

DEC 14 2012

SUSAN M SPRAY, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-12-1140-KiDH
	)		
MARYETTA C. MARKS,	)	Bk. No.	10-42867-SK
	)		
Debtor.	)		
_____	)		
	)		
MARYETTA C. MARKS,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
KATHY A. DOCKERY, Chapter 13	)		
Trustee; WELLS FARGO BANK,	)		
N.A., Trustee for Option One	)		
Mortgage Loan Trust 2007-6,	)		
Asset-Backed Certificates,	)		
Series 2007-6,	)		
	)		
Appellees.	)		
_____	)		

Argued and Submitted on November 15, 2012,  
at Pasadena, California

Filed - December 14, 2012

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Sandra R. Klein, Bankruptcy Judge, Presiding

Appearances: Appellant MaryEtta C. Marks argued pro se; Joseph C. Delmotte, Esq. of Pite Duncan, LLP, argued for Appellee Wells Fargo Bank, N.A., Trustee for Option One Mortgage Loan Trust 2007-6, Asset-Backed Certificates, Series 2007-6.

Before: KIRSCHER, DUNN, and HOLLOWELL, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Appellant, chapter 13<sup>2</sup> debtor MaryEtta C. Marks ("Marks"),  
2 appeals an order from the bankruptcy court granting a motion for  
3 relief from the automatic stay filed by appellee, Wells Fargo  
4 Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2007-6,  
5 Asset-Backed Certificates, Series 2007-6 ("Wells Fargo"). We  
6 AFFIRM.

7 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

8 **A. The first and second motions for relief from stay.**

9 On February 7, 2007, Marks obtained a loan ("Loan") for  
10 \$609,987.00 from Option One Mortgage Corporation ("Option One")  
11 for a residence located in Los Angeles ("Property"). In exchange  
12 for the Loan, Marks executed a promissory note ("Note") secured by  
13 a first deed of trust ("DOT") in favor of Option One.

14 Marks eventually defaulted on the Loan, and on February 22,  
15 2010, a Notice of Default ("NOD") was recorded against the  
16 Property in Los Angeles County. The NOD identified the DOT and  
17 its beneficiary as Option One. Default Resolution Network was  
18 identified as the agent authorized to file the NOD. American Home  
19 Mortgage Servicing, Inc. ("AHMSI") was listed as the contact for  
20 payment and any other information regarding the foreclosure.

21 On July 20, 2010, a Notice of Trustee's Sale ("NOS") was  
22 recorded against the Property in Los Angeles County. The NOS  
23 identified the DOT beneficiary as Option One, and Power Default  
24 Services, Inc. was identified as trustee. A sale was set for  
25 August 9, 2010.

---

26  
27 <sup>2</sup> Unless specified otherwise, all chapter, code, and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 To fend off foreclosure, Marks filed a skeletal chapter 7  
2 bankruptcy petition on August 6, 2010, thereby invoking the  
3 protections of the automatic stay under § 362(a). In her  
4 Schedule A filed on August 20, 2010, Marks listed the Property  
5 with a value of \$739,000, subject to a secured claim for  
6 \$667,294.00. In her Schedule D, Marks listed AHMSI as the secured  
7 creditor holding the claim referenced in her Schedule A. Marks  
8 also listed Option One and Sand Canyon Corporation ("Sand Canyon")  
9 as having a security interest in the Property with secured claims  
10 valued at \$0.00, noting that each entity "claim[ing] that AHMSI is  
11 same created confusion."

12 On September 17, 2010, the beneficial interest in the DOT was  
13 assigned to Wells Fargo ("Assignment"). The Assignment describes  
14 the DOT and reflects the assignor as Sand Canyon, f/k/a Option  
15 One. It contains both a handwritten and stamped signature by  
16 Joseph Kaminski, Assistant Secretary of Sand Canyon. In the upper  
17 left corner, it states that recording was requested by AHMSI,  
18 "successor in interest" to Sand Canyon, f/k/a Option One. The  
19 Assignment was recorded in Los Angeles County on October 4, 2010.

20 Meanwhile, on September 29, 2010, Wells Fargo moved for  
21 relief from the automatic stay ("First Motion for Relief") under  
22 § 362(d)(1) to proceed with foreclosure of the Property. In  
23 support, Wells Fargo offered a declaration from Brenda Harris, an  
24 employee of AHMSI, who was the "authorized loan servicing agent  
25 for [Wells Fargo]." Harris stated that Wells Fargo held the Note  
26 and that Option One had assigned its beneficial interest in the  
27 DOT to Wells Fargo. Attached to the motion was a copy of the  
28 Note, the DOT, and (at that time) the unrecorded Assignment.

1           Marks opposed the First Motion for Relief, contending that an  
2 adequate equity cushion existed on the Property. In her  
3 declaration, Marks stated that negotiations for a loan  
4 modification had broken down with AHMSI, whom she was told held  
5 the Note, which forced her to file bankruptcy to "prevent the  
6 illegal foreclosure sale of [her] property." Marks claimed she  
7 never received a copy of the NOD, and that she only found out  
8 about the scheduled trustee sale through her Theft Protection  
9 Shield Plan.

10           Two weeks after Wells Fargo had filed its First Motion for  
11 Relief, Marks moved to convert her case to chapter 13. On  
12 November 23, 2010, the bankruptcy court denied the motion to  
13 convert for Marks's failure to properly serve it in accordance  
14 with local rule. Notwithstanding the denial, the case has been  
15 mistakenly treated as having (and continues to be administered as  
16 if it had) been converted to chapter 13 and was reassigned from  
17 the Hon. Ellen Carroll to the Hon. Sandra Klein. As a result of  
18 the conversion, the First Motion for Relief was removed from the  
19 court's calendar.

20           Marks's First Amended Chapter 13 Plan, which provided for  
21 direct payments to Wells Fargo on the nearly \$76,000 arrearage on  
22 the Loan, was confirmed on May 13, 2011.

