UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NO. 22-42

Bankruptcy Case No. 22-20126-PGC

In re: KASSIANI DEMETRIADI PITASSI, a/k/a Kassi D. Pitassi,
d/b/a Lucia's Greetings, LLC
Debtor

KASSIANI DEMETRIADI PITASSI
Debtor - Appellant

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Indenture Trustee for Mortgage IT Trust 2005-2; DEUTSCHE BANK NATIONAL TRUST COMPANY, as trustee, for WAMU Mortgage Pass-Through Certificates-WAMU-2005-AR6
Creditors - Appellees

ANDREW M. DUDLEY, Chapter 13 Trustee
Trustee – Appellee

Appeal from the United States Bankruptcy Court for the District of Maine
(Peter G. Cary, U.S. Bankruptcy Judge)

BRIEF OF APPELLEE

Deutsche Bank National Trust Company, as Trustee, on behalf of the holders of the Washington Mutual Mortgage Securities Corp. WaMu Mortgage Pass-Through Certificates, Series 2005-AR6

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Dated: July 12, 2023

CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FED. R. APP. P. 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1 and Rule 8012 of the Federal Rules of Bankruptcy Procedure, Defendant-Appellees, Deutsche Bank National Trust Company, as trustee, on behalf of the holders of the Washington Mutual Mortgage Securities Corp. WaMu Mortgage Pass-Through Certificates, Series 2005-AR6 hereby state, by and through undersigned counsel, that Deutsche Bank National Trust Company is under the supervision of the Office of the Comptroller of the Currency, Charter 18608, with its principal offices located at 1999 AVENUE OF THE STARS, LOS ANGELES, CA, UNITED STATES 90067.

/s/ Reneau J. Longoria

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant states that she does not deem oral argument to be necessary because the appeal is "based largely on a procedural issue which does not require elucidation in oral argument." Appellant's Brief ("AB") at iii. The Appellee does not agree that the issues presented are "procedural" and maintains the issues presented are properly determined as a matter of law. Appellee welcomes the opportunity to appear for oral argument as this area of law has been a recent focus in the First Circuit.

JURISDICTIONAL STATEMENT

The Appellant concurs that this Court has jurisdiction to hear this case. Record Appendix ("RA") at 213. The Appellant concurs that the lower court's decision was a conclusion of law and that it is reviewed *de novo*. *In re Nieves*, 647 B.R. 809 (1st Cir. February 2, 2023).

STATEMENT OF THE ISSUES

I. Whether the Court below erred in finding that the final judgment in the "Deutsche Elm"[1] case estopped Pitassi as a matter of law based on *Res Judicata* and the *Rooker-Feldman* doctrine from arguing DBNT had no standing to enforce the mortgage on the Elm Street property.

II. Whether the finding of DBNT's standing to enforce the mortgage on behalf of the Mortgage-it Trust in the Deutsche Elm case precluded the Bankruptcy Court from making any other finding concerning DBNT's standing as Trustee of the WAMU 2005-AR6 Trust to enforce the Pitassi Mortgage on the Jackson Street property.[2]

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[1] AB at 2-4. The Appellant has appealed the Denial of Confirmation of his proposed Chapter 13 Plan which failed to provide for 2 mortgages held by separate entities both of whom are trusts and Deutsche Bank National Trust Company is the Trustee for both Trusts. Each Mortgage is on a different property and the Appellant's Brief refers to the Mortgages by the short names of "Deutsche Bank National Trust Company as Indenture Trustee for Mortgage IT Trust 2005-2 - For Elm St. (Represented by attorney Hardiman) hereinafter Deutsche Elm. (See proof of claim #1-1, Ap 220); Deutsche Bank National Trust Company, as trustee, on behalf of the holders of the Washington Mutual Mortgage Securities Corp. WaMu Mortgage Pass-Through Certificates, Series 2005-AR6 - For Jackson St. (Represented by attorney Longoria) hereinafter Deutsche Jackson. (See proof of claim #3, Ap, 275)."

[2] The Appellees will each file a separate brief in support of the bankruptcy court's decision below and the first issue will be addressed in the Deutsche Elm Brief, however, the undersigned submits that the resolution of the first issue and the standing of Deutsche Elm, judicially estopped the court below, and this Court, from a contrary finding on the Pitassi Mortgage on the Jackson Street Property.

III. Whether Pitassi was Judicially Estopped from asserting a defense to enforcement of the lien on the Jackson Street property, within her Chapter 13 bankruptcy, due to the fact that she obtained a Discharge in her 2011 Chapter 7 case and did not question the securitization of her loan or list any claim she may have had based on standing to resist the enforcement of the recorded lien.

IV. Whether the *Rooker-Feldman* doctrine provides an independent legal basis to deny confirmation of the Plan in light of the January 22, 2018, Order in the Deutsche Jackson Street case rejecting a substantially similar argument that DBNT lacked standing to foreclose.

V. Whether the *Rooker-Feldman* doctrine provides an independent legal basis to deny confirmation of the Plan in light of the August 13, 2023 Order which entered by the Connecticut State Court following the abandonment of Pitassi's Appeal of the previously entered Judgment of Strict Foreclosure.

VI. Whether Pitassi is independently, as a matter of law, estopped from contesting standing based on her acknowledgment of standing and her waiver of defenses contained in her 2008 Loan Modification.

