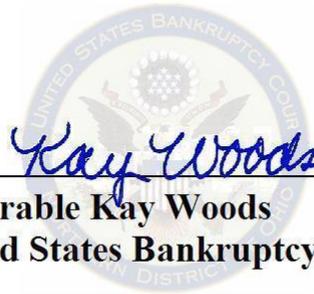


**IT IS SO ORDERED.**



**Dated: June 24, 2009  
02:01:47 PM**

**Honorable Kay Woods  
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO**

**IN RE:**

**JOHN S. WALKER and  
JOANNE WALKER,  
  
Debtors.**

\*  
\*  
\* **CASE NUMBER 06-41350**  
\*  
\* **CHAPTER 13**  
\*  
\*  
\* **HONORABLE KAY WOODS**  
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**MEMORANDUM OPINION REGARDING MOTION TO AMEND AGREED ORDER  
FOR RELIEF FROM STAY OF CITIMORTGAGE, INC. SUCCESSOR BY  
MERGER TO ABN AMRO MORTGAGE GROUP, INC.**  
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This cause is before the Court on Motion to Amend Agreed Order for Relief from Stay of Citimortgage, Inc. Successor By Merger To ABN AMRO Mortgage Group, Inc. ("Motion to Amend") (Doc. # 42) filed by Daniel M. McDermott, United States Trustee for Region 9 ("UST"), on April 20, 2009. The Motion to Amend seeks an order from this Court amending or altering Agreed Order for Relief From Stay of Citimortgage, Inc. Successor by Merger to ABN AMRO Mortgage Group,

Inc. (Property Address: 336 Sawmill Drive, Cortland, Ohio 44410) ("Agreed Order") (Doc. # 40) entered on April 16, 2009. The parties that agreed to and submitted the Agreed Order for the Court's approval are: (i) Movant Citimortgage, Inc. successor by merger to AMN AMRO Mortgage Group, Inc. ("Movant"), through its counsel, and (ii) Debtors John S. Walker and JoAnne Walker ("Debtors"), through their counsel. On May 20, 2009, Movant filed Objection to the United States Trustee's Motion to Amend Agreed Order for Relief From Stay of Citimortgage, Inc. Successor by Merger to ABN AMRO Mortgage Group, Inc. ("Objection") (Doc. # 44). The Court held a hearing on the Motion to Amend and Objection thereto on May 28, 2009.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) 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 Rule 7052 of the Federal Rules of Bankruptcy Procedure.

#### **I. FACTUAL BACKGROUND**

On March 19, 2009, Movant filed Motion of Citimortgage, Inc. Successor by Merger to ABN AMRO Mortgage Group, Inc. for Relief From Stay (Property Address: 336 Sawmill Drive, Cortland, Ohio 44410) ("Motion for Relief") (Doc. # 37). The Notice for the Motion for Relief stated that objections, if any, to the relief requested in

the Motion for Relief had to be filed and served on or before April 9, 2009. In the event an objection was timely filed, the Motion for Relief was set for hearing on April 16, 2009, at 10:30 a.m. Debtors filed Response and Request for Hearing on Citimortgage, Inc.'s Motion for Relief from Stay ("Debtors' Response") on April 8, 2009. Although the UST received Notice of the Motion for Relief, the UST did not object or otherwise respond to the Motion for Relief. Prior to the scheduled hearing on the Motion for Relief, Movant and Debtors executed and submitted the Agreed Order, which resolved all issues in the Motion for Relief and Debtors' Response.

Less than ten days after entry of the Agreed Order, the UST filed the Motion to Amend, which cited Federal Rule of Civil Procedure 59 (incorporated herein by Federal Rule of Bankruptcy Procedure 9023) as the basis to request the Court to correct an error of law.