23           On June 8, 2011, Wells Fargo again moved for relief from stay  
24 ("Second Motion for Relief") under § 362(d)(1) because Marks had  
25 failed to make sufficient pre- and postpetition payments on the  
26 Loan. In support, Wells Fargo offered a declaration from Carolyn  
27 J. Moore, an employee of AHMSI. Unlike the Harris declaration,  
28 Moore did not state that AHMSI was the authorized loan servicing

1 agent for Wells Fargo, or that Wells Fargo was the holder of the  
2 Note entitled to payments. She did, however, state that Option  
3 One had assigned its beneficial interest in the DOT to Wells  
4 Fargo. Attached was a copy of the Note, the DOT, and the since-  
5 recorded Assignment to Wells Fargo.

6 Marks filed an untimely opposition to the Second Motion for  
7 Relief on July 6, 2011, in which she contended Wells Fargo had  
8 failed to indicate the connection between AHMSI, whose employee  
9 signed the declaration in support, and Wells Fargo, to whom she  
10 claimed she had been making regular payments pursuant to a loan  
11 modification agreement and her chapter 13 plan. Marks asserted  
12 that AHMSI was a stranger to the Loan.

13 A hearing on the Second Motion for Relief was held on  
14 July 14, 2011, before the Hon. Peter Carroll. Warren L. Brown,  
15 Esq. ("Brown") appeared for Marks. The bankruptcy court noted  
16 that the issue with regard to the connection between AHMSI and  
17 Wells Fargo was a similar issue to that raised in Veal v. Am. Home  
18 Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897, 906 (9th Cir.  
19 BAP 2011), and, based on the evidence provided, Wells Fargo had  
20 not made the connection between it and AHMSI:

21 And, specifically I have to agree with the Debtor that I  
22 can't make a connection based on the evidence in support  
23 of the motion between [AHMSI] and Wells Fargo. Now Wells  
24 Fargo certainly has standing to bring the motion  
25 according to the paperwork that's attached. But the  
26 declaration that ties everything together is signed by  
27 Carolyn Moor [sic], who is the Assistant Secretary of  
28 [AHMSI], and it doesn't refer to Wells Fargo or even  
claim to have a connection with Wells Fargo. It is as if  
[AHMSI] is bringing this motion. It does reference the  
deed of trust that was assigned to Wells Fargo, but does  
not state anywhere that it is the duly authorized  
servicing agent for Wells Fargo and has authority to make  
this declaration and to state what funds are owing on the  
note and to Wells Fargo secured by the deed of trust on

1 the property.  
2 Hr'g Tr. (July 14, 2011) 1:21-2:13 (emphasis added). Counsel for  
3 Wells Fargo requested a continuance to file a supplemental  
4 declaration regarding AHMSI's role as loan servicer for Wells  
5 Fargo, but also noted that a continuance would be appropriate if  
6 Marks was working with AHMSI on a loan modification. The  
7 bankruptcy court granted the continuance, but Wells Fargo later  
8 withdrew the Second Motion for Relief to give Marks additional  
9 time to pursue a loan modification.

10 **B. The third motion for relief from stay.**

11 On January 9, 2012, Wells Fargo filed a third motion for  
12 relief from stay ("Third Motion for Relief"), wherein it requested  
13 relief under § 362(d)(1) for Marks's failure to tender  
14 postpetition payments due and owing under the Note. In support,  
15 Wells Fargo offered a declaration from Demetrius Foster, an  
16 employee of AHMSI. Foster stated that, by contract, AHMSI was the  
17 authorized loan servicing agent for Wells Fargo and that Option  
18 One had assigned its beneficial interest in the DOT to Wells  
19 Fargo. Attached was a copy of the Note, the DOT, and a copy of  
20 the Assignment without the related recording document. A hearing  
21 was scheduled for February 1, 2012.

22 On January 19, 2012, an untimely opposition to the Third  
23 Motion for Relief was filed by alleged creditor, Rev. C.R. Tillman  
24 ("Tillman"). Tillman contended that Wells Fargo lacked standing  
25 and that it should be sanctioned for bringing a "fraudulent motion  
26 with deceptive exhibits." Attached to Tillman's opposition was a  
27 copy of an objection he had filed in November 2011 in response to  
28 an additional fee request by Brown. In that opposition, Tillman

1 contended Marks owed him \$499.00 for title and legal research he  
2 claimed helped "defeat" Wells Fargo's previous motions for relief  
3 from stay. Tillman further contended his research revealed that  
4 the Assignment to Wells Fargo was void since it violated the stay  
5 in Marks's case, and the Assignment was also unenforceable under  
6 In re Veal because it failed to assign the Note with the DOT.

7       Eight days after he filed his first objection, Tillman filed  
8 a second untimely objection to the Third Motion for Relief, which  
9 was similar to the first, but this one contained a declaration  
10 from Marks. Marks contended that Wells Fargo had not produced any  
11 evidence that it held the Note. She further argued that Wells  
12 Fargo lacked standing to enforce the Note because it had not been  
13 properly endorsed. Marks stated her intent to file complaints  
14 against Wells Fargo with the U.S. Trustee's Office, the U.S.  
15 Attorney General, the NAACP, the FBI, and the Secret Service  
16 Office, due to Wells Fargo's forgery and false document  
17 procurement in lending transactions.

18       One day before the scheduled hearing, Marks, now appearing  
19 pro se, filed her own untimely opposition to the Third Motion for  
20 Relief. She contended that both AHMSI and Wells Fargo failed to  
21 establish "standing" as directed by Judge Carroll at the hearing  
22 on the Second Motion for Relief. In her supporting declaration,  
23 Marks contended that AHMSI had not shown how it came into  
24 possession of the Note or shown any proof of agency. Marks also  
25 contended that Wells Fargo had failed to show any proof of agency,  
26 or how or when it was assigned the DOT.

