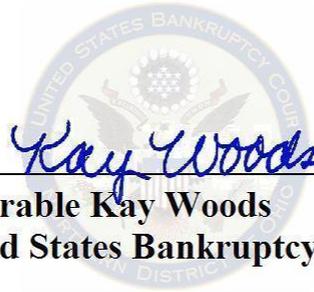


**IT IS SO ORDERED.**



**Dated: June 30, 2009  
02:36:29 PM**

**Honorable Kay Woods  
United States Bankruptcy Judge**

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

**IN RE:**

**MIKE SIECZKOWSKI,  
  
Debtor.**

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\*     **CASE NUMBER 08-43319**  
\*  
\*     **CHAPTER 13**  
\*  
\*     **HONORABLE KAY WOODS**  
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**MEMORANDUM OPINION REGARDING MOTION TO RECONSIDER ENTRY OF AGREED  
ORDER OR AMEND ORDER TO ADDRESS OBJECTION OF CREDITOR**  
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This cause is before the Court on Motion to Reconsider Entry of Agreed Order or Amend Order to Address Outstanding Objection of Creditor ("Motion to Reconsider") (Doc. # 34) filed by U.S. Bank National Association as Trustee For The Certificateholders Citigroup Mortgage Loan Trust Inc. Asset-Backed Pass-Through Certificates Series 2007-AHL3, by and through its servicer BAC Home Loans Servicing, LP (fka Countrywide Home Loans Servicing, L.P.) ("Movant") on June 10, 2009. The Court held a hearing on the Motion

to Reconsider on June 18, 2009 ("Reconsideration Hearing"). At the conclusion of the Reconsideration Hearing, the Court denied the Motion to Reconsider. This Opinion more fully sets forth the basis for the Court's decision.

The Motion to Reconsider is purportedly based on Federal Rules of Civil Procedure 59(e) and 60(b) and requests this Court to "reconsider the Order reinstating this case [Doc. # 32] entered on June 5, 2009." (Mot. to Reconsid. at 1.) Because the Motion to Reconsider was filed within ten (10) days after entry of the Court's Order, it falls within the time frame of Rule 59(e). As set forth below, except for filing the Motion to Reconsider within ten days after entry of the order, Movant fails to come within the purview of either Rule 59 or Rule 60; Movant sets forth no basis for the Court to grant the requested relief.

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)(A) and (O). 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 AND PROCEDURAL BACKGROUND**

Debtor Mike Sieczkowski ("Debtor") filed a voluntary chapter 13 petition on November 12, 2008. The First Meeting of Creditors

pursuant to 11 U.S.C. § 341 was held on December 10, 2008. On March 5, 2009, Michael A. Gallo, Standing Chapter 13 Trustee ("Trustee") filed Motion to Dismiss (Doc. # 18) Debtor's case on the grounds that Debtor had failed to file a chapter 13 plan that Trustee could recommend for confirmation and that the plan filed by Debtor was not adequately funded. On April 8, 2009, the Court held a hearing on the Motion to Dismiss ("Dismissal Hearing"). No party filed a response to the Motion to Dismiss, and no one appeared at the Dismissal Hearing in opposition to the Motion to Dismiss. Subsequent to the Dismissal Hearing, the Court entered Order Dismissing Chapter 13 Case and Notice to Secured Creditors Entitled to Adequate Protection of Right to File Claim ("Dismissal Order") (Doc. # 20).

On April 28, 2009, Debtor filed Motion to Reinstate Chapter 13 Case ("Motion to Reinstate") (Doc. # 23), which requested this Court to reinstate the chapter 13 case on the grounds that "debtor has made the required payments to bring his chapter 13 payments current[.]" On April 30, 2009, Movant filed Response to Debtor's Motion to Reinstate Case ("Response") (Doc. # 24), which requested that the Court (i) deny the Motion to Reinstate, and (ii) set the Motion to Reinstate for hearing. No other party responded or objected to the Motion to Reinstate; however, the Court does not grant such motions without the Trustee's acknowledgment that Debtor has made the payments, as represented in the motion, and that it is appropriate to reinstate the case.

