**WRITTEN DECISION - NOT FOR PUBLICATION**

ENTERED 5/26/11
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CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

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| In re:<br>Jessie M. Arizmendi,<br>Debtor. | Bk. No. 09-19263-PB13<br>RS No. CNR-2 |
| OneWest Bank FSB, its assignees and/or successors,<br>Moving Party,<br>v.<br>Jessie M. Arizmendi, Debtor; Thomas H. Billingslea, Chapter 13 Trustee; and Indymac Mortgage Services, Junior Lien,<br>Respondents. | MEMORANDUM DECISION |

Jessie M. Arizmendi ("Ms. Arizmendi") filed a chapter 13 case and, based on a proof of claim, ultimately recognized OneWest Bank FSB ("OneWest") as the lender having a claim secured by a lien against her home. She proposed a chapter 13 plan that cured the pre-petition arrearage on this obligation over a five year period. OneWest did not object to her plan notwithstanding that Ms. Arizmendi was not a borrower and notwithstanding that

Ms. Arizmendi acquired an ownership interest in her home pursuant to a pre-bankruptcy transfer of a fractional interest from her daughter-in-law, Frida Vissuet ("Ms. Vissuet"). In the absence of any objection, the Court confirmed Ms. Arizmendi's plan, and she commenced payments thereunder.

Ms. Vissuet, who is a borrower, also took proactive steps to address the default situation. Among other things, she attempted to reduce her monthly payments through a HAMP modification. OneWest established a reduced HAMP trial period payment amount, and Ms. Vissuet made these payments. Eventually, however, OneWest declined Ms. Vissuet's HAMP modification request. But, Ms. Vissuet disputed the basis for the denial and continued to make reduced monthly payments in the HAMP modification amount.

After the collapse of the HAMP modification negotiations, and while OneWest received monthly arrearage curative payments from Ms. Arizmendi and monthly HAMP payments from Ms. Vissuet, OneWest sought relief from the automatic stay to foreclose. OneWest advanced a variety of theories as a basis for relief from stay including an assertion that cause existed based on a lack of good faith in Ms. Arizmendi's bankruptcy filing and bankruptcy plan, a lack of adequate protection, and other cause under section 362(d)(1) of Title 11.[1] As discussed below, OneWest ultimately abandoned its good faith arguments and focused, instead, on other section 362(d)(1) theories.

After careful analysis, and notwithstanding the fact that foreclosure will be devastating for Ms. Arizmendi and, in all likelihood, economically disadvantageous to the party ultimately entitled to loan proceeds, the Court concludes that grounds for stay relief under section 362(d)(1) may exist.

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[1] Hereinafter, references to code sections refer to title 11 of the United States Code, also referred to as the "Bankruptcy Code", unless otherwise specified.

But, the Court also finds that OneWest placed expediency and cost reduction far above its obligation of candor with the Court and, thus, provided the Court with misinformation during the course of this proceeding. The Court concludes that this misconduct renders the OneWest evidence unreliable and justifies a denial of stay relief, albeit without prejudice. This misconduct also requires further inquiry. As a result, the Court will issue an order denying stay relief without prejudice to refiling and will also issue an order to show cause why compensatory and coercive sanctions are not appropriate.

## FACTS

**Initial Loan History.**

On July 24, 2007, Ms. Vissuet obtained a loan in the amount of $360,000 (the "Loan") from Pacificbanc Mortgage ("Original Lender") and executed and delivered a promissory note evidencing the Loan (the "Note"). Ms. Vissuet also executed and delivered a deed of trust securing her obligations under the Note (the "Trust Deed"). Original Lender properly recorded the Trust Deed in the Official Records of the County Recorder of San Diego County and created a lien against the real property described in the Trust Deed (the "Home"). Ms. Vissuet was the sole owner of the Home at the time of the Loan.

The Original Lender no longer asserts an interest in the Note and Trust Deed.

Ms. Vissuet's brother-in-law lived in the Home and initially assisted in Note payments. After his death, Ms. Vissuet lost this assistance, concurrently suffered business reversals, and eventually was unable to make the regularly scheduled Note payments.

**Debtor and Her Relationship With the Home.**

Ms. Vissuet's mother-in-law, Ms. Arizmendi, resided in the Home for approximately six years prior to the Loan and continued to live in the Home after the Loan. Ms. Arizmendi is a frail 86-year-old with hearing loss and difficulty in walking. She appeared in Court in a

wheelchair and even with the assistance of Court-provided auditory devices had difficulty hearing the courtroom proceedings. The Home is modified to accommodate her disabilities.

