



**SO ORDERED,**

**Judge Jamie A. Wilson**  
**United States Bankruptcy Judge**  
**Date Signed: November 17, 2023**

**The Order of the Court is set forth below. The docket reflects the date entered.**

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**DANNY HALL AND JUDY HALL,  
  
DEBTORS.**

**CASE NO. 11-03139-JAW  
  
CHAPTER 7**

**ORDER DENYING MOTION FOR APPROVAL OF CLAIM UNDER 11 U.S.C. § 506(b)**

This matter came before the Court on September 26, 2023 for a hearing (the “Hearing”) on the Motion for Approval of Claim under 11 U.S.C. § 506(b) (the “Motion”) (Dkt. #1116) filed by PriorityOne Bank (“POB”); Chapter 7 Trustee’s Response in Opposition to POB’s Motion for Approval of Claim (the “Response”) (Dkt. #1130) filed by Eileen N. Shaffer, the chapter 7 trustee (the “Trustee”); Chapter 7 Trustee’s Memorandum in Support of Response in Opposition to POB’s Motion for Approval of Claim (Dkt. #1131) filed by the Trustee; Objection to Motion for Approval of Claim under 11 U.S.C. § 506(b) and Joinder in Chapter 7 Trustee’s Response in Opposition and Memorandum in Support of Response in Opposition (Dkt. #1133) filed by the debtors, Danny Hall and Judy Hall (together, the “Halls”), and PriorityOne Bank’s Reply to Chapter 7 Trustee’s Response in Opposition to PriorityOne Bank’s Motion for Approval of Claim (the “Reply”) (Dkt. #1136) filed by POB in the above-referenced bankruptcy case (the “Bankruptcy Case”).

At the Hearing, Derek A. Henderson represented POB, C. Victor Welsh, III represented the Trustee, and Craig M. Geno represented the Halls. POB introduced into evidence, without objection, twenty-three exhibits attached to the Motion, marked as Exhibits 1-23 (Dkt. #1116-1 to 1116-24), and four exhibits attached to the Reply, marked as Exhibits 1-4 (Dkt. #1136-1 to 1136-4); the Trustee introduced into evidence, without objection, the exhibits attached to her Response marked as Exhibits 1-6 (Dkt. #1130-1 to 1130-6). In addition, the Trustee introduced into evidence one new exhibit at the Hearing, which was marked as Trustee's Exhibit 1.<sup>1</sup>

### **Jurisdiction**

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (K), and (O) because it involves the allowance of a claim against the estate and the validity and extent of liens. The parties confirmed at the Hearing that they do not contest the jurisdiction or authority of this Court to adjudicate this matter. (Hr'g at 10:19-10:20 (Sept. 26, 2023)).<sup>2</sup> Notice of the Hearing was proper under the circumstances.

### **Introduction**

POB seeks \$647,509.06 in post-petition default interest and attorney's fees under § 506 of the Bankruptcy Code. Usually, an oversecured creditor is entitled to "reasonable fees, costs, or charges provided for under the agreement" only to the extent of its "security cushion." 11 U.S.C. § 506. This case presents unusual circumstances where an arbitration award determined the total amount of POB's claim under the parties' agreements and Mississippi law, leaving this Court with the task of deciding whether the arbitration proceedings resolved the issue of post-petition default interest

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<sup>1</sup> This Order refers to POB's exhibits attached to the Motion as "(POB Ex. \_\_)"; POB's exhibits attached to the Reply as "(POB Reply Ex. \_\_)"; and the Trustee's exhibits attached to the Response as "(Tr. Ex. \_\_)". The exhibit introduced into evidence by the Trustee at the Hearing is referred to as "(Tr. Hr'g Ex. 1)".

<sup>2</sup> The Hearing was not transcribed. Citations are to the timestamp of the audio recording.

and attorney's fees under 11 U.S.C. § 506 and, if so, whether POB's claim is barred by the doctrine of collateral estoppel. At the request of the parties, the Court bifurcated the Hearing to address the issues of collateral estoppel and POB's entitlement to a 11 U.S.C. § 506(b) claim before calculating the precise amount, if any, owed POB.

### **Facts<sup>3</sup>**

The facts are undisputed and lengthy. The length is necessary because the parties raise a legal question that requires the Court to discuss a series of business and personal loans between the parties beginning in 2007 as well as all proceedings involving the parties since 2011 when the Halls filed bankruptcy.

Between 2007 and 2011, the Halls, acting either individually or for entities that they owned and operated—Riverwind Construction, Inc., Riverwind Real Estate, Inc., and Riverwind Homes, Inc.—obtained eighteen separate loans totaling \$6,403,372.44 from POB. (POB Exs. 1-18). The Halls were primary borrowers on seven loans, and guarantors on the remaining eleven. The loans were secured by real property, two certificates of deposit ("CDs"), and other personal property, and the loans contained a cross-collateralization provision, meaning that all collateral secured each loan. The annual interest rate for repayment varied among the notes from 3.10% to 8.75% with an average percentage of 5.43%. (Tr. Ex. 1 at 37). The notes provided for payment of reasonable attorney's fees and collection costs in the event of default: "I agree to pay all reasonable costs you incur to collect on this Loan, including attorney's fees, costs of court, and other legal expenses." (POB Exs. 1-18 ¶ 20). The notes also provided for default interest at the rate of 18% per annum: "Interest will accrue at the rate of 18.00% per year on the unpaid principal balance of this note not

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<sup>3</sup> This Order constitutes the Court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052, 9014. To the extent any findings of fact are considered conclusions of law, they are adopted as such, and vice versa.

paid at maturity, including maturity by acceleration. Borrower and Lender agree that any charges for failure to repay principal at maturity are not a penalty or interest, but are intended to compensate the Lender for expenses arising from such delinquency or default.” (POB Exs. 1-18). In connection with each loan, the Halls signed a written arbitration agreement.<sup>4</sup> The loan documents and the arbitration agreements are governed by Mississippi law. The Halls defaulted on the loans.

### *Bankruptcy Case*

The Halls filed a chapter 11 bankruptcy petition on September 8, 2011. (Dkt. #1). The case converted to chapter 7 on April 4, 2014, and Eileen Shaffer was appointed the Trustee. (Dkt. #404). The bankruptcy schedules reflect \$7,155,180.08 in secured debt and \$743,896.89 in general unsecured debt as of the petition date. (Dkt. #74). The claims register indicates a general unsecured debt of \$314,751.42. (POB Ex. 21).

### *POB’s Proof of Claim*

POB’s original proof of claim (“POC”) (Cl. #17-1) asserts a total debt of \$5,915,172.49 as of September 21, 2011 arising from eighteen loans.<sup>5</sup> (Cl. #17-1). This amount includes pre-petition interest at the varying rates set forth in the notes. POB listed the debt as “secured” but did not include the value of its collateral or the amount of its secured claim. Attached to the POC are the notes and other loan documents totaling 350 pages.

### *Interim Agreed Order on POB’s Stay Motion as to Certain Collateral*

The commencement of the Bankruptcy Case automatically stayed any collection actions against the Halls. *See* 11 U.S.C. § 362(a). On October 18, 2011, POB filed the Motion for Abandonment and Request for Relief from § 362 Automatic Stay, or in the Alternative, Request for

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<sup>4</sup> *See Shaffer v. PriorityOne Bank*, Civil Action No. 3:15-cv-304-HTW-LRA, Dkt. #6-1 to #6-2 (S.D. Miss. June 29, 2015).

