

MAR 14 2018

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. AZ-17-1055-KuBL  
)  
DEED AND NOTE TRADERS, L.L.C., ) Bk. No. 4:10-bk-03640-BMW  
)  
Debtor. )

DEED AND NOTE TRADERS, L.L.C., )  
)  
Appellant, )

v. )

MEMORANDUM\*

AMERICA'S SERVICING COMPANY, dba )  
Wells Fargo Bank N.A.; BANK OF )  
AMERICA, N.A., Successor by Merger )  
to BAC Home Loans Servicing LP; )  
CALIBER HOME LOANS, INC., as )  
servicer for LSF9 Master )  
Participation Trust; CITIMORTGAGE, )  
INC.; DITECH FINANCIAL LLC, f/k/a )  
Green Tree Servicing LLC; GREEN )  
TREE SERVICING, LLC; FLAGSTAR BANK; )  
NATIONSTAR MORTGAGE; OCWEN LOAN )  
SERVICING LLC; PNC MORTGAGE, a )  
division of PNC Bank, NA; )  
RESIDENTIAL CREDIT SOLUTION, INC., )  
as Servicer for J.P. Morgan )  
Acquisition Corp.; SETERUS INC.; )  
WELLS FARGO BANK, N.A.; CHRISTIANA )  
TRUST, a Division of Wilmington )  
Savings Fund Society, FSB, as )  
Trustee for Normandy Mortgage )  
Services Loan Trust, Series )  
2013-17, as serviced by Rushmore )  
Loan Management Services LLC; U.S. )  
BANK NATIONAL ASSOCIATION, as )  
Trustee for Citigroup Mortgage Loan )  
Trust Inc., Asset-Backed Pass- )  
Through Certificates, Series )

\* 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 2007-AMC1; DEUTSCHE BANK NATIONAL )  
TRUST COMPANY, as Trustee, on )  
2 behalf of the holders of WaMu )  
Mortgage Pass-Through Certificates,) )  
3 Series 2006-AR1, by and through its) )  
servicing agent, Select Portfolio )  
4 Servicing, Inc.; FAY SERVICING, )  
LLC; JPMORGAN CHASE BANK N.A.; J.P.) )  
5 MORGAN MORTGAGE ACQUISITION )  
CORPORATION; RUSHMORE LOAN )  
6 MANAGEMENT SERVICES, LLC; U.S. BANK )  
NATIONAL ASSOCIATION, as Trustee )  
7 for Terwin Mortgage Trust 2005-8HE,) )  
Asset-Backed Certificates, Series )  
8 2005-8HE, as serviced by )  
Specialized Loan Servicing, LLC; )  
9 WILMINGTON TRUST, NATIONAL )  
ASSOCIATION, as Successor Trustee )  
10 to Citibank, N.A., as Trustee for )  
Bear Stearns ALT-A Trust 2006-4, )  
11 Mortgage Pass-Through Certificates,) )  
Series 2006-4, by and through its )  
12 servicing agent, Select Portfolio )  
Servicing, Inc.; SPECIALIZED LOAN )  
13 SERVICING LLC; THE BANK OF NEW YORK )  
MELLON, f/k/a, The Bank of New )  
14 York, successor in interest to JP )  
Morgan Chase Bank, N.A. as Trustee )  
15 for Structured Asset Mortgage )  
Investments II Inc. Bear Stearns )  
16 ALT-A Trust, Mortgage Pass-Through )  
Certificates, Series 2005-7; THE )  
17 BANK OF NEW YORK MELLON, f/k/a, The )  
Bank of New York, successor in )  
18 interest to JP Morgan Chase Bank, )  
N.A. as Trustee for Structured )  
19 Asset Mortgage Investments II Inc. )  
Bear Stearns ALT-A Trust, Mortgage )  
20 Pass-Through Certificates, Series )  
2005-8; HOMEWARD RESIDENTIAL, INC.;

21 DEUTSCHE BANK NATIONAL TRUST )  
COMPANY, as Trustee, in trust for )  
22 Registered Holders of Soundview )  
Home Loan Trust 2007-WMC1, Asset )  
23 Backed Certificates, Series )  
2007-WMC1, through servicing agent )  
24 Select Portfolio Servicing, Inc., )  
 )  
25 Appellees. )  
 )

