Foreclosed Justice: Causes and Effects of the Foreclosure Crisis

Written Testimony

of

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THE FORECLOSURE CRISIS AND THE RULE OF LAW

> Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.
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> *Plato*

> In America, *the law is king*. For as in absolute governments the King is law, so in free countries the law *ought* to be king; and there ought to be no other.
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> *Thomas Paine,* Common Sense, 1776

I. INTRODUCTION.

Chairman Conyers, Ranking Member Smith and members of the Committee, thank you for inviting me to testify today regarding the causes and effects of the foreclosure crisis.

I am here today to speak for two constituencies. Foremost in importance are the millions of homeowners who have lost their homes, or who are at risk of losing their homes in the present foreclosure crisis. The other is the supremely dedicated, and vastly outnumbered, group of lawyers from around the country which is doing its best to protect these homeowners and which has been instrumental in exposing the current foreclosure scandal.

I call myself a retired lawyer these days, although the last two and one half years of my retirement has been dedicated on a full time basis to the work of the Maine Attorneys Saving Homes ("MASH") project. MASH is a project jointly sponsored by Maine's legal services organization, Pine Tree Legal Assistance and its affiliated Maine Volunteer Lawyer's Project. In the MASH project we have trained a network of over 60 private practice attorneys to assist in providing pro bono representation to Maine homeowners undergoing foreclosure. We act as a clearinghouse to intake these cases and refer them out to private pro bono counsel; and after referrals are made, I provide back up consultation and support to those lawyers. I function purely as a volunteer and receive no compensation, directly or indirectly from Pine Tree Legal Assistance of the Maine Volunteer Lawyers Project.

I have been a lawyer for over forty years now. Fresh out of law school in 1969, I went to work for a non-profit organization in Boston called Citizens Housing and Planning Association where we were working to help increase and upgrade housing resources for low income residents. Following that I was in private practice for almost thirty years. During much of that time I represented major banks and financial institutions in Maine. During the much different banking crisis of the late 1980s and early 1990s I represented these banks, as well as the FDIC, in many foreclosure and loan litigation cases. I prepared and litigated many foreclosure summary judgment motions and know the requirements of that system well.

In 2008, after several years away from the legal profession, I began my volunteer legal work for MASH. What I encountered there was a stunning reversal to what my practices had been in representing banks and the FDIC twenty years earlier. Certainly the volume of foreclosure cases is huge when compared to normal times, but the conduct of the mortgage servicers and their lawyers in bringing these cases is what really astonished me. Their conduct was uniformly careless at best to downright deceptive and fraudulent at worst. I can say with professional pride that in my days as a bank lawyer, I do not believe that I ever lost any motion for summary judgment that I filed in a foreclosure case. That was so because they were prepared honestly and with respect for the rule of law as set forth in our rules of civil procedure.

What I encountered when I came to MASH in 2008 were large volumes of summary judgment motions of mortgage servicers prepared with little regard for honesty, with little to no respect for the legal protections afforded to homeowners under our foreclosure statutes and under our rules of civil procedure, and with utter disregard for the integrity of the judicial system. I estimate that, in foreclosure summary judgment motions handled by MASH volunteer lawyers and by Pine Tree Legal Assistance, the motions for summary judgment of the servicers are denied more than 75% of the time. The loan servicing industry and their lawyers are not troubled by this loss ratio because they know that fewer than 6% of homeowners needing legal assistance in Maine can obtain such assistance. In the other 94% of their foreclosures, they face no opposition in their race to foreclosure.

I considered assigning to this testimony the title "Two Different Worlds of Foreclosures" after listening to and reading the testimony presented to the House Financial Services Housing and Community Opportunity Subcommittee by representatives of the loan servicers on November 18, 2010. The world of foreclosures and the perfect record of outcomes described by Mr. Marano of Ally Financial (the parent corporation of GMAC Mortgage) is so extremely different from what we, as lawyers experience representing homeowners a daily basis, that it does not seem like we are even on the same planet. For example, how can he ask us to believe that GMAC's foreclosure outcomes are all accurate when, as recently as a few weeks ago, I went into a foreclosure mediation proceeding in Maine where GMAC Mortgage certified (see Exhibit 11, p. 107, ¶ c.) that it owned the loan and it turned

out that Freddie Mac owned the loan? (This is a common rather than an isolated example.)

Much of what follows in this testimony is focused upon GMAC Mortgage, LLC, because its conduct has consumed so much of my time over the last few months. However, the conduct described here has been widespread among almost all of the major loan servicers and has been prevalent throughout the industry.

II. CAUSES OF THE FORECLOSURE CRISIS IN THE LEGAL SYSTEM.

The economic causes of the foreclosure crisis have been well documented in presentations before the Senate Banking Committee on November 16, 2010 by Diane Thompson of the National Consumer Law Center[1] and the House Financial Services Committee on November 18, 2010 Professor Adam Levitan of Georgetown University and Julia Gordon of the Center for Responsible Lending,[2] as well as by other witnesses before this Committee. The aspect of the foreclosure crisis that I address here is its impact upon our judicial system and the homeowners caught up in it. The foreclosure crisis, as it is manifested in our judicial system, is defined by hundreds of thousands of perjurious affidavits that servicers have filed in summary judgment motions all over the country over at least the last several years.[3] These affidavits, signed by servicer employees, make the following dishonest claims:

- that they had custody and control of loan files when they didn't;
- that they had personal knowledge of the contents of those files when they never even looked at them;
- that they had personal knowledge of the truth of the contents of their affidavits when they never even bothered to read them;
- that the copies of the critical loan documents attached to their affidavits were true and correct when they never bother to look at those attachments; and
- that they appeared before notaries swear to the truth of the affidavits when they never did so.

The servicers claim that these are mere "technical defects." They assert that the underlying facts stated in every one of these affidavits as to loan details, default letters being timely sent, and loan amounts due are true. To the contrary, I know as a matter of my own direct involvement in many foreclosure cases, my work with the MASH lawyers in Maine, and my daily contact with foreclosure defense lawyers

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1 http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a

2 http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1376

3 There are 23 judicial foreclosure states where the most common route to a foreclosure judgment is by a motion for summary judgment supported by sworn affidavit of servicer witnesses. Often a document called an "affidavit of debt" is required in non-judicial states as well.

all over the country, that the underlying facts in many of these affidavits simply are not true.

A. ABUSE OF THE SUMMARY JUDGMENT PROCESS.

1. HOW THE SUMMARY JUDGMENT PROCESS WORKS.

An understanding of the summary judgment process in foreclosure cases is required in order to understand what is happening in these foreclosure cases. Rule 56 of the Federal Rules of Civil Procedure (Exhibit 1 at page 23)[4] provides a process for avoiding trials when there is no genuine issue as to the material facts at issue in a lawsuit. In the application for summary judgment, in lieu of witnesses appearing in person to be sworn in and to testify, the testimony of a witness is presented by a sworn affidavit. It is important to note that Rule 56 requires that these affidavits, without exception, be based upon the personal knowledge of the witnesses signing them. The Rule permits only "admissible evidence".

Rule 56 permits no exceptions or lower standards for foreclosure cases. In a foreclosure case where an unopposed motion for summary judgment is filed, the only evidence in front of the judge is that mortgage servicer's employee's affidavit. Its honesty and integrity are crucial to a fair and just decision being made by a judge whether to enter a judgment of foreclosure that will result in the eviction of a family from its home. In the 94% or more of the cases where homeowners are unrepresented, it is likely that judgments of foreclosure will be entered based upon those dishonest affidavits.

In normal times, the summary judgment process should be ideally suited to foreclosure cases. This was the case back in the 1980s and 1990s when I was representing banks and the FDIC. These are not normal times, however. The utter chaos created by the loan securitization industry and perpetuated by the mortgage loan servicing industry means that such elemental facts as the identity of the party who really has the right to enforce the loan are often in doubt. There is often doubt about who possesses the note and what indorsements of it have been made; the concepts of possession and indorsement are key components of the question of who has the right to enforce the note. In addition, there is often doubt as to whether a proper notice of default was sent to the homeowner in a timely fashion. And, most important, there is often doubt as to whether a servicer has properly accounted for the payments made by the homeowner or has pumped up the homeowner's loan balance by improperly adding junk fees to the amount claimed to be due.

With all of these potential issues, it is critical that the servicers offer only those witnesses who are in a position to have the knowledge and experience

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[4] The Maine Rules of Civil Procedure for state court proceedings are almost identical to the Federal Rules, and most states have similar rules of their own.

required to check the loan documents, check the servicers' underlying files, and provide accurate and honest evidence of the true facts relating to its loans. That person must be a servicer employee who would be capable of testifying in a real trial in court and able to vouch for the accuracy of its business records documenting the loan balances, not a just back-office functionary whose principal job is to sign papers.

2. HOW THE SUMMARY JUDGMENT PROCESS IS ABUSED BY MORTGAGE LOAN SERVICERS.

Jeffery Stephan of GMAC Mortgage, LLC represents the servicer industry's refusal to meet the requirements of a summary judgment affidavit. He had no function within GMAC other than to sign papers, including summary judgment affidavits. It is has been cheaper for GMAC to pay Stephan a low wage to sign papers than to hire and train a sufficient number of employees so that only employees who actually have the requisite personal knowledge of the critical facts will be signing its summary judgment affidavits.

An example of one of Stephan's affidavits is attached as Exhibit 2 at page 28. To an unsuspecting eye, the affidavit looks straightforward and appears to entitle Fannie Mae to judgment. I deposed Stephan in that case on June 7, 2010, and a summary of the transcript and the transcript itself are attached as Exhibits 3, at page 33 and 4 at page 37. His testimony was astonishing. When Stephan says in his affidavit that he has personal knowledge of the facts stated in his affidavit, he doesn't. When he says that he has custody and control of the loan documents, he doesn't. When he says that he is attaching "a true and accurate" copy of a note or a mortgage, he has no idea if that is so because he does not look at the exhibits. When he makes any other statement of fact, he has no idea if it is true.[5] When the notary says that Stephan appeared before him or her, he didn't, and when the notary says that Stephan was sworn, he wasn't.

GMAC Mortgage filed thousands of Stephan's affidavits in foreclosure cases all over the country in cases involving its own loans as well in cases where it was servicing loans for Fannie Mae, Freddie Mac, and trustees of mortgage-backed securitized trusts. This misconduct was not a recent development at GMAC Mortgage---it has been going on at least since 2004, well before the occurrence of the foreclosure crisis. This latter fact is evidenced by the sanctions imposed upon it in a Florida case in 2006 defended by Attorney Kowalski who is also testifying before you today. Copies of his motion attacking a 2004 affidavit just like Stephan's, the related court sanctions order against GMAC, and its in-house counsel's directive to fix the problem (which was ignored) are attached as Exhibit 5.

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[5] Stephan asserts that the only thing that he does with an affidavit is to check "the figures" in the affidavit against a computer screen, but he has no knowledge of how those figures are created because he has no knowledge of how data is put into the system and has no knowledge of how the accuracy and security of the system is maintained.

I know from my personal experience over the past two and one half years that this kind of servicer fraud-upon-the-court activity is not isolated to GMAC Mortgage. It has been the norm across the entire foreclosure industry, including the other servicers represented here today, JPMorgan Chase and Bank of America.

3. HOW THE SUMMARY JUDGMENT PROCESS IS ABUSED BY THE LAWYERS REPRESENTING THE SERVICERS.

As Stephan explained in his deposition, it is the servicers' lawyers who prepare the summary judgment affidavits. A quick look at the first lines of Stephan's affidavit (Exhibit 2 at page 28) reveals the first sign of lawyer misconduct. When GMAC's lawyer prepared that affidavit, the name of the affiant was left blank, meaning that the lawyer did not know who was going to sign it. Without knowing who will be signing the summary judgment affidavit, the lawyer cannot fulfill his or her professional responsibility to know that the affiant is a competent witness and is presenting sworn statements truly based upon his or her personal knowledge.

The second obvious sign of servicer lawyer misconduct is that the affidavit discloses that the witness will be a "Limited Signing Officer." Any responsible lawyer seeing that title should be suspicious as to whether such a witness is anything more than a mere paper signer and as to whether that signer has the personal knowledge of the facts as required by Rule 56.

When I was representing banks and the FDIC, I firmly believed that it was my professional duty to present summary judgment affidavits to the courts only where I believed that the facts contained in those affidavits had evidentiary support. A lawyer cannot fulfill that duty without knowing who the person is for whom an affidavit is being prepared and without satisfying himself or herself that that person is in a position to have personal knowledge of the facts being stated. In my opinion, it is not ever proper for a lawyer to prepare and present a summary judgment affidavit without knowing the identity of the witness in advance and without knowing what it is about that person's job functions that qualify him or her to present critical evidence to the court. No lawyer would put a witness on the stand in a courtroom trial without first determining his competence to testify, and no lawyer should offer an affidavit of a witness on a summary judgment motion without first making the same determination.

These lawyers for the servicers are preparing and filing hundreds and often thousands of these affidavits annually. Yet they close their eyes to their professional obligations as officers of the courts they are working in to know that they are presenting honest evidence.

B. ABUSE OF THE BANKRUPTCY PROCESS.

Many foreclosures result from lost jobs, divorce, or illness resulting in unaffordable medical expenses. These same factors result in many debtors filing for protection under Chapter 13 of the Bankruptcy Code. Thus, many foreclosures

are dealt with through the bankruptcy system. A 2008 study by Katherine Porter, Esq., currently a visiting professor at Harvard Law School, documented widespread and systemic abuse by servicers in the bankruptcy mortgage claims process.[6] Since the publication of Professor Porter's study of over 1700 Chapter 13 cases, the misconduct of the servicers has not only continued, it has increased to the point where the United States Trustee Program (a unit of the Justice Department) has recently begun to focus special attention on these abuses.[7]

In my private practice days, I often represented by bank and creditor clients in the Bankruptcy Court, and again I have been shocked by the abuses occurring in that court system. My current work with homeowners and their lawyers in foreclosure cases has revealed a level of servicer abuse and misconduct in the Bankruptcy Court that, not unsurprisingly, parallels the misconduct in state court foreclosure proceedings described above. Professor Porter's study details well the abuse of servicers in bankruptcy in how claims amount are improperly calculated in fees are improperly charged to homeowner loan accounts. What I want to address here is the abuse of servicers in documenting their standing to even assert secured claims against homeowners in bankruptcy.

1. HOW FORECLOSURES WORK IN BANKRUPTCY.

The requirement for a foreclosing party to document its mortgage claim against a homeowner in bankruptcy is similar to what is required in the summary judgment process. The servicer is required to file on behalf of the mortgage holder a proof of a secured claim documenting proof that the mortgage holder really does hold the home owner's note and mortgage and really does have the legal right to enforce the mortgage documents. If a mortgage holder seeks to foreclose within the context of a Chapter 13 proceeding, it is required to file a motion for relief from the automatic stay provisions of Section 362 of the Bankruptcy Code (11 U.S.C. §362) in order to obtain Bankruptcy Court permission to pursue a state court foreclosure proceeding. These bankruptcy motion papers are similar to those filed in a motion for summary judgment and must include a servicer's affidavit similar to that required for a summary judgment proceedings. The servicers are routinely presenting dishonest claims in these bankruptcy filings, just as they are routinely doing so in the summary judgment proceedings.

2. HOW THE BANKRUPTCY PROCESS IS ABUSED BY SERVICERS AND THEIR LAWYERS.

A series of case filings by JPMorgan Chase illustrate how servicers are abusing the bankruptcy process in pursuing foreclosures in that forum. A chronology of the illustrative filings prepared by Attorney Linda Tirelli of New York

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[6] Katherine Porter. 2008. "Misbehavior and Mistake in Bankruptcy Mortgage Claims" http://works.bepress.com/katherine_porter/1/

[7] http://www.nytimes.com/2010/11/28/business/28gret.html?ref=business

is attached to this document as Exhibit 5 at page 51. Spanning a period of over two years and continuing even today JPMorgan Chase has engaged in pattern of filings in the Bankruptcy Court for the Southern District of New York that is simply breathtaking in the scope of dishonest and deceptive practices that it reveals.

I became familiar with the conduct of JPMorgan Chase and the series of cases chronicled by Attorney Tirelli as a result of a foreclosure proceeding filed in Maine by JPMorgan Chase as servicer for a loan alleged to be owned by Deutsche Bank. The Maine case is *Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2005-WL2 v. MacDonald* (Me. Dist. Ct. RE-08-385, Bidd.). In this case, JPMorgan Chase filed a motion for summary judgment and supported it by an affidavit of a person claiming to be one of its officers. In that affidavit, the JPMorgan Chase officer asserts that JPMorgan Chase once owned the loan and that it transferred it to Deutsche Bank in 2009. It attached to its officer's affidavit is a mortgage assignment purporting to evidence that transfer. When I examined the Pooling and Servicing Agreement that created the Deutsche Bank trust back in 2005,[8] it became clear that Deutsche Bank could not have purchased this loan from JPMorgan Chase in 2009 because that trust closed to the purchase of any new loans back in 2005.

Having been alerted to the probable fraudulent nature of the JPMorgan Chase affidavit, upon further research I found the *In re Neur* case in the Bankruptcy Court in the Southern District of New York described by Attorney Tirelli in Exhibit 5. In that case, involving the same parties, and exactly the same set of fraudulently created facts, the U.S. Trustee's office intervened and filed a motion for sanctions against JPMorgan Chase. In response, and in related depositions, JP Morgan Chase admitted that it had never owned the loan in question and that the purported assignment from it to Deutsche Bank was fictitious.

Even after admitting in *In re Nuer* in New York that it had created a fictitious chain of transfers in an effort to prove the right of Deustche Bank to enforce the Nuer loan, JPMorgan Chase made exactly the same dishonest and fictitious claim in the *MacDonald* case in Maine in an attempt to prove Deutsche Bank's right to enforce the MacDonald loan. When confronted by me in Maine, JPMorgan Chase withdrew its summary judgment motion. Had no homeowner lawyer been present in this Maine case, no judge would have ever known about JPMorgan Chase's attempted fraud upon the court, and a judgment of foreclosure would have been entered against Ms. MacDonald.

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[8] The Pooling and Servicing Agreement is the telephone book sized document that creates the securitized trust and includes the provisions regarding the servicer's duties and compensation. Many of these Pooling and Servicing Agreements, known in the industry as PSAs, are publicly available on the SEC Edgar website. Yet as a part of their pattern of obstructive conduct, loan servicers, including JPMorgan Chase, routinely refuse to produce these PSAs in pre-trial discovery, claiming that they are proprietary documents that must be protected by confidentiality orders.

While the egregious misconduct of JPMorgan Chase is highlighted here, the pattern is widespread across the industry.

C. THE ECONOMIC AND OTHER REASONS FOR THE ABUSE OF SUMMARY JUDGMENT AND BANKRUPTCY PROCESSES BY SERVICERS AND THEIR LAWYERS.

One primary explanation for the plague of dishonest foreclosure affidavits is the desire of the servicers and their lawyers to maximize the amount of money they make on each foreclosure case. It is cheaper for the servicers and their lawyers to submit a dishonest affidavit than it is to take the time required to prepare and submit one that is honest and that respects the civil rules of procedure relating to motions for summary judgment.

The testimony of Professor Adam J. Levitan presented to the House Financial Services Housing and Community Opportunity Subcommittee on November 18, 2010, beginning on page 7, presents a detailed outline of how servicers are paid for servicing mortgage loans. In a nutshell, that compensation scheme provides the greatest economic benefit to servicers and their lawyers when they foreclose as swiftly as possible using the least possible amount of manpower. GMAC Mortgage, in its testimony to that same House Subcommittee, essentially admitted that it had cut corners when Mr. Marano stated that, with its 6 years of misconduct now fully exposed, it finally "has increased the number of employees handling foreclosure documentation."[9]

Saving time and expense and maximizing fee revenue also drives the lawyers who prepare the summary judgment motions and affidavits for the servicers. They are paid on a flat fee basis, meaning they receive the same amount of compensation for each foreclosure case, and without regard to whether one case takes more lawyer time than the next.[10] That incentive drives them to use paralegals and lower level employees to prepare summary judgment documents and to minimize the amount of lawyer time devoted to any case. From my own experience, I know that it takes substantial time to properly prepare a summary judgment motion and to communicate with the witness who signs the affidavit, just as it does when preparing a witness to testify in court. After all, that affidavit literally replaces a witness's testimony at trial. The fee structure imposed upon their lawyers by the servicers causes those lawyers to be unwilling to devote the needed time to prepare and present affidavits that are honest and that respect the Rules of Civil Procedure.

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[9] Written Testimony of Mr. Thomas Marano, Chief Executive Officer, Mortgage Operations, Ally Financial Inc. before the Subcommittee on Housing and Community Opportunity, Committee of Financial Services, November 18, 2010. http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1376

[10] The servicers also grade these lawyers on how fast they push the foreclosures through the legal system and reward those who are the most swift with substantial bonus fee payments.

In addition, the communications systems that servicers have imposed upon their lawyers make it almost impossible for those lawyers to fulfill their professional responsibility in presenting honest summary judgment motions. Most of the major servicers require their lawyers to use computer systems only for communications between the lawyers and the servicers. With rare exceptions, telephonic communications are discouraged, and they are often even prohibited. Thus major impediments have been placed in the way of any effort that a responsible lawyer might make to communicate with a servicer witness about preparing and signing an honest summary judgment affidavit. This convoluted communication system is also driven by economics and by the desires of the servicers to use the least amount of manpower possible on any given foreclosure.

A second major reason for the abuse of the summary judgment and bankruptcy processes by servicers is that the documents needed to prove the mortgage loan claims of their clients often do not exist or are defective. Servicers try to cure this problem by creating fictitious documents. A simple example again involves GMAC's Jeffery Stephan. In addition to signing summary judgment affidavits, he also signed note indorsements and mortgage assignments. In one of our GMAC cases in Maine, he attached to one of his summary judgment affidavits a never-before-seen note indorsement. We knew instantly that it was fictitious because it showed a chain of transfers not permitted by the Pooling and Servicing Agreement in that case. When we confronted GMAC with this fact in opposition to its motion for summary judgment, its lawyers reversed course and claimed that Stephan's indorsement was a mistake, and they then presented us with two new indorsements (that raise issues of their own).

Professor Adam Levitan, in Section III of his House Finance Committee written testimony beginning on page 19,[11] lays out in detail the documentation problems existing in the foreclosure industry. In the face of such problems, the desire of the servicers to foreclose quickly and cheaply leads them to attempt to create fictitious cures for these documentation problems, and they know that they can get away with it in the vast majority of cases where homeowners have no legal representation.

C. DISHONESTY, DENIAL, COVER-UP AND DEFIANCE IN THE MORTGAGE SERVICING INDUSTRY.

1. DISHONESTY.

It was dishonest for GMAC Mortgage, beginning at least as early as 2004, to submit affidavits to the courts in Florida where its officers stated that they had personal knowledge of defendants' loan files, that they had examined their loan files and determined that the allegations of the related foreclosure complaints were true, and that they knew the complaints accurately reflected the amounts due. That dishonesty was admitted when attorney Kowalski deposed the GMAC employee

[11] http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1376

who made those statements in 2006 and she admitted that none of those statements were true. See Exhibit 6, pages 64-76.) Any possible room for denial was removed when the judge in that case specifically found that "GMAC Mortgage Corporation submitted false testimony" (Florida Order, Exhibit 7, page 79), sanctioned it for that dishonesty, and ordered it to file proof that it had modified its corporate practices so that future affidavits would be accurate and honest.

It was dishonest for GMAC Mortgage to continue these exact same practices after having filed with that judge in the Florida court a document entitled, "A Policy Directive From the Legal Staff," certified on June 6, 2006 (Exhibit 8 at pages 85-86), by an "Associate Counsel - Legal Staff", claiming a corporate-wide correction of those practices. The extent of the dishonesty in the presentation of this never-followed policy statement is revealed by the fact that the GMAC witness in the Florida 2006 case, Margie Kwiatanoski, went on to become Jeffery Stephan's supervisor as head of the GMAC Mortgage Document Signing Department in 2008.

Further, GMAC had the audacity to argue to the United States District Court in Maine on August 10, 2010, that, because the 2006 Florida order only related to "servicing of loans 'within the state of Florida'" its relevance to GMAC's identical dishonesty in Maine cases was "significantly overstated." (See Exhibit 9 at page 94, 1s full par.). GMAC apparently believes that it was acceptable for it to go on submitting dishonest affidavits in all other states since it had not yet been caught and sanctioned in those states. For over six years now, GMAC has manifested a belief that it is not bound by the rule of law relating to the foreclosure of the homes of American families.

As the fifth largest loan servicer in the country servicing 2.4 million loans (according to the testimony of Thomas Marano), GMAC Mortgage has, since at least 2004, filed thousands upon thousands of these dishonest summary judgment affidavits in courts all across the country. It has now asked a subcommittee of this Chamber to believe the loan detail facts in every one of those affidavits was true and that not a single mistake occurred. Both common sense and evidence such as that in the recent case reported in the Cleveland Plain Dealer on October 19, 2010, involving three successive GMAC Mortgage foreclosures on an Ohio mortgage where there was no default (Exhibit 10, page 100), should permit no one to accept that assertion to be true.

In how many of these GMAC cases were affidavits submitted as to loan sums due where payments were improperly recorded? In how many were forced-place insurance policies improperly imposed by it at homeowner expense (as we have seen in Maine)? In how many were default letters never sent? In how many were the default letters utterly inadequate? In how many cases was the plaintiff named by GMAC not even the owner of the loan?[12] We cannot know the answers to these

[12] Attached hereto as Exhibit 11, page 105, is a Certification of Mortgagee signed by Jeffery Stephan on July 25, 2010 (almost seven weeks after his June 7, 2010 deposition) certifying

questions because of GMAC's failure to meet the "rule of law" requirements for the presentation of honest affidavits by witnesses who really had personal knowledge of the required facts.

2. DENIAL.

There is a persistent refusal in the servicing industry to be honest about its misconduct. Even at the House Finance Committee hearing on November 18, 2010, Ally Financial's Thomas Marano stated "Based upon our review to date, no loan was foreclosed unless the borrower was in default." Contrast that to the above cited report from the Cleveland Plain Dealer of a house wrongfully foreclosed upon by GMAC three times. Even without this example, given the utter chaos in the servicer industry, it defies credulity to believe that there is not one single case in which GMAC Mortgage has made a mistake. It is this refusal of GMAC Mortgage and the rest of the foreclosure industry servicers to recognize their misconduct and mistakes that makes it unlikely that the industry will reform itself without external intervention. Rather, it will seek to cover up that misconduct whenever it can.

3. COVER-UP.

When GMAC Mortgage was confronted with the evidence of Stephan's dishonest affidavits in Maine, its first effort was an attempt to silence me rather than to have its lawyers immediately go to the Maine courts and admit that GMAC had presented dishonest affidavits from Jeffery Stephan all across the State of Maine.[13] I deposed Stephan on June 7, 2010. On June 22, 2010, GMAC replaced its lawyers in that $85,000 foreclosure case with national litigation counsel out of Birmingham, Alabama, and a major national law firm based in Portland, Maine. Their first action in that case, taken on June 25, 2010, was not to notify the court that false evidence had been presented and to seek to withdraw Stephan's dishonest affidavits. Rather their first act was to file a motion for protective order in an attempt to bury the Stephan transcript. See Exhibit 16, page 131.

