests such a transfer, a message will appear in your message center indicating that the servicer has requested the file be transferred. DMM reviews this request to ensure that the transfer request is valid and upon confirmation, transfers the file to the correct department. Two messages (from DMM) will appear in the Message Center after the file has been transferred – one indicating that a transfer has occurred and another indicating the file has been re-submitted. You will also receive an email notifying you that such transfer occurred.

How long will it take for the servicer to get back to me?:

Every servicer is different and while all of the servicers on the DMM Portal are doing what they can to respond in as timely a fashion as possible, the fact remains that servicers are receiving an unprecedented number of requests. That being said, servicers on the Portal should be responding to the initial submission and acknowledging receipt of the file within 7 days. Once a file has been opened, review can take anywhere between 30-90 days with most servicers responding within 45-60 days. During this time, it is critical for you to monitor your files and check them for messages from the servicer. Quite often we see servicers asking attorneys for additional information/clarification on files. It is up to you to respond to those requests to keep the process moving forward.

DMM is constantly working with servicers on ways to speed up the process and increase the efficiency with which it is completed. Servicers continue to dedicate more resources towards utilizing the Portal and we expect the overall response times to get markedly better. Our shared goal with our servicers is to be able to reduce total review times to no more than 10 days from the date the file is submitted. We will keep you posted of all new developments as they arise.

I made a submission through the Portal, but when I called customer service, they said they couldn't find my submission. Why?

Each servicer has assigned a special team to work the Portal. These teams are usually not connected into the general customer

service call centers. That is why the customer service departments cannot "see" your submission through the Portal. Rest assured, however, your submission has been made to the servicer and once you have received notification that your account has been opened, you have written proof that your submission has actually been received and is being processed. If you have questions about your file, please use the "Email Servicer" link to communicate with the servicer. If you are still not getting a response, please contact DMM at **support@defaultmitigation.com**.

I see a red "No Response" button on my screen...what does that mean?

A red "No Response" button will appear on your screen if a certain amount of time has passed since the servicer's last response to you. Clicking this button will automatically send a message to the servicer requesting an update on the file. DMM will also receive a copy of this message and will work with the servicer to resolve any issues. Make sure to check your messages before clicking this button to ensure that you have provided the servicer with all of the required documents.

I submitted a package through the Portal but the Servicer sent documents directly to the Borrower. Why?

Many of the Servicers have document fulfillment centers. When the Servicer authorizes certain action to be taken, documents/correspondence is often automatically sent directly to the Borrower whose information is on file with the Servicer. To avoid any issues, please make sure to advise your clients to notify you as soon as they receive any packages from the Servicer.

There is an $ by a borrower's name. What does that mean?

Accounts with an $ next to their name are solicitation submissions - i.e., the **servicer** initiated the loss mitigation request through the Portal (not the borrower/borrower's representative).

I received a message from the Servicer to fax some documents. I thought all communication was supposed to be through the Portal. What should I do

Although servicers should not be requesting that you fax any documents to them outside of the Portal, some servicers may nonetheless do this from time to time. Since our goal is to help you get results, we recommend that in these circumstances, you comply with their request and fax the documents to the number they provide. **Then message them through the Portal with a confirmatory email and include a copy of the faxed documents together with a copy of the completed fax transmittal**. This will ensure that you have complied with their request while at the same time documenting your response on the Portal.

This "belt and suspenders" approach has been employed by some of our attorneys and has been instrumental in combatting the "we don't have the fax" defense when they can't find the documents. It has even been used to postpone foreclosure sales.

Don't see your question here?

If your question wasn't answered, please contact us at **support@defaultmitigation.com**.

Servicer FAQs

DMM Portal

DEFAULT MITIGATION MANAGEMENT

Welcome to the DMM Loss Mitigation Web Portal

Existing Users	Invitation Code Only	Create an Account
If you are already registered to use the DMM Portal, login here: **Email*:** **Password*:** Forgot? **Invitation Code:** **Loan Number:** * - Required If you received an invitation code, please enter it above along with a valid loan number for the borrower. This will download your invitation to your account. Login	If you received an Invitation Code but do not have an account, please enter the Invitation Code below along with a valid loan number for the borrower. (You will create your account after we verify the Invitation Code and loan number). **Invitation Code*:** **Loan Number*:** * - Required If you (or your organization) already have an account, please login under Existing Users. Login	If you do not have a user account and you did not receive an invitation code, you can create your account here. Please click on the appropriate link below to register for the DMM Portal. Servicers Click Here Attorneys Click Here Counselors Click Here Pro Se Filers Click Here Court/Trustees Click Here Default Attorneys Click Here **Notice:** All Parties attempting to register will be validated before registration is completed.

Note: Use of this Portal in no way commits any of the parties to either offer or accept any loss mitigation solutions. This Portal provides a streamlined means of communication between interested parties. It enables parties interested in mortgage loss mitigation to submit all of the necessary documentation and to communicate with each other throughout the process via a secure web platform.

This site is owned and operated by Default Mitigation Management LLC. For any questions regarding the DMM Loss Mitigation Web Portal, contact Default Mitigation Management LLC at 800-481-1013 or click here to email us

Privacy Policy

INSTRUCTIONS FOR IRS FORM 4506T-EZ

Step 1
Fill out the form
(Refer to the detailed "Instructions for Completing IRS Form 4506T-EZ" at end of this document)

Step 2
All borrowers must **SIGN and DATE** the form
(*Signatures should be exactly in the same name as provided in original return*)

Step 3
Scan the signed form and submit it to the Servicer through the Portal – do **NOT** fax to the IRS.

* Note: IRS Form 4506T-EZ may not be applicable to borrowers that do not file federal income tax returns on a calendar year basis, borrowers that do not file federal income tax returns using Form 1040 and borrowers that have not filed a federal income tax return. In these cases, borrower should submit a signed and completed IRS Form 4506-T which may be found here - http://www.irs.gov/pub/irs-pdf/f4506t.pdf.

Form **4506T-EZ**
(Rev. January 2010)
Department of the Treasury
Internal Revenue Service

Short Form Request for Individual Tax Return Transcript

► **Request may not be processed if the form is incomplete or illegible.**

OMB No. 1545-2154

Tip. Use Form 4506T-EZ to order a 1040 series tax return transcript free of charge.

1a Name shown on tax return. If a joint return, enter the name shown first.	**1b First social security number on tax return**
2a If a joint return, enter spouse's name shown on tax return.	**2b Second social security number if joint tax return**

3 Current name, address (including apt., room, or suite no.), city, state, and ZIP code

4 Previous address shown on the last return filed if different from line 3

5 If the transcript is to be mailed to a third party (such as a mortgage company), enter the third party's name, address, and telephone number. The IRS has no control over what the third party does with the tax information.

Third party name	Telephone number

Address (including apt., room, or suite no.), city, state, and ZIP code

6 **Year(s) requested.** Enter the year(s) of the return transcript you are requesting (for example, "2008"). Most requests will be processed within 10 business days.

Caution. If the transcript is being mailed to a third party, ensure that you have filled in line 6 before signing. Sign and date the form once you have filled in line 6. Completing these steps helps to protect your privacy.

Note. *If the IRS is unable to locate a return that matches the taxpayer identity information provided above, or if IRS records indicate that the return has not been filed, the IRS may notify you or the third party that it was unable to locate a return, or that a return was not filed, whichever is applicable.*

Signature of taxpayer(s). I declare that I am the taxpayer whose name is shown on either line 1a or 2a. If the request applies to a joint return, **either** husband or wife must sign. **Note.** *For transcripts being sent to a third party, this form must be received within 120 days of signature date.*

			Telephone number of taxpayer on line 1a or 2a
Sign Here	► **Signature** (see instructions)	Date	
	► **Spouse's signature**	Date	

For Privacy Act and Paperwork Reduction Act Notice, see page 2. Cat. No. 54185S Form **4506T-EZ** (Rev. 01-2010)

Purpose of form. Individuals can use Form 4506T-EZ to request a tax return transcript that includes most lines of the original tax return. The tax return transcript will not show payments, penalty assessments, or adjustments made to the originally filed return. You can also designate a third party (such as a mortgage company) to receive a transcript on line 5. Form 4506T-EZ cannot be used by taxpayers who file Form 1040 based on a fiscal tax year (that is, a tax year beginning in one calendar year and ending in the following year). Taxpayers using a fiscal tax year must file Form 4506-T, Request for Transcript of Tax Return, to request a return transcript.

Use Form 4506-T to request the following.

• A transcript of a business return (including estate and trust returns).

• An account transcript (contains information on the financial status of the account, such as payments made on the account, penalty assessments, and adjustments made by you or the IRS after the return was filed).

• A record of account, which is a combination of line item information and later adjustments to the account.

• A verification of nonfiling, which is proof from the IRS that you did not file a return for the year.

• A Form W-2, Form 1099 series, Form 1098 series, or Form 5498 series transcript.

Form 4506-T can also be used for requesting tax return transcripts.

Automated transcript request. You can call 1-800-829-1040 to order a tax return transcript through the automated self-help system. You cannot have a transcript sent to a third party through the automated system.

Where to file. Mail or fax Form 4506T-EZ to the address below for the state you lived in when that return was filed.

If you are requesting more than one transcript or other product and the chart below shows two different RAIVS teams, send your request to the team based on the address of your most recent return.

If you filed an individual return and lived in:	Mail or fax to the "Internal Revenue Service" at:
Florida, Georgia, North Carolina, South Carolina	RAIVS Team P.O. Box 47-421 Stop 91 Doraville, GA 30362 770-455-2335
Alabama, Kentucky, Louisiana, Mississippi, Tennessee, Texas, a foreign country, or A.P.O. or F.P.O. address	RAIVS Team Stop 6716 AUSC Austin, TX 73301 512-460-2272
Alaska, Arizona, California, Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, Wyoming	RAIVS Team Stop 37106 Fresno, CA 93888 559-456-5876
Arkansas, Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia	RAIVS Team Stop 6705 P-6 Kansas City, MO 64999 816-292-6102

Signature and date. Form 4506T-EZ must be signed and dated by the taxpayer listed on line 1a or 2a. If you completed line 5 requesting the information be sent to a third party, the IRS must receive Form 4506T-EZ within 120 days of the date signed by the taxpayer or it will be rejected.

Transcripts of jointly filed tax returns may be furnished to either spouse. Only one signature is required. Sign Form 4506T-EZ exactly as your name appeared on the original return. If you changed your name, also sign your current name.

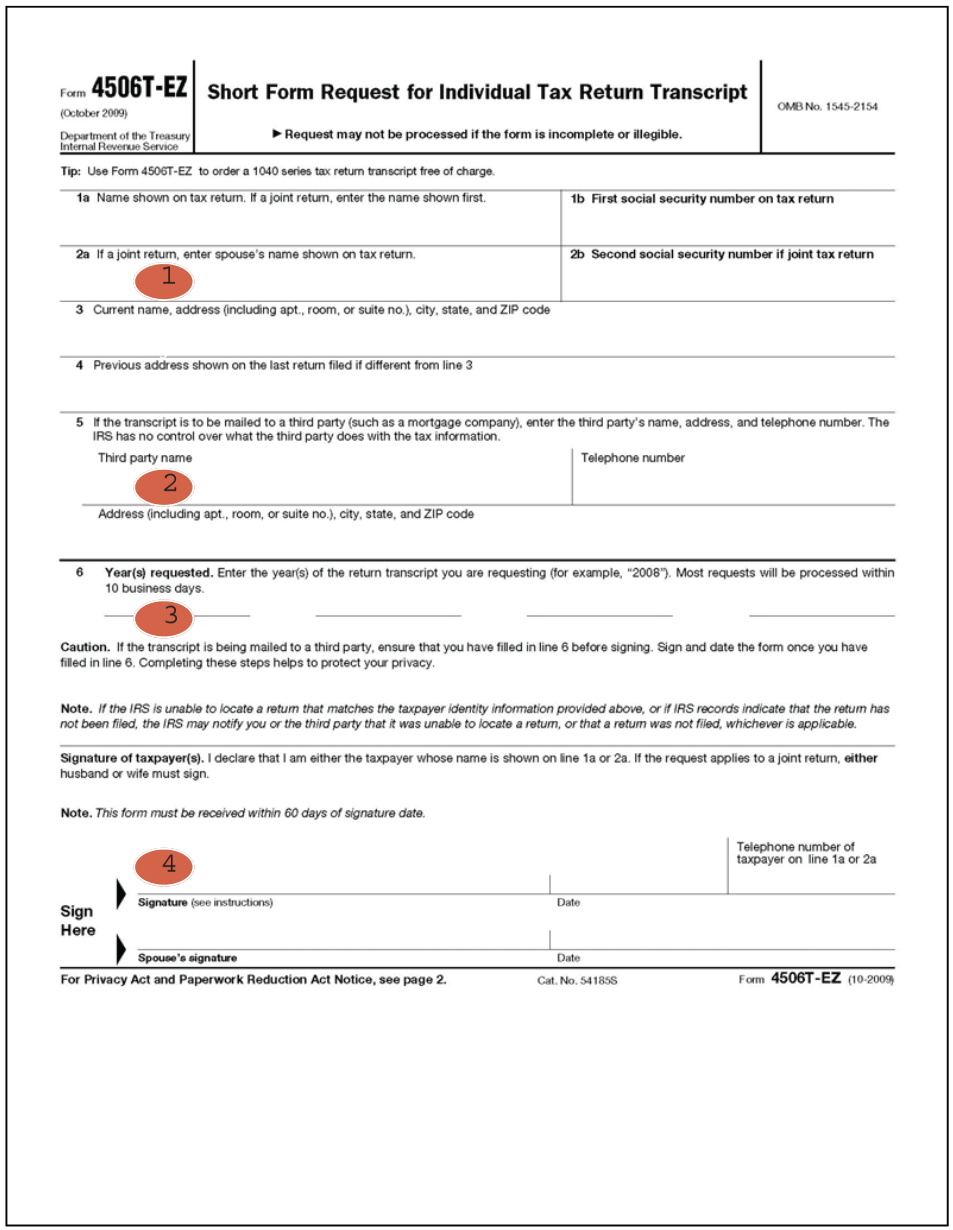
Privacy Act and Paperwork Reduction Act Notice. We ask for the information on this form to establish your right to gain access to the requested tax information under the Internal Revenue Code. We need this information to properly identify the tax information and respond to your request. Sections 6103 and 6109 require you to provide this information, including your SSN. If you do not provide this information, we may not be able to process your request. Providing false or fraudulent information may subject you to penalties.

Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and cities, states, and the District of Columbia for use in administering their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file Form 4506T-EZ will vary depending on individual circumstances. The estimated average time is: **Learning about the law or the form,** 9 min.; **Preparing the form,** 18 min.; and **Copying, assembling, and sending the form to the IRS,** 20 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making Form 4506T-EZ simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the form to this address. Instead, see *Where to file* on this page.



Form **4506T-EZ** (October 2009)
Department of the Treasury Internal Revenue Service

Short Form Request for Individual Tax Return Transcript

► **Request may not be processed if the form is incomplete or illegible.**

OMB No. 1545-2154

Tip: Use Form 4506T-EZ to order a 1040 series tax return transcript free of charge.

1a Name shown on tax return. If a joint return, enter the name shown first. | **1b First social security number on tax return**

2a If a joint return, enter spouse's name shown on tax return. | **2b Second social security number if joint tax return**

1

3 Current name, address (including apt., room, or suite no.), city, state, and ZIP code

4 Previous address shown on the last return filed if different from line 3

5 If the transcript is to be mailed to a third party (such as a mortgage company), enter the third party's name, address, and telephone number. The IRS has no control over what the third party does with the tax information.

Third party name | Telephone number

2

Address (including apt., room, or suite no.), city, state, and ZIP code

6 **Year(s) requested.** Enter the year(s) of the return transcript you are requesting (for example, "2008"). Most requests will be processed within 10 business days.

3

Caution. If the transcript is being mailed to a third party, ensure that you have filled in line 6 before signing. Sign and date the form once you have filled in line 6. Completing these steps helps to protect your privacy.

Note. *If the IRS is unable to locate a return that matches the taxpayer identity information provided above, or if IRS records indicate that the return has not been filed, the IRS may notify you or the third party that it was unable to locate a return, or that a return was not filed, whichever is applicable.*

Signature of taxpayer(s). I declare that I am either the taxpayer whose name is shown on line 1a or 2a. If the request applies to a joint return, **either** husband or wife must sign.

Note. *This form must be received within 60 days of signature date.*

4

Sign Here

Signature (see instructions) | Date | Telephone number of taxpayer on line 1a or 2a

Spouse's signature | Date

For Privacy Act and Paperwork Reduction Act Notice, see page 2. Cat. No. 54185S Form **4506T-EZ** (10-2009)

1. If you filed a joint tax return, make sure you include both names on the Form 4506T-EZ.
2. The third party is your mortgage servicer. You can find the name of your servicer on your mortgage statements; however, the address where you send your monthly payments may not be the correct address for your servicer's foreclosure prevention department. To find the correct address, please refer to the Servicer Address Chart (attached).
3. Your servicer only needs your most recent year's tax return. Enter that tax year on the first line. For example, if you filed your taxes in April 2010, you were filing for the 2009 tax year, so you would enter "2009." This **completed form must be sent to your servicer.**
4. Even if you file a joint tax return, you only need one signature (the person listed on line 1a) to file the Form 4506T-EZ. NOTE: The IRS must receive your form within 120 days of the signature date.

SERVICER ADDRESS CHART

Use the Chart below to find the information for your Servicer to be entered on Line 5 on IRS Form 4506T-EZ

Servicer Name	Address
21st Mortgage Corporation	*Third Party Name* 21st Mortgage Corporation *Telephone Number* 865-523-2120 *Address* 620 Market Street One Centre Square Knoxville, TN 37902
Bank of America (and Countrywide)	*Third Party Name* Bank of America, N.A. *Telephone Number* 800-669-6607 *Address* MHA Escalations Unit PO Box 940070 Simi Valley, CA 93094-0070
Chase Home Finance LLC (and Washington Mutual)	*Third Party Name* Chase Fulfillment Center *Telephone Number* 866-550-5705 *Address* Regular Mail: PO Box 469030 Glendale, CO 80246 Overnight Mail: 4500 Cherry Creek Drive Suite 100 Glendale, CO 80246

EMC Mortgage Corporation	*Third Party Name* EMC Fulfillment Center *Telephone Number* 800-723-3004 *Address* Regular Mail: PO Box 469030 Glendale, CO 80246 Overnight Mail: 4500 Cherry Creek Drive Suite 100 Glendale, CO 80246
GMAC Mortgage LLC	*Third Party Name* GMAC Mortgage *Telephone Number* 800-850-4622 *Address* Attn: Loss Mitigation 233 Gibraltar Road Suite 600 Horsham PA 19044
Kentucky Housing Corporation	*Third Party Name* Kentucky Housing Corporation *Telephone Number* 502-564-7630 *Address* 1231 Louisville Rd Frankfort, KY 40601
Litton Loan Servicing	*Third Party Name* Litton Loan Servicing *Telephone Number* 800-247-9727 *Address* 4828 Loop Central Drive Houston, TX 77081

New South Federal Savings Bank	*Third Party Name* LPP Mortgage *Telephone Number* 866-255-9397 *Address* 425 Phillips Blvd Ewing, NJ 08628 * *Note: New South Federal Savings Bank has recently been acquired by Beal Bank*
Ocwen Financial Corporation, Inc.	*Third Party Name* Ocwen Loan Servicing, LLC Attention: Home Retention Department *Telephone Number* 800-746-2936 *Address* 1661 Worthington Rd Ste 100 West Palm Beach, FL 33409
Resurgent Capital Services	*Third Party Name* Resurgent Capital Services *Telephone Number* (800) 365-7107 *Address* P.O. Box 10826 Greenville, SC 29603-0826
Saxon Mortgage Services	*Third Party Name* Saxon Attention: Home Preservation HMP Documentation Department *Telephone Number* 800-594-8422 *Address* 4708 Mercantile Drive North Fort Worth, TX 76137

Select Portfolio Servicing	*Third Party Name* Select Portfolio Servicing Inc. *Telephone Number* 888-818-6032 *Address* PO BOX:65250 Salt Lake City, UT 84165-0250
Wells Fargo Home Mortgage (and America's Servicing Company)	*Third Party Name* petesabbag DataVision Resources, LLC 0000300501 *Telephone Number* 515-989-0877 *Address* 84 E. School St. Carlisle, IA 50047 **Note: Wells Fargo/ASC use a third party processor. Please enter the Third Party Name **exactly** as shown above*

INSTRUCTIONS
FOR
DODD FRANK CERTIFICATION FORM

Step 1
Fill out the form

Step 2
All borrowers must **SIGN and DATE** the form

Step 3
Scan the signed form and submit it to the Servicer through the Portal

Dodd-Frank Certification

The following information is requested by the federal government in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203). **You are required to furnish this information.** The law provides that no person shall be eligible to receive assistance from the Making Home Affordable Program, authorized under the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5201 *et seq.*), or any other mortgage assistance program authorized or funded by that Act, if such person, in connection with a mortgage or real estate transaction, has been convicted, within the last 10 years, of any one of the following: (A) felony larceny, theft, fraud or forgery, (B) money laundering or (C) tax evasion.

Borrower	Co-Borrower
☐ I have not been convicted within the last 10 years of any one of the following in connection with a mortgage or real estate transaction: **(a)** felony larceny, theft, fraud or forgery, **(b)** money laundering or **(c)** tax evasion	☐ I have not been convicted within the last 10 years of any one of the following in connection with a mortgage or real estate transaction: **(a)** felony larceny, theft, fraud or forgery, **(b)** money laundering or **(c)** tax evasion

In making this certification, I/we certify under penalty of perjury that all of the information in this document is truthful and that I/we understand that the Servicer, the U.S. Department of the Treasury, or their agents may investigate the accuracy of my statements by performing routine background checks, including automated searches of federal, state and county databases, to confirm that I/we have not been convicted of such crimes. I/we also understand that knowingly submitting false information may violate Federal law.

_____ _____
Borrower Signature Date

_____ _____
Co-Borrower Signature Date

INSTRUCTIONS
FOR
REQUEST FOR MODIFICATION AND AFFIDAVIT

Step 1
Fill out the form
(Refer to the detailed "Instructions for Completing RMA Form" at end of this document)

Step 2
All borrowers must **SIGN and DATE** the form

Step 3
Scan the signed form and submit it to the Servicer through the Portal

Making Home Affordable Program
Request For Modification and Affidavit (RMA)

MAKING HOME AFFORDABLE.GOV

REQUEST FOR MODIFICATION AND AFFIDAVIT (RMA) page 1 | COMPLETE ALL THREE PAGES OF THIS FORM

Loan I.D. Number_____ Servicer _____

BORROWER	CO-BORROWER
Borrower's name	Co-borrower's name
Social Security number Date of birth	Social Security number Date of birth
Home phone number with area code	Home phone number with area code
Cell or work number with area code	Cell or work number with area code

I want to:	☐ Keep the Property	☐ Sell the Property	
The property is my:	☐ Primary Residence	☐ Second Home	☐ Investment
The property is:	☐ Owner Occupied	☐ Renter Occupied	☐ Vacant

Mailing address

Property address (if same as mailing address, just write same) E-mail address

Is the property listed for sale? ☐ Yes ☐ No
Have you received an offer on the property? ☐ Yes ☐ No
*Date of offer*_____ *Amount of offer $*_____
Agent's Name: _____
Agent's Phone Number: _____
For Sale by Owner? ☐ Yes ☐ No

Have you contacted a credit-counseling agency for help ☐ Yes ☐ No
If yes, please complete the following:
Counselor's Name: _____
Agency Name: _____
Counselor's Phone Number: _____
Counselor's E-mail: _____

Who pays the real estate tax bill on your property?
☐ I do ☐ Lender does ☐ Paid by condo or HOA
Are the taxes current? ☐ Yes ☐ No
Condominium or HOA Fees ☐ Yes ☐ No $ _____
Paid to: _____

Who pays the hazard insurance premium for your property?
☐ I do ☐ Lender does ☐ Paid by Condo or HOA
Is the policy current? ☐ Yes ☐ No
Name of Insurance Co.: _____
Insurance Co. Tel #: _____

Have you filed for bankruptcy? ☐ Yes ☐ No If yes: ☐ Chapter 7 ☐ Chapter 13 *Filing Date:*_____
Has your bankruptcy been discharged? ☐ Yes ☐ No *Bankruptcy case number* _____

Additional Liens/Mortgages or Judgments on this property:

Lien Holder's Name/Servicer	Balance	Contact Number	Loan Number

HARDSHIP AFFIDAVIT

I (We) am/are requesting review under the Making Home Affordable program.
I am having difficulty making my monthly payment because of financial difficulties created by (check all that apply):

☐ My household income has been reduced. For example: unemployment, underemployment, reduced pay or hours, decline in business earnings, death, disability or divorce of a borrower or co-borrower.	☐ My monthly debt payments are excessive and I am overextended with my creditors. Debt includes credit cards, home equity or other debt.
☐ My expenses have increased. For example: monthly mortgage payment reset, high medical or health care costs, uninsured losses, increased utilities or property taxes.	☐ My cash reserves, including all liquid assets, are insufficient to maintain my current mortgage payment and cover basic living expenses at the same time.

☐ Other:

Explanation (continue on back of page 3 if necessary): _____

_____

REQUEST FOR MODIFICATION AND AFFIDAVIT (RMA) page 2 | COMPLETE ALL THREE PAGES OF THIS FORM

INCOME/EXPENSES FOR HOUSEHOLD[1]

Number of People in Household:

Monthly Household Income	
Monthly Gross Wages	$
Overtime	$
Child Support / Alimony / Separation[2]	$
Social Security/SSDI	$
Other monthly income from pensions, annuities or retirement plans	$
Tips, commissions, bonus and self-employed income	$
Rents Received	$
Unemployment Income	$
Food Stamps/Welfare	$
Other (investment income, royalties, interest, dividends etc.)	$
Total (Gross Income)	***$***

Monthly Household Expenses/Debt	
First Mortgage Payment	$
Second Mortgage Payment	$
Insurance	$
Property Taxes	$
Credit Cards / Installment Loan(s) (total minimum payment per month)	$
Alimony, child support payments	$
Net Rental Expenses	$
HOA/Condo Fees/Property Maintenance	$
Car Payments	$
Other _____ _____	$
Total Debt/Expenses	***$***

Household Assets	
Checking Account(s)	$
Checking Account(s)	$
Savings/ Money Market	$
CDs	$
Stocks / Bonds	$
Other Cash on Hand	$
Other Real Estate (estimated value)	$
Other _____	$
Other _____	$
Do not include the value of life insurance or retirement plans when calculating assets (401k, pension funds, annuities, IRAs, Keogh plans, etc.)	
Total Assets	***$***

INCOME MUST BE DOCUMENTED

[1]*Include combined income and expenses from the borrower and co-borrower (if any). If you include income and expenses from a household member who is not a borrower, please specify using the back of this form if necessary.*

[2]***You are not required to disclose Child Support, Alimony or Separation Maintenance income, unless you choose to have it considered by your servicer.***

INFORMATION FOR GOVERNMENT MONITORING PURPOSES

The following information is requested by the federal government in order to monitor compliance with federal statutes that prohibit discrimination in housing. **You are not required to furnish this information, but are encouraged to do so. The law provides that a lender or servicer may not discriminate either on the basis of this information, or on whether you choose to furnish it.** If you furnish the information, please provide both ethnicity and race. For race, you may check more than one designation. If you do not furnish ethnicity, race, or sex, the lender or servicer is required to note the information on the basis of visual observation or surname if you have made this request for a loan modification in person. **If you do not wish to furnish the information, please check the box below.**

BORROWER	☐ I do not wish to furnish this information	CO-BORROWER	☐ I do not wish to furnish this information
Ethnicity:	☐ Hispanic or Latino ☐ Not Hispanic or Latino	*Ethnicity:*	☐ Hispanic or Latino ☐ Not Hispanic or Latino
Race:	☐ American Indian or Alaska Native ☐ Asian ☐ Black or African American ☐ Native Hawaiian or Other Pacific Islander ☐ White	*Race:*	☐ American Indian or Alaska Native ☐ Asian ☐ Black or African American ☐ Native Hawaiian or Other Pacific Islander ☐ White
Sex:	☐ Female ☐ Male	*Sex:*	☐ Female ☐ Male

To be completed by interviewer

This request was taken by:

☐ Face-to-face interview
☐ Mail
☐ Telephone
☐ Internet

Interviewer's Name (print or type) & ID Number

Interviewer's Signature *Date*

Interviewer's Phone Number (include area code)

Name/Address of Interviewer's Employer

ACKNOWLEDGEMENT AND AGREEMENT

In making this request for consideration under the Making Home Affordable Program, I certify under penalty of perjury:

1. That all of the information in this document is truthful and the event(s) identified on page 1 is/are the reason that I need to request a modification of the terms of my mortgage loan, short sale or deed-in-lieu of foreclosure.
2. I understand that the Servicer, the U.S. Department of the Treasury, or their agents may investigate the accuracy of my statements and may require me to provide supporting documentation. I also understand that knowingly submitting false information may violate Federal law.
3. I understand the Servicer will pull a current credit report on all borrowers obligated on the Note.
4. I understand that if I have intentionally defaulted on my existing mortgage, engaged in fraud or misrepresented any fact(s) in connection with this document, the Servicer may cancel any Agreement under Making Home Affordable and may pursue foreclosure on my home.
5. That: my property is owner-occupied; I intend to reside in this property for the next twelve months; I have not received a condemnation notice; and there has been no change in the ownership of the Property since I signed the documents for the mortgage that I want to modify.
6. I am willing to provide all requested documents and to respond to all Servicer questions in a timely manner.
7. I understand that the Servicer will use the information in this document to evaluate my eligibility for a loan modification or short sale or deed-in-lieu of foreclosure, but the Servicer is not obligated to offer me assistance based solely on the statements in this document.
8. I am willing to commit to credit counseling if it is determined that my financial hardship is related to excessive debt.
9. I understand that the Servicer will collect and record personal information, including, but not limited to, my name, address, telephone number, social security number, credit score, income, payment history, government monitoring information, and information about account balances and activity. I understand and consent to the disclosure of my personal information and the terms of any Making Home Affordable Agreement by Servicer to (a) the U.S. Department of the Treasury, (b) Fannie Mae and Freddie Mac in connection with their responsibilities under the Homeowner Affordability and Stability Plan; (c) any investor, insurer, guarantor or servicer that owns, insures, guarantees or services my first lien or subordinate lien (if applicable) mortgage loan(s); (d) companies that perform support services in conjunction with Making Home Affordable; and (e) any HUD-certified housing counselor.

