

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re: :  
: Amending General Order M-364  
Adoption of Modified Loss Mitigation :  
Program Procedures : M - 413  
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By resolution of the Board of Judges of the United States Bankruptcy Court for the Southern District of New York, General Order M-364, dated December 18, 2008, instituted a uniform, comprehensive, court-supervised loss mitigation program in order to facilitate consensual resolutions for individual debtors whose residential real property is at risk of loss to foreclosure. The loss mitigation program has helped avoid the need for various types of bankruptcy litigation, reduced costs to debtors and secured creditors, and enabled debtors to reorganize or otherwise address their most significant debts and assets under the United States Bankruptcy Code. Accordingly, the "Loss Mitigation Program Procedures" were adopted, pursuant to 11 U.S.C. § 105(a). General Order M-364 also provided that the Court may modify the Loss Mitigation Program Procedures from time to time by duly adopted General Order.

Accordingly, after further review of the loss mitigation program, the Board of Judges has agreed to certain modifications to the procedures and forms,

NOW, THEREFORE, IT IS ORDERED that the revised Loss Mitigation Program Procedures and forms are adopted, effective December 30, 2010, and shall be available in the clerk's office and on the Court's web site.

Dated: New York, New York  
December 29, 2010

/s/ Arthur J. Gonzalez  
Chief United States Bankruptcy Judge

## **LOSS MITIGATION PROGRAM PROCEDURES**

### **I. PURPOSE**

The Loss Mitigation Program is designed to function as a forum for debtors and lenders to reach consensual resolution whenever a debtor's residential property is at risk of foreclosure. The Loss Mitigation Program aims to facilitate resolution by opening the lines of communication between the debtors' and lenders' decision-makers. While the Loss Mitigation Program stays certain bankruptcy deadlines that might interfere with the negotiations or increase costs to the loss mitigation parties, the Loss Mitigation Program also encourages the parties to finalize any agreement under bankruptcy court protection, instead of seeking dismissal of the bankruptcy case.

### **II. LOSS MITIGATION DEFINED**

The term "Loss Mitigation" is intended to describe the full range of solutions that may avert either the loss of a debtor's property to foreclosure, increased costs to the lender, or both. Loss mitigation commonly consists of the following general types of agreements, or a combination of them: loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction. The terms of a loss mitigation solution will vary in each case according to the particular needs and goals of the parties.

### **III. ELIGIBILITY**

The following definitions are used to describe the types of parties, properties and loans that are eligible for participation in the Loss Mitigation Program:

#### **A. DEBTOR**

The term "Debtor" means any individual debtor in a case filed under Chapter 7, 11, 12 or 13 of the Bankruptcy Code, including joint debtors.

#### **B. PROPERTY**

The term "Property" means any real property or cooperative apartment used as a principal residence in which an eligible Debtor holds an interest.

#### **C. LOAN**

The term "Loan" means any mortgage, lien or extension of money or credit secured by eligible Property or stock shares in a residential cooperative, regardless of whether or not the Loan (1) is considered to be "subprime" or "non-traditional," (2) was in foreclosure prior to the bankruptcy filing, (3) is the first or junior mortgage or lien on the Property, or (4) has been "pooled," "securitized," or assigned to a servicer or to a trustee.

#### **D. CREDITOR**

The term "Creditor" refers to any holder, mortgage servicer or trustee of an eligible Loan.

## **IV. ADDITIONAL PARTIES**

### **A. OTHER CREDITORS**

Where it may be necessary or desirable to obtain a global resolution, any party may request, or the bankruptcy court may direct, that multiple Creditors participate in loss mitigation.

### **B. CO-DEBTORS AND THIRD PARTIES**

Where the participation of a co-debtor or other third party may be necessary or desirable, any party may request, or the bankruptcy court may direct, that such party participate in loss mitigation, to the extent that the bankruptcy court has jurisdiction over the party, or if the party consents to participation in loss mitigation.

### **C. CHAPTER 13 TRUSTEE**

The Chapter 13 Trustee has the duty in Section 1302(b)(4) of the Bankruptcy Code to “advise, other than on legal matters, and assist the debtor in performance under the plan.” Any party may request, or the bankruptcy court may direct, the Chapter 13 Trustee to participate in loss mitigation to the extent that such participation would be consistent with the Chapter 13 Trustee’s duty under the Bankruptcy Code.

### **D. MEDIATOR**

At any time, a Debtor or Creditor participating in the Loss Mitigation Program may request, or the bankruptcy court may order, the appointment of an independent mediator from the United States Bankruptcy Court for the Southern District of New York’s Register of Mediators, which may be viewed at <http://www.nysb.uscourts.gov/mediators.html>. A mediator will assist in loss mitigation in accordance with these Procedures and with the United States Bankruptcy Court of the Southern District of New York Amended General Order for the Adoption of Procedures Governing Mediation of Matters in Bankruptcy Cases and Adversary Proceedings dated January 17, 1995 (General Order M-143), as amended on October 20, 1999 (General Order M-211); and December 1, 2009 (General Order M-390).