## **II. UST'S MOTION TO AMEND**

The UST argues that the Agreed Order contains an error of law that this Court must correct. The UST's argument is as follows: (i) Debtor's mortgage prohibits Movant from charging fees that are prohibited by applicable law; (ii) because Debtor's real estate is located in Ohio, the law of Ohio controls; (iii) Debtor's mortgage provided Debtor with the ability to reinstate the mortgage after acceleration by Movant; (iv) after filing the Motion for Relief, Movant and Debtor entered into the Agreed Order that provided for

Movant to file a supplemental proof of claim in the amount of \$500.00 for attorney fees as part of the post-petition arrearage; (v) the Agreed Order did not provide for reinstatement of Debtor's mortgage; and (vi) Ohio law prohibits Movant from collecting attorney fees from Debtor unless Movant reinstates the mortgage. The UST identifies the error of law as the inclusion in the Agreed Order of a provision that Movant can file a proof of claim for attorney fees. The UST notes that (i) Movant did not request attorney fees in the Motion for Relief, and (ii) the Agreed Order does not provide for Debtors' mortgage to be reinstated, but holds stay relief in abeyance conditioned upon Debtors making certain payments to Movant. The UST argues that "the legal fees to which reference is made in the 'Agreed Order' are prohibited under Ohio law under the holding of *Wilborn v. Bank One Corporation*. Therefore, the 'Agreed Order' should be amended to remove the provisions relating to attorneys fees." (Mot. to Amend at 4.)

### **III. STANDING**

The Court first addresses whether the UST has standing to move to amend or alter an Agreed Order to which he was not a party and which resolved a motion to which he did not object. This Court finds that, under these circumstances, the UST's Motion to Amend is not properly before the Court.

The UST relies on Federal Rule of Civil Procedure 59, which provides, "(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than 10 days after

the entry of the judgment.” FED. R. CIV. P. 59 (West 2009). Rule 59 does not specify who may file a motion to alter or amend. However, this Court finds that, implicit in Rule 59 is the requirement that the motion may be brought only by a party to the original trial or judgment. Here, the UST is not a party to the Agreed Order. The UST did not cite, and this Court could not find, any case in which an entity that was not a party to a judgment was granted relief under Rule 59.

The general rule is that a party to an agreed order cannot seek its amendment. As one bankruptcy court has stated: “A number of cases have dealt with the question of whether a *party will be permitted to modify or amend a judgment which has been entered by consent of the parties* or by agreement of counsel. The answer has uniformly been that such a modification or amendment will not be permitted.” *Tipton v. Tennesco, Inc. (In re Tipton)*, 18 B.R. 464, 468 (Bankr. E.D. Tenn. 1982) (emphasis added).

The UST relies on 11 U.S.C. § 307 as the basis for his standing to bring the Motion to Amend. Section 307 provides that “[t]he United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title . . . .” 11 U.S.C. § 307 (West 2008). Through § 307, the UST would have had standing to be heard regarding the Motion for Relief, but the UST did not avail himself of that opportunity. Because the UST failed to object or respond to the Motion for Relief, it is not clear that § 307 confers standing upon the UST to seek to amend the Agreed Order that

resolved such Motion and to which the UST was not a party.

An agreed order is not only an order of the court, it constitutes a contract by and between the parties. The parties - in this case, Movant and Debtor - mutually agreed to a method and manner to resolve the Motion for Relief. The Agreed Order contains provisions that this Court would not have been able to require the parties to accept, absent their agreement. Thus, the Agreed Order not only constitutes an order, which is enforceable by this Court, but a contract by and between Movant and Debtor. In the instant case, both Movant and Debtor were represented by counsel, who negotiated, reviewed, and agreed to the terms of the Agreed Order.

In filing the Motion to Amend, the UST is not requesting the Court to vacate the Agreed Order; instead, the UST wants the Court to amend the Agreed Order to remove one provision of the Agreed Order. By seeking to have the Court change only one term of the Agreed Order - but leaving the remainder intact - the UST is attempting to redefine the contract between Movant and Debtor. Although the UST does not represent either party to the Agreed Order, through the Motion to Amend, the UST appears to be advocating a position that could have been - but apparently was not - taken by Debtor.