As Ms. Vissuet's payment problems continued, Ms. Arizmendi became increasingly agitated by the risk they posed to her and the Home. Eventually, Ms. Vissuet and other family members developed a plan to save the Home. On or about November 25, 2010, Ms. Vissuet transferred a fifty percent interest in the Home to Ms. Arizmendi by quitclaim deed and as a gift. She intended to concurrently seek a reverse mortgage secured by the Home and a HAMP modification of the Loan. The reverse mortgage strategy was not successful. Similarly, the HAMP modification attempt did not yield quick results, and OneWest actively pursued foreclosure.

**The Bankruptcy.**

As a result, Ms. Arizmendi, in consultation with her family, initiated a chapter 13 case (the "Case") and listed her 50 percent interest in the Home as an asset of her chapter 13 estate. Her schedule D valued her 50 percent interest in the Home at $289,500 and showed IndyMac Mortgage Services as a substantially undersecured creditor holding a first priority lien against the Home. Mr. Rubin Arizmendi, an attorney frequently appearing before this Court, represented Ms. Arizmendi. Ms. Arizmendi is his mother; Ms. Vissuet is his wife.

Ms. Arizmendi filed a chapter 13 plan (the "Plan") which provided for a five percent dividend to unsecured creditors and for a cure of all arrearage under the Note through regular monthly payments over the five year life of the Plan and in the amount of $485.60 (the "Cure Payment"). Boilerplate language in the Plan states that: "Notwithstanding any other provision of this plan, during this case . . . debtors shall make the usual and regular payments called for by any security agreements supporting non-voidable liens against debtor's real estate . . . in a current manner."

OneWest filed its proof of claim (the "Claim") in the Case on March 13, 2010. OneWest identified itself therein as the creditor (the . . . entity to whom the debtor owes money . . . ).

OneWest received appropriate and timely notice of Ms. Arizmendi's bankruptcy, the Plan, and its opportunity to object to the Plan. OneWest failed to object to the Plan, and the Court confirmed the Plan on March 30, 2010.

**HAMP Modification Issues.**

On or about November 18, 2009, Ms. Vissuet signed a Home Affordable Modification Trial Period Plan (the "HAMP Plan"). The HAMP Plan established a trial period for payments in the amount of $1,395.00 (the "HAMP Payment"). Ms. Arizmendi and/or her family began making these payments in December of 2009 and continue to submit monthly payments in this amount.

OneWest eventually denied the request for a HAMP modification. The propriety of this denial is not squarely before the Court in connection with this motion. The Court notes, however, that OneWest alleged that Ms. Vissuet failed to supply required documents. The Court finds that Ms. Vissuet attempted to comply with OneWest's requirements and believes that she submitted all appropriate documents to OneWest. The Court also finds that Maria Arizmendi believes that she personally sent certain required documents to OneWest. The Court understands that this issue is pending in another court and, again, does not here determine whether all requested documents were actually provided and whether OneWest's HAMP denial otherwise was appropriate. The only evidence before this Court, however, establishes that OneWest received some documents and that Ms. Vissuet believes that she submitted all required documents either personally or through an agent.

In addition to the HAMP Payment, the Debtor made all of the Cure Payments that became due under the Plan as of the close of evidence. Thus, OneWest received monthly post-petition payments totaling $1,880.60. During this same time period, the Note required regular monthly payments, inclusive of impounds, of $2,558.92.[2] Curiously, however, OneWest's witness testified at trial that OneWest received only HAMP Payments, and the witness appeared confused when questioned regarding the Cure Payments. Post-trial briefing ultimately established that the OneWest witness was mistaken in his trial testimony.

**The Relief From Stay Motion.**

On September 1, 2010, OneWest filed its motion for relief from stay (the "Stay Motion"). OneWest sought stay relief under section 362(d)(1) for cause based on alleged post-petition payment defaults, an alleged lack of adequate protection, and allegations that Ms. Arizmendi filed the Case in bad faith. OneWest also sought relief under section 362(d)(2). Given that Ms. Arizmendi confirmed the Plan and that she continues to live in the Home, the Court questioned the appropriateness of relief under section 362(d)(2). It is unnecessary to further consider this topic, however, as OneWest did not pursue its section 362(d)(2) based claims for stay relief at or after the trial.

OneWest supported the Stay Motion with the Declaration of Brian Burnett (the "OneWest Declaration"). In reliance on alleged personal knowledge and on OneWest business records that he allegedly maintained, Mr. Burnett stated under penalty of perjury that OneWest was the real party in interest in connection with the Stay Motion: " . . . as they are the current beneficiary under the terms of a promissory note and/or Deed of Trust attached [to the Declaration]." Mr. Burnett also stated under penalty of perjury that: (a) OneWest received an interest in the Trust Deed pursuant to an assignment attached to the OneWest Declaration (the "Assignment"); and (b) that OneWest is the "holder and in actual

[2] At trial, OneWest's witness estimated the amount as $2,400.00.

physical possession of the original Promissory Note dated July 14, 2007 in the principal amount of $360,000.00 attached hereto as Exhibit "E" . . . " Finally, the OneWest Declaration contained a payment history that failed to include the Cure Payments.