▶ _____ _____

Borrower Signature Date

▶ _____ _____

Co-Borrower Signature Date

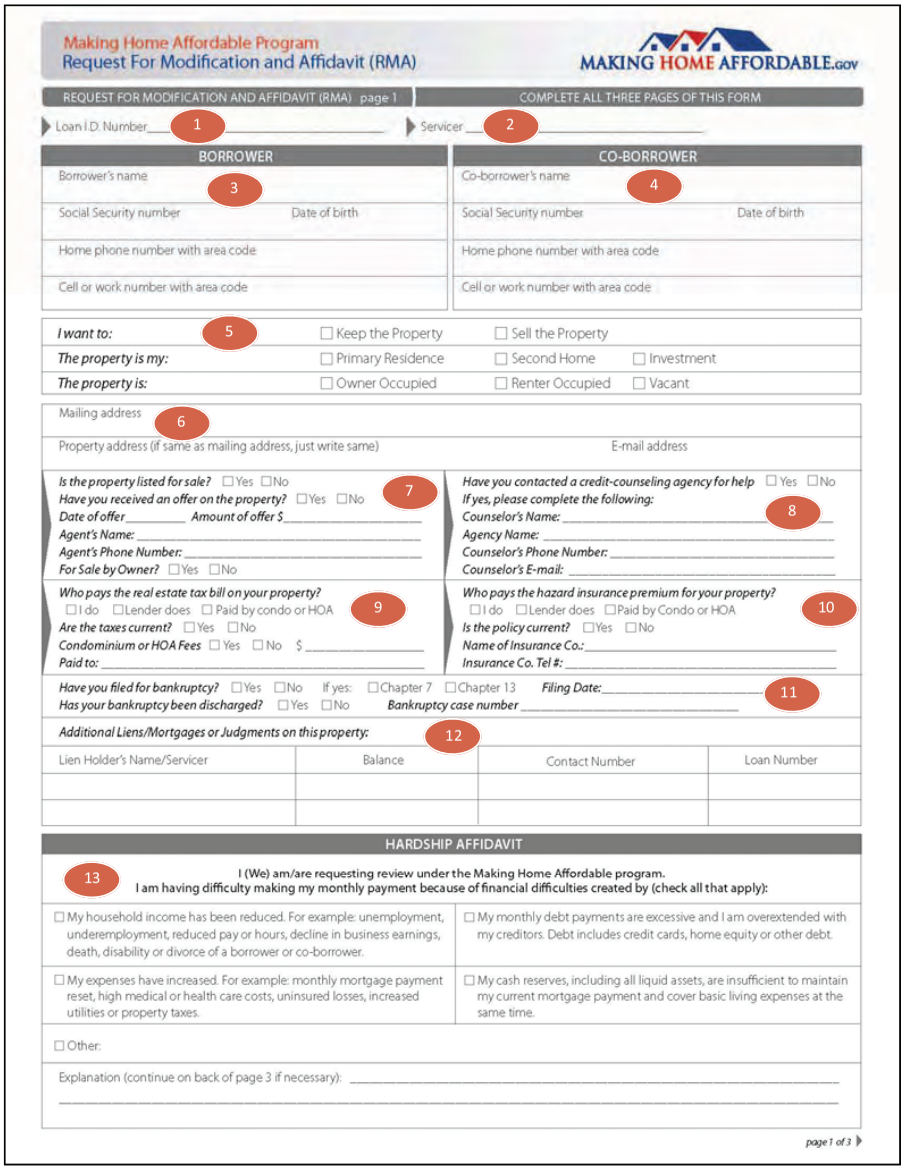
NOTICE TO BORROWERS

Be advised that by signing this document you understand that any documents and information you submit to your servicer in connection with the Making Home Affordable Program are under penalty of perjury. Any misstatement of material fact made in the completion of these documents including but not limited to misstatement regarding your occupancy in your home, hardship circumstances, and/or income, expenses, or assets will subject you to potential criminal investigation and prosecution for the following crimes: perjury, false statements, mail fraud, and wire fraud. The information contained in these documents is subject to examination and verification. Any potential misrepresentation will be referred to the appropriate law enforcement authority for investigation and prosecution. By signing this document you certify, represent and agree that: "Under penalty of perjury, all documents and information I have provided to Lender in connection with the Making Home Affordable Program, including the documents and information regarding my eligibility for the program, are true and correct."

If you are aware of fraud, waste, abuse, mismanagement or misrepresentations affiliated with the Troubled Asset Relief Program, please contact the SIGTARP Hotline by calling 1-877-SIG-2009 (toll-free), 202-622-4559 (fax), or www.sigtarp.gov. Mail can be sent to Hotline Office of the Special Inspector General for Troubled Asset Relief Program, 1801 L St. NW, Washington, DC 20220.

Instructions for Completing RMA Form

The numbered sections correspond to instructions on the right.



Making Home Affordable Program
Request For Modification and Affidavit (RMA)

MAKING HOME AFFORDABLE.GOV

REQUEST FOR MODIFICATION AND AFFIDAVIT (RMA) page 1 | COMPLETE ALL THREE PAGES OF THIS FORM

1 Loan I.D. Number _____ 2 Servicer _____

BORROWER	CO-BORROWER
Borrower's name 3	Co-borrower's name 4
Social Security number / Date of birth	Social Security number / Date of birth
Home phone number with area code	Home phone number with area code
Cell or work number with area code	Cell or work number with area code

5
I want to: ☐ Keep the Property ☐ Sell the Property
The property is my: ☐ Primary Residence ☐ Second Home ☐ Investment
The property is: ☐ Owner Occupied ☐ Renter Occupied ☐ Vacant

Mailing address 6
Property address (if same as mailing address, just write same) / E-mail address

7
Is the property listed for sale? ☐ Yes ☐ No
Have you received an offer on the property? ☐ Yes ☐ No
Date of offer _____ *Amount of offer $* _____
Agent's Name: _____
Agent's Phone Number: _____
For Sale by Owner? ☐ Yes ☐ No

8
Have you contacted a credit-counseling agency for help ☐ Yes ☐ No
If yes, please complete the following:
Counselor's Name: _____
Agency Name: _____
Counselor's Phone Number: _____
Counselor's E-mail: _____

9
Who pays the real estate tax bill on your property?
☐ I do ☐ Lender does ☐ Paid by condo or HOA
Are the taxes current? ☐ Yes ☐ No
Condominium or HOA Fees ☐ Yes ☐ No $ _____
Paid to: _____

10
Who pays the hazard insurance premium for your property?
☐ I do ☐ Lender does ☐ Paid by Condo or HOA
Is the policy current? ☐ Yes ☐ No
Name of Insurance Co.: _____
Insurance Co. Tel #: _____

11
Have you filed for bankruptcy? ☐ Yes ☐ No If yes: ☐ Chapter 7 ☐ Chapter 13 *Filing Date:* _____
Has your bankruptcy been discharged? ☐ Yes ☐ No *Bankruptcy case number* _____

12
Additional Liens/Mortgages or Judgments on this property:

Lien Holder's Name/Servicer	Balance	Contact Number	Loan Number

HARDSHIP AFFIDAVIT

13
I (We) am/are requesting review under the Making Home Affordable program.
I am having difficulty making my monthly payment because of financial difficulties created by (check all that apply):

☐ My household income has been reduced. For example: unemployment, underemployment, reduced pay or hours, decline in business earnings, death, disability or divorce of a borrower or co-borrower.

☐ My monthly debt payments are excessive and I am overextended with my creditors. Debt includes credit cards, home equity or other debt.

☐ My expenses have increased. For example: monthly mortgage payment reset, high medical or health care costs, uninsured losses, increased utilities or property taxes.

☐ My cash reserves, including all liquid assets, are insufficient to maintain my current mortgage payment and cover basic living expenses at the same time.

☐ Other:

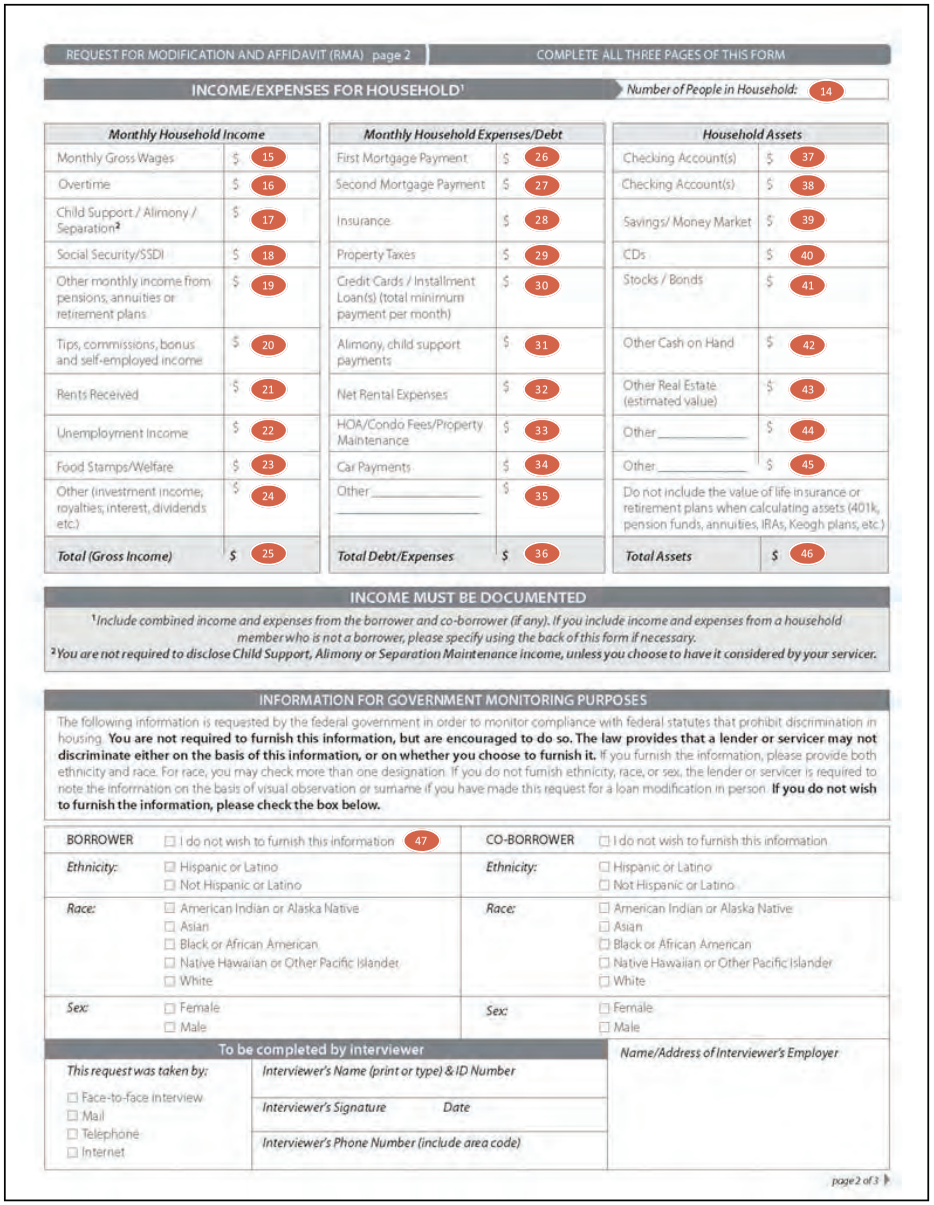
Explanation (continue on back of page 3 if necessary): _____

page 1 of 3

1. Your loan ID number is on your mortgage statement
2. Your loan servicer is the financial institution that collects your monthly mortgage payments.
3. The borrower section must be the person whose name is on the mortgage.
4. The co-borrower is a second person on the mortgage. Do not fill this section out for someone who is not listed on the mortgage.
5. For this section, you should only choose on option for each question.
6. Please provide a mailing address and property address if different. The property address should correspond to the mortgage you are applying to modify.
7. If your property is not listed for sale, you do not need to fill out the rest of Section 7. Only include offers for sale that you received in the past year.
8. Counselors are available free of charge and can be located on the Making Home Affordable website (ww.MakingHomeAffordable.gov).
9. If your real estate taxes and property insurance are part of your monthly payment that you make to your servicer, select "lender does." HOA: Homeowner's association
10. See instructions for Section 9.
11. The filing date indicates when you officially filed for bankruptcy. Only check the "yes" box for a discharged bankruptcy if you no longer owe any obligations.
12. Additional liens include second (or third) mortgages and home equity lines of credit.
13. Please select as many hardships that apply to your situation. You can use the extra lines to explain your hardship, though extensive explanations could delay the processing of your documentation.

Instructions for Completing RMA Form

The numbered sections correspond to instructions on the right.



REQUEST FOR MODIFICATION AND AFFIDAVIT (RMA) page 2 | COMPLETE ALL THREE PAGES OF THIS FORM

INCOME/EXPENSES FOR HOUSEHOLD[1] — Number of People in Household: 14

Monthly Household Income		Monthly Household Expenses/Debt		Household Assets	
Monthly Gross Wages	$ 15	First Mortgage Payment	$ 26	Checking Account(s)	$ 37
Overtime	$ 16	Second Mortgage Payment	$ 27	Checking Account(s)	$ 38
Child Support / Alimony / Separation[2]	$ 17	Insurance	$ 28	Savings/ Money Market	$ 39
Social Security/SSDI	$ 18	Property Taxes	$ 29	CDs	$ 40
Other monthly income from pensions, annuities or retirement plans	$ 19	Credit Cards / Installment Loan(s) (total minimum payment per month)	$ 30	Stocks / Bonds	$ 41
Tips, commissions, bonus and self-employed income	$ 20	Alimony, child support payments	$ 31	Other Cash on Hand	$ 42
Rents Received	$ 21	Net Rental Expenses	$ 32	Other Real Estate (estimated value)	$ 43
Unemployment Income	$ 22	HOA/Condo Fees/Property Maintenance	$ 33	Other _____	$ 44
Food Stamps/Welfare	$ 23	Car Payments	$ 34	Other _____	$ 45
Other (investment income, royalties, interest, dividends etc.)	$ 24	Other _____ _____	$ 35	Do not include the value of life insurance or retirement plans when calculating assets (401k, pension funds, annuities, IRAs, Keogh plans, etc.)	
Total (Gross Income)	$ 25	*Total Debt/Expenses*	$ 36	*Total Assets*	$ 46

INCOME MUST BE DOCUMENTED

[1] *Include combined income and expenses from the borrower and co-borrower (if any). If you include income and expenses from a household member who is not a borrower, please specify using the back of this form if necessary.*

[2] *You are not required to disclose Child Support, Alimony or Separation Maintenance income, unless you choose to have it considered by your servicer.*

INFORMATION FOR GOVERNMENT MONITORING PURPOSES

The following information is requested by the federal government in order to monitor compliance with federal statutes that prohibit discrimination in housing. **You are not required to furnish this information, but are encouraged to do so. The law provides that a lender or servicer may not discriminate either on the basis of this information, or on whether you choose to furnish it.** If you furnish the information, please provide both ethnicity and race. For race, you may check more than one designation. If you do not furnish ethnicity, race, or sex, the lender or servicer is required to note the information on the basis of visual observation or surname if you have made this request for a loan modification in person. **If you do not wish to furnish the information, please check the box below.**

BORROWER	☐ I do not wish to furnish this information 47	CO-BORROWER	☐ I do not wish to furnish this information
Ethnicity:	☐ Hispanic or Latino ☐ Not Hispanic or Latino	*Ethnicity:*	☐ Hispanic or Latino ☐ Not Hispanic or Latino
Race:	☐ American Indian or Alaska Native ☐ Asian ☐ Black or African American ☐ Native Hawaiian or Other Pacific Islander ☐ White	*Race:*	☐ American Indian or Alaska Native ☐ Asian ☐ Black or African American ☐ Native Hawaiian or Other Pacific Islander ☐ White
Sex:	☐ Female ☐ Male	*Sex:*	☐ Female ☐ Male

To be completed by interviewer

This request was taken by:
☐ Face-to-face interview
☐ Mail
☐ Telephone
☐ Internet

Interviewer's Name (print or type) & ID Number

Interviewer's Signature *Date*

Interviewer's Phone Number (include area code)

Name/Address of Interviewer's Employer

page 2 of 3

14. Indicate the number of people in a household who contribute to the total income.
15. Monthly gross wages are what you receive before taxes. Use your most current pay stub to find this amount.
16. This amount should be listed on a current pay stub.
17. If you receive child support, alimony, or separation maintenance income, you are not required to report it by law. You should only include this amount if you would like it to be included in the income calculation.
18. SSDI: Social Security/Disability Income
19. Only include if you are retired and collecting income from retirement funds.
20. If reported, this amount will be on your pay stub.
21. Only include rental income if used as part of your overall income.
22. You must have at least nine months of unemployment income to report on this form.
23. Report the amount indicated on your benefits letter. You must provide a copy of this letter as documentation of this income.
24. Add all other income and report sum in this box.
25. Add all amounts in income column (boxes 15-24) and report sum.
26. This amount can be found on your statement for your first mortgage.
27. If applicable, this amount can be found on your statement for your second mortgage or home equity lines of credit.
28. This refers only to homeowner's insurance and should be reported only if you pay this yourself.
29. Only report these taxes if you pay them yourself.
30. Add all credit cards and installment payments and report sum here.
31. If you are responsible for paying child support or alimony, you must report the amount here.
32. Report amount if your total rental income does not cover your total rental expenses.
33. HOA: Home Owner's Association; Report only if you pay these fees yourself.
34. Include car payments only if you are the owner of the vehicle.
35. Include any other pertinent household expenses.
36. Add all amounts in expense column (boxes 26-35) and report sum.

37-39. Report amounts for all accounts, if applicable.

40. CDs: certificates of deposit

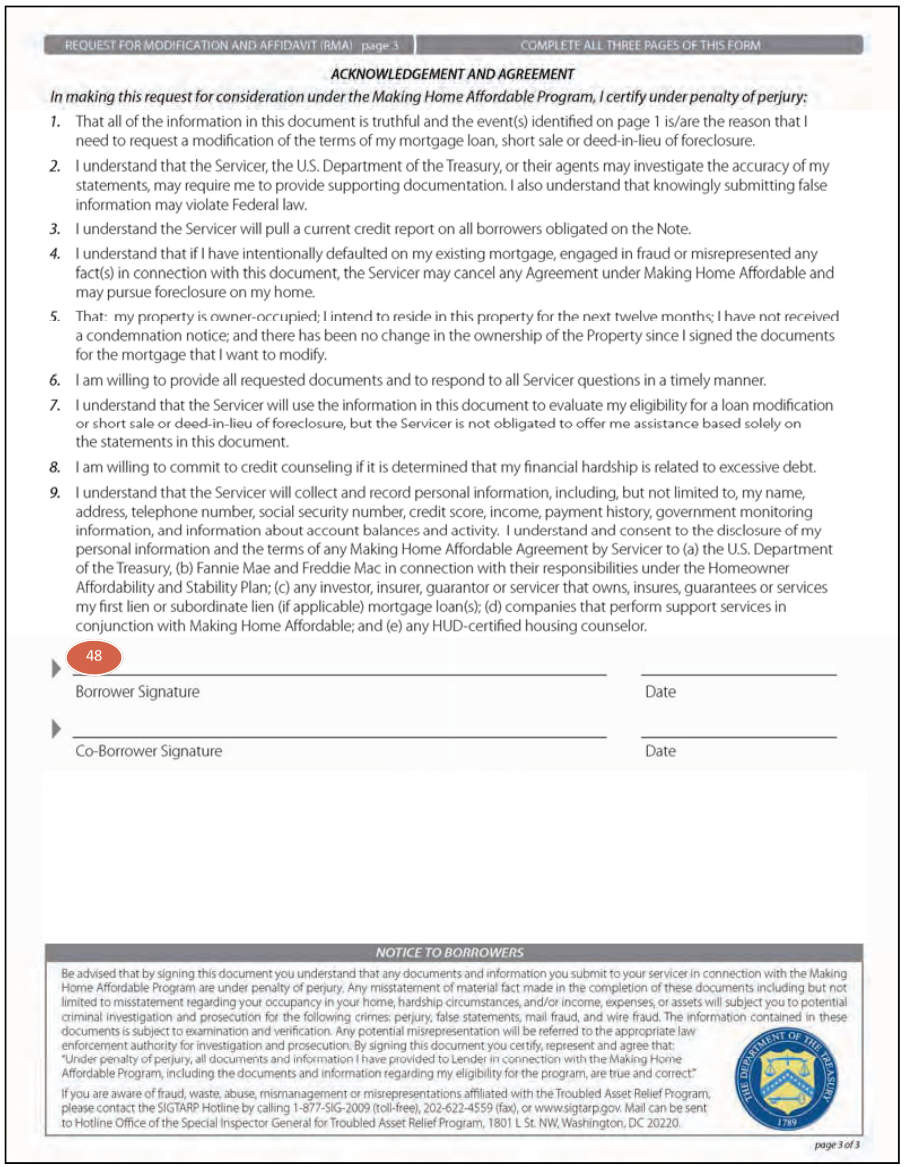
41-42. Report amounts for all accounts, if applicable.

43. Include estimated value for all other properties owned.

44-45. Report any other assets other than the value of life insurance or retirement plans, including 401K, pension funds, IRAs, Keogh plans, etc.)

46. Add all amounts in assets column (boxes 37-45) and report sum.
47. This information is not required but encouraged to ensure federal compliance with anti-discrimination laws. No information reported in this section will affect your consideration to receive a modification.

The numbered sections correspond to instructions on the right.



REQUEST FOR MODIFICATION AND AFFIDAVIT (RMA) page 3 | COMPLETE ALL THREE PAGES OF THIS FORM

ACKNOWLEDGEMENT AND AGREEMENT

In making this request for consideration under the Making Home Affordable Program, I certify under penalty of perjury:

1. That all of the information in this document is truthful and the event(s) identified on page 1 is/are the reason that I need to request a modification of the terms of my mortgage loan, short sale or deed-in-lieu of foreclosure.
2. I understand that the Servicer, the U.S. Department of the Treasury, or their agents may investigate the accuracy of my statements, may require me to provide supporting documentation. I also understand that knowingly submitting false information may violate Federal law.
3. I understand the Servicer will pull a current credit report on all borrowers obligated on the Note.
4. I understand that if I have intentionally defaulted on my existing mortgage, engaged in fraud or misrepresented any fact(s) in connection with this document, the Servicer may cancel any Agreement under Making Home Affordable and may pursue foreclosure on my home.
5. That: my property is owner-occupied; I intend to reside in this property for the next twelve months; I have not received a condemnation notice; and there has been no change in the ownership of the Property since I signed the documents for the mortgage that I want to modify.
6. I am willing to provide all requested documents and to respond to all Servicer questions in a timely manner.
7. I understand that the Servicer will use the information in this document to evaluate my eligibility for a loan modification or short sale or deed-in-lieu of foreclosure, but the Servicer is not obligated to offer me assistance based solely on the statements in this document.
8. I am willing to commit to credit counseling if it is determined that my financial hardship is related to excessive debt.
9. I understand that the Servicer will collect and record personal information, including, but not limited to, my name, address, telephone number, social security number, credit score, income, payment history, government monitoring information, and information about account balances and activity. I understand and consent to the disclosure of my personal information and the terms of any Making Home Affordable Agreement by Servicer to (a) the U.S. Department of the Treasury, (b) Fannie Mae and Freddie Mac in connection with their responsibilities under the Homeowner Affordability and Stability Plan; (c) any investor, insurer, guarantor or servicer that owns, insures, guarantees or services my first lien or subordinate lien (if applicable) mortgage loan(s); (d) companies that perform support services in conjunction with Making Home Affordable; and (e) any HUD-certified housing counselor.

48

Borrower Signature _____ Date _____

Co-Borrower Signature _____ Date _____

NOTICE TO BORROWERS

Be advised that by signing this document you understand that any documents and information you submit to your servicer in connection with the Making Home Affordable Program are under penalty of perjury. Any misstatement of material fact made in the completion of these documents including but not limited to misstatement regarding your occupancy in your home, hardship circumstances, and/or income, expenses, or assets will subject you to potential criminal investigation and prosecution for the following crimes: perjury, false statements, mail fraud, and wire fraud. The information contained in these documents is subject to examination and verification. Any potential misrepresentation will be referred to the appropriate law enforcement authority for investigation and prosecution. By signing this document you certify, represent and agree that: "Under penalty of perjury, all documents and information I have provided to Lender in connection with the Making Home Affordable Program, including the documents and information regarding my eligibility for the program, are true and correct."

If you are aware of fraud, waste, abuse, mismanagement or misrepresentations affiliated with the Troubled Asset Relief Program, please contact the SIGTARP Hotline by calling 1-877-SIG-2009 (toll-free), 202-622-4559 (fax), or www.sigtarp.gov. Mail can be sent to Hotline Office of the Special Inspector General for Troubled Asset Relief Program, 1801 L St. NW, Washington, DC 20220.

page 3 of 3

48. Please be sure to read entire agreement before signing. Do not leave off a signature as this will decrease efficient document processing.

7/07/11 8:55PM

Debtor Attorney	**David Krieger, Esq.**
Nevada Bar No.	**9086**
Attorney Firm Name	**HAINES & KRIEGER, LLC**
Address	**1020 Garces Ave. Suite 100**
City, State Zip Code	**Las Vegas, NV 89101**
Phone #	**(702) 880-5554**
Pro Se Debtor	

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:	)	BK - **S** -
Debtor: **John Doe**	)	Judge: Trustee:
Last four digits of Soc. Sec. No.: **xxx-xx-xxxx**	)	CHAPTER 13 PLAN # **1**
	)	Plan Modification ☒ NA ☐ Before Confirmation ☐ After Confirmation
Joint Debtor: **Jane Doe**	)	Pre-Confirmation Meeting:
Last four digits of Soc. Sec. No.: **xxx-xx-xxxx**	)	Date: Time: **8:30 am**
	)	Confirmation Hearing:
	)	Date: Time: **1:30 pm**

CHAPTER 13 PLAN AND PLAN SUMMARY
OF INTEREST RATES AND PLAN SUMMARY
☒ MOTION(S) TO VALUE COLLATERAL ☒ MOTION(S) TO AVOID LIENS
[*Check if motion(s) will be filed*]

YOU ARE HEREBY NOTIFIED THAT THIS PLAN AND THESE MOTIONS, IF APPLICABLE, WILL BE CONSIDERED FOR APPROVAL AT THE CONFIRMATION HEARING DATE SET FORTH ABOVE. THE FILING AND SERVING OF WRITTEN OBJECTIONS TO THE PLAN AND MOTIONS SHALL BE MADE IN ACCORDANCE WITH BR 3015(f) & 9014 AND LR 9014(e).

DEBTOR PROPOSES THE FOLLOWING CHAPTER 13 PLAN WITH DETERMINATION OF INTEREST RATES WHICH SHALL BE EFFECTIVE FROM THE DATE IT IS CONFIRMED.

Section I. Commitment Period and Calculation of Disposable Income, Plan Payments, and Eligibility to Receive Discharge

1.01 Means Test - Debtor has completed Form B22C – Statement of Current Monthly income and Calculation of Commitment Period and Disposable Income.

1.02 Commitment Period - The applicable commitment period does not apply.

1.03 Commitment Period and Disposable Income
☐ The Debtor is under median income. ☒ The Debtor is over median income.
The Debtor has calculated that the net monthly disposable income of $ **0.00** multiplied by the Applicable Commitment Period of **60** months equals $ **-0.00** which shall be paid first to debtor's attorney fees with the balance to be paid to general non-priority unsecured creditors.

1.04 Liquidation Value Pursuant to §1325(a)(4)
Liquidation value is calculated as the value of all excess non-exempt property after the deduction of valid liens and encumbrances and before the deduction of trustee fees and priority claims. The liquidation value of this estate is: **0.00** . The liquidation value is derived from the following non-exempt assets (describe assets): _____.

1.05 Projected Disposable income - The Debtor(s) does propose to pay all projected disposable income for the applicable commitment period pursuant to §1325(b)(1)(B).

1.06 The Debtor(s) shall pay the greater of disposable income as stated in 1.03 or liquidation value as stated in 1.04.

1.07 Future Earnings The future earnings of Debtor shall be submitted to the supervision and control of Trustee as is necessary for the execution of the plan.

1.08 MONTHLY PAYMENTS:
a. Debtor shall pay to Trustee the sum of $ **1,725.00** for **60** (# of months) commencing **02/21/2010** . Totaling **103,500.00**.
b. Monthly payments shall increase or decrease as set forth below:
The sum of $__ for __ (# of months) commencing __. Totaling __
The sum of $__ for __ (# of months) commencing __. Totaling __

1.09 OTHER PAYMENTS - In addition to the submission of future earnings, Debtor will make non-monthly payment(s) derived from property of the bankruptcy estate or property of Debtor, or from other sources, as follows:

Amount of payment	Date	Source of payment
$		
$		
$		

1.10 TOTAL OF ALL PLAN PAYMENTS INCLUDING TRUSTEE FEES = 103,500.00

1.11 Trustees fees have been calculated at 10% of all plan payments which totals = **10,350.00** This amount is included in 1.10 above.

