

**THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

WILLIAM J. ROBERTS, )  
*Pro Se Plaintiff-Appellant,* )  
                                )  
v.                             )  
                                  )  
AMERICA'S WHOLESALE LENDER, )  
*et al.,*                     )  
                                  )  
*Defendants-Appellees.*   )

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On Appeal from the United States District Court for the District of Utah  
The Honorable Dee Benson  
D.C. No. 2:11-CV-00597-DB

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**APPELLEES' RESPONSE BRIEF**

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SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED

*Oral argument is not requested*

September 4, 2012

**CORPORATE DISCLOSURE STATEMENTS**

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel certifies that:

Appellee BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing LP, merged into Bank of America, N.A., in July 2011. Prior to that, BAC Home Loans Servicing, LP was owned by BAC GP, LLC and BANA LP, LLC. Bank of America, N.A. owns 100% of both BAC GP, LLC and BANA LP, LLC. Bank of America, N.A. is a wholly-owned subsidiary of Bank of America Corporation. Bank of America Corporation is a publicly traded company, and no publicly traded company owns more than 10% of Bank of America Corporation.

Appellee ReconTrust Company, N.A. is a wholly-owned subsidiary of Bank of America Corporation. Bank of America Corporation is a publicly-traded company, and no publicly-traded company owns more than 10% of Bank of America Corporation.

Appellee Countrywide Home Loans, Inc. (“CHL”) is a wholly-owned subsidiary of Bank of America Corporation effective July 1, 2008. CHL and its former subsidiaries are no longer publicly traded companies. Bank of America Corporation is a publicly traded company, and no publicly-traded company owns more than 10% of Bank of America Corporation. America’s Wholesale Lender (“AWL”) is a trade name for CHL.

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**PRIOR OR RELATED APPEALS**

There are no prior or related appeals.

### **JURISDICTIONAL STATEMENT**

The United States District Court for the District of Utah properly assumed jurisdiction over this matter pursuant to 28 U.S.C. §§ 1332 and 1441. BAC Home Loans Servicing, LP (“BAC-HLS”), f/k/a Countrywide Home Loans Servicing LP (“CW-HLS”), ReconTrust Company, N.A. (“ReconTrust”), and Countrywide Home Loans, Inc. (“CHL”) d/b/a/ America’s Wholesale Lender (“AWL”) (collectively “the Bank”) removed this matter from the Third Judicial District Court, Salt Lake County, State of Utah based on diversity of citizenship jurisdiction.

As to diversity jurisdiction, William Roberts (“Roberts”) is a citizen of Utah. ReconTrust, as a national banking association, is a citizen of the state in which its main office is located, which is California. BAC-HLS, as a limited partnership, was a citizen of each state in which any of its partners were citizens, in this case Nevada and California. CHL is a New York corporation with its principal place of business in California. AWL is a trade name for CHL. The amount in controversy exceeds \$75,000.00. *See* R. at 11, 18.

The District Court entered a final order dismissing Roberts’ complaint on April 18, 2012. Roberts filed a timely notice of appeal on May 17, 2012. This Court properly has jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES**

1. Did the District Court properly hold that AWL is a trade name for Countrywide Home Loans, Inc., and that an assignment of deed executed using the AWL trade name was not null and void?
2. Did the District Court properly hold that the declaratory judgment claims, seeking to enjoin ReconTrust from foreclosing on the Property, and the unjust enrichment claim, alleging monetary damages for unlawful foreclosure, were not justiciable where ReconTrust was substituted out as trustee and where no foreclosure had occurred on the Property?
3. Did the District Court properly hold that Roberts otherwise failed to state any claim upon which relief may be granted?

## **STATEMENT OF THE CASE**

Roberts appeals the District Court's dismissal of a multi-count mortgage foreclosure challenge that Roberts filed after defaulting on his mortgage, but before his Property was scheduled to be sold at a foreclosure sale. By way of background, on June 7, 2011, Roberts filed his complaint in the Third Judicial District Court in and for the County of Salt Lake, State of Utah, asserting six claims against the Bank: (1) declaratory judgment; (2) quiet title; (3) unjust enrichment; (4) reckless/intentional infliction of emotional distress; (5) fraud; and (6) accounting. *See R.* at 29-36.

On June 27, 2011, the Bank removed this case to the United States District Court for the District of Utah with the consent of all Defendants. Three weeks later, on July 18, 2011, the Bank filed a Motion to Dismiss the Complaint pursuant

to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* R. at 180, 183. The District Court held a hearing on the Bank’s Motion to Dismiss on December 13, 2011. *See* R. at 26. Then, on March 22, 2012, the Magistrate Judge issued an eighteen-page Report and Recommendation on the Bank’s Motion, recommending that the District Court grant the Motion. *See* R. at 815.

Roberts filed objections to the Report on April 6, 2012. *See* R. at 834. The District Court entered its Order granting the Motion to Dismiss on April 18, 2012. *See* R. at 842. The District Court dismissed the Complaint because: (1) it relies on a theory regarding AWL’s corporate identity that lacks any “factual or legal basis”; and (2) several claims are not justiciable. Specifically, the District Court dismissed counts I (declaratory judgment), II (quiet title), III (unjust enrichment), and V (fraud), holding that AWL was not a separate corporate entity, but rather a trade name for CHL. The District Court also held that counts I and III were not justiciable because ReconTrust was substituted out as trustee and no foreclosure sale had occurred on the Property. Further, the District Court dismissed each of the counts because, as a matter of law, they failed to state a claim upon which

relief may be granted. Roberts appeals from the District Court's Order dismissing his claims.<sup>1</sup>

### **STATEMENT OF THE FACTS**

Roberts entered into two different loans with different banks for his property at 140 West Macarthur Avenue, Salt Lake City, Utah 84115 (the "Property"). *See R.* at 23. The majority of his claims, however, relate only to the refinance loan with AWL because the Bank initiated foreclosure proceedings under this loan.

#### **The Refinance Loan with CHL**

On July 2, 2003, Roberts borrowed \$102,000.00 from AWL to refinance the Property. *See R.* at 25. AWL appears as the lender on the Note evidencing the loan. *See R.* at 25. On that same date, Roberts executed a Deed of Trust (the "REFI Deed") granting CHL a secured interest in the Property. *See R.* at 25, 39. AWL also appears as lender on the REFI Deed. *See R.* at 39. Although Roberts states "[i]t is alleged [the Note and REFI Deed] were sold to a Sponsor or Depositor of a REMIC Trust between 7/3/2003 and 10/30/2003," he does not provide any facts or explanation to support that statement. *See R.* at 25.

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<sup>1</sup> After the Magistrate Judge issued the Report and Recommendation, the District Court received certain documents from Roberts seeking a temporary restraining order and preliminary injunction. *See R.* at 843-44. These documents were not filed with the court and do not appear on the docket. *See R.* at 843-44. Nevertheless, the court denied these requests. *See R.* at 843-44. Roberts does not appeal from these rulings.

On July 7, 2009, AWL assigned the beneficial interest under the REFI Deed to BAC-HLS via a Corporation Assignment Deed of Trust/Mortgage signed by Angela Nava as Assistant Secretary of AWL. *See R.* at 50. BAC-HLS then appointed ReconTrust as successor trustee of the REFI Deed on July 8, 2009 via a Substitution of Trustee signed by Angela Nava as Assistant Secretary of BAC-HLS. *See R.* at 51.

Pursuant to the REFI Deed, ReconTrust scheduled a non-judicial foreclosure sale of the Property for June 7, 2011 at 10:30 AM. *See R.* at 29. That sale did not occur because Roberts and the Bank agreed to postpone and cancel the sale in light of the pending litigation. *See Docket at 2, Roberts v. America's Wholesale Lender, No. 110913759 (Utah 3d D. Ct., Salt Lake Cnty.).*<sup>2</sup> On November 2, 2011, Armand J. Howell, a member of the Utah bar, was substituted as trustee. *See R.* at 814.

### **The Home Equity Line of Credit with U.S. Bank**

On May 16, 2006, Roberts received a \$25,000.00 home equity line of credit with U.S. Bank, *see R.* at 25, which was secured by a Deed of Trust (the “HELOC

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<sup>2</sup> The Bank requests that the Court take judicial notice of the Docket entry which states “Plaintiff and Defendants through their counsel, agreed to postpone and cancel the sale as stated on the record.” *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (holding that a court can also consider “matters of which a court may take judicial notice” when reviewing a motion to dismiss); *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) (holding courts can take judicial notice of their own files and records, as well as facts which are a matter of public record in order to show their contents).

Deed”). *See* R. at 56. Roberts states “[i]t is alleged [the Note and HELOC Deed] were sold to a Sponsor or Depositor of a REMIC Trust between 5/17/2006 and 8/17/2006,” but he provides no facts or explanation to support the allegation. *See* R. at 26.

### **SUMMARY OF THE ARGUMENT**

The District Court properly dismissed the majority of Roberts’ claims against the Bank finding that AWL is the trade name for CHL and not, as Roberts believes, a separate, unrelated entity. Specifically, Roberts argued that AWL could not have executed the foreclosure-related documents because it did not come into existence until after the documents were executed. Roberts’ theory is based on a fundamental misunderstanding regarding the corporate identity of AWL, as he mistakes a wholly unrelated and unaffiliated entity named America’s Wholesale Lender, Inc. with the AWL trade name used by CHL. Indeed, it is clear from the registration filed by CHL with the New York State Division of Corporations, that “AWL” is simply a trade name for CHL.

In the alternative, Roberts belatedly proffers an equally unavailing argument that even if it is a trade name, AWL lacked any legal capacity to execute the foreclosure-related documents. First, the argument is not properly on appeal as Roberts waived it in the District Court by failing to timely raise it. Second, Utah’s Uniform Commercial Code expressly permits signature through a trade name, and

no Utah authorities prohibit the use of a trade name on foreclosure-related documents. Further, Roberts' purported legal support is non-binding and inapplicable to the facts here.

Additionally, Roberts' declaratory judgment and unjust enrichment claims are not justiciable. These claims allege that ReconTrust lacks authority to foreclose on the property in the future, and seek damages for such foreclosure. ReconTrust has suspended all operations in Utah, however, and has been substituted out as trustee in this case. Also, no foreclosure has occurred on the Property.

The District Court also correctly held that each of the claims independently fails to state a claim upon which relief can be granted. First, the unjust enrichment claim is not viable because of the availability of remedies to Roberts under the REFI Deed and HELOC Deed, and because foreclosure upon a deed of trust when a borrower is in default is not inequitable. Second, the quiet title claim cannot stand because Roberts fails to allege with sufficient legal or factual support that he has superior claim to the Property. Rather, Roberts' allegations suggest that the Bank maintains superior title. Third, Roberts' claims for reckless/intentional infliction of emotional distress and fraud were properly dismissed because Roberts fails to sufficiently allege facts to support these claims. Instead, Roberts relies on conclusory statements that are not sufficient to support a claim for relief.

Finally, Roberts' new arguments arising out of Fannie Mae's status as the loan investor should be summarily rejected by this Court because Roberts failed to raise this argument in the District Court, and cannot raise it for the first time now. Roberts' argument further fails on the merits because Fannie Mae's role as the loan investor does not affect ReconTrust's authority to foreclose.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

#### **Standard of Review on Motion to Dismiss**

This Court reviews *de novo* the District Court's ruling on the Bank's Motion to Dismiss.<sup>3</sup> *See Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007). To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must plead sufficient facts "to state a claim to relief that is plausible on its face." *Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Supreme Court held in *Ashcroft v. Iqbal* that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. In *Twombly*, the Supreme Court explained that a complaint must plead more than labels or a formulaic recitation of the elements of a cause of action, and that factual

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<sup>3</sup> Roberts' opening brief fails to set forth the appropriate standard of review.

allegations must be enough to “raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Twombly*, 550 U.S. at 555 (citations omitted). Quoting *Twombly*, this Court requires a plaintiff to “‘nudge[] [his] claims across the line from conceivable to plausible’ in order to survive a motion to dismiss.” *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (alterations in original) (quoting *Twombly*, 550 U.S. at 570).

### **The Heightened Standard for Pleading Fraud**

In addition to meeting the threshold requirements of Rule 12(b)(6), Roberts’ fraud claim must be pled with sufficient particularity to state a claim under Federal Rule of Civil Procedure 9(b). Rule 9(b) provides that, “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” FED. R. CIV. P. 9(b). “At a minimum, Rule 9(b) requires that a plaintiff set forth the ‘who, what, when, where and how’ of the alleged fraud’ [and] ‘set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.’” *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, Inc.*, 472 F.3d 702, 726-27 (10th Cir. 2006) (quoting *Koch v. Koch Indus.*, 203 F.3d 1202, 1236 (10th Cir. 2000)); *Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997)).

## **II. ROBERTS' CLAIMS ARE BASED ON TWO ERRONEOUS LEGAL THEORIES.**

Roberts bases his claims against the Bank on two erroneous legal theories. First, Roberts argues that AWL had no legal capacity to assign the beneficial interest of the REFI Deed to BAC-HLS. In support of this theory, Roberts submits two alternative arguments: (1) that AWL could not have executed the assignment because it did not exist as of the date of the assignment, *see R.* at 25-26; and, in the alternative; (2) AWL lacked legal capacity to execute the assignment. *See R.* at 797-98.

Roberts' second legal theory, which he submits for the first time on appeal, is that Fannie Mae's status as the loan investor impacts ReconTrust's authority to foreclose. This Court should reject both of these incorrect theories and affirm the District Court's dismissal of Roberts' claims.

### **A. AWL is a trade name for Countrywide Home Loans, Inc.**

Roberts' claims are based on the mistaken assertion that AWL is a "fictitious entity" that "has no legal capacity and thus no standing." *See R.* at 24-27, 30-32, 34; Appellant's Br. at 7, 9; *see also R.* at 821-22 (explaining that allegations regarding AWL's corporate identity "pervades" the Complaint). Contrary to this allegation, however, AWL was the trade name for CHL during the time period

when Roberts entered into the REFI Deed with AWL.<sup>4</sup> And AWL is the named Lender on the REFI Deed, giving AWL the power to assign the security instrument and to appoint successor trustees. *See R.* at 39, 47-48, 59.

**1. Roberts’ Complaint is based on a Fundamental Misunderstanding Regarding the Corporate Identity of AWL.**

Roberts’ argument that AWL could not have executed the assignment of deed is patently incorrect because it confuses the AWL entity in this case for an unaffiliated, unrelated corporate entity of a similar name. Specifically, Roberts alleges that “no corporation under the name AWL was formed until December 16, 2008. No prior expired company existed per the New York State Division of []Corporations . . . .” R. at 26. Roberts supports this mistaken theory with “printouts from a publicly available website that purportedly show AWL was not a corporation at the time of the REFI Deed.” R. at 821; *see* Appellant’s Br. at 5.

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<sup>4</sup> The District Court took judicial notice of the following document: New York State, Department of State, Corporations and State Records Division, CORPORATION – CERTIFICATE OF AMENDMENT OF ASSUMED NAME (Apr. 29, 1996) (showing America’s Wholesale Lender and not America’s Wholesale Lender, Inc., was an “assumed name” for Countrywide Home Loans, Inc.). Courts can take judicial notice of facts that are a matter of public record in order to show their contents. *See Hogan*, 453 F.3d at 1264 n.24; *United States v. McGee*, No. 99-2054, 1999 U.S. App. LEXIS 21787, at \*5 (10th Cir. Sept. 10, 1999) (“Public records are generally presumed to be trustworthy.”); *United States v. Wright*, 850 F. Supp. 965, 967 (D. Utah 1993) (finding that, with regard to a public record, “[t]he presumption is that this document was accurately prepared”).

As the District Court held, however, the printouts “refer to a similarly-named but entirely different and unrelated entity from Defendant AWL.” R. at 821, 843 (adopting the report and recommendation). Indeed, Plaintiff misunderstands the New York State Division of Corporations printout for CHL, as CHL never changed its corporate name to AWL. Rather, it merely used AWL as a *trade name*, as clearly established by the Certificate of Assumed Name. *See* R. at 594.

As properly found by the District Court, AWL was a trade name for CHL and not a separate legal entity as believed by Roberts. For this reason alone, counts I (declaratory judgment), II (quiet title), III (unjust enrichment), and V (fraud), which rely on this erroneous premise, fail. This Court should affirm the District Court’s holding which dismissed Roberts’ claims with prejudice on this basis.

**2. Countrywide Home Loans, Inc., had Authority to Execute the REFI Deed under its trade name, AWL.**

In the alternative, Roberts incorrectly argues that even if AWL were a trade name for CHL, it still lacked legal capacity to execute the assignment of the REFI Deed. As a preliminary matter, Roberts has waived this argument because he did not properly raise the argument during the Motion to Dismiss briefings in the District Court. Rather, he belatedly raised the argument in an Opposition to a

Notice of Supplemental Authority filed by the Bank about an unrelated issue.<sup>5</sup> See R. at 797-98; *see also Cole v. New Mexico*, 58 Fed. App'x 825, 829 (10th Cir. 2003) (holding that “by failing to raise the issue in his initial response to the respondent’s motion to dismiss, [the plaintiff] has waived the argument”); *Wood v. World Wide Ass’n of Specialty Programs & Schs. Inc.*, No. 2:06-cv-00708 TS, 2007 U.S. Dist. LEXIS 32083, at \*18 (D. Utah Apr. 30, 2007) (holding that “Plaintiffs apparently concede this RICO claim because they do not argue it in their response to the Motion to Dismiss”).

On the merits, Roberts’ alternative argument challenging signatory authority by AWL also fails. He argues that the Note “does not say ‘America’s Wholesale Lender, a trade name of Countrywide Home Loans, Inc. . . .’” Appellant’s Br. at 9. Utah law, however, expressly allows for a negotiable instrument to be signed “by the use of any name, including a trade or assumed name . . .” UTAH CODE ANN. § 70A-3-312. Roberts fails to cite to any legal authority prohibiting the use of a trade name in executing the Assignment of Beneficial Interest in the REFI Deed. Although Roberts cites to two Connecticut state court cases, his reliance on

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<sup>5</sup> Roberts’ filing was not responsive to the Notice of Supplemental Authority which brought to the District Court’s attention two cases that held that ReconTrust does have authority to exercise the power of sale in Utah. See R. at 763. Roberts also did not seek leave of court to file this document, which is required by the District Court’s local rules.

these cases is misplaced for two reasons.<sup>6</sup> Appellant's Br. at 10. First, these two state court cases apply Connecticut law and therefore do not bind the Court as to its interpretation of Roberts' claims under Utah law. *See America's Wholesale Lender v. Pagano*, 866 A.2d 698 (Conn. Ct. App. 2005); *America's Wholesale Lender v. Silberstein*, 866 A.2d 695 (Conn. Ct. App. 2005). Second, the holdings of these cases do not apply to the facts of this case. Rather, these cases hold that because a trade name is not an entity with legal capacity to sue, the corporation has no standing to file a lawsuit in Connecticut state court. *See Pagano*, 866 A.2d at 700; *Silberstein*, 866 A.2d at 697. In this case, however, AWL did not file a lawsuit against Roberts so its standing or capacity to sue is not in question.<sup>7</sup>

In summary, all of Roberts' conclusory allegations challenging AWL's corporate existence are "without factual or legal basis." *See R.* at 843. Accordingly, this Court should affirm the District Court's decision to dismiss Roberts' claims based on AWL's legal status.

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<sup>6</sup> Notably, despite being published seven years ago, it does not appear that a single court outside of Connecticut has cited to these cases. *See America's Wholesale Lender v. Pagano*, 866 A.2d 698 (Conn. Ct. App. 2005); *America's Wholesale Lender v. Silberstein*, 866 A.2d 695 (Conn. Ct. App. 2005).

<sup>7</sup> Further, ReconTrust is not aware of any authorities in Utah which prohibit a foreclosing entity to execute foreclosure-related documents using its trade name.

**B. Roberts' Argument Regarding Fannie Mae Cannot be Raised for the first time on Appeal and is Irrelevant.**

Throughout the opening brief, Roberts alleges, for the first time, that because Fannie Mae owns the note and trust deed, the Bank lacks “standing” to pursue foreclosure of the Property. *See* Appellant’s Br. at 4, 6, 7, 9, 11. Roberts attaches an affidavit to his Appellant’s Brief stating that he “found his loan on the Fannie Mae locator website,” and that the website lists Fannie Mae as the loan investor.<sup>8</sup> *See* Appellant’s Br., Ex. 1. As a preliminary matter, Roberts has waived this argument on appeal by failing to present this argument to the District Court at all. *See Tele-Commc’ns, Inc. v. C.I.R.*, 104 F.3d 1229, 1233 (10th Cir. 1997) (“[W]e should not be considered a ‘second shot’ forum, a forum where secondary, back-up theories may be mounted for the first time.”). Accordingly, this Court should disregard Roberts’ arguments concerning Fannie Mae.

Even so, the argument still fails because it misunderstands the relationship between the servicer and owner. A servicer acts on behalf the owner of the debt. *See King v. Am. Mortg. Network, Inc.*, No. 1:09-cv-00162 DAK, 2010 U.S. Dist. LEXIS 92210, at \*8-9 (D. Utah Sept. 1, 2010) (holding that servicer was authorized to foreclose on behalf of Fannie Mae, the owner of the note). As the owner of the debt, “Fannie Mae often requires servicers to initiate legal

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<sup>8</sup> This Affidavit is not part of the record and cannot be properly considered on appeal.

proceedings in the servicer's name if the servicer or MERS is the mortgagee of record. After the servicer forecloses, Fannie Mae generally requires the servicer to convey title of the property to it." *Kiah v. Aurora Loan Servs., LLC*, No. 10-40161-FDS, 2010 U.S. Dist. LEXIS 121252, at \*15-16 (D. Mass. Nov. 16, 2010) (internal citations omitted). In fact, "the Fannie Mae Servicing Guide grants servicers, acting in their own names, the authority to represent Fannie Mae's interests in foreclosure proceedings as holder of the mortgage note." *Sharpe v. Wells Fargo Home Mortg.*, No. 11-3020-PA, 2011 U.S. Dist. LEXIS 132541, at \*7 (D. Or. Nov. 16, 2011). Therefore, the loan servicer, has standing to act as an agent of Fannie Mae. See *Greer v. O'Dell*, 305 F.3d 1297, 1302 (11th Cir. 2002) (holding that a loan servicer has standing to conduct the legal affairs of the investor); *Hazzard v. ABN AMRO Mortg. Grp., Inc.*, No. A-11-CA-1019-SS, 2012 U.S. Dist. LEXIS 106818, at \*9 (W.D. Tex. Feb. 23, 2012) (holding that a servicer has authority to foreclose as an agent of Fannie Mae). Roberts' arguments concerning Fannie Mae as investor are without merit and should be disregarded.

### **III. THE DISTRICT COURT PROPERLY DISMISSED ROBERTS' CLAIMS.**

#### **A. The District Court Properly Dismissed Roberts' Requests for Declaratory Relief.**

The District Court also properly dismissed Roberts' five separate, but improper, requests for declaratory judgment that:

1. ReconTrust lacks authority to proceed with foreclosure of the REFI Deed and enforcement of the REFI Note (“Request No. 1”). *See R.* at 29-30.
2. ReconTrust is not a qualified trustee under Utah Code Ann. § 57-1-21(1)(a)(i) or (iv) and therefore lacks legal authority as a trustee to sell the Property (“Request No. 2”). *See R.* at 30.
3. Roberts should be entitled to damages based upon Defendants’ alleged violation of Utah Code Ann. § 57-1-23.5(2)(a), which states that “[a]n unauthorized person who conducts an unauthorized sale is liable to the trustor for the actual damages suffered by the trustor as a result of the unauthorized sale or \$ 2,000, whichever is greater” (“Request No. 3”). R. at 30.
4. “[T]he [Bank] lack[s] any agency from the real parties in interest” (“Request No. 4”). R. at 30.
5. ReconTrust has no standing to pursue foreclosure because BAC-HLS “lacks standing to assign the Successor Trustee as a Trustee to the Trust Deed” (“Request No. 5”). R. at 30.

As explained in the Magistrate Judge’s Report, not only are these claims moot, they are based on erroneous conclusions of law.

### **1. Roberts’ Declaratory Judgment Claims are moot.<sup>9</sup>**

The District Court properly dismissed these claims because they are moot and, therefore, the District Court lacked subject matter jurisdiction. “Mootness is a threshold issue because the existence of a live case or controversy is a

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<sup>9</sup> Moreover, the Utah statutes limit only the power of sale to title insurance companies and members of the Utah bar. *See UTAH CODE ANN. §§ 57-1-23, -23.5.* The statutes do not purport to prohibit ReconTrust from serving as the trustee. *See UTAH CODE ANN. § 57-1-21.* Here, ReconTrust did not exercise the power of sale as the Property has not been sold at foreclosure.

constitutional prerequisite to federal court jurisdiction.” *McClelland v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996) (citations omitted); *see also Utah Safe to Learn-Safe to Worship Coalition, Inc. v. Utah*, 94 P.3d 217, 224 (Utah 2004) (holding that a “justiciable controversy” is a threshold requirement for a court to render declaratory relief). A claim is moot “when it is impossible to grant any effectual relief.” *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 891 (10th Cir. 2008) (citations omitted). A claim is also moot if a plaintiff’s interest is nothing more than “the satisfaction of a declaration that a person was wronged.” *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 (10th Cir. 1994) (citation omitted).

Here, Roberts’ declaratory judgment claims are moot because ReconTrust is no longer the trustee to the Deed of Trust. *See R.* at 825. Each of Roberts’ requests for declaratory relief is based on the theory that ReconTrust “is the named successor trustee,” and that ReconTrust “is not a qualified trustee” under Utah law and therefore lacks the authority to sell the Property. *See R.* at 29-30. ReconTrust, however, is no longer the substitute trustee for the Property. In fact, ReconTrust suspended its operations in Utah in October 2011. On November 2, 2011, Armand J. Howell, a member of the Utah bar, was substituted as trustee. *See R.* at 814. Because Plaintiff’s requests for declaratory judgment are moot, the District Court properly denied relief for each request.

**2. Plaintiff's Requests for Declaratory Relief are based on Erroneous Conclusions of law.**

Even if the requests for declaratory relief were not moot, the District Court properly dismissed the claim because Roberts' requests for declaratory relief are premised on erroneous conclusions of law. *See R.* at 823.

**a. Request Nos. 1 and 2 are Improper Because ReconTrust has Authority to Foreclose in Utah.**

Roberts' theory that ReconTrust is not a qualified trustee under Utah law, and lacks the authority to foreclose under the REFI Deed, is simply incorrect. As alleged in the Complaint, ReconTrust was appointed successor trustee for the REFI Deed. *See R.* at 29, 48. The REFI specifically allows for such appointment. *See R.* at 39-49. In addition, ReconTrust's authority to foreclose on Roberts' Utah Property is not restricted by Utah law because of federal preemption, as more fully explained below.

**(1) The National Bank Act "ordinarily preempts" Utah law.**

Utah Code §§ 57-1-21 and 57-1-23, which purport to deny national banks the power of sale, are preempted by the National Bank Act ("NBA") because Congress intended for the federal government to have supremacy in regulating national banks. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 7 (2007). As the Supreme Court has recognized, national banks are "instrumentalit[ies] of the federal government, created for a public purpose, and . . . subject to the paramount

authority of the United States.” *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978) (citation omitted). “State attempts to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties.” *Bank of Am. v. City & Cnty. of S.F.*, 309 F.3d 551, 561 (9th Cir. 2002) (citing to *First Nat'l Bank of San Jose v. Cal.*, 262 U.S. 366, 369 (1923)). Indeed, the legislative history states that the “object” of the NBA is to “establish a national banking system” free from state regulation. Cong. Globe, 38th Cong., 1st Sess. 1451 (1864).

Further, the general presumption that state laws are not preempted by federal law does not apply in the context of national banking. *See Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996) (finding that the history “interpreting grants of both enumerated and incidental ‘powers’ to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law”) (citing to *First Nat'l Bank of San Jose*, 262 U.S. at 368-69 (national banks’ “power” to receive deposits pre-empts contrary state law); *Watters*, 550 U.S. at 12 (grants of federal power under the NBA ordinarily preempt conflicting state law)). Thus, through the comprehensive statutory scheme of the NBA, Congress intended that a national bank would be subject to laws and regulations promulgated by the

federal government, and not the individual states where the national banks operate.

*See id.* at 7.

Here, Utah Code §§ 57-1-21 and 57-1-23 limit the power of sale in Utah to active members of the Utah state bar and title insurance companies. *See UTAH CODE ANN. §§ 57-1-21, 57-1-23.* By their plain language, the Utah statutes purport to deny national banks the power of sale, which is in conflict with federal law and regulation. Accordingly, they are preempted and void because “they attempt to control the conduct of national banks . . . conflict with federal law, frustrate the purposes of the National Bank Act, [and] impair the efficiency of national banks to discharge their duties.” *Bank of Am.*, 309 F.3d at 561.

**(2) Section 92a(a) of the NBA Authorizes ReconTrust to Exercise the power of sale as to the Property**

ReconTrust is authorized to conduct foreclosures in Utah as a federally chartered national banking association that operates under the NBA, *see 12 U.S.C. §§ 21 through 216d*, and is regulated by the Office of the Comptroller of the Currency (the “OCC”). As such, ReconTrust’s fiduciary activities as trustee are governed by federal law, specifically 12 U.S.C. § 92a of the NBA. Section 92a(a) specifically provides:

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefore, when not in contravention of State or local law, the right to act as trustee . . . or in any other fiduciary capacity in which State banks, trust

companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

12 U.S.C. § 92a(a). The right to act “as trustee” under § 92a(a) includes the right to conduct trustee sales and associated tasks. *See* OCC Interp. Ltr. (June 13, 1986) (unpublished) (explaining that a national bank may exercise its trustee powers by conducting trustee sales, among other functions associated with foreclosures of property). Therefore, under the statute, a national bank is authorized to conduct trustee sales as long as the grant of authority is “not in contravention of State or local law” of the State in which the bank is “located.” *See* 12 U.S.C. § 92a(a).

The OCC specifically addressed the “location” of national banks as stated in § 92a by defining the terms “State” and “State laws” to mean “the state in which the bank acts in a fiduciary capacity.” 12 C.F.R. §§ 9.7(d), 9.7(e)(1). Section 9.7(d) further defines the state in which the bank “acts in a fiduciary capacity” as the state in which the bank exercises three core fiduciary functions. Specifically, the regulation explains that “[a] national bank acts in a fiduciary capacity in the state in which it [1] accepts the fiduciary appointment, [2] executes the documents that create the fiduciary relationship, and [3] makes discretionary decisions regarding the investment or distribution of fiduciary assets.” 12 C.F.R. § 9.7(d).

For states in which a national bank does not “act in a fiduciary capacity,” as defined in § 9.7(d), the OCC has interpreted § 92a to provide that a national bank

may still act as a trustee for property located in such states. *See* 12 C.F.R. § 9.7(b). The regulation states, “[w]hile acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state, and it may act as fiduciary for relationships that include property located in other states.” 12 C.F.R. § 9.7(b). In such instances, pursuant to 12 C.F.R. § 9.7(e)(1), “[t]he State laws that apply to a national bank’s fiduciary activities by virtue of 12 U.S.C. § 92a are the laws of” the “home” state, meaning the state in which the national bank “acts in a fiduciary capacity.” In other words, “[e]xcept for the state laws made applicable to national banks by virtue of 12 U.S.C. 92a, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks.” 12 C.F.R. § 9.7(e)(2).

The OCC Interpretive Letters have adhered to the interpretation and application of § 92a and § 9.7 since the final issuance of § 9.7 by the OCC in 2001. *See* 66 Fed. Reg. 34792. For example, in OCC Letter 973, the OCC explained that “the state in which a bank acts in a fiduciary capacity for any given fiduciary relationship is the state in which the bank performs the core fiduciary activities of accepting fiduciary appointments, executing documents that create the fiduciary relationship, or making decisions regarding the investment or distribution of fiduciary assets. . . .” OCC Interpretive Letter 973 at 3 (Aug. 12, 2003) (unpublished). As summed up by OCC Interpretive Letter 995:

[A] national bank looks to state law to determine which fiduciary capacities are permissible. For this purpose, the relevant law is the law of the state in which the national bank is located, which the OCC has interpreted to mean the state in which the national bank acts in a fiduciary capacity.

Part 9 of the OCC's regulations clarifies that the state in which a bank acts in a fiduciary capacity for any given fiduciary relationship is the state in which the bank performs the key fiduciary activities of accepting fiduciary appointments, executing documents that create the fiduciary relationship, or making decisions regarding the investment or distribution of fiduciary assets.

For each fiduciary relationship, a national bank will refer to only one state's laws for purposes of defining the extent of its fiduciary powers pursuant to Section 92a. The Bank would look to the laws of that state to determine which fiduciary capacities it may engage in, and may then engage in any of these capacities for customers both in that state and in other states. The fiduciary capacities permitted under the laws of other states where the Bank's *customers* are located do not affect the fiduciary capacities in which the Bank may act.

OCC Interp. Ltr. 995 at 2 (June 22, 2004) (unpublished) (emphasis in original) (internal citations omitted).

Accordingly, ReconTrust “acts in a fiduciary capacity” “in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets.” 12 C.F.R. § 9.7(d). To the extent these activities take place in more than one state, “then the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that *the bank designates*

from among those states.” 12 C.F.R. § 9.7(d); *see also* OCC Interpretive Letter 973 at n.6.

Here, Roberts has made no allegation to establish that Utah is the state where ReconTrust accepted its fiduciary appointment, executed documents creating the fiduciary relationship, or made discretionary decisions. *See generally* R. at 23-37. In fact, the Substitution of Trustee and Notice of Default were executed in Texas. *See* R. at 51, 62-63 (showing ReconTrust’s Texas address). Further, Roberts has not alleged that ReconTrust designated Utah from among those states in which the trust activities occurred, and ReconTrust has not, in fact, designated Utah as the state in which it acts in a fiduciary capacity.

Because ReconTrust exercises its core fiduciary functions in Texas, ReconTrust’s authority to conduct trustee sales is governed by Texas law. Texas law permits national banks to act as trustee under deeds of trust and to exercise the power of sale with regard to such deeds of trust. *See* TEX. FIN. CODE ANN. §§ 32.001, 182.001; TEX. PROP. CODE ANN. §§ 51.0001, 51.0074. As ReconTrust is authorized under Texas law to act as a trustee, ReconTrust is not, therefore, acting “in contravention of State law” under 92a(a) when it exercises the power of sale in Utah.

**(3) Even if Utah law Applies for § 92a Purposes, ReconTrust can still Exercise the power of sale Pursuant to § 92a(b).**

Even if Utah state law governs the analysis, which it does not, ReconTrust still can exercise the power of sale pursuant to federal law because title insurance companies compete with ReconTrust. *See* 12 U.S.C. § 92a(b). Under § 92a(b), if a state authorizes its “banks, trust companies, or other corporations which compete with national banks” to exercise the power of sale in Utah, national banks also are allowed to exercise the power of sale. *See* 12 U.S.C. § 92a(b) (emphasis added). The only trustees authorized by Utah state law to execute the power of sale are members of the Utah state bar and title insurance companies. *See* UTAH CODE ANN. § 57-1-21(3). Thus, if Utah law governs the analysis under § 92a, the sole question is: “*Do Utah title insurance companies compete with ReconTrust?*”<sup>10</sup> This question must be answered in the affirmative.

It is undisputed that ReconTrust, as a national bank, has authority to act as a trustee under a deed of trust and conduct trustee sales, among other functions associated with foreclosures of property. *See* OCC Interp. Ltr. (June 13, 1986); *see also supra* p. 12, 14 n.6. Title insurance companies compete with ReconTrust because title insurance companies also serve as trustees under deeds of trust for

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<sup>10</sup> To the extent a member of the Utah state bar can exercise the power of sale in the capacity as a professional corporation, the inquiry extends to the members of the Utah state bar.

real property, *see UTAH CODE ANN.* § 57-1-21(1); § 57-1-23, and both engage in similar operations and vie for the same type of commercial business from the same consumer group. While the NBA does not define “compete,” as used in § 92a, the Supreme Court has defined competition under the NBA as occurring when state actors are “engaged either in similar businesses or in particular operations or investments like those of national banks.” *First Nat'l Bank of Hartford v. Hartford*, 273 U.S. 548, 558 (1927). The Court further explained:

[I]n order to establish the fact of competition it is [not] necessary to show that national banks and competing investors solicit the same customers for the same loans or investments. It is enough as stated if both engage in seeking and securing in the same locality capital investments of the class now under consideration which are substantial in amount.

. . .

Here plaintiff is shown to have investments in real estate mortgages and to be engaged in selling them. The sale of mortgages and “other evidences of debt” acquired by way of loan or discount with a view to reinvestment is, we think, within the recognized limits of the incidental powers of national banks. To that extent, the business of acquiring and selling such mortgages and evidences of debt, carried on by numerous individuals, firms, and corporations in Wisconsin, comes into competition with this incidental business of national banks.

273 U.S. at 559-60 (internal quotations and citations omitted).

Thus, Utah title insurance companies compete with ReconTrust under § 92a(b) because they meet the criteria of “competition” as defined by the Supreme Court: (1) they are engaged in similar operations as trustees; and (2) potentially vie

for the same commercial business from the same consumer group in the same locality. *See id.* Utah Code § 57-1-23 allows title insurance companies to exercise the power of sale in their capacity as trustee, and public records, court filings, and even internet advertisements confirm that these Utah title insurance companies seek and actually exercise the power of sale as trustees in Utah.<sup>11</sup> Because title insurance companies also act as trustees under deeds of trust and perform the same fiduciary duties as ReconTrust, under § 92a, ReconTrust may exercise the power of sale in Utah.<sup>12</sup>

**b. Request No. 3 fails Because there has been no Foreclosure sale.**

The District Court correctly dismissed Roberts' third request for declaratory judgment because it improperly seeks damages of \$52,020 based on an alleged violation of Utah Code Ann. § 57-1-23.5. *See R.* at 30. As stated in the Magistrate

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<sup>11</sup> See, e.g., *Dohner v. Wachovia Mortg. FSB*, No. 2:11-cv-00276, 2011 U.S. Dist. LEXIS 103674, at \*1 (D. Utah Sept. 13, 2011) (unpublished) (naming eTitle Insurance Agency, LLC, the trustee in their foreclosure sale, as a defendant); Backman Title Services, Inc. (<http://www.backmantitle.com/trusteeSaleServices/trusteeSaleServices.php>); Lincoln Title Insurance Agency, Inc. (<https://www.lincolntitletn.com/REO.aspx>); Provoland Title Company (<http://www.provoland.com/services/foreclosures/>).

