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LEGAL UPDATE

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BANKRUPTCY

Final Automatic Stay Order can be Revisited [5TH CIR]

The debtors filed for bankruptcy under Chapter 7 of the Bankruptcy Code and failed to disclose all their interests. After the bankruptcy case was closed, the debtors, among other plaintiffs ("the non-debtors"), filed a Kansas state lawsuit ("the Kansas litigation") against the creditor. The Kansas litigation revealed that the debtors had failed to include Kansas oil and gas interests in their bankruptcy schedules. The creditor moved to reopen the bankruptcy case, the bankruptcy court granted the creditor's motion, and the automatic stay went into effect. The debtors continued the Kansas litigation until the bankruptcy trustee successfully moved to stay the entire Kansas litigation. The nondebtors and non-creditor defendants (together, "the non-bankruptcy parties") moved to modify the automatic stay, which the bankruptcy court denied because the parties failed to show cause and the bankruptcy estate's property interests were "hopelessly intermingled with the [nondebtor's] claimed interests" in the Kansas litigation. However, the debtors' filings and prosecution in the Kansas litigation continued. The creditors moved in the bankruptcy court for (1) civil contempt sanctions against the debtors; and (2) a discretionary declaration that the Kansas litigation was void ab initio because of the debtors' undisclosed mineral interests. The bankruptcy court held that the debtors and two of the debtor's attorneys were in contempt and denied the void ab initio claim for failure to allege a violation of the automatic stay by the non-bankruptcy parties in the Kansas litigation. Around the same time, a settlement was reached between the trustee and the creditor, pursuant to which the trustee transferred all the debtors' rights in the mineral lease at issue to the creditor in exchange for the creditor releasing all claims against the bankruptcy estate. After the bankruptcy court approved the settlement, the non-bankruptcy parties moved to determine whether the automatic stay had been terminated due to the estate's transfer of and relinquishment of the mineral lease interests. The bankruptcy court then signed four orders stating that the stay was no longer in effect with respect to the non-debtors' claims in the Kansas litigation. It also made clear the non-debtors had not violated the automatic stay, and the Kansas litigation was not void ab initio. The creditors appealed the orders to the district court, which affirmed. Creditors then appealed to the Fifth Circuit.

In ***Am. Warrior, Inc. v. Found. Energy Fund IV-A, L.P. (In re McConathy)***, 111 F.4th 574 (5th Cir. 2024), the Fifth Circuit affirmed the bankruptcy and the district court's judgments. First, the court found that the creditor incorrectly interpreted the scope of the stay. The court held that the lower courts did not err in limiting any violation of the automatic stay to the debtor and its counsel. The court echoed the bankruptcy court's distinction in the Kansas litigation between the claims against the debtors, which were invalid, and the claims of the non-debtors, which were merely paused while the estate sorted out the mineral lease rights involved in the claims. The court also stated the creditor's contention that the Kansas litigation was void ab initio was inconsistent with the creditor's own behavior because it failed to appeal the bankruptcy's ruling that recognized the validity of Kansas litigation. Second, the court disagreed with the creditor's res judicata theory regarding the bankruptcy court's previous order ("the initial order"), refusing to lift the stay earlier in the bankruptcy case. The creditor argued this initial order was final and barred the debtor from further attempts to lift the stay because the debtor never appealed that initial order. The creditor relied on two Supreme Court cases, but the Fifth Circuit disagreed, explaining the cases would not apply because, taken at face value, they would fundamentally misapply the automatic stay. The Fifth Circuit explained that the bankruptcy code is not a "straitjacket"; therefore, when a party fails to appeal, they are not limited from doing so later. The court disagreed with the contention that because the debtor never appealed that initial order, it became final with prejudice. Next, the court disagreed with the creditor that a formal annulment was required to "retroactively validate" the Kansas

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litigation. The Fifth Circuit emphasized that it has never held that all actions taken in violation of the automatic stay are automatically void, just that they are voidable. Lastly, the circuit court held it had no jurisdiction to review a permissive abstention given the provisions of 11 U.S.C. § 1334(c)(l).

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Chapter 11 Conversion or Dismissal [ED NY]

The debtor filed for Chapter 11 bankruptcy. In the bankruptcy petition, the debtor reported owning and living in a residential property in New York. The bank held the mortgage on the debtor's property and filed a claim in the bankruptcy case for the remaining balance. The debtor submitted a reorganization plan to the court to pay off the debt to the bank. The debtor claimed that he could pay off the debt by making small payments for 20-22 months, and the remaining balance would be covered by either a sale of some or all the property to a neighboring religious organization or through his spouse's inheritance. The bank objected to the proposal, arguing that the debtor had failed to file a disclosure statement, thereby violating 11 U.S.C. § 1125 and Rule 3016(b). In addition, the bank argued that the plan was "speculative" and would alter the bank's lien on the property, violating 11 U.S.C. § 1123(b). The court permitted the parties to negotiate and explore loss mitigation options, but they failed to reach a settlement. The trustee then filed to convert the case to Chapter 7 case, or to dismiss the case under 11 U.S.C. § 1112(b). The trustee concluded that a successful reorganization was unlikely because the debtor was not earning income, couldn't pay his debts, and did not qualify for mortgage assistance. Further, the trustee argued that dismissal was appropriate because the reorganization plan was speculative, "impermissibly modified a mortgage on residential property," and the bank would not agree to the plan. The bank then sought relief from the automatic stay to foreclose on the property. 11 U.S.C. § 362(d)(2). The debtor opposed the trustee's motions, asserting that his monthly operating reports did not change unexpectedly and that he had been negotiating with the bank and needed more time. He further claimed that the value of the property had not diminished and that continuing the Chapter 11 bankruptcy case was in the best interest of all parties. The bankruptcy court found that the debtor could not generate income to pay his debts and that the bank (the only impaired creditor) could reject the plan and prevent confirmation under 11 U.S.C. § 1129(a). Additionally, the court noted that the exceptions to dismissal under § 1112(b) were inapplicable because there was no evidence that the creditor's best interest would not be served by dismissal, and the bank sought dismissal rather than conversion. Therefore, the bankruptcy court dismissed the case for cause under § 1112(b), and the debtor appealed.