By its June 25, 2010, motion for protective order, GMAC Mortgage sought the imposition of money sanctions against me for what it called my "malicious dissemination" of Stephan's deposition transcript to other lawyers around the country defending homeowners in GMAC foreclosure cases. Even though I have been working as a volunteer lawyer for the past two and one half years and have not made a single penny off the sharing of Stephan's transcript with other

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that GMAC owns the loan in question, when a check on the Freddie Mac website (see Exhibit 12, page 108) shows that Freddie Mac owns the loan. This one incident is by no means an isolated example of this kind of conduct from GMAC.

[13] Rule 3.3(c) of the Rules of Professional Conduct for Maine lawyers requires that "If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

lawyers[14], GMAC attempted to smear me with the claims that "Defendant's attorney wants the ability to disseminate discovery from this case for his own commercial purposes" and that I was seeking to "profit from litigation adverse to lenders." In addition, GMAC's new lawyers sought a court order to compel me to retrieve Stephan's transcript from those lawyers with whom I had shared it and to prevent me from using in any other GMAC case, even in other GMAC cases with Stephan affidavits where I was representing the homeowners. That motion was utterly unfounded and unsupported as is shown in our opposition to it, Exhibit 13 at page 111, and by the detailed order of our court in Maine denying it on September 24, 2010, and instead imposing sanctions against GMAC Mortgage for its bad faith conduct. See Exhibit 14 at page 122.

This GMAC Mortgage cover-up attempt came four years after the identical misconduct was sanctioned in Florida in 2006 (Exhibit 7 at page 78) and six months after it was again revealed in another deposition of Stephan in another Florida case on December 10, 2010. This history of dishonesty in GMAC's foreclosure practices, its effort to silence a lawyer who exposes those practices, and its refusal just a week ago in testimony before this Chamber to recognize the extent of its mistakes, compels the conclusion that the mortgage servicing industry cannot be trusted to reform itself.[15]

4. DEFIANCE.

In the statement of Ally Financial's CEO of Mortgage Operations, Thomas Marano, to the House Committee on Financial Services on November 18, 2010, he asserted that, in cases "[w]here the original affidavit was substantially correct, we are generally seeking the court's permission to proceed with the prior judgment." That is a categorically untrue and misleading statement. There are a significant number of cases in Maine where GMAC has obtained summary judgments but where no foreclosure sales have yet occurred. In not a single one of those cases has GMAC sought permission to proceed with a sale based upon such a judgment. We know of at least one recent instance (within the last month) where GMAC conducted such a sale without seeking court permission.

More importantly, we know that GMAC is strenuously resisting our efforts in Maine to obtain a court order stopping it from conducting sales of homes in all

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[14] In fact, I have spent a fair amount of my own money sending copies of that transcript to other lawyers for their use in court proceedings in other states where GMAC Mortgage was continuing foreclosures based upon Stephan's dishonest affidavits.

[15] It also should be noted GMAC Mortgage delayed for two and one half months before notifying Freddie Mac of the discovery of Stephan's false affidavits. He was deposed on June 7, 2010, and it was not until August 25, 2010, that GMAC reported the problem to Fannie and Freddie. See Exhibit 15 at page 129. And it delayed for three more weeks before announcing on September 17, 2010 that it was halting sales of and evictions properties taken through its flawed foreclosure process.

cases where the foreclosure judgments are based upon Stephan's dishonest affidavits. This opposition, in violation of its own CEO's statements less than a week ago to a subcommittee of this Chamber, evidences its defiant refusal to acknowledge and correct is dishonest practices. GMAC's present conduct in Maine evidences a continuation of its six-year pattern of ignoring and defying the rule of law in the foreclosures conducted by it.

III. EFFECTS OF THE FORECLOSURE CRISIS

A. IMPROPER FORECLOSURES ARE OCCURRING.

I know from my work in Maine with many foreclosure defense lawyers that we are seeing a significant number of foreclosure actions where the claims of the servicers do not support judgments of foreclosure being sought. Knowing too that we, as lawyers, are seeing only a fraction of the foreclosure cases being filed, it is virtually certain that a significant number of improper foreclosures have been occurring, both in Maine and all over the country. I hear and see reports of wrongful foreclosure actions on virtually a daily basis in my daily communications with lawyers from around the country. I have no statistics to document the volume of these improper foreclosures apart from first hand experience and a constant flow of anecdotal reports. Diane Thompson of the National Consumer Law Center, beginning on Page 13 of her written testimony to the Senate Banking Committee on November 16, 2010,[16] cataloged the various kinds of servicer errors that are causing these wrongful foreclosures.

B. HOMEOWNERS ARE BEING DENIED LOAN MODIFICATIONS THAT WILL BENEFIT BOTH THE HOMEOWNERS AND THE OWNERS OF THEIR LOANS.

Those of us attempting to help homeowners obtain reasonable loan modifications are outraged by the obstructive tactics of the loan servicers. All of the major servicers have signed contracts with the Treasury Department in which they agree to follow HAMP directives and rules in evaluating homeowner eligibility for loan modifications under HAMP. When servicers violate these directives and rules, as they so often do, they are breaching their contracts and attempting to operate outside of the rule of law that applies to their conduct.

Servicers often note that not all homeowners are eligible for loan modifications because they cannot afford even reduced payments. I do not entirely disagree with that assertion as to some homeowners, but I must then call upon the servicers to explain why it is so enormously difficult for us even to negotiate short-sale and deed-in-lieu-of-foreclosure agreements with them under the HAFA

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16 http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a&Witness_ID=d9df823a-05d7-400f-b45a-104a412e2202

program. When they obstruct or refuse to allow even these kinds of transactions, their motivation to pursue the money generated for them in foreclosures over lower sums earned in negotiated resolutions becomes abundantly clear.

The previously mentioned testimony of Professor Adam Levitan to the House Finance Committee and of Diane Thompson to the Senate Banking Committee last week describe in considerably more detail how such loan modifications serve not only homeowners, but also the investors in the securitized trusts. The testimony of both of these witnesses also describes in detail the economic incentives that drive the servicers to favor foreclosures over loan modifications or other negotiated resolutions.

C. THE JUDICIAL SYSTEM IS BEING DAMAGED.

1. THE VOLUME OF FORECLOSURE CASES IS EXCESSIVE.

State court systems all over the country are overwhelmed by the tremendous volumes of foreclosure cases being filed. This crushing case load could not come at a worse time, with state budgets cuts including state judicial budgets cuts. Courthouses are being closed, judicial vacancies are going unfilled, court staffs are being reduced and court hours are being curtailed.

Foreclosure cases are among the most complex and paper-intensive cases faced by lower level trial courts. They are time-consuming cases to resolve. Foreclosure cases that are improperly filed result in contested summary judgment motions, pre-trial discovery disputes, [17] and trials that should not be required. Similarly, foreclosures that should be resolved by loan modifications and never put into the foreclosure litigation process at all impose additional and unnecessary burdens upon the state court systems. State foreclosure mediation programs are showing growing signs of success, but even there, the delay and obstructionist tactics of the servicers drag those mediation proceedings out far longer than should be necessary, causing unnecessary expense for the courts and delaying access to the mediation process for all homeowners.

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[17] The servicers routinely abuse the pretrial discovery system with extraordinary delaying tactics, and voluminous objections to reasonable discovery requests, even objecting constantly to requests for production of the original promissory note. These obstructive discovery tactics further burden the court systems with protracted court hearings of discovery disputes. In addition this tactic increases legal expense for homeowners and decreases their ability to fairly defend themselves.

2. **THE CONFIDENCE OF INDIVIDUAL CITIZENS THAT THE JUDICIAL SYSTEM WILL TREAT THEM FAIRLY IS BEING DESTROYED.**

In a recent article entitled "Justice for Some", Nobel laureate economist Joseph Stiglitz declared recently that it is the "universally accepted hallmark of an advanced, civilized society" that "[t]he rule of law is supposed to protect the weak against the strong, and ensure that everyone is treated fairly."[18] As Stiglitz goes on to note, "[p]art of the rule of law is the security of property rights" and that that, to some banks, the foreclosure of homes where the prescribed legal process is "just collateral damage."

While there have been expressions of concern about the outrageous abuse of our judicial system by the nation's largest financial institutions, few in positions of leadership in our government have been willing to label this crisis as the scandal that it truly is.[19] Instead, mostly what we hear from our government leaders is a steady drumbeat of expressions of concern about what the "foreclosure problem" might do to our economy. To these leaders, the abuse of our most weak and vulnerable citizens through takings of their homes outside of the process required by the rule of law is only a footnote to their concerns about economic issues. Other than in a few isolated state court civil sanctions decisions, there have been no indictments or punishments of our financial institutions and their loan servicers for their scandalous and dishonest conduct.

Our weak, vulnerable and mostly unrepresented homeowners are left with the reality that our once trusted financial institutions have filed huge volumes of false foreclosure affidavits for many years in courts all across the country, and are only now being publicly exposed. These homeowners are also being left to observe that neither Federal nor State authorities have any willingness to pursue criminal prosecutions for this dishonest conduct. They have the sure knowledge that if they ever lied to the courts, as the banks and their loan servicers have lied to them on such a massive scale, they would be charged with perjury and severely punished. As Stiglitz notes at the end of his article, "the proud claim of 'justice for all' is being replaced by the more modest claim of 'justice for those who can afford it.'"

More than occasionally I have heard, and had other lawyers report, expressions of doubt by homeowners they can get a fair shake if they go to court against the servicers and the banks and GSE clients like Fannie Mae and Freddie Mac. This growing doubt in the ability and willingness of our justice system to

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[18] Josph Stiglitz, *Justice for Some*, http://www.project-syndicate.org/commentary/stiglitz131/English

[19] Even the November Oversight Report of the Congressional Oversight panel dated November 16, 2010 benignly refers to the problem as being one of "mortgage irregularities". http://cop.senate.gov/reports/library/report-111610-cop.cfm

operate within "rule of law" principles causes tremendous, but immeasurable, damage throughout our society.

IV. SOLUTIONS.

Beginning on page 12 of her written testimony before the House Financial Services Subcommittee on Housing and Community Opportunity on November 16, 2010,[20] Julia Gordon of the Center for Responsible Lending provided a comprehensive statement of the remedies that are required to resolve the situation addressed by my testimony. I highlight only a few of those solutions here, but they are all important. The common theme among all of these solutions is that the servicers' financial incentives to foreclose must be replaced with incentives to negotiate loan modifications whenever possible and graceful exit strategies when modifications are not possible. A key tool in developing the incentives toward negotiated resolutions is to insist that the rule of law must fully apply to our financial institutions and their servicers in all aspects of their foreclosure activities so that they will be required to bear the full costs of honestly conducted foreclosures when they elect to avoid the loan modification process.

A. APPROPRIATE FUNDS TO SUPPORT LEGAL REPRESENTATION FOR HOMEOWNERS.

I place this item as one of the first priorities because it is an urgent need and immediately achievable goal. Legal services organizations around the country have been critical links in the effort to provide representation to homeowners in foreclosure. But for the existence of the Foreclosure Diversion Program at Pine Tree Legal Assistance in Maine, my work as a volunteer lawyer in exposing the dishonest conduct of GMAC Mortgage would not have been possible. The funding for that program is due to end in about six months. If that happens, the full time lawyers in that program will be gone, our ability to reach out to and use the services of about sixty private volunteer lawyers will be lost, and our ongoing training programs for foreclosure defense lawyers in Maine will be eliminated.

It is the legal profession that has exposed the massive and dishonest conduct of the foreclosure industry. The Dodd/Frank legislation authorized HUD to expend $35 million to establish a Foreclosure Legal Assistance Program to provide funding to legal services organizations for homeowner representation, but Dodd/Frank did not appropriate those funds, and efforts to find funding at HUD or elsewhere have so far been unsuccessful. What's more, that fund, which is to be directed at the 125 hardest hit metropolitan areas, may not even help Maine because of our rural makeup. Over the coming year, legal services programs all over the country will be facing losses of funding to continue their critical foreclosure defense work. Simply

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20 http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=df8cb685-c1bf-4eea-941d-cf9d5173873a&Witness_ID=d9df823a-05d7-400f-b45a-104a412e2202

put, Congress must find the will to immediately appropriate the funds required to preserve all of these programs, in rural as well as in metropolitan areas.

B. REQUIRE FANNIE MAE AND FREDDIE MAC TO FORECLOSE THE MORTGAGES OWNED BY THEM IN THIER OWN NAMES.

Requiring Fannie and Freddie to foreclosure in their own name should be another simple and achievable goal. Maine's foreclosure mediation program kicks in immediately after a homeowner is served with foreclosure papers and requests mediation. As we try to negotiate loan modifications with servicers in those mediation proceedings, we are constantly being surprised to learn that plaintiffs claiming ownership of loans in foreclosure are not in fact the owners. Maine statutory and case law require that a foreclosure be prosecuted only by the owner of the loan, whereas Fannie Mae and Freddie Mac require their servicers to conceal their identities in foreclosure cases and to foreclose in the servicers' names.

This deception by Fannie and Freddie obstructs foreclosure mediation efforts because, without knowing the true owner of the loan, neither the homeowner, his or her lawyer (if he or she is fortunate enough to have one) nor the mediator is able to know what loss mitigation programs might be available to the homeowner. The Fannie/Freddie deception also conceals from Congress and the public the true scope of their roles in the present foreclosure crisis.

There is no good legal or public policy excuse for Fannie and Freddie to be permitted to carry on this deceptive and obstructive practice. The Federal Housing Finance Agency, which is responsible for the oversight of these GSEs, has the authority to require this change.

C. REFORM HAMP TO REQUIRE PRINCIPAL REDUCTIONS.

Diane Thompson, in her Senate Banking Committee testimony and Julia Gordon in her House Financial Services Housing and Community Subcommittee testimony, address this need in depth. As a lawyer working directly with homeowners, I am continually conflicted when I see clients accepting loan modifications under the HAMP program. Many of their homes are worth far less than the principal balances on their loans. They accept the modifications that are available out of emotional attachment to their homes, or often simply because the modified payment is less expensive than rent would be, yet they are going forward with a total debt amount that is very difficult to repay. Servicers repeatedly claim that HAMP is a failure because there is such a high re-default rate. Simple logic tells us that a homeowner with a house far underwater in debt is going to have much less incentive to struggle to meet mortgage payments then he or she would be if the debt did not exceed the value of the house. Rational principal reductions will reduce re-defaults and will help rebuild homeowner economic security to the point where they may again become contributing members of our consumer driven economy.

As recently modified, HAMP authorizes servicers to offer principal reductions, but such reductions are not mandated. Until principal reductions are

mandated the program will remain crippled and our recovery from this foreclosure nightmare will be delayed.

D. ENFORCE SERVICER CONTRACTUAL OBLIGATIONS UNDER HAMP.

All servicer participants in HAMP are contractually obligated to comply with all of its provisions. Overwhelmingly, we see failures in compliance, and lawyers all over the country report the same experience. The obstructive approach taken to the HAMP modification process is hugely wasteful of the limited legal resources available to homeowners. Efforts to modify loans with the assistance of counsel routinely take three and four times as long as should reasonably be required, and the process is even worse for those who are unrepresented. HAMP modifications are not being offered before foreclosures are filed; HAMP modifications are denied without adequate reason; homeowner paperwork is routinely and repeatedly lost; and there is a tremendous problem in getting the servicers to convert temporary modifications into permanent ones. Our experience in Maine is that, Bank of America is the worst offender in the program--we spend a truly disproportionate amount of our time in trying get Bank of America to comply with HAMP and the incidents of Bank of America abuse of homeowners under the HAMP program is the most egregious that we see.

The Treasury Department is the agency responsible for enforcing servicer's compliance with HAMP. Despite the often reported and widely known abuses of the program by servicers, there is no evidence that Treasury has ever taken any enforcement action against any servicer. Pressure must be brought to bear on Treasury to require it to carry out its oversight and enforcement responsibility.

There is active litigation, and a split of decisions, all over the country as to whether homeowners can be treated as third party beneficiaries with the right to enforce the HAMP agreements. Such litigation and uncertainty should be eliminated by revisions to HAMP regulations to make it explicitly clear that homeowners are intended third party beneficiaries. If the regulators of the HAMP program will not enforce the servicers' obligations under the program, then homeowners simply must be given that right.

D. REQUIRE THE IRS TO ENFORCE THE REMIC RULES.

Homeowners have no direct stake in whether the Internal Revenue Service enforces the REMIC rules relating to the mortgage-backed securities trusts, yet they are being indirectly impacted. The REMIC rules required that mortgages be assigned to these trusts within a certain period of time at the establishment of the trusts. It is becoming increasingly clear that many of these trusts may have failed to meet this requirement. The blockbuster decision *Kemp v. Countrywide Home Loans* (Bankr. N.J. Adv. No. 08-2448, Nov. 16, 2010) that came out two weeks ago revealed that Countrywide routinely failed to transfer the notes on loans it made. The trusts try to solve this problem by obtaining the notes, indorsements and mortgage assignments just before, or sometimes during, foreclosure. This late acquisition of

the loans violates the REMIC rules, yet there is not hint of any enforcement by the IRS.

Yet again, homeowners are watching the failure of the rule of law. They know that if they fail to pay their taxes or cheat on their tax returns, they will be prosecuted. But they see a double standard at work that allows the securitized trusts to escape tax penalties for their misconduct. Even a threat of enforcement of the REMIC rules by the IRS could change the economic equation of foreclosures in such a way as to motivate the trusts and the servicers to begin to favor loan modifications over foreclosures.

V. CONCLUSION.

The rule of law is what preserves the stability of our democracy. As we allow the mortgage loan industry to circumvent the rule of law we show that corporate interests can get away with such massive dishonesty, and we thereby encourage more of it. As citizens see our largest financial institutions flaunt their violations of our legal systems, our citizens lose faith in these institutions and in their government. Surely this loss of faith is what is leading to the increasing volume of "strategic defaults" that the financial institutions so loudly condemn.

There are remedies that can significantly improve the foreclosure problem if the political will can be mustered to implement them and if regulators can be motivated to do their jobs. Appropriate prosecution of those responsible for the massive levels of dishonesty that have been exposed can help restore the loss of confidence in the legal system by those victimized by the abuses of the mortgage servicers.

Thank you for this opportunity to share my thoughts and observations with you and for your interest in these problems.

Thomas A. Cox, Esq.

Maine Attorneys Saving Homes
A joint project of Pine Tree Legal Assistance and
The Maine Volunteer Lawyers Project

TESTIMONY OF THOMAS A. COX, ESQ.
LIST OF EXHIBITS

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Exhibit 1

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof. A motion for summary judgment may not be filed until the expiration of 20 days from the commencement of the action.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, but within such time as not to delay the trial, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Proceedings on Motion. Any party opposing a motion may serve opposing affidavits as provided in Rule 7(c). Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by subdivision (h) show that there is no genuine issue as to any material fact set forth in those statements and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly. In the event that a moving party's motion for summary judgment is denied in whole or in part, facts admitted by the parties solely for the

purpose of the summary judgment motion shall have no preclusive effect at trial upon any third party who did not participate in the summary judgment proceeding.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleading, but must respond by affidavits or as otherwise provided in this rule, setting forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Statements of Material Fact.

In addition to the material required to be filed by Rule 7, a motion for summary judgment and opposition thereto shall be supported by statements of material facts as addressed in paragraphs (1), (2), (3), & (4) of this rule.

(1) Supporting Statement of Material Facts. A motion for summary judgment shall be supported by a separate, short, and concise statement of material

facts, set forth in numbered paragraphs, as to which the moving party contends there is no genuine issue of material fact to be tried. Each fact asserted in the statement shall be set forth in a separately numbered paragraph and shall be supported by a record citation as required by paragraph (4) of this rule.

(2) Opposing Statement. A party opposing a motion for summary judgment shall submit with its opposition a separate, short, and concise statement. The opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule. Each such statement shall begin with the designation "Admitted," "Denied," or "Qualified" (and, in the case of an admission, shall end with such designation). In addition to any denials or qualifications, the party opposing summary judgment may note any objections to factual assertions made by the moving party as set forth in paragraph (i). The opposing statement may contain in a separately titled section any additional facts which the party opposing summary judgment contends raise a disputed issue for trial, set forth in separate numbered paragraphs and supported by a record citation as required by paragraph (4) of this rule.

(3) Reply Statement of Material Facts. A party replying to the opposition to a motion for summary judgment shall submit with its reply a separate, short, and concise response limited to the additional facts submitted by the opposing party and any objections to denials or qualifications as set forth in paragraph (i). The reply statement shall admit, deny or qualify such additional facts by reference to the numbered paragraphs of the opposing party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by paragraph (4) of this rule. Each reply statement shall begin with the designation "Admitted," "Denied," or "Qualified" (and, in the case of an admission, shall end with such designation).

(4) Statement of Facts Deemed Admitted Unless Properly Controverted; Specific Record of Citations Required. Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted. An assertion of fact set forth in a statement of material facts shall be followed by a citation to the specific page or paragraph of identified record material supporting the assertion. The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment. The court shall

have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts.

(i) Motions to Strike Not Permitted.

(1) Motions to strike factual assertions, denials, or qualifications contained in any statement of material facts filed pursuant to this rule are not permitted. If a party contends that the court should not consider a factual assertion, denial, or qualification, the party may set forth an objection in either its opposing statement or in its reply statement and shall include a brief statement of the reason(s) for the objection and any supporting authority or record citations.

(2) A party moving for summary judgment may respond in its reply statement to any objections made by the party opposing summary judgment. If the moving party objects in its reply statement to any factual assertion, denial, or qualification made by the opposing party, the party opposing summary judgment may file a response within 7 days of the filing of the reply statement. Such a response shall be strictly limited to a brief statement of the reason(s) why the factual assertion should be considered and any supporting authority or record citations.

(j) Foreclosure Actions. No summary judgment shall be entered in a foreclosure action filed pursuant to Title 14, Chapter 713 of the Maine Revised Statutes except after review by the court and determination that (i) the service and notice requirements of 14 M.R.S. § 6111 and these rules have been strictly performed; (ii) the plaintiff has properly certified proof of ownership of the mortgage note and produced evidence of the mortgage note, the mortgage, and all assignments and endorsements of the mortgage note and the mortgage; and (iii) mediation, when required, has been completed or has been waived or the defendant, after proper service and notice, has failed to appear or respond and has been defaulted or is subject to default. In actions in which mediation is mandatory, has not been waived, and the defendant has appeared, the defendant's opposition pursuant to Rule 56(c) to a motion for summary judgment shall not be due any sooner than ten (10) days following the filing of the mediator's report.

Advisory Note
August 2009

Exhibit 2

Loan No. 0554937904
STATE OF MAINE
CUMBERLAND ,SS

MAINE DISTRICT COURT
DISTRICT NINE
DIVISION OF NORTHERN CUMBERLAND
CIVIL ACTION
DOCKET NO. BRI-RE-09-65

FEDERAL NATIONAL MORTGAGE ASSOCIATION Plaintiff v. NICOLLE M. BRADBURY Defendant and GMAC MORTGAGE, LLC d/b/a DITECH, LLC.COM and BANK OF AMERICA, NA Parties in Interest	**AFFIDAVIT IN SUPPORT OF PLAINTIFF S MOTION FOR SUMMARY JUDGMENT**

COMMONWEALTH OF PENNSLVANIA
Montgomery, ss.

I, Jeffrey Stephan Limited Signing Officer , depose and say as follows:

1. My name is Jeffrey Stephan Limited Signing Officer am a Limited Signing Officer with GMAC Mortgage, LLC (GMAC), a limited liability company organized and existing under the laws of the State of Delaware with a principal place of business in Fort Washington, Pennsylvania. GMAC is the servicing agent for the mortgage to Federal National Mortgage Association (FNMA). I have under my custody and control the records relating to the mortgage transaction referenced below.

My knowledge as to the facts set forth in this Affidavit is derived from my personal knowledge of these records. These records were made at or near the time of the event, transaction, or from information transmitted by, a person with personal knowledge of the events recorded therein. These records are kept in the ordinary course of business of GMAC as FNMA s servicer and all previous holders and servicers of the Note and Mortgage referenced below and it is the regular practice of GMAC as servicing agent to FNMA and all previous holders and servicers of the Note and Mortgage referenced below to make such records.

2. GMAC maintained the account of the Note and Mortgage referenced below. By virtue of GMAC s maintenance of the account, GMAC is responsible for accepting payments, notifying debtors of the account status, and calling defaults.

3. Defendant executed and delivered to GMAC Mortgage Corporation a Note, dated July 25, 2003 in the original principal amount of $75,000.00, a true and correct copy of which is attached hereto as Exhibit A.

4. In order to secure said Note, Defendant executed and delivered to GMAC Mortgage Corporation in its favor a Mortgage, dated July 25, 2003, and recorded in the Oxford County Registry of Deeds in Book 458, Page 84, a true and correct copy of which is attached hereto as Exhibit B.

5. The Note was subsequently assigned to FNMA by the endorsement as set forth on the Note Endorsement attached to the Note.

6. Mortgage Electronic Registration Systems, Inc., acting solely as nominee for GMAC Mortgage Corporation and its successors and assigns, as the beneficiary of said Mortgage subsequently assigned said Mortgage to FNMA by Assignment of Mortgage, dated February 13,

2009, and recorded in said Registry of Deeds in Book 557, Page 40, a true and correct copy of which is attached hereto as Exhibit C.

7. Defendant is presently in default on said Note in that she has failed to make the monthly payments and therefore has breached the condition of the aforesaid Mortgage. Payments of principal and interest are due for October 1, 2008 to and including July 20, 2009.

8. On or about November 7, 2008, GMAC sent Defendant a notice of the default, a true and correct copy of which is attached hereto as Exhibit D. Defendant failed to reinstate the mortgage within the time period as set forth in said notice.

9. There is presently due and owing on said Note and Mortgage the principal amount of $74,343.47, interest thereon to July 20, 2009, in the amount of $3,867.06 with additional interest accruing on said principal balance at the note rate of 5.875%, late fees of $512.28, escrow advances of $1,453.23, property inspection fees of $101.25 and attorney's fees and costs related to the collection of sums due under the Note, paid by FNMA, less a suspense balance of $142.20.

10. Defendant is a resident of Denmark, in the County of Oxford and State of Maine. Defendant is not in the military service of the United States as defined in Article I of the "Soldiers' and Sailors' Relief Act of 1940," as amended; said Defendant is not an infant or incompetent person; and venue is proper in this Court by virtue of the fact that the premises which are described in said Mortgage in this proceeding are located in Denmark in the County of Oxford and State of Maine.

Dated: Aug 5, 2009

Jeffrey Stephan
Its Limited Signing Officer Limited Signing Officer

COMMONWEALTH OF PENNSLVANIA
Montgomery, ss..

Aug 5, 2009

Personally appeared the above-named, Jeffrey Stephan Limited Signing Officer known to me to be the person described in the foregoing Affidavit, and being duly sworn by me, made oath that the above Affidavit signed by him/her is true.

Before me,

Notary Public

Printed Name

My Commission Expires

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Susan Tasher, Notary Public
Upper Dublin Twp., Montgomery County
My Commission Expires Nov. 9, 2011
Member Pennsylvania Association of Notaries

Exhibit 3

SUMMARY OF KEY PORTIONS OF TESTIMONY OF JEFFERY STEPHAN AT HIS DEPOSTION TAKEN ON JUNE 7, 2010

P. 33, line 24

Q. Do you have any knowledge of how summary judgment affidavits are used in judicial foreclosure case?

A. No.

Q. Are you aware that they are given to a judge?

A. Yes.

Q. And do you understand that a judge relies upon them?

A. Yes

P. 34, line16

Q. Has the manner in which you perform your duties as team lead for the document execution team changed in any way over the period from August 5, 2009 to the present date?

