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# NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

NORTHERN DIVISION

In re:	)	Case No. 9:14-bk-12827-PC
	)	
CYNTHIA CYNKO ZIPSER,	)	Chapter 13
	)	
	)	<b>MEMORANDUM DECISION</b>
	)	
	)	Date: July 23, 2015
	)	Time: 10:00 a.m.
	)	Place: United States Bankruptcy Court
Debtor.	)	Courtroom # 201
	)	1415 State Street
	)	Santa Barbara, CA 93101

This matter comes before the court on an objection by Cynthia Cynko Zipser (“Debtor”) to Claim # 3 filed by Ocwen Loan Servicing, LLC, as servicer for Christiana Trust, a division of Wilmington Savings Fund Society, FSB, not in its individual capacity but as Trustee of ARLP Trust 3 (“Ocwen”). Debtor seeks disallowance of Ocwen’s Claim # 3 in its entirety. Ocwen opposes Debtor’s objection. The court, having considered the pleadings, evidentiary record,<sup>1</sup> and arguments of counsel, will overrule Debtor’s objection to Ocwen’s Claim # 3 pursuant to the

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<sup>1</sup> Evidentiary Objections of Secured Creditor to Direct Testimony of Cynthia Zipser and Daniel Zipser are sustained.

1 following findings of fact and conclusions of law made under F.R.Civ.P. 52(a)(1),<sup>2</sup> as  
2 incorporated into FRBP 7052 and applied to contested matters in bankruptcy cases.

3 I. STATEMENT OF FACTS

4 On November 15, 2010, Daniel Zipser and Cynthia C. Zipser (collectively, the “Zipsers”)  
5 filed a voluntary petition under chapter 7 in Case No. 1:10-bk-24388-MT, styled Daniel Zipser  
6 and Cynthia C. Zipser, Debtors, in the United States Bankruptcy Court, Central District of  
7 California, San Fernando Valley Division. In Schedule A, the Zipsers disclosed that they owned  
8 a single family residence at 87 Shady Grove Lane, Thousand Oaks, California (the “Property”),  
9 valued at \$636,500 encumbered by the following liens: (1) a first lien held by Bank of America  
10 securing note with a balance of approximately \$639,920; and (2) a second lien held by Bank of  
11 America securing a note with a balance of approximately \$116,911. The Zipsers received a  
12 discharge in the case on December 21, 2011. On November 18, 2013, the chapter 7 trustee filed  
13 a final account and the case was closed.

14 On December 30, 2014, Debtor filed her voluntary petition under chapter 13 of the Code  
15 in the above referenced case. In the petition, Debtor disclosed her address as 200 Oak Leaf  
16 Drive, # 207, Thousand Oaks, CA. Debtor disclosed in Schedule A that she owned a community  
17 interest in the Property valued at “\$0.00.” Debtor further disclosed in Schedule A that the  
18 “Amount of Secured Claim” encumbering the Property was “\$0.00.” No creditors holding a lien  
19 against the Property were listed by the Debtor in Schedule D. In Schedule F, Debtor listed  
20 Countrywide Financial as the holder of an unsecured nonpriority claim in the amount of “0.00”  
21 with a notation identifying the Property and stating “Discharged -- \$639,920.00.” Ocwen was  
22 also listed as a creditor in Schedule F with the notation “Notice Only.” In response to Question  
23 15 of the Statement of Financial Affairs, Debtor disclosed the Property as a prior address of the  
24 Debtor from 2004 to 2010.

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25 <sup>2</sup> Unless otherwise indicated, all “Code,” “chapter” and “section” references are to the  
26 Bankruptcy Code, 11 U.S.C. §§ 101-1330. “Rule” references are to the Federal Rules of  
27 Bankruptcy Procedure (“FRBP”), which make applicable certain Federal Rules of Civil  
28 Procedure (“F.R.Civ.P.”). “LBR” references are to the Local Bankruptcy Rules of the United  
States Bankruptcy Court for the Central District of California (“LBR”).

1 On December 30, 2014, the court set a claims deadline of May 12, 2015. Debtor's  
2 chapter 13 plan, which did not provide for the payment of any secured claims other than a claim  
3 held by JP Morgan Chase, was confirmed by consent at a hearing on March 19, 2015. An order  
4 confirming the plan was entered on April 9, 2015.

