UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NO. PR 01-073

Bankruptcy Case No. 87-03026-ESL
Adversary Proceeding No. 00-0026

IN RE: COLONIAL MORTGAGE BANKERS CORP.,
Debtor.

BANCO SANTANDER DE PUERTO RICO,
Plaintiff/Appellant,

v.

HANS LOPEZ STUBBE, TRUSTEE,
WASHINGTON MUTUAL BANK,
Defendants/Appellees.

Appeal from the United States Bankruptcy Court
for the District of Puerto Rico
(Hon. Enrique S. Lamoutte, U.S. Bankruptcy Judge)

Before
FEENEY, DEASY, and BROWN,
U.S. Bankruptcy Appellate Panel Judges.

Wanda Luna Martinez, Esq., on brief for the Appellant.

Jorge Souss, Esq. and Ivan R. Fernandez-Vallejo, Esq., on brief for the Appellees.

OPINION

August 16, 2002

Brown, J.

The United States Bankruptcy Court for the District of Puerto Rico (Lamoutte, J.) granted the Defendants' motion to dismiss a complaint filed by Banco Santander de Puerto Rico ("Banco Santander" or the "Appellant") pursuant to Fed. R. Civ. P. 12(b)(6). In its complaint, Banco Santander sought an order from the bankruptcy court requiring Hans Lopez Stubbe, as Interim Trustee (the "Trustee"), and Washington Mutual Bank ("Washington" and collectively with the Trustee the "Defendants" or the "Appellees"), to turn over certain funds that were deposited in a Golden Passbook account (the "Passbook Account"). The Defendants filed a motion to dismiss on the grounds of *res judicata* arguing the complaint was essentially identical to a complaint filed in a previous adversary proceeding in the case. In the prior adversary proceeding, Crefisa, Inc. v. Hans Lopez Stubbe, Trustee, The Bowery Savings Bank, Adv. No. 93-0126 ("the 1993 adversary proceeding" or "the first adversary proceeding"), the bankruptcy court had denied the Plaintiff's request to order the turnover to it of the proceeds of the Passbook Account based upon its failure to establish a perfected security interest in the account. See In re Colonial Mortgage Bankers Corp., 186 F.3d 46, 48 (1st Cir. 1999). The bankruptcy court's decision in the 1993 adversary proceeding was initially reversed by the United States District Court for the District of Puerto Rico (the "District Court") (see Colonial Mortg. Bankers Corp. v. Lopez-Stubbe, 1998 WL 638341 (D.P.R. 1998)), but was affirmed by the United States Court of Appeals for the First Circuit (the "First Circuit"). Colonial Mortgage, 186 F.3d at 51-52. In the instant case, the bankruptcy court granted the Defendants' motion to dismiss and denied Banco Santander's subsequent motion for reconsideration and certification to the Supreme Court of Puerto Rico.

Banco Santander appeals the judgment and order granting dismissal, as well as the related order denying the subsequent motion for reconsideration and certification. The Appellant contends that the bankruptcy court erred as a matter of law because: (1) the 1993 adversary proceeding was limited solely to entry of summary judgment regarding the lack of standing of Crefisa, Inc. ("Crefisa") and is not binding upon Banco Santander as the proper party in interest; and (2) the bankruptcy court's construction of applicable Puerto Rico state law is contrary to the clear text of the statute, thereby warranting certification. In response, the Appellees argue that the parties and the claim involved satisfy the identity requirements of *res judicata*, that reconsideration was not justified, and the bankruptcy court correctly rejected Banco Santander's belated request for certification. For the reasons set forth below, we affirm the decision of the bankruptcy court.

I. FACTUAL AND PROCEDURAL BACKGROUND

The procedural history of the dispute is extensive. Most of the claims and issues raised in this appeal have been in dispute since 1986. A discussion of the history of the litigation is necessary and unavoidable.

Colonial Mortgage Bankers Corp. ("Colonial") was in the business of servicing mortgages. Milton J. Rua ("Rua") was the president of Colonial. In 1980, Rua received a $500,000 loan from Caguas Central Federal Savings Bank ("Caguas"). In consideration for the loan, Rua executed a promissory note due on demand in the principal amount of $500,000 in favor of Caguas. The transaction occurred in the following manner: Caguas made a $500,000 deposit (representing the loan) into Rua's personal checking account at Caguas. Rua then opened a new savings account at Caguas (the Passbook Account) with a $500,000 check drawn from his

personal checking account. Although the Passbook Account was opened as a personal savings account of Rua, the passbook bore the title "Colonial Mortgage Bank, B.S.B. Corp." Rua, in addition to executing the promissory note, made a written pledge of the Passbook Account to Caguas as collateral to secure the loan.

In December 1987, Colonial filed a petition for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Puerto Rico. That same month, The Bowery Savings Bank ("Bowery") filed a lawsuit in the District Court seeking to recover approximately $1,000,000 from Colonial, Caguas, Rua and Rua's wife. In that action, the District Court found that Colonial and Rua had diverted millions of dollars from Bowery trust accounts managed by Colonial and had channeled money into various Colonial accounts held at Caguas. See Bowery Sav. Bank v. Colonial Mortgage Bankers Corp., 87–874-RLA (D.P.R.).

Four months later, in April 1988, the bankruptcy court entered an order, at the request of the Trustee in Colonial's bankruptcy case, requiring Caguas to turn over the funds in the Passbook Account to the Trustee. In rendering its decision, the bankruptcy court found that the funds held in the Passbook Account bearing Colonial's name were property of Colonial's bankruptcy estate. More than a year later, pursuant to the bankruptcy court's order, Caguas turned over approximately $557,000 to the Trustee, representing the original principal amount of $500,000 plus accumulated interest.

