18 Misc.3d 1138(A), 859 N.Y.S.2d 895, 2008 WL 498090 (N.Y.Sup.), 2008 N.Y. Slip Op. 50342(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 18 Misc.3d 1138(A), 2008 WL 498090 (N.Y.Sup.))

beneficiaries. Neither Elizabeth nor movants had present interests in income. Therefore, there was no need to serve movants with process in the accounting, since Elizabeth's interests were aligned with that of her children (*see id.*).

*7 The remaining arguments with respect to jurisdiction are unavailing. Cross movants' contention that the settlor's estate was a necessary party in the 1952 proceeding, so many years after the judgment, does not require that it be set aside as to them (*see* Herskowitz v. Friedlander, 224 A.D.2d 305, 306 [1st Dept 1996]). Second, the petitions and orders to show cause adequately apprised the interested persons of the nature of the proceedings; they state that the Bank sought accountings for the trusts and to be relieved of any liability for its acts concerning the trusts for the periods of the accounts (*cf.* Brown v. Giesecke, 40 A.D.2d 1009 [2d Dept 1972] [in mortgage foreclosure action, service on individual of advanced age and lack of experience and understanding was invalid, where it was made on a misrepresentation that it was merely to clear title]). Third, movants' claim that Pedro Arellano Lamar's parents never had an opportunity to procure a guardian in his behalf is not supported by the record.[FN4] In any case, Arellano Lamar was in fact represented by a guardian ad litem in that proceeding.

> FN4. Section 206 of the Civil Practice Act provided that "[w]here an infant defendant resides out of the state ... the court, in its discretion, may make an order designating a person to be his guardian ad litem unless the infant or some one in his behalf procures such a guardian to be appointed as prescribed in this article within a specified time after service of a copy of the order ." As previously noted, the affidavit of service of process for the 1952 proceeding is dated July 31, 1952. The court appointed Keefe to represent the infants on September 10, 1952, after the return date of September 3rd (Lelen Aff., Exh. A).

Therefore, there is no basis to vacate the judgments for jurisdictional reasons.

Constructive Fraud And Misconduct

CPLR 5015 also provides that a judgment or order may be vacated for "fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015[a][3]). It is clear that the fraud referred to in CPLR 5015(a)(3) can be "intrinsic" or "extrinsic" to the issues in controversy (*Oppenheimer v. Westcott*, 47 N.Y.2d 595, 603 [1979]; *Avenoso v. Avenoso*, 266 A.D.2d 326, 327 [2d Dept 1999]). In the context of a motion to set aside a judgment, "extrinsic fraud" has been defined as a "fraud practiced in obtaining a judgment such that a party may have been prevented from fully and fairly litigating the matter" ' (*Bank of N.Y. v. Lagakos*, 27 AD3d 678, 679 [2d Dept 2006], quoting *Shaw v. Shaw*, 97 A.D.2d 403 [2d Dept 1983]; *see also Aguirre v. Aguirre*, 245 A.D.2d 5, 7 [1st Dept 1997]).

As noted by the Court of Appeals in *Oppenheimer, supra,* the inclusion of "misrepresentation, or other misconduct" in paragraph (a)(3) broadened the basis for relief beyond what was previously recognized by prior case law, which required that the movant establish the commission of a fraud (*Oppenheimer*, 47 N.Y.2d at 603 [citation omitted]). These factors apply to either what has occurred before the judgment or were the means by which the judgment was procured (*Nachman v. Nachman*, 274 A.D.2d 313, 315 [1st Dept 2000]; *Herskowitz*, 224 A.D.2d at 306; *Mizerik v. Mizerik*, 170 A.D.2d 886, 887 [3d Dept 1991]). The statute, however, does not apply when the moving party had knowledge of the fraud or misconduct before entry of the judgment (*see McGovern v. Getz*, 193 A.D.2d 655, 657 [2d Dept], *lv dismissed* 82 N.Y.2d 741 [1993]).

The court also has the inherent discretionary power to vacate its judgments or orders where it appears that substantial justice will be served and injustice will be prevented (*see Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 68 [2003]; *Goldman v. Cotter*, 10 AD3d 289, 293 [1st Dept 2004]; *Bronx Intl. Cable v. Metropolitan Constr. Corp.*, 278 A.D.2d 131, 132 [1st Dept 2000]). However, "[a] court's inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud], mistake, inadvertence, surprise or excusable neglect" (*Matter of McKenna v. County of Nassau, Off. of County Attorney*, 61 N.Y.2d 739, 742 [1984] [internal quotation marks and citation omitted]).

***8** The court must first consider whether movants and cross movants have unduly delayed in moving to vacate the judicial settlements. Although there is no

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express time limit for making a motion pursuant to CPLR 5015(a)(3), such a motion must be made within a reasonable time (*see Aames Capital Corp. v. Davidsohn*, 24 AD3d 474, 475 [2d Dept 2005]; *Richardson v. Richardson*, 309 A.D.2d 795, 796 [2d Dept 2003]; *City of Albany Indus. Dev. Agency v. Garg*, 250 A.D.2d 991, 993 [3d Dept 1998]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:3, at 206). In making the determination of reasonableness, courts have looked to whether the movant was aware of the relevant facts (*see e.g. Rizzo v. St. Lawrence Univ.*, 24 AD3d 983, 984 [3d Dept 2005] [plaintiff's delay of two years despite awareness of all relevant facts was unreasonable]; *Richardson*, 309 A.D.2d at 796 [wife's delay in moving to vacate judgment was unreasonable where she received summons and complaint in 1989 and did not move to vacate her default until 12 years later]; *Green Point Sav. Bank v. Arnold*, 260 A.D.2d 543, 543-544 [2d Dept 1999] [defendant's delay of four years after he was served with a copy of the judgment with notice of entry was unreasonable]).

Here, as noted above, the judgments that movants and cross movants are seeking to attack are dated February 25, 1953, August 30, 1974, and September 11, 1975. Movants and cross movants moved to vacate these judicial settlements in 2005, 52 years after the first judicial settlement, and 30 and 31 years after the final two judicial settlements. Pedro Arellano Lamar avers that "[i]n or about 2001," he learned that his mother, late sister, brother, and he were beneficiaries and/or remainder beneficiaries of his great-grandmother's 1927 trusts (Arellano Lamar 6/13/05 Aff., ¶ 25). Julieta Cadenas Silva admits that she knew that her grandmother had established a trust with a major banking company in New York, but was not familiar with any of the details (Cadenas Silva Aff., ¶ 8). Justo Lamar Sanchez states that he never knew that Maria, Marcelo, Emilio, Julio, Jorge, and Gabriela had a one-fifth interest in each other's trusts, although they later learned that they had remainder interests in those trusts in the event that the primary beneficiary died (Lamar Sanchez Aff., ¶ 9). However, none of these beneficiaries state when they found out about the judgments themselves. The court concludes that movants and cross movants have failed to file their motions within a reasonable period of time, given the extremely lengthy passage of time in this case. Movants and cross movants have also failed to clearly and persuasively show that they did not recently learn of the trusts and accountings, as would be required when seeking to vacate judgments so ancient.

Even assuming, arguendo, that movants and cross movants had made their motions within a reasonable time, they have not persuaded this court that the Bank procured the judgments by "fraud, misrepresentation, or other misconduct" (*Woodson*, 100 N.Y.2d at 70, citing CPLR 5015[a][3]). Movants contend that the Bank withheld negative information from the settlor and the beneficiaries [FN5], invested trust assets without the settlor's direction or consent, and concealed that it had invested in mortgage participations [FN6] that were not current on their terms. In addition, cross movants contend that the Bank misrepresented precedent concerning the Rule Against Perpetuities to the settlor, the beneficiaries, and the court in the 1974 proceeding concerning Jorge and Marcelo's trusts, and also concealed that it had drafted the trusts.

FN5. Movants and cross movants assert that this is evidenced by a memorandum dated August 3, 1931 from the Bank, which states:

> Mr. Hackney:4353/58-H
>
> I have your memorandum dated June 23, 1931, referring to the de Sanchez accounts. The situation presented therein brings about many difficulties and so we will have to move very cautiously, if at all, in endeavoring to rectify the situation. I have two things in mind:
>
> 1st, that I do not want to destroy Mrs. de Sanchez' confidence in us, and 2nd, that I do not want to embarrass our attorneys. Assistant Secretary (McCallion 1/19/07 Affirm., Exh. I).

FN6. An investment in a participating mortgage occurs when a trustee takes a mortgage in its own name and sells shares of the mortgage to various trusts administered by it (*see* 2A Scott on Trusts x 179.4 [4th ed 1987]).

***9** However, none of these beneficiaries appeared in the accounting proceedings to contest the accounts, and there is no evidence that they were led to believe that they should not contest these accounts. Indeed, the

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record shows that, in March 1951, the Bank wrote to Emilio, Jorge and Marcelo telling them that the Bank would formally account and requested the names, addresses, and dates of birth of their children and grandchildren (Lelen Aff., Exh. C). In a letter dated April 11, 1951, Emilio, the oldest son, responded that "if it is too much work I do not see the necessity of all that accounting, unless is [sic] something you have to do by law, but do not do it on account of us" (*id.*, Exh. D). There was also extensive correspondence with the family members to ensure that the Bank had correct addresses for the family members before the 1974 proceedings (*id.*). Thus, it cannot be said that, as a result of this "fraud" and "misconduct," they were deprived of the opportunity to fully and fairly contest the accounts (*see* Altman v. Altman, 150 A.D.2d 304, 307 [1st Dept], *appeal denied* 74 N.Y.2d 612 [1989]).

In any event, in the 1952 proceeding, the Bank filed seven full accountings with respect to each trust, which set forth in detail the opening and closing balances for each trust, each transaction in each trust, and each mortgage participation purchased for the trusts from the Bank (*see e.g.* Crotty 3/5/07 Affirm., Exh. A, at 1-3, Schedules A-K). The guardian ad litem reported that Russell Rutgers of The Hanover Bank informed him that he had on file written consents from the grantor for each individual transaction from September 16, 1927 through March 15, 1951 (Lelen Aff., Exh. A, Report of Guardian ad Litem, at 6). The guardian further stated that he "carefully studied and examined the deed of trust, the summaries, and the individual schedules" for each account, and that "[a]ll sums of money, cash, and securities [had] been accounted for" (*id.* at 11, 18, 26, 34, 43, 50, 58). The guardian concluded that the seven accounts "clearly appear[ed] to [him] as being proper and correct," and had no objections to the accounts as filed (*id.* at 61).

Moreover, with respect to the 1974 proceeding relating to the Jorge and Marcelo trusts, movants and cross movants have failed to establish that the court was in any way misled about who drafted the trusts. The Bank's counsel set forth its position concerning the construction of the two trusts in its brief, which the court accepted.

Finally, cross movants' contentions that the judgments should be set aside, because the Bank disregarded the court's instructions in the 1975 judgment that the funds from Jorge's trust be distributed to his beneficiaries, and also misrepresented the terms of the 1975 judgment in later settlement negotiations, are without merit. These cannot serve as bases to vacate these judgments because these acts occurred after the judgments. Thus, the judgments could not have been procured by that "misconduct" (*see* Nachman, 274 A.D.2d at 315).

CONCLUSION

***10** Based upon the foregoing, it is

ORDERED that the motion by Pedro Arellano Lamar and Adolfo Arellano Lamar to vacate judgments settling accounts dated February 25, 1953 and September 11, 1975 is denied; and it is further

ORDERED that the cross motion by Eugenio J. Silva, Julieta C. Silva, Julieta Cadenas, Felipe G. Silva, Estate of Flora Lamar de Fanjul, Justo Lamar Sanchez, Emilio Jose Lamar, Peter Lamar, Diana Puccetti, Marcelo Lamar, Luis Lamar, Maria Elizabeth Lamar, Ann Maria Lamar de Cesares, Elisa Gloria Lamar, Maria Luisa Suarez Rivas, Beatriz Diego, Flora M. Suarez Fanjul, Jorge B. Fanjul, Julio A. Fanjul, Justo E. Fanjul, and Marcelo E. Fanjul to vacate judgments settling accounts dated February 25, 1953, August 30, 1974, and September 11, 1975 is denied; and it is further

ORDERED that counsel for Pedro Arellano Lamar shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

N.Y.Sup.,2008.
In re Judicial Settlement of First Intermediate Accounts of Proceedings of Cent. Hanover Bank and Trust Co.
18 Misc.3d 1138(A), 859 N.Y.S.2d 895, 2008 WL 498090 (N.Y.Sup.), 2008 N.Y. Slip Op. 50342(U)

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57 A.D.3d 452, 870 N.Y.S.2d 24, 2008 N.Y. Slip Op. 10224
(Cite as: 57 A.D.3d 452, 870 N.Y.S.2d 24)

H

Supreme Court, Appellate Division, First Department, New York.
In re Elizabeth L. DE SANCHEZ, Grantor.
Pedro Arellano Lamar, et al., Movants-Appellants,
Eugenio J. Silva, et al., Cross-Movants Appellants,
v.
JP Morgan Chase Bank, Respondent-Respondent.

Dec. 30, 2008.

Background: Trust grantor's descendants brought action seeking to vacate judgment settling trust accounts on grounds that bank engaged in constructive fraud and that bank never obtained personal jurisdiction over descendants. The Supreme Court, New York County, Carol R. Edmead, J., denied descendants motion to vacate, and descendants appealed.

Holding: The Supreme Court, Appellate Division, held that bank was not required to serve process on descendants.

Affirmed.

West Headnotes

[1] Trusts 390 303

390 Trusts
390VI Accounting and Compensation of Trustee
390k302 Proceedings for Final Settlement
390k303 k. By trustee. Most Cited Cases

Bank was not required to serve process in trust accounting on trust grantor's descendants, where descendants were successor income and contingent remainder beneficiaries and had no present interest in trust income. McKinney's CPLR 7703; McKinney's SCPA 315.

[2] Process 313 149

313 Process
313II Service
313II(E) Return and Proof of Service
313k144 Evidence as to Service
313k149 k. Weight and sufficiency. Most Cited Cases

The affidavit of a process server constitutes prima facie evidence of proper service.

[3] Process 313 145

313 Process
313II Service
313II(E) Return and Proof of Service
313k144 Evidence as to Service
313k145 k. Presumptions and burden of proof. Most Cited Cases

The mere denial of receipt of service is insufficient to rebut the presumption of proper service created by a properly executed affidavit of service.

[4] Trusts 390 328

390 Trusts
390VI Accounting and Compensation of Trustee
390k328 k. Opening or vacating. Most Cited Cases

Trust grantor's descendant's contention that grantor's estate was a necessary party to accounting of trusts which occurred more than 50 years before descendant's action seeking to vacate accounting judgment did not require judgment to be set aside as to descendants; petitions and orders to show cause adequately apprised interested persons of nature of the proceedings, and stated that the bank sought accountings for the trusts and to be relieved of any liability for its acts concerning those trusts for the periods of the accounts.

[5] Trusts 390 217.1

390 Trusts
390IV Management and Disposal of Trust Property
390k216 Investments

390k217.1 k. In general. Most Cited Cases

The rule in respect of the duty of a trustee is to keep funds in a state of security, productive of interest and subject to future recall.

[6] Trusts 390 331

390 Trusts
390VI Accounting and Compensation of Trustee
390k331 k. Operation and effect of accounting. Most Cited Cases

Where there has been full disclosure followed by judicial decree, post-decree objections on matters raised by trust accounting cannot suffice to open the decree.

[7] Perpetuities 298 4(15.1)

298 Perpetuities
298k4 Creation of Future Estates in General
298k4(15) Trust Estates
298k4(15.1) k. In general. Most Cited Cases

When there is an alternative possible construction that would not violate the Rule Against Perpetuities, a trust will not be invalidated and a construction that does not violate the Rule will be found to be the one the grantor intended. McKinney's EPTL 9-1.3(b).