5 On May 11, 2015, Ocwen filed Claim # 3 in the amount of \$829,418.23 secured by a  
6 deed of trust lien on the Property. On June 17, 2015, Debtor filed an objection to Ocwen's  
7 Claim # 3. Ocwen filed written opposition to Debtor's objection on July 9, 2015, to which  
8 Debtor replied on July 16, 2015. After a hearing on July 23, 2015, the court took the matter  
9 under submission.

## 10 II. DISCUSSION

11 This court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157(b) and  
12 1334(b). Debtor's objection to Ocwen's Claim # 3 is a core proceeding under 28 U.S.C. §  
13 157(b)(2)(A), (B) and (O). Venue is appropriate in this court. 28 U.S.C. § 1409(a).

14 Debtor asserts that Ocwen's Claim # 3 must be disallowed in its entirety for one or more  
15 of the following reasons:

- 16 a. CW informed the debtor and DZ that the loan was discharged.
- 17 b. CW reported the loan fully paid to the credit bureaus.
- 18 c. CW failed to properly respond to requests for accounting information under the Real  
19 Estate Settlement Procedures Act ("RESPA").
- 20 d. CW did not physically deliver the Note to Claimant (nor its predecessors).
- 21 e. The Note was not properly endorsed.
- 22 f. Claimant does not assert clearly where its secured rights emanate from.
- 23 g. Claimant has not shown compliance with the terms contained in the Original Pooling  
24 and Servicing Agreement (PSA) when the original lender sold the Note to a Remic.
- 25 h. Claimant is not a holder of the Note entitled to foreclose under the Uniform  
26 Commercial Code (UCC).
- 27 i. CW/BOA did not have right to foreclose an unsecured note, so neither does claimant.
- 28 j. Claimant's proof of claim does not establish a valid secured claim.

1 k. Claimant concedes that its claim is not secured.<sup>3</sup>

2 A. Debtor's Burden of Proof on Objection to Claim.

3 A proof of claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a).  
4 Absent an objection, a proof of claim constitutes prima facie evidence of the validity and amount  
5 of the claim under FRBP 3001(f). Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035,  
6 1039 (9th Cir. 2000). When a creditor has filed a proof of claim that complies with the rules,  
7 thereby giving rise to the presumption of validity, the burden shifts to the objecting party who  
8 must "present evidence to overcome the prima facie case." U.S. v. Offord Fin., Inc. (In re  
9 Medina), 205 B.R. 216, 222 (9th Cir. BAP 1996). To defeat the claim, the objector must come  
10 forward with sufficient evidence and "show facts tending to defeat the claim by probative force  
11 equal to that of the allegations of the proofs of claim themselves." Lundell, 223 F.3d at 1039,  
12 quoting In re Holm, 931 F.2d 620, 623 (9th Cir. 1991). "The objector must produce evidence  
13 which, if believed, would refute at least one of the allegations that is essential to the claim's legal  
14 sufficiency." Lundell, 223 F.3d at 1040, quoting In re Allegheny Int'l, Inc., 954 F.2d 167, 173-  
15 74 (3d Cir. 1992). If the objector produces sufficient evidence to negate one or more of the  
16 sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the  
17 claim by a preponderance of the evidence. Ashford v. Consol. Pioneer Mort. (In re Consol.  
18 Pioneer Mort.), 178 B.R. 222, 226 (9th Cir. BAP 1995), aff'd, 91 F.3d 151 (9th Cir. 1996),  
19 quoting Allegheny Int'l, 954 F.2d at 173-74. The ultimate burden of persuasion remains at all  
20 times on the claimant. Lundell, 223 F.3d at 1039; Holm, 931 F.2d at 623.

21 Ocwen's Claim # 3 was timely filed, complies with the requirements of FRBP 3001, and  
22 "constitute[s] prima facie evidence of the validity and amount of [its] claim." See FRBP  
23 3001(f).

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27 <sup>3</sup> Objection to Claim of Ocwen Loan Servicing, LLC (Claim # 7 [sic]) ("Debtor's Objection"),  
28 3:4-24. Debtor uses the following abbreviations in Debtor's Objection: (1) CW refers to  
"Countrywide;" (2) DZ refers to "Daniel Zipser;" and (3) BOA refers to "Bank of America."