27       The hearing on the Third Motion for Relief went forward on  
28 February 1, 2012, before the Hon. Sandra Klein. Brown, appearing

1 for Marks, stated that he did not know Tillman, but he had learned  
2 through Marks that Tillman was her minister, who was apparently  
3 giving Marks legal advice when Brown's advice was inadequate.  
4 Marks then informed the court that Brown had disagreed with her  
5 and did not want to file an opposition to the Third Motion for  
6 Relief, so she filed her own opposition. The court noted that it  
7 had considered Marks's untimely opposition and asked her if she  
8 wished to present any argument. Marks questioned the competency  
9 of declarant Foster and argued that Wells Fargo had not produced  
10 any documents to support Foster's assertions. Marks further  
11 argued that no evidence existed showing the chain of assignment  
12 regarding her Property. Counsel for Wells Fargo argued that his  
13 client had established its standing with the Assignment and the  
14 Foster declaration. Counsel noted that Marks was behind eleven  
15 payments on her Loan postpetition.

16 After hearing further argument from the parties, the  
17 bankruptcy court found that Wells Fargo had shown a colorable  
18 claim for relief and granted the Third Motion for Relief:

19 Okay. After considering the evidence submitted by the  
20 movant -- I did review, even though it was extremely  
21 lately filed, the opposition filed by Ms. Marks -- I do  
22 find that there is sufficient evidence of the assignment  
23 in the record attached to the motion for relief from stay  
24 that was filed by movant in this case.

25 I understand there may have been issues in the previous  
26 motion that was filed before Judge Peter Carroll, but  
27 that has been rectified in this motion.

28 I also do note that in California, the entity foreclosing  
does not have to produce the note. That's clear case  
law. I can certainly provide cites. The first that  
comes to mind is the Gomez [sic] cite that was decided by  
the California Court of Appeals in 2011. And there are  
numerous other cites that also hold the same.

So I am going to grant the relief from stay and just



1 state further that this is a summary proceeding. The  
2 movant only has to show a colorable claim for relief.  
3 And I find that based upon the evidence in the record,  
4 they have shown that. So I'm granting the movant's  
5 motion under [§ 362](d)(1).

6 Hr'g Tr. (Feb. 1, 2012) 7:9-8:4. The court announced that it did  
7 not consider Tillman's opposition because he was not an attorney  
8 or a party to the case.

9 Before the bankruptcy court entered an order on the Third  
10 Motion for Relief, Tillman filed a one-page motion for  
11 reconsideration, which consisted of one sentence and lacked any  
12 legal reasoning.

13 On February 3, 2012, the bankruptcy court entered an order  
14 granting the Third Motion for Relief under § 362(d)(1)("Stay  
15 Relief Order").<sup>3</sup>

16 On February 15, 2012, Marks filed a joinder to Tillman's one-  
17 sentence motion for reconsideration under Civil Rule 59(e) and a  
18 request for evidentiary hearing. Marks contended that after the  
19 February 1 hearing, she realized she had not received copies of  
20 the exhibits attached to Wells Fargo's Third Motion for Relief,  
21 i.e., the Note, the DOT, and the Assignment, prior to the hearing.  
22 She later received copies from Brown on February 2. Marks argued  
23 that reconsideration of the Stay Relief Order was warranted  
24 because the exhibits provided newly discovered evidence with  
25 respect to Wells Fargo's standing to bring the Third Motion for  
26 Relief and to Wells Fargo's fraud.

27 Specifically, Marks argued that AHMSI's name did not appear  
28 in the body of the NOD, but was only referenced in the upper left

---

<sup>3</sup> For reasons unknown, the court entered a second identical order on February 7, 2012.

1 corner of the document. Marks further argued that the signature  
2 of Joseph Kaminski on the Assignment to Wells Fargo was illegible,  
3 and his stamped signature consisted of what is now commonly  
4 referred to as "robo-signing." In addition, the notary's  
5 acknowledgment did not establish that Kaminski actually appeared  
6 before her when signing. Therefore, according to Marks, the  
7 Assignment was fraudulent on its face. Marks further argued that  
8 although AHMSI was identified in the Assignment as the "successor  
9 in interest" to Sand Canyon, f/k/a Option One, no assignment to  
10 AHMSI existed in the public record.

11 Marks filed a second reconsideration motion and request for  
12 evidentiary hearing two days later on February 17, 2012. She  
13 refined her arguments raised in the first motion, contending that:  
14 (1) the real party in interest was Option One, not AHMSI or Wells  
15 Fargo; (2) the Assignment was invalid on its face because it was  
16 "robo-signed;" and (3) California law requires assignees to record  
17 their assignments before exercising their power of sale, and no  
18 assignment to AHMSI from Sand Canyon, f/k/a/ Option One had been  
19 recorded. In her declaration, Marks stated that she conducted a  
20 title search on the Property on February 16, 2012, which showed  
21 the Assignment had not been recorded. She identified the "title  
22 search" as "Exhibit 8," which consisted of a copy of a 1996  
23 quitclaim deed showing a gift transfer of interest in the Property  
24 from Willie J. Marks and Marks as joint tenants to Marks as sole  
25 owner, and copies of the Note, the DOT, the NOD, the NOS, and a  
26 notice of Marks's bankruptcy filing. In sum, Marks contended  
27 Wells Fargo had failed to provide any written document showing a  
28 transfer of the interest in the Property from Option One to any

1 other entity, be it AHMSI, Sand Canyon, or Wells Fargo.

2 A hearing on the reconsideration motions was held on  
3 February 29, 2012. The bankruptcy court denied the motions,  
4 rejecting Marks's argument of not having received Wells Fargo's  
5 exhibits prior to the hearing as a basis for newly discovered  
6 evidence; the court had received the exhibits and considered them,  
7 so no newly discovered evidence existed.

