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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

# No. 16-0225

## IN THE SUPREME COURT OF TEXAS

## AUSTIN, TEXAS

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**J. M. ARPAD LAMELL**,

*" Petitioner "*

v.

**ONE WEST BANK, N.A.,** a foreign corporation,
*(Formerly known as OneWest Bank, F.S.B)*

*" Respondent "*

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# PETITION FOR REVIEW

Appeal from
Cause No. 14-14-00175-CV
Fourteenth Court of Appeals
Houston, Texas

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J M ARPAD LAMELL, *pro se*

ORAL ARGUMENT REQUESTED

# IDENTITY OF PARTIES AND COUNSEL

**Petitioner:** **J M ARPAD LAMELL**, *pro se*

[redacted]

**Respondent:** **ONE WEST BANK, N.A.**
*a foreign corporation*
*(formerly known as OneWest Bank, F.S.B.)*
c/o Brett Schouest, Texas Bar No. 17807700
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San Antonio, Texas 78205, (210) 554-5500

**Petitioner's Representative:** Petitioner **J. M. Arpad Lamell,** *pro se*

In this Court, Respondent is represented by the following attorneys:

**Brett Schouest**, lead attorney
Bschouest@dykema.com
Melanie L. Fry, Texas Bar No. 24069741
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In the court of appeals, Respondent was represented by the following attorneys:

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Christine A. Nowak, Texas Bar No. 24050500
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**Brett Schouest**
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(210) 554-5500

In the trial court, Respondent was represented by the following attorneys:

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Christine A. Nowak, Texas Bar No. 24050500
DYKEMA GOSSETT PLLC
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(214) 462-6400

**Trial Judge:** **THE HONORABLE R. K. SANDILL**
Judge Presiding, 127th District Court
Harris County Civil Courthouse
201 Caroline, 10th Floor
Houston, TX 77002
(713) 368-6161

**Court of Appeals Justices:**

*Chief Justice:* Kem Thompson Frost

*Panel:* Kem Thompson Frost
William J. Boyce
Sharon McAlly

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## APPENDIX

# KEY TO RECORD REFERENCES

Petitioner's *Petition for Review* is being submitted bound together with full copies of selected documents referred to as a single Adobe PDF file. Citations to the record within the *Petition* are made either by a local hyperlinked record reference to an attached APPENDIX item in the form **(Tab-#:*p.#* - #)**[1] OR by a direct record reference in the form **[KEY:*p.#* - #]** pointing externally to the digital file of the actual Record Volume stored in the Court's database.

References to Petitioner's Appellate Briefs and Motions adhere to the following shorthand notations: *Appellant's Brief* "(**AB**:p.##-##)," *Appellant's Supplemental Brief* "(**ASB**:p.##-##)," *Appellant's Reply Brief* "(**ARB**:p.##-##)," *Appellant's Second Supplemental Brief* "(**ASSB**:p.##-##)."

***External Record References***

*KEY* = " *title as it appears on 1st page of volume as filed*"
*date filed with Court of Appeals mm/dd/yyyy*
*FILENAME with embedded date as submitted to COA – Page Range*

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Clerk's Record References

**CLK** = "CLERKS RECORD – VOLUME I"
filed with Court of Appeals on 6/1/2012
CLK REC (01 OF 01) FLD 053112.pdf – pgs 001– 212

**CR** = "ORIGINAL CLERKS RECORD – VOLUME I"
filed with Court of Appeals on 4/30/2014
CR (01 OF 01) FLD 043014.pdf – pgs 001– 755

**CR-SUP** = "1ST SUPPLEMENTAL CLERKS RECORD"
filed with Court of Appeals on 6/30/2014
CR SUP (01 OF 01) FLD 063014.pdf – pgs 01– 78

[1] ***p#*** in local (Appendix Tab) references refers to the actual page number showing on the original document, NOT the PDF page number of the digital file. Page number references in bracketed "**[.....]**" external references are to the PDF page number.

**CR-SUPP** = "3RD SUPPLEMENTAL CLERKS RECORD"
filed with Court of Appeals on 9/22/2014
CR SUPP (01 OF 01) FLD 092214.pdf pgs 01– 59

**CR-SECOND-SUP**
**=** "2ND SUPPLEMENTAL CLERKS RECORD"
filed with Court of Appeals on 9/8/2014
CR SECOND SUP (01 OF 01) FLD 090814.pdf pgs 01 – 50

**CR-FOURTH-SUP**
= "4th SUPPLEMENTAL CLERKS RECORD"
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**SUP-CLK** = "1ST SUPPLEMENTAL CLERKS RECORD"
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SUP CLK REC (01 OF 01) FLD 062413.pdf – pgs. 1–7

Reporter's Record References

**RPT1** = "REPORTER'S RECORD – TEMPORARY INJUNCTION HEARING – March 9"
filed with the Court of Appeals 6/4/2012
RPT REC (01 OF 01) FLD 060412.pdf – March 9 TI Hrng transcript

**RPT1a** = "REPORTER'S RECORD – MASTER INDEX"
filed with Court of Appeals 5/8/2012
RPT REC (01 OF 07) FLD 050812.pdf – Master Index

**RPT2** = "REPORTER'S RECORD – TEMPORARY INJUNCTION HEARING – April 3"
filed with the Court of Appeals 5/8/2012
RPT REC (02 OF 07) FLD 050812.pdf – April 3 hearing transcript

**RPT3** = "REPORTER'S RECORD – EXHIBIT P1 PSA pt 1"
filed with the Court of Appeals 5/8/2012
RPT REC (03 OF 07) FLD 050812.pdf – PSA Pt 1
pgs. 1WB00242-1WB00366

**AMND-RPT4**
= "REPORTER'S RECORD – EXHIBIT P1 PSA pt 2"
filed with the Court of Appeals 7/6/2012
AMENDED RPT REC (04 OF 07) FLD 070612.pdf – PSA Pt 2
pgs. 1WB00367-1WB00601

**RPT5** = "REPORTER'S RECORD – EXHIBITS P2 – P13"
filed with the Court of Appeals 5/8/2012
RPT REC (05 OF 07) FLD 050812.pdf – Plaintiff's Exhibits P2-P13

**RPT6** = "REPORTER'S RECORD – EXHIBITS A1 – A12"
filed with the Court of Appeals 5/8/2012
RPT REC (06 OF 07) FLD 050812.pdf – Defendant's Exhibits A1-A12

**RPT7** = "REPORTER'S RECORD – EXHIBIT A13"
filed with the Court of Appeals 5/8/2012
RPT REC (07 OF 07) FLD 050812.pdf– Defendant's Exhibit A13

**RR** = "REPORTER'S RECORD – Jan 31, 2014 Hearing Transcript
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# INDEX OF AUTHORITIES

## *Cases*

## *Statutes*



## *Other Authorities - Consent Decrees and Settlements* **(Tab-3)**

## *Rules*



## *Treatises*

# STATEMENT OF THE CASE

*Nature of the Case:*

This is an appeal of that portion of the *Judgment* and *Opinion* of the 14th Court of Appeals (No. 14-14-00174-CV) affirming the trial court's order authorizing release of bond to Respondent. Petitioner also appeals the court's determination that the *Deed of Trust* is not void together with the effective overruling of his un-rebutted verified denial of the genuineness of the endorsements on his *Note* by virtue of that determination. In no way, however, does this appeal seek to overturn the court's reversal of the trial court's grant of summary judgment against Petitioner or any of its other rulings in his favor.

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|---|---|
| *Trial Court Judge:* | **The Honorable R. K. Sandill** |
| *Trial Court:* | 127th District Court of Harris County, Texas |
| *Trial Court Disposition:* | Summary Judgment Granted, Order Releasing Bond Granted |
| *Parties in Court of Appeals:* | Petitioner J M ARPAD LAMELL was Appellant. Respondent ONEWEST BANK, N.A. (*formerly known as OneWest Bank, F.S.B.*) was Appellee. |
| *Court of Appeals*: | Fourteenth Court of Appeals in Houston |
| *Names of Justices:* | Chief Justice Kem Thompson Frost and Justices William J. Boyce and Sharon McAlly |
| *Citation:* | *Lamell v. OneWest Bank ,* FSB, 485 S.W.3d 53 (2015) |
| *Court of Appeals' Disposition:* | Reversed as to trial court grant of summary judgment and affirmed as to remainder of trial court judgment |

# STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under Texas Government Code §22.001(a)(2) because the decision (**Tab-4**) of the court of appeals in this cause conflicts with prior decisions of the Supreme Court and other Texas Courts of Appeals regarding questions of law relevant to this case. As evidenced by the cases cited herein, the decision of the court of appeals conflicts with, as detailed in **Tab-1** attached hereto, 6 decisions of the Supreme Court, 5 decisions of the 14th Court, 6 cases citing a key 14th Court case (*Muniz*), and 11 decisions of other Texas Courts of Appeals (Petitioner has identified conflicts with 28 cases).

The Supreme Court has jurisdiction of this case under Texas Government Code §22.001(a)(3) because this is a matter involving the construction or validity of rules and statutes necessary to a determination of the case including TEX.R.CIV.P. 301, TEX.CIV.PRAC.&REM.CODE §52.006, TEX.R.APP.P. 24.1(a)(1), TEX.R.APP.P. 24.1(d), TEX.R.APP.P. 24.1(c), TEX. BUS. & COMM. CODE §1.206, TEX. BUS. & COMM. CODE §3.308(a) and TEX.R.CIV.P. 93(8).

The Supreme Court has jurisdiction of this case under Texas Government Code §22.001(a)(6) because the error committed by the court of appeals in this matter is of such importance to the jurisprudence of the State of Texas that it requires correction by this Court.

# ISSUES PRESENTED

**Review Point 1:**

The court erred in affirming the trial court's *Bond Release*.

**Review Point 2:**

The court erred in holding that Petitioner's *Deed of Trust* is not void.

**Review Point 3:**

Implicit in the *Opinion* is a holding that Petitioner's *Note* is also not void. However, Petitioner pled a *Verified Denial* of the genuineness of the *Note*, un-rebutted by Respondent, which the court failed to address. Holding that Petitioner's *Note* is not void while at the same time affirming Respondent's right to foreclose amounts to dismissing, without explanation, Petitioner's *Verified Denial.* This is an error.

**Review Point 4**:

The court's embedded rejection of Petitioner's *Verified Denial* introduces a question of law appropriate for the Court's review.

# PETITION FOR REVIEW

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Comes now Petitioner J M Arpad Lamell, filing this his *Petition For Review* of the *Judgment* as reflected in the *Opinion* issued by the Fourteenth Court of Appeals November 17, 2015 under cause number 14-14-00175-CV and styled *J. M. Arpad Lamell v. One West Bank, FSB,* a Foreign Corporation (presently known as One West Bank N.A.). As grounds therefore, Petitioner would show as follows:

## STATEMENT OF FACTS

The Factual Background recited in the court's *Opinion* is essentially correct with slight supplementation. Petitioner appreciates the court's holdings in his favor but maintains that the court's affirmance of the trial court's release of bond, its holding that the deed of trust is not void and certain other dicta in its *Opinion*, are erroneous.

Petitioner requests that the Court consider the following additional information: (TEX.R.APP.P. 53.2(g))

1. Respondent made no counterclaims or claims for affirmative relief in *Defendant's Original Answer* [CLK:119-20], its sole defensive pleading.

2. On 2/18/2013, "*Plaintiff's Supplement to Plaintiff's Supplemental Petition,*" [CR:534-9] challenged by verified denial ("*Verified Denial"*) the genuineness of endorsements on Petitioner's *Note*.

3. Respondent has never rebutted Petitioner's *Verified Denial.*

4. The trial court's January 31, 2014 "*Modified Order Granting Summary Judgment and Final Judgment"* (**Tab-5**) was a take-nothing order. In "dispos[ing] of all parties and all claims," it made no award of monetary or non-monetary relief to Respondent. (ARB:6¶20).

5. Petitioner never challenged the trial court's original 5/16/2012 order setting bond (**Tab-7**).

6. On 2/20/2015, Respondent unequivocally admitted to the court: "Then, as now, OneWest did not have a claim which entitled it to an award of damages." (**Tab-9**:p.8¶2)

7. The "*Assignment of Mortgage*" [CR:64-6] was executed on 6/29/2010, 3 years AFTER closing of the CSMC Trust.

## SUMMARY OF THE ARGUMENT

Bond relief is essential to the appeal process and the treatment of bonds is an important issue state-wide. The court's decision eviscerates the essential distinction between a bond as security and treating it as liquidated, agreed-upon damages requiring no other proof for release. It puts the court in direct conflict with decisions of the Supreme Court and many Texas Courts of Appeals.

Petitioner has argued throughout that the *Note* is void and that, accordingly, the *ASSIGNMENT* of the *Deed Of Trust* (*Assignment of Mortgage – "Assignment"* hereinafter) is a nullity[2] and therefore also void. The court, however, has not addressed these. In particular, the court erred in holding, on the one hand, that the *Deed of Trust* is NOT void when Petitioner never made such a claim, while on the other, neglecting to rule on the claim he DID make that the *Assignment* is void. Because the *Assignment* is void, the *Deed of Trust* never vested in Respondent. The holding that Respondent has the right to foreclose is unfounded and erroneous.

Without explanation, the court failed to address Petitioner's *Verified Denial* while nonetheless implicitly dismissing it by virtue of its respectively explicit and implicit holdings that the *Deed of Trust* and the *Note* are not void and that Respondent has the right to foreclose. This exposes a question of law Petitioner hopes the Court will consider.

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[2] *Van Burkleo v. Southwestern*, 39 S.W. 1085, 1087 (Tex.Civ.App. 1896)

# STANDARD OF REVIEW

## Review Points 1, 2, 3

**Abuse of Discretion**: The Court abuses its discretion when it makes an error of law or misapplies law to the facts. *E.g.,Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772,790 (5th Cir. 1999) . See also: *Walker v.Packer*, 827 S.W.2d 833, 840 (Tex. 1992) orig.proceeding) (failure to analyze or apply law correctly is abuse of discretion).

## Review Point 4

**De Novo**: Conclusions of law are reviewed de novo. "[H]owever, the reviewing court may review the trial court's legal conclusions drawn from the facts to determine their correctness." *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). Since this Review Point involves the construction or validity of a statute, consideration by the Supreme Court is appropriate.

# ARGUMENT

**Review Point 1:** The court erred in affirming the trial court's *Bond Release*.

To support bond release, the rules require: 1) pleadings supporting damages, 2) evidence supporting damages, and 3) an award of damages. Each must be present to release monies from deposited bond amounts.

The imposition of a bond in whatever amount initially set serves ONLY as security for payment of damages or losses occasioned by the appeal, which losses are inherently unknowable at the time bond is set due to their speculative nature. The bond (or "cash-deposit-in-lieu-of-bond") is NOT a guarantee of payment nor does it constitute an agreement as to liquidated damages in any amount.

The Rules and Authorities provide as follows:

- "When a judgment is for money, the amount of the security must equal the sum of: (1) the amount of compensatory damages awarded in the judgment; (2) interest for the estimated duration of the appeal; and (3) costs awarded in the judgment." *GM Houser, Inc. v. Rodgers*, 204 S.W.3d 836, 840 (Tex. App.—Dallas 2006, no pet.) (citing TEX.CIV.PRAC.&REM.CODE §52.006**;** TEX.R.APP.P. 24.2(a)(1)).

- [Petitioner's] cash deposit, however, is not in payment of the judgment but is only security for the payment of such. *Mea v. Mea*, 464 S.W.2d 201, 208 (Tex. App.—Tyler 1975, no writ) (citing *Bayoud v. Nassour*, 408 S.W.2d 344 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.)); TEX.R.APP.P. 24.1(d). (*Reply Brief*, Exhibit-Q:p.9¶9.)

- *Hughes v. Habitat Apartments*, 828 SW 2d 794, 795 - Tex: Court of Appeals (5th Dist. 1992) A supersedeas bond is not intended to provide security for damages that have not been finally determined. *Cf. Culbertson v. Brodsky*, 775 S.W.2d 451, 454 (Tex. App.— Fort Worth 1989, writ dism'd

w.o.j.), op. on merits, 788 S.W.2d 156 (Tex.App.— Fort Worth 1990, writ denied) (TEX.R.APP.P. 47 is not intended to provide security for speculative damages).

**1)** Respondent's Admission alone justifies reversal.

Respondent's admission was deliberate, clear, and unequivocal :

"Then, as now, [Respondent] did not have a claim which entitled it to an award of damages." (*Appellee's Response to Appellant's Motion to Reduce Supersedeas Security* – 2/20/2015 – p.8,¶2.)

By itself, it fully disposes of and is contrary to the court's affirmance of bond release. It renders the other necessary conditions for bond release moot.

Moreover, it satisfies 5 essential conditions[3] of a judicial admission and should have been taken as such by the court.[4]

While it might otherwise be hearsay, Respondent's statement can be taken as a judicial admission because it was made against interest in reference to a material matter. (See *Hartford Accident and Indemnity Co. v. McCardell*, 369 SW 2d 331, 337 (Tex. 1963). [5] See also *Cook v. Hamer*, 309 SW 2d 54, 57 (Tex. 1958). Judicial

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[3] "(1) the declaration relied upon must have been made in the course of a judicial proceeding; (2) the declaration was contrary to an essential fact embraced in the theory of recovery or defense asserted by the party; (3) the statement was deliberate, clear, and unequivocal; (4) giving conclusive effect to the declaration would not run contrary to public policy; and (5) the declaration related to a fact upon which a judgment for the opposing party was based. *U.S. Fidelity & Guaranty Co. v. Carr*, 242 S.W. 2d 229 (Tex.Civ.App.—San Antonio, 1951); see also *Peck v. Peck*, 172 S.W.3d 31 (Tex, 2005); *Lee v. Lee*, 43 S.W.3d 636, 641-2 (Tex.App, —Fort Worth, 2001)."

[4] See also Judicial Admissions & Judicial Estoppel , The 7th Annual Advanced Evidence and Discovery Course, Lynne Liberato, November 11, 1994

[5] Generally, "evidence of a statement made out of court when such evidence is offered for the purpose of proving the truth of such previous statement is inadmissible as hearsay." McCormick and Ray, Texas Law of Evidence, Vol. 1, §781, and cases there cited.

admissions to an appellate court are binding. *Holy Cross Church of Christ v. Wolf*, 44 S.W.3d 562, 569 (Tex. 2001) "The vital feature of a judicial admission is its conclusiveness on the party making it. It not only relieves his adversary from making proof of the fact admitted but also bars the party himself from disputing it." *Gevinson v. Manhattan Construction Co*., 449 S.W.2d 458, 466 (Tex. 1969).

Considering its unequivocal nature, that it was made against Respondent's own interest, and that it was made in a motion submitted as part of a judicial proceeding in response to an essential element of Petitioner's prior briefs and argument, Respondent's admission can be taken as a judicial admission, just as binding as if it had been made in a brief or pleading.[6] On its strength alone, the court's affirmation of the trial court's *Bond Release* should be reversed.

**2)** The Conditions for bond release have not been satisfied.

*Appellant's Brief* (AB:p.67-70) and *Appellant's Reply Brief* (ARB:p.02-10), show why *Bond Release* was improper.

The elements required for bond release are:

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One of the exceptions to this rule is an admission of a party *against his interest in reference to a material matter*. An admission used in this sense "may be defined as any statement made or act done by one of the parties to any action or on his behalf which amounts to a prior acknowledgment by such party that one of the facts relevant to the issues is not as he now claims." McCormick and Ray, Texas Law of Evidence, Vol. 2, §1121.

[6] "Over the years, this rule has expanded beyond live pleadings to statements made in briefs and other motions." (https://judgebonniesudderth.wordpress.com/2011/08/02/judicial-admissions-through-statements-by-attorneys/ Judicial Admissions Through Statements by Attorneys, Law Blog on the Texas Rules of Evidence, Judge Bonnie Sudderth – August 2, 2011).

### A. *Proof of Damages*

Respondent has provided no evidence of damages or losses to support a money award. The unsworn statements made by its attorneys at the time bond was set are not legally cognizable as evidence.

- the unsworn statements of Counsel cannot be taken as proof of damages [CR-SUPP:38]. *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997).

The amount set for the bond initially was purely a speculative estimate.[7] It did not constitute proof of damages nor a guarantee of payment or agreement as to liquidated damages. Citing the court's own case *Muniz v. Vasquez*, 797 S.W.2d 147, 150 (Tex. App. – Houston [14th Dist.] 1990, no pet.):[8]

- "The supersedeas bond is part of the right of appeal and is only intended to indemnify the judgment creditor from losses caused by delay of appeal. *State v. Watts*, 197 S.W.2d 197 (Tex.Civ.App.--Austin 1946, writ ref'd). The supersedeas bond is not an unconditional agreement to pay a stated sum of money; but imposes only a contingent or conditional liability, and its primary purpose is security. Id, at 199." *Muniz*, p.150 (emphasis added)

- "A court may not summarily ascertain the amount of monetary damages occasioned by delay in appeal. The terms "loss or damage" within the meaning of [TEX.R.APP.P. 364] [predecessor to TEX.R.APP.P. 47], and as used in the original order fixing the amount of the cash deposit, refer to monetary or material losses ascertainable by proof, either by the judgment itself, or, where that is not conclusive, by evidence relating to proof of damages generally." *Los Campeones, Inc. v. Valley Intern. Properties, Inc.*, 591 S.W.2d 312 (Tex.Civ.App.--Corpus Christi 1979, no writ); citing *State*

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[7] In its second bond release motion Respondent represented that the trial court "reasonably estimated that the appeal ... would be determined within eleven months." Respondent noted further that "the pendency of the appeal has overshot the Court's estimation." [CR-SUP:28,fn2]

[8] Other cases involving supersedeas bonds also cite *Muniz*. (*See* **Tab-01**)

*v. Watts*, 197 S.W.2d 197 (Tex.Civ.App.--Austin 1946, writ ref'd)." *Muniz*, p.150

**B. *Claim for Damages***

Even without Respondent's admission, the record shows that, despite ample opportunity, Respondent never pled any claim for release of bond amounts to it in payment of "damages" (AB:p.69).

- A judgment must conform to the pleadings and proof. *Latch v. Gratty, Inc.*, 107 S.W.3d 543, 546 (Tex. 2003) (citing TEX.R.CIV.P. 301); *Bhatia v. Woodlands North Houston Heart*, 396 S.W.3d 658, 664 (Tex. App.—Houston [14th Dist.] 2013 pet. denied); *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 688 (Tex. 1991) (citing TEX.R.CIV.P. 301); *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex.1983))

**C. *Award of Damages***

There has never been an award of money damages to Respondent. The trial court's January 31, 2014 take-nothing *Final Judgment* clearly stated: a) "This is a *final judgment," and b) "This Order disposes of all parties and all claims* and is appealable." (**Tab-5**). It did not mention any money award to Respondent.

There being no claims pled for damages, no evidence [proof] of damages, and no award of money damages, the court erred in affirming *Bond Release*.

**3)** <u>"Invited error" and "estoppel" do not apply</u>.

The idea that Petitioner somehow invited the trial court to authorize a supersedeas bond just so he could later claim error in its original setting is completely

at odds with the actions and filings of Petitioner and Respondent both. Respondent, for its part, had never previously seen fit to raise "invited error" or "estoppel" against Petitioner in trial court or on appeal.

Petitioner NEVER claimed error in the original setting (**Tab-7**) of his bond. The *Bond Release* (**Tab-6**) was an entirely separate event which Petitioner DID appeal because, among other reasons, Respondent had no claim for damages.