VII. Whether Pitassi is precluded from challenging DBNT's ability to enforce her Mortgages based on her failure to file an Adversary Proceeding challenging the validity of the liens as required by Federal Rule of Bankruptcy Procedure 7001(2).

STATEMENT OF RELEVANT FACTS

Deutsche Bank National Trust Company, as trustee, on behalf of the holders of the Washington Mutual Mortgage Securities Corp. WaMu Mortgage Pass-Through Certificates, Series 2005-AR6 ("DBNT") is the current holder of a note executed and delivered by the Debtor to Washington Mutual Bank, FA ("WAMU"), in the amount of $927,500.00, and dated December 1, 2004 (the "Pitassi Note") and first mortgage, executed and delivered by Kassiani Pitassi and Frank Pitassi

(the "Pitassis") to WAMU dated December 1, 2004, and recorded in the Fairfield CT. Registry of Deeds in Book 4807, Page 176 (the "Pitassi Mortgage") on real estate located at 10 Jackson Street, Cos Cob, CT 06807 (the "Jackson Street Property"). RA at 83, 103-133.

The Pitassi Mortgage loan was modified in 2008 by written agreement ("Pitassi Loan Mod") between the Pitassis and the holder of the Note and Mortgage at that time, which was recorded on January 16, 2009. RA at 83, 134-143. In Paragraph 14 of the Pitassi Loan Mod, the Pitassis acknowledged the lender's standing to enforce the Pitassi Mortgage Loan and waived all claims including those raised within the plan at issue in this appeal, which was rejected by the Bankruptcy Court. RA at 138. Specifically, Paragraph 14 of the Pitassi Loan Mod states:

> As part of the consideration for this Agreement, Borrower agrees **to release and waive all claims Borrower might assert against the Trust and or its agents, and arising from any act or omission to act on the part of the Trust or it's agents, officers, directors, attorneys, employees and any predecessor-in-interest to the Note and Security Instrument, and which Borrower contends caused Borrower damage or injury, or which Borrower contends renders the Note or the Security Instrument void, voidable, or unenforceable.** This release extends to any claims arising from any judicial foreclosure proceedings or power of sale proceedings if any, conducted prior to the date of this Agreement. **Borrowers have and claim no defenses, counterclaims or rights of offset of any kind against the Trust, Washington Mutual or against collection of the Loan.**

RA at 138 (emphasis added).

In June of 2009 the Pitassis did fall into default following the 2008 Pitassi Loan Mod. RA at 83-84. On June 30, 2011, both of the Pitassis filed a Chapter 7 "No Asset" bankruptcy petition, and on October 17, 2011, received their Chapter 7 Discharges of their personal liability for the payment obligations under the Pitassi Mortgage Loan. Addendum ("Add.") at 1, 2; RA at 83-84, referencing DK 24.

On August 10, 2016, DBNT commenced a judicial foreclosure action to foreclose the Pitassi Mortgage in the Connecticut Superior Court in Stamford Connecticut, Case No. FST-CV16-6029484S. RA at 84, 144-153. As reflected on the docket, the Pitassis did not initially appear or defend in the judicial foreclosure action. RA at 84, 157-158. Following the entry of default, on December 1, 2017, DBNT filed a Motion for Judgment of Strict Foreclosure and Finding of Entitlement of Possession. RA at 84, 157-158.

On January 17, 2018, the Pitassis, who were represented by Paul S. Nakian Esq., filed an Answer and Special Defense arguing that the chain of Assignments of Mortgage into the Trust was invalid and that "the Assignment is fraudulent." RA at 217-219.

On January 22, 2018, the Pitassis, through Counsel, filed a Motion to Vacate and Open Judgment of Default ("Motion to Vacate"), and a Motion to Dismiss for Lack of Subject Matter Jurisdiction, to which DBNT objected, and the Ct. Court subsequently denied on June 8, 2018. RA at 84, 161-165. The arguments made in

support of the Motion to Dismiss for lack of Jurisdiction, though more detailed, were, in sum and substance, the same arguments made within Pitassi's Plan at issue in the instant case.[3] Notwithstanding the fact that the Pitassis both obtained discharges of their personal liability in their 2011 Chapter 7 Bankruptcy, Add. at 1, 2, the Pitassis' Motion to Dismiss advanced defenses to the foreclosure of the Pitassi Mortgage Loan, RA at 161-162, which were in direct contravention to their waiver of any defenses to the enforcement of the Loan as provided under the 2008 Pitassi Loan Mod. RA at 138. The essence of the Pitassis' defense to the Connecticut judicial foreclosure, which was filed late, was that the Plaintiff did not have standing because of a faulty assignment chain. RA at 217-219.

The Pitassi Mortgage Loan was securitized into the Series 2005-AR6 trust, and copies of the assignments of mortgage reflecting the proper transfer of record were filed with the Proof of Claim, yet Pitassi argued that Judicial Estoppel applied to bar the enforcement of the Pitassi Mortgage in the Connecticut Judicial

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[3] Tucked in Section 8.1 of the Plan, which is titled "Nonstandard plan Provisions," is Debtor's statement that with regard to both of the secured liens held by DBNT as Trustee for two different trusts, "Debtor has hired an expert witness (a forensic securities analyst) who has opined that the Bank has no legal claim or interest in either property. As such the Bank's claims will be denied, no money is owed to the bank for these properties, and the Bank lacks any mortgage interest in the properties. In addition, Debtor received a bankruptcy discharge on 10/17/2011 in case 11-2090958 which discharged her obligation on any such debt. Finally, on information and belief, the Bank does not hold the original notes. The Bank shall file in the appropriate registry of deeds discharges of their claims to any interest in mortgages and notes related to the properties." RA at 27.

