No. _____

IN THE

Supreme Court of the United States

IN RE: RAMON AGUIRRE AND BERTHA AGUIRRE, *DEBTORS.*

WHEELER FINANCIAL, INC.,

Petitioner,

—v.—

J.P. MORGAN CHASE BANK, N.A., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a lien is extinguished by operation of § 1141(c) of the Bankruptcy Code, when the lienholder did not file a proof of claim due to the debtors' failure to provide notice of the claims bar date, and when the lienholder's only participation in the bankruptcy case was providing oral feedback on the terms of the plan to the debtors' counsel.

PARTIES TO THE PROCEEDING

Petitioner is Wheeler Financial, Inc, an Illinois corporation. Petitioner was appellee in the district court (J. Norgle) and, after remand to the bankruptcy court, was appellant to the district court (J. Pacold) and appellant in the court of appeals.

Respondents are Bertha and Ramon Aguirre, the petitioners for bankruptcy protection in the bankruptcy court, and JPMorgan Chase Bank, N.A. Both Respondents were appellants in the district court (J. Norgle) and, after remand, were appellees in the district court (J. Pacold) and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioners state as follows:

Petitioner Wheeler Financial, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- In the matter of: Ramon Aguirre and Bertha Aguirre, Nos. 21-2681, 21-2682, 21-2687 & 21-2782 (7th Cir. June 16, 2022) (affirming the judgment of the district court);
- In re: Ramon Aguirre and Bertha Aguirre, Nos. 18-cv-07915, 19-cv-01232, 19-cv-01233 (N.D. Ill. Aug. 19, 2021) (J. Pacold) (order affirming bankruptcy court order, after remand, denying Petitioner's motion for relief from stay, granting Debtor's motion to modify plan and vacating the order which directed Petitioner's tax deed be vacated);
- In re: Ramon Aguirre, et al., Nos. 16-cv-4924, 16-cv-4927, and 16-cv-5271 (N.D. Ill. Jan. 23, 2017) (J. Norgle) (order vacating bankruptcy court's order lifting the automatic stay and denying the motion to modify the plan); and
- In re: Ramon Aguirre and Bertha Aguirre, No. 14-24420 (Bankr. N.D. Ill. Apr. 18, 2016) (orders lifting the automatic stay and denying the motion to modify plan); and
- In re: the Matter of the Application of the County Treasurer, 2014COTD4203 (Cir. Court Cook County, Illinois) (Petitioner's Petition for tax deed).

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PETITION FOR WRIT OF CERTIORARI

Wheeler Financial, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

INTRODUCTION

Petitioner asks this Court to resolve an open question regarding the operation of § 1141(c) of the Bankruptcy Code: whether a lienholder must file a proof of claim before its lien will be released upon plan confirmation. Section 1141(c) provides that the confirmation of a chapter 11 plan releases all liens not expressly retained by the plan. *See* 11 U.S.C. § 1141(c). For a lien to be deemed released, however, almost all Courts of Appeals to address the issue have interpreted § 1141(c) as requiring that the lienholder have "participated" in the underlying bankruptcy case. *In re Northern New England Telephone Operations,* 795 F.3d 343 (2d Cir. 2015); *In re S. White Transp., Inc.,* 725 F.3d 494, 498 (5th Cir. 2013); *In re Penrod,* 50 F.3d 459 (7th Cir. 1995); *F.D.I.C. v. Be-Mac Transp. Co., Inc. (In re Be-Mac Transp. Co., Inc.),* 83 F.3d 1020 (8th Cir. 1996).[1]

The seminal case on § 1141(c), *In re Penrod,* 50 F.3d 459 (7th Cir. 1995), held that a secured creditor only "participates" when a proof of claim is filed respecting

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[1] The Fourth Circuit has not adopted the participation requirement. *See University Suppliers, Inc. v. Reg'l Building Systs., Inc. (In re Reg'l Building Systems, Inc.),* 254 F.3d 528 (4th Cir. 2001). Nevertheless, in *Regional Building Systems,* the Fourth Circuit held that plan confirmation released a lien under § 1141(c) when the lienholder had "participated" in the bankruptcy case by sitting on an official committee of unsecured creditors and filing a proof of claim. *Id.* at 523.

the lien. Following *Penrod,* the Eighth Circuit refused to apply § 1141(c) when the lienholder did not file a timely proof of claim, notwithstanding the lienholder's notice of the hearing on confirmation. *Be-Mac Transp.,* 83 F.3d at 1027 (holding that FDIC had not participated because it merely had an allowed unsecured claim, not an allowed secured claim).

In the case below, the Seventh Circuit departed from its own precedent in *Penrod* and the holding of the Eighth Circuit. Affirming the district court's reversal of the bankruptcy court, the Seventh Circuit held that confirmation of a plan eliminated Petitioner's lien when no proof of claim was or could be filed, given that the debtors failed to provide notice of the bankruptcy case until after the claims bar date had passed.

The decision was wrongly decided. It conflicts not only with other Circuit precedent, but also with the long-standing principle that liens pass through bankruptcy unless drawn into the case by filing a proof of claim, whether voluntarily by the lienholder or involuntarily by the debtor. *E.g., Dewsnup v. Timm,* 502 U.S. 410, 417–18, 112 S. Ct. 773, 778, 116 L. Ed. 2d 903 (1992) (noting lienholder's right to "stay[ ] aloof from the bankruptcy proceeding" and have its lien ride-through the bankruptcy, but "subject . . . to the power of other persons or entities to pull him into the proceeding pursuant to § 501" of the Bankruptcy Code through the filing a proof of claim). The question posed by the Seventh Circuit's holding is of fundamental importance to the operation of the Bankruptcy Code, because it addresses an open question about lienholder's obligations and rights in a chapter 11 bankruptcy case.

OPINIONS BELOW

The court of appeals' order affirming the district court's opinion is reproduced as App. A. The district court's opinion (J. Pacold) is reproduced as App. B. The bankruptcy court orders after remand are reproduced as App. C and D. The district court's opinion (J. Norgle) is reproduced as App. E. The bankruptcy court's order granting stay relief and memorandum decision are reproduced as App. F and G.

JURISDICTION

The court of appeals issued its judgment on June 16, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix reproduces 11 U.S.C. §§ 101, 501, 502, 506, 521, and 1141, Federal Rules of Bankruptcy Procedure 1007, 2002, 3001, 3002, 3003, and 3004.

STATEMENT OF THE CASE

A. Statutory Background

1. *Claims in Bankruptcy*

A "claim" is defined in the Bankruptcy Code[2] as "(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of

[2] References to the Bankruptcy Code refer to title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.*

performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." 11 U.S.C. § 101(5).

A claim solely *in rem* against the debtor's property, like Petitioner's lien in this case, is a "claim" under § 506(a) of the Bankruptcy Code. *Johnson v. Home State Bank,* 501 U.S. 78, 85 (1991); *see In re Lamont,* 740 F.3d 397, 404 (7th Cir. 2014) (holding that purchaser of unpaid real estate taxes in Illinois holds a "claim," as defined in § 101(5) of the Bankruptcy Code, against owner of real estate).

Section 502(a) of the Bankruptcy Code governs the claims allowance process. This section provides that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a).

Section 506 of the Bankruptcy Code governs the determination of whether a claim is "secured." Generally, the value of a secured claim is the value of the estate's interest in the collateral, and is unsecured to the extent that the amount of the claim exceeds the value of the estate's interest in the collateral. *See* 11 U.S.C. § 506(a)(1).

2. *Allowance of Claims against the Bankruptcy Estate.*

Section 501 of the Bankruptcy Code permits creditors, including secured creditors, to file proofs of claim against the debtor's bankruptcy estate. 11 U.S.C. § 501(a). If the creditor does not file a timely proof of claim, "the debtor or the trustee may file a proof of such claim". 11 U.S.C. § 501(c); *see* Fed. R.

Bankr. P. 3004 ("If a creditor does not timely file a proof of claim, the debtor or trustee may file a proof of the claim within 30 days" of the claims bar date). Upon the filing of a proof of claim, the claim is deemed allowed until a party in interest objects. 11 U.S.C. § 502(a).

No proof of claim needs to be filed if the claim is listed in the debtor's bankruptcy schedules as undisputed and non-contingent, and in a liquidated amount. Fed. R. Bankr. P. 3002(a) ("A secured creditor . . . must file a proof of claim . . . for the claim . . . to be allowed, except as provided in Rule 3003"); 3003(b)(1) ("The schedule of liabilities filed pursuant to § 521(1) of the Code shall constitute prima facie evidence of the validity and amount of the claims of creditors.").

In a chapter 11 case, if the claim is not scheduled and no proof of claim is filed, the claim is not allowed. Fed. R. Bankr. P. 3002(a). In that instance, the creditor "shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution." Fed. R. Bankr. P. 3002(c)(2).

The Bankruptcy Code distinguishes, however, between the allowance of a claim and the survival of a lien. Although secured creditors must hold allowed claims to participate in the bankruptcy case, *see* Fed. R. Bankr. 3002(a), (c)(2), the failure of a secured creditor to file a proof of claim does not invalidate the creditor's lien. 11 U.S.C. § 506(d)(2) ("To the extent that a lien secured a claim against the debtor that is not an allowed secured claim, such lien is void, unless . . . (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title." 11 U.S.C. § 506(d)(2); *see* Fed. R. Bankr. P. 3002(a) ("A lien that

secured a claim against the debtor is not void due only to the failure of any entity to file a proof of claim.").

3. *Bankruptcy Schedules and Notices.*

At the outset of a bankruptcy case, the debtor must file a list of its creditors. 11 U.S.C. § 521(a)(1)(A); *see* Fed. R. Bankr. P. 1007(a)(1). The list of creditors, often referred to as a "creditor matrix," must include the name and address of each entity included on the debtor's bankruptcy schedules. Fed. R. Bankr. P. 1007(a)(1). The creditor matrix is utilized by the clerk of the court to issue notices to creditors of the commencement of the bankruptcy case and the deadline to file claims. Fed. R. Bankr. P. 2002(a), (f). *See In re Vanderpol*, 606 B.R. 425, 430 (Bankr. D. Colo. 2019) (explaining that clerk's office uses the creditor matrix to issue a notice of the bankruptcy case and claims bar date to creditors).

4. *Confirmation of a Plan.*

A chapter 11 debtor may emerge from bankruptcy by obtaining confirmation of a plan of reorganization. 11 U.S.C. §§ 1121, 1129. Creditors who are impaired under the plan are entitled to vote to accept or reject it. 11 U.S.C. § 1126(a). If all impaired classes vote to accept the plan, the bankruptcy court may confirm the plan under § 1129(a) of the Bankruptcy Code; if not all impaired classes accept, the bankruptcy court may still confirm the plan if it satisfies the requirements of § 1129(b) of the Bankruptcy Code. *See* 11 U.S.C. § 1129(a), (b).

The effect of confirmation of a chapter 11 plan is addressed in § 1141 of the Bankruptcy Code. Subsection (c) of that section provides, in pertinent part, as follows: "except as otherwise provided in the

plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor." 11 U.S.C. § 1141(c).

B. Factual and Procedural Background

The facts of this case are undisputed. App. 57a. Bertha and Ramon Aguirre (the "Debtors") own real estate in Chicago, Illinois, where they operate a restaurant (the "Property"). JPMorgan Chase Bank, N.A. ("JPMorgan") holds a mortgage against the Property and other property owned by the Debtors. App. 58a. The Debtors failed to pay the real estate taxes on the Property for 2010, and on August 8, 2012, almost two years before their bankruptcy filing, the Petitioner purchased the 2010 real estate tax lien at the Cook County Treasurer's annual tax sale. App. 57a. The Debtors also failed to pay the property taxes for tax years 2011 and 2012 and the first installment of tax year 2013, and Petitioner paid these subsequent taxes. *Id*. Under Illinois law, upon purchase at the tax sale, Petitioner held a tax lien secured by the Property in the amount of all taxes it paid plus certain cost and interest. *See* 35 ILCS 200/21-75; *LaMont*, 740 F.3d at 404.

The statutory deadline to redeem the tax sale was June 8, 2015 ("Redemption Deadline"). 35 ILCS 200/21-345. App. 57a. Any party interested in the Property, including JPMorgan and the Debtors, was entitled to redeem the tax sale by paying off Petitioner's lien before the Redemption Deadline. *See* 35 ILCS 200/21-345. The record is clear that JPMorgan had actual knowledge of the unpaid taxes as early as November 2013, and both it and the

Debtors had actual knowledge of the Redemption Deadline and the tax sale as of July 2014[3]. On December 10, 2014, Petitioner filed a petition for tax deed in the Circuit Court of Cook County. App. 57A. The record is also clear the Debtors and JPMorgan were served with the requisite statutory notices in the Tax Deed Proceeding on or about January 15, 22, and 26, 2015. Despite being served notice as required under Illinois law, neither party redeemed the Tax Sale by the Redemption Deadline.

On June 30, 2014, the Debtors filed a petition under chapter 11 of the Bankruptcy Code. App. 57a. Petitioner was not identified in the creditor matrix, and the Debtors did not list Petitioner's tax lien as a debt in their schedules. App. 58a. As a result, Petitioner could not, and did not, file a claim. *Id.* On September 26, 2014, the claims bar date expired. *Id.* On November 5, 2014, the Debtors filed a plan of reorganization, which did not mention Petitioner or its tax lien. The Debtors later amended the plan on December 16, 2014 (the "Plan") to reference Petitioner's tax lien and require the Debtors to make payments to Petitioner. App. 58a.

Petitioner first learned of the Bankruptcy Case on or about March 1, 2015, after the Debtors contacted Petitioner to solicit a vote in favor of the Plan. *Id.* The Debtors "received feedback from [Petitioner] and, to resolve its potential objection," agreed to modify the Plan to require payment of Petitioner's lien "within six

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[3] JPMorgan admitted knowledge of the Tax Claim in August of 2014 in this Case. See [Dkt. No. 45, bankruptcy case 14-24420], ¶¶ 16, 17. JPMorgan obtained an estimate of redemption in February of 2015, which it attached as an exhibit to its Response Brief to Petitioner's motion for Stay Relief.

months of confirmation," or by October 15, 2015 (the "Payment Deadline"). App 59a.

On April 15, 2015, after a hearing on confirmation of the Plan (the "Confirmation Hearing"), the bankruptcy court entered an order confirming the Plan, as well as an agreed minute order modifying the Plan to include the Payment Deadline.

The Debtors defaulted on the confirmed Plan by failing to make any payment to Petitioner by the Payment Deadline. App. 60a. As a result, on November 19, 2015, Petitioner filed a motion for relief from the automatic stay (the "Motion for Stay Relief"). *Id*. In the Motion for Stay Relief, Petitioner argued that the Debtors' default under the Plan constituted "cause" for relief from stay under § 362(d)(1) of the Bankruptcy Code to permit Petitioner to seek a tax deed to the Property. *Id*. In response, the Debtors and JPMorgan argued the Plan did not expressly preserve the Petitioner's tax lien and was thus void under § 1141(c). App. 61. Petitioner replied that the Plan could not eliminate its lien, because Petitioner had not participated for purposes of § 1141(c). App. 38-39a. After all, Petitioner had not received notice of the case until after the claims bar date, and no proof of claim was filed regarding Petitioner's lien. App. 58a.

In response to the Motion for Stay Relief, the Debtors filed a motion to modify the confirmed Plan to extend the Payment Deadline by six months. App. 61a. On April 18, 2016, the bankruptcy court entered orders granting the Motion for Stay Relief and lifting the automatic stay, and denying the Debtors' motion to modify the Plan. App. 51-52a.

In its opinion, the bankruptcy court found "there is no question" that the Debtors had defaulted under the confirmed Plan by failing to pay Petitioner's lien. App.

66a. As the Bankruptcy Court held, "[t]he debtors' post confirmation default . . . is cause to lift the automatic stay, and neither JPMorgan nor the Debtors dispute that, nor could they." App. 67a. The bankruptcy court rejected the argument that Petitioner's lien was wiped out by operation of § 1141(c), holding that in fact, the Plan expressly preserved the lien. App. 67a. The court found that "the language of the Plan did not expressly extinguish [Petitioner's] rights as a tax purchaser against the Property, which is a lien that includes both the right to payment and a right to an equitable remedy against the Debtors' property". App. 79a. The court noted the "language of the Plan required payment by the Debtors in 'exchange for . . . release'" of Petitioner's claim and "[b]ecause the payment has not been made, [Petitioner's] claim, which includes its lien rights, has not been released." App. 82a. Therefore, the bankruptcy court ruled Petitioner's lien "both the right to payment and the right to an equitable remedy, survives." App. 80a.

The bankruptcy court also refused to enforce a last-minute offer by JPMorgan to pay Petitioner's lien, finding the offer was "too little, too late". App. 83a. The bankruptcy court found JPMorgan had received over $144,000 from the Debtors during the Bankruptcy Case and "wasted repeated chances to pay Petitioner and remove the threat of Petitioner's tax deed foreclosing all other interests in the Property." App. 71a. The court noted the "Debtors do bear sole responsibility in creating the problem the court is presently faced with. It is their inaction with respect to payment of [Petitioner] under the Plan, or predefault modification of the Plan, that puts the parties in the position they are now in". App. 69a. Finally, the bankruptcy court described the "overall

inequitable conduct of the Debtors and JPMorgan," including how the Debtors "brought [Petitioner] into the case at the eleventh hour". App. 70a.

C. Procedural History of the Appeals

On May 1, 2016, Chase and the Debtors appealed the bankruptcy court order granting the Motion for Stay Relief. In the meantime, Petitioner resumed the Tax Deed Proceeding in the state court, and on May 25, 2016, the state court held an uncontested hearing on the Application for Deed. App. 14a. The hearing in the tax deed case was *ex parte*, as neither Chase nor the Debtors had filed appearances in state court despite having received the statutory notices and having full knowledge of the pendency of the state court proceeding. *Id*. On June 8, 2016, the state court found Petitioner was entitled to an order directing the issuance of a tax deed to Petitioner for the Property and entered an order directing the Cook County Clerk to issue the deed to Petitioner (the "Tax Deed"). *Id*.

On January 23, 2017, the district court reversed and vacated the order granting the Motion for Stay Relief. App. 14-50a. The district court held that the bankruptcy court abused its discretion by lifting the stay and denying the motion to modify the plan. App. 49a. The district court cited *In re Penrod,* 50 F.3d 459 (7th Cir. 1995), and held Petitioner had participated in the formation of the Plan because it had actual knowledge before the Plan was confirmed and was able to negotiate the Payment Deadline. App. 42a, 45a. Petitioner's lien was therefore extinguished at confirmation and replaced with a "contractual right defined by the terms of the Plan". App. 45a. The district court remanded the case back to the

bankruptcy court for proceedings "consistent" with its opinion. *Id.*

On remand, the bankruptcy court entered its order denying Petitioner's motion for stay relief and granted the Debtors' motion to modify their plan. App. 31a. It also entered an order finding the tax deed void. Petitioner appealed to the district court, and the case was assigned to a different District Judge, Judge Pacold. App. 15a. On August 19, 2021, Judge Pacold affirmed the order denying the Motion for Stay Relief and granting the motion to modify the plan. App. 10a. She held that both orders were required under the law of the case as set forth in Judge Norgle's district court opinion. App. 19a. However, Judge Pacold reversed the order finding the tax deed void, holding that an action taken in reliance on an order granting relief from the automatic stay was not void, even if that order was later vacated on appeal. App. 30a.

