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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT CALIFORNIA
LOS ANGELES DIVISION

In re DEBTOR Debtor	) Case No.)) Chapter 13)) MOTION TO DISALLOW PROOF OF) CLAIM NO. 5 OF AURORA LOAN) SERVICES PURSUANT TO F.R.B.P.) 3001(d) and 3007)))

TO THE HONORABLE SANDRA KLEIN, U.S. BANKRUPTCY JUDGE; KATHY A. DOCKERY, CHAPTER 13 TRUSTEE; MCCARTHY & HOLTHUS, COUNSEL FOR AURORA LOAN SERVICES, LLC. AND ALL OTHER INTERESTED PARTIES:

COMES NOW,Debtor, by and through her counsel of record does respectfully move this court to disallow Proof of Claim No. 5 of Aurora Loan Services, LLC. ("Aurora") pursuant to F.R.B.P. 3001(d) and 3007.

FACTS

1. In a letter dated July 12, 2009 Debtor received a written response to her Qualified Written Request ("QWR") under the Real Estate Settlement Procedures Act ("RESPA"). Kahrl Wutscher LLP responded on behalf of Aurora Loan Services, LLC and stated on page 2 of that letter that the current owner of the debt was Deutsche Bank Trust Company America, in trust for Residential Accredit Loans, Inc. Mortgage Asset-Backed Pass-

Through Certificates, Series 2006-Q05. Annexed hereto is a copy of the QWR response letter dated 07/12/09 as Exhibit 1.

2. On 03/14/11 Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code. [Docket 1]

3. On 04/20/11 Aurora Loan Services, LLC filed Proof of Claim No. 5. Annexed hereto is a copy of Aurora's Proof of Claim as "Exhibit 2."

4. The Proof of Claim No. 5 of Aurora consists of the following:

a. Official Form B10 showing Aurora Loan Services LLC as Creditor, and under Basis for Claim is "Money Loaned, Real Property;"

b. An account breakdown sheet;

c. A copy of a Deed of Trust record in Los Angeles County records on 03/21/06 showing SCME Mortgage Bankers, Inc. A California Corporation ("SCME") as "Lender;"

d. A copy of a Corporate Assignment of Deed of Trust dated 12/15/10;

e. A copy of an Adjustable Rate Note dated 03/10/06 showing SCME Mortgage Bankers, Inc. A California Corporation as "Lender;"

f. A copy of two (2) stamped endorsements at the end of the Note. The first is from SCME to Residential Funding Corporation; and the second endorsement is from Residential Funding Corporation to Deutsche Bank Trust Company Americas as Trustee;

g. A copy of a Note Allonge endorsement from Deutsche Bank Trust Company Americas as Trustee FKA Bankers

Trust Company, as Trustee by Residential Funding Company, LLC FKA Residential Funding Corporation, it's Attorney in Fact in blank.

AURORA LOAN SERVICES LLC HAS FAILED TO PROVIDE EVIDENCE OF PERFECTION OF THEIR SECURITY INTEREST PURSUANT TO F.R.B.P. 3001(d)

6. F.R.B.P. 3001(d) provides, "If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.

7. Collateral notes and trust deeds cannot be perfected under California law without actual possession of the security instruments. The exception to this rule is under Cal. Bus. & Prof. Code § 10233.2, which, under limited circumstances, permits perfection without possession of the security instruments. Neilson v. Chang (in Re First T.D. & Inv. Inc.), 253 F.3d 520 (9th Cir. 2001). Under 11 U.S.C.S. § 544(a), unperfected security interests are avoidable and can be relegated to the status of general unsecured claims. Merely possessing the original note may allow Aurora to have standing to enforce the Note, but does not provide evidence of perfection of their security interest.

8. Perfection of a security interest in real property requires every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or incumberancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded, California

Civil Code §1107. F.R.B.P. 3001 Subdivision (d) states, "Satisfactory evidence" of perfection, which is to accompany the proof of claim, would include a duplicate of an instrument filed or recorded, a duplicate of a certificate of title when a security interest is perfected by notation on such a certificate, a statement that pledged property has been in possession of the secured party since a specified date, or a statement of the reasons why no action was necessary for perfection. The secured creditor may not be required to file a proof of claim under this rule if he is not seeking allowance of a claim for a deficiency. But see § 506(d) of the Code, 9-3001 Collier on Bankruptcy App. 3001. Here, Aurora purports to establish perfection by a Corporate Assignment of Deed of Trust recorded 12/22/10 and by a Note Allonge.

