

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

SHARON H. SMITH — PETITIONER  
(Your Name)

VS.

HSBC BANK USA et al RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

U.S. Bankruptcy Court, So. Dist of CA, Case No 07-28244 ;  
Court of Appeals of Georgia ; Supreme Court of Georgia ;  
U.S. Supreme Court

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☒ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: \_\_\_\_\_  
\_\_\_\_\_, or

☐ a copy of the order of appointment is appended.

Sharon H. Smith  
(Signature)

**AFFIDAVIT OR DECLARATION  
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, SHARON H. Smith, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ 0	\$ 0	\$ 0	\$ 0
Self-employment	\$ 0	\$ 0	\$ 0	\$ 0
Income from real property (such as rental income)	\$ 0	\$ 0	\$ 0	\$ 0
Interest and dividends	\$ 0	\$ 0	\$ 0	\$ 0
Gifts	\$ 0	\$ 0	\$ 0	\$ 0
Alimony	\$ 0	\$ 0	\$ 0	\$ 0
Child Support	\$ 0	\$ 0	\$ 0	\$ 0
Retirement (such as social security, pensions, annuities, insurance)	\$ 888. <sup>00</sup>	\$ 757. <sup>00</sup>	\$ 1,080. <sup>00</sup>	\$ 0
Disability (such as social security, insurance payments)	\$ 0	\$ 0	\$ 0	\$ 0
Unemployment payments	\$ 0	\$ 0	\$ 0	\$ 0
Public-assistance (such as welfare)	\$ 0	\$ 0	\$ 0	\$ 0
Other (specify):	\$ 0	\$ 0	\$ 0	\$ 0
<b>Total monthly income:</b>	\$ 888. <sup>00</sup>	\$ 757. <sup>00</sup>	\$ 1,080. <sup>00</sup>	\$ 0

DECEASED  
9/5/2021

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE	N/A	N/A	\$ N/A

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE	N/A	N/A	\$ N/A

4. How much cash do you and your spouse have? \$ 400.00  
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
Checking	\$ 4,361	\$ 0
IRA	\$ 13,560	\$ 0

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home  
Value NONE

☐ Other real estate  
Value NONE

☐ Motor Vehicle #1  
Year, make & model 2003 JAGUAR  
Value \$3000 - \$5,000 VANDEN PLAS

☐ Motor Vehicle #2  
Year, make & model 1999 JAGUAR XK8  
Value a \$500 - \$1000 (NEEDS ENGINE REPAIR)

☒ Other assets  
Description Wedding Bands  
Value \$1,000

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
<u>NONE</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
<u>NONE</u>	<u>N/A</u>	<u>N/A</u>
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	DECEASED 9/5/2021 Your spouse
<u>AT IN SENIOR FACILITY</u> Rent or home-mortgage payment (include lot rented for mobile home)	\$ <u>2,620</u>	\$ <u>0</u>
Are real estate taxes included? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ <u>250</u>	\$ <u>0</u>
Home maintenance (repairs and upkeep)	\$ <u>0</u>	\$ <u>0</u>
Food	\$ <u>400</u>	\$ <u>0</u>
Clothing	\$ <u>20</u>	\$ <u>0</u>
Laundry and dry-cleaning	\$ <u>0</u>	\$ <u>0</u>
Medical and dental expenses	\$ <u>400</u>	\$ <u>0</u>



DECEASED  
9/5/2021

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ 400	\$ 0
Recreation, entertainment, newspapers, magazines, etc.	\$ 50	\$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ 20	\$ 0
Life	\$ 0	\$ 0
Health	\$ 0	\$ 0
Motor Vehicle	\$ 122	\$ 0
Other: _____	\$ 0	\$ 0
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	\$ 0	\$ 0
Installment payments		
Motor Vehicle	\$ 0	\$ 0
Credit card(s)	\$ 0	\$ 0
Department store(s)	\$ 0	\$ 0
Other: _____	\$ 0	\$ 0
Alimony, maintenance, and support paid to others	\$ 0	\$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ 0	\$ 0
Other (specify): _____	\$ 0	\$ 0
<b>Total monthly expenses:</b>	\$ 4,282	\$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes

☒ No

If yes, describe on an attached sheet.

N/A

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much?

N/A

If yes, state the attorney's name, address, and telephone number:

N/A

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes

☒ No

If yes, how much?

N/A

If yes, state the person's name, address, and telephone number:

N/A

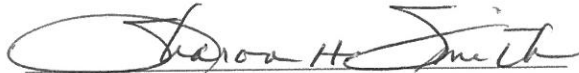
12. Provide any other information that will help explain why you cannot pay the costs of this case.

SEE ATTACHMENT.

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

Executed on:

June 2, 2022

  
(Signature)

# 12

We had 2 lots against which we borrowed to cover expenses over the last several years. I no longer have the lots, but was able to get enough for them to pay off the lien and to pay rent and other expenses.

My fear is that my small IRA will soon run out and I will be unable to pay future medical expenses. I have rheumatoid arthritis and have been diagnosed with breast cancer. (See Affidavit attached to Motion to Direct Clerk to File Petition.)

I could pay the \$300 filing fee out of my social security, but can't afford the printing of the booklet, which would severely deplete my IRA. Therefore, it is essential that I be allowed to proceed IFP. Otherwise, issues of national importance cannot be presented to the Court, and manifest injustice will prevail. See the Petition.

No. \_\_\_\_\_

**In the  
Supreme Court of the United States**

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SHARON H. SMITH,

*PETITIONER,*

vs.

HSBC BANK USA,

HSBC BANK USA, N.A.,

HSBC BANK USA, NATIONAL ASSOCIATION

AS TRUSTEE FOR THE HOLDERS OF BCAP LLC TRUST 2006-AA2,

PATRICK J. BURKE, PRES./CEO OF HSBC BANK USA, N.A.,

BALCH & BINGHAM, LLP,

GEREMY GREGORY, AGENT FOR BALCH & BINGHAM LLP,

CHRISTOPHER ANULEWICZ, AGENT FOR BALCH & BINGHAM LLP

MCGUIRE WOODS, LLP,

PAUL A. ROGERS, AGENT FOR MCGUIRE WOODS, LLP,

THOMAS R. WALKER, AGENT FOR MCGUIRE WOODS, LLP,

JARROD S. MENDEL, AGENT FOR MCGUIRE WOODS, LLP,

RUBIN LUBLIN, LLC,

PETER LUBLIN, AGENT OF RUBIN LUBLIN, LLC,

BRET CHANESS, AGENT OF RUBIN LUBLIN, LLC,

RONNIE PERRY REALTY Co., INC. AND

JILL JERNIGAN, AGENT/BROKER FOR RONNIE PERRY REALTY Co., INC.,

M. DELORES MURPHY,

CHOATE AND COMPANY, P.C.,

ZACHARY HARRIS, AND

SAMUEL CHOATE,

*RESPONDENTS.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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**PETITION FOR WRIT OF CERTIORARI**

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SHARON H. SMITH  
1055 Hatches Pond Lane, Apt. 101  
Morrisville, NC 27560  
(912) 268-8117  
smbsmith@comcast.com  
*Petitioner Pro Se*

June 2, 2022

## **I. QUESTIONS PRESENTED FOR REVIEW**

The Eleventh Circuit Orders, **App. A, App. C, App. E, App. G**, squarely conflict with the precedents of this Court. This Court's resolution of the circuit split is of national importance.

I. Circuit Split: Whether the Court should reverse the decisions below because they conflict with controlling precedent?

A. At specific issue is the interrelationship between the Bankruptcy stay under 11 U.S.C. §362(a) and abandonment under Section 554: If property leaves the estate and goes back to the debtor upon abandonment, is this property, including possessory rights, protected by 11 U.S.C. §362(a) from creditor action? Whether the Bankruptcy Court, District Court and Panel decisions are in conflict with H.R. Rep. No. 95-595, 95th Cong., 1st. Sess. 340 (1977), *reprinted in* 1978 U.S. Code Cong. Ad. News, 5787, 5963, 6296-97? H.R. Rep. No. 95-595 at 343 (1977) (stating that, while § 362(c)(1) terminates the automatic stay as to estate property when the subject property is no longer estate property, that provision “does not terminate the stay against property of the debtor if the property leaves the estate and goes to the debtor.”)?

B. Also at issue is whether disallowance of a claim renders the subject lien void under 11 U.S.C. Section 506(d) when alleging creditors have submitted no proof of a real party in interest with Article III standing with respect to the subject

lien and did not move to set aside the disallowance order? Whether the Bankruptcy Court, District Court, and Eleventh Circuit Panel decisions are in conflict with *Dewsnup v. Timm*, 502 U.S. 410, 415 (1992), where the Court clarified that § 506(d)'s voidance mechanism turns on claim allowance or disallowance; *Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995, 1999 (2015) (affirming *Dewsnup*'s interpretation of § 506(d))?

II. Whether the Bankruptcy Court, District Court affirming, the Eleventh Circuit Panel affirming, erred in arbitrarily concluding that HSBC had a "right to relief from the stay" with no proof in the record of a real party in interest with Article III standing to have been granted relief of the bankruptcy stay?

III. Whether the Smiths' Fifth Amendment right to due process was violated?

*Inter alia*, no hearings having been held by the bankruptcy court, district court or the Eleventh Circuit court, despite requests for hearings; bankruptcy court having failed to take jurisdiction over core issues and dismissing the Smiths' complaints; the Bankruptcy Court, District Court, and Eleventh Circuit Panel failed to enter default judgment against HSBC Appellees for failure to timely defend, despite District Court having acknowledged HSBC Appellees' failure to timely defend and HSBC Appellees having provided no proof of excusable neglect, as required by the Eleventh Circuit Court; new evidence having not been allowed; and the

District Court having ordered an expanded filing injunction against the Smiths, further restricting their access to the Courts; the Eleventh Circuit having allowed double attorney fees for frivolous appeal when the issues presented are clearly not frivolous; without hearing having concluded that there was no violation of the discharge injunction and, therefore, no contempt, due process having required that a hearing be conducted on all material issues of fact; the Bankruptcy Court having erroneously applied *res judicata*; the District Court having erroneously applied collateral estoppel; the District Court, the Panel affirming having concluded that the Bankruptcy Court's failure to issue a scheduling order in violation of Fed. R. Civ. P. 16 (b) was not a substantial defect affecting the Smiths' rights; the courts erred in concluding actions were not attempts to recover discharged debt in violation of 11 U.S.C. § 524 (a) (2), the "objective effect" having been clearly to pressure the repayment of discharged debt?

## **II. PARTIES**

Petitioner is:

**SHARON H. SMITH**, citizen and resident of Wake County, North Carolina; 1055 Hatches Pond Lane, Apt. 101, Morrisville, NC 27560.

Respondents are:

**HSBC BANK USA**, *not a legal entity but was issued a writ of possession in 2016 after filing a dispossessory proceeding, claiming ownership of the subject property.*

**HSBC BANK USA, N.A.**,  
HSBC Bank USA, National Association, an American subsidiary of UK-based HSBC, is a bank with its operational head office in New York City and its nominal head office in McLean, Virginia.

**HSBC BANK USA, NATIONAL ASSOCIATION  
as Trustee for the Holders of BCAP LLC Trust 2006-AA2**,  
BCAP LLC Trust 2006-AA2 is primarily in the business of asset-backed securities, 200 Park Avenue, New York NY 10166.

**PATRICK J. BURKE, PRES./CEO of HSBC Bank USA, N.A.**,  
President and CEO of HSBC Bank USA, N.A. at the time the lawsuit was filed, 2929 Walden Avenue, Depew, NY 14043.

**BALCH & BINGHAM, LLP**,  
30 Ivan Allen Jr. Blvd. NW, Suite 700, Atlanta, GA 30308.

**GEREMY GREGORY, Agent for Balch & Bingham LLP**,  
30 Ivan Allen Jr. Blvd. NW, Suite 700, Atlanta, GA 30308.

**CHRISTOPHER ANULEWICZ, Agent for Balch & Bingham LLP**,  
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**THOMAS R. WALKER, Agent for McGuire Woods, LLP,**  
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**PETER LUBLIN, Agent of Rubin Lublin, LLC,**  
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**BRET CHANESS, Agent of Rubin Lublin, LLC,**  
3145 Avalon Ridge Place, Suite 100, Peachtree Corners, Georgia 30071.

**RONNIE PERRY REALTY CO., INC.**  
3144 Cypress Mill Road, Brunswick, GA 31525.

**JILL JERNIGAN, Agent/Broker for Ronnie Perry Realty Co., Inc.,**  
Top Producers Coastal Georgia, Inc., 3144 Cypress Mill Road, Brunswick, GA  
31525.

**M. DELORES MURPHY,** resident of Glynn County, GA,  
706 Ogleshorpe Ave., Unit A, St. Simons Island, GA 31522.

**CHOATE AND COMPANY, P.C.,**  
300 Main Street, Suite 201, St. Simons Island, GA 31522.

**ZACHARY HARRIS,** resident of Glynn County, GA, 130 Sea Palms Lane,  
St. Simons Island, GA 31522.  
Attorney for M. Delores Murphy and Agent of Choate and Company, P.C.

**SAMUEL CHOATE,** resident of Glynn County, GA.  
Attorney for M. Delores Murphy, Choate Harris, P.C., f/k/a Choate and Company,  
P.C., 300 Main Street, Suite 201, St. Simons Island, GA 31522.

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- A        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11640, affirming the judgment of the district court [Dismissal-HSBC et al], was filed on March 18, 2021.
- B        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11640, denying petition for rehearing, was filed on January 3, 2022.
- C        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11641, affirming the judgment of the district court, [Denial of Motion to Enforce Discharge Injunction and Motion for Contempt- HSBC et al] was filed on March 18, 2021.
- D        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11641, denying petition for rehearing, was filed on January 3, 2022.
- E        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11638, affirming the judgment of the district court [Dismissal- Murphy], was filed on March 18, 2021.
- F        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11638, denying petition for rehearing, was filed on January 3, 2022.
- G        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11636, affirming the judgment of the district court [Denial of Motion for Contempt- Murphy et al], was filed on March 18, 2021.
- H        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11636, denying petition for rehearing, was filed on January 3, 2022.
- I        The unpublished Order of the United States District Court for the Southern District of Georgia, Brunswick Division, No. 2:19-cv-00076-LGW, affirming the Bankruptcy Court [Dismissal-HSBC et al] was filed on March 30, 2020.

- J The unpublished Order of the United States District Court for the Southern District of Georgia, Brunswick Division, No. 2:19-cv-00073-LGW, affirming the Bankruptcy Court [Denial of Motion to Enforce Discharge Injunction and Motion for Contempt- HSBC et al] was filed on March 30, 2020.
- K The unpublished Order of the United States District Court for the Southern District of Georgia, Brunswick Division, No. 2:19-cv-00075-LGW, affirming the Bankruptcy Court [Dismissal- Murphy] was filed on March 30, 2020.
- L The unpublished Order of the United States District Court for the Southern District of Georgia, Brunswick Division, No. 2:19-cv-00074-LGW, affirming the Bankruptcy Court [Denial of Motion for Contempt- Murphy et al] was filed on March 30, 2020.
- M The unpublished Order of Dismissal with Prejudice of the United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, Adv. No. 2:17-02016 [HSBC et al] was filed on June 7, 2019.
- N The unpublished Order Denying Emergency Motion to Enforce Discharge Injunction and Motion for Contempt [HSBC et al] of the United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, No. 2:19-bkc-20244-MJK was filed on June 7, 2019.
- O The unpublished Order of Dismissal with Prejudice of the United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, Adv. No. 2:17-02012 [Murphy] was filed on June 7, 2019.
- P The unpublished Order Denying Emergency Motion for Enforcement of Discharge Injunction and/or Automatic Stay and Denying Motion for Contempt [Murphy et al] of the United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, No. 2:19-bkc-20244-MJK was filed on June 7, 2019.
- Q Order Disallowing Claim #10 of Countrywide Home Loans, Inc.