<sup>12</sup> ReconTrust need not satisfy the state licensing requirements that UTAH CODE §§ 57-1-21 and 57-1-23 impose on Utah title insurance companies. *See, e.g., Watters*, 550 U.S. at 15 n.7 (Federal law “has never permitted States to license, inspect, and supervise national banks as they do state banks.”); *Bank of Am. v. Lima*, 103 F. Supp. 916, 918 (D. Mass. 1952); cf. *United States v. Locke*, 529 U.S. 89, 94 (2000).

Judge's Report, a request for money damages is not a proper request for declaratory relief. *See R.* at 825. Rather, under Utah law, a court "has the power to issue declaratory judgments determining rights, status, and other legal relations within its respective jurisdiction. UTAH CODE ANN. § 78B-6-401.<sup>13</sup> Monetary relief is not appropriate for declaratory judgments under Utah law. *See id.*

Further, this claim fails because it is not ripe. As a subset of Article III's case or controversy requirement, the ripeness doctrine avoids premature adjudication of abstract or inchoate issues that may never need to be decided. *See United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947). The Utah statute, § 57-1-23.5(2)(a), penalizes only a person "who conducts an unauthorized sale." Here, there has been no sale of the Property. Ex. 1, Docket at 2, *Roberts v. America's Wholesale Lender*, No. 110913759 (Utah 3d Dist. Ct., Salt Lake Cnty.) ("Plaintiff and Defendants through their counsel, agreed to postpone and cancel the sale as stated on the record."). Accordingly, the statute has not been violated, and the issue is not ripe for determination. *See Mitchell*, 330 U.S. at 89-91 (finding that issues were not ripe as to those who had not been charged with violating a statute); *see also Utah Safe to Learn-Safe to Worship Coalition*, 94 P.3d at 224 (holding

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<sup>13</sup> For diversity claims not involving substantive federal law, such as this one, the substantive law of the forum state governs the analysis of the claims. *See Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1016 (10th Cir. 2001).

that an issue must be “ripe for determination” for a court to issue declaratory relief).

**c. Request No. 4 fails Because the deeds of trust are not null and void.**

The District Court properly dismissed Request No. 4 because it seeks a declaration that the Bank has no interest in the Property, based solely on Roberts’ erroneous theory that the underlying Deeds of Trust and subsequent assignments are null and void. *See R.* at 30. Again, Roberts misunderstands information contained on a website regarding another entity with a similar name. Because AWL was a valid trade name for CHL at the time of assignment, the Deeds of Trust are not void, and the Bank is the real parties in interest. *See supra* pp. 10-12. The District Court properly denied Roberts’ fourth request for declaratory judgment for these reasons.

**d. Request No. 5 fails Because it Conflicts with the Express terms of the REFI Deed.**

Request No. 5, which challenges ReconTrust’s “standing,” was properly dismissed by the District Court because the express terms of the REFI Deed provide that “Lender, at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder.” R. at 48. Here, AWL assigned the beneficial interest in the REFI Deed to BAC-HLS, which in turn appointed ReconTrust as the successor trustee. *See R.* at 50-51. Because

AWL was the proper trade name for CHL (which had been acquired, indirectly, by Bank of America Corporation), the assignment of beneficial interest in the REFI Deed to BAC-HLS was valid. Therefore, the District Court properly denied Roberts' request for a declaration that BAC-HLS had no standing to assign ReconTrust as the successor trustee.

**B. The District Court Properly Dismissed Roberts' Unjust Enrichment Claim.**

Roberts' unjust enrichment claim again relies on the mistaken assumption that AWL is a "nonentity and has no legal capacity to do any business," and that the Bank is not the proper party to foreclose. *See R.* at 30-31. As explained above, Roberts' allegations regarding the identity of AWL are simply incorrect, and any claim based on this misunderstanding should be dismissed. *See supra* pp. 10-12.

Roberts' claim for unjust enrichment fails for three additional reasons, as identified by the District Court. *See R.* at 826. First, there has been no foreclosure on the Property. To state a valid claim for unjust enrichment, Roberts must allege three elements:

"(1) a benefit conferred . . . ; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention [of the benefit] by the conferee . . . under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value."

*US Fid. v. US Sports Specialty*, 270 P.3d 464, 468 (Utah 2012) (citation omitted). Here, Roberts does not allege that the Bank *has* benefitted, only that it *would*

benefit – at some time in the future – through the sale of the Property. *See R.* at 31. The Property has not been sold; therefore, the unjust enrichment claim is not yet ripe for adjudication.

Second, the claim fails because recovery under an unjust enrichment claim is only available “in the absence of an enforceable contract.” *Ashby v. Ashby*, 227 P.3d 246, 250 (Utah 2010); *see also Am. Towers Owners Ass’n, Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1193 (Utah 1996) (“[I]f a legal remedy is available, such as breach of an express contract, the law will not imply the equitable remedy of unjust enrichment.”). In this case, Roberts attached two enforceable contracts to his Complaint: the REFI Deed and the HELOC Deed. *See R.* at 39-49, 56-61. Roberts has not argued or shown that these contracts are not enforceable. Because a legal remedy is available under these contracts, Roberts cannot maintain an unjust enrichment claim.

Third, there is no unjust enrichment under these facts because foreclosure of a Deed of Trust when a borrower is in default is not inequitable. *See Associated Indus. Dev., Inc. v. Jewkes*, 701 P.2d 486, 488 (Utah 1984) (“[W]e have no basis for finding that the ordinary operation of a statutory foreclosure proceeding will result in an unjust enrichment of the mortgagee. . . .”).

Because Roberts fails to provide any basis to support his claim for unjust enrichment, this Court should affirm dismissal of this claim.

**C. The District Court Properly Dismissed Roberts' Quiet Title Claim.**

The District Court properly dismissed Roberts' quiet title claim because he has not and cannot allege any facts to establish that he possesses superior claim to the Property. To maintain a quiet title claim, a plaintiff must allege "title, entitlement to possession, and that the estate or interest claimed by others is adverse or hostile to the alleged claims of title or interest." *Utah State Dep't of Soc. Servs. v. Santiago*, 590 P.2d 335, 337-38 (Utah 1979) (citation omitted). The "plaintiff must prevail on the strength of his own claim to title and not on the weakness of a defendant's title or even its total lack of title." *Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating, Co.*, 98 P.3d 1, 8 (Utah 2004). Here, the Complaint is devoid of any allegation that Roberts has superior title to the Property. Rather, the factual allegations in the Complaint suggest the opposite: Roberts executed the REFI Deed and HELOC Deed, and he conveyed his interest in the Property for the purpose of securing the loan. Roberts does not and cannot allege that his interest in the Property is superior to the Trust Deeds. On this basis alone, the Court should affirm the dismissal of Roberts' quiet title claim.

Also, Roberts' challenge to the Bank's claim to the Property is based on his mistaken belief that AWL "lacks any legal capacity to do business as a nonentity." R. at 32. Again, for the reasons previously established, Roberts is mistaken about AWL's corporate identity. *See supra* pp. 10-12.

For all of these reasons, this Court should affirm the District Court's dismissal of the quiet title claim.<sup>14</sup>

**D. The District Court Properly Dismissed Roberts' Claim for Reckless/Intentional Infliction of Emotional Distress.**

The District Court properly dismissed Roberts' claim for reckless and intentional infliction of emotional distress because Roberts alleges only conclusory statements that are not supported by factual allegations. *See R.* at 829-30. To properly state a claim for intentional infliction of emotional distress, a plaintiff must allege that the defendant:

intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.

*Anderson Dev. Co. v. Tobias*, 116 P.3d 323, 338 (Utah 2005) (citation omitted). To be considered "outrageous," the conduct must evoke "outrage or revulsion" and "be more than unreasonable, unkind, or unfair." *Bennett v. Jones, Waldo, Holbrook & McDonough*, 70 P.3d 17, 30 (Utah 2003) (citation omitted). Such

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<sup>14</sup> Finally, to the extent Roberts bases his quiet title claim on the so-called "split the note" theory, which is not clear, courts have repeatedly held that the mortgage follows the note and have rejected the "split the note" theory. This Court and the Utah Court of Appeals have both rejected variations of this theory. *See Commonwealth Prop. Advocates, LLC v. MERS, Inc.*, Nos. 10-4128, 10-4193, 10-4215, 680 F.3d 1194, 1205 (10th Cir. Dec. 23, 2011) (citing *Commonwealth Prop. Advocates v. MERS, Inc.*, 263 P.3d 397, 399 (Utah Ct. App. 2011)).

conduct “is not necessarily outrageous merely because it is tortious, injurious, or malicious, or because it would give rise to punitive damages, or because it is illegal.” *Id.*

Roberts merely alleges that “Defendants recklessly offered to modify without having any intention to actual [sic] modify the subject Note and Trust Deed.” R. at 33. Even taking the conclusory statements as alleged, Roberts has failed to plead facts sufficient for this claim. Roberts fails to identify the specific bank and loan, and also fails to plead conduct that rises to the level of “outrageous conduct” needed to support a claim of intentional infliction of emotional distress. His conclusory statement, without more, is insufficient.

Roberts attempts to cure the deficiency in his Complaint by asserting, for the first time on appeal, that he “had to suffer through 3 scheduled attempts by BAC to sell Roberts’ personal primary residence, when BAC as servicer for Fannie Mae, knew they were not the beneficiary of the trust deed and didn’t possess the power of sale.” Appellant’s Br. at 8. Again, Roberts cannot raise new arguments on appeal and he further misunderstands Fannie Mae’s role as the investor of the Property. This Court should affirm the District Court’s dismissal of Roberts’ reckless/intentional infliction of emotional distress claim.

**E. The District Court Properly Dismissed Roberts' Fraud Claim.**

The Magistrate Judge properly recommended dismissal of Roberts' fraud claim because the claim is based on Roberts' erroneous conclusion concerning AWL's corporate identity. *See R. at 829-30* (citing R. at 34-35). As explained above, Roberts' allegations regarding AWL are incorrect and any claim based on this allegation should be dismissed. *See supra* pp. 10-12.

This Court should also affirm the District Court's dismissal of the fraud claim because Roberts fails to sufficiently state a fraud claim under Utah law, and also fails to meet the heightened pleading standard of Rule 9(b) of the Federal Rule of Civil Procedure. To state a fraud claim, a plaintiff must allege the following elements:

- (1) a representation; (2) concerning a presently existing material fact;
- (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

*Giusti v. Sterling Wentworth Corp.*, 201 P.3d 966, 977 n.38 (Utah 2009). In addition, under the heightened pleading standard of Rule 9(b), a fraud claim "must 'set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof.'" *United States ex. Rel. Sikkenga*, 472 F.3d at 726-27.

Roberts fails to sufficiently plead a fraud claim because he does not identify a particular false representation, nor does he identify the person who allegedly made the false statement. Roberts also fails to allege any reliance on the false statement, nor does he plead damages resulting from the false statement. Instead, he merely asserts that the two documents assigning the REFI Deed and the document appointing ReconTrust as successor trustee were fraudulent because Diana Feehan and Angela Nava allegedly signed them without authority and as employees of different entities than indicated on the documents. *See R.* at 34-35. Roberts does not allege with supporting facts that either individual specifically worked for one entity and not another. Nor does he allege that, even if employed by one entity, the individual did not have authority to sign for another entity.

Roberts also alleges, without sufficient factual support, that Angela Nava's execution of the document appointing ReconTrust as successor trustee created "a conflict of interest for her to be acting on behalf on [sic] a transaction giving beneficial interest from the one defendant to the other," and thus "Plaintiff has reason to believe such transfer and substitution were fraudulently made and has [sic] damaged Plaintiff." R. at 35. Roberts does not elaborate on this conclusory statement and, therefore, does not plead sufficient facts to state a claim for fraud.

This Court also should reject Roberts' allegation of fraud that he raises for the first time on appeal. According to the opening brief, the Bank "used"

ReconTrust employees to execute and record documents stating “BAC was the beneficial owner of the Trust Deed and Note when [BAC] knew Fannie Mae was the beneficial owner.” Appellant’s Br. at 9. As a preliminary matter, Roberts did not allege any facts in the Complaint to support such an argument, and Roberts’ Fannie Mae-based arguments are improperly raised for the first time before this Court. Therefore, Roberts has waived such argument on appeal. In addition, as explained above, Roberts misunderstands Fannie Mae’s role as the investor of the loan. *See supra* pp. 12-14. Therefore, because the Bank’s ownership status is not a false statement, Roberts’ fraud claims based on this status should be dismissed.

#### **F. Roberts is not Entitled to an Accounting.**

Based on his opening brief, it does not appear that Roberts appeals from the District Court’s decision dismissing his claim for an accounting. Therefore, Roberts has waived any arguments relating to this claim on appeal. *See Tele-Commcs, Inc.*, 104 F.3d at 1233. Even so, an accounting is not appropriate for this case. The Supreme Court has held that “[t]he necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is . . . the absence of an adequate remedy at law.” *Dairy Queen Inc. v. Wood*, 369 U.S. 469, 478 (1962) (citation omitted). Therefore, “in order to maintain such a suit on a cause of action cognizable at law, . . . the plaintiff must be able to show that the ‘accounts between the parties’ are of such a ‘complicated

nature’ that only a court of equity can satisfactorily unravel them.” *Id.* Indeed, “modern procedural tools – such as the appointment of special masters to assist the jury with difficult matters – make it a ‘rare case’ when computational complexities will render a legal remedy inadequate.” *Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 965 (10th Cir. 2009) (quoting *Dairy Queen*, 369 U.S. at 478). “[I]t is widely acknowledged that [the *Dairy Queen* Court’s] analysis severely limited the circumstances in which [an accounting] would be available.” *Id.* The purpose of an accounting is to take the damages calculation from a jury so an equitable accounting can be performed by a court of equity. *See id.*

Here, Roberts misunderstands the purpose of an accounting and requests that the Bank provide him with an accounting of the “use of all money received by the [the Bank], including the use of fees to buy derivative or insurance to protect certificate and/or note holders from loss.” R. at 36. Roberts does not provide any legal basis for why the Bank would be required to provide him with such information. Roberts also neglects to allege the absence of an adequate remedy at law, or that the accounts in this case are so complicated that only a court of equity can unravel them. Further, because all of Roberts’ actual causes of action should be dismissed, as discussed above, there are no damages for those causes of action to be accounted for.

## **CONCLUSION**

This Court should affirm the District Court's order dismissing Roberts' claims because, as the District Court held, all of Roberts' claims are based on a misunderstanding of AWL's corporate identity. Even so, Roberts has failed to sufficiently plead a claim against the Bank. Further, Roberts' claims for declaratory relief and unjust enrichment are moot as the foreclosure never occurred, and ReconTrust is no longer the substitute trustee for the Property. Finally, Roberts waived the Fannie Mae argument on appeal because he failed to raise it with the District Court, and, in any event, Fannie Mae's role as the loan investor does not support any of Roberts' claims.

Roberts' appeal fails to raise any concern that the District Court erred in adopting the Magistrate Judge's recommendation and dismissing the Complaint. Therefore, this Court should affirm the District Court for the reasons stated in the District Court's Order and the Magistrate Judge's Report.

Date: September 4, 2012

Respectfully submitted,

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SERVICING, LP, f/k/a COUNTRYWIDE  
HOME LOANS SERVICING, LP**

**RECONTRUST COMPANY, N.A.**

**COUNTRYWIDE HOME LOANS, INC.,  
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**STATEMENT OF COUNSEL AS TO ORAL ARGUMENT**

Oral argument is not requested.

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I certify that a copy of the foregoing **APPELLEES' RESPONSE BRIEF**, as submitted in digital form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec Endpoint Protection technologies Antivirus and Antispyware Protection (9/4/12), Proactive Threat Protection (9/4/12); and Network Threat Protection (31/12) and is free of viruses. In addition, I certify all required privacy redactions have been made.

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I certify that a copy of the foregoing **APPELLEES' RESPONSE BRIEF** was sent via (ECF) electronic service to the following on this 4<sup>th</sup> day of September, 2012:

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TITLE 12. BANKS AND BANKING  
CHAPTER 2. NATIONAL BANKS  
REGULATION OF THE BANKING BUSINESS; POWERS AND DUTIES OF NATIONAL BANKS

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*12 USCS § 92a*

**§ 92a. Trust powers**

(a) Authority of Comptroller of the Currency. The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

(b) Grant and exercise of powers deemed not in contravention of State or local law. Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act [*12 USCS §§ 92a and note, 248, and 26 USCS §§ 581, 584*].

(c) Segregation of fiduciary and general assets; separate books and records; access of State banking authorities to reports of examinations, books, records, and assets. National banks exercising any or all of the powers enumerating [enumerated] in this section shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this section. The State banking authorities may have access to reports of examination made by the Comptroller of the Currency insofar as such reports relate to the trust department of such bank, but nothing in this Act [*12 USCS §§ 92a and note, 248, and 26 USCS §§ 581, 584*] shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank.

(d) Prohibited operations; separate investment account; collateral for certain funds used in conduct of business. No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Comptroller of the Currency.

(e) Lien and claim upon bank failure. In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

(f) Deposit of securities for protection of private or court trusts; execution of and exemption from bond. Whenever the laws of a State require corporations acting in a fiduciary capacity to deposit securities with the State authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law. National banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement. National banks shall have power to execute such bond when so required by the laws of the State.

(g) Officials' oath or affidavit. In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

(h) Loans of trust funds to officers and employees prohibited; penalties. It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than \$ 5,000, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court.

(i) Considerations determinative of grant or denial of applications; minimum capital and surplus for issuance of permit. In passing upon applications for permission to exercise the powers enumerated in this section, the Comptroller of the Currency may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to him proper, and may grant or refuse the application accordingly: Provided, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers.

(j) Surrender of authorization; board resolution; Comptroller certification; activities affected; regulations. Any national banking association desiring to surrender its right to exercise the powers granted under this section, in order to relieve itself of the necessity of complying with the requirements of this section, or to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, or for any other purpose, may file with the Comptroller of the Currency a certified copy of a resolution of its board of directors signifying such desire. Upon receipt of such resolution, the Comptroller of the Currency, after satisfying himself that such bank has been relieved in accordance with State law of all duties as trustee, executory [executor], administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or other fiduciary, under court, private, or other appointments previously accepted under authority of this section, may, in his discretion, issue to such bank a certificate certifying that such bank is no longer authorized to exercise the powers granted by this section. Upon the issuance of such a certificate by the Comptroller of the Currency, such bank (1) shall no longer be subject to the provisions of this section or the regulations of the Comptroller of the Currency made pursuant thereto, (2) shall be entitled to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, and (3) shall not exercise thereafter any of the powers granted by this section without first applying for and obtaining a new permit to exercise such powers pursuant to the provisions of this section. The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein.

(k) Revocation; procedures applicable.

(l) In addition to the authority conferred by other law, if, in the opinion of the Comptroller of the Currency, a national banking association is unlawfully or unsoundly exercising, or has unlawfully or unsoundly exercised, or has failed for a period of five consecutive years to exercise, the powers granted by this section or otherwise fails or has failed to comply with the requirements of this section, the Comptroller may issue and serve upon the association a notice of intent to revoke the authority of the association to exercise the powers granted by this section. The notice shall contain a statement of the facts constituting the alleged unlawful or unsound exercise of powers, or failure to exercise powers, or failure to

comply, and shall fix a time and place at which a hearing will be held to determine whether an order revoking authority to exercise such powers should issue against the association.

(2) Such hearing shall be conducted in accordance with the provisions of subsection (h) of section 8 of the Federal Deposit Insurance Act (*12 U.S.C. 1818(h)*), and subject to judicial review as provided in such section, and shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or later date is set by the Comptroller at the request of any association so served.

(3) Unless the association so served shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the issuance of the revocation order. In the event of such consent, or if upon the record made at any such hearing, the Comptroller shall find that any allegation specified in the notice of charges has been established, the Comptroller may issue and serve upon the association an order prohibiting it from accepting any new or additional trust accounts and revoking authority to exercise any and all powers granted by this section, except that such order shall permit the association to continue to service all previously accepted trust accounts pending their expeditious divestiture or termination.

(4) A revocation order shall become effective not earlier than the expiration of thirty days after service of such order upon the association so served (except in the case of a revocation order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable, except to such extent as it is stayed, modified, terminated, or set aside by action of the Comptroller or a reviewing court.

**HISTORY:**

(Sept. 28, 1962, P.L. 87-722, § 1, 76 Stat. 668; March 31, 1980, P.L. 96-221, Title VII, Part A, § 704, 94 Stat. 187.)



UTAH CODE ANNOTATED

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\*\*\* STATUTES CURRENT THROUGH THE 2012 FOURTH SPECIAL SESSION \*\*\*

TITLE 57. REAL ESTATE  
CHAPTER 1. CONVEYANCES

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*Utah Code Ann. § 57-1-21 (2012)*

§ 57-1-21. Trustees of trust deeds -- Qualifications

(1) (a) The trustee of a trust deed shall be:

(i) any active member of the Utah State Bar who maintains a place within the state where the trustor or other interested parties may meet with the trustee to:

- (A) request information about what is required to reinstate or payoff the obligation secured by the trust deed;
- (B) deliver written communications to the lender as required by both the trust deed and by law;
- (C) deliver funds to reinstate or payoff the loan secured by the trust deed; or
- (D) deliver funds by a bidder at a foreclosure sale to pay for the purchase of the property secured by the trust deed;

(ii) any depository institution as defined in *Section 7-1-103*, or insurance company authorized to do business and actually doing business in Utah under the laws of Utah or the United States;

(iii) any corporation authorized to conduct a trust business and actually conducting a trust business in Utah under the laws of Utah or the United States;

(iv) any title insurance company or agency that:

(A) holds a certificate of authority or license under Title 31A, Insurance Code, to conduct insurance business in the state;

(B) is actually doing business in the state; and

(C) maintains a bona fide office in the state;

(v) any agency of the United States government; or

(vi) any association or corporation that is licensed, chartered, or regulated by the Farm Credit Administration or its successor.

(b) For purposes of this Subsection (1), a person maintains a bona fide office within the state if that person maintains a physical office in the state:

(i) that is open to the public;

(ii) that is staffed during regular business hours on regular business days; and

(iii) at which a trustor of a trust deed may in person:

- (A) request information regarding a trust deed; or
- (B) deliver funds, including reinstatement or payoff funds.

(c) This Subsection (1) is not applicable to a trustee of a trust deed existing prior to May 14, 1963, nor to any agreement that is supplemental to that trust deed.

(d) The amendments in Laws of Utah 2002, Chapter 209, to this Subsection (1) apply only to a trustee that is appointed on or after May 6, 2002.

(2) The trustee of a trust deed may not be the beneficiary of the trust deed, unless the beneficiary is qualified to be a trustee under Subsection (1)(a)(ii), (iii), (v), or (vi).

(3) The power of sale conferred by *Section 57-1-23* may only be exercised by the trustee of a trust deed if the trustee is qualified under Subsection (1)(a)(i) or (iv).

(4) A trust deed with an unqualified trustee or without a trustee shall be effective to create a lien on the trust property, but the power of sale and other trustee powers under the trust deed may be exercised only if the beneficiary has appointed a qualified successor trustee under *Section 57-1-22*.

**HISTORY:** L. 1961, ch. 181, § 3; 1963, ch. 110, § 1; 1969, ch. 162, § 1; 1985, ch. 64, § 1; 1996, ch. 182, § 25; 2001, ch. 236, § 2; 2002, ch. 209, § 1; 2004, ch. 177, § 1; 2008, ch. 250, § 41.



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\*\*\* STATUTES CURRENT THROUGH THE 2012 FOURTH SPECIAL SESSION \*\*\*

TITLE 57. REAL ESTATE  
CHAPTER 1. CONVEYANCES

[Go to the Utah Code Archive Directory](#)

*Utah Code Ann. § 57-1-23 (2012)*

§ 57-1-23. Sale of trust property -- Power of trustee -- Foreclosure of trust deed

The trustee who is qualified under *Subsection 57-1-21(1)(a)(i)* or (iv) is given the power of sale by which the trustee may exercise and cause the trust property to be sold in the manner provided in *Sections 57-1-24* and *57-1-27*, after a breach of an obligation for which the trust property is conveyed as security; or, at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision for it in the trust deed.

**HISTORY:** L. 1961, ch. 181, § 5; 2001, ch. 236, § 5.



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\*\*\* STATUTES CURRENT THROUGH THE 2012 FOURTH SPECIAL SESSION \*\*\*

TITLE 57. REAL ESTATE  
CHAPTER 1. CONVEYANCES

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*Utah Code Ann. § 57-1-23.5 (2012)*

§ 57-1-23.5. Civil liability for unauthorized person who exercises power of sale

(1) As used in this section:

(a) "Unauthorized person" means a person who does not qualify as a trustee under *Subsection 57-1-21(1)(a)(i)* or (iv).

(b) "Unauthorized sale" means the exercise of a power of sale by an unauthorized person.

(2) (a) An unauthorized person who conducts an unauthorized sale is liable to the trustor for the actual damages suffered by the trustor as a result of the unauthorized sale or \$ 2,000, whichever is greater.

(b) In an action under Subsection (2)(a), the court shall award a prevailing plaintiff the plaintiff's costs and attorney fees.

**HISTORY:** C. 1953, 57-1-23.5, enacted by L. 2011, ch. 228, § 2.



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\*\*\* STATUTES CURRENT THROUGH THE 2012 FOURTH SPECIAL SESSION \*\*\*

TITLE 70A. UNIFORM COMMERCIAL CODE  
CHAPTER 3. NEGOTIABLE INSTRUMENTS  
PART 3. ENFORCEMENT OF INSTRUMENTS

[Go to the Utah Code Archive Directory](#)

*Utah Code Ann. § 70A-3-312 (2012)*

§ 70A-3-312. Lost, destroyed, or stolen cashier's check, teller's check, or certified check

(1) In this section:

(a) "Check" means a cashier's check, teller's check, or certified check.

(b) "Claimant" means a person who claims the right to receive the amount of a cashier's check, teller's check, or certified check that was lost, destroyed, or stolen.

(c) "Declaration of loss" means a written statement, bearing a notification to the effect that false statements made in the written statement are punishable by law, to the effect that:

(i) the declarer lost possession of a check;

(ii) the declarer is the drawer or payee of the check, in the case of a certified check, or the remitter or payee of the check, in the case of a cashier's check or teller's check;

(iii) the loss of possession was not the result of a transfer by the declarer or a lawful seizure; and

(iv) the declarer cannot reasonably obtain possession of the check because the check was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(d) "Obligated bank" means the issuer of a cashier's check or teller's check or the acceptor of a certified check.

(2) (a) A claimant may assert a claim to the amount of a check by a communication to the obligated bank describing the check with reasonable certainty and requesting payment of the amount of the check, if:

(i) the claimant is the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check;

(ii) the communication contains or is accompanied by a declaration of loss of the claimant with respect to the check;

(iii) the communication is received at a time and in a manner affording the bank a reasonable time to act on it before the check is paid; and

(iv) the claimant provides reasonable identification if requested by the obligated bank.

(b) (i) Delivery of a declaration of loss is a warranty of the truth of the statements made in the declaration.

- (ii) If a claim is asserted in compliance with this Subsection (2), the claim becomes enforceable at the later of:
- (A) the time the claim is asserted; or
  - (B) the 90th day following the date of the check, in the case of a cashier's check or teller's check, or the 90th day following the date of the acceptance, in the case of a certified check.
- (c) Until the claim becomes enforceable, it has no legal effect and the obligated bank may pay the check or, in the case of a teller's check, may permit the drawee to pay the check. Payment to a person entitled to enforce the check discharges all liability of the obligated bank with respect to the check.
- (d) If the claim becomes enforceable before the check is presented for payment, the obligated bank is not obliged to pay the check.
- (e) When the claim becomes enforceable, the obligated bank becomes obliged to pay the amount of the check to the claimant if payment of the check has not been made to a person entitled to enforce the check. Subject to *Subsection 70A-4-302(l)(a)*, payment to the claimant discharges all liability of the obligated bank with respect to the check.
- (3) If the obligated bank pays the amount of a check to a claimant under Subsection (2)(e) and the check is presented for payment by a person having rights of a holder in due course, the claimant is obliged to:
- (a) refund the payment to the obligated bank if the check is paid; or
  - (b) pay the amount of the check to the person having rights of a holder in due course if the check is dishonored.
- (4) If a claimant has the right to assert a claim under Subsection (2) and is also a person entitled to enforce a cashier's check, teller's check, or certified check that is lost, destroyed, or stolen, the claimant may assert rights with respect to the check either under this section or *Section 70A-3-309*.
- (5) This section does not apply to checks that have become the property of the state pursuant to Title 67, Chapter 4a, Unclaimed Property Act.

**HISTORY:** C. 1953, 70A-3-312, enacted by L. 1995, ch. 110, § 1; 1996, ch. 79, § 89; 2007, ch. 306, § 92.



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\*\*\* STATUTES CURRENT THROUGH THE 2012 FOURTH SPECIAL SESSION \*\*\*

TITLE 78B. JUDICIAL CODE  
CHAPTER 6. PARTICULAR PROCEEDINGS  
PART 4. DECLARATORY JUDGMENTS

[Go to the Utah Code Archive Directory](#)

*Utah Code Ann. § 78B-6-401 (2012)*

§ 78B-6-401. Jurisdiction of district courts -- Form -- Effect

(1) Each district court has the power to issue declaratory judgments determining rights, status, and other legal relations within its respective jurisdiction. An action or proceeding may not be open to objection on the ground that a declaratory judgment or decree is prayed for.

(2) The declaration may be either affirmative or negative in form and effect and shall have the force and effect of a final judgment or decree.

**HISTORY:** L. 1951, ch. 58, § 1; C. 1943, Supp., 104-33-1; C. 1953, 78-33-1; renumbered by L. 2008, ch. 3, § 930.



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FINANCE CODE  
TITLE 3. FINANCIAL INSTITUTIONS AND BUSINESSES  
SUBTITLE A. BANKS  
CHAPTER 32. POWERS, ORGANIZATION, AND FINANCIAL REQUIREMENTS  
SUBCHAPTER A. ORGANIZATION AND POWERS IN GENERAL

**GO TO TEXAS CODE ARCHIVE DIRECTORY**

*Tex. Finance Code § 32.001 (2012)*

§ 32.001. Organization and General Powers of State Bank

(a) One or more persons, a majority of whom are residents of this state, may organize a state bank as a banking association or a limited banking association.

(b) A state bank may:

(1) receive and pay deposits with or without interest, discount and negotiate promissory notes, borrow or lend money with or without security or interest, invest and deal in securities, buy and sell exchange, coin, and bullion, and exercise incidental powers as necessary to carry on the business of banking as provided by this subtitle;

(2) act as agent, or in a substantially similar capacity, with respect to a financial activity or an activity incidental or complementary to a financial activity;

(3) act in a fiduciary capacity, without giving bond, as guardian, receiver, executor, administrator, or trustee, including a mortgage or indenture trustee;

(4) provide financial, investment, or economic advisory services;

(5) issue or sell instruments representing pools of assets in which a bank may invest directly;

(6) with prior written approval of the banking commissioner, engage in a financial activity or an activity that is incidental or complementary to a financial activity; and

(7) engage in any other activity, directly or through a subsidiary, authorized by this subtitle or rules adopted under this subtitle.

(c) For purposes of other state law, a banking association is considered a corporation and a limited banking association is considered a limited liability company. To the extent consistent with this subtitle, a banking association may exercise the powers of a Texas business corporation and a limited banking association may exercise the powers of a Texas limited liability company as reasonably necessary to enable exercise of specific powers under this subtitle.

(d) A state bank may contribute to a community fund or to another charitable, philanthropic, or benevolent instrumentality conducive to public welfare an amount that the bank's board considers expedient and in the interests of the bank.

(e) A state bank may be organized or reorganized as a community development financial institution or may serve as a community development partner, as those terms are defined by the Riegle Community Development and Regulatory Improvement Act of 1994 (Pub. L. No. 103-325).

(f) In the exercise of discretion consistent with the purposes of this subtitle, the banking commissioner may require a state bank to conduct an otherwise authorized activity through a subsidiary.

**HISTORY:** Enacted by Acts 1997, 75th Leg., ch. 1008 (H.B. 10), § 1, effective September 1, 1997; am. Acts 2001, 77th Leg., ch. 528 (H.B. 2155), § 4, effective September 1, 2001.



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FINANCE CODE  
TITLE 3. FINANCIAL INSTITUTIONS AND BUSINESSES  
SUBTITLE F. TRUST COMPANIES  
CHAPTER 182. POWERS, ORGANIZATION, AND FINANCIAL REQUIREMENTS  
SUBCHAPTER A. ORGANIZATION AND POWERS IN GENERAL

**GO TO TEXAS CODE ARCHIVE DIRECTORY**

*Tex. Finance Code § 182.001 (2012)*

§ 182.001. Organization and General Powers of State Trust Company

(a) Subject to Subsection (g) and the other provisions of this chapter, one or more persons may organize and charter a state trust company as a state trust association or a limited trust association.

- (b) A state trust company may engage in the trust business by:
- (1) acting as trustee under a written agreement;
  - (2) receiving money and other property in its capacity as trustee for investment in real or personal property;
  - (3) acting as trustee and performing the fiduciary duties committed or transferred to it by order of a court;
  - (4) acting as executor, administrator, or trustee of the estate of a deceased person;
  - (5) acting as a custodian, guardian, conservator, or trustee for a minor or incapacitated person;
  - (6) acting as a successor fiduciary to a trust institution or other fiduciary;
  - (7) receiving for safekeeping personal property;
  - (8) acting as custodian, assignee, transfer agent, escrow agent, registrar, or receiver;
  - (9) acting as investment advisor, agent, or attorney in fact according to an applicable agreement;
  - (10) with the prior written approval of the banking commissioner and to the extent consistent with applicable fiduciary principles, engaging in a financial activity or an activity incidental or complementary to a financial activity, directly or through a subsidiary;
  - (11) exercising additional powers expressly conferred by rule of the finance commission; and
  - (12) exercising any incidental power that is reasonably necessary to enable it to fully exercise the powers expressly conferred according to commonly accepted fiduciary customs and usages.

(c) For purposes of other state law, a trust association is considered a corporation and a limited trust association is considered a limited liability company. To the extent consistent with this subtitle, a trust association may exercise the

powers of a Texas business corporation and a limited trust association may exercise the powers of a Texas limited liability company as reasonably necessary to enable exercise of specific powers under this subtitle.

(d) A state trust company may contribute to a community fund or to a charitable, philanthropic, or benevolent instrumentality conducive to public welfare an amount that the state trust company's board considers appropriate and in the interests of the state trust company.

(e) Subject to Section 184.301, a state trust company may deposit trust funds with itself.

(f) A state trust company insured by the Federal Deposit Insurance Corporation may receive and pay deposits, with or without interest, made by the United States, the state, a county, or a municipality.

(g) In the exercise of discretion consistent with the purposes of this subtitle, the banking commissioner may require a state trust company to conduct an otherwise authorized activity through a subsidiary.

**HISTORY:** Enacted by Acts 1999, 76th Leg., ch. 62 (S.B. 1368), § 7.16(a), effective September 1, 1999; am. Acts 2001, 77th Leg., ch. 528 (H.B. 2155), § 20, effective September 1, 2001; am. Acts 2001, 77th Leg., ch. 1420 (H.B. 2812), § 6.008(a), effective September 1, 2001.



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PROPERTY CODE  
TITLE 5. EXEMPT PROPERTY AND LIENS  
SUBTITLE B. LIENS  
CHAPTER 51. PROVISIONS GENERALLY APPLICABLE TO LIENS

**GO TO TEXAS CODE ARCHIVE DIRECTORY**

*Tex. Prop. Code § 51.0001 (2012)*

§ 51.0001. Definitions

In this chapter:

(1) "Book entry system" means a national book entry system for registering a beneficial interest in a security instrument that acts as a nominee for the grantee, beneficiary, owner, or holder of the security instrument and its successors and assigns.

(2) "Debtor's last known address" means:

(A) for a debt secured by the debtor's residence, the debtor's residence address unless the debtor provided the mortgage servicer a written change of address before the date the mortgage servicer mailed a notice required by Section 51.002; or

(B) for a debt other than a debt described by Paragraph (A), the debtor's last known address as shown by the records of the mortgage servicer of the security instrument unless the debtor provided the current mortgage servicer a written change of address before the date the mortgage servicer mailed a notice required by Section 51.002.

(3) "Mortgage servicer" means the last person to whom a mortgagor has been instructed by the current mortgagee to send payments for the debt secured by a security instrument. A mortgagee may be the mortgage servicer.

(4) "Mortgagee" means:

(A) the grantee, beneficiary, owner, or holder of a security instrument;

(B) a book entry system; or

(C) if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record.

(5) "Mortgagor" means the grantor of a security instrument.

(6) "Security instrument" means a deed of trust, mortgage, or other contract lien on an interest in real property.

(7) "Substitute trustee" means a person appointed by the current mortgagee or mortgage servicer under the terms of the security instrument to exercise the power of sale.

(8) "Trustee" means a person or persons authorized to exercise the power of sale under the terms of a security instrument in accordance with Section 51.0074.

**HISTORY:** Enacted by Acts 2003, 78th Leg., ch. 554 (H.B. 1493), § 1, effective January 1, 2004; am. Acts 2007, 80th Leg., ch. 903 (H.B. 2738), § 1, effective June 15, 2007.