8 After the bankruptcy court had ruled and went off the record,  
9 Tillman appeared and presented argument on his one-sentence motion  
10 for reconsideration. In short, he argued that the Assignment was  
11 invalid because it was done postpetition in violation of the stay.  
12 The court informed Tillman that assignments are not impacted by  
13 the stay, and that a creditor is free to assign its interest to  
14 whomever it wants. After hearing further argument from Tillman,  
15 the court again denied the motions for reconsideration, and,  
16 specifically, denied Tillman's motion because it failed to provide  
17 any supporting facts or argument. The court entered an order  
18 denying both motions for reconsideration on March 22, 2012 (the  
19 "Reconsideration Order").

20 Marks timely filed an amended Notice of Appeal on March 26,  
21 2012.<sup>4</sup>

## 22 II. JURISDICTION

23 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
24 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C. § 158.

25

26

---

27 <sup>4</sup> On March 28, 2012, Marks filed a motion for stay pending  
28 appeal, which Wells Fargo opposed. The bankruptcy court denied  
that motion on May 2, 2012.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

### III. ISSUES

1. Did the bankruptcy court abuse its discretion when it granted Wells Fargo's Third Motion for Relief?

2. Did the bankruptcy court abuse its discretion in denying the motions to reconsider the Stay Relief Order?

### IV. STANDARDS OF REVIEW

We review a bankruptcy court's order granting relief from the automatic stay for an abuse of discretion. Gruntz v. Cnty. of L.A. (In re Gruntz), 202 F.3d 1074, 1084 n.9 (9th Cir. 2000)(en banc); Edwards v. Wells Fargo Bank, N.A. (In re Edwards), 454 B.R. 100, 104 (9th Cir. BAP 2011). Likewise, the bankruptcy court's denial of a motion for reconsideration is reviewed for an abuse of discretion. OneCast Media, Inc. v. James (In re OneCast Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006). A bankruptcy court abuses its discretion if it applied the wrong legal standard or its findings were illogical, implausible, or without support in the record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

We review de novo whether a party has standing. Mayfield v. United States, 599 F.3d 964, 970 (9th Cir. 2010); In re Veal, 450 B.R. at 906. De novo means review is independent, with no deference given to the trial court's conclusion. Mwanqi v. Wells Fargo Bank, N.A. (In re Mwanqi), 432 B.R. 812, 818 (9th Cir. BAP 2010).

### V. DISCUSSION

**A. The bankruptcy court did not err in determining that Wells Fargo had standing to prosecute the Third Motion for Relief.**

Marks contends on appeal that the Assignment to Wells Fargo

1 is void, or fraudulent, or otherwise ineffective. On this basis,  
2 she asserts that Wells Fargo lacked standing to prosecute the  
3 Third Motion for Relief.

4 **1. Standing**

5 Standing is a threshold matter of jurisdiction. In re  
6 Edwards, 454 B.R. at 104. The issue of standing involves both  
7 "constitutional limitations on federal court jurisdiction and  
8 prudential limitations on its exercise." Warth v. Seldin,  
9 422 U.S. 490, 498 (1975); In re Veal, 450 B.R. at 906. Only  
10 prudential standing is at issue in this appeal.<sup>5</sup> Prudential  
11 standing requires the plaintiff to assert its own legal rights  
12 rather than the legal rights of others. Dunmore v. United States,  
13 358 F.3d 1107, 1112 (9th Cir. 2004).

14 Motions for relief from stay are contested matters under  
15 Rule 9014. Rule 9014(c) provides that Rule 7017, which in turn  
16 incorporates Civil Rule 17(a), is applicable to contested matters.  
17 Civil Rule 17(a)(1) provides that "[a]n action must be prosecuted  
18 in the name of the real party in interest . . . ." Thus, to  
19 satisfy the requirements of prudential standing and Civil  
20 Rule 17(a)(1), "the action must be brought by the person who,  
21 according to the governing substantive law, is entitled to enforce  
22 the right." 6A Wright, Miller, Kane & Marcus, FED. PRAC. & PROC.,  
23 Civ. ¶ 1543 (3d ed. 2011); In re Veal, 450 B.R. at 908. Simply  
24 put, the party moving for relief from the automatic stay must be

---

25  
26 <sup>5</sup> Constitutional standing is satisfied because Wells Fargo  
27 established the minimum requirements of injury in fact, causation,  
28 and redressability. The automatic stay's prohibition on  
Wells Fargo's right to exercise its alleged nonbankruptcy rights  
could be redressed by obtaining relief from stay. See In re Veal,  
450 B.R. at 906.

1 the "real party in interest."

2 The stay under § 362(a) is extremely broad in scope and  
3 prohibits almost any type of formal or informal collection or  
4 legal action against a debtor or the property of the estate.  
5 Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot., 474 U.S. 495,  
6 503 (1986). The automatic stay prevents continuation of a  
7 foreclosure proceeding concerning a debtor's property, or property  
8 of a bankruptcy estate, during the pendency of the bankruptcy  
9 case. Countrywide Home Loans, Inc. v. Hoopai (In re Hoopai),  
10 581 F.3d 1090, 1093 (9th Cir. 2010).

11 Under § 362(d), a "party in interest" can request relief from  
12 the automatic stay. Section 362(d)(1) authorizes relief from stay  
13 "for cause, including the lack of adequate protection of an  
14 interest in property of such party in interest." The Code does  
15 not define the term "party in interest." Thus, whether a moving  
16 party is a "party in interest" under § 362(d) is determined on a  
17 case-by-case basis, taking into account both the claimed interest  
18 and how that interest is affected by the automatic stay. In re  
19 Veal, 450 B.R. at 913; Kronemyer v. Am. Contractors Indem. Co.  
20 (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP 2009). A  
21 "party in interest" can include any party that has a pecuniary  
22 interest in the matter, that has a practical stake in the  
23 resolution of the matter, or that is impacted by the automatic  
24 stay. Brown v. Sobczak (In re Sobczak), 369 B.R. 512, 517-18 (9th  
25 Cir. BAP 2007).

