Using Chapter 13 Bankruptcy in Foreclosure Cases

Friday, September 16, 2016

Albany Marriott
Albany, NY

CLE Course Materials and NotePad®

Complete course materials distributed in electronic format online in advance of the program.

Sponsored by the

New York State Bar Association and The Committee on Legal Aid

This program is offered for education purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Patricia Spataro, LAP Director

1.800.255.0569

New York State Bar Association

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form-you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees: please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

You MUST turn in this form at the end of the program for your MCLE credit.

Using Chapter 13 Bankruptcy in Foreclosure Cases, Friday, September 16, 2016
New York State Bar Association's Committee on Legal Aid, Albany Marriott, Albany, NY

Name:
(Please print)

I certify that I was present for the entire presentation of this program

Signature: Date:

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NEW YORK STATE BAR ASSOCIATION

Live Program Evaluation (Attending In Person)
Please complete the following program evaluation. We rely on your assessment to strengthen teaching methods and improve the programs we provide. The New York State Bar Association is committed to providing high quality continuing legal education courses and your feedback is important to us.

Program Name: Using Chapter 13 Bankruptcy in Foreclosure Cases

Program Code: FRIHEAB2

Program Location: Albany Marriott, Albany - NY

Program Date: September 16, 2016

1. What is your overall evaluation of this program? Please include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional Comments____

____

2. Please rate each Speaker's Presentation based on **CONTENT** and **ABILITY** and include any additional comments.

	CONTENT				ABILITY			
	Excellent	Good	Fair	Poor	Excellent	Good	Fair	Poor
Peter M. Frank	☐	☐	☐	☐	☐	☐	☐	☐
David J. Bryan	☐	☐	☐	☐	☐	☐	☐	☐
Ndukwe Agwu	☐	☐	☐	☐	☐	☐	☐	☐
William Flynn	☐	☐	☐	☐	☐	☐	☐	☐
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(please turn over)

Additional comments (CONTENT)

_____

_____

Additional comments (ABILITY)

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3. Please rate the program materials and include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional comments

_____

_____

4. Do you think any portions of the program should be **EXPANDED** or **SHORTENED**? Please include any additional comments.
☐ Yes – Expanded ☐ Yes – Shortened ☐ No – Fine as is

Additional comments

_____

_____

5. Please rate the following aspects of the program: **REGISTRATION**; **ORGANIZATION**; **ADMINISTRATION**; **MEETING SITE** (if applicable), and include any additional comments.

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
Registration	☐	☐	☐	☐	☐
Organization	☐	☐	☐	☐	☐
Administration	☐	☐	☐	☐	☐
Meeting Site (if applicable)	☐	☐	☐	☐	☐

Additional comments

_____

_____

6. How did you learn about this program?
☐ Ad in legal publication ☐ NYSBA web site ☐ Brochure or Postcard
☐ Social Media (Facebook / Google) ☐ Email ☐ Word of mouth

7. Please give us your suggestions for new programs or topics you would like to see offered

_____

_____

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, NY 12207
Phone: 518-463-3200 | Secure Fax: 518.463.5993

Using Chapter 13 bankruptcy in Foreclosure Cases: An Overview

NYS Bar Association Partnership Conference
Friday, September 16, 2016
11:00 am – 12:15 pm

- Introduction of panel and short description of their organizations' Chapter 13 practice in Foreclosure (William Flynn)
- Overview of what a Chapter 13 Bankruptcy Case is (William Flynn & David Bryan)
- Loss mitigation and modifying the mortgage loan (Ndukwe Agwu & Peter M. Frank)

Table of Contents

Using Chapter 13 Bankruptcy in Foreclosure Cases

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USING CHAPTER 13 BANKRUPTCY IN FORECLOSURE CASES: AN OVERVIEW

CO-SPONSORED BY
BROOKLYN LEGAL SERVICES CORPORATION A AND

THE BROOKLYN BAR ASSOCIATION VOLUNTEER LAWYERS PROJECT

THIS PROGRAM IS FUNDED IN PART BY THE AMERICAN BANKRUPTCY FOUNDATION AND THE NYS ATTORNEY GENERAL'S HOPP PROGRAM SOME MATERIAL DERIVED FROM *THE ATTORNEY'S HANDBOOK ON CONSUMER BANKRUPTCY AND CHAPTER 13*: 40TH ED, 2016 BY HARVEY J. WILLIAMSON, ESQ.

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WHAT IS A CHAPTER 13 BANKRUPTCY CASE?

- Chapter 13 is the chapter of the Bankruptcy Code which allows a person to repay all or a portion of his/her debts under the supervision and protection of the bankruptcy court
- In a chapter 13 case, the debtor must submit to the court a plan for the repayment of all or a portion of his/her debts
- The plan must be approved by the court to become effective
- If the court approves the debtor's plan, most creditors will be prohibited from collecting their claims from the debtor
- The debtor must make regular payments to a person called the chapter 13 trustee

WHAT IS A CHAPTER 13 BANKRUPTCY (CONT'D)

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- The Chapter 13 Trustee collects the money paid by the debtor and disburses it to creditors in the manner called in the plan
- Upon completion of the payments called for in the plan, the debtor is released from liability for the remainder of his/her dischargeable debts

4 HOW DOES A CHAPTER 13 CASE DIFFER FROM A CHAPTER 7 CASE?

- As a practical matter, in a Chapter 7 case, the debtor loses all or most of his/her non-exempt property and receives a Chapter 7 discharge, which releases the debtor from liability for most debts
- In a Chapter 13 case, the debtor usually retains his/her non-exempt property, but must pay off as much of his/her debts as the court deems feasible and receives a Chapter 13 discharge, which is slightly broader than a Chapter 7 discharge and releases the debtor from liability for a few types of debts that are not dischargeable under Chapter 7
- However, a Chapter 13 case normally lasts much longer than a Chapter 7 case

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WHEN IS CHAPTER 13 PREFERABLE TO CHAPTER 7?

- Chapter 13 is preferable for a person who:

1. Wishes to repay all or most of his/her unsecured debts and has the income with which to do so within a reasonable time;
2. Has valuable non-exempt property, or has valuable exempt property securing debts, either of which would be lost in a Chapter 7 case;
3. Is not eligible under means testing to maintain a Chapter 7 case;
4. Is not eligible for a Chapter 7 discharge;
5. Has one or more substantial debts that are dischargeable under Chapter 13 but not under Chapter 7;

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WHEN IS CHAPTER 13 PREFERABLE TO CHAPTER 7? (CONT'D)

6. Has sufficient assets with which to repay most of his/her debts, but needs temporary relief from creditors in order to do so.

7

WHAT IS A CHAPTER 13 DISCHARGE?

- A Chapter 13 discharge is a court order releasing a debtor from all of his/her dischargeable debts and ordering creditors not to collect them from the debtor
- A debt that is discharged is one that the debtor is released from and does not have to pay
- There are two types of Chapter 13 discharge:

1) A full or successful plan discharge, which is granted to a debtor who completes all payments called for in the plan; and
2) A partial or unsuccessful plan discharge, which is granted to a debtor who is unable to complete the payments called for in the plan due to circumstances for which the debtor should not be held accountable

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WHAT TYPES OF DEBTS ARE NOT DISCHARGEABLE IN CHAPTER 13 CASES?

- A full Chapter 13 discharge granted upon completion of all the payments required in the plan discharges a debtor from all debts except:

1) Debts that were paid outside of the plan and not covered in the plan;
2) Debts for domestic support obligations, which includes debts for child support and maintenance;
3) Debts for death or personal injury caused by the debtor's operation of a motor vehicle, vessel or aircraft while intoxicated;
4) Most tax debts;
5) Debts for restitution or criminal fines included in a sentence imposed on the debtor for conviction of a crime;
6) Debts for fraud, embezzlement or larceny;

9 WHAT TYPES OF DEBTS ARE NOT DISCHARGEABLE IN CHAPTER 13 CASES? (CONT'D)

7) Debts for student loans or educational obligations unless a court rules that not discharging the debt would impose an undue hardship on the debtor and his/her dependents;
8) Debts for damages caused by willful or malicious conduct by the debtor;
9) Installment debts whose last payment is due after the completion of the plan;
10) debts incurred while the plan was in effect that were not paid under the plan;
11) Debts owed to creditors who did not receive notice of the Chapter 13 plan;
12) Long-term debts upon which payments were made under the plan

10 WHAT IS A CHAPTER 13 PLAN?

- A Chapter 13 plan is a written plan presented to the court by the debtor that states how much money or property the debtor will pay to the Chapter 13 Trustee;
- How long the debtor's payments to the Chapter 13 Trustee will continue (3 or 5 years);
- How much will be paid to each of the debtor's creditors

11 WHAT IS THE ROLE OF THE CHAPTER 13 TRUSTEE?

- The Chapter 13 Trustee is appointed by the United States Trustee to:

1) Collect payments from the debtor;
2) Make payments to the creditors in the manner set forth in the debtor's plan;
3) Administer the debtor's Chapter 13 case until it is closed

The Debtor is required to cooperate with the Chapter 13 Trustee

12 WHAT DEBTS MAY BE PAID UNDER A CHAPTER 13 PLAN?

- Any debts whatsoever, whether they are secured or unsecured
- Even debts that are non-dischargeable, such as debts for student loans or child support may be paid under a Chapter 13 plan

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MUST ALL DEBTS BE PAID IN FULL UNDER A CHAPTER 13 PLAN?

- No. While priority debts, such as debts for domestic support obligations and taxes, and fully secured debts must be paid in full under a Chapter 13 plan, only an amount that the debtor can reasonably afford must be paid on most debts
- The unpaid balances of most debts that are not paid in full under the Chapter 13 plan are discharged upon completion or termination of the plan

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MUST ALL UNSECURED DEBTS BE TREATED ALIKE UNDER A CHAPTER 13 PLAN?

- No. If there is a reasonable basis for doing so, unsecured debts (or claims) may be divided into separate classes and treated differently.
- It may be possible, therefore, to pay certain unsecured debts in full, while paying significantly less on others.

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HOW MUCH OF THE DEBTOR'S INCOME MUST BE PAID TO THE CHAPTER 13 TRUSTEE UNDER THE CHAPTER 13 PLAN?

- Usually all of the disposable income of the debtor and the debtor's spouse for a 3 or 5 year period must be paid to the Chapter 13 Trustee
- Disposable income is income received by the debtor and his/her spouse that is not deemed to be necessary for the support of the debtor and his/her dependents

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WHEN MUST THE DEBTOR BEGIN MAKING PAYMENTS TO THE CHAPTER 13 TRUSTEE UNDER A CHAPTER 13 PLAN?

- The debtor must begin making payments to the Chapter 13 Trustee within 30 days after the Chapter 13 case is filed with the court
- The payments must be made regularly, usually on a bi-weekly, or monthly basis
- If the debtor is employed, some courts require that the payments to be made directly to the Chapter 13 Trustee by the debtor's employer

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HOW LONG DOES A CHAPTER 13 PLAN LAST?

- The required length of the Chapter 13 plan depends on the debtor's income
- If the debtor's income is less than the median income for the debtor's state and family size, the length of the plan must be 3 years, unless the debtor can justify a longer period, which may not exceed 5 years
- If the debtor's annual income exceeds the median income, the length of the plan must be 5 years unless all unsecured claims can be paid off in a shorter period
- The debtor's annual income = current monthly income x 12 months

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WHAT IS A PRIORITY CLAIM?

- A priority claim is an unsecured claim that is given priority of payment under the Bankruptcy Code. It is a claim that must be paid before other unsecured claims are paid. Examples of priority claims:

1) Tax claims
2) Wage claims
3) Claims for maintenance or support
4) Claims for administrative fees, such as the Chapter 13 Trustee's fee, the filing fee, and the fee for the debtor's attorney (if applies) are also priority claims in Chapter 13 cases

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WHAT IF THE COURT DOES NOT APPROVE A DEBTOR'S CHAPTER 13 PLAN?

- If the court will not approve the plan initially proposed by the debtor, the debtor may modify the plan and seek court approval of the modified plan
- If the court does not approve a plan, it will usually give its reasons for refusing to do so, and the plan may then be appropriately modified so as to become acceptable to the court
- A debtor who does not wish to modify a proposed plan may either convert the case to a Chapter 7 case or ask the court to dismiss the case

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WHAT IS THE ROLE OF THE DEBTOR'S ATTORNEY IN A CHAPTER 13 CASE?

The debtor's attorney performs the following functions in a typical Chapter 13 case:

1) Examining the debtor's financial situation and determining whether a Chapter 13 case is a feasible alternative for the debtor , and if so, whether a single or a joint case should be filed;
2) Assist the debtor in obtaining the required pre-bankruptcy briefing on budget and credit counseling
3) Assisting the debtor in preparation of the budget
4) Examining the liens or security interests of secured creditors to ascertain their validity or avoidability, and taking the legal steps necessary to protect the debtor's interest in such matters

21 WHAT IS THE ROLE OF THE DEBTOR'S ATTORNEY IN A CHAPTER 13 CASE? (CONT'D)

5) Devising and implementing methods of dealing with secured creditors
6) Assisting the debtor in devising a Chapter 13 plan that meets the needs of the debtor and is acceptable to the court
7) Preparing the necessary pleadings and Chapter 13 forms
8) Filing the Chapter 13 forms and pleadings with the court
9) Attending the Meeting of the Creditors, the Confirmation Hearing, and any other court hearings required in the case
10) Assisting the debtor in obtaining court approval of a Chapter 13 plan

22 WHAT IS THE ROLE OF THE DEBTOR'S ATTORNEY IN A CHAPTER 13 CASE? (CONT'D)

11) Checking the claims filed in the case, filing objections to improper claims, and attending court hearings theron
12) Assisting the debtor in overcoming any legal obstacles that may arise during the course of the case
13) Assisting the debtor in attending and completing the required instructional course on personal financial management
14) Assisting the debtor in obtaining a discharge upon the completion or termination of the plan

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LOSS MITIGATION DISCUSSION
NDUKWE AGWU, ESQ. & PETER M. FRANK, ESQ.

- Who is the Chapter 13 Client
- What to pay particular attention to in a Chapter 13 case
- What to expect in a Chapter 13 case

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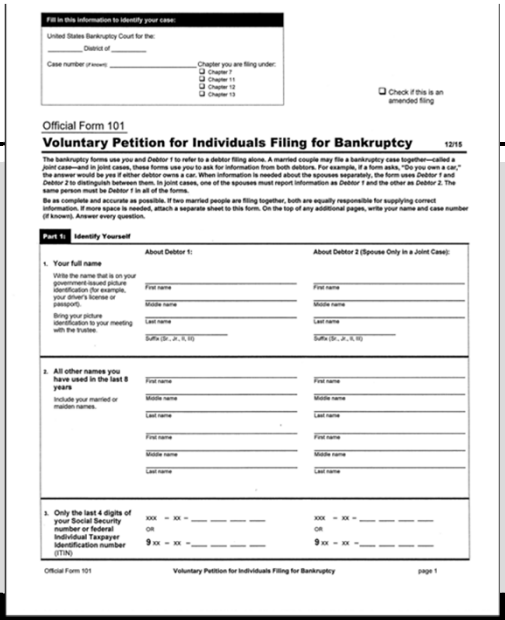

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____

Case number (if known): _____ Chapter you are filing under:
- ☐ Chapter 7
- ☐ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13

☐ Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy 12/15

The bankruptcy forms use you and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use you to ask for information from both debtors. For example, if a form asks, "Do you own a car," the answer would be yes if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	First name Middle name Last name Suffix (Sr., Jr., II, III)	First name Middle name Last name Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names.	First name Middle name Last name First name Middle name Last name	First name Middle name Last name First name Middle name Last name
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	XXX – XX – ____ ____ ____ ____ OR 9XX – XX – ____ ____ ____ ____	XXX – XX – ____ ____ ____ ____ OR 9XX – XX – ____ ____ ____ ____

Official Form 101 Voluntary Petition for Individuals Filing for Bankruptcy page 1

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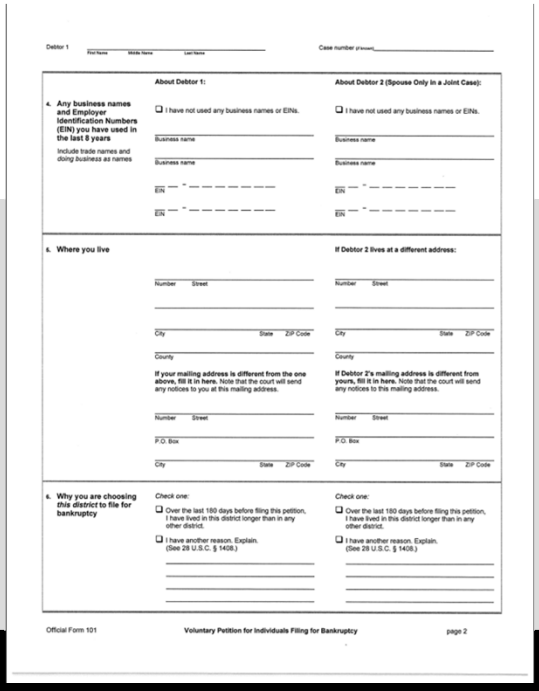

Debtor 1 First Name Middle Name Last Name Case number (if known)

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years Include trade names and doing business as names	☐ I have not used any business names or EINs. Business name Business name EIN — — EIN — —	☐ I have not used any business names or EINs. Business name Business name EIN — — EIN — —
5. Where you live	Number Street City State ZIP Code County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. Number Street P.O. Box City State ZIP Code	**If Debtor 2 lives at a different address:** Number Street City State ZIP Code County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. Number Street P.O. Box City State ZIP Code
6. Why you are choosing this district to file for bankruptcy	*Check one:* ☐ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ☐ I have another reason. Explain. (See 28 U.S.C. § 1408.)	*Check one:* ☐ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ☐ I have another reason. Explain. (See 28 U.S.C. § 1408.)

Official Form 101 **Voluntary Petition for Individuals Filing for Bankruptcy** page 2

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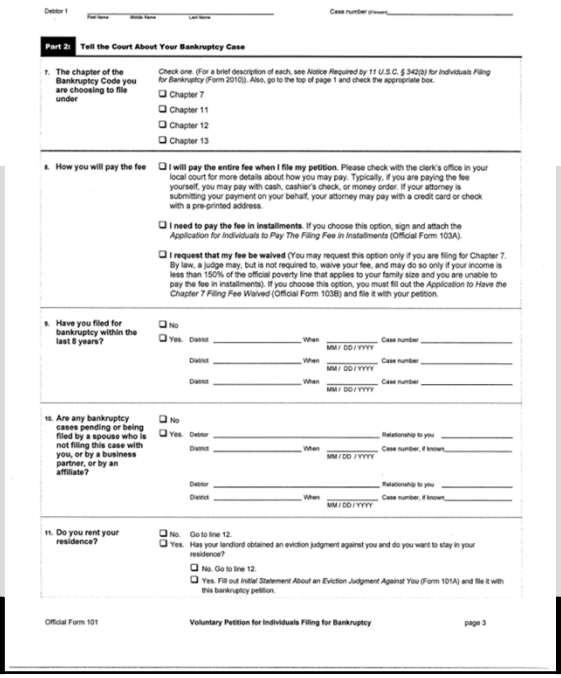

Debtor 1 First Name Middle Name Last Name Case number (if known)

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under	*Check one. (For a brief description of each, see Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form 2010)). Also, go to the top of page 1 and check the appropriate box. ☐ Chapter 7 ☐ Chapter 11 ☐ Chapter 12 ☐ Chapter 13
8. How you will pay the fee	☐ **I will pay the entire fee when I file my petition.** Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address. ☐ **I need to pay the fee in installments.** If you choose this option, sign and attach the *Application for Individuals to Pay The Filing Fee in Installments* (Official Form 103A). ☐ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.
9. Have you filed for bankruptcy within the last 8 years?	☐ No ☐ Yes. District When MM / DD / YYYY Case number District When MM / DD / YYYY Case number District When MM / DD / YYYY Case number
10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?	☐ No ☐ Yes. Debtor Relationship to you District When MM / DD / YYYY Case number, if known Debtor Relationship to you District When MM / DD / YYYY Case number, if known
11. Do you rent your residence?	☐ No. Go to line 12. ☐ Yes. Has your landlord obtained an eviction judgment against you and do you want to stay in your residence? ☐ No. Go to line 12. ☐ Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it with this bankruptcy petition.

Official Form 101 **Voluntary Petition for Individuals Filing for Bankruptcy** page 3

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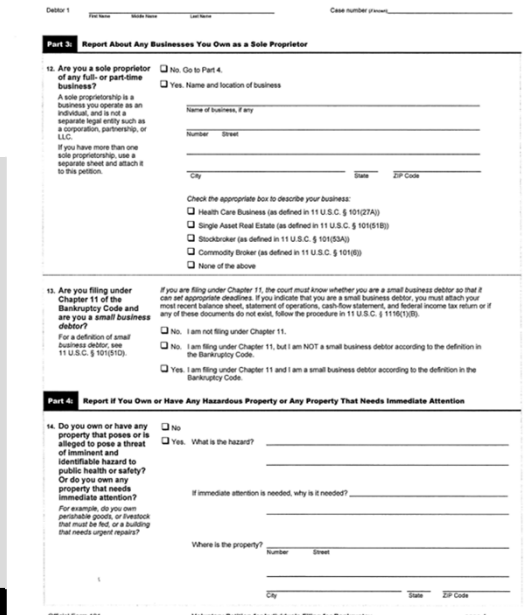

Debtor 1 _____ Case number (if known) _____
First Name Middle Name Last Name

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

- ☐ No. Go to Part 4.
- ☐ Yes. Name and location of business

Name of business, if any

Number Street

City State ZIP Code

Check the appropriate box to describe your business:

- ☐ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ☐ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ☐ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ☐ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ☐ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a *small business debtor*?

For a definition of small business debtor, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines. If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

- ☐ No. I am not filing under Chapter 11.
- ☐ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
- ☐ Yes. I am filing under Chapter 11 and I am a small business debtor according to the definition in the Bankruptcy Code.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

- ☐ No
- ☐ Yes. What is the hazard? _____

If immediate attention is needed, why is it needed? _____

Where is the property? _____
Number Street

City State ZIP Code

Official Form 101 **Voluntary Petition for Individuals Filing for Bankruptcy** page 4

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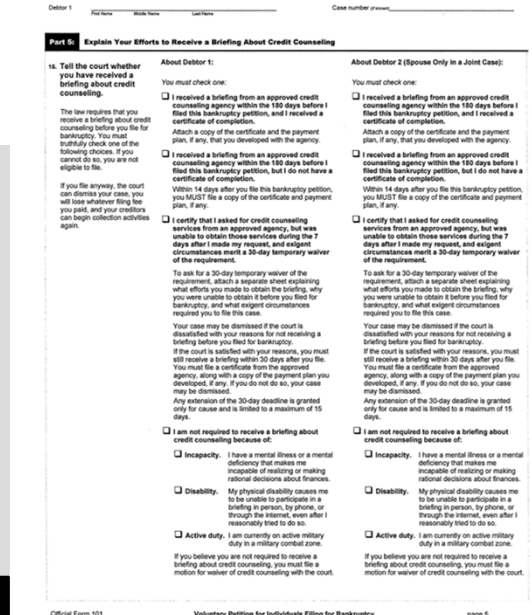

Debtor 1 _____ Case number (if known) _____
First Name Middle Name Last Name

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

- ☐ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**
  Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.
- ☐ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**
  Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.
- ☐ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**
  To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.
  Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.
  If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.
  Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.
- ☐ **I am not required to receive a briefing about credit counseling because of:**
  - ☐ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
  - ☐ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
  - ☐ **Active duty.** I am currently on active military duty in a military combat zone.

  If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

- ☐ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**
  Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.
- ☐ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**
  Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.
- ☐ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**
  To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.
  Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.
  If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.
  Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.
- ☐ **I am not required to receive a briefing about credit counseling because of:**
  - ☐ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
  - ☐ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
  - ☐ **Active duty.** I am currently on active military duty in a military combat zone.

  If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Official Form 101 **Voluntary Petition for Individuals Filing for Bankruptcy** page 5

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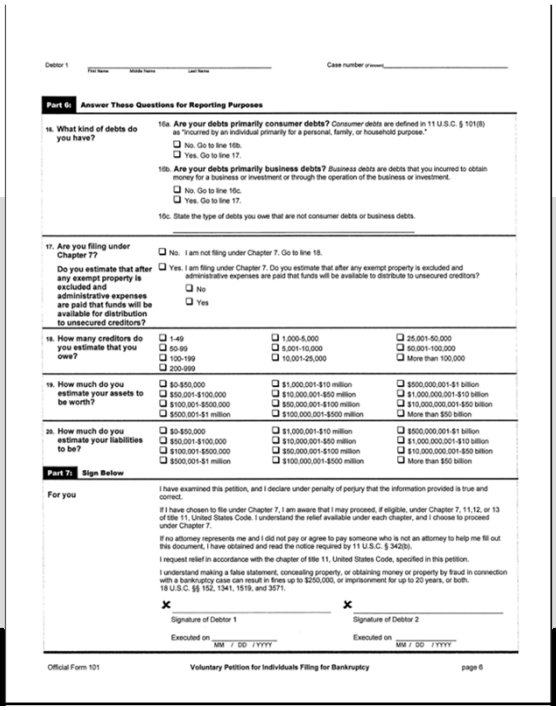

Debtor 1 First Name Middle Name Last Name Case number (if known)

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ☐ No. Go to line 16b.
- ☐ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ☐ No. Go to line 16c.
- ☐ Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

17. Are you filing under Chapter 7?

- ☐ No. I am not filing under Chapter 7. Go to line 18.
- ☐ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
  - ☐ No
  - ☐ Yes

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

18. How many creditors do you estimate that you owe?

- ☐ 1-49
- ☐ 50-99
- ☐ 100-199
- ☐ 200-999
- ☐ 1,000-5,000
- ☐ 5,001-10,000
- ☐ 10,001-25,000
- ☐ 25,001-50,000
- ☐ 50,001-100,000
- ☐ More than 100,000

19. How much do you estimate your assets to be worth?

- ☐ $0-$50,000
- ☐ $50,001-$100,000
- ☐ $100,001-$500,000
- ☐ $500,001-$1 million
- ☐ $1,000,001-$10 million
- ☐ $10,000,001-$50 million
- ☐ $50,000,001-$100 million
- ☐ $100,000,001-$500 million
- ☐ $500,000,001-$1 billion
- ☐ $1,000,000,001-$10 billion
- ☐ $10,000,000,001-$50 billion
- ☐ More than $50 billion

20. How much do you estimate your liabilities to be?

- ☐ $0-$50,000
- ☐ $50,001-$100,000
- ☐ $100,001-$500,000
- ☐ $500,001-$1 million
- ☐ $1,000,001-$10 million
- ☐ $10,000,001-$50 million
- ☐ $50,000,001-$100 million
- ☐ $100,000,001-$500 million
- ☐ $500,000,001-$1 billion
- ☐ $1,000,000,001-$10 billion
- ☐ $10,000,000,001-$50 billion
- ☐ More than $50 billion

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11,12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

✘ _____ Signature of Debtor 1

Executed on _____ MM / DD / YYYY

✘ _____ Signature of Debtor 2

Executed on _____ MM / DD / YYYY

Official Form 101 **Voluntary Petition for Individuals Filing for Bankruptcy** page 6

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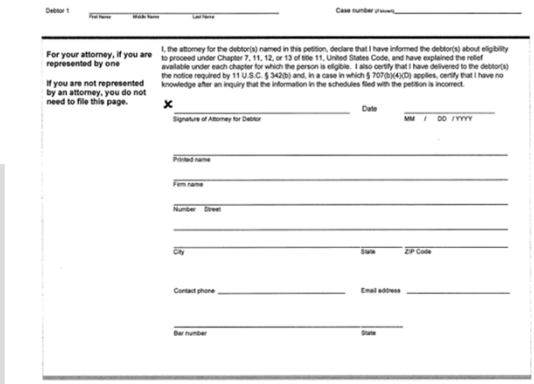

Debtor 1 First Name Middle Name Last Name Case number (if known)

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

✘ _____ Signature of Attorney for Debtor

Date _____ MM / DD / YYYY

Printed name _____

Firm name _____

Number Street _____

City _____ State _____ ZIP Code _____

Contact phone _____ Email address _____

Bar number _____ State _____

Official Form 101 **Voluntary Petition for Individuals Filing for Bankruptcy** page 7

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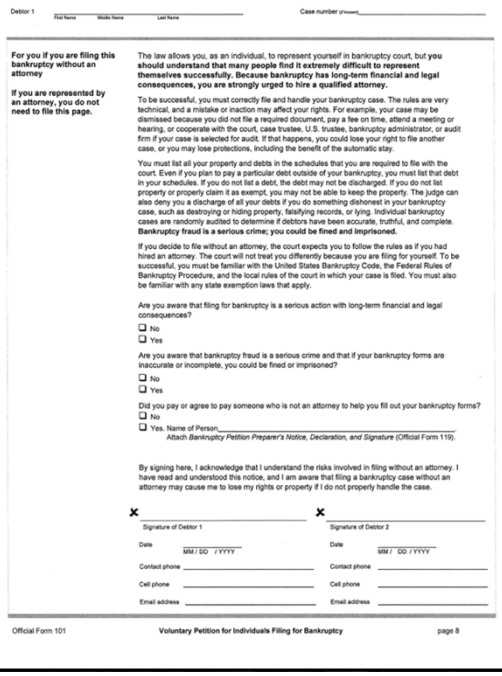

Debtor 1 First Name Middle Name Last Name

Case number (if known)

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

☐ No
☐ Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

☐ No
☐ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

☐ No
☐ Yes. Name of Person _____
Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

✘ _____ Signature of Debtor 1	✘ _____ Signature of Debtor 2
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY
Contact phone _____	Contact phone _____
Cell phone _____	Cell phone _____
Email address _____	Email address _____

Official Form 101 **Voluntary Petition for Individuals Filing for Bankruptcy** page 8

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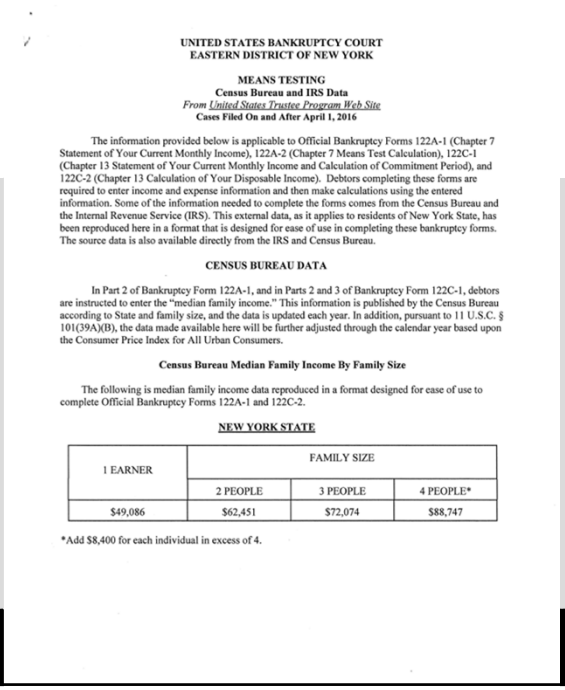

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

MEANS TESTING
Census Bureau and IRS Data
From United States Trustee Program Web Site
Cases Filed On and After April 1, 2016

The information provided below is applicable to Official Bankruptcy Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122A-2 (Chapter 7 Means Test Calculation), 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period), and 122C-2 (Chapter 13 Calculation of Your Disposable Income). Debtors completing these forms are required to enter income and expense information and then make calculations using the entered information. Some of the information needed to complete the forms comes from the Census Bureau and the Internal Revenue Service (IRS). This external data, as it applies to residents of New York State, has been reproduced here in a format that is designed for ease of use in completing these bankruptcy forms. The source data is also available directly from the IRS and Census Bureau.

CENSUS BUREAU DATA

In Part 2 of Bankruptcy Form 122A-1, and in Parts 2 and 3 of Bankruptcy Form 122C-1, debtors are instructed to enter the "median family income." This information is published by the Census Bureau according to State and family size, and the data is updated each year. In addition, pursuant to 11 U.S.C. § 101(39A)(B), the data made available here will be further adjusted through the calendar year based upon the Consumer Price Index for All Urban Consumers.

Census Bureau Median Family Income By Family Size

The following is median family income data reproduced in a format designed for ease of use to complete Official Bankruptcy Forms 122A-1 and 122C-2.

NEW YORK STATE

1 EARNER	FAMILY SIZE		
	2 PEOPLE	3 PEOPLE	4 PEOPLE*
$49,086	$62,451	$72,074	$88,747

*Add $8,400 for each individual in excess of 4.

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MEANS TESTING

IRS Data
(Cases Filed On and After April 1, 2016)

In Part 2 of Official Form 122A-2 and in Part 1 of Official Form 122C-2, debtors are instructed to enter "National Standards" and "Local Standards." This information is updated annually by the IRS. The following data is reproduced in a format designed for ease of use in completing these bankruptcy forms.

NOTE: The IRS expense figures posted here are for use in completing bankruptcy forms. They are NOT for use in computing taxes or for any other tax administration purpose.

1. National Standards. The National Standards are published by the IRS, and the table includes five (5) subcategories of expenses and their combined total. The National Standards are published by household size and gross income level.

Note that question Number 30 on Forms 122A-2 and 122C-2 allow for a qualifying debtor to claim an additional food and clothing expense if the debtor's average monthly food and clothing expense exceeds the combined allowances for those two subcategories, not to exceed five (5) percent. For purposes of these bankruptcy forms, the food and clothing expense subcategories have been combined and are provided as a separate line item, which is displayed together with the five (5) percent calculation of those two subcategories combined.

Collection Financial Standards for Food, Clothing and Other Items

One Person National Standards
Based on Gross Monthly Income

Expense	One Person	Two Persons	Three Persons	Four Persons
Food	315	588	660	821
Housekeeping supplies	32	66	65	74
Apparel & services	88	162	209	244
Personal care products & services	34	61	64	70
Miscellaneous	116	215	251	300
Total	**$585**	**$1,092**	**$1,249**	**$1,513**

For each additional person, add to four person total allowance: $378

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Bankruptcy Allowable Living Expenses – National Standards (See 11 U.S.C. § 707(b)(2)(A)(ii)(I))

Expense	One Person	Two Persons	Three Persons	Four Persons
Food & Clothing (Apparel & Services)*	$403	$750	$869	$1,065
5% of Food & Clothing	$20	$38	$43	$53

More than Four Persons	Additional amount per person
Food & Clothing (Apparel & Services)*	$266
5% of Food & Clothing	$13

2. Local Standards. The Local Standards are published by the IRS and consist of two primary expense categories, "Housing and Utilities" and "Transportation."

a. Local Housing and Utilities Expense Standards - For Counties Which the Eastern District of New York Comprises. The Housing and Utilities Standards are published by the IRS by State, county, and family size. For purposes of these bankruptcy forms, the Housing and Utilities Standards are provided in two components -- non-mortgage expenses and mortgage/rent expenses.

Data for Kings, Queens, Richmond, Nassau, and Suffolk Counties

	Family Size And Expense Type					
	1 Person		2 Person		3 Person	
	Non-Mortgage	Mortgage/ Rent	Non-Mortg.	Mortgage/ Rent	Non-Mortgage	Mortgage/ Rent
Kings County	$606	$1,761	$712	$2,069	$750	$2,180
Queens County	$596	$1,682	$700	$1,975	$738	$2,081
Richmond County	$574	$1,661	$674	$1,951	$710	$2,056
Nassau County	$593	$2,254	$696	$2,647	$734	$2,789
Suffolk County	$578	$1,985	$679	$2,331	$716	$2,456

Note: These IRS expense figures are for use in completing bankruptcy forms. They are not for use in computing taxes or for any other tax administration purpose. Expense information for tax purposes can be found on the IRS Web site.

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b. Local Transportation Expense Standards - For New York Metropolitan Statistical Area. The Transportation Standards are published by the IRS in two components. The Operating Costs & Public Transportation Costs component of the Transportation Standards is published by number of cars and by Metropolitan Statistical Area (MSA) and Census Bureau region. The data presented here applies to the New York Metropolitan Statistical Area, which includes the counties which the Eastern District of New York comprises (Kings, Queens, Richmond, Nassau and Suffolk). The Ownership Costs component of the Transportation Standards is published on a national basis, by number of cars. The information is reproduced here in a format designed for ease of use in completing the bankruptcy forms.

IRS LOCAL TRANSPORTATION* EXPENSE STANDARDS

New York Metropolitan Statistical Area

Operating Costs & Public Transportation Costs (Questions 12 and 14, and 15, on Forms 122A-2 and 122C-2)			
Region	No Car	One Car	Two Cars
New York	$185	$342	$684

*Does not include personal property taxes.

Ownership Costs (Lines 13a and 13d, on Forms 122A-2 and 122C-2)		
	First Car	Second Car
National	$517	$1,034

Administrative Expenses Multiplier

11 U.S.C. § 707(b)(2)(A)(ii)(III) allows a debtor who is eligible for chapter 13 to include in his/her calculation of monthly expenses the actual administrative expenses of administering a chapter 13 plan in the judicial district where the debtor resides.

The Executive Office for U.S. Trustees issues the schedules of actual administrative expenses which contain, by judicial district, the chapter 13 multiplier needed to complete Official Bankruptcy Forms 122A-2 (Chapter 7) and 122C-2 (Chapter 13). The multiplier will be entered in Question 36 of both forms.

For the Eastern District of New York, the multiplier to be entered is **8.2%**.

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Fill in this information to identify your case:

Debtor 1 _____ (First Name, Middle Name, Last Name)

Debtor 2 (Spouse, if filing) _____ (First Name, Middle Name, Last Name)

United States Bankruptcy Court for the: _____ District of _____

Case number (if known) _____

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

- ☐ 1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).
- ☐ 2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).
- ☐ 3. The commitment period is 3 years.
- ☐ 4. The commitment period is 5 years.

☐ Check if this is an amended filing

Official Form 122C-1

Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period 12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ☐ **Not married.** Fill out Column A, lines 2-11.
   - ☐ **Married.** Fill out both Columns A and B, lines 2-11.

   Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

		Column A Debtor 1	*Column B* Debtor 2 or non-filing spouse
2.	**Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).	$_____	$_____
3.	**Alimony and maintenance payments.** Do not include payments from a spouse.	$_____	$_____
4.	**All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Do not include payments from a spouse. Do not include payments you listed on line 3.	$_____	$_____
5.	**Net income from operating a business, profession, or farm**	Debtor 1	Debtor 2
	Gross receipts (before all deductions)	$_____	$_____
	Ordinary and necessary operating expenses	− $_____	− $_____
	Net monthly income from a business, profession, or farm	$_____	$_____ Copy here→ $_____	$_____
6.	**Net income from rental and other real property**	Debtor 1	Debtor 2
	Gross receipts (before all deductions)	$_____	$_____
	Ordinary and necessary operating expenses	− $_____	− $_____
	Net monthly income from rental or other real property	$_____	$_____ Copy here→ $_____	$_____

Official Form 122C-1 **Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period** page 1

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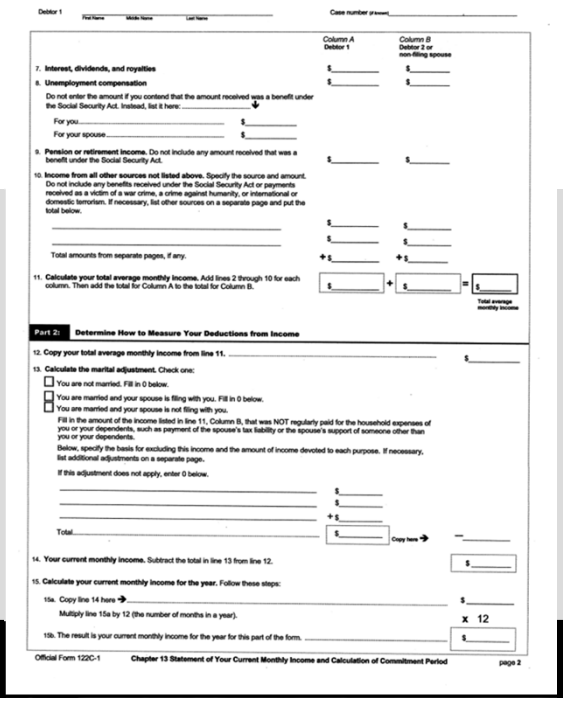

Debtor 1 First Name Middle Name Last Name Case number (if known)

	Column A Debtor 1	Column B Debtor 2 or non-filing spouse
7. Interest, dividends, and royalties	$	$
8. Unemployment compensation	$	$
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here:		
For you	$	
For your spouse	$	
9. Pension or retirement income. Do not include any amount received that was a benefit under the Social Security Act.	$	$
10. Income from all other sources not listed above. Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total below.		
	$	$
	$	$
Total amounts from separate pages, if any.	+ $	+ $
11. Calculate your total average monthly income. Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$ + $	= $ Total average monthly income

Part 2: Determine How to Measure Your Deductions from Income

12. Copy your total average monthly income from line 11. $

13. Calculate the marital adjustment. Check one:

- ☐ You are not married. Fill in 0 below.
- ☐ You are married and your spouse is filing with you. Fill in 0 below.
- ☐ You are married and your spouse is not filing with you.

Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

Below, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

If this adjustment does not apply, enter 0 below.

