Dated: December 07, 2012
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
RHONDA MINOR,
Debtor.

Case No. 11-22982-L
Chapter 13

ORDER GRANTING IN PART AND DENYING IN PART MOTION IN LIMINE (WELLS FARGO)

BEFORE THE COURT is the Motion in Limine filed by Wells Fargo Bank, N.A. ("Wells Fargo"), and the Debtor's objection thereto. There are three contested matters presently set for trial on January 28 and 29, 2013, involving the Debtor and Wells Fargo: (1) Wells Fargo's motion for relief from the automatic stay; (2) Wells Fargo's objection to confirmation of the Debtor's plan; and (3) the Debtor's objection to Wells Fargo's proof of claim. Wells Fargo seeks to exclude all evidence or testimony from the trial of the three contested matters that is related to the following:

1. Whether the Note and Deed of Trust were improperly transferred from Community Mortgage Corporation to Wells Fargo such that Wells Fargo should not be considered a party entitled to enforce the Note and Deed of Trust;
2. Whether the Note and Deed of Trust, as endorsed and assigned, fail to provide Wells Fargo with legal standing to enforce its rights under the Note and Deed of Trust;
3. Whether the Debtor has a fraud in the factum defense regarding the enforcement of the Note by Wells Fargo;
4. Whether the Debtor has a claim for wrongful foreclosure against Wells Fargo;
5. Whether the Debtor has a claim whereby injunctive relief is required to enjoin Wells Fargo from proceeding with a foreclosure sale at some future time;
6. Whether the Debtor has a cause of action under the California Civil Code sections referenced in her Adversary Complaint;
7. Whether the Debtor has a cause of action under the California Evidence Code sections referenced in her Adversary Complaint;
8. Whether the Debtor has a claim to quiet title in the person of the Debtor;
9. Whether Wells Fargo is required to enter into a loan modification agreement and workout arrangement with the Debtor in regard to the Property;
10. Whether the Debtor has a claim for predatory lending;
11. Whether Wells Fargo has an obligation to comply with an Order of the Office of the Comptroller of Currency before filing its Motion for Relief from the Automatic Stay or its Objection to Confirmation;
12. Whether the Debtor has a claim for malicious prosecution;

13 Whether the Debtor has a claim for spoliation of evidence;

14. Whether the Debtor has a claim for breach of contract;

15. Whether the Debtor can present evidence with regard to her request for punitive damages;

16. Whether the Debtor can present evidence with regard to Well's Fargo's status as a holder in due course;

17. Whether the Debtor can present evidence regarding the standing of Wells Fargo to file a proof of claim under 11 U.S.C § 506;

18. Whether the Debtor can present evidence of alleged actions of Wells Fargo that would support a claim for fraudulent transfer pursuant to 11 U.S.C. § 548;

19. Whether the Debtor has a claim for alleged violations of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-104;

20. Whether the Debtor has a claim for intentional interference with a business relationship;

21. Whether the Debtor has a claim for intentional infliction of emotional distress;

22. Whether the Debtor has a claim for breach of fiduciary duty; and

23. Whether the Debtor can present evidence of any other claims or defenses that should have been raised in the Adversary Proceeding.

Wells Fargo seeks to exclude these issues from the trial on the contested matters for the reason that these matters have already been litigated and dismissed with prejudice in the associated adversary proceeding styled *Rhonda Minor v. Wells Fargo Bank, N.A.*, Adv. Proc. No. 11-00392 (Bankr. W.D. Tenn.).

The Debtor filed an objection to the Motion in Limine. She avers that Wells Fargo concealed material evidence during the Adversary Proceeding in an attempt to interfere with her right to due process. The Debtor states that documents were produced by Wells Fargo during discovery that were materially different from the evidence available to her when the Adversary Proceeding was open. Specifically, she complains that she was not made aware during the pendency of the Adversary Proceeding that Wells Fargo was not in possession of the Note, and that an Assignment of the Deed of Trust was defective. She asserts that she was not made aware until after the Adversary Proceeding was closed that her loan was securitized, and that it is now owned by Fannie Mae, but serviced by Wells Fargo.