26  
27 Argued and Submitted on February 23, 2018  
at Phoenix, Arizona

28 Filed - March 14, 2018

1 Appeal from the United States Bankruptcy Court  
2 for the District of Arizona

3 Honorable Brenda Moody Whinery, Bankruptcy Judge, Presiding

4 **Appearances:** Scott D. Gibson argued for appellant Deed and  
5 Note Traders, L.L.C.; Craig Goldblatt of Wilmer  
6 Cutler Pickering Hale & Dorr LLP argued for  
7 appellee Bank of America N.A.; Katherine Anderson  
8 Sanchez of Dickinson Wright PLLC argued for  
9 appellee Flagstar Bank; Kyle S. Hirsch of Bryan  
10 Cave LLP argued for appellees JPMorgan Chase Bank  
11 N.A. and J.P. Morgan Mortgage Acquisition  
12 Corporation; Steven D. Jerome of Snell & Wilmer  
13 LLP appeared for appellees America's Servicing  
14 Company and Wells Fargo Bank, N.A.; Leticia  
15 Butler appeared for appellee Caliber Home Loans,  
16 Inc.; Janet M. Spears of Aldridge Pite, LLP  
17 appeared for appellees Citimortgage, Inc., Fay  
18 Servicing, LLC, and Rushmore Loan Management  
19 Services, LLC; Amelia B. Valenzuela of Quarles &  
20 Brady LLP appeared for appellees Deutsche Bank  
21 National Trust Company and Residential Credit  
22 Solution, Inc.; Michael Bosco appeared for  
23 appellees Nationstar Mortgage and PNC Mortgage;  
24 Solomon S. Krotzer appeared for appellee Ocwen  
25 Loan Servicing LLC; Aaron Michael Waite of  
26 Weinstein & Riley, PS appeared for appellees  
27 Specialized Loan Servicing LLC, The Bank of New  
28 York Mellon, and U.S. Bank National Association.

17 Before: KURTZ, BRAND, and LAFFERTY, Bankruptcy Judges.

18 When Deed and Note Traders, LLC (Debtor) filed its second  
19 chapter 11<sup>1</sup> petition, it owned over 150 residential properties,  
20 each secured by separate notes held by a variety of lenders and  
21 loan servicers (Secured Creditors), including appellees. Debtor  
22 confirmed its plan of reorganization and later filed a motion  
23 for an order to show cause (OSC Motion), seeking to have certain  
24

25 \_\_\_\_\_  
26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,  
28 Rule references are to the Federal Rules of Bankruptcy Procedure,  
and Civil Rule references are to the Federal Rules of Civil  
Procedure.

1 Secured Creditors held in contempt for failing to comply with  
2 the terms of the plan. The bankruptcy court held numerous  
3 hearings on the OSC Motion over a five-year period, and gave  
4 Debtor multiple opportunities to supplement its allegations of  
5 contempt with clear and convincing evidence and provide proof of  
6 damages in connection with each property.

7 At the last hearing, the bankruptcy court took the matter  
8 under advisement and later issued its Ruling and Order Regarding  
9 Debtor's Application For An Order to Show Cause Re: Contempt and  
10 Debtor's Motion to Modify the Plan.<sup>2</sup> The court denied the OSC  
11 Motion, as supplemented, finding that Debtor failed to provide  
12 clear and convincing evidence showing that any of the Secured  
13 Creditors had failed to comply with the confirmed plan. The  
14 bankruptcy court further found that even if Debtor had made a  
15 prima facie case for contempt, it failed to provide proof of  
16 damages. Debtor appeals from this ruling. We AFFIRM.

### 17 I. FACTS<sup>3</sup>

18 Debtor is an Arizona limited liability company that was  
19 formed in 1993. Since then, it has engaged in the real estate  
20 business in Tucson, Arizona, purchasing, rehabilitating, leasing  
21 and selling residential properties.

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22  
23 <sup>2</sup> The order on appeal also denied Debtor's motion to modify  
24 its confirmed plan. Debtor has not put that ruling at issue in  
25 this appeal. Thus, we do not consider it. See Padgett v.  
Wright, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

26 <sup>3</sup> For the background facts and procedural history, we borrow  
27 heavily from the facts set forth in In re Deed and Note Traders,  
28 LLC, BAP Nos. AZ-11-1091-PaDJu, AZ-11-1092-PaDJu, 2012 WL 1191891  
(9th Cir. BAP Apr. 5, 2012) and the bankruptcy court's ruling and  
order that is the subject of this appeal.

1 Debtor financed the acquisition of its properties using its  
2 own operating income and through the many loans it obtained from  
3 individual investors. These were generally short-term, high  
4 interest loans. Debtor's business plan was to hold a property  
5 for about a year, during which time Debtor would rehabilitate  
6 the property, and then refinance the loan with traditional  
7 lenders at market rates. As property values increased, Debtor  
8 would sell property in its inventory at a profit.

9 In December 2006, the Arizona attorney general investigated  
10 Debtor's business practices and, after lengthy negotiations, the  
11 parties entered into a consent agreement. Under the terms of  
12 the agreement, Debtor was required to sell a number of houses  
13 back to their original owners and to pay significant attorney  
14 fees incurred by the state. These payments and transactions  
15 occurred at the beginning of a declining real estate market and,  
16 according to Debtor, practically eliminated its operating  
17 reserves. Debtor's financial problems were exacerbated in  
18 August 2007 when First Magnus Financial Corporation, a large  
19 provider of traditional and other residential loan programs in  
20 Arizona, shut down and filed for bankruptcy.

21 **A. Debtor's First Bankruptcy Case**

22 The combination of fines, the loss of funding sources for  
23 buyers from Debtor's inventory, and the corresponding loss of  
24 sales revenue caused Debtor to file its first chapter 11  
25 petition in September 2007. There were over 159 properties  
26 involved, valued at over \$40 million, with \$30 million in  
27 secured claims against those properties.