	$
	$
	+ $
Total	$ Copy here → —

14. Your current monthly income. Subtract the total in line 13 from line 12. $

15. Calculate your current monthly income for the year. Follow these steps:

15a. Copy line 14 here → $

Multiply line 15a by 12 (the number of months in a year). x 12

15b. The result is your current monthly income for the year for this part of the form. $

Official Form 122C-1 **Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period** page 2

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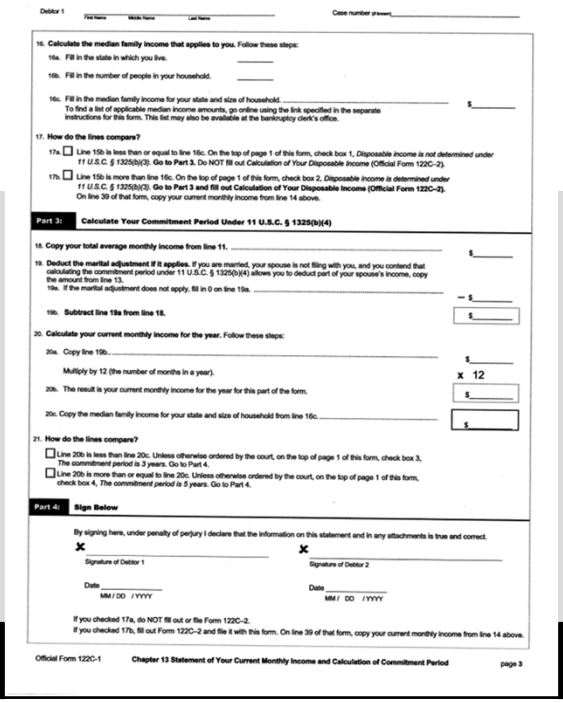

Debtor 1 First Name Middle Name Last Name Case number (if known)

16. Calculate the median family income that applies to you. Follow these steps:

16a. Fill in the state in which you live. _____

16b. Fill in the number of people in your household. _____

16c. Fill in the median family income for your state and size of household. $

To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

17. How do the lines compare?

17a. ☐ Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3).* **Go to Part 3.** Do NOT fill out *Calculation of Your Disposable Income* (Official Form 122C–2).

17b. ☐ Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3).* **Go to Part 3 and fill out Calculation of Your Disposable Income (Official Form 122C–2).** On line 39 of that form, copy your current monthly income from line 14 above.

Part 3: Calculate Your Commitment Period Under 11 U.S.C. § 1325(b)(4)

18. Copy your total average monthly income from line 11. $

19. Deduct the marital adjustment if it applies. If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13.

19a. If the marital adjustment does not apply, fill in 0 on line 19a. — $

19b. Subtract line 19a from line 18. $

20. Calculate your current monthly income for the year. Follow these steps:

20a. Copy line 19b. $

Multiply by 12 (the number of months in a year). x 12

20b. The result is your current monthly income for the year for this part of the form. $

20c. Copy the median family income for your state and size of household from line 16c. $

21. How do the lines compare?

- ☐ Line 20b is less than line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 3, *The commitment period is 3 years.* Go to Part 4.
- ☐ Line 20b is more than or equal to line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 4, *The commitment period is 5 years.* Go to Part 4.

Part 4: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____ Signature of Debtor 1

Date _____ MM / DD / YYYY

✘ _____ Signature of Debtor 2

Date _____ MM / DD / YYYY

If you checked 17a, do NOT fill out or file Form 122C–2.
If you checked 17b, fill out Form 122C–2 and file it with this form. On line 39 of that form, copy your current monthly income from line 14 above.

Official Form 122C-1 **Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period** page 3

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LOSS MITIGATION PROGRAM PROCEDURES

I. PURPOSE

The Loss Mitigation Program is designed to function as a forum for debtors and lenders to reach consensual resolution whenever a debtor's residential property is at risk of foreclosure. The Loss Mitigation Program aims to facilitate resolution by opening the lines of communication between the debtors' and lenders' decision-makers. While the Loss Mitigation Program stays certain bankruptcy deadlines that might interfere with the negotiations or increase costs to the loss mitigation parties, the Loss Mitigation Program also encourages the parties to finalize any agreement under bankruptcy court protection, instead of seeking dismissal of the bankruptcy case.

II. LOSS MITIGATION DEFINED

The term "loss mitigation" is intended to describe the full range of solutions that may avert either the loss of a debtor's property to foreclosure, increased costs to the lender, or both. Loss mitigation commonly consists of the following general types of agreements, or a combination of them: loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction. The terms of a loss mitigation solution will vary in each case according to the particular needs and goals of the parties.

III. ELIGIBILITY

The following definitions are used to describe the types of parties, properties and loans that are eligible for participation in the Loss Mitigation Program:

A. DEBTOR

The term "Debtor" means any individual debtor in a case filed under Chapter 7, 11, 12 or 13 of the Bankruptcy Code, including joint debtors.

B. PROPERTY

The term "Property" means any real property or cooperative apartment used as a principal residence in which an eligible Debtor holds an interest.

C. LOAN

The term "Loan" means any mortgage, lien or extension of money or credit secured by eligible Property or stock shares in a residential cooperative, regardless of whether or not the Loan (1) is considered to be "subprime" or "non-traditional," (2) was in foreclosure prior to the bankruptcy filing, (3) is the first or junior mortgage or lien on the Property, or (4) has been "pooled," "securitized," or assigned to a servicer or to a trustee.

D. CREDITOR

The term "Creditor" refers to any holder, mortgage servicer or trustee of an eligible Loan.

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IV. ADDITIONAL PARTIES

A. OTHER CREDITORS

Where it may be necessary or desirable to obtain a global resolution, any party may request, or the bankruptcy court may direct, that multiple Creditors participate in loss mitigation.

B. CO-DEBTORS AND THIRD PARTIES

Where the participation of a co-debtor or other third party may be necessary or desirable, any party may request, or the bankruptcy court may direct, that such party participate in loss mitigation, to the extent that the bankruptcy court has jurisdiction over the party, or if the party consents to participation in loss mitigation.

C. CHAPTER 13 TRUSTEE

The Chapter 13 Trustee has the duty in Section 1302(b)(4) of the Bankruptcy Code to "advise, other than on legal matters, and assist the debtor in performance under the plan." Any party may request, or the bankruptcy court may direct, the Chapter 13 Trustee to participate in loss mitigation to the extent that such participation would be consistent with the Chapter 13 Trustee's duty under the Bankruptcy Code.

D. MEDIATOR

At any time, a Debtor or Creditor participating in the Loss Mitigation Program may request, or the bankruptcy court may order, the appointment of an independent mediator from the United States Bankruptcy Court for the Southern District of New York's Register of Mediators, which may be viewed at http://www.nysb.uscourts.gov/mediators.html. A mediator will assist in loss mitigation in accordance with these Procedures and with the United States Bankruptcy Court of the Southern District of New York Amended General Order for the Adoption of Procedures Governing Mediation of Matters in Bankruptcy Cases and Adversary Proceedings dated January 17, 1995 (General Order M-143), as amended on October 20, 1999 (General Order M-211).

V. COMMENCEMENT OF LOSS MITIGATION

Parties are encouraged to request loss mitigation as early in the case as possible, but loss mitigation may be initiated at any time, by any of the following methods:

A. BY THE DEBTOR

1. In Section C of the Model Chapter 13 Plan, a Chapter 13 Debtor may indicate an interest in discussing loss mitigation with a particular Creditor The Creditor shall have 21 days to object. If no objection is filed, the bankruptcy court may enter an order (a "Loss Mitigation Order").
2. A Debtor may file a request for loss mitigation with a particular Creditor. The Creditor shall have 14 days to object. If no objection is filed, the bankruptcy court may enter a Loss Mitigation Order.

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3. If a Creditor has filed a motion requesting relief from the automatic stay pursuant to Section 362 of the Bankruptcy Code (a "Lift-Stay Motion"), at any time prior to the conclusion of the hearing on the Lift-Stay Motion, the Debtor may file a request for loss mitigation. The Debtor and Creditor shall appear at the scheduled hearing on the Lift-Stay Motion, and the bankruptcy court will consider the loss mitigation request and any opposition by the Creditor.

B. BY A CREDITOR

A Creditor may file a request for loss mitigation. The Debtor shall have 7 days to object. If no objection is filed, the bankruptcy court may enter a Loss Mitigation Order.

C. BY THE BANKRUPTCY COURT

The bankruptcy court may enter a Loss Mitigation Order at any time, provided that the parties that will be bound by the Loss Mitigation Order (the "Loss Mitigation Parties") have had notice and an opportunity to object.

D. OPPORTUNITY TO OBJECT

Where any party files an objection, a Loss Mitigation Order shall not be entered until the bankruptcy court has held a hearing to consider the objection. At the hearing, a party objecting to loss mitigation must present specific reasons why it believes that loss mitigation would not be successful. If a party objects on the grounds that loss mitigation has been requested in bad faith, the assertion must be supported by objective reasons.

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VI. LOSS MITIGATION ORDER

A. DEADLINES

A Loss Mitigation Order shall contain deadlines for all of the following:

1. The date by which the Loss Mitigation Parties shall designate contact persons and disclose contact information, if this information has not been previously provided.
2. The date by which each Creditor must initially contact the Debtor.
3. The date by which each Creditor must transmit any information request to the Debtor.
4. The date by which the Debtor must transmit any information request to each Creditor.
5. The date by which a written report must be filed or the date and time set for a status conference at which a verbal report must be provided. Whenever possible, in a Chapter 13 case the status conference will coincide with the first date set for confirmation of the Chapter 13 plan, or an adjourned confirmation hearing. Where a written report is required, it should generally be filed not later than 7 days after the conclusion of the initial loss mitigation session.
6. The date when the loss mitigation period will terminate, unless extended.

B. EFFECT

Whenever a Loss Mitigation Order is entered, the following shall apply to the Loss Mitigation Parties:

1. Each Creditor is authorized to contact the Debtor directly. It shall be presumed that such communications do not violate the automatic stay.
2. Except where necessary to prevent irreparable injury, loss or damage, a Creditor shall not file a Lift-Stay Motion during the loss mitigation period. Any Lift-Stay Motion filed by the Creditor prior to the entry of the Loss Mitigation Order shall be adjourned to a date after the last day of the loss mitigation period, and the stay shall be extended pursuant to Section 362(e) of the Bankruptcy Code.
3. In a Chapter 13 case, the deadline by which a Creditor must object to confirmation of the Chapter 13 plan shall be extended to permit the Creditor an additional 14 days after the termination of loss mitigation, including any extension of the loss mitigation period.
4. All communications and information exchanged by the Loss Mitigation Parties during loss mitigation will be inadmissible in any subsequent proceeding pursuant to Federal Rule of Evidence 408.

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VII. DUTIES UPON COMMENCEMENT OF LOSS MITIGATION

Upon entry of a Loss Mitigation Order, the Loss Mitigation Parties shall have the following duties:

A. GOOD FAITH

The Loss Mitigation Parties shall negotiate in good faith. A party that fails to participate in loss mitigation in good faith may be subject to sanctions.

B. CONTACT INFORMATION

1. The Debtor: Unless the Debtor has already done so in the Chapter 13 plan or as part of a request for loss mitigation, the Debtor shall provide written notice to each Creditor, indicating the manner in which the Creditor should contact the Debtor.
2. The Creditor: Unless a Creditor has already done so as part of a request for loss mitigation, each Creditor shall provide written notice to the Debtor, identifying the name, address and direct telephone number of the contact person who has full settlement authority.

C. STATUS REPORT

The Loss Mitigation Parties shall provide either a written or verbal report to the bankruptcy court regarding the status of loss mitigation within the time set by the bankruptcy court in the Loss Mitigation Order. The status report shall state whether one or more loss mitigation sessions have been conducted, whether a resolution was reached, and whether one or more of the Loss Mitigation Parties believe that additional loss mitigation sessions would be likely to result in either a partial or complete resolution. A status report may include a request for an extension of the loss mitigation period.

D. BANKRUPTCY COURT APPROVAL

The Loss Mitigation Parties shall seek bankruptcy court approval of any resolution or settlement reached during loss mitigation.

VIII. LOSS MITIGATION PROCESS

A. INITIAL CONTACT

Following entry of a loss mitigation order, the contact person designated by each Creditor shall contact the Debtor and any other Loss Mitigation Party within the time set by the bankruptcy court. The Debtor may contact any other Loss Mitigation Party at any time. The purpose of the initial contact is to create a framework for the discussion at the loss mitigation session and to ensure that each of the Loss Mitigation Parties will be prepared to participate in the loss mitigation session – it is not intended to limit additional issues or proposals that may arise during the session. During the initial contact phase, the Loss Mitigation Parties should discuss the following:

1. The time and method for conducting the loss mitigation sessions.
2. The types of loss mitigation solutions under consideration by each party.

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3. A plan for the exchange of required information prior to the loss mitigation session, including the due date for the Debtor to complete and return any information request or other loss mitigation paperwork that each Creditor may require. ***All information should be provided at least 7 days prior to the loss mitigation session.***

B. LOSS MITIGATION SESSIONS

Loss mitigation sessions may be conducted in person, telephonically or via video conference. At the conclusion of each loss mitigation session, the Loss Mitigation Parties should discuss whether additional sessions are necessary and set the time and method for conducting any additional sessions, including a schedule for the exchange of any further information or documentation that may be required.

C. BANKRUPTCY COURT ASSISTANCE

At any time during the loss-mitigation period, a Loss Mitigation Party may request a settlement conference or status conference with the bankruptcy court.

D. SETTLEMENT AUTHORITY

Each Loss Mitigation Party must have a person with full settlement authority present during a loss mitigation session. During a status conference or settlement conference with the bankruptcy court, the person with full settlement authority must either attend the conference in person or be available by telephone or video conference beginning 30 minutes prior to the start of the conference.

IX. DURATION, EXTENSION AND EARLY TERMINATION

A. INITIAL PERIOD

The initial loss mitigation period shall be set by the bankruptcy court in the Loss Mitigation Order.

B. EXTENSION

1. Agreement: The Loss Mitigation Parties may agree to an extension of the loss mitigation period. The Loss Mitigation Parties shall request an extension in writing, filed on the docket in the main bankruptcy case and served on all parties in interest, who shall have three days to object to a request for extension of the loss mitigation period. The bankruptcy court may grant a request for extension of the loss mitigation period for cause.
2. No Agreement: Where a Loss Mitigation Party does not consent to the request for an extension of the loss mitigation period, the bankruptcy court shall schedule a hearing to consider whether further loss mitigation sessions are likely to be successful. The bankruptcy court may order a reasonable extension if it appears that (1) a further loss mitigation session is likely to result in a complete or partial resolution that will provide a substantial benefit to a Loss Mitigation Party, (2) the party opposing the extension has not participated in good faith or has failed in a material way to comply with these Procedures, or (3) the party opposing the extension would not be prejudiced.

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C. EARLY TERMINATION

1. Upon Request of a Loss Mitigation Party: A Loss Mitigation Party may request that the loss mitigation period be terminated and shall state the reasons for the request. Except where immediate termination is necessary to prevent irreparable injury, loss or damage, the request shall be made on notice to all other Loss Mitigation Parties, and the bankruptcy court may schedule a hearing to consider the termination request.
2. Dismissal of the Bankruptcy Case:
   a. Other than at the request of a Chapter 13 Debtor, or the motion of the United States Trustee or Trustee for failure to comply with requirements under the Bankruptcy Code: Except where a Chapter 13 Debtor requests voluntary dismissal, or upon motion, a case shall not be dismissed during the loss mitigation period unless the Loss Mitigation Parties have provided the bankruptcy court with a status report that is satisfactory to the court. The bankruptcy court may schedule a further status conference with the Loss Mitigation Parties prior to dismissal of the case.
   b. Upon the request of a Chapter 13 Debtor: **A Debtor is not required to request dismissal of the bankruptcy case as part of any resolution or settlement that is offered or agreed to during the loss mitigation period.** Where a Chapter 13 Debtor requests voluntary dismissal of the bankruptcy case during the loss mitigation period, the Debtor's dismissal request shall indicate whether the Debtor agreed to any settlement or resolution from a Loss Mitigation Party during the loss mitigation period or intends to accept an offer of settlement made by a Loss Mitigation Party during the loss mitigation period.
   c. Notice: If a bankruptcy case is dismissed for any reason during the loss-mitigation period, the Clerk of the Court shall file a notice on the docket indicating that loss mitigation efforts were ongoing at the time the bankruptcy case was dismissed.

X. SETTLEMENT

The bankruptcy court will consider any agreement or resolution reached during loss mitigation (a "Settlement") and may approve the Settlement, subject to the following provisions:

1. Implementation: A Settlement may be noticed and implemented in any manner permitted by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), including, but not limited to, a stipulation, sale, plan of reorganization or amended plan of reorganization.
2. Fees, Costs or Charges: If a Settlement provides for a Creditor to receive payment or reimbursement of any fee, cost or charge that arose from loss mitigation, such fees, costs or charges shall be disclosed to the Debtor and to the bankruptcy court prior to approval of the Settlement.

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3. Signatures: Consent to the Settlement shall be acknowledged in writing by (1) the Creditor representative who participated in loss mitigation, (2) the Debtor, and (3) the Debtor's attorney, if applicable.
4. Hearing: Where a Debtor is represented by counsel, a Settlement may be approved by the bankruptcy court without further notice, or upon such notice as the bankruptcy court directs, unless additional notice or a hearing is required by the Bankruptcy Code or Bankruptcy Rules. Where a Debtor is not represented by counsel, a Settlement shall not be approved until after the bankruptcy court has conducted a hearing at which the Debtor shall appear in person.
5. Dismissal Not Required: **A Debtor is not required to request dismissal of the bankruptcy case in order to effectuate a Settlement.** In order to ensure that the Settlement is enforceable, the Loss Mitigation Parties should seek bankruptcy court approval of the Settlement. Where the Debtor requests or consents to dismissal of the bankruptcy case as part of the Settlement, the bankruptcy court may approve the Settlement as a "structured dismissal," if such relief complies with the Bankruptcy Code and Bankruptcy Rules.

XI. COORDINATION WITH OTHER PROGRAMS

[Provision may be added in the future to provide for coordination with other loss mitigation programs, including programs in the New York State Unified Court System.]

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
----------X
In Re: Chapter

Case No.

Debtor(s)
----------X

LOSS MITIGATION REQUEST - BY DEBTOR

I am a Debtor in this case. I hereby request to enter into the Loss Mitigation Program with respect to ***[Identify the property, loan and creditor(s) for which you are requesting loss mitigation]***:

_____
[Identify the Property]
_____
[Last 4 Digits of Loan Number]
_____
[Creditor's Name and Address]

SIGNATURE

I understand that if the Court orders loss mitigation in this case, I will be expected to comply with the Loss Mitigation Procedures. I agree to comply with the Loss Mitigation Procedures, and I will participate in the Loss Mitigation Program in good faith. I understand that loss mitigation is voluntary for all parties, and that I am not required to enter into any agreement or settlement with any other party as part of entry into the Loss Mitigation Program. I also understand that no other party is required to enter into any agreement or settlement with me. I understand that **I am not required to request dismissal of this case** as part of any resolution or settlement that is offered or agreed to during the Loss Mitigation Period.

Sign: _____ Date: _____, 20____

Print Name: _____
[First and Last Name]
Telephone Number: _____
[i.e. 999-999-9999]
E-mail Address [if any]: _____

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
----------x
In re: Case No.
Chapter

Debtor(s)
----------x

LOSS MITIGATION FINAL REPORT

Name of Lender: _____

Property Address: _____

Last Four Digits of Account Number of Loan: _____

File Date of Request for Loss Mitigation: ___/___/_____

Date of Entry of Order Granting Loss Mitigation: _____

Date of Entry of Order Approving Settlement (*if any*): _____

Other Requests for Loss Mitigation in this Case: ____ Yes ____ No

The use of the Court's Loss Mitigation Procedures has resulted in the following (please check appropriate the box below):

- ☐ Loan modification.
- ☐ Loan refinance.
- ☐ Forbearance
- ☐ Short sale.
- ☐ Surrender of property.
- ☐ No agreement has been reached.
- ☐ Other: _____
  _____
  _____
  _____

Dated: _____ **Signature**: _____

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

---------- x

In re: Chapter

Case No.

Debtor(s).

---------- X

LOSS-MITIGATION ORDER

☐ A Loss Mitigation Request[1] was filed by the debtor on *[Date]* _____, 2011.
☐ A Loss Mitigation Request was filed by a creditor on *[Date]* _____, 2011.
☐ The Court raised the possibility of loss mitigation, and the parties have had notice and an opportunity to object.

Upon the foregoing, it is hereby

ORDERED, that the following parties (the "Loss Mitigation Parties") are directed to participate in the Loss Mitigation Program:

1. The Debtor
2. _____, the Creditor with respect to _____ *[describe Loan and/or Property]*.
3. *[Additional parties, if any]* _____

It is further **ORDERED**, that the Loss Mitigation Parties shall comply with the Loss Mitigation Procedures annexed to this Order; and it is further

ORDERED, that the Loss Mitigation Parties shall observe the following deadlines:

1. Each Loss Mitigation Party shall designate contact persons and disclose contact information by *[suggested time is 7 days]*, unless this information has been previously provided. As part of this obligation, **a Creditor shall furnish each Loss Mitigation Party with written notice of the name, address and direct telephone number of the person who has full settlement authority**.

2. Each Creditor that is a Loss Mitigation Party shall contact the Debtor within **14 days of the date of this Order**.

[1] All capitalized terms have the meanings defined in the Loss Mitigation Procedures.

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3. Each Loss Mitigation Party shall make its request for information and documents, if any, within **14 days of the date of this Order**.

4. Each Loss Mitigation Party shall respond to a request for information and documents within **14 days after a request is made, or 7 days prior to the Loss Mitigation Session, whichever is earlier.**

5. The Loss Mitigation Session shall be scheduled not later than _____ *[suggested time is within 35 days of the date of the order]*.

6. The Loss Mitigation Period shall terminate on _____ *[suggested time is within 42 days of the date of the order]*, unless extended as provided in the Loss Mitigation Procedures.

It is further **ORDERED**, that a status conference will be held in this case on _____ *[suggested time is within 42 days of the date of the order]* (the "Status Conference"). The Loss Mitigation Parties shall appear at the Status Conference and provide the Court with an oral Status Report unless a written Status Report that is satisfactory to the Court has been filed not later than 7 days prior to the date of the Status Conference and requests that the Status Conference be adjourned or cancelled; and it is further

ORDERED, that at the Status Conference, the Court may consider a Settlement reached by the Loss Mitigation Parties, or may adjourn the Status Conference if necessary to allow for adequate notice of a request for approval of a Settlement; and it is further

ORDERED, that any matters that are currently pending between the Loss Mitigation Parties (such as motions or applications, and any objection, opposition or response thereto) are hereby adjourned to the date of the Status Conference to the extent those matters concern (1) relief from the automatic stay, (2) objection to the allowance of a proof of claim, (3) reduction, reclassification or avoidance of a lien, (4) valuation of a Loan or Property, or (5) objection to confirmation of a plan of reorganization; and it is further.

ORDERED, that the time for each Creditor that is a Loss Mitigation Party in this case to file an objection to a plan of reorganization in this case shall be extended until 14 days after the termination of the Loss Mitigation Period, including any extension of the Loss Mitigation Period.

Dated:

BY THE COURT

_____
United States Bankruptcy Judge

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Chapter 13 Checklist

Official forms referenced can be found on: http://www.nyeb.uscourts.gov/chapter-13-checklist-0

Filing Fee: $310.00 Payable By: Attorneys may pay by check; money order; certified bank check; cash or credit card (Visa, Mastercard, American Express or Discover). **Personal and Third Party Checks cannot be accepted. Pro-se debtors must make all payments in cash (exact amount) or money order made payable to "CLERK, U.S. BANKRUPTCY COURT." Do NOT send cash through the mail.**

If the debtor is an individual the fee may be:
Paid in installments. A signed application must be filed for the court's approval **[Official Form 103A]**

DOCUMENTS MUST BE FILED WITHIN **14 CALENDAR DAYS OF FILING THE PETITION** UNLESS OTHERWISE INDICATED.
YOUR CASE MAY BE DISMISSED IF YOU DO NOT FILE THE REQUIRED DOCUMENTS ON TIME.

Requirement: Original plus 1 copy of all documents submitted.

DOCUMENTS DUE AT TIME OF FILING OF BANKRUPTCY PETITION	FORM NUMBER
☐ Voluntary Petition for Individuals Filing for Bankruptcy **[Signed]**	**101**
☐ Initial Statement About an Eviction Judgment Against You ***[if applicable]*** **[Signed]**	**101A**
☐ Statement About Your Social Security Numbers	**121**
☐ Statement Pursuant to E.D.N.Y. LBR 1073-2(b)	Local Form
☐ Certificate of Credit Counseling and Debt Repayment Plan (or certificate pursuant to 11 U.S.C. § 109(h)(3) or a request pursuant to 11 U.S.C. § 109(h)(4))	**101 [Part 5]**
☐ List of Creditors (Certified by Attorney or Debtor, if Pro-se) – Typed **[Name and Address ONLY]** Pursuant to E.D.N.Y. LBR 1007-1(a)	
☐ Creditor Matrix Pursuant to E.D.N.Y. LBR 1007-3	

DOCUMENTS DUE WITHIN 14 DAYS	FORM NUMBER
☐ **Schedule A/B: Property**	**106A/B**
☐ Schedule C: The Property You Claim as Exempt	106C
☐ **Schedule D: Creditors Who Have Claims Secured By Property**	**106D**
☐ **Schedule E/F: Creditors Who Have Unsecured Claims**	**106E/F**
☐ Schedule G: Executory Contracts and Unexpired Leases	106G
☐ Schedule H: Your Codebtors	106H
☐ **Schedule I: Your Income**	**106I**
☐ **Schedule J: Your Expenses**	**106J**
☐ **Schedule J-2: Expenses for Separate Household of Debtor 2** *[if applicable]*	**106J-2**
☐ Summary of Your Assets and Liabilities and Certain Statistical Information (Individual)	106Sum
☐ Declaration About an Individual Debtor's Schedules	106Dec
☐ **Statement of Financial Affairs for Individuals Filing for Bankruptcy**	**107**
☐ **Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period**	**122C-1**
☐ **Chapter 13 Calculation of Your Disposable Income**	**122C-2**
☐ **Chapter 13 Plan**	
☐ **Copies of Pay Statements received within 60 days of filing from any Employer or a statement indicating this requirement is not applicable [Show only last four digits of Social Security Number]**	
☐ **Notice to Individual Debtor with Primarily Consumer Debts** under 11 U.S.C. § 342(b), if applicable. Required if the debtor is an individual with primarily consumer debts. Certification that the notice has been given Must **FILED** ***with the petition or within 14 days***. 11 U.S.C. §§ 342(b), 521(a)(1)(B)(iii), 707(a)(3). **Part 7 of *Official Form 101*** contains spaces for the certification.	**2010**

DISCHARGE ELIGIBILITY:
☐ **Personal Financial Management Course** – Certificate must be filed with the court within 60 days after the first date set for the meeting of creditors under § 341 of the code in order to receive a discharge **[Official Form 423] Individual ONLY.**

YOU MAY ALSO NEED TO FILE:

If you paid a petition preparer or you are represented by an attorney:	FORM NUMBER
☐ Disclosure of Compensation of Attorney for Debtor. 11 U.S.C. § 329 and Fed.R.Bankr.P. 2016(b)	**2030**
☐ Pre-petition Statement Pursuant to Fed.R.Bankr.P. 2017-1 (Due Within 14 Days)	
☐ Bankruptcy Petition Preparer's Notice, Declaration, and Signature	**119**
☐ Disclosure of Compensation of Bankruptcy Petition Preparer	**2800**

PLEASE NOTE:

- **If the item(s) in bold print are not filed within 45 days after the filing of the petition, your case may be automatically dismissed on the 46th day after the filing of the petition.**
- **The Court may schedule a hearing to potentially dismiss the debtor's case if the item(s) above are filed late.**
- **If your case is dismissed, you may not receive the protection of the automatic stay if you file additional cases within one year.**

NOTE: *This checklist should be used as an information source and not as legal advice. You should consult an attorney for individual advice.*

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

FEE SCHEDULE DECEMBER 1, 2015

PAYMENT OPTIONS

All filing fees must be paid by one of the following options: attorneys check; money order; certified bank check; cash or credit card (Visa, MasterCard, American Express or Discover). Pro-se debtors must make all payments in cash or money order made payable to the "CLERK, U.S. BANKRUPTCY COURT". Personal and Third Party Checks cannot be accepted. Do NOT send cash through the mail.

New Case Filings - Fee Schedule	Total Fees
Chapter 7 Voluntary - Liquidation	**$335.00**
Chapter 7 Involuntary	**$335.00**
Chapter 9 Municipality Bankruptcy	**$1,717.00**
Chapter 11 Corporation; Partnership or Individual	**$1,717.00**
Chapter 11 Involuntary	**$1,717.00**
Chapter 12 Family Farmer or Family Fisherman Bankruptcy	**$275.00**
Chapter 13 Individual Debt Adjustment	**$310.00**
Chapter 15 Ancillary and Other Cross-Border Cases	**$1,717.00**

Miscellaneous Filing Fees	Total Fees
Complaints and Removal Actions [If the United States or a debtor is the plaintiff, no fee is required]	**$350.00**
Notice of Appeal *or* Cross Appeal from a Final Judgment [$5.00 notice of appeal fee + $293.00 docket fee]	**$298.00**
Notice of Appeal from Interlocutory Order	**$5.00**
Amendment to Bankruptcy Schedules or List of Creditors [Fees apply to add or delete a creditor from schedules D, and/or E/F] NOTE: The bankruptcy judge may, for good cause, waive the charge in any case.	**$30.00**
Certification	**$11.00**
Exemplification of documents	**$21.00**
Record Search	**$30.00**
Abstract of Judgment [Fees include certification fees]	**$30.00**
Document Filing/Indexing [Filing any document that is not related to a pending case or proceeding, this includes registering a judgment from another district]	**$46.00**
Record Retrieval [For retrievals involving multiple boxes, $39.00 for each additional box]	**$64.00**
Notice of Voluntary Conversion	**$25.00**
Any Payment Returned or Denied for Insufficient Funds	**$53.00**
Audio Recording	**$30.00**
Photocopies – per page	**$0.50**
Electronic Printouts	**$0.10**

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Motion Fees	Total Fees
Motion to Terminate, Annul, Modify or Condition the Automatic Stay	**$176.00**
Motion to Compel Abandonment pursuant to Rule 6007(b)	**$176.00**
Motion to Withdraw Reference under 28 U.S.C. § 157(d)	**$176.00**
Motion to Sell Property of the Estate Free and Clear of Liens under 11 U.S.C § 363(f)	**$176.00**
Motion to Sever (Split/Divide a Joint Case) Chapter 7	**$335.00**
Motion to Sever(Split/Divide a Joint Case) Chapter 13	**$306.00**
Motion to Sever (Split/Divide a Joint Case) Chapter 11	**$1,717.00**
Motion to Sever (Split/Divide a Joint Case) Chapter 12	**$275.00**
Motion to Appear Pro Hac Vice [$150.00 attorney admission fee payable to the CLERK, U.S. BANKRUPTCY COURT, is due with the filing of the Motion.]	**$150.00**
Motion to Reopen Case - Ch7	**$260.00**
Motion to Reopen Case - Ch9	**$1,167.00**
Motion to Reopen Case - Ch11	**$1,167.00**
Motion to Reopen Case - Ch12	**$200.00**
Motion to Reopen Case - Ch13	**$235.00**
Motion to Reopen Case - Ch15	**$1,167.00**
Motion to Convert Case - Ch7 to Ch11	**$922.00**
Motion to Convert Case - Ch13 to Ch11	**$932.00**
Motion to Convert Case - Ch11 to Ch7	**$15.00**
Motion to Convert Case - Ch13 to Ch7	**$25.00**
Motion to Convert Case - Ch12 to Ch7	**$60.00**
Motion to Convert Case - Ch12 to Ch13	**$35.00**
Motion to Convert Case - Ch12 to Ch11	**$800.00**
Motion to Convert IFP Case - Ch7 to Ch13	**$310.00**
Motion to Redact a Record [$25.00 per affected case]	**$25.00**

Fee Exemptions
Motion for Relief From Stay - filed by the following: • Child Support Creditor or its Representative, if **Form 2810** ***(Appearance of Child Support Creditor or Representative)*** required by § 304(g) of the Bankruptcy Reform Act of 1994 is filed. • Stipulation for Court Approval of an Agreement for Relief From a Stay • Motion filed a Co-debtor
Motion to Reopen – filed for the following reasons: • To permit a party to file a complaint to obtain a determination under Rule 4007(b) • Filed by debtor to reopen case based upon an alleged violation of the terms of the discharge under 11 U.S.C. § 524; or • Reopened to correct an administrative error **NOTE:** • The fee is **DUE** upon filing a request to reopen a case in which the court did not enter a discharge due to the debtor's failure to file a **"Certificate of completion of a Financial Management Course."** • The court may waive the filing fee under appropriate circumstances or defer payment of the fee from trustees pending discovery of additional assets – [If the payment is **deferred**, the fee should be **waived** if **no** additional assets are discovered.] • **IFP Applicants** – Debtors previously awarded approval to waive the court's initial filing fee, when filing a motion to reopen **must** file with the court a **NEW** application to waive the reopening fee. • **The reopening fee will not be charged if the only reason for reopening is to redact a record already filed in a case, pursuant to Fed. R. Bankr. P. 9037.**

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Fee Exemptions
Federal Agencies: • The exemption for the "United States" contained in the court miscellaneous fee schedules applies exclusively to any department, agency, or instrumentality in the executive or legislative branches of the United States Government (USG), any independent federal agency or wholly-owned USG corporation, and Federal Reserve banks and branches. • The exemption is **not** available for private individuals or entities solely because of contractual relationships with federal government entities. • Entities seeking to receive this (or any) fee exemption bear the burden of establishing that they are entitled to the exemption.

FEE ASSESSMENTS	Court Fees
Administrative Fees - For filing a case under Title 11 ***or*** when a motion to divide a joint case under Title 11 is filed. • For filing a petition under Chapter 7, 12 or 13: $75.00 • For filing a petition under Chapter 9, 11 or 15: $550.00 • When a motion to divide a joint case under Chapter 7, 12 or 13 is filed: $75.00 • When a motion to divide a joint case under Chapter 11 is filed: $550.00	
Trustee's Fee - Pursuant to 11 U.S.C. § 330(b)(2) a trustee fee applies to the following: • For filing a petition under Chapter 7 • For filing a motion to reopen a Chapter 7 case • For filing a motion to divide a joint Chapter 7 case • For filing a motion to convert a case to a Chapter 7 case • For filing a notice of conversion to a Chapter 7 case	**$15.00**
Amendments – The filing fee does **NOT** apply in any of the following instances: • Changing the address of a creditor or the attorney for the creditor • Adding the Name and Address of an Attorney for a creditor listed on the schedules.	**$30.00**
Appeals – All fees are **NOT** due at the time of filing in certain instances: • Fees on Appeals or Cross Appeal filed by the Bankruptcy Trustee and/or Chapter 11 Debtor-in-possession are payable only from the estate (if applicable). • This pertains to the $293.00 docketing fee **ONLY**; the $5.00 Notice of Appeal Fee authorized under 28 U.S.C. § 1930 (e) must be paid at the time of filing by any party filing a Notice of Appeal or Cross Appeal.] **NOTE:** A separate fee is to be paid by each party filing a Notice of Appeal ***or*** Cross Appeal. **[Exceptions:** Parties filing a **Joint Notice of Appeal** are required to pay **ONLY ONE FEE.]**	**$298.00**
Direct Appeals – Upon notice from the Court of Appeals that a direct appeal from the bankruptcy court has been authorized, the Appellant shall pay an additional fee.	**$207.00**
Complaint (Adversary Proceedings) – The filing fee is **NOT** due if any of the following apply: • If the trustee or debtor-in-possession files the complaint, the fee should be paid by the estate (if applicable) • If the debtor is the Plaintiff • If the Plaintiff is a Child Support Creditor or Representative; parties must file with the court **Form 2810** (Appearance of Child Support Creditor or Representative) required by § 304(g) of the Bankruptcy Reform Act of 1994	**$350.00**

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Conversions (Motion to Convert or Notice of Conversion) - If the filing fee for the chapter to which the case is requested to be converted exceeds that of the initial filing fee of the original chapter a fee will be assessed to ensure that all debtors pay the same amount. • Ch. 11 to Ch. 7: $15.00 (Trustee Fee) • Ch. 13 to Ch. 7: $25.00 ($15.00 Trustee Fee + $10.00 filing fee differential) • Ch. 12 to Ch. 7: $60.00 ($15.00 Trustee Fee + $45.00 filing fee differential) • Ch. 12 to Ch. 13: $35.00 (filing fee differential) **Exceptions:** Fees assessed for converting to a chapter 11 from either a chapter 7 or 13 are pursuant to 28 U.S.C § 1930(a).	
Motion to Split (Sever/Divide a Joint Case under 11 U.S.C. § 302) – The fee to Split – Sever/Divide a joint case into two separate cases at the request of the debtor(s) is the same as the filing fee for the Chapter under which the joint case was commenced, plus the $75.00 administrative fee for Chapters 7, 12 and 13; $550.00 administrative fee for Chapter 11; plus the $15.00 Chapter 7 Trustee's fee. • Ch. 7: $245.00 + $75.00 Administrative Fee + $15.00 Trustee Fee = $335.00 • Ch. 12: $200.00 + $75.00 Administrative Fee = $275.00 • Ch. 13: $235.00 + $75.00 Administrative Fee = $310.00 • Ch. 11: $1167.00 + $550.00 Administrative Fee = $1717.00	
Motion to Reopen: Applicable filing fees **due** upon filing a Motion to Reopen Case: • Chapter 7 Trustee Fee – Payment pursuant to 11 U.S.C. § 330(b)(2) • Chapter 7: $245.00 + $15.00 Trustee Fee = $260.00 • Chapter 9: $1167.00 • Chapter 11: $1167.00 • Chapter 12: $200.00 • Chapter 13: $235.00 • Chapter 15: $1167.00 **NOTE:** The **$75.00** administrative fee due upon filing a petition is **NOT** due upon reopening.	
Retrieval Fee - For retrieval of one box of records from a Federal Records Center, National Archives, or other storage location removed from the place of business of the court. **NOTE:** • An additional **"Retrieval Fee"** may be applied to motions filed to reopen the case if the file is **no longer** available at the court. • A waiver or deferment of filing fee for a motion to reopen a case for trustee's discovery of assets **does not** apply to a waiver of **"Retrieval Fee."** • **For retrievals involving multiple boxes, $39.00 for each additional box.**	**$64.00**

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Biographies

Biographies

Peter M. Frank, Esq.

Peter M. Frank, Esq. is a Senior Staff Attorney at Legal Services of the Hudson Valley in the Kingston Office. He presently represents tenants in landlord/tenant proceedings, but has been representing homeowners in foreclosure long before the crisis hit, and long before any other legal services program. When LSHV formed a Foreclosure Unit – Peter was the lead attorney and mentor to the agency's foreclosure attorneys. LSHV was also one of the few legal services programs that utilized Chapter 13 Bankruptcy as part of their foreclosure practice. He started his legal career as an associate with Cleary, Gottlieb, Steen & Hamilton in New York. He then went into music management representing many popular musicians, and then private practice focusing on entertainment and environmental law, before moving into the legal services realm. His expertise in litigation and bankruptcy make him a sought after speaker and mentor. Peter graduated with a BA in Philosophy & Government from Boston University, and a JD from the Harvard Law School.

David J. Bryan, Esq.

David J. Bryan, Esq**.** is the Program Director for the Consumer and Economic Advocacy Program at Brooklyn Legal Services – Corporation A. David has 15 years experience practicing Law in the New York City area. After admission to the NYS Bar, and prior to joining Brooklyn Legal Services – Corp A, Mr. Bryan worked at Sonin & Genis, and then Malapero & Prisco, two New York-based personal injury law firms. In 2003, Mr. Bryan transitioned to Brooklyn Legal Services – Corp A, becoming the Director of the Comprehensive Rights Unit, Which served persons living with and affected by HIV/AIDS. In 2009, he became the Director of what is now the Consumer and Economic Advocacy Program at Brooklyn – Corp A, Providing oversight of all aspects of litigation and mediation, as well as leading the development And implementation of strategic plans for effective litigation, case management and funding resources. Brooklyn Legal Services – Corp A is leading the way to the use of Chapter 13 bankruptcy in foreclosure cases. David J. Bryan received his JD from the University of North Carolina School of Law.

Ndukwe Agwu, Esq.

Ndukwe Agwu, Esq. is a Senior Staff Attorney & Blackshear Fellow in the Consumer and Economic Advocacy Program at Brooklyn Legal Services – Corporation A. Following graduation from law school, Ndukwe worked as an in-house attorney for DHL, handling OSHA and Workers Compensation cases. In 2008, he accepted a position in the Mount Vernon Office of Legal Services of the Hudson Valley, handling landlord/ tenant, public benefits, unemployment, and social security benefits. In 2010, Mr. Agwu moved into the Foreclosure Prevention Unit and soon thereafter became one of the leading foreclosure attorneys in the agency. Ndukwe is a graduate of the Max Gardner Bankruptcy Boot Camp and a member of the National Association of Consumer Bankruptcy Attorneys (NACBA). He is on the Board of Directors for the Coalition for Debtor Education at Fordham Law School, and an adjunct professor at SUNY Purchase, where he teaches Legal Research & Writing, and The Nature and Function of Law. He was recently named the Center for NYC Neighborhoods city-wide Network Advisor for Bankruptcy for non-profit legal services providers that provide foreclosure prevention services. Mr. Agwu graduated with a BA in Political Science & Economics from SUNY – Purchase, and a received a JD from Touro Law School.

William Flynn, Esq.

William Flynn, Esq. is the Managing Attorney of the Foreclosure Prevention Unit at the Brooklyn Bar Association Volunteer Lawyers Project. Prior to coming to the VLP, Mr. Flynn served as the Regional Managing Attorney for the Upper Hudson Valley Region of Legal Services of the Hudson Valley and the Agency – wide coordinator of LSHV's Foreclosure Practice, including Judge Lippman's pilot Settlement Conference representation project. He had the pleasure to work with both Peter Frank and Ndukwe Agwu. Mr. Flynn previously served as a Staff Attorney in the Community Support Services Unit of LSHV, a general practice unit serving those living with mental disabilities. He also served as a Staff Attorney at Gay Men's Health Crisis, Inc., handling HIV-based discrimination and consumer bankruptcy cases. The VLP operates two foreclosure clinics in the Kings County Supreme Court, and one at the Brooklyn Borough President's Office at Borough Hall. Mr. Flynn holds a BA in Political Science from SUNY – New Paltz and a JD form CUNY School of Law.

New York State Bar Association
Legal Services Partnership Conference

USING CHAPTER 13 IN FORECLOSURE CASES
AN OVERVIEW

Friday, September 16, 2016
11 am – 12:15 pm

LOSS MITIGATION SUPPLEMENT

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

LOSS MITIGATION PROGRAM PROCEDURES

I. PURPOSE

The Loss Mitigation Program is designed to function as a forum for debtors and lenders to reach consensual resolution whenever a debtor's residential property is at risk of foreclosure. The Loss Mitigation Program aims to facilitate resolution by opening the lines of communication between the debtors' and lenders' decision-makers. While the Loss Mitigation Program stays certain bankruptcy deadlines that might interfere with the negotiations or increase costs to the Loss Mitigation Parties, the Loss Mitigation Program also encourages the parties to finalize any agreement under Bankruptcy Court protection, instead of seeking dismissal of the bankruptcy case.