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PROPERTY CODE  
TITLE 5. EXEMPT PROPERTY AND LIENS  
SUBTITLE B. LIENS  
CHAPTER 51. PROVISIONS GENERALLY APPLICABLE TO LIENS

**GO TO TEXAS CODE ARCHIVE DIRECTORY**

*Tex. Prop. Code § 51.0074 (2012)*

§ 51.0074. Duties of Trustee

- (a) One or more persons may be authorized to exercise the power of sale under a security instrument.
- (b) A trustee may not be:
  - (1) assigned a duty under a security instrument other than to exercise the power of sale in accordance with the terms of the security instrument; or
  - (2) held to the obligations of a fiduciary of the mortgagor or mortgagee.

**HISTORY:** Enacted by Acts 2007, 80th Leg., ch. 903 (H.B. 2738), § 3, effective June 15, 2007.



LEXISNEXIS' CODE OF FEDERAL REGULATIONS  
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TITLE 12 -- BANKS AND BANKING  
CHAPTER I -- COMPTROLLER OF THE CURRENCY, DEPARTMENT OF THE TREASURY  
PART 9 -- FIDUCIARY ACTIVITIES OF NATIONAL BANKS  
REGULATIONS

[Go to the CFR Archive Directory](#)

*12 CFR 9.7*

§ 9.7 Multi-state fiduciary operations.

(a) Acting in a fiduciary capacity in more than one state. Pursuant to *12 U.S.C. 92a* and this section, a national bank may act in a fiduciary capacity in any state. If a national bank acts, or proposes to act, in a fiduciary capacity in a particular state, the bank may act in the following specific capacities:

(1) Any of the eight fiduciary capacities expressly listed in *12 U.S.C. 92a(a)*, unless the state prohibits its own state banks, trust companies, and other corporations that compete with national banks in that state from acting in that capacity; and

(2) Any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state.

(b) Serving customers in other states. While acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state, and it may act as fiduciary for relationships that include property located in other states. The bank may use a trust representative office for this purpose.

(c) Offices in more than one state. A national bank with fiduciary powers may establish trust offices or trust representative offices in any state.

(d) Determination of the state referred to in *12 U.S.C. 92a*. For each fiduciary relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship. A national bank acts in a fiduciary capacity in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets. If these activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states.

(e) Application of state law. (1) State laws used in section 92a. The state laws that apply to a national bank's fiduciary activities by virtue of *12 U.S.C. 92a* are the laws of the state in which the bank acts in a fiduciary capacity.

(2) Other state laws. Except for the state laws made applicable to national banks by virtue of *12 U.S.C. 92a*, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks.

**HISTORY:** [66 FR 34792, 34798, July 2, 2001]



FEDERAL REGISTER

Vol. 66, No. 127

Rules and Regulations

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency (OCC)

**12 CFR Parts 5 and 9**

[Docket No. 01-14]

RIN 1557-AB79

**Fiduciary Activities of National Banks**

66 FR 34792

**DATE:** Monday, July 2, 2001

**ACTION:** Final rule.

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[\*34792]

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is publishing its final rule regarding the authority and standards for national banks to conduct multi-state trust operations. The purpose of these changes is to provide enhanced guidance to national banks engaging in fiduciary activities.

**EFFECTIVE DATE:** August 1, 2001.

**FOR FURTHER INFORMATION CONTACT:** Lisa Lintecum, Director, or Joel Miller, Senior Advisor, Asset Management, (202) 874-4447; Richard Cleva, Senior Counsel, Bank Activities and Structure Division, (202) 874-5300; Andra Shuster, Counsel, Legislative and Regulatory Activities Division, (202) 874-5090; or William Dehnke, Assistant Director, Securities and Corporate Practices Division, (202) 874-5210.

**SUPPLEMENTARY INFORMATION:** On December 5, 2000, the OCC published a notice of proposed rulemaking (NPRM) in the *Federal Register* (65 FR 75872) to amend 12 CFR part 9 to add provisions addressing the application of *12 U.S.C. 92a* in the context of a national bank engaging in fiduciary activities in more than one state. The purpose of the rulemaking was to provide clarity and certainty for national banks' multi-state fiduciary activities. The standards contained in the NPRM reflected positions taken in three earlier OCC Interpretive Letters. n1 Interpretive Letter No. 695 found that a national bank authorized to engage in fiduciary activities may act in a fiduciary capacity in

any state that permits its own in-state fiduciaries to act in that capacity, including at trust offices. Interpretive Letters Nos. 866 and 872 clarified that a national bank that acts in a fiduciary capacity in one state may market its fiduciary services to customers in other states, solicit business from them, and act as fiduciary for customers located in other states. The NPRM and the final rule are based upon the detailed analysis contained in these Interpretive Letters.

*n1 OCC Interpretive Letter No. 872 (Oct. 28, 1999) reprinted in [1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) P81-366 (IL 872); OCC Interpretive Letter No. 866 (Oct. 8, 1999) reprinted in (1999-2000 Transfer Binder] Fed. Banking L. Rep. (CCH) P81-360 (IL 866); and OCC Interpretive Letter No. 695 (Dec. 8, 1995), reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) P 81-010 (IL 695).*

Along with the NPRM, we also published an advance notice of proposed rulemaking (ANPR) inviting comments on whether the OCC should establish uniform national standards for the conduct of fiduciary activities by national banks. The ANPR invited comments on whether uniform standards of care generally applicable to national bank trustees' administration of private trusts and investment of private trust property should be established.

We received comments on both the NPRM and the ANPR. As discussed further below, comments on the NPRM predominantly were favorable. Comments on the ANPR were more mixed, raising a significant number of issues that will require additional analysis before any determination is made concerning how to proceed. Rather than delay addressing the issues covered by the OCC interpretations, we are issuing this final rule, which covers only the matters included in the NPRM, and are reserving a decision whether to proceed with a proposal to establish uniform fiduciary standards pending completion of our analysis of the issues raised by the commenters.

The OCC received 25 comments on the NPRM. These comments included 4 from state bank supervisors' offices, 1 from a state bank supervisors' organization, 6 from banking trade associations, 13 from banks and bank holding companies, and 1 from a law firm. Most of the commenters supported the proposed changes, although several offered additional suggestions for changes. The state bank supervisors disagreed with the proposal and expressed concern about the effect the rule would have on the application of state laws to national banks engaged in fiduciary activities.

For the reasons discussed below, we have adopted the provisions of the NPRM substantially as proposed, but have made a number of changes in response to the comments received to clarify certain provisions.

#### **Description of Proposal, Comments Received, and Final Rule**

##### *Definitions (Revised § 9.2)*

Proposed § 9.2 defined "trust office" and "trust representative office" in §§ 9.2(j) and (k), respectively. A "trust office" was defined as an office of a national bank, other than a main office or a branch, at which the bank acts in a fiduciary capacity. A "trust representative office" was defined as an office of a national bank, other than a main office, branch, or trust office, at which the bank performs activities ancillary to its fiduciary business, but does not act in a fiduciary capacity.

The final rule modifies the definition of trust office to clarify that it includes all offices where the bank engages in one or more of the key fiduciary activities specified in § 9.7(d)- *i.e.*, accepting the fiduciary appointment, executing the documents that create the fiduciary relationship, or making discretionary decisions regarding the investment or distribution of fiduciary assets. The definition in the proposal focused on where the bank acted in a fiduciary capacity (where the key fiduciary activities were performed) and implicitly assumed that all of the key fiduciary activities would be performed in one state for each fiduciary relationship (so that "acting in a fiduciary capacity" and performing the key activities were the same). However, as discussed in detail below in connection with § 9.7(d), in some instances, the key activities may be performed at offices in different states for some fiduciary relationships. In those instances, as provided in § 9.7(d) [\*34793] a bank must determine one state in which it acts in a fiduciary capacity for purposes of 12 U.S.C. 92a. That means that there will remain other offices in other states in which the bank performs key fiduciary activities that, under the definition in the proposal, would not have been considered to be trust offices. However, our intention was that because each of these key activities is significant standing alone, all offices in which a bank engages in *any* of the key fiduciary activities should be considered to be trust offices. Therefore, the final rule clarifies the definition of "trust office" to be an office of a national bank, other than a main office or a branch, at which the national bank engages in one or more of the activities specified in § 9.7(d). A corresponding change has been made to § 9.2(k). A "trust representative office" is defined as an office of a national bank, other than a main office, branch, or trust office, at which the bank performs activities ancillary to its fiduciary business, but does not engage in any of the activities specified in § 9.7(d).

Section 9.2(k) of the proposal listed the following examples of ancillary activities: advertising, marketing, and soliciting for fiduciary business; contacting existing or potential customers, answering questions, and providing information about matters related to their accounts; acting as a liaison between the trust office and the customer (e.g., forwarding requests for distribution or changes in investment objectives, or forwarding forms and funds received from the customer); or simply inspecting or maintaining custody of fiduciary assets.

A number of commenters suggested that various activities be added to the list of examples of ancillary activities. The list of ancillary activities set forth in § 9.2(k) is illustrative only, however, and not all-inclusive. While the OCC considers many of the suggested activities to be ancillary activities, we have not included most of them in the text of the final rule because the list set out in the definition is not intended to be comprehensive. A national bank may therefore identify additional activities as ancillary without seeking the express concurrence of the OCC. To make this clear, we have added to the text of the final rule an express statement that the items on the list are illustrative and that other activities may also be "ancillary" for the purposes of the definition. n2

n2 Classifying activities as "ancillary" in §§ 9.2(j) and (k) is meant only to assist in the determination of the state in which the bank is acting in a fiduciary capacity for section 92a purposes. Only the key fiduciary activities in § 9.7(d) are relevant for determining that state: *all* other activities are "ancillary" for this purpose. This classification does not affect the importance of such activities or change in any way a bank's fiduciary duty with respect to such activities.

Two commenters urged that holding title to real property in any state be added to the list of ancillary activities in § 9.2(k), because some state laws attempt to prohibit out-of-state entities from taking title to real property without a state license or other authorization. Because this appears to be a specific issue warranting clarification, we have added holding title to real estate to the list of ancillary activities in § 9.2(k). The statutory authority for national banks to exercise fiduciary powers, 12 U.S.C. 92a, does not subject the exercise of a national bank's fiduciary powers to restrictions or preconditions, such as licensing requirements, under state law. State laws prohibiting out-of-state national banks from taking title to real property have such an effect. For these reasons, and because we believe that this activity is consistent with national banks' exercise of their fiduciary powers, we have added holding title to real property to the list of ancillary activities in the final rule. n3 Consistent with this change, we also have added language to § 9.7(b) to clarify that while acting in a fiduciary capacity in one state, a bank may act as fiduciary for relationships that include property located in other states.

n3 This is consistent with the Office of Thrift Supervision's (OTS) position under its parallel statute. See OTS Chief Counsel Opinion (August 8, 1996), reprinted in [1996-1997 Transfer Binder] *Fed. Banking L. Rep. (CCH)* P83-102 (OTS August 1996 Opinion) (holding title to real property as trustee in a state would not cause a federal savings association to be located in that state because the activity is incidental and not discretionary).

As we stated in the NPRM, neither a trust office nor a trust representative office is a branch for purposes of the McFadden Act, 12 U.S.C. 36, which governs the location of national bank branches. In order to be considered a branch under the McFadden Act, a bank facility must perform at least one of the core branching functions of receiving deposits, paying checks, or lending money. 12 U.S.C. 36(j). The locational limitations of 12 U.S.C. 36 are not intended to reach all activities in which national banks are authorized to engage, but only core branching functions. See *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987) (considering securities brokerage powers) (*Clarke*). Proposed §§ 9.2(j) and (k) therefore stated that a trust office or a trust representative office is not a branch unless it is also an office at which deposits are received, or checks paid, or money lent. n4

n4 This final rule is consistent with the limitation, found in 12 U.S.C. 93a, which states that the general rulemaking authority vested in the OCC by that section "does not apply to section 36 of [Title 12 of the United States Code]." This limitation simply makes clear that section 93a does not expand whatever authority the OCC has pursuant to other statutes to adopt regulations affecting national bank branching. Congress clearly contemplated that the OCC would implement section 36, as is evidenced by the repeated references to obtaining the OCC's approval throughout that section (see, e.g., paragraphs (b)(1), (b)(2), (c), (g), and (i) of section 36). It would be illogical to conclude that the OCC, in implementing the provisions requiring national banks to obtain the OCC's prior approval under the sections cited, cannot interpret what the terms of the statute mean or that the interpretation must be made on a case-by-case basis. This rulemaking simply clarifies a situation that falls outside the branching restrictions imposed by section 36.

Several state bank supervisors disagreed with the OCC's conclusion that fiduciary activities are not core branching functions and stated their belief that trust offices should be considered to be branches. They assert that the *Clarke* case held only that discount brokerage activities are not core branching functions and should not be read to conclude that any other activities are not core branching functions.

The OCC has carefully considered these comments, but remains of the view that fiduciary activities under section 92a do not constitute core branching functions and that a national bank office that provides only fiduciary services would not be subject to the McFadden Act. In *Clarke*, the Supreme Court held that the McFadden Act's locational limits do not reach all activities in which national banks engage. This conclusion in the *Clarke* case is reinforced by the recent decision in *First National Bank of McCook, Nebraska v. Fulkerson, et al.*, Civil Action No. 98-D-1024, slip op. (D.C. Co. March 7, 2000), where the court held that the combination of a deposit production office, a loan production office, and an ATM do not constitute a branch because no core branching functions are performed. n5

n5 See also *Bank One, Utah v. Guttau*, 190 F. 3d 844 (8th Cir. 1999) (ATMs are excluded from the definition of "branch").

Finally, the second sentence in current § 9.2(g) provides that the extent of fiduciary powers is the same for out-of-state national banks as in-state national banks. We proposed to remove this sentence as unnecessary in light of new § 9.7, which sets forth the rules concerning multi-state fiduciary operations. We received no comments on this proposed change, and have adopted it as proposed. [\*34794]

#### *Approval Requirements (revised § 9.3)*

Current § 9.3(a) provides that "[a] national bank may not exercise fiduciary powers unless it obtains prior approval from the OCC to the extent required under 12 CFR 5.26." Section 5.26(e)(5) currently provides that a national bank that has obtained the OCC's approval to exercise fiduciary powers does not need to obtain further approval to "commence fiduciary activities" in a state in addition to the state(s) described in the application for which it received OCC approval to exercise fiduciary powers. Instead, the bank is required only to provide written notice to the OCC within ten days after commencing fiduciary activities in a new state.

Under the proposal, a bank that has received OCC approval to exercise fiduciary powers does not need prior OCC approval each time it seeks to act in a fiduciary capacity in a new state or to conduct activities in a new state that are ancillary to its fiduciary business. Proposed paragraph (b) also directs the bank to follow the notice procedures in § 5.26(e)(5) (discussed below) in order to emphasize that revised § 9.3(b) is consistent with § 5.26(e)(5) and is not intended to impose any additional or different procedures on national banks. Current paragraph (b), which addresses the procedures for organizing a limited purpose trust bank, would be redesignated as paragraph (c).

We received one comment on this proposed change, suggesting that we clarify in § 9.3(b) that marketing and soliciting fiduciary business are included in ancillary activities. Because this is made clear in § 9.2(k), it is unnecessary to repeat it in this provision. The final rule has, however, been changed to reflect the modified definition of "trust office" in § 9.2(j). Consistent with § 5.26(e)(5) of the final rule, this provision now states that a national bank granted fiduciary powers by the OCC is not required to obtain the OCC's prior approval to engage in any of the activities specified in § 9.7(d) in a new state or to conduct ancillary fiduciary activities in a new state.

#### *Multi-State Fiduciary Operations (New § 9.7)*

The statutory authority for national banks to exercise fiduciary powers is contained in 12 U.S.C. 92a(a) and (b). In IL 872, IL 866, and IL 695, the OCC considered how the language of section 92a would be applied in an interstate context.

Under section 92a, national banks may exercise fiduciary powers with OCC approval. Section 92a(a) states:

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, *when not in contravention of State or local law*, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located. (Emphasis added).

Section 92a(b) clarifies that, whenever state law permits state banks, trust companies, or other corporations that compete with national banks (State Fiduciaries) to exercise any of the fiduciary powers in section 92a(a), a national bank's exercise of those powers is deemed not to be in contravention of State or local law under section 92a.

Thus, "when not in contravention of State or local law" (the Contravention Clause), a national bank may act in any of the fiduciary capacities specified in section 92a(a). This statutory grant of authority does not limit where a national bank may act in a fiduciary capacity. Nor does it require that the customers for whom the bank may act or the property

involved in the fiduciary relationship be located in the same state as the bank. A bank is free to act in a fiduciary capacity in more than one state.

The Contravention Clause in section 92a(a) requires that a national bank look to the laws of the state in which it acts, or proposes to act, in a fiduciary capacity to determine what fiduciary capacities are permissible.<sup>n6</sup> The state in which the bank acts in a fiduciary capacity for each existing or proposed fiduciary relationship is the state in which the bank performs the key fiduciary activities of accepting fiduciary appointments, executing documents that create the fiduciary relationship, or making decisions regarding the investment or distribution of fiduciary assets. This state is also the state referred to in other provisions in section 92a that refer to state law (subsections 92a(b), (c), (f), (g) and (i)) (the Section 92a State).

<sup>n6</sup> The last phrase in paragraph (a) of section 92a refers to the state in which the national bank is "located." The primary reference to a state is in the Contravention Clause regarding the right to act in fiduciary capacities (the language emphasized above). That language was in the statute originally, before the phrase using the term "located" was added. Thus, we believe that the reference to the state in which a bank is located refers to the state in which the bank is acting in a fiduciary capacity. We note that the OTS construes its parallel statute in a similar way. The OTS concludes that a federal savings association may exercise fiduciary powers permitted for state fiduciaries in the states in which it is located, but it is "located" for this purpose in the state in which it performs key fiduciary functions. See, e.g., OTS August 1996 Opinion.

Section 9.7 of the proposed rule reflected this interpretation of section 92a. In paragraph (a) of proposed § 9.7, we stated that a national bank may act in a fiduciary capacity in any state. Proposed § 9.7(a) went on to state that if a national bank acts, or proposes to act, in a fiduciary capacity in a particular state, the bank may act in any of the eight fiduciary capacities expressly listed in section 92a(a) unless the state affirmatively prohibits that capacity for its own State Fiduciaries as well as any other capacity a state permits for its own State Fiduciaries. This authority exists even if the state purports to restrict it for national banks. If state law is silent with respect to one (or more) of the eight capacities listed in section 92a(a), then that capacity is not in contravention of state law and a national bank may act in that capacity.

These conclusions, along with a more complete explanation of their underlying reasons, were stated in IL 695 and IL 872. As previously noted, the proposal intended to reflect the conclusions reached in those letters and is based on the reasoning stated therein.

Most of the comments on proposed § 9.7(a) supported its adoption. Of these, several requested that we clarify that the question of where a national bank is located for purposes of section 92a is a question of federal law. Comments from several state bank supervisors objected to proposed § 9.7(a), on the grounds that it would permit national banks a competitive advantage by being able to expand their fiduciary activities into states notwithstanding state limits on who may act as fiduciary. These commenters maintained that section 92a preserves for each state the right to establish such limits. They also suggested that the determination of which state's laws govern the permissible capacities should be resolved by whether a national bank has its main office or a branch located in that state.

As set out above, we believe that section 92a imposes no limitations on where a bank may act in a fiduciary capacity. Under the Contravention Clause, a state may not prohibit or restrict national banks (including out-of-state national banks) from acting in a fiduciary capacity in the state in any manner, unless it also limits its own State Fiduciaries.

Moreover, we disagree that "location" for purposes of section 92a is appropriately determined by the presence of a main office or bank branch. As previously discussed, the Contravention Clause of section 92a [\*34795] requires that a bank look to the laws of the state in which it acts in one or more fiduciary capacities in order to determine the limits on those capacities.

For the reasons discussed above, we have adopted proposed § 9.7(a) as proposed, making only stylistic changes to improve the readability of this provision.

Once the state in which a national bank is acting in a fiduciary capacity is identified, the fiduciary services may be offered regardless of where the fiduciary customers reside or where property that is being administered is located. This point was incorporated in proposed § 9.7(b), which provided that a national bank may market its services to customers in other states and solicit business from them. It also may establish and use a trust representative office for these purposes. Accordingly, a state may not prohibit or restrict out-of-state national banks from marketing to, or performing fiduciary functions for, customers in that state. Such state laws are not within the powers reserved to the states by sec-

tion 92a, and so they cannot prohibit or restrict a national bank's exercise of its federally granted powers. n7 These conclusions are consistent with the conclusions set out in IL 866 and IL 872. n8

n7 See, e.g., *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996).

n8 The OTS has reached the same conclusions under its parallel statute. See, e.g., OTS August 1996 Opinion (federal savings association will not be deemed located in a state where its only trust-related activities are marketing its trust services and performing incidental duties pursuant to its appointment as testamentary trustee or trustee holding real estate; and federal law would preempt state laws that prohibit or restrict an out-of-state federal thrift from engaging in these activities in the state); OTS Chief Counsel Opinion No. 94/CC-13 (June 13, 1994), reprinted in [1994 Transfer Binder] *Fed. Banking L. Rep. (CCH)* P82,814 (trust marketing and referral activities at affiliate's offices does not make federal savings association located at those offices; state laws that prohibit or restrict an out-of-state federal thrift from engaging in these activities in the state are preempted).

A few commenters asked that we clarify that § 9.7(b) does not require a national bank to establish a trust representative office in order to market its fiduciary services to, or act as a fiduciary for, customers in any state. We agree that a bank need not establish a trust representative office; the reference to trust representative offices was intended solely to illustrate one option available to national banks who seek to market their fiduciary services. The final rule, like the proposal, states that a national bank "may" use a trust representative office to market its fiduciary services to and act as a fiduciary for customers in any state, indicating that use of a trust representative office is discretionary. As noted earlier, we also have added language to § 9.7(b) to clarify that while acting in a fiduciary capacity in one state, a bank may act as fiduciary for relationships that include property located in other states.

As previously discussed, section 92a imposes no geographic limit on where a bank may act in a fiduciary capacity. Similarly, there is no geographic limit on where a bank may offer services that are incidental to acting in a fiduciary capacity. Accordingly, proposed § 9.7(c) reflected the conclusions stated in the Interpretive Letters that a national bank with fiduciary powers may establish a trust office or trust representative office in any state. We received no comments on proposed § 9.7(c) as such, and we have adopted it as proposed.

Proposed § 9.7(d) clarified how national banks may determine the state in which they are acting in a fiduciary capacity. In IL 866 and IL 872, we concluded that a national bank is deemed to be "acting in a fiduciary capacity" for purposes of section 92a in the state in which the bank performs the key fiduciary functions of executing the documents that create the fiduciary relationship, accepting the fiduciary appointment, and making decisions regarding the investment or distribution of fiduciary assets. As proposed, § 9.7(d) incorporated this position and further provided that, if with respect to a particular fiduciary relationship these key fiduciary activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity will be the state that the bank and customer designate from among those states. We specifically invited comment on ways to simplify the determination of where a bank with multi-state operations is acting in a fiduciary capacity.

We received several comments relating to the determination of where a bank acts in a fiduciary capacity when the key fiduciary activities take place in more than one state. One commenter asked us to clarify whether it was our intent to have the choice of law clause in the trust's governing instrument be used to designate where the bank acted in a fiduciary capacity. Similarly, two commenters suggested that we look to the governing instrument to make the determination. A few commenters suggested that, where the designation could not be made by the governing instrument or the customer has not or cannot otherwise make the designation, the bank be permitted to do so alone. A few commenters also noted the importance of the meaning of the term "customer," noting that if defined too broadly, it could be quite burdensome for a bank to consult with customers to make the designation.

We agree with those commenters who pointed out the potential problems, in situations where a bank performs the key fiduciary activities in more than one state, of requiring a bank to obtain customer agreement concerning the state in which the bank will be deemed to be acting in a fiduciary capacity. For instance, a bank could be forced to obtain the agreement of many different people residing in several different locations. To avoid these problems, we have revised § 9.7(d) to provide that a bank performing the key fiduciary activities in more than one state for any particular fiduciary relationship may designate from among these states which state's laws are made applicable by operation of section 92a for that relationship. We have also made some minor changes intended to improve the readability of § 9.7(d), including a change in its heading.

Many of the commenters indicated some confusion over the significance of the determination of the Section 92a State. Section 92a directs the application of state law for purposes of determining a national bank's permissible fiduciary

capacities (referred to in sections 92a(a) and (b)); for purposes of setting certain operational requirements for national banks as corporate fiduciaries (referred to in sections 92a(f), (g) & (i)); and for purposes of granting state banking authorities limited access to OCC examination reports relating to national bank trust departments (referred to in section 92a(c)). Proposed § 9.7(d) provided a means to identify which state's laws apply for purposes of section 92a when a bank is conducting multi-state fiduciary activities. As discussed more fully below, this determination is separate from the selection of the substantive law that governs matters affecting the exercise of the fiduciary appointment, such as standards of care.

Proposed § 9.7(e) provided a direct statement of how state law applies to a national bank engaging in fiduciary activities. As set out in the proposal, the state laws that apply to a national bank's fiduciary activities by operation of section 92a are the laws of the state in which the bank acts in a fiduciary capacity.

Two commenters suggested that we clarify that state laws may not impose operational requirements on national banks that engage only in limited trust operations. In both IL 866 and IL 872 we stated that section 92a does not "condition the exercise of fiduciary [\*34796] powers on compliance with state laws that purport to impose licensing or operating requirements on national banks." n9 This point is incorporated in § 9.7(e)(2) of the final rule, which provides that, with the exception of those state laws specifically referenced in section 92a, national banks' exercise of fiduciary powers is not subject to restrictions or preconditions under state law. Such restrictions and preconditions include, but are not limited to, state licensing requirements. This principle applies to the fiduciary activities of full service national banks as well as national banks that engage only in limited trust operations.

n9 See IL 866 p. 9; IL 872 p. 10.

Section 9.7(e) does not affect the applicability of state substantive laws that govern the fiduciary relationship, such as the standard of care to be exercised by the fiduciary, or ability of a grantor to designate which state's laws govern the trust itself. A grantor is free to designate which state laws apply for all other purposes or to have the applicable law determined by choice-of-law rules. For example, if the bank acting in a fiduciary capacity in State A is trustee for a trust whose grantor and beneficiaries are located in State B and the trust, by its terms, is governed by the laws of State C, then the laws of State C will govern the administration of the trust. The choice of law clause in a trust instrument does not, however, determine where a bank is acting in a fiduciary capacity or the laws that apply by operation of section 92a. That determination is a matter of federal law pursuant to section 92a. It cannot be altered by agreement of the parties.

Several state bank supervisors objected to the conclusion that a national bank is not subject to state laws that restrict the activities of out-of-state fiduciaries. However, as discussed above, the Contravention Clause in section 92a only serves to limit national banks from engaging in fiduciary capacities that are not permitted for State Fiduciaries but does not otherwise limit a national bank's ability to exercise its federal authority in any state. State laws that are outside the ambit of the Contravention Clause, and so not authorized by Congress to apply to national banks, may not restrict or interfere with the exercise of permissible federal power. *See, e.g., Barnett Bank, supra.*

The state supervisors also pointed to discussion in earlier OCC interpretive letters, in particular IL 525, that suggested that all aspects of state law governing state fiduciary institutions applied to national banks. However, IL 525 was concerned primarily with the substantive fiduciary standards that would apply to national banks in certain trust contexts. As noted above, the substantive law governing a trust is a different matter than the law made applicable to national banks by operation of section 92a. Moreover, the discussion of state law in IL 525 did not involve an interstate situation and was focused on the issue of the substantive fiduciary law governing the fiduciary appointment. The OCC's analysis of the application of section 92a in the interstate context, including the manner in which it incorporates state law, is clearly set forth in ILs 872, 866, and 695, the NPRM, and this final rule. Any contrary implications in IL 525 do not represent the position of the agency.

#### *Deposit of Securities with State Authorities (Revised § 9.14)*

Under section 92a(f) and current § 9.14 of our regulations, a national bank must comply with state laws that require corporations that act in a fiduciary capacity to deposit securities with state authorities for the protection of private or court trusts. The proposal made a technical amendment to § 9.14 to conform to the terminology used in proposed § 9.7. The proposal replaced the phrase "administers trust assets" in paragraph (b) of that section with the phrase "acts in a fiduciary capacity." No substantive change was intended by this amendment.

The proposal also added a second sentence to § 9.14(b) to clarify how a bank that conducts fiduciary operations on a multi-state basis pursuant to proposed § 9.7 should compute the amount of deposit required by a state law that requires a deposit of securities on a basis other than assets (such as an amount equal to a percentage of capital). Pursuant to the proposal, in such a state, the bank may compute the amount of deposit required on a pro-rated basis, according to the proportion of fiduciary assets for which the bank is acting in a fiduciary capacity at offices located in that state.

A few commenters requested clarification of how the rule would apply to them, suggesting that sample calculations be included in the regulation. We believe that specific questions are better addressed by consultation with agency staff or in interpretive letters. Accordingly, we are adopting the proposal for this section without change.

#### *Fiduciary Powers (Revised § 5.26)*

Consistent with the proposed changes discussed above, we also proposed an amendment to *12 CFR 5.26(e)* to clarify that a national bank that plans to act in a fiduciary capacity in a state in addition to the state described in the application for fiduciary powers that the OCC has approved need only give notice of commencing to act in a fiduciary capacity in a new state. The proposal would revise current § 5.26(e)(5) so that it reflects the distinction between acting in a fiduciary capacity and conducting activities ancillary to the bank's fiduciary business. The ten-day, after-the-fact notice requirement would apply only to acting in a fiduciary capacity.

The final rule has been changed to reflect the modified definition of "trust office" in § 9.2(j). This provision now states that no application is required when a national bank with fiduciary powers plans to engage in any of the fiduciary activities specified in § 9.7(d) or conduct ancillary activities in a new state. The final rule provides that, instead, the ten-day, after-the-fact notice to the OCC is required when a bank begins to engage in any of the key fiduciary activities specified in § 9.7(d) in a new state.

We received six comments requesting that we clarify that there is no need for prior approval or subsequent notice for establishing trust representative offices. As discussed above, a national bank that has received OCC approval to exercise fiduciary powers does not need to make any further application to the OCC when it plans to engage in any of the fiduciary activities specified in § 9.7(d) or conduct ancillary activities in a new state, but does need to provide notice to OCC within 10 days after it begins to engage in any of the fiduciary activities specified in § 9.7(d) in a new state. Since engaging in ancillary activities does not constitute engaging in any of the key fiduciary activities specified in § 9.7(d), and since only ancillary activities are undertaken at a trust representative office, a national bank is not required to get prior approval or give subsequent notice in order to establish a trust representative office. We have added a new sentence to clarify this point in the final rule.

#### **Regulatory Flexibility Act**

Pursuant to section 605(b) of the Regulatory Flexibility Act, *5 U.S.C. 605(b)* (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

Pursuant to section 605(b) of the RFA, the OCC hereby certifies that this [\*34797] rulemaking will not have a significant economic impact on a substantial number of small entities. The final rule codifies case law and OCC interpretations, but adds no new requirements. Accordingly, a regulatory flexibility analysis is not needed.

#### **Executive Order 12866**

The OCC has determined that this final rulemaking is not a significant regulatory action under Executive Order 12866.

#### **Unfunded Mandates Act of 1995**

Section 202 of the Unfunded Mandates Reform Act of 1995, *2 U.S.C. 1532* (Unfunded Mandates Act), requires that the agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate or by the private sector, of \$ 100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. For the reasons outlined above, the OCC has determined that this final rule will not result in expenditures by State,

local, and tribal governments, or by the private sector, of \$ 100 million or more in any one year. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed any regulatory alternatives.

#### **Executive Order 13132**

Executive Order 13132 requires Federal agencies, including the OCC, to certify their compliance with that Order when they transmit to the Office of Management and Budget any draft final regulation that has Federalism implications. Under the Order, a regulation has Federalism implications if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." In the case of a regulation that has Federalism implications and that preempts State law, the Order imposes certain consultation requirements with State and local officials; requires publication in the preamble of a Federalism summary impact statement; and requires the OCC to make available to the Director of the Office of Management and Budget any written communications submitted to us by State and local officials. By the terms of the Order, these requirements apply to the extent that they are practicable and permitted by law and, to that extent, must be satisfied before the OCC promulgates a final regulation.

In our proposal relating to this final rule, we noted that certain provisions in the proposal may have Federalism implications, as that term is used in the Order, or may be found by a Federal court to preempt State law. The concern regarding Federalism was primarily directed to the advance notice, according to which the OCC proposed to establish uniform federal standards governing fiduciary activities that would be generally applicable to national bank trustees' administration of private trusts and investment of private trust property. A discussion of the Federalism issues arising from any uniform federal standard of fiduciary activities will be provided in any subsequent rulemaking document on that issue.

This final rule contains provisions that determine which States' laws apply to a national bank for purposes of *12 U.S.C. 92a*, a Federal law. The determination of which State's rules apply for purposes of section 92a is governed, for the reasons set out above, by a determination of the State in which a national bank is acting in a fiduciary capacity. Once that determination is made, then, by operation of section 92a, other States' laws governing the operation of a national bank's fiduciary activities do not apply.

We note that there has been consultation with State officials on the issues addressed herein, both through this rulemaking and through other documents published in the **Federal Register** on which comment was invited. See *60 FR 66163* (December 21, 1995), *61 FR 68543* (December 30, 1996), *62 FR 19172* (April 18, 1997), and *62 FR 19173* (April 18, 1997). As discussed in this preamble, we received and considered a number of comments from states, and will make them available to the Director of the OMB.

# THE CONGRESSIONAL GLOBE.

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there were not only servants for the period of seven years, who were Hebrews, but that there were slaves for life, slaves that descended as an inheritance, and upon this very passage in the New Testament showing that that law under the old dispensation was not abrogated by the introduction of the new dispensation, he holds that Paul was bound in justice and right to return Onesimus to Philemon. Whom did he return? He returned a slave. Onesimus was Philemon's slave. He had escaped from his master; he had become converted, had become a believer in the Christian religion, and in that epistle of Paul to Philemon Paul expresses a great desire to have Onesimus with him on account of the comfort it would be to him; but he returned him to Philemon because it was a matter of duty and of right; he was his property.

But, sir, I do not propose to enter into this theological argument, and I have only referred to it to show to the honorable Senator that even by the standard authority of his own church his positions are not tenable. Why, sir, there was such a thing as the year of jubilee among the Jews, when all that were held in bondage—I mean of Hebrew origin—returned to their own tribes and to their own inheritance; so that if a man had wasted his property, even if he had become a slave voluntarily, when the year of jubilee came, he returned to his own tribe and to his own inheritance. Was it ever heard, was it ever contended by any commentator on the Scriptures, will it be said by the honorable Senator, whom I take to be well versed in theological lore, and for whose candor and whose honesty and whose character as a Christian gentleman I have the most profound respect, that a slave held under the Hebrew code was admitted to the privilege, upon the return of the year of jubilee, of entering into the possession of any lands? Not at all. Such an idea has never been advanced so far as I have known—and while I am not very well acquainted with these things, I have sometimes looked into them—no such idea has ever been advanced by any Christian writer, unless it has been done in these late days, and the books now published upon such subjects I now never look into, because the children have become so much wiser than the fathers, and the modern Christians so much better than Paul, that I do not trouble myself very much with their teachings or their opinions upon such subjects.

But, sir, this was not my object in rising to submit a few remarks to the Senate on the present occasion. The honorable Senator from Maryland [Mr. Johnson] yesterday propounded a question to me. I had stated in some remarks that I had previously made to the Senate that in my opinion it was not competent for three fourths of the States by ratification to make the proposed amendment to the Constitution obligatory upon a dissenting State whose interests were affected by the amendment. If I had doubted the correctness of the position which I then assumed, before the speech of the honorable Senator from Maryland, I should not doubt it now, for the simple reason that when no more has been said against the soundness of that position than was said by him, I have a right to infer that all that could be said against it was said; and I know that no Senator is more able to show its unsoundness than the honorable Senator from Maryland.

The honorable Senator's question was this: was it not competent for all the States, when they formed the Constitution, to provide in that Constitution that slavery should not exist anywhere in the United States? My answer is, that it was perfectly competent for all States agreeing to the ratification of that Constitution to provide that slavery should not exist within the limits of any State agreeing to that ratification; it was competent for them to provide that no State should be admitted into their Union unless they also would agree to that as a condition of union; but it was not competent for them to say that any other State, as North Carolina, Rhode Island, New York, and Virginia, should still be members of the Union with such a prohibition, against the protest of

either one of those States against the abolition of slavery in their midst.

The idea, which the honorable Senator from Maryland seemed to entertain was, that because it was perfectly competent for the original thirteen States to provide in the Constitution, if they had chosen to do so, that slavery should not, after its adoption, exist anywhere within the limits of the thirteen States, therefore it is competent for three-fourths of the States, by ratification, how to do whatever the original parties to the compact might have originally done. I deny the soundness of that proposition. While I admit that it would have been perfectly competent for the original States to bind every party that came into their Union by such an agreement, I deny that that provision of the Constitution which empowers two-thirds of the States to propose amendments, and three-fourths of the States to ratify those amendments, gives to such two thirds or three-fourths the power claimed for them by the honorable Senator.

Let me illustrate. The members of this Senate are engaged in different pursuits in life. They live, if you please, in the same neighborhood. One is possessed of a farm adapted to grazing, and to grazing alone; another's property consists entirely of water-power; another's property is land adapted to a vineyard and to nothing else; another's to growing grain, &c. For purposes common to themselves, regulating their intercourse and trade with the outside world, they agree to enter into written articles of agreement for a common purpose, to promote their common interests. They do enter into such an agreement as that. They agree also in those articles that whenever two thirds of their number think a change of those articles of agreement would be advantageous to them all they may propose such amendments, which amendments, if ratified by three-fourths of the whole number, shall become binding, and constitute a portion of the articles of agreement. Suppose, sir, under those circumstances, that three-fourths of the number should propose for the common benefit of the whole that your pasture land should be overflowed by my water-power, so that your possession is rendered worthless to you, and that the vineyard of your neighbor should be destroyed or greatly damaged. Suppose that this amendment proposed by two-thirds should afterwards be ratified by three-fourths of the whole number. I ask you, sir, would you, whose entire possession has been destroyed, or so affected as to become worthless to you, and would the owner of the vineyard whose possession has been rendered worthless to him, be bound against you and his protest to submit to any such conditions as those, simply because in the articles of agreement, and by force of the ratification of three-fourths of the number, it had been so provided?