28 Debtor filed its plan and disclosure statement in December

1 2007. The plan was amended on April 24 and May 22, 2008 (First  
2 Plan). The First Plan classified the Secured Creditors in  
3 Class 4. All Class 4 claimants would retain their respective  
4 security interests on the properties securing their claims and  
5 would be paid as follows:

6 **Payment of the Class 4 Claim.** Upon the earliest to  
7 occur of (i) the Maturity Date (as defined below),  
8 (ii) a Sale of the property securing said Claim, other  
9 than a sale where the Debtor provides all or any  
10 portion of the financing for the sale, or (iii) the  
11 refinancing of the secured indebtedness against said  
12 property, the entire amount of the Class 4 Claims and  
13 all accrued-but-unpaid interest thereon (as provided  
14 in paragraph 6.1(a), above) shall be due and payable  
15 in full; provided, however, that absent a Sale or  
16 refinancing of the indebtedness secured by said  
17 Property, commencing on the earlier of (i) fifteenth  
18 (15th) day of the second (2nd) calendar month  
19 following the Effective Date, or 45 days after the  
20 Effective Date, interest on the Class 4 Claims shall  
21 be paid monthly, with the entire amount of the  
22 Outstanding Principal and all accrued-but-unpaid  
23 interest due and payable as to those Class 4 Claims  
24 that are secured by a first position lien (other than  
25 real estate taxes) on or before the seventh  
26 anniversary of the Effective date and as to those  
27 Class 4 Claim that are secured by a 2d or 3d lien  
28 position, on or before the fifth anniversary of the  
Effective Date (the "Maturity Date").

19 In October 2008, the bankruptcy court entered an Order  
20 Confirming Debtor's Plan of Reorganization Dated December 7,  
21 2007, as Amended. About three months later, the bankruptcy  
22 court entered a final decree and order closing the case on the  
23 basis that payments had commenced under the First Plan and  
24 Debtor had substantially consummated the plan under § 1101.

25 **B. The Current Chapter 11 Bankruptcy Case**

26 Four days after the closing of the First Case, Debtor filed  
27  
28

1 a second chapter 11 petition on February 12, 2010.<sup>4</sup>

2 **1. The Confirmation of Debtor's Second Plan**

3 In April 2010, Debtor proposed a plan of reorganization  
4 (Second Plan). The only significant difference between the  
5 First and Second Plans was Debtor's proposal to reduce the  
6 Class 4 Secured Creditors' allowed claims to the "market value"  
7 of the properties securing those claims as of the effective date  
8 of the plan; i.e., the Second Plan proposed to "cram down" these  
9 claims.

10 In June 2010, Debtor filed its First Amended Disclosure  
11 Statement for Debtor's Plan of Reorganization Dated April 2,  
12 2010 (Amended Disclosure Statement). Attached as Exhibit 5 was  
13 a schedule of all of the properties and lenders with alleged  
14 secured claims against Debtor's bankruptcy estates, the balances  
15 of the liens against each property, and the estimated current  
16 fair market value of each property.

17 Debtor's manager submitted a declaration in support of  
18 confirmation of the Second Plan stating: "In filing this case,  
19 the Debtor did not attempt in any way to alter the payment due  
20 its creditors as established in the Plan for the First  
21 Chapter 11, but only to attempt to reduce the debt amounts to  
22 reflect current market value of the properties as permitted  
23 under section 506 of the Bankruptcy Code." Attached to the  
24 declaration was an exhibit which showed the property address,  
25 the lender name, the current loan balance, the current fair  
26 market value, the current new loan amount at current fair market

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27  
28 <sup>4</sup> The case was assigned to Judge Eileen Hollowell.

1 value, a proposed new interest payment, and the monthly rental  
2 income, if applicable.

3 In February 2011, the bankruptcy court entered an order  
4 confirming Debtor's Second Plan (Second Confirmation Order).  
5 Under the terms of the confirmed plan, Class 4 Secured Creditors  
6 were to receive interest only payments at a rate of 5.6% for the  
7 duration of the plan based upon the readjusted value of the  
8 property as determined by the bankruptcy court. After the  
9 Second Confirmation Order was entered, the bankruptcy court  
10 entered orders approving stipulations between Debtor and Secured  
11 Creditors regarding the current fair market value of the  
12 relevant properties. If the current fair market value of a  
13 property was not resolved by stipulation, the bankruptcy court  
14 determined the value based on the evidence in the record and  
15 entered orders accordingly.

16 Several Secured Creditors appealed the Second Confirmation  
17 Order to this Panel. The Panel affirmed the bankruptcy court's  
18 order confirming the plan in In re Deed and Note Traders, LLC,  
19 2012 WL 1191891.

20 **2. The First Motion And Order Directing Secured Creditors**  
21 **To Comply With The Terms Of The Second Plan**

22 In September 2012 – months after the Second Confirmation  
23 Order was entered and upheld on appeal – Debtor filed a Motion  
24 for Entry of Order Directing Lenders to Comply with Terms of  
25 Confirmed Plan of Reorganization or Be Subject to Contempt  
26 Citation (Motion to Comply). Debtor alleged that most of its  
27 Secured Creditors had ignored the plan and continued to insist  
28 that Debtor pay its mortgage according to the original terms of

1 the loans. Exhibit "A" to the Motion to Comply attached  
2 correspondence sent by various Secured Creditors to Debtor.  
3 Debtor maintained that this correspondence established that most  
4 of its Secured Creditors were not complying with the terms of  
5 the Second Plan.

