

Recent Developments in Residential Foreclosure Litigation  
Pertinent Case-Law and Statutes

**Federal Court Cases:**

*Marty v. Mortgage Electronic Registration Systems, Inc.*, 2010 WL 4117196 (D. Utah 2010)  
(Judge Waddoups)

*Upperman v. Deutsche Bank National Trust Co.*, 2010 WL 1610414 (E.D. Va. 2010)

*Larota-Florez v. Godman Sachs Mortgage Co.*, 2010 WL 1444026 (E.D. Va. 2010)

*Burnett v. Mortgage Electronic Registration Systems, Inc.*, 2009 WL 3582294 (D. Utah 2009)  
(Judge Kimball)

*Wareing v. Meridias Capital, Inc. et al.*, 2011 WL 997215 (D. Utah 2011) (Judge Stewart)

*Wade v. Meridias Capital, Inc.*, 2011 WL 997161 (D. Utah 2011) (Judge Sam)

*Rodeback v. Utah Financial et al.*, 2010 WL 2757243 (D. Utah 2010) (Judge Campbell)

**State Court Cases:**

*CPA v. JPMorgan Chase Bank, N.A.*, Memorandum and Decision, Third District Case No. 100404018 (Judge Stone 2011)

*Cohen v. JPMorgan Chase Bank et al.*, Memorandum Decision and Order, Third District Case No. 100500889 (Judge Kelly 2011)

*Evans v. Intermountain Mortgage Co.*, Order, Third District Case No. 100923044 (Judge Quinn 2011)

*U.S. Bank, N.A. v. Ibanez*, 941 N.E.2d 40 (Mass. 2011)

*Webb v. Citimortgage, Inc.*, 2011 WL 1481010 (Utah Fourth District Court, Judge Steven L. Hansen, April 18, 2011)

**Statutes:**

Utah Code § 57-1-21 (S.B. 261)

Utah Code § 57-1-24.5 (S.B. 261)

MAR 24 2011

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THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY WEST JORDAN DEPT.  
WEST JORDAN DEPARTMENT, STATE OF UTAH

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CPA )  
 ) Memorandum  
 ) and  
vs ) Decision  
 )  
 ) Case: 100404018  
J P Morgan Chase Bank National ) Judge Andrew Stone  
 )  
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Before the Court are several papers stemming from the Court's prior Memorandum decision dated November 29, 2010. Plaintiff has filed a petition to rehear that decision and the parties have exchanged briefing on that motion. Plaintiff's Petition is based in part on a pending Rule 56(f) affidavit, seeking to continue the Motion for Summary Judgment until specified discovery may be had. Summary Judgment was granted by the Memorandum Decision after the Court converted Defendant's Motion to Dismiss to a Motion for Summary Judgment pursuant to Rule 12(b) in a decision dated August 18, 2010. After that decision, the parties were given the opportunity to address the Motion as one made under Rule 56. The Memorandum Decision of November 29, 2010 decided the case on that basis. Defendant, pursuant to the Memorandum Decision has submitted a proposed Order, as well as a proposed form of Judgment.

Since the Memorandum Decision, this case has been re-assigned to the undersigned. In addressing the above pending matters, the undersigned has reviewed all matters submitted to the Court in connection with Defendant's original Motion to Dismiss, all matters submitted to the Court after the Court converted that motion to a Motion for Summary Judgment, including Plaintiff's Rule 56(f) Affidavits and memoranda filed by both parties in connection with that filing, as well as the audio transcript of the August 16, 2010 hearing held on the original Motion To Dismiss. Having reviewed all these materials, the Court is now prepared to rule on the pending matters.

This case involves a trust deed ("Trust Deed") on real estate and accompanying promissory note (the "Note"). While multiple notes were originally at issue, this action concerns one that was executed, along with the Trust Deed, by Plaintiff's alleged predecessor in interest

with respect to title to the subject property. These were executed in connection with a loan made by Washington Mutual Bank. The original Trustor under the Trust Deed and Borrower under the Note later purported to quit claim the property to the Plaintiff here. Defendant J.P. Morgan Chase Bank ("Chase") is the current holder of the Note, evidently (though not, as explained below, necessarily) through a sale of the assets of Washington Mutual Bank FSB.