The court says Petitioner is "estopped from arguing now that the trial court erred in granting him the very relief requested." (**Tab-4**:p.19) Since Petitioner NEVER claimed the court should NOT have granted the stay and setting of security he requested, the court erred in applying "invited error" and "estoppel" against him to support affirmance of *Bond Release*.

**4)** Conclusion as to Review Point 1.

Although Respondent's admission is, in itself, sufficient to reverse the court's affirmance of *Bond Release*, the essence of Petitioner's Review Point 1 remains that, without support in its pleadings, a showing of damages, or a supporting money judgment, *Bond Release* to Respondent is unfounded.

The effect of the court's affirmance of *Bond Release* was to convert the substantial cash deposit Petitioner had faithfully posted as CONTINGENT security only for damages as yet undetermined and unknowable, into something it was NEVER intended to be – a GUARANTEE of the full amount of cash deposited as

liquidated damages PAID IN ADVANCE – thus representing a windfall payment to Respondent over and above the value of Petitioner's property already pledged as fully adequate collateral.

Not only does it conflict with its own findings in *Muniz* and other 14th court cases (**Tab-1** "*Index of Case Conflicts*"), the court's decision conflicts with decisions of other Texas Courts of Appeals and the Supreme Court in 23 additional cases.

**Review Point 2:** The court erred in holding that Petitioner's *Deed of Trust* is not void.

**1)** <u>The predicate for this holding simply does not exist. It is gratuitous and not responsive to Petitioner's claims</u>**.**

The *Opinion* opens with a false statement to support an erroneous holding:

> "homeowner asserted ... the deed of trust ... [was] void due to securitization issues. We conclude that the deed of trust is not void."

To be sure, the court repeats essentially the same claim 5 more times: once on page 6, twice on page 10, again on page 12, and lastly on page 14.

Each time misses the mark. At no point in the entire proceedings did Petitioner ever make this claim. He claimed ONLY that the "*Assignment of Mortgage*" was void. Specifically: searching through his 7 briefs and submissions to the court, Petitioner found "Deed" 369 times and "Assignment" 596 times. In the 8 volumes of the Clerk's Record, he found "Deed" 213 times and "Assignment" 271 times. Not a single one of these 1449 references suggest that the *Deed of Trust* is void.

Despite mentioning "deed of trust" 37 times and "assignment" some 20 times, the *Opinion* never addresses Petitioner's argument that critical defects in the "*Assignment*" and its execution render it void and ineffective.

In NOT responding to Petitioner's actual claims and, instead, inventing claims he never made only to reject them, the court errs. The court's written opinion must "addr[ess] every issue raised and necessary to final disposition of the appeal". (TEX.R.APP.P. 47.1)

**2)** The court's argument does not defeat Petitioner's claims that the *Note* and the *Assignment of Mortgage* are void.

Petitioner cites and quotes extensively (AB:p.51-64) from the PSA, New York Law,[9] case authority and Black's Law, to show how, operating in coordination, they render the *Note* and the ASSIGNMENT of the *Deed of Trust* void.

Reviewing the PSA, the court dismisses the conflicts brought on by the egregiously untimely transfer of Petitioner's loan as follows:

> "In sum, the text of the [PSA] does not support [Petitioner's] assertion that any loan assigned to the trust after the closing date violates the Pooling and Services Agreement." (**Tab-4**:p.11¶1)

This is not true. Petitioner directed his argument not to "any loan" but, rather, to all the loans that, together with his, were supposedly bundled together AT INCEPTION for deposit into the Trust's ORIGINAL POOL. To effect closing, the documentation

[9] New York Civil Practice, Consolidated Laws of New York, Estates, Powers and Trust, Art. 7, Part 2 §7.24

and executions accompanying each original bundled loan had to be delivered to the Trustee at closing (or within a few months at the latest).

The court's mention of "substitute" loans is inapt. Petitioner's loan was NEVER a substitute loan. Even if it had been, to qualify for entry into the pool 5 years after closing (!), it would have had to have been at least a performing loan which, by then, it had long since ceased to be.

In short, the court's *Opinion* does not address Petitioner's claims that the *Note* and the *ASSIGNMENT* of the *Deed of Trust* is void. His claims of "voidness" arise from the many reasons documented in Petitioner's appeal briefs including:

- years too late "execution" of *Note* and *Assignment of Mortgage* contrary to PSA renders both Void. (AB:p.53). see also, concerning *Assignment*, "six other dimensions of voidness" passage (AB:p.59¶5)
- Chain of Title defects: 1) the parties supposed to appear on the *Note* are not there, 2) the parties that are on the *Note* shouldn't be. Both conditions violate the PSA. (See PSA [RPT3:5]) [10] (AB:p.54-5)
- Tell-tale Bleed-Through of ink on "*Notes*" proves Mischief. (ARB:p.30¶1)
- No *Note* to Deliver: *Nemo Dat Quod Non Habet*. (ARB:p.29¶2)

Responding to Petitioner's claim that "various issues ... create problems with the assignments" the court says Petitioner "does not specifically state how these problems would preclude summary judgment on any particular claim (**Tab-4**:p.9)." This is untrue. Petitioner devotes some 26 pages (AB:p.48-64, ARB:p.23-33) to

[10] Ptl [RPT3:1WB00242-1WB366], Pt2 [AMND-RPT4:1WB00367-1WB00601]

specifically identifying the "issues" and showing how and why they not only preclude summary judgment but establish the *Assignment of Mortgage* and the endorsements on the *Note* as illegitimate and void.

**Review Point 3:** Implicit in the *Opinion* is a holding that Petitioner's *Note* is also not void. However, Petitioner pled a *Verified Denial* of the genuineness of the *Note*, un-rebutted by Respondent, which the court failed to address. Holding that Petitioner's *Note* is not void while at the same time affirming Respondent's right to foreclose amounts to dismissing, without explanation, Petitioner's *Verified Denial*. This is an error.

**Review Point 4:** The court's embedded rejection of Petitioner's *Verified Denial* introduces a question of law appropriate for the Court's review.

**1)** The court erred in failing to consider the import of Petitioner's *Verified Denial.*

Under TEX.R.CIV.P. 93(8), Petitioner pled his *Verified Denial* in *Plaintiff's Supplement to Plaintiff's Supplemental Petition* (CR:534-9). Petitioner carried his *Verified Denial* forward in his *Supplemental Brief* (ASB:p.1(c)) and *Reply Brief* (ARB:p.25-26 see "Fact Issues as to Validity of Endorsements.")

The court, however, seems to have never directly reached or seriously considered Petitioner's *Verified Denial* in its decision. Without discussing it, the court denied the issue indirectly in its determination that "the deed of trust is not void." The unexplained effective denial of this issue was an abuse of discretion.

**2)** Petitioner's *Verified Denial* brings to light an outdated and preposterous presumption that effectively nullifies TEX.R.CIV.P. 93(8).

In the absence of a sworn pleading denying it, the genuineness of an endorsement or assignment of a written instrument is held as "fully proved." (TEX.R.CIV.P. 93(8)). Various Texas cases[11] cite the absence of a verified denial to uphold endorsements otherwise challenged by litigants as not genuine. Notably, Petitioner has NOT been able to find Texas authority showing what happens when a litigant DOES plead a verified denial. Still, cases exist in other states where verified denial has been pled only to be disallowed as insufficient later on by applying the presumption, *not articulated in the rule*, that corporate documents are rarely falsified and must therefore be taken as genuine.[12] Rarely is a litigant able to meet the requirement of showing the "significant amount" of evidence required to overcome

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[11] e.g. *Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150 (Tex. App.—Hous. (14 Dist.), 2014)

[12] (**Tab-8)** "*Memorandum of Decision – In re: Cynthia Carrsow-Franklin*, No. 10-20010, 2015WL364719 (Bankr. D.D.N.Y. Jan.29, 2015)) "Because of the general factual context described in the Official Comment, which recognizes that 'in ordinary experience forged or unauthorized signatures are very uncommon,' *Off. Cmt. 1* to §3.308, courts have nevertheless required a significant amount of evidence to overcome the presumption." See *In re Phillips*, 491 B.R. 255, 273 n. 37 (Bankr. D. Nev. 2013) ("This evidence was inconclusive at best. Against this background, the court is prepared to believe that it is more likely that [the claimant] negligently failed to copy the Note and First Allonge when it filed its [first] Proof of Claim rather than it forged the First Allonge later on. In short, when both are equally likely, the court picks sloth over venality."); see *also Congress v. U.S. Bank. N.A.*, 98 So. 3d 1165, 1169 (Civ. App. Ala. 2012) (referring to requirement of substantial, though not clear and convincing, evidence to rebut the presumption under U.C.C.§§ 3-308(a) and 1-206(a), although directing trial court on remand to apply preponderance-of-the-evidence standard to whether the presumption was overcome). *underline emphasis added*

this presumption. In actual practice, "significant amount" seems to serve as a term of art for "more than you'll ever have."

In his *Verified Denial*, Petitioner faces the same insurmountable "corporate-documents-are-rarely-falsified" presumption that underlies TEX. BUS. & COMM. CODE §3.308(a), TEX. BUS. & COMM. CODE §1.206(a) and TEX.R.CIV.P. 93(8) itself.

Respondent's obstruction of Petitioner's discovery leading up to his *Verified Denial* is detailed under "Essential Discovery Waylaid (AB:p.27-29)." Making it even harder to overcome the presumption required to shift the burden of proof as to genuineness to Respondent, Respondent successfully blocked Petitioner's request for further documents, effectively hamstringing to the point of futility further discovery beyond what Petitioner accomplished in his Corporate Deposition (CR:432-517).

**3)** The "corporate-documents-are-rarely-falsified" presumption is flatly wrong and should be re-considered.

Consider the backdrop of today's banking/mortgage lending practice and the global financial meltdown brought on by "banker-gone-wild" securitization and lending abuses. Against this, an outsized number of over 4,000,000 concluded foreclosures [13] – leaving aside attempted ones like Petitioner's – were rife with false affidavits, "robo-signed" assignments, after-the-fact document "improvement" or

[13] From 2007 to 2011. See article: "How many People Have Lost Their Homes?" http://www.globalresearch.ca/how-many-people-have-lost-their-homes-us-home-foreclosures-are-comparable-to-the-great-depression/53354

perjured notarizations [14] to name a few "problems." These foreclosures represent households[15] totaling over 10,000,000 people reduced to homelessness and destitution by Wall Street desperados – essentially twice as many people as live in Houston, Dallas and San Antonio combined!

For appropriate context, the dereliction of major financial institutions is well-chronicled in recent books by authoritative journalists. ("*Chain of Title*," "*Liar's Poker*," "*House of Cards*," "*Reckless Endangerment*," "*All the Devils Are Here*," links to which are attached for general reference in **Tab-2**)

The many federal consent decrees/orders (**Tab-3**) executed between the offices of Thrift Supervision and Comptroller of the Currency and the nation's major mortgage banks/servicers [14, 16] show document "shenanigans" were no longer "rare" but, if anything, had become the rule.

The widely-reported record-setting bankruptcies of Wall Street high-fliers IndyMac, New Century, WaMu and others and the paying out of billions in civil settlements (*See* items 9,10,11 **Tab-1**) to avoid prosecution and firestop litigation

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**14** See excerpts of federal consent decrees in **Tab-03** judicial notice of which is hereby requested. TEX.R.EVID. 201(b). TEX.R.EVID. 201(d). TEX.R.EVID. 201(f). *Cf. Office of Public Utility Counsel v. PUC*, 878 S.W.2d 598, 600 (Tex. 1994).

**15** 2015 U.S. Census, average household has 2.54 persons

**16** e.g. OneWest Bank, N.A.; U S National Bank, N.A.; OCWEN; JPMorgan Chase; Bank of America; HSBC; Wells Fargo; Citibank; MetLife.

arising out of pervasive financial misdeeds negates any general presumption of corporate good faith.

**4)** Conclusion as to Review Points 3 & 4.

The presumption that, when challenged, signatures on mortgage-related documents must nonetheless be deemed legitimate is completely wrong-headed. Its existence and continued exercise serves no other purpose but to negate the intent and effect of the very rules that bring it into play.

Facing this presumption, Petitioner and others similarly situated are doubly challenged: first, by the presumption itself that banks do no wrong and second, by the attitude that homeowners facing foreclosure are only deadbeats who can do no right.

## CONCLUSION

Affirming *Bond Release* to Respondent was erroneous. Respondent itself judicially admitted it had no claim for damages. This admission was sufficient by itself to reverse affirmance because it rendered moot the other conditions required for bond release.

Even without Respondent's admission, there was no claim, evidence, or award to support *Bond Release* anyway and, accordingly, no basis for affirmance. The court's claims of "invited error" and "estoppel" are unsupported by the facts and do not add more support to its affirmance of *Bond Release*.

The "the-deed-of-trust-is-not-void" holding is similarly unwarranted. The court's unexplained rejection of Petitioner's *Verified Denial* however, exposes the illegitimacy of the standing "corporate-documents-are-rarely-falsified" presumption. Hiding from sight, it effectively nullifies the intent of TEX. BUS. & COMM. CODE §3.308(a), TEX. BUS. & COMM. CODE §1.206(a) and TEX.R.CIV.P. 93(8). This issue appears to be a matter of first impression which this Court is well-positioned to resolve.

The court's decision conflicts with decisions of the Texas Supreme and Appellate Courts that articulate what is required in the administration of bonds. The Court has jurisdiction over challenges to its own prior decisions and rulings. Jurisprudence demands that the Court defend and correct the particular challenges presented in the court's decision.

## PRAYER

Petitioner prays that this Court sustain Petitioner's issues on review, and on review:

1) Reverse and Render that portion of the 14th Court of Appeals' judgment that affirms the trials court's *Bond Release* order.

2) Reverse and Render, or in the alternative Remand for further hearing in the Court of Appeals or the trial court, that portion of the 14th Court of Appeals' judgment which holds that "the deed of trust is not void."

3) Rule that all costs of this proceeding be taxed against Respondent and that Petitioner be granted any and all other relief to which he may show himself justly entitled.

Respectfully submitted,

/s/ J. M. Arpad Lamell

# CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2016, a true and correct copy of the foregoing PETITION FOR REVIEW was sent by e-service, certified mail, return receipt requested, and/or hand delivery to parties of record as shown below.

/s/ J. M. Arpad Lamell
J M Arpad Lamell

Parties:

Via: XX e-service/email ☐ certified mail, RRR ☐ courier, receipted delivery

To: **ONE WEST BANK, N.A.** *a foreign corporation*
*(formerly known as OneWest Bank, F.S.B.)*
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To: **ONE WEST BANK, N.A.** *a foreign corporation*
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To: **ONE WEST BANK, N.A.** *a foreign corporation*
*(formerly known as OneWest Bank, F.S.B.)*
**Ellen Mitchell**, Texas Bar No. 14208875 *(retired)*
DYKEMA COX SMITH
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(210) 554-5500

## CERTIFICATION

Petitioner certifies that he has reviewed the foregoing Petition for Review and concluded that every factual statement in the Petition is supported by competent evidence included in the Appendix or Record.

/s/ J. M. Arpad Lamell
J M Arpad Lamell

## CERTIFICATE OF COMPLIANCE

The number of words in Petitioner's ***Petition for Review***, as calculated by the word count function of Microsoft Word 2007, less items exempt from the word count (per TEX.R.APP.P. 38(i)(l) caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix) is:

**4,483**

/s/ J. M. Arpad Lamell
J M Arpad Lamell

# APPENDIX

**Tab-1** *Index of Case Conflicts*

## *Index of Case Conflicts*

Salient rulings indexed below are paraphrased.

Cases shown in outlined paragraphs, while not referred to directly in the Petition, represent additional conflicts on essentially the same issues.

**Supreme Court of Texas Cases**:

***Banda v. Garcia***, 955 S.W.2d 270, 272 (Tex. 1997) • unsworn attorney statements are not evidence ...

***Latch v. Gratty, Inc***., 107 S.W.3d 543, 546 (Tex. 2003) • judgment must conform to the pleadings and proof

***Mapco, Inc. v. Carter***, 817 S.W.2d 686, 688 (Tex. 1991) • judgment must conform to the pleadings of the parties

***Cunningham v. Parkdale Bank***, 660 S.W.2d 810, 813 (Tex.1983) • judgment must conform to the pleadings of the parties

***Stoner v. Thompson***, 578 S.W.2d 679, 682, 683-84 (Tex.1979) • a party may not be granted relief in the absence of pleadings to support that relief

***United States Gov't v. Marks***, 949 S.W.2d 320, 326 (Tex. 1997) • attorney statements must be sworn

**14th Court of Appeals Cases**:

***Bhatia v. Woodlands North Houston Heart***, 396 S.W.3d 658, 664 (Tex. App.—Houston [14th Dist.] 2013 pet. denied) • judgment must conform to the pleadings and proof

***Burns v. Bishop***, 48 S.W.3d 459, 468 (Tex.App.-Hous. (14 Dist.), 2001) • award must be support by a pleading

***In re Butler***, 987 S.W.2d 221, 225 (Tex. App.-Houston [14th Dist.] 1999, no pet.) • unsworn attorney statements are not evidence

***Daugherty v. Jacobs***, No. 14-04-00682-CV , 187 S.W.3d 607; 2006 Tex. App. LEXIS 483 (Tex. App. — Houston [14th Dist.] 2006, no pet.) • unsworn attorney statements are not evidence

***Muniz v. Vasquez***, 797 S.W.2d 147, 150 (Tex. App. – Houston [14th Dist.] 1990, no pet.) • supersedeas bond is not an unconditional agreement to pay a stated sum of money • supersedeas bond primary purpose is security • court may not summarily ascertain the amount of monetary damages occasioned by delay in appeal • loss or damage ... refer to monetary or material losses ascertainable by proof, either by the judgment itself, or, where that is not conclusive, by evidence relating to proof of damages generally • goal in setting the supersedeas bond is to require an amount which will adequately protect the judgment creditor against any loss or damage occasioned by the appeal • The purpose of a supersedeas bond is to secure the appellee and abate, until judgment becomes final, the remedies he would otherwise have for realizing his judgment • supersedeas bond is intended to indemnify the judgment creditor from losses caused by delay of appeal

**Cases citing *Muniz v. Vasquez*:**

***Whitmire v. Greenridge Place Apartments***, No. 01-09-00291-CV 333 SW3d 255 (1st Dist. 2010) • supersedeas bond is intended to indemnify the judgment creditor from losses caused by delay of appeal

***Fairways Offshore Exploration v. Patterson Services, Inc***. No. 01-11-00079-CV 355 SW 3d 296 - Tex: Court of Appeals, 1st Dist 2011 • supersedeas bond primary purpose is security • supersedeas bond is intended to indemnify the judgment creditor from losses caused by delay of appeal

***In re Bell*** No. 02-12-00390-CV Tex: Court of Appeals, 2nd Dist., 2012 App.-Texarkana 1998, pet. denied) • The purpose of a supersedeas bond is to secure the appellee and abate, until judgment becomes final, the remedies he would otherwise have for realizing his judgment

***Lee v. Aurora Loan Services, LLC*** No. 06-08-00077-CV Tex: Court of Appeals, 6th Dist., 2009 App.-Dallas Feb. 18, 2004, no pet.) • goal in setting the supersedeas bond is to ... adequately protect the judgment creditor against any loss or damage occasioned by the appeal • court may not summarily ascertain the amount of monetary damages occasioned by delay in appeal

***In re Levitas*** No. 13-10-00345-CV Tex: Court of Appeals, 13th Dist., 2010 • goal in setting the supersedeas bond is to require an amount which will adequately protect the judgment creditor against any loss or damage occasioned by the appeal • sureties on the bond or deposit are then subject to liability for all damages and costs that may be awarded against the judgment debtor

***Reagan v. NPOT PARTNERS I, LP***, No. 06-08-00071-CV Tex. Court of Appeals, 6th Dist. 2009 • Supersedeas is intended only to indemnify a landlord or other owner from losses caused by delay of appeal

**Cases in Other Texas Courts of Appeals**:

***GM Houser, Inc. v. Rodgers***, 204 S.W.3d 836, 840 (Tex. App.—Dallas 2006, no pet.) • amount of security must equal sum of damages, interest, and costs awarded in a judgment

***Edlund v. Bounds***, 842 S.W.2d 719, 732 (Tex. App.—Dallas 1992, writ denied) • the purpose of a supersedeas bond is to secure the appellee

***Carter Real Estate & Dev., Inc. v. Builder's Serv. Co***., 718 S.W.2d 828, 830 (Tex. App.—Austin 1986, no writ) • the purpose of a supersedeas bond is to secure the appellee

***Universe Life Ins. Co. v. Giles***, 982 S.W.2d 488, 493 (Tex. App.—Texarkana 1998, pet. denied) • the purpose of a supersedeas bond is to secure the appellee

***Hughes v. Habitat Apartments***, 828 S.W.2d 794, 795 (Tex. App.—Dallas 1992, no writ) • supersedeas bond is not intended to provide security for damages that have not been finally determined ...

***Mea v. Mea***, 464 S.W.2d 201, 208 (Tex. App.— Tyler 1975, no writ) • cash deposit is <u>not</u> in payment of the judgment but is only security for the payment of such

***Bayoud v. Nassour***, 408 S.W.2d 344 (Tex. Civ. App.— Dallas 1966, writ ref'd n.r.e.) • cash deposit is not in payment of the judgment but is only security for the payment of such

***Los Campeones, Inc. v. Valley Intern. Properties, Inc***., 591 S.W.2d 312 (TEX.CIV.APP. — Corpus Christi 1979, no writ) • supersedeas bond ... is only intended to indemnify the judgment creditor from losses caused by delay of appeal

***State v. Watts***, 197 S.W.2d 197 (TEX.CIV.APP.--Austin 1946, writ ref'd) • supersedeas bond ... is only intended to indemnify the judgment creditor from losses caused by delay of appeal

***Culbertson v. Brodsky***, 775 S.W.2d 451, 454 - Tex: Court of Appeals (2nd Dist. 1989) • not the intent of any part of Rule 47 to provide security for speculative damages

***Fullenwider v. American Guar. & Liab. Ins. Co***., 821S.W.2d 658, 662 (Tex. App. — San Antonio 1991, writ denied) • attorney statements must be sworn

**Tab-2** *Bibliography – Suggested Background*

# *Bibliography – Suggested Background*

*note: links to AMAZON.COM kindle format purchase pages are provided for each of the below-listed titles. A Kindle reading app is available for download to any web-enabled digital device at no charge from the AMAZON website.*

***Chain of Title*** – How Three Ordinary Americans Uncovered Wall Street's Great Foreclosure Fraud, David Dayen

digital download in Kindle format available at:

https://www.amazon.com/Chain-Title-Americans-Uncovered-Foreclosure-ebook/dp/B01DV1YERY/ref=sr_1_1_twi_kin_2?ie=UTF8&qid=1466095265&sr=8-1&keywords=chain+of+title+david+dayen

***Liar's Poker*** – Rising Through the Wreckage on Wall Street, Michael Lewis

https://www.amazon.com/Liars-Poker-Through-Wreckage-Paperback-ebook/dp/B003E20ZRY/ref=sr_1_1_twi_kin_2?ie=UTF8&qid=1466095793&sr=8-1&keywords=liar%27s+poker

***House of Cards*** – A Tale of Hubris and Wretched Excess on Wall Street, William D. Cohan

https://www.amazon.com/House-Cards-Hubris-Wretched-Excess-ebook/dp/B001NLL5WC/ref=sr_1_5?s=digital-text&ie=UTF8&qid=1466095911&sr=1-5&keywords=house+of+cards+kindle+book

***Reckless Endangerment*** – How Outsized Ambition, Greed, and Corruption Created the Worst Financial Crisis of Our Time, Gretchen Morgenson and Joshua Rosner

https://www.amazon.com/Reckless-Endangerment-Outsized-Corruption-Armageddon-ebook/dp/B004H1TM1G/ref=sr_1_1?s=digital-text&ie=UTF8&qid=1466096043&sr=1-1&keywords=reckless+endangerment+ebook

***All the Devils Are Here*** – The hidden history of the Financial Crisis, Bethany McLean and Joe Nocera

https://www.amazon.com/All-Devils-Are-Here-Financial-ebook/dp/B005DIAUN6/ref=pd_sim_351_3?ie=UTF8&dpID=51Nmlqn0btL&dpSrc=sims&preST=_OU01_AC_UL320_SR210%2C320_&psc=1&refRID=G13MNS611RC6QAHRMX0T

**Tab-3** *Government Consent Decrees and Settlements*

# *Government Consent Decrees and Settlements*

**1.** Consent Order – In the Matter of: **Bank of America, N.A.** – April 13, 2011
http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47b.pdf

*Excerpt:*

**COMPTROLLER'S FINDINGS**

The Comptroller finds, and the Bank neither admits nor denies, the following:

(1) The Bank is among the largest servicers of residential mortgages in the United States, and services a portfolio of 13,500,000 residential mortgage loans. During the recent housing crisis, a substantially large number of residential mortgage loans serviced by the Bank became delinquent and resulted in foreclosure actions. The Bank's foreclosure inventory grew substantially from January 2009 through September 2010.

