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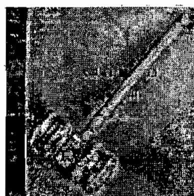
Mortgages

R.I. Judge Upholds Foreclosure Mediation Program

January 31, 2011

January 31, 2011 (Jeff Alan)



U.S. Bankruptcy Court Judge Arthur N. Votolato upheld the court's right to establish a mediation program for homeowners facing foreclosure. The ruling was in response to objections filed by creditors in two bankruptcy cases. The creditors are PHH Mortgage Corp., doing business as PHH Mortgage Service Center, and Ocwen Loan Serving LLC as servicer of Deutsche Bank National Trust Co.

Votolato implemented the program, called the loss mitigation program, in November 2009 "in response to the home mortgage and foreclosure crisis generally," and also because the court "repeatedly had to postpone hearings" due to delays that debtors were experiencing in seeking out-of-court mortgage-loan modifications.

"This practice of parties repeatedly seeking more time simply because they had not yet connected was counterproductive, it was a huge waste of time for the parties and the Court, and was forcing needless litigation …" the order stated. "…We decided to break the log jam" by introducing a process that would open "communications between debtors and the lenders' decision-makers."

Rhode Island Senator Sheldon Whitehouse (D) issued the following statement today regarding the decision by Judge Votolato:

"Today's decision by Judge Votolato is a win for Rhode Island homeowners. The Rhode Island bankruptcy court's foreclosure mediation program helps distressed families to cut through the red tape of our broken mortgage modification process and has already saved at least 100 homes in our state. I hope today's decision will encourage other bankruptcy districts to follow Rhode Island's lead and adopt similar programs."

Last week, Whitehouse introduced the Limiting Investor and Homeowner Loss in Foreclosure Act (S. 222) to support these successful programs. Last year he held a field hearing of his Judiciary Subcommittee on Administrative Oversight and the Courts to examine the effectiveness of mediation programs. This Tuesday he will chair a hearing of the full Judiciary Committee entitled "Foreclosure Mediation Programs: Can Bankruptcy Courts Limit Homeowner and Investor Losses?"

At a hearing in October, Whitehouse praised Votolato's program, saying it is especially needed because of the documented failures of the federal government's flagship foreclosure-prevention program, the Home Affordable Modification Program (HAMP).

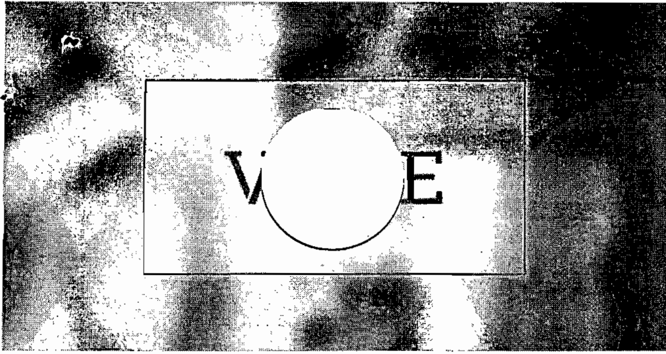
For the most part, the mortgage industry has been against forced mediation programs on the grounds that the states and the mortgage companies are ill-equipped for the amount of mediations that would be necessary to work through the current level of foreclosed properties, thus prolonging the housing slump for years.

John Mechem, a spokesman for the Mortgage Bankers Association which represents the largest mortgage lenders, said the group is opposed to both mandatory and voluntary mediation programs. He argued that the programs are expensive and are often used by borrowers as a tactic to stall foreclosure.

Mechem said the industry on its own has done almost 1.5 million mortgage modifications this year outside of mediation programs. If such programs must be implemented, he said, the MBA favors a voluntary system over mandatory meetings.

Tags: foreclosure mediation program, homeowners, mortgage borrowers, loan modifications, debtors, lenders, bankruptcy, housing slump, HAMP

#bankruptcy #debtors #foreclosure mediation program #HAMP #homeowners #housing slump #lenders #loan modifications #mortgage borrowers



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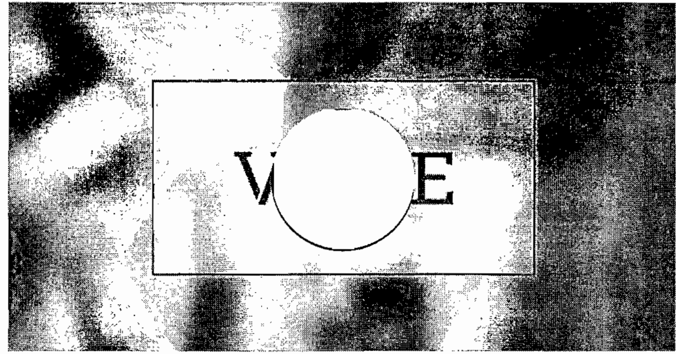

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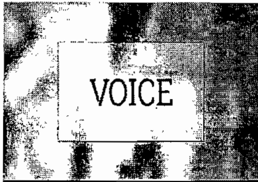

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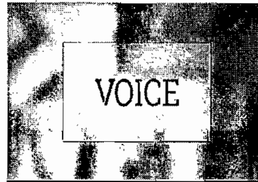

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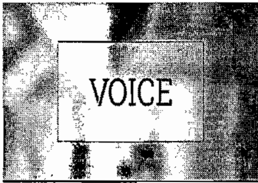

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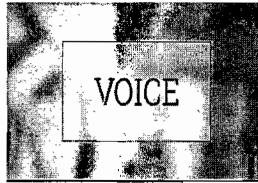

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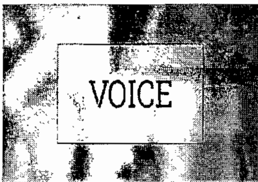

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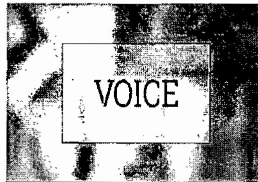

Housing • Mortgages

Existing Home Sales Rebound

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Type of Loan

Refinance

Type of Property

Single-Family Home

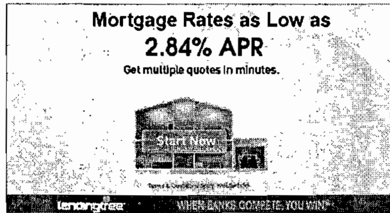
Street Address of Property

Zip Code of Property

What is Your FICO Score?