As the Court recognized in its prior Memorandum Decision, there are three critical undisputed facts in this case that bear repeating:

1. The loan in question is in default.
2. Chase purchased the loan and note when it purchased all of Washington Mutual's assets.
3. Chase has possession of the endorsed-in-blank original note.

Plaintiff's Motion for Reconsideration takes issue with these facts. First, Plaintiff questions whether the loan is actually in default, suggesting that the ability to enforce the note has somehow been transferred away via securitization of the note. Second, Plaintiff questions whether the note was purchased when Chase purchased "all of" Washington Mutual's assets. Plaintiff provides no explanation as to how these particular assets might have been left out of those purchased, and does not take issue with the fact that Chase now possesses the Note. Third, Plaintiff dismisses the possession of Chase of the endorsed in blank original note by suggesting that perhaps Chase holds it only as a custodian, and requests discovery to determine what Chase's rights might be by virtue of its possession of the note.

Plaintiff's arguments are answered by statute. Utah's Uniform Commercial Code defines who is entitled to enforce an instrument such as the note at issue in this case:

"Person entitled to enforce" an instrument means the holder of the instrument ... A person may be a person entitled to enforce the instrument even though he is not the owner of the instrument or is in wrongful possession of the instrument.

Utah Code Ann. § 70A-3-301. Plaintiff invites the Court to speculate that Chase may be a mere custodian of the note. The statute does not contemplate such speculation, nor do the standards on a motion to dismiss or a motion for discovery under rule 56(f) require it. Chase's possession of the note resolves the question whether the loan has been validly called into default, makes moot the question of how Chase came to possess the note, and entitles Chase to enforce its terms. Moreover, because the security follows the debt under Utah Code Ann. § 57-1-35, Chase has the benefit of the trust deed securing the note.

Plaintiff asserted four separate claims. First, Plaintiff sought a declaratory judgment based

on estoppel, alleging the conduct of certain servicers of the notes at issue in this case, as the agents of the Note holder, bars Chase from enforcing the Note and Trust Deed. The Court questions whether this is even a cognizable claim. No reliance by Plaintiff on Defendant or its agents' actions is asserted. Though Plaintiff alleges what it views as the failure of certain servicers to disclose Chase's ownership of the note, Plaintiff offers no explanation of how such actions can invalidate the rights under the Note and Trust Deed. With respect to any asserted rights of the Borrower under the Note, Plaintiff is not a party thereto. In any event, the Court holds that no facts alleged in this claim that would justify setting aside the Note or the Trust Deed or declaring them unenforceable. On this basis the First Cause of Action was properly dismissed on Summary Judgment.

The Second Cause of Action seeks declaratory judgment that Chase may not enforce the Note or Trust Deed based upon asserted violations of Utah Code Ann. § 57-1-22 regarding the appointment of successor trustees. In addition, this claim challenges the asserted securitization of the Note. Neither the Complaint nor Plaintiff's briefing offers any explanation of how the alleged improper filing of a substitution of Trustee in conjunction with the filing of a Notice of Default has affected Plaintiff's rights, or how securitization affects the rights under the Note. And again, Plaintiff is not a party to or successor to any rights under the Note. Whether viewed under the lens of a Rule 12(b)(6) motion, a summary judgment motion, or a Rule 56(f) motion for continuance, the Court is not required to indulge in speculation as to what may have been done with respect to the Note in the supposed securitization process. Utah law rejects Plaintiff's theory that securitization separates the Trust Deed from the underlying Note. Utah Code Ann. § 57-1-35. Moreover, the Utah Legislature has set out a detailed method for the protection of Trustors and their successors, in Utah Code Ann. §§ 57-1-31 and 57-1-31.5. In this Cause of Action, Plaintiff complains of an inability to discharge the Note's obligations. These complaints ignore these statutory provisions. The Court rejects the notion that mere allegation of "securitization" somehow overcomes Utah law specifying the rights of a holder of the Note, Utah law that security follows the underlying debt, or Utah law setting forth the remedies for owners of land subject to Trust deeds securing notes in default. Whatever collateral agreements a holder may have entered with respect to securitization (if any), Utah law says that the right to enforce the note rests with the holder, and the security follows that underlying debt. For these reasons, summary judgment was appropriate on the Second Cause of Action.

