

1 GREGORY L. WILDE NV Bar No. 004417
2 Tiffany and Bosco P.A.
3 212 South Jones Blvd.
4 Las Vegas, Nevada 89107
5 Telephone: (702) 258-8200
6 Fax: (702) 258-8787
7 glw@tblaw.com

8 Attorneys for Secured Creditor
9 BSI FINANCIAL SERVICES, INC., servicing agent for
10 NSP LA TRUST c/o HMC ASSETS, LLC as
11 Administrator of the Trust, Successor in interest to
12 Bayview Loan Servicing, LLC

13 UNITED STATES BANKRUPTCY COURT
14 SOUTHERN DISTRICT OF NEVADA

15 In re

16 DON HOLBROOK and
17 LAURIE HOLBROOK,

18 Debtors.

Bk. No. 11-27072-led

Chapter 13

RESPONSE TO DEBTORS' OBJECTION
TO PROOF OF CLAIM OF BAYVIEW
LOAN SERVICING, LLC

Date: January 8, 2014
Time: 2:00 p.m.

19 COMES NOW BSI FINANCIAL SERVICES, INC., servicing agent for NSP LA TRUST
20 c/o HMC ASSETS, LLC as Administrator of the Trust, Successor in interest to Bayview Loan
21 Servicing, LLC (hereinafter "Secured Creditor"), by and through its attorney of record, the law
22 firm of Tiffany & Bosco, P.A., and hereby submits its response to the Debtor's Objection to Proof
23 of claim filed on November 20, 2013 (Docket #210) ("Claim Objection" herein).

24 This Response is made and based upon the pleadings and papers on file herein, the
25 Memorandum of Points and Authorities that follows, and any oral argument the Court permits
26

1 at the hearing of this matter.

2 DATED this 24th day of December 2013.

3
4 **TIFFANY & BOSCO, P.A.**

5 /s/ Gregory L. Wilde, Esq.

6 GREGORY L. WILDE, ESQ.

7 Nevada Bar No. 4417

8 212 S. Jones Blvd

9 Las Vegas NV 89107

10 Attorney for Secured Creditor

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. STATEMENT OF FACTS**

13
14 On or about October 3, 2002, Debtor Don Holbrook, for valuable consideration, made,
15 executed, and delivered to First Arizona Savings, FSB ("FAS") an Adjustable Rate Note in the
16 principal sum of \$173,000.00 ("Note"). On or about October 3, 2002, Debtor Don Holbrook made,
17 executed and delivered to FAS a Deed of Trust (the "Deed of Trust") granting FAS a security
18 interest in the Property. The Deed of Trust was recorded on October 8, 2002, in the Official
19 Records of Mohave County, State of Arizona, as instrument no. 2002068417. FAS transferred its
20 beneficial interest in the Note and Deed of Trust to Bayview by Assignment recorded on March
21 12, 2012. Bayview transferred its beneficial interest to NSP LA TRUST c/o HMC ASSETS, LLC
22 ("NSP") by Assignment recorded on October 16, 2013. BSI Financial Services, Inc. is the
23 servicing agent for NSP.
24

25 The property subject to the first trust deed obligation held by NSP is generally described as
26

1 2230 N Palo Verde Blvd, Lake Havasu City, AZ. The property subject to the first trust deed
2 obligation held by NSP is generally described as 2230 N Palo Verde Blvd, Lake Havasu City,
3 AZ ("subject property" herein). The subject property is apparently Debtors' *vacation* home and
4 Debtors are not generating any monthly income from the subject property.

5
6 On October 31, 2011, Debtors filed the instant Chapter 11 petition in this Court. At the
7 time of filing the instant bankruptcy, Debtors were due and owing for three (3) monthly mortgage
8 payments. Secured Creditor's predecessor, FDIC as Receiver for First Arizona Savings, filed a
9 Proof of Claim on January 16, 2012 (claim #5), listing \$3,562.20 in pre-petition arrears and a total
10 debt of \$146,453.30 as of the date of filing. This \$3,562.20 in pre-petition arrears consisted of
11 three (3) monthly mortgage payments of \$1,146.00 *each*, late charges in the amount of \$115.05,
12 and property inspection fees in the amount of \$9.15.

