Show Me the Paperwork

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HYPOTHETICAL

A. The Bulk Sale of a Portfolio of Loans – a Documentation Challenge to all Involved

ABC Loan Corp. ("ABC Corp") is a purchaser of distressed debt obligations. ABC Corp buys a package of loans from Big Bank, N.A. ("Bank"), including hundreds of obligations secured by mortgages around the country. The sale of the loans from Bank to ABC Corp is documented pursuant to a Loan Sale Agreement, with the only information about the individual loans sold being an exhibit listing the loans.

Specifically, this exhibit states the obligor's name, the original principal amount of the loan, the balance of the loan, the address of the property securing the obligation, and the last date of payment by the obligor for each loan. Additionally, assignments of mortgages have been recorded for each of the mortgages securing the loans, assigning said mortgages to ABC Corp; however, there are no allonges or other assignments of record.

The obligor for one of the loans has filed for bankruptcy (the "Debtor") and ABC Corp has filed a proof of claim for the amounts due and owing on the purchased obligation. The Debtor has now filed an objection to ABC Corp's proof of claim and asserted that ABC Corp has not and cannot show that it is the proper party in interest with regard to the loan.

How should ABC Corp respond?

B. Potential Problems

- ABC Corp did not receive any of the "original loan" documents from Bank as part of the sale
- Bank may not have the "original loan" documents, or even know where the loan documents are located due to successive mergers and branch closings
- Different courts accept different evidence of note ownership

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- Best Evidence Rule – Rule 1002 – Requirement of the Original Document - An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

- Accordingly, the best evidence will always be the original note, but that is not always possible. Luckily, the rules provide for such circumstances.

- Rule 1003 – Admissibility of Duplicates - A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

- When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), supra, a "duplicate" of the document possesses this character.

- If no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under this rule. This position finds support in the decisions, *Myrick v. United States*, 332 F.2d 279 (5th Cir. 1964) (which found no error in admitting photostatic copies of checks instead of original microfilm in absence of suggestion to trial judge that photostats were incorrect)t; *Sauget v. Johnston*, 315 F.2d 816 (9th Cir. 1963) (finding it was not error to admit copy of agreement when opponent had original and did not on appeal claim any discrepancy).

- Rule 1004 – Exceptions to Best Evidence Rules - An original document is not required, and other evidence of the content of a writing, recording, or photograph is admissible if:

  (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
  (b) an original cannot be obtained by any available judicial process;
  (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
  (d) the writing, recording, or photograph is not closely related to a controlling issue.

- Accordingly, this Rule provides that if failure to produce the original is satisfactory explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused. Crucially, loss or destruction of the original, unless due to bad faith of the proponent, is a satisfactorily explanation of nonproduction.

- Rule 902(4) - Self-Authenticating Evidence - Copies of public records are self-authenticating if certified by the records custodian or another person so authorized.

Recorded mortgages and assignments would be valid evidence to demonstrate the current holder of a mortgage.

D. Legal Implications – Federal Case Law – 3rd Circuit

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- A note's existence can be proven other than by production of the original note or a copy thereof. *Bohm v. Dolata (In re Dolata)*, 306 B.R. 97 (Bankr. W.D. Pa. 2004) (citing Fed.R.Evid. 1004) (P 1 -- original lost or destroyed, P 2 -- original not obtainable by judicial process or procedure, or P 3 -- original in possession of opponent) (*also citing* Fed. R.Evid. 1004 advisory committee's note for the proposition that, "under Fed.R.Evid. 1004, when production of the original is not required, the proffering party need not offer a duplicate even if that is available; the proffering party may present any evidence including oral testimony").

- "[I]f the writing or copy [upon which a claim is based] is not accessible to the pleader [and thus cannot be attached to a pleading], it is sufficient so to state, together with the reason, and to set forth the substance in writing." *Bohm v. Dolata (In re Dolata)*, 306 B.R. 97 (Bankr. W.D. Pa. 2004).

  - The unavailability of a note does not, and shall not, render a mortgage either unenforceable or, consequently, worthless. *Bohm v. Dolata (In re Dolata)*, 306 B.R. 97 (Bankr. W.D. Pa. 2004).

    - First, the production of a note, as a matter of law, is not essential to a mortgagee's right of action on a mortgage, which means, in turn, that a mortgage's value is not lost or diminished in any way simply because a mortgagee is, or will be, unable to produce an accompanying note when suing on the mortgage. *Bohm v. Dolata (In re Dolata)*, 306 B.R. 97 (Bankr. W.D. Pa. 2004).

    - Second, there are exceptions to the "best evidence rule" to allow for alternative proof of the existence of such note. *See* Fed.R.Evid. 1004, 28 U.S.C.A. (West 2001) (P 1 -- original lost or destroyed, P 2 -- original not obtainable by judicial process or procedure, or P 3 -- original in possession of opponent). *Bohm v. Dolata (In re Dolata)*, 306 B.R. 97 (Bankr. W.D. Pa. 2004)[1]

[1] Results may be different in other circuits, i.e., *In re Patterson*, 2012 Bankr. LEXIS 5466 (Bankr. W.D.N.C. Nov. 26, 2012) (finding that a person not in possession of the original note must meet the requirements of NC Gen Stat 25-3-309 in order to enforce the note and mortgage).

- Accordingly, while ABC Corp. may not have the original note, they may not need it as the recorded mortgage evidences the secured claim.

- Moreover, the exceptions to the best evidence rule could apply and remove the need to produce the original note. Thus, even without the original note, ABC Corp. may enforce the obligation.

(b) But what if the Debtor claims that per the terms of the Note, all payments were made and the mortgage was to be satisfied?

- How can this be handled without a copy of the note?

- "A mortgage is prima facie evidence of the existence and amount of the debt therein set forth, and the burden of proof to overcome the consideration recited in the instrument is on the mortgagor," *Bohm v. Dolata (In re Dolata)*, 306 B.R. 97 (Bankr. W.D. Pa. 2004) (internal citations omitted).

- The law in Pennsylvania is that "reference in any document to an obligation to pay a sum of money 'with interest' without specification of the applicable rate shall be construed to refer to the rate of interest of six per cent per annum. *Bohm v. Dolata (In re Dolata)*, 306 B.R. 97 (Bankr. W.D. Pa. 2004)

- Therefore, the payment terms of the note can be calculated even without a copy of the note, if the Mortgage references the original principal amount of the loan and that the loan will accrue interest (even at an unspecified rate).

E. Conclusion

- While not having access to the original loan documents can pose issues, none of these are problems that cannot be overcome.

- You should always try and get as much documentation as possible as part of your loan sale agreements.

- Even if you can't get full loan documentation, you may still be able to show that you are entitled to enforce the obligation through the use of the rules of evidence.

Hypo 1

ABC Collections files an unsecured proof of claim attaching a statement listing the original creditor name, account number, balance and last payment date. No other documentation is attached. Debtor has listed the original creditor on the petition with a much lower balance and doesn't recognize the collection agency name. You file an objection disputing the amount and standing issue relating to the collector.

Creditor –

What proof do you need to meet prima facie threshold for presumption?

How do you overcome hearsay problems with statements?

What documents must you present?

How do you authenticate the documents?

What witnesses do you need?

Debtor-

What proof do you need to rebut the presumption?

How do you get the documents you need?

What witnesses do you need?

Legal Analysis:

Proofs of claim are prima facie evidence of the validity and amount of the debt if filed in accordance with the rules. F.R.B.P. 3001(f)

F.R.B.P. 3001(c) (1)

Claim based on a writing

Except for a claim governed by paragraph (3) of this subdivision, when a claim, or an interest in property of the debtor securing the claim is based on a writing, a copy of the writing shall be filed with the proof of claim. If the wiring has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

F.R.B.P. 3001(c)(3)(A)

Claim based on an open-end or revolving consumer credit agreement

When a claim is based on an open-end or revolving consumer credit agreement – except one for which a security interest is claimed in the debtor's real property – a statement shall be field with the proof of claim, including all of the following information that applies to the account:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the anem fo the entity to whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of an account holder's last transaction;

(iv) the date of the last payment on the account; and

(v) the date on which the account was charged to profit and loss.

(B) On written request by the party in interest, the holder of a claim based on an open-end or revolving consumer credit agreements hall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.

Federal Rules of Evidence:

602 – Lack of Personal Knowledge – competency of witness to testify

803(6) Hearsay exception for business records

901/902 Authentication

1002 Best Evidence Rule

1004(4) original lost/destroyed

Caselaw:

If filed with sufficient information and in accordance with Rule 3001, a claim is prima facie valid. The burden of going forward then shifts to the objector to produce evidence sufficient to refute at least one of the allegations in the claim which is essential to its legal sufficiency. Once done, the burden of persuasion shifts back to the claimant. *In re Allegheny Int'l Inc*., 954 F.2d 167, 173-174 (3rd Cir. 1992)

When a proof of claim is filed by an assignee of a credit card account, the assignment or a summary of the assignment must be attached to the claim in order for the Court to accord the claim prima facie evidentiary status. *In re O'Brien*, 440 B.R. 654 (Bankr.E.D.Pa. 2010). If the claimant attaches a summary, it must include a clear and detailed chain of title from the original creditor to the claimant in order to satisfy the requirements of Rule 3001(c).

Objections based on a creditor's failure to attached documents is insufficient to disallow claims. See *Campbell v. Verizon Wireles*s, 336 B.R. 430 (BAP 9th Cir. 2005); *Heath v. American Express Travel Related Services Co. Inc*., 331 B.R. 424 (BAP 9th Cir. 2005); *Dove-Nation v. eCast Settlement Corp.*, 318 B.R. 147 (BAP 8th Cir. 2004). Debtor must still allege a factual dispute as to the validity, ownership or amount of a claim under 11 U.S.C. § 502. *In re Lapsanky*, 2006 WL 3859243 (Bankr.E.D.Pa. Oct. 31, 2006).

Debtor's schedules are admissions which will be reviewed sua sponte by the Court to determine the validity of the claim. See *In re O'Brien*, 440 B.R. 654. However, it is not sufficient to show that the debtor owed the original creditor money, the assignee must produce evidence that the debt is owed to the party filing the proof of claim.

Hypo 2

PRA Receivables, as assignee for Discover, files a proof of claim for what it characterizes as a non-dischargeable private student loan owed by Debtor. No note is attached to the proof of claim. However, a screen shot of the account is attached showing the balance, last payment date and redacted account number. A statement is also attached indicating that the original promissory note was lost or destroyed and cannot be produced. Debtor lists no student loans on his schedules and indicates that he had co-signed on a student loan for his son years ago and believes that it was paid off. No student loan appears on Debtor's credit report. Debtor files an objection to the proof of claim disputing the amount owed, standing of PRA Receivables to collect the debt and the allegation that the debt is a non-dischargeable student loan.

Creditor –

What proof do you need to overcome standing issue?

How detailed of an explanation must be provided regarding the loss/destruction of the note?

What documents must be provided to show chain of title?

What proof do you need relating to the amount owed and eligibility of debt to qualify as non-dischargeable student loan?

Who do you need to testify at the hearing as to the original debt, current outstanding balance and servicing rights?

Debtor –

What proof, other than your client's testimony, do you need to establish that the account does not belong to the debtor?

What documentation can you request from the creditor regarding the validity and ownership of the debt?

Legal Analysis:

Rule 3001(c) (1) makes it clear that a claim based on a writing must attach the writing to the proof of claim; and, if the writing has been lost or destroyed, a statement of the circumstances surrounding the loss/destruction must be supplied.

Relevant caselaw requires that an assignee filing a proof of claim must provide the assignment or a summary of the chain of title which clearly details the history from the original creditor to the

current holder of the claim. See *In re O'Brien*. The initial burden of proof is on the creditor to establish the existence of the debt and that it falls within the scope of 11 U.S.C. § 523(a)(8).

In order to be non-dischargeable under 11 U.S.C. § 523(a)(8)(B), a private lender must establish that the debt is a "qualified education loan" as defined by section 221(d)(1) of the Internal Revenue Code of 1986.

Definition of Qualified Education Loan under 26 U.S.C. §221(d)(1):

The term "qualified education loan" means any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses –

(A) which are incurred on behalf of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred;

(B) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred; and

(C) which are attributable to education furnished during a period during which the recipient was an eligible student.

Such term includes the indebtedness used to refinance indebtedness which qualifies as a qualified education loan…

Most Courts, including the Fifth and Seventh Circuits analyze whether a loan is a Qualified Education Loan by focusing on the stated purpose of the loan when it was obtained, rather than how the proceeds were actually used by the borrower. *In re Sokolik*, 635 F.3d 261, 266 (7th Cir. 2011); *Murphy v. PHEAA*, 282 F.3d 868, 870 (5th Cir. 2002). This is often referred to as the "substance of the transaction test". Courts "need only ask whether the lender's agreement with the borrower was predicated on the borrower being a student who needed financial support to get through school." *In re Sokolik*, 635 F.3d at 266. See also, *In re Rumer*, 469 B.R. 553 (Bankr.M.D.Pa. 2012) and *In re Beesley*, 2013 WL 5134404 (Bankr.W.D.Pa. 2013).

For Federal Loans, a good place to start gathering information regarding the loans is the National Student Loan Database System www.nslds.ed.gov. For private loans, you are generally relying on the materials provided by the client. Discovery will be an important tool as is the Fair Debt Collection Practices Act when dealing with a collection agency. 15 U.S.C. §1692(g) allows the debtor to dispute the debt and request validation of the debt within 30 days of receiving a collection notice. The collector must provide the name of the original creditor, the amount of the debt and provide a copy of the verification of the debt or a copy of the judgment to the debtor. Verification of the debt can include the original contract, accounting of payments, date of services provided and dates on which the debt was incurred.

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In re: OMAR E. ESCOBAR, Debtor. In re: RICHARD M. FREDERICK and YVETTE D. FREDERICK, Debtors.

Case No. 11-71114-ast, Chapter 7, Case No. 11-71135-ast, Chapter 7

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF NEW YORK

457 B.R. 229; 2011 Bankr. LEXIS 3172

August 22, 2011, Decided

COUNSEL: [**1] For Omar E Escobar, Debtor (8-11-71114-ast): Adam C Gomerman, Huntington Station, NY.

Trustee (8-11-71114-ast, 8-11-71135-ast): Allan B Mendelsohn, Allan B. Mendelsohn, LLP, Huntington, NY.

For Richard M. Frederick, Debtor (8-11-71135-ast): Richard F Artura, Phillips, Weiner, Artura & Cox, Lindenhurst, NY.

For Yvette D. Frederick, Joint Debtor (8-11-71135-ast): Richard F Artura, Phillips, Weiner, Artura & Cox, Lindenhurst, NY.

JUDGES: Alan S. Trust, United States Bankruptcy Judge.