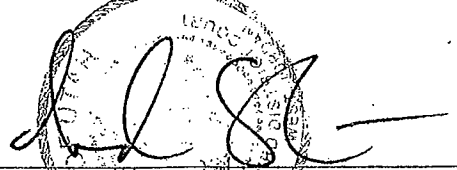
The Third Cause of Action is for Quiet Title based on these same theories, and the Fourth Cause of Action is for refund of attorney's fees and other fees based on the same theories. For the reasons stated above, summary judgment was properly granted on these claims.

The Court is mindful that Plaintiff, in response to the Court having converted this Motion to Dismiss to a Motion For Summary Judgment, has submitted a Rule 56(f) affidavit seeking discovery on whether the note in question was securitized, and whether Chase holds the note as a custodian. As can be seen from the above discussion, the Court's decision is not based on a determination that the Note was or was not, in fact, securitized, or that Chase is or is not holding the Note as a custodian. Chase has the right to enforce the note as its holder. Discovery will not

advance the case and a continuance for purposes of discovery is not warranted.

The Motion to Reconsider is denied. The Motion for a Continuance under Rule 56(f) is denied. Summary Judgment is granted to Defendant. The Court will sign the Judgment proposed by Defendant and no further Order is necessary.

Dated 21<sup>st</sup> day of March, 2011

  
\_\_\_\_\_  
Judge Andrew Stone

A circular court seal is partially visible behind the signature. The seal contains the text "COURT OF APPEALS" and "STATE OF MISSISSIPPI".

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FILED BY DS

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

ALLAN COHEN,

Plaintiffs,

v.

JP MORGAN CHASE BANK, a New York  
Corporation, BANK OF AMERICA, N.A.;  
MARLON L. BATES as successor trustee;  
and DOES 1-5,

Defendants.

**MEMORANDUM DECISION  
AND ORDER**

**(a) GRANTING LENDERS'  
MOTION TO DISMISS;  
(b) GRANTING TRUSTEE'S  
MOTION TO DISMISS; AND  
(c) DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT**

Case No. 100500889

Judge Keith A. Kelly

On May 19, 2011, the above matter came before the Court on the following motions filed by the parties: (a) the Motion to Dismiss filed on December 22 & 23, 2010 by lender Defendants JP Morgan Chase ("Chase") and Bank of America ("BofA") (collectively "Lenders"); (b) the Motion to Dismiss filed on November 24, 2010 by Defendant Marlon L. Bates ("Bates"); and (c) the Motion for Summary Judgment filed on January 7, 2011 by Plaintiff Allan Cohen ("Plaintiff" or "Cohen").

For the reasons discussed below, the Court concludes that the Lenders' Motion to Dismiss should be granted based upon the failure of all of Plaintiff's claims as a matter of law.

Because of this, it follows that the Court should dismiss all claims against the trustee Bates, who is named as a co-defendant on essentially the same claims filed against the Lenders. Further, it follows that, based upon the dismissal of all of Plaintiff's claims, Plaintiff's Motion for Summary Judgment should be denied.

## **I. BACKGROUND FACTS**

In this case, Plaintiff alleges that he borrowed \$2.8 million from Washington Mutual ("WaMu"), and that he gave WaMu a Trust Deed secured by his property in connection with the transaction. (Complaint ¶¶ 8-10.) Plaintiff further alleges that Chase is the "purchaser of the loans and other assets of Washington Mutual Bank . . . from the Federal Deposit Insurance Company ('FDIC')," and that BofA is the "purported successor in interest in Cohen's deed of trust." (*Id.* ¶¶ 2-3.) Plaintiff admits that he has been in default in his loan payments since April 2010. (*Id.* ¶ 13.)

Plaintiff further alleges that, on June 23, 2010, a Notice of Default under the Trust Deed was filed by Bates, the purported successor trustee under the Trust Deed. (*Id.* ¶ 14.) Then, on July 15, 2010, a Notice of Assignment of Trust Deed and Note was recorded as having been executed by Chase. (*Id.* ¶ 14.) The Assignment gives notice that Chase has assigned to BofA all beneficial interest under the Trust Deed together with the Note. (*Id.* ¶ 21.) In addition, Plaintiff alleges that, on July 10, 2010, a Substitution of Trustee was recorded as having been executed for BofA, appointing Bates as successor trustee and confirming all actions taken on the beneficiary's behalf – which actions include filing the June 23, 2010 Notice of Default. (*Id.* ¶¶ 21-23.)

