No. 09-20415

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

IN RE JUDY C. WILBORN,

Debtor.

WELLS FARGO BANK, N.A.,

Appellant,

—v.—

JUDY C. WILBORN, KARLTON E. FLOURNOY,
MONICA FLOURNOY, and JUDITH A. MARTIN,

Appellees.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS – NO. 07-03481

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF PLAINTIFFS AND SEEKING AFFIRMANCE OF THE BANKRUPTCY COURT'S DECISION

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December 7, 2009

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CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

Wells Fargo Bank, N.A. v. Wilborn, et al. – No. 09-20415

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

Pursuant to 5th Circuit Local Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated: December 7, 2009

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STATEMENT OF INTERST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,000 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 400,000 bankruptcy cases filed each year. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individuals, a significant number of whom file chapter 13 bankruptcies. The Court's ruling on the issues presented will affect debtors, both in this circuit and across the nation.

CONSENT

This brief is being filed with the consent of the parties.

SUMMARY OF ARGUMENT

Plaintiffs allege that during the course of their chapter 13 plans, Wells Fargo improperly charged or collected fees from chapter 13 debtors without disclosing such fees or filing an application for compensation or reimbursement with the court. Unfortunately, over the last decade it has become increasingly common for mortgage creditors to add fees and charges to mortgage accounts without notice to the borrower, trustee or bankruptcy court while the bankruptcy case is pending, and without disclosing the fees in a proof of claim or seeking court approval. As a result, many debtors emerge from a chapter 13 case after three to five years of struggling to cure an arrearage only to have the servicer begin foreclosure anew based on claims of unpaid fees for such items as attorney's fees, property inspections, broker price opinions, and other charges allegedly incurred during the chapter 13 case.

The hiding of fees in chapter 13 cases is unfair and causes substantial injury to consumer debtors. The practice ensures that fees will avoid any possibility of court scrutiny. Even if the fees are reasonable and authorized, the failure to disclose them deprives consumer borrowers of the right to provide for their payment during the bankruptcy case, jeopardizing borrowers' opportunity for a fresh start.

In this case, the district court and, derivatively the bankruptcy court, has jurisdiction over Plaintiffs' claims that "arise under title 11" and "arise in" a title 11 case. Further, the bankruptcy court properly certified the class. The injunctive relief sought by Plaintiffs is critically important to protect class members and to protect the integrity of the bankruptcy system. Absent affirmance of the decision below, Wells Fargo, and other mortgage lenders, will continue unabated with their improper collection practices that thwart debtors' ability to emerge from bankruptcy current on their mortgage obligations and with their fresh start.

ARGUMENT

I. The district court, and derivatively the bankruptcy court, have jurisdiction over the plaintiffs' claims and the bankruptcy court may adjudicate those claims because they are core proceedings.

In analyzing the jurisdictional question before this Court, it would be a mistake to begin the analysis, as Wells Fargo has done, with bankruptcy court jurisdiction. *See* Elizabeth Warren and Jay L. Westbrook, *Class Actions for Post-petition Wrongs: National Relief Against National Creditors*, 22-Mar. Amer. Bankr. Inst. J. 14, 14 (March 2003). The jurisdictional wonderland of bankruptcy must begin with the bankruptcy jurisdiction of the district court. *Id.* Thus, the question of whether a bankruptcy court can adjudicate a proceeding starts with an inquiry into whether the district court has federal jurisdiction over the proceeding under section 1334(b), which is to be construed broadly. *FDIC v. Majestic Energy Corp.*, 835 F.2d 87, 90 (5th Cir. 1988); *see Matter of Wood, 825 F.2d 90, 92 (5th Cir. 1987)(*stating that the broad jurisdiction granted under the 1978 Act was not altered by *Marathon* or the Bankruptcy Amendments and Federal Judgeship Act of 1984); *In re Ben Cooper, Inc.,* 896 F.2d 1394

(2d Cir. 1990)("The statements of several influential legislators, however, indicate that bankruptcy jurisdiction was to be construed as broadly as possible within the constitutional constraints of *Marathon*.") If jurisdiction is found, the second step of the inquiry is to examine section 157 "to determine the extent to which a bankruptcy court, rather than a district court, can adjudicate the matter, which depends on whether the matter is a core or non-core proceeding." *Majestic Energy,* 835 F.2d at 90. In this case, *amicus* submits that federal jurisdiction exists because the proceeding arises under the Bankruptcy Code or "arises in" a title 11 case and that the bankruptcy court may adjudicate plaintiffs' claims because the matter is a core proceeding.

A. Statutory Jurisdictional Framework

Section 1334(a) of 28 U.S.C. confers original jurisdiction on the district courts over all "cases" under title 11. Section 1334(b) confers original, but non-exclusive, jurisdiction on the district courts over civil "proceedings" having the requisite statutory connection either (1) to a title 11 bankruptcy case or (2) predicated on a claim arising under a provision of title 11. In the bankruptcy context, "case" and "proceeding" are terms of art. The filing of a petition for relief under chapter 7, 11, 12, 13 or 15 commences a title 11 "case." A "proceeding" is a litigated controversy that may occur as the case under the Bankruptcy Code unfolds. Most commonly "proceedings" are classified as "contested matters" governed by Federal Rule of Bankruptcy Procedure 9014 or "adversary proceedings" governed by Bankruptcy

Rules 7001-7087.

Section 157(a) authorizes the district courts to "refer" to the bankruptcy judges for the district all bankruptcy "cases" as well as all "proceedings" over which the district court would have section 1334 subject matter jurisdiction. By blanket orders of reference entered under section 157(a), the district courts have generally delegated all of their jurisdiction to the bankruptcy judges.[1] Sections 157(b) and 157(c) distinguish between those matters referred by the district court in which the bankruptcy judge may enter a final order or judgment (core proceedings) and those matters referred by the district court that may only be heard by a bankruptcy judge (non-core proceedings).

Under section 1334(b) there are three independent connections to bankruptcy, any one of which may serve as a predicate for a district court's exercise of subject matter jurisdiction over a proceeding. 11 U.S.C. § 1334(b); *In re Noletto*, 244 B.R. 845, 849 (Bankr. S.D. Ala. 2000)("The three categories offer alternative bases of bankruptcy jurisdiction."). If any one of these predicates is present, the district court is empowered, without more, to adjudicate the controversy. If none of the three predicates exist, then the district court cannot act unless there is an independent jurisdictional basis, such as diversity of citizenship under 28 U.S.C. § 1332.

[1] Consistent with section 157(a), the Southern District of Texas has, by General Order No. 2002-2, referred to the bankruptcy judges for the district "[a]ll bankruptcy cases and all proceedings arising under Title 11 or arising in or related to a case under Title 11—except matters on appeal…"

Section 1334(b) provides that any one of the following three classes of proceedings has a sufficient connection to bankruptcy to support the exercise of subject matter jurisdiction over the proceeding by the district court: (1) a proceeding that "arises under" a provision of title 11; (2) a proceeding that "arises in" the title 11 bankruptcy case; or (3) a proceeding that is "related to" the title 11 bankruptcy case. As this Court stated in *Wood*, the phrase "arising under title 11" describes those proceedings that involve a cause of action created or determined by a statutory provision of title 11. *Wood,* 825 F.2d at 96. Proceedings "arising in" a title 11 case are those that are not based on any right expressly permitted by title 11, but which nevertheless would have no existence outside of the bankruptcy. *Id.* at 97. An action is "related to" the bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action and which in any way impacts upon the handling and administration of the bankruptcy estate. *EOP-Colonnade of Dallas, Ltd. P'ship v. Faulkner*, 430 F.3d 260, 266 (5th Cir. 2005).

Section 157(b)(1) provides, in part, that "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11…." With respect to *proceedings*,[2] then, bankruptcy judges may make "determinations"—or issue final orders—only if two prerequisites

[2] Bankruptcy judges may also issue final orders and judgments in *cases* under title 11. The statutory basis for jurisdiction over cases is in section 1334(a). There is no dispute that jurisdiction in this case must be based on section 1334(b) because Plaintiffs' Complaint constitutes a proceeding, not a case, in bankruptcy parlance.

are met. First, the matter must be a proceeding "arising under" a provision of title 11 or a proceeding that "arises in" the title 11 bankruptcy case. Second, the matter must be a "core" proceeding within the meaning of section 157(b)(2).[3] Bankruptcy courts, therefore, lack the power under section 157(b)(1) to issue final orders and judgments in proceedings that are only "related to" a title 11 bankruptcy case unless, as specified by section 157(c)(2), all parties consent to the exercise of adjudicatory power by the bankruptcy judge. Thus a bankruptcy court's power to issue final orders and judgments in a case depends on the nature of the district court's subject matter jurisdiction (arising under, arising in, or related to) and whether the proceeding is central—or "core"—to traditional bankruptcy functions designed to provide a fresh start to individual debtors and equality of distribution among creditors. *See In re Luonga*, 259 F.3d 323, 332 n.7 (5th Cir. 2001)(finding the main objectives of the Bankruptcy Code to include "ensuring the efficient administration and equitable distribution of the estate for the benefit of the creditors and protecting the debtor's right to a fresh start"). The status of a proceeding as "core" or "non-core" does not affect the issue of jurisdiction. Rather such status goes to whether the bankruptcy court can issue a final order in the proceeding.

Proceedings that are "related to" a title 11 bankruptcy case or that are "non-core" proceedings may still be heard by bankruptcy courts. *See* 11 U.S.C. § 157(c)(1); Fed.

[3] Section 157(b)(2) provides a non-exclusive list of core proceedings.

R. Bankr. P. 9033. For these types of proceedings, a bankruptcy judge "hears" the matter and submits proposed findings of fact and conclusions of law to the district court as required by section 157(c)(1). The district court enters a "final" order after considering the drafts and conducting a *de novo* review of all matters as to which specific and timely objections have been made. In this way, the role of the bankruptcy judge in a non-core proceeding is similar to a magistrate judge.

B. Obtaining a Fresh Start by Curing Mortgage Arrearages in Chapter 13

The district court's, and derivatively the bankruptcy court's, jurisdiction over the plaintiffs' claims cannot be understood without an explanation of the mechanics of handling mortgages in chapter 13. Frequently chapter 13 debtors are behind in their mortgage payments prior to filing. Since the enactment of the Bankruptcy Code in 1978, homeowners facing foreclosure have often turned to bankruptcy as a last resort to try to save their homes. *See* Tara Twomey, et al, *Saving Homes in Bankruptcy: Housing Affordability and Loan Modification*, 2008 Utah L. Rev. 1123, 1126 (2008). Chapter 13 allows these debtors to reorganize their finances and cure the arrearages owing on their mortgages while they maintain ongoing monthly mortgage payments. *See* 11 U.S.C. § 1322(b)(5). The debtor's ability to "cure and maintain" under section 1322(b)(5) is available even if the lender has accelerated the loan before the bankruptcy is filed and even if state law or the debtor's loan contract does not provide such a right. *See Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236 (5th Cir.

1984)(extensively discussing debtor's right to cure mortgage defaults). The right to cure mortgage defaults further extends to defaults on the mortgage loan contract that occur after the bankruptcy petition has been filed and during the three- to five-year period of the debtor's chapter 13 plan. *See Matter of Mendoza*, 111 F.3d 1264, 1269 (5th Cir. 1997).

The common sense meaning and goal of section 1322(b)(5) is to allow chapter 13 debtors to emerge from bankruptcy with a mortgage obligation that is current. That is, debtors should emerge from bankruptcy with no outstanding fees, costs or other issues that would stop debtors from receiving their fresh start. In this way, debtors' power to cure any defaults and maintain payments through a chapter 13 plan offers families the opportunity under federal law to save their homes from foreclosure.

Chapter 13 includes several provisions that deal specifically with mortgages. Section 1322(b)(2) protects certain mortgage lenders[4] from modification of their rights under their pre-petition mortgage loan agreements. 11 U.S.C. § 1322(b)(2); *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993). However, the Supreme Court in *Nobelman* recognized that protection from modification does not mean that the contractual rights of a home mortgage lender are unaffected by the mortgagor's

[4] Section 1322(b)(2) provides that a chapter 13 plan may: "modify the rights of holders of secured claims, other than a claim that is secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;"

chapter 13 bankruptcy. *Nobelman*, 508 U.S. at 330. Several provisions of the Bankruptcy Code alter lenders' rights to foreclose notwithstanding the anti-modification provision of section 1322(b)(2). *See, e.g.,* 11 U.S.C §§ 362 (automatic stay), 502(b) (claims allowance) and 544 (avoidance powers). Most importantly for the case at bar, Congress balanced mortgage lenders' protections in section 1322(b)(2) with section 1322(b)(5), which gives debtors the right to cure arrearages and remain current on the mortgage debt.[5] 11 U.S.C. § 1322(b)(5). Section 1322(b)(5) provides an explicit exception to section 1322(b)(2)'s prohibition of mortgage modifications. 11 U.S.C. § 1322(b)(5)("notwithstanding paragraph (2)"); *see Grubbs*, 730 F.2d at 241. Regardless of the mortgage contract, section 1322(b)(5) allows debtors to cure mortgage arrearages and maintain current payments through a chapter 13 plan. 11 U.S.C. § 1322(b)(5). The power granted to debtors in section 1322(b)(5) is illustrative of Congress' intention to provide homeowners with the right to cure defaults and preserve their primary asset. *See Mendoza*, 111 F.3d at 1269.

Chapter 13 plans commonly provide that the debtors will pay a certain amount each month on account of their mortgages. A portion of the established amount is allocated to cure any defaults and the remainder is allocated to keeping the account current. Based on this straightforward system of allocating payments, debtors are able

[5] Section 1322(b)(5) states that the plan may: "notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;"

to save their homes from foreclosure by curing any monetary defaults and maintaining current payments on their mortgage obligations. The end result is that debtors emerge from bankruptcy with a fresh start. Undisclosed fees, such as those assessed by Wells Fargo, wreak havoc on this system.