Excellent (780 or above)

Year of Birth



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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND
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In re: :

ALBERTO G. SOSA : BK No. 10-11702
Debtor Chapter 7

- - - - - - - - - - - - - - - - - - -x

DECISION AND ORDER OVERRULING CREDITOR'S OBJECTION TO LOSS MITIGATION

APPEARANCES:

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BEFORE ARTHUR N. VOTOLATO, United States Bankruptcy Judge

BK No. 10-11702

Heard on November 18, 2010, on the Objection of PHH Mortgage Corporation d/b/a PHH Mortgage Service Center ("PHH"), a secured creditor, to the Debtor's Request for Loss Mitigation.[1] PHH objects on several grounds, which, when reduced to the basics, challenges the Bankruptcy Court's authority to require home mortgage lenders to participate in the Court's loss mitigation program. Because this dispute involves issues of first impression, an explanation of the Rhode Island *Loss Mitigation Program and Procedures* ("*LMP*" or "Program") should be helpful to readers generally, as well as in assisting the Court to address the parties' arguments in an orderly way.

INTRODUCTION

The Rhode Island *LMP* became effective on November 1, 2009, pursuant to R.I. Bankr. Gen. Ord. 09-003, issued October 22, 2009. Thereafter, in response to growing pains associated with the implementation of the relatively new program, it was amended several times and is now operating under the *Third Amended Loss Mitigation Program*, effective August 23, 2010. R.I. Bankr. Gen. Ord. 10-003, issued August 17, 2010. The amendments have been

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[1] This objection was heard along with the objection in another case, *In re Lawton*, BK No. 10-11302, which raised similar issues. The only difference in the two cases is that in *Lawton* a Motion for Relief From Stay was already pending when the debtors filed their request for loss mitigation. The Court notes that in considering and ruling upon this dispute, I have weighed the arguments presented by the parties in *Lawton*, as well.

aimed, essentially, at increasing the efficiency and user friendliness of the Program, and to simplify the use of recommended forms. As the Debtor's request for loss mitigation was filed on April 27, 2010, this proceeding is governed by the terms of the *Second Amended LMP*. The substantive provisions, however, are similar and applicable to all versions of the Program.

Since late 2007, bankruptcy case filings in this District have nearly doubled, reflecting the economic downturn experienced nationwide since that time, and which continues as of the writing of this decision. The *LMP* was implemented in response to the home mortgage and foreclosure crisis generally, and also to address an associated issue that at about the same time was being raised with increasing regularity in this Court. Specifically, at hearings on motions for relief from stay, debtors were routinely advising the Court that they had been seeking out of court loan modifications, forbearance agreements, or similar relief regarding their home mortgages, but that lenders' responses were virtually impossible to come by, despite multiple requests made to the mortgage holder or servicer. The stories were familiar and nearly identical. Creditors' counsel regularly stated that they were either unaware of such requests, or had no information to share - not even the name of a contact person. With communication between parties and a consensual resolution as the objectives, but too often without

enough information to assess the likelihood of an agreement, the Court repeatedly had to postpone hearings, order the parties to confer, and report their progress at yet another hearing. These multiple postponements were the result of the Court's inability to fix what had become a very disruptive information exchange deficit.[2] That, in turn, resulted in calendars crowded with unresolved litigation. Other courts were experiencing similar problems.

> At each weekly calender of relief from stay motions, debtors plead with the court for assistance in obtaining loan modification. Sometimes they have been unable to penetrate the lenders' impenetrable phone tree to talk to a live person; or having reached someone at the other end of the line, they are unable to obtain answers to their inquiries after weeks or months of trying; or having submitted paperwork to the lender, only to be told more papers are required, or that the papers they've already submitted have been lost.

Clawson v. Indymac Bank (In re Clawson), 414 B.R. 655, 661 (Bankr. N.D. Ca. 2009), *rev'd on other grounds*, 434 B.R 556 (N.D. Ca. 2010)(bankruptcy court order enforcing settlement agreement reversed and remanded). This practice of parties repeatedly seeking more time simply because they had not yet connected was

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[2] These are this Court's general observations, not specific to any case, but which were part of a clearly consistent pattern, i.e., that repeatedly coming back to court empty handed carried no consequences. Having to listen to the Court express its frustration with the results of unsupervised mediation was obviously not a sufficient incentive to communicate, because nothing was getting done.

counter productive, it was a huge waste of time for the parties and the Court, and was forcing needless litigation, with costs and fees being wasted on useless services.

To address that condition, and with no end to it in sight, we decided to break the log jam by introducing a process "for debtors and lenders to [mediate and to] reach consensual resolution when a debtor's residential property is at risk of foreclosure" by "opening communications between debtors' and [the] lenders' decision-makers."[3] *LMP §I Purpose, 1.*

In order to address certain anticipated issues, this Court crafted, as carefully as it could, a process intended to ease some of the concerns of the residential lending community. Following are several examples of provisions intended to maintain the rights of the parties: (1) either the debtor or a creditor can initiate the process, *Second LMP, §V(A) & (B)*, 3-4; (2) if objections are filed, loss mitigation may not begin unless and until such

[3] The idea of court supervised loss mitigation did not originate in Rhode Island. The Bankruptcy Court for the Southern District of New York was the first to initiate such a program, and several bankruptcy judges in the Eastern District of New York have since adopted a similar program. The Bankruptcy Court for the Northern District of California has also established guidelines for addressing loan modifications in relief from stay litigation in chapter 11 and 13 cases. In addition, legislation in Connecticut, Indiana, Maine, New York and Vermont now requires local courts to implement their own mediation programs. Closer to home, Providence and Cranston, Rhode Island, have initiated similar local programs.

opposition is resolved, *Second LMP §V(D)*,5; (3) after entry of a Loss Mitigation Order, a "Party ... may request that the loss mitigation period be terminated for cause." *Second LMP §IX.C.(1)*, 10; (4) if cause for early termination is shown, the loss mitigation process is ended. *In re Cayard*, BK No. 09-12378, 2010 WL 1137931 (Bankr. D.R.I. March 17, 2010). The foregoing list is illustrative, and *not* all inclusive.

DISCUSSION

The Debtor filed this Chapter 7 case on April 20, 2010, and requested loss mitigation on April 27, 2010. On May 11, 2010, Creditor PHH filed its objection to the Debtor's request, and on June 2, 2010, an initial hearing was held before Bankruptcy Judge Henry Boroff. On July 12, 2010, this Court appointed John Rao, Esq., of the National Consumer Law Center as *pro bono* amicus counsel. Thereafter, the parties filed briefs and arguments were heard on November 18, 2010. Relief from stay had not been requested as of the date of the loss mitigation request, nor has a motion since been filed by PHH or any other creditor in the seven months since the initial request was filed. Other than a general objection to having to participate in the program, PHH has not offered any "specific reasons why loss mitigation [concerning Mr. Sosa] would not be successful." *Second LMP §V(D)*, 5. In fourteen months since the start of the Program, this Court has consistently

overruled objections to loss mitigation if the only reason alleged was "[m]y client does not wish to participate." *In re Simarra*, BK No. 09-14245, 2010 WL 2144150 (Bankr. D.R.I. April 14, 2010)("objection lacks any substantive merit" when it fails to "address the only relevant issue, i.e., 'specific reasons why loss mitigation would not be successful'").

