No.

IN THE

Supreme Court of the United States

IN RE DANIEL L. JUNK AND CHRISTINE H. JUNK

ON PETITION FOR WRIT OF MANDAMUS TO
THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED

In *Jesinoski, et ux., v. Countrywide Home Loans, Inc., et al.*, 135 S.Ct. 790, 190 L.Ed.2d 650 (2015) (*per curiam*) this Court unanimously held that a borrower exercising his right to rescind under the Truth in Lending Act, 15 U.S.C. § 1635(a), need only provide written notice to his lender within the 3-year period as set forth in § 1635(f), not file suit within that period . . . "[t]he language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind." *Jesinoski, supra*.

The Act further provides when a borrower "exercises his right to rescind under [Section 1635(a)], he is not liable for any finance or other charge, and any security interest given by the [borrower] . . . becomes void upon such a rescission." *Id.* § 1635(b).

> Within 20 days after receipt of a notice of rescission, the creditor *shall* return to the [borrower] any money or property given as . . . downpayment . . . and *shall* take any action necessary or appropriate to reflect the termination of any security interest created under the transaction (emphasis added). *Ibid.*

The questions presented are:

(1) Whether a district court's exercise of its equitable discretion to abstain pursuant to 28 U.S.C. § 1334(c)(1), without applying applicable federal law under 15 U.S.C. §§ 1635(a) and (b) to an objection to a creditor's secured claims against the estate, was an

impermissible usurpation of power under constitutional separation of powers principles?

(2) Whether Petitioners are entitled to relief pursuant to 28 U.S.C. § 1651(a)?

PARTIES TO THE PROCEEDINGS

Petitioners Daniel L. Junk and Christine H. Junk were the Debtors in Possession, Debtors and appellants in the proceedings below.

Respondent, the Honorable Edmund A. Sargus, Jr., Chief Judge, United States District Court, Southern District of Ohio, Eastern Division, issued the final judgement subject this petition pursuant to 28 U.S. Code § 158 in review of the bankruptcy court's opinion below.

Respondent, the United States Bankruptcy Court for the Southern District of Ohio – Columbus, was an interested party to the appeal of the bankruptcy court's opinion below.

Respondent CitiMortgage, Inc. was a contested creditor, adversary proceeding defendant and appellee in the proceedings below.

Respondents Citi Master Servicing, Citibank U.S.A. N.A., Jennifer Oakes, HSBC Bank, USA, N.A., HSI Asset Securitization Corp., HSBC Securities, Inc. (USA), HALO Trust 2007–AR1, Mayer Brown LLP, MERSCORP Holdings Inc. *formerly known as* MERSCORP, Inc., Mortgage Electronic Registration Systems, Inc., Bayview Loan Servicing, LLC, Riley Pope & Laney, LLC, Heidi Carey, Roy Laney, T. Lowndes Pope, Nelson Mullins Riley & Scarborough LLP, B. Rush Smith, III, Brian Crotty, Michael Anzelmo, Security Connections, Inc., Krystal Hall, Joan Cook, Robert G. Hall, Nexsen Pruet LLC, Andrea Easler, Edward M. Hughes, and Colonial Coast Title Agency LLC, Lawyers Title

Insurance Corp. were adversary proceeding defendants and appellees in the proceedings below.

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Petitioners Daniel L. Junk and Christine H. Junk respectfully jointly petition this Court *pro se*, for a writ of mandamus vacating the judgment of the Honorable Edmund A. Sargus, Jr., Chief Judge, United States District Court, Southern District of Ohio, Eastern Division, that affirmed the bankruptcy court's opinion and order to abstain under 28 U.S.C. § 1334(c)(1) on their objection as debtors in possession to CitiMortgage, Inc.'s claim against the estate directing the district court to first apply the law under 15 U.S.C. §§ 1635(a) and (b) to determine whether CitiMortgage, Inc. has a claim as a secured creditor of the estate before exercising its equitable powers in this case.

INTRODUCTION

"[I]n March 2009, the Junks sent a notice of claim and rescission purporting to rescind the November 2006 loan transaction and the Note and the Mortgage. Ex. 20 to J.E. 46; Tr. at 159. The Junks received no response to that notice. Tr. at 159-60." *Junk v. CitiMortgage, Inc. (In re Junk)*, 512 B.R. 584, 592 (S.D. Ohio 2014).

This petition presents the kind of extraordinary circumstances in which this Court exercises its discretionary authority to issue a writ of mandamus in aid of its appellate jurisdiction. This case arises from the federal courts below failing to apply the law under 15 U.S.C. §§ 1635(a) and (b) of the Truth in Lending Act (the "Act") to the Junks' objection as debtors in possession to CitiMortgage's Inc.'s ("CitiMortgage") claim against their estate as a secured creditor. Although bankruptcy sounds in

equity,[1] neither the district court nor the bankruptcy court has any discretion or authority to exercise equitable powers so as to permit violations of statutes to continue against the estate and the Junks.

In *Jesinoski, et ux., v. Countrywide Home Loans, Inc., et al.*, 135 S.Ct. 790, 190 L.Ed.2d 650 (2015) (*per curiam*) this Court unanimously held that a borrower exercising his right to rescind under the Act, 15 U.S.C. § 1635(a), need only provide written notice to his lender within the 3-year period as set forth in § 1635(f), not file suit within that period * * * "[t]he language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. * * * " "Section 1635(a) nowhere suggests a distinction between disputed and undisputed rescissions, much less that a lawsuit would be required for the latter." *Jesinoski,* at 792 *supra*.

The Act further provides when a borrower "exercises his right to rescind under [Section 1635(a)], he is not liable for any finance or other charge, and any security interest given by the [borrower] . . . becomes *void* upon such a rescission." *Id*. § 1635(b) (emphasis added).

> Within 20 days after receipt of a notice of rescission, the creditor *shall* return to the [borrower] any money or property given as . . . downpayment . . . and *shall* take any action necessary or appropriate to reflect the

[1] *Bank of Marin v. England*, 385 U.S. 99, 103 (1966).

> termination of any security interest created under the transaction (emphasis added). *Ibid.*

Because the Junks timely exercised their right of rescission under Section 1635(a) over four (4) years prior to filing bankruptcy, *(In re Junk)*, 512 B.R. 584, 592, *supra,* federal law, not state law governs the enforceability of CitiMortgage's claim as a secured creditor against the estate under Sections 1635(a) and (b). CitiMortgage's claimed security interest filed in the Junks' bankruptcy case is void *ab initio* as a matter of federal law. [2]

There is no dispute that the Junks exercised their right of rescission timely under the Act over eight (8) years ago. (*In re Junk)*, 512 B.R. 584, 592, *supra.* There is no dispute that neither the refinance lender American Home Mortgage ("AHM") nor CitiMortgage has ever, to this day, responded to the Junks' notice of rescission. *Ibid.* Regardless those findings after an evidentiary hearing, neither the bankruptcy court nor the district court applied the

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[2] Although both the district court and the bankruptcy court ignored the Act in deciding to abstain pursuant to 28 U.S.C. § 1334(c)(1), federal policy issues under the supremacy clause are also at issue regarding the Act and its preemption of state law causes of action. See *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 6 F.3d 1184, 1190-91 (7th Cir. 1993) (reversing determination to abstain because it disagreed that resolution of issue of state law was necessary to bankruptcy determination before district court); *Coker v. Pan Am. World Airways (In re Pan Am. Corp.)*, 950 F.2d 839 (2d. Cir. 1991) (concluding that bankruptcy abstention was not warranted where determinative issue involved federal law regarding "whether the Warsaw Convention preempts the Coker plaintiffs' state law causes of action" since "supremacy clause questions are 'essentially one of federal policy' ").

Act to the estate's claims under the Act before exercising their equitable powers in choosing to abstain pursuant to 28 U.S.C. § 1334(c)(1) from deciding the estate's objection to CitiMortgage's claim.

The lower courts' exercise of equitable powers without first applying the Act to this case was an impermissible usurpation of power under constitutional principles of separation of powers. Without first applying the law under the Act, the district court's affirmation of the bankruptcy court's opinion and order to abstain was an unconstitutional abuse of discretion allowing CitiMortgage to continue its violations of the Act against the bankruptcy estate and petitioners.

Under 28 U.S.C. § 1334(d), review of the district court's judgment is precluded by appeal or otherwise by the court of appeals under Section 158(d), 1291, or 1292 of Title 28, or by this Court under Section 1254 of Title 28. Therefore, because petitioners have exhausted all other remedies available to them, they seek review of the district court's affirmation of the bankruptcy court's decision to abstain under 28 U.S.C. § 1334(c)(1), pursuant to this Court's jurisdiction in mandamus.

Section 1334(d) makes no mention of this Court's ability to review such determinations pursuant to its mandamus authority under 28 U.S.C. § 1651. Thus, under the familiar maxim "*expressio unius est exclusio alterius*" – *i.e.,* the expression of one is the exclusion of others – this Court has the power to review a district court's abstention determination

pursuant to § 1334(c)(1) under its mandamus authority.

The moment that a district court judge sitting in equity begins to consider whether a valid statute must be obeyed, the judicial system departs from the careful boundaries that have been maintained in this country for over two centuries and invades the core function of the legislature. "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches."[3]

The Act imposes direct mandates under §§ 1635(a) and (b). The courts below ignored those congressional mandates resulting in a judgment that constitutes a remarkably direct and constitutionally impermissible extension of the judicial function into the legislative process, violating the tripartite nature of our Constitution. The resulting ruling does violence to the statute by impermissibly allowing Respondent CitiMortgage to continue its violations of the Act against the Junks' estate and the Junks with impunity. When a court in equity is confronted on the merits with a continuing violation of statutory law, it has no discretion or authority to balance the equities so as to permit that violation to continue. In aid of this Court's appellate jurisdiction, pursuant to constitutional principles of separation of powers, the petition should be granted.