If a lender, during the chapter 13, diverts a portion of debtor's payments to undisclosed fees, then the diverted amount necessarily will not be applied to the debtor's arrearage or current obligation. The result of diverting funds is that the arrearage does not get paid in accordance with the plan and confirmation order or the debtor slips into default on current obligations without any notice of the accruing fees. Alternatively, if the lender assesses the debtor's account for a fee or expense but does not provide notice to the debtor of the fee or expense, the lender deprives the debtor of the ability to cure any defaults and remain current on the mortgage obligation during the pendency of the chapter 13 in contravention of the plain language of section 1322(b)(5).

Section 1322(b)(5), allowing debtors to cure defaults and remain current on their mortgage obligations, and the confirmation order and the binding effect of a plan provided by section 1327(a)[6] have the effect of bringing debtors current on their mortgage obligations at the conclusion of the plan. If debtors successfully make it to

[6] Section 1327(a) provides that: "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan."

the end of their three or five-year chapter 13 plans, the Bankruptcy Code grants debtors a fresh start. Interpretations of the Bankruptcy Code that suggest creditors have the right to "book" fees, without notice to the debtor or court, during a chapter 13 bankruptcy and collect those fees after the case is closed, eviscerate the "cure and maintain" provision of section 1322(b)(5). Such practices also thwart the underlying fresh start purpose of chapter 13.

Lenders cannot be allowed to place former debtors in default and foreclose on a debtor's home for undisclosed charges that accrued during the course of the bankruptcy case. Debtors' rights to cure defaults and maintain payments pursuant to 1322(b)(5) must have meaning in providing debtors with a fresh start.

C. Jurisdiction is proper because the plaintiffs' complaint is based on whether the Bankruptcy Code and Rules allow Wells Fargo to collect the disputed fees in the manner alleged.

Plaintiffs are seeking relief for violations of section 506(b), Rule 2016 and orders of confirmation. Plaintiffs do not allege that Wells Fargo's collection activities breached the mortgage contracts. Rather, the essence of the complaint "is whether the Bankruptcy Code, Bankruptcy Rules, and the confirmation orders provide procedural restrictions that prohibit [Wells Fargo's] collection of undisclosed, unapproved fees after the debtor's discharge from bankruptcy." *Rodriguez v. Countrywide Home Loans, Inc.*, Slip Op., Docket No. B-09-070, at 15-17 (S.D. Tex. Dec. 3, 2009)(district court holding that claims identical to Plaintiffs'—alleging collection of undisclosed fees violated Bankruptcy Code, Rules and confirmation orders—are core proceedings)(Included in Addendum). Plaintiffs' claims "could arise only in the context of a bankruptcy case." *Wood*, 825 F.2d at 97.

In this case, Plaintiffs allege that Wells Fargo must disclose and seek bankruptcy court approval of fees and expenses charged between the filing of the petition and the issuance of the discharge order. After the petition is filed, but prior to confirmation of a chapter 13 plan, 11 U.S.C. § 506(b)[7] and Federal Rule of Bankruptcy Procedure 2016(a) govern a mortgage lender's ability to collect fees and expenses. *See Rodriguez*, Slip Op., Docket No. B-09-070 at 4, 17. Following confirmation, section 1322(b)(5), 1327(a), Rule 2016(a) and the confirmation order govern how fees and expenses may be collected. *See id.* Plaintiffs do not argue that lenders, such as Wells Fargo, have no ability to recover fees and expenses incurred while a chapter 13 case is pending. Rather, Plaintiffs assert that when debtors have chapter 13 cases pending, lenders must disclose the fees and expenses and file an application for compensation or reimbursement with the court. The merit of Plaintiffs' claims rest on an interpretation of the statutory provisions of title 11, including sections 506(b), 1322(b)(2), 1322(b)(5) and 1327(a). As such, the proceeding is one "arising under title 11." *See Wood*, 825 F.2d at 96; *Tate v. NationsBanc Mortgage Corp.*, 253 B.R. 653, 662 (Bankr. W.D.N.C. 2000)("[Section] 506(b) of the Code and its procedural counterpart,

[7] Prior to confirmation, section 506(b) authorizes oversecured creditors to collect reasonable fees, costs and charges provided for under their agreement with the debtor.

Bankruptcy Rule 2016, create right and duties that affect debtors and creditors alike. Therefore Plaintiffs' complaint invokes substantive rights created by the Bankruptcy Code and falls within the Court's 'arising under' jurisdiction").

The district court (and thus the bankruptcy court) also has jurisdiction over this matter because it "arises in" a case under title 11. "Arising in" acts as the residual category of civil proceeding over which the district court has jurisdiction. Proceedings "arising in" a title 11 case are those that are not based on any right expressly permitted by title 11, but which nevertheless would have no existence outside of the bankruptcy. *Wood*, 825 F.2d at 96. In this case, chapter 13 debtors are asking the court to enforce violations of procedural requirements and confirmation orders and thereby prevent Wells Fargo from collecting undisclosed fees. The court has the power to remedy these violations by using its inherent authority to enforce its own orders and rules, or its powers under 11 U.S.C. § 105.

It is unquestionable that courts possess the inherent authority to enforce their own orders and rules. *See Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985); *Cook v. Ochsner Foundation Hospital*, 559 F.2d 270, 272 (5th Cir. 1977). Additionally, under section 105 of the Bankruptcy Code, courts may take any action or make any determination "necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105; *see Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 356 n.1 (5th Cir. 2008)(bankruptcy court may use section 105 to impose sanctions on parties who attempt to abuse the procedural mechanisms within the bankruptcy court). Requesting the court to enforce the Federal Rules of Bankruptcy Procedure and confirmation orders falls squarely within the court's "arising in" jurisdiction.

Wells Fargo incorrectly suggests that the bankruptcy court has no jurisdiction because Plaintiffs' claims would not affect debtors' estates. For the purposes of "arising in" and "arising under" jurisdiction, an adversary proceeding need not have an effect on an individual bankruptcy estate for a bankruptcy court to have authority to resolve the claim with a final order *See Bank United v. Manley*, 273 B.R. 229 (N.D. Ala. 2001)(providing extensive analysis). Furthermore, the proceeding need not relate to only one bankruptcy case. *Id.* at 232-44. The effect analysis is only relevant if the court's authority to hear the case is limited to "related to" jurisdiction under 28 U.S.C. § 1334(b). The district court, and consequently the bankruptcy court, has jurisdiction when the proceeding involves the rights and duties of the estate ***or the debtor***, and the claims sought to be enforced are substantive rights provided by the Bankruptcy Code. *Id.* In fact, there are many causes of action "arising under" the Bankruptcy Code that do not involve the debtor's estate. For example, section 525 permits a debtor to bring a claim when discrimination is based on a prior bankruptcy. Relief for violations of the automatic stay (§ 362) or the discharge injunction (§ 524) are intended to compensate the debtor for injury, not the debtor's estate. As the court in

Bank United concluded:

> The conceivable limits of bankruptcy court jurisdiction, therefore, must embrace matters beyond those simply affecting the estate. Proceedings affecting a debtor's rights, liabilities, options, or freedom of action are also valid proceedings cognizable by the bankruptcy courts when they arise under the Bankruptcy Code. To contend otherwise strips the debtor of certain authorized (and perhaps implied) causes of action, and eliminates specific grants of jurisdiction.

Bank United, 273 B.R. at 243-44.

Plaintiffs' claims allege violations of the Bankruptcy Code, Bankruptcy Rules, and court orders confirming Plaintiffs' chapter 13 plans. These claims arise under title 11 and arise in cases under title 11. The district court (and derivatively the bankruptcy court) has subject matter jurisdiction over the claims. Because these claims could arise only in the context of a bankruptcy case, they are considered core proceedings under section 157(b). *See Woods*, 825 F.2d at 97. Consequently, the bankruptcy court has authority to resolve Plaintiffs' claims by final order.

II. Class certification by the Bankruptcy Court was appropriate.

A. Bankruptcy courts have authority to determine class claims.

Class actions serve an important function in our system of civil justice. They are procedural devices that allow for the efficient administration of justice and provide redress to plaintiffs with small but valid claims. *See Cosgrove v. First & Merchs. Nat'l Bank*, 68 F.R.D. 555, 560 (E.D. Va. 1975). The Supreme Court has long recognized that without class actions claimants with small claims would be unable to obtain relief.

See Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338 n.9 (1980); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985)(plaintiffs with small claims "would have no realistic day in court if a class action were not available"). In the consumer context, class actions serve an important purpose beyond simply compensating the injured. Often, class representatives act as private attorneys general vindicating cumulative wrongs and obtaining significant injunctive relief or institutional change, and requiring the disgorgement of illegal profits. William Rubenstein & Alba Conte, Newberg on Class Actions §§ 5.49 & 5.51 (4th ed. 2009).

Rule 23, as incorporated into the Federal Rules of Bankruptcy Procedure by Rule 7023, expresses a "policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit." *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 163 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975). The need for the class procedural device, as well as the policies that animate it, applies equally in the bankruptcy context. Financially strapped debtors have few resources to individually challenge creditor conduct that results in relatively small damages. Additionally, the courts themselves benefit from the judicial economy of class actions. As Judge Hanen recently noted in *Rodriguez*:

> By incorporating Rule 23 into the Bankruptcy Code, Congress "indisputably intended to make procedures related to prosecuting a class action" available in bankruptcy proceedings. *Charter Co. v. Charter Co.* (*In re Charter Co.*, 876 F.2d 866, 870 (11th Cir. 1989); *see* Fed R. Bankr. P. 7023 (incorporating Rule 23 into the Rules of Bankruptcy Procedure). Courts thus have upheld the jurisdiction of bankruptcy courts over class

> actions when the criteria expressed in Rule 23 are satisfied. *See In re Charter*, 876 F.2d 866, 879 (11th Cir. 1989); *Reid v. White Motor Corp.*, 886 F.2d 1462, 1469-70 (6th Cir. 1989); *Matter of Am. Reserve Corp.,* 840 F.2d 487, 488 (7th Cir. 1988); *Wilborn v. Wells Fargo Bank, N.A.* (*In re Wilborn*), 404 B.R. 841, 848-49 (Bankr. S.D. Tex. 2009); *In re Iommazzo*, 149 B.R. 767, 775 (Bankr. D.N.J. 1993); *see also Davis v. Davis* (*In re Davis*), 194 F.3d 570, 572 (5th Cir. 1999)(citing cases standing for the proposition that class actions are available in adversary proceedings before bankruptcy court).

See Rodriguez, Slip Op., Docket No. B-09-070 at 21. Nothing in the statutory grant of jurisdiction to the district court, the order of reference to the bankruptcy courts, the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure suggest that Congress intended to categorically foreclose debtor class actions arising under the Bankruptcy Code. *See Bank United*, 273 B.R. at 229 ("When coated with Rule 7023, such an already bitter pill becomes impossible to swallow").

B. The decision of the bankruptcy court is reviewable only for abuse of discretion.

This court has long adhered to the principle that a decision on class certification is reviewable only for abuse of discretion as long as the correct legal standard in making the class certification decision is applied. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998); *J.R. Clearwater, Inc. v. Ashland Chemical Co.*, 93 F.3d 176, 180 (5th Cir. 1996)("decision as to whether to certify a class lies within the wide discretion of the trial court"). As the court stated in *Allison* at 408:

> We note at the outset that the district court maintains substantial discretion in determining whether to certify a class action, a decision we

> review only for abuse. Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation. Whether the district court applied the correct legal standard in reaching its decision on class certification, however, is a legal question that we review *de novo*.

In this case, the bankruptcy court separately reviewed each factor related to class certification and evaluated whether that factor was met. The court concluded that Plaintiffs' allegations that Wells Fargo improperly charged and collected fees from chapter 13 debtors satisfied all the requirements of Rule 7023.

C. Injunctive relief on behalf of the class in this case is critically important to protect class members and to protect the integrity of the bankruptcy system.

It is well settled that the cornerstone of federal bankruptcy policy is the fresh start associated with obtaining a discharge of debt. In passing the Bankruptcy Code in 1978, Congress was concerned that once a debtor meets the requirement of the law, he or she obtain a meaningful and effective fresh start. *See, e.g.*, H.R. Rep. No. 595, 95th Cong., 1st. Sess. 117 (1977) (fresh start is the "essence of modern bankruptcy law"); H.R. Rep. No. 595, 95th Cong., 1st Sess. 125 (1977) ("purpose of straight bankruptcy… is to obtain a fresh start"); H.R. Rep. No. 595, 95th Cong. 1st Sess. 118 (1977) (Chapter 13 designed to ensure "the debtor is given adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start"); *id.*, at 118 (Whether debtor uses Chapter 7 or 13, "bankruptcy relief should be effective, and should provide the debtor with a fresh start."). *See also* H.R. No. 95-595, p. 128 (1977)

("Perhaps the most important element of the fresh start for a consumer debtor after bankruptcy is discharge.... [This bill] proposes to remedy the deficiencies in the current discharge provisions and to make the discharge effective relief for consumer debtors.").

Plaintiffs here are seeking relief from conduct that has subverted their fresh start. Code section 1322(b)(5) recognizes not only that a consumer debtor may make payments under the plan to cure any defaults but also may provide for the "maintenance of payments while the case is pending." If consumer debtors make all payments required by their confirmed plan to pay off the arrearage amount listed in the mortgage creditor's proof of claim, cure any monetary defaults and maintain the ongoing post-petition payments as required under the mortgage documents, the debtor should emerge from bankruptcy fully current on the mortgage as if no pre-petition default existed. *See In re Rathe*, 114 B.R. 253 (Bankr. D. Idaho 1990)(enjoining mortgage lender from attempting to collect any sums other than contractual payments accruing after the date of order approving trustee's final accounting, closing estate, and granting debtor their discharge).