13
14 Debtors have amended their Chapter 11 Plan *multiple* times. Secured Creditor is listed in
15 Debtors' *Eighth Modified* Plan as the holder of a Class 1-A *oversecured* claim, with principal and
16 variable interest payments commencing March 1, 2013, in addition to escrow payments for taxes
17 and insurance. Pursuant to the proposed *Eighth Modified* Plan, Debtors were to recommence
18 regular monthly mortgage (principal, interest, and escrow) payments to Secured Creditor (and its
19 predecessors) in a timely manner commencing with the **March 1, 2013** post-petition payment.
20 Debtors' *Eighth Modified* Plan specifically states that Debtors will be responsible for the monthly
21 escrow payments for property taxes and insurance. The *current* monthly mortgage payment owed
22 to Secured Creditor, effective November 1, 2013, is \$983.23, which includes a *principal and*
23 *interest* component of \$757.91 and an *escrow* component for taxes and insurance of \$225.41.
24 Debtors have recently only made one (1) full regular monthly payment in the amount of \$983.23,
25 on November 13, 2013.
26

1 While Debtors' proposed *Eighth Modified* Plan provides for the payment of monthly
2 mortgage payments on Secured Creditor's claim commencing March 1, 2013, Debtor has only
3 made five (5) *partial post-petition* monthly payments (with no escrow portions) to Secured
4 Creditor and only one (1) *full* monthly mortgage payment (including escrow) since the filing of the
5 instant bankruptcy on October 31, 2011. Debtors are already in breach of their proposed *Eighth*
6 *Modified* Plan. Secured Creditor had filed the Declaration of Tara Spangler Re: Breach of the
7 *Eighth Modified* along with Objections to Debtors' *Eighth Modified* Plan, which provides that out
8 of the six (6) payments tendered by the Debtors since the filing of the instant bankruptcy, five (5)
9 out of six (6) of these payments were *partial* payments that failed to include an escrow payment
10 for property taxes and insurance. Debtors are due and owing for a total of twenty two (22) *post-*
11 *petition* monthly mortgage payments, as well as three (3) pre-petition monthly mortgage
12 payments. Debtors are also due for Secured Creditor's post-petition attorneys' fees incurred in
13 protecting Secured Creditor's *oversecured* claim.

14 On October 3, 2013, Secured Creditor filed an *Amended* Proof of Claim ("Amended Proof
15 of Claim" herein), which includes both the *pre-petition* arrears owed by the Debtors as of the date
16 of filing the instant bankruptcy, *as well as* the significant *post-petition* arrears that came due as a
17 result of Debtors' failure to tender all regular monthly mortgage payments to Secured Creditor.
18 Secured Creditor will also be filing a *Second Amended* Proof of Claim.

19 On November 20, 2013, Debtors filed the Claim Objection (docket entry # 210), alleging
20 that the *Amended* Proof of Claim is "fatally flawed." Debtors allege that Secured Creditor did not
21 properly account for the payments tendered by the Debtors *post-petition* and improperly added
22 prior servicer fees in the amount of \$3,714.90 to Secured Creditors' *Amended* Proof of Claim.
23 However, Debtors apparently ignore the fact that Secured Creditor's *Amended* Proof of Claim was
24 amended to reflect *both* post-petition arrears as well as *pre-petition* arrears. Further, in order to
25 resolve the dispute concerning the \$3,714.90 in prior servicer fees, Secured Creditor will file a
26

1 *Second Amended* Proof of Claim which does not include those fees. This *Second Amended* Proof
2 of Claim renders Debtors' Claim Objection *moot*.