A. No.

P. 54

Q. When you sign a summary judgment affidavit, do you check to see if all of the exhibits are attached to it?

A. No.

Q. When you sign a summary judgment affidavit, do you inspect any of the exhibits attached to it.

A. No.

Q. Does anybody in your department check to see if all of the exhibits are attached to it?

A. No.

Q. When you sign a summary judgment affidavit, do you inspect any exhibits attached to it?

A. No.

EXHIBIT 1

P. 56, line 56

Q. My question to you is where does a summary judgment affidavit go after you sign it?

A. After I sign it, it is handed back to my staff. My staff hands it to a notary for notarization. They send it back to the attorney network requesting any type of affidavit.

Q. So you do not appear before the notary; is that correct.

A. I do not.

P. 58, line 13

Q. Your department does not do an independent check of the accuracy of the information on summary judgment affidavits coming to you; isn't that correct?

A. I review, quickly, the figures. Other than that, that's about it.

P. 61, line 14

Q. And you just testified that you look at principal, interest, late charges and escrow, is that correct?

A. That is correct.

Q. Is there anything else that you look at in your computer system when your signing a summary judgment affidavit?

A. The only thing I review other than that is who the borrower is.

Q. When you receive a summary judgment affidavit to sign, do you read every paragraph of it?

A. No.

Q. What do you read?

A. I look at the figures.

Q. That's all that you look at when you sign a summary judgment affidavit?

A. Yes, to ensure that the figures are accurate.

P. 62, line 11

Q. Is it fair to say that when you sign a summary judgment affidavit, you do not know what information it contains other than the figures that are set forth within it?

A. Other than the borrower's name and if I have signing authority for that entity. That is correct.

P. 67, line 21

Q. So other than the due date and the balances due, is it correct that you do not know whether any other part of the affidavit that you sign is true.

A. That could be correct.

Q. Is it correct?

A. That is correct.

Exhibit 4

MAINE DISTRICT COURT, DISTRICT NINE
DIVISION OF NORTHERN CUMBERLAND

\- - -

FEDERAL NATIONAL :
MORTGAGE ASSOCIATION : DOCKET NO.
Plaintiff : BRI-RE-09-65
:
v. :
:
NICOLE M. BRADBURY :
Defendant:
and :
GMAC MORTGAGE, LLC :
d/b/a DITECH, LLC.COM :
and BANK OF AMERICA, NA:
Parties in Interest:

\- - -

June 7, 2010

\- - -

Oral deposition of JEFFREY D. STEPHAN, taken pursuant to notice, was held at the law offices of LUNDY FLITTER BELDECOS & BERGER, P.C., 450 N. Narberth Avenue, Narberth, Pennsylvania 19072, commencing at 10:10 a.m., on the above date, before Susan B. Berkowitz, a Registered Professional Reporter and Notary Public in the Commonwealth of Pennsylvania.

\- - -

1
2 APPEARANCES:
3
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15
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19 Counsel for GMAC and Fannie Mae
20
21
22
23
24
25

1
2 (Document marked Exhibit-1
3 for identification.)
4 - - -
5 (It is hereby stipulated and
6 agreed by and between counsel that
7 sealing, filing and certification
8 are waived; and that all
9 objections, except as to the form
10 of questions, be reserved until
11 the time of trial.)
12 - - -
13 JEFFREY D. STEPHAN, after
14 having been duly sworn, was
15 examined and testified as follows:
16 - - -
17 MS. PITNEY: I would like to
18 put on the record that we
19 requested a stipulation, and
20 Attorney Cox has denied our
21 request for that stipulation. And
22 that would be a stipulation that
23 this deposition transcript be used
24 for this case, FNMA versus
25 Bradbury, only.

1 STEPHAN
2 MR. COX: Mr. Fleischer, we
3 understand that Julia Pitney
4 represents the plaintiff in this
5 case. Who do you represent today?
6 MR. FLEISCHER: I believe
7 Ms. Pitney both represents Fannie
8 Mae and GMAC, and I am here on
9 GMAC's behalf.
10 MR. COX: GMAC is neither a
11 plaintiff nor defendant in this
12 case, so we may have some issues
13 around that, but we'll cross that
14 bridge when we get to it.
15 - - -
16 EXAMINATION
17 - - -
18 BY MR. COX:
19 Q. Mr. Stephan, for the record,
20 would you state your full name, please?
21 A. Jeffrey Stephan.
22 Q. How old are you?
23 A. I am 41, in June.
24 Q. You live in Sellersville,
25 Pennsylvania?

1 STEPHAN
2 A. That is correct.
3 Q. Have you had your deposition
4 taken previously?
5 A. In other cases, yes.
6 Q. How many other cases?
7 A. This will be my third time.
8 Q. What other cases were you
9 deposed in, to your recollection?
10 A. In what kind of cases?
11 Q. Well, can you remember the
12 names of the cases?
13 A. No, I don't.
14 Q. When is the last time that
15 you've had your deposition taken?
16 A. I would approximate two,
17 three months ago.
18 Q. Was that in Florida?
19 A. No. That was in New Jersey.
20 Q. That would have been in
21 2010?
22 A. Yes.
23 Q. Then you were deposed in
24 Florida in December of 2009?
25 A. That is correct.

6

1 STEPHAN
2 Q. When was the other
3 deposition, the third deposition?
4 A. This one today is the third.
5 Q. Have you testified in court
6 as a witness before?
7 A. No.
8 Q. Did you review any documents
9 to prepare for this deposition?
10 A. Yes.
11 Q. What documents did you
12 review?
13 A. I looked at the deposition
14 that was sent to me. And I went over the
15 Complaint with Brian.
16 THE WITNESS: When was that,
17 Thursday, Wednesday?
18 MR. FLEISCHER: You're
19 directed not to say anything with
20 regard to what we spoke about,
21 but, yes, you can answer to what
22 you looked at.
23 THE WITNESS: Yes.
24 MS. PITNEY: I'm sorry to
25 interrupt. I'm just having a

7

1 STEPHAN
2 little difficulty hearing you. Is
3 there any way to push the phone a
4 little closer to Mr. Stephan?
5 MR. FLEISCHER: Okay. And,
6 Julia, let me know during the
7 course if there's still a problem.
8 MS. PITNEY: You were doing
9 fine, and then it got a little
10 fuzzy.
11 THE WITNESS: I'll talk
12 louder.
13 MS. PITNEY: Thank you.
14 BY MR. COX:
15 Q. What deposition did you look
16 at?
17 A. The deposition for this
18 case.
19 Q. The Deposition Notice?
20 A. Right, the Deposition
21 Notice.
22 Q. It was not another
23 deposition transcript --
24 A. No.
25 Q. -- that you were referring

8

1 STEPHAN
2 to?
3 A. No.
4 MR. FLEISCHER: Let him
5 finish the question, and then
6 respond, because it makes it
7 cleaner for the transcript.
8 THE WITNESS: Thank you.
9 BY MR. COX:
10 Q. What is your educational
11 background?
12 A. I have a four-year degree at
13 Penn State University in liberal arts.
14 Q. When did you go to work for
15 GMAC?
16 A. I began work at GMAC
17 September 30th of '04.
18 Q. What was your work history,
19 in a summary form, before you went to
20 work for GMAC?
21 A. I have done collections and
22 mortgage foreclosures for other
23 companies.
24 Q. Who have you done mortgage
25 foreclosure work for?

9

1 STEPHAN
2 A. ContiMortgage, Fairbanks
3 Capital, GMAC.
4 Q. The first one, I'm not sure
5 about. Is that Conti, C-O-N-T-E (sic)?
6 A. C-O-N-T-I.
7 Q. What period of time did you
8 work for ContiMortgage?
9 A. I began there in '92. I
10 believe I left there in '98.
11 Q. What years, approximately,
12 did you work for Fairbanks Capital?
13 A. '98 to '04.
14 Q. You work in the GMAC
15 Mortgage office in Fort Washington,
16 Pennsylvania; is that correct?
17 A. That is correct.
18 Q. Approximately, how many
19 people work in that office?
20 A. I can't estimate the number
21 of people. I can say my department,
22 approximately 50 to 60 people.
23 Q. What's the name of your
24 department?
25 A. Foreclosures.

10

1 STEPHAN
2 Q. When you began working for
3 GMAC Mortgage in 2004, what position did
4 you begin working in?
5 A. I was a foreclosure
6 specialist.
7 Q. What kinds of duties did
8 that involve?
9 A. That involved the day-to-day
10 handling and servicing of a portfolio of
11 loans that fell into a foreclosure
12 category.
13 Q. What kinds of duties did you
14 carry out with respect to those matters?
15 MS. PITNEY: Object to form.
16 MR. COX: You have to
17 answer.
18 MS. PITNEY: You can answer
19 the question.
20 THE WITNESS: The everyday
21 servicing of the file, from
22 contacting the attorney, supplying
23 an attorney who's handling a case
24 within my portfolio with any
25 information they may need, a copy

11

1 STEPHAN
2 of documents that may be needed
3 through a fax form or e-mail form,
4 the calculation of figures for
5 judgments, reporting sale results
6 at that time, and properly
7 conveying properties to the proper
8 departments for post sale action.
9 BY MR. COX:
10 Q. How long did you hold the
11 position of foreclosure specialist?
12 A. With GMAC, three years.
13 Q. So you would have assumed a
14 new position sometime in 2007?
15 A. Yes.
16 Q. What position did you assume
17 in 2007?
18 A. I became a team lead within
19 the foreclosure department.
20 Q. What duties did you assume
21 as the team lead in the foreclosure
22 department?
23 A. At that time, GMAC
24 segregated our department into teams, and
25 I was put into place as the supervisor or

12

1 STEPHAN
2 team lead for our bidding team, which
3 would be a team of individuals who
4 calculate the bids for sales.
5 Q. Calculate the bids for sales
6 of mortgage --
7 A. Foreclosure sales.
8 MR. FLEISCHER: Again, let
9 him finish the question.
10 BY MR. COX:
11 Q. Just so I can understand it,
12 your role in that position was to help
13 GMAC calculate what it was going to bid
14 at any given foreclosure sale?
15 A. That would be correct.
16 Q. The foreclosure
17 department -- is that what it's called?
18 A. Yes.
19 Q. That has units within it?
20 A. Yes.
21 Q. And when you were doing the
22 bidding work, what unit were you a part
23 of at that time?
24 A. The bid team.
25 Q. How long did you serve on

13

1 STEPHAN
2 the bid team?
3 A. I'm going to estimate six
4 months to a year, at the most.
5 Q. Does it sound roughly
6 correct that sometime in 2008, you
7 assumed a new position?
8 A. Yes.
9 Q. What was the next position
10 that you held after working on the bid
11 team?
12 A. My present position, which
13 is the team lead of the document
14 execution team.
15 Q. Is there also a service
16 transfer unit?
17 A. Yes, there is.
18 Q. Are you the team lead of
19 that as well?
20 A. Yes, I am. That falls into
21 the document execution team.
22 Q. So I talk your language,
23 there's a foreclosure department?
24 A. Yes.
25 Q. And the subdivisions within

1 STEPHAN
2 that, do you call them teams or units?
3 A. Teams.
4 Q. So there's a foreclosure
5 department, and then within it are a
6 group of teams that do different
7 functions; is that correct?
8 A. That is correct.
9 Q. What does the document
10 execution team do?
11 MR. FLEISCHER: Objection as
12 to form.
13 THE WITNESS: Can you
14 rephrase that?
15 BY MR. COX:
16 Q. What are the functions of
17 the document execution team?
18 A. The functions of my document
19 execution team is, I have staff that
20 prints documents, from our computer
21 system, that are submitted from our
22 attorney network. I have staff, also, on
23 that team who prepares the documents
24 which have already received figures from
25 our attorneys. So there are completed

1 STEPHAN
2 documents. They fill in the blanks, they
3 stamp names. They ensure that all of the
4 notary lines are completed properly once
5 it's returned from the notary. And that
6 staff also is in charge of making sure
7 they Federal Express the document back to
8 the designated attorney within our
9 network.
10 Q. What does the service
11 transfer team do?
12 A. The service transfer team
13 receives a list of loans from our
14 transfer management team, which is
15 located in Iowa. The service transfer
16 team within foreclosure only handles
17 loans that fall into a bankruptcy or
18 foreclosure category. They prepare files
19 or CDs, and transfer them to the new
20 servicer. So they're loans that are
21 either acquired, or they're loans that
22 are being transferred to a new servicer
23 for service.
24 Q. How many employees are on
25 the document execution team?

1 STEPHAN
2 A. 14.
3 Q. Including yourself?
4 A. No; including me, 15.
5 Q. What training have you
6 received from GMAC to function in your
7 capacity as the team lead for the
8 document execution team?
9 MS. PITNEY: Object to form.
10 BY MR. COX:
11 Q. Let me restate the question.
12 Have you received any training from GMAC
13 to use in conjunction with your
14 performance as the team lead for the
15 document execution team?
16 A. Yes.
17 Q. What training have you
18 received?
19 A. I received side-by-side
20 training from another team lead to
21 instruct me on how to review the
22 documents when they are received from my
23 staff.
24 Q. Who was that person?
25 A. That person, at the time, I

1 STEPHAN
2 believe was a gentleman by the name of
3 Kenneth Ugwuadu, U-G-W-U-A-D-U. He is no
4 longer with GMAC.
5 Q. How long did that training
6 last?
7 A. Three days.
8 Q. Were there any written or
9 printed training materials or manuals
10 used as a part of that training?
11 A. No.
12 Q. Again, just so I understand
13 what your testimony was, that training
14 involved your learning how to review the
15 documents that were being processed
16 through your hands; is that correct?
17 A. That's correct.
18 Q. What were you trained to do
19 with respect to those documents by that
20 gentleman?
21 A. Basically, how to review the
22 system, which I already basically knew
23 from preparing documents in my prior
24 position before becoming a team lead. So
25 it was more or less a rehash, let's say,

18

1 STEPHAN
2 or retraining, to confirm that I was
3 looking at things correctly in the
4 system.
5 Q. When you refer to a system,
6 you're referring to a computer system?
7 A. Yes.
8 Q. Other than what you might
9 call it when you're not happy, does that
10 system have a name?
11 A. Yes. That system is called
12 Fiserv, F-I-S-E-R-V.
13 Q. Have you received any
14 training on how to use that system?
15 A. Yes, when I was hired.
16 Q. Are there any manuals or
17 training materials associated with your
18 training on that system?
19 A. Yes, there is.
20 Q. Do you have those manuals in
21 your possession?
22 A. Presently, no.
23 Q. Do they exist in your office
24 at GMAC?
25 A. I honestly don't know.

19

1 STEPHAN
2 Q. In your role as team lead
3 for the document execution team, do you
4 have any duties with respect to the
5 receipt, application, or counting for
6 loan payments?
7 A. No.
8 MS. PITNEY: Object to the
9 form of the question.
10 BY MR. COX:
11 Q. What department has that
12 responsibility?
13 A. To my understanding, that
14 would be customer service. And within
15 customer service, I believe there is a
16 cash unit.
17 Q. Have you ever worked in that
18 cash unit?
19 A. No.
20 Q. Have you ever worked in that
21 customer service department?
22 A. No.
23 Q. Have you ever had any
24 training in how that department and unit
25 work?

20

1 STEPHAN
2 A. No.
3 Q. In your capacity as team
4 lead for the document execution team, do
5 you have any responsibility for data
6 entry into the computer system regarding
7 payments received by GMAC?
8 A. No.
9 Q. In your capacity as the team
10 lead for the document execution team, do
11 you have any role in the foreclosure
12 process at GMAC, other than the signing
13 of documents?
14 MR. FLEISCHER: Objection as
15 to the form of the question.
16 THE WITNESS: Can you
17 rephrase?
18 BY MR. COX:
19 Q. In your capacity as the team
20 lead for the document execution team, do
21 you have any role in the foreclosure
22 process, other than the signing of
23 documents?
24 A. No.
25 Q. I'm going to hand you what

21

1 STEPHAN
2 we have marked as Deposition Exhibit
3 Number 1, which is your affidavit in this
4 case, dated August 5, 2009.
5 MS. PITNEY: Excuse me, Tom.
6 This is Julia. Am I to presume
7 that this is the only exhibit
8 you're going to be introducing?
9 Because I haven't received any
10 exhibits that you plan to produce
11 at this deposition today.
12 MR. COX: I had no idea you
13 were going to be participating
14 today, Julia.
15 MS. PITNEY: Well, I
16 represent the plaintiff. It
17 shouldn't come as any surprise.
18 MR. COX: We're not going to
19 have a debate on the record. The
20 exhibits are here. You're welcome
21 to come see them. I had no idea
22 that you were going to participate
23 in this fashion.
24 MS. PITNEY: You had no
25 idea?

22

1 STEPHAN
2 MR. COX: I'm not going to
3 have this exchange on the record
4 with you. If you want to go off
5 the record for a minute, I'll be
6 happy to do it.
7 MS. PITNEY: No, we're going
8 to stay right on the record, Tom.
9 MR. COX: That's fine.
10 MS. PITNEY: Is it your
11 intent to introduce these exhibits
12 that have not been produced to the
13 opposing party?
14 MR. COX: I'm not going to
15 respond to that. I will entertain
16 objections that you are going to
17 make. But I'm not going to
18 respond to your questions on the
19 record.
20 MS. PITNEY: I'm going to
21 object to each and every exhibit.
22 MR. COX: That's your right
23 to do that.
24 BY MR. COX:
25 Q. I've handed you Deposition

23

1 STEPHAN
2 Exhibit Number 1, Mr. Stephan. Is that a
3 document signed by you?
4 A. Yes, that is my signature.
5 Q. And that's dated August 5,
6 2009?
7 A. That is correct.
8 Q. Do you have any memory of
9 signing that document?
10 A. No, I do not.
11 MS. PITNEY: I'd like to
12 take a brief break and speak with
13 Attorney Fleischer separately.
14 There's no question pending.
15 (Whereupon, a short recess
16 was taken.)
17 MR. COX: I gather you have
18 something you want to say on the
19 record, Julia?
20 MS. PITNEY: Yes. I object
21 to not being provided copies of
22 the documents that you intend to
23 introduce in this deposition. And
24 in an effort to make things more
25 efficient, my proposal is that --

24

1 STEPHAN
2 I understand there's not a large
3 number of documents. I propose
4 that we have Attorney Fleischer
5 fax them to me, or e-mail, in
6 bulk, or we're going to have to
7 stop. I would object. And each
8 time I'm going to stop and have
9 each document sent to me.
10 MR. COX: Your objection is
11 noted.
12 MR. FLEISCHER: Why don't we
13 at least just deal with the one
14 document that's in front of us at
15 this point, which is the
16 affidavit, and then we'll address
17 each one as they come up.
18 MS. PITNEY: Fair enough.
19 BY MR. COX:
20 Q. Mr. Stephan, you've
21 testified that in addition to yourself,
22 there are 14 other employees in your
23 document execution team.
24 A. That is correct.
25 Q. You have a title of limited

25

1 STEPHAN
2 signing officer; is that correct?
3 A. That is correct.
4 Q. How long have you been a
5 limited signing officer for GMAC
6 Mortgage?
7 A. I'm going to estimate, two
8 years.
9 Q. Are there any other limited
10 signing officers among the 14 people on
11 your team?
12 A. No, not amongst my 14
13 people.
14 Q. Exhibit-1, on the bottom of
15 the first page, says: I have under my
16 custody and control the records relating
17 to the mortgage transaction referenced
18 below.
19 What records does GMAC
20 maintain with respect to mortgage
21 transactions?
22 MS. PITNEY: Object to the
23 form.
24 THE WITNESS: Please
25 rephrase.

26

1 STEPHAN
2 BY MR. COX:
3 Q. What records does GMAC
4 maintain with respect to mortgage loans?
5 A. We keep our records for the
6 foreclosure department and the rest of
7 the company on our Fiserv system for
8 availability throughout our company.
9 Q. Do paper records exist
10 anywhere within GMAC Mortgage?
11 A. Yes, they do.
12 Q. Where do they exist?
13 A. I believe they are housed
14 either in our Iowa office or in
15 Minnesota, or with any of our custodians
16 involved within the company.
17 Q. Do you have any
18 responsibilities for making entries in
19 the Fiserv system?
20 A. Other than just usual notes,
21 no.
22 Q. What kind of usual notes do
23 you enter?
24 MS. PITNEY: Object. I'm
25 objecting to the form of the

27

1 STEPHAN
2 question. And, furthermore, I'm
3 objecting to the extent that
4 you're basically asking him an
5 incredibly broad-based question
6 here, Tom. If you want to ask him
7 about this case and any entries he
8 made with respect to this case,
9 then that's fine. But your
10 question is pretty sweeping there.
11 BY MR. COX:
12 Q. What is your usual business
13 practice and routine with respect to
14 making usual notes in the Fiserv system?
15 A. If a customer were to call
16 in, I would make a note in our computer
17 system.
18 Q. Do customers call you in
19 your capacity as team lead for the
20 document execution team?
21 A. No, they do not.
22 Q. So if that's the only kind
23 of notes that you would make in the
24 system, is it fair to say that you don't
25 make notes in that system?

28

1 STEPHAN
2 A. That would be correct.
3 Q. And you have no role in the
4 entry of any other data into that system;
5 isn't that correct?
6 A. That is correct.
7 Q. What department maintains
8 that system?
9 MR. FLEISCHER: Objection as
10 to form.
11 BY MR. COX:
12 Q. Do you know what department
13 maintains that system?
14 A. The system is used by the
15 entire company.
16 Q. Do you know what department
17 maintains the security for that system?
18 A. The IT department.
19 Q. Where is that located?
20 A. Throughout the entire
21 country.
22 Q. Do you know what department
23 makes entries into that system?
24 A. Numerous departments.
25 Q. Do you know what departments

29

1 STEPHAN
2 have the ability to change entries in
3 that system?
4 A. Nobody has the ability to
5 change an entry in the system, as far as
6 a note would go.
7 Q. What do you mean by that?
8 A. Such as if a customer calls
9 in, you type in the system. Once you
10 type it, it's entered.
11 Q. Does GMAC keep a paper
12 record of loan payments made by mortgage
13 customers?
14 A. I do not know.
15 Q. I think you said that the
16 cash department receives payments --
17 customer payments; is that correct?
18 A. To my knowledge, yes.
19 Q. That's the department that
20 you've said you have not worked in; is
21 that correct?
22 A. That is correct.
23 Q. So you don't have firsthand
24 knowledge about how it operates; is that
25 correct?

1 STEPHAN
2 A. That is correct.
3 MS. PITNEY: Object.
4 BY MR. COX:
5 Q. Do you have any knowledge
6 about how the data relating to those
7 payments are entered into the system?
8 A. I do not have that
9 knowledge.
10 Q. Do you have any knowledge
11 about how GMAC ensures the accuracy of
12 the data entered into the system?
13 A. No, I do not.
14 Q. Do you have any knowledge as
15 to what measures GMAC takes to preserve
16 the integrity and security of the system?
17 A. No, I do not.
18 MS. PITNEY: Object to the
19 form of that question.
20 BY MR. COX:
21 Q. In your capacity as team
22 lead for the document execution team,
23 what kinds of documents do you sign?
24 A. The types of documents I
25 sign are assignments of mortgage,

1 STEPHAN
2 numerous types of affidavits, deeds that
3 need to be done post sale, a substitution
4 of trustees. And that covers it in a
5 general span.
6 Q. You said you sign a variety
7 of affidavits. What kinds of affidavits
8 do you sign?
9 A. I sign judgment affidavits
10 for judicial foreclosure actions. I will
11 sign an affidavit verifying military
12 duty. I sign affidavits in reference to
13 -- if GMAC has exhausted all options
14 through lost mitigation upon reviewing
15 notes in our Fiserv system. That's a
16 general description of different types
17 of affidavits.
18 Q. Your document execution team
19 provides documents for foreclosures in
20 what states?
21 A. Throughout the country.
22 Q. Are there other document
23 execution teams within the GMAC system?
24 A. I believe our bankruptcy
25 unit also has a document execution team.

1 STEPHAN
2 Q. That's the only other
3 document execution team that you're aware
4 of?
5 A. To my knowledge, yes.
6 Q. When you referred in one of
7 your answers a few moments ago to
8 judgment affidavits, are you referring to
9 the type of affidavit in front of you, as
10 Deposition Exhibit-1?
11 A. That is a similar type of
12 affidavit, yes. This states Affidavit in
13 Support of the Plaintiff's Motion for
14 Summary Judgment.
15 Q. Have you received any
16 training regarding the summary judgment
17 process in judicial foreclosure states?
18 A. No.
19 Q. Do you have any knowledge as
20 to what a summary judgment affidavit is
21 used for in the State of Maine?
22 MR. FLEISCHER: Objection as
23 to form.
24 BY MR. COX:
25 Q. Would you please answer the

1 STEPHAN
2 question?
3 A. To my knowledge, a borrower
4 would have filed a contested answer. And
5 this would be our next step within the
6 process, to confirm the amount that is
7 due to support the summary judgment.
8 Q. Do you understand how the
9 affidavit is used, that is, Deposition
10 Exhibit Number 1?
11 MS. PITNEY: Objection.
12 Tom, you're getting dangerously
13 close here to the privileged area.
14 I mean, this affidavit, in itself,
15 was prepared in preparation for
16 litigation -- in litigation; not
17 even preparation for it, but
18 during litigation.
19 MR. COX: I have not the
20 slightest interest in getting into
21 attorney/client privilege. I'll
22 rephrase the question.
23 BY MR. COX:
24 Q. Do you have any knowledge of
25 how summary judgment affidavits are used

34

1 STEPHAN
2 in judicial foreclosure states?
3 A. No.
4 Q. Are you aware that they are
5 given to a judge?
6 A. Yes.
7 Q. And do you understand that
8 the judge relies upon them?
9 A. Yes.
10 Q. At the time that you
11 executed Deposition Exhibit-1 on August
12 5, 2009, you were, at that time, in your
13 position as team lead for the document
14 execution department?
15 A. Yes.
16 Q. Has the manner in which you
17 perform your duties as the team lead for
18 the document execution department changed
19 in any way over the period from August 5,
20 2009 to the present date?
21 A. No.
22 Q. Has your job description
23 changed in any manner during that time?
24 A. I assumed the responsibility
25 at that time of also handling the service

35

1 STEPHAN
2 transfer team as an additional
3 responsibility; other than document
4 execution, no.
5 Q. In your usual business
6 practice as a team lead for the document
7 execution team, how does a summary
8 judgment affidavit come to you, such as
9 the one that is Deposition Exhibit Number
10 1?
11 MS. PITNEY: Objection.
12 Tom, if you'd like to ask him
13 about how this specific affidavit
14 came to him, that's fine. But,
15 again, you're asking way too
16 broad.
17 BY MR. COX:
18 Q. Do you know how this
19 specific affidavit got to you, Mr.
20 Stephan?
21 A. We have a process in place
22 that if our attorney network needs an
23 affidavit, they will upload it into our
24 system, which is called LPS. We have
25 another system, which is a communication

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1 STEPHAN
2 tool, between our attorneys. They load
3 it into a process called signature
4 required.
5 MS. PITNEY: Jeff, I'm going
6 to interrupt you right there. To
7 the extent that this answer or
8 anything else that you say has to
9 do with your communication between
10 you and your attorney -- GMAC and
11 its attorney, it's attorney/client
12 privilege.
13 THE WITNESS: So I won't
14 answer.
15 MR. COX: Well, let's go
16 back and ask the question again.
17 MS. PITNEY: He's answered
18 the question. He gets the
19 affidavit from the attorney.
20 BY MR. COX:
21 Q. What is the LPS system?
22 A. That is a communication tool
23 with our attorney network.
24 Q. Is LPS a separate company?
25 A. Yes.