On May 1, 2009, the Court set the Motion to Reinstate for hearing on May 21, 2009, at 10:30 a.m. ("Reinstatement Hearing"). On or about May 19, 2009, Movant submitted "Agreed Order Resolving Creditor [sic] Objection to Debtor [sic] Motion to Reinstate Case" ("Proposed Agreed Order"), which purported to set forth terms that "resolved" Movant's objection to the Motion to Reinstate. The terms of the Proposed Agreed Order mirror terms that are usually incorporated into an agreed order resolving a motion for relief from stay, including provisions for (i) Debtor to pay Movant amounts that allegedly constituted a post-petition mortgage arrearage; (ii) Movant to send a letter to Debtor and counsel for Debtor in the event of default; and (iii) filing of an affidavit by Movant if the default was not cured, which would result in "an order [being] entered without further hearing, terminating the stay imposed by section 362(a) of the Bankruptcy Code with respect to [Movant], its successors and assigns." (Prop. Agrd. Ord. ¶ 4.) The Proposed Agreed Order provided that, "[s]ubject to the terms and conditions above, [Movant] hereby WITHDRAWS its Response[.]" (Id. ¶ 6.)

At no time prior to submission of the Proposed Agreed Order did Movant file a motion for relief from stay. Indeed, the only pleading filed by Movant in Debtor's case prior to filing the Response was Notice of Appearance (Doc. # 13) filed on November 25, 2008.

Despite the fact that the Proposed Agreed Order only purported to "resolve" Movant's Response, the Notice accompanying the Proposed

Agreed Order was captioned "Notice of Reinstatement of Bankruptcy Case[,]" which would have informed parties in interest that "this previously dismissed bankruptcy case has been reinstated by the court." (See Doc. # 29.) Confusion about correct notice occurred because the terms of the Proposed Agreed Order could only be effective if Debtor's case was reinstated. Although the Proposed Agreed Order was docketed as an order of this Court (Doc. # 29), notice of entry of the Proposed Agreed Order was never sent.

Immediately after realizing that the Proposed Agreed Order did not resolve any pending motion for relief from stay and that it was not an appropriate order to resolve the Motion to Reinstate, the Court entered Order Vacating Agreed Order ("Vacation Order") (Doc. # 30) on May 20, 2009. Notice of the Vacation Order was provided to counsel for Movant via e-mail immediately after the Vacation Order was docketed. Indeed, counsel for Movant acknowledges that he received such e-mail notice because he states that "on May 21, 2009, counsel for Movant contacted the Court to inquire why the previously submitted Agreed Order was vacated by the Court." (Mot. to Reconsid. ¶ 9.) Since the BNC Notice (Doc. # 31) regarding the Vacation Order was not sent until May 22, 2009, counsel for Movant had to have received the e-mail notification that was sent on May 20, 2009. Thus, counsel for Movant had notice that Movant's withdrawal of the Response was not effective, the Response remained pending, and the Reinstatement Hearing would go forward as scheduled.

The Court held the Reinstatement Hearing on May 21, 2009. Trustee attended the Reinstatement Hearing, but neither Debtor nor Movant appeared at such hearing. Trustee represented at the Reinstatement Hearing that Debtor had made the payments, as set forth in the Motion to Reinstate, and Trustee had no objection to reinstatement of Debtor's case. As a consequence, the Court granted the Motion to Reinstate and directed Trustee to submit an agreed order between Trustee and Debtor. The Court's actions were in no way premised upon the failure of Movant and/or Movant's counsel to attend the Reinstatement Hearing. This Court found that Movant's Response did not have any impact upon reinstatement of Debtor's case and, indeed, appeared to contemplate subsequent relief from the automatic stay if Debtor's case was reinstated. The Response stated, "[s]hould Debtor provide the funds to reinstate the loan post-petition, [Movant] would seek the additional protection of an Agreed Order providing standard 30 day default 10 day/cure language." (Resp. at 1.) The "relief" requested by Movant was not appropriately raised in an objection to a motion to reinstate a case. Movant essentially sought to by-pass filing a motion for relief from stay. The Court was aware of the Response and, having granted the Response, in part, by holding the requested Hearing, the Court implicitly overruled the remainder of the Response by declining to deny the Motion to Reinstate.

On June 5, 2009, this Court entered Agreed Order Reinstating Chapter 13 Case ("Agreed Order") (Doc. # 32), which was signed by

Trustee and counsel for Debtor. On June 10, 2009, Movant filed the Motion to Reconsider.