1.12 Tax Refunds - Debtor shall turn over to the Trustee and pay into the plan annual tax refunds for the tax years:
NA

1.13 ELECTION TO PAY 100% OF ALL FILED AND ALLOWED GENERAL NON-PRIORITY UNSECURED CLAIMS

a. ☐ 100% of all filed and allowed non-priority claims shall be paid by Trustee pursuant to this Plan.
b. ☐ General unsecured creditors will be paid interest at the rate of __%. [Check this box and insert the present value rate of interest - if debtors estate is solvent under §1325(a)(4).]

1.14 Statement of Eligibility to Receive Discharge

a. Debtor, **Adrian Moncera** **is eligible** to receive a Chapter 13 discharge pursuant to §1328 upon completion of all plan obligations.
b. Joint Debtor, **Marifi Moncera** **is eligible** to receive a Chapter 13 discharge pursuant to §1328 upon completion of all plan obligations.

Section II. Claims and Expenses

A. Proofs of Claim

2.01 A Proof of Claim must be timely filed by or on behalf of a priority or general non-priority unsecured creditor before a claim will be paid pursuant to this plan.

2.02 A CLASS 2A Secured Real Estate Mortgage Creditor shall be paid all post-petition payments as they become due whether or not a Proof of Claim is filed. The CLASS 2B secured real estate mortgage creditor shall not receive any payments on pre-petition claims unless a Proof of Claim has been filed.

2.03 A secured creditor may file a Proof of Claim at any time. A CLASS 3 or CLASS 4 secured creditor must file a Proof of Claim before the claim will be paid pursuant to this Plan.

2.04 Notwithstanding Section 2.01 and 2.03, monthly contract installments falling due after the filing of the petition shall be paid to each holder of a CLASS 1 and CLASS 6 secured claim whether or not a proof of claim is filed or the plan is confirmed.

2.05 Pursuant to §507(a)(1), payments on domestic support obligations (DSO) and payments on loans from retirement or thrift savings plans described in §362(b)(19) falling due after the filing of the petition shall be paid by Debtor directly to the person or entity entitled to receive such payments whether or not a proof of claim is filed or the plan is confirmed, unless agreed otherwise.

2.06 A Proof of Claim, not this plan or the schedules, shall determine the amount and the classification of a claim. Pursuant to §502(a) such claim or interest is deemed allowed unless objected to and the Court determines otherwise.

a. Claims provided for by the plan - If a claim is provided for by this plan and a Proof of Claim is filed, payments shall be based upon the claim unless the Court enters a separate Order otherwise determining (i) value of the creditors collateral; (ii) rate of interest; (iii) avoidance of a lien; (iv) amount of claim or (v) classification of a claim. If interest is required to be paid on a claim, the interest rate shall be paid in accordance with the Order Confirming Chapter 13 Plan or such other Order of the Court which establishes the rate of interest.

b. Claims not provided for by the plan - If a claim is not provided for by this plan and a Proof of Claim is filed, no payment will be made to the claimant by the Trustee or the Debtor until such time as the Debtor modifies the plan to provide for payment of the claim. Such claim or interest is deemed allowed unless objected to and the Court determines otherwise. If no action is taken by the Debtor, the Trustee may file a Motion to Dismiss the case or a Trustee's Modified Plan.

B. Fees and Administrative Expenses

2.07 Trustee's fees - Trustee fees shall be calculated at 10% of payments made under the Plan, whether made before or after confirmation, but excluding payments made directly by Debtor, as provided for by the plan, to CLASS 1, CLASS 2, or CLASS 6 creditors or pursuant to an executory contract or unexpired lease.

2.08 Compensation of Former Chapter 7 Trustee Payment of compensation of the type described in §1326(b)(3) shall be limited to the greater of $25, or 5% of the amount payable to non-priority unsecured creditors divided by the length of the plan, each month for the duration of the plan.

Trustee's Name	Compensation
-NONE-	

2.09 Administrative expenses other than Trustee's fees and Debtor's attorney's fees - Except to the extent the claimant agrees to accept less, and unless §1326(b)(3)(B) is applicable, approved administrative expenses other than Trustee's fees and Debtor's attorney's fees shall be paid in full.

Creditor's Name	Services Provided	Amount Owed

2.10 Administrative Expenses - DEBTOR'S ATTORNEY'S FEES - The Debtor's attorney's fees, costs, and filing fees in this case through Confirmation of the plan shall be the sum of the following:

The sum of $ **2,000.00** has been paid to the attorney prior to filing the petition. The balance of $ **2,800.00** shall be paid through the plan. It is contemplated that the Debtor(s) will continue to utilize the services of their attorney through the completion of the plan or until the attorney is relieved by Order of the Court. Debtor may incur additional attorney's fees post-confirmation estimated in the amount of $ **3,500.00** . Such additional estimated attorney's fees are included in this plan for payment by the Trustee and do not render the plan infeasible. Any additional attorney's fees and costs after confirmation must be paid through the plan after approval of the Court.
[Trustee Pays]

C. Secured Claims

2.11 CLASS 1 Secured claims for real estate loans and/or real property taxes that were current when the petition was filed. - At the time of the filing of the petition, Debtor was current on all CLASS 1 claims. Debtor shall pay the ongoing contract installment payment on each CLASS 1 claim for real estate loans and/or real property taxes due after the filing of the petition as listed below.
[Debtor Pays]

Creditor's Name / Collateral Description	Installment Payment	Interest Rate	Maturity Date
-NONE-			

2.12 CLASS 2 - Secured claims for real estate loans and/or real property taxes that were delinquent when the petition was filed - The monthly contract installment payment on each CLASS 2A claim for real estate loans due after filing of the petition shall be paid as designated below. The Debtor shall pay directly all post-petition real estate taxes not otherwise paid by the real estate loan creditor. Trustee shall pay all CLASS 2C pre-petition arrearage claim for real estate taxes prior to CLASS 2B payment on pre-petition arrearage claims on real estate loans. CLASS 2 claims are not modified by this plan and the creditor shall retain its existing lien until paid in full.

2.12.1 CLASS 2A - Secured Real Estate Mortgage - Post Petition monthly contract installment payments
Post-Petition monthly contract installment payments shall be paid by the Trustee or Debtor as designated below. If the Trustee is designated, then: (a) the Trustee shall make monthly post-petition contract installment payments on claims as they come due. (b) The first monthly contract installment payment due after the filing of the petition shall be treated and paid in the same manner as a pre-petition arrearage claim unless agreed otherwise. (c) If Debtor makes a partial plan payment that is insufficient to pay all monthly contract installment payments due, these installments will be paid in the order listed below. (d) Trustee will not make a partial payment on a monthly contract installment payment. (e) If Debtor makes a partial plan payment, or if it is not paid on time and Trustee is unable to pay timely a monthly contract installment payment due on a CLASS 2A claim. The Debtor's cure of this default must be accompanied by any applicable late charge. (f) Upon receipt, Debtor shall mail or deliver to Trustee all notices from CLASS 2A creditors including, without limitation, statements, payment coupons, impound and escrow notices, default notifications, and notices concerning changes of the interest rate on variable interest rate loans. The automatic stay is modified to permit the sending of such notices. Prior to mailing or delivering any such notice to the Trustee, Debtor shall affix the Chapter 13 case number to it. If any such notice informs Debtor that the amount of the monthly contract installment payment has increased or decreased, Debtor shall increase or decrease, as necessary, the plan payment to the Trustee without modification of this plan.

Creditor's Name / Collateral Description	Installment Payment	Interest Rate	Maturity Date	Post-petition Payments Paid By:	If Trustee, # of Months through Plan
ABC Mortgage, Inc. Single Family Home 123 Happy Street Las Vegas, Nevada 89000	See Section 6.01 et seq.	TBD		Trustee	TBD

2.12.2 CLASS 2B - Secured Real Estate Mortgage - Pre-Petition Claim. [Trustee Pays]

Creditor's Name / Collateral Description	Interest Rate If Applicable	Pre-petition Arrearage	Grand Total
ABC Mortgage, Inc. Single Family Home 123 Happy Street Las Vegas, Nevada 89000	0.00	18,684.00	TBD Arrears shall not be paid while debtor negotiates loan modification See section 6.01 et seq.

2.12.3 CLASS 2C - Pre-petition claim on real property taxes, homeowners association, and public utilities. [Trustee Pays]

Creditor's Name / Collateral Description	Interest Rate If Applicable	Pre-petition Arrearage	Grand Total
-NONE-			

2.13 CLASS 3 - Secured claims that are modified by this plan or that have matured or will mature before the plan is completed - Each CLASS 3 claim will be paid in full by the Trustee. The creditor shall retain its existing lien and receive payments in equal monthly amounts as specified below. The monthly payments may increase or decrease after a specified number of months as stated below. This section shall be used to specify **Adequate Protection Payments**. A CLASS 3 claim shall be the amount due under any contract between Debtor and the claimant or under applicable non-bankruptcy law, or, if §506(a) is applicable, the value of the collateral securing the claim, whichever is less. Section 506(a) is not applicable if the claim is secured by a purchase money security interest and (a) was incurred within 910 days of the filing of the petition and is secured by a motor vehicle acquired for the personal use of Debtor, or (b) the claim was incurred within 1 year of the filing of the petition and is secured by any other thing of value. **[Trustee Pays]**

2.13.1 CLASS 3A - Secured Claims Paid Based on a Proposed §506(a) Collateral Valuation or by Agreement. [Trustee Pays]

Creditor's Name / Collateral Description	Claim Amount	Fair Market Value	Interest Rate	Number of Monthly Payments	Total Interest to be paid	Monthly Payments	Start Date	Grand Total Paid by Plan
-NONE-								

2.13.2 CLASS 3B - Secured Claims Modified and Paid in Full (§506 does not apply)
§1325(a) - Modification of 910 Day Motor Vehicle Claim / 1 Year Personal Property Claim / Secured Tax Liens / Other [Trustee Pays]

Creditor's Name / Collateral Description	Claim Amount	Interest Rate	Number of Monthly Payments	Total Interest to be paid	Monthly Payments	Start Date	Grand Total Paid by Plan
-NONE-							

2.13.3 CLASS 3C - Debtor(s) offer to modify a 910- Day PMSI motor vehicle or personal property purchase within 1 year period or any other thing of value - Unless Creditor affirmatively accepts the offer by the time of the Confirmation Hearing, Debtor shall surrender the collateral within 10 days after the confirmation hearing in full satisfaction of the debt. **[Trustee Pays]**

Creditor's Name / Collateral Description	Claim Amount	Debtor's Offer To Pay on Claim	Debtor's Offer Interest Rate	Number of Monthly Payments	Total Interest to be paid	Proposed Monthly Payment	Start Date	Grand Total Paid by Plan
-NONE-								

2.14 CLASS 4 - Secured claims for personal property that were delinquent when the petition was filed including 910-Day PMSI motor vehicle or any other thing of value if debt was incurred within 1 year of filing. CLASS 4 claims are not modified by this plan and may mature before or after the last payment under the plan. Debtor or a third party shall pay the monthly contract installments on CLASS 4 claims as they come due whether or not the plan is confirmed and such payment shall constitute adequate protection as required by §1326(a)(1)(C). Trustee shall pay each CLASS 4 pre-petition claim for arrears. Creditor shall retain its existing lien.
[Trustee Pays Delinquency/Debtor Pays Post-Petition]

Creditor's Name / Collateral Description	Claim Amount	Monthly Contract Payment	Months Remaining in Contract	Pre-petition arrears	Interest Rate	Total Interest	Grand Total
-NONE-							

2.15 CLASS 5 - Secured claims satisfied by the surrender of collateral - As to personal property secured claims, Debtor shall surrender the collateral to the creditor not later than 10 days after confirmation of this plan. As to real property secured claims, the entry of the confirmation order shall constitute an order modifying the automatic stay to allow the holder of a CLASS 5 secured claim to exercise its remedies under applicable non-bankruptcy law.

Creditor's Name / Collateral Description	Surrender in Full Satisfaction of Debt	If No, Estimated Deficiency
-NONE-		

2.16 CLASS 6 - Secured claims paid directly by Debtor or third party (other than ongoing real estate mortgage payments) - CLASS 6 claims mature before or after the completion of this plan, are not in default, and are not modified by this plan which may include 910-Day motor vehicle claims and claims incurred within 1 year of filing the petition and secured by any other thing of value. These claims shall be paid by Debtor or a third person whether or not the plan is confirmed. **[Debtor Pays]**

Creditor's Name / Collateral Description	Monthly Contract Installment	Maturity Date
-NONE-		

D. Unsecured Claims

2.17 CLASS 7 - Priority unsecured claims pursuant to §507.

2.17.1 CLASS 7A - Priority unsecured claims being paid in full pursuant to §507. [Trustee Pays]

Creditor's Name	Describe Priority	Claim Amount	Interest Rate If Applicable	Total Interest To Be Paid	Grand Total
-NONE-					

2.17.2 CLASS 7B - Priority unsecured claims pursuant to §507 and §1322(a)(2) and the holder of the claim agrees to a different treatment of the claim. [Trustee Pays]

Creditor's Name	Describe Priority	Original Claim Amount	Agreed Claim Amount	Interest Rate If Applicable	Total Interest To Be Paid	Grand Total
-NONE-						

2.17.3 CLASS 7C - Priority unsecured claims pursuant to §507(a)(1)(B) and §1322(a)(4). This class includes allowed unsecured Domestic Support Obligations appropriately assigned to a government unit whereby less than the full amount will be paid and the plan provides for all of Debtor's Projected Disposable Income for a 5 year period. **[Trustee Pays]**

Creditor's Name	Claim Amount	Amount Paid Through Plan
-NONE-		

2.18 CLASS 8 - §1305 Post-Petition Claims - This class includes but is not limited to taxes that become payable to a governmental unit while the case is pending and/or consumer debt including delinquent Post-Petition Mortgage Payments. **[Trustee Pays]**

Creditor's Name / Collateral Description (if applicable)	Claim Amount	Interest Rate	Interest To Be Paid	Penalties	Grand Total
-NONE-					

2.19 CLASS 9 - Special class unsecured claims - This class includes unsecured claims, such as co-signed unsecured debts, that will be paid in full even if all other unsecured claims may not be paid in full. This class may include §1328(a) Non-dischargeable Claims with payment of interest pursuant to §1322(b)(10) provided disposable income is available after making provision for full payment of all allowed claims. **[Trustee Pays]**

Creditor's Name / Description of Debt	Claim Amount	Interest Rate	Number of Months	Monthly Payment	Start Date	Total Interest to be paid	Grand Total
-NONE-							

2.20 CLASS 10 - General non-priority unsecured claims - After payment to CLASS 9 Creditors, the Trustee will pay to the creditors with allowed general non-priority unsecured claims a pro rata share of approximately **0.00** less debtor attorney fees.
In the event that Liquidation Value as stated in 1.04 is greater than Disposable Income as stated in 1.03, the approximate dollar amount to be paid to non-priority unsecured claims shall be greater than stated herein. **[Trustee Pays]**

Section III. Executory Contracts and Unexpired Leases

3.01 Debtor assumes or rejects the executory contracts and unexpired leases listed below. Debtor shall pay directly all required contractual post-petition payments on any executory contracts or unexpired lease that has been accepted. Any executory contract or unexpired lease not listed in the table below is rejected. Entry of the Confirmation Order modifies the automatic stay to allow the non-debtor party to a rejected unexpired lease to obtain possession of leased property pursuant to §365(p)(3).

Lessor - Collateral Description	Accept / Reject	Monthly Contract Payment	Pre-petition Arrears	Pre-petition Arrears Paid By	Interest Rate	Start Date	Total Interest Paid By Plan	Grand Total
-NONE-								

Section IV. Payment of Claims and Order of Payment

4.01 After confirmation of this plan, funds available for distribution will be paid monthly by Trustee to holders of allowed claims and approved expenses.

4.02 Distribution of plan payment. ***(select one)***

☒ **a. Regular Distribution of Plan Payments** - Trustee shall pay as funds are available in the following order unless stated otherwise: Trustee's fees, monthly contract installments to CLASS 2A; adequate protection payments until confirmation; administrative expenses; CLASS 3, CLASS 2C, and CLASS 4 secured claims as provided for in the plan; CLASS 7 priority claims until paid in full; CLASS 8 §1305 post-petition claims; CLASS 2B arrearage claims; CLASS 9 special class unsecured claims; CLASS 10 general non-priority unsecured claims.

OR

☐ **b. Alternative Distribution of plan payments** - If the Regular Distribution of Plan Payments is not selected then this alternative distribution of plan payments shall be specifically set forth below in Section VI Additional Provisions and shall designate the order of payment as funds are available.

4.03 Priority of payment among administrative expenses - The portion of the monthly plan payment allocated in Section 4.02 for administrative expenses described in Sections 2.08, 2.09, and 2.10 shall be distributed first on account of the monthly dividend due to a former chapter 7 trustee pursuant to Section 2.08, then to holders of administrative expenses described in Sections 2.09 and 2.10 on a pro rata basis

Section V. Miscellaneous Provisions

5.01 Adequate protection payments - Prior to confirmation, Trustee shall pay on account of each allowed CLASS 3 claim secured by a purchase money security interest in personal property an adequate protection payment as required by §1326(a)(1)(C) commencing the month after the petition is filed provided that a Proof of Claim has been filed and payment has been provided for in this plan. Adequate protection payments shall be disbursed by Trustee in connection with the customary disbursement cycle beginning the month after the petition is filed. The Creditor shall apply adequate protection payments to principle and interest consistent with this plan.

5.02. Post-petition interest - Post-petition interest shall accrue on all Class 2, Class 3, and Class 4 claims at the rates stated herein except to the extent the Class 2B claim is for mortgage arrears on a loan incurred after October 22, 1994, unless the real estate contract provides otherwise, in which case interest will always be 0%. If the plan specifies a '0%' rate, no interest will be accrued. However, if the provision for interest is left blank, interest at the rate of 10% per annum will accrue. For Class 2A claims secured only by real property that is Debtor's principal residence, and for Class 3.B. claims that are not subject to §506(a) collateral valuation and secured by property with a value greater than is owed under any contract or applicable non-bankruptcy law, interest shall accrue from the petition date. All Class 3B and Class 3C and Class 4 secured claims shall accrue interest from the date the plan is confirmed unless otherwise ordered by the court.

5.03 Vesting of property - Any property of the estate scheduled under §521 shall revest in the Debtor upon confirmation. In the event the case is converted to a case under Chapter 7, 11, or 12 of the Bankruptcy Code or is dismissed, the property of the estate shall be determined in accordance with applicable law.

5.04 Debtor's duties - In addition to the duties imposed upon Debtor by the Bankruptcy Code and Rules, the Local Bankruptcy Rules, and the General Order, this plan imposes the following additional requirements on Debtor: **(a) Transfers of property and new debt.** Debtor is prohibited from transferring, encumbering, selling, or otherwise disposing of any personal property with a value of $1,000 or more or real property with a value of $5,000 or more without first obtaining court authorization. Except as provided in §364 and §1304, Debtor shall not incur aggregate new debt exceeding $1,000 without first obtaining court authorization. A new consumer debt of less than $1,000 shall not be paid through this plan absent compliance with §1305(c). **(b) Insurance.** Debtor shall maintain insurance as required by any law or contract and Debtor shall provide evidence of that insurance as required by §1326(a)(4). **(c) Compliance with applicable non-bankruptcy law.** Debtor's financial and business affairs shall be conducted in accordance with applicable non-bankruptcy law including the timely filing of tax returns and payment of taxes. **(d) Periodic reports.** The Debtor shall provide Trustee with a copy of any personal federal tax return filed while the case is pending accompanied by W-2 forms and 1099 forms. Upon Trustee's request, Debtor shall provide Trustee with other tax returns filed while the case is pending and quarterly financial information regarding Debtor's business or financial affairs. **(e) Documents required by Trustee.** In addition to the documents required by the Bankruptcy Code and Local Rules, the Debtor shall provide to Trustee not later than the first date set for the §341 meeting (1) written notice of the name and address of each person to whom the Debtor owes a domestic support obligation together with the name and address of the relevant State child support enforcement agency [see 42 U.S.C. §464 & §466], (2) a wage order if requested by Trustee, (3) a CLASS 2A Worksheet and Authorization to Release Information for each CLASS 2A claim, (4) IRS Form 8821 and IRS Form 4506. **(f) Documents required by Trustee prior to Discharge of Debtor.** Within 30 days of the completion of plan, the Debtor shall certify to the Court with a copy to the Trustee the following: (1) of the name and address of each person to whom the Debtor owes domestic support obligation at that time together with the name and of the relevant State child support enforcement agency [see 42 U.S.C. §464 & §466]; (2) current address of the Debtor; (3) name and address of Debtor's current employer; (4) name of each creditor whose claim was not discharged under 11 USC §523(a)(2); and/or (5) name of each creditor that was reaffirmed by the Debtor under §524(c); and (6) certificate of completion of an instructional course in Personal Financial Management.

5.05 Remedies on default - If Debtor defaults in the performance of this plan, or if the plan will not be completed in 60 months, Trustee or any other party in interest may request appropriate relief by filing a motion and setting it for hearing pursuant to LR 9014. This relief may consist of, without limitation, dismissal of the case, conversion of the case to chapter 7, or relief from the automatic stay to pursue rights against collateral. If, on motion of a creditor, the court terminates the automatic stay to permit a creditor to proceed against its collateral, unless the court orders otherwise, Trustee shall make no further distribution to such secured claim. *Any deficiency claim remaining after the disposition of the collateral shall be satisfied as a CLASS 10 unsecured claim provided a proof of claim or amended proof of claim is timely filed and allowed and served on Debtor and Trustee, except as may be provided in 2.15 CLASS 5. Such deficiency claim shall be paid prospectively only. Chapter 13 plan payments previously disbursed to holder of other allowed claims shall not be recovered by the trustee to provide a pro rata distribution to the holder of any such deficiency claim.*

5.06 Creditors shall release lien on titles when paid pursuant to §1325(a)(5)(B) - A holders of a claim shall retain its lien until the earlier of (a) the payment of the underlying debt determined under non-bankruptcy law or (b) discharge under Section §1328; and if the case under this chapter is dismissed or converted without completion of the Plan, such liens shall also be retained by such holder to the extent recognized by applicable non-bankruptcy law. After either one of the foregoing events has occurred, creditor shall release its lien and provide evidence and/or documentation of such release within 30 days to Debtor(s).

5.07 Plan Payment Extension Without Modification - If the Plan term does not exceed 60 months and CLASS 2B, CLASS 2C, CLASS 4, CLASS 7, CLASS 8, and CLASS 9 claims are filed in amounts greater than the amounts specifically stated herein, the Debtor **authorizes** the Trustee to continue to make payments to creditors beyond the term of the Plan, such term not to exceed 60 months. The Debtor shall continue to make plan "payments until the claims, as filed, are paid in full or until the plan is otherwise modified.

Section VI. Additional Provisions

6.01 Other than to insert text into the designated spaces, to expand the tables to include additional claims, or to change the title to indicate the plan is an amended or modified plan, the preprinted language of this form has not been altered - This does not mean that Debtor is prohibited from proposing additional or different plan provisions. As long as consistent with the Bankruptcy Code, Debtor may propose additional or different plan provisions or specify that any of the above provisions will not be applicable. Each such provision or deletion shall be set forth herein below or attached hereto as an exhibit and shall be identified by a section number (6.02, 6.03, etc.).

THIS IS A LOAN MODIFICATION PLAN. IF NO OBJECTION IS FILED BY THE MORTGAGE CREDITOR TO THE PROVISIONS SET FORTH BELOW DEBTOR WILL REQUEST THAT THIS PLAN BE CONFIRMED

6.02 Treatment of Mortgages Paid by Trustee in this Plan and "Trustee Reserve Funds"

A. "TRUSTEE RESERVE FUNDS"

1. The "Trustee Reserve Funds" shall consist of plan payments paid by the Debtor to the Chapter 13 Trustee prior to confirmation of this Chapter 13 Plan. Upon confirmation of this Chapter 13 Plan, or other order of the Court, the Trustee shall disburse funds in the "Trustee Reserve Funds" in the following order:
   a. First, to Creditors pursuant to the proposed Adequate Protection Payment set forth in Paragraph 6.02(B) below;
   b. Second, to Creditors as Monthly Payments as set forth in Sections 2.13.1, 2.13.2 or 2.13.3 above.
   c. Third, to the Chapter 13 Trustee for earned administrative expenses;
   d. Fourth, to Administrative fee claimants as defined in Section 2.09 above;
   e. Fifth, to Administrative Expenses – DEBTOR'S ATTORNEY'S FEES as defined under Plan Section 2.10;
   f. Sixth, pursuant to Section 4.02 above.
2. Funds held as "Trustee Reserve Funds" shall not be used for any purpose other than those listed above in Paragraph "A".
3. **"Unsecured Creditors" shall receive the exact amount specified in Plan Section 2.20 above in addition to any tax refunds provided for by this Chapter 13 Plan and may be paid to "Unsecured Creditors" upon receipt.**
4. Upon completion of the instant Chapter 13 Plan, any funds remaining in "Trustee Reserve Account" shall be refunded to the Debtor.
5. In the event Debtor obtains a loan modification with the Creditor identified in Section "2.12.1 CLASS 2A" above, Debtor shall apply to the Court for approval to enter into the modified loan agreement. After such request for approval to enter into loan modification with Creditor is granted, this Chapter 13 Plan shall be amended prior to confirmation or modified after confirmation to reflect the final terms of such Loan Modification Agreement.
6. In the event the Debtor is denied for a loan modification with lender, the Debtor shall, within 30 days, do one of the following:
   a. Provide for the surrender the subject property;
   b. Convert this case to Chapter 7;
   c. Amend the Chapter 13 Plan to provide for the curing of the full amount of pre-petition and post-petition arrears and full monthly mortgage payments according to the terms of the Note and Deed of Trust.
7. This Chapter 13 Plan was prepared in contemplation that the Chapter 13 Trustee's Compensation is established at 10%. From time to time the Trustee compensation on distributions is modified by the EOUST either upward or downward but never to exceed 10% at any point in time.
   a. In an over median 60 month commitment period case, any difference in the reduction of the Trustee's compensation shall inure to the benefit of the Debtor. Any funds accumulated during the plan, after payments to secured, priority and unsecured creditors (as set forth in 2.20 and 6.02 A.3.), may be used by the Chapter 13 Trustee, at the Trustee's discretion**,** any time Debtor is delinquent or deficient on Plan payments. Any funds accumulated at the conclusion of the case after completion of payments to secured, priority and unsecured creditors (as set forth in 2.20 and 6.02 A.3.) shall be refunded to the Debtor.
   b. In an under median 36 month commitment period case, any reduction in Trustee's compensation shall inure to the benefit of the Creditors if the case is confirmed.

B. ADEQUATE PROTECTION PAYMENTS

1. Debtor is attempting to obtain a loan modification with **ABC MORTGAGE, INC.** **(hereinafter "Creditor")**
2. The Chapter 13 Trustee shall commence distributing Adequate Protection Payments as follows:
   a. On the first business day of the month following the date the Debtor's first payment becomes due under this Plan:
   b. Adequate Protection Payments shall be equal to 0.25% of the value of the Debtor's residence (based on the filing date of the Debtor's petition). The fair market value (FMV) of the Debtor's residence on the filing date was $_____.
   c. Adequate Protection Payments to this lender shall be 0.25% x $_____ (FMV Residence) = $_____ (Adequate Protection Payments to lender) unless the payment amount is modified by Order of the Court.
   d. Adequate Protection Payments shall commence _____, 2010.
   e. The Adequate Protection Payments set forth above **DOES NOT INCLUDE** escrow payments for real estate taxes, insurance or other expenses.
   f. These "adequate protection payments" shall continue until this Plan is confirmed at which time any accumulated Adequate Protection Payments will be paid in first month of distribution. Thereafter Adequate Protection Payments will be paid in a like amount each month which shall continue until: i) this Plan is modified; ii) the lender specifies a trial modification payment; iii) the Debtor and Lender enter into a final Loan Modification agreement; iv) the Loan Modification Agreement is denied; v) the Lender and Debtor enter into a stipulated order providing for alternative treatment of Lender's claim; or vi) entry of other Order of the Court.
   g. In the event the Loan Modification is finalized or a trial Loan Modification payment is specified, these payments shall supersede the Adequate Protection payments.
   h. In the event the Loan Modification is denied, the Debtors will no longer be entitled to make reduced payments and will owe the full monthly mortgage payment according to the terms of the Note and Deed of Trust.
3. In the event Debtor and Creditor enter into a final Loan Modification Agreement with or without completing the Trial Period, this Chapter 13 Plan shall be amended prior to confirmation or modified after confirmation to reflect the final terms of such Loan Modification Agreement.
4. The Creditor designated in Paragraph 1 above shall have a lien on all Adequate Protection Payments as set forth in Paragraph 2.c above whether this case is confirmed or unconfirmed. In the event this case is Dismissed or Converted to another Chapter, the Trustee shall distribute the unpaid Adequate Protection Payments to Creditors as soon as practical and before closing the case.
5. The Chapter 13 Trustee shall not be required to recover any previously paid Adequate Protection Payments or pre-petition arrears distributed pursuant to the above provisions in the event this case is dismissed or converted to another Chapter.

C. LOAN MODIFICATION AGREEMENT – TRIAL PAYMENT PERIOD

In the event Debtor and Creditor enter into a Loan Modification Agreement, hereinafter referred as **LMA**, it is contemplated that Debtor will be required to make monthly mortgage payments for a specified or unspecified Trial Payment Period. This Plan requires the Chapter 13 Trustee to make all Trial Period Payments from the payments received from Debtor(s). In the event that the Trial Payments exceed the amount Debtor(s) are required to pay the Chapter 13 Trustee, the Trustee shall notify Debtor(s) and Debtor's attorney of the new payment amount to successfully complete the monthly Trial Period Payment. In the event such modification adversely affect**s** any other Creditor's payment under this Plan**,** Debtor(s) must file an amended or modified Plan.