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1 STEPHAN
2 MS. PITNEY: Objection. The
3 means by which he communicates any
4 details about -- the means by
5 which he communicates with his
6 attorneys is privileged.
7 BY MR. COX:
8 Q. What does LPS do?
9 MS. PITNEY: I'm going to
10 object again on privilege grounds.
11 Same objection. Do not answer
12 that question.
13 THE WITNESS: Okay.
14 BY MR. COX:
15 Q. Is the source of what you
16 know about what LPS does based upon any
17 communication that you've had with
18 lawyers?
19 A. Sorry. Please rephrase
20 that. I don't understand your question.
21 Q. Do you know what LPS does
22 with respect to documents processed by
23 your unit?
24 MS. PITNEY: Objection.
25 Same objection.

1 STEPHAN
2 MR. COX: He can answer that
3 yes or no.
4 THE WITNESS: I still don't
5 understand what you're asking.
6 BY MR. COX:
7 Q. You've mentioned LPS.
8 A. Right.
9 Q. That's a separate company;
10 is that correct?
11 A. It's a system that we have
12 acquired from a company by the name of
13 Fidelity, in order to have communication
14 between our attorneys.
15 Q. Do you have any memory of
16 specifically receiving Deposition
17 Exhibit-1?
18 A. No.
19 Q. Again, I'm asking you, based
20 upon that, to describe what the usual
21 business practice is within your unit, as
22 far as how affidavits, such as Deposition
23 Exhibit-1, come to you.
24 A. Our attorney will load it to
25 the LPS system. Members of my team will

1 STEPHAN
2 print it. Other members will prepare it.
3 The figures have already been loaded from
4 our network of attorneys. So my team
5 does not have any input on the affidavit,
6 other than filling in my name. They
7 bring it to me. I review it against our
8 Fiserv system, execute it, hand it back.
9 They get it notarized. It's Federal
10 Expressed back to the individual attorney
11 asking.
12 Q. Do you keep a log of any
13 sort of what documents you execute?
14 MS. PITNEY: I'm sorry. Can
15 you repeat the question, Tom? I
16 could not hear that.
17 BY MR. COX:
18 Q. Do you keep a log of any
19 sort of what documents you execute?
20 MS. PITNEY: Objection.
21 Work product. Any type of log
22 that he keeps relative to these
23 affidavits is prepared in
24 preparation for litigation; to the
25 extent that one even exists.

1 STEPHAN
2 MR. COX: He can answer the
3 question of whether or not he
4 keeps a log, before I ask him what
5 goes into the log.
6 MS. PITNEY: Fine.
7 THE WITNESS: No, I don't
8 have a log.
9 BY MR. COX:
10 Q. Does anybody keep a log of
11 what documents you sign?
12 MS. PITNEY: Object to the
13 form of that question.
14 THE WITNESS: Please
15 rephrase.
16 BY MR. COX:
17 Q. Do you know if anybody keeps
18 a log of what documents you execute?
19 A. We have notaries in our
20 department, approximately six, who keep a
21 log for what they notarize.
22 Q. These are notaries within
23 your department?
24 A. That is correct.
25 Q. As I understand it, the

1 STEPHAN
2 first step is, in your department, a
3 document comes in on the LPS system from
4 the outside lawyer; is that correct?
5 A. That is correct.
6 Q. And then an employee in your
7 department prints it out; is that
8 correct?
9 A. That is correct.
10 Q. And then you said that the
11 employee prepares the document. What
12 does that mean?
13 MS. PITNEY: Objection. The
14 document is prepared for
15 litigation. It is privileged.
16 How it is prepared is privileged.
17 Do not answer that question.
18 BY MR. COX:
19 Q. Do your employees have any
20 direct communication with outside
21 counsel?
22 A. Yes, through the LPS system.
23 MS. PITNEY: Objection. How
24 and what he communicates with his
25 attorney is privileged, Tom.

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1 STEPHAN
2 MR. COX: I haven't asked
3 for the content. I asked if it
4 happens.
5 BY MR. COX:
6 Q. Would you answer the
7 question, please?
8 A. Yes, through the LPS system.
9 Q. Is anything done to a
10 document submitted to the LPS system by
11 an outside lawyer before it reaches your
12 hands?
13 MS. PITNEY: Objection.
14 Preparation of the document is
15 privileged. It's for litigation.
16 Do not answer the question.
17 BY MR. COX:
18 Q. Is the document that is
19 received in the LPS system from outside
20 counsel presented to you in exactly the
21 form that it is received in from outside
22 counsel?
23 MS. PITNEY: Objection.
24 Same objection.
25 MR. COX: Is it an

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1 STEPHAN
2 objection, or are you instructing
3 him not to answer?
4 MS. PITNEY: I'm instructing
5 him not to answer, to the extent
6 you're asking him questions about
7 a document that was prepared
8 specifically during the course of
9 litigation. It's protected by
10 privilege, and you can't ask him
11 questions about it.
12 BY MR. COX:
13 Q. Deposition Exhibit-1 has
14 your name stamped on it with a stamp; is
15 that correct?
16 A. That is correct.
17 Q. And below your name, the
18 words "limited signing officer" appear;
19 is that correct?
20 A. That is correct.
21 Q. Who puts that stamp on these
22 affidavits?
23 A. My team.
24 Q. On this particular
25 affidavit, your name and title is stamped

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1 STEPHAN
2 twice on the first page, and once on the
3 signature page for you; is that correct?
4 A. That is correct.
5 Q. And then it's stamped again
6 on the notary page; is that correct?
7 A. That is correct.
8 Q. So as I understand it, an
9 affidavit, such as Deposition Exhibit-1,
10 is initially prepared by outside counsel?
11 MS. PITNEY: Objection.
12 BY MR. COX:
13 Q. Is that correct?
14 A. Yes, that is correct.
15 Q. Does anybody on your team
16 verify the accuracy of any of the
17 contents of the affidavit before it
18 reaches your hands?
19 MS. PITNEY: Objection
20 again. How the document is
21 prepared -- you can ask him
22 questions about the document and
23 what's stated in the document.
24 The preparation of the document,
25 which is prepared for litigation,

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1 STEPHAN
2 is privileged. Do not answer the
3 question, Jeff.
4 BY MR. COX:
5 Q. Mr. Stephan, do you recall
6 testifying in your Florida deposition in
7 December, with regard to your employees,
8 and you said, quote, they do not go into
9 the system and verify the information as
10 accurate?
11 A. That is correct.
12 MS. PITNEY: I'm sorry.
13 Tom, could you please repeat what
14 you just said? I just couldn't
15 hear.
16 MR. COX: Quote: They do
17 not go into the system and verify
18 the information as accurate.
19 BY MR. COX:
20 Q. Is that correct?
21 A. That is correct.
22 MR. FLEISCHER: Tom, can you
23 reference what litigation that was
24 in, do you know?
25 MR. COX: The Florida case

1 STEPHAN
2 that he testified in.
3 MR. FLEISCHER: I just
4 thought you might have a reference
5 there.
6 MR. COX: I'll get it
7 shortly.
8 BY MR. COX:
9 Q. Do you and your 14-person
10 team all work in the same physical space?
11 A. Yes. We're all in the same
12 department.
13 Q. Do you have an office or a
14 cubicle, or what?
15 A. Cubicle.
16 Q. Do the employees bring
17 documents to you to sign?
18 A. That is correct.
19 Q. How many do they bring to
20 you at a time, on average?
21 A. For a month, anywhere from
22 six to 8,000 documents.
23 Q. Do you recall testifying in
24 your Florida deposition in December that
25 you estimated it was 10,000 documents a

1 STEPHAN
2 month?
3 A. I do not recall. I'm going
4 off of numbers within the past month or
5 so.
6 Q. Have those numbers gone down
7 in the past month or so?
8 A. There has been a decrease.
9 Q. Back in December, were you
10 signing in the range of 10,000 documents
11 a month?
12 A. I may have been.
13 Q. Back in August of 2009,
14 roughly, how many documents a month were
15 you signing?
16 A. I cannot estimate. I don't
17 know.
18 Q. Do you believe that it was
19 more or less than the number you were
20 signing in December?
21 A. I'm going to assume, more.
22 Q. And on a given day, I
23 understand an employee brings you a group
24 of documents for you to sign; is that
25 correct?

1 STEPHAN
2 A. That would be correct.
3 Q. Roughly, how many are
4 brought to you in a group, on average?
5 A. Throughout a day, I believe
6 we are averaging approximately 400 new
7 requests coming in from our attorney
8 network. So I would say approximately
9 400 per day.
10 Q. This sounds very basic.
11 But, physically, are you handed a pile of
12 100 documents, 300 documents? How does
13 that work?
14 A. They bring them to me in
15 individual folders from each one of the
16 members of my team. I do not count how
17 many are in the files.
18 Q. So each team employee has a
19 folder of document; is that correct?
20 A. That is correct.
21 Q. When you receive a summary
22 judgment affidavit to be signed by you,
23 is it accompanied by any other documents
24 relating to the loan?
25 MS. PITNEY: Objection. The

1 STEPHAN
2 document is prepared for
3 litigation. And anything he does
4 when he's preparing it is
5 privileged.
6 MR. COX: Are you telling
7 him not to answer?
8 MS. PITNEY: I am. Tom, if
9 you want to ask him about general
10 procedures, which you have been,
11 then I'm not going to object as
12 much. But if you want to ask him
13 about what goes into preparing a
14 document that was used for summary
15 judgment, that's clearly prepared
16 for litigation, and it's
17 privileged and protected.
18 MR. COX: I think you
19 haven't heard my question, Julia.
20 I'll state it again.
21 BY MR. COX:
22 Q. When you receive a summary
23 judgment document for your execution, is
24 it accompanied by any other documents?
25 MS. PITNEY: My objection is

1 STEPHAN
2 -- you can answer that question,
3 Jeff.
4 THE WITNESS: There are
5 times when it has the Complaint
6 connected. There are times when
7 it is brought to me just as the
8 affidavit.
9 BY MR. COX:
10 Q. When you say that there are
11 times when it comes to you with a
12 Complaint connected, you mean attached as
13 an exhibit?
14 A. Such as this one, yes.
15 Q. When you say "this one,"
16 you're referring to Deposition Exhibit-1?
17 A. Yes, that is correct.
18 Q. Deposition Exhibit-1 has
19 several exhibits attached to it; is that
20 correct?
21 MS. PITNEY: Could you
22 please tell me what the exhibits
23 that are attached are, because I
24 don't have the benefit of having
25 them in front of me?

1 STEPHAN
2 THE WITNESS: Exhibit-A is a
3 copy of the note and the --
4 MR. COX: Julia, this is
5 your summary judgment affidavit.
6 MS. PITNEY: I'm not
7 doubting that it is. I just don't
8 know what these other exhibits
9 attached are.
10 MR. COX: Don't you have
11 your copy?
12 MS. PITNEY: You're the one
13 verifying if they're the same as
14 the one I'm looking at, Tom.
15 THE WITNESS: Exhibit-B is
16 the mortgage. Exhibit-C is the
17 assignment of note and mortgage.
18 Exhibit-D -- I believe we're
19 looking at the demand, or the
20 breach letter. And those are the
21 four documents that are connected
22 to this affidavit of summary
23 judgment.
24 BY MR. COX:
25 Q. In your usual practice, are

1 STEPHAN
2 those exhibits attached to the affidavit
3 at the time that you sign them?
4 MS. PITNEY: Objection.
5 You're asking about a document
6 that was prepared by an attorney.
7 Anything that comes with it that
8 he's asked to review is
9 privileged -- the communication
10 between a client and an attorney.
11 Do not answer the question.
12 BY MR. COX:
13 Q. Mr. Stephan, would you
14 please look at Paragraph 3 of Exhibit-1.
15 Do you see there the statement: That a
16 true and correct copy of which is
17 attached hereto is Exhibit-A?
18 A. Where are you looking?
19 Q. Paragraph 3. Do you see
20 that statement?
21 A. Yes, I do.
22 Q. When you sign an affidavit
23 such as Exhibit-1, are the exhibits
24 attached to it?
25 MS. PITNEY: Objection. A

1 STEPHAN
2 document that's provided to him by
3 an attorney is privileged.
4 MR. COX: Are you telling
5 him not to answer that question?
6 MS. PITNEY: Yes. I'll say
7 again, Tom, if you would like to
8 ask him about the facts that are
9 in the affidavit, the details
10 about this loan -- which I might
11 remind you involves a woman by the
12 name of Nicole Bradbury -- then
13 I'm sure Jeff will answer your
14 question?
15 MR. COX: Well, he has the
16 affidavit in front of him in this
17 case. And the affidavit which he
18 swore to says a true and correct
19 copy of the note is attached to
20 it. And I'm asking him if that
21 document was attached to it at the
22 time that he signed it.
23 BY MR. COX:
24 Q. Would you please answer that
25 question?

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1 STEPHAN
2 A. To my knowledge, I do not
3 recall.
4 Q. Is it your usual business
5 practice to have exhibits attached to
6 affidavits that you sign?
7 A. Yes.
8 Q. All exhibits?
9 MS. PITNEY: Object to form.
10 THE WITNESS: I do not know.
11 BY MR. COX:
12 Q. When you sign a summary
13 judgment affidavit, do you check to see
14 if all the exhibits are attached to it?
15 A. No.
16 Q. Does anybody in your
17 department check to see if all the
18 exhibits are attached to it at the time
19 that it is presented to you for your
20 signature?
21 A. No.
22 Q. When you sign a summary
23 judgment affidavit, do you inspect any
24 exhibits attached to it?
25 A. No.

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1 STEPHAN
2 MS. PITNEY: Could you
3 repeat the question, Tom? Did you
4 say -- or can you have it read
5 back, please?
6 (Whereupon, the pertinent
7 portion of the record was read.)
8 MS. PITNEY: Object to the
9 form.
10 BY MR. COX:
11 Q. What happens to an affidavit
12 in your department after you sign it?
13 MS. PITNEY: Objection.
14 What happens to the document
15 afterwards is -- it's in the
16 course of litigation. The same
17 objection as I said before. Where
18 it goes is privileged.
19 MR. COX: Where it goes is
20 not a communication. It is not
21 privileged.
22 MS. PITNEY: You don't know
23 that.
24 MR. COX: Pardon me?
25 MS. PITNEY: You don't

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1 STEPHAN
2 necessarily know that.
3 MR. COX: The physical
4 movement of a document is not a
5 communication. It's a fact.
6 BY MR. COX:
7 Q. My question to you is, where
8 does a summary judgment go after you sign
9 it?
10 A. After I sign it, it is
11 handed back to my staff. My staff hands
12 it to a notary for notarization. It is
13 then handed back to my staff. They send
14 it back to the network attorney
15 requesting any type of affidavit.
16 Q. So you do not appear before
17 the notary; is that correct?
18 A. I do not.
19 Q. What does your staff do with
20 a summary judgment affidavit, such as
21 Deposition Exhibit-1, after it receives
22 it back from the notary?
23 A. They go into our LPS system,
24 close out process, stating it's being
25 sent back to --

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1 STEPHAN
2 MS. PITNEY: Objection.
3 Sorry. I don't mean to interrupt
4 you, Jeff. I'm going to instruct
5 you not to answer anything else,
6 because you've already testified
7 that the LPS system is the means
8 by which you communicate with your
9 attorney. The attorney/client
10 communication is privileged. So
11 don't continue to answer the
12 question.
13 Actually, if there is no
14 question, pending, I'd like to
15 take a brief break to discuss
16 something with Brian Fleischer.
17 (Whereupon, a short recess
18 was taken.)
19 BY MR. COX:
20 Q. Mr. Stephan, do you recall
21 testifying in your Florida deposition in
22 December that you rely on your attorney
23 network to ensure that the documents that
24 you receive are correct and accurate?
25 A. That is correct.

1 STEPHAN
2 Q. And is that, in fact, the
3 case?
4 A. Yes.
5 Q. And your department does not
6 do any independent accuracy check of
7 those records; isn't that correct?
8 MR. FLEISCHER: Objection as
9 form.
10 THE WITNESS: Can you
11 rephrase?
12 BY MR. COX:
13 Q. Your department does not do
14 any independent check of the accuracy of
15 the information on the summary judgments
16 coming to you; isn't that correct?
17 A. I review, quickly, the
18 figures. Other than that, that's about
19 it.
20 Q. Do you recall testifying in
21 your Florida deposition in December, that
22 the affidavits that you sign are not
23 based upon your own personal knowledge?
24 A. I do not recall.
25 MS. PITNEY: Objection to

1 STEPHAN
2 the form.
3 BY MR. COX:
4 Q. You do not recall that?
5 A. I do not recall.
6 Q. When you receive a summary
7 judgment affidavit from one of your staff
8 members, what do you do with it?
9 A. I will first review it
10 against our computer system, which is
11 Fiserv, in general terms, to verify that
12 the figures are correct. And then I will
13 execute it and hand it back to my staff
14 to have it notarized.
15 Q. You say "in general terms"
16 you review it. What do you mean?
17 MS. PITNEY: Objection.
18 THE WITNESS: I compare the
19 principal balance. I review the
20 interests. I take a look at the
21 late charges. I look at the
22 outstanding escrow amounts. When
23 I say "general terms," I mean I'm
24 not looking at the escrow and
25 breaking it down to the penny.

1 STEPHAN
2 I'm saying, yes, it looks correct
3 in my computer system.
4 BY MR. COX:
5 Q. Is there anything else that
6 you look at in your computer system when
7 you're signing a summary judgment
8 affidavit?
9 MS. PITNEY: I'm sorry. I
10 couldn't hear the last part of
11 that.
12 BY MR. COX:
13 Q. Is there anything else that
14 you look at in your computer system at
15 the time that you sign a summary judgment
16 affidavit?
17 A. The only other thing I
18 can --
19 MS. PITNEY: One second.
20 Are we talking about the computer
21 system, the communication system?
22 I just was asking for
23 clarification of --
24 MR. COX: Let me clarify it.
25 MS. PITNEY: What computer

1 STEPHAN
2 communication system Tom was
3 asking him about.
4 BY MR. COX:
5 Q. You testify that you go into
6 the First Serve (sic) system; is that
7 correct?
8 A. Yes, Fiserv.
9 Q. Fiserv. Do you go into any
10 other computer system at the time that
11 you're signing a summary judgment
12 affidavit?
13 A. No.
14 Q. And you just testified that
15 you look at principal, interest, late
16 charges and escrow; is that correct?
17 A. That is correct.
18 Q. Is there anything else that
19 you look at in your computer system when
20 you're signing a summary judgment
21 affidavit?
22 A. The only thing I review,
23 other than that, is who the borrower is.
24 Q. When you receive a summary
25 judgment affidavit to sign, do you read

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1 STEPHAN
2 every paragraph of it?
3 A. No.
4 Q. What do you read?
5 A. I look for the figures.
6 Q. That's all that you look at
7 when you sign a summary judgment
8 affidavit?
9 A. Yes, to ensure that the
10 figures are correct.
11 Q. Is it fair to say then that
12 when you sign a summary judgment
13 affidavit, you do not know what it says,
14 other than what the figures are that are
15 contained within it?
16 MR. FLEISCHER: Objection as
17 to form.
18 MS. PITNEY: Objection to
19 the form of the question.
20 THE WITNESS: Please
21 rephrase.
22 BY MR. COX:
23 Q. It fair to say that when you
24 sign a summary judgment affidavit, you
25 don't know what information it contains,

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1 STEPHAN
2 other than the figures that are set forth
3 within it?
4 A. Other than the borrower's
5 name, and if I have signing authority for
6 that entity. That is correct.
7 Q. The practice that you've
8 just described for signing summary
9 judgment affidavits is the practice that
10 you use signing all summary judgment
11 affidavits that you handle; is that
12 correct?
13 MR. FLEISCHER: Again, I'm
14 going to object to the form of the
15 question.
16 BY MR. COX:
17 Q. Is that correct?
18 A. The practice that I use for
19 summary judgment affidavits is the same
20 practice that I use for all affidavits.
21 Q. And that's the one that
22 you've just described?
23 A. Yes.
24 Q. Is any part of your
25 compensation at GMAC Mortgage tied to the

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1 STEPHAN
2 volume of documents that you sign?
3 A. No.
4 Q. Is any part of your
5 compensation tied to the volume of
6 documents that your department processes?
7 A. No.
8 Q. Is it your understanding
9 that the process that you follow in
10 signing summary judgment affidavits is
11 in accordance with the policies and
12 procedures required of you by GMAC
13 Mortgage?
14 A. Yes.
15 Q. Does GMAC do any quality
16 assurance training for your department?
17 A. Presently, no.
18 Q. Has it in the past?
19 A. I do not know.
20 Q. You don't recall any?
21 A. I never received any.
22 Q. Do you have any memory of
23 checking the numbers on the Bradbury
24 affidavit that's in front of you as
25 Deposition Exhibit-1?

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1 STEPHAN
2 A. I do not recall.
3 Q. If a loan has been modified,
4 does that show up in the Fiserv system
5 that you look at?
6 A. When you say "modified," are
7 you stating a loan modification?
8 Q. Yes.
9 A. Yes.
10 Q. Does that show up?
11 A. Yes.
12 Q. If a loan has been modified,
13 is any information put in the summary
14 judgment affidavits that you sign about
15 that?
16 MR. FLEISCHER: Objection.
17 Are you talking about modified, or
18 his term was loan modification. I
19 just want to make sure we're
20 clear.
21 MR. COX: That's fine.
22 BY MR. COX:
23 Q. If there's a loan
24 modification, does information about a
25 loan modification appear in the summary

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1 STEPHAN
2 judgment affidavits that you sign?
3 A. I do not know.
4 MS. PITNEY: In all of them,
5 or in this one?
6 MR. COX: In any of them.
7 THE WITNESS: I don't know.
8 BY MR. COX:
9 Q. Based upon your testimony,
10 Mr. Stephan, is it correct that when you
11 sign a summary judgment affidavit, such
12 as Deposition Exhibit-1 that is in front
13 of you, you don't know whether any
14 portion of it is true, other than the
15 paragraph containing the numbers that
16 you just described; is that correct?
17 MS. PITNEY: Object to the
18 form. Tom, are you asking him
19 about this affidavit?
20 MR. COX: Well, he's
21 testified that doesn't recall
22 signing this particular affidavit,
23 so that was not my question. Let
24 me restate it.
25 BY MR. COX:

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1 STEPHAN
2 Q. In your practice of signing
3 summary judgment affidavits, Mr. Stephan,
4 is it correct that they always have a
5 paragraph containing the numbers of the
6 amounts claiming to be due?
7 A. That would be correct.
8 Q. And is it correct that when
9 you sign those affidavits, you don't know
10 whether any other part of the affidavit
11 is true or correct?
12 A. Please advise me. What do
13 you mean by "any other part"?
14 Q. Any other paragraph, other
15 than the one containing the numbers.
16 A. I review it for the due
17 date, if that's included in there.
18 Q. So all of them --
19 A. So that would be the
20 numbers.
21 Q. So other than the due date
22 and the balances due, is it correct that
23 you do not know whether any other part of
24 the affidavit that you sign is true?
25 A. That could be correct.

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1 STEPHAN
2 Q. Is it correct?
3 A. That is correct.
4 Q. And isn't it also correct
5 that you do not check the numbers on
6 every single summary judgment affidavit
7 that you sign?
8 A. That is not correct.
9 Q. You check every single one?
10 A. Yes.
11 Q. How long does it take you,
12 on average, to process the execution of a
13 summary judgment affidavit?
14 MS. PITNEY: Object to the
15 form.
16 MR. COX: Please answer.
17 THE WITNESS: Anywhere from
18 five to 10 minutes, off the top of
19 my head.
20 MR. COX: If we can take a
21 break. I may be done, but we can
22 take a break for five minutes.
23 (Whereupon, a short recess
24 was taken.)
25 BY MR. COX:

69

1 STEPHAN
2 Q. Mr. Stephan, referring you
3 again to the bottom line on Page 1 of
4 Exhibit-1, it states: I have under my
5 custody and control, the records relating
6 to the mortgage transaction referenced
7 below.
8 It's correct, is it not,
9 that you did not have in your custody any
10 records of GMAC at the time that you
11 signed a summary judgment affidavit?
12 MS. PITNEY: Objection to
13 the form.
14 THE WITNESS: I have the
15 electronic record. I do not have
16 papers.
17 BY MR. COX:
18 Q. You have access to a
19 computer. Is that what you mean?
20 A. Yes.
21 Q. You have no control over
22 that system, do you?
23 MR. FLEISCHER: Objection as
24 to form.
25 BY MR. COX:

1 STEPHAN
2 Q. You have no control over
3 that Fiserv computer system, do you?
4 A. No, I do not.
5 Q. And someone else within GMAC
6 is responsible for ensuring the accuracy
7 of that system; isn't that correct?
8 A. That would be correct.
9 MR. COX: I have no further
10 questions.
11 MR. FLEISCHER: We're done,
12 Julia, unless you have something
13 to add.
14 MS. PITNEY: No.
15 (Witness excused.)
16 - - -
17 (Whereupon, the deposition
18 concluded at 11:45 a.m.)
19
20
21
22
23
24
25

1
2 INDEX
3 Testimony of: Jeffrey Stephan
4 By Mr. Cox 4
5
6
7 - - -
8 EXHIBITS
9 - - -
10

NO.	DESCRIPTION	PAGE
1	Affidavit August 5, 2009	3

15
16
17
18
19
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21
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25

1
2 I have read the foregoing transcript
3 of my deposition given on June 7, 2010,
4 and it is true, correct and complete, to the
5 best of my knowledge, recollection and belief,
6 except for the corrections noted hereon and/or
7 list of corrections, if any, attached on a
8 separate sheet herewith.
9
10
11 ______________________
12 JEFFREY STEPHAN
13
14
15
16
17 Subscribed and sworn to
18 before me this ____ day
19 of ______________, 2010.
20
21
22 ___________________________
23 Notary Public
24
25

1
2 CERTIFICATE
3 I HEREBY CERTIFY that the witness
4 was duly sworn by me and that the
5 deposition is a true record of the
6 testimony given by the witness.
7
8
9
10
Susan B. Berkowitz, a
11 Registered Professional Reporter
and Notary Public
12 Dated: June 9, 2010
13
14
15
16
17
18 (The foregoing certification
19 of this transcript does not apply to any
20 reproduction of the same by any means,
21 unless under the direct control and/or
22 supervision of the certifying
23 reporter.)
24
25

Exhibit 5

Timeline of JPMorgan Chase Abuse of Bankruptcy Process in the Southern District of New York

Prepared by Linda Tirelli, Esq.

April 2008: SDNY BK In re Schuessler: Mortgagee secured claim filed by Chase and its foreclosure mill attorneys at Steven J Baum PC Judge. Bankruptcy Judge Cecelia Morris writes a 62 page decision blasting the parties for omitting pertinent facts and not having a system of checks and balances. The debtor attempted to make a payment that the bank refused, they mailed it in. A motion for relief from stay to foreclose was automatically generated by Baum firm triggered by LPS – no one checked the facts. This case is famous throughout the Bankruptcy litigation community largely because the Judge is clear in her opinion that an omission of material fact is as much an abuse of process as a false statement.

August 2008: SDNY BK In re Pawson: Judge Martin Glenn tells Chase, " In re Schuessler was strike one, this is strike two and you *know* what happens on strike three." Chase argues to keep the record sealed Judge Glenn denies the request. Case settled (It was included $50,000 legal fees paid to the debtors attorney and compensation to the debtors via loan modification.

November 2008: SDNY BK In re Nuer: SDNY 08-14106 (aka – "strike 3") Chase, LPS and foreclosure mill firm of Steven J. Baum, P.C.'s office submit 2 bogus assignments of mortgage both dated the same date one signed by Scott Walter an employee at LPS and the second signed by Ann Garbis a Vice President at Chase. Each purports to assign the loan from Chase to a CLOSED securitized trust. **Chase NEVER owned the loan** – period.

