

# Neil Garfield – Expert or Bozo?



2013



Bob Hurt

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*Executive Summary: this article shows that attorney Neil Garfield's foreclosure defense arguments actually hurt those who use them; it presents two court opinions as proofs; it cites numerous rulings denouncing securitization arguments in foreclosure defenses; it advocates comprehensive professional mortgage examination as essential to saving a home from a bad mortgage or foreclosure.*

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## Failing Garfield Foreclosure Defense

I know many people love attorney Neil Garfield because on his LivingLies blog, he acts like the champion of foreclosure victims. But check out just two of the cases where the court denounces Garfield's pleadings and "expertise," and where those relying on Garfield LOSE BIG. The courts rip them to SHREDS. See appended opinions:

- [In re: Connelly](#), US Bankruptcy Ct, AZ;
- [Salazar v Indymac & Onewest](#), USDC New Mexico, attached.

Neil Garfield might have the intention of helping foreclosure victims, but he actually hurts them with paperwork like the plaintiffs in the above cases relied upon. He sells useless securitization audits and affidavits and provides a foreclosure defense template with utterly bogus arguments here:

<http://livinglies.files.wordpress.com/2008/11/template-complaint1.pdf>

He seems to ignore the indisputable, undeniable facts of virtually every foreclosure:

1. The borrower signed the note and mortgage
2. The borrower defaulted on the loan by not making timely payments, thereby injuring the note holder.
3. The mortgagee/holder files a foreclosure action in order to force a sale of the mortgaged property to recover the loss
4. The public trustee or the courts MUST give redress to the injured party and MUST NOT impair the obligations of the contracts.

Admittedly, the plaintiff foreclosure victims used his affidavit/pleading template inartfully and incompetently. But look at this excerpt of a note from the Salazar opinion:

" Plaintiff solely relies on his expert's assertion that he possesses "knowledge of the actual intents, purposes, meanings and effect of the 1999 amendments [to the] Uniform Commercial Code.... Article 9 applies to the sale of promissory notes." Garfield Aff. 9:9-12. Even if this opinion testimony by a witness who has not been qualified as an expert could be considered by the Court, it would be rejected because it directly contradicts Veal. This Court follows the decisions of the Ninth Circuit BAP, and accordingly, Plaintiff's argument that only Article 9 applies to the transfer of the Note fails."

Look at Footnote 4 in the Salazar case (bottom of page 25) for an array of case citations where judges denounced the plaintiff's presentation of Garfield's work as "shotgun pleadings. And see this denunciation of the Garfield arguments from the Connelly opinion (giving summary judgment to the bank):

"Defendant is entitled to summary judgment because Plaintiff's opposition consisted of unpersuasive conclusory statements which ignored Ninth Circuit law, the Bankruptcy Rules, the Local Rules, and the Conversion Order. Plaintiff's pleadings are filled with inapposite legal theories unsupported by facts or law. For example, in the Response's discussion of how UCC Articles 3 and 9 affect the PSA and MLPA, Plaintiff never acknowledges that he is not a party to those contracts and fails to cite a single case from the Ninth Circuit to support his arguments. Notably, Plaintiff neglects to cite or adhere to recent Arizona and Ninth Circuit cases which address how a creditor may enforce its rights under a promissory note and deed of trust."

This statement pretty much sums up both cases: "Plaintiff's pleadings are filled with inapposite legal theories unsupported by facts or law." All of this brings me to ask:

## **Is Neil Garfield an expert or a bozo?**

Let me make this point by asking another question:

If you were a lawyer and a client came to you for help dealing with a notice of

foreclosure or a foreclosure complaint for breach of contract, which of these would you do:

1. Allege that the bank didn't lend real money or that the securitization trust receipts paid off the loan or the holder of the note has no standing; or
2. Examine the mortgage for evidence of prior torts, breaches, or error by the lender or lender's agents?

Now, ponder these additional questions:

1. Doesn't it go without saying that the foreclosure becomes INEVITABLE if the foreclosure victim cannot deny the essential facts outlined in 1-4 above?
2. Doesn't a foreclosure defender attorney commit legal malpractice by doing #1 immediately above and ignoring #2?
3. Doesn't it seem obvious that one can defeat foreclosure ONLY by proving a prior breach, tort, or error underlying the mortgage so as to give the court justification for declaring the mortgage void, invalid, or defective?

My central point... If you took out a mortgage in the past 10 or 12 years, you have a 90% chance that the lender or lender's agents cheated you. If you don't believe this, read the summary at the front of the [Financial Crisis Inquiry Commission Report](#). It essentially ignores Wall Street fraud, but it shows that government and the finance industry colluded in the predatory lending that caused massive job loss and collapsed homeowner equities nationwide.

What does "predatory lending" mean? It means lender knew the borrower could not afford payments or the appraiser overvalued the house, or the mortgage broker or lender charged excessive fees, or the lender or lender's agents made false representations to the borrower, or somehow cheated the borrower, and DID SO KNOWINGLY. They did this to obtain unjust enrichment and set up the borrower for foreclosure.

In order to prove an injury, the borrower must hire a professional to perform a comprehensive mortgage examination to find all the causes of action (reasons to sue) underlying the mortgage. If the examination report reveals causes of action, the borrower can obtain legal counsel to demand and negotiate a settlement offer or sue the original lender in a new action or as a cross claim for those causes of action.

Neil Garfield STUDIOUSLY refuses to tell his readers this reality, but the comprehensive mortgage examination provides the ONLY WAY a mortgage victim or foreclosure victim can get the house free and clear or obtain financial compensation for suffering the injuries from the lender or lender's agents.

There is NO other way, as the attached court cases point out here in Connelly:

**"...the Court finds that Defendant is a holder of the Note entitled to enforce it because Defendant is the bearer of the Note properly indorsed in blank."**

### **Fight the Foreclosure and Lose; Fight the Mortgage and Win**

How could the judge have stated it with greater clarity and simplicity? What does Neil Garfield FAIL TO UNDERSTAND about this? Everything, apparently.

Do you see the two possible scenarios?

**Scenario 1.** By attacking the foreclosure, the borrower can at best win temporary dismissal without prejudice on some standing issue, and the lender will re-file the complaint, and the borrower will lose the house and all the fees paid to the attorney, because the borrower injured the lender by defaulting on the mortgage.

**Scenario 2.** But, by attacking the lender for mortgage torts, breaches, or errors, the borrower can win the house free and clear or financial compensation AND legal fees because the lender or agents injured the borrower.

Neil Garfield seems to thrive on and promote Scenario 2. Instead of performing comprehensive professional mortgage examinations, Garfield contents himself with hawking securitization and loan audits that do absolutely no good because they aim mostly at arguing over the foreclosure rather than attacking the original lender for causes of action underlying the mortgage. And the statute of limitations has expired on most of the TILA/HOEPA/RESPA violations he might find, so they provide no basis for a lawsuit, especially now that most foreclosures deal with underwater mortgage loans.

### **What it Takes to Beat a Bad Mortgage and a Foreclosure**

Let me clarify: ONLY a comprehensive professional mortgage examination, combing through ALL of the documents related to the mortgage and foreclosure in the context of the borrower's observations and experiences can provide a basis for settling with or suing the lender. And such a settlement/suit will stop a foreclosure dead in its tracks. It can result in the borrower getting the house free and clear, all legal fees and costs paid, and punitive damages. Want Proof? Read these stories and see what a SENSIBLE, COMPETENT attorney can do with a proper professional mortgage examination:

### **Anecdotal PROOF of the Value of a Comprehensive Mortgage Exam**

[Note that these stellar examples exist only because the lender or lender's counsel was an idiot for not settling early - all settlements include non-disclosure agreements to hush up the mortgage victim]

1. **House free and clear, legal fees/costs paid, \$2.1 million in punitive damages** -  
<http://wvrecord.com/news/233771-quicken-loans-on-losing-end-of-3-million-predatory-lending-verdict>
  
2. Wells Fargo lied on the loan application - **\$250K compensation, \$1 million punitive** -  
<http://www.bizjournals.com/baltimore/stories/2008/08/11/story8.html?b=1218427200^1681713>
  
3. Ocwen lied to borrower who missed loan payment - **\$10 million actual damages, \$1.5 million mental anguish and economic damage** -  
<http://www.bizjournals.com/southflorida/stories/2005/11/28/daily20.html?page=all>
  
4. 8th USCCA W. Mo. **reinstated \$6 million punitive damage arbitration award** against servicer (Stark v. Sandperg, Phoenix & von Gontard, et al.) -  
<http://mortgage-home-loan-bank-fraud.com/legal/Stark%20vs%20EMC.pdf>

If you have a mortgage, particularly if you have an under-water loan (you owe more than the value of the house), you NEED a professional mortgage examination to prove any causes of action underlying that mortgage. If you want such a mortgage examination, call me right now for help. I'll explain the solution strategy and connect you to a professional mortgage examiner who can provide you with a full examination report within 7 business days.

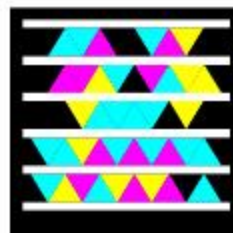
Bob Hurt  
 727 669 5511 - Call Now. I charge no fee

(Yes, you may distribute this article far and wide, if you really want to help people)

P.S. See case law citations below proving the nonsense of securitization arguments in defense of foreclosure. Defend via a good offense – attack the bad mortgage. BH



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# Failing Securitization Arguments

Rodenhurst v. Bank of Am., 773 F. Supp. 2d 886, 899 (D. Haw. 2011) ("The overwhelming authority does not support a [claim] based upon improper securitization.") "[S]ince the securitization merely creates a separate contract, distinct from plaintiffs' debt obligations under the Note and does not change the relationship of the parties in any way, plaintiffs' claims arising out of securitization fail."

Lamb V. Mers, Inc., 2011 WL 5827813, \*6 (W.D. Wash. 2011) (citing cases);

Bhatti, 2011 WL 6300229, \*5 (citing cases); In re Veal, 450 B.R. at 912 ("[Plaintiffs] should not care who actually owns the Note-and it is thus irrelevant whether the Note has been fractionalized or securitized-so long as they do know who they should pay.");

Horvath v. Bank of NY, N.A., 641 F.3d 617, 626 n.4 (4th Cir. 2011) (securitization irrelevant to debt); Commonwealth Prop. Advocates, LLC v. MERS, 263 P.3d 397, 401-02 (Utah Ct. App. 2011) (securitization has no effect on debt);

Henkels v. J.P. Morgan Chase, 2011 WL 2357874, at \*7 (D.Ariz. June 14, 2011) (denying the plaintiff's claim for unauthorized securitization of his loan because he "cited no authority for the assertion that securitization has had any impact on [his] obligations under the loan, and district courts in Arizona have rejected similar arguments");

Johnson v. Homecomings Financial, 2011 WL 4373975, at \*7 (S.D.Cal. Sep.20, 2011) (refusing to recognize the "discredited theory" that a deed of trust " 'split' from the note through securitization, render[s] the note unenforceable");

Frame v. Cal-W. Reconveyance Corp., 2011 WL 3876012, \*10 (D. Ariz. 2011) (granting motion to dismiss: "Plaintiff's allegations of promissory note destruction and securitization are speculative and unsupported. Plaintiff has cited no authority for his assertions that securitization has any impact on his obligations under the loan")."The Court also rejects Plaintiffs' contention that securitization in general somehow gives rise to a cause of action - Plaintiffs point to no law or provision in the mortgage preventing this practice, and cite to no law indicating that securitization can be the basis of a cause of action. Indeed, courts have uniformly rejected the argument that securitization of a mortgage loan provides the mortgagor a cause of action." See Joyner V. Bank Of Am. Home Loans, No. 2:09-CV-2406-RCJ-RJJ, 2010 WL 2953969, at \*2 (D. Nev. July 26, 2010) (rejecting breach of contract claim based on securitization of loan);

Haskins V. Moynihan, No. CV-10-1000-PHX-GMS, 2010 WL 2691562, at \*2 (D. Ariz. July 6, 2010) (rejecting claims based on securitization because plaintiffs could point to no law indicating that securitization of a mortgage is unlawful, and "[p]laintiffs fail to set forth facts suggesting that Defendants ever indicated that they would not bundle or sell the note in conjunction with the sale of mortgage-backed securities");

In re Correia, 452 B.R. 319, 324-25 (B.A.P. 1st Cir. 2011) (finding debtors lacked standing to challenge validity of mortgage assignment, based upon alleged noncompliance with pooling and servicing agreement);

In re Smoak, --- B.R. ---, 2011 WL 4502596, \*5-6 (Bankr. S.D. Ohio 2011) (holding debtors under securitized notes lacked standing to raise violations of PSA);



In re Almeida, 417 B.R. 140, 149 n. 4 (Bankr. D. Mass. 2009) (noting holder of second mortgage on property was "not a third party beneficiary of the PSA, and, ironically, he would appear to lack standing to object to any breaches of the terms of the PSA. . . . [Instead] the investors who bought securities based upon the pooled mortgages would be the parties with standing to object to any defects in those mortgages resulting from any failure to abide by the express provisions of the PSA.");

Livonia Property Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC, 717 F. Supp. 2d 724, 748 (E.D. Mich. 2010), aff'd, 399 Fed. Appx. 97 (6th Cir.2010) (same);