(2) In connection with certain foreclosures of loans in its residential mortgage servicing portfolio, the Bank:

(a) filed or caused to be filed in state and federal courts affidavits executed by its employees or employees of third-party service providers making various assertions, such as ownership of the mortgage note and mortgage, the amount of the principal and interest due, and the fees and expenses chargeable to the borrower, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were not based on such personal knowledge or review of the relevant books and records;

(b) filed or caused to be filed in state and federal courts, or in local land records offices, numerous affidavits or other mortgage-related documents that were not properly notarized, including those not signed or affirmed in the presence of a notary;

(c) litigated foreclosure proceedings and initiated non-judicial foreclosure proceedings without always ensuring that either the promissory note or the mortgage document were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time;

(d) failed to devote sufficient financial, staffing and managerial resources to ensure proper administration of its foreclosure processes;

(e) failed to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training; and

(f) failed to sufficiently oversee outside counsel and other third-party providers handling foreclosure-related services.

**(3) By reason of the conduct set forth above, the Bank engaged in unsafe or unsound banking practices.**

. . .

**2.** Consent Order – In the Matter of: **U.S. Bank National Association**
April 13, 2011
http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47j.pdf

*Excerpt:*

**COMPTROLLER'S FINDINGS**

The Comptroller finds, and the Bank neither admits nor denies, the following:

(1) The Bank is among the largest servicers of residential mortgages in the United States and services a portfolio of 1,400,000 residential mortgage loans. During the recent housing crisis, a large number of residential mortgage loans serviced by the Bank became delinquent and resulted in foreclosure actions. The Bank's foreclosure inventory grew substantially from 2008 through 2010.

(2) In connection with certain foreclosures of loans in its residential mortgage servicing portfolio, the Bank:

(a) filed or caused to be filed in state and federal courts affidavits executed by its employees making various assertions, such as the amount of the principal and interest due or the fees and expenses chargeable to the borrower, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were not based on such personal knowledge or review of the relevant books and records;

(b) filed or caused to be filed in state and federal courts, or in local land records offices, numerous affidavits that were not properly notarized, including those not signed or affirmed in the presence of a notary;

(c) failed to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training; and (d) failed to sufficiently oversee outside counsel and other third-party providers handling foreclosure-related services.

**(3) By reason of the conduct set forth above, the Bank engaged in unsafe or unsound banking practices.**

. . .

**3.** Consent Order – In the Matter of: **OneWest Bank, FSB** – April 13, 2011
http://www.occ.gov/static/ots/misc-docs/consent-orders-97665.pdf

*Excerpt:*

**OTS'S FINDINGS**

The OTS finds, and the Association neither admits nor denies, the following:

1. The Association is a servicer of residential mortgages in the United States, and services a portfolio of approximately $141 billion dollars in residential mortgage loans. During the recent housing crisis, a large number of residential mortgage loans serviced by the Association became delinquent and resulted in foreclosure actions.

2. In connection with certain foreclosures of loans in its residential mortgage servicing portfolio, the Association engaged in the following unsafe or unsound practices:

(a) filed or caused to be filed in state and federal courts numerous affidavits executed by its employees or employees of third-party service providers making various assertions, such as ownership of the mortgage note and mortgage, the amount of the principal and interest due, and the fees and expenses chargeable to the borrower, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were not based on such personal knowledge or review of the relevant books and records;

(b) filed or caused to be filed in state and federal courts, or in local land records offices, numerous affidavits or other mortgage-related documents that were not properly notarized, specifically that were not signed or affirmed in the presence of a notary;

(c) litigated foreclosure and bankruptcy proceedings and initiated non-judicial foreclosure proceedings without always ensuring that the promissory note and mortgage document were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time;

(d) failed to devote sufficient financial, staffing and managerial resources to ensure proper administration of its foreclosure processes;

(e) failed to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training; and (f) failed sufficiently to oversee outside counsel and other third-party providers handling foreclosure-related services

. . .

**4.** Consent Order – In the Matter of: **HSBC Bank USA, N.A** – April 13, 2011
http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47d.pdf

*Excerpt:*

**COMPTROLLER'S FINDINGS**

The Comptroller finds, and the Bank neither admits nor denies, the following:

(1) The Bank is among the largest servicers of residential mortgages in the United States, and services a portfolio of approximately 340,000 residential mortgage loans. During the recent housing crisis, a large number of residential mortgage loans serviced by the Bank became delinquent and resulted in foreclosure actions. The Bank's foreclosure inventory grew substantially from 2007 through 2010.

(2) In connection with certain foreclosures of loans in its residential mortgage servicing portfolio, the Bank:

(a) filed or caused to be filed in state court affidavits executed by its employees or employees of third-party service providers making various assertions, such as the note attached to the complaint is a true copy, the mortgage/deed was recorded, and the amount of principal due, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records when, in many cases, they were not based on such personal knowledge or review of the relevant books and records;

(b) filed or caused to be filed in state courts, or in local land records offices, numerous affidavits or other mortgage-related documents that were not properly notarized, including those not signed or affirmed in the presence of a notary;

(c) litigated foreclosure proceedings and initiated non-judicial foreclosure proceedings without always ensuring that either the promissory note or the mortgage document were properly endorsed or assigned at the appropriate time;

(d) failed to devote sufficient financial, staffing and managerial resources to ensure proper administration of its foreclosure processes;

(e) failed to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training; and

(f) failed to sufficiently oversee outside counsel and other third-party providers handling foreclosure-related services.

(3) **By reason of the conduct set forth above, the Bank engaged in unsafe or unsound banking practices.**

. . .

## 5. Consent Order – In the Matter of: **MetLife Bank, N.A** - April 13, 2011

http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47g.pdf

*Excerpt:*

**COMPTROLLER'S FINDINGS**

The Comptroller finds, and the Bank neither admits nor denies, the following:

(1) The Bank is among the largest servicers of residential mortgages in the United States, and services a portfolio of 541,000 residential mortgage loans. During the recent housing crisis, a substantially large number of residential mortgage loans serviced by the Bank became delinquent and resulted in foreclosure actions. The Bank's foreclosure inventory grew substantially from 2009 through 2010.

(2) In connection with certain foreclosures of loans in its residential mortgage servicing portfolio, the Bank:

(a) filed or caused to be filed in state court affidavits executed by its employees or employees of third-party service providers making various assertions, such as the note attached to the complaint is a true copy, the mortgage/deed was recorded, and the amount of principal due, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records when, in many cases, they were not based on such personal knowledge or review of the relevant books and records;

(b) filed or caused to be filed in state courts, or in local land records offices, affidavits or other mortgage-related documents that were not properly notarized, including those not signed or affirmed in the presence of a notary;

(c) failed to devote sufficient, staffing and managerial resources to ensure proper administration of its foreclosure processes;

(d) failed to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training; and

(e) failed to sufficiently oversee outside counsel and other third-party providers handling foreclosure-related services.

(3) **By reason of the conduct set forth above, the Bank engaged in unsafe or unsound banking practices.**

. . .

**6.** Consent Order – In the Matter of: **Wells Fargo Bank, N.A.** – April 13, 2011
https://www.propublica.org/documents/item/wells-fargo-occ-consent-order

*Excerpt:*

**COMPTROLLER'S FINDINGS**

The Comptroller finds, and the Bank neither admits nor denies, the following:

(1) The Bank is among the largest servicers of residential mortgages in the United States, and services a portfolio of 8,900,000 residential mortgage loans. During the recent housing crisis, a substantially large number of residential mortgage loans serviced by the Bank became delinquent and resulted in foreclosure actions. The Bank's foreclosure inventory grew substantially from January 2009 through December 2010.
(2) In connection with certain foreclosures of loans in its residential mortgage servicing portfolio, the Bank:

(a) filed or caused to be filed in state and federal courts affidavits executed by its employees or employees of third-party service providers making various assertions, such as ownership of the mortgage note and mortgage, the amount of the principal and interest due, and the fees and expenses chargeable to the borrower, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were not based on such personal knowledge or review of the relevant books and records;

(b) filed or caused to be filed in state and federal courts, or in local land records offices, numerous affidavits or other mortgage-related documents that were not properly notarized, including those not signed or affirmed in the presence of a notary;

(c) litigated foreclosure proceedings and initiated non-judicial foreclosure proceedings without always ensuring that either the promissory note or the mortgage document were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time;

(d) failed to devote sufficient financial, staffing and managerial resources to ensure proper administration of its foreclosure processes;

(e) failed to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training; and

(f) failed to sufficiently oversee outside counsel and other third-party providers handling foreclosure-related services.

(3) **By reason of the conduct set forth above, the Bank engaged in unsafe or unsound banking practices.**

. . .

**7 .** Consent Order – In the Matter of: **JP Morgan Chase & Co.**
April 13, 2011
https://www.federalreserve.gov/newsevents/press/enforcement/enf20110413a5.pdf

*Excerpt:*

**CONSENT ORDER**

WHEREAS, JPMC, through the Bank and the Mortgage Servicing Companies, collectively, is the third largest servicer of residential mortgages in the United States and services a portfolio of 8.5 million residential mortgage loans. During the recent financial crisis, a substantially larger number of residential mortgage loans became past due than in earlier years. Many of the past due mortgages have resulted in foreclosure actions. From January 1, 2009, to December 31, 2010, the Mortgage Servicing Companies initiated 256,179 foreclosure actions;

WHEREAS, in connection with the process leading to certain foreclosures involving the Servicing Portfolio, the Mortgage Servicing Companies allegedly:

(a) Filed or caused to be filed in state courts and in connection with bankruptcy proceedings in federal courts numerous affidavits executed by employees of the Mortgage Servicing Companies or employees of third-party providers making various assertions, such as the ownership of the mortgage note and mortgage, the amount of principal and interest due, and the fees and expenses chargeable to the borrower, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were not based on such knowledge or review;

(b) Filed or caused to be filed in state courts and in connection with bankruptcy proceedings in federal courts or in the local land record offices, numerous affidavits and other mortgage-related documents that were not properly notarized, including those not signed or affirmed in the presence of a notary;

(c) Litigated foreclosure and bankruptcy proceedings and initiated non-judicial foreclosures without always confirming that documentation of ownership was in order at the appropriate time, including confirming that the promissory note and mortgage document were properly endorsed or assigned and, if necessary, in the possession of the appropriate party;

(d) Failed to respond in a sufficient and timely manner to the increased level of foreclosures by increasing financial, staffing, and managerial resources to ensure that the Mortgage Servicing Companies adequately handled the foreclosure process; failed to respond in a sufficient and timely manner to the increased level of Loss Mitigation Activities to ensure timely, effective and efficient communication with borrowers with respect to Loss Mitigation Activities and foreclosure activities; and full exploration of Loss Mitigation options or programs prior to completion of foreclosure activities; and

(e) Failed to have adequate internal controls, policies and procedures, compliance risk management, internal audit, training, and oversight of the foreclosure process, including sufficient oversight of outside counsel and other third-party providers handling foreclosure-related services with respect to the Servicing Portfolio.

**WHEREAS, the practices set forth above allegedly constitute unsafe or unsound banking practices;**

**8.** Settlement Agreement And Consent Order – OCWEN – December 3. 2013
http://www.dbo.ca.gov/ENF/Ocwen/Ocwen-FinalOcwenMMCSettlementAgreement_12.3.13.pdf

(*Excerpt beginning at pg 4.*)

**EXAMINATION FINDINGS**

**WHEREAS**, "Examination Findings" means Reports of Examination and related inquiries and investigations by the State Mortgage Regulators that identified practices that may otherwise violate the laws and regulations of the Participating States and related Federal law, including but not limited to the allegations and Releases that are the basis of the Consent Judgment and specifically including:

a. Lack of controls related to document execution, including evidence of robo-signing, unauthorized execution, assignment backdating, improper certification and notarization, chain of title irregularities, and other related practices affecting the integrity of documents relied upon in the foreclosure process;

b. Deficiencies in loss mitigation and loan modification processes, including but not limited to:

. . .

**9.** Consumer Financial Protection Bureau – Press Release –
CFPB, State Authorities Order OCWEN to Provide $2 Billion in Relief to Homeowners for Servicing Wrongs – Dec 19, 2013
http://www.consumerfinance.gov/about-us/newsroom/cfpb-state-authorities-order-ocwen-to-provide-2-billion-in-relief-to-homeowners-for-servicing-wrongs/

*Excerpt:*

***Largest Nonbank Servicer Will Also Refund $125 Million to Foreclosure Victims and Adhere to Significant New Homeowner Protections***

WASHINGTON, D.C. — Today, the Consumer Financial Protection Bureau (CFPB), authorities in 49 states, and the District of Columbia filed a proposed court order requiring the country's largest nonbank mortgage loan servicer, OCWEN Financial Corporation, and its subsidiary, OCWEN Loan Servicing, to provide $2 billion in principal reduction to underwater borrowers. The consent order addresses OCWEN's systemic misconduct at every stage of the mortgage servicing process. OCWEN must also refund $125 million to the nearly 185,000 borrowers who have already been foreclosed upon and it must adhere to significant new homeowner protections.

"Deceptions and shortcuts in mortgage servicing will not be tolerated," said CFPB Director Richard Cordray. "OCWEN took advantage of borrowers at every stage of the process. Today's action sends a clear message that we will be vigilant about making sure that consumers are treated with the respect, dignity, and fairness they deserve."

The proposed OCWEN Consent Order is available at:
http://files.consumerfinance.gov/f/201312_cfpb_consent-order_ocwen.pdf

OCWEN, a publicly traded Florida corporation headquartered in Atlanta, Ga., is the largest nonbank mortgage servicer and the fourth-largest servicer overall in the United States. As a mortgage servicer, it is responsible for collecting payments from the mortgage borrower and forwarding those payments to the owner of the loan. It handles customer service, collections, loan modifications, and foreclosures.

OCWEN specializes in servicing subprime or delinquent loans and places a major emphasis on resolving delinquency through loss mitigation or foreclosure. In recent years, it has acquired competitors – including Homeward Residential Holdings LLC (formerly American Home Mortgage Servicing Inc.) and Litton Loan Servicing LP. It has also acquired the mortgage servicing rights from the portfolios of some of the country's largest banks.

The CFPB is charged with enforcing the Dodd-Frank Wall Street Reform and Consumer Protection Act which protects consumers from unfair, deceptive, or abusive acts or practices by mortgage servicers – whether they are a bank or nonbank. State financial regulators, state attorneys general, and the CFPB uncovered substantial evidence that OCWEN violated state laws and the Dodd-Frank Act.

In early 2012, examinations by the Multistate Mortgage Committee, which is comprised of state financial regulators, identified potential violations at OCWEN. In addition, the Federal Trade Commission referred its investigation of OCWEN to the CFPB after the Bureau opened in July 2011. The Bureau then teamed with state attorneys general and state regulators to investigate and resolve the issues identified. Today's settlement is a multi-jurisdictional collaborative effort.

Borrowers Pushed into Foreclosure by Servicing Errors

The CFPB and its partner states believe that OCWEN was engaged in significant and systemic misconduct that occurred at every stage of the mortgage servicing process. According to the complaint filed in the federal district court in the District of Columbia, OCWEN's violations of consumer financial protections put thousands of people across the country at risk of losing their homes. Specifically, the complaint says that OCWEN:

Took advantage of homeowners with servicing shortcuts and unauthorized fees: Customers relied on OCWEN to, among other things, treat them fairly, give them accurate information, and appropriately charge for services. According to the complaint, OCWEN violated the law in a number of ways, including:

- Failing to timely and accurately apply payments made by borrowers and failing to maintain accurate account statements;
- Charging borrowers unauthorized fees for default-related services;
- Imposing force-placed insurance on consumers when OCWEN knew or should have known that they already had adequate home-insurance coverage; and
- Providing false or misleading information in response to consumer complaints.
- Deceived consumers about foreclosure alternatives and improperly denied loan modifications: Struggling homeowners generally turn to mortgage servicers, the link to the owners of the loans, as their only means of developing a plan for payment. OCWEN failed to effectively assist, and in fact impeded, struggling homeowners trying to save their homes.

This included:

- Failing to provide accurate information about loan modifications and other loss mitigation services;
- Failing to properly process borrowers' applications and calculate their eligibility for loan modifications;
- Providing false or misleading reasons for denying loan modifications; Failing to honor previously agreed upon trial modifications with prior servicers; and
- Deceptively seeking to collect payments under the mortgage's original unmodified terms after the consumer had already begun a loan modification with the prior servicer.

Engaged in illegal foreclosure practices: One of the most important jobs of a mortgage servicer is managing the foreclosure process. But OCWEN mishandled foreclosures and provided consumers with false information. Specifically, OCWEN is accused of:

- Providing false or misleading information to consumers about the status of foreclosure proceedings where the borrower was in good faith actively pursuing a loss mitigation alternative also offered by OCWEN; and
- Robo-signing foreclosure documents, including preparing, executing, notarizing, and filing affidavits in foreclosure proceedings with courts and government agencies without verifying the information.

Remedies: Consumer Protections

Today's proposed court order will bar OCWEN from committing such violations in the future. It requires OCWEN to provide $125 million in refunds to foreclosed-upon consumers and $2 billion in loan modification relief to its customers through principal reduction. The refunds and relief also apply to consumers whose loans were previously serviced by Homeward Residential Holdings and Litton Loan Servicing. According to the proposed order, OCWEN must:

Common consumer questions and answers about the order can be found at:
http://files.consumerfinance.gov/f/201312_cfpb_common-questions_ocwen.pdf

A copy of the OCWEN complaint that the CFPB and state attorneys general filed today can be found at: http://files.consumerfinance.gov/f/201312_cfpb_complaint_ocwen.pdf
my note – see pg 13 of complaint paragraph "p". "Q' which specifically reference document problems

The complaint is not a finding or ruling that the defendants have actually violated the law. The proposed federal court order will have the full force of law only when signed by the presiding judge.

See excerpt below from: EXHIBIT A, "Settlement Term Sheet," I. FORECLOSURE AND BANKRUPTCY INFORMATION AND DOCUMENTATION.
http://files.consumerfinance.gov/f/201312_cfpb_consent-order_ocwen.pdf

1. Servicer shall ensure that ... Declarations, affidavits, and sworn statements filed by or on behalf of Servicer in judicial foreclosures or bankruptcy proceedings and notices of default, notices of sale and similar notices submitted by or on behalf of Servicer in non-judicial foreclosures are accurate and complete and are supported by competent and reliable evidence.

...

2. Servicer shall ensure that affidavits, sworn statements, and Declarations are based on personal knowledge,

...

3. Servicer shall ensure that affidavits, sworn statements and Declarations executed by Servicer's affiants are based on the affiant's review and personal knowledge of the accuracy and
completeness of the assertions in the affidavit, sworn statement or Declaration, set out facts that Servicer reasonably believes would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. Affiants shall confirm that they have reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and required loan ownership information.

...

**10.** February 5, 2016 DOJ Office of Public Affairs – For Immediate Release

Justice Department Reaches $470 Million Joint State-Federal Settlement with HSBC to Address Mortgage Loan Origination, Servicing and Foreclosure Abuses

https://www.justice.gov/opa/pr/justice-department-reaches-470-million-joint-state-federal-settlement-hsbc-address-mortgage

*Excerpt:*

"the handling of foreclosures and for ensuring the accuracy of information provided in federal bankruptcy court. These standards are designed to prevent foreclosure abuses of the past, such as robo-signing, improper documentation and lost paperwork, and create new consumer protections."

**$25 billion National Mortgage Settlement (NMS) reached in February 2012** between the federal government, 49 state attorneys general and the District of Columbia's attorney general and the five largest national mortgage servicers,

**$968 million settlement reached in June 2014** between those same federal and state partners and SunTrust Mortgage Inc.

...

**11.** February, 2012 National Mortgage Settlement — $25 Billion

with: **Ally/GMAC**; **Bank of America**; **Citi**; **JPMorgan Chase**; **Wells Fargo**

*Excerpt:*

"The agreement settled state and federal investigations finding that the country's five largest mortgage servicers routinely signed foreclosure related documents outside the presence of a notary public and without really knowing whether the facts they contained were correct. Both of these practices violate the law."

"**Specifically, this settlement does not**:

- Release any criminal liability or grant any criminal immunity.
- Release any private claims by individuals or any class action claims.
- Release claims related to the securitization of mortgage backed securities that were at the heart of the financial crisis.
- Release claims against Mortgage Electronic Registration Systems or MERSCORP.
- Release any claims by a state that chooses not to sign the settlement.
- End state attorneys general investigations of Wall Street related to financial fraud or the financial crisis.

. . .

**12.** February 9, 2016 Correcting Foreclosure Practices – Summary report

**OCC Imposes Restrictions on Six OCC-Regulated Mortgage Servicers**

http://www.occ.gov/topics/consumer-protection/foreclosure-prevention/correcting-foreclosure-practices.html

*Excerpt:*

"On June 17, 2015, the OCC announced certain business restrictions related to mortgage servicing activities of EverBank; HSBC Bank USA, N.A.; JPMorgan Chase Bank, N.A.; Santander Bank, National Association; U.S. Bank National Association; and Wells Fargo Bank, N.A. The OCC determined that these banks have not met all of the requirements of existing consent orders."

. . .

**13.** Comptroller of the Currency
Administrator of National Banks
US Department of the Treasury
OCC Interim Status Report – Foreclosure-Related Consent Orders – Nov 2011
http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-139a.pdf

*Excerpt:*

This interim report summarizes actions taken by national banks and federal savings associations to correct deficiencies in mortgage servicing and foreclosure processing identified in consent orders issued on April 13, 2011, by the Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS) against 12 mortgage servicers.

> (*Note:* On July 21, 2011, regulatory responsibility for federal savings associations transferred from the OTS to the OCC under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Consent orders taken by the OTS prior to the transfer remain in effect and enforceable by the OCC).

The OCC took action against eight national bank servicers: Bank of America, Citibank, HSBC, JPMorgan Chase, MetLife Bank, PNC, U.S. Bank, and Wells Fargo. The OTS took action against four federal savings association servicers and two holding companies: Aurora Bank, FSB; EverBank (and the thrift holding company, EverBank Financial Corp.); OneWest Bank, FSB (and its holding company IMB HoldCo LLC); and Sovereign Bank.

. . .