The copy of the Note attached to the OneWest Declaration and the copy of the Note attached to the Claim are identical and are referred to hereafter as the "Unendorsed Note."

The Assignment did not mention any IndyMac entity; MERS, as a nominee of the Original Lender, assigned the Trust Deed and Note directly to OneWest. Neither the Court nor Ms. Arizmendi initially questioned this portion of the evidence. The Court was aware that OneWest obtained IndyMac Bank, FSB assets pursuant to an FDIC receivership, so the reference to IndyMac in the schedules did not alarm the Court, and, indeed, supported the assertion that OneWest had physical possession of the Unendorsed Note and collection rights thereunder as stated in the OneWest Declaration. Similarly, while the Court questioned the ability of the MERS assignment to transfer the Note, the Court viewed this reference as mere surplusage and assumed that the Assignment reflected clean-up of the record as regards the identity of the holder of a beneficial interest under the Trust Deed. The Court acknowledges that there were some irregularities even on this record, but the Debtor did not raise them and the Court's general awareness of the IndyMac/OneWest relationship also indicated that the Court need not inquire further.

**Submission of Documents.**

At the preliminary hearing on the Stay Motion, the Court determined that an evidentiary hearing was necessary, set this matter for trial, and entered a scheduling order. Pursuant to its scheduling order, the Court established deadlines for submission of documents. Both parties, notwithstanding this order, filed untimely documents. Having said this, however, neither party objected to the other party's documents and neither party argued that it was prejudiced by the late submissions. Similarly, while the Court strongly

prefers strict compliance with its orders, the late filings did not impair the Court's ability to prepare for the trial. As a result, the Court accepted all late filed submissions.

**OneWest Trial Testimony.**

At trial, Charles Boyle, an Assistant Vice President in the Default Risk Management Group, Litigation Department of OneWest, testified, among other things, that the beneficiary of the Loan is Freddie Mac. This testimony was not consistent with the OneWest Declaration. Mr. Boyle also testified that he had no knowledge of the Cure Payments.

**Additional Briefing.**

At the trial, the Court carefully considered the demeanor of the various witnesses and the testimony provided. In connection with the trial, the Court also reviewed all other evidence and argument appropriately before the Court. Notwithstanding, however, significant questions continued, and the Court required additional briefing in connection with several issues as outlined in the Order Setting Briefing Schedule, Outlining Preliminary Determinations, and Establishing Procedures for Final Resolution of Issues (Dkt. No. 56) (the "Briefing Order").

OneWest's post-trial documents provided the analysis and argument required by the Briefing Order. But, these documents also contained factual assertions inconsistent with the OneWest Declaration and the Claim. OneWest now provided a standing argument based on a new version of the Note (the "Endorsed Note").[3] The Endorsed Note attached an allonge dated July 24, 2007 evidencing a transfer from Original Lender to "IndyMac Bank, FSB" and bore an endorsement in blank from IndyMac Bank F.S.B. OneWest argued in

[3] OneWest did not file a new declaration authenticating the Endorsed Note. Instead, it attached a copy of the Endorsed Note to its post-trial memorandum and made arguments based on the Endorsed Note.

connection therewith that it had enforcement rights under the Endorsed Note as a holder notwithstanding the admittedly accurate testimony at trial indicating that OneWest is a servicer for Freddie Mac and not the secured creditor. The OneWest post-trial memorandum also references a separate agreement with Freddie Mac, but fails to further evidence or discuss this agreement. The OneWest post-trial memorandum, finally, bases a standing argument on physical possession of the Endorsed Note and OneWest's alleged status as a trust deed beneficiary based on the Assignment.

## DISCUSSION

### 1. Good Faith.

In the Briefing Order, the Court stated its preliminary determination that Ms. Arizmendi did not act in bad faith in connection with the Case. The Court allowed OneWest, notwithstanding this determination, to assert bad faith arguments based on the conduct of Ms. Vissuet and Mr. Arizmendi, a seasoned bankruptcy professional. The Court, however, also voiced the preliminary view that issue preclusion barred OneWest from requesting stay relief based on alleged bad faith as confirmation of the Plan required determinations that the Case was filed in good faith and that the Plan was proposed in good faith. See sections 1325(a)(3) and (7). OneWest, thereafter, abandoned its bad faith arguments.