The Debtor also makes reference to the announcement of Tennessee Attorney General Bob Cooper that Tennessee is participating in a $25 billion settlement agreement with the nation's five largest mortgage servicers, including Wells Fargo, arising out of an investigation into unacceptable mortgage servicing and foreclosure practices. The Debtor implies that Wells Fargo's practices were unacceptable in her case.

The Debtor claims that she should not be held to the same standards of pleading and procedure as is a party represented by an attorney.

Although the Debtor makes numerous other arguments, they may be summarized thus: Wells Fargo deliberately concealed from her the material fact that it is not the owner of her Note and Deed of Trust. Therefore, the judgment in the Adversary Proceeding should be set aside, and Wells Fargo should be punished. The Debtor asserts that the judgment should be set aside under provisions of the Tennessee Code, not applicable in this bankruptcy proceeding.

I conducted a hearing on the motion in limine on October 17, 2012, which was attended by James Bergstrom, as attorney for Wells Fargo, and by the Debtor, representing herself. At the hearing, Mr. Bergstrom introduced three exhibits: (1) a certified copy of the Deed of Trust, which bears the stamp of the Shelby County Register indicating that it was recorded on March 4, 2008, at 11:26 a.m.; (2) the original Note dated February 29, 2008, which is endorsed to Wells Fargo by Community Mortgage Corporation, and by Wells Fargo in blank; and (3) a certified copy of an Assignment of Deed of Trust, naming Mortgage Electronic Registration Systems, Inc., as nominee for Community Mortgage Corporation, assignor, and Wells Fargo assignee, which bears the stamp of the Shelby County Register indicating that it was recorded on March 8, 2011, at 3:11 p.m.

The Debtor introduced as Collective Exhibit 4 documents that she asserts were received from Wells Fargo through discovery that are material to her claims and objections. These consist of: (A) an unrecorded copy of the Assignment of Deed of Trust; (B) a Notice to Borrower from Community Mortgage Corporation dated March 7, 2008; (C) Wire Instructions on the letterhead of Community Mortgage Corporation; (D) Responses to Requests for Admission prepared by Wells Fargo in this bankruptcy case; (E) a RESPA Servicing Disclosure, signed by Rhonda Minor, dated March 8, 2008; Equal Credit Opportunity Act Notice, signed by Rhonda Minor, dated March 8, 2008; a portion of a credit application, signed by Rhonda Minor, dated March 8, 2008; (F) a document headed "Investor Information" indicating that "FNMA" is the investor and "Wells Fargo Bank, N.A.," is the "name to foreclose in"; (G) a letter dated September 26, 2011, from Wilson & Associates, P.L.L.C. to Rhonda Minor and Gilbert Garcia as tenants, enclosing Notice of Trustee's Sale; a letter dated September 7, 2011, from Wilson & Associates, P.L.L.C. to Rhonda Minor and Gilbert Garcia as owners, enclosing Notice of Trustee's Sale; a letter dated March 15, 2011, from Wilson &