**25 Dorsey & Whitney LLP, New York (Mark S. Sullivan of counsel), for movant-appellants.

McCallion & Associates LLP, New York (Kenneth F. McCallion of counsel), for cross-movants appellants.

Kelley Drye & Warren LLP, New York (Robert E. Crotty of counsel), for respondent.

TOM, J.P., FRIEDMAN, GONZALEZ, McGUIRE, ACOSTA, JJ.

***453** Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 7, 2008, which denied the motion and cross motion by descendants of the grantor of certain 1927 trusts to vacate judicial orders of settlement entered on February 26, 1953, August 30, 1974, and September 11, 1975, unanimously affirmed, with costs.

**26 In 1927, two years before the Great Depression, Elizabeth Laurent de Sanchez, whose family owned a sugar plantation in Cuba, set up seven inter vivos trusts for the benefit of her six children-Emilio (two trusts in his name), Jorge, Julio, Marcelo, Maria and Gabriela. In 1953, following the grantor's death, the first intermediate accounts for these trusts were settled and approved by Supreme Court, New York County, for Hanover Bank, as successor in interest to Central Union Trust Company and predecessor in interest to JP Morgan Chase Bank. In 1974, the court settled the bank's second intermediate accounts for the Emilio trusts, and in 1975, the court approved the bank's second and final accounts for the Jorge and Marcelo trusts. A half-century after the first accountings and more than 30 years after the second accountings, appellants-the grantor's grandchildren, great grandchildren and great great grandchildren-seek to vacate the judgments settling these accounts on the grounds that the bank engaged in constructive fraud against them, and the court never obtained personal jurisdiction over them.

Contrary to appellants' contentions, the motion court did not improperly raise the issue of timeliness sua sponte; the bank actually argued in its 2005 memorandum of law that the motions were untimely. Although the applicable standard of review is disputed, under either standard-CPLR 317 or 5015-the motions were untimely. Even had the motions been timely, the arguments asserted on appeal-lack of personal jurisdiction and "overwhelming evidence" of constructive fraud-would be without merit.

[1][2][3] ***454** With respect to personal jurisdiction, it is well established that the affidavit of a process server constitutes prima facie evidence of proper service. The mere denial of receipt of service "is insufficient to rebut the presumption of proper service created by a properly executed affidavit of service" (*De La Barrera v. Handler*, 290 A.D.2d 476, 477, 736 N.Y.S.2d 249 [2002]). Appellants' affidavits contained simply conclusory denials, and were thus insufficient to rebut the presumption of proper service (*see e.g. Ortiz v. Santiago*, 303 A.D.2d 1, 3-4, 757 N.Y.S.2d 521 [2003]). In any event, appellants' interests were "virtually represented" by the grantor's eldest living survivor in each line of descent (*see* CPLR 7703; SCPA 315). Her descendants, including

the movants and cross movants herein, are successor income and contingent remainder beneficiaries. Neither the grantor nor any of appellants had present interests in income. Therefore, there was no need to serve the movants and cross movants with process in the accounting, since the grantor's interest was aligned with that of her progeny (*see* *Matter of Schwartz*, 71 Misc.2d 80, 335 N.Y.S.2d 243 [1972]).

[4] The remaining arguments with respect to personal jurisdiction are without merit. Cross movants' contention that the grantor's estate was a necessary party in the 1952 proceeding, so many years after the judgment, does not require that it be set aside as to them (*see* *Herskowitz v. Friedlander*, 224 A.D.2d 305, 306, 637 N.Y.S.2d 726 [1996]). The petitions and orders to show cause adequately apprised the interested persons of the nature of the proceedings, and stated that the bank sought accountings for the trusts and to be relieved of any liability for its acts concerning those trusts for the periods of the accounts.

[5] A judgment or order may be vacated for "fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015[a][3]). After the trusts were created in 1927, the goal of the investment fiduciary throughout the Great Depression and ****27** long thereafter was to preserve the principal while creating a reasonable income (*see* *Matter of Carnell*, 260 App.Div. 287, 289, 21 N.Y.S.2d 376 [1940], *affd.* 284 N.Y. 624, 29 N.E.2d 935 [1940]). "The rule in respect of the duty of a trustee is to keep funds in a state of security, productive of interest and subject to future recall" (*Matter of Flint*, 240 App.Div. 217, 226, 269 N.Y.S. 470 [1934], *affd.* 266 N.Y. 607, 195 N.E. 221 [1935]). The trust investments were not for growth of assets for the grantor's grandchildren and great grandchildren, but rather in accordance with her express direction that they be in securities that were "long term" and "tax exempt." Furthermore, extensive correspondence confirms that she and her family were kept apprised of the investments, and Emilio Sanchez confirmed that "all the changes during all the years have been done with my approval and that of Mrs. Elizabeth Laurent de Sanchez."

[6] ***455** With respect to mortgage participation, where there has been full disclosure followed by judicial decree, post-decree objections on matters raised by the accounting cannot suffice to open the decree (*see* *Matter of Van Deusen*, 24 Misc.2d 611, 616-617, 196 N.Y.S.2d 737 [1960]). The record shows that the bank communicated extensively with the beneficiaries as to mortgage participation and did not conceal anything. In addition, there was no self-dealing, as the bank merely purchased the mortgage for the trust.

[7] Finally, the bank did not misrepresent precedent concerning the Rule Against Perpetuities to the grantor, the beneficiaries, and the court in the 1974 proceeding concerning Jorge's and Marcelo's trusts, as there is a longstanding principle of interpretation that when there is an alternative possible construction that would not violate the Rule, the trust will not be invalidated and a construction that does not violate the Rule will be found to be the one the grantor intended (EPTL 9-1.3[b]; *see* *Schettler v. Smith*, 41 N.Y. 328, 336 [1869]). In this case, the problem arose because some of the grantor's children did not have issue of their own. It is unreasonable to argue that the grantor intended the trusts to be invalidated; in fact, the construction provided by the bank's counsel was clearly communicated to counsel for all parties, and no objections were raised.

We have considered appellants' remaining arguments and find them unavailing.

N.Y.A.D. 1 Dept.,2008.
In re de Sanchez
57 A.D.3d 452, 870 N.Y.S.2d 24, 2008 N.Y. Slip Op. 10224

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TAB 6

2 of 100 DOCUMENTS

New York Law Journal
New York Law Journal

October 5, 1993 Tuesday

SECTION: Pg. 26 (col. 6) Vol. 210

LENGTH: 577 words

HEADLINE: ESTATE OF WALTER L. TANENBLATT, DEC'D;
Court Decisions;
Second Judicial Department;
Nassau County;
Surrogate's Court

BYLINE: Surrogate Radigan

BODY:

Court Decisions

Second Judicial Department

Nassau County

Surrogate's Court

This is a proceeding for advice and direction (SCPA 2107) commenced by the preliminary executrix seeking the court's order authorizing and approving the entry by the preliminary executrix into a written stipulation of settlement dated May 12, 1993 for the discontinuance of certain pending litigations.

The decedent and his father, Israel Tanenblatt, were the owners of Tudor Handle Corp. and Tudor Plastics, Inc. Following the death of Israel, litigation ensued between Walter and the estate of Israel, Walter claiming 100 percent ownership of both corporations and the estate of Israel asserting ownership of 50 or 52 percent of the corporations. The litigation was hotly contested and very substantial counsel fees were incurred in its pursuit.

It has been alleged and unrebutted that Walter's estate is either insolvent or on the verge of insolvency. In the corporate litigation, the corporations have counter-claimed against Walter and the estate for mismanagement and waste of corporate assets seeking reimbursement to the corporations of an amount in excess of $200,000. The parties to the corporate litigation entered into the aforementioned stipulation of settlement before the Supreme Court, Queens County, which provides, in essence, that the estate of Walter will relinquish any claim to the shares of either Tudor Handle Corp. or Tudor Plastics, Inc. and will also pay over to Tudor Handle Corp. the sum of $44,600 in consideration of which both corporations agree to withdraw with prejudice their actions against the estate of Walter aforesaid. This stipulation also provides that it shall only become effective upon approval of its terms by this court.

Counsel for the estate has represented that all known creditors of the estate have been made parties to this proceeding. All have defaulted except the law firm of Ruskin, Moscou, Evans & Faltischek, who have a claim against the estate of Walter and/or the corporations in the amount of $116,000. The Ruskin firm duly appeared and interposed its objection to the petition.

Several conferences having been held before the court since that time, the estate of Walter, the corporations and the Ruskin firm have entered into another stipulation spread on the record in open court on September 23, 1993 whereby, among other things, the Ruskin firm withdraws its objection to the petition in exchange for the estate's acceptance of the Ruskin firm as a general creditor of the estate in the amount of $20,000. A guardian ad litem appointed to protect the interests of infant contingent remaindermen interposes no objection to the relief sought in the petition or the terms of the stipulation dated September 23, 1993.

Having given careful consideration to the terms of the stipulation, the financial condition of the estate and the interests of the beneficiaries and the other creditors, the court determines that-the relief sought in the petition and the terms of the September 23, 1993 stipulation and the stipulation dated September 1, 1993 in Supreme Court, Queens County, before Honorable John A. Milano, are in the best interests of the estate and, because of the reduction of the Ruskin firm's claim from $116,000 $0 $20,000, is also in the best interests of the creditors of the estate, the court grants the petition subject to the terms of the aforementioned stipulations.

This decision constitutes the order of the court.

LOAD-DATE: April 15, 2011

TAB 7

1 of 1 DOCUMENT

MICHAEL D. and SHARRON MAYO, individually and on behalf of all those similarly situated, Plaintiffs, v. GMAC MORTGAGE, LLC, USB REAL ESTATE SECURITIES, INC., DEUTSCHE BANK NATIONAL TRUST COMPANY (in its capacity as trustee of the MASTR SPECIALIZED LOAN TRUST 2007-01), and RESIDENTIAL FUNDING COMPANY, LLC, Defendants.

No. 08-00568-CV-W-DGK

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

2011 U.S. Dist. LEXIS 3349

January 13, 2011, Decided
January 13, 2011, Filed

SUBSEQUENT HISTORY: Reconsideration denied by *Mayo v. GMAC Mortg., LLC, 2011 U.S. Dist. LEXIS 13066 (W.D. Mo., Feb. 9, 2011)*

PRIOR HISTORY: *Michael D. v. GMAC Mortg., LLC, 2010 U.S. Dist. LEXIS 51517 (W.D. Mo., Mar. 1, 2010)*

COUNSEL: [*1] For Michael D Mayo, Sharron Mayo, Plaintiffs: David M. Skeens, Garrett Mark Hodes, J. Michael Vaughan, Kip D. Richards, R. Frederick Walters, LEAD ATTORNEYS, Walters Bender Strohbehn & Vaughan P.C., Kansas City, MO.

For GMAC Mortgage LLC, Residential Funding Company, LLC, Defendants: Catesby Ann Major, Irvin Victor Belzer, LEAD ATTORNEY, Bryan Cave, LLP-KCMO, Kansas City, MO; Craig S. O'Dear, Irvin Victor Belzer, LEAD ATTORNEYS, Bryan Cave LLP, Kansas City, MO; Leslie A. Greathouse, LEAD ATTORNEY, Spencer Fane Britt & Browne LLP-KCMO, Kansas City, MO.

For USB Real Estate Securities, Inc., Defendant: Daniel L. McClain, LEAD ATTORNEY, Scharnhorst, Ast & Kennard, PC, Kansas City, MO; Leslie A. Greathouse, LEAD ATTORNEY, Spencer Fane Britt & Browne LLP-KCMO, Kansas City, MO; David C. Bohan, David J. Stagman, Sheldon T. Zenner, Katten Muchin Roseman, LLP, Chicago, IL.

For Mortgage Asset Securitization Transactions, Inc., Defendant: Daniel L. McClain, LEAD ATTORNEY, Scharnhorst, Ast & Kennard, PC, Kansas City, MO; Leslie A. Greathouse, LEAD ATTORNEY, Spencer Fane Britt & Browne LLP-KCMO, Kansas City, MO.

For Mastr Specialized Loan Trust 2007-01, Deutsche Bank National Trust Company, Defendants: [*2] Leslie A. Greathouse, LEAD ATTORNEY, Spencer Fane Britt & Browne LLP-KCMO, Kansas City, MO; Elizabeth A Frohlich, Jami Wintz McKeon, Morgan Lewis & Bockius LLP, San Francisco, CA; J. Loyd Gattis, III, Spencer Fane Britt & Browne LLP-KCMO, Kansas City, MO.

JUDGES: GREG KAYS, JUDGE.

OPINION BY: GREG KAYS

OPINION

SUMMARY JUDGMENT ORDER

This case is a putative class action brought under the Missouri Second Mortgage Loan Act ("MSMLA"). Plaintiffs Michael and Sharron Mayo allege they were charged illegal fees at closing in connection with their residential second mortgage loan, and they are suing the various companies who subsequently acquired or serviced their loan.

Before the Court are the Defendants' various motions for summary judgment. [1] The motions are

GRANTED IN PART. The Court holds (1) Mrs. Mayo was not a party to the Loan thus she does not have standing to sue Defendants; (2) the funding fee and underwriting fee charged at closing both violate the MSMLA, but the other fees charged do not; (3) the loan servicers did not violate the MSMLA, but Assignee Defendants indirectly violated it by virtue of the fact that illegal fees were rolled into the principal of the Loan at closing, and Assignee Defendants subsequently [*3] received these fees in monthly payments; (4) Mr. Mayo may sue for interest previously paid to the Assignee Defendants; and (5) Defendants are not entitled to summary judgment on the issue of punitive damages.

1 Motion for Summary Judgment by Deutsche Bank National Trust Company in its capacity as Trustee for the MASTR Specialized Loan Trust 2007-01 (doc. 173); Motion for Summary Judgment by GMAC Mortgage, LLC and Residential Funding Company, LLC (doc. 174); and Motion for Summary Judgment of UBS Real Estate Securities, Inc. (doc. 177).

All claims against Defendants GMAC Mortgage, LLC and Residential Funding Company, LLC are dismissed with prejudice.

Summary Judgment Standard

A moving party is entitled to summary judgment Aif the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. A party who moves for summary judgment bears the burden of showing that there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. When considering a motion [*4] for summary judgment, a court must scrutinize the evidence in the light most favorable to the nonmoving party, and the nonmoving party "must be given the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp., 950 F.2d 566, 569 (8th Cir. 1991)* (citation omitted).

To establish a genuine issue of fact sufficient to warrant trial, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Instead, the nonmoving party must set forth specific facts showing there is a genuine issue for trial. *Anderson, 477 U.S. at 248*. But the nonmoving party "cannot create sham issues of fact in an effort to defeat summary judgment." *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co., 49 F.3d 399, 402 (8th Cir. 1995)* (citation omitted).

Facts

Viewing the evidence in the light most favorable to the Plaintiffs, for purposes of resolving the pending motion the Court finds the facts to be as follows. Argument, controverted facts, facts immaterial to the resolution of the pending motion, facts not properly supported by the cited portion [*5] of the record, and contested legal conclusions have been omitted.

Plaintiffs Michael and Sharron Mayo are a husband and wife who reside at a house in Grandview, Missouri. They bought their home on October 28, 2005 for $130,000.00. To finance the purchase Mr. Mayo applied for a loan with Wells Fargo Bank, N.A. The Mayos thought that there would simply be one loan from Wells Fargo, but when they arrived at the closing on October 28, 2005, they were told Wells Fargo was not lending the entire purchase price. Wells Fargo would lend $104,000 (80% of the loan), and Option One Mortgage Corporation would lend the remaining $25,800 (20% of the loan).