In ***Plasterer v. US Bank Trust N.A.***, Case No. 2:23-cv-6151 (NJC), 2025 WL 101612, 2025 U.S. Dist. LEXIS 7282 (E.D.N.Y. Jan. 14, 2025) (opinion not yet released for publication), the court affirmed the bankruptcy court's dismissal of the debtor's Chapter 11 case for cause. The court reiterated that a court must dismiss or convert a Chapter 11 case if it "is in the best interest of creditors and the estate" and the court finds "cause" § 1112(b). First, the court found that the bankruptcy court had sufficient evidence to find cause. 11 U.S.C. § 1112(b)(4)(A) states that a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation" constitutes cause for dismissal. The bankruptcy court found "that there was a continuing loss to or diminution of the estate" because the debtor had negative cash flow, could not pay current expenses, and the postpetition arrears had grown because the debtor failed to make post-petition mortgage payments. The court also found that the debtor had no chance of rehabilitation because he did not have income, the reorganization plan was speculative and unfeasible, and he had provided no evidence of his "vague claims" to sources of money that could pay off his debts. The debtor argued that the bankruptcy court should have considered several other factors, such as his ongoing negotiations and good faith efforts to pay his debts. However, the debtor failed to dispute the bankruptcy court's findings of fact. Further, the debtor did not argue that an exception to § 1112(b) applied or that the case should have been converted to Chapter 7. Therefore, the debtor had failed to set forth an argument that would "compel a different outcome." Next, the debtor argued that the bankruptcy court erred in not allowing an extension for him to file his reorganization plan. However, the debtor filed his request for an extension beyond the 120-day time period under § 1121(b), and the issue was moot because § 1121(a) permitted a Chapter 11 debtor to "file a plan at any time during the case." Finally, the debtor argued that the bankruptcy court should have heard his argument regarding "the authenticity of the chain of custody of the mortgage." The court rejected his argument because the debtor failed to file the objection "at least 30 days before the hearing" as required by Bankruptcy Rule 3007(a). Therefore, the court affirmed the bankruptcy court's dismissal of the debtor's Chapter 11 case.

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In Contrast to Receivers, Bankruptcy Trustees Cannot Avoid the Misconduct, Claims, and Defenses of the Debtor [8TH CIR]

The debtor's owner was running a Ponzi scheme and created and used the debtor to facilitate the scheme. When investors gave money to the debtor, the owner diverted the funds to himself or others in the scheme via the debtor's accounts with the bank. Following the collapse of the scheme, the debtor pleaded guilty to wire fraud and several conspiracy charges and was placed in a receivership where a receiver was then appointed. With the court's authorization, the receiver filed for bankruptcy on behalf of the debtor, and the bankruptcy court then appointed the receiver as the trustee of the bankruptcy estate. The trustee filed an adversary proceeding in bankruptcy court against the bank, alleging that the bank aided and abetted the scheme and, in effect, breach of financial duty. Specifically, the trustee claimed the bank knew of the scheme and gave the debtor special treatment to help the debtor's account avoid detection by ignoring money-laundering alerts and excessive overdrafts on the debtor's accounts. The bank moved for summary judgment, arguing under the doctrine of in pari delicto, the debtor was barred from recovery because the debtor was a party to the scheme with equal or greater fault. The bankruptcy and district court both ruled the in pari delicto defense was unavailable to the bank because, under Minnesota law, the "new" receivership entity did not assume the wrongdoing of the debtor's previous officers, or, in the alternative, questions of material fact remained regarding the fault of the parties. After the bank was denied from advancing the in pari delicto defense, the jury found the bank liable, and the bank appealed. The Eighth Circuit reviewed the district court's denial of the defense for abuse of discretion.

