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 (JPMORGAN CHASE)

BEFORE THE COURT is the Motion in Limine filed by JPMorgan Chase Bank, N.A. ("Chase"), 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 Chase: (1) Chase's motion for relief from the automatic stay; (2) Chase's objection to confirmation of the Debtor's plan; and (3) the Debtor's objection to Chase's proof of claim. Chase seeks to exclude all evidence or testimony from the trial of the three contested matters that is related to the following:

(a) Whether Freedom Mortgage effectively assigned the Note and Deed of Trust to Chase;

(b) Whether Chase has legal standing to enforce its rights under the Note and Deed of Trust;

(c) Whether Chase had any obligation to follow OCC Orders before filing its Stay Relief Motion;

(d) Any claim for predatory lending;

(e) Any claim for wrongful foreclosure;

(f) Any claim for quiet title;

(g) Any request for injunctive relief to halt the foreclosure sale;

(h) Any cause of action under the California Civil Code Sections 2923.6, 3309(b), 430.10(b), or 2823.6 or California Evidence Code Sections 400 *et seq.;*

(i) Any fraud in the factum defense to the endorsement of the Note; and

(j) Any other claims or defenses that should have been raised in the Adversary Proceeding.

Chase 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. JPMorgan Chase Bank, N.A.,* Adv. Proc. No. 11-00393 (Bankr. W.D. Tenn.).

The Debtor responded to the motion in limine by filing a twenty-five page document which included a "Notice and Application," and an "Objection to JPM Motion in Limine" (Dkt. No. 256). Although the Debtor says many things in response to the motion in limine, her primary argument seems to be that the dismissal of the adversary proceeding should be set aside because Chase concealed from her the fact that it had not obtained an assignment of the deed of trust until after the order was entered dismissing the adversary proceeding. The Debtor, who has represented herself throughout these proceedings, asserts that had she known this fact it would have influenced the

outcome of the adversary proceeding. Although she has not sought relief from the judgment in the adversary proceeding, she asks the court to vacate the order of dismissal pursuant to the Tennessee Rules of Civil Procedure (which do not apply to this federal bankruptcy case). Although this matter is not before the court, the fact that the assignment of the deed of trust was recorded after the dismissal of the adversary proceeding would have had not effect on the outcome of that proceeding. As I discuss more fully below, the adversary proceeding was dismissed on the basis of lack of jurisdiction.

I conducted a hearing on the Motion in Limine on October 4, 2012, which was attended by Allison A. Weimer, as attorney for Chase, and by the Debtor representing herself. At the hearing, Ms. Weimer produced the original note and deed of trust that are in dispute. The note is endorsed to JPMorgan Chase Bank, N.A.

BACKGROUND FACTS

The Note and Deed of Trust

On November 20, 2007, the Debtor executed a Note payable to the order of Freedom Mortgage Corporation ("Freedom Mortgage") in the original principal amount of $157,122.00. The Note was endorsed by Freedom Mortgage to Chase either on that date or at some later date. The Note is secured by a Deed of Trust that was recorded in the Office of the Shelby County Register on January 15, 2008, covering real property located at 7404 Barnstable Road.

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. Chase filed a Motion for Relief from the Automatic Stay on June 3, 2011. Chase alleged that cause exits to grant it relief from the automatic stay

because the Debtor had failed to make payments due under the Note. Chase further alleged that the Debtor had no equity in the property and that it was therefore burdensome to the estate. Before the motion could be heard, the Debtor filed a motion to convert her case from Chapter 7 to Chapter 13. The motion to convert was granted by order entered July 12, 2011. Chase asked that its motion for relief from the automatic stay be reset for hearing on the Chapter 13 docket. The Debtor filed a Response to the Motion for Relief on September 9, 2011, an amended response on October 27, 2011, and a second amended response on September 7, 2012. The Debtor's primary contention in these responses is that Chase does not have legal standing to enforce the Note and Deed of Trust. The Debtor also asks that Chase's secured claim be valued at $0.00, that Chase be permanently enjoined from foreclosing on the property, and that she be awarded punitive damages, costs, and fees.

The Chapter 13 Plan and Chase's Objection to Confirmation

The Debtor proposed a Chapter 13 plan, which was amended twice. The second amended plan proposed that the Debtor pay $618 per month, maintain her ongoing mortgage payments outside the plan (the Debtor owns another parcel of real property which she uses as her principal residence), pay $300 per month on an arrearage of $20,000 owed to Wells Fargo Bank, NA, and $318 per month on an arrearage of $32,000 owed to Chase. No unsecured claims were provided for in the proposed plan.