Mr. Mayo signed two separate loan applications, both dated October 28, 2005. For each loan there was a separate loan underwriting and approval process; separate verification of income and employment; separate wire transfers; separate loan submissions; separate instructions to the closing agent; separate credit checks; and separate title insurance policies. Mr. Mayo also gave Wells Fargo formal notice as the first lien holder that he had given Option One a junior mortgage in the property.

The Wells Fargo loan had an adjustable rate note. The deed of [*6] trust for this loan identifies both Mr. and Mrs. Mayo as the "Borrower." Mr. and Mrs. Mayo each signed the deed of trust, but Mrs. Mayo is identified as a "Non-Borrower" on the page bearing the notary's signature. Included with the deed of trust was an "Adjustable Rate Rider" and a "Prepayment Rider," each of which is signed by Mr. and Mrs. Mayo.

The Loan at issue in this case.

The second mortgage loan made by Option One ("the Option One loan" or "the Loan"), is at the center of this lawsuit. The Loan was secured by a subordinate lien deed of trust. The Loan was to be repaid with interest at yearly rate of 11.65% in consecutive monthly installments over 30 years. The promissory note identifies Option One as the lender. The promissory note and addendum are signed by Mr. Mayo only. The HUD-1 Settlement Statement is signed by both Mr. and Mrs. Mayo.

Both Mr. and Mrs. Mayo executed a Deed of Trust for the benefit of Option One. The Deed of Trust identifies "Michael and Sharron Mayo, husband and wife as joint tenants" as the "Grantor," and is signed by both. The Deed of Trust granted Option One a security lien in residential real estate which real estate was subject to one or more prior mortgage [*7] loans, namely, the Wells Fargo loan. The Deed of Trust contains the following notation at the bottom left-hand corner of the first page: "Missouri -- Second Mortgage."

Both loans closed concurrently on October 28, 2005. The Deed of Trust for the Loan was filed with the Jackson County Recorder of Deeds' Office on November 10, 2005.

The challenged settlement charges.

Capital Title Agency, Inc. provided title and closing services for the Loan. At closing Mr. and Mrs. Mayo signed a HUD-1 Settlement Statement supplied by Option One which identified "Option One Mortgage Corp." as the lender. The statement set out the following fees which Plaintiffs allege violate the Missouri Second Mortgage Loan Act:

Tax Service Contract fee to	$65.00
Fidelity National Tax Service	
Funding Fee to Option One	$50.00
Underwriting Fee to Option One	$395.00
Flood Search fee to First	
American Flood Data Services	$12.00
Interest to Option One	$33.40
Settlement or Closing Fee to	
Capital Title Agency, Inc.	$100.00
Courier/Delivery Fee to Capital	
Title Agency, Inc.	$25.00
Wire Fee to Capital Title	
Agency, Inc.	$20.00

These fees total $1,015.40 and were paid at closing by rolling the amounts owed into the Loan principal.

None of the Defendants [*8] *directly* contracted for, charged, or received any of these fees in connection with the making or closing of the Loan. None of the Defendants are, or ever have been, related to, controlled by, or affiliated by common ownership with Capital Title Agency, Inc., Fidelity National Tax Service, or First American Flood Data Services.

The "Funding Fee" and "Underwriting Fee" were paid to Option One.

Capital Title coordinated and performed all tasks associated with closing the Loan. Specifically, Capital Title compiled from various sources the loan documents needed for the closing, including the deed of trust and note. Capital Title also copied and transmitted documents to Option One and the Plaintiffs in connection with the Loan after the closing. It also filed the mortgage with the Jackson County Recorder of Deeds. Capital Title charged three fees for the services that it provided: It charged a $100 "settlement or closing fee" to conduct a title examination, issue title insurance, and prepare the settlement statement and other documents related to the Loan; [2] it charged a $25 "courier/delivery fee" for collecting and sending documents necessary to conduct the title examination, prepare the [*9] title commitment, and record documents relating to the Loan; [3] and it charged a $20 "wire fee" for the cost of electronically disbursing the Loan proceeds. [4]

2 Specifically, Capital Title gathered information about the property in order to determine whether title to the property was marketable. Capital Title also prepared a preliminary title commitment which it sent to Option One. After the conditions identified in the preliminary commitment were met, Capital Title ensured that the conditions imposed by the lender were also satisfied. Then, Capital Title completed the settlement statement and other documents related to the loan and prepared the disbursements to be made from the loan proceeds. Capital Title also assembled documents prepared by Option One and other service providers. Once the documents were ready, Capital Title scheduled the closing of the loan, met with the Mayos, and obtained signa-

tures on the loan documents. Capital Title remitted copies of those documents to Option One immediately after the closing, so that the loan could be approved on the next day. Option One also made copies of those documents for the Mayos. Capital Title ensured that the holder of the first mortgage [*10] was notified of the second mortgage. Capital Title then updated its investigation of the encumbrances on the Mayos' property. Finally, Capital Title submitted the documents for the Loan to be recorded. This process, from the title examination to the recording of the new documents, required several hours to complete.

3 Capital Title sent a courier to the Jackson County, Missouri courthouse to gather documents necessary to conduct the initial title examination. A second trip to the courthouse was made to verify that the initial title examination was still valid after the Loan closed. Capital Title also sent the preliminary title commitment to Option One by Federal Express. Finally, a courier took documents relating to the Loan to the courthouse to be recorded.

4 Capital Title preferred to send payments by wire because it was a fast, reliable method. Option One wired the Loan proceeds to Capital Title, which deducted the fees described above, plus fees for title insurance and recording, and remitted the remaining proceeds by wire. Each time Capital Title received or sent a wire its bank charged it between $7.50 and $20.

Option One paid out two of the other challenged fees to third-parties. [*11] It paid the $65.00 tax service contract fee to Fidelity National Tax Service for conducting a search to confirm payment of property taxes on the Plaintiffs' property. It also paid the $12.00 flood search fee to First American Flood Data Services for determining whether the house is located in a flood hazard area. Option One was not affiliated with either Fidelity National Tax Service or First American Flood Data Services.

A $33.40 pre-paid interest charge was imposed. Under the note, Mr. Mayo was required to make monthly payments to Option One of principal and interest, to be made on the 1st day of each month, with the first monthly payment for the month of November 2005 due on December 1, 2005. The note is dated October 28, 2005, and interest began accruing on that date. The $33.40 interest payment was payment on interest that accrued for the four days, from October 28, 2005 through October 31, 2005, until the first day of the month of the first regularly-scheduled payment.

The Loan, post settlement.

Option One held the Loan and acted as the servicer until about November 20, 2006. As loan servicer, Option One sent monthly statements and collected from the Plaintiffs remittances of principal [*12] and interest in connection with the Loan. Option One collected a minimum of $2,749.95 in interest payments during this time.

UBS subsequently purchased the Loan.

Defendant UBS Real Estate Securities, Inc. ("UBS") acquired the Loan and other loans from Option One pursuant to the terms of a Master Asset Purchase and Servicing Agreement dated August 1, 2004. On or about September 15, 2006, Option One sold a pool of 135 loans with a total principal balance of approximately $22.7 million to UBS for approximately $21.6 million. The Loan was included in this pool.

UBS contends it subjected these loans to a thorough due diligence process to determine their legality. There are numerous disputed questions of fact here about this process, including the mechanics of this process, its adequacy, and whether it was undertaken in good faith. The Court finds that viewing the evidence in the light most favorable to the Plaintiffs, there is evidence from which a reasonable juror could infer that UBS and any subsequent purchaser that relied on UBS's due diligence were completely indifferent to any violations of the MSMLA in purchasing the Loan.

GMACM serviced the Loan from the time it was owned by UBS.

In [*13] 2004, before UBS purchased the Loan, UBS and GMAC Mortgage Corporation ("GMAC Mortgage") entered into a servicing agreement whereby GMAC Mortgage agreed to service loans owned and acquired by UBS. GMAC Mortgage was the predecessor of Defendant GMACM, LLC ("GMACM"). GMACM was formed on April 13, 2006.

Pursuant to the terms of the servicing agreement, GMAC Mortgage and its successor GMACM serviced certain mortgage loans on behalf of UBS. The agreement confirmed that UBS was the "Owner" of the serviced loans and that GMAC Mortgage and its successor GMACM were merely the "Servicer." The agreement further provided that GMAC Mortgage and GMACM, as Servicer, "acknowledge[] that ownership of each Mortgage Loan, inclusive of the servicing rights thereto, is vested in the Owner." [*14] The parties agree that after UBS purchased the loan from Option One, the responsibility for performing the servicing of the loan was transferred to GMACM pursuant to the agreement. Under the agreement responsibility for servicing the loan did not confer on GMACM any rights to the loan, only the right

to be paid a fee in exchange for performing activities related to servicing mortgage loans on behalf of UBS, the owner.

In connection with the transfer of loan servicing from Option One to GMACM, GMACM was provided with copies of certain documents from Option One, including the Note and Deed of Trust purchased by UBS. The original loan documents for the loan, such as the Note, Deed of Trust and any assignment, were held by the Custodian, Wells Fargo Bank, N.A. GMACM also received from Option One a copy of an "assignment in blank" (a blank assignment of the Deed of Trust), which Option One dated November 4, 2005. It is a standard practice in the residential mortgage loan servicing industry for the loan originator to provide the loan servicer with an "assignment in blank" so that the servicer can perform its servicing responsibilities, including assigning the loan to another servicer if needed [*15] or releasing the deed of trust once the loan is paid off.

GMACM serviced the Loan from the time UBS purchased it, approximately November 20, 2006, until the Loan was paid off and a Full Deed of Release of the Deed of Trust was recorded on or about April 8, 2008.

The core function of GMACM as the servicer was to collect from the borrower payments due on the loan, including interest. In collecting these payments pursuant to the Servicing Agreement, GMACM acted in a custodial capacity only and maintained a custodial account separate from its own assets and funds. [5] GMACM collected loan payments which included interest on the Loan only in its capacity as the Loan servicer. As part of its administrative responsibilities it also sent Mr. Mayo IRS form 1098 Mortgage Interest Statements forms for tax years 2006, 2007, and 2008 identifying "GMAC Mortgage" as the "Recipient/Lender."

5 Pursuant to the terms of the Servicing Agreement, GMACM primarily performed the following activities related to the servicing of mortgage loans such as the loan at issue here:

> a) maintaining a servicing file, "in a custodial capacity only," of documents necessary to service each mortgage loan;
> b) delivering monthly statements [*16] or invoices to borrowers;
> c) collecting all payments due under each mortgage loan;
> d) segregating and holding all payments in "custodial accounts" apart from its own funds and general assets to be invested for the benefit of UBS;
> e) remitting to UBS all amounts in the custodial account and any monthly payments collected;
> f) segregating and holding all escrow funds in "escrow accounts" apart from its own funds and general assets for the payment of property taxes and insurance by borrowers;
> g) furnishing reports to UBS as required by the Servicing Agreement;
> h) ensuring timely payment of rents, taxes, assessments, water rates, insurance payments and other charges on each mortgage loan;
> i) ensuring maintenance of insurance;
> j) responding to borrower inquiries;
> k) counseling and working with delinquent borrowers; and
> l) supervising foreclosure and property dispositions.

UBS subsequently sold the Loan to Mortgage Assets Securitization Transactions, Inc.

In March 2007, UBS sold all its rights to the Loan to Mortgage Asset Securitization Transactions, Inc. Plaintiffs contend that Mortgage Asset Securitization Transactions, Inc. is merely a nominal owner.

Mortgage Asset Securitization Transactions, Inc., [*17] deposited the mortgage loans into a Trust designated as "MASTR Specialized Loan Trust 2007-01." The MASTR Trust was established as an express trust under the laws of New York pursuant to Section 2.08 of the Pooling and Servicing Agreement ("PSA") dated as of March 1, 2007. The Trustee of the MASTR Trust is Defendant Deutsche Bank National Trust Company ("DBNTC"). **RFC then became the master servicer.**

Pursuant to the terms of the PSA and the related March 1, 2007 Assignment, Assumption and Recognition Agreement ("AARA"), Defendant Residential Funding Company, LLC ("RFC") acted as the Master Servicer/Trust Administrator for the pool of mortgage loans transferred to theMASTR Trust, including the Loan. As Master Servicer/Trust Administrator for the MASTR Trust, RFC primarily performed monitoring and reporting activities regarding the Trust's mortgage loans.

[6] RFC acted on behalf of the MASTR Trust in performing these activities and reported to DBNTC, the Trustee, regarding its master servicing obligations.

> 6 These monitoring and reporting activities included: a) receiving, reviewing and evaluating reports of remittances prepared by the servicer, GMACM, related to the mortgage loans; b) reconciling [*18] the results of its monitoring of GMACM's activities and, if necessary, coordinating corrective adjustments to the records; c) providing information to prepare periodic distribution reports for the holders of the certificates issued by the MASTR Trust and the rating agencies; and d) reconciling the result of its monitoring of collections on the mortgage loans with actual remittances of the servicer to the custodial account under the Servicing Agreement.

RFC provides independent reporting, monitoring and cash flow reconciliation services for the benefit of the MASTR Trust and its certificate holders. In its capacity as trust administrator, RFC is responsible for preparing and delivering to DBNTC, the Trustee, a statement for the certificate investors and rating agencies setting forth details as to the distributions of collections to be made on each monthly distribution date, including amounts and order of priority of such distributions.

RFC did not directly collect or receive payments of principal or interest on the mortgage loans in the Trust. The payments of principal and interest were collected and received by the servicer, who then remitted these payments to RFC. Once RFC received [*19] the payments from the servicer, RFC placed the payments in a custodial account in the name of the DBNTC, the Trustee, for the benefit of the shareholders of the Trust (the "Custodial Account."). RFC then disbursed these funds to DBNTC, the Trustee.

The AARA did not confer on RFC any rights to the mortgage loans; rather, RFC contracted for and received only the right to be paid a fee to perform monitoring and reporting activities. RFC's fee for its work was paid out of interest earned on the Custodial Account. RFC did not directly charge, contract for, or receive any of the challenged fees allegedly charged, contracted for, or received prior to or at the closing of the Loan, nor did it have contact with Mr. or Mrs. Mayo with respect to the Loan. RFC never acquired by purchase, assignment, or any other means, any ownership interest in the Loan.

Neither GMACM nor RFC brokered or securitized the Loan. Neither GMACM nor RFC is or has been related to, controlled by, or affiliated with UBS, DBNTC or the MASTR Trust.

GMACM continued to service the Loan until it was paid off in March 2008.

The AARA designated GMACM as the loan servicer for the pool of mortgage loans transferred to the MASTR Trust, [*20] which included the Loan. GMACM's Servicing Agreement with UBS became subject to the terms of the AARA. The AARA did not purport to confer any rights to the mortgage loans on GMACM. With the exception of a few modifications pursuant to the AARA, there was no change in the activities performed by GMACM in servicing the mortgage loans transferred to the MASTR Trust. GMACM continued to collect mortgage payments from the borrowers. As noted earlier, GMACM serviced the Loan from approximately November 20, 2006, until the Loan was paid off on March 27, 2008.

The same day the loan was paid off GMACM sent a "Request for Release of Documents -- Paid Off Loan" to Wells Fargo. In April 2008 GMACM stamped its name -- "GMAC Mortgage LLC" -- on the pre-dated blank assignment dated by Option One. GMACM did this in its designated role as the servicer and as a matter of administrative convenience to enable GMACM to promptly release the lien securing the discharged Loan. The assignment, although dated November 4, 2005, was not recorded with the Jackson County Recorder of Deeds Office until April 14, 2008. GMACM was identified as an assignee only of Mr. Mayo's Deed of Trust, not the Loan. Contemporaneous [*21] with the recording of this assignment, a Full Deed of Release of the Deed of Trust was recorded. It is dated April 8, 2008, and identifies the Grantor as "GMAC Mortgage, LLC."

