

ORDERED.



Dated: July 29, 2010

Eileen W. Hollowell

EILEEN W. HOLLOWELL
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:) Chapter 13
)
ANTHONY TARANTOLA,) Case No. 4:09-bk-09703-EWH
)
Debtor.)

DEUTSCHE BANK NATIONAL TRUST)
COMPANY, as Trustee in trust for the)
Certificateholders for Argent Securities)
Inc., Asset-Backed-Pass-Through)
Certificates, Series 2004-W8, its assignees)
and/or successors,)

MEMORANDUM DECISION

Movant,)
v.)
ANTHONY TARANTOLA, Debtor; and)
DIANNE C. KERNS, Chapter 13 Trustee,)
Respondents.)

I. INTRODUCTION

Yet again, the court is called upon to decide whether the purported holder of a note allegedly transferred into a securitized mortgage pool has standing to obtain relief from the automatic stay. Yet again, the movant has failed to demonstrate that it has standing. To make matters worse, the movant filed its motion without evidentiary

1 support of its claim, attempted to create such evidentiary support after the fact, and only
2 disclosed its “real” evidence on the day of the final evidentiary hearing. The relief will be
3 denied.
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5 6 **II. FACTUAL AND PROCEDURAL HISTORY**

7 On or about November 7, 2003, the Debtor executed and delivered to Argent
8 Mortgage Company, LLC (“Argent Mortgage”) an adjustable rate promissory note in the
9 principal sum of \$377,600 (“Note”) secured by a Deed of Trust (“DOT”) on real property
10 located at 11201 East Hashknife Circle, Tucson, Arizona 85749 (“Property”).
11

12 Shortly after the creation of the instruments, the Note was allegedly placed in a
13 securitized mortgage pool: Asset-Backed Pass-Through Certificates Series 2004-W8,
14 dated May 1, 2004 (“Pool”). (Final Evidentiary Hr’g Tr. 25, 78-79, June 23, 2010,
15 DE #80.)¹ Under the Pooling and Servicing Agreement dated May 1, 2004 (“PSA”),
16 Argent Securities Inc. (“Argent Securities”) is listed as the “Depositor,” with Ameriquest
17 Mortgage Co. (“Ameriquest”) as the “Master Servicer,” and Deutsche Bank National
18 Trust Co. (“Deutsche”) as the “Trustee” and initial custodian (“Initial Custodian”).
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20 (Ex. 6.)

21 Movant alleges the servicer for the Pool changed twice since its creation.
22 (Tr. 25, 35.) Sometime prior to May 2008, the servicer changed from Ameriquest to Citi
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27 ¹ Any additional citations to a transcript refer to the Final Evidentiary Hearing Transcript
dated June 23, 2010 (DE #80). All exhibit numbers refer to exhibits admitted at the hearing.

1 Residential Servicing Inc. ("Citi Residential"), and then changed again to American
2 Home Mortgage Servicing Inc. ("AHMSI") in May 2008. (Tr. 34.)²

3 As of October 1, 2008, the Debtor was in default on his obligations under the
4 Note. Debtor filed his petition for relief under Chapter 13 of the Bankruptcy Code on
5 March 7, 2009. AHMSI filed a Proof of Claim ("POC") on June 29, 2009. Attached to
6 the POC are the following:
7

- 8 a. The Note. No endorsements appear on the Note. No allonge is attached
9 to the Note.
- 10 b. DOT.
- 11 c. Assignment of Mortgage/Deed of Trust ("Assignment #1") from Argent
12 Mortgage to AHMSI, executed by Citi Residential as servicer for Argent
13 Mortgage. Assignment #1 was notarized June 25, 2009. No recording
14 information appears on Assignment #1.
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16 Deutsche filed a Motion for Relief from Stay ("MRS") on December 8, 2009, on
17 the grounds that the Debtor was in default, had no equity in the Property, and the
18 Property was not necessary for an effective reorganization. (DE #35.) The MRS also
19 requested adequate protection payments to protect Deutsche's alleged interest in the
20 Property. The MRS represented at paragraph 5 that Deutsche is "now the holder of the
21 Note that is secured by the Deed of Trust and is the real party in interest." Attached to
22 the MRS are the following exhibits:
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26 ² Movant provided no documentary evidence to support its allegations regarding
27 changes in servicers.

- 1 a. The Note. No endorsements appear on the Note. No allonge is attached
2 to the Note.
3
4 b. DOT.
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6 c. Assignment of Mortgage/Deed of Trust (“Assignment #2”) from Argent
7 Mortgage to Deutsche, executed by AHMSI as servicer for Argent
8 Mortgage. Assignment #2 was notarized November 12, 2009. No
9 recording information appears on Assignment #2.