On September 14, 2021, Petitioner filed notices of appeal of Judge Pacold's Orders, thereby commencing an appeal to the United States Court of Appeals for the Seventh Circuit.

D. The Seventh Circuit's Decision

On June 16, 2022, the Seventh Circuit affirmed Judge Pacold, holding that the lien was released by operation of § 1141(c). App. 1a. Judge Easterbrook wrote the opinion for the panel. The Seventh Circuit framed the issue under § 1141(c) not as whether Petitioner "participated" in the bankruptcy case, but instead whether Petitioner was a "party" to the bankruptcy case. Although Petitioner "did not become a party through the means normally employed for that purpose," the Seventh Circuit noted that "an entity can waive service and consent to party status even though

the norms of party-making have not been followed." App. 8a. The Seventh Circuit went on to state that "a litigant also can waive its right to participate in the voting on a proposed plan of reorganization. [Petitioner] did not vote, but it negotiated for better terms, got the terms it sought, accepted the plan's confirmation as a *fait accompli*, and claimed rights under it. Those steps effectively consent to have the lien replaced by a cash payment and waive any entitlement to better or earlier notice." *Id.* The Seventh Circuit concluded that the confirmed Plan "knocks out any entitlement that [Petitioner] may once have had to obtain a tax deed and foreclose on its lien." App. 8a.

REASONS FOR GRANTING THE PETITION

I. The decision below creates a split of authority among the Circuits.

The Seventh Circuit held that the Petitioner's lien could be released even though it did not file a proof of claim. The holding is directly at odds with the precedent of the Eighth Circuit Courts of Appeal.

The seminal case interpreting § 1141(c) is from the Seventh Circuit, *In re Penrod*, 50 F.3d 459 (7th Cir. 1995) (Posner, J.). In *Penrod*, the Seventh Circuit held that, "unless the plan of reorganization, or the order confirming the plan, says that a lien is preserved, it is extinguished by the confirmation." *Penrod,* 50 F.3d at 463. However, this rule only applies if "the holder of the lien participated in the reorganization. If he did not, his lien would not be 'property dealt with by the plan,' and so [§ 1141(c) of the Bankruptcy Code] would not apply." *Id.* (*citing* 11 U.S.C. § 1141(c)).

The reason for the participation requirement, the Seventh Circuit held, is to reconcile "the language of section 1141(c) with the principle . . . that liens pass through bankruptcy unaffected." *Id.* at 463; *see id.* at 462 (citing *Long v. Bullard,* 117 U.S. 617, 620–21 (1886); *Dewsnup v. Timm,* 502 U.S. 410 (1992); *In re James Wilson Associates,* 965 F.2d 160, 167 (7th Cir.1992)). A lienholder has the option to "bypass his debtor's bankruptcy proceeding and enforce his lien in the usual way, which is by bringing a foreclosure action in state court." *Id.*

The *Penrod* court equated "participation" with the filing of a proof of claim, whether voluntarily by the lienholder, or involuntarily by the trustee, the debtor or another party jointly liable on the debt. *See id.* at 462 (noting that secured creditor may be "dragged into the bankruptcy involuntarily, because the trustee or the debtor . . . file[s] a claim on the creditor's behalf"); ("The secured creditor does not, *by participating in the bankruptcy proceeding through filing a claim*, surrender his lien. But this is not to say that the lien is sure to escape unscathed through the bankruptcy.") (emphasis added); ("We have concluded that the default rule for secured creditors *who file claims* for which provision is made in the plan of reorganization is extinction and is found in the Code itself".) 50 F.3d at 462 (emphasis added).

All of the Circuits who have addressed § 1141(c) have adopted *Penrod*'s participation requirement, with the exception of the Fourth Circuit. *See In re Northern New England Telephone Operations,* 795 F.3d 343 (2d Cir. 2015) (following *Penrod* by holding lien is extinguished under § 1141(c) when a lienholder "participated" by filing proof of claim, but declining to address whether "some quantum of lienholder participation" less than filing claim would be

sufficient); *In re S. White Transp., Inc.,* 725 F.3d 494, 498 (5th Cir. 2013) (following *Penrod* and refusing to invalidate lien based on lienholder's mere passive receipt of notice of bankruptcy case, finding lienholder did not participate because it did not file a proof of claim); *F.D.I.C. v. Be-Mac Transp. Co., Inc. (In re Be-Mac Transp. Co., Inc.),* 83 F.3d 1020 (8th Cir. 1996) (following *Penrod,* holding that FDIC had not participated under § 1141(c) because it had merely an allowed unsecured claim, not a secured claim); *In re Barton Indus., Inc.,* 104 F.3d 1241, 1245 (10th Cir. 1997) (citing *Penrod* and holding that plan may alter lien rights, provided lienholder "participated in the proceedings and received notice," and finding that lienholder did not receive sufficient notice of chapter 11 plan); *see also In re Vitro Asset Corp.,* 656 F. App'x 717, 724 (5th Cir. 2016) (finding participation where creditor filed claim); *In re Ahern Enterprises, Inc.,* 507 F.3d 817, 825 (5th Cir. 2007) (holding that lienholder participated by means of filing an unsecured claim).

Consistent with *Penrod,* the Fourth Circuit held that a lien not expressly retained by the plan is extinguished by operation of § 1141(c). *University Suppliers, Inc. v. Reg'l Building Systems, Inc. (In re Reg'l Building Systems, Inc.),* 254 F.3d 528, 533 (4th Cir. 2001). However, the Fourth Circuit did not expressly adopt *Penrod*'s holding that the lienholder must have participated in the bankruptcy case. *See id.* Commentators have acknowledged the Fourth Circuit's divergent approach to § 1141(c).[4]

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[4] *E.g.,* Brubaker, R., *Lien Voiding or Lien Pass-Through Upon Confirmation of a Chapter 11 Plan (Part II): The (Ir)Relevance of Secured Creditor Participation*, 34 No. 1 Bankruptcy Law Letter NL 1 (Jan. 2014) (discussing diverging approaches of Fourth Circuit (in *Reg'l Building*), Fifth Circuit (in *S. White*

Until the case below, Petitioner is aware of no Circuit court to find "participation" when the creditor has not filed a proof of claim. To the contrary, the Eighth Circuit expressly found that the lienholder must have an allowed secured claim on file for the lien to be released under § 1141(c). *Be-Mac Trans.,* 83 F.3d at 1027. In *Be-Mac*, the FDIC had filed a proof of claim asserting secured and unsecured amounts, then amended the claim to correct the amount of the claim but erroneously left the "secured" portion blank. *Id.* at 1022-23. The debtors filed a chapter 11 plan, which interpreted the amended claim as unsecured and released the FDIC's lien. *Id.* at 1023. The bankruptcy court confirmed the plan, treating the FDIC as an unsecured creditor and refusing to permit the FDIC to vote as a secured creditor. *Id.* at 1024. On appeal, the Eighth Circuit affirmed the district court's reversal of the plan confirmation order. *Id.* at 1027. According to the Eighth Circuit, the confirmed plan could not eliminate the FDIC's lien under § 1141(c), because it was not allowed to participate as a secured creditor in the bankruptcy case. *Id.* "Since the FDIC could only vote on the plan and receive distributions as an unsecured creditor, *its lien was never brought into the bankruptcy proceedings* and could therefore not be extinguished by confirmation of the plan." *Id.* (emphasis added).

Similarly, the Fifth Circuit held that participation means more than mere passive receipt of notice of the bankruptcy case. *S. White Transp.*, 725 F.3d at 498. In *S. White,* the lienholder Acceptance Loan Co. held a lien on the debtor's office building. *Id.* at 495. When the debtor filed a chapter 11 bankruptcy case,

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Transportation) and Seventh Circuit (in *Penrod*) with respect to creditor participation under § 1141(c)).

Acceptance received notice of the claims bar date but did not file a proof of claim or otherwise participate in the bankruptcy case. *Id.* The bankruptcy court subsequently confirmed a plan which purported to eliminate Acceptance's lien. *Id.* After the confirmation order was entered, Acceptance moved for a declaratory judgment that its lien was not released. *Id.* at 496. The bankruptcy court denied the motion, but the district court reversed, holding that Acceptance had not participated in the bankruptcy case for purposes of § 1141(c). *Id.* The Fifth Circuit affirmed, holding that mere passive receipt of notice by the lienholder was insufficient participation for a lien to be released under § 1141(c). *Id.* at 497.

Here, the Seventh Circuit's decision conflicts with the Eighth Circuit's holding in *Be-Mac*. Like the FDIC in *Be-Mac*, the Petitioner did not have an allowed secured claim on file – to the contrary, the Petitioner was never given the opportunity to file a proof of claim, as it only received notice of the bankruptcy case after the claims bar date had passed.

If anything, the case below more closely resembles the facts of *S. White*. It is undisputed that Petitioner filed no proof of claim, submitted no papers with the court, made no court appearances, and sat on no committees. It is further undisputed that, as the Seventh Circuit found, the Debtors had failed to schedule Petitioner's claim or notify Petitioner of the bankruptcy case until the plan confirmation stage, in contravention of Bankruptcy Rules 1007 and 2002. The full extent of Petitioner's "participation" was a brief communication with Debtors' counsel, which the bankruptcy court described as "feedback" regarding the addition of the Payment Deadline to the Plan. Under the Seventh Circuit's holding, the mere scintilla

of involvement in the bankruptcy case will be sufficient to extinguish a lien.

II. The decision was wrongly decided.

The Seventh Circuit incorrectly focused on notice as the deciding factor for participation under § 1141(c). The correct interpretation of § 1141(c) is the one initially set forth in *Penrod*: that a lien is only "dealt with by the plan" when a proof of claim has been filed asserting the lien, whether by the lienholder, the debtor or another party jointly liable on the debt.

The Bankruptcy Code makes clear that a lienholder participates in a bankruptcy case through the filing of a proof of claim under § 501 – and further, that its participation is optional unless another party files a claim on its behalf. A proof of claim is a statement of the amount and character of a claim. *In re Padget*, 119 Bankr. 793, 797 (Bankr. D. Colo. 1990). "The rationale for requiring the filing of a formal proof of claim or interest in accordance with section 501 is to ensure that all those involved in the proceeding will be made aware of the claims against the debtor's estate." 4 Collier on Bankruptcy P 501.01 (16th ed. 2022) (internal quotations omitted). The "primary purpose" of filing a claim is to "share in in any distribution" from the bankruptcy estate. *Id.*

The proof of claim must be completed and signed by the creditor, its attorney, the trustee, debtor, or co-debtor. *See* Official Bankr. Form 410. The claim states the name of the creditor, where notices and payments should be sent, the amount due on the claim, the basis of the claim, whether the claim is secured or unsecured, the basis for perfection, the value of the property, amount to cure default, the interest rate, whether the claim is subject to setoff or priority. *Id.*

The filed claim gives all parties notice the lienholder is deemed a participant and the financial details of the lien, and that the lien may be modified or released. Section 502(a) of the Bankruptcy Code provides any creditor may object to another creditor's proof of claim. This allows creditors to evaluate the claims of other participating creditors and voice objections where warranted. Thus, where there is no claim filed, there is no creditor participation.

The Bankruptcy Code is explicit that a lienholder need not file a proof of claim to preserve its lien. 11 U.S.C. § 506(d)(2). Although the failure to file a proof of claim waives the lienholder's right to distributions from the chapter 11 estate, the underlying lien survives. Fed. R. Bankr. P. 3002(a); 3003(c)(2).

The point is that the Bankruptcy Code establishes the claims process as the mechanism for a lienholder's participation, as the Seventh Circuit recognized in *Penrod*, 50 F.3d at 462. Absent a proof of claim being filed, no participation occurs that is recognized by the Bankruptcy Code, and the lien passes through the bankruptcy.

In the case below, however, the Seventh Circuit incorrectly focused not on the Bankruptcy Code or participation under § 1141(c), but whether notice was given. The Seventh Circuit first examined whether Petitioner was a "party" to the bankruptcy and, determining it was, ended its analysis when it was satisfied Petitioner "negotiated for better terms." But this analysis misses the point. The question is not whether a creditor negotiated better plan terms, but whether its claim was "dealt with by the plan" under § 1141(c). As the Seventh Circuit correctly held in *Penrod,* under the Bankruptcy Code, a claim can only be "dealt with by the plan" if a claim is on file. By way

of comparison, the lienholder in *Be-Mac Transportation* "spoke on various occasions with [debtor] about the nature of its claim" over several months. 83 F.3d 1020 at 1023. Yet, the Eighth Circuit refused to find the lien extinguished because the "procedure for determining whether the FDIC had a valid lien was never followed." *Id*. at 1026. Therefore, "its lien was never brought into the bankruptcy proceedings and could therefore not be extinguished by confirmation of the plan." *Id.* at 1027.

From a policy perspective, Petitioner's interpretation of § 1141(c) would not allow creditors to "wait in the wings" and surprise the debtor after a plan is confirmed by failing to file a claim. The debtor can force the lienholder to participate, either by filing a proof of claim on the lienholder's behalf or, in a chapter 11, listing the claim in its bankruptcy schedules. 11 U.S.C. § 501(c); Fed. R. Bankr. P. 3004. *See Penrod,* 50 F.3d at 462 (noting that a lienholder may be "dragged into the bankruptcy involuntarily" through the debtor's filing of a proof claim on behalf of the lienholder).

The opposing view – that the debtors' communication with the lienholder about the plan constitutes participation – would create perverse incentives for the debtor. A debtor could file bankruptcy without notice to a lienholder, ignore Bankruptcy Rules 1007 and 2002 and fail to send notice of the bankruptcy case or claims bar date, and on the eve of confirmation, call the lienholder and discuss the plan. Based on any feedback from the creditor, the debtor could then claim the creditor "participated" sufficiently to wipe out its lien with no remedy upon default. Such a rule would not only immunize debtors from violating the Bankruptcy Rules, but incentivize such violations. It would

encourage debtors to notify creditors last minute, bypass the claims process entirely, and seek to invalidate liens on the basis of any oral "feedback" received from the creditor.

At bottom, the Seventh Circuit's decision ignored § 1141(c) and the extensive body of case law interpreting it, including its own precedent. The Bankruptcy Code requires that, for a lien to be eliminated under § 1141(c), the creditor must have participated by filing a proof of claim.

III. The decision is important for all lienholders and chapter 11 debtors.

Although the Court has set forth, on multiple occasions, the principle that liens pass through bankruptcy, it has never addressed the lien stripping provisions of § 1141(c). This provision is among the most powerful in the Bankruptcy Code, yet the amount of participation necessary of a creditor before its lien will be extinguished is an unsettled issue. This issue is important not only to tax purchasers like the Petitioner, but to secured creditors of all stripes, including secured lenders and mechanic's lienholders. Secured creditors must know their options when a bankruptcy case is filed so they may take appropriate steps to protect their rights.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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September 12, 2022

APPENDIX

Appendix A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 21-2681, 21-2682, 21-2687 & 21-2782

IN THE MATTER OF:

RAMON AGUIRRE and BERTHA AGUIRRE,

Debtors.

APPEALS OF:

WHEELER FINANCIAL, INC., and
JPMORGAN CHASE BANK, N.A.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 18-cv-07915, 19-cv-01232 & 19-cv-01233
— **Martha M. Pacold**, *Judge*.

ARGUED MAY 24, 2022 — DECIDED JUNE 16, 2022

Before EASTERBROOK, WOOD, and BRENNAN, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Litigants' indifference to procedures has made a mess of this bankruptcy proceeding. A $40,000 debt for real estate taxes is the nub of contention, and the litigants must have spent multiples of that sum on legal fees. Bankruptcy Judge

Barnes has entered and revised numerous orders, including multiple plans of reorganization. Two district judges have found fault with some aspects of the bankruptcy judge's orders. But the main problem lies with the litigants.

Ramon and Bertha Aguirre own several properties in northern Illinois. JPMorgan Chase Bank loaned them about $1.3 million on the security of one parcel, a restaurant in Cook County. After the Aguirres stopped paying real estate taxes, Wheeler Financial paid on their behalf and received the right to a tax deed once a redemption period had expired. The Bank could have paid the taxes, or redeemed from Wheeler, and added the amount to the loan in order to protect its interest. Had the Bank done so, none of the events that we must consider would have occurred. But the Bank didn't.

After a few years of "saving" on real estate taxes, the Aguirres stopped paying other debts and filed a bankruptcy petition. They listed a few tax debts but not the ones to Cook County and, derivatively, Wheeler. Indeed, the Aguirres did not list either the County or Wheeler as creditors, and neither was served with notice or a summons. The Bank knew about the unpaid taxes but it, too, failed to ensure that the County or Wheeler was served.

The Aguirres proposed a plan of reorganization that would pay all back property taxes. At this point the tax debts were a matter of record, but no one saw to it that the County or Wheeler was served. The judge approved the plan of reorganization even though the principal Class 2 creditors (the County and Wheeler) did not vote—unsurprising, as they had not been notified. Time passed, the Aguirres did not pay up, and Wheeler finally appeared in the

bankruptcy court to ask the judge to lift the automatic stay so that it could go to state court to get a tax deed. Judge Barnes obliged—as did a state judge, who issued the requested deed.

District Judge Norgle reversed and held, among other things, that the stay should have been left in place because the confirmed plan superseded Wheeler's lien even though it had not been paid. 565 B.R. 646 (N.D. Ill. 2017). He remanded for further proceedings. Wheeler dutifully told the state court, which revoked the tax deed—though the suit in Illinois remains pending, and Wheeler hopes to get another tax deed some day. On remand, Bankruptcy Judge Barnes declared the tax deed "void" and approved a revised plan of reorganization, this one calling on the Bank to pay Wheeler about $65,000. More appeals led to a ruling by District Judge Pacold that the state judge's order was not "void": reinstatement of a stay does not retroactively invalidate judicial decisions made while no stay was outstanding. 2021 U.S. Dist. LEXIS 156866 (N.D. Ill. Aug. 19, 2021). Nonetheless, Judge Pacold concluded, the order approving the revised plan and thus knocking out Wheeler's lien is valid, and the state judge's rescission of the deed made any other dispute academic. Both Wheeler and Chase have appealed to this court.

Wheeler observes that it *still* has not been served with process, and it contends that the plan of reorganization therefore does not affect it. If it is not bound by the plan, then its lien passes through the bankruptcy, see *Long v. Bullard*, 117 U.S. 617 (1886); *In re Penrod*, 50 F.3d 459 (7th Cir. 1995), and the plan needs to be re-revised to eliminate all Wheeler-specific clauses. But if that is so then this case would not be over in the bankruptcy court, which would

mean that the district court's order is not final and we would lack appellate jurisdiction under 28 U.S.C. §§ 158, 1291. Bankruptcy comprises many disputes that are stand-alone suits outside bankruptcy, and an appeal is permissible if the district court has finally resolved one such dispute. See, e.g., *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015); *In re Morse Electric Co.*, 805 F.2d 262 (7th Cir. 1986). A final determination of Wheeler's rights under a confirmed plan would qualify for appeal. But if the plan does not affect Wheeler, there's nothing to appeal. The order isn't final if the plan needs more revision, and Wheeler isn't aggrieved by an order that does not affect its rights.

So, to decide whether we have jurisdiction, we need to determine whether the plan of reorganization binds Wheeler. And the answer to that question could dispose of Wheeler's argument that its lien passes through bankruptcy. We think the best way to get a handle on this problem is to lay out a partial timeline of the bankruptcy.