In ***Kelley v. BMO Harris Bank N.A.***, 115 F.4th 901 (8th Cir. 2024), the Eighth Circuit reversed the district court's denial of the bank's in pari delicto defense. The court explained that a trustee "stands in the shoes of [a] debtor," meaning the in pari delicto defense is available in a proceeding brought by a bankruptcy trustee if the defense could have been raised against the debtor. Additionally, the court noted that if the debtor itself had sued the bank in Minnesota, the bank would have been allowed to raise its in pari delicto defense so that the defense would have been available against the debtor. The issue facing the court was how Minnesota receivership law changed the availability of the defense because the trustee argued that he was not bringing the action in the "shoes" of the debtor but rather the "cleansed" receivership. State law governs a receiver's rights in a state-law matter, even if the receiver was federally appointed as it was here. Minnesota law states that a receiver "is not bound by the fraudulent acts of a former officer of the corporation,", allowing the receiver to sue for fraud committed against the former entity's creditors, even though a defense, like in pari delicto, might have been available against the entity itself. Magnusson v. Am. Allied Ins., 189 N.W.2d 28 (Minn. 1971). The court disagrees with the trustee that this law should be interpreted as "cleansing" the entity, as the conversion to a receivership did not change the debtor, only the management. The court clarifies that while serving as the receiver, the receiver could have pursued causes of action in Minnesota as a party' free from the previous act of the debtor's officers but rather, he only brought actions after taking over as the

trustee. The change from receiver to trustee was a second change in management in which all the debtor's assets, including causes of action, were transferred from the receiver to the trustee and became part of the bankruptcy estate - so the receiver-trustee could no longer bring claims as the receiver with the benefit of freedom from previous fraudulent acts. The court emphasizes that the receivership is not a party here, the debtor is, and the debtor's claims would have been subject to the in pari delicto defense if they brought the claims itself, so the trustee, acting on behalf of the debtor, is also subject to the defense. In its decision, the Eight Circuit pointed to a similar proceeding from the Second Circuit. There, the Second Circuit held that the trustee, as an innocent party, acts are representative of the debtor, and therefore, all the debtor's misconduct is assigned to the trustee. Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Inv. Sec. LLC), 721 F.3d 54 (2d Cir. 2013). The court concluded that the district court made a legal error in ruling that the bank's defense was unavailable and, as such, abused its discretion. Finding that the bank could in no situation be found to be more culpable than the debtor, whose sole purpose of existing was to facilitate the Ponzi scheme, the court held the bank's in pari delicto defense barred the trustee's claims and remanded the case with instructions to enter judgment for the bank.

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What Must a Solvent Debtor Pay? Addressing the Contractual Rate vs the Federal Judgment Rate for Post-Petition Interest and Make-Whole Fees [3RD CIR]

The debtor was financially crippled during the COVID Pandemic and filed for protection under Chapter 11 of the bankruptcy code. Under the Chapter 11 confirmed reorganization plan ("the plan"), the debtor was sold to a group of private equity funds. Also, the creditors were left unimpaired as a part of the plan. The debtor successfully paid off pre-petition debt, including various unsecured notes. However, a dispute arose between the debtor and the noteholders ("the creditors") when the plan resulted in the debtor getting back a significant amount of cash and allowing the solvent debtor to pay the lower applicable federal judgment rate on the post-

petition interest of the notes rather than the contractual rate when the debtor did not pay make-whole fees typically paid to the creditors of early maturing notes to compensate for lost profits. The creditors lost more than $270 million as a result of the debtor redeeming the notes in bankruptcy rather than outside bankruptcy. On the other hand, the debtor was so well situated as a result of the reorganization plan that it could pay its stockholders over one billion dollars. The creditors filed a complaint seeking payment of post-petition interest at the contract rate, make-whole fees, and flat fees for early redemption provided for in two of the notes. The bankruptcy court dismissed the creditors' claims, first finding that the creditors were unimpaired creditors of a solvent debtor and therefore entitled to interest, but only at the "legal" rate or the federal judgment rate. Second, the bankruptcy court found the make-whole fees to be the economic equivalent of interest and disallowed the claim because claims for unmatured interest are not allowed in bankruptcy court unless the debtor is solvent. Finally, the bankruptcy court dismissed the creditors' claim for the flat fees because they had not been triggered. The creditors appealed on all three claims.

In ***Wells Fargo Bank, N.A. v. Hertz Corp. (In re Hertz Corp.)***, 117 F.4th 109 (3rd Cir. 2024), the Third Circuit reversed and affirmed in part the bankruptcy court's decision. The Third Circuit agreed with the bankruptcy court's decision regarding the flat fees. In affirming, the court followed the contract's stated terms and found that the debtor never agreed to pay this type of fee. The court rejected the creditors' argument regarding the definition of maturity, pointing out that the notes use the words "Stated Maturity" and concluded that the definition of maturity did not apply to the case before it. Next, the Third Circuit addressed two questions of bankruptcy law: (1) whether make-whole fees constitute "unmatured interest" (or post-petition interest) prohibited by § 502(b)(2) of the Bankruptcy Code, and (2) whether the Bankruptcy Code requires a solvent debtor to pay unimpaired creditors post-petition interest at the contract rate or merely the lower federal judgment rate. The court affirmed the bankruptcy court's ruling regarding the payment of the make-whole fees. The court concluded that § 502(b)(2) precludes a claim for unmatured interest if it is either (1) definitionally interest; or (2) its economic equivalent. Here, the court found that the applicable premiums were both definitionally interest and the economic equivalent of interest. Lastly, the court held that solvent debtors must pay unimpaired creditors interest accruing post-petition at the contract rate. In its decision, the court looked to the absolute priority rule in 11 U.S.C. § 1129(b). The rule requires that creditors and debtholders be paid in bankruptcy before stockholders. Here, the court found that the absolute priority rule "can require payment of contract interest rate in solvent debtor cases." Additionally, because the debtor in this case had already paid a dividend to stockholders during the plan, the court reasoned that equitable principles demanded the creditors receive the post-petition interest at the contract rate.

