IT IS SO ORDERED.

Dated: June 17, 2016
11:16:30 AM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	**CASE NUMBER 10-42287**
JOSEPH J. MOCELLA and	*	
KIMBERLY A. MOCELLA,	*	**CHAPTER 13**
	*	
Debtors.	*	**HONORABLE KAY WOODS**
	*	

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MEMORANDUM OPINION REGARDING
CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

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Before the Court are cross-motions for partial summary judgment, each filed on March 31, 2016: (i) Nationstar Mortgage LLC's Motion for Partial Summary Judgment on the Debtors' Amended Motion for Contempt ("Nationstar's Motion") (Doc. 175) filed by Nationstar Mortgage LLC ("Nationstar"); and (ii) Motion for Partial Summary Judgment for Contempt ("Debtors' Motion") (Doc. 176) filed by Debtors Joseph J. Mocella and Kimberly A. Mocella. Each party seeks partial summary judgment regarding

whether Nationstar's actions during the Debtors' bankruptcy case constitute a violation of the automatic stay pursuant to 11 U.S.C. § 362, as asserted by the Debtors in Amended Motion for Contempt Against Nationstar Mortgage LLC ("Contempt Motion") (Doc. 166-1).

For the reasons set forth herein, the Court will grant each motion for partial summary judgment, in part, and deny each motion for partial summary judgment, in part. The Debtors' claims fail as a matter of law to the extent they allege that Nationstar violated the automatic stay by (i) failing to comply with Federal Rule of Bankruptcy Procedure 3002.1; and (ii) improperly seeking relief from the automatic stay. The Debtors' claims do not fail as a matter of law to the extent they allege that Nationstar violated the automatic stay by (i) misapplying mortgage payments during the Debtors' bankruptcy case; and (ii) including improper interest, fees, and costs in proposed loan modifications. However, genuine issues of material fact exist with respect to Nationstar's alleged misapplication of the Debtors' mortgage payments and inclusion of improper interest, fees, and costs in proposed loan modifications, which preclude summary judgment on those issues. The Debtors' claims do not fail as a matter of law to the extent they allege that Nationstar failed to honor the Stipulated Order.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28

U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FACTS

The Debtors filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code on June 18, 2010. The Debtors reside at 415 Kenmore Avenue SE, Warren, Ohio 44483 ("Residence"). On August 24, 2010, the Debtors filed Amended Chapter 13 Plan ("Plan") (Doc. 24), in which they proposed to pay (i) the monthly mortgage payments on their Residence directly to Nationstar outside the Plan; and (ii) the mortgage arrearage of $1,724.81 through the Plan. (Plan, Art. 2 E.) The Plan was confirmed upon the Court's entry of Confirmation Order (Doc. 35) on August 3, 2011.

On October 6, 2010, Nationstar filed a proof of claim denominated Claim No. 19-1, in which it asserted a claim secured by the Residence in the amount of $76,885.15, including an arrearage of $2,334.59. No party objected to Claim No. 19-1.[1]

A. First Motion for Relief from Stay

Nationstar filed its first motion for relief from stay with respect to the Residence on November 1, 2010 ("First Motion")

[1] The arrearage of $2,334.59 in Claim No. 19-1 was greater than the arrearage of $1,724.81 in the Plan. Pursuant to the Confirmation Order, "Trustee shall pay claims as filed, absent an objection by Debtor or other party in interest." (Confirmation Order ¶ 13.)

(Doc. 29), in which it stated that the Debtors' monthly mortgage payments of $817.44 were delinquent for September through November 2010. (First Mot. ¶ 13.) Accounting for a suspense balance of $2.12, Nationstar stated that the Debtors' mortgage was post-petition delinquent in the amount of $2,450.20. (First Mot., Ex. C ¶ IV.) The Debtors filed a response to the First Motion on November 27, 2010 (Doc. 31), in which the Debtors "request[ed] arrangements be made to cure the post petition delinquency." (First Mot. Resp. at 1.) Nationstar withdrew the First Motion on December 15, 2010 (Doc. 33). The Court never held a hearing on the First Motion.

B. Second Motion for Relief from Stay

Nationstar filed its second motion for relief from stay with respect to the Residence on January 19, 2012 ("Second Motion") (Doc. 46), in which it stated that the Debtors' monthly mortgage payments of $817.44 were delinquent for November 2011 through January 2012. (Second Mot. ¶ 13.) Accounting for a suspense balance of $556.90, Nationstar stated that the Debtors' mortgage was post-petition delinquent in the amount of $1,895.42. (Second Mot., Ex. C ¶ IV.)

The Debtors filed a response to the Second Motion on February 16, 2012 (Doc. 48), in which they summarily denied that the mortgage was in arrears. The Debtors supplemented their response to the Second Motion on April 4, 2012 ("Supplement")

(Doc. 53). Exhibit A to the Supplement was correspondence from Nationstar to the Debtors dated August 12, 2011 ("Loan Modification Offer"), which stated,

> Congratulations, you have been preapproved for a Loan Modification, which will permanently change the terms of the mortgage pending review of all required documents. If you comply with the terms of the required Trial Period Plan, supply any additional documentation requested, and meet all eligibility criteria we will modify the mortgage and may waive all prior late charges that remain unpaid.
>
> To Accept This Offer:
>
> - Pay the required trial payments outlined on the attached Trial Plan notice.
> - Provide any additional documents required for final approval. If any additional documents are required we will contact you during the trial to obtain them.
> - Sign and return both copies of the Loan Modification Agreement that will be sent to you or your attorney once the trial plan is completed and the final approval of the modification is processed.

(Loan Mod. Offer at 1.) The Loan Modification Offer further stated, "To qualify for a permanent modification, you must make the following <u>trial period payments in a timely manner as specified in the Trial Period Plan below – instead of your normal monthly mortgage payments:</u> . . . ." (*Id.* at 2 (emphasis in original).) The "Trial Period Plan" required three payments of $612.28 due September 1, October 1, and November 1, 2011, respectively. (*Id.*)

In the Supplement, the Debtors asserted that (i) they timely made the three trial period payments; and (ii) Nationstar did not

request additional documentation during the trial period. As a consequence, the Debtors argued that they had accepted Nationstar's Loan Modification Offer and there was "no reason that the debtors should not qualify for the permanent modification based on [Nationstar's] own unambiguous terms in their offer." (Suppl. at 1-2.) Moreover, the Debtors stated that Nationstar continued to accept their reduced payments of $612.28 through the filing of the Supplement, which was more than five months after the final trial period payment was due.

The Court held a hearing on the Second Motion on April 5, 2012, at which appeared Jason A. Whitacre, Esq. on behalf of Nationstar and Gary J. Rosati, Esq. on behalf of the Debtors. Mr. Whitacre represented that Nationstar had no record of a permanent loan modification, but could not state with specificity the manner in which the Debtors had failed to comply with the Loan Modification Offer. Mr. Whitacre had the following exchange with the Court:

> Mr. Whitacre: . . . The Debtors have responded to the [Second Motion] alleging that they were in a trial modification back in August of 2011, but that modification was ended in January. There's no full modification of record. . . .
>
> So at this point I don't think there's any dispute that under the terms of the original note and mortgage that there would be an arrears. What the Debtors are arguing, though, is that there was a trial modification that was entered into back in August, and despite not having any permanent modification entered into by either

party, that that somehow controls the note and mortgage at this point.

* * *

Mr. Whitacre: I can't sit here today, Your Honor, and say with certainty what either side did or didn't do in order to effectuate that into a permanent modification. The only thing I can represent to the Court is that the loan was never permanently modified, and that under the original note and mortgage payments that the loan is post-petition delinquent.

* * *

Mr. Whitacre: Your Honor, the — my client says that they sent the Debtors requests for information that weren't complied with. The Debtors —

The Court: Do you have information that you can supply to the Court showing that that request was actually made and those documents were not supplied?

Mr. Whitacre: I can supplement the motion, Your Honor. I don't have it with me today. I can supplement the motion with copies, .pdf copies, of the letters that were mailed to the homeowner.

* * *

The Court: Well, I'm going to adjourn this. I want the parties to see if you can work this out. But if you really have requested documents, you need to make sure that the Debtors know what those documents are and give them a reasonable time period to supply those documents.

