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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In Re: Mortgages, Ltd., Debtor.	Case No. **2:08-bk-07465-RJH** Chapter 11
VICTIMS RECOVERY, L.L.C., an Arizona limited liability company, Plaintiff, vs. GREENBERG TRAURIG LLP, a New York limited liability partnership; *et al.*, Defendants.	Adversary Proc. No. **2:10-ap-01214-RJH** **PLAINTIFF'S RESPONSE TO GT DEFENDANTS' MOTION FOR SUBSTITUTION, JOINDER OR RATIFICATION OF REAL PARTIES IN INTEREST**

The GT Defendants' Motion for Substitution, etc. ("Rule 17(a) Motion" or "Motion"), which the MHM Defendants have joined, is yet another unnecessary and baseless motion that blatantly misstates the law established by the United States Constitution and by virtually every court years ago, from the United States Supreme Court and the Ninth Circuit Court of Appeals on down.

As discussed in the following Memorandum of Points and Authorities, the Supreme Court has always held that "assignees-for-collection," such as Plaintiff Victims Recovery, L.L.C. ("VR"), have a Constitutional right to prosecute claims in their own name as plaintiffs without substituting or joining the assignors of those claims even when those assignees have

no beneficial interest in the claims and must give all of the net litigation proceeds back to the assignors, which in this case are 18 individual investors named in the Complaint ("the VR Investors"),[1] who assigned their claims "for collection" and yes, "for convenience" to VR, regardless of the reason and consideration for such assignments.

Notwithstanding that right, Rule 17(a), Fed. R. Civ. P., and the plethora of federal case law interpreting and applying that rule specifically provide that in order to avoid any potential prejudice to GT or MHM, the VR Investors, as assignees, can, as their *first* (not last) option, consent to and ratify VR's commencement and continuation of this action in its own name without being required to join or substitute (which are the second and third options under Rule 17(a), in that order) the VR Investors as plaintiffs if they consent to and ratify VR's action and agree to be bound by its outcome and the applicable discovery rules in the same manner as parties.

By the VR Investors' respective assignments of their claims to VR and their consent and ratification of VR's action, any possible prejudice to, and objection by, GT and MHM have been completely eliminated. As a result, GT and MHM's Motion lacks any merit or legal basis whatsoever and should be summarily denied.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Greenberg Traurig LLP, Robert Kant and his wife, and Jeffrey Verbin (collectively, "GT" or "the GT Defendants") posit three bases for their Rule 17(a) Motion, which Defendants Mayer Hoffman McCann, P.C., CBIZ, Inc., CBIZ MHM, LLC, Charles McLane,

[1] Actually there are 16 (not 18) separate VR Investors for purposes of this litigation because as explained in footnote 1 on page 3 of the Complaint, three of the 18 "RevOp" Investors listed in the table on that page previously assigned their individual investments to L.L.J. Investments, LLC, which, in turn, assigned the claims arising out of those investments to VR.

Joel Kramer and their wives (collectively, "MHM" or "the MHM Defendants") have joined:

1. Plaintiff VR[2] is not the "real party in interest" in this case because the assignments to VR of claims ("Assignments") by the VR Investors in the Revolving Opportunity Loan Program ("RevOp") created and sold to them by Mortgages Ltd. is invalid and a sham.
2. Even if those assignments were valid, the VR Investors are still the real parties in interest for purposes of Rule 17, and therefore, they must be substituted for, or joined with, VR as Plaintiffs.
3. GT and MHM would be prejudiced by allowing VR to prosecute the claims of the VR Investors because the outcome of this litigation would not be *res judicata* on those investors and they would not be subject to the same discovery obligations that VR is.

As the following discussion explains, none of these contentions have any merit because none have any factual or legal support. In fact, these contentions are so diametrically opposite to the long-established, indisputable principles and decisions from the U.S. Supreme Court and federal and Arizona appellate courts that it is difficult to comprehend why GT filed this Motion. Regardless, there is absolutely no possibility of prejudice to GT or MHM (or any other Defendant for that matter) in any event because as a result of GT's refusal to accept VR's offer to