At no time did GMACM ever acquire, by purchase, assignment, or any other means, any ownership interest in the Loan. When Mr. Mayo requested the identity of the owner of his loan pursuant to *15 U.S.C. § 1641(f)(2)*, GMACM identified the owner of the loan as UBS and/or the MASTR Trust.

Discussion

The sole count of the First Amended Complaint (doc. 32) alleges that each of the Defendants violated *§ 408.233.1* of the Missouri Second Mortgage Loan Act ("MSMLA") with respect to Plaintiffs' loans by "directly or indirectly charging, contracting for, and/or receiving" settlement charges not allowed, or in excess of what were allowed, under the MSMLA, or by receiving interest on loans which violated the MSMLA.

I. The MSMLA.

The MSMLA is a "fairly comprehensive" consumer protection measure, enacted to protect Missouri homeowners by regulating "the business of making

high-interest second mortgage loans on residential real estate." *U.S. Life Title Ins. Co. v. Brents, 676 S.W.2d 839, 841 (Mo. App. 1984)*. The statute regulates the [*22] rates and terms of second mortgage loans, including the fees that may be charged, and "creates a private right of action for a person 'who suffers any loss of money or property as a result of' a violation of the Act." *Washington v. Countrywide Home Loans, Inc., No. 08-00459-CV-W-FJG, 2010 U.S. Dist. LEXIS 2623, 2010 WL 199881, at *2 (W.D. Mo. Jan. 13, 2010)* (Gaitan, J.) (quoting *Mo. Rev. Stat. § 408.562*.).

The MSMLA defines a "second mortgage loan" as

> a loan secured in whole or in part by a lien upon any interest in residential real estate created by a security instrument, including a mortgage, trust deed, or other similar instrument or document, which provides for interest to be calculated at the rate allowed by the provisions of *section 408.232*, which residential real estate is subject to one or more prior mortgage loans.

Mo. Rev. Stat. § 408.231.1 (2006). In relevant part it provides that,

> 1. No charge other than that permitted by *section 408.232* shall be *directly or indirectly charged, contracted for or received* in connection with any *second mortgage loan*, except as provided in this section:
>
> (1) Fees and charges prescribed by law actually and necessarily paid to public officials for perfecting, releasing, or satisfying [*23] a security interest related to the second mortgage loan;
>
> (2) Taxes;
>
> (3) *Bona fide closing costs paid to third parties, which shall include*:
>
> (a) Fees or premiums for title examination, title insurance, or similar purposes including survey;
>
> (b) Fees for preparation of a deed, settlement statement, or other documents;
>
> (c) Fees for notarizing deeds and other documents;
>
> (d) Appraisal fees; and
>
> (e) Fees for credit reports;
>
> (4) Charges for insurance as described in subsection 2 of this section;
>
> (5) A nonrefundable origination fee not to exceed five percent of the principal which may be used by the lender to reduce the rate on a second mortgage loan;
>
> (6) Any amounts paid to the lender by any person, corporation or entity, other than the borrower, to reduce the rate on a second mortgage loan or to assist the borrower in qualifying for the loan;
>
> (7) For revolving loans, an annual fee not to exceed fifty dollars may be assessed.

Mo. Rev. Stat. § 408.233.1 (2005) (emphasis added). However, the law also provides that *§ 408.233.1* "shall not apply to any transaction in which a single extension of credit is allocated between a first lien and any number of subordinate liens . . ." *Mo. Rev. Stat. § 408.237* [*24] (2005).

The MSMLA also provides statutory remedies for violations. *Section 408.236* states that,

> *Any person violating* the provisions of *sections 408.231 to 408.241 shall be barred from recovery of any interest on the contract*, except where such violations occurred either:
>
> (1) As a result of an accidental and bona fide error of computation; or
>
> (2) As a result of any acts done or omitted in reliance on a written interpreta-

> tion of the provisions of sections 408.231 to 408.241 by the division of finance.

Mo. Rev. Stat. § 408.236 (2005) (emphasis added). Additionally *§ 408.562* provides that,

> *In addition to any other civil remedies or penalties provided for by law, any person who suffers any loss of money* or property as a result of any act, method or practice in violation of the provisions of sections 408.100 to 408.561 *may bring an action in the circuit court . . . to recover actual damages*. The court may, in its discretion, award punitive damages and may award to the prevailing party in such action attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary and proper.

Mo. Rev. Stat. § 408.562 (2005) (emphasis added).

II. Because [*25] Mrs. Mayo is not a party to the Loan, she lacks standing to sue Defendants.

As an initial matter the Court holds Mrs. Mayo lacks standing to bring any MSMLA claims against Defendants because she was not a party to the Loan.

The doctrine of standing asks whether the litigant is entitled to have the court decide the merits of the dispute. *See Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*. There are several requirements for standing, some of which are constitutional, that is, derived from interpretation of Article III, and some of which are prudential, meaning derived from the requirements of prudential judicial administration. Erwin Chemerinsky, *Federal Jurisdiction*, § 2.3.1, at 60-61 (5th ed. 2007). To satisfy constitutional standing requirements the plaintiff must show (1) that the plaintiff personally has suffered an actual or threatened injury ("injury-in-fact"); (2) that plaintiff's injuries are traceable to the challenged action of the defendant and not some third party ("traceability"); and (3) that the court can redress that injury by the relief requested ("redressibility"). *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Prudential limitations on standing (1) require the [*26] plaintiff to assert only his or her own rights, not the rights of third parties; (2) forbid a plaintiff from suing as a taxpayer who shares a grievance in common with all other taxpayers; and (3) require the plaintiff to be within the zone of interests protected by the statute in question. Chemerinsky, *Federal Jurisdiction*, § 2.3.1, at 61. The burden of establishing standing lies with the plaintiff. *Steger v. Franco, Inc., 228 F.3d 889, 892 (8th Cir. 2000)*.

Mrs. Mayo does not have standing to sue under the MSMLA if she is not a party to the mortgage loan. *See HBC Auto Fin., Inc. v. Lyles, 240 S.W.3d 736, 738 (Mo. Ct. App. 2007)* (holding plaintiff who was not a party to, nor a third-party beneficiary, lacks standing to argue a loan agreement was invalid); *cf. Dash v. FirstPlus Home Loan Trust, 248 F. Supp. 2d 489, 503 (M.D.N.C. 2003)* (holding plaintiffs had standing to sue for violation of state lending law only assignees or purchasers of their loans, not other parties' loans). Otherwise Mrs. Mayo would not have suffered an injury-in-fact, she would simply be trying to assert someone else's rights--her husband's--and not her own.

And Mrs. Mayo is not, in fact, a party to the Loan. "A mortgage [*27] loan consists of a promissory note and security instrument, usually a mortgage or a deed of trust, which secures payment on the note by giving the lender the ability to foreclose on the property." *Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619, 623 (Mo. Ct. App. 2009)*. A spouse is not a party to a mortgage loan if she signs the deed of trust but does not sign the promissory note. *Ethridge v. TierOne Bank, 226 S.W.3d 127, 129 (Mo. 2007)*. Although Mrs. Mayo signed the Deed of Trust, she did not sign the Note, thus she was not a party to the mortgage loan. The fact that she believed she was a party to the Loan and signed the documents she was requested to sign at closing does not alter the analysis. Consequently she does not have standing to sue.

III. The funding fee and underwriting fee violate the MSMLA, but the other fees do not.

A. The Loan is a "piggyback" loan, and the MSMLA applies to it.

Defendants' first argument is that the MSMLA does not apply to the Loan because it was a "piggyback loan" which was part of a single extension of credit, along with the first mortgage loan, to acquire the property. There is no merit to this argument.

A piggyback loan is a common financing [*28] option whereby two loans are made to the borrower to finance more than 80% of the purchase price of a home without paying private mortgage insurance. *See Rendler v. Corus Bank, 272 F.3d 992, 996 (7th Cir. 2001)*. The first loan is typically made for 80% of the purchase price, and the second, or "piggyback," loan is a second-lien loan drawn to cover the down-payment requirement of the first-lien loan. *See Espinoza v. Recontrust Co., N.A., No. 09-CV-1687-IEG (RBB), 2010 U.S. Dist. LEXIS 38484, 2010 WL 1568551, at *1 n.1 (S.D. Cal. April 19,*

2010). The Loan at issue here, a second-lien loan which funded the 20% of the purchase price that the Wells Fargo loan did not, is a classic "piggyback" loan.

The Loan was not part of a single extension of credit. Although both the Option One and Wells Fargo loans closed concurrently as part of a single transaction to purchase the Mayos' home, there were two separate extensions of credit. This is evidenced by the fact that were two separate loans, an adjustable rate loan and a 30-year fixed loan, made by two different lending companies. For each loan there were separate notes and deeds of trust, separate HUD-1 settlement statements and loan disclosures, separate loan applications, [*29] separate loan underwriting processes, separate loan approvals, separate credit checks, and separate title policies. There were also separate wire transfers funding the loans, separate verification of income and employment, and separate instructions to the closing agent. Mr. Mayo also gave Wells Fargo separate, formal notice as the first lien holder that he was giving Option One a second lien on the property.

Finding that there were two extensions of credit, the Court holds Defendants cannot invoke *§ 408.237* to prevent the MSMLA from applying to the Loan.

B. The funding fee and underwriting fee paid to Option One violated the MSMLA.

Plaintiffs argue, and Defendants do not dispute, that the funding fee and underwriting fee paid to Option One violate the MSMLA. Defendants' argument, discussed below, is that *they* did not violate the MSMLA, thus they are not liable for any damages.

Whether or not the Defendants individually violated the MSMLA, it is clear that the funding fee and underwriting fees paid to Option One violated *§ 408.233.1(3)* because they were not paid to third parties, nor they are permissible under any other subsection of *§ 408.233.1*.

C. The other challenged fees are bona fide [*30] closing costs paid to third parties that are permitted under *§ 408.233.1(3)*.

Defendants contend that five of the challenged fees (the tax contract service fee, the flood search fee, the settlement or closing fee, the courier/delivery fee, and the wire fee), are permitted under the MSMLA as "bona fide closing costs paid to third parties." *Mo. Rev. Stat. § 408.233.1(3)* (2005). They argue the statute's language allowing "bona fide closing costs paid to third parties, which shall include . . .," outlines categories of acceptable fees. *Id.*

Plaintiffs argue that the list of permissible "closing costs" set out in *§ 408.233.1(3)* is a limited and exclusive one. If a particular fee does not appear among the statutory list, it is *per se* illegal, and violates the MSMLA. Plaintiffs have withdrawn their allegation that the "Flood Search Fee" paid to First American Flood Data Services violates the MSMLA. [7]

> 7 In addition to arguing that the flood search fee was a bona fide closing cost paid to a third party, Defendants argued that the fee was authorized by federal law, and federal law preempts the MSMLA. In response Plaintiffs initially argued that "none of the 5 fees Defendants' motions address (tax [*31] service contract, flood search, settlement or closing, courier/delivery and wire fees) appears among the authorized list of 'closing costs' in *§ 408.233.1(3)*. Hence, each should be deemed an illegal fee." Suggs. In Opp'n (doc. 192) at 172-73. Two pages later, however, they concede the issue, stating they "withdraw their allegation that the flood certification fee violates the MSMLA." *Id.* at 174.

1. "Which shall include" as used in *§ 408.233.1(3)* is inclusive.

A sister court in this district has previously held that the plain language of the statute "does not identify fees by a particular label or name; instead it provides for types or categories of fees that are permissible as bona fide closing costs for services that are required for the closing of a second mortgage loan." *Washington, 2010 U.S. Dist. LEXIS 2623, 2010 WL 199881 at *4* (quoting *Mitchell v. Beneficial Loan & Thrift Co., 463 F.3d 793, 795 (8th Cir. 2006)*). The question of whether the enumerated list in *§ 408.233.1(3)* is exclusive was not before the court in *Washington*, but it is here.

In interpreting a state statute a federal court applies the state's rules of statutory construction. *Kansas State Bank in Holton v. Citizens Bank of Windsor, 737 F.2d 1490, 1496 (8th Cir. 1984)*. [*32] Under Missouri law "courts have a duty to read statutes in their plain, ordinary and usual sense. Where there is no ambiguity, this Court does not apply any other rule of construction." *MC Dev. Co., LLC v. Cent. R-3 Sch. Dist. of St. Francis County, 299 S.W.3d 600, 604 (Mo. 2009)*. Where this is ambiguity, "[t]he primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *State ex rel. Burns v. Whittington, 219 S.W.3d 224, 225 (Mo. 2007)*.

As a threshold matter the Court finds there is no ambiguity and that the plain and ordinary meaning of *§ 408.233.1(3)* is that the enumerated fees are simply examples, not an exclusive list. *Contra Mitchell v. Residential Funding Corp., 334 S.W.3d 477, 2010 Mo. App. LEXIS 1593, 2010 WL 4720755, at *12-13 (Mo. Ct. App.*

Nov. 23, 2010) (holding the list is "deliberate and exclusive.") As used in the statute this Court finds that "which shall include" is inclusive. This finding is confirmed by the controlling caselaw. As the Missouri Supreme Court has observed, "[t]he meaning of the word 'include' may vary according to its context. Ordinarily it is not a word of limitation, but rather of enlargement." *St. Louis County v. State Highway Comm'n, 409 S.W.2d 149, 153 (Mo. 1966)*. [*33] In *St. Louis County* voters had approved a bond issuance for "the construction of highways," "said highways to include those commonly known as the Mark Twain and Daniel Boone Expressways and Ozark Expressway with Route 61 connection, and an outer belt expressway running generally north and south and connecting with highways and expressways running generally east and west" in the county, but the bond proceeds were used on other highways in the county. Overturning the trial court the Missouri Supreme Court ruled the bond language did not prohibit the proceeds from being spent on other highways in the county. The Supreme Court held, "[w]hen used in connection with a number of specified objects [the word 'include'] implies that there may be others which are not mentioned." Similarly, in the present case, the Court reads "include" in *§ 408.233.1(3)* as implying that there are other permissible fees which are not mentioned.

This holding is consistent with the requirement that when reading a statute a court "is required to give meaning to every word of the legislative enactment." *State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 140, 144 (Mo. 2002)*. Limiting recoverable bona fide closing [*34] costs to the enumerated fees would essentially write the words "which shall include" out of the statute. If the listed fees were meant to be the only permissible ones, the General Assembly would not have inserted the phrase "which shall include" in the statute, it would have been superfluous and unnecessary. The Court also notes the plain and ordinary use of the phrase "which shall include" is to alert the reader that the subsequently listed items are examples. Hence the only reading of *§ 408.233.1(3)* which gives meaning to every word of it is to interpret "which shall include" inclusively.

Plaintiffs' contention, that the phrase "which shall include" is "irrefutably restrictive" and that there is "absolutely no reason" for the legislature to enumerate the five fees if it was not an exclusive set, ignores obvious reasons for listing the fees: It would be practically impossible for the General Assembly to envision every bona fide closing cost that could be paid to a third party and list it in the MSMLA, but a partial list illustrates what types of costs are allowed. Likewise there is no merit to the suggestion that reading the phrase inclusively will "truly blow apart" the statute and [*35] "permit a lender to assess any number of different, additional fees." Read inclusively the language still limits fees to bona fide closings costs paid to third parties. It prevents borrows from being charged any non bona fide fees, or fees that will directly or indirectly be paid to a lender.