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CFPB

Once Waived, It Cannot be Saved: Loss of Trial by Jury [9TH CIR]

A consumer lender was sued by the Consumer Financial Protection Bureau (CFPB) for predatory lending practices. The district court, via a bench trial, found the lender liable and imposed legal restitution. The lender appealed this judgment, arguing that the court had violated· its -Seventh Amendment right to a jury trial. However, the CFPB and the lender had agreed to waive their rights to a jury before the bench trial had been held. Nonetheless, the lender objected, claiming that it would not have waived its right to a jury trial had it known that the CFPB (and the court) would pursue legal restitution instead of equitable restitution. Legal restitution has commonly been treated as the more generous type of restitution, allowing monetary damages to be imposed past the amount the offender profited; unlike equitable restitution, which limits damages to the offender's net profits; Thus, the lender asked that the case be. remanded for a jury trial or, alternatively, that the damages be reduced.

In ***Consumer Financial Protection Bureau v. Cashcall, Inc.***, No. 23-55259, 2025 WL 22135, 2025 U.S. App. LEXIS . 9 (9th Cir. Jan. 3, 2025) (opinion not yet released for publication), the court held that the lender's waiver of a jury trial was valid and affirmed the lower court's judgment. In coming to this conclusion, the court did not need to determine whether the lender had a right to a jury trial, but it found that even if the lender did have the right, it had waived that right. The court explained that the waiver had been valid even though the lender misunderstood the type of relief sought by the CFPB. Legal error does not make a waiver invalid. The court also refused to apply the equitable doctrine of judicial estoppel, ruling that the CFPB's position was clear the entire time and never changed: it was pursuing damages for violation of its rules. Finally, the court refused to reduce the damages award because such a reduction would prevent victims from being made whole.

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FDIC

Legal Fallout of the Silicon Valley Bank Failure [ND CA]

The depositor had several billion dollars deposited in three separate deposit accounts at the failed bank. Once the bank failed, the FDIC took over the process of liquidating the assets and ensuring depositors received the insured funds from the bank. During this process, the United States Secretary of the Treasury invoked the Systemic Risk Exception under 12 U.S.C. § 1823(c)(4)(G), which allows for the protection of uninsured deposits if it would mitigate serious financial problems. The Secretary of the Treasury also made "public statements that all deposits would be made available and all depositors would be made whole." While mitigating the disaster, the government agencies set up a bridge bank to receive the failed bank's deposits, both insured and uninsured. This transfer included the depositor's funds, some of which it withdrew. However, the bridge bank began rejecting the depositor's transfers after the FDIC, acting in its receiver capacity (FDIC-RI), placed a hold on the depositor's accounts. The bridge bank then assigned the depositor's accounts to the FDIC-RI, which caused the depositor to lose access to a substantial amount of funds. Subsequently, the depositor filed for relief under Chapter 11 of the Bankruptcy Code and therefore operated as a debtor in possession. The depositor sent a letter to the FDIC in its corporate capacity (FDIC-C) demanding access to its uninsured funds, but the FDIC did not respond until several months later. The depositor then brought the following eight claims for relief against the FDIC-C: (1) declaratory judgment, (2) turnover of account funds, (3) violation of the automatic stay, (4) violation of the depositor's Fifth Amendment due process rights, (5) violation of the Administrative Procedure Act, (6) review of the FDIC-C's decision under the APA, (7) estoppel, and (8) violation of the Freedom of Information Act (FOIA). The FDIC responded with Rule 12(b)(l) and 12(b)(6) motions.