OPINION BY: Alan S. Trust

OPINION

[*231] **MEMORANDUM OPINION GRANTING MOTIONS FOR RELIEF FROM STAY**

Issues Before the Court and Summary of Ruling

Pending before the Court are motions seeking relief from the automatic stay which touch upon issues that have been the subject of numerous recent federal and state court decisions regarding who has the right to seek to foreclose against residential property, particularly following the collapse of the sub-prime mortgage market. Each case[1] here presents a servicing agent acting on behalf of an owner or holder of a promissory note secured by a lien against residential real property seeking stay relief in order to continue a foreclosure action which was pending as of the petition date. In each case, the owner [**2] or holder of the promissory note and assignee of the mortgage at issue was a member of the Mortgage Electronic Registration System a/k/a MERS program ("MERS"), and claims rights under mortgage assignment executed by MERS, either directly to it or within its chain of title of the mortgage.

1 This Court combined oral argument on the motions filed in these cases to preserve judicial resources and to better promote efficiencies and economies for the parties, as the legal issues presented by these motions appeared to be related, if not substantially related, and no apparent factual disputes were before the Court to resolve.

The chapter 7 trustee, but not the debtors, objected to the stay relief motion in each case, and presented a narrowly drawn challenge to lien validity and standing to seek stay relief. This decision, therefore, addresses whether the movants have standing to seek stay relief, and whether they are entitled to stay relief.

For the reasons to follow, this Court concludes that each movant has established its legal standing as a party-in-interest to seek stay relief, and that each has met its burden of proof to obtain stay relief. As further discussed herein, these determinations [**3] are not based in any significant respect on the strictures and structures of the MERS system and program, but upon the Bankruptcy Code's requirements under Section 362 and substantive New York State law regarding the rights of the owner

and/or holder of a promissory note secured by a lien against real property to seek to foreclose.

Jurisdiction

This Court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§157(b)(2)(A), (G) and (O), and 1334(b), and the Standing Order of Reference in effect in the Eastern District of New York dated August 28, 1986.

Facts and Background

The Bankruptcy Cases

The Escobar Case and Motion

On February 27, 2011, Omar E. Escobar ("Escobar") filed a voluntary petition for [*232] relief under Chapter 7 of the Bankruptcy Code, which was assigned case number 11-71114-ast. Allan B. Mendelsohn, Esq. was appointed as interim Chapter 7 trustee, and thereafter qualified to become the permanent Chapter 7 trustee of the Escobar estate (the "Trustee").

On March 9, 2011, America's Servicing Company ("ASC"), as servicer for HSBC Bank USA, National Association, as trustee for Deutsche Bank ALT 2006-AB3 ("HSBC") filed a motion seeking termination of the automatic stay (the [**4] "ASC Motion"). [11-71114, dkt item 10] On March 21, 2011, the Trustee filed an Affirmation in Opposition to the ASC Motion (the "ASC Opposition"). [11-71114, dkt item 13] On May 2, 2011, ASC filed an Affirmation with Citation to Legal Authority in Further Support of Motion for Relief from the Automatic Stay. [11-71114, dkt item 15] On May 19, 2011, a hearing on the ASC Motion and the ASC Opposition was held. At the conclusion of the hearing, the Court directed that supplemental submissions were to be made by June 1, 2011. In addition, the Court set June 1, 2011, as the deadline for the parties to file a letter requesting or waiving oral argument. On June 1, 2011, counsel for ASC filed a letter requesting oral argument on the ASC Motion. [11-71114, dkt item 20]

On June 1, 2011, the Trustee filed a letter memorandum in further support of his position in the ASC Opposition. [11-71114, dkt item 21]

The Frederick Case and Motion

On February 28, 2011, Richard M. Frederick and Yvette D. Frederick ("Frederick" and collectively, the "Fredericks") filed a joint voluntary petition for relief under Chapter 7 of the Bankruptcy Code, which was assigned case number 11-71135-ast. Allan B. Mendelsohn, [**5] Esq. was appointed as interim Chapter 7 trustee, and thereafter qualified to become the permanent Chapter 7 trustee of the Fredericks' estate (the "Trustee").

On March 30, 2011, Chase Home Finance LLC ("Chase") filed a motion seeking to vacate the automatic stay (the "Chase Motion"). [11-71135, dkt item 12] On April 15, 2011, the Trustee filed an Affirmation in Opposition to the Chase Motion (the "Chase Opposition"). [11-71135, dkt item 14] A hearing on the Chase Motion and the Chase Opposition was adjourned at the request of the parties to July 14, 2011.

On June 27, 2011, Chase filed a memorandum of law, clarifying that it is acting as JP Morgan Chase Bank, N.A., successor by merger to Chase Home Finance, LLC, as servicer for Fannie Mae ("Fannie Mae").[2] [11-71135, dkt item 23]

2 Fannie Mae is a common abbreviated term for the Federal National Mortgage Association.

The Consolidated Hearing on the Stay Motions

By Order entered in each case on June 15, 2011, oral argument was combined on the stay motions and scheduled for July 7, 2011 (the "Hearing"). [11-71114, dkt item 22; 11-71135, dkt item 20] At the Hearing, ASC requested permission to supplement the record with an affidavit attesting [**6] to its possession of the original note and mortgage at issue in the Escobar case, and the Trustee requested the ability to submit a post-hearing memorandum. The Court set a deadline of August 4, 2011, for supplemental submissions from all parties, which deadline has now passed. The Court has considered these supplemental submissions.

[*233] *The Trustee's Objections*

In Escobar, the Trustee's objection was narrowly drawn. The Trustee argued that, because the chain of mortgage assignments to HSBC originates from MERS, and that MERS never held the Escobar Note, the "Mortgage may be unenforceable." [11-71114, dkt item 12] The Trustee does not challenge ASC's authority to act on behalf of HSBC.

In Frederick, the Trustee also presented a narrowly drawn but differently phrased objection; there, the Trustee argued that under "applicable law," if the "mortgage and note are held by different parties, there is no debt to support the mortgage, which would, therefore, be unenforceable." [11-71135, dkt item 14] The Trustee does not challenge Chase's authority to act on behalf of Fannie Mae.

Moreover, the Trustee does not challenge any of the factual allegations made by either ASC or Chase as to execution, endorsement, [**7] transfer, assignment, and possession of the original Escobar Note and Escobar Mortgage, or the original Frederick Note and Frederick Mortgage. Both of the Trustee's objections rely exclu-

sively on the opinion of Judge Grossman of this Court in *In re Agard*, 444 B.R. 231 (Bankr. E.D.N.Y. 2011), and limit the opposition to an alleged unenforceability of the note and mortgage based thereon.

The Notes and Mortgages: Escobar

On or about April 5, 2006, Escobar executed a promissory note in the original principal amount of $305,205.00 (the "Escobar Note"), made payable to "Impac Funding Corporation dba Impac Lending Group, a California Corporation" ("Impac"). Escobar, along with Angela Escobar,[3] executed a mortgage of even date to secure payment of the Escobar Note (the "Escobar Mortgage"), by granting a lien against the property located at 18 Pine Street, Central Islip, New York 11722 (the "Escobar Property"). The Escobar Mortgage defines Impac as the Lender, and refers to MERS as follows: "FOR PURPOSES OF RECORDING THIS MORTGAGE, MERS IS THE MORTGAGEE OF RECORD." In the granting clause of the Escobar Mortgage, the lien to secure payment of the Escobar Note is granted "to MERS (solely as nominee [**8] for Lender and Lender's successors-in-interest) . . .." The Escobar Mortgage was recorded in Suffolk County, New York on September 27, 2007.

3 Angela Escobar did not execute the Escobar Note.

On a date unknown, Impac endorsed the Escobar Note in blank--specifically, a Kristy Alcai, acting as authorized signatory on behalf of Impac, endorsed the Escobar Note: "PAY TO THE ORDER OF : WITHOUT RECOURSE." The Escobar Note endorsement bears the signature of a person signing as Kristy Alcai. On or about October 15, 2009, an Elpiniki M. Bechakas, acting on behalf of MERS, executed an assignment of the Escobar Mortgage, purportedly acting on behalf of Impac, to the benefit of HSBC (the "Escobar Impac Mortgage Assignment"). The Impac Mortgage Assignment purports to assign both the Escobar Note and Escobar Mortgage to HSBC, and was recorded on November 23, 2009, in Suffolk County, New York. [11-71114, dkt item 10-2]

ASC provided the Affidavit of Beverly De Caro, a Vice President of loan documentation of ASC, in which she affies that ASC began servicing the Escobar loan on January 1, 2007, and that the original Escobar Note and original Escobar Mortgage have been in the possession of Deutsche Bank [**9] National Trust Company as custodian for ASC (the "Custodian") since April 12, 2006. Ms. De Caro further affies that the Custodian has had continual possession of the original Escobar Note [*234] and Escobar Mortgage with two exceptions--from April 6, 2009, through September 23, 2009, when the loan file was sent to HSBC to be imaged (copied digitally), and until July 2011 when the Custodian sent the loan file to Steven J. Baum, P.C., as counsel for ASC. [11-71114, dkt item 34]

ASC has also provided the Court with an Attorney Certification executed by Dennis Jose, Esq., as attorney for ASC. [11-71114, dkt item 35] Therein, Mr. Jose affies that on July 27, 2011, the Baum law firm received the original Escobar Note, bearing the in blank endorsement by Impac on the Note, and the original Escobar Mortgage, and attaches copies thereof.

Finally, ASC provided an Affirmation in Relation to Attorney Certification. [11-71114, dkt item 36] Therein, Mr. Jose "bring[s] to the court's attention that attached to the Note by staple is an assignment dated April 10, 2006, which is dated five (5) days after the origination of the Note." [11-71114, dkt item 36 ¶ 2] This document, titled Assignment of Mortgage, names [**10] MERS "as nominee" for Impac as assignor of the Escobar Mortgage and names MERS as assignee of the Escobar Mortgage (the "Escobar MERS Mortgage Assignment"). This Mortgage Assignment first provides that MERS as nominee for Impac assigns in blank all right, title and interest to the Escobar Mortgage, but also states that MERS as nominee for Impac has endorsed "said note," and that the Escobar Mortgage "and all indebtedness secured thereby" are assigned and transferred to MERS. This Mortgage Assignment is also executed by Kristy Alcai, but as authorized signatory on behalf of MERS, not on behalf of Impac. Mr. Jose further affies that this Mortgage Assignment "does not appear to have been recorded in the County of Suffolk's records." [11-71114, dkt item 36 ¶3]

The Notes and Mortgages: The Fredericks

On or about September 10, 2001, Richard Frederick executed a promissory note in the original principal amount of $417,000.00 (the "Frederick Note") in favor of Fairway Independent Mortgage Corporation ("Fairway"). Mr Frederick also executed a mortgage of even date to secure payment of the Frederick Note (the "Frederick Mortgage"), by granting a lien against the property located at 342 Miller [**11] Place Road, Miller Place, New York 11764 (the "Frederick Property"). The Frederick Mortgage defines Fairway as the Lender, and refers to MERS as follows: "FOR PURPOSES OF RECORDING THIS MORTGAGE, MERS IS THE MORTGAGEE OF RECORD." In the granting clause of the Frederick Mortgage, the lien to secure payment of the Frederick Note is granted "to MERS (solely as nominee for Lender and Lender's successors in interest) . . . ." The Frederick Mortgage was recorded on November 9, 2001, in Suffolk County, New York.

On an unknown date, Fairway endorsed the Frederick Note to AmTrust Bank. On an unknown date, the FDIC, as receiver for AmTrust Bank f/k/a Ohio Savings Bank, endorsed the Frederick Note in blank--specifically, a "Stephanie Jones," acting as authorized agent, purportedly signed the Frederick Note on behalf of AmTrust: "PAY TO THE ORDER OF WITHOUT RECOURSE." [11-71135, dkt item 12] The Frederick Note bears the signature of a person signing as Stephanie Jones.

On or about November 16, 2007, an Assignment of the Frederick Mortgage was purportedly executed by MERS, as nominee for Fairway, acting through a Beth Cottrell, assigning the Frederick Mortgage and the Frederick Note to AmTrust. [**12] This assignment was recorded on November 25, 2009, in Suffolk County, New York. [*235] A second assignment of the Frederick Note and the Frederick Mortgage was purportedly executed by a Michele Fegr on or about January 22, 2010, acting on behalf of AmTrust, assigning the Frederick Note and Frederick Mortgage to Chase. This second assignment was recorded on January 29, 2010, in Suffolk County, New York.

Chase provided the Affidavit of Sherry D. Stafford of Chase, in which she affies that Chase is in possession of the original Frederick Note and the original Frederick Mortgage, that Chase received the original note on January 16, 2008, and received the original mortgage on February 13, 2008, and that Chase has continuously maintained possession of them since receipt. [11-71135, dkt item 24] Chase also provide an Affidavit of Thomas Reardon, a Chase employee, that, based upon a review of Chase's records, it has continuously acted as servicer of the Frederick mortgage since December 4, 2007, when it began to service the loan for AmTrust.[4] [11-71135, dkt item 25]

> 4 Chase also provided an Affidavit of Dan McLaughlin of MERS, but this affidavit plays no part in this Court's decision. [11-71135, dkt [**13] item 26]

Analysis

The automatic stay is among the most basic of debtor protections under bankruptcy law. Section 362 of the Bankruptcy Code provides that the filing of a bankruptcy petition creates an automatic stay against *inter alia* "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case. " 11 U.S.C. § 362(a)(1). It is well settled that "any proceeding or actions described in section 362(a)(1) are void and without vitality if they occur after the automatic stay takes effect." *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 527 (2d Cir. 1994) (citing *48th St. Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th St. Steakhouse Inc*.), 835 F.2d 427, 431 (2d Cir. 1987), *cert. denied*, 485 U.S. 1035, 108 S. Ct. 1596, 99 L. Ed. 2d 910 (1988); *In re Ebadi*, 448 B.R. 308 (Bankr. E.D.N.Y. 2011); *In re Vela*, No. 09-45134, 2009 Bankr. LEXIS 2719, 2009 WL 2882867 (Bankr. E.D.N.Y. 2009). This stay, however, is both temporary in duration and subject to being modified or terminated under circumstances set out under the Bankruptcy Code. *See* 11 U.S.C. § 362(c), (d).

Standing to Seek Stay Relief

All parties agree that standing [**14] is a prerequisite to seeking stay relief. This Court will, therefore, begin by defining the parameters of the standing question presented. First, the Trustee does not challenge a mortgage servicer's standing to seek stay relief, acting as an agent of the purported owner or holder of a promissory note or mortgage. Second, no challenge is asserted by the Trustee to the notion that a party affected by the automatic stay may seek relief from the stay, nor does the Trustee assert that either ASC or Chase is not prohibited by the stay from continuing the state court foreclosure actions at issue.