## **II. PLAINTIFF'S CLAIMS**

In his First Claim, Plaintiff seeks a "declaratory judgment that Bates lacks authority to foreclose on Plaintiff's Property," based upon arguments (a) that Defendants cannot prove the underlying transaction allowing the trustee's sale (*id.* ¶¶ 33-39); (b) that the Substitution of Trustee is not signed by all of the beneficiaries as required by Utah Code Ann. § 57-1-22(2)(d) (*id.* ¶ 31); and (c) that the underlying Notice of Assignment and Substitution of Trustee are void because they were the product of fraud or mistake (*id.* ¶¶ 13-18, 21-23, 25-26 & 32).

In his Second Claim, Plaintiff claims negligent misrepresentation based upon statements, actions, and procedures of WaMu at the time Plaintiff originally borrowed \$2.8 million from WaMu. (*Id.* ¶¶ 42-48.)

In his Third Claim, Plaintiff makes general allegations of mortgage fraud. (*Id.* ¶¶ 50-54.)

Finally, in his Fourth Claim, Plaintiff claims that he entitled to an order of the Court quieting title to him because his Note and Trust Deed have been “split,” thereby invalidating the Trust Deed.

### **III. LENDERS’ MOTION TO DISMISS**

This Court will first address the Lenders’ Motion to Dismiss, filed December 22 & 23, 2010 pursuant to Utah R. Civ. P. 12(b)(6). After first considering the applicable standard of review, this Court will address Plaintiff’s claims in the following order: Fourth, Second, Third and First.

#### **A. Standard of Review**

The Lenders move this Court to dismiss Plaintiffs’ action pursuant to Utah R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. A Rule 12(b)(6) dismissal is appropriate only where the Court concludes that the plaintiff has failed to state a claim upon which relief can be granted; where it appears beyond a doubt that the plaintiff can prove no facts to support its claim that would entitle it to relief. *See Tuttle v. Olds*, 2007 UT App 10, 14, 155 P.3d 893 (2007). The Court must accept all factual allegations made in the complaint as true and draw all reasonable inferences in a light most favorable to the plaintiff. *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991) (internal citation omitted).

In claims for fraud or mistake, however, Rule 9(b) provides: “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Thus, claims based upon fraud or mistake are subject to dismissal if not pleaded with particularity. *See, e.g., Coroles v. Sabey*, 2003 UT App 339 ¶¶ 21-31, 79 P.3d 974. The Rule 9(b) pleading requirement for pleading fraud “should not be understood as limited to allegations of common-law fraud. The purpose of that requirement dictates that it reach all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by the term ‘fraud’ in its broadest dimension.” *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972 (Utah 1982).

Since the Lenders’ Motion is filed pursuant to Utah R. Civ. P. 12(b)(6), if matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties are to be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” *See* Utah R. Civ. P. 12(b).

The Court applies these legal standards each of Plaintiff’s claims, as stated below.

B. Fourth Claim for Relief: Quiet Title based upon Note/Trust Deed Split

In his Fourth Claim, Plaintiff alleges that he is entitled to “an order of the Court nullifying the recorded Chase/BofA Trust Deed and quieting title to the Property in favor of the Plaintiff.” (Complaint ¶ 62.) The basis for this claim is this chain of logic:

a. Plaintiff alleges that the Lenders “have no valid recorded interest in the Property.” (*Id.* ¶ 58.)

b. Plaintiff then claims that “the recorded Trust Deed is a nullity unless there is a valid recorded assignment transferring the security interest: ‘The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose . . . .’” (*Id.* ¶ 59 (quoting a Missouri Court of Appeals decision)).

c. Thus, Plaintiff alleges that “the Property is encumbered by a Trust Deed which is null and void, but is clouding title to the Property.” *Id.* ¶ 60.

This is the classic “split the note” argument, alleging that, if a trust deed is not properly transferred along with the note by means of a “valid recorded assignment,” then the trust deed is “null and void” by having been split from the note.