Foreclosure in 2018 because of an unexplained "implicit waiver" and an alleged admission in a pleading in an unrelated case brought in Washington, DC. RA at 162-164. Pitassi argued that the Trustee of the WAMU Trust "cannot possibly be a holder of note in a loan that it never received." RA at 162-164. The pleading went on to baselessly argue that because of unspecified "fraud," the "Defendant asks this Court to take judicial notice of the widespread frauds undertaken by Deutsche Bank and the fact that it has paid millions of dollars to resolve government lawsuits and that there on-going United States fraud lawsuits against Deutsche Bank and/or its subsidiaries." RA at 162. The Connecticut Court rejected the Arguments that DBNT did not really own/hold the mortgage loan and entered Judgment in the bank's favor on January 22, 2018. RA at 164, 174.

On February 9, 2018, the Pitassis filed a Notice of Appeal of the Connecticut decision, however, that Appeal was dismissed on March 22, 2018. RA at 84, 178.

On August 13, 2018, the Judgment was granted and was certified on August 23, 2018 ("Judgment of Strict Foreclosure").[4] RA at 84, 172-174. In the Judgment,

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[4] The Debtor cites to the U.S. Supreme Court's decision in *Tyler v. Hennepin County*, 143 S.Ct. 1369 (2023), as "overturning strict foreclosure sales" Appellant's Br. at 3 n. 4. The citation attempts to advance the argument that all strict foreclosures are "overturned" by the decision in *Tyler*, however, that was not the Court's holding. *See id.* at 1378. In *Tyler*, the Supreme Court was faced with a state law that allowed the state to retain the surplus proceeds following a third-party tax sale. *Id.* at 1376. The Court held that the law was a taking and that a "taxpayer is entitled to the surplus in excess of the debt owed." *Id.* Conversely, in

the Connecticut Court specifically found "the value of the property located 10 JACKSON STREET, Greenwich, CT 06807 to be $1,000,000.00 and the debt due to DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR WAMU MORTGAGE PASS THROUGH CERTIFICATES WAMU 2005-AR6 to be $1,285,222.51." RA at 84, 172.

On September 4, 2018, the Pitassis filed a second Notice of Appeal of the final August 13, 2018 Judgment, RA at 179-181, however, the Appeal was also dismissed by the Court by Order entered on May 1, 2019, which held "PURSUANT TO THE APPELLATE COURT ORDER OF APRIL 16, 2019, ORDERING THE DISMISSAL OF THE ABOVE-CAPTIONED APPEAL UNLESS THE BRIEF AND APPENDIX OF THE DEFENDANTS-APPELLANTS WERE FILED ON OR BEFORE APRIL 30, 2019, AND AS OF THIS DATE, SAID BRIEF AND APPENDIX HAVE NOT BEEN FILED, YOU ARE HEREBY ADVISED THAT THE APPEAL IS DISMISSED." RA at 182.

Following motion practice as reflected on the docket, the Court further issued Notices of Judgment which entered on August 1, 2022, and August 23, 2022. RA at 184-187.

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this case, the Connecticut Court specifically found that there is no equity in the 10 Jackson Street property. RA at 172.

On August 10, 2022, Kassiani Pitassi filed a second bankruptcy petition, in Maine, this time for relief under Chapter 13 of the United States Bankruptcy Code. RA at 1. On September 27, 2022, the Debtor filed her Plan, which incorrectly listed the prepetition arrears owed to DBNT as $0.00. RA at 27.

Pursuant to DBNT's filed Proof of Claim, the total lien on the Jackson Street Property as of August 10, 2022, was $1,476,626.24 and the total amount of arrears owed as of the petition date is $802,534.47, and the loan is due for the June 1, 2009 payment. RA at 276-278.

The Debtor's Plan acknowledges that the personal liability for the debt owed to DBNT was discharged in her 2011 bankruptcy filed at Docket 11-20958. RA at 27. When the Debtor filed for Chapter 7 bankruptcy protection in 2011, she swore under the pains and penalties of perjury that no claims existed, other than the lawsuit of *Kassi v. Chase Bank* and, based on that sworn statement, she subsequently received the benefit of relief in the form of a Chapter 7 discharge. RA at 345-347. The Debtor's filings in the Chapter 13 case acknowledge the non-payment of the Pitassi Mortgage, do not provide for future payments, and rely on baseless, already adjudicated, bare allegations in the non-standard provisions of 8.1 that she claims to have issues with the securitization that should prevent DBNT from enforcing its interest in the property and from being paid in her bankruptcy.

RA at 27. No Adversary Complaint was filed in the Chapter 13 case to challenge the Lien pursuant to Federal Rule of Bankruptcy Procedure 7001(2).

SUMMARY OF THE ARGUMENT

DBNT respectfully submits that the Bankruptcy Court's decision denying confirmation of the plan, reviewed by this Court *de novo,* was correctly decided as a matter of law for at least four reasons, any one of which would make a hearing or findings of fact unnecessary. The Plan was correctly denied confirmation on the basis of judicial estoppel, *res judicata*, the application of the *Rooker-Feldman* doctrine and the failure to raise the challenge to the standing to enforce the mortgages within an adversary proceeding. Even if none of the estopple grounds were applicable, the Bankruptcy Court properly rejected Pitassi's attempt to challenge the validity and enforceability of DBNT's Mortgage lien, not by filing an adversary proceeding as generally provided for in Section 7001(2) of the Bankruptcy Rules,[5] but rather, by mentioning what she claims to be a "securitization issue" in the Non-standard Provisions set forth in Section 8.1 of her Plan.