Associates, P.L.L.C. to Rhonda Minor and Gilbert Garcia as tenants, enclosing Notice of Trustee's Sale; (H) a letter from Wells Fargo to Wilson & Associates enclosing an executed Appointment of Successor Trustee; (I) a Summary of Today's Visit concerning an appointment by Rhonda Minor with Dr. Jana Robinson on July 3, 2012; (J) a letter from Wells Fargo to Rhonda Minor dated October 10, 2010, indicating that her loan was in default for failure to make payments; (K) a Corporate Resolution appointing a list of officers of Wells Fargo Home Mortgage, a Division of Wells Fargo, as assistant secretaries and vice presidents of MERS, granting them certain authority with respect to loans registered in the MERS system; (L) excerpts from the deposition of H. John Kennerty, May 20, 2010, in the case of Geleine v. Northwest Trustee Services, et al.; (M) the WFB Collateral File, consisting of a UPS 2nd Day Air tracking label addressed to Wilson & Associates in Little Rock, AR, a page with a bar code, the numbers "033000" and "Note," a page with bar codes headed "Minor, Rhonda," followed by a loan number, client number, and borrower name, with a receipt date time of "7/3/2008 1:51:50PM," due date of "7/5/2-8 1:51:50 PM," and received by a number; a sheet dated "4/29/2010," followed by "A," and then "LM Settlement - Tammy Porter," and then by the Debtor's name; a page with a copy of the endorsement of the Note in blank; a cover sheet referencing a client number with note "atty needs"; a Loan Modification Agreement dated June 1, 2010, with the Debtor named as Borrower and Wells Fargo as lender, signed by the Debtor on April 23, 2010, and by Wells Fargo on April 27, 2010; a cover sheet for documents concerning the Debtor sent to Wilson & Associates with return instructions dated December 14, 2011; a Manifest with the Debtor's name and the date December 14, 2011, with a loan count of 1; a shipping receipt confirmation signed by an individual on behalf of Wilson & Associates dated December 16, 2011; a copy of the Note.

In essence, the Debtor asserts that had she known of the existence of one or more of these documents prior to the dismissal of the Adversary Proceeding, the outcome of the motion to dismiss would have been different. That issue is not before me, however. The Debtor has not filed a motion in the adversary proceeding to have the order dismissing the adversary proceeding vacated on any basis and the arguments the Debtor makes would not have had an effect on the outcome of the Adversary Proceeding. As I discuss more fully below, the Adversary Proceeding was dismissed on the basis of lack of jurisdiction.

The issue before me now is whether the Debtor should be permitted to introduce proof on the various issues noted in the Motion in Limine, most of which relate to claims for affirmative relief against Wells Fargo, in connection with the trial of the three contested matters.

BACKGROUND FACTS

The Note and Deed of Trust

On February 29, 2008, the Debtor and her spouse, Gilbert Garcia, executed a Note payable to the order of Community Mortgage Corporation ("Community Mortgage") in the original principal amount of $317,200.00. The Note was endorsed by Community Mortgage to the order of Wells Fargo, and then by Wells Fargo in blank. The Note is secured by a Deed of Trust recorded in the Office of the Shelby County Register on March 4, 2008, covering real property located at 3284 Richland View Lane, Bartlett, Tennessee. The real property serves as the Debtor's principal residence.

The Bankruptcy Petition and Motion for Relief from Stay

The Debtor commenced her bankruptcy case by filing a voluntary petition under Chapter 7 of the Bankruptcy Code on March 23, 2011. Wells Fargo filed its Motion for Relief from Automatic

Stay on April 4, 2011. A minute entry indicates that the motion was orally granted on June 3, 2011, but before a written order was entered, the Debtor filed a Motion to Convert from Chapter 7 to Chapter 13 on June 10, 2011. When a written order on Wells Fargo's Motion for Relief from Stay was submitted for entry, it reflected that the motion was conditionally denied, conditioned upon the Debtor converting her case to Chapter 13 within fourteen days after the date of the order. It further provided that in the event of conversion to Chapter 13, the automatic stay would remain in effect so long as the Debtor maintained her plan payments, but in the event that she failed to make those payments, the motion could be reset for hearing. The order was entered July 6, 2011. The Motion to Convert to Chapter 13 was granted by order entered July 12, 2011.

The Chapter 13 Plan and Wells Fargo's Objection to Confirmation

The Debtor proposed a Chapter 13 plan, which was amended twice. The second amended plan proposed that the Debtor would pay $618 per month, maintain her ongoing mortgage payments outside the plan, pay $300 per month on an arrearage of $20,000 owed to Wells Fargo, and $318 per month on an arrearage of $32,000 owed to Chase Home Lending. No unsecured claims were provided for in the proposed plan.