In 1990, Caguas failed and the Resolution Trust Corporation ("RTC") was appointed as receiver. Thereafter, on December 21, 1990, RTC endorsed Rua's promissory note in favor of Caguas to Banco Santander as part of a multi-million dollar sale of Caguas' assets to Banco

Santander pursuant to a purchase and sale agreement (the "P & S Agreement"). Banco Santander later re-endorsed the promissory note to Crefisa, one of its wholly-owned subsidiaries.

On October 6, 1991, Crefisa commenced the first adversary proceeding through which it sought to recover the funds held by the Trustee from the Passbook Account. In its complaint, Crefisa alleged that the promissory note and Rua's written pledge of the Passbook Account were sufficient evidence of Crefisa's security interest in the Passbook Account. Significantly, at no time during the first adversary proceeding did Crefisa offer into evidence the P & S Agreement by and between RTC and Banco Santander.

The Trustee filed a motion seeking dismissal of the first adversary proceeding for the Plaintiff's failure to state a claim or, in the alternative, summary judgment in his favor based upon lack of standing. In support of his motion, the Trustee argued that Crefisa had failed to establish any interest in the Passbook Account, as the promissory note from Rua in favor of Caguas did not reference either Rua's written pledge or any security interest in the Passbook Account. Moreover, the Trustee asserted that Crefisa had failed to show any valid security interest and had failed to show any interest arising under the P & S Agreement. The bankruptcy court agreed with the Trustee and, on January 25, 1995, issued an order granting the Trustee's motion and dismissing the first adversary proceeding. Judgment was entered on February 10, 1995. The First Circuit has summarized the bankruptcy court's ruling as follows:

> In a nutshell, the bankruptcy court ruled that the promissory note's transfer was governed by Puerto Rico's Negotiable Instruments Law, which did not provide for automatic transfer of the security for an assigned note . . . and even if the Civil Code were applicable to the transfer, its requirements for an automatic transfer of a security interest had not been met as to third parties. . . . Since the

> promissory note made no mention of security, Crefisa had not shown that it had obtained Caguas' security interest in the account.

Colonial Mortgage, 186 F.3d at 48 (footnote omitted) (citations omitted).

Crefisa appealed the decision to the District Court . The District Court reversed the bankruptcy court's dismissal of the first adversary proceeding, determining that Crefisa was entitled to assert a security interest in the Passbook Account. In its decision, the District Court found that the P & S Agreement between RTC and Banco Santander confirmed the intent of the parties to effect a transfer of the security interest. See id. at 49. The District Court also found, alternatively, that the endorsement and transfer of the promissory note from Caguas, through RTC and Banco Santander, to Crefisa carried Caguas' security interest in the Passbook Account with it by operation of law under the Puerto Rico Civil Code.

The Trustee and Bowery appealed the decision of the District Court to the First Circuit. On appeal, the Trustee and Bowery argued that as a procedural matter, the District Court was not entitled to consider the P & S Agreement between RTC and Banco Santander as evidence of the transfer of the security interest because it had not been entered into evidence in the bankruptcy court. They further argued that the District Court's alternative reliance on the Puerto Rico Civil Code over Puerto Rico's Negotiable Instruments Law was erroneous.

The First Circuit reversed the District Court and held that it was not entitled to consider the P & S Agreement as evidence of the transfer of the security interest, since, sitting in its appellate capacity, it was limited to the evidentiary record compiled in the bankruptcy court. Moreover, the First Circuit found that Crefisa had failed to establish that pursuant to Fed. R. Civ. P. 60(b)(2) there was an exception or circumstance that would warrant the appellate court's

consideration of the P & S Agreement. The First Circuit also held that although the transfer of the promissory note itself was valid, there was no valid transfer of the security interest under either the Puerto Rico Civil Code or the Puerto Rico Negotiable Instruments law. In so holding, the First Circuit found that because the endorsed promissory note was not a notarized document, and since there was nothing in the record to indicate that the promissory note was transferred by a notarized document, the promissory note was a "private instrument" which could not affect third parties, such as the Trustee, unless it was registered. As a result, the First Circuit concluded that the bankruptcy court had correctly dismissed the first adversary proceeding and the District Court had erred in reversing the bankruptcy court's decision. See generally Colonial Mortgage, 186 F.3d at 51-52.

Thereafter, Crefisa filed a petition for rehearing *en banc*, which was denied on September 2, 1999. Likewise, Crefisa's petition to the United States Supreme Court for a *writ of certiorari* was denied on January 24, 2000.

Sometime after the First Circuit rendered its decision, Crefisa endorsed the promissory note back to Banco Santander. Thereafter, on April 4, 2000, Banco Santander commenced this adversary proceeding (the "second adversary proceeding") in the bankruptcy court seeking to compel the turnover of the proceeds of the Passbook Account. Banco Santander's complaint in the second adversary proceeding was virtually identical to the complaint filed in the first adversary proceeding by Crefisa, except for changes in the names or identities of the parties. First, the plaintiff in the first adversary proceeding was Crefisa, who had since transferred its interest in the subject funds back to Banco Santander, the plaintiff in the second adversary

proceeding. Second, one of the defendants in the second adversary proceeding, Washington, was the successor in interest to a defendant in the first adversary proceeding, Bowery.

