

SIGNED.

Dated: September 12, 2011



James M. Marlar

James M. Marlar, Chief Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

10 In re:)	Chapter 13
11 JEFFREY B. HODDER and JEAN L HODDER,)	No. 4:08-bk-09586-JMM
12 _____ Debtors.)	Adversary No. 4:10-ap-00798-JMM
13 JEFFREY B. HODDER and JEAN L HODDER,)	MEMORANDUM DECISION
14 _____ Plaintiffs,)	
15 vs.)	
16 WILSHIRE CREDIT CORPORATION as 17 servicer for LASALLE BANK, NA; LASALLE BANK, NA; and MORTGAGE LENDERS NETWORK, USA, INC., an Arizona corporation,)	
18 _____ Defendants.)	

INTRODUCTION

22 Before the court, in this adversary proceeding, is a motion for judgment on the
23 pleadings, filed by the Defendants (Adv. ECF No. 29).

24 Prior to a discussion leading to a ruling on the motion, it is necessary to review the
25 status of the Debtors' case to date, in order to place the current controversy into its proper context.

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1 **THE CHAPTER 13 CASE**

2 **A. In General**

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4 The Debtors filed their Chapter 13 case on July 30, 2008, slightly over three (3) years
5 and one (1) month ago. A Chapter 13 case is strictly voluntary, and a debtor must provide, in a
6 plan, for payments to creditors over a period of time that is no less than three years, and no more
7 than five years. 11 U.S.C. §§ 1322(a)(4); (d)(2)(C); 1325(b)(4)(A). In some circumstances not
8 applicable here, a plan period may be less than three years. 11 U.S.C. § 1325(b)(4)(B).

9 To date, the Debtors have not yet had a plan confirmed, despite having filed five
10 different plans (ECF Nos. 12, 51, 71, 99 and 107¹). Their current plan promises to pay in, to the
11 Trustee, \$29,817.20 over a five-year (sixty-month) period. To date, they have paid in (through
12 September 15, 2011) the total sum of \$18,957.84.² This is what the Trustee has on hand.

13 The Debtors most recent plan (ECF No. 107) specifies that the Debtors will make
14 payments as follows:

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<u>Amount</u>	<u>Months</u>	<u>Total</u>
\$325	1-11	\$3,575
\$556	12-59	26,132
\$110.20	60	<u>110.20</u>
		\$29,817.20

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27 ¹ "Adv. ECF No." refers to the adversary proceeding docket numbers and "ECF
28 No." refers to the administrative case docket numbers.

² Chapter 13 Trustee's website.

1 Since we are now in month 38 of the plan, the Debtors should have paid in, to the Trustee:

<u>Amount</u>	<u>Months</u>	<u>Total</u>
\$325 X 11	1-11	\$3,575
\$556 X 25	12-37	<u>13,900</u>
		\$17,475

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7 So far, the Debtors are in monetary compliance with their plan promises.

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9 **B. The Debtors' Property**

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11 When the Debtors filed for bankruptcy protection, they listed their significant property
12 interests as:

<u>Real Property</u>	<u>Value</u>	<u>Lienholder</u>	<u>Lien Amount</u>
3736 S. Opal, Mesa, AZ	\$235,000	Homeowners Financial	\$214,467
5778 E. Broadway, Apache Junction, AZ	\$300,000	Wilshire Credit Corporation (1st and 2nd mortgages)	\$386,619
<u>Personalty</u>	<u>Value</u>	<u>Lienholder</u>	<u>Lien Amount</u>
401(K)	\$7,450	None	\$0
2006 Ford F150	\$24,997	Ford Motor Credit	\$24,997
2006 Ford F350	\$36,663	Ford Motor Credit	\$36,663
Equipment	\$4,000	None	\$0

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24 (Schedules, ECF No. 10).

1 **C. Stay Relief**

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3 Several stay relief motions were filed by the various secured creditors, and
4 dispositions occurred as to affected properties, as follows:

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6 3736 S. Opal Mesa, AZ Stay lifted on October 27, 2008, in favor
7 of the petitioning lienholder. Current
8 status: Trustee's Sale occurred (ECF
9 No. 34). No remaining claim.