## **V. COMMENCEMENT OF LOSS MITIGATION**

Parties are encouraged to request loss mitigation as early in the case as possible, but loss mitigation may be initiated at any time, by any of the following methods:

### **A. BY THE DEBTOR**

1. In Section C of the Model Chapter 13 Plan, a Chapter 13 Debtor may indicate an interest in discussing loss mitigation with a particular Creditor. Upon requesting same in the Chapter 13 Plan, the Debtor must serve said plan on the Creditor and file proof of same on the Electronic Case Filing System (“ECF”). If the Creditor fails to object within 21 days of service of the plan the Debtor shall submit a Loss Mitigation Order and the bankruptcy court may enter the order (the “Loss Mitigation Order”).

2. A Debtor may file a request for loss mitigation with a particular Creditor. The Creditor shall have 14 days to object. If no objection is filed, the Debtor shall submit a Loss Mitigation Order and the bankruptcy court may enter the Loss Mitigation Order.

3. Upon entry of the Loss Mitigation Order, the Debtor must serve same upon the appropriate Creditor and file proof of service on ECF.

4. If a Creditor has filed a motion requesting relief from the automatic stay pursuant to Section 362 of the Bankruptcy Code (a "Lift-Stay Motion"), at any time prior to the conclusion of the hearing on the Lift-Stay Motion, the Debtor may file a request for loss mitigation. The Debtor and Creditor shall appear at the scheduled hearing on the Lift-Stay Motion, and the bankruptcy court will consider the loss mitigation request and any opposition by the Creditor.

#### **B. BY A CREDITOR**

A Creditor may file a request for loss mitigation. The Creditor must serve said request on the Debtor and Debtor's counsel and file proof of service on ECF. The Debtor shall have 7 days after service of the request to object. If no objection is filed, the Creditor shall submit a Loss Mitigation Order and the bankruptcy court may enter the Loss Mitigation Order. Upon entry of the Order, the Creditor is to serve same upon Debtor and Debtor's counsel and file proof of same on ECF.

#### **C. BY THE BANKRUPTCY COURT**

The bankruptcy court may enter a Loss Mitigation Order at any time, provided that the parties that will be bound by the Loss Mitigation Order (the "Loss Mitigation Parties") have had notice and an opportunity to object.

#### **D. OPPORTUNITY TO OBJECT**

Where any party files an objection, a Loss Mitigation Order shall not be entered until the bankruptcy court has held a hearing to consider the objection. At the hearing, a party objecting to loss mitigation must present specific reasons why it believes that loss mitigation would not be successful. If a party objects on the grounds that loss mitigation has been requested in bad faith, the assertion must be supported by objective reasons.

### **VI. LOSS MITIGATION ORDER**

#### **A. ORDER**

A separate order shall be submitted for each party listed in the Loss Mitigation Request.

#### **B. DEADLINES**

A Loss Mitigation Order shall contain set time frames for all of the following:

1. The date by which the Loss Mitigation Parties shall designate contact persons and disclose contact information, if this information has not been previously provided.
2. The date by which each Creditor must transmit any information request to the Debtor.
3. The date by which the Debtor must transmit any information request to each Creditor.

4. The date by which a written report must be filed or the date and time set for a status conference at which a verbal report must be provided. Whenever possible, in a Chapter 13 case the status conference will coincide with the first date set for confirmation of the Chapter 13 plan, or an adjourned confirmation hearing. Where a written report is required, it should generally be filed not later than 7 days after the conclusion of the initial loss mitigation session.

### **C. EFFECT**

Whenever a Loss Mitigation Order is entered, the following shall apply to the Loss Mitigation Parties:

1. All communications between the parties shall be made through the designated contacts unless the Court rules otherwise.
2. Except where necessary to prevent irreparable injury, loss or damage, a Creditor shall not file a Lift-Stay Motion during the loss mitigation period. Any Lift-Stay Motion filed by the Creditor prior to the entry of the Loss Mitigation Order shall be adjourned to a date after the last day of the loss mitigation period, and the stay shall be extended pursuant to Section 362(e) of the Bankruptcy Code.
3. In a Chapter 13 case, the deadline by which a Creditor must object to confirmation of the Chapter 13 plan shall be extended to permit the Creditor an additional 14 days after the termination of loss mitigation, including any extension of the loss mitigation period.
4. All communications and information exchanged by the Loss Mitigation Parties during loss mitigation will be inadmissible in any subsequent proceeding pursuant to Federal Rule of Evidence 408.