On July 5, 2000, the Trustee and Washington filed a motion to dismiss the second adversary proceeding pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the prior decision in Colonial Mortgage was *res judicata* in the second adversary proceeding, requiring the bankruptcy court to dismiss the second adversary proceeding. In its opposition to the motion to dismiss, Banco Santander argued that *res judicata* did not apply because the first adversary proceeding was dismissed for lack of standing. According to Banco Santander, since the defendants in the first adversary proceeding entitled their motion "Motion To Dismiss Or For Summary Judgment For Lack Of Standing," the first adversary proceeding was dismissed for lack of standing to sue and was not a dismissal on the merits.

On July 12, 2001, the bankruptcy court issued an Opinion and Order, finding that Banco Santander's cause of action was barred by the bankruptcy court's earlier decision. In rendering its decision, the bankruptcy court reasoned that the prior adversary proceeding was not dismissed for lack of standing:

> What is clear is that the First Circuit Court of Appeals confirmed this court's ruling that the transfer of the Golden Passbook account was not perfected either under the Civil Code of Puerto Rico or the Puerto Rico Negotiable Instruments Law, so as to create a security interest. Thus, as a private document it could not affect third parties, and the trustee is a third party for all legal effects to this controversy. . . . The court finds that Santander's cause of action is barred by this court's previous decision of January 20, 1995 in Crefisa Inc. v. Hans Lopez Stubbe (In re Colonial Mortgage Bankers Corporation), adv. pro. no. 93-0126.

Op. and Order at 6 (July 10, 2001).

Banco Santander subsequently filed a motion with the bankruptcy court seeking reconsideration of the bankruptcy court's decision to dismiss the second adversary proceeding and certification to the Supreme Court of Puerto Rico of the policy question of whether a "party must have given value to void the assignment . . . in order to be a third party under section 3941 of the Civil Code." Banco Santander argued that the bankruptcy court erred in: (1) not certifying the policy issue to the Supreme Court of Puerto Rico; and (2) applying *res judicata* because Banco Santander does not "stand in the same shoes" as Crefisa regarding the assignment of the Passbook Account. The bankruptcy court denied Banco Santander's motion for reconsideration, finding that Banco Santander had not set forth facts or law sufficient to convince the bankruptcy court to reverse its earlier decision. In so holding, the bankruptcy court found that the policy issue regarding the Trustee as a third party, which had been mentioned in dicta by the First Circuit as an open question and raised by Banco Santander for the first time in the second adversary proceeding only in its motion for reconsideration, involved a mixed issue of federal bankruptcy law and Puerto Rico Civil Code, making it inappropriate for certification to the Supreme Court of Puerto Rico. The bankruptcy court further held that Banco Santander had offered no "newly discovered evidence" regarding its alleged security interest which would merit the bankruptcy court's reconsideration of the issue. On September 10, 2001, the bankruptcy court, therefore, denied Banco Santander's motion for reconsideration.

On September 20, 2001, Banco Santander filed its notice of appeal. In its notice of appeal Banco Santander states that it is appealing the "Opinion and Order of the United States Bankruptcy Court for the District of Puerto Rico, entered on September 10, 2001 . . . denying

Banco Santander de Puerto Rico Motion for Reconsideration, dismissing the adversary proceeding, and denying certification to the Supreme Court of Puerto Rico."

II. ISSUES

1. Whether the United States Bankruptcy Appellate Panel for the First Circuit (the "Panel") has jurisdiction over this appeal to the extent it relates to the order dismissing the complaint and denial of reconsideration of that order?

2. Whether the bankruptcy court erred in granting Appellee's motion to dismiss and finding that Banco Santander's cause of action was barred by the bankruptcy court's previous decision in the 1993 adversary proceeding, and the First Circuit's decision in Colonial Mortgage?

3. Whether the bankruptcy court erred in denying reconsideration of its dismissal of the second adversary proceeding and denying certification to the Supreme Court of Puerto Rico?

III. JURISDICTION

The threshold issue presented by this appeal is whether, and to what extent, the Panel has jurisdiction over this appeal of the bankruptcy court's judgment dismissing the subject adversary proceeding and denying reconsideration and certification pursuant to 28 U.S.C. §158(a)(1) and (b)(1).

It is axiomatic that a bankruptcy appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. See In re George E. Bumpus, Jr. Constr. Co., Inc., 226 B.R. 724 (B.A.P. 1st Cir. 1998); see also In re Ferren, 227 B.R. 279 (B.A.P. 8th Cir. 1998). The notice of appeal states only that it is an appeal "from Opinion and Order of the United States Bankruptcy Court for the District of Puerto Rico entered on September 10, 2001 by the Honorable Enrique S. Lamoutte, denying Banco Santander de

Puerto Rico Motion for Reconsideration, dismissing the adversary proceeding, and denying certification to the Supreme Court of Puerto Rico." There is no reference to the judgment in favor of Appellees dated July 16, 2001 or the underlying order dismissing the adversary proceeding dated July 10, 2001.

