

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-09-1396-HPDu  
 )  
 FAWN RIDGE PARTNERS, LP, ) Bk. No. 09-15088-TD  
 )  
 Debtor. )  
 )  
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 )  
 FAWN RIDGE PARTNERS, LP, )  
 )  
 Appellant, )  
 )  
 v. ) **M E M O R A N D U M**<sup>1</sup>  
 )  
 BAC HOME LOANS SERVICING, LP, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Submitted on March 18, 2010  
at Pasadena, California

Filed - March 29, 2010

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding.

Before: HOLLOWELL, DUNN and PERRIS<sup>2</sup>, Bankruptcy Judges

The debtor in this case challenged the right of BAC Home  
Loans Servicing, LP (BAC) to seek relief from stay to foreclose

<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.

<sup>2</sup> Hon. Elizabeth L. Perris, Chief Bankruptcy Judge for the  
United States Bankruptcy Court for the District of Oregon,  
sitting by designation.

1 on the debtor's real property secured by deeds of trust naming  
2 Countrywide Home Loans, Inc. (Countrywide) as beneficiary. The  
3 bankruptcy court determined that the debtor waived any challenge  
4 to BAC's standing to seek relief from the automatic stay and,  
5 because it found cause existed under § 362(d)(1) and (d)(2),  
6 granted BAC relief from stay. The debtor appeals the bankruptcy  
7 court's determination that BAC had standing to bring the stay  
8 relief motion. We REVERSE because BAC did not establish its  
9 standing to seek stay relief.

#### 10 I. FACTS

11 Fawn Ridge Partners, LP (the Debtor) is in the business of  
12 real estate investment and development. The Debtor filed a  
13 chapter 11 bankruptcy petition on March 5, 2009, and continued  
14 its business as the debtor in possession. According to the  
15 Debtor's disclosure statement, the Debtor's general partner is  
16 Fawn Ridge, LLC, and its sole limited partner is the Darling  
17 Family Trust.<sup>3</sup> The Debtor's principal is Richard L. Darling  
18 (Darling), the managing member of Fawn Ridge, LLC and co-trustee  
19 of the Darling Family Trust.

20 In June 2000, Darling and his wife acquired real property, a  
21 single family residence in Thousand Oaks, California (the  
22 Rainfield Property). The Darlings transferred the Rainfield  
23 Property to the Darling Family Trust in 2007, and in February  
24 2009, the Darling Family Trust conveyed the Rainfield Property to

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26 <sup>3</sup> The Debtor's Disclosure Statement and Chapter 11 Plan were  
27 not included in the record on appeal. However, we may take  
28 judicial notice of the underlying bankruptcy records. See  
O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),  
887 F.2d 955, 957-58 (9th Cir. 1989).

1 the Debtor.<sup>4</sup>

2 The Debtor's bankruptcy schedules show the Rainfield  
3 Property is fully encumbered. The Rainfield Property is valued  
4 at \$1,550,000. Countrywide is listed on the Debtor's Schedule D  
5 as a creditor holding an adjustable rate promissory note secured  
6 by a deed of trust<sup>5</sup> on the Rainfield Property in the amount of  
7 \$1,760,000 (the Note and Deed of Trust), and as a creditor on a  
8 home equity line of credit for \$220,000, secured by a second deed  
9 of trust on the Rainfield Property.

10 On July 23, 2009, BAC filed a notice and motion for relief  
11 from the automatic stay (the Stay Relief Motion) as to the  
12 Rainfield Property under the Note and Deed of Trust.<sup>6</sup> BAC  
13 identified itself as "BAC Home Loans Servicing, L.P., fka  
14 Countrywide Home Loans Servicing, L.P., fka Countrywide Home  
15 Loans, Inc." Included in the Stay Relief Motion was a form  
16 declaration<sup>7</sup> by a bankruptcy specialist at BAC stating that she

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18 <sup>4</sup> The Debtor's Disclosure Statement states that the  
19 conveyance occurred in February 2009; however, its Reply Brief on  
20 appeal asserts the transfer was made in December 2009, under an  
21 equity sharing agreement. BAC alleges that the transfer occurred  
on the eve of bankruptcy, which it asserts was evidence of a bad  
faith filing, if not a fraudulent transfer.