- June 30, 2014: The Aguirres file for bankruptcy.
- July 3, 2014: The Aguirres certify that they've notified their creditors. Despite this certification, Wheeler and the Cook County Treasurer are not notified.
- July 25, 2014: The Aguirres serve creditors (again excluding Cook County and Wheeler) with a notice telling them when proofs of claim are due.
- August 11, 2014: The Cook County tax liability is mentioned for the first time, in an order by Judge Barnes extending the

automatic stay and ordering debtors to pay the second installment of their 2013 real estate taxes relating to their Chicago property (this installment is not part of the debt that Wheeler purchased).

- August 12, 2014: The Bank files a response to the Aguirres' motion to make adequate-protection payments. The Bank relates that the Aguirres haven't paid real estate taxes on the restaurant property in years. An appendix lists the amount of tax liability and identifies Wheeler as the tax debt's purchaser. This appears to be the first notice to Judge Barnes that Wheeler is a creditor—though the Bank does not ensure that Wheeler becomes a party.
- September 26, 2014: Claim bar date for non-governmental creditors. Wheeler naturally does not file a claim.
- November 5, 2014: The Aguirres file their Chapter 11 plan. The Cook County Treasurer's claim is listed under Class 2, but only in vague terms. The plan does not mention Wheeler.
- December 10, 2014: Wheeler files in the Circuit Court of Cook County a petition for a tax deed. It does not name the Bank as a litigant, and the Aguirres, who were served, default.
- December 16, 2014: The Aguirres file an amended plan that lists back taxes on the restaurant as $40,000. This plan identifies both the Cook County

Treasurer and Wheeler as creditors for that amount. The Aguirres and the Bank still do not serve Wheeler with process.

- February 10, 2015: The Aguirres file their second amended plan, which again lists Wheeler as a creditor for around $40,000. It remains unserved.
- February 23, 2015: The Aguirres file a Certificate of Service of Class 2 Ballots, certifying that a copy of (1) the ballot, (2) the court's order setting a hearing in April, (3) the Second Amended Disclosure Statement, and (4) the Second Amended Plan has been sent to Wheeler and various Cook County officers. The Certificate is supposed to say what means of notice will be used, but it does not. It also specifies that the Plan is binding if confirmed, and it gives the recipient the choice to either accept or reject the Second Amended Plan.
- March 1, 2015: Wheeler says that it received the Certificate of Service of Class 2 Ballots "on or about" this date. This is the first time that Wheeler has been served with anything.
- April 4, 2015: A ballot report filed with the bankruptcy court says that Wheeler's vote has not been received. The record does not contain evidence that Wheeler ever voted for or against this plan.
- April 15, 2015: Judge Barnes files a hand-written Plan Amendment adding a provision that requires the Aguirres to

pay the debt to Wheeler within 6 months. The plan is confirmed on this date. This amendment apparently was the result of negotiation among the Aguirres, the Bank, and Wheeler—though Wheeler did not file anything in the bankruptcy court.

- October 15, 2015: The Aguirres miss the deadline for paying off Wheeler's debt. The Bank does not step in to pay in their stead.
- November 19, 2015: Wheeler files a Motion for Relief from Stay that treats the Plan as binding on it. Wheeler asserts that the Aguirres' "post-confirmation default . . . entitles Wheeler to stay relief for 'cause' pursuant to [11 U.S.C.] §362(d)(1)." That statute applies "on request of a party in interest," so by making this motion Wheeler identifies itself as a party. Wheeler also says that "[u]nder the Plan, Wheeler was allowed a 'Class 2' Claim . . . and was entitled to payment." From here on, Wheeler files many other papers in the bankruptcy court and the district court.

Judges Barnes, Norgle, and Pacold all appear to have assumed that Wheeler has been a party since November 19, 2015, if not earlier. When asked at oral argument whether his client is a party, Wheeler's lawyer said yes—though counsel hedged about when and how this happened, observing that Wheeler was never served with process. Yet while conceding that Wheeler is a party, counsel strenuously contended that Wheeler's lien passes through bankruptcy unaffected, which is possible only if Wheeler is *not* a

party and therefore is not bound by the confirmed plan of reorganization. See *Penrod*, 50 F.3d at 461.

To say that this sequence leaves a lot to be desired is an understatement. But it seems safe to conclude, if only because of counsel's concession, that Wheeler is a party, making it bound by the plan unless we reverse. Wheeler did not become a party through the means normally employed for that purpose, but an entity can waive service and consent to party status even though the norms of party-making have not been followed. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 735–36 (1878). And a litigant also can waive its right to participate in the voting on a proposed plan of reorganization. Wheeler did not vote, but it negotiated for better terms, got the terms it sought, accepted the plan's confirmation as a *fait accompli*, and claimed rights under it. Those steps effectively consent to have the lien replaced by a cash payment and waive any entitlement to better or earlier notice.

Wheeler had other means of attacking this plan. It could have contended, for example, that the roughly $65,000 it stands to receive falls short of the "indubitable equivalent" of the tax lien's value. 11 U.S.C. §1129(b)(2)(A)(iii). But Wheeler does not contend that it has been forced to take a haircut, even considering the running of interest on the original $40,000 debt.

Because Wheeler is a party, the plan has been confirmed, and Wheeler has bypassed its principal opportunities to contest the plan, there is nothing more for us to do. The confirmed plan knocks out any entitlement that Wheeler may once have had to obtain a tax deed and foreclose on its lien—knocks it out, that is, if the Aguirres or Chase at last pay as the plan provides, something they should have done

seven years ago. As long as it remains unpaid, Wheeler need not dismiss its state-court proceeding, though dismissal will be obligatory once payment has been tendered. The parties have contested many other legal issues, but nothing else need be said to resolve these appeals.

AFFIRMED

Appendix B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Case Nos. 18-cv-07915,
19-cv-01232, 19-cv-01233

Bankr. Case No. 14-24420

Judge Martha M. Pacold

In re:

RAMON AGUIRRE AND BERTHA AGUIRRE,

Debtors,

WHEELER FINANCIAL, INC.,

Appellant,

v.

JPMORGAN CHASE BANK, N.A.,
RAMON AGUIRRE AND BERTHA AGUIRRE,

Appellees.

Memorandum Opinion and Order

This bankruptcy appeal addresses three orders entered by the bankruptcy court in the Chapter 11 proceedings of Debtors Ramon and Bertha Aguirre ("the Debtors"). JPMorgan Chase Bank, N.A.

("Chase") loaned the Debtors money and had a security interest in their commercial property. Wheeler Financial, Inc. ("Wheeler") had a tax lien on that property. After the bankruptcy court confirmed a Chapter 11 reorganization plan, it granted Wheeler relief from the bankruptcy proceeding's automatic stay and declined to allow the Debtors to modify the reorganization plan. Chase and the Debtors appealed, and the district court reversed. On remand, the bankruptcy court entered the three orders at issue in this appeal. For the following reasons, the court affirms two of those orders and vacates the third.

Background

The court assumes familiarity with Judge Norgle's opinion on the prior appeal from this case. *See In re Aguirre,* 565 B.R. 646, 648 (N.D. Ill. 2017). That decision describes the history of this dispute in detail, *id.* at 648–51, and the court reviews those facts only briefly here.

The Debtors own a commercial property located at 1374 West Grand Avenue in Chicago, Illinois, and run a restaurant located inside. [11-1] at 4.[1] In 2009, Chase provided the Debtors a loan that was collateralized by both the Debtors' residential property, located in Lisle, Illinois, and the Chicago commercial property containing the restaurant. [11-1] at 9, 100, 698.

The Debtors did not pay their 2010 real estate taxes on the restaurant property, so the Clerk of Cook County sold a Certificate of Purchase to the property

[1] Bracketed numbers refer to entries on the district court docket and are followed by the page and/ or paragraph number. Page number citations refer to the CM/ECF page number.

to Wheeler at a 2012 tax sale, giving Wheeler a tax lien on the property. [11-1] at 25, 33. Wheeler continued to pay the property taxes in subsequent years. [11-1] at 35–42. As of February 2019, Wheeler's tax claim totaled $68,528.55. [11-1] at 98.

On June 30, 2014, the Debtors filed for Chapter 11 bankruptcy. [11-1] at 249. They did not list Wheeler or the Clerk of Cook County as a creditor at that time.

Meanwhile, Wheeler filed a petition for a tax deed in the Circuit Court of Cook County on December 10, 2014. [11-1] at 48. The Debtors did not file an appearance, and Wheeler did not serve Chase with a summons.

In February 2015, the Debtors filed in bankruptcy court a Second Amended Plan of Reorganization (the "Plan") with three classes of creditors. [11-1] at 84–93. Class One was Chase, Class Two was Wheeler, and Class Three consisted of non-priority unsecured creditors. The Debtors' Plan contemplated a full payment to Wheeler, funded by the sale of another of the Debtors' properties. [11-1] at 92.

Wheeler argued that it did not receive actual notice of the bankruptcy filing until it received a Certificate of Service of Class Two Ballots on March 1, 2015. By this point, Wheeler had missed the deadline to file a proof of claim in the bankruptcy court. [11-1] at 106. Nevertheless, after receiving notice of the bankruptcy proceedings, Wheeler was able to participate in those proceedings by negotiating an additional provision in its claim which required the Debtors to pay the entire balance owed to Wheeler within six months of Plan confirmation. [11-1] at 300. The bankruptcy court confirmed that Plan, including that provision, on April 15, 2015. [11-1] at 283.

The Debtors did not make any payments to Wheeler within the six-month period, which ended on October 15, 2015. [11-1] at 27. In November 2015, Wheeler filed a motion for relief from the automatic stay under 11 U.S.C. § 362(d)(1) in order to pursue the pending state court petition for a tax deed.[2] [11-1] at 22. In December, the Debtors filed a motion to modify the Plan to extend the due date for its payment to Wheeler by six months (to April 15, 2016) and to provide a guaranty that Chase would pay if the Debtors could not. [11-1] at 301, 306, 308. At a January 2016 hearing, counsel for the Debtors and Chase appeared with $50,000 in cashier's checks and offered to pay Wheeler immediately, rather than within the proposed six-month extension. [14] at 23-24. Nonetheless, on April 18, 2016, the bankruptcy court granted the motion to lift the stay and denied the motion to modify the Plan. [11-1] at 316–17. Chase and the Debtors appealed. [11-1] at 320–33. On May 2, Chase moved in the bankruptcy court for a stay of the decision pending appeal, [14] at 97–100, and the bankruptcy court denied that motion on May 11, [14] at 103.

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[2] A Chapter 11 petition "operates as a stay, applicable to all entities, of . . . the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title." 11 U.S.C. § 362(a)(2). This automatic stay "continues until . . . the time a discharge is granted or denied." § 362(c)(2)(C). "In a case in which the debtor is an individual . . . confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan." § 1141(d)(5)(A). Thus, although the Plan had been confirmed, the automatic stay remained in place until "completion of all payments under the plan." *Id.*

On May 5, 2016, Wheeler filed an application for a tax deed to the property in state court. [11-1] at 350. On May 25, the state court held a hearing and took the matter under advisement. [11-1] at 351. On May 27, Chase moved in the district court to stay the bankruptcy court's stay relief order. [11-1] at 352. At a hearing on June 3, Wheeler asked the district court for the opportunity to brief Chase's motion, and the district court set a briefing schedule. [11-1] at 352. On June 27, 2016, the district court granted the motion to stay. 565 B.R. at 651. However, in the intervening period, the state court issued a tax deed to Wheeler and Wheeler recorded it. *Id.* Chase and the Debtors did not appear at or contest the state court proceedings. *Id.* When the district court granted the stay, the district court instructed Wheeler not to take further action on the tax deed. *Id.*

In January 2017, the district court held that after the Plan was confirmed, "Wheeler no longer had a lien on the Debtors' restaurant property." *Id.* at 654. Accordingly, "it was an abuse of discretion for the bankruptcy court to lift the stay and permit Wheeler to pursue legal action in the state court." *Id.* Because the bankruptcy court's decision was "based on erroneous conclusions of law," the district court vacated the bankruptcy court's order modifying the automatic stay and remanded "for further proceedings consistent with this Opinion." *Id.* at 655. The district court also vacated the bankruptcy court's order denying the Debtors' motion to modify the Plan without discussing the merits of that denial. *Id.* Wheeler appealed this decision to the Seventh Circuit. [14] at 277. In July 2018, the Seventh Circuit dismissed the appeal for lack of appellate jurisdiction after determining that the district court's decision was not a final and appealable order. [14] at 316–18.

On remand in the bankruptcy court, Chase filed (and subsequently amended) a motion requesting that the court compel Wheeler to vacate the tax deed. [11-1] at 465, 471. On November 15, 2018, the court granted that motion and entered an order (the "Tax Deed Order") stating: "The parties in this matter are authorized and Wheeler Financial, Inc. is directed to take such actions in accordance with this Order as are necessary to correct state-court or other state or county records." [11-1] at 533. In accordance with the order, Wheeler filed an unopposed motion in the state court tax deed proceeding to vacate the order issuing the tax deed. That motion was granted without prejudice in December 2018. [14] at 608.

The Debtors then moved to modify the Plan to allow Chase to pay Wheeler's claim. [11-1] at 540, 547. On February 6, 2019, the court entered an order (the "Modification Order") approving a Plan modification that allowed the Debtors to satisfy the claim by paying Wheeler $68,528.55 within seven days of the order. [11-1] at 98. On the same day, the court also entered an order (the "Stay Order") denying Wheeler's renewed request for relief from the automatic stay to pursue a tax deed in state court. [11-1] at 624. Wheeler's appeals from these three orders—the Tax Deed Order, the Modification Order, and the Stay Order—make up the consolidated appeal now before the court.

Discussion

I. The Stay Order and Plan Modification Order

The court first addresses the appeals from the bankruptcy court's Stay Order and Plan Modification Order.

Bankruptcy courts have the power to grant creditors relief from an automatic stay and to modify a debtor's confirmed plan. *See* 11 U.S.C. § 362(d)(1) (providing for relief from the automatic stay if the bankruptcy court makes a "for cause" finding); *see also* § 1127(b) (providing for modification of a plan if the bankruptcy court determines that "circumstances warrant" modification of the plan). The bankruptcy's court's decisions exercising this discretion can be reversed only for an abuse of discretion. *Matter of Holtkamp,* 669 F.2d 505, 507 (7th Cir. 1982); *In re Witkowski,* 16 F.3d 739, 746 (7th Cir. 1994). The court therefore reviews both the Stay Order and Plan Modification Order for an abuse of discretion.

The Bankruptcy Court abuses its discretion when "1) the decision was based on an erroneous conclusion of law, 2) the record contains no evidence on which the bankruptcy court could have based its decision, or 3) the factual findings are clearly erroneous." *Matter of Stavriotis,* 977 F.2d 1202, 1204 (7th Cir. 1992).

As a threshold matter, all of Wheeler's challenges to both the Stay Order and the Modification Order turn on arguments that are foreclosed by Judge Norgle's prior order in this case. Wheeler admits as much. *See* [11] at 19 ("The Second Stay Order was squarely premised upon the Remand Opinion's erroneous law of the case that the Plan had extinguished Wheeler's lien rights"); *id.* at 24 ("Like the Second Stay Order, the Modification Order was premised on this Court's erroneous conclusion that Wheeler was an unsecured creditor under the Plan."). Given the posture of these appeals, Wheeler argues that the bankruptcy court abused its discretion by adhering to Judge Norgle's order. But the bankruptcy court had no other option. *See Kovacs v. United States,* 739 F.3d 1020, 1024 (7th Cir. 2014) ("The

lower court is bound, through the mandate rule, to the resolution of any points that the higher court has addressed."). Wheeler concedes this point as well, but nevertheless argues that this court can and should "reconsider and alter" Judge Norgle's opinion. [20] at 1 n.2.

The court disagrees. Judge Norgle's opinion establishes the law of the case for both the bankruptcy court and this court on this subsequent appeal. *See, e.g., In re FBN Food Servs., Inc.,* 185 B.R. 265, 277 (N.D. Ill. 1995) ("Because 'the doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions,' Judge Conlon's ruling on this issue should be binding upon us.") (citation omitted)), *aff'd and remanded sub nom. Matter of FBN Food Servs., Inc.,* 82 F.3d 1387 (7th Cir. 1996) ("Judge Aspen rejected that contention under the law of the case; he was (rightly) unwilling to reexamine Judge Conlon's decision."). "The law of the case doctrine is a corollary to the mandate rule and prohibits a lower court from reconsidering on remand an issue expressly or impliedly decided by a higher court absent certain circumstances." *United States v. Adams,* 746 F.3d 734, 744 (7th Cir. 2014). In addition, the "doctrine of law of the case counsels against a judge's changing an earlier ruling that he made in the same case or that his predecessor as presiding judge had made. The doctrine has greater force . . . when there is a change of judge during the litigation and the new judge is asked to revisit the rulings of his predecessor." *HK Sys. v. Eaton Corp.,* 553 F.3d 1086, 1089 (7th Cir. 2009) (citations omitted).

It is true that the law of the case is not an absolute bar to reconsideration; this court could revisit the legal conclusions in Judge Norgle's opinion if there

was a "compelling reason for reexamination." *In re S. Beach Sec., Inc.,* 606 F.3d 366, 378 (7th Cir. 2010). Wheeler, however, does not identify any such compelling reason here. It does not point, for example, to any new facts or intervening law that would make reconsideration appropriate. *See Fujisawa Pharm. Co. v. Kapoor,* 115 F.3d 1332, 1339 (7th Cir. 1997) ("The doctrine of law of the case requires the second judge in a case in which there has been reassignment to abide by the rulings of the first judge unless some *new* development, such as a new appellate decision, convinces him that his predecessor's ruling was incorrect.") (emphasis added). The court thus declines to reconsider issues decided by Judge Norgle's prior opinion.

More specifically, each of Wheeler's arguments with respect to the Stay Order and the Modification Order (the bankruptcy court's two February 6, 2019 orders) requires reconsideration of Judge Norgle's order. For example, Wheeler argues that the Plan's confirmation did not extinguish Wheeler's lien rights. Judge Norgle held that, as of the Plan's confirmation, "Wheeler no longer had a lien on the Debtors' restaurant property." *In re Aguirre,* 565 B.R. at 654. The court will not disturb that holding.

Likewise, Wheeler's argument that the Plan's confirmation did not extinguish its lien rights is the only basis for Wheeler's derivative claim that the bankruptcy court's Stay Order was an abuse of discretion. Wheeler argues that since its lien rights were intact and the Debtors defaulted on their obligation to pay within six months, there was adequate "cause" to lift the automatic stay under 11 U.S.C. § 362(d)(1). Judge Norgle rejected both the premise and the conclusion of this argument too, 565 B.R. at 655, and Wheeler does not argue that

anything makes its latest request for relief from the stay different. The bankruptcy court's Stay Order is affirmed.

A similar principle obtains as to the Modification Order. Here too the bankruptcy court applied the law of the case, reasoning that since Judge Norgle held that Wheeler is an unsecured creditor, the Plan modification was equitable and did not violate 11 U.S.C. § 1127(f). Wheeler does not challenge the bankruptcy court's application of Judge Norgle's order. Instead, Wheeler again challenges only the premise, arguing that "the law of the case as expressed in the Remand Opinion is erroneous," and the Plan modification should have been "considered in light of Wheeler's status as a secured creditor." [11] at 26. For the same reasons discussed above—that Wheeler solely challenges Judge Norgle's order and has not met the high threshold for reconsideration of that order by, for example, identifying new facts or law—the court will not reconsider Judge Norgle's order. Because Wheeler does not provide any other ground to challenge the Modification Order, that order is affirmed as well.