**Tab-4** *Opinion of the 14th Court of Appeals – "Opinion"*

November 17, 2015

# JUDGMENT

## The Fourteenth Court of Appeals

J.M. ARPAD LAMELL, Appellant

NO. 14-14-00175-CV V.

ONEWEST BANK, FSB, A FOREIGN CORPORATION, Appellee

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This cause, an appeal from the judgment signed, January 31, 2014, was heard on the transcript of the record. We have inspected the record and find the trial court erred in granting summary judgment with respect to the following claims brought by appellant J.M. Arpad Lamell: declaratory judgment, unlawful tax collection, unlawful levy and illegal lien, wrongful acceleration/foreclosure, violation of Real Estate Settlement Procedures Act, violation of the Texas Fair Debt Collection Practices Act, unjust enrichment, slander of title, mortgage or title fraud, false pretense, civil conspiracy, mail fraud, breach of contract, or any purported claim asserted in Lamell's supplemental petition, supplement to the supplemental petition, or second supplement to the supplemental petition. We therefore order that the portions of the judgment addressing those claims are **REVERSED** and ordered severed and **REMANDED** for proceedings in accordance with this court's opinion.

Further, we find no error in the remainder of the judgment and order it **AFFIRMED**. For good cause, we order that each party shall pay fifty percent of all costs incurred by reason of this appeal. We further order this decision certified below for observance.

**Affirmed in Part and Reversed and Remanded in Part and Opinion filed November 17, 2015.**


**In The**

# Fourteenth Court of Appeals

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**NO. 14-14-00175-CV**

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**J.M. ARPAD LAMELL, Appellant**

**V.**

**ONEWEST BANK, FSB, A FOREIGN CORPORATION, Appellee**

---

**On Appeal from the 127th District Court**
**Harris County, Texas**
**Trial Court Cause No. 2010-11491**

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# O P I N I O N

A homeowner filed suit against a mortgage servicer asserting a variety of claims in conjunction with the mortgage servicer's attempt to foreclose on the homeowner's property. The mortgage servicer sought summary judgment on some of the claims. In response to the mortgage servicer's summary-judgment motion, the homeowner asserted that the mortgage servicer could not foreclose on his property because the deed of trust and attached note were void due to securitization

issues. We conclude that the deed of trust is not void. We affirm in part and reverse and remand in part.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant/plaintiff J.M. Arpad Lamell executed a promissory note to Home123 Corporation/New Century Mortgage to refinance his home. A deed of trust secured the note. A few years after this transaction, Lamell received notice that servicing for his loan had been transferred to IndyMac Mortgage Services, a division of OneWest Bank[1] ("OneWest"). The deed of trust named as beneficiary Mortgage Electronic Registration Systems, Inc., acting solely as nominee for Home 123 Corporation and its successors and assigns ("MERS"). Effective April 11, 2010, MERS assigned the deed of trust to the CSMC Trust. OneWest serviced the loan on behalf of CSMC Trust.

During 2008 and 2009 Lamell protested the property tax appraisal on his home. Both protests led to lawsuits. During the pendency of the lawsuits, Lamell did not pay the contested portion of his property tax, but OneWest advanced funds to pay the disputed taxes assessed on the home. OneWest raised Lamell's payments to cover the funds OneWest advanced to pay the contested portion of Lamell's property taxes. Lamell filed a lawsuit against the Harris County Appraisal District (HCAD), the Appraisal Review Board of the Harris County Appraisal District, and the Harris County Tax Assessor-Collector ("Harris County Parties"). During the pendency of that lawsuit, Lamell stopped making payments

[1] In his reply brief, Lamell requests this court to take judicial notice of news releases announcing the Federal Deposit Insurance Corporation's takeover of IndyMac in 2008 and announcing the sale of IndyMac's banking operations to OneWest Bank, the information available regarding Lamell's property on HCAD's "Real Property Account Information" page for Lamell's property, and a notice of rejection sent by New Century to MERS. Assuming without deciding that we may take judicial notice of these documents, doing so would not change the outcome of this appeal. *See Thornton v. Cash*, No. 14-11-01092, 2013 WL 1683650, at *14 (Tex. App.—Houston [14th Dist.] Apr. 18, 2013, no pet.) (mem. op.).

on the note and OneWest threatened foreclosure. Lamell then added OneWest as a named defendant in his lawsuit against the Harris County Parties. Lamell later reached a settlement with the Harris County Parties, but continued his suit against OneWest.

In his original petition, the only claim Lamell asserted against OneWest was a claim that "[a]ll the Defendants together have violated Plaintiff's right to Due Process." Based on the claims asserted in his petition, Lamell requested that the trial court (1) enjoin OneWest from initiating acceleration, foreclosure, or deficiency actions, (2) require OneWest to correct any negative reports it may have provided to credit reporting agencies, and (3) order OneWest to restore Lamell's mortgage payment to the amount in force before the imposition of escrow. In response to OneWest's notice of intent to foreclose on his property, Lamell sought and received a temporary restraining order. Lamell then requested a temporary injunction. The trial court denied this request and dissolved the temporary restraining order.

Lamell challenged the denial of the temporary injunction by interlocutory appeal. In conjunction with the appeal, Lamell filed a motion to stay the enforcement of the order denying injunctive relief, or in the alternative, to set a supersedeas bond. The trial court ruled that Lamell could supersede the order denying his request for a temporary injunction during Lamell's appeal, and the trial court set the supersedeas amount that Lamell would have to post to supersede the order. Lamell deposited cash with the trial court clerk in lieu of a supersedeas bond. This court eventually dismissed Lamell's interlocutory appeal as moot based on the trial court's grant of summary judgment as to all of Lamell's claims. *See Lamell v. Indymac Mortgage Servs., F.S.*, 2013 WL 3580634, at *1 (Tex. App.—Houston [14th Dist.] July, 11, 2013, pet. denied) (mem. op.). The trial

court then ordered the supersedeas funds to be released to OneWest.

OneWest moved for summary judgment asserting both traditional and no-evidence grounds. OneWest argued it was entitled to summary judgment on the following grounds:

> (1) Lamell's claims for violation of due process, equal and uniform tax appraisal, false agency, and unlawful tax collection lack evidentiary support;
>
> (2) Lamell has no evidence of his failure-to-disclose claim;
>
> (3) Lamell has no evidence of fraud or misrepresentation;
>
> (4) Lamell has no evidence of conversion;
>
> (5)Lamell lacks standing to challenge the assignment and securitization of the note;
>
> (6) Lamell's arguments about "backdating" are without merit;
>
> (7) There is no evidence that the assignment or securitization of the loan are improper;
>
> (8) There is no evidence OneWest committed any wrongful act under the Texas Debt Collections Act or Fair Debt Collection Practices Act; and
>
> (9) Lamell cannot assert a claim against OneWest for unfair debt collection, because OneWest is not a debt collector under either act.

Lamell filed three supplemental petitions after OneWest filed its traditional and no-evidence summary-judgment motion. In these supplemental petitions, Lamell asserted claims against OneWest for (1) unlawful tax collection, (2) unlawful levy and lien, (3) wrongful acceleration/foreclosure, (4) false pretense, (5) breach of contract, (6) violation of the Real Estate Settlement Procedures Act, (7) slander of title, (8) mortgage and title fraud, (9) unfair debt collection, (10) mail fraud, (11) civil conspiracy, (12) unjust enrichment, and (13) fraud. Lamell sought injunctive relief and a declaratory judgment that OneWest is not the owner and holder of the note. In Lamell's supplement to the supplemental petition and

second supplement to the supplemental petition, Lamell asserted that (1) OneWest has no authority to foreclose, (2) the note is not genuine, (3) OneWest's authority is without consideration, and (4) the statute of frauds bars recovery.

The trial court granted OneWest's summary-judgment motion.[2] Lamell now challenges that ruling in this appeal.

## II. ANALYSIS

In a traditional motion for summary judgment, if the movant's motion and summary-judgment evidence facially establish its right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). In reviewing a no-evidence summary judgment, we ascertain whether the nonmovant pointed out summary-judgment evidence raising a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206–08 (Tex. 2002). In our de novo review of a trial court's summary judgment, we consider all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). When, as in this case, the order granting summary judgment does not specify the grounds upon which the trial court relied, we must

[2] Lamell filed a motion requesting that we abate this appeal to allow the trial court clerk time to supplement the record. The record has been supplemented. We deny as moot Lamell's motion to abate the appeal.

affirm the summary judgment if any of the independent summary-judgment grounds is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

**A. Standing**

At the outset, we address OneWest's argument that Lamell lacks standing to challenge the date of the assignment or the securitization of the note because if that argument has merit this court would lack jurisdiction over such claims. The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a justiciable interest in its outcome. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). A plaintiff has standing when it is personally aggrieved. *Id.* The standing doctrine requires that there be a real controversy between the parties that actually will be determined by the judicial declaration sought. *Id.* at 849. This court previously determined that a homeowner bringing suit to remove a cloud on title, and seeking a judgment canceling a deed of trust, had standing to argue the deed of trust was invalid because the party attempting to enforce the deed of trust was not the owner and holder of the associated note. *See Morlock, L.L.C., v. Nationstar Mortg., L.L.C.*, 447 S.W.3d 42, 45 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). In so holding, this court determined that a homeowner's interest in the title to his property gives the homeowner a sufficient justiciable interest to advance arguments challenging the deed of trust. *See id.* In *Morlock*, the homeowner argued that the deed of trust was invalid because the party claiming a right to enforce the deed of trust through non-judicial foreclosure was not the owner and holder of the associated note. *See id.* at 47. As in *Morlock*, Lamell asserts that the deed of trust is void because there are problems with the assignment and securitization of the deed of trust and note. Although *Morlock* involved a suit to remove a cloud on title, and Lamell has

asserted a variety of claims against OneWest, Lamell asserts the same justiciable interest in challenging the assignment and securitization of the note and deed of trust. In both cases, the homeowner's justiciable interest vests in challenging an alleged interest in the title to the homeowner's real property. Because Lamell's justiciable interest is the same as Morlock's, we conclude that Lamell has standing to seek a determination as to these issues as part of his challenge to OneWest's right to enforce the deed of trust. *See id.* at 45. Accordingly, we conclude Lamell has standing to challenge the assignment and securitization of the note. *See id.*

**B. Claims Not Challenged in OneWest's Summary-Judgment Motion**

Lamell asserts that the trial court erred in granting OneWest's summary-judgment motion because OneWest did not assert summary-judgment grounds that applied to all of the claims in Lamell's supplemental petitions. A summary-judgment motion must stand or fall on the grounds expressly presented in the motion. *See McConnell v. Southside Indep. Sch. Dist.,* 858 S.W.2d 337, 341 (Tex. 1993). Nonetheless, if the summary-judgment grounds expressly presented in the motion are sufficiently broad to encompass claims first asserted in an amended pleading filed after the motion, it is procedurally appropriate for the trial court to grant summary judgment as to these new claims, even if the movant does not amend the motion to address the new claims. *See Wilson v. Korthauer,* 21 S.W.3d 573, 579 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). To state a no-evidence ground the movant must assert clearly that there is no evidence of one or more essential elements of a claim or defense on which the adverse party would have the burden of proof at trial. *See* Tex. R. Civ. P. 166a(i) (stating that a no-evidence movant seeks "summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial" and that "[t]he motion must

state the elements as to which there is no evidence"); *BP Oil Pipeline Co. v. Plains Pipeline, L.P.*,—S.W.3d—,—, 2015 WL 3988574, at *13 (Tex. App.—Houston [14th Dist.] June 30, 2015, no pet. h.). In his supplemental petitions, Lamell added claims against OneWest.

OneWest did not expressly present any traditional summary-judgment grounds in its motion that are sufficiently broad to encompass Lamell's claims for unlawful tax collection, unlawful levy and illegal lien, wrongful acceleration/foreclosure, violation of Real Estate Settlement Procedures Act, unjust enrichment, slander of title, mortgage or title fraud, false pretense, civil conspiracy, mail fraud, breach of contract, or any other claim asserted in Lamell's supplemental petition, supplement to the supplemental petition, or second supplement to the supplemental petition.[3] The only statement in OneWest's summary-judgment motion that arguably might constitute a no-evidence summary-judgment ground attacking some of these claims reads as follows:

> OneWest is entitled to summary judgment on Plaintiff's claims for violation of due process, violation of equal and uniform tax appraisal, false agency, and unlawful tax collection (to the extent such claims can be asserted against OneWest) because there is no evidence to support them.

This statement is not sufficiently specific to constitute a no-evidence summary-judgment ground because OneWest did not state there is no evidence of one or more essential elements of any of Lamell's alleged claims. *See* Tex. R. Civ. P. 166a(i); *BP Oil Pipeline Co.*,—S.W.3d at —, 2015 WL 3988574, at *13–14. Because OneWest did not assert a summary-judgment ground challenging Lamell's claims for unlawful tax collection, unlawful levy and illegal lien, wrongful acceleration/foreclosure, violation of the Real Estate Settlement

[3] OneWest did not specially except to Lamell's pleadings.

Procedures Act, unjust enrichment, slander of title, mortgage or title fraud, false pretense, civil conspiracy, mail fraud, breach of contract, Lamell's request for declaratory judgment that neither IndyMac nor any party seeking to foreclose on IndyMac's behalf is the owner and holder of the note, or any claim asserted in Lamell's supplemental petition, supplement to the supplemental petition, or second supplement to the supplemental petition, we sustain Lamell's first issue with respect to these claims. And, we reverse the summary judgment with respect to those claims.[4] *See Espeche v. Ritzell*, 123 S.W.3d 657, 664 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

**C. Fraud**

OneWest asserted as a summary-judgment ground that there is no evidence that the assignment and securitization of the note are improper, and OneWest specifically asserted that there is no evidence of each of the elements of Lamell's claim for fraud. Accordingly, OneWest filed a no-evidence summary-judgment ground that was sufficiently specific to amount to an attack on Lamell's fraud claim.

Lamell challenges the summary judgment by pointing to various issues he contends create problems with the assignments among the various parties. These problems include potential issues related to backdating and problems with the authenticity of the note. Lamell does not specifically state how these problems would preclude summary judgment on any particular claim. We presume for the sake of argument that these issues relate to Lamell's fraud claim and we address them to the extent they relate to his fraud claim. In its summary-judgment motion, OneWest asserted that even if the securitization or assignment of the note contained the problems Lamell describes, those problems did not affect OneWest's

[4] In doing so, we make no comment on the merits of these claims.

ability to foreclose on the deed of trust.

*1. Deed of Trust*

Lamell asserts that the deed of trust is void because it was securitized in the CSMC Mortgage-backed trust in violation of the terms of the Pooling and Servicing Agreement that governs the trust. In particular, Lamell asserts that the deed of trust is void because it was not assigned to the trust before the trust's start-up date and because there is no evidence that the deed of trust was transferred into the trust by the depositor.

The deed of trust names MERS, and all of MERS's successors and assigns, as beneficiaries. The record contains an assignment of the deed of trust from Champagne Williams, on behalf of MERS, to U.S. Bank National Association, as trustee for the trust. The deed of trust was assigned on June 29, 2010, effective April 11, 2010. The Pooling and Servicing Agreement governs the operation of the trust.

The Pooling and Servicing Agreement classifies different types of loans that may be sold to the trust. It states that the trust will elect to be treated as a real estate mortgage investment conduit, a classification that affords the trust a certain type of treatment for federal income taxation purposes. According to Lamell, this type of treatment requires all loans to be sold to the trust by the start-up date, which was in March 2007. Thus, Lamell asserts, because MERS assigned the deed of trust to the trust in 2010, the assignment violated the terms of the Pooling and Servicing Agreement and the violation renders the deed of trust void.

Lamell does not assert that any provision in the deed of trust prevented MERS from assigning the instrument to the CSMC Trust. Nor does Lamell assert any provision of the Pooling and Servicing Agreement states that a deed of trust

improperly placed in the trust renders the deed of trust void. To the contrary, the Pooling and Servicing Agreement contemplates the delivery of loans into the trust after the closing date. It acknowledges that parties may need to purchase additional loans and place them into the trust at later dates in certain situations. In section 2.03(c), for example, the Pooling and Servicing Agreement contemplates the possibility that a party may be required to purchase a substitute loan and deposit it into the trust at a later date in certain circumstances. Section 2.05 also notes that mortgages may be transferred into the trust after the closing date under certain circumstances. In section 2.07(g), the parties contemplate the possibility that loans will be placed into the trust, causing the trust to be taxed. The Pooling and Servicing Agreement apportions liability for such a tax to various parties. Section 3.01 authorizes each servicer and sub-servicer to use its best judgment to determine when it is best to register any related loan on the MERS system or to cause the removal from the registration of any loan. The servicers and sub-servicers have the authority to execute and deliver on behalf of the trustee and the certificate holders, any and all instruments of assignment and other comparable instruments to achieve these purposes. The Pooling and Services Agreement contains provisions discussing compensation for any potential tax penalties incurred. In sum, the text of the agreement does not support Lamell's assertion that any loan assigned to the trust after the closing date violates the Pooling and Services Agreement.

Even presuming for the sake of argument that the deed of trust was placed into the trust in violation of trust's terms, Lamell has not cited and we have not found any authority holding that the breach of the securitization agreement renders the deed of trust void. The record contains the deed of trust executed by Lamell to Home123. The record also contains an assignment, signed by Champagne

Williams on behalf of MERS, from MERS, acting solely as nominee for Home123 Corporation, to the CSMC Trust. The summary-judgment evidence does not show as a matter of law that the deed of trust is void, nor does it raise a genuine fact issue on this point. Therefore, Lamell's argument that the deed of trust is void does not show that the trial court erred in granting summary judgment as to his fraud claim.

*2. Owner and Holder Status*

Lamell also asserts that OneWest, as the servicer of the mortgage, cannot foreclose because OneWest did not prove its status as owner and holder of the note. OneWest produced the note signed by Lamell along with an assignment to OneWest. OneWest indorsed the note in blank.

Lamell asserts that the note is void and summary judgment for OneWest is improper because:

- OneWest had an assignment of mortgage executed on June 29, 2010, that purported to be effective April 11, 2010. The assignment is shown as being executed by Champagne Williams on behalf of MERS, acting solely as nominee for Home123 Corporation. This assignment shows Home123 Corporation as the present owner and holder of the Note, but Home123 Corporation was not in existence at the time.
- OneWest produced a copy of the note in October 2010 that it asserted was a certified copy of the original. The copy showed no indorsements. At a hearing in March 2012, the trial court required OneWest to appear with the note and proof that the instrument was assigned to OneWest. In April 2012, OneWest brought a document that was allegedly the original note with a new extra page showing three rubber stamp indorsements. According to Lamell, this copy of the note with the indorsements contained bleed-through ink marks that were not visible on the certified and authenticated note produced in October 2010.
- Lamell asserts that OneWest's failure to originally produce the note with the indorsements prevented him from conducting complete discovery and therefore from discovering other fact issues. Based on these alleged

discovery violations, Lamell asserts the trial court should not have considered the note produced in April 2012 as evidence.

- Even considering the 2012 note as evidence, there is an unexplained indorsement gap between Home123 and CSMC Trust.

OneWest eventually produced the note Lamell signed with Home123 Corporation and that note had an indorsement from Home123 Corporation to New Century Mortgage Corporation, an indorsement from New Century Mortgage Corporation to IndyMac Bank [OneWest], and an indorsement in blank by IndyMac Bank. With respect to this note, Lamell acknowledges that the document produced by OneWest contains an indorsement in blank, but complains the trial court should not have considered the note because OneWest did not initially produce it in discovery. Lamell also asserts that some ink markings that bled through to the front of the note raise fact-issues about the authenticity of the instrument. Additionally, Lamell contends the assignment and securitization issues, the potential forgery or fabrication of the evidence, and the discovery violations show the note is void. But Lamell does not cite any authority holding that any of these issues render the note void, nor does he explain how these issues would render the note void.

With respect to Lamell's argument that Home123 was an "extinct" corporation, the record does not contain any evidence that Home123 no longer exists or is incapable of assigning the note or deed of trust. Instead, Lamell states on appeal that the bankruptcy of Home123 is "widely reported in the media" and mentions that another case is pending in district court that references the bankruptcy. The record does not contain evidence raising a fact-issue on Lamell's assertion that Home123 was "extinct" at the time it assigned the note and therefore the note is void. To the extent Lamell asserts the bleed-through on the note shows the assignments between third-parties were fabricated or forged, such a claim

would render the note merely voidable, not void. *See Nobles v. Marcus*, 533 S.W.2d 923, 926 (Tex. 1976); *Morlock, L.L.C. v. Bank of New York*, 448 S.W.3d 514, 517 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Lamell has not cited, nor have we found any authority suggesting that a discovery violation would somehow make a note void. We conclude that the summary-judgment evidence does not raise a fact issue on Lamell's claim that the note is void.

We need not address Lamell's other complaints regarding the note because OneWest did not need to be the owner or holder of the note to foreclose since OneWest was acting on behalf of the CSMC Trust, which held the deed of trust. Non-judicial sales of real property under contract liens are governed by Chapter 51 of the Texas Property Code. *See* Tex. Prop. Code Ann. § 51.001, et seq. (West, Westlaw through 2015 R.S.). Under section 51.0025, a mortgagee or a mortgage service provider may conduct foreclosure proceedings without proving its status as the owner and holder of the note. *See* Tex. Prop. Code Ann. § 51.0025 (West, Westlaw through 2015 R.S.); *Morlock*, 447 S.W.3d at 47.

Lamell admits OneWest is servicing his mortgage. We already have addressed Lamell's complaints regarding the deed of trust and found they lack merit. The summary-judgment evidence shows that the actions taken by OneWest to foreclose were appropriate, even in the absence of proof that OneWest is the owner and holder of the note. Because Lamell's arguments are without merit, we overrule his first issue with respect to his fraud claim.

**D. Claims Under Fair Debt Collection Practices Acts**

Lamell asserts a claim against OneWest under the federal Fair Debt Collection Practices Act and its state counterpart, the Texas Fair Debt Collection Practices Act. *See* 15 U.S.C. § 1692 (West, Westlaw through Pub. L. No.114-49); Tex. Fin. Code Ann. § 392.001 et. seq. (West, Westlaw through 2015 R.S.).

Lamell challenges OneWest's attempts to collect property taxes that Lamell was actively protesting and that Lamell claims he did not owe. OneWest moved for summary judgment on the ground that OneWest is not a debt collector within the meaning of the federal and state Fair Debt Collection Practices Acts.

With respect to the both the federal and state Fair Debt Collection Practices Acts, OneWest asserts that is not a debt collector within the meaning of 15 U.S.C. § 1692a(6). OneWest does not provide any additional citation or explanation for why it is not a debt collector under the Texas Fair Debt Collection Practices Act. OneWest simply cites the federal statute and alleges that it is not a debt collector under the Texas Fair Debt Collection Practices Act.

The federal Fair Debt Collection Practices Act provides:

> The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692(a). Section 1692(a)(6) further narrows the meaning of "debt collector" by excluding "any person collecting or attempting to collect any debt owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." *See id.* § 1692(a)(6)(F)(iii). Under 15 U.S.C. § 1692(a)(6), a debt collector does not include a mortgage servicing company that began servicing the mortgage before it was in default. *See CA Partners v. Spears*, 274 S.W.3d 51, 79 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 723 (5th Cir. 2013). The summary-judgment evidence shows OneWest was servicing Lamell's mortgage before the note went into default. As a matter of law, OneWest is not a debt collector under the Fair Debt Collection Practice Act. The trial court

did not err in granting summary judgment with respect to Lamell's claims under the federal Fair Debt Collection Practices Act. *See CA Partners*, 274 S.W.3d at 79; *Miller*, 726 F.3d at 723.