It is contemplated that a **LMA** may or may not require Debtor to perform a Trial Payment Period as a condition before finalizing the Agreement.

1. **LMA** Trial Payment Period entered into BEFORE Confirmation:
    a. Debtor's Attorney shall immediately notify the Chapter 13 Trustee in writing through e-mail and by phone contact with the Trustee's Mortgage Payment Administrator within 3 business days of finalization of the **LMA** with Trial Period entered into with Creditor.
    b. Debtors Attorney shall provide a copy of the **LMA** disclosing all of the terms and conditions to the Trustee within 3 business days of finalizing the Agreement.
    c. Debtor and Trustee shall enter into a Stipulation which shall include all terms and conditions of the **LMA** and Trial Payment authorizing the Trustee to commence making payments to Creditor prior to Confirmation, which shall be approved by the Court.
    d. In the event Debtors' payments to the Trustee are insufficient to appropriately make the payments as required by the **LMA** – Trial Period Payments, the Stipulation required in Paragraph 3 above, shall adjust for any payments and conditions required by Creditor to successfully complete the Trial Payment Period.
    e. The **LMA** Trial Payments shall continue to be paid until the Plan is confirmed and shall continue thereafter until such time as the Creditor agrees to the final terms of the modification and the trial period payments have been completed.
    f. In the event Debtor fails to make the monthly payments to the Trustee in full or is delinquent in any manner, the Chapter 13 Trustee shall not be responsible for the failure of the completion of the terms and conditions of the **LMA**. **The Trustee shall not make any partial payments to this Creditor in the event payments are not sufficient.**
    g. The Trustee shall make the **LMA** – Trial Period payments on the first day of each month except for the first payment which may be made in advance of the first monthly payment due Creditor pursuant to the terms of the **LMA**.
2. **LMA** Trial Payment Period entered into AFTER Confirmation:
    a. Debtor's Attorney shall immediately notify the Chapter 13 Trustee in writing through e-mail and by phone contact with the Trustee's Mortgage Payment Administrator within 3 business days of finalization of the LMA with Trial Period entered into with Creditor.
    b. Debtors Attorney shall provide a copy of the LMA disclosing all of the terms and conditions to the Trustee within 3 business days of finalizing the Agreement.
    c. In the event the **LMA** – Trial Payment Period monthly payments exceed the Debtors confirmed Plans payments, Debtor shall file a Modified Plan disclosing the new terms and conditions and provide for appropriate payments. Debtors Modified Plan shall clearly state whether taxes, insurance or any other payments are included or excluded from the monthly payments. Debtor shall file the Modified Plan with the Court and provide notice to all Creditors of the date and time for hearing in the event of objection. Debtor may serve either a complete copy of the Plan or Summary of the Plan as contemplated by Bankruptcy Rule 3015 upon all Creditors. Debtor shall immediately commence the increased plan payment to allow for the timely disbursement of the Trial Payments.
    d. The LMA Trial Payments shall continue to be paid after confirmation until such time as the Creditor agrees to the final terms of the **LMA** and the trial period payments have been completed.
    e. In the event Debtor fails to make the monthly payments to the Trustee in full or is delinquent in any manner, the Chapter 13 Trustee shall not be responsible for the failure of the completion of the terms and conditions of the **LMA**. The Trustee shall not make any partial payments to this Creditor in the event payments are not sufficient.
    f. The Trustee shall make the **LMA** – Trial Period payments on the first day of each month except for the first payment which shall be made in advance of the first monthly payment due Creditor pursuant to the terms of the **LMA**.

D.LOAN MODIFICATION AGREEMENT (INCLUDING NO TRIAL PAYMENT PERIOD) - MORTGAGE PAYMENTS MADE BY TRUSTEE

1. The Debtor's loan modification agreement, hereinafter referred to as **"LMA"**, must be approved by the Court. The **LMA** will specify the new terms and conditions for the repayment of the original real estate loan.
2. The **LMA** will set forth the new monthly real estate payment which will include principal and interest and may include escrows for real estate taxes and insurance and other expenses. In some instances the Debtor(s) will be obligated to pay the taxes and insurance directly and not through their lender or Trustee. The **LMA** will specify the Creditor name and payment address to which monthly real estate payment will be made.
3. The **LMA** may include step payments to lender that may increase or decrease during the term of the Chapter 13 Plan.
4. Debtor acknowledges and understands that real estate taxes and insurance may increase or decrease during the term of this Chapter 13 Plan which may affect Plan payments to Trustee.
5. If the **LMA** is approved by the Court, the Debtor will amend or modify this Chapter 13 Plan as needed to provide for the required payments to lender by the Chapter 13 Trustee.

6. In the event Debtor's **LMA** includes escrow obligations for real estate taxes and/or insurance and other expense and there is a subsequent change in these obligations, lender shall provide reasonable notice to both Debtor and the Trustee of the changes and the new monthly mortgage payment amount. Debtor's Attorney shall also provide the Trustee with notice of any changes.
7. The Chapter 13 Trustee shall disburse the monthly payments to lender on or about the first business day of each month during the term of this Chapter 13 Plan. In the event the Trustee does not have sufficient funds to make a complete monthly mortgage payment, the Trustee shall not disburse any funds to the lender for that month. In summary, no partial payments will be made by the Trustee to mortgagee for Debtor's monthly mortgage obligation.
8. In the event the monthly mortgage payment changes due to a change in the terms of the **LMA** or a change in the real estate taxes and/or insurance, Debtor authorizes the Trustee to notify the Debtor (by a Trustees directive or otherwise) of the new Chapter 13 Plan payment (which may increase or decrease as the case may be) without formal modification of Debtor's Chapter 13 Plan.

E. MISCELLANEOUS PROVISIONS APPLICABLE TO LMA CASES AND CONDUIT MORTGAGE CASES.

1. Within two (2) months of the completion of Debtor's Chapter 13 Plan, the Trustee may file a motion to determine whether Debtor is current on all obligations required on Debtor's real estate loans paid by and through the Chapter 13 Trustee. In addition thereto, or in the alternative, the Trustee may obtain a statement from the lender which provides for an accounting of all receipts and disbursements made to lender on Debtor's behalf; the current status and condition of the loan, and a statement regarding whether there are any reported or unreported and/or unpaid charges, assessments, or any other expenses of any kind charged against Debtor's account and a current status of principal due, interest and escrows for taxes and insurance. Lender shall provide a copy of the foregoing to Debtor that Debtor may use and rely upon at any time if there is any subsequent dispute over the repayment of the loan or modified loan after Debtor obtains a Chapter 13 Discharge.
2. Lender shall apply all payments made by the Chapter 13 Trustee to principal and interest and if appropriate to taxes and insurance pursuant to 11 USC Section 524(i). In the event there are any other expenses or fees charged by lender against Debtor's loan account not previously mentioned herein, lender shall provide written notice to Debtor and the Trustee within 30 days of the charges made to the account.
3. Within two (2) months of completion of Debtor's Plan, the Trustee shall notify the Debtor and lender of the first date Debtor will resume mortgage payments directly to lender. Lender shall thereafter provide Debtor with monthly mortgage statements and the address where Debtor shall make payments.
4. Upon receiving a Discharge, Debtor shall be deemed current on any mortgage obligation to lender pursuant to the terms and conditions of their **LMA** and this Chapter 13 Plan.
5. Nothing contained herein shall affect the Debtor or Trustee from filing a modified Chapter 13 Plan pursuant to 11 USC Section 1329.

The signatures below certify that the preprinted text of this plan form has not been altered. Any changes of the preprinted text plan form have been specifically stated in Section VI- Additional Provision.

Date **January 21, 2010** Signature **/s/ John Doe**
John Doe
Debtor

Date **January 21, 2010** Signature **/s/ Jane Doe**
Jane Doe
Joint Debtor

Submitted by:

/s/ David Krieger, Esq.
David Krieger, Esq.
Attorney

THE STANDING CONTROVERSY CONTINUES IN THE NINTH CIRCUIT BAP

Randy Nussbaum
Nussbaum, Gillis & Dinner, P.C.
14500 N. Northsight Blvd.
Suite 116
Scottsdale, Arizona 85260

819377/999-71

Attached are three recent Ninth Circuit Bankruptcy Appellate Panel (BAP) decisions originating in the Arizona Bankruptcy Court system. *In re Veal*, an appeal from Judge Randolph Haines, was published, while the twin cases of *Sardana* and *Matson*, both appeals of Judge Case, were identified as not for publication.

Interestingly enough, and not surprisingly, the same law firm argued all three opinions on behalf of the debtors, whereas the same law firm was representing the lenders in the two unpublished opinions and a different law firm appeared for the lender in the published one. However, the debtors' counsel regularly appears in Arizona Bankruptcy Court on behalf of debtors, whereas the lenders' attorneys specialize in representing lenders and, in particular, in stay lift proceedings.

The three decisions are the result of what has become a common tactic by debtors' lawyers to oppose stay lift motions on the grounds that the party bringing such an action did not have standing in that it could not prove that it had been properly assigned the original lender's rights under the note and deed of trust. The stay relief opposition was not based upon the debtors contending payments had been misapplied or arguing violations of federal or state or Truth-in-Lending law or even relying upon evidence that the debtors were in a position to ultimately cure the pre-petition default or make post-petition payments. Instead, in all instances, the debtors relied entirely on the argument that notwithstanding their failure to make payments for what was a rather impressive amount of time, the lender had not presented a sufficient *prima facie* case to be granted the stay relief needed to proceed with the inevitable trustee's sale.

Even though the appeals were only heard one month apart, the Bankruptcy Appellate Panels were different with the exception of Judge Markell, who was on all of them. This in itself

may have ensured some consistency among the rulings, which is reassuring because of the fair amount of uncertainty prevalent nationwide.

The published opinion, *In re Veal*, came to what some pundits may suggest was a surprising ruling. The Bankruptcy Appellate Panel was not overly concerned about the lack of a notarized assignment to the moving party, Wells Fargo, but instead reversed Judge Haines on the basis that the lender had not been able to demonstrate that the underlying note had been assigned to Wells Fargo as well. This was the case even though the underlying Court found that Wells Fargo had a sufficient "colorable claim" to proceed with stay relief.

The *Matson* and *Sardana* opinions are even more intriguing in that the debtors in the underlying similar cases both objected to stay lift which was granted by Judge Case. The panel in *Matson* found that since Arizona was not a "show me the note state," any technical defects in the lender's pleadings should not be addressed in a stay lift motion since the lender possessed a "colorable claim." On the other hand, in the *Sardana* case, since a legitimate issue arose as to who actually owned the note, the Bankruptcy Appellate Panel reversed the stay lift granted by the bankruptcy judge and required an evidentiary hearing to determine the issue of whether the moving party actually had proper standing.

Regardless of the ultimate outcome of these decisions, one conclusion could be drawn from the trial judges and the Bankruptcy Appellate Panel. The trial judges were apparently concerned with being asked to protect debtors requesting equitable relief who were in default for at least a year and the ultimate burden that would be placed on lenders in having to comprehensively document every single stay lift motion. The Bankruptcy Appellate Panel, on the other hand, did not focus on the longevity of the debtor's defaults, but instead was seeking

more certainty and clarity by lenders' counsel to ensure that the lenders had fully complied with their technical obligations as moving creditors requesting stay relief.

2011 WL 2304200
Only the Westlaw citation is currently available.
United States Bankruptcy Appellate Panel of the Ninth Circuit.

In re Howard Richard VEAL, Jr., and Shelli Ayesha Veal, Debtors.
Howard Richard Veal, Jr.; Shelli Ayesha Veal, Appellants,
v.
American Home Mortgage Servicing, Inc.; Wells Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2006–3 Asset–Backed Certificates, Series 2006–3, and its successor and/or assignees, Appellees.

BAP Nos. AZ–10–1055–MkKiJu, AZ–10–1056–MkKiJu (Related Appeals)**

While not formally consolidated, these two related appeals were heard at the same time, and were considered together. This single disposition applies to both appeals, and the clerk is directed to file a copy of this disposition in each appeal.

No. 09–14808.Argued and Submitted June 18, 2010.Filed June 10, 2011.

Appeal from the United States Bankruptcy Court for the District of Arizona, Honorable Randolph J. Haines, Bankruptcy Judge, Presiding.

Attorneys and Law Firms

Trucly D. Pham of John Joseph Volin, P.C., argued for Appellants, Howard Richard Veal, Jr. and Shelli Ayesha Veal.

Kevin Hahn of Malcolm Cisneros argued for Appellees, American Home Mortgage Servicing, Inc. and Wells Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2006–3 Asset–Backed Certificates, Series 2006–3, and its successors and/or assignees.

Before: MARKELL, KIRSCHER and JURY, Bankruptcy Judges.

Opinion

OPINION

Table of Contents

I. INTRODUCTION

*1 In the first of these two related appeals, debtors and appellants Howard and Shelli Veal (the "Veals") challenge the bankruptcy court's order granting relief from the automatic stay under § 362(d)1 to appellee Wells Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2006–3, Asset–Backed Certificates Series 2006–3 ("Wells Fargo").2 In the second appeal, the Veals challenge the bankruptcy court's order overruling their objection to a proof of claim filed by appellee American Home Mortgage Servicing, Inc. ("AHMSI"). This proof of claim relates to the same obligation that is the focus of Wells Fargo's motion for relief from the automatic stay.

1 Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

2 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(B) and (G), and we have jurisdiction under 28 U.S.C. § 158.

In each appeal, the issue presented is whether the appellee established its standing as a real party in interest to pursue the relief it requested. With respect to Wells Fargo's request for relief from the automatic stay, we hold that a party has standing to seek relief from the automatic stay if it has a property interest in, or is entitled to enforce or pursue remedies related to, the secured obligation that forms the basis of its motion. With respect to AHMSI's proof of claim, we hold that a party has standing to prosecute a proof of claim involving a negotiable promissory note secured by real property if, under applicable law, it is a "person entitled to enforce the note" as defined by the Uniform Commercial Code.

Applying these holdings, in the relief from stay appeal, we determine that the record does not support the bankruptcy court's finding that Wells Fargo had standing. We thus REVERSE the bankruptcy court's relief from stay order. In AHMSI's claim objection appeal, the bankruptcy court did not make findings necessary to determine AHMSI's standing as a person entitled to enforce the Veals' obligations, so we must VACATE the claim objection order and REMAND for further proceedings.

II. FACTS

The Veals do not dispute that, in August 2006, Shelli Veal executed a promissory note (the "Note") in favor of GSF Mortgage Corporation ("GSF"). To secure her payment obligations under the Note, Ms. Veal also executed a mortgage (the "Mortgage") in favor of GSF covering certain real property located in Springfield, Illinois (the "Property").

On June 29, 2009, the Veals filed a chapter 13 bankruptcy. The Veals listed AHMSI on their Schedule D as a secured creditor. This schedule, submitted under penalty of perjury, stated that the Veals owed AHMSI $150,586.92 (the "Veal Loan"), and that AHMSI held security on the Property securing that indebtedness. At no point did the Veals' schedules ever list the Veal Loan as disputed. The Veals similarly referred to AHMSI as a secured creditor in their chapter 13 plan and in their amended chapter 13 plan. At the time this appeal was submitted, the Veals had not confirmed their plan.

A. AHMSI's Proof of Claim and the Veals' Claim Objection

On July 18, 2009, AHMSI filed a proof of secured claim. In the proof of claim, AHMSI stated that it was filing the claim on behalf of Wells Fargo as Wells Fargo's servicing agent.

*2 In addition to an itemization of the claim amounts, AHMSI attached the following documents to the proof of claim:

(1) a copy of the Note, showing an indorsement from GSF to "Option One";

(2) a copy of the Mortgage;

(3) a copy of a recorded "Assignment of Mortgage" assigning the Mortgage from GSF to Option One Mortgage Corporation ("Option One"); and

(4) a letter dated May 15, 2008, signed by Jordan D. Dorchuck as Executive Vice President and Chief Legal Officer of AHMSI, addressed to "To Whom it May Concern" (the "Dorchuck Letter").

On its face, the Dorchuck Letter states that AHMSI acquired Option One's mortgage servicing business.
The Dorchuck Letter is just that; a letter, and nothing more. Mr. Dorchuck does not declare that his statements are made under penalty of perjury, nor does the document bear any other of the traditional elements of admissible evidence. No basis was laid for authenticating or otherwise admitting the Dorchuck Letter into evidence at any of the hearings in this matter. Indeed, the Veals objected to its consideration as evidence.3

3 The Veals stated in a memorandum filed with the bankruptcy court that "[t]his [Dorchuck] letter is not admissable [sic] evidence of anything." The bankruptcy court did not rule on this objection.

On November 5, 2009, the Veals filed an objection to AHMSI's proof of claim. Approximately a month later, the Veals filed a memorandum of points and authorities in support of their claim objection. Among other objections, the Veals contended that AHMSI lacked standing. According to the Veals, AHMSI needed to establish that it was authorized to act as servicing agent on behalf of Wells Fargo, and that either AHMSI or Wells Fargo had to be qualified as holders of the Note, within the meaning of Arizona's version of the Uniform Commercial Code. The Veals argued that the proof of claim exhibits did not establish any of these necessary facts.4

4 The Veals also argued that there were several defects in the chain of mortgage assignments between GSF and Wells Fargo, but the Veals emphasized that the key defect was the failure to establish that either AHMSI or Wells Fargo qualified as the holder of the note.

On November 19, 2009, AHMSI filed its opposition to the Veals' claim objection. The opposition contained no legal argument and virtually no evidence. Almost a page long, the opposition simply rehashed the contents of AHMSI's proof of claim. AHMSI also attached to the opposition duplicate copies of some of the same documents that it had previously attached to the proof of claim, again without any apparent compliance with the rules of evidence, as AHMSI provided no declaration authenticating any of the documents attached thereto.

B. Wells Fargo's Relief from Stay Motion and the Veals' Response

Meanwhile, on October 21, 2009, Wells Fargo filed a motion for relief from stay to enable it to commence foreclosure proceedings against the Property. Wells Fargo alleged in the motion that it was a secured creditor pursuant to a first priority mortgage. None of the three exhibits attached to the motion, however, directly supported this allegation: its first exhibit was a copy of the same Mortgage that AHMSI attached to its proof of claim; its second exhibit was an itemization of postpetition amounts due; and its final exhibit was a copy of the Veals' Schedules A and D. Wells Fargo submitted no other documents with its motion. As a result, Wells Fargo presented no evidence as to who possessed the Note and no evidence regarding any property interest it held in the Note.
**3* On November 5, 2009, the Veals responded to the relief from stay motion. They argued that Wells Fargo lacked standing to prosecute the relief from stay motion and that Wells Fargo was not the real party in interest. The Veals also submitted no evidence with their response; rather, they relied on the absence of evidence submitted in support of the relief from stay motion.5

5 The Veals did refer the bankruptcy court to documents available on the website of the Securities Exchange Commission supposedly related to the alleged securitization of the Veal Loan, but there is no indication in the record whether the bankruptcy court actually looked at or considered these documents.
These documents, had they been properly authenticated, might have filled some (but not all) of the gaps in the evidence. For instance, the documents contained a Pooling and Serving Agreement ("PSA") for a securitization trust. The PSA identifies and appoints Option One as servicer for the trust assets and identifies Wells Fargo as trustee of the trust. Further, the schedules

> attached to the PSA appear to identify the Veal Loan as one of the trust assets. Thus, the PSA, had it been properly authenticated and admitted, would have tied both Option One and Wells Fargo to the Veal Loan. The PSA did not, however, identify AHMSI in any capacity, including its alleged role as successor servicer or subservicer of the Veal Loan. The PSA is similarly unhelpful as to the current holder of the Note.

Wells Fargo did not file a written reply in support of its relief from stay motion. It did, however, file two separate papers, each entitled "Notice of Supplemental Exhibit." The first notice, filed on November 10, 2009, attached a single exhibit—a copy of the same Note that AHMSI had attached to its proof of claim. The second notice, filed on February 1, 2010, contained two exhibits: (a) a copy of the same assignment of mortgage that AHMSI had attached to its proof of claim, and (b) a copy of a subsequent assignment of mortgage, dated November 10, 2009—after the date of filing of the relief from stay motion—assigning the rights under the Mortgage from "Sand Canyon Corporation formerly known as Option One Mortgage Corporation" to Wells Fargo. Neither of these assignments were authenticated.

These assignments were important. They purported not only to transfer the Mortgage to each named assignee, but also to transfer other rights as well. The purported assignment from GSF to Option One, for example, stated that it assigned not only the Mortgage, but also "the note(s) and obligations therein described and the money due and to become due thereon with interest, and all rights accrued or to accrue under such Mortgage."[6]

6 This contractual assignment of the Note was superfluous given the indorsement on the original note. *See* Uniform Commercial Code § 3–204.

The purported assignment from Option One to Wells Fargo was different, however, and more limited. It purported to transfer

> the following described mortgage, *securing the payment of a certain promissory note(s) for the sum listed below,* together with all rights therein and thereto, all liens created or secured thereby, all obligations therein described, the money due and to become due thereon with interest, and all rights accrued or to accrue under such mortgage.

Thus, unlike the assignment from GSF to Option One, the purported assignment from Option One to Wells Fargo does not contain language effecting an assignment of the Note. While the Note is referred to, that reference serves only to identify the Mortgage. Moreover, unlike the first assignment, the record is devoid of any indorsement of the Note from Option One to Wells Fargo. As a consequence, even had the second assignment been considered as evidence, it would not have provided any proof of the transfer of the Note to Wells Fargo. At most, it would have been proof that only the Mortgage, and all associated rights arising from it, had been assigned.[7]

7 One might argue that the clauses in the assignment which follow the italicized appositive phrase are broad enough to pick up the Note, and thus effect a transfer of it. They do, after all, purport to transfer "all rights therein and thereto, ... all obligations therein described, [and] the money due and to become due thereon with interest." But given the carve out of the Note at the beginning of the sentence, the relative pronouns "therein," "thereto," and "thereon" more naturally refer back to the obligations contained in the Mortgage itself, such as the obligation to insure the Property, and not to an external obligation such as the Note. It would be odd indeed if, after referring to the Note but not explicitly making it the object of the transfer (as the initial assignment from GSF did), the words were made to curl back and pick up the Note just because the Mortgage mentioned the Note among its many terms. Although the clauses might be sufficiently vague to permit parol evidence to clarify their intended meaning, no such evidence was offered or requested.

C. Joint Hearing on the Claim Objection and the Relief from Stay Motion

After several continuances of each matter, on February 3, 2010, the bankruptcy court held a joint hearing on the Veals' claim objection and Wells Fargo's relief from stay motion. Neither party presented evidence at the hearing, and the court's Local Rules prohibited them from presenting live testimony at this initial hearing unless the court had ordered otherwise. *See* Bankr.D. Ariz. R. 9014–2(a).[8] Indeed, the bankruptcy court referred to the hearing on the relief from stay motion as a preliminary hearing, thereby indicating that a subsequent evidentiary hearing would be set if necessary. See Bankr.D. Ariz. R. 4001–1(i)(2).[9]

8 Bankr.D. Ariz. R. 9014–2(a) provides:

> **Hearings on Contested Matters**
>
> (a) Initial Hearing without Live Testimony. Pursuant to Bankruptcy Rule 9014(e), all hearings scheduled on contested matters will be conducted without live testimony except as otherwise ordered by the court. If, at such hearing, the court determines that

there is a material factual dispute, the court will schedule a continued hearing at which live testimony will be admitted.

9 Bankr.D. Ariz. R. 4001–1(i)(2) provides:

Automatic Stay—Relief From

(i) Procedure Upon Objection.

(2) Relief may be granted or denied at the preliminary hearing based upon the affidavits, declarations, and other supporting documentation filed as part of the motion or objection if the opposing party's affidavits, declarations and supporting documentation fail to establish the existence of a material issue of fact that requires an evidentiary hearing.

*4 Both parties presented oral argument, after which the bankruptcy court ruled from the bench. The bankruptcy court overruled the Veals' claim objection and granted the relief from stay motion. The court found that the documents presented adequately reflected Wells Fargo's standing, and the court stated that the issue of who qualified as holder of the note was irrelevant. According to the bankruptcy court, "At minimum, they [Wells Fargo] have demonstrated they are an assignee of the debt and the mortgage has apparently been assigned to them."

Notwithstanding this statement, the bankruptcy court made no findings regarding AHMSI's standing generally, or more specifically regarding whether AHMSI had established that it was Wells Fargo's authorized agent.

The Veals timely appealed both orders.

III. DISCUSSION

The Veals challenge Wells Fargo's standing to seek relief from the stay and AHMSI's standing as a real party in interest with respect to the proof of claim it filed. Standing is a legal issue that we review de novo. *Wedges/Ledges of Cal., Inc. v. City of Phoenix,* 24 F.3d 56, 61 (9th Cir.1994); *Kronemyer v. Am. Contractors Indem. Co. (In re Kronemyer),* 405 B.R. 915, 919 (9th Cir. BAP2009).

A. Standing in Mortgage Cases

A federal court may exercise jurisdiction over a litigant only when that litigant meets constitutional and prudential standing requirements. *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 11 (2004). Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). *See also Arizona Christian Sch. Tuition Org. v. Winn,* 131 S.Ct. 1436, 1442 (2011); *City of Los Angeles v. County of Kern,* 581 F.3d 841, 845 (9th Cir.2009).

1. Constitutional Standing

Constitutional standing requires an injury in fact, which is caused by or fairly traceable to some conduct or some statutory prohibition, and which the requested relief will likely redress. *Winn,* 131 S.Ct. at 1442; *Sprint Commc'ns Co. v. APCC Servs., Inc.,* 554 U.S. 269, 273–74 (2008); *United Food & Comm'l Workers Union Local 751 v. Brown Grp., Inc.,* 517 U.S. 544, 551 (1996).

Both Wells Fargo and AHMSI satisfy the relatively minimum requirements of constitutional standing: they each have shown injury in fact, causation, and redressability. Injury in fact is shown with respect to Wells Fargo by the automatic stay's prohibition on its right to exercise its alleged remedies against the Veals, and with respect to AHMSI by the effect of claim allowance procedures on its ability to receive a distribution from the Veals' estate. Causation exists by the simple fact that neither Wells Fargo nor AHMSI may exercise their nonbankruptcy remedies due to the existence of the automatic stay. Finally, redressability exists in each case because the relief requested, if appropriate, would address and remedy the claimed injury.

2. Prudential Standing

*5 Even though Wells Fargo and AHMSI may meet the constitutional minima for standing, this determination does not end the inquiry. They must also show they have standing under various prudential limitations on access to federal courts. Prudential standing " 'embodies judicially self-imposed limits on the exercise of federal jurisdiction.' " *Sprint,* 554 U.S. at 289 (quoting *Elk Grove,* 542 U.S. at 11); *County of Kern,* 581 F.3d at 845.

In this case, one component of prudential standing is particularly applicable. It is the doctrine that a plaintiff must assert its own legal rights and may not assert the legal rights of others. *Sprint,* 554 U.S. at 289; *Warth,* 422 U.S. at 499; *Oregon v. Legal Servs. Corp.,* 552 F.3d 965, 971 (9th Cir.2009).

Here, the Veals allege that neither Wells Fargo nor AHMSI have shown they have any interest in the Note or any right to be paid by the Veals. They seek to invoke prudential standing principles which generally provide that a party without the legal right, under applicable substantive law, to enforce an obligation or seek a remedy with respect to it is not a real party in interest. *Doran v. 7–Eleven, Inc.,* 524 F.3d 1034, 1044 (9th Cir.2008). If the Veals' contention is correct as to AHMSI and Wells Fargo, then both creditors failed to satisfy their prudential standing burden.

3. Prudential Standing and the Real Party in Interest Doctrine

This formulation of the prudential standing doctrine, however, conflates somewhat with the real party in interest doctrine found in Rule 7017.10 While at least one prominent authority maintains that the third party standing doctrine and the real party in interest requirement are legally distinct, 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure, Civil* § 1542 (3d ed.2010), another authority succinctly summarizes the practical distinction: "Generally, real parties in interest have standing, but not every party who meets the standing requirements is a real party in interest." 4 *Moore's Federal Practice* § 17.10[1], at p. 17–15 (3d ed.2010) (footnotes omitted).

10 Rule 7017 incorporates Civil Rule 17, and is applicable here through Rule 9014(c).
Some cases have suggested that Civil Rule 17(a), requiring the "real party in interest" to prosecute federal civil litigation in its own name, can effectuate the prudential limitation on third-party standing. *See, e.g., Dunmore v. United States,* 358 F.3d 1107, 1112 (9th Cir.2004); *In re Hayes,* 393 B.R. 259, 267 (Bankr.D.Mass.2008). However, whatever the practical result of Civil Rule 17's application, the two remain distinct legal requirements, as discussed below.

As a result, if neither Wells Fargo nor AHMSI is a real party in interest, we need not parse the remaining differences between standing and real party in interest status. We thus concentrate on real party in interest status and whether Wells Fargo or AHMSI met their burden of demonstrating that they qualified as real parties in interest.11

11 In all of its various aspects, the standing issue is an inherently factual inquiry into the nature of the rights asserted, *see, e.g., Sprint,* 554 U.S. at 271–73, and the party asserting that it has standing bears the burden of proof to establish its standing. *Summers v. Earth Island Inst.,* 555 U.S. 488, ——, 129 S.Ct. 1142, 1149 (2009) (the movant "bears the burden of showing that he has standing for each type of relief sought"); *Bennett v. Spear,* 520 U.S. 154, 167–68 (1997); *Hasso v. Mozsgai (In re La Sierra Fin. Servs., Inc.),* 290 B.R. 718, 726 (9th Cir. BAP2002). These cases require that the movant bear the burden of proving both constitutional and prudential standing.

4. Real Party in Interest Status and Its Policies

Civil Rule 17(a)(1) starts simply: "An action must be prosecuted in the name of the real party in interest." Although the exact definition of a real party in interest may defy articulation, its function and purpose are well understood. As stated in the Advisory Committee Notes for Civil Rule 17,

> In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

*6 Notes of Advisory Committee on 1966 Amendments to Rule 17. *See also U–Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1039 (9th Cir.1986) (" 'The modern function of the rule ... is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.' ") (quoting Advisory Committee Notes to the 1966 amendment of Civil Rule 17).