6 The bankruptcy court issued an Order Directing Secured  
7 Creditors to Comply with Terms of Plan (Order to Comply). The  
8 order required all Class 4 Secured Creditors to accept payments  
9 from Debtor as provided for under the Second Plan and to amend  
10 their records to reflect their treatment in the Second Plan. If  
11 a Secured Creditor failed to abide by the order, Debtor was to  
12 file a motion requesting the court issue an order directing the  
13 Secured Creditor to appear and show cause why it should not be  
14 held in contempt for failure to abide by the terms of the Second  
15 Plan.

### 16 **3. The OSC Motion**

17 On March 6, 2013, Debtor filed the OSC Motion alleging that  
18 some Secured Creditors did not comply. The OSC Motion alleged  
19 that certain Secured Creditors refused to abide by the terms of  
20 the Second Plan; i.e., many had returned Debtor's payments,  
21 which were in amounts consistent with the Second Plan, insisting  
22 that larger amounts be paid or that the arrearages be paid  
23 before payments would be accepted, and others refused to accept  
24 payoffs of the restructured debt, insisting that the original  
25 amounts of the indebtedness be paid before a sale could occur.  
26 These general allegations were asserted against the  
27 "institutional lenders," without specifying any particular  
28 creditor or particular wrongdoing.

1 Debtor also represented that it had served copies of the  
2 Order to Comply upon its Secured Creditors, seeking compliance  
3 with the Second Plan. In the end, Debtor requested the  
4 bankruptcy court to issue an Order to Show Cause to the Secured  
5 Creditors identified in Exhibit "A" attached to the motion,  
6 directing that they appear and show cause why they should not be  
7 held in contempt due to their failure to comply with the terms  
8 of the Second Plan, and if appropriate, award damages to Debtor.  
9 Exhibit "A" showed approximately fifty-seven loans and listed  
10 the creditor's name, the property, and the loan number.

11 On March 12, 2013, the bankruptcy court issued an Order to  
12 Show Cause Regarding Creditors' Failure to Comply with Debtor's  
13 Plan (OSC Order), requiring the named Secured Creditors to  
14 appear and show cause why they should not be held in contempt  
15 for failing to comply with the terms of the Second Plan.  
16 Attached to the OSC Order as Exhibit "A" was a list of loans and  
17 the corresponding creditors alleged to have failed to comply  
18 with the Second Plan.

19 Numerous Secured Creditors responded to the OSC Motion,  
20 complaining that the treatment of Class 4 claims in the First  
21 Plan and the Second Plan was indeterminate and vague -  
22 individual loans and properties were not identified, nor were  
23 the terms relating to the fair market value of the properties,  
24 payment amounts or payment terms (including taxes and  
25 insurance). Without this information, the Secured Creditors  
26 argued, plan compliance was nearly impossible.

27 The bankruptcy court held a hearing on the OSC Order on  
28 April 11, 2013. Secured Creditors who appeared complained that

1 they needed to know exactly what the allegations of contempt  
2 were so that they could conduct investigations and prevent  
3 reoccurrence of any alleged violations of the terms of the  
4 Second Plan. The bankruptcy court ordered Debtor's counsel to  
5 work towards stipulations with those creditors in an Interim  
6 Order Re: Order to Show Cause Regarding Creditors' Failure to  
7 comply with Debtor's Plan (Interim Order) entered July 1, 2013.

8 For Secured Creditors who did not appear at the hearing,  
9 the bankruptcy court directed Debtor to lodge an order that  
10 specified, by property and by lender, those lenders that failed  
11 to appear, and finding that they were in contempt. The court  
12 ordered Debtor also to provide a calculation of damages by  
13 property and lender and to provide notice of the same to the  
14 lender. If the Secured Creditor did not respond, the bankruptcy  
15 court would award judgment in favor of Debtor for the amount of  
16 the damages submitted.

17 There is nothing in the record showing that Debtor's  
18 counsel complied with the directives in the Interim Order with  
19 respect to the non-appearing Secured Creditors. Moreover, since  
20 Debtor had not complied with the Interim Order with respect to  
21 several Secured Creditors who had appeared at the hearing, those  
22 creditors filed a motion to compel Debtor to comply with the  
23 court's order. On March 6, 2014, the bankruptcy court held a  
24 hearing on the motion to compel. At the hearing, the  
25 complaining Secured Creditors were permitted to upload orders  
26 clarifying their respective treatment under the Second Plan.  
27 Debtor's counsel did not object to those stipulations.

1           **4.    The Second Motion For Entry Of Order Directing Secured**  
2           **Lenders To Comply With Debtor's Confirmed Plan**

3           On June 5, 2014, Debtor filed a second motion for entry of  
4           an order directing Secured Creditors to comply with Debtor's  
5           confirmed plan (Second OSC Motion). Similar to the first OSC  
6           Motion, the Second OSC Motion did not contain any specific  
7           allegations of wrongdoing in connection with a specific Secured  
8           Creditor. In the Second OSC Motion, Debtor moved for an order  
9           directing the non-complying Secured Creditors to provide the  
10          following information to Debtor: (1) the name, address, and  
11          contact person (or counsel) for the current owner or servicer of  
12          the loan;<sup>5</sup> (2) confirmation of the current principal balance of  
13          the loan as set forth in the plan, the stipulation of the  
14          parties, or the order of the court determining value; (3) the  
15          amount of interest accruals on the unpaid principal balance  
16          since the confirmation of the plan; and (4) if taxes and  
17          insurance have been impounded and not paid, pay all such taxes  
18          and insurance, and any interest or penalties thereon, without  
19          charging to Debtor such penalties and interest and account to  
20          Debtor for the same. Debtor alleged that it had diligently  
21          requested this information from the Secured Creditors, but was  
22          unable to obtain it. Finally, Debtor reserved its right to  
23          sanction or amend the damages against the Secured Creditors  
24          identified in its original OSC Motion.