United States Bankruptcy Court for the Southern District of Georgia,  
Brunswick Division, No. 07-20244 was filed on March 11, 2013.

R Certified SEC Document: Prospectus Supplement dated Nov. 29,  
2006BCAP LLC Trust 2006-AA2  
Servicer: Countrywide Home Loans Servicing, L.P. or Indymac Bank  
[Not Countrywide Home Loans, Inc.]

S Certified SEC Document: Form 10K for fiscal year ended Dec. 31,  
2006 BCAP 2006-AA2 List of Mortgages  
[Showing Smiths' mortgage was not in said Trust.]

T Letter from Mr. Cooper to Marvin and Sharon Smith  
Case Number: 0720244  
Loan Number: 611005117  
Property Address: 311 10<sup>th</sup> Street Unit B, St. Simons Island, GA  
31522

“Our records indicate that the debt associated with the above-  
referenced property was subject of a bankruptcy proceeding and  
discharged by order of the Court.”

“Mr. Cooper is a brand name for Nationstar Mortgage LLC.  
Nationstar Mortgage LLC is doing business as Nationstar Mortgage  
LLC d/b/a Mr. Cooper. ”

[The Letter from Mr. Cooper was submitted to the Bankruptcy Court  
on May 23, 2018 as an attachment to Plaintiffs' Supplement: New  
Evidence, Dkt. #25and#26, in Adversary Proceeding 17-02016-MJK.]

## V. TABLE OF AUTHORITIES

### CASES

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<i>HSBC Bank USA, Nat’l Ass’n v. Blendheim (In re Blendheim)</i> , 803 F.3d 477 (9th Cir. 2015).....	23
<i>Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee</i> , 456 U.S. 694 (1982).....	37
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## **VI. OPINIONS BELOW**

The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11640, affirming the judgment of the district court [Dismissal-HSBC et al], was filed on March 18, 2021. [**App. A**].

The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11640, denying petition for rehearing, was filed on January 3, 2022. [**App. B**].

The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11641, affirming the judgment of the district court, [Denial of Motion to Enforce Discharge Injunction and Motion for Contempt- HSBC et al] was filed on March 18, 2021. [**App. C**].

The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11641, denying petition for rehearing, was filed on January 3, 2022. [**App. D**].

The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11638, affirming the judgment of the district court [Dismissal-Murphy], was filed on March 18, 2021. [**App. E**].

The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11638, denying petition for rehearing, was filed on January 3, 2022. [**App. F**].

The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11636, affirming the judgment of the district court [Denial of Motion for Contempt- Murphy et al], was filed on March 18, 2021. [**App. G**].

The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11636, denying petition for rehearing, was filed on January 3, 2022. [**App. H**].

The unpublished Order of the United States District Court for the Southern District of Georgia, Brunswick Division, No. 2:19-cv-00076-LGW, affirming the Bankruptcy Court [Dismissal-HSBC et al] was filed on March 30, 2020 [**App. I**].

The unpublished Order of the United States District Court for the Southern District of Georgia, Brunswick Division, No. 2:19-cv-00073-LGW, affirming the Bankruptcy Court [Denial of Motion to Enforce Discharge Injunction and Motion for Contempt- HSBC et al] was filed on March 30, 2020 [**App. J**].

The unpublished Order of the United States District Court for the Southern District of Georgia, Brunswick Division, No. 2:19-cv-00075-LGW, affirming the Bankruptcy Court [Dismissal- Murphy] was filed on March 30, 2020 [**App. K**].

The unpublished Order of the United States District Court for the Southern District of Georgia, Brunswick Division, No. 2:19-cv-00074-LGW, affirming the Bankruptcy Court [Denial of Motion for Contempt- Murphy et al] was filed on March 30, 2020 [**App. L**].

The unpublished Order of Dismissal with Prejudice of the United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, Adv. No. 2:17-02016 [HSBC et al] was filed on June 7, 2019 [**App. M**].

The unpublished Order Denying Emergency Motion to Enforce Discharge Injunction and Motion for Contempt [HSBC et al] of the United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, No. 2:19-bkc-20244-MJK was filed on June 7, 2019 [**App. N**].

The unpublished Order of Dismissal with Prejudice of the United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, Adv. No. 2:17-02012 [Murphy] was filed on June 7, 2019 [**App. O**].

The unpublished Order Denying Emergency Motion for Enforcement of Discharge Injunction and/or Automatic Stay and Denying Motion for Contempt [Murphy et al] of the United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, No. 2:19-bkc-20244-MJK was filed on June 7, 2019 [**App. P**].

## **VII. JURISDICTION**

The United States Court of Appeals for the Eleventh Circuit entered its Orders, **App. A, C, E, and G**, on March 18, 2021; Petitions for Rehearing and Rehearing en Banc, **App. B, D, F, and H**, having been denied on January 3, 2022. Motion to submit the consolidated Petition out of time, due to extraordinary circumstances, is

submitted herewith. The Petition for Writ of Certiorari is consolidated pursuant to Rule 12.4; all four judgments sought to be reviewed on a writ of certiorari to the Eleventh Circuit Court involve closely related questions.

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1) and under Article III of the United States Constitution.

### **VIII. CONSTITUTIONAL PROVISIONS INVOLVED**

*U.S. Const. Art. III, section 2:*

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

*U.S. Const. Amendment V:*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation.

### **IX. STATEMENT OF THE CASE**

The subject property in this case (“Property”), 311 10<sup>th</sup> Street, Unit B, Saint Simons Island, GA 31522, was the Smiths’ residence prior to eviction by HSBC Bank USA, N.A. in August, 2017.

On or about August 7, 2006, Plaintiffs borrowed a sum of money in the amount of \$1,767,500 in a mortgage loan transaction wherein Synovus Mortgage Corp. (“Lender”), acted in the role of “Lender” pursuant to the Security Deed recorded on August 23, 2006 with the Glynn County Superior Court at Bk 2026, Page 174.

On April 2, 2007, Marvin B. Smith and Sharon H. Smith, “Smiths”, Debtors/Appellants, filed their bankruptcy case 07-20244 under Chapter 11 of title 11 of the United States Code. The Chapter 11 Case was converted to a Chapter 7 Case on May 8, 2008. The case remains open.

On April 25, 2012 the subject property was abandoned by the Estate, Bankr.Dkt.#555, and again became the debtors’ property, and as such was subject to the automatic stay. See H.R. Rep. No. 95-595, 95th Cong., 1st. Sess. 340 (1977), *reprinted in* 1978 U.S. Code Cong. Ad.News, 5787, 5963, 6296-97. H.R. Rep. No. 95-595 at 343 (1977)(stating that, while § 362(c)(1) terminates the automatic stay as to estate property when the subject property is no longer estate property, that provision “does not terminate the stay against property of the debtor if the property



leaves the estate and goes to the debtor.”).

On March 11, 2013 the Bankruptcy Court disallowed “in its entirety” Claim #10 of Countrywide Home Loans, Inc. with regard to the subject property. Order, Bankr.Dkt.#603, **App. Q**.

On June 1, 2016 the Smiths received a standard discharge of their debt in case 07-20244, Order, Bankr.Dkt.#699.

On September 5, 2022 Marvin B. Smith, III died.

**Regarding HSBC Respondents:**

On November 18, 2007 Countrywide Home Loans, Inc. filed a proof of Claim #10, as the secured creditor holding a “first priority security deed on property located at 311 10<sup>th</sup> Street, Unit #B, Saint Simons Island, Georgia 31522” attached to which was the first couple of pages of the subject security deed.<sup>1</sup>

On September 25, 2008 Countrywide Home Loans, Inc. as servicing agent for HSBC Bank USA, National Association as Trustee for Holders of BCAP LLC Trust 2006-AA2 requested relief of stay, Bankr.Dkt.#154, representing itself to be “a secured creditor of Debtors pursuant to a Note and Deed to Secure Debt”, attaching the subject Deed to Secure Debt described above, which did not reference Countrywide Home Loans, Inc. or HSBC Bank USA, N.A. in any capacity.

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<sup>1</sup> Order Denying Motion to Vacate Consent Order [Bankr.Dkt #206]: “...Attached to each proof of claim was one page showing an itemized payoff balance and one photocopied page from a security instrument that did not reference Countrywide in any capacity.” [Emphasis added.]

On November 12, 2008 Consent Order Modifying Stay was filed, Bankr.Dkt.#174, granting conditional relief of stay on May 5, 2019.

On April 15, 2009, prior to relief of stay, the Smiths, proceeding *pro se* moved the Bankruptcy Court to vacate the Consent Order, Bankr.Dkt.#192, objecting that Countrywide Home Loans Inc. as servicing agent for HSBC Bank USA, National Association as Trustee for Holders of BCAP LLC Trust 2006-AA2 was not a real party in interest and had no legal standing to seek any relief incident to the subject Security Deed or to have entered into the Consent Order.

On May 5, 2009 Countrywide Home Loans, Inc. as Servicing Agent for HSBC Bank USA, National Association as Trustee for the Holders of BCAP LLC Trust 2006-AA2 was granted relief of stay pursuant to the conditional Consent Order filed November 12, 2008, Bankr.Dkt.#174; however, there was no proof of an agency relationship in the record.<sup>2</sup>

On February 7, 2011 BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP as Servicing Agent for the Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificate holders of CWHEQ, Inc, Home Equity Loan Asset-Backed Certificates, Series 2006-S9 represented to the

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<sup>2</sup> In fact, there was no agency relationship. Countrywide Home Loans, Inc. was not the servicer for said Trust. The certified SEC document for BCAP LLC Trust 2006-AA2 identifies Countrywide Servicing, LP as "Servicer", **App. R. NO ASSIGNMENT EXISTED in 2009; it was fabricated in 2011. The Smiths loan was *never* in said trust. See App. S.**

Bankruptcy Court in its Motion to Continue Hearing, Bankr.Dkt.#396, that the Smiths' loan had been transferred to the new entity, CWHEQ, Inc. Home Equity Loan Asset-Backed Certificates, Series 2006-S9.

On April 21, 2011 Peter Lublin of Rubin Lublin LLC represented in Notice of Substitution of Parties, Eleventh Circuit Court of Appeals No. 10-13671 -C, April 21, 2011: **"Appellants' loan is now held by the BCAP 2006-AA Trust."** [Emphasis added.]

On April 22, 2011 Mr. Trainor of Blank & Rome represented that the owner of the Smiths' note was BAC Home Loans Servicing LP for the benefit of the BCAP 2006-AA Trust.

On July 20, 2011 the Eleventh Circuit dismissed the appeal as frivolous. (The Smiths' were proceeding IFP and the District Court had stated that the appeal was frivolous.). Also, at the request of Countrywide Home Loans, Inc. as servicing agent for HSBC Bank USA, National Association as Trustee for Holders of BCAP LLC Trust 2006-AA2, the Eleventh Circuit Court of Appeals granted the opposed substitution of parties. The party granted relief of stay through the Consent Order became BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP as Servicing Agent for the benefit of the BCAP 2006-AA Trust, *Smith v. Countrywide Home Loans, Inc.*, 10-13671 (11<sup>th</sup> Cir. July 20, 2011).

After the Appeal was docketed in Eleventh Circuit Court of Appeals and prior to briefing, the Smiths filed in the Bankruptcy Court Motion to Reconsider on December 14, 2010 [Bankr.Dkt. #377] which included new evidence not in the record on appeal. The closing dates of the two trusts made it impossible for the Smiths' mortgage to have been transferred as represented by Countrywide Home Loans Inc. and BAC Home Loans Servicing, LP. The uncertified SEC filings, however, were characterized by the Bankruptcy Court as "printouts from Internet websites". On December 19, 2013 the Bankruptcy Court dismissed with prejudice the Motion to Reconsider and imposed a filing injunction barring the Smiths from filing any pleadings or motions wherein Countrywide Home Loans, Inc., Countrywide Home Loan Servicing LP, or BAC Home Loans Servicing LP were named.<sup>3</sup>

On December 4, 2013 Nationstar Mortgage as Servicer for HSBC Bank USA, National Association as Trustee for Holders of BCAP LLC Trust 2006-AA2 filed a motion for relief of stay attaching the Assignment of security deed, Bankr.Dkt.#623; which was withdrawn on 12/5/2013, Bankr.Dkt.#625.

Having learned of the Assignment by Nationstar's filing, Bankr.Dkt#623, the Smiths attempted in 2014 to file an adversary Complaint against Nationstar Mortgage

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<sup>3</sup> Order Dismissing Motion to Reconsider and Granting Motion for Sanctions, BankrDkt.#566; District Court Order Affirming the Order and Denying Smiths' Motion to Vacate Judgments Below as Void, CV212-179, Dkt. #10; 11<sup>th</sup> Cir Court of Appeals' Order dismissing appeal as frivolous, and granting BAC's motion for damages and an injunction against the Smiths, 13-13808, December 19, 2013; Certiorari denied on May 5, 2014, U.S. Supreme Court No. 13-8924.

and others, Bankr.Dkt #650, #651 which included the Assignment and certified SEC documents<sup>4</sup> as new evidence of fraud upon the Court; however, the Complaint was not allowed to be filed and was stricken by the Bankruptcy Court, Bankr.Dkt.#648, because Countrywide and BAC were “protected entities”.<sup>5</sup>

On April 13, 2015 the Smiths submitted to the U.S. District Court Southern District of New York the Complaint against HSBC Bank USA, N.A. et al, which was pre-screened by the pro se office and filed on April 14, 2015 as Case No. 1:15-cv-02778. That case was transferred to the U.S. District Court Southern District of Georgia Brunswick Division on or about April 15, 2015, primarily because of the urgency of the TRO involving property in Glynn County, GA, Case No. 2:15-cv-00047-LGW-RSB.

Sharon Smith contacted the U.S. District Court Clerk’s office in Brunswick , GA daily from approximately April 18, 2015 through April 29, 2015 to ascertain status of the Motion for TRO. The answer was always that the TRO was still under consideration by the Judge. Because no action had been taken on the TRO and the foreclosure sale was set for May 5, 2015, the Smiths withdrew the TRO in the District Court on April 29, 2015. The same day the Smiths filed in Superior Court of Glynn County, GA a Complaint incorporating the Complaint originally filed in the New

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<sup>4</sup> Certified SEC document, **App. S**, includes loan tapes proving that the Smiths’ mortgage was never in **BCAP LLC Trust 2006-AA2**.

<sup>5</sup> See footnote 13 below. Appellate review was thwarted under the guise of pre-screening.

York District Court as Appeals; and requested a TRO in the Superior Court which was denied on April 30, 2015. The TRO was denied on May 4, 2015, Case No. CE15-00566-063; however, the Superior Court assured the Smiths that “The Court is in no way implying that Plaintiffs’ claims in this case are frivolous.” and that the Court would “do everything in its power to ensure they receive a fair trial”.

On May 5, 2015 the Smiths’ home at 311 10<sup>th</sup> Street Unit B, St. Simons Island, GA 31522 was foreclosed upon by HSBC Bank USA, National Association as Trustee for the Holders of BCAP LLC Trust 2006-AA2. *See* Deed Under Power; despite having told the court that the Smiths’ loan was not in said trust.

The Smiths withdrew the Complaint in the U.S. District Court on May 7, 2015. The U.S. District Court subsequently took the Notice of Withdrawal as a Motion to Withdraw the Complaint and granted withdrawal of the Complaint and withdrawal of the Motion for TRO on June 11, 2015. Order, CV215-47,Dkt.#10.

The same day, May 7, 2015 the Smiths filed in the Superior Court CE15-00566-063 the Amended Complaint (reflecting the wrongful foreclosure which had taken place on May 5, 2015) which incorporated the initial complaint.

On June 9, 2015 the Defendants in the Amended Complaint filed Notice of Removal of the Superior Court Case CE15-00566-063 to the U.S. District Court, which was filed as Case CV215-70; and moved for dismissal of the complaint and for the complaint to be stricken, which was granted by the District Court.