Of course, reading *§ 408.233.1(3)* inclusively is contrary to *Mitchell v. Residential Funding Corp. 2010 Mo. App. LEXIS 1593, 2010 WL 4720755, at *13* (holding the list is "deliberate and exclusive.") [8] In *Mitchell* the court acknowledged a previous decision in *State ex rel. Nixon v. Estes* that "include" is usually a term of enlargement, but held it had an exclusive meaning as used in *§ 408.233.1(3)*. [9] The court distinguished *Estes* on the grounds that the "contextual language" of *§ 408.233.1(3)* was "quite different." *Mitchell, 2010 Mo. App. LEXIS 1593, 2010 WL 4720755, at *13*. It opined that in Estes an inclusive use of "include" was needed to animate the legislature's intent, but an exclusive use was required under *§ 408.233.1(3)* to effectuate the MSMLA's broad purpose as a consumer protection statute. *Id.*

> 8 Plaintiffs' claim that "five (5) different judges in four (4) different cases" have reached a similar conclusion. This is an exaggeration. In several [*36] of the cited cases it is unclear whether the issues before the court were identical to those here, or what exactly the court's ruling was. That said, the rulings in *Schwartz v. Bann-Cor Mortgage*, No. 00CV226639, special master's report at 11 (Circuit Court of Jackson County, Mo. filed May 14, 2009) and *Mitchell v. Residential Funding Corporation*, No. O3CV2200489 (Circuit Court of Jackson County, Mo.) support Plaintiffs' position.
>
> 9 *Mitchell* acknowledged that in *State ex rel. Nixon v. Estes* it held "[w]hile the plain meaning of the word 'include' may vary according to its context in a statute, it is ordinarily used as a term of enlargement, rather than a term of limitation." *Mitchell, 2010 Mo. App. LEXIS 1593, 2010 WL 4720755, at *13* (citing *State ex rel. Nixon v. Estes, 108 S.W.3d 795, 800 (Mo. Ct. App. 2003)*. This portion of *Estes cites St. Louis County, 409 S.W.2d at 152-153*.

The Court declines to follow this small portion of *Mitchell* for two reasons. First, while *Estes* may be distinguishable, *St. Louis County* is analogous, and because it is an analogous decision by the state's highest court its holding should control in interpreting *§ 408.233.1(3)*. Second, although this Court reads *§ 408.233.1(3)* as unambiguously [*37] providing a non-exclusive list of fees, assuming for the sake of argument that the language is ambiguous, an inclusive reading best embraces the General Assembly's intent. The Court finds the MSMLA is a usury law. The General Assembly's intent was to

prevent lenders who were already charging high-interest rates on second mortgage loans from also lining their pockets with fees for questionable services. *See Thomas v. U.S. Bank Nat. Ass'n ND, 575 F.3d 794, 796 n.1 (8th Cir. 2009)* ("The limits on closing costs and fee provided for in the MSMLA act as a trade-off for allowing lenders to charge a higher interest rate on second mortgage loans."). Section *§ 408.233.1(3)* does this by preventing the imposition of anything other than bona fide closing costs paid to third parties. But interpreting the subsection exclusively, that is, as allowing fees for the bona fide closing costs explicitly mentioned, but not others, would be arbitrary and do nothing to advance the statute's purpose. A bone fide $25 "document preparation fee" paid to a third-party is no worse than a bone fide $25 "courier fee" paid to a third-party. Both are costs of business passed on to the consumer. Reading the language [*38] as allowing fees for any bona fide closing cost so long as it is paid to a third party best effectuates the statute's purpose.

Consequently the Court holds "which shall include" in *§ 408.233.1(3)* should be read inclusively.

2. The four contested fees are bona fide closing cost paid to third-parties.

As discussed above *§ 408.233.1(3)* permits a bona fide closing cost to be paid to a third party in connection with a second mortgage loan. A "bona fide [closing] cost is one that is 'paid to an unaffiliated third party for services actually performed.'" *Washington, 2010 U.S. Dist. LEXIS 2623, 2010 WL 199881 at *4* (quoting *Mitchell v. Beneficial Loan & Thrift Co., 463 F.3d 793, 795 (8th Cir. 2006))*. Plaintiffs concede that the $12 flood search fee charged at closing was lawful. With respect to the four contested fees the record establishes that three of them, the tax service contract fee paid to Fidelity National Tax Service, and the courier/delivery and wire fees paid to Capital Title Agency, were paid to unaffiliated third parties for services actually performed, thus they do not violate the MSMLA.

Plaintiffs contest the legality of the remaining fee, arguing the $100 settlement or closing fee paid to Capital Title Agency [*39] was not bona fide. Plaintiffs note that under Missouri law it is illegal to charge or receive a document preparation fee unless a licensed attorney has prepared the deed and other legal documents, and that under federal law it is unlawful to assess a fee for completing a settlement statement, and Plaintiffs intimate that Capital Title Agency has violated these provisions.

The authority cited by Plaintiffs establishes that "escrow companies may not charge a separate fee for document preparation or vary their customary charges for closing services based upon whether documents are to be prepared in the transaction," *Eisel v. Midwest BankCentre, 230 S.W.3d 335, 337 n.1 (Mo. 2007)*; that "charging a separate fee for the completion of legal forms by non-lawyers constitutes the unauthorized practice of law," *Carpenter v. Countrywide Home Loans, Inc., 250 S.W.3d 697, 702 (Mo. 2008)*; and that federal regulations prohibit any lender or servicer from imposing a fee for the preparation of a settlement statement. While the record clearly demonstrates that Capital Title spent several hours conducting a title search and collecting and preparing various documents needed for closing, there is no evidence [*40] that it charged a separate fee or varied its customary charges for preparing legal documents, or that it was a lender or servicer under federal law such that it was prohibited from imposing a fee for the preparation of a settlement statement. Furthermore the MSMLA explicitly states that "fees for preparation of a deed, settlement statement, or other closing documents" are legal. *Mo. Rev. Stat. § 408.233.1(3)(b)* (2005). Consequently the charge was a bona fide closing cost paid to a third party. *See Washington, 2010 U.S. Dist. LEXIS 2623, 2010 WL 199881, at *4* (holding $60 fee paid to third party title company which compiled the loan documents needed for closing, including the mortgage and note, and performed other pre and post-closing tasks, was permissible under *§ 408.233.1(3)*).

D. A pre-paid interest charge by itself does not violate the MSMLA.

Plaintiffs also contend that the pre-paid interest charge violates the MSMLA. Their argument is not that it is *per se* unlawful to charge pre-paid interest, but that once Option One violated *§ 408.233.1* by charging an illegal fee, Plaintiffs became entitled to recover all interest paid, including the prepaid interest, pursuant to *§§ 408.236* and *408.562*. The Court discusses [*41] Plaintiffs' argument below, but holds here that a pre-paid interest charge is not, by itself, a violation of the MSMLA.

IV. Assignee Defendants UBS and DBNTC as trustee of the MASTR Trust are liable under the MSMLA, but loan servicers GMACM and RFC are not.

Plaintiffs assert three theories of liability against Defendants. Plaintiffs contend that (1) because the money used to pay the illegal fees at closing was financed and rolled into the principal, Defendants received or collected a small amount of illegal fees each time a monthly payment was made on the Loan, thus Defendants *independently* violated the MSMLA by *indirectly* receiving illegal loan fees each month; (2) Defendants are *derivatively* liable as the originating lender's assignees under Missouri law, because by assuming the loans they assumed Option One's liability; and (3) Plaintiffs have a cause of action against DBNTC as trustee of the MASTR

Trust and UBS (jointly "the Assignee Defendants") to recover interest paid on the Loan, because once Option One charged an illegal fee the loan became tainted so that assignees of the Loan were barred from collecting any interest on it.

A. As post-closing, non-loan holder servicers, neither [*42] GMACM or RFC violated the MSMLA.

As post-closing, non-loan holder servicers who did not have any ownership interest in the Loan such that they were entitled to any interest or principal from it, neither GMACM or RFC directly or indirectly charged, contracted for or received any illegal fees in violation of *§ 408.233.1(3)*, thus they cannot be liable as the Complaint alleges.

GMACM serviced the Loan after UBS purchased the Loan in November of 2006. As the servicer GMACM collected payments due on the Loan, but was acting in a custodial capacity only. GMACM maintained a custodial account for the payments separate from its own assets and did not retain any loan payments or interest. The Loan's various owners simply paid GMACM a fee to perform administrative services related to collection and disbursement of the monthly payments.

RFC's relationship to the Loan is similar. After the MASTR Trust acquired the Loan RFC acted as the Master Servicer/Trust Administrator for the entire pool of mortgage loans transferred to the MASTR Trust, which including the Loan. As Master Servicer/Trust Administrator RFC primarily performed administrative and accounting functions for the Loan. RFC acted on behalf [*43] of the MASTR Trust in performing these activities and reported to DBNTC, the Trustee, regarding its master servicing obligations. RFC did collect or receive payments of principal or interest on the mortgage loans in trust, but received these payments from GMACM and placed them in a custodial account in the name of the DBNTC for the benefit of the Trust's shareholders. RFC was paid for its work as Master Servicer/Trust Administrator out of interest earned on the custodial account.

Neither GMACM nor RFC is related to, controlled by, or affiliated (other than its business relationships) with UBS, DBNTC or the MASTR Trust, and neither directly or indirectly charged, contracted for, or received any of the illegal fees imposed at the closing. Most importantly, unlike the Assignee Defendants, GMACM and RFC never acquired any ownership interest in the Loan such that they were entitled to the actual payments.

Performing administrative tasks related to the collection, accounting, and disbursement of monthly loan payments is completely different from charging, contracting for, or receiving an illegal fee imposed at closing. Nothing in the plain text of the MSMLA imposes liability on third-parties, [*44] such as loan servicers, who perform administrative tasks on loans.

Finally, the fact that GMACM was made an assignee on the deed of trust for administrative purposes is irrelevant. The assignment does not evidence that GMACM ever charged, contracted for, or received impermissible fees in any way, which is what liability is based on here. GMACM received an assignment in blank so that GMACM could be made an assignee on the deed of trust for administrative purposes, that is, so it could more efficiently perform its servicing responsibilities by assigning the loan to another servicer or releasing the deed of trust once the loan had been paid off. Indeed, at the time the assignment in blank was apparently created, November 4, 2005, GMACM was not even in existence.

Accordingly the Court finds GMACM and RFC are entitled to summary judgment on all claims against them.

B. Assignee Defendants indirectly violated the MSMLA by virtue of the fact that illegal fees were rolled into the principal of the Loan at closing, and Defendants subsequently received these fees in monthly payments made on the Loan.

Plaintiffs argue that because the money used to pay the illegal fees at closing was financed and [*45] rolled into the principal balance of the Loan, all Defendants received a small amount of these illegal fees every month as part of the monthly payment on the Loan, thus all Defendants violated the MSMLA by "indirectly" receiving illegal fees each time they received a monthly payment.

In response, Defendants contend that construing "indirectly charged" as encompassing financing payments on illegal fees charged at closing casts an absurdly wide net of liability. Defendants note that several courts have held for purposes of determining when a cause of action accrues under a statute of limitation that an illegal fee is charged once, at closing, not every time a payment is made. *Miller v. Pac. Shore Funding, 92 Fed. Appx. 933, 937 (4th Cir. Jan. 28, 2004)* (holding plaintiff's claims accrued at closing when he paid the disputed fees, even though the fees were paid by a promissory note); *Shepard v. Ocwen Fed. Bank, FSB, 172 N.C. App. 475, 617 S.E.2d 61, 65 (N.C. Ct. App. 2005)* (holding that although periodic payments were made toward the loan, the fee was paid at closing, observing plaintiffs were not required to finance the loan origination fee, they could have paid it by cash, check, or credit card). Finally, [*46] Defendants contend that "indirectly charged" as used in *§ 408.233.1* means a fee charged in a misleading or deceitful way at closing, not a fee received at some later time by a downstream assignee who indirectly finances the closing costs.

The Court agrees that the MSMLA covers fees that are financed into the loan principal and then paid over time. *Mitchell, 2010 Mo. App. LEXIS 1593, 2010 WL 4720755 at *17* (holding that fees rolled into loan principal on which assignee defendants charged interest supports a finding that they indirectly charged an unauthorized fee). The text of the statute states "[n]o charge . . . shall be directly or indirectly charged, contracted for *or received* . . ." Mo. Rev. Stat. § 408-233.1 (2005) (emphasis added). The definition of "indirect" is "deviating from a direct line or course: not proceeding straight from one point to another: proceeding obliquely or circuitously: ROUNDABOUT." *Webster's Third New Int'l Dictionary* 1151 (1986) (capitalization in original). Here the Assignee Defendants indirectly received the illegal fees, albeit a very small amount of them, each time they received a monthly payment containing a repayment of fees that were rolled into the principal. Although interpreting [*47] "indirectly" as Defendants suggest is consistent with an alternate definition of the word, such an interpretation would produce an odd result: Participants in the secondary mortgage market could easily evade the law and launder an illegal loan by selling it immediately after closing. The Court finds that Option One charged or contracted for illegal fees at closing, and the Assignee Defendants indirectly received these fees at a later time as the loan payments were made, thus Assignee Defendants independently violated § 408-233.1.

C. Assignee Defendants are not derivatively liable under the MSMLA as Option One's assignees.

Plaintiffs also claim Assignee Defendants are derivatively liable as the originating lender's assignees under Missouri law. Plaintiffs contend that they "stand in the shoes" of the assignor, Option One, and thus are derivatively liable for its MSMLA violations. There is no merit to this argument.

"Although an assignee is said to 'step into the shoes' of the assignor," this generally means "an assignee can acquire no greater right than the assignor held against the obligor." *Mitchell, 2010 Mo. App. LEXIS 1593, 2010 WL 4720755 at *20*. But an assignment of the right to collect a debt does not mean [*48] "that the assignee is subject to all of an obligor's causes of action against the assignor." *Id.* Nothing in the MSMLA changed this aspect of the common law: "While a lender may be held liable for directly or 'indirectly' charging, contracting for, or receiving unlawful charges, 'indirect' still implies the lender's liability for its own actions, not those of the loan originator." *Id.*

Consequently the Court grants Defendants summary judgment on this theory of liability.

D. Whether Assignee Defendants are holders in due course is a disputed question of material fact.

Related to their derivative liability theory Plaintiffs argue that *§ 408.236* "provides that interest is not allowed on violative second mortgage loans," and that "one who steps into the shoes of such a violator, must forego or forfeit and/or pay any interest paid and received on the illegal loan." Suggs. In Opp'n. at 157. Plaintiffs contend that regardless of whether Defendants independently violated the MSMLA, Option One violated it which tainted the Loan such that no interest could be charged on it, and this stain could not be laundered away by a subsequent assignment.

Defendants argue that mortgage loans are negotiable instruments [*49] governed by Article 3 of the Missouri Commercial Code ("the UCC"), [10] that the UCC does not provide the obligor on a negotiable instrument the right to pursue claims against an assignee of the negotiable instrument for the statutory violations of the assignor, and that the UCC displaces any common-law rights here. Defendants' argument appears to be that since they are assignees, they are holders in due course entitled to the protection of the Holder in Due Course rule.

10 *Mo. Rev. Stat. §§ 400.1-101-400.4A-507* (2005).