Anderson v. Countrywide Home Loans, 2011 WL 1627945, \*4 (D. Minn. 2011) (rejecting argument that assignment to a securitization trust was invalid because the PSA provided that the trust ceased accepting mortgages several years before the contested assignment from MERS because "compliance with the chain of assignment mandated by a PSA was not relevant to the validity of the assignee's interest.") (citing Peterson-Price v. U.S. Bank Nat'l Ass'n, 2010 WL 1782188, \*10 (D. Minn. 2010));

Greene v. Home Loan Serv., Inc., 2010 WL 3749243, \*4 (D. Minn. 2010) ("Plaintiffs are not a party to the [PSA] and therefore have no standing to challenge any purported breach of the rights and obligations of that agreement.");

Long v. One West Bank, 2011 WL 3796887, \*4 (N.D. Ill. 2011) (rejecting argument that assignment executed after trust was closed in violation of the PSA rendered transaction invalid, reasoning that non-parties to the PSA lacked standing to challenge the assignment and "it is irrelevant to the validity of the assignment whether or not it complied with the PSA");

Juarez v. U.S. Bank Nat'l Ass'n, 2011 WL 5330465, \*4 (D. Mass. 2011) (reasoning that plaintiff "does not have a legally protected interest in the assignment of the mortgage to bring an action arising under the PSA");

Cooper v. Bank of New York Mellon, 2011 WL 3705058, \*17 (D. Haw. 2011) (dismissing breach of contract count brought by delinquent mortgagors for breach of PSA, reasoning that mortgagors were not third-party beneficiaries of PSA and thus had no standing to enforce its terms);

Abubo v. Bank of N.Y. Mellon, 2011 WL 6011787, \*7-9 (D. Haw. 2011) (rejecting argument that PSA violation could form basis for relief, noting that this "argument has been rejected in recent decisions by many courts");

Bascos v. Fed. Home Loan Mortg. Corp., 2011 WL 3157063, \*6 (C.D. Cal. 2011) ("To the extent Plaintiff challenges the securitization of his loan because Freddie Mac failed to comply with the terms of its securitization agreement, Plaintiff has no standing to challenge the validity of the securitization of the loan as he is not an investor of the loan trust.");

In Re Walker, 466 B.R. 271, 285 nn. 28-29 (Bankr. E.D. Pa. 2012) (collecting cases and noting that "[A] judicial consensus has developed holding that a borrower lacks standing to (1) challenge the validity of a mortgage securitization or (2) request a judicial determination that a loan assignment is invalid due to noncompliance with a pooling and servicing agreement, when the borrower is neither a party to nor a third party beneficiary of the securitization agreement.").

Other district courts have also held that borrowers do not have standing to challenge breach of securitization agreements. See Armeni v. America's Wholesale Lender, 2012 WL 253967 at \*2 (C.D. Cal. Jan. 25, 2012)(same);



Junger v. Bank of Am., N.A., 2012 WL 603262 (C.D. Cal. Feb. 24, 2012)(same);) Greene v. Home Loan Servs. Inc., 2010 WL 3749243, \*4 (D. Minn. Sept. 21, 2010) ("Plaintiffs do not have standing to bring their challenge regarding the securitization of the mortgage" because they were "not a party to the Pooling and Servicing Agreement.").

Kain V. Bank Of New York Mellon (D.S.C. 3-18-2013) (the third-party debtor who is not a beneficiary to the pooling and serving agreement lacks standing to challenge holder's rights to enforce the negotiable instrument due to an alleged invalidity in or noncompliance with the pooling and serving agreement):

Metcalf V. Deutsche Bank National Trust Company (N.D.Tex. 6-26-2012) (Courts in this circuit have repeatedly held that borrowers do not have standing to challenge the assignments of their mortgages because they are not parties to those assignments...Plaintiffs do have standing, however, to challenge defendants' authority to foreclose on the ground that foreclosure did not comply with the terms of the deed of trust);

Almutarreb v. Bank of New York Trust Co., N.A., 2012 WL 4371410, \*2 (N.D. Cal. Sept. 24, 2012) ("holding that "because Plaintiffs were not parties to the PSA, they lack standing to challenge the validity of the securitization process, including whether the loan transfer occurred outside of the temporal bounds prescribed by the PSA.");

Lane v. Vitek Real Estate Industries Group, 713 F.Supp.2d 1092, (E.D.Cal. 2010) ("The argument that parties lose interest in a loan when it is assigned to a trust pool has also been rejected by numerous district courts.");

Sami v. Wells Fargo Bank, 2012 WL 967051, at \*5-6 (N.D. Cal. 2012) (rejecting claim "that Wells Fargo failed to transfer or assign the note or Deed of Trust to the Securitized Trust by the 'closing date,' and that therefore, 'under the PSA, any alleged assignment beyond the specified closing date' is void" because the plaintiff lacked standing);

White v. IndyMac Bank, FSB, No. 09-00571, 2012 WL 966638, at \*7-8 (D. Haw. Mar.20, 2012). (recognizing a servicer can foreclose on behalf of the beneficial owner of the loan);

Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1042 (9th Cir. 2011) ("None of their allegations indicate that the plaintiffs were misinformed about MERS's role as a beneficiary, or the possibility that their loans would be resold and tracked through the MERS system .... By signing the deeds of trust, the plaintiffs agreed to the terms and were on notice of the contents.");

U.S. Bank, N.A. v. Knight, 90 So. 3d 824 (Fla. 4th DCA 2012) ("to have standing, an owner or holder of a note, indorsed in blank, need only show that he possessed the note at the institution of a foreclosure suit; the mortgage necessarily and equitably follows the note.");

WM Specialty Mortg., LLC v. Salomon, 874 So.2d 680, 682 (Fla. 4th DCA 2004), ("a mortgage is but an incident to the debt, the payment of which it secures, and its ownership follows the assignment of the debt. If the note or other debt secured by a mortgage be transferred without any formal assignment of the mortgage, or even a delivery of it, the mortgage in equity passes as an incident to the debt. . . ." Id.);

Wolf v. Fed. Nat'l Mortg. Ass'n (4th Cir., 2013) Wolf lacks standing to attack the validity of the assignment. Furthermore, the assignment does not affect Wolf's rights or duties at all. Wolf still has the obligation under the note to make payments. In fact, the only thing the assignment affects is to whom Wolf makes the payments. Thus, she has no interest in the assignment from MERS to BAC. Accordingly, she has no standing to challenge it);

Rhodes V. JPMorgan Chase Bank (S.D.Fla. 6-28-2012) (a failure by Defendant to record its assignment is "applicable only to and enforceable by competing creditors or subsequent bona fide purchasers of the mortgagee, not by the mortgagor."

JP Morgan Chase v. New Millennial, LC, 6 So. 3d 681, 685 (Fla. Dist. Ct. App. 2009) (quoting In re Halabi, 184 F.3d 1335, 1338 (11th Cir. 1999)) (internal parenthesis omitted);

Tapia V. U.S. Bank, N.A. 718 F. Supp.2d 689, 697-98 (E.D.Va. 6-22-2010) ('Plaintiffs argue that Defendants could not demonstrate standing to institute the foreclosure because they could not prove Article III injury. The Court rejects Plaintiffs' standing argument to the extent that Plaintiffs use the term "standing" to refer to the requirement that a secured party first prove in court its right to initiate a foreclosure before the procedure commences. The fundamental flaw in Plaintiffs' allegation is that Virginia is a non-judicial foreclosure state...a non-judicial foreclosure, do not require an interested party to prove "standing" in a court of law before initiating the foreclosure process...The Court therefore rejects Plaintiffs' "standing" argument) (internal citations omitted);

Indymac Bank, FSB V. Decastro, NJ: Appellate Div. 2013 ("we now have made clear that lack of standing is not a meritorious defense to a foreclosure complaint. Russo, supra, 429 N.J. Super. at 101 (holding that "standing is not a jurisdictional issue in our State court system and, therefore, a foreclosure judgment obtained by a party that lacked standing is not `void' within the meaning of Rule 4:50-1(d)").

Tuille v. Am. Home Mortg. Servs., Inc., 483 F. App'x 132, 135 (6th Cir. 2012) (internal citations omitted) ("any defect in the written assignment of the mortgage would make no difference where both parties to the assignment ratified the assignment by their subsequent conduct in honoring its terms, and that [the plaintiff], as stranger to the assignment, lacked standing to challenge its validity.")

Lariviere V. Bank Of N.Y. As Tr., Civ. No. 9-515-P-S, 2010 WL 2399583, at \*4 (D. Me. May 7, 2010) ("Many people in this country are dissatisfied and upset by [the securitization] process, but it does not mean that the [plaintiffs] have stated legally cognizable claims against these defendants in their amended complaint.");

Upperman V. Deutsche Bank Nat'l Trust Co., No. 01:10-cv-149, 2010 WL 1610414, at \*3 (E.D. Va. Apr. 16, 2010) (rejecting claims because they are based on an "erroneous legal theory that the securitization of a mortgage loan renders a note and corresponding security interest unenforceable and unsecured");

Silvas V. Gmac Mortg., Llc, No. CV-09-265-PHX-GMS, 2009 WL 4573234, at \*5 (D. Ariz. Dec. 1, 2009) (rejecting a claim that a lending institution breached a loan agreement by securitizing and cross-collateralizing a borrower's loan). The overwhelming authority does not support a cause of action based upon improper securitization. Accordingly, the Court concludes that Plaintiffs cannot maintain a claim that "improper restrictions resulting from securitization leaves the note and mortgage unenforceable);

Summers V. Pennymac Corp. (N.D.Tex. 11-28-2012) (any securitization of Plaintiffs' Note did not affect their obligations under the Note or PennyMac's authority as mortgagee to enforce the Note and foreclose on the property if Plaintiffs defaulted).;

Nguyen V. Jp Morgan Chase Bank (N.D.Cal. 10-17-2012) ("Numerous courts have recognized that a defendant bank does not lose its ability to enforce the terms of its deed of trust simply because the loan is assigned to a trust pool. In fact, 'securitization merely creates a separate contract, distinct from [p]laintiffs['] debt obligations under the note, and does not change the relationship of the parties in any way. Therefore, such an argument would fail as a matter of law");

Flores V. Deutsche Bank National Trust (Md. 7-7-2010) (“The fact that Plaintiff’s mortgage may have been combined with many others into a securitized pool on which a credit default swap, or some other insuring-financial product, was purchased, does not absolve Plaintiff of responsibility for the Note. That transaction by the holder of the Deed is separate from collecting on the Note itself. Thus, although Plaintiff’s default may have triggered insurance for any losses caused by that default, she is not discharged from the promissory notes themselves”);

Welk v. GMAC Mortg., LLC., 850 F. Supp. 2d 976 (D. Minn., 2012) (“At the end of the day, then, most of what Butler offers is smoke and mirrors. Butler’s fundamental claim that his clients’ mortgages are invalid and that the mortgagees cannot foreclose because they do not hold the notes is utterly frivolous.);

Vanderhoof v. Deutsche Bank Nat’l Trust (E.D. Mich., 2013) (internal citations omitted) (“s]ecuritization” does not impact the foreclosure. This Court has previously rejected an attempt to assert a claim based upon the securitization of a mortgage loan. Further, MERS acts as nominee for both the originating lender and its successors and assigns. Therefore, the mortgage and note are not split when the note is sold.”)

# Salazar v Indymac & OneWest

JAMES L. SALAZAR AND JUDY A. SALAZAR, Plaintiffs,

v.

INDYMAC BANK, F.S.B.; ONEWEST BANK, FSB,

in its own capacity and as acquirer of certain assets and liabilities of Indymac Bank;

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.;

and MERSCORP HOLDINGS, INC.; and, names: John Doe's 2-2,541,

inclusive, said names being fictitious,

it being the intention of the Plaintiffs' to designate any

and all entities involved in the acts of malfeasance alleged herein,

the true names of the fictitious Defendant's are otherwise

unknown at present time and will be supplemented by amendment

when ascertained, et. al; Elizabeth Mason, the Castle Law Group, LLC;

Elizabeth M. Drantrell; Andrew P. Yarrington; Castle Stawiarski, LLC, Castle Meinhold,

Castle Meinhold Stawiarski, Castle Meinhold Stawiarski Legal Services, Defendants.

No. 12cv1182 MCA/RHS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Dated: February 28, 2013

## MEMORANDUM OPINION AND ORDER

### DENYING EMERGENCY INJUNCTIVE RELIEF AND

### DISMISSAL OF AMENDED COMPLAINT

**THIS MATTER** comes before the Court on pro-se Plaintiffs James L. and Judy A. Salazar's First Request that the Court Take Judicial Notice of Complaint filed by Defendant's [sic] Unrecorded Assignment, filed January 17, 2013 (Doc. 20); on their emergency request for a Stay of Foreclosure, filed late in the afternoon of January 22, 2013 (Doc. 22); and on Defendants OneWest Bank, FSB ("OneWest") and Mortgage Electronic Registration Systems, Inc. ("MERS") Motion to Dismiss Amended Complaint and Complaint for Declaratory and Injunctive Relief, filed February 7, 2013 (Doc. 33). Plaintiffs have not responded to the motion to dismiss. The foreclosure

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sale was to take place at 11:00 a.m. on January 24, 2013. See Doc. 22 at 2. With such untimely and limited notice, the Court was unable to schedule a hearing on the Plaintiffs' emergency request, and the Court assumes that the sale was conducted and that the request is now moot.