For this home preservation model to be successful, there must be full disclosure of all post-petition defaults and maintenance payments. *See In re Sanchez*, 372 B.R. 289, 297 (Bankr. S.D. Tex. 2007)("[I]n order for the bankruptcy system to function-every entity involved in a bankruptcy proceeding must fully disclose all relevant facts"); *In re Jones*, 366 B.R. 584, 602-03 (Bankr. E.D. La.2007)("Bankruptcy courts can not function if secured lenders are allowed to assess post-petition fees without disclosure and then divert estate funds to their satisfaction without court approval"). Unfortunately, it has become increasingly common for mortgage creditors to add fees and charges to mortgage accounts without notice to the borrower, trustee or bankruptcy court while the bankruptcy case is pending, and without disclosing the fees in a proof of claim or seeking court approval. Some creditors secretly maintain these charges on the debtor's account while the bankruptcy is pending and wait to collect the fees once the bankruptcy case is closed or when the loan is paid off or refinanced.[8] Others include the post-petition fees in the proof of claim but fail to separately list or itemize them. Many debtors emerge from a chapter 13 case after three to five years of struggling to cure an arrearage only to have the lender begin foreclosure anew based on claims of unpaid fees for such items as attorney's fees, property inspections, broker price opinions, and other charges allegedly incurred during the chapter 13 case.

One of the first cases to challenge this practice was *Tate v. NationsBanc Mortgage*

[8] Some servicers refuse to provide normal escrow account statements and payment change notices to borrowers in bankruptcy, depriving these borrowers of the opportunity to pay the amounts due during the chapter 13 case and subjecting them to later collection efforts. *E.g.*, *In re Dominique*, 368 B.R. 913 (Bankr. S.D. Fla. 2007)(servicer failed to provide escrow statements during chapter 13 plan and just before plan completion provided debtors with an escrow account review indicating a $6,397 escrow deficiency); *In re Rizzo-Cheverier*, 364 B.R. 532 (Bankr. S.D.N.Y. 2007)(servicer allowed deficiency in escrow account to accrue and then, without notice to debtor, applied trustee plan payments intended for prepetition arrears to post-petition escrow deficiency).

Corp., 253 B.R. 653 (Bankr. W.D.N.C. 2000). The *Tate* court found that attorney's fees listed on proofs of claim under the label "bankruptcy fee" were *per se* unreasonable under Code section 506(b) because the creditor failed to obtain approval of the fees under Bankruptcy Rule 2016. At the same time *Tate* was being litigated, a series of class action lawsuits had been filed against numerous mortgage servicers and auto lenders in the Bankruptcy Court for the Southern District of Alabama, which issued a number of written opinions. *See, e.g., In re Powe*, 282 B.R. 31 (Bankr. S.D. Ala. 2001); *Noletto v. NationsBanc Mortgage Corp.*, 281 B.R. 36 (Bankr. S.D. Ala. 2000); *In re Sheffield*, 281 B.R. 24 (Bankr. S.D. Ala. 2000); *In re Harris*, 280 B.R. 899 (Bankr. S.D. Ala. 2001); *In re Slick*, 280 B.R. 722 (Bankr.S.D.Ala. 2001). *See also Chrysler Financial Corp. v. Powe*, 312 F.3d 1241 (11th Cir. 2002).

The first two cases to go to trial were *Slick v. Norwest Mortgage, Inc.* and *Harris v. First Union Mortgage Corp.* In *Slick*, the court found that the servicer Norwest[9] initially prepared and filed proofs of claim in its borrower's Chapter 13 cases using in-house staff, and that it did not charge borrowers a separate fee for this work. Over the course of several years, this work was transferred to various outside law firms and bankruptcy service companies. With the outsourcing of this work came the practice of charging debtors a fee in the range of $75 to $125 for the preparation of proofs of claim. Evidence at trial also established that while Norwest initially disclosed these

[9] Norwest Mortgage was merged into Wells Fargo & Co. in 1998. *See* Wells Fargo New Release (June 8, 1998), available at www.wellsfargo.com/press/merge19980608.

fees on proofs of claim, it later changed its policy in response to "pending litigation, industry litigation and opinions of in-house counsel" and no longer disclosed the fee on claims or in any other manner.[10]

The Alabama bankruptcy court found that the practice of hiding these post-petition fees from debtors and bankruptcy courts violates Bankruptcy Code section 506(b) and denies Chapter 13 debtors the right to fully cure mortgage defaults under section 1322(b)(5). A creditor should not be permitted to pick and choose which fees are to be paid under a Chapter 13 plan as part of its claim for arrearage and costs, and then attempt to collect fees not included in the claim after the case is closed. Moreover, if the fees are not disclosed, the judge in *Slick* found that neither the debtor nor the court can assess their reasonableness as required by section 506(b), and they are therefore rendered *per se* unreasonable. *See also Noletto v. NationsBanc Mortgage Corp.*, 281 B.R. 36, 47 (Bankr. S.D. Ala. 2000)("Fees which are not disclosed at all, fees which are not properly claimed with specificity, or are not included in the arrearage claim to be paid through the plan if the plan so provides, are per se unreasonable because they are improperly charged."); *Harris v. First Union Mortgage Corp.*, 280 B.R. 876, 885 (Bankr. S.D. Ala. 2001).

In order to send a clear message to creditors that this practice will not be tolerated, the Alabama bankruptcy court invoked its power under section 105 and

[10] The change in policy apparently came in response to the lawsuit filed in *Majchrowski v. Norwest Mortgage*, 6 F.Supp.2d 946 (N.D. Ill. 1998).

imposed a monetary sanction of $2 million against the creditor.[11] The court found that its award was justified based on the calculated business choice made by the creditor:

> The decision was a business and bottom line driven decision. Norwest created this issue by its major policy shift - to outsource certain actions and lay that cost on borrowers. It benefitted financially from that action. Once a decision was made to charge debtors for a previously "free" service, Norwest knew it had two choices - to disclose that a fee was being charged or to not disclose it. At first it made a disclosure. Then, when it encountered a court challenge to the fees it charged, it changed its policy. It chose not to disclose the fees it charged anymore. Nondisclosure or "hiding" a fee always carries some risk, particularly when the "target" of the nondisclosure is unsophisticated.[12]

The hiding of fees in chapter 13 cases is unfair and causes substantial injury to consumer debtors. The practice ensures that fees will avoid any possibility of court scrutiny. Even if the fees are reasonable and authorized, the failure to disclose them deprives consumer borrowers of the right to provide for their payment during the bankruptcy case, jeopardizing borrowers' opportunity for a fresh start. Consumers cannot reasonably avoid the injury caused by this practice since only mortgage lenders possess the needed information about the fees being charged. The practice is also deceptive in that it misleads consumers into believing that their chapter 13 plan payments, if made successfully, will bring their account current and prevent them from being foreclosed upon.

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[11] A similar $2 million punitive damage award was issued in *Harris v. First Union Mortgage Corp.*

[12] *See In re Slick*, No. 98-14378, Order Awarding Judgment to Plaintiffs (Oct. 22, 2002) at Addendum 1.

The class action device is particularly appropriate in consumer cases where the litigation serves an important purpose beyond simply compensating injured class members. As in this case, the class representatives and class counsel are seeking to obtain significant injunctive relief to finally put an end to Wells Fargo's abusive collection practices, to obtain the fresh start the bankruptcy law guarantees, and to require the disgorgement of Wells Fargo's illegal profits from these practices. In so doing, plaintiffs are appropriately carrying out an important function of class litigation by serving as private attorneys general. *See* William Rubenstein & Alba Conte, Newberg on Class Actions §§ 5.49 & 5.51 (4th ed. 2009).

CONCLUSION

For all the foregoing reasons, *amicus* respectfully requests that this Court affirm the decision of the bankruptcy court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 6367 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond14-point font.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Carey D. Ebert
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ADDENDUM

ADDENDUM

1. *In re Slick*, No. 98-14378, Order Awarding Judgment to Plaintiffs (Oct. 22, 2002)

1 -] UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF ALABAMA

In Re

CATHERINE D. SLICK, Case No. 98-14378-MAM

Debtor.

CATHERINE D. SLICK,

Plaintiff,

v. Adv. No. 99-1136

NORWEST MORTGAGE, INC.,

Defendant.

ORDER AWARDING JUDGMENT TO PLAINTIFFS

Steve Olen and Steven L. Nicholas, Mobile, AL, Attorneys for the Plaintiff Class

Donald J. Stewart, Mobile, AL, Attorney for Plaintiff Class

Henry A. Callaway, III and Windy C. Bitzer, Mobile, AL, Attorneys for the Defendants

This matter is before the Court on (1) defendant's motion for a judgment on partial findings pursuant to Fed. R. Bankr. P. 7054; (2) defendant's motion for a verdict at the close of the evidence; and (3) trial of the case. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order.

FACTS

A.

Catherine Slick filed a chapter 13 bankruptcy case on December 3, 1998. She had a mortgage loan secured by her homestead. The mortgagee was ***Norwest*** Mortgage, Inc. ***Norwest*** was given notice of Ms. Slick's bankruptcy filing and it filed a proof of claim on December 18, 1998. The proof of claim did not include any disclosure of any attorneys fee being paid to anyone to file the proof of claim. In fact, Barrett Burke Wilson Castle Daffin & Frappier LLP ("Barrett Burke"), a Texas law firm, prepared and filed the proof of claim. Barrett Burke charged ***Norwest*** $125 for preparation of the proof of claim. ***Norwest*** paid Barrett Burke and then assessed or posted the fee to Slick's account by adding the fee to the loan balance due ***Norwest*** from Slick.

Norwest filed an amended claim in November 1999. The proof of claim preparation fee was not disclosed on this claim form either. ***Norwest*** never sought court approval for the fee at any time.

B.

Norwest had followed several different procedures throughout the years for handling bankruptcy proofs of claim. Before 1994, ***Norwest*** prepared and filed all proofs of claim through use of its own nonlawyer personnel. ***Norwest*** charged no fee to debtors for this work.

In 1994 or 1995, ***Norwest*** hired Creditor's Bankruptcy Service ("CBS") to prepare and file its proofs of claim. This "outsourcing" of the claims preparation process freed ***Norwest*** from the expense of maintaining staff of its own to file the claims. ***Norwest*** then added the cost of the claim preparation to each debtor's account. A CBS nonlawyer employee did the work in Norwest's Charlotte, NC office. CBS put the proof of claim preparation fee on the proof of claim form, designating it as a "proof of claim filing fee." CBS charged $75 for each claim filed.

In 1996, Barrett Burke succeeded CBS as the outside firm filing proofs of claim for ***Norwest.*** In the beginning (until July 1997), Barrett Burke prepared the claims, but ***Norwest*** employees signed them. ***Norwest*** also was listed as the party filing the claims on the stationery used to mail claims to courts. Barrett Burke's fee was posted to each debtor's account when paid. Continuing the CBS procedure, the proof of claim filing fee was disclosed on the form. In July 1997, Barrett Burke's nonattorney employees started signing the claims and did so until June 1998 when Barrett Burke hired an attorney, Debra Clark, to take over the review and signing of all proofs of claim. Barrett Burke initially charged $100 per claim. That fee rose to $125.

The same procedures were followed in the Des Moines, Iowa and Maryland service centers with different law firms doing the work. The only difference was that the Iowa and Maryland service centers never had an attorney working on claims. Only nonlawyer employees of the outside firms prepared the claims. However, just as in the Charlotte service center, in the Des

Moines and Maryland service centers, the fee was also disclosed on the claim form and the fee charged by the outside firm was added to each debtor's account.

By April 1998, ***Norwest*** had consolidated its claims filing procedures and Barrett Burke was doing all of Norwest's claim filing. The Maryland and Iowa service centers had phased out their bankruptcy departments and the work was consolidated in Charlotte.

C.

As stated above, the proof of claim preparation fee was disclosed on the proof of claim form commencing in 1994 when the fee was first incurred due to Norwest's outsourcing. However, in September 1997, ***Norwest*** informed Barrett Burke to discontinue disclosing the fee due to "pending litigation, industry litigation and opinions of in-house counsel." (Deposition of Jill Helmers, pp. 42-43.) The change in policy occurred because of the allegations in a class action suit commenced against ***Norwest*** Mortgage. See Majchrowski v. ***Norwest*** Mortgage, 6 F. Supp. 2d 946 (
N.D. Ill. 1998). The suit alleged that ***Norwest*** included improper inspection
and attorneys fees in its proofs of claim and asserted that these charges violated the RICO Act, committed unfair and deceptive practices and breached the ***Norwest*** mortgage agreements.

The ***nondisclosure*** of the claim preparation fees did not mean that they were no longer charged. The fees were still posted to debtors' accounts. However, no debtor knew the fee was being assessed against him or her-at least not from any filings with the bankruptcy court. The fee was not even added to the loan balance shown in the proofs of claim filed.

D.

Since 1994, Barrett Burke's fee has always been a flat rate fee for each claim prepared and filed of either $75, $100, or $125. (It was unclear to the Court what the fee was in the beginning and when it rose.) In 1999, Barrett Burke filed 7,811 claims for ***Norwest*** and was paid $976,
375. The Barrett Burke attorney who worked at Norwest's Charlotte office reviewed and signed each claim after nonattorney employees of Barrett Burke prepared the claims. If she worked fifty 40-hour weeks, she spent about 15 minutes on each claim. She testified that she spent 25-40 minutes on each claim-2 to almost 3 times the 15-minute average. Her supervising attorney testified that she believed Barrett Burke's on-site attorney spent one to one-and one-half hours on each proof of claim.

