FORECLOSED JUSTICE: CAUSES AND EFFECTS OF THE FORECLOSURE CRISIS (PART I & II)

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

DECEMBER 2, 2010 AND DECEMBER 15, 2010

Serial No. 111–158

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

FORECLOSED JUSTICE: CAUSES AND EFFECTS OF THE FORECLOSURE CRISIS (PART I & II)

FORECLOSED JUSTICE: CAUSES AND EFFECTS OF THE FORECLOSURE CRISIS (PART I & II)

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

DECEMBER 2, 2010 AND DECEMBER 15, 2010

Serial No. 111–158

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

62–935 PDF WASHINGTON : 2011

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

JOHN CONYERS, JR., Michigan, *Chairman*

HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
WILLIAM D. DELAHUNT, Massachusetts
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO PIERLUISI, Puerto Rico
MIKE QUIGLEY, Illinois
JUDY CHU, California
TED DEUTCH, Florida
LUIS V. GUTIERREZ, Illinois
TAMMY BALDWIN, Wisconsin
CHARLES A. GONZALEZ, Texas
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SÁNCHEZ, California
DANIEL MAFFEI, New York
JARED POLIS, Colorado

LAMAR SMITH, Texas
F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
DANIEL E. LUNGREN, California
DARRELL E. ISSA, California
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TOM ROONEY, Florida
GREGG HARPER, Mississippi

PERRY APELBAUM, *Majority Staff Director and Chief Counsel*
SEAN MCLAUGHLIN, *Minority Chief of Staff and General Counsel*

C O N T E N T S

Page

HEARING DATES

(PART I)

DECEMBER 2, 2010

OPENING STATEMENTS

WITNESSES

Page

(PART II)

DECEMBER 15, 2010

OPENING STATEMENTS

WITNESSES

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

FORECLOSED JUSTICE: CAUSES AND EFFECTS OF THE FORECLOSURE CRISIS (PART I)

THURSDAY, DECEMBER 2, 2010

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:12 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Boucher, Jackson Lee, Waters, Cohen, Quigley, Chu, Deutch, Gonzalez, Sánchez, Smith, Coble, Goodlatte, Issa, Forbes, Franks, Gohmert, and Chaffetz.

Staff Present: (Majority) Perry Apelbaum, Majority Staff Director and Chief Counsel; Susan Jensen, Counsel; James Park, Counsel; Reuben Goetzl, Clerk; and Zachary Somers, Minority Counsel.

Mr. CONYERS. Good morning. The Committee will come to order. We are going to begin by thanking our three colleagues who will not be returning to Congress next year for their fine and outstanding contributions to the Committee. The first is Rick Boucher who has been with us since he arrived in 1983. Actually, the third most senior Member on the Committee, who has served on Energy and Commerce simultaneously for most of that time. And he has always been able to be counted on for bringing to us a thoughtful perspective to many of the sensitive issues that are dealt with on the House Judiciary Committee.

I have got a number of issues that he has championed: The Free Flow of Information Act, Satellite Home Viewers Act, he did a lot of work on the PATRIOT Act, and we have always been able to count on him for an honest evaluation of the many problems that we have dealt with. And his absence will be missed greatly. The next is Bill Delahunt from Massachusetts, a former prosecutor, who authored the Innocence Protection Act, has worked the last couple of congressional sessions on the Foreign Affairs Committee. He has championed equity state sales tax levies. And we remember him also for joining our other colleague, Mel Watt, who is not leaving, in creating the states rights caucus, and we had some interesting contributions there.

And finally, Dan Maffei, who was only with us for one term, but he took the lead in saving hundreds of dealerships at General Motors and Chrysler, and he helped strengthen legislation to protect employees and retirees caught up in bankruptcies. Dan has a great opportunity, and he has clearly enjoyed being with us. We hope he can return. And I will yield to my Ranking Member, Mr. Smith, Lamar, for any comments he may want to make about departing Members.

Mr. SMITH. Thank you, Mr. Chairman. I really just want to echo your comments and sentiments, because I agree with you 100 percent. Mr. Delahunt is not here and Mr. Maffei is not here, so I won't dwell on them to the extent that I might have otherwise. But I do want to single out Rick Boucher as someone who has been a friend over many years, someone who has worked with me, and I with him, on any number of issues, particularly those issues involving the subject of high tech and patent reform and telecommunications as well.

He is an expert in many, many areas. And oftentimes to hear him speak about those issues is to hear an unwritten Ph.D thesis. And I often feel like it could be taken down and turned in as such. And we agree on so many issues. I won't mention the DMCA because there are so many other issues we agree on. But he will be missed as well, both his manner and his intelligence. But I do hope he stays in touch with this Committee and with you and me, Mr. Chairman, as well, because the friendship that we have with Mr. Boucher needs to continue and I am sure it will. And I will yield back.

Mr. CONYERS. Thank you very much, Lamar. Is there any other Member disposed to make a comment?

Mr. FORBES. Mr. Chairman.

Mr. CONYERS. Yes, of course. The gentleman is recognized.

Mr. FORBES. Mr. Chairman, I would just like to echo what both of you said about Rick Boucher, and that is with no slight to the other Members, but I have enjoyed serving with Rick over the years in the Virginia delegation. And everything the Ranking Member said about his demeanor and his expertise has been so true. We have had a great working relationship and a great friendship. And Rick, we just appreciate your service, not only to the country, but to the Commonwealth of Virginia.

Mr. CONYERS. Well, spoken like a true Virginian, Randy Forbes. If there are no other comments——

Mr. GONZALEZ. Mr. Chairman.

Mr. CONYERS. Yes, Judge Gonzalez, Texas.

Mr. GONZALEZ. And I will be brief. But I have had the great privilege of knowing Rick now and serving with him both on Judiciary and Energy and Commerce. It has been an incredible experience. One, he is such a good friend. But to have a friend who is also a mentor is just the most incredible combination you can have, especially a Member of Congress. You are going to be missed, Rick.

But my sense is that hopefully we still will be in contact because we have so much to still learn from you on a continuing basis. Again, it has been great, and I just wish you were still coming back next year and standing with us as we all got sworn in, as we get sworn in in January. Thank you, Mr. Chairman. I yield back.

Mr. CONYERS. Thank you very much, Mr. Gonzalez. Today's hearing is entitled Foreclosed Justice: Causes and Effects of the Foreclosure Crisis. And I and Lamar Smith want to begin with some observations. You know, reports began to surface about fraudulent foreclosure documentation issues several months ago. In The Washington Post, the comment was, The Nation's Overburdened Foreclosure System is Riddled With Faked Documents, Forged Signatures and Lenders Who Take Shortcuts Reviewing Borrowers Files. We learned about the robo-signers that mortgage servicers utilize who sign off on thousands of foreclosure documents a month without ever verifying the accuracy of the information contained in those statements. And there have been other reports. Servicers seeking to foreclose on properties when they lacked proof of title to do so. Affidavits notarized outside the presence of the signer. Notarizations by individuals who had no legal authority to do so. Affidavits asserting conflicting facts signed by the same individual. Unfortunately, this problem is really not news to us.

In 2007, the Commercial and Administrative Law Subcommittee of this Committee received testimony from one of the Nation's most respected consumer bankruptcy practitioners about the problems of mortgage lenders foreclosing without having documentation to support any entitlement to do so.

So we are here today not just about faulty paperwork problems, and about the need to stop the flood of unnecessary foreclosures that is ravaging across this Nation, our neighborhoods, communities, towns and cities.

And so we have three issues that are in the front of my mind as we proceed: What caused the current foreclosure problem? Initially, predatory lending practices and lax lending standards played a major role. Some lenders specifically targeted minority communities by pushing families into high interest rate mortgages that they could obviously not afford, a sort of form of reverse redlining.

And so this practice devastated communities of color across the Nation and created a higher incidence of foreclosures. As a matter of fact, many economists have attributed the subprime mortgage practice as what triggered the whole bubble collapsing. For example, one out of every eight Wells Fargo loans in predominantly Black neighborhoods have gone into foreclosure compared with one in 59 such loans in White neighborhoods. As these subprime mortgages, of course with escalating interest rates, matured, homeowners couldn't any longer afford the mortgage payments and began to default. And as more homes fell into foreclosure, the prices of homes in surrounding areas obviously became more depressed.

And what exacerbated all of this was, in some places, the massive loss of jobs. Take Detroit, for example, where with the collapse of the automobile industry this exaggerated and further emphasized home loss because a lot of people lost their homes because they lost their jobs and foreclosure was inevitable. But even prior to the recent recession, many working families found it difficult to meet their housing obligations. And after the latest recession, the bottom fell out of the housing market, the value of home prices fell even more precipitously in many areas of the U.S. Many families as a result are now struggling to repay mortgages for homes that are worth less than what they owe. They are under water. And the crisis has been compounded by the lending industry's steadfast refusal to modify home mortgages to save them from foreclosure.

Ironically, many of the beneficiaries of the stimulus and TARP and bailout are still not lending money to small homeowners. As of last year, 2½ million homes were lost to foreclosure. Current projections estimate that by the time this foreclosure crisis abates, as many as 13 million homes will ultimately be lost to foreclosure. And yet on Wall Street, mortgage lenders and servicers and Fannie Mae and Freddie Mac, all of whom received taxpayer bailouts to the tune of billions of dollars over the last 2 years, have, in many instances, turned a blind eye toward homeowners in similar financial distress.

Under every program established to date, homeowners must rely on the willingness of lenders to modify mortgage terms to save their homes. The HAMP, Home Affordable Mortgage—Home Affordable Modification Program, a $75 billion incentive program designed to encourage participating lenders to sign a contract with the United States Treasury to modify mortgages, has had few—well, I won't say they haven't had any result, but it is so modest it is hardly worth talking about. Out of many millions of homes lost or headed to foreclosure, half, less than half a million mortgages have been successfully modified under this program.

We hear report after report that homeowners are drowning in bank bureaucracy with lost documents, unexplained rejections, and some of them just closed down, period, and vanished. You can't even get them on the phone, and they aren't even in their business location any longer. And so many homes are rushed through foreclosure without homeowners having a realistic opportunity to restructure the mortgage.

Now, in light of these disclosures about inaccurate foreclosure documents, we have to ask, do these institutions legally have the right to foreclosure at all? And that has been answered by at least one Federal judge who will testify about the numerous documentation problems encountered at the trial court level.

I will skip—let me conclude. The question that overrides the hearing is what can we do about the foreclosure problem and the continuing problem of high unemployment. And I will put some of those answers into the record. And thank you for your indulgence. And now I would like to yield to Lamar Smith of Texas, the Ranking Member of the House Judiciary Committee.

Mr. SMITH. Thank you, Mr. Chairman. The past few years have been a trying time for the U.S. housing market and American homeowners. The foreclosure crisis has had a devastating impact on the economy and regrettably has led to many Americans losing their homes. The crisis has its roots in poorly underwritten loans and unconventional mortgage products and has been compounded by high unemployment. Over the past few months, a new problem has emerged in the foreclosure crisis, the scandal that has erupted around the widespread mismanagement of foreclosure documents by lenders and mortgage servicers. The corners they have cut to keep up with the large and growing numbers of foreclosures are inexcusable.

For many Americans, a house will be the biggest purchase they ever make and their single largest asset. Given the importance of the purchase of a home, only strict compliance with State foreclosure laws is acceptable. Accordingly, regardless of whether borrowers have defaulted on their obligations, they are entitled to due process in foreclosure. This scandal is about more than sloppy and careless foreclosure practices, it is about due process, private property rights and the rule of law.

Fortunately, it appears the vast majority of defects and foreclosure documents that have been uncovered are technical in nature. The evidence indicates that despite the many unacceptable technical errors that have been made by and large foreclosures have only occurred in cases in which the homeowners were in default. In many instances, foreclosures take more than a year from start to finish giving the borrower ample time to discover any flaws in the documents supporting foreclosure. And in about one-third of all cases, borrowers have already abandoned their homes before their foreclosure process has even started. This does not minimize the seriousness of the industry wide mismanagement of foreclosure documents, but it does demonstrate that we must be careful in our response to the scandal.

The housing market is showing some signs of recovery. We need to avoid setting the recovery back by overreacting. Foreclosure rules and requirements are determined under State law. For this reason, attorneys general in all 50 States and the District of Columbia have launched an investigation into the foreclosure documentation problems. And I thank the State AGs for their efforts. It appears that their investigations may result in a settlement with mortgage servicers leading to a nationwide fund to help any homeowners who did suffer wrongful foreclosures.

However, the foreclosure document scandal has led some, including some Members of this Congress, to call for a nationwide moratorium on foreclosures. This approach, in my judgment, would be a mistake. All indications are that a nationwide moratorium would cause further harm to the already depressed U.S. housing market. Lenders and servicers must be held accountable for their mistakes, but we must also maintain the stability of the housing market. A moratorium on foreclosures will only serve to continue the significant uncertainty that this controversy has raised for potential home buyers and the housing market. At a time when purchases of foreclosed homes account for 25 percent of all sales, halting foreclosures could harm the economy and slow down the modest recovery further worsening unemployment.

The current foreclosure crisis has been devastating. No one wants to see these people lose their homes. Foreclosures not only uproot families and cause hardship to borrowers, but they also depress community property values and result in severe losses for lenders and investors. But now is the not the time for a quick fix approach like foreclosure moratoriums or allowing modification of home mortgages in bankruptcy. These so-called solutions will only cause more harm to the country's economy, and, in fact, delay the recovery. We need to focus on restoring the integrity of the foreclosure process in a manner that protects homeowners and does not disrupt the functioning of the housing market. Thank you, Mr. Chairman. I yield back.

Mr. CONYERS. Thank you, Lamar Smith. Is there any Member that is inclined toward just a brief observation? Let's see. I will start off with Mr. Cohen of Memphis, Tennessee.

Mr. COHEN. Thank you, Mr. Chairman. First of all, I want to say I appreciate your opening statement. And I concur on so many of your remarks and you have well gone through the history of the Committee and my Subcommittee, which I thank you for appointing me the Chair of, Commercial and Administrative Law, and the work we have done and we have looked at in this Congress. And I want to thank you for what you have done. I guess it is going to be the last Judiciary Committee for a while where you are Chairman. And you have been a great Chairman and shown great ability to work with both sides. And I have learned from you in my opportunity to be a Subcommittee Chair in doing that and trying to be fair to both sides and maintain. And I always think about how would Chairman Conyers handle this.

And I am sure that Ranking Member Smith has done the same thing, and you prepared him well. With that said, the subject matter is one that is so important to the American people. And I think this subject matter is probably as much as anything else what caused the change in the elections that took place. The American public was angry that nobody worried about the integrity of the lending practices or the integrity of the bankers or the integrity of the Wall Street folks who bundled all these mortgages and securitized them and made them so complex that nobody knew where they originated and made the problem of dealing with these foreclosures so difficult.

Rather than worry about the integrity of that process, we, and I did it too, because it was the right thing to do, and Chairman Frank said so appropriately, that it was what would be considered collateral benefit, that sometimes you have to help the people that caused the harm to help the whole system. And the collateral benefit went to Wall Street. But we put 700 and something billion dollars what was a bipartisan effort, President Bush's idea, and Secretary Paulson's, and a goodly number of Republicans and Democrats joined together to make a very difficult vote, but one that was necessary, but one that took care of keeping in place the people who perpetrated and were responsible for the foreclosure crisis, the unemployment situation in this country, and almost put this country and the world's economies under water.

We took care of those people who got the major salaries and the major bonuses and are living just as well on Wall Street; we didn't put any of them in jail, none of them suffered in any way whatsoever for morally reprehensible conduct and who benefited financially, to a great extent, and whose lives are better than ever. And yet the homeowner and the unemployed who need unemployment insurance and who need help with their mortgages are considered to be detritus, they are considered to be collateral damage, and nobody has cared about them.

But the fact is the Democratic Congress, and there probably were a few Republican votes with us, but predominately, this democratic Congress has cared and tried to help. I think that the modifications in bankruptcy is the answer, and it is so important, because nothing else has worked. And there needs to be somebody with a lever to help the homeowner, and nobody does. These people are the forgotten victims of all of this economic fallout. They are the purple hearts of this economy, and they are being forgotten about in terms of help with their foreclosures. And, yes, we might have to do some things that are unusual, but they have been put in this position by people who made subprime loans, who made deals that maybe they were too good to be true, but they made those offers and they were wrong and got people into loans and obligations greater than they could afford; they have lost their monies, their homes and a lot of excess cost that they otherwise would not have incurred if they were not lured into it.

Many have lost their jobs. And now that they need unemployment benefits, there are people that don't want to give it to them. What you do onto the least of thee you do onto me, and for those who have given much, much is expected. And at this time when Christians and Jews and Muslims all should be thinking about what we are privileged to have and those that may not be privileged to have were not doing it. We are thinking about what this Congress has seen and this Administration has been seeing, wrongfully so, I believe, by the public, is caring about those that have much and taking care of those that caused the problem and keeping them in their high lofts in Wall Street, and not caring about the little fellow.

And that is what we need to do. And we need to have modifications to mortgages and we need to act. And if we err, we need to err on the side of the people who have been injured and harmed. With that, I yield back the remainder of my time. And thank you, Mr. Chairman.

Mr. CONYERS. Thank you. Darrell Issa, would you care for a brief comment?

Mr. ISSA. I would, Chairman. Seldom do I get the opportunity to say to a Chairman of the other party how much I have enjoyed my tenure under your leadership, but today is one of those days. You have been fair, you have been firm and I am not going to miss you because I know you will be right there just one over. And I look forward to serving with you in the next Congress. With that, I will correct you on one thing in your opening statement, Mr. Chairman. You used the word billions for bailout, when, in fact, it is trillions. Freddie and Fannie, we took full faith obligation for those entities.

So, in addition to the 140 or so billion that they have been handed permanently, we are on the hook for every penny, something that I hope in the legal terms here, in the financial terms that the Committee on Financial Services and on the money, follow the money terms of the Government Oversight Committee, we can bring that to an end and never again put full faith behind somebody else's profit taking.

When we talk about Wall Street, let's remember Freddie and Fannie are Washington, D.C. Entities and not, in fact, Wall Street.

Mr. Chairman, the Home Affordability—Affordable Modification Program, or HAMP, must be ended. In its 20 months it has proven to delay the inevitable, it has proven to raise hopes only to be dashed, it has proven to be able to renegotiate only to have foreclosure return at every bit as high a rate. Mr. Chairman, in the 20 or so months that HAMP has been actively negotiating, they have—of the nearly 3 million opportunities that would have been granted, about 1½ million have begun; 1,395 trials have started; 719,000 or roughly half have been rejected; and 483,000 have been made permanent, of which nearly 10 percent have already redefaulted and expect that to rise three to fourfold.

During that period of time, the Obama administration, I believe in good faith, employed $22 billion in first time home buyer tax credits. Mr. Chairman, my Committee next door follows the money, this Committee follows the law. In this case, when you look at $22 billion in first time home buyer credits, without looking at what the true price of those homes should be, without those homes having reached their value, what we have done is had a new round of thousands or actually millions of new home buyers buy homes that are still sinking in value.

We must not complain about the number of foreclosures or sales, we must, in fact, look at HAMP and other programs and say, what are they doing to increase, dramatically increase the number of foreclosures if appropriate and legally reviewed, which is certainly something that has not yet been proven that the banks are willing to do accurately at 100 percent level, but also the number of short sales, voluntary abandonments and the like.

The truth is the sooner that a property is transferred to a new owner, able to make the payments, able to maintain the home, the sooner that the precipitous drop in value stops. Abandoned homes, homes in which a home has been rented to somebody who is no longer the owner and homes which are being stripped systemically because there is a profit taking even after the home is in foreclosure, all of this dramatically reduces the value of the home. Every neighborhood in my community in which a home is in foreclosure it can be seen from the outside that the maintenance has stopped, that the lawns have gone dry and the like.

This is what we as Committees of jurisdiction must work on. The swift, accurate and legal execution of those mechanisms now existing or which may be created that will allow for the proper value of a home to be assessed, a homeowner able to meet that value, able to remain through some mechanism and those not able to quickly able to move on to appropriate housing, and that house, home, apartment, condo or the like, able to be put back into current maintenance.

Mr. Chairman, the tragedy in America today are the homes that sit idle, abandoned or in foreclosure and in ruin. I hope that in the next Congress, we will continue to work on a bipartisan basis to recognize that is what is stopping America's value of homes from reaching bottom, reaching a point in which people can make sound investments and begin rising.

I look forward to this hearing and to the next Congress of us working together to solve it. I thank the Chairman for his leadership, the Ranking Member for his leadership and yield back.

Mr. CONYERS. Thank you, Darrell Issa. The gentleman from Florida, Ted Deutch.

Mr. DEUTCH. Thank you, Mr. Chairman. And Mr. Chairman, I would like to thank you first for the opportunity you have given me in the short time——

Mr. CONYERS. Excuse me. Mr. Quigley, do you mind if he goes ahead of you?

Mr. QUIGLEY. Yes.

Mr. DEUTCH. Another opportunity that you and Mr. Quigley have provided in the short time that I have been here. I would also like to take time to recognize your tireless efforts on this issue. In reforming the foreclosure process and ensuring that it treats homeowners fairly and justly, this hearing has particular significance from my State of Florida with the second highest number of foreclosures in the country and where half of all borrowers owe more than their properties are worth.

The collapse of our Nation's economy and the meltdown of the housing market have unveiled systemic problems in the mortgage foreclosure system. There is much blame to go around, but it is incumbent upon us to work on solutions so that foreclosures are processed in a fair and equitable manner. Railroading homeowners through foreclosure processes that are quickly cobbled together to relieve court dockets of mounting foreclosures can and, as we have seen, often do disregard due process rights of homeowners.

In Florida, the State legislature has created foreclosure only in courts, meant to reduce the mounting backlog of more than 300,000 foreclosure cases by the end of 2011. In an effort to quickly relieve court dockets, however, evidentiary hearings are rarely provided to examine whether documents are correct or fraudulent. Hearing times are sometimes as short as 15 seconds; do you live in the home? Are you behind in your payments? And lawyers representing the banks often do not appear in court.

In addition, while the foreclosure proceedings move forward a mediation process begins. The dual track system in Florida often confuses homeowners with court and mediation documents and creates confusion for the borrower, whether they need to have legal representation at the foreclosure process, in the mediation process or both. This is not limited to Florida, and I hope that we will have an opportunity to hear from the panelists today. This accelerated judicial review system is fraught with opportunities for fraud and for the due process rights of homeowners to be trampled.

In addition, the Federal Government's loan modification programs fail to provide necessary incentives for banks to engage in the scope of large scale modifications that are necessary to fix the broken mortgage system. And with waves of foreclosures continuing to inundate the court system, Mr. Chairman, more needs to be done to keep people in their homes, to root out fraud and to protect the due process rights of people going through foreclosure.

I think that is what we will have an opportunity to pursue here today. And I thank you for holding this hearing and giving me this opportunity, and I yield back. Thank you, Mr. Chairman.

Mr. CONYERS. The Chair recognizes a senior Member of the Committee, the gentleman from North Carolina, Howard Coble, who is a Ranking Member on at least one of the Subcommittees.

Mr. COBLE. Thank you, Mr. Chairman. And I will be very brief. I want to associate myself with the comments of the distinguished gentlemen from California when he used two four letter "F" words to describe you, and those words were firm and fair. And I reiterate what Darrell said about that. I also want to associate myself with Darrell's comments. He is still here. When he said——

Mr. ISSA. Keep talking.

Mr. COBLE. I am saying it favorably. When he said, Mr. Chairman, one of the problems, and we all know this, is abandoned or vacant houses. When houses lie vacant and/or abandoned crime inevitably follows. So we need to be aware of that. And I thank you again for your leadership, Mr. Chairman, and yield back.

Mr. CONYERS. The gentleman from Illinois, Michael Quigley.

Mr. QUIGLEY. Thank you, Mr. Chairman. Much has been said already, I won't add to that, except to, I guess, a message to the financial institutions. In my view, this recent round of mistakes only adds insult to injury. But like many Members, my office in Chicago, our district offices, try to help our constituents on a case-by-case basis, those who are dealing with foreclosure. And there are many not-for-profit organizations in my city of Chicago that try to help people as well.

To sum up, how they have been treated by the financial institutions in their attempts to modify, they have been lied to, their information has been delayed, their information they received is inconsistent, incorrect and they have been abused a second time. This is often because of the trust involved here created an even worse situation for them because it has pushed the time clock well past their ability to catch up.

So what I would try to suggest to those institutions, and they haven't even treated our staffs well, they haven't returned phone calls. My colleague, Jan Schakowsky, and I had to have a forced meeting in which we said to these banks you need to return our phone calls, you need to respect our constituents who are facing foreclosure. It has gotten that bad.

So with all due respect, I would suggest that they need to—the respect that they get from the Members and the help they get from Congress, at the very least, ask them to treat our constituents, their clients, with that same respect. It has not happened, and I suggest that its time has come. Thank you.

Mr. CONYERS. Thank you. The Chair is pleased to recognize Bob Goodlatte, a senior Member of the Committee from Virginia.

Mr. GOODLATTE. Mr. Chairman, thank you very much, and thank you for holding this hearing on the Effect of Foreclosure, Its Causes and Effects in the Current Foreclosure Crisis. Currently, Federal, State and local law enforcement agencies are investigating the recently uncovered irregularities in the foreclosure processes used by some banks. These irregularities are very troubling and raise many questions about the validity of some foreclosures, as well as the validity of other chain of title transactions.

Or it is important that we meticulously gather the actual facts so that we can best solve the problems, broad accusations not backed by the facts will do little to help those who have been harmed by these errors.

In addition, any solutions to this problem should be tailored to the actual problem and not be so broad as to punish banks, including smaller community banks that likely play by the rules and completed the paperwork properly.

And I would like to associate myself with the comments of the gentleman from North Carolina, Mr. Coble, who noted that there are ongoing problems. If we simply have this entire system break down, there are many related problems that occur in terms of vacant houses, in terms of disruption of our financial markets, in terms of other things, it is much more important that we get this focused on making sure that each individual who is the subject of a foreclosure is treated fairly than it is that we do something to put a halt, as has happened in some places, to the entire foreclosure process for any lengthy period of time. Because that is going to have a far-reaching impact, not just on the individuals directly affected, but by every homeowner in the country and everyone who desires to become a homeowner in the country.

So I look forward to hearing from our expert witnesses today on this very important issue. And again I thank you, Mr. Chairman.

Mr. CONYERS. I thank you. We have with us on the panel, and we welcome them and commend them for their patience, Judge Winslow, Ms. Julie Williams, Mr. Ed DeMarco and Ms. Phyllis Caldwell, who is Chief of the Homeownership Preservation Office for the Department of Treasury. She is also a former president of the Washington area—the Washington Area Women's Foundation, President of Community Development Banking for Bank of America, and we welcome her as our first witness. And we would have—without objection, we will have all the statements entered into the record. And we will start off Ms. Caldwell with you.

Mr. GOODLATTE. Mr. Chairman, I hate to interrupt, but it has been brought to my attention that your good friend and the gentleman from Texas, Louie Gohmert, wanted to say a few words.

Mr. CONYERS. Judge Gohmert, excuse me, I didn't—I wasn't aware. The gentleman from Texas is welcome and recognized before we begin our witnesses. Please, forgive me.

Mr. GOHMERT. Because of my warm feelings when I waved earlier, it may have been seen as a gesture of howdy. But also your recognizing me underscores what Darrell Issa had said, we have disagreed politically over many things, but you have never been anything but gracious as Chairman toward me personally, and I will always be grateful. Thank you, Chairman. I did want to address a couple of things. My friend from across the aisle, that, because there is more Democrats, actually sits right next to me on this side of the aisle, had commented about the Wall Street bailout. And I know that things were well intentioned, I know it was under the Bush administration and I know that President Bush was responding to the urgency pushed on him by Treasury Secretary Paulson as Paulson pushed for the Paulson poultice to solve his friends on Wall Street's problems, but what happens when this body steps in to interrupt the rules, to interrupt the laws and the system that has been put in place, it sends things spiraling.

So I disagree with my friend from Tennessee, it was not necessary to spend $700 billion for a major green poultice to be placed on the problem on Wall Street. It arose because of greed. There were people taking advantage of the situation that had come up with a ridiculous way in which to gamble legally by putting together mortgages so you couldn't review the individual mortgages, you bought a package. And then you would buy insurance called credit default swaps. But we wouldn't require that you put anything aside in reserve to pay the insurance in the event the insurable event occurred. Those were all big mistakes. But you don't rush in and completely redesign the system by rewarding people's greed and say here is a green poultice to put on your hurt, you make them go through the system as it was set up called bankruptcy that was provided for in the Constitution and which was actually set in place when people realized the financier of the revolution, Mr. Morris, was in debtor's prison. And he was let out of prison once the bankruptcy laws were put in place.

AIG should have gone through, most of their departments were making money, let them go through reorganize. Instead of rewarding Goldman Sachs for their greed, they should have gone through bankruptcy. We created a bigger problem when we rushed in and rewarded the greed there.

Now, with foreclosure there are rules in place. And if people have not followed the rules in foreclosing, there need to be consequences that are set forth under the rules and in the court system. But by playing by the rules and not changing them after people have messed up, then we give certainty to the system and the economy heals much quicker than if we interrupt.

And it brings me to what really drove me off the bench as a district judge into wanting to legislate. And knowing that legislating from the bench was improper, I left and ran for the opportunity. But I found myself sentencing more and more women who were single moms who were charged with felony welfare fraud. And when you look to the heart of every case, it seemed to arrive from the same thing, or derive from the same thing. And that was that the great society legislation was so well intentioned they saw single moms, deadbeat dads not contributing, so let's help these single moms, let's give them a check for these children they are having out of wedlock where the deadbeat dad doesn't help.

What has happened over the last 45 years is we have lured young women out of high school into having babies only to find they can't live off that little check for one child, and then they would have another and another, the ones that would come before my court for welfare fraud. And they would finally realize, I am never going to get out of this rut, so maybe if I either sell drugs or if I get a job and don't tell the Federal authorities, maybe I can climb out of this hole. And it just seemed immoral that we, the well intentioned, as a Congress provided incentives to lure these young women away from their God-given potential into a rut from which there was no hope for most of them for getting out.

We should not be satisfied with good intentions. We need to look at the bigger picture, give incentives to reach potential, not lure people into a rut of indentured servitude to this Congress and to this Washington. The same thing with unemployment. Given 99 weeks, my goodness, if you can't find a job in 26 weeks in the area in which you are trained, then the incentives ought to be to retrain for a place where there is jobs, not let you sit home dreading the consequences for a year and a half later where there is still no jobs. That seems immoral to me.

And I am very concerned that we don't do something well intentioned with regard to foreclosures that end up doing more harm 40 years, 45 years from now, as I think we have done from the great society. We need to incentivize proper conduct, we need to enforce the fact that rules should be followed. And whether you are a foreclosure company, a mortgage company or a borrower, if you haven't played by the rules, then there is consequences.

And close with this example. A stockbroker said, or a stockbroker friend of his from California told him he needs the government to step in because he is going to lose his home. He has a $700,000 home and he can't make the payments. He said, well, we make basically the same thing, how can you afford a $700,000 home? He said, well, we had bought one before on a 12-month note, interest only at the end of the 12 months, and we could turn it and make a nice profit. So we did it with this one and now we can't make the interest payments and we are about to lose our home if the Federal Government doesn't step in.

They should have bought a $300,000 or $400,000 home instead of overstepping, and I don't think Congress should step in and help this guy keep his $700,000 home. We need to buy within our means, this Congress needs to act within its means and I think the world will be a better place because of it. Thanks for indulging me, Chairman.

Mr. CONYERS. Ms. Caldwell, you are still the first witness at this panel. And we are pleased that you will start off our discussion.

TESTIMONY OF PHYLLIS CALDWELL, CHIEF, HOMEOWNERSHIP PRESERVATION OFFICE, UNITED STATES DEPARTMENT OF THE TREASURY

Ms. CALDWELL. Thank you, Chairman Conyers, and Members of the Committee, again, as we discussed, the foreclosure problems that have recently come to light underscore the continued critical importance of the Making Home Affordable program launched by Treasury of which HAMP is a part. Preventing avoidable foreclosures through modifications and other alternatives to foreclosure continues to be a critical priority. Foreclosures dislocate families, disrupt the community and destabilize local housing markets. Over the last 20 months, we have developed rules and procedures to facilitate meaningful modifications and other foreclosure alternatives. We have urged servicers to increase staffing and improve customer service. We have developed specific guidelines and certifications on how and when homeowners must be evaluated for HAMP.

HAMP has strong compliance mechanisms in place to ensure that servicers follow program guidelines. Treasury has built procedural safeguards and appropriate communication standards within HAMP to minimize those instances where borrowers are dual-tracked, where they are being evaluated for HAMP at the same time they are being put through the foreclosure process.

Specifically, program guidelines require participating mortgage servicers of nonagency loans to evaluate homeowners for HAMP modifications before referring those homeowners to foreclosure; suspend any foreclosure sales against homeowners who have applied for HAMP modifications while their applications are pending; freeze all pending foreclosure actions when a borrower makes the first payment on a fully verified income trial plan; evaluate whether homeowners who do not qualify for HAMP or who have fallen out of HAMP qualify for alternative home retention or private modification programs; evaluate whether homeowners may qualify for a short sale or deed in lieu of foreclosure and provide a written explanation to any homeowner who is not eligible for HAMP modification and to delay the foreclosure sale for at least 30 days afterwards to give the homeowner time to appeal.

Servicers may not proceed to foreclosure sale until they have tried these alternatives. They must also issue a written certification to their foreclosure attorney or trustee stating, "All loss mitigation alternatives have been exhausted and a nonforeclosure option could not be reached."

On October 6th, Treasury clearly reminded servicers of this existing HAMP rule. And we have instructed our compliance team to review the ten largest servicers, processes and procedures for complying with these guidelines. If we find incidents of noncompliance, Treasury will direct servicers to take corrective action, which may include suspending those foreclosure proceedings and reevaluating the affected homeowners for HAMP.

In terms of compliance, it is important to remember that although Treasury administers HAMP, it does so through a voluntary contract with the servicer versus regulatory or enforcement agency authority. Thus, our compliance efforts are focused on ensuring that servicers are following the contractual requirements of their servicer participation agreements. Compliance remedies have included reevaluating loans for HAMP eligibility, resoliciting borrowers, enhancing servicer processes and providing additional training to staff.

To date, almost 1.4 million homeowners have started trial modifications and 520,000 have started permanent modifications. These homeowners have experienced a 36 percent median reduction in their mortgage payments or more than $500 a month. Consider that in the first quarter of 2009, nearly half mortgage modifications increased borrowers monthly payments or left payments unchanged. By the second quarter of 2010, 90 percent of mortgage modifications for the borrower lowered monthly payments. Homeowners today have access to more sustainable foreclosure prevention solutions. And HAMP uses taxpayer resources efficiently. Its pay-for-success design supports borrowers who are committed to staying in their homes and making monthly payments by paying out servicer, borrower and investor incentives over 5 years when the loan remains current. And the investor, not the taxpayer, retains the risk of borrower payment.

In conclusion, we believe the foreclosure problems underscore the continued need for servicers to focus on evaluating homeowners for all home retention options starting with HAMP. We appreciate the efforts of both Members of this Committee and our partners in the housing community in holding servicers accountable and improving HAMP's design and performance. I look forward to taking your questions. Thank you.

[The prepared statement of Ms. Caldwell follows:]

PREPARED STATEMENT OF PHYLLIS CALDWELL

Embargoed until delivery

Written Testimony of Phyllis Caldwell,
Chief of Homeownership Preservation Office,
U.S. Department of the Treasury
Hearing before the House Committee on the Judiciary on
"Foreclosed Justice: Causes and Effects of the Foreclosure Crisis"
December 2, 2010

Chairman Conyers, Ranking Member Smith, and Members of the Committee, thank you for the opportunity to testify today regarding issues surrounding mortgage servicing. This testimony will cover two key areas: first, the steps we are taking to ensure that servicers participating in the Making Home Affordable (MHA) program are adhering to program guidelines in light of the recent foreclosure issues, and second, the accomplishments of MHA to date and its impact on mortgage servicing.

The reports of "robo-signing", faulty documentation and other improper foreclosure practices by mortgage servicers are unacceptable. If servicers have failed to comply with the law, they should be held accountable. The Administration is leading a coordinated interagency effort to investigate misconduct, protect homeowners and mitigate any long-term effects on the housing market. While Treasury does not have the authority to regulate the foreclosure practices of financial institutions, nor to ensure that those practices conform to the law, it is working closely with agencies that do have such authority.

The Financial Fraud Enforcement Task Force, a broad coalition of law enforcement, investigatory, and regulatory agencies that brings together more than 20 federal agencies, 94 U.S. Attorneys Offices, and dozens of state and local partners, is working to ensure that foreclosure practices are thoroughly investigated and any criminal behavior is prosecuted. The Federal Housing Administration (FHA) has been reviewing servicers of loans it insures for compliance with loss mitigation requirements. Additionally, the Office of the Comptroller of the Currency has directed all large national bank servicers to review their foreclosure management processes – including file reviews, affidavit processing, and signatures – to ensure that the processes are fully compliant with all applicable state laws. The other independent banking regulatory agencies are doing similar reviews of institutions under their jurisdiction. Attached to my testimony is a fact sheet providing more detail concerning the activities of the coordinated interagency effort.

Because MHA and its first lien program, the Home Affordable Modification Program (HAMP), are pre-foreclosure programs, the recent reports of robo-signing of affidavits and improper foreclosure documentation do not directly affect the implementation of HAMP. But these documentation failures reflect the fact that servicers did not have the proper resources in place, nor did they have procedures and controls in place to prevent this crisis. As we have learned in implementing HAMP, servicers were historically structured and staffed to perform a limited role—primarily collecting payments. They did not have the systems, staffing, operational capacity or incentives to engage with homeowners on a large scale and offer meaningful relief from unaffordable mortgages.

The foreclosure problems underscore the continued critical importance of the Making Home Affordable Program launched by the Obama Administration. Preventing avoidable foreclosures through modifications and other alternatives to foreclosure continues to be a critical national priority. Foreclosure is painful for homeowners; it is also costly to servicers and investors. Foreclosures dislocate families, disrupt the communities, and destabilize local housing markets. For this reason, the Obama Administration launched the Making Home Affordable program in the spring of 2009, of which HAMP is a key component. HAMP is intended to prevent avoidable foreclosures by providing financial incentives to servicers, investors and borrowers to voluntarily undertake modifications of mortgages for responsible homeowners in a way that is affordable and sustainable over time. In cases where a modification is not possible, the participating servicers must consider other alternatives to foreclosure.

As a result, throughout the last 20 months, we have worked to develop systems and procedures to ensure that responsible homeowners are offered meaningful modifications and other foreclosure alternatives. To remedy servicer shortcomings, we have urged servicers to rapidly increase staffing and improve customer service. We have developed specific guidelines and certifications on how and when borrowers must be evaluated for HAMP and other loss mitigation options prior to foreclosure initiation. We have also continued our compliance efforts to ensure borrowers are fairly evaluated and that servicers conduct their operations in accordance with Treasury guidelines. MHA has strong compliance mechanisms in place to ensure that servicers follow our program's guidelines.

HAMP Procedural Safeguards and Compliance Efforts

Treasury has built numerous procedural safeguards in HAMP to avoid foreclosure sales. Specifically, program guidelines that became effective on June 1st require participating mortgage servicers of non-GSE loans to:

- Evaluate homeowners for HAMP modifications before referring them for foreclosure. The focus here is on early intervention. Servicers must reach out to all potentially eligible borrowers when they are only two months delinquent and there is a still a viable opportunity to save the loan;
- Suspend foreclosure sales against homeowners who have applied for HAMP modifications, while their applications are pending;
- Freeze all pending foreclosure actions when a borrower makes the first payment under a fully verified trial plan.
- Evaluate whether homeowners who do not qualify for HAMP (or who have fallen out of HAMP) qualify for alternative loss mitigation programs or private modification programs;
- Evaluate whether homeowners who cannot obtain alternative modifications may qualify for a short sale or deed-in-lieu of foreclosure; and
- Provide a written explanation to any borrower who is not eligible for modification and delay foreclosure for at least 30 days to give the homeowner time to appeal.

Servicers may not proceed to foreclosure sale unless and until they have tried these alternatives. They must also first issue a written certification to their foreclosure attorney or trustee stating that "all available loss mitigation alternatives have been exhausted and a non-foreclosure option could not be reached." On October 6, Treasury clearly reminded servicers of non-GSE loans of this existing requirement that they are prohibited from conducting foreclosure sales until these pre-foreclosure certifications are executed. It should be noted that the GSEs have similar guidelines for their HAMP modifications.

The MHA compliance program is designed to ensure that servicers are meeting their obligations under the MHA servicer contracts for loans where Fannie Mae or Freddie Mac is not the investor, and uses a variety of compliance activities to assess servicers from different perspectives. Treasury has engaged a separate division of Freddie Mac, Making Home Affordable-Compliance (MHA-C), to perform these compliance activities. Employing a risk-based approach, compliance activities are performed ranging generally monthly for servicers with the largest percentages of potentially eligible borrowers, to at least twice annually for the smaller-sized servicers.

Our compliance activities focus on ensuring that homeowners are appropriately treated in accordance with MHA guidelines. As the program has evolved, servicers have adapted their processes to incorporate MHA programs. Treasury has implemented non-financial remedies that have shaped servicer behavior in order to address the most vital issue: the ultimate impact on the homeowner.

As information regarding irregularities in servicer foreclosure practices arose, Treasury acted swiftly and instructed MHA-C to review the ten largest servicers' internal policies and procedures for completing these pre-foreclosure certifications before initiating the foreclosure proceedings, and to assess a limited sample of foreclosure sales that have occurred since the effective date of the guidance. The results of the review are not yet available. However, if MHA-C identifies any incidents of non-compliance with HAMP guidelines, Treasury will direct servicers to take appropriate corrective action, which may include suspending foreclosure proceedings and re-evaluating the affected homeowners for HAMP, as well as undertaking changes to servicing processes to help ensure that HAMP guidelines are followed prior to initiating the foreclosure process.

HAMP's Accomplishments and Its Impact on the Mortgage Industry

To date, HAMP has achieved three critical goals: it has provided immediate relief to many struggling homeowners; it has used taxpayer resources efficiently; and it has helped transform the way the entire mortgage servicing industry operates.

Twenty months into the program, close to 1.4 million homeowners have entered into HAMP trials and experienced temporary reductions in their mortgage payments. Of these, almost 520,000 homeowners converted to permanent modifications. These homeowners are experiencing a 36 percent median reduction in their mortgage payments—averaging more than $500 per month—amounting to a total, program-wide savings of nearly $3.7 billion annually for homeowners.

Early indications suggest that the re-default rate for permanent HAMP modifications is significantly lower than for historical private-sector modifications—a result of the program's focus on properly aligning incentives and achieving greater affordability. For HAMP modifications made in the fourth quarter of 2009, at six months, fewer than 10 percent of permanent modifications are 60+ days delinquent. According to the OCC's Mortgage Metrics Report, the comparable delinquency rates for non-HAMP modifications made in the same quarter were 22.4 percent. Regarding HAMP re-defaults, the OCC states, "These lower early post-modification delinquency rates may reflect HAMP's emphasis on the affordability of monthly payments and the requirements to verify income and complete a successful trial period."

Borrowers who do not ultimately qualify for HAMP modifications often receive alternative forms of assistance. Based on survey data from the eight largest servicers, approximately one-half of homeowners who apply for HAMP modifications but do not qualify have received some form of private-sector modification. Less than ten percent have lost their homes through foreclosure sales.

HAMP uses taxpayer resources efficiently. HAMP's "pay-for-success" design utilizes a trial period to ensure that taxpayer-funded incentives are used only to support borrowers who are committed to staying in their homes and making monthly payments, and the investor retains the risk of the borrower re-defaulting into foreclosure. No taxpayer funds are paid to a servicer or an investor until a borrower has made three modified mortgage payments on time and in full. The majority of payments are made over a three to five-year period only if the borrower continues to fulfill this responsibility. These safeguards ensure that spending is limited to high-quality modifications.

MHA Has Been a Catalyst—Setting the Benchmark for Sustainable Modifications

MHA has transformed the way the mortgage servicing industry deals with alternatives to foreclosure. Because of MHA, servicers have developed constructive private-sector options. Where there was once no consensus plan among loan servicers about how to respond to borrowers in need of assistance, HAMP established a universal affordability standard: a 31 percent debt-to-income ratio, which dramatically enhanced servicers' ability to reduce mortgage payments to sustainable levels while simultaneously providing the necessary justification to investors for the size and type of modification.

In the year following initiation of HAMP, home retention strategies changed dramatically. According to the OCC/ OTS Mortgage Metrics Report, in the first quarter of 2009, nearly half of mortgage modifications increased borrowers' monthly payments or left their payments unchanged. By the second quarter of 2010, 90 percent of mortgage modifications lowered payments for the borrower. This change means borrowers are receiving better solutions. Modifications with payment reductions perform materially better than modifications that increase payments or leave them unchanged.

Moreover, even holding the percentage payment reduction constant, the quality of modifications made by servicers appears to have improved since 2008. For modifications made in 2008, 15.8

percent of modifications that received a 20 percent payment reduction were 60 days or more delinquent three months into the modification. For modifications made in 2010, that delinquency rate has fallen almost in half, to 8.2 percent. The OCC's Mortgage Metrics Report from 2010:Q2 attributes the improvement in mortgage performance to "servicer emphasis on repayment sustainability and the borrower's ability to repay the debt."

Spurred by the catalyst of the HAMP program, the number of modification arrangements was nearly three times greater than the number of foreclosure completions between April 2009 and August 2010. More than 3.7 million modification arrangements were started, including the close to 1.4 million trial HAMP modification starts, more than 568,000 FHA loss mitigation and early delinquency interventions, and more than 1.6 million proprietary modifications by servicing members of the HOPE NOW Alliance.

Further, it is important to keep in mind that MHA is only one of many Administration housing efforts targeting these challenges: the Administration has also provided substantial support for the housing markets through support for Fannie Mae and Freddie Mac to help keep mortgage rates affordable; purchase of agency mortgage-backed securities; and an initiative to provide support and financing to state and local Housing Finance Agencies (HFAs). These HFAs provide, in turn, tens of thousands of affordable mortgages to first time homebuyers and help develop tens of thousands of affordable rental units for working families.

Responding to a Changing Housing Crisis

MHA was designed to be a versatile program. MHA includes a second lien modification program, a foreclosure alternatives program that promotes short sales and deeds-in-lieu of foreclosures, and an unemployment forbearance program. Treasury expanded HAMP to include FHA and Rural Development mortgage loans through the FHA-HAMP and RD-HAMP program, and also introduced a principal reduction option. Finally, Treasury introduced a program to allow the hardest-hit states to tailor housing assistance to their areas, and worked with FHA to introduce an option for homeowners with high negative equity to refinance into a new FHA loan if their lender agrees to reduce principal on the original loan by at least ten percent.

Second Lien Modification Program

The Second Lien Modification Program (referred to as 2MP) requires that when a borrower's first lien is modified under HAMP and the servicer of the second lien is a 2MP participant, that servicer must offer to modify the borrower's second lien according to a defined protocol. 2MP provides for a lump sum payment from Treasury in exchange for full extinguishment of the second lien, or a reduced lump sum payment from Treasury in exchange for a partial extinguishment and modification of the borrower's remaining second lien. Although 2MP was initially met with reluctance from servicers and investors who did not want to recognize losses on their second lien portfolios, as of October 3, 2010, Treasury has signed up seventeen 2MP servicers, which includes the four largest mortgage servicers, who in aggregate service approximately 60 percent of outstanding second liens. The program uses a third-party database to match second lien loans with first lien loans permanently modified under HAMP. Servicers are required to modify second lien loans within 120 days from the date the servicer receives the first lien and second lien matching information. The implementation of this database began over the summer. Five 2MP Servicers have already begun matching modified first liens with their corresponding second liens, while the other twelve are in some phase of developing systems capacity to do so. Information on the second lien program will be included in upcoming Monthly Servicer Performance Reports as data becomes available.

Home Affordable Foreclosure Alternatives Program

Any modification program seeking to avoid preventable foreclosures has limits, HAMP included. HAMP does not, nor was it ever intended to, address every delinquent loan. Borrowers who do not qualify for HAMP may benefit from an alternative program that helps the borrower transition to more affordable housing and avoid the substantial costs of a foreclosure. Under HAFA, Treasury provides incentives for short sales and deeds-in-lieu of foreclosure for circumstances in which borrowers are unable to complete the HAMP modification process or decline a HAMP modification. Borrowers are eligible for a relocation assistance payment, and servicers receive an incentive for completing a short sale or deed-in-lieu of foreclosure. In addition, investors are paid additional incentives for allowing some short sale proceeds to be distributed to subordinate lien holders. The Home Affordable Foreclosure Alternatives (HAFA) Program became effective on April 5, 2010.

Unemployment Program

In March 2010, the Obama Administration announced enhancements to HAMP aimed at unemployment problems by requiring servicers to provide temporary mortgage assistance to many unemployed homeowners. The Unemployment Program (UP) requires servicers to grant qualified unemployed borrowers a forbearance period during which their mortgage payments are temporarily reduced for a minimum of three months, and up to six months for some borrowers, while they look for a new job. Servicers are prohibited from initiating a foreclosure action or conducting a foreclosure sale (a) while the borrower is being evaluated for UP, (b) after a foreclosure plan notice is mailed, (c) during the UP forbearance or extension, or (d) while the borrower is being evaluated for or participating in HAMP or HAFA following the UP forbearance period. UP went in to effect August 1, 2010. Because no incentives are paid under UP, data reports will be based on servicer surveys.

Principal Reduction Alternative

The Administration announced further enhancements to HAMP in March 2010 by encouraging servicers to write down mortgage debt as part of a HAMP modification (the Principal Reduction Alternative, or PRA). Under PRA, servicers are required to evaluate the benefit of principal reduction and are encouraged to offer principal reduction whenever the net present value (NPV) result of a HAMP modification using PRA is greater than the NPV result without considering principal reduction. The principal reduction and the incentives based on the dollar value of the principal reduced will be earned by the borrower and investor based on a pay-for-success structure. Under the contract with each servicer, Treasury cannot compel a servicer to select PRA over the standard HAMP modification even if the NPV of PRA is greater than the NPV of regular HAMP. However, Treasury has required servicers to have written policies for PRA to help ensure that similarly situated borrowers are treated consistently. The program became operational October 1, 2010 and the four largest servicers have indicated an intention to offer PRA to homeowners.

FHA Refinance

Also in March 2010, the Administration announced adjustments to existing FHA refinance programs that permit lenders to provide additional refinancing options to homeowners who owe more than their homes are worth because of large declines in home prices in their local markets. This program, known as the FHA Short Refinance option, will provide more opportunities for qualifying mortgage loans to be restructured and refinanced into FHA-insured loans.

In order to qualify for this program, a homeowner must be current on their existing first lien mortgage; the homeowner must occupy the home as a primary residence and have a qualifying credit score; the mortgage owner must reduce the amount owed on the original loan by at least 10 percent; the new FHA loan must have a balance of no more than 97.75% of the current value of the home; and total mortgage debt for the borrower after the refinancing, including both the first lien mortgage and any other junior liens, cannot be greater than 115% of the current value of the home – giving homeowners a path to regain equity in their homes and affordable monthly payments. Program guidance was issued to participating FHA servicers in September 2010.

HFA Hardest-Hit Fund

On February 19, 2010, the Administration announced the Housing Finance Agency Innovation Fund for the Hardest Hit Housing Markets (HFA Hardest-Hit Fund) for state HFAs in the nation's hardest-hit housing markets to design innovative, locally targeted foreclosure prevention programs. In total, $7.6 billion has been allocated to 18 states (Alabama, Arizona, California, Florida, Georgia, Illinois, Indiana, Kentucky, Michigan, Mississippi, Nevada, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, and Tennessee) and the District of Columbia under the HFA Hardest-Hit Fund. As of November 1, 2010, four states were either accepting applications or providing assistance (Arizona, Michigan, Ohio and Rhode Island). By the end of 2010 another three states are expected to begin providing assistance. The remaining states are expected to begin providing assistance in the first half of 2011.

Allocations under the HFA Hardest-Hit Fund were made using several different metrics. Some of the funds were allocated to states that have suffered average home price drops of more than 20 percent from their peak, while other funds were allocated to states with the highest concentration of their populations living in counties with unemployment rates greater than 12 percent or unemployment rates that were at or above the national average. In addition, some funds were allocated to all the states and jurisdictions already participating in the HFA Hardest-Hit Fund to expand the reach of their programs to help more struggling homeowners. The applicable HFAs designed the state programs themselves, tailoring the housing assistance to their local needs. A minimum of $2 billion of the funding is required to be used by states for targeted unemployment or under-employment programs that provide temporary assistance to eligible homeowners to help them pay their mortgages while they seek re-employment or additional employment or undertake job training. Treasury also required that all of the programs comply with the requirements of EESA, which include that they must be designed to prevent avoidable foreclosures. All of the funded program designs are posted online at http://www.FinancialStability.gov/roadtostability/hardesthitfund.html.

Transparency, Accountability, and Compliance

I would like to provide you with further detail regarding the compliance efforts regarding HAMP. To protect taxpayers and ensure that TARP dollars are directed toward promoting financial stability, Treasury established rigorous transparency and accountability measures for all of its programs, including all housing programs. In addition, every borrower is entitled to a clear explanation if he or she is determined to be ineligible for a HAMP modification. Treasury requires servicers to report the reason for modification denials in the HAMP system of record. MHA-C's compliance activities, through Second Look loan file reviews and other on-site assessments, evaluate the appropriateness of the denials as well as the timeliness and accuracy of the denial notification to the affected borrowers.

In order to improve transparency of the HAMP NPV model, which is a key component of the eligibility test for HAMP, Treasury increased public access to the NPV white paper, which explains the methodology used in the NPV model. To ensure accuracy and reliability, MHA-C conducts periodic audits of servicers' NPV practices. MHA-C conducts two types of reviews related to NPV. For those servicers that have re-coded the requirements of the NPV model in their processing systems, MHA-C conducts on-site and off-site reviews of model accuracy, model management, and data integrity and inputs. For those servicers using the MHA Servicer Portal, MHA-C conducts reviews of data integrity and inputs. Where non-compliance is found, Treasury requires servicers to take remedial actions, which can include re-evaluating borrowers with appropriate inputs, process changes, corrections to recoded NPV implementations, and, for servicers who have re-coded the NPV model, reverting back to the MHA Servicer Portal for loans with negative NPV results from the servicers' re-coded NPV model until necessary corrections have been re-evaluated by MHA-C. In addition, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Treasury is preparing to establish a web portal that borrowers can access to run a NPV analysis using input data regarding their own mortgages, and to provide to borrowers who are turned down for a HAMP modification the input data used in evaluating the application.

As stated above, servicers are subject to various other compliance activities, including periodic, on-site compliance reviews as well as on-site and off-site loan file reviews. These various compliance activities performed by MHA-C assess servicers' compliance with HAMP requirements. Treasury works closely with MHA-C to adapt and execute our risk based compliance activities quickly based on changes in the program as well as observed trends. The current assessment of the top ten servicers' adherence to our pre-foreclosure certifications and requirements is one example of how we adapt our compliance activities. MHA-C provides Treasury with the results from each of the various compliance activities conducted. Treasury performs quality reviews of these activities and evaluates the nature and scope of any instances of non-compliance, and assesses appropriate responses, including remedies, in a consistent manner. As stated earlier, during the beginning of the program, and as additional features (*e.g.*, the Second Lien Program) are introduced, Treasury's compliance activities and associated remedies focus on shaping servicers' behavior and improving processes as servicers ramp up or modify their implementation of HAMP. As the program and servicers' processes mature, financial remedies may become more appropriate and effective in reinforcing Treasury's compliance and performance expectations.

Looking Ahead for Housing

Servicers need to increase efforts in helping borrowers avoid foreclosure through modification, as well as other alternatives to foreclosure, such as short sales. Furthermore, as we have learned through HAMP, servicers must be held accountable for ensuring that their foreclosure processes have integrity and are used after all loss mitigation options have been exhausted. Treasury's main priority is to ensure that *first*, participating servicers are doing everything that they can to reach, evaluate, and start borrowers into HAMP modifications, *second*, if a HAMP modification is not possible, every servicer is properly evaluating each homeowner for all other potential options to prevent a foreclosure, including HAFA or one of their own modification programs, and *third*, servicers are utilizing programs such as UP or the HFA Hardest-Hit Fund to their fullest ability in order to prevent avoidable foreclosures.

Over the past 20 months, we have been actively engaged with stakeholders from across the housing sector to find ways to increase the pace of new HAMP modifications, improve the characteristics of those modifications, and improve the borrower experience. We sincerely appreciate the assistance that we have gotten from Members of Congress and the advocacy community in strengthening borrower protections, incentivizing principal reduction, and assisting the unemployed. And most importantly, we value the efforts that Members of Congress, counselors and advocates have made in holding servicers accountable.

Yet, as we deploy a comprehensive suite of loss mitigation options, we must remember, as the President noted, not every foreclosure can be prevented. Any broad-based solution must aim at achieving both an efficient and equitable allocation of resources. This means a balance must be struck between affording homeowners opportunities to avoid foreclosure while expeditiously easing the transition in those cases where homeownership is not an economically sustainable alternative. This is especially important in order to lay the foundation for future appreciation which will provide a meaningful path to sustainable homeownership.

In the coming months, we will begin to see the impacts of the newly launched MHA programs. These programs will reach more distressed homeowners and provide additional stability to the housing market going forward. In much the same way that HAMP's first lien modification program has provided a national blueprint for mortgage modifications, these new programs will continue to shape the mortgage servicing industry and act as a catalyst for industry standardization of short sale, refinance and principal reduction programs. The interplay of all these programs will provide a much more flexible response to changes in the housing market over the next two years.

THE WHITE HOUSE
Office of the Press Secretary

FOR IMMEDIATE RELEASE
October 20, 2010

FACT SHEET: Federal Government Efforts to Support Accountability, Stability and Clarity in the Housing Market

Today the Department of Housing and Urban Development, the Department of the Treasury, the Department of Justice, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the Securities and Exchange Commission, the Federal Housing Finance Agency and the Office of Thrift Supervision met to discuss ongoing interagency action to support accountability, stability, and clarity in the housing market and residential mortgage backed securities market.

We are working together to review practices that do not comply with state foreclosure law or applicable federal laws, including taking the following actions:

- The Federal Housing Administration (FHA) has been reviewing servicers for compliance with loss mitigation requirements. These reviews are being broadened to include a larger range of processes, focusing in particular on servicer procedures during the final stages of the foreclosure process. These reviews are expected to be complete within nine weeks.

- The Financial Fraud Enforcement Task Force, led by the Department of Justice, has brought together more than 20 federal agencies, 94 US Attorney's Offices and dozens of state and local partners to share information about foreclosure and servicing practices. The Task Force's collaborative efforts are ensuring that the full resources of the federal and state regulatory and enforcement authorities are being brought to bear in addressing this issue.

- The Financial Fraud Enforcement Task Force has also been coordinating with State Attorneys General in their joint review of "robo-signing" practices in foreclosure cases.

- The Department of Justice, including through the Executive Office for U.S. Trustees, is also working with regulators to investigate and, where appropriate, litigate against servicers, their law firms, and third-party providers regarding their foreclosure and bankruptcy processes.

- The Federal Housing Finance Agency (FHFA) directed Fannie Mae and Freddie Mac to remind servicers of their contractual and legal responsibilities in foreclosure processing. On October 13, FHFA directed Fannie Mae and Freddie Mac to implement a policy framework for dealing with possible foreclosure process deficiencies that requires servicers to review their foreclosure processes and fix any processing problems they identify. The FHFA policy framework includes specific steps servicers should take to remedy mistakes in foreclosure affidavits so that the information contained in the affidavits is correct and that the affidavits are completed in compliance with applicable law.

- The Office of the Comptroller of the Currency (OCC) directed all large national bank servicers on September 29 to review their foreclosure management processes, including file review, affidavit processing and signatures, to ensure that the processes are fully compliant with all applicable state laws.

- The Office of the Comptroller of the Currency and the Federal Reserve System are jointly examining foreclosure and securitization practices at the nation's largest servicers. The examinations will include intensive review of the firms' policies, procedures, and internal controls related to loan modifications, foreclosures and securitizations. The reviews will also evaluate controls over the selection and management of third-party service providers.

- In coordination with the work of the other agencies, the Office of Thrift Supervision (OTS) is reviewing the mortgage related policies, foreclosure processes and staffing levels of the largest servicers it supervises. The OTS has gathered preliminary information through its regional offices about the servicer practices across the country. It also issued correspondence on October 8 to all savings associations involved in servicing residential mortgages requiring the immediate review of their actual practices associated with the execution of documents related to the foreclosure process.

- The Federal Deposit Insurance Corporation is participating in the reviews by the OCC, the Federal Reserve System, and the OTS of the foreclosure and securitization practices of the largest mortgage servicers in its role as back-up supervisor. The FDIC also is verifying that the servicers it supervises do not exhibit the problems that others have identified as well as reviewing the processes used by servicers of loans subject to loss share agreements and other loans from receiverships of failed banks. The regulators are also evaluating foreclosure and securitization practices in electronic registration systems.

- The Federal Trade Commission (FTC) is monitoring servicers under existing public orders to confirm proper servicing and foreclosure processes, is conducting reviews in line with past servicing abuses and monitoring the market closely for any fraud or foreclosure scams.

- The US Treasury has implemented a strong compliance framework for the Home Affordable Modification Program (HAMP) servicers. On October 6, Treasury issued a notice to HAMP servicers reminding them of their requirement to comply with all applicable state and federal laws, as well as a reminder that prior to foreclosure sale, servicers must certify to the foreclosure attorney or trustee that all loss mitigation options have been considered and exhausted. Treasury also recently instructed its HAMP compliance agent to review internal policies, procedures, and processes for completing the pre-foreclosure certifications at the ten largest servicers.

- In addition to its role enforcing the federal securities laws, the Securities and Exchange Commission (SEC) has issued proposed rules that would provide greater transparency and disclosures in the securitization market and provide investors with additional tools to evaluate actions in the securitization market.

###

Mr. CONYERS. Mr. Edward DeMarco has been called one of the 50 most powerful men in real estate by Bloomberg BusinessWeek. He appears today as the acting director of the Federal Housing Finance Agency which is the conservator for both Fannie Mae and Freddie Mac. He also established the agenda for the Home Affordable Finance program. And we welcome you to this hearing today, sir.

TESTIMONY OF EDWARD J. DeMARCO, ACTING DIRECTOR, FEDERAL HOUSING FINANCE AGENCY

Mr. DEMARCO. Thank you, Mr. Chairman. Chairman Conyers, and Members of the Committee, thank you for inviting me here today. The recently identified deficiencies and the preparation and handling of legal documents to carry out foreclosures——

Mr. CONYERS. Could you pull your mic closer to you, we can't hear.

Mr. DEMARCO. Okay. Is this working? I will begin again. The recently identified deficiencies and the preparation and handling of legal documents to carry out foreclosures are unacceptable. Those deficiencies undoubtedly reflect strains on a system that is operating beyond capacity, but they also represent a breakdown in corporate internal controls and management oversight.

FHFA's goals in this matter are twofold, to ensure that foreclosure processing is done in accordance with the servicer contract and applicable laws and to protect taxpayers from further losses on defaulted mortgages. Of course, before any foreclosure is completed, we expect servicers to exhaust all alternatives.

My prepared statement reviews the actions that FHFA has taken to date, as well as those underway. It also provides context for understanding the problems that have arisen, including consideration of the role of servicers and a description of the diverse range of foreclosure processing requirements. As I have previously reported to Congress, the enterprises, Fannie Mae and Freddie Mac, minimize losses on delinquent mortgages by offering distressed borrowers loan modifications, repayment plans or forbearance. These loss mitigation tools reduce the enterprises losses on delinquent mortgages and help homeowners retain their homes. Servicers of enterprise mortgages know that these tools are the first response to a homeowner who falls behind on their mortgage payments. Yet for some delinquent borrowers, their mortgage payments are simply not affordable due to unemployment or other hardship, and a loan modification is not a workable solution.

For these cases the enterprises offer foreclosure alternatives in the form of short sales and deeds in lieu of foreclosure. Despite these options for a graceful exit from a home, foreclosure remains the final and necessary option in many cases. As we know, foreclosure process deficiencies have emerged in several major servicers. Recently, FHFA provided the enterprises and servicers a four-point policy framework for handling these deficiencies. The four points are simply stated: First, verify that the foreclosure process is working properly; second, remediate any deficiencies identified in foreclosure processes; third, refer suspicions of fraudulent activity; and finally, avoid delay in processing foreclosures in the absence of identified problems. Pursuant to that guidance, the enterprises continue to gather information on the full nature and extent of the servicers problems. Only a small number of servicers have reported back to the enterprises has having some problem with their foreclosure processing that needs to be addressed. Still, these firms represent a sizable portion of the enterprises combined books of business. The enterprises are currently working directly with their servicers to ensure that all loans are handled properly and corrections and refiling of paperwork are completed where necessary and appropriate.

To be clear, FHFA does not regulate mortgage servicers and the enterprises relationship with them is a contractual one. As conservator of Fannie Mae and Freddie Mac, FHFA expects all companies servicing enterprise mortgages to fulfill their contractual responsibilities which include compliance with both the enterprises' seller/servicer guides and applicable law. Also, FHFA remains committed to ensuring borrowers are presented with foreclosure alternatives.

Still, it is important to remember that FHFA has a legal obligation as conservator to preserve and conserve enterprise assets. This means minimizing losses on delinquent mortgages. Clearly, foreclosure alternatives, including loan modifications, can reduce losses relative to foreclosure. But when these alternatives do not work timely and accurate foreclosure processing is critical for minimizing taxpayer losses.

To conclude, regulatory agencies including FHFA, are carrying out important examination activities that will better inform the issue. Thus, identification of further actions or regulatory responses should await the results of these examinations and evaluation of the information being developed. Thank you.

Mr. CONYERS. Thank you.

[The prepared statement of Mr. DeMarco follows:]

PREPARED STATEMENT OF EDWARD J. DEMARCO

Statement of

Edward J. DeMarco, Acting Director

Federal Housing Finance Agency

Before the
Committee on the Judiciary
U.S. House of Representatives
"Foreclosed Justice: Causes and Effects of the Foreclosure Crisis"

December 2, 2010

Statement of Edward J. DeMarco, Acting Director,
Federal Housing Finance Agency
Before the Committee on the Judiciary
U.S. House of Representatives
"Foreclosed Justice: Causes and Effects of the Foreclosure Crisis"
December 2, 2010

Introduction

Chairman Conyers, Ranking Member Smith and members of the Committee, thank you for inviting me to speak with you today about problems in mortgage servicing. The recently-identified deficiencies in the preparation and handling of legal documents to carry out foreclosures are unacceptable. While those deficiencies undoubtedly reflect strains on a system that is operating beyond capacity and was never designed to handle the volume of nonperforming loans that we are seeing today, they also represent a breakdown in corporate internal controls and the integrity of mortgage servicing and foreclosure processing. Servicers and others within the industry may have attempted to expand the resources available to deliver appropriate loss mitigation services, including timely and accurate foreclosure processing, but in some instances those efforts have been inadequate.

Since this latest set of difficulties was identified, I have had a team of managers and staff from the Federal Housing Finance Agency (FHFA) working closely with Fannie Mae and Freddie Mac (the Enterprises) to gauge the full scope of the foreclosure processing problem and to move forward on foreclosures where appropriate. Our goals are two-fold: to ensure that foreclosure processing is done in accordance with the servicer contract and applicable laws, and to protect taxpayers from further losses on defaulted mortgages. Moving forward on foreclosures where appropriate limits taxpayer losses and contributes to the ultimate recovery of domestic housing markets. Of course, before any foreclosure is completed, we expect servicers to exhaust all alternatives.

With those objectives in mind, I will review the actions that FHFA has taken to date, as well as those underway. Before doing so, I will provide context for understanding the problems that have arisen, including consideration of:

- the role of the servicers, attorneys, and their contractual relationship with the Enterprises when performing loss mitigation and foreclosures and
- the complexities of the system in which state and local laws create a diverse range of requirements that can extend foreclosure timelines, leaving homeowners and homebuyers in limbo, putting home values at risk in neighborhoods with abandoned or vacant properties and slowing the recovery of the housing market.

Today, Fannie Mae and Freddie Mac own or guarantee 30 million mortgages; of those, more than 1.3 million are more than 90 days seriously delinquent. As I have reported to the Committee on prior occasions, the Enterprises have sought to minimize losses on delinquent mortgages by offering distressed borrowers loan modifications, repayment plans, or forbearance. These loss mitigation techniques reduce the Enterprises' losses on delinquent mortgages *and* help homeowners retain their homes. Servicers of Enterprise mortgages know that these loss mitigation options are the first response to a homeowner who falls behind on their mortgage payments.

Yet, for some delinquent borrowers, their mortgage payments are simply not affordable due to unemployment or other hardship and a loan modification is not a workable solution. In other cases, homeowners have decided not to continue payment on their mortgages, perhaps because of the decline in value of their house or because personal circumstances have changed their desire or ability to retain their home. For these cases, the Enterprises offer foreclosure alternatives in the form of short sales and deeds-in-lieu of foreclosure. Such foreclosure alternatives generally are better for the homeowner, the neighborhood, and the Enterprise. Despite these options for a graceful exit from a home, foreclosure remains the final and necessary option in many cases.

The sheer volume of delinquent homeowners has put intense pressure on servicers, including their loan workout efforts and their foreclosure processes. Other hearings and studies have analyzed how and why this has happened. One of our challenges today is to identify the full scope and implications of foreclosure processing problems and to improve the integrity of the foreclosure process at servicers and related parties that are failing to perform to required standards.

Breakdowns in the Foreclosure Process and FHFA's Initial Response

As reports of foreclosure documentation deficiencies emerged at several major servicers, FHFA sought to ascertain the full scope and nature of the problem. On October 1, I issued a statement that said, in part:

> "FHFA, as conservator for Fannie Mae and Freddie Mac, supports efforts by the Enterprises to remind servicers and other parties engaged in processing foreclosures to do so in accordance with their seller-servicer agreements and applicable laws and regulations. Where deficiencies have been identified, FHFA has directed the Enterprises to work collectively to develop and implement a consistent approach to address any problems. In addition, FHFA is coordinating with appropriate regulators on this issue. Our goal is to assure the integrity of the foreclosure process and to see that any corrections in processes be tailored to the problem, protecting the rights of borrowers and investors without causing any undue disruption to the mortgage markets."

On October 13, FHFA built upon its earlier statement by providing the Enterprises and servicers a four-point policy framework for handling foreclosure process deficiencies, including specific steps FHFA expects them to take to assess and remedy the problems. The four points are simply stated:

1. Verify that the foreclosure process is working properly;
2. Remediate any deficiencies identified in foreclosure processing;
3. Refer suspicions of fraudulent activity; and
4. Avoid delay in processing foreclosures in the absence of identified problems.

Pursuant to that guidance, the Enterprises continue to gather information on the full nature and extent of servicer problems. Since then, only a small number of servicers have reported back to the Enterprises as having some problem with their foreclosure processing that needs to be addressed. Still, these firms represent a sizeable portion of the Enterprises combined books of business. The issues identified to-date range in size and scope, and may not affect every delinquent mortgage that a particular servicer is handling. Thus, it is difficult to say just how many delinquent Enterprise mortgages may be affected and the degree of difficulty in remediating the deficiencies. The Enterprises are currently working directly with their servicers to ensure that all loans are handled properly and corrections and refiling of paperwork are completed where necessary and appropriate. Because the file reviews are being performed case-by-case, the full evaluation will take a substantial amount of time and resources.

As made clear in FHFA's October 13th policy framework, if wrongful acts in foreclosure processing are discovered, the appropriate remedies should be undertaken by servicers, regulators, and law enforcement. Simply put, it is not acceptable that servicers and other parties involved in foreclosure processing may not have adhered to state and local laws. As Conservator of the Enterprises, FHFA expects all companies servicing Enterprise mortgages to fulfill their contractual responsibilities, which include compliance with both the Enterprises' seller/servicer guides and applicable law. We expect the same of other parties as well, including law firms working on foreclosure processing of Enterprise loans. Finally, to reinforce the duties undertaken by servicers, the Enterprises have indicated that they may pursue remedies for contractual violations.

The Role of the Servicer

When an Enterprise purchases a mortgage from an originating lender, it contracts with that lender or another bank or financial institution to service the loan. The servicer is the main communication point for the borrower, accepting all payments and crediting the borrower's account.

When homeowners get behind in payments, the servicer is expected to work with the delinquent borrower to set up a repayment plan, modify the loan, or, if foreclosure alternatives are not viable, begin foreclosure proceedings. Although the Enterprises hold the actual promissory notes through document custodians who maintain these records separate from the servicers, Fannie Mae and Freddie Mac do not themselves accept or process payments or move to modify or foreclose.

For their work, the servicers get paid by the Enterprises and, under the terms of their contracts, each servicer is obligated to follow the procedures established by the Enterprise, including compliance with all appropriate laws. The Enterprises also provide policy guidelines to their seller/servicers. A servicer is contractually bound to comply with this guidance; however, the Enterprises do not review loan files for each and every mortgage they guarantee or purchase. Instead, the Enterprises rely on a representation and warranty (rep and warrant) model under which the loan originator and loan servicer commit that the loan origination and servicing complies with the Enterprise's seller/servicer guide. Under the terms of the servicer contracts, the Enterprises can require the servicer to pay damages if the servicer does not follow the seller/servicer guidelines or force the servicer to buy back the loan if the loan fails to meet the Enterprises' eligibility guidelines.

The majority of Enterprise loans are serviced by a few very large banks. However, there are hundreds of servicers that hold contracts with each Enterprise; many are relatively small institutions. Each servicer typically works on behalf of many investors, including trustees for private label securities, and must follow the procedures and processes set forth in each investor contract. As I will describe further below, we are working with other government agencies to review foreclosure servicing practices and operations, and where we find firms with operational deficiencies, these must be remedied.

Attorneys Specializing in Foreclosure Processing

In order to complete foreclosures, particularly in judicial foreclosure states, servicers often contract with law firms from the Enterprises' approved attorney networks (for servicers of one Enterprise this is required, for the other, it is optional to use the approved network). These law firms have been evaluated by the Enterprises before being added to that Enterprise's attorney network. By adding a firm to its network, the Enterprise has concluded the firm has sufficient capacity and expertise to assist a servicer in need of foreclosure processing services. Recently the capacity of some of these law firms has also been strained by the volume of foreclosures and the burden on the court systems. In light of processing problems we are discussing today, it is evident that both Enterprises must take steps to improve their selection and oversight of the attorneys in their networks.

State Foreclosure Processes and Foreclosure Timelines

Foreclosure proceedings and requirements are established at the state level. Almost half of the states have a judicial foreclosure process that relies on the court system. By contrast, foreclosures in non-judicial states are managed according to state and local laws but handled outside of the court system.

Both systems have protections for homeowners, and to a large extent the essential paperwork and documentation elements are the same across all states, although particular requirements vary from jurisdiction to jurisdiction. In judicial foreclosure states, individual judges may set specific requirements within their courtrooms that are in addition to, or differ from, terms established by other judges in that state. Servicers and law firms involved in processing foreclosures must be aware of and responsive to such particular requirements.

Both judicial and non-judicial states are experiencing growing numbers of foreclosures, which are contributing to long delays between a borrower's default and the completion of an associated foreclosure.

Currently, the time from start to completion of a foreclosure for Enterprise loans in non-judicial states typically takes six months to a year. In judicial foreclosure states, it takes even longer, often 6 months longer than in non-judicial states and in certain judicial states the difference is even greater. Bear in mind, these foreclosure periods begin *after* the loan becomes seriously delinquent, typically about four months.

Some reasonable delays in the foreclosure process have been expected, appropriately so over the past two years, as new loss mitigation programs, such as loan modifications, have been introduced. These programs have often been accompanied by temporary foreclosure moratoria so that homeowners in the foreclosure process could be assessed for a modification. Servicers are obligated to follow Enterprise guidelines, including evaluating homeowners' for eligibility for the various foreclosure mitigation programs I described earlier.

While FHFA remains committed to ensuring borrowers are presented with foreclosure alternatives, it is important to remember that FHFA has a legal obligation as Conservator to preserve and conserve the Enterprises' assets. As I have said before, this means minimizing losses on delinquent mortgages. Clearly, foreclosure alternatives, including loan modifications, can reduce losses relative to foreclosure and benefit homeowners and neighborhoods, adding some measure of stability to local housing markets. But when these alternatives do not work, timely and accurate foreclosure processing is critical for minimizing taxpayer losses. The direct effect on taxpayers is thus: when an Enterprise-guaranteed mortgage is delinquent four months, the Enterprise removes the mortgage from the mortgage-backed security in which it was funded, paying off the security investors at par. The delinquent mortgage then goes on the balance sheet of the Enterprise, funded with debt issued by the Enterprise, debt supported by the Treasury Department's Senior Preferred Stock Purchase Agreement. While awaiting foreclosure (or some foreclosure alternative), that loan is generating no revenue because the borrower has stopped paying, but the Enterprise must keep paying interest on the debt supporting the mortgage. The cost of the delay is why it is critical to FHFA's responsibilities as Conservator to ensure timely processing of foreclosure actions – the cost is ultimately borne by the taxpayer.

When a homeowner falls behind on their mortgage payments, servicers operate on a single track, working through loss mitigation options with the homeowner, typically beginning with the HAMP program and followed by other loan modification programs or other foreclosure alternatives. When all loss mitigation alternatives have been exhausted, the servicers are expected to initiate the foreclosure process. Furthermore, the Enterprises have instructed servicers to suspend foreclosure processing when loss mitigation activities reach certain milestones. At times, simultaneous actions are necessary because of the long timeframes of the foreclosure process and because borrowers are not always responsive to foreclosure alternative offers.

While the Enterprises have established foreclosure time limits in their seller/servicer guides, no servicers have been penalized in recent years for exceeding those limits, largely because state and local legal requirements, loan modification efforts, the unprecedented volume, and various foreclosure moratoria have greatly contributed to delays. During this year, FHFA has been working with each Enterprise to improve servicers' adherence to these timelines, and to apply penalties where justified, but the recent set of issues have further complicated that effort.

Deficiencies in the foreclosure process, including problems with affidavits, notaries, and improper practices, appear to be the result of inadequate resources for and oversight of servicing operations. The pressure from high volumes of foreclosures working through the system has surfaced fault lines in the foreclosure process that remain the responsibility of management at these companies to identify and fix.

Other Actions Being Taken & Matters for Consideration

All of us – regulators, lawmakers, investors, and the general public – want answers to the questions raised by this most recent breakdown in our housing finance market and we want them now. Much work is underway to assess the characteristics, extent, and location of these problems and conclusions must await the completion of this work. Regulatory agencies including FHFA are carrying out important examination activities that will better inform the issue. Thus, identification of further actions or regulatory responses must await the results of these examinations and evaluation of the information developed.

My colleagues can speak to the examination activities they are leading, some of which include FHFA participation. In particular, FHFA is participating in a multi-agency examination of the Mortgage Electronic Registration Systems (MERS). FHFA is reviewing the Enterprises' practices with regard to oversight of their counterparties, which have been lacking in the past. Neither FHFA nor the Enterprises have any regulatory authority with regard to mortgage servicers. FHFA's authority is limited to the Enterprises and, as I have noted, the Enterprises' relationships with mortgage servicers are contractual, not regulatory.

I do not support a blanket moratorium on foreclosures. The adverse consequences of a moratorium outweigh the argued benefits. The costs to neighborhoods, taxpayers, and investors would be enormous. Our focus should be on fixing problems where they are found and then moving forward expeditiously with foreclosure proceedings where foreclosure alternatives have been exhausted and where no process deficiencies have been identified or they have been remedied. Delay is costing taxpayers money and creates undesirable incentives for homeowners to stop paying their contracted mortgage obligations.

To date, Fannie Mae and Freddie Mac, as well as other parts of the housing finance industry, have relied on a rep and warrant model, whereby one party commits to follow a set of standards and the other party trusts that commitment, unless and until a clear violation or breach is identified. FHFA is reviewing the Enterprises' practices in enforcing reps and warrants and FHFA expects adherence to those contract terms with regard to mortgages they purchase and with regard to mortgage servicing.

FHFA remains committed to working with fellow regulators to enhance our oversight of the foreclosure process and to ensure market participants adhere to state and federal laws. To further our efforts at bringing stability to housing finance, our approach needs to continue to focus on offering troubled homeowners an opportunity to remedy their payment difficulties. Failing that, homeowners should be offered foreclosure alternatives but, after that, foreclosure must proceed in a legal and timely manner for the sake of neighborhoods, investors, and taxpayers.

Thank you for this opportunity to testify. I would be glad to answer any questions.

Mr. CONYERS. Attorney Julie Williams is the Chief Counsel of the Office of Comptroller of the Currency at the Department of Treasury. OCC supervises all national banks and their operating subsidiaries. Attorney Williams is the author of two books and numerous articles on financial servicers, securities and corporate law matters.

We welcome you to the hearing this morning.

TESTIMONY OF JULIE L. WILLIAMS, CHIEF COUNSEL, OFFICE OF THE COMPTROLLER OF THE CURRENCY, UNITED STATES DEPARTMENT OF THE TREASURY

Ms. WILLIAMS. Thank you.

Chairman Conyers and Members of the Committee, I appreciate this opportunity to appear today to discuss recent events concerning the mortgage foreclosure process and the actions that the Office of the Comptroller of the Currency is taking in response.

The occurrences of improperly executed documents and attestations that have come to light raise concerns about the overall integrity of the foreclosure process. Laws in each State establish the requirements and process by which that action may be taken. When that due process is not followed, it is not a technicality, it goes to the propriety of the foreclosure itself. The improprieties that have been identified in the past several months are unacceptable practices that warrant the thorough investigation that is now under way by the OCC and other agencies and appropriate and vigorous responses.

The OCC supervises all national banks and their operating subsidiaries, including their mortgage-servicing operation. In recent years as problem loans surged, the OCC's primary focus was to prevent avoidable foreclosures by directing national banks to increase the volume and sustainability of loan modifications. When we saw, using data from our mortgage metrics system, that an inordinate number of modifications initiated in 2008 were redefaulting, we directed national bank mortgage servicers to take corrective action. Since then we have seen a sharp increase in modifications that lowered monthly payments and fewer defaults.

While these efforts are preventing foreclosures, many families are still struggling and face the prospect of losing their homes. In this regard questions have arisen about the practice of continuing foreclosure proceedings, even when a trial modification has been negotiated and is in force. We agree that this dual track is unnecessarily confusing for distressed homeowners and risks them receiving mixed or contradictory information.

HAMP requirements contain a model for suspending foreclosure proceedings when a borrower is successfully performing in a trial modification program; but most modifications today are not HAMP modifications. Therefore, yesterday, Acting Comptroller John Walsh announced that the OCC will direct national bank servicers to suspend foreclosure proceedings for borrowers in all types of successfully performing trial modifications where the servicer has the legal ability to do so. It is important to remember, however, that GSEs and private investors dictate the terms for non-HAMP modifications, so this flexibility may not always be available to the servicers.

The OCC, as part of its supervisory processes, reviews a national bank's foreclosure governance process to determine if it has appropriate policies, procedures and internal controls necessary to ensure the accuracy of information relied upon in the foreclosure process and compliance with Federal and State laws. We expect banks to test these processes through their internal audit and ongoing quality-control functions. Unfortunately, neither banks' internal quality control tests, internal audits, nor the OCC's own consumer complaint data suggested foreclosure document processing was an area of systemic concern. However, when problems were identified at Ally Bank, which is not a national bank, we immediately directed the eight largest national bank mortgage servicers to review their operations and take corrective actions.

In concert with other regulatory agencies, OCC examiners are now reviewing samples of individual loan files where foreclosures have either been initiated or completed to test the validity of banks' self-assessments and corrective actions; whether foreclosed borrowers were appropriately considered for loss-mitigation alternatives such as loan modification; and whether fees charged were appropriate, documents were accurate and appropriately reviewed, proper signatures were obtained, and documents necessary to support a legal foreclosure proceeding were provided.

We have likewise instructed examiners to be alert to and document any practices such as misapplied payments, padded fees and inappropriate application of forced-placed insurance as part of these file reviews. Where we find errors or deficiencies, we are directing national banks to take immediate corrective action, and we will not hesitate to take an enforcement action or impose civil money penalties, removals from banking, and make criminal referrals if warranted.

We expect to complete our examinations by mid to late December and to determine by the end of January what additional supervisory or enforcement actions are needed.

Thank you again for the opportunity to appear today. I would be happy to answer your questions.

Mr. CONYERS. Thank you.

[The prepared statement of Ms. Williams follows:]

PREPARED STATEMENT OF JULIE L. WILLIAMS

For Release Upon Delivery
10:00 a.m., December 2, 2010

TESTIMONY OF

JULIE L. WILLIAMS

CHIEF COUNSEL AND FIRST SENIOR DEPUTY COMPTROLLER

before the

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

December 2, 2010

Statement Required by 12 U.S.C. § 250:

The views expressed herein are those of the Office of the Comptroller of the Currency and do not necessarily represent the views of the President.

Introduction

Chairman Conyers, Ranking Member Smith, and members of the Committee, I appreciate this opportunity to discuss recently reported events concerning the foreclosure process and actions that the Office of the Comptroller of the Currency (OCC) is taking to address these situations where they involve national banks. The occurrences of improperly executed documents and attestations raise concerns about the overall integrity of the foreclosure process. The loss of one's home is a personally and financially disastrous event for a borrower. Laws in each state establish the requirements and process by which that action may be taken. When that due process is not followed, it is not a technicality; it goes to the propriety of the foreclosure itself. The improprieties that have been identified in the past several months are unacceptable practices that warrant the thorough investigation that is now underway by the OCC, other federal bank regulators, and other agencies, and appropriate and vigorous responses.

The OCC supervises all national banks and their operating subsidiaries, including their mortgage servicing operations. The servicing portfolios of the eight largest national bank mortgage servicers[1] account for approximately 63 percent of all mortgages outstanding in the United States – nearly 33.3 million loans totaling almost $5.8 trillion in principal balances as of June 30, 2010.

To date, six large national bank servicers have publicly acknowledged deficiencies in their foreclosure processes. The lapses that have been reported represent a serious operational breakdown in foreclosure governance and controls that national banks should maintain. These lapses are unacceptable, and we are taking aggressive actions to hold national banks accountable, and to get these problems fixed.

[1] Bank of America, Citibank, JPMorgan Chase, HSBC, MetLife, PNC, Wells Fargo, and U.S. Bank.

As soon as the problems at Ally Bank came to light, we directed the largest national bank mortgage servicers under our supervision to review their operations, to take corrective action to remedy identified problems, and to strengthen their foreclosure governance to prevent reoccurrences. At the same time, we initiated plans for intensive, on-site examinations of the eight largest national bank mortgage servicers. Through these examinations we are independently testing the adequacy of governance over their foreclosure processes to ensure foreclosures are completed in accordance with applicable legal requirements and that delinquency affidavits and claims that are the basis for the foreclosure are accurate.

As part of our examinations we also are reviewing samples of individual loan files where foreclosures have either been initiated or completed to test the validity of bank self-assessments and corrective actions, and to determine whether troubled borrowers were considered for loss mitigation alternatives such as loan modifications prior to foreclosure.

We have likewise instructed examiners to be alert to, and document, any practices such as misapplied payments, padded fees, and inappropriate application of forced placed insurance as part of these file reviews. Should we find evidence of such occurrences, we will take appropriate action. Our examinations are still on-going.

My testimony provides a brief discussion of these recently publicized foreclosure problems, and our most recent findings on trends in modifications, alternatives to modifications, and foreclosures from the *OCC and OTS Mortgage Metrics Report*. I then describe the OCC's actions with respect to loan modifications and problems that have arisen in the foreclosure process.

Current Foreclosure Problems

The current foreclosure problems represent another painful chapter of the recent financial crisis, stemming from a record number of troubled borrowers, which has strained servicer capacity to provide loss mitigation activities to those borrowers and ensure a large and growing number of foreclosures are properly processed.

The concerns about improper foreclosure practices initially centered on two issues that deal with the documentation required to effect foreclosure actions. The first issue involves requirements under some state laws for individuals to sign affidavits attesting to *personal* knowledge of the accuracy and completion of required documentation essential to a valid foreclosure proceeding. The second issue is whether, in similar situations where required by state law, individual notaries may have violated procedures in notarizing documentation by, for example, notarizing the documents after they had been signed, rather than in the presence of the individual signing the affidavit. As the situation has evolved, concerns have broadened to include the accuracy of information underlying the foreclosure process, and the physical possession and control over documents necessary to foreclose on a home. Our examinations are investigating all of these issues.

The signing and attestation of foreclosure documents are steps required by various state laws that govern the legal completion of a foreclosure proceeding—and as such, typically represent the final steps in what is a very lengthy and resource intensive process that banks undertake to deal with seriously delinquent borrowers. The time to complete a foreclosure process in most states can take 15 months or more and in many cases can be as long as two years. Foreclosure completion timelines are generally set by investors such as Fannie Mae and Freddie Mac, and there are penalties that they may impose on servicers that do not meet the timelines mandated by these investors.

The specific requirements and the legal standards applied for determining personal knowledge may vary across judicial foreclosure states, and thus require servicers to ensure that their processes conform to individual state, or in some cases, local precedent. To assist with meeting these requirements, mortgage servicers often outsource some of the requisite legal work to law firms familiar with local standards and other third parties for input and review. Fannie Mae and Freddie Mac in fact require servicers to use law firms approved for particular geographies when preparing foreclosure filings. For large mortgage servicers that operate nationwide, this often has resulted in use of a significant number of third parties – lawyers and other service providers – and a panoply of documents used in their mortgage foreclosure processes: one large mortgage servicer has indicated that they use over 250 different affidavit forms. These operational challenges, however, do not absolve the banks from their responsibilities to have the appropriate staff, quality controls, and an effective audit process in place to ensure that documents are accurate and the foreclosure process is conducted in compliance with applicable state and local laws.

Servicers typically move forward with foreclosure proceedings only after thoroughly evaluating a borrower's eligibility for loan modifications and other alternatives, such as short sales or deed-in-lieu-of-foreclosures.[2] As a practical matter, many investors for whom loans are serviced, including Fannie Mae and Freddie Mac, require servicers to attempt loss mitigation actions, including modifications, prior to foreclosing on a home. The largest national bank mortgage servicers are participants in Treasury's Home Affordable Modification Program (HAMP) and are required to evaluate troubled borrowers to determine their eligibility for a HAMP modification. For borrowers that fail to qualify for a HAMP loan modification, servicers also typically consider whether the borrowers would qualify for a modification under their proprietary programs, which generally have more flexible criteria. In the vast majority of cases, it is only after these loan modification efforts have been exhausted that final foreclosure actions are taken.

[2] Short sales refer to sales of mortgaged properties at prices that net less than the total amount due on the loans. Servicers and borrowers negotiate repayment programs, forbearance, or forgiveness for any remaining deficiency on the debt. Short sales typically have less adverse impact than foreclosures on borrowers' credit records. Deed-in-lieu-of-foreclosure actions refer to actions in which borrowers transfer ownership of the properties (deeds) to servicers in full satisfaction of the outstanding mortgage debt to lessen the adverse impact of the debt on borrowers' credit records.

Recent Trends in Mortgage Modifications and Foreclosure Activity

Since 2008, the OCC has collected loan level data from the large national banks we supervise and published this information in quarterly mortgage metrics reports. We have since expanded our data collection and reporting efforts and joined with the Office of Thrift Supervision (OTS) to publish data on the performance of loans and loan modifications, and to highlight trends in loss mitigation activities, foreclosures, and re-defaults occurring on mortgages serviced by large national banks and federally regulated thrifts. Our most recent report, released in September, provides data through second quarter 2010 for nearly 34 million first-lien mortgages, totaling nearly $6 trillion in outstanding balances—representing approximately 65 percent of all first-lien residential mortgages in the country.[3] Key trends from that report are summarized below.

Overall Mortgage Performance

As shown in Table 1, the percentage of current and performing mortgages remained unchanged from the previous quarter at 87.3 percent. The percentage of mortgages 30 to 59 days delinquent increased to 3.1 percent at the end of the second quarter of 2010, compared with 2.8 percent at the end of the previous quarter and 3.2 percent a year ago. The percentage of seriously delinquent mortgages[4] was 6.2 percent, a decrease of 5.3 percent from the previous quarter but up 16.1 percent from a year ago. Foreclosures in process were 3.4 percent of the total portfolio, a 1.4 percent decrease from the previous quarter but a 16.1 percent increase from a year ago.

[3] A full copy of the *OCC and OTS Mortgage Metrics Report, Second Quarter 2010* is available at: http://www.occ.gov/publications/publications-by-type/other-publications/mortgage-metrics-q2-2010/mortgage-metrics-q2-2010-pdf.pdf.

[4] Seriously delinquent loans are those mortgages that are 60 or more days past due and all mortgages held by bankrupt borrowers whose payments are 30 or more days past due.

Table 1. Overall Portfolio Performance
(Percentage of All Mortgages in the Portfolio)

	6/30/09	9/30/09	12/31/09	3/31/10	6/30/10	1Q %Change	1Y %Change
Current and Performing	88.6%	87.2%	86.4%	87.3%	87.3%	0.1%*	-1.4%
30–59 Days Delinquent	3.2%	3.4%	3.4%	2.8%	3.1%	11.0%	-3.5%
Seriously Delinquent	5.3%	6.2%	7.1%	6.5%	6.2%	-5.3%	16.1%
Foreclosures in Process	2.9%	3.2%	3.2%	3.5%	3.4%	-1.4%	16.1%
Overall Portfolio Performance (Number of Mortgages in the Portfolio)							
Current and Performing	29,962,265	29,666,568	29,217,743	29,574,957	29,483,014	-0.3%	-1.6%
30–59 Days Delinquent	1,078,663	1,154,825	1,138,822	939,306	1,038,422	10.6%	-3.7%
Seriously Delinquent	1,798,532	2,111,588	2,388,938	2,210,393	2,083,585	-5.7%	15.8%
Foreclosures in Process	992,554	1,091,620	1,079,386	1,170,785	1,149,770	-1.8%	15.8%

Home Retention Actions

As shown in Table 2, servicers implemented 902,800 permanent loan modifications (shown as "Other Modifications" and "HAMP Modifications") over the past five quarters with HAMP modifications accounting for approximately 26 percent of this total. During the second quarter 2010, servicers initiated or implemented 504,292 home retention actions. This included 273,419 HAMP and other permanent loan modifications, an increase of 18.1 percent from the first quarter of 2010. Loan modifications implemented in second quarter 2010 represent 13.1 percent of seriously delinquent borrowers, up from 7.9 percent in the second quarter 2009. While the number of permanent modifications increased, the number of trial modifications and other payment plans declined as servicers worked through their portfolio of seriously delinquent mortgages to determine borrower eligibility under HAMP and each servicer's own proprietary loan modification programs.

Table 2. Number of New Home Retention Actions

	6/30/09	9/30/09	12/31/09	3/31/10	6/30/10	1Q %Change	1Y % Change
Other Modifications	142,362	130,464	103,617	131,207	164,473	25.4%	15.5%
HAMP Modifications	–	783	20,679	100,269	108,946	8.7%	–
Other Trial Period Plans	64,201	127,902	96,048	101,764	73,673	-27.6%	14.8%
HAMP Trial Period Plans	79,994	272,709	259,015	188,503	64,666	-65.7%	-19.2%
Payment Plans	131,974	163,551	121,722	120,587	92,534	-23.3%	-29.9%
Total	418,531	695,409	601,081	642,330	504,292	-21.5%	20.5%

Changes to Borrowers' Monthly Payments Resulting from Modifications

Early in the mortgage crisis, servicers' informal payment plans and loan modifications were done in low volume and often resulted in mortgage payments that increased or did not change. This traditional approach to loss mitigation gave delinquent borrowers experiencing temporary financial problems a chance to catch-up on making their loan payments. However, as the mortgage crisis deepened, unemployment climbed, and the number of delinquent borrowers increased to unprecedented levels, it became clear that more formal and permanent modifications were needed. The OCC's mortgage metrics data provided factual evidence that loan modifications completed in 2008 were experiencing high re-default rates. As a result of those high re-default rates, in March 2009, the OCC directed the largest national banks to take corrective action to implement loan modification programs designed to achieve more sustainable modifications.

As a result, servicers have focused efforts on improving the quality of their loan modifications and the performance of those modifications over time. This is evidenced by the increase in modifications that are reducing borrowers' monthly mortgage payments and the corresponding decline in re-defaults (as measured by serious delinquencies) subsequent to modification since the OCC's direction to servicers in 2009. As shown in Table 3, mortgage modifications that lowered monthly principal and interest payments increased to more than 90 percent of all modifications during the second quarter 2010. The emphasis on payment affordability and sustainability has resulted in a 62 percent increase in the average monthly savings in mortgage payments from mortgage modifications from a year ago. As shown in Table 4, modifications made during the second quarter of 2010 reduced monthly payments by an average of $427. Further, 56 percent of the modifications made during the second quarter reduced the borrower's monthly payment by 20 percent or more, representing an average savings to the consumer of $698 a month. These actions for more sustainable payments are also reflected in lower re-default rates for more recently modified loans. Modifications made after the end of the first quarter of 2009 have experienced about half the re-default rates of modifications made prior to that time.[5]

Table 3. Changes in Monthly Principal and Interest Payments Resulting from Modifications
(Percentage of Modifications)*

	6/30/09	9/30/09	12/31/09	3/31/10	6/30/10	1Q %Change	1Y %Change
Decreased by 20% or More	38.8%	37.0%	41.8%	54.9%	56.4%	2.9%	45.5%
Decreased by 10% to Less than 20%	19.6%	18.3%	19.1%	17.7%	17.6%	-0.4%	-10.2%
Decreased Less than 10%	19.9%	24.4%	21.1%	14.9%	16.1%	8.1%	-19.3%
Subtotal for Decreased	**78.3%**	**79.7%**	**82.0%**	**87.4%**	**90.1%**	**3.1%**	**15.1%**
Unchanged	4.3%	3.6%	4.8%	2.7%	1.9%	-30.8%	-55.8%
Increased	17.4%	16.8%	13.2%	9.9%	8.0%	-18.9%	-54.0%
Subtotal for Unchanged and Increased	**21.7%**	**20.3%**	**18.0%**	**12.6%**	**9.9%**	**-21.4%**	**-54.4%**
Total	100.0%	100.0%	100.0%	100.0%	100.0%		
(Number of Modifications)							
Decreased by 20% or More	54,860	48,151	51,036	126,379	153,730	21.6%	180.2%
Decreased by 10% to Less than 20%	27,691	23,786	23,338	40,663	47,875	17.7%	72.9%
Decreased Less than 10%	28,213	31,707	25,748	34,271	43,827	27.9%	55.3%
Subtotal for Decreased	110,764	**103,644**	100,122	201,313	245,432	21.9%	121.6%
Unchanged	6,038	4,630	5,822	6,273	5,136	-18.1%	-14.9%
Increased	24,665	21,829	16,142	22,750	21,831	-4.0%	-11.5%
Subtotal for Unchanged and Increased	30,703	**26,459**	21,964	29,023	26,967	-7.1%	-12.2%
Total	141,467	130,103	122,086	230,336	272,399	18.3%	92.6%

*Payment change information was not reported on 895 modifications in the second quarter of 2009; 1,144 in the third quarter of 2009; 2,210 in the fourth quarter of 2009; 1,140 in the first quarter of 2010; and 1,020 in the second quarter of 2010.

Table 4. Average Change in Monthly Payments Resulting from Modifications
All Modifications

	6/30/09	9/30/09	12/31/09	3/31/10	6/30/10	1Q %Change	1Y %Change
Decreased by 20% or More	$617	$623	$626	$664	$698	5.0%	13.1%
Decreased by 10% to Less than 20%	$193	$196	$185	$189	$187	1.2%	-2.9%
Decreased Less than 10%	$61	$55	$62	$67	$68	0.8%	11.7%
Unchanged	—	—	—	—	—	—	—
Increased	$145	$146	$153	$163	$132	-19.0%	-8.7%
Overall	$264	$258	$290	$392	$427	8.9%	61.8%

[5] *See OCC and OTS Mortgage Metrics, Second Quarter*, page 7.

Home Forfeiture Actions – Short Sales, Deed-in-Lieu-of-Foreclosures, and Foreclosures

As previously noted, mortgage servicers generally do not proceed with home forfeiture actions until they have evaluated the borrower's eligibility for a loan modification that would allow the borrower to stay in his or her home. Unfortunately, loan modification programs cannot help borrowers who simply cannot make even reduced mortgage payments. In these cases, servicers turn to home forfeiture actions to protect the interests of lenders and investors.

Completed home forfeiture actions—foreclosure sales, short sales, and deed-in-lieu-of-foreclosure actions—totaled 221,474 during the second quarter, an increase of 14.2 percent from the previous quarter (see Table 5). Short sales and deed-in-lieu-of-foreclosure actions increased significantly during the quarter, but they remain only 26 percent of home forfeiture actions overall. While home forfeiture actions increased in the second quarter, servicers implemented about 2.3 times more home retention actions—loan modifications, trial period plans, and payment plans—than total home forfeiture actions.

Table 5. Completed Foreclosures and Other Home Forfeiture Actions

	6/30/09	9/30/09	12/31/09	3/31/10	6/30/10	1Q %Change	1Y %Change
Completed Foreclosures	106,004	118,606	128,859	152,654	162,812	6.7%	53.6%
New Short Sales	25,128	30,766	37,583	40,043	56,926	42.2%	126.5%
New Deed-in-Lieu-of-Foreclosure Actions	1,120	1,233	1,054	1,185	1,736	46.5%	55.0%
Total	132,252	150,605	167,496	193,882	221,474	14.2%	67.5%
Newly Initiated Home Retention Actions Relative to Completed Foreclosures and Other Home Forfeiture Actions	316.5%	461.7%	358.9%	331.3%	227.7%	-31.3%	-28.1%

The number of newly initiated foreclosures decreased by 21.2 percent, to 292,072, during the second quarter of 2010, the lowest level in more than a year. The lower number is partly attributable to the increase in permanent modifications made during the quarter. In addition, HAMP guidelines now preclude the servicer from initiating a foreclosure action until the borrower has been determined to be ineligible for a HAMP modification. Similarly, the number of loans in process of foreclosure decreased by 1.8 percent from the previous quarter to 1,149,770, reflecting the increases in permanent modifications and completed foreclosures during the quarter as well as the drop in newly initiated foreclosure actions. Notwithstanding these positive trends, we expect the number of foreclosure actions will remain elevated as the large inventory of seriously delinquent loans and loans in process of foreclosure works through the system.

Table 6. Number of Newly Initiated Foreclosures and Foreclosures in Process

	6/30/09	9/30/09	12/31/09	3/31/10	6/30/10	1Q %Change	1Y %Change
Number of Newly Initiated Foreclosures							
Total	369,226	369,209	312,520	370,536	292,072	-21.2%	-20.9%
Number of Foreclosures in Process							
Total	992,554	1,091,620	1,079,386	1,170,785	1,149,770	-1.8%	15.8%

OCC Supervisory Efforts

Emphasis on Sustainable Loan Modifications and Accurate Financial Reporting

As the volume of problem loans surged to record levels and has worked its way through the financial system, servicers have struggled to maintain the needed capacity and resources to effectively deal with the number of consumers who require assistance. We have used our examination process and our Customer Assistance Group (CAG) to address issues as they have arisen.

Our primary supervisory focus in assessing how servicers work with borrowers experiencing payment problems over the past two years has centered on their efforts to offer sustainable loan modifications that avoid foreclosure and allow troubled borrowers to remain in their homes. As previously noted, when our mortgage metrics data showed that an inordinately high percentage of loan modifications made in 2008 were re-defaulting, we directed large national bank mortgage servicers to take corrective action and revise their loan modification programs to produce loan modifications that resulted in more sustainable loan payments. In most cases, this requires concessions on the terms of the loan, rather than simply granting a borrower a payment deferral that capitalizes arrearages, which was typical in many traditional modifications. In addition, in our supervision of national bank mortgage servicers we have issued numerous "Matters Requiring Attention," requiring improvements in servicers' loan modification operations and increased staffing.

Some observers have stated that mortgage servicers have an inherent conflict of interest in working with borrowers to modify a first lien where the servicer holds the second lien on the property. In general, all other creditors benefit from a modification of the first lien since the modification puts the borrower in a stronger cash flow position, and makes the borrower more likely to be able to make payments on other debts. A conflict of interest could arise if the second lien holder were trying to overstate the second lien's carrying value (and under-allocate loan loss reserves) for a troubled borrower. The OCC has addressed this potential conflict by directing that second lien holders must take steps necessary to understand any potential issues with the first lien and ensure that carrying values and loan loss reserve levels reflect all risk in the transaction – including any problems the borrower might be having on the first lien, even if the second lien is performing as agreed.

The volume of current and performing second liens held by national banks behind delinquent or modified first liens remains relatively small. The OCC analyzed second liens held by national banks and matched more than 60 percent of them ($293 billion) to first-lien mortgages. Of these 5,000,000 matched second mortgages, only about 6 percent, or 235,000, were current and performing but behind delinquent or modified first liens. The balance of those current and performing second liens behind delinquent or modified first mortgages totaled less than $18 billion. The OCC has directed national banks that hold such performing second liens to properly reflect the associated credit impairment for those second liens through an increase in the allowance for loan losses, or in many cases, a charge-off of the loan where appropriate.

Oversight of and Responses to Foreclosure Documentation Issues

When reviewing a bank's foreclosure governance process, such as practices involved with the preparation and filing of affidavits for foreclosure proceedings, examiners determine if the bank has appropriate policies, procedures, and internal controls in place to ensure the accuracy of information relied upon in the foreclosure process and compliance with federal and state laws. An appropriate governance process would include the testing of those policies and procedures through periodic internal audits and the bank's on-going quality control function. In this instance, however, neither internal quality control, internal or third party audits at the largest servicers, nor our CAG data revealed the foreclosure document processing issues.

When the problems at Ally Bank – an institution that is not supervised by the OCC – became public, the OCC took immediate action to determine if procedural breakdowns at national bank servicers could be resulting in similar foreclosure affidavit problems. On September 29, 2010, we immediately ordered the eight largest national bank servicers to conduct a comprehensive self-assessment of their foreclosure management processes, including file review and affidavit processing and signature. We also made clear that where deficiencies were identified, the servicers needed to take prompt action to remedy any improper documentation, including as applicable, making appropriate re-filings with local courts. Equally important, we also directed banks to strengthen foreclosure governance to ensure the accuracy of the information relied upon in the foreclosure process and prevent re-occurrences of documentation problems.

Concurrent with this directive, we began planning on-site examinations at each of these large servicers and their mortgage servicing operational centers. Our objectives are to independently test and verify the adequacy and integrity of bank self-assessments and corrective actions; the adequacy and effectiveness of governance over servicer foreclosure processes to ensure foreclosures are completed in accordance with applicable legal requirements and that affidavits and claims are accurate; and to determine whether troubled borrowers were considered for loss mitigation alternatives such as loan modifications prior to foreclosure.

These examinations are now underway at each of the eight servicers. The examination teams include examiners from the OCC, plus the Federal Reserve Board (FRB) and Federal Deposit Insurance Corporation (FDIC). The OCC has approximately 100 examiners working on this effort. Legal support is provided by staff attorneys from both the OCC and FRB. We have established an interagency foreclosure review team to provide oversight and direction to on-site examination teams to ensure consistency in our examination work.

As noted above, a key objective of our examinations is to determine the adequacy and effectiveness of governance over the foreclosure process. The scope of work to assess governance is extensive and includes an assessment of each servicer's foreclosure policies and procedures, organizational structure and staffing, vendor management, quality control and audit, loan documentation including custodial document management, and foreclosure work flow processes. As part of these reviews, examiners are conducting interviews with personnel involved in the preparation, review, and signing of foreclosure documents. Our objective in conducting these interviews is to understand current and past practices with respect to preparation of foreclosure documents, whether the staff conducting these functions had sufficient knowledge and training, including training in relevant requirements, to effectively complete and sign-off on foreclosure affidavits, and to help assess the underlying cause of any identified deficiencies.

Examiners are also reviewing samples of individual borrower foreclosure files from judicial and non-judicial states that include both in-process and completed foreclosures. In reviewing these files, examiners will determine whether foreclosed borrowers were appropriately considered for alternative loss mitigation actions such as a loan modification. Examiners are also checking for the following:

- A documented audit trail that demonstrates that data and information (e.g., amount of indebtedness and fees) in foreclosure affidavits and claims are accurate and comply with state laws;
- Possession and control over the underlying, critical loan documents such as original note, mortgage, and deed of trust to support legal foreclosure proceedings; and
- Evidence that the affidavit and documents were independently and appropriately reviewed, and that proper signatures were obtained.

In addition to these loan file reviews, examiners will review the nature, volume, and resolution of foreclosure-related complaints. These will include complaints received by the OCC's Customer Assistance Group as well as complaints received by the banks.

Finally, examiners will assess the adequacy of each bank's analysis and financial reporting for the potential adverse impact on the bank's balance sheet and capital that may arise from the increased time and costs needed to correct any procedural errors; losses (if any) resulting from inability to access collateral; and expected litigation costs. We are directing banks to maintain adequate reserves for potential losses and other contingencies and to make appropriate disclosures, consistent with applicable Securities and Exchange Commission disclosure rules.

Using our authority under the Bank Service Company Act, we also are conducting interagency examinations of two major non-bank mortgage service providers. The OCC, in coordination with the FRB, FDIC, and Federal Housing Finance Agency, is leading an on-site examination of the Mortgage Electronic Registration System (MERS). A key objective of the MERS examination is to assess MERS's corporate governance, control systems, and the accuracy and timeliness of information maintained in the MERS system. Examiners assigned to MERS will also visit on-site foreclosure examinations in process at the largest mortgage servicers to determine how servicers are fulfilling their roles and responsibilities relative to MERS.

We are also participating in an examination being led by the FRB of Lender Processing Services, Inc., which provides third-party foreclosure services to banks.

We expect to have most of our on-site examination work completed by mid to late December. We then plan to aggregate and analyze the data and information from each of these examinations to determine whether or what additional supervisory and regulatory actions may be needed. We are targeting to have our analysis completed by the end of January.

We recognize that the problems associated with foreclosure processes and documentation have raised broader questions about the potential effect on the mortgage market in general and the financial impact on individual institutions that may result from litigation or other actions by borrowers and investors. Obviously, for a host of reasons – from fair treatment of borrowers to the fundamentals of the mortgage marketplace – mortgage servicers must get this right. We are directing banks to take corrective action where we find errors or deficiencies, and we have an array of informal and formal enforcement actions and penalties that we will impose if warranted. These range from informal memoranda of understanding to civil money penalties, removals from banking, and criminal referrals.

Conclusion

The OCC is focused on identifying and rectifying problems so that the basic function and integrity of the foreclosure process is restored; the rights of all homeowners subject to the foreclosure process are protected; and the basic functioning of the U.S. mortgage market is stabilized. As we move forward we will continue to cooperate with the many inquiries and investigations that are taking place and provide updates to the Congress.

Mr. CONYERS. Our next witness is Judge Dana Winslow, who has served as the justice in the New York Supreme Court for the past 14 years. He has been at the trial level of more than 1,000 mortgage cases and has a wide experience of what actually happens during this foreclosure crisis.

We welcome you this morning.

TESTIMONY OF THE HONORABLE F. DANA WINSLOW, SUPREME COURT JUSTICE, NEW YORK STATE SUPREME COURT

Judge WINSLOW. I thank you very much and all of the members of the panel for affording me this opportunity.

I have decided, based upon the presentations made and the comments delivered already, that the level of sophistication is such that I can proceed to certain areas without the need for what seems to be repetition.

First, I do think that responsibility, not blame, has to be determined, and I think we will find that the responsibility lies with lenders, lenders' attorneys, the investment community including Wall Street, mortgage and real estate brokers, the business community, borrowers, and I say with no less the courts themselves, the judiciary, is responsible as well for this problem.

The court has accepted foreclosure applications without scrutiny. An environment of trust has prevailed rather than an examination of the submissions and a requirement to submit the required proof. Recently title companies have been expressing reluctance to ensure foreclosed properties because of questions about the status of title.

I am going to go basically to my conclusion so that I have sufficient time, and I think that it will also help to show why I am saying what I am about the particular problems within the industry.

I think the ultimate resolution rests in a paradigm chain which focuses upon the defendant owners' ability to pay rather than the plaintiff mortgagees' artificial requirements. For example, if the defendant homeowners are able to pay $2,000 per month, having a present obligation of $3,500 per month, a loan modification for a period of 2 or more years at $2,000 per month would avoid the plaintiff mortgagee's costs as well as the mortgagor's costs of foreclose and property maintenance, avoid the potential loss of principle arising out of a forced sale in a depressed market, and allow the defendant homeowners to remain in their home. This approach could ultimately reduce the cost to lenders, borrowers, stabilize the real estate market, and do what I think is most important: promote equitable predictability. We must have predictability, but it cannot be unfair.

Why this result? Because the examination has focused on the mortgagee all along. We look at what is wrong with the mortgagees' submissions, and we do not find that we are able to effect resolutions. All we are doing is forestalling or deferring the inevitable. If a prima facie case requirement to entitlement remains with the mortgagee and after the acceptance of such proof without refutation by the homeowner, then justified dialogue can commence without regard to considerations of possible deficiencies of the plaintiff mortgagee.

What do we see on a regular basis? Well, what we see is that many of the affidavits attesting loss of note—and I am taking a step back—are inaccurate, clearly inaccurate on their face. Take a step back because in New York and in many States, a mortgage cannot be foreclosed without possession control of the note.

We find gaps in the chain of title, and I refer you to my attachment B in which there are multiplicity of names contained within the caption; and to attachment A, which agonizingly, but I am afraid accurately, demonstrates the course that both a mortgage and note takes place in this mortgage climate.

Assignment documents are frequently notarized several months after the assignment was purportedly effected and are notarized in blank.

MERS, which needs to be mentioned, has, in fact, changed drastically over the years. I have seen them starting in 2003 or 2004 and have received information from them.

I also notice my red light. And though from my perspective I usually am not as aware of it as I am now, I will stop at this point to say that the necessity for an examination of precisely what MERS is allowed to do, whether MERS is permitted the opportunity to foreclose, foreclose on behalf of an assignee as opposed to the original lender.

And I do ask you all to in closing consider one issue that wasn't mentioned, and that is that many people need to move from one community to another for a job. They can't. They can't move to get employment because they can't sell the house that they are in and move to another area. So that is another issue that I have not seen mentioned, and I ask for questions galore if the panel is so inclined. Thank you.

Mr. CONYERS. Thank you, Judge Winslow.

[The prepared statement of Judge Winslow follows:]

PREPARED STATEMENT OF THE HONORABLE F. DANA WINSLOW

F. DANA WINSLOW

NYS SUPREME COURT JUSTICE

Before the House of Representatives

DECEMBER 2, 2010

ON

CAUSES AND EFFECTS OF THE FORECLOSURE CRISIS

HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY

FORECLOSED JUSTICE:
CAUSES AND EFFECTS OF THE FORECLOSURE CRISIS

Hon. F. Dana Winslow
December 2, 2010

1 BACKGROUND

1.1 Justice in NY State Supreme Court for past 14 years. (Highest trial court within NYS system.)

1.2 Former president of the NYS Supreme Court Justices' Association and present member of the Executive Committee.

1.3 Previous – practicing attorney: federal securities area; commercial, municipal, criminal, and civil litigation in State and Federal Courts.

1.4 On the bench: Presided over more than 1000 mortgage foreclosure cases and the mass re-assessment case in 2003-2005 which provided insight into home values on Long Island.

2 OVERVIEW – FROM COURT'S PERSPECTIVE

2.1 Volume of Foreclosures. Based upon anecdotal evidence, approximately 11% of all homes in Nassau County are either in foreclosure or have been in default for 90 days or more. Court statistics show that 3.12% of all of the homes in Nassau County (approximately 360,000) are in foreclosure. Nassau County Supreme Court (2010) statistics:

2.1.1 Year to date filings: 4,625

2.1.2 Total pending: 11,144

2.2 Problems seen on a recurrent basis. Deficiencies or defects in: (i) the Plaintiff Mortgagee's proof of its right to foreclose and (ii) the Defendant Homeowners' notice of a foreclosure and their opportunity to attempt a loan modification or "workout," or otherwise protect their interests.

2.3 Guiding Principle: Equitable Predictability. Plaintiff Mortgagee, Defendant Homeowner, and the Real Estate industry as a whole, must know with greater certainty what the probable outcome will be following the commencement of a foreclosure action; a predictability that is fair and sustainable.

3 MORTGAGEE ISSUES

3.1 Uncertainty in process and outcome.

3.1.1 **Uncertain requirements**. In the past, the judiciary may have inadvertently contributed to the creation of the foreclosure crisis, by accepting, without question, the submissions of lending institutions seeking foreclosure. Courts have come to recognize the need to scrutinize the evidentiary submission of the Plaintiff Mortgagee before proceeding with foreclosure, and to define the nature of the proof required; that is, the documents that must be submitted to commence the action and apply for an Order of Reference (the Court Order in NY State providing for the computation of the Defendant Homeowner's debt by a court-appointed referee).

3.1.2 **Unsatisfactory Options.** Plaintiff Mortgagees are ambivalent about foreclosure. They want to stop the financial drain of retaining homes in their default inventory (on which they must continue to pay taxes and insurance premiums), yet they know that selling the property in foreclosure results in a greater inventory of homes and a depression of community property values. Forced sale does not relieve them of their property-related expenses, since in the overwhelming percentage of cases, the mortgaged property is sold to a subsidiary or a company controlled by the Plaintiff Mortgagee.

3.1.3 **Uninsurable properties.** Title companies have been expressing increasing reluctance to insure foreclosed properties, due to uncertainty regarding the legitimacy of the transfer of the property to a third party.

3.2 Proof of Standing – Ownership of the Note and Mortgage. Standing has become such a pervasive issue that I frequently use the term "presumptive mortgagee in foreclosure" to describe the Plaintiff Mortgagee.

3.2.1 **Possession of the actual Mortgage and the actual Note**

3.2.1.1 Failure to produce Note or production of wrong Note.

3.2.1.2 Affidavits of non-possession or loss of Notes – offered in lieu of the Note. Who has the burden of proof? Are there presumptions available to either party?

3.2.2 **Gaps in the chain of title**. Missing assignments – effects on prior unnamed mortgagees and their rights. I have obtained from the County Clerk printouts of mortgagee title that have differed substantially from the information provided by Plaintiff Mortgagees in foreclosure applications.