10 On January 5, 2010, Deutsche filed a “Notice of Filing Exhibit and Exhibit in
11 Support of Motion for Relief from Automatic Stay” (DE #39), which attaches, as an
12 exhibit, a copy of the Note and, on a separate piece of paper, an “Allonge to Promissory
13 Note” (“Allonge”), which lists a loan number, the Debtor’s name, and the Property’s
14 address. The undated Allonge purports to assign the Note from Argent Mortgage to
15 Deutsche.

16 On January 17, 2010, the Debtor filed a response (“Response”) to the MRS
17 challenging Deutsche’s standing to seek relief from stay. (DE #40.) The Response also
18 raises a number of other arguments, including a claim that Deutsche was required to
19 provide documentation for every assignment of the Note and DOT, that only certificate
20 holders of the Pool can demonstrate standing and that the Debtor is entitled to credit for
21 any third-party payments made to the Pool’s certificate holders. At the preliminary
22 hearing on the MRS, the Movant relied on the Allonge to demonstrate its standing.
23 (Mins. of Prelim. Hr’g for MFR 1, DE #45.) The court set an evidentiary hearing for June
24 15, 2010, which was later vacated by the court and rescheduled to June 23, 2010.
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1 On June 18, 2010 (DE #68), Deutsche filed a “Supplemental Declaration”
2 consisting of a declaration by Jennifer Ward, in her capacity as an employee of AHMSI,
3 as servicer for Deutsche. The Supplemental Declaration asserts at paragraph 8 that
4 Deutsche became the holder of the Note “when an allonge affixed to the original
5 promissory note transferring the Promissory Note to Movant was executed by Karen
6 [sic] Smith” pursuant to the following documents:

- 8 a. corporate resolution appointing Kathy Smith (not Karen) as an Assistant
9 Secretary of AHMSI;
- 10 b. corporate resolution appointing all Assistant Secretaries of AHMSI as
11 officers of Citi Residential, electing such officers to be vice presidents and
12 assistant secretaries (“Special Officers”) of Citi Residential;
- 13 c. list of powers of attorneys, which Special Officers of Citi Residential are
14 authorized to execute; and
- 15 d. 2007 Limited Power of Attorney (“LPA”) from Argent Mortgage to Citi
16 Residential.
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19 On June 23, 2010, an evidentiary hearing was held on the MRS. At the
20 commencement of the hearing, a motion in limine filed by Deutsche (DE #69) was
21 granted which limited the subject of the hearing to the issue of Deutsche’s standing.

22 Deutsche called, as a witness, an employee of AHMSI from its litigation and mediation
23 group who testified that he had brought the original of the Note (“Original”) to the
24 hearing. (Ex. 5.) The Original includes two stamped, undated, “without recourse”,
25 endorsements (collectively, “Endorsements”) which did not appear on any other
26 versions of the Note filed by Deutsche. There is an endorsement from “Argent
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1 Mortgage Company” (not “Argent Mortgage Company LLC”) to Ameriquest signed by
2 Wayne Lee “President” and also signed by John R. Grazer “EVP/CFO.” The second
3 endorsement is in blank, from Ameriquest, signed by Kirk Langs “President” and also
4 signed by John R. Grazer “EVP/CFO.”³
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6 When asked to explain the disparity between the Original and the copies of the
7 Note attached to Deutsche’s MRS and POC, Deutsche’s witness testified that, when
8 AHMSI’s staff reviewed the Note on its “imaging system,” the Allonge was not attached
9 and no other assignments appeared on the imaged Note. (Tr. 47.) The witness further
10 testified that when AHMSI acts as an originator of a loan, loan documents are scanned
11 into an imaging system at closing but not thereafter. (Tr. 49.)
12

13 Deutsche admitted into evidence a copy of the Original, the DOT, an unsigned
14 copy of the PSA with all exhibits, including a “Mortgage Loan Purchase Agreement”
15 (“MLPA”), the corporate resolutions, and the LPA which purportedly permitted Kathy
16 Smith to act on behalf of Argent Mortgage. The Debtor admitted into evidence the
17 Allonge and Assignment #2. The Debtor also offered the testimony of a purported
18 expert on loan securitization and portions of that expert’s report. Because the court
19 limited the subject of the hearing to Deutsche’s standing, the scope of the expert’s
20 testimony was also limited to that subject.
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25 ³ When Exhibit 5 was first presented, the court expressed concerns over its late
26 disclosure. The court offered to adjourn the hearing to provide Debtor’s counsel more time to
27 review the Original with the Endorsements; however, Debtor’s counsel agreed to the admission
28 of the Original as long as the record reflected its late disclosure.