Federal Rule of Appellate Procedure 3(c) requires the notice of appeal to "designate the judgment, order or part thereof appealed from." This rule is both jurisdictional and mandatory. See Kotler v. American Tobacco Co., 981 F.2d 7, 10-11 (1st Cir. 1992). Where an appellant only appeals from the denial of a Rule 59(e) motion, an appellate court may decline jurisdiction over the underlying judgment. See Aybar v. Crispin-Reyes, 118 F.3d 10 (1st Cir. 1997); Mariani-Giron v. Acevedo-Ruiz, 945 F.2d 1, 3 (1st Cir. 1991). However, in the First Circuit, technical omissions generally do not defeat an appeal provided the notice contains the functional equivalent of what the rule requires, and the defending party is not misled or confused. See Kotler, 981 F.2d at 11. Indeed, when reviewing the scope of a notice of appeal, the First Circuit traditionally favors intent over form. United States v. Best, 212 F.2d 743 (1st Cir. 1954). Where a timely Rule 59(e) motion is not based upon narrow grounds, but, more or less, raises the arguments made previously to the trial court and raised on appeal, then such arguments have been held to be properly raised by an appeal from the denial of such a motion. See Town of Norwood v. New England Power Co., 202 F.3d 408, 415 (1st Cir. 2000). In this instance, the Appellant raised the issues underlying the judgment in favor of Appellees in its motion for reconsideration, as well as in its notice of appeal that included a reference to the order "dismissing the adversary proceeding." Based upon the briefs filed by the litigants and the oral argument, it likewise appears that the parties regarded the notice of appeal as raising not only the

order denying reconsideration and certification, but also the underlying order dismissing the adversary proceeding. Therefore, the Panel will treat the notice of appeal as embracing the merits of the judgment and order denying reconsideration.

IV. STANDARD OF REVIEW

"Federal *res judicata* principles govern the *res judicata* effect of a judgment entered in a prior federal suit, including judgments of the bankruptcy court." Iannochino v. Rodolakis (In re Iannochino), 242 F.3d 36, 41 (1st Cir. 2001); see also Apparel Art Int'l v. Amertex Enters., Ltd., 48 F.3d 576, 583 (1st Cir. 1995). "In an appeal from district court review of a bankruptcy court order, the court of appeals independently reviews the bankruptcy court's decision, applying the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law." Iannochino, 242 F.3d at 41 (quoting In re SPM Manuf. Corp. (Official Unsecured Creditors' Comm. v. Stern), 984 F.2d 1305, 1310-11 (1st Cir. 1993)).

It is proper for this Panel to review *de novo* the bankruptcy court's dismissal of the subject adversary proceeding based upon the doctrine of *res judicata*. See id.; see also Apparel Art, 48 F.3d at 582 (citing Kale v. Combined Ins. Co. of America, 924 F.2d 1161, 1165 (1st Cir.) (courts of appeal ordinarily review trial courts' rulings on motions to dismiss *de novo*), cert. denied, 502 U.S. 816 (1991)).

In reviewing the merits of an order granting a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and its bankruptcy counterpart, Fed. R. Bankr. P. 7012(b)(6) ("Rule 12(b)(6)"), a reviewing court may affirm a dismissal for failure to state a claim only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory. See Berezin v. Regency Sav. Bank, 234 F.3d 68, 70 (1st Cir. 2000); Langadinos v. American Airlines, Inc.,

199 F.3d 68, 69 (1st Cir. 2000); Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990). In making this determination, the court must accept the well-pled facts of the non-moving party's complaint as true and indulge every reasonable inference in favor of allowing the lawsuit to proceed. See Berezin, 234 F.3d at 70; Langadinos, 199 F.3d at 69; Correa-Martinez, 903 F.2d at 52; see also North Bridge Assocs., Inc. v. Boldt, 274 F.3d 38, 40 (1st Cir. 2001); Tompkins v. United Healthcare of New England, Inc., 203 F.3d 90, 93 (1st Cir. 2000). As a result, the court will construe the complaint liberally and will view the allegations in the light most favorable to the non-moving party. See Craigs, Inc. v. General Elec. Capital Corp., 12 F.3d 686, 688 (7th Cir. 1993). Furthermore, the court must resolve all ambiguities or doubts concerning sufficiency of the claim in favor of the pleader. See United States v. Olsen, 2001 U.S. Dist. LEXIS 18854 (N.D. Ill. 2001) (stating that well-pled allegations of a complaint must be accepted as true, and ambiguities in the complaint must be construed in favor of the non-moving party).

When reviewing a Rule 12(b)(6) motion to dismiss, the court must accept the well-pled facts of the non-moving party's complaint as true and indulge every reasonable inference in favor of allowing the lawsuit to proceed. The court, however, is neither bound by the plaintiff's legal characterization of the facts, nor required to ignore facts set forth in the complaint that undermine the plaintiff's claims. See Scott v. O'Grady, 975 F.2d 366, 368 (7th Cir. 1992). As the First Circuit noted in Correa-Martinez:

> In the menagerie of the Civil Rules, the tiger patrolling the courthouse gates is rather tame, but "not entirely . . . toothless". Despite the highly deferential reading which we accord a litigant's complaint under Rule 12(b)(6), we need not credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions or outright vituperation.

Correa-Martinez, 903 F.2d at 52 (citations omitted).

Therefore, courts cannot grant a Rule 12(b)(6) motion to dismiss unless "it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." Id. (emphasis added). If there are facts alleged which would enable the plaintiff to recover on a particular theory, then it appears that the court must deny the motion to dismiss.

Although both the trial and reviewing courts must accept as true all well-pled allegations of the complaint, and must construe the complaint in favor of the complaining party, the factual allegations to be considered by the court must be drawn from plaintiff's verified complaint and any exhibits attached thereto. See Street v. Rakiey, 1993 U.S. App. LEXIS 6655 (1st Cir. 1993). Such exhibits are considered part of the complaint and may properly be reviewed when evaluating a motion to dismiss under Rule 12(b)(6). See id. For purposes of Rule 12(b)(6), additional facts submitted outside the pleadings will be explicitly excluded and not considered, except those documents that: (1) are attached to the motion to dismiss, (2) are referred to in the complaint, *and* (3) are central to the plaintiff's claims. See Levenstein v. Salafsky, 164 F.3d 345, 347 (7th Cir. 1998). Although the court's review is generally limited to the complaint, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint, or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. See Warth v. Seldin, 422 U.S. 490 (1975).