February 2009: In re Pawson: Chase sends a letter to the U.S. Trustees office in the Department of Justice, not legal binding itself to any course of action but stating an intent to discontinue its practices (which were the filing of mortgage assignments for loans that it never owned. Notwithstanding this letter Chase continues to dig heels in the ground in the Nuer case

January 2010: In re Nuer: U.S. Department of Justice Office of the U.S. Trustee files a Memorandum in of Support of Sanctions against Chase in In re Nuer for Chase's dishonesty in filing false statements and false assignments of a loan that Chase never owned.

January 7, 2010: In re Nuer: In a hearing before Hon Robert Gerber, Chase through its attorney admits the documents complained about in Nuer back in 2008 are factually inaccurate.

January 2010: In re Nuer: By letter (without any proper pleading) Chase attempts to withdraw its false pleading and documents from the Nuer case without reserving the rights of the debtor to assert claims for damages resulting from the filings of those false pleadings. I filed a Motion to Strike the withdrawal with the court based on the fact that a year of litigation had damaged the debtor, had caused the Debtor to run up a very large legal bill and had left the homeowner association dues unpaid for all that time. I did include a "Conditional Motion for Sanctions and Fees" with my original objection to the Chase's motion for relief from the automatic stay under Section 363 of the Bankruptcy Code.

Timeline of JPMorgan Chase Abuse of Bankruptcy Process in the Southern District of New York

Prepared by Linda Tirelli, Esq.

January 2010: Texas BK In re Hongkeo: Chase and its attorneys file a bogus assignment of Deed of Trust dated in 2008 signed the famous Robo Signors "Bryan Bly & Crystal Moore" The Hongkeo case mirrors Nuer on many levels. The bogus Chase mortgage assignment purported to be an assignment by Chase of the mortgage in issue, but Chase never owned any interest in that mortgage.

February 2010: In re Nuer: Judge Gerber hears Debtor's motion to strike Chase's improper letter trying to withdraw its false documents and accepts my arguments assuring the Debtor that all her rights and remedies to assert claims against Chase are to be preserved. Chase then enters a stipulated agreement with Debtor and U.S. Trustee to withdraw its false pleading and reserve the right of the debtor to seek damages and sanctions. Chase does nothing to attempt to resolve the case with the Debtor. Parties proceed with depositions. Both Ann Garbis of LPS and Scott Walter of Chase, testify to signing the assignments (of mortgage interests that Chase never owned), never verifying any of the information beyond the date and the spelling of their names. Garbis testified the internal practice of Chase is to sign a folder full of documents daily and send them to a different department to be notarized and returned to the foreclosure mill attorneys. Their testimony confirmed the business practice of Chase to routinely have false notarizations - an illegal act.

June 2010: ED NY In re Palaza: Chase filed a proof of claim in the EDNY which purports to assign a mortgage from JP Morgan as successor in interest to Washington Mutual (assignor) indicating a FL address to Deutsche Bank as Trustee for Long Beach Mortgage loan Trust 2005-WL1 (Assignee) Chase never owed that mortgage loan either. Furthermore that trust's closing date passed 5 years earlier on 2005, thus, even if it had owned that mortgage, its purported assignment of it five years after the trust closed would have been invalid. This document is signed by robo-signor Wanda Chapman in Florence County SC.

September 2010: Chase tells the world in a series of press releases that while there may be "some minor issues" with a few of their documents, they have never withdrawn their blatantly false documents from any of these case - despite the FACT they stipulated to do exactly that in Nuer just 7 months prior.

October 2010: SD NY In re Hardesty: Chase and its foreclosure Mill attorneys at Steven Baum P.C. office submit another bogus assignment of mortgage to the US Bankruptcy Court in the case of. It is a bogus assignment by Chase of a mortgage interest, which it never owned to a securitized trust that closed years prior to the date to the assignment. Baum filed a Motion to Compel Abandonment by the Debtor of the interest in the property of the estate, i.e., the debtor's home, so that the firm could proceed to foreclose. The Ch.7 Trustee, not realizing the false nature and significance of the document, consults me and I advise the Ch. 7 Trustee to immediately contact the U.S. Dept. of Justice Office of the U.S. Ch. 13 Trustee, Attorney Gregory Zipes, to report suspected fraud.

Attorney Zipes immediately contacts the Steven Baum, P.C. Bankruptcy Litigation department manager Amy Polowy, Esq. and Attorney Jay Teitelbaum of Teitelbaum & Baskin,

Chase's second tier attorney, to inquire. Within 1 hour, a letter from the Baum firm is filed on the court's ECF system withdrawing the Motion. All documents remain on ECF. The facts and documents submitted in Hardesty mirror the facts in Nuer.

October 2010: - Chase Tells Florida's Attorney General that it is not filing false documents in its cases.

November 2010: SD NY In re Bruce: Chase and its attorneys submit a bogus Assignment of Mortgage (assigning a mortgage never owned by Chase) signed by robo-signor "Wanda Chapman" who claims to be an officer of MERS making an assignment from assignor "WMC Mortgage Corp." indicating a Florida address, to an assignee, "US National Bank Association as Trustee for JPMorgan Mortgage Acquisition Trust 2006-WMC4Asset Backed Pass Through Certificates Series 2006-WMC4" indicating a Minnesota address. Ms. Chapman curiously signed the document as per notarized acknowledgment, in Florence County SC. Chase is the purported servicer to the trust and Ms. Chapman, according to the collection of her signatures on other sworn documents that we have is actually employed by Chase. Her Internet Linkedin account profile indicates that she is actually an "Operations Unit Manager for JP Morgan" working in Florence County, SC.

Exhibit 6

IN THE CIRCUIT COURT OF THE FOURTH
JUDICIAL CIRCUIT, IN AND FOR DUVAL
COUNTY, FLORIDA

CASE NUMBER: 16-2004-CA-4835-XXXX-MA
DIVISION: CV-E

TCIF REO2, LLC,

Plaintiff,

v.

MARTIN L. LEIBOWITZ, AS TRUSTEE,
etc., et al.,

Defendants.
_______________________________________/

THIS INSTRUMENT IN COMPUTER SP

FILED
MAR 06 2006
CLERK CIRCUIT COURT

MOTION FOR SANCTIONS FOR FRAUD UPON THE COURT

COME NOW, Defendants Robert and Lillian Jackson, by and through their undersigned counsel, and pursuant to Rule 1.140, Florida Rules of Civil Procedure, hereby move the Court to enter sanctions against the Plaintiff, including Dismissal of the pending matter with prejudice and such other sanctions as the Court deems appropriate. In support of this Motion, Defendants would state as follows:

1. On or about August 6, 2004, Plaintiff filed a Motion for Summary Judgment with this Court. In support of the Motion for Summary Judgment, Plaintiff contemporaneously filed an Affidavit of Indebtedness signed and subscribed by Margie Kwiatanowski, a "Limited Signing Officer" with GMAC Mortgage Corporation ("GMAC"), the servicing agent for Plaintiff. Plaintiff filed subsequent Amended Motions for Summary Judgment on March 10, 2005 and November 3, 2005, and again filed Affidavits of Indebtedness signed and subscribed by Ms. Kwiatanowski, as a Limited Signing Officer.

2. The Affidavits of Indebtedness contains Ms. Kwiatanowski's statements, allegedly under oath, on behalf of GMAC, that she:

(a) has "personal knowledge of the status of all mortgages and notes owned and held by said corporation." (Affidavit, paragraph 1).

(b) has "examined the relevant loan documents and the Complaint, and each allegation of the Complaint is correct." (Affidavit, paragraph 2).

(c) is familiar with the loan payment records, which are regularly compiled and maintained as business records: "These records properly reflect loan payments, charges, and advances that are noted in the records at the time of the applicable transactions by persons whose regular duties include recording this information." (Affidavit, paragraph 3).

(d) swore and subscribed to the statements before a Notary.

3. The Affidavits additionally detail the alleged facts as the status of the mortgage, including the material dates, the amount owed and the fees and charges.

4. Ms. Kwiatanowski was deposed at GMAC's facility in Horsham, Pennsylvania, on January 31, 2006. See, Notice of Deposition, attached hereto as Exhibit "A" and incorporated by reference. During the deposition, Ms. Kwiatanowski admitted the above statements under oath were false:

(a) has "personal knowledge of the status of all mortgages and notes owned and held by said corporation." (Affidavit, paragraph 1).

Ms. Kwiatanowski admitted that, while she can *access* other loan documents, the statement regarding personal knowledge was false:

Q. All right. Let me ask you to go to the Amended Affidavit, which is Jackson 00006. And we'll start with page - - I'm sorry, paragraph 1.

It states that you're a limited signing officer and that you have personal knowledge of the status of all mortgages and notes owned and held by said corporation.

Do you see that?

A. Yes, I do.

Q. How is that true?

A. Well, generally, I understand what a note and a mortgage is, and how - - how the loan is originated.

Q. Right. But this says you have personal knowledge of the status of all mortgages owned and held by said corporation; corporation being TCIF RE02, LLC?

A. Well, actually, we're the servicing agent for them. We would not have originated the loan.

I'm not quite sure how to answer your question, though.

Q. Well, how is it that you have personal knowledge of the status of all mortgages serviced by GMAC for this claimant?

A. Again, I'm not - - I don't know.

Q. Do you have personal knowledge of the status of all mortgages and notes serviced by GMAC for this claimant?

A. No, I do not.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 30 line 9 - p. 31 line 15) (emphasis added)

(b) has "examined the relevant loan documents and the Complaint, and each allegation of the Complaint is correct." (Affidavit, paragraph 2).

Ms. Kwiatanowski testified she reviewed only a single computer screen prepared by someone else. She did not review any loan documents, much less the "relevant" ones, and did not read the Complaint:

> Q. Now, paragraph 2 - - and I'm just jumping ahead to your affidavit. But your affidavits, as you may be familiar, referenced the fact that you reviewed certain things in order to sign the affidavits?
>
> A. That's correct.
>
> Q. Okay. The records in paragraph 2 that are requested are: Any and all documents, electronic memoranda, policy manuals, servicing manuals, or other items of any kind reviewed in preparation for completion of the Affidavit of Indebtedness dated July 15, 2004, and Amended Affidavit of Indebtedness dated October 20, 2005. And your affidavits are then attached after this.
>
> But my next question is: Is there anything other than what's sitting to your left, that you recall reviewing in order to prepare the two affidavits?
>
> A. I would have - - excuse me, I"m sorry. I would have reviewed a screen in our system that populates what the total indebtedness is. And I don't believe a copy of that screen is within this pile.
>
> Q. Okay. Are you saying that you reviewed a single screen?
>
> A. Yes.
>
> Q. And when I'm picturing a screen, I'm picturing a single page of information; or is there more than one page of information that appears on your screen?
>
> A. There is one page of information.
>
> Q. What is that page of information called?
>
> A. It's called the foreclosure work screen.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 19 line 13 - p. 20 line 24)

* * *

Q. Okay. Did you review the payment history separately?

A. I would have no reason to review it separately.

Q. Okay. In other words, you did not review the payment history before completing your affidavit?

A. That's correct.

Q. Would you have reviewed the actual note of mortgage before completing your affidavit?

A. No, I would not have.

Q. Would you have reviewed any of the customer history log, the document, the discussions back and forth between the mortgagors and the servicing company?

A. No, I would not have.

Q. Is it fair to say, then, that in completing an affidavit such as the ones we have attached as Bates stamped Jackson 3 through 5, and Jackson 6 through 8, that you would have reviewed one computer screen called the foreclosure work screen?

A. That's correct.

Q. And nothing else?

A. That's correct.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 22 line 16 - p. 23 line 17) (emphasis added)

*   *   *

Q.   Paragraph 2, it says: I have examined the relevant loan documents and the Complaint, and each allegation of the Complaint is correct.

Is the Complaint part of the foreclosure work screen?

A.   No, it is not.

Q.   Would you have actually read the Complaint before signing the Amended Affidavit of Indebtedness?

A.   No, I would not. I could have reviewed it because generally they are downloaded in a system that we have linked to our attorneys.

Q.   Scanned?

A.   Yes. Imaged.

Q.   Imaged?

A.   Um-hmm.

Q.   Do you know whether it's general practice to bring up the image of the Complaint when you're reviewing the foreclosure work screen?

A.   No, I would not.

Q.   So typically you would not examine the Complaint before signing the affidavit?

A.   That's correct.

Q.   We've already covered that you review the foreclosure work screen.

What are the "relevant loan documents" that are referenced in paragraph 2?

A. I would think that they would have been anything that is supplied to the foreclosing attorney; it would be the mortgage, the note, the title policy.

Q. And did you review the relevant loan documents consisting of the mortgage and the note and the title policy before signing the Amended Affidavit of Indebtedness?

A. No, I did not.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 31 line 16 - p. 33 line 6) (emphasis added)

(c) "These records properly reflect loan payments, charges, and advances that are noted in the records at the time of the applicable transactions by persons whose regular duties include recording this information." (Affidavit, paragraph 3).

Ms. Kwiatanowski admitted that she had no knowledge of whether the information kept was recorded "at the time of the applicable transaction by persons whose regular duties include recording this information," and simply relies on the "system" without having any idea how or whether the "system" confirms entries are made accurately and timely:

Q. Do you agree that that sentence, the last sentence of paragraph 3 of your affidavit, indicates that the entries are made at the time of the transactions?

A. Yes, I do.

Q. Okay. So then, let me step back and re-ask the question. How is the system set up to confirm that those entries are made accurately and timely?

A. I wouldn't be able to answer that. That's not my area of expertise.

Q. Well, you swore to this affidavit.

A. Well –

Q. You swore to the truth of the fact that the history is noted in the record at the time of the transaction.

How do you know that to be true?

A. Because I – I have to rely on our system of record.

Q. Right. I agree that it's set up for you to rely on that, but that's not what this says. It says you're swearing to the fact that that record is accurate and timely.

A. I just would have to have confidence in my system that it is true and correct.

Q. Okay. Is there any – let me go back to my hypothetical that I asked you, where a mortgagor has a conversation with a loan specialist or work-out specialist, or whatever their title is, and reaches some sort of payment plan. Okay?

A. Okay.

Q. How is the system set up to confirm, number one, that that conversation is entered that day, for example, versus an employee taking a note and entering it a week later when they come back from vacation; and now is it set up to confirm that the data is entered accurately, that the employee has the payment numbers and times of payment and method of payment entered accurately?

A. I wouldn't be able to answer that because that's not in my unit.

Q. As part of your unit, have you ever gone back to confirm how you can swear to the truth of this sentence?

A. There are times when I might have to review a loan as far as conversations, if a borrower was disputing something. There would be those times that I would review the notes and the account at that point.

But in – in this particular affidavit, I had no reason to go back to review anything.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 34 line 13 - p. 36 line 20)

The record in the instant case demonstrates why some minimal scrutiny (as otherwise sworn to in the subject Affidavits, but never actually completed by the Affiant) would be necessary:

> Q. And is it fair to say that as of November 25, 2003, the Jacksons were completely paid up with GMAC, according to that entry?
>
> A. I would – I would have to confirm that by looking at the payment history.
>
> Q. Well, tell me what else that entry would mean; in other words, why would that entry be made in the comment history if the payment history didn't reflect it as true?
>
> A. Well, as it should, it should agree. I don't – I'm not disputing that. But my feeling would be I would look to see how the payments were applied, to see if they were applied correctly, if I had a reason to review this account.
>
> Q. Which you did not?
>
> A. That's correct.
>
> Q. Well, isn't it fair to say that your affidavit indicates that the payment due February 1, 2004, is the one that placed this loan in default, correct?
>
> A. That's correct.
>
> Q. And that would be a payment due for December, a payment due for January, and a payment due for February of '04, correct?
>
> A. That's correct.
>
> Q. Did you ever go back to confirm whether those were the payments that threw this loan into default?
>
> A. I would only know what the due date is in the system.

Q. Just based on what the foreclosure work screen says?

A. That's correct.

Q. Would you know who the person – because I want to be fair, now that I have an understanding of your role in this.

Would you know who the person would be who would be most familiar with the entries on the comment history that we're going over right now?

A. I don't think I could give you a specific person, no.

Q. Okay. If I told you that Mr. and Mrs. Jackson have canceled checks showing payments cashed by GMAC on January 5th of '04 and February 14, of '04, you have no explanation for that; that's not your role in reviewing this?

A. That's correct. That's something payment research would handle.

Q. Okay. With regard to whether the payments were accurately allotted to principal and interest as opposed to paid from suspense or pay to suspense, that would not be your role?

A. That's correct.

Q. Allotting the payments accurately is not your role?

A. That's correct.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 49 line 10 - p. 51 line 21)

Unfortunately, while the Affidavit reflecting sworn testimony to the Court indicates the Affiant has conducted a complete review of the file, GMAC's system is designed so that other departments within GMAC are responsible for reviewing the data:

Q. All right. Ms. Kwiatanowski, let me ask you this: Is there any reason or any way in the system that is set up within GMAC for the foreclosure work screen to indicate any problems or issues or disputes prior to the day you review it?

A. No.

Q. If there are comments in the – I forget what we called them – the comment history, if there are comments here that note, for example, that the borrower is having problems trying to get someone to resolve escrow and payment applications issues, if there are comments that say Account escrow payment may not be correct, sent for explanation, that type of thing, are any of those – or do any of those result in any sort of flags that get to the foreclosure work screen?

A. If there were any reason, if there was a dispute prior to a loan being referred, they would put what we call a CIT on the loan; that would prevent it from being referred while it was being researched.

Q. Okay. And I do see that, the listing for CIT, throughout this history.

What then, stops that CIT trigger and sends it on to your department, or stops the CIT hold and then sends it on to your department?

A. I believe there's -- I believe there's two different CITs for different lengths of time to keep it on hold. I believe – and also it would fall into someone's queue to see whether or not that should be removed prior to removing it; to see, for example, to see if the research has been completed. And if it has been and they find no error of GMAC's, then they would remove that CIT and that would move forward to foreclosure.

Q. Okay. Which department conducts that analysis –

A. It would –

Q. – is it done before it gets to your department or your unit?

A. Yes.

Q. Okay. How's that get done?

A. It would be through customer service. It would really depend on what the issue was as to what unit would be handling it.

Q. Okay. Well, for example, here we have – and I'm just summarizing this, and just because I think it is accurate – but there are entries here throughout with regard to a dispute in how the payments are being applied; you know, one notation here made by a GMAC individual that the account escrow payment may not be correct, sent for explanation.

How can you – or can you tell from that which unit is handling the review?

A. No, I cannot.

Q. What are the names of the units that do the reviews; you said there were two?

A. Well, there's a payment – there's payment research. There's an escrow unit if it were a dispute with taxes or insurance, they would need to review it. For an MI issue, that area would review it. It would all depend on the issue –

Q. Okay.

A. – who would be researching it.

Q. Is there a way to tell from the comment histories which units resolve the dispute?

A. It would show by that teller number on there who the associate was.

Q. Okay.

A. And then you would know from there what unit they would come from.

Q. And again, that gets done on the DocTrac – I'm sorry.

A. The XNet.

Q. XNet?

A. Preconversion, on the XNet.

Q. Okay.

A. Postconversion, we can do it right on our system.

Q. Is there a review process to make sure that the conclusion is accurate?

A. I wouldn't be able to answer that.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 58 line 7 - p. 61 line 24)

(d) swore and subscribed to the statements before a Notary.

Finally, Ms. Kwiatanowski admitted at the deposition she did not sign the Affidavits in front of a notary, but that it was "our" regular practice for the Affidavits to be placed in a folder and sent across the building to be signed by the notary, sometimes on another day:

Q. On Ms. Holmes' notary section, do you see there that she does not fill out the name of the person who is taking the oath?

A. I see that now, yes.

Q. And do you see that she also does not have a notary stamp?

A. I see that also, yes.

Q. Are you familiar with Pennsylvania's notary statute?

A. I realize that they have to have a stamp to notarize.

Q. And that both of those are violations of Pennsylvania's notary statute?

A. I would think so, yes.

Q. How is it that you and Ms. Holmes ended up in the same place at the same time for completion of the affidavit, how does that physically work?

A. Well, all documents that we sign already sworn in, she would hand me personally. So she would just sign off -- she would notarize it after I signed off.

Q. Are you two in the same room when that's done?

A. Yes.

Q. Okay. How is that physically done, is what I am asking?

A. We would – anything that I would sign over to – anything I would sign off, I would give to her to notarize.

Q. Okay. And how – again, how is that physically done; do you and she meet in the same room, at the same time in the same place?

A. She is in the same building. I – I would leave – it could be more than just one affidavit in a folder and I waited for her to notarize.

Q. Okay. But by then, I'm taking it that she notarizes it at a different time than you sign it?

A. That's correct.

Q. Okay. Is that also true for the signature on Jackson 00008?

A. Yes, that's correct.

Q. And that appears to be a Brenda Staehle?

A. Brenda Staehle.

Q. Staerle, S-T-A-E-R-L-E.

A. Actually it's S-T-A-E-H-L-E.

Q. Okay. Thank you.

And she does indicate that you are the person swearing, and she does have her notary stamp here. But what you're indicating is you signed the document –

For example, the Amended Affidavit of Indebtedness, which is 6 through 8 on our Bates stamp, you sign the document, you put it in a folder, it gets routed to Ms. Staehle and then she signs it at a later time?

A. That's correct.

Q. Do you know if she signs it on the same day that you do?

A. Generally, yes, she would.

Q. How do you know that, what's the control for that?

A. Because they would try to complete something within the same day; as we have our guidelines to follow and our time frames to get it back to the processor, to supply it back to the attorney.

Q. Okay. But there's no doubt that she doesn't notarize it – or she doesn't witness your signing?

She does not witness or did not witness you placing your signature on Bates stamp 8; is that correct?

A. That's correct.

Deposition of Margie Kwiatanowski, taken January 31, 2006 (p. 27 line 4 - p. 30 line 8) (emphasis added)

Clearly, the notary statutes of both Pennsylvania (57 P.S. 158) and Florida (Section 117.05, Florida Statutes) are violated by the process used by GMAC in the instant case (and in all other cases, given the procedure outlined by Ms. Kwiatanowski.) Violation of Florida's notary statutes in the manner described (notarizing a signature if the person whose signature is being notarized is not in the presence of the notary at the time) constitutes malfeasance and misfeasance in the conduct of official duties, pursuant to Section 117.107(9), Florida Statutes. Under Pennsylvania law, when a notary certifies a document, the notary attests that the document has been executed, that the notary *was confronted by the signor*, that the signor is the person whose name is subscribed, and that the notary is *verifying the date of execution*. In Re Fisher, 320 B.R. 52, at 63 (E.D. Penn. 2005) (emphasis added.)

5. As referenced above, the Affidavits of Indebtedness filed by GMAC in furtherance of the foreclosure constitute sworn testimony to this Court in validation of the debt and GMAC's right to collect the debt. Unfortunately, the Affidavits are rife with falsehoods and misstatements; GMAC's system does not allow the Affiant (or her entire department, for that

matter) any opportunity to review the actual history of the loan or any of the loan document, as the Affidavit otherwise maintains to the Court. Defendants assert the filing of such false sworn testimony is a fraud upon this Court.

6. It is appropriate for the trial court to dismiss an action based on fraud, provided that there is a blatant showing of "fraud, pretense, collusion, or other similar wrongdoing." Distefano v. State Farm Mutual Automobile Ins. Co., 846 So. 2d 572, 574 (Fla. 1st DCA 2003).

7. Misrepresentations in the Affidavit are willful fraud, interfering with the Court's "ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense."*Id.*

8. This Court should dismiss the pending action with prejudice and award such other relief as the Court deems just and appropriate.

WHEREFORE, Defendants Robert and Lillian Jackson, respectfully request this Court enter sanctions against Plaintiff, including entry of a Dismissal with Prejudice and such other relief as the Court deems just and appropriate.

DATED at Jacksonville, Duval County, Florida, this 3 day of March, 2006.

LAW OFFICES OF TROMBERG & KOWALSKI

Fred Tromberg, Esquire (FBN: 246514)
James A. Kowalski, Jr., Esquire (FBN: 852740)
Charlie F. Schmitt (FBN: 0012803)
4925 Beach Boulevard
Jacksonville, FL 32207
Telephone: (904) 396-5321
Facsimile: (904) 396-5730
Attorneys for Defendants

Exhibit 7

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NUMBER: 16-2004-CA-4835-XXXX-MA

DIVISION: CV-E

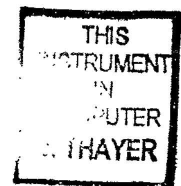
TCIF REO2, LLC,

Plaintiff,

v.

MARTIN L. LEIBOWITZ, AS TRUSTEE, etc., et al.,

Defendants.
_____________________________________/



FILED 05/02/06 PM 01:00 JIM FULLER

ORDER GRANTING DEFENDANTS' MOTION FOR SANCTIONS

This cause came before the Court on April 5, 2006 on Defendants Robert Jackson and Lillian Jackson's Motion for Sanctions for Fraud Upon the Court. The Court has reviewed the pleadings, considered arguments of counsel, and is otherwise fully advised in the premises.

The Court finds Plaintiff, through its servicing entity, GMAC Mortgage Corporation, submitted false testimony to the Court in the form of Affidavits of Indebtedness signed and subscribed by Margie Kwiatanowski, a "Limited Signing Officer" with GMAC Mortgage Corporation. The submission of the false Affidavits was pursuant to protocols and procedures wherein Ms. Kwiatanowski, as Limited Signing Officer, would attest to review of the relevant loan documents, the Complaint, and the loan payment records, when in fact (as sworn to by Ms. Kwiatanowski in her deposition) she neither reviewed the referenced records nor was familiar with the manner in which the records were created by GMAC on behalf of Plaintiff. In her deposition, Ms. Kwiatanowski admitted none of the Affidavits were signed before a Notary, and that Affidavits of the sort filed by Plaintiff would be signed and then left in a folder, to be notarized at a different

time. The admissions by Ms. Kwiatanowski in her deposition directly contradict the sworn testimony to the Court in the form of the referenced Affidavits, both as to the substance of the Affidavits and with regard to whether the Affidavits were sworn to before a notary.

The Court recognizes the statements made by Plaintiff's counsel at the hearing to the effect that the procedures in place at GMAC with regard to servicing of this Plaintiff's loans were being corrected. The Court finds the submission of false testimony to the Court in the manner described does not rise to the level required in order for this Court to dismiss the action. Cox v. Burke, 706 So.2d 43 (Fla. 5th DCA 1998.) The Court will not condone Plaintiff's actions in filing false testimony, however, and the Court has both the inherent authority to sanction Plaintiff's actions, based upon the findings set forth above, and finds sanctions to be appropriate. It is therefore:

ORDERED AND ADJUDGED:

1. Defendants' Motion for Sanctions for Fraud Upon the Court is GRANTED.

2. The subject Affidavits as completed by Ms. Kwiatanowski are and same be stricken.

3. The Court orders Plaintiff to pay Defendants' attorneys' fees and costs for the efforts related to the taking of Ms. Kwiatanowski's deposition. Based upon a review of the record and the Affidavit filed by Defendants' counsel, the Court finds a reasonable sanction to be 30 hours of attorney's time and further finds a reasonable, local hourly rate to be $250.00, and further awards costs in the amount of $634.50. Therefore, the Plaintiff, TCIF REO2, LLC, Inc. shall forward to defense counsel payment of $ 8,134.50 in sanctions for the reasons set forth above within 30 days from the date of this Order.