3 II. LEGAL ARGUMENTS

4 A. Debtors' Claim Objection Will Be *Moot* by the Filing of Secured Creditor's *Second* 5 *Amended* Proof of Claim

6 Debtors had filed the Claim Objection in order to object to Secured Creditor's *Amended*
7 Proof of Claim that was filed on October 3, 2013. In their Claim Objection, Debtors dispute the
8 \$3,714.90 in "prior servicer fees" that was included in the Amended Proof of Claim. In order to
9 resolve the dispute concerning these "prior servicer fees", Secured Creditor will be filing a *Second*
10 *Amended* Proof of Claim that does not include this \$3,714.90 in prior servicer fees. The filing of
11 the *Second Amended* Proof of Claim would appear to render Debtor's Claim Objection *moot*.
12 Despite the mootness of Debtors' Claim Objection, Secured Creditor will respond to the *other*
13 arguments (besides the argument concerning the \$3,714.90 in "prior servicer fees") set forth by
14 the Debtors in their Claim Objection.
15

16 B. Debtor Failed to Satisfy the Burden of Proof to Show that Secured 17 Creditor's Claim is Invalid

18 According to 11 U.S.C. § 502(a), a proof of claim is deemed allowed unless a party in
19 interest objects. Federal Rule of Bankruptcy Procedure 3001(f) provides that a proof of claim
20 executed and filed in accordance with the rules constitutes prima facie evidence of the validity and
21 the amount of the claim. Case law provides that in order to "defeat a claim, the objector must
22 come forward with sufficient evidence and show facts tending to defeat the claim by probative
23 force equal to that of the allegations of the proofs of claim themselves." Lundell v. Anchor Const.
24 Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000) (citation omitted). If the Debtor then
25 produces "*sufficient evidence* to negate one or more of the sworn facts in the proof of claim, the
26

1 burden reverts to the claimant to prove the validity of the claim by a preponderance of the
2 evidence” (emphasis added). Furthermore, “objections without substance are inadequate to
3 disallow claims.” In re Campbell, 336 B.R. 430, 436 (B.A.P. 9th Cir. 2005).

4 In other words, the burden of proof is on the objecting party to produce evidence
5 “equivalent in probative value to that of the creditor to rebut the *prima facie* effect of the proof of
6 claim.” *In re VTN, Inc.*, 69 B.R. 1005, 1008 (Bankr. S.D. Fla 1987) citing *In re DeLorean Motor*
7 *Co. Litigation*, 59 B.R. 329 (Bankr. E.D. Mich. 1986); *In re Herron*, 381 B.R. 184, 190 (Bankr. D.
8 Md. 2008) (denying a motion to reconsider its overruling of an objection to a claim and opining
9 that “it is this Court’s reading of the relevant law that in all but the most unique cases, it is
10 incumbent upon the objecting party to produce evidence as to the basis of its objection in order to
11 overcome a properly filed proof of claim that achieve *prima facie* validity.”). Debtors have failed
12 to meet the burden of proof needed to rebut the *prima facie* effect of the proof of claim.
13

14 Secured Creditor’s *Amended* Proof of Claim provides that there were \$31,696.54 in arrears
15 due and owing to Secured Creditor. Debtors are apparently at issue with the standard language on
16 the *Amended* Proof of Claim (page 1, paragraph 4), which provides: “Amount of arrearage and
17 other charges, *as of the time case was filed*, included in secured claim, if any: \$31,696.54”
18 (emphasis added). Notwithstanding the language in the *Amended* Proof of Claim, Secured Creditor
19 had filed the *Amended* Proof of Claim in order to inform the Debtors, this Court, and all interested
20 parties of *both* the pre-petition arrears owed by the Debtors, as well as *post-petition* arrears.
21 Secured Creditor is an *oversecured* creditor who must be paid in full through Debtors’ Chapter 11
22 Plan.
23

24 Debtors had only made six (6) payments to Secured Creditor since the filing of the instant
25 bankruptcy on October 31, 2011. Out of these six (6) payments, five (5) of those were *partial*
26