In its oral and written arguments, PHH points out that the *LMP* refers only to 11 U.S.C. § 105(a) as authority to enforce the Program. PHH Memorandum of Law, at 2. From that, PHH argues that the LMP: (i) has enlarged the substantive rights of debtors by creating or granting a previously unauthorized *retention option* under 11 U.S.C. § 521(a)(2)(A); (ii) violated the relief from stay time constraints of 11 U.S.C. § 362(d); (iii) exceeds what Bankruptcy Courts are authorized to do under § 105; PHH Memorandum, at 3-5; and (iv) that "the Procedures are outside of the scope of the Court's Section 105(a) powers." Id. at 5.

The Debtor and *Amicus*, National Consumer Law Center, Inc. (NCLC) contend that even without a formal loss mitigation program in place, there is ample authority and precedent for the Court to regulate the administration of cases pending before it. Such authority is in the Bankruptcy Code, the Bankruptcy Rules, and in particular Fed. R. Bankr. P. 7016, which incorporates Fed. R. Civ. P. 16, and 9014. 11 U.S.C. § 105(d) provides that a "court on its

own motion ... (1) *shall* hold such status conferences as are necessary to further the expeditious and economical resolution of the case." Rule 7016 incorporates Fed. R. Civ. P. 16, which provides "[i]n any action, the court may order the ... [parties] ... to appear for one or more pretrial conferences for such purposes as ... (5) facilitating settlement." (Emphasis added). While Rule 7016 is not, per se, applicable to contested matters, Rule 9014(c) authorizes "the court ... at any stage in a particular matter [to] direct that one or more of the other rules in Part VII shall apply." Rule 7016 is one "of the other rules in Part VII."

The Court's interest in loss mitigation is twofold: (1) to encourage and facilitate home mortgage modifications, and thereby reduce foreclosures; and (2) to alleviate Court congestion and delay. While PHH emphasizes that *R.I. Bankr. Gen. Ord. 09-003* issued October 22, 2009, references only § 105(a), the *Second Amended LMP* requires a *status conference* to be held if loss mitigation is requested *after* the creditor has sought relief from stay. *Second Amended LMP §V.A(3)*, 3. The current *LMP* clearly implicates Rules 9014 and 7016, which assist courts in determining early on: (1) whether a loan modification is likely; or (2) if the mediation has little or no chance of success, to terminate the loss mitigation and schedule a prompt hearing on relief from stay. In addition, requests for early termination are granted upon request

where it is shown that a loan modification is not feasible, and that further discussions would be futile. *In re Cayard, supra*.

That the Court has not compiled an all encompassing list of every relevant Code and Rule provision, does not indicate that the *LMP* is a stand-alone artifice which purports to give debtors new rights, or interferes with the existing rights of creditors. To the contrary, the *LMP* is but one of the Court's many case management tools available to manage its caseload. If the mediation process is successful, the parties go forward in their new relationship, and the resolved matter is removed from the Court's calendar. If mediation fails, the issues are adjudicated in accordance with applicable law.

The First Circuit Court of Appeals has held that "[e]ven apart from positive law, district courts have substantial inherent power to manage and control their calendars," *In re Atlantic Pipe*, 304 F.3d 135,143 (1st Cir. 2002), and that "it is within a district court's inherent powers to order [*even*] non-consensual mediation in those cases in which the step seems reasonably likely to serve the interests of justice." *Id.* at 145. (Emphasis added.) The source of federal courts' "'inherent power'... to manage their own affairs" is included within their power "to achieve the orderly and expeditious disposition of cases." *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31, 82 S.Ct. 1386, 8 L. Ed. 2d 734 (1962). The Rhode Island *LMP*, which is far less sweeping or invasive than the

mediation order discussed in *Atlantic Pipe*, sets specific time frames and guidelines within which parties may negotiate mortgage modification(s) or any other agreement they deem to be mutually beneficial. The Rhode Island *LMP*, as designed and intended, does not permit the mediation process to just drift, without direction.

In addition to its point that the bankruptcy court lacks authority to enforce this *LMP*, PHH argues that the Program conflicts with § 521(a)(2)(A) by "allowing the debtor to elect a retention option not available under the Code." PHH Memorandum, at 3. Reading its memoranda literally, PHH also argues, incorrectly, that during loss mitigation, debtors may keep things in the status quo, without the consent of the secured creditor, thereby circumventing §§ 521(a)(2)(A), and (B). This argument is plainly incorrect and misleading. Section 521(a)(2)(B) provides that "within 30 days after the first date set for the meeting of creditors under section 341(a), *or within such additional time as the court, for cause, within such 30-day time fixes*, the debtor shall perform his intention with respect to such property...." (Emphasis added). Thus, the Code clearly envisions instances, such as those involving the renegotiation of a secured debt, where additional time will be required for the parties to perform their stated intentions regarding such property. Additionally, unlike § 521(a)(6) which provides for the automatic termination of the stay for failure to timely perform an intention with respect to personal

property, Congress specifically excluded real property from this new remedy. The *LMP* requires parties to *negotiate* within specific deadlines, gives secured creditors the right to speedy hearings, and termination for cause if it is shown that further negotiations would be futile. *See In re Cayard, supra*. Thus, to enable the parties to engage in meaningful, good faith negotiations, the court will presumably, after notice and hearing, exercise reasonable judgment in whether to extend the time to perform a stated intention with respect to real property used as a principal residence. To this Court's knowledge, except for the reasons specified in § 521(a)(2)(A), the only way debtors can retain secured property is via agreement with their secured creditors. If agreement is reached, no interest of the secured creditor has been affected. If mediation fails, the secured creditor still has its § 362(d) rights.

NCLC points out that the addition of § 524(j) to the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), renders PHH's allegation of conflict (regarding § 521(a)(2)) problematic, at best. Section 524(j) specifically exempts secured creditors from being in violation of the discharge injunction if they seek or obtain "periodic payments associated with a valid security interest ... [in the real property that is the debtor's principal residence]...." NCLC contends that this insertion was intended to codify the so-called "ride through" option for

distressed debtors who, *with creditor assent*, continue, post discharge, to pay their mortgages. PHH reads it differently, saying that the *only* purpose of § 524(j) was to allow creditors to inform homeowners of the status of their accounts by allowing them to send "payment coupons" to debtors. The legislative history does not support this narrow interpretation, and we summarily reject PHH's fragile proffer of what Section 524(j) means. *See* House Report 109-031, Part I, Sec. 202.[4] Also regarding the "ride through" issue, several courts have held that the BAPCPA amendments to § 524(j) and § 521(a)(6), with additional changes to § 362(h), show Congress's intent to eliminate the ride through option *only* as to personal property, and to permit debtors to "take advantage of the ride through option with respect to relevant real property" without reaffirming the underlying debt. *In re Carabello*, 386 B.R. 398, 402 (Bankr. D. Conn. 2008). *See also, In re Waller*, 394 B.R. 111 (Bankr. D.S.C. 2008); *In re Wilson*, 372 B.R. 816 (Bankr. D.S.C. 2007); *In re Bennet*, 2006 WL 1540842 (Bankr. M.D. N.C. May 26, 2006). *Contra, In re Linderman*, 435 B.R. 715,718 (Bankr. M.D. Fla.