II. LOSS MITIGATION DEFINED

The term "Loss Mitigation" is intended to describe the full range of solutions that may avert either the loss of a debtor's property to foreclosure, increased costs to the lender, or both. Loss mitigation commonly consists of the following general types of agreements, or a combination of them: loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction. The terms of a Loss Mitigation solution will vary in each case according to the particular needs and goals of the parties.

III. ELIGIBILITY

The following definitions are used to describe the types of parties, properties and loans that are eligible for participation in the Loss Mitigation Program:

A. DEBTOR

The term "Debtor" means any individual debtor in a case filed under Chapter 7, 11, 12 or 13 of the Bankruptcy Code, including joint debtors.

B. PROPERTY

The term "Property" means any real property or cooperative apartment used as a principal residence in which an eligible Debtor holds an interest.

C. LOAN

The term "Loan" means any mortgage, lien or extension of money or credit secured by eligible Property or stock shares in a residential cooperative, regardless of whether or not the Loan

(1) is considered to be "subprime" or "non-traditional," (2) was in foreclosure prior to the bankruptcy filing, (3) is the first or junior mortgage or lien on the Property, or (4) has been "pooled," "securitized," or assigned to a servicer or to a trustee.

D. CREDITOR

The term "Creditor" refers to any secured creditor whether it be are the holder, mortgage servicer or trustee of an eligible Loan. If the Creditor participating in Loss Mitigation is not the direct holder of the loan, the Creditor is deemed to have full consent to act on behalf of the holder. If such consent has not been given, the Creditor must object to the Loss Mitigation Request and provide the name of the holder, trustee, or other entity that has the ability to participate in Loss Mitigation.

E. LOSS MITIGATION PARTIES

The term "Loss Mitigation Parties" refers to the Debtor and the Creditor bound by a Loss Mitigation Order to participate in Loss Mitigation.

IV. ADDITIONAL PARTIES

A. OTHER CREDITORS

Where it may be necessary or desirable to obtain a global resolution, any party may request, or the Bankruptcy Court may direct, that multiple Creditors participate in Loss Mitigation.

B. CO-DEBTORS AND THIRD PARTIES

Where the participation of a co-debtor or other third party may be necessary or desirable, any party may request, or the Bankruptcy Court may direct, that such party participate in Loss Mitigation, to the extent that the Bankruptcy Court has jurisdiction over the party, or if the party consents to participation in Loss Mitigation.

C. CHAPTER 13 TRUSTEE

The Chapter 13 Trustee has the duty in section 1302(b)(4) of the Bankruptcy Code to "advise, other than on legal matters, and assist the debtor in performance under the plan." Any party may request, or the Bankruptcy Court may direct, the Chapter 13 Trustee to participate in Loss Mitigation to the extent that such participation would be consistent with the Chapter 13 Trustee's duty under the Bankruptcy Code.

D. MEDIATOR

At any time, a Debtor or Creditor participating in the Loss Mitigation Program may request, or the Bankruptcy Court may order, the appointment of an independent mediator from the United States Bankruptcy Court for the Southern District of New York's Register of Mediators, which may be viewed at http://www.nysb.uscourts.gov/mediators.html. A mediator will assist in Loss Mitigation in accordance with these Procedures and Local Rule 9019-1.

V. COMMENCEMENT OF LOSS MITIGATION

Parties are encouraged to request Loss Mitigation as early in a case as possible, but Loss Mitigation may be initiated at any time prior to the entry of a discharge order, by any of the

following methods:

A. BY THE DEBTOR

1. In section C of the Model Chapter 13 Plan, a Chapter 13 Debtor may indicate an interest in discussing Loss Mitigation with a particular Creditor. Upon requesting same in the Chapter 13 Plan, the Debtor must serve said plan on the Creditor and file proof of same on the Electronic Case Filing System ("ECF"). If the Creditor fails to object within fourteen(14) days of service of the plan the Debtor shall submit an order approving the Loss Mitigation Request (the *"Loss Mitigation Order"*[1]) and the Bankruptcy Court may enter the order. A copy of the Southern District of New York's *"Model Chapter 13 Plan"* can be found on the Bankruptcy Court's website under "Chapter 13 Forms." The Debtor may request Loss Mitigation in the plan for one Loan without regard for whether the Loan is a first or second mortgage loan. In order to request Loss Mitigation on a second Loan, the Debtor must file a separate Loss Mitigation Request.

2. A Debtor may file a request for Loss Mitigation ("Loss Mitigation Request") with a particular Creditor. The Creditor shall have fourteen (14) days to object. If no objection is filed, the Debtor shall submit a *"Loss Mitigation Order"* and the Bankruptcy Court may enter the *"Loss Mitigation Order."* A copy of the *"Loss Mitigation Request-By the Debtor"*[2] and the *"Loss Mitigation Order"* can be found on the Bankruptcy Court's website under the "Loss Mitigation" tab.

3. Upon entry of the *"Loss Mitigation Order,"* the Debtor must serve same upon the appropriate Creditor and file proof of service on ECF. If the Creditor is a domestic or foreign corporation, partnership, or other unincorporated association, service must be made by mailing a copy of the plan to a physical address and to the attention of an officer. A copy of the *"Loss Mitigation Order"* can be found on the Bankruptcy Court's website.

4. If a Creditor has filed a motion requesting relief from the automatic stay pursuant to section 362 of the Bankruptcy Code (a "Lift-Stay Motion"), at any time prior to the conclusion of the hearing on the Lift-Stay Motion, the Debtor may file a Loss Mitigation Request. The Debtor and Creditor shall appear at the scheduled hearing on the Lift-Stay Motion, and the Bankruptcy Court will consider the Loss Mitigation Request and any opposition by the Creditor.

B. BY A CREDITOR

A Creditor may file a Loss Mitigation Request. The Creditor must serve said request on the Debtor and Debtor's counsel and file proof of service on ECF. The Debtor shall have seven (7) days after service of the request to object. If no objection is filed, the Creditor shall submit a Loss Mitigation Order and the Bankruptcy Court may enter the Loss Mitigation Order. Upon entry of the Loss Mitigation Order, the Creditor is to serve same upon Debtor and Debtor's counsel and file proof of same on ECF. The form *"Loss Mitigation Request-By the Creditor"* can be found on the Bankruptcy Court's website.

C. BY THE BANKRUPTCY COURT

The Bankruptcy Court may enter a *"Loss Mitigation Order"* at any time, provided that the Loss Mitigation Parties that will be bound by the *"Loss Mitigation Order"* have had notice and an opportunity to object.

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[1] Italicized words in quotations indicate that there is a form by the same name on the Bankruptcy Court's website. These forms should be used whenever applicable.

D. OPPORTUNITY TO OBJECT

Where any party files an objection, a *"Loss Mitigation Order"* shall not be entered until the Bankruptcy Court has held a hearing to consider the objection. At the hearing, a party objecting to Loss Mitigation must present specific reasons why it believes that Loss Mitigation would not be successful. If a party objects on the grounds that Loss Mitigation has been requested in bad faith, the assertion must be supported by evidence.

VI. LOSS MITIGATION ORDER

A. ORDER

A separate *"Loss Mitigation Order"* shall be submitted for each Loss Mitigation Request, regardless of the method used for making the request.

B. DEADLINES

A *"Loss Mitigation Order"* shall contain set time frames for all of the following:

1. The date by which the Loss Mitigation Parties shall designate contact persons and disclose contact information.
2. The date by which each Creditor must transmit any information request to the Debtor.
3. The date by which the Debtor must transmit any information request to each Creditor.
4. The date by which a written status report must be filed and the date and time set for a status conference at which a verbal report must be provided. Where a written report is required, it should generally be filed not later than seven (7) days before the initial Loss Mitigation status conference ("Initial Status Conference").

C. EFFECT

Whenever a *"Loss Mitigation Order"* is entered, the following shall apply to the Loss Mitigation Parties:

1. Unless otherwise ordered by the Bankruptcy Court, all communications between the Loss Mitigation Parties shall be made through the designated contacts' attorneys.
2. Except where necessary to prevent irreparable injury, loss or damage, a Creditor shall not file a Lift-Stay Motion while Loss Mitigation is pending.
3. Any Lift-Stay Motion filed by the Creditor prior to the entry of the *"Loss Mitigation Order"* shall be adjourned to a date after the *"Order Terminating Loss Mitigation and Final Report,"* and the stay shall be extended pursuant to section 362(e) of the Bankruptcy Code.
4. In a Chapter 13 case, the deadline by which a Creditor must object to confirmation of the Chapter 13 plan shall be extended to permit the Creditor an additional fourteen (14) days after the filing of the *"Order Terminating Loss Mitigation and Final Report."*
5. All communications and information exchanged by the Loss Mitigation Parties during Loss Mitigation will be inadmissible in any subsequent proceeding pursuant to Federal Rule of Evidence 408.
6. Unless otherwise ordered by the Bankruptcy Court, in a Chapter 7 case, the entry of the *"Loss Mitigation Order"* defers the entry of an order granting the Debtor's discharge until one day after an "Order Terminating Loss Mitigation and Final Report" is filed, pursuant to Federal Rule of Bankruptcy Procedure 4004(c)(2). The time to object to the Debtor's discharge or the dischargeability of a debt is NOT extended by this Order

VII. DUTIES UPON COMMENCEMENT OF LOSS MITIGATION

Upon entry of a Loss Mitigation Order, the Loss Mitigation Parties shall have the following duties:

A. GOOD FAITH

The Loss Mitigation Parties shall negotiate in good faith. A party that fails to participate in Loss Mitigation in good faith may be subject to sanctions.

B. CONTACT INFORMATION

1. The Debtor: Unless the Debtor has already done so in the Chapter 13 plan or Loss Mitigation Request, the Debtor shall file and serve a written notice on each Creditor, indicating the manner in which the Creditor should contact the Debtor.

2. The Creditor: Unless a Creditor has already done so as part of a Loss Mitigation Request, each Creditor shall provide written notice to the Debtor by filing and serving its Creditor Affidavit on the Debtor in which it identifies: 1) the name, address and direct telephone number of the contact person who has full settlement authority; and 2) the attorney representing it in the Loss Mitigation.

C. DOCUMENT EXCHANGE

1. The Creditor shall serve upon the Debtor and Debtor's attorney a request for information using the *"Creditor Loss Mitigation Affidavit"* form within seven (7) days of service of the *"Loss Mitigation Order."* The Creditor shall file same on ECF. The "*Creditor Loss Mitigation Affidavit*" can be found on the Bankruptcy Court's website.

2. The Debtor shall serve upon the Creditor a response to Creditor's request for information using the "*Debtor Loss Mitigation Affidavit*" form within fourteen (14) days of service of the Creditor Loss Mitigation Affidavit. The Debtor shall file only the *Debtor Loss Mitigation Affidavit* on ECF. A copy of the "*Debtor Loss Mitigation Affidavit"* can be found on the Bankruptcy Court's website.

D. STATUS REPORT

The Loss Mitigation Parties shall provide a written report to the Bankruptcy Court regarding the status of Loss Mitigation within the timeframe set by the Bankruptcy Court in the *"Loss Mitigation Order."* The status report shall state whether one or more Loss Mitigation sessions have been conducted, whether a resolution was reached, and whether one or more of the Loss Mitigation Parties believe that additional Loss Mitigation sessions would be likely to result in either a partial or complete resolution.

E. BANKRUPTCY COURT APPROVAL

The Loss Mitigation Parties shall seek Bankruptcy Court approval of any resolution or Settlement reached during Loss Mitigation.

VIII. LOSS MITIGATION PROCESS

A. INITIAL CONTACT

Following entry of a *"Loss Mitigation Order,"* the contact person designated by each Creditor shall contact the Debtor's designated contact person and any other Loss Mitigation Party within the timeframe provided in the *"Loss Mitigation Order."* The Debtor through its

designated contact person may contact any other Loss Mitigation Party at any time. The purpose of the initial contact is to create a framework for discussion at the Loss Mitigation sessions and to ensure that each of the Loss Mitigation Parties will be prepared to participate in the Loss Mitigation session – it is not intended to limit additional issues or proposals that may arise during the session. During the initial contact phase, the Loss Mitigation Parties should hold a telephone conference to discuss the following:

1. The types of Loss Mitigation solutions under consideration by each party.

2. A plan for the exchange of required information prior to the Loss Mitigation session, including the due date for the Debtor to complete and return any information request or other Loss Mitigation paperwork that each Creditor may require.

B. LOSS MITIGATION SESSIONS BETWEEN THE PARTIES

Loss Mitigation sessions between the parties may be conducted in person, telephonically or via video conference. At the conclusion of each Loss Mitigation session, the Loss Mitigation Parties should discuss whether additional sessions are necessary and set the time and method for conducting any additional sessions, including a schedule for the exchange of any further information or documentation that may be required.

C. STATUS CONFERENCES WITH THE BANKRUPTCY COURT

The Initial Status Conference shall be set by the Bankruptcy Court in the *"Loss Mitigation Order"* and may be adjourned at the discretion of the Bankruptcy Court. At any time during the pendency of Loss Mitigation, a Loss Mitigation Party may request a settlement conference or status conference with the Bankruptcy Court.

D. SETTLEMENT AUTHORITY

Each Loss Mitigation Party must have a person with full settlement authority present at every Loss Mitigation status conference. During a status conference or settlement conference with the Bankruptcy Court, the person with full settlement authority must either attend the conference in person or be available by telephone or video conference beginning thirty (30) minutes prior to the start of the conference.

IX. DURATION AND TERMINATION

A. DURATION

Once a *"Loss Mitigation Order"* has been entered by the Bankruptcy Court, it shall remain in effect until an *"Order Terminating Loss Mitigation and Final Report"* is filed.

B. EARLY TERMINATION

1. Upon Request of a Loss Mitigation Party: A Loss Mitigation Party may request that Loss Mitigation be terminated by filing the form *"Request for Termination of Loss Mitigation"* which can be found on our website stating the reasons for the request. Except where immediate termination is necessary to prevent irreparable injury, loss or damage, the request shall be made on notice to all other Loss Mitigation Parties, and the Bankruptcy Court may schedule a hearing to consider the termination request.

2. *Sua Sponte* Termination of Loss Mitigation: The Bankruptcy Court may terminate Loss

Mitigation *sua sponte* at any time for failure to comply with the Loss Mitigation Program Procedures.

3. Dismissal of the Bankruptcy Case:

a. Other than at the request of a Chapter 13 Debtor, or the motion of the United States Trustee or Trustee for failure to comply with requirements under the Bankruptcy Code: Except where a Chapter 13 Debtor requests voluntary dismissal, or upon motion, a case shall not be dismissed during Loss Mitigation unless the Loss Mitigation Parties have provided the Bankruptcy Court with a status report that is satisfactory to the Bankruptcy Court. The Bankruptcy Court may schedule a further status conference with the Loss Mitigation Parties prior to dismissal of the case.

b. Upon the request of a Chapter 13 Debtor: **A Debtor is not required to request dismissal of the bankruptcy case as part of any resolution or settlement that is offered or agreed to during Loss Mitigation.** Where a Chapter 13 Debtor requests voluntary dismissal of the bankruptcy case during a pending Loss Mitigation , the Debtor's dismissal request shall indicate whether the Debtor agreed to any settlement or resolution from a Loss Mitigation Party during Loss Mitigation or intends to accept an offer of settlement made by a Loss Mitigation Party during Loss Mitigation.

X. SETTLEMENT

The Bankruptcy Court will consider any agreement or resolution reached during Loss Mitigation (a "Settlement") and may approve the Settlement, subject to the following provisions:

1. Implementation: A Settlement may be noticed and implemented in any manner permitted by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), including, but not limited to, a stipulation, sale, plan of reorganization or amended plan of reorganization; and a Motion to Approve Loan Modification.

2. Fees, Costs or Charges: If a Settlement provides for a Creditor to receive payment or reimbursement of any fee, cost or charge that arose from Loss Mitigation, such fees, costs or charges shall be disclosed to the Debtor and to the Bankruptcy Court prior to approval of the Settlement.

3. Signatures: Consent to the Settlement shall be acknowledged in writing by (1) the Creditor representative who participated in Loss Mitigation, (2) the Creditor's attorney, (3) the Debtor, and (4) the Debtor's attorney, if applicable.

4. Hearing: Where a Debtor is represented by counsel, a Settlement may be approved by the Bankruptcy Court without further notice, or upon such notice as the Bankruptcy Court directs, unless additional notice or a hearing is required by the Bankruptcy Code or Bankruptcy Rules. Where a Debtor is not represented by counsel, a Settlement shall not be approved until after the Bankruptcy Court has conducted a hearing at which the Debtor shall appear in person.

5. Dismissal Not Required: A Debtor is not required to request dismissal of the bankruptcy case in order to effectuate a Settlement. In order to ensure that the Settlement is enforceable, the Loss Mitigation Parties should seek Bankruptcy Court approval of the Settlement.

6. Any Settlement provided to the Bankruptcy Court for its approval shall have the Agreement attached as an exhibit.

XI. ORDER TERMINATING LOSS MITIGATION AND FINAL REPORT

The Loss Mitigation Parties shall file with the Bankruptcy Court an "*Order Terminating Loss Mitigation and Final Report*":

1. when the Bankruptcy Court enters an order – after a motion is made by one of the parties to Loss Mitigation (for example, a motion asking the Court to approve a Settlement) – where such order brings to a close the Loss Mitigation;
2. when the Bankruptcy Court approves a Settlement that has been presented to the Court, which provides resolution of the Loss Mitigation; or
3. when a Loss Mitigation's request for termination has been granted upon the record of a Loss Mitigation hearing.

Loss Mitigation is not "terminated" unless an *"Order Terminating Loss Mitigation and Final Report"* is entered by the Bankruptcy Court. Where a case has two or more requests for Loss Mitigation, a separate *"Order Terminating Loss Mitigation and Final Report"* must be filed for each request.

XII. FORMS

All of the Loss Mitigation forms may be found on the Bankruptcy Court's website under the "Loss Mitigation" tab. These forms must be used. The Bankruptcy Court may revise the forms from time to time without the need to update the Loss Mitigation Program Procedures.

XIII. COORDINATION WITH OTHER PROGRAMS

[Provisions may be added in the future to provide for coordination with other Loss Mitigation programs, including programs in the New York State Unified Court System.]

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:	
Adoption of Modified Loss Mitigation Program Procedures	General Order #582 Amending General Order #543

WHEREAS, by resolution of the Board of Judges of the United States Bankruptcy Court for the Eastern District of New York, General Order #543, dated December 8, 2009, instituted a uniform, comprehensive, court-supervised loss mitigation program in order to facilitate consensual resolutions for individual debtors whose residential real property is at risk of loss to foreclosure; and

WHEREAS, the loss mitigation program has helped avoid the need for various types of bankruptcy litigation, reduced costs to debtors and secured creditors, and enabled debtors to reorganize or otherwise address their most significant debts and assets under the United States Bankruptcy Code; and

WHEREAS, the Loss Mitigation Program Procedures were adopted, pursuant to 11 U.S.C. § 105(a), and shall apply in all individual cases assigned under Chapter 7, 11, 12 or 13 of the Bankruptcy Code, to Chief Judge Carla E. Craig, Judge Dorothy T. Eisenberg, Judge Elizabeth S. Stong and Judge Joel B. Rosenthal, and any other Judge of this Court who may elect to participate in the Loss Mitigation Program; and

WHEREAS, General Order #543 also provided that the Court may modify the Loss Mitigation Program Procedures from time to time by duly adopted General Order; and

WHEREAS, after further review of the Loss Mitigation Program, the Board of Judges has agreed to certain modifications to the procedures and forms; now therefor,

IT IS HEREBY ORDERED that the revised Loss Mitigation Program Procedures and forms are adopted effective immediately and shall be available in the Clerk's office and on the Court's web site.

Dated: Brooklyn, New York
September 9, 2011

/s/Carla E. Craig
Carla E. Craig,
Chief United States Bankruptcy Judge

LOSS MITIGATION PROGRAM PROCEDURES

I. PURPOSE

The Loss Mitigation Program is designed to function as a forum in individual bankruptcy cases for debtors and lenders to reach consensual resolution whenever a debtor's residential property is at risk of foreclosure. The Loss Mitigation Program aims to facilitate resolution by opening the lines of communication between the debtors' and lenders' decision-makers. While the Loss Mitigation Program stays certain bankruptcy deadlines that might interfere with the negotiations or increase costs to the loss mitigation parties, the Loss Mitigation Program also encourages the parties to finalize any Settlement (as defined below) under bankruptcy court protection, instead of seeking dismissal of the bankruptcy case.

II. LOSS MITIGATION DEFINED

The term "loss mitigation" is intended to describe the full range of solutions that may avert the loss of a debtor's property to foreclosure, increased costs to the lender, or both. Loss mitigation commonly consists of the following general types of agreements, or a combination of them: loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction. The terms of a loss mitigation solution will vary in each case according to the particular needs, interests, and goals of the parties.

III. ELIGIBILITY

The following definitions are used to describe the types of parties, properties, and loans that are eligible for participation in the Loss Mitigation Program:

A. DEBTOR

The term "Debtor" means any individual debtor in a case filed under Chapter 7, 11, 12, or 13 of the Bankruptcy Code, including joint debtors, whose case is assigned to Chief Judge Carla E. Craig, Judge Dorothy T. Eisenberg, Judge Elizabeth S. Stong, or Judge Joel B. Rosenthal, or any other judge who elects to participate in the Loss Mitigation Program.

B. PROPERTY

The term "Property" means any real property, including condominiums or cooperative apartments, used as the Debtor's principal residence, in which the Debtor holds an interest.

C. LOAN

The term "Loan" means any mortgage, lien, or extension of money or credit secured by eligible Property or stock shares in a residential cooperative, regardless of whether the Loan (1) is considered to be "subprime" or "non-traditional;" (2) was in foreclosure prior to the bankruptcy filing; (3) is the first or junior mortgage or lien on the Property; or (4) has been "pooled," "securitized," or assigned to a servicer or to a trustee.

D. CREDITOR

The term "Creditor" means any holder, mortgage servicer, or trustee of an eligible Loan.

IV. ADDITIONAL PARTIES

A. OTHER CREDITORS

Any party may request, or the bankruptcy court may direct, more than one Creditor to participate in the Loss Mitigation Program, where it may be of assistance to obtain a global resolution.

B. CO-DEBTORS AND THIRD PARTIES

Any party may request, or the bankruptcy court may direct, a co-debtor or other third party to participate in the Loss Mitigation Program, where the participation of such party may be of assistance, to the extent that the bankruptcy court has jurisdiction over the party or the party consents.

C. CHAPTER 13 TRUSTEE

Any party may request, or the bankruptcy court may direct, the Chapter 13 Trustee to participate in the Loss Mitigation Program to the extent that such participation is consistent with the Chapter 13 Trustee's duty under Bankruptcy Code Section 1302(b)(4) to "advise, other than on legal matters, and assist the debtor in performance under the Chapter 13 plan."

D. MEDIATOR

Any party may request, or the bankruptcy court may direct, a mediator from the Mediation Register maintained by the United States Bankruptcy Court for the Eastern District of New York to participate in the Loss Mitigation Program.

V. COMMENCEMENT OF LOSS MITIGATION

Parties are encouraged to request to enter into the Loss Mitigation Program as early in the case as possible, but a request may be made at any time as follows.

A. BY THE DEBTOR (click here for printable form)

1. In a case under Chapter 13, the Debtor may request to enter into the Loss Mitigation Program with a particular Creditor in the Chapter 13 plan, and shall note the making of the request in the docket entry for the plan. The Creditor shall have 21 days to object. If no objection is filed, the bankruptcy court may enter an order referring the parties to the Loss Mitigation Program (a "Loss Mitigation Order").

2. A Debtor may serve and file a request to enter into the Loss Mitigation Program with a particular Creditor. The Creditor shall have 14 days to object. If no objection is filed, the bankruptcy court may enter a Loss Mitigation Order.

3. If a Creditor has filed a motion for relief from the automatic stay pursuant to Bankruptcy Code Section 362 (a "Lift-Stay Motion"), the Debtor may serve and file a request to enter into the Loss Mitigation Program at any time before the conclusion of the hearing on the Lift-Stay Motion. The bankruptcy court will consider the Debtor's request and any opposition by the Creditor at the hearing on the Lift-Stay Motion.

B. BY A CREDITOR (click here for printable form)

A Creditor may serve and file a request to enter into the Loss Mitigation Program. The Debtor shall have 14 days to object. If no objection is filed, the bankruptcy court may enter a Loss Mitigation Order.

C. BY THE BANKRUPTCY COURT

The bankruptcy court may enter a Loss Mitigation Order at any time after notice to the parties to be bound (the "Loss Mitigation Parties") and an opportunity to object.

D. HEARING ON OBJECTION

If any party files an objection, the bankruptcy court shall hold a hearing on the request to enter the Loss Mitigation Program and the objection, and shall not enter a Loss Mitigation Order until the objection has been heard.

VI. LOSS MITIGATION ORDER (click here for printable form)

A. DEADLINES

A Loss Mitigation Order shall contain:

1. The date by which contact persons and telephone contact information shall be provided by the Loss Mitigation Parties.

2. The date by which each Creditor shall initially contact the Debtor.

3. The date by which each Creditor shall transmit any request for information or documents to the Debtor.

4. The date by which the Debtor shall transmit any request for information or documents to each Creditor.

5. The date by which a written status report shall be filed, or the date and time for a status conference and oral status report (whether written or oral, a "Status Report"). In a Chapter 13 case, the status conference shall coincide, if possible, with a hearing on confirmation of the Chapter 13 plan. A date to file a written report shall be, if possible, not later than 7 days after the initial loss mitigation session.

6. The date when the loss mitigation process (the "Loss Mitigation Period") shall terminate, unless extended.

B. EFFECT

During the Loss Mitigation Period:

1. A Creditor may contact the Debtor directly, and it shall be presumed that such contact does not violate the automatic stay.

2. A Creditor may not file a Lift-Stay Motion, except where necessary to prevent irreparable injury. A Lift-Stay Motion filed by the Creditor before the entry of the Loss Mitigation Order shall be adjourned to a date following the Loss Mitigation Period, and the stay shall be extended pursuant to Bankruptcy Code Section 362(e).

3. In a Chapter 13 case, the date by which a Creditor must object to confirmation of the Chapter 13 plan shall be extended to a date that is at least 14 days following the Loss Mitigation Period.

4. Federal Rule of Evidence 408 shall apply to communications, information and documents exchanged by the Loss Mitigation Parties in connection with the Loss Mitigation Program.

VII. DUTIES UPON COMMENCEMENT OF LOSS MITIGATION

A. GOOD FAITH

The Loss Mitigation Parties shall negotiate in good faith. A party that does not participate in the Loss Mitigation Program in good faith may be subject to sanctions.

B. CONTACT INFORMATION

1. The Debtor: The Debtor shall provide written notice to each Loss Mitigation Party of the manner in which the Creditor shall contact the Debtor or the Debtor's attorney. This may be done in the request to enter the Loss Mitigation Program.

2. The Creditor: Each Creditor shall provide written notice to the Debtor of the name, address and direct telephone number of the contact person with authority to act on the Creditor's behalf. This may be done in the request to enter the Loss Mitigation Program.

C. STATUS REPORT

The Loss Mitigation Parties shall provide a written or oral Status Report to the bankruptcy court within the period set in the Loss Mitigation Order. The Status Report shall indicate how many loss mitigation sessions have occurred, whether a resolution has been reached, and whether a Loss Mitigation Party believes that additional sessions may result in partial or complete resolution. A Status Report may include a request for an extension of the Loss Mitigation Period.

D. BANKRUPTCY COURT APPROVAL

The Loss Mitigation Parties shall seek bankruptcy court approval of any Settlement reached during loss mitigation.

VIII. LOSS MITIGATION PROCESS

A. INITIAL CONTACT

Following entry of a Loss Mitigation Order, the contact person designated by each Creditor shall contact the Debtor and any other Loss Mitigation Party within the time set by the bankruptcy court. The Debtor may contact any Loss Mitigation Party at any time. The purpose of the initial contact is to create a framework for the loss mitigation session and to ensure that the Loss Mitigation Parties are prepared. The initial contact is not intended to limit the issues or proposals that may arise during the loss mitigation session.

During the initial contact, the Loss Mitigation Parties shall discuss:

1. The time and method for conducting the loss mitigation sessions.

2. The loss mitigation alternatives that each party is considering.

3. The exchange of information and documents before the loss mitigation session, including the date by when the Creditor shall request information and documents from the Debtor and the date by when the Debtor shall respond. All information and documents shall be provided at least seven days before the first loss mitigation session.

B. LOSS MITIGATION SESSIONS

Loss mitigation sessions may be conducted in person, by telephone, or by video conference. At the conclusion of each loss mitigation session, the Loss Mitigation Parties shall discuss whether and when to hold a further session, and whether any additional information or documents should be exchanged.

C. BANKRUPTCY COURT ASSISTANCE

At any time during the Loss Mitigation Period, a Loss Mitigation Party may request a settlement conference or status conference with the bankruptcy judge.

D. SETTLEMENT AUTHORITY

At a loss mitigation session, each Loss Mitigation Party shall have a person with full settlement authority present. At a status conference or settlement conference with the bankruptcy court, each Loss Mitigation Party shall have a person with full settlement authority present. If a Loss Mitigation Party is appearing by telephone or video conference, that party shall be available beginning thirty minutes before the conference.

IX. DURATION, EXTENSION AND EARLY TERMINATION

A. INITIAL PERIOD

The initial Loss Mitigation Period shall be set by the bankruptcy court in the Loss Mitigation Order.

B. EXTENSION

1. By Agreement: The Loss Mitigation Parties may agree to extend the Loss Mitigation Period by stipulation to be filed not less than one business day before the Loss Mitigation Period ends.

2. In the Absence of Agreement: A Loss Mitigation Party may request to extend the Loss Mitigation Period in the absence of agreement by filing and serving a request to extend the Loss Mitigation Period on the other Loss Mitigation Parties, who shall have seven days to object. If the request to extend the Loss Mitigation Period is opposed, then the bankruptcy court shall schedule a hearing on the request. The bankruptcy court may consider whether (1) an extension of the Loss Mitigation Period may result in a complete or partial resolution that provides a substantial benefit to a Loss Mitigation Party; (2) the party opposing the extension has participated in good faith and complied with these Loss Mitigation Procedures; and (3) the party opposing the extension will be prejudiced.

C. EARLY TERMINATION

1. Upon Request of a Loss Mitigation Party: A Loss Mitigation Party may request to terminate the Loss Mitigation Period by filing and serving a request to terminate the Loss Mitigation Period on the other Loss Mitigation Parties, who shall have seven days to object. If the request to terminate the Loss Mitigation Period is opposed, then the bankruptcy court shall schedule a hearing on the request. Notice may be modified for cause if necessary to prevent irreparable injury.

2. Dismissal of the Bankruptcy Case: A Chapter 13 bankruptcy case shall not be dismissed during the pendency of a Loss Mitigation Period, except (1) upon motion of the Chapter 13 Trustee or the United States Trustee for failure to comply with the requirements of the Bankruptcy Code; or (2) upon the voluntary request of the Chapter 13 Debtor. **A Chapter 13 Debtor may not be required to request dismissal of the bankruptcy case as part of a Settlement during the Loss Mitigation Period.** If a Chapter 13 Debtor requests voluntary dismissal during the Loss Mitigation Period, the Debtor shall indicate whether the Debtor agreed or intends to enter into a Settlement with a Loss Mitigation Party.

D. DISCHARGE

The Clerk of the Court shall not enter a discharge during the pendency of a Loss Mitigation Period.

X. SETTLEMENT

The bankruptcy court shall consider any agreement or resolution (a "Settlement") reached during loss mitigation and may approve the Settlement, subject to the following provisions:

1. Implementation: A Settlement may be noticed and implemented in any manner permitted by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), including but not limited to a stipulation, sale, Chapter 11 plan of reorganization, or Chapter 13 plan.

2. Fees, Costs, or Charges: If a Settlement provides for a Creditor to receive payment or reimbursement of any expense arising from the Creditor's participation in the Loss Mitigation Program, that expense shall be disclosed to the Debtor and the bankruptcy court before the Settlement is approved.

3. Signatures: Consent to the Settlement shall be acknowledged in writing by the Creditor representative who participated in the loss mitigation session, the Debtor, and the Debtor's attorney, if applicable.

4. Hearing: Where a Debtor is represented by an attorney, a Settlement may be approved by the bankruptcy court without further notice, or upon such notice as the bankruptcy court directs, unless additional notice or a hearing is required by the Bankruptcy Code or Bankruptcy Rules. Where a Debtor is not represented by counsel, a Settlement shall not be approved until the bankruptcy court conducts a hearing at which the Debtor shall appear in person.

5. Dismissal Not Required: **A Debtor shall not be required to request dismissal of the bankruptcy case in order to effectuate a Settlement.** In order to ensure that the Settlement is enforceable, the Loss Mitigation Parties shall seek bankruptcy court approval of the Settlement. Where the Debtor requests or consents to dismissal of the bankruptcy case as part of the Settlement, the bankruptcy court may approve the Settlement as a "structured dismissal," if such relief complies with the Bankruptcy Code and Bankruptcy Rules.

XI. LOSS MITIGATION FINAL REPORT

Debtor's counsel (or the Debtor, if the Debtor is proceeding without attorney representation) shall file with the Court a Loss Mitigation Final Report. The form of Loss Mitigation Final Report is on the Court's website **(click here for printable form)**. The Loss Mitigation Final Report shall be filed no later than 14 days after termination of the Loss Mitigation Period. Termination occurs:

1. when the Court enters an order terminating the Loss Mitigation Period;

2. when the Court approves a stipulated agreement that has been presented to the Court, which provides for settlement or resolution of the Loss Mitigation; or

3. upon expiration of the Loss Mitigation Period.

Where two or more requests for Loss Mitigation have been made in a case, for different properties or different mortgages on a property, a separate Loss Mitigation Final Report must be filed with respect to each request.

XII. COORDINATION WITH OTHER PROGRAMS

[Provision may be added in the future to provide for coordination with other loss mitigation programs, including programs in the New York State Unified Court System.]

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

----------X

In Re: Chapter

Case No.

Debtor(s)

----------X

LOSS MITIGATION REQUEST - BY DEBTOR

I am a Debtor in this case. I hereby request to enter into the Loss Mitigation Program with respect to ***[Identify the property, loan and creditor(s) for which you are requesting loss mitigation]***:

_____

[Identify the Property]

_____

[Loan Number]

_____

[Creditor's Name and Address]

SIGNATURE

I understand that if the Court orders loss mitigation in this case, I will be expected to comply with the Loss Mitigation Procedures. I agree to comply with the Loss Mitigation Procedures, and I will participate in the Loss Mitigation Program in good faith. I understand that loss mitigation is voluntary for all parties, and that I am not required to enter into any agreement or settlement with any other party as part of entry into the Loss Mitigation Program. I also understand that no other party is required to enter into any agreement or settlement with me. I understand that **I am not required to request dismissal of this case** as part of any resolution or settlement that is offered or agreed to during the Loss Mitigation Period.

Sign: _____ Date: _____, 20_____

Print Name: _____

[First and Last Name]

Telephone Number: _____

[i.e. 999-999-9999]

E-mail Address [if any]: _____

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
----------X
In Re: Chapter

Case No.

Debtor(s)
----------X

LOSS MITIGATION REQUEST - BY A CREDITOR

I am a Creditor (including a holder, servicer or trustee of a mortgage or lien secured by property used by the Debtor as a principal residence) of the Debtor in this case. I hereby request to enter into the Loss Mitigation Program with respect to ***[Identify the property, loan and creditor(s) for which you are requesting loss mitigation]***:

_____
[Identify the Property]

_____
[Loan Number]

_____
[Creditor's Name and Address]

SIGNATURE

I understand that if the Court orders loss mitigation in this case, I will be expected to comply with the Loss Mitigation Procedures. I agree to comply with the Loss Mitigation Procedures, and I will participate in the Loss Mitigation Program in good faith. I understand that loss mitigation is voluntary for all parties, and that I am not required to enter into any agreement or settlement with any other party as part of entry into the Loss Mitigation Program. I also understand that no other party is required to enter into any agreement or settlement with me. I understand that **I am not required to request dismissal of this case** as part of any resolution or settlement that is offered or agreed to during the Loss Mitigation Period.

Sign: _____ Date: _____, 20_____

Print Name: _____
[First and Last Name]

Telephone Number: _____
[i.e. 999-999-9999]

E-mail Address [if any]: _____

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

----------x

In re: Chapter

Case No.

Debtor(s)

----------x

LOSS-MITIGATION ORDER

☐ A Loss Mitigation Request was filed by the debtor on *[Date]* _____ , 20____.

☐ A Loss Mitigation Request was filed by a creditor on *[Date]* _____ , 20____.

☐ The Court raised the possibility of loss mitigation, and the parties have had notice and an opportunity to object.

Upon the foregoing, it is hereby

ORDERED, that the following parties (the "Loss Mitigation Parties") are directed to participate in the Loss Mitigation Program:

1. The Debtor

2. _____ , the Creditor with respect to _____ *[describe Loan and/or Property]*.

3. *[Additional parties, if any]* _____

It is further **ORDERED,** that the Loss Mitigation Parties shall comply with the Loss Mitigation Procedures annexed to this Order; and it is further

ORDERED, that the Loss Mitigation Parties shall observe the following deadlines:

1. Each Loss Mitigation Party shall designate contact persons and disclose contact information by *[suggested time is 7 days]*, unless this information has been previously provided. As part of this obligation, **a Creditor shall furnish each Loss Mitigation Party with written notice of the name, address and direct telephone number of the person who has full settlement authority**.

2. Each Creditor that is a Loss Mitigation Party shall contact the Debtor within **14 days of the date of this Order.**

---

1. All capitalized terms have the meaning defined in the Loss Mitigation Procedures

3. Each Loss Mitigation Party shall make its request for information and documents, if any, within **14 days of the date of this Order**.

4. Each Loss Mitigation Party shall respond to a request for information and documents within **14 days after a request is made, or 7 days prior to the Loss Mitigation Session, whichever is earlier.**

5. The Loss Mitigation Session shall be scheduled not later than _____ *[suggested time is within 35 days of the date of the order].*

6. The Loss Mitigation Period shall terminate on _____ [suggested time is within 42 days of the date of the date of the order], unless extended as provided in the Loss Mitigation Procedures.

It is further **ORDERED**, that a status conference will be held in this case on _____ *[suggested time is within 42 days of the date of the order]* (the "Status Conference"). The Loss Mitigation Parties shall appear at the Status Conference and provide the Court with an oral Status Report unless a written Status Report that is satisfactory to the Court has been filed not later than 7 days prior to the date of the Status Conference and requests that the Status Conference be adjourned or cancelled; and it is further

ORDERED, that at the Status Conference, the Court may consider a Settlement reached by the Loss Mitigation Parties, or may adjourn the Status Conference if necessary to allow for adequate notice of a request for approval of a Settlement; and it is further

ORDERED, that any matters that are currently pending between the Loss Mitigation Parties (such as motions or applications, and any objection, opposition or response thereto) are hereby adjourned to the date of the Status Conference to the extent those matters concern (1) relief from the automatic stay, (2) objection to the allowance of a proof of claim, (3) reduction, reclassification or avoidance of a lien, (4) valuation of a Loan or Property, or (5) objection to confirmation of a plan of reorganization; and it is further.

ORDERED, that the time for each Creditor that is a Loss Mitigation Party in this case to file an objection to a plan of reorganization in this case shall be extended until 14 days after the termination of the Loss Mitigation Period, including any extension of the Loss Mitigation Period.

Dated:

BY THE COURT

_____

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

----------x

In re:

Case No.
Chapter

Debtor(s)

----------x

LOSS MITIGATION FINAL REPORT

Name of Lender: _____

Property Address: _____

Last Four Digits of Account Number of Loan: _____

File Date of Request for Loss Mitigation: ____/____/_____

Date of Entry of Order Granting Loss Mitigation: _____

Date of Entry of Order Approving Settlement *(if any):* _____

Other Requests for Loss Mitigation in this Case: _____Yes _____No

The use of the Court's Loss Mitigation Procedures has resulted in the following (please check the appropriate box below):

☐ Loan modification.

☐ Loan refinance.

☐ Forbearance.

☐ Short sale.

☐ Surrender of property.

☐ No agreement has been reached.

☐ Other: _____
_____
_____
_____

Dated: _____ Signature: _____

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In re: Chapter _____

_____

Case No. _____-_____ (_____)

Debtor(s).

----------x

LOSS MITIGATION REQUEST – BY THE DEBTOR

I am a Debtor[1] in this case. I hereby request Loss Mitigation with respect to *[Identify the Property, last four (4) digits of Loan account number and Creditor(s) for which you are requesting Loss Mitigation]*:

_____

SIGNATURE

I have reviewed the Loss Mitigation Program Procedures, and I understand that if the Court orders Loss Mitigation in this case, I will be bound by the Loss Mitigation Program Procedures. I agree to comply with the Loss Mitigation Program Procedures, and I will participate in Loss Mitigation in good faith. I understand that Loss Mitigation is voluntary for all parties, and that I am not required to enter into any agreement or settlement with any other party as part of this Loss Mitigation. I also understand that no other party is required to enter into any agreement or settlement with me. I understand that **I am not required to request dismissal of this case** as part of any resolution or settlement that is offered or agreed to during the Loss Mitigation period.

The Debtor hereby permits the Creditor listed above to contact (check all that apply):

- ☐ The Debtor directly.
- ☐ Debtor's bankruptcy counsel.
- ☐ Other: _____.

Sign: _____ Date: _____, 20_____

Print Name: _____

Telephone Number: _____

E-mail address (if any): _____

[1] Unless otherwise provided herein, all capitalized terms are defined in the Southern District of New York's Loss Mitigation Program Procedures. The Loss Mitigation Program Procedures' definition of "Debtor" includes joint debtors.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In re: Chapter _____

_____

Case No. _____-_____ (_____)

Debtor(s).

