

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

BKY: 09-41180-NCD
Chapter 7 Case

Steven Allen Gewecke and
Tamara Lynn Gewecke,

Debtors.

**REPLY MEMORANDUM IN SUPPORT OF MOTION
FOR RELIEF FROM STAY**

US Bank National Association, as Trustee (hereinafter “**US Bank, as trustee**”)¹ submits this Reply Memorandum of Law in Support of Motion for Relief from Stay in the above-entitled matter.

INTRODUCTION

Due to US Bank, as trustee’s purported fictitious recorded assignment of mortgage, the Debtors claim US Bank, as trustee lacks standing as the real party in interest to bring this Motion for Relief from Stay. The Debtors believe that argument, in itself, should require the court to dismiss this Motion. Based upon the oral record, the other remaining issue of the Debtors’ TILA rescission claims needs to be resolved in the adversary proceeding in order to determine whether the 11 U.S.C. §362(d)(1) standard entitles US Bank, as trustee to relief from the automatic stay.

Based upon the arguments below, the underlying question for the Court should not be the validity of Assignment of Mortgage or potential violations of the Pool and Servicing Agreement

¹ U.S. Bank National Association, as trustee has brought this motion on behalf of Certificateholders CitiGroup Mortgage Loan Trust Inc. Asset-backed Pass-Through Certificates Series 2007-AMC1 as supported by the Assignment of Mortgage attached as Exhibit C to the Affidavit in Support of Motion for Relief from Stay.

attached as Exhibit G to the Ireland Affidavit (hereinafter “PSA”)², but rather the District of Minnesota’s necessary burden to establish standing as the real party in interest to bring a Motion for Relief from Stay. The Debtors are not a party to the PSA and do not have standing to make standing arguments relating to any breach or violation of that agreement. That may be a convoluted statement, but the Debtors cannot makes claims of other parties and they are not a party to the PSA.

The Debtors do, however, have the ability to claim US Bank, as trustee is not a real party in interest to bring this Motion for Relief from Stay required under the Federal Rules of Civil Procedure 17 (2009) and 11 U.S.C. § 362(d). Even if the court finds the Debtors have standing to contest whether US Bank, as trustee is the real party in interest through the claims of other parties, the PSA states that US Bank, as trustee may be the real party in interest for the Mortgage by taking possession of the Note and Mortgage and without a recorded assignment of mortgage. The Debtors’ claim US Bank, as trustee has a fabricated assignment of mortgage is only consistent with the select portions of the PSA it cited. The Assignment of Mortgage is consistent when considering all the provisions of the PSA. US Bank, as trustee obtained the Note and Mortgage thought a proper transfer and recorded an assignment of mortgage consistent with the PSA.

Moreover, the Minnesota Recording Act and law making Minnesota a race-notice jurisdiction provides US Bank, as trustee the power to enforce the Note and Mortgage at issue through its recorded assignment of mortgage. Potential or speculative parties to the Note and Mortgage having not recorded their interest on the property are not afforded any protection under Minnesota law. US Bank, as trustee’s assignment of mortgage, untested by any affected party, is

² The PSA provided in the record does not include the Mortgage Loan Schedule Exhibit listing all of the mortgages made a part of that particular security and, contrary to the Debtors’ claim Argent Mortgage Company, LLC’s mortgage could not be made part of the security, that mortgage may just be listed on the actual Mortgage Loan Schedule Exhibit.

sufficient to show it is the real party in interest to enforce the Note and Mortgage and bring a Motion for Relief from Stay.

ARGUMENT

The standing and real party in interest issue is one of first impression for this jurisdiction, but has been a hot issue around the country. *See In re Sheridan*, 2009 Bankr. Lexis 552 (Bankr. Id. 2009) (unpublished, attached as Ireland Aff. ¶ 7, Ex. H); *In re Jacobson*, 2009 Bankr. Lexis 709 (Bankr. W.D. Wash. 2009)(unpublished, attached as Ireland Aff. ¶ 8, Ex. I); *In re Hayes*, 393 B.R. 259 (Bankr. Mass. 2008); *In re Hwang*, 396 B.R. 757 (Bankr. C.D. Cal. 2008; *In re Nosek*, 386 B.R. 374 (Bankr. Mass. 2008). The various jurisdictions have concluded that Mortgage Electronic Registrations Systems, Inc. does not have necessary interest to be a real party in interest for Motions for Relief from Stay, *see In re Sheridan*, 2009 Bankr. Lexis at 552, and have gone as far as concluding that sufficient evidence of every transfer between lenders must be presented to the court to meet the burden for bringing a Motion for Relief from Stay. *See In re Hayes*, 393 B.R. at 269-70.