25 \_\_\_\_\_  
26           <sup>5</sup> Debtor alleged that many loans had been transferred to new  
27          lenders or servicers since confirmation of the Second Plan  
28          without providing transferees the information they needed to  
          comply with the terms of the Second Plan.

1 Numerous lenders joined in an omnibus response to the  
2 Second OSC Motion, contending that they had lodged orders  
3 resolving the Order to Show Cause and clarifying their treatment  
4 under the Second Plan. These creditors maintained that they  
5 should not be included in Debtor's Second OSC Motion.

6 On July 10, 2014, the bankruptcy court held a hearing on  
7 the Second OSC Motion. The bankruptcy court vacated the motion  
8 as to those creditors who could produce stipulations. As to the  
9 Secured Creditors who did not respond, the bankruptcy court  
10 directed Debtor to update the list of creditors pertaining to  
11 the Second OSC Motion, lodge an order for each creditor, and  
12 serve it pursuant to the adversary rules. The orders were to  
13 include language in bold that failure to comply within thirty  
14 (30) days may result in the imposition of sanctions, including  
15 but not limited to, an award of attorney's fees to Debtor. The  
16 record reflects that Debtor did not comply with the bankruptcy  
17 court's instruction to update the list of creditors or lodge  
18 orders for each creditor, nor were any such orders ever entered  
19 by the bankruptcy court.

20 **5. Debtor's Motion To Modify The Second Plan**

21 On June 10, 2015, Debtor filed a Motion to Modify the  
22 Second Plan (Motion to Modify). Debtor alleged that numerous  
23 Secured Creditors failed to comply with the terms of the  
24 confirmed Second Plan and continued to report various loans,  
25 which were otherwise current, in a default status. As a result,  
26 Debtor argued that it was unable to qualify for refinancing of  
27 these loans within the time frame contemplated by First Plan.  
28 On this basis, Debtor sought to modify the confirmed Second Plan

1 to extend the deadline for maturity of the secured loans under  
2 its First Plan and Second Plan for a period of five years, until  
3 November 23, 2020.<sup>6</sup>

4 **6. The October 14, 2015 Hearing**

5 On October 14, 2015, the bankruptcy court held a hearing on  
6 Debtor's Motion to Modify and a continued hearing on the OSC  
7 Motion. Debtor's counsel again asserted in general terms that  
8 certain Secured Creditors were not complying with the terms of  
9 the Second Plan.

10 The bankruptcy court ordered Debtor to (1) re-file and/or  
11 supplement the OSC Motion with an updated list of the alleged  
12 non-compliant Secured Creditors and to serve it on those  
13 creditors and (2) clearly specify the nature and extent of each  
14 creditor's alleged failure to comply with the Second Plan. The  
15 court conditionally granted the Motion to Modify through  
16 December 31, 2015, to give Debtor an opportunity to prepare and  
17 serve the supplement and to obtain a hearing prior to the  
18 expiration of the extension.

19 **7. The OSC Supplement**

20 On December 30, 2015, Debtor filed the supplement to the  
21 OSC Motion (OSC Supplement). Attached to the OSC Supplement was  
22 a spreadsheet showing (1) the list of properties owned by  
23 Debtor; (2) the Secured Creditors holding liens against the  
24 properties; (3) the amounts of the loan for each property;  
25 (4) the payment amounts; and (5) the reasons Debtor thought the  
26

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27 <sup>6</sup> Months later, Debtor's bankruptcy case was reassigned to  
28 Judge Brenda Whinery.

1 Secured Creditor was not in compliance with the terms of the  
2 Second Plan. These reasons included, among others:

3 (1) "Lender not following [bankruptcy] of 4/11. Loan  
4 amount incorrect and 9/2015 [statement] showing unpaid payments  
5 back to 8/2009 (pre-confirmation). Lender stopped paying  
6 insurance in 2010, so [Debtor] pays, Lender pays taxes."

7 (2) "Lender loan [amount] incorrect. Attorney filed  
8 clarification with court 5/28/14, but lender's statement dated  
9 9/2015 loan amount still incorrect. [Debtor] paid some  
10 insurance but lender now paying insurance and taxes."

11 (3) "Lender not sending [statements] since loan is in 3rd  
12 party name. Don't know if lender following [bankruptcy]  
13 interest rate or loan amount. Lender has NOT paid taxes.  
14 [Debtor] pays insurance."

15 The spreadsheet, which included over ninety properties, was  
16 not verified, authenticated or signed by Debtor's  
17 representative, nor was there a declaration submitted with the  
18 spreadsheet stating who had prepared the list or what  
19 information was relied upon in preparing it.

20 On the same date, Debtor requested a hearing on the OSC  
21 Supplement, but did not file a motion to expedite. Also on the  
22 same date, Debtor filed a Motion to Extend the Term of the  
23 Debtor's Plan of Reorganization (Motion to Extend) and lodged a  
24 form of order with the Motion to Extend. Debtor did not request  
25 a hearing on the Motion to Extend, nor any expedited  
26 consideration. The bankruptcy court did not enter the lodged  
27 order.