First, as the lower court correctly held, Pitassi is Judicially Estopped from challenging the validity or enforceability of both of the Pitassi Mortgage liens

[5] *See In re Morales,* 607 B.R. 16, 28 (D. Puerto Rico 2019)(rejecting challenge to the enforceability of a mortgage lien not advanced through an Adversary Proceeding); *see also In re Anthony,* 550 B.R. 577, 580 (2016).

based on her receipt of her Chapter 7 Discharge from personal liability in her 2011 Bankruptcy where she did not disclose her "standing defenses." Pitassi's argument to avoid her mortgage lien, of over 1.4 million dollars, in default since June 1, 2009, on investment property located in Connecticut, through which she continues to collect rents, should be rejected as a matter of law where, as here, it is inconsistent with the position she took in 2011 when the Pitassis petitioned for and obtained discharges of their personal liability for the debt secured by the Pitassi Mortgage in their Chapter 7 bankruptcy proceedings.

Second, the Bankruptcy Court correctly rejected the Debtor's Plan as a matter of law based on the *Rocker-Feldman Doctrine* where, as here, the Debtor raised the same challenges in the Connecticut Foreclosure, which were rejected by the Connecticut Superior Court.[6]

Third, Pitassi should be estopped as a matter of law from, in essence, attempting to attack the Connecticut Superior Court ruling rejecting the same challenge that she raised in this case, where, as here, as she did not perfect her appeal of the Connecticut decision.

Forth, as an independent additional legal basis to support Judge Cary's decision, Pitassi explicitly waived the defense she asserts in this case in 2008 when

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[6] *See Rook er v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

she obtained the Pitassi Loan Mod on the Jackson Street Property. RA at 83, 134-143.

Finally, Pitassi's Plan is not proposed in good faith. She came to the Federal Bankruptcy Court in Maine hoping to obtain yet another bite at the apple, thwart or delay the foreclosure of the mortgage lien in Connecticut and obtain the same relief in federal bankruptcy court that was already denied by the Connecticut state court, or at least delay the process while she continued to collect substantial rents, and did not even advance her challenge in a properly pled Adversary Proceeding. It is not good faith to tuck a challenge to your million plus-dollar mortgage, unpaid since 2009, for which you have no personal liability due to a discharge, into the Non-standard Provisions set forth in section 8.1 of one's bankruptcy plan.[7] Pitassi's attempt to prevent the foreclosure of her property in Connecticut by challenging DBNT's ability to enforce its lien by including the argument in the non-standard provisions of her plan rather than through a properly developed Adversary Complaint, alone, even if the lower court's decision is not upheld for all of the reasons above, supports this Court's affirmation of the Bankruptcy Court's rejection of the Plan.

[7] *See In re Morales,* 607 B.R. at 28; *In re Anthony,* 550 B.R. at 580.

ARGUMENT AND AUTHORITIES

A. Judicial Estoppel Precludes Pitassi's Challenge to the Enforcement of her Mortgage.

Justice Ginsburg outlined the well-settled principles of the doctrine of Judicial Estoppel in *New Hampshire v. Maine*:

> "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee,* 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich,* 530 U.S. 211, 227, n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000); see 18 Moore's Federal Practice § 134.30, p. 134–62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (hereinafter Wright) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").

532 U.S. 742, 749 (2001).

Justice Ginsburg emphasized that while Judicial Estoppel is not "reducible to any general formulation of principle," *Id.* at 750, *quoting Allen v. Zurich Ins. Co.,* 667 F.2d 1162, 1166 (4th Cir. 1982); *accord Lowery v. Stovall,* 92 F.3d 219, 223 (4th Cir. 1996); *Patriot Cinemas, Inc. v. General Cinemas Corp.,* 834 F.2d 208, 212 (1st Cir. 1987), three factors typically assist courts in analyzing whether

the doctrine will apply to bar the present claim or defense. "First, a party's later position must be 'clearly inconsistent' with its earlier position." *New Hampshire*, 532 U.S. at 750, *citing United States v. Hook,* 195 F.3d 299, 306 (7th Cir. 1999); *In re Coastal Plains, Inc.,* 179 F.3d 197, 206 (5th Cir. 1999); *Hossaini v. Western Mo. Medical Center,* 140 F.3d 1140, 1143 (8th Cir. 1998); *Maharaj v. Bankamerica Corp.,* 128 F.3d 94, 98 (2nd Cir. 1997). "Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" *New Hampshire*, 532 U.S. at 750, *quoting Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982). Third, "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751, *citing Davis,* 156 U.S. at 689; *Philadelphia, W. & B.R. Co. v. Howard,* 54 U.S. 307, 13 How. 307, 335–337 (1851); *Scarano v. Central R. Co. of N.J.,* 203 F.2d 510, 513 (3d Cir. 1953)(judicial estoppel forbids use of "intentional self-contradiction . . . as a means of obtaining unfair advantage").