Here, the Debtors are not a party to the PSA and cannot make claims for those parties. The Debtors have incorrectly interpreted the law transferring notes and mortgage and misinterpreted the PSA. The recorded Assignment of Mortgage to US Bank, as trustee makes its' rights in that Note and Mortgage prior and superior to any potential unrecorded claim to the Note and Mortgage. US Bank, as trustee is the recorded real party in interest and has the sufficient rights to bring this Motion for Relief from Stay.

I. THE DEBTORS ARE ATTEMPTING TO MAKE THE CLAIMS OF OTHER PARTIES TO THE ASSIGNMENT OF MORTGAGE AND PSA AND HAVE NO STANDING TO ALLEGE OR LITIGATE IT VIOLATES THE TERMS OF ANY AGREEMENT BETWEEN THOSE OTHER PARTIES.

The Debtors themselves recognize the parties to the Assignment of Mortgage and the PSA.

US Bank, as trustee and Argent Mortgage Company, LLC are the parties to the Assignment and US Bank, as trustee, CitiGroup Mortgage Loan Trust, Inc., CitiGroup Global Markets Realty Corp., and Countrywide are the parties to the PSA. More importantly, other than claiming the Assignment of Mortgage is a fabrication, it violates the PSA, and is insufficient to meet the burden for a real party in interest, the Debtors also recognize they are not a party to either the Assignment of Mortgage or the PSA. Any dispute, issue, or breach between the contractual parties of the PSA or Assignment does not involve the Debtors.

In order to have standing to make certain claims, three requirements must be met: (1) the person making the claim must, at a minimum, have suffered an injury in fact; (2) there must be some causal connection between the injury and the potential damage making the injury fairly traceable to the other party and not be a result of some third party; and (3) that the injury be likely, rather than merely speculative. *Lujan v. Defenders of Wildlife* 504 U.S. 555, 560, 112 S.Ct. 2130, 2136 (1992). The Debtors claim that US Bank, as trustee's recorded interest in the property is invalid because it violates the PSA must result in some injury to the Debtors. The Debtors cannot make claims of third parties, not part of this action.

The record does not include any information that the Debtors question they were not given credit for payments made on the Mortgage or that they did not know whom to make monthly mortgage payments. In fact, the Debtors specifically recognized Countrywide in Schedule D of the Petition as the party to provide notice regarding the bankruptcy and the party currently handling the Note and Mortgage.

Even had the Debtors made payments to Countrywide and those payments were not applied to the balance on the Note and Mortgage, the Debtors are not obligated to make double payments.

The issue and dispute would be between Countrywide and any party under the PSA. The debtors cannot show any injury from this recorded Assignment of Mortgage and are merely speculating some party to the PSA, or whoever, may claim it holds the rights under the Note and Mortgage. This speculation is insufficient to raise these claims.

The Debtors lack of standing to contest the Assignment of Mortgage is best evidenced by the unreported decision *Countrywide Homes Loans, Inc. v. Brown*, 2007 WL 706535 (N.Y. Cir. 2007). Absent a written assignment of mortgage, obviously not even recorded, the 2nd Circuit Federal Court of Appeals ruled that the borrowers were third parties to the oral assignment between the original holder of the Note and Mortgage and the party foreclosing. *Id.* As third parties, the borrowers lacked standing to even dispute an unrecorded, unwritten, oral Assignment of Mortgage. *Id.* The debtors lack standing to make claims under the PSA, which they acknowledge in their own argument. Claims regarding potential violations of the PSA are improperly before the court.

II. U.S. BANK, N.A., AS TRUSTEE'S ASSIGNMENT OF MORTGAGE PROVIDES SUFFICIENT LEGAL BASIS AS THE "REAL PARTY IN INTEREST" TO MAKE CLAIMS REGARDING THE PROPERTY AT ISSUE.

Even if the court finds the Debtors have standing to make claims the PSA has been violated, the transfer of the Note and Mortgage to US Bank, as trustee's without an immediate assignment of mortgage is completely valid and meets the terms of the PSA. In addition, US Bank, as trustee's recorded Assignment of Mortgage sets forth a sufficient interest in the property under Minnesota law to enforce the obligations of the Note and Mortgage.