## II. BASIS FOR MOTION TO RECONSIDER

Although Movant does not cite to any case or statutory authority, it postulates that: "In order for a case to be reinstated the Debtor should be current on *all* his obligations under the plan, not only the monthly plan payments." (Mot. to Reconsid. ¶ 4 (emphasis in original).) Movant states that the purpose of the Proposed Agreed Order was "[t]o address the post-petition delinquency on the mortgage payments," and that it contained terms that were "quite lenient." (*Id.* ¶ 5.) Movant further states that the Proposed Agreed Order "included standard 30 day default protection for the ongoing regular monthly mortgage payments[,]" but "[t]he intent of the proposal was to [sic] not to obtain relief from stay, but rather to fully and fairly account for the post-petition arrearage, and to provide a means by which this Chapter 13 case can ultimately succeed." (*Ibid.*)

Despite arguing that it was not the purpose of the Proposed Agreed Order to obtain relief from stay, Movant incongruously states that "[t]he alternative to addressing the arrears in a Response to the Motion to Reinstate Case would be to file for Relief from Stay." (*Ibid.* (emphasis added).)

Movant asserts two bases for the Motion to Reconsider, as follows: (i) "the proximity of the entry of the Order Vacating the previous Agreed Order and the deficiencies in noticing the same

suffice as excusable neglect under FRCP [sic] 60(b) for counsel's non-appearance at the hearing held on May 21, 2009" (*Id.* ¶ 8); and (ii) "*Movant's Objection to the Motion to Reinstate has never been addressed by the Court, and thus remains as a live, unresolved Objection to the Motion. Movant has not been afforded due process, as Movant has not had the opportunity to be heard in a meaningful time and place as to its Objection[.]*" (*Id.* ¶ 10 (emphasis in original).) As set forth below, each of these arguments is unavailing.

First, Movant attempts to make an issue out of the fact that the Court vacated the Proposed Agreed Order the day before the Reinstatement Hearing and that official notice of the Vacation Order was not sent by ECF until after the Reinstatement Hearing was held. (*Id.* ¶ 8.) Movant submitted the Proposed Agreed Order a mere two days prior to the Hearing. Because of the wording in the Agreed Order, the Court mistakenly believed it was submitted to resolve a motion to reinstate the automatic stay instead of the Motion to Reinstate. Immediately upon recognizing its error, the Court entered the Vacation Order. Despite the short time period between entry of the Vacation Order and the Hearing, counsel for Movant was put on notice through e-mail that the Proposed Agreed Order had been vacated. Counsel for Movant is responsible for the timing of submission of the Proposed Agreed Order, which resulted in the short time period at issue.

The Court was well aware of Movant's Response at the time of

the Reinstatement Hearing. Indeed, the Court granted one of the requests in the Response by holding the Reinstatement Hearing. Failure of Movant's counsel to attend the Reinstatement Hearing in no way impacted the Court's decision to grant the Motion to Reinststate.

In the Motion to Reconsider, Movant's counsel argues that his failure to attend the Reinstatement Hearing was "excusable neglect."<sup>1</sup> Movant's counsel states that the Vacation Order "was not brought to the attention of counsel for Movant until May 21, 2009, *after* the scheduled hearing date and time." (*Id.* ¶ 8 (emphasis in original).) Counsel for Movant does not allege or argue that the Court did not inform him that the Proposed Agreed Order had been vacated; he merely states - in the passive voice - that the Vacation Order "was not brought to [his] attention" until after the Reinstatement Hearing. In order for Movant's counsel to have been aware on May 21, 2009, that the Proposed Agreed Order had been vacated, of necessity, he would have received the e-mail notification sent on May 20, 2009. Under these circumstances, the failure of Movant's counsel to attend the Reinstatement Hearing does not and cannot constitute excusable neglect.

Second, Movant argues that it was denied due process. There is no basis for this assertion. Movant requested a hearing on the Motion to Reinststate. The Court held the Reinstatement Hearing. The

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<sup>1</sup>At the Reconsideration Hearing, Movant appeared to disavow and abandon the argument of excusable neglect.

Court considered Movant's request that the Court deny the Motion to Reinstate. The Court found no basis for the request and granted the Motion to Reinstate. Movant had a full and fair opportunity to object to the Motion to Reinstate, and it did so. The mere fact that counsel for Movant did not attend the Reinstatement Hearing does not constitute a lack of "opportunity to be heard in a meaningful time and place." (*Id.* ¶ 10.)

Movant is also incorrect that the Objection remains "live [and] unresolved[.]" (*Ibid.*) The Court may not have explicitly overruled the Response, but, by granting the Motion to Reinstate, the Response was implicitly overruled because the Court declined to grant the relief Movant requested - *i.e.*, denial of the Motion to Reinstate. This is not a situation where the Court made a ruling without knowledge that an objection had been lodged. The Court was well aware of the Response and found that it had no merit. Movant's Response is a single page without citation to (i) case law, (ii) statutory authority, or (iii) the record in Debtor's case. Movant's sole argument in the Response is that Debtor failed to make certain post petition payments to Movant. Indeed, Movant states:

Should Debtor provide funds to reinstate the loan post-petition, [Movant] would seek the additional protection of an Agreed Order providing standard 30 day default 10 day/cure language. In the alternative, [Movant] would request that any Order reinstating the case include language indicating that the Automatic Stay is not reimposed on the subject property as to [Movant].