26 Proceedings to decide motions for relief from the automatic  
27 stay are very limited in scope. Such proceedings "should not  
28 involve an adjudication on the merits of claims, defenses, or

1 counterclaims, but simply determine whether the creditor has a  
2 colorable claim to the property of the estate." Biggs v. Stovin  
3 (In re Lux Int'l, Ltd.), 219 B.R. 837, 842 (9th Cir. BAP 1998)  
4 (emphasis added). See In re Veal, 450 B.R. at 913 (holding same  
5 and citing First Fed. Bank of Cal. v. Robbins (In re Robbins),  
6 310 B.R. 626, 631 (9th Cir. BAP 2004)). Veal recognized that a  
7 movant has a colorable claim under § 362 if it either: (1) owns or  
8 has another form of property interest in a note secured by the  
9 debtor's (or the estate's) property; or (2) is a "person entitled  
10 to enforce such a note under applicable state law." 450 B.R. at  
11 910. We note, however, that Veal is distinguishable from the  
12 instant case because Veal was applying Illinois law, which follows  
13 the common law rule under the Uniform Commercial Code ("UCC") that  
14 a mortgagee must hold the note to foreclose. Id. at 916.  
15 Likewise, under the common law rule, an assignment of a mortgage  
16 without the note is a nullity. Id. In Veal, the Panel determined  
17 that the mortgagee failed to establish its standing to obtain  
18 relief from the automatic stay because it could not show that it  
19 possessed the note, or that it had an interest in the note. Id.  
20 at 918. In this case, California law applies,<sup>6</sup> which has altered  
21 the common law rule by statute.

22 Veal recognized that states within the Ninth Circuit,  
23 including California, have enacted nonjudicial foreclosure

---

24  
25 <sup>6</sup> The DOT, the security instrument at issue, contains a  
26 choice of law provision, which states that it shall be governed by  
27 federal law "and the law of the jurisdiction in which the Property  
28 is located." Here, that would be California. As the Panel held  
in Veal, the forum state's choice of law rules determine which  
state's substantive law applies. 450 B.R. at 916 n.32. As for  
the Property at issue here, California uses deeds of trust as  
opposed to mortgages as the security instrument for the note.

1 statutes that may have changed the common law rule. Id. at 916-17  
2 & n.34. Veal further recognized that "the minimum requirements  
3 for the initiation of foreclosures under applicable nonbankruptcy  
4 law will shape the boundaries of real party interest status under  
5 Civil Rule 17 with respect to relief from stay matters. As a  
6 consequence, the result in a given case may often depend upon the  
7 situs of the real property in question." 450 B.R. at 917 n.34.

8 California's nonjudicial foreclosure statutes are governed by  
9 CAL. CIV. CODE ("CCC") §§ 2924 through 2924k, which do not require  
10 that the note be in the possession of the party initiating  
11 foreclosure. Debrunner v. Deutsche Bank Nat'l Trust Co., 138 Cal.  
12 Rptr. 3d 830, 835 (Cal. Ct. App. 2012)(string citations omitted);  
13 Lane v. Vitek Real Estate Indus. Grp., 713 F.Supp.2d 1092, 1099  
14 (E.D. Cal. 2010)("There is no stated requirement in California's  
15 non-judicial foreclosure scheme that requires a beneficial  
16 interest in the Note to foreclose. Rather, [CCC § 2924(a)(1)]  
17 broadly allows a trustee, mortgagee, beneficiary, or any of their  
18 agents to initiate non-judicial foreclosure. Accordingly, the  
19 statute does not require a beneficial interest in both the Note  
20 and the Deed of Trust to commence a non-judicial foreclosure  
21 sale."); Hafiz v. Greenpoint Mortg. Funding, Inc., 652 F.Supp.2d  
22 1039, 1043 (N.D. Cal. 2009)(same); Hague v. Wells Fargo Bank, NA,  
23 2011 WL 3360026, at \*3 (N.D. Cal. Aug. 2, 2011)("The original note  
24 need not be produced in order to initiate nonjudicial  
25 foreclosure."). The comprehensive statutory framework established  
26 to govern nonjudicial foreclosure sales in CCC § 2924 et seq. is  
27 intended to be exhaustive. Moeller v. Lien, 30 Cal. Rptr. 2d 777,  
28 785 (Cal. Ct. App. 1994)(citing Homestead Sav. v. Darmiento,



1 281 Cal. Rptr. 2d. 367 (Cal. Ct. App. 1991)).

2 **2. Analysis**

3 Therefore, in California, a party with a nonbankruptcy right  
4 to commence foreclosure proceedings may have prudential standing -  
5 i.e, a colorable claim to the property - to prosecute a motion for  
6 relief from stay. Hence, to the extent Marks contends Wells Fargo  
7 had to show that it held the Note, or an interest in the Note, or  
8 produce the actual Note to establish its standing to prosecute the  
9 Third Motion for Relief, she is incorrect. Given that Wells Fargo  
10 could commence foreclosure of the Property without the Note, it  
11 certainly would not need to possess or show any interest in the  
12 Note in the lesser action of establishing a colorable claim  
13 entitling it to relief from stay.