In this regard, most real party in interest inquiries focus on whether the plaintiff or movant holds the rights he or she seeks to redress. *See Moore's, supra,* § 17.10[1]. Was, for example, the plaintiff a party to the contract sought to be enforced? Did it have some other interest in the contract?

But in some cases, statutory or common law recognizes relationships in which parties may sue in their own name for the benefit of others. In these cases, real party in interest doctrine potentially alters results: it allows these third parties to sue in their own name on actions in which they may not have the ultimate or direct personal stake in the matter. A guardian, for example, may sue on behalf of his or her ward, even thought the recovery is solely the ward's. Civil Rule 17(a)(1)(C). A bailee may sue in its own name for damage to goods entrusted to it, even though it does not own them. Civil Rule 17(a)(1)(D). Even assignees for collection may, under certain circumstances, sue in their own name on their assignor's debt. *See Sprint,* 554 U.S. at 284 (dictum); *Staggers v. Otto Gerdau Co.,* 359 F.2d 292, 294 (2d Cir.1966); *Kilbourn v. Western Sur. Co.,* 187 F.2d 567, 571–72 (10th Cir.1951).

Real party in interest doctrine thus melds procedural and substantive law; it ensures that the party bringing the action owns or has rights that can be vindicated by proving the elements of the claim for relief asserted. It also has another key aspect, as the Advisory Committee Notes acknowledge: if the party bringing the action loses on the merits, it ensures that the person defending the action can preclude anyone from ever seeking to vindicate, or collect on, that claim again.

B. The Substantive Law Related to Notes Secured by Real Property

Real party in interest analysis requires a determination of the applicable substantive law, since it is that law which defines and specifies the wrong, those aggrieved, and the redress they may receive. 6A *Federal Practice and Procedure* § 1543, at 480–81 ("In order to apply Rule 17(a)(1) properly, it is necessary to identify the law that created the substantive right being asserted...."). *See also id.* § 1544.

1. Applicability of UCC Articles 3 and 9[12]

12 This discussion owes much to a pending commentary of the Permanent Editorial Board for the Uniform Commercial Code. See John A. Sebert, *Draft Report of the PEB on the UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of Those Notes and the Mortgages Securing Them* (March 29, 2011), *available at* http://extranet.ali.org/directory/files/PEB_Report_on_Mortgage_ Notes–Circulation_Draft.pdf (last visited June 10, 2011).

Here, the parties assume that the Uniform Commercial Code ("UCC")[13] applies to the Note. If correct, then two articles of the UCC potentially apply.[14] If the Note is a negotiable instrument,[15] Article 3 provides rules governing the payment of the obligation represented by and reified in the Note.[16]

13 As all fifty states have enacted the UCC, citations to the UCC in this opinion will be to the official text when discussing general propositions. Specific state enactments will be cited when applicable.

14 Even if the Note is not a "negotiable instrument," and thus Article 3 would not directly apply, it may "be appropriate, consistent with the principles stated in § 1–102(2) [now § 1–103], for a court to apply one or more provisions of Article 3 to the writing by analogy, taking into account the expectations of the parties and the differences between the writing and an instrument governed by Article 3." Comment 2 to UCC § 3–104. *See also* Fred H. Miller & Alvin C. Harrell, *The Law of Modern Payment Systems* § 1.03[1][b] (2003).

15 *See* UCC § 3–102 ("This Article applies to negotiable instruments."). The term "negotiable instrument" is defined in UCC § 3–104(a) to mean:

> an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
> (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
> (2) is payable on demand or at a definite time; and

(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

16 Article 3 carries forward and codifies venerable commercial law rules developed over several centuries during which negotiable instruments played a much different role in commerce than they do today. As stated by Grant Gilmore, Article 3 is not unlike a "museum of antiquities—a treasure house crammed full of ancient artifacts whose use and function have long since been forgotten." Grant Gilmore, *Formalism and the Law of Negotiable Instruments,* 13 Creighton L.Rev. 441, 461 (1979). His following quotation is apt and often-repeated: "codification ... preserve[d] the past like a fly in amber". *Id.*

*7 Article 3, however, deals primarily with payment obligations surrounding a negotiable instrument, and the identification of the proper party to be paid in order to satisfy and discharge the obligations represented by that negotiable instrument. As will be seen, Article 3 does not necessarily equate the proper person to be paid with the person who owns the negotiable instrument. Nor does it purport to govern completely the manner in which those ownership interests are transferred. For the rules governing those types of property rights, Article 9 provides the substantive law.17 UCC § 9–109(a)(3) (Article 9 "applies to ... a sale of ... promissory notes").18 Article 9 includes rules, for example, governing the effect of the transfer of a note on any security given for that note such as a mortgage or a deed of trust.19 As a consequence, Article 9 must be consulted to answer many questions as to who owns or has other property interest in a promissory note. From this it follows that the determination of who holds these property interests will inform the inquiry as to who is a real party in interest in any action involving that promissory note.

17 Unlike Article 3, Article 9 is a relatively recent innovation which attempts, among other things, to regularize nonpossessory financing. It was last completely revised in 1999, although there are currently amendments to that version being offered for adoption by the states.

18 UCC § 9–109(a)(3) states that Article 9 applies to any sale of a "promissory note," which is defined in § 9–102(a)(65) as "an instrument that evidences a promise to pay a monetary obligation, [or] does not evidence an order to pay...." In turn, an "instrument" under Article 9 is defined as "a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment ." UCC § 9–102(a)(47).

19 *See* UCC § 9–203(g) ("The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.").

As a result, this opinion examines the relevant provisions of Article 3 and Article 9 as they apply to the Veals' Note and Mortgage, as each Article may provide substantive law that shapes the relevant real party in interest inquiry.

2. Article 3 of the UCC and the Concept of a "Person Entitled to Enforce" a Note

Article 3 provides a comprehensive set of rules governing the obligations of parties on the Note, including how to determine who may enforce those obligations and to whom those obligations are owed. *See* UCC § 3–102; Miller & Harrell, *supra,* § 1.02. Contrary to popular opinion, these rules do not absolutely require physical possession of a negotiable instrument in order to enforce its terms. Rather, Article 3 states that the ability to enforce a particular note—a concept central to our standing inquiry—is held by the "person entitled to enforce" the note. UCC § 3–301.

A thorough understanding of the concept of a "person entitled to enforce" is key to sorting out the relative rights and obligations of the various parties to a mortgage transaction. In particular, the person obligated on the note—a "maker" in the argot of Article 320—must pay the obligation represented by the note to the "person entitled to enforce" it. UCC § 3–412. Further, if a maker pays a "person entitled to enforce" the note, the maker's obligations are discharged to the extent of the amount paid. UCC § 3–602(a). Put another way, if a maker makes a payment to a "person entitled to enforce," the obligation is satisfied on a dollar for dollar basis, and the maker never has to pay that amount again. *Id. See also* UCC § 3–602(c).

20 *See* UCC § 3–103(a)(7).

If, however, the maker pays someone other than a "person entitled to enforce"—even if that person physically possesses the note the maker signed—the payment generally has *no* effect on the obligations under the note.21 The maker still owes the money to the "person entitled to enforce," Miller & Harrell, *supra,* ¶ 6.03[6][b][ii], and, at best, has only an action in restitution to recover the mistaken payment. *See* UCC § 3–418(b).

21 The 2002 Amendments to Article 3 provided a limited exception for notes transferred without notice to the maker. UCC § 3–602(b). *See* 2 James J. White & Robert S. Summers, *Uniform Commercial Code* § 16–12, at 146 (5th ed.2008).

*8 At least two ways exist in which a person can acquire "person entitled to enforce" status.22 To enforce a note under the method most commonly employed, the person must be the "holder" of the note. UCC § 3–301(i).

22 Another method is uncommon and does not require possession of the note. Under UCC § 3–301(iii), a person may be a "person entitled to enforce the note" if, among other things, "the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process." UCC § 3–309(a)(3). The burden of showing these factual predicates is on the person attempting to enforce the negotiable instrument. Here, however, the Note is not alleged to be lost or stolen.

The concept of a "holder" is set out in detail in UCC § 1–201(b)(21)(A), providing that a person is a holder if the person possesses the note and either (i) the note has been made payable to the person who has it in his possession23 or (ii) the note is payable to the bearer of the note. This determination requires physical examination not only of the face of the note but also of any indorsements.24

23 The person in possession of the note must be identified as such. This concept of identification begins with the issuance of a note to a payee. To be covered by Article 3, the note must be negotiable, which generally means the note must have "words of negotiability;" that is, the note must be initially payable to the stated payee, "or order." The two words "or order" have come to mean that the person identified for purposes of "holder" status generally needs to be identical with the last listed indorser on the note (assuming the note has not become a bearer instrument).

So if A makes a note payable to "B or order," and B indorses the note to C, C is a holder if C is in possession. If D steals the note from C, D is not the holder, even if he forges C's indorsement. The process of transfer is called "negotiation," which UCC § 3–201(a) defines as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder."

24 This would include checking to see if any purported allonge was sufficiently affixed as required by UCC § 3–204(a). *See In re Weisband,* 427 B.R. 13, 19–20 (Bankr.D.Ariz.2010); *In re Shapoval,* 441 B.R. 392, 394 (Bankr.D.Mass.2010).

The Veals contend that only a holder may enforce the Note, or seek relief from the automatic stay to enforce it. Their analysis is incomplete, for Article 3 provides another way in which an entity can become a "person entitled to enforce" a negotiable instrument. This third way involves the person attaining the status of a "nonholder in possession of the [note] who has the rights of a holder." UCC § 3–301(ii). This definition, however, seems at odds with itself; one can legitimately ask how a person who is not the holder of a note possesses the rights of a holder?

The answer to this question involves a combination of history and practicality. Non–UCC law can bestow this type of status; such law may, for example, recognize various classes of successors in interest such as subrogees or administrators of decedent's estates. *See* Comment to UCC § 3–301. More commonly, however, a person becomes a nonholder in possession if the physical delivery of the note to that person constitutes a "transfer" but not a "negotiation." *Compare* UCC § 3–201 (definition of negotiation) *with* UCC § 3–203(a) (definition of transfer). Under the UCC, a "transfer" of a negotiable instrument "vests in the transferee any right of the transferor to enforce the instrument ." UCC § 3–203(b). As a result, if a holder transfers the note to another person by a process not involving an Article 3 negotiation—such as a sale of notes in bulk without individual indorsement of each note—that other person (the transferee) obtains from the holder the right to enforce the note even if no negotiation takes place and, thus, the transferee does not become an Article 3 "holder." *See* Comment 1 to UCC § 3–203.

This places a great deal of weight on the UCC's definition of a "transfer." UCC § 3–203(a) states that a note is transferred "when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." As a consequence, while the failure to obtain the indorsement of the payee or other holder does not prevent a person in possession of the note from being the "person entitled to enforce" the note, it does raise the stakes. Without holder status and the attendant presumption of a right to enforce, the possessor of the note must demonstrate both the fact of the delivery and the purpose of the delivery of the note to the transferee in order to qualify as the "person entitled to enforce."

3. Article 9 and Transfers of Ownership and Other Interests in a Promissory Note

*9 The "transfer" concept is not only bound up in the enforcement of the maker's obligation to pay the debt evidenced by the note, but also in the ownership of those rights. Put another way, one can be an owner of a note without being a "person entitled to enforce."[25] This distinction may not be an easy one to draw, but it is one the UCC clearly embraces. While in many cases the owner of a note and the person entitled to enforce it are one and the same, this is not always the case, and those cases are precisely the cases in which Civil Rule 17 would require joinder of the real party in interest.

25 The converse is also true: one can be a "person entitled to enforce" without having any ownership interest in the negotiable instrument, such as when a thief swipes and absconds with a bearer instrument. *See* Comment 1 to UCC § 3–301. The ability of a thief to legitimately obtain payment on bearer instruments, such as bearer bonds, has factored in literature and film focusing on the dark side of humanity. *See, e.g.*, F. Scott Fitzgerald, *The Great Gatsby* ch. 9 (1925) (part of Gatsby's downfall connected with the theft or falsification of bearer bonds); *Die Hard* (Twentieth Century Fox Film Corp.1988) (thieves masquerading as international terrorists seek to steal a highly valuable trove of bearer bonds); *Beverly Hills Cop* (Paramount Pictures 1984) (friend of protagonist is murdered for stealing bearer bonds from a drug operation's kingpin).

Bearer bonds in the United States (but not internationally) were essentially eliminated in 1982 by the imposition of high tax penalties on their issuance. *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. 97–248, § 47109, 96 Stat. 596 (codified at 26 U.S.C. § 4701(a)).

This distinction further recognizes that the rules that determine who is entitled to enforce a note are concerned primarily with the maker of the note. They are designed to provide for the maker a relatively simple way of determining to whom the obligation is owed and, thus, whom the maker must pay in order to avoid defaulting on the obligation. UCC § 3–602(a), (c). By contrast, the rules concerning transfer of ownership and other interests in a note identify who, among competing claimants, is entitled to the note's economic value (that is, the value of the maker's[26] promise to pay). Under established rules, the maker should be indifferent as to who owns or has an interest in the note so long as it does not affect the maker's ability to make payments on the note. Or, to put this statement in the context of this case, the Veals should not care who actually owns the Note—and it is thus irrelevant whether the Note has been fractionalized or securitized—so long as they do know who they should pay. Returning to the patois of Article 3, so long as they know the identity of the "person entitled to enforce" the Note, the Veals should be content.[27]

26 As well as any indorser's obligation to pay. *See* UCC § 3–415(a).

27 To re-emphasize the oft-overlooked point: Article 3 is sufficiently flexible to allow a single identified person to be both the "person entitled to enforce" the note, and an agent for all those who may have ownership interests in a note. This point reflects the view that so long as the maker's obligation is discharged by payment, the maker should be indifferent as to whether the "person entitled to enforce" the note satisfies his or her obligations, under the law of agency, to the ultimate owners of the note.

Initially, a note is owned by the payee to whom it was issued. If that payee seeks either to use the note as collateral or sell the note outright to a third party in a manner not within Article 3,[28] Article 9 of the UCC governs that sale or loan transaction and determines whether the purchaser of the note or creditor of the payee obtains a property interest in the note. *See* UCC § 9–109(a)(3).

28 That is, it transfers a note in a manner not contemplated by Article 3.

With very few exceptions, the same rules that apply to transactions in which a payment right serves as collateral for an obligation also apply to transactions in which a payment right is sold outright. *See* UCC § 9–203. Rather than contain two parallel sets of rules—one for transactions in which payment rights are collateral and the other for sales of payment

rights—Article 9 uses nomenclature conventions to apply one set of rules to both types of transactions. This is accomplished primarily by defining the term "security interest," found in UCC § 1–201(b)(35),[29] to include not only an interest in property that secures an obligation, but also the right of a purchaser of a payment right such as a promissory note. *Cf.* UCC § 1–201(b)(35) (The term "security interest" also "includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9.").

29 Article 9 explicitly incorporates definitions found in Article 1. UCC § 9–102(c).

**10* Here, neither AHMSI nor Wells Fargo was the initial payee of the Note. Due to this fact, each was required to demonstrate facts sufficient to establish its respective standing. *See* note 11, *supra.* In this regard, facts that would be sufficient for AHMSI are different from those that would be sufficient for Wells Fargo. As to Wells Fargo, it had to show it had a colorable claim to receive payment pursuant to the Note, which it could accomplish either by showing it was a "person entitled to enforce" the Note under Article 3, or by showing that it had some ownership or other property interest in the Note. As to AHMSI, as it sought a distribution from the estate in payment of the Note, it had to show that it was a "person entitled to enforce" the Note, or was the agent of such a person.

C. Wells Fargo's Lack of Standing to Seek Relief from the Automatic Stay

Wells Fargo sought relief from the automatic stay to foreclose on the Property. The automatic stay, however, prevents "all proceedings relating to a foreclosure sale." *Mann v. ADI Invs., Inc. (In re Mann),* 907 F.2d 923, 926–27 (9th Cir.1990). As a result, to take any action other than filing a proof of claim, Wells Fargo had to seek relief from the stay.

1. Standing to Seek Relief from Automatic Stay

Under § 362(d), the bankruptcy court may grant relief from the automatic stay "[o]n request of a party in interest." The Bankruptcy Code does not define the term "party in interest." "Status as 'a party in interest' under § 362(d) 'must be determined on a case-by-case basis, with reference to the interest asserted and how [that] interest is affected by the automatic stay.' " *Kronemyer,* 405 B.R. at 919 (quoting *In re Woodberry,* 383 B.R. 373, 378 (Bankr.D.S.C.2008)).

Our prior precedent is appropriately lenient with respect to standing for stay relief. This Panel said in *Kronemyer* that "[c]reditors may obtain relief from the stay if their interests would be harmed by continuance of the stay." *Kronemyer,* 405 B.R. at 921. *Collier* uses a similarly expansive statement: "Any party affected by the stay should be entitled to seek relief." 3 *Collier on Bankruptcy* ¶ 362.07[2] (Henry Sommer and Alan Resnick, eds., 16th ed.2011).

This test expands or contracts to match the interests sought to be asserted. A servicer, for example, might be delegated all its principal's rights, or it could simply be asserting its separate right to be paid out of the mortgage payments. *Cf. CWCapital Asset Mgmt., LLC v. Chicago Props., LLC,* 610 F.3d 497, 500–01 (7th Cir.2010) ("The servicer is much like an assignee for collection, who must render to the assignor the money collected by the assignee's suit on his behalf (minus the assignee's fee) but can sue in his own name without violating Rule 17(a)."); *In re Hayes,* 393 B.R. 259, 267 (Bankr.D.Mass.2008) ("[S]ervicers are parties in interest with standing by virtue of their pecuniary interest in collecting payments under the terms of the notes and mortgages they service."); *In re Woodberry,* 383 B.R. 373, 379 (Bankr.D.S.C.2008). In either event, the servicer has standing to request some relief from the automatic stay.

**11* But *Kronemyer* does not precisely address the discrete issue presented here: whether Wells Fargo's interests are "harmed by the continuance of the stay." The answer to that question requires examination of both the nature of stay litigation generally and the specific nature of the nonbankruptcy rights Wells Fargo seeks to vindicate.

Relief from stay proceedings such as the one brought by Wells Fargo are primarily procedural; they determine whether there are sufficient countervailing equities to release an individual creditor from the collective stay. One consequence of this broad inquiry is that a creditor's claim or security is not finally determined in the relief from stay proceeding. *Johnson v. Righetti (In re Johnson),* 756 F.2d 738, 740–41 (9th Cir.1985) ("Hearings on relief from the automatic stay are thus handled in a summary fashion. The validity of the claim or contract underlying the claim is not litigated during the hearing."); *Grella v. Salem Five Cent Sav. Bank,* 42 F.3d 26, 33 (1st Cir.1994) ("We find that a hearing on a motion for relief from stay is merely

a summary proceeding of limited effect...."); *First Fed. Bank v. Robbins (In re Robbins),* 310 B.R. 626, 631 (9th Cir. BAP2004).

As a result, stay relief litigation has very limited claim preclusion effect, in part because the ultimate resolution of the parties' rights are often reserved for proceedings under the organic law governing the parties' specific transaction or occurrence. Stay relief involving a mortgage, for example, is often followed by proceedings in state court or actions under nonjudicial foreclosure statutes to finally and definitively establish the lender's and the debtor's rights.30 In such circumstances, the concern of real party in interest jurisprudence for avoiding double payment is quite reduced.

30 An obvious exception to this paradigm occurs when the bankruptcy court has already sustained a claim objection to a movant's proof of claim. In such cases, the doctrine that security depends on the debt it secures controls, and with the debt disallowed, the movant normally cannot pursue the real property security outside of bankruptcy. *See* 4 Richard R. Powell, *Powell on Real Property,* § 37.27[2] (2000).

Given the limited nature of the relief obtained through a motion for relief from the stay, the expedited hearing schedule § 362(e) provides, and because final adjudication of the parties' rights and liabilities is yet to occur, this Panel has held that a party seeking stay relief need only establish that it has a colorable claim to enforce a right against property of the estate. *United States v. Gould (In re Gould),* 401 B.R. 415, 425 n. 14 (9th Cir. BAP2009); *Biggs v. Stovin (In re Luz Int'l, Ltd.),* 219 B.R. 837, 842 (9th Cir. BAP1998). *See also Grella,* 42 F.3d at 32.

2. Wells Fargo's Argument Regarding Standing

Although expansive, this principle is not without limits. In granting Wells Fargo's motion for relief from stay, the bankruptcy court found that Wells Fargo had established a "colorable claim" based on two of Wells Fargo's exhibits: (1) a copy of an assignment of mortgage from GSF (the original lender) to Option One (the "GSF Assignment"); and (2) a copy of an assignment of mortgage from Sand Canyon Corporation formerly known as Option One Mortgage Corporation to Wells Fargo (the "Sand Canyon Assignment"). According to the bankruptcy court, whoever possessed or held rights in the Note was irrelevant.

**12* A bankruptcy court's determinations regarding stay relief are reviewed for an abuse of discretion, *Kronemyer,* 405 B.R. at 919. The abuse of discretion test involves two distinct determinations: first, whether the court applied the correct legal standard; and second, whether the factual findings supporting the legal analysis were clearly erroneous. *United States v. Hinkson,* 585 F.3d 1247, 1261–63 (9th Cir.2009) (en banc).

If the court failed to apply the correct legal standard, then it has "necessarily abuse[d] its discretion." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990). This prong of the determination is considered de novo. *Hinkson,* 585 F.3d at 1261–62. If the court applied the correct legal standard, the inquiry then moves to whether the factual findings made were clearly erroneous. *Id.* at 1262. Under *Hinkson,* factual findings are clearly erroneous if they are "illogical, implausible, or without support in inferences that may be drawn from the record." *Id.* at 1263. *See also* Rule 8013.

Against these high standards, the Veals pursue two different arguments. Initially, they argue that the GSF Assignment is invalid because it bears an undated notarial acknowledgment. They also argue that the Sand Canyon Assignment is invalid because it was not executed until after the Veals filed for bankruptcy and after Wells Fargo filed its relief from stay motion. See *In re Maisel,* 378 B.R. 19, 21–22 (Bankr.D.Mass.2007) (denying relief from stay because movant's standing was dependent on an assignment of mortgage dated after the filing of the relief from stay motion).

3. Wells Fargo's Lack of a Connection to the Note

The Veals' first argument would seem to require a factual investigation of the circumstances under which the Mortgage and the subsequent assignments were signed. But we need not remand for that determination. The Veals have a second argument, and it has merit. They assert that, as a matter of law, the bankruptcy court applied an incorrect legal principle in determining that Wells Fargo had an ownership or other property interest in the Note. The Veals argue that had the bankruptcy court applied the correct test, it would have found that Wells Fargo had not established such an interest, and thus its asserted rights under the Mortgage did not constitute a colorable claim to enforce a right against property of the estate.

The key to this argument is that, under the common law generally, the transfer of a mortgage without the transfer of the obligation it secures renders the mortgage ineffective and unenforceable in the hands of the transferee. *Restatement (Third) of Property (Mortgages)* § 5.4 cmt. e (1997) ("in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation").31 As stated in a leading real property treatise:

31 It does not, of course, affect the obligations which have been secured; only the rights to security for those obligations are affected.

> When a note is split from a deed of trust "the note becomes, as a practical matter, unsecured." Restatement (Third) of Property (Mortgage) § 5.4 cmt. a (1997). Additionally, if the deed of trust was assigned without the note, then the assignee, "having no interest in the underlying debt or obligation, has a worthless piece of paper."
> **13* 4 Richard R. Powell, *Powell on Real Property,* § 37.27[2] (2000). *Cf. In re Foreclosure Cases,* 521 F.Supp.2d 650, 653 (S .D.Ohio 2007) (finding that one who did not acquire the note which the mortgage secured is not entitled to enforce the lien of the mortgage); *In re Mims,* 438 B.R. 52, 56 (Bankr.S.D.N.Y.2010) ("Under New York law 'foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity.' ") (quoting *Kluge v. Fugazy,* 536 N.Y.S.2d 92, 93 (N.Y.App.Div.1988)).

In this case, Illinois law governs the issues related to the Mortgage's enforcement,32 and Illinois follows this rule.

32 The Mortgage contains a choice of law provision, which states that the law of the state where the real property is located applies to "this Security Instrument." The Property is located in Illinois, so this clause would require application of Illinois law to issues concerning enforcement of the Mortgage.
This choice of law provision is consistent with the common law. *See Restatement (Second) of Conflict of Laws* § 229. As will be seen later, the Note is governed by the law of Arizona. *See* note 41, *infra.* The application of different choice of law rules to the Note and the Mortgage is consistent with the common law: "Issues which do not affect any interest in the land, although they do relate to the foreclosure, are determined, on the other hand, by the law which governs the debt for which the mortgage was given." *Id.*

> Illinois ... courts treat a mortgage as incident or accessory to the debt, and, an assignment of a mortgage without the note as a nullity. In order for the Illinois ... courts to enforce a mortgage assignment, the assignor must assign the underlying debt secured by the mortgage debt. It is axiomatic that any attempt to assign the mortgage without transfer of the debt will not pass the mortgagee's interest to the assignee.
> *Yorke v. Citibank (In re BNT Terminals, Inc.),* 125 B.R. 963, 970 (Bankr.N.D.Ill.1990) (citing *Krueger v. Dorr,* 161 N.E.2d 433, 440–41 (Ill.App.Ct.1959); *Moore v. Lewis,* 366 N.E.2d 594, 599 (Ill.App.Ct.1977); *Commercial Prods. Corp. v. Briegel,* 242 N .E.2d 317, 321 (Ill.App.Ct.1968); and *Lundy v. Messer,* 167 N.E.2d 278, 279 (Ill.App.Ct.1960)).

This rule appears to be the common law rule. *See, e.g., Restatement (Third) of Property (Mortgage)* § 5.4 (1997); *Carpenter v. Longan,* 83 U.S. 271, 274–75 (1872) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."); *Orman v. North Alabama Assets Co.,* 204 F. 289, 293 (N.D.Ala.1913); *Rockford Trust Co. v. Purtell,* 183 Ark. 918 (1931).33 While we are aware that some states may have altered this rule by statute, that is not the case here.34

33 The Restatement also sets up a general presumption that the transfer of a mortgage normally includes an assignment of the obligation it secured. *Id.* § 5.4(b) ("Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise"). But as we have previously noted, *see* text accompanying note 7 *supra,* the mortgage assignment to Wells Fargo did not also assign the Note.

34 We are aware of statutory law and unreported cases in this circuit that may give lenders a nonbankruptcy right to commence foreclosure based solely upon their status as assignees of a mortgage or deed of trust, and without any explicit requirement that they have an interest in the note. *See, e.g.,* Cal. Civil Code §§ 2924(a)(1) (a "trustee, mortgagee or beneficiary or any of their authorized agents" may conduct the foreclosure process); 2924(b)(4) (a "person authorized to record the notice of default or the notice of sale" includes "an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee."); *Putkkuri v. Recontrust Co.,* No. 08cv1919, 2009 WL 32567 at *2 (S.D.Cal. Jan. 5, 2009) ("Production of the original note is not required to proceed with a non-judicial foreclosure."); *Candelo v. NDex West, LLC,* No. 08–1916, 2008 WL 5382259 at *4 (E .D.Cal. Dec. 23, 2008) ("No requirement exists under the statutory framework to produce the original note to initiate non-judicial foreclosure."); *San Diego Home Solutions, Inc. v. Recontrust Co.,* No. 08cv1970, 2008 WL 5209972 at *2 (S.D.Cal. Dec. 10, 2008) ("California law does not require that the original note be in the possession of the party initiating non-judicial foreclosure."). *But see In re Salazar,* —— B.R. ——, 2011 WL 1398478 at *4 (Bankr.S.D.Cal.2011) (valid foreclosure under California law requires both that the foreclosing party be

> entitled to "payment of the secured debt" and that its "status as foreclosing beneficiary appear before the sale in the public record title for the [p]roperty ."). We express no view of the interaction of these statutes and real party in interest requirements under Civil Rule 17.
>
> Ultimately, the minimum requirements for the initiation of foreclosures under applicable nonbankruptcy law will shape the boundaries of real party in interest status under Civil Rule 17 with respect to relief from stay matters. As a consequence, the result in a given case may often depend upon the situs of the real property in question.

As a result, to show a colorable claim against the Property, Wells Fargo had to show that it had some interest in the Note, either as a holder, as some other "person entitled to enforce," or that it was someone who held some ownership or other interest in the Note. *See In re Hwang,* 438 B.R. 661, 665 (C.D.Cal.2010) (finding that holder of note has real party in interest status). None of the exhibits attached to Wells Fargo's papers, however, establish its status as the holder, as a "person entitled to enforce," or as an entity with any ownership or other interest in the Note.

Not surprisingly, Wells Fargo disagrees. It argues that it submitted documents in support of its relief from stay motion which established a "colorable claim" against property of the estate. In this regard, it cites *In re Robbins,* 310 B.R. 626, 631 (9th Cir. BAP2004) (which in turn cites *Grella,* 42 F.3d at 32). However, neither *Robbins* nor *Grella* dealt with a challenge to the movant's standing which, as we have said, is an independent threshold issue. Simply put, the colorable claim standard set forth in *Robbins* does not free Wells Fargo from the burden of establishing its status as a real party in interest allowing it to move for relief from stay, as this is the way in which Wells Fargo satisfies its prudential standing requirement.