Sir, I submit it to you, to the Senate, and to the country as a question of law, whether, in the case I have supposed, if there was any attempt by the owner of the water-power to overflow your pasture lands, there ever did sit in this or in any other country a court of equity that would not grant an injunction against the exercise of such a power, on the ground that it was a fraud upon the contract, thing not contemplated by the parties when they entered into the original articles of agreement, a thing foreign to the common purpose prompting the parties to enter into such an agreement? I take it there can be but one answer to that question: that as a question of right, arising too upon plain written articles of agreement, he who administers the law would say that such an attempt by three-fourths was a fraud upon the contract and not binding upon the protesting party.

It was upon that principle I stated that a ratification by three-fourths of the States of the proposed amendment would not give it the force and validity of constitutional obligation because it was in fraud and in violation of the purposes and objects for which the Constitution was framed and the Union formed. I know of no rules of interpretation in reference to the Constitution of the United States except those rules of interpretation which arise out of the nature of a contract. In interpreting that Constitution, the terms of the instrument, the circumstances surrounding the parties to it, and the common purposes and objects which they had in view in its formation must all be taken into consideration in order to arrive at a just conclusion in reference to the powers which it confers upon the Federal Government and which it denies to the States, or which it confers upon a convention called under its own provisions.

Then I ask in this connection whether the proposed amendment would not be in fraud of the original agreement between the parties to the Constitution; whether it would not be contrary to the common purposes and objects which the parties had in view in entering into it. If it would be, then I hold that the attempt to incorporate it into the Constitution would not be binding upon a protesting State. Otherwise the Constitution would be nothing but a trap and a snare. It will be admitted that before the Constitution was formed you could not have compelled any of the four States that were out to enter into it, but you formed a contract, an agreement, a compact, a Constitution for certain avowed purposes, and provided a way to amend it, in order to get into your Union certain States who would not otherwise have come in, and now you turn around, because numerically you have the power, and, without placing those States in the position they were, in before they entered into the Union, giving them an entire disconnection from that Union with the free liberty to act, you say, "We will bind you, because you have entered in." My answer is, "Per fraud;" and although I am no secessionist—I do not care what people think on that subject, though in these days I do not count the opinion of the populace in reference to the honesty of my course or purposes, or the sincerity of the views I express—yet I do hold that such an amendment would be the clearest excuse of secession that could possibly be furnished, or that ever has been furnished to any State in this Union.

The honorable Senator from Maryland seemed to think that this might be done because "we, the people," made this Constitution. In one sense, "we, the people," did make it. The people of the States united, acting separately, however, did make it. In the language of Mr. Madison, the States are the parties, and the only parties, to the Constitution of the United States. It was the States that made the Union. It never was submitted to the people en masse, or even to a convention of delegates from all the States, or to a Congress composed of representatives from all the States; but it was proposed to the States separately, and it required the separate ratification of the States before it became binding as a covenant of union between the States.

But the honorable Senator from Maryland derived the power to incorporate this provision into the Constitution by way of amendment from the preamble of the Constitution. He cited that preamble in these words:

"We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessing of liberty."

The Senator stopped there. Certainly I do not wish to misrepresent the argument of the honorable Senator, and I will not do so; but the inference which I drew was, that full and plenary power for the enactment of this measure by the Congress of the United States and a justification for its submission to the States arose from these words of the preamble to the Constitution. I shall not enter into any discussion of the question how far the preamble to a written constitution can govern its terms. It may be used, perhaps, in cases of doubt and uncertainty, as explanatory of what the parties meant; but where the terms of the agreement or the constitution are clear as in themselves, the preamble can have no more effect upon the legal interpretation of the

indefensible in principle to issue a piece of paper money without the sanction and impress of the Government as it is to issue a piece of metallic money without that sanction and impress. I know no good reason why laws regulating the issues of paper money should not declare the issue and circulation of any other notes to be as great a crime as to issue and pass counterfeits of the coin of the country.

I have said that the national banking system was not intrical to the interests of the State banks, but that the object of this law was to offer every facility and inducement to the State banks to come in and avail of its benefits and be subject to its control. I think that no one can misunderstand my object in supporting the bill to establish a national banking system has been to bring all the banks that issue notes for currency under it; that the currency of the country may be within the control and regulation of a national law applicable to the whole country, instead of being controlled and regulated by State law as it has been heretofore.

If Congress has not the power to regulate and control the circulation of notes for currency in this great emergency, which requires the exercise of all its powers for national self-preservation, except, as Mr. Calhoun has said, through its power to tax any other currency that interferes with and depreciates its established measures of value, I hope it will exercise the power of taxation to its fullest extent that it will decline to share any longer with States, or corporations, or individuals the sovereign right of furnishing and controlling the currency which measures the value of all the property within the country. I believe the existence of the nation is at stake upon this issue; that the present necessity requires the use of every legitimate means to sustain the credit of the Government; the national credit is the basis on which the future prosperity of the country depends. In no other way than by the wise and prudent exercise of the sovereign power to regulate the currency can those other important measures to sustain the Government—the loan bills and the revenue bills—be made effective. I appeal to the members of the House, and I ask them if they can excuse themselves to their constituents and to posterity if they sacrifice the great interests that are now at stake to the comparatively petty interest of local banking.

If this war is to be continued until its great object—the overthrow of this rebellion and the cause of it—has been accomplished, the people who remain at home must enter upon the work of sustaining the war with more earnestness. We have reached the point where sacrifices are required to be made; the people must submit to largely increased taxation; instead of increasing the salaries of Government officials we must increase the value of the money in which the salaries are paid by checking the depreciation of the currency. To my mind, there can be no better example of sacrifice than for the State banks to yield to the nation that control over the currency which, so far as it now prevails, is for their corporate advantage, and not for the public good. Without this control by the Government all efforts to check the depreciation of the currency are useless. Those who complain of inadequacy of pay must consider it as their part of the sacrifice which they are called upon to make in this war; and must seek relief by joining in the attempt to create a public opinion in favor of all measures that will raise the value of the currency in which salaries are paid. A bill will soon be introduced from the Committee of Ways and Means largely increasing the taxes; but this will be insufficient for the purposes to be accomplished unless we can have some power to secure the currency against depreciation.

The question has been asked by my friend from Iowa, why any banks should be authorized to furnish notes to be used as currency, instead of confining that right to the Government, and thereby giving to the people all the benefit and advantages, without cost for interest, of the fund obtained by supplying the circulation of the currency. This question, from those in the interest of State banks, would seem to me a specious one. They know full well that State banks have so long exercised the right to furnish the currency, that any attempt to interrupt it would be made the pretense to excite prejudices in regard to State rights

behind which the State banks could shelter themselves against any direct action of Congress which affected their interest.

The object of the national bank law is neither to destroy capital invested in the State banks nor their circulation, to which the people are accustomed; its only object is to bring under the control and regulation of one uniform national law, applicable to every State of the Union, all the State banks, and make their circulation a part of the \$300,000,000 which this law authorizes as the maximum amount of bank circulation in this country.

When this object is accomplished I am ready to join with the gentleman from New York, or others, on either side of this House, in favor of such practical restrictions of the Government's issues as will prevent the depreciation of the currency; and unless defeat and disaster attend the military operations, I believe that specie prices and specie payments might be restored within the coming year.

Another reason why I think the currency of the country should not consist entirely of the issues of Government paper is, that I have more faith in the power and stability of this Government than many on the other side and some few on this side of the House. The restoration of the currency and the resumption of specie payments do not seem to me so far off as others appear to think; and believing that the resumption of specie payments is desirable and not impossible within no very distant period, it seems to me it may be necessary, when that time comes, to withdraw the Government notes from circulation, so that specie may again be the only "lawful money" of the country.

I see, no way in which the Government notes could be redeemed in specie; and I fear that any other legal tender than coin could not well exist with specie payments. Therefore, to confine the right of issuing paper for currency to the Treasury Department would seem to be a permanent arrangement for an irredeemable currency. When the act was passed authorizing the issue of the legal-tender notes no one advocated it as a permanent measure, but only as a temporary expedient to meet the emergency that existed after the banks suspended specie payments at the close of the year 1861.

One more reason I will state, which to my mind is very important; that a Government cannot issue paper as money, from its Treasury, and give it active circulation in the channels of trade and commerce throughout a great country, because its only means to accomplish that object is through its payments to public creditors. Whenever those payments are less than the amount required for the circulation, the currency must be insufficient for the business of the country, and may be diverted temporarily into channels where it is not available for the general purposes of the business of the country. It follows necessarily from this that no Government paper can be advantageously maintained in circulation, as the money of the country without the Government assuming the functions of a bank by loaning its notes to be used for currency; and the objection to this is too manifest. No Government can perform the functions of a bank by loaning money without becoming corrupt and progressively arbitrary and despotic.

The statement that this bill withdraws the property of individuals from State and municipal taxation is not correct. The property of any individual invested in these banks is taxable, like any other of their property, for State and municipal purposes. While the United States Bank was in existence the shares of stock held by any one in that bank and the dividends received from it were counted in as constituting a part of the property and income for which such person was subject to taxation under State law. But the Supreme Court decided that the bank could not be taxed by State law. Chief Justice Marshall in rendering this decision stated, as one of the reasons for it, that such power to tax was a power to destroy an institution created by the national Government.

To give to the States the power to tax the banks established under this law would destroy their character as national institutions. If the amendment giving that power to the States is adopted, I should consider the law of last year preferable to this, and should, therefore, be opposed to the passage of this bill.

The amendments reported by the Committee of the Whole on the state of the Union upon which no special vote was requested were then agreed to.

#### Fourth amendment:

Add to the seventh section the following proviso: *Provided*, That banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants.

Mr. BROOKS. I ask for a special vote upon this amendment.

Mr. WILSON called for tellers.

Tellers were ordered; and Mr. Winsor and Mr. Brooks were appointed.

The House divided; and the tellers reported—aye's 54, nays 54.

So the amendment was agreed to.

#### Sixteenth amendment:

Insert in section twenty-two, after the words "denominations," the words "one dollar, two dollars, three dollars," so that the clause will read as follows:

In order to furnish suitable notes for circulation, the Comptroller of the Currency is hereby authorized and required, under the direction of the Secretary of the Treasury, to cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and to have printed thereon, and numbered, such quantity of circulating notes, in blank, of the denominations of one dollar, two dollars, three dollars, five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, and one thousand dollars, as may be required to supply, under this act, the associations entitled to receive the same.

Mr. HOLMAN. I demand the yeas and nays upon this amendment.

The yeas and nays were ordered.

The question was taken; and it was decided in the affirmative—yeas 76, nays 54; as follows:

YEAS—Messrs. Alley, Allison, Ames, Anderson, Ashley, John D. Baldwin, Barker, Beaman, Blaine, Blow, Bonwell, Boyd, Bromall, Ambrose W. Clark, Cobb, Cote, Dixey, Donnelly, Driggs, Eberle, Ellicott, Frank, Garrison, Gorham, Griswold, Hale, Hotchkiss, Asa W. Hubbard, John R. Hubbard, Jencks, Jaffray, Larsson, Kelley, Francis W. Kellogg, Orlando Kellogg, Loan, Longyear, Marvin, McBride, McClung, Samuel F. Miller, Moorhead, Merrill, Daniel Morris, Amos Myers, Leonard and Myers, Charles O'Neill, Orr, Patterson, Perham, Pomroy, Price, Pruy, Radford, William H. Randall, Alexander H. Rice, John H. Rice, Edward H. Rollins, Schenck, Scfield, Shumway, Spalding, Starr, Stevens, Thayer, Upson, Van Valkenburg, Elizur L. Washburne, William H. Washburn, Whaley, Williams, Wilder, Wilson, Windom, and Woodbridge—76.

NAYS—Messrs. Allen, William J. Allen, Ancon, Bailey, Augustus C. Baldwin, Bliss, Brooks, James S. Brown, William F. Brown, Chumler, Cox, Dawson, Donison, Eden, Eldridge, English, Flock, Gridier, Harrington, Herkirk, Holman, Philip Johnson, William Johnson, Kollisch, Keenan, Law, Long, Malony, Marcy, McKinney, Middleton, William H. Miller, James R. Morris, Morrison, Nelson, John O'Neill, Pendleton, Samuel J. Randall, Robison, Rogers, James S. Rollins, Scott, John B. Steele, William G. Steele, Strousz, Sweet, Thomas, Voorhees, Wheeler, Chilton A. White, Joseph W. White, Winfield, Benjamin Wood, and Yeaman—54.

So the amendment was agreed to.

During the call of the roll,

Mr. FLARRINGTON stated that Mr. HARDING was confined to his house by sickness.

#### Thirty-first amendment:

Strike out section thirty, and insert in its stead the following:

*And be it further enacted*, That every association may take, receive, reserve, and charge on any man or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at a rate not exceeding seven percent per annum; and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than above shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

Mr. HOLMAN. I rise to a point of order upon the amendment now being read by the Clerk. I hold in my hand the printed bill, which I suppose is the same now being read. This section was amended by the Committee of the Whole in two respects: first, on the motion of the gentleman from Maine, [Mr. Blaine], by fixing the rate of interest the same as that prescribed by the Legislatures of the several States; and second, by providing that where a larger rate of interest than six



**DANIEL DAVID COLE, Petitioner-Appellant, v. STATE OF NEW MEXICO; ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO; ERASMO BRAVO, Warden, Guadalupe County Correctional Facility, Respondents-Appellees.**

**No. 02-2195**

**UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

*58 Fed. Appx. 825; 2003 U.S. App. LEXIS 2132*

**February 6, 2003, Filed**

**NOTICE:** [\*\*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**SUBSEQUENT HISTORY:** US Supreme Court certiorari denied by *Cole v. N.M.*, 2003 U.S. LEXIS 6194 (U.S., Oct. 6, 2003)

**PRIOR HISTORY:** (D. New Mexico). D.C. No. CIV-01-980 LH/LCS.

**DISPOSITION:** COA denied; appeal dismissed.

**COUNSEL:** For Daniel David Cole, Petitioner - Appellant: Alonzo J. Padilla, Office of the Federal Public Defender, Albuquerque, NM. Stephen P. McCue, Fed. Public Defender, Office of the Federal Public Defender, Albuquerque, NM.

For State of New Mexico, Attorney General For The State of New Mexico, Erasmo Bravo, Respondents - Appellees: Patricia A. Gandert, Office of the Attorney General, State of New Mexico, Santa Fe, NM.

**JUDGES:** Before SEYMOUR, HENRY, and BRISCOE, Circuit Judges.

**OPINION BY:** Robert H. Henry

**OPINION**

**[\*826] ORDER AND JUDGMENT \***

\* This order and judgment is not binding precedent, except under the doctrines of res judicata, collateral estoppel, and law of the case. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of *10th Cir. R. 36.3*.

[\*\*2] After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See *Fed. R. App. P. 34(a)(2)(C)*. The case is therefore submitted without oral argument.

Daniel David Cole seeks to appeal the district court's order denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons stated below, we DENY Mr. Cole's motion for a certificate of appealability and DISMISS this appeal.

*I. BACKGROUND*

Following a bench trial, the District Court of Otero County, New Mexico, found Mr. Cole guilty but mentally ill of one count of first-degree murder, in violation of *N.M. Stat. Ann. § 30-2-1(A)(1)*, and three counts of attempted first-degree murder, in violation of *N.M. Stat. Ann. §§ 30-28-1(A)* and *30-2-1(A)(1)*.<sup>1</sup> Mr. Cole received a sentence of life imprisonment on the murder conviction and nine years' imprisonment for each of the attempted murders. The state court ruled that the sentences for the attempted murders would be served concurrently with each other and consecutive to the life sentence on the first-degree murder conviction. [\*\*3] Mr. Cole appealed his convictions to the New Mexico Supreme Court. That court affirmed Mr. Cole's convictions.

*See* Rec. doc. 13, ex. G (Supreme Court of New Mexico's Decision, case no. 25,643, filed Aug. 8, 2000).

1 The murder victim was Mr. Cole's wife and the intended victims of the attempted murders were his three minor children.

On August 28, 2001, Mr. Cole filed the instant habeas petition in the federal district court, asserting fifteen grounds for relief.<sup>2</sup> Subsequently, on September 10, [\*827] 2001, Mr. Cole filed a pro se petition for a writ of habeas corpus in New Mexico state district court asserting the same claims for relief. *See* Rec. doc. 13, ex. I (Petition for Writ of Habeas Corpus, filed Sept. 10, 2001). On November 8, 2001, the Otero County District Court issued an order summarily dismissing Mr. Cole's state habeas petition.

2 In particular, Mr. Cole alleged that (1) the trial court erred in allowing a psychologist to testify about Mr. Cole's prior bad acts, based on information obtained during a sanity evaluation; (2) the trial court erred in admitting statements not preceded by a *Miranda* warning; (3) the court did not apply the correct elements of first-degree murder; (4) the court erred in admitting improper character evidence; (5) the court erred in admitted hearsay testimony; (6) the court erred in not allowing him to present mitigating evidence; (7) the sentence imposed violated double jeopardy principles; (8) the court erred in disallowing certain defenses; (9) the court violated his right to be free from self-incrimination by admitting a psychological evaluation; (10) the court erred in declining to reduce the charge to second-degree murder based upon his psychological state; (11) the court erred in allowing the prosecution to pursue the first-degree murder charge when he had asserted the insanity defense; (12) the court erred in refusing to reduce the murder charge to voluntary manslaughter based upon provocation; (13) the court erred in refusing to consider his contention that he acted in self-defense; (14) the court erred in declining to find him guilty of manslaughter rather than first-degree murder; (15) he received ineffective assistance of counsel because his trial lawyer failed to investigate the case and prepare an adequate defense. *See* Rec. vol. I, doc. 1 (Petition for a Writ of Habeas Corpus, filed August 28, 2001).

[\*\*4] The parties agree that Mr. Cole did not file a petition for a writ of certiorari with the New Mexico Supreme Court within thirty days of the filing of this summary dismissal, as required by Rule 12-201(A) of the New Mexico Rules of Appellate Procedure. However,

according to Mr. Cole, he submitted a certiorari petition prematurely--on August 28, 2001 (prior to the district court's ruling of summary dismissal). According to Mr. Cole, after this premature filing, he received a letter from the New Mexico Supreme Court informing him that he was required to file an endorsed copy of the state district court's order denying habeas relief.<sup>3</sup> Subsequently, Mr. Cole asserts, he prepared a letter to the New Mexico Supreme Court clerk's office and attached a copy of the dismissal order. However, Mr. Cole reports, he was unable to obtain notarization of his signature until December 11, 2001, because his caseworker was unavailable. On that date, he mailed the letter to the clerk's office. The clerk's office received the letter on December 13, 2001. However, the clerk's office informed Mr. Cole that it could not file his certiorari petition because the deadline had passed. *See* Rec. doc. 20, [\*5] at 6-7 (Mr. Cole's objections to the magistrate's report, filed May 3, 2002).

3 This August 28, 2001 certiorari petition is not in the record before us. It appears that Mr. Cole and his counsel may be confused about that date: August 28, 2001 is the date that Mr. Cole filed his petition for a writ of habeas corpus in the federal district court. Because Mr. Cole did not file his state habeas petition in the Otero County court until September 10, 2001, it is unclear why he would have filed a certiorari petition in the New Mexico Supreme Court prior to that date. In any event, given Mr. Cole's acknowledged failure to file a timely certiorari petition *after* the Otero County court's ruling of November 8, 2001, we need not determine whether Mr. Cole actually filed a certiorari petition in the New Mexico Supreme Court on August 28, 2001.

In the federal district court case, the magistrate judge issued proposed findings and a recommended disposition on April 23, 2002. *See* Rec. vol. I, doc. 19. The magistrate [\*6] judge concluded that Mr. Cole's petition was procedurally barred because he had not timely filed a certiorari petition in the New Mexico Supreme Court. The magistrate judge also considered the merits of Mr. Cole's ineffective assistance of counsel claim, concluding that Mr. Cole had failed to demonstrate that he was prejudiced by his counsel's alleged errors. The district court adopted the magistrate's report and recommendation and dismissed Mr. Cole's petition.

## II. DISCUSSION

Mr. Cole seeks a certificate of appealability (COA) in order to pursue this appeal. Because the district court ruled on procedural [\*828] grounds, Mr. Cole may obtain a COA if he "shows, at least, that jurists of reason would find it debatable whether the petition states a valid

claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000).

In this appeal, Mr. Cole first contends that the district court erred in dismissing his petition without first reviewing a complete record of the state court proceedings, including [\*\*7] a transcript of the trial. Mr. Cole also advances substantive challenges to the district court's conclusion that his claims are procedurally barred: He maintains that he has made a sufficient showing of cause and prejudice excusing his procedural default and that a failure to consider his claims would result in a fundamental miscarriage of justice.

#### A. Alleged Inadequacy of the Record

Mr. Cole observes that "neither the transcript of [the state court] proceedings nor the record proper from state court have been filed in this case." Aplt's Br. at 3. He contends that "without a state court record proper and transcript of proceedings, appointed counsel is unable to begin to assemble the needed proof of an ineffective assistance of counsel claim." *Id.* at 11. Mr. Cole further maintains that the district court's analysis of his procedural default is deficient because it is based on an incomplete record.

We are not persuaded by Mr. Cole's contentions about the inadequacy of the record. In response to Mr. Cole's petition, the respondent filed a motion to dismiss and a supporting memorandum in which he argued that Mr. Cole's claims were procedurally barred. *See* Rec. vol. I doc. [\*\*8] 11-12 (Motion to Dismiss and Memorandum in Support, filed December 20, 2001). The respondent noted that Mr. Cole had failed to file a timely certiorari petition in the New Mexico Supreme Court. Rec. vol. I, doc. 12, at 4-5. Additionally, the respondent stated that "the New Mexico Supreme Court's Decision [in Mr. Cole's direct appeal] pointed to specific evidence in the record from which a factfinder could have found [Mr. Cole] guilty of first degree murder and three counts of attempted first degree murder." Rec. vol. I, doc. 12 at 6. The respondent also submitted copies of the judgment and sentence, the briefs in the state court direct appeal, the New Mexico Supreme Court's decision, Mr. Cole's state court habeas petition, and the state district court's summary dismissal. *See* Rec. vol. I, doc. 13. (Answer to Petition for a Writ of Habeas Corpus, filed Dec. 20, 2001). These documents provided the district court with sufficient information to determine whether Mr. Cole's petition was procedurally barred and whether either of the established exceptions (cause and prejudice or a fundamental miscarriage of justice) would excuse his default.<sup>4</sup>

4 In that regard, we note that *Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts* enables a district court to order a summary dismissal of a petition "if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." That provision indicates that it may be proper for a district court to rule on issues of procedural bar without reviewing the entire trial transcript.

#### [\*\*9] B. Cause and Prejudice

Before filing a federal habeas corpus petition, an inmate must exhaust the available state remedies. *See* 28 U.S.C. § 2254(b)(1). "A state prisoner is ordinarily not able to obtain federal habeas corpus relief unless it appears that the [\*\*829] applicant has exhausted the remedies available in the courts of the State." *Dever v. Kan. State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994) (quotation marks omitted).

If state remedies are still available, the appropriate disposition is to dismiss a federal habeas petition without prejudice so that the petitioner may pursue those remedies. *See Coleman v. Thompson*, 501 U.S. 722, 731, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991). However, where state remedies are no longer available, a dismissal for failure to exhaust is not appropriate. Instead, we must deny the petition unless the petitioner can show cause for the default and actual prejudice resulting from the alleged federal law violation, or that a fundamental miscarriage of justice will occur if the claims are not considered. *See id.* at 750; *Klein v. Neal*, 45 F.3d 1395, 1400 (10th Cir. 1995). [\*\*10]

As noted above, Mr. Cole failed to file a certiorari petition in the New Mexico Supreme Court within thirty days of the denial of his state habeas petition, as required by Rule 12-201(A) of the New Mexico Rules of Appellate Procedure. Accordingly, we may not reach the merits of Mr. Cole's federal habeas petition unless he can establish cause for his procedural default and resulting prejudice or that a fundamental miscarriage of justice would result if we do not hear the merits of his claim. *See Coleman*, 501 U.S. at 750.<sup>5</sup>

5 We note that Mr. Cole does not contend here that the premature filing of his certiorari petition somehow rendered his subsequent petition timely. Instead, he concedes that there was a default and argues that the cause and prejudice exception excuses it. Aplt's Br. at 4.

As to cause and prejudice, Mr. Cole asserts that the unavailability of his caseworker constitutes cause for his

failure to file a timely certiorari petition in the New Mexico Supreme Court. Mr. Cole did [\*\*11] not raise this argument until he filed objections to the magistrate's report and recommendation. As a result, the district court did not consider this contention. See Rec. vol. I, doc. 21 (District Court Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition, filed June 26, 2002) (stating that Mr. Cole raised a new claim in his objections and deeming that claim waived).

We conclude that, by failing to raise the issue in his initial response to the respondent's motion to dismiss, Mr. Cole has waived the argument that the unavailability of his caseworker constituted cause for his failure to file a certiorari petition. "Allowing parties to litigate fully their case before the magistrate and, if unsuccessful, to change their strategy and present a different theory to the district court would frustrate the purpose of the Magistrates Act." *Greenhow v. Sec'y of Health & Human Servs.*, 863 F.2d 633, 638 (9th Cir. 1988), overruled on other grounds by, *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992). In explaining the delay, Mr. Cole's attorney states that he did not mention the contention about the unavailability [\*\*12] of the caseworker in his initial response because "counsel first learned of this fact April 29, 2002" [after the filing of the magistrate's proposed findings and recommendation on April 23, 2002]. Aplt's Br. at 7 n.6. This cursory explanation does not establish the kind of exceptional circumstances necessary to excuse the failure to raise the issue before the magistrate judge. See *Greenhow*, 863 F.2d at 638-39 (finding no exceptional circumstances).

Moreover, even if Mr. Cole had timely raised the argument as to the unavailability of his caseworker, we conclude that his assertions fail to establish cause [\*830] for his procedural default. The mere assertion that a particular caseworker was not available does not demonstrate that there were no other means available to Mr. Cole to file a timely certiorari petition. In the absence of sufficient cause for Mr. Cole's default, we need not address his assertions of prejudice.

#### C. Fundamental Miscarriage of Justice

Mr. Cole also contends that a fundamental miscarriage of justice would result if the merits of his claim are not addressed. He contends that the evidence is insufficient to establish his guilt as to the first-degree [\*\*13] murder charge, because his homicidal intent at the moment of his attempt to asphyxiate his wife did not continue to his subsequent, allegedly spontaneous decision to stab her. See Aplt's Br at 23.

We conclude that Mr. Cole has failed to establish a fundamental miscarriage of justice warranting an exception to procedural bar. The fundamental miscarriage of justice exception applies only in extraordinary instances in which a constitutional violation probably caused the conviction of an innocent person. See *Murray v. Carrier*, 477 U.S. 478, 479-80, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986). In order to establish a fundamental miscarriage of justice, Mr. Cole must support his allegations of innocence with "new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995). Here, Mr. Cole points to no such evidence. Moreover, the New Mexico Supreme Court's decision affirming Mr. Cole's conviction sets forth substantial evidence supporting his convictions.<sup>6</sup>

6 The Supreme Court rejected Mr. Cole's argument that because he abandoned an attempt to asphyxiate his wife, his subsequent stabbing of her did not establish an intent to kill. The court stated

By engaging in successive attempts on Ms. Cole's life, Mr. Cole evinced that his original deliberate intent to kill her survived his failed attempt to asphyxiate her . . . . Without evidence of abandonment or any other interruption of his intent [Mr. Cole's] attempts to asphyxiate, strangle, and set Ms. Cole's clothes on fire clearly provided sufficient evidence to lead [the trial judge] to find, beyond a reasonable doubt that [Mr. Cole] stabbed Ms. Cole with the deliberate intent to kill her.

Rec. vol. I, doc. 13, ex. G, at 4.

#### [\*\*14] III. CONCLUSION

Accordingly, we DENY Mr. Cole's application for a certificate of appealability and DISMISS this appeal.

Entered for the Court

Robert H. Henry

Circuit Judge



**COMMONWEALTH PROPERTY ADVOCATES, LLC, Plaintiff-Appellant, v.  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Defendant-  
Appellee. COMMONWEALTH PROPERTY ADVOCATES, LLC, Plaintiff-  
Appellant, v. BAC HOME LOANS SERVICING, LP, formerly known as Country-  
wide Home Loans Servicing, L.P.; RECONTRUST COMPANY, a Texas corpora-  
tion, Defendants-Appellees. COMMONWEALTH PROPERTY ADVOCATES,  
LLC, Plaintiff-Appellant, v. FIRST HORIZON HOME LOAN CORPORATION;  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Defendants-  
Appellees.**

**No. 10-4182, No. 10-4193, No. 10-4215**

**UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

**680 F.3d 1194; 2011 U.S. App. LEXIS 25753**

**December 23, 2011, Filed**

**NOTICE:** PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.*

For COMMONWEALTH PROPERTY ADVOCATES, LLC (10-4193), Plaintiff - Appellant: E. Craig Smay, Esq., E. Craig Smay P.C., Salt Lake City, UT.

**PRIOR HISTORY:** [\*\*1]  
(D.C. No. 2:10-CV-00340-TS), (D.C. No. 2:09-CV-01146-DB), (D.C. No. 2:10-CV-0375-DB). (D. Utah). *Commonwealth Prop. Advocates, LLC v. First Horizon Home Loan Corp.*, 2010 U.S. Dist. LEXIS 121743 (D. Utah, Nov. 16, 2010)  
*Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys.*, 2010 U.S. Dist. LEXIS 99482 (D. Utah, Sept. 20, 2010)

For BAC HOME LOANS SERVICING, LP, FKA Countrywide Home Loans Servicing, LP, RECONTRUST COMPANY, a Texas corporation (10-4193), Defendant - Appellees: Michael D. Black, Parr Brown Gee & Loveless, P.C., Salt Lake City, UT.

For COMMONWEALTH PROPERTY ADVOCATES, LLC (10-4215), Plaintiff - Appellant: E. Craig Smay, Esq., E. Craig Smay P.C., Salt Lake City, UT.

**DISPOSITION:** AFFIRMED.

For FIRST HORIZON HOME LOAN CORPORATION (10-4215), Defendant - Appellee: Matthew M. Cannon, Michael D. Mayfield, Ray Quinney & Nebeker P.C., Salt Lake City, UT; Joseph Yenouskas, Goodwin Procter LLP, Washington, DC.

**COUNSEL:** For COMMONWEALTH PROPERTY ADVOCATES, LLC (10-4182), Plaintiff - Appellant: E. Craig Smay, Esq., E. Craig Smay P.C., Salt Lake City, UT.

For MORTGAGE [\*\*2] ELECTRONIC REGISTRATION SYSTEMS, INC. (10-4215), Defendant - Appellee: Mark Louis Callister, J. Tayler Fox, James D. Gilson, Callister, Nebeker & McCullough, Salt Lake City, UT; JoAnn T. Sandifer, Husch Blackwell LLP, St. Louis, MO; Joseph Yenouskas, Goodwin Procter LLP, Washington, DC.

For MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (10-4182), Defendant - Appellee: Mark Louis Callister, J. Tayler Fox, James D. Gilson, Callister, Nebeker & McCullough, Salt Lake City, UT; JoAnn T. Sandifer, Husch Blackwell LLP, St. Louis, MO.

**JUDGES:** Before LUCERO, BALDOCK, and HARTZ, Circuit Judges. \*\*

\*\* This panel heard oral argument in appeal 10-4215 on November 17, 2011. Defendants in appeals 10-4182 and 10-4193 waived oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). Appeals 10-4182 and 10-4193 are therefore ordered submitted on the briefs.

**OPINION BY:** Bobby R. Baldock

**OPINION**

**[\*1196] ORDER AND JUDGMENT\***

\* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with *Fed. R. App. P. 32.1* and *10th Cir. R. 32.1*.

Plaintiff Commonwealth Property Advocates, LLC, acquired title to three pieces of real property in Utah from three defaulting borrowers. Plaintiff then filed three suits in diversity against various Defendants which held interests in the property, seeking to prevent foreclosure. Plaintiff argued Defendants had no authority to foreclose [\*3] because the notes in each case had been securitized and sold on the open market. Because the security follows the debt, Plaintiff argued, once Defendants sold the security they could not [\*1197] foreclose absent authorization from every investor who had purchased an interest in the securitized note. Defendants in all three cases filed motions to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, and the district court granted those motions. Plaintiff appealed, and we now consolidate these cases for purposes of opinion. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

I.

The following facts are found in Plaintiff's complaints and the attached exhibits. In appeal 10-4182, the original borrower received two loans totaling \$309,000 from American Sterling Bank, secured by real property in Bountiful, Utah. Each security interest was memorialized by a promissory note and a deed of trust naming as beneficiary Defendant Mortgage Electronic Registration Systems ("MERS") in its capacity as nominee for American Sterling.<sup>1</sup> Each deed of trust also contained a provision giving MERS "the right to foreclose and sell the Property" and to take other actions on behalf of the lender. The complaint alleges [\*4] that "[t]he obligations on the Notes were pooled and sold by Lender . . . as securities to numerous investors unknown."<sup>2</sup> The original borrower defaulted and MERS served a notice of

default on the property. Subsequently, Plaintiff acquired title to the property by way of quitclaim deed. Plaintiff filed suit against MERS alleging "causes of action" for (1) "stay of pending sale," (2) "estoppel/declaratory judgment," (3) declaratory judgment, (4) quiet title, and (5) "refund, fees and costs." Defendant MERS moved to dismiss for failure to state a claim, and the district court granted the motion. Plaintiff appealed.

1 MERS is a private electronic database that tracks the transfer of the beneficial interest in home loans. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1038 (9th Cir. 2011). "MERS was designed to avoid the need to record multiple transfers of the deed by serving as the nominal record holder of the deed on behalf of the original lender and any subsequent lender." *Id. at 1039*. MERS is designated in the deed of trust as a "nominee" for the lender and the lender's successors and assigns as well as the "beneficiary" of the deed. *Id.* MERS thus holds legal title to the [\*5] security interest. *Id.* "If the lender sells or assigns the beneficial interest in the loan to another MERS member, the change is recorded only in the MERS database, not in county records, because MERS continues to hold the deed on the new lender's behalf." *Id.* Thus, no recordation takes place unless the trust deed is transferred to an entity that is not a member of MERS. *Id.*

2 This process of pooling loans and selling them to investors on the open market is known as securitization. MERS facilitates the securitization process by allowing promissory notes to be transferred without costly recordation in local land records. See *BAC Home Loans Servicing, L.P. v. White*, 2011 OK CIV APP 35, 256 P.3d 1014, 1017 (Okla. Civ. App. 2010).

In appeal 10-4193, the original borrower received \$1,135,400 from GreenPoint Mortgage Funding to acquire real property in Sandy, Utah. In exchange, the borrower executed a promissory note in favor of GreenPoint. The borrower also executed a deed of trust in favor of Meridian Title Company. The trust deed named MERS as both the beneficiary and GreenPoint's nominee and expressly gave MERS the right "to foreclose and sell the property." Defendant BAC Home Loans Servicing later became [\*6] the servicer of the note, and Defendant ReconTrust was named as substitute trustee. According to the complaint, "the obligation under the Note was pooled and sold by Lender . . . as securities to numerous investors unknown." When the original borrower defaulted, ReconTrust served a notice of default and intent to sell. Plaintiff acquired title to the property via quitclaim deed about seven weeks later. Plaintiff then

filed suit [\*1198] against BAC Home Loans and ReconTrust asserting four "causes of action" labeled (1) "estoppel/declaratory judgment," (2) declaratory judgment, (3) quiet title, and (4) "refund, fees and costs." Defendants filed a motion to dismiss for failure to state a claim, and the district court granted the motion. Plaintiff then filed a "motion to reconsider" pursuant to "Rules 59 and 60, FRCP" because the district court "appears to have overlooked the applicable statute and the facts as admitted herein." The district court denied this motion as well, concluding Plaintiff had not shown obvious error or introduced new, previously undiscoverable evidence. Instead, the court said, Plaintiff's motion "raise[d] new arguments not addressed in the briefing to the court and rehash[e]d" [\*7] arguments already considered by the court." The court entered its order denying the "motion to reconsider" on October 1, 2010. On October 29, 2010, Plaintiff filed a notice of appeal, stating that "defendant [sic] appeals . . . the decision of the District Court herein entered October 1, 2010."

In appeal 10-4215, the original borrower executed two promissory notes totaling \$1,250,000 in favor of Defendant First Horizon Home Loan Corporation. The borrower secured these notes by two deeds of trust in property in Alpine, Utah. The trust deeds named Meridian Title Company as trustee. Both deeds of trust designated MERS as the beneficiary and as First Horizon's nominee, and both gave MERS the right to foreclose and sell the property on First Horizon's behalf. First Horizon pooled the obligations on the notes and sold them as securities to various investors. First Horizon also substituted eTitle as the trustee, but did not initially record the substitution. The original borrower defaulted on the loan, and trustee eTitle filed a notice of default. The original borrower then quitclaimed the property to Plaintiff. Plaintiff sued First Horizon and MERS, asserting "causes of action" for (1) "stay" [\*8] of pending sale," (2) "estoppel/declaratory judgment," (3) declaratory judgment, (4) quiet title, and (5) "refund, fees and costs." The district court granted Defendants' motion to dismiss, and Plaintiff appealed.