(Apr. 5, 2012 Hr'g Tr. at 2-3, 5, 7.)[2]

The Court held the adjourned hearing on the Second Motion on May 17, 2012, at which Julie A. Terry, Esq. appeared on behalf of Nationstar and Philip D. Zuzolo, Esq. appeared on behalf of the

[2] The April 5, 2012 hearing transcript is available at Doc. 118.

Debtors. Ms. Terry represented that the Debtors had failed to fulfill all conditions precedent to the Loan Modification Offer, but, like Mr. Whitacre, could not state with specificity the manner in which the Debtors had failed to comply with the Loan Modification Offer. Ms. Terry had the following exchange with the Court:

> Ms. Terry: . . . Movant filed the [Second Motion] in January 2012. This was after there was a failed — from Plaintiff's — from Movant's perspective, a failed attempt at a loan modification. Although, you know, Debtors attempted a loan modification, the loan was never actually permanently modified, so — due to conditions precedent to the loan modification were not met. So in — you know, the delinquency, their arrearage, still stood and so my client did file for relief.
>
> . . . The terms of — you know, under basic contract law, the terms of the note and mortgage are not modified verbally. They are not waived just because my client cashes a trial payment. So the delinquency is still outstanding because the terms of the note and mortgage are still in effect.
>
> The Court: What caused the loan modification not to be finalized?
>
> Ms. Terry: So the initial letter was sent out. It was a solicitation letter. It said that —
>
> The Court: No. Just tell me what they failed to do.
>
> Ms. Terry: What they failed to do. They failed to return financials that were requested.
>
> * * *
>
> Ms. Terry: . . . And my client says they sent out the financial package to the Defendants and they were not returned with any financials at all.

> The Court: When was that sent out? Do you have proof that that was sent out?
>
> Ms. Terry: I don't have a date, Your Honor. I don't have a date. I just had a statement from my client that they sent out the financial package and it wasn't returned.
>
> * * *
>
> The Court: . . . You say that your client has told you that they made a request for additional information?
>
> Ms. Terry: Yes.
>
> The Court: But you don't have anything to demonstrate that that request was actually made?
>
> Ms. Terry: Correct, Your Honor.
>
> * * *
>
> The Court: I am going to deny the [Second Motion]. If there is something that you actually can show, Ms. Terry, that indicates that there was no loan modification because something actually as a condition precedent did not occur, then you might want to — you could renew your motion.
>
> * * *
>
> The Court: So your client has had five weeks to demonstrate that there really was a default if you could demonstrate that there was a default. For your clients just to say, to tell you to come in and make that representation is very inadequate.

(May 17, 2012 Hr'g Tr. at 2-4, 6-8.)[3]

On June 5, 2012, the Court denied the Second Motion upon the entry of Order Denying Nationstar Mortgage's Motion for Relief from Stay (Doc. 59).

[3] The May 17, 2012 hearing transcript is available at Doc. 141.

C. Third Motion for Relief from Stay

On February 12, 2015, Nationstar filed a third motion for relief from stay with respect to the Residence ("Third Motion") (Doc. 88), in which it stated that the Debtors' monthly mortgage payments of $817.44 were delinquent for February 2014 through January 2015. (Third Mot. ¶ 14.) Accounting for a suspense balance of $204.52, Nationstar stated that the Debtors' mortgage was post-petition delinquent in the amount of $9,604.76. (Third Mot., Ex. D. ¶ 4.) The Third Motion did not address or make mention of the Loan Modification Offer.

The Debtors filed a response to the Third Motion on March 12, 2015 (Doc. 90), in which they denied that the mortgage was in arrears. Specifically, the Debtors stated that they had timely made their monthly mortgage payments of $612.28 since the Court denied the Second Motion in June 2012, as reflected in the Post-Petition Ledger attached to the Third Motion. The Debtors further stated that the Post-Petition Ledger demonstrated that Nationstar continued to treat the Loan Modification Offer as though it had not been implemented and, thus, continued to account for required monthly mortgage payments of $817.44. The Debtors concluded, "Therefore, as this [Third Motion] is based on the exact same facts and situation that gave rise to the [Second Motion], which the Court denied as not well-taken, the Debtors respectfully request

that the Court also deny the instant [Third Motion]." (Third Mot. Resp. at 3.)

The Court held a hearing on the Third Motion on April 16, 2015, at which appeared (i) Edward H. Cahill, Esq. on behalf of Nationstar; (ii) Mr. Zuzolo on behalf of the Debtors; (iii) Scott R. Belhorn, Esq. on behalf of the United States Trustee ("UST"); and (iv) Michael A. Gallo, Chapter 13 Trustee.

Mr. Cahill, like Mr. Whitacre and Ms. Terry previously, represented that Nationstar had no record of a permanent loan modification because the Debtors had failed to fulfill all conditions precedent to the Loan Modification Offer. Mr. Cahill did not dispute that the Debtors had made the three trial period payments. However, Mr. Cahill represented that the Debtors had failed to return an executed loan modification agreement to Nationstar as required pursuant to the Loan Modification Offer. (Apr. 16, 2015 hr'g at 10:45:46.) In response to the Court's inquiry whether Nationstar ever sent a loan modification agreement to the Debtors for execution, Mr. Cahill expressly represented that such an agreement was sent in "early 2012 after five or six trial plan payments" and that he was attempting to procure an affidavit from a representation of Nationstar to that effect. (*Id.* at 10:47:02 and 10:50:36.)

Mr. Zuzolo again stated that the Debtors had timely made their monthly mortgage payments of $612.28 since receipt of the Loan

Modification Offer, which payments were in turn accepted by Nationstar. Mr. Zuzolo conceded that neither he nor the Debtors had a copy of an executed loan modification agreement.

Upon the request of Mr. Belhorn, the Court adjourned the hearing on the Third Motion to permit the UST to seek discovery from Nationstar.

The day prior to the adjourned hearing, on July 22, 2015, the Debtors filed Motion for Contempt Against Nationstar Mortgage, LLC (Doc. 123). The Debtors alleged that Nationstar had breached its duties pursuant to the Loan Modification Offer by not granting the Debtors a permanent loan modification following the Debtors' completion of all conditions precedent. As a result, the Debtors asserted that Nationstar had misapplied the Debtors' mortgage payments subsequent to the Loan Modification Offer and, thus, violated the automatic stay in § 362(a)(3).

The Court held the adjourned hearing on the Third Motion on July 23, 2015, at which appeared Jeremy M. Campana, Esq. on behalf of Nationstar and Mr. Zuzolo on behalf of the Debtors. Mr. Campana stated that Nationstar wished to withdraw the Third Motion. However, Nationstar had neither filed a motion to that effect nor reached an agreement with the Debtors and the UST stipulating to withdrawal of the Third Motion. The Court scheduled the Third Motion for an evidentiary hearing to be held on November 3, 2015.

On Friday, October 30, 2015 at 4:50 p.m. — *i.e.*, following the close of business two business days prior to the evidentiary hearing, yet more than three months after the evidentiary hearing was scheduled — Nationstar filed Nationstar Mortgage LLC's Motion to Withdraw its Motion for Relief from Stay ("Motion to Withdraw") (Doc. 151), in which Nationstar requested to withdraw the Third Motion. Nationstar asserted, "Nationstar agrees to implement a loan modification containing the same or better terms that would have been offered based on the August 2011 [Loan Modification Offer]" and, thus, "there is no longer a basis for relief from stay." (Mot. to Withdraw ¶¶ 4-5.) The Motion to Withdraw did not address the issue to be resolved at the evidentiary hearing — *i.e.*, whether Nationstar had cause to bring the Third Motion in the first instance. Nationstar also failed to address, among other things, when the proffered loan modification would be deemed effective or how Nationstar intended to account for the payments the Debtors had tendered subsequent to the Loan Modification Offer.

On that same date at 5:15 p.m., Nationstar filed a request for expedited hearing (Doc. 152), in which it asked the Court to hold a telephonic hearing on the Motion to Withdraw prior to the evidentiary hearing on the Third Motion. The Court granted Nationstar's request for expedited hearing, in part, and scheduled the Motion to Withdraw for an in-person hearing to be held on November 3, 2015 immediately prior to the evidentiary hearing

(Doc. 153). Due to Nationstar's delay in filing the Motion to Withdraw and related request for expedited hearing, the order scheduling the expedited hearing was not docketed until November 2, 2015 at 1:49 p.m. — *i.e.*, the afternoon prior to the evidentiary hearing.