The question presented on standing, therefore, is what evidence must a party seeking stay relief bring forward to demonstrate an adequate interest in the property at issue for a bankruptcy court to consider granting relief from the stay. The resolution of this question turns on an analysis of Section 362(a) of the Bankruptcy Code, which imposes an automatic stay on all litigation against the debtor, as well as "any act to create, perfect, or enforce any lien against property of the estate[;]" Section 362(d), which provides that "[o]n request of a party in interest and after notice and a hearing, the [**15] court shall grant relief from the stay[;]" and Section 362(g), [*236] which provides that the burden of proof at any hearing on a stay relief motion on the issue of debtor's equity in the property is on the movants, but that "the party opposing relief has the burden of proof on all other issues." 11 U.S.C. §§ 362(a), (d), (g).

Resolution of the standing issue also requires consideration of the generally non-preclusive effect of stay relief litigation and the limits on such litigation imposed by Congress; that is, if a bankruptcy court grants a relief from stay motion, it is generally not determining that the movant holds a valid, perfected, and enforceable lien, just as denying a stay relief motion generally does not constitute a determination that the movant does not hold a valid, perfected and enforceable lien. *See Grella v. Salem Five Cent. Sav. Bank*, 42 F.3d 26, 31 (1st Cir. 1994) *and In re Vitreous Steel Prods*., 911 F.2d 1223, 1232 (7th Cir. 1990) (holding that validity of liens issues are

not generally involved in relief from stay proceedings). Rather, Congress intended that stay relief litigation be summary in fashion and expeditious in time. This is due in part to the stay being an [**16] injunction imposed by the mere filing of a bankruptcy case, and the recognition that granting stay relief returns the parties to the auspices of a court of competent jurisdiction to determine, on the merits, the relative rights, liabilities and responsibilities of the parties. Congress manifested this intention, in part, by essentially requiring that stay relief motions be heard and determined within thirty days from filing of the motion, unless the court determines within such thirty days that the party opposing stay relief has demonstrated a "reasonable likelihood" that it will prevail at the conclusion of a final hearing; such a final hearing is to then be held within thirty days thereafter. 11 U.S.C. § 362(e). Further, Congress, and the United States Supreme Court through the Rules Enabling Act, 28 U.S.C. § 2075, specified in Bankruptcy Rule 7001(2) that a party seeking a judicial determination of the validity, enforceability, priority or extent of a lien or other interest in property must generally seek such relief through the filing of an adversary proceeding.[5]

5 Rule 7001(2) excepts out from the requirement of an adversary proceeding when a debtor is proceeding under Rule 4003(d) [**17] to avoid a lien against or transfer of exempt property under Bankruptcy Code Section 522(f).

Further, lift stay litigation is not preclusive in the same manner as claims litigation; that is, a party in interest may object to a proof of claim filed by a creditor and obtain a determination allowing or disallowing the claim. *See* 11 U.S.C. § 502; FED. R. BANKR. P. 3001, 3002, 3007, 3008. Specific to the situation here, if a note holder or owner, or mortgagee, or servicer acting on behalf thereof, files a proof of claim under which it asserts a lien against property of the estate, a debtor, trustee, or party in interest may object to the claim and seek a determination that the claimant is not entitled to enforce the note or mortgage at issue, or that the note or mortgage are not enforceable against the debtor or the estate; a bankruptcy court may make such a determination after notice and a hearing. *See* 11 U.S.C. § 502(b)(1); *see generally In re Tender Loving Care Health Svs., Inc*., 562 F.3d 158 (2d Cir. 2009).

Thus, granting or denying a stay relief motion is not and should not be considered a determination of the ultimate enforceability or unenforceability of the note and lien at issue. [**18] Conversely, a lift stay motion cannot be brought by a stranger to the case. Congress requires under Section 362(d) that a lift stay motion be brought by a "party in interest." However, neither the Bankruptcy Code nor Rules not define that term. Rule 17 of the Federal Rules of Civil Procedure, [*237] which does apply to contested matters such as stay relief motions by virtue of Bankruptcy Rules 7017 and 9014, requires that an "action must be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17; FED. R. BANKR. P. 7017, 9014.

Thus, the level of proof necessary to demonstrate standing to seek stay relief to commence or continue a mortgage foreclosure action must be somewhere along the spectrum of providing some evidence of a litigable right or colorable claim at one end, to, at the other end, demonstrating that the movant holds a valid, perfected and enforceable lien and more likely than not will prevail in the underlying litigation stayed by the bankruptcy filing.

In *In re Mims*, 438 B.R. 52 (Bankr. S.D.N.Y. 2010), the bankruptcy court denied a motion for relief from stay to continue a mortgage foreclosure action based, in part, on standing. After examining the Bankruptcy Code [**19] and Rules, and the evidence before him, Judge Glenn concluded that "Because Wells Fargo has not offered evidence that it owns the original Note, Wells Fargo lacks standing to foreclose on the Mortgage and has therefore failed to demonstrate it is the holder of a claim." *Mims*, 438 B.R. at 56. The court's analysis therein was based, in part, on substantive New York law as to who has the right to foreclose and pursue related state law remedies, and, in part, on a construction of "party in interest" as requiring that the movant be a creditor as defined under Section 101(10) of the Bankruptcy Code. *Id*. at 55 (citing *In re Comcoach Corp*., 698 F.2d 571, 573 (2d Cir. 1983)(holding that stay relief may only be sought by a creditor or the debtor). *Mims* also noted that "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." *Mims*, 438 B.R. at 56.

Lift Stay Level of Proof

The determination of standing being present or absent may be dependent on the level of proof required. The Ninth Circuit Bankruptcy Appellate Panel ("BAP") recently addressed in great detail this issue of the level [**20] of proof necessary to establish standing to seek and obtain stay relief in the residential mortgage lift stay context. *See In re Veal*, 449 B.R. 542, 2011 WL 2652328 (9th Cir. B.A.P. 2011). At issue in *Veal* were both a lift stay motion by a purported mortgage and note assignee, and an objection to the purported assignee's proof of claim. Critical to both issues was whether "the appellee established its standing as a real party in interest to pursue the relief it requested." *Veal*, 449 B.R. 542, 2011 WL 2652328 at *1. As for stay relief, the *Veal* BAP held "that a party has standing to seek relief from the auto-

matic 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[.]" The BAP held that the alleged assignee of a Chapter 13 debtors' mortgage, which presented evidence solely of an assignment of the mortgage but no evidence that it or its agent had possession of the underlying note, did not establish that it had standing to seek stay relief as to the mortgaged property given it relative rights under applicable state law.[6]

> 6 This analysis was based on the Uniform Commercial Code as enacted [**21] in Illinois and case law decided thereunder, based on a choice of law clause in the underlying note and mortgage. *Id*. at 561 n. 32.

The *Veal* BAP analyzed standing from both a constitutional and a prudential standpoint. 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." *Veal*, 449 B.R. 542, 2011 WL 2652328 at *4. The BAP termed this a [*238] relatively minimal requirement, and further stated that even if parties "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." 449 B.R. 542, *Id*. at *5. Prudential standing "embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Id*. (quoting *Sprint Commc'ns Co. v. APCC Servs., Inc*., 554 U.S. 269, 289, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008)).

Next, the BAP linked prudential standing to the real party in interest doctrine under Rule 17 of the Federal Rules of Civil Procedure, noting that debtors sought to invoke "prudential standing principles which generally provide that a party without the legal right, [**22] under applicable substantive law, to enforce an obligation or seek a remedy with respect to it is not a real party in interest." *Id*. (internal citation omitted). The BAP held that the real party in interest doctrine "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 . . . [and] ensures that the person defending the action can preclude anyone from ever seeking to vindicate, or collect on, that claim again." *Veal*, 449 B.R. 542, 2011 WL 2652328 at *6. In so holding, the BAP openly disagreed with the Wright, Miller & Kane treatise on Federal Practice and Procedure [Civil § 1542], which "maintains that the third party standing doctrine and the real party in interest requirement are legally distinct[,]" noted the limited claim preclusive effect of lift stay litigation, and acknowledged that the standing necessary to seek stay relief is the colorable claim standard, under which "a party seeking stay relief need only establish that it has a colorable claim to enforce a right against property of the estate." 449 B.R. 542, *Id*. at *11 (internal citations omitted). Thus, the BAP [**23] established the standard for prudential standing by merging the bankruptcy party in interest standard requiring a movant to make out a colorable claim with a demonstration by the movant under Rule 17 of its ability to ultimately prevail on the merits. 449 B.R. 542, *Id*. at *13. The BAP then reversed the bankruptcy court's order granting relief from stay, stating that "the final purported assignment of the Mortgage was insufficient under Article 9 to support a conclusion that [the mortgagee] holds any interest, ownership or otherwise, in the Note." 449 B.R. 542, *Id*. at *14 (citing footnote omitted). The mortgagee needed to own these rights under Illinois law for a "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." *Id*.[7]

> 7 On the issue of the debtors' objection to the servicer's proof of claim, the BAP noted the Supreme Court's holding in *Katchen v. Landy*, 382 U.S. 323, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966), which upheld the preclusive effect of a claims litigation determination made by a bankruptcy court. *Veal*, 449 B.R. 542, 2011 WL 2652328 at *14. "In short, a claims objection proceeding in bankruptcy takes the place of the state court lawsuit [**24] or other action because such actions are presumptively stayed by the operation of § 362." *Id*. The court remanded the case for further findings on the alleged servicing agent's standing to file a proof of claim. *But see In re Minbatiwalla*, 424 B.R. 104 (Bankr. S.D.N.Y. 2009)(finding assignee of note and mortgage has standing to file a proof of claim on its own and servicer has standing to file a proof of claim on behalf of the holder or assignee of a note and mortgage; however, prima facie validity of claim depends on claim being filed in accordance with applicable rules); *In re Conde-Dedonato*, 391 B.R. 247 (Bankr. E.D.N.Y. 2008)(finding mortgage servicer has standing to file a proof of claim on behalf of the holder of a note and mortgage).

Veal and *Mims* rely to differing degrees upon applicable state law for the threshold determination of standing--that is, of the demonstration of a prudential [*239] right to seek stay relief. However, whether expressed as a colorable claim or as a substantial likelihood of success in the underlying state court litigation, a note or mortgage assignee must demonstrate rights to proceed under state law as against the property at issue to have bankruptcy standing. [**25] As noted in *Mims*, a foreclosure

of a mortgage under New York law may not be brought a party who does not have the right to enforce the underlying note for which the mortgage serves as collateral. *Mims*, 438 B.R. at 56.

Therefore, given the summary and expedited nature of stay litigation, and its nonpreclusive effect, the evidence necessary to establish standing to seek stay relief to commence or continue a foreclosure action should include a demonstration that the movant has the right under applicable state law to enforce the mortgage; however, standing should not require evidence which would be necessary to prevail over a claim objection or to prevail in an adversary proceeding asserting that the claimant does not hold a valid, perfected and enforceable lien.[8]

8 This Court recognizes that adopting this standard likely departs from the *Veal* analysis.

In the context of these cases, therefore, an analysis of substantive New York law is required to determine what the level of proof would be for ASC and Chase to commence and/or continue, but not necessarily to prevail in, a state court foreclosure action.

Foreclosure Standing Under New York Law

Recently, in *Bank of New York v. Silverberg*, the [**26] Second Department of the New York Appellate Division[9] addressed foreclosure standing, and held that a plaintiff asserting rights as a mortgagee did not have "standing to commence a foreclosure action when that party's [mortgage] assignor [MERS] was listed in the underlying mortgage instruments as a nominee and mortgagee for the purpose of recording, but was never the actual holder or assignee of the underlying notes." 926 N.Y.S.2d 532, *Id*. at *1. The *Silverberg* court summarized the law in New York generally as follows: "once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note[,]" but "a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it[.]" *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 926 N.Y.S.2d 532, 2011 WL 2279723 *4 (N.Y. App. Div. 2011)(internal citations omitted).

9 *See* 22 N.Y. COMP. CODES R. & REGS. § 670 *et seq*. Appeals taken from decisions of ten New York State supreme courts, including the supreme courts for Suffolk and Nassau counties, are assigned to the Second Department of the New York Appellate Division. Bankruptcy cases for individual debtors who reside in Suffolk and Nassau counties are assigned to judges [**27] who sit in Central Islip, such as the undersigned. Thus, the *Silverberg* decision bears significant precedential influence on foreclosure proceedings within the same geographic jurisdiction this Court serves.

Silverberg followed a long, long line of New York cases which held or stated that, as a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note. *See, e.g., Mortgage Elec. Registration Sys., Inc. v. Coakley*, 41 A.D.3d 674, 838 N.Y.S.2d 622 (N.Y. 2007).[10] Similarly, New York has long recognized [*240] that assignment of the mortgage carries with it no rights to enforce the debt. "[A] transfer of the mortgage without the debt is a nullity, and no interest is acquired by it." *Merritt v. Bartholick*, 36 N.Y. 44, 45, 34 How. Pr. 129, 1 Transc. App. 63 (N.Y. Ct. App. 1867).[11] Judge Glenn in *Mims* similarly so stated, referencing 140 years of New York law that "a mortgage is but an incident of the debt which it is intended to secure. . .." *Mims*, 438 B.R. at 56. As Judge Grossman noted in *Agard*, "Under New York law, Movant can prove that U.S. Bank is the holder of the Note by providing the Court with proof of a written assignment of the Note, or by demonstrating [**28] that U.S. Bank has physical possession of the Note endorsed over to it." *Agard*, 444 B.R. at 247 (internal citations omitted).

10 *See also Deutsche Bank Nat'l Trust Co. v. Pietranico*, 33 Misc. 3d 528, 928 N.Y.S.2d 818, 2011 N.Y. Misc. LEXIS 3698, 2011 WL 3198834 at * 11 (Slip Op. NY Supp. Suffolk County July 27, 2011) (finding under New York law the owner or holder of the promissory note holds the rights to enforce the associated mortgage and to commence a foreclosure action; mere physical possession of the promissory note endorsed in blank provides presumptive ownership of the note by the holder, and the holder of the note is the presumptive owner of the underlying mortgage); *Weaver Hardware Co. v. Solomovitz*, 235 N.Y. 321, 331-32, 139 N.E. 353 (N.Y. 1923) ("[A] mortgage given to secure notes is an incident to the latter and stands or falls with them[.]"); *Smith v. Wagner*, 106 Misc. 170, 178, 174 N.Y.S. 205 (N.Y. Sup. Ct. 1919)("[A]ssignment of the debt carries with it the security therefor, even though such security be not formally transferred in writing"). The Court notes, however, that *Pietranico* is not cited as authority for its alternate holding regarding the authority of MERS to assign the mortgage at issue therein. 2011 N.Y. Misc. LEXIS 3698, 2011 WL 3198834 at * 12.