II. The Tax Deed Order

The court now turns to the Tax Deed Order. Again, that order directed Wheeler "to take such actions in accordance with this Order as are necessary to correct state-court or other state or county records." [11-1] at 533. As to this order, Wheeler advances several arguments that do not consist solely of a challenge to Judge Norgle's order. The court addresses them below. However, the court first addresses Chase's arguments that the court lacks subject matter jurisdiction over the dispute.

A. Notice of Appeal

First, Chase contends that this court lacks appellate jurisdiction to review the Tax Deed Order because Wheeler did not properly file a notice of appeal from the Tax Deed Order when it became final.

District courts have "jurisdiction to hear appeals . . . from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges." 28 U.S.C. § 158(a). Under this provision, orders are appealable if they "finally dispose of discrete disputes within the larger case." *Bullard v. Blue Hills Bank,* 575 U.S. 496 (2015). If an order "conclusively resolves" a dispute that would be a "stand-alone case outside of bankruptcy," it is final. *Matter of Anderson,* 917 F.3d 566, 569 (7th Cir. 2019). "An appeal from a final bankruptcy order must be filed within 14 days from entry of the order (see [Federal Rule of Bankruptcy Procedure] . . . 8002(a)), and the time deadline for filing an appeal is mandatory and jurisdictional." *In re Lewis,* 459 B.R. 281, 291 (N.D. Ill. 2011) (citing *Browder v. Director, Dep't of Corr.,* 434 U.S. 257, 264 (1978); *see also In re Bond,* 254 F.3d 669, 673 (7th Cir. 2001)).

The bankruptcy court entered the Tax Deed Order on November 16, 2018. [11-1] at 533. Wheeler filed a notice of appeal on November 29. [11-1] at 534. While this appeal came within 14 days of the order, Chase argues that at the time, the order was not final or appealable under 28 U.S.C. § 158(a). Chase says the order did not become final until the court entered the other two orders on February 6, 2019, and Wheeler did not file another notice of appeal during the 14-day window following *those* orders. However, "[a] notice of

appeal filed after the bankruptcy court announces a decision or order—but before entry of the judgment, order, or decree—is treated as filed on the date of and after the entry." Fed. R. Bankr. P. 8002(a)(2). Thus, "[e]ven if the original dismissal order was not final for purposes of appeal, a premature notice of appeal takes effect when the final judgment is entered." *In re Pratola,* 589 B.R. 779, 785 (N.D. Ill. 2018) (citing Rule 8002(a)(2)). The court is satisfied that (1) Wheeler filed a notice of appeal within 14 days of the Tax Deed Order, and (2) the bankruptcy court's subsequent orders resolved the discrete dispute between the parties. This court has appellate jurisdiction over Wheeler's appeal from the Tax Deed Order.

B. Mootness

Next, Chase argues that the dispute over the Tax Deed Order is moot. "[A] suit becomes moot" if "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. [This occurs] only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Trinity 83 Dev., LLC v. ColFin Midwest Funding, LLC,* 917 F.3d 599, 601–02 (7th Cir. 2019) (quoting *Chafin v. Chafin,* 568 U.S. 165, 172 (2013)) (brackets in *Trinity).*

The Tax Deed Order directed Wheeler "to take such actions as . . . are necessary to correct state-court or other state or county records" relating to the tax deed. In accordance with the order, Wheeler filed an unopposed motion in the state court tax deed proceeding to vacate the state court order that directed issuance of the tax deed. That motion was granted in December 2018. [14] at 608. The state court order vacating the issuance of the tax deed was

without prejudice—the court held the proceeding open pending this appeal. [14] at 608.

Chase argues that since the state court vacated the tax deed, there is no live dispute between the parties and the court could not provide any meaningful relief. Wheeler responds that if the bankruptcy court's order is reversed, it will seek reissuance of the tax deed.

The court agrees with Wheeler that this dispute is not moot. "Courts often adjudicate disputes where the practical impact of any decision is not assured." *Chafin,* 568 U.S. at 175. The court conceivably could grant relief in a manner that would pave the way for Wheeler to obtain a tax deed.[3] That is enough to support jurisdiction over the dispute. Moreover, even though it is the law of the case that the Plan extinguished Wheeler's lien rights, the court is mindful not to "confuse[] mootness with the merits." *Id.* at 174; *see also Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89 (1998) ("the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction"); *ColFin,* 917 F.3d at 602 ("Courts do not say, when a defendant wins on the law, that the case is moot.").

C. *Rooker-Feldman*

On appeal, Wheeler advances three grounds for overturning the Tax Deed Order. The court begins with Wheeler's argument that the bankruptcy court lacked subject-matter jurisdiction over the dispute under the *Rooker-Feldman* doctrine, which prevents lower federal courts from "set[ting] aside a state court's judgment in a civil suit." *Iqbal v. Patel,* 780

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[3] Whether such relief actually is justified on the merits is a separate question, addressed below.

F.3d 728, 730 (7th Cir. 2015). According to Wheeler, the bankruptcy court violated *Rooker-Feldman* because its Tax Deed Order represented an "improper collateral attack on the State Court Judgment." [11] at 33. For the reasons explained below, the court disagrees.

In *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280 (2005), the Supreme Court explained that the *Rooker-Feldman* doctrine is "narrow" and "confined" to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284. Considered in these limited terms, the doctrine does not apply to Chase's motion to vacate. For one thing, Chase has not "brought" a federal case; rather, Chase is a creditor in a pre-existing case over which the bankruptcy court had already found jurisdiction. *See In re Littman,* 551 B.R. 355, 361 (N.D. Ill. 2015) *(Rooker-Feldman* doctrine inapplicable to a motion brought by "the defendant in an adversary proceeding over which the bankruptcy court had already found jurisdiction"). For another, the district court proceedings in this case—along with Chase's claimed interest in the underlying property—"commenced" *before,* not after, the state court proceedings. *See, e.g., Cossio v. Blanchard,* No. 19-2219, 2020 WL 6606366, at *2 (7th Cir. Nov. 12, 2020) ("*Rooker-Feldman* precludes a district court from adjudicating a case only when the federal suit starts after a state court has ruled against the federal plaintiff" and is inapplicable where the "federal suit started before the state court ruled"). And the state court proceedings at issue here are interlocutory rather than final, as Wheeler itself emphasizes in a different portion of its

brief. *See Bauer v. Koester,* 951 F.3d 863, 867 (7th Cir. 2020) (*Rooker-Feldman* applies only if the state court judgment is "final" or "effectively final"); [16] at 9 ("the State Court's order vacating the issuance of the Tax Deed was not entered with prejudice" and, in fact, "that order actually holds the Tax Deed Proceeding open"). More fundamentally, the district court directed its order only at Wheeler (*see* [11-1] at 533, ordering Wheeler to "take [] actions" that seek to "correct state-court or other state or county records"); the district court's order does not purport to set aside or overturn the state court's judgment. Applying the *Rooker-Feldman* doctrine to this case would therefore represent an expansion of that doctrine beyond the "narrow" grounds set forth in *Exxon* and in post-*Exxon* holdings from the Seventh Circuit. The court declines to take that step here.

In any event, the *Rooker-Feldman* doctrine may be inapplicable to this case for another reason: several courts have held that the *Rooker-Feldman* doctrine does not bar challenges to state court judgments for violating an automatic stay. Wheeler cites *Beth-El All Nations Church v. City of Chicago,* 486 F.3d 286, 292 (7th Cir. 2007), *Holt v. Lake County Bd. of Comm'rs,* 408 F.3d 335, 336 (7th Cir. 2005), and *Ritter v. Ross,* 992 F.2d 750, 754 (7th Cir. 1993), for the proposition that *Rooker-Feldman* can bar federal courts from hearing challenges to tax deed proceedings. But all of those cases involved constitutional issues rather than automatic stay violations. Neither party addresses the principle that "state court judgments entered in violation of an automatic stay in bankruptcy are void ab initio and subject to collateral attack, even if the state court has (erroneously) determined that the automatic stay does not apply to the proceeding in which the order is entered." *In re Benalcazar,* 283

B.R. 514, 525–26 (Bankr. N.D. Ill. 2002) (citing *Kalb v. Feuerstein,* 308 U.S. 433 (1940)); *see also Schmitt v. Schmitt,* 324 F.3d 484, 487 (7th Cir. 2003) (acknowledging that the "void *ab initio"* exception to *Rooker-Feldman* "might be appropriate in some bankruptcy cases . . . in order to protect the dominant federal role in that specialized area of the law," but also noting that courts are divided on this issue and that the Seventh Circuit has "acknowledged" the existence of this "exception, but . . . not endorsed it"). While *Schmitt* did not take a position on the exception, several other courts have endorsed it, holding that "when state-court litigation violates the automatic stay, the proceedings are deemed null and void ab initio, and the *Rooker-Feldman* doctrine does not bar a review of the issues presented in such litigation." *In re Kmart Corp.,* 290 B.R. 601, 610 (Bankr. N.D. Ill. 2002) (citing *In re Dunbar,* 245 F.3d 1058, 1063 (9th Cir. 2001)); *see also Schmitt v. Schmitt,* 165 F. Supp. 2d 789, 796 (N.D. Ill. 2001) (explaining that "[s]everal circuit courts have recognized this"—that is, a void ab initio—"exception to the *Rooker-Feldman* doctrine," but noting that bankruptcy appellate panels are divided on the issue). The bankruptcy court's ruling was squarely premised on the conclusion that the state court order violated the automatic stay,[4] [11-1] at 533, so *Rooker-Feldman* would not present a jurisdictional bar under the void ab initio line of cases.

The court is satisfied that it has subject matter jurisdiction over this dispute, so it now turns to the merits.

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[4] Again, whether that ruling was correct on the merits is a separate question, addressed below.

D. The Automatic Stay

Next, Wheeler attacks the merits of the ruling and argues that the bankruptcy court erred by holding that the tax deed was void for violating the automatic stay. The court reviews the bankruptcy court's legal conclusions de novo. *In re Marcus-Rehtmeyer,* 784 F.3d 430, 436 (7th Cir. 2015).

The bankruptcy court reasoned that because (1) actions taken in violation of the automatic stay are void, and (2) reversal of an order lifting the stay is equivalent to the stay never having been lifted in the first place, then (3) actions taken between the order lifting the stay and the reversal are void. [11-1] at 666–68. Wheeler does not take issue with step one. *See Middle Tennessee News Co. v. Charnel of Cincinnati, Inc.,* 250 F.3d 1077, 1082 & n.6 (7th Cir. 2001) ("Actions taken in violation of an automatic stay ordinarily are void. . . . We have no occasion to reconsider our precedent and forage into the debate among the circuits over whether such actions are void or merely voidable."). Wheeler instead disputes the bankruptcy court's conclusion that actions taken in reliance on a stay relief order before the order is reversed are void.

As Wheeler points out, numerous courts have held that consummated sales taken in reliance on a bankruptcy court's stay relief order may moot the controversy, such that a reviewing court on appeal has no power to grant effective relief. For example, in *In re Scruggs,* 392 F.3d 124 (5th Cir. 2004), the Fifth Circuit ruled that a "final and unappealable Florida judgment remain[ed] valid because the automatic stay had been validly lifted and thus was not in place (1) when the state court's judgment was rendered or (2) when that judgment became final and no longer

appealable." *Id.* at 129. There, the final and unappealable Florida judgment ended the case or controversy and the district court's subsequent reversal of the order that lifted the stay could not retroactively solve the mootness problem. *Id.*

The debtors in *Scruggs* raised the same argument that Chase presses here: that as a result of the district court's reversal, the "automatic stay was in effect—not lifted—when the Florida judgment was rendered, making it void *ab initio."* 392 F.3d at 128. But since the controversy became moot before the reversal, the court did not address this argument. This case has a different procedural posture. As noted above, this dispute remains live; the state court vacated the tax deed but did so without prejudice and kept the proceeding open pending this appeal. [14] at 608.

Wheeler also cites *In re La Prea Lanette Allen,* No. BAP CC-13-1315, 2014 WL 1426596 (B.A.P. 9th Cir. Apr. 14, 2014), where the court held that "a consummated sale of real property to a good faith third-party purchaser" mooted review since "the bankruptcy court cannot set aside the sale." *Id.* at *2. Unlike in *Scruggs,* the court also addressed the present issue more directly: "[T]he foreclosure sale would not be void if the bankruptcy court on remand vacated the stay relief order . . . . At the time of the foreclosure sale, there was a valid stay relief order, and HSBC relied on that order in moving forward with the sale. Subsequent vacatur of the order does not automatically render HSBC's then appropriate actions violative of the stay." *Id.* at *3. Chase does not address the reasoning in *Allen,* but instead appeals to the general principle that an order "vacating" a lower court's order has the effect of rendering that order "void." *United States v. Krilich,* 948 F. Supp. 719, 724

(N.D. Ill. 1996) (citing Black's Law Dictionary 1319, 1548 (6th ed. 1990)), *aff'd,* 126 F.3d 1035 (7th Cir. 1997).

The court agrees with Wheeler that the bankruptcy court's legal conclusion—that a tax deed obtained between a stay relief order and a subsequent reversal is void for violating the automatic stay—is not supported by case law. Most courts that have considered the issue have held that where a bankruptcy case is dismissed (and the automatic stay is dissolved), actions taken before the case is subsequently reinstated are valid and not in violation of the automatic stay. *See, e.g., In re Lomagno,* 320 B.R. 473, 479 (B.A.P. 1st Cir.) ("Courts deciding the issue have generally held that the reinstatement of a dismissed bankruptcy case does not retroactively reimpose the automatic stay."), *aff'd,* 429 F.3d 16 (1st Cir. 2005); *In re Moore,* 302 B.R. 112 (B.A.P. 10th Cir. 2003) ("An action taken in reliance on a bankruptcy court's order holding the stay to be inapplicable cannot be void even if the order relied on is subsequently reversed on appeal."); *In re Holloway,* 565 B.R. 435, 438 (Bankr. M.D. Ala. 2017); *In re Moore,* No. 95-57258 NVA, 2006 WL 4468609, at *8 (Bankr. D. Md. Dec. 29, 2006); *In re Thomas,* 194 B.R. 641, 649–50 (Bankr. D. Ariz. 1995) ("[O]nce the bankruptcy case is dismissed or the automatic stay has been vacated, the debtor must seek an affirmative stay or injunction to prevent creditors from pursuing their remedies under applicable state law. If the debtor does not so timely act, any actions taken by the creditor while the case is dismissed or while a stay is not in effect will be valid."); *but see In re Krueger,* 88 B.R. 238, 242 (B.A.P. 9th Cir. 1988) (holding that where "the order dismissing the case was void for lack of due process," the automatic stay

"was continuously in effect from the time of the filing of the petition and the foreclosure sale was held in violation of the stay"). Nor may a bankruptcy court "retroactively" reimpose the automatic stay pending appeal. *See In re Lashley,* 825 F.2d 362, 364 (11th Cir. 1987).

In short, the general rule appears to be that courts may not retroactively impose an automatic stay that was previously lifted. There is no reason to think the rule operates any differently where, as here, the vacated order granted one creditor relief from the stay rather than dismissing the case and thereby lifting the stay completely. Because the bankruptcy court's Tax Deed Order was based on an erroneous legal conclusion—that the tax deed was void ab initio—it was an abuse of discretion. The Tax Deed Order is therefore vacated. The court does not reach the parties' additional arguments regarding the Full Faith and Credit statute.

However, this conclusion does not have immediate consequences for the parties' rights in this case. The state court has now vacated the order issuing Wheeler's tax deed. [14] at 608. And again, Judge Norgle's holding that as of the Plan's confirmation, "Wheeler no longer [has] a lien on the Debtors' restaurant property," *In re Aguirre,* 565 B.R. at 654, remains the law of the case. That means that even though the Tax Deed Order is vacated, Wheeler may not now seek reinstatement of the tax deed. Since there are no ongoing proceedings in the bankruptcy court apart from the three orders at issue here (as the parties confirmed during a status hearing on August 17, 2021 [42]), and there is nothing left for the bankruptcy court to do with respect to these three orders, the court will not remand for further proceedings.

Conclusion

For the reasons given above, the bankruptcy court's Stay Order and Plan Modification Order are affirmed, but its Tax Deed Order is vacated. Final judgment will be entered.

Date: August 19, 2021

/s/ Martha M. Pacold
U.S. District Judge

Appendix C

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable	Timothy A. Barnes
Hearing Date	February 6, 2019
Bankruptcy Case No.	14 B 24420
Adversary No.	
Title of Case	Ramon and Bertha Aguirre
Brief Statement of Motion	Wheeler Financial, Inc.'s Motion For Relief From the Automatic Stay
Name and Addresses of moving counsel	
Representing	

ORDER

For the reasons stated in open court, the motion is denied.

/s/ Timothy A. Barnes

Appendix D

Form G5 (20170105_bko)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

BK No.: 14-24420

Chapter 11

Honorable Timothy A. Barnes

In re:

RAMON AGUIRRE AND BERTHA AGUIRRE,

Debtor(s)

ORDER GRANTING DEBTORS' THIRD AMENDED MOTION PURSUANT TO 11 U.S.C. 327 TO MODIFY CONFIRMED CHAPTER 11 PLAN AS TO CLASS TWO

This matter is before the Court on Debtors' Third Amended Motion Pursuant to 11 U.S.C. § 1127 to Modify Confinned Chapter 11 Plan as to Class Two (the "Motion"), due notice having been given, the Court having overruled the objection of Wheeler Financial, Inc.,

IT IS HEREBY ORDERED THAT:

l. The Motion is granted, as set forth herein.

2. The Debtors' Plan is modified pursuant to 11 U.S.C. § 1127(e)(2) to provide that Class 2 (Claim of Wheeler-Dealer, Ltd., d/b/a Wheeler Financial, Inc.) is amended by adding a provision that states as follows (which shall supersede the treatment for Wheeler under the plan amendment (Dkt No. 84)):

Debtors shall pay the Class 2 claim of Wheeler-Dealer, Ltd., d/b/a Wheeler Financial, Inc. ("Wheeler"), in the amount of $68,528.55 within seven (7) days after entry of this order. Payment of Wheeler's Class 2 claim will abrogate any further obligation of Debtors to pay any sum to Wheeler upon the sale of certain real property located at 1307 Burlington, Lisle, Illinois. All amounts advanced by Chase in making any payments on behalf of Debtors pursuant to this paragraph shall correspondingly increase the claim of Chase against Debtors. Chase is allowed, but not required, to file a supplemental proof of claim for the additional amounts added to its claim for obligations Chase pays on behalf of Debtors under this paragraph. All other terms as to Class 2 shall remain the same.

ENTER:

/s/ Timothy A. Barnes
Honorable Timothy A. Barnes
United States Bankruptcy Judge

Dated: 06 FEB 2019 [STAMP]

Prepared by:

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Appendix E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Civil Action Nos. 16 CV 4924, 16 CV 4927 and 16 CV 5271

Bankr. Case No. 14-24420

Hon. Charles R. Norgle

In re:

RAMON AGUIRRE, et al.,

Debtors,

JPMORGAN CHASE BANK, N.A.,

Appellant,

v.

