

1 MEMORANDUM OF POINTS AND AUTHORITIES

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3 Under the Arizona Rules of Civil Procedure Rule 60. Relief from Judgment or Order
4 on motion and upon such terms as are just the court may relieve a party or a party's legal
5 representative from a final judgment, order or proceeding for the following reasons: (1)
6 mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which
7 by due diligence could not have been discovered in time to move for a new trial under Rule
8 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or
9 other misconduct of an adverse party; (4) the judgment is void; (6) any other reason
10 justifying relief from the operation of the judgment. Good cause exists to set aside the
11 judgment because Plaintiff used fraud, misrepresentation and presented false evidence to the
12 Court.
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16 **RPEA Rule 15. Relief from Judgment or Order**

17 a. Motions to Set Aside Judgments, Orders, or Proceedings. Either party may file a motion to
18 set aside a judgment, order or proceeding on any of the following grounds:
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20 (1) The court did not have jurisdiction to hear the case; (2) The defendant tendered all
21 amounts due under the lease agreement prior to a judgment being entered or made a partial
22 payment under the Arizona Residential Landlord Tenant Act, A.R.S. §§ 33-1301 to -1381,
23 which was accepted by the landlord; (3) A party did not receive proper notice or was not
24 properly served; (4) Mistake, inadvertence, surprise, or excusable neglect; (5) Newly
25 discovered material facts exist that could establish a defense to an allegation; (6) A party is
26 subject to protection under bankruptcy laws; (7) A party is requesting relief under the
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1 Servicemembers' Civil Relief Act; (8) The parties have stipulated to set aside the judgment;
2 (9) The judgment is contrary to the law; or (10) Fraud, misrepresentation, or other
3 misconduct of an adverse party.
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5 15 c. A post judgment motion affecting possession of the property shall be treated as an
6 emergency matter and decided within three court days.
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8 **I. STATEMENT OF FACTS**

9 1. Plaintiffs are the owners of real property within the jurisdiction of this Court
10 located at 4006 South Valerian Street, Casa Grande, AZ 85294.

11 2. The property was purchased on December 2, 2005.
12

13 3. M & I Marshall & Isley Bank, (hereinafter "M&I"), was represented the
14 original lender on the loan. (See a copy of the Deed of Trust attached hereto and
15 incorporated herein by reference, marked **Exhibit B**).

16 4. Plaintiff failed to strictly comply with the law, statutes and procedures, as
17 required by state and federal law, in proceeding to foreclose upon the Plaintiffs' residential
18 real property;

19 5. Pursuant to A.R.S. § 33-809(c), "The trustee, within five business days after
20 the recordation of a notice of sale, shall mail by certified or registered mail, with postage
21 prepaid, a copy of the notice of sale to each of the persons who were parties to the trust deed
22 except the trustee." Whites never received a copy or a post office notice of certified or
23 registered mail attempted delivery of the Notice of Trustee Sale as required by statute, and
24 there exists no proof that such notice was mailed by certified or registered mail. This was a
25 willful and intentional failure by the Trustee Michael A. Bosco, Jr.

26 6. Notice of Breach and right to cure did not comply with the terms of Deed of
27 Trust.
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1 7. Defendants failed to comply with the statutory notice requirements giving
2 notice to all the interested parties.

3 8. The beneficiaries were not properly identified in the Notice of Trustee Sale.

4 9. A Corporation Assignment of Deed of Trust ("Assignment"), was recorded on
5 September 9, 2009. This document purports to transfer all beneficial interest in the Deed of
6 Trust from M&I to Kondaur Capital Corporation ("Kondaur") not the Trust that would have
7 been the source of funds with the right to receive payment and the true beneficiary. (**Exhibit**
8 **C**) This was recorded more than six (6) months **after** the Notice of Trustee Sale was
9 recorded, naming M&I as the beneficiary, when the loan had been securitized and modified.

10 10. As a result of failing to comply with the required statutes and procedure, the
11 foreclosure conducted by Tiffany & Bosco upon the Plaintiffs' Residential Real Property is
12 null and void. (*See* Affidavit of Qualified Expert William McCaffrey attached hereto as
13 **Exhibit D**)

14
15 11. On February 13, 2009, the Whites thought they entered into a Loan
16 Modification Agreement with M&I signed by Mark Bosco. The Modification called for six
17 payments beginning July 1, 2009. All six payments were timely made. During this period of
18 payments, M&I purportedly assigned their interest to Kondaur. Whites were told by M&I
19 that Kondaur would honor the Modification. The remaining payments of the Modification
20 were made to Kondaur, who cashed and did not return the payments.

21 12. Upon the completion of the six payments, M&I had promised the modification
22 would become permanent with a fixed rate of 8%. However, Kondaur refused to honor the
23 agreement stating that a payment of \$55,000.00 must be made to them to honor the
24 Modification. As Whites were calling to get wiring instructions to wire the additional funds,
25 Kondaur informed them that they had changed their mind and would not Modify the Loan at
26 all.

27 13. Debtors received from Kondaur Capital Corporation a "Notification of
28 Assignment, Sale or Transfer of your Mortgage Loan" dated on August 4, 2009, reciting that

1 the mortgage loan had been transferred to Kondaur Venture X, LLC and contemporaneously
2 to Kondaur Capital Trust Series 2009-3. The Notice went on to say that the above-mentioned
3 transfers of ownership were not recorded, but that an Assignment was later recorded in the
4 name of the *servicer* Kondaur Capital Corporation. (See **Exhibit E** attached hereto)

5 14. Kondaur continued the process of a non-judicial foreclosure with the substitute
6 Trustee Michael A Bosco, Jr. that had originally been noticed by M&I.

7 15. On February 15, 2010 Tiffany & Bosco had the Trustee's Sale scheduled for
8 March 16, 2010.

9 16. On or before March 1, 2010 the Trustee's Sale date was moved *forward* to
10 March 2, 2010. (See Affidavit of Sheila Pilat and supporting documents attached hereto as
11 **Exhibit F**)

12 17. There was no opening bid the day before the sale and there was no opening bid
13 available on the day of the sale. (See Affidavit of Sheila Pilat attached hereto as **Exhibit F**)

14 18. At the proposed "Trustee's Sale" the Whites property was not called for sale.
15 (See Affidavit of Catherine White and Donna Sue Harrison attached hereto as **Exhibit G and**
16 **H**)

17 19. Mrs. White and her assistant Donna Sue Harrison were told that the sale had
18 been pulled. (See Affidavit of Catherine White and Donna Sue Harrison attached hereto as
19 **Exhibit G and H**)

20 20. On March 2, 2010, Kondaur and Michael A. Bosco, Jr. purportedly conducted
21 a non-judicial sale on Plaintiffs Whites' residential real Property and "sold" it to Kondaur.
22 (*See, Exhibit I*)

23 21. On May 28, 2010 at the initial appearance was held for a forcible detainer
24 action. Defendant, Catherine White, appeared in pro per to enter her plea, and pleaded "not
25 guilty." She asked for a return trial date, so that her attorney could appear, but was refused
26 an opportunity for representation to appear or to conduct an evidentiary hearing. She had not
27 been properly served with the summons, and only found out about the action shortly before
28 the hearing and had no opportunity for her attorney to be present. The hearing was held at

1 that time and she was found guilty of forcible entry and detainer and judgment was granted
2 for the Plaintiff, Kondaur on the pleadings without the opportunity to present evidence or
3 testimony.

4 **II. LEGAL ARGUMENT**

5 A Trustee's Sale is a statutory remedy provided to beneficiaries pursuant to a Deed of
6 Trust. A.R.S. § 33-801 et seq., a "beneficiary" of a Deed of Trust is defined by A.R.S. § 33-
7 801(1):

8 "Beneficiary" means the person named or otherwise designated in a Trust Deed as the
9 person for whose benefit a Trust Deed is given, or the person's successor in interest. There is
10 no Assignment of Deed of Trust recorded in Pinal County identifying the current purported
11 lender and owner of the Plaintiff's mortgage, Kondaur Capital Trust Series 2009-3, as the
12 beneficiary of the Plaintiff's mortgage. .

13
14 Failed to have an opening bid. .A.R.S. § 33-809 F F. Beginning at 9:00 a.m. and
15 continuing until 5:00 p.m. mountain standard time on the last business day
16 preceding the day of sale and beginning at 9:00 a.m. mountain standard time and
17 continuing until the time of sale on the day of the sale, the trustee shall make
18 available the actual bid or a good faith estimate of the credit bid the beneficiary is
19 entitled to make at the sale. If the actual bid or good faith estimate is not available
20 during the prescribed time period, the trustee shall postpone the sale until the
21 trustee is able to comply with this subsection.

22
23 Failed to establish public notice on date of sale ARS § 33-810 B. The person
24 conducting the sale may postpone or continue the sale from time to time or change
25 the place of the sale to any other location authorized pursuant to this chapter *by*
26 *giving notice of the new date, time and place by public declaration at the time and place last*
27 *appointed for the sale.*

1 Note and DOT were separated Kondaur was not the beneficiary the Trust was, and the
2 assignment was a fabrication as John Muroi and Cheri Mann were not Vice President and
3 Assistant vice presidents of M&I Marshall & Illsley Bank, but low level robo-signers
4 employed by Support Service Corp with no personal knowledge of what they were signing.

5 The fabricated documents are unreliable hearsay and cannot be relied upon to prove the truth
6 of the matter asserted.
7

8 The Whites did not receive certified or registered mail as notice A.R.S. § 33-809(C)
9 C. The trustee, within five business days after the recordation of a notice of sale,
10 shall mail by certified or registered mail, with postage prepaid, a copy of the notice
11 of sale to each of the persons who were parties to the trust deed except the trustee.
12 The copy of the notice mailed to the parties need not show the recording date of the
13 notice. The notice sent pursuant to this subsection shall be addressed to the mailing
14 address specified in the trust deed. In addition, notice to each party shall contain a
15 statement that a breach or nonperformance of the trust deed or the contract or
16 contracts secured by the trust deed, or both, has occurred, and setting forth the
17 nature of such breach or nonperformance and of the beneficiary's election to sell or
18 cause to be sold the trust property under the trust deed and the additional notice
19 shall be signed by the beneficiary or the beneficiary's agent. A copy of the additional
20 notice shall also be sent with the notice provided for in subsection B, paragraph 2 of
21 this section to all persons whose interest in the trust property is subordinate in
22 priority to that of the deed of trust along with a written statement that the interest
23 may be subject to being terminated by the trustee's sale. The written statement may
24 be contained in the statement of breach or nonperformance.

25 Auction was not actually held. No evidence of consideration paid at the purported
26 Trustee's sale. Upon information and belief, the signature on the Trustee's Deed Upon sale
27 was not even the true signature of Michael Bosco and the Notary is invalid and appears
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1 different on the Notice of Sale and on the Trustee's Deed Upon Sale. No valid chain of title
2 and there could be no valid Trustees Deed Upon Sale.

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4 **IT WAS A MISTAKE FOR THE COURT TO GIVE JUDGMENT ON A PLEADINGS**
5 **WITHOUT CONSIDERATION OF CONTRARY EVIDENCE OFFERED BY**
6 **DEFENDANT, AN OPPORTUNITY TO PREPARE A DEFENSE OR PRESENT**
7 **WITNESSES AT TRIAL.**

8 *a. The Effect of the Statutory presumption pursuant to A.R.S. § 33-811 (B) is*
9 *to provide certainty of title to legitimate BFP'S who purchase at trustee*
10 *sales.*

11 RPEA 11 b. requires a trial be set if there is a basis for a legal defense. The
12 conclusive statutory presumption provided by A.R.S. § 33-811 (B) provides a BFP
13 with a title that has certainty. Thus a BFP can safely purchase property at a trustee
14 sale. Otherwise, only a fool would purchase property at a trustee's sale. However, the
15 presumption is not necessary where the buyer is not a BFP. In that event, the
16 application of the presumption only serves to foster fraud by affording cover to a faux
17 purchaser. This is reflected by the plain wording of that statute that the presumption
18 applies "...in favor of purchasers or encumbrancers for value and without actual
19 notice".¹ Actual notice for purposes of this argument and without getting into a
20 technical definition of BFP is used for a person who pays value for the property and
21 has no actual knowledge of a title defect.
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25 *b. The Challenge to Kondaur's status as a BFP that is entitled to the*
26 *presumption pursuant to A.R.S. § 33-811 (B) was not adjudicated.*

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28 ¹ A.R.S. § 33-811 (B).

1 In this instance, the Defendant challenge the BFP status of Kondaur there is no
2 wire transfer or cancelled check in the record. Such challenge is made in good faith as
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4 Kondaur was named as the beneficiary through a purported assignment of the
5 beneficial interest *before* the sale. During argument, Whites offered evidence that the
6 sale did not take place which would prove Kondaur was not a BFP as it had notice of
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8 title defects, because M&I sold it at a steep discount. Whites question if Kondaur in
9 fact paid value for the property as the Trustees Deed Upon Sale states that
10 \$295,000.00 was paid at the sale, but is dubious because there was the August 9, 2009
11
12 fabricated assignment.

13 The basis plead in support of the right to possession by Plaintiff (but not proved
14 by evidence) is that Kondaur holds a trustee's deed upon sale. Plaintiff's status as a
15
16 buyer is critical to the issue of the right to possession. It determines if the conclusive
17 presumption applies. If Kondaur is not a BFP then the statutory presumption does not
18
19 apply. An examination of BFP status depends upon whether or not Kondaur had
20 actual notice of title defects and if payment of \$295,000.00 as recited in the Trustee's
21 Deed was in fact made. On the issue of value paid, it is not "show me the note" but
22
23 show me the check that determines. Whites requested Kondaur provide proof of
24 payment and offered testimony that Kondaur had knowledge of the modification and
25 defective title prior to the sale. She further requested trial on these factual issues (see
26
27 extensive discussion in Transcript of May 28, 2010).

1 If the statutory presumption does not apply and BFP status is challenged (as
2 done by Whites) the Court must adjudicate if Kondaur is entitled to possession or if
3 Kondaur is an ersatz buyer. It is the ultimate issue of fact in the case. Instead of
4 allowing discovery or setting the case for trial, jury or otherwise, the Court granted
5 Judgment on the Pleadings by application of the conclusive presumption provided by
6 A.R.S. § 33-811 (B). The only evidence before the court when granting the motion
7 leading to judgment was the raw and unsworn oral claim of counsel at the hearing of
8 May 28, 2010 which is inadmissible hearsay that Kondaur was in possession of a
9 trustee's deed. A certified copy of the Trustee's Deed pursuant to A.R.S. § 12-2263
10 was not offered or admitted. Thus the motion, not being based upon evidence, cannot
11 be deemed a motion for summary judgment. The motion was granted in face of an
12 offer by Whites that factual evidence within the preview of the pleadings existed
13 requiring a hearing. This constitutes a mistake for the reasons previously cited herein
14 and to afford due process.
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20 **CONSIDERATION OF TITLE IS NOT BARRED WHEN INCIDENTAL AND**
21 **NECESSARY TO ADJUDICATE THE ISSUE OF POSSESSION.**
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23 Under A.R.S. § 12-1177 (A) a court can legitimately explore title where such
24 issue is incidental to the issue of possession. A.R.S. § 12-1177 (A) gives the court the
25 power to adjudicate the issue of possession. In order to do so the court must review the
26 claim of title in cases involving a non BFP that cannot claim the statutory
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1 presumption. Otherwise, there would be nothing to adjudicate. Thus the issues of the
2 application of the conclusive presumption and whether or not Kondaur has title fall
3 within the preview the possession issue. They are incidental and a necessary part of
4 an adjudication of the right to possession.
5

6
7 **APPLICATION OF THE STATUTORY PROHIBITION UNDER A.R.S. § 33-811 (B)**
8 **AGAINST ADJUDICATION OF TITLE VIOLATES PROCEDURAL DUE PROCESS WHERE**
9 **PLAINTIFF IS NOT A BFP.**

10 A.R.S. § 12-1177 (A) denies due process if applied in cases where the
11 conclusive presumption does not apply to the holder of a trustee's deed. Title was
12 placed in issue by Kondaur in its pleadings. Valid title is denied and challenged by
13 Whites. But title was not first placed into issue by Whites. It is a necessary element
14 of Kondaur's lawsuit. The claim of title through a trustee's deed is, according to the
15 pleadings of Kondaur, the basis for its claim to possession. If the conclusive
16 presumption applies to Kondaur there is no issue to adjudicate. The public policy of
17 providing BFP's with certainty of title prevails. But, if Whites are allowed to and
18 establishes that Kondaur is not entitled to the conclusive presumption, application of
19 A.R.S. § 12-1177 (A) prohibiting the trial court from delving into the issue of title
20 precludes Whites from defending the claim. Thus Whites right of due process is
21 violated. Whites did not write the pleadings for Kondaur. But Whites are required to
22 defend against Kondaur's allegations. If Whites cannot introduce evidence and the
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1 court cannot use it to make a determination of the ultimate factual issue in the case, the
2 right of possession, there is no need for a court.

3
4 The UCC does apply in Arizona (*See In re Veal* and the Report from the
5 Permanent Editorial Board for the Uniform Commercial Code, Supplement A, B) and
6 there is a duty of good faith in contract and as stated in the RPEA. As is in the case of
7
8 landlords and tenants, Dowdy v. Calvi, 14 Ariz. 148, 158, 125 P. 873, 877(1912), a
9 right of ownership does not always establish a right of possession superior to the right
10 of possession of Defendant. Pinkerton v. Pritchard, 71 Ariz. 117, 123, 223 P.2d 933,
11
12 937 (1950). Moreover, the right of possession in the Defendant remains superior to
13 any contrary right of possession obtained fraudulently. Merrill v. Gordon, 15 Ariz.
14
15 521, 527 140 P. 496, 499 (1914).

16 Except for the availability of the bad faith evidence, the court could have
17 presumed the adequacy of an independent right of damages associated with a wrongful
18 denial of the subject right of possession. Given the bad faith evidence, however, the
19 Defendant retains a right of possession superior to the contrary right asserted. Queiroz
20
21 v. Harvey, 220 Ariz. 273, 274-75, 205 P.3d 1120, 1121-22 (2009).

22
23 The trustee of the deed of trust was the agent of both Defendant and beneficiary
24 alike, Bisbee v. Security National Bank & Trust Co., 157 Ariz. 31, 34, 754 P.2d 1135,
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26 1138 (1988); Patton v. First Federal Savings and Loan Ass'n, 118 Ariz. 473, 476, 578
27
28 P.2d 152, 156 (1978), and owed both a duty of good faith and fair dealing. Mallamo
v. Hartman, 70 Ariz. 294, 298, 219 P.2d 1039, 1041 (1950). To the extent of the

1 involvement of the holder of the trustee deed in the subject bad faith, it remains
2 subject to the same duty of good faith and fair dealing owed to the Defendant.
3
4 Merchants & Manufacturers' Assn. v. First National Bank, 40 Ariz. 531, 537, 14 P.2d
5 717, 719 (1932).