Chase filed an objection to confirmation of the proposed plan on September 7, 2011. The Objection to Confirmation recites that Chase is the servicer of the deed of trust and deed of trust note covering real property of the Debtor. Chase objects to the proposed plan because it provides for ongoing monthly mortgage payments of $496.74 effective September 15, 2011, when the ongoing monthly payment should be $1,443.28 effective September 1, 2011, and $1,394.04 effective

November 1, 2011. The Debtor filed a response to the Objection to Confirmation alleging that Chase does not have standing to foreclose because there was no assignment of the Deed of Trust from Freedom Mortgage to Chase prior to August 4, 2010, the date of a Notice of Default given by Chase with respect to the Note.

The Proof of Claim and Objection to Proof of Claim

On June 15, 2012, Chase filed its proof of claim in this case, Claim No. 9, in which Chase claims that the outstanding amount owed under the Note was $180,783.18, that the ongoing monthly payment beginning September 1, 2011 was $1,393.14, and that the arrearage owed was $38,058.71. The Debtor filed an Objection to the Proof of Claim in which she asserts that the claim should be disallowed in its entirety and the lien of the Deed of Trust avoided, and that she should be awarded punitive damages, costs, and fees.

The Adversary Proceeding

On September 9, 2011, the Debtor filed her complaint initiating the Adversary Proceeding. The Debtor alleged that Chase and its agents, officers, employees, and affiliated or associated parties engaged "in a pattern of unlawful, fraudulent, or unfair predatory real estate practices that caused Plaintiff to become a victim of such behavior and to be in jeopardy of losing her property through foreclosure." The complaint included fifteen causes of action against Chase: 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 Chase 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 Chase does not have legal standing to foreclose the deed of trust]; Quaise [sic]

Contract - Fourth Cause of Action [here the Debtor alleged that Chase 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 Chase from foreclosing on the property]; Requirements - Eighth Cause of Action [here the Debtor alleges that Chase is not the holder of the note]; *In Limine* Motion to Exclude All Evidence - Ninth Cause of Action [here the Debtor indicates that she will move to exclude all evidence offered by Chase pursuant to "Evidence Code sections 353 and 400 et seq., Code of Civil Procedure section 430.10(b), and related decisional law."; Analogous to 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 Chase, 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 $103,000]; Comptroller Ruling - Twelfth Cause of Action [here the Debtor alleged that Chase violated an order of the Comptroller of the Currency when it filed its motion for relief from the automatic stay]; Predatory Lending - Thirteenth Cause of Action [here the Debtor alleged that she has come to realize that having a mortgage refinanced 3 times in2 years is not a good thing]; Conclusion - Fourteenth Cause of Action [here the debtor argues, among other things, that "the Plaintiff's [seemingly referring to Chase even though the Debtor is the Plaintiff] entire case rests upon the 'facial' or 'on the public record' legitimacy of extrajudicial foreclosure by its predecessor-in-interest" and makes other factual statements that seem to have nothing to do with the parties to the complaint she is filing].

On November 10, 2011, Chase filed a Motion to Dismiss the complaint in the Adversary Proceeding 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 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 April 26, 2012.[1] No timely appeal was taken, and the Adversary Proceeding was administratively closed on May 10, 2012.

ANALYSIS

Consideration of Chase'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 Chase's Motion for Relief from the Automatic Stay and its Objection to Confirmation. Also pending is the Debtor's Objection to Chase'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

[1] The order was prepared by counsel for Chase. The delay in entry of the order apparently resulted from some difficulty in electronically uploading the proposed order.

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 Chase 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 Chase's Motion for Relief from the Automatic Stay was set for hearing, and that, in connection with that hearing and the hearing on Chase'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. Chase seeks relief from the automatic stay and it objects to confirmation of the Debtor's proposed Chapter 13 plan. The Debtor objects to Chase'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.

Chase 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, 2009, and there is no reasonable likelihood that the Debtor will be able to make payments required by the Note. Chase 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). Chase 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 not 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 Chase's standing to pursue relief from the automatic stay. The Debtor contends that Chase 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 bankruptcy court focuses 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).

Chase has filed a proof of claim to which is attached copies of the Note and Deed of Trust, an escrow analysis, and a Mortgage Proof of Claim Analysis in which it sets forth the calculation of its claim. The original Note and Deed of Trust were produced at the hearing on the Motion in Limine. The Note is made payable to Freedom Mortgage, but it has been endorsed to Chase.