WHEELER FINANCIAL, INC.,

Appellee.

OPINION AND ORDER

This case is a three-party tangle, a shemozzle, between husband and wife debtors who operate an Italian restaurant out of a commercial building that they own in Chicago, the bank that loaned the debtors in excess of $1 million dollars collateralized

by the commercial property, and a tax purchaser who obtained a tax lien on the property. Debtors Ramon and Bertha Aguirre ("the Debtors") failed to pay their 2010 property taxes on the commercial property they owned. Prior to that, JPMorgan Chase Bank, N.A. ("Chase") loaned the Debtors approximately $1.3 million dollars and held a perfected first priority security interest in the commercial property. In 2012, Wheeler Financial, Inc. ("Wheeler") acquired a tax lien on the property. Before the redemption period on the tax lien expired, the Debtors filed a Chapter 11 bankruptcy petition and confirmed a reorganization plan. The Debtors then failed to pay the amount due to Wheeler under the plan by the designated date. After the Debtors missed the payment deadline, Wheeler moved to lift the automatic stay, and the Debtors moved to modify the plan. The bankruptcy court granted Wheeler relief from the automatic stay and denied the Debtors' modification of the plan. The Debtors and Chase now appeal the bankruptcy court's decision. For the following reasons, the bankruptcy court' decision is vacated, and this case is remanded for further proceedings consistent with this Opinion.

I. BACKGROUND

The Debtors own three real estate properties and operate an Italian restaurant out of one of them: the first a single family residence at 4599 Hatch Lane in Lisle, Illinois—their home ("home"); the second a three-story commercial property located at 1374 Grand Avenue in Chicago, Illinois—the Debtors' restaurant ("restaurant property"); and the third another single family residence—a rental unit located at 1307 Burlington Avenue in Lisle, Illinois that generates about $1,100 in gross income per month

("rental unit"). In October 2009, Chase loaned Debtors in excess of $1.3 million dollars. The loan was collateralized by the Debtors' home and restaurant property. The rental unit is unencumbered.

For reasons not explained in the record, the Debtors did not pay the 2010 real estate taxes on the restaurant property. On August 8, 2012, Wheeler obtained a Certificate of Purchase at the Clerk of Cook County's annual tax sale for $10,839.98, and it amounts to a tax lien on the Debtors' restaurant property. The Debtors' delinquency on their real estate taxes continued and Wheeler paid $23,945.41 to fulfill the Debtors' tax obligation for the years 2011, 2012 and a portion of 2013. The most recent payment by Wheeler was on April 2, 2014. There is no evidence in the record showing that the Debtors received actual notice from Wheeler that Wheeler had purchased and maintained the tax lien on their restaurant property.

On June 30, 2014, the Debtors voluntarily filed for bankruptcy under Chapter 11 for the purpose of reorganizing their debts. In the schedules filed on July 1, 2014, the Debtors did not list Wheeler as a secured or unsecured creditor. Nor did the Debtors list the Clerk of Cook County as a creditor for the real estate taxes on the restaurant property. Nonetheless, the Debtors proceeded before the bankruptcy court and began formulating their Chapter 11 reorganization plan.

Meanwhile, on December 8, 2014, Wheeler voluntarily filed an extension of the redemption period with the Clerk of Cook County which provided the Debtors until June 8, 2015 to pay the overdue taxes, penalties and interest. Wheeler filed a petition for a tax deed in the Circuit Court of Cook County on

December 10, 2014. The Debtors received notice of the state court proceeding in January 2015, but did not enter an appearance in the case. It appears that the first time the Debtors became aware of Wheeler's existence was when the Debtors received summons for the state court litigation. Wheeler never served Chase, the million dollar lender, a summons as an interested party in the state court proceeding.

On February 2, 2015, the Debtor filed a Second Amended Plan of Reorganization (the "Plan"). That Plan lists three classes of creditors: Class One includes only Chase, Class Two includes only Wheeler, and Class Three includes all of the unsecured creditors. In short, Class One allows the Debtors to retain ownership of their home and their restaurant property so long as they pay Chase $8,000 per month for up to thirty-six months. The Plan contemplates a lump sum payment in excess of $1 million to Chase on or before the end of the thirty-six months, and $4,000 per month thereafter until the balance owed to Chase is paid in full. The Plan is explicit that Chase retains its pre-petition liens until paid in full. The entirety of Wheeler's Class Two claim in the Plan reads as follows:

> Debtors owe over $40,000 to Wheeler-Dealer, Ltd., d/b/a Wheeler Financial, Inc., as a real estate tax purchaser, Cook County Clerk and/or DuPage County Treasurer/DuPage County Clerk, for past due real estate taxes, interest and penalties. The real estate commonly known as 1307 Burlington, Lisle, Illinois, has been placed for sale with a Real Estate Agent and shall remain for sale until sold. Upon sale of the property, the net proceeds of from the sale (defined as payment of broker's commission, real estate

> tax, prorations, usual and customary title charges, usual and customary closing costs, and a reasonable attorneys' fee, not to exceed $3,000) will be used to pay the pre-petition real estate taxes currently owing for 4500 Hatch Lane, Lisle, Illinois 60532 and 1374 West Grand Avenue, Chicago, Illinois, including but not limited to all amounts now owed to Wheeler-Dealer, Ltd., d/b/a Wheeler Financial, Inc./Cook County Clerk and the DuPage County Treasurer (both Cook and DuPage County) for these two parcels through 2013. Additionally, the balance of the net proceeds up to $50,000 shall be paid to JPMorgan as additional consideration to agree to this Plan of Reorganization. This paragraph applies to the prepetition real estate taxes on the real estate commonly known as 4599 Hatch Lane, Lisle, Illinois and 1374 West Grand Avenue, Chicago, Illinois only. This claim is impaired.

Second Amended Plan of Reorganization at 10 (hereinafter cited as "The Plan"), App. 1 to Brief of Appellant JPMorgan Chase at 11, Dkt. No. 28-1 at 11. The terms of Class Three promise to pay the unsecured creditor 100 percent of the amount due, which totals $17,385.79. The Plan explicitly states that "the Confirmed Plan shall become a binding agreement between the Debtors and his creditors, superseding all pre-petition obligations of the Debtors to his Creditors." The Plan at 11. The bankruptcy court confirmed the Plan on April 15, 2015.

Wheeler claims that it did not receive actual notice of the Debtors' bankruptcy filing until March 1, 2015, when it received a Certificate of Service of Class 2 Ballots. Because of its late notice of the bankruptcy

filing, Wheeler never filed a proof of claim. However, Wheeler participated in the formation of the Plan by negotiating an additional provision for its Class Two claim into the Plan. The additional provision states that:

> Debtors are to sell the property and/or payoff the entire balance owed to Wheeler-Dealer Ltd. within six months of confirmation. [A]ll other terms as to Class 2 shall remain the same.

Order Amending the Plan at 1, App. 2 to Brief of Appellant JPMorgan Chase at 11, Dkt. No. 28-1 at 17. The additional provision was also confirmed by the bankruptcy court on April 15, 2015.

Six months came and went after the bankruptcy court's confirmation of the Plan without the Debtors making a single payment to Wheeler. On November 19, 2015, Wheeler filed a motion for relief from stay so that it could once again proceed on its petition for a tax deed still pending in state court. On December 7, 2015, the Debtors filed a motion to modify the Plan to extend the payment date to Wheeler another six months, but it also provided a guaranty that if the Debtors could not pay the debt owed to Wheeler, Chase would. Whatever amount paid by Chase to Wheeler would correspondingly increase the amount that the Debtors owed to Chase under the Plan. The bankruptcy court ordered briefing on both motions and conducted a hearing on January 20, 2016.

At the hearing, counsel for the Debtors and Chase appeared with three cashier's checks that had a combined total of $50,000, payable immediately to Wheeler. Despite the available funds, the bankruptcy court heard legal arguments from the parties and decided to issue a written decision on the motions.

About three months later, on April 18, 2016, the bankruptcy court granted Wheeler's motion to lift the stay and denied the Debtors' motion to modify the Plan.

On June 27, 2016, this Court granted Chase's motion to stay the bankruptcy court's April 18th Order that granted Wheeler relief from the automatic stay. By that time, Wheeler had already applied for issuance of a tax deed in state court, received a tax deed on the restaurant property, and recorded the tax deed. Neither the Debtors nor Chase were present or contested the issuance of the tax deed at the state court hearings. The Court ordered Wheeler to "take no further action with the tax deed." Order at 4 (June 27, 2016).

II. DISCUSSION

Chase argues that the bankruptcy court abused its discretion when it lifted the stay and allowed Wheeler to pursue a tax deed in state court because the bankruptcy court erroneously applied the three-step analysis adopted by the Seventh Circuit in Matter of Fernstrom Storage and Van Co., 938 F.2d 731, 735 (7th Cir. 1991). Additionally, Chase argues that the bankruptcy court abused its discretion when it denied the Debtors' motion to modify the confirmed plan. The Debtors have adopted Chase's arguments in full. Wheeler defends the bankruptcy court's April 18, 2016 Memorandum Decision as an appropriate exercise of discretion given the circumstances of the case.

A. Standard of Decision

The bankruptcy code entrusts the bankruptcy court with discretion to grant a creditor relief from the

automatic stay or modify a debtor's confirmed plan. See 11 U.S.C. 362(d)(1) (requiring the court to grant relief from the automatic after making a "for cause" finding); see also 11 U.S.C. § 1127(b) (requiring the court to find that "circumstances warrant" modification of the plan). Because the statutes impart discretion to the bankruptcy court, its decision can only be reversed for an abuse of discretion. Matter of Holtkamp, 669 F.2d 505, 507 (7th Cir. 1982). An abuse of discretion occurs when "1) the decision was based on an erroneous conclusion of law, 2) the record contains no evidence on which the bankruptcy court could have based its decision, or 3) the factual findings are clearly erroneous." Matter of Straviotis, 977 F.2d 1202, 1204 (7th Cir. 1992).

B. Whether the Bankruptcy Court Abused its Discretion When it Lifted the Automatic Stay and Permitted Wheeler to Pursue a Tax Deed on the Debtors' Restaurant Property

1. The Relevant Case Law in the Seventh Circuit

There are three Seventh Circuit cases that guide the Court's analysis in this case; In re Lamont, 740 F.3d 397 (7th Cir. 2014), Matter of Penrod, 50 F.3d 459 (7th Cir. 1995), and Matter of Fernstrom Storage and Van Co., 938 F.2d 731 (7th Cir. 1991).[1] LaMont is helpful because it explains what type of claim a tax purchaser has and how it can be treated in

[1] The Court rejects Chase and the Debtors' joint position that In re Smith, 811 F.3d 228 (7th Cir. 2016) applies to the facts of this case. The Debtors have not yet moved to set aside a fraudulent transfer pursuant to 11 U.S.C. § 548, as the debtors had in Smith.

bankruptcy. LaMont was a Chapter 13 case in which a tax purchaser attempted to obtain a tax deed after the debtors entered bankruptcy, confirmed a plan, and satisfied the obligations of the plan. 740 F.3d at 401-02. Under Illinois law, Certificates of Purchase are "mere species of personal property . . . until the certificates have been redeemed and the petition for a tax deed has been granted." Id. at 405. Because the debtors filed bankruptcy before the redemption period expired, the tax purchaser's secured claim was properly accounted for, and modified by, the debtor's plan. Id. at 409. Notably the LaMont court rejected the tax purchaser's contention that the full redemption amount must be paid in full and explained that the "plan may modify a secured claim and pay it over the course of the plan." Id. Ultimately, the LaMont court affirmed the lower courts' decisions to deny the tax purchaser's request to modify the automatic stay. Id. at 411.

Penrod is helpful because it explains what happens when a secured creditor does not expressly preserve its lien in a confirmed plan. Penrod was a Chapter 11 case in which the debtors promised in a confirmed plan to pay a secured creditor the entire debt owed over seven years at eleven percent interest. 50 F.3d at 461. However, the plan said nothing about preserving a lien on the debtors' asset after confirmation of the plan. Id. Because of unforeseen circumstances, the debtors were unable to complete the payments required by the plan and defaulted shortly after the plan went into effect. Id. The bankruptcy court found in favor of the debtors because the creditor's lien was extinguished upon the confirmation of the plan. Id. While interpreting 11 U.S.C. § 1141(c), the Penrod court reasoned that "secured creditors commonly give up their preexisting

liens for other interests in the reorganized firm." Id. at 463. Because the secured creditor participated in the reorganization plan but did not expressly preserve its pre-petition lien in the plan, the creditor's lien was extinguished upon the confirmation of the plan. Id. Therefore, the Penrod court affirmed the bankruptcy court. Id. at 464.

Finally, Fernstrom is helpful because it adopted the three judicial factors that the court must consider when granting a creditor relief from the automatic stay. In Fernstrom, a creditor sought to pursue a civil case against the debtor's insurance provider after the debtor had filed for Chapter 11 bankruptcy. 938 F.2d at 733. The Fernstrom court underscored that the "automatic stay provision of the Bankruptcy Code, § 362(a) has been described as one of the most fundamental debtor protections provided by the bankruptcy laws." Id. at 735. Before determining that "cause" exists to lift the automatic stay, the bankruptcy court must decide whether:

> a) Any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit,
> b) the hardship to the [non-bankrupt party] by maintenance of the stay considerably outweighs the hardship of the debtor, and
> c) the creditor has a probability of prevailing on the merits

Id. (alteration in original). When discussing the first prong of the three-part test—prejudice to the estate or the debtor—the Seventh Circuit recognized that it was not "faced with a situation in which further prosecution of [the creditor's] suit will impair [the debtor's] ability to formulate a plan of reorganization or otherwise do [the debtor] irreparable harm.'" Id. at

736. With regard to the second prong—hardship to the creditor by continuing the stay—the Seventh Circuit discussed how, given the costs of litigation, implementing a stay in a non-bankruptcy litigation after it has reached an advanced stage is a "great prejudice" to a creditor; whereas, maintaining the stay when a non-bankruptcy litigation is in an infancy stage is less prejudicial. Id. at 736-37. In balancing these three factors, the Fernstrom court found that the bankruptcy court did not abuse its discretion when it decided to lift the stay. Id. at 737. With the legal background of these three cases in consideration, the Court turns to the facts of this case.

2. The Facts of the Case as Applied to the Relevant Case Law and the Bankruptcy Code

When Wheeler received a Certificate of Purchase on August 8, 2012, it became a creditor of the Debtors, secured by a tax lien on the restaurant property. See LaMont, 740 F.3d at 405. When the Debtors filed their Chapter 11 bankruptcy petition on June 30, 2014, Wheeler's Certificate of Purchase entitled it to a claim against the Debtors' estate. See id. at 409; see also 11 U.S.C. § 101(5). The redemption period on the restaurant property had not yet expired before the Debtors filed for bankruptcy; therefore, the Debtors still owned the building, the building was part of their estate, and Wheeler's claim could still be modified by the Plan. See LaMont, 740 F.3d at 409. When the bankruptcy court confirmed the Debtors' Plan on April 15, 2014, the Plan modified Wheeler's claim. See Penrod, 50 F.3d at 463. The Court finds that Wheeler participated in the formation of the Plan and is bound by the terms of the Plan because it had actual

knowledge of the Debtors' bankruptcy filing 45 days before the Plan was confirmed, and Wheeler was able to negotiate a payment deadline favorable to it before the Plan was confirmed. See id. at 463-64; see also 11 U.S.C. § 1141(a).

After confirmation of the Plan, Wheeler's pre-petition tax lien secured on the restaurant property was replaced with a new right—a contractual right defined by the terms of the Plan. See 11 U.S.C. §1141(d)(1). Wheeler was informed of the modification of its claim because Article IV of the Plan stated that "the Confirmed Plan shall become a binding agreement between the Debtors and his creditors, superseding all pre-petition obligations of the Debtors to his [sic] Creditors." The Plan at 12. The provisions in the Plan were silent regarding whether Wheeler maintained a secured claim on the restaurant property. Wheeler never negotiated a clause preserving its pre-petition lien; instead, Wheeler opted for a payment deadline. Therefore, Wheeler gave up its pre-petition lien for another interest in the Debtors reorganized estate when the Plan was confirmed. See Penrod, 50 F.3d at 463; see also In re Airadigm Communications, Inc., 519 F.3d 640, 649 (7th Cir. 2008) ("Penrod recognizes the practical reality that if it appears that a creditor has received some sort of payment or otherwise had its interest in property affected during the reorganization, the parties did not also agree to allow the creditor to keep its lien after the reorganization unless the plan specifically says so."); see also 11 U.S.C. § 1141(c).

Wheeler's release of its secured claim is highlighted by a comparison to the Plan provisions regarding Chase's claim. The Class One terms explicitly stated that Chase would not "release, [sic] its liens,

mortgages and security interest" until it was "paid in accordance with subparagraph (d)." The Plan at 7. The Plan reiterated that Chase's "Secured Claim shall remain perfected and in full force and effect to the same nature and extend [sic] as its pre-petition security interest, except as provided herein." Id. at 8. Chase also retained the right to foreclose on the Debtors' home and restaurant property in the event that the Debtor were not able to timely cure a default. Wheeler's post-confirmation claim, on the other hand, did not expressly retain a lien the restaurant property or a right to foreclose on the restaurant property. Instead, Wheeler exchanged its pre-petition right for a right to a payment in excess of $40,000[2] by October 15, 2015. The Plan did not provide a general remedy in case the Debtor defaulted, and the Plan did not provide a specific remedy for Wheeler if the Debtors defaulted. A plain reading of the Plan shows that, post-confirmation, Wheeler no longer had a lien on the Debtors' restaurant property.

However, Wheeler is not without recourse or remedy for the Debtors' default. The release of any claim in the Plan is conditioned upon the Debtors' payment as described in the Plan. See the Plan at 11 (creditors waive rights "[s]o long as Debtors act in accordance with the Plan terms") and (claim and liens are released "upon the completion of the payments required under the Plan"). So when the Debtors defaulted by missing the payment deadline

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[2] According to a February 9, 2015 Estimate of Cost of Redemption prepared by the Clerk of Cook County, the Debtors owed $43,058.06 as of that date. However, that total is subject to increase over time to account for taxes, penalties and costs that continue to accrue.

as prescribed by the Plan, Wheeler was entitled to a payment of roughly $40,000. Essentially, Wheeler had a breach of contract claim against the Debtors, not a right to a tax deed on the Debtors' restaurant property. Therefore, it was an abuse of discretion for the bankruptcy court to lift the stay and permit Wheeler to pursue legal action in the state court.

3. The Bankruptcy Court's Decision

Without reference to statute or Seventh Circuit case law, the bankruptcy court stated early on in its analysis that "[t]he law is clear that a postconfirmation default is cause to lift the automatic stay." Memorandum Decision at 7 (hereinafter cited as "Memorandum Decision"), App. 16 to Brief of Appellant JPMorgan Chase at 8, Dkt. No. 28-1 at 430. As discussed above, Fernstrom is the controlling case law in this circuit for determining whether to lift an automatic stay for cause, and Fernstrom requires the Court to consider three factors before granting relief from the stay. It was an erroneous conclusion of law for the bankruptcy court to conclude that the Debtors' default alone was justification to lift the stay. Postconfirmation default is not explicitly mentioned in § 362(d)[3] and it is not a factor listed in

[3] Under 11 U.S.C. § 1112, a "material default by the debtor with respect to a confirmed plan" is a reason to convert or dismiss a chapter 11 bankruptcy filing. However, § 362(d) does not list default as a reason to lift an automatic stay. Section 362(d)(1) states that modification of an automatic stay "for cause" can occur in cases where there is a "lack of adequate protection of an interest in property." 11 U.S.C. § 362(d)(1). On January 20, 2016, the Debtors and Chase offered to pay Wheeler $50,000, an amount in excess of its claim. Additionally, given the surety provided by Chase in this case, it is not a situation where Wheeler's financial interest lacks adequate protection.