The Court has carefully reviewed the documents the Plaintiffs have filed in this case and the documents the Defendants submitted with their motion to dismiss, however, and concludes that, even if the emergency motion for stay had been timely, the Court would not be authorized to grant it, and that their Amended Complaint must be dismissed for several reasons. The Court will take judicial notice of the state-court pleadings and docket sheet that the Plaintiffs and Defendants have submitted. The Court will dismiss the Amended Complaint.

## **I. PROCEDURAL AND FACTUAL BACKGROUND**

Plaintiffs initiated the present action by briefly modifying a form complaint freely available on the internet. See <http://livinglies.files.wordpress.com/2008/11/template-complaint1.pdf> (last visited on 1/28/2013). The Court has collected some specific facts from the state-court foreclosure proceedings of which the Plaintiffs request the Court take judicial notice, but otherwise, the Plaintiffs' Complaint and Amended Complaint consist largely of generic and vague allegations garnered from the form complaint, as well as legal conclusions derived from that complaint, which do not concern or implicate the named Defendants in this matter or the conduct giving rise to the present action.

According to the allegations in the Amended Complaint and the documents submitted by the parties, in August 2007 the Plaintiffs borrowed \$650,000, secured by a mortgage and Deed of Trust, on their principal residence in Santa Fe, New Mexico, where they still reside. See Doc. 20 at 5-6 (state-court Complaint for Foreclosure at 1-2); Complaint (Doc. 1) at 4-5. Defendant MERS was

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listed as the beneficiary and nominee of the Lender and its assigns in the mortgage documents. See Doc. 20 at 5; Doc. 35-1 at 15 (Plaintiffs' mortgage).

The Plaintiffs stopped making their mortgage payments in January 2011<sup>4</sup>. See Doc. 20 at 6; Doc. 35-1 at 2 (state-court complaint for foreclosure); Doc. 39-4 at 1-2 (state-court judgment adopting allegations of complaint and finding Plaintiffs in default). On August 30, 2011, OneWest Bank, to whom the mortgage had been assigned by MERS from IndyMac Bank, see Doc. 20 at 10, filed a complaint to foreclose its mortgage lien on the property in OneWest Bank, FSB v. Salazar, D-101-cv-20112705 (1st Jud. Dist. Ct. Santa Fe County, N.M.). See Doc. 35-1. The law firm of Castle Stawiariski, LLC, through its attorneys Elizabeth Mason, Keya Koul and Steven Lucero, represented OneWest. See *id.*

The Salazars wrongfully attempted to remove that foreclosure action from state court to this Court. The Plaintiffs did not file their notice of removal until 2:12 p.m. on November 16, 2012, right before the state court conducted a 3:00 p.m. hearing on OneWest Bank's motion for summary judgment in its foreclosure action. See Doc. 20 at 11 (Docket sheet from state-court case). This Court *sua sponte* remanded the foreclosure action to state court on November 27, 2012. See *OneWest Bank FSB v. Salazar*, No. 12cv1193 KBM/WPL Doc. 5 (D.N.M. Nov. 27, 2012) (Conway, J.) (concluding that there was no federal question on the face of the foreclosure complaint and that

the case had been improperly removed under 28 U.S.C. § 1446 and 28 U.S.C. § 1441(b)<sup>2</sup>.

The Plaintiffs filed their generic federal Complaint for Damages on November 15, 2012, the day before the state-court hearing was scheduled. The state court entered a judgment of foreclosure and appointed a special master on November 28, 2012; it filed another Order on December 4, 2012; and a notice of sale was filed on December 31, 2012. See Doc. 20 at 11.

The Plaintiffs filed their request that this Court take judicial notice of the state-court proceedings and documents on January 17, 2013, see Doc. 20, then filed a First Amended Complaint on January 18, 2013, incorporating the generic allegations from their original Complaint, adding the attorneys for OneWest Bank as Defendants, and retitling their Complaint as one for Wrongful Foreclosure, Fraud, Rescission, Declaratory Judgment to Quiet Title and to Void or Cancel unrecorded Assignment of Mortgage and Deed of Trust, Slander of Title, Cancellation of a Voidable Contract, and Negligence. See Doc. 21. The Amended Complaint alleges that each Defendant "claim[s] or appear[s] to claim some right, title, estate, lien, or interest in the Property adverse to Plaintiff's title . . . [which] constitute a cloud on Plaintiff's title . . . ." Doc. 21 at 4. They contend

that OneWest Bank had no "legal standing" to begin the foreclosure proceedings because it did not record the assignment of the mortgage from IndyMac Bank. *Id.* at 6.

As noted above, the First Amended Complaint primarily consists of a number of conclusory statements, including allegations that all the Defendants failed to "disclose the true character of their financial services services and debt collection practices" in some undefined way; and that they "engaged in a scheme of illegal, unfair, unlawful and deceptive business practices . . . including foreclosure services" in an undescribed manner, referring only to the general allegations in their original Complaint. *Id.* at 6-7. The Court, therefore, has reviewed the allegations in the original Complaint to try to flesh out these conclusory allegations.

In the Complaint, following the example of the form complaint, the Plaintiffs engages in a general legal discussion regarding REMIC and refers to several unnumbered exhibits, none of which are attached to the Complaint. They initially allege that an unnamed Lender was actually a "Loan seller" who conspired with the appraiser and the mortgage broker - none of whom are named Defendants, but whose names have long been known to Plaintiffs - to induce the Plaintiffs to execute a loan that did not "meet normal underwriting standards for residential loans." *Compl.* (Doc. 1) at 6-7. They contend that the appraisal was "knowingly inflated," resulting in "usury," and that the Lender/Loan seller did not perform its required due diligence and evaluation of the loan. *Id.* at 7-8. They contend that the Lender/Loan seller was neither "the source of funding nor the [actual] Lender," at the time the mortgage was recorded and that it misled them regarding the real parties in interest because "the

presence of a financial institution in the matter was a ruse." *Id.* at 8, 10-11. The Plaintiffs' principal legal theory is that, when a different financial institution (apparently IndyMac Bank) purchased the mortgage from the Lender/Loan Seller through a prior

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agreement, IndyMac Bank allegedly paid off the mortgage loan in full before the mortgage was even recorded, thus there is no "loan" on which OneWest may foreclose. See *id.* at 10-11. They also contend that the August 2007 loan closing was only an "alleged loan closing" because it was part of an "illegal scheme to issue unregulated [mortgage-backed] securities . . . based upon the negotiation of non-negotiable notes, the terms of which had been changed, altered or amended" by the "securitization process" "after the execution by the Plaintiffs" *Id.* at 21, 22. In subsequent allegations, however, the Plaintiffs inconsistently identify IndyMac Bank "and/or undisclosed third parties" as the "originating Lender." *Doc. 1* at 25. Plaintiffs allege that, at closing, IndyMac and/or these allegedly undisclosed third parties failed to make undescribed required disclosures under sections 12 CFR §§ 226.17 and 226.18 of TILA and 24 CFR §§ 3500.6 & .7 of the Real Estate Settlement Procedures Act ("RESPA"). *Compl.* at 27. They also allege that the Defendants failed to disclose that the loan contract was "void, illegal, and predatory" because the TIL disclosure showed a "fixed-rate schedule of payments, but did not provide the proper disclosures of the contractually-due amounts and rates." *Id.* at 28. Plaintiffs also contend that the Defendants failed to provide a HUD statement that properly reflected the "Yield-Spread Premium" as required by TILA, in violation of 12 C.F.R. §§ 226.4, 226.17, and 226.18 (c)(1)(iii) & (d). *Id.* Plaintiffs contend that, during the life of the loan, the Defendants failed to properly calculate the proper interest and overcharged interest on the loan, which made their foreclosure figures inaccurate. See *id.* at 30.

In the Amended Complaint, Plaintiffs bring a cause of action for rescission, return of all loan payments and fees paid, and monetary damages under the Home Ownership Equity Protection Act, ("HOEPA"), 15 U.S.C. § 1639(a)(1) & (h) because unspecified Defendants allegedly failed to make required disclosures, allegedly required them to pay closing fees and costs in excess of 10% of their

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loan, and extended credit without regard to the Plaintiffs' ability to pay. See *Am. Compl.* at 13-16.

They bring a claim for violation of RESPA, 12 U.S.C. § 2607, for having "accepted charges for the rendering of real estate services which were in fact charges for other services performed," but they have not named the mortgage broker or other entity that allegedly accepted those charges. See *id.* at 16. They bring claims for rescission under TILA, 15 U.S.C. §§ 1601 and 1605, for improperly calculating the annual percentage rate and failure to include and disclose charges on the TIL statement. See *id.* at 17-18. They seek monetary damages for an alleged violation of the Fair Credit Reporting Act ("FCRA") under 15 U.S.C. § 1681(n),(o), and (s) for reporting allegedly inaccurate information on their credit reports, swearing that they have "paid each and every payment on time from the time of the loan closing through the present." *Id.* at 18-19. They bring state-law claims for fraudulent misrepresentation, breach



of fiduciary duty, unjust enrichment, conspiracy, usury, and fraud arising from the alleged omissions and failures to disclose information required by the federal lending statutes, for inducing the Plaintiffs to enter into a loan that was not suited to their ability to repay, and for allegedly charging excessive fees and undisclosed "rebates and kickbacks." See *id.* at 19-24; *id.* at 28-30. They also allege violation of the Ohio laws prohibiting civil RICO conspiracy. See *id.* at 24-25. They seek to quiet title and to compel the Defendants to "transfer or release legal title and alleged encumbrances . . . and possession of the Subject Property" to them, along with all payments made towards the loan amount and damages in the amount of ten times the mortgage amount. See *id.* at 25-28. Based on the type and format of Plaintiffs' claims for relief, it seems even more clear that their Complaint and Amended Complaint

bears obvious indicia of being derived from generic foreclosure pleadings filed throughout the country [which] set[] forth [at least ten] federal and state law claims: (1) violations of the federal Home Ownership and Equity Protection Act ("HOEPA"), 15 U.S.C. 1639 et seq. ; (2) violations of the Real Estate Settlement

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Procedures Act ("RESPA"), 12 U.S.C. 2601 et seq. ; (3) violations of the Truth in Lending Act ("TILA"), 15 U.S.C. 1601 et seq. and Regulation Z, 12 C.F.R. 226.1 et seq. ; (4) violations of the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq.; (5) fraudulent misrepresentation; (6) breach of fiduciary duty; (7) unjust enrichment; (8) civil conspiracy; (9) civil RICO; (10) quiet title . . . .

*Bonner v. Redwood Mortg. Corp.*, No. C 10-00479 WHA, [2010 WL 1267069, 2](#) (N.D.Cal. March 29, 2010) (dismissing case). As support for their Amended Complaint, Plaintiffs allege that they have "retained forensic examiners"<sup>3</sup> and that their loan "was transferred into the trust a mortgage backed security." Am. Compl. (Doc. 21) at 5. Because the Plaintiffs did not receive any of the trust agreements, and the assignment of mortgage was allegedly never recorded in Santa Fe County, Plaintiffs again allege that OneWest has "no legal standing" to foreclose on the loan. *Id.* at 5-6.

As noted, the Plaintiffs have copied verbatim many of the allegations in the Arizona complaint cited above and from an Ohio form complaint found at [livinglies.files.wordpress.com/2008/07/federalcomplaint-ohio.pdf](http://livinglies.files.wordpress.com/2008/07/federalcomplaint-ohio.pdf). "Living lies" is a website and blog created and published by attorney [Neil Garfield](#)<sup>4</sup>.

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As noted, when reviewing the non-general and non-conclusory allegations not contained in the form complaint, the principle basis of the named Defendants' allegedly wrongful foreclosure practice appears to be that OneWest does not have legal standing to foreclose on the loan and mortgage notwithstanding the fact that it purchased IndyMac's assets from the FDIC. See Compl. at 1-4 (stating that IndyMac was "acquired" by OneWest Bank); Am. Compl. at 5, ¶ 10 ("OneWest bank acquired certain assets from the FDIC of IndyMac Bank.").

The Amended Complaint contains no allegations regarding OneWest Bank's counsel, other than to state that they filed the foreclosure action and that Elizabeth Drantell "ignored" the notice of removal at the summary-judgment hearing. See Am. Compl. at 10.

## II. ANALYSIS

In resolving a motion to dismiss, the Court accepts as true all well-pleaded, as opposed to conclusory, allegations made in the [Plaintiffs' Amended Complaint. See \*Shero v. City of Grove, Okla.\*, 510 F.3d 1196, 1200 \(10th Cir. 2007\)](#). A plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," but "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim. [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009). In reviewing the Plaintiffs' pro-se complaint, the Court applies the same legal standards applicable to pleadings drafted by counsel but liberally construes the allegations. See [Northington v. Jackson](#), 973 F.2d 1518, 1520-21 (10th Cir. 1992). A pro-se plaintiff, therefore, "still has the burden of alleging sufficient facts on which a recognized legal claim could be based." [Jenkins v. Currier](#), 514 F.3d 1030, 1032 (10th Cir. 2008) (internal quotation marks omitted). "[The] court . . . will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." [Whitney v. New Mexico](#), 113 F.3d 1170, 1173-74 (10th Cir. 1997) (internal quotation marks and citations omitted).