1 B. Ocwen Had Standing to File the Proof of Claim and Has Authority to Enforce the Claim  
2 Against the Estate.

3 “[A] party has standing to file a proof of claim based on a promissory note secured by  
4 real property if that party is a ‘person entitled to enforce’ the note under § 3–301 of the Uniform  
5 Commercial Code (“UCC”).” Green v. Waterfall Victoria Master Fund 2008-1 Grantor Trust  
6 Series A (In re Green), No. 2012 WL 4857552, at \*6 (9th Cir. BAP 2012); see Veal v. Am.  
7 Home Mortgage Serv., Inc. (In re Veal), 450 B.R. 897, 902 (9th Cir. BAP 2011) (“[W]e hold that  
8 a party has standing to prosecute a proof of claim involving a negotiable promissory note if,  
9 under applicable law, it is a ‘person entitled to enforce the note’ as defined by the Uniform  
10 Commercial Code.”). “[A] party is a person entitled to enforce the note if it is a ‘holder’ of the  
11 note . . . .” Green, 2012 WL 4857552, at \*6. Under the UCC and California law, “[a] party in  
12 physical possession of an endorsed-in-blank note qualifies as a holder of a note” . . . [and] “is  
13 entitled to enforce it.” Zulueta v. Bronitsky (In re Zulueta), 2011 WL 4485621, at \*6 (9th Cir.  
14 BAP 2011) aff’d, 520 F. Appx. 558 (9th Cir. 2013).

15 According to the evidence, Ocwen is the duly authorized and acting loan servicing agent  
16 of Christiana Trust, a division of Wilmington Savings Fund Society, FSB, not in its individual  
17 capacity but as Trustee of ARLP Trust 3. Ocwen has actual and physical possession of the  
18 Adjustable Rate Note in the original principal sum of \$639,920.00, executed by Daniel Zipser  
19 and Cynthia Cynko Zipser and payable to the order of Countrywide Bank, a division of Treasury  
20 Bank, N.A. (“Countrywide”), dated April 19, 2004 (“Note”) which forms the basis of Ocwen’s  
21 Claim # 3. The Note is endorsed in blank. The Note is secured by a deed of trust lien on the  
22 Property evidenced by a Deed of Trust executed by Daniel Zipser and Cynthia Cynko Zipser to  
23 Countrywide dated April 19, 2004, recorded as Instrument No. 20040430-0118498 in the Office  
24 of the Ventura County Recorder on April 30, 2004 (“Deed of Trust”). The Deed of Trust was  
25 assigned by Countrywide to Bank of America, National Association (“Bank of America”) by  
26 Assignment of Deed of Trust recorded on August 2, 2013, and later assigned by Bank of  
27 America to the Christiana Trust, a division of Wilmington Savings Fund Society, FSB, not in its  
28 individual capacity but as Trustee of ARLP Trust 3, c/o Ocwen by Assignment of Deed of Trust

1 recorded on April 23, 2014. As the entity in actual possession of the Note endorsed in blank and  
2 beneficiary under the Deed of Trust securing the Note, Ocwen had standing to file Claim # 3 on  
3 May 11, 2015.

4 Neither the holding in Veal nor the holding in Kemp v. Countrywide Home Loans, Inc.  
5 (In re Kemp), 440 B.R. 624 (Bankr. D.N.J. 2010), cited by Debtor, change this conclusion. In  
6 Veal, the United States Bankruptcy Appellate Panel for the Ninth Circuit addressed two related  
7 appeals, the first challenging the bankruptcy court's order granting relief from the automatic stay  
8 in favor of Wells Fargo, and the second challenging the bankruptcy court's order overruling the  
9 debtors' objection to a proof of claim filed by American Home Mortgage Servicing Inc.  
10 ("AHMSI"). AHMSI's proof of claim related to the same obligation that was the subject of  
11 Wells Fargo's motion for relief from the automatic stay. AHMSI filed the proof of claim as  
12 Wells Fargo's servicing agent. Veal, 450 B.R. at 903. The issue in Veal was whether Wells  
13 Fargo and AHMSI each had standing as a real party in interest to pursue the relief requested.

14 The BAP in Veal held that "a party has standing to prosecute a proof of claim...if, under  
15 applicable law, it is a person entitled to enforce the note..." Id. at 902. "The forum state's choice  
16 of law rules determine which state's substantive law applies." Id. at 920 n. 40. The BAP  
17 determined that enforcement of the mortgage was governed by Illinois law (where the property  
18 was located), while enforcement of the note was governed by Arizona law. Id. at 916, 920.  
19 Neither Wells Fargo nor AHMSI were able to establish under applicable law that it was a  
20 "person entitled to enforce the note" or was otherwise in possession of the note. Id. at 917, 920.  
21 Simply put, Veal stands for the proposition that a party entitled to enforce a note under  
22 applicable state law has standing to file a proof of claim.