1 payments that did not include the escrow portion used to pay property taxes and insurance, and
2 only one (1) of the six (6) payments was a *full* monthly mortgage payment. As a result of the
3 significant post-petition default by the Debtors, Secured Creditor included *both* the post-petition
4 and pre-petition arrears that came due and owing on Secured Creditor's loan. Debtors indicate in
5 their Claim Objection that Secured Creditor is "entirely failing to account for post-petition
6 payments by the Debtors-In-Possession, in the amount of \$3,472.50 . . ." Nonetheless, Debtors fail
7 to provide any evidence which shows that Secured Creditor did not apply Debtor's monthly
8 mortgage payments in the amount of \$3,472.50.
9

10 Debtors are apparently referring to the five (5) monthly mortgage payments that Debtors
11 tendered in the amount of \$694.50 *each* ($\$694.50 \times 5 = \$3,472.50$); however, pursuant to Exhibit "C"
12 attached to the Declaration of Tara Spangler in support of the Objections to Debtors' Chapter 11
13 Plan, at the time of filing the *Amended* Proof of Claim on October 3, 2013, Secured Creditor had
14 only received four (4) (not five (5)) *partial* payments from the Debtors in the amount of \$694.50
15 *each*, totaling \$2,778.00. Secured Creditor's *Amended* Proof of Claim accounts for these four (4)
16 *partial* payments tendered by the Debtors. Additionally, Secured Creditor will be filing a *Second*
17 *Amended* Proof of Claim which accounts for all payments that Secured Creditor (and his
18 predecessors) had received from the Debtors since the filing of the instant bankruptcy. Said
19 *Second Amended* Proof of Claim will specifically provide that the amount of arrears listed reflect
20 the total claim due to Secured Creditor as of December 23, 2013. For the reasons set forth above,
21 the arguments made in Debtors' Objection to Claim are without merit and should be stricken by
22 this Court.
23
24
25
26

C. Secured Creditor Will be Severely Prejudiced if the
Objection to Proof of Claim is Granted

The amounts listed in Secured Creditor's *Amended* Proof of Claim are the *pre-petition* and *post-petition* amounts owed by the Debtors for their failure to pay all mortgage payments to Secured Creditor in breach of their earlier and more recent proposed Plans. Debtors have neither provided evidence nor documentation that would contradict the *prima facie* effect of the Proof of Claim. Debtor's Claim Objection includes baseless allegations whom have absolutely no support. By its nature as an *oversecured* creditor, Secured Creditor must be paid on its claim in full. Debtors failed to make no less than 22 post-petition monthly mortgage payments to Secured Creditor. Secured Creditor is entitled for all *pre-petition* and *post-petition* arrearages that came due on its loan, as well as *post-petition* attorneys' fees that were incurred to protect its oversecured loan.


If the debtor's objection is granted, Secured Creditor may not be entitled to disbursements for all *post-petition* arrears that have come due as a result of Debtors' failure to tender all monthly mortgage payments to Secured Creditor. On the other hand, Debtor cannot show any prejudice to themselves if the court denies the Objection because the Debtors will simply be required to pay the amounts that have necessarily accrued as a result of their prior non-payment and default of their proposed *Eighth Modified Plan*.

CONCLUSION

Secured Creditor is entitled to enforce the Note and Deed of Trust and has standing and authority to file the Proof of Claim. Debtor's Claim Objection raised conjecture and questionable arguments that lack substance and evidentiary support. Secured Creditor will be filing a *Second Amended* Proof of Claim, which will render Debtor's Claim Objection *moot*. Further, as set forth above, Debtors' contentions that Secured Creditor did not properly account for Debtors' six (6)

1 payments since the filing of this case is without merit, because these payments were accounted for.
2 Secured Creditor had filed the *Amended* Proof of Claim (and will also be filing the *Second*
3 *Amended* Proof of Claim) to provide for all arrears (post-petition and pre-petition) that have come
4 due to this *oversecured* creditor. Additionally, Debtors are in breach of their own proposed Plan.
5 For these reasons, Secured Creditor requests that Debtor's Claim Objection be denied.