(Response at 1.) Movant mistakenly asserts that objecting to the Motion to Reinstate was an "alternative" to filing a motion for

relief from stay. (Mot. To Reconsid. ¶ 5.) The Court found that the Response was not the appropriate procedure to resolve the alleged failure of Debtor to make post petition payments directly to Movant. Movant was well aware that it had never moved for relief from stay, yet the Response requested that the automatic stay not be "reimposed" if the case were to be reinstated. "Reimposition" of the stay implies that the stay had been previously lifted. The simple fact is that the stay would be imposed automatically - not "reimposed" by the Court - upon reinstatement of the case. The Court, having fully dealt with the Response, declined to deny the Motion to Reinstate. Contrary to Movant's suggestion, the Response does not constitute a "live, unresolved [o]bjection[.]" (Mot. to Reconsid. ¶ 10.)

### **III. STANDARD FOR MOTIONS TO RECONSIDER**

For the convenience of parties who appear before the Court, the Court has posted its policies and procedures on its website.

The Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure do not contemplate the filing of a motion for reconsideration (with the exception of reconsideration of claims pursuant to FED. R. BANKR. P. 3008). To the extent a motion for reconsideration is filed within ten days after entry of the underlying order or judgment, it may be deemed to be a motion to amend a judgment under Rule 59. If such motion is filed after that ten-day period, it must be brought pursuant to Rule 60, seeking relief from judgment or order. Rule 59 does not contain express grounds for amending a judgment, but case law generally requires Rule 59 motions to establish one of the bases explicitly set forth in Rule 60.

The purpose of Rules 59 and 60 is not to provide a "second bite at the apple" or a "do-over." A motion for

reconsideration is an extraordinary measure and should be brought to correct a manifest error of law or fact on the part of the Court. It is not a substitute for filing a notice of appeal.

Absent direction from the Court, the non-moving party should not respond to a motion for reconsideration, and the motion should not be noticed. In the event a motion for reconsideration is filed, the Court will rule on such motion based on its merits and the substance of the underlying order, or the Court may set the motion for hearing. If the motion for reconsideration is set for hearing, the movant should be prepared to clearly state the basis for such motion, pointing out the manifest error on the part of the Court, the newly discovered evidence, or the new case law that warrants the motion.

Unless your motion raises an issue that comes within the purview of Rules 59 or 60, you should not file a motion for reconsideration. Pursuant to Rule 11 (incorporated by FED. R. BANKR. P. 9011), a pleading constitutes a representation to the Court that a valid basis exists for the motion. As a consequence, if the Court finds the motion to be without merit, the Court has the authority under Rule 9011(c)(1)(B) to enter an order directing an attorney to show cause why he or she should not be sanctioned for a violation of Rule 9011(b).

Memorandum to All Attorneys Practicing in the Youngstown Bankruptcy Court, dated July 15, 2008, Re: Bankruptcy Court Policies and Procedures ("Memorandum") at 5.

The Court's policy regarding motions to reconsider restates the law on this subject.

The decision to alter or amend a judgment under Rule 59(e) "is committed to the sound discretion of the district judge." *Am. Home Assur. Co. v. Glenn Estess & Assocs.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985). Generally, a Rule 59(e) motion will only be granted on one of the following grounds: "an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or to prevent manifest injustice." *United States v. Battle*, 272 F. Supp. 2d 1354, 1357 (N.D. Ga. 2003). A party seeking reconsideration must "set forth facts or law of a strongly

convincing nature to induce the court to reverse its prior decision." *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294, 294 (M.D. Fla. 1993). The decision to alter or amend a judgment is an "extraordinary remedy." *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994).

*Waller v. Frost*, 2006 U.S. Dist. LEXIS 19925, \*2-3 (M.D. Ga. April 17, 2006).

Regarding reconsideration of agreed orders, the Sixth Circuit has stated:

Rule 60(b) of the Federal Rules of Civil Procedure, under which this motion is brought, provides for relief on grounds of fraud, mistake of fact, or lack of authorization on the part of counsel. This record does not disclose that any of these reasons are present. . . .

A judgment may be set aside also under Rule 60(b) for "any other reason justifying relief." This has been interpreted to allow vacation of a judgment when "such action is appropriate to accomplish justice."