### 2. OneWest's Adequate Protection Arguments Are Unavailing.

Section 362(d)(1) requires relief from stay when the Court finds cause for the same. While cause is an open ended concept, one specifically enumerated type of cause is a failure of adequate protection of an interest in property. OneWest based its adequate protection argument at trial exclusively on the differential between the HAMP Payment that it admittedly received and the regular monthly payment on the Note. That monthly differential is $1,163.92 at most. As discussed above, the appropriateness and the sincerity of OneWest's position is highly questionable given that the OneWest officer testifying in

support of this proposition apparently was unaware that OneWest also received the Cure Payment. As a result, while a differential exists, it was only $678.32 at most.[4] Thus, the amount Lender received was significantly more than necessary to insure the Home, to cover taxes on the Home, and to reduce the interest accrual to some extent.[5]

A debtor must provide adequate protection in order to safeguard a secured creditor against depreciation in the value of its collateral. *In re Farmer*, 257 B.R. 556, 560 (Bankr. D. Mont. 2000). And, while courts differ as to the relevant valuation date, here the only evidence is that the value of the Home at the petition date and on the Stay Motion filing date remained constant.[6] Thus, adequate protection is not required to protect against a downward change in the market value of the Home. Similarly, the value of collateral may erode if senior liens increase through nonpayment or if obligations entitled to a senior lien remain unpaid. But here, the monthly payments clearly exceed the amount necessary for property taxes such that a tax lien need not occur, and there is no existing senior encumbrance. And finally, the value of collateral may be endangered if collateral is not insured or properly maintained. Here, the monthly payments clearly covered insurance costs, and there was no evidence of waste.[7]

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[4] If the regular payment is $2,400.00, as OneWest's witness stated at trial, the differential would be even lower.

[5] OneWest argued that there is no evidence in this regard; this argument is frivolous. The Court is well aware of the real property tax laws of California and the fact that no lender establishes a payment – that includes impounds as OneWest's witness testified – that is not more than sufficient to cover taxes and insurance costs. Thus, the HAMP Payment exceeded these amounts. Indeed, the HAMP Plan states at paragraph 2 that the monthly impound for ". . . real estate taxes, insurance premiums and other fees, if any, . . ." equals only $286.51. Further, OneWest also received the Cure Payments, and the notion that the combination of these two amounts does not include 100% of the impound plus a substantial percentage of interest is nonsensical.

[6] Movant utilized the scheduled value of the Home in the Stay Motion.

[7] And the substantial payments here provide further support for a determination that there is no diminution in collateral position, as the evidence does not show a decline in value and, certainly, does not show a decline in excess of the amount of the monthly payments in excess of insurance costs and real estate taxes.

OneWest's adequate protection argument focused on a failure to pay all accruing interest. OneWest, however, completely ignored the provisions of section 506(a). Here, OneWest admitted that it was an undersecured creditor. Thus, it held a secured claim equal to the value of its collateral and was not entitled to adequate protection of its collateral position based on accruing interest and costs. Were OneWest oversecured, the result would be different. OneWest would be entitled both to include interest accrual in its secured claim and to receive adequate protection sufficient to avoid complete erosion of its equity cushion. But here, there was no equity cushion to erode.

The Court does not suggest that the Note does not accrue interest. Nor is the Court suggesting that OneWest must apply monies received to principal. Reviewing this matter through an adequate protection lens, however, does not yield the result that OneWest suggests and does not justify stay relief; the value of its collateral is not impacted by the monthly underpayment.

But, even though cause based on adequate protection does not justify stay relief under such facts, an undersecured creditor has alternative theories that may justify stay relief in a chapter 13 case. An excessive delay in obtaining confirmation may support section 362(d)(2) relief and, in more extreme cases, could be an independent basis for section 362(d)(1) relief. If a plan does not provide any treatment for a secured creditor, section 362(d)(1) relief, again, may be appropriate. And, if a plan is confirmed and provides for payments on a secured claim, any default in the required plan payments could be a cause for section 362(d)(1) stay relief; and this could be true irrespective of any adequate protection analysis.[8] Thus, it is OneWest's allegations of Plan default that the Court now considers.

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[8] Adequate protection in the form of an equity cushion might be relevant to the form of stay relief (i.e. continuation of stay conditioned on prompt cure) or the timing of stay termination, but it would not justify a denial of a stay relief request based on a plan default.

**3. Cause Could Exist For Relief From The Automatic Stay Based On A Default Under The Plan.**

OneWest also argued that cause exists for relief from stay under the plain language of the Plan based on Ms. Vissuet's failure to pay the full Note payment once OneWest determined that it would not agree to a HAMP modification. The Court originally was skeptical of this argument and required additional briefing. Having reviewed the briefing, and having closely considered the law in this area, the Court now acknowledges the general appropriateness of this argument.

To put this matter in context, however, it is first important to emphasize that the Court does not find that OneWest properly denied the HAMP modification request. While OneWest made vague references to potential other theories, the focus of its argument as to the propriety of the HAMP modification ultimately rested exclusively on its argument that it did not receive appropriate documents. At trial, in connection with good faith issues, the Court received only limited testimony in this regard, but such testimony made clear that Ms. Vissuet, personally and through her sister, provided some documentation to OneWest. The Court cannot conclude on this record that this was all the required documentation, but given that OneWest denied receipt of anything and given the abject confusion evident in OneWest's presentation of the issues here, the Court finds it possible that OneWest actually received all necessary documents. But, whether it was proper or not, OneWest ultimately said no to a HAMP modification; and at that time Ms. Vissuet was required to make full monthly payments.