1 **III. ISSUES**

2 Does Deutsche have standing to seek relief from the automatic stay?
3

4 **IV. STATEMENT OF JURISDICTION**

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6 Jurisdiction is proper under 28 U. S. C. §§ 1334(a) and 157(b)(2)(G).
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8 **V. DISCUSSION**

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10 In order to seek relief from the stay, a movant must have a “colorable claim” in
11 the property protected by the automatic stay. In re Weisband, 427 B.R. 13, 18 (Bankr.
12 D. Ariz. 2010) (citing In re Wilhelm, 407 B.R. 392, 400 (Bankr. D. Idaho. 2009); In re
13 Emrich, 2009 WL 3816174, at *1 (Bankr. N.D. Cal. 2009)). Black’s Law Dictionary
14 defines a colorable claim as “a claim that is legitimate and that may reasonably be
15 asserted given the facts presented and the current law (or a reasonable and logical
16 extension or modification of the current law).” Black’s Law Dictionary 264 (8th ed.
17 2004). Therefore, in order to have a colorable claim Deutsche must either own the Note
18 or be entitled to enforce the rights provided to the lender in the Note and/or in the DOT.⁴
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⁴ No separate analysis is required of Deutsche’s rights under the DOT because it bases
27 its claim of standing solely on being the holder of the Note under Ariz. Rev. Stat. § 47-3301.
(Movant’s Closing Br. 4, DE #77.)
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1 A. Allonge

2 At the end of the evidentiary hearing, Deutsche asserted it had met its standing
3 burden based on the Allonge and the Endorsements.⁵ The Allonge, however, does not
4 demonstrate that Deutsche had standing to seek relief from stay when it filed the MRS
5 or anytime thereafter.
6

7 Deutsche's witness admitted that the Allonge was created after the MRS was
8 filed to "get the attorneys the information they needed." (Tr. 36, 47, 73.) Creation of
9 evidence to support a motion for relief from stay, after filing has been found to violate
10 Fed. R. Bankr. P. 9011(b)(3). See In re Maisel, 378 B.R. 19, 22 (Bankr. D. Mass. 2007)
11 ("parties seeking relief from stay must be aware that by presenting a motion to the court,
12 they represent that 'the allegations' and other factual contentions have evidentiary
13 support").
14

15 Deutsche's witness also admitted that the Allonge had not been attached to the
16 Original, but to a copy. (Tr. 79.) The Allonge, therefore, was never properly affixed to
17 the Note and could not accomplish a transfer of the Note under ARIZ. REV. STAT. ANN.
18 § 47-3204(A) (2010).
19

20 Last, but certainly not least, even if the Allonge had been affixed to the Original, it
21 would have been ineffective to transfer the Note to Deutsche because the party
22 executing the Allonge had no authority to do so. First, while the Allonge is executed by
23 Kathy Smith "as an Assistant Secretary and Vice President" of Argent, the evidence
24 presented by Deutsche demonstrates that she was instead a "Special Officer of Citi
25

26 ⁵ In its closing brief, Deutsche relies exclusively on the Endorsements in arguing that it
27 has standing.
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1 Residential Lending Inc.” exercising the LPA. But the LPA only authorized assignments
2 in specific circumstances not present here. The LPA is very similar to limited powers of
3 attorney addressed in two other reported decisions. In re Samuels, 415 B.R. 8, 17
4 (Bankr. D. Mass. 2009); In re Hayes, 393 B.R. 259, 264 (Bankr. D. Mass. 2008). Both
5 cases also involved Deutsche Bank, Argent Mortgage and Citi Residential. In those
6 cases, as here, the limited powers of attorney in question authorized assignments only
7 in connection with certain events such as a repurchase (#6 of the LPA), pay off or
8 refinancing of a note (#7 of LPA).

9
10 In this case, as in Samuels and Hayes, the Allonge was not executed in
11 connection with a repurchase or a refinancing of the Note or any other event set out in
12 the LPA. Accordingly, the LPA did not authorize the transfer in the Allonge. Deutsche
13 not only created the Allonge after it filed its MRS and falsely represented that it was
14 affixed to the Original, but it also relied on the LPA authorizing the transfer of the Note
15 when substantially identical powers of attorney have been held to be ineffective in
16 reported decisions involving Deutsche.