All three of those prongs are clearly met here and no explanation has been offered, let alone the required "good explanation" pled in an Adversary Complaint. It is inconsistent to acknowledge standing to modify a mortgage, acknowledge

standing to obtain a discharge of personal liability for that same mortgage, and then deny standing to thwart the lender's enforcement of their lien. It is both misleading and a means of gaining an unfair advantage to admit standing when it benefits you, and later deny standing to enforce the Mortgage lien not only to delay foreclosure while reaping the benefits of the investment property after relieving oneself of the obligation of ownership, but to ultimately seek a complete windfall by depriving the creditor of their security for their 1.4 million dollar debt.

This Circuit has consistently applied the doctrine in circumstances similar to the instant case wherein the borrower lists and acknowledges the debt and the secured creditor's claim to the asset for purposes of obtaining the bankruptcy discharge, and later contests the creditor's efforts to enforce its lien. *See Ribadeneira v. New Balance Athletics, Inc*, 65 F.4th 1, 27 (2023); *Payless Wholesale Distributors v. Culver,* 989 F.2d 570, 571 (1st Cir. 1993); *Perry v. Blum*, 629 F.3d 1, 8 (2010); *see also Failla v. CitiBank, N.A.,* Case No. 15-15626 (11th Cir. 2016). In *Payless*, the First Circuit recognized that:

> The basic principle of bankruptcy is to obtain a discharge from one's creditors in return for all one's assets, except those exempt, as a result of which creditors release their own claims and the bankrupt can start fresh. Assuming there is validity in Payless's present suit, it has a better plan. Conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively.

989 F.2d at 571.

In general, Judicial Estoppel "precludes a party from asserting a position in one legal proceeding which is contrary to a position [that] it has already asserted in another." *Patriot Cinemas*, 834 F.2d at 212. The doctrine "should be employed when a litigant is 'playing fast and loose with the courts,' and when 'intentional self-contradiction is being used as a means of obtaining unfair advantage.'" *Id.*, *quoting Scarano*, 203 F.2d at 513; *see, e.g., In re H.R.P. Auto Center, Inc.,* 130 B.R. 247, 253-54 (Bankr.N.D.Ohio 1991)(collecting cases and examples of the application of the doctrine in the context of bankruptcy).

Appling the doctrine in another bankruptcy matter wherein the debtors received the benefit of their discharge, the First Circuit elaborated on the applicability of the doctrine explaining that "[a] bankruptcy court 'accepts' a position taken in the form of omissions from bankruptcy schedules when it grants the debtor relief, such as discharge, on the basis of those filings." *Guay v. Burack*, 677 F.3d 10, 18 (1st Cir. 2012), *citing Cannon–Stokes v. Potter,* 453 F.3d 446, 447 (7th Cir. 2006)("[Debtor] had represented that she had no claim against [defendant] . . .; that representation had prevailed; she had obtained a valuable benefit in the discharge of her debt." (alteration in original)); *Payless Wholesale Distributors,* 989 F.2d at 571 ("[Debtor] having obtained judicial relief on the representation that no claims existed, cannot now resurrect them and obtain relief on the opposite basis.").

In February of 2023, the First Circuit considered the application of Judicial Estoppel in *Botelho v. Buscone*, 61 F.4th 10 (1st Cir. 2023), and clearly laid out the history and requisite analysis for applying the doctrine. In *Botelho*, this Circuit affirmed the bankruptcy court's decision to reserve the determination of whether Judicial Estoppel barred one neighbor's (Ann) claim against the other (Mary) following the failure of their joint yogurt shop venture. *Id.* at 23. Ann brought her claims in the context of a fully pled adversary complaint seeking a determination that, pursuant to 11 U.S.C. § 523(a)(2)(A), her claim against Mary was non-dischargeable for the purposes of Mary's bankruptcy based on what Ann claimed were Mary's false and fraudulent representations in the course of their business dealings. *Id.* at 17. Mary claimed that Ann was estopped from bringing the claims set forth in her adversary complaint as a result of her failure to identify said claims in the schedules that she filed in the bankruptcy proceedings wherein she obtained a Chapter 7 Discharge. *Id.* The *Botelho* Court, affirmed the BAP's opinion which largely affirmed the Bankruptcy Court's opinion in *In re Buscone*, 634 B.R. 152, holding that, under the unique facts of that case, the resolution of Ann's claim of fraud was properly reserved for trial because there were issues of fact that prevented the Court from resolving the claim as a matter of law. *Botelho,* 61 F.4th at 28. Contrary to Pitassi's analysis of this case, *Botelho* does not stand for the proposition that a hearing is always necessary prior to the application of the

doctrine. Following a thorough review of the law, the *Botelho* Court explained that by affirming the lower court's decision, it was not limiting the doctrine but simply acknowledging that the trial court has the discretion to reserve a determination on whether to apply the doctrine to bar the claim pending further factual development:

> In light of the doctrine's construction, we observe no abuse of discretion in the court's decision to deny Mary's request for judicial estoppel at summary judgment. We need not adopt any doctrinal exception to reason so; like the Supreme Court, we simply "do not question that it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.' " *New Hampshire*, 532 U.S. at 753, 121 S.Ct. 1808 (*quoting John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995)). Essentially, what the case before us underscores is the reality that factual circumstances drive the estoppel analysis, and that declining to apply judicial estoppel might be reasonable in those instances where further factual development will better inform the ultimate decision, and where it is not immediately clear that estoppel would advance the doctrine's primary purpose of safeguarding the integrity of the courts.

Id. at 25-26.