----------x

LOSS MITIGATION REQUEST – BY A CREDITOR

I am a Creditor[1] in this case. I hereby request Loss Mitigation with respect to *[Identify the property, last four (4) digits of Loan account number and creditor(s) for which you are requesting loss mitigation]*:

_____

SIGNATURE

I have reviewed the Loss Mitigation Program Procedures, and I understand that if the Court orders Loss Mitigation in this case, I will be bound by the Loss Mitigation Program Procedures. I agree to comply with the Loss Mitigation Program Procedures, and I will participate in Loss Mitigation in good faith. If Loss Mitigation is ordered, I agree to provide the Court with written and verbal status reports stating whether or not the parties participated in one or more Loss Mitigation sessions, whether or not a settlement was reached, and whether negotiations are ongoing. I agree that **I will not require the Debtor to request or cause dismissal of this case** as part of any resolution or settlement that is offered or agreed upon during Loss Mitigation.

The Creditor hereby designates as its contact:

[add name of contact and contact information here]

The Creditor hereby designates as its attorney in Loss Mitigation:

[add name and contact information here]

Sign:_____ Date: _____, 20_____

Print Name: _____

Title: _____

Firm or Company: _____

[1] Unless otherwise provided herein, all capitalized terms are defined in the Southern District of New York's Loss Mitigation Program Procedures. The Loss Mitigation Program Procedures' definition of "Debtor" includes joint debtors.

Telephone Number: _____

E-mail address (if any): _____

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In re: Chapter

Case No. - ( )

Debtor(s).

----------x

DEBTOR LOSS MITIGATION AFFIDAVIT

STATE OF NEW YORK)
)ss.:
COUNTY OF)

I, _____ , being sworn, say:

I am not a party to this action, am over 18 years of age and reside in _____, New York.

On _____ , I served a true and completed copy of the documents requested in the *"Creditor Loss Mitigation Affidavit,"*[1] dated____, upon the following parties via (first class mail, facsimile or email)_____ at the following addresses____ ; including the following documents:

☐ A copy of the Debtor's[2] two (2) most recent federal income tax returns;

☐ A copy of the Debtor's last two (2) paycheck stubs, proof of social security income, pensions, or any other income received by the Debtor;

Or, if Debtor is self-employed:

☐ A copy of the Debtor's business' two (2) most recent months' profit and loss statements, setting forth a breakdown of the monthly business income and expenses for *[the months of]*;

☐ A copy of the mortgagee=s completed financial worksheet;

☐ Proof of second/third party income by affidavit of the party, including the party's last two (2) paycheck stubs,

☐ Other (please specify)

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[1] Italicized words in quotations indicate that there is a form by the same name on the Bankruptcy Court's website. These forms shall be used whenever applicable.

[2] Unless otherwise provided herein, all capitalized terms are defined in the Southern District of New York's Loss Mitigation Program Procedures. The Loss Mitigation Program Procedures' definition of "Debtor" includes joint debtors.

Dated: , New York

, 20

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In re: Case No. ()
Chapter

Debtor(s).

----------x

LOSS-MITIGATION ORDER

A Loss Mitigation Request[1] was filed by the

- ☐ Debtor on *[Date]* _____, 20__;
- ☐ Creditor on *[Date]* _____, 20__;
- ☐ The Court raised the possibility of Loss Mitigation on *[Date]* _____, 20__.

Pursuant to the Loss Mitigation Program Procedures, the parties have had notice and an opportunity to object. Upon the foregoing, it is hereby

ORDERED, that the following parties (collectively, the "Loss Mitigation Parties") are directed to participate in Loss Mitigation on Loan ending in *[last four (4) digits of Loan account number]*:

1. The Debtor, *[name of Debtor]*; and

2. The Creditor, *[name of Creditor]* with respect to (address of residence).

ORDERED, that the Loss Mitigation Parties shall comply with the Southern District of New York Loss Mitigation Program Procedures; and it is further

ORDERED, that the Loss Mitigation Parties shall observe the following deadlines:

1. Within 7 days of the entry of this Order:

[1] Unless otherwise provided herein, all capitalized terms are defined in the Southern District of New York's Loss Mitigation Program Procedures.

- **Service of this Order:** The Loss Mitigation Party seeking Loss Mitigation shall serve this Order upon the other Loss Mitigation Parties and any additional parties that were served with the Loss Mitigation Request. Upon service of this Order, an affidavit of service shall be filed with the Court.

2. **Within 7 days of the service of the Loss Mitigation Order:**

   - **Designation of Contact Persons:** Each Loss Mitigation Party shall designate contact persons and disclose contact information, unless this information has been previously provided. As part of this obligation, the Creditor shall furnish each Loss Mitigation Party with written notice of the name, address and direct telephone number of the person who has full settlement authority on the loan in question as well as the attorney or law firm representing the Creditor in the Loss Mitigation; and

   - **Creditor Loss Mitigation Affidavit:** The Creditor shall serve upon the Debtor and Debtor's attorney a request for information using the *"Creditor Loss Mitigation Affidavit"*[2] form and shall file the *"Creditor Loss Mitigation Affidavit"* form and proof of service of same on the Court's Electronic Case Filing System (ECF). The Creditor may designate its contact and attorney in the *"Creditor Loss Mitigation Affidavit."*

3. **Within 14 days of the service of the Creditor Loss Mitigation Affidavit:**

   - **Debtor Loss Mitigation Affidavit:** The Debtor shall serve upon the Creditor all documents requested in a response to Creditor's request for information using the "*Debtor Loss Mitigation Affidavit*" and Debtor shall file proof of service of said documents using the *"Debtor Loss Mitigation Affidavit"* on ECF. All documents shall be sent in one complete package and served upon the Creditor's designated contact person and the Creditor's attorney.

4. **Within 21 days of the service of the Debtor Loss Mitigation Affidavit:**

   - **Conference Call:** The Loss Mitigation Parties and their attorneys shall participate in a conference call to discuss the status of Loss Mitigation.

   - **Second Creditor Loss Mitigation Affidavit (if any):** The Creditor shall file on ECF and serve upon the Debtor and Debtor's counsel a second *"Creditor Loss Mitigation Affidavit"* setting forth any additional financial documents required from the debtor(s), including, if applicable, a detailed description of any inconsistencies found by the Creditor in the Debtor's documents that

[2] Italicized words in quotations indicate that there is a form by the same name on the Bankruptcy Court's website. These forms shall be used whenever applicable.

requires further clarification and the clarification required, together with an affidavit of service for same. ***Failure to timely file the "Creditor Loss Mitigation Affidavit" requesting additional documents or explanations of inconsistences, if any, may result in the Creditor waiving its right to obtain addition financial information from the Debtor and said Creditor may be required to accept the Debtor's representations regarding income or other financial matters;***

5. **Within 14 days of the service of the Second Creditor Loss Mitigation Affidavit:**

    - **Second Debtor Loss Mitigation Affidavit (if any):** The Debtor shall provide any requested information to the Creditor and file on ECF a second *"Debtor Loss Mitigation Affidavit"* demonstrating service of same upon the Creditor.

6. **Within 60 days of the service of the Loss Mitigation Order:**

    - **Second Conference Call:** The Loss Mitigation Parties and their attorneys shall participate in a second conference call if any documents remain outstanding.

    - **Status Report:** The Loss Mitigation Parties shall file a status report in the form of a letter evidencing compliance with this Order and updating the Court on the status of the Loss Mitigation and summarizing the conference call.

7. **Within 75 days of service of the Loss Mitigation Order:**

    - **Status Conference:** The first status conference shall be held in this case on *[check Court's website for a Loss Mitigation hearing date within 75 days of the service of this Order]* at 9:30 AM *at* the United States Bankruptcy Court located at _____ (the "Initial Status Conference"). The Loss Mitigation Parties shall appear at the Status Conference and provide the Court with a verbal Status Report. ***The Initial Status Conference cannot be adjourned without permission of the Court and consent of the other Loss Mitigation Parties.***

        - If the Debtor has failed to provide any and all of the requested documents prior to the Initial Status Conference, ***the Debtor shall appear*** at the Initial Status Conference ***with said documents*** or be prepared to testify as to why the Debtor has failed to provide them.

        - Should Debtor fail to provide to the Creditor all requested documentation as required by the Creditor's First and/or Second Loss Mitigation Affidavits by the Initial Status Conference, the Creditor may seek termination of Loss Mitigation at the Initial Status Conference, provided

that the Creditor files a *"Request to Terminate Loss Mitigation"* at least seven (7) days prior to the Initial Status Conference in accordance with the Loss Mitigation Program Procedures.

- At the Initial Status Conference, the Court may consider a Settlement reached by the Loss Mitigation Parties, or may adjourn the Initial Status Conference, as necessary.

8. **Within 30 days of the Initial Status Conference:**

   - **Creditor Status Report:** The Creditor shall file a status report indicating whether or not the Debtor is entitled to a loan modification. If a modification is offered, this status report shall set forth the terms and conditions thereof. If no determination has been made upon this loan, the status report shall include the name and phone number of the underwriter reviewing the file and the exact level of review of the loan. Failure to do so may result in the Court scheduling a date for Creditor, by a representative of same with full settlement and negotiation authority, to appear before it to explain why it has not provided to the Debtor with such information.

     - **Appearance of Bank Representative:** Should a representative of the Creditor be required to appear at any time during the Loss Mitigation, the Creditor shall file a letter designating the agent appearing before the Court upon ECF.

And it is further

ORDERED, that any matters that are currently pending between the Loss Mitigation Parties may be adjourned by the Court to the date of the Initial Status Conference to the extent those matters concern (1) relief from the automatic stay, (2) objection to the allowance of a proof of claim, (3) reduction, reclassification or avoidance of a lien, (4) valuation of a Loan or Property, (5) objection to confirmation of a plan of reorganization; or (6) any other matter so scheduled by the Court.

ORDERED that in a chapter 7 case, the entry of this Order automatically defers the entry of an order granting the Debtor's discharge until one day after an *"Order Terminating Loss Mitigation and Final Report"* is filed pursuant to Federal Rule of Bankruptcy Procedure 4004(c)(2). The time to object to the Debtor's discharge or the dischargeability of a debt is ***NOT*** extended by this Order; and it is further

ORDERED, that the time for each Creditor that is a Loss Mitigation Party in this case to file an objection to a plan of reorganization shall be extended until 14 days after the filing of an *"Order Terminating Loss Mitigation and Final Report."*

Dated:

BY THE COURT

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
In re: **CHAPTER _**

CASE NO.

Debtor(s).
----------X

ORDER APPROVING TRIAL LOAN MODIFICATION AGREEMENT

Upon the motion, by notice of presentment dated (the "Motion"), for an order pursuant to Fed. R. Bankr P. 9019 and General Order #M-413 approving the entry into and performance by the above debtor(s) (the "Debtor(s)") of a Trial Loan Modification Agreement dated , a copy of which is attached hereto as **Exhibit "A"** hereto (the "Trial Loan Modification"), modifying, on a trial basis, the loan referred to therein and related mortgage held by on the Debtors' residence; and there being due and sufficient notice of the Motion; [and there being no opposition to the requested relief; and no additional notice of or a hearing on the Motion being required under the circumstances;] [and on the record of the hearing held on the Motion on ;] and it appearing that the Trial Loan Modification is fair and reasonable and in the best interests of the Debtor(s) [and the estate], it is hereby

ORDERED, that the Motion is granted and the Debtor(s) is [are] authorized to enter into and perform the Trial Loan Modification; and it is further

ORDERED, that the Debtor(s) is [are] authorized, without the need for further Court Order, to enter into and perform any permanent modification of the foregoing loan and mortgage that is on the same or better terms than the Trial Loan Modification.

Dated:

_____
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
In re: **CHAPTER**

CASE NO. ( )

Debtor(s).
----------X

ORDER APPROVING LOAN MODIFICATION AGREEMENT

The Debtor, _____, having moved this Court pursuant to General Order #M-[] for an order approving a loan modification agreement dated [] (the "Application"), attached hereto as Exhibit "A," modifying the [*first, second, third, etc.*] mortgage held by [*name of creditor*] against the Debtor's residence, and all creditors, the chapter [] trustee and all parties who have filed a notice of appearance in the case having been given proper notice, and no objections having been filed, and it appearing that said loan modification is proper and in the best interest of the debtor and the estate,

NOW, on application of the Debtor, it is hereby

ORDERED, that the Debtor, is authorized to enter into the loan modification agreement annexed hereto as Exhibit "A".

Dated:
_____, 20

_____
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Case No. __-_____ (___)
_____,	:	Chapter __
Debtor(s)	:	

ORDER TERMINATING LOSS MITIGATION AND FINAL REPORT

Name of Creditor: _____

Property Address: _____

Last Four Digits of Account Number of Loan: _____

File Date of Loss Mitigation request: __/__/____

Date of Entry of Loss Mitigation Order: _____

Date of Entry of Order Approving Settlement (*if any*): _____

Other Requests for Loss Mitigation in this Case: ____ Yes ____ No

The use of the Court's Loss Mitigation Program Procedures has resulted in the following *[please check appropriate box below]*:

- ☐ Loan modification
- ☐ Short sale
- ☐ Other: _____
- ☐ Surrender of property
- ☐ No agreement has been reached

ORDERED, that Loss Mitigation is terminated with respect to the Loan identified above by the last four digits of the account number.

Dated:

_____
United States Bankruptcy Judge

LOAN MODIFICATION CONTACT INFO

BANK OF AMERICA

- **1-800-846-2222**

CITIMORTGAGE

- **1-866-272-4749**

JP MORGAN CHASE

- **1-866-550-5705**

WELLS FARGO BANK

- **1-800-678-7986**

ALLY FINANCIAL

- **Under GMAC Mortgage: 1-800-850-4622**
  - If you are having problems getting the assistance you need, please contact their Executive Escalation Team at 1-866-924-8409, Mon – Fri from 8 am to 5 pm CT, or email homeowner.help@mortgagebanksite.com. They will respond to your request within 3 business days.

New York State Bar Association
Legal Services Partnership Conference

USING CHAPTER 13 IN FORECLOSURE CASES
AN OVERVIEW

Friday, September 16, 2016
11 am – 12:15 pm

CASES & DECISIONS

Slip Copy, 2014 WL 789116 (Bkrtcy.D.N.J.)
(Cite as: 2014 WL 789116 (Bkrtcy.D.N.J.))

C
Only the Westlaw citation is currently available.NOT FOR PUBLICATION

United States Bankruptcy Court, D. New Jersey.
In re: Ralph V. Furino, Jr., Debtor.

Case No. 12–29799 (CMG)
Signed February 26, 2014
Filed February 27, 2014

Wasserman, Jurista & Stolz, Leonard C. Walczyk, Esq., Attorneys for Debtor.

Milstead & Associates, LLC, David H. Lipow, Esq., Attorneys for Creditor Nationstar Mortgage LLC.

Chapter 7
OPINION
CHRISTINE M. GRAVELLE, U.S.B.J.

INTRODUCTION

*1 This matter comes before the Court on the request of Ralph Furino, Jr. ("Debtor") for an award of sanctions based on the alleged bad faith of Nationstar Mortgage, LLP ("Nationstar") in negotiating a loan modification pursuant to this Court's Loss Mitigation Program and Procedures (the "LMP"). The Court grants the request and awards sanctions to the Debtor in the amount of five thousand dollars ($5,000.00).

JURISDICTION AND VENUE

The Court has jurisdiction over this contested matter under 28 U.S.C. §§ 1334(a) and 157(a) and the Standing Order of the United States District Court dated July 10, 1984, as amended October 17, 2013, referring all bankruptcy cases to the bankruptcy court. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (O) . Venue is proper in this Court pursuant to 28 U.S.C. § 1408. The statutory predicates for the relief sought herein are 11 U.S.C. § 105 and Fed. R. Bankr.Proc. 7016 and 9029(b). Pursuant to Fed. R. Bankr.P. 7052, the Court issues the following findings of fact and conclusions of law.

BACKGROUND

In August 2012, Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code simultaneously filing a Notice of Request for Loss Mitigation which proposed a monthly adequate protection payment of $2,829.42 ("Request"). Receiving no objection from Nationstar, this Court entered an Order on August 24, 2012, ("Order") granting the Request and directing Debtor and Nationstar to participate in loss mitigation. Consistent with Section VI of the LMP, the Order set forth deadlines for the parties to request, exchange, and review the information necessary to make a determination as to the viability of a loan modification.

Although Debtor filed a "Designation of Contact Person" in accordance with the Order, it is unclear as to whether Nationstar ever formally designated a contact person for the purposes of loss mitigation. The Request listed an address for Nationstar and named a local attorney under the section designated as "Creditor's Contact Information." At the outset of the bankruptcy filing, a different attorney, although one from the same law firm, entered her appearance with a request for service of papers on behalf of Nationstar.

Less than a month after entry of the Order, Debtor sent a written proposal for modification to the mortgagee. He asked Nationstar what it would need from him to evaluate his proposal.[FN1] The proposal put Nationstar on notice of its duty to negotiate in good faith set forth in section VII.A. of the LMP.

FN1. Contrary to the requirements of the LMP, Debtor had received no request for documentation or other information from Nationstar.

According to Debtor's October 24, 2012 Loss Mitigation Status Report, Nationstar had requested, and Debtor had completed and returned, a Uniform Borrower Assistance Form, Hardship Affidavit, **HAMP** Monitoring Data Form and Request for Tax Transcript. At Debtor's request, the Court extended the loss mitigation period and scheduled a settlement conference for January 7, 2013. The Court required personal appearances by both Debtor and a representative of Nationstar, and requested the appearance of counsel for both as well. Yet, neither counsel nor a personal representative appeared on behalf of Nationstar. The Court thus re-scheduled the conference for February 25, 2013, and awarded counsel fees to Debtor for Nationstar's failure to appear. [FN2] Debtor renewed the offer he had made more than three months before the scheduled status conference.

> FN2. At some point, Nationstar began utilizing the firm of Milstead & Associates, LLC ("Milstead") for the purpose of loss mitigation. It is unclear as to when this substitution occurred or how Debtor was noticed of the change, as Milstead did not enter an appearance until Debtor filed his motion for sanctions. It appears that Debtor's counsel was aware of the change, as he forwarded correspondence to an attorney at Milstead on January 10, 2013. In the same month, a different attorney, from the firm that had been representing Nationstar throughout the proceeding, substituted in for the prior attorney.

***2** The docket contains no detail regarding specific requests for information (or lack thereof) during the time period from May onward. In August 2013, counsel for both parties appeared before this Court to report on the status of negotiations. No personal representative of Nationstar with settlement authority appeared at the status conference as required by LMP VIII D. Milstead appeared on behalf of Nationstar even though no attorney from that firm had entered an appearance. The Milstead attorney represented that he had just taken over the file from an attorney who had recently left the firm so he knew very little about the status of the modification proposal, but he believed Nationstar still needed information from Debtor. Debtor claimed he had responded to all outstanding requests. The Court ordered Nationstar to provide Debtor with a list of necessary documents as soon as possible and set another status conference for October 1, 2013, requiring an appearance by a personal representative of Nationstar in accordance with the LMP. Debtor's counsel advised that he would be filing a Motion for Sanctions, which the Court agreed to entertain at the October 1st hearing.

Debtor filed the present motion for sanctions on September 6, 2013, returnable at the pre-set October 1st hearing. Nationstar submitted written opposition to the motion the morning of the hearing [FN3] alleging that Debtor failed to provide adequate documentation to enable Nationstar to assess a loan modification and failed to make adequate protection payments. [FN4] The objection did nothing to address the over 13–month delay in the loss mitigation process, choosing instead to focus on the history of the negotiations after the August 27th hearing.

> FN3. D.N.J. LBR 9013–1(d)(1) provides that "[a]ll answering papers and cross-motions shall be filed and served at least 7 days before the return date."
>
> FN4. In fact, Nationstar had been rejecting Debtor's adequate protection payments for approximately three months, stating that the payments were returned as insufficient to resolve the delinquency on his account. At oral argument, Nationstar corrected its allegation of default in its Amended and Supplemented Reply to Debtor's Motion for sanctions.

Once again, no personal representative of Nationstar appeared at the October 1st hearing. The Court waited for counsel to arrange for his client's

telephonic appearance. It became apparent to the Court that the parties had not reached the point at which a decision could be made on a loan modification. Following discussion, the Court instructed Nationstar to provide Debtor with a definitive and final demand for the information needed to assess the Debtor's request for a modification. Nationstar represented that it would conduct an immediate review, notify Debtor of the information needed, and reach a decision on modification within one week. Based on those representations, the Court adjourned the motion for sanctions to the following week and directed that all parties appear personally if a decision could not be reached.

At the hearing the following week, Nationstar confirmed that it had received all of the information it needed to propose a modification and that it needed until the end of the day to make a proposal. Nationstar offered a trial modification to Debtor's counsel later that night. The trial modification reduces Debtor's monthly payments by more than $200.00 per month. The Debtor complains that the offer is a trial and not a permanent modification, claiming that the offer is made in bad faith and is sanctionable.

DISCUSSION

A. *Bad Faith*

This Court created an LMP and established procedures for its implementation by General Order dated July 29, 2011. The following year, the Court incorporated the LMP into its Local Rules.[FN5] See LBR 4001–5. The LMP was implemented in response to the rising number of residential foreclosure actions filed in this state. It provides a forum for mortgagors and mortgagees to resolve foreclosure actions, or potential foreclosure actions. See LMP § 1.

> FN5. The full text of the LMP is posted on the Court's website at *www.njb.uscourts.gov*.

The LMP includes a detailed outline of the loss mitigation process. A party must specifically request use of the LMP. If the request is made by a debtor, it must set forth the amount of adequate protection payments to be made during the loss mitigation period. See LMP § V.A.1. The LMP provides a time period for objections to the request and an opportunity to be heard. See LMP § V.D. If no objection is filed, or if an objection to the implementation of the LMP is overruled, the Court enters a Loss Mitigation Order ("LMO"). See LMP § VI.A. The LMO sets deadlines for the designation of contact persons and the exchange of information. See id. § VIII.A. It requires that the parties attending loss mitigation sessions or court appearances have full settlement authority. See LMP § VIII.D. It also requires periodic status reports. See id., § VII.C.

*3 Participation in the LMP does not require loan modification, it requires the parties to work toward an acceptable resolution whenever possible so as to keep debtors in their homes. *In re: A.T. Reynolds & Sons, Inc.*, 452 B.R. 374, 384 (S.D.N.Y.2011) (holding that parties cannot be forced to make a settlement offer and cannot be coerced into a settlement by the court). At the same time, it allows debtors to make affordable mortgage payments. Any agreement reached during loss mitigation must be approved by the court. See LMP § X.

The LMP is not mandatory, unless it is ordered by the court after notice and a hearing. But once the LMO enters, parties must negotiate in good faith or be subject to sanctions. See LMP § VII.A.

Nationstar did not object to Debtor's request for participation in the LMP. It did not object to the proposed adequate protection payments.[FN6] Nationstar began the document request process with Debtor, but did not comply with other provisions of the LMP. Its designation of contact persons, if made at all, was confusing at best. Nationstar's attorney of record was not the same person or firm as the firm that handled document requests or negotiations, or that appeared on Nationstar's behalf at the final status conferences. Nine months into the LMP,

although Nationstar still had not responded to Debtor's proposal, it refused to accept Debtor's court-approved mortgage payments.

> FN6. Debtor proposed making 100 % of his monthly mortgage payment as adequate protection instead of paying 60 as allowed by the LMP. See LMP § VII.B. This, even though his home had a negative equity of approximately $22,000.00.

The Court extended the loss mitigation period numerous times, rescheduled the February 25th status conference six times, extended loss mitigation into August 2013 and held at least one telephone conference in which Nationstar agreed to outline for Debtor the information it needed to complete its review of his modification request. As late as September 2014, Nationstar had neither provided Debtor with an outline of information needed nor responded to his offer.

Nationstar, its attorney, or both failed to appear at a minimum of three conferences.[FN7] Another status conference was delayed while the Court waited for Nationstar's attorney to contact his client and instruct his client to participate by telephone. Decisions regarding loan modifications cannot be made if the decision makers do not show up. Thirteen months after entry of the LMP, and more than a year after Debtor submitted his modification proposal to Nationstar, the mortgagee finally responded. Most of the activity during the 13 month period appears to have occurred during the last two weeks of the period, and only as a result of pressure from the Court.

> FN7. The docket shows status conferences rescheduled each month. The majority of the scheduled conferences does not show appearances by either party and the record is not clear as to why they were rescheduled with such frequency. It appears that a number of conferences were held as telephone conferences, with a record of at least one report of Nationstar's failure to provide Debtor with a list of documents it had committed to providing the previous month. This report coincided with Nationstar's refusal to accept adequate protection payments.

The Court finds Nationstar's lack of responsiveness and failure to appear at status conferences to violate its duty to participate in the LMP in good faith. That said, Debtor's unhappiness with Nationstar's proposal is not indicative of bad faith, in itself, nor does the duty to negotiate in good faith guarantee a positive outcome.

B. *Sanctions*

***4** The Code authorizes courts to issue any order, process or judgment necessary or appropriate to carry out its provisions. See 11 U.S.C. § 105. Similarly, the Federal Rules of Bankruptcy Procedure (the "Rules") authorize courts to issue any just order when a party or its attorney fails to participate in an action in good faith. See Fed. R. Bankr.Proc. 7016. These provisions address the inherent power of the courts, based on practical necessity, to regulate their dockets to promote the orderly and expeditious disposition of cases. See *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir.2000), citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir, 1986), *cert. denied, Suffolk County v. Graseck*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *In re Bambi*, 492 B.R. 183 (Bankr.S.D.N.Y.2013); *In re Kozich*, 406 B.R. 949 (Bankr.S.D.Fla.2009).

The Rules also address situations in which there is no controlling law or rule, and authorize a judge to regulate practice in any manner consistent with federal law, federal and local rules, and official forms. See *In re Chaussee*, 399 B.R. 225 (9th Cir. BAP2008); *Miller v. Cardinale* (*In re Deville*), 280 B.R. 483, 495–96 (9th Cir. BAP2002). 11 U.S.C. § 105(a); Fed. R. Bankr.Proc. 9029(b). The primary purpose of all court rules is to secure the just, speedy and inexpensive determination of every action and proceeding. See Fed. R. Civ. Proc. 1,

Fed. Bankr. R. Proc. 9032.

This power may be used to require parties acting in bad faith to pay for the opposing party's attorney's fees. See *Miller v. Cardinale, infra,* 280 B.R. at 494.

Debtor supplemented his Motion for Sanctions with an Affidavit of Services prepared by his counsel. The Affidavit outlines charges for attorney time and expenses from the filing of the case through October 1, 2013, totaling $13,517.30. Nationstar did not object to the fees. The Court's review of services performed shows that Debtor incurred $6,060.00 in counsel fees after the Court awarded fees in January 2013, including the preparation of the motion for sanctions. Because the time included travel and entries for services that the Court believes would have been necessary to complete the negotiations in any event, the Court will award $5,000.00 to Debtor to be paid by Nationstar. The award is meant to encourage active, good faith participation in the LMP.

Bkrtcy.D.N.J., 2014
In re Furino
Slip Copy, 2014 WL 789116 (Bkrtcy.D.N.J.)

END OF DOCUMENT

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 13
Veronica C Hosking,	Case No. 14-35174 (CGM)
Debtor.	

MEMORANDUM DECISION SANCTIONING RUSHMORE LOAN MANAGEMENT SERVICES FOR FAILURE TO ACT IN GOOD FAITH IN ACCORDANCE WITH THIS COURT'S LOSS MITIGATION PROGRAM PROCEDURES

APPEARANCES:

Law Office of Stacey P. Byford, PLLC
158 Vineyard Avenue
Highland, NY 12528
Attorneys for the Debtors
By: Stacey Paige Byford, Esq.

Knuckles, Komosinski, & Elliot, LLP
565 Taxter Road
Suite 590
Elmsford, New York 10523
Attorneys for US Bank, National Association, not in its individual capacity, but solely as Trustee for the RMAC Trust, Series 2013-1T
By: Stuart L. Kossar, Esq.

CECELIA G. MORRIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Before the Court is the issue of whether Rushmore participated in loss mitigation in good faith. The Court finds that Rushmore failed to participate in good faith by failing to inform Debtor of the down payment requirement and for failing to designate a contact with full settlement authority, as stated herein.

Jurisdiction

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. § 157(a) and the Standing Order of Reference signed by Chief Judge Loretta A. Preska dated January 31, 2012. This is a "core proceeding" under 28 U.S.C. § 157(b)(2)(A) (matters concerning the administration of the estate).

Background

Debtor filed for chapter 13 relief on January 31, 2014. Vol. Pet., ECF No. 1. At the time of filing, the amount of Debtor's mortgage arrears was $18,112.26. Claim No. 6-1. On March 4, 2014, Debtor requested loss mitigation with "Rushmore LMS" in her chapter 13 plan. Plan 2, ECF No. 10. On March 27, 2014, Debtor filed an amended plan clarifying her request for loss mitigation with "Rushmore Loan Management Svcs, LLC" ("Rushmore" or "Creditor"). Am. Plan 2, ECF No. 15. The amended plan was served upon Rushmore in accordance with this Court's Loss Mitigation Program Procedures. Cert. Serv., ECF No. 16.

On July 1, 2014, Knuckles, Komosinski & Elliott LLP filed a letter on the docket, which is addressed to Debtor's counsel and states as follows:

> As you may recall, this office represents the interests of U.S. Bank, National Association, not in its individual capacity, but solely as Trustee for the RMAC Trust, Series 2013-1T in the above referenced matter.
>
> Please allow this letter to serve as our formal request that your office submit a Loss Mitigation Order to the Court no later than July 11, 2014. Your office has failed to submit an Order Granting Loss Mitigation since the petition was filed on March 3, 2014. Such delay by [sic] is extremely prejudicial to our client.
>
> If an Order Granting Loss Mitigation is not submitted to the Court by July 11, 2014, this office will be requesting that the Court terminate Loss Mitigation.

Ltr., ECF No. 18. The letter was signed by Mark R. Knuckles, Esq, Counsel for U.S. Bank National Association, not in its individual capacity, but solely as Trustee for the RMAC Trust,

Series 2013-1T ("RMAC Trust"). *Id.* The Order Granting Application for Loss Mitigation ("LM Order") was entered on July 8, 2014. LM Order, ECF No. 19.

The LM Order names Rushmore as a party to loss mitigation and orders that Rushmore comply with the Southern District of New York Loss Mitigation Program Procedures. *Id.* The LM Order also requires that Rushmore "furnish [the Debtor] with written notice of the name, address and direct telephone number of the person who has full settlement authority on the loan in question as well as the attorney or law firm representing the Creditor in the Loss Mitigation." LM Order ¶ 2. The LM Order was served on Rushmore on August 18, 2014. Cert. Serv., ECF No. 28.

On August 8, 2014, Debtor filed a Debtor's Affidavit indicating that documents were sent to Rushmore. Debtor Aff., ECF No 23. On August 12, 2014, a Creditor Affidavit was filed by Mark R. Knuckles, Esq, Counsel for U.S. Bank National Association, not in its individual capacity, but solely as Trustee for the RMAC Trust, Series 2013-1T, indicating that no additional documents were being requested at that time and that the documents provided by the Debtor were being reviewed. Cred. Aff. 1, ECF No. 27. In the Creditor Affidavit, Angeline Horner, Asset Resolution Specialist, was designated as Rushmore's Loss Mitigation contact and Mark R. Knuckles, Esq., of Knuckles, Komosinski & Elliott, LLP, was designated as Rushmore's attorney for Loss Mitigation. *Id.* 2.

On August 20, 2014, Debtor filed a Debtor's Affidavit indicating that bank statements, paystubs, and pension statements had been sent to the Creditor. Debtor Aff., ECF No. 31. On September 2, 2014, Debtor filed a status letter, which states:

> The financial package has been completed, signed and emailed to Knuckles, Komosinski and Elliott, LLP via lossmitigation@kkelaw.com on 8/8/2014. On 8/13/2014 the Creditors attorney requested: recent three months bank statements and specific paystubs and pension statements. On 8/20/2014 we

> forwarded the information requested via email and are awaiting further correspondence from the Creditors attorney.

Ltr., ECF No. 35. That same day, a Creditor Affidavit was filed on behalf of Rushmore. Cred. Aff., ECF No. 36. In the sworn affidavit, Creditor states that additional documents were needed, including paystubs and "proof of down payment or letter of explanation as to why no down payment [sic] available." *Id.*

On September 24, 2014, Debtor's counsel filed a status report addressed to the Court, which states:

> On 9/5/2014 our office provided the letter of explanation regarding the paystubs as requested by Knuckles, Komosinski & Elliott, LLP. attorney for the creditor. The creditor also requested proof of down payment from the debtor, at this time the debtor does not have funds available for a down payment. The creditor's attorney has informed us that the request for a loan modification is being processed with no down payment.

Ltr., ECF No. 39. On September 26, 2014, Creditor's attorney filed a status letter addressed to the Court, which states:

> As you may recall, this office represents the interests of U.S. Bank, National Association, not in its individual capacity, but solely as Trustee for the RMAC Trust, Series 2013-1T in the above referenced matter.
>
> Please allow this letter to serve as our Loss Mitigation status report.
>
> Since the prior Loss Mitigation Status Hearing, held on September 9, 2014, our client has informed us that the debtor's loss mitigation was moving forward with no down payment offer as one has not been provided. The file is currently under review for a decision.
>
> Additionally, at the prior Loss Mitigation Status Hearing, debtor's counsel indicated that the debtor had recently obtained employment and steady paystubs would be forthcoming. As of today, our office has not been provided with current paystubs.

Status Rpt., ECF No. 40.

On December 3, 2014, Debtor's counsel filed a letter stating that all documents had been sent to Creditor's attorney on September 30, 2014 and Debtor was awaiting a response. Ltr.,

ECF No. 47. On December 15, 2014, Creditor's attorney filed a status letter, which is addressed to the Court and states:

> As you may recall, this office represents the interests of U.S. Bank, National Association, not in its individual capacity, but solely as Trustee for the RMAC Trust, Series 2013-1T in the above referenced matter.
>
> Please allow this letter to serve as our Loss Mitigation status report.
>
> Since the prior Loss Mitigation Status Hearing, held on October 1, 2014, our client has informed us that the debtor's loan modification was denied as she could not provide a good faith down payment. The denial letter was provided to debtor's counsel and is attached hereto.
>
> Based on the above, this office respectfully requests that Loss Mitigation be terminated.

Status Rpt., ECF No. 48. Attached as an exhibit to the December 15, 2014 status letter, is a letter from Rushmore indicating that the Debtor's request for a loan modification had been denied ("Denial Letter"). *Id.* The Denial Letter indicates that the reason for the denial of the loan modification is that "[t]he amount of good faith down payment is insufficient to offer a loan modification." *Id.* at 2. The Denial Letter is dated October 7, 2014. *Id.* at 1. The Denial Letter appears to have come from the "Loss Mitigation Department" at Rushmore but has no signature and no one is named at the end of the letter as having authored it. *Id.* at 3. The Denial Letter advises the Debtor to contact Brian Pound to discuss additional alternatives to foreclosure and refers to Brian Pound to as the Debtor's "Single Point of Contact." *Id.* at 1.

At the December 17, 2014 hearing, the Court heard that the Creditor denied the Debtor a loan modification for failure to make a down payment. The Court ordered a senior Vice President of the Creditor with authority to adjust the loan to appear at the January 21, 2015 hearing.

At the January 21, 2015 hearing, Mike Aiken appeared and stated that the investor guidelines require a down payment. Hr'g Tr. 3:15-17, Jan. 21, 2015. When the Court ordered the

written investor guidelines to be produced for the Court, Mr. Aiken stated that "I think in this case, Your Honor, this isn't necessarily a written document, more than it's a gentleman down the hall . . . ." *Id.* 5:1-3. Due to that statement, the Court ordered "the person . . . [who] made the denial" and "the written guidelines that say[] [the lack of down payment is] the reason." *Id.* at 6:23-25. The investor was ordered to appear as well. *Id.* at 8:25-9:1-6. The Court also stated that the investor should be prepared to testify as to what authority gives it the power to require the down payment and if the answer is going to be the investor guidelines, the Court wants the guidelines produced in writing. *Id.* at 4:16-25.

The Court held an evidentiary hearing on February 25, 2015, at which William Bell testified on behalf of the Creditor, a document purporting to be investor guidelines was produced and the Debtor testified. Mr. Bell is employed by Roosevelt Management Company, LLC, an investment firm that purchases mortgages. Trail Tr., Feb. 25, 20105 4:22-5:4. Rushmore is a mortgage servicer that services loans for Roosevelt.[1] *Id.* Based upon a review of the evidence and testimony provided at that hearing, the Court finds that Rushmore failed to participate in this Court's Loss Mitigation program in good faith.

[1] Mr. Bell, who is not employed by Rushmore spoke about the organization as if it were interchangeable with Roosevelt Management, the company for which he purportedly works. Yet, at the same time, he had surprising difficulty recalling names of people employed by Rushmore. Tr. 32:13-33:8. ("STACEY BYFORD: . . . What happened after you reviewed all the information in connection with debtor's modification application? A It — It was determined that we were requesting a good faith down payment from the customer and that the amount -- JUDGE MORRIS: Who's we? THE WITNESS: Rushmore and I as the investor. JUDGE MORRIS: And who at Rushmore? THE WITNESS: They have an entire underwriting department that review files, ma'am.? JUDGE MORRIS: Names of those people? . . . THE WITNESS: I would have to look at the ro[]ster and go through the names. There's multiple employees. JUDGE MORRIS: Can you do that? THE WITNESS: I don't have that information with me today. JUDGE MORRIS: Why did you not bring it today? THE WITNESS: I — I don't have that *information*, ma'am."); ("THE WITNESS: Brian Pound works in our Loss Mitigation Department at Rushmore — JUDGE MORRIS: At Rushmore. Wait a minute, but who are you? THE WITNESS: I am William Bell. I work for Roosevelt Management Company which is the administrator of the trust of this loan. JUDGE MORRIS: So you said, "Our." THE WITNESS: Yes, I have a relationship — JUDGE MORRIS: You're using some pronouns here that are really confusing me. THE WITNESS: Rushmore is — as the administrator of the trust they are the servicer of my loan — my loans, some of my loans. . . . JUDGE MORRIS: Sure. But it's a different company. You can't hire and fire Brian. THE WITNESS: I — I cannot, no.").

Discussion

Since 2009, the Southern District of New York has offered its Loss Mitigation Program in order to facilitate consensual resolutions between debtors and creditors whenever a debtor's residential property is at risk of foreclosure. Loss Mitigation Program Procedures ("Procedures")[2] at 1; *see also In re Bambi*, 492 B.R. 183, 188 (Bankr. S.D.N.Y. 2013) (quoting Hon. Cecelia G. Morris & Mary K. Guccion, *The Loss Mitigation Program Procedures for the United States Bankruptcy Court for the Southern District of New York*, 19 Am. Bankr. Inst. L. Rev. 1, 4 (2011). "The Loss Mitigation Program aims to facilitate resolution by opening the lines of communication between the debtors' and the lenders' decision-makers." Procedures, at 1. "The premise of the Loss Mitigation program is simple: ***Put the decision-making parties in direct contact with each other***, and set a schedule for their discussion as to what can be done about the debtor's home." Morris & Guccion, *supra*, at 4 (emphasis added). Direct communication between decision makers is one of the fundamental principles of this Court's Loss Mitigation Program. *Id.*

To ensure that a meaningful discussion takes place, the Procedures require that parties "negotiate in good faith" and warns that "[a] party [who] fails to participate in Loss Mitigation in good faith may be subject to sanctions." Procedures, at 5. To meet the requirement of "good faith," a creditor does not have to offer a loan modification. *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374, 384 (S.D.N.Y. 2011) (holding that parties cannot be forced to make a settlement offer and cannot be coerced into a settlement by the court). "Good faith" requires the parties to attend conferences, provide any requested memoranda, and produce representatives with settlement authority. *Id.* at 381.

[2] The Loss Mitigation Program Procedures for the Southern District of New York are available on the Court's website at http://www.nysb.uscourts.gov/sites/default/files/LossMitigationProcedures.pdf.

Whether Rushmore Acted in Good Faith pursuant to the Procedures when it Denied Debtor's Application for Modification of her Mortgage for Failing to Provide a Down Payment?

After five months in Loss Mitigation, Rushmore denied Debtor's request for a loan modification for failure to provide a down payment. The first time that Rushmore advised the Court and Debtor that a down payment was required in order to be considered for a loan modification was in the Denial Letter, which was emailed to Debtor's counsel and filed with the Court in December 2014.[3] *See* Trial Ex. G (email dated Dec. 8, 2015); Status Rpt., ECF No. 48 (filed Dec. 15, 2015).

When questioned by the Court regarding why the loan was denied, Rushmore insisted that its investor guidelines require a down payment equal to 25% of the arrears on the loan being modified and that the guidelines could not be changed to accommodate a lower down payment for the Debtor in this case. Hr'g Tr. 3:15-17, Jan. 21, 2015, ECF No. 66; Trial Tr. 17:1-3, Feb. 25, 2015, ECF No. 69. Despite numerous requests for documentation of this requirement, Rushmore was unable to produce any credible evidence demonstrating that the investor guidelines required such an outcome.

Rushmore failed to include the fact that a down payment was required in its initial Creditor Affidavit, which was filed on August 12, 2014. *See* Cred. Aff., ECF No. 27. Then, on three subsequent occasions, Rushmore indicated that a down payment would not be necessary so long as the Debtor provided an explanation. *See* Cred. Aff., ECF No. 36 (Debtor needed to provide "proof of down payment or letter of explanation as to why no down payment [sic] available.") (filed on September 2, 2015); Ltr., ECF No. 39 ("The creditor also requested proof of down payment from the debtor, at this time the debtor does not have funds available for a down payment. The creditor's attorney has informed us that the request for a loan modification is

[3] The Court notes that the Denial Letter is dated October 8, 2014. No explanation has been given for why Rushmore failed to provide this letter to Debtor's counsel or the Court until December 2014.

being processed with no down payment.") (filed on September 24, 2015); Status Rpt., ECF No. 40 ("Since the prior Loss Mitigation Status Hearing, held on September 9, 2014, our client has informed us that the debtor's loss mitigation was moving forward with no down payment offer as one has not been provided. The file is currently under review for a decision.") (filed on September 26, 2015).