<sup>5</sup> As discussed later, POB amended its original POC.

Adequate Protection (the “Stay Motion”) (Dkt. #53) seeking relief from the stay to set off the CDs against the debt owed by the Halls and foreclose the real property. In support of its Stay Motion, POB argued that the Halls had little or no equity in the real property, it was not adequately protected, and the Halls had failed to pay property taxes totaling \$157,405.64. (Dkt. #190). The Halls filed an answer opposing the Stay Motion (Dkt. #80), and a hearing before Bankruptcy Judge Edward Ellington<sup>6</sup> took place on February 1, 2012. At that hearing, the parties announced a partial settlement. The Halls agreed to terminate the stay as to the CDs, certain personal property, and the following real property:

1.93 Acres, Rankin County, MS (Old Brandon Road)

Lots 23, 24, 30, 31, 37, 38, Riverwind, Phase III-B, Rankin County, MS

Tract A (7.438), Tract B (7.276), Parcels and Tracts, Rankin County, MS

Tract A (38.944) & Tract B (4.910), Rankin County, MS

The Halls did not agree to terminate the stay as to the remaining personal property and the following real property:

Mac and Bones (Kidz Rock Building), Rankin County, MS

Claudia’s Daycare, Rankin County, MS

Office Building, Pearson Road, Rankin County, MS (also described as the Green Building)

In a written order, Judge Ellington approved the settlement and held POB’s Stay Motion in abeyance as to the remaining collateral until April 30, 2012. (Dkt. #206). After that date, POB or the Halls could ask the Court to reset the Stay Motion, if necessary.

POB liquidated the CDs and applied the proceeds of \$1,198,985.82 to two loans in full and a third loan in part.<sup>7</sup> The liquidation of the CDs reduced the total loan balance to \$4,716,186.67.<sup>8</sup>

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<sup>6</sup> Three bankruptcy judges, including the above signed judge, have presided over this Bankruptcy Case during the past twelve years.

<sup>7</sup> POB later stated that the fair market value of the CDs was actually \$1,150,000.00. (Tr. Ex. 3 at 9 n.3).

<sup>8</sup> \$5,915,172.49 (POC amount) – \$1,198,985.82 (proceeds of CDs) = \$4,716,186.67.

POB obtained appraisals on all real property securing the loans and then conducted a series of foreclosures of the properties on which the stay had terminated. At each sale, POB was the winning bidder. The amount of POB's winning bid was substantially less than the appraised fair market value of the foreclosed properties. The chart below shows the sale date, the property's appraised value, and POB's winning bid amount:

<b>Property</b>	<b>Foreclosure Date</b>	<b>Fair Market Value (Appraised Value)</b>	<b>POB's Bid Amount</b>
41.854 acres	04/26/2012	\$628,000	\$330,000
Riverwind Lots 23, 24, 37	04/26/2012	\$75,000	\$52,500
Lot 30 (427 Poplar)	04/26/2012	\$107,500	\$86,000
Lot 31	04/26/2012	\$25,000	\$17,500
Lot 38 (203 Sycamore)	04/26/2012	\$106,500	\$87,500
7.438 Acres & 5.42 Acres	05/14/2012	\$4,856,000	\$2,750,000
1.93 Acres	08/02/2012	\$129,000	\$85,000
	<b>TOTALS</b>	<b>\$5,927,000</b>	<b>\$3,408,500</b>

(Dist. Ct. Dkt. #120 at 4-5).

*Final Order on POB's Stay Motion as to Remaining Collateral*

At POB's request, the Stay Motion was reset, and a second hearing took place before Judge Ellington on May 17, 2013. (Dkt. #368). Judge Ellington ruled from the bench. (Dkt. #371 at 91). He granted POB immediate relief from the stay as to all remaining personal and real property except the Kidz Rock building. Judge Ellington delayed the termination of the stay as to the Kidz Rock building until September 1, 2013. (Dkt. #371 at 91). He later entered an order memorializing his bench ruling. (Dkt. #368 at 3).

POB conducted foreclosures of the remaining properties. Again, at each sale, POB was the winning bidder, and POB's bid was substantially less than the property's appraised fair market value. The chart below summarizes each sale:

<b>Property Description</b>	<b>Foreclosure Date</b>	<b>Fair Market Value (Appraised Value)</b>	<b>POB's Bid Amount</b>
Claudia Daycare	04/17/2014	\$420,000	\$315,000
Kidz Rock (Mac & Bones)	04/17/2014	\$940,000	\$760,000
Green Building (Office)	02/13/2015	\$141,000	\$105,000
	<b>TOTALS</b>	<b>\$1,501,000</b>	<b>\$1,180,000</b>

(Dist. Ct. Dkt. #120 at 5).

*Trustee's Objection to POC*

After the case converted to chapter 7, the Trustee filed the Trustee's Objection to Certain Proofs of Claim (the "Trustee's Objection") (Dkt. #528) asserting that POB had failed to "file an amended claim reflecting the current balance on its loans" after the foreclosures. POB filed the Response to Trustee's Objection to Certain Proofs of Claim (Dkt. #531), acknowledging that it had "foreclosed certain real property which would provide credit to the indebtedness owed" and agreeing to file an amended POC. The trial was set for March 13, 2015 (Dkt. #601) but was continued by agreement "until brought on by either party." (Dkt. #621).

*POB's First Amended POC*

POB amended its proof of claim to assert an unsecured claim of \$450,953.18. (Cl. #17-2). According to POB, this amount reflects the deficiency owed by the Halls after the foreclosures of all of its collateral. (Cl. #17-2). In an addendum to the first amended POC, POB asserted that the foreclosure sales complied with Mississippi law and that the \$450,953.18 deficiency did not include all interest, legal fees, and costs that would be included if its collateral were worth more. In that regard, the addendum contains the following language: "To the extent it is ever determined that [POB]'s collateral has or had additional value, [POB] reserves the right to amend this claim to include all interest, legal fees and expenses that may be allowed by the loan documents and the United States Bankruptcy Code." (Cl. #17-2).

### *District Court Action*

The Trustee retained special counsel<sup>9</sup> and on April 24, 2015, filed a complaint against POB in the U.S. District Court for the Southern District of Mississippi (the “District Court”). *See Shaffer v. PriorityOne Bank*, Civil Action No. 3:15-cv-304-HTW-LRA, Dkt. #1 (S.D. Miss. Apr. 24, 2015) (“District Court Action”). She alleged that POB failed to calculate the alleged \$450,953.18 deficiency in a commercially reasonable manner consistent with the loan documents. (Dist. Ct. Dkt. #1 at 6). The Trustee did not dispute the validity of the foreclosures; she challenged only the deficiency amount. She maintained that if POB had given fair credit, the Halls would have reached a surplus debt amount of \$1,159,813.30 after the foreclosure on May 14, 2012, leaving no basis for the remaining foreclosures. (Dist. Ct. Dkt. #1 at 7). The chart below demonstrates the Trustee’s argument:

PROPERTY	FAIR MARKET VALUE PER BANK APPRAISAL	DEBT AGAINST PROPERTY PER PROOF OF CLAIM	DATE OF SALE	SALE BID	DEBT REDUCT. IF CREDITED FMV OF COLLATERAL	DEBT  ((\$4,716,186.67) Initial Debt
River Ridge Subdivision (undeveloped)	\$628,000.00	\$422,949.07 (Loan 14)	4/26/12	\$330,000.00	(\$628,000)	(\$4,088,186.67)
207 Sycamore Court	\$142,000.00	\$108,185.95 (Loan 17)	4/26/12	\$87,500.00	(\$142,000)	(\$3,946,186.67)
427 Poplar Blvd.	\$142,000.00	\$110,135.71 (Loan 16)	4/26/12	\$86,000.00	(\$142,000)	(\$3,860,186.67)
Lots 23, 24, 37 River Ridge	\$75,000.00	\$121,234.15 (Loan 15)	4/26/12	\$52,500.00	(\$75,000)	(\$3,807,686.67)
Lot 31 River Ridge	\$25,000.00	\$54,428.40 (Loans 2, 17)	4/26/12	\$17,500.00	(\$25,000)	(\$3,790,186.67)
Rankin County Commercial Property	\$4,950,000.00	\$1,848,658.67 (Loan 10) \$181,949.01 (Loan 11) \$80,887.41 (Loan 12) \$252,103.61 (Loan 13)	5/14/12	\$2,750,000	(\$4,950,000)	<b>\$1,159,813.30 SURPLUS**</b>

<sup>9</sup> See Application of Trustee to Employ Attorneys for Special Purpose (Dkt. #649); Order Approving Application of Trustee to Employ Attorney for Special Purpose (Dkt. #676).

(Dist. Ct. Dkt. #1 at 7). The Trustee asserted three counts—breach of contract, breach of good faith and fair dealing, and wrongful foreclosure. POB filed a motion to compel arbitration, which the District Court granted on November 2, 2015. (Dist. Ct. Dkt. #12).

#### *Halls' Objection to First Amended POC in Bankruptcy Case*

On November 7, 2016, the Halls filed the Objection to Proof of Claim (the “Halls’ Objection”) (Dkt. #796) in the Bankruptcy Case. The Halls challenged the deficiency amount (\$450,953.18) given that no court had determined that the amount was fair and equitable. The Halls also asserted that the deficiency amount should be reduced, if not eliminated altogether, because property values had increased in the surrounding area. POB filed the Response to Objection to Proof of Claim (Dkt. #805) on November 28, 2016. POB argued that the Halls lacked standing to object to the first amended POC. The parties later agreed to hold the Halls’ Objection in abeyance pending the final outcome of the arbitration proceedings. (Dkt. #811).

#### *Arbitration Proceedings*

The arbitration proceedings took place under the Rules of the American Arbitration Association (“AAA”).<sup>10</sup> See *Shaffer v. PriorityOne Bank*, Case No. 01-16-0003-0322. POB filed an answer to the complaint, asserting as an affirmative defense “all applicable conditions, provisions, terms and exclusions of the contracts comprising the Loans subject to this action.” (Tr. Hr’g Ex. 1 at 3). In its prayer for relief, POB asked “that after due proceedings are had, there be a judgment in favor of PriorityOne Bank, with *full prejudice* and at Claimant’s costs.” (Tr. Hr’g Ex. 1 at 9) (emphasis added). POB did not reserve the § 506 claim in its answer.

The parties conducted limited discovery, and POB filed a summary judgment motion, which the arbitrator, John G. Corlew (the “Arbitrator”), denied. (Tr. Ex. 1 at 6-7). The Arbitrator then

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<sup>10</sup> The AAA is a nonprofit organization that provides alternative dispute resolution services. <http://www.adr.org/about-us> (last visited Nov. 17, 2023).

conducted an evidentiary arbitration hearing on October 1, 2019. (Tr. Ex. 1). Fifty-four exhibits were entered into evidence. The Trustee's exhibits included a foreclosure chart and POB's deposition; POB's exhibits included the affidavit of its chief loan officer, Anthony Chester White ("White"), with attached charts and appraisals of the real property. (Tr. Ex. 1 at 4-5). The Arbitrator heard testimony from White and the Trustee as well as legal argument from counsel.

At the arbitration hearing, POB argued that it correctly calculated the deficiency by applying the foreclosure sale prices to the loan balance because its winning bids exceeded 40% of the appraised fair market value of the properties.<sup>11</sup> POB insisted that Mississippi law does not require a lender to bid fair market value for its collateral or to use fair market value when calculating the deficiency amount. (Tr. Ex. 1 at 53).

The Trustee, in contrast, argued that POB failed to prove that it was entitled to a deficiency judgment under principles of equity. *Mississippi Valley Title Ins. Co. v. Horne Constr. Co.*, 372 So. 2d 1270, 1272 (Miss. 1979) ("No right to a deficiency judgment vests until plaintiff satisfies . . . that [the judgment] would be equitable, in the light of the sale price, to authorize a deficiency judgment."). According to the Trustee, equity required POB to give the Halls fair credit for the commercially reasonable value of their properties. (Tr. Ex. 1 at 51) (citing *Hartman v. McInnis*, 996 So. 2d 704, 711-712 (Miss. 2007)).

In support of its position that its winning bids were fair and equitable, POB relied on the testimony of White, who oversaw the Halls' loans. (Tr. Ex. 1 at 8-169). White testified that POB calculated the payoff by adding the principal loan balance plus interest at the contract rate and

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<sup>11</sup> In Mississippi, a foreclosure is generally deemed valid or "commercially reasonable" if the foreclosing creditor bids at least 40% of the property's fair market value. *Allied Steel Corp. v. Cooper*, 607 So. 2d 113, 120 (Miss. 1992).

expenses. He confirmed that POB added unpaid interest, attorneys' fees, and costs as of the foreclosure sale date to the balance of each loan. (Tr. Ex. 1 at 10, 41, 109-10).

POB introduced into evidence a copy of POB's original proof of claim to establish the "debt start balance" of \$5,915,172.49.<sup>12</sup> (Tr. Ex. 1 at 29-30). POB's counsel explained that undersecured creditors generally are not entitled to unmatured interest under the Bankruptcy Code. (Tr. Ex. 1 at 33-34). For that reason, POB's original and first amended POCs did not include post-petition interest and attorney's fees. Even so, post-petition interest and attorney's fees continued to accrue on the debt "[o]n the bank's books." (Tr. Ex. 1 at 36).

Q. (By Mr. Buffington) . . . When you determined the payoff prior to the foreclosure, you included any accrued interest you were allowed to accrue, any attorneys' fees you were allowed to add and any other expenses; correct?

A. That's correct.

(Tr. Ex. 1 at 110). White prepared a chart to show that POB was entitled to an additional \$951,065.00 in contract interest, \$3,214,172.00 in default interest, and \$479,347.00 in expenses if the Arbitrator determined that "the value of the property is worth more than the debt." (Tr. Ex. 1 at 111-12, 128-29; Tr. Ex. 2). Based on White's testimony, POB's counsel made the following argument to the Arbitrator:

MR. BUFFINGTON: John [Corlew], I will simplify it. This—we have an amended proof of claim for \$450,000 that does not include interest, legal fees and other expenses that the bank's incurred in dealing with these loans. *And if, in fact, what the plaintiffs are saying is true and they deserve more credit for more value, then we get to raise all of those numbers across the board pursuant to the loan documents.* And that's what we have talked about from day one, so it's not coming as a surprise to anybody.