11 *See* [**29] *also Kluge v. Fugazy*, 145 A.D.2d 537, 536 N.Y.S.2d 92 (N.Y. App. Div. 1988)(holding that plaintiff, the assignee of a

> mortgage without the underlying note, could not bring a foreclosure action); *Flyer v. Sullivan*, 284 A.D. 697, 134 N.Y.S.2d 521 (N.Y. App. Div. 1954)(holding that mortgagee's assignment of the mortgage lien, without assignment of the debt, is a nullity). A "mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation." *FGB Realty Advisors v. Parisi*, 265 A.D.2d 297, 298, 696 N.Y.S.2d 207(N.Y. App. Div. 1999).

Thus, New York law has long recognized that the rights under a mortgage lien are beneficially transferred to the assignee of a promissory note, without the execution of a written assignment of the mortgage, and even without a written assignment of the mortgage. However, the obverse is not true; an assignment of the mortgage does not effect a transfer of the debt. Said otherwise, and perhaps by oversimplification, the lien follows the debt, but the debt does not follow the lien.

Here, each movant has demonstrated physical possession of the original Notes, each endorsed in blank, in addition to physical possession of the original Mortgages. An [**30] endorsement in blank renders the note as bearer paper under the U.C.C. as enacted and in effect in New York, and negotiation of bearer paper is effectuated by delivery.[12] N.Y.U.C.C. LAW §§ 3-302(1), 3-204(2).[13]

> 12 No party suggested that any state's law other than New York's should apply here.
>
> 13 New York's version of the Uniform Commercial Code has remained virtually unchanged since its adoption in 1962. *See* N.Y. Sess. Laws 1962, ch. 553 (effective Sept. 27, 1964). Therefore, as the standing issue requires a state law analysis, different results may follow in jurisdictions analyzing transactions not governed by the New York UCC. Property rights are generally determined in accordance with applicable state law. *Butner v United States*, 440 U.S. 48, 54, 99 S. Ct. 914, 59 L. Ed. 2d 136(1979).

Further, to determine "holder or assignee" status as to a note, the *Silverberg* court rejected the notion that a plaintiff must "provide *proof of recording* of the corrected assignment of the mortgage prior to the commencement of the [foreclosure] action," and stated that "this particular contention is without merit, as an assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery." 926 N.Y.S.2d 532, *Id*. at *4 (emphasis [**31] in original). As noted in *Silverberg*, "[i]n a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage [*241] and the holder or assignee of the underlying note at the time the action is commenced[.]" *Silverberg*, 926 N.Y.S.2d 532, 2011 WL 2279723 *3 (internal citations omitted).

This Court concludes that the level of proof necessary to commence a foreclosure action under New York law, as stated in *Silverberg*, is the appropriate level of proof necessary to confer standing to seek stay relief. Thus, in cases such as these, where the movant claims rights as a secured creditor by virtue of an assignment of rights to a promissory note secured by a lien against real property, it must provide satisfactory proof of its status as the owner or holder of the note at issue. Here, the Movants have met this burden of proof through their uncontroverted affidavit testimony that they are holders of the Notes by virtue of possession of the original notes executed with endorsements in blank (pay to the order of).

Whether movants can ultimately prevail in the state foreclosure action and obtain a judgment of foreclosure is for the state courts to determine. [**32] For example, and for purposes of this opinion, this Court does not treat the Escobar MERS Mortgage Assignment stapled to the Escobar Note as a special indorsement of the note to MERS under N.Y.U.C.C. LAW § 3-204, nor as an allonge intended as a special indorsement to MERS. Section 3-204(3) allows a holder of a note indorsed in blank to "convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement." N.Y.U.C.C. LAW § 3-204(3). Section 3-202(2) of the New York Uniform Commercial Code allows negotiation to occur by an indorsement written on the instrument "or on a paper so firmly affixed thereto as to become a part thereof," typically referred to as an allonge. N.Y.U.C.C. LAW § 3-202(2). The Escobar MERS Mortgage Assignment does not appear to be a special indorsement consistent therewith. This Mortgage Assignment is not executed by Impac on its own behalf, but, instead, is purportedly executed by MERS as nominee for Impac; this assignment purports to both be an in blank indorsement or assignment as well as a restrictive indorsement or assignment; this Assignment states that MERS [**33] as nominee for Impac "has endorsed said note," when, in fact, it had not; Impac indorsed the note in its own behalf. Further, none of the affirmations or affidavits provided to the Court expresses an intention that the stapling of this Mortgage Assignment to the Escobar Note was intended as an allonge to the Escobar Note in accordance with N.Y.U.C.C. § 3-202(2). Moreover, for MERS to claim rights to enforce the Escobar Note on its own behalf is inconsistent with the granting clause of the Escobar Mortgage, which provides that the lien to secure payment of the Escobar Note is granted "to MERS (solely as nominee for Lender and Lender's successors-in-interest)," and with the Escobar Impac Mort-

gage Assignment which MERS executed on or about October 15, 2009, purportedly acting on behalf of Impac, to assign the Escobar Mortgage and indebtedness secured thereby to HSBC. Finally, the Trustee does not contend that MERS ever became the owner or holder of the Escobar Note; to the contrary, the Trustee alleges the Escobar Note was separated from the Escobar Mortgage as his basis for challenging the enforceability of the Escobar Mortgage.

The state courts, as courts of competent jurisdiction, can [**34] well make the ultimate determinations as to whether ASC, on behalf of HSBC, and Chase, on behalf of Fannie Mae, are entitled to judgments of foreclosure. However, evidence to the effect provided herein creates a colorable claim on behalf of ASC and Chase to relief before a state court of competent jurisdiction, [*242] and thus satisfies movants' burden of establishing party in interest standing under Section 362(d) to seek stay relief.[14]

> 14 Whether this level of proof would be adequate for a purported lien holder to prevail on an objection to a filed proof of claim, or in an adversary proceeding seeking to establish lien validity, priority and enforceability, is not before this Court, and therefore not reached by this opinion.

Substantive Right to Stay Relief

Having established standing to seek stay relief, the second question is whether movants have demonstrated entitlement to stay relief. The Trustee did not challenge movants' evidence of the Debtors' defaults under the respective notes and mortgages. No effective reorganization is possible in a chapter 7 case. Movants met their burden of proving each debtor's lack of equity in the respective properties at issue. Thus, movants have each satisfied [**35] their respective burdens to obtain stay relief under Section 362(d)(2) (in Frederick) and under Sections 362(d)(1) and (d)(2) (in Escobar).

Distinguishing Agard

Finally, because the Trustee's objections rely exclusively on *Agard*, a comparison of the issues here to the issues in *Agard* is appropriate. In *Agard*, the Court provided a detailed and thoughtful analysis of MERS authority, or lack thereof, to execute assignments of mortgages that pass through the MERS system. Select Portfolio Servicing, Inc. ("Select Portfolio"), as servicer for U.S. Bank National Association, as Trustee for First Franklin Mortgage Loan Trust 2006-FF12, Mortgage Pass-Through Certificates, Series 2006-FF12 ("U.S. Bank") sought stay relief to continue a pre-petition foreclosure action. Debtor, Mr. Agard, filed limited opposition to the motion, contesting Select Portfolio's standing to seek relief from stay, and raised "a fundamental question as to whether MERS had the legal authority to assign a valid and enforceable interest in the subject mortgage." *Agard*, 444 B.R. at 235. Select Portfolio, on behalf of U.S. Bank, responded that its standing to seek relief from stay was established by virtue of a judgment of [**36] foreclosure and sale entered in its favor by the state court prior to the filing of the bankruptcy. Judge Grossman concurred, stating that "by application of either the *Rooker-Feldman* doctrine, or *res judicata* . . . this Court must accept the state court judgment of foreclosure as evidence of U.S. Bank's status as a creditor secured by the Property." *Id*. at 236.

However, in light of having pending at that time "dozens" of stay relief motions filed by MERS assignees, the Court provided an extensive analysis and criticism of MERS's claim that the business model it constructed and implemented imbued it with general and pervasive authority to assign mortgages within the MERS family members. Relying on long standing New York law that requires that an assignor of a note and mortgage must possess rights in those instruments to effectively assign rights under either, the Court stated that "even if MERS had assigned the Mortgage acting on behalf of the entity which held the Note at the time of the assignment, this Court finds that MERS did not have authority, as "nominee" or agent, to assign the Mortgage absent a showing that it was given specific written directions by its principal." *Id*. at 254.

These [**37] cases are quite unlike *Agard* for the following primary and material reasons: (1) neither *res judicata* nor *Rooker-Feldman* applies because no prepetition judgment of foreclosure exists in favor of either ASC or Chase; and (2) each movant has established its status as a holder of the original note and mortgage executed by each debtor and the rights to enforce the [*243] respective notes; (3) both movants assert, and the Trustee concedes, that MERS never held physical possession of the notes and mortgages; (4) each movant is relying, in part, on its status as holder of the note at issue, and not solely on an assignment of the mortgage; and (5) the original notes and mortgages did not physically separate from each other. Critically, in *Agard*, the Court found that the movant did not meet its burden of showing "that U.S. Bank, the party on whose behalf Movant seeks relief from stay, is the holder of the Note." *Agard*, 444 B.R. at 246. That burden has been met here.

As for the Trustee's assertion that a separation of the note from the mortgage can cause the mortgage lien to be rendered unenforceable,[15] the Trustee did not demonstrate that the notes and mortgages did separate here, and was unable to [**38] provide any case law turning "can" into "does." The Court provided the Trustee the

opportunity to submit post-Hearing briefing specifically addressing whether any court applying substantive New York law had made such a determination. The Trustee was unable to do so.

15 As noted *supra*, in the Fredericks case, the Trustee specifically alleged that if the "mortgage and note are held by different parties, there is no debt to support the mortgage, which would, therefore, be unenforceable." [11-71135, dkt item 14] The Trustee was relying on a question left open in *Agard*, as to whether mortgages processed through the MERS system give rise to properly perfected and valid liens if the owner or holder of the note is an independent entity from the beneficial owner of the deed of trust. *Agard*, 444 B.R. at 247 n.5.

Conclusion

The automatic stay in effect pursuant to Section 362 should be terminated as to ASC and Chase, such that each may take any all action under applicable state law to exercise state law remedies as against the Properties. Orders consistent herein shall be issued.

Dated: August 22, 2011

Central Islip, New York

/s/ Alan S. Trust

Alan S. Trust

United States Bankruptcy Judge

Topic 8: Standing to Bring Lift Stay Motions with Respect to Residential Real Estate – Who Holds the Note?

***In re Escobar*, 2011 Bankr. LEXIS 3172 (Bankr. E.D.N.Y. August 22, 2011)**

I. **Facts**:
   a. These consolidated cases involved motions for relief from the automatic stay by assignees of notes and mortgages and objections to the motions for relief by the Chapter 7 trustee challenging the standing of the assignee, a member of the Mortgage Electronic Registration System ("MERS"), to seek stay relief.

II. **Issue**:
   a. Did movants, as assignees of the notes and mortgages, have standing to seek relief from the automatic stay of § 362(d) as "parties in interest." What level of evidence was required with respect to the transfer, assignment and/or ownership of the notes and mortgages sufficient to show an adequate interest in the property at issue in order for the bankruptcy court to consider granting relief from stay?

III. **Holding**:
   a. The movants held physical possession of the note in question, endorsed in blank, in addition to physical possession of the original mortgages. Under New York law and the Uniform Commercial Code, this was sufficient to show that the movants had the right to proceed against the property in a foreclosure proceeding. Therefore, the assignees had standing under § 362(d) to seek relief from stay.

IV. **Rule**:
   a. The evidence necessary to establish standing to seek stay relief to commence or continue a foreclosure should include a demonstration that the Movant has the right under applicable state law to enforce the mortgage; however, standing should not require evidence which would be necessary to prevail on an action challenging whether Movant has a valid, perfected and enforceable lien.

V. **Rationale**:
   a. Standing to seek relief from stay is a prerequisite to obtaining relief from the stay. If the movant does not have standing as a party in interest, relief from stay is in appropriate. With the current environment of mortgage servicers and multiple assignments of notes, it is the burden of the movant to show that they hold the appropriate interest.
   b. The determination of granting or denying a motion for relief from stay should not be considered a determination of the ultimate enforceability of a note or lien at issue. To have standing the movant must be a "party in interest," which in the context of relief from stay motions means a creditor with an interest in the property at issue.
   c. To determine if a party has an interest in the property at issue and is therefore a "party in interest" under § 362(d), an analysis of the applicable substantive state law is required.

VI. **Related Cases**
   a. There is a split in the courts as to the level of proof required to show standing to bring a § 362(d) relief from stay action. In addition to the standard espoused in Escobar, the following standards have been established:

i. Movant must show that is has a "colorable claim" against the property (Brown Bark I L.P. v. Ebersole (In re Ebersole), 440 B.R. 690 (Bankr. W.D. Va. 2010) (adopting standard set forth in In re Weisband, 427 B.R. 13 (Bankr. D. Ariz. 2010)); and
ii. Movant must show that it has a substantial likelihood of success in an underlying state court action with respect to the property (In re Veal, 449 B.R. 542 (9th Cir. B.A.P. 2011)).

FOCUS - 2 of 2 DOCUMENTS

In Re: Darcy Alana Herron, Debtor

Case No. 06-15285-RAG, Chapter 13

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND

381 B.R. 184; 2008 Bankr. LEXIS 605

January 23, 2008, Decided
January 23, 2008, Filed

COUNSEL: [**1] For Darcy Alana Herron, Debtor: Imad K. Dajani, Baltimore, MD.

JUDGES: ROBERT A. GORDON, U.S. BANKRUPTCY JUDGE.

OPINION BY: ROBERT A. GORDON

OPINION

[*186] **MEMORANDUM OPINION AND ORDER DENYING MOTION TO RECONSIDER ORDER OVERRULING OBJECTION TO PROOF OF CLAIM**

Before the Court for consideration at a hearing held on August 29, 2007 was Debtor's Motion for Reconsideration or to Amend or Alter Judgment Denying Debtor's Objection to Jefferson Capital System (sic) Proof of Claim (Motion to Reconsider) filed on August 10, 2007. Dkt. No. 63. For the reasons stated on the record at the conclusion of the hearing, as outlined in detail below, the Court will deny the Debtor's Motion.