3.2.3 **Retroactive Assignments.** Occurs when, at the time of the commencement of a foreclosure action, the foreclosing Plaintiff Mortgagee did not own the Note and Mortgage. The Note or Mortgage are subsequently assigned to the Plaintiff Mortgagee but made effective "as of" a date prior to commencement of the action. Some NY Courts are now holding that such retroactive assignments do not confer standing upon an assignee mortgagee. I did so in January 2010, in *The Bank of New York as Trustee v. Nagi Elserafy et al.*, Nassau County Index No. 010723/07.

3.2.4 **Robo-signing.** Questionable validity of signatures on assignments and affidavits attesting to ownership of the Note and Mortgage. Examples:

3.2.4.1 Signed by: "Duly Authorized Officer," "Authorized Signer," "Attorney-in-Fact" or "Authorized Agent." What do these titles mean? What is the function of the person signing the documents, and what is the basis of their personal knowledge?

3.2.4.2 Same person signs several documents, in several different capacities: e.g., "Vice President of [Assignor Mortgagee]" is also the "Assistant Secretary of the Servicer" for the Plaintiff Mortgagee, and an employee of the law firm bringing the foreclosure action.

3.2.5 **Validity of notary stamps** on assignments.

3.2.5.1 Assignment documents notarized several months after the assignment was purportedly effected.

3.2.5.2 Notarized in blank – name of the person whose signature was purportedly witnessed is omitted.

3.3 <u>Separation of Equitable and Legal Interest in the Mortgage.</u>

3.3.1 **Servicers.** There is no precise definition. More aptly, there are interchangeable definitions. In one instance, the servicer collects the mortgage payments from the homeowner. In another, the servicer appears to be the equitable owner of the mortgage, and in a third, the servicer commences a foreclosure action on behalf of the equitable owner. In one instance, I asked the attorney for the plaintiff to tell me whether he represented the Plaintiff Mortgagee or the servicer and he said that he did not know.

3.3.2 **Mortgage Electronic Registration Systems ("MERS")**

3.3.2.1 History: My office has been in communication with MERS since 2004. According to MERS counsel, MERS, owned by MERSCORP, was formed in 1996 and, as of 1997, has acted only as a "nominee," to facilitate the transfer of mortgages.

3.3.2.2 Issues:

3.3.2.2.1 Difficulty arises in multiple unrecorded transfers of the legal ownership of the Mortgage (with or without the transfer of the Note) and with tracing and proving the chain of title. I refer the Committee to the attached diagram [Attachment "A"], obtained on the internet, which I believe to be both a nonsensical and accurate depiction of the problems concerning mortgagee chain of title.

3.3.2.2.2 Unclear whether MERS is (by virtue of the rights granted by the Homeowner in the initial Mortgage instrument) the nominee for the initial Mortgagee only, or for all subsequent Mortgagees, including the unnamed, unrecorded Mortgagees in the chain of title, and the Mortgagee who holds the beneficial interest at the time of foreclosure.

3.3.2.2.3 MERS is named as Nominee for purposes of recording the Mortgage. MERS relies upon that status in bringing foreclosure actions in its own name, as Plaintiff. It is unclear that the designation as Nominee for *recording* purposes gives MERS the right to *foreclose*.

3.3.2.2.4 MERS appears on both sides of the foreclosure action. I have seen actions in which MERS has brought the action as plaintiff, and named itself as a defendant.

3.3.3 Can deficiencies be addressed by an Allonge, with or without the approval or signature of the Homeowner? This question has not been answered by the judiciary or the legislature.

3.4 "<u>Packaging" of Mortgages</u>. The creation of pools of mortgages, typically with tranches; i.e., Collateralized Debt Obligations ("CDOs").

3.4.1 **Problem**: whether or not the "pool," "trust" or "fund" has the ultimate right to select specific mortgages from its assets and thereafter foreclose. Does the Court have to make independent determinations through a hearing process?

3.4.2 **Example**: I refer the Committee to the attached caption, which is typical of foreclosure actions arising from CDOs [Attachment "B"].

3.5 Other Prima Facie Proof.

3.5.1 **General problem**. Foreclosures processed by law firms in "bulk": my office has compared foreclosure applications that vary little or not at all from each other and occasionally contain language inapplicable to the foreclosure being considered.

3.5.2 **Proof of debt.**

3.5.2.1 Case example: Wife signed Mortgage but not the Note. I held that the Plaintiff Mortgagee must provide, at minimum, an explanation. Without such explanation, there would be dismissal. Demonstrates a dual problem: First, there is no conformity with the recording act (the Mortgage does not match the underlying debt obligation); and second, it allows the lenders to issue mortgages with the knowledge that one of the homeowners is not creditworthy, and to show overstated income or payment requirements on the closing statements for the loan.

3.5.3 **Amount due**.

3.5.3.1 Robosigning - the individual signing the affidavit has no knowledge of the required facts.

3.5.3.2 Plaintiff Mortgagee must demonstrate proper accounting and crediting of payments, particularly where there have been multiple mortgagees and/or servicers.

4 HOMEOWNER ISSUES

4.1 General. The ultimate goal is a process which is equitable and predictable, affording the Defendant Homeowners sufficient and accurate information, and an opportunity to protect their interests.

4.2 Knowledge of the Lawsuit: Service of Process.

4.2.1 **Actual knowledge**. The laws governing service of process are designed to provide defendants with actual notice of the lawsuit whenever possible. Problems arise in determining whether or not the Defendant Homeowner has received actual notice. Affidavits of process servers are often incomplete, uninformative or defective on their face.

4.2.2 **Substituted service.**

4.2.2.1 NY's Civil Practice Law and Rules ("CPLR") allows service by methods other than in-hand delivery to Defendant Homeowner.

4.2.2.1.1 CPLR 308(2) Delivery to person of "Suitable Age and Discretion" at the residence.

4.2.2.1.2 CPLR 308(4) "Nail and Mail" – affixation to the door of the residence.

4.2.2.2 Problems determining whether the summons and complaint were ultimately received by the Defendant Homeowner.

4.2.2.2.1 Person who accepts papers is not named, identified or described. The recipients are often "John" or "Jane" Doe, identified only as the Defendant Homeowner's "co-tenant" or "co-occupant."

4.2.2.2.2 Papers are delivered or affixed at an address other than the property being foreclosed. No explanation is offered.

4.2.2.2.3 If papers are delivered to the property being foreclosed, it is not always clear that the Defendant Homeowner still resides there. Law does not permit substituted service at the "last known address."

4.2.2.2.4 Due diligence: Before resorting to CPLR 304(4) "nail and mail" service, process server fails to first use due diligence to serve the Defendant Homeowner by CPLR 308(1) service (actually handing the papers to him/her) or by CPLR 308(2) substituted service. The due diligence requirement is not satisfied when these prior attempts occur on weekdays when the Defendant Homeowner would be expected to be at work or in transit to or from work.

4.2.2.3 Problems determining Non-military status.

4.2.2.3.1 I have seen cases in which the sole proof of non-military status was the process server's observation that the person (other than the Defendant Homeowner), who accepted the papers or verified the Defendant Homeowner's address, was not in military clothing.

4.2.2.3.2 Department of Defense confirmation of non-military status is often not provided, and even when submitted, we rarely know what information the Plaintiff Mortgagee provided to the Department of Defense when requesting military status. I have received affidavits stating that individuals with common names such as "Andrew Jones," were not in the military service.

4.3 Access to legal representation. Less than 3% of the Defendant Homeowners appear with counsel. Most of the Defendant Homeowners proceed alone, at a difficult time in their lives. *But see* CPLR 3408(b) (a *pro se* defendant may be permitted to proceed as a "poor person" and have counsel appointed to represent him or her). Nassau and Suffolk Counties in NY have established a *pro bono* legal representation program.

4.4 Modification Applications/negotiations.

4.4.1 **Knowledge and access.** The Defendant Homeowners rarely know whom to contact, and rarely have reasonable access to the appropriate person in the Plaintiff Mortgagee's office or the law firm representing the Plaintiff Mortgagee.

4.4.1.1 Attorneys practicing across the state with multiple offices have often utilized a single address, telephone and fax number which has effectively created barriers for Defendant Homeowners who are trying, willing, and maybe able, to offer payment of arrears or acceptable loan modifications. The barrier is increased by the multiplicity of choices confronted by a caller reaching an automated phone system.

4.4.1.2 Access must include the name of a knowledgeable representative of the Plaintiff Mortgagee, including counsel or someone who has or can obtain the necessary authority to proceed with a meaningful resolution, if possible, at the earliest stage of the proceedings.

4.4.2 **Plaintiff Mortgagee "Bad faith."** CPLR 3408(f) – Plaintiff Mortgagees must participate in mandatory settlement conferences, and negotiate in good faith for a mutually agreeable resolution, including loan modification, if possible.

4.4.2.1 Timely response – A Plaintiff Mortgagee must timely acknowledge the information provided by the Defendant Homeowner and respond to justified offers of modification. There are many instances of a Plaintiff Mortgagee refusing to consider a loan modification because the Defendant Homeowner's financial information was not up-to-date, even though the delay was due to the Plaintiff Mortgagee's own failure to timely respond to the Defendant Homeowner.

4.4.2.2 Short Sale – The short sale contemplates that the Defendant Homeowner will provide an acceptable contract of sale to the Plaintiff Mortgagee reducing the outstanding balance due. More often than not, the ultimate contract submitted to the Plaintiff Mortgagee is determined to be unacceptable (too far below market value), even though the determination of market value by the Plaintiff Mortgagee does not comport with comparable sales, particularly in a falling market.

4.4.2.3 Protocol – There must be some definition of, and consistency in, the manner and circumstances in which a modification will be granted.

4.4.2.3.1 6/31 rule: Informal protocol adopted by several lenders (including Emigrant Mortgage Company).

4.4.2.3.1.1 Reduction of interest rate to 6%

4.4.2.3.1.2 Monthly payments equal to or less than 31% of gross income

4.4.2.3.2 I have seen at least two occasions in which a third party (e.g., relative) has been potentially available as an asset or income guarantor, but has not come forward because the criteria for loan modification were unknown. When ultimately apprised of the protocol, they were willing to guarantee the debt and offer funds to reduce the arrears.

4.4.3 **Communication breakdown.** Foreclosure proceeds while modification/settlement is pending. In several of my cases, the modification and foreclosure were being handled by separate departments within the same lending institution, and the modification department did not communicate with the foreclosure department. The foreclosure sale took place while the Defendant Homeowner was waiting for a response on the modification.

4.4.4 **Conflict of interest.** Some attorneys represent the Plaintiff Mortgagee as well as a second mortgagee bank named as a defendant. Differing interests present potential impediment to modification or settlement.

4.4.5 **Judicial Response.** Bad faith in settlement negotiations has been used by Courts as a basis to vacate the underlying debt or interest, or impose substantial sanctions. One case was recently overturned by the Appellate Division as an inappropriate *sua sponte* exercise of equitable power without legal authority or notice to the parties. *IndyMac Bank, F.S.B. v. Yano-Horoski*, 26 Misc.3d 717, *rev'd* 2010 WL 4676301 (November 16, 2010). Another case has yet to see appellate resolution. *Emigrant Mortgage Co. v. Corcione*, 28 Misc.3d 161 (April 16, 2010) ($100,000 sanction and voiding accrual of interest). In my view, the state of the law is less certain or predictable as a result of these decisions.

4.5 <u>Foreclosure Rescue Scams</u> (e.g., "Straw Man transaction"). In order to avoid foreclosure, Defendant Homeowner "sells" property to a "straw man" who borrows money from a new bank to "purchase it." Straw man rents the property back to the Defendant Homeowner. Plaintiff Mortgagee is paid off, but Defendant Homeowner is unable to make the "rent" payments to the "straw man," and winds up in eviction proceedings. Defendant Homeowner loses any equity of redemption or right to surplus moneys that he or she might have had prior to the transaction.

5 RECOMMENDATIONS/CONSIDERATIONS

5.1 Service of Process – In my view, NY law requires the following proof from Plaintiff Mortgagees who serve the summons and complaint by a method other than in-hand delivery [e.g., CPLR 308(2) and 308(4)].

5.1.1 Demonstrate diligent efforts to serve by personal delivery.

5.1.2 Identify the full name of the person accepting papers, and his or her relationship to the Defendant Homeowner.

5.1.3 Ascertain, verify and provide documentary proof of the Defendant Homeowner's current and valid address.

5.1.4 Provide credible and substantiated proof of the Defendant Homeowner's non-military status.

5.2 Attorney Certification. Administrative Order of the Chief Administrative Judge of the Courts, dated October 10, 2010 – Plaintiff Mortgagee's counsel in a foreclosure action is now required to file an affirmation certifying that counsel has made inquiry to the banks and lenders, and carefully reviewed the papers, to verify the accuracy of documents filed in support of residential foreclosures.

5.2.1 As of the effective date of this requirement, attorneys in over 50% of the Nassau foreclosure matters have attempted to withdraw the proceeding, or some portion of the proceeding, without notification to the Defendant Homeowner. This figure is based upon my own anecdotal experience in cases over which I preside, as well as information provided by Court officials and Plaintiffs' attorneys.

5.2.2 In all new foreclosure actions, commenced after the effective date of the Administrative Order, the attorney certification must be filed with the initial request for judicial intervention. (If the action was already pending at the effective date, the certification may be made at other stages in the proceeding, as specified in the Administrative Order.) Does a single certification at one stage of the proceedings (e.g. commencement) satisfy the requirement with respect to all subsequent submissions? To what extent, and under what circumstances, is an attorney required to update or reaffirm the certification? Further administrative and judicial action is anticipated.

5.3 Real Property Actions and Proceedings Law ("RPAPL") 1303. Notice required to be served with the summons and complaint on colored paper providing the Defendant Homeowner with advice on how homeowners can seek help and warning the Defendant Homeowner of foreclosure rescue scams.

5.4 CPLR 3408. Mandatory settlement conferences in residential foreclosure actions.

5.5 Prima Facie Proof.

5.5.1 Total "package" should be submitted by the Plaintiff Mortgagee before the Defendant Homeowner is required to respond.

5.5.2 The "Stamp." I created a stamp in 2007 [Attachment "C"], to be inserted in all Orders of Reference, which sets forth the minimum requirements of proof to be submitted to the referee. Substantially the same requirements have been codified in CPLR 3408(e).

5.6 Sanctions for Bad Faith. Voiding accrual of interest during period of "bad faith."

6 ON THE HORIZON

6.1 Reverse mortgages. A popular commodity receiving heightened publicity in the past ten years, particularly for lower income homeowners who have substantial equity in their homes. The procedures and practices for foreclosure in this area have not been established. If permitted under the loan, the minimum requirements for foreclosure upon a reverse mortgage would seem to be the same as with every other mortgage but, in addition, should include an affidavit of fair market value as of the commencement of the action.

6.2 UCC Article 3. Some Plaintiff Mortgagees have argued that their status as a holder of a negotiable instrument (the Note) under UCC Article 3 allows them to proceed in foreclosure without proof of the chain of title (i.e., endorsements, intermediate assignments of the Note and Mortgage). Problems: first, a Mortgage is not a negotiable instrument under UCC Article 3; second, the endorsement in blank procedure, frequently used by a Plaintiff Mortgagee, does not necessarily create the elusive negotiable instrument; and third, in many cases, the Plaintiff Mortgagee cannot produce the Note.

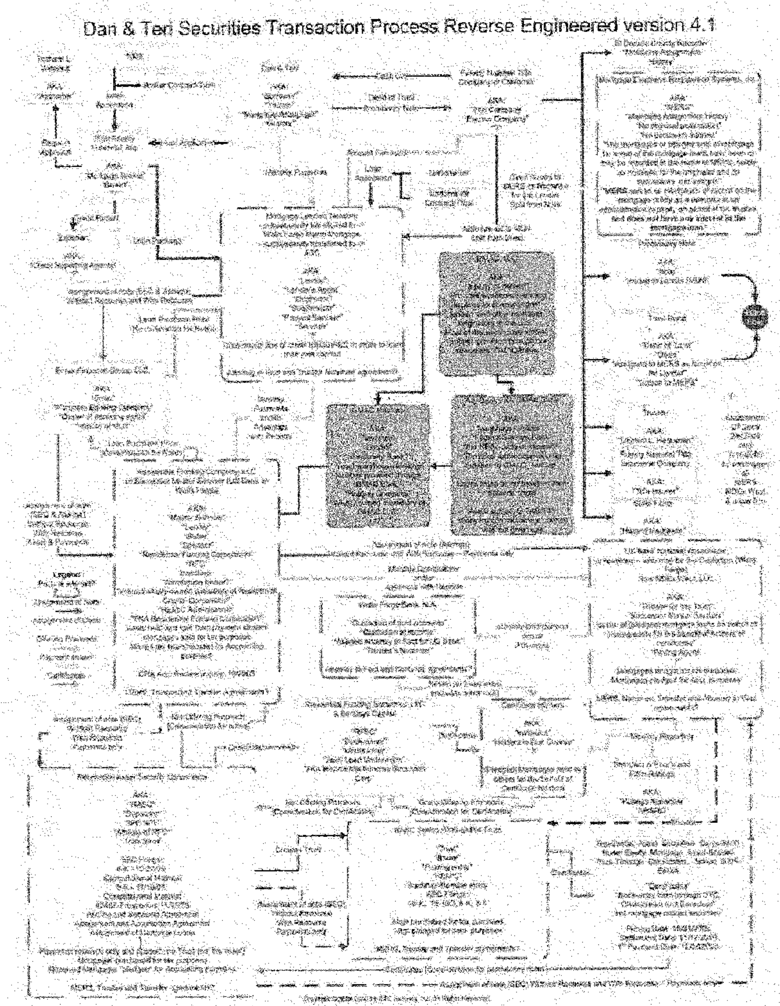
6.3 Notice of Pendency. RPAPL 1331 requires plaintiffs to file a Notice of Pendency in a foreclosure action at least 20 days before a final judgment is rendered. A Notice of Pendency is effective for three years from the date of filing [CPLR 6513]. Successive Notices of Pendency may be filed, even after a Notice of Pendency has expired or has otherwise been rendered ineffective [CPLR 6516]. The problem arises when foreclosure proceedings continue beyond the effective period of the Notice of Pendency, and the Notice of Pendency has not been renewed, or proof of such renewal has not been provided to the Court. Does such failure to timely renew the Notice of Pendency void the proceeding *ab initio*, or is it a correctable deficiency which can be rectified without Court intervention?

7 CONCLUSION

The ultimate solution may rest in a paradigm change which focuses upon the Defendant Homeowners' ability to pay, rather than the Plaintiff Mortgagee's artificial financial requirements. For example, if the Defendant Homeowners are able to pay $2,000 per month, having a present obligation of $3,500 per month, a loan modification for a period of two years or longer, at $2,000 per month, would avoid the Plaintiff Mortgagee's costs of foreclosure and property maintenance, avoid the potential loss of principal arising out of a forced sale in a depressed market, and allow the Defendant Homeowners to remain in their home. This approach could ultimately reduce the costs to lenders and borrowers, stabilize the real estate market, and promote equitable predictability.

ATTACHMENTS

A. Dan & Teri Securities Transaction Process Reverse Engineered Version 4.1
B. Caption: Wells Fargo v. Mori
C. The "Stamp."



ATTACHMENT "A"

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,
Justice

WELLS FARGO BANK, N.A. FOR THE BENEFIT OF THE CERTIFICATEHOLDERS ASSET BACKED SECURITIES CORPORATION HOME EQUITY LOAN TRUST, SERIES WMC 2005-HE5 ASSET BACKED PASS-THROUGH CERTIFICATES, SERIES, WMC 2005-HE5 C/O Countrywide Home Loans, Inc. 400 Countrywide Way Simi Valley, CA 93065 Plaintiff, -against- JONATHAN MORI, HOME CASH, INC., AMERICAN BUSINESS MORTGAGE SERVICES, INC., CHRYSLER FINANCIAL COMPANY, LLC, COUNTRYWIDE FINANCIAL CORP., DEBRA ANN COLLINS, MICHAEL JENIS, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR WMC MORTGAGE CORP., NASSAU COUNTY OFFICE OF HOUSING AND INTERGOVERNMENTAL AGENCY, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PEOPLE OF THE STATE OF NEW YORK, TOWN OF OYSTER BAY DEPARTMENT OF INTERGOVERNMENTAL AGENCY, UNITED STATES OF AMERICA ACTING THROUGH THE IRS, WANTAGH DENTAL ARTS PC, JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.), Defendants.	TRIAL/IAS, PART 9 NASSAU COUNTY INDEX NO.: 653/07 MOTION DATE: 6/1/07 MOTION SEQ NO.: 001

ATTACHMENT "B"

and it is further

ORDERED, that plaintiff shall include in the documentation provided to the referee pursuant to RPAPL §1321, the following: (1) an accounting of all credits to and charges against the account of the subject mortgage for a period of five years prior to the commencement of this foreclosure action, which may be produced in the form in which it is maintained in the regular course of business, or a copy of any accounting meeting these requirements that has been provided to the mortgagor within the five month period prior to this action; and (2) an affidavit by an officer of the plaintiff attesting to ownership of the subject note and the mortgage securing the note, which shall establish the chain of title from the inception of the loan to date. The report of the referee shall include a representation that the plaintiff has complied with this requirement. Reasons for failure to provide the information required, or deficiencies or discrepancies in the information provided, must be noted in the referee's report, which shall be served immediately upon the Court and all mortgagors, together with the information upon which it is based. No Judgment of Foreclosure and Sale shall be awarded in the absence of the foregoing.

ORDERED, that the named plaintiff mortgagee in the foreclosure proceedings shall additionally provide, to the referee, the documentation evidencing the "Appointment of the FDIC as conservator or receiver" pursuant to 12 USCA §1821 (c) and the documentation demonstrating the transfer, hypothecation, assumption of the assets or obligations, assignment or creation of agency with or for the benefit of the FDIC, as applicable in the instant matter.

J.S.C.

ATTACHMENT "C"

Mr. CONYERS. There will be questions as soon as we return from our obligation to cast votes on the floor. The Committee will stand in recess. Members of both panels are invited to join our staffs in the conference rooms, and the Committee will stand in recess.

[Recess.]

Mr. CONYERS. The Committee will come to order, please.

The question that I would like to pose to our distinguished panel, and I appreciate your forbearance, and I understand your schedules, is what can be done to reduce the number of foreclosures? I am going to start with Judge Winslow.

Judge WINSLOW. All right. There are a number of things that can be done. One is to assure that the servicer, who I am afraid still is ill-defined, falling into various categories, one of being a collection agency, another of acting as a plaintiff in a foreclosure proceeding—to assure that the note is available, the note is in the control of the mortgagee, and that the entire package is complete and factually appropriate in order for the commencement of discussions to take place.

Now, once they do, then it must go to the mortgagor. The mortgagor homeowner must then—if there is no contest or protestation of the prima facie case established by the plaintiff mortgagee, the mortgagor then must come forward and produce whatever response it has.

For instance—and I have never seen it, I had nothing to do with the creation of this mortgage. A very good case in point is one that I recently decided, and that was a case in which the two homeowners, husband and wife, signed the mortgage. Only the husband signed the note. I determined without further explanation that that was insufficient for the case to proceed on the basis that that did not comport with the requirements of New York law.

In the event that there is no refutation, then the next step must be justified negotiations between the mortgagee in foreclosure, whoever it is that is commencing that foreclosure action, has the authority and has the knowledge, with the mortgagor with counsel, if possible. In New York we have established under CPLR 3408(f) a process by which there will be an appointment of counsel for a poor person. That must be expanded.

There must be some kind of overseeing of the mortgagor's rights, either through the courts or through counsel, and then there must be an ability for that homeowner to communicate with the lender or the lender's counsel. We have seen numerous instances where the legal back contains an address in upstate New York, the action is commenced in Nassau County, and the only way that anyone, including the court, can get in touch with that person in upstate New York, who shall remain nameless for the moment, is by leaving messages, which are not ever answered.

The person who developed the answering service should have a coveted place in hell because it creates that barrier that prohibits the necessary dialogue between the two, the opportunity to engage in something that could lead to a loan modification. And the loan modification can occur, and has in my part, three times in the last month when there has been a third party stepping forward with sufficient funds to address the arrearage and sufficient income to address the income needs going forward.

There is a 6-31 rule that is generally applicable with several banks, including Immigrant, which is utilized. And that 6-31 rule means 6 percent interest, and there must be coverage of 31 percent of the total income that would be used to pay the mortgage on a monthly basis.

So if we incorporate those concepts, ideas and issues, I think we have a much better chance to address the real problems of the mortgage crisis. Thank you, sir.

Mr. CONYERS. Thank you very much.

Attorney Williams.

Ms. WILLIAMS. Thank you, Mr. Chairman.

If I understood your question, it was how to avoid getting into the foreclosure process, or how to produce a situation to reduce the number of foreclosures.

I think there are three basic elements to improving what is happening right now. First, is making sure that troubled borrowers are effectively considered for loan modifications, and that these programs servicersuse to identify and to consider modifications for troubled borrowers are working.

Second, as part of that is a continuation of improving the operations of the servicers so that they can deal effectively and promptly with troubled borrowers to answer the kinds of questions that the judge is referring to, ensuring that theydeal effectively with the paperwork that is being provided them, and that they are able to provide answers to those borrowers in a prompt fashion.

And thirdly, I think the step that I talked about in my oral statement, which is trying to eliminate some of the confusion and potential mix-ups that may flow from this dual-track process where you have a borrower that has been approved to get into a trial modification program, but yet the borrower is still getting notices or otherwise being treated as part of the foreclosure legal process; to suspend that so that the borrower has a clear path to work through the modification in accordance with the terms of the mod.

We have evidence from our mortgage metrics system that when the servicers provide affordable, sustainable modifications, with payments that the borrowers can afford, it does significantly reduce the redefault rates and keep those borrowers out of foreclosure.

Mr. CONYERS. But, Attorney Williams, in the vast number of cases, that is not happening, the recommendations that you have just elicited.

Ms. WILLIAMS. I think there are areas certainly to be improved in connection with all of the three areas that I noted, and the action that the OCC directed with respect to the dual-tracking concern was something that the Comptroller announced just yesterday. It is, unfortunately, a reality, though, that there are going to be situations where we have homeowners that cannot afford the homes that they are in. There are options available for what has been referred to as a graceful way to deal with that as well.

Mr. CONYERS. Mr. DeMarco

Mr. DEMARCO. Mr. Chairman, the most effective thing to reduce foreclosures in this country would be jobs, getting folks back to work. They don't have the income, or they have had reduced income, they are not going to be able to keep up with their mortgage. So the first thing and the biggest impact that could be had is to get our economy moving again where it needs to be and to be able to have enhanced employment opportunities for folks. And there are plenty of folks that still have jobs, but they have had reduced income as a result of those jobs. That is far and away, in my mind, the first.

The other two are to continue to improve, as we have been working hard to do, on two things. One is communication of the opportunities that are being made available to troubled homeowners. There is actually a great deal of public information out there now, it continues to be developed and improved, about what to do if you are having trouble with your mortgage and that there are alternatives to foreclosure out there.

I think continuing to make that clear to our citizens who are having trouble with their mortgage would be helpful. That is a responsibility we all share. Regulators share it, Members of Congress share it, banks and mortgage servicers share it, financial counselors share it. There are opportunities here, and we just need to continue to make that clear and to improve our communication.

And the third is I do believe that there are some large mortgage servicers that have been very resource-strapped by this unprecedented volume of troubled mortgages, and these institutions need to continue to invest more of their resources, their capital, into educating, training and monitoring their employees and bringing in additional employees who are needed to implement the various programs that have been put in place over the last 2 years to give a wider range of opportunities to people with troubled mortgages.

Mr. CONYERS. Ms. Campbell—or Caldwell, excuse me.

Ms. CALDWELL. Thank you.

Again, this may echo some of the statements by my fellow panel members, but I think, you know, first and foremost we have to expect servicers to follow the laws in the States in which they do business and to adhere to the contracts with the investors for whom they service. And the investors, including whether it is investor guidelines from Fannie Mae and Freddie Mac for the Federal housing agency, or even those that participate in HAMP, all have protocols in place to consider modifications before foreclosure, and we need to hold them accountable for that.

The second is increased capacity across the servicing industry. Even though, you know, there has certainly been a tremendous addition of resources to modifications, loss mitigations, still at this point there needs to be more resources against this crisis. It is still huge in scale.

Third, continued support for counseling and—because one of the things that we do know is that people do not go through a mortgage process enough times in their life to ever get good at it. And when you add to the stress of not being able to pay, we continue to support, and educate, and train counselors as part of our outreach.

And then finally, some standard set of guidelines and protocols for servicing practices. And one of things that we have worked very, very hard in the HAMP program and will acknowledge has taken a long time to do is set up a system to try and align incentives among groups of people that only had aligned incentives when properties were rising forever. And as they started to decline, where those incentives have not been aligned, it becomes very apparent to us all. And we work very hard in the HAMP program to try to align those incentives, and when we have done it right, for those homeowners in permanent modifications, they have seen their payments reduced by, you know, 36 percent, $500 a month on average. The redefault rates are lower than for historical modifications, and the payments are affordable and sustainable and predictable for the homeowner. So while it hasn't been the volumes that we would have liked to have seen, for those who it has helped, it has been an effective use of taxpayer funds and a change in servicing practices.

So those would be my recommendations.

Mr. CONYERS. Ms. Caldwell, in many, if not most, of the instances that you recommended, we are not up to speed on them, and I don't see how they are going to ever be utilized and brought into fruition.

Ms. CALDWELL. You know, again, this has taken a very long time, it has been a very difficult process to implement. And I think you have heard across this panel that there still needs to be more attention to this matter, but I thought it might be helpful just to share some statistics from our call center complaints.

In October 2009, 18 percent of the complaints were they have submitted documents and had not gotten a response from their servicers. In October 2010, it is 5 percent. Now, 5 percent is still unacceptably high for losing documents or not responding to homeowners, but it does show the effect of resource investments.

You know, when we had servicers not participating in HAMP, a year ago folks that called in to complain heard 10 percent of the time they were not participating in HAMP. It is now down to 2 percent in 2010. We are seeing year-over-year improvement, but it has been a very slow process to increase capacity given the scale and the changing nature of this real estate crisis.

Mr. CONYERS. Well, the projections that we have is that there will be a total of 13 million foreclosures in the United States of America before we come out of this downturn. So I don't know how I can take any great encouragement at the figures that more people are using HAMP that call you when the number of foreclosures is going up. My question was how do we reduce the extraordinary number of foreclosures?

Ms. CALDWELL. You know, I think, as we have heard, we need to continue to outreach to homeowners. You have heard from other panel members. We still at this point in time have homeowners for the first time they are having contact with their servicer is when the foreclosure notice is filed.

And we recently launched a public service campaign to educate homeowners that help is available. We have worked with many of the nonprofits on stopping fraud and other scammers that go after homeowners, but it is very, very difficult. And one of the reasons why this program runs through 2012 is we are not out of the crisis. We still have a lot of work to do.

Mr. CONYERS. Well, does anyone here dispute the economic prediction that there will be 13 million foreclosures before we see any change?

Judge WINSLOW. Yes, I disagree with it. I think it is going to be far more. Nassau County alone has now 40,000 foreclosures that have either been commenced or are in danger of being commenced.

Mr. CONYERS. How many?

Judge WINSLOW. 3.12 percent actually commenced and another 7 percent in which the homeowner, borrower, is 90 days or more in arrears. It is increasing; it is not decreasing, and it cannot change unless the paradigm changes. Unless we see what it is that the homeowner can do and, in doing so, allow the equilibrium, which is now a disequilibrium, to return to the real estate market because of surety regarding home sales, we will not effect any substantial change in this process. It will only get worse from this person's perspective.

Mr. DEMARCO. Mr. Chairman, I am not familiar with the particular study you are referring to. If you would like to have your staff provide it, I will be happy to have my team take a look and assess what are the underlying assumptions in a forecast like that.

Mr. CONYERS. Well, what do you have? What is your forecast?

Mr. DEMARCO. I don't have a forecast, Mr. Chairman, but I can give you a couple of numbers. Fannie Mae and Freddie Mac currently own or guarantee about 30 million mortgages. That is out of about 55 million mortgages in this country. So for the first 8 months of this year, which, you know, one would expect this year to be, you know, one of the high points in terms of such action, the completed foreclosures on Fannie Mae and Freddie Mac loans through the first 8 months was a little less than 300,000. And I would add that for the 300,000 foreclosures, there were more than double that number completed foreclosure-prevention actions.

So while there may be a great deal of filing of foreclosure, initiation of foreclosure processes, we are all still working very hard on these alternatives to foreclosure. And at least I can only speak to the enterprise book of business that I am responsible for, but we are working diligently through these various foreclosure alternatives, whether that means a loan modification, a repayment plan, or a short sale or deed in lieu of foreclosure. And our rate through the first 8 months of 2010, as I said, Mr. Chairman, a little less than 300,000 completed foreclosures and more than double that number of foreclosure alternatives having been finalized. So the modification, the modification is not a trial mod, it is a completed permanent mod.

Mr. CONYERS. Are you telling me, Mr. DeMarco, that you have never heard of this prediction or projection of 13 million foreclosures before today?

Mr. DEMARCO. Mr. Chairman, I am not familiar with what the assumptions are behind that, so I am not confident of what is in this projection, and I would be happy to take a closer look at it.

Mr. CONYERS. All right. You have never heard of it before, or you don't know what—well, let me just get this straight. You have never heard of it before, or you have heard of it and you are not sure of its validity? Which?

Mr. DEMARCO. Mr. Chairman, I can't recall whether I have heard that particular prediction or not.

Mr. CONYERS. You can't.

Mr. DEMARCO. I cannot, I am sorry, sir.

Mr. CONYERS. Well, I am, too. But we are all sorry. But, you know, you have got a pretty big role in this, and to have never heard of this figure before. Now, maybe my staff pulled it up out of thin air, or maybe they have misunderstood it and I am not reporting it to you accurately. It would seem to me——

Mr. DEMARCO. If——

Mr. CONYERS. Wait a minute. It would seem to me that you would have some projection of your own if you don't accept or have never heard of this one.

Mr. DEMARCO. With respect to doing projections, Mr. Chairman, as a conservator and regulator of Fannie Mae and Freddie Mac, that is the focus of my agency. And we have recently published on our Web site a series of loss projections with regard to future draws from the Treasury Department due to losses by Fannie Mae and Freddie Mac. And so we have made available that report on our Web site that takes various possible house price paths. We applied a stress-test-like scenario modeled after what the bank regulators did last year, and that information—I would be happy to provide copies of that report to the Committee.

Mr. CONYERS. Well, would it help you, or will it have helped you, that you came before us today and you found out about the projection of 13 million foreclosures? Would that be of any assistance to your responsibility in the Federal Government?

Mr. DEMARCO. Mr. Chairman, I view my responsibility is to minimize——

Mr. CONYERS. Just answer the question. Would it or wouldn't it?

Mr. DEMARCO. No, Mr. Chairman, it wouldn't.

Mr. CONYERS. It would not.

Mr. DEMARCO. Because I would not care whether the number was 13 million or 5 million or 20 million. I am working like the dickens to minimize——

Mr. CONYERS. Did you say that it would not affect you?

Mr. DEMARCO. Mr. Chairman, we are working to minimize that number.

Mr. CONYERS. I just wanted to get your response, sir.

Mr. DEMARCO. Yes, sir.

Mr. CONYERS. Did you say it would not?

Mr. DEMARCO. No, I am misunderstood. It would be helpful to know what that projection was and see if there is information in that projection that could inform our decisionmaking. That is why I would be happy to have that from your staff, sir, so I could review the number and the basis behind it.

Mr. CONYERS. All right.

Mr. DEMARCO. If there is information in that sort of projection that could be helpful to inform our work, I would be most happy to have that.

Mr. CONYERS. Thank you. We will be happy to provide you with the background for that statistic.

And I want to thank Mr. Goodlatte, Bob Goodlatte, for his forbearance here, because the only thing that I would like to raise now is the fact that no one on this panel has raised the question either for or against the temporary moratorium on foreclosures, which is probably the most obvious remedy that anybody in North America could come up with, especially in view of the fact that it has been employed during the era of Franklin Delano Roosevelt at not only the national level, but at the State levels as well, and that there are Governors who have resorted to this request at the State level. And I am now about to dismiss all of you afterward, and there hasn't been one solitary word mentioned about this procedure established in the 1930's.

Judge WINSLOW. Then let me, if I may, sir. The answer is that a deferral or a moratorium may be appropriate if during that time there is an honest, justified attempt at working out the resolution that is only being forestalled.

I would agree with a moratorium, but I don't believe that we are going to see a sudden rise in house values, home values, that is going to make a radical change in the way we approach the real estate market and the foreclosure market, and that has to happen over time. If we have—make it twofold for the moratorium, I would think that that would be a very appropriate consideration. Thank you, sir.

Mr. DEMARCO. Mr. Chairman, if I may, you are correct. I did not raise this issue in my oral remarks, but I do deal with it directly in my written statement submitted to the Committee. And I submitted my view that I am not in favor of a nationwide moratorium on foreclosures. I do not believe that that is either appropriate or necessary at this point in time. And I believe that the cost of such a moratorium would outweigh the potential benefits, and I go through that in my written statement, Mr. Chairman.

Mr. CONYERS. Well, do you still leave the door open slightly, Mr. DeMarco, for the possibility that temporary State foreclosure moratoriums could be, under circumstances, appropriate?

Mr. DEMARCO. I wouldn't rule it out, Mr. Chairman, but I am not aware of circumstances at this moment in which I would say that that is appropriate.

I would say that where we have servicers that have identified problems in foreclosure processing that calls into question the validity of paperwork being submitted to courts or being submitted to State officials to effect a foreclosure, in those cases where there was an identified problem with the servicer, absolutely it would be dishonorable and it would be illegal to be submitting such documents when there was a known problem. I think in that case for the individual servicer where there is a problem identified, that is how we ought to be targeting stoppages of foreclosure actions until we are sure that the law is being properly followed.

Mr. CONYERS. Attorney Williams, I notice you nodding your head.

Ms. WILLIAMS. I think we agree completely with the point that Mr. DeMarco just made, where there have been identified flaws and deficiencies in the foreclosure process or in the documentation. If there are questions about the accuracy of the information that is being relied on in connection with the foreclosure, those need to be fixed before foreclosure resume.

Ms. CALDWELL. I would just say the same for those servicers in those cases where their processes have showed they are not sufficient to follow the laws, they need to stop the foreclosures, fix the problems, and we supported those moratoriums.

I would also say within the Making Home Affordable program, servicers are not permitted to file foreclosure until they have tried to solicit homeowners that are 60 days delinquent, and we set standards by how many times they have to attempt by mail and by phone before they can file foreclosure.

But in terms of a national moratorium, we have a lot of concerns on neighborhoods and other things that can help folks that are waiting to buy a house out of foreclosure.

Mr. CONYERS. Ranking Member Bob Goodlatte of Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Ms. Caldwell, when did the Treasury Department first learn of the foreclosure document problems?

Ms. CALDWELL. Can you be more specific?

Mr. GOODLATTE. Well, you know, we have got this whole thing that has burst on the scene here in the last few months about problems with foreclosure documents not being properly processed, not being properly signed and so on. You are familiar with that, right?

Ms. CALDWELL. Correct.

Mr. GOODLATTE. When did the Department—when did the Treasury Department first become aware of that?

Ms. CALDWELL. Again, I don't want to speak for everyone in the Treasury Department, but certainly within our office we became familiar with at the time that the first major servicer, Ally, announced its foreclosure moratorium due to that documentation problem.

Mr. GOODLATTE. So was it from press accounts, in other words, that you first learned of this problem?

Ms. CALDWELL. From my office, yes.

Mr. GOODLATTE. With all the work that Treasury has done with loan modifications, and working with lenders and servicers through the Housing Affordable Modification Program, did the Treasury Department have any indication that there were such widespread documentation problems with foreclosures? Obviously some of the people coming in for the modification process must have reached a foreclosure stage of their circumstances.

Ms. CALDWELL. You know, I think it is important to keep in mind that the Making Home Affordable Program is focused on foreclosure prevention, doing everything to keep that homeowner from getting to foreclosure. Certainly as it relates to documentation problems, we saw many of them. And we have had servicers go back, we solicit homeowners, we track them on collecting documentation, and in January of 2010, we instituted a temporary review period where we asked all servicers to go back and make sure they notified homeowners as to the status of their documentation or their payment and gave them a chance to appeal.

So we certainly saw documentation and capacity problems within modification, and we took steps to change behavior and correct that, but, again, HAMP is focused on foreclosure prevention, not the technical and State specifics on foreclosure.

Mr. GOODLATTE. Let me ask Ms. Williams, when did the OCC become aware of the foreclosure documentation problem?

Ms. WILLIAMS. At the same time that Ms. Caldwell has mentioned.

Mr. GOODLATTE. And was it from press reports?

Ms. WILLIAMS. It was from press reports in connection with the Ally matter.

Mr. GOODLATTE. And can you explain how the OCC, which regulates the large banks that are at the center of this controversy, failed to detect that there were foreclosure documentation issues well before this turned into a crisis that we find has gummed up the entire works here and caused problems for families, problems for people who want to buy homes, and has really altered the entire real estate market of the country?

Ms. WILLIAMS. We were focusing our supervisory resources very intensively on the modification process, and directing the national bank servicers to make various improvements in their operations and in the structure of the modifications that they were offering. So our focus was on that aspect of their mortgage servicing operation. We were relying on internal audit and internal quality control procedures that these institutions had over what we regarded as sort of general business processes, how documents are signed, how documents are notarized.

The OCC, and I think bank regulatory agencies in general, in terms of what our examiners do, when you are

talking about the general business processes of a bank, we rely to a large extent on the quality control and the audit by the institution to get those processes right. And we also look for warning signs, for example, consumer complaints from the OCC's Consumer Assistance Group. There were no warning signs from internal audit, quality control, or even complaints relating to the foreclosure documentation aspect of mortgage servicing triggering red lights for us.

In hindsight, as we think about the volume of transactions that were going through the process, we could have been more suspicious that the challenges that the servicers were encountering on the modification stages—which they had issues and they continue to have issues—that there may have been similar types of problems in handling the volume that were cropping up in the foreclosure stage. But that then raises a question. Does that mean that in order to oversee, you have to literally station bank examiners in the rooms where people are signing documents, to see if there is a notary sitting next to them?

I think there are some very legitimate questions about how to effectively supervise this type of activity going forward. And one thing that I would note is the examinations that we have underway. We call them horizontal exams—across multiple banks and with the involvement of the other bank regulators and also the FHFA in certain respects, will produce not just findings particular to the individual banks to convey to those banks, but the regulators plan to do a public report of the basic problems that we find, sort of a lessons learned.

And I think that lessons learned can translate into two things that are very relevant to your question. One is there has been discussion about the development of standards for mortgage servicers so that there is a set of more uniform standards and expectations.

Mr. GOODLATTE. Is that something the Federal Government should do or the State Government should do that?

Ms. WILLIAMS. Well, the Federal bank regulators certainly have the ability to do that, to set more precise standards across the depository institutions that we regulate. We also need to use our findings,as a lessons learned on our supervisory processes to illuminate ways in which we can more effectively supervise. And the idea of developing new standards and looking at supervisory techniques I think go hand in hand.

Mr. GOODLATTE. Thank you. Mr. DeMarco, has the robo-signing scandal exposed the American taxpayers to any potential legal liability because of the Federal conservatorship of Freddie Mac and Fannie Mae?

Mr. DEMARCO. Congressman, I am unaware of legal liability it would pose. It does pose a risk of additional losses to those taxpayers, which troubles me. But those losses would arise principally from additional delays in the actual processing of a foreclosure so that the loss on that particular property goes up. The longer the foreclosure takes, the more the American taxpayer is paying for that mortgage to be carried by Fannie Mae and Freddie Mac and the greater risk that the property value continues to decline. And those two things, sir, increase the loss to the taxpayer.

Mr. GOODLATTE. What steps are Freddie Mac and Fannie Mae taking to ensure that foreclosure documentation scandals like this don't reoccur in the future?

Mr. DEMARCO. Several things. With the major servicers, they are literally on site to look at how their mortgages are being serviced. We have been sending out a great deal of reminders and communications to servicers about their contractual responsibility. And I will speak for FHFA and say that we are certainly, you know, working in coordination with Federal banking regulators and awaiting their examination activity that Julie Williams spoke of a moment ago.

Mr. GOODLATTE. Thank you. Justice Winslow, you are a State court judge and your testimony has detailed alleged abuses by servicers participating in State court foreclosure proceedings. Is your appeal to Congress for help today a suggestion that the New York State courts and Rules of Civil Procedure are not equipped to deal effectively with lawyers and parties who mislead the court?

Judge WINSLOW. It is addressed to both. I think that it can be a Federal matter as well as a State matter. Insofar as sanctions are concerned, insofar as consideration of the action taken against a particular mortgagee, that does lie within the purview of the State legislature and the State court judges. However, HAMP and HAFA have the ability to address certain minimum requirements. This is a due process issue in many respects, which can be addressed by Congress to assure that each party is fairly treated, that the protections are afforded.

Mr. GOODLATTE. I agree with you that we can do that. But let me ask you as a follow-up.

Judge WINSLOW. Certainly, please.

Mr. GOODLATTE. The attorneys general of all 50 States and the District of Columbia are investigating the foreclosure documentation scandal. Given that foreclosure is a State law issue, do you have any reason to believe that the State attorneys general are not in the best position to resolve the issue, at least initially?

Judge WINSLOW. I have no reason to believe otherwise. I think that they are capable of addressing the particular issues that they have. But that doesn't mean solution of the problem. It means an examination, a reaction, rather than a proactive approach which can come on the Federal level.

Mr. GOODLATTE. It can come on the Federal level, but each State concerned about both people who may be wrongly subjected to foreclosure and to the fact that the delay in the foreclosure, as Mr. DeMarco has pointed out, has serious ramification beyond the individuals in that individual transaction; they also have the ability to make sure that they step in and see that attorneys and others who are responsible for following the law are indeed following the law.

Judge WINSLOW. His comment is a very interesting one, because at this point I think it is well recognized that the mortgagee, the homeowner, who has had a foreclosure, and after sale there is a deficiency, is unable to pay it. So the mortgagee is the party that is most likely injured. That then creates the environment or the atmosphere in which Federal regulation can set certain minimum standards, as they have in HAMP and HAFA. So I see very little enforcement through the Federal Government standards now because they are not compulsory, they are not mandatory, they allow for the individual mortgagee to select.

Mr. GOODLATTE. One last question. What interest has the State bar association in ensuring that the attorneys who conduct it regulates—I am sorry, the bar association regulates the conduct of these attorneys, correct?

Judge WINSLOW. In a grievance fashion, absolutely, yes.

Mr. GOODLATTE. Well, have there been in New York, to your knowledge, any ethics proceedings brought with regard to attorneys handling foreclosure cases?

Judge WINSLOW. As of this moment, not to my knowledge.

Mr. GOODLATTE. Is that the bar association's failure to be paying attention to what is going on here as well?

Judge WINSLOW. In many respects. But in deference to the New York State bar association, they are not acting within clearly defined rules. They are using the rules that they are developing themselves through a Committee process.

Mr. GOODLATTE. I mean, rules of ethical procedure regarding improper signatures to documents don't exist right now under the canons of ethics or the bar association in the State of New York?

Judge WINSLOW. They clearly do. But the rules that would be applied have come to light in the context of the violations only within the last year. The association between the lender and the lender's attorney is not something that was considered in 2005 when virtually every single foreclosure, no matter how improper the submission was, ended up in a resolution because of the increasing value of real estate in the real estate market.

Mr. GOODLATTE. Well, you know, I understand——

Judge WINSLOW. Does that answer or not answer your question?

Mr. GOODLATTE. I understand the desire on the part of many to have somebody wave a magic wand or come up with a silver bullet that will both cure all of the pending foreclosures that exist right now and prevent this kind of thing from happening in the future. I would argue that the silver bullet is to have people pay the penalty for not following the law as it exists right now. And I think you would see people clean up their act really quickly if that took place.

Judge WINSLOW. And just one very fast statistic. In the appellate division first department alone, there are over 3,500 grievances that have to be processed. Yes, there is underway a bar association committee investigation and approach to addressing your problem as you articulated it. It hasn't happened yet, it is on the horizon. And I don't think——

Mr. GOODLATTE. Do you think the sooner everybody who is affected by it got about doing what they need to do, and if they are charged by the law or the canons of ethics or by the contractual obligations that they have got about doing it, the sooner we would clean this up and the sooner we wouldn't see repetition of it. And the longer we wait for Congress or somebody else on high to say that we have some magic solution, whether it is 13 million or 300,000 or whatever the number is, it is a good number, but to think that we can set up some new regime that is going to take care of this problem I think is a mistake. We need to get about the business of taking each one of these mortgages and doing them correctly.

And to the extent that Ms. Caldwell's Department can help people avoid foreclosure with a refinance intervention on their part, great, I am all for it. But it seems to me we are wasting a lot of time here saying we are not going to do anything because we have got so many of them, that we are just going to have a moratorium or a freeze or some other thing that delays justice occurring.

Judge WINSLOW. Yes, sir. And you heard what I said about a moratorium or a freeze.

The other aspect of this is the extent to which the lender participated in the lending process with the borrower. If in fact there is a conjunction of lender-borrower activity such that the lender directly or indirectly requested the borrower to place greater income on the financial statement is participation. Insofar as what the New York State Bar Association can do, they can do something, but it must be the grievance committee that is ultimately responsible for taking action against someone for suspension and a revocation of licensor.

Mr. GOODLATTE. Thank you. I want to thank all the members of the panel. It has been very helpful. Mr. Chairman, thank you very much.

Mr. CONYERS. Thank you very much, Mr. Goodlatte.

Mr. GOODLATTE. I appreciate your forbearance as well.

Mr. CONYERS. Well, I appreciate your steadfastness on this issue. I am now pleased to recognize the distinguished gentlelady from Los Angeles, California, Maxine Waters, a senior Member of the Committee.

Ms. WATERS. Thank you very much, Mr. Chairman. I appreciate the opportunity to continue the work that I have been involved with on the Financial Services Committee relative to these foreclosures and loan modifications. And I am familiar with some of the witnesses that are here today, had an opportunity to spend some time raising some questions, and if I may I want to start again with Ms. Caldwell, who is the Chief of Homeownership Preservation Office, Department of Treasury.

We heard from the Congressional Budget Office this week that when all is said and done, the Treasurer will only spend $12 billion of the $50 billion originally targeted under TARP for homeowner assistance. Moreover, of the $12 billion only $4 billion is for HAMP and sent to payments for services to modify loans. That is 8 percent of the total allocated to the program.

At my hearing on November 18th, Governor Elizabeth Duke said we could expect more than 6 million more foreclosures through 2012. I guess my question today, Ms. Caldwell, is $4 billion enough to deal with the scale of this problem?

Ms. CALDWELL. Congresswoman, I am not familiar with all of the assumptions behind the Congressional Budget Office analysis. But what I do know is that as we sit here today, we continue to have $45.6 billion allocated to the housing programs that include close to $30 billion for HAMP, plus the hardest hit—$7.6 billion for the hardest hit funds that support the State housing finance agencies, including in California, as well as the program we recently announced through the FHA.

And what we—and I think it is important to remember that these programs run through 2012, and we continue, we continue to focus on outreach, because we don't think the crisis is behind us, and we think there is more work to do on mortgage modifications, and we are committed to doing that.

Ms. WATERS. Ms. Caldwell, if I may, I am concerned that with so much money left unspent—and you are describing that the program is scheduled to go through 2012—that we are on track to have $38 billion in HAMP funds remaining. Can the Treasury Department do anything to change HAMP so that this $38 billion does not go unspent?

Ms. CALDWELL. Again, Congresswoman, that is something that we look at every day within the context of the programs that we have. I think it is important to remember that the funding is paid out over a period of 5 years as mortgages remain successful. As the crisis is changed, we moved to the hardest hit funds to get money out to the States. So we remain committed to helping as many homeowners avoid foreclosure as possible.

Ms. WATERS. Well, I am being advised that the CBO report takes all of that into account. And it looks as if the money is not going to be spent, can't be spent.

Let me just get at why I think probably the moneys are not being spent as they could be spent. What percentage of borrowers are dropped from HAMP trial modifications simply because they didn't submit the requisite paperwork, even when they made all of their trial payments. I know this will be different for every servicer, so you don't have to disaggregate the information, just give me an average of what percentage of these borrowers are being dropped because of paperwork problems.

Ms. CALDWELL. In terms of trial modifications, again, it is hard to be very specific because there are some cases where their documentation—there are some cases where they didn't submit documentation and didn't make payment. But I would say approximately in that population that went into a trial based on their stated income, about 30 percent had a documentation issue.

Ms. WATERS. Well, the ones that I am referring to are the ones that made all of their trial payments and they wish to keep going, but they have not completed the paperwork. And a lot of times we are hearing that paperwork is lost, all kinds of problems with paperwork. So why are they dropped, why would they be dropped if they are up to date on their trial payments?

Ms. CALDWELL. Again, you know, we have heard from your office and we have worked closely with a number of offices on resolving the paperwork. In January, as you know, we said the servicers could not decline anyone for lack of paperwork. They had to go back, they had to send a letter to that homeowner saying what paperwork was missing and give that homeowner a chance to resubmit it again. If they are declined for paperwork again, they have a 30-day appeal. And so while there continues to be an unacceptable level of lost paperwork, we have continued to keep people in trials for an extraordinarily long time to get the paperwork done.

Ms. WATERS. Well, we believe that those persons who are in compliance, who have made all of their payments, should not be dropped because of paperwork problems. We don't know whether or not this problem is caused by the bank's failure to process paperwork, we don't know what is happening. But we believe that if these clients are keeping up with their payments that you should continue to keep them into the HAMP program in some way so that they can stay in their homes rather than facing foreclosure.

Now, having said that, you mentioned the Keep Your Home program. Other than Bank of America, the major servicers are not participating in California's 790 million principal reduction component of the Keep Your Home program which uses money from the hardest hit fund. Now, Treasury oversees this California program. Why can't you get more banks to participate than just one?

Ms. CALDWELL. So let me just—I would like to address one more thing on the document issue, because you have

raised a very important concern, and I just want to make sure your office knows that if anyone has been declined from HAMP and has a reason code, they have been told that they did not submit their paperwork and they can produce and appeal it, we force the servicer to look at it. In some cases if they have decided that the paperwork doesn't work or they can't produce it, the servicer must consider them for an alternative modification. So I just want to make sure your office and others know that we take it——

Ms. WATERS. Well, do all of the HUD counselors know this, all of those persons who are involved with assisting with loan modifications? Have you sent out any memorandum or notice to them that would explain this to them? Because they call us, and we are getting from the counselors in the HUD program that people are being dropped who are up to date on their payments in HAMP. So evidently they don't know. Has there been any communication with them?

Ms. CALDWELL. You know, on November 3rd we actually issued guidance to servicers on handling the homeowner complaints and making sure that inquiries were independently reviewed and that servicers had to suspend any foreclosure sale until it has been resolved. Because again, the capacity issue has been something that we want to make sure gets addressed.

But again, I would like to answer your question on the hardest hit fund, and just say that in September we called in all of the large servicers and representatives from all of the 18 housing finance agencies, along with representatives of Fannie Mae, Freddie Mac and FHFA, and talked to them about the importance of this program and putting together a model to get the servicers to work with all of the State FHFAs in this program.

Ms. WATERS. I am reminded that at our Subcommittee hearing, the banks basically admitted to dropping participants because of paperwork problems. So I don't know what you can do to be more forceful in getting their cooperation or what you can do to communicate better to the counselors how to follow up when they get these complaints. But the fact of the matter is, I suppose all of this is voluntary; is that right?

Ms. CALDWELL. Participation is voluntary, but once a servicer signs up, that servicer has to comply with the requirements of that contract, and we expect them to do so.

Ms. WATERS. But they don't have to sign up?

Ms. CALDWELL. Correct. Servicers do not have to participate. And in fact as of October 3rd, any servicer that is not in the program is not able to sign. So we have signed up the servicers that we have in there now.

Ms. WATERS. Okay. And I want to get back to something that—questions that I have started, without badgering you, I don't want to badger you. But I do want to know this. Since HAMP is not working—and I think there is a consensus that it really is not working—it is a voluntary program, and since there have been no sanctions, no fines, no real enforcement, I want to know what is Treasury's program to redo all of this, to reconstruct it, to come back with something that is really going to deal with these foreclosures and loan modifications? What are you offering that is different?

Ms. CALDWELL. Congresswoman, first let me just say it is not badgering. I really do appreciate the leadership you have provided on behalf of homeowners, not only in your State, but throughout the country. But while I will agree with you that HAMP has not helped as many people as we would have liked to have seen helped at this time last year, it has helped; it had tremendous growth when we started the year with 31,000 to 500,000. We need to focus and do more, and so I will agree with you on that.

But I think it is very important, we can't lose sight of the fact that those modifications done within HAMP are affordable and they are sustainable and they have changed the way the servicing industry has done business. So I just want to make sure that we follow that.

In terms of the programs, I also want to just remind you that it is contractual, it is voluntary, but that is the way the program was set up. And as part of the TARP legislation, those programs that we have in place are the programs that we have. And we continue to try to work and revise those programs to the extent we can within the legislation that we have based on feedback from homeowners, from investors, and from servicers to make sure it is performing better.

Ms. WATERS. I appreciate what you are

Saying, Ms. Caldwell, but I would like to know, given you have all the money that you need to deal with these problems in the HAMP program in the hardest hit fund, the Keep Your Home program, how would you suggest that that money be used to speed up loan modifications and to facilitate loan modifications and do principal write-down? Do you have any—I mean, I know that you are saying that you have seen some progress. And I must be very honest with you. Those of us who work very closely with this just don't see the progress. We are still bombarded with requests for help for these problems, for foreclosure problems in our districts. And we really do need to see more aggressive action. The more we hammer away at how to do it, we uncover more and more problems that the regulatory agencies should be uncovering, should be on top of, should know about. And it is just blowing my mind that we have all of these problems with the robo-signing and not having the notes, et cetera. So I mean it is not that we can be comfortable that things are getting better. How could you use this money to make it better?

Ms. CALDWELL. Again, while the programs that we have announced continue to be early, I just want to make sure on the record that we have made so many changes to this program in response to what we have heard. In fact, some would say that we have made too many changes, that the system can't absorb them. But within the first part of this year we announced the hardest hit fund to five States, to have those States that were hardest hit get money out the door. We got good response to that, that we increased it in June to add an additional five States.

Ms. WATERS. What banks are participating?

Ms. CALDWELL. Again, as I mentioned——

Ms. WATERS. In California we have one bank that is participating, Bank of America. Why can't you get more to participate?

Ms. CALDWELL. As I mentioned, you know, the programs are just continuing to be launched. The large servicers have said they will participate. We have called them all in, including the agencies, in September and more of them are participating right now in the unemployment programs because that has been faster to implement in a severe crisis to address, but we remain focused on encouraging the use and the consideration of principal reduction as much as possible, and we would like to see more servicers engaged in the California program. I think it is a good pilot for other FHFAs.

Ms. WATERS. Well, as I see it, whether we talk about the program that we funded for unemployed homeowners or whether we talk about the TARP money that you have, we have basically done everything possible to support keeping people in their homes. And it is a little bit mind-boggling to recognize that you have the money, you have the power, we have all of this so-called oversight, and we still are looking at 6 million more foreclosures through 2012.

I know, Ms. Caldwell, there are some people that would have you believe that these are just irresponsible people who tried to game the system. But I have said over and over again, I don't believe that millions all of a sudden became bad people. Something happened, and we know what it was. The subprime crisis was created basically through predatory practices, really; I mean that is what it amounts to. And nobody has gone to jail, nobody has been fined, nobody has been penalized in any way. And we just feel as if, given all of the resources that we have made available to facilitate keeping people in their homes, that we are just not doing a good job of it. You are not doing a good job, our regulatory agencies are not weighing in in ways that could help us keep people in their homes.

And we think that when we find things, like in the HAMP program, where people are up to date on their payments and they have kept, you know, good faith with the contract, that they should be assisted in staying in their home rather than being dropped because the paperwork is not done. Sometimes it takes a long time to get the paperwork done. We have people who call us, the elderly, for example, who are asked for paperwork and they have no assistance in trying to put that paperwork together. And we finally get them with some counselors and the counselors have to start from scratch in helping this 80-year old person who has been in that house for 30 or 40 years who got a refi through some slick loan initiator, and then we find that this person has been in HAMP, they have paid, and they are going to get kicked out of their home.

So it is very disturbing. And every time we hold these hearings and we go over these questions and we bring this to your attention, it gets even more frustrating.

Mr. Chairman, I yield back the balance of my time.

Mr. CONYERS. Thank you very much. I am pleased now to call Darrell Issa, recognize him and to thank him for his—he has quite a schedule and he has fulfilled his commitment to return back to the Committee for questions, and we yield to him at this time.

Mr. ISSA. Thank you, Mr. Chairman. And nothing could be more important than American homeowners' ability to stay in their home if they have the means to do so, and I appreciate your leadership on this.

And for my colleague from California, as you may recall, we have asked the special IG for an audit of the program you mentioned earlier, and as soon as I get it back I will share it with your office. I very much think you have a point, that this is an example where we have got to get the numbers to figure out whether in fact it needs to be shut down or revamped.

I will try to be brief, I know we have votes coming up and we have a lot of Members still to ask questions. Mr. DeMarco, I am going to only ask you one question, and I sort of view it this way. In the news, rightfully so, there has been huge indignation that loans are being not fully looked at and simply stamped, the so-called robo signatures. But isn't it true that Fannie and Freddie admitted that they didn't look at individual loans, that they relied on third-party guarantees of large packs of them when they took on trillions of dollars of obligation effectively on behalf of the American people?

Mr. DEMARCO. Congressman, Fannie Mae and Freddie Mac do not service mortgages. They do guarantee mortgages that they acquire or they securitize.

Mr. ISSA. What I am getting to is they took mortgages without looking at them, just as we are initiating HAMP events today, based on, if you will, stated income, which is another name for the beginning of a liar's loan if you don't change along the process, right?

Mr. DEMARCO. I see. Fannie Mae and Freddie Mac typically purchase their loans that have been run through an automated underwriting system of theirs so that it passes or doesn't pass a screen that they have developed that defines their underwriting——

Mr. ISSA. Well, didn't their screen fail? Isn't it true that they took crap in? They took in outright lies in which the underwriting property was never worth what it was borrowed against and the individual never had the income to repay it? Isn't that true in many, many, many, many thousands of cases?

Mr. DEMARCO. Congressman, they have drawn $151 billion from the American taxpayer. They clearly bought loans that they either did not adequately underwrite or they did not price the risk adequately. And they certainly did not establish and build up in their corporations sufficient capital to back the risk they were taking.

Mr. ISSA. I appreciate your honesty and candor. Because one of the challenges that will not be met in this Congress, but we will be dealing with in the next one, is what do we do going forward, how do we unwind the history, and then if the Federal Government is going to have participation through some form of a GSE, how do we make sure this doesn't happen again and, more importantly to me, make sure that executives don't get paid millions simply because they took a lot of these on, and the less they looked and the more they took on the higher their bonuses were? And I think you would agree that that is part of our undisputed history.

Ms. Caldwell, I appreciate your presence here. You have been before both our Committees and you have always, you have been gracious and patient for us to ask a lot of questions, often the same. In this case I will try not to completely retrace our steps on HAMP, but let me go through just a couple of them that I think the record is not completely clear on here.

Although you have made changes in the front end of HAMP recently, I mean it is an evolving program, isn't it true that basically people do not have an obligation to at least somewhat substantiate their income at the very, very, very beginning of an application, that they still come in with effectively I make this much, give me 90 days to prove it?

Ms. CALDWELL. Congressman, effective June homeowners coming into HAMP verify their income before the trial modification starts. We announced that change in January and had it take effect in June. Certainly last year, when we were in the midst of the crisis and servicers did not have capacity to verify income up front, we did permit homeowners in under stated income.

Mr. ISSA. Which brings, the question is, in America, particularly if you are a salaried employee, and most of the people were, not all, but most, why was there ever an expectation that the status quo, the lead-in of this thing would be this is how much I make and I will prove it later? Because the 90 days in fact stretched on in the beginning of this process, didn't it?

Ms. CALDWELL. That is correct. And I think we certainly, both servicers, Treasury and participants in the program, would all acknowledge that the capacity to collect the documentation, which as you stated it seemed like it would be easy, presented a very difficult challenge. And we struggled with the documentation for, you know, a good period of time. And that is why in January we did change the program to require documentation up front, so that we wouldn't have the problems that Congresswoman Waters discussed about lost paperwork and not good treatment of homeowners or the one that you addressed about the potential for people coming in and having the mortgage reduced and then never providing income.

Mr. ISSA. Now, just to make the record clear, as I understand it, and correct me if I have misunderstood this all along, but the participants, if they initiate and it goes along anywhere except to a permanent modification, you don't reimburse that, is that correct? In other words, the B of A or any other bank or servicer, they are eating the front end of the process if it completely fails, isn't that true?

Ms. CALDWELL. Correct, yes. HAMP is a pay-for-success program, so the servicers, the investors and the homeowners only receive incentives if the mortgage is successful.

Mr. ISSA. Let's try to quantify that. How much have you paid so far?

Ms. CALDWELL. Again, I don't have the exact figures in front of me, but I would say approximately $700 million.

Mr. ISSA. So you paid about half a billion, round number?

Ms. CALDWELL. A little more than that, but that is fair.

Mr. ISSA. And you have obligated $30 billion, round number?

Ms. CALDWELL. For the HAMP program, correct.

Mr. ISSA. So there is a lot of obligation and not much pay-for-success at this point, right?

Ms. CALDWELL. And I think it is important that success is defined over 5 years. So the amount paid out to date just reflects the one time success payment when a modification converts and then there is payment that goes through 5 years for each year that the modification is successful.

Mr. ISSA. And that is typically $1,000 at a crack times the number of loans and so on. They are relatively small payments per loan, right?

Ms. CALDWELL. The payments to the servicer and the homeowner are fixed, but for the investor it is a cost share based on the mortgage reduction between 38 and 31 percent, so that could vary by a lot.

Mr. ISSA. So this $30 billion program over 5 years that is serviced, if you will, on the front end of actually going to completion about half a million people, is going to cost us $30 billion over 5 years. And you are probably aware that in our hearings next door the companies, the servicers, the banks, told us that basically anybody who got into this 500 million, virtually all of them would have renegotiated without the HAMP, that in fact the ones who succeeded are the same who would have succeeded otherwise. Are you aware of those statements, I assume?

Ms. CALDWELL. I am aware of those statements, yes.

Mr. ISSA. Well, you know, Congresswoman Maxine Waters and all of us on the dais represent different constituencies, but we all have one thing in common, which is we know that money is fungible. So if all of the money you paid were obligated, half a billion paid out, $30 billion obligated and continuing to escalate, if all of it would have been, if these people would have gotten loan modifications anyway, they would have gotten to stay in their homes, assuming they applied, and it could have all been done with no Federal assistance, and they still would have gotten substantially the same deals, or at least they would have gotten their loans which they felt they could no longer afford modified so they could afford them, then shouldn't we take that $30 billion over 5 years and ask Congresswoman Waters and Congressman Conyers and others where we would like to spend $30 billion helping people in need instead?

It is not just a rhetorical question, it is based on the hearings next door and here. It is the greatest question I have going into the new year for HAMP, is why do we continue investing in something that takes a very long time, delays the disposition of land and our homes and we have had testimony from the banks participating and nonparticipating that it doesn't create any substantial amount of new modified loans, it simply reimburses for the most part for the people they would have done anyway.

Ms. CALDWELL. I think one of the things that, again, is important to think about in HAMP is that it does pay for success. And those same servicers have also testified that the existence of HAMP fundamentally changed the approach of modification in terms of payment reducing and other types of programs.

Mr. ISSA. Ma'am, I have no doubt that in the midst of a crisis Republican and Democratic Presidents made decisions along with Treasury to try to find ways to change what was a free-fall. But Congress has an obligation to not live up to the worst of what Ronald Reagan always said, which is nothing had, I am paraphrasing, had greater immortality than a temporary government program. This program seems to have outlived its usefulness in that we are no longer in free-fall, we are in a period in which it appears as though loan modifications would occur anyway, and that if we began looking at the next tranche of $30 billion and said, well, can we target it only to those which would otherwise not have successfully been modified, can we modify the use of—I am not saying to stop spending money necessarily, but can we spend this money better in other ways than simply rewarding basically banks for doing what they would do anyway in their best interest?

Ms. CALDWELL. And I think that is a very important consideration for Congress to have, but I also would just like to say that as we sit here today we have heard stories from many Members that modifications are not being done the way they need to be done, that the forecast for foreclosures continues to be high, we have heard multiple ranges of projections, but as we sit here today, you know, my office is charged with making sure modifications get done in accordance with program guidelines, and that goes to 2012.

Mr. ISSA. And I appreciate your dedication. You know, the word "bureaucrat" is not always a pejorative. You are

Doing what is your task. Our challenge and Congresswoman Waters' challenge is can we take the next tranche of $30 billion and look at those who are failing in what we now call HAMP and say, well, wait a second, maybe what we should do is let loan modifications occur and only look at those who fail to get a modification through an ordinary way and then look at them on a different merit basis.

So I understand that your left and right barriers are your program, and I think you have been ingenious in trying to improve it over time. It started off as a terrible program; now it is only a program we are not sure does us any good. But that is a lot better than it was initially.

So Mr. Chairman, I respect that I have gone over my time. I appreciate it. I look forward to us continuing to figure out if there is a way to use these funds better. And I appreciate, and I particularly do, Phyllis, you have been great, you have done the best you can do, I think it has been very good of you to continue to try to take a program and make it work better than when it started. And I don't hold you accountable, but I do hope that we hold ourselves accountable to look at where the best place to put the dollars are.

I yield back.

Ms. CALDWELL. Thank you.

Mr. CONYERS. Thank you very much, Darrell Issa. I am pleased now to recognize a former Subcommittee Chairwoman, Sheila Jackson Lee of Houston, Texas.

Ms. JACKSON LEE. Mr. Chairman, thank you, and I hope on your wisdom that we will continue this effort. I am delighted to listen to the questioning of Mr. Issa because he has confirmed of your genius that these hearings were long overdue. And I guess you will have to hear us pontificate for a little bit.

Let me, first of all, thank all the witnesses. And coming at it from the perspective of the Judiciary Committee, I know that we tried some months or more than a year ago to organize the concept of bankruptcy and foreclosure to allow the homeowners to work their own arrangement out. And it was interesting to hear the banking industry and mortgagors saying that we would have a calamity. And I frankly believe we have a calamity now, because we continue to see foreclosures, the tide has not stopped. And as I understand some of my colleague's questions, Congresswoman Waters raised a question of lost paperwork, I raise a question or the point of arrogance by banks: We don't have to worry about the paperwork, decisions are already made. And it is just perplexing, compounded by the fact that it is like pulling steak from a barracuda to try to get a loan from a bank today. And of course they threw it back on the regulators.

So I guess as we have listened to this series of questioning, and forgive me for not hearing the details of your testimony, I came in a little bit on Judge Winslow's remarks, but I still view where we are as a crisis, as a calamity. I don't see any progress having been made. I think the banks are culprits. We have made them richer and less sensitive to the intent of this body, which was to create greater access to credit, stabilize the marketplace. It is difficult for people to secure mortgages today, it is difficult for people to refinance, there is no relief on foreclosures, and the fat cats keep getting fatter.

And I think there is a valid point to the distinguished gentleman from California's comment about whether or not this program is working that you are in charge of, Ms. Caldwell, and whether or not there needs to be less of a boondoggle for the banks getting money to do good stuff and they don't do it.

So I would like to raise the question of what considerations is Treasury giving to totally modifying what you are responsible for? What kind of comfort level do you have with success on this remodification effort, and I have not listened to all that you have responsibility for. And what kind of vigorous give and take or oversight or hammer do you have on the banks? What is the punitive measure that can be utilized for banks that continuously ignore the homeowner? The homeowner is usually one person. They don't usually come in a class action, they don't usually organize the block and say let's 10 of us go in. It is usually one person at a time. That is an easy, easy prey to knock over. You don't have to even worry about that person. Because either by the time they are already out of their house, they are foreclosed on, either by the time they don't have the means to stay even in a foreclosed house because they can't pay for other things, maybe they are in that bad a shape, so they may go away quickly, particularly if they are not represented by counsel. And in this instance I think this was a process where they could handle this on their own.

But how deeply, I asked two questions, I hope you took note of them, how deeply does this program that you are

involved in penetrate beyond the Beltway to provide a real comfort for these homeowners who are still going through foreclosures neighborhood by neighborhood, city by city, sometimes it is up, sometimes it is down, but it is still continuing?

Ms. Caldwell.

Ms. CALDWELL. Thank you. Let me just first say that the stories that we hear about lost documentation, robo-signing and other practices are, you know, disturbing, inexcusable and, you know, servicers need to be held accountable in those cases where they are violating the laws in States which they do business. You know, the program that we operate, the Making Home Affordable Program, is a program authorized through TARP that is a contractual relationship, so it is governed by contract versus enforcement or regulatory agency. But when those servicers have signed the contracts we expect to hold them accountable.

Ms. JACKSON LEE. In what way; what is the punitive measure?

Ms. CALDWELL. Again, because it is contractual there is no civil money penalties or, you know, fines. We have remedies that we can withhold incentives on permanent modifications or we can claw back money that has already been paid. But our focus now is to get more modifications made.

Ms. JACKSON LEE. And do the servicers include banks that you have contracted with?

Ms. CALDWELL. The servicers, yes, bank servicers.

Ms. JACKSON LEE. Include banks and others, forgive me for not understanding the distinction. Pardon me?

Ms. CALDWELL. Yes.

Ms. JACKSON LEE. All banks?

Ms. CALDWELL. No, not all banks.

Ms. JACKSON LEE. Right, but it does include some banks?

Ms. CALDWELL. It does include banks, servicers that are part of banks.

Ms. JACKSON LEE. And this was done administratively or when we passed TARP did we instruct Treasury to do this, meaning the Congress? Did we instruct or you have done this under the TARP funds administratively?

Ms. CALDWELL. I am not sure I have the answer to that.

Ms. JACKSON LEE. We passed TARP. That was a legislative action.

Ms. CALDWELL. Correct.

Ms. JACKSON LEE. Did we create and instruct you on this modification program that you are now speaking of, or did you create it administratively under TARP using TARP funds?

Ms. CALDWELL. Again, I was not part of Treasury when TARP was created, but I understand that there was always a mortgage modification component to it. When I joined, the office had already been established. So I don't know all of the legislative detail behind the creation.

Ms. JACKSON LEE. I will let you finish, but I think it is dastardly that we would have—I don't think there has any place in business where there is not a punitive measure for breaching contract. And for us to just pat people on the back or tap them on the knuckles, if you will, a tap-tap and say, oh, naughty, naughty, and they are literally killing people and throwing them out of their houses is a disgrace. And it may be that we need to remedy that. There needs to be some penalties where people feel the pain that they are creating for this whole market.

But finish, if you would. I just want to go to these other witnesses for questions. So you have got this modification program, it is contractual—and you can finish, go ahead. I think the question I want to hear from you is the fact that, you know, what is the punitive, what is the relief—as I understand it, that you have not implemented any of the remedies or claw backs, but what is it when this process fails and the victims are the sufferers, what do you all do?

Ms. CALDWELL. Again, you know, in those cases where laws have been violated we expect the servicers to be held accountable. In terms of the authority under our contracts, in those cases where servicers did not solicit homeowners for HAMP, we have required them to suspend those foreclosures and go back and reconsider those homeowners for modifications. In terms of those situations where homeowners have been inappropriately denied, we ask the servicers to reconsider those decisions.

So again, while we have not gone back and clawed back incentives at this point in time, remembering we are still, you know, less than 2 years into the program and, you know, may in some cases be building those steps necessary to impose fines, we have taken every step to change the behavior of the servicing industry and make sure that homeowners had an opportunity to be fairly considered for HAMP.

Ms. JACKSON LEE. Let me move on to Mr. DeMarco very quickly and let Julie Williams contribute as it relates to how you fit into this process. But Mr. Chairman, I think it is a darn disgrace. And I am sitting next to a seasoned Member of the Financial Services Committee who has lived through this, Congresswoman Waters. And I imagine that they have crafted as much as they could craft a structure within the capitalistic system. All of us claim and have an affection for capitalism. No one here is waving the socialist flag or the Communist flag. But if there is ever a disgraceful debacle that has shown no positive relief on behalf of the United States Government for its people, its people who pay taxes, its people who are the basis of this country, it is mortgage foreclosure, because we have gone through it. And so I would simply say that the Judiciary Committee needs to look at this.

I frankly believe there should be punitive measures, jail time. Because it is absolutely absurd that people can be comfortable in their offices using our money to fool around, mess up and nothing happens to them at all. But the poor victim in the home, the home that is $1 million or $250,000 or $55,000, you know, is not only the victim, but also gets blamed because that is the dodo who got into a house that they couldn't afford. Fraud was limited; it existed, yes. But in many instances people were well intentioned by who led them to believe what they could handle. And then there was just the average Joe, hard working Joe, whose two-income family tried to get a brownstone in New York or tried to get a house in Detroit, you know the conditions there, or in Houston or in L.A. Or elsewhere.

So if anyone can answer. Judge Winslow, I didn't hear your testimony. I heard it but didn't hear it.

Judge WINSLOW. I am so sorry you didn't.

Ms. JACKSON LEE. Yes, I know. I am going to be reading it though. Do you have any insight on this question of a lack of a punitive measure, or do you have any insight on why we failed to craft the bankruptcy process for holders of mortgages to protect themselves from foreclosure.

Judge WINSLOW. All right. If I could be sure that I understand your question so that I can answer it as accurately as I can. Why not have the trustee in bankruptcy and the bankruptcy court handle the process; is that the question.

Ms. JACKSON LEE. We had legislation that failed to make the mark that we were going to include access to the bankruptcy courts for mortgage foreclosure, yes, so that all parties could be protected. You must have heard that debate, it has been going on for a number of years. So I just need yes or no. Do you think that is a viable approach?

Judge WINSLOW. I do not.

Ms. JACKSON LEE. Why not?

Judge WINSLOW. Because the trustee in bankruptcy and the bankruptcy judge have an obligation to make a determination as to what point all assets have been appropriately distributed from the estate of the bankrupt and then there is a release.

We see, I see on numerous occasions, probably every 4 or 5 proceedings that appear before me, at least one and frequently more than one bankruptcy which was ultimately released. It is not a salvation. It is an——

Ms. JACKSON LEE. Because my time is limited and the Chairman has been very kind and I just have one more question, let me say to you I am not convinced.

My final point is do you think there should be criminal or punitive measures for a failed process, bankers, servicers and others having a dereliction of duty that causes in a potentially criminal way for viable homeowners and others to lose their homes?

Judge WINSLOW. Yes.

Ms. JACKSON LEE. All right. Thank you, sir. Let me move to Ms. Williams and Mr. DeMarco. I will ask you collectively as government representatives, what are you doing to stop the tide of foreclosures realistically? And what are you doing to help punish the deadbeats, who are servicers who are not doing their job?

Just start with you, Ms. Williams.

Ms. WILLIAMS. Okay. Just by way of a little bit of background, the Office of the Comptroller of the Currency, a bank supervisory agency; we are responsible for national banks. We have been—and I describe this in my written testimony in some detail—very involved and very active in focusing on causing national banks to improve their handling of the modification process and to increase the volume of affordable sustainable modifications that national banks are entering into.

Ms. JACKSON LEE. Do you keep records, can you tell me that you have sizably increased that? Do you have punitive measures? Do you have criminal measures? Do you have civil fines for their inappropriate behavior?

Ms. WILLIAMS. Yes, we do. Let me break those down. We have a substantial amount of data and——

Ms. JACKSON LEE. How many, I would like to see that submitted to the Committee.

Ms. WILLIAMS. We can provide for you information on modifications by types that national banks have entered into, the characteristics of the modifications, the extent to which the mods resulted in reduced payments of 10 percent, 20 percent, more than 20 percent. We have a lot of data on that. I am happy to share that with you.

Ms. JACKSON LEE. I would appreciate it. Can you give me one answer, do you have a list of those who have been civilly fined, if you don't have criminal fines or punished for their inactivity?

Ms. WILLIAMS. For their inactivity or——

Ms. JACKSON LEE. Their improper, their, if you will, lack of performance.

Ms. WILLIAMS. We are in the midst right now of a very extensive multi-agency examination process that relates to the foreclosure documentation and integrity issues. I describe this, there is more detail in my written statement.

Ms. JACKSON LEE. Right.

Ms. WILLIAMS. It will be done by the end of December. In the weeks after that, we will be evaluating what enforcement and supervisory steps we want to take. All of the banking agencies are a part of this. We have very, very broaden enforcement remedies.

Ms. JACKSON LEE. Well, the question is whether there has been any penalties, whether there has been any revocation of charters. And let me just say that I love our banks, we have community banks, we have large banks, and national banks as you have indicated. But there has to be an even playing field. There is not in this mortgage foreclosure.

I close on Mr. DeMarco. Do you have any teeth in what you are doing? This love of capitalism or this fear that the marketeers threaten Congress as they did a few hours before we passed this bailout that all would collapse, and we would never see America as it was ever again. We see that we are still in the midst of a quagmire. All of these threats I think have frozen the Federal Government into activity. Because you cannot possibly be doing anything if we go into our districts and find all these people that are in foreclosure, and they will say to you we tried to reach the bank, we tried modification and then we can't even get access to credit on another side of the coin.

Mr. DeMarco.

Mr. DEMARCO. Congresswoman, since we put Fannie Mae and Freddie Mac into conservatorship those companies have completed about 1.2 million foreclosure alternative transactions. We report on that on a monthly basis to the Congress through what is called the Federal Property Managers Report. I would be glad to provide a copy of that to you.

With respect to penalties, Congresswoman, Fannie Mae and Freddie Mac's relationship with the mortgage servicers is a contractual one. And on the basis of contractual violations of representation and warranty, Fannie Mae and Freddie Mac have put back to mortgage servicers and originators billions of dollars worth of mortgages. I provided the actual data yesterday on the Senate side. I will be happy to provide the data on that to you. And there is still requests outstanding totaling in the billions of dollars. I also reported that. I would be pleased to provide that data to you as well.

And I would say with respect to Fannie Mae and Freddie Mac, while they are in some sense certainly victims of problems in the mortgage servicing thing, they also need to be held accountable for the problems that we have in the housing market, and obviously the Federal Government through FHFA, which was 6 weeks old at the time, placed Fannie Mae and Freddie Mac into conservatorship. The CEOs were dismissed from the job, the Boards of Directors, much of senior management has been replaced. And yes, in the past there have been civil money fines against certain management at those companies.

Ms. JACKSON LEE. Well, thank you. It may be that we are the only ones who did anything, and certainly Fannie Mae and Freddie Mac were the ones that everyone wanted to put on the guillotine because it was easy to do. I think we need to look closely at criminal fines and other penalties, Mr. Chairman, for this foreclosure debacle. No one is getting it, people are still hurting. As long as we are fooling around with contractual relationships, there will be no action whatsoever. The banks will cry foul, they will talk about the system is collapsing and the world is coming to an end, and we will stand back and hold our hands up and all of America will be walking past foreclosed properties.

Mr. Chairman, I thank you for this hearing and I hope the Judiciary Committee can get its teeth into this process. I yield back.

Mr. CONYERS. Thank you, Sheila Jackson Lee.

I turn now to the Ranking Member of the Committee, the gentleman from Arizona, Mr. Trent Franks.

Mr. FRANKS. Thank you for that advancement. I appreciate the way that you advanced my position here. It is temporary?

Mr. CONYERS. Yes.

Mr. FRANKS. He says it is temporary. Thank you, Mr. Chairman.

Mr. DeMarco, if I could begin with you, sir. In your written testimony you state that Freddie Mac and Fannie can require a servicer to pay damages if the servicer does not follow the servicer guidelines. And of course that seems very appropriate to me. At the same time it perhaps introduces a little more uncertainty into the current crisis which may compound the problem, at least in the short-term.

But my first question is whether Freddie or Fannie have actually sought any damages. It is a little related to Ms. Jackson Lee's question, but as a result of the robo-signing controversy, have you sought any damages from any of those entities?

Mr. DEMARCO. Servicers were reminded on October 1st by Fannie and Freddie that robo-signing or those sorts of mistakes were not following proper procedures and foreclosure process and is a violation of the seller-servicer agreement. They have been alerted that this makes them subject to penalty, and the position at the moment, this is still fairly early, is we are assessing what the damage has been, to know what sort of remedy under the contracts to pursue, because we are still trying to find out whose got the problem, what the scope of it is and what has been the damage to Fannie Mae and Freddie Mac as a result of that. There has not been an assessment made to date that I am aware of, but they were alerted of this possibility as set forth back in the contract back on October 1st.

Mr. FRANKS. Given the conservatorship, the question is sort of a hard one to ask, I ask if Freddie on Fannie have done it or if you have done it. Who is responsible for making the decision on whether or not to seek damages in the first place given the conservatorship in place at this time?

Mr. DEMARCO. As we describe at the time the two companies were placed into conservatorship, the day-to-day operations of the company were delegated to the senior management, the management team and the reconstituted boards of directors of the company, so that there could be normal functioning corporate governance. So day-to-day operations, including executing and implementing and carrying out terms of contracts, are the responsibility of management. But I can assure you, Congressman, on this matter that has all of our attention, we are paying close attention to what the companies are finding with respect to added losses that they may be incurring as a result of these matters. And I would expect that appropriately remedies, fines, so forth, under the terms of the contract would be pursued.

Mr. FRANKS. That makes sense. In other words, it is really their responsibility at this point, but you are having some very pointed discussions with them?

Mr. DEMARCO. Yes. As conservator we are ultimately responsible. And the companies understand quite well and I am pleased with the support and activity of the senior management and the board. They fully understand that both of these companies are operating only as a consequence of the backstop provided by the American taxpayer, that they have a responsibility in operating these businesses, to do so in a way in which it minimizes losses on these troubled mortgages, because those losses are passing through to the American taxpayer.

Mr. FRANKS. I guess that probably tees me up for the next question. Given the conservatorship of Freddie Mac and Fannie Mae, how would an extended nationwide foreclosure moratorium potentially affect the taxpayers?

Mr. DEMARCO. Congressman, I believe such an extended nationwide moratorium would add cost to the taxpayer. And I go into this a little bit in my written statement, but I would not support a nationwide moratorium. I don't see the grounds for it. At this point in time I think that absolutely where there are mortgage servicers that are not processing foreclosures properly, if they are in violation of State law, if they are not doing it according to contract, that that must be corrected, but I do not believe that we have the evidence to suggest that a nationwide foreclosure moratorium would on balance help this matter. I think that it would further harm neighborhoods and increase costs to the taxpayer.

Mr. FRANKS. I understand.

Mr. Chairman, some fairly learned voices have questioned the legality of the Mortgage Electronic Registration System, which is commonly known as the MERS system. And since about 60 percent of the Nation's residential mortgages are recorded in the name of MERS, Inc., the legality of this sort of obscure entity should either be established or addressed at least. And questions have been raised about MERS being both acting as an agent and as a principal in mortgage deals, and it just seems like the incoherence of the MERS legal position then becomes fairly challenging to sort out.

This may be something for Judge Winslow to look at here, but can you address those concerns? Judge, if it is all right with you, sir, I will start with you, but I think this will be something anybody can take a shot at because in property rights, protecting, you know, property rights it becomes obviously very critical to define precisely who owns what. And this seems to blur that line pretty dramatically in my mind.

Judge WINSLOW. I think the blurring started after 1997, and that is about the creation date of MERS Corp. and MERS. Through the years up to about 2004, MERS took a position they were a nominee only and did not act as a foreclosure agent. There then came a time up until approximately 2007 when MERS changed that position and stated that they would not any longer act as an agent to foreclose, particularly after the beginnings of the robo-signing recognition. It is still the case that MERS from time to time in the older cases, as well as in some of the newer cases where they, I understand it from the Web site, believe that they have the actual note in hand, that they will act as a mortgagee or in the capacity of a mortgagee in foreclosure as a plaintiff. I don't think that without having an equitable interest in the mortgage that the nominee in equity has the right to commence a foreclosure proceeding.

Mr. FRANKS. Well, judge——

Judge WINSLOW. Does that make sense?

Mr. FRANKS. You very eruditely defined why I asked the question.

Judge WINSLOW. Thank you.

Mr. FRANKS. I am impressed. But obviously you see the nexus of the question. And Ms. Williams, if you want to take a shot at it.

Ms. WILLIAMS. Okay. Let me add a couple of pieces here. There is a lot of confusion around because there is a lot of imprecise language that is used in some of the descriptions of the process.

Mr. FRANKS. Precisely, it's imprecise.

Ms. WILLIAMS. It takes you back to your real property classes in law school about the difference between the mortgage note and the mortgage. MERS doesn't hold the note; the note will go ultimately to a document custodian. What MERS is doing is acting as a nominee with respect to the mortgage. And it is the mortgage that gets recorded, not the note and there is confusion about that.

Issues about MERS's status are fundamentally issues under State property law. And that law is long-standing, our Acting Comptroller sometimes refers to these principles as going back to the days of Queen Elizabeth I, and some of that is probably quite right. So you are dealing with a situation where you have a modern type of electronic registry in the context of State property laws that have principles that are really rather quite old.

Separate from that, with respect to MERS I just want to add—and this is in my written testimony—that we are doing an examination of MERS and how MERS operates and the processes and procedures that it follows in order to do what it does. It is an interagency examination. The FHFA examiners are also part of this as well as examiners from the Fed and the FDIC. So looking operationally at MERS is also part of the examination work that we have underway right now.

Mr. FRANKS. I think Professor Peterson might have been inclined to ask some of those same questions.

I guess my last question is this, Mr. Chairman, and I address it to the group here to see who might best answer it, which entity created this MERS system? What was the fundamental reason for it? What was the rationale for it? And of course States feel like to some degree that their statutorial authority has been subordinated in this process and maybe they are right, maybe they are not, but those questions. And what is the answer? What would you do to address it?

Judge, you sound like you are ready to take it on.

Judge WINSLOW. I would be very pleased to. We have been in touch with MERS, my office has, since approximately 2004, speaking to general counsel, exchanging e-mails and trying to have an understanding of precisely what it is that they do. So at any particular moment in time their function was defined, but morphed into something else thereafter. Typically and from the beginning MERS Corp., which is owned substantially by banks, insurance companies like AIG and others, look to using companies such as MERS in order to facilitate the transfer of the mortgage. And it can do so in an inexpensive fashion and in a rapid fashion and sometimes so rapidly that the transfer takes place before the County Clerk has any notice, as a for instance, of the transfer. And that does become a problem even though in many States it is permissible to transfer a mortgage without making the change in the records of the County Clerk.

Mr. FRANKS. So would anyone want to suggest any way that it should be addressed at this point? Is there anything that you think is an important next step?

Mr. DeMarco.

Mr. DEMARCO. Congressman, I would simply say that the review that Julie Williams mentioned is underway and I would like to see what comes out of that, but the basic premise here that there be a way of adding liquidity to the mortgage and mortgage servicing is something that developed in part in response to the growing mortgage industry and the growing transfer of mortgages, mortgage servicing, and the development of securitization. And this utility, if you will, is something that has been developed to contribute to facilitating development of securitization, the development of securitization, developed to be able to better access global capital markets, to ultimately be able to reduce mortgage costs for borrowers.

So while there are things, questions being raised about MERS, they are being looked at and there should be, I think we need to keep in mind here that this is part of, you know, as has been mentioned, coming to grips with technology, securitization and ways of facilitating financial transactions.

Mr. FRANKS. So you are really not saying that it was part of catalyzing the bubble, it was just sort of one of the accoutrements that went with it, it sounds like, and that sounds reasonable.

Mr. Chairman, I yield back and thank you all for coming here today.

Mr. CONYERS. Thank you, Trent Franks. I am now pleased to recognize the gentlelady from California from California, Dr. Judy Chu.

Ms. CHU. Thank you, Mr. Chair. I would like to ask Justice Winslow about the remedies available in court. According to the Washington Post, some judges in New York are estimating that they are dismissing 20 to 50 percent of the foreclosure cases on the basis of sloppy or fraudulent paperwork that was filed by lenders. In one case the court ruled in favor of a homeowner in Long Island and cited that the mortgage company's paperwork on her foreclosure case was flawed and that its behavior was repugnant. The judge erased the family's $295,000 and gave the house back for free.

Now while this may be an unusual result, it does illustrate that there is the power of the court to remedy some of these fundamental flaws in the system. I would certainly like that to be available in California, but unfortunately we are a non judicial State where the lender doesn't have to prove to a judge that they have to foreclose on a homeowner.

The problem is how could you catch this kind of repugnant paperwork in this kind of situation where you are a nonjudicial State? And how could an average homeowner without high level mortgage knowledge even know what to look for?

Judge WINSLOW. Thank you so much for the question. And I do want everyone to realize that the case that you are referring to, the Yano case, has in fact been reversed by the Appellate Division Second Department with some admonition to Judge Spinner that he exceeded his authority in revoking, terminating, voiding the underlying mortgage obligation.

I believe that cases such as this on one side are positive because they bring to the attention of the community the nature of the problem that we have. On the other, I think they are not positive because they lead to unpredictability, inability to understand what is going to happen next. We have the tools right now under 3408 of the C.P.L.R. And under the direction of the administrative rules established by Jonathan Lippmann and Ann Pfau, the Chief Administrators, State of New York, to do two things. One is to require the certification of all documents by the attorney representing the lender. And failing to do that, there would be implications under what is called Rule 130 of the Uniform Trial Rules. So there are significant penalties available for failing to comply with that particular rule.

The use of an extreme to address a particular problem may not always be more than today's sound byte. And I am afraid that in some cases that is what is happening and an improper conclusion is being reached by the public that oh, I have a chance now to wipe out my mortgage. That is not what is happening in New York State.

New Jersey adopted the same rule literally 3 days ago about requiring the note and mortgage to be together, and it is growing into a State, common law State that has much of the same rules as New York. And you know certainly about Florida. So there are within our system right now penalties available under Rule 130 which provide for $10,000 fines to both the attorney and the principal in a case, plus all of the costs associated with the defense of the case by the defendant or the plaintiff who was wronged in the matter.

That is the answer that I think we should follow up on. If we need more than that, then I think the trouble is going to be of such a nature that the draconian method, if applied, is going to ultimately find a way to raise its head and show that it is not the answer.

Ms. CHU. Do you think it is true that the judges in New York are estimating that they are dismissing 20 to 50 percent of foreclosure cases due to sloppy paperwork?

Judge WINSLOW. I am sorry?

Ms. CHU. You said that the Yano case was reversed.

Judge WINSLOW. Yes.

Ms. CHU. But in terms of the other judges the Washington Post said that they were dismissing 20 to 50 percent of the foreclosures cases on the basis of sloppy or fraudulent paperwork that was filed by lenders.

Judge WINSLOW. Yes. In those particular cases I will tell you what I do and I don't think that it is substantially different than many of the judges of this State do. There is either a motion for a default judgment, the 3215, or a motion for summary judgment, 3212, which is made by the plaintiff. If in fact when I examine the submission it is faulty, dismiss the submission and look at the underlying action. And if there is no basis for the underlying action, dismiss that. That still allows the lender the opportunity to remedy it, if the lender can. So the matter doesn't end and we don't have a circumstance, with rare occasions, where the lender is deprived of any action or claim that it could maintain against the borrower.

Ms. CHU. I am still thinking about any State over the next 2 years an additional 7,000 foreclosures are expected and an almost

10 percent of these could be saved through a court supervised modification.

Judge WINSLOW. Yes.

Ms. CHU. What concrete remedies do you think are available in a State like mine?

Judge WINSLOW. I'm sorry, how did I get that information?

Ms. CHU. Well, I am just talking about California, which is a nonjudicial state.

Judge WINSLOW. Okay, and?

Ms. CHU. What concrete remedies are available in our State?

Judge WINSLOW. What can we do about the 7,000?

Ms. CHU. Yeah.

Judge WINSLOW. What we can do about the 7,000 is to try a mediation, but that is the most. And I don't believe it is going to be effective. I have not seen mediation work as well as I would like or hope to see because both sides have the opportunity to say no. But since the 7,000 constitute notice only of a pending default matter which will result in a foreclosure, there is nothing that the State—that New York State can do other than to make the suggestion that there be a mediation.

Ms. CHU. Okay, thank you.

Judge WINSLOW. Thank you.

Mr. CONYERS. Our final questioner for the day is the distinguished gentleman from Florida, Mr. Deutch. I want to commend him, he has been at the beginning of these hearings. He has been through much of the middle part of it, and now he will be the final Member to question the panel. The gentleman is recognized.

Mr. DEUTCH. Thank you, Mr. Chairman. Let the record show, Mr. Chair, that even as I was not sitting here I did watch the hearing as I was eating my sandwich. I appreciate the opportunity. I would like to go back to Judge Winslow for 1 second.

The certification process that you described with the $10,000 penalty, what happens if there is a false certification that is discovered only when it is too late? The fraud, the robo-signature, the notary example that you gave, some other violation, mortgage servicer, whatever it is, it appears too late and the homeowner has been foreclosed out.

Judge WINSLOW. As about as bad as it could possibly be, because you can set aside, you can set aside that whole transaction and require one of two things, either an enforcement proceeding, which would require that the property be returned to the original homeowner-borrower, or that damages equal to the actual loss be paid by the lender or the nominee who commenced the foreclosure action.

Mr. DEUTCH. Thank you. And Ms. Williams, given the late hour and the votes that were just called, I will say that I do have some serious concerns about the findings in the congressional oversight panel report from the 16th of November, particularly the securitization process. I will submit those to you as follow-up questions.

But I did want to return to something you said earlier in an exchange you had with Mr. Goodlatte. He had asked about why your office had not paid attention to this sooner; you talked about the focus being on modifications. The answer was there were no warning signs about foreclosure documentation that were triggering any red lights. There was an article in 2007 about some, I think it was Deutsche Bank where the foreclosure—2007 in fact where Deutsche Bank lacked standing to foreclosure in 14 cases because it couldn't produce the documents. That was followed by other cases around the country. I think it would be helpful to understand how it is that we might have missed those, and at this point what is in place to ensure that we don't miss something like that going forward?

Ms. WILLIAMS. A perfectly fair, appropriate question. What I was trying to explain is that we didn't have indicators of a systemic programmatic problem with the foreclosure documentation. I think that we would not argue that there have been situations that have occurred over the course of the last several years where a particular practice or particular situation, a particular loan that involved a bank, a national bank or otherwise, was not handled properly and that there have been instances of litigation over that. But what we have typically looked at in the examination process when we are focusing on what I term general business processes, how you sign the documents, doing the notarization properly, is the bank's internal control processes, their quality assurance and their audit to see that those issues are being identified and they weren't. And the issues weren't surfacing in our own consumer complaint system either.

Mr. DEUTCH. Excuse me, if I may, just to fast forward, you have acknowledged earlier that this raises concerns about the overall integrity of the foreclosure process. Certainly in my State of Florida this is a devastating crisis and the integrity of the entire process has absolutely been called into question.

So I would like to address what is going to be happening through your office, through the OCC? The OCC's mission is to regulate and supervise national banks. What will be happening? You talked about the potential for civil money penalties, you talked about the potential for criminal referrals if warranted. Who is making that determination? Whose conducting the investigation? How much staffing is there? How can we be assured that this report that will be coming out in the next few weeks will actually lead to the necessary actions we take to restore some integrity to this process?

Ms. WILLIAMS. Right, right. First of all, what is being done right now, and what we initiated a number of weeks ago when the problem came to light as a result of the Allied Bank situation is we immediately directed the major servicers that we supervise to do a self-assessment and they did self-identify that they had some of the same issues. That resulted in them stopping foreclosures and correcting practices that were then being conducted. So there is a corrective process that was already initiated. This is essentially what I am trying to say.

At the same time we began the process and teed off a little while later after it was organized with other agencies a very comprehensive, horizontal, multi-servicer examination process that we are in the midst of right now, and it will be as a result of what we find when we conclude those examinations that will be the basis for the decisions that at least the banking agencies would make in terms of what type of supervisory or enforcement actions we would take with respect to the institutions that we supervise. We expect that we will be done with the on-the-ground exam work by the end of this month. The results will be beginning to be communicated to the institutions shortly thereafter in the public report that the agencies are envisioning in January hopefully.

Mr. DEUTCH. Right. And you said that there may be civil money penalties or there may be criminal referrals.

Ms. WILLIAMS. I was describing the very broad range of types of powers that the banking agencies have.

Mr. DEUTCH. Who will be making those determinations?

Ms. WILLIAMS. Each banking agency will make those determinations with respect to the institutions that we have jurisdiction over.

Mr. DEUTCH. And they will be making those determinations based on what? Is there anything anecdotally that we have seen in any of these accounts in the various newspapers around the country, is there anything that stands out as the type of activity that if confirmed might lead those sorts of penalties?

Ms. WILLIAMS. Well, there clearly have been breakdowns in controls and oversight, but we need to get to the end of our examination process to understand the dimensions of the problems, if that was all, if there is more of what else needs to be fixed before we can make any final decisions about what the appropriate remedies and sanctions are.

Mr. DEUTCH. Okay. Finally, Mr. Chair, let me understand then, there is a public report that will be coming out in January?

Ms. WILLIAMS. Well, what the agencies have committed to do is to come out with—the particular contours of this, I don't think has been decided, but a form of public report on the results of the horizontal exams. It would not, I would expect, be bank specific, but it would talk about the types of issues that were discovered, sort of lessons learned for the servicers and also perhaps serve as a basis for the agencies to think about developing some uniform standards for mortgage servicers and also for the agencies to think about techniques to use going forward for our own supervision.

Mr. DEUTCH. And I would respectfully suggest that uniform standards going forward will be helpful. But there are hundreds of thousands of foreclosure cases winding their way through the courts in Florida through this rocket docket process where separate foreclosure courts have been established. Those hundreds, the hundreds of thousands of citizens in my State aren't worried about uniform standards that will be applied proactively. They want to be sure that the actions that have been taken thus far to the extent that there is some evidence of fraudulent activity or a pattern of fraud, whatever is necessary for there to be penalties, that the law is upheld so that there is some confidence brought back into this foreclosure process and so that they know that the consumers of my State and nationwide are actually receiving the just due that they deserve. That is what I hope comes from this.

Ms. WILLIAMS. Yes, sir, we understand that.

Mr. DEUTCH. Thank you, Mr. Chair.

Mr. CONYERS. Thank you, Mr. Deutch. Our gratitude to all of the witnesses. We appreciate your bearing with us. There will be an additional hearing in which the second panel will be rescheduled and the bankers, of which there are approximately six, that are also scheduled to testify on this matter.

And if Mr. Franks has any comment he can make it now.

Mr. FRANKS. Thank you all for being here.

Judge WINSLOW. Thank you, sir.

Mr. CONYERS. And the hearing stands adjourned.

[Whereupon, at 2:50 p.m., the Committee was adjourned.]

FORECLOSED JUSTICE: CAUSES AND EFFECTS OF THE FORECLOSURE CRISIS (PART II)

WEDNESDAY, DECEMBER 15, 2010

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:15 a.m., in room 2141, Rayburn House Office Building, the Honorable Henry C. "Hank" Johnson, Jr. presiding.

Present: Representatives Scott, Watt, Johnson, Chu, Deutch, Schiff, Smith, Sensenbrenner, Coble, Gallegly, Goodlatte, King, Franks, and Rooney.

Staff Present: (Majority) Susan Jensen, Counsel; James Park, Counsel; Reuben Goetzl, Clerk; and Zachary Somers, Minority Counsel.

Mr. JOHNSON. [Presiding.] The Committee will come to order. Good morning, and before I recognize myself for a brief statement, I do want to welcome Senator Sheldon Whitehouse from the State of Rhode Island, who is with us today to testify regarding the Home Affordable Modification Program. This is the continuation of a hearing that started either last week or a week before that, and we had to call it off due to votes, a long series of votes. And so I appreciate the second panel members for coming today.

We will first hear from Senator Whitehouse. Senator Whitehouse is very busy over in the Senate and doesn't have a lot of time. So without any further adieu, I would like to recognize him. He has for more than 20 years championed health care reform, improving the environment, solving fiscal crises, and investigating public corruption. As Chair of the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts, Senator Whitehouse has been a fearless consumer advocate on various issues, particularly in the area of helping homeowners save their homes from foreclosure.

We very much look forward to his comments and appreciate his contribution to today's hearing.

Would you begin, Senator?

TESTIMONY OF THE HONORABLE SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. I will gladly do that, Representative Johnson. I thank you for the opportunity to testify. Ranking Member Smith, Members of the Committee.

Sadly the foreclosure crisis remains unabated in my home State of Rhode Island and many other parts of the country. And I appreciate that you have convened this hearing in the final days of the 111th Congress to inquire that this issue.

Mr. JOHNSON. And Senator, will you pull that microphone up just a little closer. Thank you.

Senator WHITEHOUSE. I look forward to working with this Committee on legislation next year.

In my capacity, like yours, Representative Johnson, as Chairman of the Subcommittee on Administrative Oversight and the Courts, I have chaired several hearings recently on the foreclosure crisis, most recently in late October. At that hearing a constituent of mine, Larry Britt from Riverside, Rhode Island, told a story that is probably familiar to this Committee.

Larry had applied with his mortgage servicer for a mortgage modification under the Obama administration's Home Affordable Modification Program, which we call HAMP, and shepherding that request had become for Larry a nearly full-time job. Time and again over a 19-month period, the mortgage servicer asked Larry to submit, and resubmit, and resubmit document after document. Despite Larry having FedEx and facsimile records proving that he had already submitted those documents, the bank consistently alleged that Larry failed to send in the necessary paperwork and he had to do it over and over again. When he tried to clear up things over the phone he was punted from department to department, never once during his 19 months of many calls reaching anyone who appeared to have any authority to make a decision.

After 19 months of this bureaucratic nightmare, the bank finally approved Larry for a mortgage modification. The modification papers came to him via FedEx just 1 day after a bank representative told him that he didn't qualify for a modification. While he is cautiously optimistic with those papers in hand, he still isn't certain that the bank won't changes its mind again.

Larry's story and thousands more like it get to a story of bureaucracy run amok at the very heart of the foreclosure crisis. Mortgage companies unwilling or unable to efficiently evaluate modification requests, homeowners and mortgage investors in limbo, suffering the consequences. When the paperwork runaround leads to foreclosure, a family loses its home, neighbors lose property value, communities lose tax revenue. Investors who purchase the right to the mortgage payments may lose out too. Often the foreclosure is not necessary.

I met with a group of Rhode Island realtors the other day and every single one sitting around the table had the same story. Each one of them had at least one short sale nailed down with a buyer and a seller and had the experience of a foreclosure notice appearing and interrupting the short sale. Obviously that was the worst outcome for the homeowner. It was also a worst outcome for the investors, because the result from the foreclosure sale was worse than the outcome that had been agreed to in the short sale.

In the age of securitization the servicer merely serves as a processing agent and may not work in the interest of the people who actually own the mortgage. And in the age of corporate bureaucracy, the left hand may not know what the right hand is doing.

While the program was well-intentioned, the poor performance of the HAMP has demonstrated that cash incentives alone won't get the banks to operate effectively and in good faith. A different mechanism is needed to ensure compliance.

In the past I had focused on proposals to give bankruptcy court judges the power to reduce the principal on primary residences mortgages, the same way they can for other mortgages on vacation homes, on loans for cars and boats. While I have long believed that this is the most efficient and least costly way to keep families in their homes and many observers agree, the large banks have fought against it with their full lobbying might.

Despite House passage of cram-down legislation in March of 2009, for which I thank and applaud you, we in the Senate have been unable to overcome filibusters. Given these political realities I decided to add to the focus of my Subcommittee a different approach, already underway in several bankruptcy courts. Under programs adopted in bankruptcy courts in Rhode Island, New York, Florida, and Vermont, the court may order the homeowner and the mortgage servicer to sit down and negotiate in good faith, a settlement that is preferable to foreclosure for all parties.

While judges have the ability under the programs to appoint a formal mediator if the informal talks don't work, in practice it has not been necessary in the vast majority of cases. For most homeowners the mere chance to speak directly with their mortgage company, with someone who has some authority is enough to lead to a mutually beneficial agreement.

Under the bankruptcy loss mitigation programs the power of the court to compel good faith talks breaks through the bureaucratic maze of the voluntary modification programs. The court of course does not have the power to force a settlement, but it can force the parties to talk to each other, and that can avoid a costly foreclosure that will benefit no one.

The programs in Rhode Island and the other States were designed with the input of creditors and homeowners and have been successful to date. I believe that the courts have appropriately implemented these programs under their section 105(d) authority to convene pretrial status conferences. Unfortunately, one servicer has challenged the authority of the bankruptcy court in Rhode Island to require it to come in and talk to the homeowner before it forecloses on their home. I have no doubt that the court's authority will be upheld eventually, but it could be years of litigation and appeal before the parties have a final answer. In the meantime other judges around the country may be reluctant to adopt a program facing such a challenge.

I proposed a simple legislative fix that would clarify that bankruptcy courts can run foreclosure loss mitigation programs, can make parties talk with each other before someone's home gets taken away. I hope that this Committee will help me pass it into law early next year. It seems plain and noncontroversial.

The American people are tired of taxpayer bailouts for banks, and we owe it to them to support a sensible program that comes with zero cost to the taxpayer. Bankruptcy will not be the answer for every homeowner, but the loss mitigation programs can help homeowners like Larry cut short a stalled application process and finally get an answer to their modification request. One could even imagine that the good sense of this could cause it to propagate outside of the bankruptcy process on a voluntary basis.

In Rhode Island bankruptcy court loss mitigation has already saved 100 homes and it has the potential to save thousands more across the country. I believe that makes it worth supporting.

Once again, thank you for the opportunity to take part in this hearing and I commend your good work. Thank you, Mr. Chairman.

[The prepared statement of Senator Whitehouse follows:]

PREPARED STATEMENT OF THE HONORABLE SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

United States House of Representatives
Committee on the Judiciary
"Foreclosed Justice: Causes and Effects of the Foreclosure Crisis — Part II"
December 15, 2010
Statement of Senator Sheldon Whitehouse

Chairman Conyers, Ranking Member Smith, Members of the Committee, thank you for the opportunity to testify here today. Sadly, the foreclosure crisis remains unabated in my state of Rhode Island and many other parts of the country. I very much appreciate you convening this hearing in the final days of the 111th Congress and look forward to working with you on legislation next year.

In my capacity as Chairman of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, I have chaired several hearings on the foreclosure crisis, most recently in late October. At that hearing, a constituent of mine – Larry Britt from Riverside, Rhode Island – told a story that is probably familiar to this Committee. Larry had applied with his mortgage servicer for a mortgage modification under the Obama Administration's Home Affordable Modification Program (HAMP), and shepherding that request had become for him a full-time job. Time and again, over a nineteen-month period, the mortgage servicer asked Larry to submit and resubmit and resubmit document after document. Despite Fed Ex and facsimile records proving his submissions, the bank consistently alleged that Larry failed to send in necessary paperwork. When he tried to clear things up over the phone, he was punted from department to department, never once during his many calls reaching anyone who appeared to have any authority to make a decision.

After nineteen months of this paperwork nightmare, the bank finally approved Larry for a mortgage modification. The modification papers came to him via Fed Ex just one day after a bank representative had told him that he didn't qualify for a modification. While cautiously optimistic, he still isn't certain that the bank won't change its mind yet again.

Larry's story, and thousands more like it, get to a story of bureaucracy run amok at the very heart of the foreclosure crisis: mortgage companies unwilling or unable to efficiently evaluate modification requests; homeowners and mortgage investors in limbo suffering the consequences. When the paperwork run-around leads to foreclosure, a family loses its home, neighbors lose property value, and communities lose tax revenue. Investors, who purchased the right to the mortgage payments, may lose out too. Often the foreclosure is not necessary. I met with a group of Rhode Island realtors and every one had had a short sale nailed down, only to have the deal interrupted by a foreclosure notice, with a worse outcome for the homeowner, and the investors, from a worse price in foreclosure. In the age of securitization, the servicer merely serves as processing agent and may not work in the interests of the people who actually own the mortgage, and in the age of corporate bureaucracy, the left hand may not know what the right hand is doing.

While the program was well-intentioned, the poor performance of the HAMP has demonstrated that cash incentives alone won't get the banks to operate in good faith: a different mechanism is needed to ensure compliance.

In the past, I had focused on proposals to give bankruptcy court judges the power to reduce the principal on primary residence mortgages, the same way they can for most other loans including those on vacation homes, cars, and boats. While I have long believed this to be the most efficient and least costly way to keep families in their homes, and many observers agree, the large banks have fought against it with their full lobbying might. Despite House passage of "cramdown" legislation in March of 2009, I'm sorry to say we have been unable to overcome filibusters in the Senate.

Given these political realities, I decided to add to the focus of my subcommittee a different approach, already underway in several bankruptcy courts.

Under programs adopted in bankruptcy courts in Rhode Island, New York, Florida, and Vermont, the court may order the homeowner and mortgage servicer to negotiate in good faith a settlement that is preferable to foreclosure for all parties. While judges have the ability under the programs to appoint a formal mediator, it is not necessary in the vast majority of cases. For most homeowners, the mere chance to speak directly with their mortgage company is enough to lead to an agreement.

Under the bankruptcy loss mitigation programs, the power of the court to compel good faith talks breaks through the bureaucratic maze of the voluntary modification programs. The court does not have the power to force a settlement, but it can force the parties to try to talk to each other, and that can avoid a costly foreclosure that will benefit no one.

The programs in Rhode Island and the other states were designed with the input of creditors and homeowners and have been successful to date. I believe that the courts have appropriately implemented these programs under their Section 105(d) authority to convene pre-trial status conferences. Unfortunately, one servicer has challenged the authority of the bankruptcy court in Rhode Island to require it to negotiate under the program. I have no doubt that the court's authority will be upheld eventually, but it could be years of appeals before the parties have a final answer. In the meantime, other judges around the country may be reluctant to adopt a program that may be challenged.

I have proposed a legislative fix that would clarify that bankruptcy courts can run foreclosure loss mitigation programs, and make the parties talk with each other before someone's home gets taken away. I hope that this committee will help me to pass it in to law early next year. The American people are tired of taxpayer bailouts for banks, and we owe it to them to support a sensible program that comes with zero cost to the taxpayer. Bankruptcy will not be the answer for every homeowner, but the loss mitigation programs can help homeowners like Larry cut short a stalled application process and finally get an answer to their modification request. In Rhode Island, bankruptcy court loss mitigation has already saved 100 homes, and it has the potential to help saves thousands more across the country. I believe that makes it worth supporting. Once again, thank you for the opportunity to take part in this hearing, and I commend your good work.

Mr. JOHNSON. Thank you, Senator, and thank you for the legislation that you just mentioned. I think it is good in the judicial States, foreclosure judicial States, but there are about half the States almost that suffer from a nonjudicial foreclosure process, States like Georgia where I hail from, and I am looking at some legislative solutions to that process, some Federal legislative solutions to that process which should measure up well with your efforts.

Senator WHITEHOUSE. Mr. Chairman, in States like yours and mine, which are both nonjudicial foreclosure States, the ability of a homeowner to seek bankruptcy protection in order to stop foreclosure and resolve all of their credit issues at the same time is facilitated by this proposal. So it is effective in Rhode Island and I think it would be effective in Georgia as well, notwithstanding the nonjudicial nature of your foreclosure process.

Mr. JOHNSON. Certainly. Thank you.

Senator WHITEHOUSE. Thank you, Chairman. Thank you all for your courtesy.

Mr. JOHNSON. Thank you for your appearance today.

And now we will call for the second panel. I will now recognize myself for a brief statement.

These are challenging times in America, our economy is struggling during an unprecedented housing crisis, a crisis that is devastating American families and neighborhoods. Too many constituents have contacted my district offices for assistance because the banks and lenders are losing their paperwork, failing to respond to their request for modifications and failing to return their calls in a timely manner. Their lives are disrupted and turned upside down by the foreclosure process and by the shoddy procedures. The same bankers who came to Congress with hat in hand demanding a bailout, the same bankers who couldn't have survived without welfare paid for by the American taxpayer, those same bankers have no problem summarily throwing the American taxpayer out of her home without due process, without accurate documents, without regard for the human beings whose lives are being affected.

So I submit to our friends from the financial industry that our constituents, your borrowers, are living human beings. They have blood flowing through their veins, they care about their loved ones, they agonize over what will happen to their homes. They need to be treated fairly during the foreclosure process.

One of the major causes of this foreclosure crisis was greed. Banks and lending institutions, fueled by greed, put everyday hardworking Americans into mortgages that they knew that these Americans could not afford. In last week's foreclosure hearing we had a chance to hear from a judge who has presided over more than 1,000 mortgage cases. He testified to the many problems he sees time and time again in his courtroom, including situations where lawyers representing mortgagors failed to know who they represented, or they lacked the underlying note evidencing their entitlement to seek foreclosure, or they failed to establish the legal chain of title establishing the standing of their client mortgagors, and they submitted to the court in some cases false affidavits attesting to the ownership and the note of the mortgage.

Recent press reports indicate that lenders have executed foreclosures recklessly and without adequate review of relevant documents. The practice of robo-signing, where lenders sign foreclosure documents with little or no knowledge of the contents of the documents, calls into question the legitimacy of hundreds of thousands of foreclosures. Other problems rampant in the foreclosure process range from the imposition and collection of improper fees, poor underwriting and improper servicing, not to mention the pervasive predatory lending that set the stage for the crisis in the first place.

These are serious issues that do not appear to be isolated incidents, but rather a systematic problem within the foreclosure industry.

Since 2007, Americans have lost nearly 6 million homes to this foreclosure crisis. This issue is of the utmost importance to me because my home State of Georgia ranks seventh in the Nation for foreclosures. Foreclosure and predatory lending issues have always been crucial issues to me. As a Dekalb County commissioner, I authored and passed Georgia's first approved ordinance against predatory lending which State legislators later used as a guide in passing a statewide law.

As foreclosures continued to surge, we must ask if mortgage servicers are doing all that they can to provide sustainable alternatives to foreclosure. How can we ensure that servicers have the training, personnel support, and judgment to properly service loans and interact with customers to avoid foreclosure? This is a time of economic and financial instability, and at the very least families should be able to go to sleep at night knowing that they have a place to lay their heads. Unfortunately, many Americans live under the shadow of imminent foreclosure and struggle against servicers who are often incompetent and disinterested.

I thank the Chairman for all of his hard work on this Committee during this Congress and for taking the time to hold this hearing. The Chairman had to depart for another very important meeting, and he asked me to chair this full Committee today.

I look forward to hearing from the witnesses today, and I yield back the balance of my time and will now recognize the Ranking Member of the Judiciary Committee and soon to be Chairman, my friend, Congressman Lamar Smith from Texas.