On May 6, 2016, HSBC Bank USA, who is not a legal entity, filed a dispossessory proceeding, claiming ownership of the same property, 311 10<sup>th</sup> Street, Unit B, St. Simons Island, GA 31522. See Affidavit for Summons of Dispossessory filed in the Magistrate Court, Case No. 1601540.

On July 5, 2016 the Magistrate Court issued a writ of possession to HSBC Bank USA, who is not a legal entity; regarding the action begun on May 6, 2016.

On October 20, 2016 the Superior Court amended the non-amendable defect and issued a Writ of Possession to HSBC Bank USA, N.A.; regarding the action begun on May 6, 2016 by HSBC Bank USA.

On February 13, 2017 the Eleventh Circuit Court of Appeals overturned the District Court's dismissal of the Smiths' Complaint in No. 2:15-cv-70 and ruled that HSBC Bank USA, N.A. was not subject of the filing injunction and remanded the case to the District Court, No. 2:15-CV-70. See *Smith v. HSBC Bank USA, N.A. et al*, No. 16-11045, (11<sup>th</sup> Cir. February 13, 2017).

After the Eleventh Circuit Court ruled that HSBC Bank USA, N.A. was not a subject of the filing injunction, the Smiths filed in the U.S. Bankruptcy Court for the Southern District of Georgia, Case 07-20244, Motion for Entry of Order on Violation of the Automatic Stay and Emergency Verified Motion for Stay of Writ of Possession and Enforcement of the Automatic Stay, "Emergency Motions", Bankr.Dkt.#728, file-stamped on July 27, 2017, and Amendment to correct a date, Bankr.Dkt.#729,



file-stamped on July 28, 2017; which were not allowed to be docketed until August 9, 2017.

On August 8, 2017 the Bankruptcy Court filed its Report and Recommendation to the United States District Court in Bankruptcy Case 07-20244, Bankr.Dkt.#726, rather than rendering a decision, based on the erroneous assumption that the HSBC parties were subject of a filing injunction; despite the Smiths having attached to the Motion, Bankr.Dkt.#728, this Court's Order *Smith v. HSBC Bank USA, N.A. et al*, No. 16-11045, (11<sup>th</sup> Cir. Feb. 13, 2017).

On August 9, 2017 the Smiths filed an Emergency Motion in the District Court 2:15-cv-70, Dkt.#69 asking for injunctive relief and to notify the Bankruptcy Court that HSBC Bank USA and HSBC Bank USA, N. A. are not subject of the pre-filing injunction as ordered by the Eleventh Circuit.

On August 9, 2017 the U.S. District Court issued two Orders in response to the Emergency Motion, Dkt. #69, 2:15-cv-70. One Order, Bankr.Dkt.# 727, was filed in the Bankruptcy Court rejecting the Report and Recommendation and ordering the Bankruptcy Court "to file the Smiths' July 27, 2017 submission [Bankr.Dkt.#728] and rule upon it" and to allow a challenge to the Consent Order. The second August 9, 2017 Order was filed in the District Court 2:15-cv-70, Dkt.#70, denying the Smiths' Emergency Motion, Dkt.#69, filed in that Court, Smith v. HSBC Bank USA, N.A., No. 2:15-CV-70 (S.D. Ga. Aug. 9, 2017); however, in said Order the District Court



assumed that there had been an agency agreement between Countrywide Home Loans Inc. and HSBC Bank USA, National Association as Trustee for the Holders of BCAP LLC Trust 2006-AA2; which is disputed by certified SEC documents.<sup>6</sup>

On August 10, 2017 HSBC Bank USA, N.A., utilizing Writ of Possession, began the eviction of the Smiths from their home which was completed on August 14, 2017.

**Regarding Complaint Filed Against HSBC Respondents:**

On November 9, 2017, the Smiths filed a Complaint in Adv. No. 17-02016, against Defendants/Respondents in compliance with the Bankruptcy Court Report and Recommendation that the relief sought in the Emergency Motions, Bankr.Dkt#728, required an adversary proceeding.

On December 5, 2017, the Bankruptcy Court Order, BankrDkt.#740, ruled that the Emergency Motions, Bankr.Dkt.#728, were barred by *res judicata* as to the interlocutory order denying injunctive relief, Smith v. HSBC Bank USA, N.A., No. 2:15-CV-70 (S.D. Ga. Aug. 9, 2017), Dkt.#70, which had been appealed to the Eleventh Circuit Court of Appeals.

The Letter, **App. T**, submitted in May, 2018 as “New Evidence”, Adv.17-02016,Dkt.#25,Dkt.#26, is acknowledgement by Nationstar Mortgage that

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<sup>6</sup> See Footnote 2 above. And the Smiths’ mortgage was never in said trust as documented by certified SEC documents, **App. S**, attached to Complaint; and Countrywide Home Loans, Inc. was not a servicer for the BCAP LLC Trust 2006-AA2, **App. R**.

Respondents willfully and knowingly proceeded in violation of the bankruptcy stay and/or discharge injunction. However, the new evidence was ignored.

On June 7, 2019, the Bankruptcy Court denied as moot the Smiths' Motion for Entry of Default Judgment and dismissed the Smiths' claims in Complaint, Adversary Proceeding No. 17-02016, as barred by *res judicata* as to the interlocutory order, Smith v. HSBC Bank USA, N.A., No. 2:15-CV-70 (S.D. Ga. Aug. 9, 2017), Dkt.#70, after the Eleventh Circuit Panel, No. 18-10736;18-12349, affirmed the District Court. However, the Eleventh Circuit Court had already ruled that the interlocutory order No. 2:15-CV-70, Dkt.#70, was not a final judgment on the merits, but was instead an interlocutory denial of an injunction. See Smith v. HSBC Bank USA, N.A. et al, No. 17-13622, (11<sup>th</sup> Cir. July 23, 2018). The Dismissal Order was appealed to the District Court which affirmed the Bankruptcy Court and stated: "the Court declines to exercise its discretion to enter default judgment on this matter", No.2:19-cv-00076, Dkt. #10, p.12,13; despite having acknowledged Respondents' failure to timely defend. The Eleventh Circuit Panel affirmed the District Court. **App. A.**

**Regarding Motion for Contempt Against HSBC Respondents:**

Countrywide Home Loans, Inc. filed Claim #10 as "secured creditor" with no proof attached with regard to the subject property at 311 10<sup>th</sup> Street, Unit B, St. Simons Island, GA 31522, the Smiths' home. The Smiths objected to said claim, as set forth in the record.

On March 11, 2013 the Bankruptcy Court disallowed Claim # 10 of Countrywide Home Loans, Inc. with regard to the subject property; Order, Bankr.Dkt.#603, **App. Q**. The court's disallowance of the claim rendered the subject lien void under 11U.S.C. §506(d) upon the Smiths' discharge June 1, 2016; Order, Bankr.Dkt.#699; said lien having not referenced Countrywide Home Loans, Inc. or HSBC in any capacity.

Despite the Claim #10 having been disallowed in 2013, and despite having had knowledge of the Bankruptcy Court's Order, Bankr. Dkt #603, Respondents, HSBC Bank USA, National Association as Trustee for Holders of BCAP LLC Trust 2006-AA2, proceeded to foreclosure in 2015 and HSBC Bank USA and HSBC Bank USA, N.A. proceeded to eviction in 2016, utilizing the subject lien (the same security deed attached to the Claim #10) which had been disallowed in its entirety in 2013.

On May 18, 2018 the Smiths received the Letter from Mr. Cooper, a/k/a Nationstar Mortgage. *See* Letter, **App. T**.<sup>7</sup> In the Letter, Mr. Cooper acknowledged that according to its records the debt associated with the subject property at 311 10<sup>th</sup> Street, Unit B, Saint Simons Island, GA 31522 was discharged by Order of the Court in Case Number 07-20244. The loan number referenced is 611005117.

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As noted in the letter, **App. T**: "Mr. Cooper is a brand name for Nationstar Mortgage LLC. Nationstar Mortgage LLC is doing business as Nationstar Mortgage LLC d/b/a Mr. Cooper. " Nationstar Mortgage began doing business as Mr. Cooper in August, 2017. The Letter from Mr. Cooper was also submitted to the Bankruptcy Court on May 23, 2018 as an attachment to Plaintiffs' Supplement: New Evidence, Dkt. #25 and #26, in Adversary Proceeding 17-02016-MJK.

The loan number is the same as the loan number on the Notice from Nationstar Mortgage LLC, dated April 24, 2014, identifying itself as servicer for the subject loan and stating that the foreclosure would be conducted in the name of : HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR HOLDERS OF THE BCAP LLC TRUST 2006-AA2 (“Noteholder”). Subsequently, on March 24, 2015 Rubin Lublin, LLC as attorney for HSBC Bank USA, National Association as Trustee for The Holders of BCAP LLC Trust 2006-AA2 (“Foreclosing Entity”) sent Notice of Acceleration and Foreclosure with regard to the subject property with identifying File No. NAT-14-02718-4. The Deed Under Power was filed by Rubin Lublin, LLC on behalf of Nationstar Mortgage LLC as Attorney in fact for HSBC Bank USA, National Association as Trustee for the Holders of BCAP LLC Trust 2006-AA2. As previously presented to the Bankruptcy Court and the District Court, it was also learned during the eviction that Balch & Bingham, attorneys conducting the eviction, were employed by Nationstar Mortgage. The new law firm replacing Balch & Bingham, McGuire Woods, is also employed by Nationstar Mortgage.<sup>8</sup> Consequently, all the parties had access to the record referred to in the letter by Mr. Cooper, a/k/a Nationstar Mortgage LLC, acknowledging: “Our records indicate that

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<sup>8</sup> Jeremy Gregory and Christopher Anulewicz of Balch & Bingham represented themselves to the Courts as attorneys for HSBC Bank USA, N.A.; however, during the dispossession it was learned that both were employed by Nationstar Mortgage. Paul Rogers of McGuire Woods, LLP, the new law firm replacing Balch & Bingham, represented himself as attorney for Respondents, HSBC Bank USA, N.A. et al when he has admitted that Balch & Bingham is employed by Nationstar Mortgage (Bankr. Adversary 17-02016-MJK; District Court CV217-156).

the debt associated with the above-reference property [311 10<sup>th</sup> Street Unit B, Saint Simons Island, GA 31522] was subject of a bankruptcy proceeding and discharged by order of the Court.”

On August 31, 2018 the Smiths filed Emergency Motion to Enforce Discharge Injunction and Motion for Issuance of an Order to Respondents to Show Cause Why They Should Not be Held in Contempt, Bankr.Dkt.#755, which was denied without hearing nearly one year later on June 7, 2019, Bankr.Dkt.#758.

The Smiths timely appealed the Order, Bankr.Dkt.#758, which was affirmed by the District Court March 30, 2020, Case No. 2:19-cv-00073, Dkt.#18. The District Court also ordered an expanded filing injunction against the Smiths, further restricting the Smiths’ access to the Courts.

The Eleventh Circuit Panel, **App. C**, affirmed the District Court, but did not address the issue of the expanded filing injunction and the consequential violation of the Smiths’ due process rights under the Fifth Amendment.

### **Regarding the Murphy Respondents:**

**I. Background in State Court:** Marvin B. Smith, III and Sharon H. Smith, “Smiths”, petitioned the Superior Court for a Temporary Protective Order pursuant to O.C.G.A. § 16-5-90 et seq. against their neighbor, and secretary of their condominium association, M. Delores Murphy. The trial court dismissed the Petition for Temporary Protective Order pursuant to O.C.G.A. § 9-11-37 (d) and to O.C.G.A.

§ 9-11-37 (b)(2)(C) for failure of the Smiths to respond to discovery; despite the fact that the Smiths had responded on several occasions and despite the fact that the Superior Court had issued no Order regarding discovery with which the Smiths' had not complied. Furthermore, an automatic stay of discovery was in place pursuant to O.C.G.A. § 9-11-12 (j). Murphy counterclaimed for "nuisance" which was in fact long-term water damage caused by Murphy and others. With full knowledge of the water damage, Ms. Murphy and her ex-husband purchased Unit A, originally a \$2,000,000 property, in or about 2011 for the discounted price of \$675,000 from the Bank after foreclosure upon the Developer; the Murphys having been aware of long-term water damage at the time of purchase. Ms. Murphy's Counterclaim alleged that the Smiths had caused her water damage in Unit A; despite three different insurance claims having been filed by Ms. Murphy, the conclusion of which was long-term water damage and no sudden events in Unit B, the Smiths' Condominium. The Superior Court proceeded to a jury trial on the Counterclaim in violation of the Bankruptcy Stay and in violation of a notarized Settlement Agreement; and despite pending litigation in the Bankruptcy Court regarding said violations. The jury awarded Murphy a \$650,000 judgment plus \$10,000 punitive damages against the Smiths. The record shows that the Smiths were denied due process. *Inter alia*, an Order granting Murphy's Motion in Limine excluded relevant evidence, Murphy's attorneys were contacting Judge Lane's law clerk without the Smiths' knowledge,

jury charges were changed and the Smiths' jury charges were excluded, without order of the court in violation of the Pre-trial Order, signed by Judge Lane on June 15, 2018:

It is hereby ORDERED that the foregoing, including the attachments thereto, constitutes the PRE-TRIAL ORDER in the above case and supersedes the pleadings which may not be further amended except by order of the court to prevent manifest injustice. [Emphasis added.]

**II. Background in Federal Court:** The Smiths filed as a Contested Matter in the Bankruptcy Court a Motion to Enforce the Automatic Stay on August 23, 2017, Bankr.Dkt.#733; however, the Court denied the motion because the relief sought required an adversary proceeding under B.R. 7001, Bankr.Dkt.#750. The Bankruptcy Court held that determination of validity of the documents filed with the Secretary of State and the enforcement of the stay, with regard to the actions of Defendant and the Superior Court Orders being declared void, require an adversary proceeding.

Consequently, on October 10, 2017 the Smiths filed an adversary proceeding in the U.S. Bankruptcy Court, Adv. Proc.17-02012-MJK.

Murphy filed on October 24, 2017 a Motion to Stay Proceedings, Adv.No.17-02012,Dkt.#11. The Smiths filed an Objection, Dkt.#13, on October 30, 2017. However, there was no hearing and no ruling.

On November 29, 2017 Murphy filed a Motion for Judgment of the Pleadings, Adv.No.17-02012,Dkt.#15; and the Smiths filed their Response in Opposition on December 5, 2017, Adv.No.17-02012,Dkt.#18, objecting, *inter alia*, on the basis of



disputed material fact, the necessity of discovery and requested amendment before dismissal.

The Smiths had timely filed their Rule 26(f) Report , Adv.Dkt.#19, on December 12, 2017, showing that defendant's counsel had failed to cooperate and requested the Court's protection with regard to discovery because of fear of retaliation by M. Delores Murphy against the Smiths and others. *See* the Rule 26(f) Report, Adv.Dkt.#19. The Report was forwarded to Chambers on December 12, 2017, as noted on the Docket Report, No. 17-02012. However, no Scheduling Order was ever issued.

On May 23, 2018, Adv.No.17-02012, Dkt.#20,#21, the Smiths had submitted new evidence to the Bankruptcy Court. The Smiths had requested the right to amend prior to dismissal, Adv.No.17-02012,Dkt.#18,p.19.

On June 7, 2019, without hearing on any of the issues, the Bankruptcy Court Order, Adv.No.17-02012,Dkt.#22, granted M. Delores Murphy's opposed Motion for Judgment on the Pleadings filed on November 29, 2017, Adv.No.17-02012,Dkt.#15, dismissed all claims and denied all outstanding motions as "moot. The District Court affirmed the Bankruptcy Court on March 30, 2020, Case No. 2:19-cv-75. The Eleventh Circuit Panel decision, **App. E**, affirmed the District Court.