6 Despite the inapplicability of constitutional rights otherwise, Kelly v. Nations
7 Bank Mortg. Corp., 199 Ariz. 284, 289, 17 P.3d 790, 795 (App. 2000), the instant
8 forcible detainer action upholds the applicability of the subject constitutional rights.
9
10 See Trujillo v. Superior Court, 134 Ariz. 355, 357, 656 P.2d 644, 646 (App. 1992)
11 (denying an equal protection challenge); Blair v. Stump, 127 Ariz. 7, 10-11, 617 P.2d
12 791, 794-94 (App. 1980) (upholding an equal protection challenge). The
13 meaningfulness of RPEA 15 (a) under any other interpretation establishes their
14 availability, Alejandro v. Harrison, 223 Ariz. 21, 24, 219 P.3d 231, 234 (App. 2009),
15 and the wrongful denial of the admissibility of the bad faith evidence establishes the
16 constitutional rights of Defendant to present his bad faith evidence. Kenyon v.
17 Hammer, 142 Ariz. 69, 79, 688 P.2d 961, 971 (1984).

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21 Until the bad faith evidence is fully explored, the lower court may not presume
22 the superiority of the contrary right of possession. Johansen v. Arizona Hotel, 37
23 Ariz. 166, 173-74, 291 P. 1005, 1008 (1930). As the bad faith evidence implicates
24 only the merits of possession and not title, any consideration of title remains purely
25 incidental and appropriate for subject consideration. Curtis v. Morris, 186 Ariz. 534,
26 535, 925 P.2d 259, 260 (1996).
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28

1 In cases where the presumption does not apply, as the Whites attempted to
2 demonstrate here in the trial court, it is inconsistent to deny the Court the power to
3 examine Kondaur's status as a BFP while the court is charged with the duty to
4 adjudicate the right of possession. It is further inconsistent with the prerequisite of
5 BFP status for the application of the conclusive presumption found in A.R.S. § 33-811
6
7 (B). Such a restriction applied in cases where the holder of the Trustee's Deed is not a
8 BFP does not further the public purpose of protecting BFP's who purchase property at
9 trustee's sales. The only purpose it serves is to facilitate fraud by acting as cover for
10 faux sales by ersatz buyers.
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13 A.R.S. § 12-1177 (A) is one sentence. It states as follows:

14 On the trial of an action of forcible entry or forcible detainer, the only issue
15 shall be the right of actual possession and the merits of title shall not be
16 inquired into.
17

18 This statute applies to landlord tenant cases as well as cases such as this, where
19 the party in possession holds a deeded title. There is no distinction. The first clause
20 charges the court with the duty to determine the right of possession in FED cases. The
21 second clause limits the inquiry. The second clause is an expediency clause.
22 Whatever the indented purpose, it serves to expedite FED cases through the courts
23 whether they are landlord tenant relationships or involve a possessor holding or
24 claiming title through a deed. This clause assists the courts in avoiding the time
25 necessary to determine real party in interest and good title of a plaintiff claiming in
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1 good faith the right to possession based upon a trustee's deed upon sale. Eliminating
2 court congestion is a laudable purpose. But it does not trump due process.

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4 In cases such as this, where a party in possession is claiming title under a deed,
5 there is more at stake than the possession issues involving landlord-tenant. Property
6 ownership rights, which carry possessory rights, are involved. Removing a person
7 from their home while ownership rights are still being thrashed about in other court
8 actions, as in the Whites case, takes away the most important aspect of ownership; the
9 right of possession.
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11
12 The Court must examine if title is tainted in cases where a plaintiff is claiming
13 right of possession through a trustee's deed when the application of the conclusive
14 presumption under A.R.S. § 33-811 (B) is challenged. Otherwise, the court is making
15 an assumption that plaintiff is the real party in interest and a BFP. Assumptions are
16 not evidence. Furthermore, such inquiry is necessary to reconcile the expediency
17 clause of A.R.S. § 12-1177 (A) with the exclusion of non BFP's from entitlement to
18 the conclusive presumption under A.R.S. § 33-811 (B). The legislature was specific in
19 both statutes. Yet the expediency clause of A.R.S. § 12-1177 (A) is irrational and
20 conflicts with the intent of the legislature expressed in the first clause of the statute
21 and in light of A.R.S. § 33-811 (B), 33-420 when BFP status and the right to the
22 conclusive presumption is challenged in a FED action it is incumbent upon the court
23 to look at the facts instead of insufficient hearsay.
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1 Whites have offered evidence to prove, that Kondaur is not a BFP entitled to a
2 conclusive presumption. The Court's refusal to set a hearing and consider evidence
3 addressing the status of Kondaur as the real party in interest or a BFP by relying upon
4 unsworn testimony of counsel is a mistake and a denial of due process. The
5 mechanical application of the conclusive statutory presumption in favor of Kondaur
6 without an evidentiary determination that Kondaur is entitled to the presumption is
7 reversible error as a further denial of due process. In the courts denial of a hearing,
8 Whites were ultimately precluded from introducing evidence to disprove that Kondaur
9 was entitled to possession of the Whites residence. Thereby, the trial court denied
10 Whites due process under the Arizona Constitution and the Constitution of the United
11 States.
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16 **III. Conclusion**

17 The Defendants have engaged in inequitable conduct. They have obtained favorable
18 decisions from this Court and other Courts based on proof that is, at best, a misrepresentation
19 and, at worst, outright fraud. It is critical to the integrity of the Courts and the entire
20 judiciary that the Judgment be set aside to allow the Bankruptcy Court to evaluate the nature
21 and extent of the infractions committed by the Plaintiffs in an adversary proceeding. For the
22 reasons sets forth above, Defendants respectfully requests that this Court grant their Motion
23 to Set Aside Judgment and allow the Defendants to proceed as outlined above in the above
24 referenced case.
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27 WHEREFORE, it is respectfully requested that:
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Judgment of forcible detainer be set aside.

The matter be set for a hearing or decided within 3 court days.

Such other relief the Court deems just and proper.

DATED this 11th day of August, 2011.

Rhoads & Associates PLC
By /s/ Douglas C. Rhoads 
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Attorney for Defendant

ORIGINAL of the foregoing
mailed this 11th day
of August, 2011, to:

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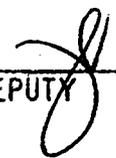
By: /s/ DCR

EXHIBIT "A"

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FILED
KRISTI YOUTSEY RUIZ
CLERK OF SUPERIOR COURT

10 MAY 28 PM 2:16

BY  DEPUTY

PINAL COUNTY DEPT. CLERK'S OFFICE
CIVIL DIVISION

9 **SUPERIOR COURT OF ARIZONA**
10 **PINAL COUNTY**

11 **KONDAUR CAPITAL CORPORATION,**
12 its successors and/or assigns,
13 Plaintiff(s),

CASE NO.: CV 2010-02012

14 vs.

15 **CLINTON WHITE AND CATHERINE**
16 **WHITE, HUSBAND AND WIFE, AS**
17 **COMMUNITY PROPERTY WITH RIGHT OF**
18 **SURVIVORSHIP, WHO ACQUIRED TITLE**
19 **AS CLINTON WHITE AND CATHY WHITE,**
20 **HUSBAND AND WIFE,**

21 and DOES OCCUPANTS I through X, inclusive,
22 Defendant(s).

JUDGMENT



23 This cause came on for scheduled hearing on May 28, 2010 before the Superior Court of Pinal
24 County, Arizona. Plaintiff's counsel, Jeremy T. Bergstrom, appeared by and through its associated
25 local appearance attorney, David G. Hébert (AZ Bar # 015792).

26 _____ Defendant(s) failed to appear or otherwise respond to the Complaint.

27 X Defendant(s) appeared in pro per.

28 _____ Defendant(s) appeared by and through its attorney of record.

1 The Court having considered the oral and documentary evidence before it and finding that the
2 Defendants herein named were regularly and duly served; that the allegations contained in Plaintiff's
3 Complaint are true and correct; that there is no just reason for a delay in entering a final judgment
4 against the person(s) named below; and good cause appearing therefore;
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6
7 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the Defendant(s) are guilty
8 of forcible entry and detainer and that the Plaintiff(s) are granted judgment against Defendant(s):
9 Clinton White, Catherine White, and each of them as follows:
10

11
12 1. For Possession of the premises located at:

13 **4006 South Valerian Street**
14 **Casa Grande, AZ 85294**

15 2. Rental Damages and Costs are waived.
16

17 **IT IS FURTHER ORDERED** that should Defendant(s) fail or refuse to vacate according to this
18 order, Plaintiff shall be entitled to the issuance of a Writ for Restitution of the aforementioned
19 premises no sooner than June 3, 2010.
20

21
22 **IT IS FURTHER ORDERED** that this Judgment be entered at this time as a final judgment.
23

24
25 DATED: May 28, 2010

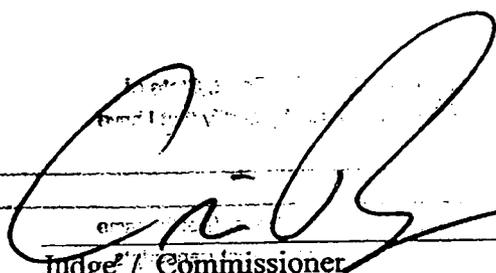
26
27 
28 Judge/Commissioner
29 Superior Court of Arizona (Pinal County)
30

EXHIBIT "B"

Construction
to Permanent
First American Title

Return To:
M&I Bank FSB
ATTN Final Documentation Dept.
P. O. Box 478
Milwaukee, WI 53201-0478

21



OFFICIAL RECORDS OF
PINEL COUNTY RECORDER
LAURA DEAN-LYILE

Prepared By:

Lorann J. Ten Haken
Vice President
M&I Bank FSB

DATE/TIME: 11/21/07-1323
FEE: \$30.00
PAGES: 21
FEE NUMBER: 2007-126151

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DEED OF TRUST

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

- (A) "Security Instrument" means this document, which is dated November 15, 2007 together with all Riders to this document.
- (B) "Borrower" is Clinton White and Catherine White, husband and wife, as community property with right of survivorship, who acquired title as Clinton White and Cathy White, husband and wife.

Borrower is the trustor under this Security Instrument. Borrower's mailing address is P.O. Box 338, Coolidge, AZ 85228

(C) "Lender" is M&I Marshall & Ilsley Bank

Lender is a Corporation organized and existing under the laws of the State of Wisconsin

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ARIZONA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

Form 3003 1/01 (rev. 8/02)

U.S.D. -6 (AZ) (0209)

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Lender's mailing address is 770 N Water Street
Milwaukee, WI 53202

Lender is the beneficiary under this Security Instrument.

(D) "Trustee" is First American Title Insurance Company, a California Corp.
Trustee's mailing address is
PO Box 2922, Phoenix, AZ 85062

(E) "Note" means the promissory note signed by Borrower and dated November 15, 2007
The Note states that Borrower owes Lender Six Hundred Fifty Thousand and 0/100ths
Dollars
(U.S. \$650,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic
Payments and to pay the debt in full not later than December 01, 2037

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the
Property."

(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges
due under the Note, and all sums due under this Security Instrument, plus interest.

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following
Riders are to be executed by Borrower [check box as applicable]

| | | |
|---|---|---|
| <input checked="" type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider | <input type="checkbox"/> Second Home Rider |
| <input type="checkbox"/> Balloon Rider | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> 1-4 Family Rider |
| <input type="checkbox"/> VA Rider | <input type="checkbox"/> Biweekly Payment Rider | <input type="checkbox"/> Other(s) [specify] |

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations,
ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final,
non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other
charges that are imposed on Borrower or the Property by a condominium association, homeowners
association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by
check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic
instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit
or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller
machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse
transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid
by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i)
damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the
Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the
value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on,
the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the
Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its
implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to
time.

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time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the

County

of

State

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

SEE ATTACHED LEGAL

Parcel ID Number: 402-02-002W 9
4006 S Valerian Street
Casa Grande
("Property Address"):

which currently has the address of
[Street]
(City), Arizona 85294-0000 (Zip Code)

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items

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pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U. S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be

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in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 13 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the

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lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. If such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with

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the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. **Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. **Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. **Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. **Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable

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attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

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(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstated as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

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Initials *CW* White, C

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12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

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Form 3003 1/01 (rev. 8/02)

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA

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requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicers and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

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Initials

White, C

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NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall give written notice to Trustee of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee shall record a notice of sale in each county in which any part of the Property is located and shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the other persons prescribed by Applicable Law. After the time required by Applicable Law and after publication and posting of the notice of sale, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder for cash at the time and place designated in the notice of sale. Trustee may postpone sale of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made thereon. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it or to the county treasurer of the county in which the sale took place.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender may, for any reason or cause, from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Time of Essence. Time is of the essence in each covenant of this Security Instrument.

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Initials:

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White, C

Form 3003 1/01 (rev. 8/02)

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

Clinton White

Clinton White (Seal)
-Borrower

Catherine White

Catherine White (Seal)
-Borrower

(Seal) -Borrower (Seal) -Borrower

(Seal) -Borrower (Seal) -Borrower

(Seal) -Borrower (Seal) -Borrower

UNOFFICIAL

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White, C

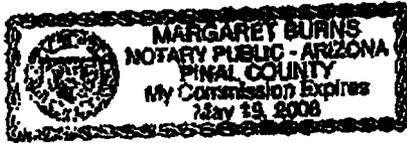
STATE OF Arizona, ~~Maricopa~~ *Pinal*

County ss:

16

The foregoing instrument was acknowledged before me this November *15*, 2007
by Clinton White and Catherine White .

My Commission Expires: *05-19-08*



Margaret Burns
Notary Public

Unofficial Copy

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White, C

EXHIBIT "A"**Parcel 1**

That portion of the North half of Section 1, Township 7 South, Range 7 East of the Gila and Salt River Meridian, Pinal County, Arizona, being a portion of Parcel "H5" as said parcel is shown on the Map entitled "Daniel and Martha Anderson Land Division", recorded December 16, 2003 and on file in the office of the County Recorder of Pinal County, in Surveys Book 9, at Page 127 thereof, described as follows:

BEGINNING at a found 5/8 inch rebar with aluminum cap marked "RLS 17258" at the Southeast corner of said Parcel "H5";

THENCE along the South line thereof, South 89 degrees 36 minutes 52 seconds West, (basis of bearings), a distance of 783.92 feet to a found 5/8 inch rebar with aluminum cap marked "RLS 37512";

THENCE North 00 degrees 31 minutes 25 seconds West along the West line of said Parcel "H5", a distance of 412.65 feet to a set 1/2 inch iron bar with cap marked "RLS 25090";

THENCE North 89 degrees 36 minutes 52 seconds East, a distance of 784.73 feet to a set 1/2 inch iron bar with cap marked "RLS 25090" on the East line of said Parcel "H5";

THENCE along said East line South 00 degrees 24 minutes 39 seconds East, a distance of 412.65 feet to the **POINT OF BEGINNING**.

Parcel 2

An easement for ingress and egress over that portion of the Northeast quarter of Section 1, Township 7 South, Range 7 East of the Gila and Salt River Base and Meridian, Pinal County, Arizona, being a portion of Parcels "H4" and "H5" as said parcels are shown on the map entitled "Daniel and Martha Anderson Land Division", recorded December 16, 2003 and on file in the official records of Pinal County in Surveys, Book 9 at Page 127 thereof, described as follows:

COMMENCING at the North quarter corner of said Section 1;

THENCE North 89 degrees 53 minutes 30 seconds East (basis of bearings), along the North line of said Northeast quarter, said line being the monument line of Selma Highway, a distance of 328.29 feet;

THENCE South 00 degrees 24 minutes 40 seconds East, a distance of 40.00 feet to a point on the South right-of-way line of said Selma Highway, and the **TRUE POINT OF BEGINNING**;

THENCE South 00 degrees 24 minutes 40 seconds East, along a line parallel with and 328.29 feet distant East therefrom, the North-South mid-section line of said Section 1, a distance of 1286.35 feet;

THENCE North 89 degrees 42 minutes 40 seconds East, a distance of 1.52 feet;

THENCE South 00 degrees 24 minutes 40 seconds East, along a line parallel with and 329.81 feet distant East therefrom, said North-South mid-section line of said Section 1, a distance of 1323.52 feet to a point on the East-West mid-section line;

THENCE South 89 degrees 36 minutes 52 seconds West along said East-West mid-section line, a distance of 24.52 feet;

THENCE North 00 degrees 24 minutes 39 seconds West, a distance of 2609.98 feet to a point on said South right-of-way line of Selma Highway;

THENCE North 89 degrees 53 minutes 30 seconds East, along said South right-of-way line, a distance of 23.00 feet to the TRUE POINT OF BEGINNING.

EXCEPT any portion lying within Parcel No. 1 above.

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EXHIBIT "C"



Record and Return to:

KONDAUR CAPITAL CORPORATION
1100 TOWN & COUNTRY ROAD
SUITE 1600
ORANGE, CA 92868

DATE/TIME: 09/09/2009 1350

FEE: \$13.00

PAGES: 3

FEE NUMBER: 2009-094042

09-08462

ASSIGNMENT OF DEED OF TRUST

FOR VALUE RECEIVED, M&I MARSHALL & ILSLEY BANK, a Wisconsin Corporation, its successors and assigns, hereby assigns and transfers to KONDAUR CAPITAL CORPORATION, its successors and assigns, all its right title and interest in and to a certain mortgage executed by, CLINTON WHITE AND CATHERINE WHITE, HUSBAND AND WIFE, AS COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP, WHO ACQUIRED TITLE AS CLINTON WHITE AND CATHY WHITE, HUSBAND AND WIFE, Dated NOVEMBER 15, 2007, to M&I MARSHALL & ILSLEY BANK, and recorded on NOVEMBER 21, 2007, in DOCUMENT NO. 2007-128151 of Official Records in the Office of the County Recorder of PINAL, which encumbers the following described property, to-wit:

Legal Description:
SEE ATTACHED LEGAL.

THIS ASSIGNMENT SHALL BE EFFECTIVE AS OF THE DATE OF THE MORTGAGE REFLECTED ABOVE.

Dated this 4TH Day of AUGUST, 2009.