In the Denial Letter, the reason provided for the Debtor's denial was that "[t]he amount of good faith down payment is insufficient to offer a loan modification." Status Rpt., ECF No. 48. Rushmore elected to declare the down payment was "insufficient" instead of choosing the reason listed directly above it, which states: "You did not provide proof of the good faith down payment." *Id.* By indicating that the reason for the denial was that the down payment was "insufficient" instead of "not provided," the Denial Letter makes it seem like the amount of the down payment is negotiable—if not altogether unnecessary. At no time was it made clear to the Court or to the Debtor that the failure to provide a down payment would result in automatic denial of a loan modification. If that were the case, Rushmore should have communicated that requirement to the Debtor at the outset of the loss mitigation process.

Eventually, the Court held a hearing to consider whether the investor guidelines require a down payment, at which time it became clear to the Court that they do not. To call what Rushmore produced "investor guidelines" takes a vivid imagination. The guidelines take the form of a matrix comprised of two columns of information taking up approximately a third of one page. *See* Trial Ex. A.[4] The guidelines contain abbreviations such as, "Min LTV," "Max FE DTI," and "MSP," without a key that defines what those abbreviations mean. *Id.* The guidelines

[4] Due to Rushmore's insistence at trial that the investor guidelines contain information regarding modification of this loan, the Court believes it is necessary to include a copy of this document in its decision. Descriptions of the lack of information contained in this document do it no justice. A copy of the document referred to as Rushmore's investor guidelines are attached as exhibit A to this Memorandum Decision.

do not indicate that a down payment is required. Instead, they indicate that the "***Target*** Down payment" for Debtor's loan is "25%." *Id.* (emphasis added). The word target indicates that the down payment need not always be 25%. William Bell, the administrator of the RMAC Trust and the "Vice President over [sic] the Asset Management Group,"[5] confirmed in his testimony that the amount of the down payment required varies on a case-by-case basis and depends on "the history of the file, what has happened in the past, what other items are – are going on within the file." Trial Tr. 14:21-25; 53:10-12. He also testified that he has "final authority to make decisions on loan modifications" and as such has the ability to overrule the requirement that Debtor make a 25% down payment. *Id.* at 14:21-25.

From the testimony, it seems that Rushmore's failure to communicate its policy regarding the requirement for a down payment was due to its failure to designate a contact with full settlement authority.

Did Rushmore Designate Someone with Full Settlement Authority?

According to the Procedures, "any secured creditor whether it be the holder, mortgage servicer or trustee of an eligible Loan" is a "Creditor" for purposes of Loss Mitigation. Procedures, at 2. Rushmore was named as the Creditor in the Loss Mitigation Request. By not objecting to the request,[6] Rushmore consented to participate in this Court's Loss Mitigation Program and is deemed to have authority to act on behalf of the mortgage holder, RMAC Trust, Series 2013-1T. *See id.* ("If the Creditor participating in Loss Mitigation is not the direct holder of the loan, the Creditor is deemed to have full consent to act on behalf of the holder. If such consent has not been given, the Creditor must object to the Loss Mitigation Request and provide

[5] Throughout Mr. Bell's testimony, he never mentioned Ms. Horner. As for Mr. Aiken and Mr. Pound, Mr. Bell stated that Mr. Aiken "works in 'our' Litigation Department" and Mr. Pound "works in 'our' Loss Mitigation Department at Rushmore." To be clear, Mr. Bell does not work for Rushmore.

[6] A letter was filed by Creditor's counsel, who actively sought entry of the LM Order with regards to RMAC Trust, Series 2013-1T.

the name of the holder, trustee, or other entity that has the ability to participate in Loss Mitigation.").

Pursuant to the Procedures, any creditor participating in Loss Mitigation is required to identify in writing "the name, address and direct telephone number of the contact person who has full settlement authority." Procedures, at 5. Instead of designating one contact person with settlement authority, as it was required to do, Rushmore designated a contact without any settlement authority and provided a string of "contacts" to the Court—none of whom appeared to know anything about this specific loan or the exact reason for its denial.

The first person designated as Rushmore's contact person is Angeline Horner, an Asset Resolution Specialist at Rushmore. She was designated as the Loss Mitigation contact in the Creditor Affidavit, which was filed on August 12, 2014. Cred. Aff, at 2, ECF No. 27. Ms. Horner was also listed as the contact in an August 11, 2014 and a September 9, 2014 letter from Rushmore to the Debtor. *See* Trial Ex. D (letter dated Aug. 12, 2014) ("Should you have any questions regarding this matter, please contact your relationship manager Angeline Horner . . . ."); *see also* Ltr. dated Sept. 9, 2014, Trial Ex. F (same). Other than being named in these documents, it does not appear that Angeline Horner participated in the Loss Mitigation process on this loan. None of the letters from Rushmore are signed by her[7] and she did not appear in Court when the Court ordered a contact with authority to adjust the loan to appear.

In a letter dated October 7, 2014, Rushmore indicates that the Debtor's "Single Point of Contact" is Brian Pound. This is the second "single point of contact" named by Rushmore. Again, the letter is not signed by any individual and is closed simply "Sincerely, Loss Mitigation

[7] None of the letters from Rushmore are signed by an individual. The letters dated August 11, 2014 and September 9, 2014, close with "Sincerely, Home Retention Department Rushmore Loan Management Services LLC" with no signature or individual named. *See* Ltr. dated Aug. 11, 2014, Trial Ex D; Ltr. dated Sept. 9, 2014, Trial Ex. F. The Denial Letter, closes with "Sincerely, The Loss Mitigation Department." *See* Ltr. dated Oct. 7, 2014, Tr. Ex. G.

Department." *See* Ltr. dated Oct. 7, 2014, Trial Ex. G. Mr. Bell testified that Brian Pound works in Rushmore's Loss Mitigation Department. No explanation was provided by Rushmore or Mr. Bell as to how or why the "single point of contact" changed in the middle of loss mitigation and nothing was formally filed with the Court to amend the Creditor Affidavit, which names Angeline Horner as the designated contact for Rushmore.

When the Court ordered a representative of the Creditor with authority on the loan modification to appear at the January 21, 2015 hearing, a third person named Mike Aiken, appeared. Mr. Aiken, who is a "Vice-President and Litigation Attorney for Rushmore," also filed a sworn affidavit on behalf of Rushmore. Status Rpt., ECF No. 59, Ex. 2 (Aiken Aff). At the January 21, 2015 hearing, it became clear to the Court that Mr. Aiken did not have full authority to issue loan modifications on behalf of Rushmore. Mr. Aiken indicated that he was beholden to the investor guideline, which he said "isn't necessarily a written document, more than it's a gentleman down the hall." Hr'g Tr. 5:2-3.

The "gentleman down the hall" to whom Mr. Aiken refers is quite possibly, William Bell. Mr. Bell appeared at the February 25, 2015 evidentiary hearing in response to this Court order that the investor and the person who made the denial on this particular Debtor's loan appear. He testified that he has "final authority to make decisions on loan modifications" and that he can "overrule" the guidelines. *Id.* at 14:21-25. He claimed on several occasions that he, and only he, had full authority to grant and deny loan modifications. *Id.* at 24:13-17. ("I'm the only one that [sic] can actually deny [loan modification requests]. So I actually denied it."). He also provided the Court with the name of fifth individual, Andrew Coup, who he said reviewed the file prior to sending it on to him. *Id.* at 64:19-22. Mr. Coup was never disclosed to the Court or the Debtor as a loss mitigation contact.

Despite Rushmore's sworn affirmation, which was filed on August 12, 2014, that Angeline Horner had full settlement authority to act on behalf of the RMAC Trust, it appears that she did not. *See* Procedures at 2 ("The term "Creditor" refers to any secured creditor whether it [is] the holder, mortgage servicer or trustee of an eligible Loan. If the Creditor participating in Loss Mitigation is not the direct holder of the loan, the Creditor is deemed to have full consent to act on behalf of the holder. If such consent has not been given, the Creditor must object to the Loss Mitigation Request and provide the name of the holder, trustee, or other entity that has the ability to participate in Loss Mitigation."). It is not even clear whether Ms. Horner reviewed the Debtor's file. By failing to provide the name of a contact with full settlement authority on Debtor's loan, Rushmore violated this Court's Loss Mitigation Procedures and is in contempt of this Court's LM Order. *See* Procedures at 5 ("Unless a Creditor has already done so as part of a Loss Mitigation Request, each Creditor shall provide written notice to the Debtor by filing and serving its Creditor Affidavit on the Debtor in which it identifies: 1) the name, address and direct telephone number of the contact person who has full settlement authority . . . ."); LM Order at 2 ("Each Loss Mitigation Party shall designate contact persons and disclose contact information, unless this information has been previously provided. As part of this obligation, the Creditor shall furnish each Loss Mitigation Party with written notice of the name, address and direct telephone number of the person who has full settlement authority on the loan in question . . . .").

Debtor was Harmed by Rushmore's Failure to Designate Someone with Full Settlement Authority

Having found that Rushmore failed to designate a contact with full settlement authority, the Court now turns to the question of whether Debtor was harmed by Rushmore's failure. The Court finds that she was. Debtor participated in this Court's Loss Mitigation Program for approximately four months before receiving notice that she was denied for failure to provide

proof of a down payment in an email from Creditor's counsel dated December 8, 2014 and repeated in a status letter filed with the Court on December 15, 2014. *See* Trial Ex. G; *see also* Ltr., ECF No. 48. Prior to that time, Rushmore never stated unequivocally that a down payment was required for the Debtor to be considered for a loan modification.

The Court's Loss Mitigation Program Procedures have been crafted specifically to prevent just these types of situations. Pursuant to the Procedures, Rushmore was required to file a "Creditor Loss Mitigation Affidavit"[8] ("Creditor Affidavit") within 7 days of service of the LM Order. Procedures at 5. The Creditor Affidavit is a form created by the Court and requires a Creditor to swear to the documents that Debtor must provide in order to be considered for a loan modification. The purpose of the Creditor Affidavit is to put the Debtor on notice of all of the information that is required in order to be considered for a loan modification with the Creditor at a very early stage in the loss mitigation process. The first Creditor Affidavit filed by Rushmore on August 12, 2014, does not indicate that a down payment is required. *See* Cred. Aff., ECF No. 27 ("At this time, no documents are being requested. Documents were recently provided and are currently being reviewed by the Creditor.").

On September 2, 2014, a second Creditor Affidavit was filed. This time the Creditor Affidavit requests "proof of down payment or letter of explanation as to why no down payment is available." Cred. Aff., ECF No. 36. On September 26, 2014, the Creditor filed a status report, as is required under the Procedures. The status letter states: "[O]ur client has informed us that the debtor's loss mitigation was moving forward with no down payment offer as one has not been provided. The file is currently under review for a decision." Ltr., ECF No. 40.

[8] The forms required to participate in the Court's Loss Mitigation Program are available at http://www.nysb.uscourts.gov/loss-mitigation.

On December 15, 2014, Creditor filed another status report, which states: "[O]ur client has informed us that the debtor's loan modification was denied as she could not provide a good faith down payment." Ltr., ECF No. 48. Attached to the status letter is a letter from Rushmore dated October 7, 2014, which states that the reason for denial of Debtor's loan modification request is that "[t]he amount of good faith down payment is insufficient to offer a loan modification." *See id.*

Thus, it seems that Rushmore did not provide the name of someone with full settlement authority until February 20, 2015, when Mr. Bell was named in the proposed joint pre-trial order. *See* Status Rpt., ECF No. 60, Ex. 1. Had Mr. Bell been involved in the process earlier, perhaps he could have made the Rushmore's requirements on this specific loan clear. By not informing the Debtor sooner, Debtor expended time in collecting documents and filling out paperwork. Debtor met with her attorney and her attorney appeared in Court, filed letters, and expended fees on her behalf. The fees will most likely be paid by the unsecured creditors through the plan. Thus, by failing to provide a contact with authority on the loan, Debtor was not fully aware of the requirements necessary to participate in loss mitigation and the Creditor has cost the Debtor as well as the unsecured creditors.

By failing to designate a contact with full settlement authority, Rushmore has failed to act in good faith under the Procedures and is subject to sanctions. Procedures at 5 ("The Loss Mitigation Parties shall negotiate in good faith. A party that fails to participate in Loss Mitigation in good faith may be subject to sanctions."); *see also In re Bambi*, 492 B.R. 183, 190-91 (Bankr. S.D.N.Y. 2013) (ordering a creditor to pay a debtor's attorney's fees for failing to participate in loss mitigation in good faith). Similarly, by failing to comply with the LM Order, which directed Rushmore to provide such a contact, Rushmore is in contempt of that order and subject to

sanctions. *Id.* ("Courts may also use civil contempt pursuant to § 105(a) and Federal Rule of Bankruptcy Procedure 9020 to 'to compel a reluctant party to do what a court requires of him.'") (quoting *Badgley v. Santacroce*, 800 F.2d 33, 36 (2d Cir. 1986).

For failing to participate in the Court's loss mitigation program in good faith, the Court awards the Debtor her actual damages incurred in participating in this loss mitigation process, including her travel to and from the Courthouse at $0.575 per mile,[9] expenses, and attorney's fees and costs.

Whether Rushmore Properly Designated its Attorney

Rushmore was also required to designate "the attorney representing it in the Loss Mitigation." Procedures, at 5. Rushmore also designated Mark R. Knuckles, Esq. of Knuckles, Komosinki & Elliot, LLP ("Knuckles") as its attorney. Interestingly, Knuckles has never made an appearance in this case on behalf of Rushmore, the named creditor in the LM Order. Each document that Knuckles filed in this case states that it was filed "on behalf of U.S. Bank, National Association, not in its individual capacity, but solely as trustee for the RMAC Trust, Series 2013-1T." Creditor Aff., ECF No. 27. Some of the status reports filed by Knuckles on behalf of U.S. Bank contain letters from Rushmore. It is unclear to the Court what role, [10] if any, U.S. Bank had in this Loss Mitigation—aside from being "the trustee who handles the funds in the bank accounts." Trial Trans. 9:8-22. It is unclear whether Knuckles represents Rushmore in addition to U.S. Bank. Even at the trial where a representative of Rushmore was ordered to

[9] This rate is the same as the IRS's standard mileage rate taxpayers to use in computing the deductible costs of operating an automobile for business for 2015, available at http://www.irs.gov/Tax-Professionals/Standard-Mileage-Rates.

[10] Debtor's counsel insinuated that Rushmore is not licensed to service loans in New York. *See* Trial Tr. at 67:11-15. The Court has no evidence of this but does find it odd that Rushmore never appeared through legal counsel in this case.

appear, Mr. Kossar stated that he was appearing on behalf of U.S. Bank. *Id.* at 3:15-19. No law firm made an appearance on behalf of Rushmore. *Id.*

While the Court finds the relationship between Knuckles and Rushmore concerning, it does not appear to have affected the loss mitigation enough to warrant sanctions beyond those already awarded.

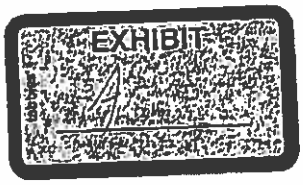
Conclusion

For the foregoing reasons, Rushmore has failed to participate in good faith the Court's Loss Mitigation Program and as a sanction shall pay Debtor's actual damages—putting her back to where she was before beginning loss mitigation. Debtor should file an accounting of her actual damages, including expenses, travel time at $0.575 per mile, and attorney's fees. The Debtor should submit an order consistent with this Memorandum Decision.

Dated: Poughkeepsie, New York
April 20, 2015

/s/ Cecelia G. Morris
CECELIA G. MORRIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Owner	RMC
Investor #	273
Notes	2nd & curr = Final Mod
Stip Period	1st Liens 3 mos if <180 days dq 6 mos if => 180 days 2nd Liens 3 mos for 2nds
Target Down payment	25%
Min LTV	115%
Max FE DTI	35%
Max BE DTI	45%
Target NDI	10-20%
Amortization	Fixed
Min Rate	5-7%
MAX Term	480
Defer/Forgive	Defer
Waterfall Order	Capitalize Rate Defer Term
Rush	Litigation
Hardest Hit Programs	Reinstatement - Yes Unemployment - No, not as source of income for a mod
HAMP Participant	Only on those specifically noted w/HAMP icon
Value to be use for Hamp review	value in MSP
HAMP Special Instructions	HAMP PRA waterfall



There is an Eastern District of New York case you might want to look at - Sperry Assoc's. Fed. Credit Union v. U.S. Bank Nat'l Assoc. (In re White), 514 B.R. 365, 371 (Bankr. E.D.N.Y.) (holding that a HAMP modification does not impair junior lienholder and does not change priority of senior mortgage lien).

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a).
If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Claim Pursuant to 11 U.S.C. § 503(b)(9):
Check this box if you have a claim arising from the value of any goods received by the Debtor 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

7. Credits:
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

8. Documents:
Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

9. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim
A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. § 506 (a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car.

A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. § 507 (a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

INFORMATION

Evidence of Perfection
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Acknowledgment of Filing of Claim
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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
----------X

In re:

Telge Peiris and Ramya Peiris,

Debtors.

Chapter 13
Case No. 1-14-4095-NHL

----------X

Telge Peiris and Ramya Peiris,

Plaintiffs,

v.

Ocwen Loan Servicing, LLC d/b/a City National Bank,

Defendant

Adv. Proc. No. 1-14-01063-NHL

----------X

DECISION DENYING MOTION

APPEARANCES:

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HONORABLE NANCY HERSHEY LORD
UNITED STATES BANKRUPTCY JUDGE

Before the Court is a motion by creditor/defendant Ocwen Loan Servicing, LLC ("Ocwen" or the "Movant") to dismiss the adversary complaint of chapter 13 debtors/plaintiffs Telge Peiris and Ramya Peiris (the "Debtors"), which seeks to "strip off" Ocwen's wholly unsecured second mortgage on the Debtors' principal residence. In the alternative, Ocwen moves for judgment on the pleadings or for summary judgment. Ocwen argues that because no party filed a proof of claim on account of the second mortgage, the Court cannot value its claim. Ocwen theorizes that valuation is a prerequisite to lien stripping, and the Debtors thus are not entitled to their requested relief even if the amount of the first mortgage exceeds the value of the property. For the reasons stated below, the Court rejects this analysis and denies Ocwen's motion.

Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and 157(b)(1), and the Eastern District of New York standing order of reference dated August 28, 1986, as amended by order dated December 5, 2012. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A). The following are the Court's findings of fact and conclusions of law to the extent required by Rule 52 of the Federal Rules of Civil Procedure (the "Rules"), as made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

Background

The Debtors filed a joint petition for relief under chapter 13 of title 11 of the United States Code (the "Bankruptcy Code") on March 4, 2014. On their Schedules of Assets and Liabilities, the Debtors listed their Staten Island residence (the "Property"), encumbered by two secured claims, both held by Ocwen. The Debtors' chapter 13 plan dated March 4, 2014 (the "Plan"), filed with the petition, provided that payments to Ocwen on account of the first

mortgage would be paid outside the Plan. As to the second mortgage, the Plan provided that the lien was "to be voided in an adversary proceeding" and the debt reclassified as a general unsecured claim. Ocwen received notice of the petition; the meeting of creditors, scheduled for April 2, 2014; the Plan; and the hearing on confirmation, scheduled for May 14, 2014.

Ocwen also received notice of the deadline to file a proof of claim, July 1, 2014. Ocwen did not file a proof of claim with respect to the second mortgage.[1] The Debtors could have filed a proof of claim on behalf of Ocwen, but they failed to do so prior to the statutory deadline. *See* Fed. R. Bankr. P. 3004.

The Debtors' complaint alleges that the Property is worth $477,000.00. Compl. 5, ECF No. 1. As evidence of value, the Debtors attach a Residential Appraisal Summary Report prepared by Homeland Appraisals Inc., based on an interior and exterior inspection of the Property conducted on February 12, 2014.[2] Compl. Ex. A, ECF No. 1-1. The complaint also alleges that a first mortgage, in the amount "of $486,846.56 consisting of $389,793.61 in [p]rincipal balance and $97,052.95 in [d]eferred principal balance," encumbers the Property. Compl. 5, ECF No. 1. In support, the Debtors annex a Mortgage Account Statement for the first mortgage, dated February 14, 2014. Compl. Ex. B, ECF No. 1-2.

The Debtors assert that because the amount of the first mortgage exceeds the value of the Property, the second mortgage, in the amount of $111,061.00, is wholly unsecured, pursuant to 11 U.S.C. § 506(a), and thus not subject to the anti-modification clause of 11 U.S.C. § 1322(b)(2). Accordingly, by operation of § 506(d), the second mortgage is not an allowed secured claim, and the Debtors contend they can strip off the lien.

[1] Ocwen did not file a proof of claim with respect to its first mortgage, either.
[2] The appraisal gives the date of report as "02/14/13," which appears to be a typographical error, as the appraisal was conducted in February 2014, which was approximately one month prior to the bankruptcy filing date.

Ocwen filed an answer and, subsequently, the instant motion. Ocwen contends that because no party timely filed a proof of claim on account of the second mortgage, it cannot be considered an "allowed" claim, under 11 U.S.C. § 502. Generally, under § 506(d), liens that secure claims that are not allowed secured claims are void. However, Ocwen avers that the second lien is not void, because § 506(d)(2) excepts claims that are not allowed claims due only to the failure to file a proof of claim.[3] Furthermore, Ocwen contends that only "allowed" claims can be valued under § 506(a), and, absent a valuation, the Bankruptcy Code does not permit strip off of the second mortgage. Thus, Ocwen argues that the second lien must ride through the Debtors' bankruptcy.

Discussion

I. Legal Standard

Rule 12(c), made applicable by Bankruptcy Rule 7012, states that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). In the interest of due process, courts sparingly grant such motions, limiting relief to circumstances "where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings." *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988). In ruling on a Rule 12(c) motion, "the Court must accept as true all of the non-movant's well pleaded factual allegations, and draw all reasonable inferences in favor of the non-movant." *Mennella v. Office of Court Admin.*, 938 F.Supp. 128, 131 (E.D.N.Y. 1996), *aff'd*, 164 F.3d 618 (2d Cir. 1998). Exhibits attached to the complaint may be considered in deciding a Rule 12(c) motion. *See Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001). It is the movant's burden "to show the absence of any material issue

[3] 11 U.S.C. § 506(d)(2) provides in pertinent part: "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim . . . ."

appearing genuinely to be in dispute." *Falls Riverway Realty, Inc. v. City of Niagara Falls, N.Y.*, 754 F.2d 49, 54 (2d Cir. 1985) (citing *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)). "[A] defense of failure to state a claim may be raised in a Rule 12(c) motion for judgment on the pleadings, and when this occurs the court simply treats the motion as if it were a motion to dismiss. *Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., Div. of & Am. Home Prods. Corp.*, 850 F.2d 904, 909 n.2 (2d Cir. 1988).

Under Rule 12(b)(6), made applicable by Bankruptcy Rule 7012, a plaintiff must plead sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable . . . ." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A complaint must allege enough facts to "nudge[ ] [the] claims across the line from conceivable to plausible." *Twombly,* 550 U.S. at 570. This plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 557). In ruling on a motion pursuant to Rule 12(b)(6), the Court may consider the complaint, documents attached to the complaint, documents incorporated into the complaint by reference, and matters subject to judicial notice. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47–48 (2d Cir. 1991). The Court accepts factual allegations in a complaint as true and draws all reasonable inferences in favor of the non-movant. *Roth v. Jennings,* 489 F.3d 499, 501 (2d Cir. 2007).

A motion for summary judgment, governed by Rule 56, made applicable by Bankruptcy Rule 7056, also disposes of a case before trial; however, it allows parties to advance their

arguments with limited evidentiary support, including "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). A motion for summary judgment should only be granted when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Factual inferences are drawn in the nonmoving party's favor. *Ford v. McGinnis,* 352 F.3d 582, 587 (2d Cir.2003). Summary judgment is warranted when no genuine issue of material fact exists, and "based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *D'Amico v. City of New York,* 132 F.3d 145, 149 (2d Cir.1998).

II. Analysis

Although the Debtors' complaint does not cite *Pond v. Farm Specialist Realty (In re Pond*), 252 F.3d 122 (2d Cir. 2001), it is premised on the rule adopted by the Second Circuit in that case. *Pond* reads § 506(a) in conjunction with § 1322(b)(2) to conclude that within the context of a chapter 13 case, a second mortgage on a debtor's primary residence wholly unsupported by any equity in the property may be voided. *Id.* Section 1322(b)(2) provides that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . ." 11 U.S.C. § 1322(b)(2). In other words, a chapter 13 debtor may not alter the rights of a creditor that holds a secured interest in the debtor's principal residence. *Id.* However, the *Pond* court reasoned that if a second mortgage on the debtor's principal residence is determined to be wholly unsecured after application of § 506(a), then the creditor does not hold a secured interest in the debtor's principal residence, and the debtor is entitled to alter its rights in the chapter 13 plan by stripping off the second lien. *Pond*, 252 F.3d at 126.

Ocwen does not dispute that this is the prevailing law in the Second Circuit. Instead, it argues that only proofs of claim filed on the claims register may be valued under § 506(a) and stripped off under *Pond*. Owen is incorrect—§ 506(a) values the collateral, not the lien.

The *Pond* decision provided that "to determine whether a lien is 'secured' under Section 506(a), a court must examine the value of the collateral underlying a lien, not the value of the lien itself." *Pond*, 252 F.3d at 127. The logic behind the *Pond* court's reasoning is that "[t]he value of a lien could differ from the value of the collateral underlying that lien for a variety of reasons, such as the state-law rights that attach to the lien but not to the collateral, or the costs associated with collecting on the lien." *Id.* at n.5. A court must therefore look first to the value of the Debtor's principal residence and compare it to the amount of the first lien. *Id.* at 127. If no equity remains after applying the value of the first lien, then the second lien is "wholly unsecured under Section 506(a)." *Id.* Nowhere in this process is the court required to value the second lien. *In re Miller*, 462 B.R. 421, 428 (Bankr. E.D.N.Y. 2011) ("[T]o determine whether a lien is 'secured' under Section 506(a), a court must examine the value of the collateral underlying a lien, not the value of the lien itself.").

Consequently, lien stripping decisions since *Pond* reinforce this analysis, regardless of whether the junior lienor files a claim. In *In re Aubain*, the debtor scheduled a first and second mortgage on her primary residence. *In re Aubain*, 296 B.R. 624, 627 (Bankr. E.D.N.Y. 2003). The mortgagee holding the first lien filed a proof of claim, while the mortgagee holding the second lien did not. *Id.* at 627–28. The debtor moved to avoid the wholly unsecured second lien, and the creditor objected. *Id.* at 634–35. The court held that where the value of the property has been applied to the first lien, a second lien may be stripped where there is no collateral remaining to support any part of the second lien. *Id.* Other courts similarly applied *Pond* in the absence of a

proof of claim. *E.g. In re Shen*, 501 B.R. 216, 219 (Bankr. S.D.N.Y. 2013) (at the time court entered order stripping wholly unsecured second mortgage, creditor had not filed proof of claim); *In re Robert*, 313 B.R. 545, 547, 549 (Bankr. N.D.N.Y. 2004) (Although the holder of the second lien had "not filed an objection to confirmation or a proof of claim" the court could "determine the value of collateral, which secures an allowed claim, to ascertain what portion of the claim is secured and what portion is unsecured."); *Green Tree Servicing, LLC v. Wilson (In re Wilson)*, 532 B.R. 486, 493 n.9 (Bankr. S.D.N.Y. 2015) ("Green Tree 'seeks to make a connection between the filing of a proof of claim and the allowance of a creditor's lien where no such connection exists.'") (citing *Christo v. Wells Fargo Bank (In re Christo)*, No. 12-30083, 2012 WL 3839238, at *6 (Bankr. N.D.Ohio Sept. 4, 2012)).

According to the Debtors, the value of the collateral is $477,000 and the first mortgagee is owed $487,427.38. If the amount owed on the first mortgage exceeds the value of the collateral, there is no equity in the property beyond the first mortgage. The analysis is complete; the second mortgage is wholly unsecured and may be stripped off by operation of *Pond*. The fact that no proof of claim was ever filed is irrelevant. No determination is needed as to whether the second mortgage is an allowed claim under § 502, or whether it may be valued under § 506(a). The only valuation to be performed, according to *Pond* and the relevant case law, is of the collateral.[4]

It is therefore similarly unnecessary for a debtor to file a proof of claim on behalf of an unsecured second lienholder for the sole purpose of instituting an adversary proceeding to strip that lien. There is at least one example of a case in this district where a debtor filed a claim on a

[4] Ocwen also argued that its second lien is not void under 11 U.S.C. § 506(d), contending that the only reason its claim is not allowed is because it did not file a proof of claim. However, the failure to file a proof of claim would not be the reason why Ocwen does not have an allowed secured claim; rather, the value of the Property and the amount of the first mortgage are dispositive.

creditor's behalf for just this purpose. *See In re Renz*, 476 B.R. 382, 388 (Bankr. E.D.N.Y. 2012) ("Debtors clearly filed the [proof of claim] so that they could initiate the Adversary for the express purpose of avoiding the . . . Mortgage and reclassifying the . . . Claim as unsecured"). However, in *Renz*, the court explicitly stated that it "need not and therefore does not reach the issue of whether a claim has to be filed by or on behalf of a purported secured creditor for a debtor to initiate an adversary proceeding to determine the extent, validity, priority and/or lien status of a lien filed of public record." *Id.* at n.8.

Therefore, the fact that the Debtors did not file a proof of claim on behalf of Ocwen is not fatal to the complaint. Despite Ocwen's opposition to the contrary, a wholly unsecured second mortgage on a debtor's principal residence may be stripped off without any proof of claim on file.

Conclusion

For all the reasons stated above, the fact that a proof of claim was not filed on account of Ocwen's second mortgage is not dispositive of whether the Debtors are permitted to strip off the junior lien. Accordingly, Ocwen's motion is denied. A separate order will issue.

Dated: September 30, 2015
Brooklyn, New York

Nancy Hershey Lord

Nancy Hershey Lord
United States Bankruptcy Judge

C

United States Bankruptcy Court, S.D. New York.
In re: Jose and Carmen Morales, Debtor(s).

Case No. 13–36516 (cgm)
Signed March 10, 2014

Background: Chapter 13 debtor-mortgagors filed motion for approval of loan modification based on Home Affordable Modification Program (**HAMP**) trial plan. Mortgagee objected to language in debtors' proposed order that would have reduced its bankruptcy claim to zero.

Holdings: The Bankruptcy Court, Cecelia G. Morris, Chief Judge, held that:
(1) **HAMP** trial modification did not create a basis for altering or reclassifying mortgagee's allowed secured claim, and
(2) entry of language in proposed order that imposed a deadline for delivery of the permanent modification was in the best interests of the estate.

Motion granted in part and denied in part.

West Headnotes

[1] Bankruptcy 51 ⚿2127.1

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2127 Procedure
51k2127.1 k. In general. Most Cited Cases

Mortgages 266 ⚿306

266 Mortgages
266VII Payment or Performance of Condition, Release, and Satisfaction
266k306 k. Change in time or mode of payment. Most Cited Cases

Premise of loss mitigation program adopted by bankruptcy court was simple, namely, to put decision-making parties in direct contact with each other, and to set a schedule for their discussion as to what could be done about debtor's home.

[2] Mortgages 266 ⚿306

266 Mortgages
266VII Payment or Performance of Condition, Release, and Satisfaction
266k306 k. Change in time or mode of payment. Most Cited Cases

Home Affordable Modification Program (**HAMP**) program requires that all mortgage loans owned or guaranteed by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) that meet certain requirements be evaluated by the loan servicers for loan modifications; if a borrower qualifies, then the servicer is obligated to modify the loan in accordance with a predefined formula that reduces the borrower's monthly payment to 31% of his gross income for the first five years.

[3] Bankruptcy 51 ⚿3708(9)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(9) k. Security interests in principal residences. Most Cited Cases

Debtor cannot confirm a Chapter 13 plan that incorporates a Home Affordable Modification Program (**HAMP**) loan modification where a secured claim based on the original loan obligation is outstanding. 11 U.S.C.A. § 1325(a)(5).

[4] Bankruptcy 51 ⚿3708(1)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(1) k. In general. Most Cited

Cases

Bankruptcy 51 ⚿3708(4)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(4) k. Surrender of property. Most Cited Cases

Bankruptcy 51 ⚿3710(2)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3710 Amount of Repayment; De Minimis Repayment
51k3710(2) k. Payment in full. Most Cited Cases

Allowed secured claim can only be treated in one of three ways in a Chapter 13 plan: the plan can provide for surrender of the collateral securing the claim, provide for payment of the claim in an amount not less than the allowed amount of such claim, or provide a treatment that the claimant will accept. 11 U.S.C.A. § 1325(a)(5).

[5] Bankruptcy 51 ⚿3708(2)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(2) k. Lien retention. Most Cited Cases

Bankruptcy 51 ⚿3708(5)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(5) k. Cram down. Most Cited Cases

Bankruptcy 51 ⚿3710(6)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3710 Amount of Repayment; De Minimis Repayment
51k3710(6) k. Present value; time value differential; interest. Most Cited Cases

By using cramdown, Chapter 13 debtor is permitted to keep the property over the objection of the creditor; the creditor retains the lien securing the claim, and the debtor is required to provide the creditor with payments, over the life of the plan, that will total the present value of the allowed secured claim, that is, the present value of the collateral. 11 U.S.C.A. § 1325(a)(5)(B).

[6] Bankruptcy 51 ⚿2575

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2575 k. Liens securing claims not allowed. Most Cited Cases

Bankruptcy 51 ⚿3708(9)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(9) k. Security interests in principal residences. Most Cited Cases

Chapter 13 debtor cannot strip down a mortgage lien on the debtor's principal residence if the mortgage lien is secured by some value in the property. 11 U.S.C.A. § 1322(b)(2).

[7] Bankruptcy 51 ⚿3707

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3707 k. Classification and discrimination. Most Cited Cases

Bankruptcy 51 ⚿3708(9)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3708 Secured Claims; Cram Down
51k3708(9) k. Security interests in principal residences. Most Cited Cases

Mortgages 266 ⚿306

266 Mortgages
266VII Payment or Performance of Condition, Release, and Satisfaction
266k306 k. Change in time or mode of payment. Most Cited Cases

Trial modification of Chapter 13 debtor-mortgagors' loan pursuant to the Home Affordable Modification Program (**HAMP**) did not create a basis for altering or reclassifying mortgagee's allowed secured claim; trial modification did not constitute an agreement between debtors and mortgagee to modify its secured claim, as there were several conditions in **HAMP** Guidelines that had to be met before debtors' trial period plan could be converted into a permanent modification, including that debtors had to make all trial period payments, and debtors' trial modification offer specifically provided that existing loan and loan requirements remained in effect and unchanged during trial period, trial modification did not render mortgagee's claim unenforceable under applicable New York law, pursuant to which trial plans do not alter underlying loan obligations, and fact that mortgagee's claim was contingent during trial modification did not provide basis for objection. 11 U.S.C.A. §§ 502(a), 502(b)(1).

[8] Mortgages 266 ⚿306

266 Mortgages
266VII Payment or Performance of Condition, Release, and Satisfaction
266k306 k. Change in time or mode of payment. Most Cited Cases

Under the Home Affordable Modification Program (**HAMP**), where the conditions to receiving a permanent modification are not met, the borrower's original loan obligation is not altered.

[9] Bankruptcy 51 ⚿2826

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2826 k. Effect of state law, in general. Most Cited Cases

In deciding whether applicable law renders a claim unenforceable, the basic federal rule in bankruptcy is that state law governs the substance of claims. 11 U.S.C.A. § 502(b)(1).

[10] Bankruptcy 51 ⚿2828.1

51 Bankruptcy
51VII Claims
51VII(A) In General
51k2828 Contingent or Unliquidated Claims
51k2828.1 k. In general. Most Cited Cases

For purposes of the section of the Bankruptcy Code providing that an objection to a claim cannot stand if the sole basis for the objection is that the claim is contingent or unmatured, a "contingent" claim is an obligation that will become due upon the happening of a future event that was within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created. 11 U.S.C.A. § 502(b)(1).

[11] Bankruptcy 51 ⚿3033

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3032 Compromises, Releases, and Stipulations
51k3033 k. Judicial authority or approval. Most Cited Cases

Legal standard for determining the propriety of a bankruptcy settlement is whether the settlement is in the best interests of the estate.

[12] Bankruptcy 51 ⚿2133

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2127 Procedure
51k2133 k. Orders. Most Cited Cases

Mortgages 266 ⚿306

266 Mortgages
266VII Payment or Performance of Condition, Release, and Satisfaction
266k306 k. Change in time or mode of payment. Most Cited Cases

In proposed order approving Chapter 13 debtor-mortgagors' trial loan modification based on Home Affordable Modification Program (**HAMP**) trial plan, entry of language that imposed a 30-day deadline for mortgagee's delivery to debtors of permanent loan modification following debtors' completion of trial payments was in the best interests of the estate; absent such a deadline, once their trial plan was complete debtors may have been forced to wait an extensive period of time to receive a permanent loan modification, which may have resulted in delayed administration of their case and prejudice to other creditors.

*214 Andrea B. Malin, Genova & Malin, Attorneys, The Hampton Center, 1136 Route 9, Wappingers Falls, NY 12590-4332, Attorney for Debtors.

Jay Teitelbaum, Teitelbaum & Baskin, LLP, 1 Barker Avenue, Third Floor, White Plains, New York 10601, Attorney for JPMorgan Chase Bank, N.A.

Chapter 13

MEMORANDUM DECISION DENYING MOTION TO APPROVE LOAN MODIFICATION AND REDUCE CLAIM IN PART AND GRANTING IN PART

CECELIA G. MORRIS, CHIEF UNITED STATES BANKRUPTCY JUDGE

Debtors filed a motion to approve a loan modification based on a Home Affordable *215 Modification Program trial plan. The proposed order includes language that would reduce the mortgagee's bankruptcy claim to zero. The mortgagee objects to the claim provision in the order, arguing that the **HAMP** trial modification does not create a basis for altering its secured claim. The Court agrees with the mortgagee and strikes the claim reduction language from the order.

Jurisdiction

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. § 157(a) and the Amended Standing Order of Reference signed by Chief Judge Loretta A. Preska dated January 31, 2012. This is a "core proceeding" under 28 U.S.C. § 157(b)(2)(B) (allowance of claims against the estate).

Background [FN1]

FN1. Unless otherwise noted, the following discussion constitutes the Court's findings of facts and conclusions of law pursuant to Fed. R. Bankr.P. 7052.

On December 4, 2013, the Debtors filed a Motion to Approve Loan Modification and Reduce Claim to Zero ("Motion"). Mot. 1, ECF No. 34. The Motion states that the Debtors were offered a trial modification (the "Trial Modification") by J.P. Morgan Chase, N.A. ("Creditor"). *Id.* at 2. The Trial Modification is a trial plan ("Trial Period Plan") under the Home Affordable Modification Program ("**HAMP**") and requires the Debtors to make three monthly trial payments of $1,600.44 beginning January 1, 2014. *Id.* Debtors state that the final loan modification "that will result" from the Trial Modification will recapitalize arrears under the original note and mortgage into a new loan. *Id.* at 2–3. According to the Debtors, "if the debtors make the THREE (3) trial payments, the debtors will be given a Final Loan Modification Agreement without condition or limitation." *Id.* at 3. Debtors seek approval of the Trial Modification at this stage despite the fact that "the [f]inal [m]odification is condition-

al upon the debtors' performance [of the Trial Modification]." *Id.*

Attached to the Motion is a proposed order ("Proposed Order") that contains some provisions that are not discussed in the body of the Motion. Prop. Order 3, ECF No. 34. The Proposed Order seeks to reduce the Creditor's claim to zero ("Claim Language"). *Id.* The Proposed Order provides "that Claim No. 12 filed on October 1, 2013 by J.P. MORGAN CHASE, N.A. ("CHASE") is hereby reduced to zero and will receive no payment under the plan...." *Id.* The Proposed Order also states

> that J.P MORGAN CHASE, N.A. shall deliver to the debtors the permanent loan modification agreement within 30 days of the date upon which the debtors completes [sic] the trial payments and shall return to the debtors a fully executed copy thereof within twenty-one (21) days of its receipt of the Loan Modification Agreement executed by the debtors.
>
> *Id.*

Creditor filed a limited objection to the Motion. Obj. 1, ECF No. 37. Creditor opposes "to the extent of the proposed treatment of the [Creditor's] Claim." *Id.* at 2. According to the Creditor, alteration of the claim during the Trial Modification violates § 502 of the Bankruptcy Code.[FN2] *Id.* Creditor states that the basis for its claim is the underlying loan obligation, an obligation that the Creditor believes to be unchanged by the Trial Modification. *Id.* at 4–6. To the extent a permanent modification ***216** would affect the claim based on the underlying loan obligation, the Creditor argues that there are several conditions to permanent modification that are not presently satisfied. *Id.* at 4.

> FN2. Unless otherwise noted, all sectional references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101 – 1532 (2012).