Plaintiff's complaints are difficult to construe, but they appear to raise three substantive claims for relief.<sup>3</sup> First, under the heading of "Estoppel/Declaratory Judgment," Plaintiff alleges Defendants failed to provide information regarding the interests of "persons to whom the Note and/or Trust Deed may be assigned" when requested to do so by Plaintiff. Plaintiff alleges the failure to provide this information subjects it "to risks, abuses, and prejudice" and "render[s] impossible proper discharge of the obligation on the Note." Thus, Plaintiff seeks to estop Defendants from asserting that the notes are in default or that they hold the power of sale under the trust deeds. Plaintiff also requests a declaratory

judgment that Defendants "lack any [enforceable] interest in the trust deed." In 10-4215, Plaintiff makes several additional allegations under this cause of action. Plaintiff alleges Defendants violated a number of Utah statutory provisions, *Utah Code Ann. §§ 57-1-22(3)(a);* [\*9] 57-1-22(1)(a); 57-1-23; and 57-1-21(4). Plaintiff also alleges, "First Horizon is attempting to foreclose on the subject property without being the Beneficiary of record for the first position Trust Deed."

3 Plaintiff's first claim, for stay of a foreclosure sale "pending resolution of issues of rights under the security," was rendered moot by the district court's final judgment, which resolved the "issues of rights under the security." Plaintiff did not seek a stay of foreclosure pending appeal. Nevertheless, Defendants appear to have voluntarily postponed foreclosure in all three cases.

[\*1199] In its second substantive claim, Plaintiff seeks a declaratory judgment that Defendants "lack any interest under the Trust Deed which may be enforced by . . . sale of the subject property." Plaintiff alleges that, because Defendants transferred the notes to subsequent assignees, Defendants "lacked authority to declare a default" or to sell the subject property and distribute any proceeds. The complaints allege that because the investors in each securitized note were not assigned the corresponding trust deed, "the obligation under the Note has . . . become unsecured, and the Note and Trust Deed, may not [\*10] be foreclosed." Plaintiff further claims it is "a bona fide purchaser for value of the subject property without notice of any claim" by persons to whom Defendants assigned the notes.

Plaintiff's third claim, seeking to quiet title, rests upon two grounds. First, Plaintiff asserts that Defendants' failure "to retain any interest in the obligation under the Note voided any title or power they might have under the Trust Deed, and rendered said Trust deed unenforceable by them." Second, Plaintiff alleges that "[r]ecordation of the plaintiff's deed to the subject property prior to the recordation of any assignment of the Trust Deed, renders any such assignments void and unenforceable against the subject property" under *Utah Code Ann. §§ 57-3-102* and 57-3-103. Plaintiff seeks to quiet title in its favor, thus "freeing title to the subject property of the lien of the Trust Deed and leaving any obligation under the Note unsecured . . ."<sup>4</sup>

4 Plaintiff's final claim for "refund, fees and costs" appears to be a novel attempt to request sanctions as part of a complaint. Plaintiff alleges that Defendants' "pretense of authority to foreclose, or attempt to foreclose, under the Trust Deeds were [sic] [\*11] fraudulent." Plaintiff al-

leges any assertions by Defendants that they were entitled to enforce the obligations on the notes "would constitute a fraud upon the court" subject to sanctions under *Utah Code Ann.* § 78B-5-825. Thus, Plaintiff asked the court to order Defendants to pay Plaintiff's costs. This claim has no plausible legal basis.

Plaintiff appears to raise only one issue on appeal.<sup>5</sup> Plaintiff argues securitization of a note renders the holder of the underlying trust deed and its nominees unable to foreclose absent authorization by *every* investor holding an interest in the securitized note. Plaintiff contends that any authorization to foreclose contained in the trust deeds is invalidated by *Utah Code Ann.* § 57-1-35. This claim appears to relate to Plaintiff's second and third substantive claims for relief, both of which challenged Defendants' authority to foreclose, but which sought different forms of relief (a declaratory judgment and quiet title). Although Plaintiff's complaints appeared to raise several other claims, Plaintiff has not raised those claims on appeal. [\*1200] An appellant's opening brief must set forth "appellant's contentions and the reasons for them, with citations [\*12] to the authorities and parts of the record on which the appellant relies." *Fed. R. App. P.* 28(a)(9)(A). Consequently, "[a]n issue or argument insufficiently raised in the opening brief is deemed waived." *Becker v. Kroll*, 494 F.3d 904, 913 n.6 (10th Cir. 2007). Because Plaintiff has only appealed with respect to Defendants' authority to foreclose, we will not address the remaining claims.<sup>6</sup>

5 Plaintiff's statements of the "issues on appeal" provide little help in determining what exactly Plaintiff is appealing. In appeal 10-4182, for example, Plaintiff states the "issues on appeal" as follows: (1) "Was the District Court bound by the plain terms of the documents executed by the parties, including that making enforcement by the owner of the debt option in case of any non-payment?"; (2) "Was the District Court required to deem established on motion to dismiss the factual allegations of the Complaint?"; (3) "Was the District Court required to take cognizance of proffered documents showing the sale of the subject loan in the securitization scheme?"; (4) "What is the effect of [Utah Code Ann. § 57-1-35] where loans are sold for purposes of securitization?"; (5) "Are cases in which transfer [\*13] of the debt is not shown applicable?"; (6) "Where the documents make enforcement optional in any case of non-payment, the loan has previously been sold, and the new owner takes no step to enforce, may the District Court authorize foreclosure by the original lender which sold the loan and was paid off?" Appeal 10-4215 added the fol-

lowing unhelpful issue statement: "5. May the district court rely upon misquotation of an irrelevant statement in an inapposite case?"

6 Plaintiff appears to raise another claim in its opening brief. Plaintiff argues in its brief that foreclosure would be invalid because Defendants failed to comply with the trust deeds' requirement that Defendants give a notice of acceleration and a thirty-day opportunity to cure before invoking the trustee's statutory power of sale. Plaintiff failed to plead this claim in its complaint, and therefore we will not consider it on appeal. See *Smith v. Cummings*, 445 F.3d 1254, 1258 (10th Cir. 2006).

## II.

We first address Defendants' arguments challenging our jurisdiction. In appeal 10-4193, Defendants argue we cannot consider the merits of the 12(b)(6) motion because Plaintiff appealed only the denial of its "motion to reconsider." [\*14] In appeal 10-4215, Defendants argue Plaintiff lacks standing to sue, because Plaintiff's injury is self-imposed and because Plaintiff is seeking to assert a third party's rights.

### A.

We may construe Plaintiff's motion to reconsider as relevant to appeal 10-4193 either as a motion to alter or amend the judgment under *Fed. R. Civ. P.* 59(e) or as motion for relief from the judgment under *Fed. R. Civ. P.* 60(b). If a motion is timely under both rules, how we construe it depends upon the reasons expressed by the movant. *Jennings v. Rivers*, 394 F.3d 850, 855 (10th Cir. 2005). A Rule 59(e) motion is the appropriate vehicle "to correct manifest errors of law or to present newly discovered evidence." *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (quoting *Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992)). A Rule 60(b) motion is appropriate for, among other things, "mistake, inadvertence, surprise, or excusable neglect" and "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial." *Fed. R. Civ. P.* 60(b)(1),(2). The district court did not construe Plaintiff's motion as either a Rule 59 or Rule 60 [\*15] motion, but simply denied it. Plaintiff's motion was filed within fourteen days of the district court's order, meaning it was timely under Rule 59(e). The motion appears to be properly characterized as a Rule 59(e) motion, because Plaintiff claimed the district court "overlooked the applicable statute and the facts." We accordingly construe it as a Rule 59(e) motion. "[A]n appeal from the denial of a motion to reconsider construed as a Rule 59(e) motion permits consideration of the merits of the underlying

judgment, while an appeal from the denial of a *Rule 60(b)* motion does not itself preserve for appellate review the underlying judgment." *Hawkins v. Evans*, 64 F.3d 543, 546 (10th Cir. 1995). Because we construe Plaintiff's motion as one brought under *Rule 59(e)*, we may consider the merits of the district court's underlying dismissal.

#### B.

Defendants next challenge Plaintiff's standing as relevant to appeal 10-4215. The doctrine of standing has both a constitutional and a prudential component. To have standing under Article III, Plaintiff must assert an injury that is (1) concrete, particularized, and actual or imminent, (2) fairly traceable to the Defendants' challenged action, and (3) [\*\*16] [\*1201] redressable by a favorable ruling. *Horne v. Flores*, 557 U.S. 433, 129 S. Ct. 2579, 2592, 174 L. Ed. 2d 406 (2009). Defendants First Horizon and MERS argue Plaintiff's alleged injuries are not "fairly traceable" to any conduct by Defendants because Plaintiff's injuries "resulted from [Plaintiff's] own decision to knowingly purchase a trust deed-encumbered property from a defaulting borrower, not the result of any conduct by [Defendants]." Defendants cite *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1156 n.8 (10th Cir. 2005), in which we characterized an abortion provider's "injury" as self-inflicted because it resulted from the provider's decision to adopt stricter parental notification procedures than the challenged statute required. This case differs from *Gandy* because the asserted injury--an unauthorized foreclosure--was initiated by Defendants, not Plaintiff. Unlike the plaintiff in *Gandy*, Plaintiff has brought no additional injury upon itself. Plaintiff's decision to purchase the encumbered property in no way deprived it of the right to challenge an allegedly unauthorized foreclosure.<sup>7</sup> Thus, Plaintiff has Article III standing.

<sup>7</sup> Defendants also cite an unpublished district court opinion, *D.M. Johnson Family Trust v. Countrywide Home Loans, Inc.*, 2009 U.S. Dist. LEXIS 101054, 2009 WL 3615690 (D. Utah Oct. 28, 2009). [\*\*17] There, defaulting borrowers transferred their property to straw purchasers for \$1.9 million, lent to the purchasers by Countrywide, with the agreement that the original borrowers would make the payments on the Countrywide loan. When the borrowers again defaulted, they brought suit against Countrywide, alleging that Countrywide engaged in predatory lending practices. The district court held that the original defaulting borrowers lacked standing. There was no injury, the court said, because Countrywide's loan to the straw purchasers actually *benefited* plaintiffs. Furthermore, the court

said no causal nexus existed between Countrywide's provision of the loan and the plaintiffs' injury, because the plaintiffs' failure to pay precipitated foreclosure. Unlike in Countrywide, the alleged injury in this case is not a predatory loan that benefitted Plaintiff, but rather a foreclosure on Plaintiff's property. So in addition to having no precedential value, *Countrywide* is inapposite.

One element of prudential standing is "the general prohibition on a litigant's raising another person's legal rights." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004). Defendants in 10-4215 argue Plaintiff [\*\*18] is attempting to assert the rights of a third party, the original borrower on the mortgage. Defendants cite *Shire Development v. Frontier Investments*, 799 P.2d 221, 222-23 (Utah Ct. App. 1990), for the proposition that "a plaintiff lacks standing to sue about a contract to which he is not a party." Plaintiff has not, however, asserted any contractual rights. Instead, Plaintiff alleges Defendants have no legal or contractual authority to foreclose. Because Plaintiff is the current owner of the real property, a foreclosure would injure Plaintiff directly. Therefore, Plaintiff also has prudential standing, and we may proceed to the merits.

#### III.

We review a *Rule 12(b)(6)* dismissal de novo, accepting as true all well-pleaded factual allegations in the complaint and viewing them in the light most favorable to the plaintiff. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). In evaluating a motion to dismiss, we may consider not only the complaint, but also the attached exhibits and documents incorporated into the complaint by reference. *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is [\*\*19] plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). When reviewing a *12(b)(6)* dismissal, [\*1202] "we must determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007). Dismissal is appropriate if the law simply affords no relief. See *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 712 (10th Cir. 2006) (observing that dismissal under *12(b)(6)* was appropriate where a federal statute provided no remedy for the alleged conduct).

Our first task is to determine exactly what cause or causes of action Plaintiff is asserting. Plaintiff's "causes

of action" listed in its complaints are actually forms of relief. Because Plaintiff asserted no federal claims and brought this case in diversity, its claims for relief must be grounded in state law. Plaintiff, however, asserted no common law basis for its claims and waived its only claims based on Utah statutes.<sup>8</sup> The claim Plaintiff pursues on appeal is simply that [\*\*20] Defendants had no authority to foreclose because they transferred the debt. The most analogous state law cause of action appears to be an action for wrongful foreclosure. See *Timm v. Dewsnap*, 1999 UT 105, 990 P.2d 942, 945 (Utah 1999) (remanding for the trial court "to address the merits of [plaintiff's] claim for the wrongful foreclosure of the trust deed property"). The elements of this cause of action are unclear, but "[a] party may have an apparently valid trustee's sale set aside for irregularity, want of notice, or fraud if there is evidence sufficient to overcome the presumption of its validity." *Occidental/Neb. Fed. Sav. Bank v. Mehr*, 791 P.2d 217, 221 (Utah 1990). We construe Plaintiff's properly preserved claim as one for wrongful foreclosure under Utah law. Our next question is whether the facts alleged are sufficient to support a claim for relief.

8 Plaintiff's complaint in appeal 10-4215 alleged violations of *Utah Code Ann.* §§ 57-1-22(3)(a); 57-1-22(1)(a); 57-1-23; and 57-1-21(4), but Plaintiff has not renewed these allegations on appeal.

Utah law relating to trust deeds gives a trustee the power to sell the trust property if the borrower breaches an obligation relating to the secured [\*\*21] property. *Utah Code Ann.* § 57-1-23. In addition, the beneficiary may elect to have the foreclosure conducted according to the "law for the foreclosure of mortgages on real property." Id. The trustee may exercise the power of sale even "without express provision for it in the trust deed." Id. Thus, under § 57-1-23 the only trustee Defendant in this case, ReconTrust, had apparent authority to foreclose. Additionally, all the trust deeds in this case said "MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of [Lender's] interests, including, but not limited to, the right to foreclose and sell the Property." This language appears to give MERS the right to foreclose on behalf of not only the lenders but also the lender's successors and assigns.<sup>9</sup> As the district court said, "By the clear language of the deeds of trust, MERS has the authority to foreclose and sell the property on behalf of both the original lender and the 'lender's successors'."

9 Although Plaintiff named BAC Home Loans Servicing as a defendant in 10-4193, the complaint in that case alleges no facts to support any culpability on BAC's part. Thus, the 12(b)(6)

dismissal was [\*\*22] clearly appropriate as to BAC Home Loans Servicing.

Nevertheless, Plaintiff argues the trust deed provisions giving MERS this right are invalid because they conflict with *Utah Code Ann.* § 57-1-35. Plaintiff also appears to argue § 57-1-35 deprived ReconTrust of the power to foreclose as a trustee. [\*\*1203] *Section 57-1-35* says: "The transfer of any debt secured by a trust deed shall operate as a transfer of the security therefor." Plaintiff argues this provision invalidates MERS's and ReconTrust's authorization to foreclose, because the sale of the note in the subsequent securitization scheme also transferred the security. Plaintiff claims Defendants can no longer foreclose because they no longer hold the security interest in the real property. According to Plaintiff, "upon sale of a loan, in a securitization or otherwise, original 'nominees,' such as MERS, lose any right to exercise any power under the trust deed . . . absent some further agreement with the new owner of the debt."<sup>10</sup> Under Plaintiff's theory, the "new owners" of the debt are the investors who purchased interests in the securitized debt. Plaintiff argues MERS can only foreclose if each investor provides MERS with written authorization [\*\*23] to do so.

10 Defendants in appeal 10-4215 argue that the Pooling and Servicing Agreement (PSA), the document which effected the securitization, independently authorized Defendants to foreclose. Plaintiff argues that the PSA is not a sufficient "further agreement" with the investors because it does not satisfy the statute of frauds. The PSA is, in fact, irrelevant because it is not properly before us. On appeal from a 12(b)(6) motion to dismiss, we may only look at the complaint, the attached exhibits, and any document incorporated into the complaint by reference that is filed with the defendant's 12(b)(6) motion. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009); *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1253-54 (10th Cir. 2005). Plaintiff did not attach the PSA to any of its complaints, and none of the Defendants attached it to their motions to dismiss. Thus, we cannot consider the document.

The Utah Supreme Court has never addressed the effect of § 57-1-35 on the power to foreclose. While these appeals were pending, however, the Utah Court of Appeals addressed Plaintiff's arguments and interpreted § 57-1-35. *Commonwealth Prop. Advocates v. Mortg. Elec. Registration Sys., Inc.*, 263 P.3d 397, 2011 UT App 232 (Utah Ct. App. 2011), [\*\*24] cert. denied, Utah State Courts Appellate Docket No. 20100888 (Dec. 14, 2011). Commonwealth involved a suit brought by Plaintiff in Utah state court making almost identical claims and ar-

gments to those it has put forth here.<sup>11</sup> The deed of trust in Commonwealth was identical to the trust deeds in these cases, and it gave MERS authority to foreclose on behalf of the lender and its assigns. *263 P.3d* at 399. The Utah Court of Appeals concluded the trust deed provided sufficient authority to foreclose. The court cited approvingly a number of federal district court opinions (including the district court's opinion on appeal in 10-4215) that dismissed Plaintiff's claims because the trust deeds authorized MERS to foreclose. *Id.* at 402. The state court said: "We also agree with the federal district court's related rulings . . . that [Plaintiff] has failed to explain how the securitization of the Note could have revoked this language in the Deed of Trust." *Id.*

11 Indeed, if Defendants had been afforded the opportunity to raise issue preclusion, Plaintiff's claims almost certainly would have been barred under that doctrine. Issue preclusion applies under Utah law where (1) the party against whom [\*\*25] issue preclusion is asserted was a party to or in privity with a party to the prior adjudication; (2) the issue decided in the prior adjudication was identical to the one presented in the instant action; (3) the issue in the first action was completely, fully, and fairly litigated; and (4) the first suit resulted in a final judgment on the merits. *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, 250 P.3d 465, 477 (Utah 2011). These requirements would have been satisfied here. Defendants had no opportunity to raise issue preclusion, however, because the state court's decision was rendered after the briefing in all three appeals was concluded.

The state court then addressed Plaintiff's reliance on § 57-1-35. The court said, "The plain language of this statute [\*1204] simply describes the long-applied principle in our jurisprudence that when a debt is transferred, the underlying security continues to secure the debt." *Id.* at 403. The court went on:

[W]e interpret section 57-1-35 as ensuring the basic presumption that "[a] transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise," see *Restatement (Third) of Prop.: Mortgages* § 5.4. The plain [\*\*26] language of the statute does nothing to prevent MERS from acting as nominee for Lender and Lender's successors and assigns when it is permitted by the Deed of Trust. Therefore, contrary to [Plaintiff]'s liberal citation of section 57-1-35, we do not interpret the statute as preventing, implying, or

somehow indicating that the original parties to the Note and Deed of Trust cannot validly contract at the outset "to have someone other than the beneficial owner of the debt act on behalf of that owner to enforce rights granted in [the security instrument]" . . . .

*Id.* (quoting *Marty v. Mortg. Elec. Registration Sys.*, 2010 U.S. Dist. LEXIS 111209, 2010 WL 4117196 (D. Utah Oct. 19, 2010)). The court went on to "reject [Plaintiff]'s assertion that *Utah Code section 57-1-35* prohibits the original parties to the Note and Deed of Trust from agreeing to have someone other than the beneficial owner of the debt act on behalf of that owner and its successors and assigns to enforce rights granted in the trust deed." *Id.* at 404 (internal citations and brackets omitted). The court upheld the district court's entry of summary judgment against Plaintiff.<sup>12</sup> *Id.* at 405.

12 The Utah state district court in Commonwealth had converted the [\*\*27] defendants' motion to dismiss into a motion for summary judgment because it relied on documents outside the complaint. The court of appeals affirmed the conversion, despite Plaintiff's challenge. But the court observed that "even if the district court had not converted Defendants' motion to dismiss into a motion for summary judgment, its ruling on the motion to dismiss would have produced the same result--a dismissal of [Plaintiff's] case." *Commonwealth*, 263 P.3d 397, 2011 UT App 232, 2011 WL 2714429 at \*6.

The Utah Court of Appeals' decision in *Commonwealth* effectively disposes of these three cases. "When exercising diversity jurisdiction, we apply state law with the objective of obtaining the result that would be reached in state court." *Butt v. Bank of Am., N.A.*, 477 F.3d 1171, 1179 (10th Cir. 2007). If the state's highest court has reached an issue, "[t]he federal court must defer to the most recent decisions of the state's highest court." *Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 866 (10th Cir. 2003). Where the state's highest court has not addressed the issue, we still follow the state's intermediate court decisions absent "convincing evidence that the highest court would decide otherwise." *Webco Indus., Inc. v. ThermaTool Corp.*, 278 F.3d 1120, 1126 (10th Cir. 2002) [\*\*28] (citing *B.F. Goodrich Co. v. Hammond*, 269 F.2d 501, 505 (10th Cir. 1959)). According to the Supreme Court, "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the

highest court of the state would decide otherwise." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 85 L. Ed. 139 (1940)

We have no reason to believe the Utah Supreme Court would reach a different result than did the Utah Court of Appeals. The court of appeals' decision is based on a straightforward reading of the statute. Even assuming Plaintiff is correct that securitization deprives Defendants of their implicit power to foreclose [\*1205] as holders of the trust deeds, the trust deeds *explicitly* granted Defendants the authority to foreclose. Contrary to Plaintiff's contention, § 57-1-35 in no way prohibits such an authorization. The statute merely says the transfer of a debt operates as the transfer of the security. It says nothing about who is or is not authorized to foreclose on a trust deed. As the Utah Court of Appeals said: "[T]he Deed [\*\*29] of Trust explicitly gave MERS the right to foreclose on behalf of 'Lender and Lender's successors and assigns.' The statute does not prohibit parties from contracting for these arrangements . . ." *Commonwealth*, 263 P.3d at 403. The state court's decision is consistent both with the statute and with numerous federal district court cases that have addressed the same arguments. See *id.* at 402 (citing cases). The Utah Court

of Appeals has reinforced its decision in an even more recent appeal by Plaintiff. *Commonwealth Property Advocates, LLC v. U.S. Bank Nat'l Ass'n*, P.3d , 2011 UT App 415, 2011 WL 6091684 (Utah Ct. App. Dec. 8, 2011) (per curiam) ("Because [Plaintiff's] complaint in this case relies on the same erroneous principle raised in MERS that securitization of the note separated it from the trust deed, MERS is dispositive."). We see nothing to suggest the Utah Supreme Court would reach a different conclusion. In fact, on December 14, 2011, the Utah Supreme Court chose not to grant certiorari in Commonwealth. Thus, we defer to the Utah Court of Appeals' decision. Because Plaintiff's diversity jurisdiction claims have no legal basis under Utah law, the district court properly dismissed [\*\*30] all three complaints under *Fed. R. Civ. P. 12(b)(6)*. Accordingly, the judgments in appeals 10-4182, 10-4193, and 10-4215 are

AFFIRMED.

Entered for the Court,

Bobby R. Baldock

United States Circuit Judge



DANIEL B. DOHNER, An individual MARY LYNN DOHNER, An individual, Plaintiffs, vs. WACHOVIA MORTGAGE FSB a United States federal savings bank WELL'S FARGO HOME MORTGAGE, a division of Wells Fargo Bank, NA, a United States corporation FIRST AMERICAN TITLE INSURANCE AGENCY, a Utah company ETITLE INSURANCE AGENCY, a Utah company, Defendants.

Case No. 2:11-CV-00276-DS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

2011 U.S. Dist. LEXIS 103674

September 13, 2011, Decided  
September 13, 2011, Filed

**COUNSEL:** [\*1] For Daniel B. Dohner, individual, Mary Lynn Dohner, individual, Plaintiffs: Abraham C. Bates, LEAD ATTORNEY, WASATCH ADVOCATES, SALT LAKE CITY, UT; Taralyn A. Jones, JONES BILLS PC, SALT LAKE CITY, UT.

For Wachovia Mortgage FSB, a United States federal savings bank, Wells Fargo Home Mortgage, a division of Wells Fargo Bank, NA, a United States corporation, Defendants: James Delos Gardner, M. Lane Molen, LEAD ATTORNEYS, SNELL & WILMER (UT), GATEWAY TOWER WEST, SALT LAKE CITY, UT.

For First American Title Insurance Agency, a Utah company, Defendant: David M. Bennion, LEAD ATTORNEY, PARSONS BEHLE & LATIMER, SALT LAKE CITY, UT.

**JUDGES:** David Sam, Senior United States District Judge.

**OPINION BY:** David Sam

**OPINION**

**MEMORANDUM DECISION**

The court has before it Defendants' Motion to Dismiss Plaintiff's Complaint pursuant to *Fed.R.Civ.P. 12(b)(6)*. While the court notes plaintiffs' request for hearing, the court has considered the briefing, the state of the law on the issues presented to the court, and *DU-*

*CivR7-1(f)* and finds that there is no justification for oral argument on the motion pending before the court. The motion to dismiss will therefore be determined by the court on the basis of the written memoranda of the parties.

**1. [\*2] Background**

On or about March 11, 2008, Plaintiffs obtained a loan from the original lender, Wachovia, in order to refinance a home located at 1363 East Elk Glen Drive, Draper, Utah. Wachovia loaned Plaintiffs \$645,000.00. Plaintiffs executed a promissory note that required repayment of the loan and a deed of trust encumbering the property and securing Plaintiff's obligations under the note. Subsequently, Plaintiffs defaulted on the loan by failing to make full monthly payments. Plaintiffs filed their Complaint in this case on March 23, 2011, setting forth three separate Causes of Action against Wachovia Mortgage, FSB, Wells Fargo Home Mortgage, Wells Fargo Bank, N.A., and Mortgage Electronic Registration Systems, Inc. (the "Wells Fargo Defendants"): (1) Breach of Duty of Good Faith and Fair Dealing, (2) Negligent Misrepresentation, and (3) Violation of the Fair Credit Reporting Act. The Wells Fargo Defendants filed their Motion to Dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* on May 27, 2011.

**2. Standard of Review**

When evaluating a motion to dismiss, the court accepts all factual allegations in the complaint as true and

draws all reasonable inferences in favor [\*3] of the nonmoving party. See *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir. 2008); *Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1284 (10th Cir. 2008). A claim has facial plausibility when the plaintiff pleads factual contents that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1223-1224 (10th Cir. 2009).

### 3. Claim Against Wells Fargo Defendants for Breach of Duty of Good Faith and Fair Dealing

Plaintiffs first allege that the Wells Fargo defendants breached their duty of good faith and fair dealing by inducing the Plaintiffs to become delinquent on their mortgage and then failing to timely and adequately consider them for a loan modification. The implied covenant of good faith and fair dealing inheres in every contract. See *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, 94 P.3d 193, 198. As distinguished from a contract's express terms, the covenant "is based on judicially recognized duties not found within the four corners of the contract." *Christiansen v. Farmers Ins. Exch.*, 116 P.3d 259, 262, 2005 UT 21 (Utah 2001) (citing *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 798 (Utah 1985)). [\*4] "Under [the covenant], both parties to a contract impliedly promise not to intentionally do anything to injure the other party's right to receive the benefits of the contract." *Eggett*, 94 P.3d at 195. Furthermore, the "covenant . . . should prevent either party from impeding the other's performance of his obligations [under the contract]; and . . . one party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused." *Zion's Props., Inc. v. Holt*, 538 P.2d 1319, 1321 (Utah 1975) (footnote omitted); see also *Advanced Restoration*, 126 P.3d 786, 792, 2005 UT App 505 (Utah Ct. App. 2005); *PDQ Lube Ctr., Inc. v. Huber*, 949 P.2d 792, 798 (Utah Ct. App. 1997).

Plaintiffs allege that prior to defaulting on their loan, they requested a loan modification. (Compl., ¶¶ 58-67.) Plaintiffs claim that when they attempted to request the loan modification from Wachovia, they were informed that they must first be delinquent to request such a modification. (Compl., ¶ 61.) Plaintiffs then allege that Wells Fargo defendants failed to timely respond, a delay which caused the delinquency amount on the mortgage to increase to the point where Plaintiffs [\*5] were unable to cure the default. (Compl., ¶ 61.) These facts, as alleged, do not indicate that the Wells Fargo Defendants either impeded the Dohners in performing their obligations under the contract or rendered it impossible for the Dohners to perform. The parties do not dispute that the Wells Fargo Defendants were under no duty to modify

the loan agreement. The Dohners elected to breach the contract unilaterally, hoping that Wells Fargo would modify the loan. None of Plaintiffs' allegations to indicate that Wells Fargo induced this default, but simply that Wells Fargo explained that it would not consider Plaintiffs for a modification unless they were in default. (Compl., ¶ 61.)

Plaintiffs rely on several cases to support their theory that the Wells Fargo defendants acted in bad faith when they failed to modify the Dohner's loan. Each of these cases is distinguishable from the fact scenario at hand. Plaintiffs point to an exception to the Statute of Frauds that provides "[i]f a party has changed his position by performing an oral modification so that it would be inequitable to permit the other party to found a claim upon the original agreement[,] . . . the modified agreement should [\*6] be held valid." *Stanton v. Ocwen Loan Servicing, LLC*, 2010 U.S. Dist. LEXIS 102525, 2010 WL 3824640 (N.D. Utah 2010)(quoting *White v. Fox*, 665 P.2d 1297, 1301 (Utah 1983)). Unlike the Plaintiffs in *Stanton* that alleged a series of very specific oral and written promises to modify from their mortgage provider, the Dohners do not allege in any of the 92 paragraphs of pleadings that the Wells Fargo defendants made any specific promise, either orally or in writing, to modify the loan agreement upon which plaintiffs might have relied. They allege that "Defendants offered Plaintiffs alternatives in January, 2011 but have failed to provide any opportunity to realize the benefits of the alternatives." (Compl., ¶ 66.) Whether this portion is alleged against the Wells Fargo Defendants is uncertain, as other allegations seem to suggest that these allegations are directed toward BSI. Even if this paragraph is referring to the Wells Fargo Defendants and taken as true, it does not constitute grounds upon which this court might enforce an oral promise because no oral promise is alleged.

Insofar as the Dohners attempt to base this cause of action on the Home Affordable Modification Program ("HAMP"), such claims fail as a matter of law. [\*7] HAMP does not require lenders to modify loans. Rather, it requires lenders "to consider borrowers for loan modifications and suspend foreclosure activities while a given borrower is being evaluated for a modification." *Marks v. Bank of America*, 2010 U.S. Dist. LEXIS 61489, n.3, \*14-15 (D. Ariz. June 22, 2010). Furthermore, "there is no private right of action under HAMP." *Shurtliff v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 117962, \*10 (D. Utah Nov. 5, 2010). Even if the court accepts all of Plaintiffs' factual allegations as true and draws all reasonable inferences in their favor, Plaintiffs have not stated a claim for breach of the duty of good faith and fair dealing upon which relief may be granted.

#### 4. Claim Against Wells Fargo Defendants for Negligent Misrepresentation

Plaintiffs' negligent misrepresentation claims fail as a matter of law. First, Plaintiffs claim that Wachovia negligently misrepresented that Plaintiffs "would be able to repay the loan terms." (Compl., ¶¶ 70-74.) Specifically, Plaintiffs claim that Wachovia was required to "use necessary care in proposing the loan" and that it "did not perform reasonable underwriting analysis" in determining whether Plaintiffs [\*8] would be able to repay the loan. (Compl., ¶¶ 71-73.) This court has rejected Plaintiffs' theory that Wachovia owed Plaintiffs a duty to ensure their ability to repay their Loan, holding that "under Utah law, a lender does not owe a borrower any fiduciary duties, including such alleged duty to investigate Plaintiff's ability to repay a loan." *Rhodes v. Wells Fargo Home Mortg.*, 2010 U.S. Dist. LEXIS 84199, 2010 WL 3222414, \*4 (D. Utah 2010)(unpublished). Although "a fiduciary duty may be created between a lender and a borrower depending on specific facts surrounding the transaction[.]" *Stanton*, WL 3824640 at 8-9, Plaintiffs have not alleged facts that would indicate that the relationship here is different from the arms-length relationship of the typical borrower and lender. Furthermore, Plaintiffs were necessarily in the best position to know whether they would be able to repay the loan.

Second, Plaintiffs allege that the Wells Fargo Defendants "carelessly or negligently misrepresented to the Dohners that the value of the home would continue to increase when it did not." (Compl., ¶ 75.) This claim also fails as a matter of law, because negligent misrepresentation claims require that the representation in question [\*9] be made regarding a "presently existing material fact." *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, 201 P.3d 966, 977 (Utah 2009). See also *Cerritos Trucking Co. v. Utah Venture No. 1*, 645 P.2d 608, 612 (Utah 1982)(negligent misrepresentation cases involve a "past or present fact"). Even taken as true, Plaintiffs' allegations do not qualify as misrepresentations of a presently existing material fact and must, therefore, fail as a matter of law.

Third, Plaintiffs claim that the Wells Fargo defendants committed TILA violations, which they argue provides "per se" evidence of misrepresentation. (Compl., ¶¶ 76-77.) The allegations of TILA violations are unavailing because the Complaint was filed more than one year after the alleged failure to disclose. TILA expressly provides that a plaintiff must bring claims for damages under TILA within one year "from the date of occurrence of the violation." 15 U.S.C. §1640(e). See also *Sanders v. Ethington*, 2010 U.S. Dist. LEXIS 133996, \*7 (D. Utah Dec. 15, 2010)(“15 U.S.C. §1640(e) clearly places a one-year time limit on a private person's ability to bring a damages claim for TILA violations.”)

Fourth, Plaintiffs claim that the Wells Fargo Defendants negligently [\*10] misrepresented that the Dohners received the best loan terms for which they qualified when their loan was below "prime." (Compl., ¶¶ 76-77.) As set forth above, this misrepresentation claim fails because the Wells Fargo Defendants had no duty to ensure that Plaintiffs obtained the "best loan." See *Rogers v. American Brokers Conduit*, 2009 U.S. Dist. LEXIS 99745, \*8 (D. Utah 2009)(unpublished)(rejecting Plaintiffs' theory that lender had a duty to ensure loan would be suitable for borrowers' circumstances and financial condition). Plaintiffs have not alleged facts sufficient to demonstrate that the Wells Fargo Defendants took upon themselves such fiduciary duties. Even if all of Plaintiffs allegations are taken as true, they do not substantiate a claim for negligent misrepresentation.

#### 5. Claim Against Wells Fargo Defendants for Violation of the Fair Credit Reporting Act

Finally, Plaintiffs allege that the Wells Fargo Defendants violated the FCRA when they received the Dohners' applications for loan modification, accessed their consumer reports and failed to notify them of an adverse action. (Compl., ¶¶ 87-92.) This claim fails as a matter of law because there is no private right of action [\*11] for violation of the notification requirement contained in 15 U.S.C. § 1681m. The language of 15 U.S.C. § 1681m(h)(8)(A)-(B) clearly states that this section "shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section." See *Bourdelais v. J.P. Morgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 35507, \*21 (E.D. Va. Apr. 1, 2011) ("Virtually every federal district court and the only federal court of appeals to interpret § 1681m(h)(8) has found [that] . . . no private right of action exists for violations of section 1681m in its entirety.") Thus, Plaintiffs' Claims for FCRA violations fail as a matter of law.

#### 6. Conclusion

For the foregoing reasons, the court grants the motion of defendants Wachovia Mortgage, FSB, Wells Fargo Home Mortgage, Wells Fargo Bank, N.A., and Mortgage Electronic Registration Systems, Inc. to dismiss plaintiffs' complaint with prejudice.

SO ORDERED.

Dated this 13th day of September, 2011.

/s/ David Sam

David Sam

Senior Judge

United States District Court



BRIAN HAZZARD, Plaintiff, -vs- ABN AMRO MORTGAGE GROUP, INC.;  
CITIMORTGAGE, INC.; JUANITA STRICKLAND; JANIE MUCHA; SELIM  
TAHERZADEH; and CARA FEATHERSTONE, Defendants.

Case No. A-11-CA-1019-SS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF  
TEXAS, AUSTIN DIVISION

*2012 U.S. Dist. LEXIS 106818*

February 23, 2012, Decided  
February 23, 2012, Filed

**COUNSEL:** [\*1] Brian Hazzard, Plaintiff, Pro se, Austin, TX.

For CitiMortgage Inc., ABN AMRO Mortgage Group, Inc., Defendants: Benjamin David Lee Foster, Locke Lord LLP, Austin, TX; Robert T. Mowrey, Marc Daniel Cabrera, Locke Lord LLP, Dallas, TX.

For Juanita Strickland, Janie Mucha, Selim Taherzadeh, Cara Featherstone, Defendants: Lauren R. Godfrey, Quilling Selander Lownds Winslett Moser P.C., Dallas, TX.

**JUDGES:** SAM SPARKS, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** SAM SPARKS

**OPINION**

**ORDER**

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Defendants CitiMortgage, Inc. and ABN AMRO Mortgage Group, Inc.'s Motion to Dismiss [#6], and pro se Plaintiff Brian Hazzard's "Opposition to Defendant's Motion for Summary Judgment and Motion for Leave to Amend" [#14], which the Court construes as a response to the motion to dismiss, and Defendants' Reply [#15]. Having considered the documents, the file as a whole, and the applicable law, the Court issues the following opinion and orders GRANTING the motion to dismiss, and DENYING leave to file an amended complaint.

**Background**

This is a type of case which is sadly all too common on the Court's docket: a foreclosed homeowner, bringing a desperate [\*2] assortment of ill-considered claims in state court, and removed here on the bases of federal-question and diversity jurisdiction. This case was initially brought in the 201st District Court of Travis County, Texas, via an "Original Application for Injunctive Relief and Request for Temporary Restraining Order" filed by Plaintiff pro se on January 26, 2011. Plaintiff subsequently obtained counsel, who filed the First Amended Petition in that court on November 14, 2011. The case was removed here on November 29. On December 6, 2011, Defendants, following the script for such cases, filed a motion to dismiss pursuant to *Rule 12(b)(6)*. Subsequently however, Plaintiff's counsel moved to withdraw, which this Court granted. See Order [#9]. The Court simultaneously granted Plaintiff an extension of time to respond to the motion to dismiss. Plaintiff did so timely, albeit under the heading "Opposition to Defendant's Motion for Summary Judgment and Motion for Leave to Amend." [\*3] [#14]. In his Opposition, Plaintiff essentially concedes that his Amended Petition is fatally flawed, but argues this is a result of the inadequacy of his former counsel, and requests leave to file a second amended complaint.