So our 450 would be increased by additional interest, by additional expenses and by virtue of the fact that we're still carrying three large pieces of property that we haven't been able to sell. *So that's what our claim is.*

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<sup>12</sup> POB relied on the original POC during the arbitration hearing even though the original POC had been superseded by the amended POB and, therefore, the original POC had no legal effect in the Bankruptcy Case. *See United Indep. Sch. Dist. v. Vitro Asset Corp. (In re Vitro Asset Corp.)*, 656 F. App'x 717, 721 n.1 (5th Cir. 2016).

(Tr. Ex. 1 at 188-89) (emphasis added).

In addition to the payoff amount, White also testified about POB's calculation of its bid price and the deficiency. He said that POB obtained appraisals for each property in anticipation of the foreclosures. (Tr. Ex. 1 at 11). The first appraisals provided a liquidation value, and the second appraisals, performed just days before the foreclosures, provided a fair market value. (Tr. Ex. 1 at 138, 149, 151-52). According to White, POB determined the bid price based, in part, on the property's appraised liquidation value. (Tr. Ex. 1 at 11, 14).

White explained that POB calculated the deficiency by subtracting its foreclosure bid from the payoff amount. When questioned, White agreed that subtracting the fair market appraised value rather than the bid price from the payoff amount would result in no deficiency after the foreclosure on May 14, 2012. White also admitted that adding post-petition interest at an average rate of 6% and post-foreclosure expenses (such as insurance, property tax, and building maintenance) to the payoff amount would still result in no deficiency. (Tr. Ex. 1 at 40-42).

#### *Arbitrator's Decision*

On October 29, 2019, the Arbitrator issued its fourteen-page Opinion and Award in favor of the Trustee. (POB Ex. 20). The Arbitrator ruled that Mississippi law required POB to predicate the deficiency amount on the fair market value of the foreclosed properties. (POB Ex. 20 at 3-5 (citing *Mississippi Valley Title Insurance v. Horne*, 372 So. 2d 1270, 1272 (Miss. 1979))). He then concluded that the "best evidence" of the fair market value of the foreclosed properties was the appraised values obtained by POB near the time of each foreclosure. (POB Ex. 20 at 7). Notably, the Arbitrator did not end his analysis there. After determining the amount that POB should have applied to the loan balance, he calculated the final, total amount of POB's claim.

The Arbitrator began his calculation with a payoff amount of \$4,716,186.67. Next, he recalculated the deficiency to include the appraised value of the properties rather than the bid prices. He determined that POB realized more than the payoff amount of \$4,716,186.67 at the foreclosure sale on May 14, 2023. The Arbitrator awarded the Trustee the surplus from the foreclosed properties (\$1,081,813.33) and the cumulative value of the wrongfully foreclosed properties (\$1,630,000.00) for a total of \$2,711,813.33. The Arbitrator attached the following chart to his Opinion and Award to illustrate his findings:

#### APPENDIX 1

PROPERTY	FORECLOSURE DATE	FAIR MARKET VALUE AT FORECLOSURE	"COMMERCIAL" VALUE ADDED TO REACH \$4,716,182.67 (INDEBTEDNESS BEFORE FORECLOSURES)	SURPLUS REMAINING AT 05/14/12 AND FAIR MARKET VALUE OF PROPERTIES FORECLOSED THEREAFTER
41.854 acres	04/26/12	\$ 628,000.00		
Riverbend Lots 23, 24, 27	04/26/12	75,000.00		
Riverbend Lot 30	04/26/12	107,500.00		
Riverbend Lot 31	04/26/12	25,000.00		
Riverbend Lot 38	04/26/12	106,500.00		
<b>TOTAL</b>		<b>\$ 942,000.00</b>		
<b>COMMERCIAL</b>	05/14/12	<b>\$4,856,000.00</b>	<b>\$3,774,186.67</b>	<b>\$1,081,813.33</b>
1.93 acres	10/24/12	129,000.00		129,000.00
Daycare	04/17/14	420,000.00		420,000.00
Kids Rock	04/17/14	940,000.00		940,000.00
Green Building	03/11/15	141,000.00		141,000.00
		<b>\$1,630,000.00</b>		
<b>TOTAL FAIR MARKET VALUES OF PREMATURE FORECLOSURES AND SURPLUS</b>				<b>\$2,711,813.33</b>

(POB Ex. 20 at 14).<sup>13</sup>

POB presented evidence in support of its claims for post-petition contract and default interest as well as attorney's fees. Specifically, White's chart, at Trustee's Exhibit 2, indicates that POB claimed damages of \$951,065.00 in "Contract Interest," \$3,214,172.00 in "Default Interest," and

<sup>13</sup> In the chart, the Arbitrator intended to list \$4,716,186.67 as the starting debt, the figure he cited earlier in his opinion, rather than \$4,716,182.67, a difference of \$4.00. (Tr. Ex. 3 at 8 n.2).

\$479,347.00 in “Expenses” as of November 30, 2018. The Arbitrator, however, ultimately rejected POB’s figures and awarded the Trustee \$2,711,813.33. White’s testimony and the chart at Trustee’s Exhibit 2 clearly establish that POB asked the Arbitrator for the same award of post-petition interest and attorney’s fees that it now seeks from this Court under § 506.

*POB’s Motion to Vacate the Award*

POB filed a motion asking the Arbitrator to vacate the award in its entirety or, alternatively, modify the award. (Tr. Ex. 3 at 1). POB argued that the Arbitrator disregarded Mississippi foreclosure law because “there is simply no requirement that the mortgagee credit the mortgagor for the fair market value of the collateral instead of the bid price at the foreclosure sale.” (Tr. Ex. 3 at 3). POB also insisted that Mississippi law does not require a bank to demonstrate that it gave fair credit for the value of its collateral when calculating the deficiency against a guarantor. (Tr. Ex. 3 (citing *Bosarge v. LWD MS Props., LLC*, 158 So. 3d 1137, 1144 n.5 (Miss. 2015))).

Finally, POB argued that the Arbitrator committed certain “computational errors” that when corrected should have resulted in a deficiency judgment in POB’s favor or at least should have reduced the surplus in the Trustee’s favor. POB asserted that “the Arbitrator did not consider the actual amount of the debt owed to the Bank before subtracting the fair market value of the properties. . . . [T]he Arbitrator’s figure (i.e., \$4,716,186.67) simply did not represent the actual debt owed to the Bank at the time of the foreclosures” because it failed to include post-petition contract interest, default interest, and expenses. (Tr. Ex. 3 at 9). POB attached a chart to demonstrate that the “indebtedness—from which any credit after foreclosure should have applied—totaled \$7,251,200.80.” (Tr. Ex. 4). Simply put, POB complained that it did not get what it asked for, *i.e.*, post-petition default interest and expenses. Its argument about “computational errors” further confirms that POB’s claim in the arbitration proceeding duplicates its § 506 request.

The Arbitrator denied POB's motion to vacate the award in a one-page order. (Tr. Ex. 5). POB then asked the AAA to disqualify the Arbitrator, vacate the award, and appoint a new arbitrator to conduct a new hearing. POB's objection was based on the Arbitrator's pre-existing financial relationship with POB.<sup>14</sup> The AAA dismissed POB's petition on the ground the AAA was not the proper forum to address its objections.