The same day, June 7, 2019, without any hearings with regard to disputed fact, the Bankruptcy Court denied the Smiths' Emergency Motion for Enforcement of



Discharge Injunction and/or Automatic Stay and Motion for Contempt, Bankr.Dkt.#756, filed September 4, 2018. The District Court affirmed the Bankruptcy Court on March 30, 2020, Case No.2:19-cv-74. The Eleventh Circuit Panel decision, **App. G**, affirmed the District Court.

#### **X. REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI**

The Eleventh Circuit Panel<sup>9</sup> appears to have affirmed the courts below without consideration of Appellants' Briefs. Specifically, two issues addressed in depth in the Briefs were the fact that Countrywide Home Loans Inc. was never a servicing agent for HSBC Bank USA, National Association as Trustee for the Holders of BCAP LLC Trust 2006-AA2, as documented by certified SEC filings, **App. R**<sup>10</sup>, and therefore, not a real party in interest with Article III standing to have been granted relief of the bankruptcy stay; and the fact that the claim of Countrywide Home Loans, Inc. was denied in its entirety by order of the Bankruptcy Court, **App. Q**, and therefore, the deed was rendered void upon discharge. That the Eleventh Circuit Court of Appeals has applied vastly different legal standards with regard to these issues, demonstrates

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<sup>9</sup> The same Panel issued decisions in all four cases, 20-11640, 20-11641, 20-11636, 20-11638, despite the clerk having stated that different judges were reviewing the four cases and that the cases had not been consolidated. Appellee, in its Brief, had misrepresented to the Court that the cases had been consolidated.

<sup>10</sup> Note that the Panel Decision, **App. A** at p.3, refers to "Countrywide—as servicing agent for HSBC—". Countrywide Home Loans, Inc. is a different entity and was never servicing agent for said trust.

the inconsistency within the Eleventh Circuit, as well as inconsistency with the standards applied by other circuits.

**1. CIRCUIT SPLIT: THE COURT SHOULD REVERSE THE DECISIONS BELOW BECAUSE THEY SQUARELY CONFLICT WITH CONTROLLING PRECEDENT.**

**All of the actions of HSBC Respondents with regard to foreclosure and dispossession utilizing the void lien constitute “ the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived” in violation of 11U.S.C§524(a)(2).**

The Bankruptcy Court and the District Court ignored the fact that Countrywide Home Loans, Inc.’s Claim #10 with regard to the subject property was disallowed “in its entirety” by Order of the Bankruptcy Court, Bankr.Dkt.#603, in 2013. **The disallowance order rendered the subject lien void.** . See *HSBC Bank USA, Nat’l Ass’n v. Blendheim (In re Blendheim)* , 803 F.3d 477 (9th Cir. 2015), citing *Dewsnup v. Timm*, 502 U.S. 410 (1992), where the Court clarified that §506(d)’s voidance mechanism turns on claim allowance or disallowance. See *Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995, 1999 (2015) (affirming *Dewsnup*’s interpretation of § 506(d)). See also 4 Collier on Bankruptcy ¶ 506.06[1][a] (“[*Dewsnup*] determined that section 506(d) does not void liens on the basis of whether they are secured under section 506(a), but on the basis of whether the underlying claim is allowed or

disallowed . . .”). When the plain and unambiguous language of the statute does not lead to absurd results, the courts’ only role is to apply the statute according to its terms. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Schindler Elevator Corp. v. United States ex rel. Kirk*, — U.S. —, 131 S.Ct. 1885, 1893 (2011) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). There is nothing ambiguous in the language of 11U.S.C. §506(d).

In the present case, because Claim #10 was disallowed “in its entirety”, there are no *in rem* rights with regard to the void lien. Consequently, the Bankruptcy Court, District Court affirming, Eleventh Circuit Panel affirming, erred in concluding that the subject lien was not void and erred in concluding that there were *in rem* rights associated with the void lien. The Panel stated at page 6 of the decision, **App. C**: “The Supreme Court has said that—while a Chapter 7 discharge extinguishes the personal liability of the debtor—it does not extinguish a creditor’s right to foreclose on a valid mortgage on the debtor’s property. See Johnson v. Home State Bank, 501 U.S. 78, 83 (1991). Instead, ‘a creditor’s right to foreclose on the mortgage survives or passes through the bankruptcy.’ *Id.*” However, *Johnson v. Home State Bank* does not apply in the present case, because there is no proof in the record that Respondents are creditors and/or that a “valid mortgage” exists.

The Eleventh Circuit Panel erred at page 7 of the decision, **App. C**: “to the contrary, the bankruptcy trustee said expressly that HSBC ‘should look to its

collateral for satisfaction of the debt.’ However, the Panel left out the key word

“Creditor” in the trustee’s objection. Quoting from Appellants’ Brief at page 26:

The Claim #10 was disallowed by Order of the Bankruptcy Court, Bankr.Dkt.#603, due to the Objection of the Trustee, Bankr.Dkt.#588: “Objection to Claim No. 10 of Countrywide Home Loans, Inc, in the amount of \$1,858,535.38 on the grounds that the same is secured by property either abandoned or not administered by the Trustee and, therefore, Creditor should look to its collateral for satisfaction of the debt.”)[Emphasis added.]. The District Court misstated: “the Trustee specifically noted in its objection that the owner of the claim should ‘look to its collateral for the satisfaction of the debt’.” [Emphasis added.] Order 2:19-cv-73,Dkt.18,p.16. There is no proof in the record that “owner of the claim” #10 was a secured creditor. In the Contempt Order, p.10, the Bankruptcy Court concluded that “The disallowance was procedural and its effect was simply to keep Countrywide and/or HSBC from receiving a distribution from the Trustee for the Claim.” *Indeed*, the reason the disallowance was necessary was to keep the non-secured owner of the claim #10, Countrywide Home Loans, Inc., from receiving a distribution. If the proof of claim #10 had established a security interest, and thereby standing, there would have been no reason for disallowance. Therefore, the objection was substantive. *In re Lane*, supra.<sup>11</sup>

When the Trustee’s objection to Claim #10 was filed, Countrywide Home Loans, Inc. and/or HSBC had an opportunity to be heard if it could have proved a real party in interest; however, for all the reasons set forth above, HSBC Bank USA, National Association as Trustee for Holders of BCAP LLC Trust 2006-AA2 could not prove a real party in interest, proof which was incumbent upon the alleging creditor; and, therefore, chose not to be heard.

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<sup>11</sup> *In re Lane*, , 589 B.R. 399, 403 (B.A.P. 9th Cir. 2018). *In re Lane* at 408:

In the context of a claim objection under § 502(b), the question of whether standing is a substantive or procedural objection has been addressed by only a few courts. However, those courts are unanimous in stating that it is a substantive objection under § 502(b)(1), which provides that a claim may be disallowed to the extent it is unenforceable against a debtor under any applicable law, including state law. See *In re Richter*, 478 B.R. 30, 48-49 (Bankr. D. Colo. 2012) ; *Pursley v. eCAST Settlement Corp.* (In re Pursley), 451 B.R. 213, 231-32 (Bankr. M.D. Ga. 2011) ; *In re King*, 2009 WL 960766, at \*5 (Bankr. E.D. Va. Apr. 8, 2009) ; *In re Cleveland*, 396 B.R. 83, 93-94 (Bankr. N.D. Okla. 2008).

Until the Order, **App. Q**, has been set aside by a real party in interest with standing to move the Court to do so, the disallowance Order stands. The Letter, **App. T**, submitted as “New Evidence”, Adv.17-02016,Dkt#25,#26, is acknowledgement by Nationstar Mortgage that Respondents willfully and knowingly proceeded in violation of the bankruptcy stay and/or discharge injunction to foreclosure and dispossession.

Countrywide Home Loans, Inc.’s Claim #10 had been disallowed in its entirety in 2013, Bankr.Dkt. #603, **App. Q**. The subject property had been abandoned by the Estate in 2012, Bankr.Dkt. #555, and had again become the debtors’ property; therefore, the bankruptcy stay with regard to the debtors’ property under 11U.S.C. §362(a)(1) and/or §362(a)(5) was in place when HSBC Bank USA, National Association as Trustee for the Holders of BCAP LLC Trust 2006-AA2 foreclosed on the subject property in 2015. See H.R. Rep. No. 95-595 at 343 (1977)(stating that, while

**11 U.S.C. §362(c)(1) terminates the automatic stay as to estate property when the subject property is no longer estate property; that provision “does not terminate the stay against property of the debtor if the property leaves the estate and goes to the debtor.”**). See also *In re Cruseturner*, 8 B.R. 581 at 589, 590 (Bankr. D. Utah 1981); *In re Perry*, 29 B.R. 787 at 793, 794 (Bankr. D. Md. 1983).

The Smiths' debt was subsequently discharged June 1, 2016, Bankr.Dkt.#699, at which time the stay ended under 11U.S.C. §362(a)(1) and §362(a)(5); however, the stay remained in effect under 11U.S.C. §362(a)(3) with regard to the Smiths' property and rights which are owned by the Estate, including possessory rights. On October 20, 2016 the Superior Court issued a Writ of Possession to HSBC Bank USA, N.A., regarding the action begun on May 6, 2016 by HSBC Bank USA, who is not a legal entity. And the Smiths were dispossessed in August, 2017 by agents of Nationstar Mortgage. The dispossessory action was begun prior to the Smiths' discharge; therefore, the dispossessory action was taken in violation of 11U.S.C. §362(a)(1) and 11U.S.C. §362(a)(3). Consequently, **HSBC Bank USA, N.A. as Trustee for the Holders of BCAP LLC Trust 2006-AA2, having never requested relief of stay, proceeded in violation of 11U.S.C. §362(a) to foreclosure and HSBC Bank USA and HSBC Bank USA, N.A., having never requested relief of stay, proceeded to dispossession; therefore, all actions are void and without effect.** *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11<sup>th</sup> Cir., 1982) the Eleventh Circuit Court, citing. *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940).

Regardless, the Smiths' rights, including possessory rights, which are owned by the Estate, were, and continue to be, protected under 11U.S.C. §362(a)(3) until the Smiths' Bankruptcy Case 07-20244 is closed. See *In Re Salov*, 510 B.R. 720 (2014). The Estate remains intact until the case is closed. **Administration of property of the**

**Estate is not the determining factor for when the Estate ceases to exist. See 11U.S.C. §554(c).** There is no abandonment to the debtors until the case is closed; at which time the Smiths' property and rights will no longer be property of the Estate under 11U.S.C. §362(c)(1). Therefore, **the Bankruptcy Court, the District Court and the Panel erred in concluding that no bankruptcy estate remains and that the adversary proceeding could not have an effect on the estate.**

The Bankruptcy Court also has "related to" jurisdiction over the state claims with regard to the false Assignment of the security deed because "the outcome of the proceeding could conceivably have an effect on the bankruptcy estate or alter the debtor's rights, liabilities, options, freedom of action, which in any way impact the administration of the estate." *Lemco Gypsum*, 910 F.2d at 788 (quoting *Pacor*, 743 F.2d at 994). It is well established law that the party seeking relief from stay to foreclose a mortgage on the debtor's property bears the burden of proving that it has authority under applicable state law to foreclose the mortgage in question and, by virtue of that authority, standing to move for relief from the automatic stay to foreclose. Congress has extensive authority in the bankruptcy arena, including the authority to supersede state property law. *See* U.S. Const. Art.I, § 8, cl. 4.

Respondents have committed documented mortgage fraud and fraud upon the court, as evidenced by certified SEC documents attached to the Complaint in Adv.No.17-02016. Because Marvin Smith was and Sharon Smith is elderly, said



mortgage fraud constitutes elder abuse. “O.C.G.A. §16-8-100 et seq GA Residential Mortgage Fraud ACT ” is specifically listed on the Elder Abuse Investigation Checklist. “Exploitation” under O.C.G.A. §30-5-3 means illegal or improper use of a disabled adult or elder person or that person’s resources for another’s profit or advantage. Therefore, **all the state claims satisfy the “related to” criteria set forth in *Pacor*.**

Furthermore, **the claim of fraud upon the Court, to the detriment of the Smiths, arose “in” the false statements made to this Court to obtain a substitution of parties regarding the relief of stay.** “A claim ‘arises under’ title 11 if the cause of action ‘invoke[es] a substantive right created by the Bankruptcy Code,’ and it ‘arises in’ a case under title 11 if the claim would arise only in a bankruptcy context.” *Cont’l Bank of Miami v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1344-45 (11<sup>th</sup> Cir. 1999).

Additionally, **the Bankruptcy Court erred in denying as “moot” the Smiths’ Motion for Entry of Default Judgment,** because the court could have provided the relief requested. As set forth above and in Appellants’ Briefs, there were claims over which the Bankruptcy Court had subject-matter jurisdiction. Respondents failed to timely defend and failed to provide the required proof of excusable neglect. *In re South Atlantic Financial Corp.*, 767 F. 2d 814, 818 (11<sup>th</sup> Cir 1985); See also *Pioneer Inv. Servs. V. Brunswick Assocs.*, 507 U.S. 380, 13 (1993). Regardless, the



Bankruptcy Court had no jurisdiction over the party HSBC Bank USA, N.A. and, therefore, could not dismiss the action against said party based on the Motion to Dismiss filed by “Defendant, HSBC Bank USA, National Association as Trustee for the Holders of BCAP, LLC Trust 2006-AA2, Mortgage Pass-Through Certificates, series 2006-AA2, by and through its counsel”. **The District Court erred in affirming the Bankruptcy Court’s decision and by declining its discretion to enter default judgment.** Despite having acknowledged that Respondents failed to timely defend, the District Court stated: “the Court declines to exercise its discretion to enter default judgment on this matter”, No.2:19-cv-00076, Dkt. #10,p.12,13. However, where a district court “makes an error of law,” it “by definition abuses its discretion.” *Koon v. United States*, 518 U.S. 81, 100 (1996). Consequently, the Eleventh Circuit Panel, **App. A**, erred in affirming.

As set forth herein, HSBC Respondents had access to the record referred to in the letter by Mr. Cooper, a/k/a Nationstar Mortgage LLC, **App. T**. Therefore, **HSBC Respondents knowingly and willfully violated the bankruptcy stay under 11U.S.C. §362(a) and/or the discharge injunction under 11U.S.C. §524(a).** Consequently, **the Bankruptcy Court, District Court affirming, and the Panel affirming, erred in not exercising its contempt power.** *See In re McClean; Green Point Credit, LLC et al v. McClean*, Case No.14-14002, 11<sup>th</sup> Cir. 07/23/2015. Appellees repeatedly argued that neither the bankruptcy stay nor discharge injunction

applied; however, *In re Hardy*, 97 F.3d 1384, 1389–90 (11th Cir. 1996) the Eleventh Circuit found that “the focus of the court’s inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.”.

**The Bankruptcy Court, District Court affirming and the Eleventh Circuit Panel affirming, App. E and App. A, erred in dismissing all claims in the Complaint, Adv.No.17-02012, Dkt.#1 and Adv.No.17-02016, Dkt.#1;** there having been claims over which the Bankruptcy Court had subject-matter jurisdiction; there having been included with Exhibits attached to the Complaint “enough facts to state a claim to relief that is plausible on its face” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007); and there having been material facts in dispute which prohibited dismissal by summary judgment. *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157 (1970); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (discussing Rule 12(b)(6)). All of the claims set forth in the Complaints either arose in, arose under or were related to the Smiths’ property, the Association, and/or their rights associated with said property. *Lemco Gypsum*, 910 F.2d 784, 788 (11th Cir.1990), (quoting *Pacor*).