**Analysis**

**I. 12(b)(6) Dismissal**

**A. Legal Standard**

2012 U.S. Dist. LEXIS 106818, \*

Federal Rule of Civil Procedure 8(a)(2) requires a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). A motion under Federal Rule of Civil Procedure 12(b)(6) asks a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In deciding a motion to dismiss under 12(b)(6), a court generally accepts as true all factual allegations contained within the complaint. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993). However, a court is not bound to accept legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986). Although all reasonable inferences will be resolved in favor of the plaintiff, the plaintiff must plead "specific facts, not mere conclusory allegations." *Tuchman v. DSC Commc'n Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). [\*4] The plaintiff must plead sufficient facts to state a claim for relief that is facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. Although a plaintiff's factual allegations need not establish that the defendant is probably liable, they must establish more than a "sheer possibility" that a defendant has acted unlawfully. *Id.* Determining plausibility is a "context-specific task," that must be performed in light of a court's "judicial experience and common sense." *Id.* at 1950. In deciding a motion to dismiss, courts may consider the complaint, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, such as documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007).

## B. Application

The Court agrees Plaintiff's live amended petition is typical [\*5] of the frivolous pleadings filed in this and several other cases by Plaintiff's former counsel. See, e.g., *Villanueva v. Bank of Am., N.A.*, No. A-11-CA-916-SS, at 3-5 (W.D. Tex. Dec. 19, 2011). Furthermore, Plaintiff appears to concede the failings of his complaint: "The reality is, Plaintiff needs leave to amend and clean up this entire case . . ." Pl.'s Obj. [#14] at 6. In any event, the theories underpinning Plaintiff's various causes of action are entirely frivolous, and fail to state a claim for which relief can be granted.

Plaintiff has brought the following causes of action: (1) violations of the Real Estate Settlement Practices Act (RESPA), (2) violations of the Truth in Lending Act (TILA), (3) violations of the Fair Debt Collections Practices Act (FDCPA), (4) violations of the Fair Credit Reporting Act (FCRA), (5) trespass to try title and quiet title, (6) breach of contract, (7) statutory fraud, and fraud in a real estate transaction, (8) fraud by nondisclosure, and (9) negligent misrepresentation. However, the factual allegations underlying all nine are reliant on two equally frivolous theories: (1) Defendants do not possess the promissory note ("show-me-the-note") and [\*6] so cannot foreclose, and (2) the note and the deed of trust have been separated from each other or "bifurcated," thus rendering the deed of trust unenforceable.

Both theories are entirely unsupported under Texas law, in large part because the Texas Property Code provides broad authorization to various entities to conduct foreclosure in the event of default. Under Texas law, a party may be authorized to initiate foreclosure proceedings under a deed of trust, irrespective of whether that party is a "holder" or "holder in due course" of the related promissory note. See *Reardean v. CitiMortgage, Inc.*, No. A-11-CA-420-SS, 2011 U.S. Dist. LEXIS 87567, 2011 WL 3268307 at \*4 (W.D. Tex. July 25, 2011) ("[W]hile a suit to recover a promissory note typically requires possession, foreclosures do not. Under Texas law, a mortgage servicer can foreclose under a deed of trust, regardless of whether it is a holder."); *Wells v. BAC Home Loans Servicing, L.P.*, No. W-10-CA-00350, 2011 U.S. Dist. LEXIS 61529, 2011 WL 2163987 at \*3 (W.D. Tex. Apr. 26, 2011) ("Nothing requires the mortgage servicer to possess the original promissory note. Indeed, the Texas Property Code contemplates that the mortgage servicer will often represent the mortgagee, who may or may not [\*7] possess the note itself.") (citations omitted). As such, Plaintiff has failed to state a claim for which relief can be granted, and all causes of action in his First Amendment Petition must be DISMISSED.

Finally, in his Objection, Plaintiff argues for the first time there is a defect in the chain of assignments from the originator of the note and deed to the Defendants, and apparently believes he should be allowed to replead under such a theory. Specifically, Plaintiff challenges the authority of the officer of Defendant ABN Amro who executed an assignment, Pl.'s Obj. [# 14] at 3-4, and argues that Fannie Mae is the current note holder, and (presumably under Plaintiff's mistaken subscription to the "show-me-the-note" theory) seems to be asserting that only Fannie Mae can foreclose, see id. However, these new attempts to state a complaint for which relief can be granted fail as well, because (1) whether Fannie Mae or some other party is the current note holder is irrelevant, for the reasons given above, and (2) it is well-established

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that borrowers lack standing to challenge the chain of title of a loan, *see, e.g., Valdez v. Fed. Home Loan Mortg. Corp.*, No. 3:11-CV-01363-F, 2011 U.S. Dist. LEXIS 152575, 2011 WL 7068386, at \*2 (N.D. Tex. Nov. 28, 2011). [\*8] In effect, Plaintiff is attempting to stand in the shoes of Fannie Mae, but he has no basis in law to do so. It appears that all that has happened is that the original mortgagor, ABN Amro, merged with CitiMortgage, *see* Defendants' Mot. to Dismiss [#6-1], Ex. C (Certificate of Merger), and the note may in turn have been securitized under Fannie Mae, with CitiMortgage retaining status as servicer. There is nothing particularly sinister or even unusual about any of this, and certainly nothing which would support a basis for any relief to the Plaintiff--accepting as true Plaintiff's contention that Fannie Mae owns the note, that would not preclude CitiMortgage from foreclosing on the property, either in its capacity as servicer, or as an agent of Fannie Mae. *See TEX. PROP. CODE § 51.0025* (authorizing servicers to foreclose).

## II. Leave to Amend

### A. Legal Standard

Plaintiff has sought leave to file a new amended complaint. The Federal Rules direct that such relief must be "freely given when justice so requires." *See FED. R. CIV. P. 15(a)*. The Supreme Court has emphasized that "this mandate is to be heeded," and explained: "If the underlying facts or circumstances relied upon by a plaintiff may be [\*9] a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). As such, "[i]n the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.," leave to amend should be granted. *Id.*

Nevertheless, "[e]xcept as authorized by the first sentence of *FED. R. CIV. P. 15(a)* for one amendment before service of a responsive pleading, a complaint may be amended only by leave of the district court, and, while such leave is to be freely given when justice so requires, the decision is left to the sound discretion of the district court . . ." *U.S. ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 387 (5th Cir. 2003). Leave to amend need not be granted when it would be futile to do so. *Id.*

### B. Application

A review of Plaintiff's original state court petition for relief shows that this case has been entirely frivolous from the beginning, regardless of any procedural failings [\*10] by Plaintiff's former counsel. The "Original Application for Injunctive Relief"--signed by Plaintiff himself, not former counsel--admitted that Plaintiff was not making payments, and had no intention of doing so until Defendant CitiMortgage provided "proof that Defendant still retained the original Promissory Note, and to prove that it was NOT bifurcated." Not. of Removal [#1-3], Ex. A, pt 1 (Original Application) ¶ 12. As such, Plaintiff cannot blame his former counsel for his failure to state a claim for which relief can be granted; Plaintiff himself has advocated precisely the same bogus theories since the inception of this lawsuit. Plaintiff makes no effort to deny that he has been in default since August 2010, and despite the numerous filings made by him before the state court and this Court, up to and including his present Objection, there is no indication whatsoever of any facts which would support a meritorious claim, either in law or in equity. Plaintiff has had over a year to state a claim, and was already on notice from Defendants' state-court summary judgment motion that his causes of action were unsupportable under Texas law. *See* Not. of Removal [#1-4], Ex. A, pt 2 (Motion [\*11] for Summary Judgment) at 4-7. It is fully apparent that the underlying facts and circumstances of this case are not a "proper subject of relief," and, as such, any further amendment would be futile. *See Foman*, 371 U.S. at 182; *Humana Health Plan*, 336 F.3d at 387. Therefore, the Court DENIES leave to amend.

### Conclusion

Accordingly:

IT IS ORDERED that Defendants CitiMortgage, Inc. and ABN AMRO Mortgage Group, Inc.'s Motion to Dismiss [#6] is GRANTED;

IT IS FURTHER ORDERED that Plaintiff Brian Hazzard's First Amended Petition is DISMISSED WITHOUT PREJUDICE.

SIGNED this the 23rd day of February 2012.

/s/ Sam Sparks

SAM SPARKS

UNITED STATES DISTRICT JUDGE



DAVID KIAH, Plaintiff, v. AURORA LOAN SERVICES, LLC; MORTGAGE ELECTRONIC SYSTEMS, INC.; and UNKNOWN DEFENDANTS: MERS SUBSCRIBING MEMBERS JOHN DOE AND/OR JANE DOE, 1 THRU UNKNOWN, CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE COMPLAINT ADVERSE TO PLAINTIFF'S TITLE, Defendants.

Civil Action No. 10-40161-FDS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

*2010 U.S. Dist. LEXIS 121252*

November 16, 2010, Decided  
November 16, 2010, Filed

**SUBSEQUENT HISTORY:** [\*1]

As Amended March 3, 2011. As Corrected March 4, 2011

**COUNSEL:** Pro Se Party David Kiah, Plaintiff, Pro se, Brighton, MA.

For Aurora Loan Services, LLC, Mortgage Electronic Registration Systems, Inc., Defendants: Reneau J. Longoria, LEAD ATTORNEY, John A. Doonan, Stephen M. Valente, Doonan, Graves & Longoria, LLC, Beverly, MA.

**JUDGES:** F. Dennis Saylor IV, United States District Judge.

**OPINION BY:** F. Dennis Saylor IV

**OPINION**

**AMENDED MEMORANDUM AND ORDER ON DEFENDANTS' MOTION TO DISMISS**

**SAYLOR, J.**

This action arises out of an attempted foreclosure on plaintiff David Kiah's property by Aurora Loan Services, LLC. Plaintiff is proceeding *pro se*.

Kiah originally filed this complaint in Land Court on July 21, 2010. It was removed to this Court by defendants on the basis of diversity jurisdiction. Kiah seeks a

declaratory judgment that "the mortgage on record [is] legally null and void." (Compl. ¶ 76). He also seeks \$20,000 in damages from Aurora plus court costs and attorney's fees. (*Id.* ¶¶ 77-78).

On September 17, 2010, defendants moved to dismiss for failure to state a claim upon which relief can be granted. Plaintiff filed motions styled as motions for judgment on the pleadings, examination of title, and endorsement of lis pendens on September 28, 29, and 30, [\*2] respectively. On November 16, this Court granted defendants' motion to dismiss the complaint for failure to state a claim and denied plaintiff's motions as moot.

This is an amended order arising from an intervening clarification of the law. Kiah has filed motions for reconsideration and to set aside the judgment pursuant to *Fed. R. Civ. P. 60(b)*. On January 7, 2011, the Massachusetts Supreme Judicial Court issued its opinion in *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 941 N.E.2d 40 (2011). That decision, among other things, clarifies the requirements for mortgage foreclosures in Massachusetts.

After considering *Ibanez* and the arguments of the parties, the Court concludes that dismissal was proper. For the reasons stated below, plaintiff's motions for reconsideration and to set aside the judgment will be denied, and the Court's previous order, in amended form, will remain in place.

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In essence, the documents submitted by plaintiff with his complaint -- such as the mortgage and the mortgage assignment -- directly contradict his theories of recovery, and he has neither made sufficient allegations of fraud to satisfy the requirements of *Fed. R. Civ. P.* 9(b) nor made allegations sufficient to raise a [\*3] right to relief above the level of sheer speculation.

## I. Statement of Facts

### A. The Mortgage Loan

On May 24, 2007, David Kiah executed and delivered a promissory note in the amount of \$ 180,000. (Compl. Ex. A). The note was secured by a mortgage on his property at 229 Gardner Road in Hubbardston, Massachusetts. The mortgagee was Mortgage Electronic Registration Systems, Inc. ("MERS"). (*Id.*). The mortgage was executed that day and recorded at the Worcester South Registry of Deeds. (Compl. ¶ 2, Ex. A).

According to the terms of the mortgage, "MERS is a separate corporation that is acting solely as a nominee for Lender [defined as "First Magnus Financial Corporation"] and Lender's successors and assigns." (Compl. Ex. A).<sup>1</sup>

1 Plaintiff provided an explanation of MERS's role in the mortgage market as an exhibit to his complaint. (See Def. Notice of Removal Ex. 4). According to plaintiff, the purpose of MERS is to act as the mortgagee of record for mortgage loans that are registered in its system. (*Id.*). It records the mortgage and tracks ownership of the lien. (*Id.*). When the promissory note is sold (and possibly re-sold) in the secondary mortgage market, the MERS database tracks that transfer. [\*4] (See *id.*). Mortgage lenders and other entities subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. (*Id.*) Members contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system. (*Id.*). As long as the parties involved in the sale are members, MERS remains the mortgagee of record (thereby avoiding recording and other transfer fees that are otherwise associated with the sale) and continues to act as an agent for the new owner of the promissory note. (*Id.*). To facilitate the execution of assignments from MERS, MERS regularly designates "certifying officers," who are typically employees of MERS member firms. See *In re Moreno*, 2010 Bankr. LEXIS 1558, 2010 WL 2106208, at \*2 (Bankr. D. Mass. May 24, 2010). MERS authorizes these employees, through for-

mal corporate resolutions, to execute assignments on its behalf. *Id.*

For a discussion of *MERSCORP, Inc. v. Ro-maine*, 8 N.Y.3d 90, 96, 861 N.E.2d 81, 828 N.Y.S.2d 266 (N.Y. App. Div. 2006).

According to the closing instructions, the "Investor" (presumably, the source of the funds) was Lehman Brothers Bank, FSB. (Compl. [\*5] Ex. D).

### B. The Assignment of the Note and Mortgage

First Magnus filed for bankruptcy on August 21, 2007, and was administratively dissolved on April 2, 2009. (Compl. ¶¶ 8-9, Ex. C). It appears that the mortgage loan was securitized; in any event, it is undisputed that the current owner of the debt is presently the Federal National Mortgage Association ("Fannie Mae"). (Compl. ¶¶ 37-44, Ex. G). The loan is being serviced by Aurora Loan Services, LLC. (*Id.*).

Plaintiff disputes the assignment of the mortgage. It is undisputed that Aurora presently possesses the note and has the right to enforce the note. (Def. Opp'n to Remand at 2, Ex. B; Pl. Mot. for Recons. at 18).<sup>2</sup>

2 Plaintiff and defendants presented two different versions of the note as exhibits to their pleadings. The note attached to plaintiff's complaint is endorsed "in blank." (Compl. Ex. A). The note presented by defendants contains an endorsement to Aurora. (Def. Opp'n to Remand Ex. B). Kiah, however, does not dispute that Aurora is currently in possession of the note and has a "substantive right to enforce the note and mortgage as a holder." (Pl. Mot. for Recons. at 18). He also does not request a declaration that the transfer [\*6] of the note to Aurora is void. (See Compl. ¶¶ 76-80).

Aurora alleges that the note and mortgage were assigned to it in June 2007. (Def. Mot. to Dismiss at 5; Def. Opp'n to Remand Ex. D). At that time, no assignment of mortgage was recorded at the Registry of Deeds. (Def. Mot. to Dismiss at 5).<sup>3</sup>

3 According to defendants, such an assignment is generally not recorded unless the loan goes into default. (Compl. Ex. F; Def. Mot. to Dismiss at 5).

At some point before January 2010, Kiah stopped making payments on the mortgage, and the loan went into default. Aurora then initiated steps to foreclose on the property.

Plaintiff has attached to the complaint a document entitled "Corporate Assignment of Mortgage." (Compl.

Ex. B). The assignment states that the assignor is MERS (as "nominee for First Magnus Financial Corporation . . . it's [sic] successors and assigns") and that the assignee is Aurora. (*Id.*). The "Date of Assignment" is listed as January 6, 2010. (*Id.*).

The document also states that the "Effective Date" of the assignment is June 9, 2007—a little more than two weeks after the note and mortgage were executed. (*Id.*). That assignment was recorded in the Worcester South Registry of Deeds [\*7] on January 19, 2010. (*Id.*).

### C. Land Court Proceedings

On January 20, 2010, Aurora filed a complaint in Land Court seeking a judgment that Kiah is not in active military service and is not entitled to the protections of the Service Members Civil Relief Act, 50 App. U.S.C. § 533.<sup>4</sup> After Kiah challenged Aurora's standing to bring such an action, Aurora produced the note and recorded the assignment of the mortgage. *See Aurora Loan Servs., LLC v. David Kiah*, No. 10 MISC 420743 (HMG), 2-3 (Mass. Land Ct. Sept. 8, 2010). As a result, the Land Court found that Aurora was the current holder of the promissory note and assignee of record of the mortgage.

4 The SMCRA prohibits filing of civil suits against active duty services members and service members who had been on active duty in the prior year.

On July 23, 2010, Kiah filed suit against Aurora and MERS in Land Court seeking to invalidate the mortgage and demanding damages for fraudulent conveyance and slander of title. On August 20, 2010, Aurora and MERS removed the lawsuit to this Court.

On September 30, 2010, Kiah filed a Chapter 13 bankruptcy petition. His bankruptcy petition was dismissed on October 7 for failure to file a Chapter 13 plan [\*8] within the time provided by the court.

On November 16, this Court granted defendants' motion to dismiss the complaint for failure to state a claim, and Aurora foreclosed on November 22. On the same day, plaintiff filed a motion for reconsideration. He then filed a notice of appeal on December 10. Finally, on December 23, he filed a motion in this Court to set aside the judgment pursuant to *Fed. R. Civ. P. 60(b)*.

On January 7, 2011, the Massachusetts Supreme Judicial Court issued the *Ibanez* opinion, and the Court subsequently issued a memorandum taking plaintiff's post-judgment motions under advisement.<sup>5</sup>

5 Because a notice of appeal has been filed, the Court's review of these motions is governed by the procedures set forth in *Puerto Rico v. SS Zoe*

*Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979). Under *Colocotroni*, the Court may assess post-judgment motions and dismiss them if they are without merit. *Id.* If the court cannot dispose of such motions without further consideration, however, it must issue a brief memorandum taking those motions under advisement and stating the number of additional days required to complete its review and issue an order. The issuance of the *Ibanez* decision prompted [\*9] the Court to issue such a memorandum here.

### II. Standard of Review

On a motion to dismiss, the court "must assume the truth of all well-plead[ed] facts and give the plaintiff the benefit of all reasonable inferences therefrom." *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5 (1st Cir. 2007) (citing *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999)). Materials attached to a complaint, or incorporated by reference, are a part of the pleading itself, and the Court may consider them on a motion to dismiss. *Trans-Spec Truck Serv., Inc. v. Caterpillar, Inc.*, 524 F.3d 315, 321 (1st Cir. 2008). To survive a motion to dismiss, the complaint must state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555 (citations omitted). Dismissal is appropriate if plaintiff's well-pleaded facts do not "possess enough heft to show that plaintiff is entitled to relief." *Ruiz Rivera v. Pfizer Pharms., LLC*, 521 F.3d 76, 84 (1st Cir. 2008) [\*10] (quotations and textual alterations omitted).

As noted above, this order has been amended in response to plaintiffs motion to set aside judgment pursuant to *Fed. R. Civ. P. 60(b)*. The evaluation of a motion for reconsideration brought pursuant to *Rule 60(b)* is "committed to the district court's sound discretion." *Stonkus v. City of Brockton Sch. Dep't*, 322 F.3d 97, 100 (1st Cir. 2003). The rule provides several grounds for relief from a judgment or order, including "mistake, inadvertence, surprise, or excusable neglect," and "any other reason that justifies relief." *Fed. R. Civ. P. 60(b)(1), 60(b)(6)*. Motions under this rule are ordinarily granted only when exceptional circumstances are present, but "district courts have broad discretion to determine whether such circumstances exist." *Ahmed v. Rosenblatt*, 118 F.3d 886, 891 (1st Cir. 1997). The contours of *Rule 60(b)(6)*, the "catch-all" provision, are "particularly malleable," and the Court's "decision to grant or deny such relief is inherently equitable in nature." *Ungar*

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v. Palestinian Liberation Org., 599 F.3d 79, 83, 84 (1st Cir. 2010).

### III. Analysis

In his complaint, plaintiff essentially contends that MERS did not have the power to [\*11] assign the mortgage to Aurora and that Aurora therefore cannot foreclose on the property because it is not the mortgagee. As noted, he does not dispute Aurora's possession of the note or challenge Aurora's substantive right to enforce the note. He sets forth multiple theories of recovery, as discussed below.

#### A. Whether the Mortgage and Assignment Are Void Because MERS Had No Legal Power to Act for First Magnus' "Successors and Assigns"

Plaintiff contends that First Magnus declared bankruptcy, and was dissolved, before the mortgage was assigned to Aurora; that MERS could not act on behalf of a non-existent entity; and that therefore MERS did not have the legal power to transfer the mortgage to Aurora. He further asserts that the assignment of the mortgage and the mortgage itself are void as a result.

Defendant contends that the assignment of the mortgage actually occurred in June 2007, but simply was not recorded until January 2010. In any event, plaintiff cannot succeed on his theory, because he does not challenge the validity of the assignment of the *note* to Aurora. That admission is fatal to his claim. By law, the transfer of the note automatically transfers an equitable interest in [\*12] the underlying mortgage, even without a formal assignment. *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 652, 941 N.E.2d 40 (2011) ("[T]he holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage. . ."); see also *Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872) ("The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity."). An equitable right to the mortgage was therefore transferred to Aurora along with the note.<sup>6</sup> Plaintiff's theory that the note and the mortgage somehow became disconnected from one another, and that the mortgage should disappear as a result, is therefore not tenable as a matter of law.

<sup>6</sup> As *Ibanez* makes clear, however, a mere equitable right to the mortgage is not enough to foreclose on a property. "In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage." *Ibanez*, 458 Mass.

at 652. To foreclose, the note holder [\*13] must first exercise its equitable right to obtain the mortgage through a "valid written assignment . . . or a court order of assignment." *Id.* at 653.

In any case, and as plaintiff also acknowledges, MERS had the power to act as the agent of any valid note holder under the terms of the mortgage documents. The plain language of the mortgage states that MERS was acting as nominee for First Magnus and its "successors and assigns." (See Compl. Ex. A). First Magnus' dissolution would not prevent its successors and assigns, including Aurora, from seeking transfer of the mortgage from MERS.

Accordingly, the dissolution of First Magnus would not and could not prevent Aurora from obtaining an assignment of the mortgage from MERS, both as a matter of law and according to the arrangement that existed between MERS and Aurora as a "successor and assign" of First Magnus. The complaint alleges no plausible basis to conclude otherwise, and accordingly this theory is without merit and fails to state a claim.

#### B. Whether First Magnus Could Have Transferred the Mortgage to Anyone Other Than Lehman Brothers

Plaintiff next contends that Lehman Brothers Bank, FSB acquired the note by transfer from First Magnus [\*14] shortly after closing and paid a premium for the note over its face value. (Compl. ¶ 28). Plaintiff contends that once "First Magnus . . . sold its interest[,] MERS could not sell or transfer it again on behalf of First Magnus." (Compl. ¶ 30).

The premise of this claim appears to be that First Magnus and/or MERS somehow attempted to sell the same note twice. But that is not what the exhibits submitted by plaintiff show. According to plaintiff's own allegations, Lehman Brothers acquired the debt from First Magnus. But even assuming that Lehman actually acquired the note (as opposed to, for example, the contractual right to receive payment on the obligation), it does not follow that MERS thereby lost any capacity to act. Indeed, MERS was expressly granted the right to act on behalf of First Magnus and its "successors and assigns." Accordingly, even assuming that First Magnus sold its interest in the note to Lehman, MERS retained the power to transfer the mortgage on behalf of Lehman as First Magnus's successor. In other words, the mortgage explicitly granted MERS the power that plaintiff claims it did not have.

The complaint offers no plausible allegations as to why that provision should [\*15] be disregarded. As to that theory, therefore, the complaint fails to state a claim upon which relief can be granted.

### C. Whether the Assignment of Mortgage Was Fraudulent

Plaintiff and defendants agree that Aurora is the servicer and therefore has both "the right to enforce the Note and . . . the right to receive payment of the debt on behalf of [the owner of the debt]." (Compl. ¶ 32; Def. Mot. to Dismiss at 6). Plaintiff, however, contends that Aurora cannot be the mortgagee if another entity owns the debt and that the assignment of mortgage to Aurora is therefore fraudulent. (Compl. ¶¶ 33-36, 39-44).

Plaintiff appears to misapprehend the role of a servicing agent. As servicer, Aurora acts on behalf of the owner of the debt--in this case, Fannie Mae. *See Peoples Mortg. Co. v. Federal Nat. Mortg. Ass'n*, 856 F. Supp. 910, 917-18 (E.D. Pa. 1994). As the servicer, Aurora has the right to foreclose on the mortgage on Fannie Mae's behalf. *In re O'Kelley*, 2010 U.S. Dist. LEXIS 111372, 2010 WL 3984666, at \*1 (D. Hawaii 2010). Indeed, Fannie Mae often requires servicers to initiate legal proceedings in the servicer's name if the servicer or MERS is the mortgagee of record. *Id.* After the servicer [\*16] forecloses, Fannie Mae generally requires the servicer to convey title of the property to it. *Id.* Therefore, Aurora, as Fannie Mae's agent, has the right both to collect on the debt and to foreclose on the mortgage. *See id.*

Plaintiff also contends that the assignment was "an act of fraudulently conveying and slandering Plaintiff's title in furtherance of a conspiracy to conceal the trading of the note." (Compl. ¶ 35). To the extent the complaint is alleging a claim of fraud, it does not meet the pleading requirements of *Fed. R. Civ. P. 9(b)*. Among other things, the complaint must "[a]t a minimum . . . allege the time, place and contents of the alleged misrepresentation, as well as the identity of the person making them." *Petricca v. Simpson*, 862 F. Supp. 13, 15-16 (D. Mass. 1994) (citing *Keith v. Stoelting, Inc.*, 915 F.2d 996, 1000 (5th Cir. 1990)). Read liberally, this claim alleges that Aurora--the servicer--misrepresented (presumably to MERS or to Fannie Mae) that it had the right to foreclose on the mortgage and thereby obtained the assignment of mortgage fraudulently. (Compl. ¶¶ 32-33). As noted above, Aurora, as servicer for Fannie Mae, appears to have the right to collect on plaintiff's [\*17] note and to foreclose on his mortgage. There is simply nothing in the complaint that would plausibly suggest that the assignment to Aurora was procured by fraud.

In short, there is nothing illegal or improper in the fact that Aurora acts as a servicing agent, and the complaint makes out no plausible claim that anything in the arrangement between Aurora and Fannie Mae is illegal or improper. As to that theory, therefore, the complaint fails to state a claim upon which relief can be granted.

### D. Whether the Use of the Term "Successors and Assigns" Was Valid

As noted, the mortgage and assignment state that MERS is the nominee for First Magnus and its "successors and assigns." (Compl. Ex. B). Plaintiff contends that the phrase "successors and assigns" cannot be used "as a wildcard for whatever (undisclosed) person is the current holder of the note." (Compl. ¶ 45). Plaintiff argues that the mortgage and the assignment are voidable because they misrepresent the parties to the contract. (*See id.*).

There is nothing in the use of the commonplace phrase "successors and assigns" that suggests any fraud or other impropriety. The phrase simply makes clear that the note and mortgage may be assigned and [\*18] that MERS may continue to act as an agent for the new owners. Furthermore, plaintiff does not allege that the use of the term induced him to enter into the contract, or that he justifiably relied on the alleged misrepresentation. *See Commerce Bank & Trust Co. v. Hayeck*, 46 Mass. App. Ct. 687, 692, 709 N.E.2d 1122 (Mass. App. Ct. 1999). To the extent that the complaint rests on this theory, it fails to state a claim upon which relief can be granted.

### E. Whether the Assignment Is Void for Lack of Consideration

Plaintiff further contends that the assignment of mortgage was without consideration and is therefore void.<sup>7</sup> Under the circumstances presented here, this is nothing more than sheer speculation, with no specific facts to support it. Furthermore, and in any event, it is difficult to see why plaintiff has standing to assert such a claim, and how in any event he has suffered a compensable injury if the consideration was not paid. Such implausible allegations are insufficient to survive a motion to dismiss.

<sup>7</sup> The assignment of mortgage recites consideration of ten dollars. (Compl. ¶¶ 46-52, Ex. B).

### F. Whether the Assignment Is Invalid Because It Is Backdated or Because the Assignor Lacked [\*19] Signatory Authority

The assignment of mortgage has a "Date of Assignment" of January 6, 2010, but an "Effective Date" of June 9, 2007. Plaintiff contends that the assignment of mortgage was therefore backdated, and that this "back-dating" "lacks economic substance[,] is "frivolous[,"] and should be disregarded. (Compl. ¶¶ 53-58).

Defendants contend that the assignment occurred in June 2007, and simply was not recorded until January 2010. But even if the Court assumes the assignment occurred in January 2010 instead of June 2007, plaintiff's

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theory fails. Massachusetts law requires only that the assignment of mortgage be executed and recorded prior to the publication of the notice of sale. *See Ibanez*, 458 Mass. at 651 (noting that Massachusetts requires a foreclosing party have a valid assignment of mortgage at the time of notice and sale, but does *not* require assignment to be "in recordable form" at that time). The backdating thus has no legal effect, at least in this context.<sup>8</sup>

<sup>8</sup> Plaintiff also asserts that the backdating of the document is "part of the scheme and conspiracy of fraudulent conveyance." (Compl. ¶ 56). As noted above, for an allegation of fraud to survive a motion to dismiss, [\*20] plaintiff must "allege the . . . contents of the alleged misrepresentation." *Petricca*, 862 F. Supp. at 15-16. Read liberally, this claim alleges that Aurora misrepresented the date on which it actually was assigned the mortgage. Aurora, however, did not misrepresent anything, as it disclosed both the "date of assignment" and the "effective date" on the assignment of mortgage, and there is no claim of justifiable reliance on the part of plaintiff. Therefore, this claim fails to state any allegations of fraud at all, much less allegations sufficient to satisfy the heightened pleading requirements of Rule 9(b). *See Fed. R. Civ. P. 9(b).*

In his motion to set aside the judgment, plaintiff asserts a new and alternative theory that the mortgage assignment was ineffective because MERS' signing officer, Theodore Schultz, lacked signatory authority at the time of the assignment to Aurora. Plaintiff contends that the assignment—and, by extension, the foreclosure sale—are void.

This argument is also without merit. First, Schultz appears to have had signatory authority on the date of the assignment. Defendants have submitted a MERS "Corporate Resolution" that predates the assignment and grants such [\*21] authority to an "attached list of candidates," including Schultz. (*See* Def. Opp'n to Mot. to Set Aside J. Ex. C).<sup>9</sup> This is confirmed by the fact that MERS, a defendant in this case, does not contest the assignment.

<sup>9</sup> Plaintiff contends that the exhibits related to Schultz's signatory authority are a "fraud on the court." (Def. Mot. to Set Aside J. at 2). It is unclear, however, how the Court has been the subject of a fraud. The relevant documents appear to have been created in accordance with MERS practices for authorizing and assigning mortgages. (*See* Def. Opp'n to Mot. to Set Aside J. at 6); *see also In re Jessup*, 2010 Bankr. LEXIS 2432, 2010 WL 2926050, at \*3 (Bankr. E.D. Ky.

*July 22, 2010*). While those practices are arguably unusual, the Court does not appear to have been misled by the filings, and other courts have relied on similar assignments from MERS. *See In re Lopez*, 2011 Bankr. LEXIS 476, 2011 WL 576820, at \*5 (Bankr. D. Mass. Feb. 9, 2011) (MERS assignment system creates "a complete and facially valid chain of title establishing that it holds the Mortgage"); *In re Moreno*, 2010 Bankr. LEXIS 1558, 2010 WL 2106208, at \*2-4 (Bankr. D. Mass. May 24, 2010) (suggesting MERS transfer [\*22] system is valid where MERS officer is an employee or agent of the note holder); *see also In re Mortg. Elec. Registration Sys. (MERS) Litigation*, 2011 U.S. Dist. LEXIS 7232, 2011 WL 251453, at \*8 (D. Ariz. Jan. 25, 2011) ("The MERS system is not fraudulent, and MERS has not committed any fraud."); *Golliday v. Chase Home Finance, LLC*, 2011 U.S. Dist. LEXIS 785, 2011 WL 31038, at \*1 (W.D. Mich. Jan. 5, 2011) (assignment of mortgage using MERS system was valid absent further evidence of fraud); *In re Jessup*, 2010 Bankr. LEXIS 2432, 2010 WL 2926050, at \*6 (Bankr. E.D. Ky. July 22, 2010) (MERS assignments are valid where a person has been appointed under the MERS system or where the transfer is subsequently ratified by MERS); *Randle v. GMAC Mortg., LLC*, 2010 Mass. LCR LEXIS 130, 2010 WL 3984714, at \*1 (Mass. Land Ct. Oct. 12, 2010) (treating MERS assignment as valid without describing details of that assignment); *Amtrust Bank v. TD Banknorth, N.A.*, 2010 Mass. LCR LEXIS 36, 2010 WL 1019638, at \*1 (Mass. Land Ct. Mar. 22, 2010) (same). But see *HSBC Bank USA, N.A. v. Yeasmin*, 27 Misc. 3d 1227[A], 911 N.Y.S.2d 693, 2010 NY Slip Op 50927[U], 2010 WL 2089273, at \*6 (N.Y. Sup. Ct. 2010) (calling the MERS assignment system [\*23] "the mortgage twilight zone" and comparing it to a "journey into a wondrous land of imagination"); *Aurora Loan Servs., LLC v. Judith Mendes da Costa*, No. 09-142-CA, 3 (Fla. Cir. Ct. Apr. 28, 2010) ("MERS has no substantive rights itself, and, therefore, cannot assign what it does not have.").

Second, even if Schultz lacked the authority to assign the mortgage, this would not invalidate the assignment under Massachusetts law. *Mass. Gen. Laws ch. 183 § 54B* provides:

Notwithstanding any law to the contrary, a[n] . . . assignment of mortgage . . . if executed before a notary public, justice of the peace or other officer entitled by law to acknowledge instruments, whether

executed within or without the commonwealth, by a person purporting to hold the position of . . . vice president, . . . secretary, . . . or other similar office, including assistant to any such office or position, of the entity holding such mortgage, or otherwise purporting to be an authorized signatory for such entity . . . shall be binding upon such entity . . .

*Mass. Gen. Laws. ch. 183 § 54B.* It is undisputed that Shultz purported to be a vice president and assistant secretary of MERS at the time of the assignment and [\*24] supported this with a "Corporate Resolution" from the Board of Directors of MERS. (See Def. Opp'n to Mot. to Set Aside J. Ex. C). Furthermore, the assignment was executed before a notary public. (See Compl. Ex. B). In this case, the clear language of § 54B provides that the assignment would be binding.

*Ibanez* does not require a different result. In *Ibanez*, the Massachusetts Supreme Judicial Court held that a foreclosure sale made by a party who holds the note but not the mortgage is void as a matter of law. 458 Mass. at 656-57. In that case, the note holders provided no evidence of assignment prior to foreclosure. *Id.* at 642-44. Here, there was a facially valid assignment of the mortgage from MERS to Aurora prior to the foreclosure sale. See *In re Lopez*, 2011 Bankr. LEXIS 476, 2011 WL 576820, at \*5 (Bankr. D. Mass. Feb. 9, 2011) (suggesting that lack of signatory authority would be a "latent defect[] that could not interrupt a "facially valid chain of title establishing that [assignee] holds the Mortgage"). To the extent the assignment is defective, *Ibanez* would require, at most, that a confirmatory assignment be executed and recorded. See *Ibanez*, 458 Mass. at 654.

#### G. Whether MERS Could [\*25] Have Assigned the Mortgage

Plaintiff further contends that an assignment of a mortgage is invalid unless the note is transferred with it. (Compl. ¶¶ 59-73). He alleges that MERS could not have assigned the mortgage because it never had physical possession of or a beneficial interest in the note, and therefore that the assignment of the mortgage to Aurora is void. (Compl. ¶¶ 70, 73) (citing *Carpenter*, 83 U.S. at 274).

"[T]he holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage." *Ibanez*, 458 Mass. at 652; *Boruchoff v. Ayvazian*, 323 Mass. 1, 10, 79 N.E.2d 892 (1948) ("[W]here a mortgage and the obligation secured thereby are held by different persons, the mortgage is regarded as an incident to the obligation,

and, therefore, held in trust for the benefit of the owner of the obligation."). Even if MERS never had possession of or a beneficial interest in the note, this claim must fail because MERS was holding the mortgage in trust for Aurora. *See id.* The assignment of mortgage, therefore, would still be valid.

Plaintiff also alleges that MERS never had a beneficial interest in the mortgage and therefore [\*26] did not have legal capacity to assign it. (Compl. ¶ 67). MERS is the "nominee" for First Magnus's successors and assigns. (Compl. Ex. A). A "nominee" is a "person designated to act in place of another, usu[ally] in a very limited way" or a "party who hold bare legal title for the benefit of others." *Black's Law Dictionary* 1076 (8th ed. 2004); see *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 538, 216 P.3d 158 (2009) (summarizing various opinions concerning the role of MERS). Therefore, even though MERS does not have a beneficial interest in the property, it nonetheless could have transferred the mortgage on its behalf of the beneficial owner. *See id.*

Again, plaintiff's claims are contradicted by the very documents that he submitted with the complaint, and there is no plausible basis to suggest that those documents should be disregarded.

#### H. Whether There Was a Fraudulent Conveyance and Slander of Title

Finally, plaintiff contends generally that the assignment of mortgage from MERS to Aurora was a fraudulent conveyance and slander of title. (Compl. ¶ 75). He does not, however, allege with specificity the circumstances constituting that fraud as required by *Rule 9(b)*. *Fed. R. Civ. Pro. 9(b)*; [\*27] *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985) (noting that mere allegations of fraud cannot satisfy the particularity requirement, "no matter how many times such accusations are repeated"). These theories accordingly will not support a claim for relief.<sup>10</sup>

10 None of plaintiff's remaining arguments in his motions for reconsideration and to set aside the judgment merit relief from the Court's dismissal of the complaint. Under these circumstances, the Court declines to exercise its discretion under *Fed. R. Civ. P. 60(b)* to afford plaintiff relief from its prior judgment. Accordingly, plaintiff's motions for reconsideration and to set aside the judgment will be denied, and the order granting defendants' motion to dismiss will remain in place.