In resolving the motion, the Court may consider "documents incorporated by reference in the complaint; documents referred to in and central to the complaint, when no party disputes its

authenticity; and matters of which a court may take judicial notice." [Gee v. Pacheco](#), 627 F.3d 1178, 1186 (10th Cir. 2010) (internal quotation marks omitted).

A district court may sua sponte dismiss a pro-se complaint action on the basis of a statute of limitations if "it is clear from the face of the complaint that there are no meritorious tolling issues, or the court has provided the plaintiff notice and an opportunity to be heard on the issue." [Vasquez Arroyo v. Starks](#), 589 F.3d 1091, 1097 (10th Cir. 2009).

### A. THIS COURT HAD NO AUTHORITY TO STAY THE FORECLOSURE PROCEEDINGS.

28 U.S.C. § 2283, the federal Anti-Injunction Act ["AIA"], "is an absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act," [Vendo Co. v. Lektro-Vend Corp.](#), 433 U.S. 623, 630 (1977), none of which

apply here. See [Atl. Coast Line R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 287 \(1970\)](#) (noting that "the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts"). "Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately to the [ Supreme] Court [of the United States]." *Id.* This Court had no authority to interfere in the court-ordered foreclosure and sale proceedings. The Salazars' remedy is to appeal from the foreclosure orders that they contend are erroneous to the state appellate courts after a final order has been entered.

#### **B. THE COURT MUST DISMISS OR STAY CLAIMS RELATED TO THE FORECLOSURE PROCEEDINGS.**

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The Defendants urge dismissal of the Plaintiffs' Amended Complaint and the subsequently filed Complaint for Declaratory and Injunctive relief under the Rooker-Feldman doctrine. See Doc. 34 at 2, 7-9. But no final judgment has been entered in the state-court case, nor has an appeal been taken and decided. Therefore, the state case is not final for purposes of applying that doctrine. See [Bear v. Patton, 451 F.3d 639, 642 \(10th Cir. 2006\)](#) (noting that state-court proceedings are considered to be "ongoing" until "a lower state court issues a judgment and the losing party allows the time for appeal to expire.") (internal quotation marks and citation omitted); [Guttman v. Khalsa, 446 F.3d 1027, 1031 \(10th Cir. 2006\)](#) ("Under Exxon Mobil, the Rooker-Feldman doctrine only applies to cases brought 'after the state proceedings have ended.' 125 S.Ct. at 1526. State proceedings had not ended when Guttman filed his federal court claim. As such, the Rooker-Feldman doctrine does not apply and the district court did have subject matter jurisdiction.").

Defendants next contend that the Plaintiffs' action should be dismissed under the state common-law "doctrine of priority jurisdiction." Doc. 34 at 2, 9-11. That doctrine was first adopted by the New Mexico Supreme Court in 1962, and generally posits that

a second suit based on the same cause of action as a suit already on file will be abated where the first suit is entered in a court of competent jurisdiction in the same state between the same parties and involving the same subject matter or cause of action, if the rights of the parties can be adjudged in the first action.

[State v. Larrazolo, 70 N.M. 475, 482, 375 P.2d 118, 123 \(1962\)](#). But that doctrine applies only to courts within the state's state-court judicial system. It does not apply to concurrent litigation in state and federal courts, where it has long been held that parties may maintain concurrent lawsuits absent a good policy reason. See, e.g., [Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 479 \(1981\)](#) ("[T]he mere grant of jurisdiction to a federal court does not operate to oust a state court from

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concurrent jurisdiction over the cause of action."); Colo. [River Water Conservation Dist. v. United States, 424 U.S. 800, 813 \(1976\)](#) (holding, in case where parties brought same claims in both federal and state courts that "[a]bdication of the obligation to decide cases can be justified under [the abstention] doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest") (internal quotation marks omitted). This abstention doctrine, however, provides a mandatory basis for dismissal in this case.

"Younger abstention dictates that federal courts not interfere with state court proceedings by granting equitable relief-such as injunctions of important state proceedings or declaratory judgments regarding constitutional issues in those proceedings-when such relief could adequately be sought before the state court." [Rienhardt v. Kelly, 164 F.3d 1296, 1302 \(10th Cir. 1999\)](#). A federal court must abstain from exercising jurisdiction when: (1) there is an ongoing state criminal, civil, or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings "involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies." Taylor, 126 F.3d at 1297. Younger abstention is non-discretionary; it must be invoked once the three conditions are met, absent extraordinary circumstances. See [Seneca-Cayuga Tribe of Okla. v. State of Oklahoma ex rel. Thompson, 874 F.2d 709, 711 \(10th Cir. 1989\)](#)

[Amanatullah v. Colorado Bd. of Med. Exam'rs, 187 F.3d 1160, 1163 \(10th Cir.1999\)](#). "Younger abstention is jurisdictional" and should be addressed "at the outset because a determination that the district court lacked jurisdiction over a claim moots any other challenge to the claim, including a different jurisdictional challenge." D.L. v. Unified Sch. Dist. No. 497, [392 F.3d 1223, 1228-29 \(10th Cir. 2004\)](#).

### **1. The state-court proceedings are ongoing.**

As noted, state-court proceedings are considered to be "ongoing" until "a lower state court issues a judgment and the losing party allows the time for appeal to expire." Bear, 451 F.3d at 642 "The time frame for this determination is when the federal action was filed." [Dauwe v. Miller, 364](#)

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Fed. App'x 435, 437 (10th Cir. 2010). In this case, the Plaintiffs' federal action was filed the same day the state-district court held a hearing on OneWest's motion for summary judgment, and the state-court proceedings are still ongoing, as reflected by the docketing statement the Plaintiffs filed in this Court. Because Plaintiffs' federal action was filed while state-court foreclosure proceedings were ongoing, the Court concludes that the first prong of the Younger abstention doctrine is satisfied.

### **2. The state-court proceedings provided an adequate forum to hear the claims raised in the Plaintiffs' federal complaint.**

"Typically, a plaintiff has an adequate opportunity to raise federal claims in state court 'unless state law clearly bars the interposition of the [federal statutory] and constitutional claims.'" [Crown Point I, LLC v. Intermountain Rural Elec. Ass'n, 319 F.3d 1211, 1215 \(10th Cir. 2003\)](#) (quoting J.B. ex rel. [Hart v. Valdez, 186 F.3d 1280, 1292 \(10th Cir. 1999\)](#)). Here, the Plaintiffs point out that they have already raised many of the same issues, defenses, and claims in the state-court foreclosure proceedings that they raise in this federal case. See Doc. 22 at 7-8; Am. Compl. at 10-11. And the Defendants have conclusively established. See Doc. 34 at 2 (attaching answer and motions filed by the parties in the state-court proceedings and noting that, "after a hearing on the merits on a motion for entry of summary judgment, [the court] held that MERS had the right to Assign the Mortgage, that OneWest had the right to foreclose, granted OneWest judgment for the amounts due on the mortgage loan, held OneWest's mortgage is the senior lien on the property, and ordered that the property be sold at a foreclosure sale"). For example, in their Answer to OneWest's foreclosure complaint, the Plaintiffs argued that "OneWest was not authorized to bring the action; OneWest attached forged and fraudulent evidence to bring the action; the Borrowers did not owe

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OneWest any money; OneWest was not the assignee of the Mortgage; OneWest did not have standing to maintain the foreclosure action." *Id.* at 4; see Doc. 36-1 (Plaintiffs' Answer). And even if some of their defenses to foreclosure were not raised in the state-court proceedings, the "pertinent issue is whether the claims could have been raised in the pending state proceedings." J.B. ex rel. Hart, 186 F.2d at 1892 (emphasis in original; internal quotation marks omitted). The Plaintiffs must establish that state law barred the presentation of their claims, but they cannot do so. See *id.* Because the Plaintiffs cannot produce any evidence demonstrating their federal claims were barred in the state-court foreclosure proceedings, the Court concludes that the second prong of the Younger abstention doctrine is satisfied.

### **3. The state-court foreclosure proceedings involve important state interests that traditionally look to state law for their resolution.**

The United States Supreme Court has noted that "the general welfare of society is involved in the security of the titles to real estate" and the power to ensure that security "inheres in the very nature of [state] government." [BFP v. Resolution Trust Corp., 511 U.S. 531, 544 \(1994\)](#) (internal quotation marks omitted) (holding "that a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with"). The Tenth Circuit Court of Appeals held that the third prong of the Younger abstention doctrine was satisfied in a federal quiettitle suit, stating "what more important state interest is there for the state court to address than the enforcement of its method of registering good title to privately owned lands within the state?" [Taylor v. Jaquez, 126 F.3d 1294, 1297 \(10th Cir. 1997\)](#). And cf. *Lambeth v. Miller*, No. 09-3027, 363 Fed. App'x 565, 568, [2010 WL 299244](#), \*\*2 (10th Cir. Jan. 27, 2010) (holding that "zoning and

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nuisance abatement issues are traditional state law matters that implicate important state interests, satisfying the third condition" of the Younger abstention analysis). The Tenth Circuit has further recognized in dicta that a federal suit challenging a state-court foreclosure sale "could [not] pass muster" under the Younger abstention doctrine. *DCR Fund I, LLC v. TS Family Ltd. P'ship*, No. 05-6232, 261 Fed. App'x 139, 145-46, [2008 WL 196298](#), \*\*5-6 (10th Cir. Jan. 24, 2008) (holding that the district court properly refused to consider the defendants' request for injunctive relief to halt a foreclosure sale and claims for conspiracy, abuse of process, and conversion associated with that sale). Thus, the district courts in this circuit and other circuits consistently have held that abstention under the Younger doctrine is mandatory when a federal action implicates title to real property and state-court foreclosure proceedings are ongoing. See, e.g., *Barefoot, et al., v. Onewest Bank, FBS, et al.*, No. 11-CV-0038 JB/LFG, Doc. No. 10 (D.N.M. Feb. 23, 2011) (adopting the magistrate judge's report recommending abstention under the Younger doctrine where the plaintiffs requested a TRO and preliminary injunction to halt a foreclosure sale); *Beeler Prop., LLC v. Lowe Enter. Residential Investors, LLC*, No.07-CV-00149-MSK-MJW, [2007 WL 1346591](#), at \*3 (D. Colo. May 7, 2007) (holding that "[a]ctions that challenge the [foreclosure] order and process are proceedings involving important state interests concerning title to real property located and determined by operation of state law"); *Mayeres v. BAC Home Loans*, No. 10-44816 MBK, ADV. 11-1516 MBK, [2011 WL 2945833](#), \*4 (Bankr. D.N.J. Jul 21, 2011) (abstaining under Younger doctrine because "matters presented in the Complaint are clearly the subject of a pending state foreclosure matter . . . [and the plaintiff's] claim that the mortgage interest is invalid is a core issue in that state litigation. Additionally, the State of New Jersey has an important interest in determining title to real property located and governed by state law."); *Beck v. Wells Fargo Bank*, No. 10-4652, [2011 WL 3664287](#)

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(E.D.Pa. Aug. 19, 2011) (abstaining from actions seeking to enjoining state foreclosure because "[t]he state has an important interest in resolving disputes related to real property located within its jurisdiction, as such disputes implicate matters primarily governed by state law" and "failure to abstain would unduly interfere with the state court's ability to manage the mortgage foreclosure action, a proceeding which 'traditionally is handled in state court.' *Nat'l City Mortgage Co. v. Stephen*, 09-1731, [647 F.3d 78](#), [2011 WL 2937275](#), at \*7 (3d Cir. July 22, 2011)"); *Bank of America v. Sharim, Inc.*, No., 10 Civ. 7570(PAC), [2010 WL 5072118](#) at \*\*3-4 (S.D.N.Y. Dec. 13, 2010) (abstaining under the Colorado River abstention doctrine).

Plaintiffs' Amended Complaint, which asks this Court to adjudicate Plaintiffs' right and title to the subject property, implicates an important state interest controlled by state foreclosure law. Because all three factors mandating abstention exist in this case, the Court concludes that it must abstain from exercising jurisdiction over Plaintiffs' action for declaratory and injunctive relief, including jurisdiction over Plaintiffs' claims to quiet title, and that those claims must be dismissed pursuant to the Younger abstention doctrine.

**4. Plaintiffs' claim for monetary damages under the FCRA and their state-law claim for fraud against OneWest must be dismissed.**

The Salazars' allegation that they made every loan payment on time, from the time of the loan's execution to the present date comes from the form complaint and has been rejected by the state court. Similarly, their allegation that signatures on the assignment have been forged or are fraudulent are recommended general allegations promoted by the form complaints and has been rejected. Those findings are not conclusive at this point, however. Under these circumstances, the Court will dismiss these claims without prejudice and remind the Salazars that, if in the future, they

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file a complaint making these allegations and they are false, they will face sanctions for perjury.