Fernstrom. The bankruptcy court eventually discussed Fernstrom in its decision, but it glossed over the Seventh Circuit's admonition that "[c]ause as used in § 362(d) has no clear definition and is determined on a case by case basis." 938 F.3d at 735.

When considering the first two Fernstrom factors, the bankruptcy court recognized the great harm to the Debtor and the bankrupt estate—loss of the Debtors' primary source of income and the loss of the valuable commercial property—if it lifted the automatic stay, but regardless, thought that a delayed payment to Wheeler was far more prejudicial. This was an abuse of discretion. "Illinois law is clear that a tax purchaser has no right to issuance of a deed, and so is not harmed if the redemption payment is made." In re Bates, 270 B.R. 455, 464-65 (N.D. Ill. 2001) (citing Monreal v. Sciortino, 338 Ill. App.3d 475, 479 (Ill. App. Ct. 1992)). On January 20, 2015, in the presence of the bankruptcy judge, the Debtor and Chase offered to pay Wheeler $50,000 in the form of cashier's checks. On appeal, Chase continues to offer to pay Wheeler the full redemption amount within seven days of Wheeler providing "sufficient information and documentation to Chase (i.e., exact amount owed, Wheeler's FEIN, etc.) to enable it to process the payment of Wheeler's claim." Brief of Appellant JPMorgan Chase Bank, N.A. at 33. According to Illinois law, these continued efforts to redeem Wheeler' claim alleviate the harm to Wheeler. Conversely, the Debtors and the bankrupt estate will suffer a great prejudice if Wheeler is allowed to retain the tax deed on the restaurant property. Furthermore, under Penrod and 11 U.S.C. § 1141(d)(1), the Plan now controls, and Wheeler is only entitled to payment of its claim, not a deed to the restaurant property.

Instead of ordering payment in the form of the $50,000 in cashier's checks to Wheeler and denying Wheeler's motion to lift the stay, the bankruptcy court terminated the stay so that Wheeler could pursue a tax deed in state court. The bankruptcy court's April 18th Memorandum Decision disregarded the Plan's modification of Wheeler's claim, allowed Wheeler to potentially obtain a financial windfall on its Certificate of Purchase, and dismantled the Debtors' ability to formulate a viable reorganization plan. Furthermore, the bankruptcy court's decision lacks consideration of how at the time Wheeler moved to lift the stay, Wheeler had done little to advance the state court litigation beyond filing a petition for a tax deed. This misapplication of controlling case law cannot stand. Therefore, the bankruptcy court's April 18th Memorandum Decision and corresponding orders are hereby vacated. Upon remand, the bankruptcy court should take steps not inconsistent with this Opinion; one direction may include the remedy proposed by Chase in the conclusion of its brief.

III. CONCLUSION

The bankruptcy court's Memorandum Decision granting Wheeler relief from the automatic stay was an abuse of discretion because it was based on erroneous conclusions of law. Therefore, the Order Modifying the Automatic Stay must be vacated, and this case must be remanded for further proceedings consistent with this Opinion. Because reversible error occurred in the bankruptcy court's decision regarding the automatic stay, the Court also vacates the Order Denying Motion to Modify Plan without discussing the merits of the bankruptcy court's denial of the Debtors' motion to modify the stay.

IT IS SO ORDERED.

ENTER:

/s/ Charles Ronald Norgle
CHARLES RONALD NORGLE, Judge
United States District Court

DATE: January 23, 2017

Appendix F

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 14bk24420

Chapter 11

Judge Timothy A. Barnes

In re:

Ramon Aguirre,

Bertha Aguirre,

Debtors.

ORDER MODIFYING THE AUTOMATIC STAY

This matter having coming to be heard on the Motion of Wheeler Financial, Inc. for Relief from the Automatic Stay [Dkt. No. 91] (the "Motion for Relief") concerning the property located at 1374 West Grand Avenue, Chicago, Illinois; the court having jurisdiction over the subject matter and all necessary parties appearing at the hearings on the Motion for Relief conducted on December 15, 2015 and January 20, 2016 (the "Hearings"), the court having considered the testimony and evidence presented by all parties and the arguments of all parties in their filings and in person before the court at the Hearings;

and in accordance with the Memorandum Decision of the court in this matter issued concurrently herewith, wherein the court finding that the grounds for relief from stay under 11 U.S.C. § 362(d)(1) exist;

NOW, THEREFORE, IT IS HEREBY ORDERED:

The Motion for Relief is GRANTED.

Dated: April 18, 2016

ENTERED:

/s/ Timothy A. Barnes
Timothy A. Barnes
United States Bankruptcy Judge

Appendix G

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 14bk24420

Chapter 11

Judge Timothy A. Barnes

In re:

Ramon Aguirre,

Bertha Aguirre,

Debtors.

TIMOTHY A. BARNES, Judge.

MEMORANDUM DECISION

This matter comes before the court on the Motion of Wheeler Financial, Inc. for Relief from the Automatic Stay [Dkt. No. 91] (the "Motion for Relief") filed by Wheeler Financial, Inc. ("Wheeler") and the Debtors' Motion Pursuant to 11 U.S.C. § 1127(e) to Modify Confirmed Chapter 11 Plan as to Class Two (Wheeler-Dealer, Ltd DBA Wheeler Financial Inc., DuPage County, Cook County and JPMorgan Chase Bank, N.A.) [Dkt. No. 99] (the "Motion to Modify Plan") filed by Ramon Aguirre and Bertha Aguirre (together, the "Debtors"). The Motion for Relief seeks

relief from the automatic stay as to 1374 West Grand Avenue, Chicago, Illinois (the "Property") based on the Debtors' default of their obligation to pay Wheeler under their confirmed chapter 11 plan. The Motion to Modify Plan was filed after the Debtors' default under their plan and seeks to modify the plan in order to extend the deadline for payment to Wheeler. Both the Motion for Relief and the Motion to Modify Plan (collectively, the "Motions") have been fully briefed and the parties have appeared before this court for oral argument on December 15, 2015 and January 20, 2016 (the "Hearings").

For the reasons stated below, the Motion for Relief is granted and the Motion to Modify Plan is denied.

JURISDICTION

The federal district courts have "original and exclusive jurisdiction" of all cases under title 11 of the United States Code (the "Bankruptcy Code"). 28 U.S.C. § 1334(a). The federal district courts also have "original but not exclusive jurisdiction" of all civil proceedings arising under title 11 of the United States Code, or arising in or related to cases under title 11. 28 U.S.C. § 1334(b). District courts may, however, refer these cases to the bankruptcy judges for their districts. 28 U.S.C. § 157(a). In accordance with section 157(a), the District Court for the Northern District of Illinois has referred all of its bankruptcy cases to the Bankruptcy Court for the Northern District of Illinois. N.D. Ill. Internal Operating Procedure 15(a).

A bankruptcy judge to whom a case has been referred may enter final judgment on any core proceeding arising under the Bankruptcy Code or arising in a case under title 11. 28 U.S.C. § 157 (b)(1). A motion for relief

from stay arises in a case under title 11 and is specified as a core proceeding. 28 U.S.C. § 157(b)(2)(G); *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.,* 140 B.R. 969, 976-77 (N.D. Ill. 1992); *In re Quade,* 482 B.R. 217, 221 (Bankr. N.D. Ill. 2012) (Barnes, J.). A motion to modify a confirmed plan may also only arise in a case under title 11 and is a core proceeding. 28 U.S.C. §§ 157(b)(2)(A), (L) and (O).

Accordingly, final judgment is within the scope of the court's authority.

PROCEDURAL HISTORY

In considering the Motions, the court has considered the arguments of the parties at the Hearings, has reviewed and considered the Motions themselves, the attached exhibits submitted in conjunction therewith, and has reviewed and found each of the following of particular relevance:

1. Second Amended Plan of Reorganization [Dkt. No. 69] (the "Plan");
2. Order [Dkt. No. 84] (the "Modifying Order");
3. Order Approving Second Amended Disclosure Statement (Dkt. No. 70) and Confirming Second Amended Plan of Reorganization (Dkt. No. 69) [Dkt. No. 85] (the "Confirmation Order");
4. JPMorgan Chase Bank, N.A.'s Response to Motion of Wheeler Financial Inc., [*sic*] For Relief from the Automatic Stay [Dkt. No. 100];
5. Debtors' Response to Motion of Wheler [*sic*] Financial Inc.'s Motion for Relief from the Automatic Stay [Dkt. No. 101];

6. Objection of Wheeler Financial, Inc. to Debtors' Motion to Modify Confirmed Chapter 11 Plan [Dkt. No. 109];

7. JPMorgan Chase Bank, N.A.'s Reply to Objection of Wheeler Financial Inc., [*sic*] to Debtors' Motion to Modify Plan [Dkt. No. 112, duplicate filing at Dkt. No. 114];

8. Reply of Wheeler Financial, Inc., in Support of Its Motion for Relief from the Automatic Stay [Dkt. No. 113];

9. Debtors' Reply in Supprt [*sic*] of Their Motion to Modify Their Confirmed Chapter 11 Plan [Dkt. No. 115];

10. JPMorgan Chase Bank, N.A.'s Supplement in Support of Debtors' Motion to Modify Plan [Dkt. No. 119];

11. Joint Supplement by JPMorgan Chase Bank, N.A. and the Debtors to Their Responses to the Motion for Relief from the Automatic Stay by Wheeler Financial Inc. [Dkt. No. 120] (the "Joint Supplement"); and

12. Response of Wheeler Financial, Inc. to Supplement and Joint Supplement [Dkt. No. 131].

Though these items together do not constitute an exhaustive list of the filings in the above captioned bankruptcy case, the court has taken judicial notice of the contents of the docket in this matter. *See Levine v. Egidi,* No. 93C188, 1993 WL 69146, at *2 (N.D. Ill. Mar. 8, 1993) (authorizing a bankruptcy court to take judicial notice of its own docket); *In re Brent,* 458 B.R. 444, 455 n.5 (Bankr. N.D. Ill. 1989) (Goldgar, J.) (recognizing same).

BACKGROUND

In this matter, the facts are essentially undisputed. For the purposes of determining the Motions, the court therefore finds as follows:

The Debtors petitioned for bankruptcy protection under chapter 11 on June 30, 2014 (the "Petition Date"). The Debtors' schedules did not list a debt owed to a third party purchaser of tax claims. That was incorrect. The Debtors did, in fact, owe past due taxes on the Property that resulted in the purchase of that debt by a third party tax purchaser prior to the Petition Date.

More specifically, the Debtors owed 2010 real estate taxes on the Property totaling approximately $10,592.98. The Debtors also failed to pay the first and second installments of property taxes for tax years 2011 and 2012 and the first installment of tax year 2013. On August 8, 2012, Wheeler purchased the 2010 delinquent taxes at a tax sale and subsequently paid the 2011, 2012 and first installment of the 2013 taxes. The time period within which the Debtors could pay Wheeler before title to the Property transferred pursuant to applicable state law (more fully discussed *infra),* otherwise known as the redemption period, was scheduled to expire on September 8, 2014. On December 10, 2014, Wheeler filed a petition in the Circuit Court of Cook County to pursue its applicable rights with respect to the Property. Nonetheless, Wheeler subsequently extended the redemption period an additional six months to June 8, 2015 (the "Redemption Deadline").[1]

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[1] No party explains how an extension of an already expired redemption period is valid. Because no party challenges the validity of the extension and because the parties' subsequent

Because the Debtors did not list the obligation to Wheeler on their schedules and failed to provide notice to Wheeler of its bankruptcy case prior to the claims bar date, September 26, 2014, Wheeler did not file a proof of claim in this case. After the bar date had passed, the Debtors worked in earnest with JPMorgan Chase Bank, N.A. ("JPMorgan"), on a plan of reorganization. Court notes from hearings in November 2014 indicate that those efforts include addressing the Debtors' tax issues. While the original plan and disclosure statement proposed by the Debtors did not at that time include a treatment of Wheeler, by December 16, 2014, the Debtors had amended that plan and disclosure statement to include Wheeler. *See, e.g..,* Plan ¶ 3.2(A), p.10.

Nonetheless, it was not until March 1, 2015 that Wheeler learned of the Debtors' bankruptcy filing when it received a copy of the Debtors' proposed plan of reorganization. *See* Certificate of Service of Class 2 Ballots [Dkt. No. 75]. In the Plan, the Debtors estimated their liability to Wheeler as $40,000.00. Plan, ¶ 3.2(A), p.10.

JPMorgan is the holder of a cross-collateralized claim secured by a restaurant on the Property located in the West Loop of Chicago near the United Center and a separate property located at 4599 Hatch Lane in DuPage County that serves as the Debtors' residence. *See* Claim 4-1. As set forth in the Plan, the secured debt owed to JPMorgan far exceeds the value of those two properties combined. Plan, Preamble, p. 2. Pursuant to the Plan, the Debtors are to make monthly payments of

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actions clearly indicate a reliance of all concerned in the extension's effect, the court makes no determination regarding the validity of the extension but does, as discussed below, have concerns regarding it.

$8,000.00 to JPMorgan, Plan, ¶ 3.2(A), p. 7, and the Debtors have made these payments since October 2014. *See* Agreed Adequate Protection Order [Dkt. No. 52]. In comparison, since filing for bankruptcy protection, the Debtors have made no payments to Wheeler.

The Debtors' Plan was filed on February 10, 2015. The Plan was presented by the Debtors and solicited according to the procedures provided for in the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. Though the Debtors had not notified Wheeler when they commenced the bankruptcy case or scheduled Wheeler's claim, the Debtors included Wheeler in the solicitation. As a result, the Debtors received feedback from Wheeler and, to resolve its potential objection, through the Modifying Order amended the terms of their Plan as it related to Wheeler. At the April 15, 2015 confirmation hearing, the Debtors presented the court with the Modifying Order and requested that it be entered along with the Confirmation Order.[2] The

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[2] Both JPMorgan and the Debtors argue that the Modifying Order does not have the same gravity as the Chapter 11 Plan. This argument has no merit. It is the practice of this court to permit minute orders. These minute orders serve an important purpose: they expedite proceedings for parties that need an immediate order. The Debtors knew in advance of the hearing on confirmation of the Plan that Wheeler sought a payment deadline. Instead of filing a modified plan and undertaking all that goes along with such, the Debtors' counsel drafted a handwritten order amending the Plan and the Debtors requested that the second amended Plan, as modified by that order, be immediately confirmed. Counsel for the Debtors represented to the Court that the Modifying Order was not material and did not require a resolicitation of the Plan. Counsel for JPMorgan was present at this hearing and provided no objection to the Modifying Order. The Modifying Order therefore amended the Plan and the arguments to the contrary are specious.

Modifying Order provides that the Debtors would "sell the property and/or payoff the entire balance owed to Wheeler-Dealer, Ltd. within six months of confirmation."[3] The Debtors' Plan proposed a sale of 1307 Burlington, Lisle, Illinois (the "Sale Property") to obtain funds to satisfy the debt owed to Wheeler and the Modifying Order set the deadline for payment to Wheeler within six months, which was October 15, 2015 (the "Deadline"). The Plan, as modified, was confirmed at the April 15, 2015 confirmation hearing, prior to the running of the extended Redemption Deadline.

The attempts to sell the Sale Property generated only one offer. The offer was so substantially below asking price that it was rejected, and the Sale Property was not sold. Rather than address this situation with Wheeler and the court, the Debtors allowed the Deadline to come and go without taking any action. As a result, the Debtors defaulted on the Plan and on November 19, 2015, Wheeler moved for relief from the automatic stay, citing the default as cause pursuant to section 362(d)(1) of the Bankruptcy Code.

In the Motion for Relief, Wheeler argues that if the court were to apply the Seventh Circuit's *Fernstrom* factors, the potential harm to Wheeler would far exceed any harm to the Debtors or the estate. *See In re Fernstrom Storage and Van Co.,* 938 F.2d 731 (7th Cir. 1991). Wheeler alleges that it is prejudiced by the continued delay of payment and that it has a strong likelihood of prevailing on the merits of its tax deed outside of the bankruptcy court proceedings.

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[3] Wheeler-Dealer, Ltd., is apparently the legal name of Wheeler, which does business as Wheeler Financial, Inc. *See* Motion to Modify Plan.

In response to the Motion for Relief, the Debtors first filed the Motion to Modify Plan, wherein they finally sought to address the default, and later filed a response. The Motion to Modify Plan, filed over a month after the passing of the Deadline, asserts that the Debtors need more time to sell the Sale Property and thus need more time to make the payment to Wheeler. The Debtors request that the Deadline be extended to April 15, 2016 (an additional six months) to pay Wheeler in full. After six months, if the Sale Property is still not sold, the Motion to Modify states that JPMorgan will step in and finally make the payment to Wheeler.

The Debtors rely on section 1127(e), which as discussed below allows a debtor to modify a confirmed chapter 11 plan. No explanation was offered as to why, and given the nature of the default, the Debtors did not and could not have sought modification prior to the default having occurred. The Debtors' thereafter filed a response to the Motion for Relief. In that, they argued that the Motion for Relief would be mooted by the Motion to Modify Plan and adopted JPMorgan's response, discussed below.

Throughout the course of these matters, JPMorgan has acted in concert with the Debtors, at times simply supporting the Debtors' positions, acting through the Debtors, or acting jointly with the Debtors. These acts have all been less than subtle advances of JPMorgan's own agenda. It has been very clear that JPMorgan is in charge, so much so that in hearings JPMorgan's counsel has more than once argued the Debtors' position before the Debtors did so. That comes as little surprise, given what is at stake. While the Debtors stand to lose their ownership in one of their various properties, if Wheeler is successful in enforcing its rights, JPMorgan stands to lose its

priority security interest in the Property, valued at over $1,000,000.00. *See* Debtors' Schedule A.

It is also no surprise then that JPMorgan argued vociferously against the Motion for Relief, introducing arguments that the Debtors' briefings did not supply. Among the various theories advanced by JPMorgan, JPMorgan argues that Wheeler no longer had a security interest in the Property and therefore had no standing to bring the Motion for Relief. This is because, JPMorgan alleges, the Plan reduces Wheeler's claim to an impaired unsecured claim of $40,000.00 and Wheeler failed to file a proof of claim. Alternatively, JPMorgan argues that even if Wheeler does have a security interest, the Debtors may, pursuant to the plain language of section 1127(e), modify the Plan's treatment of that interest.

In discussing the *Fernstrom* factors, JPMorgan argues that the hardship that would result for the Debtors would outweigh any harm to Wheeler. JPMorgan alleges that Wheeler would make an inequitable profit if permitted to enforce its rights on the Property, while the Debtors would "lose everything" including the business operated on the Property and the Debtor's residence on which JPMorgan's lien is cross-collateralized. Neither JPMorgan nor the Debtors explain how Wheeler enforcing its rights against the Property will equate to the Debtors losing either the Property, the business or their home, given the uncertainty of all parties' rights at the state court level. This is particularly hard to understand given that the threat of losing the residence that JPMorgan seeks to protect the Debtors from is a threat from JPMorgan itself. JPMorgan also does not explain how allowing a party its legally afforded rights amounts to an

inequitable profit, or what exactly an inequitable profit might be.