M&I MARSHALL & ILSLEY BANK

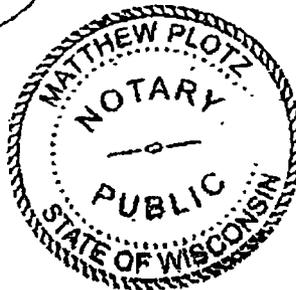
BY: [Signature]
John A. Muroni Vice President

ATTEST: [Signature]
Cheri M. Mann, Assistant Vice President

STATE OF WISCONSIN

County of Waukesha

The foregoing Assignment of Deed of Trust was sworn to, subscribed and acknowledged before me this 4th day of August, 2009, by John A. Muroni and Cheri M. Mann, who is personally know to me to be the Vice President and Assistant Vice President of M&I MARSHALL & ILSLEY BANK, and that said instrument was signed on behalf of said corporation.



[Signature]
MATTHEW PLOTZ, Notary Public
My commission will expire October 16, 2011

098xxxx4295-40000
This instrument was drafted by:
ROSANNE YOUNG

EXHIBIT "D"

1 **LAW OFFICES OF KEVIN JENSEN, PLLC**
2 **ATTORNEYS and COUNSELORS at LAW**
3 **3740 EAST SOUTHERN AVE.**
4 **SUITE 210**
5 **MESA, ARIZONA 85206**
6 **TELEPHONE (480) 632-7373**
7 **FACSIMILE (480) 632-8383**

8 Kevin Jensen, State Bar No. 021524

9 *Attorneys for Plaintiff*

10 **UNITED STATES BANKRUPTCY COURT**
11 **DISTRICT OF ARIZONA**

12)
13)
14)
15)
16)
17)
18)
19)
20)

21 **CLINTON WHITE**
22 **CATHERINE WHITE**

23 **Plaintiff**
24 **v.**

25 **Case No.**
26 **AFFIDAVIT OF**
27 **WILLIAM McCAFFREY**

28 **STATE OF ARIZONA**)
)
29 **County of MARICOPA**)

30 **ss.**

31 **I William McCaffrey, declare as follows:**

32 **I am over the age of 18 years and qualified to make this declaration. I**
33 **have no direct or indirect interest in the outcome of the case at bar for which I**
34 **am offering my observations, analysis, opinions and testimony.**

1 I have personal knowledge and experience to render opinions in the
2 topic areas related the securitization of mortgage loans, derivative securities,
3 the securities industry, real property law, Uniform Commercial Code
4 practices, predatory lending practices, Truth in Lending Act requirements,
5 loan origination and underwriting, accounting in the context of securitization
6 and pooling and servicing of securitized loans, assignment and assumption of
7 securitized loans, creation of trusts under deeds of trust, pooling agreements,
8 and issuance of asset backed securities and specifically mortgage-backed
9 securities by special purpose vehicles in which an entity is named as trustee
10 for holders of certificates of mortgage backed securities, the economics of
11 securitized residential mortgages during the period of 2001-2008, appraisal
12 fraud, and its effect on APR disclosure, usury, exceeding the legal limit for
13 interest charged, foreclosure of securitized and non-securitized residential
14 mortgages.

15 Finding the following:

16 **KONDAUR CAPITAL CORSPONDENCE CONCLUSIONS:**

17 *HOME PAGE KONDAUR CAPITAL STATES THEY PURCHASE:*

18
19 *LOANS WITH ORIGINATION FRAUD*
20 *LOANS WITH REGULARTORY VIOLATIONS*
21 *LOANS REJECTED FOR INVESTOR PURCHASE*
HYPER DEFAULTED LOANS

22 ***BUSINESS MODEL:***

23 Kondaur is a debt collector who specializes in purchasing delinquent
24 mortgages on residential property. There is apparently a market for "bad
25 paper" because servicers and lenders are overwhelmed with delinquent
26 mortgages right now. Some are willing to sell off some of the notes they hold
27 for a few for pennies on the dollar in order to get them off their books.
28

1 Like any debt buyer, Kondaur hopes to recover more than it has paid to
2 purchase the paper. It does this by aggressively approaching homeowners
3 and demanding that they essentially give up their home for a little cash, or
4 face foreclosure.

5 Kondaur's CEO, Jon Daurio, claims that his firm works with borrowers, what
6 he really means is putting pressure on them to get out so Kondaur can list the
7 home quickly and sell it off. Since it has bought the underlying mortgage for a
8 fraction of the face value of note, the market value of the home will almost
9 always be higher and it will profit on the sale.

10 Mr. Daurio is a former Ameriquest Mortgage executive. Ameriquest was one
11 of the more egregious "subprime" lenders, roping people into mortgages it
12 knew they could never afford. Now he wants to profit off the backs of the
13 very same people he fleeced while he was with Ameriquest.

13 **KONDAUR CAPITAL NEWS:**

14 *STATING THEY HAVE A LOAN MODIFICATION PROGRAM, HOWEVER THEY DO*
15 *NOT PARTICIPATE IN THE HAMP PROGRAM*

16 *FORECLOSER HANDLED BY LPS, LENDER PROCESSING SERVICES, CURRENTLY*
17 *UNDER INVESTIGATION BY THE UNITED STATES JUSTICE DEPARTMENT FOR*
18 *MANUFACTURING FAKE ASSIGNMENTS OF MORTGAGE.*

19 *US TRUSTEES OFFICE CHARGED WITH MONITORING BANKRUPTCYS IS*
20 *INVESTIGATING WHETHER LPS HASTENED FORECLOSURES.*

21 **KONDAUR CAPITAL CORPORATION** or their employees did not prepare
22 documents, as industry standard requires.

23 **RECORDED DOCUMENTS:**

24 **FEBRUARY 13, 2009 WHITES ENTERED INTO MODIFICATION AGREEMENT**
25 **with Marshall and Ilsley Bank**

26 **ALL SIX PAYMENTS WERE RECEIVED.**

27 **Marshall and Ilsley Bank, FILED A NOTICE OF TRUSTEE SALE**
28

1 **MARSHAL & ISLSLEY BANK LISTED AS BENEFICIARY ON NOTICE OF**
2 **TRUSTEE SALE DATED**

3 **Conclusively, there is no valid chain of title.**

4 **KONDAUR CAPITAL CORPORATION is not the real party in interest.**
5 **KONDAUR CAPITAL CORPORATION is not the Lender, defined by the Deed.**
6 **KONDAUR CAPITAL CORPORATION is not the holder in due course of the**
7 **Note.**

8 **KONDAUR CAPITAL CORPORATION is not in possession of the genuine and**
9 **original Note that Plaintiff signed.**

10 **The REAL PARTY IN INTEREST is not in possession of the genuine and**
11 **original Note that Plaintiff signed.**

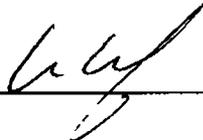
12 **Plaintiffs loan was securitized.**

13 **The only potential holder in due course of a note falls within one or more of**
14 **the following classifications:**

- 15 • **Investors who purchased asset backed securities in which ownership**
16 **of the loans were described with sufficient specificity as to at least**
17 **express the intent to convey ownership of the obligation as evidenced**
18 **by the promissory note and an interest in real property consisting of a**
19 **security interest held by an entity that was described as the**
20 **beneficiary of a Trust created by an instrument entitled Deed of Trust;**
- 21 • **Insurers that paid some party on behalf of said investors.**
- 22 • **Counterparties on credit default swaps.**
- 23 • **Conveyances or constructive trusts.**
- 24 • **Any other party that has traded in mortgage backed securities from the**
25 **aggregated pools**
26

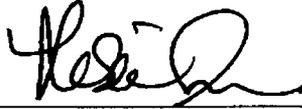
27 **All factual testimony or statements made in this declaration are true and**
28

1 correct to the best of my knowledge and belief. All opinions stated herein are
2 based upon a reasonable degree of probability or a high likelihood of
3 probability. I have no direct or indirect interest in the outcome of the case at
4 bar for which I am offering my observations, analysis, opinions and
5 testimony.

6
7
8 
9 _____
10 William D. McCaffrey

11
12
13 12/16/2010
14 Date

15 SWORN TO AND SUBSCRIBED before me, the undersigned notary public, this
16 16th Day of December, 2010

17 
18 _____
19 Notary Public

20 My commission expires: 8/13/2012



EXHIBIT "E"

August 4, 2009

CLINTON WHITE
4006 South Valerian Street
Casa Grande, AZ 85294

NOTIFICATION OF ASSIGNMENT, SALE OR TRANSFER OF YOUR MORTGAGE LOAN

RE: Loan Number - 109260
Property Address: 4006 South Valerian Street
Casa Grande, AZ 85294

The purpose of this notice is to inform you that, effective August 17 2009, your mortgage loan was assigned, sold or transferred to Kondaur Venture X, LLC and contemporaneously assigned, sold or transferred to Kondaur Capital Trust Series 2009-3. The assignment, sale, or transfer of your loan to Kondaur Venture X, Inc., and contemporaneous assignment, sale or transfer to Kondaur Capital Trust Series 2009-3, does not affect any term or condition of the Mortgage, Deed of Trust or Note and this notice requires no action on your part. If you need to contact these entities, they can be reached at:

Kondaur Venture X, LLC or Kondaur Capital Trust Series 2009-3
c/o Kondaur Capital Corporation
1100 Town & Country Road, Suite 1600
Orange, CA 92868
Attention: Jon Daurio, CEO
1-888-566-3287, ext. 2052

The above-described transfers of ownership were not recorded. However, there has been an assignment recorded, or we intend to record an assignment, into the name of the servicer of your loan, Kondaur Capital Corporation. Said recordation was, or is intended to be, in Pinal County, AZ.

If you have any questions relating to the transfers of ownership of your mortgage loan, please contact Kondaur Capital Corporation, the servicer of your mortgage loan and the designated agent for Kondaur Capital Trust Series 2009-3, at the following telephone number, and/or email address:

KONDAUR CAPITAL CORPORATION
Attention: Marc DeMahy
Toll-free: (877) 737-8866, ext. 7069
mdemahy@kondaur.com

It is important that you send your monthly payments directly to Kondaur Capital Corporation, the servicer of your mortgage, at the address on your mortgage statement.

Checks should be made payable to Kondaur Capital Corporation. All correspondence and inquiries concerning your mortgage loan should be addressed to Kondaur Capital Corporation.

EXHIBIT "F"

1 Douglas C. Rhoads AZ Bar No. 015265
2 RHOADS & ASSOCIATES, PLC
3 3844 North 32nd St. Suite 1
4 Phoenix, AZ 85018
5 Telephone: (602) 499-7709
6 Facsimile: (208) 475-7709
7 RhoadsAssoc@gmail.com
8 Attorneys for Debtor

6 UNITED STATES BANKRUPTCY COURT
7 DISTRICT OF ARIZONA
8

9 In Re:
10 CATHERINE ANN WHITE, CLINTON
11 A WHITE

Chapter: 13

Case No.: 4:11-bk-00709-EWH

Chapter 13 Debtors

13 KONDAUR CAPITAL CORPORATION

AFFIDAVIT OF
SHEILA PILAT

Movant,

15 vs.

16 CATHERINE ANN WHITE, CLINTON
17 A WHITE,

18 Respondants.

19 County of Maricopa }
20 State of Arizona } ss.

21 Sheila Pilat, being first duly sworn, deposes and states as follows:
22

23 1. I am over the age of eighteen years and qualified to make this affidavit. I am a
24 resident of the State of Arizona and make this Affidavit based on my own personal knowledge.

25 2. I was a Branch Manager for several Mortgage Companies for seven (7) years,
26 passed the Arizona State Exam to become a Broker and I am still in good standing with the State
27 of Arizona.

28 3. When the White Trustee's Sale was first posted on Tiffany and Bosco's website, I
observed that it listed M & I Bank as Lender and it also showed M & I bank on the Notice of

1 Trustee's Sale recorded at the Pinal County Recorder's office. Later, Tiffany and Bosco's website
2 changed the Lender to Kondaur Capital.

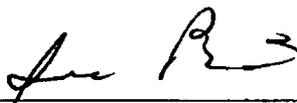
3 4. Debtors received from Kondaur Capital Corporation a "Notification of Assignment,
4 Sale or Transfer of your Mortgage Loan" dated on August 4, 2009, reciting that the mortgage loan
5 had been transferred to Kondaur Venture X, LLC and contemporaneously to Kondaur Capital
6 Trust Series 2009-3. The Notice went on to say that the above-mentioned transfers of ownership
7 were not recorded, but that an Assignment was recorded in the name of the *servicer* Kondaur
8 Capital Corporation. See Exhibit A attached hereto.

9 5. As of February 15, 2010, Tiffany & Bosco had the White Trustee's Sale scheduled
10 for March 16, 2010.

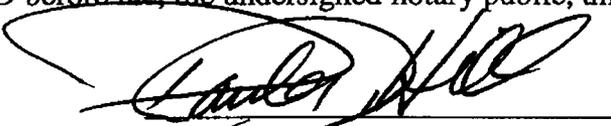
11 6. As of March 1, 2010 the Trustee's Sale had been changed to March 2, 2010, and
12 there was no opening bid at Tiffany & Bosco's website at 9:00 am on the day before the new
13 scheduled White Trustee's Sale. I continued to monitor it throughout the day, and there was never
14 any opening bid posted. I called Tiffany & Bosco's office to verify that they did not have an
15 opening bid for this Trustee's Sale. They verified by phone that there was no opening bid and that
16 the sale would have to be moved.

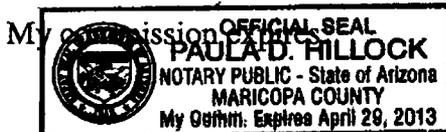
17 7. On March 2, 2010, I called Tiffany and Bosco to find out the new Trustee's Sale
18 date and they informed me that the property had reverted to Lender (Kondaur) for \$295,000.00.

19 FURTHER AFFIANT SAYETH NAUGHT.

20 
21 _____
22 Sheila Pilat

23 SWORN TO AND SUBSCRIBED before me, the undersigned notary public, this 8th day
24 of March, 2011.

25 
26 _____
27 Notary Public



Sheila Pilat

From: Becky Perez [beckyp@theaomgroup.com]

Sent: Monday, March 01, 2010 12:32 PM

To: Sheila Pilat

Subject: Re: catherine white

Thank you so much - U R the best :)

On Mon, Mar 1, 2010 at 12:28 PM, Sheila Pilat <sheila@cox.net> wrote:

Done!

Sheila Pilat,

480 699-1482 phone

1-877-210-6685 fax

NOTICE: This communication may contain privileged or other confidential information. If you are not the intended recipient and believe that you may have received this communication in error, please reply to the sender indicating that fact and delete the copy you received. In addition, you should not print, copy, retransmit, disseminate, or otherwise use the information. Thank you.

From: Becky Perez [mailto:beckyp@theaomgroup.com]

Sent: Monday, March 01, 2010 11:56 AM

To: Sheila Pilat

Subject: catherine white

Sheila -

Catherine White called in wanting more information on her foreclosure. Curious on why it would have been bumped up from the 16th of March 2 tomorrow. What kind of steps are we taking on her case? Can you please call her on her cell #520-560-5881 If Donna the bookkeeper answers we can talk to her.

Thanks

7/5/2011

--

Rebecca Perez
AZ Foreclosure Assistance / AOM Group LLC
beckyp@theaomgroup.com

(office) 602-424-5734
(fax) 602-293-3801

DISCLAIMER: Arizona Foreclosure Assistance LLC is not a law firm. If you feel you are in need of competent legal advice, you should consult a licensed attorney familiar with foreclosure. Arizona Foreclosure Assistance LLC is an organization designed to assist home owners with mortgage or home loan modifications, property short sales and assist home owners to determine what options may be available regarding their property. Arizona Foreclosure Assistance LLC does not advise home owners on legal issues regarding foreclosure, including but not limited to: foreclosure, deed of sale, public auctions, eviction, forcible detainer actions, special detainer actions or lease buy-back issues. Further, Arizona Foreclosure Assistance LLC does not provide home owners with any other legal advice or participate in any form of unauthorized practice of law.

--

Rebecca Perez
AZ Foreclosure Assistance / AOM Group LLC
beckyp@theaomgroup.com

(office) 602-424-5734
(fax) 602-293-3801

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Sheila Pilat

From: no-reply@salesforce.com on behalf of Orlando Sagarnaga [orlandos@azforeclosureassistance.com]
Sent: Friday, February 12, 2010 10:04 PM
To: orlandos@azforeclosureassistance.com; sheilap@theaomgroup.com; annette@azforeclosureassistance.com; beckyp@azforeclosureassistance.com
Subject: Report: AOM GROUP PENDING FORECLOSURES REPORT run at 2/12/2010 10:04 PM

AOM GROUP PENDING FORECLOSURES REPORT

Run as: Orlando Sagarnaga
 Run at: 2/12/2010 10:04 PM

Filtered By:

Interval: Foreclosure Sale Date equals Custom (1/1/2009 to null)
 View: All opportunities
 Opportunity Status: Any
 Probability: All
 Stage equals Negotiation/Review
 AND Account Name equals Legal Option
 AND Foreclosure Sale Date greater or equal 5/1/2009

| Opportunity Owner | Opportunity Name | Account Name | Primary Contact | Foreclosure Sale Date | Trustee Information |
|--------------------------|------------------------------|---------------------|-----------------|-----------------------|---|
| <u>Richard Clark</u> | <u>Silvia Cortez</u> | <u>Legal Option</u> | | 7/28/2009 2:49 PM | Trust Deed Network |
| <u>Richard Clark</u> | <u>Gary W. Heath</u> | <u>Legal Option</u> | | 10/29/2009 9:41 AM | Michael A. Bosco, Jr. |
| <u>Becky Perez</u> | <u>Jason Carr</u> | <u>Legal Option</u> | | 11/2/2009 10:30 AM | - |
| <u>Richard Clark</u> | <u>Serjio Hernandez</u> | <u>Legal Option</u> | | 11/4/2009 4:42 PM | MTC Financial |
| <u>Richard Clark</u> | <u>Norma Sandoval</u> | <u>Legal Option</u> | | 12/3/2009 1:08 PM | MTC Financial |
| <u>Becky Perez</u> | <u>Mahwood H. Tehrani</u> | <u>Legal Option</u> | | 12/10/2009 9:49 AM | http://www.rppsales.com/Properties.asp |
| <u>Becky Perez</u> | <u>Alfredo Munoz</u> | <u>Legal Option</u> | | 12/15/2009 9:53 AM | Recontrust |
| <u>Becky Perez</u> | <u>Mark Murphy</u> | <u>Legal Option</u> | | 1/11/2010 8:33 AM | Recontrust Company |
| <u>Becky Perez</u> | <u>Kurt W. Kramer</u> | <u>Legal Option</u> | | 1/12/2010 8:16 AM | Michael A. Bosco, Jr. |
| <u>Orlando Sagarnaga</u> | <u>Jessica Aranda</u> | <u>Legal Option</u> | | 1/19/2010 1:53 PM | Recontrust Company |
| <u>Sheila Pilat</u> | <u>Timoteo H. Araiza III</u> | <u>Legal Option</u> | | 1/21/2010 8:38 AM | Tiffany & Bosco |
| <u>Orlando Sagarnaga</u> | <u>Cesar Munoz</u> | <u>Legal Option</u> | | 1/22/2010 8:55 AM | Recontrust Co. |
| <u>Becky Perez</u> | <u>Alexander L. Rubio</u> | <u>Legal Option</u> | | 2/16/2010 8:44 AM | Michael A. Bosco Jr. |
| <u>Becky Perez</u> | <u>Curtis L. Mariner</u> | <u>Legal Option</u> | | 2/16/2010 9:28 AM | Quality Loan Service Corp. c/o Quality Loan |
| <u>Annette Sagarnaga</u> | <u>Steven J. VonPrisk</u> | <u>Legal Option</u> | | 2/17/2010 8:56 AM | Tiffany & Bosco |