Wells Fargo filed its Objection to Confirmation on September 7, 2011. In its objection, Wells Fargo recites that it is the servicer of the Note and Deed of Trust covering property listed in the Debtor's Chapter 13 plan. Wells Fargo objects to the plan because it provides for an arrearage in the amount of $20,000, when in fact the arrearage owed to Wells Fargo is $31,743.06. Further, it objects that the plan provides for an ongoing monthly mortgage payment in the amount of $999.00, when in fact the ongoing monthly mortgage payment is $2,350.43.

The Proof of Claim and Objection to Proof of Claim

Wells Fargo filed its Proof of Claim (Claim 1-1) on September 7, 2011. Attached to the Proof of Claim were copies of the Deed of Trust, the Note, and a Loan Modification Agreement dated April 23, 2010. Wells Fargo filed an Amended Proof of Claim (Claim 1-2) on October 18, 2011, which was subsequently withdrawn on October 19, 2011. On that day, Wells Fargo filed a Second Amended Proof of Claim (Claim 1-3), showing a secured claim in the amount of $333,252.49, ongoing monthly payments beginning September 1, 2011 in the amount of $2,350.43, and a total arrearage claim of $32,678.65.

The Debtor filed her Objection to the Claim of Wells Fargo on December 27, 2011. She filed an Amended Objection on April 16, 2012, and a Second Amended Objection on August 20, 2012. The Debtor's initial objection to the proof of claim challenges Wells Fargo's standing to present the proof of claim filed in this case because it is the loan servicer, but not the owner of the note. The Amended Objection raises the question of whether Wells Fargo used the correct form to file its proof of claim and reiterates the objection that Wells Fargo does not have legal standing to pursue the claim in this case. The Debtor also asserts that the amount of the secured claim should be reduced to the value of the property securing the claim – $185,000 according to the Debtor – pursuant to section 506(a) of the Bankruptcy Code. In the Second Amended Objection, the Debtor reasserts her position that Wells Fargo is not the owner of the note, alleges that Wells Fargo's subsequent actions to perfect its secured status constitute a voidable preference, alleges that Wells Fargo's subsequent actions to perfect its secured status constitute an inappropriate post-petition transfer, alleges that Wells Fargo's actions prior to the filing of the bankruptcy petition constitute

a fraudulent transfer, alleges that Wells Fargo is not a holder in due course of the note, and alleges that Wells Fargo's lien should be avoided and title quieted in the Debtor.

The Adversary Proceeding

On September 9, 2011, the Debtor filed her complaint initiating the Adversary Proceeding. The complaint was virtually identical to a complaint filed by the Debtor on the same day against JPMorgan Chase Bank (Adv. No. 11-00393). The Debtor alleged that Wells Fargo and its agents, officers, employees, and affiliated or associated parties, and their predecessors, had engaged "in a pattern of unlawful, fraudulent, or unfair predatory real estate practices causing Plaintiff to become a victim of such behavior and to be in jeopardy of losing her property through foreclosure." The complaint included the following causes of action against Wells Fargo: Fraud in the Factum - First Cause of Action [here the Debtor alleged that she was induced to obtain loans without accurately realizing the risks, duties or obligations incurred]; Allonge - Second Cause of Action [here the Debtor alleged that Wells Fargo is not a holder in due course of the note and that there is a missing assignment of the deed of trust]; Wrongful Foreclosure - Third Cause of Action [here the Debtor alleged that Wells Fargo does not have legal standing to foreclose the deed of trust]; Quaise [sic] Contract - Fourth Cause of Action [here the Debtor alleged that Wells Fargo does not have legal standing to foreclose the note because it is not the owner, holder, or beneficiary under the note]; Violation of California Civil Code 2923.6 - Fifth Cause of Action; Quiet Title - Sixth Cause of Action [here the Debtor alleged that she is not sure who she should make her note payments to]; Injunctive Relief - Seventh Cause of Action [here the Debtor asked that the court enjoin Wells Fargo from foreclosing on the property]; Requirements - Eighth Cause of Action [here the Debtor alleged that Wells Fargo is not the holder of the Note]; *In Limine* Motion to Exclude all Evidence - Ninth