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[2] In footnote 1 on page 2 of the Motion, GT incorrectly describes VR as being owned by "Hawkins, Murphy [sic] and LLJ, LLC." That is not what is stated in VR's original Articles of Organization ("Articles"), which GT cites and which was filed with the Arizona Corporation Commission ("ACC") on March 9, 2010, ***and*** what is stated in VR's Amended Articles, which was filed with the ACC on June 1, 2010, before the Complaint was filed to correct the name of the "LLJ, LLC." What the Amended Articles states is that the ***only*** member who "own[s] ***a twenty percent (20%) or greater interest***" in VR is L.L.J. Investments, LLC ("LLJ") (incorrectly identified as "LLJ, LLC" in the original Articles). (Emphasis added). Neither the original, nor the Amended Articles state that LLJ is the only member of VR. In fact, VR's Operating Agreement identifies and states that all 16 of the VR Investors (*see* n.1, *supra*) are members of VR. However, because none of members' ownership interests in VR is 20% or greater, except for LLJ, in accordance with the Arizona Limited Liability Company Act, the Articles (both the original and Amended) list only LLJ as a member because it is the only member that holds more than a 20% ownership interest in VR (which resulted from the previous, unrelated assignments by the three LLJ members of their individual RevOp investments to LLJ, giving LLJ an approximately 28.63% ownership interest in VR).

stipulate that all of the VR Investors would be bound by the outcome of this litigation and would be subject to all discovery obligations as parties (*see* email correspondence between VR's and GT's counsel, attached as Exhibit 1 and incorporated herein by reference), ***all of the VR Investors have signed all-inclusive written confirmations, consents, ratifications and agreements*** to preclude any prejudice to GT, MHM and any other Defendant. *See Confirmation, Ratification, Consent and Agreements Regarding Victims Recovery L.L.C. Litigation* ("Ratifications"), attached as Exhibit 2 and incorporated herein by reference.

I. THE VR INVESTORS' ASSIGNMENTS ARE VALID.

GT asserts that the Assignments from the VR Investors to VR are invalid because (a) they were given merely for the "convenience" of the VR Investors, (b) they were made without consideration, (c) they contravene Arizona public policy, and (d) they were made to obtain a litigation advantage, including the prejudicial inference arising from VR's name itself.

GT's assertions about "convenience" and "lack of consideration," are easily disposed of by the Ninth Circuit's decision in *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bur.*, 701 F.2d 1276 (9th Cir. 1983), where the court held that a pharmaceutical association, to which member pharmacies had assigned the antitrust claims against they had against a health care provider, could bring an action on those claims in its own name as the real party in interest against the provider. As the court explained:

> "Rule 17(a) is designed to ensure that lawsuits are brought in the name of the party possessing the substantive right at issue. ***It is not to prevent a consolidation of individual claims such as occurred here***. … ***The consideration that moved to Association in this case consists of the transfer to it of authority to bring this suit and to allocate the proceeds***. In exchange Association undertook to bring the suit. It is not necessary that the assignors forfeit all interest in possible damages before consolidating their claims in a more efficient class suit."

Id. at 1282 (emphasis added) (citing 6 C.Wright & A.Miller, *Federal Practice and Procedure* § 1541, at 635-36 (1971 & Supp.1982)).

As the Assignments from the VR Investors to VR (attached as Exhibit 3 and incorporated herein by reference), demonstrate, "[t]he consideration that moved to [VR] in this case consists of the transfer to it of authority to bring this suit and to allocate the proceeds. In exchange

[VR] undertook to bring the suit." *Id.*; *accord*, *In re Herley Indus. Inc. Sec. Litig.*, No. No. 06-2596, 2009 WL 3169888, *6 (E.D. Pa. Sep. 30, 2009) (holding that investor adviser to whom investors had assigned their investment fraud claims could sue on such claims in his own name as the real party in interest because such an assignment "gives a plaintiff standing to pursue an assignor's claims, even if the assignee will not receive any pecuniary gain from pursuing the action and would otherwise not have standing.").

To the extent that *Archie v. Shell Oil Co.*, 110 F. Supp. 542, 544 (E.D. La. 1953), *aff'd*, 210 F.2d 653 (5th Cir. (1954), *cert. denied*, 348 U.S. 843 (1954), which is the only authority that GT cites in support of its "convenience" argument, lends any support to that argument, *Klamath-Lake Pharm.* certainly trumps that 50+ year old case from a lower court in Louisiana. Moreover, *Archie* is factually inapposite because there the plaintiff, Archie, was merely acting as an agent for the owners of certain mineral-rights claims and he had no ownership rights in those claims, whereas here, as a result of the Assignments, VR owns the VR Investors' claims outright for the purposes of this litigation.