Mr. SMITH. Thank you, Mr. Chairman. Mr. Chairman, I was interested in your opening statement because I didn't realize what you had done in the Georgia legislature to help address this problem and that is much appreciated, and I was glad to hear you say that a State law had been the result of your efforts.

Mr. Chairman, let me thank the witnesses from the second panel at our last hearing for their patience and for coming back to testify this week. I regret we were unable to hear from you the last time but appreciate your effort to be here today.

Errors in the foreclosure process are inexcusable and undermine the rule of law and the due process rights of borrowers. However, there does not appear to be any evidence of fraud or intent to mislead the courts. Rather, all indications are that the foreclosure documentation problems are limited to unacceptable, but curable documentation defects.

While the foreclosure documentation issues are troubling, and mortgage servicers undoubtedly will be held accountable for their mistakes, the larger problem is how to end the foreclosure crisis. We seem to be caught in an economic paradox between job creation and recovery of the housing sector.

As Peter Lawson of the American Enterprise Institute has observed, "The housing industry, which amounts to almost one-sixth of the U.S. economy, has always been the economic sector that led the United States out of recessions." But at the same time it appears that jobs are what we need for the housing sector to recover. Analysts at Moody's have noted that without jobs fewer households are created and the existing households are unable to afford to buy a home.

Unemployment, coupled with a large number of borrowers who are under water on their mortgages and an overall lack of consumer confidence, is creating a drag on the housing sector. And by all indications a weak housing sector is constraining the broader economy. So while the mortgage documentation problems that are the genesis of this hearing are important, the more important question is how do we get the housing sector moving again?

At this point Obama administration programs like the Home Affordable Modification Program has succeeded in spending large sums of taxpayer money, but have had little success at stemming foreclosures. Hopefully as we move forward we can establish more effective policies for both job creation and recovery of the housing sector.

Mr. Chairman, I look forward to the witnesses' testimony and I yield back the balance of my time.

Mr. JOHNSON. Thank you, Congressman.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I ask that other Members submit their statements for the record. Without objection, other Members' opening statements will be included in the record and without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record. Without objection, the Chair will be authorized to declare a recess of the hearing at any point.

I will now introduce our second panel. First is Mr. James Kowalski, Jr. He specializes in consumer protection litigation. Prior to entering private practice, Mr. Kowalski served as an assistant State attorney for Florida from 1989 to 1996, where he prosecuted public corruption, sex crimes, and homicides. He is a graduate of the University of California at Berkeley and the University of San Francisco School of Law. Mr. Kowalski also brings the perspective of having practiced in Florida, one of the States like my State of Georgia which has been hardest hit by the ongoing foreclosure crisis. He has also been on the forefront of the foreclosure documentation scandal. Welcome, sir.

Next is Mr. Thomas Cox. He has been a lawyer for more than 40 years and currently is a volunteer program coordinator at the Maine Attorneys Savings Homes Project. The project is jointly sponsored by the Pine Tree Legal Assistance and its affiliated Maine Volunteer Lawyers Project. Mr. Cox brings to this hearing a unique perspective. While he currently represents homeowners facing foreclosure, he used to represent lenders seeking to foreclose. I think his perspective will be particularly interesting on the foreclosure documentation issues that we are considering here today. Mr. Cox received his AB from Colby College and his JD from Boston University. Welcome, sir.

Our next witness, Ms. Sandra Hines, has been detained, a flight delay I believe, so she may or may not get here before we conclude this hearing.

Next I would like to welcome Vanessa Fluker. She is an attorney who practices in Detroit, which some consider to be one of the Nation's home foreclosure epicenters. Nearly every day she is in court helping those at risk losing their homes to foreclosure, and she is a leader of the Moratorium, now Coalition to Stop Foreclosures, Evictions and Utility Shut-offs.

Thank you for being here, ma'am. Over the years Ms. Fluker and Chairman Conyers have worked very hard to have the State of Michigan institute a statewide foreclosure moratorium, and we will want to hear her explain to us why such a moratorium is needed. Ms. Fluker received her joint MA/JD degree in 2002 from the WSU Law School and the Department of Political Science.

Our next witness is Tom Deutsch. Mr. Deutsch, excuse me, sir, is the Executive Director of the American Securitization Forum. Before obtaining that position he practiced law in the capital markets department of Cadwalader, Wickersham & Taft. He earned his BA from Washington University in St. Louis and his JD from the University of Pennsylvania. Welcome, sir.

Our final witness is Mr. Christopher Peterson, who is an Associate Dean for Academic Affairs and a professor of law at the Quinney College of Law, University of Utah. He has lobbied on consumer lending policy and testified on consumer finance before the U.S. Senate Banking Committee and the White House. He has a BS, an HBA, and a JD from the University of Utah. It won't come as a surprise, but Professor Peterson has strongly divergent views from Mr. Deutsch on the impact of securitization on real property law. So we are looking forward to an erudite discussion from both of these experts.

Now, Mr. Kowalski, would you please begin?

TESTIMONY OF JAMES A. KOWALSKI, JR., ESQUIRE, LAW OFFICES OF JAMES A. KOWALSKI, JR., PL, JACKSONVILLE, FL

Mr. KOWALSKI. Representative Johnson, Members of the Committee, thank you for inviting us here today to testify on issues relating to the foreclosure crisis facing our country. I am an attorney practicing in Florida and a member of the National Association of Consumer Advocates. I would like to start my testimony by making a few clear points in follow up to the regulators' testimony during your last hearing.

First, the manufacturer of significant documents for submission to the courts is not a recent practice by the servicing industry. It is widespread and longstanding. The use of robo-signers, more accurately called robo perjurers, where an individual submits testimony under oath in the form of an affidavit, an affidavit relied upon as the primary evidence of the court in evicting the homeowner, where the individual has no personal knowledge whatsoever regarding the substance of their testimony, is not a recent practice by the servicing industry. These abuses of the judicial system are not the work of a few individuals or a rogue, outsourced unit of the servicer. The systemic use of manufactured documents and false affidavits is a business model. It has been the business model of the servicing industry for years.

I have been an attorney in Florida for 20 years, starting as a assistant State attorney in the Fourth Judicial Circuit in 1989. I served as the division chief of the Public Corruption Unit in the County Court, and as the senior trial attorney in the Special Assault Unit in the Repeat Offender Court Unit. I was also a member of the on-call homicide team, and I put three men on Florida's death row.

After leaving the State attorney's office in 1996, I entered civil practice and began representing individuals in wrongful debt collections and wrongful mortgage foreclosure cases in the early 2000's. I took my first robo signer or robo perjurer deposition in 2003.

As a result of almost a decade of handling wrongful foreclosure matters, I have reached five general conclusions. First, the servicing industry as a business model is irretrievably broken, and the application of servicing industry procedures to loan modifications or, to that matter, to any issues whatsoever with the foreclosure itself has been counterproductive. The clearest evidence of this is in the dual track process where a borrower who might not be behind at all, who calls his or her servicer to inquire about a loan modification or wrongly force placed coverage or a posting error by the servicer will often end up months down the road with one unit of the servicer continuing to deal with what by then is a horrific customers relations issue, while another unit of the same servicer proceeds blindly and mindlessly with foreclosure.

The various units of the servicer do not communicate, are not permitted to communicate, and do not even have access to each other's computer systems. At every turn the goal appears to be the pursuit, churning, and diverting of servicer fees. Examples of everything I will testify about are in the exhibits that I filed with my testimony.

Number two, affidavits and assignments of mortgage filed in mortgage foreclosure cases are for the most part worthless. The overwhelming evidence from Florida and around the country consists of proof that affidavits are completed by persons who not only do not read the file, they do not even have access to the critical portions of the file.

It is also now evident that assignments are created after the fact in an attempt to show a chain of ownership, and many critical facts in the assignment such as the date or the assertion of an equitable transfer are not based on any evidence at all. For example, the date often used by the assignment is the date the file was transferred to the law firm, not the date the servicer purportedly took ownership or the trust purportedly took ownership.

I listened to a Federal district judge last month describe affidavits as all surface and no anchor. I have never taken the deposition of an affiant or read or reviewed a deposition taken by another lawyer in more than 7 years of this practice where the affidavit itself was wholly truthful.

Number three, many of the mill law firms are overwhelmed by the internal structures and by demands placed on them by the industry, and as a practical effect have complied with whatever they have been asked to do. This includes law firm employees signing affidavits on behalf of their clients where a law firm employee had no personal knowledge and was acting outside the scope of whatever authority they might have.

Number four, Legal Aid groups and HUD counselors are an integral part of the solution and must be better funded to provide support at all levels.

Number five, local counsel unfortunately has no connection to these issues.

In conclusion, I would respectfully suggest that the major servicers should not be believed when they assert that borrowers are deadbeats and that speeding up the process and rubber-stamping MERS is the course we should follow. At some point we simply have to stop accepting the ever changing excuses offered by the servicing industry. If we are to restore trust in our institutions, we have to start at some point to reform the servicing industry. The dual track concept needs to end immediately. Fannie and Freddie need to be incentivized to be part of the solution. MERS needs to end. The servicers do not need a truth bailout to go along with a financial bailout we have given them as a reward for truly abysmal business practices. And Legal Aid groups and HUD counselors have to be properly funded.

Mr. JOHNSON. Mr. Kowalski, I am going to ask that you sum up at this time. I neglected to mention to the witnesses that each of you have 5 minutes, as indicated on the contraption in front of you. There is a green, a red and a yellow light. The green light cuts off after 4 minutes, it goes to yellow, and then it goes to red. So if you would, sir, please.

Mr. KOWALSKI. Lawyers will always say I just have a few more points, but I do just have a few more points. As members of the National Association of Consumer Advocates, we would appreciate the opportunity to form a bipartisan partnership to confer as regularly as you want with the Members of this Committee, with your staff, with OCC, with Treasury and with others to work through the short and long-term solutions to these issues. But at each step the interests of American homeowners need to be considered first.

Thank you.

[The prepared statement of Mr. Kowalski follows:]

PREPARED STATEMENT OF JAMES A. KOWALSKI, JR.

LAW OFFICES OF JAMES A. KOWALSKI, JR., PL
MEMBER OF THE BAR IN FLORIDA AND CALIFORNIA

Written Testimony of

James A. Kowalski, Jr., Esquire
Law Offices of James A. Kowalski, Jr., PL
Jacksonville, FL

Before the
Committee On The Judiciary
United States House of Representatives

"Foreclosed Justice: Causes and Effects of the Foreclosure Crisis"

December 2, 2010
10:00 a.m.

12627 SAN JOSE BOULEVARD, SUITE 203, JACKSONVILLE, FL 32223
TEL: 904.268.1146 FAX: 904.268.1342 EMAIL: KOWALSKI.LAW@MAC.COM

Testimony

Thank you for the opportunity to present testimony on the causes and effects of the foreclosure crisis. As an attorney handling consumer litigation cases in Florida, I have had a front-row seat for much of the past decade, as Florida has been particularly affected by the overall economic crisis, with specific harm coming to the state's citizens in the form of overwhelmingly high mortgage foreclosure rates.

These remarks are drawn in part from testimony I provided in July 2009 to the Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases, and from prior seminars I have taught in this field. My testimony has not changed because the actions of the mortgage servicing industry have not changed – for years. The manufacture of documents in court, the use of robo-signers, the complete lack of proper documentation required by the Pooling and Servicing Agreements, the UCC and New York trust law – all of this has been standard industry practice *for most of the past decade.*

First, let me make clear that I am not here to demonize the servicing industry and their mill law firms. I do not see the securitized trusts and their mill law firms as demons – I see them as an entirely new legal vehicle for separating homeowners from their homes, with little or no resemblance to the normal attorney-client relationship we are familiar with, and little or no systemized review of individual cases. These are not our grandfather's banks, and the legal product that has been introduced into our state court systems are not like anything we have seen before.

The system that has been in place for years, with the mill firms being merely an extension of contractors to the servicing industry for securitized loans, represents a facial violation of many of the ethical rules which govern attorneys, including Rule 4-2.1, Rules Regulating the Florida Bar, which requires an attorney to exercise "independent professional judgment." Pleadings are routinely drafted by the client (the servicer, not the plaintiff) with no little or no meaningful review by the attorney.

These actions are forced, in part, by the timing pressures imposed by the servicing industry. In 2004, Fidelity National Information Services, a Jacksonville-based company which provides much of the software interface technology used by mill firms and servicers, implemented an "Attorney Performance Report" (APR). The APR is designed to reward high-scoring attorneys, who are ranked on the basis of a number of timing factors. The faster the case is shoved through the foreclosure process, the higher the score. Firms are then color coded as "green light", "yellow light" and "red light," with the slower "red light" firms receiving less and less business.

The focus on speed is part of the business model for the servicers. As those of us who have litigated these cases for years now, and as all of us now know as a result of the robo-signing scandals, most of the servicers use "Signing Officers" – rows of individuals who sit before reams of documents prepared by others, with not even a modest wink at the business records exception to the hearsay rule, and who sign the documents only to have the document transported across the business campus to rows of notaries, who attest to the signatures without ever complying with the basics of their state's notary laws.

Some of the mill firms now employ their own "Signing Officers" -- individuals who will sign Assignments of Mortgage on behalf of the owners of the pool, supposedly authorized by the servicer pursuant to the Pooling and Servicing Agreement which applies to the particular securitized trust. The documents are prepared entirely by the servicer.

On occasion, the law firm employees also sign the Affidavits in support of motions for summary judgment filed by the law firms -- here, the lawyer's office staff *becomes the material witness for the lawyer's client.*

Right or wrong, you can see from this system there is no real separation between the servicers and the mill firms. The law firm employee is signing documents prepared by the client / servicer (who also has not independently reviewed the substance contained therein). I have provided numerous examples of this in the attached Exhibits.

The most significant problem which arises as a result of this standard business model is the "dual track" system, where homeowners dealing with one unit of a servicer on a loan modification will quickly end up in a foreclosure handled by another unit of the same servicer – units which not only do not coordinate their efforts, but which impose firewalls between themselves, where an employee of one unit cannot even access the computer database used by another unit – even where the information is critical and could either (1) prevent a foreclosure or (2) demonstrate that the foreclosure was wrongly filed in the first place.

The use of robo-signers and the dual track mechanism means simply this: at a very basic level, the servicer *cannot* be relied upon to confirm the veracity of the default. Put another way, if there is a problem with the paperwork, there is a problem with the foreclosure.

None of this is new – judges around the country have been imposing sanctions for this conduct *for years*, and the media has been reporting on these issues *for years.*

I raise these issues to make this point – the core problem with the development of the securitized trusts, the invention of the servicing industry, and the creation of the mill firm system, is that all problems, concerns or issues raised by the borrower / homeowner / defendants are not only ignored, but that the system provides incentives for this practice. This is the single biggest cause of the foreclosure crisis, and we have seen firsthand the effects, in Florida and throughout the country, on families (particularly children), on small businesses, on the economy in general.

A study released last year by the Federal Reserve Bank of Boston makes this clear: Mortgage lenders don't try to rework most home loans held by borrowers facing foreclosure because it would probably mean losing money. We knew ahead of time, based on these findings and prior studies, that the Obama administration's major effort to solve the foreclosure crisis by giving the lending industry $75 billion to rewrite delinquent loans to more affordable levels was not likely to work. One of the study's coauthors, Boston Fed senior economist Paul S. Willen, said the government would be better off giving the money directly to struggling borrowers to help them with their payments, rather than to lenders that are averse to working out the troubled loans.

The Fed's study found that only *3 percent* of seriously delinquent borrowers - those more than 60 days behind - had their loans modified to lower monthly payments; about 5.5 percent received loan modifications that did not result in lower payments. The study focused on 665,410 loans that were originated between 2005 and 2007 and subsequently became seriously delinquent. It also followed about 150,000 borrowers for six months after they received help, through the end of 2008.

"A lot of people you give assistance to would default either way or won't default either way," Willen said. "[The servicers] are trying to maximize profits, and at this point maximizing profits does not mean modifying loans."

We also see this at the state level, with many servicers and lenders who have signed on to receive TARP funds, and are therefore contractually obligated to stay foreclosure lawsuits and comply with the Treasury's HAMP and HARP programs, denying to borrowers that they even participate in the programs or have received federal money. We now know that servicing fees have been pursued to the detriment of both the investors and the homeowners.

As a result of my years of first-hand experience, I have reached 5 major conclusions, outlined below, with supporting documentation as to each:

1. The servicing industry as a business model is irretrievably broken, and the application of the servicing industry procedures to loan modifications sought under HAMP and other programs has been counterproductive. The clearest evidence of this is in the "dual track" process.

Under the "dual track" system, a borrower who might not be behind at all, and who calls the servicer to inquire about a loan modification, is often told they need to miss three payments in order to be considered for a loan modification. After the first payment is missed, two things immediately happen: (a) an initial default letter is computer-generated; and (b) the missed payment is reported to the credit bureaus. When the borrower calls after receiving the letter, they are told that this is expected, and they should proceed to miss the next two payments. The same thing happens for payments 2 and 3; at 91 days the borrower is in default and the file is sent to the default loan department, and the referral to the mill law firm starts. At that point, for the first time, the borrower or a HUD counselor is permitted to submit financial records to the loan modification department to seek a modification, but the borrower's financial position has already worsened because of the credit reporting. From this point forward, the borrower is on "dual tracks" and the foreclosure proceeds with one department at the same time the loan modification is considered by another department. The two departments do not, and are often not permitted to, communicate. See, Exhibits 2 and 7.

Under this system, when the Affidavit of Indebtedness is created, the so-called "robo-signer" looks at a summary of the payment history only (no other documents whatsoever) and is never permitted to review the actual contact history containing the instructions to the borrower. Exhibit 2.

2. **Affidavits and Assignments of Mortgage filed in mortgage foreclosure cases are, for the most part, worthless.** The overwhelming evidence from Florida and around the country consists of proof that Affidavits are completed by individuals who not only do not read the file; they do not even have access to the critical portions of the loan file. Those who review a summary of the payment screen, for example, are not even permitted to review the customer contact screen, which should include reference to conversations with the borrowers. See, Exhibits 2-6 and 8.

It is now evident that Assignments are also created after the fact in an attempt to demonstrate a chain of ownership, and that many critical facts in the Assignments, such as the date of the Assignment or the assertion of an equitable transfer, are not based on any evidence at all. (For example, the date often used for the Assignment is the date the file is transferred to the law firm, *not* the date the Trust purportedly took ownership of the loan.)

I listened to a Federal District Judge last month describe Affidavits as "all surface and no anchor." I have never taken a deposition of an Affiant, or read or reviewed a deposition taken by another lawyer, in more than 7 years of this practice, where the Affidavit itself was wholly truthful. In the GMAC deposition that has made national news, for example, possibly the only fully truthful statement in the entire document was the name of the Affiant herself. See, Exhibit 8.

3. **Many of the mill law firms are overwhelmed by their internal structures and by demands placed on them by the industry and, as a practical effect, have complied with whatever they have been asked to do.** This applies particularly to the Law Offices of David J. Stern, as clearly demonstrated by the recent depositions taken by the Florida Attorney General's Office, and includes law firm employees acting as affiants and signatories on Affidavits where the law firm employee had no personal knowledge and was acting outside the scope of whatever authority they might have had. See, Exhibit 6.

4. **Legal Aid groups and HUD counselors are an integral part of the solution, and must be better funded to provide support at all levels.** For example, the Jacksonville Area Legal Aid (JALA) lawyers carefully review the files, and, for the most part, when a JALA lawyer is coming to court, it is an indication that there is a solution at the end of the case (for example, the borrower should qualify for a loan modification but that portion of the file is in the "dual-track" morass.) HUD counselors can also provide invaluable information on HAMP-related solutions, and both legal services and HUD

counselors must be properly funded to provide assistance in litigation. Exhibit 1 is an example of a borrower who was fortunate to come into contact with her local Legal Aid, which is providing assistance in a case in which two foreclosures filed by two different securitized trusts are pending at the same time.

5. Local counsel has no connection to these issues whatsoever. They do not participate in the creation of the Affidavits or Assignments, know nothing about the file other than what they are told by the staff of the mill law firm, and usually do not have the opportunity to review the file until immediately before the hearing. They do not have the opportunity to conduct any independent investigation whatsoever, do not sign pleadings, and are therefore outside the purview of Rule 2.515(a), Florida Rules of Judicial Procedure: "The signature of an attorney shall constitute a certificate by the attorney that the attorney has read the pleading or other paper; that, to the best of the attorney's knowledge, information and belief there is good ground to support it…"

Conclusion

So – what to do, given the business practices of the industry, the servicing abuses outlined above, and the fact that the mill firm system provides no meaningful checks and balances to the foreclosure process sought by the servicer?

First, I would respectfully suggest that the major servicers should not be believed when they suggest that all borrowers are deadbeats, and speeding up the process, and rubber-stamping the abomination that is MERS, should be the course we follow. At some point, we simply have to stop accepting the ever-changing excuses offered by the servicing industry for what appears to be a completely failed business model.

Why should we continue to place trust in an industry that has clearly resorted to the wholesale manufacture of critical documents as a business practice?

If we are to restore trust in our institutions, including in the judicial process itself, we have to start, at some point, to reform the servicing industry. The "dual track" concept needs to end immediately. Fannie and Freddie need to be incentivized to be part of the reform process, not part of the problem. MERS needs to end, as the servicers do not need a "truth bailout" to go along with the massive financial gift we have given them as a reward for truly abysmal business practices. A careful inquiry, point-by-point and document-by-document, needs to be started so that investors can have faith in the fact that they actually own what they think they own.

At each step, the interests of American homeowners need to be considered first.

Thank you for allowing me the opportunity to share these comments.

TABLE OF CONTENTS

EXHIBIT 7: Excerpt of BOA deposition, in which the BOA employee who was charged with testifying, with knowledge, about a BOA credit disability plan, confirmed he could not find out anything regarding the BOA credit disability plan.

EXHIBIT 8: The GMAC mess.

EXHIBIT 1

IN THE CIRCUIT COURT OF THE
4TH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.: 16-2010-CA-004731 XX

WELLS FARGO BANK, N.A., AS CERTIFICATE TRUSTEE FOR VNT TRUST SERIES 2010-1,
Plaintiff,

vs.

JACQUELINE P. YULEE; BRANDON CHASE HOMEOWNERS ASSOCIATION, INC.; MERCEDES HOMES, INC.; UNKNOWN SPOUSE OF JACQUELINE P. YULEE; UNKNOWN TENANT (S); IN POSSESSION OF THE SUBJECT PROPERTY,
Defendants.

725 (5) tm

FILED
APR 14 2010
CLERK CIRCUIT COURT

COMPLAINT

The Plaintiff, **WELLS FARGO BANK, N.A., AS CERTIFICATE TRUSTEE FOR VNT TRUST SERIES 2010-1**, sues the Defendants named in the caption hereof and alleges:

COUNT I

1. This is an action to foreclose a mortgage on real property in **DUVAL** County, Florida.
2. On **October 31, 2003, JACQUELINE P. YULEE** executed and delivered a promissory note and Purchase Money Mortgage securing payment of the same to **WELLS FARGO HOME MORTGAGE, INC.**, which mortgage was recorded in the Official Records Book **11504**, Page **862**, of the Public Records of **DUVAL** County, Florida and which mortgaged the property described therein, then owned by and in possession of said mortgagor. Said mortgage was subsequently assigned to **WELLS FARGO BANK, N.A., AS CERTIFICATE TRUSTEE FOR VNT TRUST SERIES 2010-1.** A copy of the mortgage and assignment are attached hereto and made a part hereof.
3. Plaintiff is the owner of said note.
4. Defendant(s), **JACQUELINE P. YULEE**, own(s) the property.
5. There has been a default under the note and mortgage held by Plaintiff in that the payment due **February 01, 2007** and all subsequent payments have not been made. Plaintiff declares the full amount due under the note and mortgage to be now due.

10-17854

6. All conditions precedent to the filing of this action has been performed or has occurred.
7. There is now due, owing and unpaid to the Plaintiff as of the date of the filing of this complaint the following amounts on principal of said note and mortgage: unpaid principal balance: **$ 206,811.90**, plus interest, escrow, title search expenses for ascertaining necessary parties to this suit, title search, title exam, filing fee, and attorneys fees and costs.
8. Plaintiff has obligated itself to pay the undersigned attorneys a reasonable fee for their services herein, Pursuant to the loan documents Plaintiff is entitled to an award of attorneys fees.
9. Defendants, as **UNKNOWN TENANT(S)**, in possession of the subject property, may claim some interest in or lien upon the subject property arising from being in actual possession of same, but interest, if any, is subject and inferior to the lien of Plaintiff's mortgage.
10. The Defendant, **BRANDON CHASE HOMEOWNERS ASSOCIATION, INC.** may claim some interest in or lien upon the subject property by virtue of **Claim of Lien**, which is recorded at Official Records Book **14049**, Page **1492** of the Public Records of DUVAL County. Said interest, if any, is subject and inferior to the lien of Plaintiff's mortgage. Additionally the Defendant, **BRANDON CHASE HOMEOWNERS ASSOCIATION, INC.**, may claim some interest in or lien upon the subject property by virtue of any assessments pursuant to FL Statute 720.3085.
11. The Defendant, **MERCEDES HOMES, INC.** may claim some interest in or lien upon the subject property by virtue of **ANY POSSIBLE INTEREST PURSUANT TO LACK OF AFFIDAVIT OR RESOLUTION AUTHORIZING EXECUTOR TO SIGN FOR MERCEDES HOMES, INC.**, which is recorded at Official Records Book 11504, Page **861** of the Public Records of DUVAL County. Said interest, if any, is subject and inferior to the lien of Plaintiff's mortgage.
12. The Defendant, **UNKNOWN SPOUSE OF JACQUELINE P. YULEE** may claim some interest in or lien upon the subject property by virtue of **Any possible Homestead Interest**. Said interest, if any, is subject and inferior to the lien of Plaintiff's mortgage.

WHEREFORE, Plaintiff prays as follows:

(a.) That this Court will take jurisdiction of this cause, the subject matter and the parties hereto.

(b.) That this Court ascertain and determine the sums of money due and payable to the Plaintiff from the Defendant(s), including without limitation principal, interest, advances, attorney fees, and costs pursuant to the loan documents.

(c.) That the sum of money found to be due as aforesaid be decreed by this Court to be a lien upon the lands described in Plaintiff's mortgage.

(d.) That such lien be foreclosed in accordance with the rules and established practice of this Court, and upon failure of the Defendants to pay the amount of money found to be due by them to the Plaintiff, the said land be sold to satisfy said lien.

(e.) That this Court decree that the lien of the Plaintiff is superior to any and all right, title or interest of the Defendants herein or any person or parties claiming by, through or under them since the institution of this suit.

(f.) That all right, title or interest of the Defendants or any person claiming by, through or under them be forever barred and foreclosed.

(g.) That this Court grants general relief in this cause as in its discretion might be just and proper including, but not limited to, a deficiency judgment, except where a discharge is applicable, if the proceeds of the sale are insufficient to pay Plaintiff's claim.

Law Offices of Marshall C.Watson, P.A.
1800 N.W. 49TH Street, Suite 120
Fort Lauderdale, FL 33309
Telephone: (954) 453-0365
(800) 441-2438
Facsimile: (954) 771-6052

By: ______________________
Cherri-Ann Giannell, Esq.
Bar Number: 40692

Giselle Hugues
Bar#66821

IN THE CIRCUIT COURT OF THE
4TH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.:

WELLS FARGO BANK, N.A., AS CERTIFICATE TRUSTEE FOR VNT TRUST SERIES 2010-1,
Plaintiff,

vs.

JACQUELINE P. YULEE; BRANDON CHASE HOMEOWNERS ASSOCIATION, INC.; MERCEDES HOMES, INC.; UNKNOWN SPOUSE OF JACQUELINE P. YULEE; UNKNOWN TENANT (S); IN POSSESSION OF THE SUBJECT PROPERTY,
Defendants.

BORROWER CONTACT INFORMATION

Name: **JACQUELINE YULEE**
Address: **10909 BRANDON CHASE DRIVE**
JACKSONVILLE, FL 32219
Phone number: 904 7130627

10-17854

Managing Attorneys
Marshall C. Watson
Caryn A. Graham

Associate Attorneys
Antonio Alonso
Patricia Arango
Ria Sankar Balram
Laurence Barsky
Anissa Bolton
Carolyn Dudnik
Albert Buznik
Jessica Cabrera
Antonio Campos
Tara Castillo
Linda Chelvam
Connie Delisser
Jenny Dziorney
Ingrid Fadil
Penny Fraser
Luke Fynn
Joanne Galipault
Michael Gelety
Cherri-Ann Giannelli
Barbara Gonzalez
Kerry Green
Can Guner
Shari N. Hines
Giselle Hugues
Tenia Hunter
Vida Jasaitis

LAW OFFICES
OF MARSHALL C. WATSON

1800 NORTH WEST 49TH STREET, SUITE #120
FORT LAUDERDALE, FLORIDA 33309

Associate Attorneys
Yanique Johnson
James Karrat
Brian Kowal
Barrie Krumholz
Elizabeth Le
Karen Marozsan
Sean A. Marshall
Mark Mastrarrigo

Associate Attorneys
Jan McLaughlin
Sabine Michel-Zamor
Ari Miller
Karen E. Morgan
Priscilla Moxam
Areeb Nasser
Erin Nevius
Wm. David Newman, Jr.

Telephone (954) 453-0365
Facsimile (954) 771-6052

Associate Attorneys
Rebecca Nilsen
Carri L. Pereyra
Michael Phillips
Frank Reder
Robin Reyes
Kristen Rosenthal
John Salcedo
Francesca San Roman
Andrew Scolaro
Ryan Shipp
Nalini Singh
Gail Sparks
Karen A. Thompson
Noel Vandenhouten
Lea Vandergriff
Barbara Vendrell
Angela Vitiglio
Lynn Marie Vouis
Scott Weiss
Darian Williams
Vaios Zamakis

Of Counsel
John Watson
David Tabb
George Zamora

March 22, 2010

NOTICE REQUIRED BY THE FAIR DEBT COLLECTION PRACTICES ACT
15 U.S.C. SECTION 1692, AS AMENDED

RE: Property Address: 10909 BRANDON CHASE DRIVE JACKSONVILLE, FL 32219

Owner: JACQUELINE P. YULEE
Mortgagor: JACQUELINE P. YULEE
Our File #: 10-17854

1. The Plaintiff, WELLS FARGO BANK, N.A., AS CERTIFICATE TRUSTEE FOR VNT TRUST SERIES 2010-1, is the creditor to whom the debt is owed by those individuals who are obligated under the promissory note and mortgage.

2. The debtor may dispute the validity of this debt, or any portion thereof, within 30 days of receipt of this Notice. If the debtor fails to dispute the debt within 30 days, the debt will be assumed valid by the creditor.

3. If the debtor notifies the creditor's law firm in writing within 30 days from receipt of this notice that the debt, or any portion thereof, is disputed, the creditor's law firm will obtain verification of the debt, or a copy of a judgment and a copy of the verification will be mailed to the debtor by the creditor's law firm. Collection efforts, resulting in additional attorney fees and costs however, will continue during this 30 day period until this office receives the written request for verification.

4. If the creditor named herein is not the original creditor, and if the debtor makes a written request to the creditor's law firm within 30 days of receipt of this Notice, the name and address of the original creditor will be mailed to the debtor by the creditor's law firm. Collection efforts, resulting in additional attorney fees and costs however, will continue during this 30 day period until this office receives the written request for the name and address of the original creditor.

5. As of March 22, 2010, you owe a total amount of $254,661.45 in certified funds. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your certified funds, in which event we will inform you before depositing the check for collection. For further information, please call 1-800-441-2438.

6. Written requests pursuant to this notice should be addressed to FAIR DEBT COLLECTION CLERK, Marshall C. Watson, P.A.

7. This communication is for the purpose of collecting a debt, and any information obtained from the debtor will be used for that purpose.

8. The Law does not require me (the debt collector) to wait until the end of the thirty-day period before suing you (the consumer) to collect this debt. Once a lawsuit is commenced, all judicial remedies will be zealously pursued and attorney fees and costs, which you may be responsible for, in whole or in part, will be incurred. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period which begins with your receipt of this letter, the law requires me to suspend my efforts (through litigation or otherwise) to collect the debt until I mail the requested information to you. Once the requested information is mailed to you litigation efforts will resume.

9. Even though you are required to file a response to the lawsuit prior to the thirty (30) days, your validation rights, as set forth in this notice, shall not expire for thirty (30) days.

EXHIBIT "A"

NOTICE OF LEGAL ASSISTANCE REGARDING FORECLOSURE CASES

You can lose the home you own as a result of the foreclosure papers served on you with this Notice.

However, you may be able to save your home. You probably will need a lawyer to help you.

Volunteer lawyers are available through The Jacksonville Bar Association to review your situation to see whether your home can be saved.

If you would like to get legal help to save your home, you should call **Jacksonville Area Legal Aid at 356-8371**. Your situation will be reviewed and referred to a lawyer who will assist you if there is a basis for assistance.

If you cannot afford a lawyer, you will not be charged any lawyer's fees. If you can afford to pay reduced fees, but not regular fees, you may be charged only a reduced fee within your financial ability.

You need to act right away if you want to try to save your home. If you delay, any rights you have may be lost.

Book 11504 Page 862

RETURN TO:
B-D-R TITLE CORP.
10475 FORTUNE PARKWAY, SUITE 205
JACKSONVILLE, FL 32256

Return To:
WELLS FARGO HOME MORTGAGE, INC.
FINAL DOCUMENTS X4701-022
3601 MINNESOTA DRIVE
BLOOMINGTON, MN 55435-5284

Doc# 2003391062
Book: 11504
Pages: 862 - 884
Filed & Recorded
12/03/2003 12:51:24 PM
JIM FULLER
CLERK CIRCUIT COURT
DUVAL COUNTY
RECORDING $ 93.00
TRUST FUND $ 12.00
MORTGAGE DOC ST $ 748.30
INTANGIBLE TAX $ 427.58

This document was prepared by:
KEVIN A. HAUS
WELLS FARGO HOME MORTGAGE, INC.
2051 KILLEBREW DRIVE #300
BLOOMINGTON, MN 55425-

[Space Above This Line For Recording Data]

MORTGAGE

0133563346

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated **OCTOBER 31, 2003** , together with all Riders to this document.
(B) "Borrower" is
JACQUELINE P. YULEE, AN UNMARRIED PERSON

.

Borrower is the mortgagor under this Security Instrument.
(C) "Lender" is **WELLS FARGO HOME MORTGAGE, INC.**

Lender is a **Corporation** .
organized and existing under the laws of **THE STATE OF CALIFORNIA** .

23

Lender's address is
P. O. BOX 5137, DES MOINES, IA 50306-5137
Lender is the mortgagee under this Security Instrument.
(D) **"Note "** means the promissory note signed by Borrower and dated **OCTOBER 31, 2003** .
The Note states that Borrower owes Lender **TWO HUNDRED THIRTEEN THOUSAND SEVEN HUNDRED FIFTY AND NO/100** Dollars
(U.S. $ .....**213,750.00**..........) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than **NOVEMBER 1, 2033** .
(E) **"Property"** means the property that is described below under the heading "Transfer of Rights in the Property."
(F) **"Loan"** means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(G) **"Riders"** means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

[ ] Adjustable Rate Rider	[ ] Condominium Rider	[ ] Second Home Rider
[ ] Balloon Rider	[X] Planned Unit Development Rider	[ ] 1-4 Family Rider
[ ] VA Rider	[ ] Biweekly Payment Rider	[X] Other(s) [specify]
		Prepayment Rider

(H) **"Applicable Law"** means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
(I) **"Community Association Dues, Fees, and Assessments"** means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
(J) **"Electronic Funds Transfer"** means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(K) **"Escrow Items"** means those items that are described in Section 3.
(L) **"Miscellaneous Proceeds"** means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(M) **"Mortgage Insurance"** means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(N) **"Periodic Payment"** means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.
(P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's convenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender, the following described property located in the **County** [Type of Recording Jurisdiction] of **DUVAL** [Name of Recording Jurisdiction]:

LEGAL DESCRIPTION IS ATTACHED HERETO AS SCHEDULE "A" AND MADE A PART HEREOF.

THIS IS A PURCHASE MONEY MORTGAGE.

Parcel ID Number: which currently has the address of **10909 BRANDON CHASE DRIVE** [Street] **JACKSONVILLE** [City], Florida **32219** [Zip Code] ("Property Address"):

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact the the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designed payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designed payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provision of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. 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. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer or servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environment Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Attorneys' Fees. As used in this Security Instrument and the Note, attorneys' fees shall include those awarded by an appellate court and any attorneys' fees incurred in a bankruptcy proceeding.

25. Jury Trial Waiver. The Borrower hereby waives any right to a trial by jury in any action, proceeding, claim, or counterclaim, whether in contract or tort, at law or in equity, arising out of or in any way related to this Security Instrument or the Note.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:

Jan Hall

JACQUELINE P. YULEE (Seal)
Borrower
10909 BRANDON CHASE DRIVE
JACKSONVILLE, FL 32218

Stephanie L. Richards

STATE OF FLORIDA, County ss:

This foregoing instrument was acknowledged before me this OCT 31, 2003 by JACQUELINE P. YULEE, AN UNMARRIED PERSON

who is personally known to me or who has produced drivers license as identification.

Jan Hall

Notary Public

Jan Hall

JAN HALL
MY COMMISSION # DD 185459
EXPIRES: March 1, 2007
Bonded Thru Notary Public Underwriters

Exhibit "A"

Lot 50, BRANDON CHASE, as per plat thereof, recorded in Plat Book 55, Page 13, 13A-13G, of the Public Records of Duval County, Florida

Book 11504 Page 881

PREPAYMENT RIDER

0133563346

THIS PREPAYMENT RIDER is made this ...31st..... day of ...OCTOBER..... ...2003..... , and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Note to .... WELLS FARGO HOME MORTGAGE, INC. .... of the same date and covering the Property described in the Security Instrument and located at: ..10909 BRANDON CHASE DRIVE, JACKSONVILLE, FL 32219........................
(Property Address)

PREPAYMENT COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

I have the right to make payments of principal at any time before they are due. A prepayment of all of the unpaid principal is known as a "full prepayment." A prepayment of only part of the unpaid principal is known as a "partial prepayment."

Except as provided below, I may make a full prepayment or a partial prepayment at any time without paying any penalty. However, if within the first .two..... (..2..) year(s) after the execution of the Security Instrument I make full prepayment, I will pay a prepayment charge in an amount equal to the payment of six (6) months' advance interest, at the interest rate provided for under the Note, on the amount prepaid which is in excess of twenty percent (20%) of the original principal amount.

0133563346

BY SIGNING BELOW, Borrower accepts and agrees to the terms and provisions contained in this Prepayment Rider.

(Seal)
JACQUELINE P. YOLEE -Borrower

PLANNED UNIT DEVELOPMENT RIDER

THIS PLANNED UNIT DEVELOPMENT RIDER is made this **October 31, 2003**, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date, given by the undersigned (the "Borrower") to secure Borrower's Note to **WELLS FARGO HOME MORTGAGE, INC.** (the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

10909 BRANDON CHASE DR, Jacksonville, Florida 32219
(Property Address)

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and certain common areas and facilities, as described in 55, 13, 13A-13G, Public Records of **Duval County**, (the "Declaration"). The Property is a part of a planned unit development known as

BRANDON CHASE
(Name of Planned Unit Development)

(the "PUD"). The Property also includes Borrower's interest in the homeowners association or equivalent entity owning or managing the common areas and facilities of the PUD (the "Owners Association") and the uses, benefits and proceeds of Borrower's interest.

PUD COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. PUD Obligations. Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

B. Property Insurance. So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the Property which is satisfactory to Lender and which provides insurance coverage in the amounts (including deductible levels), for the periods, and against loss by fire, hazards included within the term "extended coverage," and any other hazards, including, but not limited to, earthquakes and floods, for which Lender requires insurance, then: (i) Lender waives the provision in Section 3 for the Periodic Payment to Lender of the yearly premium installments for property insurance on the Property; and (ii) Borrower's obligation under Section 5 to maintain property insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy.

What Lender requires as a condition of this waiver can change during the term of the loan. Borrower shall give Lender prompt notice of any lapse in required property insurance coverage provided by the master or blanket policy.

In the event of a distribution of property insurance proceeds in lieu of restoration or repair following a loss to the Property, or to common areas and facilities of the PUD, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender. Lender shall apply the proceeds to the sums secured by the Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

C. Public Liability Insurance. Borrower shall take such actions as may be reasonable to insure that the Owners Association maintains a public liability insurance policy acceptable in form, amount, and extent of coverage to Lender.

D. Condemnation. The proceeds of any award or claim for damages, direct or consequential, payable to Borrower in connection with any condemnation or other taking of all or any part of the Property or the common areas and facilities of the PUD, or for any conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender. Such proceeds shall be applied by Lender to the sums secured by the Security Instrument as provided in Section 11.

E. Lender's Prior Consent. Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to: (i) the abandonment or termination of the PUD, except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of a taking by condemnation or eminent domain; (ii) any amendment to any provision of the "Constituent Documents" if the provision is for the express benefit of Lender; (iii) termination of professional management and assumption of self-management of the Owners Association; or (iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Owners Association unacceptable to Lender.

F. Remedies. If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and provisions contained in this PUD Rider.

JACQUELINE P. YULEE - Borrower

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR
DUVAL COUNTY, FLORIDA, CIVIL ACTION

U.S. BANK TRUST NATIONAL ASSOCIATION, AS TRUSTEE OF THE SEQUOIA FUNDING TRUST

Plaintiff

vs.

JACQUELINE YULEE; BRANDON CHASE HOMEOWNERS ASSOCIATION, INC.; HSBC AUTO ACCOUNTS INC., F/K/A OFL-A RECEIVABLES CORP.; UNKNOWN SPOUSE OF JACQUELINE YULEE; UNKNOWN TENANT #1; UNKNOWN TENANT #2; AND OTHER UNKNOWN PARTIES, INCLUDING THE UNKNOWN SPOUSE OF ANY TITLE HOLDER IN POSSESSION OF THE PROPERTY, AND, IF A NAMED DEFENDANT IS DECEASED, THE SURVIVING SPOUSE, HEIRS, DEVISEES, GRANTEES, CREDITORS, AND ALL OTHER PARTIES CLAIMING BY, THROUGH, UNDER OR AGAINST THAT DEFENDANT, AND THE SEVERAL AND RESPECTIVE UNKNOWN ASSIGNS, SUCCESSORS IN INTEREST, TRUSTEES OR OTHER PERSONS CLAIMING BY, THROUGH, UNDER OR AGAINST ANY CORPORATION OR OTHER LEGAL ENTITY NAMED AS A DEFENDANT, AND ALL CLAIMANTS, PERSONS OR PARTIES, NATURAL OR CORPORATE, OR WHOSE EXACT LEGAL STATUS IS UNKNOWN, CLAIMING UNDER ANY OF THE ABOVE NAMED OR DESCRIBED DEFENDANTS

Defendant(s)

CASE NO.:

16-2009 CA 003074XXXX

DIVISION CV-F

725
(41)
(10)

MORTGAGE FORECLOSURE COMPLAINT

Plaintiff, U.S. BANK TRUST NATIONAL ASSOCIATION, AS TRUSTEE OF THE SEQUOIA FUNDING TRUST, sues Defendants: JACQUELINE YULEE; BRANDON CHASE HOMEOWNERS ASSOCIATION, INC.; HSBC AUTO ACCOUNTS INC., F/K/A OFL-A RECEIVABLES CORP.; UNKNOWN SPOUSE OF JACQUELINE YULEE; UNKNOWN TENANT #1; UNKNOWN TENANT #2; AND OTHER UNKNOWN PARTIES, INCLUDING THE UNKNOWN SPOUSE OF ANY TITLE HOLDER IN POSSESSION OF THE PROPERTY, AND, IF A NAMED DEFENDANT IS DECEASED, THE SURVIVING SPOUSE, HEIRS, DEVISEES, GRANTEES, CREDITORS, AND ALL OTHER PARTIES CLAIMING BY, THROUGH, UNDER OR AGAINST THAT DEFENDANT, AND THE SEVERAL AND RESPECTIVE UNKNOWN ASSIGNS, SUCCESSORS IN INTEREST, TRUSTEES OR OTHER PERSONS CLAIMING BY, THROUGH, UNDER OR AGAINST ANY CORPORATION OR OTHER LEGAL ENTITY NAMED AS A DEFENDANT, AND ALL CLAIMANTS, PERSONS OR PARTIES, NATURAL OR CORPORATE, OR WHOSE EXACT LEGAL STATUS IS UNKNOWN, CLAIMING UNDER ANY OF THE ABOVE NAMED OR DESCRIBED DEFENDANTS and alleges:

1. This is an action to foreclose a mortgage on real property located and situated in DUVAL County, Florida. All references to "Official Records Books" are to those filed in the Current Public Records of said County.

2. On October 31, 2003, JACQUELINE P. YULEE as Mortgagor, being then the owner of the subject property executed and delivered a Promissory Note ('Note') and a Mortgage ('Mortgage') securing the payment of the indebtedness to WELLS FARGO HOME MORTGAGE, INC. The Mortgage was recorded on December 3, 2003, in Official Records Book 11504, at Page 862, and mortgaged the real property described therein ("Property"). A copy of the Note and a copy of the Mortgage are attached as Exhibits "A" and "B" respectively, and incorporated herein.

3. The Mortgage is a purchase money mortgage, the proceeds of the loan evidenced by the Note having been used by the Mortgagor to pay all or a portion of the purchase price of the property. The instrument of conveyance to Mortgagor is recorded in Official Records Book 11504, at page 861.

4. Plaintiff owns and holds the Note and Mortgage by reason of Note endorsement.

5. Plaintiff's Mortgage is superior in dignity to any and all other mortgages or liens against the property by any Defendant named herein.

6. The Note and Mortgage are in default by reason of nonpayment of the installment due January 1, 2007, and all payments subsequent thereto.

7. Plaintiff gave notice as required under paragraph 22 of the Mortgage and Defendant failed to cure the defaults within the time specified in the notice.

8. Plaintiff declares the full amount payable under the Note and Mortgage to be now due.

9. Defendan, JACQUELINE P. YULEE, owes Plaintiff $206,811.90 that is due on principal on the Note and Mortgage, together with interest from December 1, 2006, late charges, title search expense for ascertaining necessary parties to this action; and such other expenses as may be incurred by Plaintiff to preserve and protect the property or Plaintiff's rights in the property including, but not limited to, inspections, appraisals, boarding up or securing the property, changing locks, determining the existence and the amount of or paying any code enforcement or other lien, or the expenses incurred in avoiding same; and, all costs of filing, service of process, publication of notice of sale and sale associated with this foreclosure action.

10. The interests of each Defendant are subject, subordinate, and inferior to the right, title, interest, and lien of Plaintiff's Mortgage.

11. The property is owned by Defendant(s), JACQUELINE P. YULEE, and is in the possession of said Defendant(s) or unknown parties.

12. Defendant, BRANDON CHASE HOMEOWNERS ASSOCIATION, INC. may claim some interest in the Property that is the subject of this foreclosure action by virtue of a claim of lien recorded in Official Records Book 14049, Page 1492.

13. Defendant, HSBC AUTO ACCOUNTS INC., F/K/A OFL-A RECEIVABLES CORP. may claim some interest in the Property that is the subject of this foreclosure action by virtue of Final Judgments recorded in Official Records Book 9284, Page 2039, and Official Records Book 9300, Page 173.

14. Defendant, UNKNOWN SPOUSE OF JACQUELINE YULEE, may claim some interest in the Property that is the subject of this foreclosure action by virtue of marital or homestead rights or other interest in the Property subject to the Mortgage.

15. In addition to the specific interest alleged, each defendant named herein is also named for any other interest said defendant may claim or have, recorded or unrecorded except such interests as may by statute be superior to the mortgage being foreclosed or survive foreclosure and sale of the property.

16. In addition to the parties designated by name herein, there may be others who are interested in this action and who may have or claim some right, title, interest, or lien in, to, or upon the real property or some part thereof described in the Mortgage, as the unknown spouse of any title holder in possession of the property, as surviving spouse, heir, devisee, grantee, creditor, and all others claiming by, through, under, or against a deceased person; and the several and respective unknown assigns, successors in interest, trustees or other persons claiming by, through, under, or against, any corporation, or other legal entity named as a Defendant; and all claimants, persons or parties, natural or corporation, or whose exact legal status is unknown, claiming under any of the above named or described Defendants; the names of each of such other parties are unknown to the Plaintiff and after diligent inquiry cannot be ascertained. All such persons are party Defendants to this action by the name and description of UNKNOWN TENANTS AND OTHER UNKNOWN PARTIES.

17. If a natural person who is a defendant is not at this time a resident of this State, or if he or she conceals himself or herself to avoid service of process, or if a Defendant other than a natural person does not maintain an office in this State for the receipt of service of process, then each such Defendant is alleged to be doing or to have done business in this State, or to own or to have owned property in this State, or to otherwise have had sufficient contact within this State to give rise to the interest alleged above and to subject said Defendant to the jurisdiction of this Court.

18. All conditions precedent to the acceleration of the Note and to foreclosure of the Mortgage have been performed, have occurred, or have been waived.

19. Plaintiff has retained the Golson Felberbaum, PLLC in this action and is obligated to pay its attorneys a reasonable fee for services in this action, as well as all costs of collection, all of which Plaintiff is entitled to recover from Defendants under the Note and Mortgage.

WHEREFORE, Plaintiff prays:

That an accounting be had to determine the sums due Plaintiff under the Note and Mortgage, and if the sums are not paid within the time set by this court, that the property be sold to satisfy Plaintiff's claim, and if the proceeds of the sale are insufficient to pay Plaintiff's claim that a Deficiency Judgment be entered for the sum remaining unpaid against the Defendant, JACQUELINE P. YULEE, and that the estate of all Defendants and all persons claiming under and through them since the filing of the Notice of Lis Pendens be foreclosed.

That this Court grant such other and further relief as the Court may deem just.

GOLSON FELBERBAUM, PLLC

William M. Golson, Esquire (SPN 41540, FBN 187881)
Stacy St. Germain, Esquire (FBN 485559)
Roger D. Bear, Esquire (SPN 299511, FBN 304212)
Carlos R. Aguilar, Esquire (FBN 926361)
Jessica E. Conte, Esquire (FBN 68412)
1230 South Myrtle Avenue, Suite 105
Clearwater, FL 33756-3445
Phone: (727) 446-4826
Fax: (727) 446-1723

Our File No.: A905720/AE

Book 11504 Page 862

Return To:
WELLS FARGO HOME MORTGAGE, INC.
FINAL DOCUMENTS X4701-022
3801 MINNESOTA DRIVE
BLOOMINGTON, MN 55435-5284

This document was prepared by:
KEVIN A. HADS
WELLS FARGO HOME MORTGAGE, INC.
2051 KILLEBREW DRIVE #300
BLOOMINGTON, MN 55425-

RETURN TO:
B-D-R TITLE CORP.
10475 FORTUNE PARKWAY, SUITE 205
JACKSONVILLE, FL 32256

Doc# 2003391062
Book: 11504
Pages: 862 - 884
Filed & Recorded
12/03/2003 12:51:24 PM
JIM FULLER
CLERK CIRCUIT COURT
DUVAL COUNTY

RECORDING	$	93.00
TRUST FUND	$	12.00
MORTGAGE DOC ST	$	748.30
INTANGIBLE TAX	$	427.50

[Space Above This Line For Recording Data]

MORTGAGE

0133563346

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated **OCTOBER 31, 2003**, together with all Riders to this document.

(B) "Borrower" is
JACQUELINE P. YULEE, AN UNMARRIED PERSON

Borrower is the mortgagor under this Security Instrument.

(C) "Lender" is **WELLS FARGO HOME MORTGAGE, INC.**

Lender is a **Corporation**
organized and existing under the laws of **THE STATE OF CALIFORNIA**

FLORIDA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT — FORM 3010 1/01

Page 1 of 18 — Initials: — 6R(FL) Rev 11/02/00

23

EXHIBIT "B"

Lender's address is
P. O. BOX 5137, DES MOINES, IA 50306-5137
Lender is the mortgagee under this Security Instrument.

(D) "Note" means the promissory note signed by Borrower and dated **OCTOBER 31, 2003**. The Note states that Borrower owes Lender **TWO HUNDRED THIRTEEN THOUSAND SEVEN HUNDRED FIFTY AND NO/100** Dollars (U.S. $ ....212,750.00..........) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than **NOVEMBER 1, 2033**.

(E) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(F) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(G) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

☐ Adjustable Rate Rider	☐ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☒ Planned Unit Development Rider	☐ 1-4 Family Rider
☐ VA Rider	☐ Biweekly Payment Rider	☒ Other(s) [specify]

Prepayment Rider

(H) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(I) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(J) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(K) "Escrow Items" means those items that are described in Section 3.

(L) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(M) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(N) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's convenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender, the following described property located in the **County** [Type of Recording Jurisdiction] of **DUVAL** [Name of Recording Jurisdiction]:

LEGAL DESCRIPTION IS ATTACHED HERETO AS SCHEDULE "A" AND MADE A PART HEREOF.

THIS IS A PURCHASE MONEY MORTGAGE.

Parcel ID Number: which currently has the address of
10909 BRANDON CHASE DRIVE [Street]
JACKSONVILLE [City], Florida **32219** [Zip Code]
("Property Address"):

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. **Funds for Escrow Items**. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower sholl pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilitiesturned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Londer agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact the the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designed payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designed payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provision of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. 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. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer or servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environment Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Attorneys' Fees. As used in this Security Instrument and the Note, attorneys' fees shall include those awarded by an appellate court and any attorneys' fees incurred in a bankruptcy proceeding.

25. Jury Trial Waiver. The Borrower hereby waives any right to a trial by jury in any action, proceeding, claim, or counterclaim, whether in contract or tort, at law or in equity, arising out of or in any way related to this Security Instrument or the Note.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:

Jan Hall

JACQUELINE P. YULEE (Seal)
Borrower
10809 BRANDON CHASE DRIVE
JACKSONVILLE, FL 32219

Stephanie L. Richards

Book 11504 Page 879

STATE OF FLORIDA, County ss:

This foregoing instrument was acknowledged before me this OCT 31, 2003 by JACQUELINE P. YULEE, AN UNMARRIED PERSON

who is personally known to me or who has produced drivers license as identification.

Notary Public

Jan Hall

JAN HALL
MY COMMISSION # DD 188459
EXPIRES: March 1, 2007
Bonded Thru Notary Public Underwriters

SFL16 Rev 10/18/00 Page 16 of 16 Initials: JY FORM 3010 1/01

Book 11504 Page 880

Exhibit "A"

Lot 50, BRANDON CHASE, as per plat thereof, recorded in Plat Book 55, Page 13, 13A-13G, of the Public Records of Duval County, Florida

Book 11504 Page 881

PREPAYMENT RIDER

0133563346

THIS PREPAYMENT RIDER is made this ...31st...... day of ...OCTOBER...... ....2003...., and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Note to .... WELLS FARGO HOME MORTGAGE, INC. .... of the same date and covering the Property described in the Security Instrument and located at: ..10909 BRANDON CHASE DRIVE, JACKSONVILLE, FL 32219........................

(Property Address)

PREPAYMENT COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

I have the right to make payments of principal at any time before they are due. A prepayment of all of the unpaid principal is known as a "full prepayment." A prepayment of only part of the unpaid principal is known as a "partial prepayment."

Except as provided below, I may make a full prepayment or a partial prepayment at any time without paying any penalty. However, if within the first .two...... (..2..) year(s) after the execution of the Security Instrument I make full prepayment, I will pay a prepayment charge in an amount equal to the payment of six (6) months' advance interest, at the interest rate provided for under the Note, on the amount prepaid which is in excess of twenty percent (20%) of the original principal amount.

0133563346

BY SIGNING BELOW, Borrower accepts and agrees to the terms and provisions contained in this Prepayment Rider.

_____(Seal)
JACQUELINE P. YULEE -Borrower

PLANNED UNIT DEVELOPMENT RIDER

THIS PLANNED UNIT DEVELOPMENT RIDER is made this **October 31, 2003**, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date, given by the undersigned (the "Borrower") to secure Borrower's Note to **WELLS FARGO HOME MORTGAGE, INC.** (the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

10909 BRANDON CHASE DR, Jacksonville, Florida 32219
(Property Address)

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and certain common areas and facilities, as described in 55, 13, 13A-13G, Public Records of **Duval County**, (the "Declaration"). The Property is a part of a planned unit development known as

BRANDON CHASE
(Name of Planned Unit Development)

(the "PUD"). The Property also includes Borrower's interest in the homeowners association or equivalent entity owning or managing the common areas and facilities of the PUD (the "Owners Association") and the uses, benefits and proceeds of Borrower's interest.

PUD COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. PUD Obligations. Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

B. Property Insurance. So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the Property which is satisfactory to Lender and which provides insurance coverage in the amounts (including deductible levels), for the periods, and against loss by fire, hazards included within the term "extended coverage," and any other hazards, including, but not limited to, earthquakes and floods, for which Lender requires insurance, then: (i) Lender waives the provision in Section 3 for the Periodic Payment to Lender of the yearly premium installments for property insurance on the Property; and (ii) Borrower's obligation under Section 5 to maintain property insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy.

What Lender requires as a condition of this waiver can change during the term of the loan. Borrower shall give Lender prompt notice of any lapse in required property insurance coverage provided by the master or blanket policy.

In the event of a distribution of property insurance proceeds in lieu of restoration or repair following a loss to the Property, or to common areas and facilities of the PUD, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender. Lender shall apply the proceeds to the sums secured by the Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

C. Public Liability Insurance. Borrower shall take such actions as may be reasonable to insure that the Owners Association maintains a public liability insurance policy acceptable in form, amount, and extent of coverage to Lender.

D. Condemnation. The proceeds of any award or claim for damages, direct or consequential, payable to Borrower in connection with any condemnation or other taking of all or any part of the Property or the common areas and facilities of the PUD, or for any conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender. Such proceeds shall be applied by Lender to the sums secured by the Security Instrument as provided in Section 11.

E. Lender's Prior Consent. Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to: (i) the abandonment or termination of the PUD, except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of a taking by condemnation or eminent domain; (ii) any amendment to any provision of the "Constituent Documents" if the provision is for the express benefit of Lender; (iii) termination of professional management and assumption of self-management of the Owners Association; or (iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Owners Association unacceptable to Lender.

F. Remedies. If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and provisions contained in this PUD Rider.

Jacqlie P. Yulee

JACQUELINE P. YULEE - Borrower

Duval case # 2004 CA 7204
Atty # F04011709

A 905720 0133563345 228404

FIXED RATE NOTE

OCTOBER 31, 2003 — Date | JACKSONVILLE — City | FLORIDA — State

10908 BRANDON CHASE DRIVE, JACKSONVILLE, FL 32219 — (Property Address)

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $ 213,750.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is WELLS FARGO HOME MORTGAGE, INC.

I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 7.375 %.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the first day of each month beginning on DECEMBER 1, 2003. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal.

If, on NOVEMBER 1, 2033 , I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at WELLS FARGO HOME MORTGAGE, INC. P.O. BOX 10304, DES MOINES, IA 50306-0304 or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. $ 1,476.32 .

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use all of my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

EXHIBIT "A" JG

0133563346

5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorney's fees.

7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

9. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

JS

10. UNIFORM SECURED NOTE D133583348

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts that I owe under this Note. Some of those conditions are described as follows:

> If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.
>
> If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

11. DOCUMENTARY TAX

The state documentary tax due on this Note has been paid on the mortgage securing this indebtedness.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

JACQUELINE FUYULEE -Borrower (Seal)

(Sign Original Only)

WITHOUT RECOURSE
PAY TO THE ORDER OF

WELLS FARGO HOME MORTGAGE, INC.
By
Joan M. Mills,
Vice President

ADDENDUM TO FIXED RATE NOTE
(Prepayment)

0133563346

THIS ADDENDUM is made this ..31st..... day of ..OCTOBER.... ..2003.. , and is incorporated into and intended to form a part of the Note dated the same date as this Addendum.

1. **Section 4 of the Note is modified to provide that I have the right to make payments of principal at any time before they are due. A prepayment of all of the unpaid principal is known as a "full prepayment." A prepayment of only part of the unpaid principal is known as a "partial prepayment."**

Except as provided below, I may make a full prepayment or a partial prepayment at any time without paying any penalty. However, if within the first ..two... (..2..) year(s) after the execution of the Security Instrument I make full prepayment, I will pay a prepayment charge in an amount equal to the payment of six (6) months' advance interest, at the interest rate provided for under the Note, on the amount prepaid which is in excess of twenty percent (20%) of the original principal amount.

2. All other provisions of the Note are unchanged by this Addendum and remain in full force and effect.

Dated: 10/31/03 Jacqueline P. Yulee (Seal)

JACQUELINE P. YULEE -Borrower

Prepayment Addendum
(AL, AZ, CA, CO, CT, DE, FL, GA, HI, ID, IN, KY, MA, ME, MT, ND, NE, NH, NV, NY, OK, PA, SC, SD, TN, TX, UT, WA, WY)

EC151L Rev. 08/28/03

EXHIBIT 2

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: **16-2002-CA-4452**
DIVISION: **CV-E**

THE CHASE MANHATTAN BANK, AS TRUSTEE OF IMC HOME EQUITY LOAN TRUST 1998-1 UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF MARCH 1, 1998,
Plaintiff/Counter Defendant,

vs.

LILLIE BELL BARNUM, aka LILLIE B. BARNUM, *et al.*,
Defendants/Counter Plaintiffs,

vs.

FAIRBANKS CAPITAL CORPORATION,
Third Party Defendant.
_______________________________________/

ORDER GRANTING DEFENDANTS/COUNTER PLAINTIFFS' MOTION TO AMEND COUNTERCLAIM TO PLEAD PUNITIVE DAMAGES

This matter is before the Court on the Barnums' Motion to Amend Counterclaim to Assert a Claim for Punitive Damages and Proffer in Support Thereof against Counter Defendant Chase Manhattan Bank (Chase) and Third Party Defendant Fairbanks Capital Corp. (Fairbanks). On July 14, 2004, and again on November 2, 2004, this Court held hearings at which the parties presented their arguments to the Court. Upon consideration of the motion, and the information and arguments submitted by the parties, the Court finds the motion should be granted.

I. INTRODUCTION

Defendants/Counter Plaintiffs Lillie Bell Barnum and Eunice Barnum (the "Barnums") seek leave to amend their counterclaim against Chase and Fairbanks to add a claim for punitive damages pursuant to section 768.72, Florida Statutes. The statute states in pertinent part:

> (1) In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure.
>
> (2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:
>
> * * *
>
> (b) "Gross negligence" means that the defendant's conduct was so . . . wanting in care that it constituted a *conscious disregard or indifference to the . . . rights of persons exposed to such conduct.*[1]
>
> (Emphasis supplied.)

The standard for pleading punitive damages under section 768.72 was described in *State of Wisconsin Investment Board v. Plantation Square Assoc.*, 761 F. Supp. 1569, 1580 (S.D. Fla. 1991) (*citing Will v. Systems Eng'g Consultants*, 554 So. 2d 591, 592 (Fla. 3d DCA 1989)) as follows:

> [A] § 768.72 challenge more closely resembles a motion to dismiss that additionally requires an evidentiary proffer and places the burden of persuasion on the plaintiff. In considering a motion to dismiss, factual adjudication is inappropriate as all facts asserted — or here, reasonably established — by the plaintiff are to be taken as true.
>
> ***
>
> As such, the court has given recognition only to those assertions of the defendants which would show Plaintiff's factual bases to be patently false or irrelevant, and has paid no heed whatsoever to the defendants' alternative evidentiary proffers.

[1] The statute also defines "intentional conduct" as a basis for an award of punitive damages; however, at the November 2, 2004 hearing, the parties agreed that only "gross negligence" as defined in § 768.72(2) is at issue here.

761 F. Supp. at 1580-81 (citations omitted).[2]

Thus, the Barnums' proffer of evidence in support of their motion to amend must be taken as true, in the same manner in which allegations of a complaint are taken as true in considering a motion to dismiss, except where the Barnums' proffer may be shown to be patently false or irrelevant. The Court's task then is to determine if the facts shown by the proffer meet the statutory requirements for liability for punitive damages.

II. THE PROFFER

In support of their motion, the Barnums' proffer the following facts:

a. On or about June 20, 2003, Chase, through its loan servicing agent, Fairbanks, filed a Mortgage Foreclosure Complaint naming the Barnums, among others, as party defendants. In its Complaint, Chase alleged it was the owner and holder of the Note and Mortgage and it was entitled to foreclosure because of non-payments beginning April 1, 2002.

b. Prior to the filing of the Complaint, the Barnums had corresponded with Fairbanks and its predecessor, Citifinancial Mortgage Company (Citifinancial), concerning an alleged lapse in the homeowner's insurance required by the mortgage, the placement by the lenders of forced insurance, and their claim for reimbursement for the premium on the forced insurance. Barnums asserted that an escrow account had been set up for their particular mortgage

---

[2] In *Holmes v. Bridgestone/Firestone, Inc.*, 2004 WL 2726131 (Fla. 4th DCA November 24, 2004) the court reiterated the analogy of §768.72 challenge and a motion to dismiss, stating, "...where the only issue is whether the proferred facts would support punitive damages, the analysis...is similar to determining if a complaint states a cause of action, which is a question of law." The Fourth District went on to hold that in that case, the proffer reflected facts which, if true, would support punitive damages; therefore, it reversed the trial court's denial of plaintiff's motion to amend to seek punitive damages.

and that the escrow account should be responsible for payment of the homeowner's insurance coverage required by the mortgage. (Chase Manhattan/Fairbanks dispute whether an escrow account should have been created; but since the Court cannot find that Barnums' contention is patently false, it is accepted as true for the purpose of their motion to amend.) Throughout this dispute, the Barnums continued to pay the same monthly amount, $369.20, which was routinely accepted by Chase through its servicing agents, including Fairbanks.

c. In August 2001 Barnums wrote to Anne Clemens, Supervisor of Services for Fairbanks and to Danielle Lowery, Supervisor of Consumer Services for Fairbanks registering their frustration that the charge for forced place insurance was still being assessed against them, notwithstanding their sending evidence of the coverage claimed to have been lapsed, and demanding that their account be rectified. In turn, Fairbanks, through Mary Halpin, Research Specialist, wrote to Lillie Barnum on September 4, 2001, stating, in part:

> "Thank you for the recent correspondence regarding your mortgage loan. We are researching this matter and will contact you via mail with a resolution as soon as possible. We appreciate you bringing this matter to our attention."

On October 24, 2001, Eunice Barnum wrote to Ms. Halpin again summarizing the Barnums' position and documenting the near-constant collections telephone calls from Fairbanks, the efforts to straighten out the problems, and the continuing difficulty in having Fairbanks respond to contact by the Barnums.

d. Fairbanks then followed its September 4, 2001, letter with correspondence of December 10, 2001, stating, in part:

> "This letter is to notify you an adjustment was made to your monthly payment. The new amount of your payment is $269.20 and will be effective as of 09-01-01. This adjustment was made

due to removing the collection for insurance."

e. The very next day, Fairbanks issued correspondence of December 11, 2001,captioned "DEMAND LETTER - YOU COULD LOSE YOUR HOME" and demanding, of an amount due and owing of $1,205.59. As noted above, the Barnums were then sued in June, 2002.

f. On July 11, 2002, an employee of Fairbanks, Andrea Rempfer, executed an Affidavit as to Amounts Due and Owing,, in which Ms. Rempfer testified she was "...familiar with the books of account and have examined all books, records, and documents kept by Fairbanks Capital Corp. concerning the transactions alleged in the Complaint", and further, that "The books, records, and documents which Affiant has examined are in the custody, supervision and control of Affiant, and are complete, accurate and correct." The affidavit was filed with this Court in support of Chase's motion for summary judgment of foreclosure.

g. Ms. Rempfer was deposed on August 29, 2003, and confirmed, in sum:

1. she did not personally review any of the original books, records, and documents maintained by Fairbanks as these items were, in fact, kept in a different department in a different state and not forwarded to her, and only reviewed a computer screen which documented the loan history;
2. she was not provided the complete loan history, even via computer screen, as her instructions were to review only the three months preceding the affidavit;
3. the loan history, in total, did not reflect <u>any effort</u> by Fairbanks to correct the loan amount in accord with the Fairbanks letter of December 10, 2001, which purported to adjust the payment amount to $269.20;

4. if she had been given the opportunity or instruction to review the complete loan history, including the adjustment letter of December 10, 2001, she would not have completed her Affidavit.

h. With regard to whether the Barnums were actually behind in their monthly payments of $369.20 as of the date of Ms. Rempfer's Affidavit, the Court is aware of an additional factual dispute, namely, that the Barnums take the position they were instructed by a Fairbanks' representative not to make a payment during the spring of 2002. Again, the Court is bound to accept Barnum's proffer as to this to be true for the purposes of this motion, and notes that, while no written documentation exists in the record confirming this instruction, the Fairbanks documentation of correspondence and contact is woefully inadequate, missing, for example, any documentation of their own letter of December 10, 2001, referenced above. The Barnums have, in their proffer, also provided numerous references to Fairbanks' violations of its own manuals and procedures with respect to actions which should have been taken in response to contacts by the Barnums.

i. On February 11, 2003, fourteen months after Fairbanks confirmed, in writing, that forced placed coverage would be removed and the Barnums were due a refund, Chase Manhattan filed its Notice of Voluntary Case Dismissal.

III. Discussion

As previously noted, it is now the task of the Court to determine if the facts shown by the proffer meet the statutory requirements for liability for punitive damages, a task which would have been much simpler were there Florida cases cited to the Court allowing or disallowing such damages in similar situations. In almost all of the punitive damages cases cited by both parties, the malicious prosecution claims involved arrest and criminal prosecution. None dealt with wrongful mortgage foreclosures, which is the subject of the Barnum's counterclaim. Nevertheless the Court was able to locate a number of cases from other jurisdictions which allowed recovery of punitive damages in actions for wrongful foreclosure. *See, e.g. National Mtg. Co. v. Williams,* 357 So.2d 934 (Miss. 1978); *Cooper v. Cooper,* 783 A.2d 430 (Vt. 2001); *Curl v. First Federal Savings & Loan Assn.,* 243 Ga. 842, 843-844(2), *Decatur Investments Co. v. McWilliams,*, 290 S.E.2d 526 (Ga. App. 1982); *Tower Financial Services, Inc. v. Smith,* 423 S.E.2d 257, (Ga. App. 1992). Thus, the nature of Barnum's counterlcaim does not preclude a claim for punitive damages.

The Court concludes that there is a reasonable showing by evidence proffered which would provide a reasonable basis for recovery of punitive damages, and that a jury could reasonably find that Counter Defendants' conduct was so wanting in care that it constituted a conscious disregard or indifference to the rights of the Barnums. Thus the requirements of Sections 768.72(1) as to amendments and 768.72(2)(b) as to gross negligence have been satisfied.

The facts from the proffer, if true, indicate an ongoing battle between the Barnums and Counter Defendants over the issue of forced placed insurance covering several years, a history of telephone calls frequently unanswered, correspondence not acknowledged, and of Counter Defendant's left hand in Pennsylvania not knowing what their right hand in Utah was doing. The latter point is illustrated by their letter of December 10, 2001, acknowledging the removal of the charge for forced placed insurance and reduction of Barnum's payment, followed by a default notice the very next day. In their brief in support of their proposed order denying the motion to amend, Counter Defendants acknowledged that the December 10, 2001, letter originated from their Utah office, while the December 11, 2001, letter originated from their foreclosure department in Pennsylvania. Similarly, Fairbanks' employee, Andrea Rempfer, in Pennsylvania, executed an affidavit, - filed with the Court, no less - in which she attested that she was "...familiar with the books of account and have examined all books, records, and documents kept by Fairbanks Capital Corp. concerning the transactions alleged in the Complaint", and further, that "The books, records, and documents which Affiant has examined are in the custody, supervision and control of Affiant, and are complete, accurate and correct." Her deposition, however, established that her affidavit was not based on all the books, records and documents, all of which were in Utah, but on a computer screen showing the Barnum's record for the three months preceding the execution of the affidavit. In fact, she then had no knowledge of all the records pertaining to the Barnums. All these instances, in the context of the totality of the evidence proffered, can reasonable be viewed as indicating a pattern of such a want of care and indifference to the rights of the Barnums as to constitute "gross negligence" under Section 768.72(2)(b).

Of course, these conclusions are premised on the acceptance of the proffer as true, which is required of the Court, although the Court is aware that much of the evidence is disputed. What a jury may find after hearing all of the evidence is another matter.

An issue was raised as to which of the five counts of the Counterclaim the claim for damages would apply. [3] The Court concludes that while it is unclear whether the Fair Debt

[3] The Counts of the Counterclaim are:

Count I: Abuse of process, as to both Chase Manhattan and Fairbanks;
Count II: Fair Debt Collection Practices Act, as to Fairbanks;
Count III: Consumer Collection Practices Act, as to both Chase Manhattan and Fairbanks;
Count IV: Breach of Contract, as to Chase Manhattan; and
Count V: Malicious Prosecution, as to both Chase Manhattan and Fairbanks.

Collection Practices Act will support a claim for punitive damages. *See, Thomas v. Pierce, Hamilton and Stern, Inc.*, 967 F.Supp. 507 (N.D. Ga. 1997), and punitive damages are generally not recoverable for a breach of contract action, *See Ghodrati v. Miami Paneling Corp.*, 770 So.2d 181 (Fla. 3rd DCA 2000), punitive damages are recoverable under the malicious litigation and abuse of process counts, *see, e.g., Alamo Rent-A-Car v. Mancusi*, 632 So.2d 1352 (Fla. 1994)and under the count for violation of the Florida Consumer Collection Practices Act, ("The court may, in its discretion, award punitive damages * * *." Section 559.77(1), Florida Statutes.

It is, therefore, **ORDERED AND ADJUDGED:**

1. Defendants/Counter Plaintiffs EUNICE and LILLIE BELL BARNUM'S Motion to Amend their Complaint to Assert a Claim for Punitive Damages is **GRANTED.** Defendants/ Counter Plaintiffs are granted leave to amend their Counterclaim accordingly within twenty (20) days of the date of this Order. Defendants/Counter Plaintiffs are granted leave of Court to propound punitive damages discovery to Chase Manhattan and Fairbanks forthwith.

2. Chase Manhattan and Fairbanks shall have twenty (20) days from receipt of the amended Counterclaim within which to file responsive pleadings.

DONE AND ORDERED, in Chambers, at Jacksonville, Duval County, Florida, on December 28, 2004,

BERNARD NACHMAN, ***Circuit Judge***

Copies to: James A. Kowalski, Jr., Esq.
Michael Duncan, Esq.
William J. Scott, Esq.

ORDER ENTERED
DEC 28 2004
BERNARD NACHMAN

EXHIBIT 3

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2004-CA-5879

DIVISION: CV-F

AMERICAN RESIDENTIAL EQUITIES,
XXXI, LLC,

Plaintiff,

vs.

JOHN C. KOHN, JR.; DEMETRIA L.
KOHN, et al.,

Defendants.
_______________________________/

ORDER GRANTING DEFENDANTS' AMENDED MOTION FOR SUMMARY JUDGMENT, MOTION TO STRIKE AFFIDAVIT OF STEVEN BRAND AND MOTION TO STRIKE NOTICE OF HEARING AND DENYING PLAINTIFF'S MOTION TO CONTINUE HEARING

THIS CAUSE came on to be heard before the Court on August 14, 2007 on the following Motions: (1) Defendants' Amended Motion for Summary Judgment; (2) Defendant's Motion to Strike Affidavit of Steve Brand; (3) Plaintiff's Motion to Continue Hearing and Notice of Same; and (4) Defendants' Motion to Strike Notice of Hearing and Objection to Motion to Continue Hearing on Defendants' Motion for Summary Judgment. The Court has considered the pleadings, heard arguments of counsel, and is otherwise fully advised in the premises. The Court finds as follows:

1. This mortgage foreclosure action was commenced in September, 2004 with the filing of a mortgage foreclosure complaint and Notice of *Lis Pendens* by MTGLQ INVESTORS, LLP, the predecessor in interest to current Plaintiff AMERICAN

RESIDENTIAL EQUITIES, XXXXI, LLC (ARE). The Defendants, JOHN and DEMETRIA KOHN, moved for summary judgment arguing neither MTGLQ nor ARE owned the Note and Mortgage when the action was commenced. In response thereto, ARE filed the Affidavit of Steven Brand, an employee of the originating lender, First NLC Services, LLC, (First NLC) in which Mr. Brand maintained that while no legal assignment was made by First NLC to MTGLQ, an equitable assignment occurred prior to the foreclosure being filed and that this equitable assignment was supported by consideration.

2. At deposition, Mr. Brand admitted, in contrast to the statements made in his Affidavit, that he had no personal knowledge as to whether the Note and Mortgage were sold to MTGLQ or whether any consideration was paid by MTGLQ to First NLC, and also admitted he had no knowledge as to whether the loan documents were physically transferred to MTGLQ. Rather, Mr. Brand testified First NLC sold the Note and Mortgage to Goldman Sachs, an entity not before the Court. Mr. Brand's deposition testimony confirmed his Affidavit was not based upon personal knowledge and confirmed he was not competent to testify to the matters stated therein, as required by Rule 1.510 (e), Florida Rules of Civil Procedure. Accordingly, Mr. Brand's Affidavit as offered by Plaintiff is properly stricken by the Court.

3. Since no evidence was offered confirming an equitable assignment occurred, the only legal assignment giving standing to either MTGLQ or ARE is the assignment from First NLC to ARE dated December 14, 2004, and recorded at Book 12248, Page 1243 of the Official Records of Duval County, a date after the commencement of this action.

4. Based upon the record evidence before the Court, neither ARE nor MTGLQ had standing when the action was commenced and there are no genuine issues of material fact. The KOHNS are therefore entitled to Summary Final Judgment as a matter of law. Jeff-Ray v. Jacobson, 566 So.2d 885 (Fla. 4th DCA 1990); W.M. Specialty Mortgage, LLC v. Salomon, 874 So.2d 680 (Fla. 4th DCA 2004).

5. The Court has considered Plaintiff's Motion to Continue and Defendants' Objection to Motion to Continue, and finds this action has been pending, at the time of hearing, for almost three years. While Plaintiff asks for more time, arguing it has issued subpoenas attempting to locate more information demonstrating it had standing to sue Defendants, the Court notes almost two months have passed at the time of hearing since Plaintiff was aware its own Affiant, Mr. Brand, confirmed the originating lender did not sell the subject Note and Mortgage to MTGLQ, as alleged in the affidavit, but to a non-party, Goldman Sachs. Nothing was submitted by Plaintiff indicating what evidence it hoped to find in discovery that would otherwise contradict testimony offered by its Affiant, or that this evidence would be material on the issue of standing. Defendants' Amended Motion for Summary Judgment was therefore properly considered by the Court. See, Colby v. Ellis, 562 So.2d 356 (Fla. 2d DCA 1990).

It is, therefore, ORDERED AND ADJUDGED:

1. Defendants' Amended Motion for Summary Judgment is GRANTED and Summary Final Judgment is hereby entered in favor of Defendants. Plaintiff ARE shall take nothing by this action, and the Defendants shall go hence without day.

2. Defendants' Motion to Strike Affidavit of Steven BRAND is GRANTED.

3. Plaintiff's Motion to Continue Hearing on Defendants' Motion for Summary Judgment is DENIED. Defendants' Motion to Strike Notice of Hearing and Objection to Motion to Continue Hearing on Defendants' Motion for Summary Judgment is GRANTED.

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, this ____ day of October, 2007.

ORDER ENTERED

OCT 16 2007

Circuit Court Judge

/s/ CHARLES O. MITCHELL, JR.

Copies to:

James A. Kowalski, Jr., Esq.
12627 San Jose Blvd., Suite 203
Jacksonville, FL 32223

Laura J. Boeckman, Esq.
8787 Baypine Road, Suite 255
Jacksonville, FL 32256

Clay Holtsinger, Esq.
1505 North Florida Ave.
P.O. Box 800
Tampa, FL 33601-0800

Lashunda Larniece Alexander
382 S.W. Lightwood Place
Fort White, FL 32038

Edward Alexander
382 S.W. Lightwood Place
Fort White, FL 32038

Joseph F. Duszlak, Esq.
Attorney Ad Litem for Essie J. Hill, Jr.
348 E. Adams St.
Jacksonville, FL 32202

Fred Franklin, Esq.
1301 Riverplace Blvd., Suite 1500
Jacksonville, FL 32207

Elizabeth Wellborne, Esq.
1701 Hillsboro Blvd., Suite 307
Deerfield Beach, FL 33442

IN THE CIRCUIT COURT OF THE
4TH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA
CASE NO. 16-2004-CA-5879
DIV: CV-F

AMERICAN RESIDENTIAL EQUITIES,
XXXI, LLC,
Plaintiff,

COPY

v.

JOHN C. KOHN, JR.; DEMETRIA L.
KOHN, et al.,
Defendants.
______________________________/

AMERICAN RESIDENTIAL EQUITIES,
XXXI, LLC,
Plaintiff,
v.

TICOR TITLE INSURANCE COMPANY OF
FLORIDA f/k/a AMERICAN PIONEER TITLE
INSURANCE COMPANY, MTGLQ INVESTORS,
LLC, and OCWEN FEDERAL BANK, FSB,
Defendants.
______________________________/

888 S.E. 3rd Avenue
Suite 201
Fort Lauderdale, Florida
June 19, 2007
1:04 p.m.

DEPOSITION OF STEVEN R. BRAND

Taken before Lynda Royer, R.P.R. and Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed in the above cause.

Can you trace the connection between Goldman Sachs Mortgage and MTGLQ?

A Okay. No, other than it must be an affiliated company of Goldman Sachs. We deal only with the main investor, but each sale may go to different affiliated companies, servicing companies. I mean, I'm not aware about how that works on an individual sales basis.

Q Well, then why on paragraph three of your affidavit would you have written MTGLQ Investors, as opposed to Goldman Sachs Mortgage which the document indicates?

A I did not research that part. That was added into the document. I presume again that must be the name of the affiliated company to which this loan, pool of loans were sold to.

Q Well, did you participate in the research that linked MTGLQ to GSM?

A No. My research was on the dates only.

Q Then why would you swear to the truth of paragraph three?

A Again, I'm not familiar with all the different affiliated companies with which -- servicing companies to which each sales transaction goes to. That is executed by our legal department, and again that could have been the one related to that sale.

Q You relied on somebody else with regard to paragraph three; is that true?

A Correct.

Q Was the affidavit produced or drafted by your legal department?

A Yes.

Q Did you review each paragraph before you signed it?

A I reviewed the dates that I had submitted as information that I had provided to this affidavit, yes.

Q So you reviewed the spreadsheet, for example, Exhibit 3, you provided some date material to the legal department, and then the legal department drafted an affidavit that they then sent back to you for signature?

A That's correct.

Q Do you know who in the legal department drafted Exhibit 2?

A Yes. I believe it was Susan Fishman.

Q Do you have Ms. Fishman's last name spelling?

A F-I-S-H-M-A-N.

EXHIBIT 4

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL COURT IN AND
FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA09-0418

DIVISION: 55

M & T BANK,
Plaintiff,

vs.

LISA D. SMITH a/k/a LISA DAVIS
SMITH, et. al.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT WITH PREJUDICE

THIS CAUSE came before the Court on Defendants' Motion to Dismiss Second Amended Complaint with Prejudice. Defendants argue Plaintiff's Complaint and exhibits demonstrate a lack of standing and a fraud upon the Court, because Plaintiff has abandoned its prior claims that (1) Plaintiff is the owner of the Promissory Note and entitled to enforce the Note, but has lost the Note, and (2) Plaintiff now has possession of the Note and is currently the owner of the Promissory Note by virtue of an Assignment from an entity that had already transferred the Note. By contrast, Plaintiff now claims that it is the servicer of the loan, and that Wells Fargo owns the Note pursuant to the Allonge to the Promissory Note. The Court has reviewed the pleadings, considered arguments of counsel, and being otherwise fully advised in the premises finds as follows:

The instant action was filed by the Law Offices of Marshall C. Watson, on behalf of the Plaintiff, M & T Bank, on February 10, 2009. On April 23, 2009, the Defendants, Lisa Davis Smith and Larry Smith, moved to dismiss the Complaint, because the Plaintiff's allegation that it owned the Note as bearer paper based on an Allonge attached to the Note conveying possession of the Note in blank, was inconsistent with the Plaintiff's allegation the Note was lost. On September 22, 2009, an Order Granting Defendants' Motion to Dismiss was entered. Plaintiff then filed an Amended Complaint on September 22, 2009, alleging that it owned the Note by virtue of an Assignment. On October 6, 2009, the Defendants again moved to dismiss the Amended Complaint, because a foreclosure action cannot be based on an Assignment of a mortgage which did not exist at the time the foreclosure was filed. On February 19, 2010, an Order Granting Defendant's Motion to Dismiss Amended Complaint was entered. On March 3, 2010, Plaintiff filed a Second Amended Complaint, alleging that it is now the servicer of the loan, and that Wells Fargo owns the Note pursuant to the Allonge to the Promissory Note. The Defendants then moved to dismiss the Second Amended Complaint on March 9, 2010, for fraud upon the Court because: (1) the previously blank Allonge to the Note now contains a stamp indicating Wells Fargo, National Association as Trustee, to be the payee of the Note, (2) First National Bank of Nevada could not have added the stamp, since the FDIC closed the First National Bank of Nevada in 2008, and (3) Plaintiff is now alleging that Wells Fargo owns the Note, contradicting all of its previous claims. Defendants' Motion to Dismiss Second Amended Complaint with Prejudice is currently before the Court.

Upon review of Defendants' motion, the Court finds the Plaintiff lacks standing and is not a proper party to the suit. The Court has been misled by the Plaintiff from the beginning. In the initial Complaint, the Plaintiff alleged it owned the Note that was lost. Then Plaintiff alleged that not only was the lost Note found, but that Plaintiff actually owned the Note by Assignment. After both of these Complaints were dismissed, Plaintiff then alleged that Wells Fargo owned the Note, while the Plaintiff was merely a servicer of the loan. Moreover, the

Assignment on which Plaintiff relied in its First Amended Complaint postdates the filing of this foreclosure action and is inconsistent with the Mortgage, Note, stamps allegedly affixed to the Note, and the Allonge. The blank stamp affixed to the Note and the Allonge indicate a transfer from First Bank Mortgage, a division of First Bank of Georgia, to First National Bank of Nevada, and then to an unidentified bearer. In contrast, the Assignment indicates a transfer from First Bank Mortgage, by and through Mortgage Electronic Recording Systems, directly to the Plaintiff. However, First Bank Mortgage had transferred possession of the Note to First National Bank of Nevada prior to the date of Assignment from First Bank Mortgage to Plaintiff, and the Assignment postdates the filing of the foreclosure action. Accordingly, this action will be dismissed with prejudice as to M & T Bank, since M & T Bank has been unable to clarify how it owns the Note, but Wells Fargo may commence a new action, on its own, if it is in fact the owner of the Note.

Additionally, the Court is concerned with the authenticity of the documents filed. Plaintiff is asking the Court to ignore the documents filed in the first two Complaints, and to rule solely on the most recent Complaint. However, all three of these documents appear to be inconsistent with one another and have changed as needed to benefit the Plaintiff. For instance, the blank Allonge as filed on both February 10, 2009, and September 22, 2009, remarkably turned into a stamped Allonge on March 3, 2010, with Wells Fargo's information in the previously blank area. This transformation is most interesting, given that it was argued that the Office of the Comptroller of the Currency closed the First National Bank of Nevada on July 25, 2008, and the stamp did not appear in either of the February or September 2009 filings. Similarly, Assignments appeared and vanished as needed, and the Allonge changed to fit the Plaintiff's particular purpose at that moment. Accordingly, an evidentiary hearing will be held to determine the authenticity of the Allonge and the appearance of the Assignment.

Rule 4-3.3(a)(1) of the Rules Regulating the Florida Bar provides that "[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." As officers of the Court, attorneys should ensure the facts they represent and contained in their motions filed before the Court are correct and accurate. The Court has not yet had an evidentiary hearing to determine whether the various actions in this case were intentional efforts to misdirect the Court, or simply the result of inartful legal work, and therefore, the Court cannot yet determine whether sanctions should be imposed. However, this issue will be clarified at the evidentiary hearing. Accordingly, it is:

ORDERED AND ADJUDGED that:

1. The instant cause of action, *M & T Bank v. Lisa D. Smith, et al.*, St. Johns County case number CA09-0418, is and the same is hereby DISMISSED WITH PREJUDICE. (However, this order shall not prevent a proper plaintiff, possibly Wells Fargo, from bringing a new action on the Mortgage and Note.)

2. The Court reserves jurisdiction to determine the amount of fees and costs, if any, to which Defendants are entitled upon the filing of a motion and a hearing on the matter.

3. An evidentiary hearing is hereby scheduled for Thursday, August 19, 2010, at 1:45 p.m. in Room 305 of the Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, Florida 32084, to determine why the Allonge has changed from blank to specific, why the Assignment appeared and then disappeared, and whether sanctions should be imposed against the Plaintiff and/or Plaintiff's counsel in this action, and the Court specifically reserves jurisdiction to consider this matter.

DONE AND ORDERED in Chambers, in St. Johns County, St. Augustine, Florida, this ____day of June, 2010.

Conformed Copy

J. MICHAEL TRAYNOR
Circuit Court Judge

J. Michael Traynor
Circuit Court Judge

Copies to:
Shari N. Hines, Esquire
1800 N.W. 49th Street, Suite 120
Fort Lauderdale, FL 33309

James A. Kowalski, Jr., Esquire
12627 San Jose Boulevard, Suite 203
Jacksonville, FL 32223

ATTENTION: PERSONS WITH DISABILITIES:
In accordance with the Americans With Disabilities Act, if you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the Office of the Deputy Court Administrator, 904-827-5617 not later than two (2) days prior to the proceeding. If you are hearing or voice impaired, call 1-800-955-8771.

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: 55-2009-CA-000418

M&T BANK,

Plaintiff,

vs.

LISA D. SMITH a/k/a LISA DAVIS SMITH; JANICE BROWN; JOHN VONASEK; UNKNOWN SPOUSE OF LISA D. SMITH a/k/a LISA DAVIS SMITH; UNKNOWN TENANT(S); UNKNOWNS TENANT(S) IN POSSESSION OF THE SUBJECT PROPERTY,

Defendants.

______________________________/

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: June 2, 2010

TIME: 9:15 a.m.

PLACE: Richard O. Watson Judicial Center
4010 Lewis Speedway
St. Augustine, Florida 32084

BEFORE: HONORABLE J. MICHAEL TRAYNOR
Circuit Judge

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were **stenographically reported** by:

Carman L. Gaetanos
Florida Professional Reporter
Coastal Court Reporters, LLC
3940 Lewis Speedway, Suite 2102
St. Augustine, FL
(904) 824-3525

CERTIFIED COPY

APPEARANCES

SHARI N. HINES, Esquire
Law Offices of Marshall C. Watson, P.A.
1800 NW 49th Street, Suite 120
Fort Lauderdale, FL 33309
Appearing telephonically for the Plaintiff.

JAMES A. KOWALSKI, JR., Esquire
Law Office of James A. Kowalski, Jr., PL
12627 San Jose Boulevard, Suite 203
Jacksonville, Florida 32223
Appearing for the Defendants - Lisa and Larry Smith.

ANDREA N. WRIGHT, Esquire
The Wright Firm
1260 North Ponce de Leon Boulevard
St. Augustine, Florida 32084
Appearing for the Defendants - John Vonasek and Janice Brown.

P R O C E E D I N G S

THE COURT: This is Judge Traynor.

MS. HINES: Good morning. Attorney Shari Hines calling in for a hearing on M&T Bank versus Lisa Smith.

THE COURT: Ms. Hines, good morning. I have Mr. Kowalski here and I have Ms. Wright here. They are just getting set up, so just one second while they get up and we will go ahead with -- when did you send that?

MR. KOWALSKI: The 27th, but it was supposed to be hand walked in. That's okay, I made extra copies anyway.

THE COURT: All right. Mr. Kowalski, it's your motion to dismiss the Second Amended Complaint, so go ahead. Just speak loud so she can hear you, please.

MR. KOWALSKI: Your Honor, this is a Motion to Dismiss with Prejudice for fraud upon the Court. This is the third go around, and what I would like to do with the Court's permission is to take the Court through the three complaints that have been filed. The first one is the Complaint. And what I'm handing the Court is a copy of the first two pages of the Complaint to show the allegations of standing, and then the attachments to the complaint.

In the initial complaint M&T alleged it was the owner. M&T alleged it was the holder, but that the original Note had been destroyed. The exhibits consist of a Note, and I've highlighted the portion on the Note where it's stamped True and Certified Copy of Original. There's a signature section there. And then on the stamps which appear on the last page of the Note, we see a transfer from the initial lender which is First Bank Mortgage, a division of First Bank of Georgia to First National Bank of Nevada, and then the very last page we have an allonge that's signed by Amy Hawkins, Shipping Officer for First National Bank of Nevada.

So this Complaint alleged M&T was the owner and holder and held the Note as bearer paper, but had forever lost the bearer paper. So this Complaint was dismissed without prejudice, and M&T was allowed to filed an Amended Complaint.

The Amended Complaint, and I'm handing the Court a copy of the first couple pages of the Complaint, together with the attachments. And the Amended Complaint was filed in September 2009, the initial Complaint was February of 2009. In the

Amended Complaint which is now roughly, I guess it would be ten months old, M&T alleges it is the owner. M&T alleges it is now in possession of the original Promissory Note. M&T alleged that it was the owner by virtue of an assignment. And I'm quoting in particular from Paragraphs 3 and 4 of the Complaint. They're the owner of the Note by virtue of an assignment, and they're in possession of the original.

We turn to the attachments, we see the same Note with the same True and Certified Copy of Original stamp. We see the same stamp from First Bank Mortgage to First National Bank of Nevada, and we see the same allonge endorsed and blank, First National Bank of Nevada, and now for the first time we see an assignment.

Now the assignment is prepared by the law firm. And the assignment states that MERS, as nominee for First Bank Mortgage, in other words, as nominee for an entity that no longer holds the Note according to the stamps affixed to the Note itself transfers this directly to M&T, and I'm reading, quote, together with the Note. And that's at the second full paragraph of the assignment.

Unfortunately for M&T, this assignment

post-dates the filing of the complaint. Obviously it's dated 10 July '09. The original Complaint was February of 2009, but here we have the law firm itself preparing this assignment which purports to deliver the actual Note from the original lender directly to M&T. And of course because it was post-dated on its face, this does not show standing at the inception which is required, and this was dismissed without prejudice.

Now we have what brings us here today, and I'm handing the Court the Second Amended Complaint. For the first time we see that M&T does not own the Note. In fact, Wells Fargo Bank National Association as trustee owns the note. They allege they own it pursuant to an allonge, and that M&T is simply the servicer.

We turn to the Note, we have the same without recourse pay to the order of the First National Bank of Nevada, but now for the very first time we have a stamp on the allonge. It's on an allonge that's signed by First National Bank of Nevada. It didn't appear in the true and original copies of the Note that were presented to this Court. So according to the Third Complaint, the assignment attached to the Second Complaint was a fraud perpetrated upon this Court as a fiction to show standing from First Bank Mortgage directly to M&T prepared by the lawyers.

According to the First and the Second Complaint, the allonge is a fraud perpetrated upon this Court where a stamp appears for the very first time. The assignment is now completely forgotten in the Third Complaint. There is no mention at all of the assignment, of the fact that the law firm itself alleged that MERS as nominee for First Bank Mortgage, a division of First Bank of Georgia delivered the Note and Mortgage directly to M&T in July of 2009.

Your Honor, the Court is permitted to dismiss a case with prejudice. Oh, and by the way, First National Bank of Nevada was closed by the FDIC in July of 2008, so First Bank of Nevada isn't putting any stamps on anything for some time.

The Court is permitted to dismiss an action with prejudice if the fraud appears to be so pervasive as to permeate the proceedings. Now, either M&T or Wells Fargo, or whoever the heck owns this Note can still file a new complaint and can still foreclose, but the defendants would strongly urge this Court to find fraud based upon these three complaints which are each internally inconsistent with each other, and which each show indicia of fraud between the two others.

We would ask for a dismissal with prejudice of this action. And I have also asked in the motion for dismissal with prejudice. I've also asked for an evidentiary hearing before the Court to determine whether in fact the firm itself, or M&T or Wells Fargo -- I certainly think the record shows the firm is complicit. The firm prepared the assignment, which appears to be, according to the Third Complaint, a complete fiction. And the question then becomes whether M&T and Wells Fargo were complicit in the firms' actions, or whether it's simply the firm. But in any event, it appears that fraud upon the Court is pervasive between these three documents, and we would ask for a dismissal with prejudice. With M&T or Wells Fargo or whoever it is, they obviously can file a new action if they wish based upon a new date of breach.

THE COURT: Ms. Hines.

MS. HINES: Your Honor, there has been no fraud committed on the Court. Upon filing of the Second Amended -- the First Amended Complaint was filed based on information received from the client. And with that information that the facts were as provided to our firm in order to file said Complaint. When the Court dismissed that First Amended Complaint, we went back to the client, requested that a search be made for any and all original documents relating to this file, and that's when we received the original Note and original Mortgage which has since been filed with the Court.

Upon review of those original documents we were able to assert the true chain of title of the Note, and that information is what was given in the Second Amended Complaint. And the information was given in detail in the Second Amended Complaint to show the correct chain, and to correct any mistakes that had been made in the prior complaint.

What you have before you, Your Honor, the Second Amended Complaint is the chain of title and shows what entity has standing to bring this Foreclosure Complaint before the Court.

I -- the last hearing that we had, counsel stated that standing was note the issue, it was something else. Now he's stating that it is standing and he's unsure which entity in truth has standing to bring this action.

The court file shows that M&T Bank as servicer, which we now learned is the true -- the true standing of M&T as servicer has the right to file this foreclosure action on behalf of the owner, which is Wells Fargo Bank. And that's what was done. There has been no fraud committed on the Court, Your Honor. What you have before you is the truth.

THE COURT: Mr. Kowalski, is it your -- I have one question, and then I'm going back to Ms. Hines with a couple of questions. Is it your position that a servicer cannot bring an action on behalf of the owner of a Note?

MR. KOWALSKI: A servicer can bring an action on behalf of the owner.

THE COURT: I just wanted to make sure.

MR. KOWALSKI: No. If the Second Amended Complaint stood on its own, and we hadn't had anything for the year and four months --

MS. HINES: I can't hear him, sir, I'm sorry.

MR. KOWALSKI: If the Second Amended Complaint stood on its own and we hadn't had anything for the year and a half before today, then the Second Amended Complaint states a cause of action. The concern is that everything I've said before, we have a new stamp placed on what before was maintained to this Court as an original copy of the Note, or we have an allonge that was completely made up by the law firm in order to perpetrate a fiction upon this Court, a fiction of standing. Either one of those two --

MS. HINES: But that --

MR. KOWALSKI: Either one of those two has to be true.

MS. HINES: Actually that isn't true, Your Honor. The original document -- the document that we had before that did not have the stamp is what was originally sent to us. When we requested all original documents from the client, what we got was that allonge with the stamp on it. And I noted after we received all the original documents that there was a discrepancy, and the firm did not put that stamp there, and I doubt that the client did either because it's -- if the original documents are reviewed and they're in the court file, you will see that that stamp is rather old. So I'm not sure why or where opposing counsel is going with this. That stamp was not put there by the firm.

THE COURT: All right. Anything else?

MR. KOWALSKI: Nothing from the defense.

MS. HINES: I just want to say, Your Honor, that I think at this point, I think the Second Amended Complaint is complete and alleges enough facts in order to proceed with the foreclosure action. If we were to proceed with this Motion to Dismiss, then you know the Court must view, you know, the Motion to Dismiss as it pertains to the four corners of the Complaint. What opposing counsel is proposing is an evidentiary hearing which is outside of the purview of a Motion to Dismiss.

THE COURT: Well, I agree that that's not a motion to dismiss hearing, but he wasn't asking me to conduct a motion to dismiss hearing with an evidentiary component. He was asking me to have an evidentiary hearing to determine whether or not -- what parties are responsible for what he believes to be fraud on the Court, and then to determine what sanctions are appropriate.

I do have a question though, this person Devesa who is the assistant vice-president of MERS and that assignment, I mean how did y'all prepare an assignment in '09, in '09 for a bank that wasn't in existence? That does concern me a little bit to say the least.

MR. KOWALSKI: Well, Judge, the point there is that the assignment is prepared on behalf of an entity that no longer exists, but it's First Bank of Nevada that was seized, and it's First Bank of Nevada whose stamp is modified from the two exactly identical allonges that were filed with the Court before.

THE COURT: Georgia was the initiating bank?

MR. KOWALSKI: Georgia is the initial lender, and then they sold it to First Bank of Nevada according to the stamp on the Note. I mean, there is so much wrong with the assignment which is the second complaint.

THE COURT: The thing that I'm showing on its face is this, and if I just take the Second Amended Complaint and then try to get to the third, the Second Amended Complaint shows that on the date of the assignment -- if I don't ask any other questions -- on the date of the assignment, it was owned by Georgia going to M&T Bank, and that's in '09. The lawsuit -- the lawsuit was -- and that was in July of '09. The lawsuit was brought in February of '09.

Now I've got a Second Amended Complaint that kind of ignores the fact that I've got a recorded assignment in the public records. I mean, you know, I'm supposed to take judicial notice of my files at least, and I don't know how you get by that assignment to the next step. But even if you do, how do you -- how do you have a bank, and you know without a date, I'm just saying without a date, a bank that no longers exists paying it to the order of somebody, Wells Fargo, and I don't have any dates on any of these documents.

I know banks for some reason have this fear of putting dates on their allonges and their assignments, I'm not sure why they do. You know, I've got an initial -- the third page of the original document has got an assignment to First National Bank of Nevada, so I know it went at least there. And then I've got it to First National Bank of Nevada and then to Wells Fargo, but I've got no dates when that happened.

I will take a look at it and I will send out an order. I'm not sure what I will do yet until I take a look at it, but I appreciate it.

Y'all take care. Have a good day.

MS. HINES: Thank you, Your Honor.

MR. KOWALSKI: Thank you.

(Proceedings concluded.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
)
COUNTY OF ST. JOHNS)

I, Carman L. Gaetanos, FPR, Court Reporter, do hereby certify that I was authorized to and did transcribe report the foregoing proceedings, and that the transcript is a true and correct record of my **stenographic notes**.

Dated this 16th of June, 2010,

St. Augustine, St. Johns County, Florida.

Carman L. Gaetanos, FPR
Court Reporter

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA09-0418

DIVISION: 55

M&T BANK,

Plaintiff,

vs.

LISA D. SMITH, etc., et al.,

Defendants.
_______________________________/

AFFIDAVIT ON BEHALF OF M&T BANK
IN SUPPORT OF MOTION FOR REHEARING

STATE OF NEW YORK

COUNTY OF ERIE

Joseph Morrison, being first duly sworn, makes the following statements of fact of his own personal knowledge.

1. Affiant is administrative Vice President and Manager, Real Estate Collection and Recovery, for the Plaintiff in this matter, M&T Bank, a New York Banking Corporation, and held that position at the time this foreclosure was instituted. Affiant has been employed with M&T Bank for approximately fifteen (15) years. His duties include oversight and administration of mortgage foreclosures around the country.

2. Affiant, or another equally knowledgeable representative of M&T Bank, will appear at the evidentiary hearing scheduled herein for August 19, 2010 to testify in person as to the matter set forth in this Affidavit. This Affidavit is offered in support of M&T Bank's

pending Motion for Rehearing in regard to that Order entered June 10, 2010 dismissing M&T Bank's Second Amended Complaint with Prejudice, in order to (1) respond to the questions raised by the Court in that Order, (2) document for the Court the chain of documentation establishing the right and standing of M&T Bank to foreclose the subject mortgage, and (3) establish for the Court that while this action reflected significant confusion in regard to the relatively complex chain of documents, there was no fraud or falsification whatsoever in regard to this proceeding.

The Allonge Issue

(Discrepancy between Complaint and Second Amended Complaint)

3. The mortgage note, attached to each complaint filed herein, includes a stamped endorsement from First Bank of Georgia to First National Bank of Nevada.

4. Attached to the initial Complaint filed in this action was an Allonge to Note, reflecting an endorsement in blank from First National Bank of Nevada, the assignee of the note. A copy of this Allonge is attached hereto as Exhibit A.

5. Attached as an exhibit to the Second Amended Complaint is a copy of the Allonge to Note endorsed by First National Bank of Nevada, but this copy of the Allonge included a stamp in the place of the blank endorsement, making the note payable to Wells Fargo Bank, National Association, as Trustee, in trust for the Registered Holders of Nomura Asset Acceptance Corporation Alternative Loan Trust. A copy of this Allonge is attached hereto as Exhibit B.

6. At the time M&T Bank is retained by a financial institution or other entity to service a group of loans, M&T Bank receives, along with an electronic loan servicing file, two paper files: (1) a servicing file, and (2) a custodial file. The servicing file includes the loan application, closing documents, appraisals, title insurance documents and various other loan-

related documents. This file commonly includes multiple copies of certain documents, including copies of documents in various stages of completion, such as drafts and unsigned copies. The custodial file contains various original documents, including the note and mortgage. When a loan is in default and to be foreclosed, the servicing file is provided electronically to foreclosure counsel. Thereafter, original documents from the custodial file are physically delivered to counsel by overnight mail.

7. A copy of the blank/unstamped Allonge to Note referenced in paragraph 4 above was included in M&T Bank's servicing file, and was transmitted electronically to foreclosure counsel, along with other pertinent documents from the servicing file, immediately upon counsel's engagement.

8. The stamped/endorsed Allonge to Note, in its original form, was maintained in M&T Bank's custodial file, and was separately provided to foreclosure counsel, along with other original documents, ten days after transmission of the servicing file.

9. In short, a copy of the unstamped/endorsed-in-blank Allonge to Note, and the original stamped/endorsed Allonge to Note, both existed in M&T Bank's files as separate documents. There was no alteration to the Allonge to Note in the course of this foreclosure action. Instead, the unstamped/endorsed-in-blank copy of the Allonge was erroneously attached to the additional complaint, instead of the stamped/endorsed Allonge.

The Assignment of Mortgage Issue

(From Amended Complaint)

10. Attached to the Amended Complaint filed herein was an Assignment of Mortgage from Mortgage Electronic Registration Systems, Incorporated (commonly known as "MERS"), as nominee for First Bank of Georgia, assigning the mortgage to M&T Bank. A copy of that

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA09-0418
DIVISION: 55

M&T BANK,

Plaintiff,

vs.

LISA D. SMITH, etc., et al.,

Defendants.
_______________________________/

**STIPULATED ORDER
MODIFYING JUNE 10, 2010 ORDER DISMISSING SECOND AMENDED COMPLAINT WITH PREJUDICE, CANCELLING AUGUST 19, 2010 EVIDENTIARY HEARING, AND VACATING ORDER SCHEDULING OCTOBER 5, 2010 REHEARING**

After consideration by the Court and upon the stipulation of the parties, it is

ORDERED:

1. This Court's Order Granting Defendant's Motion to Dismiss Second Amended Complaint with Prejudice entered June 10, 2010 in this action ("the June 10, 2010 Order") is reinstated and is modified herewith, in the following manner:

(a) After the first sentence of the second paragraph on page 2 of the subject Order, which reads "[u]pon review of Defendants' motion, the Court finds the Plaintiff lacks standing and is not a proper party to this suit," the following sentence is inserted:

> This finding is limited to this specific action and the default alleged therein, and should not be construed as a bar - by way of res judicata, collateral estoppel, or otherwise - to commencement of a new foreclosure action by M&T Bank in its capacity as servicer of the subject mortgage, upon the proper allegations regarding same.

(b) The last sentence of the first paragraph on page 3 of the Order is deleted. That paragraph reads as follows:

> Accordingly, this action will be dismissed with prejudice as to M&T Bank, since M&T Bank has been unable to clarify how it owns the Note, but Wells Fargo may commence a new action, on its own, if it is in fact the owner of the Note.

(c) The following sentence shall be substituted for the sentence deleted above, as the last sentence of the first paragraph on page 3 of the Order:

> Accordingly, this action will be dismissed with prejudice as to M&T Bank, but M&T Bank, or any other entity who has the right to foreclose the subject Mortgage, may commence a new foreclosure action.

(d) The following words are deleted from the parenthetical sentence at the end of paragraph number 1 on page 4 of the Order: "a proper Plaintiff, possibly Wells Fargo, from bringing … ." That sentence shall now read as follows: "(However, this Order shall not prevent a new action on the Mortgage and Note.)"

(e) Otherwise, the June 10, 2010 Order shall remain in full force and effect.

2. This Court's Order of July 20, 2010 scheduling a rehearing on Defendants' Motion to Dismiss Second Amended Complaint with Prejudice for Fraud Upon the Court is vacated as moot in light of the preceding paragraph. The rehearing scheduled for October 5, 2010 at 3:15 p.m. is cancelled and shall be removed from the calendar.

3. The Evidentiary Hearing scheduled by the Court in this action for August 19, 2010 at 1:45 p.m. is cancelled in light of the matters resolved in this Order, and shall be removed from the calendar.

4. The Plaintiff herein, M&T Bank, shall reimburse the Smith defendants their reasonable attorneys fees incurred in the defense of this action. The Court reserves jurisdiction

to determine the amount of such reasonable fees, in the event the parties are unable to agree upon same.

DONE AND ORDERED in Chambers, in St. Johns County, St. Augustine, Florida, this ____ day of ______________, 2010.

Conformed Copy

SEP 01 2010
J. MICHAEL TRAYNOR
CIRCUIT COURT JUDGE
J. Michael Traynor
Circuit Court Judge

STIPULATION

The undersigned do hereby stipulate and agree to entry of the Stipulated Order Modifying June 10, 2010 Order Dismissing Second Amended Complaint With Prejudice, Cancelling August 19, 2010 Evidentiary Hearing, and Vacating Order Scheduling October 5, 2010 Rehearing, set forth above.

ROGERS TOWERS, P.A.

By: ______________________
A. Graham Allen
Florida Bar No. 117110
1301 Riverplace Boulevard, Suite 1500
Jacksonville, Florida 32207-1811
(904) 398-3911 (telephone)
(904) 396-0663 (facsimile)

ATTORNEYS FOR M&T BANK

LAW OFFICES OF MARSHALL C. WATSON, P.A.

By: ______________________
Shari N. Hines
Florida Bar No. 171654
1800 N.W. 49th Street, Suite 120
Fort Lauderdale, Florida 33309
(954) 453-0365 (telephone)
(954) 771-6052 (facsimile)

ATTORNEYS FOR M&T BANK

LAW OFFICES OF JAMES A. KOWALSKI, JR., PL

By: [signature]
James A. Kowalski, Jr.
Florida Bar No. 852740
12627 San Jose Boulevard, Suite 203
Jacksonville, Florida 32223
(904) 268-1146 (telephone)
(904) 268-1342 (facsimile)

ATTORNEYS FOR DEFENDANTS LISA AND LARRY SMITH

WRIGHT FIRM

By:________________________
Andrea N. Wright
Florida Bar No. 017778
1260 North Ponce de Leon Boulevard, Suite E
St. Augustine, Florida 32084
(904) 808-1200 (telephone)
(904) 808-1255 (facsimile)

ATTORNEYS FOR DEFENDANTS JOHN VONASEK AND JANICE BROWN

CONROY, SIMBERG, GANON, KREVANS, ABEL, LURVEY, MORROW & SCHEFER, P.A.

By:________________________
Dale L. Friedman
Florida Bar No. 854646
3440 Hollywood Boulevard, Second Floor
Hollywood, Florida 33021
(954) 961-1400 (telephone)
(954) 967-8577 (facsimile)

ATTORNEYS FOR LAW OFFICES OF MARSHALL C. WATSON, P.A.

LAW OFFICES OF JAMES A. KOWALSKI, JR., PL

By: ______________________________
James A. Kowalski, Jr.
Florida Bar No. 852740
12627 San Jose Boulevard, Suite 203
Jacksonville, Florida 32223
(904) 268-1146 (telephone)
(904) 268-1342 (facsimile)

ATTORNEYS FOR DEFENDANTS LISA AND LARRY SMITH

WRIGHT FIRM

By: ______________________________
Andrea N. Wright
Florida Bar No. 017778
1260 North Ponce de Leon Boulevard,
Suite E
St. Augustine, Florida 32084
(904) 808-1200 (telephone)
(904) 808-1255 (facsimile)

ATTORNEYS FOR DEFENDANTS JOHN VONASEK AND JANICE BROWN

CONROY, SIMBERG, GANON, KREVANS, ABEL, LURVEY, MORROW & SCHEFER, P.A.

By: ______________________________
Dale L. Friedman
Florida Bar No. 854646
3440 Hollywood Boulevard,
Second Floor
Hollywood, Florida 33021
(954) 961-1400 (telephone)
(954) 967-8577 (facsimile)

ATTORNEYS FOR LAW OFFICES OF MARSHALL C. WATSON, P.A.

LAW OFFICES OF JAMES A. KOWALSKI, JR., PL

By:____________________________

James A. Kowalski, Jr.
Florida Bar No. 852740
12627 San Jose Boulevard, Suite 203
Jacksonville, Florida 32223
(904) 268-1146 (telephone)
(904) 268-1342 (facsimile)

ATTORNEYS FOR DEFENDANTS LISA AND LARRY SMITH

WRIGHT FIRM

By:____________________________

Andrea N. Wright
Florida Bar No. 017778
1260 North Ponce de Leon Boulevard, Suite E
St. Augustine, Florida 32084
(904) 808-1200 (telephone)
(904) 808-1255 (facsimile)

ATTORNEYS FOR DEFENDANTS JOHN VONASEK AND JANICE BROWN

CONROY, SIMBERG, GANON, KREVANS, ABEL, LURVEY, MORROW & SCHEFER, P.A.

By: Dale Friedman

Dale L. Friedman
Florida Bar No. 854646
3440 Hollywood Boulevard, Second Floor
Hollywood, Florida 33021
(954) 961-1400 (telephone)
(954) 967-8577 (facsimile)

ATTORNEYS FOR LAW OFFICES OF MARSHALL C. WATSON, P.A.

EXHIBIT 5

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

Case No.: 16-2006-CA-1564

Division: CV-G

THE BANK OF NEW YORK, AS TRUSTEE FOR THE HOLDERS OF THE EQCC ASSET BACKED CERTIFICATES, SERIES 2001-2,

Plaintiff,

vs.

PAULETTE WILLIAMS; MERCURY FINANCE COMPANY OF FLORIDA, A DISSOLVED CORPORATION,

Defendants.

______________________________/

ORDER GRANTING DEFENDANT'S/COUNTER-PLAINTIFF'S MOTION TO AMEND AMENDED COUNTERCLAIM AND TO <u>ASSERT A CLAIM FOR PUNITIVE DAMAGES</u>

This cause came on before the Court May 20, 2008 on the Motion by Defendant / Counter-Plaintiff PAULETTE WILLIAMS to Amend Amended Counterclaim and to Assert a Claim for Punitive Damages. The Court has reviewed the pleadings, reviewed the authority cited, and is otherwise fully advised in the premises. The Court finds as follows:

<u>The Evidence Proffered by WILLIAMS</u>

1. In July, 2004, THE BANK OF NEW YORK filed an action against Defendant WILLIAMS in Case No. 2004-4918-CA; Division CV-G (Circuit Court, Duval County, Florida),

2. The chain of <u>recorded</u> assignments appearing in the Official Books and Records of Duval County is as follows:

First Assignment

May 21, 1999:	Assignment from One Stop Mortgage to AAMES Capital Corporation, recorded July 26, 1999.

Second Assignment

June 13, 2000:	Second Assignment from One Stop Mortgage to AAMES Capital Corporation recorded July 6, 2000.

Third Assignment

June 13, 2000:	Assignment from AAMES Capital Corporation to NationsCredit Home Equity Services, recorded July 6, 2000.

Lis Pendens (2004 case)

July 17, 2004:	Notice of *Lis Pendens* recorded by Plaintiff, The Bank of New York, acting solely in its capacity as Trustee for the Holders of the EQCC Asset Backed Certificates, Series 2001-2, in Case No. 2004-4918-CA.

Fourth Assignment

September 24, 2004:	Assignment from NationsCredit Mortgage Corporation of Florida to the current Plaintiff, The Bank of New York, acting solely in its capacity as Trustee for the Holders of the EQCC Asset Backed Certificates, Series 2001-2, recorded October 26, 2004.

Fifth Assignment

October 13, 2004:	Assignment from AAMES Capital Corporation to NationsCredit Financial Services Corporation, recorded November 23, 2004.

Lis Pendens (2006 case)

February 24, 2006	Notice of *Lis Pendens* recorded by Plaintiff.

3. The proffered evidence, in the form of records from the State of Florida Secretary of State, coupled with Admissions from Plaintiff, confirms NationsCredit Mortgage Corporation of Florida did not exist as a corporate entity as of the date of the Fourth Assignment. This Assignment (the Fourth Assignment, above) also post-dates the commencement of the 2004

action. WILLIAMS also proffered testimony from THE BANK's corporate representative, who relied upon the September 24, 2004 assignment to confirm ownership of the Note and Mortgage by THE BANK (Deposition of Mindy Leetham, p. 19-20) – as referenced above, this Assignment post-dated the commencement of the 2004 action and was from an company which did not exist as a corporate entity at the time.

4. In addition to the record evidence, which reflects a lack of standing at the time the 2004 action was commenced, THE BANK OF NEW YORK has admitted and argued strenuously in pleadings before the First District Court of Appeal (First DCA Case Number: 1D07-2626) that its lack of standing was glaring, straightforward and clear, and doomed THE BANK's case from the outset. THE BANK OF NEW YORK is bound by the position it has taken on appeal in the 2004 case. Parties are not permitted to take inconsistent positions in litigation, pursuant to the doctrine of judicial estoppel. The doctrine is intended to prevent a litigant from "playing fast and loose with the courts." *Smith v. Avatar Properties, Inc.*, 714 So.2d 1103, at 1107 (Fla. 5th DCA 1998), citing *Russell v. Rolfs*, 893 F.2d 1033, at 1037 (9th Cir. 1990). *See also, Montero v. Compugraphic Corp.*, 531 So.2d 1034 (Fla. 3d DCA 1988.