A mortgage loan is a promissory note and thus a negotiable instrument governed by the UCC. *Merz v. First Nat'l Bank of Franklin Cnty., 682 S.W.2d 500, 501-02 (Mo. Ct. App. 1984)*. A holder of an instrument, such as a promissory note, is a holder in due course if (1) the instrument when sold to the holder "did not bear such apparent evidence of forgery or alteration" or was not otherwise so incomplete as to call into questions its authenticity; and (2) the holder took the instrument under certain conditions, including taking the instrument "in good faith" and "without notice that any party has a defense or claim in recoupment described in *Section 400.3-305(a)*." *Mo. Rev. Stat. § 400.3-302(a)*. [*50] The burden of proof is on the party seeking to establish that it is a holder in due course. *Transcon. Holding Ltd. v. First Banks, Inc., 299 S.W.3d 629, 660 (Mo. Ct. App. 2009)*. The benefit of being a holder in due course of a negotiable instrument is that such a holder takes free of any "personal" defenses or claims of the maker, such as lack of consideration, but not "real" defenses, such as the underlying transaction being illegal. *Id. at 659*; *Mo. Rev. Stat. § 400-3.305* (2005). A holder in due course does not take free of any "real" defenses, such as the illegality of underlying transaction. *Transcon., 299 S.W.3d at 659*; *Mo. Rev. Stat. § 400-3.305* (2005).

The Assignee Defendants are entities that subsequently purchased the promissory note on the Loan and

so might be holders in due course. But given that there is a disputed question of material fact whether Assignee Defendants took the note in good faith or without notice of Plaintiffs' *§ 400.3-305* defense, the Court cannot determine at this time whether any Assignee Defendant is a holder in due course, and so cannot grant summary judgment on this theory of liability. [11]

> 11 Interestingly, even if the Assignee Defendants are holders [*51] in due course, there is a question whether Mr. Mayo may have had a defense which as a matter of law extinguished any obligation he had to repay any interest on the Loan. A "real" defense against a holder in due course includes the "illegality of the transaction which, under other law, nullifies the obligation of the obligor." *Mo. Rev. Stat. § 400.3-305(a)(1)(ii)* (2005).

V. Remedies

Defendants also seek summary judgment with respect to two remedies sought by Plaintiffs. *Section 408.236* states that, "[a]ny person violating the provisions of *sections 408.231 to 408.241* shall be barred from recovery of any interest on the contract." *Mo. Rev. Stat. § 408.236* (2005). *Section 408.562* provides that, "[i]n addition to any other civil remedies or penalties provided for by law, any person who suffers any loss of money or property as a result of any act, method or practice in violation of the provisions of *sections 408.100 to 408.561* may bring an action in the circuit court . . . to recover actual damages." *Mo. Rev. Stat. § 408.562* (2005). *Section 408.562* also invests the court with discretion to award punitive damages, equitable relief, and attorney's fees.

A. Plaintiffs may sue for interest previously [*52] **paid to Assignee Defendants.**

Defendants move for summary judgment on Plaintiff's claim for the return of all interest paid on the Loan. Defendants note that the MSMLA bars entities that have violated the statute from "*recovery* of any interest on the contract." They argue that "recover" as used in *§ 408.236* means "to be successful in a suit, to collect or obtain amount," not "charge" or "collect." Defendants read *§ 408.236* as barring a violator from suing a borrower to recover interest, not authorizing a borrower to sue a violator for the return of interest previously paid. Plaintiffs argue that *§ 408.236*, alone and together with *§ 408.562*, authorize Plaintiffs to recover interest on the loan.

There are two possible meanings of "recovery" as used in *§ 408.236*: (1) "The regaining or restoration of something lost or taken away;" and (2) "The obtainment of a right to something (esp. damages) by a judgment or decree." *Black's Law Dictionary* 1302 (8th ed. 2004). Both are equally plausible, so the Court cannot say that *§ 408.236* by itself creates a cause of action to recover interest previously paid on a loan. But reading *§ 408.236* in conjunction with *§ 408.562*, which explicitly creates a cause [*53] of action to "recover" damages for a violation *§ 408.231.1*, the Court finds that the plain meaning of the statute gives Plaintiffs a cause of action to recover interest paid to Assignee Defendants. Defendants motion is denied on this point.

B. Defendants are not entitled to summary judgment on punitive damages.

Defendants also move for summary judgment on Plaintiffs' claims for punitive damages under *§ 408.236*. Defendants contend that even at this stage of the litigation the record establishes that punitive damages should not be awarded here as a matter of law.

Under Missouri law,

> [a] punitive damages claim must be established with clear and convincing evidence. Clear and convincing evidence is evidence that "instantly tilts the scales in the affirmative when weighed against evidence in opposition; evidence which clearly convinces the fact finder of the truth of the proposition to be proved." Evidence may be clear and convincing even if susceptible to different interpretations which may, or may not, clearly convince a reasonable juror.

In re Genetically Modified Rice Litig., 666 F.Supp.2d 1004, 1030 (E.D. Mo. 2009). Viewing the evidence in the light most favorable to the Plaintiffs, there [*54] is evidence from which a reasonable juror could infer that the Assignee Defendants may have been completely indifferent to the borrower's rights under the MSMLA. Accordingly Defendants have not shown they are entitled to summary judgment with respect to punitive damages at this time. Of course, whether plaintiffs will actually make a submissible case for punitive damages depends on the evidence presented at trial.

Conclusion

The motions for summary judgment are GRANTED IN PART. The Court holds (1) Mrs. Mayo was not a party to the Loan thus she does not have standing to sue Defendants; (2) the funding fee and underwriting fee paid at closing to Option One both violate the MSMLA, but the other fees imposed do not; (3) the loan servicers are not liable, but the Assignee Defendants indirectly

violated the MSMLA by virtue of the fact that illegal fees were rolled into the principal of the Loan at closing and they subsequently received these fees in monthly payments; (4) Mr. Mayo may sue for interest previously paid to the Assignee Defendants; and (5) Defendants are not entitled to summary judgment on the issue of punitive damages.

All claims against Defendants GMAC Mortgage, LLC and Residential [*55] Funding Company, LLC are dismissed with prejudice.

IT IS SO ORDERED.

DATE: January 13, 2011

/s/ Greg Kays

GREG KAYS, JUDGE

UNITED STATES DISTRICT COURT

TAB 8

Slip Copy, 2010 WL 3324705 (N.D.Ill.)
(Cite as: 2010 WL 3324705 (N.D.Ill.))

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
STERLING FEDERAL BANK, F.S.B., Plaintiff,
v.
DLJ MORTGAGE CAPITAL, INC., Bank of America, N.A., Select Portfolio Servicing, Inc. and the Bank of New York Mellon Corp., Defendants.

No. 09 C 6904.
Aug. 20, 2010.

Brian Roger Kopelowitz, The Kopelowitz Ostrow Firm, PA, Fort Lauderdale, FL, David Paul Neuman, Stoltmann Law Offices, P.C., Chicago, IL, for Plaintiff.

Charles B. Leuin, Paul Alexis Del Aguila, Greenberg Traurig, LLP, Jonathan Stuart Quinn, Max A. Stein, Reed Smith LLP, Chicago, IL, Colleen J. O'Loughlin, Jeffrey Q. Smith, Scott E. Eckas, Bingham McCutchen LLP, New York, NY, for Defendants.

MEMORANDUM OPINION

JOHN F. GRADY, District Judge.

***1** Before the court is defendants' motion to dismiss plaintiff's complaint. For the reasons explained below we grant defendant's motion.

BACKGROUND

In separate transactions during December 2002 and May 2003 plaintiff Sterling Federal Bank, F.S.B. ("Sterling") purchased mortgage-backed pass-through certificates on the secondary market for approximately $6.5 million. (*See* Compl. ¶ 11; *id.* at n. 1.) [FN1] These certificates entitle their holders to periodic principal and interest payments funded by payments by borrowers from "pools" of sub-prime home mortgage loans. (*Id.* at ¶ 12; *see also* Prospectus Supp. (2002-24) at S-10.) The complaint alleges that the Series 2002-22 and 2002-24 certificates were collateralized by pools of 3,318 mortgage loans (aggregate principal balance: $569,444,524) and 1,794 mortgage loans (aggregate principal balance: $393,080,111), respectively. (Compl. ¶ 12 n. 2.) Credit Suisse First Boston Mortgage Corp. ("CSFB Mortgage") purchased the underlying mortgage loans from sellers including defendants DLJ Mortgage Capital, Inc. ("DLJ"), an affiliate of CSFB Mortgage. (Prospectus Supp. (2002-24) at S-21.) DLJ purchased the loans it sold to CSFB Mortgage from "various mortgage loan originators and purchasers" including, with respect to the 2002-24 transaction, defendant Bank of America, N.A. ("BOA"). (*Id.*) CSFB Mortgage (as the "depositor") conveyed the mortgages to trusts created specifically for these transactions, in return for which CSFB Mortgage received certificates evidencing various interests in the trusts. (*See* PSA (2002-24) §§ 2.01, 2.06.) CSFB Mortgage sold the certificates to its affiliate Credit Suisse First Boston Corp. (as underwriter), who then resold them to initial investors. (Prospectus Supp. (2002-24) at S-94.) The certificates are divided into various classes, each with a distinct position in the hierarchy of payment. (*Id.* at S-10-11.) Defendants contend-and Sterling does not dispute-that Sterling purchased certificates on the secondary market in classes subordinated to virtually all other certificates in order of payment. [FN2]

FN1. The terms governing the two "Certificate Series" at issue in this case-2002-22 (purchased by Sterling on December 29, 2002) and 2002-24 (purchased on May 27, 2003)-are substantially similar. For ease of reference we will follow the parties' lead and refer to documents concerning Series 2002-24 except as otherwise noted. The principal documents are: (1) the Prospectus Supplement, dated August 28, 2002, attached as Ex. B to Sterling's Complaint ("Prospectus Supp. (2002-24)"); and (2) the Pooling and Servicing Agreement, dated August 21, 2002, attached as Ex. 1 to the defendants' memorandum of law in support of their motion to dismiss ("PSA (2002-24)"). Sterling attached the PSA for the 2002-22 transaction to its complaint, but not the PSA for the 2002-24 transaction. That appears to have been an oversight. (*See* Compl. ¶¶ 15, 17 (referring to that document as though it had been attached).) For purposes of defendants' motion we will treat the PSAs as part of

Sterling's complaint. Fed.R.Civ.P. 10(c); *see also Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 466 (7th Cir.2007).

FN2. Those classes are identified as Security 2002-22 DB1 and Security 2002-24 IB2. (Compl.¶ 11.)

Many mortgage-backed securities transactions have features (called "credit support" or "credit enhancement") designed "to give investors greater assurance they will receive payments on their [mortgage-backed securities]." SEC Staff Report, Enhancing Disclosure in the Mortgage-Backed Securities Markets, at Part II.C.4 (Jan.2003), *available at* http://www.sec.gov/news/studies/mortgagebacked.htm#secii. These particular transactions were "over-collateralized," meaning that the mortgage pools were expected to generate more cash flow than the amounts needed to make payments on the certificates. (Defs.' Mem. at 6; Compl. ¶¶ 21-22.) Also, certain of the mortgage loans in the pool are covered by a mortgage guaranty insurance policy covering losses up to a maximum amount. (Compl. ¶¶ 15, 20-22; *see also* Prospectus Supp. (2002-24) at S-11, S-23-24.) Sterling alleges that the defendants failed to remedy mortgage defaults and failed to provide information to certificateholders and ratings agencies that would have revealed the mortgage pools' true condition. Because of the defendants' actions the securities are no longer over-collateralized (Pl.'s Resp. at 2 n. 3) and ratings agencies have substantially downgraded the certificates' investment ratings. (Compl. ¶¶ 21-22; *see also id.* at ¶ 15 n. 4; Prospectus Supp. (2002-24) at S-95 ("The ratings on mortgage pass-through certificates address the likelihood of the receipt by certificateholders of all distributions on the underlying mortgage loans to which such certificateholders are entitled.").) The first six counts of Sterling's seven-count complaint allege that the defendants breached their obligations under the certificates' governing documents, the PSAs. Count VII alleges that BNYM, as trustee and "trust administrator," breached its fiduciary duties to certificateholders (including Sterling).

1. Count I Alleging Breach of Contract Against BOA & DLJ

***2** DLJ and BOA, as mortgage sellers, made certain representations and warranties to CSFB Mortgage and BNYM concerning the underlying mortgage loans. (*See* PSA (2002-24) § 2.03 & Schedules IIIA (DLJ) & IIID (BOA).) Paragraph 26 of Sterling's complaint refers generally to "Schedules IIA, IIF, IIIA, and IIID," which contain nearly one hundred separate representations and warranties. In their opening brief defendants argue that this is insufficient to give them notice of the alleged breach. (Defs.' Mem. at 13-14.) Sterling responds that it "clearly alleges" breach of paragraph (xii) in schedules IIIA (DLJ) and IIID (BOA). (Pl.'s Resp. at 7.) Paragraph (xii)-in which DLJ and BOA represent that they are the sole owners of the mortgage loans-is not mentioned anywhere in the complaint, either directly or indirectly. But elsewhere in the complaint Sterling refers to paragraphs (iii) (representing that there are no material loan defaults) and (xi) ("[n]o fraud, error, omission, misrepresentation, negligence or similar occurrence with respect a Mortgage Loan has taken place on the part of Seller or the Mortgagor ....). (Compl.¶ 17.) We infer that Sterling alleges that DLJ and BOA breached these particular representations and warranties. Section 2.03 of the PSAs requires the sellers to cure any breach of a representation or warranty that "materially and adversely affects the interests of the Certificateholders in any Mortgage Loan" within 90 days of discovering (or receiving written notice of) such breach. (PSA (2002-24) § 2.03(c).) If the seller fails to cure the breach then it must-with an exception not applicable to the loans at issue here-"repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee." (*Id.*) Sterling alleges that DLJ and BOA have failed to cure or repurchase defaulted loans. (Compl. ¶ 28; Pl.'s Resp. at 13 n. 8.)

2. Counts II, III, and IV Alleging Breach of Contract Against Select Portfolio Servicing, Inc. ("SPS").

Under the PSAs defendant SPS (as "Servicer") collects payments and performs other administrative activities with respect to the loans. (Compl. ¶ 8; *see generally* PSA (2002-24) Article III ("Administration and Servicing of Mortgage Loans").) Sterling alleges that SPS failed to pursue claims for insurance coverage regarding the mortgage loans (*see* PSA (2002-24) § 3.09) and failed to foreclose on delinquent loans (*see id.* at § 3.11). (Compl. ¶¶ 33-34 (Count II).) SPS also failed to provide defendant Bank of New York Melon ("BNYM," as trustee) with "complete and accurate information" concerning the mortgage loans in breach of PSA §§ 2.07(m) and 3.07(a). (*Id.* at ¶¶ 38-39 (Count

III).) Finally, Sterling alleges that SPS failed to "enforce" DLJ's and BOA's obligations to cure or repurchase defaulted loans. (*Id.* at ¶¶ 43-46 (Count IV).)

3. Counts V, VI, and VII Alleging Breach of Contract and Breach of Fiduciary Duty Against BNYM.

*3 BNYM, as the successor in interest to Bank One, National Association (*see* Defs.'s Mem. at 7 n. 8), serves as the trustee and "Trust Administrator" with respect to the transactions. Sterling contends that BNYM breached PSA § 12.05 by failing to provide ratings agencies with information concerning the mortgage loans. (Compl. ¶¶ 50-51 (Count V).) Sterling further alleges that BNYM violated PSA § 4.04 by failing to provide "full and accurate information" to certificateholders regarding claims submitted under the mortgage guaranty insurance policy. (*Id.* at ¶ 55 (Count VI).) Finally, Sterling alleges that BNYM breached its fiduciary duties to certificateholders (including Sterling) by "failing to enforce the terms of the [PSAs]." (*Id.* at ¶ 67 (Count VII).) Specifically, Sterling alleges that BNYM "had a duty to seek data from SPS as to the number of and status of Triad insurance claims, particularly Triad claim denials." (*Id.* at ¶ 62.)