Whether mortgage servicers constitute "debt collectors" under the Texas Fair Debt Collection Practices Act appears to be an issue of first impression in Texas. In construing a statute, our objective is to determine and give effect to the Legislature's intent. *See Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). If possible, we must ascertain that intent from the language the Legislature used in the statute and not look to extraneous matters for an intent the statute does not state. *Id*. If the meaning of the statutory language is unambiguous, we adopt the interpretation supported by the plain meaning of the provision's words. *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997). We must not engage in forced or strained construction; instead, we must yield to the plain sense of the words the Legislature chose. *See id*.

The Texas Fair Debt Collection Practices Act defines "debt collector" as "a person who directly or indirectly engages in debt collection and includes a person who sells or offers to sell forms represented to be a collection system, device, or scheme intended to be used to collect consumer debts." Tex. Fin. Code Ann. § 392.001(6) (West, Westlaw through 2015 R.S.). There are no statutory exceptions. *See id.* The summary-judgment evidence shows that OneWest directly engaged in collecting a debt and therefore qualifies as a debt collector under the plain language of the Texas Fair Debt Collection Practices Act. *See Miller*, 726 F.3d at 723 (holding mortgage servicers are debt collectors under Texas Fair Debt Collection Practices Act). *See also Smith v. Heard*, 980 S.W.2d 693, 697 (Tex. App.—San Antonio 1998, pet. denied) (noting actors are not excused from provision of Texas Fair Debt Collection Practices Act because debt is owed

directly to actor); *Monroe v. Frank*, 936 S.W.2d 654, 659–60 (Tex. App.—Dallas 1996, writ dism'd w.o.j.) (same). Because OneWest was not entitled to judgment as a matter of law on its only summary-judgment ground against Lamell's claim under the Texas Fair Debt Collection Practices Act, the trial court erred in granting summary judgment on this claim.[5]

**E. Supersedeas Bond**[6]

In the trial court, Lamell filed a motion to stay enforcement of the order denying the temporary injunction or, in the alternative, to set a supersedeas bond amount pending appeal. In the motion, Lamell argued that under Texas Rule of Appellate Procedure 24, the trial court had the authority to set the amount of a supersedeas bond that Lamell could file to supersede the order denying temporary injunction while Lamell appealed this order, and Lamell urged the trial court to grant this relief. OneWest opposed the motion.

The trial court granted Lamell's request and determined that Lamell could supersede the order denying his request for a temporary injunction during Lamell's appeal, and the trial court set the supersedeas amount that Lamell would have to post to supersede the order. Lamell deposited cash with the trial court clerk in lieu of a supersedeas bond. After Lamell's interlocutory appeal was dismissed, OneWest requested the release of these funds.

In Lamell's second issue, Lamell asserts the trial court abused its discretion in granting OneWest's motion to authorize release of the supersedeas funds to OneWest. In support of this issue, Lamell argues that (1) OneWest is not entitled

[5] OneWest also asserted in its summary-judgment motion that it did nothing wrong, but this ground is not sufficiently specific.

[6] Lamell deposited cash in lieu of a supersedeas bond. Both parties refer to a supersedeas bond in their briefs. We sometimes refer to the cash deposit as a supersedeas bond for ease of reference.

to receive the money because it has no authority to conduct foreclosure proceedings and because there are fact issues as to whether the note and deed of trust are void; (2) the trial court should not have stated that foreclosure proceedings may go forward because OneWest did not seek this relief in its pleadings, nor did it request a declaratory judgment under Chapter 37 of the Civil Practice and Remedies Code; (3) OneWest did not request release of these funds in its pleadings; and (4) Lamell was not a judgment debtor under Texas Rule of Appellate Procedure 24.1.

As to the first argument, we already have addressed Lamell's arguments that the note and assignments are void, and the record reflects that OneWest had authority to conduct foreclosure proceedings. With respect to Lamell's second argument, OneWest was not required to ask the trial court in its pleadings to state in its order that foreclosure proceedings may advance, nor was OneWest required to request declaratory relief in this regard.

As to Lamell's third argument, OneWest was not required to amend its pleadings for the trial court to release the cash deposited in lieu of a supersedeas bond. OneWest's motion requesting release of the cash in lieu of the supersedeas bond was sufficient. *Cf. Muniz v. Vasquez*, 797 S.W.2d 147, 150 (Tex. App.—Houston [14th Dist.] 1990, no pet.). With respect to Lamell's fourth argument, Lamell urged the trial court to set the supersedeas amount so that he could supersede the order denying temporary injunction. Over OneWest's opposition, Lamell argued the trial court could and should supersede this order under Texas Rule of Appellate Procedure 24. The trial court granted Lamell's request and allowed him to supersede the denial of the temporary injunction.

Now, on appeal, Lamell argues that he was not a judgment debtor under Texas Rule of Appellate Procedure 24.1. If that assertion is true, Lamell was not

entitled to supersede the order under that rule. Lamell argues that the trial court should not have granted his request to allow him to supersede the order because there was nothing to supersede in the trial court. Under the doctrine of invited error, a party cannot request a specific action in the trial court and then complain on appeal that the trial court committed error in granting the requested relief. *See Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 862 (Tex. 2005); *Gordon v. Gordon*, No. 14-10-01031-CV, 2011 WL 5926723, at *7 (Tex. App.—Houston [14th Dist.] Nov. 29, 2011, no pet.) (mem. op.). Lamell is estopped from arguing now that the trial court erred in granting him the very relief he requested. *See Weidner v. Sanchez*, 14 S.W.3d 353, 366–67 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The invited-error doctrine prevents Lamell from denying that the bond posted was a supersedeas bond and from arguing that the trial court erred in ordering it. *See Tittizer*, 171 S.W.3d at 862; *Gordon*, 2011 WL 5926723, at *7.

Because Lamell's first, second, third, and fourth arguments lack merit,we overrule Lamell's second issue. *See Tittizer*, 171 S.W.3d at 862; *Gordon*, 2011 WL 5926723, at *7.

## III. CONCLUSION

The trial court erred in granting OneWest's summary-judgment motion with respect to Lamell's claims for declaratory judgment, unlawful tax collection, unlawful levy and illegal lien, wrongful acceleration/foreclosure, violation of Real Estate Settlement Procedures Act, violation of the Texas Fair Debt Collection Practices Act, unjust enrichment, slander of title, mortgage or title fraud, false pretense, civil conspiracy, mail fraud, breach of contract, or any claim asserted in Lamell's supplemental petition, supplement to the supplemental petition, or second supplement to the supplemental petition. We therefore reverse the trial court's judgment with respect to these claims and remand the claims to the trial court. The

trial court did not err in granting summary judgment with respect to the remainder of Lamell's claims. Accordingly, we affirm the remainder of the trial court's judgment.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Boyce and McCally.

**Tab-5** *Trial Court Order Appealed From - Modified Order Granting Summary Judgment and Final Order – "Final Judgment"*

[CR:716-7]

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"ORIGINAL CLERKS RECORD – VOLUME I"
filed 4/30/2014

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**CAUSE NO. 2010-11491**

| | | |
|---|---|---|
| J. M. ARPAD LAMELL<br><br>Plaintiff,<br>v.<br><br>ONEWEST BANK, FSB, a FOREIGN CORPORATION,<br><br>Defendant. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | IN THE DISTRICT COURT OF<br><br>HARRIS COUNTY, TEXAS<br><br>[illegible] JUDICIAL DISTRICT |



**MODIFIED ORDER GRANTING SUMMARY JUDGMENT** and Final Judgment

On April 12, 2013, this Court issued its "Order Granting Defendant ONEWEST's Traditional and No-Evidence Motion for Summary Judgment", which order granted Defendant's motion in its entirety and further ordered that all of Plaintiff's claims against ONEWEST were to be dismissed WITH prejudice.

Plaintiff J. M. Arpad Lamell filed his timely motion to modify said Court's Judgment to reflect that, as to the claim of Wrongful Foreclosure only, dismissal of that particular claim should be WITHOUT prejudice.

The Court having considered the Motion, all pleadings and evidence on file, and the arguments of Plaintiff and ONEWEST's counsel, and being fully advised in the premises, finds that Plaintiff's motion to modify its judgment should be granted and that the Court's judgment of April 12, 2013 BE VACATED AND HEREBY REVISED as follows:

IT IS, THEREFORE, ORDERED that Defendant ONEWEST's Traditional and No-Evidence Motion for Summary Judgment" is GRANTED.

IT IS, THEREFORE, FURTHER ORDERED that Plaintiff's claim against ONEWEST for Wrongful Foreclosure is hereby dismissed WITHOUT prejudice and that all of Plaintiff's OTHER claims against ONEWEST are hereby dismissed WITH prejudice.

This is a final judgment.

**SO ORDERED** this 31st day of January, 2014. @ 11:35 a.m.

Hon. Judge R. K. Sandill

This Order disposes of all parties and all claims and is appealable.

**Agreed**

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.....

**Agreed as to Form Only**

/s/ J. M. Arpad Lamell
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**Tab-6** *Trial Court Order Appealed From - Order Granting OneWestBank FSB's Third Motion to Authorize Release of Bond – "Bond Release"*

[CR-SUP:73-74]

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"1ST SUPPLEMENTAL CLERKS RECORD"
filed 6/30/2014

CR SUP (01 OF 01) FLD 063014.pdf

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CAUSE NO. 2010-11491

| | | |
|---|---|---|
| J.M. ARPAD LAMELL as the PROPERTY OWNER, | § | IN THE DISTRICT COURT |
| Plaintiff, | § | |
| v. | § | |
| HARRIS COUNTY APPRAISAL DISTRICT, THE APPRAISAL REVIEW BOARD OF HARRIS COUNTY APPRAISAL DISTRICT, THE HARRIS COUNTY TAX ASSESSOR-COLLECTOR, AND INDYMAC MORTGAGE SERVICES, DIVISION OF ONE WEST BANK, FSB, A FOREIGN CORPORATION, | § | HARRIS COUNTY, TEXAS |
| Defendants. | § | 127TH JUDICIAL DISTRICT |



## ORDER GRANTING ONEWEST BANK FSB'S THIRD MOTION TO AUTHORIZE RELEASE OF BOND

On January 24, 2014, came on for consideration Defendant OneWest Bank, FSB's Third Motion to Authorize Release of Bond ("OneWest's Motion"). The Court having reviewed OneWest's Motion, any responsive pleadings on file, and the arguments of counsel and/or plaintiff, if any, and being fully advised in the premises, finds that the Motion should be GRANTED.

IT IS, THEREFORE, ORDERED that OneWest's Motion is GRANTED IN ITS ENTIRETY.

IT IS FURTHER ORDERED that the Court Clerk RELEASE all of the funds in Account No. 68870 payable to OneWest Bank, FSB.

IT IS FURTHER ORDERED that the Court Clerk RELEASE all of the funds in Account No. 69652 payable to OneWest Bank, FSB.

IT IS FURTHER ORDERED that any prior order enjoing foreclosure proceedings on Plaintiff's property are hereby dissolved and of no further effect, and that foreclosure of Plaintiff's property may proceed.

SIGNED on this the 31st day of January, 2014. @ 11:38 a.m.

Hon. Judge R.K. Sandill

**Tab-7** *Trial Court Order Setting Bond – 5/16/2012)- "Order Setting Bond"*

[CR-SUP:18-20]

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"1ST SUPPLEMENTAL CLERKS RECORD"
filed 6/30/2014

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**CAUSE NO. 2010-11491**

| | | |
|---|---|---|
| **J.M. ARPAD LAMELL asthe PROPERTY OWNER** | § | **IN THE DISTRICT COURT OF** |
| **vs.** | § | |
| THE HARRIS COUNTY TAX ASSESSOR COLLECTOR and INDYMAC MORTGAGE SERVICES, and ONE WEST BANK FSB, A FOREIGN CORPORATION | § | **HARRIS COUNTY, TEXAS** |
| | § | **127TH JUDICIAL DISTRICT** |

ORDER SETTING SUPERSEDEAS BOND AMOUNT PENDING APPEAL

On the 25th day of May, 2012 came on to be heard Appellant J.M. ARPAD LAMELL (hereinafter called "Appellant") Motion to Stay Enforcement of Order Denying Injunctive Relief or alternatively, Set Supersedeas Bond.

Appellant appeared in person with counsel and announced ready.

Defendant One West Bank, FSB appeared by and through its attorney and announced ready.

After hearing the evidence and the argument of counsel the Court finds Appellant is entitled to the following relief.

FILED
Chris Daniel
District Clerk
MAY 31 2012
Time: _____
By: _____ Deputy

IT IS ORDERED ADJUDGED and DECREED that Appellant J.M. ARPAD LAMELL is entitled while his appeal of this Court's order of April 10, 2012 entitled "Order Denying Plaintiff's Application for Temporary Injunction" is pending to supercede and stay enforcement of that order upon Appellant filing with the District Clerk of Harris County (hereinafter called "the Clerk"), Texas, a good and sufficient bond approved by the Clerk in the initial amount of Fifteen Thousand Six Hundred Seventy-Nine Dollars ($15,679.00) on or before 9 a.m. on Friday, June 1, 2012 and increasing the bond amount $1,735.64 monthly thereafter for nine (9) consecutive months with the first payment of $1,735.64 due and payable to the Clerk on July 1, 2012 and a like $1.735.64 payment due to the Clerk on the first day of each consecutive month thereafter through and including March 1, 2013. It is expressly ORDERED that the stay of denial of injunctive relief is conditioned on the timely posting of the aforementioned amounts.

Any additional relief not expressly granted herein is hereby DENIED.

Signed this 31 day of May, 2012.

Judge Presiding

Approved as to Form Only:

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**Tab-8** *Appellant's Notice of Additional Authority – filed 01/21/2015*

# J. M. Arpad Lamell

February 12, 2015

The Honorable Christopher A. Prine
Clerk of the Fourteenth Court of Appeals
301 Fannin St.
Houston, TX 77002

Re: Notice of Additional Authority
*J M Arpad Lamell v. OneWest Bank FSB,* No. 14-14-00175-CV

Dear Mr. Prine:

The purpose of this letter is to bring to the Court's attention the recent *Memorandum of Decision* in the case, *In re: Cynthia Carrsow-Franklin*, No. 10-20010, 2015 WL364719 (Bankr. S.D.N.Y. Jan. 29, 2015). A convenience copy of the complete decision is attached hereto.[1]

Although this is a decision of the Bankruptcy Court in the Southern District of New York, it involves a debtor, property and fact pattern requiring application of Texas law. This decision was handed down on January 29, 2015, the very day my *Appellant's Reply Brief* was filed in this matter.

The decision is directly on point with respect to several issues discussed within my *Appellant's Brief* (filed October 21, 2014) and my *Appellant's Reply Brief* (filed January 29, 2015), in my appeal, *Lamell v. OneWest Bank*., No. 14-14-00175-CV, now pending before the Fourteenth Court of Appeals.

The Court should find holdings within this decision as highlighted in the convenience copy attached hereto persuasive as to several issues raised in my briefs in the following pages: *Appellant's Brief*, pgs. 23, 38, 56-64, 67-68; *Appellant's Reply Brief*, pgs. 25-33.

[1] I respectfully request the Court to take judicial notice pursuant to TEX. R. EVID. 202 of the January 29th, 2015 decision: *In re: Cynthia Carrsow-Franklin*, No. 10-20010, 2015WL364719 (Bankr. S.D.N.Y. Jan. 29, 2015). This decision is available online at:

http://www.nysb.uscourts.gov/content/re-10-20010-rdd-cynthia-carssow-franklin-0

I respectfully request the Court to consider this recent decision as supplementary authority pursuant to TEX. R. APP. P. 38.7.

This case is presently set for submission on Tuesday, February 24, 2015 before a panel consisting of Chief Justice Frost, Justice Boyce, and Justice McAlly.

Would you please forward this *Notice of Additional Authority* with the attached convenience copy of the *Memorandum of Decision* to the Justices on the panel so that they may be apprised of this additional authority in their deliberations on this matter?

Thank you!

Respectfully submitted,

/s/ J. M. Arpad Lamell
J. M. Arpad Lamell, pro se
[redacted]

Cc: Thomas A. Hanson, Esq.
Enc/2: Certificate of Service, Memorandum of Decision

## CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2015, a true and correct copy of the foregoing *"Notice of Additional Authority"* was sent by e-service/e-mail to Mr. Thomas Hanson, lead counsel for Appellee OneWest to the address as shown below.

/s/ J. M. Arpad Lamell

J. M. Arpad Lamell

Via: TexFile e-service and e-mail.
To: **Thomas M. Hanson**
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In re:

Cynthia Carrsow-Franklin,

Debtor.

Chapter 13
Case No. 10-20010 (RDD)

----------x

**MEMORANDUM OF DECISION ON DEBTOR'S OBJECTION TO CLAIM OF WELLS FARGO BANK, NA**

APPEARANCES: Garvey, Tirelli & Cushner, Ltd., by Linda M. Tirelli, for the debtor

Hogan Lovells US LLP, by David Dunn and Nocole E. Schiavo, for Wells Fargo Bank, NA

HON. ROBERT D. DRAIN, UNITED STATES BANKRUPTCY JUDGE

The debtor herein (the "Debtor") has objected to a claim filed in this case by Wells Fargo Bank, NA ("Wells Fargo"), Claim No. 1-2, dated September 29, 2010 (amending Claim No. 1-1), on the basis that Wells Fargo is not the holder or owner of the note and beneficiary of the deed of trust upon which the claim is based and therefore lacks standing to assert the claim.[1] This Memorandum of Decision states the Court's reasons, based on the record of the trial held on December 3, 2013 and the parties' pre- and post-trial submissions, for granting the Claim Objection.

**Jurisdiction**

The Court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157(a)-(b) and 1334(b). Under 28 U.S.C. § 157(b)(2)(B) this is a core proceeding which the Court may determine by final order.

**Background**

On July 15, 2010, Wells Fargo filed its first proof of claim in this case, Claim No. 1-1, asserting indebtedness of $170,072.60, including prepetition arrears of $38,163.16. The proof of claim attached a

[1] *See* Objection to Proof of Claim #1-1 As Amended Claim #1-2 Filed by Wells Fargo Bank, NA and Request for Accounting and Conditional Motion for Damages and Fees, dated October 4, 2010 (the "Claim Objection").

copy of a 30-year note, dated October 30, 2000, payable to Mortgage Factory Inc. in the amount of $145,850 (the "Note"), which was signed by the Debtor. The version of the Note attached to Claim No. 1-1 bears a specific indorsement by Mortgage Factory Inc. to ABN Amro Mortgage Group, Inc. ("ABN Amro") and no other indorsements.

Claim No. 1-1 also attached a Deed of Trust made out to Malcom D. Gibson, as trustee, and an Assignment of Rents, both dated October 30, 2000, which secure the Note with the Debtor's interest in the real property located at 2523 Crenshaw Drive, Round Rock Texas 78664 and the other collateral described therein (the "Property"). There is no real dispute that the Deed of Trust and related security documents were properly filed and recorded under Texas law; they bear the November 16, 2000 file stamp of the County Clerk of Williamson County, Texas.[2] Claim No. 1-1 also attached an Assignment of Lien, dated October 30, 2000, pursuant to which Mortgage Factory, Inc. assigned its rights under the Note and related liens to ABN Amro; it, too, bears the County Clerk's file stamp, dated November 16, 2000.

Also attached to Claim No. 1-1 was an Assignment of Deed of Trust by ABN Amro, dated June 20, 2002, pursuant to which ABN AMRO assigned "all beneficial interest in" the Deed of Trust securing the Note, together with the Note, to Mortgage Electronic Registration System ("MERS") "as nominee for Washington Mutual Bank, FA," which bears the Williamson County Clerk's June 28, 2002 file stamp.

Claim No. 1-1 also attached (a) a Loan Modification Transmittal Form, (b) a Loan Modification Agreement signed by the Debtor and an officer of Wells Fargo, dated February 12, 2008, and (c) an unsigned form, with the heading "Freddie Mac," addressed to an officer of Wells Fargo, which states that Freddie Mac has approved Wells Fargo's request to consider a loan modification pertaining to the Debtor on certain conditions.

[2] Texas law applies to the merits of the Claim Objection. It is the parties' choice of law under ¶ 16 of the Deed of Trust and would apply in any event because the Note and Deed of Trust were entered into by the parties in Texas and pertain to real property located in Texas.

Finally, Claim No. 1-1 attached an Assignment of Mortgage pursuant to which MERS assigned to Wells Fargo "a mortgage" (neither rights under the Deed of Trust, nor the Note) made by the Debtor pertaining to the Note. This Assignment of Mortgage is dated July 12, 2010, which is three days before the date of Claim No. 1-1, and is executed on behalf of MERS "as nominee for Washington Mutual Bank, FA" by John Kennerty, Assistant Secretary, presumably of MERS.

In the Claim Objection, the Debtor's counsel has represented without dispute that after reviewing Claim No. 1-1 she contacted Wells Fargo's then counsel, who had signed Claim No. 1-1 on Wells Fargo's behalf, with questions regarding Wells Fargo's standing to assert the claim and followed up on July 26, 2010 with a qualified written request under RESPA, 12 U.S.C. § 2605, and a borrower's request under TILA, 15 U.S.C. §§ 1601, *et seq.* Wells Fargo responded to these requests in a letter, dated August 18, 2010, in which it stated that Freddie Mac owned the Note, which Freddie Mac had already represented to the Debtor's counsel in a July 27, 2010 email. *See* Exhibits N and O, respectively, to the Claim Objection.

Neither the email from Freddie Mac, the letter from Wells Fargo, nor anything else offered by Wells Fargo's then counsel dealt with the two key issues raised by Claim No. 1-1, however: (i) how could Wells Fargo or Freddie Mac assert a claim under the Note when the Note was neither specifically indorsed to either of them nor indorsed in blank (and was specifically indorsed to ABN Amro, although ABN Amro had subsequently assigned its interest therein to MERS as nominee for Washington Mutual Bank, FA), and (ii) how could Wells Fargo properly assert any rights under the July 12, 2010 Assignment of Mortgage when the person who signed the Assignment of Mortgage from MERS in its capacity "as nominee for Washington Mutual Bank, FA" to Wells Fargo was an employee of Wells Fargo (as well as of MERS),[3] and there was no evidence that Washington Mutual Bank, FA authorized MERS to assign its

[3] It is undisputed that when he executed the Assignment of Mortgage John Kennerty was an employee of Wells Fargo, not of Washington Mutual Bank, FA, as well as of MERS. *See generally In re Smith*, 509 B.R. 260, 263 n. 1 (Bankr. N.D. Cal. 2014) ("MERS acts as mortgagee of record for mortgage loans that are registered in MERS'

interest in the Property to Wells Fargo? Wells Fargo and Freddie Mac's responses to the Debtor's counsel's questions raised another question, though: if Freddie Mac was the owner of the loan, as both Wells Fargo and Freddie Mac contended, why was Claim No. 1-1 filed by Wells Fargo not as Freddie Mac's agent or servicer, but, rather, in its own name? (The ownership/agency issue had practical as well as possible legal consequences because counsel for Wells Fargo contended that Freddie Mac guidelines precluded Wells Fargo from considering loan modification proposals for the Debtor.)

Before the expiration of the bar date in this case, though, Wells Fargo filed another proof of claim, amended Claim No. 1-2, dated September 23, 2010, which was the same as Claim No. 1-1 in all respects except one: the copy of the Note attached to Claim No 1-2 had a second indorsement. In addition to the specific, or special indorsement from Mortgage Factory Inc. to ABN Amro, it also had a blank indorsement, signed by Margaret A. Bezy, Vice President, for ABN Amro.