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[4] "Second, section 202 amends section 524 of the Bankruptcy Code to provide that the discharge injunction does not apply to a creditor having a claim secured by an interest in real property that is the debtor's principal residence if the creditor communicates with the debtor in the ordinary course of business between the creditor and the debtor *and such communication is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of an* [sic] *in rem relief to enforce the lien.*" House Report 109-031, Part I, Title II - Enhanced Consumer Protection, Sec. 202. (Emphasis added.)

2009)(*pre*-BAPCPA, the "Eleventh Circuit clearly has stated that a Chapter 7 debtor must either redeem or reaffirm a debt if the debtor wants to keep the collateral ... [and that decision] ... is still applicable and controlling"). In this Circuit, we are governed by *In re Burr*, 160 F.3d 843 (1st Cir. 1998), which holds that the ride through option is not available with respect to personal property. We note that *Burr,* like the *In re Harris* case, 421 B.R. 597 (Bankr. S.D. Ga. 2010), interpreted language in § 521(a)(2) that was unchanged by BAPCPA. *Id.* at 847-8. However, it is not necessary, and I do not address here, the larger post-BAPCPA question - whether debtors can force a permanent ride through on their homes without reaffirming the underlying debt. The loss mitigation process under scrutiny here in no way authorizes debtors to retain such property without the creditor's consent. Rather, it merely permits the Court to extend the time necessary to perform the stated intention until the parties know whether: (1) a new mortgage contract is being entered into (loan modification), or (2) the mortgage is to be reaffirmed, or (3) the property is being surrendered. Under Rhode Island's *LMP*, no new substantive rights are created, nor are any existing Code provisions infringed upon.

PHH also argues that the *LMP* conflicts with the relief from stay provisions of § 362. In its facial attack on the program, PHH raises several very unlikely scenarios where the *loss mitigation* process could alter certain of the secured creditors' rights under

§ 362. Even giving hypothetical deference to the creditor's argument, the Court disagrees that § 362 is so constraining that such a conflict should result in the nullification of the entire Program. Section 362(e) authorizes the court to extend the automatic stay for a specific time in "compelling circumstances." In light of the adoption of federal housing programs designed to assist distressed borrowers and their lenders, compelling circumstances clearly exist to extend the stay for the 60 to 90 days required by the negotiating parties to complete the loss mitigation process. If the debtor fails to cooperate in the process, the creditor may move to terminate the loss mitigation order, and if granted, an expedited hearing on any pending relief from stay motion will be scheduled. However, in the matter(s) before us, the conditional restriction on the filing of a relief from stay motion after loss mitigation has been initiated is not an issue that requires a decision on the present facts.[5] Nevertheless, and mindful that the Program is still relatively new, this Court will continue to examine, refine, and amend the LMP as necessary to maintain its utility, integrity, and operation as long

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[5] In the instant case, PHH has not moved for relief from stay despite the fact that no order for loss mitigation has entered. In *Lawton*, a motion for relief was filed prior to the loss mitigation request but the parties consented to [Docket No. 18] the continuation of that motion until the resolution of the creditor's objection to loss mitigation. At hearing, creditor's counsel also raised a burden of proof issue concerning § 362(g). However, since no motion for relief from stay has been filed in the *Sosa* case, the burden of proof issue is not before us.

as necessary. For example, the Court finds relevant the following concession proposed by NCLC during oral argument. PHH concentrates on §VI.B.(1),6, of the Loss Mitigation Order which prohibits creditors from filing "Lift Stay Motions during the loss mitigation period." *Second LMP §VI.B.(1),6.* While this provision already contains adequate safeguards, by expressly permitting creditors to move for relief from stay where necessary to "prevent irreparable injury," the inclusion of this language is not necessary to support the goals of the process. Therefore, to keep the program as neutral and user friendly as possible, upon the filing of this Decision, §VI.B.1 of the *LMP* will be amended, prospectively, to allow motions for relief from stay to be filed during the loss mitigation period. However, if it appears that such motions are being filed prematurely, and/or primarily to drive up costs to debtors, particularly when a consensual loan modification is in progress, the Court will consider, on a case by case basis, whether such fees and costs are appropriate. Since the inception of the *LMP,* creditors have had the right to object and be heard on loss mitigation requests under *§V.D* of the Program, before a loss mitigation order may enter. The existing part of that section requiring the objector to allege "specific reasons why loss mitigation would not be successful," will still apply.

CONCLUSION

The Rhode Island Loss Mitigation Program was conceived as a case management tool designed to encourage the resolution of differences between residential mortgage lenders and their borrowers, and to provide a way for them to access the various federal housing programs available outside of bankruptcy, such as the Home Affordable Modification Program (HAMP). The Loss Mitigation Program is intended to start a dialogue, giving the parties nothing more than the opportunity to discuss their respective positions. The alleged dire consequences of the implementation of such a Program, as predicted by PHH have not materialized, and if any do emerge, they will be judicially addressed forthwith.

For the reasons discussed above, and based on the arguments of the NCLC and by the Debtors, here and in *Lawton*, which are adopted and incorporated herein by reference, PHH's Objection to participating in this Court's loss mitigation program is **OVERRULED**.

Dated at Providence, Rhode Island, this 28th day of January, 2011.

Arthur N. Votolato
U.S. Bankruptcy Court

Entered on docket: 1/28/11

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

- x

In re:	: BANKRUPTCY GENERAL ORDER
Adoption of Loss Mitigation Program and Procedures	: No. 09-003
	:

- x

ORDER ADOPTING LOSS MITIGATION PROGRAM AND PROCEDURES

Pursuant to 11. U.S.C. §105(a), this Court deems it advisable and in the public interest to provide a uniform, comprehensive, court-supervised Loss Mitigation Program in order to facilitate and assist in the consensual resolution of issues involving debtors and creditors with joint contractual interests in residential real property at risk of loss to foreclosure. This loss mitigation program is intended to avoid or reduce unnecessary bankruptcy litigation and cost to debtors and secured creditors, and to enable debtors to reorganize or otherwise address their significant debt and asset structure under the Bankruptcy Code. The need for such a program is evident in light of the various government sponsored loss mitigation programs (Making Homes Affordable) introduced to address the systemic mortgage defaults and the decline in the current residential housing economy nationwide, including the District of Rhode Island. Accordingly, the "Loss Mitigation Program" annexed to this order is hereby adopted.

