

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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 In re: :  
 : Amending General Orders M-364, M-413  
 Adoption of Modified Loss Mitigation :  
 Program Procedures : M-451  
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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, as amended by General Order M-413, dated December 29, 2010, 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 fourteen days from entry of this Order, and shall be available in the Clerk's Office and on the Court's web site; and it is further

ORDERED, that the Clerk's Office may update the Loss Mitigation Program Procedures and forms, with the approval of the Board of Judges, without the need to issue a new General Order.

Dated: Poughkeepsie, New York  
June 17, 2013

/s/ Cecelia G. Morris  
Chief United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

**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 secured creditor whether it be the holder, mortgage servicer or trustee of an eligible Loan. If the Creditor participating in Loss Mitigation is not the direct holder of the loan, the Creditor is deemed to have full consent to act on behalf of the holder. If such consent has not been given, the Creditor must object to the Loss Mitigation Request and provide the name of the holder, trustee, or other entity that has the ability to participate in Loss Mitigation.

#### **E. LOSS MITIGATION PARTIES**

The term “Loss Mitigation Parties” refers to the Debtor and the Creditor bound by a Loss Mitigation Order to participate in Loss Mitigation.

### **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 Local Rule 9019-1.

## V. COMMENCEMENT OF LOSS MITIGATION

Parties are encouraged to request Loss Mitigation as early in a case as possible, but Loss Mitigation may be initiated at any time prior to the entry of a discharge order, 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 fourteen (14) days of service of the plan the Debtor shall submit an order approving the Loss Mitigation Request (the “*Loss Mitigation Order*”<sup>1</sup>) and the Bankruptcy Court may enter the order. A copy of the Southern District of New York’s “*Model Chapter 13 Plan*” can be found on the Bankruptcy Court’s website under “Chapter 13 Forms.” The Debtor may request Loss Mitigation in the plan for one Loan without regard for whether the Loan is a first or second mortgage loan. In order to request Loss Mitigation on a second Loan, the Debtor must file a separate Loss Mitigation Request.

2. A Debtor may file a request for Loss Mitigation (“Loss Mitigation Request”) with a particular Creditor. The Creditor shall have fourteen (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*.” A copy of the “*Loss Mitigation Request-By the Debtor*”<sup>2</sup> and the “*Loss Mitigation Order*” can be found on the Bankruptcy Court’s website under the “Loss Mitigation” tab.

3. Upon entry of the “*Loss Mitigation Order*,” the Debtor must serve same upon the appropriate Creditor and file proof of service on ECF. If the Creditor is a domestic or foreign corporation, partnership, or other unincorporated association, service must be made by mailing a copy of the plan to a physical address and to the attention of an officer. A copy of the “*Loss Mitigation Order*” can be found on the Bankruptcy Court’s website.

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 Loss Mitigation Request. 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 Loss Mitigation Request. The Creditor must serve said request on the Debtor and Debtor’s counsel and file proof of service on ECF. The Debtor shall have seven (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 Loss Mitigation Order, the Creditor is to serve same upon Debtor and Debtor’s counsel and

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<sup>1</sup> Italicized words in quotations indicate that there is a form by the same name on the Bankruptcy Court’s website. These forms should be used whenever applicable.

file proof of same on ECF. The form “*Loss Mitigation Request-By the Creditor*” can be found on the Bankruptcy Court’s website.

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

The Bankruptcy Court may enter a “*Loss Mitigation Order*” at any time, provided that the Loss Mitigation Parties that will be bound by the “*Loss Mitigation Order*” 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 evidence.

## **VI. LOSS MITIGATION ORDER**

### **A. ORDER**

A separate “*Loss Mitigation Order*” shall be submitted for each Loss Mitigation Request, regardless of the method used for making the 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.
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 status report must be filed and the date and time set for a status conference at which a verbal report must be provided. Where a written report is required, it should generally be filed not later than seven (7) days before the initial Loss Mitigation status conference (“Initial Status Conference”).

### **C. EFFECT**

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

1. Unless otherwise ordered by the Bankruptcy Court, all communications between the Loss Mitigation Parties shall be made through the designated contacts’ attorneys.
2. Except where necessary to prevent irreparable injury, loss or damage, a Creditor shall not file a Lift-Stay Motion while Loss Mitigation is pending.
3. 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 “*Order Terminating Loss Mitigation and Final Report*,” and the stay shall be extended pursuant to section 362(e) of the Bankruptcy Code.
4. 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 fourteen (14) days after the filing of the “*Order Terminating Loss Mitigation and Final Report*.”

5. 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.