Creditor believes that reclassification of its claim during the Trial Modification forces the Creditor to preemptively object to confirmation of any chapter 13 plan that does not treat its unmodified arrears. *Id.* at 2. Creditor asserts that confirmation of a plan based only on the Trial Modification will lead to an infeasible plan if no permanent modification is executed. *Id.*

In further support of its position, Creditor points to this Court's General Order M–451(VI)(c)(4), which provides that "[i]n a chapter 13 case, the deadline by which a Creditor must object to confirmation of the Chapter 13 plan shall be extended to permit the Creditor an additional (14) days after the filing of the 'Order Terminating Loss Mitigation and Final Report.' " *Id.* at 6 (quoting *In re* Adoption of Modified Loss Mitigation Program Procedures, Gen. Or. No. M–451, at 8 (June 17, 2013) (amending General Orders M–364 and M–413), *available at* http://www.nysb.uscourts.gov/court-info/local-rules-and-orders/general-orders).[FN3] Creditor argues that this provision recognizes that confirmation must wait until Loss Mitigation is terminated. Obj. 6, ECF No. 37. According to Creditor, termination would only properly occur in this case after execution of a permanent modification. *Id.*

> FN3. General Order M–451 shall be short cited hereinafter as *Gen. Or. M–451.*

Discussion

A. *The Court's Loss Mitigation program and HAMP modifications.*

[1][2]The Trial Modification was achieved through this Court's Loss Mitigation program. "The premise of the Loss Mitigation program is simple: Put the decision-making parties in direct contact with each other, and set a schedule for their discussion as to what can be done about the debtor's home." *In re Bambi,* 492 B.R. 183, 188 (Bankr.S.D.N.Y.2013) (quoting Hon. Cecelia G. Morris & Mary K. Guccion, *The Loss Mitigation Program Procedures for the United States Bankruptcy Court for the Southern District of New York,* 19 Am. Bankr.Inst. L.Rev. 1, 4 (2011)). Many

parties in Loss Mitigation seek to utilize **HAMP**. The court in *In re Cruz* provided a synopsis of **HAMP**:

> **HAMP** arose out of the Emergency Economic Stabilization Act of 2008, and is administered by the Federal National Mortgage Association ("Fannie Mae") as the agent of the Department of the Treasury. The program requires that all mortgage loans owned or guaranteed by Fannie Mae or the Federal Home Loan Mortgage Corporation ("Freddie Mac" and together with Fannie Mae, the government-sponsored agencies or "GSEs") that meet certain requirements be evaluated by the loan servicers for loan modifications. If a borrower qualifies, then the servicer is obligated to modify the loan in accordance with a predefined formula that reduces the borrower's monthly payment to 31% of his gross income for the first five years. In addition, many servicers of mortgage loans not owned by the GSEs have executed so-called Servicer Participation Agreements ("SPAs") with Fannie Mae, as agent for the Treasury Department, by which they agree to review and modify loans on similar terms.

Cruz v. Hacienda Assocs., LLC (In re Cruz), 446 B.R. 1, 3 (Bankr.D.Mass.2011) (internal citation omitted).

The Treasury Department, acting through Fannie Mae, has produced guidelines that mortgage servicers must follow ***217** when a borrower is considered for a modification under **HAMP**. *Id.*; *see also* U.S. Dep't of the Treasury, Making Home Affordable Program Handbook for Servicers of Non–GSE Mortgages (ver. 4.3 2013).[FN4] Pursuant to these Guidelines, "[f]ollowing underwriting, N[et] P[resent] V[alue] evaluation and a determination, based on verified income, that a borrower qualifies for **HAMP**, servicers will place the borrower in a trial period plan (TPP)." **HAMP** Guidelines at 122. The Trial Period Plans typically last three months. *See id.* According to the Guidelines, "[b]orrowers who make all trial period payments timely and who satisfy all other trial period requirements will be offered a permanent modification." *Id.*

> FN4. The **HAMP** Handbook shall be hereinafter short cited as "**HAMP** Guidelines."

Once an agreement is reached in Loss Mitigation, the Procedures allow parties to obtain court approval of the agreement "in any manner permitted by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure ..., including, but not limited to, a stipulation, sale, plan of reorganization or amended plan of reorganization; and a Motion to Approve Loan Modification." *Gen. Or. M–451* at 7. Parties often seek approval of **HAMP** Trial Plans before a permanent modification is offered, and the Court provides a form Order Approving Trial Loan Modification to facilitate those approvals. *See Order Approving Trial Loan Modification*, United States Bankruptcy Court, Southern District of New York, http://www.nysb.uscourts.gov/sites/default/files/TrialModProposedOrderEO.docx (last visited March 5, 2014).

B. *The incentive to reduce the claim.*

[3][4][5][6]Chapter 13 debtors often seek to reduce, reclassify, or moot the lender's secured claim as part of a motion to approve a loan modification. The reason is that the debtor cannot confirm a chapter 13 plan that incorporates the modification where a secured claim based on the original loan obligation is outstanding. An allowed secured claim can only be treated in one of three ways in a chapter 13 plan. 11 U.S.C. § 1325(a)(5); *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 956–57, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997). The plan can provide for surrender the collateral securing the claim, payment of the claim in an amount "not less than the allowed amount of such claim,"[FN5] or provide ***218** a treatment that the claimant will accept. *Id.*

> FN5. The Supreme Court in *Rash* labeled § 1325(a)(5)(B), which allows the debtor to pay the allowed amount of the secured

claim, as the " 'cram down' power." 520 U.S. at 957, 117 S.Ct. 1879. By using cramdown,

> the debtor is permitted to keep the property over the objection of the creditor; the creditor retains the lien securing the claim, see § 1325(a)(5)(B)(i), and the debtor is required to provide the creditor with payments, over the life of the plan, that will total the present value of the allowed secured claim, *i.e.*, the present value of the collateral, see § 1325(a)(5)(B)(ii). The value of the allowed secured claim is governed by § 506(a) of the Code.
>
> *Id.* Section 1322(b)(2) makes it impossible for the Debtors in this case to elect cram down with respect to this secured claim. Section 1322(b)(2) provides that the chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured by a security interest in real property that is the debtor's personal residence...." The simple rule is that "a debtor cannot strip down a mortgage lien on the debtor's principal residence ... if the mortgage lien is secured by some value in the property." *In re Laycock*, 497 B.R. 396, 398 (Bankr.S.D.N.Y.2013); *see also Dewsnup v. Timm*, 502 U.S. 410, 417, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992); *Nobelman v. American Savings Bank*, 508 U.S. 324, 331–32, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). The Loss Mitigation program only applies to principal residences, meaning that this claim is not subject to cram down. *Gen. Or. M–451* at 2.

In Loss Mitigation cases where a loan modification is offered, this means the debtor can pay the claim in full, surrender the principal residence, or obtain acceptance from the creditor. In cases where a Trial Period Plan is offered, some debtors wait to execute a permanent modification before confirming the plan. Once a permanent modification is executed, acceptance of the plan by the creditor is much more likely. None of the three options are viable during Trial Period Plans. The debtor will seek to retain the collateral and make the modified payment. The lender may also decline to accept treatment in the plan that provides for less than payment of its entire secured claim, despite a Court-approved Trial Period Plan. As this case illustrates, lenders may not be convinced that the trial plan will become a permanent modification.

Other debtors attempt to object to the claim and confirm a chapter 13 plan prior to execution of the permanent modification. The Court believes this is due to delays in receiving permanent modifications from lenders. The Court's experience is consistent with the allegations in numerous published opinions. *See, e.g., Salvador v. Bank of America (In re Salvador)*, 456 B.R. 610, 617 (Bankr.N.D.Ga.2011) (Debtors allegedly signed a trial plan on December 7, 2009, made the necessary payments, and did not receive a permanent modification); *Jenkis v. JP Morgan Chase Bank, N.A. (In re Jenkins)*, 488 B.R. 601, 610 (Bankr.E.D.Tenn.2013) (Lender asserted that it "did not determine during the Trial Period that Plaintiffs qualified for a permanent modification, so it did not provide Debtors with a fully executed copy of the Modification Agreement.... Accordingly, the Loan Documents were not modified ... [and] the Plaintiff's obligations reverted back to the contractual terms...."); *Bosque v. Wells Fargo Bank, N.A.*, 762 F.Supp.2d 342, 354–56 (D.Mass.2011) (Plaintiffs sought provisional class certification and an order compelling defendant to provide notice of the lawsuit to all borrowers who signed trial plans but were not offered permanent modifications by the dates specified in the trial plan agreements; court denied motion without prejudice and allowed continued discovery); *Picini v. Chase Home Finance LLC*, 854 F.Supp.2d 266, 270 (E.D.N.Y.2012) (Plaintiffs alleged that they made all required payments under a March 2010 trial plan

and did not receive any information regarding a potential permanent modification until October 2010, and were then dropped from **HAMP** entirely). Given this landscape, it is not surprising that many debtors attempt to reclassify, reduce, or moot the secured claim during the Trial Period Plan so they can move forward with confirmation in a timely fashion.

Despite the practical appeal of reclassification of the secured claim during the Trial Period Plan, § 502(a) provides that "[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." The Motion and Proposed Order must give rise to a valid claim objection before the Court can enter the Proposed Order as written.

C. *The Trial Modification does not provide a basis for reclassification of the Creditor's claim.*

[7]Section 502(b) provides that "[e]xcept 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*219 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" one of the nine exceptions listed in § 502(b)(1)–(9) are applicable. Subsections (e)(2), (f), (g), (h), and (i) are not relevant here.

"[T]he Supreme Court has held that if there is no basis to disallow a claim under section 502, the claim must be allowed." *Harbinger Capital Partners LLC v. Ergen (In re LightSquared Inc.)*, 504 B.R. 321, 339–40 (Bankr.S.D.N.Y.2013) (citing *Travelers Cas. Surety Co. of Am. v. Pacific Gas Electric Co.*, 549 U.S. 443, 449, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007)). Paragraphs (b)(1) through (9) of § 502(b) provide the only bases for objecting to a claim. *In re Muller*, 479 B.R. 508, 512 (Bankr.W.D.Ark.2012) (citation omitted).

The only potentially applicable provision is § 502(b)(1), which states that a claim may be disallowed if "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." To enter the Claim Language, there must either be an agreement between the parties to disallow the claim, or the claim must be unenforceable under applicable law.

The **HAMP** Guidelines and the Trial Modification agreement reveal that the Trial Modification does not constitute an agreement between the Debtors and the Creditor to modify Creditor's secured claim. There are several conditions in the **HAMP** Guidelines that must be met before a Trial Period Plan can be converted to a permanent modification. The **HAMP** Guidelines provide that "[b]orrowers who make all trial period payments timely and who satisfy all other trial period requirements will be offered a permanent modification." **HAMP** Guidelines at 122. A necessary condition is that borrowers "make all trial period payments." *Id.* The **HAMP** Guidelines make clear that "[b]orrowers who do not make current trial period payments are considered to have failed the trial period and are not eligible for a permanent modification." *Id.* at 123. Another condition is that the lender must maintain first lien position and the underlying note and mortgage must remain fully enforceable. *Id.* at 128. The lender must also obtain insurer approval for the modification. *Id.* at 130.

[8]Where the conditions to receiving a permanent modification are not met, the original loan obligation is not altered. The **HAMP** Guidelines provide that "[a] servicer should not change a borrower's scheduled loan terms in its servicing system and/or mortgage file during the trial period." *Id.* at 123. Any trial payments received by the lender are applied to the existing loan, and are not returned to the borrower if the borrower ultimately does not qualify for a permanent modification. *Id.* The fact that the underlying loan is still valid during the Trial Period Plan is also reflected in the Trial Modific-

ation offer submitted to the Debtors, which provides that the "existing loan and loan requirements remain in effect and unchanged during the trial period." Mot. Ex. A, at 2, ECF No. 34. The Court concludes that there is no agreement between the parties to modify the Creditor's claim at this time.

[9]Nor does it appear that the Trial Modification renders the claim unenforceable under applicable law for purposes of § 502(b)(1). In deciding whether applicable law renders a claim unenforceable, "[t]he 'basic federal rule' in bankruptcy is that state law governs the substance of claims." *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000) (citing ***220***Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)). New York courts have found that the trial plan does not alter the underlying loan obligation. In *Wells Fargo Bank, N.A. v. Meyers*, 108 A.D.3d 9, 966 N.Y.S.2d 108, 110 (2013) (Second Department), the parties participated in mandatory foreclosure settlement conferences pursuant to N.Y. C.P.L.R. 3408(f) (McKinney 2007 & Supp.2013). In August of 2009, the borrowers received a trial **HAMP** offer, which the borrowers signed on September 1, 2009. *Id.* at 111. The trial offer indicated that the lender would not foreclose during the Trial Period Plan if the trial payments were made; nonetheless, the lender initiated foreclosure one day later on September 2, 2009. *Id.* The lender then informed the borrowers that a second Trial Period Plan was required due to a miscalculation. *Id.* On April 28, 2010, the lender sent the borrowers a letter stating that they were denied for modification, as their monthly housing expense was less than 31% of their gross monthly income. *Id.* The parties appeared at a conference before the referee, and the lender indicated that it would send the borrowers a modification within five to seven days. *Id.* Despite this assurance, the lender sent the borrowers another rejection letter on May 20, 2010. *Id.* Another modification was offered with higher payments than the original; that offer was rejected by the borrowers. *Id.* at 111–12.

The trial court ordered the lender to provide the borrowers with a final modification under the original trial terms, citing the lender's failure to negotiate in good faith as required by section 3408 of the New York Civil Practice Law and Rules. *Id.* at 112. The appellate court reversed this remedy, stating that "[t]he 'original modification agreement' was merely a trial arrangement, not an agreement for the binding obligations of the parties going forward." *Id.* at 116. The court noted that while section 3408 of the New York Civil Practice Law and Rules contains no express remedy for the failure to negotiate in good faith, "[t]he courts may not rewrite the contract that the parties freely entered into—the loan and mortgage agreements—upon a finding that one of those parties failed to satisfy its obligation to negotiate in good faith pursuant to CPLR 3408." *Id.* at 117. The court did note that there were other potential remedies for the failure to negotiate in good faith. *Id.* at 116. Forcing the creditor into a new agreement that modified the existing loan terms was not an available remedy. *Id.*

Applying comparable rationale, the court in *JP Morgan Chase Bank, N.A. v. Hardo* found that

> [s]ince there is no duty on the part of the **HAMP** servicers to modify mortgages[,] neither the engagement in the processing of loan modification applications nor the issuance of a [Trial Period Plan] gives rise to a right on the part of borrowers to a permanent loan modifications if they successfully complete the trial plan payments....

36 Misc.3d 359, 373–74, 940 N.Y.S.2d 829 (N.Y.Sup.Ct. March 5, 2012) (Suffolk County) (internal citations omitted).

Similarly, district courts for the Southern District of New York have concluded that **HAMP** does not provide a private cause of action to the borrower. *Wheeler v. Citigroup*, 938 F.Supp.2d 466, 471 (S.D.N.Y.2013) ("**HAMP** does not create a private right of action for borrowers against loan servicers.") (citations omitted); *Griffith–Fenton v. Chase Home Finance*, No. 11 CV 4877(VB), 2012 WL

2866269, at *3 (S.D.N.Y. May 29, 2012) ("**HAMP** does not provide a private cause of action, nor may plaintiff enforce the agreement as a third-party-beneficiary.").

[10]Creditor's claim would remain an allowed secured claim even if completion of *221 the Trial Modification entitled the Debtors to a permanent modification under applicable law. Pursuant to § 502(b)(1), an objection to a claim cannot stand if the sole basis for the objection is that the claim is "contingent or unmatured." A contingent claim is an "obligation that will become due upon the happening of a future event that was within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created." *In re South Side House, LLC*, 451 B.R. 248, 260 (Bankr.E.D.N.Y.2011) (quoting *Olin Corp. v. Riverwood Int'l Corp. (In re Manville Forest Prods. Corp.)*, 209 F.3d 125, 128–29 (2d Cir.2000)). As noted above, the Trial Modification agreement and the **HAMP** Guidelines make clear that the presence of the Trial Modification does not affect the underlying loan. Completion of the Trial Modification is the only way the Debtors could become entitled to a permanent modification, and completion has not occurred. The claim will either stand or be modified, depending on the "happening of a future event...." *Id.* That the claim is contingent during the Trial Modification does not provide a basis for objection.

The Court concludes that § 502(b)(1) does not apply. At this time, the Creditor holds an allowed secured claim that must remain allowed "in such amount" as it was filed. 11 U.S.C. § 502(b).

D. *The Court declines to include the language proposed by the Creditor.*

Creditor proposes that the Court substitute the Claim Language in the Proposed Order with a clause stating "that upon the execution of permanent loan modification on terms consistent with this Order, (i) Claim No. 12 shall be expunged and reduced to zero; and (ii) Chase shall receive no payment under the plan in connection with Claim No. 12." Obj. 3, ECF No. 37. As the Court concludes there is no basis to alter the Creditor's claim at this time, the Court will simply strike the Claim Language.

E. *The Court will enter the language that imposes a deadline for delivery of the permanent modification.*

[11][12]The Proposed Order contains the following requirement:

> J.P MORGAN CHASE, N.A. shall deliver to the debtors the permanent loan modification agreement within 30 days of the date upon which the debtors completes [sic] the trial payments and shall return to the debtors a fully executed copy thereof within twenty-one (21) days of its receipt of the Loan Modification Agreement executed by the debtors.
>
> Prop. Order 3, ECF No. 34.

Creditor does not object to this portion of the Proposed Order. "[T]he legal standard for determining the propriety of a bankruptcy settlement is whether the settlement is in the 'best interests of the estate.' " *In re Adelphia Comme'ns Corp.*, 368 B.R. 140, 225 (Bankr.S.D.N.Y.2007) (quotation omitted). As noted above, the Court has observed that debtors are often forced to wait extensive periods of time to receive permanent modifications once trial plans are complete. This delays administration of bankruptcy cases and may prejudice other creditors. The Court will enter the language in the best interests of the estate.

Conclusion

For the foregoing reasons, the Court strikes the Claim Language from the Proposed Order, and will enter the Proposed Order in all other respects. Debtors should submit an order consistent with this opinion.

Bkrtcy.S.D.N.Y., 2014
In re Morales
506 B.R. 213

506 B.R. 213
(Cite as: 506 B.R. 213)

END OF DOCUMENT

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

Case No. 14-73711-reg

AHMAD HASSAN,

Chapter 13

Debtor.

----------x

MEMORANDUM DECISION
(Re: Motion to Avoid Second Mortgage Lien)

Before the Court is a motion ("Motion") by Ahmad Hassan (the "Debtor") to avoid a second mortgage lien on his residence (the "Property"), pursuant to 11 U.S.C. §§ 506(a) and (d) and § 1322(b)(2), in order to treat the second mortgage claim as unsecured in the Debtor's Chapter 13 plan. Specialized Loan Servicing LLC ("SLS"), individually and as servicing agent for Bank of New York Mellon f/k/a The Bank of New York as successor Indenture Trustee to JPMorgan Chase Bank, N.A. CWHEQ Revolving Home Equity Loan Trust, Series 2006-F represents the second mortgagee. SLS objects to the Motion on the basis that the value of the Property exceeds the amount owed on the first mortgage as of the date the petition was filed. SLS argues that after accounting for the first mortgage, there is equity remaining to which SLS's mortgage lien can attach, under *In re Nobelman*, 508 U.S. 324 (1993), the bankruptcy provisions cited by the Debtor may not be used to modify SLS's mortgage lien. According to the Debtor, there is no such equity to which SLS's mortgage lien can attach. The issue before the Court is whether the value of the Property is greater than $258,332.85, the amount of the allowed secured claim filed by the first mortgagee. The outcome of the Motion has significant consequences to the Debtor because the Debtor must pay SLS in full under a Chapter 13 plan, so long as SLS's lien is secured by a dollar in value.

The Debtor has the burden of establishing that the value of the Property is equal to or less than the amount owed on the first mortgage, and that there is no excess value to which the second mortgage lien can attach. Once the Debtor has met his burden, SLS must present sufficient evidence to overcome the Debtor's valuation. The Debtor's burden of proof is not a heightened one, as urged by SLS, but it is the Debtor's initial burden nonetheless. The record in this case consists of two appraisals submitted by the parties and their testimony in support of their valuations. Both appraisers used comparable sales to establish value, and the difference in valuation between the two appraisers is less than ten percent. Based on the evidentiary record, the Debtor has met his burden of proof as required by the Bankruptcy Code. Both appraisals employ sound methodologies and the appraisers are qualified, but taking into consideration all of the evidence and testimony, SLS has failed to overcome the Debtor's valuation. Therefore, for the reasons amplified below, the Motion is granted, and SLS's junior lien shall be treated as an unsecured claim in the Debtor's Chapter 13 plan.

PROCEDURAL HISTORY

On August 12, 2014 (the "Petition Date"), the Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code. On August 13, 2014, the Debtor filed the Motion. On September 17, 2014, SLS filed an Affirmation in Response. Hearings on the Motion were held on November 10, 2014 and December 10, 2014. An evidentiary hearing was held on February 4, 2015. On February 16, 2015, the Debtor and SLS each filed post-hearing briefs. In addition to raising issues related to the Motion, SLS voiced objections to confirmation of the Debtor's plan. Thereafter, the matter was marked submitted.

FACTS

The Debtor owns the Property which is his residence. The Debtor listed the Property on Schedule A, with a value of $250,000. The Property is encumbered by a first mortgage, with a balance owed in the amount of $258,332.85 as of the Petition Date. SLS is listed in the schedules as holding a second mortgage lien on the Property, with a mortgage balance of $62,000 as of the Petition Date. In the Motion, the Debtor alleges that the Property was worth $250,000 as of the Petition Date. The Debtor seeks to have the second mortgage lien of SLS declared unsecured pursuant to sections 506(a) and (d) of the Bankruptcy Code and treated as an unsecured claim in the Debtor's proposed plan pursuant to § 1322 of the Bankruptcy Code. Based on the amount owed on the first mortgage as of the Petition Date, the Debtor is entitled to the relief sought in the Motion only if the Court finds that the Property is worth $258,332.85 or less.

Each party retained an expert to value the Property. The Debtor's expert, Robert Grennan, is a certified real estate appraiser who has been conducting appraisals since 1998. Grennan's appraisal was prepared as of April, 2014, which is within a few months prior to the Petition Date.[1] Grennan employed the sales comparison approach, using similar houses in the vicinity of the Property that were sold at or around the date of his appraisal. According to Grennan, the Property was worth $250,000 as of the appraisal date. (Debtor's Ex. 1). The Debtor's appraisal took into consideration homes that were more than one mile away from the Property because there were few homes within a one-mile radius with only two bedrooms. (Debtor's Ex.1). In addition to having two legal bedrooms, the Property is located on a busy street, both factors which adversely affect the value of the Property. (Debtor's Ex. 1). Grennan compared the Property to six home sales in the area. The prices for the comparable sales ranged

[1] Both parties agree that the Property should be valued as of the Petition Date for the purposes of the Motion.

from $235,000 to $305,000. (Debtor's Ex. 1). After adjusting the sale prices for each property to compensate for location, size and whether the basement was finished and for the extra bathroom in the basement, the comparable adjusted sales ranged from $243,200 to $283,200. The first comparable property ("Comp 1") required several adjustments to the $278,000 sale price, the most significant being a 10% downward adjustment to account for the more favorable location. The differences resulted in a reduction of $18,700 for an adjusted sale price of $269,400. The second comparable property ("Comp 2") is a two bedroom house 1.5 miles away from the Property. After making several adjustments including a 10% downward adjustment for the more favorable location, the sale price of $260,000 was adjusted upward to $261,100. The third comparable property ("Comp 3") is a two bedroom house located .58 miles from the Property, which sold for $235,000. After making an upward adjustment in the total amount of $8,200 based on its superior residential location, its poor condition and some other factors, Grennan valued Comp 3 at $243,200. The fourth comparable property ("Comp 4") sold for $305,000. After a net downward adjustment of $21,800 to reflect the better condition of Comp 4 and the lack of finished rooms in the basement, the value of Comp 4 was adjusted to $283,200. The fifth comparable property ("Comp 5") sold for $295,000. After making a net downward adjustment in the amount of $50,400, based primarily on the better location of Comp 5, a third legal bedroom and the larger square footage, the property was valued at the adjusted amount of $244,600. The sixth comparable property ("Comp 6") sold for $260,000. The sale price of Comp 6 was adjusted downward in the net amount of $9,400 to reflect the smaller living area, the lack of a finished basement and the better location. As a result, Comp 6 has an adjusted value of $250,000. According to Grennan, the most significant factor in the adjusted value of the comparable home sales is the location. In general, homes prices in residential areas were

decreased by 10% to take into account the more desirable location. Trial Tr., p. 14. With respect to the basement, homes with unfinished basements were given an upward adjustment of $2,500, and homes without a bathroom in the basement were given an upward adjustment of $1,000 - $2,000. Trial Tr., p. 16. According to Grennan, a legal bathroom built above-grade would call for an adjustment of approximately $5,000. Id.

While the average value of the comparable sales examined by Grennan equals $256,833.33, Grennan concluded that the actual value of the Property was below this average because of its location on a busy street, next to commercial property (Trial Tr., p. 24). According to Grennan, the location of the Property had an adverse effect in excess of the 10% reduction normally taken to reflect a less desirable location. Id.

Arleen Goscinski prepared an appraisal for SLS and testified in support of her appraisal, which valued the Property at $270,000 (SLS Ex. 5). Goscinski has been a certified appraiser for twenty five years, and her credentials were not subject to challenge by the Debtor. Her appraisal was prepared to reflect the value of the Property as of August 12, 2014. Like Mr. Grennan, Ms. Goscinski used the comparable sales approach, but she used only three comparable sales, including one sale that took place on the same street on June 14, 2014 ("SLS Comp 1"). SLS Comp 1 sold for $270,000, and Ms. Goscinski gave SLS Comp 1 the greatest weight of the three comparable sales she chose. (Trial Tr., p. 28). SLS Comp 1 had three bedrooms and one bathroom, and was larger than the Property by approximately 400 feet. SLS Comp was located on the same street as the Property, so Ms. Goscinski considered the location to be equivalent. (Trial Tr. p. 28). After taking into consideration the larger size, the extra bedroom upstairs and the lack of a finished basement and bathroom in the basement, along with the fact that the kitchen had not been updated, she gave SLS Comp 1 an adjusted value of $269,460.00. (SLS

Ex. 5). The second comparable ("SLS Comp 2") sold for $278,000, with an adjusted valuation of $267,955. The adjustment was based on the smaller living space and lack of finished basement, offset by the residential location. The third and last comparable ("SLS Comp 3") sold for $260,000, which was adjusted to $271,265.00. (SLS Ex. 5). The upward adjustment was based on the residential location and updated bathroom, tempered by the smaller living space, the average condition of the home, and the lack of a finished basement. Ms. Goscinski used a 10% adjustment for the residential locations for SLS Comp 2 and SLS Comp 3. (Trial Tr. p. 31, 32). Like Mr. Grennan, Ms. Goscinski believes that the location of the property in question is the primary consideration, but according to Ms. Goscinski, she would not have included two of the comparables used by Mr. Grennan because one was an older colonial, and another was in a different school district. (Trial Tr., p. 34 – 35). Ms. Goscinski valued the Property's finished basement with the two bedrooms and bathroom at $15,000. (Trial Tr., p. 39). She gave greater value to the rooms in the basement than did Grennan based on her opinion that the rooms were usable and would add value to any buyer, despite the fact that the bedrooms and bathroom were not legal.

DISCUSSION

The Debtor seeks to avoid the junior mortgage lien of SLS pursuant to Bankruptcy Code §§ 506(a), 506(d), 1322(b) and 1325. If the Motion is granted, then SLS's claim will be treated as unsecured, its lien will be avoided upon entry of the Debtor's discharge, and SLS will only be paid a percentage of its claim under the Debtor's proposed plan. If the Motion is denied, then SLS will have a secured claim and must be paid in full under any plan proposed by the Debtor. A Chapter 13 debtor may seek to avoid a mortgage lien on his or her

residence if that lien is determined to be wholly unsecured pursuant to Bankruptcy Code §§ 506(a), 506(d) and 1322(b). *Pond v. Farm Specialist Realty (In re Pond)*, 252 F.3d 122, 126 (2d Cir. 2001). Section 506(a) is the correct starting point for a judicial determination of value of the creditor's secured claim. *Id.* (Section 506(a) "provides that a claim is secured only to the extent of the value of the property on which the lien is fixed." (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 239 (1989)). Therefore, whether SLS's claim is secured turns on the value of the Property compared to the amount of the first mortgage on the Property.

Legal Standard and Burden of Proof

The Court is mindful of the fact that this valuation is being made in the context of a Chapter 13 bankruptcy, where the outcome of this decision determines whether SLS is to be paid the full amount of its claim or whether SLS will be paid the same percentage as the other unsecured creditors in the Debtor's plan. Under *Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993), the Supreme Court held that a Chapter 13 debtor may not bifurcate a claim on a debtor's residence into a secured and unsecured claim, as to do so would violate the anti-modification provisions set forth in Section 1322(b)(2) of the Bankruptcy Code. The Second Circuit has read *Nobelman* and the relevant Bankruptcy Code provisions to "protect[] a creditor's rights in a mortgage lien only where the debtor's residence retains enough value – after accounting for other encumbrances that have priority over the lien – so that the lien is at least partially secured under Section 506(a)." *In re Pond*, 252 F.3d at 126. Therefore, the Second Circuit, along with every other Circuit considering this issue, permits Chapter 13 debtors to avoid wholly unsecured junior mortgages, notwithstanding the anti-modification provisions of Section 1322(b)(2).

The Supreme Court in *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 961 (1997), highlighted that the Bankruptcy Code provides that valuation is to be determined in light of the

purpose of the valuation as well as the proposed use or disposition of the property. In this case, the purpose of this valuation is to determine whether SLS receives payment in full under the plan. While not the basis of its decision, the Court is aware that so long as there is one dollar in value in excess of the first mortgage, SLS will be paid an amount that far exceeds that dollar.

The Debtor has the burden of demonstrating that "there is not even one dollar of value" in the Property in excess of the amount owed on the first mortgage. *In re LePage*, 2011 WL 1884034, at *4 (Bankr. E.D.N.Y. May 18, 2011). (*citing In re Karakas*, 2007 WL 1307906 at *6 (other citations omitted)). Once the Debtor has met his burden, SLS must submit sufficient evidence to overcome the valuation proposed by the Debtor. *Id.* (other citations omitted). SLS urges the Court to adopt a high threshold based on the facts of this case. According to SLS, a heightened standard is justified where 1) there was sufficient equity in the property for the junior lien to attach at the time the loan was executed pre-petition, 2) the alleged deficiency may have been created in part because of the debtor's failure to make payments on the first mortgage or the debtor has incurred other obligations that prime the existing liens on the property, and 3) the alleged value deficiency is not significant. In support of adopting this test, SLS cites to *In re Fisher*, 289 B.R. 544 (Bankr. W.D.N.Y. 2003), and *In re Dziendziel*, 295 B.R. 184 (Bankr. W.D.N.Y. 2003). Both decisions were rendered by Judge Ninfo. Pursuant to Judge Ninfo's rationale, a heightened burden of proof is warranted where the debtor's conduct fits within the criteria outlined above. Although not expressly discussed in either case, Judge Ninfo seems to have concluded that where the debtor bears some responsibility for the lack of equity in the property due to non-payment of the secured obligations, the debtor should face a higher burden in order to strip off the junior mortgage.

When two appraisal reports conflict, a court should carefully compare "the logic of their analyses" and "the persuasiveness of their subjective reasoning." *In re Park Ave. Partners Ltd. P'ship*, 95 B.R. 605, 610 (Bankr. E.D. Wisc. 1988).

ANALYSIS

Both appraisers are qualified and used similar methodology, yet the Debtor's appraiser values the Property at $250,000, and SLS's appraiser values the Property at $270,000. One significant difference between the two appraisers is the number of comparable sales included in the analysis. The Debtor's appraiser included six comparable sales to arrive at his valuation, while SLS's appraiser used only three comparable sales. According to SLS's appraiser, Comp. 3 should not be included because it is a different model house and it is significantly older. Comp. 1 should be excluded because it is in a different school district. Comp. 3 had an adjusted value of $243,200 and Comp. 1 had an adjusted value of $283,200.

Other than these distinctions, the most significant difference between the methods employed by the two appraisers is the value given to the finished basement. The Debtor's appraiser gave the finished rooms in the basement a valuation of approximately $4,000, and SLS's appraiser gave the basement rooms a valuation of $15,000. The Debtor's appraiser gave the below-grade bathroom a value of $1,000 to $2,000, and acknowledged that if the bathroom were located above-grade, it would be valued at $5,000. The two bedrooms in the basement were treated as a finished basement, and given a value of $2,500. SLS's appraiser justified her higher value for the finished basement based on the value to the buyer. Although the bedrooms and bathroom in the basement were not legal, she believed they were worth more than a merely finished basement.

If the comparable sales used by the Debtor's appraiser were averaged, the valuation would equal $256,833.33. According to the Debtor's appraiser, the location of the Property is on a busy road, next to commercial property, which requires a further reduction, as is reflected in Grenner's appraisal of $250,000. The Court has no reason to believe that this additional reduction is improper. This is not a case where one appraisal is clearly superior to the other appraisal, as was the case in *In re Lepage*, 2011 WL 1884034. In *Lepage*, the mortgagee's appraiser employed a flawed methodology and provided testimony that was less credible than the debtor's appraiser, and the Court concluded that the debtor sustained his burden of proof. This is also not a case like *Wright v. Chase (In re Chase)*, where Chief Judge Craig denied the debtor's motion to avoid the second mortgage because the debtor's retained appraiser concluded that the property was worth in excess of the first mortgage. In this case, the two valuations differ by less than ten percent, and both appraisers used the sales comparison approach with similar variables. Therefore, this case turns largely on the burden of proof assigned to the Debtor and SLS. The Debtor has met his initial burden of proof and has established that there is not $1 in value beyond the amount of the first mortgage. The Court cannot conclude, based on all of the evidence, that SLS has overcome the Debtor's valuation. Therefore, the Court finds that the Property is worth

less than the amount owed on the first mortgage. To the extent SLS has raised objections to confirmation of the Debtor's plan in its supplemental submission, the Court shall consider them at the Debtor's next confirmation hearing.

CONCLUSION

Based on the entire record before the Court, the Debtor has sustained his burden of proof regarding the value of the Property, which the Court finds is worth less than $258,332.85. SLS has not overcome the Debtor's valuation, and therefore, the Motion is granted. The Court shall enter an order consistent with this Memorandum Decision.

Dated: Central Islip, New York
October 8, 2015

Robert E. Grossman
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:

DELROY ANTHONY WHITE dba
ASWAN ENTERTAINMENT, INC.,

Debtor.

Chapter 13

Case No. 12-47895-CEC

SPERRY ASSOCIATES FEDERAL CREDIT UNION,

Plaintiff,

-against-

U.S. BANK, NATIONAL ASSOCIATION, AS
TRUSTEE, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., and
JP MORGAN CHASE BANK, N.A.

Defendants.

Adv. Proc. No. 13-01144-CEC

DECISION

APPEARANCES:

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CARLA E. CRAIG
Chief United States Bankruptcy Judge

This matter comes before the Court on cross motions for summary judgment in this adversary proceeding, which was commenced by Sperry Associates Federal Credit Union ("Sperry"), the junior lien holder with respect to the debtor's real property. Sperry seeks a declaratory judgment against U.S. Bank National Association, Mortgage Electronic Registration Systems, Inc., and JP Morgan Chase Bank, N.A. (collectively, the "Defendants"), that subordinates all or a portion of the senior mortgage on the Debtor's real property to the Sperry mortgage. Sperry contends its position as a junior mortgagee was impaired when the Debtor and the servicer for the senior mortgagee, JP Morgan Chase Bank, N.A. ("Chase"), entered into a loan modification agreement without Sperry's consent. Because the modification neither increased the principal amount nor the interest rate of the senior mortgage, there is no basis to subordinate the senior mortgage to Sperry's junior lien. Defendants' motion for summary judgment is therefore granted, and Sperry's motion for summary judgment is denied.

JURISDICTION

This Court has jurisdiction of this core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K), 28 U.S.C. § 1334, and the Eastern District of New York standing order of reference dated August 28, 1986, as amended by order dated December 5, 2012. This decision constitutes the Court's findings of fact and conclusions of law to the extent required by Federal Rule of Bankruptcy Procedure 7052.

BACKROUND

The following facts are undisputed, except as otherwise noted.

The debtor, Delroy Anthony White (the "Debtor"), owns real property located at 108-20A 172nd Street, Jamaica, New York 11433 (the "Property"). (Schedule A, 12-47895-CEC, ECF No. 1.) The Debtor executed a note and mortgage, dated November 23, 2005 in the original

principal amount of $323,000 in favor of First Financial Equities (respectively, the "Chase Note" and the "Chase Mortgage"). (JPMorgan Chase's Mot. for Summ. J., Exs. 2 and 3, 13-01144-CEC, ECF Nos. 20-4 and 20-5.) On December 21, 2005, the Chase Mortgage was recorded against the Property and was held in the name of Mortgage Electronic Registration Systems, Inc. ("MERS"), as mortgage and nominee of First Financial Equities. (JPMorgan Chase's Mot. for Summ. J., Ex. 3, 13-01144-CEC, ECF No. 20-5.) On December 13, 2012, an assignment of mortgage was recorded which assigned the Chase Mortgage from MERS to a trust, for which U.S. Bank National Association ("U.S. Bank") acts as trustee, and for which Chase acts as servicer. (JPMorgan Chase's Mot. for Summ. J., Exs. 8 and 9, 13-01144-CEC, ECF Nos. 20-10 and 20-11.)

On May 2, 2007, the Debtor executed a note in favor of Sperry (the "Sperry Note") for $55,000 and executed a second mortgage (the "Sperry Mortgage") on the Property to secure the Sperry Note. (collectively, the "Sperry Loan"). (Sperry's Mot. for Summ. J., Ex. C, 13-01144-CEC, ECF No. 21-3.) The Sperry Mortgage has a maturity date of May 2, 2022. Id. The Sperry Mortgage was recorded on June 4, 2007. (Compl., 13-01144-CEC, ECF No. 1 at ¶ 14.)

On February 9, 2009, the Debtor executed a loan modification agreement with Chase and MERS, as nominee (the "2009 Modification"). (JPMorgan Chase's Mot. for Summ. J., Ex. 6, 13-01144-CEC, ECF No. 20-8.) The 2009 Modification reaffirmed the total amount outstanding on the Note and reduced the interest rate from 6.925% to 3.000%, for one year, and provided for the interest rate to increase during each of the following two years, and to be capped at 5.617%. Id. No new funds were advanced in connection with the 2009 Modification. Id. Although the 2009 Modification was entered into without Sperry's consent, Sperry does not

contend that the 2009 Modification impaired its position as a junior mortgagee. (Comp., 13-01144-CEC, ECF No. 1.)

On October 28, 2010, the Debtor executed a second loan modification agreement with Chase and MERS, as nominee (the "2010 Modification"), in which he acknowledged that he was in default under the Chase Note and unable to make the monthly payments under the Chase Mortgage, absent modification. (Reply Affirmation in Further Supp. of Defs.' Mot. for Summ. J., 13-01144-CEC, ECF No. 30-1). The 2010 Modification, which was entered into pursuant to the Federal Home Affordable Modification Program ("HAMP"), lowered the Debtor's monthly payment obligations under the Note. (JPMorgan Chase's Mot. for Summ. J., Ex. 7, 13-01144-CEC, ECF No. 20-9.) Applying HAMP guidelines, the 2010 modification (i) extended the maturity date of the Note by one month, to January 1, 2036; (ii) capitalized arrears owed on the Note and deferred, interest free, any payment on account of $65,300 of the modified principal balance to the end of the term of the Note, at which time the deferred principal amount plus all other amounts due under the Note would be due and payable; (iii) reduced the interest rate to 2.000% for 5 years, with a step up to 3% in year 6, to 4% in year 7, and to 4.25% in year 8 for the remaining term of the loan. Id. No new funds were advanced under the 2010 Modification. Id. Like the 2009 Modification, the 2010 Modification was entered into without Sperry's consent. (Compl., 13-01144-CEC, ECF No. 1 at ¶ 37.)

On November 15, 2012, the Debtor filed a petition for relief pursuant to chapter 13 of the Bankruptcy Code. (Chapter 13 Voluntary Pet., 12-47895-CEC, ECF No 1.) Chase, as servicer of the Chase Mortgage, filed a proof of claim (12-47895-CEC, Claim No.17) in the amount of $314,832.34. Sperry filed a proof of claim (12-47895-CEC, Claim No. 9) in the amount of $54,477.42. The Property had a value of approximately $300,000, based on appraisals

performed in June, 2012. (Mot. to Avoid Lien, 12-47895-CEC, ECF No. 20-3). On February 28, 2013, the Debtor filed a motion pursuant to 11 U.S.C. § 506(a)(1) and Fed. R. Bankr. P. 3012 to deem Sperry's secured claim to be wholly unsecured for the purposes of the Debtor's chapter 13 plan of reorganization. (Mot. to Avoid Lien, 12-47895-CEC, ECF No. 20). The Debtor's motion was granted by order entered on May 23, 2013, without prejudice to Sperry's rights if successful in its claim for subordination of the Chase Mortgage. (Order, 12-47895-CEC, ECF No. 42.) The Debtor's chapter 13 plan was confirmed on May 30, 2013. (Order Confirming Chapter 13 Plan, 12-47895-CEC, ECF No. 48.)

On May 2, 2013, Sperry filed this adversary proceeding, seeking to subordinate the Chase Mortgage to the Sperry Mortgage, or in the alternative to subordinate the amount of the deferred principal balance under the 2010 Modification to the Sperry Mortgage, and to disallow Chase's proof of claim. (Compl., 13-01144-CEC, ECF No.1.) On January 22, 2014, both sides filed motions for summary judgment, which are addressed by this decision. (JPMorgan Chase's Mot. for Summ. J., 13-01144-CEC, ECF No. 20; Sperry's Mot. for Summ. J., 13-01144-CEC, ECF No. 21.)

ARGUMENTS

Sperry argues that the 2010 Modification, by deferring $65,300 of principal to the maturity date of the Note, rather than providing for that amount to be amortized during the term on the Note, made the Note and Mortgage more susceptible to default at maturity. In addition, according to Sperry, the 2010 Modification adversely affected the Sperry Mortgage prior to maturity, because, in the event of a default and foreclosure sale, the deferred balloon payment and lowered monthly payments under the Chase Mortgage would result in a higher amount due on the Chase Mortgage at the time of foreclosure, reducing of the proceeds of the foreclosure

sale available to satisfy the Sperry Note. Because of this, Sperry asserts it is entitled to have its junior mortgage, or at least an amount equal to the $65,300 deferred principal payment under the Chase Mortgage, placed ahead of the Chase Mortgage.

The Defendants argue that Sperry's position was not impaired by the 2010 Modification. The Defendants maintain that the deferred balloon payment does not impair Sperry's position, because the deferred payment does not bear interest, and is due 14 years after the Sperry Note matures. The Defendants also contend that the lowered monthly payments do not impair Sperry's mortgage, but rather improve its position, because, prior to the 2010 Modification, the Debtor was in default and unable to make the monthly payments under the Chase Mortgage.