22 <sup>5</sup> Mortgage Electronic Registration Systems, Inc. ("MERS") is  
23 named as Countrywide's nominee and beneficiary.

24 <sup>6</sup> Although BAC listed both the Note and Deed of Trust, as  
25 well as the equity loan and second deed of trust, in its Stay  
26 Relief Motion, only the Note and Deed of Trust were attached to  
the Stay Relief Motion. The parties' discussion about  
modification of the loan seems to reference only the Note.

27 <sup>7</sup> Under the Local Bankruptcy Rules for the Central District  
28 of California, a movant must use local form 4001-1M.R.P. for its

(continued...)

1 was a custodian of BAC's records and files. A box on the  
2 declaration form used in the Central District of California for  
3 stay relief motions was marked indicating that BAC "holds a deed  
4 of trust." The exhibits attached to the declaration to evidence  
5 this contention were only the Note and Deed of Trust in the name  
6 of Countrywide (the note for the equity loan and second deed of  
7 trust were not included). No documentation regarding an  
8 indorsement, assignment, transfer, sale of the Note and Deed of  
9 Trust, or servicing agreement, was included with the Stay Relief  
10 Motion.

11 In its Stay Relief Motion, BAC listed the Deed of Trust as  
12 securing a claim in the amount of \$1,846,749.<sup>8</sup> BAC alleged that  
13 cause existed under § 362(d) to lift the stay because there was  
14 no equity in the Rainfield Property and it was not necessary for  
15 an effective reorganization. Furthermore, BAC alleged that the  
16 Debtor filed its bankruptcy case in bad faith on the basis that  
17 the Debtor was not the original obligor on the Note.

18 On August 5, 2009, the Debtor filed an Opposition to the  
19 Stay Relief Motion. The Debtor argued the Rainfield Property was  
20 necessary for an effective reorganization. It contended there  
21 was no cause for stay relief because its proposal to modify the  
22 loan securing the Rainfield Property to fair market value, along  
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24 <sup>7</sup>(...continued)  
25 relief from stay motion. Local Rule 1002-1(d)(9) ("Motions for  
26 relief from stay shall be made using those forms designated for  
27 mandatory use in the F 4001-1 series of the court-approved  
forms.").

28 <sup>8</sup> This amount included \$47,666 in prepetition arrearages and  
\$39,083 in postpetition arrearages.

1 with the payment of adequate protection payments to BAC, would  
2 offer BAC better treatment than if BAC foreclosed its security  
3 interest.

4 On August 18, 2009, the Debtor and BAC entered into a  
5 Stipulation for Interim Adequate Protection (the Adequate  
6 Protection Agreement) to allow the parties time to negotiate  
7 modifications on the Note. The bankruptcy court entered an order  
8 approving the Adequate Protection Agreement the same day. Under  
9 the terms of that agreement, the parties agreed to continue the  
10 hearing on the Stay Relief Motion, meanwhile the Debtor would  
11 make adequate protection payments to BAC in the amount of \$5,500  
12 per month for September, October, and November 2009.

13 The Debtor's loan modification proposal was to reduce the  
14 amount of the Note by more than \$400,000 and to lower the  
15 interest rate from 6.5% to 5%. BAC rejected the Debtor's  
16 proposed loan modification on September 25, 2009, and later  
17 objected to the same treatment as stated in the Debtor's  
18 Disclosure Statement and chapter 11 Plan.<sup>9</sup>

19 On November 4, 2009, the Debtor filed a Supplemental  
20 Opposition to the Stay Relief Motion. The Supplemental  
21 Opposition challenged BAC's right to seek stay relief because  
22 (1) BAC had failed to join the owner of the Note; and (2) BAC had  
23 "failed to demonstrate that it [was] the holder of the [N]ote,  
24 the owner of the [N]ote, or any party with standing to enforce  
25 the [N]ote." The Debtor again argued that no cause existed for  
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27 <sup>9</sup> BAC contends that the hearing on the Stay Relief Motion  
28 was also a hearing on its objection to the Debtor's Disclosure  
Statement. However, the order on appeal specifies that it only  
determines the stay relief issues.

1 stay relief because the Rainfield Property was necessary to an  
2 effective reorganization and loan modifications would benefit  
3 BAC, providing it with "greater economic recovery than if BAC  
4 foreclosed."

5 BAC responded on November 12, 2009, requesting that the  
6 bankruptcy court take judicial notice that "Bank of America  
7 Corporation purchased Countrywide Financial Corporation" in order  
8 to find that BAC had standing to bring the Stay Relief Motion.  
9 BAC also relied on correspondence by the Darlings to Bank of  
10 America on October 30, 2009, as evidence of its standing,  
11 contending that the correspondence constituted an admission by  
12 the Debtor that BAC was entitled to enforce the Note.

13 Furthermore, BAC argued that the Darlings' transfer of the  
14 Rainfield Property to the Debtor was a fraudulent transfer and  
15 that the Debtor, through the transfer, was attempting in bad  
16 faith to circumvent § 1123(b)(5), which disallows modification of  
17 an obligation secured by an individual debtor's principal  
18 residence. BAC produced no additional documentation to evidence  
19 its interest in the Note and Deed of Trust.

20 On November 18, 2009, the bankruptcy court held a hearing on  
21 the Stay Relief Motion. At the hearing, the bankruptcy court  
22 addressed the Debtor's objection to BAC's standing by taking  
23 judicial notice that:

24 Bank of America owns Countrywide and that all the  
25 activity that I have seen with respect to Countrywide  
26 since that time . . . has been absorbed by Bank of  
27 America. Bank of America has chosen to operate under a  
28 number of subsidiaries in a variety of ways but it's  
one company . . . it's all Bank of America.

Hr'g Tr. 6:1-6.

1 On December 7, 2009, the bankruptcy court subsequently  
2 entered a Supplemental Memorandum regarding BAC's Stay Relief  
3 Motion. In its Supplemental Memorandum, the bankruptcy court  
4 found that the Debtor's challenge to BAC's standing was not  
5 "timely or valid" and was suggestive of bad faith. It entered an  
6 order on December 7, 2009, granting BAC relief under § 362(d)(1)  
7 and (d)(2). The Debtor timely appealed.<sup>10</sup>

## 8 II. JURISDICTION

9 The bankruptcy court had jurisdiction under 28 U.S.C.  
10 § 157(b)(1) and (b)(2)(G). We have jurisdiction under 28 U.S.C.  
11 § 158.

## 12 III. ISSUE

13 Did the bankruptcy court err in determining that BAC had  
14 standing to seek relief from the automatic stay?

## 15 IV. STANDARDS OF REVIEW

16 A bankruptcy court's decision to grant relief from the  
17 automatic stay is generally reviewed for an abuse of discretion.  
18 Delaney-Morin v. Day (In re Delaney-Morin), 304 B.R. 365, 368  
19 (9th Cir. BAP 2003). However, we review de novo whether a party  
20 has a sufficient stake in a controversy to establish standing.  
21 Pershing Park Villas Homeowners Assoc. v. Unified Pac. Ins. Co.,  
22 219 F.3d 895, 900 (9th Cir. 2000). De novo review requires that  
23 we consider a matter anew, as if no decision had been previously  
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26 <sup>10</sup> The Debtor filed with the Bankruptcy Appellate Panel an  
27 emergency motion for a stay pending appeal on December 17, 2009.  
28 Consideration of the motion was deferred to this Panel because  
the parties agreed that no foreclosure would take place prior to  
April 8, 2009. This memorandum decision disposes of that motion.

1 rendered. United States v. Silverman, 861 F.2d 571, 576  
2 (9th Cir. 1988).

### 3 V. DISCUSSION

4 Relief from stay hearings are limited in scope to  
5 determining the adequacy of protection, equity, and the necessity  
6 of property to an effective reorganization. 11 U.S.C. § 362(d).  
7 The validity of the underlying claim is not litigated.

8 In re Emrich, 2009 WL 3816174 \*1 (Bankr. N.D. Cal. 2009)  
9 (citations omitted). As limited as the issues are in a stay  
10 relief proceeding, the party seeking stay relief must establish  
11 standing and be a party in interest. 11 U.S.C. § 362(d);  
12 In re Wilhelm, 407 B.R. 392, 398 (Bankr. D. Idaho 2009). The  
13 Debtor argues BAC had no standing to seek relief from the  
14 automatic stay because BAC produced no evidence establishing it  
15 held any interest in the Note and Deed of Trust securing the  
16 Rainfield Property, and had no entitlement to enforce the  
17 obligation.

#### 18 A. Standing

19 The issue of standing involves both "constitutional  
20 limitations on federal court jurisdiction and prudential  
21 limitations on its exercise." Warth v. Seldin, 422 U.S. 490, 498  
22 (1975). Constitutional standing concerns whether the plaintiff's  
23 personal stake in the lawsuit is sufficient to have a "case or  
24 controversy" to which the federal judicial power may extend under  
25 the Constitution's Article III. Id. at 498-99; Pershing Park  
26 Villas, 219 F.3d at 899; Lujan v. Defenders of Wildlife, 504 U.S.  
27 555, 559-60 (1992).

1           Additionally, the prudential doctrine of standing "is  
2 comprised of both judicially-created limitations, such as the  
3 prohibition on third-party standing . . . and statutorily-imposed  
4 limitations, such as the [Fed. Rule Civ. P.] Rule 17(a)  
5 requirement" that suits be maintained by the real party in  
6 interest. Gilmartin v. City of Tucson, 2006 WL 5917165 \*4  
7 (D. Ariz. 2006), citing Lee v. Deloitte & Touche LLP,  
8 428 F.Supp.2d 825, 831 (N.D. Ill. 2006).

9       **B. Constitutional Standing**

10           The "irreducible constitutional minimum of standing"  
11 requires a showing that the plaintiff has suffered an actual,  
12 concrete and particularized injury in fact, caused by the  
13 defendant's conduct, which a favorable judgment will likely  
14 redress. Lujan v. Defenders of Wildlife, 504 U.S. at 560.

15           BAC argues that its standing was confirmed by the terms of  
16 the order approving the Adequate Protection Agreement, and is now  
17 the law of the case.<sup>11</sup> Under the law of the case doctrine, an  
18 issue of law once decided should govern the same issues in  
19 subsequent stages of the same litigation. Christianson v. Colt  
20 Indus. Operating Corp., 486 U.S. 800, 815-16 (1988);  
21 In re Ellett, 300 B.R. 768, 772 (Bankr. E.D. Cal. 2003). The  
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23           <sup>11</sup> See, e.g., Reusser v. Wachovia Bank, N.A., 525 F.3d 855,  
24 861 (9th Cir. 2008). In that case, Wachovia was the holder of a  
25 deed of trust on the debtor's property. Its loan servicer,  
26 Washington Mutual, sought relief from stay to foreclose on the  
27 property. The order granted relief as to enforcement of the deed  
28 of trust and to the property. Finding that the order was a final  
order binding as to the res or property, the Ninth Circuit held  
that the debtor could not later collaterally attack the  
bankruptcy court's jurisdiction on the basis that Washington  
Mutual lacked standing to seek relief from the automatic stay.

1 doctrine does not apply here. First, the bankruptcy court did  
2 not, through the order approving the Adequate Protection  
3 Agreement, finally decide an issue of law with respect to BAC's  
4 standing. See Quern v. Jordan, 440 U.S. 332, 347 n.18 (1979)  
5 ("The doctrine of law of the case comes into play only with  
6 respect to issues previously determined.").

7 More importantly, the order approving the Adequate  
8 Protection Agreement was entered after the Stay Relief Motion was  
9 filed. Constitutional standing is a "threshold jurisdictional  
10 requirement, and cannot be waived." Pershing Park Villas,  
11 219 F.3d at 899-900; Warth v. Seldin, 422 U.S. at 498-99;  
12 In re Jacobson, 402 B.R. 359, 366-67 (Bankr. W.D. Wash. 2009).  
13 Thus, BAC cannot rely on the order approving the Adequate  
14 Protection Agreement to provide it with standing.

15 BAC contends it has standing because it submitted a  
16 declaration with its Stay Relief Motion indicating that BAC  
17 "holds a deed of trust" securing the Rainfield Property.  
18 However, BAC is not the payee on the Note securing the Deed of  
19 Trust nor a beneficiary under the Deed of Trust.

20 Mere possession of the Note does not make BAC a "holder" of  
21 the Note. Under California law,<sup>12</sup> to qualify as a holder, one  
22 must be in possession of the instrument, and the instrument must  
23 be properly endorsed. Cal. Comm. Code ("CComC") § 1201(21);  
24 In re Hwang, 396 B.R. at 762. Although the payee of an  
25 instrument may negotiate it, the payee must indorse it as well as

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27 <sup>12</sup> In the absence of bankruptcy law providing for the  
28 enforcement of a promissory note, state law governs. See  
In re Hwang, 396 B.R. 757, 762 (Bankr. C.D. Cal. 2008).

1 deliver it to another person, who then can become its holder.  
2 CComC § 3201, 1201(21)(A). There is no evidence in the record  
3 that Countrywide indorsed the Note and transferred it to BAC (or  
4 to Bank of America). Thus, mere possession of the Note and Deed  
5 of Trust does not provide BAC with standing.

6 Furthermore, while BAC's title indicates it is a loan  
7 servicer, this by itself is insufficient to establish BAC's  
8 standing. A loan servicer may have constitutional standing  
9 because it has a right to payment pursuant to its duties as a  
10 servicer on a loan. See, e.g., In re Conde-Dedonato,  
11 391 B.R. 247, 250 (Bankr. E.D.N.Y. 2008) (collecting cases). The  
12 loan servicer's interest in the note is "by virtue of its  
13 servicing activities for which it receives compensation."  
14 In re Viencek, 273 B.R. 354, 357-58 (Bankr. N.D.N.Y. 2002).  
15 Thus, a loan servicer may be injured by a debtor when it loses  
16 its servicing fees as a result of the debtor's nonpayment on the  
17 loan. But, in this case, BAC did not provide evidence, such as  
18 an affidavit or other documentation, establishing the terms of  
19 its agreement to service the loan for Countrywide or Bank of  
20 America.

21 Thus, BAC failed to present the evidence necessary to  
22 demonstrate that it was either the holder of the Note, the  
23 transferee or assignee of the Note, or the servicer of the Note.  
24 The bankruptcy court's taking of judicial notice that Bank of  
25 America Corporation purchased Countrywide Financial Corporation  
26 does not cure BAC's standing issues because BAC offered no  
27 evidence to establish the nature of its relationship to Bank of  
28 America or Countrywide. Therefore, BAC did not demonstrate that

1 it had been injured by the Debtor's default on the loan. As a  
2 result, it did not have constitutional standing to file the Stay  
3 Relief Motion.

4 **C. Prudential Standing**

5 Prudential standing requires the plaintiff to assert its own  
6 claims rather than the claims of another. Dunmore v. United  
7 States, 358 F.3d 1107, 1112 (9th Cir. 2004); In re Hwang,  
8 396 B.R. at 766. Unlike constitutional standing, prudential  
9 standing does not derive from the Constitution and may be waived  
10 by a defendant if not properly or timely raised. Pershing Park  
11 Villas, 219 F.3d at 899; Lee v. Deloitte & Touche LLP,  
12 428 F.Supp.2d at 831 (Rule 17 objection waived when not raised  
13 timely).

14 The bankruptcy court determined that the Debtor's challenge  
15 to BAC as the real party in interest was waived. However, we  
16 need not reach the prudential standing issues raised by the  
17 Debtor in this appeal since BAC failed to demonstrate it had  
18 constitutional standing to seek relief from the automatic stay.

19 **VI. CONCLUSION**

20 For the foregoing reasons, we REVERSE the bankruptcy court's  
21 order granting stay relief to BAC. BAC is free to file a new  
22 motion for relief from stay if it can properly demonstrate its  
23 standing.<sup>13</sup>

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27 <sup>13</sup> On March 8, 2010, the Debtor filed a motion requesting  
28 this Panel to take judicial notice of corporate documentation  
regarding Countrywide and Bank of America. The Panel issued an  
order on March 11, 2010, deferring ruling on the motion until  
after oral argument. We decline to take judicial notice of the  
Debtor's documentation and deny the motion.