Similarly, *Robinson v. Kamens*, 664 F. Supp. 118 (S.D.N.Y. 1987), which GT cites is also inapposite, both as to the facts and as to the issues in question. The issue there was not whether an assignee had the right to sue in his own name, but whether the assignor, as opposed to the assignee, could still sue in her name even after partially assigning away certain property rights in light of her allegation that the assignment was invalid because it had been procured by fraud. There is no claim here by anyone that the Assignments were procured by fraud; nor are the VR Investors attempting to sue in their own names. In addition, as *Robinson* points out, "Even [if] plaintiff knowingly assigned her claim for purposes of collection, … where there has been a partial assignment, ***such as an assignment for collection***, the assignor and assignee each retain an interest in the claim and are ***both real parties in interest***." Id. at 120 (emphasis added) (footnotes omitted).

Nor does the authority that GT cites for the contention that the Assignments are against Arizona public policy say or support that at all. What *Greene v. Reed*, 15 Ariz. App. 110, 112, 486 P.2d 222 (1971), which GT cites, said was that the assignment in question there was a sham

and invalid because "the parties to the assignment intended it merely as ***a device to avoid payment of taxes***." *Id.* at 113, 486 P.2d at 225 (emphasis added). The Assignments are not being employed to do that or to operate in any way as an illegal device; therefore, the Assignments do not violate any Arizona public policy, and GT has cited no authority that would even infer any notion of a violation of public policy.

On the other hand, Arizona law clearly supports the VR Investors' Assignments because "[a]s a general rule, any claim that would survive the death of the plaintiff may be assigned." *Liberty Mut. Ins. Co. v. Thunderbird Bank*, 113 Ariz. 375, 378, 555 P.2d 333, 336 (1976). There is no question that the claims belonging to the five personal VR Investors (Mr. and Mrs. Caine, Mr. Kohner, Mr. McFadden and Mr. Murphey) would survive their deaths, and that if the other VR Investors were natural persons instead of entities with perpetual existences, their claims would also survive their deaths. Moreover, even the Arizona case law that GT cites makes it clear that "the question of want of consideration is ***not available as between the assignee and the debtor*** [whose debt was assigned]." *Greene*, at 112, 486 P.2d at 224 (emphasis added). Thus under Arizona law, neither GT, MHM, nor any other Defendant, for that matter, who are the "debtors" of the VR Investors, can challenge the want of consideration for the Assignments of the debts (claims) to VR.

As for GT's unsupported, bizarre and ridiculous assertion that VR cannot prosecute this litigation in its own name because it has a "prejudicially sympathetic name," *GT's Motion* at 5, the VR Investors, organizers and members were free to select whatever name they chose for their limited liability company, which has twice been registered and recognized as a valid entity under Arizona law by the Arizona Corporation Commission. For that matter, they could have called it "Investors Who Got Screwed by Mortgages Ltd. and Mortgages Ltd.'s Lawyers and Accountants" if they had wanted to and no one, including GT or MHM, would have a legitimate basis to complain about that name, unless, of course, someone else had registered it first.

II. VR, AN ASSIGNEE-FOR-COLLECTION, IS THE REAL PARTY IN INTEREST.

This is where GT and MHM's contentions really fall apart. Contrary to their assertion, an assignee-for collection, like VR, is, in fact, the real party interest—at least that is what the

highest court in the land, the United States Supreme Court, says. The Court's statement and analysis in *Sprint Commun. Co. v. APCC Servs., Inc.*, 554 U.S. 269 (2008), is so definitive, instructive and absolutely controlling that the following extended quotations from the Court's decision is in order:

> As far back as "the 19th century, most state courts entertained suits virtually identical to the litigation before us: suits by individuals who were ***assignees for collection only, i.e., assignees who brought suit to collect money owed to their assignors but who promised to turn over to those assignors the proceeds secured through litigation***."

Id., 554 U.S. at 280 (emphasis added) (citing myriad cases from numerous jurisdictions, including *Wines v. Rio Grande W.R. Co.*, 235, 33 P. 1042 (Utah 1893) ("holding that an assignee could bring suit based on causes of action assigned to him ***'simply to enable him to sue'*** and who 'would turn over to the assignors all that was recovered in the action, after deducting [the assignors'] proportion of the expenses of the suit'" (Emphasis added)).

> [S]o *many* States allowed these suits that by 1876, the distinguished procedure and equity scholar John Norton Pomeroy declared it "settled by a *great preponderance* of authority, although there is some conflict" that an assignee is "entitled to sue in his own name" whenever the assignment vests "legal title" in the assignee, and notwithstanding "any contemporaneous, collateral agreement by virtue of which he is to receive a part only of the proceeds … or even is to thus account [to the assignor] for the *whole* proceeds." During this period, a number of federal courts similarly indicated approval of ***suits by assignees for collection only***.