## **VII. DUTIES UPON COMMENCEMENT OF LOSS MITIGATION**

Upon entry of a Loss Mitigation Order, the Loss Mitigation Parties shall have the following duties:

### **A. GOOD FAITH**

The Loss Mitigation Parties shall negotiate in good faith. A party that fails to participate in loss mitigation in good faith may be subject to sanctions.

### **B. CONTACT INFORMATION**

1. The Debtor: Unless the Debtor has already done so in the Chapter 13 plan or as part of a request for loss mitigation, the Debtor shall provide written notice to each Creditor, indicating the manner in which the Creditor should contact the Debtor.
2. The Creditor: Unless a Creditor has already done so as part of a request for loss mitigation, each Creditor shall provide written notice to the Debtor, identifying the name, address and direct telephone number of the contact person who has full settlement authority.

### **C. DOCUMENT EXCHANGE**

1. The Creditor shall serve upon the Debtor and Debtor's attorney a request for information using the "*Creditor Loss Mitigation Affidavit*" form within 7 days of service of the Order. The Creditor shall file same on ECF.

2. The Debtor shall serve upon the Creditor a response to Creditor's request for information using the "*Debtor Loss Mitigation Affidavit*" form within 21 days of service of the Creditor Loss Mitigation Affidavit. The Debtor shall file only the *Debtor Loss Mitigation Affidavit* on ECF.

#### **D. STATUS REPORT**

The Loss Mitigation Parties shall provide either a written or verbal report to the bankruptcy court regarding the status of loss mitigation within the time set by the bankruptcy court in the Loss Mitigation Order. The status report shall state whether one or more loss mitigation sessions have been conducted, whether a resolution was reached, and whether one or more of the Loss Mitigation Parties believe that additional loss mitigation sessions would be likely to result in either a partial or complete resolution. A status report may include a request for an extension of the loss mitigation period.

#### **E. BANKRUPTCY COURT APPROVAL**

The Loss Mitigation Parties shall seek bankruptcy court approval of any resolution or settlement reached during loss mitigation.

### **VIII. LOSS MITIGATION PROCESS**

#### **A. INITIAL CONTACT**

Following entry of a loss mitigation order, the contact person designated by each Creditor shall contact the Debtor's designated contact person and any other Loss Mitigation Party within the time set by the bankruptcy court. The Debtor through its designated contact person may contact any other Loss Mitigation Party at any time. The purpose of the initial contact is to create a framework for the discussion at the loss mitigation session and to ensure that each of the Loss Mitigation Parties will be prepared to participate in the loss mitigation session – it is not intended to limit additional issues or proposals that may arise during the session. During the initial contact phase, the Loss Mitigation Parties should discuss the following:

1. The time and method for conducting the loss mitigation sessions.
2. The types of loss mitigation solutions under consideration by each party.
3. A plan for the exchange of required information prior to the loss mitigation session, including the due date for the Debtor to complete and return any information request or other loss mitigation paperwork that each Creditor may require. ***All information should be requested by the Creditor at least 7 days prior to the loss mitigation session. Proof that the request has been made shall be filed on ECF. Debtor has 14 days after the request is made to respond. Proof of Debtor's response to said request shall be filed on ECF.***

#### **B. LOSS MITIGATION SESSIONS**

Loss mitigation sessions may be conducted in person, telephonically or via video conference. At the conclusion of each loss mitigation session, the Loss Mitigation Parties should discuss whether additional sessions are necessary and set the time and method for conducting any additional sessions, including a schedule for the exchange of any further information or documentation that may be required.

### **C. BANKRUPTCY COURT ASSISTANCE**

At any time during the loss-mitigation period, a Loss Mitigation Party may request a settlement conference or status conference with the bankruptcy court.

### **D. SETTLEMENT AUTHORITY**

Each Loss Mitigation Party must have a person with full settlement authority present during a loss mitigation session. During a status conference or settlement conference with the bankruptcy court, the person with full settlement authority must either attend the conference in person or be available by telephone or video conference beginning 30 minutes prior to the start of the conference.

## **IX. DURATION, EXTENSION AND EARLY TERMINATION**

### **A. INITIAL PERIOD**

The initial loss mitigation period shall be set by the bankruptcy court in the Loss Mitigation Order.

### **B. EXTENSION**

1. Agreement: The Loss Mitigation Parties may agree to an extension of the loss mitigation period. The Loss Mitigation Parties shall request an extension in writing, filed on the docket in the main bankruptcy case and served on all parties in interest, who shall have three days to object to a request for extension of the loss mitigation period. The bankruptcy court may grant a request for extension of the loss mitigation period for cause.