Cause of Action [here the Debtor indicated that she would move to exclude all evidence proffered by Wells Fargo pursuant to "Evidence Code sections 353 and 400 et seq., Code of Civil Procedure section 430.10(b)"]; Analogous to a General Demurrer - Tenth Cause of Action [here the Debtor again urged the court to preclude the introduction of evidence]; Fair Market Value - Eleventh Cause of Action [here the Debtor argued on the basis of the California Civil Code that Wells Fargo, as a mortgage servicer, had the obligation to maximize the value of the Plaintiff's property]; the Debtor stated that she wanted to enter into a loan modification based upon a property value of $220,000]; Predatory Lending - Twelfth Cause of Action [here the Debtor alleged that she "believed the misleading advice the professionals gave [to her]" and that "Predatory Lending is largely responsible for the grim reality that one in ten homeowners is behind on their monthly payments and currently facing foreclosure."]; Comptroller [sic] Ruling - Thirteenth Cause of Action [here the Debtor asserts that Wells Fargo violated an order of the Comptroller of the Currency by filing its Motion for Relief from the Automatic Stay]; Conclusion - Fifteenth Cause of Action[1] [here the Debtor argues that Wells Fargo lacks standing to foreclose the Deed of Trust].

Wells Fargo filed a Motion to Dismiss the complaint in the Adversary Proceeding on October 25, 2011, on the basis that the complaint failed to state a claim upon which relief may be granted. The Debtor filed a response and an amended response. A hearing was conducted on January 19, 2012. At that hearing I expressed concern about the jurisdiction of the bankruptcy court to entertain the numerous causes of action raised by the Debtor, causes of action that properly belong in an appropriate state or federal court. I stated that it was appropriate to dismiss the complaint for failure to state a cause of action *under federal bankruptcy law*, and noted that to the extent that the

[1] There is no "Fourteenth Cause of Action."

Debtor sought protection from foreclosure, she had that protection as the result of the filing of the bankruptcy case. I noted, however, that a motion for relief from the automatic stay was pending and that if the automatic stay were terminated, the Debtor would be free to raise state law issues in opposition to any attempted foreclosure. An order dismissing the Adversary Proceeding was entered on January 24, 2012. No timely appeal was taken, and the Adversary Proceeding was administratively closed on February 3, 2012.

ANALYSIS

Consideration of Wells Fargo's Motion in Limine must start with the recollection that the matters to be tried by the court are fairly narrow. Pending for trial are Wells Fargo's Motion for Relief from the Automatic Stay and its Objection to Confirmation. Also pending is the Debtor's Second Amended Objection to Wells Fargo's Proof of Claim. The Motion in Limine seeks to limit the evidence that may be presented at trial. It does so on the basis that the court's prior order dismissing the Adversary Proceeding should be given preclusive effect either under the principle of res judicata or the doctrine of collateral estoppel.

In dismissing the Adversary Proceeding, the court decided that the types of claims raised by the Debtor in her complaint were not properly brought before the bankruptcy court for two reasons: first, because on the whole, the Debtor sought injunctive relief to prevent foreclosure which she had already received as the result of filing her bankruptcy petition; and second, because any claims that the Debtor wanted to raise to prevent foreclosure on the basis of state or other law should be brought in an appropriate forum. I dismissed the Adversary Proceeding because it failed to state a claim under *federal bankruptcy law*. *See Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2012) (Bankruptcy courts have constitutional authority to enter final judgments on disallowance of proofs of claim, but

lack constitutional authority to enter final judgment on debtor's affirmative claims against secured creditor). I did not determine and did not intend to determine whether the Debtor could state some claim against Wells Fargo in an *appropriate* forum. As a result, I do not agree that the Motion in Limine should be granted based upon the dismissal of the Adversary Proceeding.