On November 2, 2015 at 3:44 p.m. — again, the afternoon prior to the evidentiary hearing, which Nationstar unilaterally assumed was no longer necessary — Nationstar filed Nationstar Mortgage LLC's Memorandum of Law in Support of the Motion for Relief from Stay (Doc. 154).

At the hearing on the Motion to Withdraw, Mr. Campana appeared on behalf of Nationstar and Mr. Zuzolo appeared on behalf of the Debtors. Mr. Campana acknowledged that Nationstar did not provide Mr. Zuzolo with the terms of the proposed loan modification until the prior afternoon. Mr. Zuzolo represented that the Debtors had not accepted the latest proposed loan modification and did not consent to Nationstar's withdrawal of the Third Motion. As a consequence, the Court denied the Motion to Withdraw on the basis that it was not timely and failed to state cause (*see* Docs. 156-57).

After orally denying the Motion to Withdraw, the court proceeded with the evidentiary hearing on the Third Motion, at which appeared (i) Mr. Campana on behalf of Nationstar; (ii) Mr. Zuzolo on behalf of the Debtors; and (iii) Mr. Belhorn on behalf

of the UST. Following an adjournment, the parties entered a stipulation on the record denying the Third Motion. On November 3, 2015, the Court entered Stipulated Order Regarding Nationstar Mortgage LLC's Motion for Relief from Stay ("Stipulated Order") (Doc. 159). The Stipulated Order contains the following "findings of fact":

> 1. Nationstar mailed and the Debtors' [sic] received a solicitation for a loan modification dated August 12, 2011 ("2011 Alt Mod") [— *i.e.*, what the Court has defined as the "Loan Modification Offer"].
>
> 2. Debtors' loan met the eligibility criteria to receive the 2011 Alt Mod solicitation.
>
> 3. In 2011, Nationstar tracked their Alt Mod loan offers in a tracking system called Remedy which at the time required a manual uploading of the Alt Mod offers into the Remedy system.
>
> 4. Nationstar did not manually upload the Debtors' 2011 Alt Mod documents into their Remedy tracking system.
>
> 5. Due to the Alt Mod offer not being uploaded, Nationstar never sent the final modification documents to the Debtors related to the 2011 Alt Mod solicitation.
>
> 6. At no time did the Debtors fail to provide financial information with respect to the 2011 Alt Mod documents.
>
> 7. The 2011 Alt Mod solicitation contained an express requirement that the final loan modification be placed in writing and signed by both Nationstar and the Debtors.
>
> 8. At no time did the Debtors fail to sign a final loan modification document that had been actually sent to them with respect to the 2011 Alt Mod solicitation.

> 9. At no time did the Debtors fail to comply with requests for information related to the 2011 Alt Mod solicitation.
>
> 10. The Debtors did not fail to comply with any condition precedent necessary to receive the final modification documents with respect to the 2011 Alt Mod solicitation.
>
> 11. But for the 2011 Alt Mod documents not being uploaded into the Remedy system, Nationstar would have sent the final modification documents to the Debtors with respect to the 2011 Alt Mod solicitation.
>
> 12. No final loan modification agreement was signed by the Debtors with respect to the 2011 Alt Mod solicitation.
>
> 13. At no time did the Debtors contact Nationstar directly and request that the final loan modification agreement with respect to the 2011 Alt Mod solicitation be sent to them.
>
> 14. The filing of the Motion for Relief in January of 2012 was the first notice to the Debtors the 2011 Alt Mod solicitation was not recognized by Nationstar.

(Stip. Order at 2-3.) Moreover, the parties reached the following resolution:

> 1. Nationstar shall provide the Debtors with a loan modification containing these specific terms: (i) the loan modification will be instituted retroactively as of December 1, 2011; (ii) new monthly principal, interest and escrow payment is $563.41; (iii) new unpaid balance as of November 1, 2015 is $69,071.93 which includes crediting all payments as if timely made from December 1, 2011; (iv) the first payment is due December 1, 2015; (v) no fees, costs or other charges will be assessed to the loan; and (vi) the remaining term will be 432 months (from an original term of 480 months) at 4.625% interest.
>
> 2. By entering into this Stipulated Order the parties are not waiving any claims they may have against

> each other and are reserving all defenses and rights with respect thereto.
>
> 3. The implementation of the loan modification described herein brings the Debtors' loan current, therefore the Motion is denied with prejudice related to the facts and circumstances to date.

(*Id.* at 3.)

On January 25, 2016, the Debtors filed Motion to Amend Motion for Contempt Against Nationstar ("Motion to Amend") (Doc. 166), in which the Debtors sought leave to amend the July 22, 2015 motion for contempt. Attached to the Motion to Amend is the Contempt Motion presently before the Court. The Debtors sought to amend the original motion for contempt to include facts regarding (i) each of the three motions for relief from stay; (ii) the loan modification process; and (iii) Nationstar's actions subsequent to entry of the Stipulated Order. On February 25, 2016, Nationstar filed Nationstar Mortgage LLC's Objection to the Debtors' Amended Motion for Contempt ("Objection") (Doc. 169). The Objection did not oppose the Debtors' filing of the Contempt Motion. Instead, the Objection dealt entirely with the specific allegations in the Contempt Motion as if the Court had already granted leave for the Debtors to file the Contempt Motion. As a consequence, the Court granted the Motion to Amend (Doc. 171). The Court deemed the Contempt Motion filed, as attached to the Motion to Amend, and the Objection filed in response thereto.

On April 14, 2016, Nationstar filed Nationstar Mortgage LLC's Memorandum in Response to the Debtors' Motion for Partial Summary Judgment for Contempt ("Nationstar's Response") (Doc. 180), and the Debtors filed Debtors [sic] Memorandum in Opposition to Nationstar's Motion for Partial Summary Judgment ("Debtors' Response") (Doc. 182). The Debtors filed Reply in Support of Motion for Partial Summary Judgment ("Debtors' Reply") (Doc. 183) on April 21, 2016, and Nationstar filed Reply of Nationstar Mortgage LLC to Debtors' Memorandum in Opposition to Nationstar's Motion for Partial Summary Judgment ("Nationstar's Reply") (Doc. 184) the following day.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, states, in pertinent part:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(a) (2016). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if a reasonable person could return a verdict for the non-moving party." *Jacob v. Twp. of W.*

Bloomfield., 531 F.3d 385, 389 (6th Cir. 2008) (citing *Anderson*, 477 U.S. at 248).

"The moving party bears the burden of proving the absence of genuine issues of material fact and its entitlement to judgment as a matter of law." *Longaberger Co. v. Kolt*, 586 F.3d 459, 465 (6th Cir. 2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). The burden then shifts to the nonmoving party to present specific facts demonstrating the existence of a genuine dispute. *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 759-60 (6th Cir. 2010) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In evaluating a motion for summary judgment, "the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party." *Banks v. Wolfe County Bd. of Educ.*, 330 F.3d 888, 892 (6th Cir. 2003) (citing *Matsushita*, 475 U.S. at 587). Where the parties have filed cross-motions for summary judgment, each motion must be evaluated on its own merits and inferences must be drawn against the party whose motion is being considered. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 n.6 (6th Cir. 1999) (citations omitted).

III. ARGUMENTS OF THE PARTIES

Before the Court addresses the motions for partial summary judgment and responsive pleadings, the Court notes that both parties have taken overly litigious and adversarial positions in

this case. The sole issue presently before the Court is whether Nationstar's actions in this case, most of which are no longer in factual dispute, constitute a violation of the automatic stay as a matter of law. The primary related issue is whether a loan modification was ever effectuated. Yet, after having apprised the Court of their positions in the Contempt Motion (30 pages) and Objection (86 pages), the parties chose to restate the facts and repeat their arguments, at times verbatim, in Nationstar's Motion (46 pages), Debtors' Motion (68 pages), Nationstar's Response (27 pages), Debtors' Response (68 pages), Nationstar's Reply (23 pages), and Debtors' Reply (8 pages).