#### IV. Conclusion

For the foregoing reasons, defendants' motion to dismiss is GRANTED. Plaintiff's motions for judgment on the pleadings, title examination, and endorsement of lis pendens are DENIED as moot. Plaintiffs' motion for reconsideration and motion to set aside judgment are DENIED.

**So Ordered.**

/s/ F. Dennis Saylor

F. Dennis Saylor IV

United States District Judge

Dated: November 16, 2010



**JASON J. KING, Plaintiff, vs. AMERICAN MORTGAGE NETWORK, INC.,  
CHASE HOME FINANCE, LLC, MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., ETITLE INSURANCE AGENCY, and DOES 1-5, Defendants.**

**Case No. 1:09CV162 DAK**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,  
NORTHERN DIVISION**

**2010 U.S. Dist. LEXIS 92210**

**September 1, 2010, Decided  
September 2, 2010, Filed**

**PRIOR HISTORY:** *King v. Am. Mortg. Network, 2010 U.S. Dist. LEXIS 84092 (D. Utah, Aug. 16, 2010)*

**COUNSEL:** [\*1] For Jason King, Plaintiff: Lillian M. Meredith, LEAD ATTORNEY, PROPERTY OWNER RIGHTS PLLC, SANDY, UT.

For Chase Home Finance, Defendant: J. Tayler Fox, James D. Gilson, LEAD ATTORNEYS, CALLISTER NEBEKER & MCCULLOUGH, SALT LAKE CITY, UT.

For Mortgage Electronic Registration Systems, Defendant: James D. Gilson, LEAD ATTORNEY, J. Tayler Fox, CALLISTER NEBEKER & MCCULLOUGH, SALT LAKE CITY, UT.

**JUDGES:** DALE A. KIMBALL, United States District Judge.

**OPINION BY:** DALE A. KIMBALL

## **OPINION**

### **MEMORANDUM DECISION AND ORDER**

This matter is before the court on Defendants Chase Home Finance ("Chase") and Mortgage Electronic Registration Systems, Inc.'s ("MERS") Motion to Dismiss. A hearing was held on May 5, 2010. At the hearing, Defendants were represented by James D. Gilson and J. Tayler Fox. Plaintiff Jason J. King was represented by Lillian M. Meredith. The court has carefully considered the memoranda and other materials submitted by the parties.

Since taking the matter under advisement, the court has further considered the law and facts relating to this motion. Now being fully advised, the court renders the following Memorandum Decision and Order.

## **BACKGROUND**

In November 2007, Plaintiff Jason King received a loan (the "Loan") from [\*2] American Mortgage Network, Inc. ("AmNet") in connection with his purchase of real property in Ogden, Utah. The Loan is evidenced by a promissory note (the "Note") signed by Mr. King in the amount of \$100,000. The Loan is secured by the property as described in the Deed of Trust dated November 8, 2007 (the "Trust Deed"). Mortgage Electronic Registration Systems, Inc. ("MERS") was designated as the beneficiary of the Deed of Trust as nominee for AmNet and its assigns, as the legal title owner of the property. Plaintiff understood and agreed in the Trust Deed that MERS has the authority to foreclose on the property:

Borrower understands and agrees that . . . MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of [Lender's] interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument.

By virtue of being named a nominal beneficiary, MERS is enabled to transfer rights under the trust deed to whoever owns the note at the time of enforcement. Under the terms of the Loan, Plaintiff agreed that AmNet [\*3] was authorized to sell or transfer the Note and Deed of Trust to a third party. On January 30, 2008, AmNet transferred the beneficial rights under the Note, through MERS, to the Federal National Mortgage Association ("Fannie Mae"). Shortly thereafter in February 2008, AmNet transferred to Chase the servicing rights under the Loan for collection of payments and enforcement of the Note, and notice in this regard was provided to Plaintiff.

Sometime prior to January 2009, Plaintiff defaulted under the terms of the Loan. As a result of the default, Chase executed a Substitution of Trustee, naming defendant eTitle Insurance Agency ("eTitle") as successor trustee under the Trust Deed. On February 24, 2009, eTitle recorded a Notice of Default and Election to Sell against the Property in Weber County.

On March 25, 2009, Plaintiff mailed a handwritten letter to Chase explaining that he could no longer afford the Property due to financial difficulties. On July 21, 2009, an attorney for Plaintiff wrote a letter on behalf of Plaintiff to Chase, accusing Chase of violating federal law, demanding that "any and all documents related to the . . . loan" be produced to counsel, and threatening legal action [\*4] if the documents were not produced. On December 4, 2009, Plaintiff filed a Complaint commanding this action.<sup>1</sup> Plaintiff claims, among other things, that (1) Chase, as the loan servicer, never responded to his Qualified Written Request ("QWR") and that he is therefore entitled to damages and attorney's fees; and (2) Chase, as the servicer, did not have authority to initiate the foreclosure process and therefore breached the contract and/or the implied covenant of good faith and fair dealing by allowing the "alleged trustee," eTitle Insurance Agency, to continue the foreclosure process without authority, and (3) the "alleged trustee" has failed to act in good faith and with reasonableness by failing to make any inquiry into whether the Servicer is actually a beneficiary of the Trust Deed and holder of the Note.

<sup>1</sup> Mr. King filed a virtually identical suit against the same entities but pertaining to a neighboring piece of property in Ogden. That case pending was before Judge Stewart and was recently dismissed. See *King v. American Mort. Network*, 2010 U.S. Dist. LEXIS 84092, 2010 WL 3222419 (D. Utah, Aug. 16, 2010) (unpublished).

## DISCUSSION

Plaintiff first claims that Defendant Chase violated the Real Estate Settlement [\*5] and Procedures Act ("RESPA") by failing to respond to a qualified written request ("QWR"). Under 12 U.S.C. § 2605(e):

[A] qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that-

(I) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

12 U.S.C. § 2605(e)(1)(B). A QWR relates only to the "servicing" of the loan, which is defined as requests relating to the "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan . . . and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." *Id.* § 2605(i)(3). If the lender fails to comply with a QWR, the borrower is entitled to "any actual damages to the borrower as a result of the failure; and . . . any additional damages, as the [\*6] court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$1,000." *Id.* § 2605(f)(1).

The court finds that Plaintiff's letter of July 21, 2009 was not a "qualified written requests" under RESPA. The letter did not allege any error or request for information about servicing the Loan. Rather, it was an accusation of unlawful conduct, a demand to produce loan documents for inspection, and a threat of legal action, which contained no reference to servicing of the Loan. Therefore, Chase had no duty to respond to the July 21 letter under RESPA.<sup>2</sup>

<sup>2</sup> Also, even if Chase failed to acknowledge receipt of the letter within 20 days, that failure is not a substantive issue. While Chase may not have acknowledged receipt within twenty days, it promptly provided a substantive response to the request, addressing the issues Plaintiff raised, together with copies of the Note, Good Faith Estimate, Loan Application, disclosures, and loan history.

Moreover, even if the letter could be construed as a QWR, Plaintiff's RESPA claim still fails because he has

not demonstrated a causal link between any damages and the alleged RESPA violation. [\*7] Although Plaintiff attempts to allege he suffered harm by stating that, "Defendants' delay has caused injuries to Plaintiff via this litigation, emotional distress, any improper fees that may, or may not, have been assessed by Chase, and the anticipated foreclosure of the property at issue--whereby Plaintiff would be liable for a deficiency judgment." Chase's letter in response on August 28 cannot be considered a material "delay." Second, Plaintiff faces foreclosure and the consequences thereof including a deficiency judgment because of his failure to pay his mortgage. Plaintiff also chose to bring this lawsuit instead of curing his default under the terms of the loan. Plaintiff cannot now claim that Chase is liable for harm caused by his failure to make his mortgage payments. Third, the foreclosure of a security interest cannot give rise to a claim for emotional distress. *See, Grealish v. American Brokers Conduit*, 2009 U.S. Dist. LEXIS 84842, 2009 WL 2992570, \*3 (D. Utah) (Judge Sam) (stating that plaintiff's emotional distress claim failed because, "As a matter of law, the foreclosure of a deed of trust is not outrageous or extreme, but is a normal event when a mortgage debt is not paid").

Plaintiff also argues [\*8] that Chase and MERS do not have authority to begin foreclosure of the Trust Deed on the Property because the Note and Trust Deed have been "split." The court finds no merit to Plaintiff's argument. The Note was executed by Plaintiff on November 8, 2007 in favor of the original lender, AmNet. On the same day, a Trust Deed was executed naming MERS as the nominal beneficiary acting on behalf of AmNet or its successors and assigns. AmNet sold the Note to Federal National Mortgage Association ("Fannie Mae") in approximately February of 2008. Concurrently therewith or shortly thereafter, the servicing rights under the Note and Trust Deed were transferred to Chase.

Thus, Fannie Mae owns the Note, and Chase is the authorized loan servicer on behalf of Fannie Mae. MERS

is the nominal beneficiary under the Trust Deed as agent for Fannie Mae and its "successors and assigns," which includes Chase. *See In re Huggins*, 357 B.R. 180, 184 (Bankr. D. Mass. 2006) (stating that there is "no disconnection between the note and mortgage" when MERS is acting as nominee for a lender); *see also Burnett v. Mortgage Electronic Registration Sys. Inc.*, 2009 U.S. Dist. LEXIS 100409, 2009 WL 3582294, \*4 (D. Utah, October 27, 2009). Chase and MERS [\*9] are clearly authorized to act on behalf of the holder of the Note, Fannie Mae, to begin foreclosure of the Property. Plaintiff's claims that (1) the Note and Trust Deed have been split, and (2) that Chase did not have authority to foreclose the Trust Deed on the Property are simply not plausible claims for relief and must be dismissed. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

## CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Chase and MERS's Motion to Dismiss is GRANTED. All claims against Defendants Chase Home Finance ("Chase") and Mortgage Electronic Registration Systems, Inc.'s are DISMISSED with prejudice. There is no indication in the docket that the only remaining Defendant, eTitle Insurance Agency, has ever been served, and thus, the claims against eTitle are DISMISSED without prejudice. The Clerk of the Court is directed to close this case.

DATED this 1st day of September, 2010.

BY THE COURT:

/s/ Dale A. Kimball

DALE A. KIMBALL

United States District Judge



**MICHAEL S. SHARPE, DENISE M. SHARPE, Plaintiffs, v. WELLS FARGO HOME MORTGAGE, Defendant.**

**Civ. No. 11-3020-PA**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON**

**2011 U.S. Dist. LEXIS 132541**

**November 16, 2011, Decided  
November 16, 2011, Filed**

**PRIOR HISTORY:** *Sharpe v. Wells Fargo Home Mortg.*, 2011 U.S. Dist. LEXIS 20896 (D. Or., Mar. 1, 2011)

**COUNSEL:** [\*1] Denise M. Sharpe, Plaintiff, Pro se, Central Point, OR.

For Wells Fargo Home Mortgage, Wells Fargo Home Bank, Defendants: Pilar C. French, LEAD ATTORNEY, Brian T. Kiolbasa, Robert E. Maloney, Jr., Lane Powell, PC, Portland, OR.

**JUDGES:** OWEN M. PANNER, U.S. DISTRICT JUDGE.

**OPINION BY:** OWEN M. PANNER

**OPINION**

**Order**

**PANNER, J.**

Defendant moves for summary judgment. The sole question remaining is whether defendant complied with the recording requirements of *ORS 86.705(1)*. For the reasons stated below, I grant defendant's motion for summary judgment [#32].

**BACKGROUND**

On July 23, 2004, plaintiffs signed a promissory note for \$194,750.00 in favor of Washington Mutual Bank, the "Lender." The note stated the Lender may transfer the note and that anyone taking the note by transfer (and who is entitled to receive payments under the note) is the "Note Holder."

That same day, plaintiffs executed a trust deed in favor of Washington Mutual Bank. The trust deed named Washington Mutual as the Lender and Beneficiary of the security instrument. The trust deed stated the note could be sold without prior notice to plaintiffs. (March 14, 2011 French Decl., ex. 2, 13-14, ¶ 20.) The trust deed stated the "Loan Servicer" could change and that the [\*2] servicing obligations would not be assumed by the note purchaser (unless otherwise provided by the note purchaser). (Id.) Plaintiffs also signed a Servicing Disclosure Statement stating Washington Mutual Bank would service the loan but could transfer the servicing of the loan in the future. (May 6, 2011 Brust Decl., ex. 4.)

On September 16, 2004, Washington Mutual sold the loan to Fannie Mae. (Id. at ¶ 3.) Washington Mutual continued to service the loan. On February 1, 2007, Washington Mutual transferred the servicing of plaintiffs loan to Wells Fargo Home Mortgage. (Id.) Wells Fargo provided plaintiffs written notice of the change in servicing. (Id. at ex. 8.) On February 21, 2007, Washington Mutual assigned the trust deed to Wells Fargo. (Id. at ex. 5.) Wells Fargo recorded the assignment in the Jackson County land records.

In August 2010, plaintiffs defaulted on the loan. On October 28, 2010, Wells Fargo recorded its appointment of Northwest Trustee Services, Inc. as successor trustee. (Id. at ex. 6.) That same day, Northwest recorded a Notice of Default and Election to Sell. (Id. at ex. 7.)

On March 1, 2011, plaintiffs filed a complaint. Plaintiffs raised several theories regarding [\*3] why defendant's non-judicial foreclosure proceedings were unlawful. I dismissed all of the claims except for plaintiffs' claim that defendant violated the Oregon Trust

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Deed Act by failing to record all assignments of the trust deed. As noted, defendant moved for summary judgment.

## STANDARDS

The court must grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). The court views the evidence in the light most favorable to the non-moving party. *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995). All reasonable inferences are drawn in favor of the non-movant. *Gibson v. County of Washoe*, 290 F.3d 1175, 1180 (9th Cir. 2002). If the moving party shows that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

## DISCUSSION

As [\*4] noted, the sole question remaining is whether defendant complied with the recording requirements of *ORS 86.705(1)*. In Oregon, a trustee may conduct a non-judicial foreclosure sale only if:

The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records in the counties in which the property described in the deed is situated . . . .

*ORS 86.735(1)*. There is no doubt that Washington Mutual, the original lender, was the beneficiary of the trust deed. See *ORS 86.705(1)* ("Beneficiary' means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given[.]"). As I explained in *Hooker v. Northwest Trustee Services, Inc.*, 2011 U.S. Dist. LEXIS 57005, 2011 WL 2119103, at \*3-4 (D. Or. May 25), the Oregon Trust Deed Act requires the recording of any assignments of the beneficial interest in the trust deed. As I noted in Hooker, I agree with Judge Alley that "Oregon law permits foreclosure without the benefit of a judicial proceeding only when the interest of the beneficiary is clearly documented in a public record." 2011 U.S. Dist. LEXIS 57005, [WL] at \*7 (quoting *In re McCoy*, 446 B.R. 453, 2011 WL 477820, at \*4).

I previously [\*5] noted that "Oregon's recording requirement is consistent with the longstanding rule that the trust deed or mortgage generally follows the note." 2011 U.S. Dist. LEXIS 57005, [WL] at \*4. (citing *Carpenter v. Longan*, 83 U.S. 271, 274, 21 L. Ed. 313 (1872); *United States Nat'l Bank v. Holton*, 99 Ore. 419, 427-29, 195 P. 823, 826 (1921)(collecting cases)). As in Hooker, the trust deed at issue states "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." (Trust Deed, March 14, 2011 French Decl., Ex. 2, 13, ¶ 20 (emphasis added).) Therefore, Washington Mutual's 2004 sale of plaintiffs' loan to Fannie Mae was an assignment of the beneficial interest in the trust deed. The Oregon Trust Deed Act requires that assignment to be reflected in the county land records prior to the initiation of a non-judicial foreclosure. *ORS 86.735(1)*. Because under Oregon law, a servicer can proceed in its own name on behalf of the note holder, Wells Fargo's appearance in the county land records, which defendant recorded prior to initiating non-judicial foreclosure proceedings, satisfies *ORS 86.735(1)*.

As noted, the only assignment recorded is Washington Mutual's [\*6] 2007 assignment of the trust deed to Wells Fargo. Just prior to the assignment, Washington Mutual transferred servicing rights to plaintiffs' loan to Wells Fargo. *ORS 86A.175(1)* states that a servicer - with the permission of the note holder - may perform certain actions either in its own name or in the name of the note holder. Among the actions a servicer may perform in its own name are:

(A) Holding documents or written instruments and receiving and disbursing payments according to the instructions of the parties to the documents or written instruments;

(B) Collecting or remitting, or having the right or obligation to collect or remit, for a lender, note owner, note holder or other holder of an interest in a note or for a [servicer's] own account, payments, interest, principal, and trust items, including but not limited to hazard insurance and taxes, on a mortgage banking loan or mortgage loan in accordance with the terms of the loan, and includes loan payment follow-up, loan analysis and notifications to the borrower that are necessary to enable the borrower to keep the loan current and in good standing; and

(C) Bringing and maintaining a suit or action to collect amounts owed on a [\*7] mortgage banking loan or mortgage

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loan, including but not limited to exercising contractual, statutory or common law remedies such as injunction, specific performance, judicial or nonjudicial foreclosure or receivership.

*ORS 86A.175(3).*

As noted, the trust deed stated that if the note was sold, the servicing rights would not follow the note (unless otherwise provided by the note purchaser). (March 14, 2011 French Decl., ex. 2, 13-14, ¶ 20.) Additionally, the servicing agreement signed by plaintiffs stated Washington Mutual could transfer the servicing rights to plaintiffs' loan. (May 6, 2011 Brust Decl., ex. 4.) Fannie Mae authorizes its servicers to "appear in the land records as the mortgagee." (May 16, 2011 Evans Decl., ex. 1, 2; Fannie Mae Mortgage Selling and Servicing Contract, § 202.) The servicing contract allows the servicer to execute assignments of the trust deed. (*Id.* at 4; § 202.05.) Finally, "the Fannie Mae Servicing Guide grants servicers, acting in their own names, the authority to represent Fannie Mae's interests in foreclosure proceedings as holder of the mortgage note." (*Id.* at ex. 3, 1.)

The provisions of *ORS 86A.175(3)*, together with Fannie Mae's servicing contract [\*8] and guidelines, demonstrate that Wells Fargo did not violate the recording requirements of *ORS 86.705(1)*. *ORS 86A.175(3)(C)* allows a servicer to initiate non-judicial foreclosure proceedings in its own name. *ORS 86A.175(3)(A)* allows a servicer to hold the note in its own name (on behalf of the note holder). *ORS 86A.175(3)(B)* allows a servicer to collect payments on the note in its own name. I agree with defendant that it necessarily follows that *ORS 86A.175(3)* allows a lender to sell a loan and then record an assignment of the trust deed to the subsequent servicer, provided *ORS 86A.175(3)* and the note holder allow the subsequent servicer to proceed in its own name. To require Washington Mutual to record the assignment in Fannie Mae's own name would render *ORS 86A.175* meaningless.

Although I am troubled with a situation, apparently present here, where the note holder's interest is never revealed to the borrower prior to a non-judicial foreclosure, the Oregon legislature has clearly spoken on this issue. In certain situations, including those present here, the legislature allows a servicer to proceed in its own name on behalf of the note holder. I do not determine the wisdom of the statute, [\*9] but only whether defendant violated the statute.

I note that on at least two occasions, Wells Fargo sent plaintiffs letters denying plaintiffs' requests for loan modifications. (Plaintiff's Response, #46, ex. 2,3.) Neither letter identified Fannie Mae. Both letters simply stated plaintiffs failed to meet the "investor" guidelines. (*Id.* at ex. 3 ("Your loan modification required approval from the investor that ultimately owns your mortgage. You have not been approved for a mortgage loan modification because the investor on your mortgage has declined the request.")) As noted, the final decision on whether to allow borrowers on the verge of non-judicial foreclosure the opportunity to request a modification directly from the owner of the loan rests with the Oregon legislature.

Here, the only sale of the loan was from Washington Mutual to Fannie Mae. Because the *ORS 86A.175(3)* allows Wells Fargo, as Fannie Mae's servicer, to perform all of the challenged actions in its own name, the recorded assignment from Washington Mutual to Wells Fargo did not violate the Oregon Trust Deed Act's recording requirements.

## CONCLUSION

Defendant's motion for summary judgment [#32] is GRANTED.

IT IS SO ORDERED.

DATED [\*10] this 16 day of November, 2011.

/s/ Owen M. Panner

OWEN M. PANNER

U.S. DISTRICT JUDGE



UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ANDRE MCGEE, Defendant - Appellant.

No. 99-2054

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

*1999 U.S. App. LEXIS 21787; 1999 Colo. J. C.A.R. 5177*

September 10, 1999, Filed

**NOTICE:** [\*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

**SUBSEQUENT HISTORY:** Reported in Table Case Format at: *1999 U.S. App. LEXIS 33469*.

Certiorari Denied January 18, 2000, Reported at: *2000 U.S. LEXIS 787*.

**PRIOR HISTORY:** (District of New Mexico). (D.C. No. CR-98-387-LH).

**DISPOSITION:** AFFIRMED.

**COUNSEL:** For UNITED STATES OF AMERICA, Plaintiff - Appellee: James Tierney, Asst. U.S. Attorney, District of New Mexico, Albuquerque, NM.

For ANDRE MCGEE, Defendant - Appellant: Alonso J. Padilla, Ann Steinmetz, Fed. Public Defender, Office of the Federal Public Defender, Albuquerque, NM.

**JUDGES:** Before BRORBY, EBEL and LUCERO, Circuit Judges.

**OPINION BY:** CARLOS F. LUCERO

**OPINION**

**ORDER AND JUDGMENT \***

\* The case is unanimously ordered submitted without oral argument pursuant to *Fed. R. App. P. 34(a)(2)* and *10th Cir. R. 34.1(G)*. This order and

judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of *10th Cir. R. 36.3*.

[\*2] Appellant Andre McGee pled guilty to two counts of both possession with intent to distribute cocaine base in violation of *21 U.S.C. § 841(a)(1)* and *21 U.S.C. § 841(b)(1)(A)* and aiding and abetting in violation of *18 U.S.C. § 2*. The district court sentenced him to two concurrent terms of 121 months in prison, based in part on a criminal history category of II. *U.S.S.G. § 5A*. On direct appeal, McGee contends the district court erred in assigning two criminal history points for prior sentences. We exercise jurisdiction under *28 U.S.C. § 1291* and *18 U.S.C. § 3742(a)*, and affirm.

The presentence report assigned McGee one criminal history point pursuant to *U.S.S.G. § 4A1.1(c)* and *§ 4A1.2(f)*<sup>1</sup> for each of two prior misdemeanor offenses—petty larceny and battery—that had resulted in diversionary dispositions. McGee objected to the report, arguing that the petty larceny charge should have been dismissed once the appellant successfully completed petty larceny school. With respect to the battery offense, McGee argued that there was no record of a finding or admission of guilt [\*3] or of a judgment entered following a plea of *nolo contendere*, as required by *U.S.S.G. § 4A1.2(f)*. At the sentencing hearing, McGee's attorney made a proffer, which the court accepted, that his client would testify he had never signed a plea agreement, had never been asked by the presiding judge how he pled, and had never entered a plea. The only relevant documents before the district court pertaining to these two offenses, other than the presentence report, were computer printouts of court docket entries from the Bernalillo County Metropolitan

Court. The district court rejected McGee's arguments and adopted the factual findings and Guidelines applications of the presentence report with respect to both offenses.

1 *U.S.S.G. § 4A1.1(c)* requires a sentencing judge to assign one criminal history point for each "prior sentence" of less than sixty days imprisonment. *U.S.S.G. § 4A1.2(f)* provides that:

Diversion from the criminal process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under § 4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

[\*4] On appeal, McGee argues that the court improperly calculated his criminal history for three reasons: the docket printouts were unreliable and therefore should not have been considered at sentencing; even if reliable, the docket printouts failed to establish by a preponderance of the evidence that the battery misdemeanor was a prior sentence that could be included in his criminal history; and even if both offenses could be properly counted under *U.S.S.G. § 4A1.1(c)*, it would be contrary to the underlying policy of the Guidelines to impose upon the appellant a heightened sentence based on two relatively minor offenses.<sup>2</sup>

2 McGee does not raise on appeal, as he did at the sentencing hearing, the issue of whether a plea of *nolo contendere* resulting in a deferred judgement under New Mexico law is a "prior sentence" within the meaning of *U.S.S.G. § 4A1.2(f)*. This issue, therefore, is waived. *See State Farm Fire & Casualty Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994). Because the issue is not raised on appeal, we do not review it.

[\*5] The Sentencing Guidelines provide that "in resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." *U.S.S.G. § 6A1.3(a)*. We apply a clear error standard to a district court's determination that a particular item of evidence has sufficient indicia of reliability. *See United States v. Hooks*, 65 F.3d 850, 854 (10th Cir. 1995). McGee suggests that the docket printouts were unreliable in part because they were not certified. Authentication, however, is not required at a sentencing hearing. *See U.S.S.G. § 6A1.3(a)*. McGee further

asserts that the printouts were unreliable because "a margin of error always exists when information is entered into a computerized record system," and the unavailability of additional records demonstrates poor record keeping. Public records are generally presumed to be trustworthy. *See, e.g., Fed. R. Evid. 803(8)* (public records exception to the hearsay rule). The district court [\*6] did not err in rejecting McGee's speculative assertions in favor of this presumption.

We turn to the question of whether the evidence before the district court was sufficient to establish that the battery conviction was a "prior sentence" within the meaning of *U.S.S.G. § 4A1.1(c)*.<sup>3</sup> On this point, the government has the burden of proving the existence of a prior sentence by a preponderance of the evidence. *See United States v. Simpson*, 94 F.3d 1373, 1381 (10th Cir. 1996). The district court determined that the government met its burden, a finding of fact which we review for clear error. *See id. at 1380*. In *Simpson* we held "that a certified docket sheet is adequate, absent some contradictory evidence by the defendant, to establish the existence of a prior conviction" for purposes of sentencing. *Id. at 1381*. Appellant argues that in the present case the docket printout is not adequate because, unlike the docket sheet in *Simpson*, it was not certified, and there was contradictory evidence--McGee's testimony that he never pled *nolo contendere*. We do not consider these differences significant. The district court, being in [\*7] a better position to weigh the credibility of witnesses, determined that the unreliability of McGee's testimony outweighed the claimed unreliability of the metropolitan court docket printout. We fail to perceive clear error and thus defer to the district court's conclusion that the docket printout was adequate to establish, by a preponderance of the evidence, the existence of a prior sentence.

3 Appellant concedes that, if the docket printout is found reliable, it is sufficient to prove the prior sentence for the petty larceny offense.

Finally, McGee argues that his two misdemeanor convictions involved "situational misconduct" and, when used to assign criminal history points for sentencing purposes, over-represent his prior criminal conduct. *See U.S.S.G. § 4A1.3*. This argument amounts to a challenge of the sentencing court's refusal to depart downward under *U.S.S.G. § 4A1.3*. It is well established that we "cannot exercise jurisdiction to review a sentencing court's refusal to depart from the Guidelines, [\*8] either upward or downward, unless the court refused to depart because it interpreted the Guidelines to deprive it of authority to do so." *United States v. Fortier*, 180 F.3d 1217, 1231 (10th Cir. 1999). The record indicates that the district court made a discretionary decision not to

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depart from the Guidelines, and we therefore have no jurisdiction to review this issue.

The judgment of the district court is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT

Carlos F. Lucero

Circuit Judge



**WILLIAM CHASE WOOD, et al., Plaintiffs, vs. WORLD WIDE ASSOCIATION OF SPECIALTY PROGRAMS AND SCHOOLS, INC., et al., Defendants.**

**Case No. 2:06-CV-708 TS**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

**2007 U.S. Dist. LEXIS 32083**

**April 30, 2007, Decided**

**April 30, 2007, Filed**

**SUBSEQUENT HISTORY:** Motion denied by *Wood v. World Wide Ass'n of Specialty Programs & Sch., Inc.*, 2007 U.S. Dist. LEXIS 32118 (D. Utah, Apr. 30, 2007)

**PRIOR HISTORY:** *Wood v. World Wide Ass'n of Specialty Programs & Schools, Inc.*, 2007 U.S. Dist. LEXIS 29545 (D. Utah, Apr. 19, 2007)

**COUNSEL:** [\*1] For William Chase Wood, Tammy M. Wood, Gregory Wilson Wood, Steven Harlan Baker, William A. Boyles, Jr., Charles Burnett, Karen Burnett, Nathan Paul Burnett, Christopher Carbo, Lee E. Colburn, Phillip Garibay, Christine Gomez, Gregory Gomez, Joseph Gomez, Sean Hellinger, Heather Brook Jackson, Theresa Jackson, Ari Lavi Katave, Brenda Lancaster, Ryan Clark Pink, David Sallee, Krystal Vaughan, Jonathan Walmsley, Janeen Whitchurch, Ana Wills, Randall Wills, Randall Ferdinand Wills, James Aldridge, Courtney Ann Carroll Anderson, Elizabeth Anderson, Christ Basios, Christopher Buffoni, Joseph Burns, Remberto Carbo, Jennifer Chambard, Jonathan Claflin, Ryan Colburn, John Conor, as Personal Representative of the Estate of Frank Conor, Beth Cooper, Lynne Cooper, Steven Cooper, Alexandra Coto, Tara Coto, Morgan Davis, Chelsea Filer, Nick Frederickson, Kurt Frey, Lon Hoffman, Melissa Hoffman, Susan Hooten, Dustin Kava, Andrew King, Julie Kruckeck, Sheila Lai, Scott David Lancaster, Andrew Monty Lapica, Sally Lapica, Matthew Lawrence, Charles Lee, Nathaniel Lee, Joanne Lehnhardt, Carl R. Milliken, Dan Milliken, Sandra Bressi Milliken, Cody Landon Perez, Lana Pink, Alice Powers, Allison Coleen Powers, [\*2] Tom Powers, Jake Resnikoff, Paul Warren Richards, Irene Romero, Benjamin Sallee, Lana Sallee, Lorin Stewart, Martie Tuthill,

Ryan Walmsley, Tammi West, Kristen Whitchurch, Carol Wright, Plaintiffs: Bradley H. Parker, LEAD ATTORNEY, PRINCE YEATES & GELDZAHLER, SALT LAKE CITY, UT; C. Richard Henriksen, Jr., LEAD ATTORNEY, HENRIKSEN & HENRIKSEN, SALT LAKE CITY, UT; James W McConkie, II, LEAD ATTORNEY, PARKER & MCCONKIE, SALT LAKE CITY, UT; Lori A. Watson, LEAD ATTORNEY, R. Windle Turley, LEAD ATTORNEY, T. Nguyen, LEAD ATTORNEY, TURLEY LAW FIRM, DALLAS, TX.

For World Wide Association of Specialty Programs and Schools, Robert B. Lichfield, Ken Kay, Defendants: Terry M. Plant, LEAD ATTORNEY, Cory D. Memmott, Stewart B. Harman, PLANT CHRISTENSEN & KANELL, SALT LAKE CITY, UT.

For Cross Creek Center For Boys, Cross Creek Manor, Karr Farnsworth, Defendants: Gary L Johnson, LEAD ATTORNEY, Martha Knudson, LEAD ATTORNEY, RICHARDS BRANDT MILLER & NELSON, SALT LAKE CITY, UT.

For Teens In Crisis, Academy at Ivy Ridge, The, Defendant: Spencer C. Siebers, LEAD ATTORNEY, SILVESTER & CONROY LC, SALT LAKE CITY, UT.

For Teen Help, Defendant: Dennis J. Conroy, LEAD ATTORNEY, Fred R. Silvester, [\*3] LEAD ATTORNEY, Spencer C. Siebers, LEAD ATTORNEY, SILVESTER & CONROY LC, SALT LAKE CITY, UT.

For Majestic Ranch Acadamy, Defendant: D. Scott Berrett, LEAD ATTORNEY, John M. Webster, RIVER-

DALE, UT; Matthew A. Bartlett, LEAD ATTORNEY, BARTLETT & WEBSTER, RIVERDALE, UT.

For Spring Creek Lodge, Defendant: Phillip S. Ferguson, LEAD ATTORNEY, Ruth A. Shapiro, CHRISTENSEN & JENSEN PC, SALT LAKE CITY, UT.

For Tranquility Bay, Defendant: Alan G. Kipnis, LEAD ATTORNEY, ARNSTEIN & LEHR, FT LAUDERDALE, FL; Spencer C. Siebers, LEAD ATTORNEY, SILVESTER & CONROY LC, SALT LAKE CITY, UT.

**JUDGES:** TED STEWART, United States District Judge.

**OPINION BY:** TED STEWART

## OPINION

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS CLAIMS AND GRANTING MOTIONS FOR MORE DEFINITE STATEMENT

### I. INTRODUCTION

Currently, over 80 Plaintiffs bring a Second Amended Complaint asserting claims against 27 Defendants. The proposed Third Amended Complaint seeks to add a number of Plaintiffs, but would not otherwise add any additional claims or allegations of fact.<sup>1</sup> Defendants Robert B. Lichfield (Lichfield), World Wide Association of Specialty Programs and Schools (WWASP), and Ken Kay (Kay)<sup>2</sup> [\*4] move to dismiss and for a more definite statement. Defendant Majestic Ranch (Majestic) joins in that motion and seeks to add an additional basis for dismissal.<sup>3</sup> Defendants Cross Creek Manor, LLC, Cross Creek Center for Boys, LLC (Cross Creek Defendants) and Karr Farnsworth (Farnsworth)<sup>4</sup> move to join in the WWASP Defendants' Motion to Dismiss<sup>5</sup> and the WWASP Defendants' Motion for a More Definite Statement.<sup>6</sup>

1 The provisions of the Second Amended Complaint and the proposed Third Amended Complaint at issue in the present Motions are identical. They will be collectively referred to as "the Complaints."

2 Collectively the WWASP Defendants.

3 Docket No. 70.

4 Collectively the Cross Creek Defendants.

5 Docket No. 57.

6 Docket No. 58.

The Court will grant the Motions to Dismiss the RICO and fraud claims for failure to state a claim, because those claims are not pleaded with the requisite

particularity. The Court will dismiss the claims based on Utah criminal statutes for failure [\*5] to state a claim, because Plaintiffs have not shown that those criminal statutes provide a private cause of action. Finally, the Court will grant the various motions for more definite statements.

### II. JOINDER

As an initial matter, the Court notes that neither the Federal Rules of Civil Procedure nor the Local Rules permit motions to join in another party's motion.<sup>7</sup> Such attempts at joinder result in needless confusion.<sup>8</sup> For example, the docket does not show that Majestic has a pending motion because it did not file its own motion, but Plaintiffs have responded to its arguments because it filed a motion to join the Motion filed by other Defendants.<sup>9</sup> Because the Cross Creek Defendants joined in the present motion, they currently have two Motions to Dismiss pending, one is their present joinder, and the other, filed a week later, asserts a different grounds for dismissal.<sup>10</sup> Presumably, these Motions assert alternative grounds for dismissal.

7 Compare Fed. R. Civ. P. 18 (joinder of claims and remedies) with 19, 20, and 21 (addressing joinder, misjoinder, and non-joinder of persons and parties).

[\*6]

8 See Docket No. 76 (Notice of Deficiency requesting that Majestic's Motion for Joinder be refiled).

9 Docket No. 82.

10 Docket No. 62; see also Docket No. 73 (Cross Creek Defendants' Motion to Sever).

In order to avoid needless confusion of the docket, the Court will not consider any further motions for a party to join in a previously filed motion. Parties are certainly permitted to file joint motions, or to file notices of non-opposition to a motion. But parties shall no longer file motions requesting joinder in previously-filed motions. Instead, all parties shall file any further motions in accordance with DUCivR 7-1.

### III. FRAUD CLAIMS

Plaintiffs bring claims of actual and constructive fraud, conspiracy and fraudulent concealment, and fraud under the Utah Deceptive Practices Act. Defendants move to dismiss these claims because they are not pleaded with particularity as required by Fed. R. Civ. P. 9(b).

The Court has noted the Rule 9(b) claims in its prior Order.<sup>11</sup>

*Rule 9(b)* states that "in all averments of fraud or mistake, [\*7] the circumstances constituting the fraud or mistake shall be stated with particularity." *Fed. R. Civ. P. 9(b)*. At a minimum, *Rule 9(b)* requires that a plaintiff set forth the 'who, what, when, where and how' of the alleged fraud," and must "set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof."<sup>12</sup>

11 Mem. Dec. and Order Granting Defendant Teens in Crisis' Motion to Dismiss, at 3.

12 *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726-27 (10th Cir. 2006) (holding *Rule 9(b)*'s heightened pleading requirements apply to actions under the FCA) (quoting *Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) and *Koch v. Koch Indust., Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000)).

The Court has discussed elsewhere Plaintiffs' contentions that they will submit fact sheets [\*8] detailing the alleged fraud as to each Plaintiff; that less specificity is needed where they allege "corporate fraud;" and that the mere allegation that each Defendant participated in the "promotion, advertisement and marketing of the [Defendant] resident boarding schools" is sufficient to state a claim for each of its fraud-based causes of action against each Defendant.

As *Rule 9(b)* and controlling case law provide, the time, place, and contents of the alleged misrepresentations must be alleged, as well as the identity of the persons making the misrepresentations. Noticeably absent from the Second Amended Complaint is any allegation of the specific contents of the alleged advertisements or promotional and marketing materials, the dates upon which they were received by any Plaintiff, and by which Defendant they were allegedly sent. Even when any alleged misrepresentation is identified,<sup>13</sup> there is an absence of allegations as to which Defendant made the alleged representation, by what means (e.g. email, advertisement, or statements), about what facility, to which of the numerous Plaintiffs, and on or about what date. In fact, it is not possible from the Complaints to determine [\*9] which facility any student Plaintiff allegedly attended or the time in which they allegedly did so. The only dates provided in the Complaints comprises a vague ten-year period.<sup>14</sup> Further, the ten-year period is speci-

fied as the period of the placement of the students in Defendant school, not as the period of the alleged misrepresentations.