The Loss Mitigation Program ("LMP") and forms for initiating loss mitigation shall be available at the clerk's office and on the court's web site. The Court may modify the LMP from time to time by duly adopted General Orders, with any such revisions available in the clerk's office and on the court's web site, immediately upon their adoption.

NOW, THEREFORE, IT IS ORDERED that this Court's Loss Mitigation Program is adopted, effective November 1, 2009.

ORDER:

Susan M. Thurston
Clerk of Court
Dated: October 22, 2009

ENTER:

Arthur N. Votolato
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

LOSS MITIGATION PROGRAM AND PROCEDURES

I. PURPOSE

The Loss Mitigation Program (LMP) is designed to function as a forum for debtors and lenders to reach consensual resolution when a debtor's residential property is at risk of foreclosure. The LMP aims to facilitate such resolution by opening communications between the debtors' and lenders' decision-makers. While the LMP stays certain bankruptcy deadlines that may have the effect of delaying the normal progress of bankruptcy administration, more importantly, the LMP encourages the parties to finalize a feasible and beneficial agreement under Bankruptcy Court protection, instead of seeking dismissal of the bankruptcy case.

II. LOSS MITIGATION DEFINED

The "loss mitigation" process is intended to include the full range of solutions that may prevent either the loss of a debtor's property to foreclosure, increased costs to the lender, or both. Loss mitigation commonly consists of several general types of agreements, or a combination of them: loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction[1]. The terms of a loss mitigation solution will vary in each case according to the particular needs and goals of the parties.

III. ELIGIBILITY

The following definitions describe the types of parties, properties and loans that are eligible for participation in the Loss Mitigation Program:

A. DEBTOR

The term "Debtor" means any individual debtor in a case filed under Chapter 7, 11, 12 or 13 of the Bankruptcy Code, including joint debtors. If the Debtor is represented by counsel, the term "Debtor" is to be interpreted to include both the Debtor and the Debtor's attorney, unless the Debtor, with the approval of Debtor's

[1] This is not intended to be an exclusive list of loss mitigation solutions.

counsel, has expressly requested and authorized direct involvement without counsel.

B. PROPERTY

The term "Property" means any real property used as a principal residence in which an eligible Debtor holds an interest.

C. LOAN

The term "Loan" means any mortgage, lien or extension of money or credit secured by eligible Property, regardless of whether the Loan (1) is considered to be "subprime" or "non-traditional," (2) was in foreclosure prior to the bankruptcy filing, (3) is the first or junior mortgage or lien on the Property, or (4) has been "pooled," "securitized," or assigned to a servicer or to a trustee.

D. CREDITOR

The term "Creditor" refers to any mortgage holder, assignee, servicer or trustee of an eligible Loan.

IV. ADDITIONAL PARTIES

A. OTHER CREDITORS

Where necessary or desirable to obtain a global (i.e. more than a two party) resolution, any party may request, or the bankruptcy court may direct that multiple Creditors participate in the loss mitigation process.

B. CO-DEBTORS AND THIRD PARTIES

Where the participation of a co-debtor or other third party is necessary or desirable, any party may request, or the Bankruptcy Court may direct that such party participate in loss mitigation, to the extent that the Bankruptcy Court has jurisdiction over the party, or if the party consents to such participation.

C. CHAPTER 13 TRUSTEE

It is the duty of the Chapter 13 Trustee under Section 1302(b)(4) of the Bankruptcy Code to "advise, other than on legal matters, and assist the debtor in performance under the plan." Any party may request, or the Bankruptcy Court may direct the Chapter 13 Trustee to participate in loss mitigation to the extent that

such participation would be consistent with the Chapter 13 Trustee's duties under the Bankruptcy Code.

V. COMMENCEMENT OF LOSS MITIGATION

Parties are encouraged to request loss mitigation as early in the case as possible, but loss mitigation may be initiated at any time, by any of the following methods:

A. BY THE DEBTOR

1. In Section XIII of the Model Chapter 13 Plan (RI Local Form W.1), a Chapter 13 Debtor may indicate an interest in discussing loss mitigation with a particular Creditor. If the box in Section XIII is checked, within seven (7) days of filing the Plan, the Debtor shall serve on the Creditor and its counsel, if known, and file with the Court, a Notice and/or Request for Loss Mitigation (Form A to G.O. 09-003), together with a Proposed Loss Mitigation Order with applicable dates supplied (Form C to G.O. 09-003). The Creditor shall have fourteen (14) days to object. If no objection is filed, the Bankruptcy Court may enter the proposed order "Loss Mitigation Order".

2. Alternatively, a Debtor may file with the Court and serve on the Creditor and its counsel, if known, a Notice and/or Request for Loss Mitigation (Form A to G.O. 09-003), together with a Proposed Loss Mitigation Order with applicable dates supplied (Form C to G.O. 09-003). The Creditor shall have fourteen (14) days to object. If no objection is filed, the Bankruptcy Court may enter a Loss Mitigation Order.

3. If a Creditor has filed a motion for relief from the automatic stay pursuant to Section 362 of the Bankruptcy Code (a "Lift-Stay Motion"), at any time prior to the conclusion of the hearing on the Lift-Stay Motion, the Debtor may file a Notice and/or Request for Loss Mitigation (Form A to G.O. 09-003). The Debtor and Creditor shall appear at the scheduled hearing on the Lift-Stay Motion, at

which time the Bankruptcy Court will consider the loss mitigation request and any opposition by the Creditor.

B. BY A CREDITOR

A Creditor may file with the Court and serve on the Debtor and Debtor's counsel, if any, a Request for Loss Mitigation (Form B to G.O. 09-003), together with a Proposed Loss Mitigation Order with applicable dates supplied (Form C to G.O. 09-003). The Debtor shall have seven (7) days to object. If no objection is filed, the Bankruptcy Court may enter a Loss Mitigation Order.

C. BY THE BANKRUPTCY COURT

The Bankruptcy Court may enter a Loss Mitigation Order at any time, provided that the parties bound by said Order (the "Loss Mitigation Parties") have had notice and opportunity to object and be heard.

D. OPPORTUNITY TO OBJECT

Where any party files an objection, a Loss Mitigation Order shall not be entered until the Bankruptcy Court, after adequate notice, has held a hearing to consider the objection. At least 2 days prior to the hearing, a party objecting to loss mitigation must present to the Court and parties, specific reasons why it believes that loss mitigation would not be successful. If a party objects on the ground that loss mitigation has been requested in bad faith, the assertion must be supported by objective reasons, and by sworn testimony, if necessary.

VI. LOSS MITIGATION ORDER

A. DEADLINES

A Loss Mitigation Order shall contain deadlines for the following:

1. The date by which the Loss Mitigation Parties shall designate contact persons and disclose contact information, if this information has not been previously provided.
2. The date by which each Creditor must initially contact the Debtor.
3. The date by which each Creditor must transmit information requests to the Debtor.