E.

Recently *Norwest* began to send all of its Fannie Mae and VA loans to
two law firms other than the Barrett Burke firm. Fannie Mae and VA loans are about 25% of Norwest's portfolio. The firms are approved by Fannie Mae as required by Fannie Mae procedures. The firms charge up to $800 for services in each bankruptcy case. The firms break their fees into two parts. They charge $450 for work within 90 days after the bankruptcy filing, which work
includes filing a proof of claim. A large portion of the time expended is spent on loss mitigation efforts.[1A recent Wall Street Journal article described the loss mitigation program. "Pinched Homeowners are Finding Shelter in Modified Loans," Wall Street Journal, October 30, 2001, at A.1.]1 After confirmation (about 90 days after filing of a case), if work is done, a second bill is sent. No fees are shown on any proof claim filed by a Fannie Mae approved firm. They do not break out how much time is devoted to performing any particular task including preparation and filing of a proof of claim. The firms also do not differentiate between pre- and postconfirmation work.

F.

Barrett Burke sold its claims processing business to First American on approximately January 2, 2001. First American is not a law firm. First American operated exactly like Barrett Burke did. In fact, the Barrett Burke attorney who handled proofs of claim at the *Norwest* offices
continued to do so (probably as a First American employee) until July 1, 2001 or so when First American's services were terminated.

G.

Norwest Mortgage merged with Wells Fargo in 1998. Its bankruptcy
department is still located in the Charlotte, NC service center.

As of July 1, 2001, the proof of claim fee policy came full circle. After July 1, 2001, no fee was assessed to borrowers who filed bankruptcy for the filing of a proof of claim except Fannie Mae and VA loans. *Norwest* handles all non-Fannie Mae loans in-house. First American's services have been terminated.

H.

From 1994 to July 2001 (and continuing for Fannie Mae and VA loans), the proof of claim filing fee was posted to a debtor's account and was collected from the debtor if the loan was paid in full.[2In the Fannie Mae and VA loan cases, the claim preparation charge is a part of the first $ 450 billed to *Norwest* (Wells Fargo).]2 This payment may have occurred through a bankruptcy case, through loan maturity and payment, through a redemption after foreclosure, or through a refinancing of the debt. If a foreclosure occurred, the fee was never collected from the debtor unless the debtor redeemed the property.

I.

The evidence shows that proofs of claim were filed by ***Norwest*** in 23,
771 bankruptcy cases with no fee disclosure from September 1, 1997 through June 30, 2001. Other than those loans in which a foreclosure has occurred since the bankruptcy filing of a debtor, the proof of claim filing fee remains posted to the account or the fee has been paid as part of a redemption, refinance or other payment of the loan in full.

LAW

The plaintiffs have the burden of proving their case by a preponderance of the evidence. That burden has been met. The Court carefully considered the defendant's motion for a judgment on partial findings pursuant to Fed. R. Bankr. P. 7054 and the defendant's motion for a verdict at the close of the evidence. The plaintiffs met their burden at each stage of the trial and these motions are denied.
The Court has already entered numerous orders in this case and several similar cases. The Court, when appropriate, will refer to those rulings by reference rather than repeat them. All prior rulings in this case are incorporated by reference.

The remaining sections of the opinion will be broken into ten parts and the Court will discuss each issue in turn.

A. Jurisdiction

B. Class Certification

C. Fee Disclosure in Chapter 13 Cases

D. Cases in Which Fees were Disclosed

E. Statute of Limitations

F. Converted and Dismissed Cases

G. Damages

H. Sanctions

I. Prejudgment Interest

J. Attorneys Fees

A.

Jurisdiction

This Court issued a ruling on its jurisdiction to hear this type of case. In re Noletto, 244 B.R. 845 (Bankr. S.D. Ala. 2000). The Court incorporates that ruling by reference. The U.S. District Court for the Northern District of Alabama has recently issued a thoughtful opinion concluding that its bankruptcy court also has jurisdiction to consider a class action suit. Bank United v. Manley (In re Manley), Case No. CV-00-N- 2141-W, opinion dated November 29, 2001. This Court adopts its reasoning as well. This Court concludes that there is clearly no obstacle to this Court ruling on issues involving debtors in this district. The defendant does not dispute this exercise. It is debtors' cases beyond this district as to which a question has been raised. As to those cases, the District Court certainly has jurisdiction if this Court does not. If this Court is held to be without jurisdiction over this case, the Court reports and recommends to the District Court that it adopt these findings and conclusions pursuant to Fed. R. Bankr. P. 9033.

The problem at issue in this case and several others pending in this Court and other courts needs to be addressed. Creditors should not be able to assess fees to the account of a person in bankruptcy without the person's knowledge. A bankruptcy case's purpose is to allow a debtor to get out of financial trouble. At discharge, a debtor ought to be able to expect he or she has brought his or her secured debts current and wiped out all unsecured debts not paid through a plan. Undisclosed fees prevent a debtor from paying the fees in his or her plan-an option that should not be lost simply because a creditor chooses to not list the fee and expects to collect it later. Also, secured creditors should not be able to add unapproved attorneys fees to a debtor's account during a bankruptcy when no other creditor can receive fees without approval.

B.

Class Certification

This Court has issued an opinion certifying a class in this case and a separate order defining the class. In re Slick, Order Granting Plaintiff's Motion to Alter, Amend or Vacate Summary Judgment Order and Denying Defendant's Motion to Alter or Amend, March 6, 2001 (Bankr. S.D. Ala. 2001); In re Slick, Order Defining Class to be Certified in Case, June 5, 2001 (Bankr. S.D. Ala. 2001). These opinions are incorporated by reference.

C.

Fee Disclosure in Chapter 13 Cases

The crux of the controversy in this case is whether ***Norwest*** can charge attorneys fees to debtors' accounts at any time during a bankruptcy case without disclosure of those fees to anyone. The Court has already addressed this issue in an opinion in this case. Supra, Slick order of March 6, 2001, at 5. The evidence at trial did not alter this Court's view of the issue.

Norwest, since 1994, has outsourced its bankruptcy proofs of claim
filing function. The outside firm-whether a law firm or not-charges a fee for the service of preparing and filing the claim. (In the case of the Fannie Mae Designated Counsel Program, the fee is an unspecified amount of the first installment fee charged to ***Norwest.***) The fee is posted to each
debtor's account. Any failure to pay the fee is not grounds for default, but ***Norwest*** attempts to collect the fee when a loan is paid off or a
redemption after foreclosure occurs. The fee is not collected if a foreclosure occurs with no redemption.

Since September 1997, the fee has not been disclosed at all during a debtor's bankruptcy case. It is simply posted to the debtor's account and the debtor finds out about the fee (if ever) after his or her bankruptcy case is discharged or the case is dismissed or relief from the stay is granted to the creditor.

This Court has written an opinion that deals with the issue of ***nondisclosure*** and inadequate disclosure of fees. In re Noletto, Order
Granting Defendant's Summary Judgment Motion, dated December 29, 2000 (Bankr. S.D. Ala. 2000). That opinion is incorporated by reference.

The U.S. Supreme Court case of Rake v. Wade, 508 U. S. 464, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (1993) and the Eleventh Circuit case of Telfair v. First Union Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000) cert. denied, 531 U.S. 1073 (2001), reh'g denied, 121 S. Ct. 765 (2001), speak to this issue. This ruling is consistent with their holdings. Rake v. Wade held that a chapter 13 debtor who chose to cure a default on his or her oversecured home mortgage through a plan had to pay postpetition interest on the arrearage claim. The plan in question provided that the arrearage including interest and attorneys fees would be paid through the plan. The Supreme Court held that debtors could pay postpetition interest through the plan and be in compliance with 11 U.S.C. §§ 506(b) and 1322(b)(5). The Court commented, without disagreeing, that Collier on Bankruptcy and the parties to the suit agreed that § 506(b) is applicable only to the effective date of the plan. 3 Collier on Bankruptcy ¶ 506.05, pp. 506-43 and n.5c (15th ed. 1993); Rake at 508 U.S. 468. Thus, § 506(b) interest and fees should only be added to a claim if preconfirmation.

The Telfair case, Telfair v. First Union Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000) cert. denied, 531 U.S. 1073 (2001), reh'g denied, 121 S. Ct. 765 (2001), building upon this ruling, held that payment of postconfirmation attorneys fees from the debtor's regular monthly mortgage payments paid postconfirmation did not violate § 506(b) or § 362 of the Bankruptcy Code.

[A]fter confirmation, only the amount required for the plan payments remained property of the estate. Telfair's regular loan payments, made outside of the plan, were therefore no longer property of the estate and First Union's application of a portion of those payments to attorneys fees pursuant to the Deed [of Trust] did not violate section 362.

Id. at 1340; and

[T]he Supreme Court has stated that interest accrues under section 506(b) "as part of the allowed claim from the petition date until the confirmation or effective date of the plan." Rake v. Wade, 508 U. S. 464, 471, 113 S. Ct. 2187, 2191, 124 L. Ed. 2d 424 (1993) . . . . This Court . . . can find no basis to distinguish Rake's statement that section 506(b) "applies only from the date of filing through the confirmation date," 508 U.S. at 468, 113 S. Ct. at 2190, on the ground that it dealt with interest rather than attorney's fees.

Id. at 1328-29. No other circuit court has disagreed with Telfair. Indeed, it would be hard to do so since it is based on the U.S. Supreme Court case of Rake v. Wade.

Telfair reasons that postconfirmation fees are not part of the creditor's secured claim in a chapter 13 bankruptcy case, but preconfirmation fees are. The treatment of all preconfirmation fees, therefore, must be consistent with this premise.

Since the fees are to be treated as part of Norwest's secured claim, two things must happen. The proof of claim fee must be disclosed so that the debtor knows the fee is part of the secured claim. Second, the fee should be included in the arrearage claim portion of the debt so that debtor can pay the fee through his or her plan as allowed by 11 U.S.C. § 1322(b)(5)..

Norwest makes several new arguments at trial as to the propriety of its undisclosed attorneys fee charges:

1. The fees are not treated as "defaults" and therefore need not be cured under 11 U.S.C. § 1322(b)(5).

2. A long-term mortgage debt survives the discharge of the debtor in a chapter 13 case. It is consistent with this premise that a debtor may remain liable for some debts which cannot be or are not included in a creditor's proof of claim.

The first argument relates to § 1322(b)(5) of the Bankruptcy Code that states a chapter 13 plan shall

provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

If failure to pay the attorneys fee is not a "default," according to ***Norwest***, the sum should not be added to any arrearage claim to be paid in a plan. ***Norwest*** points to how its mortgage documents treat the proof of claim fee. (Def. Exh. No. 16; ¶ 6(B) and 9(a)). Only failure to pay monthly mortgage payments is an event of default, not failure to pay fees or expenses.
This theory will not save ***Norwest*** for several reasons. First, º 506(b) clearly includes attorneys fees as part of a creditor's secured claim as made clear in Rake

v. Wade, supra, and Telfair, supra. If the fee is not listed, the debtor has no way to know it exists. If the debtor does not know it exists, it cannot be a part of the secured claim. Since it should be included as part of the secured claim, it cannot be collected after discharge. Second, *Norwest* cannot decide for the debtor what arrearage or costs the debtor may pay in his or her plan and what arrearages he may not pay in his plan by picking and choosing which § 506(b) costs to disclose. Section 1322(b)(5) is a provision of the Bankruptcy Code which gives the debtor options for plan formulation, not the creditor. If the debtor does not know all of his debts, he cannot exercise his options most effectively for himself. A creditor should not be able to dictate to a debtor what option he selects by its ***nondisclosure.*** *Norwest* failed to disclose a $75-125 fee. What if it was more?[3In the Fannie Mae cases, it may have been more-up to $450 for unspecified services.]3 One thousand dollars? Two thousand dollars? The debtor must be able to sort through his choices. Also, only "reasonable" attorneys fees are to be added to the debt. If the fees are not disclosed, no reasonableness determination can be made. As this case shows, fees have been $75, $100, $125 and a part of a $450 fee.

Norwest's second argument is that since the mortgage debt rides through the plan and discharge, it does not matter if the fee is added to the arrearage. A portion of the debt will remain anyway and letting this fee ride through is consistent with that. This argument is also incorrect. As Rake v. Wade and Telfair stated, § 506(b) states that a secured claim includes all prepetition debt and all postpetition interest, fees, costs and charges to the effective date of the plan. The § 506(b) charges can be paid through the plan. The debtor has a choice to make--to pay the debt in the plan or to allow it to be added to the debt and paid after the bankruptcy case is concluded. If a creditor fails to disclose those charges, they cannot be added later. *Norwest* has no choice in the matter. If the fee is not disclosed, it is discharged.

D.

Cases in Which Fees were Disclosed

In 1994 or 1995, *Norwest* commenced outsourcing of the proof of claim filing function. Initially Creditor's Bankruptcy Service filed the claims. CBS disclosed a $75 charge for a "proof of claim filing fee" on the proofs of claim filed. The plaintiffs are not asserting that any relief is due them when there has been a disclosure in this case. ("Based on the undisputed evidence in this case, Defendant *Norwest* Mortgage . . . intentionally implemented a practice of assessing and collecting proof of claim fees from bankruptcy debtors with no disclosure of the fees." (emphasis in original) (Plaintiff's trial brief, p. 1)). Therefore, the Court assumes for purposes of this ruling, without making additional findings, that CBS's disclosure was adequate. Since the disclosure was adequate, the debtors had an opportunity to challenge the fee in each of their cases. Therefore, debtors with CBS claims are not members of the class of debtors included in this case. This is also true of any debtors in whose chapter 13 cases the Barrett Burke fee or Fannie Mae/VA fees were disclosed.