*Allinsmith v. Funke*, 421 F.2d 1350, 1351 (6th Cir. 1970).

In the instant case, Movant has set forth no facts or law indicating (i) intervening change in controlling law; (ii) new evidence; (iii) clear error of law or fact; (iv) fraud or mistake of fact; or (v) any other reason justifying relief. The only reason(s) set forth in the Motion to Reconsider are "excusable neglect" by Movant's counsel in not attending the Reinstatement Hearing, and alleged lack of due process. As set forth above, this Court finds no factual or legal basis for either of these arguments.

Despite the fact that the Court posts its policies on the Court's website for the convenience of attorneys who practice before the Court, counsel for Movant acknowledged at the Reconsideration

Hearing that he had not read the Memorandum and that he was unaware of this Court's policies. Counsel for Movant could point to no extraordinary reason for bringing the Motion to Reconsider. Nor could he point to any facts or law of a strongly convincing nature to persuade this Court to reverse its decision that granted the Motion to Reinstate through entry of the Agreed Order. Counsel for Movant simply argued that he did not believe the Court had considered and overruled his objection to the Motion to Reinstate; however, counsel for Movant was incorrect. This Court had done so.

Instead of filing a motion for relief from stay and entering into an agreed order, consistent with the terms of the Proposed Agreed Order to resolve such motion, counsel for Movant chose to file the specious Motion to Reconsider. Despite protestations to the contrary, the relief Movant sought in the Response could only have been obtained by filing a motion for relief from stay. Movant expressly acknowledges that filing the Response was an "alternative" to filing for relief from stay, yet insists that relief from stay was not Movant's intent. This position is simply disingenuous. Rather than filing the appropriate motion, counsel for Movant wasted this Court's precious time and limited resources by filing the Motion to Reconsider. The Motion to Reconsider was not grounded on any manifest error of law or fact; it was simply an attempt to get the Court to provide Movant relief without Movant's filing an appropriate motion and following proper procedure.

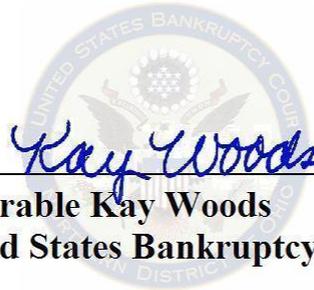
**IV. CONCLUSION**

The Motion to Reconsider was not based on a manifest error of law or fact. Counsel for Movant presented no facts or law warranting reconsideration of this Court's disposition of the Motion to Reinstate. The Motion to Reconsider was filed without a valid basis therefor. The Motion to Reconsider not only lacked merit, counsel for Movant was ill prepared at the Reconsideration Hearing because he (i) had not read this Court's Memorandum; and (ii) did not present any valid argument for the Motion to Reconsider. Movant's only argument was based on lack of "due process," although counsel for Movant acknowledged he had actual notice of the Vacation Order. Furthermore, contrary to the assertion that Movant's objection was "live [and] unresolved" (Mot. to Reconsider. ¶ 10), the Court had addressed the merits of the Response. Accordingly, Movant had no basis to seek reconsideration of the Agreed Order that granted the Motion to Reinstate. The Motion to Reconsider is not well taken and will be denied.

An appropriate order will follow.

# # #

**IT IS SO ORDERED.**



**Dated: June 30, 2009  
02:36:29 PM**

**Honorable Kay Woods  
United States Bankruptcy Judge**

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

<b>IN RE:</b>	*	
	*	<b>CASE NUMBER 08-43319</b>
	*	
<b>MIKE SIECZKOWSKI,</b>	*	<b>CHAPTER 13</b>
	*	
<b>Debtor.</b>	*	<b>HONORABLE KAY WOODS</b>
	*	

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**ORDER DENYING MOTION TO RECONSIDER ENTRY OF AGREED ORDER  
OR AMEND ORDER TO ADDRESS OBJECTION OF CREDITOR**  
\*\*\*\*\*

This cause is before the Court on Motion to Reconsider Entry of Agreed Order or Amend Order to Address Outstanding Objection of Creditor ("Motion to Reconsider") filed by U.S. Bank National Association as Trustee For The Certificateholders Citigroup Mortgage Loan Trust Inc. Asset-Backed Pass-Through Certificates Series 2007-AHL3, by and through its servicer BAC Home Loans Servicing, LP (fka Countrywide Home Loans Servicing, L.P.) on June 10, 2009.

For the reasons set forth in this Court's Memorandum Opinion entered this date, the Court finds that the Motion to Reconsider is not well taken and is hereby denied.

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