4. Counsel for Plaintiff shall file with the Court GMAC's written explanation and confirmation, on behalf of Plaintiff, that GMAC's policies and procedures with regard to the servicing of all of this Plaintiff's loans within the State of Florida have been modified, in accord with

representations made by counsel to the Court that such modifications were being made, to confirm the affidavits filed in future foreclosure actions in Florida accurately memorialize the actions and conduct of the affiants. The written confirmation of policy changes, and an explanation for the policies now in place, shall be filed with the Court within 30 days of the date of this Order.

DONE AND ORDERED, in Chambers, at Jacksonville, Duval County, Florida, this 1st day of May, 2006.

Circuit Court Judge

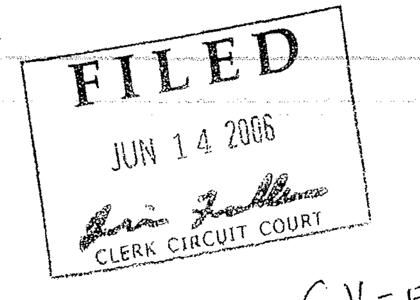
Copies to: James A. Kowalski, Jr., Esquire
Roy A. Diaz, Esquire

STATE OF FLORIDA
DUVAL COUNTY
I, THE UNDERSIGNED Clerk of the Circuit Court, Duval County,
Florida, DO HEREBY CERTIFY the within and foregoing is a true
and correct copy of the original as it appears on record and file
in the office of the Clerk of Circuit Court of Duval County, Florida
WITNESS my hand and seal of Clerk of Circuit Court
Jacksonville, Florida, this the 25 day of June A.D. 2010
JIM FULLER
Clerk, Circuit and County Courts
Duval County, Florida
By Deputy Clerk

Exhibit 8

IN THE CIRCUIT COURT FOR DUVAL
COUNTY, FLORIDA. CIVIL DIVISION

CASE NO. 162004CA004835XXXXMA



CV-F

TCIF REO2, LLC,

Plaintiff,

vs.

MARTIN L. LEIBOWITZ, AS TRUSTEE UNDER THE JACKSON FAMILY LAND TRUST DATED NOVEMBER 18, 2002; ROBERT L. JACKSON; LILLIAN M. JACKSON; WILLIAM W. MASSEY, III; STATE OF FLORIDA DEPARTMENT OF REVENUE; UNKNOWN TENANT NO. 1; UNKNOWN TENANT NO. 2, et. al.,

THIS INSTRUMENT
IN COMPUTER
J.T.

Defendants.

______________________________/

PLAINTIFF'S NOTICE OF COMPLIANCE WITH THIS COURT'S ORDER DATED MAY 1, 2006

COMES NOW, the Plaintiff, TCIF REO2, LLC., by and through its undersigned counsel, and files this Notice of Compliance with this Court's Order dated May 1, 2006, and states that the Plaintiff has forwarded a check to opposing counsel as required pursuant to paragraph 3 of said Order, and has simultaneously herewith submitted the Directive to the Court, as required pursuant to paragraph 4 .

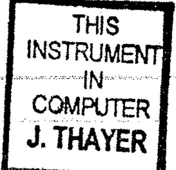
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Compliance has been sent via U.S. Mail this 12th day of June, 2006 to all parties on the attached Service List.

SMITH, HIATT & DIAZ, P.A.
Attorneys for Plaintiff
2691 East Oakland Park Boulevard, Suite 303
Fort Lauderdale, Florida 33306
Telephone: (954) 564-0071
Facsimile: (954) 564-9252

BY: ______________________
ROY A. DIAZ
Florida Bar No. 767700

H:\CLIENT\6126-24564\Notice of compliance with court order 5-1-06.wpd



2691 E. Oakland Park Blvd.
Suite 303
Fort Lauderdale, Florida 33306

(954) 564-0071 Telephone
(954) 564-9252 Facsimile

Mailing Address:
PO Box 11438
Fort Lauderdale, Florida 33339-1438

June 12, 2006

Via Overnight UPS

BERNARD NACHMAN

The Honorable Bernard Nachman
Duval County Courthouse
330 E. Bay Street, Room 202
Jacksonville, FL 32202-

File m

RE: TCIF REO2, LLC v. MARTIN LEIBOWITZ, as Trustee, et al.

Case No. 162004CA004835XXXXMA

CV'E

FILED0614'06PM0246JIM FULLER

Dear Judge Nachman:

Enclosed with this correspondence is a courtesy copy of the Plaintiff's Notice of Compliance with this Court's Order dated May 1, 2006, and the original signed Directive from GMAC regarding its policies on Affidavits being filed with the court in connection with mortgage foreclosure cases.

Thank you for your consideration.

Respectfully submitted,
SMITH, HIATT & DIAZ, P.A.

Roy A. Diaz
For the Firm

Enclosures

cc:.James A. Kowalski, Jr., Esq

A POLICY DIRECTIVE FROM THE LEGAL STAFF

DOCUMENT SIGNATURE PRACTICES

The Legal Staff and its retained outside counsel present evidence to the courts in probably all jurisdictions. This evidence takes the form of written documentation signed by authorized corporate representatives. Some of these documents are notarized either as a simple notarial certificate and others notarized as sworn instruments before the notary. The following directives make not only good business sense but are commanded by statute. Thus, besides financial impact in the cases we handle, the signing process may invoke sanctions by a court. It is the integrity of our cases that is at stake and we cannot afford anything less than full accuracy.

1. Any signatory in behalf of the corporation must read and fully understand the instrument that is being signed. Do not sign unless you have that comfort level.

2. Any signatory in behalf of the corporation must be properly authorized by the corporation. When in doubt, consult with your manager or the Legal Staff for guidance.

3. Do not sign verifications on court pleading documents unless you have independently reviewed and checked the facts.

4. Sign instruments ***only in the presence of*** the witnessing notary public.

5. If the text of the notarial certificate contains an oath (e.g. "Subscribed and sworn to before me. . ." or similar words) the notary must affirmatively say to the signer, "Do you so swear?".

6. Pre-signing notarial certificates before the signer are prohibited by law everywhere.

CERTIFICATION

The undersigned certifies that as of June 1, 2006, the attached Policy Directive on Document Signature Procedure has been distributed to the associate general counsel and associate counsel of the respective business units of GMAC Mortgage Corporation for distribution to authorized signatories within the enterprise. This Policy Directive is a reaffirmation of existing procedures incorporating the statutory mandates to notaries public of the respective residence states of such notaries public.

June 6, 2006

James J. Barden
Associate Counsel – Legal Staff

STATE OF FLORIDA
DUVAL COUNTY
I, THE UNDERSIGNED Clerk of the Circuit Court, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit Court of Duval County, Florida.
WITNESS my hand and official Seal of Circuit Court at Jacksonville, Florida, this the 23 day of June A.D. 2010
JIM FULLER
Clerk, Circuit and County Courts
Duval County, Florida
By ______ Deputy Clerk

Exhibit 9

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

US BANK NATIONAL ASSOCIATION AS TRUSTEE FOR BAFC2006-1,)
Plaintiff)
v.)
GORDON T. JAMES)
Defendant/Third-Party Plaintiff)
v.)
GMAC MORTGAGE LLC and QUICKEN LOANS, INC.)
Third-Party Defendants)

2:09-cv-00084 - JHR

PLAINTIFF AND GMAC MORTGAGE LLC'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR RELIEF PURSUANT TO Fed. R. Civ. P. 56(g)

Through his Motion for Relief Pursuant to Fed. R. Civ. P. 56(g), Defendant attempts to parlay procedural defects in the execution of an affidavit into a summary judgment ruling in his favor. Defendant fails to offer, however, a convincing argument that the affidavit in question was "presented in bad faith or solely for the purpose of delay" as required by Rule 56(g). Central to the determination of that issue, although almost entirely overlooked by Defendant, is that every fact contained in the affidavit in question material to the disposition of the merits of the case is true. Even if Defendant could clear the "bad faith" hurdle, the sanctions requested are disproportionate and would represent a windfall for the Defendant borrower. Rule 56(g) does not support such relief in the circumstances. Defendant's Motion should therefore be denied.

FACTUAL BACKGROUND

Defendant, Gordon T. James ("Defendant" or "James") executed a Note and Mortgage in connection with a loan for $207,000.00 currently held by Plaintiff U.S. Bank National Association as Trustee for BAFC 2006-1 Trust (hereinafter "Plaintiff" or "U.S. Bank") and

{W1901433.4}

serviced by Third-Party Defendant GMAC Mortgage, LLC ("GMACM"). (Declaration of Aixa M. Torres dated August 10, 2010, Exhibit 1, at ¶¶ 2, 3, 4, 5.) Defendant admits that he has failed to make multiple monthly payments on this mortgage loan from 2007 through the present. (Deposition of Gordon James, Exhibit 2, at 139-140, 198-199; Ex. 1 at ¶¶ 6, 8.) As a result of that delinquency, Plaintiff brought this action to foreclose on the subject property.

On April 26, 2010, Plaintiff moved for summary judgment on its claim for foreclosure. The material facts establishing Defendant's delinquency were set forth in an affidavit executed by Jeffrey Stephan, a limited signing officer at GMACM, submitted in support of Plaintiff's Motion for Summary Judgment. ("Stephan Affidavit," Doc. 93.)

In June of 2010, Defendant and GMACM on behalf of U.S. Bank entered into a temporary loan modification agreement under the Home Affordable Modification Program ("HAMP"). (Declaration of John Meinecke, Doc. 163-1, at ¶ 6.) In light of this modification agreement, Plaintiff no longer wishes to devote the resources necessary to pursue foreclosure at this time, and has moved pursuant to Fed. R. Civ. P. 41(a)(2) to dismiss voluntarily its claim for foreclosure. (Plaintiff's Motion to Dismiss Complaint, Doc. 163.)

Although Defendant may take issue with the manner in which the Stephan Affidavit was executed and notarized, the substance of the affidavit is true and correct in all respects material to the merits of Plaintiff's claims for relief, and Defendant does not and cannot dispute that. Defendant nevertheless asks this Court to set aside his own concessions and admissions, and to disregard established material facts, as a means of punishing Plaintiff for procedural deficiencies related to an affidavit.

Specifically, Defendant through his Motion under Rule 56(g) asks this Court to enter summary judgment in his favor on Plaintiff's foreclosure claim, and to deny Plaintiff's and GMACM's Motion for Summary Judgment on all counterclaims and third party claims, based

upon procedural defects in the execution and notarization of an affidavit. Defendant has not offered any persuasive proof, however, that the affidavit was submitted to the Court in bad faith. Moreover, while not conceding that the Stephan Affidavit was submitted in bad faith as that term is used in Rule 56(g), sanctions levied against Plaintiff, if any, should comport with the sanctions contemplated by applicable law governing affidavits offered in bad faith. Certainly, Defendant is not entitled to a favorable summary judgment ruling based solely on procedural errors that did not alter the substantive information relied upon in this action.

ARGUMENT

I. Rule 56(g) sanctions against Plaintiff should be reserved for egregiously bad conduct and are unwarranted in this case.

Defendant's motion invokes Rule 56(g) of the Federal Rules of Civil Procedure which provides as follows:

> If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

Fed. R. Civ. P. 56(g).

While Rule 56(g) sanctions are not often at issue in the federal courts, there are a few First Circuit cases in which courts have considered sanctions for affidavits made in bad faith. *See e.g.*, *Fort Hill Builders, Inc. v. Nat'l Grange Mutual Ins. Co.*, 866 F.2d 11 (1st Cir. 1989); *Michael v. Liberty*, 566 F.Supp.2d 10 (D. Me. 2008). In both of these cases, the court determined that there was no bad faith under Rule 56(g) and declined to award sanctions. *See Fort Hill Builders*, 866 F.2d at 16 (finding no bad faith when affidavit raised a weak claim of bias but was not frivolous); *Michael*, 566 F.Supp.2d at 12 (finding no bad faith when affidavit included a factual inaccuracy but there was no evidence the inaccuracy was intentional). In fact, the First Circuit has stated that "[t]he rare instances in which Rule 56(g) sanctions have been imposed, the conduct has been particularly egregious." *Fort Hill Builders*, 866 F.2d at 16 (citing

cases from other circuits in which Rule 56(g) sanctions have been imposed for such egregious conduct).

One of the few cases in which a court imposed sanctions pursuant to Rule 56(g) is *Cobell v. Norton*, 214 F.R.D. 13, 22 (D.D.C. 2003). The *Cobell* court granted sanctions and held defendants in contempt only after noting that defendants misrepresented the nature of certain accountings which were detailed and filed in a "materially misleading" affidavit. *Id.* at 18. The *Cobell* court took issue with the fact that the affidavit was materially misleading to find that the affidavit was filed in bad faith. *Id.* The court concluded that in order to merit a finding of bad faith, the conduct should be "particularly egregious" and "entirely unwarranted." *Id.* at 21 (citing *Fort Hill Builders*, 866 F.2d at 16). A procedural deficiency was not the issue in *Cobell.* In *Cobell*, the bad conduct resulting in sanctions was described as a "pattern of deceit by defendants that was demonstrated in the factual finding made .... The court [was] unwilling to turn a blind eye to yet another demonstration of defendants' misconduct and their willingness to mislead the Court and to misrepresent the truth whenever it suits them." *Id.* at 21.

Other courts have taken a similar approach and awarded sanctions only when false affidavits were submitted knowingly in an effort to mislead the Court. In *Acrotube, Inc. v. J.K. Fin. Group, Inc.*, 653 F.Supp. 470, 478 (N.D. Ga. 1987), the court imposed sanctions when a party submitted an affidavit that flatly contradicted the party's admission in its prior amended answer to the complaint but declined to alter its position when confronted about the inconsistency. The court explained that the affiant's testimony "was flatly at odds with facts indisputably within his knowledge" and was "an effort to mislead the Court and to delay the proceedings." *Id.* Similarly, in *Barticheck v. Fidelity Union Bank*, 680 F.Supp. 144, 147-148 (D.N.J. 1988), the court imposed sanctions when a party submitted an "eleventh hour affidavit which clearly contradict[ed] her prior sworn testimony" in an effort to create a triable issue of

fact to defeat summary judgment. The court noted that sanctions were appropriate because the affidavit was "inexplicably contradictory" to prior deposition testimony. *Id.* at 150.

In sharp contrast to those knowingly deceitful submissions of material representations of fact, Plaintiff, in the instant action, submitted an affidavit that is factually sound but procedurally flawed. Furthermore, Plaintiff has acknowledged the procedural deficiencies of the Stephan Affidavit and has submitted the subsequent declaration of Aixa Torres which confirms the accuracy of the material facts set forth in the Stephan Affidavit concerning Defendant's default giving rise to the foreclosure action.

Defendant contends that Plaintiff relied on the Stephan Affidavit after learning of these procedural flaws when it did not address those flaws in its Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment. At the time Plaintiff filed its Reply, however, the period of time for Mr. Stephan to read and sign the deposition transcript in which these procedural flaws were described had not yet expired. Mr. Stephan's deposition took place on June 7, 2010, in the case of *Federal National Mortgage Association v. Nicolle Bradbury* pending in Maine State District Court, and Plaintiff filed its Reply (Doc. 134) on June 16, 2010. Plaintiff was entitled to sufficient time to investigate any potential corrections or clarifications to Mr. Stephan's testimony before acting to correct his affidavit.[1]

Defendant has asserted that these procedural deficiencies have produced an affidavit that is "fundamentally false." Plaintiff acknowledges that the Stephan Affidavit contained an inadvertent inaccuracy concerning the Note and its endorsements, and has submitted the declarations of Judy Faber and Alexander Saksen to explain and correct that inaccuracy. That inadvertent inaccuracy, however, did not misrepresent any of the material facts in the foreclosure

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[1] Defendant also mentions another deposition of Mr. Stephan taken in a Florida action during December 2009, however there is no suggestion that counsel representing Plaintiff in this case in Maine was aware of that Florida testimony before presenting Mr. Stephan's affidavit in this case.

action and does not render the affidavit "fundamentally false." Moreover, the inaccuracy was not submitted to the court knowingly or with the intent to deceive, distinguishing the present situation from cases in which courts have imposed sanctions under Rule 56(g).

In the months prior to filing the above captioned foreclosure action, counsel for Plaintiff believed that it had obtained from GMACM a copy of the original Note as it existed at the time of Defendant's default giving rise to the foreclosure action and that the original Note was missing the endorsement to U.S. Bank. (Declaration of Alexander Saksen, dated August 10, 2010, Exhibit 3, at ¶ 5). Out of a good faith belief that the Note needed to be endorsed to U.S. Bank prior to filing a complaint for foreclosure, Plaintiff's counsel requested that GMACM endorse the Note to U.S. Bank. (Ex. 3 at ¶ 6). This endorsement was made by Jeffrey Stephan on September 22, 2008, well before the initial Complaint in this action was filed in state court in January 2009. (Ex. 3 at ¶ 6). In June of 2010, after it became clear to GMACM that Plaintiff's counsel had not obtained a copy of the correct original Note, GMACM sent to Plaintiff's counsel the original Note, containing all current endorsements, including the one to U.S. Bank. (Ex. 3 at ¶ 10; Declaration of Judy Faber, dated August 10, 2010, Exhibit 4, at ¶ 3). Therefore, the Stephan endorsement proved to have been duplicative of a prior endorsement. Upon receipt of the correct original Note, counsel for Plaintiff promptly submitted a copy to the Court and to opposing counsel. (Ex. 3 at ¶ 11).

The Stephan Affidavit stated that Defendant executed the Note with Quicken Loans, and that the Note was endorsed to U.S. Bank by the endorsement made by Mr. Stephan and attached to his affidavit. The material fact of that statement – that the Note was endorsed to the current holder U.S. Bank – is and always has been true. Moreover, the mistaken submission of the Stephan endorsement was not undertaken in knowing deceit. Rather, the Note endorsed by Mr. Stephan was submitted with a good faith belief in its authenticity as the original Note.

Defendant makes much of what he alleges to be GMACM's failure to implement a policy directive relating to the signing of affidavits following sanctions imposed by a Florida court in 2006. It is worth noting that this order, entered by the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, on its face applied to policies and procedures governing servicing of loans "within the State of Florida." The relevance of this order in addressing a situation involving a loan in Maine several years later is significantly overstated by Defendant. Certainly, the procedure followed by Mr. Stephan in executing his affidavit in this case was flawed, and Plaintiff does not dispute that. The issue on Defendant's Rule 56(g) Motion, however, is whether the affidavit was "submitted in bad faith or solely for delay." Fed. R. Civ. P. 56(g). With that assertion, Plaintiff very much takes issue. Rushed and abbreviated procedures, however improper, are not the same as "bad faith," particularly in the absence of any intentional misrepresentation of material fact. Defendant has not shown that the Stephan Affidavit and endorsement were submitted to this Court in bad faith. There is simply no basis for a finding of bad faith in this case under Rule 56(g).

II. Even if Plaintiff's conduct constitutes "bad faith," it does not warrant such an extreme sanction as favorable rulings for Defendant on summary judgment concerning all pending claims.

The court's discretion to impose sanctions for a party's failure to comply with the rules of civil procedure is not without limits and guidelines. *Young v. Gordon*, 330 F.3d 76, 81 (1st Cir. 2003). As Defendant himself pointed out, it is incumbent upon the court to "fit the punishment to the severity and circumstances of the violation" when determining what, if any, sanctions are to be levied against a party. *Id.*

Defendant's request for summary judgment can be likened to a request for dismissal on the merits. The drastic sanction of dismissal is reserved for those extreme cases in which "a party has engaged deliberately in deceptive practices that undermine the integrity of judicial

proceedings because courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." *Gilbert v. Blount, Inc.*, 2006 WL 3081384, at *4 (D. Me. Oct. 27, 2006) (citing *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006)).

While Plaintiff acknowledges that it failed to comport with the standards for a properly executed and notarized affidavit, such action was not deceptive in nature concerning the merits of the litigation and certainly is not "utterly inconsistent with the orderly administration of justice." *Id.* In fact, Plaintiff has filed the declarations of Aixa Torres, Judy Faber, and Alexander Saksen to ensure that the record before the court is factually and procedurally sound. Therefore, the integrity of this court is not undermined by the procedurally defective affidavit. Moreover, the material facts contained in the affidavit are true and the fact that the endorsement to U.S. Bank was accomplished by an endorsement other than the one Plaintiff's counsel initially believed to be effective does not change those material facts. Indeed, Defendant's primary complaint about the procedurally defective affidavit – that the affiant did not have personal knowledge of the information contained in the business records attached thereto – is itself immaterial because Mr. Stephan's affidavit was based on his knowledge of business records, not his personal knowledge of the events.

Rule 56(g) expressly contemplates only money damages as the sole sanction for submission of an affidavit in bad faith. Trial courts have a comprehensive arsenal of civil procedure rules to protect the court from fraud and abuse. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 62, (1991) (Scalia, J., dissenting). Pursuant to Rule 56(g), a trial court can punish contempt of its authority by "award[ing] expenses and/or contempt damages when a party presents an affidavit in a summary judgment motion in bad faith or for the purpose of delay." *Chambers*, 501 U.S. at 62 (Scalia, J., dissenting). In other words, a finding of contempt as a result of a bad

faith affidavit is punishable with an award of expenses and fees or other monetary award, not summary judgment for the opposing party. This is especially true in the instant action where there is no fraud and the alleged sanctionable action amounts to a procedural deficiency.

Additionally, Defendant asks this court to permit it to conduct further discovery into the Stephan Affidavit and endorsement. This request not only exceeds the bounds of any reasonable sanction, but it is a pointless fishing expedition because Plaintiff has admitted the deficiencies in the Stephan Affidavit and is no longer relying on it in any respect. Plaintiff, through its Motion to Stay, offered to allow additional discovery of the true original Note which former Plaintiff's counsel discovered and presented to the Court only recently, but Defendant, apparently satisfied with the authenticity of that original Note after inspecting it, declined that invitation by opposing Plaintiff's Motion to Stay. It is not reasonable for Defendant to request at the same time discovery not reasonably calculated to produce facts relevant to the issues remaining in this case.

Alternatively, Defendant asks this Court to conduct its own inquiry into the role of Plaintiff's counsel and GMACM with regard to the filing of the Stephan Affidavit. While a court certainly has the power to conduct an independent investigation, there is no fraud here that would warrant such an inquiry. *Chambers*, 501 U.S. at 44 (citing *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946)). As stated above, the material facts contained in the Stephan Affidavit are true in substance, and the sole factual error concerning the endorsement to U.S. Bank was inadvertent and does not affect the underlying fact that at the time the Complaint was filed, U.S. Bank was the holder of the Note. There simply is no element of fraudulent intent or malice demonstrated in Plaintiff's actions, and certainly no complicit behavior on the part of Plaintiff's counsel, that would warrant such an extraordinary inquiry action.

Summary judgment for Defendant on the foreclosure claim and a favorable ruling for Defendant on his opposition to Plaintiff's and GMACM's Motion for Summary Judgment concerning all counterclaims and third party claims would result in a windfall to Defendant. Defendant was contractually obligated to make payments pursuant to his mortgage and he failed to do so, resulting in the instant foreclosure action. Plaintiff was and is contractually entitled to foreclose on the subject mortgage, and Plaintiff's recent request to dismiss the Complaint does not change that fact. The procedurally defective affidavit does not in any way alter the material facts proving Defendant's delinquency and Defendant fails to and cannot identify any prejudice experienced as a result of the procedurally defective affidavit. Moreover, that affidavit has absolutely nothing to do with any of Defendant's counterclaims. Plaintiff maintains that there is not the requisite "bad faith" on its part to warrant sanctions, but in the event this court determines nevertheless that sanctions are warranted, those sanctions should address actual prejudice to the Defendant resulting from Plaintiff's conduct without creating a windfall for Defendant.

CONCLUSION

Plaintiff concedes that the Affidavit of Jeffery Stephan was procedurally flawed in its execution and notarization, however the underlying material factual substance of the Stephan Affidavit remains accurate. The inquiry requested by Defendant is unwarranted because the defective affidavit was not fraudulent or malicious, and is no longer relied on by Plaintiff. Neither were Plaintiff's counsel and GMACM complicit in any bad conduct as alleged. Furthermore, Defendant's request for summary judgment as a sanction for a contempt finding would result in a windfall to Defendant. Defendant admittedly defaulted on his mortgage obligations and should not now be allowed to rely on a procedural deficiency to negate his own wrongdoing and obtain a windfall.

Dated at Portland, Maine this the 10th day of August, 2010.

/s/ John J. Aromando
John J. Aromando
Michelle Y. Bush
PIERCE ATWOOD, LLP
One Monument Square
Portland, ME 04101
207-791-1100

jaromando@pierceatwood.com
mbush@pierceatwood.com

Attorneys for Plaintiff U.S. Bank and Third Party Defendant GMAC Mortgage LLC

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2010, I electronically filed the foregoing document entitled Memorandum in Opposition to Defendant's Motion for Relief Pursuant to Fed. R. Civ. P. 56(g) with the Clerk of Court using the CM/ECF system which will send the notification of such filing to the following:

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Dated: August 10, 2010

/s/ John J. Aromando
John J. Aromando

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Attorney for Plaintiff U.S. Bank and Third Party Defendant GMAC Mortgage LLC

Exhibit 10

Everything Cleveland

Eastlake couple foreclosed upon three times, despite never missing a payment

Published: Sunday, October 17, 2010, 5:00 AM Updated: Sunday, October 17, 2010, 8:56 AM

Teresa Dixon Murray, The Plain Dealer

View full size

Chuck Crow, The Plain Dealer

Michael and Pamella Negrea have been foreclosed on three times and have battled GMAC for years.

EASTLAKE, Ohio -- The first time Michael and Pamella Negrea were foreclosed upon in 2001, the suit was thrown out of court. They had never even made a late payment.

That didn't stop GMAC Mortgage.

In 2005, two years after the case was dismissed, GMAC filed for foreclosure again. This time, the Negreas sued for breach of contract, fraud and unfair debt collection. They won more than $217,000, and the foreclosure was thrown out again.

And still that didn't stop GMAC.

The mortgage company now has foreclosed again, just as GMAC sits at the heart of a national foreclosure scandal. The company has suspended foreclosures in 23 states, and is reviewing cases in all 50 states, over revelations of possibly fraudulent documents, and several other banks have followed suit.

"It's like a foreclosure machine," the Negreas' attorney, Stephen Futterer of Willoughby, said of GMAC. "It won't stop."

The Negreas' case reveals the inner workings and the depth of the troubles facing the mortgage industry, which seems to have blindly shoved through thousands of foreclosures without even reading the documents.

Michael Negrea, a Willoughby police officer for 25 years, says most people he talks with can't even comprehend their tale. "You think, 'You make your payments, and everything is fine.' You would think this couldn't possible happen."

A representative for GMAC did not return a phone call seeking comment.

The Eastlake couple's story started in 1995, when they built their modest 2,400-square-foot colonial and borrowed $200,000. They refinanced in 1998 with a local mortgage company, which sold the loan to Advanta Mortgage Corp.

The loan was sold a year later to Nation's Credit, then it was sold to Homecomings Financial, with the loan being serviced by Fairbanks Capital Corp., one of the nation's most notorious mortgage lenders. The Federal Trade Commission in 2003 sued Fairbanks for deceptive and illegal practices, including not posting customer payments, and the company agreed that year pay $40 million in damages.

Sometime while Fairbanks was in the picture for the Negreas, two payments didn't get posted.

"You'd call and talk to someone and they said they'd look into it," said Michael Negrea, 53. "When you called and asked for the person you talked to, they no longer worked for the company. You'd leave a message for a supervisor, and they'd never call you back."