Presumably, Claim No. 1-2 was intended to satisfy the Debtor's questions about Wells Fargo's standing to assert a claim: as discussed below, under Texas law a person in possession of a note indorsed in blank may enforce the note and a related deed of trust or mortgage even if the noteholder does not have a valid assignment of the mortgage or deed of trust. Nevertheless, the Debtor filed the Claim Objection, asserting several reasons why Claim No. 1-2 should be disallowed under 11 U.S.C. § 502 and Fed. R. Bankr. P. 3007, although since that time she actively pursued only two.[4]

First, the Debtor contended that Wells Fargo lacked standing to assert the claim because it admittedly did not own the loan upon which it was based yet filed the claim on its own behalf, not as

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system. Mortgage lenders subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. Members (lenders and servicers) contractually agree to appoint MERS to act as their common agent on all mortgages the member registers in the MERS system. To facilitate the execution of assignments from MERS, MERS regularly designates 'certifying officers,' who are typically employees of MERS member firms. MERS authorizes these employees through formal corporate resolutions to execute assignments on its behalf.").

[4] The Debtor's objection to the amount of Claim No. 1-2 also continues, as does the Debtor's request for the imposition of sanctions, including under 28 U.S.C. § 1927.

agent or servicer for Freddie Mac. *See In re Unioil, Inc.*, 962 F.2d 988, 992 (10th Cir. 1992) (proof of claim "which did not even indicate [claimant's] representational capacity much less disclose the identity of the true creditor, was defective" under Fed. R. Bankr. P. 3001(b));[5] *cf. In re Manville Forest Products Corp.*, 89 B.R. 358, 376-77 (Bankr. S.D.N.Y. 1988), *aff'd*, 99 B.R. 542 (S.D.N.Y. 1989), *aff'd*, 896 F.2d 1384 (2d Cir. 1990) (applying Fed. R. Bankr. P. 3003(c), which pertains to cases under chapters 9 and 11 of the Bankruptcy Code, to preclude filing of proof of claim in unauthorized capacity).

Second, the Debtor contended that the blank indorsement that appeared for the first time on the form of Note attached to Claim No. 1-2 was as improper as the purported July 12, 2010 Assignment of Mortgage to Wells Fargo executed on behalf of the assignor/nominee by an employee of Wells Fargo. As alleged by the Claim Objection, the blank indorsement was forged in response to problems with the documentation of Wells Fargo's right to enforce the Note, just, as the Debtor contended, the July 12, 2010 Assignment of Mortgage was manufactured three days before Claim No. 1-1 was filed in order to falsely lead the Debtor and the Court to think that Wells Fargo had an independent right to enforce a mortgage on the Property.

Wells Fargo retained new counsel,[6] and the parties engaged in discovery disputes that resulted in an order compelling the deposition of John Kennerty, who by then no longer worked for Wells Fargo, *see Kennerty v. Carrsow-Franklin* (*In re Carrsow-Franklin*), 456 B.R. 753 (Bankr. D. S.C. 2011), and Wells Fargo's production of a woefully unqualified initial Rule 30(b)(6) witness. With discovery still far from complete, however, the Debtor moved for summary judgment under Fed. R. Bankr. P. 7056, primarily on

[5] Fed. R. Bankr. P. 3001(b) states that "A proof of claim shall be executed by the creditor or the creditor's authorized agent [except where permitted under the Bankruptcy Rules to be filed by the debtor or bankruptcy trustee or by a guarantor, surety, indorser or other co-debtor]."

[6] Stephen J. Baum, P.C., which had filed Claim Nos. 1-1 and 1-2 on Wells Fargo's behalf, ceased doing business on December 31, 2011. In March, 2012 the firm entered into a $4 million settlement with the State of New York over its handling of foreclosure actions and documents, in which It did not admit to any wrongdoing. Press Release of Attorney General Eric T. Schneiderman, dated March 22, 2012: "A.G. Schneiderman Announces $4 Million Settlement with New York Foreclosure Law Firm Steven J. Baum P.C. and Pillar Processing LLC."

the basis that Wells Fargo concededly did not own the loan yet had not filed Claim No. 1-2 in a representative capacity. Wells Fargo responded that it did not need to be the owner of the loan in order to enforce the Note and a secured claim for amounts owing under it. Instead, Wells Fargo relied, under Texas' version of Article 3 of the Uniform Commercial Code (the "U.C.C."), solely on being the "holder" of the Note indorsed in blank by ABN Amro that appeared for the first time as an attachment to Claim No. 1-2.[7]

In a bench ruling on March 1, 2012, memorialized by an order dated May 21, 2012, the Court agreed with Wells Fargo, concluding that, under Texas law, if Wells Fargo were indeed the holder of the Note properly indorsed in blank by ABN Amro, Wells Fargo could enforce the Note and the Deed of Trust even if it was not the owner or investor on the Note or properly assigned of Deed of Trust,[8] citing *SMS Fin., Ltd. Liab. Co. v. ABCO Homes, Inc.*, 167 F.3d 235, 238 (5th Cir. 1999) (under Texas law, "[t]o recover on a promissory note, the plaintiff must prove: (1) the existence of the note in question; (2) that the party sued signed the note; (3) that the plaintiff is the owner or holder of the note; and (4) that a certain balance is due and owing on the note") (emphasis added), and *In re Pastran*, 2010 Bankr. LEXIS 2237, at

[7] Perhaps wary of relying on an assignment by the assignee to itself without authorization by the purported assignor, Wells Fargo has waived reliance on the July 12, 2010 Assignment of Mortgage to establish its right to assert Claim No. 1-2, looking only to its status as a holder of the Note. It indeed appears that Mr. Kennerty's signature on the Assignment of Mortgage was improper in either of his capacities, as an officer of Wells Fargo or as an officer of MERS, without further authorization from Washington Mutual Bank, FA, because ABN Amro assigned MERS the Deed of Trust solely in MERS' capacity as nominee for Washington Mutual Bank, FA, without the power of foreclosure and sale in its own right and not for its own successors and assigns as well as Washington Mutual Bank, FA's; and MERS (through Mr. Kennerty) executed the Assignment of Mortgage solely as nominee for Washington Mutual Bank, FA. Compare *Kramer v. Fannie Mae*, 540 Fed. Appx. 319, 320 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1310, 188 L. Ed. 2d 305 (2014) (MERS could assign deed of trust made out to it that specifically granted MERS the power to foreclose and assign its rights); *Silver Gryphon, L.L.C. v. Bank of Am. NA*, 2013 U.S. Dist. LEXIS 168950, at *11-12 (S.D. Tex. Nov. 7, 2013) (same); *Richardson v. CitiMortgage, Inc.*, 2010 U.S. Dist. LEXIS 123445, at *3, *13-14 (E.D. Tex. Nov. 22, 2010) (same), *and Nueces County v. MERSCORP Holdings, Inc.*, 2013 U.S. Dist. LEXIS 93424, at *20 (S.D. Tex. July 3, 2013); *In re Fontes*, 2011 Bankr. LEXIS 1792, at *11-13 (B.A.P. 9th Cir. Apr. 22, 2011); and *In re Weisband*, 427 B.R. 13, 20 (Bankr. D. Az. 2010) (MERS as mere "nominee" of mortgage holder lacks power to transfer enforceable mortgage).

[8] See discussion of the Texas U.C.C. below. The Court also found that there was no meaningful evidence that Claim No. 1-2 was filed by Wells Fargo as Freddie Mac's agent or servicer or that Freddie Mac actually was the investor/owner of the loan, and, accordingly, granted that portion of the Debtor's summary judgment motion for an order declaring that Claim No. 1-2 was not filed in Wells Fargo's capacity as servicer or agent.

*6-7 (Bankr. N.D. Tex., July 13, 2010) (same). *See also* Tex. Bus. & Com. Code § 3.301 (2014) ("A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument . . . ."); *Das v. Deutsche Bank Nat'l Trust Co.*, 2014 Tex. App. LEXIS 2541, at *6-7 (Tex. App. Dallas March 5, 2014), *petition for review denied*, 2014 Tex. LEXIS 441 (Tex. May 30, 2014) (same); *Martin v. New Century Mortg. Co.*, 377 S.W.3d 79, 84-5 (Tex. App. Houston 1st Dist. 2012) (same); *Roberts v. Roper*, 373 S.W.3d 227, 232 (Tex. App. Dallas 2012) (same); *BAC Home Loans Servicing, LP. v. Tex. Realty Hldgs., LLC*, 901 F. Supp. 2d 884, 907 (S.D.Tex. 2012) ("A holder of a note, as well as an owner, may enforce the note."); *see generally* Joseph William Singer, "Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them," 46 Conn. L. Rev. 497, 526 (Dec. 2013) ("Foreclosure and Failures") ("The prevailing view seems to be that most mortgage notes are negotiable instruments governed by Article 3 of the Uniform Commercial Code (U.C.C.) and that mortgage obligations are owed to 'the person entitled to enforce the note' within the meaning of U.C.C. section 3-301; that person may be different from the person who 'owns' the note and has the ultimate right to the economic value of the note."); James M. Davis, "Paper Weight: Problems in the Documentation and Enforcement of Transferred Mortgage Loans, and Proposal for an Electronic Solution," 87 Am. Bankr. L.J. 305, 322-23 (2013) (discussing the difference between the right to enforce a note under the U.C.C. and ownership of the note). For the proposition that under Texas law the holder of a note may enforce a deed of trust securing the note even if the deed of trust is not assigned to the noteholder or in the noteholder's name, *see Kiggundu v. Mortg. Elec. Registration Sys.*, 469 Fed. Appx. 330, 332 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 210, 184 L. Ed. 2d 41 (2012).

The Court therefore denied the Debtor's summary judgment motion for an order declaring that Wells Fargo lacked standing to assert Claim No. 1-2. Because discovery with respect to the bona fides of

the all-important blank indorsement appearing on the version of the Note attached to Claim No. 1-2, was not complete, however, the Court scheduled an evidentiary hearing on that issue.[9]

After the completion of discovery, which included the depositions of Mr. Kennerty and Mr. Kyle N. Campbell – the third witness offered by Wells Fargo to corroborate its possession of the Note attached to Claim No. 1-2 and the propriety of the blank indorsement – the Court held an evidentiary hearing in which it took testimony from Mr. Campbell and the Debtor. The parties earlier agreed to the admission of Mr. Kennerty's deposition transcript in lieu of his testimony, as well as to the admission into evidence of the exhibits attached to Claim Nos. 1-1 and 1-2, as well as the original of the Note with the blank ABN Amro indorsement, a copy of which was attached to Claim No. 1-2.

Based on the Court's review of the original of that document, the blank ABN Amro indorsement has been stamped on the last page of the Note, although it is not discernable whether Margaret A. Bezy's signature was separately written in on the signature line or was part of the stamp. *See* December 3, 2013 Trial Transcript ("Trial Tr."), at 5-6 (The Court: "So this is the second endorsement, the blank endorsement, then is a file stamp? It's a stamp?" Mr. Dunn: "I have no personal knowledge, but it

[9] Since this Court's March 1, 2012 bench ruling on the Debtor's summary judgment motion, many courts applying Texas law have held not only that the holder of a note can enforce it in a foreclosure proceeding notwithstanding that the noteholder does not hold the deed of trust or mortgage (the so-called "mortgage follows the note" rule that applies in most jurisdictions and traces back at least to *Carpenter v. Longan, 83 U.S. 271, 274 (1872)*), *see Kiggundu v. Mortg. Elec. Registration Sys.*, 469 Fed. Appx. at 332, but also that the secured party to a deed of trust may enforce it against the collateral even if it does not hold the note secured thereby. *See Morlock, L.L.C. v. Bank of N.Y.*, 2014 Tex. App. LEXIS 9135, at *5-9 (Tex. App. Houston 1st Dist. Aug. 19, 2014), *reh'g den.*, 2014 Tex. App. LEXIS 13907 (Tex. App. Houston 1st Dist. Dec. 30, 2014); *Morlock, L.L.C. v. JPMorgan Chase Bank, N.A.*, 2014 U.S. App. LEXIS 17968, at *4-5 (5th Cir. Sept. 19, 2014); *Thomas v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 113220, at *14-15 (N.D. Tex. July 16, 2013); *Calvino v. Conseco Fin. Servicing Corp.*, 2013 U.S. Dist. LEXIS 124343, at *18-20 (W.D. Tex. Aug. 29, 2013), and the cases cited therein. Not all jurisdictions follow the latter rule, *see*, *e.g.*, *Eaton v. Fannie Mae*, 969 N.E.2d 1118, 1131-33 (Mass. 2012); *Bank of N.Y. v. Silverberg*, 926 N.Y.S.2d 532, 539 (N.Y. App. Div. 2d Dep't 2011); Foreclosures and Failures, 46 Conn. L. Rev. at 526. During the same period courts applying Texas law have held that a borrower lacks standing to contest the fraudulent (as opposed to forged) assignment of a deed of trust in certain circumstances, although the extent of the rule is not free from doubt. *Morlock, L.L.C. v. Bank of N.Y.*, 2014 Tex. App. LEXIS 13907, at *2-5; *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220, 224-25 (5th Cir. 2013); *Brinson v. Universal Mortg. Co.*, 2014 U.S. Dist. LEXIS 121685, at *10-13 (S.D. Tex. Sept. 2, 2014); *Venegas v. U.S. Bank, Nat'l Ass'n*, 2013 U.S. Dist. LEXIS 66000, at *13-16 (W.D. Tex. May 9, 2013). As noted above, however, Wells Fargo has relied solely on being a holder of the Note to sustain Claim No. 1-2 and has not raised the foregoing arguments.

appears to be." The Court: "Well, it appears to be. It doesn't look like it's a signature." Mr. Dunn: "It appears to be an inked stamp." The Court: "Right." Mr. Dunn: "The endorsement in blank by ABN Amro does appear to have been applied by a representative.").

While agreeing to the admission of the original version of the Note, the Debtor did not, of course, agree to the validity of the blank ABN Amro indorsement, continuing to assert that it was forged. The Debtor also objected to the admission of certain other proposed exhibits printed from Wells Fargo's computer file for the loan at issue, which Wells Fargo offered as business records under Fed. R. Evid. 803(6).

After post-trial briefing on the Debtor's objection to the exhibits' admission, the Debtor also moved to reopen the record to take further discovery of Wells Fargo based on the contention that she had unearthed withheld evidence consisting of a Wells Fargo attorney manual that supported her contention that Wells Fargo had an "indorsement team" that improperly added the blank indorsement to the Note.[10]

The Court granted this motion, provided that the additional discovery would pertain only to the loan and Note at issue. Several months passed until, after the Court's inquiry, the parties replied that they were not going to present any more evidence and wanted a ruling on the merits of the Claim Objection on the basis of the evidence previously submitted.

**Discussion**

Because it is undisputed that (a) the Debtor signed the Note (and received the loan proceeds)[11] and (b) a properly recorded lien on the Property secures the Debtor's obligation under the Note (albeit that Wells Fargo does not rely independently on the Deed of Trust assigned to ABN AMRO and then

[10] *See* Supplement to Emergency Motion to Reopen and for Leave to Propound Additional Discovery to Defendant for Additional Evidence Withheld Prior to Trial, dated March 11, 2014.

[11] *See* Trial Tr. at 95-6 (testimony of the Debtor).

assigned to MERS as nominee for Washington Mutual Bank, FA (none of which has filed a proof of claim) or the Assignment of Mortgage to sustain its claim), the only issue addressed by the parties is whether Wells Fargo has standing to enforce the Note, and, thus, assert Claim No. 1-2.[12] This is because, as stated above, Texas follows the majority rule that "[w]hen a mortgage note is transferred, the mortgage or deed of trust is also automatically transferred to the note holder by virtue of the common-law rule that 'the mortgage follows the note.'" *Campbell v. Mortg. Elec. Registration Sys., Inc.*, 2012 Tex. App. LEXIS 4030, at *11-12 (Tex. App. Austin May 18, 2012), *quoting J.W.D., Inc. v. Fed. Ins. Co.*, 806 S.W.2d 327, 329-30 (Tex. App. Austin 1991). *See also Kiggundu v. Mortg. Elec. Registration Sys., Inc.*, 469 Fed. Appx. 330, 332; *Richardson v. Ocwen Loan Servicing, LLC*, 2014 U.S. Dist. LEXIS 177471, at *13 n.4 (N.D. Tex. Nov. 21, 2014); *Nguyen v. Fannie Mae.*, 958 F. Supp. 2d 781, 790 n.11 (S.D. Tex. 2013); *Trimm v. U.S. Bank., N.A.*, 2014 Tex. App. LEXIS 7880, at *14 (Tex. App. Fort Worth July 17, 2014).

Wells Fargo's right to enforce the Note, and thus its standing to assert Claim No. 1-2, derives from the Note's status as a negotiable instrument under Texas' version of the U.C.C. *See* Tex. Bus. & Com. Code § 3.104(a). The Debtor has not disputed that the Note is negotiable, and the Note in any event satisfies the requirements of a negotiable instrument under Texas law, as it is "an unconditional promise . . . to pay a fixed amount of money . . . payable to . . . order at the time it [was] issued; . . . payable . . . at a definite time; and does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money" except as permitted by the statute. *Id.* S*ee also Farkas v. JP Morgan Chase Bank*, 2012 U.S. Dist. LEXIS 190194, at *6-7 (W.D. Tex. June 22, 2012), *aff'd*, 544 Fed. Appx. 324 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 628, 187 L. Ed. 411

[12] One might argue, although Wells Fargo has not, that the parties' pre-bankruptcy course of dealing, including the Loan Modification Agreement signed by the Debtor on February 12, 2008 and attached to Claim No 1-2 (*See also* Trial Tr. at 96-104), would independently support Wells Fargo's right to assert Claim No. 1-2; however, if the blank ABN Amro indorsement were forged, the Loan Modification Agreement and course of dealing would ultimately improperly derive from Wells Fargo's fraudulent assertion of the right to enforce the Note and Deed of Trust.

(2013); *Steinberg v. Bank. of Am., N.A.*, 2013 Bankr. LEXIS 2230, at *12-14 (B.A.P. 10th Cir. May 30, 2013).

Under Texas law, a person entitled to enforce a negotiable instrument such as the Note includes "the holder of the instrument," Tex. Bus. & Com. Code § 3.301(i), and "a holder is 'the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.'" *Nguyen v. Fannie Mae*, 958 F. Supp. 2d at 787-88 (*quoting* Tex. Bus. & Com. Code § 1.201(b)(21)(A)).[13]

Under Texas' U.C.C.,

(a) If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a 'special indorsement.' When specially indorsed, an instrument becomes payable to the identified person and may be negotiated[14] only by the indorsement of that person . . . .

(b) If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a 'blank indorsement.' When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

Tex. Bus. & Com. Code § 3.205. *See generally Venegas v. U.S. Bank Nat'l Assn*, 2013 U.S. Dist. LEXIS 66000, at *7 (W.D. Tex. May 9, 2013)*:*

> Under Texas law, a holder is 'the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.' Tex. Bus. & Com. Code § 1.201(b)(21)(A). 'A person can become the holder of an instrument when the instrument is issued to that person, or he can become a holder by negotiation.' *Martin v. New Century Mortg. Co.*, 377 S.W.3d 79, 84 (Tex. App. Houston 2012) (citing Tex. Bus. & Com. Code § 3.201 cmt. 1). When the instrument is payable to an identified entity, 'negotiation requires transfer of possession of the instrument and its indorsement by the holder.' *Id.* (quoting Tex. Bus. & Com. Code § 3.201(b)). An instrument is payable to bearer when it is indorsed in blank. Tex. Bus. & Com. Code § 3.205(b).

[13] There are other ways to enforce a note without being a holder in possession, for example by establishing that one is a "nonholder in possession . . . with the rights of a holder" (Tex. Bus. & Com. Code § 3.301(ii)), or through a lost note affidavit (Tex. Bus. & Com. Code § 3.309), but Wells Fargo has not relied on these provisions.

[14] "'Negotiation' means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes a holder." Tex. Bus. & Com. Code § 3.201(a).

As discussed above, Wells Fargo's counsel provided the original Note to the Court at the evidentiary hearing, and it was admitted into evidence with the sole caveat that the Debtor disputes the bona fides of ABN Amro's blank indorsement that appears on it. Trial Tr. at 4-7. Thus, it is uncontroverted that the Note is in Wells Fargo's possession. In accordance with the foregoing sections of Texas' U.C.C., therefore, if the blank ABN Amro indorsement is bona fide, Wells Fargo is the holder of the Note, entitled to enforce it. *Trimm v. U.S. Bank, N.A.*, 2014 Tex. App. LEXIS 7880, at *13; *Das v. Deutsche Bank Nat'l Trust Co.*, 2014 Tex. App. LEXIS 2541, at *6 ("An instrument containing a blank endorsement is payable to the bearer and may be negotiated by transfer of possession alone."). On the other hand, if the indorsement is forged, it is not valid, and – the only other indorsement on the Note being a specific indorsement to ABN Amro – Wells Fargo could not rely on the foregoing statutory provisions to establish that it is the holder of the Note. *See In re Pastran*, 2010 Bankr. LEXIS 2237, at *10 ("[S]ince [claimant] is in possession of a promissory note endorsed in 'blank,' it is, by definition, a 'holder' under section 3.201(a). This, of course, assumes that all of the indorsements on the Note are authentic and authorized.").

Texas' U.C.C. provides that, although Wells Fargo has the ultimate burden of proof, the indorsements on the Note, including ABN Amro's all-important blank indorsement by Margaret A. Bezy, Vice President, are presumed to be authentic:

> In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument are admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic. . . .

Tex. Bus. & Com. Code § 3.308(a) (emphasis added).

Texas' U.C.C. defines "presumed" as follows: "Whenever this title creates a 'presumption' with respect to a fact, or provides that a fact is 'presumed,' the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence." *Id.* § 1.206(a). *In re*

*Pastran*, 2010 Bankr. LEXIS 2237, at *10-11 ("Thus, [the claimant] is not required to prove that the indorsements on the Note are valid and authentic unless and until the Debtor overcomes the presumption by putting on evidence that supports a finding that the indorsements on the Note were somehow forged or unauthorized.").

"The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant."[15] Official Comment to Tex. Bus. & Com. Code § 3.308 ("Off. Cmt."). The presumption is effectively incorporated into Fed. R. Evid. 902(9), which provides that no extrinsic evidence of authenticity is required to admit "[c]ommercial paper, a signature on it, and related documents, to the extent allowed by general commercial law," and it is loosely analogous to the rebuttable presumption of the prima facie validity of a properly filed proof of claim under Fed. R. Bankr. P. 3001(f).

While Tex. Bus. & Com. Code §§ 3.308(a) and 1.206(a) provide that the presumption of an authentic signature applies "unless and until evidence is introduced that supports a finding of nonexistence," they do not state the quantum of evidence to overcome the presumption. The Official Comment to § 3.308, however, refers to "some evidence" and to "some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence," and then states, "[t]he defendant's evidence need not be sufficient to require a directed verdict, but it must be enough to support the denial by permitting a finding in the defendant's favor." Off. Cmt. 1 to § 3.308.[16] This suggests that the required evidentiary showing to overcome the presumption is similar to that needed

[15] This second rationale for the presumption does not apply here: the Claim Objection is premised not on the forgery of the Debtor's signature but, rather, on the forgery of the blank ABN Amro indorsement.