17 18 B. Endorsements

19 Because the Allonge was ineffective (as well as fabricated after the fact),
20 Deutsche’s standing depends on the validity of the Endorsements. Deutsche claims
21 that it is the holder of the Note because when the Original was finally produced, it
22 contained an endorsement in blank.
23

24 Under Arizona law, when an instrument is endorsed in blank, it becomes a
25 bearer instrument, and may be negotiated by transfer of possession alone. ARIZ. REV.
26 STAT. ANN. § 47-3205(B). Normally, under Fed. R. Evid. 902(9), the Original, as
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1 commercial paper, is entitled to a presumption of authenticity. Furthermore, U.C.C. § 3-
2 307 (ARIZ. REV. STAT ANN. § 47-3307(B) presumes the genuineness of signatures in
3 negotiable instruments. But, under ARIZ. REV. STAT. ANN. § 47-3308, when the validity
4 of an endorsement is challenged, the burden of demonstrating authenticity is on the
5 party asserting it.⁶

7 In its closing brief, Deutsche asserts that the difference between the Original and
8 the versions of the Note attached to the MRS and POC can be explained by the so-
9 called “common practice” in the mortgage industry of imaging notes and deeds of trust
10 at the time a loan is originated and not updating the electronic file thereafter. However,
11 there is nothing in the record which demonstrates that this was the common practice of
12 Argent Mortgage. In fact, the testimony of Deutsche’s witness was based on the
13 practices of AHMSI, which was not the originator of the Note and did not become the
14 servicer until 2008. The witness’ explanation as to why the copies of the Note on the
15 “imaging system” did not contain the Endorsements is nothing more than speculation.
16 Therefore, in light of Deutsche’s admission that it fabricated the Allonge, and in the
17 absence of any credible explanation for the difference of the Original from other filed
18 versions of the Note, the court will not apply the usual evidentiary presumptions of
19 validity to the Endorsements.
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21
22 In order to prove the Endorsements’ validity, Deutsche must demonstrate that the
23 Endorsements were executed by a party with authority, acting for an entity that owned
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25 ⁶ In this case, Debtor previously challenged the validity of the signature on the Allonge,
26 but due to the late disclosure of the Original, Debtor was unable to file a written challenge to the
27 Endorsements before the evidentiary hearing. Debtor has challenged the validity of the
28 Endorsements in his closing brief. (Resp’t Post Trial Br. 7, DE #78.)

1 the Note when the Endorsements were executed. Deutsche's witness, however, did not
2 know the identity of the parties who executed the Endorsements or the date the
3 Endorsements were executed.⁷

4 In the alternative, Deutsche may be able to rely on the PSA and its various
5 exhibits to demonstrate that the Note was transferred to the Pool.⁸ In In re Samuels, the
6 court found:

7
8 The PSA itself, in conjunction with the schedule of mortgages deposited
9 through it into the pool trust, served as a written assignment of the
10 designated mortgage loans, including the mortgages themselves.

11 415 B.R. at 18.

12 In this case, as in Samuels, the PSA includes requirements for assigning notes
13 and mortgages into the Pool. Section 2.01 of the PSA provides, in relevant part, that all
14 the "Mortgage Loans identified on the Mortgage Loan Schedule" will be delivered to the
15 Pool Trustee ("Deutsche") in the following form:

16 The original Mortgage Note, endorsed in blank without recourse, or in the
17 following form: "Pay to the Order of Deutsche Bank National Trust
18 Company, as Trustee under the "applicable agreement, without recourse."

19 However, the Endorsements do not satisfy Section 2.01 because, even if they
20 are assumed to be valid, there is no endorsement from Argent Mortgage (the originator

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22 ⁷ Indeed, the witness did not even know where the Original was maintained by AHMSI.
23 He only knew he received it from the "doc prep" division of AHMSI after requesting it the week
24 of the evidentiary hearing. (Tr. 49-50, 85).

25 ⁸ Debtor argues that any assignment of the Note after the "cutoff date" of the PSA
26 would be ineffective because it would violate REMIC and the PSA terms. (Resp't's Resp. to Mot.
27 2, DE #40.) However, an assignment to the Pool is not necessarily ineffective after the "cutoff
28 date." As noted by the court in Samuels: "Even if this direct assignment were somehow
violative of the PSA, giving rise to unfavorable tax, regulatory, contractual, and tort
consequences, neither the PSA nor those consequences would render the assignment itself
invalid." 415 B.R. at 22.