A foreclosure was filed in 2001 on behalf of Homecomings, which owned the loan. Right around the same time, the servicing was transferred from Fairbanks to GMAC. Once Homecomings said the Negreas were in foreclosure, the company wouldn't accept their monthly payments. So the couple simply put the money in the bank.

When attorneys for both sides sat down in 2003, they worked out a written settlement: All penalties and interest would be wiped out and the Negreas would pay the actual payments owed. Homecomings/GMAC also would erase the foreclosure and negative information from the Negreas' credit files. (The Negreas say that still has never happened.) The Negreas started making normal payments again in early 2004.

By June, GMAC sent another default letter. The couple had copies of their canceled checks and even the return receipts from the Postal Service showing when the payments had been sent and received. All payments had been on time, and GMAC apologized in July for the mistake.

In October, they got another default letter. And they got a letter saying that GMAC thought their $500 homeowners' insurance premium hadn't been paid, so they were imposing a new policy at $3,200. In truth, their insurance hadn't lapsed. They'd had the same company since buying the home.

GMAC again sent apology letters.

After the couple sent their December payment, it wasn't cashed. The next month, in January 2005, GMAC again filed for foreclosure and wouldn't back down.

"They pretty much treated us like criminals," Michael Negrea said.

Futterer, who has been their attorney in the case since 2003, filed a counter claim for breach of contract, fraud and violating debt collection laws.

The Negreas insisted on going to trial. As the evidence unfolded, Michael Negrea said, "you could hear some of the people on the jury saying, 'Oh my gosh.' "

It turned out that GMAC had applied their payments to the bogus penalties that had been forgiven in court proceedings back in 2003, as well as to payments that had already been posted.

Futterer asked for a large enough award from GMAC to wipe out their roughly $200,00 mortgage forever. By the time they got the $217,244 settlement more than three years later -- in 2009 -- GMAC had again added on more than $50,000 worth of fees.

So why wouldn't they refinance the balance with a more reputable bank? It is because they still had two foreclosures on their credit records, along with dozens of erroneous late payments. "They screwed up our credit so bad we can't get any kind of loan," said Pamella Negrea, 57.

But GMAC wasn't done.

In 2008, the couple got a statement from GMAC demanding payment for its attorneys in the second foreclosure case -- the one in which GMAC lost the counterclaim. "How can you ask for legal fees when you paid our legal fees?" Michael Negrea asked.

During the last few years, GMAC has repeatedly accused the Negreas of not having homeowners' insurance and insisted on making monthly home inspections, charging $700 or more for each one. GMAC told them the

inspections were to make sure they still lived there. Michael Negrea considered them harassment.

The couple had been making normal payments last year when GMAC again stopped cashing them, saying they owed a lump sum of nearly $310,000 plus attorneys' fees on their $208,000 mortgage.

In August 2009, GMAC/Homecomings filed for foreclosure again, this time in federal court instead of common pleas court. "We feel they're court-shopping," Futterer said. The trial is set for January.

The Negreas are ecstatic that GMAC's practices may finally be coming to light, even though the accusations so far are limited to whether GMAC gave false information about foreclosures.

"I can't image how many people lost their houses who didn't deserve it," Michael Negrea said.

The couple is drained from years of back and forth with GMAC.

"I think a lot of people would have just given up," said Pamella Negrea, a graphic designer. "Nobody believes us. People think, 'A bank wouldn't file for foreclosure if the bank wasn't right.' "

"People ask me, 'How do you put up with this?' I have no choice," Michael Negrea said. "It has cost us a fortune. We don't make that much. But it's our home."

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Exhibit 11

STATE OF MAINE
KENNEBEC,SS

MAINE SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

GMAC MORTGAGE, LLC f/k/a
GMAC MORTGAGE CORPORATION

Plaintiff

v.

MARC G. BERUBE AND LISA BERUBE

Defendants

and

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
Party in Interest

CERTIFICATION OF MORTGAGEE

COMMONWEALTH OF PENNSYLVANIA
Montgomery, ss.

I, Jeffrey Stephan Limited Signing Officer, depose and say as follows:

1. My name is Jeffrey Stephan Limited Signing Officer. I am a Jeffrey Stephan Limited Signing Officer with GMAC Mortgage, LLC f/k/a GMAC Mortgage Corporation (GMAC), a limited liability company organized and existing under the laws of the State of Delaware and having a principal place of business in Fort Washington, Pennsylvania. GMAC has under its custody and control the records relating to the mortgage transaction referenced below.

2. GMAC hereby CERTIFIES, pursuant to Title 14 M.R.S.A. § 6321, to the following:

a. GMAC has strictly performed all provisions to provide notice to the mortgagor as mandated by 14 M.R.S.A. § 6111.

b. The subject Mortgage, dated 1/30/2004, and recorded in the Kennebec County Registry of Deeds in Book 7823, Page 75 was granted to Homecomings Financial Network, Inc. by Marc G. Berube and Lisa Berube to secure a Note dated 1/30/2004 given to Homecomings Financial Network, Inc. by Marc G. Berube and Lisa Berube.

c. GMAC is the owner of the Note and Mortgage in this matter as evidenced by the Note and Mortgage and all endorsements and assignments thereto. True copies of the Mortgage and Note are attached as exhibits to the Complaint.

Dated: July 26, 2010 By: ______________________

Its: ______________________

Jeffrey Stephan
Limited Signing Officer

Exhibit 12

Go straight to content.

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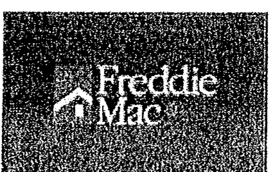
- Privacy Policy



Freddie Mac: Avoiding Foreclosure
Steps You Can Take Today to Protect Your Home

Does Freddie Mac Own Your Mortgage?

Call your servicer -- the organization to which you make your mortgage payments -- immediately if you are having difficulty paying your mortgage on time. The telephone number and mailing address of your mortgage servicer should be listed on your monthly statement. There are also a number of organizations that may be able to help you.

Your servicer should be able to tell you if your mortgage is owned by Freddie Mac. If you wish, you may conduct a search using the secured look-up tool below. **Please enter your information carefully** -- a spelling error or other small mistake could cause an uncertain result. Abbreviations, typos, or including the "Street Type" in the "Street Name" field can lead to incorrect results.

Self-Service Lookup

* Indicates required fields

First Name *	Marc
Last Name *	Berube
House Number *	254
Street Name *	Maxwell Do not include "Street", "Avenue", "Drive", etc. in this form field.
Street Suffix	Suffix
Unit Number	
City *	Litchfield
State *	ME
Zip Code *	Format: ##### 04350
Last 4 Digits of Social Security Number *	Enter last 4 digits only. Format: #### Why do we ask for Social Security?
Verification *	☑ By checking this box and clicking on the button below to submit this information, I confirm I am the owner of this property or have the consent of the owner to lookup this information.

Go straight to content.

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- Privacy Policy

Freddie Mac
How to Get Help with Your Mortgage

Yes. Our records show that Freddie Mac is the owner of your mortgage.

En Español

What to Do Next

1. **For help with your mortgage, contact your lender and let them know you would like to pursue assistance through the federal Making Home Affordable program.**

   (Your lender is the company to which you make your mortgage payments, and may also be referred to as a mortgage servicer.) Your lender can help you determine if you are eligible for the Making Home Affordable Program.

   a. **Through the Making Home Affordable program**, there are several options available to you:

      - A **Home Affordable Modification** to help you obtain more affordable mortgage payments if you're behind in making your mortgage payments or believe you may be soon.
      - A **Home Affordable Refinance** to better position you for long-term homeownership success if you have been making timely mortgage payments but have been unable to refinance due to declining property values.
      - A **short sale** or **"deed-in-lieu of foreclosure"** to transition to more affordable housing if it is not realistic for you to keep your home.

      Freddie Mac is working with our mortgage servicers (your lenders) to offer these solutions to eligible borrowers with Freddie Mac-owned mortgages. *Because Freddie Mac does not work directly with consumers, you will need to work with your lender to determine your best foreclosure prevention option.*

   b. **If you are not eligible for the Making Home Affordable program**, don't give up! Ask your lender about other options to make your payments more affordable

Exhibit 13

STATE OF MAINE
CUMBERLAND, ss.

MAINE DISTRICT COURT
DISTRICT NINE
DIVISION OF NORTHERN CUMBERLAND
DOCKET NO. BRI-RE-09-65

FEDERAL NATIONAL MORTGAGE ASSOCIATION	)	
	)	
Plaintiff	)	**DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF PROTECTIVE ORDER**
v.	)	
NICOLLE M. BRADBURY	)	
	)	
Defendant	)	

STATEMENT OF FACTS 1

ARGUMENT

I. ABSENT A PROTECTIVE ORDER, THE DEFENDANT WAS ENTITLED TO DISSEMINATE THE STEPHAN DEPOSITION TRANSCRIPT AS SHE SAW FIT 6

II. THE PLAINTIFF AND GMAC MORTGAGE, LLC HAVE SHOWN NO GOOD CAUSE FOR THE ISSUANCE OF A PROTECTIVE ORDER 7

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IV. DEFENDANT IS ENTITLED TO AN AWARD OF COUNSEL FEES IN DEFENDING AGAINST THE PROTECTIVE ORDER MOTION 10

STATEMENT OF FACTS

At issue in this protective order proceeding is the transcript of the deposition of Jeffery Stephan taken on June 7, 2010, which reveals the complete falsity of Stephan's summary judgment affidavit. It is that August 5, 2009 affidavit of Stephan that was the sole evidence[1] presented to and relied upon the Court in entering its Order for Partial Summary Judgment dated January 27, 2010. That Order granted Plaintiff judgment on all issues except as to the amount due on the Defendant's note and mortgage.

a. The Falsity of the Stephan Affidavit.

[1] For the purposes of this Memorandum, the affidavit of Plaintiff's counsel in support of Plaintiff's Motion for Summary Judgment is ignored, as it pertains only to the attorney fees claimed by Plaintiff.

The Stephan deposition proves that Stephan's affidavit is a stunning series of lies.

Stephan claims to have personal knowledge of the facts contained in the affidavit based upon his asserted "custody and control" of the "records relating to the mortgage transaction." Aff. ¶ 1. His deposition revealed that he has no custody and control of any loan records. Tr. pp 69-70.[2] He claims to have *access* to scanned computer images of those records, Tr. 61-62 & 69-70, but he does not even look at them when signing a summary judgment affidavit. Tr.61-62. Thus, when his affidavit asserts that he has knowledge of the facts in it "derived from my personal knowledge of these records", that statement is a blatant lie. He claims to check only "the figures" in affidavits by comparing them to those in his computer system, thus even the implication in his affidavit that he has personal knowledge of those figures is false---at best those statements are hearsay based upon someone else's data entries, which he is not even competent to authenticate.

The magnitude of Stephan's false claims of knowledge about any of the facts stated in his affidavit is revealed by his stunning admission that he does not read summary judgment affidavits before signing them:

Tr. Page 61, Line 14:

> Q. When you receive a summary judgment affidavit to sign, do you read every paragraph of it?
>
> A. No.
>
> Q. What do you read?
>
> A. I look at the figures.
>
> Q. That's all that you look at when you sign a summary judgment affidavit?
>
> A. Yes, to ensure that the figures are accurate.

Tr. Page 62, Line 23:

---

[2] A copy of the transcript of the Stephan deposition is attached to Plaintiff's motion as Exhibit A.

Q. Is it fair to say that when you sign a summary judgment affidavit, you do not know what information it contains other than the figures that are set forth within it?

A. Other than the borrower's name and if I have signing authority for that entity. That is correct.

Tr. Page 54, Line 12:

Q. When you sign a summary judgment affidavit, do you check to see if all of the exhibits are attached to it?

A. No.

Q. When you sign a summary judgment affidavit, do you inspect any of the exhibits attached to it.

A. No.

Stephan's personal knowledge affidavit statements that "true and correct" copies of the note and mortgage are attached are not known by him to be true because he does not look at the scanned images of loan documents available to him, nor does he look at the copies of documents attached to his affidavit. While this statement of personal knowledge is a lie that may be harmless here, since Defendant admits the accuracy of those copies, these clear lies illustrate the falsity of the entire affidavit.

When Stephan goes on his affidavit to assert his personal knowledge of the fact of and date of mailing of the alleged default notice to Defendant, the assertion that he has knowledge of those facts also is a lie because he looked at no business records to determine if the statements are true.

And of truly disturbing importance is the fact that Stephan does not even trouble himself to appear before a notary to be sworn.

Tr. p. 56, Line 7:

Q. My question to you is where does a summary judgment affidavit go after you sign it?

A. After I sign it, it is handed back to my staff. My staff hands it to a notary for notarization. They send it back to the attorney network requesting any type of affidavit.

Q. So you do not appear before the notary; is that correct?

A. I do not.

It is this testimony that Plaintiff and GMAC Mortgage seek to hide by their motion for a protective order.

b. Plaintiff's Allegations of "Improper Disclosure" of the Stephan Transcript.

Plaintiff[3] and GMAC Mortgage, LLC now assert that the appearance of Stephan's transcript on an Internet blog of a Florida foreclosure defense lawyer is evidence of improper conduct of Defendant's counsel. Offering no evidence whatsoever, GMAC speculates that Defendant's counsel sent the transcript to the Florida attorney who published it, and insinuate that it was improper for the transcript to be shared with other lawyers defending homeowners in foreclosure actions. After all of the innuendo, GMAC admits that "it is irrelevant whether or not Mr. Weidner is the attorney to whom Mr. Cox disclosed the transcript . . . " Pl. Motion ¶12.

c. The Alleged Harm Claimed by Plaintiff and GMAC Mortgage, LLC.

The harm that GMAC complains of is that, after alleged dissemination of the Stephan transcript that revealed his and GMAC's utter contempt for the Maine judicial process, GMAC as a corporate entity and its employees have suffered "embarrassment, annoyance, intimidation and oppression". They offer no affidavits and not one shred of evidence to support this absurd claim. The real harm or "effect" of the dissemination of the Stephan transcript that GMAC wants this Court to aid it in avoiding, is that the transcript has exposed the fact that judgments entered in every

---

[3] It is interesting to note that the Motion for Protective Order is filed on behalf of Federal National Mortgage Association and Bank of America in addition to GMAC Mortgage. One would think that taxpayer supported FNMA would have adverse interests to GMAC on this issue due to the misconduct of GMAC in the filing of the Stephan summary judgment affidavit, and one is left to wonder how Bank of America has any interest whatsoever in the protective order proceeding, as no such interest is identified in the Motion. Because it is clear that it is only the self-interest of GMAC Mortgage, LLC that is at stake here, for the remainder of this memorandum the moving party is simply referred to as "GMAC".

judicial foreclosure state into which Stephan's affidavits have been sent are vulnerable to being set aside as having been procured by fraud.

d. The Relief Sought by GMAC.

GMAC seeks the following relief:

i. A prohibition "from disseminating discovery materials for purposes unrelated to trial preparation, trial or settlement of this particular lawsuit". Plaintiff Motion ¶15.

ii. Retroactive application of the order "so as to protect information already obtained . . ." Plaintiff Motion ¶16. It is not clear what GMAC is asking for here.

iii. Sanctions against Defendant's counsel including an order that "Mr. Cox be required to reimburse Plaintiff for all fees and costs associated with filing this motion for protective order." Plaintiff Motion ¶17.

iv. An order that "Mr. Cox should be barred from using Mr. Stephan's transcript in his other cases against GMACM." Plaintiff Motion ¶ 17.

e. The Facts Regarding Defendant's Counsel.

Before the deposition of Jeffery Stephan began on June 7, 2010, GMAC knew that Defendant's counsel was representing Maine homeowners in two other pending GMAC mortgage foreclosure cases, because GMAC counsel here was also counsel in those cases. Similarly, it knew of his role in the Maine Attorneys Saving Homes ("MASH") program because the attorney who signed the complaint in this action, and a member of the firm which represented GMAC at the time of the Stephan deposition, has been a participant in the MASH program, has attended a training program put on by it, and has even received email correspondence from the undersigned counsel for Defendant attempting to refer a MASH foreclosure defense case to him.

I. ABSENT A PROTECTIVE ORDER, THE DEFENDANT WAS ENTITLED TO DISSEMINATE THE STEPHAN DEPOSITION TRANSCRIPT AS SHE SAW FIT.

GMAC asserts that "(t)his dissemination of Mr. Stephan's testimony is inconsistent with the Maine Rules of Civil Procedure . . ." Plaintiff Motion ¶8. The First Circuit Court of Appeals, dealing with the Federal equivalent of Maine's Rule 26, certainly does not see it that way, holding that " the Supreme Court has noted that parties have general *first amendment* freedoms with regard to information gained through discovery and that, absent a valid court order to the contrary, they are entitled to disseminate the information as they see fit." (emphasis in original) *Public Citizen Group v. Liggett Group, Inc.,* 858 F.2d 775, 780 (1st Cir. 1988), citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31-36, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984). Going on from there, the First Circuit adopted the reasoning of the Second Circuit Court of Appeals, which held as follows:

> A plain reading of the language of *Rule 26(c)* demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, i.e., *if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection . . . Any other conclusion effectively would negate the good cause requirement of rule 26(c): Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order since the public would not be allowed to examine the materials in any event.* (emphasis added)

Public Citizen, id. at 858 U.S. 789, quoting *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139, 145-146 (2nd Cir.), cert. denied, 484 U.S. 953, 108 S. 344, 98 L. Ed. 370 (1987). See also *Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858 (7th Cir. 1994) (*"Absent a protective order, parties to a lawsuit may disseminate materials obtained during discovery as they see fit.")

Because, to this point, there has been no protective order in this case, no "good cause" had been shown for limiting dissemination of the Stephan transcript. Therefore, under the rationales of the Supreme Court and the First, Second and Seventh Circuit Courts of Appeals, there has been no

limit upon Defendant's right to share that transcript with other lawyers defending homeowners in foreclosure cases. GMAC does not cite one single Rule of Civil Procedure, one single Rule of Professional Conduct, one statute, and not even one single court decision that stands for its proposition that a party is limited in disseminating pre-trial discovery materials in the absence of a protective order. There is no such precedent. Defendant's Counsel's actions have not been "inappropriate" or "improper" in any respect.

II. THE PLAINTIFF AND GMAC MORTGAGE, LLC HAVE SHOWN NO GOOD CAUSE FOR THE ISSUANCE OF A PROTECTIVE ORDER.

GMAC belatedly[4] now seeks a protective order under M.R.Civ.P. 26(c). Under that Rule a protective order is permitted, but only "for good cause shown." Not only has GMAC failed to show "good cause", it has failed to show *any cause*-- it has provided no affidavits or other evidence to support its claims.

GMAC cites only three cases to support its request for protective order. In both *Seattle Times Co. v. Rhinehart*, *id.*, and *Baker v. Buffenbarger*, 2004 U.S. Dist. LEXIS 19083 (D. N.D. Ill, 2004), the courts considered the granting of protective orders, but only after having received *affidavits* showing the claimed "good cause". It is not possible to determine what evidence was presented to support the protective order under consideration in *Damiano v. Sony Music*, 2000 U.S. Dist. LEXIS 16670 (D. N.J. 2000). Affidavits are required. See *Easton Sports, Inc. v. Warrior Lacrosse, Inc.,* 2006 U.S. Dist. LEXIS 96358 (E.D., So. Div., Mich.) ("Where a business is the party seeking protection, it will have to show that disclosure would cause significant harm to its competitive and financial position. That showing requires specific demonstrations of fact,

---

[4] Defendant's Counsel's letter to counsel for GMAC dated June 4, 2010 attached to Plaintiff's Motion as Exhibit C outlines on page two the manner in which GMAC sat on its hands before the June 7, 2010 deposition.

supported where possible *by Affidavit* and concrete examples rather than broad, conclusory allegations of potential harm.) (emphasis added)

The "good cause" standard, that must be proved by affidavit evidence, is best enunciated in *Cipollone v. Ligget Group, Inc.,* 785 F.2d 1108 (3rd Cir. 1986) where the court stated:

> . . . *Rule 26(c)* places the burden of persuasion on the party seeking the protective order. To overcome the presumption, the party seeking the protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the *Rule 26(c)* test. *See United States v. Garrett, 571 F.2d 1323, 1326, n. 3 (5th Cir. 1978)* (requiring "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements"); *General Dynamics Corp. v. Selb Mfg. Corp., 481 F.2d 1204, 1212 (8th Cir. 1973), cert. denied, 414 U.S. 1162, 94 S. Ct. 926, 39 L. Ed. 2d 116 (1974)*; 8 C. Wright & A. Miller, *Federal Practice and Procedure* ß 2035 (1970 & Supp. 1985). Moreover, the harm must be significant, not a mere trifle. *See, e.g., Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982)* (refusing protective order where proponent's only argument in its favor was the broad allegations that the disclosure of certain information would "injure the bank in the industry and local community"), *cert. denied sub nom. Citytrust v. Joy, 460 U.S. 1051, 75 L. Ed. 2d 930, 103 S. Ct. 1498 (1983).*

Cipollone, id., at 785 U.S. 1121. The Seventh Circuit adds that "(m)ost cases endorse the presumption of public access to discovery materials." *Citizens First Nat'l Bank v. Cincinnati Ins. Co.,* 178 F.3d 943, 946 (7th Cir. 1999).

In *Cipollone*, the court was also dealing with a claim of corporate embarrassment of the sort asserted by GMAC here and made the following statements:

> . . . because release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious. As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground. *Cf. Joy v. North, supra* [*Citytrust v. North,* 692 F.2d 880, 894 (2d Cir. 1982)] (a protective order will not issue upon the broad allegation that disclosure will result in injury to reputation); to succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.

Cipollone, id. at 178 F.3d at 1121. Even if the rhetoric of GMAC's counsel in his legal memorandum could be taken as facts stated in an affidavit, those statements are insufficient to prove the requisite "good cause". They do not show that the alleged corporate embarrassment to GMAC is "particularly serious" or that it would "cause significant harm to its competitive and financial position" as required by the court in *Cipollone.* Any embarrassment to GMAC comes from the fact that the Stephan transcript reveals the fundamentally dishonest and contemptuous summary judgment practices that GMAC engages in.[5] That kind of embarrassment is not something from which Rule 26(c) is designed to protect GMAC.

As a result of the sharing of the Stephan transcript among foreclosure defense counsel, GMAC may well face litigation in other cases challenging its summary judgment motions and foreclosure judgments that are based upon Stephan affidavits. This is entirely appropriate. The Ninth Circuit (citing similar holdings in the Seventh and Tenth Circuits, *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 , 1428 (10th Cir. 1990); *Wilk v. Am Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980)) has expressly held that there should be a strong bias in favor of "access to discovery materials to meet the needs of parties engaged in collateral litigation. . . Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery." *Foltz v. Ho,* 331 F.3d 1122, 1131 (9th Cir. 2003).

III. ALL RELIEF SOUGHT BY PLAINTIFF MUST BE DENIED.

Over its displeasure with the sharing of the Stephan transcript with other foreclosure defense counsel, GMAC seeks to sanction Defendant's counsel by requesting an order that he pay GMAC's

[5] If the Court deems Plaintiff's unsworn copies of pages from an Internet search to be admissible evidence, then the Court is urged to conduct its own Google search using the words "Jeffrey Stephan GMAC". The first three pages of that search (30 entries) will reveal 5 references to the June 7, 2010 transcript and most of the remaining 25 relating to the December 10, 2010 transcript. Plaintiff fails to prove even with its inadmissible evidence that it is the June 7, 2010 transcript is the cause of any claimed embarrassment.

fees in bringing this legally unfounded and factually unsupported motion. In addition, GMAC seeks to bar Defendant's counsel from using the Stephan transcript in any other GMAC foreclosure case being defended by him. This is a blatant effort to disqualify Defendant's counsel from those other cases by limiting his ability to provide full professional representation to his clients in those cases. Because there has been nothing improper about the sharing of this transcript, there is absolutely no basis for the imposition of any sanction upon Defendant's counsel.

The GMAC motion for a protective order now can be seen only as an effort by GMAC to retaliate against Defendant's counsel for his exposure of GMAC's bad faith and contemptuous summary judgment practices. The fact that GMAC supplied not one bit of legal support for its claim of wrongful dissemination of the Stephan transcript, and not one single affidavit to support its motion, can lead to no other conclusion. The conclusory allegations of Plaintiff's counsel, even if they had been supported by affidavits, do not prove the requisite good cause for the issuance of a protective order. The motion must be denied.

IV. DEFENDANT IS ENTITLED TO AN AWARD OF COUNSEL FEES IN DEFENDING AGAINST THE PROTECTIVE ORDER MOTION.

Rule 26(c) by reference to M.R.Civ.P. 37(a)(4) allows for awards of expenses on protective order motions. The motion here is utterly unsupported as a matter of law and unproven by any affidavits or other evidence. It is an unjustified effort to increase the litigation burden of the Defendant that requires that Plaintiff and GMAC as the moving parties be ordered to pay counsel fees to counsel for Defendant for the effort required to defend this motion.

DATED: July 2, 2010

Thomas A. Cox, Esq., Maine Bar No. 1248
Attorney for Defendant
P.O.Box1314
Portland, Maine 04104
(207) 749-6671

Exhibit 14

STATE OF MAINE
CUMBERLAND, ss.

BRIDGTON DISTRICT COURT
DOCKET NO. BRI-RE-09-65

FEDERAL NATIONAL MORTGAGE ASSOC.

Plaintiff

v.

NICOLLE BRADBURY

Defendant

and

GMAC MORTGAGE, LLC d/b/a DiTech, LLC .com and BANK OF AMERICA, NA

Parties-in-Interest

ORDER ON FOUR PENDING MOTIONS

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The Court has reviewed each of the four pending motions before it, as well as all supporting materials, including supporting affidavits and statements of material fact. The Court held oral argument on September 1, 2010. Those present were attorneys Tom Cox, Esq. and Geoffrey Lewis, Esq. for Defendant, and attorney John Aromando, Esq. for Plaintiff and Party-in-Interest GMAC. Attorneys Cox and Aromando argued capably for their positions.

On the question of summary judgment, before the Court is Plaintiff's Renewed Motion for Summary Judgment, as well as Defendant's Motion for Revision and Reversal of the Partial Summary Judgment Order. By its motion, Plaintiff asks that the Court affirm its previously issued order of January 27, 2010 granting summary judgment in its favor on the issue of liability, and further seeks summary judgment in its favor on the issue of the amounts owed. The Defendant's motion seeks to set aside this Court's previous order granting partial summary judgment for Plaintiff.

Defendant urges that this Court set aside its order on the ground that in so ruling, the Court relied upon the affidavit of Jeffrey Stephan, which was deficient under M. R. Civ. P. 56(e) because Mr. Stephan had signed the affidavit outside the presence of a notary and without reading its contents. The Plaintiff contends that the order can stand even putting aside the Stephan affidavit, and in any event has sought to cure the irregularities in its filing by submitting a properly sworn affidavit to support its motion.

There are, however, deficiencies in Plaintiff's filing which are not cured by the newly-submitted affidavit, namely deficiencies in its statement of material facts (SMF). The Law Court has made clear that in ruling on a summary judgment motion, Maine courts are "neither required *nor permitted* to search outside the facts properly referenced in the statements of material facts ...." *See, e.g, Camden Nat'l Bank v. Peterson*, 2008 ME 85 ¶ 26, 948 A.2d 1251, 1258 (emphasis added). In *Chase Home Finance LLC v. Higgins*, 2009 ME 136, 985 A.2d 508, the Law Court set forth a list of those facts which "must be included in the mortgage holder's statement of material facts." *Id.* at ¶ 11, 985 A.2d at 511. Plaintiff was bound to abide by this mandate, because both its initial and renewed summary judgment motions were filed after the June 15, 2009 effective date noted in *Chase*. *See id* at ¶ 11 n.2, 985 A.2d at 510 n. 2 (explaining that new statutes and rules will apply to summary judgment motions filed after their effective dates, regardless of when the foreclosure action was commenced, and adding: "We include the new requirements here for future reference of parties moving for summary judgment in residential foreclosure actions").