E.

Statute of Limitations

On June 5, 2001, this Court certified a class that included all bankruptcy debtors who filed a chapter 13 petition on or after January 1, 1994, in which certain proofs of claim were filed. The Court indicated in the certification order that it would deal with what the appropriate limitations period was after trial of the case.

Norwest asserts that the debtors included in this class should be those who filed cases from and after July 9, 1997 or later because that date is two years prior to the filing of this class action suit. The Alabama statute applicable to this case sets a two-year limit. Ala. Code § 6-2- 38(j) and (e) (1975). Due process suits are limited by a two-year statute as well. Ala. Code § 6- 2-38(l) (1975). The plaintiffs assert that statutes of limitations do not control when the issue is injunctive relief. Holmberg v. Armbrecht, 327 U.S. 392 (1946). Also, equitable tolling should apply since the fees were undisclosed. In re Bookout Holsteins, Inc., 100 B.R. 427 (Bankr. N.D. Ind. 1989). Finally, there is no statute of limitations for a violation of the stay. E.g., In re Wills, 226 B.R. 369 (Bankr. E.D. Va. 1998); In re Germansen Decorating, Inc., 149 B.R. 517 (Bankr. N.D. Ill. 1992).

The Court concludes that the class of debtors should include all debtors who filed chapter 13 cases on or after January 1, 1994 if ***Norwest*** charged but did not disclose a proof of claim filing fee in the case. The Court agrees with the plaintiffs' arguments. The fact that the fees in this case were completely undisclosed makes an equitable tolling argument especially appropriate. Erie Ins. Co. v. Romano (In re Romano), 262 B.R. 429, 432 (Bankr. N.D. Ohio 2001) ("Equitable tolling will apply when a plaintiff, through no fault of its own and despite the exercise of due diligence, cannot determine information essential to bringing a complaint in a timely manner."). Because the primary relief to be granted is injunctive, and because of equitable tolling, the period of limitations is longer-from January 1, 1994 to date. The Court is not agreeing with plaintiffs' position that the stay has been violated and, therefore, the fact that there is no limitations period for stay violations is not adopted.

F.

Converted and Dismissed and Closed Cases

Norwest asserts that debtors whose cases have been converted or dismissed should be excluded from the class as finally constituted. ***Norwest*** argues that converted or dismissed debtors will not pay any arrearages from property of the estate; and, in converted cases, the attorneys fee claim becomes part of the prepetition claim. 11 U.S.C. § 348(d). First, an undisclosed fee in a discharged chapter 7 case, if posted or collected after filing of the case, violates the chapter 7 debtor's discharge. The posting and collection of the fee is an action to collect a preconfirmation claim treated in the plan. The violation remains, even if the case is closed.

Such violations can be handled without reopening each underlying case. Singleton v. Wells Fargo Bank, N.A. (In re Singleton), 269 B.R. 270 (Bankr. D.R.I. 2001). As to dismissed cases, no discharge is entered so there can be no violation of it. However, each debtor still has a cause of action to avoid the fee because it was improperly charged during the bankruptcy case. This cause of action is not extinguished by dismissal of the case because § 349 of the Bankruptcy Code specifically addresses what occurs at dismissal and extinguishment of bankruptcy causes of action is not included. The case of Menk v. Lapaglia (In re Menk), 241 B.R. 896, 906 (B.A.P. 9th Cir. 1999) specifically catalogues numerous actions that are not extinguished. Among these are issues of compensation. Id. at 906. That is precisely the issue in this case. What is the proper compensation to be allowed to ***Norwest***, if any, for preparation of the bankruptcy proof of claim? This is an issue of bankruptcy law. It should not be dealt with in state court when a class
of similar debtors is constituted in federal court. The issue is still a part of the bankruptcy case and federal court jurisdiction remains. The matter "arises under title 11." 28 U.S.C. § 1334(b). The question is the validity and reasonability of the fee under § 506(b), a purely federal law question. Therefore, debtors in dismissed cases are included. There is also no need for these cases to be reopened. Id. at 906-07.

G.

Damages

The damages suffered by the plaintiffs are of two kinds. First, all of the debtors had a proof of claim filing fee posted to their accounts. Second, some of the debtors have actually paid the fee.[4The exact number that have paid the fee is unknown at present.]4 Those debtors that have had the fee posted to their accounts must have the fee expunged from their account records. Those who have paid the fee must have it returned.

Even if the bankruptcy case of a debtor has been dismissed or converted or relief from stay granted, the fee cannot remain on the account or be added after the bankruptcy is over. The fee was a bankruptcy attorneys fee. It should have been charged and disclosed during the bankruptcy case and the debtor given a right to contest the fee in bankruptcy court. Therefore none of the fees are collectible from a debtor. As Telfair stated, preconfirmation fees are part of the secured claim in the bankruptcy case and, therefore, this Court concludes that they are discharged if they are not claimed or adequately disclosed in the bankruptcy case.

The Court does not even need to reach the issue of the propriety or reasonability of a particular fee or type of fee. When an attorneys fee for filing a proof of claim is completely undisclosed, it simply cannot be charged.
As to the fees of Fannie Mae/VA counsel that are not broken down as to pre- and post confirmation charges, all charges must be presumed to be preconfirmation in the first billing because the Court was given no evidence (or very little) to the contrary. The evidence indicated that the first billing was made at about the time of confirmation. Therefore, when the Court speaks of how to treat fees in its order for judgment, the entire first bill of $450 that

was posted to debtors' accounts must be expunged and must be refunded, if paid by the debtor.

H.

Sanctions

Plaintiffs seek sanctions or exemplary damages for the actions of ***Norwest*** under ° 105 of the Bankruptcy Code. Section 105 authorizes a court to

issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Such damages are awarded when there has been an abuse of the bankruptcy process. Karsch v. LaBarge (In re Clark), 223 F.3d 859 (8th Cir. 2000). Cases have awarded damages under § 105 for attorney misconduct. In re Rimsat, Ltd., 212 F.3d 1039 (7th Cir. 2000). The case of In re Tate, 253 B.R. 653 (Bankr. W.D.N.C. 2000) used § 105 to award damages for money collected on improperly filed claims. Cases involving issues related to § 362 stay violations, such as Jove Engineering, Inc. v. Internal Revenue Service (In re Jove Engineering, Inc.), 92 F.3d 1539 (11th Cir. 1996), and violations of § 524, the discharge injunction, such as Bessette v. Avco Financial Services, Inc., 230 F.3d 439 (1st Cir. 2000), have invoked § 105 to award actual damages, attorneys fees, and punitive damages too. As stated above, actual damages in the form of an injunction and the ancillary relief of repayment of any proof of claim filing fees collected are appropriate under § 105 in this case. Attorneys fees are also warranted.

The more difficult issue is whether punitive or exemplary damages should be assessed. Courts award exemplary damages if a creditor has willfully abused the bankruptcy process or court orders. E.g., In re Lafferty, 229 B.R. 707 (Bankr. N.D. Ohio 1998). There are factors to consider that weigh both ways.

Prior to September 1997, ***Norwest*** disclosed the proof of claim filing fees it charged to debtors on the debtors' proofs of claim. Only after a federal court suit raised a question about inspection and attorneys fees was that policy changed. Norwest's evidence was that it was trying to follow what its legal advisers thought was correct procedure in bankruptcy cases. There has been no evidence of any malicious intent; however, the decision not to disclose fees was certainly intentional or "willful."

The reason ***Norwest*** had this problem was its attempt to raise its own profits and avoid lawsuits. ***Norwest***, to lower its costs, outsourced an activity it previously did in-house without attorneys. From 1994 to 2001, it paid nonattorney entities or attorneys to file the proofs of claim and put that cost on its borrowers. The

decision was a business and bottom line driven decision. ***Norwest*** created this issue by its major policy
shift-to outsource certain actions and lay that cost on borrowers. It benefitted financially from that action. Once a decision was made to charge debtors for a previously "free" service, ***Norwest*** knew it had two
choices-to disclose that a fee was being charged or to not disclose it. At first it made a disclosure. Then, when it encountered a court challenge to the fees it charged, it changed its policy. It chose not to disclose the fees it
charged anymore. ***Nondisclosure*** or "hiding" a fee always carries some
risk, particularly when the "target" of the ***nondisclosure*** is unsophisticated.

The Court concludes that the ***nondisclosure*** should be sanctioned.
Norwest gave debtors no notice at all of a fee added to their accounts. Over $2,000,000 in fees have been assessed to unknowing debtors.[5 This figure is arrived at by figuring that an average fee of $100 was charged for the 23,771 claims filed.]5 Courts are concerned about fees, as the numerous decisions about fees at all court levels attest. E.g., cases cited at Bankruptcy Service, Lawyers Edition, § 16:636 Sua Sponte Power of the Court (Gavin L. Phillips & Michael J. Yaworsky, eds, West 2001). Treatises discuss judges' duties in regard to fees. E.g., 2 Chapter 11 Theory and Practice, § 12.01 at 12:3 (James F. Queenan, Jr., et al., eds. 1994) ("The bankruptcy judge has an independent duty to examine the property and reasonableness of fees, even if no party in interest objects."). ***Norwest*** decided to not disclose its fees in the face of this
knowledge. The Court concludes that $2,000,000 in punitive damages should be paid to the plaintiffs. This represents less than $100 per debtor. This sum is large enough to send a message to ***Norwest*** and other lenders
about the necessity of disclosing fees in bankruptcy cases.

The Court looked for cases upon which to base its award. There was only one similar case. In the Conley v. Sears, Roebuck & Co. case, 222 B.R. 181 (D. Mass. 1998), Sears agreed to pay 151% of 190,000 debtors' out of pocket losses or over $165,000,000 and a finance charge waiver (18-21%) on all postpetition purchases. The actions of Sears were clear violations of the blackletter bankruptcy law. Sears' actions affected more debtors. Therefore, an exemplary award of approximately $100 per debtor is appropriate in this case. This is considerably less than the 151% of charges and finance charge waiver paid in the Sears case.

I.

Prejudgment Interest

The plaintiffs have suggested several prejudgment interest rates that could be applied in this case. Plaintiffs conclude a rate of 6% is most appropriate since it is the rate used in Alabama, Ala. Code § 8-8-2 (1975), and in Norwest's home state (before its merger with Wells Fargo), Minn. Stat. § 334.01. This Court has broad discretion in whether to award prejudgment interest. In re Vic Bernacchi & Sons, Inc., 170 B.R. 647 (Bankr. N.D. Ind. 1994). The Court concludes prejudgment interest should be paid to every plaintiff who has paid some or all of the attorneys fee posted to his or her account. The debtor has been deprived of the use of that money since payment. Since this is a case based strictly on federal law and involves plaintiffs from every state, the most appropriate interest rate to use is 28 U.S.C. § 1961(a), the federal prejudgment interest statute.

J.

Attorneys Fees

The parties have agreed that attorneys fees will be determined at a later hearing.

CONCLUSION

Undisclosed proof of claim preparation attorneys fees cannot be posted to or collected from bankruptcy debtors. Such fees, if posted or collected, are improper under the Bankruptcy Code, particularly 11 U.S.C. § 506(b).
IT IS ORDERED:

1. The motions of ***Norwest*** Mortgage, Inc. for judgment on partial findings and for a judgment at the close of the evidence are DENIED.

2. ***Norwest*** Mortgage is enjoined from posting all undisclosed proof of claim preparation attorneys fees to the account of any mortgagors who filed chapter 13 bankruptcy cases from January 1, 1994 to the current date.

3. ***Norwest*** Mortgage shall expunge from the account of any mortgagor who filed chapter 13 on January 1, 1994 to date any undisclosed proof of claim preparation attorneys fee.

4. ***Norwest*** Mortgage is ordered to refund to the class all undisclosed proof of claim preparation attorneys fees collected from mortgagors who filed chapter 13 cases from January 1, 1994 to date together with prejudgment interest pursuant to 28 U.S.C. § 1961(a) for the period from the date of collection to the date of refund to the debtor.

5. The plaintiffs are awarded exemplary damages of $2,000,000 for ***Norwest*** Mortgage's improper, undisclosed assessment of fees to debtors' accounts.

6. ***Norwest*** shall search its records for the names and last known addresses of all members of the class and provide that list to plaintiffs' counsel within ninety days of this order.

7. A hearing on attorneys fees to be awarded to plaintiffs' counsel shall be held on

October 22, 2002 at 1:00 p.m. in Courtroom 2, U.S. Bankruptcy Court, 201 St. Louis Street, Mobile, AL 36602.

Dated:

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MARGARET A. MAHONEY

CHIEF BANKRUPTCY JUDGE

2. *Rodriguez v. Countrywide Home Loans, Inc.*, Slip Op., Docket No. B-09-070 (S.D. Tex. Dec. 3, 2009)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

YDALIA RODRIGUEZ, MARIA ANTONIETA HERRERA, DAVID HERRERA, LUCY MORENO, ALFONSO MORENO,	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. B-09-070
	§	
COUNTRYWIDE HOME LOANS, INC.,	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Before this Court are the objections to a Report and Recommendation, which denies Defendant's Motion to Withdraw the Reference (Docket No. 1). For the reasons set forth below, the Court adopts the recommendation and DENIES the Defendant's motion to Withdraw the Reference.

I. PROCEDURAL HISTORY

Plaintiffs Ydalia Rodriguez, Maria Antonieta Herrera, David Herrera, Lucy Moreno, and Alfonso Moreno (Plaintiffs) are former Chapter 13 debtors who either have or had mortgage contracts with Defendant Countrywide Home Loans, Inc. (Countrywide). Each plaintiff had a Chapter 13 plan confirmed by the United States Bankruptcy Court for the Southern District of Texas. After confirmation, each plaintiff made the payments required under their Chapter 13 plans and received a discharge from bankruptcy. Plaintiffs allege that, after receiving their discharges, Countrywide sought to collect fees and expenses it had allegedly incurred, but not disclosed, during the pendency of the Plaintiffs' Chapter 13 proceedings and that Countrywide also allegedly failed to obtain approval for these fees or expenses from the bankruptcy court.