4. The date by which the Debtor must transmit information requests to each Creditor.
5. The date by which a written report must be filed, or the date and time set for a status conference at which verbal reports must be provided by the parties. Whenever possible, in Chapter 13 cases, the status conference will coincide with the first date set for confirmation of the Chapter 13 plan, or any continued confirmation hearing. Where a written report is required, it should be filed not later than 7 days after the conclusion of the initial loss mitigation session.
6. The date when the loss mitigation period will terminate, unless duly extended.

B. <u>EFFECT</u>

Upon the entry of a Loss Mitigation Order, the following shall apply to the Loss Mitigation Parties:

1. Except where necessary to prevent irreparable injury, loss or damage, the LM Party Creditor shall not file a Lift-Stay Motion during the loss mitigation period. Any Lift-Stay Motion filed by such LM Party Creditor prior to the entry of the Loss Mitigation Order shall be continued to a date after the last day of the loss mitigation period, and the stay shall be extended pursuant to Section 362(e) of the Bankruptcy Code.
2. In a Chapter 13 case, the hearing date for confirmation of the plan shall be continued to a date after the last day of the loss mitigation period. The deadline by which a Creditor must object to confirmation shall be extended to permit the Creditor an additional fourteen (14) days after the conclusion or termination of loss mitigation.
3. During the Loss Mitigation period, Debtors must stay current with their Chapter 13 plan payments in order to remain eligible for the program.
4. Pursuant to Federal Rule of Evidence 408, all communications and information exchanged by the Loss Mitigation Parties during the loss mitigation procedure will be inadmissible in any subsequent proceeding.

VII. DUTIES UPON COMMENCEMENT OF LOSS MITIGATION

Upon entry of a Loss Mitigation Order, the Loss Mitigation parties shall have the following obligations:

A. GOOD FAITH

The Loss Mitigation Parties shall negotiate in good faith. A party failing or refusing to participate in loss mitigation in good faith may be subject to sanctions.

B. CONTACT INFORMATION

1. The Debtor: The Debtor shall provide written notice to each Creditor, indicating the manner in which the Creditor should contact the Debtor, unless the Debtor has already done so in the Chapter 13 plan or as part of a request for loss mitigation,

2. The Creditor: Each Creditor shall provide written notice to the Debtor, identifying the name, address, and direct telephone number of the contact person with settlement authority, unless a Creditor has already done so as part of a prior request for loss mitigation.

C. STATUS REPORT

The Loss Mitigation Parties shall provide either a written or verbal report to the Bankruptcy Court regarding the status of the loss mitigation, within the time set by the Bankruptcy Court in the Loss Mitigation Order. The status report shall include whether one or more loss mitigation sessions have been conducted, whether a resolution was reached, and whether one or more of the Loss Mitigation Parties believe that additional loss mitigation sessions would be likely to result in either a partial or complete resolution. A status report may include a request for an extension of the loss mitigation period.

D. BANKRUPTCY COURT APPROVAL

The Loss Mitigation Parties shall file a written request for Bankruptcy Court approval of any resolution or settlement reached during loss mitigation.

VIII. THE LOSS MITIGATION PROCESS

A. INITIAL CONTACT

Within seven (7) days following entry of a Loss Mitigation Order, the contact person designated by each Creditor shall contact the Debtor's attorney, or Debtor, if specifically authorized, and any other Loss Mitigation Party, unless a different deadline is set by the Bankruptcy Court. The Debtor may contact any Loss Mitigation Party at any time. The purpose of the initial contact is to create a framework for the discussion at the loss mitigation session and to ensure that each of the Loss Mitigation Parties will be prepared to participate meaningfully in the loss mitigation session - it is not intended to limit additional issues or proposals that may arise during the session. During the initial contact phase, the Loss Mitigation Parties should discuss the following:

1. The time, place and method for conducting the loss mitigation sessions.
2. The types of loss mitigation solutions under consideration by each party.
3. A plan for the exchange of requested information prior to the loss mitigation session, including the due date for the Debtor to complete and return any information request or other loss mitigation paperwork that each Creditor may require. ***All information shall be provided at least 7 days prior to the loss mitigation session.***

B. LOSS MITIGATION SESSIONS

Loss mitigation sessions may be conducted in person, telephonically, or via video conference. At the conclusion of each loss mitigation session, the Loss Mitigation Parties should discuss whether additional sessions are necessary and set the time and method for conducting any additional sessions, including a schedule for the exchange of any further information or documentation that may be required.

C. BANKRUPTCY COURT ASSISTANCE

At any time during the loss mitigation period, a Loss Mitigation Party may request a settlement conference or status conference with the Bankruptcy Court.

D. SETTLEMENT AUTHORITY

Each Loss Mitigation Party must have a person with full settlement authority present during the loss mitigation session. During a status conference or settlement conference with the Bankruptcy Court, a person with full settlement authority must either attend the conference in person or be available by telephone or video conference 30 minutes prior to the start of the conference.

IX. DURATION, EXTENSION AND EARLY TERMINATION

A. INITIAL PERIOD

The initial loss mitigation period shall be set by the Bankruptcy Court in the Loss Mitigation Order.

B. EXTENSION

1. Agreement: The Loss Mitigation Parties may agree to an extension of the loss mitigation period by filing an extension in writing on the docket in the main bankruptcy case and served on all parties in interest, who shall have three (3) days to object to said extension.
2. No Agreement: Where a Loss Mitigation Party does not consent to the request for an extension of the loss mitigation period, the Bankruptcy Court shall schedule a hearing to consider whether further loss mitigation sessions are appropriate. The Bankruptcy Court may order an extension if it appears that (1) a further loss mitigation session is likely to provide a substantial benefit to a Loss Mitigation Party, (2) the party opposing the extension has not participated in good faith or has failed in a material way to comply with these Procedures, (3) the party opposing the extension would not be prejudiced, or (4) for other cause shown.

C. EARLY TERMINATION

1. Upon Request of a Loss Mitigation Party: A Loss Mitigation Party may request that the loss mitigation period be terminated, and shall state the reasons for the request.

Except where immediate termination is necessary to prevent irreparable injury, loss or damage, the request shall be made on notice to all other Loss Mitigation Parties, and if it is deemed appropriate or necessary, the Bankruptcy Court may schedule a hearing to consider said request.