Sprint Commun., 554 U.S. at 281-82 (boldface emphasis added) (quoting *Remedies and Remedial Rights* § 132, at 159 and citing numerous federal court decisions).

The Court's analysis continues, "'*A majority of courts* has held that ***an assignee for collection only is a real party in interest' entitled to bring suit***." *Id.* at 282 (emphasis added) (quoting Michael Ferguson, *Comment, The Real Party in Interest Rule Revitalized: Recognizing Defendant's Interest in the Determination of Proper Parties Plaintiff*, 55 Cal. L. Rev. 1452, 1475 (1967)). "***Even this Court long ago indicated that assignees for collection only can properly bring suit***." *Id.* at 283 (emphasis added) (citing *Waite v. Santa Cruz*, 184 U.S. 302 (1902)); *Spiller v. Atchison, T. & S.F.R. Co.*, 253 U.S. 117 (1920); and *Titus v. Wallick*, 306

U.S. 282 (1939)).

> Finally, we note that there is also considerable, more recent authority showing that ***an assignee for collection may properly sue on the assigned claim in federal court***. *See*, *e.g.*, 6A Wright & Miller § 1545, at 346-348 (noting that an assignee with legal title is considered to be a real party in interest and that as a result "federal courts have held that an assignee for purposes of collection who holds legal title to the debt according to the governing substantive law is the real party in interest even though the assignee must account to the assignor for whatever is recovered in the action"); 6 Am.Jur.2d, Assignments § 184, pp. 262-263 (1999) ("***An assignee for collection or security only is within the meaning of the real party in interest statutes and entitled to sue in his or her own name on an assigned account or chose in action, although he or she must account to the assignor for the proceeds of the action, even when the assignment is without consideration***" (footnote omitted)). See also *Rosenblum v. Dingfelder*, 111 F.2d 406, 407 (C.A.2 1940); *Staggers v. Otto Gerdau Co.*, 359 F.2d 292, 294 (C.A.2 1966); *Dixie Portland Flour Mills, Inc. v. Dixie Feed & Seed Co.*, 382 F.2d 830, 833 (C.A.6 1967); *Klamath-Lake Pharmaceutical Assn. v. Klamath Medical Serv. Bur.*, 701 F.2d 1276, 1282 (C.A.9 1983).

Sprint Commun., 554 U.S. at 284-85 (emphasis).; *accord*, *U.S. v. Thornburg*, 82 F.3d 886, 891 (9th Cir. 1996) (holding that an assignment absolute in form can be shown to be for collection only); *Easton Bus. Opp. v. Town Exec. Suites*, 230 P.3d 827, 831 (Nev. 2010) (holding that assignee of broker's right to real estate commission was "real party in interest" and could bring suit in his own right as plaintiff to recover commission owed to broker).

The Court ends with this conclusive holding in *Sprint Commun.*: ***an assignee who holds legal title to an injured party's claim has the Constitutional standing to pursue the claim, even if the assignee has agreed to remit all of the proceeds from the litigation to the assignor*** with the following explanation:

> The history and precedents that we have summarized make clear that courts have long found ways to allow assignees to bring suit; that where assignment is at issue, courts … have always permitted the party with legal title alone to bring suit; and that there is a strong tradition specifically of suits by assignees for collection. We find ***this history and precedent well nigh conclusive in respect to the issue before us: Lawsuits by assignees, including assignees for collection only*** ….

554 U.S. at 285 (internal quotation marks omitted) (emphasis added).

Again, since the above case law demonstrates that VR holds legal title to the VR Investors' claim, at least for purposes of collection and this litigation, nothing more needs to or could be added to what the Court has stated to show that VR was Constitutionally entitled to commence this action and that it is Constitutionally entitled to continue this litigation in its own name as the real party in interest without being required to substitute or join the VR Investors as Plaintiffs. In short the Court's holding demonstrates that GT and MHM's motion is baseless, and certainly, none of the other cases from inferior courts that GT cites and relies on refutes this unquestionable conclusion.