*Trustee's Motion to Confirm the Arbitration Award*

The Trustee filed a motion asking the District Court to confirm the \$2,711,813.22 arbitration award in her favor. (Dist. Ct. Dkt. #37); 9 U.S.C. § 9. POB responded by asking the District Court to vacate or, alternatively, modify the award. (Dist. Ct. Dkt. #52). POB argued that the Arbitrator had a disqualifying conflict of interest, "exceeded [his] powers" by "manifestly disregarding" Mississippi law, and was guilty of other misbehavior. (Tr. Ex. 6 at 1-4). Except for its conflict-of-interest argument, POB's reasons for vacating the award were similar, *i.e.*, that the Arbitrator rendered an award that contradicted Mississippi law.

As alternative relief, POB asked the District Court to modify the award because "the arbitrator failed to use the correct amount of indebtedness owed to the Bank in calculating the Award." (Tr. Ex. 6 at 3). POB proposed three separate figures in support of its motion to modify or correct the Arbitrator's \$2,711,813.33 award: (1) a \$1,512,700.80 deficiency judgment in POB's favor; (2) a \$1,147,700.80 deficiency judgment in POB's favor; or (3) a \$1,326,799.20 surplus judgment in the Trustee's favor. (Dist. Ct. Dkt. #52). POB did not attempt to reserve its right to assert a claim under § 506 as part of the arbitration proceedings but instead asked for post-petition interest and attorney's fees and then complained when it did not get them. In fact, even if it had attempted to

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<sup>14</sup> The Arbitrator's financial relationship with POB ended more than a year before the arbitration hearing. (Dist. Ct. Dkt. #115 at 7).

reserve its right, it abandoned that right when it asked the Arbitrator for the same relief it now seeks before this Court under § 506.

*(1) POB's Argument for a \$1,512,700.80 Deficiency Judgment*

POB argued that the Arbitrator erred by miscalculating the debt owed to POB at the time of the foreclosure sales and by crediting the loan balance with the appraised fair market values of the properties instead of the winning bid prices. (Tr. Ex. 6 at 27-29). POB insisted that the Arbitrator's starting figure of \$4,716,186.67, pulled from POB's original POC, failed to include interest, attorney's fees and expenses incurred after the date of the bankruptcy petition. According to POB, the actual debt was \$7,251,200.80, which included the principal, interest, default interest, expenses, and late charges owed by the Halls from the date of the bankruptcy petition to the date of each respective foreclosure. (Tr. Exs. 4 & 6 at 29). POB attached the same chart that it attached to its motion to vacate or modify in the arbitration proceeding to support its contention that the Arbitrator should have started his calculation at \$7,251,200.08. (*Compare* Tr. Ex. 4 with Dist. Ct. Dkt. #52-13). Next, POB argued that the Arbitrator should have given the Halls credit only for the winning bid prices. POB asserted that using these numbers, the Arbitrator should have rendered a deficiency judgment in POB's favor of \$1,512,700.80, *i.e.*, the total debt of \$7,251,200.80, less the CDs of \$1,150,000.00, and the total foreclosure bid price of \$4,588,500.00, plus interest, attorney's fees and expenses. (Tr. Ex. 6 at 30).

*(2) POB's Argument for a \$1,147,700.80 Deficiency Judgment*

POB argued, in the alternative, that the Halls were guarantors rather than primary borrowers on the loans secured by the first six foreclosure properties, so the Arbitrator should have used the bid prices from the first six foreclosure sales in his credit-to-balance calculation. (Tr. Ex. 6 at 18).

POB asserted that correcting the amount should have resulted in a deficiency judgment in POB's favor for \$1,147,700.80, plus interest, attorney's fees and expenses.

*(3) POB's Argument for a Reduced Surplus Judgment of \$1,326.799.20*

Finally, POB argued that even if the Arbitrator correctly used the fair market value of all properties, his calculation should have reflected a surplus in the Halls' favor of only \$1,326.799.20. POB again contended that the Arbitrator should have started his calculation at \$7,251,200.08. (Tr. Ex. 6 at 30-31).

*District Court's Confirmation of Arbitration Award*

Among the statutory grounds for vacating an award under the FAA are: "where there was evident partiality . . . in the arbitrators," 9 U.S.C. § 10(a)(2), "where the arbitrators were guilty of . . . any other misbehavior by which the rights of any party have been prejudiced," 9 U.S.C. § 10(a)(3); and "where the arbitrators exceeded their powers," 9 U.S.C. § 10(a)(4). Also, an order modifying or correcting an award is permissible under the FAA "[w]here there is an evident material miscalculation of figures." 9 U.S.C. § 11(a). POB insisted that "even using the Arbitrator's own formula and numbers presented at the hearing, the Arbitrator should have rendered a monetary award in the *Bank's* favor for a remaining deficiency—not the other way around." (Tr. Ex. 6 at 8).

The District Court addressed the Arbitrator's alleged conflict of interest in a separate order. In that first order, the District Court found that John Corlew had a conflict of interest arising out of his status as the guarantor on a business loan obtained from POB. (Dist. Ct. Dkt. #115). But the District Court concluded that POB had constructive knowledge of that conflict and waived it by failing to object until after the Arbitrator rendered the adverse award.

In the second order, the District Court addressed POB's argument that the Arbitrator "manifestly disregarded" Mississippi foreclosure law and miscalculated the payoff amount. The District

Court ruled that manifest disregard was not a permissible standalone basis for vacating the award, but even if it were, “[t]he Arbitrator’s Opinion and Award cites well-established Mississippi law.” (Dist. Ct. Dkt. #120 at 21).

As to the alleged computational errors, the District Court held that the FAA permits the mathematical correction of an award only when the record demonstrates an unambiguous and undisputed factual mistake and not when the correction is based on a substantive argument that goes to the merits of the parties’ dispute. (Dist. Ct. Dkt. #120 at 21); 9 U.S.C. § 11(a). The District Court viewed POB’s challenge to the Arbitrator’s numbers as a “new substantive theory of recalculation.” (Dist. Ct. Dkt. #120 at 21). The District Court reached this conclusion after previously noting POB’s argument that “[t]he correct indebtedness . . . totaled \$7,251,200.80, which amount includes the principal at filing, interest, *default interest, expenses and late charges* due and owing as of the date of the foreclosure sales.” (Dist. Ct. Dkt. #120 at 7) (emphasis added).

#### *District Court’s Award of Trustee’s Attorney’s Fees & Expenses*

After the District Court confirmed the arbitration award, the Trustee filed a motion for reimbursement of her attorney’s fees and expenses on the ground that POB’s challenge to the award was “without justification.” (Dist. Ct. Dkt. #91); *see Delek Ref., Ltd. v. Local 202, United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union*, 891 F.3d 566, 573 (5th Cir. 2018) (recognizing that courts may award attorney’s fees and expenses against a party who challenges an arbitration award based on its merits rather than on one of the statutory grounds listed in the FAA). The District Court agreed with the Trustee and instructed her to submit evidence of her fees and expenses. (Dist. Ct. Dkt. #121). POB appealed the District Court’s rulings.

### *Fifth Circuit Appeal*

The Fifth Circuit affirmed the District Court in a two-paragraph *per curiam* decision. *Shaffer v. PriorityOne Bank*, No. 21-60802, 2023 WL 2706907 (5th Cir. Mar. 29, 2023). It ruled that the District Court did not commit reversible error in refusing to vacate the award on conflict-of-interest grounds. It further ruled that POB failed “to show that the arbitration award was in manifest disregard of Mississippi law.” POB filed a petition for hearing *en banc*, which the Fifth Circuit treated as a petition for panel rehearing and denied.