7/5/2011

| | | | | | | | | |
|----------------------------------|--------------------------------------|---------------------|-----------------------|--|-----------------------|------------|------------|--|
| <u>Becky Perez</u> | <u>Kimberly H. Murphy - 63rd Ave</u> | <u>Legal Option</u> | 2/17/2010 8:57 AM | Michael A. Bosco Jr | (602) 255- 6035 | 09-48059 | - | 12/2/2009- |
| <u>Becky Perez</u> | <u>Gonzalo Moreno</u> | <u>Legal Option</u> | 2/18/2010 3:34 PM | Tiffany & Bosco | (602) 255- 6035 | 09-12003 | 8/6/2009 | 8/6/2009- |
| <u>Richard Clark</u> | <u>James A. Scrivano</u> | <u>Legal Option</u> | 2/19/2010 8:59 AM | Recontrust Company | (800) 281- 8219 | 08-0102146 | - | -- |
| <u>Orlando Sagarnaga</u> | <u>Jeffrey Higgins</u> | <u>Legal Option</u> | 2/19/2010 9:21 AM | Old Republic Default Management Services | (714) 573- 1965 | 09-21232 | 8/4/2009 | 8/4/2009- |
| <u>Orlando Sagarnaga</u> | <u>Francisco Pesqueira</u> | <u>Legal Option</u> | 2/19/2010 1:23 PM | Recontrust Company | (800) 281- 8219 | 09-0021466 | 8/3/2009 | 8/3/2009Avery Anderson Referred this |
| <u>Becky Perez</u> | <u>Leo Simon</u> | <u>Legal Option</u> | 2/19/2010 2:06 PM | Tiffany & Bosco | (602) 255- 6000 | 08-44756 | - | -- |
| <u>Becky Perez</u> | <u>Curtis Mariner Sr.</u> | <u>Legal Option</u> | 2/26/2010 8:57 AM | Recontrust | (800) 281- 8219 | 09-0069208 | 10/2/2009 | 10/2/2009This is SR |
| <u>Becky Perez</u> | <u>Raymond G. Pacheco</u> | <u>Legal Option</u> | 3/2/2010 1:40 PM | Priority Posting | (714) 573- 1965 | 09-34657 | 12/17/2009 | 12/17/2009- |
| <u>Becky Perez</u> | <u>Andres Guillen</u> | <u>Legal Option</u> | 3/5/2010 3:31 PM | Perry & Shapiro, L.L.P. | (602) 222- 5711 | 09-018025 | 9/1/2009 | 9/1/2009- |
| <u>Becky Perez</u> | <u>Matthew N. Farmer</u> | <u>Legal Option</u> | 3/8/2010 2:31 PM | Northwest Trustee Services | (714) 277- 4888 | 7662.21132 | 9/4/2009 | 9/4/2009- |
| <u>Richard Clark</u> | <u>Lonnie M Atkeson</u> | <u>Legal Option</u> | 3/8/2010 4:44 PM | Recontrust Company | (800) 281- 8219 | 08-0108628 | - | -Jason Young is Renter-602- 488-5581 |
| <u>Becky Perez</u> | <u>Ruth O'Callaghan</u> | <u>Legal Option</u> | 3/11/2010 9:13 AM | Recontrust Company | (800) 281- 8219 | 09-0138786 | 11/9/2009 | 11/9/2009- |
| <u>Richard Clark</u> | <u>Tim Carter</u> | <u>Legal Option</u> | 3/16/2010 7:34 AM | Title Trust Deed Service Co | (818) 871- 1900 | 2008006335 | 8/12/2009 | 8/12/2009She will add to lawsuit this month |
| <u>Orlando Sagarnaga</u> | <u>Clinton & Cathy White</u> | <u>Legal Option</u> | 3/16/2010 12:53 PM | Michael A. Bosco Jr. | (602) 255- 6035 | 09-08462 | 2/11/2010 | 2/11/2010OK TT Donna-She is the Book Keeper |
| <u>Becky Perez</u> | <u>Kimberly H. Murphy - 47th Dr.</u> | <u>Legal Option</u> | 3/22/2010 11:45 AM | Priority Posting | (714) 573- 1965 | T0957607AZ | 2/1/2010 | 2/1/2010- |
| <u>Becky Perez</u> | <u>Melc Kulitea</u> | <u>Legal Option</u> | 3/23/2010 8:56 AM | Recontrust Compnay | (800) 281- 8219 | 09-0153025 | 12/17/2009 | 12/17/2009- |
| <u>Orlando Sagarnaga</u> | <u>Raymond and Yolanda Appelwick</u> | <u>Legal Option</u> | 3/24/2010 7:16 AM | Quality Loan Service Corp | (714) 573- 1965 | az09333282 | 8/6/2009 | 8/6/2009- |
| <u>Becky Perez</u> | <u>Juanita T. Losaria</u> | <u>Legal Option</u> | 3/25/2010 12:54 PM | Recontrust Company | (800) 281- 8219 | 09-0139680 | 12/1/2009 | 12/1/2009- |
| <u>Orlando Sagarnaga</u> | <u>Victoria Carpenter</u> | <u>Legal Option</u> | 3/31/2010 10:00 AM | Michael A. Bosco, Jr. | (602) 255- 6035 | 09-32576 | 8/6/2009 | 8/6/2009- |
| <u>Sheila Pilat</u> | <u>Robert Kochmann / Menlo St</u> | <u>Legal Option</u> | 4/8/2010 12:45 PM | Cal-Western Reconveyance Corp | (800) 546- 1531 | 1234440-08 | 11/6/2009 | 11/6/2009This house is rented.. |
| Grand Totals (35 records) | | | | | | | | |

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NOD32 4851 (20100209) Information

This message was checked by NOD32 antivirus system.
<http://www.eset.com>

7/5/2011

EXHIBIT "G"

Douglas C. Romach AZ Bar No. 015265
PricewaterhouseCoopers LLP
1841 North 72nd St, Suite 1
Phoenix, AZ 85018
Telephone: (602) 499-7700
Facsimile: (602) 475-7700
Romach.Douglas@pwc.com
Attorney at Law

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In Re: CATHERINE ANN WHITE, CLINTON WHITE
A WHITE Case No. RT11-DR-00709-FWH

Chapter 11 Debtors

RENDER CAPITAL CORPORATION

AFFIDAVIT OF
CATHERINE ANN WHITE

Attest:

CATHERINE ANN WHITE, CLINTON
A WHITE,

Respondents.

County of Pinal

State of Arizona.

ss

Catherine Ann White, being first duly sworn, deposes and states as follows:

1. I am over the age of eighteen years and qualified to make this affidavit. I am a resident of the State of Arizona and make this Affidavit based on my own personal knowledge.

2. My husband, Clinton White, and I entered into a provisional repayment agreement with M & T Marshall & Disky Bank ("M&T"). We were to make 6 payments beginning July 1, 2009. At the completion of the six payments, M & T would modify the loan permanently with a fixed rate of 8% or less (we were currently on a variable rate).

11 The scheduled payment would be either the same amount we were making during payment
12 periods or less.

13 7. On July 1, 2009 we started to make the payments. Also we made two
14 payments we were notified by M&J that our loan had been sold to Kondur Capital
15 Corporation ("Kondur") and all future payments should be made to them.

16 8. We made the remaining four payments to Kondur as instructed by M&J
17 and in compliance with our original agreement.

18 9. After the last of these payments had been made, Kondur defaulted on the
19 agreement by stating that they would only modify the loan if we made an additional
20 payment of \$7,000 to them. Although we were very disappointed that they had changed the
21 agreement we were in a position to keep our home, so we sent them
22 the above indicated additional \$55,000.00 to pay them.

23 10. Even as we were getting ready to wire the additional money, our sister
24 and mother Donna Sue Harrison (Ms. Harrison) telephoned Kondur for whom instructions
25 had been made with Vire, a purported employee of Kondur, and he informed Ms. Harrison
26 that Kondur had changed their mind and could not modify the loan even with the
27 additional payment of \$75,000.00.

28 11. As a result of Kondur's default to comply with the original agreement we
29 were sold to NICH. Kondur continued the process of a non-judicial foreclosure with
30 a foreclosure trustee, Tiffany & Boston that has originally been started by M & J.

31 12. As of February 15, 2010, Tiffany & Boston had a Trustee's Sale scheduled for
32 March 10, 2010.

33 13. On March 1, 2010, the Trustee's Sale had been changed to March 7, 2010,
34 and there was no opening bid. There was not an opening bid posted or announced at the day
35 of the scheduled one, March 2, 2010, due to Tiffany & Boston not having an opening bid
36 from Kondur.

37 14. On March 2, 2010, I retained the Trustee's Sale of our property through an
38 Auctioneer, Sandra Ann Grande, AZ 85204, on the steps of the Pinal County Courthouse.

11. While my property sales were announced, our property located at
12. 1400 South Valerian Street, Casa Grande, AZ 85104, was not.

13. I did not use the individual conducting the auction about my property and
14. being announced to which I was informed that the sale was "not being held on this
15. property as it was "pulled".

16. FURTHER AFFLIANT SAYETH NAUGHT

17. 
18. Catherine Ann White

19. SWORN TO AND SUBSCRIBED before me, the undersigned notary public, this
20. 17th day of March, 2011

21. 
22. Notary Public



EXHIBIT "H"

1 Douglas C. Krouse, AZ Bar No. 018205
2 REEDS & ASSOCIATES, PLLC
3 1641 North 52nd St, Suite 1
4 Phoenix, AZ 85018
5 Telephone: (602) 480-7709
6 Facsimile: (602) 475-7709
7 dkrouse@reedsgroup.com
8 www.reedsgroup.com

9 UNITED STATES BANKRUPTCY COURT
10 DISTRICT OF ARIZONA

11 Plaintiff
12 CATHERINE ANN WHITE, CLINTON A WHITE, Chapter 11
13 Defendant
14 Case No. 11-11-00709-KWH

15 Chapter 11 Debtor

16 RONDAIR CAPITAL CORPORATION
17 Affiant of
18 DONNA SUE HARRISON
19 Mesquite

20 CATHERINE ANN WHITE, CLINTON
21 A WHITE

22 Respondents

23 County of Maricopa
24 State of Arizona

25 Donna Sue Harrison, being duly sworn, deposes and states as follows:
26 I am over the age of eighteen years and qualified to make this affidavit. I am
27 a resident of the State of Arizona and make this Affidavit based on my own personal
28 knowledge.

29 I hold a position with the Debtors, Catherine White and Clinton White, as the
30 Office Manager.

31 As one of my office duties, I was asked by the Whites to contact Ronda
32 Air Corporation ("Ronda") to receive wiring instructions for making a credit

1 payment for their home which is a property located at 4006 South Valerian Street, Casa
2 Grande, AZ 85294.

3 [redacted] I spoke with Marc, a purported employee of Kondaur, at which time he
4 informed me that Kondaur had "changed" both mind and would not modify the loan even
5 with the additional payment of \$85,000.00."

6 [redacted] As a result, a Trustee Sale was scheduled and I was misled by the White's
7 and the bank.

8 [redacted] In March 2, 2011, I attended the trustee's Sale of Cully and Chiana White's
9 property located at 4006 South Valerian Street, Casa Grande, AZ, 85294, on the steps
10 of the Pinal County Courthouse.

11 [redacted] There were sales called but when the White's property was called out
12 by White, I asked the person conducting the auction about her property. Mrs. White was
13 informed that the sale "was not being held on that property as it was "pulled".

14 FURTHER AFFIANT SAYS NOTHING.

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149 SWORN TO AND SUBSCRIBED before me, the undersigned notary public, on
150 the 17th day of March, 2011.

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159 My commission expires:



EXHIBIT "I"

Great American Title Agency

WHEN RECORDED MAIL TO :
Tiffany & Bosco, P.A.
2525 E. Camelback Rd.
Ste. 300
Phoenix, AZ 85016



OFFICIAL RECORDS OF
PINAL COUNTY RECORDER
LAURA DEAN-LYTLER

Forward Tax Statements to :
Kondaur Capital Corporation
T & B File # 09-08462 Conv
Mortgage Co.# 0000109260
Title Co. # 2904084

DATE/TIME: 03/09/2010 1124
FEE: \$13.00
PAGES: 3
FEE NUMBER: 2010-022295

EXEMPT TRANSACTION - NO AFFIDAVIT
ARS 11-1134 (B)(1)

TRUSTEE'S DEED UPON SALE

Michael A. Bosco, Jr., as the duly appointed Trustee (or successor Trustee or Substituted Trustee), under a Deed of Trust referred to below, and herein called "Trustee", does hereby grant without any covenant or warranty to :

Kondaur Capital Corporation

herein called Grantee, the following described real property situated in Pinal County, described as :

Parcel 1

That portion of the North half of Section 1, Township 7 South, Range 7 East of the Gila and Salt River Meridian, Pinal County, Arizona, being a portion of Parcel "H5" as said Parcel is shown on the Map entitled "Daniel and Martha Anderson Land Division", recorded December 16, 2003 and on file in the office of the County Recorder of Pinal County, in Surveys Book 9, at Page 127 thereof, described as follows:

BEGINNING at a found 5/8 inch rebar with aluminum cap marked "RLS 17258" at the Southeast corner of said Parcel "H5";

THENCE along the South line thereof, South 89 degrees 36 minutes 52 seconds West, (basis of bearings) a distance of 783.92 feet to a found 5/8 inch rebar with aluminum cap marked "RLS 37512";

THENCE North 00 degrees 31 minutes 25 seconds West along the West line of said Parcel "H5", a distance of 412.65 feet to a set 1/2 inch iron bar with cap marked "RLS 25090";

THENCE North 89 degrees 36 minutes 52 seconds East, a distance of 784.73 feet to a set 1/2 inch iron bar with cap marked "RLS 25090" on the East line of said Parcel "H5";

THENCE along said East line South 00 degrees 24 minutes 39 seconds East, a distance of 412.65 feet to the POINT OF BEGINNING.

Parcel 2

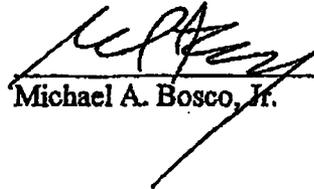
An easement for ingress and egress over that portion of the Northeast quarter of Section 1, Township 7 South, Range 7 East of the Gila and Salt River Base and Meridian, Pinal County, Arizona, being a portion of Parcels "H4" and "H5" as said parcels are shown on the map entitled "Daniel and Martha Anderson Land Division", recorded December 16, 2003 and on file in the official records of Pinal County in Surveys, Book 9 at Page 127 thereof, described as follows:

COMMENCING at the North quarter corner of said Section 1;
THENCE North 89 degrees 53 minutes 30 seconds East (basis of bearings), along the North line of said Northeast quarter, said line being the monument line of Selma Highway, a distance of 328.29 feet;
THENCE South 00 degrees 24 minutes 40 seconds East, a distance of 40.00 feet to a point on the South right-of-way line of said Selma Highway, and the **TRUE POINT OF BEGINNING**;
THENCE South 00 degrees 24 minutes 40 seconds East, along a line parallel with and 328.29 feet distant therefrom, the North-South mid-section line of said Section 1, a distance of 1286.35 feet;
THENCE North 89 degrees 42 minutes 40 seconds East, a distance of 1.52 feet;
THENCE South 00 degrees 24 minutes 40 seconds East, along a line parallel with and 329.81 feet distant East therefrom, said North-South mid-section line of said Section 1, a distance of 1323.52 feet to a point on the East-West mid-section line;
THENCE South 89 degrees 36 minutes 52 seconds West along said East-West mid-section line, a distance of 24.52 feet;
THENCE North 00 degrees 24 minutes 39 seconds West, a distance of 2609.98 feet to a point on said South right-of-way line of Selma Highway;
THENCE North 89 degrees 53 minutes 30 seconds East, along said South right-of-way line, a distance of 23.00 feet to the **TRUE POINT OF BEGINNING**.
EXCEPT any portion lying within Parcel No. 1 above.

This conveyance is made pursuant to the powers including the power of sale conferred upon Trustee by said Deed of Trust executed Clinton White and Catherine White, husband and wife, as community property with right of survivorship, who acquired title as Clinton White and Cathy White, husband and wife, as Trustor, recorded on 11/21/07, Instrument No./Docket-Page: 2007-128151 Official Records in the Office of the County Recorder of Pinal County, AZ and in compliance with the laws of the State of Arizona authorizing this conveyance.

Said property was sold by Trustee at Public auction on March 2, 2010, at the place named in the Notice of Trustee's Sale. "Grantee", being the highest bidder at such sale, became the purchaser of said property and made payment thereof to said Trustee for the amount bid, namely \$295,000.00, which payment was made either entirely in cash or by the satisfaction, pro tanto, of the obligation then secured by said Deed of Trust, together with the foreclosure and expenses relative thereto.

IN WITNESS WHEREOF, MICHAEL A. BOSCO, JR., as Trustee, has this day caused his name to be hereunto affixed.

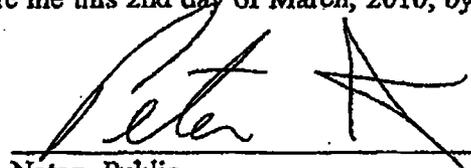


Michael A. Bosco, Jr.

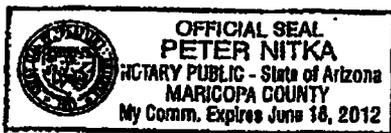
State of Arizona)
)ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 2nd day of March, 2010, by Michael A. Bosco, Jr., as Trustee.

My Commission Expires:



Notary Public



SUPPLEMENT "A"

JUN 10 2011

ORDERED PUBLISHED

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP Nos. AZ-10-1055-MkKiJu
) AZ-10-1056-MkKiJu
HOWARD RICHARD VEAL, JR., and) (Related Appeals)*
SHELLI AYESHA VEAL,)
) Bk. No. 09-14808
Debtors.)

HOWARD RICHARD VEAL, JR.;
SHELLI AYESHA VEAL,
Appellants,

v.