The Court further notes that the parties have seemingly missed the purpose of summary judgment, which is to determine issues of law based on undisputed facts. Both parties have devoted considerable portions of their pleadings to the issue of what damages are appropriate if Nationstar is found to have violated the automatic stay. However, as stated in further detail below, § 362(k) mandates actual damages for willful violations of the automatic stay and, in appropriate circumstances, allows for punitive damages. 11 U.S.C. § 362(k) (2016). Whether Nationstar acted in bad faith or otherwise to justify an award of punitive damages is a contested issue of fact, as exhibited by the excessive back and forth between the parties concerning that issue. Thus, Nationstar's intent is not properly before the Court at the summary

judgment stage and will not be addressed by the Court in this Memorandum Opinion. The parties' arguments regarding Nationstar's intent and damages will be restated below only to the extent necessary to develop a complete record of the issues presently before the Court.

A. Debtors' Contempt Motion and Nationstar's Objection

1. Contempt Motion

In the Contempt Motion, the Debtors assert that Nationstar violated the automatic stay in § 362(a)(3) by (i) misapplying the Debtors' mortgage payments due to Nationstar's failure to implement the Loan Modification Offer; (ii) attempting to collect improper interest, fees, and costs included in proposed loan modifications following Nationstar's failure to implement the Loan Modification Offer; (iii) filing each of the three motions for relief from stay without cause; and (iv) refusing to implement the loan modification ordered by the Court in the Stipulated Order.

First, subsequent to the Loan Modification Offer, "Nationstar continued accepting the modified trial period plan payment but misapplied the payments based on the contractual post-petition payment calculation instead of the modified trial period payment. This misapplication of payments caused Nationstar's system to treat the loan as contractually behind." (Contempt Mot. at 4.) Second, following Nationstar's failure to implement the Loan Modification Offer, "Nationstar sent proposed loan modifications

that required trial period plan payments and essentially threatened foreclosure if the Debtors did not accept." (*Id.* at 6.) These proposed loan modification offers "increased the amount of interest, fees and costs being capitalized to the loan (including the fees and costs from the first improperly filed [First Motion])" because Nationstar had "misapplied each monthly payment as a partial payment, causing an increasing delinquency with the loan." (*Id.*) Third, "Nationstar has knowingly filed three Motions for Relief from Stay in this case without basis, in violation of the Court's instructions, and as a result of its own malfeasance." (*Id.* at 1.) In filing the motions for relief from stay,

> Nationstar misrepresented to the Court that Nationstar had the right to seek foreclosure on the Debtors' home by fabricating the Debtors [sic] failure with some vague condition precedent with respect to the loan modification offered to the Debtors in August of 2011. However, through discovery, Nationstar was forced to admit that it was Nationstar's sole wrongdoing, not any failure on the part of the Debtors, which caused the loan modification to not be implemented.

(*Id.* at 1-2.)

Finally, following entry of the November 3, 2015 Stipulated Order, "Nationstar did not implement the loan modification as ordered by the Court. Instead, Nationstar improperly indicated that the Debtors failed to make their trial period payments. . . . Nationstar had no ability to reject the modification for any reason, as the loan was ordered modified pursuant to the [Stipulated Order]." (*Id.* at 2.) Exhibit G to the Contempt Motion

is correspondence from Nationstar to Mr. Zuzolo's law office dated December 10, 2015 ("Default Letter"), which stated that the Debtors were "declined" for loss mitigation because the Debtors had a "trial plan default." (Default Ltr. at 1.) Specifically, the Default Letter stated, "We are unable to offer you a modification because you did not make the required Trial Period Plan payments." (*Id.*)

The Debtors state that Nationstar's actions resulted in economic damages because the Debtors' mortgage was delinquent in excess of $15,000.00 when the original motion for contempt was filed in July 2015. "And despite a Court-ordered modification, all information indicates the loan remains delinquent to this day." (*Id.* at 10.) The Debtors ask the Court to find Nationstar in contempt for its willful violations of the automatic stay and award the Debtors actual damages, punitive damages, legal fees, and expenses.

2. Objection

Nationstar, on the other hand, states that "[t]he facts bear out an unfortunate mistake, not a stay violation or a contemptuous violation of a court order." (Obj. at 3.)

> Because a modification agreement had not been prepared and sent, and then signed by both parties, and then entered into Nationstar's systems, Nationstar's records continued to show that the original, unmodified loan terms remained in place. Since the [Debtors] were sending less each month than those terms required, the

> loan reflected in Nationstar's systems as past due. That led to a motion for relief from stay in this Court.

(*Id.* at 2.)

Nationstar notes that § 362(a)(3) requires an "act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate[.]" 11 U.S.C. § 362(a)(3). Nationstar argues,

> The facts alleged in the Contempt Motion do not show that Nationstar has attempted to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate. Nationstar has not violated the automatic stay. Instead, Nationstar has asked for permission to be *relieved* from the stay *before* Nationstar were [sic] to institute proceedings in state court to enforce its mortgage lien interest.

(Obj. at 13.)

The primary focus of Nationstar's analysis is that the loan was never modified because the Loan Modification Offer was neither effectuated pursuant to its own terms nor the Ohio statute of frauds. "Therefore, as a matter of fact and law, there has been no stay violation through misapplication of loan payments, as there was no loan modification for Nationstar to honor." (*Id.* at 15.)

Nationstar further argues that any alleged misapplication of the Debtors' mortgage payments was not a violation of the automatic stay "because, as a matter of law, once a creditor receives a payment from a chapter 13 debtor, the funds no longer constitute 'property of the estate.'" (*Id.* (citation omitted).) Finally,

Nationstar states that, because the Debtors paid less to Nationstar than demanded by the mortgage, "Nationstar actually received less than contemplated by the plan, leaving about $200 per month *more* in the hands of the [Debtors] which could *benefit* the estate. . . . Receiving *less* should not be viewed as an effort to take from the estate in violation of the automatic stay." (*Id.*)

B. Partial Motions for Summary Judgment and Responsive Pleadings

1. Nationstar's Motion

Nationstar argues that the loan was not modified as a result of the Loan Modification Offer and, "[w]ithout a modification, there could not have been a violation of Section 362(a)(3)." (Nationstar's Mot. at 9.) Specifically, the loan could not be modified "until the parties reached an agreement on the specific terms and memorialized them in a signed writing. Because that did not happen, Nationstar did not misapply the payments it received from the [Debtors] during this case . . . . As such, there was no stay violation." (*Id.* at 1.) Nationstar also argues that, upon receipt, the Debtors' mortgage payments were no longer property of the estate and, thus, Nationstar could not have violated the automatic stay by misapplying those payments.

Regarding the Default Letter sent to Mr. Zuzolo following entry of the Stipulated Order, Nationstar states that it "advised the [Debtors'] counsel that this was a probable misunderstanding due to the fact that the loan modification agreement was not signed

and returned. Nationstar has confirmed that it is honoring the loan modification and [Stipulated Order]." (*Id.* at 6 (citations omitted).) In addition, Nationstar states that the Stipulated Order "is silent on the timing and any additional ministerial steps for its implementation." (*Id.* at 16.) Because the Stipulated Order "does not state that the [Stipulated Order] itself *is* the modification," Nationstar did not violate the automatic stay by sending the Default Letter. (*Id.*)

i. Debtors' Response

The Debtors dispute Nationstar's assertion that its alleged violations of the automatic stay are contingent upon a finding that the loan was modified as a result of the Loan Modification Offer. The Debtors state,

> The undisputed and stipulated facts show that the [Debtors] were induced into making a lower payment by Nationstar which caused the loan to default. For no other reason than Nationstar's misconduct, the debtors did not receive the final loan modification documents. With full knowledge that it was Nationstar's failure to implement the loan mod, Nationstar attempted to lift the stay and foreclose based on the default it induced in the first place. Nationstar then used the threat of the relief from stay and foreclosure to try to coerce the [Debtors] into signing new loan modifications that increased the overall prepetition mortgage debt with delinquent interest and added costs that should never have been assessed. Therefore, the [Loan Modification Offer] is either a modification or ultimately a sham on the part of Nationstar. Regardless, Nationstar's actions violated the automatic stay.

(Debtors' Resp. at 1-2.) The Debtors further contend that the loan history "exhibits several other assessments of fees and

increased mortgage monthly mortgage [sic] payments without notice, pursuant to the plan or [Federal Rule of Bankruptcy Procedure] 3002.1[,]" which the Debtors allege were "attempts to obtain property of the estate and misapplication of payments regardless of the legal effect of the modification." (*Id.* at 8-9.)