Factual Statement

On October 3, 2006, Jefferson Capital Systems, LLC (JCS) filed Proof of Claim number 6 (JCS Claim), asserting a general unsecured claim in the amount of $ 6,605.88. The JCS Claim states that it is based upon a credit card debt incurred on August 19, 2006 [1]. The Debtor listed this debt on her Schedule F, Creditors Holding Unsecured Nonpriority Claims, in almost the exact amount as the JCS Claim [2]. Debtor did not assert that the debt was in dispute or otherwise non-payable.

1 Although JCS purports to be the current holder of claim, the JCS Claim [**2] does note that the debt originated with Aspire Visa and that JCS purchased it from Midland Credit Management, Inc.

2 Debtor identified "Midland Credit/Aspire" as the claim holder.

An Account Statement Summary (Summary) dated October 2, 2006, is attached to the JCS Claim in support thereof. The Summary indicates Debtor's account was opened on December 29, 1999 and that $ 1,392.48 in accrued interest was charged-off on April 8, 2005 from a total debt of $ 7,998.36, leaving a balance of $ 6,605.88. That amount is stated on the face of the JCS Claim as the total amount due. However, the Summary also indicates that the debt was "incurred" on August 19, 2006. Obviously, there is a measure of internal inconsistency in the information included in the Summary.

Debtor filed her original objection to claim on November 10, 2006. Dkt. No. 19. Debtor filed an amended objection on November 13, 2006 to include the notice provision required by the Local Bankruptcy Rules. Dkt. No. 22. The Court overruled the amended objection on December 22, 2006 for inadequacy of service.

On December 26, 2006, Debtor filed her second amended Objection to Claim (Objection). Dkt. No. 39. Debtor asserted that the claim is [**3] unenforceable under the general 3-year statute of limitations imposed by Maryland law [3], relying entirely upon the date the

account was opened (December 29, 1999) and the date it was charged-off (April 8, 2005) as represented in the Summary. Service of the Objection was proper and in accordance with both [*187] the Bankruptcy and Local Rules. JCS has not filed a response to the Objection.

3 See Md. Code Ann., Cts. & Jud. Proc. ß 5-101 which provides that:

> A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

A hearing on the Objection was held on July 30, 2007. Counsel for the Debtor appeared but the Debtor did not. No witnesses were called nor was any other evidence presented in support of the Objection. Instead, Counsel relied entirely upon the averments identified above. In response, the Court noted that while certain dates and corresponding references included in the Summary could be interpreted to inferentially support Debtor's contention, without a precise explanation grounded in admissible evidence as to when and why the limitations period had expired [**4] it was impossible to conclude with certainty that Debtor's objection should be sustained. This was especially true in light of Debtor's sworn acknowledgment of the validity and amount of the claim included in her Schedule F. In light of the absence of any proof as to when Debtor's final charge was recorded on the account and, moreover, the Summary's representation that the debt was incurred on August 19, 2006, the Court could not find that it was more likely than not that the claim was barred by limitations. Hence, the written Objection alone did not satisfy Debtor's burden and it was overruled without prejudice. Dkt. No. 59. The Court noted that if Debtor wished to successfully prosecute the Objection, evidence sufficient to explain why the claim was barred by limitations would be required. It was suggested that Counsel could either submit Debtor's affidavit, or, a second hearing could be scheduled for Debtor to attend and testify.

Rejecting both options, Counsel instead filed the instant Motion to Reconsider outlining what are asserted to be the infirmities of the Court's oral ruling. Debtor first challenges the sufficiency of the Summary, arguing that it constitutes hearsay and does [**5] not qualify as supporting documentation as required by Fed. R. Bankr. P. 3001(c) and (f). Debtor then asserts that since JCS, which retains the ultimate burden of proof, has defaulted by not responding to the Objection, requiring Debtor to submit evidence is unfair and violative of her substantive and procedural due process rights.

The Court held a hearing on the Motion to Reconsider on August 29, 2007. Counsel for Debtor appeared, again without his client, and vigorously argued the points made in the Motion. The Court reiterated that it could not rule in Debtor's favor based solely on the written, unsworn averments of the Objection, as some of the information contained in the Summary contradicted the Objection's proffers. Moreover, the Summary did not include a definitive representation sufficient to support a factual conclusion that the limitations period had expired. The Court denied the Motion to Reconsider, reaffirming its ruling from the previous hearing.

Legal Analysis

The Court has jurisdiction over this matter pursuant to 28 U.S.C. ß 157 and ß 1334 and Local Rule 402 of the United States District Court for the District of Maryland. This is a core proceeding pursuant to 28 U.S.C. ß 157(b)(2)(B). [**6] Venue of this Contested Matter is proper in this district and division pursuant to 28 U.S.C. ß 1408.

11 U.S.C. ß502(a) [4] governs the allowance of claims. The careful reader will note that the statute provides that a proof of claim is deemed allowed unless a party [*188] in interest objects [5]. Section 502(b) then lists the nine exclusive grounds available to properly underpin an objection to a proof of claim. See *In re Heath,* 331 B.R. 424, 435 (9th Cir. B.A.P., 2005) (holding that Section 502(b) establishes the grounds for disallowance of a claim and non-compliance with Bankruptcy Rules, including Rule 3001(c), is not one of the statutory grounds), *In re Campbell,* 336 B.R. 430, 435-436 (9th Cir. B.A.P., 2005) (same), *In re Dove-Nation,* 318 B.R. 147, 151 (8th Cir. B.A.P., 2004) (same), *In re Kirkland,* 379 B.R. 341, 344 (10th Cir. B.A.P., 2007) (adopting the exclusive view of Section 502(b), citing to *Heath* and *Dove-Nation*). In this instance, although Debtor does not specify which of the nine grounds she relies upon, she does assert that the claim is barred by the general statute of limitations imposed by state law. That would seem to fall under Section 502(b)(1) [6].

4 Hereafter, all statutory citations [**7] are to the Bankruptcy Code, found at Title 11 of the United States Code, unless otherwise noted.

5 Section 502(a) provides that:

> (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a

> partnership that is a debtor in a case under chapter 7 of this title, objects.

6 Section 502(b)(1) provides that:

> (b) Except as provided in subsections (e)(2), (f), (g), (h) and (I) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that--
>
> > (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

Although the Bankruptcy Code governs the allowability of claims, the Bankruptcy Rules dictate the manner and timing of the filing of claims and objections thereto. See Fed. R. Bankr. P. 3001-3008. Under Rule 3001(c), when a claim is based on [**8] a writing, the supporting writing is to be filed with the claim. A claim properly executed and filed constitutes "prima facie evidence" of the claim's validity and amount pursuant to Rule 3001(f). Thus, in this District, it is settled that a "properly executed proof of claim is sufficient to shift the burden of producing evidence and to entitle the claimant to a share in the distribution of the bankrupt's estate unless an objector comes forward with evidence contradicting the claim." *In re Gates,* 214 B.R. 467, 472 (Bankr. D. Md. 1997), citing to *Superior Metal Moulding Company, Inc. v. Shipp (In re Friedman),* 436 F. Supp. 234, 237 (D. Md. 1977).

Gates, supra, provides an excellent description of the step-by-step process that must be followed in order for a Debtor to properly assert, and then prevail upon, an objection to claim. To overcome the *prima facie* validity of the proof of claim, the debtor "must submit **by evidence,** a defense to one or more elements of the cause of action asserted in the claim". *Id.* at 472 (emphasis supplied). Once the debtor satisfies that standard, the burden of going forward shifts to the party bearing the burden of persuasion under the underlying, substantive, [**9] nonbankruptcy law. *Raleigh v. Illinois Dep't of Revenue,* 530 U.S. 15, 26, 120 S. Ct. 1951, 147 L. Ed. 2d 13 (2000) (bankruptcy proceeding does not alter the burden of proof on tax claim in bankruptcy court when the substantive law creating the tax obligation puts the burden on the taxpayer-debtor).

In the instant case, the disputed claim is based upon the repayment obligation under a contract. Therefore, the claimant retains the ultimate burden of proof under state law. In such a case, when the debtor provides evidence supporting [*189] an objection to claim, the burden reverts to the creditor to prove the validity of its claim by a preponderance of the evidence. *Gates,* 214 B.R. at 472. Thus, the burden of proof rests "initially, and ultimately, with the claimant who must allege facts sufficient to support their claim", if the debtor successfully rebuts the presumption of validity. *Id.*

In *Gates, supra,* the creditor's proof of claim was sufficient to be afforded *prima facie* validity. Hence, the objecting debtor was required to offer evidence on the discrete issue raised by her: whether the value of the vehicle collateral owned by her should be measured by "trade-in" (as opposed to "replacement") value. Because she failed to do so, [**10] it was held that she could not simply rely upon the fact that the creditor failed to submit such evidence at the hearing. This result is correct because the objector must first provide an evidentiary basis that rebuts a proper claim's *prima facie* validity.

The JCS Claim was properly executed and filed and was accompanied by the Summary. It therefore constitutes *prima facie* evidence of the claim's validity and amount. Since the "writing" that underlies credit card accounts--potentially including the credit agreement, electronic records, and monthly bills--can often be voluminous, creditors can comply with Rule 3001 by attaching an account summary to the proof of claim [7]. There appears to be no uniform standard as to the requisite comprehensiveness of such summary. However, both common sense and logic dictate that it should, at a minimum, include some breakdown of interest and other charges. *Heath,* 331 BR at 432-433.

7 Official Form 10 likewise so states.

In *Heath,* the court did not provide a definitive answer as to whether the necessary summary should cover either the entire account history, only the last several

months, or only the charges not included in the last pre-petition statement. [**11] *Id.* at 433. Likewise, this Court concludes it would be counterproductive to set out a specific checklist of data that must be uniformly supplied in summary form for credit card account claims. Indeed, the information that must be provided may vary from case to case. Nevertheless, the Court can conclude that the JCS Claim, with the attached Summary, does meet at least the minimum standard imposed by Bankruptcy Rule 3001 and the case law interpreting its requirements. The Summary does supply sufficient data regarding the underlying claim, including, *inter alia,* the date the account was opened, the date the debt was incurred, the balance at the time of filing, the origination and transfer of the account, the amount of interest charged-off, and the date of the charge off. It also links the debt directly to the Debtor as it includes Debtor's name, address, phone number, an account number, and a redacted social security number.

Since the JCS Claim is entitled to *prima facie* validity, it is legally incumbent on Debtor to rebut this status by presenting countervailing evidence. Instead, Debtor chose to reply upon only the bald assertion that the statute of limitations bars the claim. The fact [**12] that the account was opened in 1999 and charged-off in 2005 without more does not lead to the expiration of the claim under the Maryland statute of limitations. Debtor has not presented any evidence whatsoever, by affidavit, testimony, or otherwise, that JCS has forfeited the right to collect on the debt because of a failure to timely pursue its rights within the relevant window of opportunity as defined by Maryland law. [*190] Had Debtor submitted such evidence, it would have likely been sufficient to rebut the *prima facie* validity and shift the burden back to the creditor. As JCS failed to participate in this contested matter, it would have been unable to sustain its ultimate burden and Debtor would have likely prevailed. Instead, Debtor decided not to offer any evidence in the face of JCS's purported "default". Debtor cannot defeat the effect of the JCS Claim with unsupported allegations. Indeed, as noted in *Heath, supra,* a proof of claim that meets the more lenient standards of Rule 3001 will prevail over a mere formal objection without more. *Id.*

In short, it is this Court's reading of the relevant law that in all but the most unique cases, it is incumbent upon the objecting party to produce [**13] evidence as to the basis of its objection in order to overcome a properly filed proof of claim that achieves *prima facie* validity [8]. The Court will not, in this case, unilaterally interpret the somewhat contradictory information included in the Summary to reach the conclusion that the claim is time barred. That is only one possible interpretation. Indeed, the evidence necessary for Debtor to enhance her objection, such as monthly account statements, may already be within her possession. Debtor could also request monthly statements, or other relevant documentation, from JCS directly and if such information is not forthcoming, that fact may provide an additional evidentiary basis to object to the claim [9]. Finally, Debtor can also testify from her own personal knowledge about the status of the account.

8 It is likewise entirely possible that in the appropriate case an objection will be sustained purely on legal grounds, if the grounds are sufficiently articulated and the claim's defect appears on its face.

9 A debtor can seek information by discovery when prosecuting an objection to claim pursuant to Fed. R. Bankr. P. 9014, which incorporates Fed. R. Bankr. P. 7026 and 7028-7037 in contested [**14] matters.

The fact that JCS has chosen not to participate in this contested matter up to this point does not change the Court's ruling. To reiterate, in her Schedule F Debtor listed Midland Credit/Aspire, predecessor of JCS, as having an undisputed claim in the amount of $ 6,605, nearly the exact amount listed on the JCS Claim. In the appropriate circumstances, this Court can treat any information contained in the Debtor's bankruptcy schedules as evidentiary admissions, just as it may consider a creditor's failure to respond to an objection to claim. *Campbell,* 336 B.R. at 436 [10]. In order to overcome the *prima facie* validity of the claim and Debtor's own admission in her Schedule F, Debtor must produce evidence to rebut the properly assumed *prima facie* legitimacy of the claim. Debtor cannot rely on JCS's failure to respond to [*191] the objection without more [11].

10 In *Campbell,* debtors filed several objections alleging that the creditors had not provided proper documentation to support their claims. Each debt was scheduled by the debtors as undisputed. Although none of the creditors filed responses, the court *sua sponte* set the objections in for hearing to provide the debtors the opportunity [**15] to assert any facts sufficient to challenge the claims, independent of issues regarding the adequacy of the supporting documentation. At the hearing, no creditors appeared and debtors elected to submit on the pleadings. The bankruptcy court overruled the objections. The 9th Circuit Bankruptcy Appellate Panel, in part elaborating upon its holding in *Heath,* affirmed the bankruptcy court, ruling that the debtors had to submit evidence tending to show a factual dispute as to liability as to the amounts claimed and could not rely solely upon an alleged failure to comply with Rule 3001(c). As a result, the objections were

overruled notwithstanding the creditors' default. *Id.* at 435.

11 The Court recognizes that the bankruptcy claims filing and objection process operates in a manner that is somewhat counterintuitive as compared to normal civil litigation. Nevertheless, to the extent a measure of unorthodoxy exists it is only a reflection of the legislative policy choices embedded in Section 502(b) and the relevant Bankruptcy Rules. Properly filed claims in bankruptcy are elevated to an impressive level of potency out of respect for the system's demands for efficient, expedient, low-cost operation. [**16] Nevertheless, an objector is allowed every legitimate opportunity to seek disallowance of the particular claim. It is simply incumbent upon the objector to make out a viable case in support of the objection in the first instance in order to be in a position to prevail.

Accordingly, it is, by the United States Bankruptcy Court for the District of Maryland,

ORDERED, that the Motion to Reconsider Order Overruling Objection to Proof of Claim is **denied,** and it is further,

ORDERED, that the second amended Objection to Claim is **denied without prejudice** to the refiling of the same to permit the Debtor a third opportunity to submit evidence in support of the Objection.