6. Unless otherwise ordered by the Bankruptcy Court, in a Chapter 7 case, the entry of the “*Loss Mitigation Order*” defers the entry of an order granting the Debtor’s discharge until one day after an “Order Terminating Loss Mitigation and Final Report” is filed, pursuant to Federal Rule of Bankruptcy Procedure 4004(c)(2). The time to object to the Debtor’s discharge or the dischargeability of a debt is NOT extended by this Order

## 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 Loss Mitigation Request, the Debtor shall file and serve a written notice on 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 Loss Mitigation Request, each Creditor shall provide written notice to the Debtor by filing and serving its Creditor Affidavit on the Debtor in which it identifies: 1) the name, address and direct telephone number of the contact person who has full settlement authority; and 2) the attorney representing it in the Loss Mitigation.

### 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 seven (7) days of service of the “*Loss Mitigation Order*.” The Creditor shall file same on ECF. The “*Creditor Loss Mitigation Affidavit*” can be found on the Bankruptcy Court’s website.

2. The Debtor shall serve upon the Creditor a response to Creditor’s request for information using the “*Debtor Loss Mitigation Affidavit*” form within fourteen (14) days of service of the Creditor Loss Mitigation Affidavit. The Debtor shall file only the *Debtor Loss Mitigation Affidavit* on ECF. A copy of the “*Debtor Loss Mitigation Affidavit*” can be found on the Bankruptcy Court’s website.

### D. STATUS REPORT

The Loss Mitigation Parties shall provide a written report to the Bankruptcy Court regarding the status of Loss Mitigation within the timeframe 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.

#### **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 timeframe provided in the “*Loss Mitigation Order*.” 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 discussion at the Loss Mitigation sessions 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 hold a telephone conference to discuss the following:

1. The types of Loss Mitigation solutions under consideration by each party.
2. 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.

#### **B. LOSS MITIGATION SESSIONS BETWEEN THE PARTIES**

Loss Mitigation sessions between the parties 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. STATUS CONFERENCES WITH THE BANKRUPTCY COURT**

The Initial Status Conference shall be set by the Bankruptcy Court in the “*Loss Mitigation Order*” and may be adjourned at the discretion of the Bankruptcy Court. At any time during the pendency of Loss Mitigation, 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 at every Loss Mitigation status conference. 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 thirty (30) minutes prior to the start of the conference.

## IX. DURATION AND TERMINATION

### A. DURATION

Once a “*Loss Mitigation Order*” has been entered by the Bankruptcy Court, it shall remain in effect until an “*Order Terminating Loss Mitigation and Final Report*” is filed.

### B. EARLY TERMINATION

1. Upon Request of a Loss Mitigation Party: A Loss Mitigation Party may request that Loss Mitigation be terminated by filing the form “*Request for Termination of Loss Mitigation*” which can be found on our website stating 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. *Sua Sponte* Termination of Loss Mitigation: The Bankruptcy Court may terminate Loss Mitigation *sua sponte* at any time for failure to comply with the Loss Mitigation Program Procedures.

3. 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 Loss Mitigation unless the Loss Mitigation Parties have provided the Bankruptcy Court with a status report that is satisfactory to the Bankruptcy 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 Loss Mitigation.** Where a Chapter 13 Debtor requests voluntary dismissal of the bankruptcy case during a pending Loss Mitigation, the Debtor’s dismissal request shall indicate whether the Debtor agreed to any settlement or resolution from a Loss Mitigation Party during Loss Mitigation or intends to accept an offer of settlement made by a Loss Mitigation Party during Loss Mitigation.

## 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.

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 Creditor’s attorney, (3) the Debtor, and (4) 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.

6. Any Settlement provided to the Bankruptcy Court for its approval shall have the Agreement attached as an exhibit.

## **XI. ORDER TERMINATING LOSS MITIGATION AND FINAL REPORT**

The Loss Mitigation Parties shall file with the Bankruptcy Court an “*Order Terminating Loss Mitigation and Final Report*”:

1. when the Bankruptcy 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 Bankruptcy Court approves a Settlement that has been presented to the Court, which provides resolution of the Loss Mitigation; or
3. when a Loss Mitigation’s request for termination has been granted upon the record of a Loss Mitigation hearing.

Loss Mitigation is not “terminated” unless an “*Order Terminating Loss Mitigation and Final Report*” is entered by the Bankruptcy Court. Where a case has two or more requests for Loss Mitigation, a separate “*Order Terminating Loss Mitigation and Final Report*” must be filed for each request.

## **XII. FORMS**

All of the Loss Mitigation forms may be found on the Bankruptcy Court’s website under the “Loss Mitigation” tab. These forms must be used. The Bankruptcy Court may revise the forms from time to time without the need to update the Loss Mitigation Program Procedures.

## **XIII. COORDINATION WITH OTHER PROGRAMS**

*[Provisions 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.]*