After the January 20, 2016 Hearing, the court took the matter under advisement, promising a written ruling before March 23, 2016 or to take the bench that day and rule orally. However, after the Hearing Date but before March 23, 2016, JPMorgan chose to file two supplements without leave of court. The first supplement, dated January 26, 2016 [Dkt. No. 119], asserted that JPMorgan was in possession of $50,000.00 made payable to Wheeler Financial, Inc. This memorialized an oral representation made at the January 20, 2016 Hearing. The second supplement, the Joint Supplement, was filed on March 17, 2016 by JPMorgan (although the title provides it was filed jointly with the Debtors)[Dkt. No. 120], again without leave of court and just six days prior to the court's scheduled ruling date, and articulated entirely new arguments and legal theories. The Joint Supplement argued that the sale of the tax debt to Wheeler was actually a fraudulent transfer pursuant to the Seventh Circuit's decision in *Smith v. Sipi, LLC* (*In re Smith*), 811 F.3d 228 (7th Cir. 2016). Not surprisingly, Wheeler thereafter sought leave to respond to both supplements [Dkt. No. 121]. Leave was granted, though the order granting leave reserved on whether the inappropriately filed supplements would be considered.

In response to the reservation in the court's order granting leave to Wheeler to respond, on March 23, 2016, JPMorgan filed a motion to have the supplements considered. Though in the absence of opposition that relief was ultimately granted on April 5, 2016 at the hearing on the request, the court was compelled to admonish JPMorgan's counsel for its behavior. JPMorgan, in filing the supplements without leave

after the ordered briefing and after the court had taken the matter under advisement, violated well established rules of conduct in the court. Mistakes happen, and that might have been it. That was not, however, the crux of JPMorgan's argument to the court.

In its eventual motion to have the supplements considered, JPMorgan's counsel went one step beyond presuming to speak for the Debtors, this time presuming to speak for the court. By attempting to dictate a result to the court based on her "more than 25 years" of experience, counsel overstepped. When questioned, counsel could not articulate a single instance where a judge of this court had considered without leave supplemental filings after ordered briefing and after the court had taken the matter under advisement. Nor could she, as based on the survey the undersigned took of his colleagues, no sitting judge has ever done so. Finally, it should be noted that irony of this situation is not lost on the court. JPMorgan, in seeking to fix after the fact what it should have addressed earlier, continues an ill-advised course of conduct all too familiar in this matter.

DISCUSSION

The matter before the court involves two separate, but intertwined requests – Wheeler's Motion for Relief and the Debtors' Motion to Modify Plan. The resolutions of these two motions are inextricably linked.

At issue is the Debtors' default under the Plan by failing to provide payment to Wheeler by the Plan Deadline. That Deadline was self-imposed and arbitrary. Prior to the amendment, the applicable provision (¶ 3.2(a) of the Plan) made the sale of the Sale Property a prerequisite to payment. At the

confirmation hearing, however, the Debtors amended the Plan through the Modifying Order, and it was the Plan as so amended that was confirmed. The Modifying Order provided that "Debtors are to sell the property *and/or* pay off the entire balance owed to Wheeler-Dealer, Ltd. within six months of confirmation." Modifying Order (emphasis added). The Modifying Order was drafted by the Debtors' counsel and agreed to in open court. Had the Plan not been modified, the failure to sell the Sale Property would have prevented there from being a payment default. Thus while careful drafting might have rescued the Debtors from this default, the Plan was not carefully drafted, and no provisions regarding defaults were addressed in the Plan. The Debtors are the victims of their own actions, twice over.

Wheeler seeks relief from the automatic stay citing the default as cause. In belated response, the Debtors seek to immediately amend the Plan to extend the time to repay Wheeler, which, the Debtors argue, will moot the Motion for Relief.

Even more tardily, JPMorgan now states that it is in possession of funds to satisfy Wheeler's claim under the Plan, first proposing to pay those funds to Wheeler only if an extended period to generate funds by selling the Sale Property is unsuccessful, and then, only when it appeared that Wheeler's Motion for Relief was under strong consideration, proposing to pay Wheeler immediately. This proposal has fewer feasibility concerns than the original, but it comes belatedly and begrudgingly, and may simply be too little, too late.

With this in mind, the court will review each of the Motions in turn.

A. The Motion for Relief

The Debtors' Plan required the Debtors to sell the Sale Property and pay $40,000.00 of the proceeds to Wheeler, with the balance of the sale up to $50,000.00 to be paid to JPMorgan. Plan, ¶ 3.2(A), pp. 7-10. As originally drafted, the Plan made the sale of the Sale Property a precondition to Wheeler's payment. The Plan, as amended by the Modifying Order, however, required the Debtors to make the $40,000.00 payment to Wheeler by the Deadline of October 15, 2015 (six months from the confirmation date). The Debtors failed to sell the Sale Property but allowed the Deadline to come and go without taking any action. The Plan provided no contingency in the case of default.

There is no question therefore that when the Debtors failed to pay Wheeler by October 15, 2015, as required by the Plan, they committed a postconfirmation default under the Plan.

The law is clear that a postconfirmation default is cause to lift the automatic stay. *See, e.g., In re Randall,* 98 B.R. 916, 918 (Bankr. N.D. Ill. 1989) (Squires, J.); *see also Americredit Fin. Servs. v. Nichols* (*In re Nichols),* 440 F.3d 850, 856 (6th Cir. 2006) ("A majority of courts that have construed the 'for cause' provision of section 362(d)(1) have found that a debtor's failure to make payments to the creditor after confirmation of the plan can constitute cause to modify or lift an automatic stay"); *OneWest Bank FSB v. Arizmendi* (*In re Arizmendi*), Case No. BR 09-19263-PB13, 2011 WL 2182364, at *8 (Bankr. S.D. Cal. May 26, 2011) ("Here, there is a default under the Plan; and, thus, the mandates of Congress are clear the Court shall grant relief from stay."); *Bryant v. Tidewater Fin. Co.* (*In re Bryant*), 430 B.R.

516 (Bankr. C.D. Ill. 2010) (granting relief from stay when the debtor defaulted postconfirmation in her maintenance payments under the plan); *In re Davis,* 64 B.R. 358, 359 (Bankr. S.D.N.Y. 1986) ("the debtors' failure to make post-confirmation payments will also constitute cause for lifting the stay"); *In re Quinlan,* 12 B.R. 516, 517 (Bankr. W.D. Wis. 1981) (finding that a debtor's "unexcused failure" to make direct payments to a creditor in accordance with confirmed chapter 13 plan constituted cause to grant relief from stay). The Debtors' postconfirmation default for failing to pay Wheeler by the Deadline therefore is cause to lift the automatic stay, and neither JPMorgan nor the Debtors dispute that, nor could they.

JPMorgan argues that Wheeler does not have standing to move for relief from the automatic stay because its lien was extinguished by the terms of the confirmed Plan. This argument is not well taken. Section 362(d) allows "a party in interest" to move for relief from the automatic stay. 11 U.S.C. § 362(d). Nothing therein requires the movant to have a lien or other security rights. Any party in interest can move for relief, and standing is not a matter that, if it appears to exist, should require further inquiry in a summary proceeding. *In re Vitreous Steel Prods. Co.,* 911 F.2d 1223, 1232 (7th Cir. 1990) (finding that motions for relief from the automatic stay are summary in nature and therefore the issues considered are "limited strictly to adequacy of protection, equity, and necessity to an effective reorganization"); *see also In re Jepson,* No. 14-2459, 2016 WL 1105311 (7th Cir. Mar. 22, 2016) (affirming the bankruptcy court's denial of a standing challenge brought in defense to a motion for relief from stay). In this case, Wheeler is a party in interest to the bankruptcy proceedings, and has standing to seek relief from stay.

In the Joint Supplement, the Debtors and JPMorgan again challenge Wheeler's standing, although use a new strategy by arguing that Wheeler's standing as a party in interest is the result of a fraudulent transfer. *See Smith,* 811 F.3d at 228. *Smith* does not, however, change the outcome of the instant matters. *Smith* dealt with the avoidance of a tax deed as a fraudulent transfer. *Id*. JPMorgan and the Debtors argue that because *Smith* permits debtors to avoid tax deeds as constructively fraudulent transfers, granting Wheeler stay relief amounts to a "court-sanctioned fraudulent transfer." Joint Supplement, p. 3.

This argument is not relevant to the disposition of these matters. First, the relief sought is procedurally improper. To avoid a transfer of a lien, the proper procedure is to initiate an adversary proceeding. *See generally* Fed. R. Bankr. P. 7001. Second, Wheeler's claim has not matured into a tax deed yet. This is a factual distinction from *Smith,* where the tax purchaser obtained the tax deed within the two years prior to the bankruptcy filing. *Smith,* 811 F.3d at 235 ("This was the rare case, however, in which no one redeemed the property."). After the purchaser in *Smith* obtained its tax deed, it sold the property for a profit. Third and most important, the Debtors' Plan fails to provide for a reservation of causes of action. *See P.A. Bergner & Co. v. Bank One,* N.A. (*In re P.A. Bergner & Co.*), 140 F.3d 1111, 1117 (7th Cir. 1998) ("Under the Bankruptcy Code, the debtor must specifically identify in its reorganization plan the claims it wishes to pursue postconfirmation"); *see also D&K Props. Crystal Lake v. Mutual Life Ins. Co.,* 112 F.3d 257, 261 (7th Cir. 1997) (the plan "failed to identify any claim it was reserving and its cause of action thus is barred."). As a result, any claim for a fraudulent transfer regarding

Wheeler has been barred by the confirmation of the Plan without reserving that action. This argument is not, therefore, well taken.

The analysis for stay relief does not, however, end there. Though Wheeler has standing to request modification of the automatic stay, the grounds for such relief – "cause" as alleged by Wheeler – under *Fernstrom* must be addressed. In *Fernstrom,* the Seventh Circuit cited three factors that a court should weigh in determining cause "when equitable considerations weigh heavily in favor of the creditor and the debtor bears some responsibility for creating the problems." 938 F.2d at 735 (*quoting Matthews v. Rosene,* 739 F.2d 249, 251 (7th Cir. 1984)). These factors are:

> a) Any great prejudice to either the bankrupt estate or the debtor will result from continuation of the [action the creditor is seeking relief to pursue],
>
> b) The hardship to the [non-bankrupt party] by maintenance of the stay considerably outweighs the hardship of the debtor, and
>
> c) The creditor has a probability of prevailing on the merits.

Id. (*citing In re Pro Football Weekly*, 60 B.R. 824, 826 (N.D. Ill. 1986)). The equities in this case are, as the foregoing background provides, integral to stay relief analysis because the Debtors do bear sole responsibility in creating the problem the court is presently faced with. It is their inaction with respect to payment of Wheeler under the Plan, or predefault modification of the Plan, that puts the parties in the position they are now in.

As discussed *supra,* Wheeler may have a probability of prevailing on the merits in state court. But any

determination of Wheeler's merits in that forum would be advisory and, therefore, the court will not make such a determination.[4] That the state court is better suited to sort out these issues, however, is undeniable.

In this case, therefore, analysis under *Fernstrom* boils down to a weighing of the first and second factors. If the stay is modified and Wheeler is allowed to petition for a tax deed, a great prejudice will result to both the Debtors and JPMorgan. The Debtors will lose the Property, which generates the income the Debtors use to fund the Plan, which in turn, pays JPMorgan. Wheeler, however, will also face a hardship if the stay is maintained and the court grants the Debtors more time to pay Wheeler's claim. Though the hardship to Wheeler may appear to be only the passage of time, this payment deadline was the only protection afforded Wheeler when it was brought into the case at the eleventh hour. It is unclear what rights Wheeler might have been afforded had it been afforded more fulsome due process in the case. What is clear is that the one and only protection afforded Wheeler, a secured creditor, is at risk.

Wheeler has been patient in providing the Debtors well beyond the original redemption period allowed under Illinois law, participating with the Plan and giving the Debtors space to reorganize. During this same period, in which Wheeler has received nothing but promises, JPMorgan, the other secured creditor

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[4] This court has no jurisdiction to issue advisory opinions. *In re FedPak Sys., Inc.*, 80 F.3d 207, 211-12 (7th Cir. 1996) ("A bankruptcy court, like any other federal court, lacks the constitutional power to render advisory opinions or to decide 'abstract, academic, or hypothetical questions.'") (*quoting 1819, Ltd. v. Florida Dep't of Revenue.* (*In re Inn on the Bay, Ltd.*), 154 B.R. 364, 367 (Bankr. S.D. Fla. 1993)).

in the case, has received $8,000.00 a month in adequate protection payments. Since October 2014, when those payments commenced, JPMorgan has collected an estimated $144,000.00, all during the pendency of this case. While these payments are made, the Debtors and JPMorgan would have the court believe that there have been no funds to pay Wheeler absent a sale of the Sale Property.

These tactics, including the very belated and begrudging offers of JPMorgan have not gone unnoticed by the court. Perhaps the simplest description of these events is the age-old adage: "pigs get fat, but hogs get slaughtered." *Fin. Inv. Co. (Bermuda) v. Geberit AG,* 165 F.3d 526, 534 (7th Cir. 1998).

The list of inappropriate actions toward Wheeler and the bankruptcy process in general in this case is much longer than should be countenanced by any court. The Debtors and JPMorgan have wasted repeated chances to pay Wheeler and remove the threat of Wheeler's tax deed foreclosing all other interests in the Property, and appear to only act appropriately when forced to do so. Despite the potential harm to the Debtors and JPMorgan, the equities favor Wheeler.

As the forgoing makes clear, in a vacuum, the Motion for Relief should, therefore be granted. The Motion for Relief no longer exists in a vacuum, however. The Debtors have filed a Motion to Modify Plan, and the Motion for Relief must be considered in light of that.

B. The Motion to Modify Plan

In the Motion to Modify Plan, the Debtors seek until April 15, 2016 to sell the Sale Property and pay Wheeler. If the Sale Property is still not sold after the

six months, JPMorgan will make the payment to Wheeler, nonetheless. Further, as noted above, JPMorgan proposed an alternative in court, offering to pay Wheeler immediately.

1. *11 U.S.C § 1127*

Section 1127 of the Bankruptcy Code provides the means to modify a confirmed plan. If the debtor is an individual, a confirmed plan may be modified at any time before completion of payments under the plan, whether or not the plan has been substantially consummated, upon request of the debtor. 11 U.S.C. § 1127(e); *see also* 7 *Collier on Bankruptcy,* ¶ 1127.04 (16th ed. 2012). The reason section 1127(e) may be invoked by the Debtors, is that the Debtors, individual persons, have not completed Plan payments to at least one creditor, Wheeler.

Section 1127(e)(1) specifically permits a modification to extend or reduce the time for making payments under the plan, provided, however, that the proposed modification cannot cause the plan to cease compliance with sections 1121 through 1129.[5] 11

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[5] Wheeler argues that, by requiring compliance with section 1129, section 1127(f)(1) requires the Debtors to undergo a brand new confirmation hearing when proposing a modification. *See* Objection of Wheeler Financial, Inc. to Debtors' Motion to Modify Confirmed Chapter 11 Plan, pp. 4-8. Wheeler provides no case citation or legislative support for this reading of section 1127(f)(1). If true, however, Wheeler argues that the Debtors may not modify the Plan as to Wheeler as the Redemption Dates has passed, and no plan may be confirmed reviving rights that are extinguished.

While the practical effects of imposing compliance with section 1129 have not been discussed in detail by courts, the statute is unambiguous. Section 1127(f)(1) reads: "Sections 1121 through 1128 and the requirements of section 1129 apply to any

U.S.C. §§ 1127(e)(1) and (f). The statute therefore permits the Debtors to attempt a modification. That permission, however, does not mean that all proposed modifications will be accepted, even if they comply with section 1127(f).

To have their proposed modification accepted, the Debtors must show that the modification is feasible. *In re Repurchase Corp.*, 332 B.R. 336, 342 (Bankr. N.D. Ill. 2005) (Schmetterer, J.), *aff'd,* Case No. 05 C 7075, 2008 WL 4379035 (N.D. Ill. Mar. 24, 2008) (a chapter 11 plan proponent has the burden of proving that a plan complies with the statutory requirements by a preponderance of the evidence). In arguing feasibility, the plan's proponent need not establish that the plan carries a guarantee of success. *In re 203*

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modification under subsection (e)." 11 U.S.C. § 1127(f)(1) (emphasis added). The language emphasized in the statute dearly only applies the requirements of section 1129 to the modification, not anew to the Plan as modified.

The Supreme Court has stated that "[t]he task of resolving [a] dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *ln re Randle,* 358 B.R. 360, 362 (Bankr. N.D. Ill. 2006) (Doyle, J.), *aff'd*, Case No. 07C631, 2007 WL 2668727 (N.D. Ill. July 20, 2007). Where the language of the statute is unambiguous, no further inquiry is necessary or appropriate. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1895 (2013). Had Congress intended for a new confirmation hearing on the entire plan, revisiting issues that were considered at the prior confirmation hearing, then Congress could have chosen a different phrase, *e.g.*, "apply to any modified plan" or "apply to the modification and the plan."

Wheeler's position is at odds with bankruptcy practice and would create a circumstance where a plan would become a moving target; a final confirmation would become impossible. For these reasons, and because this theory does not govern the outcome of the matter, Wheeler' s assertion is rejected.

N. LaSalle St. P'ship, 126 F.3d 955, 962 (7th Cir. 1997), *aff'd, Bank of Am., Illinois v. 203 N. LaSalle St. P'ship,* 195 B.R. 692 (N.D. Ill. 1996), *aff'd, In re 203 N. LaSalle St. P'ship,* 126 F.3d 955 (7th Cir. 1997), *rev'd on other grounds, Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship,* 526 U.S. 434 (1999) (finding that a debtor's "hope for funding was neither corroborated nor credible" and thus denied confirmation). Instead, the proponent must show that the plan provides for a "reasonable assurance" of viability. *Id.*

The court, in considering the proposed modification, must take into account a number of factions: is the modification so material as to require resolicitation?; does the modification cause the plan to no longer be fair and equitable?; does the modification and the circumstances under which it is sought comport with overriding bankruptcy concerns, *e.g.* is the debtor honest but unfortunate?

Without, for the moment, considering JPMorgan's offer to pay Wheeler directly and immediately, it is clear that the Debtors themselves cannot demonstrate the feasibility of the modification with reasonable assurance of viability. Since confirmation almost a year ago, only one offer for purchase of the Sale Property has been received and it was so low that it was rejected. The Debtors' Motion to Modify Plan fails to describe any marketing efforts, past or future, including the list price or the use of a real estate broker, of the Sale Property. This does not show potential feasibility of the modification, just an additional delay at Wheeler's expense. Because the modification is infeasible on its face, this court need not determine if the modification complies with the remainder of section 1127(f).

The Debtors have already been afforded six months to complete the payments to Wheeler, in addition to the almost five years the Debtors have had to pay this tax claim otherwise. The Plan set a performance date of October 15, 2015. The Debtors did not comply with the terms of the Plan. Further, the Debtors had every opportunity to propose a modification prior to the default and only brought the Motion to Modify Plan in response to Wheeler's Motion for Relief, after their own default.