Ms. Arizmendi utilized a form chapter 13 plan. In connection with her treatment of OneWest, she provided for cure of the pre-petition arrearage over five years. This much is plain. What is less certain is the Plan's required treatment of the remaining debt. The parties argued as to the meaning of paragraph 9. Interpreting the language in favor of OneWest would mean Ms. Arizmendi is in default; interpreting the language in favor of

Ms. Arizmendi would mean that she has not defaulted. Paragraph 9 states in relevant part:

> [n]otwithstanding any other provision of this plan, during this case and following completion of this case, debtors shall make the usual and regular payments (including any balloon payments) called for by any security agreements supporting non-voidable liens against debtor's real estate or mobile home, directly to lien holders in a current manner.

While as a general rule, a plan acts as a final order which binds all parties, whether they assented to the plan or not, a plan which is ambiguous as to a material term is subject to interpretation by a reviewing court. *Miller v. United States*, 363 F.3d 999, 1004 (9th Cir. 2004). Thus, a bankruptcy reorganization plan is essentially a contract between a debtor and his/her creditors and must be interpreted according to the rules governing the interpretation of contracts. *Miller*, 363 F.3d at 1004 [citing *Hillis Motors, Inc. v. Haw. Auto. Dealers' Ass'n*, 997 F.2d 581, 588 (9th Cir. 1993)].

An ambiguity exists when a contract is capable of more than one reasonable interpretation. *Miller*, 363 F.3d at 1004 [citing *Local Motion, Inc. v. Niescher*, 105 F.3d 1278, 1280 (9th Cir. 1997)]. The Court finds the language of paragraph 9 ambiguous as to whether Ms. Arizmendi agreed therein that she would pay any other obligation she owed – which would amount to no payment as she had no other obligation – or whether she agreed to pay the entire Note payment (or to be bound by the consequences if others failed to make such payments). The Court allowed additional briefing on this point and also conducted its own research.

In her post-trial briefing, Ms. Arizmendi insisted that the language unambiguously indicated that she is only required to pay the HAMP Payment. The Movant argued in opposition that the language unambiguously required Ms. Arizmendi to pay the monthly payments as and when required under the Note.

When a plan fails to clearly state its intended effect on a given issue, any ambiguity is interpreted against the debtor. *County of Ventura Tax Collector v. Brawders (In re Brawders)*, 503 F.3d 856, 867 (9th Cir. 2007). Ms. Arizmendi argued that it was her intent to agree to pay the HAMP payment. But, the boilerplate language in Paragraph 9 of the confirmed Plan makes no mention of the HAMP Loan modification and does not provide expressly for payments in an amount less than that provided for in the Note. Put bluntly, and assuming that this was Ms. Arizmendi's intent, it is not sufficiently clear in the Plan so that any third party would be bound thereby. This leaves the Court with its original plan interpretation quandary. But, Ms. Arizmendi did not even attempt to argue that she did not agree to pay something. And further, any ambiguity must be construed against Ms. Arizmendi.

OneWest argued that Ms. Arizmendi agreed to pay the Note or to see that it was paid. This construction is not unreasonable and, indeed, is more reasonable than the construction urged by Ms. Arizmendi. Also, it is more consistent with due process concepts. OneWest made clear through counsel that it read the Plan as presenting OneWest with a no harm, no foul situation. While it recognized that Ms. Arizmendi was a stranger to the Loan, it interpreted the Plan as providing that it would receive both arrearage curative and regular payments. This understanding is not at odds with the plain language of the Plan, and, again this language is a more reasonable interpretation of the Plan language than is that proposed by Ms. Arizmendi. The Court will so interpret the Plan, and, thus, concludes that a post-confirmation Plan default exists.

A post-confirmation default under a plan is cause for relief from stay under section 362(d)(1) in a chapter 13 case. *Ellis v. Parr (In re Ellis)*, 60 B.R. 432, 435 (9th Cir. BAP 1985). This is true without reference to adequate protection considerations. And a post-petition default occurred here when Ms. Vissuet tendered the HAMP Payment and not a full Note payment after the termination of the HAMP modification process. Thus, if

OneWest is a party properly before the Court and its evidence is admissible and credible, stay relief is appropriate.