14 We conclude, on this record, Wells Fargo demonstrated that it  
15 had a colorable claim to the Property. In other words, Wells  
16 Fargo made the connection Judge Carroll said was lacking between  
17 AHMSI and Wells Fargo with respect to the Second Motion for  
18 Relief. His concern in that motion was that AHMSI had failed to  
19 establish its role in the scheme of things, not that Wells Fargo  
20 lacked standing. In fact, Judge Carroll expressly found that  
21 Wells Fargo had established standing based on the documents  
22 submitted. In support of the Third Motion for Relief, Wells Fargo  
23 offered the Foster declaration. Foster stated that Option One had  
24 assigned its beneficial interest in the DOT to Wells Fargo and  
25 that AHMSI was the authorized loan servicing agent for Wells  
26 Fargo. Attached was a copy of the Note, the DOT, and the  
27 Assignment. The Assignment is executed by Sand Canyon, f/k/a  
28 Option One, the original beneficiary under the DOT, and indicates

1 that all beneficial interest under the DOT was assigned to Wells  
2 Fargo on September 17, 2010. Although Wells Fargo did not include  
3 proof that the Assignment had been recorded (which it had been on  
4 October 4, 2010), the document establishing this fact was  
5 submitted with its Second Motion for Relief and was part of the  
6 record. Furthermore, this fact is a matter of public record of  
7 which the bankruptcy court was free to take judicial notice.  
8 FED. R. EVID. 201.

9 As the beneficiary under the DOT, Wells Fargo may commence  
10 the foreclosure process against the Property.  
11 See CCC § 2924(a)(1); Debrunner, 138 Cal. Rptr. 3d at 835.  
12 Accordingly, these foreclosure rights give Wells Fargo a colorable  
13 claim in the Property, and therefore it had standing to prosecute  
14 the Third Motion for Relief. We reject all of Marks's arguments  
15 to the contrary, most of which are an attempt to circumvent  
16 California's lack of a cause of action to determine whether or not  
17 a party has authority to institute foreclosure proceedings. See  
18 Gomes v. Countrywide Home Loans, 121 Cal. Rptr. 3d 819, 824-25  
19 (2011).

20 Marks first contends that Wells Fargo lacks standing because  
21 the NOD lists Option One as the beneficiary as opposed to Wells  
22 Fargo. First, this argument exceeds the scope of what the  
23 bankruptcy court had to determine in the Third Motion for Relief,  
24 which was whether Wells Fargo established its foreclosure rights  
25 under the DOT. Any technical defects in the NOD should be raised  
26 in state court, if anywhere. Second, regardless of which entity  
27 was listed as beneficiary in the NOD, which at the time was Option  
28 One, the NOD complies in all respects with CCC § 2924(a)(1)(A)-

1 (D).<sup>7</sup> Further, Marks has not established how she is prejudiced by  
2 the fact that Option One was the named beneficiary in the NOD.  
3 See Debrunner, 138 Cal. Rptr. 3d at 837-38.

4 Next, Marks challenges the validity of the Assignment. She  
5 first contends the Assignment is void on its face because it was  
6 not recorded in a timely manner, citing "CCC § 2924(h)(c)." No  
7 such statute exists. If she means CCC § 2924h(c), this statute  
8 governs bidders at trustee sales and has no relevance to recording  
9 assignments of deeds of trust. To the extent she contends  
10 CCC § 2932.5<sup>8</sup> applies, that statute governs an assignee's ability  
11 to exercise its power of sale once the assignment is duly  
12 acknowledged and recorded. However, the majority of California  
13 courts have held that the recording requirements in CCC § 2932.5  
14 apply only to mortgages and not deeds of trust.<sup>9</sup> Regardless,

15 \_\_\_\_\_  
16 <sup>7</sup> That statute requires a notice of default to identify the  
17 deed of trust, contain a statement that a breach of the  
18 obligations under the note has occurred, contain a statement  
19 setting forth the nature of each breach actually known to the  
20 beneficiary and of its election to sell or cause to be sold the  
property to satisfy that obligation and any other obligation  
secured by the deed of trust that is in default, and, if  
applicable, provide the notice statement specified in  
CCC § 2924c(b)(1). The NOD provides all of these things.

21 <sup>8</sup> CCC § 2932.5 provides:

22 Where a power to sell real property is given to a mortgagee,  
23 or other encumbrancer, in an instrument intended to secure  
24 the payment of money, the power is part of the security and  
25 vests in any person who by assignment becomes entitled to  
payment of the money secured by the instrument. The power of  
sale may be exercised by the assignee if the assignment is  
duly acknowledged and recorded.

26 <sup>9</sup> See Calvo v. HSBC Bank USA, N.A., 130 Cal. Rptr. 3d 815,  
27 819 (Cal. Ct. App. 2011), rev. denied (Cal. Jan. 4, 2012) ("The  
rule that section 2932.5 does not apply to deeds of trust is part  
of the law of real property in California."); Caballero v. Bank of

28 (continued...)

1 Marks is still incorrect because the record reflects that the NOD  
2 was recorded in Los Angeles County on October 4, 2010, which was  
3 only eighteen days after it was executed. Thus, it was recorded  
4 and in a timely manner.

5 Marks also contends that the Assignment is void because it  
6 was signed by "robo-signer" Joseph Kaminski. Although Marks does  
7 not explain what a "robo-signer" is, it appears to be someone,  
8 generally a bank employee, "who signs thousands of foreclosure  
9 documents regularly, swearing to the veracity of the information  
10 contained in them, but in reality does not have personal knowledge  
11 of the case." See S.T.O.P. Stop Taking Our Property,