Under the circumstances, the court cannot conclude that the modification, as originally proposed in the Motion to Modify Plan, is either feasible or equitable. The court recognizes that in permitting Wheeler to exercise its state law rights, whatever those rights may be, the result might be considered by some to be a "windfall" to Wheeler. If that is the case, it is the result of a system created by the state law and the actions of the Debtors and JPMorgan. It is not appropriate for this court to protect the Debtors and JPMorgan from the consequences of state law and their own actions, while further denying Wheeler its rights.

2. *Wheeler's Postconfirmation Rights*

The offer of immediate payment by JPMorgan complicates the analysis, as does the nebulous status of Wheeler's rights at this time. While the court is not inclined to enforce the former given the last minute nature of the offer and the overall inequitable conduct of the Debtors and JPMorgan,[6] it may be that Wheeler has only limited state law rights available to

[6] Among the facts not lost on the court is the fact, as mentioned earlier, that JPMorgan has been receiving regular funds from the Debtors in real time while Wheeler has been held in abeyance.

it, and it may also be that Wheeler may want to avail itself of the offer for payment from JPMorgan given possible limited state rights. To fully understand that, let's consider for a moment Wheeler's postconfirmation rights.

Under Illinois law, if a property owner fails to pay taxes, the county obtains a lien on the property on January 1 of the year immediately following the year in which the taxes are due. 35 ILCS 200/21-75; *see also In re Bovino,* 496 B.R. 492, 503 (Bankr. N.D. Ill. 2013) (Barnes, J.); *In re Commings,* 297 B.R. 701, 704 (Bankr. N.D. Ill. 2003) (Goldgar, J.) ("On January 1 of each year, an *in rem* lien securing payment of property taxes levied in that year attaches to real property in Illinois"). With the exception of some federal obligations, that lien has priority over all other liens. 35 ILCS 200/21-75; *Commings,* 297 B.R. at 704. If the property owner pays the taxes, the lien will be extinguished. *Id.* If it does not, the county has the choice to recover the taxes through different types of tax sales. *In re McKeever,* 132 B.R. 996, 1006 (Bankr. N.D. Ill. 1991) (discussing the basic five types of tax sales). When the taxes are sold, the county's lien shifts to the tax purchaser, and a statutory redemption period is created. *Commings*, 297 B.R. at 704 (*citing* IICLE, Real Estate Taxation § 5.29 at 5-28 (1997)). This transfer does not transfer legal or equitable title to the property to the tax purchaser. Instead, the purchase of the taxes by a third party transfers the county's lien, "including the right to proceed to tax deed and obtain legal title if no valid redemption is made." *McKeever*, 132 B.R. at 1006.

Such a tax lien may still be satisfied or extinguished in accordance with state law. At issue in this case is the satisfaction of a tax lien by redemption by the owner or an interested party

before the expiration of the relevant redemption period. Illinois Const., Art. IX, § 8 (creating the right of redemption for sale of real estate for the nonpayment of taxes). Although tax laws are generally construed in favor of the tax payer, *People ex. Rel. Hempen v. Baltimore & O.R. Co.,* 379, Ill. 543, 549 (IL 1942), "redemption is a statutory privilege and must be exercised in substantial compliance with the statute." *United Legal Found. v. Dep't of Revenue*, 272 Ill. App.3d 666, 676 (1st Dist. 1995). This period allows the debtor, a mortgage holder, or another party in interest to redeem the taxes by paying the delinquent amount plus any compounded interest. 35 ILCS 200/21-345. According to the Illinois Property Tax Code, property can be redeemed from such a tax sale "at any time before the expiration of 2 years from the date of sale" unless extended by the tax purchaser, in which case the property "may be redeemed on or before the extended redemption date." 35 ILCS 200/21-350. Applicable Illinois state law clearly sets out the necessary mode, manner, and time for payment. 35 ILCS 200/21-355 (To redeem property, the redemption amount must be deposited with the applicable county clerk "prior to the close of business . . . on or before the expiration of the period of redemption . . ."). Any redemption attempted after the expiration of the period specified in the statute or after an extension period is a "nullity and of no legal effect." *In re Application of Cnty Collector,* 99 Ill.App.2d 143, 146 (3d Dist. 1968). This is true even if a tax deed has not yet been issued. *People v. Altman,* 9 Ill.2d 277 (IL 1956).

Once the tax redemption period expires, the purchaser does not automatically obtain a tax deed on the property. *Commings,* 297 B.R. at 704. Within three to six months prior to the expiration of the

redemption period, the purchaser must petition the state court for a tax deed and send notice of the petition to the property owner. 35 ILCS 200/22-30; 35 ILCS 200/22-5. When obtained and recorded, a tax deed eliminates other security interests because the title to the property will be passed on to a tax purchaser "free and clear of all previous title and claims of every kind and character." *McKeever,* 132 B.R. at 1007. The tax purchaser must obtain the deed and record it within one year after the redemption period expires, or the deed, the certificate and the sale itself are deemed void. 35 ILCS 200/22-85.

Those rights, must however be viewed through the lens of the confirmed Plan. ""The provisions of a confirmed plan bind the debtor and each creditor whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan."" *In re Stovall,* 256 B.R. 490, 493 (Bankr. N.D. Ill. 1999) (Schmetterer, J.) *(quoting In re Duke,* 153 B.R. 913, 915-916 (Bankr. N.D. Ala. 1993)). Confirmed plans thus have a "preclusive effect." *Siemens Energy & Automation, Inc. v. Good* (*In re Heartland Steel, Inc.*), 389 F.3d 741, 744 (7th Cir. 2004). As a result of confirmation, a plan replaces a debtor's prepetition obligations to creditors with the obligations to those creditors set forth in the confirmed plan. Thus, after confirmation, "a creditor's lien rights are only those granted in the confirmed plan." *In re American Properties, Inc.,* 30 B.R. 239, 246 (Bankr. D. Kan. 1983).

The terms of a plan itself can expressly preserve or abrogate liens. *Stovall,* 256 B.R. at 493 ("[l]iens only survive bankruptcy where the debt is provided for in the plan and is paid in full."); *see also In re Penrod,* 50 F.3d 459, 462, 4633 (7th Cir. 1995) (finding that

"liens pass through bankruptcy unaffected . . . *unless* they are brought into the bankruptcy proceeding and dealt with there.") (emphasis added). Under some circumstances, a reorganization plan's silence regarding a creditor's continuing secured interest in the debtor's property can eliminate a creditor's lien. *Airadigm Communs., Inc. v. FCC* (*In re Airadigm Communs., Inc.*), 519 F.3d 640, 647 (7th Cir. 2008).

Courts apply contract principles to interpret a confirmed plan. *See N. Shore Gas Co. v. Salomon Inc.,* 152 F.3d 642, 652 (7th Cir. 1998). The Plan must, therefore, be interpreted under Illinois contract law. In this case, the language of the Plan did not expressly extinguish Wheeler's rights as a tax purchaser against the Property, which is a lien that includes both the right to payment and a right to an equitable remedy against the Debtors' property. *In re LaMont,* 740 F.3d 397, 408-409 (7th Cir. 2014). The Plan predicated extinguishing Wheeler's rights in its collateral on "the completion of the payments required under this Plan to the holders of Allowed Claims, [that] such Claims [or] any liens that may support such Claims shall be deemed released and discharged." Plan, ¶ 4.4, p. 11. The Plan makes this point again in paragraph 9.1: "[t]he distributions provided under the Plan shall be *in exchange for* and in complete satisfaction and *release of all Claims* against any of the assets or properties of the Debtors." Plan, ¶ 9.1, p. 13 (emphasis added).[7]

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[7] The Debtors define "Claim" as having the same meaning set forth in section 101(5) of the Bankruptcy Code. Plan, ¶ 1.8, p. 4. Section 101(5) defines a claim as a right to payment or a right to an *equitable* remedy. 11 U.S.C. § 101(5) (emphasis added). Therefore, Wheeler's claim when the Plan was confirmed consisted of its right to payment and its equitable rights against the Property.

No payments or distributions have been made to Wheeler that would trigger the release or discharge contained paragraphs 4.4 or 9.1 of the Plan. Therefore, pursuant to the terms of this Plan, because the Debtors have not yet triggered the release provisions of paragraphs 4.4 or 9.1, Wheeler's claim, both the right to payment and the right to an equitable remedy, survives. *See LaMont*, 740 F.3d at 408-409.

To this court's knowledge, treating a delinquent tax claim through the modification of a confirmed plan has not been dealt with in the context of an expired redemption period. In Chapter 13 and 11 cases, this court has previously determined that a debtor is allowed to spread the payments for a tax claim over the life of a plan if the plan is confirmed prior to the expiration of the redemption deadline. *See, e.g., Bovino,* 496 B.R. at 503; *see also In re Romious,* 487 B.R. 883 (Bankr. N.D. Ill. 2013) (Baer, J.). These cases reason that prior to the expiration of the redemption deadline, a debtor still owns the property because title has not yet passed. *Zajicek v. Burks,* Case Nos. 13 C 50339 and 14 C 50044, 2014 WL 1612277, at *1 (N.D. Ill. Apr. 22, 2014). Thus, if a bankruptcy petition is filed before the redemption period expires, in addition to its lien, the tax purchaser merely has "a right to payment or alternatively, a right to an equitable remedy against the debtors' property" while the delinquent taxpayer retains title to the subject property. *LaMont,* 740 F.3d at 409, 406; *see also In re Tynan,* 773 F.2d 177, 179 (7th Cir. 1985); *In re Bates,* 270 B.R. 455, 463 (Bankr. N.D. Ill. 2001) (Wedoff, J.) (finding that before the redemption expires the tax purchaser has a right to payment, while the debtors still owns the property). The property is, therefore, part of the

bankruptcy estate and is treatable by a plan of reorganization. *Id.* As a result, if the redemption period had not expired, a debtor may propose a bankruptcy plan that pays tax purchasers over the life of the plan in the same matter other secured creditors are paid. *LaMont,* 740 F.3d at 397, 409-10; *Bovino,* 496 B.R at 504 (applying section 1123(b)(5)).

While the filing of a bankruptcy petition may act to extend or toll the redemption period in a limited fashion, *see* 11. U.S.C. § 108(b), the confirmation of the plan itself does nothing to change the timing of the redemption period. *See Multnomah Cnty. v. Rudolph* (*In re Rudolph*), 166 B.R. 440, 444 (D. Or. 1994) (only section 108(b), and not section 1322(b), can extend a redemption period); *see also Krawczyk v. United States* (*In re Krawczyk*), 201 B.R. 589, 591 (Bankr. N.D. Ga. 1996) (concluding that section 1322(c) could not extend the statutory redemption period after the tax sale occurred). As this court has previously stated, there is no principled reason to read virtually identical language differently simply because it is applied in different bankruptcy chapters. *Bovino,* 496 B.R. at 504 (finding the ability to treat redemption rights in a chapter 11 analogous to that in a chapter 13). The Plan does not, therefore, change the redemption period. *Lamont,* 740 F.3d. at 409 ("[t]he plan is *treating* his secured claim, *not formally redeeming* the property.") (emphasis added).

The redemption period, therefore, continues to run through the bankruptcy and may even expire during the bankruptcy. *Bates,* 270 B.R. at 467. As a result, this court routinely holds that "[a]fter the redemption period has ended, there is no property tax claim that can be treated in bankruptcy." *Id.* at 461 (holding that the automatic stay "serves no substantial purpose" after the redemption period expires because

there is no tax claim that can be treated in the bankruptcy).

In this case, the Debtors filed bankruptcy before the redemption period expired. The Debtors were able to and did propose an alternative treatment for the payment of Wheeler under the Plan. The Plan appears to have been confirmed before the redemption period expired. But that isn't clear-cut, given that the extension of that time period agreed to by Wheeler that would make confirmation timely was agreed to after the running of the period. How an expired period can be extended has not been argued before the court. Nonetheless, even assuming confirmation was timely, the Debtors failed to comply with the terms of the Plan. The Redemption Deadline has passed and the Debtors no longer have the ability to redeem the Property pursuant to state law. Certainly, they could not confirm a new plan at this stage, reviving those rights. *Bates,* 270 B.R. at 461. It is also unclear what effect, if any, the three to six month period for obtaining a tax deed will have on the Debtors' rights.[8] The language of the Plan required payment by the Debtors in "*exchange for . . . release*" of Wheeler's claim. Plan, ¶ 9.1, p. 13 (emphasis added). Because the payment has not been made, Wheeler's claim, which includes its lien rights, has not been released. What value Wheeler's claim has under state law will be for the state court to determine.

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[8] As noted above, Wheeler did at one point begin the process of seeking a tax deed, but did not apparently follow through and subsequently purported to extend the already expired redemption period. It remains an open question of state law whether a new request must be made by Wheeler, or if it is, whether the Debtors will be afforded the customary 3 to 6 months to respond.

It is unclear to the court, based on what has been presented, what the current status of either Wheeler's or the Debtors' rights under state law are with respect to the Property. What is clear is that Wheeler should not be prohibited from finding out, if that is its desire. Wheeler has established grounds for relief from the automatic stay and the last minute attempts of the Debtors and JPMorgan to circumvent Wheeler's rights are simply not compelling under the circumstances. Should Wheeler agree to stay in the Plan, the court will entertain a modification proposal agreed to by all. Otherwise, the parties' rights with respect to the Property is now a matter for the state court to determine.

It is within this court's discretion to deny a proposed modification to a confirmed plan. 11 U.S.C. § 1127(b) (phrased permissively) ("The proponent of a plan or the reorganized debtor *may* modify such plan . . . if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title") (emphasis added). When faced with a party who has established its rights for relief from the automatic stay and a situation where there is a tenuous offer for payment like the one from JPMorgan, this court finds that it is too little, too late – the circumstances do not warrant modification. JPMorgan and the Debtors should not be rewarded for the benefits they have taken at Wheeler's expense.

CONCLUSION

For all of the foregoing reasons, the court concludes that, in the limited respect discussed herein, the Motion for Relief is well taken, and is, therefore, granted. The Debtors' Motion to Modify Plan is

denied. Separate orders will be issued, concurrent with this Memorandum Decision.

Dated: April 18, 2016

/s/ Timothy A. Barnes
Timothy A. Barnes
United States Bankruptcy Judge

Appendix H

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
– CM/ECF LIVE, Ver. 6.1.1
Eastern Division

Case No.: 1:16–cv–05271

Honorable Charles R. Norgle Sr.

Ramon Aguirre,

Plaintiff,

v.

Wheeler Financial, Inc.,

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, January 23, 2017:

MINUTE entry before the Honorable Charles R. Norgle: This case is REMANDED for further proceedings consistent with the Court's Opinion and Order. (See Case No. 16 C 4924)Civil case terminated. Mailed notice(ewf,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing

system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at *www.ilnd.uscourts.gov*.

Appendix I

FEDERAL RULES OF BANKRUPTCY PROCEDURE RULE 3003

Rule 3003. Filing Proof of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases

(a) Applicability of rule. This rule applies in chapter 9 and 11 cases.

(b) Schedule of liabilities and list of equity security holders.

(1) Schedule of liabilities. The schedule of liabilities filed pursuant to § 521(1) of the Code [11 USCS § 521(1)] shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent, or unliquidated. It shall not be necessary for a creditor or equity security holder to file a proof of claim or interest except as provided in subdivision (c) (2) of this rule.

(2) List of equity security holders. The list of equity security holders filed pursuant to Rule 1007(a)(3) shall constitute prima facie evidence of the validity and amount of the equity security interests and it shall not be necessary for the holders of such interests to file a proof of interest.

(c) Filing proof of claim.

(1) Who may file. Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.

(2) Who must file. Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) Time for filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).

(4) Effect of filing claim or interest. A proof of claim or interest executed and filed in accordance with this subdivision shall supersede any scheduling of that claim or interest pursuant to § 521(a)(1) of the Code [11 USCS § 521(a)(1)].

(5) Filing by indenture trustee. An indenture trustee may file a claim on behalf of all known or unknown holders of securities issued pursuant to the trust instrument under which it is trustee.

(d) Proof of right to record status. For the purposes of Rules 3017, 3018 and 3021 and for receiving notices, an entity who is not the record holder of a security may file a statement setting forth facts which entitle that entity to be treated as the record holder. An objection to the statement may be filed by any party in interest.

Appendix J

UNITED STATES CONSTITUTION
Amendment 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

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 offence 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.

Appendix K

11 USC §502

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§502 Allowance of Claims or Interests

(a) A claim or interest, proof of which is filed under SECTION 501 OF THIS TITLE, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under SECTION 523(A)(5) OF THIS TITLE;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph

(1), (2), or (3) of section 726(a) or under the Federal Rules of Bankruptcy Procedure, except that—

(A) a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide; and

(B) in a case under chapter 13, a claim of a governmental unit for a tax with respect to a return filed under section 1308 shall be timely if the claim is filed on or before the date that is 60 days after the date on which such return was filed as required.

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)

(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor

on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under SECTION 509 OF THIS TITLE.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g)

(1) A claim arising from the rejection, under SECTION 365 OF THIS TITLE or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and

shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under SECTION 507(A)(8) OF THIS TITLE shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of

such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

(k)

(1) The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20 percent of the claim, if—

(A) the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budget and credit counseling agency described in section 111;

(B) the offer of the debtor under subparagraph (A)—

(i) was made at least 60 days before the date of the filing of the petition; and

(ii) provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof; and

(C) no part of the debt under the alternative repayment schedule is nondischargeable.

(2) The debtor shall have the burden of proving, by clear and convincing evidence, that—

(A) the creditor unreasonably refused to consider the debtor's proposal; and

(B) the proposed alternative repayment schedule was made prior to expiration of the 60-day period specified in paragraph (1)(B)(i).

Appendix L

11 USC §1111

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§ 1111. Claims and interests

(a) A proof of claim or interest is deemed filed under section 501 of this title [11 USCS § 501] for any claim or interest that appears in the schedules filed under section 521(a)(1) or 1106(a)(2) of this title [11 USCS § 521(a)(1) or 1106(a)(2)], except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

(b) (1) (A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title [11 USCS § 502] the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title [11 USCS § 363] or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if—

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such

property is sold under section 363 of this title [11 USCS § 363] or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title [11 USCS § 506(a)], such claim is a secured claim to the extent that such claim is allowed.

Appendix M

11 USC §1141

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§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)

(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of

this title [11 USCS § 502(g), 502(h), or 502(i)], whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title [11 USCS § 501];

(ii) such claim is allowed under section 502 of this title [11 USCS § 502]; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title [11 USCS § 523].

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title [11 USCS § 727(a)] if the case were a case under chapter 7 of this title [11 USCS §§ 701 et seq.].

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter [11 USCS §§ 1101 et seq.].

(5) In a case in which the debtor is an individual—

(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 [11 USCS §§ 701 et seq.] on such date;

(ii) modification of the plan under section 1127 [11 USCS § 1127] is not practicable; and

(iii) subparagraph (C) permits the court to grant a discharge; and

(C) the court may grant a discharge if, after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that—

(i) section 522(q)(1) [11 USCS § 522(q)(1)] may be applicable to the debtor; and

(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) [11 USCS § 522(q)(1)(A)] or liable for a debt of the kind described in section 522(q)(1)(B) [11 USCS § 522(q)(1)(B)]; and if the requirements of subparagraph (A) or (B) are met.

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) [11 USCS § 523(a)] that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 [31 USCS §§ 3721 et seq.] or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor—

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.