O P I N I O N

AMERICAN HOME MORTGAGE SERVICING,)
INC.; WELLS FARGO BANK, N.A., as)
Trustee for Option One Mortgage)
Loan Trust 2006-3 Asset-Backed)
Certificates, Series 2006-3, and)
its successor and/or assignees,)
Appellees.)

Argued and Submitted on June 18, 2010
at Phoenix, Arizona

Filed - June 10, 2011

Appeal From The United States Bankruptcy Court
for the District of Arizona

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

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

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

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

5 Before: MARKELL, KIRSCHER and JURY, Bankruptcy Judges.

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I. INTRODUCTION

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

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

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

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

1 a negotiable promissory note secured by real property if, under
2 applicable law, it is a "person entitled to enforce the note" as
3 defined by the Uniform Commercial Code.

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

12 II. FACTS

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

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

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

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

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

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

9 (2) a copy of the Mortgage;

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

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

17 On its face, the Dorchuck Letter states that AHMSI acquired
18 Option One's mortgage servicing business.

19 The Dorchuck Letter is just that; a letter, and nothing
20 more. Mr. Dorchuck does not declare that his statements are made
21 under penalty of perjury, nor does the document bear any other of
22 the traditional elements of admissible evidence. No basis was
23 laid for authenticating or otherwise admitting the Dorchuck
24 Letter into evidence at any of the hearings in this matter.
25 Indeed, the Veals objected to its consideration as evidence.³

26
27 ³The Veals stated in a memorandum filed with the bankruptcy
28 court that "[t]his [Dorchuck] letter is not admissible [sic]

(continued...)

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

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

21

22

23

24 ³(...continued)
25 evidence of anything." The bankruptcy court did not rule on this
26 objection.

26

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

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

3 Meanwhile, on October 21, 2009, Wells Fargo filed a motion
4 for relief from stay to enable it to commence foreclosure
5 proceedings against the Property. Wells Fargo alleged in the
6 motion that it was a secured creditor pursuant to a first
7 priority mortgage. None of the three exhibits attached to the
8 motion, however, directly supported this allegation: its first
9 exhibit was a copy of the same Mortgage that AHMSI attached to
10 its proof of claim; its second exhibit was an itemization of
11 postpetition amounts due; and its final exhibit was a copy of the
12 Veals' Schedules A and D. Wells Fargo submitted no other
13 documents with its motion. As a result, Wells Fargo presented no
14 evidence as to who possessed the Note and no evidence regarding
15 any property interest it held in the Note.

16 On November 5, 2009, the Veals responded to the relief from
17 stay motion. They argued that Wells Fargo lacked standing to
18 prosecute the relief from stay motion and that Wells Fargo was
19 not the real party in interest. The Veals also submitted no
20 evidence with their response; rather, they relied on the absence
21 of evidence submitted in support of the relief from stay motion.⁵

23 ⁵The Veals did refer the bankruptcy court to documents
24 available on the website of the Securities Exchange Commission
25 supposedly related to the alleged securitization of the Veal
26 Loan, but there is no indication in the record whether the
bankruptcy court actually looked at or considered these
documents.

27 These documents, had they been properly authenticated, might
28 have filled some (but not all) of the gaps in the evidence. For
instance, the documents contained a Pooling and Serving Agreement
(continued...)

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

14 These assignments were important. They purported not only
15 to transfer the Mortgage to each named assignee, but also to
16 transfer other rights as well. The purported assignment from GSF
17 to Option One, for example, stated that it assigned not only the
18 Mortgage, but also "the note(s) and obligations therein described
19 and the money due and to become due thereon with interest, and
20
21

22 ⁵(...continued)
23 ("PSA") for a securitization trust. The PSA identifies and
24 appoints Option One as servicer for the trust assets and
25 identifies Wells Fargo as trustee of the trust. Further, the
26 schedules attached to the PSA appear to identify the Veal Loan as
27 one of the trust assets. Thus, the PSA, had it been properly
28 authenticated and admitted, would have tied both Option One and
Wells Fargo to the Veal Loan. The PSA did not, however, identify
AHMSI in any capacity, including its alleged role as successor
servicer or subservicer of the Veal Loan. The PSA is similarly
unhelpful as to the current holder of the Note.

1 all rights accrued or to accrue under such Mortgage."⁶

2 The purported assignment from Option One to Wells Fargo was
3 different, however, and more limited. It purported to transfer
4 the following described mortgage, *securing the payment*
5 *of a certain promissory note(s) for the sum listed*
6 *below, together with all rights therein and thereto,*
7 *all liens created or secured thereby, all obligations*
8 *therein described, the money due and to become due*
9 *thereon with interest, and all rights accrued or to*
10 *accrue under such mortgage.*

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

22 ⁶This contractual assignment of the Note was superfluous
23 given the indorsement on the original note. See Uniform
24 Commercial Code § 3-204.

25 ⁷One might argue that the clauses in the assignment which
26 follow the italicized appositive phrase are broad enough to pick
27 up the Note, and thus effect a transfer of it. They do, after
28 all, purport to transfer "all rights therein and thereto, . . .
all obligations therein described, [and] the money due and to
become due thereon with interest." But given the carve out of
the Note at the beginning of the sentence, the relative pronouns
"therein," "thereto," and "thereon" more naturally refer back to
the obligations contained in the Mortgage itself, such as the
obligation to insure the Property, and not to an external
obligation such as the Note. It would be odd indeed if, after
(continued...)

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

3 After several continuances of each matter, on February 3,
4 2010, the bankruptcy court held a joint hearing on the Veals'
5 claim objection and Wells Fargo's relief from stay motion.
6 Neither party presented evidence at the hearing, and the court's
7 Local Rules prohibited them from presenting live testimony at
8 this initial hearing unless the court had ordered otherwise. See
9 Bankr. D. Ariz. R. 9014-2(a).⁸ Indeed, the bankruptcy court
10 referred to the hearing on the relief from stay motion as a
11 preliminary hearing, thereby indicating that a subsequent
12 evidentiary hearing would be set if necessary. See Bankr. D.
13 Ariz. R. 4001-1(i)(2).⁹

14 _____
15 ⁷(...continued)
16 referring to the Note but not explicitly making it the object of
17 the transfer (as the initial assignment from GSF did), the words
18 were made to curl back and pick up the Note just because the
19 Mortgage mentioned the Note among its many terms. Although the
20 clauses might be sufficiently vague to permit parol evidence to
21 clarify their intended meaning, no such evidence was offered or
22 requested.

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

24 **Hearings on Contested Matters**

25 (a) Initial Hearing without Live Testimony.
26 Pursuant to Bankruptcy Rule 9014(e), all hearings
27 scheduled on contested matters will be conducted
28 without live testimony except as otherwise ordered by
the court. If, at such hearing, the court determines
that there is a material factual dispute, the court
will schedule a continued hearing at which live
testimony will be admitted.

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

Automatic Stay - Relief From

(i) Procedure Upon Objection.

(continued...)

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

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

14 The Veals timely appealed both orders.

15 III. DISCUSSION

16 The Veals challenge Wells Fargo's standing to seek relief
17 from the stay and AHMSI's standing as a real party in interest
18 with respect to the proof of claim it filed. Standing is a legal
19 issue that we review de novo. Wedges/Ledges of Cal., Inc. v.
20 City of Phoenix, 24 F.3d 56, 61 (9th Cir. 1994); Kronemyer v. Am.
21 Contractors Indem. Co. (In re Kronemyer), 405 B.R. 915, 919 (9th
22

23 ⁹(...continued)

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

1 Cir. BAP 2009).

2 A. *Standing in Mortgage Cases*

3 A federal court may exercise jurisdiction over a litigant
4 only when that litigant meets constitutional and prudential
5 standing requirements. Elk Grove Unified Sch. Dist. v. Newdow,
6 542 U.S. 1, 11 (2004). Standing is a "threshold question in
7 every federal case, determining the power of the court to
8 entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975).
9 See also Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct.
10 1436, 1442 (2011); City of Los Angeles v. County of Kern, 581
11 F.3d 841, 845 (9th Cir. 2009).

12 1. Constitutional Standing

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

19 Both Wells Fargo and AHMSI satisfy the relatively minimum
20 requirements of constitutional standing: they each have shown
21 injury in fact, causation, and redressability. Injury in fact is
22 shown with respect to Wells Fargo by the automatic stay's
23 prohibition on its right to exercise its alleged remedies against
24 the Veals, and with respect to AHMSI by the effect of claim
25 allowance procedures on its ability to receive a distribution
26 from the Veals' estate. Causation exists by the simple fact that
27 neither Wells Fargo nor AHMSI may exercise their nonbankruptcy
28 remedies due to the existence of the automatic stay. Finally,

1 redressability exists in each case because the relief requested,
2 if appropriate, would address and remedy the claimed injury.

3 2. Prudential Standing

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

12 In this case, one component of prudential standing is
13 particularly applicable. It is the doctrine that a plaintiff
14 must assert its own legal rights and may not assert the legal
15 rights of others. Sprint, 554 U.S. at 289; Warth, 422 U.S. at
16 499; Oregon v. Legal Servs. Corp., 552 F.3d 965, 971 (9th Cir.
17 2009).

18 Here, the Veals allege that neither Wells Fargo nor AHMSI
19 have shown they have any interest in the Note or any right to be
20 paid by the Veals. They seek to invoke prudential standing
21 principles which generally provide that a party without the legal
22 right, under applicable substantive law, to enforce an obligation
23 or seek a remedy with respect to it is not a real party in
24 interest. Doran v. 7-Eleven, Inc., 524 F.3d 1034, 1044 (9th Cir.
25 2008). If the Veals’ contention is correct as to AHMSI and Wells
26 Fargo, then both creditors failed to satisfy their prudential
27 standing burden.

28

1 3. Prudential Standing and the Real Party in Interest
2 Doctrine

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

15 As a result, if neither Wells Fargo nor AHMSI is a real
16 party in interest, we need not parse the remaining differences
17 between standing and real party in interest status. We thus
18 concentrate on real party in interest status and whether Wells
19 Fargo or AHMSI met their burden of demonstrating that they
20
21
22

23 ¹⁰Rule 7017 incorporates Civil Rule 17, and is applicable
24 here through Rule 9014(c).

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

1 qualified as real parties in interest.¹¹

2 4. Real Party in Interest Status and Its Policies

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

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

13 Notes of Advisory Committee on 1966 Amendments to Rule 17. See
14 also U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1039
15 (9th Cir. 1986) ("The modern function of the rule . . . is
16 simply to protect the defendant against a subsequent action by
17 the party actually entitled to recover, and to insure generally
18 that the judgment will have its proper effect as res judicata.")
19 (quoting Advisory Committee Notes to the 1966 amendment of Civil
20 Rule 17).

21 _____
22 ¹¹In all of its various aspects, the standing issue is an
23 inherently factual inquiry into the nature of the rights
24 asserted, see, e.g., Sprint, 554 U.S. at 271-73, and the party
25 asserting that it has standing bears the burden of proof to
26 establish its standing. Summers v. Earth Island Inst., 555 U.S.
27 488, ___, 129 S.Ct. 1142, 1149 (2009) (the movant "bears the
28 burden of showing that he has standing for each type of relief
sought"); Bennett v. Spear, 520 U.S. 154, 167-68 (1997); Hasso v.
Mozsqai (In re La Sierra Fin. Servs., Inc.), 290 B.R. 718, 726
(9th Cir. BAP 2002). These cases require that the movant bear
the burden of proving both constitutional and prudential
standing.

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

6 But in some cases, statutory or common law recognizes
7 relationships in which parties may sue in their own name for the
8 benefit of others. In these cases, real party in interest
9 doctrine potentially alters results: it allows these third
10 parties to sue in their own name on actions in which they may not
11 have the ultimate or direct personal stake in the matter. A
12 guardian, for example, may sue on behalf of his or her ward, even
13 though the recovery is solely the ward's. Civil Rule
14 17(a)(1)(C). A bailee may sue in its own name for damage to
15 goods entrusted to it, even though it does not own them. Civil
16 Rule 17(a)(1)(D). Even assignees for collection may, under
17 certain circumstances, sue in their own name on their assignor's
18 debt. See Sprint, 554 U.S. at 284 (dictum); Staggers v. Otto
19 Gerdau Co., 359 F.2d 292, 294 (2d Cir. 1966); Kilbourn v. Western
20 Sur. Co., 187 F.2d 567, 571-72 (10th Cir. 1951).

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

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

3 Real party in interest analysis requires a determination of
4 the applicable substantive law, since it is that law which
5 defines and specifies the wrong, those aggrieved, and the redress
6 they may receive. 6A Federal Practice and Procedure § 1543, at
7 480-81 ("In order to apply Rule 17(a)(1) properly, it is
8 necessary to identify the law that created the substantive right
9 being asserted"). See also id. § 1544.

10 1. Applicability of UCC Articles 3 and 9¹²

11 Here, the parties assume that the Uniform Commercial Code
12 ("UCC")¹³ applies to the Note. If correct, then two articles of
13 the UCC potentially apply.¹⁴ If the Note is a negotiable
14

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

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

25 ¹⁴Even if the Note is not a "negotiable instrument," and
26 thus Article 3 would not directly apply, it may "be appropriate,
27 consistent with the principles stated in § 1-102(2) [now § 1-
28 103], for a court to apply one or more provisions of Article 3 to
the writing by analogy, taking into account the expectations of
the parties and the differences between the writing and an
instrument governed by Article 3." Comment 2 to UCC § 3-104.
See also Fred H. Miller & Alvin C. Harrell, The Law of Modern
Payment Systems § 1.03[1][b] (2003).

1 instrument,¹⁵ Article 3 provides rules governing the payment of
2 the obligation represented by and reified in the Note.¹⁶

3 Article 3, however, deals primarily with payment obligations
4 surrounding a negotiable instrument, and the identification of
5 the proper party to be paid in order to satisfy and discharge the
6 obligations represented by that negotiable instrument. As will
7 be seen, Article 3 does not necessarily equate the proper person
8 to be paid with the person who owns the negotiable instrument.

9
10 _____
11 ¹⁵See UCC § 3-102 ("This Article applies to negotiable
12 instruments."). The term "negotiable instrument" is defined in
13 UCC § 3-104(a) to mean:

14 an unconditional promise or order to pay a fixed amount
15 of money, with or without interest or other charges
16 described in the promise or order, if it:

17 (1) is payable to bearer or to order at the time
18 it is issued or first comes into possession of a
19 holder;

20 (2) is payable on demand or at a definite time;
21 and

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

29 ¹⁶Article 3 carries forward and codifies venerable
30 commercial law rules developed over several centuries during
31 which negotiable instruments played a much different role in
32 commerce than they do today. As stated by Grant Gilmore, Article
33 3 is not unlike a "museum of antiquities - a treasure house
34 crammed full of ancient artifacts whose use and function have
35 long since been forgotten." Grant Gilmore, Formalism and the Law
36 of Negotiable Instruments, 13 Creighton L. Rev. 441, 461 (1979).
37 His following quotation is apt and often-repeated:
38 "codification . . . preserve[d] the past like a fly in amber".
Id.

1 Nor does it purport to govern completely the manner in which
2 those ownership interests are transferred. For the rules
3 governing those types of property rights, Article 9 provides the
4 substantive law.¹⁷ UCC § 9-109(a) (3) (Article 9 "applies to . .
5 . . a sale of . . . promissory notes").¹⁸ Article 9 includes
6 rules, for example, governing the effect of the transfer of a
7 note on any security given for that note such as a mortgage or a
8 deed of trust.¹⁹ As a consequence, Article 9 must be consulted
9 to answer many questions as to who owns or has other property
10 interest in a promissory note. From this it follows that the
11 determination of who holds these property interests will inform
12 the inquiry as to who is a real party in interest in any action
13 involving that promissory note.

14 As a result, this opinion examines the relevant provisions
15

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

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

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

1 of Article 3 and Article 9 as they apply to the Veals' Note and
2 Mortgage, as each Article may provide substantive law that shapes
3 the relevant real party in interest inquiry.

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

6 Article 3 provides a comprehensive set of rules governing
7 the obligations of parties on the Note, including how to
8 determine who may enforce those obligations and to whom those
9 obligations are owed. See UCC § 3-102; Miller & Harrell, supra,
10 § 1.02. Contrary to popular opinion, these rules do not
11 absolutely require physical possession of a negotiable instrument
12 in order to enforce its terms. Rather, Article 3 states that the
13 ability to enforce a particular note - a concept central to our
14 standing inquiry - is held by the "person entitled to enforce"
15 the note. UCC § 3-301.

16 A thorough understanding of the concept of a "person
17 entitled to enforce" is key to sorting out the relative rights
18 and obligations of the various parties to a mortgage transaction.
19 In particular, the person obligated on the note - a "maker" in
20 the argot of Article 3²⁰ - must pay the obligation represented by
21 the note to the "person entitled to enforce" it. UCC § 3-412.
22 Further, if a maker pays a "person entitled to enforce" the note,
23 the maker's obligations are discharged to the extent of the
24 amount paid. UCC § 3-602(a). Put another way, if a maker makes
25 a payment to a "person entitled to enforce," the obligation is
26 satisfied on a dollar for dollar basis, and the maker never has

27
28 ²⁰See UCC § 3-103(a)(7).

1 to pay that amount again. Id. See also UCC § 3-602(c).

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

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

13 The concept of a "holder" is set out in detail in UCC
14 § 1-201(b)(21)(A), providing that a person is a holder if the
15 person possesses the note and either (i) the note has been made
16 payable to the person who has it in his possession²³ or (ii) the

17
18 ²¹The 2002 Amendments to Article 3 provided a limited
19 exception for notes transferred without notice to the maker. UCC
20 § 3-602(b). See 2 James J. White & Robert S. Summers, Uniform
Commercial Code § 16-12, at 146 (5th ed. 2008).

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

²³The person in possession of the note must be identified as
(continued...)

1 note is payable to the bearer of the note. This determination
2 requires physical examination not only of the face of the note
3 but also of any indorsements.²⁴

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

14
15 ²³(...continued)

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

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

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

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

20 This places a great deal of weight on the UCC's definition
21 of a "transfer." UCC § 3-203(a) states that a note is
22 transferred "when it is delivered by a person other than its
23 issuer for the purpose of giving to the person receiving delivery
24 the right to enforce the instrument." As a consequence, while
25 the failure to obtain the indorsement of the payee or other
26 holder does not prevent a person in possession of the note from
27 being the "person entitled to enforce" the note, it does raise
28 the stakes. Without holder status and the attendant presumption

1 of a right to enforce, the possessor of the note must demonstrate
2 both the fact of the delivery and the purpose of the delivery of
3 the note to the transferee in order to qualify as the "person
4 entitled to enforce."