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[3] *TVA v. Hill*, 437 U.S. 153, 195 (1978).

OPINIONS BELOW

The opinion of the district court (App. 1-23) is unreported and is not available on Westlaw or LEXIS.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1651.

STATUTORY AND REGULATORY PROVISIONS

Relevant provisions of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, the Federal Reserve Board's Regulation Z and 28 U.S.C. § 1334 *et seq.* are set forth below.

STATEMENT

A. Statutory and Regulatory Background

1. 15 U.S.C. § 1601, *et seq.*

Congress enacted the Truth In Lending Act ("Act") in 1968 to promote the "informed use of credit." 15 U.S.C. § 1601(a); see *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 363-366 (1973). To that end, the Act requires creditors to provide borrowers with "meaningful disclosure[s] of credit terms," 15 U.S.C. § 1601(a) – such as "finance charges, annual percentage rates of interest, and the borrower's rights," *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) – so that "the consumer will be able to compare more readily the various credit terms available to him," 15 U.S.C. § 1601(a).

The Act also gives borrowers a "right to rescind" some kinds of consumer-credit transactions. 15

U.S.C. § 1635(a); see 15 U.S.C. § 1635(d) (right to rescind is unwaivable except in emergency circumstances). The rescission right applies to certain transactions in which a creditor takes a security interest in an obligor's "principal dwelling" and in return provides money or property that the obligor uses for non-business purposes. 15 U.S.C. § 1635(a); see 15 U.S.C. § 1603. The right does not apply to transactions that finance the acquisition or initial construction of a home, or to mortgage refinancing with the original creditor with no new advances. See 15 U.S.C. § 1635(e).

Under Section 1635(a), "the obligor shall have the right to rescind" a covered transaction

> until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations * * *, of his intention to do so.

15 U.S.C. § 1635(a). Creditors must "provide, in accordance with regulations * * *, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section." *Ibid.*

Section 1635(a)'s window for exercise of the obligor's rescission right generally does not close until three business days after the later of the date the transaction is consummated or the date when a creditor provides the required forms and material

disclosures. 15 U.S.C. § 1635(a); see 15 U.S.C. § 1635(i) (discussing rescission rights exercised after initiation of foreclosure). Even if the creditor never provides those materials, however, the federal right to rescind does not extend indefinitely.

Instead, under Section 1635(f), which was added to the Act in 1974, "(a)n obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first." 15 U.S.C. § 1635(f); see Act of Oct. 28, 1974, Pub. L. No. 93-495, § 405, 88 Stat. 1517. See also *Jesinoski, et ux., v. Countrywide Home Loans, Inc., et al.*, 135 S.Ct. 790, 190 L.Ed.2d 650 (2015) (*per curiam*) (a borrower exercising his right to rescind under the Truth in Lending Act, 15 U.S.C. § 1635(a), need only provide written notice to his lender within the 3-year period as set forth in § 1635(f), not file suit within that period * * * "[t]he language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind * * * * " "Section 1635(a) nowhere suggests a distinction between disputed and undisputed rescissions, much less that a lawsuit would be required for the latter."). *Id.*

Pursuant to Section 1635(b), the obligor's exercise of the rescission right triggers a series of steps through which the transaction is unwound. See *Beach*, 523 U.S. at 412-413. First, "[w]hen an obligor exercises his right to rescind under [Section 1635(a)], he is not liable for any finance or other charge, and any security interest given by the obligor * * * becomes void upon such a rescission." 15 U.S.C. § 1635(b). Second, "[w]ithin 20 days after

receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Ibid.* Third, "[u]pon the performance of the creditor's obligations under this section, the obligor shall tender" any property the creditor has previously delivered (or "its reasonable value"). *Ibid.*

The Act contemplates the possibility that a court will resolve a dispute between the parties after the obligor sends a notice of rescission. For example, if a creditor brings suit within 20 days of receiving a notice of rescission to challenge the rescission, "[t]he procedures outlined in paragraphs (d)(2) and (3) * * * may be modified by court order." 12 C.F.R. 226.23(d)(4), see also 12 C.F.R. 1026.23(d)(4) and 15 U.S.C. § 1635(b). A creditor who fails to comply with "any requirement under section 1635" is subject to a suit by the obligor for damages, which must be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(a) and (e).

Under the Act, Congress delegated "broad authority" to implement the statute to the Board of Governors of the Federal Reserve System (Board). *Mourning v. Family Publications Svc., Inc.*, 411 U.S. 356, 365 (1973); see, e.g., 15 U.S.C. § 1604(a). The Board promulgated implementing regulations (known as "Regulation Z"), including regulations that specify how notice of rescission is to be provided. See *Mourning*, 411 U.S. at 368-369; 12

C.F.R. Pt. 226; 15 U.S.C. § 1635(a) (borrower may rescind covered transaction "by notifying the creditor, in accordance with regulations * * * , of his intention to do so").

In a 2010 enactment, Congress transferred to the Consumer Financial Protection Bureau (the "Bureau") the authority to implement and promulgate rules under the Act. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061(b)(1), 1100A(2), 1100H, 124 Stat. 2036, 2107, 2113; Designated Transfer Date, 75 Fed. Reg. 57,252 (Sept. 20, 2010) (designating transfer date of July 21, 2011). On December 22, 2011, the Bureau re-promulgated Regulation Z pursuant to that transferred authority, making no relevant substantive changes to the text of the provisions that address the right of rescission. *Truth in Lending (Regulation Z)*, 76 Fed. Reg. 79,768; see 12 C.F.R. Pt. 1026.[4]

Regulation Z provides that, "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business." 12 C.F.R. 226.23(a)(2); see 12 C.F.R. Pt. 226, Apps. H-8, H-9 (model forms for exercising rescission right); 12 C.F.R. 1026.23(a)(2). Regulation

[4] Because all relevant events in this Petition occurred before the effective transfer date, this Petition cites to the Board's regulations when discussing the Junks' rescission under the Act.

Z further provides that, if a creditor fails to deliver the required disclosures, "the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first." 12 C.F.R. 226.23(a)(3); see 12 C.F.R. 1026.23(a)(3).

Next, "[w]hen a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge." 12 C.F.R. 226.23(d)(1); see 12 C.F.R. 1026.23(d)(1). "Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest." 12 C.F.R. 226.23(d)(2); see 12 C.F.R. 1026.23(d)(2).

Finally, under 12 C.F.R. 226.23(d)(3); see 12 C.F.R. 1026.23(d)(3):

> If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the

> creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation." *Ibid.*

"The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order." 12 C.F.R. 226.23(d)(4); see 12 C.F.R. 1026.23(d)(4).

2. 28 U.S.C. § 1331(c)(1)

In 1982, four years after congressional enactment of the 1978 bankruptcy jurisdictional provisions, this Court, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), held that the delegation of the broad grant of jurisdiction to bankruptcy courts, whose judges enjoyed neither life tenure nor salary protection, violated Article III of the Constitution. This decision caused Congress to reconfigure the bankruptcy jurisdictional and procedural provisions in 1984, including the permissive bankruptcy abstention provision.

Unlike much of the 1984 legislation, which substantially altered the 1978 jurisdictional and procedural provisions to comply with this Court's *Northern Pipeline* constitutional ruling, Congress largely restated the permissive abstention provision from the former 28 U.S.C. § 1471(d). *Compare* 28 U.S.C. § 1471(d) (repealed 1984), *with* 28 U.S.C. § 1334(c)(1). There is virtually no legislative history to assist in discerning the meaning of 28 U.S.C. § 1334(c)(1).

District courts are permitted to abstain "in the interest of justice, or in the interest of comity with

State courts or respect for State law." 28 U.S.C. § 1334(c)(1):

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

A Report of the Senate Judiciary Committee included the following remarks on the permissive abstention provision:

> Yet another significant change in the 1978 law-one which again operates to give parties greater authority over the forum in which their claims are be litigated-may be found in the abstention provisions in subsection 1471(h). Abstention by Federal courts in the bankruptcy area is not a new concept. Subsection 1471(d) of existing law provides for a district court or a bankruptcy court, in the "interests of justice," to abstain from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.... S.1013 builds on this existing abstention provision but gives it greater effect by amending it to allow the district court to abstain, not only in the "interest of justice," but also in the "interest of comity with state courts and respect for state law. S. REP. NO. 98-55, at 17-18 (1983).

Several individual senators also discussed the permissive abstention provision on the floor of the

Senate. Senator Thurmond, then Chair of the Senate Judiciary Committee, pronounced the proposal hence: "Paragraph (1) of this section would direct the district judge to abstain from hearing any claim or cause of action, where this is in 'the interest of justice'-which is present law-or in 'the interest or [sic] comity with State courts and respect for State law.' " 130 CONG. REC. 9921 (1983) (statement of Sen. Thurmond). He also remarked: "[T]he abstention provisions of the 1978 act have been strengthened to allow a party who wishes to have a related proceeding based purely on State law heard in State court to have access to that forum." *Id.*

Senator Heflin, a member of the Senate Judiciary Committee, commented on the permissive abstention provision in a similar vein: "Greater authority over the choice of forum is also given to the parties by the abstention provisions of this legislation which amends the existing abstention provision to allow the district court to abstain, not only in the interest of justice, but also in the interest of comity with State courts or respect for State law." 130 CONG. REC. 9924 (1983) (statement of Sen. Heflin).