23 So does Kemp. In that case, the debtor filed an adversary proceeding seeking to expunge  
24 a proof of claim filed Countrywide Home Loans, Inc., as servicer for Bank of New York. Bank  
25 of New York did not have possession of the note secured by the debtor's real property at the time  
26 the proof of claim was filed with the court. As a result, the bankruptcy court disallowed the  
27 claim holding that Bank of New York lacked authority to enforce the note under state law. Id. at  
28 634.

Ocwen's Claim # 3 establishes a valid secured claim. Ocwen is entitled to enforce the Note under the UCC and California law. Ocwen possesses the right to foreclose. The documents establishing Ocwen's right to enforce the Note and Deed of Trust are attached to Claim # 3. Debtor has not offered evidence to the contrary, including any credible evidence that Ocwen has conceded that its claim is not secured.

C. Debtor Does Not Have Standing to Challenge the Pooling Service Agreement ("PSA") or the Real Estate Mortgage Conduit ("REMIC").

Debtor argues that the assignment of the Note and Deed of Trust to the Christiana Trust, a division of Wilmington Savings Fund Society, FSB, not in its individual capacity but as Trustee of ARLP Trust 3, is invalid as violating both the terms of the PSA and rules governing REMICs. Neither ground, however, provides a basis for the court to disallow Ocwen's Claim # 3.

Under California law, a debtor does not have standing to challenge a pooling and service agreement. Davies v. Deutsche Bank Nat'l Trust Co. (In re Davies), 565 F. Appx. 630, 633 (9th Cir. 2014) ("[T]he weight of authority holds that debtors in Davies' shoes – who are not parties to the pooling and service agreements – cannot challenge them."). Debtor has not shown that she is a party to the pooling and service agreement at issue.

Likewise, "[t]he argument that parties lose their interest in a loan when it is assigned to a trust pool or REMIC has been rejected by numerous courts." Logvinov v. Wells Fargo Bank, 2011 WL 6140995, at \*3 (N.D. Cal. Dec. 9, 2011) (citations omitted). "The alleged 'securitization of the loan does not in fact alter or affect the legal beneficiary's standing to enforce the deed of trust.'" Id. (citation omitted). "'[S]ecuritization merely creates 'a separate contract, distinct from [p]laintiffs['] debt obligations' under the note, and does not change the relationship of the parties in any way." Reyes v. GMAC Mortgage LLC, 2011 WL 1322775, at \*3 (D. Nev. 2011) (quoting Commonwealth Prop. Advocates, LLC v. First Horizon Home Loan Corp., 2010 WL 4788209, at \*2 (D. Utah 2010)).

D. Debtor's Previous Chapter 7 Discharge Does Not Affect Ocwen's Lien on the Property.

Debtor argues that Claim # 3 should be disallowed because she received a discharge in chapter 7 and Ocwen reported to certain credit reporting agencies a zero balance due on the loan after she received her discharge. It is undisputed that Debtor received a chapter 7 discharge on December 21, 2011. While discharge protects the Debtor from personal liability for the balance due under the Note, discharge did not extinguish the Deed of Trust lien on the Property securing the Note. Absent a final order or judgment declaring the lien unenforceable, Ocwen's Deed of Trust lien passed through Zipsers' chapter 7 bankruptcy unaffected. See Johnson v. Home State Bank, 501 U.S. 78, 83 (1991). "[A] mortgage interest that survives the discharge of a debtor's personal liability is a 'claim' within the terms of § 101(5)" for which treatment must be provided in a chapter 13 plan. Id at 83-84. The fact that Ocwen reported to certain credit reporting agencies that the Debtor's personal liability for payment of the debt evidenced by the Note was discharged in her chapter 7 case is not grounds to disallow Ocwen's Claim # 3. Claim # 3 is based upon the Deed of Trust lien against the Property securing payment of the Note which passed through Debtor's chapter 7 bankruptcy unaffected.

III. CONCLUSION

In sum, Debtor has not produced sufficient evidence to negate one or more of the sworn facts in Ocwen's Claim # 3. Accordingly, Debtor's objection to Ocwen's Claim # 3 is overruled. A separate order will be entered consistent with this memorandum decision.

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Date: July 28, 2015



Peter H. Carroll  
United States Bankruptcy Judge