Deed of Trust and Corporate Assignment

9. It is well established law that, "The note and mortgage are inseparable; the former is essential, the later as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." *Carpenter v. Longan*, 83 U.S. 271, 274 (1873).

10. In fact, California codified this principle in Cal. Civ. Code §2936, which provides that "[t]he assignment of a debt secured by a mortgage carries with it the security." It follows that "a mortgage may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation that the mortgage secures." Restatement (Third) of Property (Mortgages) §5.4 (citing *Carpenter v. Longan*).

11. The Corporate Assignment of Deed of Trust dated 12/15/10 purports to assign the Deed of Trust from Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for SCME Mortgage Bankers, Inc., a California Corporation it's successors and assigns to Aurora. The signature at the foot of this Corporate Assignment of Deed of Trust is made by Jan Walsh, Vice-President of MERS. Jan Walsh presents herself as an officer of MERS with authority to sign documents on behalf of SCME. Upon information and belief Debtor asserts that Jan Walsh is an employee of Claimant Aurora and not an officer of MERS with signatory power.

12. The Corporate Assignment of Deed of Trust was prepared by Kathleen Olson of Aurora located in Scottsbluff, NE where Jan Walsh is employed. Evidence of these relationships is shown by the notary on the following page attesting that the document was notarized in Scotts Bluff, Nebraska. Irene Guerrero, the notary is also an employee of Aurora.

13. Assuming that the Deed of Trust is automatically transferred when the Note is negotiated, why did Aurora find it necessary to create or have created this Corporate Assignment of Deed of Trust signed only by an employee of Aurora, untruthfully alleging to be an officer of MERS as Nominee for SCME?

14. What is even more troubling is that MERS acting solely as "nominee" for SCME is allegedly assigning the Deed of Trust from SCME directly to Aurora when the Note made a completely different trip having been purportedly assigned from SCME to Residential Funding, then to Deutsche Bank Trust Company Americas as Trustee, and then to Aurora.

15. "A nominee is one designated to act for another as his/her representative in a rather limited sense. . . In its commonly accepted meaning, the word 'nominee' connotes the delegation of authority to the nominee in a representative capacity only, and does not connote the transfer or assignment to the nominee of any property in or ownership of the rights of the person nominating him/her." *Mortgage Electronic Registration Systems, Nc., v. Rees*, 2003 WL 22133834 (Conn. Super. Ct. 2003). MERS' authority to assign the Deed of Trust in this case stems from the authority of SCME.

SCME's license from the Department of Real Estate expired 09/13/2008. The Department of Corporations reports their license as no longer active effective 01/16/2009 pursuant to an Order summarily revoking their license effective 12/08/2008. Thus, SCME would have no authority to execute the Corporate Assignment of Deed of Trust in this instant case on 12/15/2010. Annexed hereto is a copy of the License information as taken from the California Department of Real Estate on 06/16/11; a copy of the Financial Services Division of the California Department of Corporations Licensee information dated 06/17/11; a copy of an unsigned Order revoking SCME's residential mortgage lender and/or servicer license dated 11/05/08; and a copy of an unsigned Order to discontinue activities of SCME dated 08/29/08 as Exhibit "3."

The Note and Allonge

16. California Uniform Commercial Code section 3302, subdivision (1) provides, n2 "A holder in due course is a holder who takes the instrument a) For value; and (b) In good faith;

and (c) Without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person."

17. Black's Law Dictionary defines an allonge as: "A piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself. Such must be so firmly affixed thereto as to become a part thereof. *Black's Law Dictionary*, 6th ed. (citing U.C.C. §3-202(2)).