DISCUSSION

A. Standard of Review

The purpose of a 12(b)(6) motion to dismiss is to test the sufficiency of the complaint, not to resolve the case on the merits. 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356, at 354 (3d ed.2004). To survive such a motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). When evaluating a motion to dismiss a complaint, we must accept as true all factual allegations in the complaint. *Iqbal*, 129 S.Ct. at 1949. However, we need not accept as true its legal conclusions; "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555).

B. Dismissal for Noncompliance with the No-Action Clause

Defendants do not dispute that Sterling, as a certificateholder, is a third-party beneficiary of PSAs with the right to enforce those agreements. However, the PSAs impose restrictions on such suits:

> No Certificateholder shall have any right by virtue or by availing itself of any provisions of this Agreement to institute any suit or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Holder previously shall have given to the Trust Administrator a written notice of an Event of Default and of the continuance thereof, as provided herein, and unless the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates shall also have made written request upon the Trust Administrator to institute such action, suit or proceeding in its own name as Trust Administrator hereunder and shall have offered to the Trust Administrator such reasonable indemnity as it may require against the costs, expenses, and liabilities to be incurred therein or thereby, and the Trust Administrator for 60 days after its receipt of such notice, request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding; it being understood and intended, and being expressly covenanted by each Certificateholder with every other Certificateholder and the Trust Administrator, that no one or more Holders of Certificates shall have any right in any manner whatever by virtue or by availing itself or themselves of ay provisions of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of the Certificates, or to obtain priority or preference to any other such Holder or to enforce any right under this Agreement, except in the manner herein provided and for the common benefit of all Certificateholders.

*4 (PSA (2002-24) § 12.07.) So-called "no action" clauses like § 12.07 are a common feature of bond indentures. They "protect against the exercise of poor judgment by a single bondholder or a small group of bondholders, who might otherwise bring a suit against the issuer that most bondholders would consider not to be in their collective economic interest." *Feldbaum v. McCrory Corp.*, Civ. A. Nos. 11866, 11920, 12006, 1992 WL 119095, *6 (Del.Ch. June 2, 2002) (quoting *Commentaries on Indentures*, § 5.7, at

232 (1971)). Courts "strictly construe" such clauses. *Cruden v. Bank of N.Y.*, 957 F.2d 961, 968 (2d Cir.1992) (applying New York law).[FN3] Sterling "generally" alleges that "all conditions precedent have occurred or been performed," *see* Fed.R.Civ.P. 9(c), and argues that this is sufficient to satisfy the no-action clause at the pleading stage. (Pl.'s Resp. at 8.) But Sterling cannot allege something it knows to be untrue (*see* Fed.R.Civ.P. 11(b)), and it admits that it has *not* complied with § 12.07. (*Id.*) Nevertheless, it contends that we should excuse its failure to comply with the no-action clause.

FN3. The PSAs are governed by New York law. (*See* PSA (2002-24) § 12.03.)

Courts construing New York law have not applied no-action clauses to bondholder claims against indenture trustees. *See Cruden*, 957 F.2d at 968 (concluding that it would be "absurd" to ask the trustee to sue itself); *see also Peak Partners, LP v. Republic Bank*, 191 Fed.Appx. 118, 126 n. 11 (3d Cir.2006) (applying *Cruden* in a case involving mortgage-backed securities: "[t]he District Court also held, and we agree, that Peak was not required to comply with the no-action clause with regard to its suit against U.S. Bank because it would have required U.S. Bank, in effect, to sue itself.") (internal quotation marks omitted). Section 12.07 is not by its own terms limited to lawsuits filed against any particular party, but then neither was the no-action clause in *Cruden*. Indeed, the language of the two provisions is remarkably similar and defendants have not attempted to distinguish *Cruden*. We conclude that Sterling is excused from demanding that BNYM sue itself. *See Peak Partners*, 191 Fed.Appx. at 126 n .11. Defendants effectively concede this point, but argue that we should not excuse Sterling from complying with § 12.07's other requirements, including the obligation to obtain the endorsement of "Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates." (Defs.' Reply at 5.) Defendants have not cited any authorities that support parsing the no-action clause's requirements in this fashion. And by implication, at least, the authorities they rely upon have rejected that approach. *See Cruden*, 957 F.2d at 968; *Peak Partners*, 191 Fed.Appx. at 126 n. 11. We conclude that Sterling is excused from complying with the no-action clause with respect to its claims against BNYM.

Sterling argues that we should also excuse compliance with § 12.07 concerning its claims against DLJ, BOA, and SPS. First, we conclude that Sterling's claims against these parties fall within the no-action clause's broad language. *See Feldbaum*, 1992 WL 119095, *7 ("Courts have implicitly concluded that [no action clauses] appl[y] equally to claims against non-issuer defendants as to claims against issuers"); *see also Peak Partners*, 191 Fed.Appx. at 127 (applying a no-action clause to a claim against the servicer, but not to claims against the trustee, in a mortgage-backed securities transaction). It is true, as Sterling points out (Pl.'s Resp. at 9 n. 6), that "Events of Default" are defined solely with respect to SPS's duties under PSAs. (PSA (2002-24) § 8.01.) But given § 12.07's breadth-restricting *"any* suit or proceeding in equity or at law upon or under or with respect to [the PSAs]"-we do not believe that the clause can be read to apply only to claims against SPS (or to claims specifically seeking damages caused by Events of Default). *See Feldbaum*, 1992 WL 119095, *7. Nevertheless, Sterling argues that "BNYM has abdicated its roles as a protector of the interests of Sterling in such a fashion that the no-action clause should not be enforced," (Pl.'s Resp. at 9), citing *Rabinowitz v. Kaiser-Frazer Corp.*, 111 N.Y.S.2d 539 (N.Y.Sup.Ct.1952). The plaintiff in *Rabinowitz* was a bondholder owning less than one-eighth of 1% of the issuer's outstanding bonds. *Id.* at 544. The court concluded that, notwithstanding a no-action clause requiring that 25% of bondholders request that the trustee bring suit, the plaintiff had standing to sue the trustee, the issuer, and the issuer's successor-in-interest. *Id.* at 547. The court reasoned that the plaintiff had sufficiently alleged a conflict of interest that excused compliance with the no-action clause, noting that the trustee had made loans to the issuer that were "enmeshed" with transaction that allegedly caused the bondholders' loss. *Id.* at 546.

***5** Sterling alleges that BNYM has a conflict of interest because it "regularly acts and is appointed as a trustee for CSFB issued securities" and earns "trustee fees and other benefits" in that capacity. (Compl.¶¶ 65-66.) If this is a conflict of interest, then it is inherent in the office of trustee as defined in the PSAs. Courts applying New York law have rejected lawsuits against indenture trustees predicated on similar allegations. *See In re E.F. Hutton Southwest Properties II, Ltd.*, 953 F.2d 963, 972 (5th Cir.1992) ("A mere hypothetical possibility that the indenture trustee might favor the interests of the issuer merely because the

former *is* an indenture trustee does not suffice.") (citing *Elliott Associates v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir.1988)). We are not persuaded that a New York court would apply a less demanding standard where, as here, an investor is seeking to avoid a no-action clause. *Cf. In re E.F. Hutton Southwest Properties II, Ltd.*, 953 F.2d at 972 (construing New York law to require "a clear possibility" of a conflict of interest, "e.g., where the indenture trustee is a general creditor of the obligor, who is in turn in financial straits"); *Rabinowitz*, 111 N.Y.S.2d at 546 (alleging that the trustee was a general creditor of the issuer). Indeed, if we accepted Sterling's argument noaction clauses would rarely (if ever) play a role in bondholder litigation. Nor are we persuaded that the no-action clause should be set aside because BNYM has not responded to Sterling's requests for information regarding claims submitted under the mortgage guaranty insurance policy. (Compl.¶¶ 55, 70.) There is an important difference between asking the trustee to sue itself-an "absurd" requirement that we presume the parties did not intend-and asking it to sue a third party, even when the investor alleges wrongdoing by the trustee. Sterling's recourse in the event that the trustee refuses to pursue a claim is set forth in the PSA itself: if the other prerequisites are satisfied, and the trustee "neglect[s] or refuse[s]" to file a lawsuit for any reason, certificateholders may proceed without the trustee's consent. (PSA (2002-24) § 12.07.) We conclude that Sterling's futility argument does not excuse compliance with the no-action clause as to its claims against DLJ, BOA, and SPS.[FN4] As we have already indicated, Sterling admits that it has not even attempted to comply with § 12.07. Accordingly, we dismiss Counts I, II, III, and IV of Sterling's complaint without prejudice.

FN4. We are aware that the court in *Sterling Fed. Bank, F.S.B. v. Credit Suisse First Boston Corp. ("Sterling I")*, No. 07-C-2922, 2008 WL 4924926, *11 (N.D.Ill. Nov.14, 2008) reached a different conclusion on similar facts. We respectfully disagree with that decision as inconsistent with the purpose of noaction clauses to protect bondholders from footing the bill for lawsuits not in their collective economic interest. *See Feldbaum*, 1992 WL 119095, *6.

C. Whether Sterling's Claims Against BNYM are Derivative

Defendants contend that Sterling cannot maintain a direct action because the complaint alleges an injury-diminished "credit support" stemming from mismanagement of loans in the mortgage pools-affecting the trusts as a whole. *See Dallas Cowboys Football Club, Ltd. v. National Football League Trust*, No. 95 CIV. 9426(SAS), 1996 WL 601705, *2-4 (S.D.N.Y. Oct.18, 1996) (dismissing direct claims filed by a single trust beneficiary against a trustee for breach of duties owed to all trust beneficiaries). And because the claim is derivative Sterling's complaint should be dismissed for failing to satisfy Rule 23.1's pleading requirements. *See* Fed.R.Civ.P. 23.1 (requiring the plaintiff in a derivative action to "state with particularity" its "reasons for not obtaining ... or not making the effort" to "obtain the desired action from the directors or comparable authority"). The gist of Sterling's response is that it has been harmed in ways that are distinct from other certificateholders. *See, e.g., Dallas Cowboys*, 1996 WL 601705, *4 (concluding that the plaintiff could bring a direct claim for injuries caused by the defendant's actions directed specifically to the plaintiff). It alludes-without any specific citations-to banking regulations making it onerous for federally chartered banks like Sterling to carry below investment-grade securities. (*Id.*) [FN5]

FN5. Sterling also argues, circularly, that holders of each class of certificates suffer a distinct injury by dint of owning distinct classes of certificates. (Pl.'s Resp. at 10.) This argument is undeveloped and unsupported by any pertinent authorities. *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.1991) ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived.").

***6** Sterling relies heavily on the court's decision in *Sterling I*, which in turn closely followed the analysis in *First Bank Richmond, N.A. v. Credit Suisse First Boston Corp.*, No. 1:07-cv-1262-LJM-TAB, 2008 WL 4410367, *10 (S.D.Ind. Sept.24, 2008). In both cases the defendants argued-as the defendants do here-that the plaintiffs' claims were derivative because they were predicated on injury to the trusts. *See Sterling I*, 2008 WL 4924926, *10; *First Bank Richmond*, 2008 WL 4410367, *10. Without specifically addressing the direct/derivative distinction both courts

analyzed the complaints' allegations under Rule 23.1(b) (3) as though the claims were derivative. Applying New York law, these courts concluded that demand was excused. *See Sterling I*, 2008 WL 4924926, *10; *First Bank Richmond*, 2008 WL 4410367, *10. We likewise conclude that it would be futile for Sterling to demand that BNYM sue itself. *See Velez v. Feinstein*, 87 A.D.2d 309, 317, 451 N.Y.S.2d 110 (N.Y.App.Div.1982) (concluding that the complaint sufficiently alleged demand futility where the trustee was controlled by the party the plaintiff sought to sue derivatively). But Rule 23.1 imposes other obligations at the pleading stage (e.g., the complaint must be verified) and beyond (e.g., a derivative action may be settled only with notice to affected stakeholders and court approval). *See* Fed.R.Civ.P. 23. 1(b)-(c). It is important, then, to properly categorize Sterling's claims even though we have concluded that demand is excused. Sterling's claims are predicated on duties that BNYM owes to all certificateholders. *See Dallas Cowboys*, 1996 WL 601705, *4 ("These allegations assert the breach of a duty owed equally to all beneficiaries, and must be dismissed."); *see also Feldbaum*, 1992 WL 119095, *8 ("Any conduct by the issuer that violates an indenture covenant, implied or otherwise, necessarily harms all bondholders in the same manner, to wit, through an increased risk of default and a corresponding reduction in the market value of the bonds."). Sterling has been injured by virtue of owning interests in the trusts injured by BNYM's alleged breaches. Even assuming that Sterling may recover from BNYM the costs of complying with federal banking regulations, its claim is still predicated on harm to the trusts. We conclude, consistent with the implicit holding of *Sterling I*, that Rule 23.1 applies because Sterling's claims are derivative. Anticipating that Sterling will refile its complaint as a derivative action, we will proceed to discuss BNYM's other challenges to Sterling's claims against it.

D. Whether Sterling has Stated Claims Against BNYM for Breach of Contract & Breach of Fiduciary Duty.

1. Breach of Contract (Counts V & VI)

In Count V of its complaint Sterling alleges that BNYM failed to provide information to ratings agencies required by § 12.05 of the PSAs. Sterling filed a nearly identical claim against the defendants in *Sterling I*, which the court dismissed for failure to state a claim. *Sterling I*, 2008 WL 4924926, *14. In its earlier complaint Sterling recited the relevant provision of the PSA, then requested relief "without any allegation that one (or more) of the five events occurred that may have triggered Bank of New York's duty to perform." *Id.* Sterling's complaint in this case adds the allegation that BNYM has breached § 12.05. (Compl.¶ 51.) Defendants argue that Sterling has not alleged specifically what information it omitted and when, but we think this overstates Sterling's pleading burden. Sterling's allegation is not implausible, and it puts the defendants on notice of its claim. The same analysis applies to Sterling's claim that BNYM breached PSA § 4.04 by failing to provide certificateholders with the "number and principal amount of claims submitted under the Mortgage Guaranty Insurance Policy, as applicable." (PSA (2002-24) at Ex. U.) Defendants raise several substantive objections to Sterling's allegation, (Defs.' Resp. at 22-23), but those arguments that more appropriately raised in a motion for summary judgment. *Cf. Sterling I*, 2008 WL 4924926, *14 (concluding that Sterling had stated a claim for relief on similar facts).