***14** In particular, because it did not show that it or its agent had actual possession of the Note, Wells Fargo could not establish that it was a holder of the Note, or a "person entitled to enforce" the Note.[35] In addition, even if admissible, the final purported assignment of the Mortgage was insufficient under Article 9 to support a conclusion that Wells Fargo holds any interest, ownership or otherwise, in the Note. Put another way, without any evidence tending to show it was a "person entitled to enforce" the Note, or that it has an interest in the Note, Wells Fargo has shown no right to enforce the Mortgage securing the Note. Without these rights, Wells Fargo cannot make the threshold showing of a colorable claim to the Property that would give it prudential standing to seek stay relief or to qualify as a real party in interest.

35 As indicated above, *see* note 22 *supra,* there is no argument that the note is lost or destroyed.

Accordingly, the bankruptcy court erred when it granted Wells Fargo's motion for relief from stay, and we must reverse that ruling.

D. AHMSI's Lack of Standing to File Proof of Claim

AHMSI's proof of claim presents similar issues, but in a different context. An order overruling a claim objection can raise legal issues (such as the proper construction of statutes and rules) which we review de novo, as well as factual issues (such as whether the facts establish compliance with particular statutes or rules), which we review for clear error. *Campbell v. Verizon Wireless (In re Campbell),* 336 B.R. 430, 434 (9th Cir. BAP2005); *Heath v. Am. Express Travel Related Servs. Co. (In re Heath),* 331 B.R. 424, 428–29 (9th Cir. BAP2005).

The Veals contend that AHMSI's purported claim—as opposed to any security for that claim—is subject to objection under Article 3 of the UCC. If correct, their nonbankruptcy objection provides a sufficient basis for disallowance of the claim. § 502(b)(1). When ruling on such an objection, the bankruptcy court makes a substantive ruling that binds the parties in all other proceedings and may finally adjudicate the parties' underlying rights. As stated in *Katchen v. Landy,* 382 U.S. 323 (1966):

> The bankruptcy courts "have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession."

Id. at 327 (quoting *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 481 (1940)). Courts have adopted this characterization of the effect of claim objection proceedings under the somewhat different, and more expansive, jurisdictional structure in place under the 1978 Bankruptcy Code. *EDP Med. Computer Sys., Inc. v. United States,* 480 F.3d 621, 624 (2d Cir.2007); *Siegel v. Fed. Home Loan Mortg. Corp.,* 143 F.3d 525, 529–30 (9th Cir.1998); *Bank of Lafayette v. Baudoin (In re*

Baudoin), 981 F.2d 736, 742 (5th Cir.1993).

Consistent with this view, orders in claim objection proceedings have been given issue and claim preclusive effect. As stated in *Katchen,*

> The normal rules of *res judicata* and collateral estoppel apply to the decisions of bankruptcy courts. More specifically, a creditor who offers a proof of claim and demands its allowance is bound by what is judicially determined; and if his claim is rejected, its validity may not be relitigated in another proceeding on the claim.

**15* 382 U.S. at 334 (citations omitted). In short, a claims objection proceeding in bankruptcy takes the place of the state court lawsuit or other action because such actions are presumptively stayed by the operation of § 362.36

36 The process, of course, is sufficiently flexible to allow bankruptcy courts in appropriate cases to defer to nonbankruptcy courts to liquidate and settle the parties' claims and contentions. *See, e.g., Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.),* 907 F.2d 1280, 1286 (2d Cir.1990); *Goya Foods, Inc. v. Unanue–Casal (In re Unanue–Casal),* 159 B.R. 90, 96 (D.P.R.1993), *aff'd,* 23 F.3d 395 (1st Cir.1994); *Busch v. Busch (In re Busch),* 294 B.R. 137, 141 n. 4 (10th Cir. BAP2003) (collecting cases); *Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.),* 311 B.R. 551, 557–58 (Bankr.C.D.Cal.2004).

> The bankruptcy court, however, has exclusive jurisdiction over the estate property that will be distributed on such claim, 28 U.S.C. § 1334(e), and exclusive jurisdiction over the distribution of estate property.

The Veals challenge AHMSI's status as the real party in interest to file a proof of claim with respect to the Note. This argument stands on somewhat different grounds than the similar objection to Wells Fargo's stay relief. Unlike a motion for relief from the stay, the claim allowance procedure has finality, as § 502(b)(1) explicitly directs a bankruptcy court to disallow a claim if a legitimate nonbankruptcy law defense exists. Again, unlike motions for relief from the automatic stay, there will be no subsequent determination of the parties' relative rights and responsibilities in another forum. The proceedings in the bankruptcy court are the final determination. As a result, Civil Rule 17's policy of preventing multiple liability is fully implicated.

AHMSI apparently conceded that Wells Fargo held the economic interest in the Note, as it filed the proof of claim asserting that it was Wells Fargo's authorized agent. Rule 3001(b) permits such assertions, and such assertions often go unchallenged. But here the Veals did not let it pass; they affirmatively questioned AHMSI's standing. In spite of this challenge, AHMSI presented no evidence showing any agency or other relationship with Wells Fargo and no evidence showing that either AHMSI or Wells Fargo was a "person entitled to enforce" the Note. That failure should have been fatal to its position.

1. The Lack of Findings on Central Issues

The filing of an objection to claim initiates a contested matter, subject to the procedures set forth in Rule 9014. *See* Advisory Committee Notes accompanying Rule 3007.37 In contested matters, a bankruptcy court must make findings of fact, either orally on the record, or in a written decision. *See* Rule 9014(c) (incorporating Rule 7052, which in turn incorporates Civil Rule 52).38 These findings must be sufficient to enable a reviewing court to determine the factual basis for the court's ruling. *Vance v. Am. Hawaii Cruises, Inc.,* 789 F.2d 790, 792 (9th Cir.1986). Although the bankruptcy court here overruled the Veals' objection to AHMSI's proof of claim, it did so without making any findings or even any statements regarding the factual basis for the court's conclusion that AHMSI had standing to file the proof of claim.39 It simply held that being an assignee (or agent of the assignee) of the Mortgage was sufficient.

37 The Advisory Committee Notes accompanying the original version of Rule 3007, promulgated in 1983, in relevant part state that "[t]he contested matter initiated by an objection to a claim is governed by rule 9014." The Advisory Committee Notes accompanying the 2007 amendments do not alter this view.

38 Civil Rule 52(a)(1) provides in relevant part: (a) Findings and Conclusions.

> (1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.

39 Given the lack of documentation provided in response to the Veals' objection, it is not surprising that the bankruptcy court made no findings on the disputed factual issues. *See* note 7, *supra.*

Even when a bankruptcy court does not make formal findings, however, the BAP may conduct appellate review "if a complete understanding of the issues may be obtained from the record as a whole or if there can be no genuine dispute about omitted findings." *Gardenhire v. Internal Revenue Serv. (In re Gardenhire),* 220 B.R. 376, 380 (9th Cir. BAP1998), *rev'd on other grounds,* 209 F.3d 1145 (9th Cir.2000) (citing *Vance,* 789 F.2d at 792; *Magna Weld Sales Co. v. Magna Alloys & Research Pty., Ltd.,* 545 F.2d 668, 671 (9th Cir.1976)). *See also Jess v.. Carey (In re Jess),* 169 F.3d 1204, 1208–09 (9th Cir.1999); *Swanson v. Levy,* 509 F.2d 859, 860–61 (9th Cir.1975). After such a review, however, when the record does not contain a clear basis for the court's ruling, we must vacate the court's order and remand for further proceedings. *See, e.g., Alpha Distr. Co. v. Jack Daniel Distillery,* 454 F.2d 442, 452–53 (9th Cir.1972); *Canadian Comm'l Bank v. Hotel Hollywood (In re Hotel Hollywood),* 95 B.R. 130, 132–34 (9th Cir. BAP1988).

**16* We have conducted such a review of the record, and we have found nothing in the record that establishes AHMSI's standing to file the proof of claim. Neither party offered any testimony, either by way of declaration or by way of live testimony of witnesses, to support their respective positions on these contested factual issues. None of the documents attached to the parties' papers show that AHMSI was the servicing agent of Wells Fargo, let alone a servicing agent of a "person entitled to enforce" the Note.40

40 See text accompanying note 7, above. In addition, the documents presented, especially the Dorchuck Letter, are subject to a host of evidentiary problems.

When debtors such as the Veals challenge an alleged servicer's standing to file a proof of claim regarding a note governed by Article 3 of the UCC, that servicer must show it has an agency relationship with a "person entitled to enforce" the note that is the basis of the claim. If it does not, then the servicer has not shown that it has standing to file the proof of claim. *See, e.g., In re Minbatiwalla,* 424 B.R. 104, 108–11 (Bankr.S.D.N.Y.2010); *Hayes,* 393 B.R. at 266–70; *In re Parrish,* 326 B.R. 708, 720–21 (Bankr.N.D.Ohio 2005).

The bankruptcy court here apparently concluded as a matter of law that the identity of the person entitled to enforce the Note was irrelevant. Its analysis followed the Mortgage instead of the Note. We disagree. In the context of a claim objection, both the injury-in-fact requirement of constitutional standing and the real party in interest requirement of prudential standing hinge on who holds the right to payment under the Note and hence the right to enforce the Note. *In re Weisband,* 427 B.R. 13, 18–19 (Bankr.D.Ariz.2010). *See also U–Haul,* 793 F.2d at 1038 (holding that real party in interest is the "party to whom the relevant substantive law grants a cause of action"). In other words, Wells Fargo (or AHMSI as Wells Fargo's servicer) must be a "person entitled to enforce" the Note in order to qualify as a creditor (or creditor's agent) entitled to file a proof of claim. Otherwise, the estate may pay funds to a stranger to the case; indeed, the primary purpose of the real party in interest doctrine is to ensure that such mistaken payments do not occur.

2. Analysis of the Record and AHMSI's Status as a "Person Entitled to Enforce" the Note

Here, Shelli Veal apparently signed the Note in Arizona. Given the lack of a choice of law clause in the Note, Arizona law would presumptively govern who has rights to enforce the Note.41 Under Arizona's uniform adoption of the UCC, a note's maker has a valid objection to the extent that the claimant is not a "person entitled to enforce" the Note. Ariz.Rev.Stat. Ann. § 47–3301. As stated before, AHMSI presented no evidence as to who possessed the original Note. It also presented no evidence showing indorsement of the note either in its favor or in favor of Wells Fargo, for whom AHMSI allegedly was servicing the Veal Loan. Without establishing these elements, AHMSI cannot establish that it is a "person entitled to enforce" the Note. The Veals would thus have a valid claim objection under § 502(b)(1).

41 For the purpose of determining who is the real party in interest to enforce the Note, the forum state's choice of law rules determine which state's substantive law applies. 6A *Federal Practice and Procedure,* at § 1544. Arizona's applicable choice of law statute provides in relevant part that, in the absence of an agreement between the parties, Arizona's version of the UCC applies to transactions "bearing an appropriate relation" to the state of Arizona. Ariz.Rev.Stat. Ann. § 47–1301 (2011). The Veals, who are the makers of the Note, reside in Arizona and apparently executed the Mortgage and the Note in Arizona. (The Mortgage bears a notarial acknowledgment with a Notary's stamp showing that the Notary is commissioned in Maricopa County, Arizona.) These uncontested facts evidence a sufficient relationship with Arizona to justify application of Ariz.Rev.Stat. Ann. § 47–1301.

See Barclays Discount Bank Ltd. v. Levy, 743 F.2d 722, 724–25 (9th Cir.1984) (applying California's counterpart to Ariz.Rev.Stat. Ann. § 47–1301 under similar circumstances).

**17* Citing *Campbell,* 336 B.R. at 432, AHMSI essentially argues that the Veals are estopped or have waived their standing arguments. They point to "admissions" in the Veals' bankruptcy schedules and their chapter 13 plan, which both list AHMSI as a secured creditor with a lien on the Property.

We disagree. What these writings evidence is far from clear on this record. In addition to the conclusion AHMSI advances, they might also tend to show: (1) that AHMSI was the current loan servicer, but not a "person entitled to enforce" the Note, (2) that AHMSI was the holder of the Note, (3) that AHMSI was the only entity currently dunning the Veals for payment on the Note, or (4) that someone had highjacked the payment stream, and up until the claims objection, the Veals had been duped.

Campbell, on which AHMSI relies, stands for the unremarkable proposition that the bankruptcy court may give evidentiary weight to sworn statements in the debtor's schedules. *Campbell,* 336 B.R. at 436. *Campbell* does not say that a debtor's schedules are necessarily and finally determinative of all facts contained therein. *Id.* This argument may also be an attempt to win an argument not present in this appeal: nothing in the record indicates that the bankruptcy court made any findings of the sort AHMSI asserts based on the contents of the Veals' schedules or plan. Nor is it our role to make such findings.

AHMSI further argues that *Campbell* and *Heath* validate the manner in which it filed its proof of claim, and thus it is entitled to the evidentiary benefits of Rule 3001(f). Rule 3001(f) provides that an otherwise compliant proof of claim is prima facie evidence of the validity and amount of the claim. AHMSI asserts that since its proof of claim met the standards set forth in *Campbell* and *Heath,* the Veals had the burden of production of documents to sustain their objection. As a consequence, according to AHMSI, the Veals' failure to offer any evidence to counter the validity of AHMSI's claim meant that the bankruptcy court could not have erred in overruling the Veals' claim objection.

Neither *Campbell* nor *Heath* dealt with claim objections based on lack of standing. As noted above, standing is an independent threshold issue in all federal civil litigation. *Warth,* 422 U.S. at 498; *County of Kern,* 581 F.3d at 845. As indicated previously, the plaintiff or movant bears the burden of proof with respect to its own standing, *see* note 11 *supra,* and AHMSI did not meet that burden here.

Moreover, under a careful reading of the entirety of Rule 3001, standing is a prerequisite to the evidentiary benefits set forth in Rule 3001(f). On its face, Rule 3001(f) says that a proof of claim is prima facie evidence of the validity and amount of the claim if it is both *executed* and filed in accordance with the Rule, and Rule 3001(b) requires that a claim be executed by the creditor or its authorized agent. Simply put, if a claim is challenged on the basis of standing, the party who filed the proof of claim must show that it is either the creditor or the creditor's authorized agent in order to obtain the benefits of Rule 3001(f). Instead of obviating standing requirements, Rule 3001 conditions the availability of the presumptions contained in Rule 3001(f) upon the creditor first satisfying the standing requirement contained within Rule 3001(b). To hold otherwise would undermine the requirements of both constitutional and prudential standing and the important principles those requirements safeguard.

**18* In sum, the bankruptcy court's order overruling the Veals' claim objection must be vacated and this matter remanded to allow the bankruptcy court to render findings on the disputed factual issues. On remand, the determination of who is the "person entitled to enforce" the Note, and of AHMSI's alleged authorization to service the Veal Loan, may necessitate an evidentiary hearing, but we leave that decision to the bankruptcy court.

IV. CONCLUSION

For all of the foregoing reasons, the bankruptcy court's order granting Wells Fargo's relief from stay motion is REVERSED, and the order overruling the Veals' claim objection is VACATED and REMANDED for further proceedings consistent with this opinion.

End of Document

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-10-1368-DMkMa
KIRAN SARDANA,	Bk. No. 08-12830-CGC
Debtor.	
KIRAN SARDANA,	
Appellant,	
v.	**MEMORANDUM**[1]
BANK OF AMERICA, N.A.,	
Appellee.	

Argued and Submitted on May 13, 2011
at Phoenix, Arizona

Filed - June 7, 2011

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Charles G. Case, Bankruptcy Judge, Presiding

Appearances: Trucly Pham Swartz of John Joseph Volin, P.C. argued for Appellant; Leonard McDonald, Jr. if Tiffany & Bosco, P.A. argued for Appellee

---

Before: DUNN, MARKELL and MANN,[2] Bankruptcy Judges.

---

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, FRAP 32.1, it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Margaret M. Mann, Bankruptcy Judge for the Southern District of California, sitting by designation.

Debtor and appellant Kiran Sardana ("Ms. Sardana") appeals the bankruptcy court's order granting relief from stay to appellee Bank of America, N.A. ("Bank of America"). We VACATE and REMAND to the bankruptcy court to conduct an evidentiary hearing.

FACTS

On September 23, 2008, Ms. Sardana filed her chapter 13[3] bankruptcy petition. On her Schedule A – Real Property, Ms. Sardana listed her residence in Chandler, Arizona ("Property"), as having a value of $249,000 and secured claims against it in the amount of $342,001.12. In her Schedule D, Ms. Sardana stated that Bank of America had undisputed claims secured by the Property in the amounts of $288,619.18 and $53,381.94, respectively. Based on Ms. Sardana's valuation of the Property, Bank of America had a secured claim on its first trust deed ("Trust Deed") in the amount of $249,000, with the balance of $39,619.18 unsecured, and Bank of America's line of credit second lien on the Property, in the amount of $53,381.94, was wholly unsecured.

On April 13, 2010, Bank of America filed a motion for relief from stay ("Motion") requesting an order granting relief from the stay of § 362(a) to permit Bank of America to foreclose its Trust Deed and obtain possession and control of the Property. In the

[3] Unless otherwise specified, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

Motion, Bank of America alleged that Ms. Sardana had signed a promissory note ("Note") secured by the Trust Deed on the property. Copies of the Note and Trust Deed were attached as Exhibits "A" and "B" to the Motion. Bank of America is identified as the "Lender" in both the Note and the Trust Deed. In the Trust Deed, Bank of America, as "Lender," is identified as the "beneficiary under this Security Instrument." Bank of America alleged that it had a secured claim against Ms. Sardana and a secured interest in the Property by virtue of the Note and Trust Deed.

In the Motion, Bank of America further alleged that Ms. Sardana was in default of her Note obligation in that she had failed to pay the postpetition maintenance payments to Bank of America for January through April, 2010, for a total postpetition default of $6,617.02, after a setoff of funds in suspense.

Ms. Sardana filed a response ("Response") to the Motion on or about April 27, 2010. In her Response, Ms. Sardana did not dispute that she was in postpetition default of her payment obligations under the Note and Trust Deed. Her sole defense was her argument that Bank of America did not hold the original Note and thus was not a real party in interest, lacking standing to file the Motion. Ms. Sardana alleged that, as opposed to being the current "owner and holder" of the Note, "Bank of America is only a servicer, a sub-servicer or a default servicer of the debt pursuant to a pooling and servicing agreement with the actual holder. . . ."

The bankruptcy court held a preliminary hearing ("Preliminary Hearing") on the Motion on May 27, 2010. At the

Preliminary Hearing, counsel for Ms. Sardana advised the bankruptcy court that based on a preliminary investigation, it appeared that the Note had been assigned to Fannie Mae, and counsel assumed that Bank of America just retained servicing rights. Counsel for Ms. Sardana requested about 60 days to investigate the situation further and offered that Ms. Sardana was prepared to make an adequate protection payment to Bank of America.

The bankruptcy court noted that,

> There are a number of cases from the Arizona – from the District of Arizona – district judges who say Arizona is not a quote, "Show me the note state." A conclusion with which I happen to agree.

May 27, 2010 Hrg. Tr. at 10: 17-20. However, the bankruptcy court further stated its willingness to grant a short continuance based upon Ms. Sardana making adequate protection payments. The bankruptcy court also stated that during the time before a final hearing, the ownership of the Note could be explored, but its greater concern was who was the beneficiary under the Trust Deed.

Ms. Sardana submitted discovery requests to Bank of America, Fannie Mae and the chapter 13 trustee. In the Appendix to Appellant's Reply Brief, Ms. Sardana included a copy of a Motion to Compel Discovery ("Motion to Compel") and attached exhibits prepared and served on or about August 20, 2010, alleging that Bank of America had not responded to Ms. Sardana's Interrogatories and Requests for Production of Documents. Nothing in the record on appeal informs us of the disposition of the Motion to Compel.

A further hearing ("Final Hearing") on the Motion was held

on September 14, 2010. At the Final Hearing, counsel for Bank of America argued that Bank of America was the originator of the Note and Trust Deed and that they had not been transferred. Bank of America's counsel further reported that Ms. Sardana had made some discovery requests "demanding to see the original note and deed of trust." Bank of America had refused to provide access to the original Note and Trust Deed but had provided copies on three separate occasions. Counsel for Bank of America confirmed that the Trust Deed had been recorded. Bank of America's counsel concluded, "Again, they're parked in this 13 and not making payments. And we'd like relief from stay." September 14, 2010 Hrg. Tr. at 3: 12-13.

Counsel for Ms. Sardana confirmed that Ms. Sardana did not dispute that Bank of America was the original holder of the Note, but argued there was conflicting evidence as to whether Bank of America or Fannie Mae was the current holder of the Note. However, counsel for Ms. Sardana confirmed that there was no record of transfer of the Trust Deed. Ultimately, counsel for Ms. Sardana offered to present evidence that Fannie Mae was the current owner of the Note. The bankruptcy court did not receive that evidence because, "It doesn't sound like there's any dispute as to that." September 14, 2010 Hrg. Tr. at 4: 13-14. Counsel for Ms. Sardana did not dispute that she was behind on her payments for the Property postpetition.[4]

---

[4] In Appellant's Opening Brief, Ms. Sardana states that, "In compliance with the court's order, Appellant made the required adequate payment to Appellee." Appellant's Opening

(continued...)

After hearing the arguments of counsel, the bankruptcy court stated its findings and conclusions orally on the record. After noting that a motion for relief from stay is an "interim proceeding," the bankruptcy court stated that the beneficiary under a recorded deed of trust is entitled to proceed with foreclosure under Arizona state law.

> It is my view that the production of the original note is not necessary. Even if the note has been transferred the right to foreclose the deed of trust, among other people, remains with the beneficiary of record.

September 14, 2010 Hrg. Tr. at 5: 13-16. Since Bank of America was "indisputably the beneficiary of record it seems to me that they are entitled to bring this motion for relief from stay." Id. at 5: 17-19. Accordingly, the bankruptcy court overruled Ms. Sardana's argument that Bank of America was not the real party in interest and lacked standing to prosecute the Motion.

The bankruptcy court then determined that since there was no dispute that Ms. Sardana was behind on her postpetition payments under the Trust Deed obligation, there was "cause" to grant relief from stay. The bankruptcy court concluded by ordering that the stay was lifted.

An order ("Order") granting the Motion was entered by the bankruptcy court on September 20, 2010. Ms. Sardana timely

---

[4](...continued)
Brief at 6. However, there is no evidence in the record before us of any payment(s) made by Ms. Sardana postpetition, except for one payment that Ms. Sardana's husband advised the bankruptcy court at the Preliminary Hearing had been made to Bank of America's counsel. Bank of America's counsel confirmed receipt of one payment in the amount of $1,938.50.

appealed the Order.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (G). We have jurisdiction under 28 U.S.C. § 158.

ISSUE

Did the bankruptcy court err when it determined that Bank of America had standing to pursue the Motion?

STANDARDS OF REVIEW

Standing is a legal issue that we review de novo. Loyd v. Paine Webber, Inc., 208 F.3d 755, 758 (9th Cir. 2000); Kronemyer v. Am. Contractors Indem. Co. (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP 2009). De novo review requires that we consider a matter anew, as if it had not been heard before, and as if no decision had been rendered previously. United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v. Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

DISCUSSION

Although Ms. Sardana divides her argument into two parts, the only issue before us in this appeal is whether Bank of America has standing to file and prosecute the Motion.[5]

I. General Standing Principles

Standing considerations involve both "constitutional

[5] Ms. Sardana's argument that because Bank of America has no standing to prosecute the Motion, the bankruptcy court has no jurisdiction to consider the Motion, is derived from Ms. Sardana's base argument that Bank of America has no standing to begin with.

limitations on federal court jurisdiction and prudential limitations on its exercise." Warth v. Seldin, 422 U.S. 490, 498 (1975). Constitutional standing concerns whether a claimant's stake in a matter is sufficient to create a "case or controversy" to which the federal judicial power under Article III of the Constitution may extend. Id. at 498-99; Pershing Park Villas Homeowners Assoc. v. Unified Pac. Ins. Co., 219 F.3d 895, 899 (9th Cir. 2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992).

In Appellant's Opening Brief, Ms. Sardana admits that Bank of America has constitutional standing because the Note "is payable to Appellee," and Ms. Sardana was in default of her postpetition payment obligations under the Note when the Motion was filed. Appellant's Opening Brief at 10.

However, Ms. Sardana asserts that Bank of America does not have prudential standing because it is not the "real party in interest" to prosecute the Motion. In analyzing prudential standing requirements, the Supreme Court has held:

> "[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. [at 499].

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982). Ms. Sardana argues that "[t]he real party in interest in a Motion for Relief is a party entitled to enforce the right being asserted under applicable substantive law." Appellant's Opening Brief at 11.

The moving party bears the burden of proof to establish its standing to prosecute a motion for relief from stay. See In re

Wilhelm, 407 B.R. 392, 399-400 (Bankr. D. Id. 2009), citing Lujan v. Defenders of Wildlife, 504 U.S. at 561.

II. Standing to File a Motion for Relief from Stay

When a bankruptcy petition is filed, § 362(a) automatically imposes a very broad injunction, the "automatic stay," on collection and enforcement activities against the debtor, the debtor's property, and property of the estate. § 362(a)(3) specifically stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

Under § 362(d), a "party in interest" may request relief from the automatic stay. Section 362(d)(1) authorizes relief from stay "for cause, including the lack of adequate protection of an interest in property of such party in interest."

Because the term "party in interest" is not defined in the Bankruptcy Code, whether a moving party, such as Bank of America, has the status of a party in interest under § 362(d) is a fact intensive matter to be determined on a case-by-case basis, taking into account the claimed interest and the impact of the stay on that interest. In re Kronemyer, 405 B.R. at 919. A "party in interest" can include any party that has a pecuniary interest in the case, a practical stake in the resolution of the matter, or is impacted by the stay." Brown v. Sobczak (In re Sobczak), 369 B.R. 512, 517-18 (9th Cir. BAP 2007).

Motions for relief from the stay are contested matters. See Rules 4001(a) and 9014(a). Rule 9014(c) provides that Rule 7017 is applicable in contested matters. Rule 7017, in turn, incorporates Civil Rule 17. Civil Rule 17(a) provides that "[a]n

action must be prosecuted in the name of the real party in interest. . . ." Given the application of these various rules, proceedings to decide motions for relief from stay are nonetheless very circumscribed matters.

> Given the limited grounds for obtaining a motion for relief from stay, read in conjunction with the expedited schedule for a hearing on the motion, most courts hold that motion for relief from stay hearings should not involve an adjudication on the merits of claims, defenses, or counterclaims, but simply determine whether the creditor has a colorable claim to the property of the estate.

Biggs v. Stovin (In re Luz Int'l), 219 B.R. 837, 842 (9th Cir. BAP 1998) (emphasis added). See, e.g., Johnson v. Righetti (In re Johnson), 756 F.2d 738, 740-41 (9th Cir. 1985).

Cornell University Law School's Legal Information Institute defines a "colorable claim" in a straightforward manner as:

> A plausible legal claim. In other words, a claim strong enough to have a reasonable chance of being valid if the legal basis is generally correct and the facts can be proven in court. The claim need not actually result in a win.

http://topics.law.cornell.edu/wex/colorable_claim.

Resolving a motion for relief from stay involves consideration of the specific grounds for granting relief from stay set forth in § 362(d), i.e., generally whether "cause," including a lack of adequate protection of the moving party's interest, is established; whether the debtor has any equity in the subject property; and/or whether the subject property is necessary to an effective reorganization of the debtor's affairs. It generally is not an appropriate context for a definitive ruling on the merits of the underlying claims between the parties. In re Johnson, 756 F.2d at 740-41 ("Hearings on relief

from the automatic stay are . . . handled in a summary fashion. [citation omitted] The validity of the claim or contract underlying the claim is not litigated during the hearing.").

> [I]t is analogous to a preliminary injunction hearing, requiring a speedy and necessarily cursory determination of the reasonable likelihood that a creditor has a legitimate claim or lien as to a debtor's property. If a court finds that likelihood to exist, this is not a determination of the validity of those claims, but merely a grant of permission from the court allowing that creditor to litigate its substantive claims elsewhere without violating the automatic stay.

Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 33-34 (1st Cir. 1994). See In re Vitreous Steel Prod. Co., 911 F.2d 1223, 1234 (7th Cir. 1990) ("Questions of the validity of liens are not generally at issue in a § 362 hearing, but only whether there is a colorable claim of a lien on property of the estate.") (Emphasis in original.)

The Eleventh Circuit has concluded that "[a] servicer is a party in interest in proceedings involving loans which it services." Greer v. O'Dell (In re O'Dell), 305 F.3d 1297, 1302 (11th Cir. 2002). In her Reply Brief, Ms. Sardana agrees that in some circumstances, loan servicers may have standing to prosecute a motion for relief from stay. Appellant's Reply Brief at 5-6.

III. The Record Before the Bankruptcy Court

In this case, Ms. Sardana raised questions as to Bank of America's ownership of the Note, and indeed established to the bankruptcy court's satisfaction that Fannie Mae owned the Note. However, the bankruptcy court focused on who was the beneficiary under the Trust Deed. The Trust Deed was before the bankruptcy

court as an exhibit to the Motion.[6] The Trust Deed identified Bank of America as the "Lender" and further defined the "Lender" as the beneficiary under the Trust Deed. At the Final Hearing, the bankruptcy court confirmed that the Trust Deed had been recorded properly, and counsel for Ms. Sardana admitted that there had been no change of record to the Trust Deed.

As noted by the bankruptcy court, under Arizona state law, the beneficiary of a trust deed is entitled to proceed with foreclosure. Arizona Revised Statutes ("A.R.S") § 33-807, in relevant part, provides:

> A. . . . At the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property in which event chapter 6 of this title governs the proceedings. The beneficiary or trustee shall constitute the proper and complete party plaintiff in any action to foreclose a deed of trust. . . .
> B. The trustee or beneficiary may file and maintain an action to foreclose a deed of trust at any time before the trust property has been sold under the power of sale. . . .

(Emphasis added.) Accordingly, under Arizona law, a trust deed beneficiary, whether it is the holder of the related promissory note or the agent for such holder, along with the trustee under the deed of trust, is generally a party with standing to prosecute a foreclosure action.