18. In the case of *Pribus v. Bush*, 118 Cal. App. 3d. 1003 (Ca. App. 1981) the Court thoroughly discussed the use of allonges to negotiate a note. The *Pribus* Court found that "the law merchant permits the use of an allonge only when there is no longer room on the negotiable instrument itself to write an indorsement." id. (citing as a typical case, *Bishop v. Chase* (1900), 156 Mo. 158 [56 S.W. 1080]). The Court after looking to the A.L.R. on the matter stated that this represented the majority view. *Pribus* at 1008 (citing generally, Annot., Indorsement of Negotiable Instrument by Writing Not On Instrument Itself (1968)19 A.L.R. 1297, 1301-1305; Annot., Indorsement of Bill or Note by Writing Not On Instrument Itself (1928) 56 A.L.R. 921, 924-926.) Thus, the *Pribus* Court found that the allonge to the promissory note at issue was ineffective as an indorsement and therefore the defendant was not a holder in due course". *Pribus* at 1011. The debtors' Note has more than sufficient room for the endorsement at the end of the note and on the reverse side of the last page and thus this Court should

follow the majority view and find that the Allonge was ineffective to negotiate the Note to Aurora.

19. However, even if the Court finds that the Allonge was valid, the Movant has produced no proof that the allonge was ever affixed to the Note. The recent case of *In re Weisband*, 427 B.R. 13 (Bankr. D. Ariz. March 29 2010), is nearly on all fours with the case at bar. In *Weisband*, the debtor challenged the standing of creditor GMAC to bring a motion for relief from stay on the grounds that inter alia, it was not the holder of the note as the allonge was not affixed to the note. Id. at 19. The court found that "there is no basis in this case to depart from the general rule that an endorsement on an allonge must be affixed to the instrument to be valid." Id. at 20.

20. Two reasons have been cited for the "firmly affixed" rule: (1) to prevent fraud; and (2) to preserve a traceable chain of title. See *Adams v. Madison Realty & Development, Inc.*, 853 F. 2d 163, 167 (3d Cir. 1988). A draft of the 1951 version of the UCC Article 3 included the comment that "[t]he indorsement must be written on the instrument itself or an allonge, which, . . . is a strip of paper so firmly pasted, stapled or otherwise affixed to the instrument as to become part of it." *ALI, Comments & Notes to Tentative Draft No. 1 – Article III 114* (1946), reprinted in 2 Elizabeth Slusser Kelly, Uniform Commercial Code Drafts 311, 424 (1984).

More recently, however, courts have held that "stapling is the modern equivalent of gluing or pasting." *Lamson v. Commercial Cred. Corp.*, 187 Colo. 382 (Colo. 1975). See also, *Southwestern Resolution Corp. v. Watson*, 964 S.W.2d 262 (Texas

1997) (holding that an allonge stapled to the back of a promissory note is valid so long as there is no room on the note for endorsement).

Regardless of the exact method of affixation, numerous cases have rejected endorsements made on separate sheets of paper loosely inserted in a folder with the instrument and not physically attached in any way. See *Town of Freeport v. Ring*, 1999 Me. 48 (Maine 1999); *Adams v. Madison Realty & Development, Inc.*, 853 F. 2d 163 (3d Cir. 1988); *Big Builders, Inc. v. Israel*, 709 A. 2d 74 (D.C. 1988)

21. In this case, the endorsements on the reverse side of the last page of the Note show endorsements as follows:

a. SCME Mortgage Bankers, Inc. to Residential Funding Corporation; and

b. Residential Funding Corporation to Deutsche Bank Trust Company Americas as Trustee;

22. The Note allonge is made on a separate piece of paper and contains the following endorsement:

a. Deutsche Bank Trust Company Americas as trustee FKA Bankers Trust Company, as Trustee by Residential Funding Company, LLC FKA Residential Funding Corporation, it's Attorney in Fact in blank.

This paper does not indicate any permanent affixation marks such as staple marks, showing it has been permanently affixed to the original document such that it would become a part of it. The Note Allonge is not dated, except for the original loan date. Further, the reverse side of the last page of the Note itself contained adequate space for this

endorsement. Debtor asserts that based upon these facts and foregoing case law, the Note Allonge does not qualify as an endorsement.

23. Upon information and belief movant alleges that, Jody Delfs, Limited Signing Officer of the Note Allonge has no authority to make such an endorsement on behalf of Deutsche Bank Trust Company, nor any of the other entities named because she is employed by GMAC Mortgage in Iowa. Residential Funding Company is a subsidiary of GMAC Mortgage LLC. The Note Allonge provided by Aurora is a fraud upon this court.