1 Second Plan to extend the term of the plan because they would  
2 automatically be out of compliance with the plan and would have  
3 to adjust their systems accordingly.

4 On March 2, 2016, the bankruptcy court held a hearing to  
5 consider the OSC Supplement and the Motion to Modify, as well as  
6 the numerous objections and responses. Debtor's counsel argued  
7 that certain Secured Creditors misapplied plan payments, which  
8 prompted the filing of the OSC Motion. He further asserted that  
9 the misapplied payments initiated erroneous reports of default  
10 and eventual foreclosure proceedings which damaged Debtor.  
11 Counsel requested the bankruptcy court to enter an order  
12 directing the non-complying Secured Creditors to enter into  
13 stipulations with Debtor or otherwise enter an order finding  
14 that they were not in compliance with the confirmed plan. These  
15 stipulations would confirm principal balances pursuant to the  
16 confirmed plan or stipulated between the parties, confirm the  
17 fixed interest rate during the plan, provide a payment history  
18 with information regarding payment application, provide an  
19 escrow accounting, correct any erroneous reports of default with  
20 the credit agencies, and provide timely and correct payoff  
21 statements. If taxes and insurance were not timely paid, Debtor  
22 requested that the lenders be required to pay any fees and costs  
23 for the late payments incurred.

24 Several Secured Creditors appeared at the hearing, stating  
25 that they had either complied with the plan or were unsure if  
26 they complied without a clarification order. As to plan  
27 modification, one lender's counsel argued that there should be  
28 no extension of the loan maturity dates with respect to all

1 creditors since the balloon payments with his client were past  
2 due and thus Debtor was in default. Debtor's counsel responded  
3 that Debtor could not pay balloon payments at this time and thus  
4 was requesting an extension of the maturity date as to all  
5 creditors. Debtor's counsel further represented that he was  
6 prepared to present evidence regarding the effect of the  
7 erroneous defaults and how that negatively impacted Debtor,  
8 including Debtor's credit rating, which impaired its ability to  
9 refinance. After considering the arguments of counsel, the  
10 bankruptcy court took the matters under advisement.

### 11 **9. The Bankruptcy Court's Ruling**

12 On February 3, 2017, the bankruptcy court issued its ruling  
13 and order. The court denied the OSC Motion, as supplemented,  
14 finding that Debtor failed to provide sufficient evidence or  
15 detail to establish a prima facie case for contempt showing that  
16 the lenders failed to comply with confirmed Second Plan. The  
17 bankruptcy court further found that even if Debtor had met its  
18 prima facie case for contempt, Debtor failed to provide or  
19 establish any basis for damages.<sup>8</sup> Debtor filed a timely appeal  
20 from the bankruptcy court's order.

### 21 **C. Post-Appeal Events**

#### 22 **1. The State Court Lawsuit**

23 On April 13, 2017, Debtor filed a complaint in the Arizona  
24 Pima County Superior Court (Case No. C20171805) against

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26 <sup>8</sup> The bankruptcy court also denied Debtor's Motion to Modify  
27 on the grounds that the Second Plan was substantially  
28 consummated. Therefore, Debtor could not meet the requirements  
under § 1127(b) for modification. As noted, this ruling is not  
at issue in this appeal.

1 approximately twenty Secured Creditors seeking damages for  
2 breach of contract. Debtor alleged that these Secured Creditors  
3 failed to comply with the confirmed plan. As a result, it was  
4 damaged in an amount to be determined at trial.

5 On August 11, 2017, the matter was removed to the  
6 bankruptcy court. Thereafter, the removing parties, Wells Fargo  
7 Bank, N.A. and Bank of America, sought to have the complaint  
8 dismissed or, alternatively, for a more definite statement.  
9 Debtor filed a motion to remand, contending that Wells Fargo and  
10 BOA were two of twenty lenders involved in the breach of  
11 contract action in the state court. Debtor also maintained that  
12 the bankruptcy court was without jurisdiction since the Second  
13 Plan had matured and this appeal was pending.

14 At the hearing on the motion to dismiss and motion to  
15 remand, Debtor's counsel confirmed that the Second Plan matured  
16 on its terms and that this appeal was pending. He further  
17 stated that the administrative case was open only because he was  
18 not sure how a final decree would affect this appeal. Finally,  
19 counsel contended that the bankruptcy court did not have  
20 jurisdiction to consider the motion to dismiss because this  
21 appeal was pending.

22 The bankruptcy court later granted the motion to remand.  
23 Due to its ruling, the court found it unnecessary to consider  
24 the motion to dismiss. The court entered the order granting the  
25 motion to remand on December 15, 2017, and the adversary  
26 proceeding was closed.



1 the Second Plan was substantially consummated and fully matured  
2 (the maturity date was November 23, 2015). There is thus  
3 nothing left for the bankruptcy court to do except close the  
4 case. Accordingly, we conclude that the order on appeal  
5 completely disposes of the OSC Motion, as supplemented, and is a  
6 final order. We have jurisdiction under 28 U.S.C. § 158.

### 7 **III. ISSUE**

8 Whether the bankruptcy court abused its discretion by  
9 denying Debtor's OSC Motion, as supplemented, which sought to  
10 hold Secured Creditors in contempt for failing to comply with  
11 the terms of its confirmed Second Plan.

