THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: September 30, 2016

Beth E. Hanan
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:

Lucia Vargas,	Case No. 16-23199-beh
Debtor.	Chapter 13

ORDER SUSTAINING U.S. BANK NATIONAL ASSOCIATION'S OBJECTION TO DEBTOR'S MOTION FOR REFERRAL TO MORTGAGE MODIFICATION MEDIATION PROGRAM

The policy of this district is to approve requests for qualified debtors and lenders to engage in mediation in an attempt to modify mortgage terms such that debtors can retain their homesteads. There is no guarantee that mediation will result in a modification, but modification often occurs and the effort is in keeping with goals of the Bankruptcy Code. Occasionally, a lender will object to participation in the mediation process. When that occurs, the court undertakes a fact-specific inquiry.

Here, U.S. Bank National Association (the "Bank")[1] has objected to the motion of the debtor, Ms. Lucia Vargas, to participate in this district's Mortgage Modification Mediation Program (MMM Program) on the basis that the debtor is not a signatory to the underlying note, and so, according to the Bank, is not a person who can participate in loan modification. Ms. Vargas asserts that the

[1] In this case, U.S. Bank National Association is Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSMC Mortgage-Backed Pass-Through Certificates, Series 2006-5.

Garn-St. Germain Act, 12 U.S.C. section 1701j-3, can be used to compel a lender to participate in the MMM Program even if the debtor did not herself sign the note, and where the actual note signer will not be participating in the process. Both the Bank and the debtor have submitted letter briefs describing their positions.

FACTS

The subject property is Ms. Vargas's homestead. In her chapter 13 plan filed on April 22, 2016, Ms. Vargas provided that the "pre-petition arrearage claim and post-petition mortgage payments of $1731.88 [due to U.S. Bank] will be treated through a mortgage modification under the Court's Mortgage Modification Mediation Program (MMM). If the mediation does not result in a mortgage modification curing the arrears, the Debtors will pay the arrears through her Chapter 13 Plan or surrender her interest in the real estate . . . with respect to the property located at 8140 S. Alisa Lane, Oak Creek, WI." CM-ECF, Doc. No. 11, at 5.

Mr. Domingo Reyes, but not Ms. Lucia Vargas, signed the underlying note. *See* Claim No. 3-1, Part 3, at 2. Mr. Reyes and Ms. Vargas each signed the mortgage, individually. *See id.* at 14. According to Ms. Vargas's affidavit, Mr. Reyes is/was her business partner, and he has now agreed to quit claim his interest in her homestead to her. CM-ECF, Doc. No. 9, at 2. Also according to her affidavit, Mr. Reyes has agreed to "otherwise assist in the loan modification process." *Id.*

The loan is in default for failure to make payments. The Bank is not asserting a due-on-sale clause as the basis for default.

On June 30, 2016, the debtor filed a notice of motion and motion for referral to the MMM Program. CM-ECF, Doc. No. 22. On July 1, 2016, the Bank filed an objection to the motion, noting that Ms. Vargas is not a signer to the note, and also that the Bank had withdrawn from a prior effort at modification in a prior case when the debtor did not timely submit documents. CM-ECF, Doc. No. 23.

The court held a hearing on July 26, 2016, at which time counsel for Ms. Vargas stated that she had just received a quit claim deed to the property from her ex-husband (Mr. Reyes), and argued that federal law governs the debtor's ability to modify the loan even though she is not a signer to the note. The quit claim deed is not part of the bankruptcy case record. The court adjourned the hearing, and on August 8, 2016 the parties asked to brief the issue of whether the debtor, who did not sign the note but signed the mortgage, can enter into a loan modification without the participation of the note signer (her ex-husband).[2]

ANALYSIS

Ms. Vargas's letter brief asserts that she jointly owned the property with the original borrower (Mr. Reyes), who has now left the United States and does not intend to return. *See* CM-ECF, Doc. No. 29, at 4. The brief cites portions of the National Consumer Law Center's (NCLC) publication on *Foreclosures and Mortgage Servicing – Including Loan Modifications*, regarding availability of loan modifications to successor individuals. The excerpt cited relies on the Garn-St. Germain Act, and the letter brief also reprints footnotes to the NCLC publication, including state and federal case law, various Fannie Mae letters and guides, and FHA HAMP guidelines. With those citations provided, the letter brief analogizes to the "obvious intent of all the various applicable Fannie Mae/Freddie Mac/FHA and HUD guidelines to encourage and facilitate loan modifications for successor borrowers." *Id.*

The letter brief of U.S. Bank asserts that the Garn-St. Germain Act is not applicable here. *See* CM-ECF, Doc. No. 32, at 1. The Bank notes that the Act helps those who have succeeded to an interest in property through divorce or inheritance, and acts to prevent a lender from using a due-on-sale clause. But

[2] On August 18, 2016, while this matter was under advisement, the debtor filed a modified plan seeking, among other things, to "remove language to Special Provisions regarding the Mortgage Modification Mediation Program . . . ." CM-ECF, Doc. No. 31. Considering that this proposed change would moot the issue for decision, the court made a docket entry asking counsel for clarification of the debtor's position. On September 19, 2016, the debtor withdrew the August 18 proposed modified plan, and submitted a new version, which maintains the proposal to participate in the MMM Program. *See* CM-ECF, Doc. No. 33.

here, the Bank contrasts, Ms. Vargas is not a successor. Her rights have not changed since the date she signed the mortgage. (That assertion may be somewhat inaccurate, depending on the terms of the quit claim deed Ms. Vargas asserts she now has from Mr. Reyes.) In any event, the Bank points out that all of the cases cited in the NCLC excerpt involve the lender invoking a due-on-sale clause default, and that the successor-debtor fell within one of the recognized exceptions in the Act. The Bank's letter cites the pertinent section of the Act in full.