Based on these outstanding fees and expenses, Countrywide allegedly threatened to foreclose, and in some cases actually foreclosed, on the Plaintiffs' homes when they did not pay the accumulated charges.

Plaintiffs filed an adversary proceeding against Countrywide as part of Plaintiff Rodriguez's Chapter 13 bankruptcy case asserting that the collection of these post-petition, pre-discharge fees without prior disclosure or approval to the bankruptcy court violated the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Plaintiffs' confirmed plans. Plaintiffs also contend that the fees and expenses charged were unreasonable. Plaintiffs further claim that Countrywide used improper accounting methods in allocating mortgage payments they made during the pendency of their bankruptcy cases. Plaintiffs seek to certify two district-wide and nationwide classes of debtors with respect to each of these claims. [1]

Countrywide filed a Motion to Dismiss (Bankr. Docket No. 63) and Motion to Withdraw the Reference (Docket No. 64) in the bankruptcy court. The Motion to Dismiss was denied, in part, by the bankruptcy court. *Rodriguez v. Countywide Home Loans, Inc. (In re Rodriguez)*, 396 B.R. 436 (Bankr. S.D. Tex. 2008) (severing certain issues for consideration on summary judgment). The bankruptcy court issued a Report and Recommendation (Report) with respect to the Motion to Withdraw the Reference recommending that this Court deny the motion.

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[1] Pursuant to a Case Management Order issued by the bankruptcy court, discovery is currently limited to the merits of the individual Plaintiffs' claims and the potential certification of the two Southern District of Texas classes. The distinctions between the two classes are not relevant to the resolution of Countrywide's Motion to Withdraw the Reference.

II. CHAPTER 13, MORTGAGES, AND POST-PETITION EXPENSES

There is currently a split among courts on how mortgage lenders may collect post-petition, pre-discharge fees in Chapter 13 plans. Resolution of this split, if proper on a motion to withdraw the reference, could affect whether withdrawal is appropriate. Chapter 13 protects mortgage contracts, but at the same time, enables a debtor to eliminate past arrearages owed on a mortgage. Mortgage contracts may not be modified by a Chapter 13 plan. *See* 11 U.S.C. § 1322(b)(2). A Chapter 13 debtor, however, is given the opportunity to pay off arrearages owed on a mortgage. *Id.* § 1322(b)(5). Lenders often incur fees and expenses in order to protect their security interest in a debtor's home during the pendency of a Chapter 13 case. *See Rodriguez v. Countywide Home Loans, Inc. (In re Rodriguez)*, 396 B.R. 436, 441 (Bankr. S.D. Tex. 2008). These fees and expenses are permitted under the mortgage contracts. *Id.* The split arises with respect to whether the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure require a lender to provide the debtor or the bankruptcy court with notice of these post-petition, pre-discharge fees and expenses and whether such fees and expenses must be approved by the bankruptcy court prior to collection. *Compare Padilla v. Wells Fargo Home Mortgage, Inc. ("Wells Fargo")*, 379 B.R. 643 (Bankr. S.D. Tex. 2007), *with Padilla v. GMAC Mortgage Corp. ("GMAC")*, 389 B.R. 409 (Bankr. E.D. Pa. 2008).

a. *The Wells Fargo Case - Disclosure and Approval Required*

In *Wells Fargo*, the United States Bankruptcy Court for the Southern District of Texas held that a lender must disclose and seek bankruptcy court approval of fees and expenses charged post-petition and pre-discharge.[2] *Wells Fargo*, 379 B.R. at 659. Both notice and approval of the fees must occur before discharge. *Id.* The court concluded that, post-petition and pre-confirmation, 11 U.S.C. § 506(b) and Federal Rule of Bankruptcy Procedure 2016(a) govern a mortgage lender's ability to collect fees and expenses. *Id.* at 654. Section 506(b) authorizes oversecured creditors to recover interest and reasonable fees and expenses that accrue between the petition date and plan confirmation. *Id.* (citing § 506). Oversecured lenders' requests for fees and expenses are closely scrutinized by bankruptcy courts through Rule 2016(a) applications. *Id.* Rule 2016(a) provides, in pertinent part:

> An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested . . . . The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity.

Fed. R. Bankr. P. 2016(a). The *Wells Fargo* court held that Rule 2016(a)'s plain language requires creditors to file an application with the bankruptcy court (i.e., disclose fees and expenses charged) and then obtain court approval before collecting fees and expenses incurred post-petition, but prior to plan confirmation. *Wells Fargo*, 379 B.R. at 655 (citing *Jones v. Wells Fargo Home Mortgage*, 366 B.R. 584, 594–95 (Bankr. E.D. La. 2007)). The court rejected the lender's argument that Rule 2016(a) only applies to entities seeking reimbursement for services on behalf of the estate, finding that Rule 2016(a) does not contain any such limitation. *Id.*

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[2]The United States District Court for the Southern District of Texas adopted this reasoning in a similar case. *See Cano v. GMAC Mortgage Corp.*, No. 09-129 (S.D. Tex. Sept. 29, 2009).

The *Wells Fargo* court concluded that, following confirmation, 11 U.S.C. § 1322(b)(2), Rule 2016(a), the confirmation order, and applicable non-bankruptcy law control how fees and expenses may be collected. *Id.* at 655–56. While § 1322(b)(2) "requires a confirmed plan to preserve a lenders' pre-petition rights under its pre-petition contract . . . [a] lender's *exercise* of contract rights is not without its limits." *Id.* The court held that Rule 2016(a) is applicable post-confirmation as its language contains no limitation on its applicability. *Id.* at 656. The *Wells Fargo* court noted that Rule 2016 does not deny or modify a lender's contractual rights to charge and collect post-petition expenses in violation of § 1322(b)(2), but merely provides the procedural method for asserting those rights during bankruptcy. *Id.*

The court also held that § 1322(b)(2) incorporated the lenders' pre-petition contractual rights into the confirmed Chapter 13 plan. *Id.* at 659 (citing *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 328 (1993)). Since Texas law and the mortgage contracts only permitted the collection of those fees and expenses that were reasonable and necessary, *Wells Fargo* held that these limitations were incorporated into the Chapter 13 plan by § 1322(b)(2). Thus, to the extent the lenders collected fees and expenses that were not reasonable under Texas law or authorized by their contracts, the lenders also violated the Chapter 13 plan. *Id.* at 661. To enforce this term of the plan, *Wells Fargo* held that the bankruptcy court, the trustee and the debtors had to be informed of the lender's charges, which would be done by virtue of the Rule 2016 application. *See id.*

Finally, the court in *Wells Fargo* noted that debtors could not realistically obtain a "fresh start" if mortgage lenders could charge a debtor's account without disclosure. *Id.* Once debtors pay all of the "cure" payments required by their plans, the lenders could not "deny them the fresh start to which they are entitled." *Id.* Without Rule 2016(a) applications, the bankruptcy courts, trustees, and debtors would lack any meaningful ability to ensure this "fresh start." *Id.* at 659. The *Wells Fargo* court therefore concluded that Rule 2016(a) applies to all fees and expenses charged post-petition, pre-discharge and requires lenders to disclose and seek approval of fees and expenses before discharge. *Id.*

b. *The GMAC Case - No Disclosure or Approval Requirement*

The *GMAC* court initially noted that for a notice or approval requirement to exist, the debtor had to establish the lender had a legal duty to obtain court approval of post-petition legal expenses or at least provide the debtor notice that such expenses were being charged and that the failure to provide notice or seek approval prohibited collection of the charges. 389 B.R. 409, 434 (Bankr. E.D. Pa. 2008). The court observed that neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure "address directly the mechanics of the debtor's postpetition contractual performance within the chapter 13 rehabilitation environment." *Id.* The *GMAC* court disagreed with the premise that 11 U.S.C. § 506(b) required notice and approval of fees that a lender does not attempt to collect until after discharge. *Id.*

According to *GMAC*, this premise fails to consider the differences between Chapter 13 plans that propose to fully satisfy or "payoff" a secured claim under § 1322(a)(5) and plans that "cure" secured claims under § 1322(b)(5). *Id.* at 440. A "payoff plan" requires the debtor to pay off the entire secured claim and then the debtor is discharged from the underlying debt. *Id.* (citing §§ 1325(a)(5)(B)(II), 1328(a)). A secured creditor that fails to seek fees and expenses during the pendency of the payoff plan loses the ability to collect those fees after discharge. *Id.* A "cure plan" corrects arrearages owed on a secured claim pursuant to § 1322(b)(5). *Id.* After completion of the plan, there is no discharge of the debt and discharge reinstates the pre-petition contract between the lender and debtor. *Id.* (citing § 1328(a)(1)). The court concluded:

> Because there is no discharge and the parties' contract passes through the chapter 13 case unaffected, it follows that after the conclusion of the bankruptcy case, the secured creditor may collect all charges lawfully falling due under the contract that were not paid during the pendency of the bankruptcy plan. For that contractual right to be cut off, there must be a source of authority that imposes some type of procedural deadline in the bankruptcy case.

Id.

GMAC held that neither § 506(b) nor § 1322(b)(5) contain an express notice or deadline restriction. *Id.* at 441. According to *GMAC*, section 1322(b)(5) pertains only to a debtor's obligation to cure arrearages and imposes no obligations on the lender. *Id.* In the absence of an express statutory intent to impose a procedural notice or deadline restriction on creditors, the *GMAC* court found no justification for implying any such deadline. *Id.* In further support of this holding, *GMAC* noted that other courts have found it necessary to impose notice and approval procedures for fees and expenses charged by mortgage lenders during bankruptcy through rules of court or provisions in Chapter 13 plans. *GMAC*, 389 B.R. at 441 (citing, e.g., Local Bankruptcy Rule 3070-1(B) (Bankr. S.D. Fla.); *In re Watson*, 384 B.R. 697, 699 (Bankr. D. Del. 2008)). Lastly, *GMAC* observed that, by its plain language, Rule 2016(a) only applies to creditors seeking legal expenses "from the bankruptcy estate." *Id.* at 443. Rule 2016(a) therefore could not apply to impose any requirements on a lender who sought payment post-discharge, when the bankruptcy estate ceased to exist by operation of law. *Id.* (citing 11 U.S.C. § 554(c)).

The court in *GMAC* acknowledged, but disagreed, with the holdings in *Wells Fargo* and similarly decided cases:

> From a policy perspective, a rational, and perhaps even compelling case, can be made that the bankruptcy system should impose

> disclosure and/or other procedural requirements on a secured creditor's right to assess legal expenses arising postpetition in a case in which the creditor's claim is being treated and cured in a confirmed chapter 13 plan through 11 U.S.C. § 1322(b)(5). . . .
>
> Nevertheless, whatever merits . . . the policy arguments may have, I find no source of law that imposes a requirement that a secured creditor provide a debtor with notice of postpetition legal expenses . . . . In short, I am not persuaded that the policy argument is grounded sufficiently in either the Bankruptcy code or the rules of court to afford it the force of law.

Id. at 436.

III. MANDATORY WITHDRAWAL OF THE BANKRUPTCY REFERENCE

A. Standard of Review

A district court must withdraw an adversary proceeding "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d). The ambiguity of the term "consideration" has generated two standards of review concerning mandatory withdrawal. *Compare In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 952 (7th Cir. 1996), *with Laborers' Pension Trust Fund-Detroit & Vicinity v. Kiefer (In re Kiefer)*, 276 B.R. 196, 199–200 (E.D. Mich. 2002). The majority of courts interpret the provision restrictively, finding withdrawal mandatory only when a claim or defense entails "material and substantial consideration" of non-Bankruptcy Code federal law. *See In re Vicars Ins. Agency, Inc.,* 96 F.3d at 952; *Levine v. M&A Custom Home Builder & Developer*, 400 B.R. 200, 203 (S.D. Tex. 2008). These courts hold that § 157(d) cannot be given its broadest literal reading "for sending every proceeding that required passing 'consideration' of non-bankruptcy law back to the district court would 'eviscerate much of the work of the bankruptcy courts.'" *In re Vicars Ins. Agency, Inc.*, 96 F.3d at 952 (quoting *Adelphi Inst. v. Terranova*, 112 B.R. 534, 536 (S.D.N.Y. 1990)). This premise finds support from the legislative history establishing § 157(d) which indicates the provision is to be interpreted narrowly. *See id.* The *Vicars* court noted that permitting withdrawal when any non-bankruptcy federal question is implicated, even in a minor way, and a party requests withdrawal, would "encourage delaying tactics (perhaps further draining the resources of the debtor), forum shopping, and generally unnecessary litigation." *Id.* This could not have been the intent of Congress in establishing § 157(d). *See id.* Each district court in the Fifth Circuit that has considered the issue, including those in the Southern District of Texas, has adopted the "material and substantial consideration" test.[3] *See Levine*, 400 B.R. at 203; *Harris v. Washington Mutual Home Loans, Inc. (In re Harris)*, 312 B.R. 591, 595 (N.D. Miss. 2004); *Lifemark Hospitals of Louisiana, Inc. v. Liljeberg Enters., Inc. (In re Liljeberg Enters., Inc.)*, 161 B.R. 21, 24 (E.D. La. 1993).