At the hearing on the Motion to Dismiss the Adversary Proceeding, I specifically noted that Wells Fargo's Motion for Relief from the Automatic Stay was set for hearing, and that, in connection with that hearing and the hearing on Wells Fargo's Objection to Confirmation of the Debtor's Plan, I would determine whether cause existed for granting relief from the automatic stay or whether the stay should remain in effect to permit the Debtor to make payments under her plan. At that hearing, the Debtor conceded to me that she owes *someone* with respect to her Note. I cautioned her to make her plan payments and/or save funds that would otherwise be paid to her lender while the motion was pending. It has now been pending much longer than any of us anticipated.

The contested matters that are pending are fairly straightforward. Wells Fargo seeks relief from the automatic stay and it objects to confirmation of the Debtor's proposed Chapter 13 plan. The Debtor objects to Wells Fargo's proof of claim. These are the types of matters that bankruptcy judges hear on a routine basis. The proof that will be permitted to be introduced will be proof relevant to the issues raised. I will consider each of these in turn.

Motion for Relief from the Automatic Stay

The circumstances under which relief from the automatic stay may be granted are specified at section 362(d) of the Bankruptcy Code. 11 U.S.C. § 362(d). The Motion for Relief is based upon section 362(d)(1), which provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay–
>
> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

Wells Fargo claims that cause exists for granting relief from the automatic stay because the Debtor is in default on her payments under the Note, the last payment she made was made on September 1, 2010, and there is no reasonable likelihood that the Debtor will be able to make payments required by the Note. Wells Fargo further alleges that relief from the automatic stay should be granted because the Debtor has no equity in the collateral and therefore, the property is burdensome to the estate. *See* 11 U.S.C. § 554. With respect to a motion for relief from the automatic stay, the party requesting the relief has the burden of proving that the debtor has no equity in the property. The party opposing the relief has the burden of proof on all other issues. 11 U.S.C. § 362(g). Wells Fargo may rely upon the admissions of the Debtor set forth in her bankruptcy petition and schedules. *See Swanigan v. Northwest Airlines, Inc.*, 718 F. Supp. 2d 917, 924 (W.D. Tenn. 2010), quoting *Reynolds v. Comm'r of Internal Revenue*, 861 F.2d 469, 472 (6th Cir. 1988) ("Judicial estoppel is an equitable doctrine that 'protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.'"). The Debtor has consistently maintained that the property securing the note is her principal residence and that the value of the property is less than the outstanding indebtedness secured by it.

In response to the Motion for Relief from the Automatic Stay, the Debtor raises the question of Wells Fargo's standing to pursue relief from the automatic stay. The Debtor contends that Wells Fargo cannot show that it is a "party in interest" with the right to seek relief from the automatic stay.

In order to determine whether a party qualifies as a "party in interest" for purposes of section 362(d), the court should focus on whether the party in question has the right to enforce the obligation. *In re Rice*, 462 B.R. 651 , 656 (BAP 6th Cir. 2011). The determination must be made on a case by case basis. *Id.* To be specific, "a secured creditor clearly has standing to seek relief from the automatic stay as long as it can 'show that it has an interest in the relevant note, and that it has been injured by the debtor's conduct (presumably through a default on the note).'" *Id.* at 657. Further, "an assignee may also have standing to pursue relief from the stay as long as the assignment is valid and the requisite elements of a § 362(d) claim are present." *Id.* The moving party has the responsibility to establish that it has a relevant interest.

In the context of a bankruptcy case, state law determines whether a party has an enforceable right in or a colorable claim to the debtor's property. *Butner v. United States*, 440 U.S. 48, 54, 99 S. Ct. 914 (1979). Likewise, state law determines whether a party has a "right to payment," thus making that party the holder of a "claim" and therefore a "creditor" for purposes of the Bankruptcy Code. *See* 11 U.S.C. §§ 101(5)(A) and (10)(A).