The Bankruptcy Stay was in effect with regard to the debtors’ property until discharge on June 1, 2016; and currently remains in effect with regard to estate property, including the Smiths’ property and rights, until the case is closed. Murphy never requested relief of the automatic stay from the bankruptcy court:

(1) To file documents on July 31, 2015 with the Georgia Secretary of State taking over the Association in violation of 11U.S.C. §362(a)(1),

(2) To file the Temporary Restraining Order on behalf of the Association in violation of 11U.S.C. §362(a)(3),

(3) To proceed with the Counterclaim in Case CE17-00522-063, nor did she request relief of stay in order to move the Superior Court for attorney fees in violation of 11U.S.C. §362(a)(3).

**The Murphy Respondents proceeded knowingly and willfully in violation of the automatic stay and/or the discharge injunction to a jury trial in the Superior Court while the issues were pending in the Bankruptcy Court; and which are currently pending in this appeal. All actions, including judgments, taken in violation of the bankruptcy stay under 11U.S.C. §362(a) are void. See *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11<sup>th</sup> Cir., 1982) the Eleventh Circuit Court, citing *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940).**

**All of the Smiths' rights which were violated by Respondent, as set forth in the Complaint, Adv.No.17-02012, Dkt.#1, are owned by the Bankruptcy Estate and subject to the stay under 11U.S.C. §362(a)(3), including but not limited to, their possessory, contractual and Constitutional rights.**

As set forth above, the foreclosure and dispossession with regard to the subject

property are void. The Smiths have had continuous ownership rights with regard to 311 10<sup>th</sup> Street, Unit B and under the Declaration; all debt associated therewith has been discharged. Therefore, **the Bankruptcy Court, District Court, and the Eleventh Circuit Panel, App. E and App. G, erred in concluding that the Smiths have no rights under the Association's Declaration due to lack of ownership.**

**The Counterclaim brought by Murphy in Case CE17-00522-063 is an attempt to recover from the Smiths discharged debt with regard to the pre-petition water damage to the Condominium and, therefore, constitutes violation of 11U.S.C. §524(a)(2).** The purpose of the discharge injunction is “to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it.” *Green Point Credit, LLC. V. McLean (In reMcLean)*, 794 F. 3d 1313, 1321 (11<sup>th</sup> Cir. 2015) (emphasis omitted). The test adopted by the Eleventh Circuit hinges on pressure placed on the debtor to repay a discharged debt. The determining factors are whether or not the debt was discharged and whether pressure was applied to repay the discharged debt. See *In re McClean; Green Point Credit, LLC et al v. McClean*, 794 F.3d 1313, 1321-1322 (11th Cir. 2015) this Court stated:

Legislative history demonstrates clearly that the purpose of the statute is to “eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts.” H.R.Rep. No. 95–595, at 365–66 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6321. And Congress meant no doubt whatsoever: “[Section 524] is intended to insure that once a debt is discharged, *the debtor will not be pressured in any way to repay it.*

.....

*Paul v. Iglehart (In re Paul)*, 534 F.3d 1303, 1313 (10th Cir.2008) (“[C]onduct that facially appears permissible may still violate § 524(a)(2) if its objective effect is prohibited, i.e., if it really serves to pressure the debtor to pay a discharged debt.”).

.....

Adopting the reasoning of our sister circuits, we hold that the test for whether a creditor violates the discharge injunction under 11 U.S.C. § 524(a)(2) is whether the objective effect of the creditor's action is to pressure a debtor to repay a discharged debt, regardless of the legal entity against which the creditor files its claim.

Regardless of whether Murphy et al were creditors at the time of the Smith’s discharge, the “objective effect” was clearly to pressure the Smiths to repay the discharged debt associated with the pre-petition water damage to the Condominium.

HSBC Respondents and Murphy Respondents knowingly and willfully violated the bankruptcy stay under 11U.S.C. §362(a) and/or the discharge injunction under 11U.S.C. §524(a), as set forth herein and in Appellants’ Briefs. Consequently, **the Bankruptcy Court, District Court affirming, and the Eleventh Circuit Panel affirming, App. G, erred in not exercising its contempt power.** See *In re McClean; Green Point Credit, LLC et al v. McClean*, Case No.14-14002, 11<sup>th</sup> Cir. 07/23/2015. Respondents repeatedly argued that neither the bankruptcy stay nor discharge injunction applied; however, *In re Hardy*, 97 F.3d 1384, 1389–90 (11<sup>th</sup> Cir. 1996) the Eleventh Circuit found that “the focus of the court’s inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.”.

**Respondents argument fails that, as attorneys, they cannot be held in contempt,** citing: *In re McConnell* , 370 U.S. 230 , 236 (1962) (“The arguments of a lawyer in presenting his client’s case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.”). However, *In re McConnell* supports the Smiths’ Motion for Contempt. Zachary Harris brought the Petition for Temporary Restraining Order on behalf of the Association; the result of which violated the Smiths’ Constitutional rights of person. (Zachary Harris, Samuel Choate and Delores Murphy were given the right to enter at will the Smiths’ Condo with a locksmith.) Said Constitutional rights were also protected by the Bankruptcy Stay under 11 U.S.C. 362(a)(3). Zachary Harris and Samuel Choate obstructed justice, as set forth in Appellants’ Briefs No.20-11636 and in the related Briefs No.20-11638, by refusing to provide discovery and willfully delaying the Adversary Proceeding in the Bankruptcy Court in order to proceed with the Counterclaim in the Superior Court. By contacting the Judge’s law clerk without the Smiths’ knowledge, the Superior Court Judge was convinced that no stays or injunction existed. Harris also told the Judge in the pre-trial order that the courts had already determined the Smiths alleged violations to be frivolous; all while the issues were pending in the federal court. Motion for Sanctions was incorporated into Appellants’ Motion for Contempt, Bankr.Dkt.#737,Exhibit 17.

## 2. HSBC RESPONDENTS HAD NO ARTICLE III STANDING.

**The Bankruptcy Court, District Court affirming, the Eleventh Circuit Panel affirming, App. A, erred in arbitrarily concluding that HSBC had a “right to relief from the stay” with no proof in the record of a real party in interest with Article III standing to have been granted relief of the bankruptcy stay.**

Article III of the United States Constitution limits the jurisdiction of all federal courts to "cases and controversies". A person with no ownership interest has no constitutional standing because a non-owner cannot establish “injury in fact” traceable to the acts of the opposing party. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). When standing is absent, a district court lacks subject-matter jurisdiction. *See D’Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9<sup>th</sup> Cir. 2008) (a party invoking federal jurisdiction has the burden of establishing that it has satisfied the ‘case-or-controversy’ requirement of Article III of the Constitution; standing is a ‘core component’ of that requirement.”) (internal citations omitted); *Medina v. Clinton*, 86 F.3d 155,157 (9<sup>th</sup> Cir. 1996) (linking Article III standing with subject-matter jurisdiction of federal courts). And a federal court cannot hypothesize subject- matter jurisdiction for the purpose of deciding the merits. *Ruhrgas A.G. v. Marathon Oil*, 526 U.S. 574 (1999).

Only a real party in interest with Article III standing with respect to the subject lien can be granted relief of stay under 11U.S.C. §362(d), *Lujan v. Defenders of Wildlife*, 504 US 555, 560(1992); proof of which is incumbent upon the alleging creditor, *In re Allen v. Lokey*, 307 F.2d 353 (5<sup>th</sup> Cir. 1962). There is nothing in the



record to prove that any of the Respondents is a real party in interest with standing, or is a party who has the authority to act on behalf of an entity that has standing. In fact, there is proof in the record, evidenced by certified SEC documents, that Respondents are not real parties in interest with Article III standing and have committed documented fraud upon the court. There is nothing in the record that Countrywide Home Loans, Inc. as Servicing Agent for HSBC Bank USA, National Association as Trustee for the Holders of BCAP LLC Trust 2006-AA2 was a real party in interest with Article III standing; therefore, the Bankruptcy Court lacked subject-matter jurisdiction to have conditionally granted relief of stay in the Consent Order.

**Jurisdiction cannot be conferred by consent.** *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *California v. LaRue*, 409 U. S. 109 (1972). Consequently, **the Consent Order is void *ab initio* for lack of subject-matter jurisdiction**; and any subsequent orders predicated upon the Consent Order are necessarily void also. The interlocutory District Court Order, *Smith v. HSBC Bank USA, N.A.*, No. 2:15-CV-70 (S.D. Ga. Aug. 9, 2017) was predicated on the conditional relief of stay granted by the Consent Order which is void *ab initio* for lack of subject-matter jurisdiction, and, therefore, **the interlocutory order is void also and cannot bar the Smiths' claims. *Res judicata* cannot be applied to the Smiths' claims in the Complaint, Adv.No.17-02016, because the four conditions of claim preclusion have not been met**, as set forth in detail in Appellants' Brief 20-



11640. *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1550 (11th Cir. 1990). See also *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11<sup>th</sup> Cir. 1999). Also, **new evidence of fraud upon the court cannot be precluded under the law of the case doctrine.** *Newman v. Ormond*, 456 F. App'x 866, 867 (11<sup>th</sup> Cir. 2012). Furthermore, with regard to Adv. No. 17-02012, **dismissal by motion under Rule 12 is precluded due to the dispute of material fact: the real party in interest of the alleging creditors and the validity of the subject lien.** *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157 (1970); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

The Smiths have Article III standing to challenge the real party in interest of HSBC Respondents to be granted relief of stay; therefore, **the Bankruptcy Court has jurisdiction over the core matters and all related state claims, as stated herein and in the Complaints, Adv.No.17-02016 and Adv. No. 17-02012.** The Bankruptcy Court has jurisdiction over the matters pursuant to 28 U.S.C. §§ 157; 1334; 1652; 2201, FRCP 57; B.R.7001(1),(2),(7), (9).

### **3. THE SMITHS' FIFTH AMENDMENT DUE PROCESS RIGHTS HAVE BEEN VIOLATED.**

The Bankruptcy Court, and the subsequent appeals courts, placed the burden of proof of the real party in interest with Article III standing on the wrong party, thereby denying the Smiths due process. In fact, **Constitutional right to due process includes statutory entitlement to object to the real party in interest under**

**11U.S.C §362(d) and Constitutional standing under Article III.** The Fifth Amendment to the Constitution requires "due process of Law" before any person can be "deprived of life, liberty, or property" and the concept of property includes statutory entitlements. *Johnson v. U.S. Dep't of Agric.*, 734 F.2d 774 (11<sup>th</sup> Cir. 1984). The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (citations omitted); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

The Smiths have diligently for over ten years persisted with their valid objection that there is no proof in the record of a real party in interest with Article III standing of any of the alleging creditors to be granted relief of stay under 11U.S.C. §362(d). Despite the burden of proof of a real party in interest being incumbent upon the alleging creditor, the Smiths have proven with certified SEC documents, attached to the Complaint in Adversary 17-02016, that the alleging creditors have repeatedly committed fraud upon the court. Nonetheless, the Bankruptcy Court concluded: "The Smiths have repeatedly and abusively attempted to circumvent HSBC's right to relief from the stay—relief that they agreed upon in the Consent Order more than a decade ago.", Order, Adv. 17-02016, Dkt.#29; ignoring the fact that over a decade ago, the Smiths, prior to relief of stay, objected to the real party in interest with Article III Standing in their Motion to Vacate the

Consent Order, Bankr.Dkt.#192.<sup>12</sup> Arbitrarily stating that a party has a right to relief of stay, without proof in the record, does not make it so. The fact remains, ten years later or 1000 years later, that without proof of a real party in interest with standing, **there was no subject-matter jurisdiction, subject-matter jurisdiction cannot be conferred by consent, and therefore, the Consent Order is void *ab initio*. All Orders predicated on the void Consent Order, including the interlocutory order, Smith v. HSBC Bank USA, N.A., No. 2:15-CV-70 (S.D. Ga. Aug. 9, 2017), are also void and cannot bar any of the claims in the Complaint.**

The Fifth Amendment to the Constitution requires "due process of law" before any person can be "deprived of life, liberty, or property" and the concept of property includes statutory entitlements. *Johnson v. U.S. Dep't of Agric*, supra. As set forth herein, **the Smiths have been repeatedly deprived of statutory entitlements.**

As set forth in Appellants' Brief, the Smiths have been prevented from fully and fairly presenting their case. *Inter alia*, the Letter, **App. T**, should have been allowed as new evidence. ***Pro se* litigants are entitled to the opportunity to submit evidence in support of their claims, Haines v Kerner**, 404 U.S. 519 (1972). Therefore, Bankruptcy Court, District Court affirming, erred in not allowing the new evidence. And **amendment should have been allowed prior to dismissal; Foman v.**

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<sup>12</sup> The Smiths also objected pursuant to Bankr. Rule 3008 and 11 U.S.C. §502 (j) to the Proofs of Claim in Motion to Reconsider, Bankr. Dkt. #377 on 12/14/2010.

*Davis*, 371 U.S. 178, 182 (1962); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1014 (11<sup>th</sup> Cir. 2005); *Platsky v. C.I.A.*, 953 F.2d. 26 (2d Cir. 1991).

The Smiths have been more than diligent for over ten years in presenting to the Courts the fact that the banks, different ones at different times depending on the fabrication at the time, were not the real parties in interest with Article III standing to have requested relief of stay or to have proceeded to foreclosure of and eviction from the subject property. The Smiths have endured the dismissals as “frivolous”, knowing that not to be the case. **They have persevered the sanction of a filing injunction which severely restricted the Smiths’ access to the Courts and thwarted appellate review<sup>13</sup>**; thereby denying Fifth Amendment due process to the

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<sup>13</sup> See attempted filings against Nationstar, Bankr.Dkt #650,#651 which were stricken, Bankr.Dkt.#648.

See 2:14-cv-00136 at Dkt.#6 where the Smiths attempted to file Notice of Appeal to the Eleventh Circuit Court and requested permission, in compliance with the injunction, to file in the Eleventh Circuit a Motion to Stay the injunction. Thereby, appellate review was thwarted.

See also *In Re: Smith*, No.MC214-13 (S.D.Ga. Dec.16,2014); Petition for Writ of Mandamus, No.14-7577, December 11, 2014 was submitted to the U.S. Supreme Court because appellate review by the Eleventh Circuit was being thwarted. On December 16, 2014, after receiving service of the Petition for Writ of Mandamus, the U.S. District Court in Brunswick entered its Order *In Re: Smith*, No.MC214-13 (S.D.Ga. Dec.16,2014), ECF No.1, denying leave to pursue the appeal of the Bankruptcy Court’s Order as frivolous, the fraud upon the Court not having been addressed. The Order is the only item docketed, despite several other documents having been transmitted by the Bankruptcy Court. Most importantly, the Bankruptcy Court’s Transmittal of Record on Appeal to U.S. District Court, 07-20244, Bankr.Dkt.#663 (with all accompanying documents) was never docketed, but was sent to Chambers in contravention to Bankruptcy Rule 8007(b) “Duty of Clerk To Transmit Copy of Record; Docketing of Appeal. When the record is complete for purposes of appeal, the clerk **shall** transmit a copy thereof forthwith to the clerk of the district court or the clerk of the bankruptcy appellate panel. On receipt of the transmission the clerk of the district court or the clerk of the bankruptcy appellate panel **shall enter the appeal in the docket** and give notice promptly to all parties to the judgment, order or decree appealed from of the date on which the appeal was docketed...”.