In *Botelho*, Mary raised Judicial Estoppel as a defense in response to an adversary complaint and, as a result, Mary had the burden of proof. *Id.* at 26 n. 21. In that respect, the Court held that:

> We see no abuse of discretion in the bankruptcy court's conclusion that Mary failed to meet that burden. In response to Ann's affidavit claiming inadvertence, Mary argued that the explanation was implausible and, in any event, irrelevant. Regarding implausibility, the court did not agree and pointed to the dearth of evidence presented by Mary refuting Ann's claim. Regarding the relevance of Ann's

> affidavit, the court reserved that question for further factual development at trial.

Id. at 26 n. 21.

In April of 2023, citing *Botelho*, the First Circuit demonstrated that a hearing is not required when it reversed the lower court judgment and remanded the matter back to the District Court based upon the application of judicial estoppel. *See Ribadeneira v. New Balance Athletics, Inc*, 65 F.4th 1, 27 (1st Cir. 2023). In *Ribadeneira*, the Court held:

> We are persuaded that equitable estoppel applies here to prevent him, when challenging the arbitrator's jurisdiction, from maintaining that the contract was never executed, in direct contradiction to his earlier stance. *See* 18B Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 4477 (3d ed. 1998) ("Absent any good explanation, a party shall not be allowed to gain an advantage by litigating on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."); *see generally In re Buscone*, 61 F.4th 10 (1st Cir. 2023). Ribadeneira is estopped from denying that the New Agreement's arbitration clause is enforceable, just as he is estopped from asserting his nonsignatory status to avoid the obligation to arbitrate under that clause.

Id.

Here, Pitassi has likewise obtained the benefit of her discharge and, as a result, has no personal liability for the debt, yet she still sought to challenge the Mortgage lien at issue in this matter after her initial failed attempt to advance the same challenges within the Connecticut state court foreclosure. The Bankruptcy Court properly applied the doctrine of Judicial Estoppel where, as here, the Court

did not need any further factual development in the context of these circumstances to determine that Pitassi's claims are barred. Accordingly, *de novo* review on the record supports affirming the Bankruptcy Court's application of the doctrine.

As a matter of law, Pitassi cannot, in the instant action, assert that DBNT should not be entitled to foreclose based on vague, previously rejected assertions that the assignment chain is somehow defective and that the loan was ineffectively securitized. Pitassi's argument is inconsistent with the representations asserted in the prior bankruptcy proceeding in which she was clearly successful in obtaining a discharge of her personal liability for the debt, and her continued resistance to the foreclosure of the mortgage lien is clearly disadvantageous to the creditor's enforcement of its *in rem* interest. *See Payless Wholesale Distributors*, 989 F.2d at 571. Not only has Pitassi thwarted DBNT's efforts to foreclose its mortgage lien by the filing of her bankruptcy petition wherein she advances the same claims that have already been rejected by the Connecticut Superior Court, albeit improperly buried in section 8.1 of her plan, but month after month as she continues to collect rental income generated by this high-value investment property and leaves the incidents of ownership to the lender to pick up. RA at 19, 411. Even if Pitassi loses this appeal, she has won in that she will have collected over a year of rental income while the appeal has been pending, and twenty-three (23) years of potential income since defaulting. The Bankruptcy Court was not required to hold an evidentiary

hearing in order to determine the merits of the Judicial Estoppel defense as it was established as a matter of law on the face of the record.

As the United States Supreme Court recognized, a "creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the mortgagor and the mortgagee." *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992). It is that bargained for *in rem* interest that DBNT was enforcing prior to the Order imposing a stay in the instant action. That is the bargained for interest Pitassi acknowledged even prior to her first bankruptcy in 2008 when she sought and obtained a modification of her loan. The facts clearly demonstrate that Pitassi has attempted to gain an unfair advantage by litigating on one theory when she sought to modify her loan and thereafter obtain a discharge in her Chapter 7 bankruptcy, and, in turn, advancing an inconsistent theory when attempting to avoid the mortgage lien in her Chapter 13 Bankruptcy.

B. *Res Judicata* precludes Pitassi's challenge to the enforcement of her Mortgage.

In this case, all of the requisite documentation was submitted to support the entry of judgment in the Connecticut foreclosure action prior to the filing of the instant bankruptcy. There are two entries on the Docket reflecting the entry of judgment: one on August 1, 2018, which was prior to the bankruptcy filing date of August 10, 2022, and one on August 23, 2022, which was after the bankruptcy was filed. RA at 184-187. Nevertheless, the substance of Pitassi's challenge to the

foreclosure was set forth in her January 2018 filings and was rejected by the Court prior to the initial entry of Judgment on August 10, 2022.[8] The merits of the foreclosure, including DBNT's standing to enforce the Mortgage lien and any arguments to the contrary, were or could have been raised in the state foreclosure case and, as a result, are now precluded. *See In re Colonial Mortg. Bankers Corp.*, 228 B.R. 516, 521 (B.A.P. 1st Cir. 1999); *see also In re Gauvreau*, 375 B.R. 14, 19 (Bankr.D.Me. 2007)("Preclusive effect will be given to pre-bankruptcy state court determinations where appropriate").