### *Objections-to-POC Scheduling Order*

During the pendency of the arbitration proceedings and subsequent appeals, the Trustee’s Objection (Dkt. #621) and the Halls’ Objection (Dkt. #811) remained stayed in the Bankruptcy Case. The final disposition of the appeals returned the parties to this Court.

At the parties’ request, the Court entered a scheduling order setting deadlines for POB to amend its POC and file its motion for allowance of its § 506 claim and for interested parties to respond. (Dkt. #1110). The scheduling order also reflected the parties’ agreement to bifurcate the Hearing to allow the collateral estoppel issue to be heard before the Court considered any evidence regarding the precise amounts owed.

### *POB’s Second Amended POC*

On August 23, 2023, POB amended its POC once again. (Cl. #17-3). In its second amended POC, POB alleged a claim of \$647,509.06, consisting of \$575,379.11 in default interest and \$72,129.95 in attorney’s fees.

### *POB’s § 506(b) Motion*

Consistent with its second amended POC, POB filed the Motion seeking a total allowed default interest payment of \$575,379.11 calculated at the annual rate of 18% accruing from the petition

date on September 8, 2011 until the last proper foreclosure on May 14, 2012. (Dkt. #1116 at 22). In addition, POB seeks attorney's fees and costs of \$72,129.95 incurred for work performed in the Bankruptcy Case. (Dkt. #1116 at 24). The Trustee opposes the Motion on the ground that POB's claim for these additional amounts was previously litigated and denied in the arbitration proceeding. (Dkt. #1130 at 1).

## **Discussion**

### **A. § 506(b)**

Ordinarily, the amount of a creditor's claim in a bankruptcy case is measured as of the petition date. 11 U.S.C. § 502(b)(2) (disallowing "claim[s] . . . for unmatured interest"). Section 506(b)<sup>15</sup> is an exception to that rule. Under that statute, oversecured creditors may recover post-petition interest on their claims as well as attorney's fees, costs, and expenses if they are provided for in their agreements and if they are otherwise reasonable. *Rake v. Wade*, 508 U.S. 464 (1993); *United States v. Ron Pair Enters.*, 489 U.S. 235 (1985); *In re 804 Congress, LLC*, 756 F.3d 368 (5th Cir. 2014). Section § 506(b) provides:

To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506(b). Section 506 permits a creditor to recover its post-petition default interest and attorneys' fees as part of its secured claim provided that the creditor satisfies four elements:

- (1) the creditor's claim is an allowed secured claim;
- (2) the creditor is oversecured;
- (3) the fees are reasonable; and
- (4) the fees are provided for under the agreement.

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<sup>15</sup> Unless otherwise noted, all citations to statutes are to the Bankruptcy Code found at title 11 of the U.S. Code.

*In re Valdez*, 324 B.R. 296, 300 (Bankr. S.D. Tex. 2005). For a creditor to hold an “allowed secured claim,” it must first hold an “allowed claim.” Section 101(5) defines a claim as:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, which or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

11 U.S.C. § 101(5).

POB contends that the Arbitrator’s \$2,711,813.22 award to the Trustee is based on his fair market valuation of the properties. (Dkt. #1136 at 5). That valuation, according to POB, rendered it an oversecured creditor entitled to post-petition default interest and attorney’s fees under § 506(b). “POB is simply enforcing its right to assert a § 506(b) claim based upon the Arbitrator’s determination as to the value of the land that created an oversecured creditor that resulted in an award to Hall and/or the bankruptcy estate.” (Dkt. #1136 at 6). The Trustee opposes POB’s § 506 claim. She argues that POB is seeking a fifth bite at the apple because collateral estoppel/issue preclusion bars further litigation on POB’s entitlement to any additional interest or attorney’s fees under the notes. (Dkt. #1131 at 6).

Both POB and the Trustee ask the Court to apply issue preclusion principles to the arbitration award but to different findings. POB asks the Court to grant preclusive effect to the Arbitrator’s valuation of the foreclosed properties, whereas the Trustee asks the Court to grant preclusive effect to the Arbitrator’s denial of POB’s request for default interest and attorney’s fees. (Dkt. #1116 at 13; Dkt. #1131 at 18).

## **B. Collateral Estoppel/Issue Preclusion**

The doctrine of collateral estoppel/issue preclusion dictates that “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in

subsequent suits based on a different cause of action involving a party to the prior litigation.” *Montana v. United States*, 440 U.S. 147, 153 (1979). As stated by the Fifth Circuit, “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1290 (5th Cir. 1995). Collateral estoppel has the effect of “establishing conclusively questions of law or fact that have received a final judgment for the purposes of a later lawsuit.” *Walker v. Kerr-McGee Chem. Corp.*, 793 F. Supp. 688, 694 (N.D. Miss. 1992). Precluding parties from contesting matters that they have had a full and fair opportunity to litigate “protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Montana*, 440 U.S. at 153-54.

As a threshold matter, the Court notes that collateral estoppel applies in bankruptcy proceedings. *Browning v. Navarro*, 887 F.2d 553, 561 n.15 (5th Cir. 1989). The Court further notes that a confirmed arbitration award is entitled to the same preclusive effect as a final judgment. *Stoker v. Trimas Corp.*, 481 F. App’x 155, 156-57 (5th Cir. 2012); 9 U.S.C. § 13 (“the judgment [confirming the award] so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action”). The Fifth Circuit recently confirmed that deference to the findings of arbitration panels is embodied in federal bankruptcy law under principles of collateral estoppel. *See Amberson v. McAllen (In re Amberson)*, 73 F.4th 348 (5th Cir. 2023). Allowing the bankruptcy court to revisit matters resolved in arbitration would be “contrary to our ‘national policy favoring arbitration’” and would have the effect of “setting [the award] aside.” *See Amberson v. McAllen*, No. SA-21-CV-00496, 2022 WL 3581185, at \*13 (W.D. Tex. Aug. 19, 2022), *aff’d*, 73 F.4th 348 (5th Cir. 2023).

Under federal law,<sup>16</sup> the doctrine applies if three elements are met: (1) that the issue at stake is identical to one involved in the prior litigation; (2) that the issue was actually litigated in the prior litigation; and (3) that the issue determined in the prior litigation was a critical and necessary part of the judgment in that earlier action. *Bradberry v. Jefferson Conty.*, 732 F.3d 540, 548 (5th Cir. 2013).

### **1. Identical Issues**

In the arbitration proceeding, POB argued for a deficiency judgment that included default interest and attorney's fees. POB lost its argument when the Arbitrator awarded the Trustee \$2,711,813.22. POB now seeks the same award of post-petition interest and attorney's fees under § 506 from this Court.