Two district courts have rejected the substantial and material test in favor of a broad, literal interpretation of § 157(d) that would require withdrawal anytime a non-bankruptcy federal law is involved and a party requests withdrawal. *In re Kiefer*, 276 B.R. at 199–200; *see also Martin v. Friedman*, 133 B.R. 609, 612 (N.D. Ohio 1991). This theory relies on the literal language of the statute and notes the absence of any qualifying or narrowing term associated with the term "consideration." *See id.* The *Kiefer* court rejected the "evisceration" argument, finding that the requirement in the statute of a petition for withdrawal was a sufficient barrier to any possible harm to the overall jurisdiction of bankruptcy courts.

The majority interpretation appears to best capture the actual meaning of § 157(d), given the provision's legislative history and the potential for abuse from a broader reading.

[3] The Fifth Circuit has not yet addressed the standard to be applied to mandatory withdrawal.

Countrywide, apart from identifying the contrary case law, has not provided any compelling reason for this Court to depart from the restrictive interpretation of § 157(d) adopted by the district courts in this circuit and the majority of courts nationwide. The Court therefore will apply the "substantial and material" standard to Countrywide's request for mandatory withdrawal.

To find that a claim involves "substantial and material consideration" of non-bankruptcy federal law, the court must find the claim will involve an interpretation of the federal law rather than the mere application of well-settled law. *In re Vicars Ins. Agency, Inc.*, 96 F.3d at 953–54 (citing *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991)). Withdrawal is thus mandatory "when the court must undertake analysis of significant open and unresolved issues regarding the non-title 11 law." *Id.* at 954.

B. Discussion

Countrywide contends that even under the "substantial and material" test, withdrawal is mandatory in this action because resolution of the Plaintiffs' claims requires consideration of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601–2617. RESPA governs the administration of escrow accounts in the servicing of home mortgage loans. *See* § 2609; 24 C.F.R. § 3500.17. Urging this Court to adopt and apply *GMAC*, Countrywide contends that absent notice and approval requirements in the Bankruptcy Code or Rules, resolution of the Plaintiffs' claims will turn on the contracts and RESPA's notice and accounting provisions. *See, e.g.*, § 3500.17(f)(3)–(5), (i)(2) (exempting lenders from providing a bankrupt borrower annual escrow statements and requiring lenders to provide escrow account payment histories to debtors within ninety days of their accounts becoming current).

Plaintiffs rely on *Wells Fargo* and similarly decided case law in asserting that their claims sound solely in the procedural limitations imposed on lenders by the Bankruptcy Code and Rules. Plaintiffs also note that they have not pleaded a cause of action based on RESPA, are not seeking any recovery under RESPA, nor are they raising any state-law claims that may be preempted by RESPA. Countrywide has not asserted RESPA as an affirmative defense.

The Report and Recommendation before this Court follows the *Wells Fargo* finding of notice and approval restrictions on the collection of fees under the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2016(a).[4] The Report concludes that, at most, it may have to apply RESPA to understand how payments were allocated, but that such application would only involve an application of settled law. *See also Anderson v. Countrywide Home Loans, Inc. (In re Anderson)*, 395 B.R. 7, 8 (E.D. Mich. 2008) (noting when reviewing similar claims that "[t]he mere fact that . . . RESPA may be 'implicated' . . . does not suffice to require withdrawal of the reference. . . . Countrywide has not demonstrated that the bankruptcy court will be required [to] make a 'significant interpretation' of these statutes [including RESPA], or that it will have to do anything more than apply established law to the facts of this particular case").

Even if the bankruptcy court finds that RESPA were to apply to the Plaintiffs' claims, Countrywide has not identified any substantial, unsettled questions of law regarding notice or approval under RESPA. Assuming *GMAC* applies and there are no notice or approval restrictions under the Bankruptcy Code, the bankruptcy court would appear only to have to apply the established law concerning RESPA to the Plaintiffs' claims. Countrywide then does not

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[4]As noted earlier, a district court in the Southern District of Texas has reached this conclusion in a similar case. *See Cano v. GMAC Mortgage Corp.*, No. 09-129 (S.D. Tex. Sept 29, 2009).

appear to have demonstrated that withdrawal of the reference is mandatory; it has not identified any claims or defenses that will require "substantial and material" consideration of non-bankruptcy federal law.

IV. PERMISSIVE WITHDRAWAL

A. Standard of Review

If withdrawal of the reference is not mandatory, 28 U.S.C. § 157(d) also grants a court discretion to "withdraw, in whole or in part, any case or proceeding . . . for cause shown." § 157(d). In determining whether "cause" exists, the court weighs the following factors: Are the proceedings core or non-core? Do the proceedings involve a jury demand? Would withdrawal further uniformity in bankruptcy administration? Would withdrawal reduce forum-shopping and confusion? Would withdrawal foster economical use of resources? Would withdrawal expedite the bankruptcy process? *Levine v. M&A Custom Home Builder & Developer, LLC*, 400 B.R. 200, 203 (S.D. Tex. 2008) (citing *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 999 (5th Cir. 1985)).

B. Nature of the Proceedings

The bankruptcy court makes the initial determination of the core status of the proceedings[5], however, the district court conducts a *de novo* review of the bankruptcy court's findings.[6] *Mirant Corp. v. The Southern Co.*, 337 B.R. 107, 115 n.13 (N.D. Tex. 2006) (citing

[5] The bankruptcy court held that these proceedings were core under 28 U.S.C. § 157(b)(2). *Rodriguez v. Countrywide Home Loans (In re Rodriguez)*, 396 B.R. 436, 447 (Bankr. S.D. Tex. 2008).

[6] If a matter is non-core, the bankruptcy court may issue final orders and judgments only with the consent of the parties. *In re OCA, Inc.*, 2006 WL 4029578, at *3 (E.D. La. Sept. 19, 2006) (citing *Michaelesco v. Shefts*, 303 B.R. 249, 252 (D. Conn. 2004)); *see Vola v. Enron Oil & Gas Co.*, 2007 U.S. Dist. LEXIS 38997, at *9 (S.D. Tex. May 29, 2007). A bankruptcy court may make findings of fact and conclusions of law with respect to non-core proceedings. *In re OCA, Inc.*, 2006 WL 4029578, at *3 (citing *In re United States Lines, Inc.*, 197 F.3d 631, 636 (2d

28 U.S.C. § 157(b)(3)). The term "proceedings" refers to "specific claims, causes of actions, or grounds for relief, and not to the entire action." *Id.* at 116 (citing *Ralls v. Docktor Pet Ctrs., Inc.*, 177 B.R. 420, 425 (D. Mass. 1995)). This Court must therefore make an independent determination as to the core status of each cause of action asserted in the complaint. *Id.*

The Bankruptcy Code does not define the terms "core" and "non-core", however, the core status of a proceeding depends on "both the form and substance of the proceeding." *Id.* at 117 (quoting *Wood v. Wood* (*In re Wood*), 825 F.2d 90, 97 (5th Cir. 1987)). A core proceeding either invokes "a substantive right provided by title 11 or . . . [is a claim] that, by its nature, could arise only in the context of a bankruptcy case." *In re Wood*, 825 F.2d at 97; *see In re Luonga*, 259 F.3d 323, 332 n.7 (5th Cir. 2001) (finding the main objectives of the Bankruptcy Code to include "ensuring the efficient administration and equitable distribution of the estate for the benefit of the creditors and protecting the debtor's right to a fresh start"); *cf. In re Wood*, 825 F.2d at 97–98 (finding a claim based on liability under state law that could be brought outside the context of bankruptcy was non-core). Section 157(b)(2) provides a non-exclusive listing of core proceedings. *Id.* at 116. Core proceedings include:

> (A) matters concerning the administration of the estate; . . .
>
> (I) determinations as to the dischargeability of particular debts; . . .
>
> (L) confirmation of plans; . . .

Cir. 1999)). These determinations are subject to *de novo* review by the district court. *Id.* "In this sense, the bankruptcy court acts like a magistrate court with respect to proceedings that are related but non-core." *Id.* The classification of a proceeding as core or non-core therefore determines whether a bankruptcy court has adjudicatory jurisdiction or has a restricted judicial role over the claims. *Mirant Corp.*, 337 B.R. at 115–16 (citing 28 U.S.C. §§ 157(b)(1), (c)(1)).

> (O) other proceedings affecting . . . the adjustment of the debtor-creditor or the equity security holder relationship. . .

28 U.S.C. § 157(b)(2).

Where core issues predominate and the objectives of the Bankruptcy Code will potentially be impaired, a district court should generally deny a motion to withdraw the reference and permit the bankruptcy court to retain jurisdiction. *See Mirant Corp.*, 337 B.R. at 119; *In re Efficient Solutions, Inc.*, 2000 WL 1876356, at *6 (E.D. La. Dec. 20, 2000) (finding that when core and non-core issues are inextricably intertwined, the core proceedings may predominate); *see also In re Luonga*, 259 F.3d at 332. *But see In re The Babcock & Wilcox Co.*, 2000 WL 422372, at *4 (E.D. La. Apr. 17, 2000) (holding that withdrawal of the reference may be appropriate to have issues addressed by a court with undisputed jurisdiction).

The Plaintiff's First Amended Complaint asserts the following general claims against Countrywide.

1. *Collection of Pre-Petition Deficiencies (Counts I, II, III)*

Plaintiffs allege that Countrywide engaged in improper accounting methods and sought to collect pre-petition deficiency amounts in violation of the confirmed plans[7], orders of the bankruptcy court, and the Bankruptcy Code. Plaintiffs assert that 11 U.S.C. § 105(a) of the Bankruptcy Code grants power to the bankruptcy court to remedy these violations through contempt sanctions, monetary relief, punitive damages, attorneys' fees and costs, and injunctive relief. As alleged, this claim addresses the administration of the bankruptcy estate and the

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[7] Plaintiffs assert that the confirmed plans amounted to a contract between Countrywide and themselves. Based on Countrywide's alleged violations of those plans by improperly collecting pre-petition deficiencies, Plaintiffs have brought a breach of contract claim against the Plaintiffs.

substantive rights afforded to debtors by the Bankruptcy Code. These claims appear to be unrelated to the collection of *post*-petition fees at issue in *Wells Fargo* and *GMAC* discussed *infra*. As these "pre-petition deficiency" claims appear to be based on substantive rights afforded by the Bankruptcy Code and/or are claims that could arise only in the context of a bankruptcy case, these claims would appear to be core.

2. *Collection of Post-Petition Undisclosed, Unapproved Fees (Counts IV, V, VI, VII, VIII, IX, X, XI, XII, XIII)*

Plaintiffs also claim that Countrywide is collecting debts in violation of the Bankruptcy Code. Specifically, Plaintiffs assert Countrywide failed to disclose and obtain approval of certain fees or expenses incurred post-petition, but prior to discharge. Plaintiffs contend, through a variety of claims, that the collection of these fees post-discharge was *per se* unreasonable and in violation the confirmed Chapter 13 plans (and any contract formed by the confirmation of said plans), the Bankruptcy Code, and the Federal Rules of Bankruptcy Procedure. Essentially, Plaintiffs seek relief through the procedural protections set out in *Wells Fargo* and similar cases. Plaintiffs assert the bankruptcy court can provide relief for these violations through, *inter alia*, 11 U.S.C. § 105 by awarding the Plaintiffs contempt sanctions, monetary relief, punitive damages, attorneys' fees and costs, injunctive and declaratory relief.

The Plaintiffs assert, and the Report concurs, that the essence of the Plaintiffs' claims is whether the Bankruptcy Code, the Bankruptcy Rules, and the confirmation orders provide procedural restrictions that prohibit Countrywide's collection of undisclosed, unapproved fees after the debtor's discharge from bankruptcy. Adopting these restrictions would make these claims based on substantive rights provided by the Bankruptcy Code, which would appear to make all of these claims core. It therefore would appear that finding *Wells Fargo* to be applicable would result in these claims being considered core. Since these claims predominate the action, the action would be considered predominately core which would weigh against withdrawal of the reference.

Countrywide asserts that *GMAC* provides the proper interpretation of the procedural protections, or lack thereof, provided by the Bankruptcy Code. If the Court were to adopt the *GMAC* interpretation, Plaintiffs' claims related to the post-petition, undisclosed, unapproved fees would rely, in substance, on the mortgage contracts, state law, and RESPA. Were the Court to follow *GMAC*, the substance of the Plaintiffs' claims would appear to be non-core. As these fee and expense claims form the primary basis of the Plaintiffs' actions, these non-core claims would then predominate, justifying withdrawal of the reference.

3. *Attorneys' Fees*

Plaintiffs lastly seek attorneys' fees pursuant to Texas Civil Practice and Remedies Code § 38.001. Countrywide asserts this is clearly a non-core, state law claim. The Plaintiffs contend, and the Report agrees, that the attorneys' fees provision of the Texas Civil Practice and Remedies Code merely provides a remedy in connection with a cause of action, not a separate cause of action. The Court agrees that § 38.001 does not create its own cause of action. Plaintiffs assert they are simply seeking attorneys' fees for their claims that Countrywide violated the Bankruptcy Code, the Bankruptcy Rules, other associated orders, and/or their contract with the debtors. Countrywide has not provided authority indicating that seeking a state-law remedy as a part of a core claim can convert that proceeding into a non-core claim. Should the Court find the substance of the Plaintiffs' claims to be core, the remedy or relief sought would not appear to convert the substantive nature of those claims into non-core claims.

The core claims would still center around the Bankruptcy Code and substantive rights granted thereunder.

4. *Conclusion*

Since the Court adopts the procedural restrictions adopted in *Wells Fargo*, all of the Plaintiffs claims, with the exception of the state attorneys' fees remedy, are considered core. The core nature of the proceedings predominates, weighing against withdrawal of the reference.