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is considered material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). No genuine issue exists "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted). "More specifically, it must do more than simply show that there is some metaphysical doubt as to the material facts, and may not rely on conclusory allegations or unsubstantiated speculation." Brown v. Eli Lilly & Co., 654 F.3d 347, 358 (2d Cir. 2011) (internal quotations omitted).

"When cross-motions for summary judgment are pending, '[e]ach individual summary judgment motion must be evaluated independently.'" Healey v. Thompson, 186 F. Supp. 2d 105,

113 (D. Conn. 2001), aff'd in part, vacated in part on other grounds, Lutwin v. Thompson, 361 F.3d 146 (2d Cir. 2004). When deciding cross-motions for summary judgment, the court must "tak[e] care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Otis Elevator Co. v. Civil Factory Mut. Ins. Co., 353 F. Supp. 2d 274 (D. Conn. 2005).

Here, material facts are not in dispute.

DISCUSSION

In general, successive mortgages on the same property are entitled to priority in the order in which they have attached liens on the property. N.Y. C.L.S. Real P. § 291. See Varon v. Annino, 565 N.Y.S.2d 540 (N.Y. App. Div. 1991). "A senior lienor may enter into an agreement with the mortgagor modifying the terms of the underlying note or mortgage without obtaining the consent of any junior lienors." Fleet Bank v. County of Monroe Indus. Dev. Agency, 637 N.Y.S.2d 870, 871 (N.Y. App. Div. 1996). However, if the modification prejudices the rights of the junior lien holder or impairs its security, and is made without the junior lien holder's consent, courts have divested the senior lien holder of its priority and elevated the junior lien holder to a position of superiority. See Shultis v. Woodstock Land Dev. Assoc., 594 N.Y.S.2d 890, 892 (N.Y. App. Div. 1993); Empire Trust Co. v. Park-Lexington Corp., 276 N.Y.S. 586, 592 (N.Y. App. Div. 1934). Where the actions of the senior lien holder prejudice the junior lien holder, but do not substantially impair their security interest or destroy their equity, the senior lien holder will be required to relinquish to the junior holder its priority with respect to the modified terms only. See Shultis 594 N.Y.S. at 892.

In considering whether a modification should cause a senior mortgage to become wholly or partially subordinate to a junior lien, the courts look at the particulars of the modification and

scrutinize certain factors of the transaction. The principal factors considered are whether the modification increased the interest rate or the principal amount of the mortgage obligation.

> [W]hile precedent suggests that extension of the time of payment does not, in and of itself, work prejudice upon junior lienors so as to require their consent, changing the interest rate on the loan and bringing the additional interest charges within the lien of the mortgage does work prejudice inasmuch as the change increases the total amount of indebtedness placed prior to the subordinate lien.

Shultis, 594 N.Y.S.2d at 893 (citations omitted).

Sperry asserts that the 2010 modification adversely affected the Sperry Mortgage in two respects. First, Sperry argues, by changing the amortization of the Chase Mortgage to defer $65,300 of principal to a balloon payment due at maturity, the 2010 Modification has the effect of increasing the likelihood that the Chase Mortgage will default at maturity, by increasing the amount due at that time. Second, Sperry argues the deferral of principal adversely affects the Sperry Mortgage, prior to the maturity of the Chase Mortgage, because in the event of a foreclosure, a larger payment will be due on the Chase Mortgage than if the $65,300 had been amortized during the term of the loan.

These arguments ignore several important facts. First, the interest rate of the Chase Mortgage was substantially lowered under the 2010 Modification, to rates even lower than provided under the 2009 Modification. In addition, the $65,300 deferred principal payment due at maturity does not bear interest. Thus, the total amount payable by the Debtor under the Chase Mortgage was reduced by the 2010 Modification. Although the maturity of the Chase Mortgage was extended by one month under the 2010 Modification, the accrual of additional interest for

this period does not offset the savings resulting from reductions in the interest rate over a 26 year period. [1]

Second, Sperry's argument ignores the fact that, at the time of the 2010 Modification, the Debtor was in default under the Chase Mortgage. Rather than foreclosing the Chase Mortgage at that time, the defendants reduced the Debtor's mortgage payments pursuant to the 2010 Modification, thereby improving the Debtor's ability to make the ongoing payments due under the Sperry Mortgage. For Sperry to argue that it is prejudiced by this modification because it resulted in $ 65,300 being deferred to maturity, rather than being amortized, assumes that the Debtor had the ability, in the absence of the modification, to make both the payments on the Chase Mortgage and the Sperry mortgage, which is not the case. (See 2010 Modification, 13-01144-CEC, ECF No. 20-9 at ¶ 1, in which the Debtor represents "I am experiencing a financial hardship, and as a result, (i) I am in default under the Loan Documents, and (ii) I do not have sufficient income or access to sufficient liquid assets to make the monthly mortgage payments now or in the near future.")

Finally, the argument that deferral of $65,300 in principal under the Chase Mortgage to maturity increased the likelihood that the Debtor would be unable to pay the Sperry Mortgage at maturity ignores the fact that the Sperry Mortgage matures 14 years before the Chase Mortgage. Thus, from the standpoint of the Debtor's ability to pay the Sperry Mortgage during its term and at maturity, the deferral of principal improved Sperry's position.

In short, the undisputed facts provide no basis for subordinating any portion of the Chase Mortgage to the Sperry Mortgage, as the 2010 Modification neither increased the interest rate

[1] At the hearing on the summary judgment motions, Sperry's counsel acknowledged that the 2010 Modification resulted in a reduction of the amount due under the Chase Mortgage. (Hr'g Tr. 8:17-8:22, Mar. 20, 2014, 13-01144, ECF No. 32.)

nor increased the amount secured by the Chase Mortgage, or otherwise impaired the Sperry Mortgage in any other manner.

Conclusion

For all of these reasons, Defendants' motion for summary judgment is granted and Sperry's motion for summary judgment is denied. A separate order will issue.

Dated: Brooklyn, New York
August 14, 2014

Carla E. Craig
United States Bankruptcy Judge

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 13
	:	Case No. 15-35224 (CGM)
Maggie Garrido-Yarnis,	:	
Debtor.	:	

MEMORANDUM DECISION DENYING MOTION TO AVOID IRS TAX LIEN

APPEARANCES:

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CECELIA G. MORRIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Before the Court is Debtor's motion to avoid an Internal Revenue Service ("IRS") tax lien against the Debtor's real property. Because the tax lien attaches to real and personal property, Debtor has not met her burden of demonstrating that the tax lien is wholly unsecured and the Court denies the motion.

Jurisdiction

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. § 157(a) and the Standing Order of Reference signed by Chief Judge Loretta A. Preska dated January 31, 2012. This is a "core proceeding" under 28 U.S.C. §§ 157(b)(2)(A) (matters concerning the administration of the estate); 157(b)(2)(K) (determinations of the validity, extent, or priority of liens).

Background[1]

On February 12, 2015, Debtor filed for chapter 13. Vol. Pet., ECF No. 1. On December 21, 2015, Debtor filed a motion seeking to avoid a federal tax lien pursuant to 11 U.S.C. § 506. Mot., ECF No. 62. The IRS opposes the motion on several grounds, including: 1) a modification of its lien can only occur through the chapter 13 plan and not solely through the use of § 506; and 2) under §§ 1322 and 1325 only wholly unsecured liens can be avoided, which is not proven here. Opp., ECF No. 68.

Discussion

Debtor argues that § 506(d) may be used to void statutory liens, such as the liens held by the IRS in this case. The Supreme Court, in *Dewsnup v. Timm*, defined "secured" in the context of § 506(d) in a somewhat confusing manner and completely differently than its definition in § 506(a). 502 U.S. 410, 422 (1992). For purposes of § 506(d), a claim is secured if it is "'secured' in the ordinary sense, i.e., that is backed up by a security interest in property, whether or not the value of the property suffices to cover the claim." *See In re Strober*, 136 B.R. 614, 619 (Bankr. E.D.N.Y. 1992). A claim is either secured under § 506(d) or it is not.

[1] All citations in the Background are to the electronic docket of bankruptcy case number 15-35224, unless otherwise indicated.

> There is no basis [under the Bankruptcy Code] to divide the claim into separate claims for each type of collateral—i.e., one claim secured by the real property and a second claim secured by the personal property—which would then be independently analyzed to determine whether they are allowed secured claims.

In re Williams, 488 B.R. 492, 499 (Bankr. M.D. Ga. 2013). Thus, the IRS' claim here is clearly "secured" for purposes of § 506(d).

While Debtor did not move under § 506(d), Debtor implied that the Second Circuit's decision in *In re Pond* allows the lien to be avoided. *Pond v. Farm Specialist Realty (In re Pond)*, 252 F.3d 122, 125 (2d Cir. 2001). As such, the Court will consider the Debtor's motion under that standard. *Pond* allows a Debtor to avoid a mortgage lien by using § 506(a) in conjunction with §1322(b)(2). *Pond*, 252 F.3d at 125. Section 506(a) allows a debtor to divide a claim into secured and unsecured portions. 11 U.S.C. § 506(a). Thus, one must look to § 506(a) to determine whether *any* portion of a creditor's claim is secured. *See Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 328 (1993). If there is any portion of the claim that is secured, the creditor's rights in the entire claim are protected under § 1322(b)(2), which states that "the plan may . . . modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." *Pond*, 252 F.3d at 125; 11. U.S.C. § 1322(b)(2).

Normally, *Pond* is used to avoid wholly unsecured junior mortgage liens. *Id.* Mortgage liens generally attach only to a specific parcel or parcels of real property. Federal tax liens are different. The Internal Revenue Code states:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6321. This language creates a single lien on all of a debtor's real and personal property. "[E]ven if one or more properties subject to [the IRS'] lien is without value, if any of the property retains value, Debtors cannot bifurcate [the IRS'] undersecured claim into secured and unsecured claims." *Hoekstra v. United States (In re Hoekstra)*, 255 B.R. 285, 291 (E.D. Va. 2000).

So long as the IRS' lien retains any value, including even one dollar of security in Debtor's personal property, the entire lien is considered secured and cannot be avoided. *Nobelman*, 508 U.S. at 328-29. The Court is aware that the Third Circuit held differently in *Hammond v. Commonwealth Mortg. Corp. (In re Hammond)*, 27 F.3d 52, 56 (3d Cir. 1994). In *Hammond*, the Third Circuit focused on the word "solely" in § 1322 and held that the antimodification clause does not protect a mortgagee that holds a lien on both real and personal property (i.e. appliances, machinery, furniture, and equipment). *Id.* at 58. The Court believes that this is not consistent with the Supreme Court's decision in *Nobelman*, which rebuked reading a clause that was "sensible as a matter of grammar" to compel the meaning of "secured claim." *Nobelman*, 508 U.S. at 330-31. As such, this Court does not adopt the same reasoning.

Here, Debtor has submitted an appraisal of her real property only. To show that there is no equity to support the IRS' tax lien, Debtor must demonstrate that there is no value in her personal property as well. Thus, Debtor has not met her burden of demonstrating that the IRS' lien is wholly unsecured and can be avoided.

Conclusion

For the foregoing reasons, Debtor's motion to avoid the IRS' tax lien is DENIED. The IRS shall submit an order consistent with this Memorandum Decision.

/s/ Cecelia G. Morris

Dated: February 10, 2016
Poughkeepsie, New York

Hon. Cecelia G. Morris
Chief U.S. Bankruptcy Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID K. ZACHARY; ANNMARIE S. SNORSKY, *Debtors-Appellants*, v. CALIFORNIA BANK & TRUST, *Respondent-Appellee*.	No. 13-16402 D.C. No. 2:11-bk-42866 OPINION

Appeal from the United States Bankruptcy Court
for the Eastern District of California
Thomas C. Holman, Bankruptcy Judge, Presiding

Argued and Submitted
October 21, 2015—Stanford Law School, California

Filed January 28, 2016

Before: Richard A. Paez, Mary H. Murguia,
and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Hurwitz

SUMMARY*

Bankruptcy

Affirming the bankruptcy court's order sustaining an objection to a chapter 11 plan of reorganization, the panel held that the absolute priority rule in 11 U.S.C. § 1129(b)(2)(B)(ii)—providing that a dissenting class of unsecured creditors must be provided for in full before an individual debtor can retain any property under a reorganization plan—continues to apply following the amendments to the Bankruptcy Code enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act.

Following other circuits, the panel overruled *In re Friedman*, 466 B.R. 471 (9th Cir. BAP 2012), and adopted the "narrow view" that the BAPCPA amendments merely have the effect of allowing individual chapter 11 debtors to retain property and earnings acquired after the commencement of the case that would otherwise be excluded under § 541(a)(6) & (7). Thus, an individual debtor may not "cram down" a plan that would permit the debtor to retain prepetition property that is not excluded from the estate by § 541, but may cram down a plan that permits the debtor to retain only postpetition property.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

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Matthew D. Murphey (argued), Penelope Parmes, Martin W. Taylor, Meghan Canty Sherrill, Troutman Sanders LLP, Irvine, California, for Respondent-Appellee.

OPINION

HURWITZ, Circuit Judge:

This case presents an arcane but important question of first impression in this Circuit: Does the absolute priority rule continue to apply in individual chapter 11 reorganizations after the amendments to the Bankruptcy Code enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")? We hold that it does.

I. Factual and Procedural Background

In September 2011, David K. Zachary and Annmarie S. Snorsky ("Debtors") filed a joint voluntary individual chapter 11 petition. The Debtors' operative plan of reorganization placed their largest unsecured creditor, California Bank & Trust ("California Bank"), into its own class of unsecured creditors and proposed to pay it $5,000 on its claim of nearly $2,000,000. California Bank's claim was thus "impaired under the plan." 11 U.S.C. § 1129(a)(8)(B).

California Bank objected, arguing that the plan violated the so-called absolute priority rule of 11 U.S.C.

§ 1129(b)(2)(B)(ii). The bankruptcy judge, disagreeing with the Ninth Circuit Bankruptcy Appellate Panel ("BAP") opinion in *In re Friedman*, 466 B.R. 471 (B.A.P. 9th Cir. 2012), sustained the objection, holding that "the absolute priority rule still prevails" in individual chapter 11 bankruptcies after the enactment of BAPCPA.[1]

Debtors filed a timely notice of appeal of the bankruptcy court's order sustaining California Bank's objection to their plan. The bankruptcy court certified the appeal, and this Court authorized a direct appeal. 28 U.S.C. § 158(a), (d)(2)(A).

II. Discussion

We review "de novo the bankruptcy court's and the BAP's interpretations of the bankruptcy statute." *In re Boyajian*, 564 F.3d 1088, 1090 (9th Cir. 2009). "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989).

[1] Debtors argue that *In re Windmill Farms, Inc.*, 70 B.R. 618 (B.A.P. 9th Cir. 1987), *rev'd on other grounds*, 841 F.2d 1467, 1474 (9th Cir. 1988), "held that BAP decisions were binding on all bankruptcy courts in this circuit," and the bankruptcy court here was required to follow *In re Friedman*. Because we must today address the continued applicability of the absolute priority rule regardless of the precedential effect of BAP opinions, we pretermit consideration of the issue. *Cf. Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir. 1990) (O'Scannlain, J., specially concurring) (discussing need for judicial council action to make BAP decisions binding on all bankruptcy courts within the circuit).

A. Individual chapter 11 bankruptcies and the absolute priority rule.

"Individual debtors have two basic options under the Code." *Ice House Am., LLC v. Cardin*, 751 F.3d 734, 736 (6th Cir. 2014). They can either liquidate their non-exempt assets under chapter 7, or file for reorganization under chapters 11 or 13. *See* 11 U.S.C. §§ 701–84, 1101–46, 1301–30. A chapter 13 reorganization, however, is only available to individual debtors whose debts fall below certain limits. *See* 11 U.S.C. § 109(e). Individual debtors with more debt can only file for reorganization under chapter 11, which is "used primarily by debtors with ongoing businesses." *Toibb v. Radloff*, 501 U.S. 157, 163 (1991) (emphasis omitted).

An individual filing under chapter 11 may confirm a plan of reorganization in one of two ways. The first is by satisfying the bankruptcy court that a plan complies with each of the sixteen paragraphs in 11 U.S.C. § 1129(a). Under this path, "[o]f particular note is the requirement of obtaining the consent of each class of creditor as required by paragraph (8) of § 1129(a)." *In re Friedman*, 466 B.R. at 480. Absent unanimous approval of the plan by each class of creditors, a debtor must pursue the second path to confirmation.

Under the second path, a debtor can obtain confirmation by satisfying the bankruptcy court that, notwithstanding any creditor's objections, the plan is "fair and equitable" to each creditor class. 11 U.S.C. § 1129(b)(1), (2). Because this "nonconsensual method of confirmation" is obtained over creditor objection, it is known as a "cramdown." *In re Friedman*, 466 B.R. at 480. A debtor may cram down a plan only if it complies with the absolute priority rule in § 1129(b)(2)(B)(ii). Put another way, a bankruptcy judge

may find that a debtor's plan is "fair and equitable" to an objecting creditor only if the plan complies with the absolute priority rule.

The absolute priority rule is a "judicially created concept," with its genesis in "early twentieth-century railroad cases." *In re Friedman*, 466 B.R. at 478. It arose from the Bankruptcy Code's statutory requirement, now codified in 11 U.S.C. § 1129(b)(2), that a reorganization plan be "fair and equitable" to each class of creditors. The rule "provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property under a reorganization plan." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (alteration omitted) (quoting *In re Ahlers*, 794 F.2d 388, 401 (8th Cir. 1986)). "The U.S. Supreme Court adopted the absolute priority rule to prevent deals between senior creditors and equity holders that would impose unfair terms on unsecured creditors." *In re Friedman*, 466 B.R. at 478; *see also N. Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 503–04 (1913). The rule later "gained express statutory force, and was incorporated into Chapter 11 of the Bankruptcy Code adopted in 1978" as 11 U.S.C. § 1129(b)(2)(B)(ii). *Norwest*, 485 U.S. at 202.

Before the adoption of BAPCPA in 2005, it was clear that "no Chapter 11 reorganization plan can be confirmed over the creditors' legitimate objections (absent certain conditions not relevant here) if it fails to comply with the absolute priority rule." *Id.* At that time, the absolute priority rule provided:

> [T]he condition that a plan be fair and equitable with respect to a class [of creditors] includes the following requirements:

. . . .

> (B) With respect to a class of unsecured claims–
>
> > (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
> >
> > (ii) *the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.*

11 U.S.C. § 1129(b)(2)(B)(ii) (1994) (emphasis added). Thus, under the pre-BAPCPA Bankruptcy Code, it was clear that "every unsecured creditor must be paid in full before the debtor can retain 'any property' under a plan." *Ice House*, 751 F.3d at 737 (quoting 11 U.S.C. § 1129(b)(2)(B)(ii)).

B. Amendment of the absolute priority rule by BAPCPA.

Three provisions of the post-BAPCPA Bankruptcy Code intertwine to implement the absolute priority rule. First, § 541, which was not altered by BAPCPA, defines an estate in bankruptcy as "comprised of all" the property enumerated in that section, "wherever located and by whomever held," including "all legal or equitable interests of the debtor in property *as of the commencement of the case*." 11 U.S.C. § 541(a), (a)(1) (emphasis added). Under this section, the "property of the estate," and, therefore, the property subject

to the absolute priority rule in chapter 11 cases, is "the property the debtor owned 'as of the commencement of the case.'" *Ice House*, 751 F.3d at 737–38 (quoting 11 U.S.C. § 541(a)(1)).

The second relevant provision is § 1115, which was added in 2005 by BAPCPA. Pub. L. No. 109-8, § 321, 119 Stat. 23, 94–95 (2005). Section 1115, which only applies to individual chapter 11 proceedings, adds to the § 541 "property of the estate" certain property obtained by the debtor "after the commencement of the case":

> In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541–
>
> > (1) all property of the kind specified in section 541 that the debtor acquires *after the commencement of the case* but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and
> >
> > (2) earnings from services performed by the debtor *after the commencement of the case* but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

11 U.S.C. § 1115(a) (emphasis added).

Finally, BAPCPA amended the absolutely priority rule itself, adding the underscored language to § 1129(b)(2)(B)(ii):

> [T]he condition that a plan be fair and equitable with respect to a class [of creditors] includes the following requirements:
>
> . . . .
>
> (B) With respect to a class of unsecured claims–
>
> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, *except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.*

Pub. L. No. 109-8, § 321, 119 Stat. 23, 95 (emphasis added).

The new clauses in subsection (B)(ii) plainly create an exception to the absolute priority rule that applies only to a chapter 11 "case in which the debtor is an individual." 11 U.S.C. § 1129(b)(2)(B)(ii). But the question is, what is the exception's scope? Or, put another way, what property may an individual chapter 11 debtor retain "without running

afoul of the absolute priority rule"? *In re Friedman*, 466 B.R. at 487 (Jury, Bankr. J., dissenting).

C. Post-BAPCPA case law.

"A significant split of authorities has developed nationally among the bankruptcy courts" regarding the answer to this question. *In re Maharaj*, 681 F.3d 558, 563 (4th Cir. 2012) (describing division). Two conflicting positions have emerged: the "broad view" and the "narrow view." *Id.*

Courts applying the broad view hold that

> by including in § 1129(b)(2)(B)(ii) a cross-reference to § 1115 (which in turn references § 541, the provision that defines the property of a bankruptcy estate), Congress intended to include the entirety of the bankruptcy estate as property that the individual debtor may retain, thus effectively abrogating the absolute priority rule in Chapter 11 for individual debtors.

Id. Under this view, an individual debtor is entitled to retain most prepetition and postpetition property and nonetheless cram down a plan over an unsecured creditor's objection. *See, e.g.*, *In re Friedman*, 466 B.R. at 482; *In re Anderson*, No. 11-61845-11, 2012 WL 3133895, at *7 n.6 (Bankr. D. Mont. Aug. 1, 2012); *In re Shat*, 424 B.R. 854, 868 (Bankr. D. Nev. 2010); *In re Roedemeier*, 374 B.R. 264, 276 (Bankr. D. Kan. 2007).

Courts applying the narrow view instead hold "that the BAPCPA amendments merely have the effect of allowing individual Chapter 11 debtors to retain property and earnings

acquired after the commencement of the case that would otherwise be excluded under § 541(a)(6) & (7)." *In re Maharaj*, 681 F.3d at 563. Under this view, an individual debtor may not cram down a plan that would permit the debtor to retain prepetition property that is not excluded from the estate by § 541, but may cram down a plan that permits the debtor to retain only postpetition property.

A split panel of the Ninth Circuit BAP accepted the broad view in *In re Friedman*, 466 B.R. at 484. But, all of our sister circuits that have considered the issue have adopted the narrow view,[2] as have a sizeable majority of the district, bankruptcy appellate, and bankruptcy courts.[3] We

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[2] *See Ice House*, 751 F.3d at 740 ("We therefore hold that the absolute-priority rule continues to apply to pre-petition property of individual debtors in Chapter 11 cases."); *In re Lively*, 717 F.3d 406, 410 (5th Cir. 2013) ("The absolute priority rule, in particular, has been a cornerstone of equitable distribution for Chapter 11 creditors for over a century. We must presume Congress was well aware of that rule and, in the absence of a clearer directive, modified § 1129(b)(2)(B)(ii) in order to refine it, not reverse it, for individual debtors."); *In re Stephens*, 704 F.3d 1279, 1287 (10th Cir. 2013) ("[W]e decline to find an implied repeal [of the absolute priority rule] here."); *In re Maharaj*, 681 F.3d at 575 ("[W]e believe that Congress did not intend to abrogate the absolute priority rule for individual Chapter 11 debtors.").

[3] *See, e.g.*, *In re Woodward*, 537 B.R. 894, 901 (B.A.P. 8th Cir. 2015); *In re Brown*, 505 B.R. 638, 648-49 (E.D. Pa. 2014); *In re Tucker*, 479 B.R. 873, 877-78 (Bankr. D. Or. 2012); *In re Arnold*, 471 B.R. 578, 613-14 (Bankr. C.D. Cal. 2012); *In re Borton*, No. 09-00196-TLM, 2011 WL 5439285, at *4 (Bankr. D. Idaho Nov. 9, 2011); *In re Kamell*, 451 B.R. 505, 512 (Bankr. C.D. Cal. 2011); *In re Draiman*, 450 B.R. 777, 821 (Bankr. N.D. Ill. 2011); *In re Stephens*, 445 B.R. 816, 820-21 (Bankr. S.D. Tex. 2011); *In re Karlovich*, 456 B.R. 677, 682 (Bankr. S.D. Cal. 2010); and *In re Gbadebo*, 431 B.R. 222, 230 (Bankr. N.D. Cal. 2010). *But see, e.g.*, *In re Friedman*, 466 B.R. at 482; *In re*

today agree with our sister circuits and overrule *In re Friedman*.

D. Interpretation of the BAPCPA amendments.

BAPCPA added § 1115 as an entirely new provision of the Bankruptcy Code. That section "expands the definition of 'property of the estate' in Chapter 11 cases to include, for the first time, property obtained by the debtor 'after the commencement of the case.' And all of that property, absent some other amendment to the Code, would be subject to the absolute-priority rule." *Ice House*, 751 F.3d at 738 (quoting 11 U.S.C. § 1115(a)(1), (2)). The new language in § 1129(b)(2)(B)(ii) added by BAPCPA obviously creates "an exception to the absolute-priority rule," but less obvious is "the exception's scope." *Id.* The key to that question is determining what the word "included" means in the phrase of § 1129(b)(2)(B)(ii) stating that "the debtor may retain property included in the estate under section 1115."

The *Friedman* majority determined:

> "Included" is not a word of limitation. To limit the scope of estate property in §§ 1129 and 1115 would require the statute to read "included, except for the property set out in Section 541" (in the case of § 1129(b)(2)(B)(ii)), and "in addition to, but not inclusive of the property described in Section 541" (in the case of § 1115).

Anderson, 2012 WL 3133895, at *7 n.6; *In re Shat*, 424 B.R. at 868; and *In re Roedemeier*, 374 B.R. at 276.

466 B.R. at 482 (footnote omitted). In contrast, the Sixth Circuit's opinion in *Ice House* held:

> The critical language in § 1129(b)(2)(B)(ii) is that "the debtor may retain property included in the estate under section 1115." And the key word within that language is "included." "Include" is a transitive verb, which means it "shows action, either upon someone or something." Shertzer, *Elements of Grammar* 26 (1986). The action described by "include" is either "to take in as a part, an element, or a member" (first definition) or "to contain as a subsidiary or subordinate element" (second definition). *The American Heritage Dictionary* 913 (3d ed. 1992). The first definition ("to take in") describes genuine action—grabbing something and making a part of a larger whole—whereas the second definition ("to contain") lends itself, more dryly, to a description of things that are already there— "the duties of a fiduciary include. . . ." The first definition is plainly the better fit in § 1129(b)(2)(B)(ii): converted into the active voice, § 1129(b)(2)(B)(ii) refers to property that § 1115 includes in the estate, which naturally reads as "property that § 1115 takes into the estate," rather than as "property that § 1115 contains in the estate." Thus—employing this definition and converted into the active voice—§ 1129(b)(2)(B)(ii) provides that "the debtor may retain property that § 1115 takes into the estate."

Ice House, 751 F.3d at 738–39 (alterations omitted). Under this reading, "what § 1115 takes into the estate is property 'that the debtor acquires *after* the commencement of the case,'" and it is only "*that* property" that "'the debtor may retain' when his unsecured creditors are not fully paid." *Id.* at 739 (quoting 11 U.S.C. §§ 1115(a), 1129(b)(2)(B)(ii)) (internal punctuation omitted).

We agree with the Sixth Circuit. Section 1115 and the new clauses in § 1129(b)(2)(B)(ii) were both added by BAPCPA. Reading these two provisions as defining a new class of property that is exempt from the absolute priority rule nicely harmonizes the new provisions.[4] *See In re Lively*, 717 F.3d 406, 409 (5th Cir. 2013) ("[W]e are inclined to

[4] Some courts and commentators have suggested that the cross-reference in the second new clause in § 1129(b)(2)(B)(ii) to § 1129(a)(14), a provision involving domestic support obligations, is a scrivener's error and was meant to refer to § 1129(a)(15), which involves a new "best efforts" requirement added to chapter 11 by BAPCPA. *See, e.g.*, *In re Lucarelli*, 517 B.R. 42, 47 n.2 (Bankr. D. Conn. 2014); *In re Lively*, 467 B.R. 884, 890 n.3 (Bankr. S.D. Tex. 2012); *In re Shat*, 424 B.R. at 860 n.21; Ralph Brubaker, *The Absolute Priority Rule for Individual Chapter 11 Debtors: To Be or Not to Be?*, 32 No. 10 Bankr. L. Letter, at 5 (Oct. 2012) ("[A]s all fully recognize, the cross-reference in the absolute priority rule amendment to § 1129(a)(14) (dealing with full payment of domestic support obligations) was obviously a drafting error."). We need not decide that issue today. We note that although the reference to (a)(14) may have been a scrivener's error, it is "not an entirely absurd mixup. . . . One could easily assume that Congress wished to protect domestic support creditors by not allowing a debtor to keep any postpetition earnings—a form of Section 1115 property—so long as any domestic support obligation was not current." *In re Shat*, 424 B.R. at 860 n.21.

agree with the bankruptcy court in this case that the 'narrow' interpretation is unambiguous and correct.").

The history of the absolute priority rule also strongly supports the narrow view. Congress repealed the absolute priority rule in 1952, only to reinstate it in 1978, demonstrating that when it intends to abrogate the rule, it knows how to do so explicitly. *Compare* H.R. Rep. No. 82-2320 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1960, 1981–82, *with* Bankruptcy Code of 1978, Pub. L. No. 95-598, § 1129, 92 Stat. 2549, 2635–38 (codified in scattered sections of 11 and 28 U.S.C.).[5] More importantly, the

[5] The legislative history of the BAPCPA also bolsters the view that Congress did not intend to repeal the absolute priority rule. The Judiciary Committee Report describes "various consumer protection reforms" in BAPCPA, such as penalizing "a creditor who unreasonably refuses to negotiate" and requiring certain credit solicitations to "include enhanced consumer disclosures." H.R. Rep. No. 109-31(I), pt. 1, at 2 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 89. But this list of protections does not include any supposed repeal of the absolute priority rule. It seems unlikely that Congress would address a cornerstone rule of bankruptcy practice "in the most oblique way possible, and yet omit any mention of this remedy from the legislative history." *In re Maharaj*, 681 F.3d at 575; *see also Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) ("Furthermore, this Court has been reluctant to accept arguments that would interpret the [Bankruptcy] Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."); *In re Bonner Mall P'ship*, 2 F.3d 899, 913 (9th Cir. 1993) ("Where the text of the Code does not unambiguously abrogate pre-Code practice, courts should presume that Congress intended it to continue unless the legislative history dictates a contrary result.") (citing *Dewsnup*, 502 U.S. at 419). It also seems unlikely that Congress would facilitate cramdowns, typically objected to by creditors, in an act designed "to correct perceived abuses of the bankruptcy system." *Ransom v. FIA Card Servs.*, 562 U.S. 61, 64 (2011) (quoting *Milavetz,*

Supreme Court has expressly warned against finding implied repeal of provisions of the Bankruptcy Code. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 380 (1988) ("Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute; it is most improbable that it would have been made without even any mention in the legislative history.") (citation omitted); *see also In re Maharaj*, 681 F.3d at 571 ("The canon against implied repeal is particularly strong in the field of bankruptcy law.").

Courts adopting the broad view have stressed that "Congress in adopting BAPCPA's individual debtor chapter 11 provisions borrowed provisions from chapter 13," which does not have an absolute priority rule. *In re Friedman*, 466 B.R. at 483 (comparing, inter alia, §§ 1123(a)(8) and 1322(a)(1), §§ 1141(d)(5)(A) and 1328(a), and §§ 1127(e) and 1329(a)); *see also In re Shat*, 424 B.R. at 868 (noting "the host of change[s] to chapter 11 with respect to individuals, all made with the goal of shaping an individual's chapter 11 case to look like a chapter 13 case"); *In re Roedemeier*, 374 B.R. at 275 ("Many of the BAPCPA's changes to Chapter 11 apply only to individual debtors and are clearly drawn from the Chapter 13 model."). But if the BAPCPA amendments were intended to abrogate the absolute priority rule for chapter 11 individual debtors, Congress could have achieved that goal in a far more straightforward manner. Instead of adding language to § 1129(b)(2)(B)(ii), Congress simply could have made that provision inapplicable to individual chapter 11

Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 231-32 (2010)); *see also In re Friedman*, 466 B.R. at 490 (Jury, Bankr. J., dissenting) ("[T]he purpose behind BAPCPA was to have debtors pay more, not less.").

reorganizations. *See In re Lively*, 717 F.3d at 410 (describing broad view as "a startling, and most indirect, way for Congress to have effected partial implicit repeal of the very provision that the section amended"). Or Congress could have raised the debt limits for chapter 13 cases, ushering more individuals into that regime. *See In re Maharaj*, 681 F.3d at 573 ("Congress could have effected the changes that Debtors argue it sought in a far less awkward and convoluted manner by simply raising the Chapter 13 debt limits and making additional individuals eligible to proceed under that chapter."); *see also Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.") (citation omitted).

We acknowledge that retaining the absolute priority rule in chapter 11 cases works a "double whammy" on a debtor because, under the BAPCPA amendments to § 1129(a)(15), he "must dedicate at least five years' disposable income to the payment of unsecured creditors, and—unlike a debtor in Chapter 13—is also subject to the absolute-priority rule (and thus cannot retain any pre-petition property) if he does not pay those creditors in full." *Ice House*, 751 F.3d at 740. But the broad view could exact a heavy penalty on a "crammed down" creditor, as this case illustrates. Our task is not to balance the equities, however, but to interpret the Bankruptcy Code. *See Norwest*, 485 U.S. at 209 (noting that relief from any unfairness in the statutory scheme "cannot come from a miscontruction of the applicable bankruptcy laws, but rather, only from action by Congress"). We

conclude today that the BAPCPA amendments do not impliedly repeal the long-standing absolute priority rule.

CONCLUSION

The order of the bankruptcy court sustaining California Bank's objection to the Debtors' plan is **AFFIRMED**.

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
POUGHKEEPSIE DIVISION
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In re A.T. Reynolds & Sons, Inc.,

Debtor.

Case No. 08-37739
Chapter 11

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OPINION SANCTIONING WELLS FARGO BANK, N.A. FOR FAILURE TO COMPLY WITH GENERAL ORDER M-211 AND ORDER DIRECTING PARTIES TO MEDIATION

A P P E A R A N C E S:

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CECELIA G. MORRIS
U.S. BANKRUPTCY JUDGE

This decision resolves the Court's Order to Show Cause why Wells Fargo Bank, N.A. ("Wells Fargo") should not be held in contempt of the court orders directing Wells Fargo to engage in mediation with the Debtor, the Committee of Unsecured Creditors, and Boreal, Inc. (the "Mediation Parties"). The Court notes at the outset that this opinion addresses only Wells Fargo's conduct with respect to the mediation itself. The Court makes no findings regarding the merits of the underlying issue that caused the Court to order the Mediation parties to mediation. Any references to the record of the case are made for the limited purposes of providing the context of the mediation, and for the legal analysis of whether Wells Fargo failed to participate in the mediation in good faith.

By order dated August 27, 2009 (the "Mediation Order"), the Court ordered the Debtor, CCV Restructuring, Boreal Water Collection, Inc. ("Boreal"), Wells Fargo Bank ("Wells Fargo"), and counsel to the Committee of Unsecured Creditors (the "Committee") (collectively, the "Mediation Parties") to mediation (the "Mediation"). At a hearing on November 17, 2009 (the "November 17 Hearing"), Robert Goldman (the "Mediator" or "Goldman") advised the Court that one of the Mediation Parties failed to participate in the Mediation in good faith, and that he would provide a report to the Court describing his reasons for making this determination. On December 3, 2009, the Court issued an order to show cause (the "Order to Show Cause"), directing Wells Fargo and its counsel to appear and show cause why they should not be sanctioned for contempt of the Mediation Order and General Order M-390, the most current statement of the mediation program for the Bankruptcy Court for the Southern District of New York.[1] The Court held a hearing on the Order to Show Cause on December 31, 2009 (the "Hearing"), which was attended by two representatives of Wells Fargo, and an associate and a partner of Wells Fargo's counsel in this matter, Ruskin Moscou Faltischek, P.C. ("Ruskin Moscou"). Counsel to Debtor and Boreal were present.[2]

The issue is whether mere attendance at court-ordered mediation, without active participation in the mediation process, satisfies the requirement to participate in good faith. The Court holds that attendance without active participation is insufficient to constitute good-faith

[1] The mediation program for the United States Bankruptcy Court of the Southern District of New York is presently entitled the "Court Annexed Alternative Dispute Resolution Program" (the "ADR Program"). It was adopted on November 12, 1993, by General Order M-117, and amended on January 18, 1995 by General Order M-143. The ADR Program was amended on October 20, 1999, by General Order M-211, and was most recently amended on December 1, 2009, by General Order M-390. The portions of the ADR Program that governed the Mediation have not changed over the evolution of the ADR Program. The Court refers to the General Orders implementing the ADR Program interchangeably throughout this opinion.

[2] Counsel to the Committee appeared by telephone.

participation in mediation. In the case at bar, the Court finds that the Mediation Order was clear and unambiguous, and the Court finds clear evidence that Wells Fargo and its counsel failed to participate in good faith. Therefore, Wells Fargo and its counsel must bear the costs of the mediation as a sanction for their violation of General Order M-211 and the Mediation Order.

Statement Of Jurisdiction

This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. § 157(a) and the Standing Order of Reference signed by Acting Chief Judge Robert J. Ward dated July 10, 1984. A matter concerning the administration of the estate is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Bankruptcy courts have inherent power to enforce their orders by the imposition of sanctions for acts of civil contempt. *See In re Chief Executive Officers Clubs, Inc.*, 359 B.R. 527, 533-534 (Bankr. S.D.N.Y. 2007). When a party fails to participate in mediation in good faith in contravention of a court order, the remedy traditionally is to pay the other parties' costs in attending the conference. *Negron v. Woodhull Hosp.*, No. 05-4147-CV, 2006 WL 759806, at *1 (2d Cir. Mar. 23, 2006) (where parties were ordered to appear and mediate in good faith, district court properly required defendant to pay other parties' expenses); *Hughes v. The Lillian Goldman Family, LLC*, No. 00 CIV. 2388, 2000 WL 1228996, at *2 (S.D.N.Y. Aug. 30, 2000); *cf. In re Chief Executive Officers Clubs, Inc.*, 359 B.R. at 534 ("Civil contempt sanctions may also compensate for any harm that previously resulted").

The following constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052 and 9014.

Facts in the case at bar

A. Events prior to mediation

Debtor filed the petition for chapter 11 relief on December 5, 2008. Wells Fargo controlled and disbursed Debtor's cash collateral pursuant to numerous orders of this Court. On March 27, 2009, the Court held an auction and hearing (the "Sale Hearing"), and Debtor was sold as a going concern to Boreal. The sale was made effective by Order signed and entered on April 3, 2009. On August 13, 2009, the Court signed and entered an Order directing Wells Fargo to make a wire transfer of $35,256.23 to New York State Electric and Gas Corp. ("NYSEG") on or before March 31, pursuant to the record of the Sale Hearing (ECF Docket No. 214).

On July 1, 2009, a transcript of the Sale Hearing appeared on the docket (ECF Docket No. 202). On July 8, 2009, counsel to Boreal moved for payment of certain administrative expenses, which were wage claims of Debtor's employees for the week of Monday, March 30 through Friday, April 3, 2009. Boreal alleged that the Debtor was responsible for that week's payment of wages, but that Boreal was forced to pay the wages. Boreal did not name a specific entity that would reimburse it for the wages, but its motion is replete with references to Wells Fargo. Boreal submitted an e-mail exchange as an exhibit, which included messages on which employees of Wells Fargo and its counsel were included as recipients. An affidavit of service filed by counsel to Boreal indicates that counsel to Wells Fargo was served with the motion by electronic means.

Boreal's relief was granted by order dated July 21, 2009; the order did not specify who would pay Boreal, or what the source of the funds would be. On July 31, 2009, the Debtor moved by counsel to reconsider the order allowing Boreal the payment, characterizing payment

of the wages as a "dispute between Boreal and Wells Fargo over the terms reached at the 363 sale." Counsel to Wells Fargo was served with this motion to reconsider by regular mail.

The Debtor, CCV Restructuring, Boreal, Wells Fargo, and counsel to the Unsecured Creditors' Committee (together, the "Mediation Parties") were sent to mediation by order dated August 27, 2009, "to attempt to resolve disputes by and between the Mediation Parties relative to the section 363 sale held on March 27th, 2009 ... and the sequelae flowing therefrom, ***including but not limited to the payment of wages for the period March 30, 2009***" (the "Mediation Order") (emphasis in original).

The Mediation Order provided, *inter alia*:

> [T]hat the Mediation Parties shall furnish the mediator with copies of such documents and such confidential statement of position as the mediator may request; ...
>
> [T]hat within twenty days of appointment, the mediator shall schedule an initial mediation session; ...
>
> [T]hat this mediation shall be conducted in accordance with the United States Bankruptcy Court of the Southern District of New York Amended General Order for the Adoption of Procedures Governing Mediation of Matters in Bankruptcy Cases and Adversary Proceedings dated January 17, 1995, as amended October 20, 1999 ... ; ...
>
> [T]hat the Mediation Parties shall attend such mediation sessions as the Mediator shall deem appropriate and necessary at such times and places as the mediator shall determine ...

ECF Docket No. 224.