In addition to, and as a complement to, the statutory authority of the Trust Deed beneficiary under A.R.S. § 33-807 to

---

[6] Unauthenticated copies of the Note and Trust Deed were attached as exhibits to the Motion. On remand, for their admission as evidence, copies or originals of the Note and Trust Deed will need to be properly authenticated as required by the Federal Rules of Evidence. See Rule 901, Federal Rules of Evidence.

initiate a foreclosure action with respect to the Property, the Trust Deed by its terms provides that the Lender/beneficiary has authority to initiate a nonjudicial foreclosure sale in the event of Ms. Sardana's default of her obligations secured by the Trust Deed.[7]

---

[7] Section 22 of the Trust Deed provides, in relevant part, as follows:

> Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in the Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) the date, not less than 30 days from the date the notice is given to the Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by the Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and cost of title evidence.
>
> If Lender invokes the power of sale, Lender shall give written notice to Trustee of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee shall record a notice of sale in each county in which any part of the Property is located and shall mail copies of the notice as prescribed by applicable law to Borrower and to the other persons prescribed by Applicable Law. After the time required by applicable law and after publication and posting of

(continued...)

But that is not all that is required under Arizona law in this context. A.R.S. § 33-801(1) defines "Beneficiary" under a trust deed as "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest." A.R.S. § 33-817 further provides that, "The transfer of any contract or contracts secured by a trust deed shall operate as a transfer of the security for such contract or contracts." Accordingly, if the holder of the beneficial interest in the Note changes, even if the named beneficiary under the Trust Deed remains the same, the beneficiary's right to enforce the Note obligation and foreclose the Trust Deed must be based on some further agreement with the new owner or holder of the Note. See Hill v. Favour, 52 Ariz 561, 568, 84 P.2d 575, 578 (1938):

> The law seems to be well settled that the mortgage is a mere incident to the debt and that its transfer or assignment does not transfer or assign the debt or the note. The mortgage goes with the note. If the latter is assigned, the mortgage automatically goes along with the assignment or transfer.

Ms. Sardana relies on Arizona UCC law, particularly on A.R.S. § 47-3301, to argue that the "person entitled to enforce" instruments, such as the Note, under Arizona law is the holder of

---

[7](...continued)
the notice of sale, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder for cash at the time and place designated in the notice of sale. Trustee may postpone sale of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

the Note.[8] See Appellant's Opening Brief at 11. However, A.R.S. § 47-3301 provides:

> "Person entitled to enforce" an instrument means the holder of an instrument, a nonholder in possession of the instrument who has the rights of a holder or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to § 47-3309 or § 47-3418, subsection D. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument. (Emphasis added.)

Accordingly, based on the highlighted language of § 47-3301 alone, the statute does not say what Ms. Sardana wants it to say: Under Arizona law, a party entitled to enforce the Note obligation is not necessarily required to be the "holder" of the Note. Indeed, the Arizona district court rejected Ms. Sardana's argument, albeit in a different context, in Mansour v. Cal-Western Reconveyance Corp., 318 F. Supp. 2d 1178, 1181 (D. Ariz. 2009), citing A.R.S. § 47-3301. In fact, as noted by the bankruptcy court at the Preliminary Hearing, there are a number of decisions from federal district courts in Arizona determining that Arizona is not a "show me the note" state. See, e.g., Levine v. Downey Sav. & Loan F.A., 2009 WL 4282471 (D.Ariz. Nov.

---

[8] Ms. Sardana's argument (see Appellant's Opening Brief at 13) that because she was prepared to present evidence that Fannie Mae had purchased the Note, the "power of sale" may have been exercised and the Trust Deed beneficiary changed for purposes of § 33-807(b), is disingenuous. No suggestion was made by either party at the Preliminary Hearing or the Final Hearing that a nonjudicial foreclosure sale of the Property had occurred. Indeed, it is logical to assume from this record that Ms. Sardana opposed the Motion in order to prevent a nonjudicial foreclosure sale of the Property from taking place.

25, 2009); Garcia v. GMAC Mortgage, LLC, 2009 WL 2782791 (Aug. 31, 2009) (unpublished); Diessner v. Mortgage Elec. Registration Systems, 618 F. Supp. 2d 1184, 1187 and n.16 (D. Ariz. 2009) (citing A.R.S. § 33-807); and Mansour v. Cal-Western Reconveyance Corp., 318 F. Supp. 2d at 1181.

Even so, as counsel for Bank of America admitted at oral argument, to be a "real party in interest" for standing purposes to prosecute a motion for relief from stay, the moving party must have a right to enforce the subject obligation under Arizona law. See, e.g., BAC Home Loans Servicing, L.P. v. Zitta (In re Zitta), 2011 WL 677289 (Bankr. D. Ariz. Jan. 25, 2011); In re Weisband, 427 B.R. 13 (Bankr. D. Ariz. 2010); and In re Hill, 2009 WL 1956174 (Bankr. D. Ariz. July 6, 2009). With Ms. Sardana having made an offer of proof, which the bankruptcy court apparently accepted but disregarded, that the Note had been assigned to Fannie Mae, Bank of America needed to establish that it retained the right to enforce the Note obligation in order to establish its standing to prosecute the Motion. It did not meet its burden of proof to make that showing. Accordingly, we determine that it is appropriate to vacate the Order and remand to the bankruptcy court to conduct an evidentiary hearing on the issue of Bank of America's standing as a real party in interest to prosecute the Motion and on such other matters as the bankruptcy court determines to be appropriate.

CONCLUSION

For the foregoing reasons, we VACATE the Order and REMAND to the bankruptcy court to conduct an evidentiary hearing.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-10-1422-DMkMa
DAVID THOMAS MATSON AND DEBORAH ANN MATSON,	Bk. No. 09-21270-CGC
Debtors.	
DAVID THOMAS MATSON; DEBORAH ANN MATSON,	
Appellants,	
v.	**M E M O R A N D U M**[1]
CITIBANK, N.A.,	
Appellee.	

Argued and Submitted on May 13, 2011
at Phoenix, Arizona

Filed - June 7, 2011

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Charles G. Case, II, Bankruptcy Judge, Presiding

Appearances: Trucly Pham Swartz of John Joseph Volin, P.C. argued for the Appellants
Leonard McDonald, Jr. of Tiffany & Bosco, P.A. argued for the Appellee

---

Before: DUNN, MARKELL and MANN,[2] Bankruptcy Judges.

---

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Margaret M. Mann, Bankruptcy Judge for the Southern District of California, sitting by designation.

The debtors, David and Deborah Matson, appeal the bankruptcy court's decision to grant Citibank, N.A. ("Citibank") relief from stay as to their home in Gilbert, Arizona.[3] On appeal, the debtors contend that the bankruptcy court abused its discretion in granting Citibank relief from stay because Citibank did not have standing to request such relief as it was not a real party in interest. We AFFIRM.

FACTS

Two years before filing for bankruptcy, the debtors purchased their home, executing a promissory note, dated May 14, 2007, secured by a trust deed in favor of Ampro Mortgage ("Ampro"), a division of United Financial Mortgage Corp. ("United Financial"). The trust deed referenced the promissory note, stating that the "'Note' meant the promissory note signed by [the debtors] and dated May 14, 2007."

The trust deed named Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary thereunder and as the nominee for Ampro and its successors and assigns.

The trust deed provided that MERS, as the beneficiary,

> holds only legal title to the interests granted by [the debtors] in the trust deed, but, if necessary to comply with law or custom, MERS (as nominee for [Ampro and its] successors and assigns) has the right: to exercise any or all of those interests, including but not limited to, the right to foreclose and sell the

---

[3] Unless otherwise specified, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

> Property; and to take any action required of [Ampro] including, but not limited to, releasing and canceling this [trust deed].

(Emphasis added.)

The debtors filed their chapter 13 bankruptcy petition on August 31, 2009. They scheduled their home as having a value of $178,000, and as having a secured claim of $247,431.65 against it. The debtors listed in their schedules and chapter 13 plan HomEq Servicing Corp. as the creditor secured by the sole trust deed against their home.

Barclays Capital Real Estate, Inc., d/b/a HomEq (hereinafter "HomEq"), filed a motion for relief from stay ("initial relief from stay motion") on November 16, 2009.[4] HomEq contended in the initial relief from stay motion that the debtors defaulted on their mortgage payments for September through November 2009, totaling $6,519.60, and sought to foreclose its trust deed. HomEq provided copies of the promissory note and the trust deed as exhibits to the initial relief from stay motion.

The debtors filed a response and a motion to dismiss the initial relief from stay motion. They denied that they had defaulted on the mortgage payments. The debtors further contended that HomEq lacked standing to request relief from stay because it was not a real party in interest.[5] Specifically, the

---

[4] Neither the debtors nor Citibank provided copies of the schedules (except Schedule C included in the initial relief from stay motion) or the chapter 13 plan. We obtained them from the bankruptcy court main case docket.

[5] No hearing was set on the initial relief from stay motion or on the debtors' motion to dismiss.

debtors argued that HomEq did not own and/or hold the promissory note by endorsement, as it did not provide evidence of a valid endorsement of the promissory note in the initial relief from stay motion. Moreover, the debtors alleged, a trustee of a residential mortgage-backed securitized trust actually held and/or owned the promissory note and trust deed. HomEq merely was a servicer, sub-servicer or default servicer.

Citibank filed an amended motion for relief from stay ("amended relief from stay motion") on July 9, 2010,[6] alleging that the debtors defaulted on their mortgage payments for September 2009 through June 2010, totaling $23,872.20. Citibank further asserted that it was the successor trustee for the holders of MASTR Adjustable Mortgage Trust 2007-HF2 in a securitization transaction under a pooling and servicing agreement, dated July 1, 2007. Citibank provided as exhibits copies of the promissory note and the trust deed, the same as those provided in the initial relief from stay motion. It also provided a copy of the assignment of the trust deed ("assignment"), dated June 28, 2010.[7] The assignment specifically provided:

> For good and valuable consideration, the sufficiency of which is hereby acknowledged, [MERS], AS NOMINEE FOR AMPRO MORTGAGE[,] A DIVISION OF UNITED FINANCIAL MORTGAGE CORP., ITS SUCCESSORS AND ASSIGNS . . . By

---

[6] Neither the initial relief from stay motion nor the amended relief from stay motion cited § 362(d) as the basis for relief from stay. The order granting Citibank relief from stay also did not cite § 362(d) as the basis for relief from stay.

[7] There appears to be no indication that the assignment was recorded.

> these presents does convey, grant, bargain, sell, assign, transfer and set over to: CITIBANK, N.A., AS SUCCESSOR TRUSTEE FOR THE HOLDERS OF MASTR ADJUSTABLE MORTGAGES TRUST 2007-HF2 IN A SECURITIZATION TRANSACTION PURSUANT TO POOLING AND SERVICING AGREEMENT, DATED AS OF JULY 1, 2007, C/O HOMEQ SERVICING . . . The described Deed of Trust, <u>together with the certain note(s) described therein</u> with all interest, all liens, and any rights due or to become due thereon.

(Emphasis added.) A Noriko Colston (titled as the assistant secretary) signed the assignment on behalf of MERS.

The debtors filed a response to the amended relief from stay motion. They did not dispute that they defaulted on their mortgage payments, but claimed they were prepared to make adequate protection payments.

The debtors challenged Citibank's standing as a party in interest. They argued that Citibank did not hold the promissory note, but that, according to HomEq, U.S. Bank actually was the trustee for the holders of the promissory note. U.S. Bank, the debtors asserted, thus was the only party with the right to the mortgage payments and the authority to transfer the promissory note. Moreover, Citibank did not hold or own the promissory note by endorsement, delivery and acceptance. The debtors further contended that the assignment was defective because there was no evidence that the assignee had anything to assign or had the authority to make the assignment. Unless Citibank held the promissory note, it had no rights or interests under the trust deed. The debtors also contended that the assignment did not transfer any interest in the promissory note.

Before the October 19, 2010 hearing on the amended relief

from stay motion,[8] Citibank filed as an additional exhibit a copy of the promissory note and, with it, an untitled document and an allonge to the promissory note.[9] The untitled document (presumably an allonge) bore the following language:

> PAY TO THE ORDER OF UBS REAL ESTATE SECURITIES, INC. WITHOUT RECOURSE BY: AMPRO MORTGAGE, A DIVISION OF UNITED FINANCIAL MORTGAGE CORP. ("HomEq allonge").

The HomEq allonge was signed by the assistant vice president with the last name of Igtanloc. The assistant vice president's first name was illegible.

The allonge was not dated but it referenced the debtors, the address of their home and the July 1, 2007 date of the securitization transaction under the pooling and servicing agreement. The allonge bore the following language:

> PAY TO THE ORDER OF: Citibank, N.A., as Successor Trustee for the holders of MASTR Adjustable Mortgages Trust 2007-HF2 in a Securitization transaction pursuant to Pooling and Servicing Agreement, dated as of July 1, 2007 (without recourse) BY: UBS Real Estate Securities, Inc. By Barclays Capital Real Estate Inc., DBA HomEq Servicing its [attorney] in fact ("Citibank allonge").

Colston signed the Citibank allonge on behalf of HomEq.

On the day of the hearing, the debtors filed exhibits in support of their response. The debtors' exhibits consisted of a report titled, "Forensic Lender Discovery, Stage One: Loan Securitization Audit Report" ("report"),[10] and a letter, dated

---

[8] The hearing on the amended relief from stay motion was not set as an evidentiary hearing.

[9] HomEq provided neither the untitled document nor the allonge in the initial relief from stay motion.

[10] Forensic Professionals Group USA, Inc. ("FPG-USA") is a (continued...)

October 27, 2009, from HomEq in response to an inquiry from the debtors ("letter").

The report pointed out that the promissory note had no endorsements on its face. The report also indicated that the assignment and the Citibank allonge had been signed by a robo signor.

The report stated that there was no record of Ampro being a corporation, trade name or limited liability company. The report noted that the assignment had been executed by an entity that was no longer in existence on the date that the assignment was executed.

The report further indicated that, according to MERS, Ocwen, not HomEq, was the official loan servicer, and that HomEq "was not a stated loan servicer . . . . [but] actually a collection company." It also indicated that MERS had not shown that it was the current owner of a beneficial interest in the promissory note, ever held the promissory note, or was entitled to enforce the promissory note.

With respect to the letter, HomEq sent it in response to the debtors' request for the contact information of the "trustee/investor" of their loan. HomEq informed the debtors that it was responsible for the day-to-day servicing actions and decisions concerning their loan. HomEq nonetheless listed U.S.

---

[10](...continued)
company that investigates foreclosure documentation and the legitimacy of claims being made by the party seeking foreclosure. FPG-USA provides "highly qualified expert forensic mortgage analysis, discovery, investigation and reporting." Richard Kahn, principal of FPG-USA, apparently issued the report.

Bank, with a St. Paul, Minnesota address, as the contact for the "trustee/investor."

At the hearing, the debtors questioned the validity of the Citibank allonge, pointing out that Colston was "widely known as a robo signer." Tr. of October 19, 2010 hr'g, 2:25, 3:1. They also argued that, though it executed the HomEq allonge, Ampro was not even an "existing corporation," as indicated in the report. Tr. of October 19, 2010 hr'g, 6:11.

The debtors argued that "[HomEq] never had an interest or benefit to the note in order to have any right to assign the [promissory] note to Citibank." Tr. of October 19, 2010 hr'g, 3:3-5. They further contended that the report revealed numerous defects in the assignment of the promissory note. They also claimed that U.S. Bank, not Citibank, held the promissory note.

The bankruptcy court acknowledged the debtors' concerns regarding the robo signor and the Citibank allonge and the HomEq allonge. It also acknowledged the issue raised by the debtors as to whether U.S. Bank was involved in the loan. The bankruptcy court doubted whether that issue was "really critical," however, given that the letter was dated in 2009, almost a year before the hearing. Tr. of October 19, 2010 hr'g, 4:13.

The bankruptcy court asserted that the main issue before it boiled down to whether the stay should remain in place as to the debtors' home. The bankruptcy court found that there was "no argument here that the Debtors [had] not made any payments for over a year." Tr. of October 19, 2010 hr'g, 4:22-23. It further found that Citibank had standing to request relief from stay; the bankruptcy court determined that Citibank presented colorable

evidence showing that it was "the appropriate holder of both the note and the beneficiary under the deed of trust." Tr. of October 19, 2010 hr'g, 4:24-25.

The bankruptcy court believed that the question of whether Citibank could conduct a trustee's sale should not be addressed in a summary proceeding, such as a relief from stay motion. The issue instead must be addressed in a plenary proceeding, such as an adversary proceeding.

The bankruptcy court opined that the purpose of a relief from stay proceeding simply was to determine whether "to keep the stay in place, condition the stay or remove the stay" with no "further relief from that." Tr. of October 19, 2010 hr'g, 6:19-21. "[B]eyond the basics of showing that [Citibank and/or HomEq] have a colorable prima facie case that they're the ones who hold all of this, then all of the rest of these issues where you come back and say, well, you know, a non-existent corporation is signing it, there's somebody who hasn't reviewed the documents, all the rest of that stuff can be fully explored in a court of competent jurisdiction in the appropriate proceeding. And this is not it." Tr. of October 19, 2010 hr'g, 6:22-25, 7:1-4. The bankruptcy court stressed that "[t]his [was] not the place to litigate these issues, so long as there [was] a colorable showing of the transfers, which in this case there [was]." Tr. of October 19, 2010 hr'g, 5:16-18.

The bankruptcy court granted Citibank relief from stay, effective November 18, 2010. The bankruptcy court entered its order granting Citibank relief from stay on October 28, 2010. The debtors timely appealed.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C. § 158.

ISSUE

Did the bankruptcy court err in determining that Citibank had standing to prosecute the amended relief from stay motion?

STANDARDS OF REVIEW

"Standing is a question of law that we review de novo." Mayfield v. United States, 599 F.3d 964, 970 (9th Cir. 2010). Under de novo review, we consider the matter anew as if no decision had been rendered before. Dawson v. Marshall, 561 F.3d 930, 933 (9th Cir. 2009).

We review the bankruptcy court's decision to grant relief from stay for an abuse of discretion. Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1084 n.9 (9th Cir. 2000)(en banc). We follow a two-part test to determine objectively whether the bankruptcy court abused its discretion. United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009). First, we "determine de novo whether the bankruptcy court identified the correct legal rule to apply to the relief requested." Id. Second, we examine the bankruptcy court's factual findings under the clearly erroneous standard. Id. at 1262 & n.20. We must affirm the bankruptcy court's factual findings unless those findings are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may

be drawn from the facts in the record.'" Id. If we determine that the bankruptcy court erred under either part of the test, we must reverse for an abuse of discretion. Id.

We may affirm on any ground supported by the record. Shanks v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

DISCUSSION

The debtors issue the same challenge on appeal as they did before the bankruptcy court: They argue that Citibank had no standing to pursue the amended relief from stay motion because it was not a real party in interest, as Citibank neither owned nor held the promissory note.[11]

A. Standing generally

Essentially, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975). Standing inquiries involve "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." Id.

Constitutional standing concerns whether the plaintiff's stake in a matter is sufficient "to make out a concrete 'case' or 'controversy' to which the federal judicial power may extend

[11] The debtors also argue that because Citibank lacked standing to pursue the amended relief from stay motion, the bankruptcy court lacked jurisdiction to consider the amended relief from stay motion. But their jurisdiction argument essentially recapitulates their standing argument.

under Article III" of the Constitution. Pershing Park Villas Homeowners Assoc. v. United Pac. Ins. Co., 219 F.3d 895, 899 (9th Cir. 2000).

Prudential standing, on the other hand, concerns "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." Elk Grove United School Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984))(internal quotation marks omitted).

At the outset, the debtors concede that Citibank has constitutional standing. Appellants' Opening Brief at 11. They contend, however, that Citibank did not have prudential standing to seek relief from stay because it was not the real party in interest. They assert that "the real party in interest in a Motion for Relief [from Stay] is a party entitled to enforce the right being asserted under applicable, substantive law." Appellants' Opening Brief at 12.

As we explain below, Citibank has shown a colorable claim sufficient to qualify it as a party in interest with standing to seek relief from stay.

B. Standing to bring motion for relief from stay

When a debtor files for bankruptcy, § 362(a) automatically stays any and all collection and enforcement activities against the debtor, his or her property and the property of the estate.

See 11 U.S.C. § 362(a). A "party in interest" may request relief from the stay under § 362(d). The bankruptcy court may grant relief from the stay under § 362(d)(1), "for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1).

Motions for relief from stay are contested matters. See Rules 4001(a) and 9014(a). Because they are contested matters, motions for relief from stay must be prosecuted in the name of the real party in interest. See Rules 9014(c) and 7017 and Civil Rule 17.

The Bankruptcy Code does not define the term "party in interest." Kronemyer v. Am. Contractors Indemnity Co. (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP 2009). Status as a party in interest under § 362(d) thus is determined on a case-by-case basis, "with reference to the interest asserted and how [that] interest is affected by the automatic stay." Id. (quoting In re Woodberry, 383 B.R. 373, 378 (Bankr. D.S.C. 2008))(internal quotation marks omitted). Any party who will be impacted in a significant way by the case or has a pecuniary interest in the case or a practical stake in the outcome of a case qualifies as a "party in interest." Brown v. Sobczak (In re Sobczak), 369 B.R. 512, 518 (9th Cir. BAP 2007)(citing In re Cowan, 235 B.R. 912, 915 (Bankr. W.D. Mo. 1999)).

Hearings on motions for relief from stay are intended to be summary proceedings. Biggs v. Stovin (In re Luz Int'l, Ltd.), 219 B.R. 837, 842 (9th Cir. BAP 1998)(citing Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 31 (1st Cir. 1994)). Section 362(e) requires the bankruptcy court to hold a preliminary hearing

within thirty days from the date the motion for relief from stay is filed, or the stay is terminated. Luz, 219 B.R. at 841. See also Grella, 42 F.3d at 31. The bankruptcy court must hold a final hearing on the motion for relief from stay within thirty days following the preliminary hearing. Luz, 219 B.R. at 841. See also Grella, 42 F.3d at 31.

At a hearing on a motion for relief from stay, a bankruptcy court generally is called upon only to decide a limited set of issues: the adequacy of protection for the creditor, the debtor's equity in the property and the property's necessity to an effective reorganization. First Fed. Bank of California v. Robbins (In re Robbins), 310 B.R. 626, 631 (9th Cir. BAP 2004). See also Grella, 42 F.3d at 31 ("That [§ 362(d)] sets forth certain grounds for relief and no others indicates Congress'[s] intent that the issues decided by a bankruptcy court on a creditor's motion to lift the stay be limited to these matters."). A motion for relief from stay is a contested matter, not an adversary proceeding. Grella, 42 F.3d at 33 (citing Rules 4001 and 9014). "To allow a relief from stay hearing to become any more extensive than a quick determination of whether a creditor has a colorable claim would turn the hearing into a fullscale adversary lawsuit . . . and would be inconsistent with this procedural scheme." Id. (citation omitted). Moreover, a bankruptcy court is required under § 362(e)(1) to act quickly in resolving motions for relief from stay.[12] Luz, 219 B.R. at 842

[12] Section 362(e)(1) provides:

(continued...)

(citing Grella, 42 F.3d at 31).

> Given the limited grounds for obtaining a motion for relief from stay, read in conjunction with the expedited schedule for a hearing on the motion, most courts hold that motion for relief from stay hearings should not involve an adjudication of the merits of claims, defenses, or counterclaims, but simply determine whether the creditor has a colorable claim to the property of the estate.

Luz, 219 B.R. at 842. (Emphasis added.) See, e.g., Johnson v. Righetti (In re Johnson), 756 F.2d 738, 740 (9th Cir. 1985)("Stay litigation is limited to issues of the lack of adequate protection, the debtor's equity in the property, and the necessity of the property to an effective reorganization. . . . The validity of the claim or contract underlying the claim is not litigated during the hearing."); In re Vitreous Steel Prods. Co., 911 F.2d 1223, 1234 (7th Cir. 1990)("Questions of the validity of liens are not generally at issue in a § 362(d) hearing, but only whether there is a colorable claim of a lien on property of the

---

[12](...continued)
Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. . . . If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

estate.")(Emphasis in original.)

A hearing on a motion for relief from stay is "analogous to a preliminary injunction hearing, requiring a speedy and necessarily cursory determination of the reasonable likelihood that a creditor has a legitimate claim or lien as to a debtor's property." Grella, 42 F.3d at 34. See also Luz, 219 B.R. at 842. A bankruptcy court's decision to lift the stay "is not an adjudication of the validity or avoidability of the claim, but only a determination that the creditor's claim is sufficiently plausible to allow its prosecution elsewhere." Grella, 42 F.3d at 34 (emphasis added). In other words, the bankruptcy court has discretion to grant or deny relief from stay as long as the moving party has presented a colorable claim to the property at issue. See Luz, 219 B.R. at 842. A colorable claim is one "that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law)." Black's Law Dictionary 282 (9th ed. 2009).

C. Citibank as the real party in interest[13]

[13] The debtors also challenge the bankruptcy court's determination on evidentiary grounds. They contend that Citibank did not provide "competent, admissible evidence" demonstrating that it was entitled to enforce the promissory note. Appellants' Opening Brief at 15. According to the debtors, Citibank did not provide an adequate foundation as to the admissibility of its evidence: it did not authenticate any of its exhibits. Moreover, although the debtors submitted evidence that "cast doubt on [Citibank's]" standing, the bankruptcy court did not consider their exhibits with as much weight as those submitted by

(continued...)

The debtors argue that Citibank is not a real party in interest because it is not entitled to enforce the promissory note, as Citibank never owned or held it. According to the debtors, under Arizona Revised Statute ("A.R.S.") § 47-3301,[14]

---

[13](...continued)
Citibank.

The debtors did not challenge the admissibility of Citibank's evidence at the hearing. "The failure of a litigant to request a ruling is a waiver of the right to raise any issue before [an appellate court] concerning admissibility." Fenton v. Freedman, 748 F.2d 1358, 1360 (9th Cir. 1984). To allow a party to challenge the admissibility of evidence on appeal, without advising the trial court of its failure to rule, would give the appellant "an unfair advantage." Id. "By remaining silent in the trial court, [the litigant] denies his opponent the opportunity to lay a better foundation or to present other competent evidence. The trial court is also deprived of the opportunity to explain its ruling or to correct its error." Id. Because the debtors never objected to the admissibility of Citibank's evidence, we will not consider the debtors' argument. (Notably, the debtors did not authenticate any of the exhibits they submitted in support of their response.)

The debtors also do not demonstrate how the bankruptcy court did not weigh their evidence and Citibank's evidence appropriately. At the hearing, the bankruptcy court explicitly informed the debtors that it "[understood] the arguments that [were] made by the Debtors' counsel with regard to the so-called robo signer issue and also with regard to the question of the fact that we're dealing with allonges rather than endorsements on the face of the note. And also this issue of whether or not U.S. Bank is involved." Tr. of October 19, 2010 hr'g, 4:7-11. There is no indication, as revealed in these statements, that the bankruptcy court favored or gave more deference to Citibank's evidence than the debtors' evidence.

[14] A.R.S. 47-3301 provides:

> "Person entitled to enforce" an instrument means the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder or a
>
> (continued...)

only a holder of the instrument is entitled to enforce it. Appellants' Opening Brief at 12. Under A.R.S. § 47-1201(B)(21)(a), a holder is one "in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."

The debtors assert that Citibank never held or possessed the promissory note because it had not been transferred to MASTR Adjustable Mortgage Trust 2007-HF2 consistent with the provisions of the pooling and servicing agreement. The pooling and servicing agreement required that mortgage loans be transferred concurrently with the execution of the pooling and servicing agreement or by the cut-off date, which was July 1, 2007. Under New York law, which governs MASTR Adjustable Mortgage Trust 2007-HF2, "if the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust is void." Appellants' Opening Brief at 13. However, the debtors point out, the assignment was dated June 28, 2010, and recorded July 8, 2010 – after the cut-off date specifically set forth in the pooling and servicing agreement. MASTR Adjustable Mortgage Trust 2007-HF2 thus never effectively acquired the promissory note because the assignment occurred in violation of the pooling and servicing

---

[14](...continued)
person not in possession of the instrument who is entitled to enforce the instrument pursuant to § 47-3309 or § 47-3418, subsection D. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

agreement (i.e., the transfer occurred after the cut-off date).

The debtors' general argument, however, is problematic in that A.R.S. § 47-3301 does not say what the debtors wish it to say. The debtors' interpretation has been rejected in Mansour v. Cal-Western Reconveyance Corp., 618 F.Supp.2d 1178, 1181 (D. Ariz. 2009), where the district court pointed out that A.R.S. § 47-3301 specifically stated that a person not in possession of the instrument still is entitled to enforce the instrument. The debtors moreover did not raise this argument before the bankruptcy court. See Cold Mountain v. Garber, 375 F.3d 884, 891 (9th Cir. 2004)("In general, we do not consider an issue raised for the first time on appeal.").

Arizona is not a "show me the note" state, as emphasized by A.R.S. § 33-807. Diessner v. Mortgage Elec. Registration Sys., 618 F.Supp.2d 1184, 1187 (D. Ariz. 2009); Mansour, 618 F.Supp.2d at 1181; Garcia v. GMAC Mortgage, LLC, 2009 WL 2782791 (D. Ariz. 2009); Levine v. Downey Sav. & Loan, 2009 WL 4282471 (D. Ariz. 2009). A.R.S. § 33-807(A) provides, in relevant part:

> At the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property in which event chapter 6 of this title governs the proceedings. The beneficiary or trustee shall constitute the proper and complete party plaintiff in any action to foreclose a deed of trust . . . .

A.R.S. § 33-807(B) also provides, in relevant part:

> The trustee or beneficiary may file and maintain an action to foreclose a deed of trust at any time before the trust property has been sold under the power of sale . . . .

The debtors seek a definitive determination as to the substance of Citibank's colorable claim, which, as we explained

earlier, is not appropriate within the limited context of a motion for relief from stay, given its summary nature.