2. Breach of Fiduciary Duty (Count VII)

*7 Defendants maintain that Sterling's fiduciary duty claim is barred by the Section 352 of the N.Y. Gen. Bus. Law (the "Martin Act"). The Martin Act "prohibits various fraudulent and deceitful practices in the distribution, exchange, sale and purchase of securities." *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 190 (2d Cir.2001). There is no private right of action under the Martin Act, and "New York courts have determined that sustaining a cause of action for breach of fiduciary duty in the context of securities fraud 'would effectively permit a private action under the Martin Act, which would be inconsistent with the Attorney-General's exclusive enforcement powers thereunder.' " *Id.* (quoting *Eagle Tenants Corp. v. Fishbein*, 182 A.D.2d 610, 582 N.Y.S.2d 218, 219 (N.Y.App.Div.1992) (internal citation omitted).) Sterling's complaint alleges that it relied on BNYM's misrepresentations and omissions of material fact "in both purchasing the Certificate Tranches and in deciding when to sell or not to sell the Certificate Tranches." (Compl. ¶ 69; *see also id.* at ¶¶ 19-20, 582 N.Y.S.2d 218 (alleging that the defendants did not "make any amendment or correction to the Prospectus Supplement informing potential purchasers" that SPS and BNYM were neglecting their duties under the PSAs)). "[W]here a claim for breach of fiduciary duty

is based upon a 'significant component' of the representations that induced plaintiff to invest, the claim arises from the alleged securities fraud and is preempted by the Martin Act." *See Hecht v. Andover Assoc. Mgmt. Corp.*, No. 006100/09, 2010 WL 1254546, *10 (N.Y.Sup. March 12, 2010) (quoting *Heller v. Golden Capital*, 590 F.Supp.2d 603, 612 (S.D.N.Y.2008).) Judged by that standard Sterling's claim for breach of fiduciary duty is clearly barred. However, Sterling requests leave to amend its complaint to remove the allegations concerning its decision to purchase the securities, stating that it used its complaint in *Sterling I* as a template for this case and neglected to delete those allegations. (Pl.'s Reply in Supp. of its Mot. for Leave to File Supp. Authority at 3-4.) As defendants point out, Sterling's allegations about the Prospectus Supplement are surplusage. (*See* Defs.' Mem. at 5 n. 4.) Its claims are instead based upon the PSAs and certain obligations imposed upon indenture trustees by the common law. Those claims are unrelated to "the distribution, exchange, sale and purchase of securities." *Castellano*, 257 F.3d at 190. Provided that Sterling amends its complaint as discussed above, we conclude that the Martin Act does not bar its claim for breach of fiduciary duty.

Defendants also contend that Sterling's complaint fails to allege the existence of a fiduciary duty owed by BNYM. Indenture trustees are held to a different standard than trustees in other contexts. *See Meckel v. Continental Resources*, 758 F.2d 811, 816 (2d Cir.1985). Prior to an event of default the indenture trustee's duties are defined solely respect to the indenture (or in this case, the PSAs), with two exceptions: (1) the trustee must avoid conflicts of interest; [FN6] and (2) the trustee may be liable for failing to perform basic non-discretionary ministerial tasks with due care. *See Elliott*, 838 F.2d at 71 (2d Cir.1988); *Peak Partners*, 191 Fed.Appx. at 122. After an event of default the trustee's duties are more akin to those imposed on traditional trustees. *Peak Partners*, 191 Fed.Appx. at 122 ("It is only after an 'event of default' occurs, as that term is defined in the Indenture, that an Indenture Trustee's duty to noteholders becomes more like that of a traditional trustee."); *see also* (PSA (2002-24) § 9.01). Sterling does not specifically allege any Event of Default, but it contends that its allegations with respect to SPS "implicate" § 8. 01(b):

> FN6. We have already concluded that Sterling's complaint fails to allege a "clear possibility" of a conflict of interest distinct from the BNYM's status as trustee under the PSAs. (*See supra* Part B.)

> ***8** "Event of Default", wherever used herein, and as to each Servicer or the Master Servicer, means any one of the following events ...:
>
> [...]
>
> (b) any failure by the Master Servicer or the Servicer to observe or perform in any material respect any other of the covenants or agreements on the part of the Master Servicer or the Servicer contained in this Agreement (except as set forth in (c) and (g) below) which failure (i) materially affects the rights of the Certificateholders and (ii) shall continue unremedied for a period of 60 days after the date on which written notice of such failure shall have been given to the Master Servicer or the Servicer by the Trust Administrator or the Depositor, or to the Master Servicer or the Servicer and the Trust Administrator by the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates.

(PSA (2002-24) § 8.01(b).) Sterling has not alleged that SPS's alleged failings remained unremedied for 60 days after it received notice in the manner prescribed by the PSAs. We conclude, then, that Sterling's claim for breach of fiduciary duty cannot be based upon BNYM's post-default duties. *See, e.g., Dresner Co. Profit Sharing Plan v. First Fidelity Bank, N.A., New Jersey*, No. 95 Civ.1924(MBM), 1996 WL 694345, *5 (S.D.N.Y. Dec.4, 1996).

Sterling argues alternatively that Count VII should be construed to allege that BNYM breached its duty to perform ministerial tasks with due care. (Pl.'s Resp. at 20.) Defendants insist that Sterling is simply repackaging its claim for breach of § 4.04 as a tort claim. We conclude that Sterling has alleged distinct claims. Section 4.04 requires BNYM to provide certificateholders with certain information about the mortgage loans. Sterling argues BNYM has an implied duty to perform that ministerial task with due care. That includes the duty, not specifically set forth in the PSAs, "to inquire as to whether the information provided by SPS [about the mortgage loans] is complete." (Pl.'s Resp. at 22.) Construing the complaint liberally, we conclude that Count VII sufficiently

alleges that BNYM breached its duty to perform non-discretionary ministerial tasks with due care.[FN7]

FN7. Whether BNYM's alleged obligation to request information is truly "non-discretionary" is beyond the scope of a motion to dismiss. (*Cf.* Defs.' Reply at n. 11.)

3. Damages

This leaves the question of damages, a necessary element of Sterling's claims for breach of contract and breach of fiduciary duty. *See Robert I. Gluck, M.D., LLC v. Kenneth M. Kamler, M.D., LLC*, 74 A.D.3d 1167, 1167, 904 N.Y.S.2d 151 (N.Y.Supp.2010) (fiduciary duty); *Flomenbaum v. New York University*, 71 A.D.3d 80, 91, 890 N.Y.S.2d 493 (N.Y.Supp.2009) (breach of contract). Defendants contend that Sterling's claims are based on an increased risk that at some point in the future Sterling will not receive payments of principal and interest on the certificates. This is a fair reading of the complaint as currently drafted. Sterling alleges that defendants' actions caused "credit support" to diminish, and that ratings agencies-presumably in response to diminished credit support-revised their assessment of the certificates' default risk. (Compl. ¶¶ 15 n. 4, 21-22.) Sterling then claims that it was "damaged," without alleging that it has failed to receive any payment it is owed as a certificateholder. Rather than meet defendants' argument head-on, Sterling's response suggests alternative ways in which defendants' actions have caused concrete, present injuries. (Pl.'s Resp. at 10-11, 23-24 (citing illiquidity, increased capital reserve requirements, and increased FDIC premiums) .) We believe that defendants' substantive objections to Sterling's arguments stray too far into the merits of Sterling's claims. (*See* Defs.' Reply at 14-15; *see also id.* at n. 12.) For our purposes, it is enough that Sterling's complaint does not mention or even allude to the damages it claims in its response to the defendants' motion to dismiss. *See Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir.1989) ("It is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss."). Counts V, VI, and VII are dismissed without prejudice for failure to allege non-speculative damages. *See, e.g., Ravenswood Center, LLC v. Federal Deposit Ins. Corp.*, No. 10 C 1064, 2010 WL 2681312, *3 (N.D.Ill. July 6, 2010).

CONCLUSION

***9** Defendants' motion to dismiss (27) is granted and Sterling's complaint is dismissed without prejudice. Sterling is given leave to file an amended complaint by September 17, 2010 that cures the deficiencies we have identified, if it can do so. If Sterling chooses not to file an amended complaint by that date, the case will be dismissed with prejudice.

N.D.Ill.,2010.
Sterling Federal Bank, F.S.B. v. DLJ Mortg. Capital, Inc.
Slip Copy, 2010 WL 3324705 (N.D.Ill.)

END OF DOCUMENT

TAB 9

Slip Copy, 31 Misc.3d 1227(A), 2011 WL 1877620 (N.Y.Sup.), 2011 N.Y. Slip Op. 50864(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 2011 WL 1877620 (N.Y.Sup.))

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, Suffolk County, New York.
STEVES & SONS, INC., Plaintiff,
v.
Seth **POTTISH**, Defendant.

No. 39918–10.
May 11, 2011.

Ingerman Smith, L.L.P., Hauppauge, Attorneys for Plaintiff.

Kressel, Rothlein, Walsh & Roth, LLC, Massapequa, Attorneys for Defendant.

ELIZABETH H. EMERSON, J.

***1** Upon the following papers numbered *1–15* read on this motion *for summary judgment in lieu of complaint;* Notice of Motion and supporting papers *1–8;* Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers *9–11;* Replying Affidavits and supporting papers *12–15;* it is,

ORDERED that this motion by the plaintiff for summary judgment in lieu of complaint is granted; and it is further

ORDERED that the plaintiff is awarded damages in the amount of $130,674.63 with interest from October 21, 2009; and it is further

ORDERED that the plaintiff's application for attorney's fees is referred to a hearing, which shall be held on June 30, 2011, at 2:15 p.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

The plaintiff is a Texas corporation whose principal place of business is in San Antonio, Texas. The defendant, Seth Pottish, is a New York resident and the President of Long Island Wholesalers, Nassau–Suffolk, Inc. (P"Long Island Wholesalers"), a New York corporation whose principal place of business is in Bohemia, New York. The plaintiff manufactured doors that were purchased by Long Island Wholesalers. The record reflects that Long Island Wholesalers purchased doors from plaintiff over a period of several years pursuant to a sales credit agreement dated February 4, 2000. When Long Island Wholesalers became increasingly delinquent in its payments to the plaintiff, the plaintiff agreed to continue to supply it with doors only if Pottish personally guaranteed any future orders. The plaintiff and Pottish, as the President of Long Island Wholesalers, entered into a new credit agreement on November 30, 2007, and Pottish executed a personal guarantee in favor of the plaintiff on December 5, 2007.[FN1] The plaintiff continued to supply Long Island Wholesalers with doors until it again became delinquent in its payments. The plaintiff subsequently commenced an action in Texas against Pottish and Long Island Wholesalers and obtained a default judgment against them. The plaintiff moved in this court for summary judgment in lieu of complaint based on the Texas default judgment. By an order dated September 28, 2010, this court granted the motion against Long Island Wholesalers only, finding that Pottish had not been properly served pursuant to CPLR 308(2). The plaintiff again moves for summary judgment in lieu of complaint against Pottish. Pottish opposes the motion on the ground that the courts of this state should not enforce the Texas judgment against him because the Texas court did not obtain personal jurisdiction over him.

FN1. Also on December 5, 2007, the plaintiff and Pottish, as the President of Long Island Wholesalers, entered into an equipment loan agreement.

The full-faith-and-credit doctrine requires recognition of a foreign judgment as proof of the prior out-of-state litigation and gives it res judicata effect (*Ionescu v. Brancoveanu,* 246 A.D.2d 414, 416). The forum state, in this case New York, can review judgments of sister states only to determine whether the out-of-state court possessed personal jurisdiction over the defendant (*Federal Deposit Ins. Co. v. De Cresenzo,* 207 A.D.2d 823, 823–824; *Augusta Lumber & Supply, Inc. v. Herbert H. Sabbeth Corp.,* 101

A.D.2d 846). In doing so, the forum court must look to the jurisdictional statutes of the state in which the judgment was rendered as well as due process considerations (*Id.*). As long as jurisdiction has been obtained, a defendant's default in the rendering state will not nullify the res judicata effect of the judgment, and the full-faith-and-credit doctrine still applies (*Ionescu v. Brancoveanu, supra* at 416).

***2** Personal jurisdiction requires (1) a constitutional basis to assert jurisdiction and (2) adequate notice to the defendant (*Webpro, Inc. v. Petrou,* U.S. Dist Ct, SDNY, Sept. 25, 2002, McKenna, J., 2002 WL 31132889, at *3). Challenges to personal jurisdiction may be waived by either express or implied consent (*Id.*). In the commercial context, parties frequently stipulate in advance, for business or convenience reasons, to submit their controversies for resolution within a particular jurisdiction (*Id.*). It is well-settled that selection-of-forum clauses afford a sound basis for the exercise of personal jurisdiction over foreign defendants (*National Union Fire Ins. Co. of Pittsburgh, Pa. v. Williams,* 223 A.D.2d 395, 398). Here, the defendant consented to personal jurisdiction in Texas by signing a personal guarantee in which he agreed to submit to the jurisdiction of the Texas courts.

Although once disfavored by the courts, it is now the well-settled policy of the courts of this state to enforce contractual provisions for choice of law and selection of a forum for litigation of a contract (*Id.; see also, Brooke Group v. JCH Syndicate,* 87 N.Y.2d 530, 534). Such clauses are prima facie valid, and they are enforced because they provide certainty and predictability in the resolution of disputes (*Id.*). They are not to be set aside absent a strong showing by the resisting party that they are unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or that a trial in the selected forum would be so gravely difficult that the opposing party would, for all practical purposes, be deprived of his day in court (*Di Ruocco v. Flamingo Beach Hotel & Casino, Inc.,* 163 A.D.2d 270, 271–272; *Shalam v. KPMG, LLP,* 13 Misc.3d 1205[A], at *6 [and cases cited therein]), *affd* 43AD3d 752.

The defendant argues that the forum-selection clause in this case should be set aside because the personal guarantee signed by him was procured through coercion or economic duress. However, the defendant does not allege facts sufficient to show that the alleged threat made by the plaintiff, to withhold delivery of future orders unless the defendant guaranteed their payment, precluded the exercise of the defendant's free will (*see, Orix Credit Alliance, Inc. v. Hanover,* 182 A.D.2d 419). A mere threat by one party to a contract to breach it by not delivering required items, indeed financial or business pressure of all kinds, even if exerted in the context of unequal bargaining power, does not constitute economic duress (*Id.*) It must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate (*Id.*). The defendant has made no such showing.

The defendant also argues that the personal guarantee signed by him is void and unenforceable due to an absence of consideration. It is settled law that a guarantee executed in exchange for, and as a condition of, a promise to advance funds to a third party in the future, coupled with an actual advance at a later date, is supported by ample consideration (*see, First American Bank of New York v. Builders Funding Corp.,* 200 A.D.2d 946, 948). The defendant does not allege, nor is there any evidence in the record, that the plaintiff did not extend the promised credit to Long Island Wholesalers. Rather, the record reflects that the plaintiff continued to extend credit to Long Island Wholesalers and to supply it with doors.

***3** In view of the foregoing, the defendant has failed to establish that the forum-selection clause is invalid. Additionally, the defendant has failed to establish that enforcement of the forum-selection clause would be unreasonable, unjust, or contrary to public policy. The court finds that the defendant's conduct and connection with the State of Texas were such that the defendant should have reasonably anticipated that he would have to defend himself in a court of that state (*see, JDC Finance Co. I v. Patton,* 284 A.D.2d 164 [Texas default judgment against a guarantor entitled to full faith and credit where guarantor's only connection with Texas was that he mailed payments there; guaranties were related to a mortgage securing property in New Jersey; the documents were executed in New Jersey; guarantor never went to Texas and carried on no business in Texas]). Accordingly, the court rejects the defendant's contention that the forum-selection clause should be disregarded.

The defendant was served with process in the Texas action pursuant to Texas Civil Practice & Remedies Code § 17.044(b), which designates the Texas Secretary of State as an agent for service of process on nonresidents like the defendant who engage in business in Texas, who do not maintain a regular place of business in Texas or a designated agent for service of process, and whose lawsuit arises out of the nonresident defendant's business in Texas. The record reveals that the plaintiff served the Texas Secretary of State on September 18, 2009. The Secretary of State forwarded the process by certified mail, return receipt requested, to the defendant's home address on September 23, 2009. The return receipt bearing the defendant's signature was received by the Secretary of State on September 28, 2009. The court finds that, under these circumstances, the defendant received adequate notice of the Texas lawsuit and that the Texas court obtained personal jurisdiction over him.

Since this court's review of the Texas judgment is limited to ascertaining whether the Texas court possessed personal jurisdiction over the defendant (*see, Federal Deposit Ins. Co. v. De Cresenzo*, 207 A.D.2d 823, 823–824; *Augusta Lumber & Supply, Inc. v. Herbert H. Sabbeth Corp.*, 101 A.D.2d 846), it is not necessary to reach the defendant's remaining contentions. Accordingly, the motion is granted.

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