---

12  
13  
14 <sup>9</sup>(...continued)  
15 Am., 2012 WL 475766, at \*1 (9th Cir. Feb. 15, 2012)("For the  
16 reasons stated in Calvo and the many district court decisions that  
17 have reached the same conclusion . . . we find no 'convincing  
18 evidence' that the California Supreme Court would hold that  
19 California Civil Code section 2932.5 applies to deeds of trust.");  
20 In re Salazar, 470 B.R. 557, 560 (S.D. Cal. 2012)("the Court finds  
21 that § 2932.5 does not apply to deeds of trust."); Lindsay v.  
22 America's Wholesale Lender, 2012 WL 83475, at \*2 (C.D. Cal. Jan.  
23 10, 2012)("Section 2932.5 'does not require the recordation of an  
24 assignment of beneficial interest for a deed of trust, as opposed  
25 to a mortgage.'")(quoting Caballero v. Bank of Am., 2010 WL  
26 4604031, at \*3 (N.D. Cal. 2010)(emphasis in original)); Yau v.  
27 Deutsche Bank Nat'l Trust Co. Americas, 2011 WL 5402393, at \*9  
28 (C.D. Cal. Nov. 8, 2011)("[Section 2932.5] does not apply where  
the power of sale is set forth in a deed of trust. Section 2932.5  
applies only to mortgages that give a power of sale to the  
creditor, not to deeds of trust which grant a power of sale to the  
trustee.")(citation omitted); Herrera v. Fed. Nat'l Mortg. Ass'n,  
141 Cal. Rptr. 3d 326, 337 (Cal. Ct. App. 2012)("It is well  
established that section 2932.5 does not apply to trust deeds in  
which the power of sale is granted to a third party, the trustee.  
Section 2932.5 applies to mortgages, in which the mortgagor or  
borrower has granted a power of sale to the mortgagee or  
lender."); Haynes v. EMC Mortg. Corp., 140 Cal. Rptr. 3d 32, 34  
(Cal. Ct. App. 2012)("That section 2932.5 applies only to  
mortgages is well settled."). But see In re Cruz, 457 B.R. 806,  
814 (Bankr. S.D. Cal. 2011)(Section 2932.5 applies to deeds of  
trust and the beneficiaries' interest in the deed of trust must be  
recorded prior to the foreclosure sale).

1 <http://takeyourhomeback.com/?p=1141> (last visited on Nov. 26,  
2 2012). Marks fails to prove that Kaminski is a robo-signer or,  
3 more importantly, to cite any authority supporting her contention  
4 that an assignment signed by an alleged robo-signer renders it  
5 fraudulent or void. Disparaging terms and unsupported allegations  
6 about what might have occurred with respect to the Assignment fail  
7 to establish any claim that it is void or that fraud has been  
8 perpetrated against Marks.

9       Marks further contends that AHMSI was required to record its  
10 assignment in the DOT from Option One or Sand Canyon, and nothing  
11 in the record of title shows a transfer of interest in the  
12 Property from Option One or Sand Canyon to AHMSI. Thus, argues  
13 Marks, because AHMSI had nothing to assign to Wells Fargo, the  
14 Assignment to Wells Fargo is void. In other words, the broken  
15 "chain of assignment" invalidates the Assignment from AHMSI to  
16 Wells Fargo. Without addressing what is or is not in the record  
17 of title, AHMSI has never claimed to be beneficiary of the DOT.  
18 Option One was the original beneficiary of the DOT. The  
19 Assignment of the DOT was executed by Sand Canyon, f/k/a Option  
20 One to Wells Fargo. AHMSI established that it is the authorized  
21 loan servicing agent for Wells Fargo.

22       Next, Marks's contention that California law requires all  
23 assignments transferring an interest in real property be  
24 publically noticed and recorded misstates the law. California  
25 does not require that assignments of a beneficial interest under a  
26 deed of trust be recorded. CCC § 2934 provides only that such  
27 assignments may be recorded, and a recorded assignment operates as  
28

1 constructive notice to the public of the assignee's interest.<sup>10</sup>  
2 Further, Marks's evidence (Exhibit 8) showing the "absence" of a  
3 recorded assignment of the DOT to AHMSI, does not conclusively  
4 establish what is or is not in the record of title. A title  
5 report is a more suitable document to establish what Marks  
6 contends, presuming that AHMSI, if it ever had a beneficiary  
7 interest in the DOT, actually had to record its assignment, which  
8 is contrary to California law.<sup>11</sup>

9       Lastly, Marks argues that Wells Fargo lacked standing due to  
10 a violation of the trust agreement that was executed in connection  
11 with the securitization of the Loan. In short, Marks contends  
12 that the Assignment to Wells Fargo occurred three years after the  
13 closing of Trust 2007-6 pursuant to the pooling and servicing  
14 agreement, or PSA, so it is therefore void. Despite Marks's  
15 contention that she raised this issue before the bankruptcy court

---

16  
17       <sup>10</sup> CCC § 2934 provides:

18       Any assignment of a mortgage and any assignment of the  
19       beneficial interest under a deed of trust may be recorded,  
20       and from the time the same is filed for record operates as  
21       constructive notice of the contents thereof to all persons;  
22       and any instrument by which any mortgage or deed of trust of,  
23       lien upon or interest in real property, (or by which any  
24       mortgage of, lien upon or interest in personal property a  
25       document evidencing or creating which is required or  
26       permitted by law to be recorded), is subordinated or waived  
27       as to priority may be recorded, and from the time the same is  
28       filed for record operates as constructive notice of the  
29       contents thereof, to all persons.

30       <sup>11</sup> It is not clear why the Assignment in the upper left corner  
31       refers to AHMSI as the "successor in interest" to Sand Canyon,  
32       f/k/a Option One. Perhaps it is a scrivener's error. Perhaps  
33       AHMSI had been assigned a beneficial interest in the DOT at some  
34       point. Regardless, as explained above, California law did not  
35       require AHMSI to record its purported assignment of the DOT, so  
36       any alleged break in the chain of title does not defeat what  
37       clearly is Wells Fargo's interest in the DOT.