Plaintiff’s “split the note” argument is barred by Utah Code Ann. § 57-1-35, which states: “The transfer of any debt secured by a trust deed shall operate as a transfer of the security therefor.”

Under Section 57-1-35, when a note is transferred, then the trust deed securing that note is automatically transferred as part of the same transaction. As a result, there is no need for a separate “valid recorded assignment” of a trust deed in order for that trust deed to transfer when the note it secures is transferred. Unlike the apparent case in Missouri (as claimed by Plaintiff), Utah law does not permit the split of a note from the trust deed that secures it.

Rejecting this identical “split the note” argument, the U.S. District Court for Utah explains that, under Section 57-1-35, “each successor to the note receives the benefit of the security. Utah Code section 57-1-35 makes it impossible to split the note from the security interest. Therefore, the Trust Deed is valid even if the note changed ownership.” *Rodeback v. Utah Financial*, Case No. 1:09-cv-00134-TC, 2010 U.S. Dist. LEXIS 69821, \*8-9 (D. Utah July 13, 2010), *accord Marty v. Mortgage Elec. Registration Sys.*, Case No. 1:10-cv-00033-CW, 2010 U.S. Dist. LEXIS 111209, at \*12-18 (D. Utah Oct. 19, 2010) (rejecting the argument that the “splitting” of the note and the trust deed destroys the power to appoint a trustee and foreclose, on the grounds that such an argument was erroneously based upon an inapposite line of case law interpreting dissimilar statutory law from other jurisdictions).

At the same time, the allegations of the Complaint make clear that, absent the “split the note” argument, Plaintiff makes no claim that the Trust Deed is invalid. Plaintiff alleges that he borrowed \$2.8 million from Washington Mutual (“WaMu”), and that he gave WaMu a valid Trust Deed in connection with the transaction, even attaching the actual Note and Trust Deed. (Complaint ¶¶ 8-10.) Plaintiff further alleges that Chase is the “purchaser of the loans and other assets of Washington Mutual Bank . . . from the Federal Deposit Insurance Company (‘FDIC’),” and that BofA is the “purported successor in interest in Cohen’s deed of trust.” (*Id.* ¶¶ 2-3.) Nowhere in the Complaint or the Fourth Claim is any allegation that the loan was repaid or that the Trust Deed was reconveyed. In fact, to the contrary, Plaintiff admits that he has been in default in payments since April 2010. (*Id.* ¶ 13.)<sup>1</sup>

In sum, the Plaintiff makes no valid legal argument that the Trust Deed is “null and void,” while alleging facts making it clear that Plaintiff has given a valid Trust Deed to the property. Thus, as a matter of law, the Fourth Claim of quiet title by invalidating the Trust Deed should be dismissed with prejudice.

C. Second Claim: Negligent Misrepresentation in Original Lending Transaction

Plaintiff claims negligent misrepresentation by asserting that, at the time Plaintiff borrowed money from WaMu, the lender made various negligent misrepresentations to Plaintiff. (Complaint ¶¶ 43-48.)

In support of their Motion to Dismiss, the Lenders included reference to a September 25, 2008 Purchase and Assumption Agreement (“P&A Agreement”), under which the FDIC sold and transferred the assets of WaMu to Chase, including the Note and Trust Deed in this matter. (Lender’s 12/22/10 Memorandum at pp. 2-3, ¶¶ 3-4.) The Lenders point to paragraph 2.5 of the P&A Agreement, which provides that Chase did not assume any liabilities of WaMu that are “claims for payment of or liability to any borrower . . . related in any way to any loan or commitment to lend made by [WaMu]” prior to September 25, 2008, when WaMu was placed into FDIC receivership, “or otherwise arising in connection with [WaMu]’s lending or loan purchase activities.” (*Id.* at p. 3, ¶ 4.)