Entered: January 23, 2008

Signed: January 23, 2008

SO ORDERED

/s/ Robert A. Gordon

ROBERT A. GORDON

U.S. BANKRUPTCY JUDGE

In re: MARQUIS McCRIMMON, Debtor.

Case No. 13-31216-DER, Chapter 7

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND, BALTIMORE DIVISION

536 B.R. 374; 2015 Bankr. LEXIS 2836

August 26, 2015, Decided
August 26, 2015, Entered

COUNSEL: [**1] For Dane Equities, LLC: James C. Olson, Esq., Owings Mills, MD.

For FCI Lender Services, Inc., as servicer for Vonderharr Wagner Associates LLC Defined Benefit Pension Plan: Rita Ting-Hopper, Esq., Atlantic Law Group, LLC, Leesburg, VA.

Trustee: Richard M. Kremen, Esq., DLA Piper LLP (US), Baltimore, MD.

For the debtor, Marquis McCrimmon: Christopher Robert Doyle, Esq., Greenbelt, MD.

JUDGES: DAVID E. RICE, UNITED STATES BANKRUPTCY JUDGE.

OPINION BY: DAVID E. RICE

OPINION

[*376] **MEMORANDUM OPINION**

Dane Equities, LLC ("Dane") filed a Motion to Reopen Chapter 7 Case on February 13, 2015 [Docket No. 43] (the "Motion to Reopen"). The Motion to Reopen was opposed by FCI Lender Services, Inc. ("FCI"), as servicer for Vonderharr Wagner Associates LLC Defined Benefit Pension Plan ("Vonderharr"). FCI asserts that Vonderharr is the holder of a note secured by a deed of trust on real property known as 1507 Ramsay Street, Baltimore, Maryland 21223 (the "Property"),[1] which at the time this case was commenced was owned by the debtor, Marquis McCrimmon (the "Debtor").

1 The Property is subject to a ground rent. Thus, the interest in question here is actually a leasehold interest. For ease of reference and because it has no bearing on the issues [**2] before this court, I ignore this legal distinction when making further reference in this opinion to title to the Property.

After a hearing held on April 13, 2015, the court granted the Motion to Reopen so the court could resolve a dispute between Dane and FCI about the effect of Dane's foreclosure of the Debtor's equity of redemption in the Property pursuant to a tax sale certificate while this case was pending. In accordance with the court's order reopening this case, the United States trustee reappointed Richard M. Kremen on April 14, 2015 to serve as trustee for the Debtor's bankruptcy estate (the "Chapter 7 Trustee").

After the Motion to Reopen was filed by Dane, FCI filed a Motion for Declaratory Judgment to Void a Tax Sale Foreclosure (the "Motion to Void Tax Sale") [Docket No. 45], which Dane opposed [See Docket No. 52]. After this case was reopened, Dane filed (as contemplated by its Motion to Reopen) a Motion for Relief from Automatic Stay to Validate Tax Sale Foreclosure [Docket No. 55] (the "Motion to Annul Stay"), which FCI opposed [See Docket No. 59]. Dane asks the court to annul the automatic stay and thereby validate its state court tax sale certificate foreclosure. Neither [**3] the Chapter 7 Trustee nor the Debtor filed an opposition to either the Motion to Void Tax Sale or the Motion to Annul Stay.

An evidentiary hearing on the Motion to Void Tax Sale and the Motion to Annul Stay was held on May 13, 2015. The only witness called to testify at that hearing was Aaron A. Naiman. As Dane's manager and attorney, Mr. Naiman was the person primarily responsible for enforcement of its tax sale certificate rights against the Property. In addition to Mr. Naiman's testimony, the court admitted into evidence a number of documents offered by Dane and FCI. Although FCI was represented by counsel, no representative of FCI testified or appeared at the hearing. Neither the Chapter 7 Trustee nor the Debtor appeared at the hearing.

At the conclusion of the hearing, the court requested the parties to submit post-trial memoranda. Dane filed its Memorandum on June 12, 2015 [Docket No. 62]. FCI's reply memorandum was due by July 11, 2015, but it has yet to file one.

[*377] For the reasons that follow, I conclude based upon a preponderance of the evidence that (i) the Motion to Annul Stay should be granted and that the automatic stay under 11 U.S.C. ß 362 should be annulled effective as of the time this [**4] case was filed on December 19, 2013, and (ii) the Motion to Void Tax Sale should be denied as moot.

JURISDICTION

This court has subject matter jurisdiction over this proceeding under 28 U.S.C. ß 1334, 28 U.S.C. ß 157(a), and Rule 402 of the Local Rules of the United States District Court for the District of Maryland. This is a "core proceeding" under 28 U.S.C. ß 157(b)(2)(G). This memorandum opinion constitutes the court's findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure (made applicable here by Rules 4001(a), 7052 and 9014 of the Federal Rules of Bankruptcy Procedure).

FINDINGS OF FACT

The Director of Finance for the City of Baltimore held a public auction tax sale on May 20, 2013 of the Property (which was then owned by the Debtor) for non-payment of taxes and other municipal liens. Dane purchased the Property at the auction for $5,300.00 subject to the Debtor's right of redemption and was issued a Certificate of Tax Sale for the Property dated May 20, 2013 by the Director of Finance [Dane Exhibit 1] (the "Certificate of Tax Sale"). Dane paid $2,831.41 (the total amount of taxes and municipal liens on the Property) to obtain the Certificate of Tax Sale, on which amount interest accrued under Maryland law at the rate of 18% per annum. In accordance with Maryland law an action to foreclose the right of redemption [**5] on the Certificate of Tax Sale could not be filed until six months had passed (that is, until November 20, 2013) and the "Certificate [would] be void unless such proceeding [was] brought within two (2) years from the date of [the] Certificate" -- that is, by May 20, 2015.[2]

2 See Md. Code Ann., Tax-Prop. ß 14-833(a) ("at any time after 6 months from the date of sale a holder of any certificate of sale may file a complaint to foreclose all rights of redemption of the property to which the certificate relates"); Md. Code Ann., Tax-Prop. ß 14-833(c)(1) ("The certificate is void unless a proceeding to foreclose the right of redemption is filed within 2 years of the date of the certificate of sale.").

Maryland law requires the holder of a certificate of tax sale to give certain notices to the property owner and lienholders beginning at least two months prior to filing an action to foreclose the right of redemption.[3] Accordingly, Dane obtained a title abstract for the Property in or around September of 2013. The abstract indicated that the Property was owned by the Debtor subject to a single deed of trust in favor of PNC Bank, N.A. ("PNC").[4] Because this bankruptcy case was filed some three months later, the abstract did [*378] not indicate that the Debtor was involved in any [**6] pending bankruptcy proceedings.

3 Md. Code Ann., Tax-Prop. ß 14-833(a-1) (the "holder of a certificate of sale may not file a complaint to foreclose the right of redemption until at least 2 months after sending the first notice and at least 30 days after sending the second notice required under this subsection").

4 The parties agree the Property is subject to a deed of trust that is recorded in the Land Records of Baltimore City [FCI Exhibit C] and that it secures repayment of a loan made to the Debtor. They do not agree, however, on whether Vonderharr is the current holder of the note secured by that deed of trust and whether FCI as its servicer thus has standing to oppose the Motion to Annul Stay or to file the Motion to Void Tax Sale. For the reasons to be explained, I do not believe this court must decide the issue of FCI's standing in order to decide the issues presented.

Thereafter, Dane gave notice of its intended foreclosure to the Debtor and PNC. Although the Debtor did not respond to that initial notice, PNC sent Dane a letter dated November 19, 2013 [Dane Exhibit 3] stating that PNC had assigned its rights in the deed of trust on the Property on November 14, 2012 to GMAC Mortgage LLC ("GMAC"). As a result, Dane then [**7] sent GMAC the required initial notice of its intended foreclosure. The assignment to GMAC was not reflected in the title ab-

stract obtained by Dane and as of the time of the hearing in this court, was not recorded in the Land Records of Baltimore City.

The Debtor filed a voluntary Chapter 7 bankruptcy petition in this court on December 19, 2013. The Schedules of Assets and Liabilities filed by the Debtor with his petition [Docket No. 1, Pages 8 to 35 of 52] (the "Schedules") indicate that (i) he was the owner of the Property, (ii) the value of the Property was $43,393.00, and (iii) GMAC was the holder of a deed of trust on the Property securing repayment of a debt in the amount of $100,749.00.[5] The Statement of Intention filed by the Debtor indicated that he did not claim the Property as exempt and that he would surrender the Property to GMAC [Docket No. 4, Page 3 of 6]. The Debtor did not mention the tax sale of the Property or list Dane as a creditor in either his Schedules or his Statement of Financial Affairs. As a result, Dane was not sent and did not receive any notice of the Debtor's bankruptcy case while it was pending.

> 5 The Property was not the Debtor's residence and appears to [**8] have been an investment property. The Debtor's petition stated that his address was 115 N. Curley Street, Baltimore, Maryland 21224 (the "Curley Street Property'). In addition to the Property and the Curley Street Property, the Debtor's Schedules and Amended Schedules [Docket No. 28] indicated that he owned four other properties in Baltimore City. With the exception of the Curley Street Property, the Schedules as amended indicated that each of the properties owned by the Debtor was subject to a mortgage debt that exceeded the value of the property.

The Chapter 7 Trustee conducted the meeting of creditors pursuant to 11 U.S.C. ß 341 and on February 28, 2014 issued a Report of No Distribution indicating that he had investigated the Debtor's financial affairs and concluded that there were no assets to be administrated for the benefit of creditors. The Debtor was granted a discharge on June 3, 2014, and the court ultimately issued a final decree and closed this case on July 28, 2014.

While these events were taking place in this court without Dane's knowledge, Dane filed an action in the Circuit Court for Baltimore City, Maryland (the "Circuit Court") on January 24, 2014 to foreclose the equity of redemption [**9] under its tax sale certificate that was docketed as *Dane Equities, LLC v. Marquis McCrimmon, et al.*, Case No. 24-C-14-000485 (the "Tax Sale Foreclosure"). Dane served the Tax Sale Foreclosure complaint, summons, and related papers on, among others, PNC and GMAC on March 4, 2014, and the Debtor on April 8, 2014 [Dane Exhibit 4]. No opposition to the Tax Sale Foreclosure was ever filed. As a result, the Circuit Court entered a Judgment Foreclosing Right of Redemption on June 18, 2014 that foreclosed the right of redemption, vested title to the Property in Dane, and directed the Director of Finance to make and deliver a deed to the Property to Dane [Dane Exhibit 5] (the "Judgment"). In accordance with the Judgment, the Director of Finance executed a Deed dated July 16, 2014 that granted title to the Property to Dane, [*379] which was recorded in the Land Records of Baltimore City [Dane Exhibit 6].

After it acquired title to the Property, Dane decided to retain the Property for purposes of leasing it to a tenant. At that time, the Property was vacant and it had no water or electrical service. In addition, the Property sustained water damage due to roof leaks. As a result, Dane spent a considerable [**10] amount of its own funds to rehabilitate the Property. In addition, Mr. Naiman and other representatives of Dane expended substantial time at the Property dealing with or supervising improvements to the Property. Dane incurred and paid at least $30,569.49 to obtain and improve the Property, including $14,786.75 in costs to rehabilitate the Property after it acquired title, $3,136.15 in real property taxes for subsequent years, $1,226.15 in water bills, $3,458.15 in legal fees and expenses, $2,659.29 in miscellaneous expenses, plus the $5,303.00 purchase price [Dane Exhibit 7].[6]

> 6 Dane presented evidence at trial that it has incurred and paid a total of $33,400.90 to obtain and improve the Property. I find that the actual amount was $30,549.49 because Dane's calculation included both the $2,831.41 lien amount and the whole $5,303.00 purchase price (which already included the $2,831.41 lien amount). Because Dane thus double counted the $2,831.41 lien amount, I deducted that amount from $33,400.90 to arrive at the actual amount of $30,549.49. This amount does not include any compensation for the time spent by Mr. Naiman or other representatives of Dane supervising improvements to the Property. [**11] It also does not take into account (i) any increase in the value of the Property by reason of those improvements, or (ii) any interest accruing on amounts paid by Dane.

I find that Dane acted without knowledge or notice of this bankruptcy case and took action in good faith to enforce its rights under the Certificate of Tax Sale from the time of the tax sale auction through December 11, 2014 when it learned of the filing of this bankruptcy case from FCI's counsel. On the other hand, FCI and/or its predecessors in interest PNC and GMAC knew of this bankruptcy case and knew that Dane had commenced the

Tax Sale Foreclosure. They were in a position to warn Dane of the bankruptcy and the resulting automatic stay under 11 U.S.C. ß 362. FCI did not do so until well after the Tax Sale Foreclosure was completed, the bankruptcy case was closed, title to the Property was transferred to Dane, and Dane incurred and paid at least $30,549.49 to obtain and improve the Property.

Dane learned for the first time on December 11, 2014 that the debtor filed this bankruptcy case when Mr. Naiman was contacted by FCI's counsel demanding that the Judgment be vacated [Dane Exhibit 8]. Dane refused to vacate the Judgment, and [**12] this litigation ensued. I do not find credible FCI's argument (unsupported by any evidence) that it delayed telling Dane about this bankruptcy case because the filing of a suggestion of bankruptcy in the Circuit Court would have entered the appearance of its counsel and might have subjected FCI to various procedural burdens. There is no reasonable explanation for why FCI and/or its predecessors in interest PNC and GMAC could not have immediately contacted Dane by letter or email (as FCI ultimately did on December 11, 2014) and advised Dane that it was acting in violation of the automatic stay. If they had done so as soon as they learned of the Tax Sale Foreclosure, FCI and Vonderharr could have avoided the consequences of this litigation.

The assignment by PNC to GMAC of the deed of trust on the Property was not recorded in the Land Records of Baltimore City. Likewise, nothing is recorded in the [*380] Land Records that evidences a further assignment of the note or the deed of trust on the Property to Vonderharr. Indeed, the only evidence of any interest of Vonderharr or FCI in the note and deed of trust presented to this court was an unrecorded purported assignment effective as of June 18, [**13] 2013 by Granite Loan Acquisition Venture IX LLC ("Granite") of the deed of trust on the Property to Vonderharr [Dane Exhibit 2].[7] FCI urges the Court to also consider as evidence of standing that (i) FCI moved on Vonderharr's behalf in the Circuit Court to vacate the Judgment, and (ii) FCI commenced a foreclosure proceeding in the Circuit Court against the Property on behalf of Vonderharr, alleging that Vonderharr is the holder of the note secured by a deed of trust on the Property. Mere allegations in the Circuit Court and in a pleading filed in this court are not a basis upon which this court should make a finding that Vonderharr is in fact the holder of the note secured by the deed of trust on the Property, and I decline to do so here.