Neither Defendant's initially-filed statement of material facts nor its revised statement of material facts comports with *Chase*. For example, the mortgage holder's statement of facts must include "the existence of the mortgage, including the book and page number of the mortgage, and an adequate description of the mortgaged premises, including the street number, if any." *Id.* at ¶ 11, 985 A.2d at 511 (citing P.L. 2009, ch. 402 §§ 9, 17, effective June 15, 2009). Plaintiff's initial and subsequently filed statement of facts provide the book and page number, but fail to include the street address. *See* Plaintiff's SMFs at ¶ 2. Failure to include the street address is enough in itself to preclude the granting of summary judgment. *See Mortgage Elec. Registration Sys. v. Saunders*, 2010 ME 79 ¶ 25 (explaining that "While the book and page number – but not the mortgaged property's address – were included in the affidavit supporting one of MERS's original statements of material fact, facts not set forth in the parties' statements of material facts are not part of the summary judgment record").

Plaintiff's SMFs contain other omissions as well. It is not enough to state, as Plaintiff does, that "Demand has been made upon Defendant for payment of all amounts due ...." Plaintiff's SMFs at ¶ 5. 14 M.R.S.A. § 6111 requires that a mortgagee's default notice set forth the mortgagor's right to cure, and specifies the requisite content of such notices as well as the procedures which must be followed. As the Law Court stated in discussing compliance with the statutory written notice requirements of foreclosure, "For a mortgagee to legally foreclose, all steps mandated by statute must be strictly enforced." *Camden Nat'l Bank*, 2008 ME at ¶ 21, 948 A.2d at 1257. Plaintiff's statements of fact fail to set forth facts showing compliance with § 6111. Granting summary judgment despite such an omission would contravene the Law Court's clear pronouncements on this issue.

Accordingly, this Court's Partial Summary Judgment Order dated January 27, 2010 is hereby vacated per the request in the Defendant's Motion for Revision and Reversal, and Plaintiff's Renewed Motion for Summary Judgment is denied. No further summary judgment motions will be heard, as the deadline for filing dispositive motions

has long passed and Plaintiff has already been given a second bite of the apple. The parties have twenty days to file an agreed pre-trial order so that this matter may promptly be placed on the trial list in Portland. This file is now transferred to the Portland District Court for further filings and trial.

In addition to renewing its Motion for Summary Judgment, Plaintiff has also filed a Motion for Entry of Protective Order pursuant to M.R. Civ. P. 26(c). This motion is likewise denied.

Rule 26(c) provides that "for good cause shown" a court may enter a protective order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ...." M.R.Civ. P. 26(c). Plaintiff seeks a protective order "prohibiting the dissemination of discovery materials obtained in this case." Plaintiff's Motion for Entry of Protective Order at 7. As grounds for its motion, Plaintiff points to the embarrassment GMAC and its employees have suffered, and will continue to suffer, from the posting of excerpts from Stephan's deposition transcript on an Internet blog. The Court is not persuaded that the Plaintiff has shown the requisite "good cause" to justify entry of a protective order in this case. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988) (agreeing with Second Circuit in noting that "the party seeking a protective order has the burden of showing that good cause exists exists for issuance of that order.... [and] the obverse is also true, i.e. if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection") (citation omitted).

Stephan's deposition was taken to advance a legitimate purpose, and the testimony elicited has direct probative value to this dispute. Attorney Cox did not himself take action other than to share the deposition transcript with an attorney in Florida. That the testimony reveals corporate practices that GMAC finds embarrassing is not enough to justify issuance of a protective order. Further, Plaintiff has failed to establish that GMAC has been harmed specifically as a result of the dissemination of the June 7, 2010 deposition transcript, given that similarly embarrassing deposition testimony from Stephan's December 10, 2009 Florida deposition also appears on the Internet, and will remain even were this Court to grant Plaintiff's motion. Accordingly, because Plaintiff has failed to satisfy its burden of persuasion under Rule 26(c), its Motion for Entry of Protective Order is denied.

In addition to seeking the reversal of this Court's previously granted Order for Partial Summary Judgment, the Defendant has moved for sanctions pursuant to M.R. Civ. P. 56(g). This motion is granted in part, as explained below.

The facts underlying Defendant's motion are for the most part undisputed. Plaintiff does not dispute that its affiant, Jeffery Stephan, in his role as limited signing officer for GMAC, Plaintiff's servicing agent, signed the affidavit which Plaintiff submitted in support of its Motion for Summary Judgment without even reading it and without signing in the presence of a notary. These facts came into the record because the

Defendant went to the time and expense of traveling to Pennsylvania to take Stephan's deposition. In that deposition, which took place on June 7, 2010, Stephan testified that he signs some 400 documents per day, and that the process he follows in signing summary judgment affidavits is consistent with GMAC's policies and procedures.

The Court is particularly troubled by the fact that Stephan's deposition in this case is not the first time that GMAC's high-volume and careless approach to affidavit signing has been exposed. Stephan himself was deposed six months earlier, on December 10, 2009, in Florida. His Florida testimony is consistent with the testimony given in this case: except for some limited checking of figures, he signs summary judgment affidavits without first reading them and without appearing before a notary. Even more troubling, in addition to that Florida action, in May, 2006 another Florida court not only admonished GMAC, it sanctioned the Plaintiff lender for GMAC's affidavit signing practices. As part of its order, the Florida court required GMAC to file a Notice of Compliance, indicating its commitment to modify its affidavit signing procedures to conform to proper practices. The experience of this case reveals that, despite the Florida Court's order, GMAC's flagrant disregard apparently persists. It is well past the time for such practices to end.

Accordingly, Defendant asks that this Court impose sanctions pursuant to M.R. Civ. P. 56(g), which provides:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Although there are no Maine Law Court cases applying it, the plain language of Rule 56(g) makes clear that the Court must determine, first, whether it appears "to the satisfaction of the court" that an affidavit submitted for summary judgment purposes was presented "in bad faith or solely for the purpose of delay." The Law Court has defined "bad faith", albeit in a different context: "Bad faith 'imports a dishonest purpose and implies wrongdoing or some motive of self-interest.' Bad faith means 'dishonesty of belief or purpose ....'" *Seacoast Hangar Condo. II Ass'n. v. Martel*, 2001 ME 112 ¶ 21, 775 A.2d 1166, 1171-72 (citing a Utah case and Black's Law Dictionary).[1] It is left to the Court's discretion to determine whether offending conduct rises to the level of "bad faith" such that Rule 56(g) sanctions are warranted. *See, e.g., Cobell v. Norton*, 214 F.R.D. 13, 20 (D.D.C. 2003) (noting that "as a practical matter a court has wide discretion in deciding what constitutes 'bad faith'") (citing Wright & Miller, Federal Practice and Procedure § 2742 (3d ed. 1998)). If a Court is satisfied that the affidavit was

[1] *Seacoast Hangar*'s definition of "bad faith" occurred in the context of discussing the business judgment rule, which "does not insulate directors from liability for breach of their fiduciary duties if they 'acted primarily through bad faith or fraud ....'" *Id.* at ¶ 20 n. 1, 775 A.2d at 1171 n.1 (citation omitted).

submitted in bad faith, then the mandatory language of Rule 56(g) requires that the Court forthwith order "the party employing [the affidavit] to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees." M.R.Civ. P. 56(g).

Both parties cite *Fort Hill Builders, Inc. v. National Grange Mut. Ins. Co.*, 866 F.2d 11 (1st Cir. 1989), in which the First Circuit analyzed the cases applying the Federal Rule 56(g) to conclude that the matters in which sanctions were imposed involved "particularly egregious" conduct. Characterizing its misconduct as a mere "procedural deficiency," Plaintiff urges the Court to find no bad faith; Defendant, on the other hand, argues that, on the spectrum of egregiousness, the conduct at issue more than meets the standard for bad faith under the rule.

The Court agrees with Defendant, and finds to its satisfaction that the Stephan affidavit was submitted in bad faith. Rather than being an isolated or inadvertent instance of misconduct, the Court finds that GMAC has persisted in its unlawful document signing practices long after and even in the face of the Florida Court's order, and that such conduct constitutes "bad faith" under Rule 56(g). These documents are submitted to a court with the intent that the court find a homeowner liable to the Plaintiff for thousands of dollars and subject to foreclosure on the debtor's residence. Filing such a document without significant regard for its accuracy, which the court in ordinary circumstances may never be able to investigate or otherwise verify, is a serious and troubling matter. Accordingly, the Court orders Plaintiff[2] to compensate Defendant's counsel for his attorney's fees and costs "which the filing of the Affidavit caused [him] to incur" – in other words, that Plaintiff pay Defendant's counsel for his time and expenses in preparing for and taking Stephan's deposition, as well as for his time and expenses in preparing for, filing, and prosecuting Defendant's Rule 56(g) motion.[3]

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[2] As the Florida court imposed sanctions on the Plaintiff lender for GMAC's conduct, the Court likewise finds it appropriate to hold Plaintiff responsible for the conduct of its servicing agent, GMAC. Requiring Plaintiff to pay Defendant counsel's attorney's fees comports both with the language of Rule 56(g) (award of expenses should be ordered against party "employing" affidavits) as well as with principles of agency law. *See, e.g., Dupuis v. Federal Home Loan Mortgage Corp.*, 879 F. Supp. 139, 144 (D. Me. 1995) (holding that "[a]s a matter of agency law, it would be unfair for [the note and mortgage holder] to have the benefit of [the servicing agent's] servicing of the note and mortgage without also making [the note and mortgage holder] responsible for [the servicing agent's] excesses and failures").

[3] The Court declines to award fees for opposing Plaintiff's summary judgment or protective order motions, because those tasks were not "caused" by the bad faith affidavit. Because the Court finds its award of attorney's fees and costs to be a sufficient sanction for Plaintiff's bad faith conduct, the Court declines to explore the issue of contempt in this case as requested by Defendant.

Defendant has ten days from the date of this order to file an affidavit setting forth his time spent, usual hourly rate,[4] and expenses incurred in taking Stephan's deposition and filing and pursuing Defendant's Rule 56(g) motion. Plaintiff's written objection to Defendant's counsel's claimed expenses, if any, must be filed within seven days thereafter, and shall only address the sums claimed. The Court will thereupon issue an order setting forth the reasonable sum Plaintiff owes to Defendant's counsel.

The clerk shall docket this order by reference under Rule 79(a).

DATED: 9/24/10

Hon. Keith A. Powers, Judge
Maine District Court

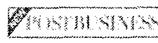
[4] That Defendant's counsel is entitled to an award of attorney's fees is not affected by the fact that he has labored in this case on a pro bono basis. *Cf., Foster v. Mydas Assoc., Inc.*, 943 F.2d 139, 144 n.7 (1st Cir. 1991) (noting that civil rights attorneys who work pro bono and prevail are usually awarded attorney's fees under civil rights statutes).

Exhibit 15

Political Economy

Politics, politicians, big business and the economy

MORE BUSINESS NEWS



Your essential source for the latest news on the intersection of Wall Street and Washington.

Ally knew of faulty GMAC documents weeks before eviction moratorium

Ally Financial officials knew a large number of documents submitted in support of mortgage foreclosure proceedings were mishandled as early as August, but did not take action to stop the evictions until last week, according to a Bloomberg report.

Ally's GMAC mortgage unit briefed one of its customers, Freddie Mac, on Aug. 25 of the problem. Freddie Mac halted evictions on Sept. 1. But Ally did not take steps to freeze evictions and foreclosures until Sept. 17, the report said.

In addition to selling and servicing its own loans, Ally handles the management of mortgages for hundreds of other firms. Fannie Mae, the nation's largest government-backed mortgage firm, also uses Ally to service some of its loans.

The company has declined to comment on the timing or substance of conversations it had with Ally except to say that "we were first notified of the situation and the planned foreclosure freeze by GMAC and then we took the necessary steps to alert our networks of the need to adhere to that freeze."

It is the responsibility of servicers like Ally "to put processes in place that ensure they are fulfilling this requirement, and they are accountable for rectifying any issues that may arise in this regard, Fannie said.

Freddie Mac and Fannie Mae, which are managed by the government since a bailout in 2008, are responsible for guaranteeing or owning more than half the $11 trillion in U.S. home mortgages. The U.S. Treasury owns a majority-stake in Ally.

Correction: An earlier version of the headline for this post incorrectly stated that it took weeks for Freddie Mac to freeze evictions after learning the paperwork for those proceedings had been mishandled. In fact, their response took about a week.

Complete coverage in The Washington Post:

Sept. 20: Ally suspends evictions on foreclosed homes in 23 states

Sept. 21: A single Ally employee, Jeffrey Stephan, signed over 10,000 documents a month without reading them

Sept. 22: Fake documents, forged signatures plague foreclosure system

'Robo-signer' Linda Green's changing signature

Who is Jeffrey Stephan anyway?

Sept. 23: Mortgage documentation problems could affect other states not included in Ally's 23-state moratorium

Sept. 24: Lawmakers question Fannie on 'foreclosure mills'

Document: Letter from Congressmen to Fannie Mae CEO

User poll: What should happen to foreclosure documents approved by

ECONOMIC AGENDA

9:30 a.m.
Sen. Barbara Mikulski (D-Md.) and Gov. Martin O'Malley (D-Md.) are scheduled to make an announcement at the General Motors plant in White Marsh

National Commission on Fiscal Responsibility and Reform meets to discuss policies that could help rein in runaway federal deficits

10 a.m.
Federal telecommunications and consumer regulators meet on the one-year anniversary of a special report that set 15 recommendations for expanding access to high-speed Internet service across the United States

11:30 a.m.
World Bank President Robert Zoellick gives a speech on global development

4 p.m.
Panel discussion at Georgetown University will examine the state of dealmaking in the commercial real estate market

7 p.m.
Senate Banking Chairman Christopher Dodd (D-Conn.) is scheduled to address the Economic Club of Washington on the financial overhaul enacted over the summer

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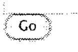

STAFF CONTRIBUTORS

Click on the faces for bios

FLETCHER

GOLDFARB

MUI

CHA

YANG

SCHNEIDER

DENNIS

IRWIN

SHEPARD

ELBOGHDADY

MONTGOMERY

WHORISKEY

About This Blog

Political Economy explores how political forces in Washington and elsewhere in the world shape the economy and how corporate agendas influence political institutions and politicians. The blog offers new perspectives on the day's top economic and business stories with exclusive interviews with government officials and lawmakers, commentary from influential economists and analysis from Post reporters. Ariana Eunjung Cha is the blog's lead writer and Mike Shepard is the author of the daily economic agenda.

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- Baseline Scenario
- Rortybomb
- Naked Capitalism
- John Lounsbury
- Interfluidity
- Megan McArdle
- Clive Crook
- Derek Thompson
- Economix
- Kevin Drum
- Real Time Economics
- Brad DeLong
- Ryan Grim
- Dominque Strauss-Kahn
- Richard Eskow
- Tim Fernholz
- Nicholas Baumann
- Shahien Nasiripour

Exhibit 16

STATE OF MAINE
Cumberland, ss

DISTRICT COURT
LOCATION: BRIDGTON
DOCKET NO. BRI-RE-09-65

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff

v.

NICOLE M. BRADBURY

Defendant

and

GMAC MORTGAGE, LLC d/b/a DiTECH, LLC.com and BANK OF AMERICA, NA

Parties-in-Interest

PLAINTIFF'S MOTION FOR ENTRY OF PROTECTIVE ORDER

Pursuant to Rule 26(c) of the Maine Rules of Civil Procedure, Plaintiff Federal National Mortgage Association and Parties-in-Interest GMAC Mortgage, LLC d/b/a DiTECH, LLC.com and Bank of America, N.A. (collectively "Plaintiff") move for entry of a protective order to prevent the use of discovery materials in this case for purposes other than to prepare for and to conduct discovery and trial in this action, including the general and gratuitous distribution of such information through the internet. In support of this Motion, Plaintiff states the following.

I. FACTUAL BACKGROUND

1. This Motion is in response to the disclosure of discovery materials obtained in this action by Defendant's attorney for improper purposes entirely unrelated to this action, the effect of which has caused embarrassment, annoyance, oppression and intimidation of the employees of Party-in-Interest GMAC Mortgage, LLC ("GMACM"), and which threatens to interfere with the judicial process. The protective order requested herein is necessary to prevent

{W1846789.2}

such conduct by Defendant's counsel in the future, and to protect GMACM and its employees from further such embarrassment, annoyance, oppression and intimidation.

2. On June 7, 2010, Thomas A. Cox, attorney for the Defendant Nicole Bradbury, deposed Jeffrey D. Stephan, an employee of GMACM. Much of Mr. Stephan's deposition testimony concerned GMACM's business practices with respect to the execution of affidavits in foreclosure actions. A copy of the transcript from Mr. Stephan's deposition is attached as Exhibit A.

3. Prior to the deposition, on June 4, 2010, Plaintiff's counsel Julia Pitney sent Mr. Cox a letter, attached as Exhibit B, stating that Mr. Stephan's deposition should be limited to Plaintiff's damages, i.e., the outstanding balance of the loan, which is the only remaining issue in the action. Ms. Pitney further warned against using Mr. Stephan's deposition to gather information exceeding the scope of the issues of this action for purposes wholly unrelated to this action. (*See Id.*). Ms. Pitney obviously had concerns going into the deposition that Mr. Stephan's deposition testimony would be used for purposes exceeding what is contemplated by and appropriate under the Maine Rules of Civil Procedure. Unfortunately, as discussed herein, Ms. Pitney's concerns were realized as Mr. Stephan's deposition testimony was posted to at least one Internet blog before Mr. Stephan had the opportunity to review his testimony and before counsel for Plaintiff even received a copy of the transcript.

4. In response to Ms. Pitney's June 4, 2010 correspondence, Mr. Cox assured Ms. Pitney that it was his "intent to conduct myself and this deposition fully in accordance with the Maine Rules of Professional Conduct and the Maine Rules of Civil Procedure." (6/4/10 Cox Letter, attached as Exhibit C). Nowhere in his letter did Mr. Cox suggest that he would disseminate the deposition transcript to third parties for purposes unrelated to this litigation. (*See Id.*).

5. Only after Ms. Pitney requested that Mr. Cox stipulate on the record that Mr. Stephan's deposition would be used only in connection with this action did Mr. Cox acknowledge his representation of other individuals adverse to GMACM and that he may use Mr. Stephan's deposition in those other cases. (*See* 6/4/10 Pitney E-mail attached as Exhibit D; 6/6/10 Cox Letter attached as Exhibit E). Mr. Cox also admitted that in his role as Volunteer Program Coordinator for the Maine Attorney's Saving Homes ("MASH") Program, he may be inclined to share Mr. Stephan's deposition with other MASH lawyers involved in other cases against GMACM. (*See Id.*). Still, Mr. Cox said nothing that would have put Ms. Pitney on notice that the deposition testimony of Mr. Stephan might be disseminated in such a manner that it would be posted to an Internet blog spot, much less disseminated before Plaintiff's counsel or Mr. Stephan even had the opportunity to review the transcript.

6. Mr. Cox has acknowledged sending the deposition transcript to an attorney in Florida who, in turn, posted the transcript to his or her blog spot. Mr. Cox did not reveal the identity of the Florida attorney to whom he sent the deposition transcript, but Plaintiff believes that the transcript was sent to attorney Matthew Weidner. On June 15, 2010, Mr. Stephan's deposition transcript from this case was posted to Mr. Weidner's blog spot, located at http://mattweidnerlaw.com/blog/2010/06/new-robo-signer-deposition-jeffrey-stephan/. A copy of the blog, in pertinent part, is attached as Exhibit F. The blog dubs Mr. Stephan the "New Robo Signer" and solicits comments from viewers.[1]

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1 In Mr. Stephan's deposition, Mr. Cox inquired as to Mr. Stephan's prior testimony in a foreclosure action pending in Florida. (Deposition Transcript, pp. 57-58, Ex. A). The deposition to which Mr. Cox referred occurred on December 10, 2009, in connection with the case styled *GMAC Mortgage, LLC v. Neu*, in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach, Florida, Case No. 50-2008-CA-040805XXX-MB. The transcript from the December 10, 2009 deposition was posted by Florida attorney Carol C. Asbury on her blog spot, which is located at www.4closurefraud.com, which refers to Mr. Stephan as the "Affidavit Slave." A copy of the blog spot, in pertinent part, is attached as Exhibit G.

7. The effect of Mr. Cox's dissemination of this transcript has been annoyance, embarrassment, intimidation and oppression not only of GMACM and Mr. Stephan but also to other employees of GMACM who fear that their respective deposition testimonies may be also be distributed widely and gratuitously on the internet or in some other very public fashion or otherwise used for improper purposes completely unrelated to the litigation in which the testimony is provided.

8. This dissemination of Mr. Stephan's deposition testimony is inconsistent with the Maine Rules of Civil Procedure, which contemplates the use of discovery material for proper purposes in connection with the action in which such discovery is generated, and seeks to protect parties and witnesses from embarrassment, annoyance, oppression and intimidation as described in Rule 26(c), and, as discussed below, the Court should enter a protective order prohibiting the further dissemination of Mr. Stephan's deposition transcript and any other discovery materials obtained in this action.

II. LEGAL ARGUMENT

9. Rule 26(c) of the Maine Rules of Civil Procedure governs protective orders. Specifically, Rules 26(c) provides that "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, any justice or judge of the court in which the action is pending may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense."

10. Courts interpreting Rule 26(c) of the Federal Rules of Civil Procedure, which is in all relevant respects identical to its Maine counterpart, generally contemplate broad, public discovery but do not permit the misuse of the judicial system in order to disseminate information that has been obtained through pretrial discovery. *See, e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199 (1984) (rejecting the plaintiff's contention that a protective order offends

the First Amendment when the order is limited to the context of pretrial civil discovery and does not restrict the dissemination of the information it gained from other sources).

11. For example, in *Baker v. Buffenbarger*, the United States District Court for the Northern District of Illinois held that the plaintiff's request for a protective order fell squarely within Rule 26(c) where evidence indicated that the plaintiff's attorney refused to agree to limit the use of defendant's deposition transcript to the subject lawsuit and where plaintiff's attorney admitted his intent to disseminate the deposition transcript. 2004 WL 2124787 (N.D. Ill. Sept. 22, 2004). In *Baker*, prior to the subject depositions, defense counsel inquired as to the purpose of videotaping the depositions. *Id.* at *1. When the plaintiffs' counsel responded that perhaps the plaintiffs would send the videotapes to the media or post the transcripts on the internet, defense counsel requested that the use of the transcripts and videotapes be limited to purposes directly related to the lawsuit. *Id.* The plaintiffs' counsel declined, asserting that the public had a right to access the materials and that the plaintiffs were free to do as they see fit with any materials obtained during discovery. *Id.* The court opined that litigants do not have an absolute right to do whatever they choose with discovery materials. Where the evidence indicates that a litigant intends to use discovery materials for a purpose unrelated to settlement or trial preparation, but instead to embarrass the party moving for a protective order, the moving party's request for a protective order falls squarely within Rule 26(c). *Id.* at *2.

12. Here, the sole remaining issue is Plaintiff's damages. Notwithstanding, Mr. Cox deposed Mr. Stephan primarily concerning GMACM's and Mr. Stephan's procedures for executing affidavits in foreclosure matters. By the time that Plaintiff's counsel received a copy of the deposition transcript, Mr. Cox had already disseminated the transcript to an attorney in Florida who, Mr. Cox acknowledged, posted the transcript on the internet. Plaintiff has reasonable grounds for concluding that Mr. Weidner is the attorney to whom Mr. Cox disclosed

the transcript and that Mr. Weidner posted the transcript to his blog spot for purposes of embarrassing Mr. Stephan and GMACM. However, it is irrelevant whether or not Mr. Weidner is the attorney to whom Mr. Cox disclosed the transcript because one thing is clear -- Mr. Cox obviously did not disclose the transcript for purposes relating to settlement or trial preparation in this lawsuit.

13. In *Damiano v. Sony Music Entertainment, Inc.*, the United States District Court of the District of New Jersey upheld a confidentiality order entered four years earlier which prohibited the plaintiff from posting confidential discovery materials on various websites, disseminating such confidential information via e-mail and in chat rooms, and offering such materials for sale. 2000 WL 1689081, *2 (D. N.J. Nov. 13, 2000). Noting that a confidentiality order may be granted at any stage of the lawsuit, including settlement, so long as it is supported by good cause, the court held that the subject confidentiality order did not violate the plaintiff's First Amendment right to speak about his claim with whomever he so desires so long as the discovery materials were not exploited for "publicity, profit or collateral gain." *Id.* at *11.

14. Exploiting Mr. Stephan's deposition transcript is exactly what has occurred here. Mr. Cox has exceeded merely discussing his claims with other attorneys but, instead, has provided to at least one other attorney Mr. Stephan's deposition transcript which was subsequently posted on the internet for the ultimate purpose of publicity and profit for the posting attorney. Although Mr. Stephan's deposition transcript may not be confidential, as were the discovery materials in the *Damiano* case, the transcript still should not be used to make a profit for attorneys with whom Mr. Cox converses.

15. Accordingly, Plaintiff asks that the Court prohibit Defendant and her counsel from disseminating discovery materials for purposes unrelated to trial preparation, trial or settlement of this particular lawsuit.

16. Plaintiff also requests that any order by the Court be applied retroactively so as to protect information already obtained through discovery from being disseminated inappropriately.

17. Furthermore, Plaintiff requests that sanctions be entered against Mr. Cox. Specifically, Plaintiff requests that Mr. Cox be required to reimburse Plaintiff for all fees and costs associated with filing this motion for protective order. As a consequence of his improper conduct, Mr. Cox should be barred from using Mr. Stephan's deposition transcript in his other cases against GMACM. Plaintiff is aware that Mr. Cox has attached this deposition transcript to a brief he filed in the case captioned *U.S. Bank National Association v. Ciraldo,* Civil Docket No. RE-10-04 pending in Maine Superior Court, Waldo County.

III. CONCLUSION

Despite having previously promised Plaintiff's counsel that he would abide by Maine's Rules of Civil Procedure, Mr. Cox admittedly disclosed Mr. Stephan's deposition transcript to an attorney in Florida who subsequently posted the transcript on the internet. The use of the deposition transcript has caused undue annoyance, embarrassment and oppression to Plaintiff and Mr. Stephan, not to mention other employees of GMACM who are now reluctant to provide deposition testimony for fear the testimony will be posted on various blog spots. For these reasons, Rule 26(c) warrants the entry of a protective order prohibiting the dissemination of discovery materials obtained in this case. Plaintiff respectfully requests the Court to enter such a protective order which would apply to all discovery materials, including the use of Mr. Stephan's deposition transcript. Plaintiff requests such other and additional relief that the Court deems appropriate.

Dated at Portland, Maine, this 25th day of June, 2010

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Attorneys for Plaintiff Federal National Mortgage Association and Parties-in-Interest GMAC Mortgage, LLC d/b/a DiTech, LLC.com and Bank of America, NA

NOTICE

Matters in opposition to this Motion pursuant to Me. R. Civ. P. 7(c) must be filed not later than 21 days after the filing of this motion unless another time is provided by the Maine Rules of Civil Procedure or by the Court. Failure to file timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.