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

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

17
18 ²⁵The converse is also true: one can be a "person entitled
19 to enforce" without having any ownership interest in the
20 negotiable instrument, such as when a thief swipes and absconds
21 with a bearer instrument. See Comment 1 to UCC § 3-301. The
22 ability of a thief to legitimately obtain payment on bearer
23 instruments, such as bearer bonds, has factored in literature and
24 film focusing on the dark side of humanity. See, e.g., F. Scott
25 Fitzgerald, The Great Gatsby ch. 9 (1925) (part of Gatsby's
26 downfall connected with the theft or falsification of bearer
27 bonds); Die Hard (Twentieth Century Fox Film Corp. 1988) (thieves
28 masquerading as international terrorists seek to steal a highly
valuable trove of bearer bonds); Beverly Hills Cop (Paramount
Pictures 1984) (friend of protagonist is murdered for stealing
bearer bonds from a drug operation's kingpin).

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

1 This distinction further recognizes that the rules that
2 determine who is entitled to enforce a note are concerned
3 primarily with the maker of the note. They are designed to
4 provide for the maker a relatively simple way of determining to
5 whom the obligation is owed and, thus, whom the maker must pay in
6 order to avoid defaulting on the obligation. UCC § 3-602(a),
7 (c). By contrast, the rules concerning transfer of ownership and
8 other interests in a note identify who, among competing
9 claimants, is entitled to the note's economic value (that is, the
10 value of the maker's²⁶ promise to pay). Under established rules,
11 the maker should be indifferent as to who owns or has an interest
12 in the note so long as it does not affect the maker's ability to
13 make payments on the note. Or, to put this statement in the
14 context of this case, the Veals should not care who actually owns
15 the Note - and it is thus irrelevant whether the Note has been
16 fractionalized or securitized - so long as they do know who they
17 should pay. Returning to the patois of Article 3, so long as
18 they know the identity of the "person entitled to enforce" the
19 Note, the Veals should be content.²⁷

20 Initially, a note is owned by the payee to whom it was
21

22 ²⁶As well as any indorser's obligation to pay. See UCC § 3-
23 415(a).

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

1 issued. If that payee seeks either to use the note as collateral
2 or sell the note outright to a third party in a manner not within
3 Article 3,²⁸ Article 9 of the UCC governs that sale or loan
4 transaction and determines whether the purchaser of the note or
5 creditor of the payee obtains a property interest in the note.
6 See UCC § 9-109(a)(3).

7 With very few exceptions, the same rules that apply to
8 transactions in which a payment right serves as collateral for an
9 obligation also apply to transactions in which a payment right is
10 sold outright. See UCC § 9-203. Rather than contain two
11 parallel sets of rules - one for transactions in which payment
12 rights are collateral and the other for sales of payment rights -
13 Article 9 uses nomenclature conventions to apply one set of rules
14 to both types of transactions. This is accomplished primarily by
15 defining the term "security interest," found in UCC
16 § 1-201(b)(35),²⁹ to include not only an interest in property
17 that secures an obligation, but also the right of a purchaser of
18 a payment right such as a promissory note. Cf. UCC § 1-
19 201(b)(35) (The term "security interest" also "includes any
20 interest of a consignor and a buyer of accounts, chattel paper, a
21 payment intangible, or a promissory note in a transaction that is
22 subject to Article 9.").

23 Here, neither AHMSI nor Wells Fargo was the initial payee of
24 the Note. Due to this fact, each was required to demonstrate

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

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

1 facts sufficient to establish its respective standing. See note
2 11, supra. In this regard, facts that would be sufficient for
3 AHMSI are different from those that would be sufficient for Wells
4 Fargo. As to Wells Fargo, it had to show it had a colorable
5 claim to receive payment pursuant to the Note, which it could
6 accomplish either by showing it was a "person entitled to
7 enforce" the Note under Article 3, or by showing that it had some
8 ownership or other property interest in the Note. As to AHMSI,
9 as it sought a distribution from the estate in payment of the
10 Note, it had to show that it was a "person entitled to enforce"
11 the Note, or was the agent of such a person.

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

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

20 1. Standing to Seek Relief from Automatic Stay

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

1 Our prior precedent is appropriately lenient with respect to
2 standing for stay relief. This Panel said in Kronemyer that
3 “[c]reditors may obtain relief from the stay if their interests
4 would be harmed by continuance of the stay.” Kronemyer, 405 B.R.
5 at 921. Collier uses a similarly expansive statement: “Any party
6 affected by the stay should be entitled to seek relief.”
7 3 Collier on Bankruptcy ¶ 362.07[2] (Henry Sommer and Alan
8 Resnick, eds., 16th ed. 2011).

9 This test expands or contracts to match the interests sought
10 to be asserted. A servicer, for example, might be delegated all
11 its principal’s rights, or it could simply be asserting its
12 separate right to be paid out of the mortgage payments. Cf.
13 CWCapital Asset Mgmt., LLC v. Chicago Props., LLC, 610 F.3d 497,
14 500-01 (7th Cir. 2010) (“The servicer is much like an assignee
15 for collection, who must render to the assignor the money
16 collected by the assignee’s suit on his behalf (minus the
17 assignee’s fee) but can sue in his own name without violating
18 Rule 17(a).”); In re Hayes, 393 B.R. 259, 267 (Bankr. D. Mass.
19 2008) (“[S]ervicers are parties in interest with standing by
20 virtue of their pecuniary interest in collecting payments under
21 the terms of the notes and mortgages they service.”); In re
22 Woodberry, 383 B.R. 373, 379 (Bankr. D.S.C. 2008). In either
23 event, the servicer has standing to request some relief from the
24 automatic stay.

25 But Kronemyer does not precisely address the discrete issue
26 presented here: whether Wells Fargo’s interests are “harmed by
27 the continuance of the stay.” The answer to that question
28 requires examination of both the nature of stay litigation

1 generally and the specific nature of the nonbankruptcy rights
2 Wells Fargo seeks to vindicate.

3 Relief from stay proceedings such as the one brought by
4 Wells Fargo are primarily procedural; they determine whether
5 there are sufficient countervailing equities to release an
6 individual creditor from the collective stay. One consequence of
7 this broad inquiry is that a creditor's claim or security is not
8 finally determined in the relief from stay proceeding. Johnson
9 v. Righetti (In re Johnson), 756 F.2d 738, 740-41 (9th Cir. 1985)
10 ("Hearings on relief from the automatic stay are thus handled in
11 a summary fashion. The validity of the claim or contract
12 underlying the claim is not litigated during the hearing.");
13 Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 33 (1st Cir.
14 1994) ("We find that a hearing on a motion for relief from stay
15 is merely a summary proceeding of limited effect"); First
16 Fed. Bank v. Robbins (In re Robbins), 310 B.R. 626, 631 (9th Cir.
17 BAP 2004).

18 As a result, stay relief litigation has very limited claim
19 preclusion effect, in part because the ultimate resolution of the
20 parties' rights are often reserved for proceedings under the
21 organic law governing the parties' specific transaction or
22 occurrence. Stay relief involving a mortgage, for example, is
23 often followed by proceedings in state court or actions under
24 nonjudicial foreclosure statutes to finally and definitively
25 establish the lender's and the debtor's rights.³⁰ In such

26 _____

27 ³⁰An obvious exception to this paradigm occurs when the
28 bankruptcy court has already sustained a claim objection to a

(continued...)

1 circumstances, the concern of real party in interest
2 jurisprudence for avoiding double payment is quite reduced.

3 Given the limited nature of the relief obtained through a
4 motion for relief from the stay, the expedited hearing schedule
5 § 362(e) provides, and because final adjudication of the parties'
6 rights and liabilities is yet to occur, this Panel has held that
7 a party seeking stay relief need only establish that it has a
8 colorable claim to enforce a right against property of the
9 estate. United States v. Gould (In re Gould), 401 B.R. 415, 425
10 n.14 (9th Cir. BAP 2009); Biggs v. Stovin (In re Luz Int'l,
11 Ltd.), 219 B.R. 837, 842 (9th Cir. BAP 1998). See also Grella,
12 42 F.3d at 32.

13 2. Wells Fargo's Argument Regarding Standing

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

24 _____
25 ³⁰ (...continued)
26 movant's proof of claim. In such cases, the doctrine that
27 security depends on the debt it secures controls, and with the
28 debt disallowed, the movant normally cannot pursue the real
property security outside of bankruptcy. See 4 Richard R.
Powell, Powell on Real Property, § 37.27[2] (2000).

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

9 If the court failed to apply the correct legal standard,
10 then it has "necessarily abuse[d] its discretion." Cooter & Gell
11 v. Hartmarx Corp., 496 U.S. 384, 405 (1990). This prong of the
12 determination is considered de novo. Hinkson, 585 F.3d at 1261-
13 62. If the court applied the correct legal standard, the inquiry
14 then moves to whether the factual findings made were clearly
15 erroneous. Id. at 1262. Under Hinkson, factual findings are
16 clearly erroneous if they are "illogical, implausible, or without
17 support in inferences that may be drawn from the record." Id. at
18 1263. See also Rule 8013.

19 Against these high standards, the Veals pursue two different
20 arguments. Initially, they argue that the GSF Assignment is
21 invalid because it bears an undated notarial acknowledgment.
22 They also argue that the Sand Canyon Assignment is invalid
23 because it was not executed until after the Veals filed for
24 bankruptcy and after Wells Fargo filed its relief from stay
25 motion. See In re Maisel, 378 B.R. 19, 21-22 (Bankr. D. Mass.
26 2007) (denying relief from stay because movant's standing was
27 dependent on an assignment of mortgage dated after the filing of
28 the relief from stay motion).

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

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

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

22 When a note is split from a deed of trust "the note
23 becomes, as a practical matter, unsecured." Restatement
24 (Third) of Property (Mortgage) § 5.4 cmt. a (1997).
25 Additionally, if the deed of trust was assigned without
26 the note, then the assignee, "having no interest in the
underlying debt or obligation, has a worthless piece of
paper."

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

1 4 Richard R. Powell, Powell on Real Property, § 37.27[2] (2000).
2 Cf. In re Foreclosure Cases, 521 F. Supp. 2d 650, 653 (S.D. Ohio
3 2007) (finding that one who did not acquire the note which the
4 mortgage secured is not entitled to enforce the lien of the
5 mortgage); In re Mims, 438 B.R. 52, 56 (Bankr. S.D.N.Y. 2010)
6 ("Under New York law 'foreclosure of a mortgage may not be
7 brought by one who has no title to it and absent transfer of the
8 debt, the assignment of the mortgage is a nullity.'") (quoting
9 Kluge v. Fugazy, 536 N.Y.S.2d 92, 93 (N.Y. App. Div. 1988)).

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

12 Illinois . . . courts treat a mortgage as incident or
13 accessory to the debt, and, an assignment of a mortgage
14 without the note as a nullity. In order for the
15 Illinois . . . courts to enforce a mortgage assignment,
16 the assignor must assign the underlying debt secured by
17 the mortgage debt. It is axiomatic that any attempt to
18 assign the mortgage without transfer of the debt will
19 not pass the mortgagee's interest to the assignee.

20 Yorke v. Citibank (In re BNT Terminals, Inc.), 125 B.R. 963, 970
21 (Bankr. N.D. Ill. 1990) (citing Krueger v. Dorr, 161 N.E.2d 433,
22
23

24 ³²The Mortgage contains a choice of law provision, which
25 states that the law of the state where the real property is
26 located applies to "this Security Instrument." The Property is
27 located in Illinois, so this clause would require application of
28 Illinois law to issues concerning enforcement of the Mortgage.

This choice of law provision is consistent with the common
law. See Restatement (Second) of Conflict of Laws § 229. As
will be seen later, the Note is governed by the law of Arizona.
See note 41, infra. The application of different choice of law
rules to the Note and the Mortgage is consistent with the common
law: "Issues which do not affect any interest in the land,
although they do relate to the foreclosure, are determined, on
the other hand, by the law which governs the debt for which the
mortgage was given." Id.

1 440-41 (Ill. App. Ct. 1959); Moore v. Lewis, 366 N.E.2d 594, 599
2 (Ill. App. Ct. 1977); Commercial Prods. Corp. v. Briegel, 242
3 N.E.2d 317, 321 (Ill. App. Ct. 1968); and Lundy v. Messer, 167
4 N.E.2d 278, 279 (Ill. App. Ct. 1960)).

5 This rule appears to be the common law rule. See, e.g.,
6 Restatement (Third) of Property (Mortgage) § 5.4 (1997);
7 Carpenter v. Longan, 83 U.S. 271, 274-75 (1872) ("The note and
8 mortgage are inseparable; the former as essential, the latter as
9 an incident. An assignment of the note carries the mortgage with
10 it, while an assignment of the latter alone is a nullity.");
11 Orman v. North Alabama Assets Co., 204 F. 289, 293 (N.D. Ala.
12 1913); Rockford Trust Co. v. Purtell, 183 Ark. 918 (1931).³³

13 While we are aware that some states may have altered this rule by
14 statute, that is not the case here.³⁴

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

21 ³⁴We are aware of statutory law and unreported cases in this
22 circuit that may give lenders a nonbankruptcy right to commence
23 foreclosure based solely upon their status as assignees of a
24 mortgage or deed of trust, and without any explicit requirement
25 that they have an interest in the note. See, e.g., Cal. Civil
26 Code §§ 2924(a)(1) (a "trustee, mortgagee or beneficiary or any
27 of their authorized agents" may conduct the foreclosure process);
2924(b)(4) (a "person authorized to record the notice of default
28 or the notice of sale" includes "an agent for the mortgagee or
beneficiary, an agent of the named trustee, any person designated
in an executed substitution of trustee, or an agent of that
substituted trustee."); Putkkuri v. Recontrust Co., No. 08cv1919,
(continued...)

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

11 Not surprisingly, Wells Fargo disagrees. It argues that it
12 submitted documents in support of its relief from stay motion
13 which established a "colorable claim" against property of the

14 _____
15 ³⁴(...continued)
16 2009 WL 32567 at *2 (S.D. Cal. Jan. 5, 2009) ("Production of the
17 original note is not required to proceed with a non-judicial
18 foreclosure."); Candelo v. NDex West, LLC, No. 08-1916, 2008 WL
19 5382259 at *4 (E.D. Cal. Dec. 23, 2008) ("No requirement exists
20 under the statutory framework to produce the original note to
21 initiate non-judicial foreclosure."); San Diego Home Solutions,
22 Inc. v. Recontrust Co., No. 08cv1970, 2008 WL 5209972 at *2 (S.D.
23 Cal. Dec. 10, 2008) ("California law does not require that the
24 original note be in the possession of the party initiating
25 non-judicial foreclosure."). But see In re Salazar, ___ B.R.
26 ___, 2011 WL 1398478 at *4 (Bankr. S.D. Cal. 2011) (valid
27 foreclosure under California law requires both that the
28 foreclosing party be entitled to "payment of the secured debt"
and that its "status as foreclosing beneficiary appear before the
sale in the public record title for the [p]roperty."). We
express no view of the interaction of these statutes and real
party in interest requirements under Civil Rule 17.

25 Ultimately, the minimum requirements for the initiation of
26 foreclosures under applicable nonbankruptcy law will shape the
27 boundaries of real party in interest status under Civil Rule 17
28 with respect to relief from stay matters. As a consequence, the
result in a given case may often depend upon the situs of the
real property in question.

1 estate. In this regard, it cites In re Robbins, 310 B.R. 626,
2 631 (9th Cir. BAP 2004) (which in turn cites Grella, 42 F.3d at
3 32). However, neither Robbins nor Grella dealt with a challenge
4 to the movant's standing which, as we have said, is an
5 independent threshold issue. Simply put, the colorable claim
6 standard set forth in Robbins does not free Wells Fargo from the
7 burden of establishing its status as a real party in interest
8 allowing it to move for relief from stay, as this is the way in
9 which Wells Fargo satisfies its prudential standing requirement.

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

24 Accordingly, the bankruptcy court erred when it granted
25 Wells Fargo's motion for relief from stay, and we must reverse
26

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

1 that ruling.

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

3 AHMSI's proof of claim presents similar issues, but in a
4 different context. An order overruling a claim objection can
5 raise legal issues (such as the proper construction of statutes
6 and rules) which we review de novo, as well as factual issues
7 (such as whether the facts establish compliance with particular
8 statutes or rules), which we review for clear error. Campbell v.
9 Verizon Wireless (In re Campbell), 336 B.R. 430, 434 (9th Cir.
10 BAP 2005); Heath v. Am. Express Travel Related Servs. Co. (In re
11 Heath), 331 B.R. 424, 428-29 (9th Cir. BAP 2005).

12 The Veals contend that AHMSI's purported claim - as opposed
13 to any security for that claim - is subject to objection under
14 Article 3 of the UCC. If correct, their nonbankruptcy objection
15 provides a sufficient basis for disallowance of the claim.
16 § 502(b)(1). When ruling on such an objection, the bankruptcy
17 court makes a substantive ruling that binds the parties in all
18 other proceedings and may finally adjudicate the parties'
19 underlying rights. As stated in Katchen v. Landy, 382 U.S. 323
20 (1966):

21 The bankruptcy courts "have summary jurisdiction to
22 adjudicate controversies relating to property over
23 which they have actual or constructive possession."
24 Id. at 327 (quoting Thompson v. Magnolia Petroleum Co., 309 U.S.
25 478, 481 (1940)). Courts have adopted this characterization of
26 the effect of claim objection proceedings under the somewhat
27 different, and more expansive, jurisdictional structure in place
28 under the 1978 Bankruptcy Code. EDP Med. Computer Sys., Inc. v.
United States, 480 F.3d 621, 624 (2d Cir. 2007); Siegel v. Fed.

1 Home Loan Mortg. Corp., 143 F.3d 525, 529-30 (9th Cir. 1998);
2 Bank of Lafayette v. Baudoin (In re Baudoin), 981 F.2d 736, 742
3 (5th Cir. 1993).

4 Consistent with this view, orders in claim objection
5 proceedings have been given issue and claim preclusive effect.

6 As stated in Katchen,

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

14 382 U.S. at 334 (citations omitted). In short, a claims
15 objection proceeding in bankruptcy takes the place of the state
16 court lawsuit or other action because such actions are
17 presumptively stayed by the operation of § 362.³⁶

18 The Veals challenge AHMSI's status as the real party in
19 interest to file a proof of claim with respect to the Note. This
20 argument stands on somewhat different grounds than the similar
21 objection to Wells Fargo's stay relief. Unlike a motion for

22 ³⁶The process, of course, is sufficiently flexible to allow
23 bankruptcy courts in appropriate cases to defer to nonbankruptcy
24 courts to liquidate and settle the parties' claims and
25 contentions. See, e.g., Sonnax Indus., Inc. v. Tri Component
26 Prods. Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280, 1286 (2d
27 Cir. 1990); Goya Foods, Inc. v. Unanue-Casal (In re
28 Unanue-Casal), 159 B.R. 90, 96 (D. P.R. 1993), aff'd, 23 F.3d 395
(1st Cir. 1994); Busch v. Busch (In re Busch), 294 B.R. 137, 141
n.4 (10th Cir. BAP 2003) (collecting cases); Truebro, Inc. v.
Plumberex Specialty Prods., Inc. (In re Plumberex Specialty
Prods., Inc.), 311 B.R. 551, 557-58 (Bankr. C.D. Cal. 2004).