2. Dismissal of the Bankruptcy Case:

   a. Other than at the request of a Chapter 13 Debtor, or on the motion of the United States Trustee, case trustee, or the Court acting sua sponte, for failure to comply with requirements under the Bankruptcy Code, a case shall not be dismissed during the loss mitigation period unless the Loss Mitigation Parties have provided the Bankruptcy Court with a status report that is approved by the Court.

   b. Upon the request of a Chapter 13 Debtor: **A Debtor shall not be required to request dismissal of the bankruptcy case as part of any resolution or settlement that is offered or agreed to during the loss mitigation period.** Where a Chapter 13 Debtor requests voluntary dismissal of the bankruptcy case during the loss mitigation period, the Debtor's dismissal request shall indicate whether the Debtor agreed to any settlement or resolution from a Loss Mitigation Party during the loss mitigation period or intends to accept an offer of settlement made by a Loss Mitigation Party during the loss mitigation period.

   c. Notice: If a bankruptcy case is dismissed for any reason during the loss mitigation period, the Clerk of the Court shall note on the docket that loss mitigation efforts were ongoing at the time the bankruptcy case was dismissed.

X. SETTLEMENT

The Bankruptcy Court will consider any agreement or resolution reached during loss mitigation (a "Settlement") and may approve the Settlement, subject to the following provisions:

1. Implementation: A Settlement may be noticed and implemented in any manner permitted by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), including, but not limited to, a stipulation, sale, plan of reorganization or amended plan of reorganization.
2. Fees, Costs or Charges: If a Settlement provides for a Creditor to receive payment or reimbursement of any fee, cost or charge that arose from loss mitigation, all such fees, costs or charges shall be disclosed to the Debtor and to the Bankruptcy Court prior to approval of the Settlement.
3. Signatures: Consent to the Settlement shall be acknowledged in writing by (1) an authorized representative of the Creditor, (2) the Debtor, and (3) the Debtor's attorney, if applicable.
4. Hearing: Where a Debtor is represented by counsel, a Settlement may be approved by the Bankruptcy Court without further notice, or upon such notice as the Bankruptcy Court directs, unless additional notice or a hearing is required by the Bankruptcy Code or Bankruptcy Rules. Where a Debtor is not represented by counsel, a Settlement shall not be approved until after the Bankruptcy Court has conducted a hearing at which the Debtor shall appear in person.
5. Amended Schedules I and J and Amended Chapter 13 Plan, if applicable:
   Within fourteen (14) days after Court approval of a Settlement, the Debtor shall file amended Schedules I and J, and an amended Chapter 13 Plan, if applicable.
6. Dismissal Not Required: **A Debtor is not required to request dismissal of the bankruptcy case in order to effectuate a**

Settlement. To ensure that the Settlement is enforceable, the Loss Mitigation Parties must request Bankruptcy Court approval of the Settlement. Where the Debtor requests or consents to dismissal of the bankruptcy case as part of the Settlement, the Bankruptcy Court may approve the Settlement as a "structured dismissal," if such action complies with the Bankruptcy Code and the Bankruptcy Rules, and does substantial justice between the parties.

XI. COORDINATION WITH OTHER PROGRAMS

[Provision may be added in the future to provide for coordination with other loss mitigation programs.]

XII. EFFECTIVE DATE

Pursuant to General Order 09-003, this LMP shall become effective on November 1, 2009.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

Form A to G.O. 09-003
TWO PAGE DOCUMENT

\- - - - - - - - - - - - - - - - - - - x
In re:
: BK No.
Chapter
Debtor(s) :
\- - - - - - - - - - - - - - - - - - - x

NOTICE AND/OR REQUEST FOR LOSS MITIGATION - BY THE DEBTOR

I am a Debtor in this case, and hereby request loss mitigation with respect to *[Identify the property, loan and creditor(s) for which loss mitigation is requested]*:

NAME OF CREDITOR: ______________________________________

____

PROPERTY ADDRESS: ______________________________________

____

SIGNATURE
I understand that if the Court orders loss mitigation in this case, I am required to comply with the Loss Mitigation Procedures, and will participate in loss mitigation in good faith. I understand that loss mitigation is voluntary, and that I am not required to enter into any agreement or settlement with any other party as part of this loss mitigation, and understand that no other party is required to enter into any agreement or settlement with me. I also understand that **I am not required to request dismissal of this case** as part of any resolution or settlement that is offered or agreed to during the loss mitigation period.

Sign: ______________________ Date: ______________, 2009

DEBTOR INFORMATION:

Print Full Name: ______________________________

Mailing Address: ______________________________

Telephone Number: ______________________________

Email Address (if any) ______________________________

Attorney Information (if any):

Name: ______________________________

Address: ______________________________

Telephone Number: ______________ Fax Number: ______________

Email Address (if any) ______________________________

Preferred Method of Contact: ______ Debtor's Attorney
______ Debtor

Pursuant to Section V of the Loss Mitigation Program, the above named Creditor has fourteen (14) Days to file with the Court and serve on the Debtor and Debtor's attorney, any objection to this Request at:

U.S. Bankruptcy Court, District of Rhode Island
The Federal Center, 380 Westminster Street,
Providence, Rhode Island 02903

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

Form B to G.O. 09-003

- - - - - - - - - - - - - - - - - - - -x
In re: :

BK No.
: Chapter

Debtor(s)
- - - - - - - - - - - - - - - - - - - -x

LOSS MITIGATION REQUEST - BY A CREDITOR

I am a creditor (including a holder, assignee, servicer or trustee of a mortgage or lien secured by property used by the Debtor as a principal residence) of the Debtor. I hereby request loss mitigation with respect to *[Identify the property and loan for which you are requesting loss mitigation]*:

____

____

____

SIGNATURE
I have reviewed the Loss Mitigation Procedures, and understand that if the Court orders loss mitigation in this case, I will be bound by the Loss Mitigation Procedures, and will participate in loss mitigation in good faith. If loss mitigation is ordered, I agree to provide the Court with a written or verbal status report stating whether or not the parties participated in one or more loss mitigation sessions, whether or not a settlement was reached, and whether negotiations are ongoing, and I **will not require the Debtor to request or cause dismissal of this case** as part of any resolution or settlement that is offered or agreed to during the loss mitigation period.