In its motion to vacate the arbitration award, POB included a chart showing that the loan balance increased to \$7,251,200.80 with the addition of default interest and other fees. (Tr. Ex. 4). Citing this higher amount, POB asked the Arbitrator to modify the \$2,711,813.22 award and instead render a \$1,512,700.00 deficiency judgment in its favor. POB lost its argument a second time when the Arbitrator denied that motion. (Tr. Ex. 5). In a similar motion to vacate filed by POB in the District Court Action, POB acknowledged that it had previously sought default interest, additional attorneys' fees, and expenses in the arbitration proceeding. (Tr. Ex. 6 at 28). Specifically, POB admitted to the District Court that "[t]hese figures were addressed at the [arbitration] hearing through the testimony of . . . Mr. Chester White." (Tr. Ex. 6 at 28). POB attached the same chart

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<sup>16</sup> The Trustee applies Mississippi law (Dkt. #1131 at 21), but it is unclear whether state or federal law governs the preclusive effect of an arbitration award that resolved state law-issues but that was confirmed by a federal court judgment. *Cf. Tremont LLC v. Halliburton Energy Servs., Inc.*, 696 F. Supp. 2d 741, 821 n.123 (S.D. Tex. 2010) (applying federal collateral estoppel law because the arbitration award was confirmed by a federal court). Because there is no substantive difference between federal and Mississippi issue preclusion principles, this Court applies federal law. *Blake v. Custom Recycling Servs., Inc.*, No. 1:15-cv-00055-GHD, 2015 WL 6704457 (N.D. Miss. Nov. 3, 2015).

to the motions to vacate that it used in both the arbitration proceeding and in the District Court Action. (*Compare* Tr. Ex. 4 with Dist. Ct. Dkt. #52-13). POB argued before the District Court that the Arbitrator should have started his calculations with a \$7,251,200.80 loan balance because that amount included “the actual principal at filing, interest, default interest, expenses, and late charges due and owing as of the date of the foreclosure sales.” (Tr. Ex. 6). POB’s argument was rejected for a third time when the District Court denied its motion and entered a final judgment affirming the arbitration award. Then, POB lost its argument a fourth time when the Fifth Circuit entered its *per curiam* opinion affirming the District Court.

In the Bankruptcy Case, POB filed a proof of claim that elicited objections by the Trustee and the Halls. Both objections allege that POB’s claim for default interest and attorney’s fees is unenforceable under the notes. That identical issue was presented to, and adjudicated by the Arbitrator, who rejected POB’s request to recalculate the Halls’ debt to include default interest and attorney’s fees. The first element of collateral estoppel/issue preclusion is satisfied.

## **2. Issue Actually Litigated in Prior Action**

The second requirement for collateral estoppel, that the issue was actually litigated, is satisfied when the issue was “raised, contested by the parties, submitted for determination, . . . and determined.” *In re Keaty*, 397 F.3d 264, 272 (5th Cir. 2005). For collateral estoppel to apply, the similarity between the actions involved is not as important as the factual issues in the respective actions. The factual issue raised and determined by the Arbitrator in the arbitration proceeding regarding POB’s entitlement to default interest and attorney’s fees is the same factual issue that POB is attempting to re-litigate before this Court as part of its § 506(b) claim.

POB maintains that the Arbitrator did not decide the issue of default interest and attorney’s fees but only determined the value of the foreclosed properties. (Dkt. #1136 at 2). According to

POB, its § 506 claim could not have arisen until after the Arbitrator determined that the value of the properties exceeded the Halls' debt. (Dkt. #1136 at 3). POB insists that valuation was the only issue properly before the Arbitrator and is the only issue entitled to preclusive effect.

The pleadings filed in the arbitration proceeding, including the Trustee's complaint, POB's answer, and the competing summary judgment motions; White's testimony at the evidentiary arbitration hearing; the charts and other exhibits introduced into evidence at the arbitration hearing; and the Arbitrator's fourteen-page opinion demonstrate that the parties actually litigated the total debt amount, including default interest and attorney's fees. More specifically, POB's argument ignores its answer to the complaint where it demanded that the Arbitrator entered a judgment in its favor and asserted as an affirmative defense "all applicable provisions, terms and exclusions of the contracts comprising the Loans." (Tr. Hr'g Ex. 1 at 3, 9). Its argument also ignores the Arbitrator's \$2,711,813.22 award of surplus funds and damages in the Trustee's favor. The Arbitrator could calculate that award only by first determining the payoff amount, including all interest, fees, and costs, owed under the notes. The Arbitrator attached Appendix 1 to the award summarizing his calculations. (POB Ex. 20 at 14). POB actively litigated its entitlement to default interest and attorney fees during the evidentiary arbitration hearing when, for example, both POB's and the Trustee's lawyers explored the following issues: whether the payoff amount included all accrued default interest and attorney's fees; how POB calculated a deficiency after each sale; whether POB considered its attorney's fees in calculating its bid prices; whether interest at the default rate of 18% continued to accrue after the bankruptcy filing; whether the payoff amount in the original POC included post-petition interest or attorney's fees; and whether the \$450,953.18 deficiency included post-petition default interest and attorney's fees. POB acknowledged the litigation of

these issues in its motions to vacate the award challenging the calculation of the amount awarded. (Tr. Ex. 6 at 28).

Moreover, POB's argument that it could raise its § 506 claim only after the Arbitrator's decision confuses the doctrines of collateral estoppel and res judicata. Unlike collateral estoppel, res judicata (or claim preclusion) "puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud." *Comm'r v. Sunnen*, 333 U.S. 591, 597 (1948). This Court's exclusive jurisdiction over POB's § 506(b) claim prevents res judicata from barring that claim but does not prevent collateral estoppel from barring relitigation of issues that form part of its claim. See *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985). Collateral estoppel simply does not undermine a bankruptcy court's exclusive jurisdiction in the same way as res judicata. For example, it is well established that collateral estoppel applies in dischargeability actions where bankruptcy courts have exclusive jurisdiction. *Grogan v. Garner*, 498 U.S. 279, 284 n.11 (1991); see *Navarro*, 887 F.2d at 561 (applying collateral estoppel in claims allowance litigation). At bottom, POB could, and did ask for default interest and attorney's fees in the arbitration proceeding, which the Arbitrator did not award. The second element of collateral estoppel/issue preclusion is satisfied.

### **3. Issue in Prior Litigation was Critical and Necessary**

The Arbitrator's determination as to the amounts owed under the notes was necessary to the entry of his award in favor of the Trustee. Consistent with *Amberson*, the Court must accept the amount of POB's claim under the notes as determined by the Arbitrator, including the Arbitrator's decision to deny POB's request for post-petition interest and attorney's fees that could have been requested under § 506 had the issue not been litigated and denied in the arbitration proceeding.

*Amberson*, 73 F.4th at 350-51. All three elements of collateral estoppel/issue preclusion are present in this case, entitling the Arbitrator’s award to preclusive effect in this contested matter.

### C. POB’s Remaining Arguments

The Court finds unpersuasive POB’s remaining arguments that collateral estoppel does not apply because: (1) a bankruptcy court has exclusive jurisdiction to adjudicate a claim under § 506(b) and (2) it reserved its rights in the second amended POC to recover default interest and attorneys’ fees.