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

1 relief from the stay, the claim allowance procedure has finality,
2 as § 502(b)(1) explicitly directs a bankruptcy court to disallow
3 a claim if a legitimate nonbankruptcy law defense exists. Again,
4 unlike motions for relief from the automatic stay, there will be
5 no subsequent determination of the parties' relative rights and
6 responsibilities in another forum. The proceedings in the
7 bankruptcy court are the final determination. As a result, Civil
8 Rule 17's policy of preventing multiple liability is fully
9 implicated.

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

20 1. The Lack of Findings on Central Issues

21 The filing of an objection to claim initiates a contested
22 matter, subject to the procedures set forth in Rule 9014. See
23 Advisory Committee Notes accompanying Rule 3007.³⁷ In contested
24 matters, a bankruptcy court must make findings of fact, either

25
26 ³⁷The Advisory Committee Notes accompanying the original
27 version of Rule 3007, promulgated in 1983, in relevant part state
28 that "[t]he contested matter initiated by an objection to a claim
is governed by rule 9014." The Advisory Committee Notes
accompanying the 2007 amendments do not alter this view.

1 orally on the record, or in a written decision. See Rule 9014(c)
2 (incorporating Rule 7052, which in turn incorporates Civil Rule
3 52).³⁸ These findings must be sufficient to enable a reviewing
4 court to determine the factual basis for the court's ruling.
5 Vance v. Am. Hawaii Cruises, Inc., 789 F.2d 790, 792 (9th Cir.
6 1986). Although the bankruptcy court here overruled the Veals'
7 objection to AHMSI's proof of claim, it did so without making any
8 findings or even any statements regarding the factual basis for
9 the court's conclusion that AHMSI had standing to file the proof
10 of claim.³⁹ It simply held that being an assignee (or agent of
11 the assignee) of the Mortgage was sufficient.

12 Even when a bankruptcy court does not make formal findings,
13 however, the BAP may conduct appellate review "if a complete
14 understanding of the issues may be obtained from the record as a
15 whole or if there can be no genuine dispute about omitted
16 findings." Gardenhire v. Internal Revenue Serv. (In re
17 Gardenhire), 220 B.R. 376, 380 (9th Cir. BAP 1998), rev'd on
18 other grounds, 209 F.3d 1145 (9th Cir. 2000) (citing Vance, 789
19

20 ³⁸Civil Rule 52(a)(1) provides in relevant part:

21 (a) Findings and Conclusions.

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

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

1 F.2d at 792; Magna Weld Sales Co. v. Magna Alloys & Research
2 Pty., Ltd., 545 F.2d 668, 671 (9th Cir. 1976)). See also Jess v.
3 Carey (In re Jess), 169 F.3d 1204, 1208-09 (9th Cir. 1999);
4 Swanson v. Levy, 509 F.2d 859, 860-61 (9th Cir. 1975). After
5 such a review, however, when the record does not contain a clear
6 basis for the court's ruling, we must vacate the court's order
7 and remand for further proceedings. See, e.g., Alpha Distr. Co.
8 v. Jack Daniel Distillery, 454 F.2d 442, 452-53 (9th Cir. 1972);
9 Canadian Comm'l Bank v. Hotel Hollywood (In re Hotel Hollywood),
10 95 B.R. 130, 132-34 (9th Cir. BAP 1988).

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

20 When debtors such as the Veals challenge an alleged
21 servicer's standing to file a proof of claim regarding a note
22 governed by Article 3 of the UCC, that servicer must show it has
23 an agency relationship with a "person entitled to enforce" the
24 note that is the basis of the claim. If it does not, then the
25 servicer has not shown that it has standing to file the proof of
26

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

1 claim. See, e.g., In re Minbatiwalla, 424 B.R. 104, 108-11
2 (Bankr. S.D.N.Y. 2010); Hayes, 393 B.R. at 266-70; In re Parrish,
3 326 B.R. 708, 720-21 (Bankr. N.D. Ohio 2005).

4 The bankruptcy court here apparently concluded as a matter
5 of law that the identity of the person entitled to enforce the
6 Note was irrelevant. Its analysis followed the Mortgage instead
7 of the Note. We disagree. In the context of a claim objection,
8 both the injury-in-fact requirement of constitutional standing
9 and the real party in interest requirement of prudential standing
10 hinge on who holds the right to payment under the Note and hence
11 the right to enforce the Note. In re Weisband, 427 B.R. 13, 18-
12 19 (Bankr. D. Ariz. 2010). See also U-Haul, 793 F.2d at 1038
13 (holding that real party in interest is the "party to whom the
14 relevant substantive law grants a cause of action"). In other
15 words, Wells Fargo (or AHMSI as Wells Fargo's servicer) must be a
16 "person entitled to enforce" the Note in order to qualify as a
17 creditor (or creditor's agent) entitled to file a proof of claim.
18 Otherwise, the estate may pay funds to a stranger to the case;
19 indeed, the primary purpose of the real party in interest
20 doctrine is to ensure that such mistaken payments do not occur.

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

23 Here, Shelli Veal apparently signed the Note in Arizona.
24 Given the lack of a choice of law clause in the Note, Arizona law
25 would presumptively govern who has rights to enforce the Note.⁴¹

27 ⁴¹For the purpose of determining who is the real party in
28 interest to enforce the Note, the forum state's choice of law

(continued...)

1 Under Arizona's uniform adoption of the UCC, a note's maker has a
2 valid objection to the extent that the claimant is not a "person
3 entitled to enforce" the Note. Ariz. Rev. Stat. Ann. § 47-3301.
4 As stated before, AHMSI presented no evidence as to who possessed
5 the original Note. It also presented no evidence showing
6 indorsement of the note either in its favor or in favor of Wells
7 Fargo, for whom AHMSI allegedly was servicing the Veal Loan.
8 Without establishing these elements, AHMSI cannot establish that
9 it is a "person entitled to enforce" the Note. The Veals would
10 thus have a valid claim objection under § 502(b)(1).

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

16 We disagree. What these writings evidence is far from clear
17 on this record. In addition to the conclusion AHMSI advances,

18
19 ⁴¹(...continued)
20 rules determine which state's substantive law applies. 6A Federal
21 Practice and Procedure, at § 1544. Arizona's applicable choice
22 of law statute provides in relevant part that, in the absence of
23 an agreement between the parties, Arizona's version of the UCC
24 applies to transactions "bearing an appropriate relation" to the
25 state of Arizona. Ariz. Rev. Stat. Ann. § 47-1301 (2011). The
26 Veals, who are the makers of the Note, reside in Arizona and
27 apparently executed the Mortgage and the Note in Arizona. (The
28 Mortgage bears a notarial acknowledgment with a Notary's stamp
showing that the Notary is commissioned in Maricopa County,
Arizona.) These uncontested facts evidence a sufficient
relationship with Arizona to justify application of Ariz. Rev.
Stat. Ann. § 47-1301. See Barclays Discount Bank Ltd. v. Levy,
743 F.2d 722, 724-25 (9th Cir. 1984) (applying California's
counterpart to Ariz. Rev. Stat. Ann. § 47-1301 under similar
circumstances).

1 they might also tend to show: (1) that AHMSI was the current loan
2 servicer, but not a "person entitled to enforce" the Note, (2)
3 that AHMSI was the holder of the Note, (3) that AHMSI was the
4 only entity currently dunning the Veals for payment on the Note,
5 or (4) that someone had highjacked the payment stream, and up
6 until the claims objection, the Veals had been duped.

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

17 AHMSI further argues that Campbell and Heath validate the
18 manner in which it filed its proof of claim, and thus it is
19 entitled to the evidentiary benefits of Rule 3001(f). Rule
20 3001(f) provides that an otherwise compliant proof of claim is
21 prima facie evidence of the validity and amount of the claim.
22 AHMSI asserts that since its proof of claim met the standards set
23 forth in Campbell and Heath, the Veals had the burden of
24 production of documents to sustain their objection. As a
25 consequence, according to AHMSI, the Veals' failure to offer any
26 evidence to counter the validity of AHMSI's claim meant that the
27 bankruptcy court could not have erred in overruling the Veals'
28 claim objection.

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

8 Moreover, under a careful reading of the entirety of Rule
9 3001, standing is a prerequisite to the evidentiary benefits set
10 forth in Rule 3001(f). On its face, Rule 3001(f) says that a
11 proof of claim is prima facie evidence of the validity and amount
12 of the claim if it is both executed and filed in accordance with
13 the Rule, and Rule 3001(b) requires that a claim be executed by
14 the creditor or its authorized agent. Simply put, if a claim is
15 challenged on the basis of standing, the party who filed the
16 proof of claim must show that it is either the creditor or the
17 creditor's authorized agent in order to obtain the benefits of
18 Rule 3001(f). Instead of obviating standing requirements, Rule
19 3001 conditions the availability of the presumptions contained in
20 Rule 3001(f) upon the creditor first satisfying the standing
21 requirement contained within Rule 3001(b). To hold otherwise
22 would undermine the requirements of both constitutional and
23 prudential standing and the important principles those
24 requirements safeguard.

25 In sum, the bankruptcy court's order overruling the Veals'
26 claim objection must be vacated and this matter remanded to allow
27 the bankruptcy court to render findings on the disputed factual
28 issues. On remand, the determination of who is the "person

1 entitled to enforce" the Note, and of AHMSI's alleged
2 authorization to service the Veal Loan, may necessitate an
3 evidentiary hearing, but we leave that decision to the bankruptcy
4 court.

5 **IV. CONCLUSION**

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

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SUPPLEMENT "B"

MEMORANDUM

March 29, 2011

From: John A. Sebert, Chair, Permanent Editorial Board for the Uniform Commercial Code (PEB)

Re: Draft Report of the PEB on the UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of Those Notes and the Mortgages Securing Them

Recent economic developments have brought to the forefront complex legal issues about the enforcement and collection of mortgage debt. Many of these issues are governed by local real property law and local rules of foreclosure procedure, as well as by rules of evidence and civil procedure, but others are addressed in a uniform way throughout the United States by provisions of the Uniform Commercial Code (UCC). Although the UCC provisions have been settled law for a number of years, it has become apparent that not all courts and attorneys are familiar with them. In addition, the complexity of some of the rules has proved daunting.

The Permanent Editorial Board for the Uniform Commercial Code has prepared this Draft Report in order to further the understanding of this statutory background by identifying and explaining several key rules in the UCC that govern the transfer and enforcement of notes secured by a mortgage on real property. Of course, the UCC does not resolve all issues in this field. Most particularly, the enforcement of real estate mortgages by foreclosure is primarily the province of a state's real property law (although determinations made pursuant to the UCC are typically relevant under that law).

This is a draft report that does not represent the final views of the PEB, the American Law Institute, or the Uniform Law Commission on the matters discussed in this report. The PEB is distributing this Draft Report broadly seeking comment on the draft, and we strongly encourage those interested in these matters to provide comments to ALI Associate Deputy Director Deanne Dissinger at ddissinger@ali.org. When submitting comments please identify your representation of or affiliation with stakeholders, as well as your expertise and experience in the mortgage and foreclosure area.

Comments should be received by May 28, 2011. After the end of the comment period, the PEB will review all of the comments that have been received and will make appropriate revisions to the draft before issuing the report as a final report of the PEB.

PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE

DRAFT REPORT

UCC RULES APPLICABLE TO THE ASSIGNMENT OF MORTGAGE NOTES AND TO THE OWNERSHIP AND ENFORCEMENT OF THOSE NOTES AND THE MORTGAGES SECURING THEM

Introduction

Recent economic developments have brought to the forefront complex legal issues about the enforcement and collection of mortgage debt. Many of these issues are governed by local real property law and local rules of foreclosure procedure, but others are addressed in a uniform way throughout the United States by provisions of the Uniform Commercial Code (UCC).¹ Although the UCC provisions have been settled law for a number of years, it has become apparent that not all courts and attorneys are familiar with them. In addition, the complexity of some of the rules has proved daunting.

The Permanent Editorial Board for the Uniform Commercial Code² has prepared this Report in order to further the understanding of this statutory background by identifying and explaining several key rules in the UCC that govern the transfer and enforcement of notes secured by a mortgage on real property. Of course, the UCC does not resolve all issues in this field. Most particularly, the enforcement of real estate mortgages by foreclosure is primarily the province of a state's real property law (although determinations made pursuant to the UCC are typically relevant under that law).

Background

Two Articles of the UCC apply to the transfer, ownership, and enforcement of mortgage notes:

¹ The UCC is a uniform law sponsored by the American Law Institute and the Uniform Law Commission. It has been enacted in every state (as well as the District of Columbia, Puerto Rico, and the United States Virgin Islands) in whole or significant part. This Report is based on the current Official Text of the UCC. Some states have enacted some non-uniform provisions that are generally not relevant to the issues discussed in this Report. Of course, the enacted text of the UCC in the state whose law is applicable governs. See note 4, *infra*, for important information about variations among different versions of Article 3 of the UCC.

²In 1961, the American Law Institute and the Uniform Law Commission, the organizations that jointly sponsor the UCC, established the Permanent Editorial Board for the Uniform Commercial Code (PEB). One of the charges of the PEB is to issue commentaries "and other articulations as appropriate to reflect the correct interpretation of the [Uniform Commercial] Code and issuing the same in a manner and at times best calculated to advance the uniformity and orderly development of commercial law."

- In cases in which the notes fulfill the technical requirements of negotiability,³ Article 3 of the UCC⁴ provides rules governing the obligations of parties on the notes and the enforcement of those obligations.
- In cases involving either negotiable or non-negotiable notes, Article 9 of the UCC⁵ contains important rules governing how ownership of those notes may be transferred, the effect of the transfer of ownership of the notes on the ownership of the mortgages securing those notes, and the right of the transferee, under certain circumstances, to record its interest in the mortgage in the applicable real estate recording office.

This Report explains the application of the rules in both of those Articles to provide guidance in:

- Identifying the person who is entitled to enforce the payment obligation of the maker⁶ of a mortgage note, and to whom the maker owes that obligation; and
- Determining who owns the rights represented by the note and mortgage.

Together, the provisions in Articles 3 and 9 of the UCC (along with general principles that appear in Article 1 and that apply to all transactions governed by the UCC) provide legal rules that apply to these questions.⁷ Moreover, these rules displace any inconsistent common law rules that might have otherwise governed those questions.⁸

³ Those requirements are set out in UCC § 3-104.

⁴ Except for New York, every state (as well as the District of Columbia, Puerto Rico, and the United States Virgin Islands) has enacted either the 1990 Official Text of Article 3 or the newer 2002 Official Text (the latter having been adopted in ten states as of the date of this Report). Unless indicated to the contrary all discussions of provisions in Article 3 apply equally to both versions. Much of the analysis of UCC Article 3 in this Report also applies under the older version of Article 3 in effect in New York, although many section numbers differ. The Report does not address those aspects of New York's Article 3 that are different than the 1990 or 2002 texts.

⁵ Unlike Article 3 (which has not been enacted in its modern form in New York), the current version of Article 9 has been enacted in all 50 states, the District of Columbia, and the United States Virgin Islands. Some states have enacted non-uniform provisions that are generally not relevant to the issues discussed in this Report (but see note 24 with respect to one relevant non-uniformity). A limited set of amendments to Article 9 was approved by the American Law Institute and the Uniform Law Commission in 2010. Except as noted in this Report, those amendments (which have not yet been enacted by any state) are not germane to the matters addressed in this Report.

⁶ A note can have more than one obligor. In some cases, this is because there is more than one maker (in which case they are jointly and severally liable; see UCC § 3-116(a)). In other cases, there may be an indorser. The obligation of an indorser is different than that of a maker in that the indorser's obligation is triggered by dishonor of the note (see UCC § 3-415) and, unless waived, indorsers have additional procedural protections (such as notice of dishonor; see UCC § 3-503)). These differences do not affect the issues addressed in this Report. For simplicity, this Report uses the term "maker" to refer to both makers and indorsers.

⁷ Subject to limitations on the ability to affect the rights of third parties, the effect of these provisions may be varied by agreement. UCC § 1-302. Variation by agreement is not permitted when the UCC so indicates (see, e.g., UCC § 9-602) or when the variation would disclaim obligations of good faith, diligence, reasonableness, or care prescribed by the UCC. But the meaning of the statute itself cannot be varied by agreement. Thus, for example, private parties cannot make a note negotiable unless it complies with UCC § 3-104. See Official Comment 1 to UCC § 1-302. Similarly, parties may not avoid the application of UCC Article 9 to a transaction that falls within its scope. See *id.* and Official Comment 2 to UCC § 9-109.

⁸UCC § 1-103(b). As noted in Official Comment 2 to UCC § 1-103:

This Report does not, however, address all of the rules in the UCC relating to enforcement, transfer, and ownership of mortgage notes. Rather, it reviews the rules relating to four specific questions:

- Who is the person entitled to enforce a mortgage note and, correspondingly, to whom is the obligation to pay the note owed?
- How can the owner of a mortgage note effectively transfer ownership of that note to another person or effectively use that note as collateral for an obligation?
- What is the effect of transfer of an interest in the note on the mortgage securing it?
- May a person to whom an interest in the note has been transferred, but who has not taken a recordable assignment of the mortgage, take steps to become the assignee of record of the mortgage securing the note?⁹

Question One – Who is The Person Entitled to Enforce a Mortgage Note and to Whom the Obligation to Pay the Note is Owed?

If the mortgage note is a negotiable instrument,¹⁰ Article 3 of the UCC provides a largely complete set of rules governing the obligations of parties on the note, including how to determine who may enforce those obligations and to whom those obligations are owed. The following discussion analyzes the application of these rules to that determination in the case of mortgage notes that are negotiable instruments.¹¹

In the context of notes that have been sold or used as collateral to secure an obligation, the central concept for making that determination is identification of the “person entitled to enforce” the note.¹² Several issues are resolved by that determination. Most particularly:

The Uniform Commercial Code was drafted against the backdrop of existing bodies of law, including the common law and equity, and relies on those bodies of law to supplement its provisions in many important ways. At the same time, the Uniform Commercial Code is the primary source of commercial law rules in areas that it governs, and its rules represent choices made by its drafters and the enacting legislatures about the appropriate policies to be furthered in the transactions it covers. Therefore, while principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to *supplant* its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such a provision, the Uniform Commercial Code preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies.