Courts of appeals are divided in their construction of 28 U.S.C. § 1334(c)(1). Some courts below conclude it codifies the judicially-created *Pullman,*[5] *Burford*[6]

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[5] *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) – "[T]he federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass on them."

[6] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) – *Burford* allows a federal court to dismiss a case only if:

and *Colorado River*[7] abstention doctrines. For example, in *Coker v. Pan Am. World Airways (In re Pan Am. Corp.),* 950 F.2d 839 (2d Cir. 1991), the Second Circuit construed section 1334(c)(1) as "intended to codify the judicial abstention doctrines." *Id.,* at 845.[8] However, several courts of appeals have explicitly rejected this approach, viewing section 1334(c)(1) as statutorily overriding these judge-made

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a) The case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or
b) The adjudication of the case in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

[7] *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) – where parallel litigation is being carried out, particularly where federal and state court proceedings are simultaneously being carried out to determine the rights of parties with respect to the same questions of law.

[8] See also, *In re Middlesex Power Equipment & Marine, Inc.* 292 F.3d 61 (1st Cir. 2002) (citing *Pan American* with approval); *Lindsey v. Dow Chem. Corp. (In re Dow Corning Corp.),* 113 F.3d 565 (6th Cir. 1997) (citing *Pan American* with approval); *In re United States Brass Corp.*, 110 F.3d 1261 (7th Cir. 1997) (citing *Pan American* with approval); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1189 (7th Cir. 1993) (concluding that "discretionary abstention under section 1334(c)(1) is 'informed by principles developed under the judicial abstention doctrines, and courts have usually looked to these well-developed notions of judicial abstention when applying section 1334(c)(1).' ") (citing and quoting *Pan American).*

doctrines.[9] For example, the Eighth Circuit, in *Mathiasen's Tanker Indus., Inc. v. Apex Oil Co. (In re Apex Oil Co.),* 980 F.2d 1150 (8th Cir. 1992), reasoned that it was "obliged to take the statute at its word," and read the word "*or*" in the statute to create two separate grounds for abstention stated in the disjunctive. *Id.*, at 1153. The Eighth Circuit interpreted section 1334(c)(1) literally to permit abstention "in the interest of justice," regardless of the source of law, and thus affirmed a decision of the district court to abstain from hearing personal injury tort claims brought, not under state law, but under the Jones Act and federal maritime law.

Finally, the courts below in this case, implicitly reject the view that Section 1334(c)(1) codifies pre-Code abstention doctrines by applying a multifactor test for discretionary bankruptcy abstention – a test

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[9] See *Eastport Assoc. v. City of Los Angeles (In re Eastport Assoc.)*, 935 F.2d 1071, 1079 & n.7 (9th Cir. 1991). There, the Ninth Circuit rejected an argument that the district court should have abstained under *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), or *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25 (1959), because section 1334(c)(1) overrides these judicial abstention doctrines:

> Section 1334(c)(1) encompasses the bases for all the judicially created abstention doctrines: an interest in justice or comity or respect for state law. If the district court did not abuse its discretion in declining to abstain under the statute, it must not have abused its discretion in declining to abstain under the narrower *Burford* and *Louisiana Power* doctrines.

In re Eastport Assoc., 935 F.2d at 1079 n.7

in which few of its many factors find parallel in nonbankruptcy abstention case law.[10] See *Meritage Homes Corp. v. JPMorgan Chase Bank, N.A.,* 474 B.R. 526, 573 (Bankr. S.D. Ohio 2012), see also *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th Cir. 1990) (setting forth twelve-factor test for discretionary bankruptcy abstention from *In re Republic Reader's Service, Inc.,* 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)), see also

B. Factual Background

On November 3, 2006, the Junks refinanced the mortgage on their primary residence in Okatie, South Carolina with their original lender AHM. The Junks executed a promissory note for the refinance transaction in the amount of $1,200,000 made payable to AHM "a New York corporation (the "Refi Note"). The Refi Note was for an amount $356,250 greater than their original note with AHM. As a part of the November 3, 2006, refinance transaction, the Junks also executed a mortgage with Respondent Mortgage Electronic Registration

[10] Despite the Sixth Circuit's *Lindsey v. Dow Chem. Corp. (In re Dow Corning Corp.),* 113 F.3d 565 (6th Cir. 1997) (citing *Pan American* with approval) the courts below in this case applied the 13-factor test from *Meritage Homes Corp. v. JPMorgan Chase Bank, N.A.,* 474 B.R. 526, 573 (Bankr. S.D. Ohio 2012). The *Meritage* thirteen-factor test deviates from most nonbankruptcy abstention doctrines. Unsettled issues of state law are not requisite to a nonbankruptcy abstention determination. For example, *Burford* abstention may be appropriate where state law involves peculiarly local issues, such as domestic relations, state taxation or criminal law. Moreover, *Colorado River* abstention also does not depend upon a showing of unsettled state law issues.

Systems, Inc. ("MERS") as the refinance mortgagee ("Refi Mortgage").

At the closing of the Refi Note transaction, in violation of the Act, the creditor was never disclosed.[11] In March 2009 within the three-year limitation period set by Section 1635(f), the Junks exercised their right to rescind the transaction and sent AHM as lender and CitiMortgage as AHM's servicer, a notice of rescission pursuant to Section 1635(a). (*In re Junk)*, 512 B.R. 584, 592, *supra.* Since receiving the Junks' notice of rescission over eight years ago in 2009, neither AHM nor CitiMortgage has ever responded to the Junks' rescission notice. *Ibid.*

C. Proceedings Below

On September 11, 2009, the Junks filed a quiet title action in South Carolina state court against

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[11] The debt obligation funds which form the basis for consideration for the Refi Note were received from American Home Mortgage Investment Corporation ("AHMIC"), a Maryland corporation – not AHM, a "New York corporation" as stated in the Refi Note. AHMIC is not disclosed in any of the settlement or closing papers of the refinance transaction. Additionally, the lender's title policy paid for by Junks at the Refi Note transaction insured American Home Mortgage Acceptance, Inc. ("AHMAI"), a Maryland corporation, not the putative lender and allegedly secured party AHM, a "New York corporation," or the creditor that funded the loan, AHMIC. Moreover, the HUD-1 statement listed the refinance lender as "American Home Mortgage, Inc.," which is not the same entity as AHM as listed on the Refi Note, or AHMIC that funded the transaction, or AHMAI as listed on the lender's title policy as having the insurable interest in the title to the property – nor is it even a company within the American Home Mortgage Holdings companies that were liquidated in bankruptcy.

Respondent AHM as the refinance lender and Respondent Mortgage Electronic Registration Systems, Inc. ("MERS") as the recorded mortgagee, along with John Doe unknown parties. The quiet title action sought to enforce the rescission exercised by the Junks in March of 2009 when they notified their creditors in writing of their intention to rescind.

During the pendency of the quiet title action, Respondent Bayview Loan Servicing, LLC ("Bayview") recorded an assignment of the rescinded Refi Note and Refi Mortgage from Respondent MERS and filed a separate action for foreclosure against the property as the owner of the refinance debt obligation and mortgage. On March 19, 2010, Respondent CitiMortgage recorded an assignment of the rescinded note and mortgage from Bayview and moved the state court to substitute CitiMortgage for Bayview as plaintiff stating Bayview sold the rescinded refinance note and rescinded mortgage to CitiMortgage.

On December 6, 2010, CitiMortgage "supplemented" its motion to substitute as plaintiff in the foreclosure action correcting its sworn statement that Bayview sold the debt obligation to CitiMortgage. In its supplemental affidavit, CitiMortgage swore that Bayview never owned the refinance debt obligation and sold only the servicing rights to CitiMortgage and that, despite Bayview's counsel's sworn affidavit that Bayview was the owner of the refinance debt obligation at the time the foreclosure action was filed, CitiMortgage claimed it was the owner and had always been the

owner of the refinance debt obligation at the time Bayview filed the foreclosure litigation.

The state court granted CitiMortgage's motion to substitute as the plaintiff in the foreclosure action and dismissed the quiet title action without prejudice, consolidating the quiet title and foreclosure actions, directing the Junks to bring their quiet title action as a part of their answer to the foreclosure action. Since the inception of litigation against the property and the Junks by Bayview in 2009, there has never been a final non-appealable order in either the state court quiet title action or the foreclosure action.

Petitioners moved to Ohio in August of 2011, and continued the South Carolina litigation from Ohio until the Junks filed for bankruptcy reorganization in the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division, under chapter 11 of the Bankruptcy Code in June 2013. On October 4, 2013, Respondent CitiMortgage filed its proof of claim against the Junks' bankruptcy estate as a secured creditor. Respondent CitiMortgage filed its proof of claim against the Junks' bankruptcy estate as a secured creditor. CitiMortgage did not file a claim as an unsecured creditor.

On October 17, 2013, CitiMortgage amended its proof of claim against the estate. On November 5, 2013, the Junks as debtors in possession, through appointed special counsel, objected to CitiMortgage's amended proof of claim on behalf of the estate, filing an adversary proceeding which is mandatory under the bankruptcy rules when seeking to avoid a lien

under 11 U.S.C. § 544. The adversary proceeding additionally named the other Respondents herein. On January 21, 2014, after the objection to CitiMortgage's claim had been filed by way of the adversary proceeding, CitiMortgage amended its proof of claim a second time, incorporating Bayview's foreclosure complaint from the South Carolina foreclosure action into its amended proof of claim 6-3.