The Debtors also state that the Loan Modification Offer, together with the findings in the Stipulated Order, establishes that "the loan was required to be modified upon compliance by the [Debtors] of all conditions precedent. Therefore, Nationstar's continued treatment of the loan as in default and misapplication of payments was a breach of contract and a violation of the automatic stay." (*Id.* at 11.) In support of this argument, the Debtors state that the statute of frauds does not apply to the Loan Modification Offer because the Loan Modification Offer was not a contract concerning real property.

ii. Nationstar's Reply

Nationstar raises several new arguments and defenses in its Reply. First, Nationstar states that filing a motion for relief from stay cannot itself constitute a violation of the automatic stay. Second, Nationstar states that "merely noting interest and other charges in a loan history does not amount to a stay violation." (Nationstar's Reply at 4.) "[E]ven if the charges were inappropriate at the time they were recorded in the loan history (which they were not), the mere reflection of debits and

credits associated with a loan is not a stay violation." (*Id.* at 5 (citations and parentheticals omitted).) Third, Nationstar states that Rule 3002.1 includes its own remedies for violations of its provisions, which do not include sanctions for violating of the automatic stay. Fourth, Nationstar contends that the Contempt Motion is barred by the doctrine of laches: "The Debtors stipulate that they realized the [Loan Modification Offer] was not recognized by Nationstar in January of 2012. Yet, the Debtors waited at least 43 months to assert claims for violation of the automatic stay through the original contempt motion." (*Id.* at 7 (citations omitted).) Finally, "The Court should apply judicial or equitable estoppel to bar the Debtors from claiming they had a loan modification throughout their case when they represented the opposite to their creditors and Nationstar in their plan."[4] (*Id.* at 12.)

2. Debtors' Motion

The Debtors contend that Nationstar violated the automatic stay as a matter of law because the "'misapplication' of payments may be viewed as a creditor exercising improper control over property of the Estate." (Debtors' Mot. at 13 (citations

[4] The Court will not address the defenses raised in Nationstar's Reply that were neither raised in Nationstar's Objection nor Nationstar's Motion — *i.e.*, the doctrines of laches and estoppel. Moreover, the Debtors' Plan was confirmed on August 3, 2011 — *i.e.*, prior to the Debtors receiving the Loan Modification Offer, which was dated August 12, 2011. Accordingly, the defense of equitable estoppel cannot exist based on the Debtors' alleged misrepresentation of their mortgage payment in the Plan because the Debtors had not yet received the Loan Modification Offer.

omitted).) Like the misapplication of payments, the Debtors state that "the assessment of improper costs and the attempt to collect those costs to [sic] the debtor further violates the automatic stay." (*Id.* at 13.) "[T]he evidence illustrates that Nationstar's [sic] attempted to increase the prepetition mortgage balance by adding delinquent interest (caused by their [sic] actions) and costs not properly noticed pursuant to the confirmed plan and the [sic] federal rule of bankruptcy procedure 3002.1." (*Id.* at 12.) The Debtors also assert that Nationstar continued to violate the automatic stay following entry of the Stipulated Order because the Debtors' mortgage payments "are not being applied in accordance with the [Stipulated Order]." (*Id.* at 19.)

The Debtors argue that a valid contract was formed pursuant to the Loan Modification Offer.

> The [Debtors] were to provide consideration through compliance with Trial Period Payments, the provision of required financial documentation, and by meeting any additional eligibility criteria required by Nationstar. Again, Nationstar has stipulated that the [Debtors] were in compliance with all terms. It was Nationstar's obligation to implement the Loan Modification [Offer]. Nationstar has stipulated that the Loan modification documents were never sent.

(*Id.* at 17 (citations omitted).) However, the Debtors contend that Nationstar violated the automatic stay irrespective of whether the loan was modified pursuant to the Loan Modification Offer:

> Either the trial period plan notice is a contract that modified the loan or it's a complete sham that fraudulently induced the debtors to fall behind ultimately increasing the arrearages of delinquent interest and costs. Nationstar then subsequently improperly attempted to capitalize the amounts to the principal balance of the loan. This is a clear attempt to obtain property of the estate and increase the prepetition mortgage lien.

(*Id.* at 14.)

i. Nationstar's Response

Nationstar reiterates its position that "there *are* conditions for modification which did not occur — there was no executed modification agreement, there was no compliance with the statute of frauds, and there was no meeting of minds over modified loan terms." (Nationstar's Resp. at 2.) Regarding the Debtors' allegations that Nationstar pursued the three motions for relief without cause, Nationstar states,

> Nationstar came back to court in good faith and presented a case supported by admitted facts and the weight of legal authority which says that there was no modification. Even if one chooses to disagree, and concludes that the loan was modified just by the delivery of a trial plan solicitation letter and three test payments, or concludes that Nationstar should have provided a loan modification, Nationstar's return to seek stay relief was not patently frivolous or in bad faith under the Sixth Circuit's standards.

(*Id.*) "Additionally, allegedly failing to provide notice of new charges under Fed. R. Bankr. P. 3002.1, allegedly adding other charges and purportedly breaching a contract all do not amount to a stay violation." (*Id.* at 3.)

Nationstar also addresses the Debtors' position that Nationstar had knowledge throughout this case that the Debtors' had fully complied with the Loan Modification Offer.

> The [Debtors] offer no evidence to suggest that Nationstar *actually knew* at that time it filed either [the Second Motion or Third Motion] that one of its employees had made a mistake by forgetting to enter the 2011 Alt Mod Solicitation into Nationstar's Remedy system. The Debtors state that Nationstar had information available to it from its systems and records from which it could have determined that there had been a mistake, but having access to things that would later reveal a mistake is far different from *knowing* that an employee missed entering a solicitation in Remedy and nevertheless still choosing to file the [Second Motion and Third Motion].

(*Id.* at 8-9.)

Regarding Nationstar's alleged failure to implement a loan modification following entry of the Stipulated Order, Nationstar states that the Stipulated Order "did not set forth instructions for exactly how and when the modification would be implemented, and the Debtors have refused to sign and return the Loan Modification Agreement needed to complete the contract documents in the loan file." (*Id.* at 10.) "Nationstar fully intends to implement the terms [of the Stipulated Order] in its system . . . ." (*Id.* at 20.)

Nationstar maintains that the Debtors have failed to allege a violation of the automatic stay that would warrant a finding of contempt because (i) Nationstar did not violate any of the Court's

orders; and (ii) there was no abuse of process in Nationstar seeking relief from the automatic stay.

ii. Debtors' Reply

In their Reply, the Debtors contend that Nationstar's Response is based primarily on argument, while the undisputed facts establish that Nationstar violated the automatic stay. Specifically, the Debtors state,

> Nationstar continued to seek relief from stay when it was indisputably known to Nationstar that it was Nationstar's misconduct that caused the debtors to be delinquent, continuing four years of repeated egregious conduct. These facts are undisputed and Nationstar can not [sic] credibly state in its opposition that their undisputed acts were not contemptuous, in violation of the stay, and in bad faith.

(Debtors' Reply at 1-2.)

IV. ANALYSIS

The Debtors assert that Nationstar's conduct in this case constitutes a violation of the automatic stay in § 362(a)(3), which states,

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
>
> * * *
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate[.]

11 U.S.C. § 362(a)(3). Section 362(k) states,

> [(k)](1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.
>
> (2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

11 U.S.C. § 362(k). Subsection (h) concerns personal property and is not applicable in this case.

"Stated broadly, the automatic stay, which is set forth in 11 U.S.C. § 362(a), stops all collection activities related to the recovery of a prepetition debt against the debtor." *In re Perviz*, 302 B.R. 357, 365 (Bankr. N.D. Ohio 2003). "The purpose of the stay is twofold: (1) to ensure the orderly liquidation of the debtor's bankruptcy estate; and (2) to provide the debtor with a breathing spell from creditors' collection efforts." *Id.* (citing *U.S. v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d. Cir. 1988)).

The Debtors allege that Nationstar violated the automatic stay by (i) misapplying the Debtors' mortgage payments as a result of Nationstar's failure to implement the Loan Modification Offer; (ii) attempting to collect improper interest, fees, and costs included in proposed loan modifications following Nationstar's failure to implement the Loan Modification Offer; (iii) filing each of the three motions for relief from stay without cause; and (iv) refusing to implement the loan modification ordered by the

Court in the Stipulated Order resolving the Third Motion. The Court will address each of these alleged actions in sequence. However, the Court will first determine, based on the undisputed facts, at what point, if any, a loan modification existed between the parties.