24. Essentially, an employee of GMAC Mortgage, which is a subsidiary of Residential Funding Corporation who previously stamped and endorsed Debtor's Note to Deutsche Bank Trust Company Americas as Trustee ("Deutsche Bank") is now allegedly acting on behalf of Deutsche Bank as its "Attorney in Fact" to execute this Allonge in blank.

25. If this court finds that the Note Allonge is invalid, then the court should find that the attempt to transfer the beneficial interest under the Deed of Trust is Void. See *In re Walker*, 10-21656-E-11, the Eastern District of California Court held that any attempt to transfer the beneficial interest of a trust deed without ownership of the underlying note is VOID under California Law.

THE PROOF OF CLAIM ACCOUNTING BREAKDOWN SHEET CONTAINS COMPUTATION ERRORS, ERRONEOUS FEES AND HAS OVERSTATED THE AMOUNT OF THE SECURED CLAIM

Interest Rate Stated is incorrect

26. The Accounting Breakdown sheet provided by Aurora in support of their Proof of Claim contains a discrepancy in the interest rate. The interest rate on the breakdown sheet shows 3.25% and yet the Debtor's most recent Account Statements from Aurora shows an interest rate of 3.375%. Further, in a letter to the Debtor dated 03/17/11, Aurora notified Debtor that the interest rate of 3.25% was to become effective on 04/01/11, yet was unchanged from the prior interest rate. In looking back over Debtor's prior statements, the statement dated 10/11/10 shows the first date that the interest rate of 3.25% would have become effective was for the month of November, 2010. Thus, even though Aurora may be accurately stating the interest rate on their breakdown sheet, they are overcharging the Debtor on her monthly mortgage statements. Annexed hereto are copies of Debtor's Account Statements dated 10/11/10, 10/19/10, 11/11/10, 11/17/10, 04/11/11, 04/19/11, 05/11/11, 05/17/11, and a copy of notice of interest rate change dated 03/17/11 as Exhibit "4."

27. If the interest rate is incorrectly stated on Debtor's account statements, then the interest amount due on the Proof of Claim Account Breakdown sheet must be incorrectly calculated.

Servicer Misapplied Debtor's Mortgage Payments

Section 2 of the Uniform Covenants of the Deed of Trust provides for the mandatory application of fees 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 the late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

In this case, Debtor's post-petition mortgage payments have been misapplied; i.e., Debtor's April, 2011 payment was applied per the April 11, 2011 mortgage statement on that same date. The statement shows the due date as 08/01/10, which applies this current payment to the arrearage in error.

The Debtor's mortgage became current upon the date of filing her bankruptcy case and the mortgage arrears are provided for in Debtor's Plan. Therefore, the 08/01/10 payment is provided for in the Debtor's Plan and the servicer Aurora has misapplied this payment. This payment was for April, 2011.

The payment for May, 2011 was also misapplied in error to the 09/01/10 payment when it should have been applied to the May, 2011 payment because the arrears are being provided for in Debtor's Plan.

Each of the post-petition payments made by the Debtor are further misapplied by Aurora's creation of a Suspense Balance from a portion of each payment. The 04/11/11 payment shows a suspense amount as $483.41 and the 05/09/11 payment shows a suspense amount of $465.58. Aurora has breached the Uniform Covenant provision of the Deed of Trust by failing to apply these funds to the Debtor's principal balance of her loan. While the funds remain in a suspense account the interest continues to accrue on the inflated principal balance owed under this Deed of Trust.

The misapplication of payments and illegal charges by Aurora are designed to extract additional and substantial profits from servicing of the Debtor's mortgage loan and from the property of this bankruptcy estate to the detriment of the debtors and unsecured creditors with filed and allowed claims.

If the servicer is allowed to continue to misapply Debtor's monthly mortgage payments, Debtor will not be current with her mortgage upon completion of her Plan payments.

Aurora Loan Services has a pattern and practice of such misapplications beyond this Debtor. Annexed hereto are copies of other such offenses by other debtor's who receive mortgage statements from Aurora as Exhibit "5."