Wells Fargo filed a proof of claim to which is attached a copy of a promissory note, a deed of trust, and a loan modification agreement. The note is made payable to Community Mortgage Corporation, but it has been endorsed twice, once to the order of Wells Fargo Bank, N.A., and a second time in blank.

The note is a negotiable instrument. *See* Tenn. Code Ann. § 47-3-104. As such it is subject to Article 3 of Tennessee's version of the Uniform Commercial Code (the "UCC"). Parties who may enforce negotiable instruments include holders and holders in due course, but it is not necessary that a party be a holder or holder in due course to enforce a note. Instead, a party need merely be

a transferee in order to enforce a negotiable instrument. The UCC states that "[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving the person receiving delivery the right to enforce the instrument." Tenn. Code Ann. § 47-3-203(a). It further provides, "[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any rights of the transferor to enforce the instrument, including any right as a holder in due course." Tenn. Code Ann. § 47-3-203(b); *see also id.*, comment 1 ("The right to enforce an instrument and ownership of the instrument are two different concepts."). The UCC specifies that a "person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to other sections of the UCC not relevant here. Tenn. Code Ann. § 47-3-301. A holder is "a person in possession of an instrument ... endorsed in blank." Tenn. Code Ann. § 47-1-201. Whether or not Wells Fargo is the owner of the note is simply not relevant to consideration of its standing to bring the motion for relief from the automatic stay. *See Gibson v. Mortgage Electronic Registration Systems, Inc.*, 2012 WL 1601313, *4-5 (W.D. Tenn. May 7, 2012) (Contention that defendant did not have legal authority to foreclose because it was not the "owner and holder in due course of the Note" finds no support under Tennessee law.). The fact that Wells Fargo was able to produce the original note at the hearing on the motion in limine establishes its right to enforce the note under state law, and therefore its standing to bring the motion for relief from the automatic stay. At least two courts of appeal agree that a loan servicer is a party in interest in proceedings involving the loans which it services. *See CW Capital Asset Management, LLC v. Chicago Properties, LLC*, 610 F.3d 497, 502 (7th Cir. 2010); *Greer v. O'Dell*, 305 F.3d 1297, 1302-03 (11th Cir. 2002).

The Debtor's concern that the assignment of the Deed of Trust to Wells Fargo did not occur until after the dismissal of the Adversary Proceeding also appears to be unfounded. Under Tennessee law it is well-established that transfer of a note, without more, carries with it the lien created by the related deed of trust. *See Samples v. Bank of America*, 2012 WL 1309135 (E.D. Tenn. April 16, 2012) (citations omitted); *Hutchens v. Bank of America, N.A.*, 2012 WL 1618316 (E.D. Tenn. May 9, 2012) (citations omitted).

Objection to Confirmation

Following the Debtor's conversion of her case to Chapter 13, Wells Fargo filed its Objection to Confirmation of the Debtor's Plan. In its Objection, Wells Fargo maintains that the proposed plan provides for an arrearage of only $20,000, when the correct arrearage amount is $31,743.06, and provides for an ongoing monthly mortgage payment of $999, effective September 15, 2011, when the correct amount should be $2,350.43.

In considering Wells Fargo's Objection to Confirmation, the proof that will be relevant will be proof concerning the outstanding indebtedness owed on the note and the terms of repayment. There seems to be no dispute that the collateral which secures the note is the Debtor's principal residence. Therefore, in order to be confirmed the plan must comply with sections 1322(b)(2) and (5) of the Bankruptcy Code. Section 1322(b)(2) permits a Chapter 13 plan to modify the rights of holders of secured claims, other than claims secured only by a security interest in real property that is the debtor's principle residence. Section 1322(b)(5) permits the plan to provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any secured claim on which the last payment is due after the date on which the final payment under the plan is due. If the plan fails to provide for the maintenance of ongoing payments in the amount

contractually due, or if it fails to provide for the curing of the arrearage owed at the time the case was filed, then it is not capable of confirmation. The proof that will be relevant to these issues will include the note and any modifications, and the Debtor's payment history.