A. Existence of a Loan Modification

The parties' dispute concerning the existence of a loan modification pursuant to the Loan Modification Offer can be dissected into two legal issues: (i) whether the alleged loan modification fails as a matter of law pursuant to the Ohio statute of frauds; and (ii) whether each condition precedent to the Loan Modification Offer was satisfied. For the reasons set forth below, the Court finds that any alleged loan modification as a result of the Loan Modification Offer fails pursuant to the Ohio statute of frauds set forth in O.R.C. § 1335.02. Furthermore, the Debtors did not satisfy each condition precedent necessary to accept the Loan Modification Offer.

1. Ohio Statute of Frauds

Section 1335.02 of the Ohio Revised Code, entitled "Actions on loan agreements," states,

> (A) As used in this section:
>
> (1) "Debtor" means a person that obtains credit or seeks a loan agreement with a financial institution or owes money to a financial institution.
>
> * * *

> (3) "Loan agreement" means one or more promises, promissory notes, agreements, undertakings, security agreements, mortgages, or other documents or commitments, or any combination of these documents or commitments, pursuant to which a financial institution loans or delays, or agrees to loan or delay, repayment of money, goods, or anything of value, or otherwise extends credit or makes a financial accommodation. "Loan agreement" does not include a promise, promissory note, agreement, undertaking, or other document or commitment relating to a credit card, a charge card, a revolving budget agreement subject to section 1317.11 of the Revised Code, an open-end loan agreement subject to section 1321.16 or 1321.58 of the Revised Code, or an open-end credit agreement subject to section 1109.18 of the Revised Code.
>
> (B) No party to a loan agreement may bring an action on a loan agreement unless the agreement is in writing and is signed by the party against whom the action is brought or by the authorized representative of the party against whom the action is brought. . . .
>
> * * *

O.R.C. § 1335.02 (2016) (emphasis added).

As an agreement pursuant to which Nationstar — a financial institution — was going to delay the repayment of money, the Loan Modification Offer is a "loan agreement" as defined in O.R.C. § 1335.02(A)(3). In order for the Debtors to bring an action pursuant to the Loan Modification Offer, the agreement needed to be in writing and signed by Nationstar or its representative. It is undisputed that Nationstar did not execute the Loan Modification Offer or the final loan modification agreement contemplated by the Loan Modification Offer. As a consequence, an enforceable loan

modification does not exist as a result of the Loan Modification Offer.

The Court's ruling is consistent with the great majority of courts to have addressed this issue. Judge Russ Kendig of this Court recently addressed a very similar set of facts in *Cultice v. Ocwen Loan Servicing LLC (In re Cultice)*, No. 14-62491, Adv. No. 15-06013, 2015 Bankr. LEXIS 2860 (Bankr. N.D. Ohio Aug. 27, 2015), and concluded that the debtors' claims were barred by the Ohio statute of frauds. Judge Kendig held:

> [A]pplicable Ohio law supports Defendant. *Macklin v. CitiMortgage, Inc.*, 2015-Ohio-97, 2015 WL 204062 (Ohio App. 8 Dist. 2015); *Wells Fargo Bank, N.A. v. Bielec*, 2014-Ohio-1805, 2014 WL 1713125 (Ohio App. 10 Dist. 2014); *Nachar v. PNC Bank, N.A.*, 901 F.Supp.2d 1012 (N.D. Ohio 2012). . . . <u>These courts have uniformly concluded that the contractual language of the temporary modification does not create a binding modification, that the temporary modification is simply step one of the process, a modification signed by the lender is necessary to create a binding modification, and without the binding modification, the original terms of the note remain in full force and effect</u>.

Id. at *4-5; *see also CitiMortgage, Inc. v. Crawford*, 934 F. Supp. 2d 942, 948 (S.D. Ohio 2013).

The Court finds that, due to the Ohio statute of frauds in O.R.C. § 1335.02 and the lack of an executed loan modification agreement, an enforceable loan modification was not created as a result of the Loan Modification Offer. Accordingly, the Debtors' claims for violation of the automatic stay fail as a matter of law

to the extent they allege that Nationstar violated the automatic stay by failing to comply with the Loan Modification Offer.

2. Conditions Precedent to the Loan Modification Offer

The Loan Modification Offer contained the following three conditions precedent in order for the Debtors to accept the offer:

> To Accept This Offer:
>
> - Pay the required trial payments outlined on the attached Trial Plan notice.
> - Provide any additional documents required for final approval. If any additional documents are required we will contact you during the trial to obtain them.
> - Sign and return both copies of the Loan Modification Agreement that will be sent to you or your attorney once the trial plan is completed and the final approval of the modification is processed.

(Loan Mod. Offer at 1.) As set forth in the Stipulated Order, "The Debtors did not fail to comply with any condition precedent necessary to receive the final modification documents with respect to the [Loan Modification Offer]." (Stip. Order ¶ 10.) However, in contravention of its promise in the Loan Modification Offer, "Nationstar never sent the final modification documents to the Debtors related to the [Loan Modification Offer]." (*Id.* ¶ 5.) As a result, "[n]o final loan modification agreement was signed by the Debtors with respect to the [Loan Modification Offer]." (*Id.* ¶ 12.)

The facts set forth in the Stipulated Order establish that the Debtors met two of the three conditions precedent for

acceptance of the Loan Modification Offer — the Debtors made the required trial period payments and provided all information requested by Nationstar. However, the Loan Modification Offer expressly stated that the Debtors were required to execute a final loan modification agreement in order to accept the Loan Modification Offer. Irrespective of the fact that, despite its promise to do so, Nationstar admittedly never sent a final loan modification agreement to the Debtors, the Debtors did not comply with each condition precedent in order to finalize a loan modification. Thus, a loan modification did not exist as a result of the Loan Modification Offer and the Debtors' tender of the trial period payments. As a consequence, Nationstar did not violate the automatic stay in "misapplying" the Debtors' mortgage payments, which were made in the amount of the trial period payments, following conclusion of the trial period.

Whether the Debtors have an independent cause of action for breach of contract, promissory estoppel, or otherwise based on the Loan Modification Offer is not addressed by this ruling.

B. Misapplication of the Debtors' Mortgage Payments

The Debtors and Nationstar dispute whether, as a matter of law, the misapplication of mortgage payments made pursuant to a chapter 13 plan, but directly to the creditor, can constitute a violation of the automatic stay. Nationstar acknowledges that this Court has previously found that such misapplication can

constitute a violation of the automatic stay, but cites contrary authority. Nationstar has not presented the Court with any binding authority or compelling case law to cause the Court to change its position. The law in the Sixth Circuit has not changed since this Court ruled as follows in *Villwock v. Citi Residential Lending (In re Villwock)*, No. 07-40796, Adv. No. 09-04319 (Bankr. N.D. Ohio Aug. 10, 2010):

> The Sixth Circuit Court of Appeals has not addressed this issue and a split of authority exists outside the Sixth Circuit. *See, e.g.*, *Galloway v. EMC Mortg. Corp. (In re Galloway)*, 2010 Bankr. LEXIS 286, *13 (Bankr. N.D. Miss. 2010) (finding that the misapplication of payments violates the automatic stay); *but see*, *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 421 B.R. 356, 368-69 (Bankr. S.D. Tex. 2009) (finding that the misapplication of payments does not violate the automatic stay). For the reasons set forth below, this Court finds that allegations of misapplication of plan payments from the trustee or payments made outside the plan by the debtor are sufficient to state a cause of action for violation of the automatic stay in § 362(a).

Id. at *12-13. Accordingly, the Debtors' claims for violation of the automatic stay do not fail as a matter of law to the extent they are based on Nationstar's misapplication of mortgage payments. Whether such misapplication occurred is a disputed issue of material fact precluding summary judgment.

As set forth in Section IV(A), *supra*, the loan was not modified as a result of the Loan Modification offer. Thus, the Debtors' claims fail to the extent they are based on Nationstar misapplying the Debtors' mortgage payments due to Nationstar's

alleged failure to honor the Loan Modification Offer. However, any misapplication of payments during the three-month trial period, as alleged by the Debtors, would be a misapplication of payments pursuant to the Loan Modification Offer. Any continued misapplication as a result of Nationstar's misapplication during the trial period could also constitute a misapplication of payments in violation of the automatic stay.