At the hearing before the bankruptcy court, the debtors questioned whether MERS properly transferred the promissory note to Citibank, challenging the assignment on two grounds. Although the debtors do not raise this argument here, we address it for the sake of thoroughness.

A party moving for relief from stay "need only present evidence sufficient to present a colorable claim – not every piece of evidence that would be required to prove the right to foreclosure under a state law judicial foreclosure proceeding is necessary." In re Weisband, 427 B.R. 13, 22 (Bankr. D. Ariz. 2010)(citation omitted). Not every party moving for relief thus "has to provide a complete chain of a note's assignment to obtain relief." Id.

The debtors first contend that MERS had nothing to assign or had no authority to make the assignment. Under the trust deed, MERS had legal title to the interests granted by the debtors in the trust deed, and it had the right to exercise any or all of those interests, including the right to foreclose. Such rights conceivably could be transferred to another party.

The debtors next argue that the purported assignment was incomplete in that MERS did not transfer the promissory note. Contrary to the debtors' assertion, however, MERS did transfer the promissory note to Citibank under the assignment. The assignment explicitly states that MERS transferred to Citibank "the described Deed of Trust, together with the certain note(s) described therein . . . ." The trust deed referenced the

promissory note, describing it to mean the "Note" signed by the debtors and dated May 14, 2007.

Admittedly, there appears to be a gap in the transfers memorialized in the HomEq allonge and the Citibank allonge. But we agree with the bankruptcy court that Citibank provided, through the assignment, "a colorable showing of the transfers" sufficient to demonstrate that it had standing to pursue relief from stay. (Emphasis added.) In other words, Citibank has provided enough evidence to show that its claim is sufficiently plausible to allow Citibank to pursue it.

Moreover, as the bankruptcy court pointed out, the issue of whether the transfer was valid is not appropriate for disposition in a hearing on a motion for relief from stay. Deciding such an issue would go beyond the intended limited scope of a hearing on a motion for relief from stay.

CONCLUSION

Citibank has provided evidence to show a colorable claim, sufficient to establish standing to seek relief from stay against the debtors. We AFFIRM.

MUSINGS ON LENDERS' STANDING ISSUES

Randy Nussbaum
Nussbaum, Gillis & Dinner, P.C.
14500 N. Northsight Blvd.
Suite 116
Scottsdale, Arizona 85260

819331/999-71

I. INTRODUCTION

The unprecedented collapse of real estate values in the southwest United States has led to a record number of defaults by homeowners for a variety of reasons, including the owner's loss of his job, the inability to keep borrowing against the home as its value plummeted, or because the home was so grossly upside down that it no longer made business sense to keep it. Eventually, lenders foreclose if not paid and if the borrower does not cure the default, home ownership is at risk. If the borrower does not have the financial wherewithal to cure the default and/or to keep the loan current in the future, that individual will need to seek alternative housing once the property is foreclosed. In many cases, doing so may be difficult, if not impossible, because of lack of funding and credit. Or, the homeowners may be desirous of trying to remain in the home without having to make payments for the simple reason that doing so may make good economic sense.

Traditionally, if the homeowner believed he had the financial wherewithal to eventually cure the house default and keep payments current post-petition, the homeowner could seek Chapter 13 bankruptcy protection. Courts have historically been generous in providing those individuals ample opportunity to cure the default on their mortgages, but required the debtors to commence making timely post-petition house payments as a condition of that leniency. Most lenders eventually accepted the viability of this strategy by debtors and, as long as the pre-petition default was paid over a reasonable period of time as determined by the Judge, would acquiesce to such strategy.

Unfortunately, because of the dramatic drop in home values, the majority of defaulting borrowers do not have equity in their homes and since they cannot force a modification of a first mortgage, have no incentive to either cure any default through a Chapter 13 Plan or even keep

the payments current post-petition. This left such a borrower with few bankruptcy options until the advent of a recent strategy which has created a fair amount of controversy among bankruptcy appellate courts throughout the country. That strategy, in simplest terms, consists of requiring the party moving for stay relief to prove that such party had standing and/or is the real party-in-interest.

II. SO HOW DOES IT WORK?

No case is exactly alike, but as a general proposition, a debtor facing a pressing foreclosure date files a Chapter 13 Petition shortly before that sale. To maximize the benefit of this strategy, that filing normally does not occur until a day or so before the sale since waiting affords the debtor additional time to remain in the house without having to pay the lender.

The lender will eventually move for stay relief and file a Proof of Claim with the stay relief motivated by the lender's need to procure permission to complete the trustee's sale. Without stay relief, the stay would remain in effect for an extended period of time, thereby providing the borrower with an additional period of time to reside in the house without making any payments.

Once the lender moves for stay relief, the debtor then responds that the party requesting relief is not the real party in interest and has not properly demonstrated how it became the owner of the note and deed of trust. Because of the magnitude of properties in default and the sheer number of loans which have been assigned in the residential loan marketplace, a high likelihood exists that the lender bringing the stay lift motion is not the original party which extended financing to the debtor. If the lender has not properly documented the assignments and if the debtor's efforts are successful, the stay cannot be lifted. Under those circumstances, unless the

lender can correct the procedural deficiency in its motion, the borrower can remain in the property for an extended period of time without having to make any payments on the loan.

In many instances, it may have taken the lender six months to a year to schedule a trustee's sale date. Since the filing of a Chapter 13 itself could very well delay the proceedings for a few months before the lender actually prepares and proceeds with the stay lift motion, and it could easily take the lender another six months to a year to correct any procedural deficiencies with its paperwork if challenged by the debtor, an enterprising debtor can remain in his home for two years, if not longer. He can do so without making any payments by simply paying an industrious attorney fees for a Chapter 13 or by doing the same thing on his own.

So why do some parties find all of this objectionable?

III. IS THIS PRACTICE OBJECTIONABLE?

One would have to be naive to believe that residential lenders are not partially at fault by unequivocally irresponsible lending practices during 2004 through 2007. Lenders were more than willing to extend negative amortization loans, stated income loans, and 100% financing to individuals whose financial background was sketchy at best. The lenders did so for a number of understandable reasons, including: a) fees generated by originating as many mortgages as possible, b) because of a belief that residential real estate values could only keep going up, and c) the incredible amount of competition in the marketplace.

Lenders did everything in their power to convince consumers to extend their credit to the max and, not surprisingly, the consumers were enthusiastic in answering the lenders' clarion calls.

Consequently, especially in anti-deficiency states like Arizona, lenders have lost billions of dollars on what can only be defined by any standard as bad loans. However, lenders are now

facing a tactic which delays their being able to recover on their collateral even though in most instances, they will only receive a small percentage of their original investment. That strategy is the now fairly popular stratagem of requiring the lender to prove it has proper standing to be demanding stay relief so it can proceed to recover its collateral.

Interestingly enough, a review of recent published and unpublished opinions confirms that the debtors are not suggesting predatory practices by the lenders or that they have not been credited payments, or that the lenders have otherwise violated Truth-in-Lending or federal or state guidelines. Instead, the debtors are simply requesting that the lender coming before the bankruptcy judge properly document its obligation.

Many practitioners, third parties, and judges find this practice ostensibly offensive for the basic reason that in most instances, the debtors have not made payments for many months, if not years, and have no ability and/or interest in ever making a house payment again. If they did, a high likelihood exists that the lender would either work with the debtor or the court would strongly encourage the lender to do so. Rather, with few exceptions, the debtors are simply requesting that the bankruptcy judge help the debtor exploit what is a harsh reality in today's mortgage marketplace, *i.e.*, the likelihood that the lender, which may be facing thousands, if not tens of thousands, of similar foreclosures in that part of the country, does not have all of its paperwork lined up to proceed with a stay lift motion.

Lawyers and judges agree that a lawyer has a responsibility to ensure that his or her client is properly represented and provided with the full protection of the law. No one has a problem with this proposition. However, many individuals in the bankruptcy field are nevertheless bothered by this practice of debtors and their counsel since the purpose behind it is not to provide an honest debtor with an opportunity to resume payments. Instead, the indisputable goal is to

permit the individual, who in most cases has not made payments for months, if not years, thereby owing the lender tens of thousands of dollars, to keep living in the home without any intention of ever paying another penny.

Is this strategy a proper one for lawyers to recommend and implement? It really is a tough call because Chapter 13 is designed to provide debtors with an opportunity to keep their homes if willing to meet their financial obligations under the Code. The above described strategy has no such intention. Instead, such a debtor is simply trying to buy more time by any means possible. The ultimate result is accruing costs and losses for lenders and a vehicle for borrowers who relish the idea of living in their homes for as close to free as possible. In the end, this strategy does provide many individuals with "a free ride," earns significant fees for lawyers, and will ultimately increase the cost of credit for honest and more conscientious borrowers.

That being said, it is easy to be judgmental when individuals are seeking to avail themselves of every opportunity possible under the law. In certain instances, raising this type of argument allows a homeowner to keep a roof over his head versus becoming homeless. Sometimes punishing a lender which has not been diligent by not granting stay relief is probably an attractive option, but when such a strategy simply becomes a new cottage industry for innovative lawyers, one starts to wonder how far a lawyer should go on behalf of individuals addressing their defaults through a bankruptcy proceeding by continuing to flaunt their non-compliance even after filing for bankruptcy relief.

So what is the answer to what is becoming a serious problem in bankruptcy courts?

IV. SOLUTION

Lenders need to be more diligent and at least meet minimal standards to procure stay relief. This is an understandable request and should not place an undue burden on lenders generally.

On the other hand, once a lender presents a basic *prima facie* case as to the default and the debtor's inability to cure that default, the lender should be granted stay relief. A high probability exists that the borrower has already resided in the home for a lengthy period of time without making payments, and forcing the borrower to comply with the repayment obligations of a Chapter 13 upon filing for bankruptcy is not an onerous obligation. Borrowers will still be able to buy a few months by filing for bankruptcy, but they will not be able to exploit their default and garner additional time unless they can demonstrate a serious flaw in the lender's paperwork.

Unfortunately, a lack of consistency now prevails among different bankruptcy courts and circuits regarding what needs to be demonstrated by lenders, and promoting consistency within the bankruptcy court as to what is required by lenders would put all interested parties on notice as to what is required to properly challenge stay relief. Such consistency would ensure that lenders would not have to guess as to what was needed to procure stay relief.

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. CC-10-1362-MkPaD
	)	
LUPI PAULO EDWARDS,	)	Bk. No. LA-10-42638-PC
	)	
Debtor.	)	
	)	
LUPI PAULO EDWARDS,	)	
	)	
Appellant,	)	
	)	
v.	)	**OPINION**
	)	
WELLS FARGO BANK, N.A., Trustee,	)	
	)	
Appellee.	)	

Submitted Without Oral Argument
on March 17, 2011*

Filed – July 12, 2011

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Peter H. Carroll, Chief Bankruptcy Judge, Presiding

---

Appearances: Appellant Lupi Paulo Edwards, pro se, on brief; Donna L. LaPorte, Esq, Wright, Finlay & Zak, LLP on brief for Appellee Wells Fargo Bank, N.A., Trustee

---

Before: MARKELL, PAPPAS, and DUNN, Bankruptcy Judges.

MARKELL, Bankruptcy Judge:

---

*This matter originally was calendared for oral argument on March 17, 2011. This panel subsequently granted the appellant's motion to submit on the briefs, by order entered on March 3, 2011.

INTRODUCTION

Debtor Lupi Edwards ("Edwards") appeals the bankruptcy court's order granting relief from the automatic stay to appellee Wells Fargo Bank, as trustee for certain mortgage-backed securities ("Wells Fargo"). We AFFIRM.

FACTS

On August 5, 2010, Edwards filed a voluntary chapter 7[1] bankruptcy petition. Within days, Wells Fargo filed a motion for relief from the automatic stay with respect to Edwards' residence, located in Long Beach, California (the "Property").

In support of its motion, Wells Fargo attached a copy of a post-foreclosure Trustee's Deed Upon Sale dated May 17, 2010 ("Trustee's Deed"). The Trustee's Deed conveys title to the Property to Wells Fargo based on the completion of a non-judicial foreclosure sale at which Wells Fargo was the successful bidder ("Foreclosure Sale"). The Trustee's Deed identifies Power Default Services, Inc. as trustee and grantor, and Wells Fargo as grantee. Wells Fargo recorded the Trustee's Deed in Los Angeles County on May 20, 2010, almost three months before Edwards filed her bankruptcy case.

Wells Fargo also attached copies of the following documents to its motion for relief from stay: (1) a Notice to Vacate Property, addressed to Edwards' and dated May 28, 2010; (2) a complaint for unlawful detainer filed in the Los Angeles County

---

[1]Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule" references are to the Federal Rules of Civil Procedure.

Superior Court ("State Court"), dated June 3, 2010 ("Unlawful Detainer Action"); (3) an order of the State Court in the Unlawful Detainer Action, dated July 14, 2010, granting summary judgment in Wells Fargo's favor in the Unlawful Detainer Action ("Unlawful Detainer Judgment"); and (4) a Writ of Possession in favor of Wells Fargo, issued on July 26, 2010.

On August 26, 2010, Edwards filed her response to Wells Fargo's motion for relief from stay. In her response, Edwards asserted that the Property was still hers, was unencumbered and was worth $180,000. Moreover, Edwards asserted that the Property was necessary for her reorganization.[2]

In support of her response, Edwards argued:

> Movant [Wells Fargo] unlawfully foreclosed this property, & executed an UNLAWFUL EVICTION against the debtor. [¶] Movant has NO STANDING to bring this motion, [¶] An ADVERSARY PROCEEDING is pending in this case against [Wells Fargo] to recover property and money, and the motion should be DENIED so that the debtor's rights are not prejudiced by defendant's wrongful actions against the debtor and the bankruptcy estate.

(Emphasis added.)

Other than a proof of insurance form, the only document that Edwards attached in support of her response was a copy of her notice of appeal of the Unlawful Detainer Judgment.[3]

Despite Edwards' reference to a pending adversary proceeding, there was none, at least when she filed her response.

---

[2]This allegation was odd. Edwards filed her case under chapter 7, which contemplates liquidation rather than reorganization.

[3]While the record does not reveal the status of Edwards' appeal in the Unlawful Detainer Action, we presume it remains pending.

Edwards did not file her adversary proceeding until September 9, 2010 – the same day as the hearing on the motion for relief from stay.[4]

On September 9, 2010, the bankruptcy court heard Wells Fargo's motion for relief from stay. Wells Fargo appeared through counsel, and Edwards appeared pro se. Edwards briefly argued that the foreclosure sale was invalid, arguing primarily that Gold Country Escrow was the original trustee on her deed of trust, and that she had never received notice of a change. She contended that this lack of notice rendered any change of trustee improper. In her view, only Gold Country Escrow had the capacity to foreclose and pass title under the deed of trust to Wells Fargo.

After confirming the facts of the Unlawful Detainer Judgment and the Writ of Possession with both Wells Fargo and Edwards, the bankruptcy court determined that cause existed to grant relief from stay pursuant to § 362(d)(1) and granted Wells Fargo its requested relief. The court also stated that its tentative ruling, issued the day before the hearing, would become the court's final order.

On September 13, 2010, Wells Fargo submitted an Order Granting Motion for Relief From Stay, which the court entered incorporating its rulings from the hearing and from the tentative

---

[4]The allegations in Edwards' complaint appear to simply re-hash Edwards' assertions made in her response to Wells Fargo's motion for relief from stay. The bankruptcy court's disposition of Edwards' adversary proceeding is the subject of a separate appeal before this panel (CC-11-1010-PaMkAl). The resolution of that appeal does not affect the appeal before us.

ruling (the "Relief from Stay Order").

Edwards timely filed her appeal.[5]

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (G), and we have jurisdiction under 28 U.S.C. § 158.

ISSUE

Did the bankruptcy court abuse its discretion in granting Wells Fargo's motion for relief from the automatic stay?

STANDARDS OF REVIEW

We review an order granting relief from stay for abuse of discretion. Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal), ___ B.R. ___, 2011 WL 2304200, at *12 (9th Cir. BAP June 10, 2011); Kronemyer v. Am. Contractors Indem. Co. (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP 2009). As noted in Veal, this standard has two parts:

> The abuse of discretion test involves two distinct determinations: first, whether the court applied the correct legal standard; and second, whether the factual findings supporting the legal analysis were clearly erroneous. United States v. Hinkson, 585 F.3d 1247, 1261–63 (9th Cir. 2009) (en banc).

---

[5]After filing her notice of appeal, Edwards filed a motion for rehearing under Rule 9023. Pursuant to Rule 8002(b), Edwards' appeal of the Relief from Stay Order became effective when the bankruptcy court entered its order denying Edwards' motion for rehearing, on October 22, 2010. We will not review as part of this appeal the order denying the motion for rehearing because Edwards did not, as required by Rule 8002(b), amend her notice of appeal to include this order. We also will not review the order denying rehearing because Edwards' brief on appeal did not raise any issues specifically relating to the motion for rehearing, and thus she has waived them. See Golden v. Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002).

> If the court failed to apply the correct legal standard, then it has "necessarily abuse[d] its discretion." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). This prong of the determination is considered de novo. Hinkson, 585 F.3d at 1261–62.

In re Veal, 2011 WL 2304200, at *12.

DISCUSSION

A. Preliminary Issue: The Record on Appeal

The panel notes that both parties referenced or included numerous documents in their briefs and excepts of record that were not presented to the bankruptcy court. Evidence, or purported evidence, that was not properly before the bankruptcy court is not part of the record on appeal. See Kirshner v. Uniden Corp. of Am., 842 F.2d 1074, 1077 (9th Cir. 1988); see also Fed. R. App. P. 10. As such, we can only consider those documents that were before the bankruptcy court when it granted Wells Fargo's motion for relief from stay, along with those documents delineated in Rule 8006.

B. Wells Fargo's Standing

We first address Edwards' argument that Wells Fargo lacked standing. Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975); see also Thomas v. Mundell, 572 F.3d 756, 760 (9th Cir. 2009); In re Veal, 2011 WL 2304200, at *4. Although standing has both constitutional and prudential dimensions, Edwards challenges only the prudential

///

///

///

standing of Wells Fargo.[6]

Prudential standing imposes limitations on the exercise of federal jurisdiction. Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004). One aspect of prudential standing is that a movant must assert its own legal rights, and may not assert the legal rights of others. See id. at 12; see also Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 960 (9th Cir. 2011); In re Veal, 2011 WL 2304200, at *5. In this context, prudential standing essentially melds with the concept of "real party in interest" under Civil Rule 17.[7] In re Veal, 2011 WL 2304200, at *6. Among other policy considerations, the real party in interest requirement "ensures that the party bringing the action owns or has rights that can be vindicated by proving the elements of the claim for relief asserted." Id.

Section 362(d) allows a party to bring a motion for relief from stay if it establishes that it is a "party in interest." While the Code does not define the term "party in interest," this status is "determined on a case-by-case basis, with reference to the interest asserted and how [that] interest is affected by the automatic stay." In re Kronemyer, 405 B.R. at 919 (quoting In re

---

[6]"Constitutional standing requires an injury in fact, which is caused by or fairly traceable to some conduct or some statutory prohibition, and which the requested relief will likely redress." In re Veal, 2011 WL 2304200, at *4. Constitutional standing is rarely lacking when a creditor seeks relief from the automatic stay, as the stay directly affects a creditor's ability to exercise or vindicate its nonbankruptcy rights.

[7]Rule 7017 makes Civil Rule 17 applicable to adversary proceedings, and Rule 9014(c) makes Rule 7017 applicable to contested matters such as motions under § 362.

Woodberry, 383 B.R. 373, 378 (Bankr. D.S.C. 2008)).

This panel has previously held that "a party seeking stay relief need only establish that it has a colorable claim to enforce a right against property of the estate." In re Veal, 2011 WL 2304200, at *11; Biggs v. Stovin (In re Luz Int'l, Ltd.), 219 B.R. 837, 842 (9th Cir. BAP 1998); see also First Fed. Bank of Cal. v. Robbins (In re Robbins), 310 B.R. 626, 631 (9th Cir. BAP 2004).

Veal essentially recognizes that a movant has a colorable claim sufficient to bestow upon it standing to prosecute a motion under § 362 if it either: (a) owns or has another form of property interest in a note secured by the debtor's (or the estate's) property; or (b) is a "person entitled to enforce" ("PETE") such a note under applicable state law. Id. at *10. When standing is challenged, applicable nonbankruptcy law provides the tests to establish a property interest or PETE status. As Veal indicates, property interests are typically established by showing compliance with local law, usually the relevant provisions of Article 9 of the Uniform Commercial Code ("UCC"), while PETE status is shown by reference to the applicable provisions of UCC Article 3. Id. at **6-10.

The issue here is not, as it was in Veal, whether Wells Fargo has an ownership or other property interest in the debtor's secured note. Indeed, due to the foreclosure, the debtor's note has been satisfied by Wells Fargo's credit bid. Rather the issue here is the simpler one of whether, when taken together, Wells Fargo's recorded Trustee's Deed and the Unlawful Detainer Judgment demonstrate that Wells Fargo has some property interest

in the Property. As shown below, this combination establishes, under applicable California law, that Wells Fargo is the presumptive current title owner. As a result, there can be no doubt that Wells Fargo has a sufficient "colorable" claim required for standing.[8]

Edwards, however, argues that Wells Fargo is not the proper party to move for relief from stay because the trustee on her Deed of Trust was Gold Country Escrow; therefore, the parties conducting the foreclosure, T.D. Services or Power Default Services, as the case may be, lacked the authority to sell the Property at the Foreclosure Sale on May 17, 2010. That contention is baseless on this record and under applicable California law.

The duly-recorded Trustee's Deed provides that Wells Fargo is the presumptive current record owner with respect to the Property. See, e.g., In re Salazar, 448 B.R. 814, 819 (Bankr. S.D. Cal. 2011) (bank moving for relief from stay established a prima facie case of standing as it was the title holder on the subject property under a recorded Trustee's Deed Upon Sale). Pursuant to its title to the Property, Wells Fargo acquired additional rights and remedies when it subsequently obtained the Unlawful Detainer Judgment and Writ of Possession to the Property. Wells Fargo possessed these interests and rights

---

[8]Although Wells Fargo has a sufficient colorable claim to give it standing under Veal, that standing only allows it to proceed with its request for stay relief. If allowed under applicable nonbankruptcy law, the debtor may still challenge the foreclosure in state court, or if there is jurisdiction, by initiating an adversary proceeding in bankruptcy court.

before Edwards filed her bankruptcy petition, and at the time it moved for relief from stay.

Moreover, under California law, Wells Fargo took title free and clear to the Property upon completion of the Foreclosure Sale. See 4 Harry D. Miller and Marvin B. Starr, CAL. REAL ESTATE § 10:208 (3d ed. 2009) (under California law, "[t]he purchaser at the foreclosure sale receives title free and clear of any right, title, or interest of the trustor or any grantee or successor of the trustor.").

Under these facts, we find that Wells Fargo satisfied the threshold showing of a colorable claim to an ownership interest in the Property, as well as enforceable rights to the Property thereunder. In turn, this establishes Wells Fargo's status as a real party in interest, as it is clear that Wells Fargo is asserting its own legal rights. Therefore, Wells Fargo had standing to seek relief from the automatic stay.

C. Cause for Relief From Stay

We now turn to the merits. Section 362(d)(1) provides that, "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . (1) for cause, including the lack of adequate protection of an interest in property of such party in interest." Although the Bankruptcy Code does not expressly define this term, "cause" for relief from stay under § 362(d)(1) is determined on a case-by-case basis. In re Kronemyer, 405 B.R. at 921.

As briefly mentioned above, in California, once a foreclosure sale concludes and the purchaser records the deed in accordance with applicable law, the original trustor or borrower

no longer has an interest or right in the subject real property. See Bebensee-Wong v. Fed. Nat'l Mortg. Ass'n (In re Bebensee-Wong), 248 B.R. 820 (9th Cir. BAP 2000) (construing Cal. Civ. Code § 2924h(c)); see also Kathleen P. March and Hon. Alan M. Ahart, CALIFORNIA PRACTICE GUIDE: BANKRUPTCY, ¶ 8:1196 (2010), available at Westlaw CABANKR ("Where a real property nonjudicial foreclosure was completed and the deed recorded prepetition, the debtor has neither equitable nor legal title to the property at the time the bankruptcy petition is filed.") (emphasis in original). Accordingly, upon the original trustor's subsequent bankruptcy filing, "there is no reason not to allow the creditor to repossess because filing a bankruptcy petition after loss of ownership cannot reinstate the debtor's title." Id. at ¶ 8:1195 (citing § 541(a)). Instead, the debtor is essentially a "squatter," and thus cause for relief from stay is established. Id. at ¶ 8:1196.

In this matter, the bankruptcy court found that cause existed based on the pre-petition Foreclosure Sale, and the subsequent Unlawful Detainer Judgment and Writ of Possession. In ruling from the bench at the relief from stay hearing, the court stated:

> Wells Fargo initiated the unlawful detainer action as the owner of the property. Evidently, [Edwards] did not respond to that unlawful detainer action. A judgment was entered by a State Court, which determined the right of possession to that property based upon evidence that was presented to that State Court judge.
>
> I am not about to question that judgment. A writ of possession was issued pursuant to that judgment. The only issue before this Court is whether or not there is some cause to lift the protection of the Bankruptcy Court to allow that State Court judgment to be enforced. And the Court believes that Wells Fargo has

established that cause.

Hrg. Trans. (Sep. 9, 2010) at 3:1-12.

In its Relief from Stay Order, the court determined that under California law, Edwards' had no right of redemption once the pre-petition Foreclosure Sale was completed. The court also found that Edwards was served with a required three-day notice to quit or pay rent on May 28, 2010, and that Wells Fargo obtained the Unlawful Detainer Judgment on July 14, 2010. On this basis, the court determined that Edwards "ha[d] no right to ignore the foreclosure and attempt to reorganize the debt." The court further determined that Edwards "filed the bankruptcy petition on August 5, 2010 in an apparent effort to stay enforcement of the unlawful detainer judgement." As such, the court properly found that Edwards no longer had an interest in the Property, and Wells Fargo established cause to obtain relief from stay.[9]

Based on the foregoing, and upon our review of Wells Fargo's rights as a purchaser at a foreclosure sale, we find that the court's factual findings were not clearly erroneous. Therefore, the court did not abuse its discretion in granting Wells Fargo relief from the automatic stay.

///

///

---

[9]This case is distinguishable from cases such as In re Salazar. In Salazar, the bank moving for relief from stay had obtained title to the subject property prior to the debtor's bankruptcy filing through a non-judicial foreclosure sale. 448 B.R. at 818. The relief sought, however, was to continue the unlawful detainer action it commenced in state court prior to debtor's bankruptcy. Id. There thus was no final state court judgment adjudicating the parties' rights.

D. The Adversary Proceeding

Edwards further claims that the bankruptcy court erred in granting relief from stay because she had commenced an adversary proceeding against Wells Fargo challenging its title. The crux of Edwards' complaint was that the Foreclosure Sale, Unlawful Detainer Action, subsequent Unlawful Detainer Judgment and Writ of Possession were improper, fraudulent, illegal and invalid.

As a preliminary matter, it is not clear that the adversary proceeding complaint was before the court at the September 9 hearing. Although Edwards referenced an adversary proceeding in her response to Wells Fargo's motion for relief from stay, the bankruptcy docket reflects that the adversary proceeding was not filed until September 9, 2010, the same day as the relief from stay hearing. There is no indication that Edwards actually presented a copy of her complaint, or even mentioned it, to the court at or before the September 9 hearing.

Even if the court could have assumed that Edwards had filed an adversary complaint, it would not change our analysis. The bankruptcy court generally has broad discretion in granting relief from stay for cause under § 362(d). Groshong v. Sapp (In re Mila, Inc.), 423 B.R. 537, 542 (9th Cir. BAP 2010). This includes granting relief from stay to enforce a prepetition state court judgment, in spite of whether the debtor has initiated a related adversary proceeding. See generally In re Robbins, 310 B.R. at 630 (granting or denying relief from stay while adversary proceeding is pending is within the sound discretion of the bankruptcy court); In re Kronemyer, 405 B.R. at 921-22 (court did not abuse discretion in granting creditor relief from stay to

continue state court litigation despite a pending adversary proceeding).

Moreover, once a California state court grants an unlawful detainer judgement in favor of a foreclosure sale purchaser, the original trustor or borrower is foreclosed under the doctrine of claim preclusion from arguing that the foreclosure sale itself was improper.[10] See Freeze v. Salot, 122 Cal. App. 2d 561, 565-66, 266 P.2d 140, 142-43 (1954)(after defendant obtained a judgment against plaintiff in an unlawful detainer action, res judicata precluded plaintiff's re-litigation of wrongful foreclosure claims in subsequent lawsuit). 28 U.S.C. § 1738 requires that federal courts give state court judgments the same effect as the judgment would be given under the applicable state law.

Edwards' complaint, much like her argument before this panel, seemingly advances the same state law claims, rights and defenses that she asserted (or should have asserted) before the State Court. As previously discussed, the State Court rendered judgment in favor of Wells Fargo in the Unlawful Detainer Action. Edwards was therefore precluded from continuing to assert that the Foreclosure Sale was improper, fraudulent, illegal and invalid in her bankruptcy case. It could not have been an abuse of discretion in these circumstances to grant relief from stay.

In sum, we find that based on the record in this case, the

---

[10]However, an unlawful detainer judgment does not necessarily bar subsequent litigation as to title of the realty. See Vella v. Hudgins, 20 Cal. 3d 251, 257, 572 P.2d 28, 31 (1977).

bankruptcy court did not abuse its discretion in granting Wells Fargo relief from the automatic stay under § 362(d)(1).[11]

CONCLUSION

For all of the reasons set forth above, the bankruptcy court's order granting relief from stay is AFFIRMED.

[11]We decline to reach the issue of whether stay relief might also have been appropriate under § 362(d)(2).