[16] In contrast, Tex. Bus. & Com. Code. § 3.302(a)(1) requires "apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question" the authenticity of an instrument asserted to be held by a holder in due course, thus focusing on the face of the instrument itself as opposed to a wider range of possible evidence of forgery. (Emphasis added.)

to defeat a summary judgment motion: the introduction of sufficient evidence so that a reasonable trier of fact in the context of the dispute could find in the defendant's favor. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); 11 Moore's Fed. Prac. 3d § 56.22[2] (2014). Because of the general factual context described in the Official Comment, which recognizes that "in ordinary experience forged or unauthorized signatures are very uncommon," Off. Cmt. 1 to § 3.308, courts have nevertheless required a significant amount of evidence to overcome the presumption. *See In re Phillips*, 491 B.R. 255, 273 n. 37 (Bankr. D. Nev. 2013) ("This evidence was inconclusive at best. Against this background, the court is prepared to believe that it is more likely that [the claimant] negligently failed to copy the Note and First Allonge when it filed its [first] Proof of Claim rather than it forged the First Allonge later on. In short, when both are equally likely, the court picks sloth over venality."); *see also Congress v. U.S. Bank. N.A.*, 98 So. 3d 1165, 1169 (Civ. App. Ala. 2012) (referring to requirement of substantial, though not clear and convincing, evidence to rebut the presumption under U.C.C. §§ 3-308(a) and 1-206(a), although directing trial court on remand to apply preponderance-of-the-evidence standard to whether the presumption was overcome).

It is important to keep in mind, however, that if the presumption is overcome, the ultimate burden of proof under Tex. Bus. & Com. Code §§ 3.308(a) and 1.206(a) is on Wells Fargo. *See People v. Richetti*, 302 N.Y. 290, 298 (1951) ("A presumption of regularity exists only until contrary substantial evidence appears. . . . It forces the opposing party (defendant here) to go forward with proof but, once he does go forward, the presumption is out of the case."). Thus, in *In re Phillips*, 491 B.R. at 273 n. 37, quoted above, if the presumption had been overcome by a preponderance of the evidence and the burden shifted and forgery and negligence were found to be equally likely, the holder of the note should lose.

What is the Debtor's evidence that the blank ABN Amro indorsement was forged or unauthorized, and is it sufficient to overcome the presumption under Tex. Bus. & Com. Code §§ 3.308(a) and 1.206(a)?

The Debtor first points out that the version of the Note attached to Wells Fargo's initial proof of claim, Claim No. 1-1, did not contain the blank ABN Amro indorsement. Besides observing that the penalty for filing a false proof of claim, as stated in Official Form 10, can be substantial, the Debtor also observes that, with the exception of the versions of the Note attached, Claim Nos. 1-1 and 1-2 were otherwise identical and included copies of most if not all of the potentially operative documents from Wells Fargo's files, which, she argues, strongly suggests that Claim No. 1-1 was not merely sloppily prepared but, rather, reflected a thorough review of the files, thus suggesting a nefarious reason why the form of Note with the blank ABN Amro indorsement was not attached to that proof of claim but was attached to Claim No. 1-2.

Were this the Debtor's only evidence, the Court might nevertheless hold that she had not overcome the presumption in Tex. Bus. & Com. Code §§ 3.308(a) and 1.206(a). That was the result in *In re Phillips*, 491 B.R. at 273,[17] as well as in *In re Hunter*, 466 B.R. 439, 449-50 (Bankr. E.D. Tenn. 2012), and *In re Wilson*, 442 B.R. 10, 15 n. 6 (Bankr. D. Mass 2011). *See also Casterline v. OneWest Bank, F.S.B.*, 537 Fed. Appx. 314, 318 (5th Cir. 2013) (without discussing Tex. Bus. & Com. Code §§ 3.308(a) and 1.206(a), court not bothered by inconsistencies between different forms of note submitted in foreclosure proceeding and in federal court proceeding); *Das v. Deutsche Bank Nat'l Trust Co.*, 2014 Tex. App. LEXIS 2541, at *7-8 (without discussing Tex. Bus. & Com. Code §§ 3.308(a) and 1.206(a), court granted summary judgment declaring lender to be current holder of note although a different version of the note was attached to proof of claim in earlier bankruptcy case). *But see Ocwen Loan Servicing, LLC v.*

[17] It is worth noting, however, that the court in *Phillips* also found that the circumstances pertaining to the filing of the second version of the note did not lead to the inference that such version was filed (and concocted) in response to a problem raised by the debtor with regard to the first version. *In re Phillips*, 491 B.R. at 273.

*Thompson*, 2014 U.S. Dist. LEXIS 2109, at *14-15 (E.D. Wisc. Jan. 7, 2014) ("[H]ere, faced with two materially different versions of the same negotiable instrument (one sans allonge and the other purportedly modified by an allonge), this Court is obliged to concur that application of FRE 902(9) to the latter would be overly mechanistic."); *In re Tarantola*, 2010 Bankr. LEXIS 2435, at *13 (Bankr. D. Ariz. July 29, 2010) ("[I]n light of [claimant's] admission that it fabricated the Allonge, and in the absence of any credible explanation for the difference of the Original from other filed versions of the Note, the Court will not apply the usual evidentiary presumptions to the validity of the Endorsements.").

In addition, however, the Debtor relies on the Assignment of Mortgage from MERS, "as nominee for Washington Mutual Bank, FA" having been executed by Mr. Kennerty, an officer of Wells Fargo (the assignee), on behalf of the assignor. Even more tellingly, it appears clear from the date of the Assignment – only three days before the date of Claim No. 1-1 – as well as Mr. Kennerty's deposition testimony, that the Assignment was prepared by Wells Fargo's then counsel to "improve" the record supporting Wells Fargo's right to file a secured claim, similar to the "improvement" of the record in *In re Tarantola*, cited above, on which the court relied, along with the two different versions of the note at issue there, to find that the presumption of authenticity was rebutted. 2010 Bankr. LEXIS 2435, at *12-13.[18] (The timing of the filing of Claim No. 1-2 only after the Debtor pointed out the difficulty of Wells Fargo's ability to enforce the form of Note attached to Claim No. 1-1 also distinguishes this matter from the facts in *In re Phillips*, as discussed in note 17 above.)

It appears from Mr. Kennerty's deposition transcript, although his testimony on this point was at times quite evasive, that during the period in question in 2010 he signed on average between 50 and 150 original documents a day in connection with Wells Fargo's administration and enforcement of defaulted loans. Deposition Transcript, dated October 15, 2012, of Herman John Kennerty ("Dep. Tr.")

[18] There is no evidence that Washington Mutual Bank, FA, which in July 2010 was in the midst of its own chapter 11 case and had merged with JPMorgan Chase Bank in September, 2008 (Claim Objection Ex. F) had anything to do with the Assignment of Mortgage. See note 7 above for a discussion of MERS' lack of authority, through Mr. Kennerty, to effectively assign the mortgage/Deed of Trust.

at 89-92. This was part of his duties as the Wells Fargo manager in charge of "default documents." *Id.* at 44. In other words, on a daily basis Mr. Kennerty and his team, members of which he also testified signed a like number of documents each day, *id.*, processed a large volume of loan documents for enforcement with very little thought about what they were doing. It is not clear that Mr. Kennerty fully understood the legal consequences of signing these documents; for example, he testified when shown the Assignment of Mortgage that he executed it not on behalf of the assigning party but, rather, on behalf of the party "in getting the assignment," although he also testified that "I'm – I'm not an attorney, but the way I understand this document, it was assigning the mortgage, taking it out of MERS' name and putting into Wells Fargo Bank's name." *Id.* at 93-4. It is clear, however, that he pretty much signed whatever outside counsel working on the default put in front of him and that these documents often included assignments, including the Assignment of Mortgage, drafted by Wells Fargo's outside enforcement counsel to fill in missing gaps in the record.

Thus, in describing the work of his "assignment team" Mr. Kennerty stated, "[I]f there was not an assignment in there [that is, in Wells Fargo's loan file] then they would – excuse me, they would advise the attorney that we did not have it, that they would need to draft the – the appropriate assignment." *Id.* at 116. *See also id.* at 76 ("[I]f the assignment needed to be created they would have advised the attorney, the requesting attorney to – that we did not have the assignment in the collateral file, then they needed to draw up the appropriate document."); *id.* at 121 ("Once it [that is, the collateral file] was received then they would check to see if it was something that could be used or not used; and, if it's something that was in the file, but couldn't be used then they would advise the requesting attorney to go ahead and draft the actual document.").

Because Wells Fargo does not rely on the Assignment of Mortgage to prove its claim, the foregoing evidence is helpful to the Debtor only indirectly, insofar as it goes to show that the blank indorsement, upon which Wells Fargo is relying, was forged. Nevertheless it does show a general

willingness and practice on Wells Fargo's part to create documentary evidence, after-the-fact, when enforcing its claims, WHICH IS EXTRAORDINARY.[19]

Moreover, Mr. Kennerty's testimony does not stop at describing manufactured mortgage assignments. He also testified that his "assignment team's" duties were not limited to processing assignments, including, when determined necessary, creating them; in addition, the "assignment team" included people tasked with endorsing notes. *Id.* at 136. His testimony on this issue is critical and will be quoted at length:

> Q. Okay. Did your department endorse notes?
>
> A. Yes.
>
> Q. Okay. And how was it that your department would come to endorse notes?
>
> A. I don't recall the specific process, but to the best of my recollection there's usually a – in – usually a – blank endorsement on – on the notes and there would – and then based on that they would complete the endorsement.
>
> Q. So when you say they would complete the endorsement, who is they?
>
> A. I'm sorry. There was a – there – there were some processors that would perform that task.
>
> Q. Okay. When you say complete the endorsement, what do you mean by that?

[19] As discussed in note 7 above, within the last few years several Texas courts have accepted the general proposition that MERS had the power to transfer interests in mortgages and deeds of trust, at least where, as was not the case here, the original deed of trust named MERS and specifically conferred on it the power to sell the collateral and transfer interests therein in the name not only of its nominee but also to its own successors in interest. What these courts do not address, perhaps because the issue was not raised, is that the authorized signing "officers" of MERS, if Mr. Kennerty is a typical example, never actually worked for that company, never had an agreement with that company, never received a paycheck from that company and were, in reality, really officers and employees of the lenders who were MERS members, Dep. Tr. at 99-102, and, therefore, that MERS could readily be used as a vehicle for self-dealing and fraud. That is, under the guise of being a MERS officer, an employee of Bank X could purport to transfer a mortgage held by MERS as nominee for Bank Y without Bank Y knowing about it or authorizing it with the exception of the fact that MERS had conferred signing authority on employees of its members, including employees of Bank X. *See Culhane v. Aurora Loan Servs. of Nebraska*, 826 F. Supp. 2d 352, 374 (D. Mass. 2011), *decision reached on appeal*, 708 F.3d 282 (1st Cir. 2013) ("Equally troubling is the conflict of interest posed by these certifying officers wearing 'two hats' simultaneously: that of assignor (as agent for MERS) and assignee (as employee of the note holder or its servicing agent).").

A. They would execute a note endorsement, a new note endorsement if there was a blank one on there.

Q. And they would do that with the original note from the collateral file?

A. To the best of my recollection, yes.

Q. Okay. And at whose request would the processors perform that function?

A. Again, to the best of my recollection, it would be done at the – either the foreclosure attorney's request or the bankruptcy attorney's request.

*Id.* at 129-31.

Mr. Kennerty then testified about the process for receiving such requests from outside enforcement attorneys and how one or two people in his department had the job of endorsing notes. *Id.* at 131-32. When questioned about how often such requests were made, whether on a daily basis or on rare occasions, Mr. Kennerty replied, "To the best of my recollection, it was on a regular basis." *Id.* at 133. He also testified about the information system or systems at Wells Fargo where such requests might be made and maintained.[20] *Id.* at 133-34.

He then testified as follows:

Q. And the actual procedure for endorsing an original note, if you could just walk me through that process. What would the processor do?

A. To the best of my recollection, they would – the request would come in. Again, we would check to see if we had the collateral file. If we – if we had it and depending on the status of the – of the loan itself, if we had the note then we could check to see, you know, what was actually on the note to see what needed to be done. If we did not have the collateral file then they would work – that processor would work with the collateral file ordering team to reach out with the appropriate attorney or, I'm sorry, the appropriate custodian to obtain the collateral file. And then they would look to – once the file came in they would look to ensure that the original note was in there and check to see if there was any endorsement on the back of the note.

Q. Okay. And if there wasn't how would they go about – how would the processor go about endorsing the note?

A. I don't recall specifically how they completed that particular task.

[20] Apparently no record of any such requests was produced in discovery.

Q. Was it a rubber stamp? Was it somebody signing? How was it?

A. To the best of my recollection, a stamp was involved but then it had to be signed.

Q. Okay. And if an endorsement was coming from an entity that no longer existed how would it be signed?

A. I do not recall.

*Id.* at 135-36 (emphasis added).

Later in his deposition, Mr. Kennerty was shown the two forms of the Note attached to Claim Nos. 1-1 and No. 1-2, respectively, and testified that he did not know how or when the indorsements were placed on them. *Id.* at 142-44. He did have this to say, however:

Q. Now, if any one of these endorsements were a rubber stamp and produced by your department would there be a record of that somewhere?

Mr. Cromwell: Objection; misstates his testimony.

Witness. I – the term rubber stamp is a – not accurate because although the – a stamp to produce the 'pay to order of' was used, the term to me, use of a rubber stamp, means it was signed, there was a signature on the – on the stamp itself and that – to my recollection, that was not the case.

*Id.* at 143-44. Mr. Kennerty said nothing more that was relevant to the issue of whether Wells Fargo forged the blank ABN Amro indorsement, with the exception of stating that "I am not familiar with Margaret Bezy," *id.* at 143, who has not been identified as ever having been an employee of Wells Fargo and presumably was an employee of ABN Amro.

I conclude that the foregoing evidence cumulatively shifts the burden to Wells Fargo under Tex. Bus. & Com. Code §§ 3.308(a) and 1-206(a) to show the authenticity of the blank ABN Amro indorsement to establish its status as a holder of the Note under Tex. Bus. & Com. Code §§ 3.301(i) and 3.201(a). It constitutes substantial evidence that Wells Fargo's administrative group responsible for the documentary aspects of enforcing defaulted loan documents created new mortgage assignments and forged indorsements when it was determined by outside counsel that they were required to enforce

loans. Given that evidence, Wells Fargo should have the burden to establish the bona fides of the blank ABN Amro indorsement that did not appear on the Note attached to Claim No. 1-1 but did appear on the Note attached to Claim No. 1-2.

Reading Mr. Kennerty's testimony carefully, it is conceivable that all of Wells Fargo's newly created mortgage assignments and newly created indorsements were proper, that, for example, the only time the indorsement processors wrote in or stamped new note indorsements (when, as Mr. Kennerty testified, they were not already on the note) or prepared new mortgage assignments was when endorsing notes from Wells Fargo to some other entity, whether as principal or agent, filling in the blank indorsements to itself, or properly, with due authorization, assigning mortgages to it from a third party. However, that interpretation certainly does not leap out from Mr. Kennerty's testimony. By no means did he qualify his testimony to make it clear that his assignment team and indorsement processers were limited by such restrictions. Frankly, it does not appear that he understood the difference between preparing legitimate assignments and indorsements by Wells Fargo and improper assignments and indorsements to Wells Fargo.

Moreover, it is widely recognized that an agent or servicer can enforce a note and mortgage on behalf of its principal. *See, e.g., Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 255 (5th Cir. 2013); *see also In re Minbatiwalla*, 424 B.R. 104, 108-09 (Bankr. S.D.N.Y. 2010) (servicer has standing to file proof of claim). It also is widely recognized, as discussed above, that a holder of a note can enforce the note and mortgage even if it does not "own" the loan, and, of course, that the holder of a note indorsed in blank does not have to fill in the blank with its own name in order to enforce it. Thus, why would Wells Fargo's defaulted document enforcement group be creating new assignments and adding indorsements on a regular basis from itself to, effectively, itself? It would not need to. Similarly, why would Mr. Kennerty's group – Wells Fargo's defaulted document group – on a regular basis be creating new documents and adding indorsements from itself to true third parties for the third parties' benefit?

True third parties were not enforcing the documents; Wells Fargo was.[21] It is more reasonable to infer from Mr. Kennerty's testimony that, instead, Wells Fargo was improving its own position by creating new documents and indorsements from third parties to itself to ensure that it could enforce its claims. Again, then, the burden should shift to Wells Fargo to show that it did not forge the blank ABN Amro indorsement.

Wells Fargo has not carried that burden. To do so, it offered only Mr. Campbell's testimony and, through him, certain exhibits copied from Wells Fargo's loan file. That testimony was not helpful to it. Mr. Campbell was not involved in the administration of the Debtor's loan until he became a potential witness in 2013. Trial Tr. at 37. He was not involved in the preparation of Claim No 1-2. *Id.* at 37. He had nothing to say about the circumstances under which the blank ABN Amro indorsement appeared on the Note attached to Claim No. 1-2, with the exception that he located the earliest entry in the electronic loan file where that version of the Note was recorded, pulled up its image and compared it to the original shown him by Wells Fargo's counsel. *Id.* at 33, 36, 49-50. He was offered, therefore, only to qualify Wells Fargo's proposed exhibits, copied from Wells Fargo's loan file, as falling within Fed. R. Evid. 803(6)'s business records exception to a hearsay objection under Fed. R. Evid. 802 and to testify that a copy of the Note with the blank ABN Amro indorsement appears in Wells Fargo's electronic records before the preparation of Wells Fargo's initial proof of claim in this case.

As noted above, the Debtor objected to Mr. Campbell's testimony to the extent that it was intended to establish a business records exception to Fed. R. Evid. 802. Because the loan file described by Mr. Campbell was an electronic record[22] and thus potentially easily alterable, the Debtor contended

[21] Conceivably, moreover, there was such a third party here – Freddie Mac, which Wells Fargo and Freddie Mac each claimed was the owner of the loan – yet there was no assignment or indorsement from Wells Fargo to or from Freddie Mac or any other legally effective evidence of transfer to or from it.

[22] In fact, Mr. Campbell testified that Wells Fargo had two electronic records systems: a "mortgage servicing platform" and the "imaging system of record." Trial Tr. at 40-1. Although it is not clear how the two systems were integrated, it appears that the loan file that Mr. Campbell accessed was the "imaging system." *Id.* at 13-16, 21.

that (i) for Mr. Campbell to be a "qualified witness" under Fed. R. Evid. 803(6)(D), or (ii) to establish, for purposes of Fed. R. Evid. 803(6)(E), that neither the possible source of information in the file nor other circumstances indicate a lack of trustworthiness, Wells Fargo would have to show at least how data is or can be inserted into the file and that such procedure has built-in safeguards to ensure accuracy and identify errors. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 557-58 (D. Md. 2007); *In re Vee Vinhnee*, 336 B.R. 437, 445-46 (B.A.P. 9th Cir. 2005); *In re Vargas*, 396 B.R. 511, 518-19 (Bankr. C.D. Cal. 2008). The *Vee Vinhnee* court stated that the foregoing showing should include "details regarding computer policy and system control procedures, including control of access to the database, control of access to the program, recording and logging in of changes, backup practices, and audit procedures to assure the continuing integrity of the records." 336 B.R. at 446-47.

In large measure, Mr. Campbell was not up to that task (and Wells Fargo offered no other evidence to meet that standard, were the Court to impose it). Mr. Campbell did not know whether there was any person overseeing the accuracy of how the records in the system were stored and maintained. *Id.* at 32, 40, 42-3. He did not know who controlled access to the system or the procedure for limiting access, except to say "[A]ccess is granted as needed." *Id.* at 40-1. He did not know of any procedures for backing up or auditing the system. *Id.* at 42. He stated, "I am not a technology person" and was not able to answer what technology ensures the accuracy of the date and time stamping of the entry of documents into the imaging system. Trial Tr. at 22. In his deposition, he testified that he did not know whether the dates and times of the entry of documents in the system could be changed, but at trial he stated that, after his deposition, "I attempted to look into this, and, to my knowledge, I am not aware of any way to change or remove attachments into the imaging system," *id*. at 43, which, given his general lack of knowledge about how the system works and failure to explain the basis for his assertion, did not inspire confidence.

Mr. Campbell also undermined his credibility when he supported his statement that he is a custodian of Wells Fargo's electronic record files by stating, "I review and maintain them, yes," *id*. at 38, a remarkable contention in light of his other testimony discussed above. And, indeed, it became clear when pressed on this issue that Mr. Campbell was not using the word "maintain" in its normal sense of ensuring that the system runs properly or even of auditing it by monitoring its inputs and outputs , but, rather, simply that he "asserts" its accuracy: "I review and maintain that they're accurate, yes. . . . I have the ability to access and maintain records. I can upload documents into an imaging system." *Id.* at 38. That is (and his other testimony clearly corroborated this), Mr. Campbell vouched for the system based only on the facts that he and other people associated with Wells Fargo regularly use it and he can find documents on it that match originals that counsel has shown him, *id.* at 33, 36, although he does not know who originated them and put them there and how, and perhaps exactly when, they were put there. *Id.* at 39-40, 43-5.

Nevertheless, Wells Fargo did not have to meet the heightened standard asserted by the Debtor for admission of electronic records under Fed. R. Evid. 803(6). In the Second Circuit, application of the business records exception, including to electronic records, requires only that a qualified witness testify that the document was kept in the course of a regularly conducted business activity and that the making of such record was the regular practice of that activity. *United States v. Komasa*, 767 F.3d 151, 156 (2d Cir. 2014);[23] *United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000), *cert. denied*, 531 U.S. 885 (2000). To be "qualified," the witness need not have personal knowledge of the actual creation of the documents. *Id.* And "[u]sing an 'automated process' to compile the records in question [electronic loan files] does not render the documents inadmissible;" only regular use in reliance on the records' accuracy is required. *Komasa*, 767 F.3d at 156; *see also In re Enron Creditors Recovery Corp.*, 376 B.R. 442, 454

[23] *Komasa* primarily analyzed admissibility under Fed. R. Evid. 902(11), 767 F.3d at 156, but the courts have applied an essentially identical approach to that Rule and Fed. R. Evid. 803(6). 5 Weinstein & M. Berger, *Weinstein's Federal Evidence* § 900.06[2][a] (2014) ("*Weinstein's Federal Evidence*").

(Bankr. S.D.N.Y. 2007) ("A business record may include data stored electronically and later printed out for presentation in court, as long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice. . . . Moreover, if employees regularly retrieve data from the entity's computer system and rely on such information for commercial purposes, they bear sufficient indicia of trustworthiness.") (internal citations omitted); *In re Lo Sia*, 2013 Bankr. LEXIS 3559, at *16-18 (Bankr. D. N.J. Aug. 27, 2013); 5 *Weinstein's Federal Evidence* § 900.07[1][b][i] ("a company's trust in its computer records for routine business decisions is strong circumstantial evidence of the records' reliability"). Moreover, because of the general trustworthiness of such records and a policy favoring the admission of evidence with any probative value, the business records exception has been construed generously. *United States v. Williams*, 205 F.3d at 34 ("We have stated that Rule 803(6) 'favors the admission of evidence rather than its exclusion if it has any probative value at all.'") (*quoting In re Ollag Constr. Equip. Corp.*, 665 F.2d 43, 46 (2d Cir. 1981)); *In re Enron Creditors Recovery Corp.*, 376 B.R. at 444-45.

Here, Mr. Campbell credibly testified that Wells Fargo widely and regularly used its electronic imaging system, Trial Tr. at 13-15, 17, and that he was sufficiently familiar with it to use it himself on a regular basis. *Id.* at 15-16, 52-3. He also testified that generally documents were entered into the system substantially contemporaneously with their receipt or preparation. *Id.* at 16-17, 20-1. Mr. Kennerty corroborated Wells Fargo's reliance on regularly kept loan files, Dep. Tr. at 73-4, 118-19, 148-49, 150 and 154, which is certainly reasonable considering that such files may be used to administer and enforce a large number of loans. Accordingly, the Debtor's objection to the admission of Mr. Campbell's testimony and Wells Fargo's proposed exhibits A through G should be overruled and those exhibits admitted into evidence.