In ***SVB Fin. Grp. v. FDIC***, No. 23-cv-06543- BLF, 2024 WL 3745009, 2024 U.S. Dist. LEXIS 141371 (N.D. Cal. Aug. 8, 2024) (opinion not yet released for publication), the Court granted in part and denied in part the FDIC's motion to dismiss. First, the court addressed whether 12 U.S.C. § 1821(f) preempted any of the depositor's claims. The FDIC-C argued that the depositor's claims (excluding the FOIA claims and Count VI) were "demands for insurance coverage;" therefore, are preempted by § 1821(f) because the statute "encompasses any claim regarding insurance coverage." The depositor argued that its claims are not for insurance coverage, rather, that when the Secretary of the Treasury invoked the Systemic Risk Exception, the FDIC was required to pay its uninsured deposits. The court agreed with the depositor that its claims were not for insurance coverage and, thus, were not preempted by § 1821(f). Further, the court could reasonably infer that the "invocation of the Systemic Risk Exception and actions taken pursuant to it did not change the characterization of deposits in excess of the statutory maximum as insured." Therefore, the court dismissed the FDIC-C's preemption argument. Second, the court addressed the plausibility of the depositor's non-FOIA claims. The Court dismissed Count II, finding that the facts alleged by the depositor do not show that the FDIC-C had "possession, custody, or control" of the depositor's deposit. Instead, the depositor's claims stated that the FDIC-R1 was responsible for the bridge bank's failure to tum over the deposits; "[h]owever, the FDIC C and the FDIC-R1 are legally distinct entities;" thus, the depositor failed to state a claim against the FDIC-C. Similarly, the Court dismissed Count III because the depositor failed to show that the FDIC-Chad possession of the depositor's deposit liabilities. The court also found that the depositor failed to adequately allege that any of the FDIC-C's actions violated the automatic stay provision, because the depositor "merely alleges that the FDIC-C has retained its property," which does not violate § 362(a)(3). City of Chicago, Illinois v. Fulton, 592 U.S. 154, 156 (2021). The FDIC-C's motion to dismiss Count IV was granted because the depositor failed to allege that it was deprived of a property interest by the FDIC-C because it was the FDIC-R1 that had placed the hold on the depositor's accounts. The court also granted the FDIC C's motion to dismiss Count V because the depositor's allegations of "purported policy pursuant to which it exercises discretion" is a "generalized complaint," which failed to provide evidence of a "purported policy" that would constitute a final agency action. Next, the court denied the FDIC's motion to dismiss Count VII. The court found there is a "general waiver of sovereign immunity from claims brought against the FDIC," under 12 U.S.C. § 1819 (Fourth). Woodbridge Plaza v. Bank of Irvine, 815 F.2d 538, 542-43 (9th Cir. 1987). In addition, the court found that "promissory estoppel claims are meant to reach the FDIC." The FDIC-C's motion to dismiss Count I was granted concerning prejudgment interest and denied in all other respects. The court cited the "no-interest rule," which explicitly denies the "award of interest separate from a general waiver of immunity to suit" without express congressional consent. Library of Congress v. Shaw, 478 U.S. 310, 314 (1986). Finally, the Court granted the FDIC-C's motion to dismiss Count VIII because the depositor voluntarily withdrew its FOIA claim.

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FEDERAL RESERVE BOARD

The FRB Giveth and the FRB Taketh Away: 12 U.S.C. § 342 Provides the FRB Discretionary Authority to Grant and Terminate a Depository Institution's Master Account [SD NY]

An international banking entity (the "bank") opened a master account with the Federal Reserve Bank of New York (FRBNY). The master account provided the bank "direct access to Federal Reserve bank services." The bank opened this account subject to a disclaimer that permitted the FRBNY to temporarily or permanently remove the bank's access "at any time by giving written notice" to mitigate risks to the FRBNY. Additionally, the Board of Governors of the Federal Reserve System (the "Board") determined what level of "due diligence and scrutiny" is necessary for different institutions. The bank did not have federal deposit insurance and thus "operate[d] outside the scope of the federal banking agencies' supervisory framework" and received the "strictest level of review." Afterwards, the FBI seized a portion of the bank's assets, resulting in the temporary suspension of its master account. The FRBNY made the reinstatement of the master account contingent on proof that illegal transactions had not been and would not be processed through the master account, an agreement to be subject to "enhanced risk mitigation measures," and compliance with the FRBNY's Account and Financial Services Handbook. After the bank's master account was fully restored, it had to submit documentation that showed the effectiveness of the bank's compliance programs. The bank sent two emails to the FRBNY requesting clarification on the deadlines for submitting the assessments, but the FRBNY did not reply. Consequently, the bank failed to file three of the assessments in a timely manner, and. the FRBNY closed the bank's master account. The FRBNY suspended closure to review the bank's assessments; however, upon review, it found that the bank "posed undue risk" and ultimately decided to close its master account The bank sued the FRBNY and the Board; arguing that: (1) the closure of the master account was an "unlawful final agency action" under the Administrative Procedure Act (APA); (2) the master account should be reinstated under the Mandamus Act; (3) the court should find that the closure violated the bank's right to the master account; (4) the FRBNY and the Board violated its fifth amendment due process rights; (5) the FRBNY's closure of the master account breached its duty of care and implied covenant of good faith and fair dealing. Most of the bank's arguments rested on its assumption that it has an "unqualified statutory right" to the master account under the Federal Reserve Act (FRA). 12 U.S.C. § 248a. The FRBNY and the Board challenged this assertion and argued that the language of 12 U.S.C. § 342 provided the FRBNY the discretion to grant master accounts but does not impose any requirements.