Even if the Court permitted the Salazars to again amend their complaint, their federal statutory claims for monetary damages under the FCRA hinge on whether they made their mortgage payments on time, and the answer to that question is inextricably intertwined with OneWest's right to foreclose on the loan for failure to make timely payments and to report the default on the note. Similarly, any state-law claim for fraud associated with the allegation that OneWest allegedly falsified the notary stamp and signatures on the assignment of the mortgage is inextricably intertwined with OneWest's assertion that the mortgage was properly assigned to it before it brought the foreclosure proceedings. Thus, the Court would be required to stay any action for damages under the FCRA and the state-law claim for fraud until a final judgment is entered in the foreclosure proceedings. See *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d at 1228 (holding that, as to claims for monetary damages, "[t]he rationale for Younger abstention can be satisfied ... by just staying proceedings ... until the state proceeding is final"). Since it appears that the Salazars have only parroted allegations from the form complaints, the better course of action is simply to dismiss those claims without prejudice.

**C. THE SALAZARS' POTENTIAL CAUSES OF ACTION UNDER TILA, HOEPA, AND RESPA AND OTHER STATE-LAW CLAIMS ARE TIME BARRED.**

The Salazars' potential causes of action under RESPA, TILA, and HOEPA, and the state-law claims for fraudulent misrepresentation, breach of fiduciary duty, unjust enrichment, conspiracy and usury during the loan process are supported only by the general allegations copied from the form complaint. Those allegations do not set out the names of the actual mortgage broker and originating lender who participated in the settlement of the loans and whose names are on the Salazars' closing

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documents and who allegedly are the actual entities or individuals who failed to properly disclose information and incorrectly calculated interest, etc. According to the Salazars' specific allegations, none of the named Defendants - except possibly IndyMac - participated in the activities leading up to the



execution and closing of the loan, thus they have failed to state claims against the named Defendants except for IndyMac for the alleged statutory and state-law violations and they should be dismissed. But even if IndyMac participated in the alleged bad acts, the relevant statutes of limitations and statute of repose have long passed to bring suit on these actions or omissions, which occurred in August 2007.

"Congress passed TILA to promote consumers' 'informed use of credit' by requiring 'meaningful disclosure of credit terms' . . ." *Chase Bank USA, NA v. McCoy*, — U.S. —, [131 S. Ct. 871, 874, 178 L. Ed.2d 716 \(2011\)](#); [Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1179 \(10th Cir. 2012\)](#). HOEPA was enacted as an amendment to TILA and "applies to a special class of regulated loans that are made at higher interest rates and are subject to special disclosure requirements." [In re Cmty. Bank of N. Va., 622 F.3d 275, 282 \(3rd Cir. 2010\)](#); *Rosenfield*, 681 F.3d at 1177 n.3 ("HOEPA is just an amendment to TILA itself"). Claims for damages brought under either TILA or HOEPA are subject to a one-year statute of limitations. See 15 U.S.C. § 1640(a), (e); *Heil v. Wells Fargo Bank, N.A.*, 298 Fed. App'x 703, 706-707, [2008 WL 4516685](#), \*3 (10th Cir. 2008). "'Equitable tolling' is the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances" and may apply to toll the statute of limitations for damages for claims brought under TILA and/or HOEPA. See *Heil*, 298 Fed. App'x at 706 (internal quotation marks omitted). But to invoke equitable tolling, the plaintiff must allege that, despite the exercise of due diligence, he was unable

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to discover the conduct that gives rise to his claims. See *id.* at 706-07. There are no allegations in the Salazars' complaint to support either fraudulent concealment or due diligence in attempting to discover IndyMac's alleged wrongful actions or omissions.

15 U.S.C. § 1635(f) provides, in relevant part, that the "obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon . . . sale of the property." 15 U.S.C. § 1635(f). The United States Supreme Court has held that claims for rescission under TILA or HOEPA are subject to an absolute three-year statute of repose that "completely extinguishes the right of rescission under TILA at the end of the specified three-year period," including using it as a defense to foreclosure. See *Rosenfield*, 681 F.3d at 1180-81 (citing and quoting extensively from [Beach v. Ocwen Federal Bank, 523 U.S. 410 \(1998\)](#)). Thus, equitable tolling based upon a creditor's alleged fraudulent concealment does not apply to claims for rescission under TILA or HOEPA. See *id.* at 1181 (citing and quoting [Jones v. Saxon Mortg., 537 F.3d 320, 327 \(4th Cir. 1998\)](#)).

The relevant date for determining whether Plaintiffs' TILA and HOEPA claims are barred is the date on which they entered into the loan agreement: August 22, 2007. See Doc. 20 at 5. The one-year statute of limitations for monetary damages thus ran on August 22, 2008, and the three-year statute of repose for that transaction was reached on August 22, 2010. This action was not filed until November 15, 2012. Consequently, Plaintiffs' claim for money damages or rescission of the contract under TILA or HOEPA are barred.

Similarly, Plaintiffs have named no defendants who provided "real estate services" to them before or during their loan transaction, or that they rendered any "settlement service" for which any of the named defendants could be held liable. See 12 U.S.C. §§ 2602(3) and 2607. They have failed

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to state a cognizable claim under RESPA against these Defendants. But even if they amended their Complaint again to add more defendants, claims for damages under RESPA are also subject to a one-year statute of limitations. See 12 U.S.C. § 2614 (stating that statute of limitations for violations of §§ 2607 or 2608 of RESPA is one year "from the date of the occurrence of the violation"). The Court will dismiss these claims.

Most of Plaintiffs' remaining state-law claims are also barred by the applicable statutes of limitations. "The statute of limitations for causes of action sounding in fraud or conversion is four years from the date that the cause of action accrues. NMSA 1978, § 37-1-4 (1880)." [Wilde v. Westland Dev. Co., 148 N.M. 627, 634, 241 P.3d 628, 635 \(Ct. App. 2010\)](#). Thus, Plaintiffs' claims for fraudulent misrepresentation against IndyMac arising from events occurring in 2007, insofar as they may be sufficiently pleaded to state a claim, are now barred.

"Unjust enrichment ... is a theory under which an aggrieved party may recover from another party who has profited at the expense of the aggrieved party." [Heimann v. Kinder-Morgan CO2 Co., 140 N.M. 552, 558, 144 P.3d 111, 117 \(Ct. App. 2006\)](#). Plaintiffs appear to base their claim for unjust enrichment on allegations taken from a form complaint, but should IndyMac have been the originating lender at the closing, their allegations could relate to its alleged actions in charging a "higher interest rate" than Plaintiffs say it should have charged and receiving kickbacks, rebates, or other fees "at closing." See Am. Compl. at 23. Because the claim for unjust enrichment is associated with unwritten or implied contracts, the four-year statute of limitations applying to actions founded on unwritten or implied contracts applies to, and bars, this claim. Cf. [Hydro Conduit Corp. v. Kemble, 110 N.M. 173, 179, 793 P.2d 855, 861 \(1990\)](#) (holding that "even though an action for unjust enrichment is not 'based on contract' in a strict theoretical sense, it is so closely

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related to an action which is so based that the immunity statute here, Section 37-1-23, should be construed to extend immunity to an unjust enrichment claim as well as to a claim founded on a true, but unwritten, contract"); NMSA 1978 § 37-1-4 (statute of limitations on actions "founded upon" unwritten contracts is four years).

Similarly, the Plaintiffs' claims for breach of fiduciary duty and conspiracy also arise from activities occurring before or during the August 2007 closing and are time barred. See Am. Compl. at 21-24. "Under NMSA 1978, § 37-1-4 (1880), the statute of limitations for bringing an action for damages based

upon allegations of conspiracy to defraud and fraud, and breach of fiduciary duty is four years." [Durham v. Southwest Developers Joint Venture, 128 N.M. 648, 658, 996 P.2d 911, 921 \(Ct. App. 1999\)](#).

**D. THE PLAINTIFFS HAVE FAILED TO STATE A STATE-LAW CLAIM FOR RICO VIOLATIONS, FOR USURY, OR AGAINST ANY ATTORNEY OR FIRM REPRESENTING ONEWEST BANK.**

The Plaintiffs' claims for civil RICO violations based upon Ohio law, see Am. Compl. at 24-25, and their claims alleging "usury" based upon an undescribed lender who was not a "properly chartered or registered financial institution" id. at 29, clearly are taken from the form complaint and are nonsensical in the context of this case. And although Plaintiffs refer to New Mexico statutes forbidding usury, they do not cite any statute that provides a basis for their claims. Further, the Supreme Court has held that the National Bank Act provides the exclusive cause of action for usury claims against national banks, and there is a 2-year statute of limitations for such a claim. See [Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 10-11 \(2003\)](#). Because 12 U.S.C. "§§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law

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claim of usury against a national bank." Id. at 11. These claims must be dismissed for failure to state a cognizable claim under *Iqbal*, 556 U.S. at 678.

The Complaint is devoid of any factual allegations to support a cognizable claim for relief regarding the individual attorney/Defendants and lawfirm that have represented OneWest in the state foreclosure proceedings. Those claims must be dismissed under *Iqbal*.

**III. CONCLUSION**

All claims against all Defendants must be dismissed under *Younger* abstention or because they are barred by the applicable statutes of limitations or because the Plaintiffs have failed to state cognizable claims for relief.

**IT IS ORDERED** that Plaintiffs' request that the Court take judicial notice (Doc. 20) is GRANTED only to the extent that the Court will take judicial notice of the state foreclosure proceedings and docket sheet attached to that motion;

**IT IS FURTHER ORDERED** that the Plaintiffs' motion for emergency injunctive relief (Doc. 22) is DENIED;

**IT IS FURTHER ORDERED** that the Defendants' motion to dismiss [Doc. 33] is GRANTED for the reasons stated in this memorandum opinion and order;

**IT IS FURTHER ORDERED** that the Amended Complaint be and here by is DISMISSED without prejudice and all other pending motions are dismissed as moot.

**SO ORDERED** this 28th day of February, 2013, in Albuquerque, New Mexico.

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**M. CHRISTINA ARMIJO**

Chief United States District Judge

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Notes:

<sup>1</sup> The Plaintiffs request that the Court take judicial notice of the foreclosure complaint. The basis of foreclosure is the allegation that Plaintiffs stopped making their loan payments; and the state court has found in favor of OneWest bank on that issue by entering a judgment of foreclosure. But the Amended Complaint alleges that the Plaintiffs "has [sic] paid each and every payment on time from the time of the loan closing through the present." Am. Compl. at 19, ¶ 4. The Court has found that this allegation is taken verbatim from the form complaint, and is but one example of the inconsistencies in the Plaintiffs' pleadings.

<sup>2</sup> The Salazars complain bitterly that, because the Order remanding the case to state court was filed only 11 days after the notice of removal was filed, the Court must have had the nefarious motives of furthering "political and sexism favors" for doing so. Doc. 20 at 3. The Court is mandated by statute, however, to remand any case that has been improperly removed "at any time." See 28 U.S.C. § 1447 ©. It is the Court's experience that defendants in foreclosure actions often seek to improperly remove the cases to federal court in an effort to delay the state-court proceedings, and the Court notes that federal district courts around the nation have begun sua sponte remanding these suits to state court. See, e.g., U.S. Bank, Nat'l Ass'n v. Williams, No.12-1756-JFA/VH, [2012 WL 2500466](#), \*1 (D.S.C. June 28, 2012) (noting that "sua sponte remand is available under appropriate circumstances" and sua sponte remanding improperly removed foreclosure action); JPMorgan Chase Bank, Nat'l Ass'n v. Canyon, No. 1:10-cv-894, [2010 WL 7199515](#), \*2 (S.D. Ohio Dec. 29, 2010) (concluding that defendant in foreclosure case was barred from removing case under § 1441 and that she had not demonstrated a federal question on the face of the complaint, and recommending sua sponte remand).

<sup>3</sup> The Federal Trade Commission has issued a Consumer Alert on the topic, cautioning homeowners to avoid the "Forensic Mortgage Loan Audit Scam." See <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt177.shtm> (site last visited 1/28/2013).

<sup>4</sup> For other examples of cases in which these general complaints contain information supplied by Mr. Garfield, see Maixner v. BAC Home Loans Servicing, LP, Civ. No. 10-3037-CL, [2011 WL 7153929](#), 3 (D.Or. Oct. 26, 2011) ("Maixner also offers as fact extended excerpts from a Securitization Research Commentary' ('SRC') obtained through LuminaQ and authored by Neil Garfield, an attorney licensed to practice in Florida who Maixner asserts is a 'nationally recognized expert in mortgage securitization.'")