The Standard for Review of a Motion to Amend to Assert Punitive Damages

5. The Court is permitted to consider a proffer of evidence in support of a Motion for Leave to Amend pursuant to Section 768.72, Florida Statutes. *Strasser v. Yalamanchi*, 677 So.2d 2 (Fla. 4th DCA 1996). The burden is upon the moving party to show a "reasonable basis for recovery of such damages" (*Will v. Systems Engineering Consultants*, 554 So.2d 591, at 592 (Fla. 3d DCA 1989) accepting all facts reasonably established by the moving party as true. *State of Wisconsin Investment Board v. Plantation Square Associates, Ltd.*, 761 F.Supp. 1569 (S.D. Fla. 1991). THE BANK is permitted to assert facts which would show WILLIAMS' factual

basis to be patently false or irrelevant (*Id.*, at 1581), but has not proffered any evidence, offering instead only arguments of counsel.

The Standard for Review in This Case

6. WILLIAMS has already pled counts alleging violations of Florida's Consumer Collection Practices Act (Count I) Malicious Prosecution (Count II), and Abuse of Process (Count III).

7. The Court is allowed to award punitive damages under the Consumer Collection Practices Act pursuant to Section 559.77(2), Florida Statutes. As to Counts II and III, both intentional torts, the presence of legal malice based upon a showing of gross misconduct or willful and wanton disregard of a Plaintiff's rights is sufficient to support a punitive damages award. Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352 (Fla. 1994).

The Standard for Review as Applied to the Proffer

8. The evidence proffered by PAULETTE WILLIAMS, as set forth herein, sets forth a reasonable basis from which a jury could conclude THE BANK OF NEW YORK was, at least, grossly negligent in suing PAULETTE WILLIAMS and acted with willful and wanton disregard to the rights of PAULETTE WILLIAMS. It is, therefore,

ORDERED:

Defendant / Counter-Plaintiff's Motion for Leave to Amend Amended Counterclaim so as to Assert a Claim for Punitive Damages is GRANTED, as to THE BANK OF NEW YORK only. The Second Amended Counterclaim attached to Defendant / Counter-Plaintiff's Motion for Leave is deemed filed as of the date of this Order, and THE BANK OF NEW YORK is permitted twenty (20) days within which to file a response thereto.

DONE AND ORDERED, in Chambers, at Jacksonville, Duval County, Florida, this

day of May 2008.

ORDER ENTERED

JUN 1 0 2008

LANCE M. DAY

CIRCUIT COURT JUDGE

Copies to:

John H. Dannecker, Esq.
Shutts & Bowen LLP
300 South Orange Avenue, Suite 1000
PO Box 4956
Orlando, FL 32802-4956

James A. Kowalski, Jr., Esq.
Law Offices of James A. Kowalski, Jr., PL
12627 San Jose Blvd. Suite 203
Jacksonville, FL 32223

EXHIBIT 6

04/30/2009 at 08:53 AM REC. $5.00 SUR. $5.00

Prepared by: DAVID J. STERN, ESQ
Record & return to: 900 South Pine Island Road Suite 400
Plantation, FL 33324-3920
08-70031(FTN)
MERS MIN: 100085200614045708
MERS PHONE: 1-888-679-6377

This space is for recording purposes only

ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS:

THAT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Residing or located at c/o FIRST HORIZON HOME LOAN CORPORATION 4000 HORIZON WAY, IRVING, TX 75063, herein designated as the assignor, for and in consideration of the sum of $1.00 Dollar and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, assign, transfer and set over unto FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK NATIONAL ASSOCIATION residing or located at: C/O FIRST HORIZON HOME LOAN CORPORATION 4000 HORIZON WAY, IRVING, TX 75063 herein designated as the assignee, the mortgage executed by CHARLES H. MEISELMAN, A MARRIED MAN JOINED BY HIS WIFE, MERRIE G. MEISELMAN recorded in ST. JOHNS County, Florida at book 2952 and page 1259 encumbering the property more particularly described as follows:

LOT 9, BLOCK 156, ST. AUGUSTINE SHORES, UNIT 5, A SUBDIVISION ACCORDING TO THE PLAT THEREOF RECORDED IN MAP BOOK 14, PAGE 21, OF THE PUBLIC RECORDS OF SAINT JOHNS COUNTY, FLORIDA.

together with the note and each and every other obligation described in said mortgage and the money due and to become due thereon

TO HAVE AND TO HOLD the same unto the said assignee, its successors and assigns forever, but without recourse on the undersigned.

Pursuant to the provisions of Sec. 689.071, Florida Statutes, the within-named-Trustee has the power and authority to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the above-described mortgage and the real property encumbered thereby.

In Witness Whereof, the said Assignor has hereunto set his hand and seal or caused these presents to be signed by its proper corporate officers and its corporate seal to be hereto affixed, this 3 day of March, 2009 but effective as of the 21st day of July, 2008.

Signed in the presence of:

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

ATTEST:

BY: ______

PRINT NAME: CHERYL SAMONS

TITLE: ASSISTANT SECRETARY

WITNESS: ______

Print Name: ANNA CLARKE

WITNESS: ______

Print Name: B. Emmanuel

STATE OF Florida
COUNTY OF Broward

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the aforesaid county and state, on this the 3 day of March, 2009 within my jurisdiction, the within named CHERYL SAMONS who is personally known to me and who acknowledged to me that (s)he is ASSISTANT SECRETARY and that for and on behalf of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. and as its act and deed (s)he executed the above and foregoing instrument, after first having been duly authorized by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. to do so.

WITNESS my hand and official seal in the County and State last aforesaid this 3 day of March, 2009.

______
NOTARY PUBLIC

Notary Public State of Florida
Bernadette Emmanuel
My Commission DD788805
Expires 05/14/2012

This Instrument Was Prepared By:

INSTR # 101904643
OR BK 33143 Pages 791 - 792
RECORDED 05/16/02 15:51:46
BROWARD COUNTY COMMISSION
DEPUTY CLERK 2030
#1

DAVID J. STERN, ESQ.
LAW OFFICES OF DAVID J. STERN, P.A.
801 S. University Drive, Suite 500
Plantation, FL 33324

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That FIRST HORIZON HOME LOAN CORPORATION, a TEXAS corporation (AClient≅), with its principal offices located at 4000 HORIZON WAY, IRVING, TX 75063, does hereby make, constitute and appoint the following:

DAVID J. STERN, MIRIAM L. MENDIETA, CHERYL SAMONS, FORREST G. MCSURDY, BEVERLY A. MCCOMAS or WENDY J. WASSERMAN of the LAW OFFICES OF DAVID J. STERN, P.A.,

as attorneys-in-fact, any one (1) of the same to be authorized to act, do and perform, on behalf of Client, with full power and authority to act for it, in its name, place and stead, any and all lawful acts, matters and things whatsoever requisite, necessary, proper or convenient to be done, as fully as Client might or could do itself for all intents and purposes, with regard to the matters listed below and performed in connection with the management and prosecution of foreclosure, bankruptcy, eviction or related litigation matters:

1. To execute, acknowledge, seal, deliver and revoke:

a. any Affidavit in Support of Plaintiff=s Motion for Summary Judgment that may be required by a Florida state or federal court for entry of Final Summary Judgment of Foreclosure;

b. any Affidavit in Support of Creditor=s Motion for Relief from Stay that may be required by a Florida state or federal court for entry of an Order lifting a bankruptcy stay.

2. This Power of Attorney shall be effective from the date of execution hereof and shall remain in full force and effect until such time as it is revoked, in writing, by Client. The revocation of this Power of Attorney may be in whole or in part, and if such revocation shall be in part, it shall only affect the specific individual or individuals named in such revocation and shall not affect or impair the powers of any individual not named. Any such revocation shall not affect the validity of a transaction initiated, but not completed, prior to such revocation.

3. By exercise of this Power of Attorney, the LAW OFFICES OF DAVID J. STERN, P.A. shall indemnify and hold harmless Client from and against any and all claims, demands, suits, penalties or actions, and from and against any and all attendant losses, costs and expenses for any claims against, or losses or liability of, Client for any cause arising out of, or resulting from, default in the performance of, or the gross negligent performance of, any obligations of an attorney-in-fact under this Power of Attorney. Client agrees to not hold the LAW OFFICES OF DAVID J. STERN, P.A. liable for any incorrect information supplied by the Client to the LAW OFFICES OF DAVID J. STERN, P.A. if the same is provided to any court pursuant to this Power of Attorney.

4. This Power of Attorney is made pursuant to authorization for making of same, which has

been duly adopted by the governing body of Client.

IN WITNESS WHEREOF, Client has caused this instrument to be executed in its corporate name by its officer thereunto duly authorized this ____ day of ______________, 20__.

In the presence of:

Client: ______________________

____
Print Name: ______________

By: Mich Fish
Michael Fisher
[Print Name]

____
Print Name: ______________

Its: Vice-President

(Corporate Seal)

FIRST HORIZON HOME LOAN CORPORATION CORPORATE SEAL KANSAS

Attest: S. Stinson
SHERRY STINSON
[Print Name]

Its: Assistant Secretary

STATE OF TEXAS
COUNTY OF DALLAS

I hereby certify that on this day, before me, an officer duly authorized in the State aforesaid and in the County aforesaid to take acknowledgments, personally appeared MICHAEL FISHER and SHERRY STINSON, as Vice-President and Assistant Secretary, respectively, of ____________________, a ______________ corporation, to me known to be the persons described in and who executed the foregoing instrument and who are personally known to me or who produced ______________ as identification and who acknowledged before me that they executed the same on behalf of the said corporation and for the purposes therein set forth.

WITNESS my hand and official seal in the County and State last aforesaid this ____ day of ______________, 20__.

Lori Jones
Notary Public, State of TX

Print Name: Lori Jones

My commission expires:

LORI JONES
NOTARY PUBLIC
STATE OF TEXAS
My Comm. Exp. 08-26-2005

EXHIBIT 7

IN THE CIRCUIT COURT,
JUDICIAL CIRCUIT, IN AND FOR
COUNTY, FLORIDA.

CASE NO.: 2010-CA-
DIVISION:

BANK OF AMERICA, N.A.,

vs.

, , ET AL,

Defendant.
_______________________/

DEPOSITION OF

DATE TAKEN: , 2010

TIME:

PLACE: County Court Administration Bldg.
Florida

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were reported by:

Florida Professional Reporter

CERTIFIED
COPY

borrowers listed applicable for Options 2, 4, 6, B, D, F, H, J or L only, in which and elect.

Q And you said you reviewed Exhibit 2 before today?

A That's correct.

Q Okay. So Exhibit 2 certainly refers to an election of the Borrowers Protection Plan by both the husband and wife in this case?

A That's correct.

Q And the Borrowers Protection Plan is similar to credit life or credit disability insurance; is that correct?

A I wouldn't know.

Q Is the Borrowers Protection Plan monitored or supervised by a unit of BOA?

A I wouldn't know. I would assume that it's monitored by one of our insurance divisions.

Q One of "our" meaning Bank of America?

A One of Bank of America's insurer's divisions.

Q Let me show you what I will mark as Exhibit 4 which is in fact -- I'm sorry there may be two there, let me see.

(Defendants' Exhibit 4 marked for identification.)

THE WITNESS: Yeah, there is.

BY MR. KOWALSKI:

Q If you can hand one to your lawyer.

Let me ask you to take a look at Exhibit 4 for just a second.

First off on the coversheet it bears a Bank of America stamp; is that correct?

A That's correct.

Q Indicating that Bank of America sent this to ?

A That's correct.

Q If Bank of America sent the Borrowers Protection Plan to Mr. , do you have a reason why you don't know about it?

A During my review of the case, I wasn't able to find this information.

Q Do you have access to the Borrowers Protection Plan interface?

A No, I do not.

Q Why not?

A I don't know.

Q Did you ask for it since you were coming here to talk about it as a spokesperson for BOA?

A I didn't know where to obtain it.

Q Well, who did you ask who told her, I don't know where to obtain this either? Did you ask your

boss?
A Yes, I actually did ask my boss where I would be able to find this.
Q Okay. You said, Hey, boss, I've got to go to - where one of the three things I'm being asked to talk about is the Bank of America Borrowers Protection Plan that our borrowers signed up for and paid for, can you tell me where to find it? Did you ask her that?
A Yes.
Q And her answer was?
A That she would have to do more research into it, but she hadn't heard about it.
Q When did that conversation take place?
A Probably a month ago.
Q And when did your boss get back with you and say, I've done my additional research and I don't have a clue where to find the Bank of America Borrowers Protection Plan that our borrowers bought and paid for, when did she come back and tell you that?
A Probably a little bit less than a month ago.
Q How long ago?
A I don't know offhand.
Q So as you sit here today as the corporate spokesperson of Bank of America, your testimony is that

you were not able to find any information about the Bank of America issued product that's specifically referred to in the documents that your lawyers filed with the Court; is that your testimony here today?

A That's correct. The only information that I was able to find was the sheets that were attached to the back of the Note.

Q Okay. Did the Borrowers Protection Plan in this case pay money on behalf of Mr. and Mrs. ?

A Not that I'm aware of.

Q Let me show you what I will mark as 5 which is a letter by which Bank of America confirmed they were paying under the Borrowers Protection Plan, and take a look at that.

(Defendants' Exhibit 5 marked for identification.)

THE WITNESS: Okay.

BY MR. KOWALSKI:

Q It's a letter dated , 2010, it says: Dear Bank of America Customer -- and you see it's on Bank of America letterhead -- your request -- by the way, it references Bank of America Borrowers Protection Plan, Line Protection Plan Services in Santa Ana, California, you see that at the bottom?

A Yes.

Q It says: Dear Bank of America Customer --

referring to -- Your request for Disability benefits under the Borrowers Protection Plan has been approved. Do you see that?

A Yes.

Q Referring back to Exhibit 4 which is the plan itself, Paragraph 16, it says, The lender cannot attempt to foreclose upon or repossess, or initiate any foreclosure proceedings or repossession activities upon any collateral until 35 days after the benefits request is rejected. Do you see that at Paragraph 16, Page 7 of 8 of the Bank of America Borrower's Protection Plan? It's all capitalized.

A Yes.

Q Can you tell me a reason why Bank of America instituted foreclosure proceedings on , 2010 when -- I'm sorry, what did I say?

MS. EINSTEIN: 2010.

BY MR. KOWALSKI:

Q 2010. Can you tell me why Bank of America instituted foreclosure proceedings against Mr. and Mrs. on , 2010 when their request for Disability benefits under the Borrowers Protection Plan was approved by letter from Bank of America dated ., 2010? Can you explain that to us today as the corporate representative of Bank of

America, or do you think Exhibit 5 is a forgery?

A I don't know. I would have to do further research in that.

Q Do you understand that the research was supposed to be done before today?

A Yes.

Q Do you understand that we've got a room full of people here, including Mr. , who by the way is disabled and awaiting surgery, all of whom arranged their schedules so that you could answer questions about Area of Inquiry 3 in a deposition notice that's been in existence for months, do you understand that?

A Yes.

Q Can you explain to us then why you're wasting the time of everybody else in this room --

MS. HENKE: Objection; form.

BY MR. KOWALSKI:

Q -- including apparently yourself?

A Again, you know, this information right here, I have not seen.

Q I understand that. But why didn't you go look for it when apparently it's being issued by another department of your employer?

MS. HENKE: Objection; form.

THE WITNESS: I have looked for it.

Again, Bank of America, extremely large company, lots of departments, you know, this might have been something that was missed. I can look further into it though.

BY MR. KOWALSKI:

Q As you sit here today, do you know anything at all about Area of Inquiry 3?

A No.

Q All right. I'm going to mark -- we were provided documents here today. I'm going to mark the first packet -- we only have one copy, although I think your lawyer has a copy -- of something. Let me describe it better. Okay. Do you have your copy?

(Defendants' Exhibit 6 marked for identification.)

MS. HENKE: Yes, I do.

BY MR. KOWALSKI:

Q It's 15 pages, and I marked it as Exhibit 6. At the top there is the numbers 1 through 7 separated by dots and in between two arrows, and at the top it says , next line , Retained by Litigation Management and assigned to .

What is Exhibit 6, these what did I say, 15 pages? What is Exhibit 6?

A Those are servicing notes.

Q And are these servicing notes maintained by

EXHIBIT 8

IN THE CIRCUIT COURT OF THE FOURTH
JUDICIAL CIRCUIT, IN AND FOR DUVAL
COUNTY, FLORIDA

CASE NUMBER: 16-2004-CA-4835-XXXX-MA

DIVISION: CV-E

TCIF REO2, LLC,

Plaintiff,

v.

MARTIN L. LEIBOWITZ, AS TRUSTEE,
etc., et al.,

Defendants.

THIS INSTRUMENT ... THAYER

FILED 05/02/06 PM 01:00 JIM FULLER

ORDER GRANTING DEFENDANTS' MOTION FOR SANCTIONS

This cause came before the Court on April 5, 2006 on Defendants Robert Jackson and Lillian Jackson's Motion for Sanctions for Fraud Upon the Court. The Court has reviewed the pleadings, considered arguments of counsel, and is otherwise fully advised in the premises.

The Court finds Plaintiff, through its servicing entity, GMAC Mortgage Corporation, submitted false testimony to the Court in the form of Affidavits of Indebtedness signed and subscribed by Margie Kwiatanowski, a "Limited Signing Officer" with GMAC Mortgage Corporation. The submission of the false Affidavits was pursuant to protocols and procedures wherein Ms. Kwiatanowski, as Limited Signing Officer, would attest to review of the relevant loan documents, the Complaint, and the loan payment records, when in fact (as sworn to by Ms. Kwiatanowski in her deposition) she neither reviewed the referenced records nor was familiar with the manner in which the records were created by GMAC on behalf of Plaintiff. In her deposition, Ms. Kwiatanowski admitted none of the Affidavits were signed before a Notary, and that Affidavits of the sort filed by Plaintiff would be signed and then left in a folder, to be notarized at a different time. The admissions by Ms. Kwiatanowski in her deposition directly contradict the sworn testimony to the Court in the form of the referenced Affidavits, both as to the substance of the Affidavits and with regard to whether the Affidavits were sworn to before a notary.

The Court recognizes the statements made by Plaintiff's counsel at the hearing to the effect that the procedures in place at GMAC with regard to servicing of this Plaintiff's loans were being corrected. The Court finds the submission of false testimony to the Court in the manner described does not rise to the level required in order for this Court to dismiss the action. Cox v. Burke, 706 So.2d 43 (Fla. 5th DCA 1998.) The Court will not condone Plaintiff's actions in filing false testimony, however, and the Court has both the inherent authority to sanction Plaintiff's actions, based upon the findings set forth above, and finds sanctions to be appropriate. It is therefore:

ORDERED AND ADJUDGED:

1. Defendants' Motion for Sanctions for Fraud Upon the Court is GRANTED.

2. The subject Affidavits as completed by Ms. Kwiatanowski are and same be stricken.

3. The Court orders Plaintiff to pay Defendants' attorneys' fees and costs for the efforts related to the taking of Ms. Kwiatanowski's deposition. Based upon a review of the record and the Affidavit filed by Defendants' counsel, the Court finds a reasonable sanction to be 32 hours of attorney's time and further finds a reasonable, local hourly rate to be $250.00, and further awards costs in the amount of $134.55. Therefore, the Plaintiff, TCIF REO2, LLC, Inc. shall forward to defense counsel payment of $ 8,134.55 in sanctions for the reasons set forth above within 30 days from the date of this Order.

4. Counsel for Plaintiff shall file with the Court GMAC's written explanation and confirmation, on behalf of Plaintiff, that GMAC's policies and procedures with regard to the servicing of all of this Plaintiff's loans within the State of Florida have been modified, in accord with

representations made by counsel to the Court that such modifications were being made, to confirm the affidavits filed in future foreclosure actions in Florida accurately memorialize the actions and conduct of the affiants. The written confirmation of policy changes, and an explanation for the policies now in place, shall be filed with the Court within 30 days of the date of this Order.

DONE AND ORDERED, in Chambers, at Jacksonville, Duval County, Florida, this 15 day of May, 2006.

Circuit Court Judge

Copies to: James A. Kowalski, Jr., Esquire
Roy A. Diaz, Esquire

3-3-06

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NUMBER: 16-2004-CA-4835-XXXX-MA
DIVISION: CV-E

TCIF REO2, LLC,

Plaintiff,

v.

MARTIN L. LEIBOWITZ, AS TRUSTEE,
etc., et al.,

Defendants.

/

MOTION FOR SANCTIONS FOR FRAUD UPON THE COURT

COME NOW, Defendants Robert and Lillian Jackson, by and through their undersigned counsel, and pursuant to Rule 1.140, Florida Rules of Civil Procedure, hereby move the Court to enter sanctions against the Plaintiff, including Dismissal of the pending matter with prejudice and such other sanctions as the Court deems appropriate. In support of this Motion, Defendants would state as follows:

1. On or about August 6, 2004, Plaintiff filed a Motion for Summary Judgment with this Court. In support of the Motion for Summary Judgment, Plaintiff contemporaneously filed an Affidavit of Indebtedness signed and subscribed by Margie Kwiatanowski, a "Limited Signing Officer" with GMAC Mortgage Corporation ("GMAC"), the servicing agent for Plaintiff. Plaintiff filed subsequent Amended Motions for Summary Judgment on March 10, 2005 and November 3, 2005, and again filed Affidavits of Indebtedness signed and subscribed by Ms. Kwiatanowski, as a Limited Signing Officer.

2. The Affidavits of Indebtedness contains Ms. Kwiatanowski's statements, allegedly under oath, on behalf of GMAC, that she:

(a) has "personal knowledge of the status of all mortgages and notes owned and held by said corporation." (Affidavit, paragraph 1).

(b) has "examined the relevant loan documents and the Complaint, and each allegation of the Complaint is correct." (Affidavit, paragraph 2).

(c) is familiar with the loan payment records, which are regularly compiled and maintained as business records: "These records properly reflect loan payments, charges, and advances that are noted in the records at the time of the applicable transactions by persons whose regular duties include recording this information." (Affidavit, paragraph 3).

(d) swore and subscribed to the statements before a Notary.

3. The Affidavits additionally detail the alleged facts as the status of the mortgage, including the material dates, the amount owed and the fees and charges.

4. Ms. Kwiatanowski was deposed at GMAC's facility in Horsham, Pennsylvania, on January 31, 2006. See, Notice of Deposition, attached hereto as Exhibit "A" and incorporated by reference. During the deposition, Ms. Kwiatanowski admitted the above statements under oath were false:

(a) has "personal knowledge of the status of all mortgages and notes owned and held by said corporation." (Affidavit, paragraph 1).

Ms. Kwiatanowski admitted that, while she can *access* other loan documents, the statement regarding personal knowledge was false:

Q. All right. Let me ask you to go to the Amended Affidavit, which is Jackson 00006. And we'll start with page - - I'm sorry, paragraph 1.

It states that you're a limited signing officer and that you have personal knowledge of the status of all mortgages and notes owned and held by said corporation.

Do you see that?

A. Yes, I do.

Q. How is that true?

A. Well, generally, I understand what a note and a mortgage is, and how - - how the loan is originated.

Q. Right. But this says you have personal knowledge of the status of all mortgages owned and held by said corporation; corporation being TCIF RE02, LLC?

A. Well, actually, we're the servicing agent for them. We would not have originated the loan.

I'm not quite sure how to answer your question, though.

Q. Well, how is it that you have personal knowledge of the status of all mortgages serviced by GMAC for this claimant?

A. Again, I'm not - - I don't know.

Q. Do you have personal knowledge of the status of all mortgages and notes serviced by GMAC for this claimant?

A. No, I do not.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 30 line 9 - p. 31 line 15) (emphasis added)

<u>(b) has "examined the relevant loan documents and the Complaint, and each allegation of the Complaint is correct." (Affidavit, paragraph 2).</u>

Ms. Kwiatanowski testified she reviewed only a single computer screen prepared by someone else. She did not review <u>any</u> loan documents, much less the "relevant" ones, and did not read the Complaint:

> Q. Now, paragraph 2 - - and I'm just jumping ahead to your affidavit. But your affidavits, as you may be familiar, referenced the fact that you reviewed certain things in order to sign the affidavits?
>
> A. That's correct.
>
> Q. Okay. The records in paragraph 2 that are requested are: Any and all documents, electronic memoranda, policy manuals, servicing manuals, or other items of any kind reviewed in preparation for completion of the Affidavit of Indebtedness dated July 15, 2004, and Amended Affidavit of Indebtedness dated October 20, 2005. And your affidavits are then attached after this.
>
> But my next question is: Is there anything other than what's sitting to your left, that you recall reviewing in order to prepare the two affidavits?
>
> A. I would have - - excuse me, I'm sorry. I would have reviewed a screen in our system that populates what the total indebtedness is. And I don't believe a copy of that screen is within this pile.
>
> Q. Okay. Are you saying that you reviewed a single screen?
>
> A. Yes.
>
> Q. And when I'm picturing a screen, I'm picturing a single page of information; or is there more than one page of information that appears on your screen?
>
> A. There is one page of information.
>
> Q. What is that page of information called?
>
> A. It's called the foreclosure work screen.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 19 line 13 - p. 20 line 24)

* * *

Q. Okay. Did you review the payment history separately?

A. I would have no reason to review it separately.

Q. Okay. In other words, you did not review the payment history before completing your affidavit?

A. That's correct.

Q. Would you have reviewed the actual note of mortgage before completing your affidavit?

A. No, I would not have.

Q. Would you have reviewed any of the customer history log, the document, the discussions back and forth between the mortgagors and the servicing company?

A. No, I would not have.

Q. Is it fair to say, then, that in completing an affidavit such as the ones we have attached as Bates stamped Jackson 3 through 5, and Jackson 6 through 8, that you would have reviewed one computer screen called the foreclosure work screen?

A. That's correct.

Q. And nothing else?

A. That's correct.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 22 line 16 - p. 23 line 17) (emphasis added)

* * *

Q. Paragraph 2, it says: I have examined the relevant loan documents and the Complaint, and each allegation of the Complaint is correct.

Is the Complaint part of the foreclosure work screen?

A. No, it is not.

Q. Would you have actually read the Complaint before signing the Amended Affidavit of Indebtedness?

A. No, I would not. I could have reviewed it because generally they are downloaded in a system that we have linked to our attorneys.

Q. Scanned?

A. Yes. Imaged.

Q. Imaged?

A. Um-hmm.

Q. Do you know whether it's general practice to bring up the image of the Complaint when you're reviewing the foreclosure work screen?

A. No, I would not.

Q. So typically you would not examine the Complaint before signing the affidavit?

A. That's correct.

Q. We've already covered that you review the foreclosure work screen.

What are the "relevant loan documents" that are referenced in paragraph 2?

A. I would think that they would have been anything that is supplied to the foreclosing attorney; it would be the mortgage, the note, the title policy.

Q. **And did you review the relevant loan documents consisting of the mortgage and the note and the title policy before signing the Amended Affidavit of Indebtedness?**

A. **No, I did not.**

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 31 line 16 - p. 33 line 6) (emphasis added)

(c) "These records properly reflect loan payments, charges, and advances that are noted in the records at the time of the applicable transactions by persons whose regular duties include recording this information." (Affidavit, paragraph 3).

Ms. Kwiatanowski admitted that she had no knowledge of whether the information kept was recorded "at the time of the applicable transaction by persons whose regular duties include recording this information," and simply relies on the "system" without having any idea how or whether the "system" confirms entries are made accurately and timely:

Q. Do you agree that that sentence, the last sentence of paragraph 3 of your affidavit, indicates that the entries are made at the time of the transactions?

A. Yes, I do.

Q. Okay. So then, let me step back and re-ask the question. How is the system set up to confirm that those entries are made accurately and timely?

A. I wouldn't be able to answer that.
That's not my area of expertise.

Q. Well, you swore to this affidavit.

A. Well –

Q. You swore to the truth of the fact that the history is noted in the record at the time of the transaction.

How do you know that to be true?

A. Because I – I have to rely on our system of record.

Q. Right. I agree that it's set up for you to rely on that, but that's not what this says. It says you're swearing to the fact that that record is accurate and timely.

A. I just would have to have confidence in my system that it is true and correct.

Q. Okay. Is there any – let me go back to my hypothetical that I asked you, where a mortgagor has a conversation with a loan specialist or work-out specialist, or whatever their title is, and reaches some sort of payment plan. Okay?

A. Okay.

Q. How is the system set up to confirm, number one, that that conversation is entered that day, for example, versus an employee taking a note and entering it a week later when they come back from vacation; and now is it set up to confirm that the data is entered accurately, that the employee has the payment numbers and times of payment and method of payment entered accurately?

A. I wouldn't be able to answer that because that's not in my unit.

Q. As part of your unit, have you ever gone back to confirm how you can swear to the truth of this sentence?

A. There are times when I might have to review a loan as far as conversations, if a borrower was disputing something. There would be those times that I would review the notes and the account at that point.

But in – in this particular affidavit, I had no reason to go back to review anything.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 34 line 13 - p. 36 line 20)

The record in the instant case demonstrates why some minimal scrutiny (as otherwise sworn to in the subject Affidavits, but never actually completed by the Affiant) would be necessary:

> Q. And is it fair to say that as of November 25, 2003, the Jacksons were completely paid up with GMAC, according to that entry?
>
> A. I would – I would have to confirm that by looking at the payment history.
>
> Q. Well, tell me what else that entry would mean; in other words, why would that entry be made in the comment history if the payment history didn't reflect it as true?
>
> A. Well, as it should, it should agree. I don't – I'm not disputing that. But my feeling would be I would look to see how the payments were applied, to see if they were applied correctly, if I had a reason to review this account.
>
> Q. Which you did not?
>
> A. That's correct.
>
> Q. Well, isn't it fair to say that your affidavit indicates that the payment due February 1, 2004, is the one that placed this loan in default, correct?
>
> A. That's correct.
>
> Q. And that would be a payment due for December, a payment due for January, and a payment due for February of '04, correct?
>
> A. That's correct.
>
> Q. Did you ever go back to confirm whether those were the payments that threw this loan into default?
>
> A. I would only know what the due date is in the system.

Q. Just based on what the foreclosure work screen says?

A. That's correct.

Q. Would you know who the person – because I want to be fair, now that I have an understanding of your role in this.

Would you know who the person would be who would be most familiar with the entries on the comment history that we're going over right now?

A. I don't think I could give you a specific person, no.

Q. Okay. If I told you that Mr. and Mrs. Jackson have canceled checks showing payments cashed by GMAC on January 5th of '04 and February 14, of '04, you have no explanation for that; that's not your role in reviewing this?

A. That's correct. That's something payment research would handle.

Q. Okay. With regard to whether the payments were accurately allotted to principal and interest as opposed to paid from suspense or pay to suspense, that would not be your role?

A. That's correct.

Q. Allotting the payments accurately is not your role?

A. That's correct.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 49 line 10 - p. 51 line 21)

Unfortunately, while the Affidavit reflecting sworn testimony to the Court indicates the Affiant has conducted a complete review of the file, GMAC's system is designed so that other departments within GMAC are responsible for reviewing the data:

Q. All right. Ms. Kwiatanowski, let me ask you this: Is there any reason or any way in the system that is set up within GMAC for the foreclosure work screen to indicate any problems or issues or disputes prior to the day you review it?

A. No.

Q. If there are comments in the – I forget what we called them – the comment history, if there are comments here that note, for example, that the borrower is having problems trying to get someone to resolve escrow and payment applications issues, if there are comments that say Account escrow payment may not be correct, sent for explanation, that type of thing, are any of those – or do any of those result in any sort of flags that get to the foreclosure work screen?

A. If there were any reason, if there was a dispute prior to a loan being referred, they would put what we call a CIT on the loan; that would prevent it from being referred while it was being researched.

Q. Okay. And I do see that, the listing for CIT, throughout this history.

What then, stops that CIT trigger and sends it on to your department, or stops the CIT hold and then sends it on to your department?

A. I believe there's -- I believe there's two different CITs for different lengths of time to keep it on hold. I believe – and also it would fall into someone's queue to see whether or not that should be removed prior to removing it; to see, for example, to see if the research has been completed. And if it has been and they find no error of GMAC's, then they would remove that CIT and that would move forward to foreclosure.

Q. Okay. Which department conducts that analysis –

A. It would –

Q. – is it done before it gets to your department or your unit?

A. Yes.

Q. Okay. How's that get done?

A. It would be through customer service. It would really depend on what the issue was as to what unit would be handling it.

Q. Okay. Well, for example, here we have – and I'm just summarizing this, and just because I think it is accurate – but there are entries here throughout with regard to a dispute in how the payments are being applied; you know, one notation here made by a GMAC individual that the account escrow payment may not be correct, sent for explanation.

How can you – or can you tell from that which unit is handling the review?

A. No, I cannot.

Q. What are the names of the units that do the reviews; you said there were two?

A. Well, there's a payment – there's payment research. There's an escrow unit if it were a dispute with taxes or insurance, they would need to review it. For an MI issue, that area would review it. It would all depend on the issue –

Q. Okay.

A. – who would be researching it.

Q. Is there a way to tell from the comment histories which units resolve the dispute?

A. It would show by that teller number on there who the associate was.

Q. Okay.

A. And then you would know from there what unit they would come from.

Q. And again, that gets done on the DocTrac – I'm sorry.

A. The XNet.

Q. XNet?

A. Preconversion, on the XNet.

Q. Okay.

A. Postconversion, we can do it right on our system.

Q. Is there a review process to make sure that the conclusion is accurate?

A. I wouldn't be able to answer that.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 58 line 7 - p. 61 line 24)

(d) swore and subscribed to the statements before a Notary.

Finally, Ms. Kwiatanowski admitted at the deposition she did not sign the Affidavits in front of a notary, but that it was "our" regular practice for the Affidavits to be placed in a folder and sent across the building to be signed by the notary, sometimes on another day:

Q. On Ms. Holmes' notary section, do you see there that she does not fill out the name of the person who is taking the oath?

A. I see that now, yes.

Q. And do you see that she also does not have a notary stamp?

A. I see that also, yes.

Q. Are you familiar with Pennsylvania's notary statute?

A. I realize that they have to have a stamp to notarize.

Q. And that both of those are violations of Pennsylvania's notary statute?

A. I would think so, yes.

Q. How is it that you and Ms. Holmes ended up in the same place at the same time for completion of the affidavit, how does that physically work?

A. Well, all documents that we sign already sworn in, she would hand me personally. So she would just sign off – she would notarize it after I signed off.

Q. Are you two in the same room when that's done?

A. Yes.

Q. Okay. How is that physically done, is what I am asking?

A. We would – anything that I would sign over to – anything I would sign off, I would give to her to notarize.

Q. Okay. And how – again, how is that physically done; do you and she meet in the same room, at the same time in the same place?

A. She is in the same building. I – I would leave – it could be more than just one affidavit in a folder and I waited for her to notarize.

Q. Okay. But by then, I'm taking it that she notarizes it at a different time than you sign it?

A. That's correct.

Q. Okay. Is that also true for the signature on Jackson 00008?

A. Yes, that's correct.

Q. And that appears to be a Brenda Staehle?

A. Brenda Staehle.

Q. Staerle, S-T-A-E-R-L-E.

A. Actually it's S-T-A-E-H-L-E.

Q. Okay. Thank you.

And she does indicate that you are the person swearing, and she does have her notary stamp here. But what you're indicating is you signed the document –

For example, the Amended Affidavit of Indebtedness, which is 6 through 8 on our Bates stamp, you sign the document, you put it in a folder, it gets routed to Ms. Staehle and then she signs it at a later time?

A. That's correct.

Q. Do you know if she signs it on the same day that you do?

A. Generally, yes, she would.

Q. How do you know that, what's the control for that?

A. Because they would try to complete something within the same day; as we have our guidelines to follow and our time frames to get it back to the processor, to supply it back to the attorney.

Q. Okay. But there's no doubt that she doesn't notarize it – or she doesn't witness your signing?

She does not witness or did not witness you placing your signature on Bates stamp 8; is that correct?

A. That's correct.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 27 line 4 - p. 30 line 8) (emphasis added)

Clearly, the notary statutes of both Pennsylvania (57 P.S. 158) and Florida (Section 117.05, Florida Statutes) are violated by the process used by GMAC in the instant case (and in all other cases, given the procedure outlined by Ms. Kwiatanowski.) Violation of Florida's notary statutes in the manner described (notarizing a signature if the person whose signature is being notarized is not in the presence of the notary at the time) constitutes malfeasance and misfeasance in the conduct of official duties, pursuant to Section 117.107(9), Florida Statutes. Under Pennsylvania law, when a notary certifies a document, the notary attests that the document has been executed, that the notary *was confronted by the signor*, that the signor is the person whose name is subscribed, and that the notary is *verifying the date of execution*. In Re Fisher, 320 B.R. 52, at 63 (E.D. Penn. 2005) (emphasis added.)

5. As referenced above, the Affidavits of Indebtedness filed by GMAC in furtherance of the foreclosure constitute sworn testimony to this Court in validation of the debt and GMAC's right to collect the debt. Unfortunately, the Affidavits are rife with falsehoods and misstatements; GMAC's system does not allow the Affiant (or her entire department, for that

matter) any opportunity to review the actual history of the loan or any of the loan document, as the Affidavit otherwise maintains to the Court. Defendants assert the filing of such false sworn testimony is a fraud upon this Court.

6. It is appropriate for the trial court to dismiss an action based on fraud, provided that there is a blatant showing of "fraud, pretense, collusion, or other similar wrongdoing." Distefano v. State Farm Mutual Automobile Ins. Co., 846 So. 2d 572, 574 (Fla. 1st DCA 2003).

7. Misrepresentations in the Affidavit are willful fraud, interfering with the Court's "ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Id.*

8. This Court should dismiss the pending action with prejudice and award such other relief as the Court deems just and appropriate.

WHEREFORE, Defendants Robert and Lillian Jackson, respectfully request this Court enter sanctions against Plaintiff, including entry of a Dismissal with Prejudice and such other relief as the Court deems just and appropriate.

DATED at Jacksonville, Duval County, Florida, this 3 day of March, 2006.

LAW OFFICES OF TROMBERG & KOWALSKI

JA Kowalski

Fred Tromberg, Esquire (FBN: 246514)
James A. Kowalski, Jr., Esquire (FBN: 852740)
Charlie F. Schmitt (FBN: 0012803)
4925 Beach Boulevard
Jacksonville, FL 32207
Telephone: (904) 396-5321
Facsimile: (904) 396-5730
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 3 day of March, 2006, to Diana B. Matson, Esq., 2691 East Oakland Park, Suite 303, Ft. Lauderdale, FL 33306.

James A. Kowalski, Jr., Esquire

Exhibit "A"

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NUMBER: 16-2004-CA-4835-XXXX-MA

DIVISION: CV-E

TCIF REO2, LLC,

Plaintiff,

v.

MARTIN L. LEIBOWITZ, AS TRUSTEE, etc., et al.,

Defendants.

_______________________________/

NOTICE OF DEPOSITION OF MARGIE KWIATANOWSKI WITH REQUEST TO PRODUCE DOCUMENTS AT DEPOSITION (BY VIDEOTAPE RECORDING)

TO: Diana B. Matson, Esq.
2691 East Oakland Park Blvd.
Suite 303
Fort Lauderdale, FL 32306

PLEASE TAKE NOTICE that on **Tuesday, January 31, 2005, at 12:30 p.m. and continuing thereafter until complete,** at 500 Enterprise Road, Horsham, Pennsylvania, 19044, the Defendants, Robert Jackson and Lillian Jackson, will take the videotaped deposition of the following:

MARGIE KWIATANOWSKI

upon oral and video examination pursuant to the Florida Rules of Civil Procedure before Esquire Deposition Services, or before some other officer authorized by law to take depositions. Said deposition is being taken for the purpose of discovery, for use at trial, or both.

At the date, time and place of the deposition, the witness shall have with her the following:

1. All books, records, and documents kept or maintained by Plaintiff and or its agents or employees which relate in any way to Robert and Lillian Jackson.

2. Any and all documents, electronic memoranda, policy manuals, servicing manuals, or other items of any kind reviewed in preparation for completion of that certain Affidavit of Indebtedness dated July 15, 2004 and Amended Affidavit of Indebtedness dated October 20, 2005, copies of which are attached hereto.

DATED, at Jacksonville, Duval County, Florida, this 8 day of December, 2005.

LAW OFFICES OF TROMBERG & KOWALSKI

Fred Tromberg, Esquire (FBN: 246514)
James A. Kowalski, Jr., Esquire (FBN: 852740)
Charlie F. Schmitt, Esquire (FBN: 12803)
4925 Beach Boulevard
Jacksonville, FL 32207
Telephone: (904) 396-5321
Facsimile: (904) 396-5730
Counsel for Defendants Robert and Lillian Jackson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery, this 8 day of December, 2005, to Diana B. Matson, Esq., 2691 East Oakland Park, Suite 303, Ft. Lauderdale, FL 33306.

James A. Kowalski, Jr., Esquire

cc: Esquire Deposition Services
1600 JFK Boulevard, Suite 1210
Philadelphia, PA 19103

IN THE CIRCUIT COURT FOR DUVAL
COUNTY, FLORIDA. CIVIL DIVISION

CASE NO. 162004CA004835XXXXMA

TCIF REO2, LLC,

Plaintiff,

vs.

MARTIN L. LEIBOWITZ, AS TRUSTEE UNDER THE JACKSON FAMILY LAND TRUST DATED NOVEMBER 18, 2002; ROBERT L. JACKSON; LILLIAN M. JACKSON; WILLIAM W. MASSEY, III; STATE OF FLORIDA DEPARTMENT OF REVENUE; UNKNOWN TENANT NO. 1; UNKNOWN TENANT NO. 2, et. al.,

Defendants.

______________________________/

FILED
JUN 14 2006
CLERK CIRCUIT COURT

CV-E

THIS INSTRUMENT
IN COMPUTER
J.T.

PLAINTIFF'S NOTICE OF COMPLIANCE WITH THIS COURT'S ORDER DATED MAY 1, 2006

COMES NOW, the Plaintiff, TCIF REO2, LLC., by and through its undersigned counsel, and files this Notice of Compliance with this Court's Order dated May 1, 2006, and states that the Plaintiff has forwarded a check to opposing counsel as required pursuant to paragraph 3 of said Order, and has simultaneously herewith submitted the Directive to the Court, as required pursuant to paragraph 4 .

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Compliance has been sent via U.S. Mail this 12th day of June, 2006 to all parties on the attached Service List.

SMITH, HIATT & DIAZ, P.A.
Attorneys for Plaintiff
2691 East Oakland Park Boulevard, Suite 303
Fort Lauderdale, Florida 33306
Telephone: (954) 564-0071
Facsimile: (954) 564-9252

BY: ______________________
ROY A. DIAZ
Florida Bar No. 767700

H:\CLIENT\6126-24564\Notice of compliance with court order 5-1-06.wpd

SERVICE LIST
Case No. 162004CA004835XXXXMA

Martin L. Leibowitz, as Trustee under
the Jackson Family Land Trust
2120 Oak Street
Jacksonville, FL 32204

Fred Tromberg, Esq.
4925 Beach Blvd.
Jacksonville, FL 32207
Attorney For Robert L. Jackson
And Lillian M. Jackson

William W. Massey, III
2254 Riverside Ave
Jacksonville, FL 32204

State of Florida Department of Revenue
c/o Dr. Dr. James A. Zingale, Executive Director
501 South Calhoun Street, Carlton Building, Room 104
Tallahassee, FL 32399

Smith,
Hiatt &
Diaz, P.A.
ATTORNEYS

2691 E. Oakland Park Blvd.
Suite 303
Fort Lauderdale, Florida 33306
(954) 564-0071 Telephone
(954) 564-9252 Facsimile

Mailing Address:
PO Box 11438
Fort Lauderdale, Florida 33339-1438

THIS INSTRUMENT IN COMPUTER J. THAYER

June 12, 2006

RECEIVED
JUN 13 2006
BERNARD NACHMAN

Via Overnight UPS

The Honorable Bernard Nachman
Duval County Courthouse
330 E. Bay Street, Room 202
Jacksonville, FL 32202-

File un

RE: TCIF REO2, LLC v. MARTIN LEIBOWITZ, as Trustee, et al.
Case No. 162004CA004835XXXXMA

CV-E

Dear Judge Nachman:

Enclosed with this correspondence is a courtesy copy of the Plaintiff's Notice of Compliance with this Court's Order dated May 1, 2006, and the original signed Directive from GMAC regarding its policies on Affidavits being filed with the court in connection with mortgage foreclosure cases.

Thank you for your consideration.

Respectfully submitted,
SMITH, HIATT & DIAZ, P.A.

Roy A. Diaz
For the Firm

Enclosures

cc: James A. Kowalski, Jr., Esq

FILED 06 14 '06 PM 02:46 JTH FULLER

A POLICY DIRECTIVE FROM THE LEGAL STAFF

DOCUMENT SIGNATURE PRACTICES

The Legal Staff and its retained outside counsel present evidence to the courts in probably all jurisdictions. This evidence takes the form of written documentation signed by authorized corporate representatives. Some of these documents are notarized either as a simple notarial certificate and others notarized as sworn instruments before the notary. The following directives make not only good business sense but are commanded by statute. Thus, besides financial impact in the cases we handle, the signing process may invoke sanctions by a court. It is the integrity of our cases that is at stake and we cannot afford anything less than full accuracy.

1. Any signatory in behalf of the corporation must read and fully understand the instrument that is being signed. Do not sign unless you have that comfort level.
2. Any signatory in behalf of the corporation must be properly authorized by the corporation. When in doubt, consult with your manager or the Legal Staff for guidance.
3. Do not sign verifications on court pleading documents unless you have independently reviewed and checked the facts.
4. Sign instruments ***only in the presence of*** the witnessing notary public.
5. If the text of the notarial certificate contains an oath (e.g. "Subscribed and sworn to before me. . ." or similar words) the notary must affirmatively say to the signer, "Do you so swear?".
6. Pre-signing notarial certificates before the signer are prohibited by law everywhere.

CERTIFICATION

The undersigned certifies that as of June 1, 2006, the attached Policy Directive on Document Signature Procedure has been distributed to the associate general counsel and associate counsel of the respective business units of GMAC Mortgage Corporation for distribution to authorized signatories within the enterprise. This Policy Directive is a reaffirmation of existing procedures incorporating the statutory mandates to notaries public of the respective residence states of such notaries public.

June 6, 2006

Barden

James J. Barden
Associate Counsel – Legal Staff

STATE OF MAINE
CUMBERLAND, ss.

BRIDGTON DISTRICT COURT
DOCKET NO. BRI-RE-09-65

FEDERAL NATIONAL MORTGAGE ASSOC.

Plaintiff

v.

NICOLLE BRADBURY

Defendant

and

GMAC MORTGAGE, LLC d/b/a DiTech, LLC .com and BANK OF AMERICA, NA

Parties-in-Interest

ORDER ON FOUR PENDING MOTIONS

The Court has reviewed each of the four pending motions before it, as well as all supporting materials, including supporting affidavits and statements of material fact. The Court held oral argument on September 1, 2010. Those present were attorneys Tom Cox, Esq. and Geoffrey Lewis, Esq. for Defendant, and attorney John Aromando, Esq. for Plaintiff and Party-in-Interest GMAC. Attorneys Cox and Aromando argued capably for their positions.

On the question of summary judgment, before the Court is Plaintiff's Renewed Motion for Summary Judgment, as well as Defendant's Motion for Revision and Reversal of the Partial Summary Judgment Order. By its motion, Plaintiff asks that the Court affirm its previously issued order of January 27, 2010 granting summary judgment in its favor on the issue of liability, and further seeks summary judgment in its favor on the issue of the amounts owed. The Defendant's motion seeks to set aside this Court's previous order granting partial summary judgment for Plaintiff.

Defendant urges that this Court set aside its order on the ground that in so ruling, the Court relied upon the affidavit of Jeffrey Stephan, which was deficient under M. R. Civ. P. 56(e) because Mr. Stephan had signed the affidavit outside the presence of a notary and without reading its contents. The Plaintiff contends that the order can stand even putting aside the Stephan affidavit, and in any event has sought to cure the irregularities in its filing by submitting a properly sworn affidavit to support its motion.

There are, however, deficiencies in Plaintiff's filing which are not cured by the newly-submitted affidavit, namely deficiencies in its statement of material facts (SMF). The Law Court has made clear that in ruling on a summary judgment motion, Maine courts are "neither required *nor permitted* to search outside the facts properly referenced in the statements of material facts ...." *See, e.g, Camden Nat'l Bank v. Peterson*, 2008 ME 85 ¶ 26, 948 A.2d 1251, 1258 (emphasis added). In *Chase Home Finance LLC v. Higgins*, 2009 ME 136, 985 A.2d 508, the Law Court set forth a list of those facts which "must be included in the mortgage holder's statement of material facts." *Id.* at ¶ 11, 985 A.2d at 511. Plaintiff was bound to abide by this mandate, because both its initial and renewed summary judgment motions were filed after the June 15, 2009 effective date noted in *Chase*. *See id* at ¶ 11 n.2, 985 A.2d at 510 n. 2 (explaining that new statutes and rules will apply to summary judgment motions filed after their effective dates, regardless of when the foreclosure action was commenced, and adding: "We include the new requirements here for future reference of parties moving for summary judgment in residential foreclosure actions").

Neither Defendant's initially-filed statement of material facts nor its revised statement of material facts comports with *Chase*. For example, the mortgage holder's statement of facts must include "the existence of the mortgage, including the book and page number of the mortgage, and an adequate description of the mortgaged premises, including the street number, if any." *Id.* at ¶ 11, 985 A.2d at 511 (citing P.L. 2009, ch. 402 §§ 9, 17, effective June 15, 2009). Plaintiff's initial and subsequently filed statement of facts provide the book and page number, but fail to include the street address. *See* Plaintiff's SMFs at ¶ 2. Failure to include the street address is enough in itself to preclude the granting of summary judgment. *See Mortgage Elec. Registration Sys. v. Saunders*, 2010 ME 79 ¶ 25 (explaining that "While the book and page number – but not the mortgaged property's address – were included in the affidavit supporting one of MERS's original statements of material fact, facts not set forth in the parties' statements of material facts are not part of the summary judgment record").

Plaintiff's SMFs contain other omissions as well. It is not enough to state, as Plaintiff does, that "Demand has been made upon Defendant for payment of all amounts due ...." Plaintiff's SMFs at ¶ 5. 14 M.R.S.A. § 6111 requires that a mortgagee's default notice set forth the mortgagor's right to cure, and specifies the requisite content of such notices as well as the procedures which must be followed. As the Law Court stated in discussing compliance with the statutory written notice requirements of foreclosure, "For a mortgagee to legally foreclose, all steps mandated by statute must be strictly enforced." *Camden Nat'l Bank*, 2008 ME at ¶ 21, 948 A.2d at 1257. Plaintiff's statements of fact fail to set forth facts showing compliance with § 6111. Granting summary judgment despite such an omission would contravene the Law Court's clear pronouncements on this issue.

Accordingly, this Court's Partial Summary Judgment Order dated January 27, 2010 is hereby vacated per the request in the Defendant's Motion for Revision and Reversal, and Plaintiff's Renewed Motion for Summary Judgment is denied. No further summary judgment motions will be heard, as the deadline for filing dispositive motions has long passed and Plaintiff has already been given a second bite of the apple. The parties have twenty days to file an agreed pre-trial order so that this matter may promptly be placed on the trial list in Portland. This file is now transferred to the Portland District Court for further filings and trial.

In addition to renewing its Motion for Summary Judgment, Plaintiff has also filed a Motion for Entry of Protective Order pursuant to M.R. Civ. P. 26(c). This motion is likewise denied.

Rule 26(c) provides that "for good cause shown" a court may enter a protective order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ...." M.R.Civ. P. 26(c). Plaintiff seeks a protective order "prohibiting the dissemination of discovery materials obtained in this case." Plaintiff's Motion for Entry of Protective Order at 7. As grounds for its motion, Plaintiff points to the embarrassment GMAC and its employees have suffered, and will continue to suffer, from the posting of excerpts from Stephan's deposition transcript on an Internet blog. The Court is not persuaded that the Plaintiff has shown the requisite "good cause" to justify entry of a protective order in this case. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988) (agreeing with Second Circuit in noting that "the party seeking a protective order has the burden of showing that good cause exists exists for issuance of that order.... [and] the obverse is also true, i.e. if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection") (citation omitted).

Stephan's deposition was taken to advance a legitimate purpose, and the testimony elicited has direct probative value to this dispute. Attorney Cox did not himself take action other than to share the deposition transcript with an attorney in Florida. That the testimony reveals corporate practices that GMAC finds embarrassing is not enough to justify issuance of a protective order. Further, Plaintiff has failed to establish that GMAC has been harmed specifically as a result of the dissemination of the June 7, 2010 deposition transcript, given that similarly embarrassing deposition testimony from Stephan's December 10, 2009 Florida deposition also appears on the Internet, and will remain even were this Court to grant Plaintiff's motion. Accordingly, because Plaintiff has failed to satisfy its burden of persuasion under Rule 26(c), its Motion for Entry of Protective Order is denied.

In addition to seeking the reversal of this Court's previously granted Order for Partial Summary Judgment, the Defendant has moved for sanctions pursuant to M.R. Civ. P. 56(g). This motion is granted in part, as explained below.

The facts underlying Defendant's motion are for the most part undisputed. Plaintiff does not dispute that its affiant, Jeffery Stephan, in his role as limited signing officer for GMAC, Plaintiff's servicing agent, signed the affidavit which Plaintiff submitted in support of its Motion for Summary Judgment without even reading it and without signing in the presence of a notary. These facts came into the record because the

Defendant went to the time and expense of traveling to Pennsylvania to take Stephan's deposition. In that deposition, which took place on June 7, 2010, Stephan testified that he signs some 400 documents per day, and that the process he follows in signing summary judgment affidavits is consistent with GMAC's policies and procedures.

The Court is particularly troubled by the fact that Stephan's deposition in this case is not the first time that GMAC's high-volume and careless approach to affidavit signing has been exposed. Stephan himself was deposed six months earlier, on December 10, 2009, in Florida. His Florida testimony is consistent with the testimony given in this case: except for some limited checking of figures, he signs summary judgment affidavits without first reading them and without appearing before a notary. Even more troubling, in addition to that Florida action, in May, 2006 another Florida court not only admonished GMAC, it sanctioned the Plaintiff lender for GMAC's affidavit signing practices. As part of its order, the Florida court required GMAC to file a Notice of Compliance, indicating its commitment to modify its affidavit signing procedures to conform to proper practices. The experience of this case reveals that, despite the Florida Court's order, GMAC's flagrant disregard apparently persists. It is well past the time for such practices to end.

Accordingly, Defendant asks that this Court impose sanctions pursuant to M.R. Civ. P. 56(g), which provides:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Although there are no Maine Law Court cases applying it, the plain language of Rule 56(g) makes clear that the Court must determine, first, whether it appears "to the satisfaction of the court" that an affidavit submitted for summary judgment purposes was presented "in bad faith or solely for the purpose of delay." The Law Court has defined "bad faith", albeit in a different context: "Bad faith 'imports a dishonest purpose and implies wrongdoing or some motive of self-interest.' Bad faith means 'dishonesty of belief or purpose ....'" *Seacoast Hangar Condo. II Ass'n. v. Martel*, 2001 ME 112 ¶ 21, 775 A.2d 1166, 1171-72 (citing a Utah case and Black's Law Dictionary).[1] It is left to the Court's discretion to determine whether offending conduct rises to the level of "bad faith" such that Rule 56(g) sanctions are warranted. *See, e.g., Cobell v. Norton*, 214 F.R.D. 13, 20 (D.D.C. 2003) (noting that "as a practical matter a court has wide discretion in deciding what constitutes 'bad faith'") (citing Wright & Miller, Federal Practice and Procedure § 2742 (3d ed. 1998)). If a Court is satisfied that the affidavit was

---

[1] *Seacoast Hangar*'s definition of "bad faith" occurred in the context of discussing the business judgment rule, which "does not insulate directors from liability for breach of their fiduciary duties if they 'acted primarily through bad faith or fraud ....'" *Id.* at ¶ 20 n. 1, 775 A.2d at 1171 n.1 (citation omitted).

submitted in bad faith, then the mandatory language of Rule 56(g) requires that the Court forthwith order "the party employing [the affidavit] to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees." M.R.Civ. P. 56(g).

Both parties cite *Fort Hill Builders, Inc. v. National Grange Mut. Ins. Co.*, 866 F.2d 11 (1st Cir. 1989), in which the First Circuit analyzed the cases applying the Federal Rule 56(g) to conclude that the matters in which sanctions were imposed involved "particularly egregious" conduct. Characterizing its misconduct as a mere "procedural deficiency," Plaintiff urges the Court to find no bad faith; Defendant, on the other hand, argues that, on the spectrum of egregiousness, the conduct at issue more than meets the standard for bad faith under the rule.

The Court agrees with Defendant, and finds to its satisfaction that the Stephan affidavit was submitted in bad faith. Rather than being an isolated or inadvertent instance of misconduct, the Court finds that GMAC has persisted in its unlawful document signing practices long after and even in the face of the Florida Court's order, and that such conduct constitutes "bad faith" under Rule 56(g). These documents are submitted to a court with the intent that the court find a homeowner liable to the Plaintiff for thousands of dollars and subject to foreclosure on the debtor's residence. Filing such a document without significant regard for its accuracy, which the court in ordinary circumstances may never be able to investigate or otherwise verify, is a serious and troubling matter. Accordingly, the Court orders Plaintiff[2] to compensate Defendant's counsel for his attorney's fees and costs "which the filing of the Affidavit caused [him] to incur" – in other words, that Plaintiff pay Defendant's counsel for his time and expenses in preparing for and taking Stephan's deposition, as well as for his time and expenses in preparing for, filing, and prosecuting Defendant's Rule 56(g) motion.[3]

---

[2] As the Florida court imposed sanctions on the Plaintiff lender for GMAC's conduct, the Court likewise finds it appropriate to hold Plaintiff responsible for the conduct of its servicing agent, GMAC. Requiring Plaintiff to pay Defendant counsel's attorney's fees comports both with the language of Rule 56(g) (award of expenses should be ordered against party "employing" affidavits) as well as with principles of agency law. *See, e.g., Dupuis v. Federal Home Loan Mortgage Corp.*, 879 F. Supp. 139, 144 (D. Me. 1995) (holding that "[a]s a matter of agency law, it would be unfair for [the note and mortgage holder] to have the benefit of [the servicing agent's] servicing of the note and mortgage without also making [the note and mortgage holder] responsible for [the servicing agent's] excesses and failures").

[3] The Court declines to award fees for opposing Plaintiff's summary judgment or protective order motions, because those tasks were not "caused" by the bad faith affidavit. Because the Court finds its award of attorney's fees and costs to be a sufficient sanction for Plaintiff's bad faith conduct, the Court declines to explore the issue of contempt in this case as requested by Defendant.

Defendant has ten days from the date of this order to file an affidavit setting forth his time spent, usual hourly rate,[4] and expenses incurred in taking Stephan's deposition and filing and pursuing Defendant's Rule 56(g) motion. Plaintiff's written objection to Defendant's counsel's claimed expenses, if any, must be filed within seven days thereafter, and shall only address the sums claimed. The Court will thereupon issue an order setting forth the reasonable sum Plaintiff owes to Defendant's counsel.

The clerk shall docket this order by reference under Rule 79(a).

DATED: 9/29/10

Hon. Keith A. Powers, Judge
Maine District Court

[4] That Defendant's counsel is entitled to an award of attorney's fees is not affected by the fact that he has labored in this case on a pro bono basis. *Cf., Foster v. Mydas Assoc., Inc.*, 943 F.2d 139, 144 n.7 (1st Cir. 1991) (noting that civil rights attorneys who work pro bono and prevail are usually awarded attorney's fees under civil rights statutes).

6

Mr. JOHNSON. Thank you, sir.

Next we will have Mr. Cox give his statement. Thank you, sir.

TESTIMONY OF THOMAS A. COX, ESQUIRE, VOLUNTEER PROGRAM COORDINATOR, MAINE ATTORNEYS SAVING HOMES PROJECT, PORTLAND, ME

Mr. COX. Chairman Johnson, Members of the Committee, thank you for this opportunity to be here today. I am retired from the private practice of law in Maine, where for many years I represented lenders as well as the FDIC in loan litigation matters. For the past

2½ years I have been working full-time as a volunteer with Pine Tree Legal Assistance of the Maine Volunteer Lawyers Project. I have come to know the foreclosure industry well from both sides of the street.

At the hearing conducted by this Committee on December 2, 2010, representatives from Treasury, the Federal Housing Finance Agency, and the Office of the Comptroller of the Currency each said that their agencies first learned of the issues relating to dishonest foreclosure affidavits and other foreclosure irregularities when the news broke in the press in September of this year. Those were stunning admissions. These issues have existed for years now and have been widely known to those of us representing homeowners. There was a massive failure in the regulators' oversight of these servicers. The issues we are talking about today should have been immediately apparent from any reasonably diligent examination of the servicer's foreclosure operations.

Because the time allowed for me to speak is so brief I am going to address my remarks solely to my dealings with GMAC Mortgage over the last several months.

Problems with GMAC Mortgage were first exposed on the public record by Attorney Kowalski in Florida back in 2006 when he was dealing with a robo-signed affidavit from a GMAC limited signing officer that was executed in 2004. So we know these activities go back at least 6 years. The Florida court sanctioned GMAC for that conduct in 2006, but GMAC rewarded its employee who was the cause of those sanctions with a promotion. She became the supervisor of GMAC's document signing department where she is the supervisor the GMAC's current robo signer, Jeffrey Stephan. It was his dishonest affidavit signing practices revealed in the deposition that I took of him on June 7th that forced GMAC to finally announce a halt in sales and evictions from foreclosed homes on September 17th of this year. Stephan, who signs between 8 to 10,000 documents a month, testified on June 7th that when his affidavits state he has personal knowledge of the facts stated in them, he doesn't. When his affidavits state that he has custody and control of loan documents at issue, he doesn't. When his affidavit states that he is attaching true and accurate copies of loan documents to his affidavits, he has no idea if that is true because it doesn't even look at them. And Stephan admitted that when his affidavits contained a sign attestation by a notary public that he personally appeared to be sworn, he doesn't even bother to do that. Furthermore, he testified that his practices are fully in accordance with GMAC Mortgage practices and procedures.

When GMAC Mortgage realized the damaging admissions made by Jeffrey Stephan in the deposition I took, rather than immediately moving to correct the problem, GMAC sought to cover it up. GMAC sought money sanctions against me personally for sharing that deposition transcript with other foreclosure defense lawyers around the country. They sought an order from the court that it be used in no other case and they sought an order from the court that it be retried from any lawyers who had received it from me.

In the end the Maine court denied the motion for sanctions that GMAC sought and imposed affirmative sanctions against GMAC for its bad faith affidavit signing practices and ordered GMAC to pay attorneys fees sanctions in that one case alone of $27,000.

Very recent actions of GMAC Mortgage prove that it is not prepared to cease its use and reliance upon these false affidavits. At the hearing conducted by the House Subcommittee on Housing and Community Opportunity on November 18th, 2010, Thomas Marano, the CEO of Ally Financial, the parent corporation of GMAC Mortgage, testified that GMAC is no longer proceeding with foreclosures based upon Stephan's affidavits without first going to the courts and seeking approval to use them. This fall we notice that GMAC Mortgage was doing exactly the opposite in Maine and was proceeding with foreclosure judgments based upon those false affidavits. We brought a Maine State court class action against GMAC seeking an injunction to stop it from continuing these offensive practices.

GMAC has vigorously opposed that effort to prevent the Maine State courts from even considering our request for injunctive relief. GMAC removed our case to the United States District Court in Maine, where the Anti-Injunction Act prohibits that court from enjoining any State court proceedings.

In light of these efforts by GMAC to avoid any judicial consideration of an injunction, the District Court ruled just this past Friday that even though we clearly had a right to a hearing on the merits in the State court, that court was powerless to grant any relief.

I submit to you that there has been abuse of our judicial systems by the foreclosure industry on an unprecedented and truly massive scale. Economic interests are driving this abuse. Until these perverse economic interests are addressed and until the regulators truly start monitoring the loan servicers and until the force of the criminal justice system is brought to bear upon the dishonest conduct of the servicers, including more than just the robo signers, those at higher levels who clearly have been aware of and condoned and ordered this conduct, there is not likely to be enduring change in this industry.

I thank you for the opportunity to be here today, and I welcome for questions.

[The prepared statement of Mr. Cox follows:]

PREPARED STATEMENT OF THOMAS A. COX

Foreclosed Justice: Causes and Effects of the Foreclosure Crisis

Written Testimony

of

Thomas A. Cox, Esq.
Volunteer Program Coordinator
Maine Attorneys Saving Homes
A joint project of Pine Tree Legal Assistance and
The Maine Volunteer Lawyers Project

Before the House Judiciary Committee

December 2, 2010

THE FORECLOSURE CRISIS AND THE RULE OF LAW

> Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.
>
> *Plato*

> In America, *the law is king.* For as in absolute governments the King is law, so in free countries the law *ought* to be king; and there ought to be no other.
>
> *Thomas Paine,* Common Sense, 1776

I. INTRODUCTION.

Chairman Conyers, Ranking Member Smith and members of the Committee, thank you for inviting me to testify today regarding the causes and effects of the foreclosure crisis.

I am here today to speak for two constituencies. Foremost in importance are the millions of homeowners who have lost their homes, or who are at risk of losing their homes in the present foreclosure crisis. The other is the supremely dedicated, and vastly outnumbered, group of lawyers from around the country which is doing its best to protect these homeowners and which has been instrumental in exposing the current foreclosure scandal.

I call myself a retired lawyer these days, although the last two and one half years of my retirement has been dedicated on a full time basis to the work of the Maine Attorneys Saving Homes ("MASH") project. MASH is a project jointly sponsored by Maine's legal services organization, Pine Tree Legal Assistance and its affiliated Maine Volunteer Lawyer's Project. In the MASH project we have trained a network of over 60 private practice attorneys to assist in providing pro bono representation to Maine homeowners undergoing foreclosure. We act as a clearinghouse to intake these cases and refer them out to private pro bono counsel; and after referrals are made, I provide back up consultation and support to those lawyers. I function purely as a volunteer and receive no compensation, directly or indirectly from Pine Tree Legal Assistance of the Maine Volunteer Lawyers Project.

I have been a lawyer for over forty years now. Fresh out of law school in 1969, I went to work for a non-profit organization in Boston called Citizens Housing and Planning Association where we were working to help increase and upgrade housing resources for low income residents. Following that I was in private practice for almost thirty years. During much of that time I represented major banks and financial institutions in Maine. During the much different banking crisis of the late 1980s and early 1990s I represented these banks, as well as the FDIC, in many foreclosure and loan litigation cases. I prepared and litigated many foreclosure summary judgment motions and know the requirements of that system well.

In 2008, after several years away from the legal profession, I began my volunteer legal work for MASH. What I encountered there was a stunning reversal to what my practices had been in representing banks and the FDIC twenty years earlier. Certainly the volume of foreclosure cases is huge when compared to normal times, but the conduct of the mortgage servicers and their lawyers in bringing these cases is what really astonished me. Their conduct was uniformly careless at best to downright deceptive and fraudulent at worst. I can say with professional pride that in my days as a bank lawyer, I do not believe that I ever lost any motion for summary judgment that I filed in a foreclosure case. That was so because they were prepared honestly and with respect for the rule of law as set forth in our rules of civil procedure.

What I encountered when I came to MASH in 2008 were large volumes of summary judgment motions of mortgage servicers prepared with little regard for honesty, with little to no respect for the legal protections afforded to homeowners under our foreclosure statutes and under our rules of civil procedure, and with utter disregard for the integrity of the judicial system. I estimate that, in foreclosure summary judgment motions handled by MASH volunteer lawyers and by Pine Tree Legal Assistance, the motions for summary judgment of the servicers are denied more than 75% of the time. The loan servicing industry and their lawyers are not troubled by this loss ratio because they know that fewer than 6% of homeowners needing legal assistance in Maine can obtain such assistance. In the other 94% of their foreclosures, they face no opposition in their race to foreclosure.

I considered assigning to this testimony the title "Two Different Worlds of Foreclosures" after listening to and reading the testimony presented to the House Financial Services Housing and Community Opportunity Subcommittee by representatives of the loan servicers on November 18, 2010. The world of foreclosures and the perfect record of outcomes described by Mr. Marano of Ally Financial (the parent corporation of GMAC Mortgage) is so extremely different from what we, as lawyers experience representing homeowners a daily basis, that it does not seem like we are even on the same planet. For example, how can he ask us to believe that GMAC's foreclosure outcomes are all accurate when, as recently as a few weeks ago, I went into a foreclosure mediation proceeding in Maine where GMAC Mortgage certified (see Exhibit 11, p. 107, ¶ c.) that it owned the loan and it turned out that Freddie Mac owned the loan? (This is a common rather than an isolated example.)

Much of what follows in this testimony is focused upon GMAC Mortgage, LLC, because its conduct has consumed so much of my time over the last few months. However, the conduct described here has been widespread among almost all of the major loan servicers and has been prevalent throughout the industry.

II. CAUSES OF THE FORECLOSURE CRISIS IN THE LEGAL SYSTEM.

The economic causes of the foreclosure crisis have been well documented in presentations before the Senate Banking Committee on November 16, 2010 by Diane Thompson of the National Consumer Law Center[1] and the House Financial Services Committee on November 18, 2010 Professor Adam Levitan of Georgetown University and Julia Gordon of the Center for Responsible Lending,[2] as well as by other witnesses before this Committee. The aspect of the foreclosure crisis that I address here is its impact upon our judicial system and the homeowners caught up in it. The foreclosure crisis, as it is manifested in our judicial system, is defined by hundreds of thousands of perjurious affidavits that servicers have filed in summary judgment motions all over the country over at least the last several years.[3] These affidavits, signed by servicer employees, make the following dishonest claims:

- that they had custody and control of loan files when they didn't;
- that they had personal knowledge of the contents of those files when they never even looked at them;
- that they had personal knowledge of the truth of the contents of their affidavits when they never even bothered to read them;
- that the copies of the critical loan documents attached to their affidavits were true and correct when they never bother to look at those attachments; and
- that they appeared before notaries swear to the truth of the affidavits when they never did so.

The servicers claim that these are mere "technical defects." They assert that the underlying facts stated in every one of these affidavits as to loan details, default letters being timely sent, and loan amounts due are true. To the contrary, I know as a matter of my own direct involvement in many foreclosure cases, my work with the MASH lawyers in Maine, and my daily contact with foreclosure defense lawyers

---

1 http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a

2 http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1376

3 There are 23 judicial foreclosure states where the most common route to a foreclosure judgment is by a motion for summary judgment supported by sworn affidavit of servicer witnesses. Often a document called an "affidavit of debt" is required in non-judicial states as well.

all over the country, that the underlying facts in many of these affidavits simply are not true.

A. ABUSE OF THE SUMMARY JUDGMENT PROCESS.

1. HOW THE SUMMARY JUDGMENT PROCESS WORKS.

An understanding of the summary judgment process in foreclosure cases is required in order to understand what is happening in these foreclosure cases. Rule 56 of the Federal Rules of Civil Procedure (Exhibit 1 at page 23)[4] provides a process for avoiding trials when there is no genuine issue as to the material facts at issue in a lawsuit. In the application for summary judgment, in lieu of witnesses appearing in person to be sworn in and to testify, the testimony of a witness is presented by a sworn affidavit. It is important to note that Rule 56 requires that these affidavits, without exception, be based upon the personal knowledge of the witnesses signing them. The Rule permits only "admissible evidence".

Rule 56 permits no exceptions or lower standards for foreclosure cases. In a foreclosure case where an unopposed motion for summary judgment is filed, the only evidence in front of the judge is that mortgage servicer's employee's affidavit. Its honesty and integrity are crucial to a fair and just decision being made by a judge whether to enter a judgment of foreclosure that will result in the eviction of a family from its home. In the 94% or more of the cases where homeowners are unrepresented, it is likely that judgments of foreclosure will be entered based upon those dishonest affidavits.

In normal times, the summary judgment process should be ideally suited to foreclosure cases. This was the case back in the 1980s and 1990s when I was representing banks and the FDIC. These are not normal times, however. The utter chaos created by the loan securitization industry and perpetuated by the mortgage loan servicing industry means that such elemental facts as the identity of the party who really has the right to enforce the loan are often in doubt. There is often doubt about who possesses the note and what indorsements of it have been made; the concepts of possession and indorsement are key components of the question of who has the right to enforce the note. In addition, there is often doubt as to whether a proper notice of default was sent to the homeowner in a timely fashion. And, most important, there is often doubt as to whether a servicer has properly accounted for the payments made by the homeowner or has pumped up the homeowner's loan balance by improperly adding junk fees to the amount claimed to be due.

With all of these potential issues, it is critical that the servicers offer only those witnesses who are in a position to have the knowledge and experience

[4] The Maine Rules of Civil Procedure for state court proceedings are almost identical to the Federal Rules, and most states have similar rules of their own.

required to check the loan documents, check the servicers' underlying files, and provide accurate and honest evidence of the true facts relating to its loans. That person must be a servicer employee who would be capable of testifying in a real trial in court and able to vouch for the accuracy of its business records documenting the loan balances, not a just back-office functionary whose principal job is to sign papers.

2. HOW THE SUMMARY JUDGMENT PROCESS IS ABUSED BY MORTGAGE LOAN SERVICERS.

Jeffery Stephan of GMAC Mortgage, LLC represents the servicer industry's refusal to meet the requirements of a summary judgment affidavit. He had no function within GMAC other than to sign papers, including summary judgment affidavits. It is has been cheaper for GMAC to pay Stephan a low wage to sign papers than to hire and train a sufficient number of employees so that only employees who actually have the requisite personal knowledge of the critical facts will be signing its summary judgment affidavits.

An example of one of Stephan's affidavits is attached as Exhibit 2 at page 28. To an unsuspecting eye, the affidavit looks straightforward and appears to entitle Fannie Mae to judgment. I deposed Stephan in that case on June 7, 2010, and a summary of the transcript and the transcript itself are attached as Exhibits 3, at page 33 and 4 at page 37. His testimony was astonishing. When Stephan says in his affidavit that he has personal knowledge of the facts stated in his affidavit, he doesn't. When he says that he has custody and control of the loan documents, he doesn't. When he says that he is attaching "a true and accurate" copy of a note or a mortgage, he has no idea if that is so because he does not look at the exhibits. When he makes any other statement of fact, he has no idea if it is true.[5] When the notary says that Stephan appeared before him or her, he didn't, and when the notary says that Stephan was sworn, he wasn't.

GMAC Mortgage filed thousands of Stephan's affidavits in foreclosure cases all over the country in cases involving its own loans as well in cases where it was servicing loans for Fannie Mae, Freddie Mac, and trustees of mortgage-backed securitized trusts. This misconduct was not a recent development at GMAC Mortgage---it has been going on at least since 2004, well before the occurrence of the foreclosure crisis. This latter fact is evidenced by the sanctions imposed upon it in a Florida case in 2006 defended by Attorney Kowalski who is also testifying before you today. Copies of his motion attacking a 2004 affidavit just like Stephan's, the related court sanctions order against GMAC, and its in-house counsel's directive to fix the problem (which was ignored) are attached as Exhibit 5.

[5] Stephan asserts that the only thing that he does with an affidavit is to check "the figures" in the affidavit against a computer screen, but he has no knowledge of how those figures are created because he has no knowledge of how data is put into the system and has no knowledge of how the accuracy and security of the system is maintained.

I know from my personal experience over the past two and one half years that this kind of servicer fraud-upon-the-court activity is not isolated to GMAC Mortgage. It has been the norm across the entire foreclosure industry, including the other servicers represented here today, JPMorgan Chase and Bank of America.

3. HOW THE SUMMARY JUDGMENT PROCESS IS ABUSED BY THE LAWYERS REPRESENTING THE SERVICERS.

As Stephan explained in his deposition, it is the servicers' lawyers who prepare the summary judgment affidavits. A quick look at the first lines of Stephan's affidavit (Exhibit 2 at page 28) reveals the first sign of lawyer misconduct. When GMAC's lawyer prepared that affidavit, the name of the affiant was left blank, meaning that the lawyer did not know who was going to sign it. Without knowing who will be signing the summary judgment affidavit, the lawyer cannot fulfill his or her professional responsibility to know that the affiant is a competent witness and is presenting sworn statements truly based upon his or her personal knowledge.

The second obvious sign of servicer lawyer misconduct is that the affidavit discloses that the witness will be a "Limited Signing Officer." Any responsible lawyer seeing that title should be suspicious as to whether such a witness is anything more than a mere paper signer and as to whether that signer has the personal knowledge of the facts as required by Rule 56.

When I was representing banks and the FDIC, I firmly believed that it was my professional duty to present summary judgment affidavits to the courts only where I believed that the facts contained in those affidavits had evidentiary support. A lawyer cannot fulfill that duty without knowing who the person is for whom an affidavit is being prepared and without satisfying himself or herself that that person is in a position to have personal knowledge of the facts being stated. In my opinion, it is not ever proper for a lawyer to prepare and present a summary judgment affidavit without knowing the identity of the witness in advance and without knowing what it is about that person's job functions that qualify him or her to present critical evidence to the court. No lawyer would put a witness on the stand in a courtroom trial without first determining his competence to testify, and no lawyer should offer an affidavit of a witness on a summary judgment motion without first making the same determination.

These lawyers for the servicers are preparing and filing hundreds and often thousands of these affidavits annually. Yet they close their eyes to their professional obligations as officers of the courts they are working in to know that they are presenting honest evidence.

B. ABUSE OF THE BANKRUPTCY PROCESS.

Many foreclosures result from lost jobs, divorce, or illness resulting in unaffordable medical expenses. These same factors result in many debtors filing for protection under Chapter 13 of the Bankruptcy Code. Thus, many foreclosures are dealt with through the bankruptcy system. A 2008 study by Katherine Porter, Esq., currently a visiting professor at Harvard Law School, documented widespread and systemic abuse by servicers in the bankruptcy mortgage claims process.[6] Since the publication of Professor Porter's study of over 1700 Chapter 13 cases, the misconduct of the servicers has not only continued, it has increased to the point where the United States Trustee Program (a unit of the Justice Department) has recently begun to focus special attention on these abuses.[7]

In my private practice days, I often represented by bank and creditor clients in the Bankruptcy Court, and again I have been shocked by the abuses occurring in that court system. My current work with homeowners and their lawyers in foreclosure cases has revealed a level of servicer abuse and misconduct in the Bankruptcy Court that, not unsurprisingly, parallels the misconduct in state court foreclosure proceedings described above. Professor Porter's study details well the abuse of servicers in bankruptcy in how claims amount are improperly calculated in fees are improperly charged to homeowner loan accounts. What I want to address here is the abuse of servicers in documenting their standing to even assert secured claims against homeowners in bankruptcy.

1. HOW FORECLOSURES WORK IN BANKRUPTCY.

The requirement for a foreclosing party to document its mortgage claim against a homeowner in bankruptcy is similar to what is required in the summary judgment process. The servicer is required to file on behalf of the mortgage holder a proof of a secured claim documenting proof that the mortgage holder really does hold the home owner's note and mortgage and really does have the legal right to enforce the mortgage documents. If a mortgage holder seeks to foreclose within the context of a Chapter 13 proceeding, it is required to file a motion for relief from the automatic stay provisions of Section 362 of the Bankruptcy Code (11 U.S.C. §362) in order to obtain Bankruptcy Court permission to pursue a state court foreclosure proceeding. These bankruptcy motion papers are similar to those filed in a motion for summary judgment and must include a servicer's affidavit similar to that required for a summary judgment proceedings. The servicers are routinely presenting dishonest claims in these bankruptcy filings, just as they are routinely doing so in the summary judgment proceedings.

2. HOW THE BANKRUPTCY PROCESS IS ABUSED BY SERVICERS AND THEIR LAWYERS.

A series of case filings by JPMorgan Chase illustrate how servicers are abusing the bankruptcy process in pursuing foreclosures in that forum. A chronology of the illustrative filings prepared by Attorney Linda Tirelli of New York

[6] Katherine Porter. 2008. "Misbehavior and Mistake in Bankruptcy Mortgage Claims" http://works.bepress.com/katherine_porter/1/

[7] http://www.nytimes.com/2010/11/28/business/28gret.html?ref=business

is attached to this document as Exhibit 5 at page 51. Spanning a period of over two years and continuing even today JPMorgan Chase has engaged in pattern of filings in the Bankruptcy Court for the Southern District of New York that is simply breathtaking in the scope of dishonest and deceptive practices that it reveals.

I became familiar with the conduct of JPMorgan Chase and the series of cases chronicled by Attorney Tirelli as a result of a foreclosure proceeding filed in Maine by JPMorgan Chase as servicer for a loan alleged to be owned by Deutsche Bank. The Maine case is *Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2005-WL2 v. MacDonald* (Me. Dist. Ct. RE-08-385, Bidd.). In this case, JPMorgan Chase filed a motion for summary judgment and supported it by an affidavit of a person claiming to be one of its officers. In that affidavit, the JPMorgan Chase officer asserts that JPMorgan Chase once owned the loan and that it transferred it to Deutsche Bank in 2009. It attached to its officer's affidavit is a mortgage assignment purporting to evidence that transfer. When I examined the Pooling and Servicing Agreement that created the Deutsche Bank trust back in 2005,[8] it became clear that Deutsche Bank could not have purchased this loan from JPMorgan Chase in 2009 because that trust closed to the purchase of any new loans back in 2005.

Having been alerted to the probable fraudulent nature of the JPMorgan Chase affidavit, upon further research I found the *In re Neur* case in the Bankruptcy Court in the Southern District of New York described by Attorney Tirelli in Exhibit 5. In that case, involving the same parties, and exactly the same set of fraudulently created facts, the U.S. Trustee's office intervened and filed a motion for sanctions against JPMorgan Chase. In response, and in related depositions, JP Morgan Chase admitted that it had never owned the loan in question and that the purported assignment from it to Deutsche Bank was fictitious.

Even after admitting in *In re Nuer* in New York that it had created a fictitious chain of transfers in an effort to prove the right of Deustche Bank to enforce the Nuer loan, JPMorgan Chase made exactly the same dishonest and fictitious claim in the *MacDonald* case in Maine in an attempt to prove Deutsche Bank's right to enforce the MacDonald loan. When confronted by me in Maine, JPMorgan Chase withdrew its summary judgment motion. Had no homeowner lawyer been present in this Maine case, no judge would have ever known about JPMorgan Chase's attempted fraud upon the court, and a judgment of foreclosure would have been entered against Ms. MacDonald.

---

[8] The Pooling and Servicing Agreement is the telephone book sized document that creates the securitized trust and includes the provisions regarding the servicer's duties and compensation. Many of these Pooling and Servicing Agreements, known in the industry as PSAs, are publicly available on the SEC Edgar website. Yet as a part of their pattern of obstructive conduct, loan servicers, including JPMorgan Chase, routinely refuse to produce these PSAs in pre-trial discovery, claiming that they are proprietary documents that must be protected by confidentiality orders.

While the egregious misconduct of JPMorgan Chase is highlighted here, the pattern is widespread across the industry.

C. THE ECONOMIC AND OTHER REASONS FOR THE ABUSE OF SUMMARY JUDGMENT AND BANKRUPTCY PROCESSES BY SERVICERS AND THEIR LAWYERS.

One primary explanation for the plague of dishonest foreclosure affidavits is the desire of the servicers and their lawyers to maximize the amount of money they make on each foreclosure case. It is cheaper for the servicers and their lawyers to submit a dishonest affidavit than it is to take the time required to prepare and submit one that is honest and that respects the civil rules of procedure relating to motions for summary judgment.

The testimony of Professor Adam J. Levitan presented to the House Financial Services Housing and Community Opportunity Subcommittee on November 18, 2010, beginning on page 7, presents a detailed outline of how servicers are paid for servicing mortgage loans. In a nutshell, that compensation scheme provides the greatest economic benefit to servicers and their lawyers when they foreclose as swiftly as possible using the least possible amount of manpower. GMAC Mortgage, in its testimony to that same House Subcommittee, essentially admitted that it had cut corners when Mr. Marano stated that, with its 6 years of misconduct now fully exposed, it finally "has increased the number of employees handling foreclosure documentation."[9]

Saving time and expense and maximizing fee revenue also drives the lawyers who prepare the summary judgment motions and affidavits for the servicers. They are paid on a flat fee basis, meaning they receive the same amount of compensation for each foreclosure case, and without regard to whether one case takes more lawyer time than the next.[10] That incentive drives them to use paralegals and lower level employees to prepare summary judgment documents and to minimize the amount of lawyer time devoted to any case. From my own experience, I know that it takes substantial time to properly prepare a summary judgment motion and to communicate with the witness who signs the affidavit, just as it does when preparing a witness to testify in court. After all, that affidavit literally replaces a witness's testimony at trial. The fee structure imposed upon their lawyers by the servicers causes those lawyers to be unwilling to devote the needed time to prepare and present affidavits that are honest and that respect the Rules of Civil Procedure.

---

[9] Written Testimony of Mr. Thomas Marano, Chief Executive Officer, Mortgage Operations, Ally Financial Inc. before the Subcommittee on Housing and Community Opportunity, Committee of Financial Services, November 18, 2010.
http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1376

[10] The servicers also grade these lawyers on how fast they push the foreclosures through the legal system and reward those who are the most swift with substantial bonus fee payments.

In addition, the communications systems that servicers have imposed upon their lawyers make it almost impossible for those lawyers to fulfill their professional responsibility in presenting honest summary judgment motions. Most of the major servicers require their lawyers to use computer systems only for communications between the lawyers and the servicers. With rare exceptions, telephonic communications are discouraged, and they are often even prohibited. Thus major impediments have been placed in the way of any effort that a responsible lawyer might make to communicate with a servicer witness about preparing and signing an honest summary judgment affidavit. This convoluted communication system is also driven by economics and by the desires of the servicers to use the least amount of manpower possible on any given foreclosure.

A second major reason for the abuse of the summary judgment and bankruptcy processes by servicers is that the documents needed to prove the mortgage loan claims of their clients often do not exist or are defective. Servicers try to cure this problem by creating fictitious documents. A simple example again involves GMAC's Jeffery Stephan. In addition to signing summary judgment affidavits, he also signed note indorsements and mortgage assignments. In one of our GMAC cases in Maine, he attached to one of his summary judgment affidavits a never-before-seen note indorsement. We knew instantly that it was fictitious because it showed a chain of transfers not permitted by the Pooling and Servicing Agreement in that case. When we confronted GMAC with this fact in opposition to its motion for summary judgment, its lawyers reversed course and claimed that Stephan's indorsement was a mistake, and they then presented us with two new indorsements (that raise issues of their own).

Professor Adam Levitan, in Section III of his House Finance Committee written testimony beginning on page 19,[11] lays out in detail the documentation problems existing in the foreclosure industry. In the face of such problems, the desire of the servicers to foreclose quickly and cheaply leads them to attempt to create fictitious cures for these documentation problems, and they know that they can get away with it in the vast majority of cases where homeowners have no legal representation.

C. DISHONESTY, DENIAL, COVER-UP AND DEFIANCE IN THE MORTGAGE SERVICING INDUSTRY.

1. DISHONESTY.

It was dishonest for GMAC Mortgage, beginning at least as early as 2004, to submit affidavits to the courts in Florida where its officers stated that they had personal knowledge of defendants' loan files, that they had examined their loan files and determined that the allegations of the related foreclosure complaints were true, and that they knew the complaints accurately reflected the amounts due. That dishonesty was admitted when attorney Kowalski deposed the GMAC employee

[11] http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1376

who made those statements in 2006 and she admitted that none of those statements were true. See Exhibit 6, pages 64-76.) Any possible room for denial was removed when the judge in that case specifically found that "GMAC Mortgage Corporation submitted false testimony" (Florida Order, Exhibit 7, page 79), sanctioned it for that dishonesty, and ordered it to file proof that it had modified its corporate practices so that future affidavits would be accurate and honest.

It was dishonest for GMAC Mortgage to continue these exact same practices after having filed with that judge in the Florida court a document entitled, "A Policy Directive From the Legal Staff," certified on June 6, 2006 (Exhibit 8 at pages 85-86), by an "Associate Counsel - Legal Staff", claiming a corporate-wide correction of those practices. The extent of the dishonesty in the presentation of this never-followed policy statement is revealed by the fact that the GMAC witness in the Florida 2006 case, Margie Kwiatanoski, went on to become Jeffery Stephan's supervisor as head of the GMAC Mortgage Document Signing Department in 2008.

Further, GMAC had the audacity to argue to the United States District Court in Maine on August 10, 2010, that, because the 2006 Florida order only related to "servicing of loans 'within the state of Florida'" its relevance to GMAC's identical dishonesty in Maine cases was "significantly overstated." (See Exhibit 9 at page 94, 1s full par.). GMAC apparently believes that it was acceptable for it to go on submitting dishonest affidavits in all other states since it had not yet been caught and sanctioned in those states. For over six years now, GMAC has manifested a belief that it is not bound by the rule of law relating to the foreclosure of the homes of American families.

As the fifth largest loan servicer in the country servicing 2.4 million loans (according to the testimony of Thomas Marano), GMAC Mortgage has, since at least 2004, filed thousands upon thousands of these dishonest summary judgment affidavits in courts all across the country. It has now asked a subcommittee of this Chamber to believe the loan detail facts in every one of those affidavits was true and that not a single mistake occurred. Both common sense and evidence such as that in the recent case reported in the Cleveland Plain Dealer on October 19, 2010, involving three successive GMAC Mortgage foreclosures on an Ohio mortgage where there was no default (Exhibit 10, page 100), should permit no one to accept that assertion to be true.

In how many of these GMAC cases were affidavits submitted as to loan sums due where payments were improperly recorded? In how many were forced-place insurance policies improperly imposed by it at homeowner expense (as we have seen in Maine)? In how many were default letters never sent? In how many were the default letters utterly inadequate? In how many cases was the plaintiff named by GMAC not even the owner of the loan?[12] We cannot know the answers to these

[12] Attached hereto as Exhibit 11, page 105, is a Certification of Mortgagee signed by Jeffery Stephan on July 25, 2010 (almost seven weeks after his June 7, 2010 deposition) certifying

questions because of GMAC's failure to meet the "rule of law" requirements for the presentation of honest affidavits by witnesses who really had personal knowledge of the required facts.

2. DENIAL.

There is a persistent refusal in the servicing industry to be honest about its misconduct. Even at the House Finance Committee hearing on November 18, 2010, Ally Financial's Thomas Marano stated "Based upon our review to date, no loan was foreclosed unless the borrower was in default." Contrast that to the above cited report from the Cleveland Plain Dealer of a house wrongfully foreclosed upon by GMAC three times. Even without this example, given the utter chaos in the servicer industry, it defies credulity to believe that there is not one single case in which GMAC Mortgage has made a mistake. It is this refusal of GMAC Mortgage and the rest of the foreclosure industry servicers to recognize their misconduct and mistakes that makes it unlikely that the industry will reform itself without external intervention. Rather, it will seek to cover up that misconduct whenever it can.

3. COVER-UP.

When GMAC Mortgage was confronted with the evidence of Stephan's dishonest affidavits in Maine, its first effort was an attempt to silence me rather than to have its lawyers immediately go to the Maine courts and admit that GMAC had presented dishonest affidavits from Jeffery Stephan all across the State of Maine.[13] I deposed Stephan on June 7, 2010. On June 22, 2010, GMAC replaced its lawyers in that $85,000 foreclosure case with national litigation counsel out of Birmingham, Alabama, and a major national law firm based in Portland, Maine. Their first action in that case, taken on June 25, 2010, was not to notify the court that false evidence had been presented and to seek to withdraw Stephan's dishonest affidavits. Rather their first act was to file a motion for protective order in an attempt to bury the Stephan transcript. See Exhibit 16, page 131.

By its June 25, 2010, motion for protective order, GMAC Mortgage sought the imposition of money sanctions against me for what it called my "malicious dissemination" of Stephan's deposition transcript to other lawyers around the country defending homeowners in GMAC foreclosure cases. Even though I have been working as a volunteer lawyer for the past two and one half years and have not made a single penny off the sharing of Stephan's transcript with other

---

that GMAC owns the loan in question, when a check on the Freddie Mac website (see Exhibit 12, page 108) shows that Freddie Mac owns the loan. This one incident is by no means an isolated example of this kind of conduct from GMAC.

[13] Rule 3.3(c) of the Rules of Professional Conduct for Maine lawyers requires that "If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

lawyers[14], GMAC attempted to smear me with the claims that "Defendant's attorney wants the ability to disseminate discovery from this case for his own commercial purposes" and that I was seeking to "profit from litigation adverse to lenders." In addition, GMAC's new lawyers sought a court order to compel me to retrieve Stephan's transcript from those lawyers with whom I had shared it and to prevent me from using in any other GMAC case, even in other GMAC cases with Stephan affidavits where I was representing the homeowners. That motion was utterly unfounded and unsupported as is shown in our opposition to it, Exhibit 13 at page 111, and by the detailed order of our court in Maine denying it on September 24, 2010, and instead imposing sanctions against GMAC Mortgage for its bad faith conduct. See Exhibit 14 at page 122.

This GMAC Mortgage cover-up attempt came four years after the identical misconduct was sanctioned in Florida in 2006 (Exhibit 7 at page 78) and six months after it was again revealed in another deposition of Stephan in another Florida case on December 10, 2010. This history of dishonesty in GMAC's foreclosure practices, its effort to silence a lawyer who exposes those practices, and its refusal just a week ago in testimony before this Chamber to recognize the extent of its mistakes, compels the conclusion that the mortgage servicing industry cannot be trusted to reform itself.[15]

4. DEFIANCE.

In the statement of Ally Financial's CEO of Mortgage Operations, Thomas Marano, to the House Committee on Financial Services on November 18, 2010, he asserted that, in cases "[w]here the original affidavit was substantially correct, we are generally seeking the court's permission to proceed with the prior judgment." That is a categorically untrue and misleading statement. There are a significant number of cases in Maine where GMAC has obtained summary judgments but where no foreclosure sales have yet occurred. In not a single one of those cases has GMAC sought permission to proceed with a sale based upon such a judgment. We know of at least one recent instance (within the last month) where GMAC conducted such a sale without seeking court permission.

More importantly, we know that GMAC is strenuously resisting our efforts in Maine to obtain a court order stopping it from conducting sales of homes in all

---

[14] In fact, I have spent a fair amount of my own money sending copies of that transcript to other lawyers for their use in court proceedings in other states where GMAC Mortgage was continuing foreclosures based upon Stephan's dishonest affidavits.

[15] It also should be noted GMAC Mortgage delayed for two and one half mouths before notifying Freddie Mac of the discovery of Stephan's false affidavits. He was deposed on June 7, 2010, and it was not until August 25, 2010, that GMAC reported the problem to Fannie and Freddie. See Exhibit 15 at page 129. And it delayed for three more weeks before announcing on September 17, 2010 that it was halting sales of and evictions properties taken through its flawed foreclosure process.

cases where the foreclosure judgments are based upon Stephan's dishonest affidavits. This opposition, in violation of its own CEO's statements less than a week ago to a subcommittee of this Chamber, evidences its defiant refusal to acknowledge and correct is dishonest practices. GMAC's present conduct in Maine evidences a continuation of its six-year pattern of ignoring and defying the rule of law in the foreclosures conducted by it.

III. EFFECTS OF THE FORECLOSURE CRISIS

A. IMPROPER FORECLOSURES ARE OCCURRING.

I know from my work in Maine with many foreclosure defense lawyers that we are seeing a significant number of foreclosure actions where the claims of the servicers do not support judgments of foreclosure being sought. Knowing too that we, as lawyers, are seeing only a fraction of the foreclosure cases being filed, it is virtually certain that a significant number of improper foreclosures have been occurring, both in Maine and all over the country. I hear and see reports of wrongful foreclosure actions on virtually a daily basis in my daily communications with lawyers from around the country. I have no statistics to document the volume of these improper foreclosures apart from first hand experience and a constant flow of anecdotal reports. Diane Thompson of the National Consumer Law Center, beginning on Page 13 of her written testimony to the Senate Banking Committee on November 16, 2010,[16] cataloged the various kinds of servicer errors that are causing these wrongful foreclosures.

B. HOMEOWNERS ARE BEING DENIED LOAN MODIFICATIONS THAT WILL BENEFIT BOTH THE HOMEOWNERS AND THE OWNERS OF THEIR LOANS.

Those of us attempting to help homeowners obtain reasonable loan modifications are outraged by the obstructive tactics of the loan servicers. All of the major servicers have signed contracts with the Treasury Department in which they agree to follow HAMP directives and rules in evaluating homeowner eligibility for loan modifications under HAMP. When servicers violate these directives and rules, as they so often do, they are breaching their contracts and attempting to operate outside of the rule of law that applies to their conduct.

Servicers often note that not all homeowners are eligible for loan modifications because they cannot afford even reduced payments. I do not entirely disagree with that assertion as to some homeowners, but I must then call upon the servicers to explain why it is so enormously difficult for us even to negotiate short-sale and deed-in-lieu-of-foreclosure agreements with them under the HAFA

---

16 http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a&Witness_ID=d9df823a-05d7-400f-b45a-104a412e2202

program. When they obstruct or refuse to allow even these kinds of transactions, their motivation to pursue the money generated for them in foreclosures over lower sums earned in negotiated resolutions becomes abundantly clear.

The previously mentioned testimony of Professor Adam Levitan to the House Finance Committee and of Diane Thompson to the Senate Banking Committee last week describe in considerably more detail how such loan modifications serve not only homeowners, but also the investors in the securitized trusts. The testimony of both of these witnesses also describes in detail the economic incentives that drive the servicers to favor foreclosures over loan modifications or other negotiated resolutions.

C. THE JUDICIAL SYSTEM IS BEING DAMAGED.

1. THE VOLUME OF FORECLOSURE CASES IS EXCESSIVE.

State court systems all over the country are overwhelmed by the tremendous volumes of foreclosure cases being filed. This crushing case load could not come at a worse time, with state budgets cuts including state judicial budgets cuts. Courthouses are being closed, judicial vacancies are going unfilled, court staffs are being reduced and court hours are being curtailed.

Foreclosure cases are among the most complex and paper-intensive cases faced by lower level trial courts. They are time-consuming cases to resolve. Foreclosure cases that are improperly filed result in contested summary judgment motions, pre-trial discovery disputes, [17] and trials that should not be required. Similarly, foreclosures that should be resolved by loan modifications and never put into the foreclosure litigation process at all impose additional and unnecessary burdens upon the state court systems. State foreclosure mediation programs are showing growing signs of success, but even there, the delay and obstructionist tactics of the servicers drag those mediation proceedings out far longer than should be necessary, causing unnecessary expense for the courts and delaying access to the mediation process for all homeowners.

[17] The servicers routinely abuse the pretrial discovery system with extraordinary delaying tactics, and voluminous objections to reasonable discovery requests, even objecting constantly to requests for production of the original promissory note. These obstructive discovery tactics further burden the court systems with protracted court hearings of discovery disputes. In addition this tactic increases legal expense for homeowners and decreases their ability to fairly defend themselves.

2. THE CONFIDENCE OF INDIVIDUAL CITIZENS THAT THE JUDICIAL SYSTEM WILL TREAT THEM FAIRLY IS BEING DESTROYED.

In a recent article entitled "Justice for Some", Nobel laureate economist Joseph Stiglitz declared recently that it is the "universally accepted hallmark of an advanced, civilized society" that "[t]he rule of law is supposed to protect the weak against the strong, and ensure that everyone is treated fairly."[18] As Stiglitz goes on to note, "[p]art of the rule of law is the security of property rights" and that that, to some banks, the foreclosure of homes where the prescribed legal process is "just collateral damage."

While there have been expressions of concern about the outrageous abuse of our judicial system by the nation's largest financial institutions, few in positions of leadership in our government have been willing to label this crisis as the scandal that it truly is.[19] Instead, mostly what we hear from our government leaders is a steady drumbeat of expressions of concern about what the "foreclosure problem" might do to our economy. To these leaders, the abuse of our most weak and vulnerable citizens through takings of their homes outside of the process required by the rule of law is only a footnote to their concerns about economic issues. Other than in a few isolated state court civil sanctions decisions, there have been no indictments or punishments of our financial institutions and their loan servicers for their scandalous and dishonest conduct.

Our weak, vulnerable and mostly unrepresented homeowners are left with the reality that our once trusted financial institutions have filed huge volumes of false foreclosure affidavits for many years in courts all across the country, and are only now being publicly exposed. These homeowners are also being left to observe that neither Federal nor State authorities have any willingness to pursue criminal prosecutions for this dishonest conduct. They have the sure knowledge that if they ever lied to the courts, as the banks and their loan servicers have lied to them on such a massive scale, they would be charged with perjury and severely punished. As Stiglitz notes at the end of his article, "the proud claim of 'justice for all' is being replaced by the more modest claim of 'justice for those who can afford it.'"

More than occasionally I have heard, and had other lawyers report, expressions of doubt by homeowners they can get a fair shake if they go to court against the servicers and the banks and GSE clients like Fannie Mae and Freddie Mac. This growing doubt in the ability and willingness of our justice system to

---

[18] Josph Stiglitz, *Justice for Some*, http://www.project-syndicate.org/commentary/stiglitz131/English

[19] Even the November Oversight Report of the Congressional Oversight panel dated November 16, 2010 benignly refers to the problem as being one of "mortgage irregularities". http://cop.senate.gov/reports/library/report-111610-cop.cfm

operate within "rule of law" principles causes tremendous, but immeasurable, damage throughout our society.

IV. SOLUTIONS.

Beginning on page 12 of her written testimony before the House Financial Services Subcommittee on Housing and Community Opportunity on November 16, 2010,[20] Julia Gordon of the Center for Responsible Lending provided a comprehensive statement of the remedies that are required to resolve the situation addressed by my testimony. I highlight only a few of those solutions here, but they are all important. The common theme among all of these solutions is that the servicers' financial incentives to foreclose must be replaced with incentives to negotiate loan modifications whenever possible and graceful exit strategies when modifications are not possible. A key tool in developing the incentives toward negotiated resolutions is to insist that the rule of law must fully apply to our financial institutions and their servicers in all aspects of their foreclosure activities so that they will be required to bear the full costs of honestly conducted foreclosures when they elect to avoid the loan modification process.

A. APPROPRIATE FUNDS TO SUPPORT LEGAL REPRESENTATION FOR HOMEOWNERS.

I place this item as one of the first priorities because it is an urgent need and immediately achievable goal. Legal services organizations around the country have been critical links in the effort to provide representation to homeowners in foreclosure. But for the existence of the Foreclosure Diversion Program at Pine Tree Legal Assistance in Maine, my work as a volunteer lawyer in exposing the dishonest conduct of GMAC Mortgage would not have been possible. The funding for that program is due to end in about six months. If that happens, the full time lawyers in that program will be gone, our ability to reach out to and use the services of about sixty private volunteer lawyers will be lost, and our ongoing training programs for foreclosure defense lawyers in Maine will be eliminated.

It is the legal profession that has exposed the massive and dishonest conduct of the foreclosure industry. The Dodd/Frank legislation authorized HUD to expend $35 million to establish a Foreclosure Legal Assistance Program to provide funding to legal services organizations for homeowner representation, but Dodd/Frank did not appropriate those funds, and efforts to find funding at HUD or elsewhere have so far been unsuccessful. What's more, that fund, which is to be directed at the 125 hardest hit metropolitan areas, may not even help Maine because of our rural makeup. Over the coming year, legal services programs all over the country will be facing losses of funding to continue their critical foreclosure defense work. Simply

---

20 http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a&Witness_ID=d9df823a-05d7-400f-b45a-104a412c2202

put, Congress must find the will to immediately appropriate the funds required to preserve all of these programs, in rural as well as in metropolitan areas.

B. REQUIRE FANNIE MAE AND FREDDIE MAC TO FORECLOSE THE MORTGAGES OWNED BY THEM IN THIER OWN NAMES.

Requiring Fannie and Freddie to foreclosure in their own name should be another simple and achievable goal. Maine's foreclosure mediation program kicks in immediately after a homeowner is served with foreclosure papers and requests mediation. As we try to negotiate loan modifications with servicers in those mediation proceedings, we are constantly being surprised to learn that plaintiffs claiming ownership of loans in foreclosure are not in fact the owners. Maine statutory and case law require that a foreclosure be prosecuted only by the owner of the loan, whereas Fannie Mae and Freddie Mac require their servicers to conceal their identities in foreclosure cases and to foreclose in the servicers' names.

This deception by Fannie and Freddie obstructs foreclosure mediation efforts because, without knowing the true owner of the loan, neither the homeowner, his or her lawyer (if he or she is fortunate enough to have one) nor the mediator is able to know what loss mitigation programs might be available to the homeowner. The Fannie/Freddie deception also conceals from Congress and the public the true scope of their roles in the present foreclosure crisis.

There is no good legal or public policy excuse for Fannie and Freddie to be permitted to carry on this deceptive and obstructive practice. The Federal Housing Finance Agency, which is responsible for the oversight of these GSEs, has the authority to require this change.

C. REFORM HAMP TO REQUIRE PRINCIPAL REDUCTIONS.

Diane Thompson, in her Senate Banking Committee testimony and Julia Gordon in her House Financial Services Housing and Community Subcommittee testimony, address this need in depth. As a lawyer working directly with homeowners, I am continually conflicted when I see clients accepting loan modifications under the HAMP program. Many of their homes are worth far less than the principal balances on their loans. They accept the modifications that are available out of emotional attachment to their homes, or often simply because the modified payment is less expensive than rent would be, yet they are going forward with a total debt amount that is very difficult to repay. Servicers repeatedly claim that HAMP is a failure because there is such a high re-default rate. Simple logic tells us that a homeowner with a house far underwater in debt is going to have much less incentive to struggle to meet mortgage payments then he or she would be if the debt did not exceed the value of the house. Rational principal reductions will reduce re-defaults and will help rebuild homeowner economic security to the point where they may again become contributing members of our consumer driven economy.

As recently modified, HAMP authorizes servicers to offer principal reductions, but such reductions are not mandated. Until principal reductions are mandated the program will remain crippled and our recovery from this foreclosure nightmare will be delayed.

D. ENFORCE SERVICER CONTRACTUAL OBLIGATIONS UNDER HAMP.

All servicer participants in HAMP are contractually obligated to comply with all of its provisions. Overwhelmingly, we see failures in compliance, and lawyers all over the country report the same experience. The obstructive approach taken to the HAMP modification process is hugely wasteful of the limited legal resources available to homeowners. Efforts to modify loans with the assistance of counsel routinely take three and four times as long as should reasonably be required, and the process is even worse for those who are unrepresented. HAMP modifications are not being offered before foreclosures are filed; HAMP modifications are denied without adequate reason; homeowner paperwork is routinely and repeatedly lost; and there is a tremendous problem in getting the servicers to convert temporary modifications into permanent ones. Our experience in Maine is that, Bank of America is the worst offender in the program--we spend a truly disproportionate amount of our time in trying get Bank of America to comply with HAMP and the incidents of Bank of America abuse of homeowners under the HAMP program is the most egregious that we see.

The Treasury Department is the agency responsible for enforcing servicer's compliance with HAMP. Despite the often reported and widely known abuses of the program by servicers, there is no evidence that Treasury has ever taken any enforcement action against any servicer. Pressure must be brought to bear on Treasury to require it to carry out its oversight and enforcement responsibility.

There is active litigation, and a split of decisions, all over the country as to whether homeowners can be treated as third party beneficiaries with the right to enforce the HAMP agreements. Such litigation and uncertainty should be eliminated by revisions to HAMP regulations to make it explicitly clear that homeowners are intended third party beneficiaries. If the regulators of the HAMP program will not enforce the servicers' obligations under the program, then homeowners simply must be given that right.

D. REQUIRE THE IRS TO ENFORCE THE REMIC RULES.

Homeowners have no direct stake in whether the Internal Revenue Service enforces the REMIC rules relating to the mortgage-backed securities trusts, yet they are being indirectly impacted. The REMIC rules required that mortgages be assigned to these trusts within a certain period of time at the establishment of the trusts. It is becoming increasingly clear that many of these trusts may have failed to meet this requirement. The blockbuster decision *Kemp v. Countrywide Home Loans* (Bankr. N.J. Adv. No. 08-2448, Nov. 16, 2010) that came out two weeks ago revealed that Countrywide routinely failed to transfer the notes on loans it made. The trusts try to solve this problem by obtaining the notes, indorsements and mortgage assignments just before, or sometimes during, foreclosure. This late acquisition of the loans violates the REMIC rules, yet there is not hint of any enforcement by the IRS.

Yet again, homeowners are watching the failure of the rule of law. They know that if they fail to pay their taxes or cheat on their tax returns, they will be prosecuted. But they see a double standard at work that allows the securitized trusts to escape tax penalties for their misconduct. Even a threat of enforcement of the REMIC rules by the IRS could change the economic equation of foreclosures in such a way as to motivate the trusts and the servicers to begin to favor loan modifications over foreclosures.

V. CONCLUSION.

The rule of law is what preserves the stability of our democracy. As we allow the mortgage loan industry to circumvent the rule of law we show that corporate interests can get away with such massive dishonesty, and we thereby encourage more of it. As citizens see our largest financial institutions flaunt their violations of our legal systems, our citizens lose faith in these institutions and in their government. Surely this loss of faith is what is leading to the increasing volume of "strategic defaults" that the financial institutions so loudly condemn.

There are remedies that can significantly improve the foreclosure problem if the political will can be mustered to implement them and if regulators can be motivated to do their jobs. Appropriate prosecution of those responsible for the massive levels of dishonesty that have been exposed can help restore the loss of confidence in the legal system by those victimized by the abuses of the mortgage servicers.

Thank you for this opportunity to share my thoughts and observations with you and for your interest in these problems.

Thomas A. Cox, Esq.

Thomas Cox

Maine Attorneys Saving Homes
A joint project of Pine Tree Legal Assistance and
The Maine Volunteer Lawyers Project

TESTIMONY OF THOMAS A. COX, ESQ.
LIST OF EXHIBITS

EX. NO.	DESCRIPTION	PAGE NO.
1	Rule 56 of the Federal Rules of Civil Procedure	23
2	Stephan Affidavit in *FNMA v. Bradbury dated August 6, 2009*	28
3	Summary of Stephan depostion testimony in *FNMA v. Bradbury*	33
4	Transcript of Stephan depostion testimony in FNMA v. Bradbury	37
5	Chronology of JPMorgan Chase filings in New York Bankruptcy Courts	51
6	Motion for Sanctions against GMAC Mortgage in Florida in 2006	61
7	Order for Sanctions against GMAC Mortgage in Florida in 2006	78
8	GMAC Mortgage 2006 Policy Directive (not followed)	82
9	GMAC Mortgage Opposition to Sanctions Motion in Maine in 2010 discounting significance of Florida 2006 sanctions order.	87
10	Cleveland Plain Dealer October 19, 2010 regarding wrongful foreclosure actions by GMAC Mortgage.	100
11	GMAC Mortgage false Certiification of Mortgagee dated July 25, 2010	105
12	Freddie Mac proof of its ownership of loan certified by GMAC as being owen by GMAC.	108
13	Opposition to GMAC Motion for Protective Order Against Cox	111
14	Maine Order against GMAC Mortgage denying its motion for protecitve order, findings its actios to be in "bad faith" and imposting sanctions	122
15	Report of GMAC Mortgage report to Freddie Mac on August 25, 2010 of affidavit isssues.	129
16	GMAC Motion for Protective Order Re Stephan Transcript	131

Exhibit 1

Last reviewed and edited January 5, 2010
Includes amendments effective August 3, 2009

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof. A motion for summary judgment may not be filed until the expiration of 20 days from the commencement of the action.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, but within such time as not to delay the trial, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Proceedings on Motion. Any party opposing a motion may serve opposing affidavits as provided in Rule 7(c). Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by subdivision (h) show that there is no genuine issue as to any material fact set forth in those statements and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly. In the event that a moving party's motion for summary judgment is denied in whole or in part, facts admitted by the parties solely for the purpose of the summary judgment motion shall have no preclusive effect at trial upon any third party who did not participate in the summary judgment proceeding.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleading, but must respond by affidavits or as otherwise provided in this rule, setting forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Statements of Material Fact.

In addition to the material required to be filed by Rule 7, a motion for summary judgment and opposition thereto shall be supported by statements of material facts as addressed in paragraphs (1), (2), (3), & (4) of this rule.

(1) Supporting Statement of Material Facts. A motion for summary judgment shall be supported by a separate, short, and concise statement of material

facts, set forth in numbered paragraphs, as to which the moving party contends there is no genuine issue of material fact to be tried. Each fact asserted in the statement shall be set forth in a separately numbered paragraph and shall be supported by a record citation as required by paragraph (4) of this rule.

(2) Opposing Statement. A party opposing a motion for summary judgment shall submit with its opposition a separate, short, and concise statement. The opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule. Each such statement shall begin with the designation "Admitted," "Denied," or "Qualified" (and, in the case of an admission, shall end with such designation). In addition to any denials or qualifications, the party opposing summary judgment may note any objections to factual assertions made by the moving party as set forth in paragraph (i). The opposing statement may contain in a separately titled section any additional facts which the party opposing summary judgment contends raise a disputed issue for trial, set forth in separate numbered paragraphs and supported by a record citation as required by paragraph (4) of this rule.

(3) Reply Statement of Material Facts. A party replying to the opposition to a motion for summary judgment shall submit with its reply a separate, short, and concise response limited to the additional facts submitted by the opposing party and any objections to denials or qualifications as set forth in paragraph (i). The reply statement shall admit, deny or qualify such additional facts by reference to the numbered paragraphs of the opposing party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by paragraph (4) of this rule. Each reply statement shall begin with the designation "Admitted," "Denied," or "Qualified" (and, in the case of an admission, shall end with such designation).

(4) Statement of Facts Deemed Admitted Unless Properly Controverted; Specific Record of Citations Required. Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted. An assertion of fact set forth in a statement of material facts shall be followed by a citation to the specific page or paragraph of identified record material supporting the assertion. The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment. The court shall

have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts.

(i) Motions to Strike Not Permitted.

(1) Motions to strike factual assertions, denials, or qualifications contained in any statement of material facts filed pursuant to this rule are not permitted. If a party contends that the court should not consider a factual assertion, denial, or qualification, the party may set forth an objection in either its opposing statement or in its reply statement and shall include a brief statement of the reason(s) for the objection and any supporting authority or record citations.

(2) A party moving for summary judgment may respond in its reply statement to any objections made by the party opposing summary judgment. If the moving party objects in its reply statement to any factual assertion, denial, or qualification made by the opposing party, the party opposing summary judgment may file a response within 7 days of the filing of the reply statement. Such a response shall be strictly limited to a brief statement of the reason(s) why the factual assertion should be considered and any supporting authority or record citations.

(j) Foreclosure Actions. No summary judgment shall be entered in a foreclosure action filed pursuant to Title 14, Chapter 713 of the Maine Revised Statutes except after review by the court and determination that (i) the service and notice requirements of 14 M.R.S. § 6111 and these rules have been strictly performed; (ii) the plaintiff has properly certified proof of ownership of the mortgage note and produced evidence of the mortgage note, the mortgage, and all assignments and endorsements of the mortgage note and the mortgage; and (iii) mediation, when required, has been completed or has been waived or the defendant, after proper service and notice, has failed to appear or respond and has been defaulted or is subject to default. In actions in which mediation is mandatory, has not been waived, and the defendant has appeared, the defendant's opposition pursuant to Rule 56(c) to a motion for summary judgment shall not be due any sooner than ten (10) days following the filing of the mediator's report.

Advisory Note
August 2009

Exhibit 2

Loan No. 0554937904
STATE OF MAINE
CUMBERLAND ,SS

MAINE DISTRICT COURT
DISTRICT NINE
DIVISION OF NORTHERN CUMBERLAND
CIVIL ACTION
DOCKET NO. BRI-RE-09-65

FEDERAL NATIONAL MORTGAGE ASSOCIATION Plaintiff v. NICOLLE M. BRADBURY Defendant and GMAC MORTGAGE, LLC d/b/a DITECH, LLC.COM and BANK OF AMERICA, NA Parties in Interest	**AFFIDAVIT IN SUPPORT OF PLAINTIFF S MOTION FOR SUMMARY JUDGMENT**

COMMONWEALTH OF PENNSLVANIA
Montgomery, ss.

I, Jeffrey Stephan Limited Signing Officer , depose and say as follows:

1. My name is Jeffrey Stephan Limited Signing Officer am a Limited Signing Officer with GMAC Mortgage, LLC (GMAC), a limited liability company organized and existing under the laws of the State of Delaware with a principal place of business in Fort Washington, Pennsylvania. GMAC is the servicing agent for the mortgage to Federal National Mortgage Association (FNMA). I have under my custody and control the records relating to the mortgage transaction referenced below.

My knowledge as to the facts set forth in this Affidavit is derived from my personal knowledge of these records. These records were made at or near the time of the event, transaction, or from information transmitted by, a person with personal knowledge of the events recorded therein. These records are kept in the ordinary course of business of GMAC as FNMA s servicer and all previous holders and servicers of the Note and Mortgage referenced below and it is the regular practice of GMAC as servicing agent to FNMA and all previous holders and servicers of the Note and Mortgage referenced below to make such records.

2. GMAC maintained the account of the Note and Mortgage referenced below. By virtue of GMAC s maintenance of the account, GMAC is responsible for accepting payments, notifying debtors of the account status, and calling defaults.

3. Defendant executed and delivered to GMAC Mortgage Corporation a Note, dated July 25, 2003 in the original principal amount of $75,000.00, a true and correct copy of which is attached hereto as Exhibit A.

4. In order to secure said Note, Defendant executed and delivered to GMAC Mortgage Corporation in its favor a Mortgage, dated July 25, 2003, and recorded in the Oxford County Registry of Deeds in Book 458, Page 84, a true and correct copy of which is attached hereto as Exhibit B.

5. The Note was subsequently assigned to FNMA by the endorsement as set forth on the Note Endorsement attached to the Note.

6. Mortgage Electronic Registration Systems, Inc., acting solely as nominee for GMAC Mortgage Corporation and its successors and assigns, as the beneficiary of said Mortgage subsequently assigned said Mortgage to FNMA by Assignment of Mortgage, dated February 13,

2009, and recorded in said Registry of Deeds in Book 557, Page 40, a true and correct copy of which is attached hereto as Exhibit C.

7. Defendant is presently in default on said Note in that she has failed to make the monthly payments and therefore has breached the condition of the aforesaid Mortgage. Payments of principal and interest are due for October 1, 2008 to and including July 20, 2009.

8. On or about November 7, 2008, GMAC sent Defendant a notice of the default, a true and correct copy of which is attached hereto as Exhibit D. Defendant failed to reinstate the mortgage within the time period as set forth in said notice.

9. There is presently due and owing on said Note and Mortgage the principal amount of $74,343.47, interest thereon to July 20, 2009, in the amount of $3,867.06 with additional interest accruing on said principal balance at the note rate of 5.875%, late fees of $512.28, escrow advances of $1,453.23, property inspection fees of $101.25 and attorney's fees and costs related to the collection of sums due under the Note, paid by FNMA, less a suspense balance of $142.20.