On May 14, 2014, the bankruptcy court held a hearing on Respondent CitiMortgage's, Citi Master Servicing's, Citibank N.A.'s, Jennifer Oakes', MERSCORP Holdings Inc.'s *f/k/a* MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc.'s, motion to dismiss the estate's objection to CitiMortgage's amended claim by way of adversary proceeding or in the alternative, abstain from deciding the objection to CitiMortgage's twice-amended claim and the adversary proceeding under 28 U.S.C. § 1334(c)(1). At the hearing on May 14, 2014, the bankruptcy court admitted evidence and testimony establishing the estate's claim that the Junks had timely exercised their right of rescission under Section 1635(a) of the Act. *(In re Junk)*, 512 B.R. 584, 592, *supra.*

On July 2, 2014, the bankruptcy court issued its Memorandum Opinion And Order On (A) Motion Of CitiMortgage, Inc. For Relief From The Automatic Stay And (B) Motions For Dismissal Of, Or Abstention From, Adversary Proceeding (the "Abstention Order") in the main bankruptcy case and the adversary proceeding. The Abstention Order ignored the estate's claims under §§ 1635(a)

and (b) and granted CitiMortgage's motion to lift the stay for cause and for permissive abstention, holding that enforcement of the Refi Note and Refi Mortgage and the issue as to whether the Junks were in default and the estate lacked equity in the property, were state law issues that should not be decided by the federal courts pursuant to 28 U.S.C. § 1334(c)(1).

Petitioners moved for stay of the bankruptcy proceedings pending appeal and timely appealed the Abstention Order to United States District Court for the Southern District of Ohio, Eastern Division. The district court denied the motion to stay the bankruptcy proceedings pending appeal.

While the Abstention Order appeal was pending, the Junks, through special counsel as debtors in possession, moved the bankruptcy court pursuant to Fed. R. Civ. P. 60 to vacate the July 2, 2014 opinion based on new evidence from CitiMortgage.[12] New evidence was received in August 2014, when CitiMortgage, responding to an information request pursuant to C.F.R. 12 § 1024.36, contradicted its pleadings from state court that were incorporated into its amended proof of claim 6-3 and which were admitted into the record of, and relied upon by, the bankruptcy court in its Abstention Order.

Pursuant to C.F.R. 12 § 1024.36, CitiMortgage replied that neither CitiMortgage nor Bayview had ever been the obligee of the Junks' refinance debt

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[12] The Junks as debtors in possession also moved the district court for a stay of the appeal a second time while the bankruptcy court decided the estate's Fed. R. Civ. P. 60 motion. The district court denied the motion to stay in its August 28, 2015 Opinion at fn1.

obligation or Refi Mortgage at any time during the state court litigation or the bankruptcy court litigation against the property. As a result, the record for the Abstention Order was based on almost five years of state court pleadings with Bayview first and CitiMortgage second, falsely claiming to be the obligee of the refinance debt obligation and Refi Mortgage that were incorporated into CitiMortgage's amended proof of claim 6-3 and the record relied on by the bankruptcy court. The bankruptcy court denied the motion.

During the pendency of the appeal of the Abstention Order, petitioners were converted by the bankruptcy court from chapter 11 to chapter 7 and a case trustee was appointed (the "Conversion Order"). Petitioners timely appealed the Conversion Order to the United States District Court for the Southern District of Ohio, Eastern Division where the district court consolidated the Abstention Order appeal and the Conversion Order appeal. Petitioners waived their right to a discharge in September of 2016.

On August 28, 2015, Respondent the Honorable Edmund A. Sargus, Jr., Chief Judge, United States District Court, Southern District of Ohio, Eastern Division, issued the final judgement in the consolidated appeal affirming the bankruptcy court's decision to abstain, finding "Daniel also sent a notice to CitiMortgage, the servicer of the loan, purporting to rescind the Note and Mortgage. (July 2 Opn. & Order at 7.)" App. 3, and holding

> [l]ast, the Court notes that Junks repeatedly press that the Note and Mortgage are unenforceable because the Junks *purportedly*

> rescinded the subject refinancing transaction pursuant to the Truth in Lending Act. But, for the reasons stated above, the bankruptcy court correctly left the enforceability of the Note and Mortgage for the South Carolina courts to decide[] (the "Consolidated Judgment") (emphasis added) App. 19-20.

The Junks moved for a stay of the bankruptcy proceedings and timely appealed the Consolidated Judgment to the United States Court of Appeals for the Sixth Circuit. The circuit court denied the motion to stay the bankruptcy proceedings pending appeal. The circuit court upheld the Consolidated Judgment without ruling on the Abstention Order stating it was statutorily precluded from reviewing the district court's ruling on abstention pursuant to 28 U.S.C. § 1331(d). The Junks moved the circuit court for a rehearing. The circuit court denied the motion for rehearing. The Junks then moved this Court for a stay of the mandate. This Court denied the motion to stay the mandate. The mandate issued for this case July 19, 2016.

On September 13, 2016, the chapter 7 trustee filed his Motion Of Chapter 7 Trustee For An Order Authorizing And Approving (1) The Compromise Of Claims With CitiMortgage, Inc., Its Affiliates, Predecessors Or Successors In Interest, And (2) The Transfer Of Real Estate Located At 181 Oldfield Way, Bluffton, South Carolina And Lot 50 Adjacent Thereto To CitiMortgage, Inc. along with an injunction against the Junks ("Compromise and Transfer Motion"). Importantly, the chapter 7 trustee and the bankruptcy court both recognized

the estate's claims under Sections 1635(a) & (b) as the Compromise and Transfer Motion allowed CitiMortgage to buy back the estate's rescission claims under the Act. In other words, the chapter 7 trustee and the bankruptcy court recognized and acknowledged the estate's claims under the Act against CitiMortgage and then allowed CitiMortgage to cure its violations of the Act by buying them back from the estate and enjoining the Junks from making any further claims against CitiMortgage for its violation of the Act.

Petitioners filed a petition for a writ of prohibition in the United States Court of Appeals for the Sixth Circuit arguing the mandate in this case required a state court order finally ending the South Carolina litigation before the bankruptcy court regained constitutional authority to approve any settlement of the adversary proceeding and CitiMortgage's claim that was based on reformation of the mortgage, the Junks being in default, the estate lacking equity in the property with the note and mortgage being enforceable against the Junks and the estate. Petitioners' writ of prohibition was denied, stating petitioners still had a remedy to appeal once the bankruptcy court approved the trustee's Compromise and Transfer Motion.

The trustee amended his motion ("Amended Compromise and Transfer Motion") and Petitioners objected to the Amended Compromise and Transfer Motion making a higher offer to the trustee than the amount CitiMortgage offered for the estate's claims and property. A hearing was held on March 23, 2017, wherein CitiMortgage matched the petitioners'

offer and the Amended Compromise and Transfer Motion with its injunction against the Junks was approved by the bankruptcy court.

The Junks moved the bankruptcy court for a stay of the bankruptcy proceedings pending appeal and timely appealed the order to the Bankruptcy Appellate Panel of the United States Court of Appeals for the Sixth Circuit ("BAP"). The bankruptcy court denied the motion to stay. Petitioners then moved the BAP for an emergency stay of the bankruptcy proceedings, which the BAP denied. On May 17, 2017, the chapter 7 case trustee and the Respondents herein that appeared in the state court action withdrew the foreclosure complaint against the property in South Carolina without prejudice by stipulation – not by order of the state court despite such requirement under the South Carolina rules and the case mandate.

On June 6, 2017, after the BAP denied a stay of the bankruptcy proceedings, the chapter 7 trustee and CitiMortgage moved the BAP to dismiss the appeal as moot pursuant to 11 U.S.C. § 363(m). The BAP granted the motion and dismissed the appeal as statutorily moot under § 363(m). On August 14, 2017, the Junks filed a petition for a writ of mandamus in the Sixth Circuit to vacate the Amended Compromise and Transfer Motion with its injunction and to enforce the mandate that required a state court order finally ending the state court litigation before the adversary proceeding could be settled. The circuit court denied the petition for a writ of mandamus on October 23, 2017, without an opinion.

REASONS FOR GRANTING THE PETITION

I. THE COMMITMENT TO THE SEPARATION OF POWERS REQUIRES THE PEITITION BE GRANTED

Congress made the means for exercising the rescission right under the Act straightforward, not costly and complex. Congress enacted the Act's rescission provisions in response to fraudulent home-improvement schemes in which homeowners were "trick(ed) * * * into signing contracts at exorbitant rates, which turn(ed) out to be liens on the family residences." 114 Cong. Rec. 14,388 (1968) (statement of Rep. Sullivan); see *id.* at 14,384 (statement of Rep. Patman); see also *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 363 (1973) (citing H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967)). The right of rescission, which is broad and generally unwaivable where it applies, is a "vitally important" part of Congress's effort to combat such practices. 114 Cong. Rec. at 14,388 (statement of Rep. Sullivan); see *Barrett v. JP Morgan Chase Bank*, 445 F.3d 874, 881-882 (6th Cir. 2006). In keeping with Congress's overarching purpose to make things clearer and simpler for borrowers, the exercise of the rescission right is intended to be straightforward. See 15 U.S.C. 1635(a) and (b); see also 114 Cong. Rec. at 14,390 (statement of Rep. Sullivan) (explaining that conferees rejected a proposal to require rescission notices to be sent by registered mail because they wanted to "keep[] a strong, workable provision").