This Court is troubled by the concept that an entity who is not a party to an agreed order can seek to compel the Court to rewrite the bargain struck by the parties to that agreed order. Here, Movant and Debtor entered into an agreement for which the UST now

seeks Court interference to change one of the terms. Although an agreed order is not a consent decree, it is similar in that the parties to the order have consented to its terms. A court should be loathe to vacate or alter an order to which the parties have agreed. "A court which, having jurisdiction of the parties and of the subject matter, renders a consent decree, if it sustains a motion of one of the parties to vacate such decree not only sanctions the breach of a contract but in effect becomes a party to the breach." *Walling v. Miller*, 138 F.2d 629, 631 (8th Cir. 1943). Because the UST is not a party to the Agreed Order, and because it never objected to the Motion for Relief, this Court does not believe that the Motion to Amend is properly before the Court. However, to the extent this Court may have the discretion to amend the Agreed Order, it declines to rewrite the bargain struck by the parties thereto.

#### **IV. ALLEGED ERROR OF LAW**

Although this Court does not believe that the UST has standing to seek the relief requested in the Motion to Amend, the Court will, nonetheless, deal with the UST's substantive argument. The UST argues that the Agreed Order must be amended because it contains an error of law. The UST interprets *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306 (Ohio 2009) to permit a lender to charge attorney fees only upon reinstatement of a mortgage.

The *Wilborn* case was a class action brought by borrowers who had entered into residential mortgage contracts with various

lenders. One of the borrowers, Sharon Wilborn, had a home equity loan agreement that was secured by her primary residence. Upon default by Wilborn, the lender instituted foreclosure proceedings. This agreement did not include a reinstatement provision, but she was authorized to make additional payments on her balance at any time. Wilborn paid off the balance, including the lender's attorney fees, which resulted in discontinuance of the foreclosure action. Each of the other borrowers had mortgages that contained reinstatement provisions, which permitted the borrower, after default but prior to judgment enforcing the mortgage and note, to bring payments current, have the foreclosure action discontinued, and the mortgage reinstated. These reinstatement provisions further provided that the lender could recover all of its costs, including reasonable attorney fees, that were incurred in the foreclosure litigation.

The Ohio Supreme Court reiterated the general rule that "a provision in a mortgage or promissory note that awards attorney fees upon the enforcement of the lender's rights when the borrower defaults, such as a foreclosure action that has proceeded to judgment, is unenforceable." *Id.* at 549. The Court went on to state that, "Reinstatement, however, differs from redemption. A defaulting borrower is not entitled by law to have a mortgage loan reinstated." *Id.* at 550.

Reinstatement occurs only when the defaulting borrower chooses reinstatement and, consequently, chooses in the existing foreclosure proceeding to forgo those statutory

protections arising from the foreclosure process. The defaulting borrower's agreement to pay the lender's attorney fees incurred in connection with the foreclosure proceedings is a reasonable exchange for the right to require the lender to reinstate the defaulted mortgage loan and to forbear the lender's legal rights to foreclose, be presently paid in full, and sever the relationship with the defaulting borrower.

*Id.* at 551. Accordingly, the Court held that the provision in the residential mortgages that provided for payment of fees in the event of reinstatement did not violate Ohio law or public policy.

The Court distinguished the situation of Wilborn, however, and held that attorney fees were not properly included in the payoff of her home equity loan.

In paying the lender's attorney fees in addition to all outstanding principal, interest and court costs, Wilborn was not voluntarily exercising a contractual right prior to judgment in exchange for the surrender of some other right by the lender. Once Wilborn paid off the entire debt, she had a right to dismissal, but instead she was required to pay the lender's attorney fees incurred in the enforcement of the note and mortgage debt. Such a circumstance has all the indicia of imposing attorney fees in connection with the enforcement of a debt, in contravention of the rule articulated in *Leavans [v. Ohio Nat'l Bank]*, 50 Ohio St. 591, 34 N.E. 1089 [(Ohio 1893)] and *Miller [v. Kyle]*, 85 Ohio St. 186, 97 N.E. 372 [(Ohio 1911)]. . . . Thus, the attorney-fee [sic] provision contained in Wilborn's loan agreement is unenforceable under Ohio's long-standing rule that attorney fees may not be collected against the debtor in an action to enforce a debt.

*Id.* at 558.