Smiths. The Smiths felt vindicated to some extent when the Eleventh Circuit Court ruled that the present parties are not subject of the filing injunction and reversed the dismissal of the District Court. *Smith v. HSBC Bank USA, N.A. et al*, No. 16-11045, (11<sup>th</sup> Cir. February 13, 2017). Finally, the U.S. District Court, Bankr.Dkt.#727, ordered the Bankruptcy Court on August 9, 2017 to allow a challenge to the Consent Order and to rule on the Smiths' Emergency Bankruptcy Motions, Bankr.Dkt.#728, regarding violation of the automatic stay filed in the Bankruptcy Court on July 27, 2017; only to have the ruling on the real party in interest circumvented by the Bankruptcy Court, Bankr.Dkt.#740, as barred by *Res Judicata* as to the interlocutory District Court Order, *Smith v. HSBC Bank USA, N.A.*, No. 2:15-CV-70 (S.D. Ga. Aug. 9, 2017). The Smiths were never given a hearing on the Emergency Bankruptcy Motions, Bankr.Dkt.#728; nor were the Smiths given a hearing in the wrongful foreclosure case (which was dismissed by the District Court after removal from Superior Court by Respondents), District Court Case No.2:15-CV-70. The District Court stated that the Smiths had provided no evidence or clear error of fraud, Dkt.#95,p.8. If the Bankruptcy Court and District Court needed clarification beyond the copies of the certified SEC documents attached to the Complaint, the Smiths would gladly have welcomed a hearing where their original certified SEC documents could have been examined. In approximately 12 years, the Smiths have *never* had a hearing by the District Court before dismissal. **In the present four cases, *no***

hearings were held by the Bankruptcy Court, District Court or Eleventh Circuit Court, despite request for hearings. Nonetheless, the Bankruptcy Court and the District Court should have taken judicial notice of the public documents. *Universal Express, Inc. v. United States SEC*, 177 Fed. Appx. 52,53 (11<sup>th</sup> Cir. 2006). And new evidence should have been allowed.

Now, the District Court has ordered an expanded filing injunction against the Smiths, further restricting their access to the Courts. District Court Order 2:19-cv-73, Dkt.18; Appeal No.20-11641, App. C.

The Bankruptcy Court erred in not issuing its Scheduling Order to have discovery proceed as requested by the Smiths in their Rule 26(f) Report in violation of Fed.R.Civ.P.16(b), L.R.26.1(c); pendency of the motion to dismiss having not provided an automatic basis to stay discovery; and there having been no order of the court to stay proceedings. Discovery requests should not have been dismissed as “moot”; there having been claims over which the Court had jurisdiction and there having been material fact in dispute. FRCP 16(b)(1) dictates that the Court “must issue a scheduling order:”[Emphasis added.]. The panel erred in affirming the District Court and by concluding that the Smiths had had not objected to the bankruptcy court’s failure to permit discovery. See the Rule 26(f) Report, Adv.Dkt.#19.

**The Eleventh Circuit Panel, App. E, erred in concluding that the Smiths’ appeal was frivolous; and therefore, erred in granting Rule 38 sanctions against the Smiths.**

[a] court may dismiss a claim as factually frivolous only if the facts alleged are "clearly baseless," [internal citations omitted] , a category encompassing allegations that are "fanciful," "fantastic," and "delusional". *Denton v. Hernandez*, 504 U.S. 25, 26 (1992).

The United States Supreme Court held in *Denton v. Hernandez*, supra.: Because the frivolousness determination is a discretionary one, it would be appropriate for a court of appeals to consider, among other things, whether the plaintiff was proceeding pro se, whether the district court inappropriately resolved genuine issues of disputed fact and whether the court applied erroneous legal conclusions. In the present case, the Smiths are proceeding *pro se*, and have shown in their Appellants' Brief No. 20-11638, which is incorporated herein by reference, that the courts below inappropriately resolved genuine issues of disputed fact and applied erroneous legal conclusions, all of which should be taken into consideration regarding the frivolousness determination. *Denton v. Hernandez*, supra. Neither the Bankruptcy Court, nor the District Court affirming, dismissed the cases as frivolous.

**It is the Smiths' due process right to demand equality of application of the law.** "Our whole system of law is predicated on the general fundamental principle of equality of application of the law." *Truax v. Corrigan*, 257 U.S. 312, 331 (1921).

## **XI. CONCLUSION**

For the foregoing reasons, this Honorable Court should grant the Petition for Writ of Certiorari; and/or reverse and remand the Opinions below.

Respectfully submitted this 2<sup>nd</sup> day of June, 2022.

A handwritten signature in black ink, appearing to read "Sharon H. Smith". The signature is fluid and cursive, with the first name "Sharon" being more prominent than the last name "Smith".

Sharon H. Smith  
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## CERTIFICATE OF SERVICE

I certify that I have this day served the parties below with a copy of  
**Petition for Writ of Certiorari and Motion to Proceed *In Forma Pauperis*:**

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Respectfully submitted this 2<sup>nd</sup> day of June, 2022.

A handwritten signature in black ink, appearing to read "Sharon H. Smith". The signature is fluid and cursive, with the first name "Sharon" being the most prominent.

Sharon H. Smith

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# APPENDIX

## **APPENDIX TABLE OF CONTENTS**

- A        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11640, affirming the judgment of the district court [Dismissal-HSBC et al], was filed on March 18, 2021.
- B        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11640, denying petition for rehearing, was filed on January 3, 2022.
- C        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11641, affirming the judgment of the district court, [Denial of Motion to Enforce Discharge Injunction and Motion for Contempt- HSBC et al] was filed on March 18, 2021.
- D        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11641, denying petition for rehearing, was filed on January 3, 2022.
- E        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11638, affirming the judgment of the district court [Dismissal- Murphy], was filed on March 18, 2021.
- F        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11638, denying petition for rehearing, was filed on January 3, 2022.
- G        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11636, affirming the judgment of the district court [Denial of Motion for Contempt- Murphy et al], was filed on March 18, 2021.
- H        The unpublished Order of the United States Court of Appeals for the Eleventh Circuit, No. 20-11636, denying petition for rehearing, was filed on January 3, 2022.
- I        The unpublished Order of the United States District Court for the Southern District of Georgia, Brunswick Division, No. 2:19-cv-00076-LGW, affirming the Bankruptcy Court [Dismissal-HSBC et al] was filed on March 30, 2020.

- J The unpublished Order of the United States District Court for the Southern District of Georgia, Brunswick Division, No. 2:19-cv-00073-LGW, affirming the Bankruptcy Court [Denial of Motion to Enforce Discharge Injunction and Motion for Contempt- HSBC et al] was filed on March 30, 2020.
- K The unpublished Order of the United States District Court for the Southern District of Georgia, Brunswick Division, No. 2:19-cv-00075-LGW, affirming the Bankruptcy Court [Dismissal- Murphy] was filed on March 30, 2020.
- L The unpublished Order of the United States District Court for the Southern District of Georgia, Brunswick Division, No. 2:19-cv-00074-LGW, affirming the Bankruptcy Court [Denial of Motion for Contempt- Murphy et al] was filed on March 30, 2020.
- M The unpublished Order of Dismissal with Prejudice of the United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, Adv. No. 2:17-02016 [HSBC et al] was filed on June 7, 2019.
- N The unpublished Order Denying Emergency Motion to Enforce Discharge Injunction and Motion for Contempt [HSBC et al] of the United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, No. 2:19-bkc-20244-MJK was filed on June 7, 2019.
- O The unpublished Order of Dismissal with Prejudice of the United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, Adv. No. 2:17-02012 [Murphy] was filed on June 7, 2019.
- P The unpublished Order Denying Emergency Motion for Enforcement of Discharge Injunction and/or Automatic Stay and Denying Motion for Contempt [Murphy et al] of the United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, No. 2:19-bkc-20244-MJK was filed on June 7, 2019.
- Q Order Disallowing Claim #10 of Countrywide Home Loans, Inc. United States Bankruptcy Court for the Southern District of Georgia, Brunswick Division, No. 07-20244 was filed on March 11, 2013.

- R Certified SEC Document: Prospectus Supplement dated Nov. 29, 2006  
BCAP LLC Trust 2006-AA2  
Servicer: Countrywide Home Loans Servicing, L.P. or Indymac Bank  
[Not Countrywide Home Loans, Inc.]
- S Certified SEC Document: Form 10K for fiscal year ended Dec. 31, 2006  
BCAP 2006-AA2 List of Mortgages  
[Showing Smiths' mortgage was not in said Trust.]
- T Letter from Mr. Cooper to Marvin and Sharon Smith  
Case Number: 0720244  
Loan Number: 611005117  
Property Address: 311 10<sup>th</sup> Street Unit B, St. Simons Island, GA 31522

“Our records indicate that the debt associated with the above-referenced property was subject of a bankruptcy proceeding and discharged by order of the Court.”

“Mr. Cooper is a brand name for Nationstar Mortgage LLC. Nationstar Mortgage LLC is doing business as Nationstar Mortgage LLC d/b/a Mr. Cooper. ”

[The Letter from Mr. Cooper was submitted to the Bankruptcy Court on May 23, 2018 as an attachment to Plaintiffs' Supplement: New Evidence, Dkt. #25and#26, in Adversary Proceeding 17-02016-MJK.]

# APPENDIX

## A



[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 20-11640  
Non-Argument Calendar

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D.C. Docket No. 2:19-cv-00076-LGW,  
Bkey No. 2:19-bkc-20244-MJK

In re: MARVIN B. SMITH, III,  
SHARON H. SMITH,

Debtors.

---

MARVIN B. SMITH, III,  
SHARON H. SMITH,

Plaintiffs-Appellants,

versus

HSBC BANK USA,  
HSBC BANK USA, N.A.,  
HSBC BANK USA, NATIONAL ASSOCIATION,  
as Trustee for the Holders of BCAP LLC Trust  
2006-AA2, et al.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Georgia

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(March 18, 2021)

Before JILL PRYOR, LUCK, and EDMONDSON, Circuit Judges.

PER CURIAM:

Marvin and Sharon Smith, proceeding pro se,<sup>1</sup> appeal the district court's order affirming the bankruptcy court's dismissal of the Smiths' adversary complaint filed against HSBC Bank USA, HSBC Bank USA, N.A., and HSBC Bank USA, National Association as Trustee for the Holders of BCAP LLC Trust 2006-AA2 (collectively, "HSBC"). No reversible error has been shown; we affirm.

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<sup>1</sup> We construe liberally pro se pleadings. See Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

I. Background

Briefly stated, the Smiths have sought -- for over a decade and in various courts -- to challenge the foreclosure proceedings on their home in St. Simons Island, Georgia (the “Property”). The adversary proceeding at issue in this appeal represents one of those challenges. Given the complicated and lengthy procedural history underlying this appeal, we will summarize the facts and proceedings only as necessary to provide context for our decision.<sup>2</sup>

In 2007, the Smiths filed for bankruptcy seeking to discharge over \$2 million in mortgage debt on the Property (“Smith I”). On their bankruptcy petition, the Smiths listed Countrywide Home Loans (“Countrywide”) as holding two secured claims against the Property.

In 2008, Countrywide -- as servicing agent for HSBC -- moved for relief from the automatic stay under 11 U.S.C. § 362(a). The bankruptcy court denied the motion but entered a Consent Order modifying the automatic stay to allow the bankruptcy trustee to market the Property for sale. If the Property remained unsold as of 4 May 2009, the automatic stay would terminate without further hearing or order and foreclosure proceedings could commence.

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<sup>2</sup> A more thorough description of the underlying factual and procedural history is set forth in the district court’s decision in Smith v. HSBC Bank, N.A., 616 B.R. 438 (S.D. Ga. 2020).

In July 2009, the bankruptcy court denied the Smiths' motion to vacate the Consent Order and stated that foreclosure on the still-unsold Property could proceed. The district court affirmed; and we dismissed as frivolous the Smiths' appeal.

HSBC foreclosed on the Property in May 2015. On 1 June 2016, the bankruptcy court entered an order discharging the Smiths' debt under Chapter 7. The Smiths were evicted from the Property in August 2017.

In November 2017, the Smiths filed in the bankruptcy court an adversary complaint against HSBC. The Smiths asserted that HSBC's foreclosure and eviction proceedings violated the automatic stay. The Smiths also alleged claims for mortgage fraud and for elder abuse in violation of Georgia law.

The bankruptcy court dismissed with prejudice the Smiths' adversary proceeding. The bankruptcy court first concluded that it lacked subject matter jurisdiction over the Smiths' state law claims for mortgage fraud and elder abuse -- claims that did not "arise under," "arise in," or "relate to" the Bankruptcy Code. The bankruptcy court next concluded that the Smiths' claims about HSBC's purported violation of the automatic stay were barred by res judicata. The district court affirmed. This appeal followed.

## II. Discussion

We review de novo legal conclusions of both the bankruptcy court and the district court. See Finova Cap. Corp. v. Larson Pharmacy, Inc. (In re Optical Techs., Inc.), 425 F.3d 1294, 1299-1300 (11th Cir. 2005). We review for clear error the bankruptcy court's factual findings. See id. at 1300.

### A. Subject Matter Jurisdiction

We review de novo questions of subject matter jurisdiction. See Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 408 (11th Cir. 1999).

The bankruptcy court has jurisdiction over three categories of proceedings: “those that ‘arise under [T]itle 11,’ those that ‘arise in cases under [T]itle 11,’ and those ‘related to cases under [T]itle 11.’” See Cont’l Nat’l Bank v. Sanchez (In re Toledo), 170 F.3d 1340, 1344 (11th Cir. 1999) (citing 28 U.S.C. § 1334(b)). A claim “arises under” Title 11 if it invokes a substantive right created by the Bankruptcy Code. Id. at 1345. A claim arises in a case under Title 11 if it involves “matters that could arise only in bankruptcy.” Id. A claim is sufficiently “related to” Title 11 for jurisdictional purposes when the outcome of the

proceeding “could conceivably have an effect on the estate being administered in bankruptcy.” See Wortley v. Bakst, 844 F.3d 1313, 1318-19, 1320 (11th Cir. 2017).

The bankruptcy court committed no error in dismissing -- for lack of subject matter jurisdiction -- the Smiths’ mortgage fraud and elder abuse claims. These claims allege violations of Georgia law and invoke no right created by the Bankruptcy Code or a matter arising only in bankruptcy. Nor would the resolution of these claims have a conceivable effect on the bankruptcy estate. By the time the Smiths filed this adversary proceeding in November 2017, the Property had been abandoned and was no longer part of the bankruptcy estate; and the bankruptcy estate had been already fully administered.

#### B. Res Judicata

“Res judicata, or claim preclusion, bars relitigation of matters that were litigated or could have been litigated in an earlier suit.” Manning v. City of Auburn, 953 F.2d 1355, 1358 (11th Cir. 1992). A claim is barred by the judgment in a prior case when four elements are met: “(1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the

parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases.” Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999). “Res judicata applies not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact.” Manning, 953 F.2d at 1358-59 (quotations omitted).

The bankruptcy court determined properly that the Smiths’ claim -- that HSBC’s foreclosure activities violated the automatic stay -- was barred by res judicata. This claim is one that the Smiths have pursued repeatedly (and unsuccessfully) in various courts over several years.

In 2015, the Smiths filed a civil action challenging the foreclosure proceedings on their home (“Smith II”). The Smiths moved the bankruptcy court to stay a writ of possession granted to HSBC which the Smiths said violated the bankruptcy court’s automatic stay. In a 9 August 2017 order, the district court denied the motion on the merits, concluding that HSBC had been granted relief from the automatic stay.

The Smiths filed a materially similar motion to stay HSBC’s writ of possession in Smith I. On 5 December 2017, the bankruptcy court denied that motion as barred by res judicata based on the district court’s 9 August 2017 order

in Smith II. We affirmed both the district court's 9 August 2017 order and the bankruptcy court's 5 December 2017 order on appeal. See Smith v. HSBC Bank USA, N.A., 775 F. App'x 492 (11th Cir. 2019) (unpublished).

In this adversary proceeding, the Smiths reiterate the same arguments raised in Smith I and in Smith II. In the light of the procedural history underlying this appeal, that the Smiths' automatic-stay claim is barred by res judicata is clear.

### C. Default Judgment

We next address the Smiths' contention that they were entitled to a default judgment because HSBC failed to file timely a responsive pleading to the Smiths' adversary proceeding.

We review the denial of a motion for a default judgment under an abuse-of-discretion standard. Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309, 1316 (11th Cir. 2002). We have said that "[d]efault is to be used sparingly." Id. Given the wide range of lesser sanctions available, the "drastic remedy" of entry of judgment by default is appropriate "only in extreme situations." Id. at 1316-17.