⁹ The Report does not discuss the application of common law principles, such as the law of agency, that supplement the provisions of the UCC other than to note some situations in which the text or comments of the UCC identify such principles as being relevant. See UCC § 1-103(b).

¹⁰ See UCC § 3-104 for the requirements that must be fulfilled in order for a payment obligation to qualify as a negotiable instrument.

¹¹ Law other than Article 3, including contract law, governs this determination for non-negotiable mortgage notes. That law is beyond the scope of this Report.

¹² The concept of “person entitled to enforce” a note is not synonymous with “owner” of the note. A person need not be the owner of a note to be the person entitled to enforce it, and not all owners will qualify as persons entitled to enforce. Rules that address transfer of ownership of a note are addressed in the discussion of Question 2 below.

- (i) the maker's obligation on the note is to pay the amount of the note to *the person entitled to enforce the note*,¹³
- (ii) the maker's payment to *the person entitled to enforce the note* results in discharge of the maker's obligation,¹⁴ and
- (iii) the maker's failure to pay, when due, the amount of the note to *the person entitled to enforce the note* constitutes dishonor of the note.¹⁵

Thus, a person seeking to enforce rights based on the failure of the maker to pay the note must identify the person entitled to enforce the note and establish that that person has not been paid. This portion of the Report sets out the criteria for qualifying as a "person entitled to enforce" a note. The discussion of Question Two addresses how ownership of a note may be effectively transferred from an owner to another person.

UCC Section 3-301 provides only three ways in which a person may qualify as the person entitled to enforce a note, two of which require the person to be in possession of the note (which, for this purpose, may include possession by a third party such as an agent)¹⁶:

- The first way that a person may qualify as the person entitled to enforce a note is to be its "holder." This familiar concept, set out in detail in UCC Section 1-201(b)(21)(A), requires that the person be in possession of the note and either (i) the note is payable to that person or (ii) the note is payable to bearer. Determining to whom a note is payable requires examination not only of the face of the note but also of any indorsements. This is because the party to whom a note is payable may be changed by indorsement¹⁷ so that, for example, a note payable to the order of a named payee that is indorsed in blank by that payee becomes payable to bearer.¹⁸
- The second way that a person may be the person entitled to enforce a note is to be a "nonholder in possession of the [note] who has the rights of a holder."
 - How can a person who is not the holder of a note have the rights of a holder? This can occur by operation of law outside the UCC, such as the law of

¹³ UCC § 3-412. (If the note has been dishonored, and an indorser has paid the note to the person entitled to enforce it, the maker's obligation runs to the indorser.)

¹⁴UCC § 3-602. In states that have enacted the 2002 Official Text of UCC Article 3, a maker is also discharged by paying a person formerly entitled to enforce the note if the maker has not received adequate notification that the note has been transferred and that payment is to be made to the transferee.

¹⁵ See UCC §§ 3-502. See also UCC § 3-602.

¹⁶ See UCC § 1-103(b). See also UCC § 3-420, Comment 1 ("Delivery to an agent [of a payee] is delivery to the payee."). Note that "delivery" of a negotiable instrument is defined in UCC § 1-201(b)(15) as voluntary transfer of possession

¹⁷ An indorsement may appear either on the instrument or on a separate piece of paper (usually referred to as an *allonge*) affixed to the instrument. See UCC § 3-204(a) and Comment 1, par. 4.

¹⁸UCC Section 3-205 contains the rules concerning the effect of various types of indorsement on the party to whom a note is payable.

subrogation or estate administration, by which one person is the successor to or acquires another person's rights.¹⁹ It can also occur if the delivery of the note to that person constitutes a "transfer" (as that term is defined in UCC Article 3, see below) because transfer of a note "vests in the transferee any right of the transferor to enforce the instrument."²⁰ Thus, if a holder (who, as seen above, is a person entitled to enforce a note) transfers the note to another person, that other person (the transferee) obtains from the holder the right to enforce the note even if the transferee does not become the holder (as in the example below). Similarly, a subsequent transfer will result in the subsequent transferee being a person entitled to enforce the note.

- Under what circumstances does delivery of a note qualify as a transfer? As stated in UCC Section 3-203(a), a note is transferred "when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." For example, assume that the payee of a note sells it to an assignee, intending to transfer all of the payee's rights to the note, but delivers the note to the assignee without indorsing it. The assignee will not qualify as a holder (because the note is still payable to the payee) but, because the transaction between the payee and the assignee qualifies as a transfer, the assignee now has all of the payee's rights to enforce the note and thereby qualifies as the person entitled to enforce it. Thus, the failure to obtain the indorsement of the payee does not prevent a person in possession of the note from being the person entitled to enforce it, but demonstrating that status is more difficult. This is because the person in possession of the note must also demonstrate the purpose of the delivery of the note to it in order to qualify as the person entitled to enforce.²¹
- There is a third method of qualifying as a person entitled to enforce a note that, unlike the previous two methods, does not require possession of the note. This method is quite limited – it applies only in cases in which "the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process."²² In such a case, a person qualifies as a person entitled to enforce the note if the person demonstrates not only that one of those circumstances is present but also demonstrates that the person was

¹⁹ See Official Comment to UCC § 3-301.

²⁰ UCC § 3-203(b).

²¹ If the note was transferred for value and the transferee does not qualify as a holder because of the lack of indorsement by the transferor, "the transferee has a specifically enforceable right to the unqualified indorsement of the transferor." See UCC § 3-203(c).

²² UCC § 3-309(a)(iii) (1990 text), 3-309(a)(3) (2002 text). The 2002 text goes on to provide that a transferee from the person who lost possession of a note may also qualify as a person entitled to enforce it. See UCC § 3-309(a)(1)(B) (2002). This point was thought to be implicit in the 1990 text, but was rejected in a federal district court opinion in which the issue was raised.

formerly in possession of the note and entitled to enforce it when the loss of possession occurred and that the loss of possession was not as a result of transfer (as defined above) or lawful seizure. If the person proves those facts, as well as the terms of the note, the person may enforce the note, but the court may not enter judgment in favor of the person unless the court finds that the maker is adequately protected against loss that might occur because if the note subsequently reappears.²³

Question Two – What Steps Must be Taken for the Owner of a Mortgage Note to Transfer Ownership of the Note to Another Person or Use the Note as Collateral for an Obligation?

In the discussion of Question One, this Report addresses identification of the person who is entitled to enforce a note. It does not address who “owns” the note. While in many cases the owner of a note and the person entitled to enforce it are the same person, as explained earlier this is not always the case. This is because the rules that determine who is entitled to enforce a note and the rules that determine whether the note, or an interest in it, have been effectively transferred serve different functions:

- The rules that determine who is entitled to enforce a note are concerned primarily with the maker of the note, providing the maker with a relatively simple way of determining to whom his or her obligation is owed and, thus, whom to pay in order to be discharged.
- The rules concerning transfer of ownership and other interests in a note, on the other hand, relate to who, among competing claimants, is entitled to the economic value of the note, a matter as to which the maker is indifferent so long as it does not affect whom the maker must pay.

Initially, a note is owned by the payee to whom it was issued. If that payee seeks either to use the note as collateral or sell the note outright, Article 9 of the UCC governs that transaction and determines whether the creditor or buyer has obtained a property right in the note. As is generally known, Article 9 governs transactions in which property is used as collateral for an obligation.²⁴ In addition, however, Article 9 governs the sale of most payment rights, including the sale of both negotiable and non-negotiable notes.²⁵ With very few exceptions, the same rules that apply to transactions in which a payment right is collateral for an obligation also apply to transactions in which a payment right is sold. Rather than contain two parallel sets of rules – one for transactions in which payment rights are collateral and the other for sales of payment rights –

²³ See UCC § 3-309(b). This subsection goes on to state that “Adequate protection may be provided by any reasonable means.”

²⁴ UCC § 9-109(a)(1).

²⁵ With certain limited exceptions not germane to this Report, Article 9 governs the sale of accounts, chattel paper, payment intangibles, and promissory notes. UCC § 9-109(a)(3). The term “promissory note” includes not only notes that fulfill the requirements of a negotiable instrument under UCC § 3-104 but also notes that do not fulfill those requirements but nonetheless are of a “type that in ordinary business is transferred by delivery with any necessary indorsement or assignment.” See UCC §§ 9-102(a)(65) (definition of “promissory note”) and 9-102(a)(47) (definition of “instrument” as the term is used in Article 9).

Article 9 uses nomenclature conventions to apply one set of rules to both types of transactions. This is accomplished primarily by defining the term “security interest” to include not only an interest in property that secures an obligation but also the right of a buyer of a payment right in a transaction governed by Article 9.²⁶ As a result, for purposes of Article 9, the buyer of a promissory note has a “security interest” in the note, and the rules that apply to security interests that secure an obligation also apply to transactions in which a promissory note is sold.²⁷

Section 9-203(b) of the Uniform Commercial Code provides that three criteria must be fulfilled in order for the owner of a mortgage note effectively to create a “security interest” (either an interest in the note securing an obligation or the outright sale of the note to a buyer) in it.

- The first two criteria are straightforward – “value” must be given²⁸ and the debtor/seller must have rights in the note.²⁹
- The third criterion may be fulfilled in either one of two ways. Either the debtor must “authenticate”³⁰ a “security agreement”³¹ that describes the note³² or the secured party must take possession³³ of it pursuant to the debtor’s security agreement.³⁴

²⁶ See UCC § 1-201(b)(35) [UCC § 1-201(37) in states that have not yet enacted the 2001 revised text of UCC Article 1]. (For reasons that are not apparent, when South Carolina enacted the 1998 revised text of UCC Article 9, which included an amendment to UCC § 1-201 to expand the definition of “security interest” to include the right of a buyer of a promissory note, it did not enact the amendment to § 1-201. This Report does not address the effect of that omission.) The limitation to transactions governed by Article 9 refers to the exclusion, in cases not germane to this Report, of certain assignments of payment rights from the reach of Article 9.

²⁷ Similar nomenclature conventions define “debtor” to include the seller of a payment right, “secured party” to include the buyer of a payment right, and “collateral” to include a sold payment right. See UCC §§ 9-102(a)(28), (72), (12).

²⁸ UCC § 9-203(b)(1). UCC § 1-204 provides that giving “value” for rights includes not only acquiring them for consideration but also acquiring them in return for a binding commitment to extend credit, as security for or in complete or partial satisfaction of a preexisting claim, or by accepting delivery of them under a preexisting contract for their purchase.

²⁹ UCC § 9-203(b)(2). Limited rights that are short of full ownership are sufficient for this purpose. See Official Comment 6 to UCC § 9-203.

³⁰ This term is defined to include signing and its electronic equivalent. See UCC § 9-102(a)(7).

³¹ A “security agreement” is an agreement that creates or provides for a security interest (including the rights of a buyer arising upon the outright sale of a payment right). See UCC § 9-102(a)(73).

³² Article 9’s criteria for descriptions of property in a security agreement are quite flexible. Generally speaking, any description suffices, whether or not specific, if it reasonably identifies the property. See UCC § 9-108(a)-(b). A “supergeneric” description consisting solely of words such as “all of the debtor’s assets” or “all of the debtor’s personal property” is not sufficient, however. UCC § 9-108(c). A narrower description, limiting the property to a particular category or type, such as “all notes,” is sufficient. For example, a description that refers to “all of the debtor’s notes” is sufficient.

³³ See UCC § 9-313. As noted in Official Comment 3 to UCC § 9-313, “in determining whether a particular person has possession, the principles of agency apply.” UCC § 9-313(c) also contains a rule under which possession by a non-agent (such as a bailee) may constitute possession by the secured party if the person authenticates a record acknowledging that it holds the collateral for the secured party’s benefit. Possession as contemplated by UCC § 9-313 is also possession for purposes of UCC § 9-203. See UCC § 9-203, Comment 4.

³⁴ UCC §§ 9-203(b)(3)(A)-(B).

- Thus, if the secured party (including a buyer) takes possession of the mortgage note pursuant to the security agreement of the debtor (including a seller), this criterion is satisfied even if that agreement is oral.
- Alternatively, if the debtor authenticates a security agreement describing the note, this criterion is satisfied even if the secured party does *not* take possession of the note. (Note that in this situation, in which the seller of a note may retain possession of it, the owner of a note can be a different person than the person entitled to enforce the note.)³⁵

Satisfaction of these three criteria of Section 9-203(b) results in the secured party (including a buyer of the note) obtaining a property right (whether outright ownership or a security interest to secure an obligation) in the note from the debtor (including a seller of the note).³⁶

Question Three – What is the Effect of Transfer of an Interest in the Note on the Mortgage Securing It?

What if a note secured by a mortgage is sold (or the note is used as collateral to secure an obligation), but the parties do not formally assign the mortgage that secures payment of the note? UCC Section 9-203(g) explicitly provides that the mortgage automatically follows the note: “The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.” (As noted previously, a “security interest” in a note includes the right of a buyer of the note.)

Thus, while this matter has engendered some confusion,³⁷ the law is clear,³⁸ and the sale of a mortgage note not accompanied by a separate conveyance of the mortgage securing the note does not result in a separation of the mortgage from the note.

³⁵ As noted in the discussion of Question One, payment by the maker of a negotiable note to the person entitled to enforce it discharges the maker's obligations on the note. UCC § 3-602. This is the case even if the person entitled to enforce the note is not its owner. As between the person entitled to enforce the note and the owner of the note, the right to the money paid by the maker is determined by the UCC and other applicable law, such as contract and agency law. See, e.g., UCC §§ 3-306 and 9-315(a)(2).

³⁶For cases in which another person claims an interest in the note (whether as a result of another voluntary transfer by the debtor or otherwise), reference to Article 9's rules governing perfection and priority of security interests may be required in order to rank order those claims (and, in some cases, determine whether a party has taken the note free of competing claims to the note). In the case of notes that are negotiable instruments, the Article 3 concept of “holder in due course” (see UCC § 3-302) should be considered as well, because a holder in due course takes its rights in an instrument free of competing property claims to it (as well as free of most defenses to obligations on it). See UCC §§ 3-305 and 3-306. With respect to determining whether the owner of a note has effectively transferred a property interest to a transferee, however, the perfection and priority rules are largely irrelevant. (Of course, application of the perfection and priority rules can result in the transferee either being subordinate to the rights of a competing claimant or being extinguished by the rights of the competing claimant.)

³⁷See, e.g., the discussion of this issue in *U.S. Bank v. Ibanez*, 458 Mass. 637, 2011 WL 38071 (Mass. 2011), at slip op. p. 10. In that discussion, the court cited Massachusetts common law precedents pre-dating the enactment of the current text of Article 9 to the effect that a mortgage does not follow a note in the absence of a separate assignment

Question Four – May a Person to Whom an Interest in the Note Has Been Transferred, but Who Has not Taken a Recordable Assignment of the Mortgage, Take Steps to Become the Assignee of Record of the Mortgage Securing the Note?

In some states, a party without a recorded interest in a mortgage may not enforce the mortgage non-judicially. In such states, even though the buyer of a mortgage note (or a creditor to whom a security interest in the note has been granted to secure an obligation) automatically obtains corresponding rights in the mortgage,³⁹ this may be insufficient as a matter of applicable real estate law to enable that buyer or secured creditor to enforce the mortgage upon default of the maker if the buyer or secured creditor does not have a recordable assignment. The buyer or other secured creditor may, of course, attempt to obtain such a recordable assignment from the seller or debtor at the time it seeks to enforce the mortgage, but such an attempt may be unsuccessful.⁴⁰

Article 9 of the UCC provides such a buyer or secured creditor a mechanism by which it can record its interest in the realty records in order to conduct a non-judicial foreclosure. UCC Section 9-607(b) provides that “if necessary to enable a secured party [including the buyer of a mortgage note] to exercise ... the right of [its transferor] to enforce a mortgage nonjudicially,” the secured party may record in the office in which the mortgage is recorded (i) a copy of the security agreement transferring an interest in the note to the secured party and (ii) the secured party’s sworn affidavit in recordable form stating that default has occurred⁴¹ and that the secured party is entitled to enforce the mortgage non-judicially.⁴²

of the mortgage, but did not address the effect of Massachusetts’s subsequent enactment of UCC § 9-203(g) on those precedents. Of course, application of UCC § 9-203(g) would result in the conclusion that the holder of the note in question had an interest in the mortgage securing the note only if the holder demonstrated that it had an attached security interest (including the interest of a buyer) in the note. Such a conclusion would not, of itself, mean that the holder can enforce the mortgage without a recordable assignment to it. That matter is the province of real property law and is addressed, in part, in the discussion of Question 4 below.

³⁸ Official Comment 9 to UCC § 9-203 confirms this point: “Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.”

³⁹ See discussion of Question Three, *supra*.

⁴⁰ In some cases, the seller or debtor may no longer be in business. In other cases, it may simply be unresponsive to requests for execution of documents with respect to a transaction in which it no longer has an economic interest. Moreover, in cases in which mortgage note was collateral for an obligation owed to the secured party, the defaulting debtor may simply be unwilling to assist its secured party. See Official Comment 8 to UCC § 9-607.

⁴¹ The 2010 amendments to Article 9 (promulgated by the American Law Institute and the Uniform Law Commission but not yet enacted) add language to this provision to clarify that “default,” in this context, means default with respect to the note or other obligation secured by the mortgage.

⁴² Of course, UCC § 9-607(b) does not address other conditions that must be satisfied for judicial or non-judicial enforcement of a mortgage.

Summary

The Uniform Commercial Code provides four sets of rules that determine matters that are important in the context of enforcement of mortgage notes and the mortgages that secure them:

- First, in the case of a mortgage note that is a negotiable instrument, Article 3 of the UCC determines the identity of the person who is entitled to enforce the note and to whom the maker owes its payment obligation; payment to the person entitled to enforce the note discharges the maker's obligation, but failure to pay that party when the note is due constitutes dishonor.
- Second, for both negotiable and non-negotiable mortgage notes, Article 9 of the UCC determines whether a transferee of the note from its owner has obtained an attached property right in the note.
- Third, Article 9 of the UCC provides that a transferee of a mortgage note whose property right in the note has attached also automatically has an attached property right in the mortgage that secures the note.
- Finally, Article 9 of the UCC provides a mechanism by which the owner of a note and the mortgage securing it may, upon default of the maker of the note, record its interest in the mortgage in the realty records in order to conduct a non-judicial foreclosure.

Of course, as noted previously, these UCC rules do not resolve all issues in this field. The enforcement of real estate mortgages by foreclosure is primarily the province of a state's real property law, but legal determinations made pursuant to the four sets of UCC rules described in this Report will, in many cases, be central to administration of that law. In such cases, proper application of real property law requires proper application of the underlying UCC rules.