III. THERE IS NO POSSIBILITY OF PREJUDICE TO ANY DEFENDANT.

Aside from the fact that Supreme Court's decision in *Sprint Commun.* is dispositive, GT and MHM hypothesize two ways that they potentially might be prejudiced if the VR Investors are not required to be substituted or joined as Plaintiffs: (1) there would be no *res judicata* effect to the outcome of this litigation so that if VR did not obtain a satisfactory judgment, any of the VR Investors could refile the same claims against them with impunity; and (2) the VR Investors would not have to comply with the rules for discovery in the same manner that plaintiffs must do so.

Rule 17(a)(3) specifically addresses these hypothetical concerns by allowing a party that commenced an action as the plaintiff to obtain a ratification of the litigation from any other person or entity who the defendant claims is the real party in interest "as if [the litigation] had been originally commenced by the real party in interest."[3] In addition, ratification is the preferred method for resolving that issue, if there is one, over the alternate methods of substitution or joinder—ratification is listed as the ***first*** option, not the third option, contrary to GT's and MHM's contentions. The holding in *Sprint Commun.* notwithstanding, in order to assuage GT's and MHM's concerns, VR offered to enter into a stipulation to bind the VR

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[3] "[T]he modern function of the [real party in interest] rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." Fed. R. Civ. P. 17(a) Advisory Committee's Note (1966)).

Investors to both the principle of *res judicata* and a plaintiff's discovery obligations, but, as previously noted, GT refused to accept that offer.

Therefore, even though ratification (or joinder or substitution) is not necessary under the Court's holding in *Sprint Commun.*, all of the VR Investors have since signed formal Ratifications (Ex. 2) confirming, consenting to and ratifying the Assignments and VR's commencement and continuation of this litigation to prosecute their claims in VR's name as the real party in interest. That is all that is required under the authority that GT cites, *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986), which remanded the judgment in that case to the trial court to obtain ratifications by the real parties in interest. *See also, Clarkson Co. v. Rockwell Int'l Corp.*, 441 F. Supp. 792, 797 (N.D. Cal. 1977) (holding that the plaintiff, as the receiver for a bankrupt corporation that had assigned all of its claims to various banks, could bring an action on the claims in its own name on behalf of the banks with the banks' contractual consent and ratification); *Motta v. Resource Shipping & Enters. Co.*, 499 F. Supp. 1365, 1371 (S.D.N.Y. 1980) (holding that a ratification letter was sufficient to cure any Rule 17(a) objection or defect); *Herley Indus.*, *supra*, 2009 WL 3169888 (holding that an investor adviser to whom investors had assigned their fraud claims could bring an action for those claims in his own name as the plaintiff, where the investors subsequently ratified the plaintiff's commencement of the action).

In short, the

> Ratification[s] from [the VR Investors] … permit the action to proceed as if it had been commenced in their names pursuant to Rule 17(a), and moot any question as to who is in fact the real party in interest. By consenting to the conduct of the suit by [VR] on their behalf, agreeing to be bound by the outcome, and further agreeing to be bound by the Federal Rules of Civil Procedure for purposes of discovery in the action, the [VR Investors] have more than satisfied the modern function of Rule 17(a) …. Indeed, ***they have eliminated every item of prejudice flowing from their absence*** complained of by [GT and MHM].

Clarkson Co., 441 F. Supp. at 797 (footnote and citations omitted) (emphasis added); *accord*, *Sun Ref. & Mktg. Co. v. Goldstein Oil Co.*, 801 F.2d 343, 345 (8th Cir. 1986) (Rule 17(a) was satisfied by the ratification because it eliminated any potential prejudice to defendant).

IV. CONCLUSION

For the above reasons, as an assignee-for-collection, VR properly brought this action in its own name and is entitled to continue it as the real party in interest ***without*** substituting or joining the VR Investors as plaintiffs. Nevertheless, out of an abundance of caution and to eliminate any potential for prejudice to GT or MHM, VR previously offered to enter into a stipulation with GT that would eliminate any possibility of prejudice, which offer GT refused, and as a result VR has obtained and is submitting with its Response, signed ratifications from all of the VR Investors to that effect. So, GT and MHM should never have involved this Court with their Motion because it is needless and a waste of judicial resources. Accordingly, GT and MHM's Motion should be summarily denied and this VR should be awarded its costs incurred in responding to the Motion.

RESPECTFULLY SUBMITTED this 18th day of November, 2010.

/s/ William A. Miller
William A. Miller
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2010, I electronically filed the foregoing with the Clerk of the Court using the Court's CM/ECF system, which will send notification of such filing to all parties of record in this case.

/s/ William A. Miller
William A. Miller
Attorney for Plaintiff