The district court determined that a default judgment was inappropriate in this case given that HSBC was (at most) one day late in filing its motion to dismiss and that the Smiths' claims were dismissed properly as barred by res judicata and for lack of subject matter jurisdiction. The district court refused "to endorse this 'gotcha' style of litigating whereby the Smiths seek to prevail on a technicality after they were unable to prevail on the merits of this frivolous and duplicative litigation."

We accept that this case presents no "extreme situation" that would justify the "drastic remedy" of default judgment. Given our "strong preference that cases be heard on the merits" and given that the Smiths' claims were facially invalid, neither the bankruptcy court nor the district court abused its discretion in denying the Smiths' motions for a default judgment. See Wahl v. McIver, 773 F.2d 1169, 1174 (11th Cir. 1985) (concluding that no exceptional circumstances justified the entry of a default judgment where -- despite an unexplained delay -- most defendants answered the complaint shortly after the deadline, plaintiff suffered no prejudice because of the delay, and most of plaintiff's claims were facially invalid).

#### D. Constitutional Due Process

On appeal, the Smiths also contend that adverse rulings by the bankruptcy court and the district court denied the Smiths their due process right to object to the real party in interest and to seek enforcement of the automatic stay. We reject these conclusory arguments. Plaintiffs have been given ample notice and opportunities to be heard -- in the bankruptcy court, the district court, and in this Court -- throughout the course of this litigation. That Plaintiffs are dissatisfied with the outcome of the proceedings establishes no constitutional violation.

AFFIRMED.

# APPENDIX

## B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 20-11640-JJ

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In re: MARVIN B. SMITH, III,  
SHARON H. SMITH,

Debtors.

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MARVIN B. SMITH, III,  
SHARON H. SMITH,

Plaintiffs - Appellants,

versus

HSBC BANK USA,  
HSBC BANK USA, N.A.,  
HSBC BANK USA, NATIONAL ASSOCIATION,  
as Trustee for the Holders of BCAP LLC Trust  
2006-AA2, et al.,

Defendants - Appellees.

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Appeal from the United States District Court  
for the Southern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JILL PRYOR, LUCK, and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40).

ORD-46

# APPENDIX

## C

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 20-11641  
Non-Argument Calendar

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D.C. Docket No. 2:19-cv-00073-LGW  
Bkey. No. 2:19-bkc-20244-AJK

In re: MARVIN B. SMITH, III,  
SHARON H. SMITH,

Debtors.

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MARVIN B. SMITH, III,  
SHARON H. SMITH,

Plaintiffs-Appellants,

HSBC BANK USA,  
HSBC BANK USA, N.A.,  
HSBC BANK USA, NATIONAL ASSOCIATION,  
as Trustee for the Holders of BCAP LLC Trust  
2006-AA2,  
PATRICK J. BURKE,  
Pres./CEO of HSBC Bank USA, N.A.,

GEREMY GREGORY,  
Agent for Balch & Bingham LLP, et al.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Georgia

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(March 18, 2021)

Before JILL PRYOR, LUCK, and EDMONDSON, Circuit Judges.

PER CURIAM:

Marvin and Sharon Smith, proceeding pro se,<sup>1</sup> appeal the district court's order affirming the bankruptcy court's order denying the Smiths' motion to enforce a bankruptcy discharge injunction and to hold in contempt certain parties involved in the foreclosure proceedings on the Smiths' home. The Smiths sought a contempt order against (1) HSBC Bank USA, HSBC Bank USA, N.A., and HSBC Bank USA, National Association as Trustee for the Holders of BCAP LLC Trust 2006-AA2 (collectively "HSBC"); (2) an HSBC corporate officer; and (3) several

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<sup>1</sup> We construe liberally pro se pleadings. See Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

lawyers, law firms, a realtor, and a realty company. No reversible error has been shown; we affirm.

I. Background

Briefly stated, the Smiths seek to challenge the foreclosure and dispossessory proceedings on their home in St. Simons Island, Georgia (the “Property”). Given the complicated and lengthy procedural history underlying this appeal, we will summarize the facts and proceedings only as necessary to provide context for our decision.<sup>2</sup>

In 2007, the Smiths filed for bankruptcy seeking to discharge over \$ 2 million in mortgage debt on the Property. On their bankruptcy petition, the Smiths listed Countrywide Home Loans (“Countrywide”) as holding two secured claims against the Property.

In 2008, Countrywide -- as servicing agent for HSBC -- moved for relief from the automatic stay under 11 U.S.C. § 362(a). The bankruptcy court denied the motion but entered a Consent Order modifying the automatic stay to allow the bankruptcy trustee to market the Property for sale. If the Property remained unsold

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<sup>2</sup> A more thorough description of the underlying factual and procedural history is set forth in the district court’s decision. See Smith v. HSBC Bank, N.A., 616 B.R. 438 (S.D. Ga. 2020).



as of 4 May 2009, the automatic stay would terminate without further hearing or order and foreclosure proceedings could commence.

In July 2009, the bankruptcy court denied the Smiths' motion to vacate the Consent Order and stated that foreclosure on the Property could proceed. The district court affirmed; we dismissed the Smiths' appeal as frivolous.

In April 2012, the bankruptcy trustee abandoned the bankruptcy estate's interest in the Property. In January 2013, the bankruptcy trustee objected to a proof of claim filed earlier by Countrywide ("Claim No. 10") on grounds that the mortgage loan on the Property was "secured by property either abandoned or not administered by the Trustee and, therefore, [Countrywide] should look to its collateral for satisfaction of the debt." The bankruptcy court sustained the objection and disallowed Claim No. 10.

HSBC foreclosed on the Property in May 2015. On 1 June 2016, the bankruptcy court entered an order discharging the Smiths' debt under Chapter 7. The Smiths were evicted from the Property in August 2017.

In August 2018, the Smiths filed the motion at issue in this appeal: a motion titled "Emergency Motion to Enforce Discharge Injunction and Motion for Issuance of an Order to Respondents to Show Cause why they should not be Held in Contempt" ("Contempt Motion"). The Smiths contended that -- by enforcing

the lien and foreclosing on the Property -- HSBC and the lawyers, law firms, and realtors involved in the foreclosure proceedings violated the bankruptcy court's discharge injunction under 11 U.S.C. § 524 and the bankruptcy court's order disallowing Claim No. 10.

The bankruptcy court denied the Contempt Motion. The bankruptcy court concluded that the Chapter 7 discharge had no effect on the lien on the Property and, thus, the foreclosure proceedings "had nothing to do with the Smiths or their discharge." The bankruptcy court also found no violation of the order disallowing Claim No. 10. The district court affirmed.

## II. Discussion<sup>3</sup>

We review de novo legal conclusions of both the bankruptcy court and the district court. See Finova Cap. Corp. v. Larson Pharmacy, Inc. (In re Optical Techs., Inc.), 425 F.3d 1294, 1299-1300 (11th Cir. 2005). We review for clear error the bankruptcy court's factual findings. See id. at 1300.

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<sup>3</sup> In their appellate brief, the Smiths reiterate arguments they have raised in other related civil actions about HSBC's alleged violations of the automatic stay. Because these arguments were not raised below in connection with the Smiths' Contempt Motion, the arguments are not properly before us in this appeal.

A. Discharge Injunction

A Chapter 7 discharge “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor.” 11 U.S.C. § 524(a)(2). The Supreme Court has said that -- while a Chapter 7 discharge extinguishes the personal liability of the debtor -- it does not extinguish a creditor’s right to foreclose on a valid mortgage on the debtor’s property. See Johnson v. Home State Bank, 501 U.S. 78, 83 (1991). Instead, “a creditor’s right to foreclose on the mortgage survives or passes through the bankruptcy.” Id.

Under the Bankruptcy Code, the Smiths’ Chapter 7 discharge had no impact on the validity or enforceability of HSBC’s lien against the Property. HSBC thus retained the right to foreclose. The bankruptcy court concluded correctly that the complained-of acts taken by HSBC and others to foreclose, evict, or to sell the Property constituted no violation of the Smiths’ Chapter 7 discharge injunction.

B. Disallowance of Claim No. 10

The bankruptcy court also concluded correctly that the validity of HSBC's lien against the Property was unaffected by the disallowance of Claim No. 10. The record demonstrates that the bankruptcy trustee sought to disallow Claim No. 10 because the trustee had earlier abandoned the Property and the Property was thus no longer part of the bankruptcy estate. Never did the bankruptcy trustee challenge the validity or enforceability of the lien on the Property. To the contrary, the bankruptcy trustee said expressly that HSBC "should look to its collateral for satisfaction of the debt." By sustaining the trustee's objection and disallowing Claim No. 10, the bankruptcy court disallowed only HSBC's claim to an interest in the bankruptcy estate. The bankruptcy court made no merits determination about the validity or enforceability of HSBC's lien on the Property.

We reject the Smiths' contention that the disallowance of a claim under the circumstances presented in this case operates to void automatically an otherwise valid lien under 11 U.S.C. § 506(d). We cannot conclude that the bankruptcy court erred in finding no violation of the disallowance order.

C. Constitutional Due Process

On appeal, the Smiths contend they were denied their due process rights when the bankruptcy court ruled on their Contempt Motion without an evidentiary hearing. This argument is without merit. Generally speaking, due process rights are attributed to the party against whom contempt sanctions are sought. See Mercer v. Mitchell, 908 F.2d 763, 766-67 (11th Cir. 1990). We have found no binding precedent requiring these same due process protections for the party seeking the issuance of a contempt order.

The Smiths also contend that adverse rulings by the bankruptcy court and the district court denied the Smiths their due process right to object to the real party in interest. We reject these conclusory arguments. That Plaintiffs are dissatisfied with the outcome of the proceedings establishes no constitutional violation.

AFFIRMED.

# APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 20-11641-JJ

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In re: MARVIN B. SMITH, III,  
SHARON H. SMITH,

Debtors.

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MARVIN B. SMITH, III,  
SHARON H. SMITH,

Plaintiffs - Appellants,

HSBC BANK USA,  
HSBC BANK USA, N.A.,  
HSBC BANK USA, NATIONAL ASSOCIATION,  
as Trustee for the Holders of BCAP LLC Trust  
2006-AA2,  
PATRICK J. BURKE,  
Pres./CEO of HSBC Bank USA, N.A.,  
GEREMY GREGORY,  
Agent for Balch & Bingham LLP, et al.,

Defendants - Appellees.

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Appeal from the United States District Court  
for the Southern District of Georgia

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JILL PRYOR, LUCK, and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

# APPENDIX E



[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 20-11638  
Non-Argument Calendar

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D.C. Docket No. 2:19-cv-00075-LGW,  
Bkey No. 2:07-bkc-20244-MJK

In re: MARVIN B. SMITH, III,  
SHARON H. SMITH,

Debtors.

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MARVIN B. SMITH, III,  
SHARON H. SMITH,

Plaintiffs-Appellants,

versus

M. DELORES MURPHY,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Georgia

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(March 18, 2021)

Before JILL PRYOR, LUCK, and EDMONDSON, Circuit Judges.

PER CURIAM:

Marvin and Sharon Smith, proceeding pro se,<sup>1</sup> appeal the district court's order affirming the bankruptcy court's dismissal of the Smiths' adversary complaint filed against Delores Murphy. No reversible error has been shown; we affirm. We also grant Murphy's motion for attorney's fees and double costs pursuant to Fed. R. App. P. 38.

I. Background

This appeal arises out of extensive litigation stemming from the Smiths' bankruptcy proceedings and from property the Smiths owned on St. Simons Island,

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<sup>1</sup> We construe liberally pro se pleadings. See Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

Georgia (the “Property”). We will summarize the facts and proceedings only as necessary to provide context for our decision.<sup>2</sup>

The Property is located within a two-unit condominium building comprised of the Property (Unit B) and Unit A. Unit A is owned by Murphy. Both units are governed by the Enchantment by the Sea Condominium Owner’s Association (“Association”). The owners of each unit are members of the Association and have voting rights.

In 2007, the Smiths filed for bankruptcy seeking to discharge over \$2 million in mortgage debt on the Property. On their bankruptcy petition, the Smiths listed Countrywide Home Loans (“Countrywide”) as holding two secured claims against the Property.

In 2008, Countrywide -- as servicing agent for HSBC Bank USA, N.A. (“HSBC”) -- moved for relief from the automatic stay under 11 U.S.C. § 362(a). The bankruptcy court denied the motion but entered a Consent Order modifying the automatic stay to allow the bankruptcy trustee to market the Property for sale. If the Property remained unsold as of 4 May 2009, the automatic stay would

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<sup>2</sup> A more thorough description of the underlying factual and procedural history is set forth in the district court’s decisions in Smith v. HSBC Bank, N.A., 616 B.R. 438 (S.D. Ga. 2020), and in Smith v. Murphy, 616 B.R. 228 (S.D. Ga. 2020).

terminate without further hearing or order; and foreclosure proceedings could commence.

In July 2009, the bankruptcy court denied the Smiths' motion to vacate the Consent Order and stated that foreclosure on the Property could proceed. The district court affirmed; and we dismissed as frivolous the Smiths' appeal.

In April 2012, the bankruptcy trustee abandoned the bankruptcy estate's interest in the Property. HSBC foreclosed on the Property in May 2015. On 1 June 2016, the bankruptcy court entered an order discharging the Smiths' debt under Chapter 7. The Smiths were later evicted from the Property in August 2017.

Meanwhile, in March 2015, members of the Association elected Marvin Smith as president and elected Murphy as secretary/treasurer of the Association. In July 2015 -- after HSBC foreclosed on the Property -- Murphy filed the Association's annual registration with the Georgia Secretary of State, naming herself as CEO.

In February 2017, Murphy -- on behalf of the Association -- filed a complaint in state court seeking to enjoin the Smiths and HSBC from preventing the Association from entering the Property to inspect and to make repairs. In an affidavit supporting her motion, Murphy purported to be the president of the Association and alleged that the Property had fallen into disrepair, was causing

water damage to her unit, and that the Smiths had refused to cooperate with repair efforts. In March 2017, the state court issued a temporary restraining order (“TRO”).

In April 2017, the Smiths filed in state court a petition for a TRO against Murphy; Murphy counterclaimed for private nuisance based on the Smiths’ failure to maintain the Property. Following a jury trial on the counterclaim, the state court entered final judgment in favor of Murphy and awarded damages of \$690,000.

In August 2017, the Smiths moved in the underlying bankruptcy action to enforce against Murphy the automatic stay under 11 U.S.C. § 362. The Smiths alleged that Murphy had violated the automatic stay by (1) filing documents with the Georgia Secretary of State declaring herself CEO/President of the Association; (2) seeking a TRO against the Smiths; and (3) by filing a counterclaim against the Smiths in state court. The bankruptcy court denied the motion in January 2018.

In October 2017, the Smiths filed the adversary proceeding that is the subject of this appeal. The complaint asserted against Murphy non-bankruptcy claims for fraud, fraud upon the court, collusion with intent to defraud, theft, violation of Constitutional rights, and recklessness (“Counts I-VI”). The Smiths also alleged that Murphy violated the automatic stay based on the same three

complained-of acts identified in the Smiths' August 2017 stay motion ("Count VII").

The bankruptcy court dismissed with prejudice the Smiths' adversary proceeding against Murphy. The bankruptcy court first concluded that it lacked subject matter jurisdiction over Counts I-VI: claims that did not "arise under," "arise in," or "relate to" the Bankruptcy Code. The bankruptcy court next dismissed Count VII for failure to state a claim. The district court affirmed.

## II. Discussion

We review de novo legal conclusions of both the bankruptcy court and the district court. See Finova Cap. Corp. v. Larson Pharmacy, Inc. (In re Optical Techs., Inc.), 425 F.3d 1294, 1299-1300 (11th Cir. 2005). We review for clear error the bankruptcy court's factual findings. See id. at 1300.