B. Summary of mediator's report

On November 17, 2009 the Mediator reported to the Court that one of the Mediation Parties failed to participate in good faith, and that the Mediator would file a report. The Mediator filed the report with the Court, in which he made the following allegations:

1. In preparation for the mediation session, Wells Fargo claimed to be "at a loss to fully understand the issues at hand;"

2. Wells Fargo desired a mediation statement to be filed with the Court, which would identify the issues to be addressed at the mediation;

3. When supplied with such a statement by counsel to Debtor, Wells Fargo objected to language to the effect that the mediation might cover "any other issues anyone wants to discuss, of course";

4. Wells Fargo demanded to know the identities of the individuals who would attend the mediation;

5. Wells Fargo expressed concern that if its demands were not complied with, then the mediation would be a "free for all" which would "waste everybody's time";

6. Wells Fargo appeared at the mediation by a "junior" representative, a "relationship manager" called Evan Zwerman, and "junior" counsel, Dan McAuliffe;

7. McAuliffe attended the mediation "prepared only to repeat a pre-conceived mantra that indicated that Wells Fargo was not open to any compromise that would involve 'taking a single dollar out of their pocket'";

5. The Mediator's attempts to see if there was any credibility to the concept that the increase in Boreal's interest rate was linked to a payment to NYSEG were deflected by McAuliffe's repeating his mantra;

6. When Goldman told Wells Fargo that he must report the bad faith to the Court, McAuliffe advised Goldman in private that there were two of him (including Zwerman) and just one of the Mediator; and that Goldman "could be assured that Wells Fargo would never agree to my acting as mediator in the future in which Wells Fargo might be a party";

7. Wells Fargo's only offer came after the hearing in which the Court stated the consequences of bad faith, and such offer was "unacceptable" to the other parties; and

8. The offer came after McAuliffe and Zwerman spent "an extended period on the phone with an unidentified person, out of the presence of the mediator."

On December 3, 2009, the Court issued an order to show cause (the "Order to Show Cause"), which states in relevant part:

> 8. On December 1, 2009, the Court received the Mediator's statement, in which the Mediator alleges that Wells Fargo failed to participate in the mediation in good faith in that Wells Fargo, among other things, insisted upon a pleading in support of the mediation being filed with the Court and demanded to know the party representatives of the other Mediation Parties; and attended the mediation by appearance of parties without full settlement authority who mostly repeated the mantra that Wells Fargo would not consider any compromise the would involve taking a single dollar out of its pocket.
>
> 9. If it is found that Wells Fargo failed to participate in good faith, then Wells Fargo will be in contempt of at least two Orders of this Court: General Order No. 390, and the ATR Mediation Order.

ECF Docket No. 230.[3] The Order to Show Cause expressly provided that Wells Fargo and its law firm would separately show cause why they should each not be sanctioned for contempt of the General Order and the Mediation Order.

In opposition to the Court's Order to Show Cause, Wells Fargo alleges:

1. It sent a representative and an attorney with full settlement authority.

According to Wells Fargo, the officer who attended the Mediation, Evan Zwerman, is 33 years old, has 10 years' banking and asset-based lending experience, and is a Vice President and Senior Banker. ECF Docket No. 236, Part 5. He is the "Relationship Manager" of Debtor's account, and has authority to make revolving loans and advances to Debtor. *Id.* He had "equal

[3] The Court clarified its Order to Show Cause on December 17, 2009, to ensure that a senior officer of Wells Fargo would appear at the hearing on the Order to Show Cause, and that a partner of Wells Fargo's law firm would appear at the hearing.

settlement authority" with his supervisor, Mark Long. *Id.* Zwerman states in his affidavit that although his "credit authority" is not unlimited, he had authority to settle the controversy. *Id.* He affirms, "Notwithstanding my authority, the positions presented to me by the other mediation parties and by the Mediator did not persuade me that Wells Fargo should pay the amounts demanded by the Mediator." *Id.*

In an affidavit, Robert Ostrowe, Senior Vice President of Wells Fargo, admits, ***"within the parameters of the bank's credit policies***, bank officers, such as Evan Zwerman, are vested with discretion to be exercised within their sound business judgment." ECF Docket No. 236, Part 4 (emphasis added).

Jeffrey Wurst, a partner of Ruskin Moscou, states in an affidavit that Daniel McAuliffe, who appeared at the mediation, is a "senior attorney" at the firm, and has 10 years' legal experience, including a clerkship with a New Jersey bankruptcy judge. ECF Docket No. 236, Part 2.

In his affirmation, McAuliffe challenges the substantive statements made by the Mediator, including whether there was a link between the NYSEG payment and the nonpayment of wages; denies acting in an obstructive manner during the mediation; and generally accuses the mediator of not being neutral. *See* ECF Docket No. 236, Part 6. McAuliffe expresses dissatisfaction with the Mediator, and expressly denies the Mediator's allegation that McAuliffe threatened the Mediator that he would never mediate for Wells Fargo again. *Id.* McAuliffe qualifies his denial of threatening Goldman with the statement, "Following this experience and my current impression of Mr. Goldman, however, it is likely true that I would not willingly agree to his serving as a 'neutral' in a matter in which I am involved." *Id.*

2. Wells Fargo was not a named party to motion practice related to payment of the wages, and therefore had no idea what the Mediation was about or how to prepare for it.

Wells Fargo insists that it was not named directly as a culpable party in the motions that preceded the Mediation. ECF Docket No. 236, Part 2, 6-7. An item of controversy is Wells Fargo's insistence on being provided a list of issues to be discussed at the Mediation that would limit the issues to be discussed at the Mediation. *Id.*, 6-8.[4]

The Court notes that the Mediator advised the Mediation Parties in an e-mail that the issues would not be limited to the ones proposed by Debtor's counsel – it is for the mediator to decide which issues were relevant. The Mediator stated, "We will go where the river takes us." ECF Docket No. 236, Part 3, Exh. C.

In his affidavit in response to the Court's Order to Show Cause, Jeffrey Wurst, counsel to Wells Fargo, includes a pre-mediation e-mail exchange between himself and the Mediator, in which Wurst responds to the message referenced in the preceding paragraph:

> We have not been involved in this matter since early April 2009. It appears that subsequent to that date a dispute arose and it appears that those issues have been referred to mediation. I suggest that before we can prepare any statement for you we need to know what it is that is being submitted to mediation. Absent that there is nothing for us to present to you because we do not know the issues. Nothing productive can be achieved from a "free for all" mediation. Certainly we cannot be prepared to discuss any issue that is not first placed on the proverbial table.
>
> Although we have been involved in many mediations in the Bankruptcy Court for the Southern District of New York, and have found them to be effective, this is the first time we are asked to participate in a process where no issues have first been presented in writing to the Court. Thus we remain puzzled. We submit that to have us all come to a mediation wholly unprepared would be a waste of everyone's time.
>
> We will be prepared to discuss only the five items enumerated by [Debtor's counsel]. In the event any additional issues are raised we will address them at the

[4] This matter is further referenced in the Mediator's Report, which is not available for viewing on ECF due to its confidential nature.

> mediation only if we feel we are able to without the benefit of reviewing any documents or other preparation.

ECF Docket No. 236, Part 3, Exh. C. An additional e-mail exchange supports the Mediator's allegation that counsel to Wells Fargo demanded to know the identities of the representatives. ECF Docket No. 236, Part 3, Exh. D.

3. Courts cannot force parties to settle, and parties are free to adopt "no-pay" positions at settlement conferences.

In response to the Court's Order to Show Cause, Wells Fargo argues that the law in the Second Circuit is that a court cannot force parties to settle.

4. Boreal did not send a principal to the mediation, either.

In his affirmation, McAuliffe alleges that Boreal was represented by Vivian Faliski, a "bookkeeper." The Mediator apparently mistook her for a principal with full settlement authority for Boreal.

In its brief support of sanctions, Boreal asserts that Faliski is the "Controller" of Boreal. Boreal asserts that Faliski had first-hand knowledge of the facts involved in the mediation, and that "Boreal at the mediation was in a position to and in fact did agree to certain matters in order to facilitate a potential resolution proffered by the Mediator." Boreal emphasizes that it is Wells Fargo's conduct that is at issue, not Boreal's.

In its brief support of sanctions, counsel to Debtor alleges that between Faliski and Wayne Day, Debtor's financial advisor, who were both in attendance, "there was more than sufficient human presence to effectuate a proper mediation."

C. Hearing on December 31, 2009

Wells Fargo presented much testimony to the effect that it believed that the law was on its side, and that the Mediation was primarily concerned with legal liability. *See, e.g.* Tr. at 21, ll. 3-9; 23, ll. 20-21; 61-62, ll. 21-1; 66, ll. 6-10.

Robert Ostrowe, a senior vice president of Wells Fargo, testified that Zwerman and another witness "are able to administer loans on a routine basis daily and approve advances for millions of dollars as long as they're within borrowing base formulas." Tr. at 47, ll. 5-7. Additionally, Zwerman allegedly had authority to settle the matter for up to $35,000, which Wells Fargo understood to be the amount at issue. *See* Tr. at 49, ll. 7-16.

The Court called the Mediator to testify. The Mediator commenced his testimony by describing his qualifications: He attended the Wharton School of the University of Pennsylvania and Harvard Law School, was admitted to practice law in 1959, and has been a mediator for thirty of the fifty years that he has practiced law. Tr. at 68, ll. 4-25. He has been a mediator in the Southern District of New York since 1999, and became a mediator in the bankruptcy courts several years ago. Tr. at 69, 1-4. The Mediator has never reported a failure to participate in good faith in his years of mediating until making the report that is the subject of this opinion. Tr. at 69, 5-9.

The Mediator testified that, at the outset of the mediation session, McAuliffe interrupted one of the Mediation Parties while he was making an argument of linkage between two events in the case, which was related to that party's theory of liability.[5] Tr. at 80-81, ll. 18-6. The Mediator continued his testimony:

> The Mediator: I asked Mr. McAuliffe if he would kind of withhold it, because on the surface it appeared at least there was a linkage, to which he resisted, no, and at

[5] The Court is careful to not discuss the substance of the mediation or the merits of any underlying issues.

that point I asked him to step into the other room because there was just no getting past that point. And then we went –

The Court: Is that a common mediator practice, what you just did?

The Mediator: It is very common, not that quick. And it was only because at this moment it just had run into a complete roadblock so that the discussion couldn't even continue.

Tr. at 82-83, ll.23-3. The Mediator further testified,

They did not go through risk analysis. They went simply through reiterate – reiterating the position they walked into the room with, which they had stated even prior to mediation. In other words, there was nothing that I could say even to get them to consider whether or not there was risk, there was exposure.

Tr. at 85, 17-23. The Mediator's testimony was confirmed by that of counsel to Boreal:

Counsel to Wells Fargo: What caused this to stop was the interjection by Mr. McAuliffe in response to something you were saying during your statement to the mediator?

Counsel to Boreal: It was stopped because we weren't even getting past square one.

Counsel to Wells Fargo: And that's because Mr. McAuliffe expressed a contrary view or, even stronger, said that you were wrong in something that you were saying?

Counsel to Boreal: No, it wasn't a contrary view, or I was wrong, it was a refusal to even, for the sake of discussion, assume that that might be the case.

Tr. at 135, ll. 12-22. Counsel to the Debtor confirmed the testimony of the Mediator and Counsel to Boreal that counsel to Wells Fargo would not entertain discussion that Wells Fargo's theory might be wrong:

Counsel to the Debtor: And it was sometime either during Mr. Portman's statement – or had ended, or during the middle of it, that I think that Mr. McAuliffe began to state his position on behalf of the bank.

The Court: And what happened at that moment?

Counsel to the Debtor: Mr. McAuliffe began to annunciate Wells Fargo's feelings. And then it turned from – well, Mr. Portman's piece stopped and Mr.

> McAuliffe and Mr. Goldman had it back and forth concerning the issue of linkage … And then, at that point it, the session, the general session, was broken off.

At the hearing, Wells Fargo did not rebut the allegations that it and its counsel had threatened the Mediator. Wells Fargo did not dispute that the eventual offer was made to the other Mediation Parties after a private phone conversation with an undisclosed party.

Principles of mediation

"Mediation isn't about whether you're going to lose or how much you are going to win. It is about identifying critical risks up front." Interview with Stephen P. Younger, Patterson, Belknap, Webb & Tyler LLP, *Project: EDR Part III; Stephen Younger: Making EDR A Reality*, The Metropolitan Corporate Counsel, Oct. 2000, Northeast Ed., at 49.

"Mediation is a process in which an impartial third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or define the contours of a relationship." Carrie Menkel-Meadow et al., Mediation: Practice, Policy and Ethics 91 (2006). "Mediation permits, indeed often requires, consideration of underlying interests, causes or values that produce conflict and thus permits the management, handling or resolution of broader concerns than just those 'disputes' which crystallize at the tip of the iceberg." *Id.* at 100-101.

> Among other things, mediation can result in the following: (1) an early assessment by the parties of the relative strengths and weaknesses of their positions; (2) a focusing and narrowing of the issues involved; (3) an objective evaluation of the case; (4) a tempering of the parties' expectations; and (5) an expeditious calculation of the actual damages involved.

A. Ross Pearlson, *Mediation: A Catalyst For Efficient Dispute Resolution*, The Metropolitan Corporate Counsel, Aug. 2002, Northeast Ed., at 13.

> Frequently, with significant issues of fact and law in dispute, parties enter mediation by resolutely assuring themselves and the mediator that they will prevail if the case goes to trial. Since both parties cannot be correct, the mediator spends considerable time working to change the parties' perceptions. This enables

> the parties to take a more realistic view of likely outcomes, and paves the way for a more thorough assessment of settlement possibilities.

Harold Himmelman, *ADR Will Work If You Use It Wisely*, The Metropolitan Corporate Counsel, Aug. 1999, Mid-Atlantic Ed., at 6. The mediator forces each party to confront its own risk. When disagreements remain, the mediator might use probability risk analysis. *Id.*

"[T]here [has] to be a party representative with authority to settle whatever [comes] up because mediation sometimes takes on a life of its own and sometimes you find out the real argument is something other than what they're doing." Robert Goldman, Transcript of Hearing, 71, ll. 19-23, *In re A.T. Reynolds & Sons, Inc.* (No. 08-37739) (ECF Docket No. 241) (hereafter, "Tr."). "Meaningful negotiations cannot occur if the only person with authority to actually change their mind and negotiate is not present. Availability by telephone is insufficient because the absent decision-maker does not have the full benefit of the ADR proceedings, the opposing party's arguments, and the neutral's input." *Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056, 1062 (E.D. Mo. 2000) (court denied motion for reconsideration of its conclusion that party failed to participate in good faith in ADR process; earlier award of sanctions was upheld and supplemented for party's "vexatious multiplication" of proceedings).

Even where a party believes that it has a "slam-dunk" case with the law on its side, it might benefit from the mediation in that it can persuade the other parties that they will be unsuccessful if the case must be decided on the merits.

"Mediation is a process in which the parties must work together, with the assistance of a trained facilitator, to devise a solution to their dispute. If either side is unwilling to do so, and insists upon being deemed the 'winner' at the end of the process, the mediation will fail A. Ross Pearlson, *Mediation: A Catalyst For Efficient Dispute Resolution*, The Metropolitan Corporate Counsel, Aug. 2002, Northeast Ed., at 13.

Mediation entails a process, and requires parties to hear each others' points of view and proposed resolutions to the issue underlying the mediation. Passive attendance at mediation cannot be found to satisfy the meaning of participation in mediation, because mediation requires listening, discussion and analysis among the parties and their counsel. Adherence to a predetermined resolution, without further discussion or other participation, is irreconcilable with risk analysis, a fundamental practice in mediation. While it goes without saying that a court may not order parties to settle, this Court has authority to order the parties to participate in the process of mediation, which entails discussion and risk analysis. Therefore, the Court holds that where a party is ordered to participate in mediation, the party fails to comply with the order when it does not engage in the process of mediation, which entails consideration of the other parties' arguments.

Mediation compared with arbitration and ordinary negotiations.

In mediation, the role of the mediator is to aid in identification of issues, clarify interests, explore alternatives, generate options, and facilitate negotiations. Jeff Abrams, *Mediator Skills Training and Reference Manual*, Mediation & Effectiveness Training Institute, B-6 (1996). In arbitration, the role of the arbitrator is to listen to facts and evidence, and render an award. *Id.* In mediation, the parties retain some control over the disposition of the matter at stake; in arbitration, the parties are bound by the determination of the arbitrator.

The mediation program for the U.S. Bankruptcy Court for the Southern District of New York

The United States Bankruptcy Court, Southern District of New York, adopted a mediation program in 1993. When the parties held their mediation session on November 17,

2009, the program was governed by General Order M-211.[6] General Order M-211 provides in relevant part:

> 1.0 Assignment of Matters to Mediation.
>
> 1.1 By Court Order. The court may order assignment of a matter to mediation upon its own motion, or upon a motion by any party in interest or the U.S. Trustee.
>
> *** 1.3 Types of matters subject to Mediation. Unless otherwise ordered by the presiding judge, any adversary proceeding, contested matter or other dispute may be referred by the court to mediation.
>
> 1.4 Mediation Procedures. Upon assignment of a matter to mediation, this General Order shall become binding on all parties subject to such mediation.
>
> *** 3.0 The Mediation.
>
> 3.1 Time and Place of Mediation. Upon consultation with all attorneys and pro se parties subject to the mediation, ***the mediator shall fix a reasonable time and place for the initial mediation conference*** of the parties ... To ensure prompt dispute resolution, ***the mediator shall have the duty and authority to establish the time for all mediation activities***, including private meetings between the mediator and parties and the submission of relevant documents. ...
>
> 3.2 Mediation Conference. A representative of each party shall attend the mediation conference, and must have complete authority to negotiate all disputed amounts and issues. ***The mediator shall control all procedural aspects of the mediation.*** The mediator shall also have the discretion to require that the party representative or a non-attorney principal of the party with settlement authority be present at any conference. ... The mediator shall report any willful failure to attend or participate in good faith in the mediation process or conference. Such failure may result in the imposition of sanctions by the court.
>
> *** 5.0 Confidentiality.
>
> 5.1 Confidentiality as to the Court and Third Parties.
>
> [Generally, the substance of the mediation is confidential.] Nothing in this section, however, precludes the mediator from reporting the status (though not content) of the mediation effort to the court orally or in writing, or from complying with the obligation set forth in 3.2 to report failures to attend or to participate in good faith.[7]

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[6] The mediation program was updated in 1999 by General Order M-211 to provide for arbitration, and again in 2009 by General Order M-390 to revise procedures. The substantive provisions of General Order M-211 that govern this matter are unchanged by the most recent General Order.

[7] On the record of a hearing held on November 17, 2009, the Mediator expressed his intent to prepare his report of the mediation session in writing and submit it directly to chambers. The parties who were present did not have any objection to the Mediator's proposal. In interest of

General Order M-211, Amended General Order M-143, *In re: Expansion of General Order M-143 to Include the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration* (1999), *available at* http://www.nysb.uscourts.gov (emphasis added).

It is clear from the foregoing that in the mediation program for the Bankruptcy Court for the Southern District of New York, the mediator controls the mediation. It is also clear that this mediation program requires parties ordered to mediation to participate in good faith, because the General Orders provide for the imposition of sanctions when a party fails to participate in good faith. To ensure good faith participation, the mediators are required to report failures to participate in good faith, and they are relieved from rules of confidentiality to the extent necessary to do so. The mediation program was developed to allow flexibility – according to section 1.3, any dispute may be sent to mediation; specific pleadings or other structures are not required by the terms of the General Orders. This design is consistent with the facts that mediation often reveals issues and concerns lurking beneath "the tip of the iceberg," and that, as the Mediator testified, mediations often take on lives of their own.

Legal analysis of whether a party participates in mediation in good faith

28 U.S.C. 1927 provides that a court might require an attorney to pay the costs of its adversary when the attorney vexatiously compounds the proceedings.[8] Fed. R. Civ. P. 16 permits federal courts to direct parties to appear for pretrial conferences including settlement

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due process, the Court provided a copy of the report to the Mediation Parties by e-mail on December 4, 2009.

[8] 28 U.S.C. § 1927 provides:

Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

conferences, and grants federal courts authority to issue sanctions for failure to participate in such a conference in good faith.[9]

As stated above, bankruptcy courts have inherent authority to compel compliance with their orders through civil contempt. A court may hold a party in civil contempt pursuant to its inherent powers when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the party has not diligently attempted in a reasonable manner to comply. *In re Chief Executive Officers Clubs, Inc.*, 359 B.R. at 535. "[T]he clear and convincing standard requires a quantum of proof adequate to demonstrate reasonable certainty that a violation occurred." *Id.*

Wells Fargo provides a law review article that is critical of mediation, which provides the following definition of good faith:

> "Good faith" is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of a design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone.

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[9] Fed. R. Civ. P. 16 provides in relevant part:

Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conference for such purposes as:

(1) expediting disposition of the action;

***(5) facilitating settlement.

***(f) Sanctions.**

(1) ***In General.*** On motion or on its own, the court may issue any just orders ... if a party or its attorney:

***(B) is substantially unprepared to participate – or does not participate in good faith – in the conference;

(2) ***Imposing fees and Costs. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses – including attorney's fees – incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 16 (2009).

John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 U.C.L.A. L. Rev. 69, 77 (2002). This definition is repeated in Boreal's brief in support of the Order to Show Cause.

Wells Fargo cites three cases in its brief in response to the Order to Show Cause. In *Negron v. Woodhull Hosp.*, No. 05-4147-CV, 2006 WL 759806 (2d Cir. Mar. 23, 2006), the district court granted the plaintiff a default judgment and an award of attorney fees when the defendant failed to bring a principal to the mediation. Wells Fargo cites this case for the dicta that a party may adopt a "no-pay" position at a mediation. The actual language reads as follows: "While the [defendant] was free to adopt a 'no pay' position, ***its failure to bring a principal party was a violation of a court order and impaired the usefulness of the mediation conference***." *Negron*, 2006 WL 759806 at **1 (emphasis added).

In *Negron*, the Court of Appeals for the Second Circuit reversed the award of a default judgment as a sanction for failure to participate in good faith in mediation, holding that the penalty was inappropriate for the offense. *Negron*, 2006 WL 759806 at **1. The court upheld the sanction of fees in favor of the other mediation party. For purposes of the matter at bar, this Court finds that *Negron* is only relevant for the unremarkable proposition that a court cannot compel the parties to settle.

Negron cannot be interpreted to mean that a party may decide in advance that it will not pay and send in an agent to sit through the mediation and parrot that it won't pay. If mere attendance were all that were required for good-faith participation, then the federal statutes that encourage mediation would be rendered meaningless. *See* 28 U.S.C. 473(a)(6) (district courts

may make available mediation)[10]; 28 U.S.C. 1927 (an attorney must pay others' costs that are incurred because of that attorney's vexatious conduct); Fed. R. Civ. P. 16; *In re Chief Executive Officers Clubs, Inc.*, 359 B.R. at 534 (bankruptcy courts can enforce its orders by the imposition of sanctions for acts of civil contempt).

In *Negron*, the Second Circuit noted in a footnote that "a party is not required to change its settlement parameters by reason of a court order to attend a settlement conference." *Negron*, 2006 WL 759806 at **1 n.1. This dicta cannot be construed to mean that a party can decide ahead of the mediation that it will accept a single, preconceived settlement, and then refuse to engage in the risk analysis that is fundamental to mediation. Such a close-minded approach to mediation would render the whole process meaningless – parties can exchange settlement offers without comment, debate or explanation, and without the benefit of a mediator.

In consideration of all the federal statutes that discourage obstructive behavior, the Court construes *Negron* to mean that at the conclusion of the mediation process, a party cannot be forced to settle. *Negron* cannot be stretched to mean that a party's mere attendance at mediation, without participation beyond insisting that it won't settle, is sufficient for compliance with the court's order directing the parties to engage in mediation; such an outcome would render the above-referenced federal statutes superfluous. *See also Hughes v. The Lillian Goldman Family,*

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[10] 28 U.S.C. § 473 provides:

Content of civil justice expense and delay reduction plans

(a)In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

(6) authorization to refer appropriate cases to alternative dispute resolution programs that –

(A) have been designated for use in a district court; or

(B) the court may make available, including mediation, minitrial, and summary jury trial.

28 U.S.C. § 473 (2006).

LLC, No. 00 CIV. 2388, 2000 WL 1228996, *2 (S.D.N.Y. Aug. 30, 2000) ("Even where the case does not settle at the settlement conference, the settlement conference often begins the dialogue that ultimately leads to settlement.").

Additionally, Wells Fargo committed the same offense as the offending party in *Negron*: The Second Circuit affirmed an award of costs where the party did not produce a party with settlement authority at the mediation. The Court finds that attending a mediation session without authority to settle or to participate in the mediation process is tantamount to not attending. The Court has not been presented with sufficient evidence to support a finding that Zwerman and McAuliffe had the requisite authority to settle the matter. Zwerman was allowed to settle for up to a predetermined cash amount; McAuliffe was prepared to advise Zwerman with regard to only predetermined theories of legal liability. Wells Fargo did not present evidence that its ultimate offer of settlement was made without resorting to a phone call. As discussed herein, availability by phone does not satisfy the requirement that a party attend with full settlement authority.

Wells Fargo cites *Bulkmatic Transp. Co. v. Pappas*, No. 99-Civ.-12070, 2002 WL 975625 (S.D.N.Y. May 9, 2002) for the proposition that a party cannot be forced to change its settlement parameters by an order to attend a settlement conference. The actual language reads as follows: "Although a court cannot force litigants to settle an action, it is well established that a court can require parties to appear for a settlement conference, and impose sanctions pursuant to Rule 16(f) if a party fails to do so." *Bulkmatic Transp. Co.*, 2002 WL 975625 at *1. In *Bulkmatic Transp. Co.*, an attorney failed to appear at a settlement conference, and the district court awarded the plaintiff an award of $1,000, finding this to be a more reasonable assessment of the plaintiff's costs than the fees of $2,634.60 that it sought as damages. As in *Negron*, the Court finds that *Bulkmatic Transp. Co.* stands for the proposition that a court cannot force a

settlement; this interpretation does not allow parties to wrest control of the mediation from the mediator in contravention of the court's orders, or to resist participation in the mediation.

Finally, Wells Fargo cites *Dawson v. United States*, 68 F.3d 886 (5th Cir. 1995), for the proposition that parties cannot be forced to settle. *Dawson* involved a sanction imposed against government lawyers for their failure to settle with an inmate who allegedly injured his shoulder in a prison softball game. *Dawson* is so factually distinguishable from the case at bar that it is irrelevant and of no guidance to this Court. In *Dawson*, the appellate court was more concerned with the public policy of not squandering taxpayer dollars on frivolous prisoner lawsuits than enforcement of a local rule regarding settlement conferences: "In light of the increasing flood of prisoner litigation that threatens to submerge our courts, [a plaintiff's status as a prisoner] is extremely relevant [in determining whether to make a settlement offer], especially when the Government is the defendant and the taxpayers will be footing the bill for any settlement." *Dawson*, 68 F.3d at 898. Additionally, the prisoner in *Dawson* defaulted on numerous appearances and other obligations as a plaintiff; comparable inattention by Boreal, the Committee and the Debtor is not present in the matter at bar. This Court will not be persuaded by any statement in *Dawson* that suggests that a party may not be sanctioned for failure to participate in court-ordered mediation in good faith.

The Court holds that that Wells Fargo and its counsel failed to participate in the mediation in good faith as required by General Order M-211, and therefore Wells Fargo and its counsel must pay the Mediator and the other parties their costs in preparing for and attending the mediation. The Court concludes that attendance at a mediation without participation in the discussion and risk analysis that are fundamental practices in mediation constitutes failure to participate in good faith.

The Court is guided by *Fisher v. SmithKline Beecham Corp.*, No. 07-CV-0347A(F), 2008 Dist. LEXIS 76207 (W.D.N.Y. Sept. 29, 2008), in reaching its conclusion. In *Fisher*, a plaintiff attempted suicide after taking defendant's product and sued. *Fisher*, 2008 Dist. LEXIS at *2. The parties were referred by court order to mediation. *Id.* at *3. Defendant filed a motion for summary judgment the day before the mediation. *Id.* at *4. Defendant's counsel handed plaintiffs' counsel a copy of the memorandum of law in support of the motion at the mediation, which the court found was generally the extent of defendant's presentation of its case at the mediation. *Id.* at *5, *18. Defendant's counsel said that unless plaintiff's counsel could explain why the action was not time-barred as argued in the memorandum of law, the defendant would offer just $1,000. *Id.* at *5. The mediation session was terminated. *Id.*

Plaintiffs sought sanctions per Fed. R. Civ. P. 16(f) and the court's alternative dispute resolution plan, for defendant's filing the motion for summary judgment the day before the mediation, and defendant's failure to participate in good faith. *Fisher*, 2008 Dist. LEXIS at *5-*6. The court granted the motion for sanctions as to defendant and its counsel, and awarded plaintiffs their costs in attending the mediation. *Id.* at *21. The court found "clear evidence" that the defendant's conduct was without merit and undertaken for improper purposes, as required by 28 U.S.C. § 1927: "Defendant's failure to timely advise Plaintiffs of the summary judgment motion Defendant intended to filed cause d Plaintiffs to unnecessarily incur expenses for no good reason." *Fisher*, 2008 Dist. LEXIS 76207 at *21.

Similarly, in the case at bar, Wells Fargo and its counsel showed up at a court-ordered mediation. Wells Fargo's counsel insisted on being dissuaded of the supremacy of its legal obligation, in lieu of participating in discussion and risk analysis. Upon review of Wells Fargo's papers in response to the Court's Order to Show Cause and upon the record of the hearing held

on December 31, 2009, the Court finds clear evidence of Wells Fargo and its counsel's misconduct pursuant to 28 U.S.C. § 1927 and the General Orders adopting mediation in this Court, sufficient to award the other Mediation Parties their costs incurred in attending the mediation.

In its brief Wells Fargo states:

> Although Wells Fargo may have entered the mediation believing that it would not be obligated to make any payments, it was open to reconsider this view if the other parties presented it with a basis for liability and/or counter-arguments to its legal position. Wells Fargo was not 'entrenched' in its position, however no such basis was presented, and Wells Fargo was unpersuaded that its legal position was flawed.

ECF Docket No. 236, Part 1. This statement is strongly indicative that Wells Fargo had predetermined that it was not liable, and is the same tactic that caused the courts to award sanctions in *Fisher*. Wells Fargo entered the mediation to assert the supremacy of its legal argument, and not to contemplate risk analysis. Wells Fargo's assertion that it was open to reconsideration is unpersuasive given its dilatory behavior leading up to the mediation. Further, the settlement offer came only after threat of sanctions and was considered to be insincere by the Mediator and counsel to the Debtor. Tr. at 144, ll. 8-12. Further, it is in direct contradiction with three witnesses' testimony that Wells Fargo would not discuss whether there was any link between two substantive events in the case, and that its counsel squashed any potential legal debate by interrupting counsel to Boreal when he attempted to discuss such a link. The Mediation was barely underway when counsel to Wells Fargo disrupted it by interrupting counsel to Boreal and thwarting any discussion about the linkage of the two substantive events. The Court is guided by *Fisher* in finding that, having predetermined that there was no legal liability, Wells Fargo engaged the other parties in an exercise in futility by attending the

Mediation, failing to participating in the mediation activities including risk analysis, and cutting off any discussion of the substantive issues.

The Court rejects Rusking Moscou's concerns about waste and confusion as frivolous. When the Mediator stated that it was for him, not Debtor's counsel, to decide what the issues would be, Wells Fargo flatly responded that it would only address Debtor's counsel's five issues, unless it felt like it was able to. The above-quoted e-mail exchange supports the allegations of the Mediator's report that Wells Fargo resisted participation in the mediation and sought to wrest control of the mediation from the Mediator.

If Wells Fargo went into the Mediation blind, it was because it closed its own eyes. Less than six months had passed between Wells' Fargo's purported exit from the case and entry of the Mediation Order. Wells Fargo had controlled Debtor's cash collateral, and Boreal assumed Debtor's loan obligation to Wells Fargo. Obviously, if there were an issue concerning payment of wages, then cash collateral and therefore Wells Fargo would be implicated. Contrary to its assertion that nothing had been presented in writing to the Court, Boreal had made a motion for payment of wages (ECF Docket Nos. 203, 204, 205), and Debtor had moved to reconsider the order granting that motion (ECF Docket No. 211, 212). Counsel to Wells Fargo was served by various means with the motions related to the wages, and is named throughout the papers. ECF Docket Nos. 203, 204, 205, 211, 212). Before the motions were filed, Wells Fargo and its counsel were parties to e-mail messages regarding the payroll, in which the Sale Hearing was referenced (though the Sale Hearing is not mentioned by date, Debtor's financial advisor, Wayne Day of CCV Restructuring, wonders in an e-mail whether he heard something wrong in the court room) (ECF Docket No. 204). Transcripts of the Sale Hearing and the hearings revolving Boreal's effort to be reimbursed for the wages were readily obtainable.

Finally, the message carries the tone that Wurst and Wells Fargo were engaging in the Mediation of their own will, as a begrudging favor to the other Mediation Parties: "We need to know the issues before we can prepare a statement"; "We want to avoid wasting time"; "We will only discuss the enumerated issues." In reality, Wells Fargo was bound to participate in the Mediation by Court Order. Wells Fargo was required by the Mediation Order to follow General Order M-211 and obey the Mediator. Wells Fargo did not achieve some special status that excused it from complying with the Mediation Order by way of its limited time and continuous befuddlement despite having been served with every paper since the Sale Hearing.

The Court finds that the identity of the other Mediation Parties' representatives was of no concern to Wells Fargo. Wells Fargo was ordered, like the other Mediation Parties, to attend the Mediation. There was no provision in that Order that the failure of one party to send an appropriate representative would excuse compliance by the other parties. Wells Fargo did not have the option to not comply with the Order if it perceived that the other parties were not going to comply.

The Court finds that counsel to Wells Fargo sought to control the procedural aspects of the mediation by resisting filing a mediation statement and demanding to know the identities of the other party representatives. General Order M-211 expressly provides that the mediator shall control the procedural aspects of the mediation. The Mediation Order provides that the Mediation Parties will supply the Mediator with such confidential statement as the Mediator requires, and that the Mediator shall schedule the mediation session. The Mediation Order expressly incorporates the provisions of General Order M-211. The Court holds that Wells Fargo's conduct was a violation of the terms of General Order M-211 and the Mediation Order.

Having determined that Wells Fargo violated the terms of General Order M-211 and the Mediation Order, the Court could properly require Wells Fargo and its counsel to pay the other parties' costs incurred in attending the wasted mediation. The Court feels compelled to address Wells Fargo's argument that it could determine its liability in advance of the mediation, and attend without engaging in risk analysis beyond insisting that it was not liable. In his report, Goldman does not take issue with Wells Fargo's adoption of a "no-pay" position. Goldman alleges that in repeating its mantra that Wells Fargo refused to "take a single dollar out of its pocket," Wells Fargo failed to consider any settlement at all or otherwise meaningfully participate in the mediation. Further, if Zwerman and McAuliffe were sent with a "no-pay" position from which they could not deviate, this is suggestive of their not having full settlement authority – they could not consider any alternate resolution or concede any risks associated with strict adherence to their "no-pay" position. Taking a "no-pay" position cannot mean that a party may predetermine that it is not liable, and show up at the mediation and refuse to participate in discussion, or consider any risk or other argument in favor of settlement. Such a rigid interpretation of "taking a no-pay position" would render mediation futile, and cannot stand in light of the fact that discussion and risk analysis are inherent in mediation, and myriad federal rules permit mediation and provide for penalties for obstructive behavior.

The Court finds that Wells Fargo's alleged confidence in its lack of liability is inconsistent with its earlier assertions of befuddlement regarding the substance of the mediation. If Wells Fargo was truly unable to discern what the mediation would be about, then it would have been unable to prepare a bulletproof legal analysis. Even though counsel to the Debtor supplied Wells Fargo with a list of five possible issues, the Mediator unequivocally advised all the parties that "they would go where the river took them," and that it was the province of the

Mediator to select issues for discussion and analysis. Strict adherence to a predetermined theory of liability is inconsistent with the fluid nature of mediation, and, in the matter at bar, suggests that Wells Fargo was disingenuous and obstructive in demanding pleadings and other filings when it knew perfectly well where the Mediation would likely go. Additionally, Wells Fargo's insistence on being persuaded that its argument was wrong, and refusing to engage in other discussion, inappropriately impaired the other parties' ability to discuss their concerns and therefore impaired the usefulness of the mediation. Wells Fargo was a participant in mediation, not an arbitrator of its own issues. It was not Wells Fargo's right or role to appear at the mediation for the limited purpose of being convinced that its legal theory was wrong. As stated above, mediation is not about winning or losing; it is about identifying risks.

Three witnesses testified that Wells Fargo obstructed discussion of a point of view other than its own, by interrupting counsel to Boreal during his initial presentation and refusing to let the discussion continue. This testimony contradicts Wells Fargo's allegation that it was open to hearing a legal position other than its own. The Court stated on the record that it found Wells Fargo's witnesses to not be credible. Tr. at 163, ll. 14-19. The Court finds from the testimony of the Mediator and counsel to Debtor and Boreal that counsel to Wells Fargo obstructed the discussion from the outset – it would not even permit one party to express its point of view.

The Court finds that Zwerman did not have the authority to settle the matter, for purposes of mediation. Tr. at 160, ll. 2-4. The Court does not question Zwerman's experience or personal knowledge of the case. The Court holds that Wells Fargo failed to comply with the Mediation Order by sending an agent whose authority was generally limited by "borrowing base formulas," with settlement authority up to a predetermined amount. While the Court understands that most companies do not have many employees with unlimited, unbridled settlement authority,

Zwerman does not appear to have had the authority to enter into creative solutions that might have been brokered by the Mediator. Additionally, in sending Zwerman, who could settle for up to a predetermined cash amount, Wells Fargo and its counsel did not provide for the very real possibility that the amount in controversy might have turned out to be in excess of $35,000.

The Court does not dispute that Zwerman has 10 years' experience or personal knowledge of the Debtor's account. The issue is whether Zwerman had full settlement authority of a legal issue, not whether he is a competent loan officer or account manager. Zwerman's title of vice president alone does not persuade the Court that he had full settlement authority. *See also Hughes v. The Lillian Goldman Family, LLC*, No. 00 CIV. 2388, 2000 WL 1228996 (S.D.N.Y. Aug. 30, 2000) (party was ordered to pay the costs of the other parties, where the offender appeared only by an attorney unfamiliar with the case, and without an employee with decision-making authority); *Nick v. Morgan's Foods*, 99 F. Supp. 2d 1056 (E.D. Mo. 2000) (court sanctioned defendant that failed to submit a mediation statement and did not send a corporate representative with authority to settle the case).

Furthermore, Zwerman and McAuliffe allegedly presented the offer only after engaging in a private telephone conversation with an undisclosed party. Tr. at 91, ll. 6-9. This allegation was not rebutted by Wells Fargo or its counsel. In the circumstances at bar, a pivotal decision was made by an absent person, who did not have the benefit of observing the mediation and interacting with the other parties and the mediator. In these circumstances, a pivotal decision was made by an absent person – meaning that the person who attended the mediation did not have full settlement authority, in contravention of the court's order directing the parties to mediation.

The Court notes that an eventual offer of settlement came only after the Mediator expressed his intent to report to the Court on a party's failure to participate in good faith. Tr. at 95, ll. 9-23.

Upon the foregoing, the Court sanctions Wells Fargo and its counsel pursuant to Fed. R. Civ. P. 16(f), for its failure to participate in the Mediation in good faith. The Court sanctions Wells Fargo's counsel, Ruskin Moscou, pursuant to 28 U.S.C. § 1927 for its vexatiously causing a fruitless mediation session and subsequent hearing on the Mediator's report of failure to participate in the mediation in good faith.

Finally, the Court holds Wells Fargo and its counsel in contempt of the Mediation Order. The Court finds that the terms of the Mediation Order are clear and unambiguous. The Mediation Order clearly defines the powers of the Mediator, granting him authority to require confidential statements of position and to set the time and place of the mediation. The Mediation Order expressly incorporates the provisions of the General Orders governing the mediation program for the Bankruptcy Court for the Southern District of New York. The Court has reviewed Wells Fargo's brief in response to the Order to Show Cause, in which it submits e-mail exchanges that show that Wells Fargo and its counsel sought to control the mediation, a clear violation of the Mediation Order, which vests control of the Mediation in the Mediator. Additionally, the Court heard testimony from three witnesses, including a mediator with thirty years' experience, that counsel to Wells Fargo obstructed and impeded the discussion at the mediation by interrupting the other participants. Wells Fargo's counsel belabored the infallibility of its legal argument. The e-mail exchange, testimony, and Wells Fargo's brief in response to the Order to Show Cause are clear and convincing proof of noncompliance; they also show that Wells Fargo and its counsel did not diligently attempt in a reasonable manner to

comply. Indeed, Wells Fargo and its counsel did everything they could to undermine, delay and impede the Mediation.

The Court emphasizes that its conclusion that Wells Fargo failed to participate in good faith is based on a comprehensive review of Wells Fargo's conduct with regard to the Mediation. Wells Fargo attempted to control the mediation process, by insisting that it be told the identities of the parties who would attend the Mediation and demanding that a mediation statement be filed with the Court. These acts were done despite the Mediator being vested with control of the mediation pursuant to the General Order and the Mediation Order. Wells Fargo claimed it was unaware of any reason it might have to mediate with the Mediation Parties, despite having been served with all motions that were filed in the months leading up to entry of the Mediation Order. Once at the Mediation, Wells Fargo simultaneously demanded to know why its legal argument would not prevail while crushing any discussion of it, instead of considering the risks inherent in litigation and the possibilities that another legal argument would prevail. Counsel to Wells Fargo allegedly threatened the Mediator that he would never mediate another matter to which Wells Fargo was a party, an allegation Wells Fargo has failed to persuade this Court is false. At the hearing on the Court's Order to Show Cause, Wells Fargo insisted that its legal position was foolproof; however, Wells Fargo was directed to participate in mediation, not to sit as its own judge and jury in an off-the-record proceeding.

CONCLUSION

Wells Fargo failed to participate in the mediation in good faith, as is shown by its dilatory and obstructive behavior between entry of the Mediation Order and the Mediation Session, and its insistence on asserting its legal argument to the exclusion of other discussion at the Mediation. Wells Fargo's failure to participate in good faith is a violation of General Order M-

211 and the Mediation order, and the Court issues sanctions pursuant to its inherent authority to enforce its orders, 28 U.S.C. § 1927 and Fed. R. Civ. P. 16.

Wells Fargo and its counsel shall bear the costs of the Mediation, including the costs of the Mediator and the other Mediation Parties to attend. The Mediator and the Mediation Parties other than Wells Fargo shall file affidavits setting forth their costs within 14 days of entry of this Decision and accompanying Order.

Dated: Poughkeepsie, New York
February 5, 2010

/s/ Cecelia Morris
The Hon. Cecelia G. Morris
U.S. Bankruptcy Judge