13 Second Amended Complaint at 22, P 4 ("[P]laintiff parents were lied to by the Defendant and through WWASP promotional and marketing materials which represented the Defendant facilities to be a safe and secure environment, where their children would be well cared for, and provided a good education, medical care, and therapy.").

14 Second Amended Complaint at 13, P 2 ("From about the mid-1990's to mid-2000's, student Plaintiffs were placed in the care of at least one of these named schools.")

As to Plaintiffs' argument that they will solve the Complaints' deficiencies by reference to "Fact Sheets" in their Second Amended Complaint, the Court has previously noted [\*10] that Plaintiffs admit that any such statements of fact are not yet prepared.<sup>15</sup> For this and other reasons, on February 22, 2007, the Court denied the Plaintiffs Motion to Incorporate by Reference Specific Statements of Fact into Their [Second Amended] Complaint.<sup>16</sup> In that Order, the Court clearly indicated that it would follow the rule that statements and material could only be incorporated into a pleading if those statements were contained in a different part of the same pleading, in another pleading, or were contained in any written instrument which is an exhibit to a pleading.<sup>17</sup> Despite this clear ruling, Plaintiffs' proposed Third Amended Complaint contains the same reference to, and attempt to incorporate, as-yet-unprepared statements of fact for each Plaintiff and states, erroneously, that Plaintiffs are providing such statements "by agreement" to defense counsel.<sup>18</sup>

15 See Docket No. 144, February 22, 2007 Mem. Dec. And Order Denying Plaintiffs' Motion to Incorporate by Reference Specific Statements of Fact into Their Complaint, at 2.

16 *Id.*

17 *Id.* (quoting *Fed. R. Civ. P. 10(c)*). See also *Fed. R. Civ. P. 7(a)* (listing allowed pleadings). The Court also notes that it is possible to attach sealed exhibits to a pleading.

[\*11]

18 Docket No. 149, Ex. 1 (proposed Third Amended Complaint), at 18, P 9.

Based upon the foregoing, the Court will grant the Motion to Dismiss the fraud claims as to the moving Defendants for failure to state the claims with the specificity required by *Rule 9(b)*.

#### IV. RULE 12(b)(6) STANDARD

In considering a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to Plaintiffs as the nonmoving parties.<sup>19</sup> A *Rule 12(b)(6)* motion to dismiss may be granted only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief" under its theory of recovery.<sup>20</sup> All well-pleaded factual allegations in the complaints are accepted as true and viewed in the light most favorable to the nonmoving party.<sup>21</sup> "A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* admits all well-pleaded facts in the complaint as distinguishable [\*12] from conclusory allegations."<sup>22</sup> The Court "need not accept conclusory allegations without supporting factual averments."<sup>23</sup> "The Court's function on a *Rule 12(b)(6)* motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted."<sup>24</sup>

19 *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002).

20 *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

21 *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

22 *Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir. 2006) (quoting *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976)).

23 *Southern Disposal, Inc., v. Texas Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

24 *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

#### [\*13] V. CIVIL RICO

Plaintiffs' Complaints allege violations of RICO's<sup>25</sup> §§ 1962(a), (b), and (c),<sup>26</sup> predicated on mail and wire fraud and engaging in monetary transactions in property derived from specified unlawful activity.<sup>27</sup>

25 Racketeer-Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961, et seq.

26 18 U.S.C. § 1962.

27 Second Amended Complaint at 31, P 5.

Defendants move to dismiss the civil RICO claims on the ground that Plaintiffs fail to state a claim because they (1) fail to allege their injuries were caused by Defendants' alleged use of, or investment of, racketeering income; (2) fail to allege the required elements of conduct, enterprise, and racketeering activity; and (3) fail to plead the required elements of conspiracy to violations § 1962 (a), (b), or (c). In particular, Defendants contend

that Plaintiffs fail to plead the underlying predicate acts with the requisite particularity required for mail and wire fraud.

[\*14] Plaintiffs contend that the cases cited by Defendants are distinguishable and that the Complaints state a claim for RICO violations under the four subsections sufficient to allow each Defendant to admit or deny the claims.

The elements of a civil RICO claim are (1) investment in, control of, or conduct of (2) an enterprise (3) through a pattern (4) of racketeering activity. "Racketeering activity" is defined in 18 U.S.C. § 1961(1)(B) as any "act which is indictable" under federal law and specifically includes mail fraud, wire fraud and racketeering. These underlying acts are "referred to as predicate acts, because they form the basis for liability under RICO."<sup>28</sup>

To establish the predicate act of mail fraud, [Plaintiffs] must allege "(1) the existence of a scheme or artifice to defraud or obtain money or property by false pretenses, representations or promises, and (2) use of the United States mails for the purpose of executing the scheme." "The elements of wire fraud are very similar, but require that the defendant use interstate wire, radio or television communications in furtherance of the scheme to defraud." [T]he common thread among . [\*15] . . these crimes is the concept of "fraud." Actionable fraud consists of (1) a representation; (2) that is false; (3) that is material; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent it be acted on; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance; (8) the hearer's right to rely on it; and (9) injury.

Failure to adequately allege any one of the nine elements is fatal to the fraud claim. The particularity requirement of *Rule 9(b), Federal Rules of Civil Procedure*, applies to claims of mail and wire fraud.<sup>29</sup>

28 *Tal*, 453 F.3d at 1261-62 (quoting 18 U.S.C. § 1962(a), (b), and (c) and *BancOklahoma Mort-*

2007 U.S. Dist. LEXIS 32083, \*

gage Corp. v. Capital Title Co., 194 F.3d 1089, 1102 (10th Cir. 1999)).

29 Tal v. Hogan, 453 F.3d 1244, 1263 (10th Cir. 2006) (quoting *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 892 (10th Cir. 1991) and *BancOklahoma*, 194 F.3d at 1102-03) (other citations omitted).

[\*16] Plaintiffs contend that they have alleged fraud with sufficient particularity to allow Defendants to respond by admitting or denying the allegations under *Fed. R. Civ. P. 8*.<sup>30</sup> The Tenth Circuit rejected this argument in *Cayman Exploration Corp. v. United Gas Pipeline Co.*, holding that "RICO predicate acts based on fraud must be stated with the particularity required by *Fed. R. Civ. P. 9(b)*" in order to survive a motion to dismiss under *Rule 12(b)(6)*.<sup>31</sup> Thus, the standard is not, as argued by Plaintiffs, whether the Complaints provide sufficient information to allow Defendants to admit or deny each RICO element. Instead, the Complaints must be sufficient to ensure that Defendants have "clear notice of the factual basis of the predicate acts."<sup>32</sup>

30 Pls' Mem. at 3.

31 873 F.2d 1357, 1362 (10th Cir. 1989).

32 *Smith v. Figa and Burns*, 69 Fed. Appx. 922, 925 (10th Cir. 2003) (quoting *Cayman Exploration*, 873 F.2d at 1362).

[\*17] The Court finds that Plaintiffs fail to state the alleged predicate acts of mail and wire fraud with the requisite particularity required under *Fed. R. Civ. P. 9(b)*. The standard for *Rule 9(b)* is discussed above. As noted, under *Rule 9(b)*'s specificity requirements, Plaintiffs must allege the time, place, and contents of the alleged misrepresentations as well as the identity of the persons making the misrepresentations. The Complaints contain no details or specifics of the predicate mail/wire fraud acts, there are no specific details about the contents of the alleged misrepresentations, which Defendant is alleged to have made what representation to which Plaintiff, or any specific details regarding when they occurred.

In the *Tal* case, predicate acts of mail fraud were stated with the required specificity for only those letters listed in the complaint that "identified the parties, the dates, the content of the alleged communications, how they were allegedly fraudulent and how they furthered the fraudulent enterprise."<sup>33</sup> Similarly, only three of the twenty-seven wire communications alleged in *Tal* were held to be stated with sufficient [\*18] particularity because they "not only describ[ed] the date, the parties to the communication and the subject matter, but also how they were fraudulent and what they were designed to accomplish."<sup>34</sup>

33 453 F.3d at 1265.

34 *Id. at 1266.*

The Court has already addressed and rejected Plaintiffs' contention that the missing specificity may be provided by fact sheets that are neither prepared nor attached to a pleading or proposed pleading.

The Complaints also attempt to allege racketeering activity relating to obscene matter. However, the Complaints make not one allegation in support of this claim. Plaintiffs apparently concede this RICO claim because they do not argue it in their response to the Motion to Dismiss.

Because the Court has determined that the predicate acts are not alleged with specificity, Plaintiffs fail to state a claim under RICO. Further, as in *Smith*, "[b]ecause the allegations include absolutely no details about the timing and nature of the predicate [\*19] acts, it is impossible to tell from the pleading whether there were two acts, what those two acts were, or if they were sufficiently related and continuous as to constitute a pattern" necessary to adequately allege a pattern of racketeering activity.<sup>35</sup> Because Plaintiffs fail to adequately allege either the predicate acts constituting racketeering or a pattern of such racketeering, Plaintiffs fail to state a claim under RICO upon which relief can be granted.

35 69 Fed. Appx. at 926.

## VI. CLAIMS FOR CIVIL DAMAGES BASED ON CRIMINAL STATUTES

Plaintiffs bring claims for Breach of Statutory Duty to Prevent Child Abuse under *Utah Code Ann. §§ 53A-6-502, 76-5-109, 76-5-103, 76-5-401.1, 76-5-404, 76-5-404.1, and 78-12-25.1* (Utah Criminal Code) and § 62A-4a-411 (Utah Human Services Code providing criminal penalty for failure to report suspected child abuse). Defendants seek to dismiss these claims on the ground that these statutes do not provide a private cause of action. Plaintiffs contend [\*20] that the claims seek civil remedies not criminal penalties for violation of the cited statutes and that the criminal statutes provide the standard of care for civil claims.

The Court agrees with Defendants. Plaintiffs are attempting to recover on a private cause of action under these statutes. Because, as a matter of law, none of these statutes provide such a private cause of action, the claims for Breach of Statutory Duty to Prevent Child Abuse under *Utah Code Ann. §§ 53A-6-502, 76-5-109, 76-5-103, 76-5-401.1, 76-5-404, 76-5-404.1, and 78-12-25.1* and § 62A-4a-411 are dismissed for the failure to state a claim.

## VII. ALTER EGO CLAIMS

Plaintiffs allege alter ego liability on the part of Defendants. Defendants contend that Plaintiffs' alter ego allegations fail to state a claim because (1) the alter ego claims are based on fraud which is not stated with particularity; (2) even those alter ego allegations not alleging fraud are not sufficient to state a claim. In a brief paragraph, Plaintiffs assert that the alter ego claims do not need not to be pleaded with particularity, but do not address the contention that their allegations do not otherwise state a claim.

For the [\*21] reasons set forth in its April 20, 2007 Memorandum Decision and Order Granting Defendant Teens in Crisis' Motion to Dismiss, the Court finds that the alter ego allegations fail to state a claim upon which relief can be granted.<sup>36</sup>

36 Docket No. 166, at 5-6 (dismissing vicarious liability claims).

#### VIII. MORE DEFINITE STATEMENT

"If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading."<sup>37</sup>

37 Fed. R. Civ. P. 12(e).

The Court finds that the Complaints are so vague and ambiguous that, as to the claims that are not dismissed herein, the moving Defendants cannot be required to frame a responsive pleading. Accordingly, [\*22] the Court orders Plaintiffs to provide a more definite statement for the movants. The more definite statement shall include, but is not limited to, the following: (1) identification by name of the Defendant(s) against whom a cause of action is brought; (2) a more specific time frame for the claims; (3) which schools or facilities each student is alleged to have attended, and when; and (4) specifics on how the Defendants are alleged to have acted in concert.

#### IX. DISCOVERY OR AMENDMENT

Plaintiffs contend that if the Court finds that any of their causes of action do not state a claim that, rather than dismissal, the Court should allow them discovery and require them to amend their Second Amended Complaint to allege their claims with more specificity. Because the claim based on the criminal statutes is dismissed as a matter of law rather than based on failure of allegations, the Court finds that discovery or amendment would not apply to that claim.

Plaintiffs argue that, rather than having their claims dismissed for failure to state a claim, they should be

permitted discovery on the "precise bases" for the claims. However, Plaintiffs do not specify any discovery that they might require [\*23] or the type of allegations that would satisfy Rule 9(b)'s requirements—"the time, place, and contents of the false representation, the identity of the party making the false statements." Further, such information is information ordinarily within the knowledge of a person who claims they relied upon such representations. Similarly, such matters as the consequences of the alleged misrepresentations, the approximate dates of a student's attendance at a school, and the name of the school(s) attended, would ordinarily be within the knowledge of a student or parent Plaintiff, rather than within the exclusive control of a Defendant. Plaintiffs have not attempted to show that the information necessary for them to meet Rule 9(b)'s specificity requirements for their fraud or RICO claims is within the exclusive control of Defendants. Nor have they attempted to show (1) any discovery that is necessary on the alter ego/vicarious liability claims or (2) that such information is within the exclusive control of the Defendants.

Courts have discretion to allow amendment rather than to dismiss for failure to state a claim.<sup>38</sup> But despite the clear notice of alleged deficiencies provided by the Motion [\*24] to Dismiss and the joinders therein, Plaintiffs have filed a proposed Third Amended Complaint that fails to add any more specific allegations regarding their fraud, RICO or alter ego/vicarious liability claims. The proposed Third Amended Complaint was filed well after the Plaintiffs filed their response to the Motions to Dismiss and for a More Definite Statement.<sup>39</sup> Under these circumstances, the Court will exercise its discretion to dismiss the fraud, RICO and alter ego/vicarious liability claims rather than to allow further amendment.

38 *Cayman Exploration*, 873 F.2d at 1362-63.

39 See Docket No. 85 (Pls' Response and Memorandum in Opposition) filed on December 18, 2006 and Docket No. 149 (Pls' Motion for Leave to File Third Amended Complaint), filed on February 28, 2007.

#### X. ORDER

Based upon the foregoing, it is hereby

ORDERED that Defendants' Motion to Dismiss (Docket No. 45) is GRANTED and Plaintiffs' claims of actual and constructive fraud, conspiracy and fraudulent concealment, [\*25] and fraud under Utah Deceptive Practices Act; the RICO claims; the civil claim for violation of criminal statutes and the alter ego/vicarious liability claims are dismissed as to Defendants Robert B. Lichfield, World Wide Association of Specialty Programs and Schools, and Ken Kay. It is further

ORDERED that the Cross Creek Defendants' Motion for Joinder (Docket No. 57) in the WWASP Defendants' Motion to Dismiss is GRANTED and Plaintiffs' actual and constructive fraud, conspiracy and fraudulent concealment, and fraud under Utah Deceptive Practices Act; the RICO claims; the civil claim for violation of criminal statutes and the alter ego/vicarious liability claims dismissed as to Defendants Cross Creek Manor, LLC, Cross Creek Center for Boys, LLC, and Karr Farnsworth. It is further

ORDERED that Defendant Majestic<sup>1</sup> Motion for Joinder (Docket No. 70), in the WWASP Defendants' Motion is GRANTED and Plaintiffs' claims of actual and constructive fraud, conspiracy and fraudulent concealment, and fraud under Utah Deceptive Practices Act; the RICO claims; the civil claim for violation of criminal statutes and the alter ego/vicarious liability claims are dismissed as to Defendant Majestic Ranch [\*26] Academy, Inc. It is further

ORDERED that the dismissal of claims set forth above applies to the Second Amended Complaint and the proposed Third Amended Complaint. It is further

ORDERED that the Motions for a More Definite Statement and for joinder in the Motion for a More Definite Statement (Docket Nos. 53, 58, and 70) are GRANTED as to the Cross Defendants, the WWASPS Defendants and Majestic Ranch Academy. Plaintiffs shall file such statement within 30 days of the entry of this Order.

DATED April 30, 2007.

BY THE COURT:

TED STEWART

United States District Judge



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\*\*\* Current through changes received August 21, 2012 \*\*\*

FEDERAL RULES OF CIVIL PROCEDURE  
TITLE III. PLEADINGS AND MOTIONS

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*USCS Fed Rules Civ Proc R 9*

Rule 9. Pleading Special Matters

(a) Capacity or Authority to Sue; Legal Existence.

(1) *In General.* Except when required to show that the court has jurisdiction, a pleading need not allege:

- (A) a party's capacity to sue or be sued;
- (B) a party's authority to sue or be sued in a representative capacity; or
- (C) the legal existence of an organized association of persons that is made a party.

(2) *Raising Those Issues.* To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) Special Damages. If an item of special damage is claimed, it must be specifically stated.

(h) Admiralty or Maritime Claim.

(1) *How Designated.* If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) *Designation for Appeal.* A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

**HISTORY:**

(Amended July 1, 1966; July 1, 1968; July 1, 1970; Aug. 1, 1987; Dec. 1, 1997.)

(As amended Dec. 1, 2006; Dec. 1, 2007.)



FOCUS - 2 of 3 DOCUMENTS

DEPARTMENT OF THE TREASURY  
OFFICE OF THE COMPTROLLER OF THE CURRENCY

OCC UNPUBLISHED INTERPRETIVE LETTER

REFERENCE: LASD; 12 C.F.R. § 5.34; 12 U.S.C. § 92(a); Trust Powers

Comptroller of the Currency  
Administrator of National Banks  
Washington, D.C. 20219

John Huffstutler, Senior Counsel  
Bank of America National Trust and Savings Association  
Bank of America Center  
Box 3700  
San Francisco, California 94137

June 13, 1986

LENGTH: 474 words

TEXT: Dear Mr. Huffstutler:

This is in response to your notice, pursuant to 12 C.F.R. § 5.34 (1985), of a proposed expansion of the activities of Continental Auxiliary Company ("Continental"), a wholly-owned operating subsidiary of Bank of America National Trust and Savings Association ("Bank"). As explained in your letter, Continental presently acts as trustee under deeds of trust in favor of the Bank as beneficiary. These deeds of trust secure real estate loans made or acquired by the Bank in the ordinary course of business. In serving as the Bank's trustee for such loans, Continental also provides certain incidental services to the Bank. For example, Continental on behalf of the Bank conducts trustee sales, enters and takes possession of properties and collects rents, issues and profits from the property, and executes and delivers deeds of conveyance and reconveyance, subordination agreements and other documents, instruments and agreements affecting deeds of trust and the properties that are subject to the deeds of trust.

According to this proposal, Continental would for a fee act as trustee under deeds of trust securing loans made or acquired by nonaffiliated banks and financial institutions, providing the additional services such as those provided for the Bank itself. The expanded activities would be conducted from Continental's existing offices but would service lenders in both California and other states.

The proposed new activities would be conducted from its existing offices at 3800 West Chapman Avenue, Orange, California. Your letter states that in California, Continental may engage in its present and proposed activities without the need to obtain any state licenses and with further capital.

In your letter, you pointed out that Continental commenced its present activity in 1955 following notification to the Comptroller. In a letter dated December 10, 1973, the Comptroller confirmed Continental's status as an operating subsidiary and its authority to engage in its present activities. The Bank has been authorized by the Comptroller to exercise trust powers under 12 U.S.C. § 92(a), a power which Continental, as an operating subsidiary of the Bank, has been exercising in the performance of its activities.

We agree that the proposed activities are permissible for a national bank as an aspect of trust powers granted by 12 U.S.C. § 92a. Under 12 C.F.R. § 5.34 a national bank may engage in activities which are a part of or incidental to banking by means of an operating subsidiary. Based on the foregoing, Continental may extend the trustee activities discussed above to other lenders.

Very truly yours,  
Michael Patriarca  
Deputy Comptroller for Multinational Banking



1 of 1 DOCUMENT

DEPARTMENT OF THE TREASURY  
OFFICE OF THE COMPTROLLER OF THE CURRENCY

OCC UNPUBLISHED INTERPRETIVE LETTER

REFERENCE: 12 USC 92a  
12 CFR 9

Comptroller of the Currency  
Administrator of National Banks  
Washington, DC 20219

John D. Lowery  
Riddell Williams P.S.  
1001 Fourth Avenue Plaza  
Suite 4500  
Seattle, Washington 98154-1065

Interpretive Letter # 973  
September 2003

August 12, 2003

LENGTH: 2114 words

Subject: Fiduciary Powers of U.S. Trust Company, N.A.

TEXT: Dear Mr. Lowery:

By letter dated July 16, 2003, you have requested, on behalf of U.S. Trust Company, N.A. (the "Bank"), a letter from the OCC confirming the authority of the Bank to serve, in California, as indenture trustee for municipal bonds issued in the State of Washington. This letter replies to the three specific questions you have posed and confirms that the Bank has that authority.

Background

The Bank is a national bank that has been authorized by the OCC to exercise trust powers. You have informed us that the bank served as indenture trustee for bonds issued in October of 2000 by the Holmes Harbor Sewer District, a municipal water and sewer district organized and existing under the laws of the State of Washington ("HHSD"). Sometime in late 1999 or early 2000, HHSD decided to issue municipal bonds to finance the acquisition of land and construction of utility infrastructure in a utility local improvement district ("ULID") formed by HHSD and located in Everett, Washington, outside HHSD's geographic boundaries.

In connection with the issuance of the bonds, HHSD retained two law firms, one located in California and one in Washington, to act as bond counsel; both bond counsel also acted as special disclosure counsel to HHSD. HHSD also contracted with an underwriter, IBIS Securities ("IBIS"), for a negotiated underwriting; IBIS retained its own underwriter's counsel. These parties also drafted all disclosure documents for investors.

In mid-September 2000 (approximately one month before the HHSD bonds were issued), U.S. Trust was approached by IBIS in California and asked to serve as indenture trustee for the HHSD bonds. U.S. Trust was provided with the opinion letters of two bond counsel stating that the ULID was validly formed, that the bonds were revenue bonds (it is undisputed that the issuer had authority under Washington law to appoint a private trustee if the bonds were revenue bonds), that HHSD had authority to issue the bonds, and that HHSD had authority to execute the indenture. U.S. Trust received these opinions prior to executing the indenture and relied on them in executing the indenture, as is the custom and practice of the industry. HHSD made similar representations in the Certificate of the Issuer executed at closing.

On October 26, 2000 (the date the bonds closed), the Bank executed an indenture with HHSD (a customer located in the State of Washington). The indenture authorized the Bank to conclusively rely on any certificate, opinion (including bond counsel opinions) or other document believed by it to be genuine and to have been signed or presented by the proper party, and provided that the Bank undertook no responsibility with respect to any information, statement or recital in any official statement, offering memorandum or any other disclosure material prepared or distributed with respect to the Bonds. The indenture also provided that all representations in the indenture were the statements of HHSD.

At all times prior to the bond issuance and while the Bank was servicing the HHSD trust account, the Bank's trust office was located in San Francisco. The Bank did not at that time (and does not currently) maintain a trust office in Washington. The Bank responded from its office in San Francisco to a request that the Bank serve the customer located in Washington.

The Bank asks the OCC to answer three specific questions, which are set forth, together with their answers, in the remainder of this letter.

#### Analysis

##### 1. Are the Bank's fiduciary trust powers and authority to act as trustee governed by Federal law or by state law?

The Bank's fiduciary powers are governed by Federal law and derive from 12 U.S.C. § 92a and Part 9 of the OCC's regulations. The statutory authority for national banks to exercise fiduciary powers is contained in 12 U.S.C. § 92a. Section 92a permits national banks to exercise fiduciary powers with OCC approval, n1 and directs that the fiduciary powers available to a national bank are determined by reference to state law. Section 92a(a) provides:

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

The grant of statutory authority in Section 92a does not limit where a national bank may act in a fiduciary capacity. Accordingly, our regulations expressly provide that a national bank may act in a fiduciary capacity in any state. n2

n1 See 12 C.F.R. § 5.26, as amended by 66 Fed. Reg. 34792, 34797 (July 2, 2001) (licensing requirements for fiduciary powers).

n2 12 C.F.R. § 9.7(a). *Id.* For a discussion of the analysis on which § 9.7 is based, see 66 Fed. Reg. 34792, 34794-96 (July 2, 2001) (preamble to final rule adopting § 9.7). See also OCC Interpretive Letter No. 695 (December 8, 1995) (IL 695) (analyzing national banks' authority to engage in fiduciary activities in multiple states); OCC Interpretive Letter No. 872 (October 28, 1999) (IL 872) (concluding that a national bank in Ohio may solicit and conduct a trust business in California and that State laws that purport to prohibit the bank from engaging in these activities were preempted).

In addition, Section 92a imposes no limitations on where the bank may market its services, where the bank's fiduciary customers may be located, or where property being administered is located. Once the state in which a national bank is acting in a fiduciary capacity is identified, the fiduciary services may be offered regardless of where the fiduciary

customers reside or where property that is being administered is located. Our regulation codifies this conclusion, stating that while acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to customers in other states. n3 In addition, a national bank may act as fiduciary for relationships that include property located in other states. n4

n3 *Id.* at § 9.7(b).

n4 *Id.*

2. *Would California law or Washington law be the applicable state law incorporated into Federal law for purposes of determining the fiduciary capacity in which the Bank may act under 12 U.S.C. § 92a for customers located in the state of Washington?*

As we have described, a national bank looks to state law to determine which fiduciary capacities are permissible. For this purpose, the relevant law is the law of the state in which the national bank acts, or proposes to act, in a fiduciary capacity. n5

n5 *Id.* at § 9.7(d).

Part 9 of the OCC's regulations also clarifies that the state in which a bank acts in a fiduciary capacity for any given fiduciary relationship is the state in which the bank performs the core fiduciary activities of accepting fiduciary appointments, executing documents that create the fiduciary relationship, or making decisions regarding the investment or distribution of fiduciary assets. n6 For each fiduciary relationship, a national bank will refer to only one state's laws for purposes of defining the extent of its fiduciary powers pursuant to Section 92a.

n6 *Id.* If, with respect to a particular fiduciary relationship, these core fiduciary activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity will be the state that the bank designates from among those states.

With respect to its fiduciary relationship with HHSD, the Bank acted in a fiduciary capacity in the state of California, since the core fiduciary activities of accepting the fiduciary appointment, executing the documents that created the fiduciary relationship, and making the decisions regarding the investment or distribution of fiduciary assets were all performed there. Based on the foregoing analysis, whenever the Bank acts in a fiduciary capacity in California, the Bank would look to the laws of that state to determine which fiduciary capacities it may engage in, and may then engage in any of these capacities for customers in other states. The fiduciary capacities permitted under the laws of other states where the Bank's customers are located, including Washington state law in this instance, do not affect the fiduciary capacities in which the Bank may act when it is acting in a fiduciary capacity in California.

3. *Given that a state can regulate its own municipal instrumentalities and political subdivisions, did the Bank nonetheless have full fiduciary trust powers and authority to act as trustee for customers located in any state (including, without limitation, Washington) if the Bank was authorized by Federal law to engage in fiduciary trust activities and assuming that the Bank complied with the applicable state law of California as incorporated into federal law granting the Bank such fiduciary trust powers and authority?*

If the Bank may act as an indenture trustee under Section 92a, the Bank is authorized to act as an indenture trustee on a multistate basis. As expressly provided in our regulation, the laws of any state other than California -- including Washington -- that purport to limit or establish preconditions on the exercise of that fiduciary power are not applicable to the Bank. n7 A state's authority to regulate the instrumentalities of its own government (for example, by state laws restricting the types of trustees, or other fiduciaries, those state government instrumentalities may appoint), is a separate matter, wholly independent of, and not affecting, the fiduciary authorities granted to national banks as a matter of Federal law. Thus, the Federal authority of a national bank to act as a trustee (or to act in any other permissible fiduciary capacities) is not affected by such statutes.

n7 *Id.* at § 9.7(e). See also IL 872.

We note that certain other provisions in Section 92a expressly require the application of state law in certain areas affecting a national bank's exercise of fiduciary powers. n8 For instance, a state's laws governing certain operational requirements are made applicable to national banks by Sections 92a(f), (g), and (i). Section 92a(c) grants state banking authorities limited access to OCC examination reports relating to national bank trust departments. However, as provided in our regulations, n9 in each case where Section 92a applies state law to national banks, it is the law of the state where the national bank is acting in a fiduciary capacity -- here, California law.

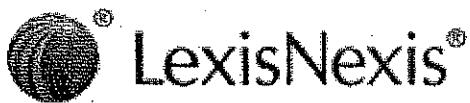
n8 It should be noted that some national banking laws, including Section 92a, incorporate elements of state law and make them part of the Federal law applicable to national banks. However, the determination of what elements of state law are incorporated is a question of Federal law. Once it is determined, other parts of state law -- even on the same subject matter -- are not incorporated and so are subject to the usual national bank preemption analysis. Cf. *Independent Bankers Ass'n of America v. Clarke*, 917 F.2d 1126 (8th Cir. 1990); *Department of Banking & Consumer Finance v. Clarke*, 809 F.2d 266 (5th Cir.), cert. denied, 483 U.S. 1010 (1987). In these decisions, state laws that applied the state's commercial bank branching laws to national banks were found to conflict with the Federal branching authority of the McFadden Act, even though the McFadden Act refers to state law. Similarly, Section 92a refers to state law but does not include all state law governing fiduciary activities.

n9 12 C.F.R. § 9.7(e)(1).

I trust that the foregoing is responsive to the questions you have asked. Please feel free to contact Andra Shuster, Counsel, at (202) 874-4694 should you have further questions.

Sincerely,

*Julie L. Williams*  
Julie L. Williams  
First Senior Deputy Comptroller and Chief Counsel



4 of 4 DOCUMENTS

DEPARTMENT OF THE TREASURY  
OFFICE OF THE COMPTROLLER OF THE CURRENCY

OCC UNPUBLISHED INTERPRETIVE LETTER

REFERENCE: 12 USC 92a

Comptroller of the Currency  
Administrator of National Banks  
Washington, DC 20219

Interpretive Letter # 995  
July 2004

June 22, 2004

LENGTH: 1936 words

Subject: Fiduciary Powers of [NB]

TEXT: Dear TEXT IS CONFIDENTIAL:

By letter dated January 30, 2004, you have requested, on behalf of [NB] (the "Bank"), confirmation of certain aspects of the Bank's fiduciary powers. This letter responds to the Bank's request.

Background

Your letter represents that the Bank wishes to implement a national fiduciary program to market, advertise, solicit, and deliver its trust and fiduciary services throughout the U.S., including in those states where it does not have a branch. The Bank may establish a full-service trust office or trust representative office in one or more of these states. In states where the Bank believes it can develop a market for its fiduciary services, it intends to engage in the following activities, with respect to individuals and institutions (corporate as well as public): review and execute documents creating the fiduciary relationship; administer, manage, and distribute fiduciary assets in accordance with the law of the situs or law designated in the trust agreements; provide investment advice; make decisions regarding the investment and distribution of fiduciary assets; and reflect situs of trust assets state-by-state on its trust systems while holding such assets at one or more central locations. In addition, pursuant to the program, the Bank will conduct other marketing and solicitation activities in all states.

As set out below, we confirm that the Bank has the authority to implement the national fiduciary program described herein. We also confirm that any state law, other than a law made applicable by 12 U.S.C. § 92a, that limits or establishes preconditions on the exercise of the fiduciary powers that are to be exercised as part of that program is not applicable to the Bank.

Analysis

1. As a national bank that has been granted fiduciary powers by the OCC, the Bank is authorized under the federal banking laws to (i) act in any and all fiduciary capacities and (ii) exercise any and all fiduciary powers in any state in which it acts, or proposes to act, in a fiduciary capacity, to the same extent granted under applicable state laws to state fiduciaries that come into competition with national banks in such state.

The Bank's fiduciary powers are governed by federal law and derive from *I2 U.S.C. § 92a* and Part 9 of the OCC's regulations. Section 92a permits national banks to exercise fiduciary powers with OCC approval, n1 and directs that the types of fiduciary powers available to a national bank are determined by reference to state law. Section 92a(a) provides:

n1 See 12 C.F.R. § 5.26 (licensing requirements for fiduciary powers).

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

Section 92a(b) provides that whenever state law permits state fiduciaries to exercise any of the eight fiduciary powers set forth in Section 92a(a), a national bank's exercise of those powers is deemed not to be "in contravention of State or local law."

Thus, a national bank looks to state law to determine which fiduciary capacities are permissible. For this purpose, the relevant law is the law of the state in which the national bank is located, which the OCC has interpreted to mean the state in which the national bank acts in a fiduciary capacity. n2

n2 12 C.F.R. § 9.7(d).

Part 9 of the OCC's regulations clarifies that the state in which a bank acts in a fiduciary capacity for any given fiduciary relationship is the state in which the bank performs the key fiduciary activities of accepting fiduciary appointments, executing documents that create the fiduciary relationship, or making decisions regarding the investment or distribution of fiduciary assets. n3 For each fiduciary relationship, a national bank will refer to only one state's laws for purposes of defining the extent of its fiduciary powers pursuant to Section 92a. The Bank would look to the laws of that state to determine which fiduciary capacities it may engage in, and may then engage in any of these capacities for customers both in that state and in other states. The fiduciary capacities permitted under the laws of other states where the Bank's *customers* are located do not affect the fiduciary capacities in which the Bank may act.

n3 *Id.* If, with respect to a particular fiduciary relationship, these key fiduciary activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity will be the state that the bank designates from among those states.

We note that certain other provisions in Section 92a also expressly require the application of state law in certain areas affecting a national bank's exercise of fiduciary powers. n4 For instance, a state's laws governing certain operational requirements are made applicable to national banks by Sections 92a(f), (g), and (i). Section 92a(c) grants state banking authorities limited access to OCC examination reports relating to national bank trust departments. However, as provided in our regulations, n5 in each case where Section 92a applies state law to national banks, it is for each fiduciary relationship, the law of the state where the national bank is acting in a fiduciary capacity for that relationship.

n4 It should be noted that some national banking laws, including Section 92a, incorporate elements of state law and make them part of the federal law applicable to national banks. However, the determination of what elements of state law are incorporated is a question of federal law. Once it is determined, other parts of state law -- even on the same subject matter -- are not incorporated and so are subject to the usual national bank preemption analysis. Cf. *Independent Bankers Ass'n of America v. Clarke*, 917 F.2d 1126 (8th Cir. 1990); *Department of Banking & Consumer Finance v. Clarke*, 809 F.2d 266 (5th Cir.), cert. denied, 483 U.S. 1010 (1987). In these decisions, state laws that applied the state's commercial bank branching laws to national banks were found to conflict with the federal branching authority of the McFadden Act, even though the McFadden Act refers to state law. Similarly, Section 92a refers to state law but incorporates only those state laws governing fiduciary activities to which it refers.

n5 12 C.F.R. § 9.7(e)(1).

The grant of statutory authority in Section 92a does not limit where a national bank may act in a fiduciary capacity. Accordingly, our regulations expressly provide that a national bank may act in a fiduciary capacity in any state. n6 Further, a national bank may establish trust offices or trust representative offices in any state. n7

n6 12 C.F.R. § 9.7(a). For a discussion of the analysis on which § 9.7 is based, see 66 Fed. Reg. 34792, 34794-96 (July 2, 2001) (preamble to final rule adopting § 9.7). See also OCC Interpretive Letter No. 695 (December 8, 1995) (IL 695) (analyzing national banks' authority to engage in fiduciary activities in multiple states); OCC Interpretive Letter No. 872 (October 28, 1999) (IL 872) (concluding that a national bank in Ohio may solicit and conduct a trust business in California and that state laws that purport to prohibit the bank from engaging in these activities were preempted).

n7 12 C.F.R. § 9.7(c).

In addition, Section 92a imposes no limitations on where the bank may market its services, where the bank's fiduciary customers may be located, or where property being administered is located. Once the state in which a national bank is acting in a fiduciary capacity is identified, the fiduciary services may be offered regardless of where the fiduciary customers reside or where property that is being administered is located. Our regulation codifies this conclusion, stating that while acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to customers in other states. n8 In addition, a national bank may act as fiduciary for relationships that include property located in other states. n9

n8 12 C.F.R. § 9.7(b).

n9 *Id.*

2. *The Bank is legally authorized under the federal banking laws to receive any appointment to act in a fiduciary capacity permitted for state fiduciaries in the state in which the Bank acts in a fiduciary capacity. State statutes that provide that only state-chartered fiduciaries, national banks principally located in the state, or national banks with branches in the state may exercise fiduciary powers in certain contexts are preempted.*

As discussed above, to determine which fiduciary capacities it may exercise, a national bank looks to the laws of the state in which it acts in a fiduciary capacity. The Bank has the authority under federal law to receive any appointment to act in any fiduciary capacity permitted for state fiduciaries in the state in which the Bank acts in a fiduciary capacity, that is, the state in which it performs one or more of the key fiduciary functions. Also as previously noted, national banks may act in a fiduciary capacity on a multi-state basis. Thus, under federal law, the Bank may act in a fiduciary capacity in State A for customers residing in State B and may receive any appointment (even from customers in other states) to act in a fiduciary capacity that state fiduciaries in State A may receive.

As you noted, some state statutes limit the type of entity that may perform fiduciary functions in certain circumstances to state-chartered fiduciaries, national banks principally located in the state, or national banks with branches in the state. Our regulations provide that with the exception of those state laws specifically referenced in Section 92a, any other state laws limiting or establishing preconditions on the exercise of fiduciary powers by a national bank are not applicable to national banks. n10 Because the types of state statutes you referenced would generally have the effect of limiting or establishing preconditions on a national bank's exercise of its fiduciary powers, they would be preempted.

n10 12 C.F.R. § 9.7(e)(2).

We note, however, that while a national bank may have the federal authority to act as a trustee and in various other fiduciary capacities (as determined by reference to the laws of the state in which it is acting in a fiduciary capacity), that authority *does not* determine whether a state instrumentality has authority under its governing state statutes to contract with the national bank for fiduciary services.

I trust that the foregoing is responsive to your request. Please feel free to contact Andra Shuster, Counsel, at (202) 874-4694 should you have further questions.

Sincerely,  
Julie L. Williams

First Senior Deputy Comptroller and Chief Counsel