### 12 **IV. STANDARDS OF REVIEW**

13 An order denying a motion for civil contempt is reviewed  
14 for an abuse of discretion. Knupfer v. Lindblade (In re Dyer),  
15 322 F.3d 1178, 1191 (9th Cir. 2003).

16 We also review a court's decision whether to hold an  
17 evidentiary hearing for an abuse of discretion. See Murphy v.  
18 Schneider Nat'l, Inc., 362 F.3d 1133, 1139 (9th Cir. 2004).

19 A bankruptcy court abuses its discretion if it applies the  
20 wrong legal standard, misapplies the correct legal standard, or  
21 if its factual findings are illogical, implausible or without  
22 support in inferences that may be drawn from the facts in the  
23 record. See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d  
24 820, 832 (9th Cir. 2011) (citing United States v. Hinkson,  
25 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

26 We may affirm on any ground supported by the record,  
27 regardless of whether the bankruptcy court relied upon, rejected  
28 or even considered that ground. Fresno Motors, LLC v. Mercedes

1 Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014).

2 **V. DISCUSSION**

3 **A. Standards For Contempt Under § 105**

4 The OSC Motion and OSC Supplement asked the bankruptcy  
5 court to issue an order holding various Secured Creditors in  
6 contempt for their failure to comply with the terms of the  
7 Second Plan, as confirmed. "Once confirmed, a Chapter 11 plan  
8 acts as both a contract which binds the parties and as an order  
9 of the bankruptcy court." JCB, Inc. v. Union Planters Bank, NA,  
10 539 F.3d 862, 870 (8th Cir. 2008). The bankruptcy court has the  
11 authority to hold a party in contempt for violating a court  
12 order such as the Second Confirmation Order, and impose civil  
13 contempt sanctions under § 105(a). In re Dyer, 322 F.3d at  
14 1189-90; Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069  
15 (9th Cir. 2002).

16 The standards for an order of contempt are high. To find a  
17 party in civil contempt, the moving party bears the burden of  
18 proving that the offending party knowingly violated a definite  
19 and specific court order by clear and convincing evidence.  
20 In re Dyer, 322 F.3d at 1190-91. To be definite and specific,  
21 the order at issue must unambiguously command the offending  
22 party to perform or refrain from performing in accordance with  
23 the order, and leave "no uncertainty in the minds of those to  
24 whom it is addressed." In re 1990's Caterers Ltd. d/b/a Vina de  
25 Villa Caterers, 531 B.R. 309, 319 n.13 (Bankr. E.D.N.Y. 2015);  
26 see also Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine  
27 Trade Ass'n, 389 U.S. 64, 76 (1967) ("The judicial contempt  
28 power is a potent weapon. When it is founded upon a decree too

1 vague to be understood, it can be a deadly one.”).

2 In addition, under the clear and convincing standard, the  
3 evidence must create a conviction that the factual contention is  
4 “highly probable.” Colorado v. New Mexico, 467 U.S. 310, 316  
5 (1984); United States v. Jordan, 256 F.3d 922, 930 (9th Cir.  
6 2001) (“[C]lear and convincing evidence ‘indicat[es] that the  
7 thing to be proved is highly probable or reasonably certain.  
8 This is a greater burden than preponderance of the  
9 evidence, . . . but less than evidence beyond a reasonable  
10 doubt.’”).

11 Once the moving party has made this prima facie showing,  
12 the burden of production then shifts to the contemnor to  
13 demonstrate why it was unable to comply with the court’s order.  
14 FTC v. Affordable Media, 179 F.3d 1228, 1239 (9th Cir. 1999);  
15 see also Battaglia v. United States, 653 F.2d 419, 422 (9th Cir.  
16 1981). However, “shifting the burden from the movant to the  
17 alleged contemnor without proving the underlying noncompliance  
18 is impermissible.” Nisselson v. Emyrean Inv. Fund, L.P. (In re  
19 Marketxt Holdings Corp.), 336 B.R. 39, 52 (Bankr. S.D.N.Y. 2006)  
20 (citing Levin v. Tiber Holding Corp., 277 F.3d 243, 251 (2d Cir.  
21 2002)).

22 If the alleged contemnor satisfies its burden of  
23 demonstrating why it was unable to comply, the movant must carry  
24 its burden of proof to refute this inability. Battaglia,  
25 653 F.2d at 423. Accordingly, while the burden of production  
26 may shift, the burden of persuasion or burden of proof with  
27 clear and convincing evidence is always on the moving party  
28 seeking a finding of civil contempt. Id. A bankruptcy court

1 has wide latitude in determining whether there has been  
2 contemptuous defiance of its order. Gifford v. Heckler,  
3 741 F.2d 263, 266 (9th Cir. 1984).

4 Civil penalties for contempt must either be compensatory or  
5 designed to coerce compliance. F.J. Hanshow Enters., Inc. v.  
6 Emerald River Dev., Inc., 224 F.3d 1128, 1137-38 (9th Cir.  
7 2001). Damages for civil contempt awards must be proven by a  
8 preponderance of the evidence. Ahearn ex rel. N.L.R.B. v. Int'l  
9 Longshore & Warehouse Union, Locals 21 & 4, 721 F.3d 1122, 1130  
10 (9th Cir. 2013). The factfinder may make a "just and reasonable  
11 estimate" of damages based on inferential and direct proof.  
12 Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100,  
13 124 (1969) ("It would be an inducement to make wrongdoing so  
14 effective and complete in every case as to preclude any  
15 recovery, by rendering the measure of damages uncertain.").