The Bank is correct that the Garn-St. Germain Act protects certain transferees of property from a lender's exercise of a due-on-sale clause. Transfers covered by the Act include:

- a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
- a transfer to a relative resulting from the death of a borrower;
- a transfer where the spouse or children of the borrower become an owner of the property;
- a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; and
- a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.

12 U.S.C. § 1701j-3(d)(3), (5), (6), (7), & (8).

The transfer of property to Ms. Vargas does not fall within any of the above categories. Although the Act protects a transfer from a spouse, it does not protect a transfer from an ex-spouse. And there is no evidence that the transfer in this case "result[ed] from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement." The court therefore agrees with the Bank that "[t]he debtor does not come into any rights through the Garn St. Germain Act," and to the extent the cases cited in the NCLC excerpt relate to transactions covered by the Act, they do not

support the debtor's position. *See, e.g.*, *In re Jordan*, 199 B.R. 68 (Bankr. S.D. Fla. 1996) (transfer qualified under subsection (d)(6)); *In re Smith*, 469 B.R. 198 (Bankr. S.D.N.Y. 2012) (same); *Citicorp Mortg. v. Lumpkin*, 144 B.R. 240 (Bankr. D. Conn. 1992) (same); *Wilson v. Bank of Am.*, 48 F. Supp. 3d 787 (E.D. Pa. 2014) (transfer qualified under subsection (d)(5));[3] and *McGarvey v. JP Morgan Chase Bank*, 2:13-CV-01099-KJM, 2013 WL 5597148 (E.D. Cal. Oct. 11, 2013) (transfer qualified under subsection (d)(8)).[4]

Even if the transfer to Ms. Vargas *did* fall under one of the categories enumerated in the Act, her argument must still fail for a more fundamental

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[3] Notably, the court in this case pointed out that the debtor's reliance on the Garn-St. Germain Act (to argue that she was entitled to bring a RESPA claim in her individual capacity, rather than as administratrix of her son's estate) was misplaced:

> Second, Plaintiff contends that "[a]s a matter of federal law, when a residential mortgagor dies, a surviving family member who inherits the mortgaged property, takes title and is living in the house must be treated as succeeding borrower on the mortgage loan, not as a stranger that has to apply to assume the mortgage pursuant to the lender's credit standards." (Pl.'s Resp. Opp'n Mot. Dismiss 18.) For this proposition, Plaintiff cites to an irrelevant statute—the Garn–St. Germain Act, 12 U.S.C. § 1701j–3(d)(5)—which prohibits a federal savings and loan institution's exercise of a "due-on-sale" clause upon "transfer to a relative resulting from the death of a borrower." 12 U.S.C. § 1701j–3(d)(5). No "due on sale" clause is involved in this case and Plaintiff has cited no case law showing that principles of this provision have been extended to RESPA.

48 F. Supp. 3d at 797. As in *Wilson*, no due-on-sale clause is involved here. In addition, the *Wilson* court rejected the debtor's reliance on the HAMP guidelines, because she had not shown she was eligible to be treated as a borrower under HAMP. *Id.* Ms. Vargas "emphasizes" the Fannie Mae-HAMP guidelines applicable to non-borrower homeowners, but the publication text she quotes is directed at non-borrower homeowners in the successor categories listed in the Garn-St. Germain Act: "HAMP guidelines require servicers to evaluate non-borrowers who inherit or are awarded sole title to a property for a HAMP modification . . . . Fannie Mae servicing rules, applicable to all loans owned by Fannie Mae, require servicers to facilitate modifications for non-borrower homeowners who receive their interest in the home through an 'exempt transaction,' which includes all of the Garn St. German exempt categories and some additional transfers."

[4] The three additional cases cited in the NCLC excerpt provided by Ms. Vargas are even less persuasive. They bear no relation to the Garn-St. Germain Act, and instead deal with other issues such as the assignability of a deed based the terms of the deed, *Andrews v. Holloway*, 231 S.E.2d 548 (Ga. Ct. App. 1976), whether a third party beneficiary of a contract must consent before the original parties to the contract can modify its terms, *Olson v. Etheridge*, 686 N.E.2d 563 (Ill. App. Ct. 1997), and whether a debtor who holds title to property but is not listed as a borrower on the note may pay off the debt in a chapter 13 plan, *In re Curington*, 300 B.R. 78 (M.D. Fla. 2003).

reason: the Bank is not trying to enforce a due-on-sale clause. Instead, the Bank has objected to mediation because it cannot enter into loan modifications with a non-borrower such as Ms. Vargas. There is no evidence in the record showing that the debtor has assumed the loan at issue and become the "borrower" on the note under the applicable laws and in accordance with the lender's policies. In the circumstances, it would be a futile exercise to order the Bank to engage in the MMM Program. The court therefore will sustain the Bank's objection.

The court's decision today is limited to the facts of this case. The court generally is reluctant to deny a motion for referral to the MMM Program in light of the district's policy of encouraging debtors and lenders to work together to reach modifications that will allow chapter 13 debtors to keep their homes. The situations in which the court will consider sustaining an objection to a motion for referral to the MMM Program are very limited—for example, when the particular facts of the case and the terms of the contract between the parties show that modification is clearly prohibited, may be futile, or would be otherwise inappropriate. Such is the case here.

For the foregoing reasons,

IT IS ORDERED that U.S. Bank's objection is SUSTAINED and the debtor's motion for referral to the MMM Program is DENIED.

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