In the second adversary proceeding, there were no exhibits attached to the complaint and Banco Santander never requested leave to amend the allegations of its complaint or to append any documents thereto. The Appellant did, however, file additional documents for the first time in the second adversary proceeding in conjunction with its motion for reconsideration, but

without leave of court. Importantly, the complaint does not reference the documents that Banco Santander belatedly filed in conjunction with its reconsideration request.

In reviewing a motion to dismiss for failure to state a claim submitted pursuant to Rule 12(b)(6), the court may not consider any documents that are outside of the complaint or not expressly incorporated therein, unless the motion is converted into one for summary judgment. See Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001). However, there is a narrow exception for: (1) documents sufficiently referred to in the complaint; (2) matters of public record; and (3) undisputably authentic documents upon which the claims are based. See id. at 33-34. For example, "when 'a complaint's factual allegations are expressly linked – and admittedly dependant upon – a document (the authenticity of which is not challenged),' then the court can review it upon a motion to dismiss." Alternative Energy, 267 F.3d at 34 (quoting Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 17 (1st Cir. 1998)).

In Alternative Energy, the appellants filed a professional malpractice suit against two attorneys and their law firm, which was insured by appellee St. Paul Fire & Marine Insurance Company ("St. Paul"). 267 F.3d 30 (1st Cir. 2001). St. Paul settled some of those claims in a settlement agreement with the appellants. The appellants then filed a second claim against St. Paul, arising out of alleged malpractice by one of the attorneys, under the theory that this claim was not covered by the settlement agreement. St. Paul filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted, claiming that the settlement agreement released all claims against the attorney covered by St. Paul. St. Paul attached a copy of the settlement agreement to its motion to dismiss. The district court, based on its interpretation of the settlement agreement, dismissed the appellants' suit.

On appeal, the appellants argued, among other things, that the district court should not have considered the settlement agreement in deciding the Rule 12(b)(6) motion to dismiss, because the agreement was not appended to or expressly incorporated in the complaint. See id. at 33. The First Circuit rejected the appellants' argument, finding that the district court had properly considered the settlement agreement. The First Circuit noted that the complaint referred to the settlement agreement and its terms numerous times, and that the appellee's alleged liability under the complaint depended directly upon whether the claims were released by the settlement agreement. See id. at 34. The First Circuit also noted that the appellants did not dispute the authenticity of the settlement agreement. See id. As a result, the First Circuit concluded that the settlement agreement had become part of the pleadings for purposes of the motion to dismiss; therefore, the district court properly considered the settlement agreement in reviewing the motion to dismiss. See id.

In Berezin, both parties had submitted documentary evidence in support of their briefs regarding the motion to dismiss. 234 F.3d 68, 70 (1st Cir. 2000). The First Circuit noted that ordinarily a court may not consider such evidence unless the motion to dismiss has been converted to a motion for summary judgment. See id. However, the First Circuit noted that there are exceptions to this general rule: (1) when the authenticity of the documents is not in dispute; (2) when the documents consist of official public records; (3) when the documents are central to the plaintiff's claim; or (4) when the documents are sufficiently referred to in the complaint. See id.

The Benezin plaintiffs based their claim, in part, on alleged breaches of contract. Among the documents submitted by the parties were copies of the contracts. These documents were

central to the plaintiffs' claims, and their authenticity was not in dispute. Accordingly, the First Circuit agreed to consider the contracts in ruling on the motion to dismiss. See id. Additionally, the parties had submitted copies of pleadings from a California state court case and a Puerto Rico local court case involving both parties. The First Circuit found that since the proceedings in those cases were official public records, it could consider them as well. See id.

The standard of review for determining the propriety of the denial of a motion for reconsideration is whether a miscarriage of justice is in prospect or the record reveals a manifest abuse of discretion. See Ruiz Rivera v. Riley, 209 F.3d 24, 27 (1st Cir. 2000) (citation omitted). However, a party may not use a motion for reconsideration as a vehicle for curing its own procedural errors or to introduce new evidence or to advance new arguments that could and should have been presented when defending against an underlying motion to dismiss. See In re Pabon Rodriguez, 233 B.R. 212, 219 (Bankr. D.P.R. 1999) (citations omitted).

V. DISCUSSION

A. The Doctrine of *Res Judicata*

The doctrine of *res judicata* dictates that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. See Apparel Art, 48 F.3d at 583. The prior judgment prevents litigation of all grounds and defenses that were or could have been raised in the action. See FDIC v. Alshuler (In re Imperial Corp. of Am.), 92 F.3d 1503, 1506 (9th Cir. 1996) (citing Allen v. McCurry, 449 U.S. 90, 94 (1980)). The policy rationale behind the *res judicata* doctrine is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by

preventing inconsistent decisions, encourage reliance on adjudication." Apparel Art, 48 F.3d at 583 (quoting Allen, 449 U.S. at 94); see also Rhode Island Hosp. Trust Nat'l Bank v. Bogosian (In re Belmont Realty Corp.), 11 F.3d 1092, 1097 (1st Cir. 1993) (stating that primary goal of the doctrine of *res judicata* is finality in litigation).

In Schneider v. Colegio de Abogados de Puerto Rico, the district court examined principles of *res judicata* and differentiated between "claim preclusion" and "issue preclusion." 546 F. Supp. 1251 (D.P.R. 1982). Regarding the former, which is at issue here, the district court stated:

> [Claim preclusion] forecloses any litigation of matters that never have been litigated, because of a determination that they should have been advanced in an earlier suit. Lovely v. Laliberte, 498 F.2d 1261 (1st Cir. 1974) . . . "Claim preclusion", or true *res judicata* . . . treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action" . . . Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial . . . The aim of claim preclusion is thus to avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues of duty and breach. . . . The burden of establishing preclusion is placed on the party claiming it and reasonable doubts will be resolved against an asserted preclusion. Claim preclusion operates only against the parties to the first suit or those in privity with them.

Id. at 1271-72.

The First Circuit has established a three-part test for determining whether the doctrine of *res judicata* precludes the litigation of a party's claims. For a claim to be precluded, there must be: (1) a final judgment on the merits in an earlier suit; (2) sufficient identicality between the causes of action asserted in the earlier and later suits; and (3) sufficient identicality between the parties in the two suits. See Iannochino, 242 F.3d at 43; Massachusetts School of Law v.

American Bar Ass'n, 142 F.3d 26, 37 (1st Cir. 1998); Apparel Art, 48 F.3d at 583; Gonzalez v. Banco Cent. Corp., 27 F.3d 751, 755 (1st Cir. 1994).

1. *Final Judgment on the Merits*

Banco Santander argues that the second adversary proceeding should not have been dismissed on *res judicata* grounds because the bankruptcy court's dismissal of the first adversary proceeding was not a determination on the merits but, rather, a dismissal for lack of subject matter jurisdiction for "lack of standing" under Fed. R. Civ. P. 12(b)(1). Banco Santander's argument appears to be based upon the Defendants' motion for summary judgment in the first adversary proceeding and the alternative request for dismissal for lack of standing.

The bankruptcy court stated in its July 10, 2001 Opinion, dismissal for a lack of standing does not bar the filing of a subsequent action by a party who has "standing" to bring the suit. See Appendix to Appellant's Brief at 45. However, the first adversary proceeding was not dismissed due to a lack of standing. As noted by the First Circuit in its Colonial Mortgage decision, "the bankruptcy court entered judgment against Crefisa, and Crefisa appealed to the district court on March 3, 1995." Colonial Mortgage, 186 F.3d at 48-49. Courts have consistently held that summary judgment constitutes a final judgment on the merits for purposes of applying *res judicata*. See Dowd v. The Society of St. Columbans, 861 F.2d 761, 764 (1st Cir. 1988).

Thus, the bankruptcy court's January 25, 1995 Opinion and Order granting summary judgment and dismissing the first adversary proceeding constituted a final judgment on the merits for purposes of *res judicata.*

2. Identicality Between the Causes of Action

In determining whether causes of action are sufficiently related to support a *res judicata* defense, the First Circuit has adopted "a transactional approach," applying the three factors set forth in the Restatement (Second) of Judgments § 24 (1982), in determining whether two claims are actually part of a single cause of action. See Iannochino, 242 F.3d at 46; Porn v. Nat'l Grange Mut. Ins. Co., 93 F.3d 31, 34 (1st Cir. 1996); Apparel Art, 48 F.3d at 583. Under this approach, a cause of action is defined as a set of facts which can be characterized as a single transaction or a series of related transactions. Apparel Art, 48 F.3d at 583. The court must determine "whether the facts that underlie [Banco Santander's] claims as contained in its . . . pleadings arise from the same nucleus of operative facts as those that were adjudicated by the . . . [first adversary proceeding]." Id. at 584. In making that determination the court may examine a number of factors, no one of which is determinative. Iannochino, 242 F.2d at 46. Those factors include: "1) whether the facts are related in time, space, origin or motivation; 2) whether the facts form a convenient trial unit; and 3) whether treating the facts as a unit conforms to the parties' expectations." Apparel Art, 48 F.3d at 584.

In this instance, the complaint filed in the second adversary proceeding was essentially identical to the complaint filed in the first adversary proceeding, except in two respects: (1) the change in parties; and (2) the references to the bankruptcy court's January 25, 1995 Opinion and Order dismissing the first adversary proceeding and to Crefisa's assignment of its rights to Banco Santander. The decision in the first adversary proceeding was based upon omissions in the original promissory note between Rua and Caguas, which had been successively endorsed by the RTC and Banco Santander and was the basis for the First Circuit affirming that decision on the

merits. See Colonial Mortgage, 186 F.3d at 48. The First Circuit reversed the district court on the procedural ground that it was not entitled to consider the P & S Agreement because that document was not part of the evidentiary record submitted to the bankruptcy court. See id. at 49. Notwithstanding the fact that the document may have been material evidence, it was not part of the record before the trial court and could not be considered for the first time on appeal to the district court.[1] See id.

Since the decision in the first adversary proceeding turned on deficiencies in the promissory note currently held by Banco Santander and Banco Santander's failure to include in its complaint in the second adversary proceeding any allegations or references to documentation not considered in the first adversary proceeding, we conclude that the two proceedings arose from the same transaction or a series of related transactions and, therefore, involved the same causes of action for *res judicata* purposes.

3. Presence of the Same Parties or Privity Between The Parties

The doctrine of *res judicata* provides that a final judgment on the merits bars a subsequent action between the same parties *or their privies* over the same cause of action. See Petitioning Creditors of Melon Produce, Inc. v. Braunstein, 112 F.3d 1232, 1240 (1st Cir. 1997) (citing Allen, 449 U.S. at 94); In re Imperial Corp. of Am., 92 F.3d at 1506. As a result, nonparties may gain the benefit (or suffer the burden) of a prior litigation if they were in privity

[1] The First Circuit noted that the P & S Agreement had been submitted to the bankruptcy court in a post-decision motion to amend the record, and that Crefisa might have sought review of the bankruptcy judge's refusal to enlarge the record where the P & S Agreement would have been available as an offer of proof on the issue of whether that refusal was error. Colonial Mortgage, 186 F.3d at 49. Despite this explanation by the First Circuit, neither the complaint nor the record in this proceeding include any reference to, or a copy of, the P & S Agreement.

with a party to the previous action. See Iannochino, 242 F.3d at 45 (citing Gonzalez, 27 F.3d at 756). "[I]f a nonparty either participated vicariously in the original litigation by exercising control over a named party or had the opportunity to exert such control, then the nonparty effectively enjoyed his day in court, and it is appropriate to impute to him the legal attributes of party status for purposes of claim preclusion." Id. (quoting Gonzalez, 27 F.3d at 758). Thus, *res judicata* is applicable where the relationship between the nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings that would be available to a party. See Gonzalez, 27 F.3d at 758.

Factors which establish privity include the right and ability to control because of ownership rights.[2] Many courts, including the First Circuit, have found that corporate affiliations such as parent and wholly-owned subsidiary are relevant in determining whether two parties are in privity for purposes of issue or claim preclusion. See Imperial, 92 F.3d at 1506 (citing In re Gottheiner, 703 F.2d 1136, 1139-40 (9th Cir. 1983) (finding defendant in prior suit was wholly-owned by defendant in subsequent suit, and collateral estoppel barred second suit));

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[2] See Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra, 983 F.2d 495, 504 (3d Cir. 1992) (holding that defendant which acquired corporation which was defendant in prior action was in privity with prior defendant); Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp., 933 F.2d 724, 728 (9th Cir. 1991) (holding that "wholly-owned subsidiary and partnership in which that subsidiary is the general partner may invoke the two dismissals of the subsidiary's parent and claim Rule 41(a)(1) *res judicata*"), cert. denied, 503 U.S. 920 (1992); In re Gottheiner, 703 F.2d 1136, 1139-40 (9th Cir. 1983) (finding that defendant in prior suit was wholly-owned by defendant in subsequent suit, and collateral estoppel barred second suit); Sparks Nugget, Inc. v. CIR, 458 F.2d 631, 639 (9th Cir. 1972) (finding privity exists between a sole or controlling stockholder and its company), cert. denied sub nom. Graves v. CIR, 410 U.S. 928 (1973); Caruso v. Candie's, Inc., 201 F.R.D. 306, 311 n.3 (S.D.N.Y. 2001) (recognizing that for *res judicata* purposes, a wholly-owned subsidiary is in privity with its parent); Protocomm Corp. v. Novell, Inc., 1998 WL 351605 (E.D. Pa. 1998) (finding that defendants in two actions were in privity for claim preclusion purposes where defendant in one action had acquired defendant in another action as a wholly-owned subsidiary); Greenberg v. Potomac Health Sys., Inc., 869 F. Supp. 328, 330-31 (E.D. Pa. 1994) (finding litigation against parent barred subsequent claim against wholly-owned subsidiary).

see also Doe v. Urohealth Sys., Inc., 216 F.3d 157, 162 (1st Cir. 2000) (finding that factor supporting determination of privity is whether companies are parent and wholly-owned subsidiary); Rhode Island Hosp. Trust Nat'l Bank, 11 F.3d at 1097 (finding that judgment of bankruptcy court in prior adversary proceeding precluded relitigation in subsequent action against controlling owner of corporate debtor on same obligation); Capraro v. Tilcon Gammino, Inc., 751 F.2d 56, 57 (1st Cir. 1985) (finding that under general principles of *res judicata*, parent company would be entitled to the benefit of the judgment in favor of its wholly-owned subsidiary); Acton Co., Inc. of Mass. v. Bachman Foods, Inc., 668 F.2d 76, 78 (1st Cir. 1982) (noting that *res judicata* doctrine applies not only to actual parties but to those in privity with the parties, such as parent corporation); Pan Am. Match, Inc. v. Sears, Roebuck & Co., 454 F.2d 871, 874 (1st Cir.) (stating the sufficient privity existed between parent company and wholly-owned subsidiary), cert. denied, 409 U.S. 892 (1972).

On appeal, Banco Santander has asserted that it is not sufficiently related to the plaintiff in the first adversary proceeding, Crefisa, and, accordingly, should not be bound by the prior decision. However, in the first adversary proceeding, the First Circuit stated that "the note was later re-endorsed by Banco Santander to Crefisa, which is apparently a wholly owned subsidiary of Banco Santander."[3] Colonial Mortgage, 186 F.3d at 48. While it may be unclear what evidence the bankruptcy court had before it in making this determination below, it does not appear

[3] Given the First Circuit's couched declaration of this relationship and the bankruptcy court's subsequent statement that Crefisa is, indeed, a wholly owned subsidiary, the Panel is puzzled why, if it did not agree with this characterization, Crefisa did not raise this issue on appeal. However, even liberally construing the issues it preserved for appeal - which this Panel has already done - this issue was not properly preserved. Thus, despite efforts at oral argument otherwise, the Panel will not consider this argument.

that this finding was contested by Crefisa. Therefore, the Panel is presented with a record that finds Crefisa to be a wholly-owned subsidiary of Banco Santander. This finding was not appealed and the time to appeal the finding has passed. As the issue was not preserved for appeal, it will not be considered by the Panel. Rather, the Panel will find, based on the record as presented, that Crefisa is a wholly-owned subsidiary of Banco Santander.

However, even if Banco Santander and Crefisa are not sufficiently related, in a corporate sense, to be deemed in privity, they are in privity contractually. Banco Santander's complaint alleged that it acquired the promissory note at issue from the RTC and sold it to Crefisa. Crefisa then commenced and lost the first adversary proceeding and subsequently assigned and transferred the promissory note to Banco Santander. See Complaint at ¶¶ 17-20, Appendix to Appellant's Brief at 4. The final decision in the first adversary proceeding was based upon the failure of the promissory note to contain any reference to any security or for Crefisa to have provided any other evidence to the bankruptcy court to support its claim to the security. See Colonial Mortgage, 186 F.3d at 48. As the holder of the promissory note, Crefisa was bound by that decision. Any estoppel arising from that decision runs with the property and Crefisa could transfer to Banco Santander no better right or title than it possessed. Perry v. Globe Auto Recycling, Inc., 227 F.3d 950, 953 (7th Cir. 2000) (citing Postal Telegraph Cable Co. v. City of Newport, 247 U.S. 464, 474-75 (1918)). Accordingly, Banco Santander cannot evade the effect of the prior decision by accepting an assignment and transfer of the promissory note from Crefisa. See id. As the transferee of the promissory note, Banco Santander is as bound by that determination as its transferor, Crefisa.

Accordingly, the Panel concludes that Crefisa and Banco Santander are in privity for purposes of *res judicata* either through their corporate relationship or by contract. In light of the foregoing, Banco Santander's cause of action in the second adversary proceeding was barred on the principles of *res judicata* by the prior decision of the bankruptcy court and the First Circuit in Colonial Mortgage, 186 F.3d 46. Therefore, the bankruptcy court's July 12, 2001 Opinion and Order is affirmed on the merits.

B. Certification to the Supreme Court of Puerto Rico

Banco Santander also argues that the bankruptcy court erred in not certifying to the Supreme Court of Puerto Rico the policy question whether a bankruptcy trustee is a third party within the meaning of Puerto Rico Civil Code § 3941. A question of law may be certified to the Supreme Court of Puerto Rico when a question of Puerto Rican law is implicated in a judicial matter before the United States Supreme Court, a federal court of appeals, a federal district court, or the highest court of any state, with respect to which, in the opinion of the soliciting court, there is no clear precedent in the jurisdiction of the Supreme Court of Puerto Rico. Rule 27(a) of the Rules of the Supreme Court of Puerto Rico, T.4 Ap. XX1-P.R. 27 (1996). The First Circuit has noted that certification to the Supreme Court of Puerto Rico is proper under Puerto Rican law where: (1) the controversy involves questions of Puerto Rican law; (2) said questions may determine the outcome of the case; (3) there are no clear-cut precedents in the Puerto Rican Court's case law; and (4) the case makes an account of all the facts relevant to said questions showing clearly the nature of the controversy giving rise to the questions. See Cuesnongle v. Ramos, 835 F.2d 1486, 1491 (1st Cir. 1987). Rule 27 further provides, however, that the Supreme Court of Puerto Rico will not issue the requested certification when the issue presented

is a mixed one of federal or state law and Puerto Rican law and could be resolved by the requesting court. See id. at 1492-95.

As set forth above, the policy question alluded to by the First Circuit in dicta in its opinion was not raised by the parties until Banco Santander attempted to raise it, for the first time, in its motion for reconsideration. The bankruptcy court rejected Banco Santander's belated attempts to raise the issue, noting that "if [Banco] Santander wanted to raise the issue and have it certified to the Supreme Court of Appeal, it should not have waited until its motion for reconsideration to do so for the first time." Opinion and Order at 5 (Sept. 7, 2001). Moreover, as noted by the bankruptcy court in its Opinion and Order, the issue of whether a "party must have given value to void the assignment . . . in order to be a third party under section 3941 of the Civil Code" is a question which involves a mixed issue of federal bankruptcy law and the Puerto Rico Civil Code. Id. The policy argument raised by Banco Santander as to whether the Trustee is a third party for purposes of § 3941 of the Puerto Rico Civil Code clearly involves a question of federal law. In addition to state law, consideration of the issue would properly include an analysis of § 544 of the Bankruptcy Code, which grants certain rights and powers to the Trustee and addresses the Trustee as a third party. Moreover, the certification request was raised for the first time in conjunction with the motion for reconsideration. Accordingly, it is untimely. See Pabon Rodriguez, 233 B.R. at 218–19. Therefore, we find that the bankruptcy court did not err in denying certification to the Supreme Court of Puerto Rico on this issue.

VI. CONCLUSION

For the foregoing reasons, this Panel holds that Banco Santander's cause of action in the second adversary proceeding was barred on the principles of *res judicata* by the prior decision of

the bankruptcy court in the first adversary proceeding and the related appeal to the First Circuit in Colonial Mortgage, 186 F.3d 46. The Panel also concludes that the bankruptcy court did not err in denying reconsideration or in denying certification to the Supreme Court of Puerto Rico on the policy question involving a mixed issue of federal bankruptcy law and the Puerto Rico Civil Code.

The July 12, 2001 Opinion and Order, the Judgment dated July 16, 2001 and the Opinion and Order dated September 7, 2001 denying reconsideration are AFFIRMED.