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 Chase 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 Chase 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).

Objection to Confirmation

Following the Debtor's conversion of her case to Chapter 13, Chase filed its Objection to Confirmation of the Debtor's Plan. In its Objection, Chase maintains that the proposed plan provides for an ongoing monthly mortgage payment of $496.74, effective September 15, 2011, when the correct amount should be $1,443.28 effective September 1, 2011, and $1,394.00 effective November 1, 2011.

In considering Chase'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. The value of the rental property is unclear. The Debtor stated on March 23, 2011, that the value of the property on the petition date was $155,000. She later amended her schedules and on February 24, 2012, stated that the value of the property on the petition date was $85,000. Because the property is not the Debtor's principal residence, she will be permitted to bifurcate the claim secured by the

rental property and make ongoing payments based upon the amount of the allowed secured claim of Chase. *See* 11 U.S.C. §§ 506(a), 1322(b)(2). If she does so, however, she must be prepared to pay the entire debt within the term of her plan. *See, e.g., Enewally v. Washington Mut. Bank,* 368 F.3d 1165, 1170-72 (9th Cir. 2004); *JPMorgan Chase Bank, N.A. v. Galaske,,* 476 B.R. 405, 410-11 (D. Vermont, 2012); *In re Hinkle,* 474 B.R. 460, 463-65 (Bankr. M.D. Penn. 2012); *In re Agustin,* 451 B.R. 617, 620-21 (Bankr. S.D. Fla. 2011); *In re Russell*, 458 B.R. 731, 737-39 (Bankr. E.D. Va. 2010). Even if she were to pay no interest on the secured obligation, the monthly payments under a five-year plan for the allowed secured claim alone would be $1,416.66 ($85,000/60 months = $1,416.66/month). In the alternative, the Debtor may choose to cure and maintain her mortgage by paying the arrearage over the life of her plan while maintaining her ongoing payments pursuant to the terms of the original note. *See* 11 U.S.C. § 1325(a)(5).

The parties have stipulated that the ongoing monthly payment under the original note was $1,393.14 beginning September 1, 2011. "Statement of All Admitted or Uncontested Fact," *Joint Pretrial Statement,* Dkt. No. 224. The parties have stipulated that the property is rented to Keith and Rochelle Davis for $1,285 per month. This means that under either scenario, the property does not generate enough income to pay the ongoing mortgage payments. It does not contribute to the Debtor's reorganization effort, either by providing shelter for her and her family, or by providing income over and above the costs associated with retaining it. Further, it calls into question the Debtor's ability to propose a plan that is feasible.

All of these issues will be considered at the hearing on Chase's Objection to Confirmation. The proof that will be relevant to that consideration include the Note and any modifications, the

Debtor's payment history, an appraisal of the property, and proof concerning the rental history of the property.

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. As I read it, the Objection 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 it does not adhere to the requirements of the Official Form?
2. Whether the proof of claim should be disallowed because it fails to meet the requirements of Federal Rule of Bankruptcy Procedure 3001?
3. Whether the proof of claim should be disallowed because Chase was not a creditor of the Debtor on the date of the filing of the bankruptcy petition?
3. Whether the proof of claim should be disallowed because copies of documents attached to the proof of claim do not match other copies of those documents?
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 Chase has duplicated, fabricated or forged the Note and Deed of Trust?
6. Whether Chase's actions before or after the filing of the bankruptcy case constitute a voidable transfer?
7. 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 Chase 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 Chase. The Motion in Limine is granted in part and the Debtor will be prevented from introducing evidence on the following claims (designated according to the original motion):

(c) Whether Chase had any obligation to follow OCC Orders before filing its Stay Relief Motion;

(d) Any claim for predatory lending;

(e) Any claim for wrongful foreclosure;

(f) Any claim for quiet title;

(g) Any request for injunctive relief to halt the foreclosure sale;

(h) Any cause of action under the California Civil Code Sections 2923.6, 3309(b), 430.10(b), or 2823.6 or California Evidence Code Sections 400 *et seq.*; and

(i) Any fraud in the factum defense to the endorsement of the Note.

The Motion in Limine is denied with respect to the remaining numbered issues. Specifically, the issue of standing (raised in items (a) and (b)) 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)
JPMorgan Chase Bank, N.A.
Attorney for JPMorgan Chase Bank, N.A.
Chapter 13 Trustee
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