10. Defendant is a resident of Denmark, in the County of Oxford and State of Maine. Defendant is not in the military service of the United States as defined in Article I of the "Soldiers' and Sailors' Relief Act of 1940," as amended; said Defendant is not an infant or incompetent person; and venue is proper in this Court by virtue of the fact that the premises which are described in said Mortgage in this proceeding are located in Denmark in the County of Oxford and State of Maine.

Dated: Aug 5, 2009

Its Limited Signing Officer Jeffrey Stephan Limited Signing Officer

Aug 5, 2009

COMMONWEALTH OF PENNSLVANIA
Montgomery, ss..

Personally appeared the above-named, Jeffrey Stephan Limited Signing Officer known to me to be the person described in the foregoing Affidavit, and being duly sworn by me, made oath that the above Affidavit signed by him/her is true.

Before me,

Notary Public

Printed Name

My Commission Expires

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Susan Seiser, Notary Public
Upper Dublin Twp., Montgomery County
My Commission Expires Nov. 9, 2011
Member, Pennsylvania Association of Notaries

Exhibit 3

SUMMARY OF KEY PORTIONS OF TESTIMONY OF JEFFERY STEPHAN AT HIS DEPOSTION TAKEN ON JUNE 7, 2010

P. 33, line 24

Q. Do you have any knowledge of how summary judgment affidavits are used in judicial foreclosure case?

A. No.

Q. Are you aware that they are given to a judge?

A. Yes.

Q. And do you understand that a judge relies upon them?

A. Yes

P. 34, line16

Q. Has the manner in which you perform your duties as team lead for the document execution team changed in any way over the period from August 5, 2009 to the present date?

A. No.

P. 54

Q. When you sign a summary judgment affidavit, do you check to see if all of the exhibits are attached to it?

A. No.

Q. When you sign a summary judgment affidavit, do you inspect any of the exhibits attached to it.

A. No.

Q. Does anybody in your department check to see if all of the exhibits are attached to it?

A. No.

Q. When you sign a summary judgment affidavit, do you inspect any exhibits attached to it?

A. No.

EXHIBIT 1

P. 56, line 56

Q. My question to you is where does a summary judgment affidavit go after you sign it?

A. After I sign it, it is handed back to my staff. My staff hands it to a notary for notarization. They send it back to the attorney network requesting any type of affidavit.

Q. So yon do not appear before the notary; is that correct.

A. I do not.

P. 58, line 13

Q. Your department does not do an independent check of the accuracy of the information on summary judgment affidavits coming to you; isn't that correct?

A. I review, quickly, the figures. Other than that, that's about it.

P. 61, line 14

Q. And you just testified that you look at principal, interest, late charges and escrow, is that correct?

A. That is correct.

Q. Is there anything else that you look at in your computer system when your signing a summary judgment affidavit?

A. The only thing I review other than that is who the borrower is.

Q. When you receive a summary judgment affidavit to sign, do you read every paragraph of it?

A. No.

Q. What do you read?

A. I look at the figures.

Q. That's all that you look at when you sign a summary judgment affidavit?

A. Yes, to ensure that the figures are accurate.

P. 62, line 11

Q. Is it fair to say that when you sign a summary judgment affidavit, you do not know what information it contains other than the figures that are set forth within it?

A. Other than the borrower's name and if I have signing authority for that entity. That is correct.

P. 67, line 21

Q. So other than the due date and the balances due, is it correct that you do not know whether any other part of the affidavit that you sign is true.

A. That could be correct.

Q. Is it correct?

A. That is correct.

Exhibit 4

MAINE DISTRICT COURT, DISTRICT NINE
DIVISION OF NORTHERN CUMBERLAND

- - -

FEDERAL NATIONAL MORTGAGE ASSOCIATION Plaintiff	:	DOCKET NO. BRI-RE-09-65
v.	:	
NICOLE M. BRADBURY Defendant	:	
and	:	
GMAC MORTGAGE, LLC d/b/a DITECH, LLC.COM and BANK OF AMERICA, NA Parties in Interest	:	

- - -

June 7, 2010

- - -

Oral deposition of JEFFREY D. STEPHAN, taken pursuant to notice, was held at the law offices of LUNDY FLITTER BELDECOS & BERGER, P.C., 450 N. Narberth Avenue, Narberth, Pennsylvania 19072, commencing at 10:10 a.m., on the above date, before Susan B. Berkowitz, a Registered Professional Reporter and Notary Public in the Commonwealth of Pennsylvania.

- - -

2

APPEARANCES:

BRIAN M. FLEISCHER, ESQUIRE
FLEISCHER, FLEISCHER & SUGLIA, P.C.
Plaza 1000 at Main Street
Suite 208
Voorhees, New Jersey 08043
(856) 489-8977
bfleischer@fleischerlaw.com
Counsel for GMAC

THOMAS A. COX, ESQUIRE
LAW OFFICES OF THOMAS A. COX
P.O. Box 1315
Portland, Maine 04104
(207) 749-6671
tac@gwi.net
Counsel for Defendant,
Nicole M. Bradbury

VIA TELEPHONE:
JULIA G. PITNEY, ESQUIRE
DRUMMOND & DRUMMOND
One Monument Way
Portland, Maine 04101
(207) 774-0317
JPitney@ddlaw.com
Counsel for GMAC and Fannie Mae

3

(Document marked Exhibit-1 for identification.)

\- - -

(It is hereby stipulated and agreed by and between counsel that sealing, filing and certification are waived; and that all objections, except as to the form of questions, be reserved until the time of trial.)

\- - -

JEFFREY D. STEPHAN, after having been duly sworn, was examined and testified as follows:

\- - -

MS. PITNEY: I would like to put on the record that we requested a stipulation, and Attorney Cox has denied our request for that stipulation. And that would be a stipulation that this deposition transcript be used for this case, FNMA versus Bradbury, only.

4

STEPHAN

MR. COX: Mr. Fleischer, we understand that Julia Pitney represents the plaintiff in this case. Who do you represent today?

MR. FLEISCHER: I believe Ms. Pitney both represents Fannie Mae and GMAC, and I am here on GMAC's behalf.

MR. COX: GMAC is neither a plaintiff nor defendant in this case, so we may have some issues around that, but we'll cross that bridge when we get to it.

\- - -

EXAMINATION

\- - -

BY MR. COX:

Q. Mr. Stephan, for the record, would you state your full name, please?
A. Jeffrey Stephan.
Q. How old are you?
A. I am 41, in June.
Q. You live in Sellersville, Pennsylvania?

5

STEPHAN

A. That is correct.
Q. Have you had your deposition taken previously?
A. In other cases, yes.
Q. How many other cases?
A. This will be my third time.
Q. What other cases were you deposed in, to your recollection?
A. In what kind of cases?
Q. Well, can you remember the names of the cases?
A. No, I don't.
Q. When is the last time that you've had your deposition taken?
A. I would approximate two, three months ago.
Q. Was that in Florida?
A. No. That was in New Jersey.
Q. That would have been in 2010?
A. Yes.
Q. Then you were deposed in Florida in December of 2009?
A. That is correct.

STEPHAN

Q. When was the other deposition, the third deposition?
A. This one today is the third.
Q. Have you testified in court as a witness before?
A. No.
Q. Did you review any documents to prepare for this deposition?
A. Yes.
Q. What documents did you review?
A. I looked at the deposition that was sent to me. And I went over the Complaint with Brian.
THE WITNESS: When was that, Thursday, Wednesday?
MR. FLEISCHER: You're directed not to say anything with regard to what we spoke about, but, yes, you can answer to what you looked at.
THE WITNESS: Yes.
MS. PITNEY: I'm sorry to interrupt. I'm just having a

STEPHAN

little difficulty hearing you. Is there any way to push the phone a little closer to Mr. Stephan?
MR. FLEISCHER: Okay. And, Julia, let me know during the course if there's still a problem.
MS. PITNEY: You were doing fine, and then it got a little fuzzy.
THE WITNESS: I'll talk louder.
MS. PITNEY: Thank you.
BY MR. COX:
Q. What deposition did you look at?
A. The deposition for this case.
Q. The Deposition Notice?
A. Right, the Deposition Notice.
Q. It was not another deposition transcript --
A. No.
Q. -- that you were referring

STEPHAN

to?
A. No.
MR. FLEISCHER: Let him finish the question, and then respond, because it makes it cleaner for the transcript.
THE WITNESS: Thank you.
BY MR. COX:
Q. What is your educational background?
A. I have a four-year degree at Penn State University in liberal arts.
Q. When did you go to work for GMAC?
A. I began work at GMAC September 30th of '04.
Q. What was your work history, in a summary form, before you went to work for GMAC?
A. I have done collections and mortgage foreclosures for other companies.
Q. Who have you done mortgage foreclosure work for?

STEPHAN

A. ContiMortgage, Fairbanks Capital, GMAC.
Q. The first one, I'm not sure about. Is that Conti, C-O-N-T-E (sic)?
A. C-O-N-T-I.
Q. What period of time did you work for ContiMortgage?
A. I began there in '92. I believe I left there in '98.
Q. What years, approximately, did you work for Fairbanks Capital?
A. '98 to '04.
Q. You work in the GMAC Mortgage office in Fort Washington, Pennsylvania; is that correct?
A. That is correct.
Q. Approximately, how many people work in that office?
A. I can't estimate the number of people. I can say my department, approximately 50 to 60 people.
Q. What's the name of your department?
A. Foreclosures.

10

STEPHAN
Q. When you began working for GMAC Mortgage in 2004, what position did you begin working in?
A. I was a foreclosure specialist.
Q. What kinds of duties did that involve?
A. That involved the day-to-day handling and servicing of a portfolio of loans that fell into a foreclosure category.
Q. What kinds of duties did you carry out with respect to those matters?
MS. PITNEY: Object to form.
MR. COX: You have to answer.
MS. PITNEY: You can answer the question.
THE WITNESS: The everyday servicing of the file, from contacting the attorney, supplying an attorney who's handling a case within my portfolio with any information they may need, a copy

11

STEPHAN
of documents that may be needed through a fax form or e-mail form, the calculation of figures for judgments, reporting sale results at that time, and properly conveying properties to the proper departments for post sale action.
BY MR. COX:
Q. How long did you hold the position of foreclosure specialist?
A. With GMAC, three years.
Q. So you would have assumed a new position sometime in 2007?
A. Yes.
Q. What position did you assume in 2007?
A. I became a team lead within the foreclosure department.
Q. What duties did you assume as the team lead in the foreclosure department?
A. At that time, GMAC segregated our department into teams, and I was put into place as the supervisor or

12

STEPHAN
team lead for our bidding team, which would be a team of individuals who calculate the bids for sales.
Q. Calculate the bids for sales of mortgage --
A. Foreclosure sales.
MR. FLEISCHER: Again, let him finish the question.
BY MR. COX:
Q. Just so I can understand it, your role in that position was to help GMAC calculate what it was going to bid at any given foreclosure sale?
A. That would be correct.
Q. The foreclosure department -- is that what it's called?
A. Yes.
Q. That has units within it?
A. Yes.
Q. And when you were doing the bidding work, what unit were you a part of at that time?
A. The bid team.
Q. How long did you serve on

13

STEPHAN
the bid team?
A. I'm going to estimate six months to a year, at the most.
Q. Does it sound roughly correct that sometime in 2008, you assumed a new position?
A. Yes.
Q. What was the next position that you held after working on the bid team?
A. My present position, which is the team lead of the document execution team.
Q. Is there also a service transfer unit?
A. Yes, there is.
Q. Are you the team lead of that as well?
A. Yes, I am. That falls into the document execution team.
Q. So I talk your language, there's a foreclosure department?
A. Yes.
Q. And the subdivisions within

14

STEPHAN

that, do you call them teams or units?

A. Teams.

Q. So there's a foreclosure department, and then within it are a group of teams that do different functions; is that correct?

A. That is correct.

Q. What does the document execution team do?

MR. FLEISCHER: Objection as to form.

THE WITNESS: Can you rephrase that?

BY MR. COX:

Q. What are the functions of the document execution team?

A. The functions of my document execution team is, I have staff that prints documents, from our computer system, that are submitted from our attorney network. I have staff, also, on that team who prepares the documents which have already received figures from our attorneys. So there are completed

15

STEPHAN

documents. They fill in the blanks, they stamp names. They ensure that all of the notary lines are completed properly once it's returned from the notary. And that staff also is in charge of making sure they Federal Express the document back to the designated attorney within our network.

Q. What does the service transfer team do?

A. The service transfer team receives a list of loans from our transfer management team, which is located in Iowa. The service transfer team within foreclosure only handles loans that fall into a bankruptcy or foreclosure category. They prepare files or CDs, and transfer them to the new servicer. So they're loans that are either acquired, or they're loans that are being transferred to a new servicer for service.

Q. How many employees are on the document execution team?

16

STEPHAN

A. 14.

Q. Including yourself?

A. No; including me, 15.

Q. What training have you received from GMAC to function in your capacity as the team lead for the document execution team?

MS. PITNEY: Object to form.

BY MR. COX:

Q. Let me restate the question. Have you received any training from GMAC to use in conjunction with your performance as the team lead for the document execution team?

A. Yes.

Q. What training have you received?

A. I received side-by-side training from another team lead to instruct me on how to review the documents when they are received from my staff.

Q. Who was that person?

A. That person, at the time, I

17

STEPHAN

believe was a gentleman by the name of Kenneth Ugwuadu, U-G-W-U-A-D-U. He is no longer with GMAC.

Q. How long did that training last?

A. Three days.

Q. Were there any written or printed training materials or manuals used as a part of that training?

A. No.

Q. Again, just so I understand what your testimony was, that training involved your learning how to review the documents that were being processed through your hands; is that correct?

A. That's correct.

Q. What were you trained to do with respect to those documents by that gentleman?

A. Basically, how to review the system, which I already basically knew from preparing documents in my prior position before becoming a team lead. So it was more or less a rehash, let's say,

STEPHAN

or retraining, to confirm that I was looking at things correctly in the system.

Q. When you refer to a system, you're referring to a computer system?

A. Yes.

Q. Other than what you might call it when you're not happy, does that system have a name?

A. Yes. That system is called Fiserv, F-I-S-E-R-V.

Q. Have you received any training on how to use that system?

A. Yes, when I was hired.

Q. Are there any manuals or training materials associated with your training on that system?

A. Yes, there is.

Q. Do you have those manuals in your possession?

A. Presently, no.

Q. Do they exist in your office at GMAC?

A. I honestly don't know.

STEPHAN

Q. In your role as team lead for the document execution team, do you have any duties with respect to the receipt, application, or counting for loan payments?

A. No.

MS. PITNEY: Object to the form of the question.

BY MR. COX:

Q. What department has that responsibility?

A. To my understanding, that would be customer service. And within customer service, I believe there is a cash unit.

Q. Have you ever worked in that cash unit?

A. No.

Q. Have you ever worked in that customer service department?

A. No.

Q. Have you ever had any training in how that department and unit work?

STEPHAN

A. No.

Q. In your capacity as team lead for the document execution team, do you have any responsibility for data entry into the computer system regarding payments received by GMAC?

A. No.

Q. In your capacity as the team lead for the document execution team, do you have any role in the foreclosure process at GMAC, other than the signing of documents?

MR. FLEISCHER: Objection as to the form of the question.

THE WITNESS: Can you rephrase?

BY MR. COX:

Q. In your capacity as the team lead for the document execution team, do you have any role in the foreclosure process, other than the signing of documents?

A. No.

Q. I'm going to hand you what

STEPHAN

we have marked as Deposition Exhibit Number 1, which is your affidavit in this case, dated August 5, 2009.

MS. PITNEY: Excuse me, Tom. This is Julia. Am I to presume that this is the only exhibit you're going to be introducing? Because I haven't received any exhibits that you plan to produce at this deposition today.

MR. COX: I had no idea you were going to be participating today, Julia.

MS. PITNEY: Well, I represent the plaintiff. It shouldn't come as any surprise.

MR. COX: We're not going to have a debate on the record. The exhibits are here. You're welcome to come see them. I had no idea that you were going to participate in this fashion.

MS. PITNEY: You had no idea?

22

STEPHAN

MR. COX: I'm not going to have this exchange on the record with you. If you want to go off the record for a minute, I'll be happy to do it.

MS. PITNEY: No, we're going to stay right on the record, Tom.

MR. COX: That's fine.

MS. PITNEY: Is it your intent to introduce these exhibits that have not been produced to the opposing party?

MR. COX: I'm not going to respond to that. I will entertain objections that you are going to make. But I'm not going to respond to your questions on the record.

MS. PITNEY: I'm going to object to each and every exhibit.

MR. COX: That's your right to do that.

BY MR. COX:

Q. I've handed you Deposition

23

STEPHAN

Exhibit Number 1, Mr. Stephan. Is that a document signed by you?

A. Yes, that is my signature.

Q. And that's dated August 5, 2009?

A. That is correct.

Q. Do you have any memory of signing that document?

A. No, I do not.

MS. PITNEY: I'd like to take a brief break and speak with Attorney Fleischer separately. There's no question pending.

(Whereupon, a short recess was taken.)

MR. COX: I gather you have something you want to say on the record, Julia?

MS. PITNEY: Yes. I object to not being provided copies of the documents that you intend to introduce in this deposition. And in an effort to make things more efficient, my proposal is that --

24

STEPHAN

I understand there's not a large number of documents. I propose that we have Attorney Fleischer fax them to me, or e-mail, in bulk, or we're going to have to stop. I would object. And each time I'm going to stop and have each document sent to me.

MR. COX: Your objection is noted.

MR. FLEISCHER: Why don't we at least just deal with the one document that's in front of us at this point, which is the affidavit, and then we'll address each one as they come up.

MS. PITNEY: Fair enough.

BY MR. COX:

Q. Mr. Stephan, you've testified that in addition to yourself, there are 14 other employees in your document execution team.

A. That is correct.

Q. You have a title of limited

25

STEPHAN

signing officer; is that correct?

A. That is correct.

Q. How long have you been a limited signing officer for GMAC Mortgage?

A. I'm going to estimate, two years.

Q. Are there any other limited signing officers among the 14 people on your team?

A. No, not amongst my 14 people.

Q. Exhibit-1, on the bottom of the first page, says: I have under my custody and control the records relating to the mortgage transaction referenced below.

What records does GMAC maintain with respect to mortgage transactions?

MS. PITNEY: Object to the form.

THE WITNESS: Please rephrase.

26

STEPHAN
BY MR. COX:
Q. What records does GMAC maintain with respect to mortgage loans?
A. We keep our records for the foreclosure department and the rest of the company on our Fiserv system for availability throughout our company.
Q. Do paper records exist anywhere within GMAC Mortgage?
A. Yes, they do.
Q. Where do they exist?
A. I believe they are housed either in our Iowa office or in Minnesota, or with any of our custodians involved within the company.
Q. Do you have any responsibilities for making entries in the Fiserv system?
A. Other than just usual notes, no.
Q. What kind of usual notes do you enter?
MS. PITNEY: Object. I'm objecting to the form of the

27

STEPHAN
question. And, furthermore, I'm objecting to the extent that you're basically asking him an incredibly broad-based question here, Tom. If you want to ask him about this case and any entries he made with respect to this case, then that's fine. But your question is pretty sweeping there.
BY MR. COX:
Q. What is your usual business practice and routine with respect to making usual notes in the Fiserv system?
A. If a customer were to call in, I would make a note in our computer system.
Q. Do customers call you in your capacity as team lead for the document execution team?
A. No, they do not.
Q. So if that's the only kind of notes that you would make in the system, is it fair to say that you don't make notes in that system?

28

STEPHAN
A. That would be correct.
Q. And you have no role in the entry of any other data into that system; isn't that correct?
A. That is correct.
Q. What department maintains that system?
MR. FLEISCHER: Objection as to form.
BY MR. COX:
Q. Do you know what department maintains that system?
A. The system is used by the entire company.
Q. Do you know what department maintains the security for that system?
A. The IT department.
Q. Where is that located?
A. Throughout the entire country.
Q. Do you know what department makes entries into that system?
A. Numerous departments.
Q. Do you know what departments

29

STEPHAN
have the ability to change entries in that system?
A. Nobody has the ability to change an entry in the system, as far as a note would go.
Q. What do you mean by that?
A. Such as if a customer calls in, you type in the system. Once you type it, it's entered.
Q. Does GMAC keep a paper record of loan payments made by mortgage customers?
A. I do not know.
Q. I think you said that the cash department receives payments -- customer payments; is that correct?
A. To my knowledge, yes.
Q. That's the department that you've said you have not worked in; is that correct?
A. That is correct.
Q. So you don't have firsthand knowledge about how it operates; is that correct?

30

STEPHAN
A. That is correct.
MS. PITNEY: Object.
BY MR. COX:
Q. Do you have any knowledge about how the data relating to those payments are entered into the system?
A. I do not have that knowledge.
Q. Do you have any knowledge about how GMAC ensures the accuracy of the data entered into the system?
A. No, I do not.
Q. Do you have any knowledge as to what measures GMAC takes to preserve the integrity and security of the system?
A. No, I do not.
MS. PITNEY: Object to the form of that question.
BY MR. COX:
Q. In your capacity as team lead for the document execution team, what kinds of documents do you sign?
A. The types of documents I sign are assignments of mortgage,

31

STEPHAN
numerous types of affidavits, deeds that need to be done post sale, a substitution of trustees. And that covers it in a general span.
Q. You said you sign a variety of affidavits. What kinds of affidavits do you sign?
A. I sign judgment affidavits for judicial foreclosure actions. I will sign an affidavit verifying military duty. I sign affidavits in reference to -- if GMAC has exhausted all options through lost mitigation upon reviewing notes in our Fiserv system. That's a general description of different types of affidavits.
Q. Your document execution team provides documents for foreclosures in what states?
A. Throughout the country.
Q. Are there other document execution teams within the GMAC system?
A. I believe our bankruptcy unit also has a document execution team.

32

STEPHAN
Q. That's the only other document execution team that you're aware of?
A. To my knowledge, yes.
Q. When you referred in one of your answers a few moments ago to judgment affidavits, are you referring to the type of affidavit in front of you, as Deposition Exhibit-1?
A. That is a similar type of affidavit, yes. This states Affidavit in Support of the Plaintiff's Motion for Summary Judgment.
Q. Have you received any training regarding the summary judgment process in judicial foreclosure states?
A. No.
Q. Do you have any knowledge as to what a summary judgment affidavit is used for in the State of Maine?
MR. FLEISCHER: Objection as to form.
BY MR. COX:
Q. Would you please answer the

33

STEPHAN
question?
A. To my knowledge, a borrower would have filed a contested answer. And this would be our next step within the process, to confirm the amount that is due to support the summary judgment.
Q. Do you understand how the affidavit is used, that is, Deposition Exhibit Number 1?
MS. PITNEY: Objection. Tom, you're getting dangerously close here to the privileged area. I mean, this affidavit, in itself, was prepared in preparation for litigation -- in litigation; not even preparation for it, but during litigation.
MR. COX: I have not the slightest interest in getting into attorney/client privilege. I'll rephrase the question.
BY MR. COX:
Q. Do you have any knowledge of how summary judgment affidavits are used

9 (Pages 30 to 33)

34

STEPHAN
in judicial foreclosure states?
A. No.
Q. Are you aware that they are given to a judge?
A. Yes.
Q. And do you understand that the judge relies upon them?
A. Yes.
Q. At the time that you executed Deposition Exhibit-1 on August 5, 2009, you were, at that time, in your position as team lead for the document execution department?
A. Yes.
Q. Has the manner in which you perform your duties as the team lead for the document execution department changed in any way over the period from August 5, 2009 to the present date?
A. No.
Q. Has your job description changed in any manner during that time?
A. I assumed the responsibility at that time of also handling the service

35

STEPHAN
transfer team as an additional responsibility; other than document execution, no.
Q. In your usual business practice as a team lead for the document execution team, how does a summary judgment affidavit come to you, such as the one that is Deposition Exhibit Number 1?
MS. PITNEY: Objection. Tom, if you'd like to ask him about how this specific affidavit came to him, that's fine. But, again, you're asking way too broad.
BY MR. COX:
Q. Do you know how this specific affidavit got to you, Mr. Stephan?
A. We have a process in place that if our attorney network needs an affidavit, they will upload it into our system, which is called LPS. We have another system, which is a communication

36

STEPHAN
tool, between our attorneys. They load it into a process called signature required.
MS. PITNEY: Jeff, I'm going to interrupt you right there. To the extent that this answer or anything else that you say has to do with your communication between you and your attorney -- GMAC and its attorney, it's attorney/client privilege.
THE WITNESS: So I won't answer.
MR. COX: Well, let's go back and ask the question again.
MS. PITNEY: He's answered the question. He gets the affidavit from the attorney.
BY MR. COX:
Q. What is the LPS system?
A. That is a communication tool with our attorney network.
Q. Is LPS a separate company?
A. Yes.

37

STEPHAN
MS. PITNEY: Objection. The means by which he communicates any details about -- the means by which he communicates with his attorneys is privileged.
BY MR. COX:
Q. What does LPS do?
MS. PITNEY: I'm going to object again on privilege grounds. Same objection. Do not answer that question.
THE WITNESS: Okay.
BY MR. COX:
Q. Is the source of what you know about what LPS does based upon any communication that you've had with lawyers?
A. Sorry. Please rephrase that. I don't understand your question.
Q. Do you know what LPS does with respect to documents processed by your unit?
MS. PITNEY: Objection. Same objection.

10 (Pages 34 to 37)

38

STEPHAN
MR. COX: He can answer that yes or no.
THE WITNESS: I still don't understand what you're asking.
BY MR. COX:
Q. You've mentioned LPS.
A. Right.
Q. That's a separate company; is that correct?
A. It's a system that we have acquired from a company by the name of Fidelity, in order to have communication between our attorneys.
Q. Do you have any memory of specifically receiving Deposition Exhibit-1?
A. No.
Q. Again, I'm asking you, based upon that, to describe what the usual business practice is within your unit, as far as how affidavits, such as Deposition Exhibit-1, come to you.
A. Our attorney will load it to the LPS system. Members of my team will

39

STEPHAN
print it. Other members will prepare it. The figures have already been loaded from our network of attorneys. So my team does not have any input on the affidavit, other than filling in my name. They bring it to me. I review it against our Fiserv system, execute it, hand it back. They get it notarized. It's Federal Expressed back to the individual attorney asking.
Q. Do you keep a log of any sort of what documents you execute?
MS. PITNEY: I'm sorry. Can you repeat the question, Tom? I could not hear that.
BY MR. COX:
Q. Do you keep a log of any sort of what documents you execute?
MS. PITNEY: Objection. Work product. Any type of log that he keeps relative to these affidavits is prepared in preparation for litigation; to the extent that one even exists.

40

STEPHAN
MR. COX: He can answer the question of whether or not he keeps a log, before I ask him what goes into the log.
MS. PITNEY: Fine.
THE WITNESS: No, I don't have a log.
BY MR. COX:
Q. Does anybody keep a log of what documents you sign?
MS. PITNEY: Object to the form of that question.
THE WITNESS: Please rephrase.
BY MR. COX:
Q. Do you know if anybody keeps a log of what documents you execute?
A. We have notaries in our department, approximately six, who keep a log for what they notarize.
Q. These are notaries within your department?
A. That is correct.
Q. As I understand it, the

41

STEPHAN
first step is, in your department, a document comes in on the LPS system from the outside lawyer; is that correct?
A. That is correct.
Q. And then an employee in your department prints it out; is that correct?
A. That is correct.
Q. And then you said that the employee prepares the document. What does that mean?
MS. PITNEY: Objection. The document is prepared for litigation. It is privileged. How it is prepared is privileged. Do not answer that question.
BY MR. COX:
Q. Do your employees have any direct communication with outside counsel?
A. Yes, through the LPS system.
MS. PITNEY: Objection. How and what he communicates with his attorney is privileged, Tom.

STEPHAN

MR. COX: I haven't asked for the content. I asked if it happens.

BY MR. COX:

Q. Would you answer the question, please?

A. Yes, through the LPS system.

Q. Is anything done to a document submitted to the LPS system by an outside lawyer before it reaches your hands?

MS. PITNEY: Objection. Preparation of the document is privileged. It's for litigation. Do not answer the question.

BY MR. COX:

Q. Is the document that is received in the LPS system from outside counsel presented to you in exactly the form that it is received in from outside counsel?

MS. PITNEY: Objection. Same objection.

MR. COX: Is it an

STEPHAN

objection, or are you instructing him not to answer?

MS. PITNEY: I'm instructing him not to answer, to the extent you're asking him questions about a document that was prepared specifically during the course of litigation. It's protected by privilege, and you can't ask him questions about it.

BY MR. COX:

Q. Deposition Exhibit-1 has your name stamped on it with a stamp; is that correct?

A. That is correct.

Q. And below your name, the words "limited signing officer" appear; is that correct?

A. That is correct.

Q. Who puts that stamp on these affidavits?

A. My team.

Q. On this particular affidavit, your name and title is stamped

STEPHAN

twice on the first page, and once on the signature page for you; is that correct?

A. That is correct.

Q. And then it's stamped again on the notary page; is that correct?

A. That is correct.

Q. So as I understand it, an affidavit, such as Deposition Exhibit-1, is initially prepared by outside counsel?

MS. PITNEY: Objection.

BY MR. COX:

Q. Is that correct?

A. Yes, that is correct.

Q. Does anybody on your team verify the accuracy of any of the contents of the affidavit before it reaches your hands?

MS. PITNEY: Objection again. How the document is prepared -- you can ask him questions about the document and what's stated in the document. The preparation of the document, which is prepared for litigation,

STEPHAN

is privileged. Do not answer the question, Jeff.

BY MR. COX:

Q. Mr. Stephan, do you recall testifying in your Florida deposition in December, with regard to your employees, and you said, quote, they do not go into the system and verify the information as accurate?

A. That is correct.

MS. PITNEY: I'm sorry. Tom, could you please repeat what you just said? I just couldn't hear.

MR. COX: Quote: They do not go into the system and verify the information as accurate.

BY MR. COX:

Q. Is that correct?

A. That is correct.

MR. FLEISCHER: Tom, can you reference what litigation that was in, do you know?

MR. COX: The Florida case

46

STEPHAN
that he testified in.
MR. FLEISCHER: I just thought you might have a reference there.
MR. COX: I'll get it shortly.
BY MR. COX:
Q. Do you and your 14-person team all work in the same physical space?
A. Yes. We're all in the same department.
Q. Do you have an office or a cubicle, or what?
A. Cubicle.
Q. Do the employees bring documents to you to sign?
A. That is correct.
Q. How many do they bring to you at a time, on average?
A. For a month, anywhere from six to 8,000 documents.
Q. Do you recall testifying in your Florida deposition in December that you estimated it was 10,000 documents a

47

STEPHAN
month?
A. I do not recall. I'm going off of numbers within the past month or so.
Q. Have those numbers gone down in the past month or so?
A. There has been a decrease.
Q. Back in December, were you signing in the range of 10,000 documents a month?
A. I may have been.
Q. Back in August of 2009, roughly, how many documents a month were you signing?
A. I cannot estimate. I don't know.
Q. Do you believe that it was more or less than the number you were signing in December?
A. I'm going to assume, more.
Q. And on a given day, I understand an employee brings you a group of documents for you to sign; is that correct?

48

STEPHAN
A. That would be correct.
Q. Roughly, how many are brought to you in a group, on average?
A. Throughout a day, I believe we are averaging approximately 400 new requests coming in from our attorney network. So I would say approximately 400 per day.
Q. This sounds very basic. But, physically, are you handed a pile of 100 documents, 300 documents? How does that work?
A. They bring them to me in individual folders from each one of the members of my team. I do not count how many are in the files.
Q. So each team employee has a folder of document; is that correct?
A. That is correct.
Q. When you receive a summary judgment affidavit to be signed by you, is it accompanied by any other documents relating to the loan?
MS. PITNEY: Objection. The

49

STEPHAN
document is prepared for litigation. And anything he does when he's preparing it is privileged.
MR. COX: Are you telling him not to answer?
MS. PITNEY: I am. Tom, if you want to ask him about general procedures, which you have been, then I'm not going to object as much. But if you want to ask him about what goes into preparing a document that was used for summary judgment, that's clearly prepared for litigation, and it's privileged and protected.
MR. COX: I think you haven't heard my question, Julia. I'll state it again.
BY MR. COX:
Q. When you receive a summary judgment document for your execution, is it accompanied by any other documents?
MS. PITNEY: My objection is

50

STEPHAN

-- you can answer that question, Jeff.

THE WITNESS: There are times when it has the Complaint connected. There are times when it is brought to me just as the affidavit.

BY MR. COX:

Q. When you say that there are times when it comes to you with a Complaint connected, you mean attached as an exhibit?

A. Such as this one, yes.

Q. When you say "this one," you're referring to Deposition Exhibit-1?

A. Yes, that is correct.

Q. Deposition Exhibit-1 has several exhibits attached to it; is that correct?

MS. PITNEY: Could you please tell me what the exhibits that are attached are, because I don't have the benefit of having them in front of me?

51

STEPHAN

THE WITNESS: Exhibit-A is a copy of the note and the --

MR. COX: Julia, this is your summary judgment affidavit.

MS. PITNEY: I'm not doubting that it is. I just don't know what these other exhibits attached are.

MR. COX: Don't you have your copy?

MS. PITNEY: You're the one verifying if they're the same as the one I'm looking at, Tom.

THE WITNESS: Exhibit-B is the mortgage. Exhibit-C is the assignment of note and mortgage. Exhibit-D -- I believe we're looking at the demand, or the breach letter. And those are the four documents that are connected to this affidavit of summary judgment.

BY MR. COX:

Q. In your usual practice, are

52

STEPHAN

those exhibits attached to the affidavit at the time that you sign them?

MS. PITNEY: Objection. You're asking about a document that was prepared by an attorney. Anything that comes with it that he's asked to review is privileged -- the communication between a client and an attorney. Do not answer the question.

BY MR. COX:

Q. Mr. Stephan, would you please look at Paragraph 3 of Exhibit-1. Do you see there the statement: That a true and correct copy of which is attached hereto is Exhibit-A?

A. Where are you looking?

Q. Paragraph 3. Do you see that statement?

A. Yes, I do.

Q. When you sign an affidavit such as Exhibit-1, are the exhibits attached to it?

MS. PITNEY: Objection. A

53

STEPHAN

document that's provided to him by an attorney is privileged.

MR. COX: Are you telling him not to answer that question?

MS. PITNEY: Yes. I'll say again, Tom, if you would like to ask him about the facts that are in the affidavit, the details about this loan -- which I might remind you involves a woman by the name of Nicole Bradbury -- then I'm sure Jeff will answer your question?

MR. COX: Well, he has the affidavit in front of him in this case. And the affidavit which he swore to says a true and correct copy of the note is attached to it. And I'm asking him if that document was attached to it at the time that he signed it.

BY MR. COX:

Q. Would you please answer that question?

14 (Pages 50 to 53)

54

STEPHAN
A. To my knowledge, I do not recall.
Q. Is it your usual business practice to have exhibits attached to affidavits that you sign?
A. Yes.
Q. All exhibits?
MS. PITNEY: Object to form.
THE WITNESS: I do not know.
BY MR. COX:
Q. When you sign a summary judgment affidavit, do you check to see if all the exhibits are attached to it?
A. No.
Q. Does anybody in your department check to see if all the exhibits are attached to it at the time that it is presented to you for your signature?
A. No.
Q. When you sign a summary judgment affidavit, do you inspect any exhibits attached to it?
A. No.

55

STEPHAN
MS. PITNEY: Could you repeat the question, Tom? Did you say -- or can you have it read back, please?
(Whereupon, the pertinent portion of the record was read.)
MS. PITNEY: Object to the form.
BY MR. COX:
Q. What happens to an affidavit in your department after you sign it?
MS. PITNEY: Objection. What happens to the document afterwards is -- it's in the course of litigation. The same objection as I said before. Where it goes is privileged.
MR. COX: Where it goes is not a communication. It is not privileged.
MS. PITNEY: You don't know that.
MR. COX: Pardon me?
MS. PITNEY: You don't

56

STEPHAN
necessarily know that.
MR. COX: The physical movement of a document is not a communication. It's a fact.
BY MR. COX:
Q. My question to you is, where does a summary judgment go after you sign it?
A. After I sign it, it is handed back to my staff. My staff hands it to a notary for notarization. It is then handed back to my staff. They send it back to the network attorney requesting any type of affidavit.
Q. So you do not appear before the notary; is that correct?
A. I do not.
Q. What does your staff do with a summary judgment affidavit, such as Deposition Exhibit-1, after it receives it back from the notary?
A. They go into our LPS system, close out process, stating it's being sent back to --

57

STEPHAN
MS. PITNEY: Objection. Sorry. I don't mean to interrupt you, Jeff. I'm going to instruct you not to answer anything else, because you've already testified that the LPS system is the means by which you communicate with your attorney. The attorney/client communication is privileged. So don't continue to answer the question.
Actually, if there is no question, pending, I'd like to take a brief break to discuss something with Brian Fleischer.
(Whereupon, a short recess was taken.)
BY MR. COX:
Q. Mr. Stephan, do you recall testifying in your Florida deposition in December that you rely on your attorney network to ensure that the documents that you receive are correct and accurate?
A. That is correct.

58

STEPHAN
Q. And is that, in fact, the case?
A. Yes.
Q. And your department does not do any independent accuracy check of those records; isn't that correct?
MR. FLEISCHER: Objection as form.
THE WITNESS: Can you rephrase?
BY MR. COX:
Q. Your department does not do any independent check of the accuracy of the information on the summary judgments coming to you; isn't that correct?
A. I review, quickly, the figures. Other than that, that's about it.
Q. Do you recall testifying in your Florida deposition in December, that the affidavits that you sign are not based upon your own personal knowledge?
A. I do not recall.
MS. PITNEY: Objection to

59

STEPHAN
the form.
BY MR. COX:
Q. You do not recall that?
A. I do not recall.
Q. When you receive a summary judgment affidavit from one of your staff members, what do you do with it?
A. I will first review it against our computer system, which is Fiserv, in general terms, to verify that the figures are correct. And then I will execute it and hand it back to my staff to have it notarized.
Q. You say "in general terms" you review it. What do you mean?
MS. PITNEY: Objection.
THE WITNESS: I compare the principal balance. I review the interests. I take a look at the late charges. I look at the outstanding escrow amounts. When I say "general terms," I mean I'm not looking at the escrow and breaking it down to the penny.

60

STEPHAN
I'm saying, yes, it looks correct in my computer system.
BY MR. COX:
Q. Is there anything else that you look at in your computer system when you're signing a summary judgment affidavit?
MS. PITNEY: I'm sorry. I couldn't hear the last part of that.
BY MR. COX:
Q. Is there anything else that you look at in your computer system at the time that you sign a summary judgment affidavit?
A. The only other thing I can --
MS. PITNEY: One second. Are we talking about the computer system, the communication system? I just was asking for clarification of --
MR. COX: Let me clarify it.
MS. PITNEY: What computer

61

STEPHAN
communication system Tom was asking him about.
BY MR. COX:
Q. You testify that you go into the First Serve (sic) system; is that correct?
A. Yes, Fiserv.
Q. Fiserv. Do you go into any other computer system at the time that you're signing a summary judgment affidavit?
A. No.
Q. And you just testified that you look at principal, interest, late charges and escrow; is that correct?
A. That is correct.
Q. Is there anything else that you look at in your computer system when you're signing a summary judgment affidavit?
A. The only thing I review, other than that, is who the borrower is.
Q. When you receive a summary judgment affidavit to sign, do you read

STEPHAN

every paragraph of it?
A. No.
Q. What do you read?
A. I look for the figures.
Q. That's all that you look at when you sign a summary judgment affidavit?
A. Yes, to ensure that the figures are correct.
Q. Is it fair to say then that when you sign a summary judgment affidavit, you do not know what it says, other than what the figures are that are contained within it?
MR. FLEISCHER: Objection as to form.
MS. PITNEY: Objection to the form of the question.
THE WITNESS: Please rephrase.
BY MR. COX:
Q. It fair to say that when you sign a summary judgment affidavit, you don't know what information it contains,

STEPHAN

other than the figures that are set forth within it?
A. Other than the borrower's name, and if I have signing authority for that entity. That is correct.
Q. The practice that you've just described for signing summary judgment affidavits is the practice that you use signing all summary judgment affidavits that you handle; is that correct?
MR. FLEISCHER: Again, I'm going to object to the form of the question.
BY MR. COX:
Q. Is that correct?
A. The practice that I use for summary judgment affidavits is the same practice that I use for all affidavits.
Q. And that's the one that you've just described?
A. Yes.
Q. Is any part of your compensation at GMAC Mortgage tied to the

STEPHAN

volume of documents that you sign?
A. No.
Q. Is any part of your compensation tied to the volume of documents that your department processes?
A. No.
Q. Is it your understanding that the process that you follow in signing summary judgment affidavits is in accordance with the policies and procedures required of you by GMAC Mortgage?
A. Yes.
Q. Does GMAC do any quality assurance training for your department?
A. Presently, no.
Q. Has it in the past?
A. I do not know.
Q. You don't recall any?
A. I never received any.
Q. Do you have any memory of checking the numbers on the Bradbury affidavit that's in front of you as Deposition Exhibit-1?

STEPHAN

A. I do not recall.
Q. If a loan has been modified, does that show up in the Fiserv system that you look at?
A. When you say "modified," are you stating a loan modification?
Q. Yes.
A. Yes.
Q. Does that show up?
A. Yes.
Q. If a loan has been modified, is any information put in the summary judgment affidavits that you sign about that?
MR. FLEISCHER: Objection. Are you talking about modified, or his term was loan modification. I just want to make sure we're clear.
MR. COX: That's fine.
BY MR. COX:
Q. If there's a loan modification, does information about a loan modification appear in the summary

STEPHAN

judgment affidavits that you sign?

A. I do not know.

MS. PITNEY: In all of them, or in this one?

MR. COX: In any of them.

THE WITNESS: I don't know.

BY MR. COX:

Q. Based upon your testimony, Mr. Stephan, is it correct that when you sign a summary judgment affidavit, such as Deposition Exhibit-1 that is in front of you, you don't know whether any portion of it is true, other than the paragraph containing the numbers that you just described; is that correct?

MS. PITNEY: Object to the form. Tom, are you asking him about this affidavit?

MR. COX: Well, he's testified that doesn't recall signing this particular affidavit, so that was not my question. Let me restate it.

BY MR. COX:

STEPHAN

Q. In your practice of signing summary judgment affidavits, Mr. Stephan, is it correct that they always have a paragraph containing the numbers of the amounts claiming to be due?

A. That would be correct.

Q. And is it correct that when you sign those affidavits, you don't know whether any other part of the affidavit is true or correct?

A. Please advise me. What do you mean by "any other part"?

Q. Any other paragraph, other than the one containing the numbers.

A. I review it for the due date, if that's included in there.

Q. So all of them --

A. So that would be the numbers.

Q. So other than the due date and the balances due, is it correct that you do not know whether any other part of the affidavit that you sign is true?

A. That could be correct.

STEPHAN

Q. Is it correct?

A. That is correct.

Q. And isn't it also correct that you do not check the numbers on every single summary judgment affidavit that you sign?

A. That is not correct.

Q. You check every single one?

A. Yes.

Q. How long does it take you, on average, to process the execution of a summary judgment affidavit?

MS. PITNEY: Object to the form.

MR. COX: Please answer.

THE WITNESS: Anywhere from five to 10 minutes, off the top of my head.

MR. COX: If we can take a break. I may be done, but we can take a break for five minutes.

(Whereupon, a short recess was taken.)

BY MR. COX:

STEPHAN

Q. Mr. Stephan, referring you again to the bottom line on Page 1 of Exhibit-1, it states: I have under my custody and control, the records relating to the mortgage transaction referenced below.

It's correct, is it not, that you did not have in your custody any records of GMAC at the time that you signed a summary judgment affidavit?

MS. PITNEY: Objection to the form.

THE WITNESS: I have the electronic record. I do not have papers.

BY MR. COX:

Q. You have access to a computer. Is that what you mean?

A. Yes.

Q. You have no control over that system, do you?

MR. FLEISCHER: Objection as to form.

BY MR. COX:

STEPHAN

Q. You have no control over that Fiserv computer system, do you?

A. No, I do not.

Q. And someone else within GMAC is responsible for ensuring the accuracy of that system; isn't that correct?

A. That would be correct.

MR. COX: I have no further questions.

MR. FLEISCHER: We're done, Julia, unless you have something to add.

MS. PITNEY: No.

(Witness excused.)

\- - -

(Whereupon, the deposition concluded at 11:45 a.m.)

INDEX

\- - -

EXHIBITS

\- - -

NO.	DESCRIPTION	PAGE
1	Affidavit August 5, 2009	3

I have read the foregoing transcript of my deposition given on June 7, 2010, and it is true, correct and complete, to the best of my knowledge, recollection and belief, except for the corrections noted hereon and/or list of corrections, if any, attached on a separate sheet herewith.

____
JEFFREY STEPHAN

Subscribed and sworn to before me this ____ day of ____________, 2010.

____
Notary Public

CERTIFICATE

I HEREBY CERTIFY that the witness was duly sworn by me and that the deposition is a true record of the testimony given by the witness.

Susan B. Berkowitz, a
Registered Professional Reporter
and Notary Public
Dated: June 9, 2010

(The foregoing certification of this transcript does not apply to any reproduction of the same by any means, unless under the direct control and/or supervision of the certifying reporter.)

Exhibit 5

Timeline of JPMorgan Chase Abuse of Bankruptcy Process in the Southern District of New York

Prepared by Linda Tirelli, Esq.

April 2008: SDNY BK In re Schuessler: Mortgagee secured claim filed by Chase and its foreclosure mill attorneys at Steven J Baum PC Judge. Bankruptcy Judge Cecelia Morris writes a 62 page decision blasting the parties for omitting pertinent facts and not having a system of checks and balances. The debtor attempted to make a payment that the bank refused, they mailed it in. A motion for relief from stay to foreclose was automatically generated by Baum firm triggered by LPS – no one checked the facts. This case is famous throughout the Bankruptcy litigation community largely because the Judge is clear in her opinion that an omission of material fact is as much an abuse of process as a false statement.

August 2008: SDNY BK In re Pawson: Judge Martin Glenn tells Chase, "In re Schuessler was strike one, this is strike two and you *know* what happens on strike three." Chase argues to keep the record sealed Judge Glenn denies the request. Case settled (It was included $50,000 legal fees paid to the debtors attorney and compensation to the debtors via loan modification.

November 2008: SDNY BK In re Nuer: SDNY 08-14106 (aka – "strike 3") Chase, LPS and foreclosure mill firm of Steven J. Baum, P.C.'s office submit 2 bogus assignments of mortgage both dated the same date one signed by Scott Walter an employee at LPS and the second signed by Ann Garbis a Vice President at Chase. Each purports to assign the loan from Chase to a CLOSED securitized trust. **Chase NEVER owned the loan** – period.

February 2009: In re Pawson: Chase sends a letter to the U.S. Trustees office in the Department of Justice, not legal binding itself to any course of action but stating an intent to discontinue its practices (which were the filing of mortgage assignments for loans that it never owned. Notwithstanding this letter Chase continues to dig heels in the ground in the Nuer case

January 2010: In re Nuer: U.S. Department of Justice Office of the U.S. Trustee files a Memorandum in of Support of Sanctions against Chase in In re Nuer for Chase's dishonesty in filing false statements and false assignments of a loan that Chase never owned.

January 7, 2010: In re Nuer: In a hearing before Hon Robert Gerber, Chase through its attorney admits the documents complained about in Nuer back in 2008 are factually inaccurate.

January __ 2010: In re Nuer: By letter (without any proper pleading) Chase attempts to withdraw its false pleading and documents from the Nuer case without reserving the rights of the debtor to assert claims for damages resulting from the filings of those false pleadings. I filed a Motion to Strike the withdrawal with the court based on the fact that a year of litigation had damaged the debtor, had caused the Debtor to run up a very large legal bill and had left the homeowner association dues unpaid for all that time. I did include a "Conditional Motion for Sanctions and Fees" with my original objection to the Chase's motion for relief from the automatic stay under Section 363 of the Bankruptcy Code.

Timeline of JPMorgan Chase Abuse of Bankruptcy Process in the Southern District of New York

Prepared by Linda Tirelli, Esq.

January 2010: Texas BK In re Hongkeo: Chase and its attorneys file a bogus assignment of Deed of Trust dated in 2008 signed the famous Robo Signors "Bryan Bly & Crystal Moore" The Hongkeo case mirrors Nuer on many levels. The bogus Chase mortgage assignment purported to be an assignment by Chase of the mortgage in issue, but Chase never owned any interest in that mortgage.

February 2010: In re Nuer: Judge Gerber hears Debtor's motion to strike Chase's improper letter trying to withdraw its false documents and accepts my arguments assuring the Debtor that all her rights and remedies to assert claims against Chase are to be preserved. Chase then enters a stipulated agreement with Debtor and U.S. Trustee to withdraw its false pleading and reserve the right of the debtor to seek damages and sanctions. Chase does nothing to attempt to resolve the case with the Debtor. Parties proceed with depositions. Both Ann Garbis of LPS and Scott Walter of Chase, testify to signing the assignments (of mortgage interests that Chase never owned), never verifying any of the information beyond the date and the spelling of their names. Garbis testified the internal practice of Chase is to sign a folder full of documents daily and send them to a different department to be notarized and returned to the foreclosure mill attorneys. Their testimony confirmed the business practice of Chase to routinely have false notarizations – an illegal act.

June 2010: ED NY In re Palaza: Chase filed a proof of claim in the EDNY which purports to assign a mortgage from JP Morgan as successor in interest to Washington Mutual (assignor) indicating a FL address to Deutsche Bank as Trustee for Long Beach Mortgage loan Trust 2005-WL1 (Assignee) Chase never owed that mortgage loan either. Furthermore that trust's closing date passed 5 years earlier on 2005, thus, even if it had owned that mortgage, its purported assignment of it five years after the trust closed would have been invalid. This document is signed by robo-signor Wanda Chapman in Florence County SC.

September 2010: Chase tells the world in a series of press releases that while there may be "some minor issues" with a few of their documents, they have never withdrawn their blatantly false documents from any of these case – despite the FACT they stipulated to do exactly that in Nuer just 7 months prior.

October 2010: SD NY In re Hardesty: Chase and its foreclosure Mill attorneys at Steven Baum P.C. office submit another bogus assignment of mortgage to the US Bankruptcy Court in the case of. It is a bogus assignment by Chase of a mortgage interest, which it never owned to a securitized trust that closed years prior to the date to the assignment. Baum filed a Motion to Compel Abandonment by the Debtor of the interest in the property of the estate, i.e., the debtor's home, so that the firm could proceed to foreclose. The Ch.7 Trustee, not realizing the false nature and significance of the document, consults me and I advise the Ch. 7 Trustee to immediately contact the U.S. Dept. of Justice Office of the U.S. Ch. 13 Trustee, Attorney Gregory Zipes, to report suspected fraud.

Attorney Zipes immediately contacts the Steven Baum, P.C. Bankruptcy Litigation department manager Amy Polowy, Esq. and Attorney Jay Teitelbaum of Teitelbaum & Baskin,

Timeline of JPMorgan Chase Abuse of Bankruptcy Process in the Southern District of New York

Prepared by Linda Tirelli, Esq.

Chase's second tier attorney, to inquire. Within 1 hour, a letter from the Baum firm is filed on the court's ECF system withdrawing the Motion. All documents remain on ECF. The facts and documents submitted in Hardesty mirror the facts in Nuer.

October 2010: - Chase Tells Florida's Attorney General that it is not filing false documents in its cases.

November 2010: SD NY In re Bruce: Chase and its attorneys submit a bogus Assignment of Mortgage (assigning a mortgage never owned by Chase) signed by robo-signor "Wanda Chapman" who claims to be an officer of MERS making an assignment from assignor "WMC Mortgage Corp." indicating a Florida address, to an assignee, "US National Bank Association as Trustee for JPMorgan Mortgage Acquisition Trust 2006-WMC4Asset Backed Pass Through Certificates Series 2006-WMC4" indicating a Minnesota address. Ms. Chapman curiously signed the document as per notarized acknowledgment, in Florence County SC. Chase is the purported servicer to the trust and Ms. Chapman, according to the collection of her signatures on other sworn documents that we have is actually employed by Chase. Her Internet Linkedin account profile indicates that she is actually an "Operations Unit Manager for JP Morgan" working in Florence County, SC.

Exhibit 6

IN THE CIRCUIT COURT OF THE FOURTH
JUDICIAL CIRCUIT, IN AND FOR DUVAL
COUNTY, FLORIDA

CASE NUMBER: 16-2004-CA-4835-XXXX-MA
DIVISION: CV-E

TCIF REO2, LLC,

Plaintiff,

v.

MARTIN L. LEIBOWITZ, AS TRUSTEE,
etc., et al.,

Defendants.

______________________________/

THIS INSTRUMENT IN COMPUTER SP

FILED
MAR 06 2006
CLERK CIRCUIT COURT

MOTION FOR SANCTIONS FOR FRAUD UPON THE COURT

COME NOW, Defendants Robert and Lillian Jackson, by and through their undersigned counsel, and pursuant to Rule 1.140, Florida Rules of Civil Procedure, hereby move the Court to enter sanctions against the Plaintiff, including Dismissal of the pending matter with prejudice and such other sanctions as the Court deems appropriate. In support of this Motion, Defendants would state as follows:

1. On or about August 6, 2004, Plaintiff filed a Motion for Summary Judgment with this Court. In support of the Motion for Summary Judgment, Plaintiff contemporaneously filed an Affidavit of Indebtedness signed and subscribed by Margie Kwiatanowski, a "Limited Signing Officer" with GMAC Mortgage Corporation ("GMAC"), the servicing agent for Plaintiff. Plaintiff filed subsequent Amended Motions for Summary Judgment on March 10, 2005 and November 3, 2005, and again filed Affidavits of Indebtedness signed and subscribed by Ms. Kwiatanowski, as a Limited Signing Officer.

2. The Affidavits of Indebtedness contains Ms. Kwiatanowski's statements, allegedly under oath, on behalf of GMAC, that she:

(a) has "personal knowledge of the status of all mortgages and notes owned and held by said corporation." (Affidavit, paragraph 1).

(b) has "examined the relevant loan documents and the Complaint, and each allegation of the Complaint is correct." (Affidavit, paragraph 2).

(c) is familiar with the loan payment records, which are regularly compiled and maintained as business records: "These records properly reflect loan payments, charges, and advances that are noted in the records at the time of the applicable transactions by persons whose regular duties include recording this information." (Affidavit, paragraph 3).

(d) swore and subscribed to the statements before a Notary.

3. The Affidavits additionally detail the alleged facts as the status of the mortgage, including the material dates, the amount owed and the fees and charges.

4. Ms. Kwiatanowski was deposed at GMAC's facility in Horsham, Pennsylvania, on January 31, 2006. See, Notice of Deposition, attached hereto as Exhibit "A" and incorporated by reference. During the deposition, Ms. Kwiatanowski admitted the above statements under oath were false:

(a) has "personal knowledge of the status of all mortgages and notes owned and held by said corporation." (Affidavit, paragraph 1).

Ms. Kwiatanowski admitted that, while she can *access* other loan documents, the statement regarding personal knowledge was false:

Q. All right. Let me ask you to go to the Amended Affidavit, which is Jackson 00006. And we'll start with page - - I'm sorry, paragraph 1.

It states that you're a limited signing officer and that you have personal knowledge of the status of all mortgages and notes owned and held by said corporation.

Do you see that?

A. Yes, I do.

Q. How is that true?

A. Well, generally, I understand what a note and a mortgage is, and how - - how the loan is originated.

Q. Right. But this says you have personal knowledge of the status of all mortgages owned and held by said corporation; corporation being TCIF RE02, LLC?

A. Well, actually, we're the servicing agent for them. We would not have originated the loan.

I'm not quite sure how to answer your question, though.

Q. Well, how is it that you have personal knowledge of the status of all mortgages serviced by GMAC for this claimant?

A. Again, I'm not - - I don't know.

Q. Do you have personal knowledge of the status of all mortgages and notes serviced by GMAC for this claimant?

A. No, I do not.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 30 line 9 - p. 31 line 15) (emphasis added)

(h) has "examined the relevant loan documents and the Complaint, and each allegation of the Complaint is correct." (Affidavit, paragraph 2).

Ms. Kwiatanowski testified she reviewed only a single computer screen prepared by someone else. She did not review <u>any</u> loan documents, much less the "relevant" ones, and did not read the Complaint:

> Q. Now, paragraph 2 - - and I'm just jumping ahead to your affidavit. But your affidavits, as you may be familiar, referenced the fact that you reviewed certain things in order to sign the affidavits?
>
> A. That's correct.
>
> Q. Okay. The records in paragraph 2 that are requested are: Any and all documents, electronic memoranda, policy manuals, servicing manuals, or other items of any kind reviewed in preparation for completion of the Affidavit of Indebtedness dated July 15, 2004, and Amended Affidavit of Indebtedness dated October 20, 2005. And your affidavits are then attached after this.
>
> But my next question is: Is there anything other than what's sitting to your left, that you recall reviewing in order to prepare the two affidavits?
>
> A. I would have - - excuse me, I'm sorry. I would have reviewed a screen in our system that populates what the total indebtedness is. And I don't believe a copy of that screen is within this pile.
>
> Q. Okay. Are you saying that you reviewed a single screen?
>
> A. Yes.
>
> Q. And when I'm picturing a screen, I'm picturing a single page of information; or is there more than one page of information that appears on your screen?
>
> A. There is one page of information.
>
> Q. What is that page of information called?
>
> A. It's called the foreclosure work screen.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 19 line 13 - p. 20 line 24)

* * *

Q. Okay. Did you review the payment history separately?

A. I would have no reason to review it separately.

Q. Okay. In other words, you did not review the payment history before completing your affidavit?

A. That's correct.

Q. Would you have reviewed the actual note of mortgage before completing your affidavit?

A. No, I would not have.

Q. Would you have reviewed any of the customer history log, the document, the discussions back and forth between the mortgagors and the servicing company?

A. No, I would not have.

Q. Is it fair to say, then, that in completing an affidavit such as the ones we have attached as Bates stamped Jackson 3 through 5, and Jackson 6 through 8, that you would have reviewed one computer screen called the foreclosure work screen?

A. That's correct.

Q. And nothing else?

A. That's correct.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 22 line 16 - p. 23 line 17) (emphasis added)

* * *

Q. Paragraph 2, it says: I have examined the relevant loan documents and the Complaint, and each allegation of the Complaint is correct.

Is the Complaint part of the foreclosure work screen?

A. No, it is not.

Q. Would you have actually read the Complaint before signing the Amended Affidavit of Indebtedness?

A. No, I would not. I could have reviewed it because generally they are downloaded in a system that we have linked to our attorneys.

Q. Scanned?

A. Yes. Imaged.

Q. Imaged?

A. Um-hmm.

Q. Do you know whether it's general practice to bring up the image of the Complaint when you're reviewing the foreclosure work screen?

A. No, I would not.

Q. So typically you would not examine the Complaint before signing the affidavit?

A. That's correct.

Q. We've already covered that you review the foreclosure work screen.

What are the "relevant loan documents" that are referenced in paragraph 2?

A. I would think that they would have been anything that is supplied to the foreclosing attorney; it would be the mortgage, the note, the title policy.

Q. **And did you review the relevant loan documents consisting of the mortgage and the note and the title policy before signing the Amended Affidavit of Indebtedness?**

A. **No, I did not.**

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 31 line 16 - p. 33 line 6) (emphasis added)

(c) "These records properly reflect loan payments, charges, and advances that are noted in the records at the time of the applicable transactions by persons whose regular duties include recording this information." (Affidavit, paragraph 3).

Ms. Kwiatanowski admitted that she had no knowledge of whether the information kept was recorded "at the time of the applicable transaction by persons whose regular duties include recording this information," and simply relies on the "system" without having any idea how or whether the "system" confirms entries are made accurately and timely:

Q. Do you agree that that sentence, the last sentence of paragraph 3 of your affidavit, indicates that the entries are made at the time of the transactions?

A. Yes, I do.

Q. Okay. So then, let me step back and re-ask the question. How is the system set up to confirm that those entries are made accurately and timely?

A. I wouldn't be able to answer that.
That's not my area of expertise.

Q. Well, you swore to this affidavit.

A. Well --

Q. You swore to the truth of the fact that the history is noted in the record at the time of the transaction.

How do you know that to be true?

A. Because I – I have to rely on our system of record.

Q. Right. I agree that it's set up for you to rely on that, but that's not what this says. It says you're swearing to the fact that that record is accurate and timely.

A. I just would have to have confidence in my system that it is true and correct.

Q. Okay. Is there any – let me go back to my hypothetical that I asked you, where a mortgagor has a conversation with a loan specialist or work-out specialist, or whatever their title is, and reaches some sort of payment plan. Okay?

A. Okay.

Q. How is the system set up to confirm, number one, that that conversation is entered that day, for example, versus an employee taking a note and entering it a week later when they come back from vacation; and now is it set up to confirm that the data is entered accurately, that the employee has the payment numbers and times of payment and method of payment entered accurately?

A. I wouldn't be able to answer that because that's not in my unit.

Q. As part of your unit, have you ever gone back to confirm how you can swear to the truth of this sentence?

A. There are times when I might have to review a loan as far as conversations, if a borrower was disputing something. There would be those times that I would review the notes and the account at that point.

But in – in this particular affidavit, I had no reason to go back to review anything.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 34 line 13 - p. 36 line 20)

The record in the instant case demonstrates why some minimal scrutiny (as otherwise sworn to in the subject Affidavits, but never actually completed by the Affiant) would be necessary:

> Q. And is it fair to say that as of November 25, 2003, the Jacksons were completely paid up with GMAC, according to that entry?
>
> A. I would – I would have to confirm that by looking at the payment history.
>
> Q. Well, tell me what else that entry would mean; in other words, why would that entry be made in the comment history if the payment history didn't reflect it as true?
>
> A. Well, as it should, it should agree. I don't – I'm not disputing that. But my feeling would be I would look to see how the payments were applied, to see if they were applied correctly, if I had a reason to review this account.
>
> Q. Which you did not?
>
> A. That's correct.
>
> Q. Well, isn't it fair to say that your affidavit indicates that the payment due February 1, 2004, is the one that placed this loan in default, correct?
>
> A. That's correct.
>
> Q. And that would be a payment due for December, a payment due for January, and a payment due for February of '04, correct?
>
> A. That's correct.
>
> Q. Did you ever go back to confirm whether those were the payments that threw this loan into default?
>
> A. I would only know what the due date is in the system.

Q. Just based on what the foreclosure work screen says?

A. That's correct.

Q. Would you know who the person – because I want to be fair, now that I have an understanding of your role in this.

Would you know who the person would be who would be most familiar with the entries on the comment history that we're going over right now?

A. I don't think I could give you a specific person, no.

Q. Okay. If I told you that Mr. and Mrs. Jackson have canceled checks showing payments cashed by GMAC on January 5th of '04 and February 14, of '04, you have no explanation for that; that's not your role in reviewing this?

A. That's correct. That's something payment research would handle.

Q. Okay. With regard to whether the payments were accurately allotted to principal and interest as opposed to paid from suspense or pay to suspense, that would not be your role?

A. That's correct.

Q. Allotting the payments accurately is not your role?

A. That's correct.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 49 line 10 - p. 51 line 21)

Unfortunately, while the Affidavit reflecting sworn testimony to the Court indicates the Affiant has conducted a complete review of the file, GMAC's system is designed so that other departments within GMAC are responsible for reviewing the data:

Q. All right. Ms. Kwiatanowski, let me ask you this: Is there any reason or any way in the system that is set up within GMAC for the foreclosure work screen to indicate any problems or issues or disputes prior to the day you review it?

A. No.

Q. If there are comments in the – I forget what we called them – the comment history, if there are comments here that note, for example, that the borrower is having problems trying to get someone to resolve escrow and payment applications issues, if there are comments that say Account escrow payment may not be correct, sent for explanation, that type of thing, are any of those – or do any of those result in any sort of flags that get to the foreclosure work screen?

A. If there were any reason, if there was a dispute prior to a loan being referred, they would put what we call a CIT on the loan; that would prevent it from being referred while it was being researched.

Q. Okay. And I do see that, the listing for CIT, throughout this history.

What then, stops that CIT trigger and sends it on to your department, or stops the CIT hold and then sends it on to your department?

A. I believe there's -- I believe there's two different CITs for different lengths of time to keep it on hold. I believe – and also it would fall into someone's queue to see whether or not that should be removed prior to removing it; to see, for example, to see if the research has been completed. And if it has been and they find no error of GMAC's, then they would remove that CIT and that would move forward to foreclosure.

Q. Okay. Which department conducts that analysis –

A. It would –

Q. – is it done before it gets to your department or your unit?

A. Yes.

Q. Okay. How's that get done?

A. It would be through customer service. It would really depend on what the issue was as to what unit would be handling it.

Q. Okay. Well, for example, here we have – and I'm just summarizing this, and just because I think it is accurate – but there are entries here throughout with regard to a dispute in how the payments are being applied; you know, one notation here made by a GMAC individual that the account escrow payment may not be correct, sent for explanation.

How can you – or can you tell from that which unit is handling the review?

A. No, I cannot.

Q. What are the names of the units that do the reviews; you said there were two?

A. Well, there's a payment – there's payment research. There's an escrow unit if it were a dispute with taxes or insurance, they would need to review it. For an MI issue, that area would review it. It would all depend on the issue –

Q. Okay.

A. – who would be researching it.

Q. Is there a way to tell from the comment histories which units resolve the dispute?

A. It would show by that teller number on there who the associate was.

Q. Okay.

A. And then you would know from there what unit they would come from.

Q. And again, that gets done on the DocTrac – I'm sorry.

A. The XNet.

Q. XNet?

A. Preconversion, on the XNet.

Q. Okay.

A. Postconversion, we can do it right on our system.

Q. Is there a review process to make sure that the conclusion is accurate?

A. I wouldn't be able to answer that.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 58 line 7 - p. 61 line 24)

(d) swore and subscribed to the statements before a Notary.

Finally, Ms. Kwiatanowski admitted at the deposition she did not sign the Affidavits in front of a notary, but that it was "our" regular practice for the Affidavits to be placed in a folder and sent across the building to be signed by the notary, sometimes on another day:

Q. On Ms. Holmes' notary section, do you see there that she does not fill out the name of the person who is taking the oath?

A. I see that now, yes.

Q. And do you see that she also does not have a notary stamp?

A. I see that also, yes.

Q. Are you familiar with Pennsylvania's notary statute?

A. I realize that they have to have a stamp to notarize.

Q. And that both of those are violations of Pennsylvania's notary statute?

A. I would think so, yes.

Q. How is it that you and Ms. Holmes ended up in the same place at the same time for completion of the affidavit, how does that physically work?

A. Well, all documents that we sign already sworn in, she would hand me personally. So she would just sign off – she would notarize it after I signed off.

Q. Are you two in the same room when that's done?

A. Yes.

Q. Okay. How is that physically done, is what I am asking?

A. We would – anything that I would sign over to – anything I would sign off, I would give to her to notarize.

Q. Okay. And how – again, how is that physically done; do you and she meet in the same room, at the same time in the same place?

A. She is in the same building. I – I would leave – it could be more than just one affidavit in a folder and I waited for her to notarize.

Q. Okay. But by then, I'm taking it that she notarizes it at a different time than you sign it?

A. That's correct.

Q. Okay. Is that also true for the signature on Jackson 00008?

A. Yes, that's correct.

Q. And that appears to be a Brenda Staehle?

A. Brenda Staehle.

Q. Staerle, S-T-A-E-R-L-E.

A. Actually it's S-T-A-E-H-L-E.

Q. Okay. Thank you.

And she does indicate that you are the person swearing, and she does have her notary stamp here. But what you're indicating is you signed the document –

For example, the Amended Affidavit of Indebtedness, which is 6 through 8 on our Bates stamp, you sign the document, you put it in a folder, it gets routed to Ms. Staehle and then she signs it at a later time?

A. That's correct.

Q. Do you know if she signs it on the same day that you do?

A. Generally, yes, she would.

Q. How do you know that, what's the control for that?

A. Because they would try to complete something within the same day; as we have our guidelines to follow and our time frames to get it back to the processor, to supply it back to the attorney.

Q. Okay. But there's no doubt that she doesn't notarize it – or she doesn't witness your signing?

She does not witness or did not witness you placing your signature on Bates stamp 8; is that correct?

A. That's correct.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 27 line 4 - p. 30 line 8) (emphasis added)

Clearly, the notary statutes of both Pennsylvania (57 P.S. 158) and Florida (Section 117.05, Florida Statutes) are violated by the process used by GMAC in the instant case (and in all other cases, given the procedure outlined by Ms. Kwiatanowski.) Violation of Florida's notary statutes in the manner described (notarizing a signature if the person whose signature is being notarized is not in the presence of the notary at the time) constitutes malfeasance and misfeasance in the conduct of official duties, pursuant to Section 117.107(9), Florida Statutes. Under Pennsylvania law, when a notary certifies a document, the notary attests that the document has been executed, that the notary *was confronted by the signor*, that the signor is the person whose name is subscribed, and that the notary is *verifying the date of execution*. In Re Fisher, 320 B.R. 52, at 63 (E.D. Penn. 2005) (emphasis added.)

5. As referenced above, the Affidavits of Indebtedness filed by GMAC in furtherance of the foreclosure constitute sworn testimony to this Court in validation of the debt and GMAC's right to collect the debt. Unfortunately, the Affidavits are rife with falsehoods and misstatements; GMAC's system does not allow the Affiant (or her entire department, for that

matter) any opportunity to review the actual history of the loan or any of the loan document, as the Affidavit otherwise maintains to the Court. Defendants assert the filing of such false sworn testimony is a fraud upon this Court.

6. It is appropriate for the trial court to dismiss an action based on fraud, provided that there is a blatant showing of "fraud, pretense, collusion, or other similar wrongdoing." Distefano v. State Farm Mutual Automobile Ins. Co., 846 So. 2d 572, 574 (Fla. 1st DCA 2003).

7. Misrepresentations in the Affidavit are willful fraud, interfering with the Court's "ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Id.*

8. This Court should dismiss the pending action with prejudice and award such other relief as the Court deems just and appropriate.

WHEREFORE, Defendants Robert and Lillian Jackson, respectfully request this Court enter sanctions against Plaintiff, including entry of a Dismissal with Prejudice and such other relief as the Court deems just and appropriate.

DATED at Jacksonville, Duval County, Florida, this 3 day of March, 2006.

LAW OFFICES OF TROMBERG & KOWALSKI

JA Kowalski

Fred Tromberg, Esquire (FBN: 246514)
James A. Kowalski, Jr., Esquire (FBN: 852740)
Charlie F. Schmitt (FBN: 0012803)
4925 Beach Boulevard
Jacksonville, FL 32207
Telephone: (904) 396-5321
Facsimile: (904) 396-5730
Attorneys for Defendants

Exhibit 7

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NUMBER: 16-2004-CA-4835-XXXX-MA

DIVISION: CV-E

TCIF REO2, LLC,

Plaintiff,

v.

MARTIN L. LEIBOWITZ, AS TRUSTEE, etc., et al.,

Defendants.

/

THIS INSTRUMENT ... UTER ... THAYER

FILED 05/02/06 PM 01:00 JIM FULLER

ORDER GRANTING DEFENDANTS' MOTION FOR SANCTIONS

This cause came before the Court on April 5, 2006 on Defendants Robert Jackson and Lillian Jackson's Motion for Sanctions for Fraud Upon the Court. The Court has reviewed the pleadings, considered arguments of counsel, and is otherwise fully advised in the premises.

The Court finds Plaintiff, through its servicing entity, GMAC Mortgage Corporation, submitted false testimony to the Court in the form of Affidavits of Indebtedness signed and subscribed by Margie Kwiatanowski, a "Limited Signing Officer" with GMAC Mortgage Corporation. The submission of the false Affidavits was pursuant to protocols and procedures wherein Ms. Kwiatanowski, as Limited Signing Officer, would attest to review of the relevant loan documents, the Complaint, and the loan payment records, when in fact (as sworn to by Ms. Kwiatanowski in her deposition) she neither reviewed the referenced records nor was familiar with the manner in which the records were created by GMAC on behalf of Plaintiff. In her deposition, Ms. Kwiatanowski admitted none of the Affidavits were signed before a Notary, and that Affidavits of the sort filed by Plaintiff would be signed and then left in a folder, to be notarized at a different time. The admissions by Ms. Kwiatanowski in her deposition directly contradict the sworn testimony to the Court in the form of the referenced Affidavits, both as to the substance of the Affidavits and with regard to whether the Affidavits were sworn to before a notary.

The Court recognizes the statements made by Plaintiff's counsel at the hearing to the effect that the procedures in place at GMAC with regard to servicing of this Plaintiff's loans were being corrected. The Court finds the submission of false testimony to the Court in the manner described does not rise to the level required in order for this Court to dismiss the action. Cox v. Burke, 706 So.2d 43 (Fla. 5th DCA 1998.) The Court will not condone Plaintiff's actions in filing false testimony, however, and the Court has both the inherent authority to sanction Plaintiff's actions, based upon the findings set forth above, and finds sanctions to be appropriate. It is therefore:

ORDERED AND ADJUDGED:

1. Defendants' Motion for Sanctions for Fraud Upon the Court is GRANTED.

2. The subject Affidavits as completed by Ms. Kwiatanowski are and same be stricken.

3. The Court orders Plaintiff to pay Defendants' attorneys' fees and costs for the efforts related to the taking of Ms. Kwiatanowski's deposition. Based upon a review of the record and the Affidavit filed by Defendants' counsel, the Court finds a reasonable sanction to be 32 hours of attorney's time and further finds a reasonable, local hourly rate to be $250.00, and further awards costs in the amount of $134.55. Therefore, the Plaintiff, TCIF REO2, LLC, Inc. shall forward to defense counsel payment of $ 8,134.55 in sanctions for the reasons set forth above within 30 days from the date of this Order.

4. Counsel for Plaintiff shall file with the Court GMAC's written explanation and confirmation, on behalf of Plaintiff, that GMAC's policies and procedures with regard to the servicing of all of this Plaintiff's loans within the State of Florida have been modified, in accord with

representations made by counsel to the Court that such modifications were being made, to confirm the affidavits filed in future foreclosure actions in Florida accurately memorialize the actions and conduct of the affiants. The written confirmation of policy changes, and an explanation for the policies now in place, shall be filed with the Court within 30 days of the date of this Order.

DONE AND ORDERED, in Chambers, at Jacksonville, Duval County, Florida, this 18 day of May, 2006.

Circuit Court Judge

Copies to: James A. Kowalski, Jr., Esquire
Roy A. Diaz, Esquire

STATE OF FLORIDA
DUVAL COUNTY
I, THE UNDERSIGNED Clerk of the Circuit Court, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit Court of Duval County, Florida.
WITNESS my hand and seal of Clerk of Circuit Court at Jacksonville, Florida, this the 25 day of June A.D. 2010
JIM FULLER
Clerk, Circuit and County Courts
Duval County, Florida
By Deputy Clerk

Exhibit 8

IN THE CIRCUIT COURT FOR DUVAL COUNTY, FLORIDA. CIVIL DIVISION

CASE NO. 162004CA004835XXXXMA

FILED
JUN 14 2006
CLERK CIRCUIT COURT

TCIF REO2, LLC,

Plaintiff,

vs.

CV-F

MARTIN L. LEIBOWITZ, AS TRUSTEE UNDER THE JACKSON FAMILY LAND TRUST DATED NOVEMBER 18, 2002; ROBERT L. JACKSON; LILLIAN M. JACKSON; WILLIAM W. MASSEY, III; STATE OF FLORIDA DEPARTMENT OF REVENUE; UNKNOWN TENANT NO. 1; UNKNOWN TENANT NO. 2, et. al.,

THIS INSTRUMENT IN COMPUTER J.T.

Defendants.
______________________________/

PLAINTIFF'S NOTICE OF COMPLIANCE WITH THIS COURT'S ORDER DATED MAY 1, 2006

COMES NOW, the Plaintiff, TCIF REO2, LLC., by and through its undersigned counsel, and files this Notice of Compliance with this Court's Order dated May 1, 2006, and states that the Plaintiff has forwarded a check to opposing counsel as required pursuant to paragraph 3 of said Order, and has simultaneously herewith submitted the Directive to the Court, as required pursuant to paragraph 4 .

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Compliance has been sent via U.S. Mail this 12th day of June, 2006 to all parties on the attached Service List.

SMITH, HIATT & DIAZ, P.A.
Attorneys for Plaintiff
2691 East Oakland Park Boulevard, Suite 303
Fort Lauderdale, Florida 33306
Telephone: (954) 564-0071
Facsimile: (954) 564-9252

BY: ______________________
ROY A. DIAZ
Florida Bar No. 767700

H:\CLIENT\6126-24564\Notice of compliance with court order 5-1-06.wpd

Smith,
Hiatt &
Diaz, P.A.
ATTORNEYS

2691 E. Oakland Park Blvd.
Suite 303
Fort Lauderdale, Florida 33306
(954) 564-0071 Telephone
(954) 564-9252 Facsimile

Mailing Address:
PO Box 11438
Fort Lauderdale, Florida 33339-1438

THIS INSTRUMENT IN COMPUTER J. THAYER

June 12, 2006

RECEIVED
JUN 13 2006
BERNARD NACHMAN

Via Overnight UPS

The Honorable Bernard Nachman
Duval County Courthouse
330 E. Bay Street, Room 202
Jacksonville, FL 32202-

File ...

RE: TCIF REO2, LLC v. MARTIN LEIBOWITZ, as Trustee, et al.
Case No. 162004CA004835XXXXMA
CV-E

FILED06-14-06PM02:45JIM FULLER

Dear Judge Nachman:

Enclosed with this correspondence is a courtesy copy of the Plaintiff's Notice of Compliance with this Court's Order dated May 1, 2006, and the original signed Directive from GMAC regarding its policies on Affidavits being filed with the court in connection with mortgage foreclosure cases.

Thank you for your consideration.

Respectfully submitted,
SMITH, HIATT & DIAZ, P.A.

Roy A. Diaz
For the Firm

Enclosures

cc: James A. Kowalski, Jr., Esq

A POLICY DIRECTIVE FROM THE LEGAL STAFF

DOCUMENT SIGNATURE PRACTICES

The Legal Staff and its retained outside counsel present evidence to the courts in probably all jurisdictions. This evidence takes the form of written documentation signed by authorized corporate representatives. Some of these documents are notarized either as a simple notarial certificate and others notarized as sworn instruments before the notary. The following directives make not only good business sense but are commanded by statute. Thus, besides financial impact in the cases we handle, the signing process may invoke sanctions by a court. It is the integrity of our cases that is at stake and we cannot afford anything less than full accuracy.

1. Any signatory in behalf of the corporation must read and fully understand the instrument that is being signed. Do not sign unless you have that comfort level.

2. Any signatory in behalf of the corporation must be properly authorized by the corporation. When in doubt, consult with your manager or the Legal Staff for guidance.

3. Do not sign verifications on court pleading documents unless you have independently reviewed and checked the facts.

4. Sign instruments ***only in the presence of*** the witnessing notary public.

5. If the text of the notarial certificate contains an oath (e.g. "Subscribed and sworn to before me. . ." or similar words) the notary must affirmatively say to the signer, "Do you so swear?".

6. Pre-signing notarial certificates before the signer are prohibited by law everywhere.

CERTIFICATION

The undersigned certifies that as of June 1, 2006, the attached Policy Directive on Document Signature Procedure has been distributed to the associate general counsel and associate counsel of the respective business units of GMAC Mortgage Corporation for distribution to authorized signatories within the enterprise. This Policy Directive is a reaffirmation of existing procedures incorporating the statutory mandates to notaries public of the respective residence states of such notaries public.

June 6, 2006

Barden

James J. Barden
Associate Counsel – Legal Staff

STATE OF FLORIDA
DUVAL COUNTY
I, THE UNDERSIGNED Clerk of the Circuit Court, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit Court of Duval County, Florida.
WITNESS my hand and official seal of Clerk of Circuit Court at Jacksonville, Florida, this the 23 day of June A.D. 20

JIM FULLER
Clerk, Circuit and County Courts
Duval County, Florida
By ______
Deputy Clerk

Exhibit 9

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

US BANK NATIONAL ASSOCIATION AS TRUSTEE FOR BAFC2006-1, Plaintiff v. GORDON T. JAMES Defendant/Third-Party Plaintiff v. GMAC MORTGAGE LLC and QUICKEN LOANS, INC. Third-Party Defendants	**2:09-cv-00084 - JHR**

PLAINTIFF AND GMAC MORTGAGE LLC'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR RELIEF PURSUANT TO Fed. R. Civ. P. 56(g)

Through his Motion for Relief Pursuant to Fed. R. Civ. P. 56(g), Defendant attempts to parlay procedural defects in the execution of an affidavit into a summary judgment ruling in his favor. Defendant fails to offer, however, a convincing argument that the affidavit in question was "presented in bad faith or solely for the purpose of delay" as required by Rule 56(g). Central to the determination of that issue, although almost entirely overlooked by Defendant, is that every fact contained in the affidavit in question material to the disposition of the merits of the case is true. Even if Defendant could clear the "bad faith" hurdle, the sanctions requested are disproportionate and would represent a windfall for the Defendant borrower. Rule 56(g) does not support such relief in the circumstances. Defendant's Motion should therefore be denied.

FACTUAL BACKGROUND

Defendant, Gordon T. James ("Defendant" or "James") executed a Note and Mortgage in connection with a loan for $207,000.00 currently held by Plaintiff U.S. Bank National Association as Trustee for BAFC 2006-1 Trust (hereinafter "Plaintiff" or "U.S. Bank") and serviced by Third-Party Defendant GMAC Mortgage, LLC ("GMACM"). (Declaration of Aixa M. Torres dated August 10, 2010, Exhibit 1, at ¶¶ 2, 3, 4, 5.) Defendant admits that he has failed to make multiple monthly payments on this mortgage loan from 2007 through the present. (Deposition of Gordon James, Exhibit 2, at 139-140, 198-199; Ex. 1 at ¶¶ 6, 8.) As a result of that delinquency, Plaintiff brought this action to foreclose on the subject property.

On April 26, 2010, Plaintiff moved for summary judgment on its claim for foreclosure. The material facts establishing Defendant's delinquency were set forth in an affidavit executed by Jeffrey Stephan, a limited signing officer at GMACM, submitted in support of Plaintiff's Motion for Summary Judgment. ("Stephan Affidavit," Doc. 93.)

In June of 2010, Defendant and GMACM on behalf of U.S. Bank entered into a temporary loan modification agreement under the Home Affordable Modification Program ("HAMP"). (Declaration of John Meinecke, Doc. 163-1, at ¶ 6.) In light of this modification agreement, Plaintiff no longer wishes to devote the resources necessary to pursue foreclosure at this time, and has moved pursuant to Fed. R. Civ. P. 41(a)(2) to dismiss voluntarily its claim for foreclosure. (Plaintiff's Motion to Dismiss Complaint, Doc. 163.)

Although Defendant may take issue with the manner in which the Stephan Affidavit was executed and notarized, the substance of the affidavit is true and correct in all respects material to the merits of Plaintiff's claims for relief, and Defendant does not and cannot dispute that. Defendant nevertheless asks this Court to set aside his own concessions and admissions, and to disregard established material facts, as a means of punishing Plaintiff for procedural deficiencies related to an affidavit.

Specifically, Defendant through his Motion under Rule 56(g) asks this Court to enter summary judgment in his favor on Plaintiff's foreclosure claim, and to deny Plaintiff's and GMACM's Motion for Summary Judgment on all counterclaims and third party claims, based upon procedural defects in the execution and notarization of an affidavit. Defendant has not offered any persuasive proof, however, that the affidavit was submitted to the Court in bad faith. Moreover, while not conceding that the Stephan Affidavit was submitted in bad faith as that term is used in Rule 56(g), sanctions levied against Plaintiff, if any, should comport with the sanctions contemplated by applicable law governing affidavits offered in bad faith. Certainly, Defendant is not entitled to a favorable summary judgment ruling based solely on procedural errors that did not alter the substantive information relied upon in this action.

ARGUMENT

I. Rule 56(g) sanctions against Plaintiff should be reserved for egregiously bad conduct and are unwarranted in this case.

Defendant's motion invokes Rule 56(g) of the Federal Rules of Civil Procedure which provides as follows:

> If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

Fed. R. Civ. P. 56(g).

While Rule 56(g) sanctions are not often at issue in the federal courts, there are a few First Circuit cases in which courts have considered sanctions for affidavits made in bad faith. *See e.g., Fort Hill Builders, Inc. v. Nat'l Grange Mutual Ins. Co.*, 866 F.2d 11 (1st Cir. 1989); *Michael v. Liberty*, 566 F.Supp.2d 10 (D. Me. 2008). In both of these cases, the court determined that there was no bad faith under Rule 56(g) and declined to award sanctions. *See Fort Hill Builders*, 866 F.2d at 16 (finding no bad faith when affidavit raised a weak claim of bias but was not frivolous); *Michael*, 566 F.Supp.2d at 12 (finding no bad faith when affidavit included a factual inaccuracy but there was no evidence the inaccuracy was intentional). In fact, the First Circuit has stated that "[t]he rare instances in which Rule 56(g) sanctions have been imposed, the conduct has been particularly egregious." *Fort Hill Builders*, 866 F.2d at 16 (citing cases from other circuits in which Rule 56(g) sanctions have been imposed for such egregious conduct).

One of the few cases in which a court imposed sanctions pursuant to Rule 56(g) is *Cobell v. Norton*, 214 F.R.D. 13, 22 (D.D.C. 2003). The *Cobell* court granted sanctions and held defendants in contempt only after noting that defendants misrepresented the nature of certain accountings which were detailed and filed in a "materially misleading" affidavit. *Id.* at 18. The *Cobell* court took issue with the fact that the affidavit was materially misleading to find that the affidavit was filed in bad faith. *Id.* The court concluded that in order to merit a finding of bad faith, the conduct should be "particularly egregious" and "entirely unwarranted." *Id.* at 21 (citing *Fort Hill Builders*, 866 F.2d at 16). A procedural deficiency was not the issue in *Cobell*. In *Cobell*, the bad conduct resulting in sanctions was described as a "pattern of deceit by defendants that was demonstrated in the factual finding made .... The court [was] unwilling to turn a blind eye to yet another demonstration of defendants' misconduct and their willingness to mislead the Court and to misrepresent the truth whenever it suits them." *Id.* at 21.

Other courts have taken a similar approach and awarded sanctions only when false affidavits were submitted knowingly in an effort to mislead the Court. In *Acrotube, Inc. v. J.K. Fin. Group, Inc.*, 653 F.Supp. 470, 478 (N.D. Ga. 1987), the court imposed sanctions when a party submitted an affidavit that flatly contradicted the party's admission in its prior amended answer to the complaint but declined to alter its position when confronted about the inconsistency. The court explained that the affiant's testimony "was flatly at odds with facts indisputably within his knowledge" and was "an effort to mislead the Court and to delay the proceedings." *Id.* Similarly, in *Barticheck v. Fidelity Union Bank*, 680 F.Supp. 144, 147-148 (D.N.J. 1988), the court imposed sanctions when a party submitted an "eleventh hour affidavit which clearly contradict[ed] her prior sworn testimony" in an effort to create a triable issue of fact to defeat summary judgment. The court noted that sanctions were appropriate because the affidavit was "inexplicably contradictory" to prior deposition testimony. *Id.* at 150.

In sharp contrast to those knowingly deceitful submissions of material representations of fact, Plaintiff, in the instant action, submitted an affidavit that is factually sound but procedurally flawed. Furthermore, Plaintiff has acknowledged the procedural deficiencies of the Stephan Affidavit and has submitted the subsequent declaration of Aixa Torres which confirms the accuracy of the material facts set forth in the Stephan Affidavit concerning Defendant's default giving rise to the foreclosure action.

Defendant contends that Plaintiff relied on the Stephan Affidavit after learning of these procedural flaws when it did not address those flaws in its Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment. At the time Plaintiff filed its Reply, however, the period of time for Mr. Stephan to read and sign the deposition transcript in which these procedural flaws were described had not yet expired. Mr. Stephan's deposition took place on June 7, 2010, in the case of *Federal National Mortgage Association v. Nicolle Bradbury* pending in Maine State District Court, and Plaintiff filed its Reply (Doc. 134) on June 16, 2010. Plaintiff was entitled to sufficient time to investigate any potential corrections or clarifications to Mr. Stephan's testimony before acting to correct his affidavit.[1]

Defendant has asserted that these procedural deficiencies have produced an affidavit that is "fundamentally false." Plaintiff acknowledges that the Stephan Affidavit contained an inadvertent inaccuracy concerning the Note and its endorsements, and has submitted the declarations of Judy Faber and Alexander Saksen to explain and correct that inaccuracy. That inadvertent inaccuracy, however, did not misrepresent any of the material facts in the foreclosure

[1] Defendant also mentions another deposition of Mr. Stephan taken in a Florida action during December 2009, however there is no suggestion that counsel representing Plaintiff in this case in Maine was aware of that Florida testimony before presenting Mr. Stephan's affidavit in this case.

action and does not render the affidavit "fundamentally false." Moreover, the inaccuracy was not submitted to the court knowingly or with the intent to deceive, distinguishing the present situation from cases in which courts have imposed sanctions under Rule 56(g).

In the months prior to filing the above captioned foreclosure action, counsel for Plaintiff believed that it had obtained from GMACM a copy of the original Note as it existed at the time of Defendant's default giving rise to the foreclosure action and that the original Note was missing the endorsement to U.S. Bank. (Declaration of Alexander Saksen, dated August 10, 2010, Exhibit 3, at ¶ 5). Out of a good faith belief that the Note needed to be endorsed to U.S. Bank prior to filing a complaint for foreclosure, Plaintiff's counsel requested that GMACM endorse the Note to U.S. Bank. (Ex. 3 at ¶ 6). This endorsement was made by Jeffrey Stephan on September 22, 2008, well before the initial Complaint in this action was filed in state court in January 2009. (Ex. 3 at ¶ 6). In June of 2010, after it became clear to GMACM that Plaintiff's counsel had not obtained a copy of the correct original Note, GMACM sent to Plaintiff's counsel the original Note, containing all current endorsements, including the one to U.S. Bank. (Ex. 3 at ¶ 10; Declaration of Judy Faber, dated August 10, 2010, Exhibit 4, at ¶ 3). Therefore, the Stephan endorsement proved to have been duplicative of a prior endorsement. Upon receipt of the correct original Note, counsel for Plaintiff promptly submitted a copy to the Court and to opposing counsel. (Ex. 3 at ¶ 11).

The Stephan Affidavit stated that Defendant executed the Note with Quicken Loans, and that the Note was endorsed to U.S. Bank by the endorsement made by Mr. Stephan and attached to his affidavit. The material fact of that statement – that the Note was endorsed to the current holder U.S. Bank – is and always has been true. Moreover, the mistaken submission of the Stephan endorsement was not undertaken in knowing deceit. Rather, the Note endorsed by Mr. Stephan was submitted with a good faith belief in its authenticity as the original Note.

Defendant makes much of what he alleges to be GMACM's failure to implement a policy directive relating to the signing of affidavits following sanctions imposed by a Florida court in 2006. It is worth noting that this order, entered by the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, on its face applied to policies and procedures governing servicing of loans "within the State of Florida." The relevance of this order in addressing a situation involving a loan in Maine several years later is significantly overstated by Defendant. Certainly, the procedure followed by Mr. Stephan in executing his affidavit in this case was flawed, and Plaintiff does not dispute that. The issue on Defendant's Rule 56(g) Motion, however, is whether the affidavit was "submitted in bad faith or solely for delay." Fed. R. Civ. P. 56(g). With that assertion, Plaintiff very much takes issue. Rushed and abbreviated procedures, however improper, are not the same as "bad faith," particularly in the absence of any intentional misrepresentation of material fact. Defendant has not shown that the Stephan Affidavit and endorsement were submitted to this Court in bad faith. There is simply no basis for a finding of bad faith in this case under Rule 56(g).

II. Even if Plaintiff's conduct constitutes "bad faith," it does not warrant such an extreme sanction as favorable rulings for Defendant on summary judgment concerning all pending claims.

The court's discretion to impose sanctions for a party's failure to comply with the rules of civil procedure is not without limits and guidelines. *Young v. Gordon*, 330 F.3d 76, 81 (1st Cir. 2003). As Defendant himself pointed out, it is incumbent upon the court to "fit the punishment to the severity and circumstances of the violation" when determining what, if any, sanctions are to be levied against a party. *Id.*

Defendant's request for summary judgment can be likened to a request for dismissal on the merits. The drastic sanction of dismissal is reserved for those extreme cases in which "a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings because courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." *Gilbert v. Blount, Inc.*, 2006 WL 3081384, at *4 (D. Me. Oct. 27, 2006) (citing *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006)).

While Plaintiff acknowledges that it failed to comport with the standards for a properly executed and notarized affidavit, such action was not deceptive in nature concerning the merits of the litigation and certainly is not "utterly inconsistent with the orderly administration of justice." *Id.* In fact, Plaintiff has filed the declarations of Aixa Torres, Judy Faber, and Alexander Saksen to ensure that the record before the court is factually and procedurally sound. Therefore, the integrity of this court is not undermined by the procedurally defective affidavit. Moreover, the material facts contained in the affidavit are true and the fact that the endorsement to U.S. Bank was accomplished by an endorsement other than the one Plaintiff's counsel initially believed to be effective does not change those material facts. Indeed, Defendant's primary complaint about the procedurally defective affidavit – that the affiant did not have personal knowledge of the information contained in the business records attached thereto – is itself immaterial because Mr. Stephan's affidavit was based on his knowledge of business records, not his personal knowledge of the events.

Rule 56(g) expressly contemplates only money damages as the sole sanction for submission of an affidavit in bad faith. Trial courts have a comprehensive arsenal of civil procedure rules to protect the court from fraud and abuse. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 62, (1991) (Scalia, J., dissenting). Pursuant to Rule 56(g), a trial court can punish contempt of its authority by "award[ing] expenses and/or contempt damages when a party presents an affidavit in a summary judgment motion in bad faith or for the purpose of delay." *Chambers*, 501 U.S. at 62 (Scalia, J., dissenting). In other words, a finding of contempt as a result of a bad faith affidavit is punishable with an award of expenses and fees or other monetary award, not summary judgment for the opposing party. This is especially true in the instant action where there is no fraud and the alleged sanctionable action amounts to a procedural deficiency.

Additionally, Defendant asks this court to permit it to conduct further discovery into the Stephan Affidavit and endorsement. This request not only exceeds the bounds of any reasonable sanction, but it is a pointless fishing expedition because Plaintiff has admitted the deficiencies in the Stephan Affidavit and is no longer relying on it in any respect. Plaintiff, through its Motion to Stay, offered to allow additional discovery of the true original Note which former Plaintiff's counsel discovered and presented to the Court only recently, but Defendant, apparently satisfied with the authenticity of that original Note after inspecting it, declined that invitation by opposing Plaintiff's Motion to Stay. It is not reasonable for Defendant to request at the same time discovery not reasonably calculated to produce facts relevant to the issues remaining in this case.

Alternatively, Defendant asks this Court to conduct its own inquiry into the role of Plaintiff's counsel and GMACM with regard to the filing of the Stephan Affidavit. While a court certainly has the power to conduct an independent investigation, there is no fraud here that would warrant such an inquiry. *Chambers*, 501 U.S. at 44 (citing *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946)). As stated above, the material facts contained in the Stephan Affidavit are true in substance, and the sole factual error concerning the endorsement to U.S. Bank was inadvertent and does not affect the underlying fact that at the time the Complaint was filed, U.S. Bank was the holder of the Note. There simply is no element of fraudulent intent or malice demonstrated in Plaintiff's actions, and certainly no complicit behavior on the part of Plaintiff's counsel, that would warrant such an extraordinary inquiry action.

Summary judgment for Defendant on the foreclosure claim and a favorable ruling for Defendant on his opposition to Plaintiff's and GMACM's Motion for Summary Judgment concerning all counterclaims and third party claims would result in a windfall to Defendant. Defendant was contractually obligated to make payments pursuant to his mortgage and he failed to do so, resulting in the instant foreclosure action. Plaintiff was and is contractually entitled to foreclose on the subject mortgage, and Plaintiff's recent request to dismiss the Complaint does not change that fact. The procedurally defective affidavit does not in any way alter the material facts proving Defendant's delinquency and Defendant fails to and cannot identify any prejudice experienced as a result of the procedurally defective affidavit. Moreover, that affidavit has absolutely nothing to do with any of Defendant's counterclaims. Plaintiff maintains that there is not the requisite "bad faith" on its part to warrant sanctions, but in the event this court determines nevertheless that sanctions are warranted, those sanctions should address actual prejudice to the Defendant resulting from Plaintiff's conduct without creating a windfall for Defendant.

CONCLUSION

Plaintiff concedes that the Affidavit of Jeffery Stephan was procedurally flawed in its execution and notarization, however the underlying material factual substance of the Stephan Affidavit remains accurate. The inquiry requested by Defendant is unwarranted because the defective affidavit was not fraudulent or malicious, and is no longer relied on by Plaintiff. Neither were Plaintiff's counsel and GMACM complicit in any bad conduct as alleged. Furthermore, Defendant's request for summary judgment as a sanction for a contempt finding would result in a windfall to Defendant. Defendant admittedly defaulted on his mortgage obligations and should not now be allowed to rely on a procedural deficiency to negate his own wrongdoing and obtain a windfall.

Dated at Portland, Maine this the 10th day of August, 2010.

/s/ John J. Aromando
John J. Aromando
Michelle Y. Bush
PIERCE ATWOOD, LLP
One Monument Square
Portland, ME 04101
207-791-1100

jaromando@pierceatwood.com
mbush@pierceatwood.com

Attorneys for Plaintiff U.S. Bank and Third Party Defendant GMAC Mortgage LLC

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2010, I electronically filed the foregoing document entitled Memorandum in Opposition to Defendant's Motion for Relief Pursuant to Fed. R. Civ. P. 56(g) with the Clerk of Court using the CM/ECF system which will send the notification of such filing to the following:

Andrea Bopp Stark, Esq.
Matthew J. Williams, Esq.
Stephen Y. Hodsdon, Esq.
Pamela W. Waite, Esq.
Thomas A. Cox, Esq.

Dated: August 10, 2010

/s/ John J. Aromando
John J. Aromando

PIERCE ATWOOD, LLP
One Monument Square
Portland, ME 04101
207-791-1100

Attorney for Plaintiff U.S. Bank and Third Party Defendant GMAC Mortgage LLC

Exhibit 10

CLEVELAND.COM
Everything Cleveland

Eastlake couple foreclosed upon three times, despite never missing a payment

Published: Sunday, October 17, 2010, 5:00 AM Updated: Sunday, October 17, 2010, 8:56 AM

Teresa Dixon Murray, The Plain Dealer

View full size

Chuck Crow, The Plain Dealer

Michael and Pamella Negrea have been foreclosed on three times and have battled GMAC for years.

EASTLAKE, Ohio -- The first time Michael and Pamella Negrea were foreclosed upon in 2001, the suit was thrown out of court. They had never even made a late payment.

That didn't stop GMAC Mortgage.

In 2005, two years after the case was dismissed, GMAC filed for foreclosure again. This time, the Negreas sued for breach of contract, fraud and unfair debt collection. They won more than $217,000, and the foreclosure was thrown out again.

And still that didn't stop GMAC.

The mortgage company now has foreclosed again, just as GMAC sits at the heart of a national foreclosure scandal. The company has suspended foreclosures in 23 states, and is reviewing cases in all 50 states, over revelations of possibly fraudulent documents, and several other banks have followed suit.

"It's like a foreclosure machine," the Negreas' attorney, Stephen Futterer of Willoughby, said of GMAC. "It won't stop."

The Negreas' case reveals the inner workings and the depth of the troubles facing the mortgage industry, which seems to have blindly shoved through thousands of foreclosures without even reading the documents.

Michael Negrea, a Willoughby police officer for 25 years, says most people he talks with can't even comprehend their tale. "You think, 'You make your payments, and everything is fine.' You would think this couldn't possible happen."

A representative for GMAC did not return a phone call seeking comment.

The Eastlake couple's story started in 1995, when they built their modest 2,400-square-foot colonial and borrowed $200,000. They refinanced in 1998 with a local mortgage company, which sold the loan to Advanta Mortgage Corp.

The loan was sold a year later to Nation's Credit, then it was sold to Homecomings Financial, with the loan being serviced by Fairbanks Capital Corp., one of the nation's most notorious mortgage lenders. The Federal Trade Commission in 2003 sued Fairbanks for deceptive and illegal practices, including not posting customer payments, and the company agreed that year pay $40 million in damages.

Sometime while Fairbanks was in the picture for the Negreas, two payments didn't get posted.

"You'd call and talk to someone and they said they'd look into it," said Michael Negrea, 53. "When you called and asked for the person you talked to, they no longer worked for the company. You'd leave a message for a supervisor, and they'd never call you back."

A foreclosure was filed in 2001 on behalf of Homecomings, which owned the loan. Right around the same time, the servicing was transferred from Fairbanks to GMAC. Once Homecomings said the Negreas were in foreclosure, the company wouldn't accept their monthly payments. So the couple simply put the money in the bank.

When attorneys for both sides sat down in 2003, they worked out a written settlement: All penalties and interest would be wiped out and the Negreas would pay the actual payments owed. Homecomings/GMAC also would erase the foreclosure and negative information from the Negreas' credit files. (The Negreas say that still has never happened.) The Negreas started making normal payments again in early 2004.

By June, GMAC sent another default letter. The couple had copies of their canceled checks and even the return receipts from the Postal Service showing when the payments had been sent and received. All payments had been on time, and GMAC apologized in July for the mistake.

In October, they got another default letter. And they got a letter saying that GMAC thought their $500 homeowners' insurance premium hadn't been paid, so they were imposing a new policy at $3,200. In truth, their insurance hadn't lapsed. They'd had the same company since buying the home.

GMAC again sent apology letters.

After the couple sent their December payment, it wasn't cashed. The next month, in January 2005, GMAC again filed for foreclosure and wouldn't back down.

"They pretty much treated us like criminals," Michael Negrea said.

Futterer, who has been their attorney in the case since 2003, filed a counter claim for breach of contract, fraud and violating debt collection laws.

The Negreas insisted on going to trial. As the evidence unfolded, Michael Negrea said, "you could hear some of the people on the jury saying, 'Oh my gosh.' "

It turned out that GMAC had applied their payments to the bogus penalties that had been forgiven in court proceedings back in 2003, as well as to payments that had already been posted.

Futterer asked for a large enough award from GMAC to wipe out their roughly $200,00 mortgage forever. By the time they got the $217,244 settlement more than three years later -- in 2009 -- GMAC had again added on more than $50,000 worth of fees.

So why wouldn't they refinance the balance with a more reputable bank? It is because they still had two foreclosures on their credit records, along with dozens of erroneous late payments. "They screwed up our credit so bad we can't get any kind of loan," said Pamella Negrea, 57.

But GMAC wasn't done.

In 2008, the couple got a statement from GMAC demanding payment for its attorneys in the second foreclosure case -- the one in which GMAC lost the counterclaim. "How can you ask for legal fees when you paid our legal fees?" Michael Negrea asked.

During the last few years, GMAC has repeatedly accused the Negreas of not having homeowners' insurance and insisted on making monthly home inspections, charging $700 or more for each one. GMAC told them the inspections were to make sure they still lived there. Michael Negrea considered them harassment.

The couple had been making normal payments last year when GMAC again stopped cashing them, saying they owed a lump sum of nearly $310,000 plus attorneys' fees on their $208,000 mortgage.

In August 2009, GMAC/Homecomings filed for foreclosure again, this time in federal court instead of common pleas court. "We feel they're court-shopping," Futterer said. The trial is set for January.

The Negreas are ecstatic that GMAC's practices may finally be coming to light, even though the accusations so far are limited to whether GMAC gave false information about foreclosures.

"I can't image how many people lost their houses who didn't deserve it," Michael Negrea said.

The couple is drained from years of back and forth with GMAC.

"I think a lot of people would have just given up," said Pamella Negrea, a graphic designer. "Nobody believes us. People think, 'A bank wouldn't file for foreclosure if the bank wasn't right.' "

"People ask me, 'How do you put up with this?' I have no choice," Michael Negrea said. "It has cost us a fortune. We don't make that much. But it's our home."

Exhibit 11

F

STATE OF MAINE
KENNEBEC,SS

MAINE SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

GMAC MORTGAGE, LLC f/k/a GMAC MORTGAGE CORPORATION Plaintiff v. MARC G. BERUBE AND LISA BERUBE Defendants and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. Party in Interest	)	**CERTIFICATION OF MORTGAGEE**

COMMONWEALTH OF PENNSYLVANIA
Montgomery, ss.

I, Jeffrey Stephan Limited Signing Officer, depose and say as follows:

1. My name is Jeffrey Stephan Limited Signing Officer, I am a Limited Signing Officer Jeffrey Stephan GMAC Mortgage, LLC f/k/a GMAC Mortgage Corporation (GMAC), a limited liability company organized and existing under the laws of the State of Delaware and having a principal place of business in Fort Washington, Pennsylvania. GMAC has under its custody and control the records relating to the mortgage transaction referenced below.

2. GMAC hereby CERTIFIES, pursuant to Title 14 M.R.S.A. § 6321, to the following:

   a. GMAC has strictly performed all provisions to provide notice to the mortgagor as mandated by 14 M.R.S.A. § 6111.

b. The subject Mortgage, dated 1/30/2004, and recorded in the Kennebec County Registry of Deeds in Book 7823, Page 75 was granted to Homecomings Financial Network, Inc. by Marc G. Berube and Lisa Berube to secure a Note dated 1/30/2004 given to Homecomings Financial Network, Inc. by Marc G. Berube and Lisa Berube.

c. GMAC is the owner of the Note and Mortgage in this matter as evidenced by the Note and Mortgage and all endorsements and assignments thereto. True copies of the Mortgage and Note are attached as exhibits to the Complaint.

Dated: July 26, 2010 By: ______________________

Its: ______________________

Jeffrey Stephan
Limited Signing Officer

Exhibit 12

Go straight to content.

- Home |
- Terms and Conditions |
- Privacy Policy

Freddie Mac: Avoiding Foreclosure
Steps You Can Take Today to Protect Your Home

Does Freddie Mac Own Your Mortgage?

Call your servicer -- the organization to which you make your mortgage payments -- immediately if you are having difficulty paying your mortgage on time. The telephone number and mailing address of your mortgage servicer should be listed on your monthly statement. There are also a number of organizations that may be able to help you.

Your servicer should be able to tell you if your mortgage is owned by Freddie Mac. If you wish, you may conduct a search using the secured look-up tool below. **Please enter your information carefully** -- a spelling error or other small mistake could cause an uncertain result. Abbreviations, typos, or including the "Street Type" in the "Street Name" field can lead to incorrect results.

Self-Service Lookup

* Indicates required fields

First Name *	Marc
Last Name *	Berube
House Number *	254
Street Name *	Maxwell Do not include "Street", "Avenue", "Drive", etc. in this form field.
Street Suffix	Suffix
Unit Number	
City *	Litchfield
State *	ME
Zip Code *	Format: ##### 04350
Last 4 Digits of Social Security Number *	Enter last 4 digits only. Format: #### Why do we ask for Social Security?
Verification *	☑ By checking this box and clicking on the button below to submit this information, I confirm I am the owner of this property or have the consent of the owner to lookup this information.

Go straight to content.

- Home |
- Terms and Conditions |
- Privacy Policy

Freddie Mac
How to Get Help with Your Mortgage

Yes. Our records show that Freddie Mac is the owner of your mortgage.

En Español

What to Do Next

1. **For help with your mortgage, contact your lender and let them know you would like to pursue assistance through the federal Making Home Affordable program.**

   (Your lender is the company to which you make your mortgage payments, and may also be referred to as a mortgage servicer.) Your lender can help you determine if you are eligible for the Making Home Affordable Program.

   a. **Through the Making Home Affordable program**, there are several options available to you:

      - A **Home Affordable Modification** to help you obtain more affordable mortage payments if you're behind in making your mortgage payments or believe you may be soon.

      - A **Home Affordable Refinance** to better position you for long-term homeownership success if you have been making timely mortgage payments but have been unable to refinance due to declining property values.

      - A **short sale** or **"deed-in-lieu of foreclosure"** to transition to more affordable housing if it is not realistic for you to keep your home.

   Freddie Mac is working with our mortgage servicers (your lenders) to offer these solutions to eligible borrowers with Freddie Mac-owned mortgages. *Because Freddie Mac does not work directly with consumers, you will need to work with your lender to determine your best foreclosure prevention option.*

   b. **If you are not eligible for the Making Home Affordable program**, don't give up! Ask your lender about other options to make your payments more affordable

Exhibit 13

STATE OF MAINE
CUMBERLAND, ss.

MAINE DISTRICT COURT
DISTRICT NINE
DIVISION OF NORTHERN CUMBERLAND
DOCKET NO. BRI-RE-09-65

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Plaintiff

v.

NICOLLE M. BRADBURY

Defendant

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF PROTECTIVE ORDER

STATEMENT OF FACTS

At issue in this protective order proceeding is the transcript of the deposition of Jeffery Stephan taken on June 7, 2010, which reveals the complete falsity of Stephan's summary judgment affidavit. It is that August 5, 2009 affidavit of Stephan that was the sole evidence[1] presented to and relied upon the Court in entering its Order for Partial Summary Judgment dated January 27, 2010. That Order granted Plaintiff judgment on all issues except as to the amount due on the Defendant's note and mortgage.

a. The Falsity of the Stephan Affidavit.

[1] For the purposes of this Memorandum, the affidavit of Plaintiff's counsel in support of Plaintiff's Motion for Summary Judgment is ignored, as it pertains only to the attorney fees claimed by Plaintiff.

The Stephan deposition proves that Stephan's affidavit is a stunning series of lies.

Stephan claims to have personal knowledge of the facts contained in the affidavit based upon his asserted "custody and control" of the "records relating to the mortgage transaction." Aff. ¶ 1. His deposition revealed that he has no custody and control of any loan records. Tr. pp 69-70.[2] He claims to have *access* to scanned computer images of those records, Tr. 61-62 & 69-70, but he does not even look at them when signing a summary judgment affidavit. Tr.61-62. Thus, when his affidavit asserts that he has knowledge of the facts in it "derived from my personal knowledge of these records", that statement is a blatant lie. He claims to check only "the figures" in affidavits by comparing them to those in his computer system, thus even the implication in his affidavit that he has personal knowledge of those figures is false---at best those statements are hearsay based upon someone else's data entries, which he is not even competent to authenticate.

The magnitude of Stephan's false claims of knowledge about any of the facts stated in his affidavit is revealed by his stunning admission that he does not read summary judgment affidavits before signing them:

Tr. Page 61, Line 14:

> Q. When you receive a summary judgment affidavit to sign, do you read every paragraph of it?
>
> A. No.
>
> Q. What do you read?
>
> A. I look at the figures.
>
> Q. That's all that you look at when you sign a summary judgment affidavit?
>
> A. Yes, to ensure that the figures are accurate.

Tr. Page 62, Line 23:

---

[2] A copy of the transcript of the Stephan deposition is attached to Plaintiff's motion as Exhibit A.

Q. Is it fair to say that when you sign a summary judgment affidavit, you do not know what information it contains other than the figures that are set forth within it?

A. Other than the borrower's name and if I have signing authority for that entity. That is correct.

Tr. Page 54, Line 12:

Q. When you sign a summary judgment affidavit, do you check to see if all of the exhibits are attached to it?

A. No.

Q. When you sign a summary judgment affidavit, do you inspect any of the exhibits attached to it.

A. No.

Stephan's personal knowledge affidavit statements that "true and correct" copies of the note and mortgage are attached are not known by him to be true because he does not look at the scanned images of loan documents available to him, nor does he look at the copies of documents attached to his affidavit. While this statement of personal knowledge is a lie that may be harmless here, since Defendant admits the accuracy of those copies, these clear lies illustrate the falsity of the entire affidavit.

When Stephan goes on his affidavit to assert his personal knowledge of the fact of and date of mailing of the alleged default notice to Defendant, the assertion that he has knowledge of those facts also is a lie because he looked at no business records to determine if the statements are true.

And of truly disturbing importance is the fact that Stephan does not even trouble himself to appear before a notary to be sworn.

Tr. p. 56, Line 7:

Q. My question to you is where does a summary judgment affidavit go after you sign it?

A. After I sign it, it is handed back to my staff. My staff hands it to a notary for notarization. They send it back to the attorney network requesting any type of affidavit.

Q. So you do not appear before the notary; is that correct?

A. I do not.

It is this testimony that Plaintiff and GMAC Mortgage seek to hide by their motion for a protective order.

b. Plaintiff's Allegations of "Improper Disclosure" of the Stephan Transcript.

Plaintiff[3] and GMAC Mortgage, LLC now assert that the appearance of Stephan's transcript on an Internet blog of a Florida foreclosure defense lawyer is evidence of improper conduct of Defendant's counsel. Offering no evidence whatsoever, GMAC speculates that Defendant's counsel sent the transcript to the Florida attorney who published it, and insinuate that it was improper for the transcript to be shared with other lawyers defending homeowners in foreclosure actions. After all of the innuendo, GMAC admits that "it is irrelevant whether or not Mr. Weidner is the attorney to whom Mr. Cox disclosed the transcript . . . " Pl. Motion ¶12.

c. The Alleged Harm Claimed by Plaintiff and GMAC Mortgage, LLC.

The harm that GMAC complains of is that, after alleged dissemination of the Stephan transcript that revealed his and GMAC's utter contempt for the Maine judicial process, GMAC as a corporate entity and its employees have suffered "embarrassment, annoyance, intimidation and oppression". They offer no affidavits and not one shred of evidence to support this absurd claim. The real harm or "effect" of the dissemination of the Stephan transcript that GMAC wants this Court to aid it in avoiding, is that the transcript has exposed the fact that judgments entered in every

[3] It is interesting to note that the Motion for Protective Order is filed on behalf of Federal National Mortgage Association and Bank of America in addition to GMAC Mortgage. One would think that taxpayer supported FNMA would have adverse interests to GMAC on this issue due to the misconduct of GMAC in the filing of the Stephan summary judgment affidavit, and one is left to wonder how Bank of America has any interest whatsoever in the protective order proceeding, as no such interest is identified in the Motion. Because it is clear that it is only the self-interest of GMAC Mortgage, LLC that is at stake here, for the remainder of this memorandum the moving party is simply referred to as "GMAC".

judicial foreclosure state into which Stephan's affidavits have been sent are vulnerable to being set aside as having been procured by fraud.

d. The Relief Sought by GMAC.

GMAC seeks the following relief:

i. A prohibition "from disseminating discovery materials for purposes unrelated to trial preparation, trial or settlement of this particular lawsuit". Plaintiff Motion ¶15.

ii. Retroactive application of the order "so as to protect information already obtained . . ." Plaintiff Motion ¶16. It is not clear what GMAC is asking for here.

iii. Sanctions against Defendant's counsel including an order that "Mr. Cox be required to reimburse Plaintiff for all fees and costs associated with filing this motion for protective order." Plaintiff Motion ¶17.

iv. An order that "Mr. Cox should be barred from using Mr. Stephan's transcript in his other cases against GMACM." Plaintiff Motion ¶ 17.

e. The Facts Regarding Defendant's Counsel.

Before the deposition of Jeffery Stephan began on June 7, 2010, GMAC knew that Defendant's counsel was representing Maine homeowners in two other pending GMAC mortgage foreclosure cases, because GMAC counsel here was also counsel in those cases. Similarly, it knew of his role in the Maine Attorneys Saving Homes ("MASH") program because the attorney who signed the complaint in this action, and a member of the firm which represented GMAC at the time of the Stephan deposition, has been a participant in the MASH program, has attended a training program put on by it, and has even received email correspondence from the undersigned counsel for Defendant attempting to refer a MASH foreclosure defense case to him.

I. ABSENT A PROTECTIVE ORDER, THE DEFENDANT WAS ENTITLED TO DISSEMINATE THE STEPHAN DEPOSITION TRANSCRIPT AS SHE SAW FIT.

GMAC asserts that "(t)his dissemination of Mr. Stephan's testimony is inconsistent with the Maine Rules of Civil Procedure . . ." Plaintiff Motion ¶8. The First Circuit Court of Appeals, dealing with the Federal equivalent of Maine's Rule 26, certainly does not see it that way, holding that " the Supreme Court has noted that parties have general *first amendment* freedoms with regard to information gained through discovery and that, absent a valid court order to the contrary, they are entitled to disseminate the information as they see fit." (emphasis in original) *Public Citizen Group v. Liggett Group, Inc.*, 858 F.2d 775, 780 (1st Cir. 1988), citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31-36, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984). Going on from there, the First Circuit adopted the reasoning of the Second Circuit Court of Appeals, which held as follows:

> A plain reading of the language of *Rule 26(c)* demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, i.e., *if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection . . . Any other conclusion effectively would negate the good cause requirement of rule 26(c): Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order since the public would not be allowed to examine the materials in any event.* (emphasis added)

Public Citizen, id. at 858 U.S. 789, quoting *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139, 145-146 (2nd Cir.), cert. denied, 484 U.S. 953, 108 S. 344, 98 L. Ed. 370 (1987). See also *Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858 (7th Cir. 1994)* ("Absent a protective order, parties to a lawsuit may disseminate materials obtained during discovery as they see fit.")

Because, to this point, there has been no protective order in this case, no "good cause" had been shown for limiting dissemination of the Stephan transcript. Therefore, under the rationales of the Supreme Court and the First, Second and Seventh Circuit Courts of Appeals, there has been no limit upon Defendant's right to share that transcript with other lawyers defending homeowners in foreclosure cases. GMAC does not cite one single Rule of Civil Procedure, one single Rule of Professional Conduct, one statute, and not even one single court decision that stands for its proposition that a party is limited in disseminating pre-trial discovery materials in the absence of a protective order. There is no such precedent. Defendant's Counsel's actions have not been "inappropriate" or "improper" in any respect.

II. THE PLAINTIFF AND GMAC MORTGAGE, LLC HAVE SHOWN NO GOOD CAUSE FOR THE ISSUANCE OF A PROTECTIVE ORDER.

GMAC belatedly[4] now seeks a protective order under M.R.Civ.P. 26(c). Under that Rule a protective order is permitted, but only "for good cause shown." Not only has GMAC failed to show "good cause", it has failed to show *any cause*-- it has provided no affidavits or other evidence to support its claims.