1 but the court "overlooked" it, this issue was never raised in  
2 connection with any of her oppositions to Wells Fargo's motions  
3 for relief. Marks raised this argument for the first time in her  
4 motion for stay pending appeal. The order denying that motion is  
5 not before us, and we generally will not consider issues raised  
6 for the first time on appeal. See United Student Funds, Inc. v.  
7 Wylie (In re Wylie), 349 B.R. 204, 213 (9th Cir. BAP 2006). Even  
8 if we did consider it, we fail to see how Marks has standing to  
9 assert breaches of a trust agreement to which she was not a party  
10 or even a third-party beneficiary. Marks has no interest in a  
11 trust agreement involving groups of investors in pools of loans.  
12 The First Circuit Bankruptcy Appellant Panel rejected this same  
13 argument raised by the debtors in Correia v. Deutsche Bank Nat'l  
14 Trust Co. (In re Correia), 452 B.R. 319, 324 (1st Cir. BAP 2011).  
15 See Washington v. Saxon Mortg. Servs. (In re Washington), 469 B.R.  
16 587, 531 (Bankr. W.D. Pa. 2012)(rejecting same argument); In re  
17 Almeida, 417 B.R. 140, 149 n.4 (Bankr. D. Mass. 2009)(holding that  
18 because party was not a third-party beneficiary of the PSA he  
19 lacked standing to object to any breaches of its terms; investors  
20 who bought securities based upon the pooled mortgages were parties  
21 with standing to object to defects in those mortgages resulting  
22 from failures to abide by the PSA).

23 Accordingly, we conclude the bankruptcy court did not err  
24 when it determined that Wells Fargo had standing to prosecute the  
25 Third Motion for Relief.

26 **B. The bankruptcy court not abuse its discretion in granting**  
27 **Wells Fargo's Third Motion for Relief.**

28 Marks's arguments on appeal do not extend beyond challenging

1 Wells Fargo's standing to prosecute the Third Motion for Relief.  
2 Nonetheless, we note that the bankruptcy court granted relief "for  
3 cause" under § 362(d)(1). What constitutes "cause" is determined  
4 on a case-by-case basis. In re Kronemyer, 405 B.R. at 921. Once  
5 a party seeking relief establishes a prima facie case that cause  
6 exists for relief under § 362(d)(1), the burden shifts to the  
7 debtor to show that relief from the stay is not warranted. USA v.  
8 Gould (In re Gould), 401 B.R. 415, 426 (9th Cir. BAP 2009).

9 We conclude the record supports the bankruptcy court's  
10 finding that "cause" existed to terminate the automatic stay and  
11 allow Wells Fargo to exercise its foreclosure remedies against the  
12 Property. Wells Fargo established its standing and a colorable  
13 claim to the Property. Further, at the time Wells Fargo filed the  
14 Third Motion for Relief, Marks had failed to tender eleven  
15 postpetition payments owing under the Note, a fact she does not  
16 apparently dispute. A debtor's failure to make postpetition  
17 mortgage payments as they become due in a chapter 13 case  
18 constitutes "cause" for relief from the automatic stay under  
19 § 362(d)(1). Ellis v. Parr (In re Ellis), 60 B.R. 432, 435 (9th  
20 Cir. BAP 1985); Lomas Mortg. USA, Inc. v. Elmore (In re Elmore),  
21 94 B.R. 670, 678 (Bankr. C.D. Cal. 1988). For these reasons,  
22 Marks did not meet her burden to show that relief from stay was  
23 not warranted.

24 Accordingly, the bankruptcy court did not abuse its  
25 discretion when it granted Wells Fargo's Third Motion for Relief  
26 and terminated the automatic stay.

27

28



1 **C. The bankruptcy court did not abuse its discretion when it**  
2 **denied the motions for reconsideration.**

3 A motion under Civil Rule 59(e), incorporated by Rule 9023,  
4 should not be granted, absent highly unusual circumstances, unless  
5 the court is presented with newly discovered evidence, committed  
6 clear error, or if there is an intervening change of controlling  
7 law. 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th  
8 Cir. 1999). A motion for reconsideration is not for rehashing the  
9 same arguments made the first time, or to assert new legal  
10 theories or new facts that could have been raised at the initial  
11 hearing. In re Greco, 113 B.R. 658, 664 (D. Haw. 1990), aff'd and  
12 remanded, Greco v. Troy Corp., 952 F.2d 406 (9th Cir. 1991).

13 Marks offers no argument as to why (or even if) the  
14 bankruptcy court abused its discretion when it denied the motions  
15 to reconsider the Stay Relief Order. Generally, arguments not  
16 raised in a party's opening brief are deemed waived. Smith v.  
17 Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999). In any event, Marks  
18 argued in her motions that reconsideration was warranted because  
19 Wells Fargo's exhibits submitted with its Third Motion for Relief,  
20 which she did not receive until after the hearing, provided newly  
21 discovered evidence to show its lack of standing and its fraud.  
22 Specifically, Marks argued that the copy of the Assignment proved  
23 that it was fraudulent on its face.

24 Under Civil Rule 59(e), "[t]o justify an amendment based on  
25 newly discovered evidence, a party 'must show that the evidence  
26 was discovered after the judgment, that the evidence could not be  
27 discovered earlier through due diligence, and that the newly  
28 discovered evidence is of such a magnitude that had the court

1 known of it earlier, the outcome would likely have been  
2 different.'" Broncel v. H & R Transp., Ltd., 2010 WL 3582492, at  
3 \*1 (E.D. Cal. 2010)(quoting Dixon v. Wallowa Cnty., 336 F.3d 1013,  
4 1022 (9th Cir. 2003)). The bankruptcy court determined that even  
5 if Marks had not received Wells Fargo's exhibits until after the  
6 hearing as she claimed, the court had received them prior to the  
7 hearing and considered them. As such, no newly discovered  
8 evidence existed. We also find no merit in Marks's argument  
9 because at the time of the hearing she was represented by Brown,  
10 who did receive a copy of Wells Fargo's exhibits prior to the  
11 hearing. Thus, we see no abuse by the bankruptcy court. In any  
12 event, it is undisputed that Wells Fargo included a copy of the  
13 Assignment with both its First and Second Motions for Relief.  
14 Furthermore, Wells Fargo's exhibits established that the  
15 Assignment has been a matter of public record since October 2010.

16 Accordingly, we conclude the bankruptcy court did not abuse  
17 its discretion in denying the motions to reconsider the Stay  
18 Relief Order.

## 19 VI. CONCLUSION

20 Based on the foregoing reasons, we AFFIRM.

21  
22  
23  
24  
25  
26  
27  
28