A. THE DEBTORS' CLAIM US BANK, AS TRUSTEE, IS SIMPLY PAPERING OVER MAJOR HOLES IN THE CHAIN OF TITLE IS WRONG BECAUSE A RECORDED ASSIGNMENT OF MORTGAGE IS NOT LEGALLY REQUIRED FOR HOLDING THE NOTE AND MORTGAGE OR, ULTIMATELY, BEING THE REAL PARTY IN INTEREST TO ENFORCE THE NOTE AND MORTGAGE.

A recorded assignment of mortgage is not legally required to enforce the obligations of a note and mortgage. More importantly, the law specifically contemplates actions of parties in the secondary mortgage market, upon which many notes and mortgages are currently transferred. The Restatement (Third) of Property: Mortgages § 5.4 (1997) addresses transfers of mortgages. It specifically states:

- “(a) A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.
- (b) Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.
- (c) A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures.”

Id. Since the Note is the obligation, the transfer of the note also transfers the mortgage unless the parties specifically express otherwise. *Id.* at (a); *see also id.* at cmt. b. Thus, the mortgage can be properly transferred with only transferring the note.

Under the Debtors claim that US Bank, as trustee is simply papering over the chain of title, the Debtors are implying that in order for the transfer to be valid, the law requires recorded assignments of mortgages for each transfer. The Debtors are completely wrong. The Restatement specifically states, “[r]ecordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it. *Id.* Thus, U.S. Bank, N.A., as trustee can show an “effective transfer” of the mortgage without recording a mortgage assignment. Without multiple recorded assignments, US Bank, as trustee may not have papered over the chain of title, but rather

followed the letter of the law that does not require recorded assignments.

The transfer of a note and mortgage without the recording of a mortgage assignment contemplates the note being a negotiable instrument. Negotiable instruments can be effectively transferred by delivering the actual instrument, the note, to another party. Minn. Stat. § 336.6-203 (2009). Upon possession, the new party has the right to enforce that instrument. *Id.* Commonly, we refer to the person in actual possession of the note as the “holder” of the note, *see* Minn. Stat. 336.1-201 (b) (21) (2009), and as the person with the right to enforce both the note and mortgage without a recorded mortgage assignment. Contrary to the Debtors’ argument, US Bank, as trustee can be the holder of the Note, and be the real party in interest to enforce the obligations of the Note and Mortgage, without having a recorded assignment of mortgage.

B. POSSESSION OF THE NOTE AND MORTGAGE ARE SUFFICIENT TO ENFORCE THE NOTE AND MORTGAGE AND BE CONSIDERED THE HOLDER OF THE NOTE AND MORTGAGE.

Although the current secondary mortgage market seems to be very complex, the realities of the parties’ positions are not that far from a very common situation people recognize. People commonly understand the concept of keeping important documents protected in a lockbox at their bank or financial institution of choice. If a person obtained, and was transferred, an original negotiable promissory note and mortgage by taking possession and placed the original negotiable promissory note and mortgage in that lockbox, people could generally understand that person had legal possession of the original negotiable promissory note and mortgage. As the holders of the original negotiable promissory note and mortgage, and, thus, the right to enforce those documents, that person would have standing to enforce the rights of the note and mortgage and be the real party in interest to those documents.

The secondary mortgage market, although much more complex, is really no more than an investor being transferred an original negotiable promissory note and mortgage and having those documents placed in a lockbox. A number of contracts control the agreements between certain parties to make this all happen, but the reality is the investor has the ability to produce the original negotiable promissory note and mortgage when necessary. These investors maintain actual possession of these notes and mortgages, through a lockbox type situation, and maintain the right to enforce the note and mortgage when necessary.

Just because the secondary mortgage market has made the nuance of holding notes and mortgages much more complex, the law contemplates these negotiable instruments being transferred, even numerous times, without the requirement of a recorded assignment of mortgage. The Debtors claim numerous assignments of mortgages must be recorded in order for US Bank, as trustee to have a non-fabricated interest in the property is simply incorrect. US Bank, as trustee and other investors are, and can, legally transfer the right to enforce a note and mortgage without recording numerous assignments of mortgage to make those transfers valid.

C. U.S. BANK, N.A., AS TRUSTEE'S RECORDED ASSIGNMENT OF MORTGAGE COMPLIES WITH THE SPECIFIC TERMS OF THE POOLING AND SERVICING AGREEMENT, UNMENTIONED OR ADDRESSED BY THE DEBTORS.