GMAC cites only three cases to support its request for protective order. In both *Seattle Times Co. v. Rhinehart, id.,* and *Baker v. Buffenbarger*, 2004 U.S. Dist. LEXIS 19083 (D. N.D. Ill, 2004), the courts considered the granting of protective orders, but only after having received *affidavits* showing the claimed "good cause". It is not possible to determine what evidence was presented to support the protective order under consideration in *Damiano v. Sony Music*, 2000 U.S. Dist. LEXIS 16670 (D. N.J. 2000). Affidavits are required. See *Easton Sports, Inc. v. Warrior Lacrosse, Inc.,* 2006 U.S. Dist. LEXIS 96358 (E.D., So. Div., Mich.) ("Where a business is the party seeking protection, it will have to show that disclosure would cause significant harm to its competitive and financial position. That showing requires specific demonstrations of fact,

[4] Defendant's Counsel's letter to counsel for GMAC dated June 4, 2010 attached to Plaintiff's Motion as Exhibit C outlines on page two the manner in which GMAC sat on its hands before the June 7, 2010 deposition.

supported where possible *by Affidavit* and concrete examples rather than broad, conclusory allegations of potential harm.) (emphasis added)

The "good cause" standard, that must be proved by affidavit evidence, is best enunciated in *Cipollone v. Ligget Group, Inc.*, 785 F.2d 1108 (3rd Cir. 1986) where the court stated:

> . . . *Rule 26(c)* places the burden of persuasion on the party seeking the protective order. To overcome the presumption, the party seeking the protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the *Rule 26(c)* test. *See United States v. Garrett, 571 F.2d 1323, 1326, n. 3 (5th Cir. 1978)* (requiring "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements"); *General Dynamics Corp. v. Selb Mfg. Corp., 481 F.2d 1204, 1212 (8th Cir. 1973), cert. denied, 414 U.S. 1162, 94 S. Ct. 926, 39 L. Ed. 2d 116 (1974)*; 8 C. Wright & A. Miller, *Federal Practice and Procedure* ß 2035 (1970 & Supp. 1985). Moreover, the harm must be significant, not a mere trifle. *See, e.g., Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982)* (refusing protective order where proponent's only argument in its favor was the broad allegations that the disclosure of certain information would "injure the bank in the industry and local community"), *cert. denied sub nom. Citytrust v. Joy, 460 U.S. 1051, 75 L. Ed. 2d 930, 103 S. Ct. 1498 (1983).*

Cipollone, id., at 785 U.S. 1121. The Seventh Circuit adds that "(m)ost cases endorse the presumption of public access to discovery materials." *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999).

In *Cipollone*, the court was also dealing with a claim of corporate embarrassment of the sort asserted by GMAC here and made the following statements:

> . . . because release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious. As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground. *Cf. Joy v. North, supra [Citytrust v. North,* 692 F.2d 880, 894 (2d Cir. 1982)] (a protective order will not issue upon the broad allegation that disclosure will result in injury to reputation); to succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.

Cipollone, id. at 178 F.3d at 1121. Even if the rhetoric of GMAC's counsel in his legal memorandum could be taken as facts stated in an affidavit, those statements are insufficient to prove the requisite "good cause". They do not show that the alleged corporate embarrassment to GMAC is "particularly serious" or that it would "cause significant harm to its competitive and financial position" as required by the court in *Cipollone.* Any embarrassment to GMAC comes from the fact that the Stephan transcript reveals the fundamentally dishonest and contemptuous summary judgment practices that GMAC engages in.[5] That kind of embarrassment is not something from which Rule 26(c) is designed to protect GMAC.

As a result of the sharing of the Stephan transcript among foreclosure defense counsel, GMAC may well face litigation in other cases challenging its summary jndgment motions and foreclosure jndgments that are based upon Stephan affidavits. This is entirely appropriate. The Ninth Circuit (citing similar holdings in the Seventh and Tenth Circuits, *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 , 1428 (10th Cir. 1990); *Wilk v. Am Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980)) has expressly held that there shonld be a strong bias in favor of "access to discovery materials to meet the needs of parties engaged in collateral litigation. . . Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful dnplication of discovery." *Foltz v. Ho,* 331 F.3d 1122, 1131 (9th Cir. 2003).

III. ALL RELIEF SOUGHT BY PLAINTIFF MUST BE DENIED.

Over its displeasure with the sharing of the Stephan transcript with other foreclosure defense counsel, GMAC seeks to sanction Defendant's counsel by requesting an order that he pay GMAC's

---

[5] If the Court deems Plaintiff's unsworn copies of pages from an Internet search to be admissible evidence, then the Court is urged to conduct its own Google search using the words "Jeffrey Stephan GMAC". The first three pages of that search (30 entries) will reveal 5 references to the June 7, 2010 transcript and most of the remaining 25 relating to the December 10, 2010 transcript. Plaintiff fails to prove even with its inadmissible evidence that it is the June 7, 2010 transcript is the cause of any claimed embarrassment.

fees in bringing this legally unfounded and factually unsupported motion. In addition, GMAC seeks to bar Defendant's counsel from using the Stephan transcript in any other GMAC foreclosure case being defended by him. This is a blatant effort to disqualify Defendant's counsel from those other cases by limiting his ability to provide full professional representation to his clients in those cases. Because there has been nothing improper about the sharing of this transcript, there is absolutely no basis for the imposition of any sanction upon Defendant's counsel.

The GMAC motion for a protective order now can be seen only as an effort by GMAC to retaliate against Defendant's counsel for his exposure of GMAC's bad faith and contemptuous summary judgment practices. The fact that GMAC supplied not one bit of legal support for its claim of wrongful dissemination of the Stephan transcript, and not one single affidavit to support its motion, can lead to no other conclusion. The conclusory allegations of Plaintiff's counsel, even if they had been supported by affidavits, do not prove the requisite good cause for the issuance of a protective order. The motion must be denied.

IV. DEFENDANT IS ENTITLED TO AN AWARD OF COUNSEL FEES IN DEFENDING AGAINST THE PROTECTIVE ORDER MOTION.

Rule 26(c) by reference to M.R.Civ.P. 37(a)(4) allows for awards of expenses on protective order motions. The motion here is utterly unsupported as a matter of law and unproven by any affidavits or other evidence. It is an unjustified effort to increase the litigation burden of the Defendant that requires that Plaintiff and GMAC as the moving parties be ordered to pay counsel fees to counsel for Defendant for the effort required to defend this motion.

DATED: July 2, 2010

Thomas A. Cox, Esq., Maine Bar No. 1248
Attorney for Defendant
P.O.Box1314
Portland, Maine 04104
(207) 749-6671

Exhibit 14

STATE OF MAINE
CUMBERLAND, ss.

BRIDGTON DISTRICT COURT
DOCKET NO. BRI-RE-09-65

FEDERAL NATIONAL MORTGAGE ASSOC.

Plaintiff

v.

NICOLLE BRADBURY

Defendant

and

GMAC MORTGAGE, LLC d/b/a DiTech, LLC .com and BANK OF AMERICA, NA

Parties-in-Interest

ORDER ON FOUR PENDING MOTIONS

The Court has reviewed each of the four pending motions before it, as well as all supporting materials, including supporting affidavits and statements of material fact. The Court held oral argument on September 1, 2010. Those present were attorneys Tom Cox, Esq. and Geoffrey Lewis, Esq. for Defendant, and attorney John Aromando, Esq. for Plaintiff and Party-in-Interest GMAC. Attorneys Cox and Aromando argued capably for their positions.

On the question of summary judgment, before the Court is Plaintiff's Renewed Motion for Summary Judgment, as well as Defendant's Motion for Revision and Reversal of the Partial Summary Judgment Order. By its motion, Plaintiff asks that the Court affirm its previously issued order of January 27, 2010 granting summary judgment in its favor on the issue of liability, and further seeks summary judgment in its favor on the issue of the amounts owed. The Defendant's motion seeks to set aside this Court's previous order granting partial summary judgment for Plaintiff.

Defendant urges that this Court set aside its order on the ground that in so ruling, the Court relied upon the affidavit of Jeffrey Stephan, which was deficient under M. R. Civ. P. 56(e) because Mr. Stephan had signed the affidavit outside the presence of a notary and without reading its contents. The Plaintiff contends that the order can stand even putting aside the Stephan affidavit, and in any event has sought to cure the irregularities in its filing by submitting a properly sworn affidavit to support its motion.

There are, however, deficiencies in Plaintiff's filing which are not cured by the newly-submitted affidavit, namely deficiencies in its statement of material facts (SMF). The Law Court has made clear that in ruling on a summary judgment motion, Maine courts are "neither required *nor permitted* to search outside the facts properly referenced in the statements of material facts ...." *See, e.g, Camden Nat'l Bank v. Peterson*, 2008 ME 85 ¶ 26, 948 A.2d 1251, 1258 (emphasis added). In *Chase Home Finance LLC v. Higgins*, 2009 ME 136, 985 A.2d 508, the Law Court set forth a list of those facts which "must be included in the mortgage holder's statement of material facts." *Id.* at ¶ 11, 985 A.2d at 511. Plaintiff was bound to abide by this mandate, because both its initial and renewed summary judgment motions were filed after the June 15, 2009 effective date noted in *Chase*. *See id* at ¶ 11 n.2. 985 A.2d at 510 n. 2 (explaining that new statutes and rules will apply to summary judgment motions filed after their effective dates, regardless of when the foreclosure action was commenced, and adding: "We include the new requirements here for future reference of parties moving for summary judgment in residential foreclosure actions").

Neither Defendant's initially-filed statement of material facts nor its revised statement of material facts comports with *Chase*. For example, the mortgage holder's statement of facts must include "the existence of the mortgage, including the book and page number of the mortgage, and an adequate description of the mortgaged premises, including the street number, if any." *Id.* at ¶ 11, 985 A.2d at 511 (citing P.L. 2009, ch. 402 §§ 9, 17, effective June 15, 2009). Plaintiff's initial and subsequently filed statement of facts provide the book and page number, but fail to include the street address. *See* Plaintiff's SMFs at ¶ 2. Failure to include the street address is enough in itself to preclude the granting of summary judgment. *See Mortgage Elec. Registration Sys. v. Saunders*, 2010 ME 79 ¶ 25 (explaining that "While the book and page number – but not the mortgaged property's address -- were included in the affidavit supporting one of MERS's original statements of material fact, facts not set forth in the parties' statements of material facts are not part of the summary judgment record").

Plaintiff's SMFs contain other omissions as well. It is not enough to state, as Plaintiff does, that "Demand has been made upon Defendant for payment of all amounts due ...." Plaintiff's SMFs at ¶ 5. 14 M.R.S.A. § 6111 requires that a mortgagee's default notice set forth the mortgagor's right to cure, and specifies the requisite content of such notices as well as the procedures which must be followed. As the Law Court stated in discussing compliance with the statutory written notice requirements of foreclosure, "For a mortgagee to legally foreclose, all steps mandated by statute must be strictly enforced." *Camden Nat'l Bank*, 2008 ME at ¶ 21, 948 A.2d at 1257. Plaintiff's statements of fact fail to set forth facts showing compliance with § 6111. Granting summary judgment despite such an omission would contravene the Law Court's clear pronouncements on this issue.

Accordingly, this Court's Partial Summary Judgment Order dated January 27, 2010 is hereby vacated per the request in the Defendant's Motion for Revision and Reversal, and Plaintiff's Renewed Motion for Summary Judgment is denied. No further summary judgment motions will be heard, as the deadline for filing dispositive motions has long passed and Plaintiff has already been given a second bite of the apple. The parties have twenty days to file an agreed pre-trial order so that this matter may promptly be placed on the trial list in Portland. This file is now transferred to the Portland District Court for further filings and trial.

In addition to renewing its Motion for Summary Judgment, Plaintiff has also filed a Motion for Entry of Protective Order pursuant to M.R. Civ. P. 26(c). This motion is likewise denied.

Rule 26(c) provides that "for good cause shown" a court may enter a protective order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ...." M.R.Civ. P. 26(c). Plaintiff seeks a protective order "prohibiting the dissemination of discovery materials obtained in this case." Plaintiff's Motion for Entry of Protective Order at 7. As grounds for its motion, Plaintiff points to the embarrassment GMAC and its employees have suffered, and will continue to suffer, from the posting of excerpts from Stephan's deposition transcript on an Internet blog. The Court is not persuaded that the Plaintiff has shown the requisite "good cause" to justify entry of a protective order in this case. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988) (agreeing with Second Circuit in noting that "the party seeking a protective order has the burden of showing that good cause exists exists for issuance of that order.... [and] the obverse is also true, i.e. if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection") (citation omitted).

Stephan's deposition was taken to advance a legitimate purpose, and the testimony elicited has direct probative value to this dispute. Attorney Cox did not himself take action other than to share the deposition transcript with an attorney in Florida. That the testimony reveals corporate practices that GMAC finds embarrassing is not enough to justify issuance of a protective order. Further, Plaintiff has failed to establish that GMAC has been harmed specifically as a result of the dissemination of the June 7, 2010 deposition transcript, given that similarly embarrassing deposition testimony from Stephan's December 10, 2009 Florida deposition also appears on the Internet, and will remain even were this Court to grant Plaintiff's motion. Accordingly, because Plaintiff has failed to satisfy its burden of persuasion under Rule 26(c), its Motion for Entry of Protective Order is denied.

In addition to seeking the reversal of this Court's previously granted Order for Partial Summary Judgment, the Defendant has moved for sanctions pursuant to M.R. Civ. P. 56(g). This motion is granted in part, as explained below.

The facts underlying Defendant's motion are for the most part undisputed. Plaintiff does not dispute that its affiant, Jeffery Stephan, in his role as limited signing officer for GMAC, Plaintiff's servicing agent, signed the affidavit which Plaintiff submitted in support of its Motion for Summary Judgment without even reading it and without signing in the presence of a notary. These facts came into the record because the

Defendant went to the time and expense of traveling to Pennsylvania to take Stephan's deposition. In that deposition, which took place on June 7, 2010, Stephan testified that he signs some 400 documents per day, and that the process he follows in signing summary judgment affidavits is consistent with GMAC's policies and procedures.

The Court is particularly troubled by the fact that Stephan's deposition in this case is not the first time that GMAC's high-volume and careless approach to affidavit signing has been exposed. Stephan himself was deposed six months earlier, on December 10, 2009, in Florida. His Florida testimony is consistent with the testimony given in this case: except for some limited checking of figures, he signs summary judgment affidavits without first reading them and without appearing before a notary. Even more troubling, in addition to that Florida action, in May, 2006 another Florida court not only admonished GMAC, it sanctioned the Plaintiff lender for GMAC's affidavit signing practices. As part of its order, the Florida court required GMAC to file a Notice of Compliance, indicating its commitment to modify its affidavit signing procedures to conform to proper practices. The experience of this case reveals that, despite the Florida Court's order, GMAC's flagrant disregard apparently persists. It is well past the time for such practices to end.

Accordingly, Defendant asks that this Court impose sanctions pursuant to M.R. Civ. P. 56(g), which provides:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Although there are no Maine Law Court cases applying it, the plain language of Rule 56(g) makes clear that the Court must determine, first, whether it appears "to the satisfaction of the court" that an affidavit submitted for summary judgment purposes was presented "in bad faith or solely for the purpose of delay." The Law Court has defined "bad faith", albeit in a different context: "Bad faith 'imports a dishonest purpose and implies wrongdoing or some motive of self-interest.' Bad faith means 'dishonesty of belief or purpose ....'" *Seacoast Hangar Condo. II Ass'n. v. Martel*, 2001 ME 112 ¶ 21, 775 A.2d 1166, 1171-72 (citing a Utah case and Black's Law Dictionary).[1] It is left to the Court's discretion to determine whether offending conduct rises to the level of "bad faith" such that Rule 56(g) sanctions are warranted. *See, e.g., Cobell v. Norton*, 214 F.R.D. 13, 20 (D.D.C. 2003) (noting that "as a practical matter a court has wide discretion in deciding what constitutes 'bad faith'") (citing Wright & Miller, Federal Practice and Procedure § 2742 (3d ed. 1998)). If a Court is satisfied that the affidavit was

[1] *Seacoast Hangar*'s definition of "bad faith" occurred in the context of discussing the business judgment rule, which "does not insulate directors from liability for breach of their fiduciary duties if they 'acted primarily through bad faith or fraud ....'" *Id.* at ¶ 20 n. 1, 775 A.2d at 1171 n.1 (citation omitted).

submitted in bad faith, then the mandatory language of Rule 56(g) requires that the Court forthwith order "the party employing [the affidavit] to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees." M.R.Civ. P. 56(g).

Both parties cite *Fort Hill Builders, Inc. v. National Grange Mut. Ins. Co.*, 866 F.2d 11 (1st Cir. 1989), in which the First Circuit analyzed the cases applying the Federal Rule 56(g) to conclude that the matters in which sanctions were imposed involved "particularly egregious" conduct. Characterizing its misconduct as a mere "procedural deficiency," Plaintiff urges the Court to find no bad faith; Defendant, on the other hand, argues that, on the spectrum of egregiousness, the conduct at issue more than meets the standard for bad faith under the rule.

The Court agrees with Defendant, and finds to its satisfaction that the Stephan affidavit was submitted in bad faith. Rather than being an isolated or inadvertent instance of misconduct, the Court finds that GMAC has persisted in its unlawful document signing practices long after and even in the face of the Florida Court's order, and that such conduct constitutes "bad faith" under Rule 56(g). These documents are submitted to a court with the intent that the court find a homeowner liable to the Plaintiff for thousands of dollars and subject to foreclosure on the debtor's residence. Filing such a document without significant regard for its accuracy, which the court in ordinary circumstances may never be able to investigate or otherwise verify, is a serious and troubling matter. Accordingly, the Court orders Plaintiff[2] to compensate Defendant's counsel for his attorney's fees and costs "which the filing of the Affidavit caused [him] to incur" – in other words, that Plaintiff pay Defendant's counsel for his time and expenses in preparing for and taking Stephan's deposition, as well as for his time and expenses in preparing for, filing, and prosecuting Defendant's Rule 56(g) motion.[3]

---

[2] As the Florida court imposed sanctions on the Plaintiff lender for GMAC's conduct, the Court likewise finds it appropriate to hold Plaintiff responsible for the conduct of its servicing agent, GMAC. Requiring Plaintiff to pay Defendant counsel's attorney's fees comports both with the language of Rule 56(g) (award of expenses should be ordered against party "employing" affidavits) as well as with principles of agency law. *See, e.g., Dupuis v. Federal Home Loan Mortgage Corp.*, 879 F. Supp. 139, 144 (D. Me. 1995) (holding that "[a]s a matter of agency law, it would be unfair for [the note and mortgage holder] to have the benefit of [the servicing agent's] servicing of the note and mortgage without also making [the note and mortgage holder] responsible for [the servicing agent's] excesses and failures").

[3] The Court declines to award fees for opposing Plaintiff's summary judgment or protective order motions, because those tasks were not "caused" by the bad faith affidavit. Because the Court finds its award of attorney's fees and costs to be a sufficient sanction for Plaintiff's bad faith conduct, the Court declines to explore the issue of contempt in this case as requested by Defendant.

Defendant has ten days from the date of this order to file an affidavit setting forth his time spent, usual hourly rate,[4] and expenses incurred in taking Stephan's deposition and filing and pursuing Defendant's Rule 56(g) motion. Plaintiff's written objection to Defendant's counsel's claimed expenses, if any, must be filed within seven days thereafter, and shall only address the sums claimed. The Court will thereupon issue an order setting forth the reasonable sum Plaintiff owes to Defendant's counsel.

The clerk shall docket this order by reference under Rule 79(a).

DATED: 9/24/10

Hon. Keith A. Powers, Judge
Maine District Court

[4] That Defendant's counsel is entitled to an award of attorney's fees is not affected by the fact that he has labored in this case on a pro bono basis. *Cf., Foster v. Mydas Assoc., Inc.*, 943 F.2d 139, 144 n.7 (1st Cir. 1991) (noting that civil rights attorneys who work pro bono and prevail are usually awarded attorney's fees under civil rights statutes).

Exhibit 15

Political Economy

Politics, politicians, big business and the economy

MORE BUSINESS NEWS

POST BUSINESS

Your essential source for the latest news on the intersection of Wall Street and Washington

ECONOMIC AGENDA

9:30 a.m.
Sen. Barbara Mikulski (D-Md.) and Gov. Martin O'Malley (D-Md.) are scheduled to make an announcement at the General Motors plant in White Marsh

National Commission on Fiscal Responsibility and Reform meets to discuss policies that could help rein in runaway federal deficits

10 a.m.
Federal telecommunications and consumer regulators meet on the one-year anniversary of a special report that set 15 recommendations for expanding access to high-speed Internet service across the United States

11:30 a.m.
World Bank President Robert Zoellick gives a speech on global development

4 p.m.
Panel discussion at Georgetown University will examine the state of dealmaking in the commercial real estate market

7 p.m.
Senate Banking Chairman Christopher Dodd (D-Conn.) is scheduled to address the Economic Club of Washington on the financial overhaul enacted over the summer

SEARCH THIS BLOG

Go

Ally knew of faulty GMAC documents weeks before eviction moratorium

Ally Financial officials knew a large number of documents submitted in support of mortgage foreclosure proceedings were mishandled as early as August, but did not take action to stop the evictions until last week, according to a Bloomberg report.

Ally's GMAC mortgage unit briefed one of its customers, Freddie Mac, on Aug. 25 of the problem. Freddie Mac halted evictions on Sept. 1. But Ally did not take steps to freeze evictions and foreclosures until Sept. 17, the report said.

In addition to selling and servicing its own loans, Ally handles the management of mortgages for hundreds of other firms. Fannie Mae, the nation's largest government-backed mortgage firm, also uses Ally to service some of its loans.

The company has declined to comment on the timing or substance of conversations it had with Ally except to say that "we were first notified of the situation and the planned foreclosure freeze by GMAC and then we took the necessary steps to alert our networks of the need to adhere to that freeze."

It is the responsibility of servicers like Ally "to put processes in place that ensure they are fulfilling this requirement, and they are accountable for rectifying any issues that may arise in this regard, Fannie said.

Freddie Mac and Fannie Mae, which are managed by the government since a bailout in 2008, are responsible for guaranteeing or owning more than half the $11 trillion in U.S. home mortgages. The U.S. Treasury owns a majority-stake in Ally.

Correction: An earlier version of the headline for this post incorrectly stated that it took weeks for Freddie Mac to freeze evictions after learning the paperwork for those proceedings had been mishandled. In fact, their response took about a week.

Complete coverage in The Washington Post:

Sept. 20: Ally suspends evictions on foreclosed homes in 23 states

Sept. 21: A single Ally employee, Jeffrey Stephan, signed over 10,000 documents a month without reading them

Sept. 22: Fake documents, forged signatures plague foreclosure system

'Robo-signer' Linda Green's changing signature

Who is Jeffrey Stephan anyway?

Sept. 23: Mortgage documentation problems could affect other states not included in Ally's 23-state moratorium

Sept. 24: Lawmakers question Fannie on 'foreclosure mills'

Document: Letter from Congressmen to Fannie Mae CEO

User poll: What should happen to foreclosure documents approved by

STAFF CONTRIBUTORS

Click on the faces for bios

About This Blog

Political Economy explores how political forces in Washington and elsewhere in the world shape the economy and how corporate agendas influence political institutions and politicians. The blog offers new perspectives on the day's top economic and business stories with exclusive interviews with government officials and lawmakers, commentary from influential economists and analysis from Post reporters. Ariana Eunjung Cha is the blog's lead writer and Mike Shepard is the author of the daily economic agenda.

Post Blogs

- Ezra Klein
- The Company Beat
- PostTech
- Market Cop
- Faster Forward
- 44
- The Fix
- The Federal Eye
- Post Partisan
- Rough Sketch

Blog Roll

- Free Exchange
- Economist's View
- Greg Mankiw
- On The Money
- Marginal Revolution
- Felix Salmon
- Baseline Scenario
- Rortybomb
- Naked Capitalism
- John Lounsbury
- Interfluidity
- Megan McArdle
- Clive Crook
- Derek Thompson
- Economix
- Kevin Drum
- Real Time Economics
- Brad DeLong
- Ryan Grim
- Dominique Strauss-Kahn
- Richard Eskow
- Tim Fernholz
- Nicholas Baumann
- Shahien Nasiripour

Exhibit 16

STATE OF MAINE Cumberland, ss	DISTRICT COURT LOCATION: BRIDGTON DOCKET NO. BRI-RE-09-65

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiff v. NICOLE M. BRADBURY Defendant and GMAC MORTGAGE, LLC d/b/a DiTECH, LLC.com and BANK OF AMERICA, NA Parties-in-Interest	**PLAINTIFF'S MOTION FOR ENTRY OF PROTECTIVE ORDER**

Pursuant to Rule 26(c) of the Maine Rules of Civil Procedure, Plaintiff Federal National Mortgage Association and Parties-in-Interest GMAC Mortgage, LLC d/b/a DiTECH, LLC.com and Bank of America, N.A. (collectively "Plaintiff") move for entry of a protective order to prevent the use of discovery materials in this case for purposes other than to prepare for and to conduct discovery and trial in this action, including the general and gratuitous distribution of such information through the internet. In support of this Motion, Plaintiff states the following.

I. FACTUAL BACKGROUND

1. This Motion is in response to the disclosure of discovery materials obtained in this action by Defendant's attorney for improper purposes entirely unrelated to this action, the effect of which has caused embarrassment, annoyance, oppression and intimidation of the employees of Party-in-Interest GMAC Mortgage, LLC ("GMACM"), and which threatens to interfere with the judicial process. The protective order requested herein is necessary to prevent

{W1846789.2}

such conduct by Defendant's counsel in the future, and to protect GMACM and its employees from further such embarrassment, annoyance, oppression and intimidation.

2. On June 7, 2010, Thomas A. Cox, attorney for the Defendant Nicole Bradbury, deposed Jeffrey D. Stephan, an employee of GMACM. Much of Mr. Stephan's deposition testimony concerned GMACM's business practices with respect to the execution of affidavits in foreclosure actions. A copy of the transcript from Mr. Stephan's deposition is attached as Exhibit A.

3. Prior to the deposition, on June 4, 2010, Plaintiff's counsel Julia Pitney sent Mr. Cox a letter, attached as Exhibit B, stating that Mr. Stephan's deposition should be limited to Plaintiff's damages, i.e., the outstanding balance of the loan, which is the only remaining issue in the action. Ms. Pitney further warned against using Mr. Stephan's deposition to gather information exceeding the scope of the issues of this action for purposes wholly unrelated to this action. (*See Id.*). Ms. Pitney obviously had concerns going into the deposition that Mr. Stephan's deposition testimony would be used for purposes exceeding what is contemplated by and appropriate under the Maine Rules of Civil Procedure. Unfortunately, as discussed herein, Ms. Pitney's concerns were realized as Mr. Stephan's deposition testimony was posted to at least one Internet blog before Mr. Stephan had the opportunity to review his testimony and before counsel for Plaintiff even received a copy of the transcript.

4. In response to Ms. Pitney's June 4, 2010 correspondence, Mr. Cox assured Ms. Pitney that it was his "intent to conduct myself and this deposition fully in accordance with the Maine Rules of Professional Conduct and the Maine Rules of Civil Procedure." (6/4/10 Cox Letter, attached as Exhibit C). Nowhere in his letter did Mr. Cox suggest that he would disseminate the deposition transcript to third parties for purposes unrelated to this litigation. (*See Id.*).

5. Only after Ms. Pitney requested that Mr. Cox stipulate on the record that Mr. Stephan's deposition would be used only in connection with this action did Mr. Cox acknowledge his representation of other individuals adverse to GMACM and that he may use Mr. Stephan's deposition in those other cases. (*See* 6/4/10 Pitney E-mail attached as Exhibit D; 6/6/10 Cox Letter attached as Exhibit E). Mr. Cox also admitted that in his role as Volunteer Program Coordinator for the Maine Attorney's Saving Homes ("MASH") Program, he may be inclined to share Mr. Stephan's deposition with other MASH lawyers involved in other cases against GMACM. (*See Id.*). Still, Mr. Cox said nothing that would have put Ms. Pitney on notice that the deposition testimony of Mr. Stephan might be disseminated in such a manner that it would be posted to an Internet blog spot, much less disseminated before Plaintiff's counsel or Mr. Stephan even had the opportunity to review the transcript.

6. Mr. Cox has acknowledged sending the deposition transcript to an attorney in Florida who, in turn, posted the transcript to his or her blog spot. Mr. Cox did not reveal the identity of the Florida attorney to whom he sent the deposition transcript, but Plaintiff believes that the transcript was sent to attorney Matthew Weidner. On June 15, 2010, Mr. Stephan's deposition transcript from this case was posted to Mr. Weidner's blog spot, located at http://mattweidnerlaw.com/blog/2010/06/new-robo-signer-deposition-jeffrey-stephan/. A copy of the blog, in pertinent part, is attached as Exhibit F. The blog dubs Mr. Stephan the "New Robo Signer" and solicits comments from viewers.[1]

1 In Mr. Stephan's deposition, Mr. Cox inquired as to Mr. Stephan's prior testimony in a foreclosure action pending in Florida. (Deposition Transcript, pp. 57-58, Ex. A). The deposition to which Mr. Cox referred occurred on December 10, 2009, in connection with the case styled *GMAC Mortgage, LLC v. Neu*, in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach, Florida, Case No. 50-2008-CA-040805XXX-MB. The transcript from the December 10, 2009 deposition was posted by Florida attorney Carol C. Asbury on her blog spot, which is located at www.4closurefraud.com, which refers to Mr. Stephan as the "Affidavit Slave." A copy of the blog spot, in pertinent part, is attached as Exhibit G.

7. The effect of Mr. Cox's dissemination of this transcript has been annoyance, embarrassment, intimidation and oppression not only of GMACM and Mr. Stephan but also to other employees of GMACM who fear that their respective deposition testimonies may be also be distributed widely and gratuitously on the internet or in some other very public fashion or otherwise used for improper purposes completely unrelated to the litigation in which the testimony is provided.

8. This dissemination of Mr. Stephan's deposition testimony is inconsistent with the Maine Rules of Civil Procedure, which contemplates the use of discovery material for proper purposes in connection with the action in which such discovery is generated, and seeks to protect parties and witnesses from embarrassment, annoyance, oppression and intimidation as described in Rule 26(c), and, as discussed below, the Court should enter a protective order prohibiting the further dissemination of Mr. Stephan's deposition transcript and any other discovery materials obtained in this action.

II. LEGAL ARGUMENT

9. Rule 26(c) of the Maine Rules of Civil Procedure governs protective orders. Specifically, Rules 26(c) provides that "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, any justice or judge of the court in which the action is pending may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense."

10. Courts interpreting Rule 26(c) of the Federal Rules of Civil Procedure, which is in all relevant respects identical to its Maine counterpart, generally contemplate broad, public discovery but do not permit the misuse of the judicial system in order to disseminate information that has been obtained through pretrial discovery. *See, e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199 (1984) (rejecting the plaintiff's contention that a protective order offends

the First Amendment when the order is limited to the context of pretrial civil discovery and does not restrict the dissemination of the information it gained from other sources).

11. For example, in *Baker v. Buffenbarger*, the United States District Court for the Northern District of Illinois held that the plaintiff's request for a protective order fell squarely within Rule 26(c) where evidence indicated that the plaintiff's attorney refused to agree to limit the use of defendant's deposition transcript to the subject lawsuit and where plaintiff's attorney admitted his intent to disseminate the deposition transcript. 2004 WL 2124787 (N.D. Ill. Sept. 22, 2004). In *Baker*, prior to the subject depositions, defense counsel inquired as to the purpose of videotaping the depositions. *Id.* at *1. When the plaintiffs' counsel responded that perhaps the plaintiffs would send the videotapes to the media or post the transcripts on the internet, defense counsel requested that the use of the transcripts and videotapes be limited to purposes directly related to the lawsuit. *Id.* The plaintiffs' counsel declined, asserting that the public had a right to access the materials and that the plaintiffs were free to do as they see fit with any materials obtained during discovery. *Id.* The court opined that litigants do not have an absolute right to do whatever they choose with discovery materials. Where the evidence indicates that a litigant intends to use discovery materials for a purpose unrelated to settlement or trial preparation, but instead to embarrass the party moving for a protective order, the moving party's request for a protective order falls squarely within Rule 26(c). *Id.* at *2.

12. Here, the sole remaining issue is Plaintiff's damages. Notwithstanding, Mr. Cox deposed Mr. Stephan primarily concerning GMACM's and Mr. Stephan's procedures for executing affidavits in foreclosure matters. By the time that Plaintiff's counsel received a copy of the deposition transcript, Mr. Cox had already disseminated the transcript to an attorney in Florida who, Mr. Cox acknowledged, posted the transcript on the internet. Plaintiff has reasonable grounds for concluding that Mr. Weidner is the attorney to whom Mr. Cox disclosed

the transcript and that Mr. Weidner posted the transcript to his blog spot for purposes of embarrassing Mr. Stephan and GMACM. However, it is irrelevant whether or not Mr. Weidner is the attorney to whom Mr. Cox disclosed the transcript because one thing is clear – Mr. Cox obviously did not disclose the transcript for purposes relating to settlement or trial preparation in this lawsuit.

13. In *Damiano v. Sony Music Entertainment, Inc.*, the United States District Court of the District of New Jersey upheld a confidentiality order entered four years earlier which prohibited the plaintiff from posting confidential discovery materials on various websites, disseminating such confidential information via e-mail and in chat rooms, and offering such materials for sale. 2000 WL 1689081, *2 (D. N.J. Nov. 13, 2000). Noting that a confidentiality order may be granted at any stage of the lawsuit, including settlement, so long as it is supported by good cause, the court held that the subject confidentiality order did not violate the plaintiff's First Amendment right to speak about his claim with whomever he so desires so long as the discovery materials were not exploited for "publicity, profit or collateral gain." *Id.* at *11.

14. Exploiting Mr. Stephan's deposition transcript is exactly what has occurred here. Mr. Cox has exceeded merely discussing his claims with other attorneys but, instead, has provided to at least one other attorney Mr. Stephan's deposition transcript which was subsequently posted on the internet for the ultimate purpose of publicity and profit for the posting attorney. Although Mr. Stephan's deposition transcript may not be confidential, as were the discovery materials in the *Damiano* case, the transcript still should not be used to make a profit for attorneys with whom Mr. Cox converses.

15. Accordingly, Plaintiff asks that the Court prohibit Defendant and her counsel from disseminating discovery materials for purposes unrelated to trial preparation, trial or settlement of this particular lawsuit.

{W1846789.2}

16. Plaintiff also requests that any order by the Court be applied retroactively so as to protect information already obtained through discovery from being disseminated inappropriately.

17. Furthermore, Plaintiff requests that sanctions be entered against Mr. Cox. Specifically, Plaintiff requests that Mr. Cox be required to reimburse Plaintiff for all fees and costs associated with filing this motion for protective order. As a consequence of his improper conduct, Mr. Cox should be barred from using Mr. Stephan's deposition transcript in his other cases against GMACM. Plaintiff is aware that Mr. Cox has attached this deposition transcript to a brief he filed in the case captioned *U.S. Bank National Association v. Ciraldo,* Civil Docket No. RE-10-04 pending in Maine Superior Court, Waldo County.

III. CONCLUSION

Despite having previously promised Plaintiff's counsel that he would abide by Maine's Rules of Civil Procedure, Mr. Cox admittedly disclosed Mr. Stephan's deposition transcript to an attorney in Florida who subsequently posted the transcript on the internet. The use of the deposition transcript has caused undue annoyance, embarrassment and oppression to Plaintiff and Mr. Stephan, not to mention other employees of GMACM who are now reluctant to provide deposition testimony for fear the testimony will be posted on various blog spots. For these reasons, Rule 26(c) warrants the entry of a protective order prohibiting the dissemination of discovery materials obtained in this case. Plaintiff respectfully requests the Court to enter such a protective order which would apply to all discovery materials, including the use of Mr. Stephan's deposition transcript. Plaintiff requests such other and additional relief that the Court deems appropriate.

Dated at Portland, Maine, this 25th day of June, 2010

John J. Aromando, Bar #3099
Pierce Atwood LLP
One Monument Square
Portland, ME 04101
207-791-1100

D. Brian O'Dell, Esq. (Admitted *Pro Hac Vice)*
Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2119

Attorneys for Plaintiff Federal National Mortgage Association and Parties-in-Interest GMAC Mortgage, LLC d/b/a DiTech, LLC.com and Bank of America, NA

NOTICE

Matters in opposition to this Motion pursuant to Me. R. Civ. P. 7(c) must be filed not later than 21 days after the filing of this motion unless another time is provided by the Maine Rules of Civil Procedure or by the Court. Failure to file timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.

{W1846789.2}

Mr. JOHNSON. Thank you, Mr. Cox. Next we will hear from Sandra Hines. Is it Saundra or Sandra?

Ms. HINES. Sandra.

Mr. JOHNSON. Ms. Hines is a lifelong Detroit resident and a social worker. She brings to this hearing her personal experience of losing her family home of 37 years to foreclosure and of being evicted from that home. Ms. Hines has turned those painful experiences into valuable resources that she uses to assist others facing foreclosure. She has been a tireless advocate on other important issues of concern to the citizens of Detroit.

We welcome you to the hearing, and we would like to hear your testimony now if you would.

Ms. HINES. Thank you.

Mr. JOHNSON. Thank you.

TESTIMONY OF SANDRA D. HINES, FORMER HOMEOWNER, DETROIT, MI

Ms. HINES. I want to first thank the honorable men and women here who can make a difference in our lives in America.

I lost my family home to foreclosure and eviction. And I don't know if anybody here knows anyone or has had anyone in they family lose they home, but it is an uprooting. We were uprooted.

I still have a lump in my throat, hole in my chest every time I think about it, because my mother and father worked real hard to get that house. We moved into 16582 Lesure, Detroit, Michigan in 1970. When we moved into that home we was the second Black family on the block. My mother and them was seeking a better way of life for us and a better environment. We stayed—my mother put a roof on that home, she put in a new furnace, she put in a hot water and cooler heater. She he had the porch redone, she had awnings put around the house. She also had before my father died central air conditioning added to the home.

My mother—I mean my sister and my father was GM workers. My father worked for GM almost to the day he died. He contacted cancer from working for General Motors in those foundries that was spitting out asbestos and lead and everything else.

I'm here to say that we believed in the American dream. Most of the people who have bought homes in America believed in the American dream. Now we are facing the American nightmare. None of us in America would have thought that the government would turn their back on the people and not allow the people to have the kind of help that they need because the banks decided they wanted to trick and rob people of they homes.

Now we can sit here all day. I am a little disappointed that the room is not full, I don't know, maybe this is a special committee and this is the only Committee that is listening to people that's really trying to save their homes. But I wish that every chair was filled in this room so that they can understand the pain that is associated when you lose a home of over 40 years.

We moved 40 years of memories in the cold, snow like a day that we had in Detroit where it snowed all day, the ice was covered over. They threw us out in conditions like that. They took my mother's antique furniture and they threw it over in the dumpster. The bailiff stood out there with his gun to let us know that he would take us to jail and kill us if we tried to stop him from coming into our house. It was the most horrible and most pitiful experience I have ever had in my life to lose a home that I lived in for 40 years.

Where do you go on Christmas now? Me and my sisters are divided. We staying in apartments when we always had a home. Where do you go on Easter when you don't have a home anymore?

What can you call—what can we call home now after all of years that my father worked at General Motors and my mother worked for a neighborhood service agency, helping people all her life because she was an investigator for JDO.

And my mother—our house was paid for. The part that hurts me so much, my mother told us, my mother said, don't remortgage the home. If you remortgage the home, the bank is going to steal it. She was telling my friends, my young friends who was first-time buyers who was buying homes at that time that was coming to my mother and didn't understand what was going on, and I am talking about back in like 2004 and '3, they didn't know this was the beginning of foreclosure and evictions. My mother encouraged them and begged them, don't remortgage your home. A couple of them didn't and they have their home today because they didn't. The ones that did don't have they home, they experienced foreclosure and eviction just like we did.

I just don't know why we have to come and beg people that we put in office to work for us to work for us. What has happened to America? I mean I don't get it. I don't get it why you all sit here and make decisions over our lives and you all can't see that if you throw us out of our homes we don't have a life. Your life change. All of you got a home. You got money, you got health care, you got the best insurance that anybody can have, you probably have the best homes that anybody can have. Don't you think other Americans want that, too? Isn't that what America is supposed to be about? The land of the brave and the home of the free? The people worked, the people, the people have worked and built America what it used to be. Because America ain't what it used to be no more.

My mother used to always say, they are going to turn America into a third world country. Well, you just about to did it. Come to Detroit and look at the neighborhoods, how they have been ravaged by foreclosure and evictions. You ride down the street 6 and 7 houses on one block out of maybe 20 houses, 10 on one side, 10 on the other side. Seven and 8 of them 10 have been shut down because of foreclosure. I don't know where those people are at.

I came here to tell a story of the people. Maybe if the people tell the story ya'll will get it. Because ain't none of the rest of ya'll been able to respect the other ones. I have seen the Congressmen that have argued on behalf of the people, they get shut down. It is like they not saying anything that anybody else is listening to. So we have to come now—and I am going to tell you, I wasn't on the roster to come from Detroit. Once I found out that you was having a hearing I asked my relatives, I asked my friends to give me money to come here. Just so happen it worked out. And on my way here I missed the first plane, I broke my glasses while I was on the plane. That is why I can't read my statement. But I'm here, because I am supposed to be here representing the American people. And it is not just Black people that is experiencing this, it is all people, all of the people in America. America is a melting pot. People come here because they want help, they want to be free. They want to have what we said America was. And even the people that was born here in America, those of us who claim to be Americans, not only are you not helping those who have came, now you are not helping us, the Americans. Why should people have to come here and tell you this when you see us, the millions and millions of people in foreclosure and evictions? Don't you want to do something about it? Don't you want to bring America back? It looks like a garbage dump now. Each city from each city. Everything is falling down, it is because people are stealing everything that ain't nailed down and not doing what the people put them in office to do.

Mr. JOHNSON. Ms. Hines, I want to thank you so much for your statement.

Ms. HINES. I am sorry if I appear to be angry, but I am. I am mad at hell. And I thank you. I know my time is up. I appreciate everybody listening to me, but the bottom line is, and I'm going to close on this: Don't listen, do something about it.

[The prepared statement of Ms. Hines follows:]

PREPARED STATEMENT OF SANDRA D. HINES

foreclosure

House Judiciary Committee

Attention: Chairman John Conyers Jr. and committee members

Statement of Sandra D. Hines

Submitted December 15, 2010

Re: Foreclosed Justice: Causes and Effect of the Foreclosure Crisis –Part II

Honorable Congressman Conyers and Congressional Representatives:

I would first like to take this time to thank you for the opportunity to speak on behave of me, and my fellow Americans that have lost their homes to foreclosure and eviction.

I am Sandra Hines from Detroit Michigan, one of the hardest hit cities in the United States.

Losing my family home of nearly forty years in December 2007 still leaves a whole in my stomach and lump in my throat.

You cannot imagine how my family lives were changed. We were up rooted and displaced in a matter of months after living in a community where everyone was on a first name basis.

We moved into our home in 1970 after my mother and father worked and saved for years to move us to a better neighborhood.

When we moved to 16582 Lesure there were only two other Black families living on the block.

We lived through many neighborhood changes and my parents went through many trails and tribulations to keep us in that house.

They repaired the roof, put in a new water heater, had a tree removed, put in a new furnace, brick porch and central air condition, before they died.

I don't know what broke my heart the most the death of my parents or losing the house they died paying for and losing it to predatory lending from the crooked dealing of Wells Fargo Bank.

I am so ashamed because my mother told us before she died "Do not mortgage the house because the bank will steal it.

We did it anyway because the house needed many major repairs, and we felt we could pay the mortgage back,

Once the house went into foreclosure we lost the house in two and a half months.

The payment went from $588 a month to $988 a month.

My Sister and I could not pay the $988 a month because my sister disability payments had been reduce from $1200 a month to $600 a month.

I was not living at the home at that time and I was barely maintaining living in an apartment

So many people got paid off our misery. My sister paid two lawyers to help us but all they did was rip us off, as the bank came and threw us out like dirty bathwater.

The banks and financial institutions are profiting off of the American People, they are robbing us of our homes, .pride and dignity.

We no longer can depend on the American Dream because now we have the American Nightmare.

We need a declaration of a state of emergency and a moratorium on foreclosures and evictions to save our families, to save our country.

America has had many chances to live out it's creed, but greed has replaced human need, and now we're headed for becoming a third world country.

Congress you can turn America around and make it the home of the brave and the land of the free, by working for the American People who elected you.
We need a moratorium on foreclosure and evictions.

Mr. JOHNSON. Thank you, Ms. Hines.
Next we will hear from Ms. Fluker, is it Fluker?
Ms. FLUKER. Yes, it is.
Mr. JOHNSON. And if you pull that microphone up and cut it on.
Ms. FLUKER. The light is on.
Mr. JOHNSON. I don't think it must be working.
Ms. FLUKER. Is it better now?

Mr. JOHNSON. Perhaps if you would grab one of the other microphones, that would be good.

Ms. FLUKER. Is this better?

Mr. JOHNSON. Oh yeah, that is much better.

TESTIMONY OF VANESSA FLUKER, VANESSA G. FLUKER, ESQUIRE, PLLC, DETROIT, MI

Ms. FLUKER. First of all, I would like to thank the Committee for having this opportunity to come here today to present testimony regarding this very important issue. I, too, like Ms. Hines from the City of Detroit, Michigan, who is ranked at the top of the list, we are almost at the very top, in foreclosures leading to evictions because we are a nonjudicial State.

First, I would like to address the perspective of, the media perception has been that for some reason we have all these massive foreclosures because you have this multitude of people who bit off more than they could chew, who went into homes that just were exorbitant and beyond their reach. This is not true. The majority of people in subprime mortgages are the working poor, minorities and senior citizens, and that is what constitutes and makes up the majority of my practice.

Unfortunately, the scenario is such that these subprime mortgages were marketed and pushed disparately on the working poor, minorities, and senior citizens. For instance to give a real life first-hand perspective, my client, Ms. Hart, works every day as a legal assistant, mother dying of cancer, she has been fighting for 2 years to get a modification with Bank of America, who by the way just got $7 billion additionally in January of this year to do that. No go. They are proceeding to evictions on that matter right now. The only reason an eviction hasn't occurred is because there may be some impropriety with the affidavits and documentation.

My client, a senior citizen, who was diagnosed with dementia in 2000, who was put in a pay-option ARM mortgage in 2007, who we are still fighting. Of course it is his family now, seeing as we have been fighting so long he died a week and a half ago.

My client who has a farm in Michigan, who was put in a subprime residential mortgage, interest only, but now he covers his house and his whole farm, and they are foreclosing and they are trying to take the whole farm.

Or even more egregious, my client who was in active duty in Iraq, serving his country, comes back, he is in foreclosure. They are like oh, well, too bad. We can't work with you, we can't modify your loan.

This is just a sampling of what I deal with every day, and it is voluminous.

And what makes this situation just in my opinion outrageous is because after, as we all know, it was the $700 billion bailout, approximately 75 percent of these subprime mortgages now are insured or underwritten by the government. Why does that become so significant? Because if in fact a mortgage is underwritten or guaranteed by Fannie Mae or Freddie Mac, when the banks and lenders throw these people out in the street they get paid the full mortgage value. That is why it is a bonanza in Michigan. Michigan property values have dropped in some areas up to 70 percent.

So for instance, I have a client whose fair market value is going between 12,500 and $15,000. Well, the mortgage balance on the home, being the adjustable rate predatory mortgage is close to $200,000. Guess what, if they are successful, in throwing that individual out of their home, they don't get the full market value, they get that full mortgage value. Therefore, why is there any incentive for any lender to work with anybody when they are being paid the full mortgage value?

Now this was really brought to light in the New York Times article on October 18th of this year. The article is about Bank of America, who is a perfect example, it is the same across the board. It talked about them resuming their foreclosures after the robo-signing issue. And what is significant about that article is because on page 2 it talks about of the 14 million mortgages that Bank of America holds, Fannie Mae and Freddie Mac underwrite one-half of them to the tune of $2.1 trillion. Layman's terms, if Bank of America forecloses on all of those underwritten loans by Fannie Mae and Freddie Mac, they would make $2.1 trillion. Again that is why my clients who sent paperwork in for modifications, 2, 3 4, 5, 6, 7 times, I turn around as an attorney send it in 2, 3, 4, 5, 6, 7 times, certified mail, green card receipt, we haven't received the document and they are moving their house to foreclosure. That is why that occurs, that is why. People who are going to trial modifications, who have paid 3 months, 6 months, 9 months take their money. All of a sudden say, oh, by the way, after paying the trial modification for 9 months, you don't modify. Next thing they know because we are nonjudicial they have a sheriff sale tacked to their door and they are the host house for the sheriff sale.

This is just getting outrageous, and I challenge this Committee and Congress to do this, I believe this will be a very telling statistical aspect—and I know my time is running out.

Fannie Mae and Freddie Mac always talks about how many houses they have sold, which is true, because in Detroit you can get a beautiful house for 10, $15,000. Someone needs to compare the numbers, how much money was paid to the banks for those mortgages versus how much money was made from the sale of those homes. And I can assure you for Michigan it will be an outrage, because basically we are bailing out the banks in a silent bailout with these guaranteed mortgages and there is no incentive to work with the borrowers.

Thank you.

[The prepared statement of Ms. Fluker follows:]

PREPARED STATEMENT OF VANESSA FLUKER

**US HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE WRITTEN TESTIMONY
FORECLOSED JUSTICE: CAUSES AND EFFECTS OF THE FORCLOSURE CRISIS
DECEMBER 2, 2010**

INTRODUCTION

There must be a true understanding the real life effects of the foreclosure mortgage crisis and the disingenuous nature of lenders in refusing to offer any assistance to borrowers locked into horrible subprime adjustable rate loans or who fall behind on their mortgages due to job loss or wage reductions.

Today the foreclosure crisis continues to intensify. An estimated 2.8 million foreclosures are projected across the U.S. during 2010, with foreclosures totaling 9 million for the years 2009 to 2012. The total lost home-equity wealth due to foreclosures is expected to be $1.9 trillion for the years 2009 to 2012. (Center for Responsible Lending, Aug. 20)

Contrary to media hype and popular belief, the average individuals affected by subprime lending are the poor, minorities and elderly. In my practice, which unfortunately now consists almost solely of predatory lending cases and foreclosure matters--the vast majority of my clients are the working class, poor, minorities, and senior citizens over the age of 75 years old, who initially owned their home outright until steered into ARMs, despite the fact they were on a fixed income, and now face foreclosure and homelessness.

Several associates and myself have committed our practices to attempting to help these people and bring some sense of justice back into the legal process. I would like someone to truly address the foreclosure issues, and look at the front line stories that we see every day. My client who works every day, with a mother suffering from pancreatic cancer who is still fighting to stop an eviction after being denied a modification from Countrywide/Bank of America, which just received an additional 7 billion dollars for modifications in January of 2010. The senior citizen with dementia since 2000, who was placed in a pay option ARM loan by Washington Mutual in 2007, and is now fighting in litigation with Chase for some type of resolution. The 79 year old man whose home is worth $12,500.00, but the predatory mortgage is almost $200,000.00, and Citimortgage refuses to modify or let him purchase the home at fair market value, but would rather foreclose and evict him and collect the full mortgage value from Fannie Mae. This is just a very small example of the instances I encounter every day resulting from the unjust and unreal rollercoaster of predatory lending, and of everyone getting assistance except for people defrauded.

THE GOVERNMENT ROLE IN THE FORECLOSURE CRISIS

What makes the foreclosure crisis is even more outrageous is the fact that the government now owns or backs 75% of residential mortgage loans through Fannie Mae, Freddie Mac, the FHA or Veterans Administration.

Fannie Mae and Freddie Mac were formerly government-sponsored enterprises, private corporations chartered by the federal government to give them enhanced standing to buy or back up mortgage loans.

However, in July 2008 Fannie Mae and Freddie Mac were taken over by the federal government due to massive losses they incurred as a result of the record rise in foreclosures caused by the fraudulent and predatory lending practices of the banks. The federal government placed Fannie Mae and Freddie Mac in trusteeship under the Federal Housing Finance Administration, guaranteeing up to $200 billion in federal tax dollars to back up their loans. That figure was raised to $400 billion, and is now uncapped.

According to a June 3, 2009, statement by then FHFA Director James Lockhart, Fannie Mae and Freddie Mac own or guarantee 56 percent of single-family mortgages worth $5.4 trillion in the U.S. When combined with the Federal Housing Administration, the federal government backs or issues a whopping 75 percent of the country's mortgages. (Associated Press, Sept. 9, 2008)

What this means is that when a borrower goes into foreclosure, the bank which made the loan gets paid off at the loan's full value by Fannie Mae or Freddie Mac. In addition, the government pays the bank to process the foreclosure. Then the government takes over the home, evicts the homeowner and any tenants, places the home on the market, and sells it at a fraction of the loan's value.

The difference in what the government paid the bank for the loan, and what the home sells for after foreclosure and eviction, is paid for by taxpayers. That arrangement amounts to a silent bailout of the banks.

For example, a home several doors from where this writer lives in Detroit sold for $137,000 in 2001. The home was then foreclosed and the loan was taken over by Fannie Mae. The home is now being listed by Fannie Mae for $31,000. The $99,000 difference between the $130,000 still owed on the home for which the bank received full value, and the $31,000 for which Fannie Mae is selling the home, is paid for out of taxpayer funds.

This bailout to the banks, which occurs with virtually every foreclosure, has already amounted to $145 billion.

While the FHFA estimated that the total cost of this bailout will be $221 to $363 billion, in 2009 the Congressional Budget Office estimated that Fannie Mae and Freddie Mac would require $389 billion in federal subsidies through 2019. (Bloomberg News, Oct. 21)

Barclays Capital Inc. analysts put the price tag as high as $500 billion, and Sean Egan, president of Egan-Jones Ratings Co., estimated that the total taxpayer bailout to the banks through Fannie Mae and Freddie Mac will total $1 trillion. (BN, June 13)

These figures do not include the additional hundreds of millions of dollars in federal subsidies on FHA-backed loans.

Instead of using its authority to stop foreclosures and evictions based on its federalization of the mortgage industry, the government encourages the lenders to speedily carry out foreclosures and the government carries out the actual evictions. It was recently exposed that Fannie Mae and Freddie Mac are using the same law firms that prepared the fraudulent documents for the major banks in their processing of foreclosures and evictions. Fannie Mae and Freddie Mac are sanctioning loan servicers if they do not toss people out of their homes within a short period of time. (NYT, Aug. 22)

Instead of the government continuing to bail out the banks and throw people out their homes, it's time for the President and Congress to immediately implement a two year moratorium on foreclosures, so the 9 million families facing foreclosure by 2012 can stay in their homes and communities and property values can be stabilized for all Americans.

LENDERS AND SERVICERS ACT IN BAD FAITH AND FAIL TO ASSIST BORROWERS

The primary federal loan modification programs to help homeowners is the Making Home Affordable Program otherwise known as the Home Affordable Modification Program, which was adopted in exchange for the original $700 billion to the banks of September 2008.

HAMP and other programs are supposed to be mandatory for the banks. But the banks do not comply to help homeowners in any significant way. The government relies on the banks themselves to carry out these modifications, and the federal government and most courts have refused to enforce any sanctions for refusal to perform them.

With the banks knowing they will be getting paid full value on the loans after foreclosure, the banks have little incentive to modify loans and have sabotaged HAMP and led to the program's virtual collapse. As of August 2010, less than one-sixth of the 3 million homeowners who were supposed to be helped have received loan modifications, and the number of borrowers being offered trial modifications has drastically declined. (NYT, Aug. 20)

Lenders make great media comments about assisting borrowers, but in reality make no attempts to work with borrowers in these outrageous loans. The very financial institutions and Servicers that signed Servicer Participation Contracts under the Making Home Affordable program go into Court and say the program is voluntary. How can it possibly be voluntary when the lenders signed a contract with Treasury to participate in the program, and are paid financial compensation for engaging in modification efforts pursuant to this contract? Yet the lenders and the courts refuse to enforce the mandate under the Making Homes Affordable Program, and borrowers continue to be foreclosed upon and evicted. **The Helping Families Save Their Homes Save Act passed by Congress in May 2009, stated that it was the sense of Congress that there be a moratorium on foreclosures until the Treasury Departmeut certified that the Home Affordable Modification Program is being implemented, yet lenders aud servicers have sabotaged the program by modifying less than one-sixth of the 3-4 million loans that were eligible. How come the Moratorium has not been put into place?**

In addition, because the lenders are economically subsidized by getting paid the full value of loans after foreclosure, they can afford to litigate a case for years and appeal eviction cases, instead of negotiating a reasonable solution. In contrast, the working class, poor, minority and elderly citizens are not able to afford the legal resources necessary to fight against these rich corporations. It is difficult trying to fight the system for justice for the working class, senior citizens, minorities and the poor, while the very entities that have defrauded these people are being bailed out and continue to get rich.

Even the most recent program, Hardest Hit Homeowners, has failed to provide any relief to unemployed borrowers because the lender and servicer must sign up for the program. The major banks and lenders have refused to participate in the program. Thus in Michigan, the $500,000,000.00 earmarked for the program just sits in a pot and less than 200 of the 30,000 unemployed homeowners that were supposed to receive assistance have actually been helped. The bottom line is trillions of dollars have been expended to "stabilize the housing market", yet this stabilization has had very little positive impact in assisting borrowers who are the real victims of the subprime market and economic crisis retain home ownership, while the banks who caused the crisis continue to be bailed out by the taxpayers.

THE LIFTING OF THE BANKS RECENT "FORECLOSURE MORATORIUMS"

The lifting of the major banks' recent short-lived "foreclosure moratoriums," which had been instituted to stem the outcry over massive fraud in the processing of foreclosure documents, further demonstrates the necessity for a genuine two-year moratorium on foreclosures and evictions predicated on the premise that housing is a fundamental human right.

For example, Bank of America on October 18 announced its intent to resume foreclosures in the 23 states which have judicial foreclosures. BOA had suspended foreclosures in those states on Oct. 1 due to revelations of fraud in the processing of foreclosure documents. BOA also announced it would resume foreclosures in a few weeks in the remaining 27 states. This move will likely encourage JP Morgan Chase and GMAC, who had similarly suspended foreclosures in the 23 judicial foreclosure states, to resume taking people's homes. (New York Times, Oct. 18)

In announcing its resumption of foreclosure activity, Barbara J. Desoer, president of Bank of America Home Loans, stated, "We did a thorough review of the process and we found the facts underlying the decision to foreclose have been accurate. We paused while we were doing that, and now we're moving forward."

While most commentators treated this announcement with the cynicism and derision it deserved, Bank of America was emboldened to make this move because of the backing of the federal government. Bank of America noted that the major holders of its mortgages, Fannie Mae and Freddie Mac, had been consulted during the review and had signed off on the decision to resume foreclosures. Of 14 million mortgages BOA services, one-half of them, worth $2.1 trillion, are owned or backed by Fannie Mae and Freddie Mac.

THE EFFECTS ON COMMUNITY

The effect of lenders refusal to work with borrowers, and more importantly Fannie Mae and Freddie Mac's refusal to work with borrowers and instead their being the primary agents for evictions, is reflected in countless homes being left vacant in the aftermath of home foreclosures. Often these vacant homes are stripped and left abandoned here in Michigan and especially in the City of Detroit. Fannie Mae then turns the homes over to the City of Detroit for demolition, without even providing adequate funds to demolish the properties. Earlier this year, approximately 1,100 homes that were previously occupied were sent for demolition to the City of Detroit. The average cost of demolition as of a few years ago was $12,000.00 per home. . The failure to prioritize home retention and to instead emphasize foreclosure and eviction leaves vacant houses as eyesores, and creates havens for crime destroying neighborhoods and the community. These very properties would be occupied if borrowers were given an opportunity to retain home ownership, millions in demolition itself could be saved, property values would be stabilized, and the taxpayers would come out ahead in the process.

IT'S TIME FOR A TWO YEAR MORATORIUM ON FORECLOSURES

It is time that the federal government at all levels take a closer look at the millions of families being destroyed by the foreclosure crisis and address this issue from the bottom up rather than the top down. It's time for Congress to:

1) Place an immediate two year moratorium on foreclosures and foreclosure-related evictions. During this moratorium courts should be empowered to set payments at a reasonable amount based on the borrower's current income. Similar moratoriums were enacted in 25 states during the 1930's. The foreclosure moratoriums were upheld as constitutional by the U.S. Supreme Court in the case of *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (54 Sup. Ct. 231, 88 A.L.R. 1481) (1934). The Supreme Court held that the people's right to survive during a period of economic emergency supersedes the contract clause of the US constitution.

2) Institute a review of all predatory and fraudulent loans so principal can be reduced to reflect the actual value of the home.

3) Clearly articulate in statutory language, enforceable in court by the borrower, that loan modifications are mandatory, not voluntary, if a lender is a participant in the Home Affordable Modification Program.

4) Use the federal government's authority based on the federalization of the mortgage industry to end the silent bailout to the banks, and make the priority keeping families in their homes while long-term solutions to this horrendous crisis that has destabilized the entire U.S. economy are developed.

Vanessa G. Fluker, Esq.
2920 East Jefferson, Ste. 101
Detroit, MI 48207
(313) 393-6005

Jerome D. Goldberg, Esq.
2920 East Jefferson, Ste. 101
Detroit, MI 48207
(313) 393-6001

Mr. JOHNSON. Mr. Deutsch?

TESTIMONY OF TOM DEUTSCH, EXECUTIVE DIRECTOR, AMERICAN SECURITIZATION FORUM, NEW YORK, NY

Mr. DEUTSCH. Representative Johnson, Members of the Committee, my name is Tom Deutsch. And, as the executive director of the American Securitization Forum, I appreciate the opportunity to testify here today on behalf of the 330 ASF member institutions who originate the collateral, structure the transactions, serve as trustees, trade the bonds, service the loans, and invest the capital in the preponderance of residential mortgage-backed securities in the United States.

In my prepared statement, I highlight some of the key aspects of securitization as well as its critical importance to the U.S. and global economy. Importantly for this hearing, there are nearly 55 million first-lien mortgages in America today that total approximately $9.75 trillion of outstanding mortgage debt. Approximately three-quarters of this debt, or about $7 trillion, resides in mortgage-backed securitization trusts and are beneficially owned by institutional investors in the United States and around the world, such as pension funds, mutual funds, and insurance companies.

But in my remarks today, I seek to address specifically the concerns raised by a few commentators, that securitization trusts may not actually own the $7 trillion of mortgages that are contained within those trusts. For example, a recent Congressional Oversight Panel report has even suggested that these issues could create systemic risk to the banking sector if loans weren't validly assigned to the securitization trusts.

But the concerns that have been raised have not been supported by substantiation that there are, in fact, signs of systematic fails in the process of assignments. Indeed, the origin of these concerns is not clear. They are not the result of a series of new court cases supporting the legal arguments advanced, but instead appear to be largely the result of novel academic theories. In fact, even the Congressional Oversight Panel report states that, quote, "The panel takes no position on whether any of these arguments are valid or likely to succeed," end quote.

So all of these dire consequences flow directly and solely from a single mistaken core premise—that is, the trusts, and ultimately the institutional investors such as pension funds and mutual funds, don't actually own the $7 trillion of loans in those trusts. As discussed in great detail in my written testimony, this core premise is incorrect. And, therefore, the dire consequences of this faulty premise will not follow.

Just last month, the ASF issued a white paper on this subject that is part of our written testimony that puts to rest many of the questions that have previously been raised by the ownership of mortgage loans. In that white paper, ASF exhaustively studied traditional legal principles and processes, including the Uniform Commercial Code, or UCC, and substantial case history throughout every one of the 50 U.S. States and the District of Columbia and found that traditional legal principles and processes are fully consistent with today's complex holding, assignment, and transfer methods for mortgage loans. In fact, 13 major U.S. law firms, listed in Exhibit A to the ASF white paper, reviewed it and believe that the executive summary contained therein represents a fair summary of the legal principles presented.

Although the ASF white paper answered many of the concerns that have previously been presented, some new concerns have been raised since that white paper was published. For example, one commentator has proposed that securitizers have not met the contractual requirements for a complete or unbroken chain of endorsement.

In our written testimony, we rebut this novel academic theory in great detail, with analysis of key contractual provisions, the intent of the contracting parties, industry custom, independent third-party trustee acceptance, as well as relevant caselaw and UCC applicability. In particular, this argument overlooks the fact that each separate step in the chain of transfers of ownership by each party, from the originator to the securitization trust, is fully documented by a separate contract.

The proposition itself, though—that securitization legal professionals have uniformly opted out of the applicable laws, such as the UCC, to set an even higher bar for transfers but then subsequently and systematically ignored that higher bar—appear on their face to be illogical assertions and, ultimately, as a legal analysis in our written testimony demonstrates, are patently false.

From time to time, though, mistakes will occur. And they certainly do occur, particularly in a market where 55 million mortgages are being serviced and in the worst housing crisis that we have seen since the Great Depression. But those mistakes do need to be addressed. But the contractual provisions of the Pooling and Servicing Agreement and other underlying documents allow for those mistakes to be corrected over time.

In conclusion, the ASF greatly appreciates the opportunity to appear before this Committee today. And I look forward to answering any questions the Committee Members may have. Thank you.

[The prepared statement of Mr. Deutsch follows:]

PREPARED STATEMENT OF TOM DEUTSCH

Statement of:

Tom Deutsch
Executive Director
American Securitization Forum

Testimony before the:
United States House of Representatives
Committee on the Judiciary

Hearing on:

Foreclosed Justice: Causes and Effects of the Foreclosure Crisis

December 2, 2010

Chairman Conyers, Ranking Member Smith, Members of the Committee, my name is Tom Deutsch and as the Executive Director of the American Securitization Forum, I appreciate the opportunity to testify here today on behalf of the 330 ASF member institutions who originate the collateral, structure the transactions, serve as trustees, trade the bonds, service the loans and invest the capital in the preponderance of residential mortgage- and asset-backed securities ("RMBS") and ("ABS") in the United States, including those backed entirely by private capital as well as those guaranteed by Ginnie Mae and the government sponsored enterprises ("GSEs") such as Fannie Mae and Freddie Mac.

In this testimony, we seek first to highlight some of the key aspects of securitization as well as its importance to the U.S. and global economy. Subsequently, we seek to address the concerns raised by a few commentators that the banking and housing markets may be subject to additional systemic risk because securitization trusts may not actually own the trillions of dollars of mortgages that are supposed to be contained within those trusts. In addition to introducing the white paper that ASF issued two weeks ago, we also examine a number of the new concerns that have been raised since the introduction of that white paper. In particular, we discuss and provide detailed background for four key components of valid loan transfers, including:

A. PSAs meet the requirement for a "complete" or "unbroken" chain of indorsement[1];

B. securitization trusts comply with New York trust law;

C. RMBS trusts effectively achieve REMIC status; and

D. mistakes do not affect validity of transfer.

[1] Note that the Uniform Commercial Code replaces the more common U.S. spelling of "endorsement" for the less common "indorsement." The UCC spelling is used throughout this testimony for consistency.

Ultimately, we find that the conventional process for loan transfers embodied in standard legal documentation for mortgage securitizations has been adequate and appropriate to transfer ownership of mortgage loans to the securitization trusts in accordance with applicable law and contract. Since loan transfers have generally been effective, all of the dire consequences that a few commentators have speculated on fade away, given the faulty premise that they start from. Moreover, a number of the concerns that have been raised that securitization professionals have uniformly opted out of use of laws such as the Uniform Commercial Code ("UCC") to set a higher bar for transfers, but then subsequently and systematically failed to meet that higher bar, appear on their face to be illogical assertions and patently false.

I. Role and Importance of Securitization to the Financial System and U.S. Economy

Securitization—generally speaking, the process of pooling and financing consumer and business assets in the capital markets by issuing securities, the payment on which depends primarily on the performance of those underlying assets—plays an essential role in the financial system and the broader U.S. economy. Over the past 40 years, securitization has grown from a relatively small and unknown segment of the financial markets to a mainstream source of credit and financing for individuals and businesses alike.

In recent years, the role that securitization has assumed in providing both consumers and businesses with credit is striking: currently, there is over $12 trillion of outstanding securitized assets, including RMBS, ABS and asset-backed commercial paper ("ABCP"). This represents a market nearly double the normal size of all outstanding marketable U.S. Treasury securities—

bonds, bills, notes, and TIPS combined.[2] Between 1990 and 2006, issuance of MBS grew at an annually compounded rate of 13%, from $259 billion to $2 trillion a year.[3] In the same time period, issuance of ABS secured by auto loans, credit cards, home equity loans, equipment loans, student loans and other assets, grew from $43 billion to $753 billion. In 2006, just before the downturn, nearly $2.9 trillion in RMBS and ABS were issued. As these data demonstrate, securitization is clearly an important sector of today's financial markets.

The importance of securitization becomes more evident by observing the significant proportion of consumer credit it has financed in the U.S. It is estimated that securitization has funded between 30% and 75% of lending in various markets, including an estimated 59% of outstanding home mortgages.[4] Securitization plays a critical role in non-mortgage consumer credit as well. Historically, banks securitized 50-60% of their credit card assets.[5] Meanwhile, in the auto industry, a substantial portion of automobile sales are financed through auto ABS.[6] Overall, recent data collected by the Federal Reserve Board show that securitization has provided over 25% of outstanding U.S. consumer credit.[7] Securitization also provides an important source of commercial mortgage loan financing throughout the U.S., through the issuance of commercial mortgage-backed securities ("CMBS").

[2] U.S. Department of the Treasury, "Monthly Statement of the Public Debt of the United States: August 31, 2009," (August 2009). < http://www.treasurydirect.gov/govt/reports/pd/mspd/2009/opds082009.pdf>.
[3] National Economic Research Associates, Inc. (NERA), "Study of the Impact of Securitization on Consumers, Investors, Financial Institutions and the Capital Markets," pg. 16 (June 2009). <http://www.americansecuritization.com/uploadedFiles/ASF_NERA_Report.pdf >.
[4] Citigroup, "Does the World Need Securitization?" pg. 10-11 (Dec. 2008). <http://www.americansecuritization.com/uploadedFiles/Citi121208_restart_securitization.pdf>.
[5] Ibid., pg. 10.
[6] Ibid., pg. 10.
[7] Federal Reserve Board of Governors, "G19: Consumer Credit," (September 2009). <http://www.federalreserve.gov/releases/g19/current/g19.htm>.

Over the years, securitization has grown in large measure because of the benefits and value it delivers to transaction participants and to the financial system. Among these benefits and value are the following:

1. *Efficiency and Cost of Financing.* By linking financing terms to the performance of a discrete asset or pool of assets, rather than to the future profitability or claims-paying potential of an operating company, securitization often provides a cheaper and more efficient form of financing than other types of equity or debt financing.

2. *Incremental Credit Creation.* By enabling capital to be recycled via securitization, lenders can obtain additional funding from the capital markets that can be used to support incremental credit creation. In contrast, loans that are made and held in a financial institution's portfolio occupy that capital until the loans are repaid.

3. *Credit Cost Reduction.* The economic efficiencies and increased liquidity available from securitization can serve to lower the cost of credit to consumers. Several academic studies have demonstrated this result. A recent study by National Economic Research Associates, Inc., concluded that securitization lowers the cost of consumer credit, reducing yield spreads across a range of products including residential mortgages, credit card receivables and automobile loans.[8]

4. *Liquidity Creation.* Securitization often offers issuers an alternative and cheaper form of financing than is available from traditional bank lending, or debt or equity financing. As

[8] National Economic Research Associates, Inc. (NERA), "Study of the Impact of Securitization on Consumers, Investors, Financial Institutions and the Capital Markets," (June 2009), pg. 16. <http://www.americansecuritization.com/uploadedFiles/ASF_NERA_Report.pdf>.

a result, securitization serves as an alternative and complementary form of liquidity creation within the capital markets and primary lending markets.

5. *Risk Transfer*. Securitization allows entities that originate credit risk to transfer that risk to other parties throughout the financial markets, thereby allocating that risk to parties willing to assume it.

6. *Customized Financing and Investment Products*. Securitization allows for precise and customized creation of financing and investment products tailored to the specific needs of both issuers and investors. For example, issuers can tailor securitization structures to meet their capital needs and preferences and diversify their sources of financing and liquidity. Investors can tailor securitized products to meet their specific credit, duration, diversification and other investment objectives.[9]

Recognizing these and other benefits, policymakers globally have taken steps to help encourage and facilitate the recovery of securitization activity. The G-7 finance ministers, representing the world's largest economies, declared that "the current situation calls for urgent and exceptional action…to restart the secondary markets for mortgages and other securitized assets."[10] The Department of the Treasury stated in March, 2009 that "while the intricacies of secondary markets and securitization…may be complex, these loans account for almost half of

[9] The vast majority of investors in the securitization market are institutional investors, including banks, insurance companies, mutual funds, money market funds, pension funds, hedge funds and other large pools of capital. Although these direct market participants are institutions, many of them—pension funds, mutual funds and insurance companies, in particular—invest on behalf of individuals, in addition to other account holders.
[10] G-7 Finance Ministers and Central Bank Governors Plan of Action (Oct. 10, 2008). <http://www.treas.gov/press/releases/hp1195.htm>.

the credit going to Main Street,"[11] underscoring the critical nature of securitization in today's economy. The Chairman of the Federal Reserve Board noted that securitization "provides originators much wider sources of funding than they could obtain through conventional sources, such as retail deposits" and also that "it substantially reduces the originator's exposure to interest rate, credit, prepayment, and other risks."[12] Echoing that statement, Federal Reserve Board Governor Elizabeth Duke stated that the "financial system has become dependent upon securitization as an important intermediation tool,"[13] and the International Monetary Fund (IMF) noted in its *Global Financial Stability Report* that "restarting private-label securitization markets, especially in the United States, is critical to limiting the fallout from the credit crisis and to the withdrawal of central bank and government interventions."[14] There is clear recognition in the official sector of the importance of the securitization process and the access to financing that it provides lenders, and of its importance to the availability of credit that ultimately flows to consumers, businesses and the real economy.

Restoration of function and confidence to the securitization markets is a particularly urgent need, in light of capital and liquidity constraints currently confronting financial institutions and markets globally. As mentioned above, at present nearly $12 trillion in U.S. assets are funded via securitization. With the process of bank de-leveraging and balance sheet

[11] U.S. Department of the Treasury, "Road to Stability: Consumer & Business Lending Initiative," (March 2009). <http://www.financialstability.gov/roadtostability/lendinginitiative.html>.

[12] Bernanke, Ben S., "Speech at the UC Berkeley/UCLA Symposium: The Mortgage Meltdown, the Economy, and Public Policy, Berkeley, California." *Board of Governors of the Federal Reserve System* (Oct. 2008). <http://www.federalreserve.gov/newsevents/speech/bernanke20081031a.htm>.

[13] Duke, Elizabeth A., "Speech at the AICPA National Conference on Banks and Savings Institutions, Washington, D.C." *Board of Governors of the Federal Reserve System* (Sept. 2009). <http://www.federalreserve.gov/newsevents/speech/duke20090914a.htm>.

[14] International Monetary Fund, "Restarting Securitization Markets: Policy Proposals and Pitfalls." *Global Financial Stability Report: Navigating the Financial Challenges Ahead* (Oct. 2009), pg.33. <http://www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/text.pdf>.

reduction still underway, and with increased bank capital requirements on the horizon, such as those expected in Basel III, the funding capacity provided by securitization cannot be replaced with deposit-based financing alone in the current or foreseeable economic environment. In fact, the IMF estimated that a financing "gap" of $440 billion existed between total U.S. credit capacity available for the nonfinancial sector and U.S. total credit demand from that sector for the year 2009.[15] Moreover, non-bank finance companies, who have played an important role in providing financing to consumers and small businesses, are particularly reliant on securitization to fund their lending activities, since they do not have access to deposit-based funding. Small businesses, who employ approximately 50% of the nation's workforce, depend on securitization to supply credit that is used to pay employees, finance inventory and investment, and other business purposes. Furthermore, many jobs are made possible by securitization. For example, a lack of financing for mortgages hampers the housing industry; likewise, constriction of trade receivable financing can adversely affect employment opportunities in the manufacturing sector. To jump start the engine of growth and jobs, securitization is needed to help restore credit availability.

Simply put, the absence of a properly functioning securitization market, and the funding and liquidity this market has historically provided, adversely impacts consumers, businesses, financial markets and the broader economy. The recovery and restoration of confidence in securitization is therefore a necessary ingredient for economic growth to resume, and for that growth to continue on a sustained basis into the future.

---

[15] International Monetary Fund, "The Road to Recovery." *Global Financial Stability Report: Navigating the Financial Challenges Ahead* (Oct. 2009), pg. 29. <http://www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/text.pdf>.

II. Transfers of Loans into the Secondary Mortgage Market

By way of background, there are approximately 55 million first lien mortgages outstanding in the United States today and an additional 25 million homes that have no mortgage attached to them. The debt outstanding for these 55 million mortgages is nearly $9.75 trillion dollars, of which approximately $7 trillion dollars resides in securitization trusts and are beneficially owned by institutional investors around the world. Approximately $5.5 trillion dollars of these loans are government guaranteed in Ginnie Mae and GSE RMBS, with an additional $1.5 trillion in outstanding private-label RMBS that has no government backstop. An additional $2.75 trillion dollars of mortgage debt is owned in the portfolios of commercial banks, savings institutions and insurance companies. In addition to the $9.75 trillion of outstanding first lien mortgages, approximately $1 trillion of second liens are currently outstanding in the United States.[16]

As part of the larger public discourse about the current state of the residential mortgage market and the increasing number of foreclosures in America, a surprising number of concerns have been raised in the last couple of months in the midst of the worst housing crisis since the Great Depression that question whether the common legal procedures that have been used to transfer residential mortgage loans into RMBS trusts were in fact legally valid. A number of different dire outcomes have been raised if loans weren't validly transferred, including borrower confusion as to who to pay their mortgage to, large bank losses, and further housing market

---

[16] Data compiled by Amherst Securities, based on information from the Federal Reserve Flow of Funds, Fannie Mae, Freddie Mac, Ginnie Mae and CoreLogic.

turmoil. A recent Congressional Oversight Panel Report ("COP Report")[17] has even suggested that these issues could create systemic risk concerns if loans weren't appropriately assigned to securitization trusts.

But the key incorrect premise that each of these dire outcomes relies upon is that the $7 trillion dollars of outstanding securitized mortgage debt has not in fact been systematically transferred in a legally sound manner. ASF believes these concerns are without merit and our membership is confident that these methods of transfer are sound and based on a well-established body of law governing the multi-trillion dollar secondary mortgage market. The conventional process for loan transfers embodied in standard legal documentation for mortgage securitizations has been adequate and appropriate to transfer ownership of mortgage loans to the securitization trusts in accordance with applicable law. This process is sufficient to establish ownership by the securitization trusts. Moreover the concerns that have been raised have not been supported by substantiation that there are in fact any material signs of systematic fails in the system. Indeed, the origin of these concerns is not clear: they are not the result of a series of court cases supporting the arguments advanced and appear to be largely the result of academic theories. In fact, even the COP Report states that "the Panel takes no position on whether any of these arguments are valid or likely to succeed."[18]

As part of our members' diligence into these public concerns, the ASF issued two weeks ago a white paper legal study entitled "Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market" (the "ASF White Paper"), which is attached to this

[17] Congressional Oversight Panel, *November Oversight Report, Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation* (November 16, 2010) <http://cop.senate.gov/documents/cop-111610-report.pdf>.
[18] Ibid., pg. 25, footnote 75.

testimony as Attachment A. In the White Paper, the ASF exhaustively studied traditional legal principles and processes, including common law, the Uniform Commercial Code and substantial case history, and finds that traditional legal principles and processes, including the not codified common law rule that "the mortgage follows the note," are fully consistent with today's complex holding, assignment and transfer methods for mortgage loans, which are legally effective for participants in the secondary mortgage market to transfer mortgage loans. Thirteen major U.S. law firms noted in Exhibit A to the ASF White Paper reviewed the ASF White Paper and believe that the Executive Summary contained therein represents a fair summary of the legal principles presented. Although we believe the ASF White Paper answered a number of the concerns that had previously been raised, some new concerns have been raised since the ASF White Paper has been published. In this testimony, we address four of these new concerns.

A. PSAs Meet the Requirement for a "Complete" or "Unbroken" Chain of Indorsement

In testimony before the U.S. Senate Committee on Banking, Housing and Urban Affairs on November 16, 2010,[19] Mr. Adam J. Levitin, Associate Professor of Law at Georgetown University Law Center, commented that while he did not disagree with the statements in the ASF White Paper about how mortgage loans may be legally transferred pursuant to contract law and the UCC, he believes that the ASF White Paper does not address some additional arguments as to why mortgage loans might not have been legally transferred to RMBS trusts in many cases.

[19] Testimony of Professor Adam J. Levitin, U.S. Senate Committee on Banking, Housing and Urban Affairs Hearing, November 16, 2010. http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a

These arguments are outlined in Mr. Levitin's testimony submitted to the Senate Committee for these hearings, and further in testimony submitted to the House Financial Services Committee, Subcommittee on Housing and Social Opportunity, on November 18, 2010.[20] We seek to address these concerns directly herein.

In his written testimony as well as his statements before the Senate Committee, Mr. Levitin does not rely on the decisions in any court cases but instead discusses standard provisions of documentation typically used to issue RMBS, which generally is in the form of a pooling and servicing agreement ("PSA"). A typical PSA includes a section requiring that legal documents for each pooled mortgage loan be delivered to the trustee, or to a custodian on the trustee's behalf. This provision typically requires delivery of the original mortgage note, which must bear the following indorsements: 1) either an indorsement in blank or an indorsement to the trustee, and 2) a 'complete' or 'unbroken' chain of indorsements from the originator or named payee to the person signing the indorsement in blank or to the trustee. The language does not specify who must sign the indorsement in 1). The language used in these typical provisions in any PSA uses either the word "complete" or "unbroken", with no apparent difference in intended meaning from deal to deal. The typical language does not state, nor does it imply, that a "complete" or "unbroken" chain means that all prior owners or holders of the note must appear as part of the chain. Nor does any judicial proceeding consider or uphold this novel opinion. Nor does Professor Levitin provide any third-party support for his interpretation of a typical PSA.

[20] Testimony of Professor Adam J. Levitin, House Financial Services Committee, Subcommittee on Housing and Social Opportunity Hearing, November 18, 2010 <http://financialservices.house.gov/Media/file/hearings/111/Levitin111810.pdf>.

In his testimony, Mr. Levitin suggests, but without providing any source of authority for his interpretation of contractual intent, that the typical PSA requirement for a "complete" chain of indorsements was intended to mean that there must be a separate indorsement from each and every person who was a prior owner of the note, including the originator, the securitization sponsor and the depositor. From his interpretation flows a number of seemingly logical but progressively more dire consequences, including:

i. the PSA was intended to supersede standard indorsement practice as codified in the UCC;
ii. the parties universally failed to comply with this requirement to show an expanded chain of indorsements;
iii. such failure violates the express terms of the PSA and therefore applicable trust law requires that transfers of the mortgage loans to the trust are void;
iv. therefore the trusts don't really own anything and the trusts furthermore violate REMIC requirements;
v. as a result the banks that sold the loans really still own them; and
vi. the banks must repay all investors in full.

All of these consequences flow, however, from a single mistaken core premise—that the typical PSA requirement for indorsements requires this expanded chain. As discussed below, this core premise is incorrect, and therefore the consequences of this premise do not follow.

The typical PSA requirement for a complete or unbroken chain of indorsements to the person signing the indorsement in blank means only that there be no gaps in the chain of indorsements, and that the chain of indorsements be sufficient to effect a transfer to the trust under applicable law. This provision would be interpreted in light of applicable law as well as customary indorsement practice, and the intent of the parties as evidenced by their contemporaneous conduct, all of which support the industry custom reading of a "complete" or "unbroken" chain.

As is clear in the ASF White Paper, for mortgage notes that are negotiable instruments, transfer may be made by negotiation in accordance with UCC Article 3, which requires an indorsement. Once a negotiable mortgage note has been endorsed in blank, negotiation may be effected by transfer of possession alone, until an indorsement has been made or completed in the name of a specific person. In other words, if there is an indorsement in blank, the note may be transferred to numerous successive parties without any need for a separate indorsement to each purchaser. Sales of mortgage notes may also be made pursuant to UCC Article 9, and such a sale is automatically perfected (without delivery of any mortgage note and with no requirement relating to any indorsement) as long as value is given in accordance with an agreement that specifies the mortgage loan to be conveyed, such as a loan schedule to a PSA.

In interpreting the typical PSA requirement for indorsements, we note that this requirement appears in the section that relates to transfer and delivery of the mortgage loans to the trustee. In this context, a "complete" or "unbroken" chain of indorsements is satisfied if the indorsements are sufficient to transfer all rights in and to the mortgage notes to the trustee under applicable law. Thus, for example, where the note was initially payable to originator A, then sold to securitization sponsor B, who transferred to depositor C who in turn is transferring the note to trustee D, a complete chain of indorsements could be: 1) an indorsement from A to B, followed by an indorsement by B in blank, or 2) an indorsement by A in blank. Either of those examples of indorsements, together with delivery of the note to D, would be sufficient to effect a negotiation and transfer to D, and therefore would be a "complete" or "unbroken" chain of indorsements as required by standard PSA language. Examples of an incomplete or broken chain would be as follows: 1) no indorsement by A, or 2) an indorsement by A to X, followed by an indorsement by B in blank. Importantly, for the purposes for which indorsement is required by the PSA (which are limited to evidencing the transfer and delivery of the mortgage loans to the trustee), an indorsement by A in blank is no less sufficient or effective than an indorsement from A to B, followed by an indorsement from B to C, followed by an indorsement from C to D. In other words, the typical PSA does not impose contractual requirements that exceed those contained in the UCC, which has been adopted by all fifty states and the District of Columbia, as it pertains to the transfer of an interest in a mortgage note.

Moreover, the intended meaning of the typical PSA requirement for indorsements is illustrated by the contemporaneous conduct of the parties to the transactions. Sellers into securitizations generally deliver physical mortgage notes with indorsements in formats (following the example above) such as 1) an indorsement from A to B, followed by an indorsement by B in blank, or 2) an indorsement by A in blank. It was not at all typical nor required to show an indorsement to or from the depositor (C in this example). Furthermore, independent, third-party trustees and custodians checking in mortgage notes believed that a note showing indorsements in these formats satisfied the requirement that there be a 'complete' or 'unbroken' chain of indorsements. This actual conduct demonstrates the intended meaning of the indorsement requirements.

Mr. Levitin argues that the intended meaning of the typical PSA requirement for indorsements is that the requirement for a 'complete' or 'unbroken' chain means that every prior holder needs to have a separate indorsement to that holder. In other words that, following the above example, there must be an indorsement from A to B, followed by an indorsement from B to C, followed by an indorsement from C to D. Yet there is no persuasive basis for the proposition that the parties intended that the typical PSA provisions required this expanded chain of indorsements, nor is there any case law to support Mr. Levitin's view.

Mr. Levitin argues that as a result of his interpretation the indorsement requirements intended an expanded chain of indorsements, and the parties therefore intended to contract around the UCC and impose upon themselves indorsement requirements that are in excess of what is required to satisfy applicable UCC provisions. It is unclear and seemingly unreasonable to practicing industry lawyers why parties to a transaction would contract around the UCC by imposing significant additional indorsement requirements upon themselves, and then to have systematically failed to observe those expanded requirements. On the other hand, it is very reasonable to interpret the PSA language as not having been intended to require this expanded chain of indorsements above and beyond UCC requirements for indorsements, where the actual indorsement practice satisfied the UCC requirements.

Mr. Levitin offers the following argument to support the interpretation that an expanded chain of indorsements was intended to be required under PSA contractual provisions:

> "The reason for this additional requirement is to provide a clear evidentiary basis for all of the transfers in the chain of title in order to remove any doubts about the bankruptcy remoteness of the assets transferred to the trust. Absent a complete chain of indorsements, it could be argued that the trust assets were transferred directly from the originator to the trust, raising the concern that if the originator filed for bankruptcy, the trust assets could be pulled back into the originator's bankruptcy estate."[21]

However, this argument overlooks the fact that each separate step in the chain of transfers of ownership by each party from the originator to the trust is fully documented by a separate contract. In other words, there is a contract covering the sale from A to B, and another contract covering the sale from B to C, and the PSA itself documents the sale from C to D. There is no need for an expanded chain of indorsements to make the chain of transfers of ownership any more plain and evident than it already is. And there is no basis for the proposition that the parties thought that an expanded chain of indorsements to override the UCC was necessary or useful for this purpose.

B. Securitization Trusts Comply with New York Trust Law

Because the parties did not intend for the expanded chain of indorsements to be contractually required under the PSA, the further argument that the transfers to the trusts were void under New York trust law also fails.

---

[21] Testimony of Professor Adam J. Levitin, U.S. Senate Committee on Banking, Housing and Urban Affairs Hearing, November 16, 2010. http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a

Professor Levitin cites New York E.P.T.L. Section 7.2-4 as authority for the concept that a transfer to a New York common law trust that is in contravention of the trust documents is void. However, that section actually refers to any "sale, conveyance or other act of the trustee *in contravention of the trust*" [emphasis added], not sales or conveyances *to the trust*. This section is intended to protect trust beneficiaries from unauthorized acts by the trustee. Cases interpreting this section relate to wrongful acts by trustees with respect to assets that have previously been transferred into the trust, such as acts that are illegal or which dissipate or impair assets of the trust. Moreover, this section contains an exception for any such acts that are authorized by any other provision of law. As we explained in the preceding section, the method used to convey the mortgage loans to the trustee is consistent with the UCC.

In his November 18 written testimony, it is stated that "transfers to New York common law trusts are governed by the common law of gifts." No authority is given for that statement, and we believe that this statement is not correct with respect to business or investment trusts, where transfers are made to the trust for consideration in commercial transactions, and not as gifts. The testimony then goes on to cite cases, which relate to the common law of gifts, for the proposition that assets must be transferred in a way "such that no one else could possibly claim ownership," and then reads the cases to impose on all transfers to New York common law trusts a requirement that "the mere recital of a transfer is insufficient to effectuate a transfer; there must be delivery in as perfect a manner as possible." The testimony goes on to argue that the contractual language in each PSA that transfers and conveys ownership of the mortgage loans to the trustee for the benefit of the investors is mere "recital" language that is ineffective in transfers to common law trusts, and further suggests that delivery of the note with an indorsement in blank is defective under this standard because it turns a note "into bearer paper to which others could easily lay claim."

The more recent of the cases cited in the testimony, Vincent v. Putnam, 248 N.Y. 76 (N.Y., 1928), involves a widow who received stocks and bonds by bequest from her husband, where the will provided that as to bequeathed remainder property that upon her death "shall remain at that time undisposed of", such property would pass to the husband's next of kin. The widow attempted to dispose of the stocks and bonds shortly before her own death by gift to one of her blood relatives. However, the only actions taken by the widow to effect the gift were to deliver the stock and bond certificates to her own attorney, with a verbal instruction to give them to her relative. This was not a transfer for consideration, and it was not a transfer to a common law trust. This case is about delivery of property to an agent of the donor, with an instruction to deliver the property to the intended donee, and the holding is that such delivery is not a completed gift. The "mere words" in this case, that were insufficient to effect a conveyance, were the verbal instruction to the widow's attorney to make the gift, which instruction could have been revoked at any time. We believe that the cases cited in the November 18 testimony do not support the proposition that transfers of property to a New York common law trust, for consideration in a commercial transaction, require a higher standard or more rigid set of transfer requirements than would apply in any transfer for value of such property in any other commercial transaction.

The notion that new legal decisions in all 50 states would be handed down with no legal precedence to nullify trillions of dollars of mortgage securitization transactions simply because the trusts acquired an interest in the pooled loans in accordance with applicable law but not in the manner that Mr. Levitin claims the trust documents require, appears on its face to be an unreasonable assertion. As noted above, we are confident that the standard processes of delivering loans into securitization trusts are proper as a matter of law and contract, and we are hard pressed to give any credence to an unsupported academic theory that the courts would thwart the intentions and expectations of the parties by voiding transfers of mortgage loans.

C. RMBS Trusts Effectively Achieve REMIC Status

A final issue that we would like to address in this section relates to Real Estate Mortgage Investment Conduits ("REMIC"), which is a tax election under federal income tax law frequently used for RMBS under which trusts backed by qualified mortgages can issue multiple classes of securities that are treated as debt, with the trust exempted from entity level taxation. One argument that has been advanced by a couple commentators is that if the mortgage loans were not validly transferred to the trust, any defect in the procedures used to make the transfer can now not be cured without violating regulations that prohibit transfers of qualified mortgages to a REMIC more than 90 days after it was created. We believe that this argument is without merit, because the argument that there were wholesale failures to properly convey ownership of mortgage loans to RMBS trusts are without merit as discussed above and in the ASF White Paper.

D. Mistakes Do Not Affect Validity of Transfer

The fact that the ASF White Paper finds that the standard industry practices are legally effective for participants in the secondary mortgage market to transfer mortgage loans does not mean that mistakes never happen. From time to time mistakes are certain to occur, particularly in a market where 55 million mortgages are transferred and/or serviced, and that is one reason why typical language in a PSA provides the opportunity to cure mistakes. It is important, however, to distinguish between document deficiencies that impair the validity of the transfer of mortgage loans, on the one hand, and the additional steps that may be necessary to enforce the loan documents against the borrowers, on the other hand. The three new concerns that we counter in this testimony call into question the validity of a mortgage loan transfer. We believe that these concerns are misplaced and that, in the ordinary course, document deficiencies on a one-off basis may delay foreclosure while the paperwork is corrected or completed but will not impair the initial transfer of the loan to the securitization trust.

In conclusion, the ASF greatly appreciates the invitation to appear before this Committee to share our views related to these current issues. I look forward to answering any questions the Committee may have.

Thank you.

ATTACHMENT A

ASF White Paper
Transfer and Assignment of Residential Mortgage Loans
in the Secondary Mortgage Market
November 16, 2010

Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market

ASF WHITE PAPER SERIES

NOVEMBER 16, 2010

American Securitization Forum

THIS WHITE PAPER AND ITS EXECUTIVE SUMMARY ARE INTENDED FOR INFORMATIONAL PURPOSES ONLY AND DO NOT CONTAIN OR CONVEY LEGAL ADVICE, A LEGAL OPINION OR A REPRESENTATION AS TO THE FACTS OF ANY PARTICULAR TRANSACTION PROVIDED BY THE AMERICAN SECURITIZATION FORUM OR BY ANY OF THE LAW FIRMS REFERENCED BELOW. THE INFORMATION IN THE EXECUTIVE SUMMARY AND WHITE PAPER SHOULD NOT BE USED OR RELIED UPON IN REGARD TO ANY PARTICULAR FACTS OR CIRCUMSTANCES. THE LAW FIRM K&L GATES LLP SERVED AS OUTSIDE COUNSEL TO THE AMERICAN SECURITIZATION FORUM IN CONNECTION WITH THE PREPARATION OF THE WHITE PAPER AND EXECUTIVE SUMMARY. THE OTHER LAW FIRMS LISTED ON EXHIBIT A HAVE REVIEWED THE WHITE PAPER AND BELIEVE THAT THE EXECUTIVE SUMMARY REPRESENTS A FAIR SUMMARY OF THE LEGAL PRINCIPLES PRESENTED.

American SECURITIZATION FORUM®

ASF Headquarters | One World Financial Center, 30th Floor | New York, NY 10281 | 212.412.7100
www.americansecuritization.com

Table of Contents

Introduction

Recently, a few commentators have raised a number of legal theories questioning whether securitization trusts, either those created by private financial institutions or those created by government sponsored enterprises, such as Ginnie Mae, Fannie Mae or Freddie Mac, have valid legal title to the seven trillion dollars of mortgage notes in those trusts. In an effort to contribute thorough and well-researched legal analysis to the discussion of these theories, the American Securitization Forum ("ASF") issues the enclosed white paper entitled "Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market" (the "White Paper"). The White Paper provides a detailed overview of the legal principles and processes by which mortgage loans are typically held, assigned, transferred and enforced in the secondary mortgage market and in the creation of mortgage-backed securities ("MBS"). These principles and processes have centuries-old origins, and they have continued to be sound and validated since the advent of MBS over forty years ago.

While the real property laws of each of the 50 U.S. states and the District of Columbia affect the method of foreclosing on a mortgage loan in default, the legal principles and processes discussed in this White Paper result, if followed, in a valid and enforceable transfer of mortgage notes and the underlying mortgages in each of these jurisdictions. To be thorough, the White Paper undertakes a review of both common law and the Uniform Commercial Code (the "UCC") in each of the 50 U.S. states and the District of Columbia. One of the most critical principles is that when ownership of a mortgage note is transferred in accordance with common securitization processes, ownership of the mortgage is also automatically transferred pursuant to the common law rule that "the mortgage follows the note." The rule that "the mortgage follows the note" dates back centuries and has been codified in the UCC. In essence, this means that the assignment of a mortgage to a trustee does not need to be recorded in real property records in order for it to be a valid and binding transfer.

In summary, these traditional legal principles and processes are fully consistent with today's complex holding, assignment and transfer methods for mortgage loans and those methods are legally effective for participants in the secondary mortgage market to transfer mortgage loans. Thirteen major U.S. law firms noted in Exhibit A have reviewed the White Paper and believe that the Executive Summary contained therein represents a fair summary of the legal principles presented. ASF wishes to thank each of these firms and the dozens of preeminent MBS attorneys who have contributed to the development of this White Paper.

Tom Deutsch

Tom Deutsch
Executive Director
American Securitization Forum

Executive Summary

1. Basic Principles

The two core legal documents in most residential mortgage loan transactions are the promissory note and the mortgage or deed of trust that secures the borrower's payment of the promissory note. In a typical "private-label" mortgage loan securitization, each mortgage loan is sold to a trust through a series of steps. A mortgage note and a mortgage may be sold, assigned and transferred several times between the time the mortgage loan is originated and the time the mortgage loan ends up with the trust. The legal principles that govern the assignment and transfer of mortgage notes and related mortgages are determined, in significant part, by the Uniform Commercial Code ("UCC"), which has been adopted by all 50 states and the District of Columbia.[1]

The residential mortgage notes in common usage typically are negotiable instruments. As a general matter, under the UCC, a negotiable mortgage note can be transferred from the transferor to the transferee through the indorsement[2] of the mortgage note and the transfer of possession of the note to the transferee or a custodian on behalf of the transferee. An assignment of the related mortgage is also typically delivered to the transferee or its custodian, except in cases where the related mortgage identifies the Mortgage Electronic Registration System ("MERS") as the mortgagee. Such assignments generally are in recordable form, but unrecorded, and are executed by the transferor without identifying a specific transferee – a so-called assignment "in blank." Intervening assignments, in some cases, may be recorded in the local real estate records.

In some mortgage loan transactions, MERS becomes the mortgagee of record as the nominee of the loan originator and its assignees in the local land records where the mortgage is recorded, either when the mortgage is first recorded or as a result of the recording of an assignment of mortgage to MERS. This means that MERS is listed as the record title holder of the mortgage. MERS' name does not appear on the mortgage note, and the beneficial interest in the mortgage remains with the loan originator or its assignee. The documents pursuant to which MERS acts as nominee make clear that MERS is acting in such capacity for the benefit of the loan originator or its assignee. When a mortgage loan is originated with MERS as the nominal mortgagee (or is assigned to MERS post-origination), MERS tracks all future mortgage loan and mortgage loan servicing transfers and other assignments of the mortgage loan unless and until ownership or servicing is transferred (or the mortgage loan is otherwise assigned) to an entity that is not a MERS member. In this way, MERS serves as a central system to track changes in ownership and servicing of the mortgage loan. Fannie Mae, Freddie Mac and Ginnie Mae, among other governmental entities, permit mortgage loans that they purchase or securitize to be registered with MERS.

---

[1] References to the UCC are to the Official Text of the Model UCC, as revised, issued by the National Conference of Commissioners on Uniform State Laws.

[2] Note that the UCC replaces the more common U.S. spelling of "endorsement" for the less common "indorsement." The UCC spelling is used throughout this Executive Summary.

2. Transfer of Promissory Notes Secured by Mortgages

The law of negotiable instruments developed over the centuries as a way to encourage commerce and lending by making such instruments, including negotiable mortgage notes, as liquid and transferable as possible. The UCC, with state-specific variations, in significant part governs the assignment and transfer of mortgage notes. Article 3 of the UCC applies to the negotiation and transfer of a mortgage note that is a "negotiable instrument," as that term is defined in Article 3. In addition, Article 9 of the UCC applies to the sale of "promissory notes," a term that generally includes mortgage notes.

In addition, as a general matter, the securitization of a loan under a typical pooling and servicing agreement provides both for the negotiation of negotiable mortgage notes (by indorsement and transfer of possession to the securitization trustee or the custodian for the trustee) <u>and</u> for an outright sale and assignment of all of the mortgage notes and mortgages. Thus, whether the mortgage notes in a given securitization pool are deemed "negotiable" (as we believe most typically are) or "non-negotiable" will have little or no substantive effect under the UCC on the validity of the transfer of the notes. The typical securitization process effects valid transfers of the mortgage notes and related mortgages in accordance with the provisions of Articles 3 and 9 of the UCC.

Under the UCC, the transfer of a mortgage note that is a negotiable instrument is most commonly effected by (a) indorsing the note, which may be a blank indorsement that does not identify a person to whom the mortgage note is payable or a special indorsement that specifically identifies a person to whom the mortgage note is payable, and (b) delivering the note to the transferee (or an agent acting on behalf of the transferee). As residential mortgage notes in common usage typically are "negotiable instruments," this is the most common method to transfer the mortgage note. In addition, even without indorsement, the transfer can be effected by transferring possession under the UCC. Moreover, the sale of any mortgage note also effects the transfer of the mortgage under Article 9. Securitization agreements often provide both for (a) the indorsement and transfer of possession to the trustee or the custodian for the trustee, which would constitute a negotiation of the mortgage note under Article 3 of the UCC <u>and</u> (b) an outright sale and assignment of the mortgage note. Thus, regardless of whether the mortgage notes in a securitization trust are deemed "negotiable" or "non-negotiable," the securitization process generally includes a valid transfer of the mortgage notes to the trustee in accordance with the explicit requirements of the UCC.

In addition, Article 3 of the UCC permits a person without possession to enforce a negotiable mortgage note where the note has been lost, stolen, or destroyed. Courts have consistently affirmed the use of the salient provisions of the UCC to enforce lost, stolen or destroyed negotiable mortgage notes that are owned by a securitization trust when the trust or its agent has proved the terms of the mortgage notes and their right to enforce the mortgage notes.

3. Assignment and Transfer of Ownership of Mortgages

As stated above, when a mortgage loan is assigned and transferred as part of the securitization of the mortgage loan in the secondary market, both the mortgage note and the mortgage itself are typically sold, assigned, and physically transferred to the trustee that is acting on behalf of the MBS investors or a trustee-designated document custodian pursuant to a custody agreement. The assignment and transfer are usually documented in accordance with a pooling and servicing agreement.

When a mortgage note is transferred in accordance with common mortgage loan securitization processes, the mortgage is also automatically transferred to the mortgage note transferee pursuant to the general common law rule that "the mortgage follows the note." The rule that "the mortgage follows the note" has been codified in the UCC, but the rule's common law origins date back hundreds of years, long before the creation of the UCC. As stated in the official comments to UCC § 9-203(g), the section "codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien." UCC § 9-203 cmt. 9. All states follow this rule.[3]

In addition to the codification under UCC § 9-203(g), reported court cases in nearly every state and non-UCC statutory provisions in some states make clear that "the mortgage follows the note." Regarding the impact of these UCC provisions, one treatise states: "Article 9 makes it as plain as possible that the secured party need not record an assignment of mortgage, or anything else, in the real property records in order to perfect its rights in the mortgage." J. McDonnell and J. Smith, Secured Transactions Under the Uniform Commercial Code, § 16.09[3][b]. Indeed, courts in several states have affirmed and applied the "mortgage follows the note" rule in cases where the mortgage assignment was not recorded by the transferee and even when there was no actual separate written assignment of the mortgage.[4]

Common securitization practices are consistent with the general rule that "the mortgage follows the note": pursuant to the pooling and servicing agreement that governs an MBS, and the language of assignment typically contained in such an agreement, the mortgage note and the mortgage itself are sold, assigned, transferred and delivered to the trustee, and the transferor also typically delivers a written assignment of the mortgage that is in blank in recordable form. Courts have held that the language of sale and assignment contained in a pooling and servicing agreement, along with the corresponding transfer, sale, and delivery of the mortgage note and mortgage, are sufficient to transfer the mortgage to the transferee/trustee or its designee or nominee.

The creation of an interest in or lien on real property, including a mortgage, is governed by the non-UCC law of the state in which the property is located. Likewise, the enforceability of mortgages (including the right and method to foreclose) is subject to all of the conditions precedent and requirements that are set forth in the particular mortgage itself and in all applicable state and local laws. Those conditions precedent

---

[3] However, in some states, such as Massachusetts and Minnesota, courts have held that the transfer of a mortgage note without an express transfer of the mortgage vests in the note holder only an equitable interest in the mortgage. This arrangement has been described as follows: the holder of the mortgage holds the legal title to the mortgage in constructive trust for the benefit of the mortgage note holder. In both states, however, case law suggests that foreclosure proceedings must be initiated by, or at least in the name of, the holder of the legal title in the mortgage.

[4] In most states, recording of an assignment of mortgage is generally not required to ensure the enforceability of the assignment of mortgage as between the assignor and assignee, and anyone with knowledge thereof. It is beyond the scope of this Executive Summary and the White Paper to discuss in detail the potential risks to the mortgage transferee of not recording a mortgage assignment. Those risks might include, among others, delaying the transferee's ability to foreclose on the mortgage, failing to receive notices that may go to the mortgagee of record, and otherwise leaving the assignee open to negligent or fraudulent actions or inactions by the mortgagee of record that could bind the mortgage transferee and impair the value or enforceability of the mortgage. Similarly, when an assignment of mortgage is not recorded, the assignor may be liable for certain obligations imposed upon a mortgagee of record, such as the obligation to provide a pay-off statement or mortgage release within a designated time period.

and procedural requirements vary from mortgage to mortgage and from state to state. Thus, ownership of a mortgage (i.e., without notice to the mortgagor or the public, without judicial proceedings (where required), without satisfaction of other conditions precedent or procedural requirements in the mortgage itself or in applicable state law), does not always give the holder of the mortgage the legal ability to foreclose on the mortgage. Though a discussion of the other necessary prerequisites to foreclosure is beyond the scope of this Executive Summary and the White Paper, the fact that other steps may need to be taken by the owner of a mortgage note, or the owner of a mortgage, is neither unique nor surprising in our legal and regulatory system and does not diminish an otherwise legally effective transfer of the mortgage note and mortgage.

The use of MERS as the nominee for the benefit of the trustee and other transferees in the mortgage loan securitization process has been a subject of litigation in recent years regarding a mortgage note holder's right to enforce a mortgage loan registered in MERS. Some cases address the authority or ability of MERS or transferees of MERS to foreclose on a mortgage for which MERS is or was the mortgagee of record. As a general matter, the assignment and transfer of a mortgage to MERS as nominee of and for the benefit of the beneficial owner of the mortgage does not adversely impact the right to foreclose on the mortgage. Decisions in many jurisdictions support this conclusion.

There are several minority decisions that, in some form, have taken issue with MERS. But none of these decisions, to our knowledge, has invalidated a mortgage for which MERS is the nominee, and none of these decisions has challenged MERS' ability to act as a central system to track changes in the ownership and servicing of mortgage loans.

Finally, it is important to recognize that the UCC does not displace traditional rules of agency law. Under general agency law, an agent has authority to act on behalf of its principal where the principal "manifests assent" to the agent "that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Accordingly, the UCC does not prevent MERS or others, including loan servicers, from acting as the agent for the note holder in connection with transfers of ownership in mortgage notes and mortgages. In short, principles of agency law provide MERS and loan servicers another legal basis for their respective roles in the transfer of mortgage notes and mortgages.

4. Conclusion

In summary, the longstanding and consistently applied rule in the United States is that, when a mortgage note is transferred, "the mortgage follows the note." When a mortgage note is transferred and delivered to a transferee in connection with the securitization of the mortgage loan pursuant to an MBS pooling and servicing agreement or similar agreement, the mortgage automatically follows and is transferred to the mortgage note transferee, notwithstanding that a third party, including an agent/nominee entity such as MERS, may remain as the mortgagee of record. Both common law and the UCC confirm and apply this rule, including in the context of mortgage loan securitizations.

Exhibit A

- Alston & Bird LLP
- Bingham McCutchen LLP
- Cadwalader, Wickersham & Taft LLP
- Dechert LLP
- Hunton & Williams LLP
- Katten Muchin Rosenman LLP
- K&L Gates LLP
- Lowenstein Sandler PC
- Mayer Brown LLP
- O'Melveny & Myers LLP
- Orrick, Herrington & Sutcliffe LLP
- Sidley Austin LLP
- SNR Denton US LLP

Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market

The beginnings of the now multi-trillion dollar secondary market for residential mortgage loans date back to the federal government's creation of Fannie Mae in 1938. Since then, the complexity of the secondary mortgage market has increased, especially as a result of the rapid growth and market acceptance of mortgage-backed securities ("MBS") that began in the 1980s. In contrast, the legal principles and processes by which mortgage-related promissory notes and security instruments (mortgages and deeds of trust) are assigned and transferred have centuries-old origins. Now, in the midst of the worst economic and housing crisis since the 1930s, some are questioning whether the traditional state law principles and processes of assignment and transfer can be fully reconciled with today's complex holding, assignment and transfer systems for mortgage-related promissory notes and security instruments, and what methods are legally effective for participants in the secondary mortgage market to establish, maintain and transfer mortgage notes and security instruments.

This paper provides an overview of the legal principles and processes by which promissory notes and related mortgage security instruments are typically held, assigned, transferred and enforced in the secondary mortgage market in connection with loan securitizations and the creation of MBS.[1]

1. Basic Principles

The two core legal documents in most residential mortgage loan transactions are the promissory note and the mortgage or deed of trust that secures the borrower's payment of the promissory note. The promissory note contains a promise by the borrower to pay the lender a stated amount of money at a specified interest rate (which can be fixed or variable) by a certain date. The typical mortgage or deed of trust contains a grant of a mortgage lien or other security interest in the borrower's real property to the lender or, in a deed of trust, to a trustee for the benefit of the lender, to secure the borrower's obligations under the promissory note.[2]

In a typical "private-label" mortgage loan securitization, each mortgage loan, which is evidenced by a mortgage note and secured by a mortgage, is sold, assigned and transferred to a trust through a series of steps:

- The loan originator or a subsequent purchaser sells, assigns and transfers the mortgage loans to a "sponsor," which is typically a financial services company or a mortgage loan conduit or aggregator.
- The sponsor sells, assigns and transfers the mortgage loans to a "depositor," which in turn sells, assigns and transfers the mortgage loans to the trustee, which will hold the mortgage loans in trust for the benefit of the certificateholders.

[1] Issues related to a party's right to foreclose or to engage in foreclosure-related activities are generally outside the scope of this paper.

[2] For ease of reference, "mortgage" will be used throughout much of this paper to refer to both mortgages and deeds of trust, and "mortgage note" will be used to refer to a promissory note that is secured by a mortgage.

- The trustee issues the MBS pursuant to a pooling and servicing agreement or trust agreement entered into by the depositor, the trustee and a master servicer or servicers.

- The trustee administers the pool assets, typically relying on the loan servicer to perform most of the administrative functions regarding the pool of mortgage loans. In addition, a document custodian is often designated to conduct a review of the mortgage loan documents pursuant to the requirements of the pooling and servicing agreement and to hold the mortgage loan documents for the loans included in the trust pool.

- In general, the loan documents are assigned and transferred from the depositor to the trustee through the indorsement of the mortgage note and the transfer of possession of the mortgage note to the trustee or a custodian on behalf of the trustee. An assignment of the related mortgage is also typically delivered to the transferee or its custodian, except in cases where the related mortgage identifies Mortgage Electronic Registration Systems ("MERS") as the mortgagee. Such assignments generally are in recordable form, but unrecorded, and are executed by the transferor without identifying a specific transferee – a so called assignment in blank.

- In some mortgage loan transactions, MERS becomes the mortgagee of record as the nominee of the loan originator and its assignee in the local land records where the mortgage is recorded, either when the mortgage is first recorded or as a result of the recording of an assignment of mortgage to MERS. This means that MERS is listed as the record title holder of the mortgage. MERS' name does not appear on the mortgage note, and the beneficial interest in the mortgage remains with the loan originator or its assignee. The documents pursuant to which MERS acts as nominee make clear that MERS is acting in such capacity for the benefit of the loan originator or its assignee. When a mortgage loan is originated with MERS as the nominal mortgagee (or is assigned to MERS post-origination), MERS tracks all future mortgage loan and loan servicing transfers and other assignments of the mortgage loan unless and until ownership or servicing is transferred (or the loan is otherwise assigned) to an entity that is not a MERS member. In this way, MERS serves as a central system to track changes in ownership and servicing of the loan. Fannie Mae, Freddie Mac and Ginnie Mae, among other governmental entities, permit loans that they purchase or securitize to be registered with MERS.

As part of the loan securitization process detailed above, a mortgage note and a mortgage may be sold, assigned and transferred several times from one entity to another. The legal principles that govern the assignment and transfer of mortgage notes and mortgages are generally determined by state law. See, e.g., In re Cook, 457 F.3d 561, 566 (6th Cir. 2006) (state law governed whether transferee had superior interest in promissory note secured by mortgage). As such, these principles can vary depending upon the state in which the assignor of the mortgage notes, the underlying property, or the relevant mortgage-related documents are located. The assignment and transfer of a mortgage note, on the one hand, and of a mortgage, on the other hand, are addressed separately below.

2. Transfer of Promissory Notes Secured by Mortgages

The residential mortgage notes in common use in the secondary mortgage market typically are negotiable instruments. The law of negotiable instruments developed over the centuries as a way to encourage commerce and lending by making such instruments, including negotiable mortgage notes, as liquid and transferable as possible. See, e.g., Overton v. Tyler, 3 Pa. 346, 347 (1846) ("[A] negotiable bill or note is a courier without luggage"); 2 Frederick M. Hart & William F. Willier, Negotiable Instruments Under the Uniform Commercial Code § 1.01 ("Negotiable instruments play such an important role in the modern commercial world that it is difficult to realize that the struggle for their existence could be as long and complex as it has been, yet the evolution of the concept took centuries."). Similarly, the standardization of the forms of mortgage notes and mortgages over the past thirty years or more has contributed to the liquidity and transferability of mortgage notes and the underlying mortgages. See Peter M. Carrozzo, Marketing the American Mortgage: The Emergency Home Finance Act of 1970, Standardization and the Secondary Market Revolution, 39 Real Prop. Prob. & Tr. J. 765, 799-800 (2004-2005) ("standardization of mortgage documents created marketable commodities. Once mechanisms were in place for the secondary market to operate, events rapidly moved toward the ultimate goal: the creation of a security which has as its base land [and] yet which will be as freely transferable as stocks and bonds" (internal quotation omitted)).

The Uniform Commercial Code ("UCC"), which, with state-specific variations, has been adopted as law by all 50 states and the District of Columbia, governs, in significant part, the transfer of mortgage notes.[3] Article 3 applies to the negotiation and transfer of a mortgage note that is a "negotiable instrument," as that term is defined in Article 3. See UCC §§ 3-102, 3-201, 3-203 and 3-204; see, e.g., Swindler v. Swindler, 355 S.C. 245, 250 (S.C. Ct. App. 2003) (Article 3 governs negotiable mortgage note). In addition, Article 9 applies to the sale of "promissory notes," a term that generally includes all mortgage notes (both negotiable and non-negotiable). See UCC §§ 1-201(b)(35) and 9-109(a)(3).[4]

The residential mortgage notes in common use today are typically negotiable instruments for UCC purposes. In addition, as a general matter, the securitization of a loan under a typical pooling and servicing agreement provides both for the negotiation of negotiable mortgage notes (by indorsement[5] and transfer of possession to the securitization trustee or the custodian for the trustee) and for an outright sale and assignment of all of the mortgage notes and related mortgages. Thus, whether the mortgage notes in a given securitization

[3] References to the UCC are to the Official Text of the Model UCC, as revised, issued by the National Conference of Commissioners on Uniform State Laws.

[4] While Article 9 does not directly govern a mortgage on real property, the fact that a mortgage note is itself secured by a mortgage on real property does not render Article 9 inapplicable to transfers of the mortgage note. See UCC § 9-109(b) ("The application of this article [9] to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.").

[5] Note that the UCC eschews the more common U.S. spelling of "endorsement" for the less common "indorsement." The UCC spelling is used throughout this paper.

pool are deemed "negotiable" (as we believe most typically are) or "non-negotiable" will have little or no substantive effect under the UCC on the validity of the transfer of the mortgage notes. The typical securitization process effects valid transfers of the mortgage notes and related mortgages in accordance with the provisions of Articles 3 and 9 of the UCC.[6]

What Constitutes a "Negotiable Instrument?"

A "negotiable instrument" is defined as:

> an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
>
> (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
>
> (2) is payable on demand or at a definite time; and
>
> (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

UCC § 3-104(a).

Reference in a mortgage note to a mortgage does not affect the mortgage note's status as a negotiable instrument. See UCC § 3-106(b) ("A promise or order is not made conditional [] by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration…."); see also Int'l Minerals & Chem. Corp. v. Matthews, 321 S.E.2d 545, 547 (N.C. Ct. App. 1984) ("referring to a mortgage or other collateral [in a mortgage note] does not impair negotiability" of the note); In re AppOnline.com, 285 B.R. 805, 815-16 (Bankr. E.D.N.Y. 2002) (reference in mortgage notes to underlying mortgages does not affect the negotiability of the notes).

The fact that a mortgage note contains a variable or adjustable interest rate also does not affect the mortgage note's status as a negotiable instrument. That is because UCC § 3-112(b) provides that "[i]nterest may be stated in an instrument[7] as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument." UCC § 3-112(b).

---

[6] Article 3 and Article 9 are not mutually exclusive. Article 9 applies to the transfer of all "promissory notes," which includes negotiable and non-negotiable instruments. Both Article 3 and Article 9 apply to "negotiable instruments." With respect to non-negotiable instruments, only Article 9 applies to the transfer.

[7] UCC § 3-104(b) defines "instrument" simply as a "negotiable instrument" for purposes of Article 3. As discussed in more detail below, the definition of "instrument" in Article 9 (governing secured transactions) is somewhat more expansive.

How is a Negotiable Mortgage Note Transferred?[8]

A negotiable mortgage note is transferred when it is "delivered" by a person other than the mortgagor for the purpose of giving the transferee the right to enforce the note. See UCC § 3-203(a). "Delivery" of a mortgage note occurs when there has been a voluntary transfer of possession of the mortgage note. See UCC § 1-201(b)(15). As a general matter, the "[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument . . . ." UCC § 3-203(b). Accordingly, a person in possession of the note becomes a "person entitled to enforce" if it can prove that it is the transferee.[9] See UCC § 3-301.