> 7 This assignment is of little or no evidentiary value to FCI. There is nothing in the record that establishes Granite was ever a holder of the note with any right to enforce the deed of trust on the Property. Moreover, the assignment purports to assign an interest in the deed of trust, not the note; it is a well-known principle of Maryland law that the right to enforce a deed of trust follows the note and thus this assignment would do little to establish [**14] that Vonderharr is the holder of the note. "The deed of trust cannot be transferred like a mortgage; rather, the corresponding note may be transferred, and carries with it the security provided by the deed of trust." *Anderson v. Burson*, 424 Md. 232, 246, 35 A.3d 452 (2011) (citing *Le Brun v. Prosise*, 197 Md. 466, 474-75, 79 A.2d 543 (1951)). Vonderharr could have addressed this issue by simply appearing in court with a witness in possession of the note. For reasons not apparent from the record, it chose not to do so.

CONCLUSIONS OF LAW

This court need not decide whether FCI has standing to oppose the Motion to Annul Stay and to prosecute its Motion to Void Tax Sale. The standing issue, like the Motion to Void Tax Sale, is moot because the court must grant the Motion to Annul Stay on its merits.

As this court has observed, "[i]t is well established in this District that a foreclosure sale conducted in violation of the automatic stay of [11 U.S.C. ß 362] is void." *In re King*, 362 B.R. 226, 233 (Bankr. D. Md. 2007) (citing *In re Brown*, 342 B.R. 248, 255 (Bankr. D. Md. 2006) and *In re Lampkin*, 116 B.R. 450, 453 (Bankr. D. Md. 1990)). As the Fourth Circuit has also said, "[a] chief purpose of the automatic stay is to allow for a systematic, equitable liquidation proceeding by avoiding a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 864 (4th Cir. 2001) (internal quotations omitted). Nevertheless, a court may validate an [**15] unknowing violation of the automatic stay by annulment of the stay. *Lampkin*, 116 B.R. at 453. Annulment of the stay validates otherwise void acts because "[t]he effect of annulling the stay is to negate its existence in its entirety." *Id.* (citations omitted).

The notion that the automatic stay may be annulled to validate otherwise void acts is contemplated by the express provisions of ß 362 of the Bankruptcy Code.[8] Courts generally hold that this includes the power to grant relief retroactively to validate actions taken in violation of the automatic stay. *See, e.g., In re Myers*, 491 F.3d 120, 127 [*381] (3d Cir. 2007) ("this Court and others have held that actions in violation of the stay, although void (as opposed to voidable), may be revitalized in appropriate circumstances by retroactive annulment of the stay"); *In re Siciliano*, 13 F.3d 748, 751 (3d Cir.

1994) ("inclusion of the word "annulling" in the statute indicates a legislative intent, to apply certain types of relief retroactively and validate proceedings that would otherwise be void *ab initio*"); *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 909-10 (6th Cir. 1993); *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178-79 (5th Cir. 1989); *Albany Partners v. Westbrook (In re Albany Partners)*, 749 F.2d 670, 675 (11th Cir. 1984) ("ß 362(d) permits bankruptcy courts, in appropriately *limited* circumstances, to grant retroactive relief from the automatic stay"). While annulment of the automatic stay should not be granted lightly due to the importance of the automatic stay, "bankruptcy courts have wide discretion in [**16] weighing the factors and determining what constitutes cause to annul the stay." *Shaw v. Ehrlich*, 294 B.R. 260, 272 (W.D. Va. 2003) (affirmed by *Wiencko v. Ehrlich (In re Wiencko)*, 99 Fed. Appx. 466, 2004 U.S. App. LEXIS 10174, 2004 WL 1146490 (4th Cir. Va., May 24, 2004)).[9]

8 "The court shall grant relief from the stay ... such as by terminating, ***annulling***, modifying, or conditioning" the automatic stay. 11 U.S.C. ß 362(d) (emphasis added).

9 In its decision in *Wiencko*, the Fourth Circuit stated that under 11 U.S.C. ß 362(d), "bankruptcy courts have the discretion to annul the automatic stay retroactively for cause in order to rehabilitate stay violations." 99 Fed. Appx. at 469 (citing *Mataya v. Kissinger (In re Kissinger)*, 72 F3d 107, 108-09 (9th Cir. 1995)).

In considering whether to annul the automatic stay and grant retroactive validation to actions taken in violation of the stay under ß 362(d)(1) of the Bankruptcy Code, courts consider a variety of factors in addition to the factors for lifting the stay generally.[10] *See, e.g., In re Fjeldsted*, 293 B.R. 12, 24-25 (B.A.P. 9th Cir. 2003) (listing factors); *In re Coletta*, 380 B.R. 140, 147-48 (Bankr. E.D. Pa. 2007) (listing additional factors). The factors "are merely a framework for analysis and not a scorecard. In any given case, one factor may so outweigh the others as to be dispositive." *In re Fjeldsted*, 293 B.R. at 25. Having carefully considered these factors, I conclude that the circumstances of this case weigh in favor of annulling the automatic stay.

10 In addition to the two main factors courts rely on when deciding whether to annul the stay, whether the creditor was aware of the bankruptcy petition and whether the [**17] debtor engaged in inequitable conduct or there would be prejudice to the creditor, the *Fjeldsted* court listed numerous other factors that courts can consider when deciding whether to annul the stay. These include weighing the prejudice to creditors or third parties such as a bona fide purchaser, whether creditors took action knowing of the stay, whether the parties can be restored to their position prior to the violation, the costs of annulment, how quickly the debtors moved to void the sale stay violation, whether annulment will cause irreparable injury to the debtor, and whether annulment will promote judicial economy. *In re Fjeldsted*, 293 B.R. at 25. The court in *Coletta* additionally looked to whether "the additional expenses necessarily incurred by the creditor who must begin anew with its enforcement remedy outweigh the benefit to anyone; and whether a motion for relief from stay would likely have been granted before the creditor acted in violation of the stay, had it been filed." *In re Coletta*, 380 B.R. at 148. *See also, In re Killmer*, 513 B.R. 41 (Bankr. S.D.N.Y. 2014) (discussing the *Fjeldstad* factors as well as other factors adopted in *In re Worldcom, Inc.*, 325 B.R. 511 (Bankr. S.D.N.Y. 2005)).

In this instance, Dane acted in good faith and without knowledge of the filing of the Debtor's bankruptcy case. In addition, if Dane had filed a motion [**18] for relief from the automatic stay before commencing the Tax Sale Foreclosure, the motion would undoubtedly have been granted [*382] and the stay would have been terminated to permit Dane to proceed with its foreclosure. There was no equity in the Property, it was not necessary for an effective reorganization because the Debtor was in a Chapter 7 case, the Property was vacant, and the Debtor's stated intent at the outset of the case was to surrender the Property. The Chapter 7 Trustee filed a Report of No Distribution confirming that he concluded that the Property was of no benefit to the bankruptcy estate.

On the other hand, FCI and/or its predecessors in interest PNC and GMAC knew of the filing of both this bankruptcy case and the Tax Sale Foreclosure, but took no action to advise Dane or the Circuit Court that Dane was acting in violation of the automatic stay. Consequently, Dane changed its position to its detriment. It incurred at least $30,569.49 to complete the Tax Sale Foreclosure, acquire title, rehabilitate, and improve the Property in anticipation of renting it to a tenant. Moreover, in order for Dane to be made whole at this point it would need to be compensated for the time and [**19] effort of its representatives in supervising the rehabilitation of the Property and presumably paid 18% interest on at least some portion, if not all, of its loss.

At this point it is not possible to restore the parties to the status quo that existed at the time of commencement of the Tax Sale Foreclosure. It has long been the law in Maryland that if the holder of a tax sale certificate does not exercise its right to foreclose the right of redemption

within the applicable time limit, "such certificate becomes void and of no effect." *Bullard v. Hardisty*, 217 Md. 489, 494, 143 A.2d 493 (1958). The two-year period within which Dane could exercise its rights expired on May 20, 2015. If the Deed to the Property, the Judgment, and the Tax Sale Foreclosure are void and not retroactively validated by annulment of the stay, Dane would find itself holding a stale and thus void tax sale certificate, with no right to now recommence an action to foreclose the right of redemption.[11]

> 11 See Md. Code Ann., Tax-Prop. ß 14-833(d) ("If a certificate is void under [ß 14-833(c)], then any right, title, and interest of the holder of the certificate of sale, in the property sold shall cease and all money received by the collector on account of the sale shall be deemed forfeited, and shall be applied by the collector [**20] on taxes in arrears on the property.").

Unlike the certain loss to Dane if this court denies the request to annul the automatic stay, the financial consequences to Vonderharr are uncertain. At the hearing, FCI's counsel argued that FCI and Vonderharr face irreparable injury because Vonderharr will lose its right to foreclose against the Property. Assuming Vonderharr had such a right, the only evidence in the record suggests Vonderharr would likely recover little if anything from foreclosure against the Property. The Debtor listed the value of the Property in his Schedules as $43,393.00. No other evidence of value was introduced at trial. Assuming Dane has a lien against the Property for all of its costs and expenses as FCI's counsel suggested (a doubtful proposition),[12] a foreclosure sale of the [*383] Property is not likely to result in any meaningful financial benefit to Vonderharr. In the unlikely event the Property sold for $43,393.00 as the Debtor believed it to be worth, Vonderharr would not only have to make Dane whole, but would also have to pay its own costs of foreclosure, transfer and closing costs, and its legal fees before netting any amount that could be applied to the mortgage [**21] debt. Any such recovery by Vonderharr would be minimal when compared to the loss imposed on Dane in the circumstances of this case.

> 12 The issue of the extent to which Dane would be protected and made whole under state law was one of the issues that the court specifically requested the parties to address in their post-trial memoranda. As explained by Dane in its post-trial memorandum, while Maryland law provides some protection to the holders of tax sale certificates when a foreclosure judgment is reopened and set aside, it is not clear that those limited protections would apply to the circumstances in which Dane finds itself. Md. Code Ann., Tax-Prop. ß 14-845. The statute speaks to judgments set aside by reason of "lack of jurisdiction or fraud"; FCI seeks, however, a declaration that Dane's foreclosure judgment is void *ab initio* by reason of violation of 11 U.S.C. ß 362. FCI did not file a reply memorandum addressing the concerns raised by Dane in its post-trial memorandum. The court's own research has not uncovered any authority that would address those concerns or give the court any assurance that Dane would be fully compensated and made whole under Maryland law in the event this court determines that Dane's foreclosure judgment [**22] is void *ab initio*.

After consideration of all of the above, I conclude that the circumstances weigh in favor of Dane. This case presents the sort of unusual and compelling circumstance in which it is appropriate to grant retroactive relief to validate action that might otherwise be void by reason of violation of the automatic stay. Thus, I find that there is cause to annul the automatic stay pursuant to 11 U.S.C. ß 362(d) as requested by Dane.

CONCLUSION

For the above reasons, an order will be entered consistent with this opinion that (i) grants the Motion to Annul Stay and annuls the automatic stay under 11 U.S.C. ß 362 as to the Property and the Tax Sale Foreclosure effective as of the time this case was filed on December 19, 2013, and (ii) denies the Motion to Void Tax Sale as moot.

Entered: August 26, 2015

Date signed August 26, 2015

/s/ David E. Rice

DAVID E. RICE

U.S. BANKRUPTCY JUDGE

IN RE: KIM GATES, Debtor(s).

CASE NO. 97-1-2435-DK, CHAPTER 13

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND, GREENBELT DIVISION

214 B.R. 467; 1997 Bankr. LEXIS 1819

November 5, 1997, Decided
November 7, 1997, Entered

DISPOSITION: [**1] Debtor's motion to reconsider the court's Order entered August 26, 1997, denied. Chase's claim allowed as a secured claim in the amount of $ 8,095.46.

COUNSEL: John L. Dowling, Esquire, for the Debtor.

Dominiquie V. Sinesi, Esquire, Local Counsel for Chase Automotive Finance Corporation.

William J. Beckett, Esquire, for Chase Automotive Finance Corporation.

Thomas L. Lackey, Esq., Chapter 13 Trustee, Bowie, MD.

Office of the United States Trustee, Greenbelt, MD.

JUDGES: DUNCAN W. KEIR, United States Bankruptcy Judge for the District of Maryland.

OPINION BY: DUNCAN W. KEIR

OPINION

[*468] ***MEMORANDUM OPINION***

Debtor requests this court to alter or amend its Order entered August 26, 1997, allowing the secured claim filed by Chase Automotive Finance Corporation ("Chase") in the amount of $ 8,095.46. The court has reviewed the pleadings and finds that the facts and legal arguments are adequately presented in the materials before it, and that a hearing would not aid the decisional process.

On March 7, 1997, Debtor commenced this case by filing a voluntary petition under Chapter 13 of the United States Bankruptcy Code. A meeting pursuant to 11 U.S.C. ß 341(a) was scheduled for April 28, [**2] 1997, and a hearing upon confirmation of Debtor's plan was set for May 20, 1997. The bar date for filing proofs of claims was July 28, 1997, [*469] in accordance with Bankruptcy Rule 3002(c). Notice of all of these dates and deadlines were sent to all creditors listed by Debtor in her schedules. As is common in this jurisdiction, the confirmation hearing preceded the bar date for filing proofs of claims by over two months.

At a hearing before this court on May 20, 1997, on confirmation of Debtor's plan, upon the unopposed recommendation of the Chapter 13 Trustee, the plan was confirmed. The plan recites in part:

> (I) -- Pay the allowed claim of Chase Automotive Finance, secured by a security interest in a 1991 Mazda Miata, to the extent that such claim is not greater than the value of said automobile, plus interest of 7.5%.

On May 1, 1997, prior to the hearing upon confirmation, Chase filed a proof of claim asserting a secured claim in the amount of $ 8,095.46. No reference to this claim was made by the Debtor or the trustee at the confirmation hearing. The amount to be paid by the Debtor to the trustee under the plan is insufficient to pay the secured claim as filed.

Subsequent [**3] to the Order of Confirmation, Debtor objected to the claim of Chase asserting that the collateral was worth only $ 4,410.00, based upon the "trade-in value" stated in the Kelly Blue Book. The objection to claim argues that the secured claim should be reduced to the trade-in value asserted, minus post-petition contract payments already made by Debtor, for a net allowed secured claim in the amount of $ 3,830.74.