The Court will take this opportunity to address Nationstar's argument that it could not have violated the automatic stay because "Nationstar actually received less than contemplated by the plan, leaving about $200 per month *more* in the hands of the [Debtors] which could *benefit* the estate. . . . Receiving *less* should not be viewed as an effort to take from the estate in violation of the automatic stay." (Obj. at 15.) The only instance in which that statement is not ludicrous is if Nationstar continued accepting the Debtors' trial period payments after conclusion of the trial period without assessing late fees, capitalizing interest, and seeking relief from the automatic stay to pursue its state court rights — presumably foreclosure on the Debtors' Residence. At a minimum, the facts demonstrate that Nationstar sought relief from the automatic stay. To state that such a course of conduct somehow benefits the estate is disingenuous at best.

C. Inclusion of Improper Charges in Proposed Loan Modifications

The Debtors allege that, throughout the course of this case, Nationstar sent the Debtors proposed loan modification offers that "increased the amount of interest, fees and costs being capitalized to the loan (including the fees and costs from the first improperly filed [First Motion])" because Nationstar had "misapplied each monthly payment as a partial payment, causing an increasing delinquency with the loan." (Contempt Mot. at 6.) Again, to the extent this claim is based on Nationstar's failure to implement the Loan Modification Offer, such claim fails. However, to the extent such claim is not dependent upon a finding that Nationstar failed to implement the Loan Modification Offer, the Court finds that the claim does not fail as a matter of law.

For the same reasons that this Court ruled in *Villwock* that the misapplication of mortgage payments can constitute a violation of the automatic stay, the Court likewise finds that the inclusion of improperly assessed interest, fees, and costs in a proposed loan modification is an "act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate[.]" 11 U.S.C. § 362(a)(3). Despite Nationstar's arguments to the contrary, such conduct is more than the "mere reflection of debits and credits associated with a loan." (Nationstar's Reply at 5.) Instead, by including amounts not contractually due in a proposed loan modification, a creditor is,

as a matter of law, attempting to obtain property from the debtor and, thus, the estate, in violation of the automatic stay. Whether Nationstar included improper interest, fees, and costs in proposed loan modification offers is a disputed issue of material fact precluding summary judgment.

D. Failure to Comply with Rule 3002.1

The Debtors allege that Nationstar assessed improper fees without complying with the notice requirements of Federal Rule of Bankruptcy Procedure 3002.1 in violation of the automatic stay. However, failing to comply with Rule 3002.1 does not itself constitute a violation of the automatic stay. Generally speaking, Rule 3002.1 requires a creditor holding a claim secured by the debtor's principal residence to file (i) a notice of any change in the payment amount; and (ii) a notice itemizing all fees, expenses, or charges incurred after the bankruptcy case is filed. FED. R. BANKR. P. 3002.1(b)-(c) (2016). Rule 3002.1 states,

> (i) Failure to Notify. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:
>
> (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
>
> (2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

FED. R. BANKR. P. 3002.1(i).

Rule 3002.1 contains its own remedies if a creditor fails to comply with its provisions, none of which are to seek damages pursuant to § 362(k). Furthermore, the Debtors provide no explanation as to how Nationstar's failure to file the required notices pursuant to Rule 3002.1 constitutes an act to obtain possession of estate property or to exercise control over estate property in violation of § 362(a)(3). If the Debtors believe that Nationstar failed to comply with Rule 3002.1, their remedies are set forth in Rule 3002.1(i). As a consequence, the Debtors' claims for violation of the automatic stay fail as a matter of law to the extent they are based on Nationstar's alleged failure to comply with Rule 3002.1.

E. Filing Motions for Relief from Stay

Section 362(a) contains the exclusive list of actions that are stayed by the filing of a bankruptcy petition. That list does not include filing a motion for relief from stay. Instead, filing a motion for relief from stay is expressly permitted by § 362(d), which provides that the court shall grant relief from stay, for specific causes, "[o]n request of a party in interest and after notice and a hearing." 11 U.S.C. § 362(d). Moreover, Federal Rule of Bankruptcy Procedure 4001(a)(1) provides that "[a] motion for relief from an automatic stay provided by the Code . . . shall

be made in accordance with Rule 9014 . . . ." FED. R. BANKR. P. 4001(a)(1) (2016). Federal Rule of Bankruptcy Procedure 9014(a) further provides, "In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." FED. R. BANKR. P. 9014(a) (2016). Thus, the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure explicitly permit a party in interest to seek relief from stay, provide the procedure for seeking relief from stay, and grant the debtor an opportunity to be heard in opposition thereto.

In *In re Sammon*, 253 B.R. 672 (Bankr. D.S.C. 2000), the debtors alleged that the creditor violated the automatic stay by filing a proof of claim listing an incorrect amount owed to the creditor. The Bankruptcy Court for the District of South Carolina concluded that a creditor could not violate the automatic stay by commencing an action against the debtor in bankruptcy court.

> Second, the Court finds that the automatic stay "'does not operate against the court with jurisdiction over the bankruptcy.'" *Robert Christopher Assoc. v. Franklin Realty Group, Inc. (In re FRG, Inc.)*, 121 B.R. 710, 714 (Bankr. E.D. Pa. 1990) (citing *In re Teerlink Ranch Ltd.*, 886 F.2d 1233, 1237 (9th Cir. 1989)); *see also In re Briarwood Hills Assoc.*, 237 B.R. 479, 480 (Bankr. W.D. Mo. 1999) ("The automatic stay does not apply to proceedings in the bankruptcy court having jurisdiction over the debtor. Numerous courts have held that the automatic stay implicitly does not bar a party from commencing a proceeding against the debtor in the court where the bankruptcy petition is pending."); *In re Bird*, 229 B.R. 90, 95 (Bankr. S.D. N.Y. 1999) (citations omitted) ("The purposes of the automatic stay, to

> preserve the assets of the debtor for the benefit of all creditors and to protect the creditors from each other by stopping the race to seize the debtor's assets, are not advanced by disallowing suits against the debtor in the court where the bankruptcy case is pending. In fact, the opposite is true. Having such litigation go forward in what can be termed the home court centralizes all actions against the debtor in one forum under the control of one court and thereby aids the home court in protecting the debtor and creditors and in efficiently administering the estate."). In other words, the automatic stay serves to protect the bankruptcy estate from actions taken by creditors outside the bankruptcy court forum, not legal actions taken within the bankruptcy court. The filing of a Proof of Claim before a bankruptcy court, which is in control over the process of administering the property of the bankruptcy estate, is the logical equivalent of a request for relief from the automatic stay, which cannot in itself constitute a violation of the stay pursuant to § 362(h). *See, e.g.*, *In re FRG, Inc.*, 121 B.R. [710,] 714 [(Bankr. E.D. Pa. 1990)]. Therefore, as a matter of law, Debtors' argument fails.

Id. at 680-81 (emphasis added). Although in the context of an allegedly overstated proof of claim, the analysis in *Sammon* applies equally in this case.

It appears that each court to have addressed this issue has concluded that filing a motion for relief from stay cannot itself constitute a violation of the automatic stay. *See, e.g.*, *Newcomber v. Litton Loan Servicing, L.P. (In re Newcomer)*, 416 B.R. 166, 178 n.4 (Bankr. D. Md. 2009) (citations and parentheticals omitted) ("To the extent that Plaintiffs intended to allege that the filing of a motion for relief from stay is a *per se* violation of the stay, the Court summarily rejects such argument."); *In re Surprise*, 342 B.R. 119, 122 (Bankr. N.D.N.Y. 2006) ("Nothing that HSBC did,

whether it be in filing its proof of claim or in seeking relief from the automatic stay, were [sic] actions taken outside the jurisdiction of this Court which violated either the injunction of Code § 524(a) or the automatic stay of Code § 362(a).")

Because the filing of a motion for relief from stay is expressly permitted pursuant to § 362(d), the Court finds that seeking relief from stay cannot itself constitute a violation of the automatic stay in § 362(a). If a debtor believes that the movant does not have cause for relief from stay, its remedy pursuant to the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure is to object thereto. If a debtor believes that the motion for relief from stay was filed for an improper purpose or without evidentiary support, its remedy is to seek sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011. As a consequence, the Court finds that the Debtors' claims for violation of the automatic stay fail as a matter of law to the extent they are based on Nationstar allegedly seeking relief from the automatic stay without cause.