## 16 **B. Analysis**

17 Debtor argues on appeal that the bankruptcy court erred by  
18 denying its OSC Motion, as supplemented, because it met its  
19 burden of proof with clear and convincing evidence of contempt.  
20 According to Debtor, the spreadsheet attached to the OSC  
21 Supplement (1) identified each property; (2) identified each  
22 lender for that property; (3) identified the correct figures  
23 that applied to each loan, including principal balances as  
24 established under the plan and payment amounts; and (4) detailed  
25 each and every instance where the lender failed to comply with  
26 the plan with respect to its loan. Debtor also asserts that if  
27 additional evidence was required to make a "prima facie" case,  
28 it was never given an opportunity to provide that evidence

1 because the court did not conduct an evidentiary hearing.  
2 Debtor maintains that by denying its motion for contempt, the  
3 court, in essence, held that the Secured Creditors were in  
4 compliance with the plan. We are not convinced.

5 Throughout the OSC proceedings, the bankruptcy court  
6 applied the correct legal standard to Debtor's contempt claims,  
7 placing the burden of proof on Debtor to show by clear and  
8 convincing evidence that certain Secured Creditors had violated  
9 the terms of the Second Plan. Although Debtor had numerous  
10 opportunities to provide such evidence, Debtor provided no  
11 declaration, affidavit, or other admissible evidence showing  
12 that any individual Secured Creditor failed to comply with the  
13 terms of the Second Plan. Further, Debtor never sought  
14 discovery nor did it seek modification of the bankruptcy court's  
15 orders during the five years the OSC Motion was pending.

16 Instead, Debtor failed to comply with the bankruptcy  
17 court's orders and instructions over a protracted period of  
18 time. In April 2013, Debtor ignored the bankruptcy court's  
19 order to provide a calculation of damages by property and  
20 creditor and to provide notice of the same to the non-complying  
21 Secured Creditors. In July 2014, Debtor failed again to follow  
22 the bankruptcy court's instruction to update the list of non-  
23 complying Secured Creditors subject to the OSC Motion, lodge an  
24 order for each creditor, and serve it pursuant to the adversary  
25 rules.

26 At the October 14, 2015 hearing, the bankruptcy court  
27 ordered Debtor to re-file or supplement the OSC Motion with an  
28 updated list of the alleged non-compliant creditors and to serve

1 it on those creditors. The bankruptcy court also ordered Debtor  
2 to specify the nature and extent of each creditor's failure to  
3 comply with the plan as to each property. Although Debtor  
4 supplemented its OSC Motion, its attempted compliance with the  
5 bankruptcy court's instructions was wholly inadequate.

6 The spreadsheet attached to the OSC Supplement, which  
7 purportedly provided the reasons why certain Secured Lenders  
8 were not in compliance with the plan, is neither verified nor  
9 authenticated, and no foundation was laid for the basis of  
10 Debtor's allegations. There are no details about the underlying  
11 records relied upon for the allegations of contempt nor are any  
12 supporting documents attached. There was no mention of what  
13 plan provision was violated.

14 Debtor alleged that a certain lender's loan amount was  
15 incorrect, but there is no evidence to support this allegation.  
16 In another instance, Debtor stated that the lender had NOT paid  
17 taxes (emphasis in original). However, there is no declaration  
18 or document showing that the lender was obligated to pay them.  
19 In short, the spreadsheet is not competent evidence of anything.  
20 It clearly is not clear and convincing evidence.

21 Therefore, Debtor failed to meet its initial burden of  
22 proof by showing a "high probability" that the Secured Creditors  
23 knowingly violated a clear and specific order.<sup>9</sup> Further, as the  
24 bankruptcy court found, even if Debtor had met its burden under  
25 the clear and convincing standard for contempt, Debtor did not

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27 <sup>9</sup> It also appears that the Second Plan was too vague to be  
28 understood. Eventually, the bankruptcy court entered forty-five  
clarification orders in connection with the OSC Motion.

1 provide any evidence of damages. Accordingly, the bankruptcy  
2 court did not abuse its discretion by denying Debtor's OSC  
3 Motion, as supplemented.

4 Finally, Debtor contends the bankruptcy court erred by not  
5 holding an evidentiary hearing. Bankruptcy courts generally  
6 enjoy broad discretion to determine whether to hold an  
7 evidentiary hearing at which live testimony can be presented.  
8 See Civil Rule 43(c) (made applicable in bankruptcy cases by  
9 Rule 9017). The record shows that Debtor never requested an  
10 evidentiary hearing nor submitted evidence in the contempt  
11 proceedings which created a factual dispute for the court to  
12 resolve. The bankruptcy court also gave Debtor numerous  
13 opportunities to present clear and convincing evidence of  
14 contempt, which it did not do; nor was there any evidence of  
15 damages. The bankruptcy court did not abuse its discretion by  
16 failing to hold an evidentiary hearing.

17 **VI. CONCLUSION**

18 For the reasons stated, we AFFIRM.  
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