**4. Modifying Or Conditioning The Stay May Be Appropriate.**

If the Court determines that cause exists for relief from stay, the Code is clear that the Court shall grant stay relief. The Court has some discretion, however, and may elect to modify the stay as well as to terminate it. If Ms. Arizmendi is in a position to promptly cure the existing default and to continue to make both the Cure Payments and regular Note payments hereafter, and if OneWest refiles an appropriate stay motion as required below, the Court would consider such an order and, given Ms. Arizmendi's age and infirmity, the Court would likely allow a six to twelve month period for cure.

**5. Notwithstanding The Equities Of The Situation, Relief From Stay Remains Available.**

The Court is well aware that the equities and, indeed, common sense do not justify relief from stay here. Ms. Arizmendi is an infirm 86 year old. The Home has been specially modified for her needs. Expulsion of Ms. Arizmendi from the Home due to a foreclosure may work a significant hardship as she may never be able to afford or obtain other housing that meets her needs. Given her age and infirmity, the physical and psychological impact of a foreclosure, indeed, could be devastating. The Court, however, ultimately lacks the ability to significantly soften the blow except as discussed in section 4 above. Here, there is a default under the Plan; and, thus, the mandates of Congress are clear – the Court shall grant relief from stay.

The Court must, however, also pause to note that while the mandate of the law is clear, as is the enormous risk to Ms. Arizmendi, the economic benefit of this exercise in contractual rights is absolutely unclear. Indeed, it appears under these facts that the result

OneWest seeks will work a significant economic disadvantage to OneWest's principal – Freddie Mac.

First, one must question why a HAMP modification is not appropriate in this case. HAMP, by all accounts, has been far from successful. And the Court is aware that HAMP modifications are often followed by future defaults. But here, OneWest independently established an appropriate monthly payment amount for receipt over the extended life of the Loan. The only evidence before this Court is that Ms. Vissuet successfully made these payments for over a year. Thus, this appears to be a situation where a HAMP modification would be in everyone's best interest as it provides for payments in an amount deemed acceptable by OneWest from a borrower who has been successful in making the required payments for a significant period of time.

But that fact, in and of itself, is far from the only one that leads the Court to believe that OneWest's position defies common sense. Here, Ms. Arizmendi agreed to make arrearage curative payments under the Plan and contractually bound herself to do so notwithstanding that a HAMP modification might otherwise be in process. There is no evidence or even suggestion that the HAMP Payment amount was derived with any consideration of the additional payments available under the Plan. As a result, Freddie Mac could receive not only the HAMP Payments, which, once again, OneWest independently determined to be sufficient, but also the Cure Payments over a five-year period. Thus, for five years it would receive almost 30 percent more than the HAMP Payment amount; and, once again, the only evidence before this Court indicates that Ms. Arizmendi paid the Cure Payments on a monthly basis without interruption for over a year. As a result, if a HAMP modification goes forward, the Cure Payments could be applied to reduce principal owed on the Loan as modified and the maturity date could be accelerated.

Thus, given the undisputed evidence that the Loan is significantly undersecured such that any near term sale will result in a loss, and given the fact that the Home has been modified to meet the needs of an elderly woman – a factor that is highly unlikely to enhance marketability – a common sense economic analysis would suggest that the HAMP modification coupled with the Cure Payments is in Freddie Mac's economic best interest. Apparently, however, Freddie Mac ceded the decision making power to OneWest, an entity which was unaware that it was receiving the Cure Payment and an entity with procedures in such disarray that it appears possible that it denied the HAMP modification based on the erroneous belief that it never received any documents in connection therewith.

The Court is left to shake its head in amazement. Until fairly recently, lenders owned their own loans and common sense economics often led to loan modifications that were beneficial to both the borrower and the lender. But here, the Original Lender is long gone and neither compassion nor common sense economic consideration appear to have a place in decisions. As a result, Ms. Arizmendi may lose her home; and Freddie Mac also appears to be a clear loser as it will suffer a loss instead of obtaining what appears to be a steady stream of payments and the opportunity to recover 100% of its investment with interest.[9] OneWest, no doubt, will recover some type of fee on account of its handling of the Loan and the foreclosure. OneWest, thus, may be a small dollar winner. But while the Court finds this whole situation unfortunate and even ridiculous, it is bound by the clear mandates of section 362(d)(1). The law must be obeyed and the rules must be followed. Thus, but for the discussion below, the Court would grant relief from stay as discussed above.

**6. But The Laws And Rules Also Apply To OneWest.**

At the trial on this matter, the Court heard testimony that was frankly astonishing. First, the only OneWest witness testified that the only payments he was aware of were the

[9] And if Freddie Mac loses, so do tax payors.

HAMP Payments. A review of the trial brief indicates that, consistent with this view, the argument made was that this was the only payment received and that OneWest suffered great harm as a result thereof.

The Court stated at the trial that if this was the case the stay would lift immediately as there was a clear obligation to make the Cure Payments under the Plan. OneWest conceded at the trial that it was probable that these payments had been made and subsequent evidence from the chapter 13 Trustee confirmed the same. The Court required OneWest to explain this discrepancy in its evidence. OneWest's explanation was that the focus of its default was on the regular Note Payments and that the Cure Payments were irrelevant. The Court strongly disagrees.