Sign:______________________________ Date:________________, 2009

Print Name:____

Title:____

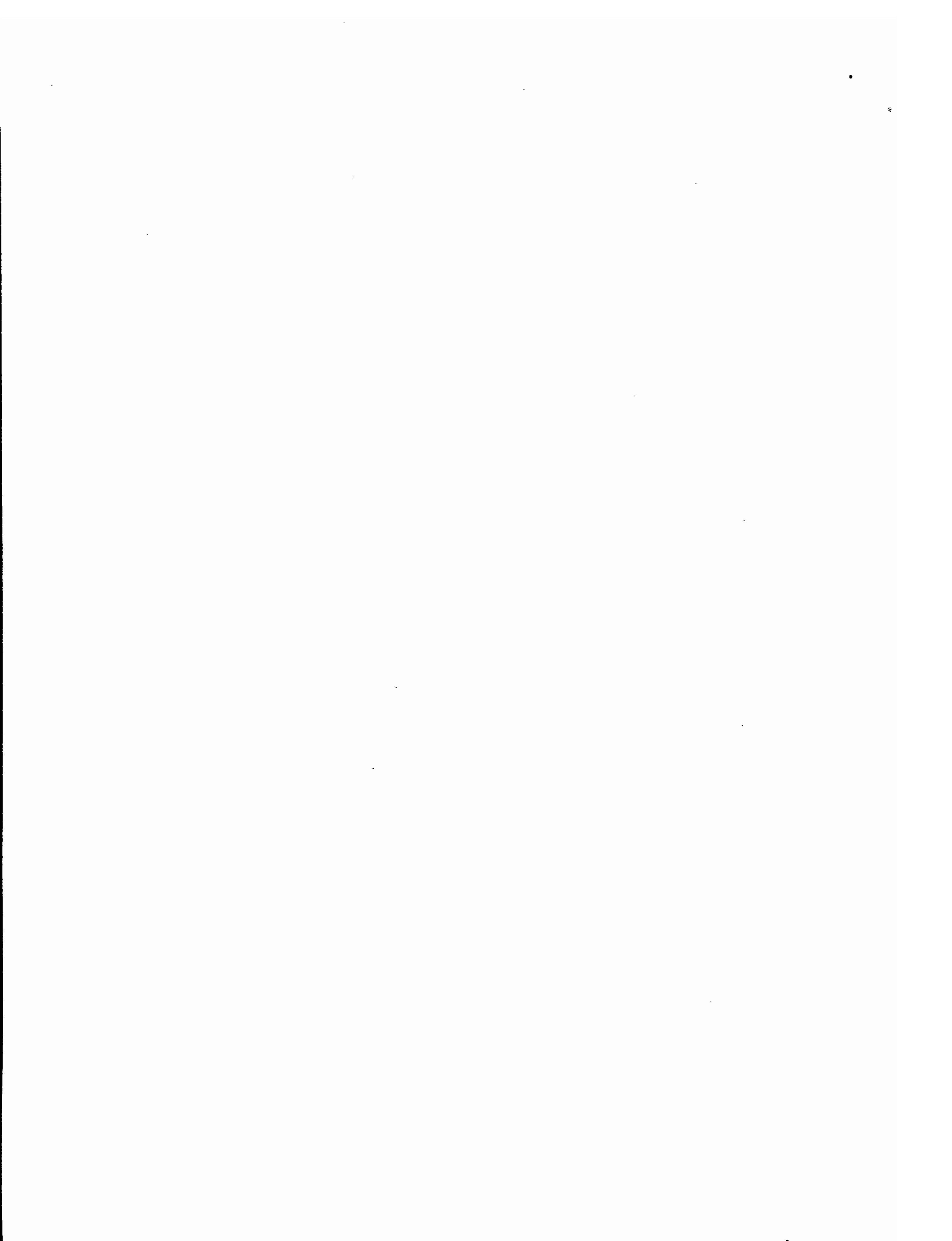
Firm or Company:____

Telephone Number:____

E-mail address (if any):_______________________________________

Pursuant to Section V of the Loss Mitigation Program, the above named Debtor has seven (7) Days to file any objection to this Request at:

U.S. Bankruptcy Court, District of Rhode Island
The Federal Center, 380 Westminster Street,
Providence, Rhode Island 02903.



UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

Form C to G.O. 09-003

- - - - - - - - - - - - - - - - - - - -x

In re: : BK No.
Chapter
:
Debtor(s)

- - - - - - - - - - - - - - - - - - - -x

LOSS MITIGATION ORDER

☐ A Loss Mitigation Request[2] was filed by the Debtor on ________ ______________________________, 200___.

☐ A Loss Mitigation Request was filed by a creditor on ________ ______________________________, 200____.

☐ The Court raised the possibility of loss mitigation, and the parties have had notice and an opportunity to object.

Accordingly, it is **ORDERED**, that the following parties (collectively, the "Loss Mitigation Parties") are directed to participate in loss mitigation:

1. The Debtor

2. ______________________________, the Creditor with respect to ______________________________ ______________________________ *[describe Loan and/or Property]*.

3. ______________________________ ______________________________ *[Additional parties, if any.]*

It is further **ORDERED**, that the Loss Mitigation Parties shall comply with the Loss Mitigation Procedures annexed to this Order; and it is further

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[2] All capitalized terms have the meanings defined in the section on Loss Mitigation Procedures.

ORDERED, that the Loss Mitigation Parties shall observe the following deadlines:

1. Each Loss Mitigation Party shall designate contact persons and disclose contact information by ____________________ *[suggested time is 7 days]*, unless this information has been previously provided. As part of this obligation, **A creditor shall furnish each Loss Mitigation Party with written notice of the name, address, and direct telephone number of the person who has full settlement authority, and shall file such Loss Mitigation Contact Information with the Court.**

2. Each Creditor that is a Loss Mitigation Party shall contact the Debtor's Attorney, or Debtor, if pro se, within **fourteen (14) days of the date of this Order.**

3. Each Loss Mitigation Party must make its information request, if any, within **fourteen (14) days of the date of this Order.**

4. Each Loss Mitigation Party shall respond to an information request within **fourteen (14) days after such request is made, or seven (7) days prior to the Loss Mitigation Session, whichever is earlier.**

5. The Loss Mitigation Session shall be scheduled not later than ____________________ *[suggested time is within 45 days of the date of the Order]*.

6. The loss mitigation period shall terminate on ____________________ *[suggested time is within 60 days of the date of the Order]*, unless extended as provided in the Loss Mitigation Procedures.

It is further **ORDERED**, that a status conference will be held in this proceeding on ____________________ *[within 60 days unless extended by Court Order]* (the "Status Conference"). The Loss Mitigation Parties shall appear at the Status Conference and provide the Court with a verbal Status Report, unless a detailed joint Status Report has been filed at least seven (7) days prior to the date of the

Status Conference with a request that the Status Conference be dispensed with in lieu of the report; and it is further

ORDERED, that at the Status Conference, the Court may consider a proposed Settlement by the Loss Mitigation Parties, or may continue the Status Conference to allow more time to complete the loss mitigation session, or for time to provide adequate notice of a request for approval of a Settlement; and it is further

ORDERED, that any other pending matters between the Loss Mitigation Parties are hereby continued to the date of the Status Conference, to the extent those matters concern (1) relief from the automatic stay, (2) objection to the allowance of a proof of claim, (3) reduction, reclassification or avoidance of a lien, (4) valuation of a Loan or Property, or (5) objection to confirmation of a plan of reorganization; and it is further

ORDERED, that the time for each Loss Mitigation Creditor to file an objection to a plan of reorganization in this case shall be extended until fourteen (14) days after the termination of the loss mitigation period, or any extension thereof.

Entered as an Order of this Court.

Dated at Providence, Rhode Island, this ________________ day of ______________________________, 2009.

____
Arthur N. Votolato
U.S. Bankruptcy Judge

Entered on docket: