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

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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	NC-15-1120-KiTaJu
	)		
ANTON ANDREW RIVERA and	)	Bk. No.	5:14-54193
DENISE ANN RIVERA,	)		
	)		
Debtors.	)		
_____	)		
	)		
ANTON ANDREW RIVERA;	)		
DENISE ANN RIVERA,	)		
	)		
Appellants,	)		
	)		
v.	)		
	)		
DEUTSCHE BANK NATIONAL TRUST	)		
COMPANY,	)		
	)		
Appellee.	)		
_____	)		

A M E N D E D  
M E M O R A N D U M<sup>1</sup>

Argued and Submitted on July 28, 2016,  
at San Francisco, California

Originally Filed - August 16, 2016  
Amendment Filed - October 6, 2016

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

Honorable M. Elaine Hammond, Bankruptcy Judge, Presiding

Appearances: Ronald H. Freshman argued for appellants Anton  
Andrew Rivera and Denise Ann Rivera; Stefan  
Perovich of Keesal, Young & Logan argued for  
appellee Deutsche Bank National Trust Company as  
Trustee for WAMU Mortgage Pass-through Certificates  
Series 2005-AR6 Trust.

Before: KIRSCHER, TAYLOR and JURY, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have, it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Chapter 13<sup>2</sup> debtors Anton and Denise Rivera ("Riveras")  
2 appeal an order overruling their objection and establishing the  
3 amount of the secured claim of Deutsche Bank National Trust  
4 Company as Trustee for WAMU Mortgage Pass-through Certificates  
5 Series 2005-AR6 Trust ("Deutsche Bank" or "Trust") in the amount  
6 of \$532,272.10. We AFFIRM.

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

8 **A. Prepetition events**

9 In 2004, the Riveras obtained a refinance loan for their home  
10 in Bethel Island, California (the "Property"). They executed an  
11 Adjustable Rate Note ("Note") for \$440,000, payable to Washington  
12 Mutual Bank, FA. To secure the Note, the Riveras executed a deed  
13 of trust ("DOT") in favor of Washington Mutual and created a lien  
14 against the Property. The DOT was subject to an Adjustable Rate  
15 Rider, which amended and supplemented the DOT.

16 Various provisions of the Note and DOT are relevant here.  
17 The Note provided for monthly interest rate changes on the first  
18 of every month ("Change Date") and changes to the monthly payment.  
19 Both the Note and the Adjustable Rate Rider conspicuously warned  
20 in all upper case letters:

21 THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY  
22 INTEREST RATE AND MY MONTHLY PAYMENT. MY MONTHLY PAYMENT  
23 INCREASES WILL HAVE LIMITS WHICH COULD RESULT IN THE  
24 PRINCIPAL AMOUNT I MUST REPAY BEING LARGER THAN THE  
25 AMOUNT ORIGINALLY BORROWED, BUT NOT MORE THAN 125% OF THE  
26 ORIGINAL AMOUNT (OR \$550,000). MY INTEREST RATE CAN  
27 NEVER EXCEED THE LIMIT STATED IN THIS NOTE OR ANY RIDER  
28 TO THIS NOTE. A BALLOON PAYMENT MAY BE DUE AT MATURITY.

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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.

1 Sections 4(G), 4(H) and 4(I) of the Note provided:

2 **4(G) Changes in My Unpaid Principal Due to Negative**  
3 **Amortization or Accelerated Amortization.** Since my  
4 payment amount changes less frequently than the interest  
5 rate and since the monthly payment is subject to the  
6 payment limitations described in Section 4(F), my monthly  
7 payment could be less or greater than the amount of the  
8 interest portion of the monthly payment that would be  
9 sufficient to repay the unpaid Principal I owe at the  
10 monthly payment date in full on the maturity date in  
11 substantially equal payments. For each month that the  
12 monthly payment is less than the interest portion, the  
13 Note Holder will subtract the monthly payment from the  
14 amount of the interest portion and will ad [sic] the  
15 difference to my unpaid Principal, and interest will  
16 accrue on the amount of this difference at the current  
17 interest rate. For each month that the monthly payment  
18 is greater than the interest portion, the Note Holder  
19 will apply the excess towards a principal reduction of  
20 the Note.

12 **4(H) Limit on My Unpaid Principal; Increased Monthly**  
13 **Payment.** My unpaid principal can never exceed a maximum  
14 amount equal to 125% of the principal amount originally  
15 borrowed. In the event my unpaid Principal would  
16 otherwise exceed that 125% limitation, I will begin  
17 paying a new minimum monthly payment until the next  
18 Payment Change Date notwithstanding the 7 ½% annual  
19 payment increase limitation. The new minimum monthly  
20 payment will be an amount which would be sufficient to  
21 repay my then unpaid Principal in full on the maturity  
22 date at my interest rate in effect the month prior to the  
23 payment due date in substantially equal payments.

18 **4(I) Required Full Monthly Payment.** On the FIFTH  
19 anniversary of the due date of the first monthly payment,  
20 and on that same day every FIFTH year thereafter, the  
21 monthly payment will be adjusted without regard to the  
22 payment cap limitation in Section 4(F).

22 Thus, Section 4(G) expressly warned the Riveras that their  
23 monthly payment could be less than the amount of the interest  
24 portion and, for each month the interest portion was underpaid,  
25 that the difference would be added to the unpaid principal balance  
26 and interest would accrue on the amount of the difference,  
27 resulting in a loan typically called a negative amortization loan.  
28 If, however, payments exceeded the interest portion, the excess

1 would be applied towards the principal. Sections 4(H) and 4(I)  
2 indicate that the Riveras' loan was an interest-only loan for the  
3 first five years.

4 The DOT provided how the Riveras' mortgage payments were to  
5 be applied:

6 **2. Application of Payments or Proceeds.** [A]ll payments  
7 accepted and applied by Lender shall be applied in  
8 the following order of priority: (a) interest due  
9 under the Note; (b) principal due under the Note;  
10 (c) any amounts due under Section 3. Such payments  
11 shall be applied to each Periodic Payment in the  
12 order in which it became due. Any remaining amounts  
13 shall be applied first to late charges, second to  
14 any other amounts due under this Security  
15 Instrument, and then to reduce the principal balance  
16 of the Note.

17 . . . .

18 **3. Funds for Escrow Items.** Borrower shall pay to  
19 Lender on the day the Periodic Payments are due  
20 under the Note, until the Note is paid in full, a  
21 sum . . . to provide for payment of amounts due for:  
22 (a) taxes . . . (c) premiums for any and all  
23 insurance required by the Lender . . . These items  
24 are called "Escrow Items[.]"

25 The Prepayment Fee Note Addendum, which amended and  
26 supplemented the Note, allowed the Riveras to make payments of  
27 principal before they were due. Any partial prepayment of  
28 principal before it was due was not subject to a penalty but would  
first be applied to the interest accrued on the amount of  
principal prepaid and then to the principal balance of the Note.

The Truth in Lending Disclosure Statement signed by the  
Riveras showed that the payment was \$1,415.21 for the first year,  
\$1,889.97 for the fifth year, and \$2,327.93 for the final twenty  
years of the thirty-year loan. The disclosure warned that the  
Note had a variable interest rate feature and stated that

1 disclosures about this feature had been provided to the Riveras.  
2 Mrs. Rivera denied ever receiving the disclosures.

3 According to the loan payment history provided by Deutsche  
4 Bank, the Riveras struggled to make the monthly payments from the  
5 beginning, frequently paying them late and being subject to a late  
6 fee of no less than \$70.76.

7 Each monthly home loan statement sent to the Riveras noted  
8 the current interest rate, the principal and escrow balances and  
9 the year-to-date figures for principal, interest, property taxes  
10 and insurance paid. The year-end "principal paid" figures showed  
11 a negative balance in 2006, 2007 and 2008. In addition, the  
12 "principal balance due" figure fluctuated from statement to  
13 statement, but showed a balance of \$469,584.23 in September 2009,  
14 the last month the Riveras made a regular contractual payment.

15 Each monthly statement also offered the Riveras what has been  
16 referred to as "pick a pay" payment options. The Riveras were  
17 given four alternatives for payments each month:

- 18 1. reduced interest and escrow (the "Minimum Payment");
- 19 2. full monthly interest and escrow;
- 20 3. full principal and interest based on the remaining  
21 scheduled loan term and escrow; and
- 22 4. full principal and interest based on a 15-year  
23 amortization and escrow.

24 Mrs. Rivera admitted at the eventual evidentiary hearing that she  
25 was aware of the "pick a pay" options for the loan.

26 As part of a HAMP application submitted in September 2009,  
27 the Riveras noted that the principal balance of the Note was  
28 \$469,981. In an attached letter, Mrs. Rivera explained that when

1 the Riveras obtained the loan, they "specifically asked for a non-  
2 negative amortization program." Mrs. Rivera went on to say that  
3 the Riveras "didn't understand the fine print," and acknowledged  
4 that they "didn't ask the right questions" and could "blame only  
5 [them]selves for [their] rash actions."

6 In October 2009, the Riveras entered into a Home Affordable  
7 Modification Trial Period Plan ("TPP") with the then servicer of  
8 the loan, JP Morgan Chase Bank, NA ("Chase"). Between October and  
9 December 2009, the Riveras made three TPP payments of \$1,736.00.  
10 These payments were placed in a suspense account and applied  
11 against the contractual payments due for September and October  
12 2009. Also in October 2009, Chase sent the Riveras a Debt  
13 Validation Notice, which stated that the principal balance on the  
14 Note was \$469,584.23.

15 In November 2009, Chase sent the Riveras a "Change Date"  
16 letter stating that their new monthly payment amount was changing  
17 starting in January 2010 and was based on an interest rate of  
18 3.358%, a remaining term of 300 months and a "projected principal  
19 balance" of \$467,393.65.

20 Even though the Riveras were no longer making payments, Chase  
21 sent similar Change Date letters in November 2010 and November  
22 2012. The 2010 letter stated that the Rivera's new monthly  
23 payment starting in January 2011 would be \$2,200.79, based on an  
24 interest rate of 2.95300%, a remaining term of 288 months and a  
25 "projected principal balance" of \$453,689.47. The 2012 letter  
26 stated that the Riveras' new monthly payment starting in January  
27 2013 would be \$2,155.14, based on an interest rate of 2.76%, a  
28 remaining term of 264 months and a "projected principal balance"

1 of \$426,104.71. Notably, the "projected principal balance" stated  
2 in each of the Change Date letters was based on the assumption  
3 that "all regularly scheduled payments" were being made.

4 **B. Postpetition events**

5 The Riveras filed a chapter 13 bankruptcy case on December 7,  
6 2012. Deutsche Bank, with Chase as servicer, filed a proof of  
7 claim evidenced by the Note, the DOT and other supporting  
8 documents ("Claim"). Deutsche Bank asserted a secured claim in  
9 the amount of \$532,272.10 against the Property, with prepetition  
10 arrearages of \$106,389.03. Deutsche Bank claimed the principal  
11 balance owed on the Note was \$468,601.71, with interest of  
12 \$43,452.77, for a total of \$512,054.48. Foreclosure fees and  
13 costs totaled \$2,908.44, and the escrow shortage was calculated at  
14 -\$19,448.99.

15 **1. The objection to Deutsche Bank's Claim**

16 The Riveras filed a pro se objection to the Claim, contesting  
17 a variety of issues ("Claim Objection"). They also filed two  
18 related adversary proceedings against Deutsche Bank, contesting  
19 standing and the validity of its lien. Both adversary proceedings  
20 were ultimately dismissed and those orders have become final. For  
21 our purposes here, the Riveras disputed the principal balance of  
22 \$468,601.71 stated in the Claim; they alleged that it conflicted  
23 with the principal amount of \$440,000 identified in the Note and  
24 the balance stated in the recent November 2012 Change Date letter.

25 The Claim Objection hearing was continued several times and  
26 ultimately set for trial. During this time, the Riveras hired and  
27 fired counsel, hired their current counsel and discussed  
28 settlement with Deutsche Bank; Deutsche Bank filed two

1 declarations from Chase employees in support of its opposition to  
2 the Claim Objection. In addition, on November 18, 2013, Chase  
3 sent the Riveras a Change Date letter, which stated that their new  
4 monthly payment starting in January 2014 would be \$2,151.98, based  
5 on an interest rate of 2.74400%, a remaining term of 252 months  
6 and a "projected principal balance" of \$411,845.68. As with the  
7 other Change Date letters, the "projected principal balance"  
8 figure was based on the assumption that all regularly scheduled  
9 payments were being made. Chase sent the Riveras another Change  
10 Date letter on November 17, 2014, which stated that their new  
11 monthly payment starting in January 2015 would be \$2,670.98,  
12 including estimated taxes and insurance, based on an interest rate  
13 of 2.71500% and a remaining term of 240 months. The letter did  
14 not use the term "projected principal balance" but stated that the  
15 loan balance was \$397,060.14.

16 The Riveras (pro se) also filed a reply to Deutsche Bank's  
17 opposition to the Claim Objection and the declarations, raising  
18 new arguments not previously asserted. In particular, the Riveras  
19 argued that according to Bill Paatalo, an expert in the  
20 securitization of loans and pooling and servicing agreements  
21 (PSAs)<sup>3</sup> retained as a witness for one of their adversary  
22 proceedings, Deutsche Bank had been reporting to the Trust  
23 certificate holders that no losses had been incurred on the loan  
24 because the servicer had been advancing payments after the Riveras

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25  
26 <sup>3</sup> The Riveras' loan is part of a pool of loans that have  
27 been securitized and are now held in a Real Estate Mortgage  
28 Investment Conduit (REMIC) trust. PSAs are the contracts between  
the trust, which holds the mortgage loans, and the servicer, who  
collects payments and deposits them into the trust pursuant to the  
PSA.

1 stopped paying. The total amount advanced was approximately  
2 \$90,714.70. Thus, argued the Riveras, the loan beneficiary had  
3 incurred no default or losses and no arrears were due. The  
4 Riveras contended that because the arrearages were paid by the  
5 servicer, they were not in default and Deutsche Bank had no  
6 grounds to assert a claim for unpaid principal and interest.

7 In another statement submitted a few months before trial, the  
8 Riveras argued that based on Paatalo's investigation the principal  
9 balance was at or below \$411,000, given the records of Washington  
10 Mutual Securities, Inc., which stated that as of April 2014 the  
11 principal balance was \$413,057.64 with zero losses and in decline.

12 In a supplement to their Claim Objection, the Riveras argued  
13 that Deutsche Bank had still failed to explain the "gap" in the  
14 principal balance – i.e., why the Claim stated that the principal  
15 balance was \$468,601.71, while the Change Date letters stated  
16 different and much lower amounts, as low as \$397,060.14 in the  
17 2014 letter.

18 The parties then filed their trial briefs. The Riveras  
19 theorized as to why the Change Date letters between 2012 and 2014  
20 had shown a declining principal balance. They contended that the  
21 servicer, which they equated to a co-obligor or guarantor of the  
22 Note, had been making payments on the Note to the Trust in order  
23 to protect its own interest and to avoid breach of its contractual  
24 responsibilities to Deutsche Bank under the PSA. Thus, claimed  
25 the Riveras, these third-party payments had satisfied the debt.  
26 The Riveras argued that servicers have no subrogation rights, so  
27 Deutsche Bank was unable to collect the advances on the servicer's  
28 behalf. By trying to collect them, argued the Riveras, Deutsche

1 Bank was engaging in fraud. The Riveras contended that the most  
2 remaining on the debt was \$397,060.14.

3 Secondly, the Riveras asserted a new argument and contended  
4 that the payment application method used by the servicer violated  
5 the terms of the DOT. Section 2 of the DOT provided that all  
6 payments were to be paid in the following priority: (1) interest  
7 due under the Note; (2) principal due under the Note; and  
8 (3) amounts due under Section 3 - escrow items (taxes, insurance,  
9 etc.). Here, the servicer applied the payments first to escrow,  
10 then to interest, then to principal - in direct violation of the  
11 DOT. The Riveras argued that the impact of misapplying the  
12 payments was an increase in principal, on which the lender earned  
13 more interest, and refunds to borrowers for overpayment on escrow  
14 where they intended to pay the interest and principal on the loan.  
15 The Riveras contended, without citing to any evidence, that had  
16 the payment been applied pursuant to the terms of the DOT, the  
17 most the principal would have increased by October 2009 was  
18 \$1,838.67.

19 Deutsche Bank contended that the loan history from 2004 to  
20 the petition date accurately reflected the principal balance due  
21 on the Riveras' loan. Deutsche Bank explained that the principal  
22 balance increased over time from the initial \$440,000 because the  
23 Riveras did not make a full payment every month, instead sometimes  
24 making the optional minimum payment that did not cover all of  
25 their monthly interest. As a result, the unpaid interest was  
26 added to the outstanding principal balance.

27 As for the servicer advances, Deutsche Bank argued that the  
28 Riveras arguments were misplaced. The advances were not made for

1 the Riveras or on their behalf; they were made under a contract  
2 between the servicer and the Trust (the PSA) and were reimbursable  
3 to the servicer. As such, the Riveras could not rely upon the  
4 servicer advances to argue that their debt was being satisfied or  
5 extinguished or that their principal balance was decreasing. The  
6 Riveras' reliance on the Change Date letters for the principal  
7 balance due was also misplaced. These letters were meant to  
8 notify borrowers with adjustable rate mortgages of the changes in  
9 their interest rate. The projection figures also assumed that  
10 borrowers were current on their monthly payments and were on  
11 schedule to pay off their loan in full within the scheduled  
12 remaining term of the loan. Here, the remaining term of the  
13 Riveras' loan had not decreased to 288 months, to 264 months or to  
14 240 months, because their payment for November 2009 was still due.

15 In addition, argued Deutsche Bank, the Riveras were notified  
16 of the claimed principal balance of \$468,601.71 in numerous other  
17 documents, including a modification letter sent to them in March  
18 2010, a statement of ineligibility sent in September of 2011, a  
19 follow up letter in December 2011, correspondence dated February  
20 7, 2013, and the September 2009 home loan statement, which stated  
21 that the balance was \$469,584.23 and was consistent with the  
22 \$468,601.71 figure because the Riveras' subsequent TPP payments  
23 slightly reduced the principal balance. Even though Mrs. Rivera  
24 stated that these documents stated the principal balance of  
25 \$468,601.71, she testified that she had always disputed the  
26 amounts asserted by Chase.

27 The parties then filed multiple motions in limine. Deutsche  
28 Bank sought to exclude any evidence regarding the servicer

1 advances to the Trust, which it claimed was irrelevant; the  
2 advances did not extinguish or otherwise alter the Riveras' debt  
3 obligations. Deutsche Bank also sought to exclude any evidence as  
4 to the Riveras' new "payment application" argument; that argument  
5 had already been rejected by California federal courts that have  
6 analyzed similar DOT provisions. Deutsche Bank explained that the  
7 DOT permitted the application of escrow payments when they became  
8 "due under the note," which was every month. Conversely, the  
9 principal and interest payments were **not** "due under the note" in  
10 full each month because the Riveras' loan contained a negative  
11 amortization feature. Thus, argued Deutsche Bank, the servicer  
12 properly applied the payments to escrow first, then interest, then  
13 principal, as contemplated by the order of priority set forth in  
14 Section 2 of the DOT. Finally, Deutsche Bank sought to exclude  
15 any testimony from Paatalo, the Riveras' purported expert witness.  
16 The bankruptcy court denied these motions.

## 17 **2. Trial on the Claim Objection**

18 Witnesses at trial included Margaret Dyer, an employee of  
19 Chase, Mr. Paatalo and Mrs. Rivera. Numerous exhibits were  
20 admitted, many of which are missing from the record.

21 Dyer testified as to the features of the Riveras' loan, why  
22 the principal balance increased over time, and the relationship  
23 between Deutsche Bank and Chase under the PSA. Dyer explained  
24 that the Riveras signed an adjustable rate loan, which contained a  
25 negative amortization provision and allowed the principal balance  
26 to increase. The Riveras had payment options that allowed them to  
27 make a reduced payment and to increase the unpaid principal  
28 balance. As Dyer explained, when the Riveras made the Minimum

1 Payment, which was the reduced interest and escrow option, the  
2 escrow would be paid and the remainder paid toward interest. The  
3 difference between the full interest payment minus the reduced  
4 interest payment would then be added to the unpaid principal  
5 balance, causing it to increase. Dyer explained that a full  
6 principal and interest payment was not due or required until the  
7 unpaid principal balance reached \$550,000 (125% of the original  
8 principal) or at year five. As for any "projected principal  
9 balances" noted in the Change Date letters, Dyer testified that  
10 the figures presented assumed the borrower was current on payments  
11 and had not gone into default.

12 When confronted with the payment options and the loan history  
13 document on cross-examination, Dyer explained that in the case of  
14 a negative amortization loan borrowers are only required to make  
15 the Minimum Payment; the others are options. Chase's system is  
16 set up to process a payment as though a borrower has made only the  
17 Minimum Payment, because that is all that is required to advance  
18 the due date on this type of loan. Dyer explained that when Chase  
19 receives a full payment, it applies the money to escrow, then the  
20 minimum to interest, which then reflects an increase in the  
21 principal balance. However, Chase then applies the remainder to  
22 reduce the principal balance.

23 As for servicer advances, Dyer testified that advances are  
24 reimbursable to the servicer under the PSA. She testified that  
25 advances are not made on behalf of the borrower, nor do they  
26 eliminate a borrower's obligation to make payments under the note.

27 Over Deutsche Bank's objection, the bankruptcy court allowed  
28 Paatalo's testimony on the limited issues of identifying key terms

1 of PSAs and the information he obtained about the Riveras' loan  
2 from ABSNet, a subscriber service that provides "back accounting"  
3 information on mortgage-backed securities. Paatalo testified  
4 generally as to the key terms in a PSA, such as servicer advances  
5 in Section 4.02. He also stated that according to ABSNet, the  
6 servicer had been making advances to the Trust for the Riveras'  
7 loan and no losses were being reported. Paatalo agreed that  
8 ABSNet reflected the balance of the Riveras' loan as \$468,601.71,  
9 as stated in the Claim.

10 Finally, Mrs. Rivera testified that it was never her intent  
11 to make minimum monthly payments between January 2005 and December  
12 2005, and she did not find out until the end of 2005 that their  
13 payments were insufficient to reduce the principal balance. Mrs.  
14 Rivera testified that she and her husband were told by their loan  
15 broker that the first 12 monthly payments of \$1,415.21 included  
16 principal and interest. Mrs. Rivera testified that she and her  
17 husband told the loan broker they did not want a negative  
18 amortization loan. In response, the loan broker told the Riveras  
19 their loan was not that type of loan, but that it was a "pick a  
20 pay" loan. Mrs. Rivera testified that nowhere in any of the loan  
21 documents did it explain they were getting a negative amortization  
22 loan.

23 The bankruptcy court took the matter under advisement, noting  
24 that even though the Riveras' issue of payment application  
25 pursuant to the DOT was not raised until the trial briefs and  
26 motions in limine, it would consider all of the arguments made.

27 **3. The bankruptcy court's decision on the Claim Objection**

28 The bankruptcy court entered its order and Memorandum

1 Decision overruling the Riveras' objection and establishing the  
2 amount of the Claim at \$532,272.10 ("Claim Order"). The court  
3 initially found that based on the evidence, the Riveras knew they  
4 had an interest-only loan in 2005 and sought to make additional  
5 payments to reduce the principal. However, since the funds they  
6 paid often fell between the Minimum Payment (Option 1) and full  
7 interest payment (Option 2), the result was an increase in the  
8 principal balance – albeit less than if they had only paid the  
9 Minimum Payment. In addition, late fees or pay-by-phone fees  
10 often reduced the funds available to apply towards interest or  
11 principal. The court also found the detailed loan history  
12 provided by Deutsche Bank was more convincing evidence of the  
13 principal balance than references made in the Change Date letters.

14 As for the servicer advances, the bankruptcy court first  
15 found that the Riveras were not a party to nor a beneficiary of  
16 the PSA. Secondly, nothing in the PSA provided that servicer  
17 advances satisfied the obligations of the Riveras to the holder of  
18 their Note. The provisions of the PSA authorizing the liquidation  
19 and foreclosure of loans not paid by borrowers underscored this  
20 interpretation. After foreclosure, the servicer is authorized to  
21 reimburse itself for prior advances that are not recoverable from  
22 the liquidation proceeds. Accordingly, the court held that the  
23 Riveras had failed to establish that any party to the PSA became a  
24 guarantor or obligor of the Riveras' obligations on their Note.

25 Finally, with respect to the disputed payment application  
26 method used by the servicer, the bankruptcy court reasoned that  
27 the Riveras' argument failed to consider that during the time they  
28 made payments from 2005 to 2009, no principal was "due" on the

1 Note. In contrast, escrow payments were due each month. The loan  
2 history established that payments were applied to interest and  
3 escrow each month. The court found this complied with Section 2  
4 of the DOT. Accordingly, no adjustment to the Claim was required.

5 The Riveras timely appealed on April 13, 2015.

## 6 II. JURISDICTION

7 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
8 and 157(b)(2)(B). We explain our jurisdiction below.

9 When the Riveras filed their appeal, the Clerk issued an  
10 Order Re Finality on May 13, 2015, expressing concerns over  
11 whether the Claim Order was final. While the Claim Order  
12 established the amount of the Claim, it also stated the amount was  
13 "subject to further determinations as to the disputed validity of  
14 the claim." After briefing from the parties, the motions panel  
15 considered the notice of appeal as a motion for leave to appeal  
16 and granted leave to the extent necessary.

17 Subsequent to the appeal, the Riveras' chapter 13 case was  
18 dismissed. Deutsche Bank moved to dismiss the appeal of the Claim  
19 Order as moot due to the dismissal. The motions panel denied that  
20 request, ruling that the establishment of a claim amount is  
21 binding and conclusive on the parties and has a preclusive effect.  
22 Bevan v. Social Commc'ns Sites (In re Bevan), 327 F.3d 994, 997  
23 (9th Cir. 2003). The parties were ordered to resume with  
24 briefing.

25 With the dismissal of the second adversary proceeding against  
26 Deutsche Bank, which was the only proceeding keeping the Claim  
27 Order from being final, it is clear that the Claim Order now is  
28 final, Eastport Assocs. v. City of L.A. (In re Eastport Assocs.),

1 935 F.2d 1071, 1075 (9th Cir. 1991), and the amount established in  
2 the Claim is binding between the parties and has preclusive effect  
3 in courts outside of the bankruptcy court. Therefore, we agree  
4 with the motions panel that the appeal is not moot, as we could  
5 grant the Riveras effective relief if we were to reverse. Motor  
6 Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation  
7 Co.), 677 F.3d 869, 880 (9th Cir. 2012). Accordingly, we have  
8 jurisdiction under 28 U.S.C. § 158(b).

### 9 **III. ISSUES**

10 1. Were the payment options provided in the Riveras' monthly  
11 home loan statements consistent with the terms of the Note and the  
12 DOT?

13 2. Did the servicer properly apply the Riveras' payments in  
14 accordance with the terms of the DOT?

15 3. Did the servicer advances to the Trust satisfy the mortgage  
16 debt and preclude Deutsche Bank from filing the Claim?

### 17 **IV. STANDARDS OF REVIEW**

18 An order overruling a claim objection can raise legal issues,  
19 which we review de novo, as well as factual issues, which we  
20 review for clear error. Veal v. Am. Home Mortg. Servicing, Inc.  
21 (In re Veal), 450 B.R. 897, 918 (9th Cir. BAP 2011). "De novo  
22 review is independent, with no deference given to the trial  
23 court's conclusion." Allen v. U.S. Bank, N.A. (In re Allen), 472  
24 B.R. 559, 564 (9th Cir. BAP 2012). Factual findings are clearly  
25 erroneous if they are illogical, implausible or without support in  
26 the record. Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th  
27 Cir. 2010).

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V. DISCUSSION

**A. The Riveras failed to raise the issue of payment options before the bankruptcy court.**

The Riveras contend the payment options offered in their monthly home loan statements breached the terms of the Note and the DOT, because they were not consistent with the terms of those documents. They assert that the Note does not provide for "payment options," does not define "pick a pay," and makes no mention of a "minimum payment." Rather, Sections 3(B) and 3(C) of the Note define the initial monthly payment and establish that a new monthly payment will be recomputed annually. Thus, argue the Riveras, the servicer's monthly statements set up for option payments designed to be a partial payment resulting in negative amortization breached the terms of the Note and the DOT.

The Riveras did not raise this argument before the bankruptcy court. Generally, an issue raised for the first time on appeal is deemed waived. WildWest Inst. v. Bull, 547 F.3d 1162, 1172 (9th Cir. 2008). We have discretion, however, to consider a newly raised issue (1) in the "exceptional" case where review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a change in the law has occurred while the appeal was pending, or (3) when the issue is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed. Id. (citing Cold Mountain v. Garber, 375 F.3d 884, 991 (9th Cir. 2004)).

We decline to exercise our discretion here. This case is not "exceptional" where review is necessary to prevent a miscarriage

1 of justice, no change in the law has occurred, and the issue is  
2 not purely one of law and the factual record may not be fully  
3 developed. It is unknown what other documents the Riveras may  
4 have received with respect to the four payment options, if any.

5 **B. The servicer properly applied the Riveras' payments in**  
6 **accordance with the terms of the DOT.**

7 The Riveras contend that the misapplication of payments  
8 resulted in an improper increase in their principal balance.  
9 Specifically, they contend the servicer applied their payments in  
10 the priority of escrow and other charges first, then interest,  
11 then principal, when it should have applied the payments in  
12 accordance with the priority set forth in the DOT: interest  
13 first, then principal, then escrow. The bankruptcy court  
14 determined that the priority payment scheme utilized by the  
15 servicer was appropriate because no principal was "due on the  
16 Note" as contemplated in Section 2 of the DOT for the first five  
17 years. The evidence had established that the loan was a negative  
18 amortization loan. In contrast, escrow payments were "due on the  
19 Note" each month. We agree with the bankruptcy court.

20 Despite the Riveras' contention that principal was due during  
21 the relevant time period, it was not; their loan was an "interest-  
22 only" loan for the first five years. The Note and DOT do not  
23 require payments of principal until either (1) the principal  
24 balance increases to 125% of the amount borrowed, or (2) the fifth  
25 anniversary of the due date of the first payment. See Note  
26 Sections 4(H) & 4(I) and the Adjustable Rate Rider in the DOT  
27 Sections 4(H) & 4(I). Section 4(H) of the Note provides that if  
28 unpaid principal exceeds 125% of the principal amount originally

1 borrowed, then the new monthly payment will be in an amount which  
2 would be sufficient to repay the unpaid principal in full on the  
3 maturity date. Section 4(G) provides that for "each month that  
4 the monthly payment is less than the interest portion, the Note  
5 Holder will subtract the monthly payment from the amount of the  
6 interest portion and will ad [sic] the difference to my unpaid  
7 Principal."

8         The terms of the Note and DOT provided that the Riveras could  
9 pay less than the full amount of interest that would need to be  
10 paid each month in order to repay the principal by the maturity  
11 date. Contrary to their argument, until the unpaid principal  
12 exceeded 125% of the amount originally borrowed, or until December  
13 1, 2009, the Note did not require principal to be paid each month.  
14 Dyer's uncontroverted testimony that a full interest and principal  
15 payment was not due or required until the unpaid principal balance  
16 reached \$550,000 or on year five is consistent with the terms of  
17 the Note and the DOT.

18         Although the Riveras could pay less than the full interest  
19 portion of their monthly payments, and principal payments were not  
20 yet due during the relevant time period, full escrow payments **were**  
21 "due on the Note" each month. Section 3 of the DOT required the  
22 Riveras to pay "Escrow Items" on the day their payments were due  
23 each month until the Note was paid in full. Section 4(F) of the  
24 Note provides that the payment cap for payment changes does "not  
25 apply to any escrow payments Lender may require under the Security  
26 Instrument." Moreover, Section 3 of the DOT provides that "Escrow  
27 Items" will be included in the monthly "Periodic Payments."  
28 Section 2 of the DOT, upon which the Riveras rely to argue that

1 the servicer applied their payments in the wrong order, provides  
2 that "payments shall be applied to each Periodic Payment in the  
3 order in which it became due. Any remaining amounts shall be  
4 applied first to late charges, second to any other amounts due  
5 under this Security Instrument [including "Escrow Items" under  
6 Section 3], and then to reduce the principal balance of the Note."

7 Therefore, because only late charges, if any, the full escrow  
8 payment and a reduced interest payment were "due" each month under  
9 the terms of the Note and DOT for the first five years, the  
10 servicer did not misapply the Riveras' payments; the priority  
11 order of payment applied – late charges and escrow payments, then  
12 interest, then principal – did not violate the terms of the Note  
13 or the DOT. As the court stated in Dunn v. GMAC Mortgage, LLC in  
14 response to a similar payment priority argument plaintiffs raised  
15 there:

16 The rules of contract interpretation require that Section  
17 2 of the DOT be construed in a manner that allows  
18 Plaintiffs to perform their obligation to pay for Escrow  
19 Items under Section 3 of the DOT while still enjoying  
20 their right to pay only the minimum payment due under the  
21 Note. Plaintiffs' interpretation would lead to an absurd  
22 result in which no borrower payment could ever be applied  
23 to the Escrow Items despite the borrower's promise to pay  
24 for those items on a monthly basis throughout the loan  
25 term. It would also prevent Defendant from negatively  
26 amortizing the loan for unpaid interest until it first  
27 applied "all" of the payment it receives to interest due  
28 . . . . Additionally, Plaintiffs' interpretation would  
nonsensically require the lender to advance its own money  
to pay the Escrow Items, thereby lending the borrower  
additional sums – at no interest – with no additional  
security, and for the entire time any interest or  
principal remain owing and unpaid.

2011 WL 1230211, at \*3 (E.D. Cal. Mar. 28, 2011).

Accordingly, the bankruptcy court did not err in determining  
that the servicer's method of applying the Riveras' payments did

1 not violate the terms of the DOT.<sup>4</sup>

2 **C. The servicer's advances did not satisfy the Riveras' debt or**  
3 **affect their obligations under the Note.**

4 Under the PSA, a servicer's duties include collecting loan  
5 payments from the borrower and submitting the payments to the  
6 trust. If the borrower stops making payments on the loan, the  
7 servicer is obligated to submit the delinquent payments; these  
8 payments are referred to as advances. Once the Riveras defaulted,  
9 the servicer began advancing funds equal to the difference between  
10 minimum monthly required payments under the Note and the amount  
11 actually received. Essentially, the servicer has been making  
12 advances to the Trust since the Riveras stopped paying in 2009.  
13 By June 2013, the advance had grown to \$90,714.70. It is  
14 undisputed these advances were required by Section 4.02 of the  
15 PSA.

16 The Riveras argue that because Deutsche Bank received  
17 payments on the debt from the servicer, they are not in default.  
18 Section 9 of the Note provides that "[a]ny person who takes over  
19 these obligations [within the Note], including the obligations of  
20 a guarantor, surety or endorser of this Note, is also obligated to  
21 keep all of the promises made in this Note." The Riveras argue  
22 that when the servicer agreed under the PSA to pay advances on the  
23 Riveras' loan, the servicer "took over" the obligations under the

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25 <sup>4</sup> Riveras' argument that payments should be made to  
26 interest, then principal and then to escrow payments is without  
27 merit. In the final application of payments, whether a payment is  
28 applied to principal or escrow payments, Riveras were properly  
charged interest on either category under the DOT at the note rate  
pursuant to sections 3 and 9. Consequently, the calculations for  
the applied funds reflect identical amounts.

1 Note, including making payments. As a result, they contend that  
2 Deutsche Bank could not file the Claim to collect any arrearages  
3 for the servicer, which the Riveras contend is a third-party  
4 surety. The Riveras' arguments are flawed.

5 First, it is undisputed the Riveras, as borrowers, are not  
6 parties to the PSA. As neither parties nor beneficiaries of the  
7 PSA, they are unable to invoke its terms or benefits. Turner v.  
8 Wells Fargo Bank, N.A. (In re Turner), 2015 WL 3485876 at \*9-10  
9 (9th Cir. BAP June 2, 2015) (borrowers lack standing to enforce  
10 PSA terms because they are not parties to or third-party  
11 beneficiaries of the PSA); Casault v. Fed. Nat'l Mortg. Ass'n, 915  
12 F. Supp. 2d 1113, 1135 (C.D. Cal. 2012). This interpretation is  
13 supported by Section 10.09 of the PSA, which states:

14 Nothing in this Agreement or in any Certificate,  
15 expressed or implied, shall give to any Person, other  
16 than the parties hereto and their respective successors  
hereunder . . . any benefit or any legal or equitable  
right, remedy or claim under this Agreement.

17 Second, the Riveras incorrectly characterize the servicer  
18 advances as "payments" on their debt. Servicer advances are not  
19 "payments" made on behalf of or for the benefit of the borrower.  
20 Ouch v. Fed. Nat'l Mortg. Ass'n, 2013 WL 139765, at \*3 (D. Mass.  
21 Jan. 10, 2013) (servicer advances would only be considered to be  
22 "on behalf of" the borrower if the servicers actually intended to  
23 extinguish the borrower's repayment obligations, citing 60 Am.  
24 Jur. 2d Payment § 1 (West 2012)); Casault, 915 F. Supp. 2d at 1136  
25 (servicer advances are not payments made on borrower's behalf;  
26 borrower's loan is still in default); Schmeclar v. PHM Fin., Inc.  
27 (In re Schmeclar), 531 B.R. 735, 739 (Bankr. N.D. Ill. 2015)  
28 (rejecting same argument that servicer advances excused debtor

1 from making any mortgage payments that came due during the period  
2 of the advances).

3 Servicer advances are loans made to the trust in the amount  
4 of the borrower's unpaid monthly payment. In addition, under the  
5 PSA, the servicer is not required to make advances to cure a  
6 borrower's delinquency if the servicer determines it would be a  
7 "nonrecoverable advance."<sup>5</sup> See PSA §§ 4.02, 4.03. Finally,  
8 servicers under the PSA are authorized to liquidate and foreclose  
9 loans not paid by the borrower (see PSA § 3.09 at ER 591), which  
10 further undermines the Riveras' argument that the servicer has  
11 made Note payments "on their behalf" or that the servicer has  
12 "taken over" their repayment obligations. See Pulliam v. PennyMac  
13 Mortg. Inv. Trust Holding I LLC, 2014 WL 3784238, at \*3 (D. Maine  
14 July 31, 2014) (rejecting borrower's same "surety" theory;  
15 servicer did not become surety for the note by entering into a  
16 contractual agreement under the trust to advance borrower's  
17 delinquent mortgage payments); Casault, 915 F. Supp. 2d. at 1136  
18 (servicer did not "take over" the borrower's payment obligations  
19 by entering into the PSA); In re Schmeqlar, 531 B.R. at 739  
20 (because PSA authorized servicer to foreclose when debtor was in  
21 default of mortgage, the advances made by the servicer could not  
22 be seen as being made for the benefit of the debtor or on his  
23 behalf). Therefore, the Riveras are still in default on the Note  
24 due to their admitted failure to pay.

25 Lastly, the servicer is entitled to reimbursement of the

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27 <sup>5</sup> Specifically, the servicer is only required to make  
28 advances to the extent they are anticipated to be recoverable from  
future payments, foreclosure proceeds, or other proceeds or  
collections. See PSA §§ 4.02, 4.03.

1 funds advanced. See PSA §§ 3.05, 4.03. Because the servicer's  
2 advances are reimbursable, the Riveras' debt to the Trust is not  
3 satisfied by those advances. Casault, 915 F. Supp. 2d. at 1135;  
4 In re Schmeclar, 531 B.R. at 739. Hence, Deutsche Bank filed the  
5 Claim.

6 Accordingly, the bankruptcy court did not err in determining  
7 that the servicer's advances did not satisfy the debt, affect the  
8 Riveras' obligations under the Note or require any adjustment to  
9 the Claim amount.

10 **VI. CONCLUSION**

11 For the foregoing reasons, we AFFIRM the Claim Order.

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