10 5778 E. Broadway Apache Junction Order entered on May 26, 2009, wherein
11 payments were to resume, and upon any
12 future default thereunder, the stay would
13 terminate (ECF No. 64). Several
14 subsequent motions and proceedings
15 have followed, involving the residence.

16 2006 Ford F350 Stay lifted. Vehicle surrendered (ECF
17 No. 65). Order dated May 26, 2009.

18 2006 Ford F150 Stay lifted. Vehicle surrendered (ECF
19 No. 48). Order dated April 9, 2009.

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21 During the proceedings, the Debtors have taken issue with the secured claim of the
22 creditor with a lien on the Broadway property. More about that later.

23 **D. The Most Recent Plan**

24 Only the most recent plan filed by the Debtors is pertinent to this discussion, their past
25 four plans having fallen by the wayside. It is the Debtors' Fifth Amended Plan, filed a year ago on
26 September 16, 2010 (ECF No. 107).

27 The most recent plan challenges the lien or liens attaching to the Broadway property,
28 and seeks a judicial determination eliminating them entirely. That is the relief sought in Adversary

1 No. 10-ap-00798. It is also how the current plan treats that creditor: avoid the liens entirely and
2 pay the creditor nothing.

3 Since September, 2010, the focus of all legal activity in the case has been in the
4 adversary proceeding, with the Debtors seeking to do away with the secured liens on the Broadway
5 property. That strife has completely stalled the parallel effort towards confirmation of a plan.

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7 **E. Payments to the Trustee**

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9 The Trustee's website reflects that since filing, the Debtors have paid \$18,957.84 into
10 the Trustee's accounts, for the benefit of the Debtors' creditors. Perhaps a portion of that fund may
11 be used, in an amended plan, toward payment of any post-petition arrearage. The court cannot
12 comment, nor does it know, what the future course of these proceedings will be.

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14 **F. The Course of the Secured Claim (Broadway Property) in the Administrative Case**

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16 During the run of this case, different things have happened relative to the Broadway
17 property. It is best to describe that course of events in chronological order.

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19 August 12, 2008 The Debtors' schedules listed the property as being worth \$300,000,
20 with \$386,619.94 in liens against it (Schedule A). The creditor is
21 noted as being Wilshire Credit Corporation ("Wilshire"), and the
debt is not checked as being disputed, contingent nor unliquidated
(Schedule D). (ECF No. 10.)

22 August 21, 2008 The Debtors' plan lists Wilshire as the lienholder holding a
23 \$391,618 claim on the Debtors' residence, with a \$15,000 arrearage
24 (ECF No. 12). There is no comment regarding any dispute with
25 Wilshire. In this version of the plan, the property is valued at
\$415,000.

26 September 11, 2008 Wilshire files a secured claim (on its first lien) for \$328,878.33
(Claim No. 4, Claims Register).

27 October 1, 2008 Wilshire files for stay relief (ECF No. 24).
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1 March 1, 2010 The court overrules the Debtors' objections to Wilshire's Claims
2 Nos. 4 and 11 (ECF No. 87 and 88), and allows them.

3 March 11, 2010 Debtors file a Rule 59 motion concerning the court's March 1, 2009
4 order (ECF No. 90). Again, the Debtors did not request a hearing,
5 and no order was entered on this motion.

6 May 4, 2010 Debtors file an adversary complaint against Wilshire, 4:10-ap-
7 00798-JMM. They raise standing and MERS issues.

8 June 10, 2011 Wilshire files another pleading, pointing out Debtors' failure to live
9 up to the stipulation ordered by the court on May 26, 2009 (ECF
10 No. 114), and note the continuation of the Debtors' pattern of
11 failing to keep its residential liens current, on a post-petition basis.

12 June 27, 2011 Debtors again oppose the default notice, contending that the court
13 has never ruled on their motion to rescind, and maintaining that the
14 Wilshire claims are fraudulent and that the servicer has no legal
15 standing (ECF No. 118).