C. Jury Demand

"If the right to a jury trial applies in a proceeding that may be heard . . . by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties." 28 U.S.C. § 157(e). As a result, when one party requests a jury trial, but does not consent to conducting the trial in the bankruptcy court, this may justify withdrawal of the reference. *See In re Nu Van Tech., Inc.*, 2003 WL 23785355, at *2 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 47–48 (1989)); *see In re Clay*, 35 F.3d 190, 195, 197–98 (5th Cir. 1994). Here, neither party has made a jury demand. Therefore, withdrawal of the reference on these grounds is not applicable and does not weigh toward withdrawal of the reference.

D. Judicial Economy

Where the bankruptcy court is intimately familiar with the types of claims filed as well as the specifics of the claim, the potential expediency of the bankruptcy court resolution of the issues favors denial of motion to withdraw the reference. *In re The Babcock & Wilcox Co.*, 2001 WL 725138, at *7 (E.D. La. June 26, 2001); *In re Efficient Solutions, Inc.*, 2000 WL 1876356, at *6 (E.D. La. Dec. 20, 2000) (denying withdrawal, in part, because withdrawal would serve only to prolong the litigation and expend valuable party and judicial resources). *But see Liljeberg Enters., Inc.*, 2000 WL 63307, at *4 (holding withdrawal supported where district court was familiar with the claims and the relationship of the parties); *Mirant Corp.*, 337 B.R. at 123 (holding that when a claim will neither interfere with nor advance the bankruptcy process, expediting the bankruptcy process is not relevant to the withdrawal decision).

This adversary proceeding has been pending in the bankruptcy court since February 26, 2008. Over the past year, the bankruptcy court has held many hearings, issued opinions concerning and bifurcating a motion to dismiss, and set a class certification hearing for December 2009. The bankruptcy court is very familiar with this case, the parties, and the claims. Further, that court is intimately familiar with the applicable Code provisions. The Report expressly declined to consider its familiarity with the case in its recommendation against withdrawal of the reference, noting that Countrywide filed its motion for withdrawal of the reference only two months after the case was filed. The bankruptcy court felt it improper to consider its familiarity with the issues presented when it only became so familiar due to the ten-month delay in ruling. This Court finds that course to be both prudent and judicious, however, this lack of conclusion does not necessarily weigh in favor of withdrawal.

The Court must also look to whether the motion for withdrawal is an attempt at forum-shopping. *In re Liljeberg Enters., Inc.*, 2000 WL 63307, at *4; *see Dimitri v. Granville Semmes*, 2000 WL 1843495, at *4 (E.D. La. Dec. 14, 2000). When a movant has been consistent in its position that particular proceedings belong in the district court, however, there is no support for forum shopping. *Travelers Indem. Co. v. The Babcock & Wilson Co.*, 2002 WL 100625, at *4 (E.D. La. Jan. 23, 2002). Countrywide has consistently asserted that these proceedings should be withdrawn to this Court, which discourages a finding of forum-shopping. Countrywide, however, also asserts that the split between the *GMAC* and *Wells Fargo* line of cases requires superior court guidance. The United States Bankruptcy Court for the Southern District of Texas has uniformly adopted the procedural restrictions noted in *Wells Fargo*, as has the McAllen District Court in *Cano v. GMAC Mortgage Corp.*, No. 09-129 (S.D. Tex. Sept 29, 2009). *See In re Rangel*, 2009 WL 1531961 (Bankr. S.D. Tex. May 29, 2009); *In re Wilborn*, 404 B.R. 841 (Bankr. S.D. Tex. 2009); *Wells Fargo*, 379 B.R. 643 (Bankr. S.D. Tex. 2007). Countrywide's motion for withdrawal of the reference could be viewed as an attempt to "appeal" these decisions without taking the formal step of seeking interlocutory review (or final appellate review) of these holdings. Viewed in that regard, Countrywide's actions seeking superior court guidance could be viewed by some as a form of forum-shopping.

Countrywide lastly asserts there are several appellate and class action issues related to judicial economy that justify withdrawal of the reference.

1. *Review of Class Action Certification*

Countrywide contends that unless the reference is withdrawn, it will lose court of appeals review over the "death knell" issue of class certification. Federal Rule of Civil Procedure 23(f) authorizes circuit courts of appeal to consider interlocutory appeals of class certification decisions. Fed. R. Civ. P. 23(f). Rule 23(f), however, applies only to district court certification orders and not to bankruptcy court orders. *See Weber v. United States*, 484 F.3d 154, 160–62 (2d Cir. 2007)*; Chrysler Fin. Corp. v. Powe*, 312 F.3d 1241, 1246 (11th Cir. 2002). A party may still appeal a bankruptcy court's certification decision to the district court. *See* 28 U.S.C. §

158(a); *Weber*, 484 F.3d at 161–62; *Powe*, 312 F.3d at 1246; Fed. R. Bankr. P. 7023 (providing that Rule 23 "applies in adversary proceedings"). The *Powe* court noted that nothing in Rule 23(f) suggested "that an appeal to the court of appeals should trump district court appellate jurisdiction over bankruptcy cases." *Powe*, 312 F.3d at 1246; *see Weber*, 484 F.3d at 161–62. "In sum, the appellate avenue addressed by Rule 23(f) is already available to petitioners through an interlocutory appeal to the district court." *Powe*, 312 F.3d at 246.

Further, a decision of a bankruptcy court may be directly appealed to the court of appeals in certain specified circumstances and when the court of appeals authorizes such an appeal. *See* 28 U.S.C. § 158(d)(2)(A). A court of appeals may also hear appeals of interlocutory orders issued by the district court sitting as appellate court in bankruptcy matters. *In re El Paso Elec. Co.*, 77 F.3d 793, 794 (5th Cir. 1995) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992)).

2. *Costs of Intermediary Appeal*

Countrywide also contends that withdrawal of the reference would eliminate the unnecessary and costly intermediary appeal to the district court under 28 U.S.C. § 158(a). Countrywide identifies one district court that has withdrawn a reference, in part, to eliminate a costly intermediary appeal. *See Abondolo v. GGR Holbrook Medford, Inc.*, 295 B.R. 101, 113 (E.D.N.Y. 2002) (citing *In re Burger Boys*, 94 F.3d at 762; *In re Orion Pictures Corp.*, 4 F.3d at 1101). This case is distinguishable, however, because the claims withdrawn in the *Abondolo* case were non-core, and thus the district court would have had to try those issues *de novo*. Further, the *Abondolo* court only withdrew certain claims/motions, and not the entire case.

3. *Conclusion as to Appellate Issues*

The Report concluded that the appellate concerns identified by Countrywide, though general and applicable to all bankruptcy proceedings, slightly favored withdrawal of the reference. Apart from the precedential nature of a Fifth Circuit ruling on the issue of certification (and other issues) and the costs of adding an appellate step, Countrywide does not identify why this particular case, as opposed to any class action in general that is proceeding in a bankruptcy court, would not receive a satisfactory opportunity to appeal to this Court.

4. *Jurisdiction Over Multi-Debtor Class Actions*

Countrywide asserts bankruptcy courts do not have jurisdiction to preside over multi-debtor class actions. Federal Rule of Civil Procedure 23 authorizes and sets forth the procedures for maintaining class actions. *See* Fed. R. Civ. P. 23. By incorporating Rule 23 into the Bankruptcy Code, Congress "indisputably intended to make procedures related to *prosecuting* a class action" available in bankruptcy proceedings. *Charter Co. v. Charter Co. (In re Charter Co.)*, 876 F.2d 866, 870 (11th Cir. 1989); *see* Fed. R. Bankr. P. 7023 (incorporating Rule 23 into the Rules of Bankruptcy Procedure). Courts thus have upheld the jurisdiction of bankruptcy courts over class actions when the criteria expressed in Rule 23 are satisfied. *See In re Charter* Co., 876 F.2d at 871; *Reid v. White Motor Corp.*, 886 F.2d 1462, 1469–70 (6th Cir. 1989); *Matter of Am. Reserve Corp.*, 840 F.2d 487, 488 (7th Cir. 1988); *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, 404 B.R. 841, 848–49 (Bankr. S.D. Tex. 2009); *In re Iommazzo*, 149 B.R. 767, 775 (Bankr. D.N.J. 1993); *see also Davis v. Davis (In re Davis)*, 194 F.3d 570, 572 (5th Cir. 1999) (citing cases standing for the proposition that class actions are available in adversary proceedings before bankruptcy court).

Several courts have also certified multi-debtor classes. *See In re Wilborn*, 404 B.R. at 869; *In re Montano*, 2007 WL 2688606, at *2 (Bankr. D.N.M. 2007) (citing *Guetling v. Household Fin. Servs., Inc. (In re Guetling)*, 312 B.R. 699, 704 (M.D. Fla. 2004); *Porter v. Nations Credit Consumer Discount Co. (In re Porter)*, 295 B.R. 529, 539 (Bankr. E.D. Pa. 2003); *In re Barrett*, 292 B.R. at 8; *In re Singleton,* 284 B.R. at 325; *Beck v. Gold Key Lease, Inc. (In re Beck)*, 283 B.R. 163, 173 (Bankr. E.D. Pa. 2002); *Williams v. Sears, Roebuck & Co. (In re Williams)*, 244 B.R. 858, 867 (S.D. Ga. 2000); *Nelson v. Providian Nat'l Bank (In re Nelson)*, 234 B.R. 528, 534 (Bankr. M.D. Fla. 1999)). While the permissible scope of a multi-debtor class action in bankruptcy court may be a valid question[8], it appears that a multi-debtor class action may proceed in bankruptcy court.

Countrywide further challenges the bankruptcy court's ability to preside over a putative nationwide class action.[9] Thus far, the bankruptcy court has only permitted discovery and briefing with respect to the certification of a district-wide class action. A hearing as to the certification of the district-wide classes will be held by the bankruptcy court in December. It would appear premature at this time to consider the certification of a nationwide class action as part of this motion to withdraw the reference. Should the bankruptcy court retain jurisdiction over this case, Countrywide could be given leave to address this issue as part of a subsequent

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[8] The Court notes there is a division between bankruptcy courts as to whether they they have the authority to exercise jurisdiction over a nationwide class action of debtors. *Compare Noletto v. Nationsbanc Mortgage Corp. (In re Noletto)*, 244 B.R. 846, 849 (Bankr. S.D. Ala. 2000) (finding bankruptcy courts have jurisdiction), *with Motichko v. Premium Asset Recovery Corp. (In re Motichko)*, 395 B.R. 25, 31 (Bankr. N.D. Ohio 2008) (citing *Singleton v. Wells Fargo Bank, N.A. (In re Singleton*), 284 B.R. 322, 325 (D.R.I. 2002); *Nelson v. Providian Nat'l Bank (In re Nelson)*, 234 B.R. 528, 534 (Bankr. M.D. Fla. 1999)) (holding actions are limited to debtors who obtained their discharge in the same judicial district)).

[9] *See supra* note 6.

motion to withdraw the reference should the bankruptcy court later certify nationwide classes.

5. *Experience with Class Actions*

Countrywide contends that district courts routinely handle class actions and are more experienced with class actions than bankruptcy courts. This Court would note that no court routinely handles class actions. Nevertheless, this factor would appear to favor withdrawal of the reference.

E. Conclusion

The Report concluded that, on the balance, the factors weighed against withdrawal of the reference. It noted that, generally, there may be greater costs in adversary proceedings being tried by bankruptcy courts given the multiple layers of appeal. It held that these costs alone do not justify withdrawal of the reference. The Report also indicated that the class action issues raised did not justify withdrawal of the reference. Overall, the core nature of the proceedings and the familiarity of the bankruptcy court with the types of claims brought weighed in favor of denial of Countrywide's motion.

Countrywide has valid concerns about the costs associated with an intermediary appeal to this Court as well as the precedential value associated with a Fifth Circuit ruling. Countrywide may also have valid concerns about the certification of a nationwide class action, however, this concern would appear to be premature. Countrywide's other concerns about this case proceeding as a class action do not appear to support withdrawal of the reference.

Permissive withdrawal therefore would appear to turn on whether this Court finds *GMAC*'s lack of restrictions are a better interpretation of the Bankruptcy Code and Rules than *Wells Fargo* procedural restrictions, and, if so, whether adopting *GMAC* on a motion to withdraw the reference (as opposed to an appeal) would be appropriate. This Court stands by the *Wells Fargo* analysis. The claims are considered by the Court to be core, and the bankruptcy court's familiarity with these types of claims weighs against withdrawal.

V. CONCLUSION

Withdrawal of the reference is not mandated in this case. In deciding this case, the bankruptcy court will only be required to apply RESPA to understand how payments were allocated. Application of RESPA, a well-established area of law, is by no means "substantial and material" consideration of non-bankruptcy federal law, the requirement for mandatory withdrawal of the reference.

Furthermore, permissive withdrawal is not appropriate in this case. The key question in this regard is whether the Court adopts the *GMAC* interpretation or the *Wells Fargo* interpretation of this fact pattern, the former leading to the conclusion that some of the claims at issue are non-core and withdrawal may, therefore, be appropriate. Since the Court adopts the *Wells Fargo* analysis, however, and holds that the claims at issue are core, permissive withdrawal of the reference is not appropriate. The objections to the Report and Recommendation are hereby DENIED. The Report and Recommendation of the Bankruptcy Court is hereby ADOPTED.

Signed on this, the 3rd day of December, 2009.

Andrew S. Hanen
United States District Judge

CERTIFICATE OF SERVICE

09-20415

WELLS FARGO V. WILBORN

I hereby certify that two copies of this Brief of *Amicus Curiae* National Association of Consumer Bankruptcy Attorneys in Support of Plaintiffs and Seeking Affirmance of the Bankruptcy Court's Decision, with one CD-Rom were sent by Federal Express Next Business Day Delivery to:

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/s/ Ramiro Honeywell
Ramiro Honeywell