(Id., ¶¶ 14-22 & Ex. I). A review of the SRC reveals that this document consists primarily of a general commentary regarding the practice of mortgage securitization accompanied by Garfield's opinion 'as an expert in securitization' regarding the significance of these practices with respect to the Maixners' mortgage loan, not of which are properly offered as fact" and dismissing with prejudice the plaintiffs claims seeking an "order holding the mortgage on their property to be void and unenforceable, the pending non-judicial foreclosure proceeding unlawful, and seeking damages for violations of, among others, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., and the Truth in Lending Act ("TILA") 15 U.S.C. § 1601 et seq.); *Sainte v. Suntrust Mortg., Inc.*, No. 1:10-CV-1637-TWT-WEJ, [2010 WL 4639242](#), \*1 (N.D.Ga. Sept. 15, 2010) (recommending dismissal of case after noting that, as alleged in the Salazar's case, "Plaintiff further alleges that the securitization of his mortgage loan exposes him to liability to 'potentially dozens or even thousands of third parties [that] could come forward claiming an unsatisfied interest in the promissory note.' ( Id. ¶ 7.) As a result of plaintiff's inability to establish chain of title to his property, he 'is left in the position of being in an adversary proceeding with ghosts.' (Id. ¶ 13.) Plaintiff alleges violations of the Truth in Lending Act, 15 U.S.C. § 1601 et seq., the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601 et seq., the Fair Debt Collections Practices Act, 15 U.S.C. § 1692 et seq., the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and a state law claim for quiet title. (Pet.¶¶ 17-43.)" and noting that, "[i]n its discussion of shotgun pleadings, the Court observed that plaintiff filed a pro forma complaint that is widely available on the internet, see, e.g., <http://mariokenny.wordpress.com/category/nature-of-the-action-by-neil-garfield/>, and frequently filed in this Court. See, e.g., *Dan v. Bank of America*, No. 1:10-cv581-CAP (N.D. Ga. filed Mar. 1, 2010); *Myers v. Countrywide Home Loans*, No. 1:10-cv-0536-JEC (N.D. Ga. filed Feb. 25, 2010); *Clark v. Wells Fargo Bank N.A.*, No. 1:09-cv-2742-CAP (N.D. Ga. filed Oct. 2, 2009); *McGrue v. Wells Fargo Bank N.A.*, No. 1:09-cv-2733-CAP (N.D. Ga. filed Oct. 2, 2009)"); *Straker v. Deutsche Bank Nat Trust*, No. 3:CV-09-0338, [2010 WL 500412, 1](#) (M.D.Pa. Feb. 5, 2010) (noting that "[a] significant portion of the body of Plaintiff's Complaint can be found in Nature of the Action by [Neil Garfield](#). Accordingly, there are only a handful of statements included in Plaintiff's Complaint that are personal to her claim and not pulled directly from the above-posted source" and dismissing claims "alleging violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605; the Home Ownership Equity Protection Act ("HOEPA"), 15 U.S.C. § 1639; the Truth-in-Lending Act ("TILA"), 15 U.S.C. § 1601; and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681. (Comp., Dkt.1) . . . and claims of fraudulent misrepresentation, unjust enrichment, civil conspiracy, civil RICO, quiet title, and usury" as improperly pleaded against all Defendants).

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# In re: Connelly

In re: DAVID CONNELLY and ELIZABETH CONNELLY, Debtors.  
DAVID CONNELLY, Plaintiff,

v.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BENEFIT  
OF HARBORVIEW MORTGAGE LOAN TRUST 2005-3, AND DOES 1-1000, Defendant.

Case No. 4:09-bk-33553-EWH

Case No. 4:12-ap-00100-EWH

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA

Dated: February 6, 2013

ORDERED.

Eileen W. Hollowell, Bankruptcy Judge

Chapter 13

MEMORANDUM DECISION RE:  
DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT

## I. INTRODUCTION

David Connelly ("Plaintiff") filed a complaint to determine the extent and validity of a lien on his residence and to receive additional related relief. U.S. Bank ("Defendant") filed a motion to dismiss ("the Motion"), asserting that Plaintiff failed to

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state any claim upon which the Court can grant relief. Because the Motion included a number of exhibits, it is being treated as a motion for summary judgment.

After considering all of the pleadings, briefs, and affidavits submitted by both parties, the Court finds that Defendant is entitled to summary judgment.

## II. FACTUAL AND PROCEDURAL HISTORY

### A. Plaintiff's Mortgage, Assignments, and Default

Plaintiff borrowed \$273,523.00 ("the Loan") from ComUnity Lending, Inc. ("ComUnity") on March 29, 2005 in order to purchase a home ("the Residence"). The Loan was evidenced by a promissory note ("the Note") executed on the same day. The Note was secured by a deed of trust ("the DOT"), recorded on March 31, 2005, which encumbers the Residence. The DOT lists ComUnity as the payee; Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary, acting as a nominee for ComUnity and its successors and assigns; and First American Title Insurance Company ("First American") as the trustee.

The Note was subsequently transferred multiple times. It bears three indorsements (collectively "the Indorsements"): (1) from ComUnity to Countrywide Document Custody Services ("CDCS"), signed by Lily Nguyen, who is listed as a "Loan Closer" for ComUnity; (2) from CDCS to Countrywide Home Loans Inc. ("Countrywide"), without recourse, signed by Laurie Meder, a CDCS vice president; and (3) a blank indorsement executed by David Spector, a Countrywide managing director.<sup>1</sup>

The DOT was assigned from MERS to Defendant, as trustee for a mortgage-securities trust created by Greenwich Capital Acceptance and Greenwich Capital

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Financial Products, on September 29, 2009 ("the DOT Assignment"). Leticia Quintana ("Quintana"), listed as an assistant secretary of MERS, executed the DOT Assignment. Quintana's signature was notarized on September 25, 2009 by Elizabeth Lopez ("Lopez"), a California notary public. Defendant substituted ReconTrust Company, N.A. ("ReconTrust") as trustee of the DOT on the same date ("the Trustee Substitution"). Quintana, again listed as an assistant secretary, signed the Trustee Substitution on behalf of Defendant. Lopez notarized Quintana's signature on the Trustee Substitution on September 25, 2009. On both the DOT Assignment and the Trustee Substitution, the notary portion on the primary document is crossed out, and a separate sheet of paper with the notary oath, signature, and seal is affixed as an attachment.

Plaintiff defaulted on the Loan on October 1, 2008. On September 29, 2009, ReconTrust noticed ("the Sale Notice") a foreclosure sale ("the Trustee's Sale") for December 31, 2009. The Sale Notice was signed on ReconTrust's behalf by Daniel Rodriguez ("Rodriguez"), who was listed as a "team member." Rodriguez's signature was notarized by Lopez on September 25, 2009. In identical fashion to the DOT Assignment and Trustee Substitution, the notary section on the Sale Notice is crossed out and an addendum with the notary oath, signature, and seal is attached at the end.

Plaintiff, along with his wife, filed a Chapter 13<sup>2</sup> voluntary petition on December 29, 2009.

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## B. The Complaint

On January 16, 2012, Plaintiff filed a "Complaint to Determine the Extent and Validity of Lien on Real Property, for Quiet Title, for Injunctive Relief, to Recover Money, Pursuant to Statutory and/or Equitable Damages, Attorney Fees and Costs, for Declaratory Relief, and a Conditional Action for an Accounting and to Obtain Unapplied Credits" ("the Complaint"). Plaintiff seeks relief on four counts.<sup>3</sup>

### 1. Count I

In Count I, Plaintiff seeks a determination of the extent and validity of the lien created by the DOT, in addition to an injunction to bar Defendant or any affiliate from asserting any lien on the Residence. Plaintiff alleges that Defendant does not own the Note, because it did not pay value for it, and is not a holder of the Note, because the Indorsements have not been authenticated and do not comply with terms of a mortgage securitization agreement.<sup>4</sup> Plaintiff further alleges that no actual funds "ever changed hands" in the course of originating the Loan because the money that ComUnity loaned to Plaintiff was generated by the sale of mortgage-backed securities ("MBS"). Plaintiff concludes that the only parties whose funds were used in making the Loan came from MBS investors ("the Investors"), and that Defendant may only assert an interest on their behalf, not its own. Finally, Plaintiff asserts that BAC, the Loan servicer, may not act on behalf of the Investors; only Defendant may do so.

According to Plaintiff, only the Investors can be harmed by Defendant's alleged failure to properly obtain ownership of the Note and DOT. The sole remedies available

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to the Investors are to access "credit default contracts"<sup>5</sup> or to bring lawsuits against the parties that allegedly improperly transferred the Note and DOT. Plaintiff further asserts that as a result of the alleged improper transfers of the Note and DOT, Plaintiff is the only party with a legitimate claim to legal title of the Residence. Plaintiff seeks a permanent injunction under Ariz. Rev. Stat. ("ARS") § 12-1101(A)(5) to this effect, although the Complaint acknowledges that injunctive relief "will not be ripe until the final results on the merits is (sic) reached."

### 2. Count II

In Count II, Plaintiff seeks to recover damages for falsely recorded documents and notary fraud. Under ARS §§ 33-420(A), (C), and 39-161, Plaintiff alleges that Defendant and its agents, including Quintana and Lopez, falsified signatures and notarizations affixed to the DOT, the Trustee Substitution, and the Sale Notice. Plaintiff claims that Quintana never served as an assistant secretary for MERS or Defendant; that Lopez crossed out notary portions of the DOT and Trustee Substitution, indicating that she did not witness the signatures as sworn; and that Quintana, Lopez, and Defendant knowingly produced false documents and lied. The Complaint asserts that additional evidence will be produced

which demonstrates a pattern of misfeasance. Plaintiff seeks treble damages and attorney's fees on Count II.

### 3. Count III

In Count III, Plaintiff seeks declaratory relief under Rule 7001(9), including findings that: the DOT, Trustee Substitution, and Sale Notice are void; that ComUnity completely divested itself of any interest in the Note and DOT prior to May 1, 2005; that

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Defendant does not own the Note; that Defendant is holder of the Note;<sup>6</sup> that Defendant has no right to enforce the Note; that Defendant holds no interest in the Residence; that no successor of any parties named in the Indorsements can own the Note or DOT; and that no party owns the Note or DOT through a right arising out of privity with Defendant.

### 4. Count IV (Contingent on Plaintiff not prevailing on Counts I-III)

In Count IV, Plaintiff seeks a determination that the Note has been "discharged by satisfaction." Plaintiff alleges that the Note has been substantially paid by a combination of payments made by Plaintiff and "miscellaneous payments" made as a result of mortgage pooling, securities sales, and credit default swaps. If any party is found to own the Note, Plaintiff demands an accounting of direct and "miscellaneous payments."

### C. The Motion

On May 11, 2012, Defendant filed the Motion. Defendant alleges that pursuant to Civil Rule 12(b), Plaintiff has failed to state a claim upon which relief can be granted. Included in the moving papers as exhibits are: a copy of the original Note bearing the Indorsements; a copy of the DOT; a copy of the DOT Assignment transferring beneficial interest under the DOT from MERS to Defendant; a copy of the Trustee Substitution; a copy of the Sale Notice; and a copy of the Cancellation of Notice of Sale.

Defendant argues that Count I fails because Plaintiff does not assert that he owns the Note, nor does Plaintiff assert that some other party has a right to enforce the Note. Meanwhile, Defendant asserts that it holds a properly negotiated bearer

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instrument which evidences that Defendant is the holder of the Note.<sup>7</sup> Additionally, Defendant asserts that Plaintiff has not pled facts to satisfy the threshold inquiry of a temporary restraining order, and in any event, Plaintiff admits that permanent injunction is not ripe, so the prayer for injunctive relief should be dismissed.

Defendant argues that Count II fails because Plaintiff's state-law claim is a non-core proceeding beyond this Court's constitutional jurisdiction. Defendant further contends that ARS § 33-420 only governs documents that create interests in property but not those pertaining to assignments, substitutions, and notices.

Defendant argues that Count III fails because it seeks declaratory relief that is duplicative of the remedies sought in the other counts.

Defendant argues that Count IV fails because it lacks any legal basis. Defendant contends that Plaintiff offers an erroneous interpretation of the DOT's "miscellaneous payments" provision,<sup>8</sup> mistaking a narrow clause that covers monies obtained as a result of events which diminish the value of the Residence, such as abandonment or damage, to more broadly include the attenuated financial transactions alleged in the Complaint.

The Motion also seeks an award of its fees and costs pursuant to language in the Note, the DOT, and ARS § 12-341.01.

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#### D. The Response

On June 2, 2012, Plaintiff filed a Response to Motion to Dismiss Complaint ("the Response"). In the Response, Plaintiff contends that the challenge to Defendant's right to enforce the Note and DOT has "two basic layers": 1) the sale of the Note and DOT violated a mortgage pooling and servicing agreement, contravening New York trust law; 2) the Note was not transferred in accordance with ARS § 47-9203.<sup>9</sup> To support his arguments, Plaintiff discusses New York law governing pooling and servicing agreements, arguing that Defendant lacks standing in this case due to alleged defects in securities contracts. It is also asserted that only Article 9 of the UCC<sup>10</sup> applies to the transfer of the Note, and that Defendant cannot satisfy Article 9's requirements. Addressing the quiet-title claim, Plaintiff concedes that it may be redundant but has

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been pled in an abundance of caution due to "favoritism that [c]ourts have obviously shown to banks against homeowners, which have been doing harm to the law." Plaintiff does not offer new material information to support the claims for false recordation, declaratory relief, or an accounting.

#### E. The Reply

On June 22, 2012, Defendant filed its Reply in Support of Motion to Dismiss ("the Reply"). Defendant claims that Plaintiff fails to address the controlling law in Arizona and the Ninth Circuit that governs which party may enforce rights under a note or deed of trust. In addition, according to Defendant, Plaintiff cannot meet the equitable standard of Arizona's quiet title statute because the Note

has not been satisfied. Defendant further contends that the Response neglects Defendant's arguments concerning false recordation, and Defendant reiterates that Plaintiff's understanding of miscellaneous payments under the DOT lacks any basis in the law.

#### F. Conversion to Summary Judgment

The Court heard oral arguments on the Motion on August 2, 2012. On September 26, 2012, the Court entered an Order ("the Conversion Order") notifying the parties that in accordance with Civil Rule 12(d), made applicable in this case by Rule 7012(b), the Motion would be considered a motion for summary judgment due to its reliance on exhibits beyond the pleadings. The Conversion Order instructed the parties to submit any additional materials "pertinent to [the Motion]" within fourteen days and to abide by the Court's Local Rules, particularly LR 9013-1, when filing their supplements. On October 9, 2012, the Court reiterated these specific instructions in an Order extending the filing deadline to November 7, 2012.