### A. Dismissal of Counts I-VI

We review de novo questions of subject matter jurisdiction. See Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 408 (11th Cir. 1999).

The bankruptcy court has jurisdiction over three categories of proceedings: “those that ‘arise under [T]itle 11,’ those that ‘arise in cases under [T]itle 11,’ and those ‘related to cases under [T]itle 11.’” See Cont’l Nat’l Bank v. Sanchez (In re Toledo), 170 F.3d 1340, 1344 (11th Cir. 1999) (citing 28 U.S.C. § 1334(b)). A claim “arises under” Title 11 if it invokes a substantive right created by the Bankruptcy Code. Id. at 1345. A claim arises in a case under Title 11 if it involves “matters that could arise only in bankruptcy.” Id. A claim is sufficiently “related to” Title 11 for jurisdictional purposes when the outcome of the proceeding “could conceivably have an effect on the estate being administered in bankruptcy.” See Wortley v. Bakst, 844 F.3d 1313, 1318-19, 1320 (11th Cir. 2017).

The bankruptcy court committed no error in dismissing -- for lack of subject matter jurisdiction -- the Smiths’ non-bankruptcy claims for fraud, fraud upon the court, collusion with intent to defraud, theft, violation of Constitutional rights, and recklessness. These claims invoke no right created by the Bankruptcy Code and involve no matter unique to bankruptcy. Nor would the resolution of these claims have a conceivable effect on the bankruptcy estate. By the time the Smiths filed this adversary proceeding in October 2017, the Property was no longer part of the bankruptcy estate; and the bankruptcy estate had been already fully administered.

B. Dismissal of Count VII

We review de novo a dismissal for failure to state a claim, accepting all properly alleged facts as true and construing them in the light most favorable to the plaintiff. Estate of Jackson v. Schron (In re Fundamental Long Term Care, Inc.), 873 F.3d 1325, 1334-35 (11th Cir. 2017).

The purported stay violations alleged in Count VII occurred in July 2015, February 2017, and May 2017. That the automatic stay expired in June 2016 -- when the bankruptcy court entered an order discharging the Smiths' Chapter 7 debt -- is clear. Thus, no automatic stay was in effect or could be violated at the time of Murphy's complained-of acts in February 2017 and May 2017.

The Smiths first contend that Murphy violated the automatic stay in July 2015 by filing registration documents with the Georgia Secretary of State. By that time, however, the bankruptcy trustee had abandoned the Property and HSBC had foreclosed on the Property. The Property was thus no longer "property of the estate" or "property of the debtor" protected by the automatic stay. Nor were the Smiths -- as former owners of the Property -- still members of the Association.



Because the Smiths can state no plausible claim for violation of the automatic stay, the bankruptcy court dismissed properly Count VII.

### C. Scheduling Order

The Smiths next contend that the bankruptcy court erred by failing to issue a scheduling order pursuant to Fed. R. Civ. P. 16(b)(2), and thus preventing unlawfully the Smiths from proceeding with discovery.

Courts “enjoy broad discretion in deciding how best to manage the cases before them.” Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1366 (11th Cir. 1997). An abuse of discretion must be redressed, however, “[w]hen a litigant’s rights are materially prejudiced by the district court’s mismanagement of a case.” Id. at 1367.

Even if we assume (without deciding) that the bankruptcy court erred by issuing no scheduling order, the Smiths have failed to show prejudice. When a scheduling order would have been due under Rule 16, the bankruptcy court had pending before it a motion for judgment on the pleadings filed by Murphy. In her motion, Murphy argued that the Smiths’ adversary proceeding should be dismissed for lack of jurisdiction and for failure to state a claim.

We have cautioned lower courts to resolve facial challenges to the legal sufficiency of a claim -- like Murphy's motion for judgment on the pleadings in this case -- before permitting discovery. See id. at 1367-68. Allowing a case to proceed to discovery on a facially invalid claim "does nothing but waste the resources of the litigants in the action before the court, delay resolution of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public's perception of the federal judicial system." Id. at 1368.

In the light of the pending challenges to the facial validity of the Smiths' claims in this adversary proceeding and of the Smiths' history of protracted litigation raising similar arguments, it would have been reasonable (and no abuse of discretion) for the bankruptcy court to delay discovery until after a ruling on Murphy's dispositive motion. We also note that never did the Smiths object to the bankruptcy court's failure to issue a scheduling order or otherwise move the bankruptcy court to permit discovery. On this record, we see no reversible error.

#### D. Constitutional Due Process

On appeal, the Smiths contend they were denied their Fifth Amendment due process rights when the bankruptcy court dismissed their adversary proceeding

without a hearing, refused to allow discovery, and issued no scheduling order. For the reasons already discussed, we reject these conclusory arguments as without merit.

#### E. Rule 38 Motion for Attorney's Fees and Costs

“If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.” Fed. R. App. P. 38. A Rule 38 sanction is appropriate when an appellant raises “clearly frivolous claims in the face of established law and clear facts.” Parker v. Am. Traffic Sols., Inc., 835 F.3d 1363, 1371 (11th Cir. 2016). A claim is frivolous if it is “utterly devoid of merit.” Id. Generally speaking, we are reluctant to impose Rule 38 sanctions on pro se appellants; but we have found Rule 38 sanctions warranted in cases when a pro se appellant has been already warned that the suit is frivolous. See, e.g., United States v. Morse, 532 F.3d 1130, 1132-33 (11th Cir. 2008); Ricket v. United States, 773 F.2d 1214, 1216 (11th Cir. 1985).

We find the record in this case supports a Rule 38 award of attorney's fees and costs. In this appeal, the Smiths continue to assert arguments that have been already flatly rejected by the bankruptcy court, the district court, and by this Court.

One central argument underlying the Smiths' appeal is that the foreclosure proceedings on the Property were unlawful because (among other things) Countrywide was not the real party in interest with standing to seek relief from the automatic stay. We dismissed -- "as frivolous and entirely without merit" -- an earlier appeal in which the Smiths presented this same argument. See Smith v. Countrywide Home Loans, Inc. (In re Smith), No. 13-13808, 2013 U.S. App. LEXIS 26218 (11th Cir. Dec. 19, 2013) (unpublished). In that appeal, we also granted the appellee's motion for damages under Rule 38 in part because the Smiths had already been warned that their arguments were frivolous. See id.

We have also already concluded in an earlier appeal that the automatic stay expired on 1 June 2016 when the Smiths' Chapter 7 case was discharged. See Smith v. HSBC Bank USA, N.A., 775 F. App'x 492, 495 (11th Cir. 2019) (unpublished). Nevertheless, the Smiths persist in arguing that the automatic stay never terminated and that conduct taken by Murphy -- conduct unrelated to the Bankruptcy Code or the bankruptcy estate and that occurred after 1 June 2016 -- violated the automatic stay.

The Smiths have been put on sufficient notice that the arguments raised in this appeal are frivolous and utterly without merit. Because the Smiths continue to pursue these frivolous arguments, Rule 38 sanctions are justified in this case. We GRANT Murphy's motion for attorney's fees and double costs. We remand to the district court for a determination of the amount of reasonable attorney's fees and costs to be awarded.

AFFIRMED and REMANDED.

# APPENDIX

## F

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 20-11638-JJ

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In re: MARVIN B. SMITH, III,  
SHARON H. SMITH,

Debtors.

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MARVIN B. SMITH, III,  
SHARON H. SMITH,

Plaintiffs - Appellants,

versus

M. DELORES MURPHY,

Defendant - Appellee.

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Appeal from the United States District Court  
for the Southern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JILL PRYOR, LUCK, and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

# APPENDIX

## G



[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 20-11636  
Non-Argument Calendar

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D.C. Docket No. 2:19-cv-00074-LGW,  
Bkey No. 2:07-bkc-20244-MJK

In re: SHARON H. SMITH,  
MARVIN B. SMITH, III,

Debtors.

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SHARON H. SMITH,  
MARVIN B. SMITH, III,

Plaintiffs-Appellants,

versus

M. DELORES MURPHY,  
CHOATE & COMPANY, P.C.,  
ZACHARY B. HARRIS,  
SAMUEL CHOATE,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Georgia

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(March 18, 2021)

Before JILL PRYOR, LUCK, and EDMONDSON, Circuit Judges.

PER CURIAM:

Marvin and Sharon Smith, proceeding pro se,<sup>1</sup> appeal the district court's order affirming the bankruptcy court's denial of the Smiths' motion to enforce a bankruptcy discharge injunction and to hold in contempt Delores Murphy and her lawyers. No reversible error has been shown; we affirm.

I. Background

This appeal arises out of extensive litigation stemming from the Smiths' bankruptcy proceedings and from property the Smiths owned on St. Simons Island,

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<sup>1</sup> We construe liberally pro se pleadings. See Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

Georgia (the “Property”). We will summarize the facts and procedural history only as necessary to provide context for our decision.<sup>2</sup>

The Property is located within a two-unit condominium building comprised of the Property (Unit B) and Unit A. Unit A is owned by Murphy. Both units are governed by the Enchantment by the Sea Condominium Owner’s Association (“Association”). The owners of each unit are members of the Association and have voting rights.

In 2007, the Smiths filed for bankruptcy seeking to discharge over \$2 million in mortgage debt on the Property. On their bankruptcy petition, the Smiths listed Countrywide Home Loans (“Countrywide”) as holding two secured claims against the Property.

In 2008, Countrywide -- as servicing agent for HSBC Bank USA, N.A. (“HSBC”) -- moved for relief from the automatic stay under 11 U.S.C. § 362(a). The bankruptcy court denied the motion but entered a Consent Order modifying the automatic stay to allow the bankruptcy trustee to market the Property for sale. If the Property remained unsold on 4 May 2009, the automatic stay would terminate without further hearing or order; and foreclosure proceedings could

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<sup>2</sup> A more thorough description of the underlying factual and procedural history is set forth in the district court’s decisions in Smith v. HSBC Bank, N.A., 616 B.R. 438 (S.D. Ga. 2020), and in Smith v. Murphy, 616 B.R. 228 (S.D. Ga. 2020).

commence. In July 2009, the bankruptcy court denied the Smiths' motion to vacate the Consent Order and stated that foreclosure on the Property could proceed.

In April 2012, the bankruptcy trustee abandoned the bankruptcy estate's interest in the Property. HSBC foreclosed on the Property in May 2015. On 1 June 2016, the bankruptcy court entered an order discharging the Smiths' debt under Chapter 7. The Smiths were later evicted from the Property in August 2017.

Meanwhile, in March 2015, members of the Association elected Marvin Smith as president and elected Murphy as secretary/treasurer of the Association. In July 2015 -- after the foreclosure on the Property -- Murphy filed the Association's annual registration with the Georgia Secretary of State, naming herself as CEO.

In February 2017, Murphy -- on behalf of the Association -- filed a complaint in state court seeking to enjoin the Smiths and HSBC from preventing the Association from entering the Property to inspect and to make repairs. In an affidavit supporting her motion, Murphy purported to be the president of the Association and alleged that the Property had fallen into disrepair, was causing water damage to her unit, and that the Smiths had refused to cooperate with repair

efforts. In March 2017, the state court issued a temporary restraining order (“TRO”).

In April 2017, the Smiths filed in state court a petition for a TRO against Murphy; Murphy counterclaimed for private nuisance based on the Smiths’ failure to maintain the Property. Following a jury trial on the counterclaim, the state court entered final judgment in favor of Murphy and awarded damages of approximately \$690,000.

In August 2017, the Smiths moved in the underlying bankruptcy action to enforce against Murphy the automatic stay under 11 U.S.C. § 362. The Smiths alleged that Murphy had violated the automatic stay by (1) filing documents with the Georgia Secretary of State declaring herself CEO/President of the Association; (2) seeking a TRO against the Smiths; and (3) by filing a counterclaim against the Smiths in state court.

The Smiths then filed an adversary proceeding against Murphy in October 2017 in which they reasserted the same purported automatic stay violations.

The bankruptcy court denied the Smiths’ August 2017 stay motion in January 2018. The bankruptcy court later dismissed with prejudice the Smiths’ adversary proceeding in June 2019.

In September 2018, the Smiths filed the motion at issue in this appeal: a motion titled “Emergency Motion for Enforcement of the Discharge Injunction and/or Automatic Stay and Motion for Contempt” (“Emergency Motion”). In their motion, the Smiths contended (for the third time) that Murphy and Murphy’s lawyers violated the automatic stay by filing documents with the Georgia Secretary of State, seeking a TRO against the Smiths, and by filing a counterclaim against the Smiths. The Smiths also alleged that Murphy and her lawyers violated the bankruptcy court’s discharge injunction under 11 U.S.C. § 524 by filing and prosecuting the private nuisance counterclaim.

The bankruptcy court denied the Emergency Motion, finding no violation of the automatic stay or the discharge injunction. The district court affirmed.

## II. Discussion

We review de novo legal conclusions of both the bankruptcy court and the district court. See Finova Cap. Corp. v. Larson Pharmacy, Inc. (In re Optical Techs., Inc.), 425 F.3d 1294, 1299-1300 (11th Cir. 2005). We review for clear error the bankruptcy court’s factual findings. See id. at 1300.

#### A. Automatic Stay

The Smiths first contend that Murphy and her lawyers violated the automatic stay in July 2015 by filing registration documents with the Georgia Secretary of State. By that time, however, the bankruptcy trustee had abandoned the Property; and HSBC had foreclosed on the Property. The Property was thus no longer “property of the estate” or “property of the debtor” subject to protection under the automatic stay. Nor were the Smiths -- although former owners of the Property -- still members of the Association.

The Smiths’ other two asserted stay violations also lack merit. The automatic stay expired in June 2016, when the Smiths’ Chapter 7 debt was discharged. Thus, no automatic stay was in effect (or could be violated) at the time of the complained-of acts in February 2017 and May 2017.

We see no error in the bankruptcy court’s determination that neither Murphy nor her lawyers violated the automatic stay.

#### B. Discharge Injunction

A Chapter 7 discharge “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor.” 11 U.S.C. § 524(a)(2). The purpose of the discharge injunction is “to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it.” See Green Point Credit, LLC v. McLean (In re McLean), 794 F.3d 1313, 1321 (11th Cir. 2015) (emphasis omitted). In determining whether a creditor has violated the discharge injunction we consider “whether the objective effect of the creditor’s action is to pressure a debtor to repay a discharged debt, regardless of the legal entity against which the creditor files its claim.” Id.

The record supports the bankruptcy court’s determination that no violation of the discharge injunction occurred. Neither Murphy nor her lawyers were creditors of the Smiths. And nothing evidences that Murphy’s counterclaim for private nuisance -- filed and prosecuted after the Smiths’ Chapter 7 discharge -- was an attempt to recover on an already-discharged debt.

### C. Constitutional Due Process



On appeal, the Smiths contend they were denied their Fifth Amendment due process rights when the bankruptcy court denied their Emergency Motion without a hearing. Contrary to the Smiths' assertion, nothing establishes that the party seeking a contempt order (as opposed to the party charged with contempt) is entitled to an evidentiary hearing. We also reject the Smiths' conclusory allegations about due process violations stemming from adverse rulings by the bankruptcy court and the district court in the Smiths' adversary proceeding against Murphy.

AFFIRMED.

# APPENDIX

## H

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 20-11636-JJ

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In re: SHARON H. SMITH,  
MARVIN B. SMITH, III,

Debtors.

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SHARON H. SMITH,  
MARVIN B. SMITH, III,

Plaintiffs - Appellants

versus

M. DELORES MURPHY,  
CHOATE & COMPANY, P.C.,  
ZACHARY B. HARRIS,  
SAMUEL CHOATE,

Defendants - Appellees.

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Appeal from the United States District Court  
for the Southern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JILL PRYOR, LUCK, and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40).

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**Additional material  
from this filing is  
available in the  
Clerk's Office.**