OneWest argued that it experienced great harm because the only payment it received was the HAMP Payment. The Court acknowledges that the Cure Payment plus a HAMP Payment does not equal the full monthly payment due under the Note. But the alleged harm to OneWest is made substantially less than argued by the combination of these payments. OneWest's handling of this issue was sloppy at best and illustrates the problem with any reliance on its witnesses. To put it bluntly, the right hand does not know what the left hand is doing at OneWest. The Court, however, would be inclined to overlook this particular problem as it was well aware that the Cure Payments needed to be made, OneWest's counsel wisely stated at the trial that in all probability the Cure Payments had been made, and the problem arguably is one of nuance in the argument and an insufficiently educated witness as opposed to overt misrepresentation. But, unfortunately, overt misrepresentation also exists.

OneWest filed a proof of claim in the Case stating that it was the creditor, "the entity to whom the debtor owes money . . .." All statements in the Declaration were consistent. During trial, however, the witness candidly testified that OneWest was not the secured creditor, but, instead, was a mere servicer and had been so at all relevant times.

The Court as a result of the clearly questionable quality of the evidence at this point again required additional briefing. OneWest briefed the issue arguing that it was in possession of the Endorsed Note, that the Endorsed Note was endorsed in blank, and that pursuant to an unspecified document, presumably some sort of servicing agreement, it had rights of enforcement in the Endorsed Note.

Thus, based on the post-trial briefing, the alleged situation is one where OneWest has standing because it became a holder of the Endorsed Note, a negotiable instrument that IndyMac Bank, FSB endorsed in blank making it payable to the bearer. See UCC § 1201(b)(21)(A) and 3201(a). As a holder, OneWest would possess rights of collection therein notwithstanding any contractual obligation to turn those collections over to Freddie Mac. See UCC § 3301(a).

Were the Court to accept as the truth all post-trial statements made by OneWest, OneWest could be entirely correct. The post-trial briefing attaches the Endorsed Note which bears an allonge from the original maker to IndyMac Bank, FSB and then an endorsement in blank from IndyMac Bank, FSB. The Endorsed Note, thus, is bearer paper and a holder of the Endorsed Note would be a holder for purposes of Article 3 of the Uniform Commercial Code and entitled to collect the same. The fact that this party is obligated to transfer payments to Freddie Mac as a matter of contract law would not negate OneWest's ability to recover on such Endorsed Note notwithstanding its "servicer" status.

But, there are key assumptions that the Court must make in order for this set of facts to withstand scrutiny. And they are that OneWest, in fact, holds the Endorsed Note and held the Endorsed Note at all appropriate points in time. Frankly, the Court is not willing to make such assumptions at this time. OneWest attached the Unendorsed Note to both its Proof of Claim and the Declaration. The Declaration stated under penalty of perjury, that the Unendorsed Note was a true and accurate copy of the Note held by OneWest. The Proof

of Claim implicitly stated the same and OneWest, of course, is obligated to provide only accurate information in connection with its Proof of Claim. The problem is that the Unendorsed Note does not bear the endorsement or attach the allonge found on the Endorsed Note, a document produced only after trial and the close of evidence. OneWest, thus, leaves the Court with the quandary of guessing which promissory note OneWest holds, whether and when OneWest held the Endorsed Note, and what the explanation is for the failure to provide the Endorsed Note prior to the close of evidence.[10]

A further evidentiary anomaly arises on account of the Assignment; MERS executed this document as a nominee for the Original Lender. But the allonge to the Endorsed Note makes clear that the Original Lender assigned its interests in the Note more than three years prior to execution of the Assignment. And rights under the Trust Deed follow the Note. *Polhemas v. Trainer*, 30 Cal. 686, 688 (1866). Thus, MERS' purported assignment of the Trust Deed **and the related note** as nominee for the Original Lender and without a reference to either IndyMac Bank, FSB or Freddie Mac appears designed to disguise rather than to illuminate the facts.

And finally, even if OneWest's second post-trial discussion of standing and submission of evidence were accurate, one thing remains clear: OneWest failed to tell the true and complete story in the OneWest Declaration and in the Claim.

The Court is concerned, as a result, that OneWest does not hold the Endorsed Note. But, perhaps more significantly, the Court is concerned that OneWest has determined that business expediency and cost containment are more important than complete candor with

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[10] OneWest could still have standing here even if the Unendorsed Note is a true and accurate copy of the relevant document. But it would not necessarily be as a holder of the Unendorsed Note. Instead, it might need to prove enforcement rights as a "nonholder in possession of the [Unendorsed Note] who has the rights of a holder." UCC § 3301(b). This would require additional evidence not currently before the Court such as a servicing agreement, at a minimum.

the courts. On these points, Ms. Arizmendi has a right to be heard, and the Court has a right to explanation.