The plain text of 15 U.S.C. § 1635(a) and this Court's unanimous decision in *Jesinoski, supra*, leaves no room for equitable discretion in this case –

the Junks exercised their right of rescission under the Act within three years of the consummation of their November 2006 refinance loan on their primary residence. *(In re Junk)*, 512 B.R. 584, 592 (S.D. Ohio 2014).

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [its] announcement of the rule. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993)

The bankruptcy court, sitting in equity, differed with Congress and this Court on whether the Junks' exercised their rescission right for the Refi Note and mortgage. On appeal, the district court, ignoring this Court's holding in *Jesinoski, supra,* affirmed the bankruptcy court's decision in equity to abstain holding that the effect of the Junks' rescission under the Act was a state law issue not a federal law issue.

> Last, the Court notes that Junks repeatedly press that the Note and Mortgage are unenforceable because the Junks *purportedly* rescinded the subject refinancing transaction pursuant to the Truth in Lending Act. But, for the reasons stated above, the bankruptcy court correctly left the enforceability of the Note and Mortgage for the South Carolina courts to decide[] (emphasis added). App 19-20.

There is nothing purported about the Junks exercising their right of rescission under the Act four years prior to filing for protection under the bankruptcy code. The moment that a district court judge sitting in equity begins to consider whether a valid statute must be obeyed, the judicial system departs from the careful boundaries that have been maintained in this country over two centuries and invades the core function of the legislature. "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U.S. 153, 195 (1978).

Neither the bankruptcy court nor the district court had the constitutional authority to exercise equitable powers so as to permit CitiMortgage's violations of the Act, specifically 15 U.S.C. § 1635(b), to continue against the estate and petitioners under 28 U.S.C. § 1334(c)(1), pursuant to principles of federalism and state comity. State law is inapposite to the Junks' exercise of their right of rescission under the Act. The purpose and language of the Act voided the Refi Note and Refi Mortgage *ab initio* and requires CitiMortgage's twice-amended claim against the Junks' bankruptcy estate be declared unsecured and disallowed as a matter of law.

"When an obligor exercises his right to rescind under [Section 1635(a)], he is not liable for any finance or other charge, and any security interest given by the obligor * * * *becomes void upon such a*

rescission." 15 U.S.C. § 1635(b) (emphasis added). Second, "[w]ithin 20 days after receipt of a notice of rescission, the creditor *shall* return to the obligor any money or property given as earnest money, downpayment, or otherwise, and *shall* take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Ibid.* (emphasis added). Third, "[u]pon the performance of the creditor's obligations under this section, the obligor shall tender" any property the creditor has previously delivered (or "its reasonable value"). *Ibid.*

Section 1635(b) confirms that sending the written notice described in Section 1635(a) is not simply a preliminary step on the way to exercising the "right of rescission." Rather, provision of the notice *constitutes* the exercise of the right, with the operative legal consequences that timely rescission entails.

Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. *TVA v. Hill*, 437 U.S. 153, 194 (1978), see also *Harper*, 509 U.S. 97 (1993), *supra*. The district court's conscious choice to ignore *Jesinoski*, *supra*, and the Act with its congressional mandates under Sections 1635(a) and (b), allowing CitiMortgage to continue its violations of the Act against the estate and the Junks, was an impermissible usurpation of power under constitutional principles of the separation of powers violating the tripartite nature of our Constitution.

II. PETITIONERS ARE ENTITLED TO RELIEF PURSUANT TO 28 U.S.C. § 1651(a)

Federal courts have the power to issue writs of mandamus or prohibition under the All Writs Act, 28 U.S.C. § 1651(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)).

In aid of its appellate jurisdiction and the commitment to the separation of powers, this Court should grant the Petition and issue the Writ. Petitioners have exhausted all other remedies available to them since the mandate on the Abstention Order issued in this case on July 2, 2014. Under 28 U.S.C. 1334(d), Congress declared the bankruptcy court's decision to abstain may not reviewed by this Court under Section 1254 of Title 28. The result is a district court judgment that ignores this Court's unanimous holding in *Jesinoski*, and thwarts congressional mandates under 15 U.S.C. § 1635(a) and (b), finding the Junks' notice of rescission was a "purported[]" rescission that has yet to occur.

The district court's decision constitutes a remarkably direct and constitutionally impermissible extension of the judicial function into

the legislative process, violating the tripartite nature of our Constitution amounting to usurpation of Congress' power under Article II. The district court's affirmation of the bankruptcy court's failure to recognize the estate's rescission claims under the Act impermissibly deprives the estate of the Act's congressionally mandated protections under the guise of equity.

This action is timely. The timeliness of a petition for a writ of mandamus is governed by the equitable doctrine of laches. *See United States (ex rel. Arant) v. Lane*, 249 U.S. 367, 371 (1919) ("[Mandamus] * * * [is] subject to the equitable doctrine of laches."); *United States v. Olds*, 426 F.2d 562, 566 (3d Cir. 1970) ("[M]andamus must be sought with reasonable promptness, [but] [t]here is no inflexible rule on timeliness ..."). *See also* 9A Moore's Federal Practice p 221.03 at 21-4. The Junks have been diligent in pursuing their rights. Although the Consolidated Judgment was issued in August of 2015, 28 U.S.C. § 1334(d) precludes appellate review. It has taken over two years for petitioners to exhaust all other remedies, with the final denial for relief coming less than 90 days ago, on October 23, 2017, when the Sixth Circuit denied the Junks' petition for a writ of mandamus seeking to enforce the mandate in this case.

Petitioners have standing to seek relief from this Court. "Only when the order directly diminishes a person's property, increases his burdens, or impairs his rights will he have standing to appeal [an action under the bankruptcy code]." *Fid. Bank, Nat'l Ass'n v. M.M. Group, Inc.*, 77 F.3d 880, 882 (6th Cir. 1996).

This standing requirement is "more limited than Article III standing." *Moran v. LTV Steel Co., Inc. (In re LTV Steel Co., Inc.),* 560 F.3d 449, 452-53 (6th Cir. 2009). The Consolidated Judgment not only impairs petitioners' rights to their property, it deprives them of any surplus remaining in their estate upon a sale of the property by the trustee.

Under the Act, the benefit to the estate and its unsecured creditors is highly significant. CitiMortgage is the only secured creditor of the estate. CitiMortgage did not file an unsecured claim. Under the Act, CitiMortgage's claimed security is void against the estate under Section 1635(b) as a result of the Junks' timely exercising their rescission right under Section 1635(a) four years prior to filing for bankruptcy protection without any response from CitiMortgage.

With no secured claims against the estate, it is undisputed that the value of the property after sale by the chapter 7 trustee would result in the unsecured creditors receiving 100% of their claims with a surplus remaining in the estate after all claims and expenses have been paid which would revert back to the Junks. As a matter of law, CitiMortgage has no claim against the estate or petitioners as a secured creditor.

CONCLUSION

The joint petition for a writ of mandamus should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DANIEL L. JUNK, et al.,
Appellants, Case No. 2:14-cv-1428

v.

CITIMORTGAGE, INC., et al.,
Appellees.
CHIEF JUDGE EDMUND A. SARGUS, JR.

IN RE: DANIEL L. JUNK, et al.

Case No. 2:15-cv-377
CHIEF JUDGE EDMUND A. SARGUS, JR.

OPINION & ORDER

Daniel and Christine Junk appeal two decisions from the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division. For several years, the Junks have engaged in litigation in South Carolina's courts relating to a house they purchased there after they stopped making payments on their mortgage note. They attempted to quiet title in the property in themselves and have defended against a foreclosure action. After moving to Ohio, and while the South Carolina litigation

remains pending, the Junks commenced this Chapter 11 bankruptcy case and adversary proceeding, contending, as they have in state court, that CitiMortgage (the plaintiff in the state court foreclosure action) cannot enforce the Note and has no enforceable mortgage on their real property. CitiMortgage moved the bankruptcy court to grant it relief from the automatic stay that took hold upon the Junks' filing their bankruptcy petition and abstain from hearing the adversary proceeding.

The first bankruptcy court decision, dated July 2, 2014, granted both requests, finding "cause" existed under 11 U.S.C. § 362(d)(l) in their main case (No. 13-55139) warranting relief from the automatic stay to allow pending South Carolina litigation to proceed to finality. Then, the bankruptcy court decided to abstain from considering the Junks' adversary proceeding (Adv. Proc. No. 13-02390) in light of the pending South Carolina litigation that had been ongoing since 2009.

After this decision, the bankruptcy court issued a show cause order directing the Junks to explain why a Chapter 11 trustee should not be appointed, or why the case should not be dismissed or converted to Chapter 7. (ECF No. 13-3.) At the show cause hearing on January 9, 2015, the court found "cause" existed to convert the case to Chapter 7, and that it was in the best interests of the creditors to do so. (See ECF No. 13-42.)

The Junks appeal the July 2, 2014 and January 9, 2015 decisions in separately filed cases in this Court.

For the reasons that follow, both decisions are **AFFIRMED**.