US Bank, as trustee possession of the Note and Mortgage and eventual recorded assignment of mortgage comply with the terms of the PSA. The Debtors' handpicked provisions of the PSA do not provide the Court the entire picture or requirements between the parties of the PSA.

The PSA, in its general terms, and also in Exhibit D, the Mortgage Loan Purchase Agreement, state the overall provisions for taking possession of the note and mortgage and allowing an assignment of that note and mortgage for recording in the future. (Ireland Aff. ¶ 6, Ex. E). Article

II, Section 2.01 Conveyance of Mortgage Loans provides the Certificateholders will obtain all, right, title and interest of the Depositor acquired under the Mortgage Loan Purchase Agreement to the mortgages on the Mortgage Loan Schedule. *Id.* at p. 47, 247-263. The provisions of both the PSA and the Mortgage Loan Purchase Agreement contain the same requirements for transferring and taking possession of notes and mortgages and neither provision requires assignments of mortgage be immediately recorded.

The Mortgage Loan Purchase Agreement specifically addresses taking possession of transferred mortgage documents, including the original note, prior to the transfer to the Certificateholders. It states:

Section 4. Transfer of the Mortgage Loans.

- (a) Possession of Mortgage Files. The Seller does hereby sell, transfer, assign, set over and convey to the Purchaser, without recourse but subject to the terms of this Agreement, all of its right, title and interest in, to and under the Mortgage Loans. The contents of each Mortgage File not delivered to the Purchaser or to any assignee, transferee or designee of the Purchaser on or prior to the Closing Date are and shall be held in trust by the Seller for the benefit of the Purchaser or any assignee, transferee or designee of the Purchaser. *Upon the sale of the Mortgage Loans, the ownership of each Mortgage Note, the related Mortgage and the other contents of the related Mortgage File is vested in the Purchaser and the ownership of all records and documents with respect to the related Mortgage Loan prepared by or that come into possession of the Seller on or after the Closing Date shall immediately vest in the Purchaser and shall be delivered immediately to the Purchaser or as otherwise directed by the Purchaser.*"

Id. at 248 (emphasis added). The PSA clearly states transfer the Mortgage Note requires possession. In a very similar fashion, the PSA transfers possession of the notes and mortgages after the transfer from the Depositor to the Certificateholders. *Id.* at 47. In fact, the PSA even recognizes the ability under Minn. Stat. §336.3-205 (2009) for a blank endorsement on the note for transferring it by possession. Contrary to the Debtors allegations that there is a need for an assignment of mortgage dated prior to the Closing Date, no such provision requires such an assignment in the PSA general

provisions or the Mortgage Loan Purchase Agreement. *Id.* at 47, 247. The PSA specifically contemplates a transfer though taking possession of the note.

Moreover, the PSA and the Mortgage Loan Purchase Agreement expressly do not require recorded assignments of each mortgage, also contrary to the Debtors' assertion. The PSA and the Mortgage Loan Purchase Agreement do state that a properly recorded assignment of Mortgage should be recorded promptly and, in no event, later than five business days after the closing date. *Id.* at 48, 249. However, there are specific conditions addressing this requirement. First, the PSA creates an exception for mortgage loans listing Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") on the mortgage or when MERS is listed on a properly recorded assignment of mortgage. *Id.* Mortgages with MERS as the nominee do not require recorded assignments with the five day period.

Secondly, the PSA and Mortgage Loan Purchase Agreement create an exception to the immediate recording requirement at all. The five day requirement for recording assignments is not required when "recordation shall not, as of the Closing Date, be required by the Rating Agencies, as a condition to their assignment on the Closing Date of their initial ratings to the Certificates, as evidenced by the delivery by the Rating Agencies of their ratings letters on the Closing Date." *Id.* In other words, if the rating agency does not require the mortgage be recorded, the parties to the PSA and Mortgage Loan Purchase Agreement do not require that the assignments be recorded.

The specifics of the PSA and the Mortgage Loan Purchase Agreement also address circumstances when the assignment of mortgage must be recorded in the future. One such circumstance is upon the "occurrence of a foreclosure relating to the Mortgagor under the related Mortgage" an assignment of mortgage must be recorded *Id.* The PSA and Mortgage Loan Purchase

Agreement also allow the assignments of mortgage to be blank. Here, the condition requiring the recording of US Bank, as trustee's Assignment of Mortgage was clearly in the instance of a foreclosure relating to the mortgagor, the Debtors. The Assignment of Mortgage meets the provisions of the PSA.