In addition, the Court did not expressly prohibit Nationstar from filing the Third Motion. As such, Nationstar cannot be held in contempt for filing the Third Motion. However, Nationstar was on notice that it was required to conduct an adequate investigation of the facts concerning whether the loan had been modified prior to filing the Third Motion. Nationstar attempts to minimize the

false statements its counsel made to the Court concerning the Debtors' purported failure to comply with the Loan Modification Offer because such representations were not "testimony." (*See* Nationstar's Resp. at 15-17.) Such misrepresentations, however, can result in sanctions imposed upon Nationstar, as well as its counsel, pursuant to Rule 9011(c).[5]

F. Failing to Implement the Stipulated Order's Loan Modification

Finally, the Court finds that the loan was modified upon entry of the Stipulated Order. Nationstar's argument that the Stipulated Order did not set forth a time period for implementing its terms is without merit and an affront to the Court. The Stipulated Order neither contemplated any further ministerial acts before the loan modification became effective nor permitted Nationstar to require the Debtors to sign further documents before implementing the loan modification. The Stipulated Order states that "Nationstar shall provide the Debtors with a loan modification containing these terms . . . (i) the loan modification will be instituted retroactively as of December 1, 2011[.]" (Stip. Order at 3.) Thus, notwithstanding Nationstar's argument to the contrary, the loan

[5] Contrary to the facts established in the Stipulated Order, Nationstar's counsel made the following false representations to the Court: (i) on April 5, 2012, Mr. Whitacre stated that the Debtors failed to comply with Nationstar's requests for information (*see supra* at 6-7); (ii) on May 17, 2012, Ms. Terry stated that the Debtors failed to comply with Nationstar's requests for information (*see supra* at 8-9); and (iii) on April 16, 2015, Mr. Cahill stated that Nationstar sent the Debtors a final loan modification agreement in early 2012 (*see supra* at 11). Each of those statements was patently false.

modification is already effective. The Stipulated Order is, indeed, the loan modification.

Moreover, the Stipulated Order meets all of the requirements of the Ohio Statute of Frauds. Specifically, the Stipulated Order is in writing and is signed by Mr. Campana as a representative of Nationstar.

Having found that the loan was modified upon entry of the Stipulated Order, the Court finds that Nationstar violated the automatic stay as a matter of law when Nationstar sent the Debtors the Default Letter and took any other actions that did not comply with the Stipulated Order. As a consequence, the Debtors are entitled to judgment as a matter of law to the extent the Contempt Motion alleges that Nationstar violated the automatic stay when it failed to comply with the Stipulated Order. The issue of damages resulting from this violation requires evidence and is not properly before the Court at this time.

V. CONCLUSION

A loan modification did not come into existence as a result of the Loan Modification Offer. The Loan Modification Offer was not signed by a representative of Nationstar as required by the statute of frauds in O.R.C. § 1335.02. Furthermore, the Debtors did not satisfy each condition precedent necessary to accept the Loan Modification Offer. Specifically, because Nationstar failed to send the promised final loan modification agreement to the

Debtors, the Debtors were not able to execute a final loan modification agreement as required by the Loan Modification Offer.

This Court has previously found that the misapplication of mortgage payments during a bankruptcy case can constitute a violation of the automatic stay as a matter of law. Nationstar offered no controlling precedent or compelling case law to cause the Court to change its position. As a consequence, the Court finds that the Debtors' claims for violation of the automatic stay do not fail as a matter of law to the extent they allege that Nationstar violated the automatic stay by misapplying mortgage payments during the Debtors' bankruptcy case. For similar reasons, the Court finds that the Debtors' claims do not fail as a matter of law to the extent they allege that Nationstar included improper interest, fees, and costs in proposed loan modifications. These allegations are disputed issues of material fact precluding summary judgment. The Court further finds that Nationstar violated the automatic stay when it failed to honor the Stipulated Order.

As a matter of law, seeking relief from the automatic stay cannot itself constitute a violation of the automatic stay. Filing a motion for relief from stay is expressly permitted by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. If a debtor opposes a motion for relief from stay, its remedy is to object thereto. Likewise, Rule 3002.1 contains its own set of

remedies, which do not include seeking damages for violation of the automatic stay.

Consistent with these rulings, the Court will (i) grant the Debtors' Motion, in part, to the extent it alleges that Nationstar failed to comply with the Stipulated Order; (ii) deny the remainder of the Debtors' Motion; (iii) grant Nationstar's Motion, in part; and (iv) deny Nationstar's Motion, in part.

An appropriate order will follow.

# # #

IT IS SO ORDERED.

Dated: June 17, 2016
11:20:23 AM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	**CASE NUMBER 10-42287**
JOSEPH J. MOCELLA and	*	
KIMBERLY A. MOCELLA,	*	**CHAPTER 13**
	*	
Debtors.	*	**HONORABLE KAY WOODS**
	*	

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ORDER GRANTING, IN PART, AND DENYING, IN PART,
CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

****

Before the Court are cross-motions for partial summary judgment, each filed on March 31, 2016: (i) Nationstar Mortgage LLC's Motion for Partial Summary Judgment on the Debtors' Amended Motion for Contempt ("Nationstar's Motion") (Doc. 175) filed by Nationstar Mortgage LLC ("Nationstar"); and (ii) Motion for Partial Summary Judgment for Contempt ("Debtors' Motion") (Doc. 176) filed by Debtors Joseph J. Mocella and Kimberly A. Mocella.

Each party seeks partial summary judgment regarding whether Nationstar's actions during the Debtors' bankruptcy case constitute a violation of the automatic stay pursuant to 11 U.S.C. § 362, as asserted by the Debtors in Amended Motion for Contempt Against Nationstar Mortgage LLC (Doc. 166-1). On February 25, 2016, Nationstar filed Nationstar Mortgage LLC's Objection to the Debtors' Amended Motion for Contempt (Doc. 169).

On April 14, 2016, Nationstar filed Nationstar Mortgage LLC's Memorandum in Response to the Debtors' Motion for Partial Summary Judgment for Contempt (Doc. 180), and the Debtors filed Debtors [sic] Memorandum in Opposition to Nationstar's Motion for Partial Summary Judgment (Doc. 182). The Debtors filed Reply in Support of Motion for Partial Summary Judgment (Doc. 183) on April 21, 2016, and Nationstar filed Reply of Nationstar Mortgage LLC to Debtors' Memorandum in Opposition to Nationstar's Motion for Partial Summary Judgment (Doc. 184) the following day.

For the reasons set forth in the Court's Memorandum Opinion Regarding Cross-Motions for Partial Summary Judgment entered on this date, the Court hereby:

1. Finds that an enforceable loan modification did not exist as a result of the Loan Modification Offer.
2. Finds that the loan was modified upon entry of the Stipulated Order.

3. Finds that the Debtors' claims for violation of the automatic stay do not fail as a matter of law to the extent they allege that Nationstar misapplied the Debtors' mortgage payments during the Debtors' bankruptcy case.

4. Finds that genuine issues of material fact exist regarding the allegations in paragraph 3, which preclude summary judgment for the Debtors or Nationstar.

5. Finds that the Debtors' claims for violation of the automatic stay do not fail as a matter of law to the extent they allege that Nationstar included improper interest, fees, and costs in proposed loan modifications.

6. Finds that genuine issues of material fact exist regarding the allegations in paragraph 5, which preclude summary judgment for the Debtors or Nationstar.

7. Finds that the Debtors' claims for violation of the automatic stay do not fail as a matter of law to the extent they allege that Nationstar failed to honor the Stipulated Order.

8. Finds that the Debtors' claims for violation of the automatic stay fail as a matter of law to the extent they allege that Nationstar failed to comply with Federal Rule of Bankruptcy Procedure 3002.1

9. Finds that the Debtors' claims for violation of the automatic stay fail as a matter of law to the extent they allege that Nationstar improperly sought relief from the automatic stay.

10. Grants the Debtors' Motion, in part, consistent with paragraph 7.

11. Denies the Debtors' Motion, in part, consistent with paragraphs 4, 6, 8, and 9.

12. Grants Nationstar's Motion, in part, consistent with paragraphs 8 and 9.

13. Denies Nationstar's Motion, in part, consistent with paragraphs 3, 4, 5, 6, and 7.

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