I. Appeal of July 2, 2014 Order (Case No. 2:14-cv-1428)

In November 2006, the Junks executed a $1.2 million Note in favor of American Home Mortgage and signed a mortgage that month identifying MERS as the mortgagee as nominee of American Home Mortgage. In March 2009, the Junks stopped making payments on the loan. (July 2, 2014 Opn. & Order at 9; ECF No. 5-54.) After this, they sent a written request for documents to American Home Mortgage, warning that no response would confer upon the Junks the power of attorney to work on the mortgage company's behalf. Daniel also sent a notice to CitiMortgage, the servicer of the loan, purporting to rescind the Note and Mortgage. (July 2 Opn. & Order at 7.) In April 2009, Daniel, purportedly acting as an agent of American Home Mortgage, signed and filed documents with the record of Beaufort County, South Carolina, stating that the mortgage was released and satisfied and that the entire debt secured by the Mortgage was paid in full. (*Id.* at 12.)

In September 2009, the Junks initiated a quite title action in Beaufort County Court of Common Pleas, Fourteen Judicial Circuit, South Carolina. A month later, Bayview Loan Servicing, LLC, the servicer of the subject mortgage loan at the time, initiated a foreclosure action against the Junks in the Beaufort County Court of Common Pleas,

Fourteenth Judicial Circuit, South Carolina. The Judicial Officer presiding over the quiet title action and the foreclosure action – the Beaufort County Master-in-Equity – dismissed the quiet title action without prejudice to the Junks asserting claims in the foreclosure action and substituted CitiMortgage as the plaintiff in the foreclosure action in place of Bayview. (July 2 Opn. & Order at 8.) Later, the Master-in-Equity dismissed a third-party complaint the Junks filed in the foreclosure action against more than 20 defendants and dismissed with prejudice each of the counterclaims the Junks filed against CitiMortgage in the foreclosure action. (*Id.* at 8.)

This "state court litigation took five hearings, several orders, and approximately two years, leaving only the counts asserted in the foreclosure complaint and the defenses asserted by the Junks to be decided by the Master-in-Equity." (July 2 Opn. & Order at 8.) Undeterred, the Junks filed multiple appeals, including an appeal of an order the appellate court previously found to be not appealable, delaying the adjudication of CitiMortgage's foreclosure action. (*Id.*) Some of the appeals were dismissed and others remained pending when the Junks filed their bankruptcy petition. (*Id.*) Then, the Junks commenced this adversary proceeding, where they rehash the same arguments made m South Carolina-that the Note and Mortgage are unenforceable. (*Id.*)

In its July 2, 2014 Order, the Bankruptcy Court granted CitiMortgage's motion for relief from automatic stay. Then, the court elected to abstain

from deciding the issues in the Junks' adversary proceeding. The Junks appeal these decisions.

a. Relief from Automatic Stay

The Junks appeal the bankruptcy court's decision to lift the automatic stay "for cause" under § 362(d)(l) as to the South Carolina property. [1] The Court reviews this equitable determination for an abuse of discretion. *See In re Nichols*, 440 F.3d 850, 856 (6th Cir. 2006); *In re Federated Dep't Stores, Inc.*, 328 F.3d 829, 836 (6th Cir. 2003).

Upon filing a petition in bankruptcy, an "automatic stay" under 11 U.S.C. § 362(a) takes hold and stops creditors from pursuing collections against the debtor, with exceptions. It also halts actions against property in which the debtor has an interest.

According to the Junks, CitiMortgage lacks the necessary standing to seek relief from the stay. Under 11 U.S.C. § 362(d)(l), the request to lift the stay must come from a "party in interest." A "creditor" of the debtor is a party in interest in a Chapter 11 case. See 11 U.S.C. § 1109(b). The term "creditor" includes an "entity that has a claim against the debtor[,]" 11 U.S.C. § 101(10), and a '"claim against the debtor'" includes claim against

[1] The Junks moved for an order staying this appeal (ECF No. 17) until the bankruptcy court weighs in on their Fed. R. Civ. P. 60 motion to vacate its July 2, 2014 opinion. The bankruptcy court denied this motion on March 2, 2015 (Case No. 13-ap-02390; ECF No. 330), and the Junks' motion (ECF No. 17) is therefore **DENIED**.

property of the debtor[,]" 11 U.S.C. § 102(2), regardless of whether the claim is disputed, 11 U.S.C. § 101(5)(A). A claim includes the "right to payment" and the "right to an equitable remedy for breach of performance if such breach gives right to a right of payment," regardless of whether such right is disputed or undisputed. 11 U.S.C. § 101(5)(A) and (B). The "right to foreclose on the mortgage can be viewed as a ' right to an equitable remedy ' for the debtor's default on the underlying obligation." *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991).

Here, CitiMortgage qualifies as a "creditor" because it holds the Note and Mortgage and pursued the foreclosure action in South Carolina before the Junks filed their bankruptcy petition. Though the Junks object to CitiMortgage's right to foreclose, a party in interest's "claim" includes a right to payment or a right to an equitable remedy regardless of any dispute as to such right. *See Johnston v. JEM Dev. Co. (In re Johnston)*, 149 B.R. 158, 161 (B.A.P. 9th Cir. 1991) (finding holder of a right to payment qualified as "creditor" even though the right was in dispute).

The Junks insist that CitiMortgage lacks standing because it is not the "owner" of the Note. (Appellant Br. at 18; ECF No. 7.) But this argument misses the relevant standard. "In order to have standing to seek relief from stay under § 362(d)(1) to continue the foreclosure action, CitiMortgage need only have a colorable, or plausible, interest in the Note and the [South Carolina] property." (July 2, 2014 Opn. & Order at 37 (citing *In re Rice*, 462 B.R. 651, 656-57

(B.A.P. 6th Cir. 2011).) *See also In re Castro*, 503 F. App' x 612,615 (10th Cir. 2012) (holding that assignee was a "party in interest" with standing under § 362(d) where it had "a colorable claim of a lien on property of the estate"); *In re Lira*, No. 6:12-35965, 2015 WL 4641600, at *6 (B.A.P. 9th Cir. Aug. 4, 2015) ("Wells Fargo had a 'colorable claim' to foreclose on the Property, which made it a party in interest under § 362(d)."). Based on the documents evidencing an indorsement of the Note to CitiMortgage and an assignment of the Mortgage to CitiMortgage, the bankruptcy court correctly concluded that CitiMortgage has at least a colorable interest in the Note and Mortgage on the South Carolina property. Bolstering this conclusion, the South Carolina Master-in-Equity substituted CitiMortgage as the plaintiff in the foreclosure action based on the assignment of the Mortgage from Bayview to CitiMortgage and CitiMortgage's possession of the original Note bearing an indorsement to CitiMortgage. State courts will determine any ownership issues; for present purposes, it is enough to conclude that not owning the note would not extinguish CitiMortgage's colorable claim. See S.C. Code Ann. § 36-3-301 ("A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.").

The Junks press that a mortgage is not a negotiable instrument governed by the UCC. But a "promissory note secured by a real estate mortgage" IS "a negotiable instrument." *Swindler v.*

Swindler, 584 S.E.2d 438, 439, 440 (S.C. Ct. App. 2003). Still, the Junks protest "only the terms of the mortgage were sued upon in state court;" the "terms of the note are not sued upon." (Appellant Br. at 17.) This misses the situation here: CitiMortgage is suing for the debt that is evidenced by the Note. If a borrower defaults on the obligation to pay as evidenced by the Note, then the lender may proceed against the collateral as secured by the Mortgage in a foreclosure action. See *Bank of Am., NA. v. Draper*, 746 S.E.2d 478, 481 (S.C. Ct. App. 2013) ("[T]he party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt.") (internal quotation marks omitted).

Nevertheless, the Junks assert that CitiMortgage waived its right to enforce the Note when it elected in the foreclosure action to waive its right to any deficiency judgment. Not so. "A mortgagee who chooses to forego a deficiency judgment simply elects to rely solely on the mortgage security for satisfaction of his debt; in other words, he relinquishes only his right to pursue assets of the mortgagor over and above those covered by the mortgage." *Sellars v. First Colonial Corp.*, 280 S.E.2d 805, 806 (S.C. 1981). CitiMortgage sought to establish default under the Note and never waived the right to its enforcement.

The Junks maintain that CitiMortgage is judicially estopped from acting as a holder, and not owner, of the Note because CitiMortgage was successfully substituted into the foreclosure action

as "owner of the note." (Appellant Br. at 20; ECF No. 7.) But the Junks forfeited this argument by not making it to the bankruptcy court. *Greco v. Livingston Cnty.*, 774 F.3d 1061, 1064 (6th Cir. 2014). ("This new argument trips over the forfeiture rule, which tells us to correct errors raised and addressed below, not to entertain new claims raised for the first time on appeal."). Though the Junks mentioned "judicial estoppel" in their Objection to CitiMortgage's Motion for Relief from the Automatic Stay, it was not in the context they argue now. (See Objection at 5 n.4; ECF No. 2-83.) And even if this argument was not forfeited, the Court would nevertheless find in its discretion judicial estoppel inappropriate here. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) ("[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion.") (internal quotation marks omitted); *Eckstein v. Cincinnati Ins. Co.*, 469 F. Supp. 2d 455, 463 (W.D. Ky. 2007) ("Judicial estoppel is an extraordinary remedy to be invoked when a party' s inconsistent behavior will otherwise result in a miscarriage of justice."). CitiMortgage's allegations in South Carolina that it is the "owner and holder" of the Note is not "clearly inconsistent" with its assertion here to be the "holder" of the Note, particularly when a "holder" can enforce the Note. *See Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008) ("[I]t is well-established that at a minimum, a party's later position must be clearly inconsistent with its earlier position[] for judicial estoppel to apply.") (internal quotation marks omitted). The bankruptcy court needed to determine only whether CitiMortgage had

a "colorable" interest in the Note and Property, which it found existed.