Further, this is not the first time that OneWest has provided less than complete information in the Southern District of California. See "Memorandum Decision Re Motion to Vacate Clerk's Entry of Default and Motion to Dismiss Complaint; Order to Show Cause for Contempt of Court", docket no. 39, Adv. Pro. 10-90308-MM (*In re Doble*; Bk. Case No. 10-11296) (Defendants, including OneWest, were neither candid nor credible in explaining failure to respond timely to complaint and submitted multiple and different notes as "true and correct"); "Order to Show Cause Why One West Bank, FSB and Its Attorneys Law Offices of Randall Miller and Christopher Hoo Should Not Appear Before the Court to Explain Why They Should Not Be Held in Contempt or Sanctioned", docket no. 47, *In re Carter*, Bk. Case No. 10-10257-MM13 (among other things OneWest provides inconsistent evidence as to its servicer status); and "Order After Hearing to Show Cause Why Indymac Mortgage Services; OneWest Bank, FSB; Randall S. Miller & Associates, P.C.; Christopher J. Hoo; Barrett Daffin Frappier Treder & Weiss, LLP; and Darlene C. Vigil Should Not Appear Before the Court to Explain Why They Should Not Be Held in Contempt or Sanctioned", docket no. 47, *In re Telebrico*, Bk. No. 10-07643-LA13 (Court concerned that OneWest provided evidence that was either intentionally or recklessly false).

The curious thing about these cases is that OneWest likely would prevail in each of them if it completely and candidly explained the basis for its motion and its standing in connection therewith. Undoubtedly, however, doing so is more costly than using a form declaration that is not customized as to the facts on a case by case basis and that is signed by an uninformed declarant. OneWest perhaps assumes that it really does not matter if the Court provides relief based on erroneous information. But, OneWest should remember an earlier theme in this decision and that is that the law is the law, rules are rules, and both

must be obeyed. And, when it becomes clear that OneWest did not obey the rules, the Court can and, indeed, must act.

In short, the Court will not participate in a process where OneWest increases its profits by disobeying the rules of this Court and by providing the Court with erroneous information. The Court, thus, will take two steps. First, the Court will deny the Stay Motion without prejudice based first on the evidentiary problems that make it impossible for the Court to determine that OneWest is properly before the Court and that render evidence critical to OneWest's *prima facie* case unreliable and second based on the Court's inherent authority to regulate and control proceedings. Next, the Court hereafter will issue an order to show cause why OneWest should not be held in contempt and/or otherwise sanctioned. In connection therewith, the Court will consider a compensatory sanction to include a recovery of any costs Ms. Arizmendi would not have incurred but for OneWest's improper actions. The compensatory sanction, frankly, could be quite limited. But, the Court also believes that a coercive sanction may well be appropriate. Given the orders to show cause that pre-date the one this Court will issue, it appears that the Court must create an economic disincentive for OneWest that will counter balance the economic benefit of a lack of complete candor. Further detail on the Court's sanctions considerations will be set forth in the order to show cause and will not be further discussed here.

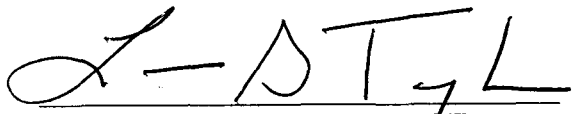
The Court finally notes that the order to show cause will issue only as to OneWest and possibly as to MERS. OneWest uses a variety of law firms. The Court was in a position to observe the demeanor of the lawyers handling this matter when the witness stated that OneWest was a mere servicer. The Court concludes based on this observation that they were unaware of this fact and unaware that OneWest supplied questionable documentary evidence. And frankly, there is nothing to be gained in pursuing the individual attorneys who must regularly appear in front of this Court. OneWest can simply change

counsel and then be less than candid with a new set of attorneys.[11] The Court is interested in modifying OneWest's behavior at an entity level, and any coercive sanction will be designed to achieve the same.

## CONCLUSION

Based on the foregoing, the Stay Motion is denied without prejudice to the right of OneWest to refile a stay relief motion. In so doing, OneWest must provide declaratory evidence that explains when and how it obtained physical possession of the Endorsed Note and/or Unendorsed Note and that otherwise provides case specific evidence of standing given its servicer status.

DATED: May 26, 2011



LAURA S. TAYLOR, JUDGE
United States Bankruptcy Court

[11] At this point in time, the best thing OneWest has going for it is the character and integrity of the two attorneys who handled this matter in the courtroom. They did so with compassion, they did so with skill, and they did so with all the candor they were capable of given the fact that they work for this entity. They are certainly free to defend OneWest in the next phase of this action.