1 of the Note) in blank or to Deutsche. Furthermore, the “Mortgage Schedule” referred to
2 Section 2.01 was not offered into evidence by Deutsche, so there is nothing which
3 identifies the Note as having been transferred to the Pool through the PSA.
4

5 The transfer of the loans under the PSA could have also occurred under the
6 MLPA. The MLPA lists Argent Securities as the Depositor and Ameriquest Mortgage
7 Co. (the original loan servicer under the PSA) as the Seller. The MLPA provides, in
8 relevant part, as follows:

9 Section 4. TRANSFER OF THE MORTGAGE LOANS

10 (b) DELIVERY OF MORTGAGE LOAN DOCUMENTS. The Seller
11 [Ameriquest] will, on or prior the Closing Date, deliver or cause to be
12 delivered to the Purchaser [Argent Securities] or any assignee, transferee
13 or designee of the Purchaser each of the following documents for each
Mortgage Loan:

14 (i) the original Mortgage Note, endorsed in blank, without
15 recourse, or in the following form: “Pay to the order of Deutsche Bank
16 National Trust Company, as Trustee under the applicable agreement,
without recourse,

17 The Endorsements arguably meet the requirements of MLPA because there is an
18 endorsement from Argent Mortgage (loan originator) to Ameriquest (seller under the
19 MLPA) and an endorsement in blank from Ameriquest, which would satisfy the MLPA’s
20 requirement of delivering to the Trustee a “Mortgage Note, endorsed in blank.” But,
21 Deutsche did not offer into evidence any document which demonstrates that the Note
22 was, in fact, sold to Deutsche under the MLPA. The MLPA identifies a “Closing
23 Schedule” (Section 2 of the MLPA) which lists all notes and mortgages being sold to
24 Deutsche, but Deutsche did not offer it (or any other document) into evidence which
25 demonstrated that the Note was actually transferred into the Pool. This case, therefore,
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1 is distinguishable from Samuels where the Mortgage Loan Schedule to the PSA and the
2 Closing Schedule to the MLPA, both of which identified the Debtor's loan, were offered
3 into evidence. 415 B.R. at 18.

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5 Frankly, the court is puzzled by Deutsche's inability to offer competent evidence
6 of its standing. Presumably, the PSA places obligations on Deutsche as the Initial
7 Custodian and as Trustee to maintain records, including original notes and mortgages
8 as well as documentation of all assignments of pooled of notes and mortgages.
9 Deutsche and its servicer, therefore, should be able to easily produce the documents
10 needed to prove standing. Instead of doing so, Deutsche, through its servicer and its
11 counsel, filed the MRS without any evidence of standing, thereafter created an
12 ineffective Allonge and falsely represented that it was attached to the Original. It then
13 waited until the last possible moment to obtain the Original, disclosed the existence of
14 the Original through the testimony of a witness, instead of bringing it to the court's
15 attention at the commencement of the evidentiary hearing, and failed to satisfactorily
16 explain the discrepancies between the Original and earlier filed versions of the Note.
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19 Deutsche is not entitled to a *prima facie* evidentiary presumption of the validity of
20 the Endorsements and has not otherwise demonstrated the Endorsements are
21 authentic. Deutsche has also not demonstrated that the Note was transferred to
22 Deutsche under the PSA or the MLPA. It has failed to demonstrate that it has a
23 colorable claim in the Note and, therefore, it is not entitled to relief from the stay.
24

25 Deutsche may attempt to address the defects identified in this Memorandum
26 Decision by filing an amended motion. However, because of the tortured history of the
27 filings made by Deutsche, Deutsche, its servicer, and its counsel must be certain that
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1 any future pleadings are filed only after adequate due diligence is undertaken to assure
2 that the pleadings are correct. Given the deficient and misleading nature of Deutsche's
3 filings, the court seriously considered issuing an order to show cause as to why
4 sanctions should not be imposed on Deutsche, its servicer, and its lawyers, especially in
5 light of the fact that sanctions were entered by another court, involving Deutsche,
6 AHMSI and counsel, for conduct similar to the facts in this case. See In re Lee 408 B.R.
7 893 (Bankr. C.D. Cal. 2009). Because the court is mindful of the stress confronted by
8 all parties in consumer cases, no *sua sponte* sanctions order will be issued. Deutsche,
9 AHMSI and counsel should, however, treat this decision as a warning. If, in the future,
10 the court is confronted with filings as deficient and incorrect as filed in this case, the
11 court will issue an order to show cause and consider imposing sanctions including, but
12 not limited to, an award of fees to debtors' counsel for having to oppose motions filed
13 without proper evidence or worse with improper evidence.
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16 17 VI. CONCLUSION

18 Deutsche has failed to satisfy its burden of demonstrating that it is a "party in
19 interest" under 11 U.S.C. §362 (d)(1) entitled to relief from the automatic stay. A
20 separate order denying Deutsche's Motion for Relief from Stay will be issued this date.
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22 Dated and signed above.
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1 Notice to be sent through the
2 Bankruptcy Noticing Center "BNC"
to the following:

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