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3 **UNITED STATES BANKRUPTCY COURT**  
4 **IN AND FOR THE DISTRICT OF ARIZONA**  
5

6 **In re** ) **In Chapter 7 proceedings**  
7 **ROSEMARY STEWART,** )  
8 **Debtor** ) **Case No. 2-09-bk-9022-CGC**  
9 ) **UNDER ADVISEMENT DECISION**  
10 ) **RE MOTION TO LIFT STAY**  
11 )

12 **I. The Issue**

13 The issue presented is whether to lift the automatic stay in this Chapter 7 case.

14 **II. Background**

15 Movant is Bank of New York Mellon (“Bank”), as trustee for a securitized trust that is  
16 the holder of a note and deed of trust originated by First Capital Lending in the amount of  
17 \$425,000 with monthly non-default payments of approximately \$3900. The Debtor, an 80 year  
18 old woman with a home in central Phoenix, alleges a monthly income of approximately \$3000.  
19 The Bank cancelled a previously scheduled trustee’s sale.

20 Debtor took the unusual step of “counterclaiming” in its response to the motion, alleging  
21 fraud, fraudulent inducement, predatory lending and violations of TILA, RESPA and HOEPA.  
22 She also asserts that, absent determinations of the counterclaims, it is unknown whether the  
23 Movant has standing to pursue relief from stay. She does not challenge whether cause exists to  
24 lift the stay in the absence of her counterclaim.

25 **III. Analysis**

26 A motion for relief from stay is designed to be a summary and targeted proceeding to  
27 determine limited issues. It is not designed to adjudicate substantial claims such as those alleged  
28 in the “counterclaims.” They are properly brought in an adversary proceeding in which the full

panoply of the Federal Rules of Civil Procedure provides due process protections to all sides. Federal Rule of Bankruptcy Procedure 7001 explicitly applies to these claims as they seek to: 1) recover money or property; 2) determine the validity of a lien; and 3) to obtain equitable relief.

Therefore, the Court will view the opposition in the hypothetical light of whether the Court should exercise jurisdiction to exercise jurisdiction over an unfiled adversary alleging the claims set forth in the “counterclaims.” The Court will decline to do so and will lift the stay.

First, this is a Chapter 7 case where the stay will lift soon upon entry of the Debtor’s discharge. Second, the Debtor asserts a right to a jury trial which is not available as a right in this Court.<sup>1</sup> Third, at best, this Court has “related to” jurisdiction to hear what are clearly non-core claims. This means that any decision would have to be in the nature of recommendations to the District Court, hardly the way to foster judicial economy. Fourth, there is no continuing “bankruptcy purpose” that would be fostered by hearing these claims. Finally, withdrawal of the reference to the District Court may well be mandatory here under 28 U.S.C. § 157(d) as this case appears to require consideration of “other laws of the United States regulating organizations or activities affecting interstate commerce.”

This approach is consistent with the ruling of *Yamamoto v. Bank of New York*, 329 F.3d 1167 (9<sup>th</sup> Cir. 2003). In *Yamamoto*, the Chapter 7 debtors rescinded a loan, brought a TILA action against the lender, and alleged that the security interest was void. In *Yamamoto* the debtors brought suit in District Court, not Bankruptcy Court. *Yamamoto* does not stand for the proposition that bankruptcy court is the proper venue for this matter.

As to standing of the Bank to bring the lift stay motion, the Ninth Circuit ruled that the security interest does not “vanish[] immediately upon the giving of notice.” *Id.* at 1172. Instead, the security becomes void if the lender acquiesces to the notice of rescission or when “the right to rescind is determined in the borrower’s favor.” *Id.* Here, the Bank has not acquiesced to the

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<sup>1</sup>Counsel indicated at argument that the debtor would “waive” her jury trial demand.

1 rescission, but instead contests it. The Bank has shown sufficient standing to bring a lift stay  
2 motion.

3 There is no temporal emergency here. No trustee's sale is pending and none can be  
4 completed sooner than 90 days after the stay is lifted. This is ample time to prepare and file a  
5 complaint in a court of competent jurisdiction and to seek injunctive relief in that court, if  
6 desired.

7 The motion will be granted. Counsel for movant is to submit a form of order.

8 So ordered.

9 DATED: August 28, 2009

10   
11 Charles G. Case II  
12 UNITED STATES BANKRUPTCY JUDGE

13 **COPY** of the foregoing mailed by the BNC and/or  
14 sent by auto-generated mail to:

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