C. *Rooker-Feldman* precludes Pitassi's challenge to the enforcement of her Mortgage.

Pitassi cannot utilize the instant federal bankruptcy court proceedings to collaterally attack the Connecticut state court foreclosure judgment. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462; *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 125 S.Ct. 1517, 1522 (2005)(Justice Ginsburg clarified that the

[8] On January 22, 2018, the Pitassis, through Counsel, Paul S. Nakian Esq., filed a Motion to Vacate and Open Judgment of Default and a Motion to Dismiss due to Lack of Subject Matter Jurisdiction to which DBNT objected and which the Court subsequently denied on June 8, 2018. RA at 84, 161-165. The arguments made in support of the Motion to Dismiss for lack of Jurisdiction were in sum and substance, though more detailed, the same arguments made within the Plan in the instant case. The essence of the untimely defense to the Connecticut judicial foreclosure was that the Plaintiff did not have standing because of a faulty assignment chain. RA at 217-219; *but see* RA at 332-334 (Proof of Claim and supporting documents filed in this case).

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application of the doctrine is limited to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments"); *Lance v. Dennis* 546 U.S. 459, 126 S.Ct. 1198, 163 L.Ed.2d 1059 (2006).

> The *Rooker Feldman* doctrine is based upon two U.S. Supreme Court cases, *Rooker v. Fidelity Trust Co.,* and *District of Columbia Court of Appeals v. Feldman.* The Supreme Court clarified its scope recently in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.,* and in *Lance v. Dennis.* It means in a nutshell that a federal court below the United States Supreme Court does not have jurisdiction over a claim that seeks in essence to overturn a state court judgment. Instead, the proper avenue for such a challenge is to the state's highest court and from there to the United States Supreme Court.

Bradbury v. GMAC Mortgage, LLC, 780 F.Supp.2d 108, 112-113 (D.Me. 2011)(Judge Hornby explained the essential tenets of the doctrine and concluded that it did not destroy subject matter jurisdiction in that case because the argument was not that the Maine state courts committed any legal error.) Here, Pitassi is directly attacking the validity of the Connecticut Foreclosure Judgment claiming that DBNT lacks standing to enforce the Pitassi Mortgage lien because it somehow "vanished" during securitization. Accordingly, her attempt to collaterally attack the Connecticut Foreclosure Judgment is precluded by the *Rooker-Feldman* doctrine.

D. Failure to file an Adversary Proceeding precludes Pitassi's challenge to the enforcement of her Mortgage.

Finally, even if the lower court's decision is not upheld for all of the reasons above, Pitassi's failure to properly advance her challenge to the mortgage liens in the context of an Adversary Proceeding as required by the rules of procedure and well-settled case law supports the Court's rejection of the Plan. As the Court in *Morales* explained:

> . . . Bankruptcy Rule 7001(2) expressly requires the initiation of an adversary proceeding "to determine the validity, priority, or extent of a lien or other interest in property". *Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 93, Bankr. L. Rep. (CCH) P76,549, 33 Collier Bankr. Cas. 2d (MB) 1159 (1995). The Debtor did not file an adversary proceeding in the present case. . . If the Debtor's intention was to seek a determination to void the lien, she was procedurally required to file an adversary proceeding.

In re Morales at 28. It is well-settled that a mortgage lien survives a discharge:

> Fundamentally, a discharge merely releases the debtor from personal liability on the discharge[d] debt; when a creditor holds a mortgage lien or other interest to secure the debt, the creditor's rights in collateral, such as foreclosure rights, survive and pass through bankruptcy". *Bibolotti v. Am. Home Mortg. Servicing Inc.*, 2013 U.S. Dist. LEXIS 69242 at *22, 2013 WL 2147949 at *10 (E.D. Tex. 2013). *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S. Ct. 2150, 2153, 115 L. Ed. 2d 66, 74 (1991). ("[T]he Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy.")

In re Morales at 28-29. Equally as well-settled is what is required to challenge a mortgage lien:

> To extinguish or modify a lien during a bankruptcy process, some affirmative step must be taken toward that end. *Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 92-93 (4th Cir. 1995), referencing *Lee Servicing Co. v. Wolf (In re Wolf)*, 162 Bankr. 98, 107 n.14 (Bankr. D.N.J. 1993); *In re Glow*, 111 Bankr. 209, 221 (Bankr. N.D. Ind. 1990). "Unless the debtor takes appropriate affirmative action to avoid a security interest in property of the estate, that property will remain subject to the security interest following confirmation." *Id.*, citing *In re Honaker*, 4 Bankr. 415, 417 (Bankr. E.D. Mich. 1980).

In re Morales at 29; *see also In re Anthony*, 550 B.R. 577, 580 (2016)(In distinguishing between what is properly challenged as a contested matter and what must be challenged in an Adversary Proceeding the Court explained, ". . . when such objections challenge 'the validity, priority, or extent of a lien,' the objecting party must file an adversary proceeding. Fed.R.Bankr.P. 3007(b); 7001(2).")

In the face of this well-settled law, Pitassi's Plan is not proposed in good faith. She came to the Federal Bankruptcy Court in Maine hoping to obtain the same relief in federal bankruptcy court that was already denied by the Connecticut state court, or at least delay the process while she continued to collect substantial rents, and did not even advance her challenge in a properly pled Adversary proceeding. It is not good faith to advance a challenge to your million plus-dollar mortgage, unpaid since 2009, for which you have no personal liability due to a discharge, in the Non-standard Provisions set forth in section 8.1 claiming as a

basis for your vague challenge that you have "hired an expert witness (a forensic securities analyst)." RA at 28. Pitassi's attempt to prevent the foreclosure of her property in Connecticut by challenging DBNT's ability to enforce its lien by including the vague, unsupported, previously rejected and previously omitted argument in the non-standard provisions of her plan, rather than through a properly developed Adversary Complaint, alone, even if the lower court's decision is not upheld for all of the reasons above, supports this Court's affirmation of the Bankruptcy Court's rejection of the Plan.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, supported by undisputed references to the relevant state and federal dockets, pleadings, and case law, the plan was not confirmable, no evidentiary hearing was required, and the issues raised by the borrower in defense of her failure to provide for the DBNT Mortgage liens were properly rejected by the Bankruptcy Court below as a matter of law.