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On November 16, 2012, following an additional extension, Defendant filed a Supplemental Brief in Support of Summary Judgment ("the Supplemental Brief") along with a Separate Statement of Facts that contains two exhibits.

Exhibit 1 is an affidavit submitted by Don Venture ("the Venture Affidavit"), a Senior Associate in the Corporate Trust Department of the Bank of New York Mellon Trust Company ("BNYMTC"), the document custodian for Defendant. The Venture Affidavit asserts that Venture has personal knowledge of BNYMTC's procedures for receiving and recording promissory notes. Attached to the Venture Affidavit are a copy of the original Note bearing the Indorsements and a copy of a computer printout from BNYMTC's records reflecting June 2, 2005 as the date upon which BNYMTC received the original Note. Venture testifies that since then, the original Note has been stored in a BNYMTC vault.

Exhibit 2 is a declaration submitted by David Duclos ("the Duclos Declaration"), a Vice President for Defendant. Attached to the Duclos Declaration are a copy of the Pooling and Servicing Agreement ("PSA") naming Defendant as trustee; a copy of the Mortgage Loan Purchase Agreement ("MLPA"); and a printout from a mortgage loan schedule referenced by the PSA and MLPA listing the Note among those in the mortgage pool.

Plaintiff did not file a brief in opposition to the Supplemental Brief. Instead, on November 16, 2012, Plaintiff submitted an affidavit claiming that Countrywide was the original Note servicer; that the Note copy provided at the time of the Loan closing carried an unsigned allonge ("the Allonge") with the language, "PAY TO THE ORDER OF COUNTRYWIDE DOCUMENT CUSTODY SERVICES...WITHOUT RECOURSE

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ComUnity Lending..."; that the Allonge was never attached to any copy of the Note that Plaintiff or Plaintiff's counsel received from Defendant or its affiliated entities; that Defendant and its affiliated entities violated the Truth in Lending Act ("TILA");<sup>11</sup> and that Defendant and its affiliated entities ignored Plaintiff's correspondence and notices of rescission.

Plaintiff received one final extension to file any further opposition to the Supplemental Brief until November 19, 2012. A day later,<sup>12</sup> Plaintiff's counsel submitted an affidavit from Neil Garfield ("the Garfield Affidavit"), an attorney previously uninvolved in this case but a purported expert in mortgages and securitization who reviewed the documents at issue, and an affidavit from Plaintiff's counsel ("the Ryan Affidavit," and collectively with Plaintiff's other affidavits, "the Plaintiff Affidavits") containing exhibits with computer printouts of MERS records from 2005, correspondence between counsel and various other parties, and copies of the Note provided to counsel. The Ryan affidavit alleges that a Countrywide affiliate, BAC Home Loans Servicing, was the original servicer of the Note; that Defendant submitted a copy of the Note with an indorsed allonge for the first time when it filed the Motion; and that despite repeated requests for a "true and correct" copy of the "current" Note, Plaintiff's counsel never received a copy of the Note bearing the Indorsements.

Defendant filed a reply on December 21, 2012 reiterating its primary arguments, challenging the legal merit and procedural propriety of the Plaintiff Affidavits, and

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contending that it had further satisfied its burden of proof by providing the PSA, MLPA, and mortgage loan schedule along with its own affidavits.

### **III. ISSUES**

- 1) Is Defendant entitled to summary judgment?
- 2) Has Defendant demonstrated that it has a valid, enforceable interest in the Note and DOT?

### **IV. JURISDICTIONAL STATEMENT**

Jurisdiction is proper for the matters decided under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (K).

### **V. DISCUSSION**

At the outset, the Court notes that Plaintiff does not challenge that he borrowed \$273,523.00 from ComUnity to purchase the Residence; that he executed the Note and DOT; and that he has been in default on the Loan since October 2008. Nor does Plaintiff argue that he has received demands for payment from different entities or that the foreclosure noticing procedures were improper. What remains in dispute is whether Defendant or any of its affiliates has a right to enforce the Note or DOT. Plaintiff argues that Defendant lacks this right because it holds no interest in the Note.

#### A. Motion to Dismiss and Motion for Summary Judgment Standard

Rule 7012(b) applies Civil Rule 12(b)-(i) to adversary proceedings in bankruptcy court. Civil Rule 12(d) instructs that if a court considers matters outside of the pleadings when deciding a motion to dismiss brought under Civil Rule 12(b)(6), the motion must be treated as a motion for summary judgment under Civil Rule 56, and the parties must be given a reasonable opportunity to present all the material that is pertinent to the

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motion. Civil Rule 12(d). Civil Rule 56 is made applicable in a bankruptcy case by Rule 7056.

When a motion to dismiss is considered as a motion for summary judgment, the Ninth Circuit does not require strict adherence to formal noticing standards. Instead, the parties must be fairly apprised that a court is looking beyond the pleadings and treating the motion to dismiss as one for summary judgment. [Olsen v. Idaho St. Bd. of Med., 363 F.3d 916, 922 \(9th Cir. 2004\)](#). A party is "fairly apprised" that the court will be deciding a summary judgment motion if that party submits matters outside the pleadings and invites consideration of them. [Cunningham v. Rothery \(In re Rothery\), 143 F.3d 546, 549 \(9th Cir. 1998\)](#).

The Motion relies on exhibits beyond the pleadings, and to comply with Civil Rule 12(d), the Court must evaluate it as one for summary judgment. The parties have been fairly apprised: they received notice of the Conversion Order and have been afforded multiple opportunities to file supplemental documents for summary judgment consideration.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits...show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2550, 91 L. Ed. 2d 265, 273 \(1986\)](#) The moving party has the burden of showing that there is no genuine issue of material fact. [Celotex](#), 477 U.S. at 323; [Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 \(9th Cir. 2007\)](#). When ruling on a motion for summary judgment, a court must view all the evidence in the light most favorable to the

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nonmoving party. [County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 \(9th Cir. 2001\)](#). A trial court can only consider admissible evidence in ruling on a motion for summary judgment. [See](#) Civil Rule 56(e); [Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 \(9th Cir. 1988\)](#).

Once the movant satisfies this burden, the burden shifts to the non-moving party. [Celotex](#), 477 U.S. at 323. The "nonmoving party must go beyond the pleadings and, by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that

there is a genuine issue for trial." [Bias v. Moynihan, 508 F.3d 1212, 1218 \(9th Cir. 2007\)](#). When contesting a moving party's facts, Civil Rule 56(e) requires that the non-movant's response, and not merely other papers, "'set forth specific facts' establishing a genuine issue." [Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031 \(9th Cir. 2001\)](#) (quoting Civil Rule 56(e)). This Court's Local Rules echo this requirement—a party opposing summary judgment "shall set forth separately from the memorandum of law...the specific facts...that...establish that a genuine issue of material fact exists that precludes summary judgment." Local Rule 9013-1(g).

Applying this legal standard to the present case, Defendant's Motion and additional filings must demonstrate that there is no genuine dispute about material facts, and that it is entitled to summary judgment as a matter of law. For reasons explained below, Defendant has satisfied this burden and summary judgment will be granted.

Defendant is entitled to summary judgment because Plaintiff's opposition consisted of unpersuasive conclusory statements which ignored Ninth Circuit law, the Bankruptcy Rules, the Local Rules, and the Conversion Order. Plaintiff's pleadings are

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filled with inapposite legal theories unsupported by facts or law. For example, in the Response's discussion of how UCC Articles 3 and 9 affect the PSA and MLPA, Plaintiff never acknowledges that he is not a party to those contracts and fails to cite a single case from the Ninth Circuit to support his arguments. Notably, Plaintiff neglects to cite or adhere to recent Arizona and Ninth Circuit cases which address how a creditor may enforce its rights under a promissory note and deed of trust.

Further, Plaintiff seeks relief on four counts in the Complaint and then raises two additional, discrete grounds for relief in the Response, asserting that the latter two comprise the gravamen of Plaintiff's argument.<sup>13</sup> Not only is the second set pled with insufficient facts or coherence to survive the Motion, but a litigant must first seek leave from the Court to amend its pleadings. Civil Rule 15(a)(2) (made applicable by Rule 7015). Plaintiff failed to abide by this requirement and inappropriately introduced new grounds for relief in the Response.

The Plaintiff Affidavits betray a similar mistake, raising several arguments, such as alleged TILA violations, not pled in the Complaint. Even more damning, the Response and the Plaintiff Affidavits fail to separately specify the facts which militate against granting summary judgment to Defendant. They violate the standard articulated by [Carmen](#) and the Local Rules, which require that facts be set forth in serial fashion, not in narrative form. Each fact must refer to a specific portion of the record where the fact may be found. To this end, the Conversion Order expressly instructed the parties to abide by LR 9013-1 and remain focused on issues raised in the Motion. Plaintiff has done neither.

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## B. Defendant's Standing to Enforce the Note

Standing is "a threshold question" required in every federal case that determines whether the court may entertain the proceeding. Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897, 906 (9th Cir. BAP 2011) (quoting Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)) (internal quotation marks omitted). A creditor seeking to exercise some interest in a debtor's estate must demonstrate both constitutional and prudential standing. Veal, 450 B.R. at 906-7.

To establish constitutional standing, a creditor must clear the relatively low hurdle of demonstrating injury in fact, causation, and redressability. Veal, 450 B.R. at 906. A note holder seeking to enforce its lien satisfies these elements because bankruptcy's automatic stay prohibits pursuit of available remedies (injury), enjoins pursuit of relief outside of bankruptcy (causation), and offers potential relief—such as lifting the stay—which would remedy the injury (redressability). Id.

A lienholder also must demonstrate that it has prudential standing, and this means that the creditor must show that it is a "real party in interest" pursuant to Civil Rule 17(a). Veal, 450 B.R. at 907. In mortgage cases involving a negotiable instrument secured by real property, the substantive law is generally supplied by the UCC, as adopted or implemented by state law. See id. at 908-10 (discussing Article 3 and Article 9 of the UCC). "Under this construct, a party may establish its standing by showing it is the 'person entitled to enforce' the promissory note as that phrase is defined by UCC Article 3." Tovar v. Heritage Pac. Fin., LLC (In re Tovar), 2012 Bankr. LEXIS 3633 at \*14-15, [2012 WL 3205252](#) (9th Cir. BAP Aug. 3, 2012) (citing Veal, 450 B.R. at 908-10).

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In Arizona, the party seeking to enforce payment under a promissory note must establish that it is a "person entitled to enforce" an instrument. ARS § 47-3301. And though this seems axiomatic, the party obligated on the note must pay a "person entitled to enforce." Veal, 450 B.R. at 910. There are several ways to acquire the status of a "person entitled to enforce," and the most pertinent to this case is to become a "holder" of the note. A party is a holder of a note if that party possesses the note and either: (i) the note has been made payable specifically to the order of the party in possession; or (ii) the note is payable to the bearer. Veal, 450 B.R. at 911; ARS § 47-1201(B)(21)(a). When indorsed in blank, an instrument becomes payable to the bearer and may be negotiated by transfer of possession alone. ARS § 47-3205(B). "Bearer" means a person in possession of a negotiable instrument that is indorsed in blank. ARS § 47-1201(B)(5).

Construing these statutes together, the Court finds that Defendant is a holder of the Note entitled to enforce it because Defendant is the bearer of the Note properly indorsed in blank.<sup>14</sup> ARS § 47-3308(A) affords a presumption of authenticity to signatures on negotiable instruments, but it also provides that when the validity of an indorsement is challenged, the burden of demonstrating authenticity falls on the party asserting it.

Plaintiff attempts to mount such a challenge but does not demonstrate that there is a genuine issue of material fact regarding the validity of the Indorsements. Rather than presenting plausible evidence along with the Complaint or Response, Plaintiff alleges that the Indorsements are invalid because the manner in which the Note was transferred violated New York trust law and unnamed securities laws. But Plaintiff fails to explain this theory sufficiently and fails to explain how errors in the securitization of the Note are germane to him.

In particular, Plaintiff argues that Article 3 is irrelevant to the determination of whether a Note has been properly transferred. In Plaintiff's view, the Indorsements, even if valid (which Plaintiff disputes), are immaterial because the Note is not a negotiable instrument. Instead, any transfer of the Note is governed by the terms of a "security agreement", which Plaintiff alleges is the PSA. Not a single case is cited to support this proposition. Plaintiff solely relies on his expert's assertion that he possesses "knowledge of the actual intents, purposes, meanings and effect of the 1999 amendments [to the] Uniform Commercial Code.... Article 9 applies to the sale of promissory notes." Garfield Aff. 9:9-12.

Even if this opinion testimony by a witness who has not been qualified as an expert could be considered by the Court, it would be rejected because it directly contradicts Veal. This Court follows the decisions of the Ninth Circuit BAP, and accordingly, Plaintiff's argument that only Article 9 applies to the transfer of the Note fails.