Chase responded to the objection to claim asserting that it held a first priority lien upon the 1991 Mazda for an indebtedness in the amount of $ 8,095.46 (as of the petition date). The response further asserts that under the decision of the United States Supreme Court in *Associates Commercial Corporation v. Rash*, 138 L. Ed. 2d 148, 117 S. Ct. 1879 (1997), the valuation of the collateral should be based upon "replacement value" which Chase asserts should be the "retail" price rather than the trade-in value. Chase asserts that its claim is oversecured and Debtor's plan must pay the full amount of its claim with interest at the contract rate.

At the hearing held upon the objection to claim, Debtor put into evidence a page from the 1997 Kelly Blue Book showing the trade-in [**4] value of the subject vehicle to be as asserted by Debtor. Chase put into evidence a page from the National Automobile Dealers' Association Official Used Car Guide ("N.A.D.A. Guide"), Eastern Edition, April 1997, showing the retail value of the subject vehicle to be $ 9,275.00. Neither party introduced any evidence concerning any rights or items of value included in the N.A.D.A. Guide's determination of retail value that were not afforded to Debtor by the retention of her vehicle.

Upon this record, the court ruled that the value of the collateral exceeded the amount of the claim as of the petition date and that accordingly, the claim was allowed as a secured claim in the full amount of the indebtedness.

Debtor now comes to this court and asks this court to alter or amend its ruling asserting three grounds. First, Debtor asserts that as Chase did not object to confirmation of Debtor's plan, the "cram down provision" contained in the plan binds Chase and accordingly the secured claim "must be reduced to the value of the collateral *as scheduled by the debtor*." Debtor's Motion to Alter or Amend at P 5 (emphasis added). [1] Second, Debtor argues that Chase cannot claim that interest [**5] should be paid under the plan upon the allowed claim at the contract rate of 12% instead of the rate proposed by Debtor as the "market rate" of 7.5%. Third, Debtor argues that Chase did not introduce any evidence which would adjust for the "value of items the debtor does not receive when she retains her vehicle" [2] and that it was not "fair" to impose upon Debtor the burden of proving these costs. Debtor argues that as a result of the alleged failure by Chase to [*470] introduce such evidence, the court should apply the trade-in or wholesale value for the vehicle.

1 The underlined words "as scheduled by the debtor" are not contained in the plan.

2 Quoting from *Associates Commercial Corporation v. Rash*, 138 L. Ed. 2d 148, 117 S. Ct. 1879, 1886-87 n.6.

Debtor does not specify a rule of procedure under which the Motion for Reconsideration is brought. Because Debtor filed the request for reconsideration within 10 days of the order from which Debtor seeks relief, the court shall treat the motion as a motion to [**6] alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e). [3] *See In re Investors Florida Aggressive Growth Fund, Ltd.*, 168 B.R. 760, 768 (Bankr. N.D. Fla. 1994); *Yorke v. Citibank, N.A. (In re BNT Terminals, Inc.)*, 125 B.R. 963, 976-77 (Bankr. N.D. Ill. 1990). Although Rule 59(e) does not set forth a standard to be applied when considering a motion to alter or amend, the United States Court of Appeals for the Fourth Circuit has recognized the following three grounds for amending a judgment pursuant to Rule 59(e): "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Collison v. International Chemical Workers Union*, 34 F.3d 233, 236 (4th Cir. 1994)(quoting *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993)).

3 Federal Rule of Civil Procedure 59(e) is made applicable to this bankruptcy case by Federal Rule of Bankruptcy Procedure 9023.

Debtor's [**7] first assertion that Chase is bound by the provision of the plan relating to its claim because it neglected to object to the confirmation of the plan is erroneous. Debtor argues that in *Associates Commercial Corp. v. Rash*, the Supreme Court ruled that a secured creditor must object to the cram-down provisions of a Chapter 13 debtor's plan in order to protect its claim that it is fully secured. Debtor directs this court's attention to the language in *Rash* which reads:

> If a secured creditor does not accept a debtor's Chapter 13 plan, the debtor has two options for handling allowed secured claims; surrender the collateral to the creditor . . . or under the cram down option, keep the collateral over the creditor's objection and provide the creditor, over the life of the plan, with the equivalent of the present value of the collateral . . . .

Rash, 117 S. Ct. at 1885. This court disagrees with Debtor's interpretation of *Rash* and does not find that the Supreme Court intended said language to overrule case law which holds that the confirmed plan is not binding upon creditors for the purpose of valuing the collateral when those creditors were not notified that [**8] an 11 U.S.C. ß 506 value determination would be made at the confirmation hearing. *See Piedmont Trust Bank v. Linkous (In re Linkous)*, 990 F.2d 160 (4th Cir. 1993).

In *In re Linkous*, the court held that while a bankruptcy court's confirmation order is typically *res judicata*, due process requires that the confirmed plan cannot bind parties to a specific valuation without actual notice that the bankruptcy court would make a Section 506 valuation at the confirmation hearing. *In re Linkous*, 990 F.2d at 162. The court rejected the debtor's argument that a sophisticated creditor would likely know that its interests were in jeopardy and held that the notice regarding the valuation of the secured claim "must state that such a hearing will be held." *Id.* at 163. *See also In re Rodnok*, 197 B.R. 232 (Bankr. E.D. Va. 1996).

In addition, other courts within this circuit have held that a contest between debtor and creditor regarding the value of a given secured claim should not be heard in the context of confirmation, but rather in a separate adversary proceeding as governed by Federal Rules of Bankruptcy Procedure 3012 and 7001. *See, e.g., Wright v. Commercial Credit* [**9] *Corp.*, 178 B.R. 703, 705-06 (E.D. Va. 1995), *appeal dismissed*, 77 F.3d 472 (4th Cir. 1996). In *Wright*, the district court held that "when a party asks the bankruptcy court to determine the extent of a lien or the value of the collateral forming the basis of the lien, adversary proceedings are required, as contemplated by Bankruptcy Rule 7001(2) and [*471] Bankruptcy Rule 3012." *Id*. at 705 (footnote omitted). [4]

> 4 Where the issue is the value of the collateral, a formal adversary proceeding is not required. Bankruptcy Rule 3012 states: "The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct." This rule contemplates hearings on issues arising under ß 506(a), pursuant to which, "secured claims are to be valued and allowed as secured to the extent of the value of the collateral and unsecured, to the extent it is enforceable, for the excess over such value." *See Wright*, 178 B.R., at 705 n.3 (quoting Notes of Advisory Committee on Rules, Rule 3012).
>
> Nonetheless, a separate proceeding upon motion (or objection to claim) is required. Such a separate proceeding may be heard concurrently with the hearing upon confirmation, if the valuation proceeding has been noticed for hearing.

[**10] Furthermore, in the District of Maryland, the hearing on the confirmation of a Chapter 13 plan often occurs earlier than the deadline for filing claims. [5] The trustee's recommendation and court's findings as to adequate funding of the plan and compliance with 11 U.S.C. ß 1325(a)(5)(B)(ii) are often based upon the amounts of claims scheduled by the debtor. If a subsequent proof of a secured or priority claim is timely filed in an amount larger than the plan can distribute, the plan must be adjusted to satisfy the requirements of 11 U.S.C. ß 1322(a)(2) and ß 1325(a). Often a motion to modify the plan is filed by the debtor or the trustee unless an objection to the filed claim is sustained.

> 5 In a Chapter 13 case, proofs of claims are required to be filed no later than 90 days after the first date set for the section 341 Meeting of Creditors. Bankruptcy Rule 3002(c).

Moreover, the facts of this case would not support a finding that the value of Chase's claim had been established by the confirmed Chapter 13 [**11] plan. Debtor's plan merely stated that the plan would "pay the allowed claim of Chase Automotive Finance, secured by a security interest in a 1991 Mazda Miata, to the extent that such claim is not greater than the value of the said automobile, plus interest of 7.5%." Thus, the plan itself does not even purport to establish the value which Debtor now argues is controlling.

The United States Supreme Court has determined that in a Chapter 13 "cram-down" case, the applicable valuation of collateral under 11 U.S.C. ß 506 is "replacement value." *Rash*, 117 S. Ct. at 1886. The Court defined replacement value as "the cost the debtor would incur to obtain a like asset for the same 'proposed use.'" *Id.* The Court further provided that a determination of exactly what the replacement value is shall be left to the bankruptcy courts, as triers of fact. *Id.* at 1886 n.6. In a consumer case, replacement value of a motor vehicle used primarily for personal transportation should be calculated by first determining the retail value, as that is the price that a consumer would have to pay to replace the vehicle in the consumer market. Accordingly, in such cases, replacement value equals retail [**12] value less the value of items, if any, which were included in the retail value but which were not received by a debtor who retains her vehicle.

In this case, Chase submitted evidence of the retail value of Debtor's automobile consisting of a photocopy

of a relevant page from the N.A.D.A. Guide. Debtor did not dispute the accuracy of the N.A.D.A. Guide as to retail value and argued instead that the "trade-in" value as provided in the Kelly Blue Book was the accurate valuation to be used. [6] No evidence was introduced concerning any item included in the retail value set forth in the N.A.D.A. Guide which was not provided to Debtor by the retention of her car. Debtor argues that it is the burden of the creditor to establish such items and as a result of Chase's failure to produce evidence as to such items, the court must apply trade-in or wholesale value.

> 6 This court follows other courts in recognizing the N.A.D.A. guide and the Kelly Blue Book as credible evidence of valuation. "This [N.A.D.A.] booklet is without question recognized authority as to a general gauge of values in the financial as well as the auto industry relating to automobiles." *In re Thayer*, 98 B.R. 748, 750 (Bankr. W.D. Va. 1989). See also *In re Roberts*, 210 B.R. 325, 330 (Bankr. N.D. Iowa 1997); *In re Winston*, 181 B.R. 589, 593 n.3 (Bankr. N.D. Ala. 1995) and cases cited therein.

[**13] [*472] Debtor's argument is incorrect for two reasons. Even if the claimant was required to produce evidence concerning items included in the retail value but not delivered to the debtor by retention of the vehicle, no basis exists to, in effect, "default" to the wholesale or trade-in value. No legal basis has been argued by Debtor for this proposition. Nor has any factual basis been established by evidence that the wholesale or trade-in value represents replacement value as mandated by the *Rash* decision.

The burden of proof with respect to claims filed under 11 U.S.C. ß 502 rests initially, and ultimately, with the claimant who "must allege facts sufficient to support their claim." *In re Weidel*, 208 B.R. 848, 854 (Bankr. M.D. N.C. 1997) (citation omitted). Nevertheless, "a properly executed proof of claim is sufficient to shift the burden of producing evidence and to entitle the claimant to a share in the distribution of the bankrupt's estate unless an objector comes forward with evidence contradicting the claim." *Superior Metal Moulding Company, Inc. v. Shipp, (In re Friedman)*, 436 F. Supp. 234, 237 (D. Md. 1977). Although some courts have held that the degree of evidence [**14] which must be shown by the objecting party is only "some evidence" contradicting the proof of claim, other courts have stated "the objector must produce evidence equal in force to the prima facie case . . . which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency." *Weidel*, 208 Bankr. at 854. *See also In re Shabazz*, 206 B.R. 116, 120 (E.D. Va. 1996), *aff'd sub nom. Shabazz v. United States*, 1997 U.S. Dist. LEXIS 9305, No. Civ.A. 97-185- A, 1997 WL 593863 (E.D. Va. June 9, 1997).

In practical application, a proof of claim establishes prima facie, the elements of a cause of action against the debtor for the claim asserted. To overcome the prima facie validity, the objecting party must demonstrate by evidence, a defense to one or more elements of the cause of action asserted in the claim, which defense, if uncontravened, would be sufficient to defeat the legal basis for the claim asserted. "If the objecting party produces such evidence, the burden of going forward reverts to the claimant to prove the validity of its claim by a preponderance of the evidence." *Weidel*, 208 Bankr. at 854.

In this case, the proof of claim alleged that Chase held [**15] a claim in the amount of $ 8,095.46 on the date of the petition upon the basis of an automotive loan secured in the same amount by a perfected security interest in a motor vehicle described as a 1991 Mazda, Vehicle Identification Number: JM1NA3513M0230448. The proof of claim, having been executed and filed in accordance with the bankruptcy rules, constituted prima facie evidence of the validity and amount of the claim. Bankruptcy Rule 3001(f); *Internal Revenue Service v. Levy, (In re Land Bank Equity Corp.)*, 973 F.2d 265 (4th Cir. 1992). Debtor's objection attacked the value of the collateral asserted in the proof of claim. If the objection was supported by evidence demonstrating that the value was less than the amount claimed, the objection would be sufficient to overcome the prima facie validity of the proof of claim on that issue.

However, Debtor failed to support her allegation of lower value with evidence. Debtor might have accomplished this by producing evidence showing that the value established by Chase was inaccurate (for example, evidence that the car was not of the condition assumed in the price guide, or that another credible source placed a lower value on such vehicles). [**16] Nor did Debtor offer any evidence that there were items which should be deleted from retail value in arriving at replacement value. Where the proof of claim established prima facie the fully secured claim of the creditor, evidence of facts contravening the secured amount of the claim, such as items which were included in the retail value but not received by the debtor, must be produced by the objecting party which alleges a lower replacement value.

In this case, Debtor solely argued (without legal basis) that trade-in value must be applied. Therefore, Debtor did not overcome the prima facie validity of Chase's secured claim, particularly as further supported by Chase's proof of retail value. If Debtor had introduced evidence contravening the element [*473] of value in Chase's proof of claim, the burden of proving by a preponderance of the evidence the replacement value of the

car would have been ultimately upon Chase. But that did not happen in this case.

For these reasons, Debtor's motion to reconsider the court's Order entered August 26, 1997, is denied. Chase's claim is allowed as a secured claim in the amount of $ 8,095.46.

Finally, Debtor argues that the 7.5% interest rate proposed [**17] in the confirmed plan of reorganization should be applied to the balance of the loan instead of the contract rate of 12%. This is not an issue in determining the claim, but pertains to the confirmability of the plan. [7]

7 11 U.S.C. ß 1325(a) provides in part:

> The court shall confirm a plan if -
>
> (5) with respect to each allowed secured claim provided for by the plan-
>
> (A) the holder of such claim has accepted the plan;
>
> (B)(I) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.

In order for the value distributed over the term of the plan on account of a secured claim to equal the present value of the claim on the effective date, the amount distributed must include interest at a discount rate sufficient to yield the required present value. *See United Carolina Bank v. Hall*, [**18] 993 F.2d 1126 (4th Cir. 1993). As Debtor's current plan is insufficient to pay the amount of the allowed secured claim, it requires modification or the case will be subject to dismissal. The issue of what is the proper discount rate shall be addressed at a hearing upon a motion to modify plan (if filed).

Dated: November *5*, 1997

DUNCAN W. KEIR

United States Bankruptcy Judge for the District of Maryland