Last, the Court notes that the Junks appear to decline any challenge that may be levelled against the bankruptcy court's determination that the relevant factors made relief from the automatic stay appropriate. To the extent that they do push any such challenge, however, the Court discerns no error in the bankruptcy court's analysis.

b. Abstention

The Junks assert that the bankruptcy court erred in abstaining from the issues raised in the adversary proceeding. Like the decision to lift the stay, the Court reviews the decision to abstain for an abuse of discretion. *Antioch Co. Litig. Trust v. Hardman*, 438 B.R. 598, 603 (S.D. Ohio 2010). The basis for permissive abstention lies in 28 U.S.C. § 1334(c)(l), which provides:

> Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In deciding whether to exercise permissive abstention, courts analyze several factors. *Meritage Homes Corp. v. JPMorgan Chase Bank, N A.*, 474

B.R. 526, 573 (Bankr. S.D. Ohio 2012) (listing factors). The Junks zero in on two that they allege the bankruptcy court misapplied.

First, the Junks claim that unsettled state-law claims do not predominate over bankruptcy issues. (Appellant Br. at 26.) The Court disagrees. The claims at the heart of the adversary proceeding – the enforceability of the Note and Mortgage – hinge on issues of South Carolina law, not bankruptcy law. Moreover, those issues implicate strong state interests. *See Blake v. Wells Fargo Bank, NA*, 917 F. Supp. 2d 732, 738 (S.D. Ohio 2013) ("[A] state foreclosure matter implicates important state interests."). And, South Carolina has not yet resolved some of the issues raised by the Junks. *See Lindsey v. Dow Chem. Co. (In re Dow Corning Corp.)*, 113 F.3d 565, 571 (6th Cir. 1997) ("[T]he primary determinant for the exercise of discretionary abstention is whether there exist[] unsettled questions of state law.") (internal quotation marks omitted). For example, the Junks argue that the Mortgage is invalid because American Home Mortgage was never a member of the MERS electronic mortgage registration system. But this Court, the bankruptcy court, and apparently the parties, are unaware of any South Carolina decisions or statutes on this point. And though the Junks argue that the securitization process rendered the Note and Mortgage unenforceable, this too has not been addressed by a South Carolina court.

Second, the Junks assert that the bankruptcy court erred in concluding that they were forum

shopping. The Court agrees with the bankruptcy court' s finding that "[t]he evidence that the Junks were forum shopping when they commenced this adversary proceeding appears overwhelming". (July 2 Opn. & Order at 64; ECF No. 5-54.) The Junks raised the same claims in South Carolina in their quiet title action, and after dismissal of that case, raised them anew in their answer and counterclaim in the foreclosure action. Then, the Junks pursued appeals in South Carolina, where they received more unfavorable rulings before filing their bankruptcy petition and commenced the adversary proceeding. (*Id.* at 65.) In the adversary proceeding, the Junks are taking positions that are inconsistent with orders entered by the Master-in-Equity in South Carolina. (Id. at 66.) These actions bear the mark of forum shopping. The factors identified by the bankruptcy court weigh in favor of abstention in light of the pending state-court litigation.

The Junks' numerous other arguments deserve quick mention. They appear to argue that the Bankruptcy Court erred in not ruling on their claims objection and allowing CitiMortgage's Proof of Claim because the Note was first indorsed in blank and then specially endorsed to CitiMortgage. But for the reasons detailed above and by the bankruptcy court, the more appropriate route is for the state court to decide whether this renders the Note unenforceable. Same with the Junks' position that that the Note's indorsement on behalf of American Home Mortgage was forged. As for the argument that the bankruptcy court should not have allowed Proof of Claim 6-3

because it did not include an escrow statement under Bank. R. 3001(c)(2), that rule does not apply here because the property at issue is not the Junks principal residence.

The Junks' last argument (in this appeal) is that the bankruptcy court abused its discretion in concluding that Daniel Junk can practice law as an unlicensed attorney in the South Carolina litigation and represent the bankruptcy estate' s interest, including co-debtor Christine Junk. (Appellant Br. at 28.) That is not what the bankruptcy court said, however. The Junks argued to that court that Daniel could not participate in the state-court appeal because he became "Daniel L. Junk, as Debtor-in-Possession," and so was no longer a proper party to the pending appeal, "rendering abstention a legal impossibility." (July 2, 2014 Opn. & Order at 72-73.) The bankruptcy court observed that the Junks were debtors in possession, and as such, "have all the rights, other than the right to compensation under section 330 of this title, and powers ... of a trustee serving in a case under this chapter." 11 U.S.C. § 1107(a). A trustee has the right and power to defend against litigation occurring outside the bankruptcy court when relief from stay is granted. Thus, the bankruptcy court noted that the Junks are authorized to participate in the litigation in South Carolina. (See July 2, 2014 Opn. & Order at 74; see also *id.* at 53 ("Mr. Brunner incorrectly argued that Mr. Junk, as debtor in possession, is precluded from continuing to *represent himself* in the South Carolina litigation because he is unlicensed to practice law. As explained further below, as a debtor

in possession, Mr. Junk has the rights and powers of a trustee. Trustees may represent themselves in Chapter 11 cases ... as well as under other chapters of the Bankruptcy Code. Because they are representing themselves, they may do so even if they are not attorneys. Thus, Mr. Junk would not be prohibited from representing himself merely because he is not a licensed attorney.") (emphasis added and internal citation omitted). No error occurred here.

The Court **AFFIRMS** the bankruptcy court's July 2, 2014 order.

II. Appeal of January 13, 2015 Order (Case No. 2:15-cv-377)

Next, the Junks appeal the bankruptcy court's order converting their Chapter 11 case to Chapter 7. (*See* Jan. 13, 2015 Opn. & Order; ECF No. 13-42.) Section 1112(b) of the Bankruptcy Code provides that once "cause" is established, the court must dismiss the Chapter 11 proceeding or convert it to Chapter 7 in light of the best interests of creditors and the estate. I 1 U.S.C. § 1 l 12(b).

CitiMortgage, arguing that such "cause" existed, moved the bankruptcy court to dismiss or convert the Junks' case pursuant to§ 1112(b). (Show Cause Order at l; ECF No. 13-3.) At a status conference on this motion, the Junks conceded that they had not been insuring their interest in the property and had not been paying real estate taxes. (Case No. 2:13-bk-55139; Proceeding Memo, ECF Entry Dated Oct. 21, 2014.) The bankruptcy court then sua sponte issued

a show cause order, providing additional grounds to dismiss or convert the case under § 1112(b). (Show Cause Order at 2.)

After issuing this show cause order, the bankruptcy court converted the Junk's case to Chapter 7. The bankruptcy court grounded this decision on several points, finding that the Junks: oversaw a "substantial or continuing loss to the estate " with "an absence of reasonable likelihood of rehabilitation," failed to maintain appropriate insurance, filed inaccurate operating reports with the bankruptcy court, did not pay post-petition taxes on the property and statutory fees to the United States Trustee, disobeyed the Bankruptcy Code by selling jewelry and borrowing money without securing requisite court authority, and showed a "lack of candor." (Jan. 13, 2015 Opn. & Order at 5-12; ECF No. 13-42.) In sum, the bankruptcy court found that:

> This case is one of the most egregious instances I've seen of debtors seeking the protections afforded by the Bankruptcy Code, most importantly, the automatic stay, without coming remotely close to living up to the fiduciary obligations that come along with those protections, including the duty to make full disclosure and to be candid with the bankruptcy court. The Junks clearly failed to file true and accurate operating reports, despite signing the reports under the penalty of perjury. So, in sum, I think there are ample grounds to dismiss or convert this case.

(Opn. & Order at 12; ECF No. 13-42.) After weighing the interests of the creditors and the estate, the bankruptcy court determined that conversion was warranted.

The Junks now appeal that order, though they decline to challenge any of the bankruptcy court's factual findings of "cause" under § 1112(b). Indeed, they acknowledge that "cause" existed for conversion or dismissal of their Chapter 11 case. (See Appellant Br. at 22; ECF No. 15 ("The bankruptcy court began the hearing with the Motion. Joint Appellants did not object to the Motion and conceded cause existed for dismissal or conversion.").) And, they refrain from challenging the bankruptcy court's decision to convert rather than dismiss their case. Instead, the Junks assert that CitiMortgage lacked standing to bring its motion to dismiss and that the bankruptcy court violated their due process rights by denying them counsel at the show cause hearing and sequestering Christine Junk from the courtroom during Daniel's testimony. As detailed below, these arguments fail.[2]

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[2] CitiMortgage filed a Motion to Dismiss Appeal (ECF No. 16), arguing that the Junks lacked appellate standing in this bankruptcy case, which is "more limited than Article III standing or the prudential requirements associated therewith." *In re Troutman Enterprises, Inc.*, 286 F.3d 359, 364 (6th Cir. 2002). The Court assumes that that the Junks have appellate standing in this bankruptcy case. Though the Supreme Court disfavors "hypothetical jurisdiction" in the Article III context, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-97 (1998), the bankruptcy appellate standards is a prudential, non-statutory requirement, *In re Godon, Inc.*, 275 B.R. 555,

a. Standing

Like their first appeal, the Junks argue that CitiMortgage lacked standing to bring a motion to dismiss because it was not a "party in interest." Section 1112(b)(l) of Title 11 provides:

> on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

But the bankruptcy court did not need a motion by a "party in interest" to order conversion. Under 11 U.S.C. § 105(a) – as acknowledged by the Junks – the bankruptcy court has independent authority to consider the matters at hand and sua sponte order conversion or dismissal upon notice to the parties in

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565 (Bankr. E.D. Cal. 2002), and "[u]nlike certain other statutory or constitutional jurisdictional questions, the resolution of a sticky prudential standing question may be bypassed in favor of deciding the case on the merits when it's clear that the appellant will lose there anyway," *In re Krause*, 637 F.3d 1160, 1168 (10th Cir. 2011). Thus, CitiMortgage's Motion to Dismiss Appeal (ECF No. 16) is **DENIED WITHOUT PREJUDICE**. *See In re Solomon*, 129 F.3d 608, 1997 WL 680934, at *6 n.10 (5th Cir. 1997) (per curiam) (table) (assuming Chapter 7 debtor had standing to appeal because debtor's substantive argument failed).

interest. (Opn. & Order at 4; ECF No. 13-42 (collecting authority).) And "[t]he Show Cause Order set forth grounds for the Court to dismiss or convert the Junks' case under § 1112(b) ... that [we]re not asserted in the CitiMortgage Motion." (Opn. & Order at 1; ECF No. 13-42.) The bankruptcy court converted the Junks' case not only upon CitiMortgage's Motion to Dismiss but also its Show Cause Order that raised additional grounds for conversion or dismissal under § 1112(b).

Nevertheless, the Junks stress that the conversion was based in part on CitiMortgage's Motion to Dismiss, rendering the order void. (Reply at 3; ECF No. 23.) But this does not negate the bankruptcy court's independent authority to convert or dismiss the case. And, its show cause order and hearing raised matters not addressed by CitiMortgage's motion. Specifically, the bankruptcy court pointed the Junks' "failure to maintain appropriate insurance," which, "standing alone, constitute[d] independent cause for conversion." (Opn. & Order at 6; ECF No. 13-42.) Also not raised by CitiMortgage but addressed by the bankruptcy court: the Junks' "unexcused failure to satisfy timely any filing or reporting requirement," which "also constitute[d] cause for dismissal or conversion." (*Id.* at 7.) Moreover, cause was found based on the Junks' "failure to pay any fees or charges" owed to the United States Trustee, another ground not raised in the motion to dismiss. The bankruptcy court also independently found that the Junks' non-compliance with the bankruptcy code and rules constituted cause, another "independent basis for dismissal or

conversion" not raised by CitiMortgage. (*Id.* at 8-9.) And, the bankruptcy court sua sponte addressed the "Junks' lack of candor" – which "r[o]se to the level of fraud upon the Court" – that further constituted cause. (*Id.* at 9-12; *cf* Mot. Dismiss at 12-13; ECF No. 12-135 (listing reasons for conversion as the diminution of the estate with no reasonable likelihood of rehabilitation and the gross mismanagement of the estate).) "Proof of any one factor is sufficient to justify conversion." *Fishell v. U.S. Tr.*, 19 F.3d 18, 1994 WL 64718, at *1 (6th Cir. 1994) (per curiam) (table). Here, the bankruptcy court sua sponte established several factors. And, the Junks acknowledge that "cause" existed for conversion or dismissal (Appellant Br. at 22), and do not challenge the decision to convert their case rather than dismiss it. No abuse of discretion occurred. *See In re Milan*, 573 F.3d 237, 248 (6th Cir. 2009) (reviewing decision to convert for abuse of discretion).

In any event, as addressed above, CitiMortgage is a "party in interest." (*See surpra* Section I.a.) *Cf. In re Lee*, 467 B.R. 906, 916 (B.A.P. 6th Cir. 2012) ("As used in § 362, 'party in interest' is not as broad as it is in § 1112(b).") To briefly recap, a creditor of the debtor is a party in interest in a Chapter 11 case, see 11 U.S.C. § 1109(b), and CitiMortgage qualifies as a creditor because it has a colorable claim against the debtor, *see* 11 U.S.C. § 101(10).

Last, the Court notes that Junks repeatedly press that the Note and Mortgage are unenforceable because the Junks purportedly rescinded the subject

refinancing transaction pursuant to the Truth in Lending Act. But, for the reasons stated above, the bankruptcy court correctly left the enforceability of the Note and Mortgage for the South Carolina courts to decide.

b. Due Process

The Junks next allege that the bankruptcy court violated their right to due process when it denied them counsel at the show cause hearing and then sequestered Christine Junk from that hearing while Daniel Junk testified. "The fundamental elements of procedural due process are notice and an opportunity to be heard." *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). Because the bankruptcy court afforded these safeguards, neither of the Junks' arguments provides a reason to disturb the decision below.

First, no due process violation occurred in denying the Junks' request to have attorneys. As debtors-in-possession, the Junks needed court approval to employ attorneys. 11 U.S.C. § 327; Fed. R. Bankr. P. 2014(a). The day before the show cause hearing, the Junks had two attorneys file notices of appearance that stated "[t]his appearance is not made on behalf of the Debtors as debtors in possession." (ECF Nos. 13-133 & 13-134.) The Junks wished for their attorneys to represent them solely in their individual capacity as debtors. Denying this request, the bankruptcy court noted that such a position runs counter to the courts that have weighed in on the subject. (Hearing at 13-14 (*citing, e.g., Cle-Ware*

Indus. v. Sokolsky, 493 F.2d 863 (6th Cir. 1974).) The Junks offer no authority suggesting that attorneys should be allowed to represent a party as a debtor but not as debtors in possession.

The Junks apparently blame the bankruptcy court for the character of their request, stating that its "denial of a continuance" 12 days before the scheduled hearing left the Junks' counsel "no choice but to appear as counsel for debtor because complying with Rule 327 was impossible." (Reply at 5; ECF No. 22.) But complying with § 327 was possible. The Junks had ample time to secure counsel between the Order to Show Cause (October 23, 2014) and the Show Cause Hearing (January 9, 2015). The Junks appeared at the show cause hearing and were provided an opportunity to testify and respond to the bankruptcy court's show cause order. Thus, they received an opportunity to be heard for purposes of due process. *See In re Colon Martinez*, 472 B.R. 137, 143 (B.A.P. 1st Cir. 2012) (affirming dismissal of bankruptcy case where debtor had ample time to secure counsel and noting that no right to counsel exists in civil cases).

Moreover, the Junks have not argued or shown that that the hearing would have yielded a different outcome had counsel represented them. Indeed, one of the attorneys that they sought to have represent them conceded before the bankruptcy court that "cause" existed for conversion or dismissal under 11 U.S.C. § 1112(b). (Hearing at 11; ECF No. 13-44). *See In re Rosen*, 545 F.3d 764, 777 (9th Cir. 2008) (affirming conversion to Chapter 7 where debtor

"was not prejudiced by any procedural deficiency"); see also Fed. R. Bankr. P. 9005 (incorporating Fed. R. Civ. P. 61, which instructs the courts to "disregard all errors and defects that do not affect any party's substantial rights").

Second, the Junks' argument that the bankruptcy court erred in sequestering Christine from Daniel's testimony similarly offers no reason to disturb the bankruptcy court. To the extent any procedural irregularities occurred, the Junks did not preserve this issue for appeal. The Junks never objected to Christine's sequester, and at no point did Daniel request to question Christine, nor did Christine request to question Daniel. And once more, the Junks have shown no prejudice from the bankruptcy court's decision to remove Christine from the courtroom during Daniel's testimony. For example, they point to no inconsistent statements between the two, or any new infom1ation that would have been brought forward had they been allowed to cross-examine one another. The Court therefore finds no reversible error. *See Simone v. Worcester Cnty. Inst. for Sav.*, 52 F.3d 309, 1995 WL 234250, at *5 (1st Cir. 1995) (per curiam) (table) (affirming bankruptcy court where the court sequestered a co-debtor wife from proceeding because the debtors "waived the issue" by failing to object and did not "demonstrate any prejudice").

The Court **AFFIRMS** the bankruptcy court's January 13, 2015 order.

III. CONCLUSION

In Case No. 2:14-cv-1428, the Court **DENIES** the Junks' Motion for Stay and Remand for Determination of Civ. R. 60(b) Motion (ECF No. 17) and **AFFIRMS** the bankruptcy court's July 2, 2014 order. In Case No. 2:15-cv-377, the Court **DENIES WITHOUT PREJUDICE** CitiMortgage's Motion to Dismiss Appeal (ECF No. 16) and **AFFIRMS** the bankruptcy court ' s January 13, 2015.

IT IS SO ORDERED.

8-28-2015 /s/

DATE EDMUND A. SARGUS, JR.
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
Eastern Division

DANIEL L. JUNK, et al.,
Appellants,

v.

CITIMORTGAGE, INC., et al.,
Appellees.

JUDGMENT IN A CIVIL CASE

CASE NO. 2:14-CV-1428
CHIEF JUDGE EDMUND A. SARGUS, JR.

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** A decision has been rendered by the Court without a hearing or trial.

Pursuant to the OPINION AND ORDER filed August 28, 2015, JUDGMENT is hereby entered DISMISSING this case.

Date: September 2, 2015

RICHARD W. NAGEL, CLERK

/S/ Andy F. Quisumbing
(By) Andy F. Quisumbing
Courtroom Deputy Clerk