In ***Banco San Juan International, Inc. v. FRB of N.Y.,*** 23-cv-6414 (JGK), 2025 WL 44259, 2025 U.S. Dist. LEXIS 3507 (S.D.N.Y. Jan. 8, 2025) (opinion not yet released for publication), the court found that the FRA does not grant an "unqualified statutory right" but instead provides the FRBNY discretion to grant master accounts to depository institutions and dismissed the bank's claims without prejudice. The court noted that the language of 12 U.S.C. § 342, which governs master accounts, provides that Federal Reserve Banks (FRB) "'may receive' deposits... not that they 'shall.'" In addition, § 248c(b)(l) of the FRA allowed the FRB to reject access to a master account without limitation; therefore, the FRB "'may' grant, deny, or close in the [FRB's] discretion, any master account." The court then rejected the bank's argument that § 248a(c)(2) of the FRA requires that an FRB grant a master account to every depository institution upon request because that statute is directed at the Board rather than an FRB. Further, the court stated that all § 248a(c)(2) required were for nonmember depository institutions to be "allowed" to obtain FRB services. Therefore, because the FRBNY provided the bank the opportunity to acquire a master account, it had complied with the requirements of § 248a(c)(2). Additionally, the court found that the bank lacked standing to sue the Board because it failed to show that it had suffered any injury attributable to the Board and failed to show how a court order could redress its injury. Next, the court addressed the bank's federal and state law claims First, the court held that the bank's "unlawful final agency action" APA claim against the FRBNY was precluded because the FRBNY's closure of the master account was a "committed agency discretion by law" and the bank "failed to enunciate any meaningful standard... 'to judge the [FRBNY' s] exercise of discretion." Heckler v. Chaney, 470 U.S. 821, 830(1985); 5 U.S.C. § 701. Similarly, the court found that the claims against the Board failed because its actions fall within § 70l and the bank did not provide a standard to review the Board's "exercise of discretion." Id. The court also found that FRBNY did not qualify as an "agency" under the APA because the FRBNY is a "private corporation" and does not have the power to make "'final and binding' decisions concerning the nation's economic and monetary policies" that the Board has Further, Congress intended to provide insulation to the FRB by keeping them "formally separate" from the federal government. United States ex rel. Kraus v. Wells Fargo & Co., 943 F.3d 588, 597 (2nd Cir. 2019). Therefore, the bank's APA claim failed due to a lack of subject-matter jurisdiction. Nonetheless, the court also found that the bank's APA claims failed on the merits. Even if the court had found that the FRBNY was an "agency," the court was precluded from overturning the decision because the FRBNY had made its decision to close the master account after it reviewed the "relevant factors" and provided a detailed explanation that "include[ed] a rational connection between the facts found and the choice made." Karpova v. Snow, 497 F.3d 262, 268 (2nd Cir. 2007). The court dismissed the bank's APA claim against the Board on the merits because "[t]he APA

authorizes only a challenge to a final action of an agency," and the Board had not made any final decisions. Lunney v. United States, 319 F.3d 550, 554 (2d Cir. 2003). Second, the court dismissed the bank's Mandamus Act claims against the FRBNY and the Board for lack of subject-matter jurisdiction because the act only applies to an "agency," defined as "any corporation in which the United States has a proprietary interest." 12 U.S.C. § 451. However, the United States held no stock in any FRB; thus the FRBNY is not an agency (as defined in § 451), and the claims had to be dismissed. Notwithstanding, the. Mandamus Act claim failed against the FRBNY and the Board because the court only had jurisdiction to "compel the performance of a nondiscretionary duty," and § 342 only granted a discretionary power to the FRBNY. Duamutef v. Immigr. & Naty Serv., 386 F.3d 172, 180 (2d Cir. 2004). Third, the court found that it lacked subject-matter jurisdiction to hear the bank's Declaratory Judgment Act (DJA) claims. The bank argued that § 248a(c)(2) entitled it to a master account. However, the DJA only provided a remedy for the bank; therefore, the court could not enter declaratory judgment unless there was "a private cause of action under [§ 248a(c)(2)]." Johnson v. JP Morgan Chase Bank, 488 F.Supp. 3d 144, 157 (S.D.N.Y. 2020). The court found that the FRA did not provide a private right of action; thus, it lacked subject-matter jurisdiction and dismissed the bank's claims. Fourth, the court dismissed the bank's due process claims because the bank was unable to "identify a valid cause of action" or "identify any property interest protected by the due process clause." Fifth, the court addressed the bank's state law claims against the FRBNY. The court found that the FRBNY had an "unqualified contractual right" to terminate the bank's master account; therefore, the bank could not claim that by terminating its account, the FRBNY breached a contractual duty of care or implied covenant of good faith. Ultimately, the court dismissed all the bank's claims but allowed it to amend its complaint.

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REAL ESTATE

Foreclosure Fight: Court Dismisses Homeowner's Claims Against Lender [WD TX]

In July 2020, a homeowner obtained a mortgage loan from a bank, secured by a deed of trust on the property. In June 2023, the loan's servicing rights were transferred when the original lender assigned the deed of trust to the current lender. The homeowner later conducted a self-initiated audit of the loan and raised concerns about discrepancies in the loan account numbers over time. Additionally, the homeowner alleged that the lender's credit reporting practices violated the Real Estate Settlement Procedures Act. Seeking to challenge the lender's authority over the mortgage, the homeowner filed a lawsuit, asserting that the lender lacked standing to enforce the loan or foreclose on the property. As part of the lawsuit, the homeowner sought a declaratory judgment to clear title to the property, monetary damages, and injunctive relief. The homeowner also alleged fraud, violations of the Uniform Commercial Code (UCC), and other misconduct related to the administration of the loan. In tum, the lender moved for judgment on the pleadings.