6
7 DATED: December 24, 2013

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9 
10 GREGORY L. WILDE
11 Tiffany & Bosco P.A.
12 212 South Jones Blvd.
13 Las Vegas, Nevada 89107
14 (702) 258-8200

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1 GREGORY L. WILDE NV Bar No. 004417

2 TIFFANY & BOSCO

3 212 South Jones Blvd.

4 Las Vegas, Nevada 89107

5 Telephone: (702) 258-8200

6 Fax: (702) 258-8787

7 Attorneys for Secured Creditor

8 BSI FINANCIAL SERVICES, INC., subservicing agent for

9 NSP LA TRUST c/o HMC ASSETS, LLC as Administrator

10 of the Trust, successor in interest to Bayview Loan Servicing, LLC

11 UNITED STATES BANKRUPTCY COURT

12 DISTRICT OF NEVADA

13 In re

14 DON HOLBROOK and
15 LAURIE HOLBROOK,

16 Debtors.

Bk. No: 11-27072-lbr

Chapter 11

CERTIFICATE OF SERVICE

Hearing –

Date: January 8, 2014

Time: 2:00 p.m.

Place: United States Bankruptcy Court

Foley Federal Building

300 Las Vegas Blvd. South

Las Vegas, NV 89101

Honorable Linda B. Riegle

19 On December 24, 2013, *(date)* I served the following documents(s) *(specify)*:

20 **RESPONSE TO DEBTORS' OBJECTION TO PROOF OF CLAIM OF BAYVIEW LOAN**
21 **SERVICING, LLC**

22 I served the above-named document(s) by the following means to the persons as listed

23 below:

24 *(Check all that apply)*

25 ☒ **a. ECF System** *(You must attach the "Notice of Electronic Filing", or list all persons and*
26

addresses and attach additional paper if necessary)

U.S. Trustee –LV - 11, USTPRegion17.lv.ecf@usdoj.gov

THOMAS E. CROWE on behalf of Debtor DON HOLBROOK
tcrowe@thomascrowelaw.com

THOMAS E. CROWE on behalf of Joint Debtor LAURIE HOLBROOK
tcrowe@thomascrowelaw.com

■ b. United States mail, postage fully prepaid
(List persons and addresses. Attach additional paper if necessary)

DEBTORS:
DON HOLBROOK
LAURIE HOLBROOK
9200 DALMAHOY PLACE
LAS VEGAS, NV 89145

G c. Personal Service (List persons and addresses. Attach additional paper if necessary)

I personally delivered the document(s) to the persons at these addresses:

G For a party represented by an attorney, delivery was made by handing the document(s) to the attorney's office with a clerk or other person in charge, or if no one is in charge by leaving the document(s) in a conspicuous place in the office.

G For a party, delivery was made by handing the document(s) to the party or by leaving the document(s) at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

G d. By direct mail (as opposed to through the ECF System)

(List persons and email addresses. Attach additional paper if necessary)

Based upon the written assignment of the parties to accept service by email or a court order, I caused the document(s) to be sent to the persons at the mail addresses listed below. I did

1 not receive, within a reasonable time after the transmission, any electronic message or other
2 indication that the transmission was unsuccessful.

3
4 **G e. By fax transmission**

5 *(List persons and fax numbers. Attach additional paper if necessary)*

6 Based upon the written assignment of the parties to accept service by fax transmission or a
7 court order, I faxed the document(s) to the persons at the fax numbers listed below. No error was
8 reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

9
10 **G f. By messenger**

11 *(List persons and addresses. Attach additional paper if necessary)*

12 I served the document(s) by placing them in an envelope or package addressed to the persons
13 at the addresses listed below and providing them to a messenger for service.

14 *(A declaration by the messenger must be attached to this Certificate of Service).*

15 **I declare under penalty of perjury that the foregoing is true and correct.**

16
17 Signed on *(date)*: December 24, 2013

18 Jennifer L. Reedy
19 (NAME OF DECLARANT)

20 
(SIGNATURE OF DECLARANT)

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