Respectfully Submitted,
Deutsche Bank National Trust Company,
as trustee, for WAMU Mortgage Pass-Through
Certificates-WAMU-2005-AR6
By its attorney,

Dated: July 12, 2023

/s/ Reneau J. Longoria

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Undersigned counsel certifies that this Brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B), the word limit of Fed. R. App. P. 5(c)(1) because, excluding the parts of the document exempted by the Fed. R. App. P. 32(f) and BRP 8015: this document contains _____ words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because: this document has been prepared in a proportionally spaced typeface Times New Roman, 14 point using Microsoft Word 2013.

/s/ Reneau J. Longoria

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CERTIFICATE OF SERVICE

I, Reneau J. Longoria, hereby certify that true and correct copies of the above have been served by either electronic notification or by placing same in the United States Mail, postage prepaid, on July 12, 2023, to all of the individuals on the following service list.

/s/ Reneau J. Longoria

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SERVICE LIST

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Lewiston, ME 04240
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Debtor
Kassiani Demetriadi Pitassi
129 Bruce Hill Road
Cumberland, ME 04021

ADDENDUM

ADDENDUM
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B18 (Official Form 18) (12/07)

UNITED STATES BANKRUPTCY COURT
District of Maine

Case No. 11-20958

Chapter 7

In re: Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address):

Frank Pitassi
30 Rosa Way
Cumberland Center, ME 04021

Kassiani D. Pitassi
30 Rosa Way
Cumberland Center, ME 04021

Social Security No.:

xxx-xx-4557

xxx-xx-1849

Employer's Tax I.D. No.:

DISCHARGE OF DEBTOR

It appearing that the debtor is entitled to a discharge,

IT IS ORDERED:

The debtor is granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

BY THE COURT

Dated: 10/17/11

James B. Haines Jr.
United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.

EXPLANATION OF BANKRUPTCY DISCHARGE IN A CHAPTER 7 CASE

This court order grants a discharge to the person named as the debtor. It is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors.

Collection of Discharged Debts Prohibited

The discharge prohibits any attempt to collect from the debtor a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtor. *[In a case involving community property:* There are also special rules that protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.] A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case. Also, a debtor may voluntarily pay any debt that has been discharged.

Debts That are Discharged

The chapter 7 discharge order eliminates a debtor's legal obligation to pay a debt that is discharged. Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed. (If this case was begun under a different chapter of the Bankruptcy Code and converted to chapter 7, the discharge applies to debts owed when the bankruptcy case was converted.)

Debts That are Not Discharged.

Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:

a. Debts for most taxes;

b. Debts incurred to pay nondischargeable taxes (applies to cases filed on or after 10/17/2005);

c. Debts that are domestic support obligations;

d. Debts for most student loans;

e. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;

f. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle, vessel, or aircraft while intoxicated;

g. Some debts which were not properly listed by the debtor;

h. Debts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged;

i. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in compliance with the Bankruptcy Code requirements for reaffirmation of debts.

j. Debts owed to certain pension, profit sharing, stock bonus, other retirement plans, or to the Thrift Savings Plan for federal employees for certain types of loans from these plans (applies to cases files on or after 10/17/2005).

This information is only a general summary of the bankruptcy discharge. There are exceptions to these general rules. Because the law is complicated, you may want to consult an attorney to determine the exact effect of the discharge in this case.

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NO. 22-42

Bankruptcy Case No. 22-20126-PGC

In re: KASSIANI DEMETRIADI PITASSI, a/k/a Kassi D. Pitassi,
d/b/a Lucia's Greetings, LLC
Debtor

KASSIANI DEMETRIADI PITASSI
Debtor - Appellant

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Indenture Trustee for Mortgage IT Trust 2005-2; DEUTSCHE BANK NATIONAL TRUST COMPANY, as trustee, for WAMU Mortgage Pass-Through Certificates-WAMU-2005-AR6
Creditors - Appellees

ANDREW M. DUDLEY, Chapter 13 Trustee
Trustee – Appellee

Appeal from the United States Bankruptcy Court for the District of Maine
(Peter G. Cary, U.S. Bankruptcy Judge)

STATEMENT REGARDING RELATED CASES
1st Cir. BAP L.R. 8010-1(b)(3)

The undersigned certifies that the undersigned knows of no related cases or appeals as that term is defined in 1st Cir. BAP L.R. 8010-1(b)(3)(A).

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Dated: July 12, 2023

UNITED STATES BANKRUPTCY APPELLATE PANEL
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Trustee – Appellee

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STATEMENT REGARDING INTERESTED PARTIES
1st Cir. BAP L.R. 8010-1(b)(4)

The undersigned certifies that the undersigned knows of no interested party as that term is defined in 1st Cir. BAP L.R. 8010-1(b)(4)(A).

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Dated: July 12, 2023