In ***Sells v. Flagstar Bancorp Inc.***, No. 1:24-CV-705-RP, 2025 WL 284224, 2025 U.S. Dist. LEXIS 2903 (W.D. Tex. Jan. 7, 2025) (opinion not yet released for publication), the court found the lender did have the right to foreclose, denied the homeowner's motion for declaratory judgment, and ruled that the homeowner's various other claims failed to be plead sufficiently. The court upheld the lender's right to foreclose, ruling that the homeowner lacked standing to challenge the assignment of the deed of trust and rejecting the claim that the lender needed to hold both the promissory note and the deed of trust. The homeowner's UCC claims also were dismissed, as foreclosure under Texas law is governed by property statutes, not by the UCC. The court also dismissed the quiet title claim, finding that the homeowner had ·not demonstrated superior title over the lender. The fraud claims failed under the economic loss doctrine and because they were not pled with the specificity required by Federal Rules of Civil Procedure Rule 9(b). Additionally, the court found no legal basis for claims related to changes in the loan number or the lender's credit reporting practices. Ultimately, the court granted the lender's motion for judgment on the pleadings, dismissing the homeowner's claims with prejudice.

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Lender Seeks Foreclosure on a Default [ND NY]

The borrower owned improved real property in the form of a student housing complex. The borrower leased the property to an industrial development agency (the "agency"), and then the agency leased it back to the borrower. The original lender provided a loan to the borrower shortly after and consolidated some pre-existing promissory notes that the borrower had executed. The borrower and. the agency executed several agreements in favor of the original lender to secure repayment of the notes. Those agreements created a first-priority mortgage lien on the property in favor of the original lender. The borrower and the original lender also executed a loan agreement; and the defendant guarantors executed a guaranty in favor of the original lender. The original lender created the first loan assignment to a mortgage corporation and executed several security instruments and assignments in its favor, including the loan agreement and the guaranty. The lender had also been the owner and holder of

the mortgage, the note, and the other loan documents since the mortgage corporation had securitized and assigned the loan to the lender. The note required that all loan interest and/or principal be paid by the borrower on the maturity date, but the borrower did not pay, so it became an event of default. The maturity default caused the loan to be transferred from the mortgage corporation to a division of the plaintiff bank, which was then authorized to pursue all remedies available under the loan, including foreclosure on the property. The borrower then made several payments to the lender, but they were all insufficient to satisfy the loan indebtedness. Accepting these insufficient payments did not constitute a waiver by the lender of any amounts that required prompt payment or the exercise of remedies. The lender filed a motion for summary judgment to recover all indebtedness, including taxes, insurance premiums, and interest.

In **U.S. Bank N.A. v. Chenango Place LLC,** Case No. 3:23-cv-928 (MAD/ML), 2025WL 71662, 2025 U.S. Dist. LEXIS 4847 (N.D.N.Y. Jan. 10, 2025) (opinion not yet released for publication), the court granted the lender's motions for summary and default judgment. New York state-law required three elements to sustain a foreclosure claim: "(1) the proof of the existence of an obligation secured by a mortgage; (2) a default on that obligation by the debtor; and (3) notice to the debtor of that default." Gustavia Home, LLC v. Hoyer, 362 F. Supp. 3d 71, 79 (E.D.N.Y. 2019). Once that evidence is submitted, the plaintiff would have "demonstrated a prima facia case of entitlement to judgment." Gustavia Home, LLC v. Bent, 321 F. Supp; 3d 409, 414-15 (E.D.N.Y 2018). Then, the burden shifts to the defendant to raise a triable issue of fact, including with respect to:. any alleged defenses or counterclaims." Id. The court held that the lender submitted evidence establishing their prima facia case of entitlement to judgment as evidenced by the loan documents. New York law also requires that "there must be some proof in the form of an affidavit of a person with knowledge, or a complaint verified by a person with knowledge" regarding the proof of debt. Bent, 321 F. Supp. 3d at 415. The lender did this by offering a declaration from an asset manager with the mortgage loan servicer based on their personal knowledge and from reviewing the lender's business records. The declaration and exhibits established that the borrower was in default and failed to fix it, further corroborating the lender's amounts requested. Despite the borrower not having submitted an opposition to the lender's motion, other than a general denial that cannot defeat summary judgment, the court examined defenses that could have been raised. The only potential defense was that the lender had waived their right to payments when it accepted payments following the maturity date. However, that must be evidenced by a "clear manifestation of intent" to waive by the lender, which the borrower had not established. Globecon Grp., LLC v. Hartford Fire Ins. Co., 434 F.3d 165, 176 (2d Cir. 2006). The court granted the lender's motion for summary judgment in the foreclosure proceeding because the borrower did not provide evidence of waivers or raise any affirmative defenses. The court also awarded reasonable attorney's fees for the summary judgment. To succeed on a default judgment, the plaintiff must show the entry of a default evidenced by a notation on the record followed by the entry of a default judgment. The court found that the borrower complied with all default procedural requirements, including submitting an application with the clerk of the court in compliance with the rules. Despite being properly served, it also found that the agency failed to defend against the action. The court concluded that by the agency failing to answer or oppose the default judgment, it is deemed to have admitted to the borrower's allegations in the complaint. Accordingly, the court granted the borrower's motion for default judgment against the agency.