2. No Agreement: Where a Loss Mitigation Party does not consent to the request for an extension of the loss mitigation period, the bankruptcy court shall schedule a hearing to consider whether further loss mitigation sessions are likely to be successful. The bankruptcy court may order a reasonable extension if it appears that (1) a further loss mitigation session is likely to result in a complete or partial resolution that will provide a substantial benefit to a Loss Mitigation Party, (2) the party opposing the extension has not participated in good faith or has failed in a material way to comply with these Procedures, or (3) the party opposing the extension would not be prejudiced.

### **C. EARLY TERMINATION**

1. Upon Request of a Loss Mitigation Party: A Loss Mitigation Party may request that the loss mitigation period be terminated and shall state the reasons for the request. Except where immediate termination is necessary to prevent irreparable injury, loss or damage, the request shall be made on notice to all other Loss Mitigation Parties, and the bankruptcy court may schedule a hearing to consider the termination request.

2. Dismissal of the Bankruptcy Case:

a. Other than at the request of a Chapter 13 Debtor, or the motion of the United States Trustee or Trustee for failure to comply with requirements under the Bankruptcy Code:

Except where a Chapter 13 Debtor requests voluntary dismissal, or upon motion, a case shall not be dismissed during the loss mitigation period unless the Loss Mitigation Parties have provided the bankruptcy court with a status report that is satisfactory to the court. The bankruptcy court may schedule a further status conference with the Loss Mitigation Parties prior to dismissal of the case.

b. Upon the request of a Chapter 13 Debtor: **A Debtor is not required to request dismissal of the bankruptcy case as part of any resolution or settlement that is offered or agreed to during the loss mitigation period.** Where a Chapter 13 Debtor requests voluntary dismissal of the bankruptcy case during the loss mitigation period, the Debtor's dismissal request shall indicate whether the Debtor agreed to any settlement or resolution from a Loss Mitigation Party during the loss mitigation period or intends to accept an offer of settlement made by a Loss Mitigation Party during the loss mitigation period.

## X. SETTLEMENT

The bankruptcy court will consider any agreement or resolution reached during loss mitigation (a "Settlement") and may approve the Settlement, subject to the following provisions:

1. Implementation: A Settlement may be noticed and implemented in any manner permitted by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), including, but not limited to, a stipulation, sale, plan of reorganization or amended plan of reorganization; and a Motion to Approve Loan Modification and Terminate Loss Mitigation.

2. Fees, Costs or Charges: If a Settlement provides for a Creditor to receive payment or reimbursement of any fee, cost or charge that arose from loss mitigation, such fees, costs or charges shall be disclosed to the Debtor and to the bankruptcy court prior to approval of the Settlement.

3. Signatures: Consent to the Settlement shall be acknowledged in writing by (1) the Creditor representative who participated in loss mitigation, (2) the Debtor, and (3) the Debtor's attorney, if applicable.

4. Hearing: Where a Debtor is represented by counsel, a Settlement may be approved by the bankruptcy court without further notice, or upon such notice as the bankruptcy court directs, unless additional notice or a hearing is required by the Bankruptcy Code or Bankruptcy Rules. Where a Debtor is not represented by counsel, a Settlement shall not be approved until after the bankruptcy court has conducted a hearing at which the Debtor shall appear in person.

5. Dismissal Not Required: **A Debtor is not required to request dismissal of the bankruptcy case in order to effectuate a Settlement.** In order to ensure that the Settlement is enforceable, the Loss Mitigation Parties should seek bankruptcy court approval of the Settlement. Where the Debtor requests or consents to dismissal of the bankruptcy case as part of the Settlement, the bankruptcy court may approve the Settlement as a "structured dismissal," if such relief complies with the Bankruptcy Code and Bankruptcy Rules.

6. Any Order or Stipulation settling Loss Mitigation shall have the Agreement attached as an exhibit.



## **XI. LOSS MITIGATION FINAL REPORT**

Debtor's counsel – or the Debtor, if the Debtor is proceeding without attorney representation – shall file with the Court a ***Loss Mitigation Final Report*** – using the current local (SDNY) form – no later than 14 days after termination of the loss mitigation period. Termination occurs:

1. when the Court enters an order – after a motion is made by one of the parties to loss mitigation (for example, a motion asking the Court to approve a settlement) – where such order brings to a close the loss mitigation;
2. when the Court approves a stipulated agreement that has been presented to the Court, which provides for settlement or resolution of the loss mitigation; or
3. upon expiration of the loss mitigation period or by Court order providing for early termination.

Where a case has two or more requests for loss mitigation, a separate ***Loss Mitigation Final Report*** must be filed for each request.

The Clerk's Office may revise the local (SDNY) form, ***Loss Mitigation Final Report***, from time to time without the need to update these procedures.

## **XII. COORDINATION WITH OTHER PROGRAMS**

*[Provision may be added in the future to provide for coordination with other loss mitigation programs, including programs in the New York State Unified Court System.]*