The easiest and most common way to transfer a negotiable mortgage note is through "negotiation." Article 3 defines "negotiation" as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." UCC § 3-201(a). The "negotiation" of a negotiable mortgage note that is payable to an identified person or entity (such as the entity that originated a mortgage loan and whose name appears as the payee in the mortgage note) – "requires **transfer** of **possession** of the instrument and its **indorsement** by the **holder**." UCC § 3-201(b) (emphasis added). As explained below, "indorsement" and "holder" are both defined terms in the UCC.

The "holder" of a negotiable mortgage note is "the person in possession of [the mortgage note] that is payable either to bearer or to an identified person that is the person in possession." UCC § 1-201(b)(21)(A). In other words, upon the closing of a mortgage loan, the "holder" of the mortgage note is the entity that is the payee on the mortgage note and that possesses the note (either actually or constructively). After a negotiable mortgage note has been negotiated, such as in connection with a loan securitization, the "holder" of the mortgage note is the entity that possesses the mortgage note if the mortgage note was indorsed to that entity or if the mortgage note was indorsed in blank or to bearer.

The term "indorsement" is defined to include "a signature . . . that alone or accompanied by other words is made on an instrument [in our case, a negotiable mortgage note] for the purpose of . . . negotiating the instrument." UCC § 3-204(a). Such an indorsement may be either a "special indorsement" or a "blank indorsement." See UCC § 3-205. A "special indorsement" is a written indorsement that specifically "identifies a person to whom it makes the instrument payable." UCC § 3-205(a). A "blank indorsement" is an indorsement that does not identify a person to whom the instrument is payable. See UCC § 3-205(b). Mortgage notes that are transferred in connection with loan securitizations are typically indorsed in blank with language such as "Pay to the order of ______________," where no name is filled in the blank. The effect of an indorsement in

[8] It is important to note that Article 3 does not concern "ownership" of a mortgage note, but instead provides for the transfer of a mortgage note and the right to enforce such notes. See UCC § 3-301; UCC § 3-203 cmt. 1. A party need not be the "owner" of the mortgage note to enforce it. See UCC § 3-301 ("A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."). Thus, a party may have the right to enforce the instrument, but not have "ownership" of that instrument. UCC § 3-203 cmt 1. For an example of situations where a party with the right to enforce an instrument is not also the "owner" of the instrument, see UCC 3-203 cmt. 1 and Note 12 infra.

[9] Note also that UCC § 3-203(c) provides for the scenario in which an instrument is transferred for value without the indorsement that, as described in the text below, would be needed for the mortgage note to have been "negotiated." Under that section, if a negotiable mortgage note is transferred for value as part of a loan securitization, but the transferor fails to indorse the note, the transferee of the note has the "specifically enforceable right to the unqualified indorsement of the transferor." UCC § 3-203(c); see Note 12, infra (discussing distinction between the right to enforce a mortgage note and ownership of the mortgage note).

blank is significant: "When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of *possession* alone until specially indorsed." UCC § 3-205(b) (emphasis added).[10] See also UCC § 3-201(b) (The negotiation of a negotiable mortgage note that is payable to bearer (such as a negotiable mortgage note that has been indorsed in blank) is effected by "transfer of possession alone.").

The term "possession" is not defined in the UCC. Thus, courts rely on common law definitions of possession to interpret that concept in the context of the negotiation of an instrument such as a mortgage note. See, e.g., In re Kelton Motors, Inc., 97 F.3d 22, 26 (2d Cir. 1996) (because Article 3 does not define "possession," a court must look to the general law of the jurisdiction in determining whether a party is in possession of a negotiable instrument). Possession can be, and very often is, effected by an agent, nominee or designee, such as the designated custodian for the securitization trust. See, e.g., Midfirst Bank, SB v. C.W. Haynes and Co., Inc., 893 F. Supp. 1304, 1314-15 (D.S.C. 1994) (constructive possession exists when an authorized agent of the owner holds the note on behalf of the owner); Jenkins v. Evans, 31 A.D.2d 597, 598 (N.Y. App. Div. 3d Dept. 1968) (agent had authority to possess instruments for principal). In such cases, while the designated custodian has "physical" possession of the mortgage note, the trustee for which the custodian holds the mortgage note has "constructive" or "legal" possession. See Midfirst Bank, 893 F. Supp. at 1314-15; see also UCC § 9-313 cmt. 3 ("if the collateral is in [the] possession of an agent of the secured party for the purposes of possessing on behalf of the secured party, and if the agent is not also an agent of the debtor, the secured party has taken actual possession" (emphasis added)).

Who May Enforce A Negotiable Mortgage Note?

The maker of a mortgage note is obligated to pay the note to the "person entitled to enforce the instrument." UCC § 3-412. The "person entitled to enforce" a negotiable mortgage note includes "(i) the holder of the instrument, [and] (ii) a nonholder in possession of the instrument who has the rights of a holder." UCC § 3-301. Accordingly, to enforce a mortgage note against the borrower, a person must generally prove either that it is a "holder" or that it is a transferee with the rights of a holder. See UCC § 3-301.

The first category of persons that may enforce a mortgage note is a "holder." A "holder" of a negotiable mortgage note is "the person in possession of [the mortgage note] that is payable either to bearer or to an identified person that is the person in possession." UCC § 1-201(b)(21)(A). The manner in which one becomes a "holder" is described in the section above.

The second category contemplated by UCC § 3-301 – a "nonholder in possession who has the rights of a holder" – is more difficult to define. Under this clause, a person would qualify as a "nonholder in possession" if possession of the mortgage note was transferred to him from the transferor, but the transferor did not indorse the mortgage note. See UCC § 3-203 cmt. 2. In this circumstance, the transferee is entitled to enforce the instrument, but to do so, the transferee must first prove both possession of the unindorsed mortgage note and prove the transfer of the mortgage note by the holder to the transferee. See id.[11] Under both clauses, the person

[10] An indorsement is considered to be made "on an instrument" for purposes of negotiation when it is made either on the mortgage note itself or on a separate paper, often referred to as an "allonge," that is affixed to the note. See UCC § 3-204(a). Once affixed, the allonge becomes "part of the instrument." Id.

[11] As noted above, the right to enforce an instrument and the ownership of that instrument are not necessarily the same. See UCC § 3-203 cmt. 1. Thus, a party may have the right to enforce the instrument, but not have "ownership" of that instrument. Id. A party

seeking to enforce the mortgage note must have possession of the note.

UCC § 3-301 also permits a person without possession to enforce a mortgage note where the mortgage note has been lost, stolen, or destroyed within the meaning of UCC § 3-309. See UCC § 3-301.[12] Courts have consistently affirmed the use of UCC § 3-309 to enforce lost, stolen or destroyed negotiable mortgage notes that a party, such as a securitization trustee, seeks to enforce when the party has proven the terms of the mortgage notes and its right to enforce the mortgage notes (i.e., it has proven the transfer of the mortgage note from the transferee). See, e.g., In re Montagne, 421 B.R. 65, 79 (D. Vt. 2009) (finding that plaintiff who satisfied requirements of UCC § 3-309 could enforce lost mortgage note); Waggoner v. Mortgage Elect. Registration Sys., Inc., No. 2003-CA-002666-MR, 2005 WL 2175439, at *1 n.1 (Ky. App. Ct. Sept. 9, 2005) ("The promissory note was proven … by an affidavit concerning a lost or destroyed promissory note.").

What Rights Against Borrower Defenses are Available to the Holder of a Negotiable Mortgage Note?

A key concept relating to the negotiation of negotiable mortgage notes is the "holder in due course" doctrine. That is because where the "holder" of a negotiable mortgage note is deemed a "holder in due course," the holder takes the mortgage note subject only to specific limited defenses of the borrower. The following is a brief summary of an expansive area of law. Under UCC § 3-302(a):

> [A] "holder in due course" means the holder of an instrument if:
>
> (1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
>
> (2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in Section 3-306 [regarding claims of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds], and (vi) without notice that any party has a defense or claim in recoupment described in Section 3-305(a).

UCC § 3-302(a).

---

need not be the "owner" of the note to enforce it. See UCC § 3-301 ("A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."). For example, if X (holder of an instrument payable to X) sells the instrument to Y pursuant to a document conveying all of X's right, title and interest in the instrument to Y, but does not deliver immediate possession to Y, Y would have ownership of the instrument under the agreement, but Y generally would not be entitled to enforce the instrument until it obtained possession of the instrument. Id.

[12] UCC § 3-301 also permits a person without possession to enforce a mortgage note where, in certain circumstances, there has been mistaken payment as defined in UCC § 3-418(d).

Under Article 3, a holder in due course of a negotiable mortgage note takes the mortgage note free of (a) all prior claims to or regarding the mortgage note by any person and (b) most defenses to enforceability of the mortgage note that may be raised by parties with whom the holder in due course has not dealt. See UCC §§ 3-305 and 3-306; see also Provident Bank v. Community Home Mortgage Corp., 498 F. Supp. 2d 558, 565 (E.D.N.Y. 2007). The defenses to which a holder in due course may be subject are found in UCC § 3-305, and include:

> a defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings.

UCC § 3-305(a)(1).

How Is a Mortgage Note Transferred Under Article 9 of the UCC?

The sale of mortgage notes is also governed, in significant part, by Article 9. Article 9 establishes (1) whether the interests of a transferee of a mortgage note have both "attached" and become "perfected" so that those interests will prevail over conflicting claims of third parties and (2) the rights of the transferee in and to the underlying mortgage that secures the mortgage note.

Article 9 addresses the sale of mortgage notes, regardless of whether they are negotiable or non-negotiable.[13] More specifically, Article 9 applies to "a sale of . . . promissory notes." UCC § 9-109(a)(3). A "promissory note" is defined as "an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds." UCC § 9-102(a)(65).[14] Given this broad definition, residential mortgage notes in common use today are typically "promissory notes" for purposes of Article 9.

Under Article 9, the sale of a mortgage note (whether or not the mortgage note is negotiable) is deemed a secured transaction and the transferee's "security interest" is automatically perfected when it attaches (more on "attachment" and "perfection" below). See UCC § 9-309(4). While security interests are most commonly thought of as the liens obtained by lenders, the UCC defines the term "security interest" to also include "any interest of a . . . buyer of . . . a promissory note in a transaction that is subject to Article 9." UCC § 1-201(b)(35) (emphasis

---

[13] Article 9 also applies to the creation of a lien on, or a "less-than-ownership security interest" in, a mortgage note. Because most assignments and transfers of mortgage notes in loan securitizations are of the ownership of the mortgage notes, not a mere lien on or security interest in the notes, this paper addresses only outright sales of mortgage notes under Article 9. The principles discussed below regarding attachment of a buyer's interest in a sale of mortgage notes are identical to those that apply in the context of the creation of a lien on mortgage notes, and the principles regarding perfection of the interest in the mortgage notes are likewise very similar. "Although . . . Article [9] occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither . . . Article [9] nor the definition of "security interest" (Section 1-201(37)) delineates how a particular transaction is to be classified. That issue is left to the courts." UCC § 9-109 cmt 4.

[14] Under Article 9, the term "instrument" is defined broadly as "a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment." UCC § 9-102(a)(47).

added). In addition, the definition of "secured party" includes "a person to which . . . promissory notes have been sold." UCC § 9-102(a)(72)(D).

Before a buyer's "security interest" in a mortgage note can be perfected under Article 9, the security interest must "attach." A security interest attaches when (1) value has been given for the sale, (2) the seller has rights in the mortgage note or the power to transfer rights in the mortgage note to the buyer and (3) either (a) the mortgage note is in the possession of the buyer pursuant to a security agreement of the seller or (b) the seller has signed a written or electronic security agreement that describes the mortgage note. See UCC § 9-203(b). Article 9 defines "security agreement" as "an agreement that creates or provides for a security interest," UCC § 9-102(a)(73), which, in the context of a mortgage loan securitization, would include an agreement pursuant to which mortgages and mortgage notes are sold and transferred from one entity to another. Such an agreement, normally a pooling and servicing agreement or trust agreement, typically will provide that the transfer of the mortgage note pursuant thereto effects a sale of the mortgage note, which would thus, under Article 9, constitute a "security agreement."

Significantly, the attachment of a security interest in a mortgage note that is itself "secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage or other lien." UCC § 9-203(g) (emphasis added).[15] Similarly, under UCC § 9-308(e), perfection of a security interest in a promissory note "also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right." UCC § 9-308(e) (emphasis added). In other words, perfection of a security interest (which includes a sale to a buyer) in a mortgage note pursuant to Article 9 also perfects a security interest in the mortgage that secures the note.

Perfection of the interest in the mortgage note is important because it provides the transferee of the mortgage note with a right in the mortgage note and mortgage superior to that of a subsequent lien creditor of the seller. And, perfection provides the transferee of the mortgage note with a right in the mortgage superior to that of a subsequent lien creditor of the mortgagee, which includes a bankruptcy trustee (see UCC § 9-102(a)(52)). See UCC § 9-308 cmt. 6.

Transfer of Mortgage Notes: Conclusion

In summary, under the UCC, the transfer of a mortgage note that is a negotiable instrument is most commonly effected by indorsing the note, which may be a blank or special indorsement, and delivering the mortgage note to the transferee (or the agent acting on behalf of the transferee). As the residential mortgage notes in common usage typically are "negotiable instruments," this is the most common method of transfer. In addition, even without indorsement, the assignment can be effected by transferring possession under UCC § 3-203(a). Moreover, the sale of any mortgage note also effects the assignment and transfer of the mortgage under Article 9. The attachment and perfection of the buyer's interest in the mortgage note attaches and perfects

[15] The comments to UCC § 9-203 expressly provide that "Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien." UCC § 9-203 cmt. 9; see also Restatement (Third) of Property (Mortgages) § 5.4(a) (1997). The same holds true for UCC § 9-308(e), under which perfection of a security interest in a mortgage note also accomplishes perfection of a security interest in the mortgage. See UCC § 9-308 cmt. 6.

the buyer's interest in the underlying mortgage that secures the mortgage note. Securitization agreements often provide both for (a) the indorsement and transfer of possession to the trustee or the custodian for the trustee, which would constitute a negotiation of the mortgage note under Article 3 of the UCC and (b) an outright sale and assignment of the mortgage note. Thus, regardless of whether the mortgage notes in a securitization trust are deemed "negotiable" or "non-negotiable," the securitization process generally includes a valid transfer of the mortgage notes to the trustee in accordance with the explicit requirements of the UCC.

3. Assignment and Transfer of Ownership of Mortgages

As described above, when a mortgage loan is assigned and transferred as part of the securitization of the loan in the secondary market, both the mortgage note and the mortgage itself are typically sold, assigned, and physically transferred to the trustee that is acting on behalf of the MBS investors or to a trustee-designated document custodian pursuant to a custody agreement. The assignment and transfer are usually documented and performed in accordance with a pooling and servicing agreement.

What is the Relationship Between the Transfer of a Mortgage Note and the Transfer of Ownership of the Mortgage?

When a mortgage note is transferred in accordance with common mortgage loan securitization processes, the mortgage is also automatically transferred to the mortgage note transferee under the UCC and the general common law rule that "the mortgage follows the note." See, e.g., Carpenter v. Longan, 83 U.S. 271, 275 (1873) ("The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter."); Mortgage Elect. Registration Sys., Inc. v. Coakley, 41 A.D.3d 674, 674 (N.Y. App. Div. 2d Dept. 2007) ("the mortgage . . . passed as an incident to the promissory note"); Restatement (Third) of Property, Mortgages § 5.4(a) (1997) ("A transfer of an obligation secured by a mortgage also transfers the mortgage . . . . ").

The rule that "the mortgage follows the note" has been codified in the UCC, but the rule's common law origins date back hundreds of years, long before the creation of the UCC. As stated in the official comments to UCC § 9-203(g), that section "codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien." UCC § 9-203 cmt. 9.

All states follow this rule.[16] In addition to the codification of the rule under UCC § 9-203(g), reported

[16] However, in some states, such as Massachusetts and Minnesota, courts have held that the transfer of a mortgage note without an express transfer of the mortgage vests in the note holder only an equitable interest in the mortgage. See, e.g., First Nat'l Bank of Cape Cod v. North Adams Hoosac Savs. Bank, 7 Mass. App. Ct. 790, 796 (1979); Jackson v. Mortgage Elect. Registration Sys., Inc., 770 N.W.2d 487, 497, 500-01 (Minn. 2009). This arrangement has been described as follows: the holder of the mortgage holds the legal title to the mortgage in constructive trust for the benefit of the mortgage note holder. See First Nat'l Bank of Cape Cod, 7 Mass. App. Ct. at 796. In both states, however, case law suggests that foreclosure proceedings must be initiated by, or at least in the name of, the holder of the legal title in the mortgage. See Jackson, 770 N.W.2d at 500; U.S. Bank Nat'l Ass'n v. Ibanez, Nos. 08 MISC 384283 (KCL), 08 MISC 386755 (KCL), 2009 WL 3297551, at *11 (Mass. Land Ct. Oct. 14, 2009) (rejecting argument that note holders had authority to foreclose on mortgages for which their status as full mortgagees was in dispute) (currently on appeal to the Massachusetts Supreme Judicial Court).

court cases in nearly every state and non-UCC statutory provisions in some states make clear that "the mortgage follows the note":

Alabama: Armour Fertilizer Works v. Zills, 177 So. 136, 138 (Ala. 1937) ("when the note is secured by a mortgage, such mortgage follows the note").

Arizona: Ariz. Rev. Stat § 33-817 ("The transfer of any contract or contracts secured by a trust deed shall operate as a transfer of the security for such contract or contracts.").

Arkansas: Leach v. First Cmty. Bank, No. CA 07-05, 2007 WL 2852599, at *1 (Ark. App. Ct. Oct. 3, 2007) ("Arkansas has long followed the rule that, in the absence of an agreement or a plain manifestation of a contrary intention, the security of the original mortgage follows the note or renewal thereof.").

California: Cal. Civ. Code § 2936 ("The assignment of a debt secured by mortgage carries with it the security"); In re Staff Mortgage & Invest. Corp., 625 F.2d 281, 284 (9th Cir. 1980) (in California, "[A] deed of trust is a mere incident of the debt it secures and . . . an assignment of the debt 'carries with it the security.' (internal quotation omitted)).

Colorado: Carpenter v. Longan, 83 U.S. 271, 275 (1873) (in an appeal from the Supreme Court of Colorado Territory, the United States Supreme Court stated: "The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.").

Connecticut: Conn. Gen. Stat. § 49-17 ("When any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall, upon the expiration of the time limited for redemption and on failure of redemption, vest in him in the same manner and to the same extent as such title would have vested in the mortgagee if he had foreclosed, provided the person so foreclosing shall forthwith cause the decree of foreclosure to be recorded in the land records in the town in which the land lies."); In re AMSCO, Inc., 26 B.R. 358, 361 (Bankr. D. Conn. 1982) ("An assignment of the note carries the mortgage with it . . . .").

District of Columbia: Hill v. Hawes, 144 F.2d 511, 513 (D.C. Cir. 1944) (after mortgage note has been cancelled, cancellation of "any mortgage follows as a matter of course and does not require a separate action").

Florida: Capital Investors Co. v. Ex'rs of Estate of Morrison, 484 F.2d 1157, 1163 n.12 (4th Cir. 1973) ("That the mortgage follows the note it secures and derives negotiability, if any, from the note is the rule in Florida where the land under mortgage in this case was located." (citing Daniels v. Katz, 237 So.2d 58, 60 (Fla. App. 1970); Meyerson v. Boyce, 97 So.2d 488, 489 (Fla. App. 1957))); Margiewicz v. Terco Properties, 441 So.2d 1124, 1125 (Fla. Dist. Ct. App. 1983) (when a note secured by a mortgage is assigned, the mortgage follows the note into the hands of the mortgagee).

Illinois: Federal Nat'l Mort. Ass'n v. Kuipers, 314 Ill. App.3d 631, 635, 732 N.E.2d 723, 727 (Ill. Ct. App. 2000) ("The assignment of a mortgage note carries with it an equitable assignment of the mortgage by which it was secured. The assignee stands in the shoes of the assignor-mortgagee with regard to the rights and interests under the note and mortgage. . . . [I]n Illinois, the assignment of the mortgage note is sufficient to transfer the underlying mortgage.") (citations omitted).

Indiana: Lagow v. Badollet, 1 Blackf. 416, 1826 WL 1087, at *3 (Ind. 1826) ("a mortgage . . . follows the debt into whose hands soever it may pass").

Iowa: Bremer County Bank v. Eastman, 34 Iowa 392, 1872 WL 254, at *1 (Iowa 1872) ("The transfer of the note, secured by the mortgage, carried the mortgage with it as an incident to the debt, and the indorsee of the note could maintain an action in his own name, to foreclose the mortgage without any assignment thereon whatever.").

Kansas: Kan. Stat. Ann § 58-2323 ("The assignment of any mortgage as herein provided shall carry with it the debt thereby secured."); Bank Western v. Henderson, 255 Kan. 343, 354, 874 P.2d 632, 640 (1994) ("[T]he mortgage follows the note. A perfected claim to the note is equally perfected as to the mortgage.").

Maryland: In re Bird, No. 03-52010-JS, 2007 WL 2684265, at *2-4 (Bankr. D.Md. Sept. 7, 2007) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it . . . .").

Massachusetts: The transfer of a mortgage note, without the express transfer of the mortgage, vests in the note holder an equitable interest in the mortgage (an interest that can be enforced by the note holder) and the mortgage holder is deemed to hold the mortgage in constructive trust for the benefit of the note holder. See Weinberg v. Brother, 263 Mass. 61, 62 (1928); Barnes v. Boardman, 149 Mass. 106, 114 (1889); Morris v. Bacon, 123 Mass. 58, 59 (1877); First Nat'l Bank of Cape Cod v. North Adams Hoosac Savs. Bank, 7 Mass. App. Ct. 790, 796 (1979); see also In re Ivy Properties, Inc., 109 B.R. 10, 14 (Bankr. D. Mass. 1989) ("[U]nder Massachusetts common law the assignment of a debt carries with it the underlying mortgage, without necessity for the granting or recording of a separate mortgage assignment.").

Despite the above cited authorities, the Massachusetts Land Court in a recent opinion cast doubt on the "mortgage follows the note" rule:

> [E]ven a valid transfer of the note does not automatically transfer the mortgage. . . . The holder of the note may have an equitable right to obtain an assignment of the mortgage by filing an action in equity, but that is all it has. . . . The mortgage itself remains with the mortgagee (or, if properly assigned, its assignee) who is deemed to hold the legal title in trust for the purchaser of the debt until the formal assignment of the mortgage to the note holder or, absent such assignment, by order of the court in an action for conveyance of the mortgage. . . . But . . . the right to get something and actually having it are two different things.
>
> U.S. Bank Nat'l Ass'n v. Ibanez, Nos. 08 MISC 384283 (KCL), 08 MISC 386755 (KCL), 2009 WL 3297551, at *11 (Mass. Land Ct. Oct. 14, 2009) (citations omitted).

The Ibanez case appears to stand in stark contrast to the principles embodied in the UCC. The Ibanez case is currently pending on appeal before the Massachusetts Supreme Judicial Court, that state's highest court.

Michigan: Prime Fin. Serv. v. Vinton, 279 Mich. App. 245, 257, 761 N.W.2d 694, 704 (Mich. Ct. App. 2008) ("the transfer of a note necessarily includes a transfer of the mortgage with it") (citing Ginsberg v. Capitol City Wrecking Co., 300 Mich. 712, 717, 2 N.W.2d 892 (1942)); Jones v. Titus, 208 Mich. 392, 397, 175 N.W. 257, 259 (Mich. 1919) (when a note given with a mortgage was indorsed over to a third party it carried with it the equitable title to the mortgage).

Minnesota: Jackson v. Mortgage Elect. Registration Sys., Inc., 770 N.W.2d 487, 497 (Minn. 2009) ("Absent an agreement to the contrary, an assignment of the promissory note operates as an equitable assignment of the underlying security interest.") (emphasis in original).

Mississippi: Holmes v. McGinty, 44 Miss. 94, 1870 WL 4406, at *4 ("[T]he mortgage . . . follows the debt as an incident, and is a security for whomsoever may be the beneficial owner of it.").

Missouri: George v. Surkamp, 76 S.W.2d 368, 371 (Mo. 1934) (when the holder of the promissory note assigns or transfers the note, the deed of trust is also transferred).

Montana: First Nat'l Bank v. Vagg, 65 Mont. 34, 212 P. 509, 511 (Mont. 1922) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while the assignment of the latter alone is a nullity. The mortgage can have no separate existence.") (citations omitted).

Nebraska: In re Union Packing Co., 62 B.R. 96, 100 (Bankr. D. Neb. 1986) (with or without the assignment of the mortgage, the assignee of the promissory note has the right to enforce the mortgage securing the note).

New Hampshire: Southerin v. Mendum, 5 N.H. 420, 1831 WL 1104, at *7 (N.H. 1831) ("When a mortgagee transfers to another person , the debt which is secured by the mortgage, he ceases to have any control over the mortgage. . . . And we are of the opinion, that the interest of the mortgagee passes in all cases with the debt, and that it is not within the statute of frauds, because it is a mere incident to the debt, has no value independent of the debt, and cannot be separated from the debt.").

New Jersey: In re Kennedy Mort. Co., 17 B.R. 957, 966 (Bankr. D. N.J. 1982) ("Anyone interested in acquiring an interest in the mortgage would be obliged to obtain an interest in the debt.").

New York: Mortgage Elec. Registration Sys., Inc. v. Coakley, 41 A.D.3d 674, 838 N.Y.S.2d 622 (App. Div. 2007) ("at the time of the commencement of this action, MERS was the lawful holder of the promissory note (see UCC 3-204[1]; Franzese v. Fidelity N.Y. FSB, 214 A.D.2d 646, 625 N.Y.S.2d 275), and of the mortgage, which passed as an incident to the promissory note (see Payne v. Wilson, 74 N.Y. 348, 354-355; see also Weaver Hardware Co. v. Solomovitz, 235 N.Y. 321, 139 N.E. 353; Matter of Falls, 31 Misc. 658, 660, 66 N.Y.S. 47, aff'd. 66 A. D. 616, 73 N.Y.S. 1134") (emphasis added); Provident Bank v. Community Home Mortgage Corp., 498 F. Supp. 2d 558, 564-65 (E.D.N.Y. 2007) (applying principle that the mortgage follows the note).

North Carolina: Dixie Grocery Co. v. Hoyle, 204 N.C. 109, 167 S.E. 469 (1933) ("The mortgage follows the debt.").

Ohio: U.S. Nat'l Bank Ass'n v. Marcino, 181 Ohio App.3d 328, 337 (2009) ("[T]he negotiation of a note operates as an equitable assignment of the mortgage, even when the mortgage is not assigned or delivered. Kuck v. Sommers (1950), 100 N.E.2d 68, 75, 59 Ohio Abs. 400. Various sections of the Uniform Commercial Code, as adopted in Ohio, support the conclusion that the owner of a promissory note should be recognized as the owner of the related mortgage. . . . Thus, although the recorded assignment is not before us, there is sufficient evidence on the record to establish that appellee is the current owner of the note and mortgage at issue in this case, and, therefore, the real party in interest.") (citations to Ohio's versions of UCC §§ 9-109(a)(3), 9-102(a)(72)(D) and 9-203(g) omitted).

Oklahoma: Zorn v. Van Buskirk, 111 Okla. 211, 239 P. 151 (1925) ("the mortgage follows the note").

Pennsylvania: In re Miller, No. 99-25616JAD, 2007 WL 81052, at *6 & n.7 (Bankr. W.D. Pa. Jan. 9, 2007) (citing and quoting with approval Gray, Mortgages in Pennsylvania at § 1-3 (1985) ("the mortgage follows the note")).

South Carolina: MidFirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F. Supp. 1304, 1318 (D. S.C. 1994) ("South Carolina recognizes the 'familiar and uncontroverted proposition' that 'the assignment of a note secured by a mortgage carries with it an assignment of the mortgage.' Hahn v. Smith, 157 S.C. 157, 154 S.E. 112 (1930); Ballou v. Young, 42 S.C. 170, 20 S.E. 84 (1894).").

Texas: Kirby Lumber Corp. v. Williams, 230 F.2d 330, 333 (5th Cir. 1956) (applying Texas law) ("The rule is fully recognized . . . that a mortgage to secure a negotiable promissory note is merely an incident to the debt, and passes by assignment or transfer of the note.").

Utah: Smith v. Jarman, 211 P. 962, 966 (Utah 1922) ("The modern doctrine that the mortgage follows the note as an incident was thus long ago recognized by this court . . . .").

Virginia: Yerby v. Lynch, 3 Gratt. 460, 1847 WL 2384, at *8-10 (Va. 1847) ("the mortgage follows the debt").

Virgin Islands: UMLIC VP LLC v. Matthias, 234 F. Supp. 2d 520, 523 (D. V.I. 2002) (citing and quoting with approval the "RESTATEMENT (THIRD) OF PROPERTY, MORTGAGES § 5.4(a) (1997). The comment to this section further explains that '[t]he principle of this subsection, that the mortgage follows the note, ... applies even if the transferee does not know that the obligation is secured by a mortgage.... Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it.' Id. § 5.4 cmt. b (1997). Accordingly, in the Virgin Islands, no separate document specifically assigning and transferring the mortgage which secures a note is required to accompany the assignment of the obligation, because the mortgage automatically follows the note.").

Washington: Nance v. Woods, 79 Wash. 188, 189, 140 P. 323, 323 (Wash. 1914) ("the mortgage follows the note").

As mentioned above, the general common law rule that "the mortgage follows the note" is codified in Article 9 of the UCC. Section 9-203(g) of the UCC states: "The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien."[17] UCC § 9-203(g) (emphasis added). The phrase "security interest" in this provision includes a buyer's ownership interest because UCC § 1-201(b)(35) defines "security interest" to include "any interest of a . . . buyer of . . . a promissory note in a transaction that is subject to Article 9." Thus, under Article 9, a sale of a mortgage note means that the buyer's rights attach not only to the mortgage note itself but also to the mortgage that secures the mortgage note. Moreover, under UCC § 9-308(e), those rights are perfected and can be enforced against third parties.[18] Regarding the impact of these UCC provisions, one treatise states: "Article 9 makes it as plain as possible that the secured party need not record an assignment of mortgage, or anything else, in the real property records in order to perfect its rights in the mortgage." J. McDonnell and J. Smith, Secured Transactions Under the Uniform Commercial Code, § 16.09[3][b].

Courts in several states have affirmed and applied the "mortgage follows the note" rule in cases where the mortgage assignment was not recorded by the transferee.[19] See, e.g., Nat'l Livestock Bank v. First Nat. Bank, 203 U.S. 296, 307-08 (1906) (citing with approval a decision of the Supreme Court of Kansas for the proposition that "where a mortgage upon real estate is given to secure payment of a negotiable note, and before its maturity the note and mortgage are transferred by indorsement of the note to a bona fide holder, the assignment, if there be a written one, need not be recorded"); Jackson v. Mortgage Elec. Registration Sys., Inc., 770 N.W.2d 487, 497-98, 500 (Minn. 2009) (applying the "mortgage follows the note" rule where there was no assignment of the mortgage); UMLIC VP LLC v. Matthias, 234 F. Supp. 2d 520, 523 (D. V.I. 2002) ("Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it."); Federal Nat'l Mort. Ass'n v. Kuipers, 314 Ill. App. 3d 631, 635, 732 N.E.2d 723, 727 (Ill. Ct. App. 2000) ("Because the assignment of the debt, with nothing more, is sufficient to preserve the mortgage lien, it cannot follow that the lien is somehow extinguished for the failure to record the assignment. Therefore, we are persuaded that the

---

[17] Courts have observed that UCC § 9-203(g) codifies the "mortgage follows the note" rule. See, e.g., U.S. Nat'l Bank Ass'n v. Marcino, 181 Ohio App.3d 328, 337 (2009) (quoting with approval Official Comment 9 to UCC § 9-203: "subsection (g) [of UCC § 9-203] codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien").

[18] As discussed above, UCC § 9-308(e) provides that "perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right." UCC § 9-308(e) (emphasis added).

[19] In most states, recording of an assignment of mortgage is generally not required to ensure the enforceability of the assignment of mortgage as between the assignor and assignee, and anyone with knowledge thereof. It is beyond the scope of this paper to discuss in detail the potential risks to the mortgage transferee of not recording a mortgage assignment. Those risks might include, among others, delaying the transferee's ability to foreclose on the mortgage, failing to receive notices that may go to the mortgagee of record, and otherwise leaving the assignee open to negligent or fraudulent actions or inactions by the mortgagee of record that could bind the mortgage transferee and impair the value or enforceability of the mortgage. Similarly, when an assignment of mortgage is not recorded, the assignor may be liable for certain obligations imposed upon a mortgagee of record, such as the obligation to provide a pay-off statement or mortgage release within a designated time period.

mortgage lien and priority position inure to the benefit of the assignee and that recording the assignment is unnecessary to preserve the security for the debt."); In re Kennedy Mortgage Co., 17 B.R. 957, 964 (Bankr. D.N.J. 1982) ("The fact that assignments of mortgages may be recorded does not affect the validity of an assignment of a mortgage which has not been recorded.").

Courts have also affirmed and applied the "mortgage follows the note" rule even when there was no actual separate written assignment of the mortgage. See, e.g., Carpenter v. Longan, 83 U.S. 271, 275 (1873) ("The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter."); Chase Home Fin., LLC v. Fequiere, 119 Conn. App. 570, 989 A.2d 606, 610-11 (Conn. Ct. App. 2010) ("General Statutes § 49-17 [which codifies the "mortgage follows the note" rule] permits the holder of a negotiable instrument that is secured by a mortgage to foreclose on the mortgage even when the mortgage has not yet been assigned to him." (emphasis added)); U.S. Nat'l Bank Ass'n v. Marcino, 181 Ohio App.3d 328, 337 (2009) (holding that bank was the "current owner" of a mortgage note and the related mortgage despite the fact that "there is no evidence on the record that appellee is the current assignee of the note and mortgage," and finding that "the negotiation of a note operates as an equitable assignment of the mortgage, even when the mortgage is not assigned or delivered" (citing Kuck v. Sommers, 100 N.E.2d 68, 75, 59 Ohio Abs. 400 (1950)); UMLIC VP LLC v. Matthias, 234 F. Supp. 2d 520, 523 (D. V.I. 2002) (the principle "that the mortgage follows the note, . . . applies even if the transferee does not know that the obligation is secured by a mortgage"); In re Union Packing Co., 62 B.R. 96, 100 (Bankr. D. Neb. 1986) (with or without the assignment of the mortgage, the assignee of the promissory note has the right to enforce the mortgage securing the note); Morris v. Bacon, 123 Mass. 58, 59 (1877) (note holder that endorsed and delivered mortgage note to bank as security for a loan, but without an assignment of the mortgage, was required by the court to transfer the mortgage to the bank); Bremer County Bank v. Eastman, 34 Iowa 392, 1872 WL 254, at *1 (Iowa 1872) ("The transfer of the note, secured by the mortgage, carried the mortgage with it as an incident to the debt, and the indorsee of the note could maintain an action in his own name, to foreclose the mortgage without any assignment thereon whatever."); Southerin v. Mendum, 5 N.H. 420, 1831 WL 1104, at *8 (N.H. 1831) ("the right of the mortgagee before foreclosure is . . . assignable by a mere assignment of the debt, without deed or writing").

Common MBS practices, as described above, are consistent with the general rule that "the mortgage follows the note": pursuant to the pooling and servicing agreement that governs a mortgage-loan securitization, and the language of assignment typically contained in such an agreement, the mortgage note and the mortgage itself are sold, assigned, transferred and delivered to the trustee, and the transferor also typically delivers a written assignment of the mortgage that is in blank in recordable form. Courts have held that the language of assignment contained in a pooling and servicing agreement, along with the corresponding transfer, sale and delivery of the mortgage note and mortgage, are sufficient to transfer the mortgage to the transferee/trustee or its designee or nominee. See, e.g., Wells Fargo Bank, N.A. v. Konover, No. 3:05 CV 1924 (CFD), 2009 WL 2710229, at *3 (D. Conn. Aug. 21, 2009) (MBS pooling agreement vested authority in pool trustee to bring legal action in the event of default); U.S. Bank N.A. v. Cook, No. 07 C 1544, 2009 WL 35286, at *2-3 (N.D. Ill. Jan. 6, 2009) (MBS pooling trust agreement effected an assignment of the mortgage at issue to the pool trustee); In re Samuels, 415 B.R. 8, 18 (Bankr. D. Mass. 2009) ("The [Pooling and Servicing Agreement] itself [by which the MBS loan trust was created], in conjunction with the schedule of mortgages deposited through it into the pool trust, served as a written assignment of the designated mortgage loans, including the mortgages themselves."); EMC Mortgage Corp. v. Chaudhri FSB, 400 N.J. Super. 126, 141, 946 A.2d 578, 588 (N.J. Super. Ct. 2008) ("any [mortgage] assignment shall pass and convey the estate of the assignor in the mortgaged premises, and the assignee may sue thereon in his own name.'" (citing New Jersey Stat. Ann. § 46:9-9 and Byram Holding Co. v. Bogren, 2 N.J. Super. 331, 336, 63 A.2d 822 (N.J. Ch. Div. 1949)); LaSalle Bank N.A. v. Lehman Bros. Holdings, Inc., 237 F. Supp. 2d 618, 632-33 (D. Md. 2002) (MBS pooling agreement granted trustee authority to bring suit on behalf of trust); LaSalle Bank N.A. v. Nomura Asset Capital Corp., 180 F. Supp. 2d 465, 470-71 (S.D.N.Y. 2001) (language in the pooling and servicing agreement for MBS trust effectually assigned mortgage to the pool trustee).[20]

What is the Relationship Between the UCC and State Real Property Laws?

Article 9 does not apply to "the creation or transfer of an interest in or lien on real property, . . . except to the extent that provision is made for . . . liens on real property in Sections 9-203 and 9-308." UCC § 9-109(d)(11) (emphasis added). As discussed above, UCC § 9-203(g) provides that, when a security interest in a mortgage note attaches, a security interest in the underlying mortgage also attaches, and UCC § 9-308(e) provides the same regarding the perfection of the security interest. See UCC § 9-203 cmt. 9 (the "mortgage follows the note" rule codified into UCC §§ 9-203(g) and 9-308(e)). In addition, UCC § 9-109(b) makes clear that Article 9 does apply to mortgage notes even though Article 9 does not govern the creation of the mortgage itself:

> The application of this article [9] to a security interest [remember that this term is defined to include any interest of a buyer of a promissory note in a transaction subject to Article 9] in a secured obligation [e.g., mortgage note] is not affected by the fact that the obligation [e.g., mortgage note] is itself secured by a transaction or interest [e.g., creation of the mortgage or deed of trust itself] to which this article does not apply.

UCC § 9-109(b).[21]

The creation of an interest in or lien on real property, including a mortgage, is governed by the non-UCC law of the state in which the property is located. See, e.g., Oregon v. Corvallis Sand and Gravel Co., 429 U.S. 363, 378-79 (1977). Likewise, the enforceability of mortgages (including the right and

---

[20] Although the rule is "the mortgage follows the note" when a mortgage note is assigned, some case law indicates that the converse is not true and that the mortgage note does not necessarily follow the mortgage if there is an attempted assignment of the mortgage alone or separate from the mortgage note. See, e.g., Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619, 623 (Mo. Ct. App. 2009) ("An assignment of the deed of trust separate from the note has no 'force.'"); Saxon Mort. Serv., Inc. v. Hillery, No. C-08-4357 EMC, 2008 WL 5170180, at *4-5 (N.D. Cal. Dec. 9, 2008) ("For there to be a valid assignment, there must be more than just assignment of the deed [of trust] alone; the note must also be assigned."); In re Wilhelm, 407 B.R. 392, 400-05 (Bankr. D. Idaho 2009); Kelley v. Upshaw, 39 Cal.2d 179, 192 (1952) ("In any event, Kelley's purported assignment of the mortgage without an assignment of the debt which is secured was a legal nullity."). This is consistent with the longstanding aspect of the "mortgage follows the note" rule that "the note and mortgage are inseparable; the former as essential, the latter as an incident." In re Bird, No. 03-52010-JS, 2007 WL 2684265, at *2-4 (Bankr. D.Md. Sept. 7, 2007).

[21] UCC Article 3, which applies to negotiable mortgage notes, does not apply to mortgages themselves because mortgages do not fit the definition of "negotiable instrument" in UCC § 3-104(a).

method to foreclose) is subject to all of the conditions precedent and requirements that are set forth in the particular mortgage itself and in all applicable state and local laws. Those conditions precedent and procedural requirements vary from mortgage to mortgage and from state to state. Thus, ownership of a mortgage (i.e., without notice to the mortgagor or the public, without judicial proceedings (where required), without satisfaction of other conditions precedent or procedural requirements in the mortgage itself or in applicable state law), does not always give the holder of the mortgage the legal ability to foreclose on the mortgage. Though a discussion of the other necessary prerequisites to foreclosure is beyond the scope of this paper, the fact that other steps may need to be taken by the owner of a mortgage note, or the owner of a mortgage, is neither unique nor surprising in our legal and regulatory system and does not diminish an otherwise legally effective transfer of the mortgage note and mortgage.

How Does the Use of MERS Affect These Issues?

The use of MERS as the nominee for the benefit of the trustee and other transferees in the mortgage loan securitization process has been a subject of litigation in recent years. See, e.g., Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619, 623 (Mo. Ct. App. 2009). Some cases address the authority or ability of MERS or transferees of MERS to foreclose on a mortgage for which MERS is or was the mortgagee of record. See, e.g., Saxon Mort. Serv., Inc. v. Hillery, No. C-08-4357 EMC, 2008 WL 5170180, at *4-5 (N.D. Cal. Dec. 9, 2008). As a general matter, the assignment and transfer of a mortgage to MERS as nominee of and for the benefit of the beneficial owner of the mortgage does not adversely impact the right to foreclose on the mortgage.

Decisions in many jurisdictions support this conclusion. See, e.g., In re Mortgage Elect. Registration Sys., Inc. (MERS) Litig., No. 2:09-md-2119, 2010 WL 4038788, at *8 (D. Ariz. Sept. 30, 2010) ("Plaintiffs have not cited any legal authority where the naming of MERS . . . was cause to enjoin a non-judicial foreclosure as wrongful."); Commonwealth Property Advocates, LLC v. Mortgage Elect. Registration Sys., Inc., No. 2:10-CV-340 TS, 2010 WL 3743643, at *3 (D. Utah Sept. 20, 2010) (MERS as nominee has authority to foreclose); Taylor v. Deutsche Bank Nat'l Trust Co., No. 5D09-4035, 2010 WL 3056612, at *3 (Fla. App. Aug. 6, 2010) ("[T]he written assignment of the note and mortgage from MERS to Deutsche Bank properly transferred the note and mortgage. . . . The transfer, moreover, was not defective by reason of the fact that MERS lacked a beneficial ownership interest in the note at the time of the assignment, because MERS was lawfully acting in the place of the holder and was given explicit and agreed upon authority to make just such an assignment."); Mortgage Elect. Registration Sys., Inc. v. Bellistri, No. 4:09-CV-731 CAS, 2010 WL 2720802, at *15 (E.D. Mo. July 1, 2010) ("[a]s the nominee of the original lender ... or the lender's assigns, MERS has bare legal title to the note and deed of trust securing it, and this is sufficient to create standing" to initiate foreclosure proceedings); Silvas v. GMAC Mortgage, LLC, No. CV-09-265-PHX-GMS, 2009 WL 4573234, at *8 (D. Ariz. Jan. 5, 2010) (MERS empowered to foreclose where MERS is designated on deed of trust as beneficiary); Diessner v. Mortgage Elec. Registration Sys., 618 F. Supp. 2d 1184, 1187-91 (D. Ariz. 2009) (MERS and trustee under deed of trust are authorized to institute non-judicial foreclosure proceeding); Jackson v. Mortgage Elec. Registration Sys., Inc., 770 N.W.2d 487, 501 (Minn. 2009) (rejecting argument that transfer of mortgage note to MERS is a transfer that must be recorded before foreclosure); Reynoso v. Paul Financial, LLC, No. 09-3225 SC, 2009 WL 3833298, at *2 (N.D. Cal. Nov. 16, 2009) (naming of MERS as initial beneficiary under deed of trust, as nominee for the lender, and the subsequent transfer of the deed of trust from MERS to a transferee was effective and did not hinder transferee's right to foreclose); Blau v. America's Servicing Co., No. CV-08-773, 2009 WL 3174823, at *8 (D. Ariz. Sept. 29, 2009) (MERS authorized under deed of trust to act on behalf of lender and transfer its interests); Farahani v. Cal-Western Recon. Corp., No. 09-194, 2009 WL 1309732, at *2-3 (N.D. Cal. May 8, 2009) (MERS authorized to pursue non-judicial foreclosure action); Vazquez v. Aurora Loan Servs., No 2:08-cv-01800-RCJ-RJJ, 2009 WL 1076807, at *1 (D. Nev. Apr. 20, 2009) (loan documents sufficiently demonstrate MERS' standing "with respect to the loan and the foreclosure"); Pfannenstiel v. Mortgage Elect. Registration Sys., Inc., No. CIV S-08-2609, 2009 WL 347716, at *4 (E.D. Cal. Feb. 11, 2009) (dismissing plaintiff's claim that MERS lacked authority to foreclose); Trent v. Mortgage Elect. Registration Sys., Inc., 288 Fed. App'x 571, 572 (11th Cir. 2008) (MERS "has the legal right to foreclose on the debtors' property" and "is the mortgagee"); Peyton v. Recontrust Co., No. TC021868, Notice of Ruling, at 2 (Cal. Super. Ct. County of Los Angeles S. Cent. Dist. Oct. 15, 2008) (MERS may foreclose under California law); Johnson v. Mortgage Elect. Registration Sys., Inc., 252 Fed. App'x 293, 294 (11th Cir. 2007) (summary judgment for MERS on its action for foreclosure of plaintiff's property); In re Smith, 366 B.R. 149, 151 (Bankr. D. Colo. 2007) (MERS has standing to conduct foreclosure on behalf of the beneficiary); Mortgage Elect. Registration Sys., Inc. v. Revoredo, 955 So.2d 33, 34 (Fla. Dist. Ct. App. 2007) ("Because, however, it is apparent – and we so hold – that no substantive rights, obligations or defenses are affected by use of the MERS device, there is no reason why mere form should overcome the salutary substance of permitting the use of this commercially effective means of business."); Mortgage Elect. Registration Sys., Inc. v. Ventura, CV054003168S, 2006 WL 1230265, at *1 (Conn. Super. Apr. 20, 2006) (MERS is proper party in foreclosure).

There are several minority decisions that, in some form, have taken issue with MERS. But none of these decisions, to our knowledge, has invalidated a mortgage for which MERS is the nominee, and none of these decisions has challenged MERS' ability to act as a central system to track changes in the ownership and servicing of loans:[22] See Rinegard-Guirma v. Bank of Am., Nat'l Ass'n, No. 10-1065-PK, 2010 WL 3945476, at *4 (D. Or. Oct. 6, 2010) (suggesting that MERS may not qualify as a legitimate beneficiary of a deed of trust under Oregon law, and preliminarily enjoining foreclosure action by MERS); In re Allman, No. 08-31282-elp7, 2010 WL 3366405, at *10 (Bankr. D. Or. Aug. 24, 2010) (same); Mortgage Elec. Registration Sys., Inc. v. Saunders, 2 A.3d 289, 297 (Me. 2010); In re Box, No. 10-20086, 2010 WL 2228289, at *5 (Bankr W.D. Mo. June 3, 2010) (finding that MERS, as beneficiary and nominee under the deed of trust lacked authority to assign the mortgage note because it never "held" the note itself);[23] In re Hawkins, No. BK-s-07-13593-LBR, 2009 WL

---

[22] Some investors and loan servicers have sought to lessen the risk of challenges to foreclosure pertaining to MERS by assigning loans out of MERS and to the note holder prior to the initiation of foreclosure.

[23] The Court in In re Box expressly noted, but did not decide, the question of whether MERS had authority to assign the note as an agent of the lender or even as "a nominee beneficiary." In re Box, 2010 WL 2228289 at *4. The same court, in a later case, answered the question directly and found that MERS, as the designated "nominee for the lender and its assigns," "was the agent for [the lender] under the Deed of Trust from the inception, and MERS became agent for each subsequent note-holder under the Deed of Trust when each such note holder negotiated the Note to its successors and assigns." In re Tucker, No. 10-61004, 2010 WL 3733916, at *6 (Bankr. W.D. Mo. Sept. 20, 2010) ("[w]hen [note-holder] acquired the right to enforce the Note as the note-holder, MERS held the beneficial interest in the Deed of Trust on behalf of [note-holder] and [note-holder] had the right to enforce all the rights granted to [the original lender] and its successors and assigns in the Deed of Trust"). Thus, the Court found that the Note and the Deed of Trust were not split because of MERS' status as agent for the note holders. Id.

901766, at *3 (Bankr. D. Nev. Mar. 31, 2009) (finding that MERS was not a true "beneficiary" under a deed of trust, that, under the UCC, MERS was not entitled to enforce the note, and that "[i]n order to foreclose, MERS must establish there has been a sufficient transfer of both the note and deed of trust, or that it has authority under state law to act for the note's holder").[24]

Finally, it is important to recognize that the UCC does not displace traditional rules of agency law. See UCC § 1-103(b) ("Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law [of] . . . principal and agent . . . supplement its provisions."); see also UCC § 9-313 cmt. 3 (principles of agency apply for purposes of determining "possession" under Article 9). Under general agency law, an agent has authority to act on behalf of its principal where the principal "manifests assent" to the agent "that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006). Accordingly, the UCC does not prevent MERS or others, including loan servicers, from acting as the agent for the note holder in connection with transfers of ownership in mortgage notes and mortgages. See, e.g., In re Tucker, No. 10-61004, 2010 WL 3733916, at *6 (Bankr. W.D. Mo. Sept. 20, 2010) (finding MERS was the "agent for [the lender] under the Deed of Trust from the inception, and MERS became the agent for each subsequent note-holder under the Deed of Trust when each such note holder negotiated the Note to its successor and assign"); King v. Am. Mortgage Network, Inc., No. 1:09CV162 DAK, 2010 WL 3516475, at *3 (D. Utah Sept. 2, 2010) (rejecting argument that note and deed of trust were split because Fannie Mae held the note and MERS was listed as the nominal beneficiary under the deed of trust and finding that both MERS and the authorized loan servicer had authority as agents of the note holder to act on behalf of the note holder, including the initiation of foreclosure proceedings on the underlying property); Mich. Comp. Laws § 600.3204(1)(d) ("The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage."); Hilmon v. Mortgage Elect. Registration Sys., Inc., No. 06-13055, 2007 WL 1218718, at *3 (E.D. Mich. Apr. 23, 2007); Caravantes v. California Reconveyance Co., No. 10-cv-1407-IEG (AJB), 2010 WL 4055560, at *9 (S.D. Cal. Oct. 14, 2010) ("as servicer of the subject loan in this case, JP Morgan had the authority to record the Notice of Default and to enforce the power of sale under the Deed of Trust"); Birkland v. Silver State Fin. Servs., Inc., No. 2:10-CV-00035-KJD-LRL, 2010 WL 3419372, at *3 (D. Nev. Aug. 25, 2010) ("MERS, as nominee on a deed of trust, is granted authority as an agent on behalf of the nominator (holder of the promissory note) as to the administration of the deed of trust, which would include substitution of trustees"). In short, principles of agency law provide MERS and loan servicers another legal basis for their respective roles in the transfer of mortgage notes and mortgages.

[24] Some parties to litigation, and commentators, have relied upon the Kansas Supreme Court's decision in Landmark National Bank v. Kesler, 216 P.3d 158 (Kan. 2009), to support the proposition that the identification of MERS as a nominee on a mortgage is improper. However, reliance on the decision in Kesler for that proposition is misplaced and stretches the decision well-beyond its actual holding. In Kesler, the Court merely held that MERS, in its capacity as the nominee for the lender under a second-position mortgage, was not entitled to notice of a foreclosure sale by the holder of the senior mortgage. See id. at 169-70. As the Kansas Appeals Court that considered the case noted, "[w]hether MERS may act as a nominee for the lender, either to bring a foreclosure suit or for some other purpose, is not at issue…." Landmark Nat'l Bank v. Kesler, 192 P.3d 177, 180 (Kan. Ct. App. 2008).

4. Conclusion

In summary, the longstanding and consistently applied rule in the United States is that, when a mortgage note is transferred, "the mortgage follows the note." When a mortgage note is transferred and delivered to a transferee in connection with the securitization of the mortgage loan pursuant to an MBS pooling and servicing agreement or similar agreement, the mortgage automatically follows and is transferred to the mortgage note transferee, notwithstanding that a third party, including an agent/nominee entity such as MERS, may remain as the mortgagee of record. Both common law and the UCC confirm and apply this rule, including in the context of mortgage loan securitizations. The legal principles and processes discussed above provide for – and, if followed, result in – a valid and enforceable transfer of mortgage notes and the underlying mortgages. The transfer and legal effectiveness of mortgage notes and mortgages are not diminished by the fact that the enforceability of mortgages, including the right to foreclose, is subject to the conditions precedent and requirements that are set forth in the particular mortgage itself and in the laws of the state in which the mortgaged property is located.

American SECURITIZATION FORUM

ASF Headquarters | One World Financial Center, 30th Floor | New York, NY 10281 | 212.412.7100
www.americansecuritization.com

Mr. JOHNSON. Okay. Thank you, Mr. Deutsch.

And if the panel will allow me just a couple of seconds to consult.

Okay. Mr. Peterson, your testimony, please.

TESTIMONY OF CHRISTOPHER L. PETERSON, PROFESSOR, S.J. QUINNEY COLLEGE OF LAW, UNIVERSITY OF UTAH, SALT LAKE CITY, UT

Mr. PETERSON. Mr. Chairman, Ranking Member Smith, other Members of the Committee, thank you for the opportunity to testify.

If the long scope of history teaches us one single lesson, it is this: that, sooner or later, the powerful folks in society are going to come and try to take the land from the less powerful folks.That is an immutable lesson from history. And if you learn nothing else from it, that is the truth about the human species. And I think that that is what we are seeing today.

One of the first things that the European colonists that came over from Europe did, before they set up the United States Constitution, before freedom of speech, before separation of church and state, before any of our constitutional principles, all 13 original colonies passed land title recording statutes that established real property records in the control and custody of democratically elected county recorders or county officials.

So the people who got to decide who owned the land was the first thing that they set up. And they did that because, in Europe, there was an understanding that, sooner or later, the rich folks were going to come and try to take the land from the poor folks. And that legacy of certainty and real property ownership has been around in our country for a long time, and it is something that we have come to take for granted. We had that, and many other countries don't.

But in the 1990's, the mid-1990's, the Mortgage Banking Association decided that they no longer wanted to pay the fees that were required since the beginning of the Republic to record documents with county officials. So they decided to create a shell company that would pretend to own all of the mortgages in the country. That way, they would never have to pay another fee for recording an assignment as those mortgages changed hands in the process of securitization. And, overall, this wasn't going to save that much money, but on any given loan maybe they would save $200, $250, plus the hassle of recording.

And they did this without any permission from the State legislatures or without any authority from appellate courts that said that they could do that. This was a radical and fundamental change in the real property recording system.

The name of the company that does this is called MERS, or the Mortgage Electronic Registration System. It is one of the currents in the foreclosure crisis that really hasn't been played out in the press and it hasn't been discussed in Congress to the extent that I think it should. And my testimony is going to focus on that particular company.

First, I believe that MERS is an anti-democratic institution. It undermines not only the democratically elected county recorders and circumvents the democratically adopted State legislatures' land title statutes, but it also circumvents the States' rights by creating a shadow company that is owned by Wall Street banks and insiders and is operated outside of Washington, D.C., without any oversight from the Federal or State governments.

Second, I think that MERS is not only anti-democratic, it is deceptive, and it doesn't work well. Because there is so much legal uncertainty since they created a new legal system without any co-operation from legislatures, it is not clear whether or not their claims of owning mortgages are actually valid or will be ratified over the long term as State appellate courts look into it further.

Also, I would submit that the MERS system stymies modification of mortgages. Families that are in the foreclosure process oftentimes get a notice from this company called MERS and don't understand who it is or whether or not they can negotiate with that particular company. It makes it more difficult and more confusing for borrowers at precisely the time when they are most vulnerable, on the eve of foreclosure.

A couple of solutions that I would suggest for the Committee to consider:

It seems to me that Fannie Mae and Freddie Mac, as well as FHA and the VA and other Federal housing finance agencies, ought to stop buying mortgages that are recorded through this exotic and unprecedented system. We still have a legal system that is safe and reliable. Why is the Federal Government still buying mortgages that are recorded in untraditional ways? Not only does it ratify the undemocratically motivated initiatives of the financial services industry, but it also imposes risks on the taxpayers because it is not certain how these legal issues are going to be worked out.

I would also suggest to the Committee that we ought to consider some new ideas in trying to incentivize modifications. Here is one: Why don't we create a one-time emergency homestead exemption of $15,000 that allows the first $15,000 in proceeds of a foreclosure sale to go to the family as opposed to the servicer. It is a little bit like a compromise between the cram-down legislation that had been considered earlier, but it is much more simple. It would be easy to administer.

The first $15,000 in proceeds goes to the homeowner. That creates incentive for the homeowner to not drag their feet and fight out long foreclosure battles because there is $15,000 that they can spend on getting a deposit on a new apartment and the first month's rent and getting the kids in a new school. Also, it creates some real incentives for servicers and the investors to really get serious about modifying mortgages.

And, unlike the HAMP program, it doesn't cost taxpayers a dime. Congress could do this with its Commerce Clause authority, I believe. And it would be a real meaningful fuel injector in the foreclosure system that might actually do some good, whereas the current programs are not doing any good and are failing.

Thanks for your time.

[The prepared statement of Mr. Peterson follows:]

PREPARED STATEMENT OF CHRISTOPHER L. PETERSON

S.J. QUINNEY
COLLEGE OF LAW
THE UNIVERSITY OF UTAH

United States House of Representatives
Committee on the Judiciary

Hearing on: "Foreclosed Justice: Causes and Effects of the Foreclosure Crisis"

Written Testimony of

Christopher L. Peterson
Associate Dean for Academic Affairs and Professor of Law
University of Utah, S.J. Quinney College of Law
Salt Lake City, Utah

December 2, 2010
10:00 a.m.

It is an honor to appear today before this Committee. Thank you for the opportunity to share some thoughts on our national foreclosure crisis. My name is Christopher Peterson and I am the Associate Dean for Academic Affairs and a Professor of Law at the University of Utah where I teach contract and commercial law classes. I commend you, Chairman Conyers, Representative Smith, and other members of the Committee for organizing these hearings and for providing an opportunity to discuss this important and timely national issue.

The foreclosure crisis is an extremely complex problem. With so many fundamental changes, opportunities for moral hazard, agency cost problems, consumer abuses, and impending lawsuits, it is easy to lose track of some of the basic legal and business practice problems that departed from past traditions and helped bring us to our present situation. In particular, it is somewhat perplexing that relatively little attention has been paid to the one company that has been a party in more problematic mortgage loans than any other institution. Mortgage Electronic Registration Systems, Inc., commonly known as MERS, is a corporation registered in Delaware and headquartered in Reston, Virginia.[1] MERS operates a computer database that includes some information on servicing and ownership rights of mortgage loans.[2] Originators, servicers, and other financial institutions pay membership dues and per-transaction fees to MERS in exchange for the right to use and access MERS records.[3] In addition to operating its computer database, MERS also pretends to own mortgage loans in order to help its members avoid paying fees to county governments.

My testimony is largely derived from two scholarly articles I have written on this topic which I invite the committee to review for further information.[4] My prepared statement today will: (1) discuss the Origin and Business Practices of MERS; (2) explore the problematic legal foundation of MERS; (3) suggest that MERS is a deceptive and anti-democratic institution designed to deprive county governments of revenue; (4) explain how MERS is undermining mortgage loan and land title record keeping; (5) argue that MERS was a contributing factor in the foreclosure crisis and has made resolving foreclosures more difficult; and (6) propose some solutions for the committee to consider.

I. The origins and Business Practices of MERS

Since the founding of the American republic each county in the United States has maintained records of who owns the land within that county.[5] Most states have tracked changes in ownership of land, including mortgages and deeds of trust, by maintaining records indexed through the names of

1. Carson Mullen, *MERS: Tracking Loans Electronically*, MORTGAGE BANKING, May 31, 2000, at 63.
2. Howard Schneider, *MERS Aids Electronic Mortgage Program*, MORTGAGE BANKING, Jan. 1, 1997, at 42.
3. *Id.*
4. Both articles are available for download free of charge: Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System,* 78 U. OF CINCINNATI LAW REVIEW 1359 (2010) (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1469749&download=yes); and Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory,* REAL PROPERTY, PROBATE AND TRUST LAW JOURNAL (*forthcoming* 2010) (public working draft available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684729).
5. PATTON AND PALOMAR ON LAND TITLES § 4 (3d ed. 2003).

grantors and grantees.[6] These grantor-grantee indexes allow individuals and businesses contemplating the purchase of land to investigate (or hire a title insurer to investigate) whether a seller or mortgagor actually owns the land they are offering for sale or mortgage. Communities have traditionally elected their county recorders or registers of deed, providing an important democratic check and balance in the preservation of property rights. A public, enduring, authoritative, transparent record of all land ownership provides a vital information infrastructure that has proven indispensible in facilitating not only mortgage finance, but virtually all forms of commerce.[7] County real property records are the oldest and hitherto most stable metric tracking the "American dream" of family homeownership.

To facilitate this service, county recorders charge modest fees on documents they record. While there is considerable variety in amount and in the method of calculating these fees, a charge of about $35.00 for a mortgage is typical. County recorders use these fees to fund their offices as well as to contribute to county and state revenue. Some county's use real property recording fees to fund their courts, legal aid offices, schools, and police departments.

For centuries American mortgage lenders have eagerly recorded their mortgages loans with county recorders because of incentives created by state land title laws. For example, if a mortgagee fails to properly record its mortgage, and then someone subsequently buys or lends against the home, the subsequent purchaser can often take priority over the first mortgagee.[8] Similarly, where a mortgagee assigns a mortgage to an investor, that investor would eagerly record documentation reflecting the assignment to protect herself from the possibility that the original mortgagee would assign the same mortgage to a different investor.[9]

In the mid-1990s mortgage bankers decided they did not want to pay recording fees for assigning mortgages anymore.[10] This decision was driven by securitization—a process of pooling many mortgages into a trust and selling income from the trust to investors on Wall Street. Securitization, also sometimes called structured finance, usually required several successive mortgage assignments to different companies. To avoid paying county recording fees, mortgage bankers formed a plan to create one shell company that would pretend to own all the mortgages in the country—that way, the mortgage bankers would never have to record assignments since the same company would always "own" all the

---

[6] 14 POWELL ON REAL PROPERTY §82.03[2][b].

[7] Gary A Jeffress & Lynn C. Holstein, *An International Survey of Real Property Recording Costs and Some Characteristics: A Preliminary Evaluation*, 5 URISA J. 53, 53 (1993) (international survey suggesting recording systems are a "precondition of an efficient land market").

[8] POWELL ON REAL PROPERTY § 82.02[1][a].

[9] *See, e.g.*, Connecticut Mut. Life Ins. Co. v. Talbot, 14 N.E. 586 (Ind. 1887) ("It is settled everywhere that unrecorded assignments of mortgages are void as against subsequent purchasers, whose interests may be affected thereby, and whose conveyances are duly recorded, provided such assignments are embraced by the recording acts."); Bacon v. Van Schoonhoven, 42 Sickels 446, 1882 WL 12538 (N.Y. 1882) ("The assignments of the . . . mortgage are also conveyances within the act. This is well settled by authority, and such assignments, if not recorded, are void, not merely as against subsequent purchasers of the same mortgage, but also as against subsequent purchasers of the mortgaged premises, whose interests may be affected by such assignments, and whose conveyances are first recorded.")

[10] Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 ID. L. REV. 805, 810-12 (1995) (describing an Ernst & Young study commissioned by mortgage banker to study how much money they could avoid paying to county governments through the MERS system).

mortgages.[11] They incorporated the shell company in Delaware and called it Mortgage Electronic Registration Systems, Inc.[12]

Even though not a single state legislature or appellate court had authorized this change in the real property recording, investors interested in subprime and exotic mortgage backed securities were still willing to buy mortgages recorded through this new proxy system.[13] Because the new system cut out payment of county recording fees it was significantly cheaper for intermediary mortgage companies and the investment banks that packaged mortgage securities. Acting on the impulse to maximize profits by avoiding payment of fees to county governments much of the national residential mortgage market shifted to the new proxy recording system in only a few years. Now about 60% of the nation's residential mortgages are recorded in the name of MERS, Inc. rather than the bank, trust, or company that actually has a meaningful economic interest in the repayment of the debt.[14] For the first time in the nation's history, there is no longer an authoritative, public record of who owns land in each county.

MERSCORP, Inc., a company closely affiliated with MERS, Inc., now maintains an electronic database that tracks mortgage servicing rights—the right of a company to collect monthly payments on behalf of the actual economic owner or owners of a loan. Instead of paying county governments, financial institutions pay MERSCORP membership fees and per transaction fees for access to the MERS database and to compensate MERS, Inc. for pretending to own the mortgages these financial institutions register on the MERSCORP database.[15] Sometimes MERSCORP also tracks ownership rights—that is actual assignments—but only if investors willingly volunteer this information.[16] Financial institutions have been cavalier about informing MERSCORP of changes in servicing and ownership rights of mortgages because they believe there are no legal penalties for neglecting to make this information available.

II. The problematic legal foundation of MERS

MERS's rights vis-à-vis mortgages registered on the MERSCORP database have created a conundrum for courts, borrowers, and foreclosure attorneys. In boilerplate security agreements included in mortgages around the country, lenders included this clause:

---

[11] Peterson, *Foreclosure, supra* note 4, at 1368-73; Howard Schneider, *MERS Aids Electronic Mortgage Program*, MORTGAGE BANKING, January 1, 1997.

[12] Howard Schneider, *MERS Aids Electronic Mortgage Program*, MORTGAGE BANKING, January 1, 1997; Carson Mullen, *MERS: Tracking Loans Electronically,* MORTGAGE BANKING, May 31, 2000, 62.

[13] Peterson, *Foreclosure supra* note 4, at 1368-73. At least one state, Minnesota, later explicitly authorized MERS recording by amending its recording act to expressly permit nominees to record "[a]n assignment, satisfaction, release, or power of attorney to foreclose." Act of Apr. 6, 2004, ch. 153, § 2, 2004 Minn. Laws 76, 76-77 (codified at Minn.Stat. § 507.413 (2008)). *See generally* Jackson v. Mortgage Electronic Registration Systems, Inc., 770 N.W.2d 487 (Minn. 2009) (interpreting this statute). However, this legal change was not enacted until long after financial institutions had already been using the MERS system in that state. Similar changes have not been enacted nationwide.

[14] Kate Berry, *Foreclosures Turn Up Heat on MERS*, AM. BANKER, July 10, 2007, at 1.

[15] Howard Schneider, *MERS Aids Electronic Mortgage Program*, MORTGAGE BANKING, January 1, 1997. Unlike mortgage loan servicers, which are compensated for foreclosure services, MERS does not receive any compensation for assisting in foreclosures. Deposition of R. K. Arnold, Henderson v. MERSCORP, INC., et al., CV-08-900805.00, Circuit Court for Montgomery County Alabama, September 25, 2009, at 88 (hereinafter: Arnold Deposition).

[16] Financial institutions have not reliably updated the MERS maintained database when they assign loans to businesses that are not members of the MERS system. *See* In re Hawkins, 2009 WL 901766, at n.35 (B.D.Nev).

> "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is *acting solely as nominee for Lender* and Lender's successors and assigns. ***MERS is the mortgagee*** under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.[17]

This passage, and a similar passage naming MERS the beneficiary in deeds of trust, is confusing to courts, borrowers, and even foreclosure attorneys. On the one hand, MERS purports to be acting as a nominee—a form of an agent. On the other hand, it also is claiming to be an actual mortgagee, which is to say an owner of the real property right to foreclose upon the security interest. It is axiomatic that a company cannot be both an agent and a principal with respect to the same right.[18] In litigation all across the country, attorneys representing MERS frequently take inconsistent positions on the legal status of the company, depending on the legal issue at hand.

Both the MERS-as-an-agent and the MERS-as-an-actual mortgagee theories have significant legal problems. If MERS is merely an agent of the actual lender, it is extremely unclear that it has the authority to list itself as a mortgagee or deed of trust beneficiary under state land title recording acts. These statutes do not have provisions authorizing financial institutions to use the name of one shell company instead of all the actual owners of interests in land. After all, the point of these statutes is to provide a transparent, reliable, record of actual—as opposed to nominal—land ownership. It is legally unclear that recording a mortgage with MERS listed as a mortgagee is sufficient to create a perfected security interest. A basic objective in recording mortgages is to establish priority *vis-à-vis* other lenders, lienors, and buyers. With the exception of Minnesota, every state land title act—the statutes that set out the rules granting priority through recording—was written <u>before</u> MERS came into being. The legislatures that drafted these statutes did not contemplate the possibility that every lender in the country would record their loans in the name of one shell company owned by banks. State supreme courts are currently free to decide that recording in the name of this proxy-mortgagee-shell-company does not perfect the mortgage. Will state Supreme Court's insist on transparent real-party-in-interest recording in this context? Before the financial crisis and all of the documentation problems our country is facing emerged, perhaps it appeared to be a safe bet. But now, it is much less certain that state appellate courts will allow the finance industry to get away with this power grab that privatizes the centuries old public record keeping system.

Counsel for MERS will no doubt continue to point to the occasional case from our history where one court or another has allowed some form of recording with some unusual agency relationship involved. They will say that these occasional cases prove their concept is "legal." But the committee should step back and think about this claim for a moment. Is there <u>really</u> a case that proves that their concept is legal? No. The concept was totally new in the history of the country so there will be no facts that could have given rise to binding case law. Every case the MERS points to will have the potential to be distinguished by a state Supreme Court that believes its legislature did not authorize this type of

[17] Mortgage Electronic Registration Systems, Inc. v. Bluming, No. GD05-16795, Civil Division, Court of Common Pleas of Allegheny County, PA, slip op. (May 31, 2006) (J. Timothy Patrick O'Reilly).
[18] Restatement (Third) of Agency Law §§1.01, 1.02.

change to the system. And those courts will be on solid ground because—let's be honest—state legislatures simply did not willfully grant permission for this radical change in recording. The land title statutes contemplate recording by many different actual mortgagee's and deed of trust beneficiaries, not by one single a shell company that stands in the place of the entire industry. Counsel for MERS will not find a case that binds a state supreme court to hold otherwise. The truly conservative position on these cases will be to insist that radical changes to the legislatures' land title acts be made by legislatures, not by industry trade associations. Some state Supreme Court justices are likely to resent turning over the county recorders' democratically maintained recording system enshrined in law by the democratically elected legislature to a bank-owned shell company.

Conversely, if MERS is actually a mortgagee, then while it may have authority to record mortgages in its own name, both MERS and financial institutions investing in MERS-recorded mortgages run afoul of longstanding precedent on the inseparability of promissory notes and mortgages. Since the 19^{th} century a long and still vital line of cases has held that mortgages and deeds of trust may not be separated from the promissory notes that create the underlying obligation triggering foreclosure rights.[19] These cases do not merely hold that mortgages follow notes as a matter of default law, but that mortgages cannot legally be separated from notes. Thus, in Carpenter v. Longan the United States Supreme Court announced the classic statement of this rule: "the note and mortgage are *inseparable*…,

---

[19] *In* re Bird, 2007 WL 2684265, at ¶¶ 2-4 (Bkrtcy.D.MD. 2007) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. . . . It is equally absurd to assume that such bifurcation was intended because such a bifurcation of the note from the deed of trust would render the debt unsecured."); *In re Leisure Time Sports, Inc.* 194 B.R. 859, 861 (9th Cir.1996) (stating that "[a] security interest cannot exist, much less be transferred, independent from the obligation which it secures" and that, "[i]f the debt is not transferred, neither is the security interest"); In re BNT Terminals, Inc., 125 B.R. 963 (Bankr. N.D. Ill. 1990) ("An assignment of a mortgage without a transfer of the underlying note is a nullity. . . . It is axiomatic that any attempt to assign the mortgage without transfer of the debt will not pass the mortgagee's interest to the assignee."); Yoi-Lee Realty Corp. v. 177th Street Realty Associates, 208 A.D.2d 185, 626 N.Y.S.2d 61, 64 (N.Y.A.D. 1 Dept.,1995) ("The mortgage note is inseparable from the mortgage, to which the note expressly refers, and from which the note incorporates provisions for default."); In re AMSCO, Inc., 26 B.R. 358, 361 (Bkrtcy. Conn., 1982) (reaffirming that "[t]he note and mortgage are inseparable"); Barton v. Perryman, 577 S.W.2d 596, 600 (Ark., 1979) ("[A] note and mortgage are inseparable."); Trane Co. v. Wortham, 428 S.W.2d 417, 419 (Tex. Civ. App. 1968) ("The note and mortgage are inseparable. . . ."); Kirby Lumber Corp. v. Williams, 230 F.2d 330, 333 (5^{th} Cir. 1956) ("The rule is fully recognized in this state that a mortgage to secure a negotiable promissory note is merely an incident to the debt, and passes by assignment or transfer of the note. * * * The note and mortgage are inseparable. . . ."); *Kelley v. Upshaw,* 39 Cal.2d 179, 192, 246 P.2d 23 (1952) ("In any event, Kelley's purported assignment of the mortgage without an assignment of the debt which is secured was a legal nullity."); Hill v. Favour, 52 Ariz. 561, 84 P.2d 575 (Ariz. 1938) ("The note and mortgage are inseparable; the former as essential, the latter as an incident.)"; Denniston v. C.I.R., 37 B.T.A. 834, 1938 WL 373 (B.T.A. 1938) ("All the authorities agree that the debt is the principal thing and the mortgage an accessory. . . The mortgage can have no separate existence."); West v. First Baptist Church of Taft, 123 Tex. 388, 71 S.W.2d 1090, 1098 (Tex. 1934) ("The trial court's finding and conclusion ignore the settled principle that a mortgage securing a negotiable note is but an incident to the note and partakes of its negotiable character. . . . The note and mortgage are inseparable; the former as essential, the latter as an incident.") (citations omitted); First Nat. Bank v. Vagg, 65 Mont. 34, 212 P. 509, 511 (Mont. 1922) ("A mortgage, as distinct from the debt it secures, is not a thing of value nor a fit subject of transfer; hence an assignment of the mortgage alone, without the debt, is nugatory, and confers no rights whatever upon the assignee. The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while the assignment of the latter alone is a nullity. The mortgage can have no separate existence.") (citations omitted); Southerin v. Mendum, 5 N.H. 420, 1831 WL 1104, at ¶ 7 (N.H. 1831) ("[T]he interest of the mortgagee is not in fact real estate, but a personal chattel, a mere security for the debt, an interest in the land inseparable from the debt, an incident to the debt, which cannot be detached from its principal.").

the assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."[20]

This ruling by the Supreme Court is fundamentally in tension with MERS' explanation of its ownership of mortgages. For instance, MERS has stated:

> Mortgage Electronic Registration systems, Inc. (MERS) gets its authority to assign and/or discharge a mortgage because *MERS is the mortgagee*, and as such holds legal title to the mortgage. . . . The nominee language does not take away from the fact that *MERS is the mortgagee*.[21]

Ironically, trustees of residential mortgage backed securitization trusts *also* claim to own legal title to the same mortgages that MERS claims to own.[22] Anglo-American law includes no tradition that supposes *two different simultaneous legal titles* for the same interest in land. Moreover, if the mortgage and the note are "inseparable"[23] MERS cannot be the mortgagee unless it is also the original payee on the note. This is why the Maine Supreme Court recently held: "MERS is not a mortgagee... because it has no enforceable right in the debt obligation securing the mortgage."[24] Similarly the Kansas Supreme Court astutely recognized that MERS' legal position is incoherent when a unanimous court wrote:

> What meaning is this court to attach to MERS's designation as nominee for [the lender]? The parties appear to have defined the word in much the same way that the blind men of Indian legend described an elephant—their description depended on which part they were touching at any given time.[25]

III. MERS is a Deceptive and Anti-Democratic Institution

As a practical matter, the incoherence of MERS' legal position is exacerbated by a corporate structure that is so unorthodox as to arguably be considered fraudulent. Because MERSCORP is a company of relatively modest size, it does not have the personnel to deal with legal problems created by its purported ownership of millions of home mortgages. To accommodate the massive amount of paperwork and litigation involved with its business model, MERSCORP simply farms out the MERS, Inc. identity to employees of mortgage servicers, originators, debt collectors, and foreclosure law firms.[26] MERS invites financial companies to enter names of their own employees into a MERS webpage which

---

[20] Carpenter v. Longan, 83 U.S. 271, 274, (1872) (emphasis added).
21.Posting of Sharon Horstkamp, MERS General Counsel, http://www.mersinc.org/ forum/viewreplies.aspx?id=13&tid=73 (Apr. 8, 2004, 12:42PM) (emphasis added).
[22] For example, securitization pooling and servicing agreements will typical include language where a securitization depositor warrants that "the Mortgage Loan, including the Mortgage Note *and the Mortgage*, . . . [are]not subject to an assignment or pledge, and *the Depositor* had good and marketable title to and . . . *[is] the sole owner thereof*." CHASE MORTGAGE FINANCE CORPORATION, DEPOSITOR, JPMORGAN CHASE BANK, N.A., SERVICER AND WACHOVIA BANK, N.A., TRUSTEE POOLING AND SERVICING AGREEMENT, Dated as of November 1, 2005, $1,900,007,729.12, Multi-Class Mortgage Pass-Through Certificates Series 2005-A1, at § 3.01(l).
[23] Carpenter, 83 U.S. at 274.
[24] *Id.* at ¶ 15.
[25] *Id.* at 165-66.
[26] Arnold Deposition at 196-98; Mortgage Electronic Registration System, Inc., MERS Law Seminar for USFN Conference, 15-16 (April 21, 2002) (document on file with author) (providing a sample certifying officer resolution).

then automatically regurgitates boilerplate "corporate resolutions" that purport to name the employees of other companies as "certifying officers" of MERS.[27] These certifying officers also take job titles from MERS stylizing themselves as either assistant secretaries or vice presidents of the MERS, rather than the company that actually employs them. These employees of the servicers, debt collectors, and law firms sign documents pretending to be vice presidents or assistant secretaries of MERS, Inc. even though neither MERSCORP, Inc. nor MERS, Inc. pays any compensation or provides benefits to them. Astonishingly, MERS "vice presidents" are simply paralegals, customer service representatives, and foreclosure attorneys employed by other companies. MERS even sells its corporate seal to non-employees on its internet web page for $25.00 each.[28] Ironically, MERS, Inc.—a company that pretends to own about 60% of the nation's residential mortgages—does not have any of its own employees but still purports to have about twenty thousand assistant secretaries and vice presidents. This corporate structure leads to inconsistent positions, conflicts of interest, and confusion.[29]

Furthermore, it is important to take a step back for a moment to look at these relationships from the perspective of a confused, frightened homeowner teetering on the brink of foreclosure and possibly even homelessness.[30] How is a homeowner to understand with whom they can negotiate a settlement, or from whom to obtain additional information, or how to distinguish a legitimate employee of a legitimate company from the thousands of mortgage related con artists and charlatans currently swirling around American families?[31] Congress' Consumer Credit Protection Act in general, and the Fair Debt Collection Practices title of that Act in particular, once took the position that even misleading (as opposed to false) representations had no place in the debt collection industry because of the great potential for consumer abuse and the threat to the American economy from undermining our collective faith in financial markets and institutions.[32] To effectuate this policy of transparency and honesty, misrepresentations and misleading statements are evaluated from the perspective of the "least sophisticated consumer" standard.[33] Unsophisticated consumers that receive communications from a MERS "vice president" or "assistant secretary" are likely to believe that this individual serves a different role in the foreclosure process than the individual actually does. Having foreclosure communications

---

[27] MERS, Corporate Resolution Request Form, www.mersinc.org/MersProducts/forms/crrf/crrf.aspx (last viewed: April 6, 2009).
[28] *Id.*
[29] *Compare* MERS Forum, FAQ with Sharon Horstkamp, MERS Vice President and Corporate Counsel, www.mersinc.org/forum/viewreplies.aspx?id=13&tid=73 last viewed June 9, 2004 ("Mortgage Electronic Registration systems, Inc. (MERS) gets its authority to assign and/or discharge a mortgage because *MERS is the mortgagee*, and as such holds legal title to the mortgage. ... The nominee language does not take away from the fact that *MERS is the mortgagee*.") (emphasis added); *with* Brief in Support of Defendant's Motion to Dismiss at 3, King v. Ocwen, Civil Action No. 07-11359, 2008 WL 2063553 (E.D.Mich, April 14, 2008) (arguing that MERS could not be liable for Fair Debt Collection Practices Act violations because "*HSBC was the mortgagee* for the property. Ocwen is the servicer for the property. [And,] MERS acted solely as the nominee for the original mortgagee of the property") (emphasis added).
30.*Clomon*, 988 F.2d at 1318 ("The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd. This standard is consistent with the norms that courts have traditionally applied in consumer-protection law.").
31.*See* John Leland, *Swindlers Find Growing Market in Foreclosures,* N.Y. TIMES, Jan. 15, 2009, at A1; Vivian S. Toy, *Penetrating the Maze of Mortgage Relief*, N.Y. TIMES, June 14, 2009, at RE1; Riva Richmond, *Online Scammers Target the Jobless,* N.Y. TIMES, Aug. 6, 2009, at B6.
32.15 U.S.C. § 1692(a) ("There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."); *id.* § 1692(c) ("Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.").
33.*See Clomon*, 988 F.2d 1314; Gammon v. GC Servs. Ltd. P'ship, 27 F.3d 1254 (7th Cir. 1994).

conducted in MERS's name may lead consumers to believe that the servicer has turned the case over to a quasi-official entity that lacks the authority to negotiate loan modifications, short sales, or settlements. The effect could be to pacify the consumer at the point they are most likely to resist through actively litigating (often in a pro se capacity) their all too often legitimate counterclaims and defenses. Indeed, this is precisely the sort of deception targeted by Congress' statute promoting "fair" debt collection.

A fair critique of MERS must include recognition of the dated, expensive, and sometimes cumbersome nature of county real property records systems. Unlike the relatively homogenous personal property lien recording systems governed by Article 9 of the UCC, the National Conference of Commissioners on Uniform State Laws and the American Law Institute have not been able to prevail on state legislatures to standardize real property mortgage and recording laws. Moreover, unlike personal property lien records, which are usually maintained by a secretary of state, real property records are generally maintained by each county. This further diversifies recordkeeping standards and operating procedures. Even with the use of title insurer plant copies, recording and searching in county property records is time consuming, expensive, and often not especially reliable.[34] In contrast, MERS gives each loan a unique identifier, is accessible through the Internet, and is organized in one nationwide system.[35] That being said, many county recorders have rapidly improved their processes recently including over 480 jurisdictions that are now offering fully electronic recording of mortgages and mortgage assignments.

Still, the problem with MERS is not just about what MERS does wrong, but also what the process of creating MERS prevented. By taking the reformation of the county recording systems created by state law upon itself, MERS and the mortgage finance industry circumvented the state and national debate that normally precedes significant legislative change. The MERS system, while digital and nationwide in scope, is not equally available to all. It has given a single corporation the opportunity to grant special "vice president" status to its favored side in foreclosure disputes. It has been manipulated into a device to make foreclosure easier and more anonymous for financiers. The financial industry could have channeled its dissatisfaction with county property records into a campaign for legal reform. This would have necessitated a debate where consumers, county officials, researchers, poverty advocates, and anyone else could have participated. If the finance industry put its formidable legislative muscle behind a public reformation of county recording systems fifteen years ago, perhaps today we would have a national system maintained by a federal regulator, or statewide systems supported by a new article of the UCC. Instead financiers chose to act alone, creating an entirely new system that competes financially with public records, undermines the accuracy of public records, and was never authorized by the elected leaders that guide a republican system of law.

In a moment of refreshing candor, not long ago MERS' President concluded an extolling public relations piece with the acknowledgment that "MERS is owned and operated by and for the mortgage

34. 14 POWELL ON REAL PROPERTY § 82.03[2].
35. R.K. Arnold, *Yes, There is Life on MERS*, 11 Prob. & Prop., July/Aug. 1997, at 32, 35.

industry."[36] It is ironic, and perhaps not coincidental, that the syntactical form of the sentence bears such close resemblance to President Lincoln's Gettysburg address. One will no doubt recall that Americans have generally aspired to "government 'of the people, by the people, for the people,'" rather than of, by, and for the mortgage bankers.[37] MERS's attempt to "capture every mortgage loan in the country"[38] is an effort to supplant the public land title recording systems' lien records, many of which predate the Constitution itself, with a purely private system. This effort is without question a surrender of the messy compromises inherent in representative democracy to the seductively easy lure of mercantile oligarchy. Perhaps those of us with romantic attachments to our Republic and the rule of law will be excused for supposing that if the mortgage bankers wanted a newer, more efficient, national land title recording system, they should have asked Congress or the legislatures first.

IV. MERS is Undermining Mortgage Loan and Land Title Record Keeping

MERS describes itself as "an innovative process that . . . eliminates the need to prepare and record assignments when trading residential and commercial mortgage loans."[39] The phrase, which the company uses both in legal briefs and public relations material, hints that recording assignments was merely some useless, archaic formality. It is far from clear that state appellate courts will agree that MERS does eliminate the need to record assignments. But even if MERS does eliminate the need to record, it most certainly does not eliminate the need for records. The policy justifications behind recording statutes are as germane today as they were hundreds of years ago when the first American colonies began adopting the statutes. While some of the processes of keeping records may have become dated, the *law itself* has not. Society needs an authoritative, transparent source of information on who owns land in order to protect property rights, encourage commerce, expose fraud, and avoid disputes. Recent case law is beginning to show gathering judicial skepticism regarding the privatized record keeping system that is displacing public county systems.

Apologists for MERS argue that so long as MERS' name is recorded in county records as a lien holder, prospective purchasers will be on notice that they must inquire further before lending against or buying the land. But who exactly are these purchasers to consult? MERS has maintained a toll free phone number where homeowners are allowed to inquire who holds the servicing rights to their mortgage.[40] But, as the recent "robo-signer" stories and examples of wrongful foreclosures in the press have shown, servicers themselves do not always have accurate records of their own. And even if they did, talking to mortgage servicing company customer service representatives, whose business incentives focus on cutting costs, is often unproductive, slow, and unreliable.[41] Moreover, in recent years mortgage servicing and origination companies have frequently become insolvent. Even federally insured

36. *Id.* at 36.
37. GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 145 (1992).
38. Arnold, *supra* note 34, at 1.
39 Welcome to MERS, www.mersinc.org (last visited Sept. 17, 2010).
40 Welcome to MERS for Homeowners, http://www.mersinc.org/homeowners/index.aspx#3 (last visited Sept. 17, 2010) (the current phone number is 888-679-6377).
41 *See* Kathreine M. Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121 (2008).

banks have been collapsing by the hundreds.[42] After seeing loan after loan in her court room with incomplete documentation and incoherent transactional records, Judge Jennifer Bailey, a Circuit Court Judge in Miami recently stated:

> [T]here are 60,000 foreclosures filed last year. Every single one of them— . . . almost every single one of them—represents a situation where the bank's position is constantly shifting and changing because they don't know what the Sam Hill is going on in their files.[43]

That MERS maintains a database of servicing rights simply does not provide a commercially reliable, authoritative source of lien information because servicers, who are in business to make profit through providing financial services, do not have an incentive to maintain permanent, transparent, publically available records of mortgage ownership.

MERS also does not reliably track beneficial ownership rights of the mortgages registered on its system. Recall that MERS only maintains a database which its members can enter information upon if they want to.[44] When the beneficial ownership interest in a loan changes hands, such as through negotiation of a promissory note and a written assignment of the mortgage, the parties to that transaction can send an electronic message to MERS updating a field of information in the database. MERS calls this process an "electronic handshake."[45] But, unlike most county real property recorders, MERS does not keep digital or hard copies of documents that embody the agreement—making it much more difficult to track fraud and errors through the record keeping system. Even more troubling, MERS members are not legally bound to update this information on the database. In the words of the MERS' CEO, the system "is capable of being used to track [beneficial ownership interests] if the members utilize it for that reason."[46] But, if the MERS members choose not to use the database to reveal themselves, MERS does not investigate further or otherwise insist that members actually use this feature of the database. Instead, MERS leaves this to the "business model" of the financial institution.[47] When asked whether MERS expects financial institutions to update the MERS database regarding changes in loan ownership, the company's CEO replied, "not so much. . . ."[48] Moreover, MERS does not keep track of what entity is in physical possession of the promissory note. Because the mortgage follows the note, the MERS system does not reveal who true current owner of the mortgage is.

---

[42] Over 250 banks have failed since 2008. Federal Deposit Insurance Corporation, Failed Banks List, available at: http://www.fdic.gov/bank/individual/failed/banklist.html (Sept. 17, 2010).

[43] HSBC Bank USA, NA as Trustee for Monura Asset Acceptance Corporation, Mortgage Pass-Through Certificates Series 2006-ARI v Eslava, Hearing Transcript on Order to Show Cause, No. 1-2008-CA-055313, at 5 (Fl 11th Cir. Ct., Miami-Dade County, May 6, 2010).

[44] Deposition of R. K. Arnold, Henderson v. MERSCORP, INC., et al., CV-08-900805.00, Circuit Court for Montgomery County Alabama, September 25, 2009, at 176 (hereinafter: Arnold Deposition).

[45] *Id.*

[46] Deposition of R. K. Arnold, Henderson v. MERSCORP, INC., et al., CV-08-900805.00, Circuit Court for Montgomery County Alabama, September 25, 2009, at 176 (hereinafter: Arnold Deposition) (on file with author).

[47] *Id.*

[48] The deposition transcript on this point reads:

> [Nicholas Wooten] Q: So whenever a transfer occurs of any interest, be it a beneficial interest in the promissory note or be it servicing interest, those you expect to be entered on the MERS system?
>
> [R.K. Arnold] A: It's not so much that we expect it. We operate a system that offers that capability."

Arnold Deposition at 178.

In a laudable, but ultimately anemic effort to respond to mounting criticism of the system's lack of transparency, MERS recently announced a new feature of its internet web page servicer identification system that allows borrowers to inquire as to the identity of a loan's investor. [49] However, the company's press release is somewhat misleading in that for securitized mortgages, MERS appears to only reveal the name of the securitization trustee, rather than the trust that is the true beneficial owner of most securitized loans. Private correspondence from MERS' communications manager explains that "the MERS® System only has the name of the trustee in the Investor field and does not capture information about the trust."[50] Learning the name of a borrower's securitization trustee does not allow the borrower to research the pooling and servicing agreement that controls a servicer's or trustee's authority to negotiate loan modifications. It also does not identify the name of the trust that could be held liable for purchasing loans that violate the Home Ownership and Equity Protection Act or other state predatory lending laws.[51] Even when the name of a securitization trustee is provided, unlike a search of the public recording system—a MERS search result is not a legally authoritative search upon which a searcher is entitled to rely in ruling out the possibility of other potential purchasers that could achieve priority in an ownership dispute under the state's land title statute. Rather it is simply a query to see whether any companies happened to have used an essentially optional "electronic handshake" to enter assignment information on a private database.

Furthermore, the MERS servicer identification system often does not produce any information on beneficial ownership of loans at all, instead giving the message: "Investor: This investor has chosen not to display their information. For assistance, please contact the servicer."[52] Note that this sentence is ambiguous as to whether MERS does not know who owns the loan or the owner of the loan actually refuses to be identified. The former is disturbing in that it illustrates that we as a society no longer have a record keeping system that actually tracks legally recognized ownership interest in land back to a root of title. The latter is disturbing because it reveals how the MERS system has abated an important legal incentive to provide public notice of land ownership interests.

Both updating the MERS database and publically recording a mortgage assignment are permissive choices for financial institutions. But, a key difference is that the public system was backed by strong legal incentives to encourage financiers to provide notice of assignments. In contrast, the MERS system—designed by and operated for the exclusive benefit of mortgage finance companies—deliberately undermines and altogether lacks that incentive. Under the still current (but presently circumvented) law of all fifty states, the owner of an interest in land may intentionally conceal herself, but does so at the risk of losing that ownership interest. In both notice and race-notice jurisdictions, if a mortgage assignee fails to record, and the assignor either intentionally or unintentionally assigns the same mortgage to a second, subsequent assignee who does record, then first assignee will lose

[49] Press Release, MERS Expands Website To Disclose Loan Investor Information, http://www.mersinc.org/newsroom/press_details.aspx?id=241 (July 16, 2010).
[50] Electronic Mail of Karmel Lejarde, MERSCORP, Inc. Communications Manager, Sept. 3, 3010, (copy on file with author).
[51] *See* Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 233-46 (2007) (summarizing mortgage loan assignee liability law).
[52] MERS Servicer Identification System Search for Servicer Information Search Results, September 6, 2010 (results available on file with author).

priority.[53] Where both assignees are using the MERS system, the only official recorded notice would be the original mortgage in the name of MERS. The MERS database may simply have no information on whether any assignments have taken place—leaving prospective investors (and courts adjudicating the conflicts that will develop) to speculate on who actually owned rights in the property. There is currently no legal penalty for failing to update the MERS database on changes in loan ownership that would incentivize financiers to avoid this situation. Because many mortgage companies in the boom years planned to sell their loans to investors, they focused on the short term commissions and profits from originating loans. They, quite frankly, did not bother with documentation that would preserve our national legacy of certainty in property rights. As a result, the MERS database does not provide reliable, authoritative information on legally cognizable beneficial ownership of loans registered in its system. County real property records that hold only a reference to the MERS system now have a systemic break in chains of title. Perhaps this is what MERS means by its corporate slogan: "Process Loans, Not Paperwork."[54]

The full risk of confusion and litigation from this system will not be known for years to come. But, the appellate courts that have been critical of the MERS system foretell further long term uncertainty surrounding property rights connected to MERS claims of ownership. For example, recognizing the implications of their own decision in *Landmark National Bank v. Kesler*, the Kansas Supreme court pointed out that "[i]n attempting to circumvent the statutory registration requirement for notice, MERS creates a system in which the public has no notice of who holds the obligation on a mortgage."[55] The Arkansas Supreme court went even further stating that "[p]ermiting an agent such as MERS purports to be to step in and act without a recorded lender directing its action would ***wreak havoc on notice in this state***."[56] And yet, that is precisely what the MERS system is designed to do. In the prototypical MERS as original mortgagee transactions *there are no recorded lenders.* [57] MERS is designed to be the cradle-to-grave notice proxy for all the half-dozen or so financial institutions and shell companies that hold title to the loan at different times—yet remain undocumented both in the public record and often on MERS' own database. We must recognize that our heritage of legal certainty in property rights created by the interaction of public recording systems and land title statutes is an important national economic resource that has been depleted by the MERS system.

V. MERS was a Contributing Factor in the Foreclosure Crisis and has Made Resolving Foreclosures More Difficult

[53] *See* 66 Am. Jur. 2d *Records and Recording Laws* § 162 (2010). *See, e.g.*, Second Nat. Bank of New Haven v. Dyer, 184 A. 386, 388-89 (Conn. 1936) ("That an assignment of a mortgage falls within the purview of the recording statute follows from the nature of such an instrument. . . . indeed to hold otherwise would make a serious inroad upon the policy of this state that purchasers of interests in real estate are entitled to rely upon the land records as disclosing the true title. . . .").
[54] *See* Welcome to MERS, www.mersinc.org (last visited Sept. 17, 2010).
[55] Landmark Nat. Bank v. Kesler, 216 P.3d 158,168 (Kan. 2009).
[56] Mortgage Elec. Registration System, Inc. v. Southwest Homes of Arkansas, 2009 Ark. 152, 301 S.W.3d 1 (Ark. 2009) (emphasis added).
[57] Some county recorders track the originating lender's name in addition to MERS' name when a mortgage is first recorded. But, once the mortgage is assigned, the name of the original lender is no longer useful and leads to a dead end in searching for actual ownership interest in the land.

While there is plenty of blame to go around, the MERS recording and foreclosure system was an additional contributing cause of the American mortgage foreclosure crisis. MERS facilitates "predatory structured finance"[58] by decreasing the exit costs of originators. As investment banks, hedge funds, institutional investors, and the credit rating agencies weighed the risks of dumping billions upon billions of dollars into mortgage securities drawn out of the balance sheets of thinly capitalized, bankruptcy-prone mortgage lenders, MERS provided an important additional inducement. In previous research, I have argued that in the run-up to the foreclosure crisis, mortgage origination companies were used as disposable liability filters.[59] When thinly capitalized originators churned out more and more securitized loans, claims against those lenders accumulated, while their assets did not.[60] Once the projected costs of disgruntled investor recourse demands and borrower predatory lending lawsuits exceeded the projected costs of bankruptcy and reformation under a new corporate guise, originator management would predictably discard their corporate identity.[61] MERS made this easier by offering a *super-generic placeholder* that transcended the aborted life of lenders. MERS reassured investors that even when an originator goes bankrupt, county property records would remain unaffected and foreclosure could proceed apace. By serving as the true mortgagee's proxy in recording and foreclosure, MERS abetted a fly-by-night, pump-and-dump, no-accountability model of structured mortgage finance.

Moreover, the use of MERS's corporate identity facilitates separation of foreclosure actions and litigation of predatory lending and servicing claims. When MERS (or more accurately servicers or foreclosure specialists acting in MERS's name) brings foreclosure actions, it justifies this entitlement based on a claim of legal ownership of mortgage liens. But when borrowers attempt to assert counterclaims challenging the legality of mortgage brokers, lenders, trusts, or servicers, MERS hides behind its claim of nominee status. One former mortgage lender has estimated that in the mid-2000s approximately 70% of brokered loan applications submitted to mortgage lenders involved some form of broker encouraged fraud.[62] Similarly, Professor Porter's study of mortgage loans in Chapter 13 bankruptcy found that residential mortgage creditors did not supply a promissory note in 41.1% of cases involving a home mortgage.[63] Because promissory notes are not supplied, nor where MERS is involved, is the actual identity of the note holder revealed, consumers and their counsel can verify neither the identity of the parties involved, nor even the amount of the debt in question. In an ordinary foreclosure, using MERS's name erects a tactical barrier to judicial resolution of these types of problems. MERS confuses and pacifies borrowers (and sometimes courts) at precisely the crucial moment: on the eve of foreclosure. Once a family looses their home, their leverage and appetite for litigation dissipate. The separation of predatory lending litigation from foreclosure litigation facilitated by bringing foreclosure in MERS's name decreases the costs of foreclosure and dulls the deterrent force of consumer protection law. MERS represents the mortgage finance industry's best effort to create a single, national foreclosure plaintiff that always has foreclosure standing, but never has foreclosure accountability.

---

[58] Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185 (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929118).
59. *Id.*, at 2275.
60. *Id.*
61. *Id.*
62. RICHARD BITNER, CONFESSIONS OF A SUBPRIME LENDER: AN INSIDER'S TALE OF GREED, FRAUD, AND IGNORANCE 45 (2008).
63. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 147 (2008).

Obviously MERS is not responsible for failings in the monetary and/or regulatory policy of the Federal Reserve Board.[64] The President and Congress could have intervened in the troubling trends toward unrealistic mortgage loans.[65] Mortgage brokers and lenders systematically strove for volume and commissions, rather than sustainable home ownership.[66] Federal banking regulators obstructed the efforts of state legislators and attorneys general to bring the market to heel.[67] The credit rating agencies rashly gave their seal of approval to the risky, complex, packaged and repackaged mortgage loan securities.[68] While MERS may have reassured investors of the viability of churned residential mortgage backed securities, it had little to do with the over-leveraging of hedge funds, bond insurers, or the government sponsored housing enterprises.[69] Recognizing MERS's role in facilitating the foreclosure crisis is not to ignore nor excuse these other causal factors. Nevertheless, it is a mistake to list the contributing factors associated with the crisis and omit MERS.

VI. Solutions

A. *Congress Should Bar the Federal Housing Entities From Purchasing Loans Recorded in MERS' Name.*

By allowing Fannie Mae, Freddie Mac, and Ginnie Mae to purchase MERS-recorded loans the federal government has inadvertently undermined sensible state land title laws and consumer protection. Moreover, irrespective of one's views of the benefits or disadvantages of MERS, the simple fact is that the system still faces significant costly legal uncertainty. Going forward Congress should bar the GSEs from digging the hole they are in deeper. Now that the risks of the MERS system are clear, it is time to require the GSEs to simply go back to the traditional system that they lived with since the Great Depression. Absent Congressional action, counsel for financial institutions, federal and state housing agencies, and title insurance companies need to take a candid, reflective look at the implications of mortgage bankers' efforts to usurp government control of real property records. Even those who prefer minimalist government must recognize that in a democratic republic divestment of this responsibility from government to industry should have occurred with the consent of elected representatives of the people. In this case, the early involvement of Fannie Mae and Freddie Mac—federally sponsored corporations that do deserve respect for their efforts to facilitate American homeownership –did not dispense with the sovereign right of state governments to control their own real property recording law. Laws for the states are made by the states, not by Government Sponsored Enterprises. Fannie Mae and

64. Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES, Sept. 6, 2009, at MM36.
65. Jo Becker et al., *White House Philosophy Stoked Mortgage Bonfire*, N.Y. TIMES, Dec. 21, 2008, at A1.
66. BITNER, *supra* note 62, at 181–82.
67. Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMPLE L. REV. 1, 96–97 (2005); Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More Than They Can Chew?*, 56 AM. U. L. REV. 515, 549–551 (2007).
68. Steven L. Schwarcz, *Understanding the Subprime Financial Crisis*, 60 S.C. L. REV. 549, 550–52 (2009).
69. Frederick Tung, *The Great Bailout of 2008–09*, 25 EMORY BANKR. DEV. J. 333, 336 (2009); Binyamin Appelbaum, et al., *How Washington Failed to Rein in Fannie, Freddie*, WASH. POST., Sept. 14, 2008, at A1.

Freddie Mac could take a step toward restoring national trust by stepping away from the MERS system and requiring traditional recording practices in qualified loans. With their many critics in Congress the last thing the GSEs need is to take on *more* political and legal risks associated with MERS. Paying recording fees on mortgage assignments is a wise legal and political investment.

Congress should also resist the temptation intervene in State real property law with a MERS "whitewash" bill that covers over the basic legal problems associated with the MERS system. Congress is only likely to make matters worse if it attempts to insert a small, inert pocket of preempted federal law for MERS within the fabric of the existing state commercial and property laws that include Article 3 and 9 of the Uniform Commercial Code, the state Land Title statutes, and state foreclosure laws. A whitewash bill is likely to have unforeseeable unintended consequences on state law. Moreover, the public is likely to resent such legislation as "legal bailout" designed to make it easier for a Wall Street-backed shell company to take homes away from families during a recession.

B. Congress Should Investigate Ways to Help States and Localities Improve the Efficiency and Uniformity of County Recording Systems

While land title law is and should remain a state and local issue, this is not to say that the federal government could not exert a positive influence by facilitating better and more uniform technology in county recording offices. Instead of allowing our democratically maintained real property records to be privitazed, Congress should do the hard work of supporting improvements in the infrastructure homeowners and industry rely upon for commerce in land. Congress could exercise real leadership by providing block grants to county governments to upgrade their recording technology in exchange for adopting uniform standards that help title insurance companies and mortgage finance companies more easily record and search the existing systems. Moreover, Congress could take one of the best features of the MERS system, its unique mortgage loan identification numbers, and instruct the HUD to make available federal unique identification numbers that could in turn be used by county recording systems and mortgage loan servicers alike in facilitating better record keeping.

Congress could task the GAO or HUD to produce recommendations on how to modernize the public county recording system. Alternatively, individual Congressional leaders could use their connections and persuasive authority to call upon the American Law Institute and the National Conference of Commissioners on Uniform State Laws to draft a model state legislation that upgrades the capabilities of and promotes uniformity in county recording offices.

C. Congress should Consider Adopting a Temporary Emergency Homestead Exemption Applicable to Mortgages in Favor of Residential, Owner-Occupied Homeowners.

Looking beyond the issues surrounding MERS, Congress needs to take a fresh look at ideas to help create more meaningful incentives for servicers to modify loans and for homeowners that cannot afford to stay in their homes to turn their properties over without protracted court battles. One exciting idea that merits further exploration would involve granting a temporary emergency homestead exemption applicable to mortgage loans in favor of owner-occupied borrowers.

In centuries past when the typical American family lived as subsistence farmers each household maintained a supply of seed grain. Living from harvest to harvest, the first portion of each crop went to replenish the supply of seed used to plant next season. One reason the finance crisis has been so terribly destructive is that it has wiped out the twenty-first century equivalent of middle class seed grain for millions of families.

Today, the typical American family gets by living from paycheck to paycheck. Although we do not generally use our homes to grow food, they are nevertheless one of our most productive resources. Homes are the indispensible base from which we enter the labor force. It is nearly impossible to be employed without a place to stay clean, feed ourselves, and rest. This is an important reason that so many families are fighting foreclosures tooth and nail—with the unintended consequences of delaying the reset in housing prices, casting legal uncertainty over financial markets, and suppressing demand for housing.

Families facing foreclosure need seed grain: cash to cover moving expenses, a deposit and first month's rent on a residential lease, or even a down payment on a less expensive home purchased with a new low, fixed interest rate mortgage. State legislatures—or even Congress—could help restart the housing market with a simple legal change that would not cost tax payers a dime. The government should pass emergency legislation providing that the first $15,000 from an owner occupied residential foreclosure sale must go to the departing family. In effect the proposal would act as a first priority "seed lien" in favor of the family.

While this concept is new, it is not unprecedented. Environmental law creates similar liens to cover the cost of cleaning up toxic waste. And the homestead laws of many states already exempt some of the value of a family's home from unsecured creditors, such as credit card companies. This emergency homestead exemption would do the same thing—albeit likely exempting less value—in the case of home mortgages loans. Plus, the law would only expand and solidify expectations surrounding the informal "cash-for-keys" polices the smartest lenders have used for generations. These lenders provided a modest amount of cash to the family in exchange for voluntarily turning over a foreclosed home in good condition. Congrees could make the law temporary with a sunset provision

These emergency laws would dramatically improve the housing market in several ways. First, cash from the proceeds of a foreclosure could convince many defaulting borrowers to turn over their homes without a fight. Many economists believe that the economy cannot turn around until the glut of foreclosures work their way through the system. Leaving fifteen thousand dollars for the family at the finish line would put fuel injectors on this process. Since so many mortgage companies cannot seem to find the records needed to foreclose, the value of cooperation from borrowers in cutting through the red tape should not be underestimated.

Second, an emergency homestead exemption on mortgages would create a stronger financial incentive for the mortgage industry to refinance delinquent loans. If the servicer knows that investors would be facing the automatic loss of fifteen thousand dollars after the foreclosure, it makes even more sense to cover the relatively modest price of underwriting a new mortgage up front.

While it is true that investors will bear the cost of this "seed lien," they may be facing these losses anyway. As it stands, millions of families are digging their heels in forcing lenders to spend thousands of dollars on attorneys' fees and dredging up lost records. We would all be better off if this money were just turned over to the families that need it instead of burned on lawyers in scorched earth legal battles.

But perhaps most importantly, mandating that each owner-occupied resident owns at least fifteen thousand dollars of liquid home equity would give families the seed grain they need to make a fresh start. As a society we simply cannot allow more families to fall into homelessness and despair. People that invested their dreams and life savings in a family home need to be able to take *something* away from the ashes of foreclosure.

In conclusion, thank you for work on behalf of American citizens in working to resolve these complex and important national problems.

Mr. JOHNSON. Thank you, Mr. Peterson.

This hearing has released to the public some very spectacularly devastating information about the mortgage industry in this country as it works: Mr. Kowalski, having put three people on death row in Florida as a criminal prosecutor, who is now handling mortgage fraud, foreclosure fraud cases, discovered back in 2003 the robo-call, the robo-signing phenomenon that has been quietly permeating the foreclosure process for perhaps years prior to that time. No telling how long. And then Mr. Cox having uncovered from the master robo-signer—or the current master robo-signer—his practices, which are fully in keeping with GMAC mortgage practices, just devastating.

And then Ms. Hines, to put the human face on how this drama affects people, real human beings and real families. And Ms. Fluker coming forward with testimony about Fannie Mae and Freddie Mac and how the taxpayers ultimately are on the hook for the full value of these mortgages even though the collateral now is not worth the paper that it is written on, in some cases.

And then Mr. Deutsch having some expertise in how this system works. And Mr. Peterson then coming forward from the early annals of history of America about the importance of title to land to the settlers, how important that was, and bringing us up to date now on how the mortgage industry has sought to evade recording fees for documents, assignments of mortgages, and have put in place this concept of the Mortgage Electronic Registration System, Incorporated.

Can you tell us, Mr. Peterson, a little bit more that that entity?

Mr. PETERSON. Sure. The company operates a database. Think of it as a big Microsoft Excel spreadsheet. And members of the system can enter information onto that database about the ownership of the loan or who owns the servicing rights of the loan.

But the tricky part that makes it legally problematic is that, in order to justify not recording those assignments, as the promissory note gets transferred to various companies on toward securitization, the mortgages list MERS as the mortgagee on the loan. The mortgagee, of course, historically, is the same person as the lender, and it is the one who owns the right to foreclose, owns the lien.

And it is very controversial, I think, from a legal perspective whether or not MERS can be a mortgagee because they don't actually invest in the asset, they don't make any loans. And now three State supreme courts—Maine, Arkansas, and Kansas—have all held that, in various contexts, MERS actually is not a mortgagee.

And it creates some real inconsistency with the position of the securitizing banks and the trustees that manage the pools of loans because they also claim to own the mortgage. They need to do that because otherwise their investors will be upset, as Mr. Deutsch pointed out——

Mr. JOHNSON. Let me stop you here.

Mr. PETERSON. Yes, please, I apologize.

Mr. JOHNSON. Who owns—or who are the participants in MERS? Who are the owners of MERS? And does MERS have the ability to cut through the rigamarole that the attorneys, Mr. Kowalski, Mr. Cox, and Ms. Fluker, have to deal with in terms of establishing a chain of title, if you will? Does MERS have the ability to be of assistance in terms of running that title down?

And I would like to hear from each of the witnesses about that.

Mr. PETERSON. Well, it is a great question. MERS is owned by Fannie Mae, Freddie Mac, and also all the big banks, Bank of America, Citi, et cetera. That is who owns it.

Can MERS cut through the rigamarole? My answer is no; MERS actually exacerbates the rigamarole. Why? Because MERS is just a shell company. They don't have many employees. So they have what are called—they have about 20,000 so-called "vice presidents." And these vice presidents become vice presidents by getting a boilerplate corporate resolution—I am using air quotes, for the record—corporate resolution. I am not sure that it really is that.

But they get this corporate resolution off the Internet. And these are really customer service representatives, paralegals, workers for servicers that pretend to be vice presidents of MERS. And they are the same people, in many cases, that were the so-called "robo-signers." So vice presidents of MERS are pretending to be—employees are pretending to be vice presidents of MERS when they go about doing this robo-signing nonsense.

So I don't think that MERS has helped clear up the system at all. It makes it more difficult for homeowners to understand what is going on. And it creates confusion and, I think, even deception in the system.

Mr. JOHNSON. All right. Thank you.

Mr. Kowalski?

Mr. KOWALSKI. If you look to—and I understand you wouldn't have it in front of you—but if you look to Exhibit 6 that I filed with the Committee, you will see a MERS assignment. It is an assignment that purports to have been signed on behalf of First Horizon Home Loan. It is actually signed by an office manager of the law firm that is foreclosing in this case.

And when I finally received, for example, the purported power of attorney that allowed the office manager to sign hundreds of these without knowing whether any true transfers took place at all because it is not part of her law firm office manager job description, I received a power of attorney that is also the next document in your Exhibit 6 that plainly makes clear that she doesn't even have authority to have signed the affidavit that she knows nothing about.

So, in short answer to your question of whether MERS helps make the process more transparent and solves issues, for the courts in particular, the answer is clearly no.

Mr. JOHNSON. Thank you.

Mr. Cox?

Mr. COX. Representative Johnson, MERS has proven to be a significant problem for us in Maine. MERS claims that it has the right to foreclose mortgages in its own name. MERS has admitted that it does not own any loan; it never has owned a loan. MERS has no right to collect payments on any loan. It admits that. But yet it claims that it has the right to foreclose mortgages.

In Maine this summer, we went to the Maine Supreme Court, and we obtained a decision in the case of *MERS v. Saunders,* which explicitly held that MERS does not have the right to conduct foreclosures.

MERS seeks to get around that problem by a subterfuge. Jeffrey Stephan is a MERS vice president, in addition to being an employee of MERS. What MERS tells people like Mr. Stephan is that, when MERS wants to foreclose in its own name, Mr. Stephan should get out his MERS hat for a moment and put it on and call himself a MERS vice president. And in that moment, he should take possession of the promissory note that belongs to GMAC, perhaps, and hold it in his hand. And at that moment, MERS owns it, they claim. And because of that, MERS claims that, from there on out, it can go forward and foreclose.

This is a subterfuge on homeowners and lawyers all over the country, who don't even know who owns their mortgage and who they should deal with in trying to handle foreclosures and negotiate modifications.

Mr. JOHNSON. Thank you.

And I will be vacating this seat perhaps during Ms. Fluker's response to the question. And I would also ask you to respond, as well, Mr. Deutsch. And the reason why I will vacate the chair is because the Chairman is back.

Thank you.

Ms. FLUKER. MERS is a problem in Michigan, as well. As stated earlier, Michigan is a foreclosure-by-advertisement State. That means it is done statutorily. In Michigan, in order to have a valid foreclosure on a property, you are supposed to be able to show that you have an ownership interest in the indebtedness. MERS cannot have an ownership interest in the indebtedness, because if you look at MERS's title on every mortgage, MERS is solely the nominee for the mortgagee.

However, because of the changing of hats, so to speak, of the affidavits that are submitted, it has become a split issue in Michigan. There are cases up on appeal right now. There are judges who say, "Hey, this doesn't make sense. There is no ownership interest." There are others that have said, well, because of the contractual relationship with the mortgage document, that they could have some standing.

The bottom line is MERS is merely, as Mr. Peterson said, a shell corporation. If you look at their Web site, they strictly hold themselves out to be a recording agency. Caselaw from Nebraska and Kansas has indicated that they do not do any servicing on the loan, meaning they don't accept payments, they don't hold the mortgage. Therefore, it almost seems kind of commonsensical that they don't have an ownership interest in the loan. Yet they continue to foreclose independently without stating the actual lender or servicer, which has obviously exacerbated and complicated the foreclosure matter even worse than it already was.

Thank you.

Mr. DEUTSCH. In 2010, we have 55 million mortgages transferring through the system. In the 1600's, when our land title property records were created—I can't give any kind of significant detail to that, but I am guessing we were in the hundreds, maybe thousands of things being recorded.

Our complex financial system has expedited the speed at which mortgages move through the system, whether they are originated or they are transferred—certainly a much more complex system. That complex system, though, has enabled a massive increase in homeownership in America over the course of the past 20, 30, 40 years. MERS has played a part of that, just as the securitization process has played a critical part of that, to allow additional access to credit.

MERS acts as a transfer of the title of the mortgage loan. That is, as an originator originates the loan, they may sell it to a subsequent purchaser, who then may sell it to another purchaser, who then ultimately securitizes it. And by that securitization process, you are able to link the process of originating the loan with institutional investors, such as pension funds and mutual funds, who are looking to invest money to effectively lend, through the securitization process, money from the mutual funds and pension funds directly to homeowners.

And MERS acts as a recording agent so that you are able to track the ownership of that mortgage from ultimately the originator to the ultimate investor who owns those loans. The process of doing that allows for the additional creation of credit.

Moreover, MERS does act on behalf of the trust. And in a majority of jurisdictions throughout America, it has been found that MERS does have the ability to foreclose in their own name. But in many jurisdictions, or in those jurisdictions that have been cited before, servicers are transferring the ownership interest out of the MERS name and into the name of the trust, who is the beneficial owner.

So this is a question of technicality as to who can foreclose, not to whether foreclosure can occur.

Mr. JOHNSON. Thank you.

Mr. CONYERS. [presiding.] Well, thank you very much, Mr. Johnson, for stimulating all of the witnesses to the response.

I would like to now turn to the distinguished gentleman from Arizona, Mr. Trent Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And I thank all of you being for being here.

Let me start by suggesting, Mr. Peterson, that your opening statement was very compelling to me. You know, there is an old Iroquois quote that says, the secret to the universe is in the true naming of things. Sometimes clarity and specificity are very, very important. And I think that that applies fundamentally to property rights. And I want to ask you some questions about that in the course of the moment here.

But I was also touched deeply, Ms. Hines, by your testimony. And I want to be very careful how I respond to that, because it seems to me that for 40 years your family did pretty well until government came along and kind of messed things up.

And I would suggest that Ms. Fluker's comments were also very compelling, in that we have created a system because of government's involvement that now we have actually created a disincentive for banks to work things out with the homeowner because they, for understandable reasons—I mean, we have a lot of major pension fund people that have contributed, or I should say invested in these things and we are trying to hold the system together.

But the end result, Ms. Fluker is correct; the end result is that, because of government involvement here and the lack of market discipline that comes with government involvement that seems to hold the system together, we are in a situation now where banks have an incentive oftentimes to foreclose rather than to work things out with the homeowner. And I think there is something desperately wrong with all of that.

It is ironic that, when this republic was first put together, one of the comments of the Founding Fathers was that—you know, when they were asked, what have you given us? The response was, well, we have given you a republic if you can keep it. And it seems like we forget that the Founding Fathers knew that sometimes government had the power to waste the substance of its people under the pretense of taking care of them.

And I really believe that government here, and with all good intentions, has caused a great deal of chaos and lack of specificity and a lack of market discipline that has created a lot of these problems. So, in a sense, I am afraid that government is as much a part of the problem as it is any possible solution.

With that, Mr. Peterson, if I could speak to some of your comments related to MERS. In your testimony, you actually question the legality of the Mortgage Electronic Registration System—I am saying that so everybody understands what it is—which, of course, is the MERS system that has been talked about here quite a lot. And I think it is a very significantly important subject since about 60 percent of the Nation's residential mortgages are recorded in the name of MERS, Inc. And the legality of this obscure entity should be either established or addressed. It seems very clear that this is a big issue.