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SECURED CLAIMS

Sufficiently Plead a § 523(a)(6) Nondischargeability Claim [BKR WD OK]

The debtor had loans with the secured creditor using residential property and restaurant equipment as collateral. After a fire on his property, the debtor conveyed the remaining restaurant equipment to a third party without notifying the secured creditor and obtained the proceeds. The secured creditor sought a determination from the court that a portion of what the debtor owed to it was nondischargeable under 11 U.S.C. § 523(a)(6). In its complaint, the secured creditor pled, in relevant part, that the conveyance or sale of the collateral and the withholding of the proceeds from those transactions constituted a willful and malicious conversion of the secured creditor's security interest, providing grounds for denying discharge of the debt. The debtor moved to dismiss for failure to state a claim for relief. Specifically, the debtor asserted that the secured creditor did not show the "willful and malicious injury" necessary for entitlement to relief under a § 523(a)(6)claim.

In ***Blu Sky Bank v Yates (In re Yates),*** Case. No. 24-10537-JDL, 2024;WL 4481074, 204 Bankr. LEXIS 2519 (Bankr. W.D. Okla; Oct. 11, 2024) (opinion not, yet released for publication), the court denied the debtor's motion to dismiss. To survive a motion to dismiss, the court explained that the secured creditor's complaint, once assumed true and viewed most favorably toward the non-movant, must possess facts that support the elements necessary for dischargeability under § 523(a)(6). The court first noted that nondischargeability under § 523(a)(6) requires a showing that the debtor's actions were both willful and malicious. Meaning that the debtor must have (1) committed an intentional act and intended harm and (2) the act was "intentional, wrongful, and without justification or excuse" In re Parra, 483 B.R. 752 (Bankr. D. N.M. 2012). Further, the court clarified that § 523(a)(6) requires that an intentional tort be

committed. Several courts have held that the tort of conversion, when intentional and not merely reckless or negligent, may be a basis for finding a debt nondischargeable. The secured creditor alleged all elements of § 523(a)(6), alleging conversion as the basis for the nondischargeability and enough facts to support its claim that the debtor's conversion was willful and malicious. Therefore, the court found the secured creditor's claim for nondischargeability of the debt sufficient. Further, the court held that the secured creditor properly alleged an injury, as the injury in cases of conversion of collateral is that the proceeds are "used for purposes other than the payment of the obligation that the property secured." Thus, the court denied the debtor's motion to dismiss and allowed the case to proceed on the merits.

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SECURITY INTERESTS

Perfection Prevails [SD NY]

The creditor entered into an agreement with the debtor to provide it telecommunications services in exchange for payments of over $3,000,000 per month. The debtor defaulted, and the creditor brought an action to recover the amount on the unpaid invoices. The trial court entered judgment in favor of the creditor, and the creditor sent a restraining notice to the bank that it was prohibited from transferring or assigning any of the debtor's property, absent a court order, satisfaction of the judgment, or state law. The bank complied and held the debtor's accounts in a deposit box. At the same time, the debtor's parent company had filed for Chapter 11 bankruptcy. A third party (the "secured party") had agreements with both the debtor and its parent company and had perfected its security interests in the debtor's assets before the judgment was entered for the creditor by the trial court. The secured party claimed that the debtor's parent company had defaulted and that it was entitled to the debtor's funds. However, the bank refused to release the debtor's funds to the secured party unless the creditor consented to the release or a court ordered its release. The creditor did not consent, therefore, the secured party filed a motion to quash the restraining notice the creditor provided the bank, to intervene in the dispute between the creditor and debtor, for an order requiring the bank to release the debtor's funds to satisfy the secured interest, and for attorney's fees.

In Acemetel USA LLC v. Ptgi Int'l Carrier Servs., 23-cv-11027 (LJL), 2024 WL 4467174, 2024 U.S.. Dist. Lexis 186029 (S.D.N.Y. Oct. 10, 2024) (opinion not yet released for publication), the court vacated the restraining notice provided to the bank, permitted the secured party to intervene, and declined to award attorney's fees. As a preliminary matter, the court addressed whether it had subject matter jurisdiction. The creditor argued that the secured party did not show complete diversity. However, the court disagreed because the original proceeding established diversity between the creditor and the debtor, and courts have "ancillary jurisdiction over subsequent proceeding necessary to vindicate its authority.'" Dulce v. Dulce, 233 F.3d 143, 146 (2d Cir. 2000). Therefore, this court, which had previously entered judgment for the creditor and permitted it to issue the restraining notice, was the "only court with authority to relieve [the secured party] from the effect of the restraining notice." The court then addressed the motion to quash or vacate the restraining notice. The secured party argued that the restraining notice "violat[ed] the rights of priority lienholders" because it had perfected its security interest in the debtor's property before the trial court entered the judgment in favor of the debtor. The court agreed, stating that "a perfected security interest affords the creditor a superior claim... over a subsequent-arising judgment." Thus, the court found that because the secured party had properly perfected its security interest, it had a "superior claim to the [debtor's] accounts," and the restraining notice should be vacated. Next, the court permitted the secured party to intervene in the proceeding between the debtor and the creditor. The court reasoned that because the secured party's security interest in the debtor's property was perfected, and the bank would not release the funds, intervention was "necessary for [the secured party] to vindicate its security interest in the accounts." Finally, the court declined to award the secured party attorney's fees because the creditor had not acted "clearly in bad faith." Ultimately, the court vacated the restraining notice and permitted the secured party to intervene.

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