16 July 20, 2011 A hearing is held. Debtors' attorney states that Debtors are
17 delinquent on their mortgage payments by at least one year (ECF
18 No. 120). The hearing was continued one month.

19 August 11, 2011 As requested by the court, the creditor produced the original
20 promissory note to Debtors' counsel, and stated that the Debtors
21 have not made payments for three years. The court takes all
22 matters under advisement (ECF No. 122).

23 DISCUSSION AND RULINGS

24 A. Administrative Matters

25 The Debtors are judicially estopped, on several fronts, from challenging Wilshire's
26 secured obligations. First, they signed their schedules, under oath, listing and not disputing
27 Wilshire's secured status and debts. Second, in other pleadings (their response to stay relief and
28 their later stipulation), they acknowledged the validity of the lien and agreed to pay it. Hamilton
v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-83 (9th Cir. 2001). That agreement and order have
never been set aside. Nor has the order of May 26, 2009 (ECF No. 64) been stayed.

1 Accordingly, based on the administrative record, the court will enter orders which:

- 2 1. Denies the Debtors' attempt to rescind the stipulation and order dated
3 May 26, 2009 (ECF No. 64). This ruling disposes of ECF No. 67.
- 4 2. Denies the Debtors' second effort to rescind (ECF No. 80).
- 5 3. Denies the Debtors' Rule 59 motion regarding its rulings on Claims
6 Nos. 4 and 11 (ECF Nos. 87, 88 and 90).
- 7 4. Based on the acknowledged failure to pay under the May 26, 2009
8 stipulation (ECF No. 64), the court will lift the stay on the real property
9 located at 5778 E. Broadway, Apache Junction, Arizona in favor of
10 Wilshire Credit Corporation, LaSalle and any and all parties claiming
11 by, through or under them. The secured creditor has met the low
12 threshold of showing a "colorable claim." In re Veal, 450 B.R. 897
13 (9th Cir. BAP 2011).
- 14 5. Due to the Debtors' inability to confirm a Chapter 13 plan for over
15 three years, the court orders that this case shall be dismissed, unless the
16 Debtors amend their plan to conform to the rulings herein, within thirty
17 (30) days. 11 U.S.C. § 1307(c)(1). Moreover, the Debtors have failed
18 to maintain current payments on their residence, from the date of filing
19 forward, as the law requires. 11 U.S.C. § 1322(b)(2) and (5). This
20 represents a severe deficiency in their Chapter 13 case. The Debtors
21 will need to become creative to overcome that statutory hurdle.

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23 **B. Adversary Proceeding No. 4:10-ap-00798-JMM**

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25 Based on the proceedings outlined above, and the court's findings, in essence, that the
26 creditor's Claims Nos. 4 and 11 are allowed, those rulings are res judicata, or, at a minimum, the law
27 of the case. In addition, due to the other findings made herein, the Debtors' contentions in the
28 adversary proceeding are rendered moot. Having decided the validity of the Wilshire/LaSalle

1 claims for stay relief purposes, this court has no further jurisdiction to decide the state law issues
2 raised by the Debtors. Stern v. Marshall, 131 S. Ct. 2594 (2011).

3 In addition, as the moving party has produced the original promissory note, it may
4 proceed to enforce any non-payment thereunder. It has established a "colorable claim" sufficient
5 for a grant of stay relief. Veal, 450 B.R. 897.

6 Any legal impediment to the Debtors' arguments regarding the status of MERS has
7 now been resolved by the Ninth Circuit's decision, rendered September 7, 2011, which disagrees
8 with the Debtors' contentions in this case, and minimizes their concerns over the role played by
9 MERS in this case. Cervantes v. Countrywide Home Loans, Inc., No. 09-17364, slip. op. (9th Cir.
10 Sept. 7, 2011).

11 Any outstanding discovery requests sought by the Debtors, against the Defendants,
12 will be DENIED.

13 An order will be entered dismissing the Debtors' adversary action.

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15 DATED AND SIGNED ABOVE.

16
17 To be NOTICED by the BNC ("Bankruptcy Noticing Center") to:
18 All parties this adversary proceeding