As to its jurisdictional argument, POB cites *Blackburn-Bliss Tr. v. Hudson Shipbuilders, Inc. (In re Hudson Shipbuilders, Inc.)*, 794 F.2d 1051 (5th Cir. 1986), for its holding that when Congress enacted § 506(b), it “intended that federal law should govern the enforcement of attorneys’ fees provisions notwithstanding contrary state law.” *Id.* at 1056. In other words, the Fifth Circuit ruled that § 506(b) preempts state law in determining whether “fees, costs or charges provided for under the agreement” are reasonable.<sup>17</sup>

POB is correct that the filing of the Bankruptcy Case added another dimension to its contractual right to default interest and attorneys’ fees. Under § 506(b), the Court must consider the reasonableness of any award of contractual default interest and attorney’s fees in light of the interests of the estate and other creditors—even if that award would otherwise be enforceable under state law. The application of § 506(b)’s reasonableness standard under federal law, comes into play, however, only *after* the right to payment of default interest and attorney’s fees has been deemed an allowed claim under § 502. POB’s right to payment *as an element of that § 506(b) claim* arises by

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<sup>17</sup> In response to this argument, the Trustee contends that *Hudson Shipbuilders* was overruled by the U.S. Supreme Court’s decision in *Stern v. Marshall*, 564 U.S. 462 (2011), as recognized by the Fifth Circuit in *Frazin v. Haynes & Boone, LLP (In re Frazin)*, 732 F.3d 313 (5th Cir. 2013). But *Frazin* did not overrule *Hudson Shipbuilders* in its entirety but only as to its additional ruling that bankruptcy courts have proper authority to adjudicate any claim that fits the statutory definition of a core proceeding.

contract, and the Arbitrator has already decided POB's right to recover default interest and attorneys' fees under the notes and Mississippi law.<sup>18</sup>

Next, POB points to the "reservation" language in its first amended POC. (Tr. Ex. 1 at 160). POB argues that the reservation language was necessary because it had to wait until the Arbitrator ruled that it was an oversecured creditor before it could claim post-petition attorney's fees and default interest. The Court finds that POB's status in the bankruptcy case did not prevent POB from seeking its attorney's fees or charging 18% default interest under the loan documents in the arbitration proceedings. (Tr. Ex. 1 at 155-56). The Court further finds that the Arbitrator ruled against POB as to its claim under the notes, and POB cannot prevent the preclusive effect of that ruling through its reservation language in the POC. POB cannot now rely on the reservation language in its POC to undermine the finality of the Arbitrator's decision. POB abandoned the reservation language by placing components of its § 506 claim before the Arbitrator.

#### **D. Summary**

At the Hearing, counsel for both parties indicated that the collateral estoppel issue they raise is without legal precedent. (Hr'g at 10:17-10:19). The posture in which POB asserts its § 506 claim is unusual. POB first asserted in the Bankruptcy Case that it was an undersecured creditor as of the petition date and for that reason obtained relief from the automatic stay to conduct non-judicial foreclosures on its collateral, but now, after having lost in District Court and the Fifth Circuit, returns to this Court to seek post-petition default interest and attorney's fees as an oversecured creditor. Although neither the parties nor this Court was able to find an exact analogous case, the

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<sup>18</sup> POB fails to explain why the District Court that confirmed the arbitration award lacked jurisdiction. Federal district courts (and bankruptcy courts by reference) have original jurisdiction over bankruptcy cases and proceedings. 28 U.S.C. §§ 157(a), 1334(a), (b).

Court has found a case involving the application of collateral estoppel to a creditor's § 506(b) claim.

In *Community Bank of Homestead v. Torcise*, 162 F.3d 1084 (11th Cir. 1998), a tomato farmer obtained a \$1.5 million loan from a bank for use in his farming operations. Months later, the farmer filed bankruptcy. The bankruptcy court granted the bank relief from the automatic stay to foreclose on the property that secured the loan. The bank foreclosed on the property in state court. The state court's judgment found the farmer liable for the principal amount of the note plus interest at the contractual default rate of 18% accruing until the foreclosure date. The farmer's resulting liability totaled nearly \$2 million. The foreclosure judgment also awarded the bank postjudgment interest at the statutory rate of 12%. The farmer did not appeal the foreclosure judgment, and the bank sold the property at a foreclosure sale.

The bank moved the bankruptcy court to release the proceeds from the sale of the property. The bankruptcy approved payment of the bank's claim at the interest rate provided in the foreclosure judgment.

On appeal, the district court ruled that the foreclosure judgment awarded "interest on interest" in violation of state law because it imposed postjudgment interest on a judgment that included prejudgment interest. The district court also ruled that § 506(b) required that prejudgment interest be calculated at the contract rate until the petition date, and that postjudgment interest at the contract rate (rather than the statutory rate) should accrue on the total debt after the petition date.

On further appeal, the Eleventh Circuit Court of Appeals held that collateral estoppel barred the farmer from contesting the amount of interest determined in the state court foreclosure judgment. This Court similarly finds that collateral estoppel bars POB from challenging the total amount of its claim as determined in the confirmed arbitration award.

Even assuming for the sake of argument that collateral estoppel did not apply to POB's § 506 claim, the Court would not be inclined to award post-petition default interest and attorney's fees. Generally, "when an oversecured creditor's claim arises from a contract, the contract provides the rate of post-petition interest," so long as a higher, default rate does not "produce an inequitable or unconscionable result." *Bradford v. Crozier (In re Laymon)*, 958 F.2d 72, 75 (5th Cir. 1992); *In re Mkt. Ctr. E. Retail Prop., Inc.*, 433 B.R. 335, 358 (Bankr. D.N.M. 2010) (recognizing "a judicial gloss on the federal rule by asking whether equitable circumstances should impact the allowance of the default rate"). In determining whether to apply a contractual default rate of interest, most courts take "a flexible approach" and examine the equities involved in the bankruptcy case. *Laymon*, 958, F.2d at 75. In balancing the equities of the case, courts consider: (1) whether the spread between the default and non-default interest rates is large; (2) whether the oversecured creditor was obstructing the bankruptcy process; (3) whether junior creditors will be harmed; and (4) whether oversecured creditor ever faced a realistic risk of nonpayment of its debt. *Windmill Run Assocs., Ltd. v. Fed. Nat'l Mortg. Ass'n (In re Windmill Run Assocs., Ltd.)*, 566 B.R. 396, 456 (Bankr. S.D. Tex. 2017).

The Court finds that the absence of a significant risk of nonpayment and other factors weigh against allowing default interest as a component of POB's claim. The Halls filed their joint bankruptcy petition in 2011; more than twelve years later, this Bankruptcy Case remains open. POB wrongfully foreclosed on some of the Halls' properties. When the Trustee initiated the District Court Action to contest POB's calculation of the deficiency amount, POB compelled the Trustee to submit the parties' dispute to arbitration. After the Arbitrator entered his \$2,711,813.22 award in the Trustee's favor, POB filed motions to vacate or modify the award. POB's motion in the arbitration proceeding was denied for lack of jurisdiction, and its motion in the District Court

Action was similarly denied and also resulted in an award of attorney's fees and expenses to the Trustee on the ground that POB's challenge was "without justification." POB pursued an appeal to the Fifth Circuit. After losing that appeal in a *per curiam* opinion, POB filed a motion for rehearing *en banc*, which the Fifth Circuit denied. The present Motion is another attempt by POB to circumvent, or at least reduce the \$2,711,813.22 award. Even assuming POB was entitled to relief under § 506, application of equity principles would not support the award of default interest or attorney's fees.

### **Conclusion**

POB asked the Arbitrator for default interest and attorney's fees, and the Arbitrator declined to award them. This Court refuses to give POB a sixth bite at the apple; POB reached the apple core when the Fifth Circuit affirmed the District Court's final judgment. POB's § 506 claim is barred by collateral estoppel and equitable principles, and the Motion should be denied.

IT IS, THEREFORE, ORDERED that the Motion is hereby denied.

IT IS FURTHER ORDERED that the Trustee's Objection and the Halls' Objection are hereby sustained, and POB's second amended POC is hereby disallowed.

##END OF ORDER##