As has been pointed out to Plaintiff's counsel in other cases, the only issue relevant to Plaintiff regarding the transfer of the Note is whether he faces multiple

claimants competing for the right to be paid. Veal, 450 B.R. at 912; Green v. Waterfall Victoria Master Fund 2008-1 Grantor Trust Series A (In re Green), 2012 Bankr. LEXIS 4884 at \*25-26, [2012 WL 4857552](#) (9th Cir. BAP Oct. 15, 2012). No evidence has been presented which indicates that multiple parties have demanded payment of the Note.

Likewise, the Plaintiff Affidavits do not contain any controverting evidence or valid legal arguments in response to the Motion or Supplemental Brief. This omission is tantamount to a non-response pursuant to Civil Rule 56(e), Local Rule 9013-1(g), and Carmen. Consequently, Defendant could prevail "merely by pointing out that there is an absence of evidence to support the nonmoving party's case." Soremekun, 509 F.3d at 984. But even with the Court's latitude in treating the Plaintiff Affidavits as evidence, they do not cast doubt on the authenticity of the Indorsements. The Plaintiff Affidavits are a melange of speculation and legal theories lacking foundation, the sort of "[c]onclusory, speculative testimony in affidavits and moving papers" deemed "insufficient to raise genuine issues of fact and defeat summary judgment." Id.

For example, the Plaintiff Affidavits argue that Defendant filed a copy of the Note bearing an indorsed allonge as an attachment to the Motion. This is not true. The copy of the Note submitted by Defendant bears the Indorsements on the back of an original Note page. Plaintiff attempts to imply subterfuge, that this is a "floating allonge" case in which an allonge bearing previously unseen indorsements is submitted by a financial institution in an attempt to demonstrate holder status and rehabilitate incompetent evidence. See, e.g., In re Weisband, 427 B.R. 13 (Bankr. D. Ariz. 2010). But the facts here do not align with that scenario because Defendant has only ever produced a properly indorsed copy of the Note in pleadings filed with the Court. In response to

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poorly worded requests for copies of the "current" Note, Plaintiff may have received incomplete reproductions, but the word "current" is not synonymous with "original." "Current" is ambiguous and could be reasonably read as an inquiry seeking a copy of the Note which sets out the loan terms, not necessarily a request for a copy of the original Note bearing the Indorsements.

Nor does the copy of the unsigned Allonge provided to Plaintiff at closing impute wrongdoing. Instead, it demonstrates that Plaintiff was on notice that ComUnity planned to transfer the Note, and the Indorsements prove that ComUnity did, in fact, complete the transfer to CDCS. A Note bearing an indorsement is preferable to an allonge due to the evidentiary questions which indorsed allonges can create. An unsigned allonge "[is] superfluous because the Note contain[s] an [i]ndorsement in blank on its face." Allen v. U.S. Bank, NA (In re Allen), 472 B.R. 559, 567 (9th Cir. BAP 2012).

Accordingly, Plaintiff has failed to overcome the presumption raised by Defendant's evidence that it is a holder entitled to enforce the Note.

### C. Validity of the Lien

As holder of the Note, Defendant is entitled to enforce the underlying security instrument. In Arizona, it is a generally held principle that a promissory note and deed of trust go together. See ARS § 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"); see also Hogan v. Wash. Mut. Bank, 277 P.3d 781, 784 (Ariz. 2012); Vasquez v. Saxon Mortgage, Inc., 228 Ariz. 357 (Ariz. 2011). Notwithstanding the clear state of the law, the Court will nevertheless review it due to Plaintiff's allegations that no party may enforce the Note and DOT.

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"When a borrower takes out a home loan, the borrower executes two documents in favor of the lender: (1) a promissory note to repay the loan; and (2) a deed of trust that transfers legal title in the property as collateral to secure the loan in the event of default." Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1039 (9th Cir. 2011). Under applicable Arizona non-judicial foreclosure law, "[w]hen

parties execute a deed of trust and the debtor thereafter defaults, ARS § 33-807 empowers the trustee to sell the real property securing the underlying note through a non-judicial sale." Hogan, 277 P.3d at 782-83. A deed of trust may only be enforced by, or on behalf of, a party entitled to enforce the obligation that a mortgage secures. Id. at 783.

The Hogan case lays out critical details of how a deed of trust can be enforced: a party named by a deed of trust as beneficiary may act directly, or through a trustee, to foreclose on property when a borrower defaults on terms of the deed of trust. Initiating the sale does not require compliance with the UCC, and a trustee need not produce an original promissory note. Hogan, 277 P.3d at 783 (citing In re Weisband, 427 B.R. at 22; Mansour v. Cal-Western Reconveyance Corp., 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009)). Further, while a trustee's sale may be invalid if initiated by, or on behalf of, a party that is not entitled to enforce the obligations of the deed of trust, the invalidity of that particular foreclosure does not mean that there is no party with the power to foreclose. Cervantes, 656 F.3d at 1044. This last point is important because Plaintiff appears to contend that no party is entitled to the benefits of the DOT.

In this case, the DOT nominally designates MERS as "beneficiary" but explains that MERS serves as beneficiary "solely as nominee for Lender and Lender's successors and assigns." This does not fatally split a deed from the corresponding note,

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as MERS is understood to be a type of agent for the original lender or its successors. Cervantes, 656 F.3d at 1044; see also Cedano v. Aurora Loan Servs., LLC (In re Cedano), 470 B.R. 522, 531 (9th Cir. BAP 2012); Weingartner v. Chase Home Finance, LLC, 702 F. Supp. 2d 1276, 1279-81 (D. Nev. 2010). As identified in the DOT, Lender was ComUnity. The DOT Assignment demonstrates that "for value received," MERS assigned its interest to Defendant, and the Trustee Substitution demonstrates that ReconTrust became trustee of the DOT. As a result, Defendant is the valid beneficiary of the DOT and ReconTrust is the proper trustee entitled to initiate foreclosure provided that the documents were properly executed.

#### D. Document Execution

Fed. R. Evid. 902(4) and (9) provide that certified copies of public records, commercial paper, and documents related to commercial paper are entitled to a presumption of authenticity. Similarly, ARS § 33-502 provides that domestic notarial acts performed outside of Arizona are presumed genuine when introduced in the state. Under analogous statutes, such as those governing the authenticity of indorsements on commercial paper, the presumption of authenticity is rebuttable, and the burden of proof shifts to the documents' proponent when the opposing party challenges their authenticity.

Plaintiff has challenged the authenticity of the DOT, Trustee Substitution, and Sale Notice, all three of which would normally be admitted under the evidentiary presumptions just highlighted. In order to

succeed, Plaintiff must provide "significant probative evidence tending to support" his allegations. Bias, 508 F.3d at 1218 (citing Gen. Bus. Sys. v. N. Am. Philips Corp., 699 F.2d 965, 971 (9th Cir. 1983))

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(quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 290, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)) (internal quotation marks omitted). Significant probative evidence goes beyond a mere "scintilla," and it is "not enough to show that there is some metaphysical doubt as to the material facts." Mann v. GTCR Golder Rauner, L.L.C., 483 F. Supp. 2d 884, 890 (D. Ariz. 2007) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

While the Court must "view the evidence in the light most favorable to the nonmoving party, drawing all reasonable inference in his favor," Mann, 483 F. Supp. 2d at 890 (quoting Horphag v. Garcia, 475 F.3d 129, 1035 (9th Cir. 2006)), even under that standard Plaintiff has not produced significant probative evidence to cast doubt on the DOT, Trustee Substitution, and Sale Notice. In fact, Plaintiff has not produced any evidence to support his falsification claims, has not offered any useful detail, and only has promised to bring forth additional evidence at a later date. This comes closer to metaphysical doubt than evidence deserving all reasonable inference. Plaintiff also has not advanced any theories explaining his suspicion—for instance, Plaintiff does not point out inconsistencies in copies of the same document. See, e.g., In re Tarantola, 2010 Bankr. LEXIS 2435, 2010 WL 3022038 (Bankr. D. Ariz. July 9, 2010). Plaintiff has not even attached the allegedly suspicious documents to the Complaint or the Response, and the Plaintiff Affidavits do not address this issue. In the absence of a more compelling pleading, the Court is comfortable affording Defendant the ordinary presumptions of authenticity of its documents.<sup>15</sup>

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#### E. Contingent Claim for Credit for Alleged Third-Party Payments

In the event that Plaintiff's other claims are denied, Count IV seeks, as alternative relief, credit and an accounting for "miscellaneous payments" made by third parties. However, the language of the DOT does not apply to such alleged payments. Instead, as Defendant points out, such payments are compensation for waste or destruction of the Residence. Therefore, Defendant is entitled to summary judgment on Count IV.

### **VI. CONCLUSION**

Defendant has demonstrated that it has standing to enforce the Note and DOT and that the documents evidencing that standing were properly executed. In addition, Plaintiff is not entitled to credit for alleged third-party payments. The Court need not address the balance of Plaintiff's claims, as they are either duplicative (declaratory judgment and quiet title) or beyond the Court's jurisdiction (notary fraud). A separate order will be entered on this date dismissing the Complaint with prejudice.

The Court will, however, retain jurisdiction to consider Defendant's claim for its attorneys' fees and costs. Defendant is ordered to file its fee application within 30 days of the date of this Memorandum Decision.

Dated and signed above.

Notice to be sent through the  
Bankruptcy Noticing Center  
to the following:

David Connelly  
Elizabeth Connelly  
11085 W. Denier Dr.  
Marana, AZ 85653

Ronald Ryan  
Ronald Ryan, PC  
1413 E. Hendrick Dr.

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Tucson, AZ 85719

U.S. Bank National Association  
U.S. Bancorp Center  
800 Nicollet Mall  
Minneapolis, MN 55402

Kyle Hirsch  
Bryan Cave LLP  
2 N. Central Ave., Ste. 2200  
Phoenix, AZ 85004

Office of the U.S. Trustee  
230 N. First Ave., Ste. 204  
Phoenix, AZ 85003

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Notes:

<sup>1</sup> The Arizona Revised Statutes do not require that indorsements be dated. Ariz. Rev. Stat. § 47-3204.

<sup>2</sup> Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule" references are to the Federal Rules of Civil Procedure. All "Local Rule" references are to the Local Rules for practicing in the U.S. Bankruptcy Court, District of Arizona.

<sup>3</sup> The Complaint is meandering, lengthy, and unclear.

<sup>4</sup> Neither the Complaint nor any other pleading describes the date of execution or the parties to the mortgage securitization agreement. However, the Court need not consider that agreement in deciding Defendant's summary judgment motion.

<sup>5</sup> Plaintiff does not define "credit default contracts" or otherwise explain how the Investors could use them.

<sup>6</sup> This request is contrary to Paragraph 9 of Count I, where Plaintiff denies that Defendant is the holder of the Note.

<sup>7</sup> Arizona has adopted the Uniform Commercial Code ("UCC") at ARS §§ 47-1101 through 47-4A507. Article 3 of the Uniform Commercial Code defines a "holder" as: "(a) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; (b) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or (c) The person in control of a negotiable electronic document of title." ARS § 47-1201.

<sup>8</sup> The language concerning "miscellaneous payments" comes from Section 11 of the DOT's uniform covenants. Section 11 addresses miscellaneous proceeds to be disbursed in the event of damage to the Residence requiring restoration, a total taking of the Residence, a partial taking of the Residence, or abandonment of the Residence. See Motion to Dismiss, Ex. B.

<sup>9</sup> The sections of ARS § 47-9203 cited by Plaintiff include:

A. A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

B. Except as otherwise provided in subsections C through I of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

1. Value has been given;

2. The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

3. One of the following conditions is met:

- (a) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
- (b) The collateral is not a certificated security and is in the possession of the secured party under section 47-9313 pursuant to the debtor's security agreement;...

F. The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by section 47-9315 and is also attachment of a security interest in a supporting obligation for the collateral.

G. 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.

<sup>10</sup>. ARS §§ 47-9101 through 47-9709.

<sup>11</sup>. 15 U.S.C. §§ 1601 et seq.

<sup>12</sup>. There have been no objections to acceptance of Plaintiff's late-filed materials, and the Court does not believe that taking them into account prejudices Defendant.

<sup>13</sup>. In the Response, Plaintiff contends that (1) the sale of the Note and DOT violated New York trust law and (2) the Note was not transferred in accordance with ARS § 47-9203. Plaintiff did not mention either New York trust law or ARS § 47-9203 in the Complaint.

<sup>14</sup>. Even were Defendant's evidence of its status as the Note's holder impeached, it would likely have standing to enforce the Note as trustee of the mortgage pool into which the Note was transferred. As articulated in [In re Samuels, 415 B.R. 8, 18 \(Bankr. D. Mass. 2009\)](#), and adopted by this Court in [Deutsche Bank Nat'l Trust Co. v. Tarantola \(In re Tarantola\)](#), 2010 Bankr. LEXIS 2435 at \*13-17, [2010 WL 3022038](#) (Bankr. D. Ariz. July 9, 2010), a pooling and servicing agreement in conjunction with a corresponding schedule of mortgages deposited into a trust's pool serves as a written assignment of designated mortgage loans and the mortgages themselves. Defendant submitted a PSA along with the Venture Affidavit and the Duclos Declaration attesting to Defendant's possession of the Note since June 2, 2005 and the Note's inclusion in the PSA's governing mortgage pool schedule.

<sup>15</sup>. To the extent that the Court lacks constitutional jurisdiction over the false recordation claim—an argument raised by Defendant—that claim would have to be dismissed.

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