This of course leaves open whether, in the light of Mr. Campbell's testimony and Wells Fargo's Exhibits A through G, as well as the other evidence admitted suggesting forgery, Wells Fargo has carried its burden to substantiate the authenticity of the blank ABN Amro indorsement.

The evidence ultimately is not helpful to Wells Fargo. As noted above and acknowledged by both Mr. Campbell and Wells Fargo's counsel, the primary purpose of his testimony was to show that the image of the version of the Note bearing the blank Wells Fargo indorsement appears in the loan file before the preparation of either of the two proofs of claim filed by Wells Fargo in this case. Trial Tr. at 49-50 (Mr. Campbell: "I was looking for the earliest copy of the note that had all the endorsements on it and that took me back to the [sic] December 28th of 2009."); *id.* at 68 (Mr. Dunn: "[T]he question is whether the note in that form was in the possession of Wells Fargo prior to the time the amended proof of claim, or the original proof of claim, was filed, so the screenshot and the fact that it does appear and the witness was able to view it and verify it as an entry on the date identified back in 2009 is an indicator that it was, in fact, so indorsed.").[24] *See also* Wells Fargo Ex. G, the index to Wells Fargo's electronic loan file, at 6 of 10 (showing the December 28, 2009 entry of a "Note," which Mr. Campbell testified was the first appearance in the file of the version of the Note with the blank ABN Amro indorsement).

That fact, however, at best merely muddies the picture. As stated by Mr. Campbell in ¶ 1 of his Affidavit, dated July 2, 2013 ("Campbell Aff."), which, pursuant to the Court's direction was submitted in lieu of his direct testimony, "In February 2007 certain rights in and with respect to the loan at issue in this proceeding were transferred to Wells Fargo. . . . The transfer of the Note and Mortgage to Wells

[24] Mr. Dunn also argued that Mr. Kennerty's testimony about his indorsement team only "relates to endorsements by Wells Fargo," Trial Tr. at 115 (emphasis added), not to Wells Fargo, but Wells Fargo offered no evidence to support this contention, which has been dealt with above.

Fargo in February 2007 was reflected in Wells Fargo's computerized business records, accessible on an 'AQN1' screen, which reflects Wells Fargo's acquisition of the loan."[25]

It is apparent from Mr. Campbell's testimony, though, that at that time Wells Fargo did not have the original of the Note that bore the blank ABN Amro indorsement, and that it received, at best, only the Note with just the special indorsement from Mortgage Factory Inc. to ABN Amro:

> When the mortgage loan was transferred to Wells Fargo, copies of the origination file were provided to Wells Fargo, and were recorded in its data system. This file included a copy of the Note containing an endorsement from Mortgage Factory to ABN Amro, [which] was recorded in Wells Fargo's imaging system. A copy of this version of the Note was placed into Wells Fargo's system on March 26, 2007 and remains accessible to the present.

*Id.* ¶ 2. What Mr. Campbell avoids saying here (but is clear from his admission during the evidentiary hearing that the first time the Note with the blank ABN Amro indorsement appears in Wells Fargo's records is December 28, 2009 (Trial Tr. at 49-50)), is that when the loan was transferred to Wells Fargo, Wells Fargo did not receive the Note with the blank indorsement, only the Note with a special indorsement that Wells Fargo could not enforce.[26]

Apparently, Mr. Campbell's reference in ¶ 2 of his Affidavit to the "origination file" was intended to provide a rationale for why an allegedly outdated copy of the Note was the only version logged into Wells Fargo's records between the transfer of the loan to it and December 28, 2009, the date identified by Mr. Campbell as the first appearance in the file of the enforceable version with the blank ABN Amro

[25] Exhibit A to the Campbell Aff., gives the date of the transfer as June 21, 2007, in fact, not February 2007, but Exhibit B to the Campbell Aff., which consists of a "hello" letter from Wells Fargo to the Debtor, dated February 3, 2007, states that "As of February 16, 2007, Washington Mutual will transfer the servicing of your mortgage loan to Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A." Both of these exhibits are internal Wells Fargo documents; it is worth reiterating that there is no document in the record that was executed by or comes from Washington Mutual Bank, FA evidencing transfer of the Note and Deed of Trust, or servicing rights and responsibilities related thereto, to Wells Fargo.

[26] Mr. Campbell refers to this document as a "copy," which suggests that Wells Fargo never held an original of the Note with only the special indorsement, but he offered no basis for that characterization. Everything in the image file is a copy, an image, including the later appearance, on December 28, 2009 of the version of the Note with the blank indorsement.

indorsement. Mr. Campbell's basis for stating that the Note without the blank indorsement was part of the "origination file" is shaky, however. The index of documents entered into Wells Fargo's electronic file for this loan, attached as Exhibit G to the Campbell Aff., does designate, at page 9 of 10, a 51-page batch of documents logged in on March 27, 2007 as "Origination;" however, the Note (presumably with only the special indorsement) is separately logged in on that date solely as a "Note." Ex. G, at 9 of 10.

Moreover, in addition to the fact that the specially indorsed version of the Note appears on its own in the file on March 27, 2007, and not as part of an "origination file," Wells Fargo has offered no explanation, let alone evidence, of who else, if not Wells Fargo, held the original of the Note with the blank ABN Amro indorsement before December 28, 2009, if, in fact, such a version then existed. The file provided by the transferor should have included it, if it did exist during that period, because Washington Mutual Bank, FA would not have been able to enforce the Note, either, without the blank indorsement, and the Assignment of Deed of Trust attached to the proofs of claim states that both the Note and Deed of Trust were transferred to MERS as nominee for Washington Mutual Bank, FA on June 20, 2002, effective November 16, 2001. In other words, why would only an outdated and unenforceable version of the Note have been logged in by Wells Fargo when it took over the file in February 2007 if the only enforceable version of the Note had in fact existed at that time (and should have existed since 2002)? The far more likely inference, instead, is that when the loan was transferred to Wells Fargo, the Note with the blank ABN Amro indorsement did not exist.

Why would the Note with the blank ABN Amro indorsement have appeared in Wells Fargo's file only on December 28, 2009, twenty-two months later? Wells Fargo has not provided an explanation, supported by evidence, replying only that the question is irrelevant. All that matters, Wells Fargo contends, is that the enforceable document was imaged into its records before the Debtor's counsel started raising questions about Claim No 1-1. What is, in fact, at least equally pertinent, however, is that the loan went into default well before the appearance of the blank-indorsed Note in the file. Thus,

Wells Fargo would at that time have started to focus on the enforcement of its rights; thus the "default documents" team would then have become involved; thus, recognizing the absence of an enforceable Note, someone on Wells Fargo's behalf responsible for enforcement should then, consistent with Mr. Kennerty's testimony, have seen fit to add the necessary indorsement.

In fact, the loan went into default twice – first in October, 2007 (see Ex. C to Campbell Aff., consisting of an October 15, 2007 default letter from Wells Fargo to the Debtor) and then in November 2008. Fairly soon after the first default, the parties entered into a Loan Modification agreement, on February 11, 2008. Campbell Aff. ¶ 6. The Debtor then defaulted under the loan modification agreement, however, starting in November, 2008, and remained in default thereafter, making only sporadic payments. *Id.* ¶¶ 7-8. It appears both from several entries on Exhibit G to the Campbell Aff. and the Debtor's testimony that workout discussions continued between Wells Fargo and its counsel, on the one hand, and the Debtor, on the other, after this second default, including until shortly before the Debtor commenced her bankruptcy case. Ex. G at 2 of 10; Trial Tr. at 100-101. It is reasonable to assume from the Debtor's testimony, however, that during this period she appeared less likely to be able to perform a new loan modification agreement that would be acceptable to Wells Fargo (she acknowledged that her financial condition worsened, she moved out of the Property, and there was storm damage to it during that period, Trial Tr. at 99-100), and that those responsible for enforcing the loan would then have seen the need for a blank indorsement on the Note and had it forged.

It is not conclusively proven that this is what happened, but, as discussed above, in the light of the evidence submitted by the Debtor Wells Fargo has the burden to show that the indorsement was genuine, and its only argument, based on the timing of the appearance of the blank-indorsed Note in the file record, does not address the reasonable contrary inference that Wells Fargo forged it when the Debtor became seriously in default. Nor is there any evidence that anyone at ABN AMRO caused the original of the Note to be stamped and signed with the blank indorsement, nor any evidence that

anyone from Washington Mutual Bank, FA or MERS on its behalf held that version, let alone forwarded it to Wells Fargo after Wells Fargo took over the loan in February 2007. Wells Fargo has not satisfied its burden.

Finally it is also worth noting that, unless the Debtor successfully invokes a separate power to transfer the Property free and clear, the Property is still encumbered by the Deed of Trust assigned to MERS as nominee for Washington Mutual Bank, FA, even if Wells Fargo has not sought to independently rely on it or the Assignment of Mortgage; in other words, there is a serious limitation to the notion that the Debtor now has a "free house." On the other hand, there are certain bare minimums to proving one's claim. The failure to timely file a claim in this case would have precluded the enforcement of an otherwise allowable claim against the Debtor, notwithstanding the Debtor's receipt of the money that formed the ultimate basis for the claim. Wells Fargo's failure to establish that it is the holder of the Note similarly requires the Claim Objection to be granted and Claims 1-2 and 1-1 disallowed.

**Conclusion**

For the foregoing reasons, the Claim Objection is granted. Counsel for the Debtor should submit a proposed order to chambers consistent with this Memorandum of Decision.

Dated: White Plains, New York
January 28, 2015

/s/ Robert D. Drain
United States Bankruptcy Judge

**Tab-9** *Appellee's Response to Appellant's Motion to Reduce Supersedeas Security – filed 01/20/2015*

No. 14-14-00175-CV



IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT
HOUSTON, TEXAS

J.M. ARPAD LAMELL,

APPELLANT,

V.

ONEWEST BANK, FSB, A FOREIGN CORPORATION,

APPELLEE.

APPEAL FROM 127TH JUDICIAL DISTRICT COURT,
HARRIS COUNTY, TEXAS

# APPELLEE'S RESPONSE TO APPELLANT'S MOTION TO REDUCE SUPERSEDEAS SECURITY

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## STATEMENT REGARDING CITATIONS TO THE RECORD

The District Court Clerk has provided multiple, non-consecutively paginated files containing the Clerk's Record. To avoid confusion, OneWest has cited the Clerk's Record as follows:

- Citations to the "Clerks Record" (filed on 05-31-12) are made in the form of "(CLK. [Page Number(s)].)"

- Citations to the "1st Supplemental Clerks Record 'Court Ordered'" (filed on 06-24-13) are made in the form of "(1st Sup. CLK. [Page Number(s)].)"

- Citations to the "Original Clerks Record" (filed on 04-30-14) are made in the form of "(C.R. [Page Number(s)].)"

- Citations to the "1st Supplemental Clerks Record" (filed on 06-30-14) are made in the form of "(1st Sup. C.R. [Page Number(s)].)"

- Citations to the "2nd Supplemental Clerks Record" (filed on 09-08-14) are made in the form of "(2nd Sup. C.R. [Page Number(s)].)"

- Citations to the "3rd Supplemental Clerks Record" (filed on 09-22-14) are made in the form of "(3rd Sup. C.R. [Page Number(s)].)"

TO THE HONORABLE COURT OF APPEALS:

Appellee OneWest Bank N.A. respectfully requests that this Court deny Appellant's Motion to Reduce Supersedeas Security for either of two reasons. First, the District Court did not abuse its discretion when it set the amount of the security in question. Second, Lamell waived his complaint when he did not object to the amount of the security with the District Court and/or when he waited nearly three years to challenge the amount.

In April 2012, the District Court denied Lamell's request for a temporary injunction to prevent foreclosure of his home following his longstanding failure to make his monthly mortgage payments. Lamell appealed the District Court's order and asked to file a supersedeas bond during the pendency of his appeal. The District Court granted Lamell's request and set the security amount equal to the value of Lamell's mortgage payments during the anticipated ten month appellate process when OneWest's lien enforcement rights were suspended.

To prevail on his Motion, Lamell must show that the District Court acted arbitrarily or unreasonably when it set the security amount. Lamell has not—and cannot—meet this high burden. The District Court reasonably based the amount of the security on the evidence that Lamell's monthly mortgage payments were $3,124.69 and that the appeal would take approximately ten months. This amount was intended to adequately protect OneWest against the loss caused by Lamell's

appeal when OneWest could not recover the value of the property for which Lamell was refusing to pay. Because the District Court acted within its discretion in setting the security amount, Lamell's Motion must be denied.

Further, the District Court set the amount of the security on May 31, 2012. Now, nearly three years later, Lamell is complaining for the first time that it was set too high. Lamell did not preserve his complaint in the District Court by filing a request, objection or motion to have the security reduced. In fact, Lamell paid the security as required (and as he requested). Lamell's Motion is therefore procedurally defective and must be denied.

## I. STATEMENT OF RELEVANT FACTS

Appellant J.M. Arpad Lamell ("Lamell") filed the underlying lawsuit in February 2010 against the Harris County Appraisal District ("HCAD"), the Appraisal Review Board of Harris County Appraisal District, and the Harris County Tax Assessor-Collector based on his belief that he had been charged excessive property taxes in 2008 and 2009. Lamell did not pay his 2008 and 2009 taxes as a result of this dispute. Appellee OneWest Bank N.A. ("OneWest")—Lamell's mortgage servicer and the holder of his Note and Deed of Trust—paid these property taxes on Lamell's behalf to preserve its first lien position on Lamell's home. In accordance with the terms of the loan, OneWest raised Lamell's mortgage payments to cover the property taxes it had paid on his behalf.

Lamell thereafter stopped making his mortgage payments. When OneWest initiated foreclosure proceedings in 2010, Lamell added OneWest as a defendant in the underlying lawsuit.[1]

On February 27, 2012, Lamell filed an Application for Temporary Restraining Order and Preliminary (Temporary) Injunction seeking to halt the foreclosure sale. (3rd Sup. C.R. 3-37.) The District Court denied Lamell's application for a temporary injunction on April 10, 2012. (CLK 191.) Lamell filed an interlocutory appeal of the denial of his temporary injunction request. *Lamell v. Indymac Mortg. Servs. F.S.B.*, No. 14-12-00412-CV (Tex. App.—Houston [14th Dist.] filed Apr. 30, 2012).

On May 16, 2012, Lamell filed a Motion to Stay Enforcement of Order Denying Injunctive Relief or Alternatively Set Supersedeas Bond Amount Pending Appeal ("Bond Motion"). (1st Sup. C.R. 3-9.) In his Bond Motion, Lamell expressly requested that the District Court "allow Appellant to post as a supersedeas bond an amount necessary to protect the judgment debtor [sic] INDYMAC's financial interest should Appellant not be successful on appeal." (1st Sup. C.R. 5.)

[1] In September 2010, Lamell settled and dismissed his claims against HCAD and the Appraisal Review Board.[1] (CLK. 127-28.) In November 2013, Lamell nonsuited his claims against the Harris County Tax Assessor-Collector. (C.R. 680.) As a result, OneWest was the only remaining defendant in the underlying litigation.

The District Court heard Lamell's Bond Motion on May 25, 2012. (*See* 1st Sup. C.R. 21.) After considering the evidence and argument of counsel, the Court granted Lamell's request for a supersedeas bond by order dated May 31, 2012 (the "Bond Order"). (1st Sup. C.R. 21-22.) To determine the amount of the bond, the District Court adhered to the requirement of Texas Rule of Appellate Procedure 24.2(a)(3) that "[t]he security must adequately protect the judgment creditor against loss or damage that the appeal might cause." (*See* 1st Sup. C.R. 54.) Reasoning that the "loss or damage" to OneWest would equal the amount of loan payments made over a typical ten month appellate process, the Court utilized the amount Lamell acknowledged as his monthly mortgage payment ($3,124,69) multiplied by ten. (*See* 1st Sup. C.R. 54.) At Lamell's request, however, the District Court ordered that only approximately half of the bond be posted immediately, with the remainder posted in monthly installments during the pendency of the appeal. (1st Sup. C.R. 22.) As a result of the Bond Order, OneWest's right to foreclose its lien on Lamell's home was stayed pending the outcome of Lamell's appeal.

This Court dismissed Lamell's appeal on July 11, 2013. *Lamell*, No. 14-12-00412-CV, 2013 Tex. App. LEXIS 8515 at *2. The Texas Supreme Court denied Lamell's petition for review on November 15, 2013. *Lamell v. Indymac Mortg. Servs.*, 2013 Tex. LEXIS 943 (Tex. 2013).

As Lamell acknowledges in his Motion, Lamell paid the full amount of the security (in cash deposits in lieu of bond). App. Mot. at 2-3. Following the issuance of the Bond Order, Lamell never objected in the District Court to the amount of the security or otherwise moved or requested to have it reduced.

Following the final adjudication of Lamell's interlocutory appeal, OneWest filed its "Third Motion to Authorize Release of Bond to Defendant OneWest" on November 19, 2013 ("Bond Release Motion"). (1st Sup. C.R. 53-70.) By Order dated January 31, 2014, the District Court released the supersedeas bond to OneWest ("Bond Release Order"). (1st Sup. C.R. 73-74.)

OneWest was granted summary judgment on Plaintiff's claims on April 12, 2013. (1st Sup. CLK. 3.) After Lamell nonsuited the Harris County Tax Assessor-Collector (the only remaining defendant) in November 2013, the District Court modified its order granting OneWest's Summary Judgment Motion to reflect that its judgment was final, disposed of all parties and claims, and was appealable ("Summary Judgment Order"). (C.R. 716-18.) This appeal followed and concerns both the Bond Release Order and the Summary Judgment Order.

According to this Court's online docket, Lamell's appeal is set for submission on Tuesday, February 24, 2015. Lamell filed his Motion to Reduce Supersedeas Security on Thursday, February 18, 2015—nearly three years after the Bond Order was issued and just five days before his appeal is set for submission—

arguing, for the very first time, that the amount of the security he finished paying almost two years ago was excessive and should be reduced.

## II. ARGUMENT AND AUTHORITIES

### A. Standard of Review

A trial court's ruling concerning the amount of a supersedeas bond is reviewed under an abuse of discretion standard. *E.g.*, *EnviroPower, L.L.C. v. Bear, Stearns & Co.*, 265 S.W.3d 1, 2 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Miller v. Kennedy & Minshew, Prof'l Corp.*, 80 S.W.3d 161, 165 (Tex. App.—Fort Worth 2002, no. pet.). "The test for whether a trial court abused its discretion is whether the trial court acted arbitrarily or unreasonably in light of all the circumstances of the case." *EnviroPower*, 265 S.W.3d at 2 (citing *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995); *Lewis v. Western Waste Indus.*, 950 S.W.2d 407, 410 (Tex. App.—Houston [1st Dist.] 1997, no writ). "The trial court abuses its discretion if the evidence is legally or factually insufficient to support its findings." *LMC Complete Auto., Inc. v. Burke*, 229 S.W.3d 469, 483 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

### B. Lamell's Motion Should Be Denied Because the District Court Did Not Abuse Its Discretion in Setting the Amount of the Security

The evidence before the District Court at the time it heard Lamell's Bond Motion was that Lamell's standard monthly mortgage payment was $3,124.69. Further, the District Court heard evidence that Lamell was in default of his loan for

refusing to make his monthly payments and, as a result, OneWest was authorized by the loan documents to foreclose the lien on Lamell's home. Had OneWest been allowed to proceed with foreclosure, it would have been able to sell Lamell's home and recover the loan amount that Lamell was refusing to repay.

The District Court based the amount of the security on this evidence. The District Court estimated that the appeal would take ten months, thus it set the bond amount roughly equal to ten monthly mortgage payments. (1st Sup. C.R. 22; *see* 1st Sup. C.R. 54.) The District Court reasoned that this amount would adequately protect OneWest from the loss it would incur while its right to enforce the lien was stayed. Lamell's Motion fails to assert any evidence or argument that the District Court acted arbitrarily or unreasonably when it calculated the security in this manner. To the contrary, the Bond Order is factually supported by the evidence in the record and, as a result, was not an abuse of the District Court's discretion. Accordingly, Lamell's Motion must be denied.

### C. Alternatively, Lamell's Motion Should Be Denied Because Lamell Has Waived His Complaint

To preserve a complaint for appellate review, Texas Rule of Appellate Procedure 33 requires that the record show the appellant first raised the complaint with the trial court by a timely request, objection or motion. TEX. R. APP. P. 33. Here, the record does not contain any such request, objection or motion. Indeed, Lamell made none, and even he does not assert otherwise. Lamell's failure to

complain to the District Court that the security was excessive bars him from raising this issue for the first time on appeal. *See* TEX. R. APP. P. 33.

Moreover, even if Lamell could assert his complaint without first raising it in the District Court, it is exceedingly untimely. The Bond Order was issued on May 31, 2012. (1st Sup. C.R. 21-22.) Lamell then paid the security in compliance with the Bond Order (again, without complaint). Now, almost three years after the Bond Order was issued and a year and a half after final judgment, Lamell asserts for the first time that the security amount should be reduced. Pursuant to Rule 33, Lamell waived his complaint by failing to timely assert it. *See* TEX. R. APP. P. 33.

The proper time for Lamell to have sought review of the Bond Order was after it was issued and before he began making the required security deposits. The sole argument upon which his Motion is based (*i.e.*, that the bond should be zero because OneWest did not recover any damages[2]) was available to Lamell at the time the Bond Order was issued. Then, as now, OneWest did not have a claim which entitled it to an award of damages. Thus, Lamell does not have a valid justification for failing to seek review of the Bond Order immediately after it was issued in May 2012.

For any or all of the foregoing reasons, Lamell's complaint has been waived. Accordingly, his Motion must be denied.

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[2] The meritless nature of such argument is addressed in detail below in Section II.D.

### D. Lamell Has Not Asserted Grounds Upon Which to Grant His Motion.

Lamell's only basis for claiming that the supersedeas security should be reduced to zero is that OneWest was not granted monetary damages or an interest in property. *See* App. Mot. at 4-8. Lamell's theory (and brief) wholly ignores Texas Rule of Appellate Procedure 24.2(a)(3), which expressly provides that a court must set a supersedeas bond that adequately protects the prevailing party against loss during an appeal "[w]hen the judgment is for something other than money or an interest in property." TEX. R. APP. P. 24.2(a)(3). Here, the judgment giving rise to the Bond Order denied a request for a temporary injunction. (CLK 191). Judgments that are injunctive in nature are considered "other judgments" under Rule 24.2(a)(3). *See Kanan v. Plantation Homeowner's Ass'n*, 2012 Tex. App. LEXIS 1458, *13 (Tex. App.—Corpus Christi Feb. 21, 2012, no pet.). Lamell's Motion fails to explain why OneWest was not entitled to security when its enforcement rights were suspended, much less how the District Court abused its discretion by following the requirements of Rule 24.2(a)(3).

## III. CONCLUSION

For the reasons stated herein, OneWest respectfully requests that the Court deny Appellant's Motion to Reduce Supersedeas Security, as well as grant OneWest such other and further relief, in law or in equity, to which it is justly entitled.

Date: February 20, 2015

Respectfully submitted,

*/s/ Thomas M. Hanson*

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**ATTORNEYS FOR APPELLEE ONEWEST BANK N.A.**

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via the Court's ECF system on Appellant on February 20, 2015.

*/s/ Kevin A. Teters*

Kevin A. Teters