Lastly, the Debtors claim that the assignment of mortgage is invalid because the parties made transfers of the notes and mortgages without recourse and with no reservation of rights. Although, on its face, that argument is consistent with the PSA and Mortgage Loan Purchase Agreement, *see id.* at 47, 243, the PSA, at a minimum, only requires blank assignments of mortgage from the "Originator" to the "Trustee". *Id.* at 47. The Originator may not hold an enforceable interest in the note and mortgage under the terms of PSA, but it does have the obligation of executing the assignment of mortgage when needed by the Trustee.

When considering all the terms of the PSA, US Bank, as trustee has not violated the terms of the agreement by recording an assignment once it began foreclosing on the property at issue. In fact, this exact situation was contemplated in the PSA and followed upon the occurrence of a foreclosure on the Debtors.

D. RECORDED ASSIGNMENTS OF MORTGAGES ARE SUFFICIENT UNDER MINNESOTA LAW TO BE THE REAL PARTY IN INTEREST FOR ENFORCING OBLIGATIONS UNDER THE NOTE AND MORTGAGE

The Minnesota Recording Act does not protect a potential real party in interest that has not recorded their interest on the property. Minnesota is a "race-notice" jurisdiction where "a bona fide purchaser who records first obtains rights to the property which are superior to a prior purchaser who failed to record." *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 524 (Minn. 1990); Minn. Stat. 507.34 (2008). Putting the complex secondary mortgage market aside, US Bank, as trustee's

recorded mortgage interest in the property is superior to any other potential real party in interest to that Mortgage, unless, of course, US Bank, as trustee has knowledge of that interest.

To take this argument even further, if US Bank, as trustee proceeded with foreclosure, purchased the Sheriff's Certificate of Sale at the foreclosure sale, and obtained fee title after no redemption was made during the six month right of redemption period, US Bank, as trustee can transfer the property with clean title to a bonafide purchaser, without knowledge of the potential unrecorded interest. The party claiming an interest in US Bank, as trustee's mortgage interest and, ultimately, the property would not have recourse against the bonafide purchaser, without knowledge of that interest under the Minnesota Recording Act. The speculation of other potential parties claiming an interest in property is the very reason for the Minnesota Recording Act and the ability for people to rely upon the property records.

The downfall of potentially losing an interest in property due to a failure to record is recognized in the Restatement. "[A]ssignees are well advised to record." § 5.4 *Mortgages*, cmt b. The secondary mortgage market may take these risks, and that is their choice, but a recorded assignment of mortgage under the Minnesota Recording Act is sufficient for meeting a burden as the "real party in interest". US Bank, as trustee has asserted by Affidavit it is the holder of the Note and Mortgage and, thus, implying there are no other known interests in the Note and Mortgage contrary to US Bank, as trustee. Based upon that representation, US Bank, as trustee is a bonafide purchase of the Note and Mortgage under the Minnesota Recording Act having a sufficient real interest in the property for a Motion for Relief from Stay.

CONCLUSION

For the reasons stated above, the Court should find U.S. Bank, N.A., as trustee has standing

to bring the Motion for Relief from Stay as a real party in interest under its recorded assignment of mortgage.

PETERSON, FRAM & BERGMAN

Professional Association

DATED: May 1, 2009

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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UNSWORN DECLARATION
FOR PROOF OF SERVICE

Jared M. Goerlit, an attorney with the law firm of Peterson, Fram & Bergman, Professional Association, Attorneys at Law, licensed to practice law in this Court, with office address of 55 East Fifth Street, Suite 800, St. Paul, Minnesota, 55101, declares that on the 1st day of May, 2009, I served the annexed Reply Memorandum in Support of Motion for Relief from Stay on the parties referred to below by mailing to each of them a copy thereof by enclosing the same in an envelope with first class postage prepaid, and depositing same in the post office at St. Paul, Minnesota, addressed to each of them as follows. The undersigned further certifies that upon information and belief, a copy of the above-referenced documents will be delivered to the individuals listed below who are Filing Users, by automatic e-mail notification pursuant to the Electronic Case Filing System and this notice constitutes service or notice pursuant to Local Rule 9006-1(a).

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And I declare, under penalty of perjury, that the foregoing is true and correct.

Signed: /e/ Jared M. Goerlitz