The *Wilborn* case held that the inclusion of attorney fees in a reinstatement situation did not violate Ohio law or public policy and, thus, such provisions were enforceable. Relying on *Wilborn*, the UST posits, "Under Ohio Law a mortgagee is prohibited from

collecting attorney fees from a residential homeowner unless the mortgagee reinstates the mortgage.” (Mot. to Amend at 3.) However, the UST’s interpretation is a negative reading of the *Wilborn* decision. Although the Ohio Supreme Court held that attorney fees were permissible in reinstatement situations, it did not hold that attorney fees were allowable *only* in a reinstatement situation. Indeed, the Court’s holding can most fairly be read to prohibit imposition of attorney fees whenever a lender attempts to collect on a debt, but that such fees are not prohibited when a borrower and lender voluntarily agree to forgo or forbear one or more of their respective rights.

In the instant case, Movant and Debtor voluntarily entered into an agreement that was not contemplated by the underlying mortgage. Each party made concessions to resolve the Motion for Relief. Although Movant was not entitled to its attorney fees to enforce the debt, neither was Debtor entitled to pay Movant the arrearage over time. As set forth above, this Court could not have required either party to accept the terms in the Agreed Order absent their agreement to do so. As a consequence, this Court finds that the circumstances relating to the Agreed Order are more akin to a reinstatement situation than an effort to collect a debt. Accordingly, in the instant case, attorney fees are not prohibited by the *Wilborn* decision. As a consequence, there is no error of law for the Court to correct.

This Court is mindful that the Ohio Supreme Court held that “a

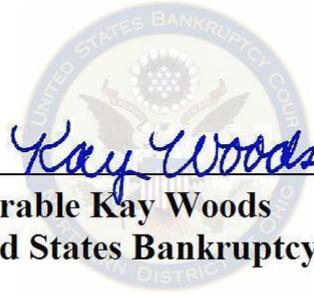
provision in a residential-mortgage contract requiring a defaulting borrower to pay a lender's *reasonable* attorney fees as a condition of terminating pending lender-initiated foreclosure proceedings on a defaulted loan and reinstating the loan is not contrary to Ohio statutory or decisional law or against Ohio public policy." *Id.* at 558 (emphasis added). Thus, any permissible attorney fees must be reasonable in amount. In the instant case, no one has suggested that the amount of the attorney fees in the Agreed Order are not reasonable. Thus, the reasonableness of the attorney fees at issue is not before the Court.

#### **V. CONCLUSION**

The Court finds that the UST does not have standing to move to alter or amend an agreed order to which it is not a party. Assuming, *arguendo*, that the UST does have standing to bring the Motion to Amend, this Court finds that there is no manifest error of law to correct. Moreover, this Court declines to exercise its discretion to alter or amend the Agreed Order. An appropriate order will follow.

# # #

**IT IS SO ORDERED.**



**Dated: June 24, 2009  
02:01:47 PM**

**Honorable Kay Woods  
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO**

<b>IN RE:</b>	*	
	*	
	*	<b>CASE NUMBER 06-41350</b>
	*	
<b>JOHN S. WALKER and</b>	*	<b>CHAPTER 13</b>
<b>JOANNE WALKER,</b>	*	
	*	
<b>Debtors.</b>	*	<b>HONORABLE KAY WOODS</b>
	*	

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**ORDER DENYING MOTION TO AMEND AGREED ORDER  
FOR RELIEF FROM STAY OF CITIMORTGAGE, INC. SUCCESSOR BY  
MERGER TO ABN AMRO MORTGAGE GROUP, INC.**  
\*\*\*\*\*

This cause is before the Court on Motion to Amend Agreed Order for Relief from Stay of Citimortgage, Inc. Successor By Merger To ABN AMRO Mortgage Group, Inc. ("Motion to Amend") (Doc. # 42) filed by Daniel M. McDermott, United States Trustee for Region 9 ("UST"), on April 20, 2009. The Motion to Amend seeks an order from this Court amending or altering Agreed Order for Relief from Stay of Citimortgage, Inc. Successor by Merger to ABN AMRO Mortgage Group, Inc. (Property Address: 336 Sawmill Drive, Cortland, Ohio 44410)

("Agreed Order") (Doc. # 40) entered on April 16, 2009.

For the reasons set forth in this Court's Memorandum Opinion entered this date, the Court finds that (i) the UST does not have standing to bring the Motion to Amend; and (ii) there is no manifest error of law to correct. Accordingly, this Court declines to exercise its discretion to alter or amend the Agreed Order. The Motion to Amend is denied.

# # #