You lay out MERS's dual and seemingly conflicting claims of acting both as agent and principal in mortgage deals. And you describe the incoherence of MERS's legal position as, quote, "exacerbated by corporate structures that is so unorthodox as to arguably be considered fraudulent." Well, I have to tell you, I agree with you completely; there is no disagreement here. Clarity here is lacking. And I understand that there was, you know, an effort to do something good here, but the clarity was lost in the process.

So can you elaborate any more? Is there anything else that you want to say about that that you haven't already said?

Mr. PETERSON. Well, thank you for the respectful comments.

Yeah, I think that I would like to add that, you know, MERS is significantly depriving county governments of revenue, which I think is another potential problem. Nobody likes taxes, I don't like taxes, but, you know, if we are going to no longer require or no longer facilitate recording assignments between mortgagees down the chain into securitization, then it needs to be the legislatures that decide that we are going to do that.

And also, speaking to the legality issues, you know, there was no State legislature that adopted a statute that said that they could do this. And what is more, they are going to drag up some cases here and there from, you know, this era or that era saying there is some nominal form of recording that is allowed and you could still successfully perfect a mortgage. But, look, there has never been a situation where the facts would arise before an appellate court that replicate these facts. We never tried to have one shell company try to own all the mortgage loans in the country before, so they are not going to find any case that says that that is legal that a Supreme Court can't distinguish.

So the reality is that we are going to have some real uncertainty about whether or not these loans are perfected and even, potentially, whether or not mortgage loans are enforceable. And that is something we are going to have to deal with for the foreseeable future.

Mr. FRANKS. So you believe that it has kind of become an anti-democratic institution and that it has fundamentally weakened or diminished the clarity of property rights itself?

Mr. PETERSON. Yes, I believe that. And, I think, increasingly, there are title insurance companies, especially the independent, smaller title insurance companies, that are starting to come to that recognition, as well. I believe it does decrease the certainty of property rights in our country.

Property rights are a function of law. Right? Law is what creates property rights. And if you have the new oracle, the new definer of who owns something be an institution that is created by an industry trade association, as opposed to a State legislature or an appellate court, in a country that purports to be a democratic republic, you have just introduced all sorts of uncertainty into the system. It is not clear whether or not the structure that they set up without permission is going to be recognized by the courts as legitimate.

And that is not just a bleeding-heart/professor/liberal comment; that is a decrease in an economic resource that industry and consumers alike have relied upon. There are a lot of countries out there where nobody knows who owns the land. And so it makes us less likely to invest in the land, it makes us less certain about whether or not we want to start businesses or build homes, because you can't be certain that, you know, 10 years down the road, some strong person might come and take that from you. We have lost some of that certainty by losing the effectiveness of our State and county real property records.

Mr. FRANKS. Thank you.

Mr. Chairman, if I could just ask Mr. Deutsch to respond to that, because I know that he had some potential dissent here, and I wanted to give you a chance to do that. Then I am prepared to yield back.

Mr. DEUTSCH. Thank you, Mr. Franks. And certainly, for the record, I do have strong dissent with Mr. Peterson's comments.

In I believe it is 46 States, the validity of MERS to effect a foreclosure has been upheld by the State judiciary. In a minority of States, in four States—I think all four of them have been mentioned—there has been some question as to whether MERS itself can initiate the foreclosure. But, in those instances, the mortgage loan could be transferred out of MERS's name and into the beneficial owner's name, whether that is a trust or another investor, to be able to initiate the foreclosure.

So there is very clear legal property right for MERS or any other system to be able to foreclose. There is no question as to the property rights.

To the second question and the second issue as to the recording fees, I think there is a very strong reason why we don't want to pay recording fees that don't do anyone any good. Particularly, as it pertains to Dodd-Frank, which was just passed, there is a specific provision that does provide the opportunity for any borrower to be able to find out who owns their loan. So that has been addressed in another means, in a Federal legislation.

But I think the critical component for MERS is to be able to allow the facilitation and transfer of mortgage loans in the secondary market system to help keep mortgage loan costs as low as possible.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. CONYERS. Thank you, Trent Franks. An interesting line of questioning.

Did anyone, before I recognize Howard Coble, want to make any comment about this discussion so far? Mr. Kowalski and Mr. Cox?

Mr. KOWALSKI. One quick point, if I could, Mr. Chairman.

With regard to the issue of whether or not MERS is transparent and tracks investors, I have a MERS screen print from the MERS servicer ID system that I printed off last week for another issue.

And just as an example, when a HUD counselor is trying to do a loan mod, one of the things they are constantly being told is they need to know what the investor guidelines are—investor guidelines, investor guidelines. The actual reality is the servicers control everything, and the servicers, if they are interested in the loan mod, don't even talk to the investor.

But this is a MERS servicer ID from last week. The servicer is GMAC Mortgage. Investor: Quote, "This investor has chosen not to display their information. For assistance, please contact the servicer." So if you are trying to find out who owns your loan from the MERS system, you can't do it anymore.

Mr. COX. Mr. Chairman, with all due respect to Mr. Deutsch, I suggest that he is perpetuating a myth that MERS has been spreading about the country.

Maine is one of the first State supreme courts to address the legitimacy of MERS's right to foreclose mortgages, and it did so this summer, and it said that they have no right to foreclose mortgages.

Almost no other States and their supreme courts have addressed the issue. There have been a number of lower-level trial court decisions going both ways. But when Mr. Deutsch suggests that 46 States have blessed the concept of MERS foreclosing mortgages, I suggest that he is not being accurate.

Mr. CONYERS. Attorney Fluker, your silence isn't kidding me one bit.

Ms. FLUKER. Thank you, Chairman. I definitely would like to address the issue, as well.

One thing that I think is very important is that the emphasis has been on MERS, recording, the assignments, things of that nature, but that is what the problem is. Even though, as Mr. Deutsch indicated, while MERS can assign it back to the servicer, who can then foreclose or assign it here or there, but all those assignments are not establishing who has the ownership interest in the debt, who actually owns this mortgage and this loan. And that is the problem.

You can go all the way through litigation. I have a case right now. We have been to Federal court; we are back in State court. And at the end of the day, we found out when they foreclosed there wasn't even a deed. There was no chain of title for the ownership of the mortgage. And 6 months after the sheriff's sale, a, quote/unquote, "affidavit of lost deed" was filed, signed by the same person who has been the corporate resolution person for a zillion different other companies and MERS. So, I mean, you know, there is questionability as to the legitimacy of that.

But that is one of the major problems with MERS, is you cannot determine strictly from a MERS assignment who has the ownership interest in the debt. And when you challenge it, there is no way to track back because MERS is solely a recording agency and is not a servicer or a lender.

Mr. CONYERS. The Chair now recognizes the distinguished Chairman of the Subcommittee on Crime and also a distinguished Member of the Budget Committee, Bobby Scott of Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Let me just follow up on that. If a person buys property at foreclosure, who do they buy it from?

Mr. Peterson?

Mr. PETERSON. It is not clear. The title to the land is still—the fee simple ownership of the land is still deeded in the homeowner. But there is a lien on the land, and the lien is recorded in the name of MERS. Now MERS has to come and file a release of the lien. But it is never clear whether or not the person that is acting on behalf of MERS—remember, this is not a real employee of MERS; this is a vice president that is an employee of some other company—it is not clear whether or not that person is the appropriate individual to release the lien. So, basically, we just have to trust the——

Mr. SCOTT. Well, release the lien is one thing, but the fee simple title, who transfers title?

Mr. PETERSON. MERS says that they are filing a release of the lien, and then the homeowner buys fee simple title from the previous homeowner.

Mr. SCOTT. Well, the homeowner is being foreclosed on. I mean, they don't sign anything. I mean, if you are doing a title search and you see a foreclosure in it, you see the owners bought the house, the mortgage is recorded. The next thing you know, somebody else owns the house. Who transferred the title?

Mr. KOWALSKI. In judicial foreclosure States, when there is a sale, the clerk's office transfers title to the bidder at the sale, which is almost always, unless there is equity in the property, is almost always the foreclosed entity.

A servicer in Florida—in Florida, typically we see servicers foreclosing in their own names. So when the title transfers, to make this issue even more confusion, instead of the investor trust transferring, you have the servicer purporting to transfer on behalf of the investor trust through the local clerk's office without any intervening assignments or true transfers being recorded as the headache for the title company down the road.

The perfect storm of that is in my Exhibit 1, which is where you have two securitized trusts, both alleging they both own the same note, foreclosing on the same house at the same time. So to add a further layer on it——

Mr. SCOTT. Two different buyers?

Mr. KOWALSKI. Well, it is an active foreclosure. So it is two different securitized trusts through two different servicers, both alleging in the paperwork they file with the court—and, in one case, swore to under Florida's recent civil procedure amendments—alleging they each own the same note and are foreclosing on the same house at the same time.

I have also cited a Florida appellate court decision where one of our appellate courts reversed on the same fact pattern, to add another layer to this issue of what exactly the clerk is transferring when a clerk in a judicial foreclosure State actually transfers the title.

Mr. SCOTT. Mr. Cox?

Mr. COX. Representative Scott, a related problem—and, again, I have to address some of the testimony from Mr. Deutsch. He has described how, in some instances, MERS will assign a mortgage backout to a foreclosing party other than MERS. I would say, in 20 to 30 percent of the cases that I encounter, when MERS is doing that—and I can give a specific example.

We have a case in Maine where a mortgage was granted to MERS as nominee for First National Bank of Arizona. Last year, MERS assigned that mortgage backout to another banking institution as nominee—purporting to act as nominee for First National Bank of Arizona. The OCC had closed that bank a year and a half earlier. MERS had no power to act for that bank at the time that it made that assignment. And it is leaving in its wake a massive title problem all across the country because of this.

Mr. SCOTT. I want to get to another issue, and quickly in the time I have left, and that is on the accounting principles, whether or not there is something in accounting principles that create disincentives for the banks to work with people.

I understand that if there is a short sale, the bank has to realize the loss right then and there. However, if there is a foreclosure, in which case they are going to end up with less money, they don't have to realize the loss, according to accounting principles, until much later. So if the bank is kind of on an edge and wants to keep their books as fat as possible, they are better off going into foreclosure because they don't have to realize the loss, rather than a short sale, which is in everybody's best interests—the homeowner, the new buyer, the bank actually.

Are there disincentives in accounting principles that we might want to address to encourage people to do what is in everybody's best interest, rather than allow the fraud of allowing banks to have on their books assets listed at values that are not realistic?

Ms. FLUKER. I would like to take that question first, if it is okay.

One of the major problems, as I articulated somewhat but didn't go into detail in my testimony when I began, was that such a large percentage of the loans now are insured by the Federal Government—Fannie Mae and Freddie Mac.

Now, let me be clear. Under the Making Home Affordable program, there is a specific hierarchy of loss-mitigation procedures that should be followed. First, you should be looking at the borrower's loan to see if they are eligible for a modification using the formula articulated in their supplemental guidelines, looking at the 31 percent of the income, things of that nature.

If, for some reason, there is not the financial possibility or feasibility of modifying that loan, you are immediately to go to the next foreclosure alternatives, being short sale and deed in lieu. That, again, just like the modifications, are even less of a possibility from the mere fact—I know in Michigan you are looking at almost a 70 percent property decrease. And I would venture to say in other States, even though the property decrease may not be that significant, there is a decrease.

So there is every incentive to move forward with the foreclosure when you are getting paid the full mortgage debt plus the foreclosure fees, plus the costs, plus the attorney fees that the foreclosure attorneys charge to foreclose on these properties.

Mr. SCOTT. Wait a minute. On the short sale, the Federal guarantee of the loan does not kick in to make the loan whole?

Ms. FLUKER. I don't believe it kicks in 100 percent. There are some incentives in place, but it is much more lucrative because you are getting the full mortgage debt at the foreclosure. At the short sale, the purpose of the short sale is that you are selling the property short of what the full mortgage debt is. Therefore, there is not going to be the same level of profitability.

And, moreover, the way the structure is set up now, with the way the laws are set up, it is actually much more expedient to send someone out two modification letters, tell them you didn't receive their documents, shoot them to a sheriff's sale—which is very simple in Michigan because Michigan is a nonjudicial foreclosure. You don't have to go into court to foreclose on anybody in Michigan.

In fact, to show you how bad it is in Michigan and how disingenuous this process is, I have people I started representing at the eviction action still getting these form letters from their lender and servicer, saying, "Hey, call us. We can help you. We can modify your loan." Why are they still getting those letters? It is because, under the supplemental guidelines of the Making Home Affordable program, they are mandated to reach out with solicitations to borrowers in order to remain eligible for those programs and receive those incentives.

So, in essence, there is an opportunity get one, two, three bites at the apple and then, at the end of the day, walk away with the whole basket because you get paid the full mortgage value on a property that is significantly less than that mortgage balance.

Mr. SCOTT. Mr. Cox?

Mr. COX. Representative Scott, there are servicer fee incentives that really are at the fundamental base of this problem.

If you consider a situation—suppose a lender or a servicer is considering a short sale today versus carrying that property to a foreclosure 6 months from now. If the servicer approves a short sale today, its fee revenue for servicing that loan stops today. If they keep that on their books for 6 months, they earn fees for property inspection, broker opinions of value, forced placed insurance, and all of the other fees that continue to accrue until that house is finally sold at foreclosure.

When it sells at foreclosure for perhaps 50 percent of what the short-sale price would have been, the servicer suffers no consequence because it doesn't own the loan. The investor suffers the consequence. So the servicer incentives are to block short sales and to keep the property earning a fee revenue for them.

Ms. HINES. They created a whole new scheme in Michigan, where the thieves and the criminals go into the houses—as soon as the house is foreclosed on and the people are thrown out, they see the dumpster roll up, the next day the thieves go in, steal everything out of the home of any value, and so they leave the home a shell. And the banks still get money because the homes are insured.

And beautiful homes that were once appraised at $100,000-plus are reduced to being sold for $15,000 and $10,000 because the thieves went right in and stole everything that wasn't nailed down. So they created a whole criminal industry off of foreclosure and eviction.

Mr. SCOTT. Mr. Chairman, it seems to me that we ought to look into the financial incentives. And we have just heard how a foreclosure—people who are doing the foreclosure have an economic interest in getting less money at a foreclosure than they could have at a short sale. Everybody is disadvantaged.

And I think there are also some accounting principles where, when you realize the loss, it would give people an incentive to just carry this phantom value on the books, creating another disincentive. And I think that is an area we need to look into.

Mr. CONYERS. I would like Susan Jensen and Mr. Park to talk with you and me about the underlying problems, that we are actually encouraging the wrong thing to happen in this downturn that we are in. And I would like to explore that further with you, sir.

I would like to turn now to Howard Coble of North Carolina, but I don't know if he is Chairman-elect of a Committee again. He is a senior Member of the Committee. We are not sure what his future status will be after January 5, but I do know that he has been around here a long time, and we are proud to recognize him now.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Chairman, I plead guilty to being a senior Member of the Committee. That is about all I know with certainty right now. But thank you for that. We will see. I will let you know. Stay tuned.

Thank you, Mr. Chairman.

Good to have the panelists with us.

Professor Peterson, let's visit MERS again. What role, if any, did Freddie Mac and Fannie Mae play in the creation of MERS? And what are these entities' current ownership stakes in MERS, if any?

Mr. PETERSON. Well, they played a significant role. I think that the origin of MERS was at Mortgage Banking Trade Association meetings, where they cooked up the idea. Fannie Mae was a big part of that. I also think that Fannie Mae helped legitimize the agency—or this company. People saw Fannie Mae as being part of the government and saw that as, you know, a stamp of approval from the Federal Government.

Of course, you know, there are a lot of things about the GSEs that I really support and think worked well. Everybody disagrees about some of these points, but, you know, back in the 1950's and the 1960's, they really were helping create some homeownership, the GSEs were. But in the past 15 years, I think that they got out of hand and really became very profit-oriented businesses. And their support of Fannie Mae, in my mind, was because they were trying to shave a few dollars and cents off of their bottom line to help facilitate bigger commissions and bonuses for their management. That is what I think happened.

And so I think that Fannie Mae and Freddie Mac bear some responsibility in creating this MERS problem. And, at a minimum, we ought to get Fannie Mae and Freddie Mac to stop digging that hole deeper and, at least for the time being, not purchase any more MERS loans because of the risk that that is going to place on the United States Treasury.

And currently they still have an ownership stake in the—as far as I know, they have ownership stake in the MERS business.

Mr. COBLE. Thank you, Professor.

Mr. Deutsch, several Members of Congress have proposed a nationwide foreclosure moratorium in response to the foreclosure documentation scandal. How would such a moratorium affect the housing market?

Mr. DEUTSCH. I think it would be catastrophic to the housing market. If you ultimately decline or disallow foreclosures to occur in situations where a modification doesn't work, a short sale doesn't work, ultimately the capital markets will freeze up. Mortgage funding will no longer flow to new originations of mortgages. First-time homebuyers will not be able to get mortgages. Because, simply put, the capital markets will not put money into a mortgage process if a borrower doesn't pay back that mortgage and they can't exercise rights to the underlying collateral.

Mr. COBLE. Thank you, sir.

Mr. Cox, Mr. Kowalski, or Ms. Fluker, either or all of the three, you have testified regarding alleged abuses by servicers in some cases. Courts, however, have procedural rules in place to punish those who swear out false affidavits, mislead the court in one way or another, or engage in other unethical behavior.

Why are these mechanisms not sufficient?

Mr. COX. Representative Coble, speaking for Maine, we have a State judicial system that is in deep trouble. We have judicial vacancies. We have vacancies in the courthouses. Courthouse hours are being curtailed. The system is simply being overwhelmed.

The problem we face is that the court system has enough trouble dealing with its case flow and with a huge increase in foreclosure cases that, so far, the States have been unable, at the State level, to deal with this problem.

I would respectfully suggest there is a solution here in Washington. Attorney General Holder last commented on this issue back on October 6th when he talked about foreclosure irregularities, and he has not been heard from since. And I respectfully suggest that if criminal charges were considered across the country, you would see a significant change across the servicing industry in incentives for getting away with what they have been getting away with.

So I suggest that a solution countrywide—because this is a countrywide problem—exists here if somehow the Attorney General's office can be led down this road. I met with the U.S. Attorney in Portland, Maine, a month ago to discuss this. And I sensed, from his feedback to me, he is waiting from word from Washington.

Mr. COBLE. Thank you.

Either of the other two want to be heard?

Thank you, Mr. Cox.

Ms. FLUKER. Thank you for your question.

First and foremost, so much of this turns not only on just there being the potentially fraudulent or faulty paperwork. I am from Michigan. Michigan is a nonjudicial foreclosure State. Therefore, technically, there is no paperwork until the person gets to the eviction stage. You have a sheriff's sale. A posting is put on an individual's house. The first time they actually see any paperwork regarding that foreclosure is when they get to eviction.

Eviction hearings in Michigan are handled by the State district court. It is an expediting hearing. You get the eviction notice; the hearing must be within 7 days of that notice. So, literally, you are looking at documentation—if, in fact, the borrower has representation, which 99.9 percent of the time they don't. But if they do have documentation, it is only at that point that you have the ability to review those documents.

And, as Mr. Cox indicated, you have an overwhelming scenario with the court system. Many times they are, you know, unable or unwilling because of their caseloads to take the time to—literally, you are going back and reviewing the whole chain of title. So it puts borrowers at a disadvantage.

Mr. COBLE. I thank you.

Mr. Chairman, I see my red light has illuminated. May I hear from Mr. Kowalski?

Mr. Kowalski?

Mr. KOWALSKI. In Florida, yes, to answer your question, the State bars are looking at this. Our State attorney general has not been active on this issue, although I understand there is a collection of 50 State attorney generals that are looking at it.

But part of the problem, in terms of the Federal Government's response, is this: The banks have always come here and said, we do not want to be regulated by the States; we do not want to face 50 different jurisdictions; we do not want the State attorneys general and individual State regulatory agencies to regulate us because we are national concerns.

They have come to Congress and said, make us immune, under the National Bank Act and other acts, make us immune from the meddling of individual States. And that is what has happened. So, as a result, these are national banks. They are regulated by the Federal Government agencies. And, in many cases, the need for transparency, which has been addressed over and over again today, is a Federal issue.

Mr. COBLE. Thank you, sir.

I yield back, Mr. Chairman.

Mr. CONYERS. We have only a few minutes before voting, and I want to divide that time between Mel Watt and Elton Gallegly.

Mel?

Mr. WATT. Do we know how much time we are dividing?

Mr. CONYERS. Well——

Mr. WATT. I will just take my time, and you cut me off whenever you get ready.

Mr. CONYERS. Ask the fellow to find out. He is on the phone right now.

Mr. WATT. Well, they haven't called votes, so we would have at least 15 minutes after they call votes. So I think we can get through in regular order here.

Let me thank my colleague from North Carolina, Howard Coble, for starting down a chain of questions that I wanted to try to pursue related to Fannie Mae and Freddie Mac's involvement with MERS.

I noticed that the former administrator of the Federal Housing Finance Agency is here in the room, and maybe he should be at the witness table.

But let me just ask Mr. Deutsch, what is your understanding of Fannie and Freddie's involvement with MERS?

Mr. DEUTSCH. I don't have a detailed understanding of the corporate governance relationship with MERS. They are some part owners of the MERS registration system. I don't know the percentage of that ownership, but they are part owners. And——

Mr. WATT. So how could a private registration service take the place of State laws that require establishment of a chain of liens and ownership through title transfer records?

Mr. DEUTSCH. I don't think MERS takes the place of the State laws. MERS operates within the State laws that have been held up in a majority of jurisdictions.

Mr. WATT. So when a mortgage comes to MERS, does it record that mortgage in the State registries?

Mr. DEUTSCH. When a mortgage is originated, let's just say at the very beginning of the process, it will be filed by MERS as an agent, as the owner of the mortgage in the State registry, so that then it can be transferred in the system.

Mr. WATT. How is MERS an owner of the mortgage at that point?

Mr. DEUTSCH. Well, they are acting as an agent for the beneficial owner.

Mr. WATT. An agent, but they are not the owner.

Mr. DEUTSCH. They are not the beneficial owner.

Mr. WATT. And when they transfer ownership, if my State requires that that be documented on the public records as to establish for everybody in the public—the owner and everybody else—the chain of title, what would happen when that transfers from MERS to somebody else?

Mr. DEUTSCH. Well, a transfer can be effected, and particularly in the capital markets, they are effectuated through——

Mr. WATT. I am not talking about in the capital markets. I am talking about on the State land registry titles.

Mr. DEUTSCH. Well, there is a critical relationship between how it is done in the legal system via contracts and how it is done——

Mr. WATT. All right. Well, let me—is the former Federal Housing Finance Agency administrator with you?

Mr. DEUTSCH. OFHEO Director Falcon?

Mr. WATT. Yes.

Mr. DEUTSCH. Or, former OFHEO Director Falcon?

Mr. WATT. Yes. Could you find out from him, while I go on to the next question, what Fannie and Freddie's formal relationship with—he is with you, right?

Mr. DEUTSCH. He is an advisor, a senior advisor.

Mr. WATT. Okay. Well, would you turn to him and find out from him, while I go on to another question, what Fannie and Freddie's involvement with MERS was at its origination, if he was involved in it at that time?

Mr. DEUTSCH. Sure.

Mr. WATT. Let me go to another question. This whole thing has been frustrating for me, in particular, because I serve not only on the Judiciary Committee but on the Financial Services Committee, which has jurisdiction over the GSEs and the preemption issues that get raised.

Ms. Fluker, there has been a lot of talk recently about standardizing these foreclosure procedures by having the Federal Government take them over. It seems to me that there are some substantial preemption issues involved with that, Federal preemption of State laws.

What is the State of Michigan's State legislature doing to—is it concerned about this whole process that you have described of nonjudicial foreclosures?

Ms. FLUKER. First and foremost I think that it is important to note that specifically with respect to MERS issues, there are quite a few cases up on appeal because it is kind of split. We are a nonjudicial foreclosure State. There has not been any discussions as far as changing that structure into a judicial structure to my knowledge. However, I think it is very important that we realize that it is not an issue whether the foreclosure is judicial or nonjudicial.

Mr. WATT. Well, I understand that. But if a sheriff has to make a decision to go and tack something on a door in Michigan before a court even gets involved in it, that presents a serious problem for that State. It doesn't happen to be the process in North Carolina, and I don't know how the Federal Government can solve that. That is a State issue. So you know, I am just going to encourage you on some of this stuff you are going to have push State legislators because if the Federal Government standardizes it and preempts all foreclosure laws in the State, I think you are going to be—a number of States are going to see their foreclosure laws go down. In your State you might see them go up, but I mean I just have some serious reservations about federalizing foreclosure law, and I would say that to all the attorneys on this panel.

My time is up. I would like to get an answer to this first question about Fannie and Freddie's involvement now that I notice Mr. Deutsch has consulted with his advisor.

Mr. DEUTSCH. For any information about MERS, the ownership interest, you would have to direct those questions to MERS. Neither one of us are aware of precise ownership interest of Fannie and Freddie.

Mr. WATT. Well, you are here representing MERS, aren't you?

Mr. DEUTSCH. I don't represent MERS. They are not a member of the American Securitization Forum.

Mr. WATT. So who are you here representing?

Mr. DEUTSCH. At the outset my testimony I indicated those who originate the loans, those that service the loans, the trustees of the loans, the investors in mortgage loans.

Mr. WATT. All right. Thank you. That perhaps my be the next hearing that somebody has.

Mr. CONYERS. Well, I would ask you to join with me and Bobby Scott and our staff to think about the next hearing, Mel, and I thank you very much.

I turn now to Elton Gallegly and recognize him, the distinguished gentleman from California.

Mr. GALLEGLY. Thank you very much, Mr. Chairman. This issue is of particular interest to me. In my former life I had a real estate brokerage business, and I have held a broker's license in the State of California for 43 years. And I can tell you in the 20 some years that I was in business before I came to Washington I had the good fortune of working with a lot of wonderful people over the years. And to the best of my knowledge, I never had a client or a customer that ever had their home foreclosed on. I think a lot of that was due to the fact that times were different, the economy was different, property values were escalating, so even probably the least focused salesmen and brokers could look like a hero because of inflated values. That hasn't been the case in the last several years, and there have been many reasons for that.

But I would like to get back to Ms. Hines and put the human side on this and see how we get into these situations whether, we are dealing with predatory lenders, whether we are dealing with lack of good oversight of the process of brokers and mortgage—real estate brokers, mortgage brokers and some personal responsibility.

It is my understanding in your testimony, Ms. Hines, that it was you and your sister that inherited the home from your mother and father that had lived in the home for at least 30 years before they passed; is that correct?

Ms. HINES. Yes.

Mr. GALLEGLY. And when you inherited the home, was it free and clear?

Ms. HINES. Yes, it was paid for.

Mr. GALLEGLY. Okay. So they had worked most of their adult lives working their tails off to be able to pay their bills in a responsible way and you inherited the home.

What year did you inherit the home?

Ms. HINES. In 2006.

Mr. GALLEGLY. 2006?

Ms. HINES. Uh-huh.

Mr. GALLEGLY. And how long was it after you inherited the home before you borrowed money?

Ms. HINES. I think it was 2005.

Mr. GALLEGLY. Okay.

Ms. HINES. It was 2 years, we went into foreclosure in 2007.

Mr. GALLEGLY. Okay, what year did you get the loan on the—how long was it after you inherited before you borrowed money on the property?

Ms. HINES. About maybe 5—maybe about 4½ years before we borrowed.

Mr. GALLEGLY. But you said you inherited it in 2005?

Ms. HINES. We inherited it in 2005. Well, my mother died, she has been dead now for 8 years. So 8 years when she died, whatever the time frame.

Mr. GALLEGLY. So you inherited the property about 2002?

Ms. HINES. Yes.

Mr. GALLEGLY. And what year did you borrow money against the property?

Ms. HINES. In 2007.

Mr. GALLEGLY. So you lived there for 4 years——

Ms. HINES. My sister and her children lived there for 4 years.

Mr. GALLEGLY. And when did it go into foreclosure?

Ms. HINES. In 2007.

Mr. GALLEGLY. The same year that you borrowed the loan?

Ms. HINES. Well, yes—we borrowed—no, we borrowed the loan the year—I think we borrowed the loan—my sister borrowed the loan 2 years before the house went in foreclosure.

Mr. GALLEGLY. Okay. And——

Ms. HINES. Let me explain something because I don't want to confuse anybody. My sister was living in the home. I was living in an apartment. So all of the business, and she hid a lot of the mail that she received when the house started going into foreclosure from me and my other sister, who didn't live in the home.

Mr. GALLEGLY. You said you borrowed the money to do repairs on the property.

Ms. HINES. My sister came to us because the house was in dire need of repairs.

Mr. GALLEGLY. So the money that you borrowed probably enhanced the value of the property?

Ms. HINES. Yes, yes.

Mr. GALLEGLY. Okay. Was all the money used just for repairs?

Ms. HINES. Most of it, not all of it. Most of the money was used for repairs. My nephew got married that year and my sister took some of the money and helped with the wedding.

Mr. GALLEGLY. Okay. The reason I ask the questions is because it shows that you are fighting a declining market in value and you enhanced the value, yet you still ended up as we refer to upside down. Do you remember offhand what the value loan-to-value ratio was when you bought the property, meaning how much was it——

Ms. HINES. How much the house was appraised for?

Mr. GALLEGLY. Right.

Ms. HINES. The house was approved for $80,000?

Mr. GALLEGLY. And how much did you borrow?

Ms. HINES. We got 43,000?

Mr. GALLEGLY. So it was about 50 percent, plus or minus?

Ms. HINES. Yes. And I would say out of the 43,000 that we received, 40,000 went into the house, because we had to have——

Mr. GALLEGLY. So you spent almost all—so theoretically you might assume that it increased the value to over 100,000 if you put 40,000 in it?

Ms. HINES. Yeah, because we had to remove a tree. The basement kept flooding, every summer the basement would flood and it was because of a tree in the backyard. So we had to remove a tree with the money.

Mr. GALLEGLY. Pardon me, I see the time has expired. And I really didn't want to get off too far on this, I just wanted to show how you got into this situation. I assume there are a lot of people, your friends and neighbors, who are in similar situations.

Ms. HINES. Well, it ballooned once we took out the loan, the mortgage on the house then—my sister was paying 588 initially and then after a 3-period it ballooned to 988. My sister was on disability because she had worked at Cadillac, too, and she had incurred asthma and had had really attacks—a lot of attacks to where they put her on disability for General Motors.

Mr. GALLEGLY. And within 90 days they increased your mortgage almost 100 percent?

Ms. HINES. Yes.

Mr. GALLEGLY. And they didn't explain that to you when you purchased the property, that it was an adjustable after a period of time?

Ms. HINES. No, they did not.

Mr. GALLEGLY. This was not in the contract anywhere.

Ms. HINES. Yeah, it was under a contract. And they gave us a contract. The contract was like 125 pages that we had to read. And so I am just being honest, we did not—not being lawyers, not thinking that it was going to go from one amount to another amount, and because the house was practically—for the base of the house, we had to have the base of the house reinforced. They call it point and pay.

Mr. GALLEGLY. Well, I guess my point is, I really question how a mortgage could increase 100 percent in a period of 90 days without the borrower knowing about it. If this was not clearly explained to you and you didn't sign it somewhere, I think there may be another problem here. So you have got lots of lawyers.

Ms. HINES. Well, We got ripped off by a couple of lawyers. We went to a couple of lawyers to help us on the issue and they ripped us off, too. It has just been a nightmare ever since this thing happened. I am not a financial person, I am not a lawyer. I wasn't living in the house to actually give you moment-to-moment accounts of what money was spent.

Mr. GALLEGLY. No, I didn't mean that.

Ms. HINES. I know that you are not, I am just saying that we went through a lot and we are still going through a lot as a result of being evicted from that house.

Mr. GALLEGLY. Thank you, Mr. Chairman.

Mr. JOHNSON. [Presiding.] Thank you. Ms. Hines, do you have any idea what a yield spread premium is?

Ms. HINES. No, I do not and I don't think my sister does either.

Mr. JOHNSON. I will now recognize the gentlelady from California, Ms. Chu.

Ms. CHU. Thank you, Mr. Chair. Well, as we all know, HAMP fell far short of the expectations. It was supposed to help 3 to 4 million people from foreclosure but instead only helped 700 to 800,000. And the congressional oversight panel that was held in the House cited the Treasury's failure to require servicer participation, failure to hold servicers accountable, and the decision to outsource critical program functions to Fannie Mae and Freddie Mac. Moreover, these programs weren't designed to handle foreclosures due to unemployment.

I have a great concern because in California we indeed are facing far more foreclosures, in fact 1.5 million new foreclosures just in my State alone. And we have created another program called the Hardest Hit Funds Program, which is a TARP-funded program, and it is to be administered to low and moderate homeowners and to include principal reduction programs which several of you have mentioned as being very important, as well as programs to assist unemployed homeowners. But the problem is that not one bank has officially signed on to join this program in California. And so we are encountering the same problems.

I want to ask anybody on the panel how we could get banks to participate in these government run programs and give true foreclosure relief to hardworking families.

Ms. FLUKER. Thank you. I think one of the major things that needs to be done, and it is in my written testimony, and people don't like this word, but it needs to be out there and it needs to be understood, there needs to be a moratorium on these foreclosures. People hear that word, they get scared, they are like, oh, my God, these borrowers are looking for a free house. That is not what a moratorium is. This is something that was done during the Great Depression in 25 States during the 1930's. It was upheld as constitutional by the U.S. Supreme Court in *Home Building and Loan Association v. Blaisdell.* That is 290 U.S. 398, 1934, for people who like to look up cases. And what actually happened was instead of going to court throwing people out in the street, people went to court and the judge determined a reasonable rent for these people to pay.

I think that is more than appropriate in this situation, not only because of our economic situation, but due to the fact we have so much underlying predatory and fraudulent conduct coming on. It would allow borrowers to still remain in their homes until all of this is sorted out. We can come down here week and week, month after month, but every day that goes by someone is being foreclosed and evicted and they are like Ms. Hines, who is not an isolated situation for people to sign these loans and not know if there were adjustable rates.

I have senior citizens that have owned their homes, 30, 40, 45 years, documents are brought to them, you are dealing with a broker who is a smooth talker, like I am taking care of you, look, everything is fine, that is why my paralyzed 80-year-old woman in a wheelchair is now facing eviction because she signed a loan for 331 and within a year it was over $1,400.

Ms. CHU. Okay. Well, I would like to hear from a variety of opinions. So Mr. Kowalski and then Mr. Peterson.

Mr. KOWALSKI. To start with, your question about hardest hit, I read this week for example that Treasury outsourced an opinion letter to a banking law firm to issue an opinion as to whether or not the hardest hit funds could go to Legal Aid groups and HUD counselors to assist with foreclosure prevention, and not surprisingly the banking law firm gave—I am not sure why the Treasury lawyers couldn't do this work, but the banking law firm gave the opinion to Treasury that it couldn't. Of course it can. The only system that we have been able to develop in Florida at least is a cooperative agreement between the legal services groups, HUD counselors who are properly aware of what is going on with these loan modifications, and pro bono lawyers, working in cooperation with the judiciary. The Florida Supreme Court created the entire Judicial Mortgage Foreclosure Mediation Program, for example.

HAMP needs to be strengthened, not abandoned. Maybe some concepts need to be looked at, but it is not voluntary, it is tied to TARP. It was always tied to TARP, and the HUD regulations make it clear it is tied to TARP. At the end of the day the servicers are all regulated by the Federal Government. The servicers make all of the decisions, the servicers decide when loan mods work, when short sales work, when foreclosures are pushed through, and those are all federally regulated entities.

Ms. CHU. So you are saying it should be tied to the TARP funds?

Mr. KOWALSKI. It is tied to the TARP funds. You gave them the money and in return for handing them the money it was you have got to go out and work on HAMP.

Ms. CHU. Mr. Peterson.

Mr. PETERSON. One of the problems I see with HAMP is that the incentive that it tries to create to promote modifications, one of the ways it does that is by giving some very modest compensation to the servicer, if they succeed, and that happens over the stage period of time. It is not very much money and it is not a sharp enough incentive to get them to actually do it.

So here is a different idea. Instead of having the taxpayers pay money to—a little bit of money to servicers to not foreclose, instead make the servicer or the investor through the trust pay an extra penalty if they actually do go forward with the foreclosure. So switch the incentive. And my advice would be peg it at 15,000, so the first is a national emergency homestead exemption. It is short of a moratorium, it is a reasonable compromise. So the first $15,000 in a proceeds of a foreclosure sale goes to the family to help them move on to the next location, get a deposit on the next apartment, pay that first month's rent, get the kids into school and that money has to be put on the table, cash on the table, if they are going to go forward with the foreclosure. It will give an incentive to borrowers that need that cash in order to move on, to stop fighting the foreclosure. It is a lot like the Cash for Keys programs that lots of servicers and lenders have done for generations where when you are foreclosing you give $1,000, 2000, $3,000 maybe to the homeowner if they turn over the keys and turn over the property in good condition without having the fixtures stripped out, that sort of thing. Only the difference is it is a little more money, and it is also clearly signaled to everybody up front, so everybody knows that that $15,000 is waiting for them. Lots of homeowners that are in foreclosure don't understand that Cash for Keys is a possibility. So I think that that would be—it is an innovative idea, but it is also much more simple. We don't have to have a big bureaucratic structure that enforces it, it just becomes a Federal law, it is a bright line rule. It is very simple and it would be effective.

Ms. CHU. Thank you.

Mr. DEUTSCH. Maybe I will address Professor Peterson's proposal. Obviously I think that would create enormous challenges for the pension funds of say a firefighters pension fund or a police pension fund. Well, now you have incentive for the borrower to default because to pay $15,000 to not actually pay their mortgage, it seems that may cause an appreciable increase in the number of foreclosures in America because it is providing an incentive not to pay their mortgage. There are a lot of Cash for Keys programs out there that do provide relocation assistance where the servicers—when there is no other alternative beside foreclosure the servicers does help the borrower transition from their home to other places with 1, 2, $3,000. But to force that upon the owners of these mortgages, to force them to pay $15,000 will have enormous downstream effects on the future of mortgage lending in America. In particular because Fannie Mae and Freddie Mac, which is right now on the backs of the taxpayer, because those institutions own such a significant amount of the mortgages in America, it ultimately would be bigger than the American taxpayer who is paying these $15,000.

Ms. CHU. Well, I should cut it off here, because I far exceeded my time. So I will yield back the balance of my time.

Mr. JOHNSON. Thank you, Ms. Chu. Next we will—I have been burning to ask this question all day. I think, Mr. Deutch from Florida, you know what my question is, do you not?

Mr. DEUTCH. Mr. Chair, I think both our witness and myself go by Deutsch, if that's helpful.

Mr. JOHNSON. And is there any other connection?

Mr. DEUTCH. Other than having a last name that is often butchered, I don't believe that we are in any other way related.

Mr. JOHNSON. All right. So at this time I will recognize Congressman Deutch.

Mr. DEUTCH. Thank you, Mr. Chair, but in an attempt to get to know Mr. Deutsch better I do have some questions for you, and we will see if these are questions that you are comfortable answering. I wanted to talk a little bit about the securitization process and specifically the securitization through Real Estate Mortgage Investment Conduits. Can I continue?

Mr. DEUTSCH. Sure, I am familiar with REMIC.

Mr. DEUTCH. Here are the concerns that I have. REMIC as I understand received tax exempt status. Receiving the tax benefits, also as I understand it, requires strict compliance with the law, including the depositing of collateral within 90 days of the REMIC's formation, is my understanding correct?

Mr. DEUTSCH. Correct.

Mr. DEUTCH. And as I further understand it, the law does not permit fixes to the transfer after that 90-day period. So under this requirement the only assets that would receive tax exempt treatment that are in a REMIC are those that are in the REMIC on the startup date.

Mr. DEUTSCH. Correct.

Mr. DEUTCH. Now, further my understanding is that a failure to comply with REMIC loss subjects the entity to 100 percent taxation.

Mr. DEUTSCH. If a securitization trust doesn't meet the REMIC requirement, then the securitization trusts proceeds are paid onto the investors would be taxed as a corporate entity tax.

Mr. DEUTCH. Right. And if they do meet the requirements then they are exempt.

Mr. DEUTSCH. Correct, correct.

Mr. DEUTCH. Now, the oversight panel, the congressional oversight panel that issued its report recently talked about—described documentation standards in the foreclosure process have helped shine a light on potential questions regarding the ownership of loans sold into securitization without the proper assignment of title to the trust that sponsors the mortgage securities. You had said earlier, Mr. Deutsch, that from time to time mistakes do occur.

Some of the issues then that I would like you to speak to include that if the millions of mortgage transfers during the boom or some number of them, small, large, there may be some dispute, but for those that were not properly completed, then under the REMIC rules, the REMICs may be empty entities that don't own anything; is that correct?

Mr. DEUTSCH. Well, I think the problem with that is that the premise that the trust don't actually own the loans is invalid. The trusts actually do own the loans, and they were validly transferred, and there are abilities for the trust to be able to cure the transfer of those loans once they are in there to perfect the ownership of the loans.

Mr. DEUTCH. I understand. They may perfect the ownership of the loans but they can't reclaim tax exempt REMIC status after that 90-day period.

Mr. DEUTSCH. Once the loans ares in a trust if a deficiency is observed you have a 90-day period to be able to cure that deficiency.

Mr. DEUTCH. The 90-day period——

Mr. DEUTSCH. From the time of the discovery of the deficiency.

Mr. DEUTCH. I would ask Mr. Peterson if that is your understanding as well of when the 90-day period starts to run.

Mr. PETERSON. My understanding is that you can't put them back in after it is closed. After the 90-day window following closure of the REMIC has expired you can't insert new collateral to the trust, otherwise it destroys the tax exempt status.

Mr. DEUTCH. Okay. So there is a difference of opinion. The question then is if they are past this 90-day period, Mr. Peterson I will stick with you for a second. If they are passed the 90-day period and the tax exempt status is lost, can't be regained, then what about the next step of assessing liability? Would there be any liability to either the creators of the REMICs, would there be liability to the trustees or servicers at that point?

Mr. PETERSON. Well, you have exceeded the boundary of the competence that I feel most comfortable with. I am not a tax lawyer, and I don't have an extensive practice of thinking through what happens when a REMIC status is destroyed. That is a big problem, and it is not something I have seen before or worked on. So I will be very cautious in answering.

Mr. DEUTCH. Let me just follow that up then. It is not something that you've seen because the issue hasn't been raised before; is that the reason?

Mr. PETERSON. Well, that is part of it, yeah. These big securitization deals, there is a lot of money on the line and the IRS has not been aggressively trying to declare these trusts as no longer tax exempt, in part because I think the Treasury Department has been attempting to prop up some of the financial institutions that would have exposure to those taxes. But I have to—again, I have to qualify this, that I am not a REMIC tax lawyers, so I don't want to—you pulled me off of my core competence.

Mr. DEUTCH. Well, I won't ask questions in great specificity then. I will only ask again whether you have seen—has the suggestion been made that the IRS ought to take a closer look at the tax exempt status of REMICs?

Mr. PETERSON. Yes, that has definitely been made. And, you know, who it is that decided not to do that is not clear to me. I assume somebody high up in the Treasury Department made that decision not to do that. My hunch, my intuition, respectfully, is that there are some compelling arguments that the collateral was not transferred consistent with the Uniform Commercial Code and there is ambiguity in the State laws out there about how that will get resolved.

There is a credible argument that the tax exempt status has been destroyed. There has not been case law confirming or rejecting that proposition yet. It could go either way. And the thing that is scary about it is it is a closer call than you would think. Having plowed trillions of dollars into the securitization structure, one would think we pretty much have that locked down and certain. It is actually not that certain. There are some decent arguments both ways. What the courts are going to go do and what the IRS is going to do, no crystal ball here on the desk from my perspective.

Mr. DEUTCH. And then finally, Mr. Chair, Mr. Deutsch, have you seen the suggestion made that some of these REMICs may have lost their tax exempt status or certainly given that there is a difference of opinion between you and Mr. Peterson that difference of opinion I would imagine can be found on a larger scale within the industry, have you seen the suggestion made that it ought to be examined and is this something that the IRS ought to do, if for no other reason than to clarify what the correct position ought to be?

Mr. DEUTSCH. I am aware of two academic commentators who have proposed the idea. I think the IRS has a lot of work and the Treasury Department has a lot of work to do on analyzing and improving the HAMP processes.

I think ultimately there is no merit to the argument or suggestion that any REMIC violations have occurred in the 7 trillion—well, $1.5 trillion in private label mortgage securities that are outstanding. I think to follow up on every academic suggestion that something wasn't transferred validly without any proof, and I address this directly in my testimony, both in the written testimony as well as the white paper that we put out just last month, that there is no valid reason to believe that the mortgage loans weren't actually transferred into the mortgage tray.

Mr. DEUTCH. I understand. Mr. Chair, this is my last question. I understand there may be no reason to believe that. I guess the final question I have is if, however, there is an example where the transfer was made outside of the 90 days, even outside of the 90 days once discovered, which would call into question the tax exempt status, in that case could you imagine the IRS ruling that the tax exempt status would be lost?

Mr. DEUTSCH. I think what you are potentially postulating is if any individual loan wasn't put into the trust, if there was some mistake on an individual anecdotal loan, if that loan wasn't into the trust, that loan would not be in the trust but it doesn't destroy the REMIC status of the trust because of one loan's violation.

Mr. DEUTCH. I am sorry that we are out of time, Mr. Chair, but I appreciate the time very much. Thank you.

Mr. JOHNSON. Thank you, Mr. Deutch. And I will say that this has been a very enlightening and frightening hearing to realize that it is a basic human instinct to want to control, and that control manifests itself in ownership of property. It is sobering to think how far we have gone down the line toward too big to fail entities having rigged up the property ownership process so as to be in a position to attain control of property here in America, land of the free, home of the brave, where a man or a woman's home is their castle. And all of this through private enterprise has been aided and abetted we are told by the United States Government, by United States Government policy or the lack thereof. And we sitting above you, you all sitting down there, we sitting up here have the power to take this complicated scenario and learn from it, turn it around and return power and control to the people.

And so I want to thank each and every one of you for your particular role in the fight, and I would ask you to not give up hope, to keep doing what you are doing. And I think collectively we will make a difference.

I would like to thank all of the witnesses for their testimony today. Without objection, Members will have 5 legislative days to submit any additional written questions which we will forward to the witnesses and ask that you answer as promptly as you can to be made part of the record. Without objection, the record will remain open for 5 legislative days for the submission of any other additional materials.

Again, I want to thank everyone for their time and patience. And I hope that, Ms. Hines, you are able to get you another pair of glasses pretty quickly and hope your trip back to Detroit is not as eventful as the one this morning coming here, and that goes for all of you all who are traveling. Again, I want to thank everyone for their time and patience. Merry Christmas, Happy New Year, Happy Chanukah, happy holidays and what not. This hearing of the Committee on the Judiciary is adjourned.

[Whereupon, at 12:48 p.m., the Committee was adjourned.]

A P P E N D I X

Material Submitted for the Hearing Record

PREPARED STATEMENT FROM
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS)

MERS®
Process loans, not paperwork.™

R.K. Arnold
President & CEO

December 7, 2010

Hon. John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Hon. Lamar Smith,
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Conyers and Mr. Smith:

Attached is testimony from Mortgage Electronic Registration Systems, Inc. (MERS) for submission as part of the hearing record for the Committee's December 8, 2010 hearing entitled "Foreclosed Justice: Causes and Effects of the Foreclosure Crisis – Part II."

I greatly appreciate the opportunity to submit testimony on MERS – its history, how it operates, and the benefit it provides to consumers, the government, communities and law enforcement.

It is important for the Committee to know that there are numerous cases upholding the legal validity of MERS. To date, MERS has received more than 200 court decisions nation-wide determining that MERS may hold and/or foreclose mortgage liens. To name just a few, see *In re Mortgage Electronic Registration Systems (MERS) Litigation*, (D.Ariz., Sept. 30, 2010, MDL Docket No. 09-2119-JAT) dismissing six class action complaints and finding that MERS has the right to foreclose; *Cervantes v. Countrywide Home Loans, Inc., et al.* 2:09-cv-00517 (D. Az., 2009), holding that MERS is the beneficiary under the deed of trust; *Ciardi v. The Lending Company, Inc. et al.*, 2010 WL 2079735 (D. Ariz.) holding that MERS is the beneficiary with the authority to foreclose; *Mortgage Electronic Registration Systems, Inc. v. Azize*, (965 So. 2d 151, 153-54 Fla. Dist. Ct. App. 2007), holding MERS can foreclose when it is the holder of the note; *Athey v. Mortgage Electronic Registration Systems, Inc.*, 2010 WL 1634066 (Tex. App. – Beaumont) holding that MERS is the beneficiary of the deed of trust, with the authority to proceed with foreclosure; *In re Huggins*, 2006 WL 3718179 (Bankr. D. Mass. 2006), holding that MERS was the mortgagee with the authority to foreclose. In the case of *Burnett v. Mortgage Electronic Registration Systems, Inc.*, 09-69 (D. Ut. 2009), the court affirmed that MERS was the beneficiary on the Deed of Trust and authorized to commence foreclosure. Additionally, in *Rodeback v. Utah Financial, et al.*, 09-134 (D. Ut., 2010), the court found that when MERS is the mortgagee as the nominee for the noteholder, the Deed of Trust is valid and enforceable. Numerous other decisions in Utah have followed these cases and rejected challenges brought against MERS.

Additionally, many courts have found that MERS' relationship to the promissory note-holder does not support the suggestion that when the borrower grants MERS the mortgage lien as the mortgagee as the nominee for the promissory note-owner, that MERS somehow runs afoul of longstanding precedent on the inseparability of promissory notes and mortgages. Mortgage law is abundantly clear that a promissory note owner may empower an agent with the authority to hold and enforce a mortgage lien on behalf of the note owner, and that courts should make every effort to recognize this agency relationship.[1]

Thank you for allowing this submission. If you or Members of the Committee have any follow-up questions about MERS or would like to meet, I would be happy to do so.

Sincerely,

R.K. Arnold

R.K. Arnold
President and CEO
MERSCORP, Inc.

Enc: Testimony for the House Committee on the Judiciary, submitted for the hearing record "Foreclosed Justice: Causes and Effects of the Foreclosure Crisis – Part II"

[1] See Restatement (Third) Property, § 5.4, comment e

Testimony of R.K. Arnold
President and CEO of MERSCORP, Inc.

House Committee on the Judiciary

Submitted for the Hearing Record
"Foreclosed Justice: Causes and Effects of the Foreclosure Crisis – Part II"

December 8, 2010

Testimony of R.K. Arnold
President and CEO of MERSCORP, Inc.
House Committee on the Judiciary
Submitted for the Hearing Record
"Foreclosed Justice: Causes and Effects of the Foreclosure Crisis – Part II"
December 8, 2010

Chairman Conyers, Ranking Member Smith and members of the Committee, my name is R.K. Arnold. I am President and CEO of MERSCORP, Inc. and its subsidiary, Mortgage Electronic Registration Systems, Inc. I appreciate the opportunity to submit comments to the Committee to explain what MERS is and isn't, its critical role in our nation's housing finance system, and how MERS has been affected by the current foreclosure crisis.

BACKGROUND

MERS is owned by the mortgage industry[1] and operated as a membership organization. Almost all mortgage lenders (about 3,000) are members of MERS, though not all members register all the loans they originate on the MERS® System.[2] MERS derives its revenue solely from its members.[3] MERS charges no fees and makes no money from mortgages, from the

[1] MERSCORP, Inc. is structured as a privately held stock company. Its principal owners are the Mortgage Bankers Association, Fannie Mae, Freddie Mac, Bank of America, Chase, HSBC, CitiMortgage, GMAC, American Land Title Association, and Wells Fargo. MERS is headquartered in Reston VA.

[2] Members tend to register only loans they plan to sell. Wells Fargo and JP Morgan Chase are the principal members in this regard. They service most of the loans they originate themselves, so registering their retail business on the MERS® System is of less practical value to them. However, when these institutions purchase loans from others, known as their correspondent business, they do require that those loans be registered on the MERS® System.

[3] MERS makes its money through an annual membership fee (ranging from $264 to $7,500) based on organizational size, and through loan registration and servicing transfer fees. MERS charges a one-time $6.95 fee to register a loan and have Mortgage Electronic Registration Systems, Inc. serve as the common agent (mortgagee)

securitization or transfer of mortgages, or from foreclosures done in its name.

MERS serves two important functions. First, it maintains a database or registry of mortgage loans, keeping track of changes in servicing rights and beneficial ownership interests over the life of the loan. Second, it can be designated by its members to serve as the mortgagee, or the holder of the mortgage lien, in the public land records. This designation is what enables MERS to maintain its accurate database.

MERS AND YOUR MORTGAGE

The mortgage loan process can be confusing and complex to consumers. There is a lot of paperwork generated and many documents to be signed. However, two pieces of paper stand out from the rest as the most important pieces needed so that the consumer can get a mortgage loan. They are: (1) the promissory note, which is a promise by the borrower to repay the loan amount to the lender or noteholder; and (2) the mortgage (also referred to as the "deed of trust" in some states), which establishes a lien against the property as collateral for the loan and allows the lender (or noteholder) to foreclose on the property if the borrower does not repay the loan according to the terms of the promissory note. The person who borrows the money is called the "mortgagor" and the holder of the mortgage is called the "mortgagee." Once the borrower signs both pieces of paper, the borrower receives the money

in the land records. For loans where Mortgage Electronic Registration Systems, Inc. will not act as the mortgagee, there is only a small one-time registration fee ($0.97). This is known as an iRegistration. Transactional fees (ranging from $1.00 to $7.95) are charged to update the database when servicing rights on the loan are sold from one member to another.

to buy the house. To obtain a mortgage loan, the borrower must agree that the mortgagee has the right to foreclose in the event of a default.

Another important party in the life of a mortgage loan is the loan servicer. The servicer is a company named (by the note-owner) to be the interface between the note-owner and the borrower to collect payments and remit them to the note-owner. It may become the noteholder for purposes of enforcing the terms of the note on behalf of the note-owner.[4]

MERS acts as the designated "common agent" for the MERS member institutions in the land records, which means that MERS holds the mortgage lien on behalf of its members and acts on their behalf as mortgagee. To accomplish this, at the time of the closing, the borrower and lender appoint MERS to be the mortgagee. The designation of MERS is prominently displayed on the mortgage document and is affirmatively approved by the borrower at closing.[5] After the borrower executes the mortgage document, it is recorded in the public land records with Mortgage Electronic Registration Systems, Inc. noted in the index prepared by the recorder (or clerk) as the mortgagee. Mortgage loan information is then registered on the MERS database.

These two key pieces of paper in a mortgage transaction follow very different paths after they are signed. The mortgage (or deed of trust) is recorded in the county land records where an imaged copy is stored.[6] The original mortgage document, with recording data added

[4] The originating lender may be the servicer in some cases.

[5] A copy of a sample mortgage document can be found in Attachment One. A short summary of MERS prepared by the Mortgage Bankers Association can be found in Attachment Two.

[6] This action tells the world that there is a lien against the property. This is done to protect the lender's interest. The recording of the mortgage puts future purchasers on notice of any outstanding claims against the property.

by the county recorder, is returned to the servicer and goes into the servicer's master loan file. The note is sent to a custodian (usually a regulated depository institution) and is typically bought and sold (and thus trades hands) in the normal course of financial activity.[7] The servicer undertakes the obligations to service the loan, but servicing rights also may move from one servicing business to another because servicing rights are contract rights, which are bought and sold independent of any sale of the promissory note. MERS does not receive or maintain either the mortgage or the promissory note.

Every time a note or servicer changes hands, a notation of that change is made (electronically) on the MERS® System by the members involved in the sale. In this way, changes in servicing rights and beneficial ownership interest in the promissory note are tracked over the life of the loan.[8]

A fundamental legal principle is that the mortgage follows the note, which means that as the note changes hands, the mortgage remains connected to it legally even though it is not physically attached. In other words, the promissory note is enforceable against the property because of the mortgage, but the mortgage instrument itself is not independently enforceable as a debt. This principle is not changed when MERS is the mortgagee because of the agency relationship between MERS and the lender. An agency relationship arises where one party is specifically authorized to act on behalf of another in dealings with third persons, and the legal

[7] The promissory note is not (and never has been) recorded or stored with the county land records office. The note is a negotiable instrument that can be bought and sold by endorsement and delivery from the seller to the note purchaser. This activity is governed in all fifty states by the Uniform Commercial Code (UCC) Article 3.

[8] The MERS® System is the database; MERSCORP, Inc is the operating company that owns the database; and Mortgage Electronic Registration Systems, Inc ("MERS") a subsidiary of MERSCORP, Inc., which serves as mortgagee in the land records for loans registered on the MERS® System. For discussion purposes, "MERS" may be used in this testimony to refer to all three entities unless specifically stated otherwise.

definition of a "nominee" is a "party who holds bare legal title for the benefit of others." Here, the language of the mortgage appoints MERS as nominee, or agent, for the lender and its successors and assigns for the purposes set forth therein. The mortgage also grants MERS broad rights, again as nominee for the lender and the lender's successors and assigns, "to exercise any or all" of the interests granted by the borrower under the mortgage, "including but not limited to, the right to foreclose and sell the property; and to take any action required of the lender." Thus, the language of the recorded mortgage authorizes MERS to act on behalf of the lender in serving as the legal titleholder under the mortgage and exercising any of the rights granted to the lender there under.

MERS members affirm this agency relationship with MERS in their membership agreements, which provide that MERS "shall serve as mortgagee of record" with respect to each mortgage loan that the MERS member registers on the MERS® System and provide that "MERS shall at all times comply with the instructions of the holder of mortgage loan promissory notes."

THE MECHANICS OF MERS

MERS tracks mortgage loans through an 18-digit identification number called the Mortgage Identification Number (MIN). With one notable exception, the MIN is to a specific home loan what the VIN (Vehicle Identification Number) is to an individual automobile. Like the VIN, the MIN can be assigned at the earliest stage of the product's creation and stays with it for its entire life. However, unlike cars which all get a VIN, not all loans get MINs and are registered on the MERS® System. This is because some loan originators do not use MERS when they do not intend to sell the servicing rights. About half of all loans active in the United States are registered on the MERS® System.

As the mortgagee of record, MERS receives all notices including legal pleadings on actions pertaining to the property such as foreclosure notices and complaints, tax sales and eminent domain actions, among the many other types of mail. MERS forwards those documents electronically to the relevant servicer who will then take the appropriate action to respond on behalf of the note-owner and MERS.

MERS plays an important role for borrowers as the permanent link between borrowers and their servicers. If servicers change or if they declare bankruptcy, the borrower always has a knowledgeable point of contact in MERS. A toll free number, the unique Mortgage Identification Number (MIN) and mailing address are prominently included on the first page of the mortgage document. MERS also maintains a website, which serves as another resource for borrowers. MERS is also a means by which the borrower can easily identify the note-owner.[9]

MERS is not part of the decision-making process as to which mortgage loans the lenders make to borrowers, nor is MERS part of how mortgage loans get securitized. It is the note-owner who decides whether a note should be sold, or transferred to a trust, or ultimately

---

[9] The design of the MERS® System always anticipated and required that borrowers would be able to access the system to determine the servicer of their loans. Providing such information to MERS is a requirement of membership and loan registration. When Congress acted last year to require that borrowers be told when their note is sold and the identity of the new note-owner, MERS established, within a matter of weeks, a new service called Investor ID. Of the 3,000 members of MERS, 97% agreed to disclose the identity of the note-owner through the MERS® System. Fannie Mae opted to be disclosed. Freddie Mac chose not to be disclosed.

securitized with a pool of other loans.[10] Loans were securitized long before MERS became operational, and in fact, there are loans in securities today that do not name Mortgage Electronic Registration Systems, Inc. as the mortgagee. What MERS does is eliminate the expense of repeated assignments, resulting in lower cost for lenders when they sell the loans (represented by the promissory note) to investors. When the note is sold, MERS continues to act as the mortgagee for the new noteholder because the mortgage interest follows the note when it changes hands.

OTHER FACTS ABOUT MERS

The number of loans registered on the MERS® System is substantial. Since its establishment in 1997, about 66 million loans have been registered and tracked on the MERS® System. About half of those loans (about 31 million) are active mortgage loans.

Measured by direct employment, MERS is a relatively small organization. About 50 people work for MERSCORP, Inc. in our Reston, Va. office. Hewlett-Packard is the MERS technology partner and runs the database with an additional 150 people.

In significant ways, MERS is analogous to the Depository Trust and Clearing Corporation (DTCC) that electronically records the assignment of stock and bond certificates, thus eliminating the need to create a new certificate each time a security is bought or sold. The benefit of MERS is similar to that of the DTCC: It reduces the errors associated with paper

[10] The issue of whether transfers of residential mortgage loans made in connection with securitizations are sufficient to transfer title and foreclosure rights is the subject of a "View Point" article entitled "Title Transfer Law 101" by Karen Gelernt that appeared in the October 19, 2010 edition of the *American Banker*. A copy can be found in Attachment Three.

processes and increases system efficiency.[11] Also like the DTCC, MERS is adjacent to the systems that create the data it tracks; it is integrated with, but independent of, its member organizations. The two primary differences between the organizations are that the DTCC holds title to the financial instrument and that it clears trades between its participants (including the exchange of funds between the counter-parties).

MERS CERTIFYING OFFICERS

Mortgage Electronic Registration Systems, Inc. takes the majority of its actions as the mortgagee through the use of officers commonly referred to as "certifying officers." From inception, the concept of certifying officers has always been fundamental to the operations of MERS. In the white paper calling for the creation of MERS (referenced in footnote 11), it was recognized that members would need to have a form of authority to act on behalf of MERS when MERS is the mortgagee on their behalf. That authority took the form of electing persons (designated by the member) as officers with limited authority to take certain actions. The offices to which each of these individuals are officially appointed are vice president and assistant secretary. The authority granted to these officers is limited to: (1) executing lien releases, (2) executing mortgage assignments, (3) initiating foreclosures, (4) executing proofs of claims and other bankruptcy related documents (e.g., motions for relief of the automatic stay), (5) executing modification and subordination agreements needed for refinancing activities, (6) endorsing over mortgage payment checks made payable to MERS (in error) by borrowers, and

[11] A 1993, 36-page white paper entitled "Whole Loan Book Entry Concept for the Mortgage Finance Industry" addresses the concepts underlying MERS and the problems it was designed to address. It is available upon request.

(7) taking such other actions and executing documents necessary to fulfill the member's servicing duties.

It is important to note that the certifying officers are the same officers whom the lenders and servicers use to carry out these functions even when MERS is not the mortgagee.
MERS has specific controls over who can be identified by its members as a certifying officer. To be a MERS certifying officer, one must be a company officer of the member institution, have basic knowledge of MERS, and pass a certifying examination administered by MERS.

Under the corporate law in Delaware (where MERS is incorporated), there is no requirement that an officer of a corporation also be an employee of that corporation. A corporation is allowed to appoint individuals to be officers without having to employ those individuals or even pay them. This concept is not limited to MERS. Corporations cannot operate without officers; they can and often do operate without employees. It is not uncommon for large organizations to have all its employees employed by an operating company and for those employees to be elected as officers of affiliated companies that are created for other purposes (all corporations are required by law to have officers to act for it). Even for loans where MERS is not the mortgagee, employees of the servicer are generally delegated the power to take actions (e.g., initiate foreclosures) and execute documents (e.g., lien releases and assignments) on behalf of the owner of the loan (and the servicer, in turn, may further delegate such authority to a third-party vendor).

MERS AND FORECLOSURE

When Mortgage Electronic Registration Systems, Inc. is the mortgagee of record, and the borrower is in default on the mortgage, and the note-owner decides to foreclose, foreclosure can be undertaken in one of two ways: Either in the name of MERS, or in the name of the noteholder (which is usually the servicer).

If the noteholder chooses to foreclose in its own name, under the MERS rules, it must be named as mortgagee in the land records. MERS, through the MERS member's designated certifying officer, will execute an assignment to the foreclosing company and the assignment will be recorded in the land records. At this point, MERS no longer holds any legal interest in the mortgage, and it plays no further role in the foreclosure process. Most loans are assigned out of MERS in this way and not foreclosed in the name of MERS.

If the note-owner chooses to have Mortgage Electronic Registration Systems, Inc. foreclose, then the note-owner endorses the note in blank (if it has not already done so), making it bearer paper, and grants possession of the note to a MERS certifying officer. This makes MERS the noteholder. Since MERS is already the mortgagee in the land records, MERS is now able to legally begin the foreclosure process on behalf of the note-owner. The foreclosure is managed entirely by the member institution's MERS certifying officer. This person typically works in the default department within the MERS member institution so they are familiar with the various state foreclosure requirements. The member manages the relationship with the law firm that is handling the foreclosure. The member retains the law firm on behalf of MERS and the member provides the necessary documents and information to the law firm. The member obtains these documents and information from the servicing files and system, which are maintained by the member.

As noted earlier, the MERS certifying officers are the same employee officers who handle foreclosure functions for the MERS member institutions. Whether a foreclosure is initiated in the name of MERS and handled by the certifying officers, or by the lender in its own name, the same people would be doing the work. Likewise, the loan file remains with the servicer as it did before MERS existed. MERS is not a repository for mortgage documents or promissory notes.

It is important to note that Mortgage Electronic Registration Systems, Inc. only initiates foreclosure when it has been instructed to do so by the servicer (acting on behalf of the note-owner) or directly by the note-owner. MERS has strict rules and procedures governing foreclosure, most notably a requirement that the certifying officer be in possession of the mortgage note when foreclosing in the name of MERS. In addition, pursuant to a 2006 MERS membership rule, no foreclosures in the name of MERS are allowed in the State of Florida.

In the event a MERS member contracts out foreclosure operations to a vendor or a law firm, a separate contract is entered into by MERS, the MERS member and the contracted firm for the purpose of establishing our understanding of the obligations of the parties and for the purposes of designating certifying officers. The specific, authorized functions of MERS certifying officers are enumerated in a corporate resolution by which MERS makes the appointment.

Because there is a choice whether a foreclosure is done in the name of the servicer, note-owner or MERS, one might wonder if there is an advantage in choosing one way or the other. The advantage to institutions by foreclosing in the name of MERS is that they do not need to record an assignment from MERS to themselves, saving them time and money. The advantage that some lenders see in not foreclosing in the name of MERS is that the MERS rules are strict and require that the note be produced. If the lender does not want to do this, the MERS member cannot commence a foreclosure action in the name of MERS, but must assign the mortgage out of MERS. This is a major reason why most loans are not foreclosed in the name of MERS.

In 2005, when it became apparent to us that foreclosures undertaken in Florida were relying excessively on lost note affidavits, MERS adopted a rule forbidding the use of lost note affidavits when foreclosures were done in the name of MERS in Florida. That rule was extended nationally in 2006 and is still in effect today. MERS believes that borrowers are entitled to know that the company foreclosing has all of the necessary paperwork and rights to do so. Showing up with the original note provides the borrower and the court with proof that the foreclosing company is the proper party to foreclose.

COMMON QUESTIONS ABOUT MERS STRUCTURE AND ROLE IN MORTGAGE MARKETS

When servicing rights or promissory notes are sold for loans where MERS is not the mortgagee, the usual practice is for the seller to execute and record an instrument assigning the mortgage lien to the purchaser (commonly referred to as an "assignment"). Assignments are not required by law to be recorded in the land records. The primary reason assignments are recorded (in cases where MERS is not the mortgagee), stems from the appointment of servicers to administer the loan on behalf of the mortgage loan owner. In which case, the servicer will be assigned the mortgage lien (thus becoming the mortgagee) in order to receive the service of process related to that mortgage loan. When Mortgage Electronic Registration Systems, Inc. is the mortgagee (i.e., holds the legal title to the mortgage lien), there is no need for an assignment between its members because MERS is the common agent for them. It is not the case that the assignments are now being done electronically through the MERS® System instead of being recorded in the land records. The need for an assignment is eliminated because title to the mortgage lien has been grounded in MERS. Moreover, transfers of mortgage notes and servicing rights are not recordable transactions (and have never been reflected in the land records) because they are not a conveyance of an interest in real property that is entitled to be recorded; only the transfer of the lien is a conveyance. A promissory note is sold by endorsing the note, and delivering it to the purchasers. Servicing rights are non-recordable contracts rights. Mortgage Electronic Registration Systems, Inc. remains the mortgagee regardless of the number of these non-recordable transfers that may occur during the life of the loan. Upon such sales, the seller and purchaser update the MERS® System of the transfer with an "electronic handshake." If the purchaser does not confirm the transaction, it is flagged by the MERS® System for follow-up. MERS also audits its members for the accuracy of the information they provide to the MERS® System.

The only reason servicers needed to appear in the county land records before MERS was so they could receive legal notices pertaining to the property. That role is now played by MERS as their common agent. MERS runs a massive mailroom and help desk operation to handle millions of legal notices for its members, which makes it far more efficient and certain that mail will go to the correct place. Today, if a servicer "boxes up" in the middle of the night and disappears, the homeowner can have confidence that legal notices will be delivered to the correct successor company without delay.

The chain of title starts and stops with Mortgage Electronic Registration Systems, Inc. as the mortgagee. MERS, as the agent for the note-owner, can hold legal title for the note-owner in the land records.[12] The basic concept of a recording statute is that a person or company claiming an interest in land protects its interest by recording that interest at the county recorder of deeds office. The recorded document provides constructive notice to the world of the claim. In many states, there is no requirement that a conveyance of real estate must be recorded in the land records. The concept of nominees appearing in the land records on behalf of the true owner has long been recognized. It has never been the case that the true owners of interests in real estate could be determined using the land records.

The use of MERS is in compliance with the statutory intent of the state recording acts. When MERS is the mortgagee, the mortgage is recorded at the county land records, thereby putting the public on notice that there is a lien on the property. As the 1993 white paper describing MERS makes clear, at certain time periods, the flow of assignments were overwhelming the county recorder system, resulting in long backlogs, and in some cases, taking the county recorder over a year to record an assignment. Now that assignments are eliminated

---

[12] The essential elements of the legal principles underlying MERS can be found in "MERS Under Attack: Perspective on Recent Decisions from Kansas and Minnesota," an article by Barkley and Barbara Clark in the February 2010 edition of *Clark's Secured Transactions Monthly*. A copy of this article can be found in Attachment Four.

because a common agent like MERS is holding the mortgage lien, the land records can operate more efficiently. Multiple assignments can lead to errors and uncertainty in the chain of title because assignments were often missing, incomplete, inaccurate, or misfiled. In situations where the recorded assignment identified the wrong property, the lender had not perfected its lien on the right property but had clouded the title for some unrelated third party.

The MERS® System also complements the county land records by providing additional information that was never intended to be recorded at the county level, namely the information about the mortgage loan servicer, and now, with the addition of MERS® InvestorID, the name of the investor.

Some have raised questions about the reduction of recording fees that has accompanied the elimination of the need to record assignments, and there have been suggestions that these fees are somehow owed or outstanding. Fees are paid for a service performed, and if a document is eliminated because it is no longer legally necessary, no fee is due and owing because there is nothing to record. Another way to look at it is that, because MERS greatly reduces the workload of county recorders, the lower operating expenses of the county recorder's office offsets the loss in fee income. Moreover, it would be the borrower, and not the lender, who ultimately pays the costs of recording assignments, either directly or indirectly.[13]

The use of MERS is based on sound legal principles. Its legal validity has been upheld as it was in the Cervantes, Jackson and In re Tucker cases, to just name a few. While there is much

[13] On loans originated by correspondent lenders or brokers (where MERS is not the mortgagee), the costs of preparing assignments and the associated filing fees are listed on the HUD-1 and paid directly by the borrower.

support by courts for the MERS role as a common agent, there have been cases where there have been evidentiary issues, which have resulted in outcomes that do not always let MERS, or its members, foreclose without going back and proving up the right to take action. States have laws that govern foreclosures[14] and when the process is not followed, it can, and should result in a court not allowing it to go forward. In some of these cases, judges wanting more evidence or information about MERS have made comments about MERS. In light of the recent foreclosure crisis, it is probable that MERS will continue to be challenged. But we are confident that when courts are provided with all of the facts, MERS will continue to prevail.[15] A MERS case law outline (current through October 20, 2010) is available upon request.[16]

[14] Individual states handle real estate foreclosures differently. In some states the foreclosure process is judicial, and in some states it is non-judicial. Under both systems, time frames and terms vary widely from state to state. A brief, general, description of both processes prepared by the Mortgage Bankers Association can be found in Attachment Five.

[15] Some important recent cases upholding the rights of MERS include:

- **IN RE Mortgage Electronic Registration Systems (MERS) Litigation**, a multi-district litigation case in federal court in Arizona where the court issued a favorable opinion, stating that "The MERS System is not fraudulent, and MERS has not committed any fraud."
- **In re Tucker** (9/20/2010), where a Missouri bankruptcy judge found that the language of the deed of trust clearly authorizes MERS to act on behalf of the lender in serving as the legal title holder.
- **Mortgage Electronic Registration Systems, Inc. v. Bellistri**, 2010 WL 2720802 (E.D. Mo. 2010), where the court held that Bellistri's failure to provide notice to MERS violated MERS' constitutional due process rights.
- **Taylor v. Deutsche Bank Nat'l Trust Co.**, So. 3d, 2010 WL 3056612 (Fla. 5th DCA 2010), where the court held the MERS mortgage to be valid under Florida law, and held that MERS may assign its rights in the mortgage to the foreclosing company who holds the note. The Florida court also held that where MERS is described as the "mortgagee under the Security Instrument" the document grants to MERS legal status under the UCC, which MERS can assign to the foreclosing bank.
- **Deutsche Bank Natl. Trust Co. v. Traxler**, 2010-Ohio-3940, where the Ohio Court of Appeals recognizes MERS' authority to assign a mortgage when designated as both a nominee and mortgagee.
- **King v. American Mortgage Network, et al.**, United States District Court, District of Utah, Northern Division (Case No. 1:09-CV-125 TS), where the court, interpreting the language of the deed of trust, held that MERS had the authority to initiate foreclosure proceedings, appoint a trustee, and to foreclose and sell the property.

[16] A review of the use of MERS in all fifty states was done by Covington and Burling in 1996 and 1997 as part of the due diligence associated with the creation of MERS. It is available upon request.

MERS CONTINUES TO IMPROVE ITS PROCESSES

In 2009, when it came to our attention that some employees designated by member institutions to serve as MERS certifying officers were not entrusted by their own institutions with signing authority, MERS enhanced its procedures to require that each MERS certifying officer be a company officer of the member institution. In addition, MERS has developed a primer containing information to be reviewed by each prospective MERS certifying officer. To test this knowledge, MERS instituted an online examination to make sure prospective certifying officers had a basic knowledge of MERS and of their roles and responsibilities as MERS certifying officers. MERS requires that these certifications be renewed annually, and we also instituted a recertification process for current certifying officers who had been designated prior to establishment of the online examination. MERS will continue to enforce these policies and refine its testing and certification program in recognition of the responsibility involved in initiating a foreclosure on someone's home.

When we saw actions were being undertaken to accelerate foreclosure document processing, we became concerned that certifying officers might be pressured to perform their responsibilities in a manner inconsistent with the MERS rules. When we did not receive the assurances we thought appropriate that this would not happen, we suspended relationships with some prominent players involved in the foreclosure process.

When we discovered that some "robo-signers" were MERS certifying officers, we contacted those certifying officers and suspended their authority. They will not be recertified until they retrain and submit to reexamination, and the members who employed them provide

MERS with a plan on what will be changed within their companies to prevent this from happening again.

The MERS management team is committed to the highest standards; we believe that MERS adds great value to our nation's system of housing finance in a way that benefits financial institutions, borrowers and the government. There are many benefits derived from the MERS database:

- The MERS database is available to borrowers to locate their servicers, and in many cases, to identify note-owners.
- For local communities, MERS has become a much-needed link between code enforcement officers and the servicing community to help combat the blight that vacant properties bring to neighborhoods. Over 600 government institutions (cities, municipalities and states) utilize the MERS® System for free to look up the property preservation contacts for loans registered on the system. This helps save the code enforcement officers much needed time in searching for the company directly responsible for the upkeep of that vacant property.
- For law enforcement agencies, MERS aids in combating mortgage fraud through the detection of undisclosed multiple liens taken out by fraudsters for the same social security number or property.

Also, with MERS, lien releases occur quickly at the time of payoff for borrowers because there can be no break in the chain of title with MERS. And finally, foreclosures in the name of MERS are not allowed without the note.

IDEAS FOR THE FUTURE

The MERS database, coupled with the Mortgage Identification Number, is a powerful tool that can be harnessed by the Congress and the industry to improve the mortgage finance system. There are a number of ideas that are worth considering so that when we emerge from this current crisis we have a housing finance system that meets our needs:

1. All residential home loans should be uniquely identified and tracked on a national database, which should include:
    a. Who is the borrower?
    b. What/Where is the property?
    c. Who is the owner of the loan's promissory note (the originator/investor)?
    d. Who is the servicer of the loan (the mortgage company)?
2. The cost of registration for the loan should be included with the other origination fees and disclosed on the HUD -1 at closing.
3. The national database should also track who has physical custody of the original promissory note (the mortgages are always available in the county land records).
4. The database should reflect both current and historical information regarding the home loan.
5. The national unique identifier should be a full life-of-loan identifier, from origination through final satisfaction (payoff) and lien release.
6. All federal data systems that deal with home loans should be required to integrate the unique national identification number, so that information regarding loans can

be linked across multiple data sources, e.g., the FHA should be able to look at HUD data, and FDIC should be able to look at SEC information, always knowing that they are comparing apples to apples. State and local government agencies should also be encouraged to adopt the number.

All of us at MERS keenly understand that while owning your own home is a dream, losing that home is a nightmare. As professionals who have dedicated ourselves to helping people realize their dream, we are deeply dismayed by the current foreclosure crisis. We take our role as a mortgagee very seriously and we see our database as a key to moving toward better access to information and transparency for consumers.

I am hopeful that as people understand more about MERS and the role we play, they will see that MERS adds great value to our nation's system of housing finance in ways that benefit not just financial institutions, the broader economy and the government, but—most of all—real people.

Thank you for holding these hearings and the opportunity for MERS to participate.

ATTACHMENTS:

1) Sample mortgage document
2) MBA Fact Sheet on MERS
3) "Title Transfer Law 101," by Karen Gelernt, *American Banker*, October 19, 2010
4) "MERS Under Attack: Perspective on Recent Decisions from Kansas and Minnesota," by Barkley and Barbara Clark, *Clark's Secured Transactions Monthly*, February 2010
5) "Judicial Versus Non-Judicial Foreclosure," Mortgage Bankers Association, October 2010

ATTACHMENT 1:

SAMPLE MORTGAGE DOCUMENT

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

Prepared by or under the supervision of:

[Name of Natural Person]

[Street Address]

[City, State Zip Code]

---------------------------------- *[Space Above This Line For Recording Data]* ---

The MERS 18-digit MIN must be visible on the Security Instrument. Place the MIN to the right of the form title, but not within the top recording margin or on the right margin.

MORTGAGE **MIN: 1000XXX-XXXXXXXXXX-X**

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) **–Security Instrument"** means this document, which is dated , together with all Riders to this document.

(B) **–Borrower"** is

MERS as the Original Mortgagee language. See page 3 of this document to note further reference to MERS as Mortgagee.

. Borrower is the mortgagor under this Security Instrument.

(C) **–MERS"** is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the mortgagee under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(D) **–Lender"** is .

Lender is a organized and existing under the laws of . Lender's address is .

(E) **–Note"** means the promissory note signed by Borrower and dated . The Note states that Borrower owes Lender Dollars (U.S. $) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than .

Initials: _____ _____ _____ _____

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

(F) "**Property**" means the property that is described below under the heading "Transfer of Rights in the Property."

(G) "**Loan**" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(H) "**Riders**" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower *[check box as applicable]*:

☐ Adjustable Rate Rider
☐ Balloon Rider
☐ 1-4 Family Rider
☐ Other(s) *[specify]*
☐ Condominium Rider
☐ Planned Unit Development Rider
☐ Revocable Trust Rider
☐ Second Home Rider
☐ Biweekly Payment Rider

(I) "**Applicable Law**" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "**Community Association Dues, Fees, and Assessments**" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "**Electronic Funds Transfer**" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "**Escrow Items**" means those items that are described in Section 3.

(M) "**Miscellaneous Proceeds**" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "**Mortgage Insurance**" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "**Periodic Payment**" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "**RESPA**" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security

Initials: _____ _____ _____ _____

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) **"Successor in Interest of Borrower"** means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to **MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property located in the**

[Type of Recording Jurisdiction]

of :

[Name of Recording Jurisdiction]

MERS noted as lender's nominee in the transfer/due on sale clause.

which currently has the address of

[Street]

, Florida ("Property Address"):

[City] *[Zip Code]*

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those 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 canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

Initials: ______ ______ ______ ______

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by

Initials: ____ ____ ____ ____

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or

Initials: _____ _____ _____ _____

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be

Initials: _____ _____ _____ _____

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to:

Initials: _____ _____ _____

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

(a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender

Initials: ______ ______ ______ ______

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has – if any – with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Initials: _____ _____ _____ _____

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

Initials: _____ _____ _____ _____

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and

Initials: _____ _____ _____

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

(d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. 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. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Initials: _____ _____ _____ _____

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Attorneys' Fees. As used in this Security Instrument and the Note, attorneys' fees shall include those awarded by an appellate court and any attorneys' fees incurred in a bankruptcy proceeding.

25. Jury Trial Waiver. The Borrower hereby waives any right to a trial by jury in any action, proceeding, claim, or counterclaim, whether in contract or tort, at law or in equity, arising out of or in any way related to this Security Instrument or the Note.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:

______________________________	______________________________ (Seal) -Borrower *[Printed Name]*
Printed Name: ____________________ *[Please Complete]*	Mailing Address:
______________________________	______________________________ (Seal) -Borrower

Initials: _____ _____ _____ _____

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

[Printed Name]

Printed Name:______________________
[Please Complete]

Mailing Address:

______________________ (Seal)
-Borrower
[Printed Name]

Mailing Address:

______________________ (Seal)
-Borrower
[Printed Name]

Mailing Address:

[Acknowledgment on Following Page]

This is an Example of a Mortgage which names MERS as the Original Mortgagee (MOM Document).

State of §
§
County of §

The foregoing instrument was acknowledged before me this , ,
[date] by

[name of person acknowledging],
who is personally known to me or who has produced
[type of identification] as identification.

Signature of Person Taking Acknowledgment

Name Typed, Printed or Stamped

Title or Rank

Serial Number, if any

After recording please return to:

[Company Name]

[Name of Natural Person]

[Street Address]

[City, State Zip Code]

ATTACHMENT 2:

MBA FACT SHEET ON MERS

MORTGAGE BANKERS ASSOCIATION
Investing in communities

MBA Fact Sheet
The Role of Electronic Mortgage Registrations

The Need for Electronic Registration

Recent events in the mortgage loan servicing industry have prompted questions about how mortgages are recorded and their ownership tracked. These questions are important for a number of reasons. In today's mortgage finance system, a loan is often sold one or more times after origination and then securitized as part of a pool of similar mortgages. Additionally, the overwhelming majority of mortgage loans are paid off through refinancing or sale of a property long before their terms (such as 15, 30 or 40 years) expire. These facts make tracking the servicer and ownership of every mortgage challenging and, at the same time, absolutely critical to the efficient operation of the mortgage market.

To understand the purpose of a registry of mortgage rights, it is important to understand the nature of mortgage loans. Mortgage loans are complex financial products that come with piles of paperwork (actual and electronic) at every step of the process – from borrower application to the ultimate marketing of a security backed by that loan. Two instruments are fundamental to virtually every mortgage loan today and rise above the rest in terms of legal importance – the promissory note and the security instrument, which is generally a mortgage or deed of trust. The security instrument establishes the note holder's right to the property, securing repayment of the borrower's promissory note upon the borrower's default.

The legal principle governing the right to receive payment under a mortgage note is that "possession" of the note determines ownership and the security instrument follows the note. The security instrument is recorded in the local (usually county) land records office to provide "public notice" of the mortgage lien.

The American process for allowing a borrower to possess real estate while paying the debt, and requiring the lender to record a notice of lien so that subsequent creditors and other interested parties can be aware of the lender's security interest in the real property, has been in place since the early 17th century. For hundreds of years, it worked pretty much the same way in counties across the country.

In more recent history, it also has been common practice to divide up the rights in a mortgage into "legal" rights and "equitable" or "beneficial" rights. Going back to the launch of FHA-insured mortgages in the 1930's, when a loan was made, the mortgage originator was identified in the public records as "mortgagee of record" on behalf of a life insurance company that would purchase the mortgage obligation. All rights to receive payment were sold to the insurance company which would become the equitable owner of the promissory note. To the world, the mortgage originator/servicer would be the mortgagee of record, but the entity would hold only "bare legal title" in order to service the mortgage on behalf of its investor. "Servicing" includes collecting mortgage payments, remitting them to investors, and handling mortgage delinquencies and defaults on behalf of an investor. As the secondary mortgage market evolved, this model was adopted by Fannie Mae and Freddie Mac, Ginnie Mae, and private label securitizers.

Under this model, every time servicing obligations changed hands as the mortgage moved through the mortgage business chain, the new servicer was generally required by the investor to record the assignment of its bare legal title in the local land records office. The records also had to be updated and liens released, as they do still today, any time a mortgage was paid off through a refinance or sale of the property.

By the early 1990s, with homeownership continuing to grow and interest rates falling to new lows, it was apparent that the mortgage recordation system that had been in use for nearly 400 years could not keep up with the modern volume of residential real property finance transactions. In fact, the 1993 mortgage refinance boom, still one of the largest in American history, was hampered by a severe backlog of paperwork (which included the assignments between servicers) at land records offices in many areas of the country, often delaying lien releases and related home purchase and mortgage refinance transactions to the detriment of consumers trying to benefit from falling interest rates and compromising the chain of record title. Borrowers, lenders and government officials all became frustrated by this situation which was exacerbated by the growing volume of investor-required mortgage assignments.

The mortgage recordation backlog of the early 1990s was somewhat analogous to Wall Street's "paperwork crisis" of the late 1960s, where clerks were buried in so many paper stock certificates that they could not process them fast enough. To solve this crisis, Wall Street turned to technology and a system of book-entry accounting to track stock ownership. Mortgage companies, banks, investors and government officials saw the positive results of this evolution in the stock market and began to discuss how to apply a similar concept to tracking mortgage ownership rights, servicing rights and warehouse loans (short-term security interests in mortgage obligations prior to their sale into the secondary mortgage market). Out of these discussions was born an industry utility that came to be called MERS, or Mortgage Electronic Registration Systems, Inc.

MERS Today

Today, MERS is an integral part of modern mortgage finance. MERS has dramatically improved the quality and availability of information in the residential mortgage process since its operations began in 1997.

The MERS® System is a database of information provided by mortgage lenders, servicers and investors. It is owned and operated by MERSCORP, Inc., the parent company of Mortgage Electronic Registration Systems, Inc. Using a standard Mortgage Identification Number (MIN), the MERS® System tracks changes in holders of loan servicing rights, owners of the mortgage note and holders of warehouse loans.

On the majority of mortgage loans today, borrowers agree at settlement to allow Mortgage Electronic Registration Systems, Inc. to be the mortgagee of record – as "nominee" for the promissory note holder – as the note is sold, aggregated and securitized. The mortgage lien and its priority position are properly established in the county recorder's office, while the ownership of the note and other mortgage rights move through the modern system of banking and capital markets, all the time being tracked closely by the MERS® System.

Allowing Mortgage Electronic Registration Systems, Inc. to serve as the mortgagee of record has relieved the pressures on the public land records caused by repeated transfers of mortgage rights (such as servicing and ownership rights), and thereby helps protect the accuracy and integrity of the chain of title. MERS also maintains a centralized "mailroom" on behalf of its members to receive and disseminate legal notices it receives as mortgagee of record.

The MERS® System supports the mortgage securitization process by giving banks, brokers, loan originators, servicers, investors and regulators the ability to track key information on every mortgage loan registered on the MERS® System. Since its inception, over 3,000 such market participants have registered more than 65 million loans with on the MERS® System. Today, over half of all outstanding mortgages are registered on the MERS® System.

MERS is also useful to borrowers, both directly and indirectly. MERS, for the first time, created a way for borrowers to track the servicer (and sometimes the investor) for their loan. This service is free online at http://www.mersinc.org/homeowners/ or by calling (888) 679-6377. Through the reduction of paperwork and other efficiencies, MERS has helped significantly reduce the costs of a mortgage which helps keep the mortgage market liquid and ultimately reduces costs to borrowers. In addition, MERS has decreased the time it takes to refinance a loan which can be a significant benefit to borrowers attempting to lower their interest rate or move from a variable interest rate loan to one with a fixed rate.

As the mortgagee of record, it is common for MERS to play a role in foreclosures. If Mortgage Electronic Registration Systems, Inc. is the mortgagee of record with the county land records, and the borrower is in default on the mortgage, foreclosure can be legally commenced either by Mortgage Electronic Registration Systems, Inc. on behalf of the note owner, or by servicer or other entity if the note owner instructs MERS to assign the mortgage to the servicer or other entity. The process varies in these two ways due to state laws and/or the preference of the servicer or investor. It is important to note that Mortgage Electronic Registration Systems, Inc. only initiates foreclosure when it has been instructed to do so by the owner of the mortgage and possesses the mortgage note.

For more information on MERS, go to www.mersinc.org.

October 29, 2010

ATTACHMENT 3:

"Title Transfer Law 101," by Karen Gelernt

***American Banker*, October 19, 2010**

AMERICAN BANKER.
THE FINANCIAL SERVICES DAILY
Tuesday, October 19, 2010

VIEWPOINT

Title Transfer Law 101

BY KAREN GELERNT

Recently, commentators have raised questions about whether certain transfers of residential mortgage loans (made in connection with secondary market transactions such as securitizations) were sufficient to transfer title to the new owner of the mortgage loans and whether such transfers of rights were sufficient to allow the new owner of the mortgages to commence foreclosure, where appropriate.

To better understand these issues, they must be put in their proper perspective based upon the law that underlies transfers of mortgage loans. The underlying tenet, however, is that residential mortgage notes are negotiable instruments which, by their nature, are intended to be liquid and easily transferable by certain key actions outlined in the law. Challenging this notion, irresponsibly questions a well-established body of law affecting trillions of dollars of mortgage loans as well as trillions of dollars of other types of negotiable instruments.

A mortgage loan consists of two important documents: the mortgage note, which constitutes the obligation of the mortgagor to pay its loan; and the mortgage, that constitutes the lien on the real property that secures the note. The note is a promissory note and notes secured by homes are typically negotiable instruments under law. Negotiable instruments have certain special characteristics under law. First, they are easily transferable (typically by endorsement).

Second, a holder in due course of a negotiable instrument takes the instrument free of most defenses to payment, thereby permitting the holder prompt payment. The intent behind the law of negotiable instruments was to enable such instruments to be as liquid as possible, to encourage commerce and lending. As such, residential mortgage loans are intended to be relatively liquid assets, easily transferred and easily realized upon.

In this way, a residential mortgage note is analogous to a check. In the case of the mortgage note, it is payable to the order of a mortgagee. Similar to a check, which is transferred by endorsement, a mortgage note is also transferred by endorsement. An endorsement can be specific (such as "Pay to the order of Joe Smith") or can be blank (such as "Pay to the order of ______"). When a note is endorsed in blank, it becomes bearer paper (in other words, the bearer, or holder, is presumed to be the owner). The analogy would be a check made out to "cash." In both instances, the instrument can be physically transferred multiple times without the requirement of additional endorsements. If you presented a bank with a check made out to "cash" the bank should not question your ownership. Similarly, the ownership by an entity of a mortgage note endorsed in blank should not, in the ordinary course, be challenged.

In other words (and aside from the separate issue of whether the circumstances that are required to commence foreclose exist with respect to the mortgage loan), mere possession of a promissory note endorsed in blank (whether a check or a mortgage note) should provide the presumption of ownership of that promissory note by the current holder. So for example, a trustee for a securitization that has physical possession of the mortgage note, should be the presumed owner of that note. Any other outcome would put at risk the entire premise and foundation of negotiable instruments law.

In the end, an endorsement in blank does not, and should not, raise a question of ownership of the instrument.

The second component of a mortgage loan is the mortgage. The mortgage and the transfer of mortgage is governed by real property law. The mortgage must be recorded to put third parties on notice of the lienholder. This protects the mortgagee as well as other parties that might assert an interest in the property, like other lenders, judgment creditors or potential purchasers of the property. It protects the mortgagee because, if a third party were to assert an interest in the real property it would be required to give notice to all the interested parties of record, including the mortgagee of record under the mortgage. If an assignee did not record an assignment of mortgage, then the assignee would not be put on notice. However, this would be a risk borne by the assignee.

Historically, when a mortgage loan was transferred it was accompanied by an assignment of mortgage, oftentimes in blank. Because the secondary market was so active, buyers of mortgage loans frequently did not record the assignments in blank and merely delivered the assignments with the related mortgage notes endorsed in blank to the subsequent buyer. Frequently, the servicer of the mortgage loans remained the mortgagee of record and would receive any important notices regarding the related mortgaged properties. However, in order to facilitate easy transfers of mortgage loans, and to ease the burden of multiple recordations of assignments of mortgage in an active secondary market, MERS systems was developed. MERS is basically an agent for the mortgagee of record. So while a mortgage note may be transferred several times the mortgagee of record remains MERS and MERS tracks the intended mortgagee in its systems.

But at the end of the day, it is the owner of the mortgage note that dictates ownership of the mortgage (a premise commonly referred to as "the mortgage follows the note") as evidenced by Article 3 and Article 9 of the Uniform Commercial Code, in effect in all states.

Ideally, at foreclosure, the mortgagee of record should correspond to the holder of the note. However, any disparity should not be an acceptable basis to bar foreclosure, since the mortgage should not be the document that is dispositive of title to the mortgage loan. The holder of the note should be deemed the owner of the mortgage loan with standing and right to foreclose.

The chain of assignment of the mortgage may for various reasons be defective, or in the case of MERS, an agent for the holder may be identified as the mortgagee, but the principles of commercial law and negotiable instruments, if applied correctly, should ultimately prevail and allow the holder of the note to foreclose to the extent permitted by the mortgage loan documents and applicable state law. Any other outcome would call into question the foundations and liquidity of negotiable instruments and severely obstruct what was always intended as a relatively liquid market.

Karen Gelernt is a partner in the capital markets department at Cadwalader, Wickersham & Taft.

ATTACHMENT 4:

"MERS Under Attack:
Perspective on Recent Decisions from Kansas and Minnesota,"
by Barkley and Barbara Clark
Clark's Secured Transactions Monthly
February 2010

CLARKS'
SECURED TRANSACTIONS MONTHLY
Documentation • Bankruptcy • Regulation

MERS Under Attack:
Perspective on Recent Decisions from Kansas and Minnesota

by Barkley and Barbara Clark

February 2010

Due to the economic downtown, the business of securitizing loans into secondary markets has come under intense scrutiny. This is particularly true in the real estate area, where loans are routinely bundled into mortgage-backed securities and sold to investors. Since the original lender contemplates the immediate sale of the loan, it is common practice for originators to appoint a nominee, as third-party agent, who remains as mortgagee in the land records throughout the life of the loan. MERSCORP, INC., a privately held shareholder Delaware Corporation, operates the nationwide electronic registry for tracking interests in mortgage loans as they move through the securitization pipeline.

Mortgage Electronic Registration Systems, Inc. (MERS), a wholly owned subsidiary of MERSCORP, Inc. that serves as mortgagee in a nominee capacity for the lender and subsequent assignees—upfront and for the life of the loan---is generating nationwide litigation. Distressed borrowers are seizing on the fact that the name of the recorded mortgagee, and the identity of the investor as the beneficial owner of the mortgage loan, do not match. Borrowers (and some bankruptcy judges) are using the mismatch as ammunition for challenging foreclosure actions and avoiding mortgage obligations.

The legal issues have recently come to a head in significant decisions by the Kansas and Minnesota supreme courts. These cases are high-stakes challenges to the MERS registration system. We think the Kansas Supreme Court misconstrued the law in reaching its decision, but the Minnesota Supreme Court got it right.

MERS loses in Kansas. The Kansas case, decided on August 28, is *Landmark National Bank v. Kesler*, 216 P.3d 158 (Kan. 2009). The Kansas high court recently denied motions for reconsideration. There is a possibility that MERS will take the case to the U.S. Supreme Court in an effort to bolster its position as mortgagee and the mortgage showed an address for MERS on millions of recorded mortgages.

In *Landmark*, MERS was the mortgagee as the nominee for the beneficial owner of the junior mortgage loan. When the first mortgagee foreclosed, it did not notify MERS even though MERS was the recorded mortgagee. A default judgment wiped out the second mortgage and the property sold to a third party. The court did not decide the issue of whether MERS was entitled to notice and service of process in the initial foreclosure action, an issue fundamental to the MERS business model. Instead, it narrowly held that the trial court did not abuse its discretion in denying MERS' motion to vacate a default judgment and require joinder of MERS. Under the court's analysis, even if MERS was technically entitled to notice and service in the initial foreclosure action, MERS would not have had a "meritorious defense."

MERS is interpreting the Kansas court's holding narrowly, based on its procedural posture (the difficulty of overturning a judgment under the "abuse of discretion standard"), and is suggesting that the holding is limited because the court did not want to vacate a default judgment. Nevertheless, consumer advocates and some commentators are reading the decision as challenging MERS' basic right to notice of foreclosure actions. For example, Dan Schechter, a law professor at Loyola Law School in Los Angeles, suggests that the case "deprives the assignee of all economic benefit from the mortgage due to

This article is reprinted with the publisher's permission from *Clarks' Secured Transactions Monthly*, October 2009 published by A.S. Pratt & Sons. Copying or distribution without the publisher's permission is prohibited. To subscribe to *Clarks' Secured Transactions Monthly*, or other A.S. Pratt publications, please call 1-800 456-2340, email sales@aspratt.com, or visit www.aspratt.com. All views expressed in the articles and columns are those of the authors and not necessarily those of A.S. Pratt, Sheshunoff Information Services, or ALEX eSolutions.

the involvement of MERS." He finds it "hard to quarrel with Kansas law" and posits that the law of "most states would be similar." Ominously, Professor Schechter concludes that dicta in the decision call into question "whether millions of MERS-administered mortgages are really enforceable." See 2009 Comm. Fin. News 72 (available on Westlaw).

MERS wins in Minnesota. *Jackson v. MERS*, 770 N.W. 2d 487 (August 13, 2009) is the Minnesota case. It came to the supreme court of Minnesota by way of a certified question from the federal district court. Borrowers facing foreclosure brought the lawsuit. Purporting to act on behalf of a class, they challenged MERS' right to proceed under Minnesota's foreclosure-by-advertisement statute, arguing that MERS had failed to comply with the statutory provisions requiring recording of an assignment of the underlying indebtedness. Minn. Stat. §§ 590.02 and 580.04 (2006). MERS serves as mortgagee for the lender as well as lender's assigns.

The Minnesota case turned on the legal question of what constitutes an assignment of a mortgage within the meaning of the foreclosure statute. The court answered the certified question in MERS' favor, holding that "transfers of the underlying indebtedness do not have to be recorded to foreclose a mortgage" under the foreclosure-by-advertisement statute. Therefore, MERS had no reason to re-record, and MERS was the proper mortgagee, with standing to bring the non-judicial foreclosure. Although the certified question focused on Minnesota's non-judicial foreclosure statute, the court's interpretation of the general law applicable to assignments of beneficial ownership interests is important.

How MERS works. Some background about how MERS works helps to put into context the legal issues before both courts. MERSCORP, Inc. tracks changes in the beneficial interests in mortgage loans in the secondary markets. MERSCORP, Inc. is similar to the book-entry systems used by the securities industry since the 1970s. A consortium of key players in the real estate financing industry developed MERSCORP, Inc. and MERS, including the GSEs (Fannie Mae, Freddie Mac, and Ginnie Mae) and the Mortgage Bankers Association; their purpose was to facilitate the operation of the mortgage markets. MERS registers about two-thirds of all residential loans in the secondary market--approximately 62 million mortgages. In a nutshell, MERS is mega.

Typically, the parties use the Fannie Mae/Freddie Mac Uniform Security Instrument. It is a three-party agreement among the borrower, lender, and MERS. The mortgage form names MERS as mortgagee of record in a nominee capacity for the original lender and lender's successors and assigns. The interest conveyed to MERS is "legal title." The document explicitly grants MERS the right to act on behalf of the lender as required by law or custom, including the right to foreclose and sell the property. Under the mortgage, the lender (and its assigns) retain "beneficial" title.

Put another way, the MERS' system intentionally names MERS as the original mortgagee while the originating lender remains as the payee on the note. When beneficial ownership interests transfer in the secondary market from one MERS member to another, (e.g. the note is negotiated and servicing rights are sold), MERSCORP, Inc. tracks these transfers electronically. The idea behind MERS is that the efficiency of the mortgage markets is vastly improved by maintaining MERS as the mortgagee on public records (in a nominee capacity for the lender and assigns) when transfers of mortgage interests (for mortgage loan sellers, warehouse lenders, mortgage investors, documents custodians, and mortgage servicers) are transacted privately pursuant to clearinghouse rules.

The MERS operating agreement also stipulates that MERS will act on behalf of the beneficial owner according to instructions from that member. Rules governing these agency relationships are set forth in member agreements. As a matter of contract, MERS becomes the agent for a new principal, the next purchasing member, each time there is a transfer. Special rules govern situations where parties that are not members of MERS purchase loans. Under these circumstances, the non-member can choose to keep using the MERS system if the servicer is a MERS member, or de-register the loan. When a non-member removes the loan from the MERS system, there is a recorded assignment of the mortgage to the new note holder.

MERS model relies on fundamental legal principles. Looking at the MERS system as a whole, it relies on well-recognized principles of real property law, the law of negotiable instruments, and basic contracts law. Important analogies in the UCC rules governing security interests in personal property also support the legal model. Here are the essential elements:

- **Use of a nominee on a security instrument is well established:** Both real estate law and the UCC recognize the validity of using a nominee. UCC § 9-502 (a) (2) states that a financing statement is sufficient if it provides the name of the secured party "or a representative of the secured party." This section codifies the holding of *In re Cushman Bakery*, 526 F2d 23 (1st Cir. 1975), cert. denied, 425 U.S. 937 (1976). That case also recognizes the validity of using a nominee as mortgagee on the mortgage for recording purposes on behalf of the note holder. See generally, 59 C.J.S. Mortgages § 80 at 116 (mortgages are valid even if the mortgagees of record are nominees or straw persons); 2 Milton R. Friedman, Friedman on Contracts & Conveyances of Real Property, § 6:1:3 (James Charles Smith ed., 7th ed. 2007). In addition, by private contract parties can establish agency relationships. UCC § 1-103(b) provides that common law agency principles may always supplement the rules governing secured transactions.

- **Article 9 rules apply even though note is secured by a mortgage**. UCC § 9-109(b) provides that "the application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply." In other words, perfection of a security interest or the outright transfer of a note is not affected by the fact that the note is secured by a mortgage. The comments clearly state that "the security interest in the promissory note is covered" by Article 9 "even though the note is secured by a real-property mortgage."

- **Under Article 9, there is no need to record a mortgage assignment when the note is transferred**. The clear rules of Article 9 provide that when a note transfers, the security interest in the real estate securing the note also transfers. The principle that the "mortgage follows the note" is a common law principle that is codified in UCC § 9-203(g). UCC § 9-308(e) is the analogous rule for perfection. A promissory note evidences the underlying indebtedness. Negotiation occurs when the new note holder takes possession. There are complicated UCC rules that apply regarding the rights of holders, but the basic rule is that there is no requirement to file assignments of the document evidencing the debt.

- **A mortgagee can remain in place even though there are subsequent assignments of the note in accordance with private contractual agreements**. Under UCC § 9-310(c), if a secured party assigns a perfected security interest, an Article 9 filing is not required to continue the perfected status of the security interest against creditors from the original debtor. The original filing provides sufficient notice that there is a lien. Under real estate law, legal title can remain in a mortgagee without invalidating the security instrument even though the beneficial note holder is another party. Here again, the original mortgage does the trick. Both the UCC filing system and real property recordation statutes provide notice to creditors of the original debtor that there is a security interest or lien on the property. Even if the assignee takes no steps to record a new assignment of the mortgage so that it reflects the name of the new assignee, the security interest remains perfected against creditors and transferees of the original debtor. The comments to UCC § 9-310(c) and longstanding case law support this basic principle.

The basic legal model for MERS is a sound one. MERS' operational model relies on the rules set forth in so-called member agreements. In order for MERS to operate as a reliable and accurate registry, members are responsible for notifying MERS each time there is an event that occurs involving a registered loan in accordance with member rules. For detailed discussion of the relevant law, see Clark and Clark, *The Law of Secured Transactions under the UCC*, ¶¶ 1.08[10][a][iv] and 2.09[2].

A closer look at the Kansas case. The Kansas dispute dates back to 2004, when a borrower named Boyd Kesler took out a first mortgage on a piece of real property in Kansas. Landmark was the original lender on a $50,000 first mortgage. About a year later, Kesler took out a second mortgage. The second mortgage secured a loan for $93,100 from Millennia Mortgage Corp. Millennia was a MERS member; the parties used a MERS mortgage form identifying MERS as mortgagee. The structure of the deal indicates that Millennia contemplated selling the loan but intended to retain MERS as the mortgagee of record. The court assumes that this is exactly what happened. In hindsight, we know that the original lender on the second mortgage did, indeed, sell the loan to Sovereign Bank. Subsequently, the borrower filed for bankruptcy. Landmark got relief from the stay, and then filed a foreclosure action, eventually obtaining a default judgment.

Crucial facts turn on notice. The first-mortgage lender notified the original second-mortgage lender, named as lender in the mortgage and a MERS member. In other words, Landmark notified Millennia; however, Landmark did not notify MERS even though MERS was on the mortgage as nominee for the lender. Millennia failed to appear as a party, and apparently failed to notify MERS of the lawsuit. Compounding the notice problems, Millennia did not notify Sovereign, even though Sovereign purchased the loan from Millennia.

MERS tries to intervene after new buyers purchased the property. Landmark sold the property without anyone appearing to enforce the second lien. The sales price was enough to pay off Landmark's first lien and left a surplus of $37,000. The borrower tried to grab these funds, thinking it had the right to the money since the default judgment had effectively wiped out the second mortgage. At some point, Sovereign, as the beneficial owner of the second mortgage, learned what was happening and attempted to assert its rights. MERS also learned about the mess and filed motions to intervene, contending that it was a necessary party to the foreclosure action.

The district court denied both parties the right to intervene. The Kansas Court of Appeals affirmed the district court. 40 Kan.App.2d. 325, 192 P23d 177 (2008). The Supreme Court took the case on a petition to review, as a matter of first impression in Kansas. The question before the court came down to a determination of whether the trial court had "abused its discretion" by refusing to permit MERS to join the litigation as a necessary party. Did MERS have a "meritorious defense" or a sufficient property interest to require joinder?

Reading between the lines: the court had trouble with the facts. Reflecting back on the court's description of the factual scenario, a couple of points jump out:

- The court spends a lot of time wrestling with the language used in the mortgage document and grapples with its terms, finding the document confusing and conflicting with respect to how it described MERS' role. Under the terms of the mortgage, the lender retains the right to enforce the mortgage but if "necessary to comply with law or custom," the mortgage provides that MERS can enforce the interests of the lender and assigns.

- Even though the mortgage gave MERS the right to foreclose, the mortgage directed that Millennia, as lender, receive notice. The court had a hard time reconciling the notice provision with MERS' argument that it was entitled to notice as mortgagee of record.

- The court seems to have trouble sympathizing with MERS, given the facts. MERS is trying to set aside a default judgment after the sale of the property. The way the court tells the story, there are hints that MERS waited too long to object because MERS' own rules and procedures malfunctioned.

Kansas court misapplies the law. Notwithstanding the tough facts, we think the court should have ruled in MERS favor on the law. The court ruled that MERS, as straw man nominee, essentially lost the power to act for the lender when the note transferred to a new note holder. The court mistakenly failed to recognize that a mortgagee, holding "legal" title under the terms of the mortgage, retains a sufficient interest in the property to act on behalf of a subsequent assignee of the note. Essentially, the court lost sight of long-standing principles regarding the use of nominees on security instruments and ignored fundamental common law principles of agency law. It misconstrued the principle that "the mortgage follows the note." It wrongly interpreted the maxim as standing for the proposition that when a separation occurs between the note and holder of the legal title to the mortgage, the mortgage lien is wiped out. To the contrary, under Article 9, a new assignment of the mortgage is not required and the original mortgagee continues to act as a vehicle for the purpose of notice for recording purposes. The mortgage remains in place and is just fine.

A closer look at the Minnesota case. This principle that "the mortgage follows the note," construed correctly, saved the day for MERS in the Minnesota case. In Jackson, the borrowers facing foreclosure argued that the assignees of their mortgage interests were required to record new mortgage assignments in the land records before they had the authority to foreclose under the Minnesota foreclosure-by-advertisement statute. According to the borrowers, subsequent assignments of the underlying debt required recording of new mortgage assignments under Minnesota law.

The Minnesota supreme court properly rejected these arguments, relying on: (a) longstanding rules sanctioning the use of nominees; (b) the principle that since "the mortgage followed the note," new mortgage assignments were not required in order to keep the mortgage alive and perfected; and (c) a literal reading of the plain language used in Minnesota's non-judicial foreclosure statutes. This language requires recording of mortgage assignments when there is a change in mortgagees. Since the parties had retained MERS as mortgagee down the assignment line, the court was able to conclude that there had been no assignment of mortgage rights. We agree with the court's decision and its reasoning.

Damage control. Without doubt, MERS is unhappy with the Kansas situation, both the Supreme Court decision and the way notice of the foreclosure suit escaped detection in the MERS system for too long. To prevent another fiasco, MERS is reminding its members:

- Notify MERS when it is named as a defendant in a foreclosure case even though the member no longer has any ownership interest in the mortgage loan.

- In the situation where there are multiple mortgage holders and the mortgage holders are MERS members, MERS will be wearing multiple hats in any foreclosure action, acting as nominee for the plaintiff and nominee for the defendant. Under these circumstances, the foreclosing party should notify MERS and name it as a defendant. This creates the strange situation where MERS is both plaintiff and defendant.

- Be certain that recorded mortgages reflect MERS as mortgagee and the indexing system reflects MERS as mortgagee.

(MERS Announcement Number 2009-06, dated October 1, 2009, posted on the MERS website).

Bottom line. Given the fallout from the Kansas case, it is not surprising that MERS is looking seriously at an appeal to the United States Supreme Court. We suspect that borrowers will rely inappropriately on *Landmark* as authority for wiping out mortgage liens in foreclosure cases and will use the case to challenge MERS' ability to enforce liens in bankruptcy court using standing and real party in interest arguments. *Jackson* is the better precedent. Even with *Jackson* in hand, there may be times when the simple fact that MERS is the mortgagee of record is not enough. Depending on the jurisdiction and posture of the litigation, MERS may need to connect the dots for the court by coming prepared with evidence documenting its agency relationship with the investor as owner of the underlying debt. Documenting the link, however, is an evidentiary matter. It does not change the law.

Note: One of the editors of this newsletter, Barkley Clark, is a partner in the firm of Stinson Morrison Hecker LLP, which represented MERS in the Kansas case. He did not participate in the case.

ATTACHMENT 5:

"Judicial Versus Non-Judicial Foreclosure"
Mortgage Bankers Association
October 2010

52

Judicial Versus Non-Judicial Foreclosure

MORTGAGE BANKERS ASSOCIATION®
Investing in communities

Judicial Versus Non-Judicial Foreclosure

In many discussions about mortgage foreclosures the terms **judicial** and **non-judicial** foreclosure are used. They involve very different processes. These terms refer to how individual states handle real estate foreclosure. Under both systems, time frames and terms vary widely from state to state. The following is a brief, general, description of both processes. The accompanying chart (see last page) depicts the varying time frames involved in the judicial foreclosure process.

Judicial Foreclosures

A judicial foreclosure is a court proceeding that begins when the lender files a complaint and records a notice in the public land records announcing a claim on the property to potential buyers, creditors and other interested parties. The complaint describes the debt, the borrower's default and the amount owed. The complaint asks the court to allow the lender to foreclose its lien and take possession of the property as a remedy for non-payment.

The homeowner is served notice of the complaint, either by mail, direct service or publication of the notice. The defendant (borrower) is permitted to dispute the facts (such as show that payments were made), offer defenses or present counterclaims by answering the complaint, filing a separate suit, and/or by attending a hearing arranged by the court. If the defendant shows there are differences of material facts, a trial will be held by the court to determine if foreclosure should occur. In the vast majority of cases, however, the foreclosure action is undisputed because the borrower is in default and cannot offer facts to the contrary. If the court determines the homeowner did default and that the debt is valid, it will issue a judgment in favor of the servicer for the total amount owed, including costs for the foreclosure process. In order for the judge to determine the amount of the judgment, the servicer submits paperwork through an affidavit that itemizes the amounts due.

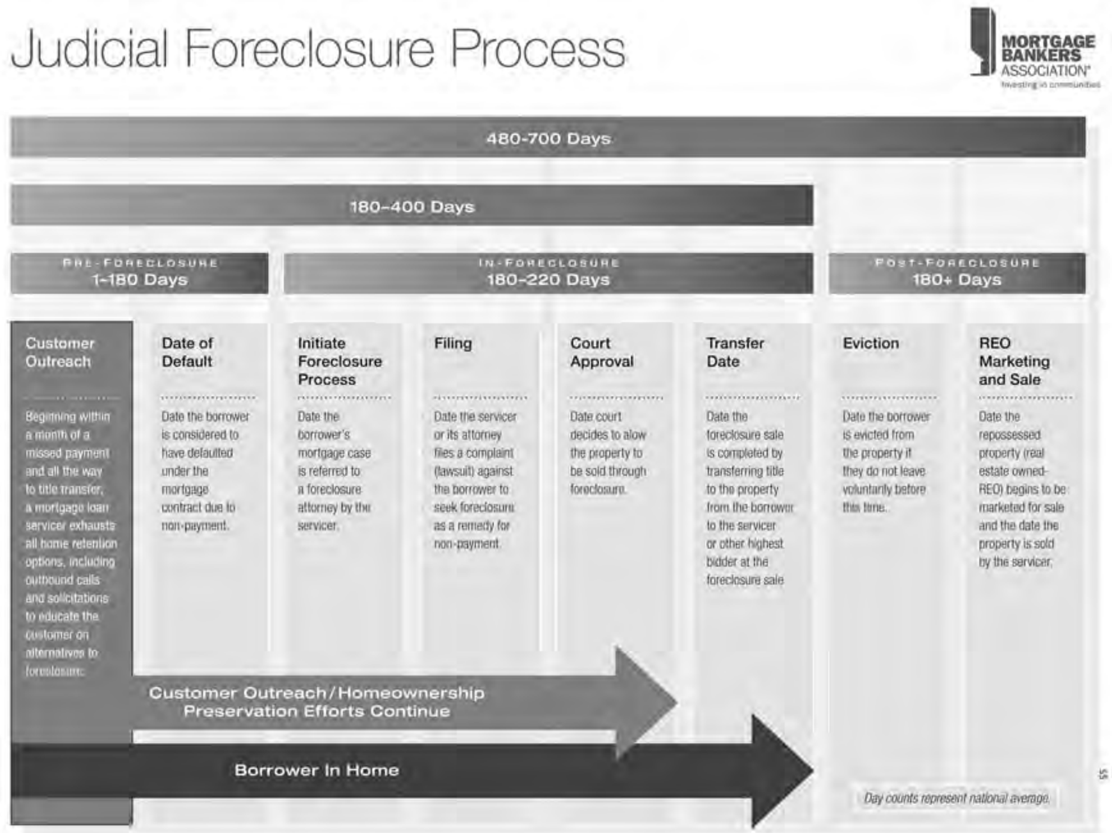
Twenty two states use judicial procedures as the primary way to foreclose. These include: Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Vermont and Wisconsin.

In all other states, foreclosure is usually handled by attorneys who follow a state-provided process. In the mortgage documents, borrowers give lenders the "power of sale" outside of judicial process in the event of an uncured default. Documentation or affidavit issues are not common in these states because of the non-judicial nature of the process.

Next, the court will authorize a sheriff's sale. The sale is an auction of the property open to anyone, and must be held in a public place. Procedures for a sheriff's sale in each locality differ, but the individual with the highest bid is granted the property. After the sale is confirmed by the court, the deed, which transfers ownership, is prepared, recorded and the highest bidder becomes the owner of the property. In most cases, the highest bidder is the servicer, who takes title of the property. The servicer then can sell the property. At this point, it is called **real estate owned (REO).**

Non-Judicial Foreclosures

The requirements for non-judicial foreclosure are established by state statue; there is no court intervention. When the default occurs, the homeowner is mailed a default letter and in many states a Notice of Default is recorded, at or about the same time. The homeowner may cure the debt during a prescribed period; if not, a Notice of Sale is mailed to the homeowner, posted in public places, recorded at the county's recorder's office, and published in area newspapers/legal publications. When the legally required notice period (determined by each state) has expired, a public auction is held and the highest bidder becomes the owner of the property, subject to recordation of the deed. Prior to the sale, if the borrower disagrees with the facts of the case, he or she can try to file a lawsuit to enjoin the trustee's sale.


Judicial Foreclosure Process
MORTGAGE BANKERS ASSOCIATION
480-700 Days
180–400 Days
PRE-FORECLOSURE
1–180 Days
IN-FORECLOSURE
180–220 Days
POST-FORECLOSURE
180+ Days
Customer Outreach
Beginning within a month of a missed payment and all the way to title transfer, a mortgage loan servicer exhausts all home retention options, including outbound calls and solicitations to educate the customer on alternatives to foreclosure.
Date of Default
Date the borrower is considered to have defaulted under the mortgage contract due to non-payment.
Initiate Foreclosure Process
Date the borrower's mortgage case is referred to a foreclosure attorney by the servicer.
Filing
Date the servicer or its attorney files a complaint (lawsuit) against the borrower to seek foreclosure as a remedy for non-payment.
Court Approval
Date court decides to allow the property to be sold through foreclosure.
Transfer Date
Date the foreclosure sale is completed by transferring title to the property from the borrower to the servicer or other highest bidder at the foreclosure sale
Eviction
Date the borrower is evicted from the property if they do not leave voluntarily before this time.
REO Marketing and Sale
Date the repossessed property (real estate owned-REO) begins to be marketed for sale and the date the property is sold by the servicer.
Customer Outreach/Homeownership Preservation Efforts Continue
Borrower In Home
Day counts represent national average.
55