Begin forwarded message:

From: Erika Pomerantz
Date: March 24, 2011 2:05:25 PM EDT
To:
Cc:
Subject: True FMV Info. for the P&A

Craig,

The purpose of this email is to provide authoritative support behind my prior email communication you have already received regarding the current Purchase and Assumption Agreement. Based upon this more authoritative support, any changes would have to be made both retrospectively (amend previous), and prospectively (amend current and future) in order to preserve public trust.

You had asked for a study comparing the appraised value, sales price, and assessed value but that would be irrelevant information as the assessed value is based upon actual comparable market / arms-length sales transactions as I had communicated to you after meeting with you briefly.

The bottom line is that the current real estate market is in a recession, and appraisals do not report a true sales price / fair market value in an arms-length transaction at this time, and this is very unfortunate. The country is currently a buyer's market, rather than a normal seller's market. People actually lose value on their property in the current market, and are lucky if they can even sell their property at all.

Throughout the entire country, property owners have a right to know that their taxable assessment of FMV is a *true* assessment as they are being levied a tax rate on this amount that they are obligated to pay. Please see the state jurisdiction chart attached that shows how all property owners, in all states, have the right to protest their assessed value if they don't agree. However, note that people are only against their tax assessment in a recession as it is supposed to be lower than FMV sale price in a healthy real estate market.

Settlement with the Assuming Institution:

The FDIC and the assuming institution handle most of their post-closing activities through the "settlement" process. Adjustments to the closing books may be made between the date of the closing of the institution and the "settlement date." The settlement date may be from 180 days to 360 days after the bank or thrift closing, depending on the failed institution's size. Adjustments reflect (1) the exercise of options by the acquirer, (2) either any repurchase of assets by the receiver or any "put back" of assets to the receiver by the assuming institution, and ***(3) the valuation of assets sold to the acquirer at <u>market prices</u>***, (75 (The FDIC's Role as Receiver).

True Market price / FMV is the estimated selling price that a willing buyer would pay to a willing seller in a transaction where neither party is under duress—this is called an arm's length transaction. Please note that in normal business contracts a court can end a contract if a party to a transaction can prove such duress. As opposed to unrealistic appraisal values in a continuously declining real estate market, the tax assessment is specifically distinguished according to property type, and valued according to actual, comparable, arms-length sales.

- Sophisticated county assessment methods have greatly improved the accuracy any fairness of tax administration. All but five states require every assessing unit to maintain the same assessment level and definition of value—that is, they require uniformity of assessment. **The assessor's primary task is to provide estimates of the market value—<u>Comparable Sales Approach / Market data approach</u>**—comparing property being appraised with similar properties that have been recently sold. The assessment process has been revolutionized with the advent and application of computers; Computer assisted mass appraisal (CAMA) models analyze extensive real estate market data and/or housing characteristic and sales data to estimate market values of properties not recently sold. The International Association of Assessing Officers argued that mass appraisal techniques and computerization now make annual revaluations and full-market assessments feasible, (1989 Supreme Court - *Allegheny Pittsburgh Coal Co.)*

- **The ultimate goal of a county assessor during valuation is to provide the most accurate estimate of what an individual property would sell for in the open market at a given time.** Standard procedures result in less variation in property assessments, thereby minimizing some of the confusion on the part of both the practitioners and the general public; The exact provisions of a state's assessment law, county assessors employ three common approaches to valuation of property that are endorsed by the American Institute of Real Estate Appraisers, (Each approach to value produces approximately the same estimate):

Cost approach—the current cost of reproducing a property minus depreciation from deterioration or functional and economic obsolescence.

Income approach—the value that the property's potential net earning power will support, based on capitalization of net income.

Comparable Sales Approach / Market Data approach —the value indicated by recent sales of comparable properties in the marketplace.

> The Sales-comparison approach is the most reliable in the appraisal because the best indicator of value is an actual sale of property on the date being valued. The next best indicator is a sale of property reasonably close to the valuation date. Absent a recent sale of the property being valued, the next best indicator is comparable sales.

- **International Accounting Standard 16**: *Determination of Fair Value*—The basis of revaluation of *fair value* of the asset at the date of revaluation, or the amount at which an asset could be exchanged between knowledgeable, willing parties in an arm's-length transaction.

- Courts have required greater conformity to statutory and constitutional requirements of accuracy and uniformity. Please see multistate chart below and court cases that follow:

CCH Multistate Chart

Legal Basis for Assessment

Assessment/Valuation Basis

Jurisdiction	Assessment/Valuation Basis	Comment	CCH ¶
Alabama	Specified percentages of fair and reasonable market value.		20-610, 20-700
Alaska	Full and true value.		20-610
Arizona	Specified percentages of either full cash value or limited property value.		20-610
Arkansas	No more than 20% of true and full market or actual value.		20-610
California	Full cash value.		20-610
Colorado	29% of actual value of all nonresidential property.		20-700
Connecticut	70% of the true and actual value.		20-610
Delaware	True value in money.		20-610
District of Columbia	Estimated market value for real property.		20-610

Florida	Just value.	FL Regulations: **12D-1.002(2)** "Just Value"—"Just Valuation", "Actual Value" and "Value"—Means the price at which a property, if offered for sale in the open market, with a reasonable time for the seller to find a purchaser, would transfer for cash or its equivalent, under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other. **12D-2.006(1)(b)** In application of the unit rule method of valuation, the Department shall consider the value indications obtained from three approaches to the system value, i.e., (1) cost approach, (2) market or stock and debt approach, (3) capitalized earnings or income approach, assuming there is enough conclusive evidence within the respective approach to render it a valid indicator of value. If the Department feels that there is not enough data available to render one or more of the approaches reliable, the Department shall base its decision on that information which it determines is conclusive enough to indicate just value.	20-610
Georgia	Specified percentages (generally 40%) of fair market value.	All taxable property should be assessed at the value that would be realized from a cash sale of the property (see ¶20-615 Valuation Methods in General). The assessed value is computed as a percentage of the fair market value (see ¶20-610 Valuation Procedures) and the appraisal is equalized with other properties as a result of an appropriate procedural manual used by county property appraisal staffs to appraise tangible real property.	20-610
Hawaii	Fair market value.		20-610
Idaho	Full market value.		20-610
Illinois	33 1/3% of fair cash value.	Special percentages apply within Cook County.	20-610
Indiana	True tax value.		20-645

Iowa	100% of actual value except for certain classes of property.		20-605, 20-610, 20-700
Kansas	Fair market value in money.		20-610
Kentucky	Fair cash value.		20-610
Louisiana	Specified percentages of fair market value, or for certain property types, use value.		20-610
Maine	Just value, which is 100% of current market value.		20-605, 20-610, 20-700
Maryland	Specified percentages of full cash value.		20-610
Massachusetts	Specified percentages of fair cash value.		20-610
Michigan	50% of true cash value.		20-610, 20-700
Minnesota	Specified percentages of market value.		20-610
Mississippi	Specified percentages of true value.		20-610
Missouri	Specified percentages of true value in money.		20-610
Montana	100% of market value.		20-610
Nebraska	Actual value for real property, net book value for personal property.		20-605, 20-610, 20-700
Nevada	35% of taxable value, generally		20-610
New Hampshire	Market value.		20-610
New Jersey	Fair market value.		20-610
New Mexico	One-third of market value.		20-615
New York	Value of property in its current use.		20-610

North Carolina	True value in money.		20-610
North Dakota	Specified percentages of true and full value.		20-605, 20-610, 20-700
Ohio	Specified percentages of true value in money.		20-610
Oklahoma	Specified percentages of fair cash value.		20-610
Oregon	100% of real market value.		20-605, 20-610, 20-700
Pennsylvania	Actual value.		20-610
Rhode Island	Full and fair cash value.		20-610
South Carolina	Specified percentages of true value in money.		20-610
South Dakota	True and full value in money.		20-610
Tennessee	Specified percentages of appraised or market value.		20-605
Texas	Market value.		20-610
Utah	Specified percentages of fair market value.		20-610
Vermont	1% of listed value.		20-610
Virginia	Fair market value.		20-610
Washington	100% of true and fair value in money.		20-615
West Virginia	True and actual value.	Effective for assessment years beginning on or after July 1, 2011, all property is assessed at 60% of its true and actual value.	20-610
Wisconsin	Full cash value.		20-610
Wyoming	Specified percentages of fair market value.		20-610

U.S. Court of Appeals, FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL) §13.3 (2009) ("Fair market value means the amount a willing buyer would have paid a willing seller in an arms-length transaction, when both parties are fully informed about all of the advantages and disadvantages of the property, and neither is acting under any compulsion to buy or sell.").

A jury had determined in the case labeled below, and attached, that a parcel of property held in a partnership should be valued at the actual price for which the property was eventually sold as actual sales are always arms-length and true fair market value unless the parties of the transaction are related:

USTC Cases, Michael R. Levy, as Independent Executor of the Estate

of Meyer Levy, Deceased v. United States of America., U.S. Court of

Appeals, Fifth Circuit, 2010-2 U.S.T.C. ¶60,608, (Dec. 1, 2010)

The FDIC is responsible for implementing a number of initiatives under the Dodd-Frank Wall Street Reform and Consumer Protection Act. One section of the Act that authorizes or requires FDIC action (per publication on the FDIC public website)—Please see Section 209 as not having a fair market / arm's length transaction, in turn resulting in "duress" goes against this new law:

SEC. 209. RULEMAKING; NON-CONFLICTING LAW.

The Corporation shall, in consultation with the Council, prescribe such rules or regulations as the Corporation considers necessary or appropriate to implement this title [Title II, Orderly Liquidations], including rules and regulations with respect to the rights, interests, and priorities of creditors, counterparties, security entitlement holders, or other persons with respect to any covered financial company or any assets or other property of or held by such covered financial company, ***and address the potential for conflicts of interest between or among individual receiverships established under this title or under the Federal Deposit Insurance Act. To the extent possible, the Corporation shall seek to harmonize applicable rules and regulations promulgated under this section with the insolvency laws that would otherwise apply to a covered financial company.***

The following California Jurisdiction case is something that I just found while researching issue, and I regret that it is as negative as the public duress in the fair market value P&A issue I am addressing:

State Tax Reporter: California, In re: County of Orange, Debtor. Federal Deposit Insurance Corporation v. County of Orange., U.S. Court of Appeals, Ninth Circuit, ¶403-184, (Aug. 28, 2001)

The FDIC law allowing exemption from property taxation, unless a lien is placed on Receivership owned property—causes state budget demise as Congress impacted the local governments as the FDIC is exempt unless a lien exists. This needs to be communicated as well. The California jurisdiction is against our regulation, and this Orange County ruling was in favor of the AI in the attached case above.

Please see attached current US Tax Court case judgment was in favor of an Assuming Institution *regarding equity and fairness of true fair market value in a current arms-length transaction:*

USTC Cases, Harris N.A., f/k/a Harris Trust & Savings Bank, Plaintiff

v. United States of America, Edward A. Scott, III, and Lauri E. Scott,

Defendants., U.S. District Court, N.D. Illinois, 2011-1 U.S.T.C. ¶50,270,

(Mar. 4, 2011)

From the case noted above:

The United States argues that, according to Zillow.com, a site featuring real estate listings and home value information, the fair market value of the property is $250,500, but "Harris N.A. has no incentive to sell the property for any more than the balance of its mortgage, $104,1644.36." (*Id*.) As Plaintiff observes, the United States can protect itself against the potential losses resulting from a "fire sale": should the United States believe the home will sell for less at a judicial sale than it is worth, the United States will be entitled to bid on the home and resell it to "extract the alleged equity from the property, just as it would from a private sale." (Reply at 5-6.) Further, Plaintiff notes, the only support the United States cites for its contention that a private sale would be more profitable is a "casual reference to Zillow.com." (*Id.*

at 6.) In any event, the private sale proposed by the United States would be impractical. ***The court agrees with Plaintiff that "if a private sale were to be authorized, Harris would be required to wait indefinitely for the property to be sold. In the present real estate market, this could take months, or even years." (Id. at 4.)***

The court granted the Plaintiff's (AI) motion for summary judgment against the United States [25] and grants Plaintiff's motion of foreclosure [25]. The court also grants Plaintiff's motion to appoint a selling officer [29]. Plaintiff is invited to submit an appropriate foreclosure judgment order within 14 days.

All contracts, including those that are specialized, must be a *true* fair market arms-length transaction both in substance and in form:

2010-2 U.S.T.C. ¶50,733, (Nov. 16, 2010)

USTC Cases, Sesco Enterprises, LLC, By and through Michael

Schubiger, its Tax Matters Partner Petitioner v. United States of

America, Respondent., U.S. District Court, D. New Jersey,

2010-2 U.S.T.C. ¶50,733, (Nov. 16, 2010)

Congress, in section 1256 of the Internal Revenue Code, 26 U.S.C. §1256, created a statutory regime for the tax treatment of futures contracts. Under the statute, a " section 1256 contract" is deemed sold for its fair market value at the end of each year (a process called "marking to market"). 26 U.S.C. §1256(a). Any gains or losses realized are calculated as 40% short-term capital gain or loss and 60% long-term capital gain or loss. *Id*. In order for Petitioner's contracts to qualify for this favorable "60/40" treatment, the contracts must have been traded on a "qualified board or exchange" ("QBE"). 1 Section 1256(g)(7) defines QBEs in three

ways: (A) a national securities exchange registered with the Securities and Exchange Commission, (B) a domestic board of trade designated as a contract market by the Commodity Futures Trading Commission ("CFTC"), or (C) "any other exchange, board of trade, or other market which the Secretary [of the IRS] determines has rules adequate to carry out the purposes of this section." 26 U.S.C. §1256(g)(7).

I regret that our organizational policy of the past still effects today's economy:

<u>2011-1 U.S.T.C. ¶50,254, (Mar. 3, 2011)</u>

USTC Cases, Washington Mutual Inc., as successor in interest to H.F.

Ahmanson & Co. and Subsidiaries, Plaintiff-Appellant v. United States

of America, Defendant-Appellee., U.S. Court of Appeals, Ninth Circuit,

2011-1 U.S.T.C. ¶50,254, (Mar. 3, 2011)

From *Concurring Opinion*

I am not satisfied that Washington Mutual, Inc. ("WaMu") can establish a cost basis in the rights that the government gave Home Savings of America ("Home Savings") when Home Savings took over other savings and loan institutions pursuant to a tax-free "G" reorganization. However, I concur in the result on a different ground — *those rights have a fair market value basis.*

However, the government asserts three reasons that WaMu is in error. I reject those reasons.

Thus, WaMu has a *fair market value basis* in the Rights.

Home Savings greatly benefitted the government at a time of great need. When Home Savings agreed to engage in the mergers in question, it was given the Rights as part of the inducement to do so. The Rights were no mere lagniappe; they had substantial value. Whether one accepts the analysis of the majority or mine, the result is that Home Savings did have a basis in them.

.

Information from earlier Savings and Loan Crisis was involved in the opinion above and is included in the US Tax Court case document attached. According to this US Tax Court

case law, the government has been found in breach of contracts it had created from later developments during the Savings and Loan Crisis. Below proves that the FDIC as a Fiduciary must make certain that all contractual agreements are in accordance with their own regulations:

Three thrift institutions created by way of supervisory mergers sued for damages on both contractual and constitutional theories. *Id.* at 858. They argued that the Bank Board and FLSIC had promised them that the supervisory goodwill created in their merger transactions could be counted toward regulatory capital reserve requirements. *Id*. After reviewing the transactions, the Court agreed with the lower courts that "***the realities of the transaction favored reading those documents as contractual commitments, not mere statements of policy*** … ." *Id*. At 863. The Court therefore had "no reason to question the Court of Appeals's conclusion that the government had an express contractual obligation to permit [the plaintiff thrifts] to count supervisory goodwill generated as a result of [their supervisory] merger[s] … as a capital asset for regulatory capital purposes." *Id*. at 864 (internal quotation marks omitted). The Court also "accept[ed] the Federal Circuit's conclusion that the Government breached these contracts when, pursuant to the new regulatory capital requirements imposed by FIRREA, 12 U.S.C. §1464(t), the federal regulatory agencies limited the use of supervisory goodwill and capital credits" as acceptable regulatory capital. *Id*. at 870. The Court rejected all special defenses advanced by the Government in its effort to prevent enforcement of the contracts at issue, *see id*. at 860, and affirmed the Federal Circuit's ruling that the **United States was liable to the thrifts for breach of contract. *Id*. at 910.**

March 18, 2011 - OIG Email Correspondence sent regarding this P&A issue:

According to the law, I believe that the FDIC as a Receiver can only receive funds based on true FMV and that is why the required documentation for Settlement Account Transactions (SATFs) include both of these copies for Assuming Bank purchases of failed bank premises and FF&E:

- Copy of page from Appraisal indicating FMV.
- Copy of the Appraisal Review summary indicating FMV.

The obvious reasoning for this is for two independent opinions, however these always match as the two professionals are always affiliated through a sub-contract relationship. From one example, FUND# 10292 - The Peoples Bank, Allstate RC conducted the Appraisal Review and an affiliated Allstate professional presented the regular Appraisal. The attached invoice from FUND# 10292 - The Peoples Bank is both from the Allstate professional who completed the Appraisal Review and the Allstate affiliated company professional who also completed the regular Appraisal.

<<10292 RE Invoice all.pdf>> (This invoice contains PII and is located on Settlement SharePoint website and on my FDIC laptop in the Jacksonville office - it shows how both appraisers, supposed to be independent, were in-fact billed together).

This duplicate supporting documentation, Appraisal Review & Appraisal, clearly serves no purpose and is "duplicate information."--Not a true matching FMV. Further, in the current real estate market it is current practice for professional CPAs, Lawyers, and licensed property Appraisers - MAIs to calculate fair market value assessed the same as the taxpayers are fairly assessed. All counties provide fair market assessments of property online as this is public information.

For this reason, many Assuming Institutions are against this part of the Purchase and Assumption Agreement and even spend additional funds for an outside third party appraiser, however it is common business practice for MAIs to always mutually agree with each other, and the AI wastes these additional payments as they always get the identical appraisal valuation of real property.

The FDIC benefits more than an Assuming Bank by using a true fair market value as the Receiver's losses are greater, and I believe they are in-fact over-stated as the FDIC "auctions off" property not assumed by acquiring banks which is not being sold at an appraised value. The "*duress from FDIC"* stated by an AI in this Official Notice received by the DRR Settlement Department regarding the purchase of premises goes against current professional practice, including the banking industry, as appraisals do not represent true fair market value within the depressed real estate market. In-fact the value of real property is declining more each year as there are declining real estate sales in the current market.

(Please see attached "P&A Issue" as this official notice does not contain PII).

In-fact, some property taxpayers object to their county FMV assessment that is on their tax bill. I have prior experience witnessing county valuation protest hearings by taxpayers in the jurisdiction attached. I also have experience putting evidence together needed for a successful reduction in FMV in the current depressed market. All county jurisdictions have the identical requirements for fair market valuation. Please note that current CPAs and lawyers receive income as a percentage of successful tax savings from winning a successful protest:

(Please see attached information labeled "Petitions to the Value Adjustment Board," of the Broward County Florida jurisdiction). Please note that taxpayers have the right to these FMV protests in all county jurisdictions, in every state.

One true purpose of the FDIC is to prevent a Great Depression from ever occurring again, and I have the duty as a professional to communicate my knowledge from prior experience as I truly care about the FDIC fiduciary capacity.

P&A agreements between the FDIC as a Receiver, like all effective business contracts that exist, must be a fair market / arms-length transaction.

Sincerely,
Erika

From: Pomerantz, Erika F.
Sent: Thursday, March 10, 2011 10:19 AM
To: Diaz, Mona
Cc: 'Black, Steve W.'; Greeley, Michael J.; Butt, Dan D.; Prusch, John F.
Subject: P & A Issue

Mona,

Here is another example of an AI with the exact Appraisal issue.

The real estate market is down and not normal. Therefore, no appraisal is needed.

Additionally, tangible property should never be appraised as it is depreciable. Conversely, real property is appreciable property--however in a bad market no appraisal is needed.

The FMV is only fair in a bad real estate market using the county property assessment of FMV on tax bills.

Respectfully,
Erika

(The attachment to this email is labeled "AI Official Notification," and is attached again in this email as there is no PII contained).

3 attachments — Download all attachments

P & A Issue.pdf
74K View Download

PETITIONS TO THE VALUE ADJUSTMENT BOARD.pdf
28K View Download

AI Official Notification.pdf
31K View Download

Additional Email Correspondence Sent Regarding this P&A issue:

Please see attached notifications. The first AI Official Settlement notification attached includes the words "only under duress of the FDIC."

One fiduciary role by the FDIC is to facilitate the purchase of a failed bank as we take the majority (over half) of the losses.

I had completed a real property tax research project during my first full-time CPA firm job after my undergrad entirely by myself (while obtaining my Masters degree in accounting). It included being witness to several property tax petition hearings in the Broward County Tax Assessor's Office (South Florida County Jurisdiction)….and I am a subject-matter expert on this as I worked on this tax research project during the decline in real estate market back in the tax year 2007 for 5 months. (***took effect in the year 2008--when the reality of the market downturn took actual tax effect*****).**

Please let me know if you have any questions…I used to put together evidence for a successful reduction in FMV on clients' Property Tax bills. Lawyers and CPAs can represent a client, and the judge is a licensed property appraiser (MAI).

Property tax law is in conformity with all state county jurisdictions, and I believe the FDIC should save appraisal funds in order to fulfill its Fiduciary role as a Receiver.

Here is another example of an AI with the exact Appraisal issue.

The real estate market is down and not normal. Therefore, no appraisal is needed.

Additionally, tangible property should never be appraised as it is depreciable. Conversely, real property is appreciable property--however in a bad market no appraisal is needed.

The FMV is only fair in a bad market using the county property assessment of FMV on the tax bills.

Respectfully,
Erika

---------- Forwarded message ----------
From: **Erika Pomerantz**
Date: Tue, Mar 22, 2011 at 1:17 PM
Subject: True FMV Info.
To: '[redacted]

Craig,

Regarding the FMV information I discussed with you earlier today:

All counties assess FMV based on actual sale prices that occur during a tax year. If they're no comparable sales, they take actual fair market sales from a prior tax year.

The actual sale prices are public information, and if there are improvements - the sales prices of improvements are also recorded as they are a part of the fair market value sales price.

I hope that I am given an opportunity to show you an actual example, however like I said the FMV county assessment is based on an average of comparable sales prices. This is fair as property owners are taxed on without dispute normally. Although in this depressed real estate market dispute exists, but the counties are almost always right due to advanced software.

Erika

USTC Cases, Harris N.A., f/k/a Harris Trust & Savings Bank, Plaintiff v. United States of America, Edward A. Scott, III, and Lauri E. Scott, Defendants., U.S. District Court, N.D. Illinois, 2011-1 U.S.T.C. ¶50,270, (Mar. 4, 2011)

Click to open document in a browser

Harris N.A., f/k/a Harris Trust & Savings Bank, Plaintiff v. United States of America, Edward A. Scott, III, and Lauri E. Scott, Defendants.

U.S. District Court, N.D. Illinois; Eastern Div., 10 C 2352, March 4, 2011.

[Code Secs. 6323 and 7403]

Tax liability: Tax liens: Mortgage: Foreclosure: Real property: Judicial sale: Court-appointed receiver: Attorney fees: Priority of liens.–
A financial institution was entitled to foreclose its mortgage lien on a couple's real property to which federal tax liens attached and to a judicial sale of that property. The government was not entitled to a court-appointed receiver to sell the property because a private sale would result in delay and would be impractical. Moreover, the government could protect itself against any potential losses resulting from a judicial sale by bidding on the property and reselling it to extract any equity. Finally, the financial institution's attorney's fees and other expenses associated with the foreclosure action were reasonable and took priority over the subordinate federal tax liens. The additional attorney's fees and expenses were incurred because of the delay caused by the government's conduct. **Back references: ¶38,160.625 and ¶41,653.14.**

MEMORANDUM OPINION AND ORDER

PALLMEYER, District Judge: Harris N.A. seeks to foreclose on a Barrington, Illinois home mortgaged by Edward and Lauri Scott, who it alleges have been in default since October 2009, and asks the court to order a judicial sale. The United States, which has a tax lien against the property, argues that a judge in a related proceeding within this district has prior exclusive jurisdiction, and that the property should be sold through a receiver. The court grants summary judgment to Harris N.A. and will enter a judgment of foreclosure to Harris N.A.

BACKGROUND

Harris N.A. ("Plaintiff") brought this lawsuit pursuant to the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1101 *et seq*, in the Circuit Court of Cook County, on March 3, 2010, seeking to foreclose on property at 116 Coolidge Avenue in Barrington, Illinois. (Compl. at 2.) Edward A. Scott III and Lauri E. Scott ("Defendants"), the owners, mortgaged the property in January 1994 for $140,850. (*Id.*) They defaulted on the mortgage on October 1, 2009, and still owe Harris $99,428.48 in principal and $1,871.55 in interest, as well as approximately $400 in miscellaneous charges. (*Id.*) At the time Harris filed the foreclosure action, the United States held three tax liens against the Scotts in the aggregate amount of $304,893.01. (*Id.* at 3.) In addition to the Scotts, Harris named the United States as a defendant, as well as "unknown owners and non-record claimants." [1] (Compl. to Foreclose Mortgage [1] at 1.) On April 16, 2010, the United States removed the case to this court pursuant to 28 U.S.C. §§1444, 2410, allowing for removal of a foreclosure action in which the United States is named as a party. (Notice of Removal [1].) On July 16, 2010, Harris N.A. moved for summary judgment and a judgment of foreclosure. (Mot. for Summ. J. [25].)

Defendants also face a separate action brought by the United States in the Northern District of Illinois on June 3, 2009, to recover back taxes. A status report in that case suggests that the United States now asserts that the outstanding taxes owed are $117,270.00, but that amount remains disputed. (No. 09-CV-3370, J. Status Report [58] at 2.) No further court date is set until May 3, 2011.

I. Motion for Summary Judgment and Judgment of Foreclosure against Edward and Lauri Scott

Summary judgment should be granted if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). “On a motion for summary judgment, the district court must construe all facts and draw all reasonable inferences in favor of the non-movant.” *Srail v. Village of Lisle*, 588 F.3d 940, 948 (7th Cir.2009).

Plaintiff entered into an adjustable rate note and mortgage agreement with Defendants on January 13, 1994. (Pl.'s 56.1 ¶ 12.) Under the terms of these agreements, Defendants borrowed $140,850 and agreed to pay Plaintiff that amount, plus interest, in monthly installments. (*Id.* ¶¶ 15, 17.) Because they have failed to make payments since October 1, 2009, Plaintiff alleges they are in default and Plaintiff is entitled to foreclose. (*Id.* ¶¶ 18, 21, 22, 24.) Citing an affidavit of Adham Alaily, an attorney for Harris, Plaintiff asserts that the Scotts now owe $99,428.48 in principal and $1,871.55 in interest. (Compl. at 2; Pl.'s 56.1, Ex. B at 1, 4.) Defendants have asserted that they “lack sufficient knowledge to form a belief about the truth or accuracy of the amounts due as alleged,” (Answer at 4), and have declined to respond at all to Plaintiff's motion for summary judgment.

The Illinois mortgage foreclosure law explains that when a party does not submit a verified answer denying the facts in the complaint, or if the party has stated that “it has no knowledge of such allegation sufficient to form a belief,” then “a sworn verification of the complaint or a separate affidavit setting forth such fact is sufficient evidence thereof against such party and no further evidence of such fact shall be required.” 735 ILCS 5/15-1506(a)(1). In these circumstances, the court may enter a judgment of foreclosure “upon motion supported by an affidavit stating the amount which is due the mortgagee … where all the allegations of fact in the complaint have been proved by verification of the complaint or affidavit.” 735 ILCS 5/15-1506(a)(2).

The Scotts' only affirmative defense to the complaint lacks merit: The Scotts asserted that Plaintiff lacks standing because the party named in the complaint is Harris N.A., while the mortgage they signed was with Harris Bank Barrington N.A., and was later assigned to Harris Trust and Savings Bank. (Answer at 5.) Harris has since updated its filings to show that it was formerly known as Harris Trust and Savings. (Pl.'s Br. at 7; Minute Order [24].) Plaintiff has set forth its allegations in a sworn and verified complaint. Defendants have not denied the amount owed, nor supported their claimed lack of sufficient knowledge to respond with an affidavit or other evidence. The court concludes that Plaintiff has met the standard for summary judgment against Defendants and will enter a judgment of foreclosure.

II. Motion for Summary Judgment Against the United States

The United States opposes Plaintiff's motion for summary judgment. Although the government never moved to dismiss the foreclosure action in this court, it contends, in response to summary judgment, that the judge presiding over the government's tax action has prior exclusive jurisdiction over the property. The United States opposes a judicial sale of the property on the ground that such a sale would result in a reduced recovery for the government's subordinate lien. The United States also argues its federal tax liens are entitled to priority over Plaintiff's attorneys' fees.

A. Prior Exclusive Jurisdiction

As noted, the United States filed suit to collect back taxes in June 2009. On October 13, 2009, the government amended its complaint in that action to seek enforcement of the tax liens against the property and to name Harris as a defendant entitled to a share of the proceeds from enforcement of the lien. (Response at 4.) The United States argues that because it amended the complaint before Plaintiff filed this foreclosure action on March 12, 2010, Plaintiff was required to bring its foreclosure claim action as a counterclaim and cross-claim in that action. (*Id.* at 2-3.) Plaintiff responds that “the United States[’] interpretation of prior exclusive jurisdiction does not have legal support.” (Reply at 2.) Specifically, Plaintiff argues that because both cases are pending in this district court, there is no issue regarding exclusive jurisdiction.

The only case the United States cites regarding the application of the prior exclusive jurisdiction doctrine to federal tax lien foreclosure actions is *United States v. Comer,* No. 95-CV-76538-DT, 2000 WL 1358677 (E.D. Mich. July 5, 2000). “The government asserts, and the court agrees, that this court has prior exclusive jurisdiction over the res in this case. Once property is brought under the jurisdiction of a federal court, state courts cannot properly exercise control over it.” *Id.* at *2. The doctrine of prior exclusive jurisdiction is, as the United States points out, wellestablished. *See, e.g., Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U.S. 294, 302 (1884) ("[T]he court had taken possession of the property itself, and that possession was necessarily exclusive."). Put simply, in a case involving the disposition of property, the first court to assert jurisdiction ordinarily maintains exclusive jurisdiction over that property. *Kline v. Burke Const. Co.,* 260 U.S. 226, 231 (1922) ("'It is settled that, when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted.") (quoting *Baltimore & Ohio Railroad Co. v. Wabash Railroad Co.,* 119 F. 678, 679 (7th Cir. 1902)).

The rationale underlying this doctrine is based on "[t]he logical and practical difficulty of two courts simultaneously vying for possession or control of the same property. …" *United States v. $79,123.49 in U.S. Cash and Currency*, 830 F.2d 94, 91 (7th Cir. 1987). Here, however, two courts are not vying for possession or control of the same property-both actions are in the Northern District of Illinois. More importantly, the United States and Plaintiff do not disagree on the disposition of the property, they disagree only about the manner of its disposition. "[T]he United States does not dispute Harris N.A.'s right to have the property sold and be paid from the proceeds." (Response at 8.) The United States would like a receiver appointed, while Harris would like the property to be subject to a judicial sale. Resolution of this dispute, in the court's view, would not run afoul of any exclusive jurisdiction principles.

B. Private Sale or Judicial Sale

The United States asks the court to appoint a receiver to sell the property pursuant to 26 U.S.C. §§7402(a) and 7403(d). (Response at 5.) Section 7402(a) provides that in a civil action brought by the United States, the district court "shall have such jurisdiction to make and issue … orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. §7402(a). Section 7403(d) provides that "the court may appoint a receiver to enforce the [tax] lien." 26 U.S.C. §7403(d).

Notably, nothing in the language of these statutes requires the court to appoint a receiver, nor does the United States argue that any statute or any other authority requires the court to appoint a receiver rather than proceed with a judicial sale. The United States instead warns that "Harris N.A. seeks to sell the property in a judicial fire sale which would likely result in a deeply discounted price which may end up stripping the rights of the United States with no surplus proceeds for the tax lien." (Response at 6.) The United States argues that, according to Zillow.com, a site featuring real estate listings and home value information, the fair market value of the property is $250,500, but "Harris N.A. has no incentive to sell the property for any more than the balance of its mortgage, $104,1644.36." (*Id.*)

As Plaintiff observes, the United States can protect itself against the potential losses resulting from a "fire sale": should the United States believe the home will sell for less at a judicial sale than it is worth, the United States will be entitled to bid on the home and resell it to "extract the alleged equity from the property, just as it would from a private sale." (Reply at 5-6.) Further, Plaintiff notes, the only support the United States cites for its contention that a private sale would be more profitable is a "casual reference to Zillow.com." (*Id.* at 6.) In any event, the private sale proposed by the United States would be impractical. The court agrees with Plaintiff that "if a private sale were to be authorized, Harris would be required to wait indefinitely for the property to be sold. In the present real estate market, this could take months, or even years." (*Id.* at 4.)

Whatever the practical implications might be, the court notes that the foreclosure and sale procedures are governed by statute. Curiously, neither party has cited the relevant provisions. The Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1107(a), governs the substance of this proceeding, but federal law governs disposition of the property following enforcement of the government's lien. The law governing the United States' removal of this action to federal court provides that

> [a] judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, *must seek judicial sale*.

28 U.S.C. §2410(c) (emphasis added). This provision is routinely honored. *See e.g.*, *Kona Properties, LLC v. United States,* No. WDQ-08-1010, 2009 WL 2366561, at *2 (D. Md. July 30, 2009) ("Under §2410(c), the United States consents to suits to foreclose a mortgage or other lien only when the plaintiff also seeks a judicial sale."); *State of Montana v. United States*, No. CV 91-95-BLG-RWA, 1995 WL 376538, at *7 (D. Mont. Oct. 7, 1993) ("While Section 2410 allows suit against the United States to foreclose a mortgage or other lien upon personal property in which the United States claims an interest, it pointedly requires that the foreclosing party must seek a judicial sale."); *United States v. Perpetual Help's Boys Home* [78-2 USTC ¶9598], 451 F.Supp. 270, 273 (E.D. Wis. 1978) ("Since the plaintiff has not sought judicial sale, her action is barred against the United States.").

Section 2410(c) might be read to suggest that the party seeking to foreclose must seek a judicial sale, while the United States is free to seek a private sale. As the court reads the statute, however, it establishes a strong presumption, if not a binding requirement, in favor of a judicial sale of the property. Harris's foreclosure action in this case has been delayed by substitution of counsel for the United Sates in this and the related action, and is ripe for decision. (Dkt. 34 at 2.) Finally, the court takes judicial notice that foreclosure actions in which the United States is a party because of tax liens are exceedingly common, and the government rarely, if ever, objects to a judicial sale. The court orders a judicial sale of the property and grants Plaintiff's motion to appoint a judicial selling officer [29] pursuant to 735 ILCS 5/15-1506(f).

C. Attorney's Fees

Plaintiff asserts that the Scotts are required by the terms of their mortgage to pay the attorney's fees and other expenses associated with the foreclosure action, a total of $6,324.90. (Pl.'s 56.1 ¶ 38.) The United States argues that these expenses should not take priority over the federal tax liens because they are not reasonable under 26 U.S.C. §6323(e)(3), which requires that the same priority given to a superior lien or security interest extend to "the reasonable expenses, including reasonable compensation for attorneys, actually incurred in collecting or enforcing the obligation secured." The United States maintains that the expenses are not reasonable because Plaintiff is a party to the related tax lien litigation, and that reasonable expenses should be limited to what would have been incurred by participating in that prior action. (Response at 2.) Because this foreclosure action is "wholly unnecessary," the United States urges the expenses are not reasonable. (*Id.* at 3.) The United States also noted that it "offered to not oppose the attorney's fees thus far incurred by the bank in this action if the bank would support the appointment of a real estate agent as a receiver." (Response at 2.)

The government's objection to Plaintiff's claim for attorneys' fees is overruled. As Plaintiff notes, it is not clear why the Scotts' mortgage lender was named in the government's action against the Scotts, and Plaintiff was compelled to wait while the United States prosecuted that action before finally deciding to bring this foreclosure action. (Reply at 6-7.) Thus, the government's own conduct generated attorney effort, and there is no reason to believe that the attorneys' fees and expenses would have been minimized had Plaintiff filed its foreclosure action as a cross-claim or counterclaim instead of as a separate lawsuit. (*Id.*) The court agrees that given the delays in this and the related case brought about by the United States, the lack of significant duplication of efforts as a result of filing the separate foreclosure action, and the relatively modest amount requested, Plaintiff's attorneys' fees and expenses are reasonable and take priority over the subordinate tax liens.

CONCLUSION

The court grants Plaintiff's motion for summary judgment against Defendants and the United States [25] and grants Plaintiff's motion of foreclosure [25]. The court also grants Plaintiff's motion to appoint a selling officer [29]. Plaintiff is invited to submit an appropriate foreclosure judgment order within 14 days.

Footnotes

1 Publication notice was made to "unknown owners and non-record claimants" but none responded by July 12, 2010, the date specified in the publication by which claimants were asked to respond. (Order for Publication [19].)