Objection to Claim

The third contested matter before the court is the Debtor's Objection to Claim. I have carefully reviewed the Debtor's Objection to Claim, and the two amendments filed with respect to that Objection. These documents are often repetitive. As I read them, the Objection as amended raises the following issues, which are for the most part legal issues and not factual issues:

1. Whether the proof of claim should be disallowed because Wells Fargo is not the real party in interest with respect to the claim or the property securing the claim?
2. Whether the proof of claim should be disallowed because it was not filed on the correct official form?
3. Whether the proof of claim should be disallowed because required documents were not included with it?
4. Whether the proof of claim should be disallowed because it was completed by the loan servicer, rather than the holder of the Note?
5. Whether the proof of claim should be disallowed because the amount claimed exceeds the amount a creditor would receive if this were a case under Chapter7?
6. Whether a portion of the claim should be disallowed because the appraised value of the property securing the claim is only $185,000?
7. Whether a portion of the claim should be disallowed because the calculations of the balance owed and the arrearage are incorrect?

8. Whether Wells Fargo's actions before or after the filing of the bankruptcy case constitute a voidable transfer?

9. Whether the lien of the deed of trust should be avoided on some basis?

Proof concerning these issues will be permitted to be introduced at the trial on the objection to claim, with the caveat that they relate only to the question of the allowance of a claim in the pending bankruptcy case. I will not entertain requests for affirmative relief against Wells Fargo in connection with the objection to claim. This was the point of dismissing the adversary proceeding. If the Debtor seeks affirmative relief, she must seek it in an appropriate forum

CONCLUSION

The proof at trial on the three pending contested matters will be limited to the issues raised by those matters. They do not extend to claims for affirmative relief against Wells Fargo. The Motion in Limine is granted in part and the Debtor will be prevented from introducing evidence on the following claims (numbered according to the original motion):

3. Whether the Debtor has a fraud in the factum defense regarding the enforcement of the Note by Wells Fargo;

4. Whether the Debtor has a claim for wrongful foreclosure against Wells Fargo;

5. Whether the Debtor has a claim whereby injunctive relief is required to enjoin Wells Fargo from proceeding with a foreclosure sale at some future time;

6. Whether the Debtor has a cause of action under the California Civil Code sections referenced in her Adversary Complaint;

7. Whether the Debtor has a cause of action under the California Evidence Code sections referenced in her Adversary Complaint;

8. Whether the Debtor has a claim to quiet title in the person of the Debtor;

9. Whether Wells Fargo is required to enter into a loan modification agreement and work out an arrangement with the Debtor in regard to the Property;

10. Whether the Debtor has a claim for predatory lending;

12. Whether the Debtor has a claim for malicious prosecution;

13. Whether the Debtor has a claim for spoliation of evidence;

14. Whether the Debtor has a claim for breach of contract;

15. Whether the Debtor can present evidence with regard to her request for punitive damages;

19. Whether the Debtor has a claim for alleged violations of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-104;

20. Whether the Debtor has a claim for intentional interference with a business relationship;

21. Whether the Debtor has a claim for intentional infliction of emotional distress;

22. Whether the Debtor has a claim for breach of fiduciary duty.

The motion in limine is denied with respect to the remaining numbered issues. Specifically, the issue of standing (raised in various ways in items number 1, 2, 16 and 17) is relevant to the motion for relief from the automatic stay and the objection to claim. Proof will be permitted on the issue of standing.

cc: Debtor (pro se)
Wells Fargo Bank, N.A.
Attorney for Wells Fargo Bank, N.A.
Chapter 13 Trustee
Matrix