Erroneous Fees and Costs Not Accounted for

28. Beginning with the Account Statement dated 10/11/10 Aurora began charging the Debtor a "Property Preservation Fee" of $12.00 as was also shown on the Debtor's statement dated 11/11/10. Unfortunately, the Debtor stopped receiving account statements from Aurora until after her bankruptcy case was filed and therefore Debtor is unable to ascertain exactly how many of these fees are being charged. However, as noted on the Account Statement dated 04/11/11 the "Property Preservation Fee" has now become $15.00 and was charged twice on this statement with a transaction date of 03/02/11 and another on 03/23/11. These fees total $69.00 and could potentially be higher if other such fees were charged for months the Debtor did not receive an account statement.

29. Why is there a $12.00 "Property Preservation Fee" prior to filing bankruptcy and now a $15.00 fee after the filing of

bankruptcy? There is no basis for Aurora to Charge such an erroneous fee as Aurora has not provided the Debtor with any property preservation services for this amount. The Debtor alleges this is an attempt by Aurora to inflate their charges to the Debtor. This is also supported by the fact that Aurora did not see fit to include these hidden fees in their Proof of Claim accounting breakdown sheet.

30. These fees likely are for appraisal and/or inspection fees that Debtor believes Aurora continues to charge her monthly, when no such services are being rendered, and then increases this fee after the Debtor has filed for bankruptcy. Uniform Covenant 9 provides in part, "If there is a legal proceeding that might significantly affect lender's interest in the Property . . . (such as a proceeding in bankruptcy . . .), then the 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. Borrower was never provided advance notice as to any inspections.

What is reasonable or appropriate to charge a 'property preservation fee' every 30 days as an inspection fee to protect lender's interest? Debtor alleges such fees are erroneous and that no such inspections have been conducted by Lender in this or any other case.

Foreclosure Fees and Costs

31. Aurora has stated and charged the Debtor an approximate total amount in foreclosure costs of $2,307.41. Included in these costs is a charge of $136.16 for "statutory mailings." Debtor is not certain on the statute for required foreclosure

mailings however, Debtor states that on 12/04/10 she received an unrecorded Notice of Default from Quality Loan Servicing. On that date, she received nine (9) envelopes containing the same information sent via U.S. mail.

32. On 12/24/11 Debtor received the same Notice of Default and not less than nine (9) envelopes containing the exact same information sent via Certified Mail through the U.S. Postal Service.

33. Subsequently, on 02/16/11 the Debtor received a Notice of Substitution of Trustee from Quality Loan Servicing and signed by Ivet Oneth of Aurora. This time the Debtor received eight (8) mailings of this Notice and did not pick up the mailing sent via certified mail.

34. Then, on 02/26/11 Debtor received Notice of Trustee's sale with nine (9) copies sent via Certified Mail; and nine (9) sent via regular mail through the U.S. Postal Service.

35. Any fees charged to the Debtor for such voluminous and redundant reporting and mailings should be removed from the Debtor's account.

36. Debtor also asserts that Aurora has charged her such foreclosure fees and costs and has not had to pay these costs as the foreclosure sale never took place since the Debtor filed her bankruptcy case before the sale date. Aurora should be ordered to provide proof that they have not only performed each and every service they are charging and proof that they have paid the invoices for these fees to be proven valid.

Uniform Covenant 14 provides in part, "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 attorney's 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.

The applicable law in this case is 11 U.S.C. §506(b) and F.R.B.P. Rule 2016 which requires such fees be approved by this court and they were not. Borrower requests these fees be setoff as a result of Aurora's breach of this covenant and violation of applicable law.

The Debtor is also informed and believes and therefore alleges that the alleged "Bankruptcy Fees and Costs" fees included in the proof of claim are attorneys fees that are not reasonable or necessary, are not supported by time and expense records, and have been claimed in violation of Section 506(b) of the Code and Rule 2016(a) of the Bankruptcy Rules.

WHEREFORE, it is respectfully requested that:

A. Proof of Claim No. 5 be expunged in full;

B. That this Court issue sanctions against the Creditor;

C. That counsel for Debtors be awarded reasonable attorney's fees and disbursements for bringing and prosecuting this motion; and

D. For such other and further relief as this Court may deem just and proper.

Respectfully Submitted.

Dated this 18 Day of July, 2011
Law Office of Christine A. Wilton
By:_____
Christine A. Wilton
Counsel For Debtors