At oral argument on this Motion on May 19, 2011, the Court had determined to exclude evidence of the P&A Agreement under Utah R. Civ. P. 56 on grounds that its terms were not supported by admissible evidence. On further review, however, the Court reconsiders and

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<sup>1</sup> Further, Plaintiff cannot succeed in a quiet title claim merely by alleging that the Trust Deed is invalid. The Utah Court of Appeals has held: “To succeed in an action to quiet title to real estate, a plaintiff must prevail on the strength of his own claim to title and not the weakness of defendant’s title or even its total lack of title.” *Collar v. Nagle Construction*, 2002 UT App 306, ¶ 18, 57 P.3d 603 (citation omitted); accord *Marty v. Mortgage Elec. Registration Sys.*, Case No. 1:10-cv-00033-CW, 2010 U.S. Dist. LEXIS 111209, at part IV (D. Utah Oct. 19, 2010) (rejecting quiet title claim based upon alleged defects in trust deed).

reverses this decision. After the Lenders referred to the P&A Agreement in their memorandum (*id.* at pp. 2-3, ¶¶ 3-4), Plaintiff did not object to the Court's admission of or consideration of the P&A Agreement. Rather, Plaintiff simply argues that the P&A Agreement does not apply to Plaintiff's claims. (*See* Plaintiff's 1/6/11 Opposition at pp. 15-17.) Thus, this Court will consider the P&A Agreement in support of the Lenders' motion.<sup>2</sup>

On reviewing the Second Claim, the Court concludes that, on its face, each of the allegations supporting the negligent misrepresentation claims deal with the original loan transaction between Plaintiff and WaMu, which is alleged to have occurred in March of 2007 (Complaint ¶¶ 8-10 & Exhibits 1-3). Plaintiff alleges (a) that the lender represented to Plaintiff that Plaintiff would be able to repay his loan (Complaint ¶ 43); (b) that the Lender did not sufficiently verify that Plaintiff would be able to repay the loan because the lender relied on Plaintiff's statement of his income without seeking underlying documentation (*id.* ¶ 44.a); (c) that the risk of repayment was high because monthly payments would adjust upwards (*id.* ¶ 44.b); (d) that the lender paid \$200,000 cash to Plaintiff as part of the loan transaction (*id.* ¶ 44); (e) that somehow the lender "knew or should have known that the terms of the mortgage would lead to an inevitable default" (*id.* ¶ 46); (f) that the lender represented to Plaintiff that the value of his home would increase (*id.* ¶ 47); and (g) that Plaintiff relied on the lender's representations that it would not create loan terms that Plaintiff would not be able to repay (*id.* ¶ 48).<sup>3</sup> Plainly, each of these claims relates to the March 2007 loan transaction, which occur prior to the September 25, 2008 date in the P&A Agreement. Thus, on its face, the Second Claim does not relate to the conduct of Chase or BofA when they later obtained the Note and Trust Deed. (Complaint ¶¶ 2-3.)

Section 2.5 of the P&A Agreement plainly bars claims against Chase based upon the lending practices of WaMu prior to the time Chase purchased the WaMu assets (including Plaintiff's Note and Trust Deed) from the FDIC. Since Plaintiff acknowledges and does not object to admission of the P&A Agreement, the Court considers and applies this agreement. On its face, the negligent misrepresentation allegations of the Second Claim are "claims for . . . liability to any borrower . . . related in any way to any loan or commitment to lend made by [WaMu]" prior to September 25, 2008, when WaMu was placed into FDIC receivership, "or

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<sup>2</sup> Under Utah R. Civ. P. 12(b), inclusion of the P&A Agreement leads this Court to treat the Lender's Motion on the Second Claim as one for summary judgment. Thus, the Court includes and considers all materials that Plaintiff has submitted in opposition to the Motion, including Plaintiff's requests for judicial notice. The Court notes that, in addition to not objecting to inclusion of the P&A Agreement, the Plaintiff did not oppose the Lenders' Motion by seeking leave for discovery under Utah R. Civ. P. 56(f) or otherwise argue that he is not able to oppose the Lenders' Motion.

<sup>3</sup> These claims, on their face, seem implausible at best – especially when they involve a borrower sophisticated enough to engage in a seven-figure loan transaction. The implausibility of these assertions in the Second Claim, however, is not the basis for this Court's ruling.

otherwise arising in connection with [WaMu]’s lending or loan purchase activities.” (Lender’s 12/22/10 Memorandum at p. 3, ¶ 4.) Thus, Plaintiff’s Second Claim is barred by Section 2.5 of the P&A Agreement as a matter of law.

Consistent with this Court’s ruling, the U.S. District Court for Utah applied this identical provision of the P&A Agreement related to Chase’s purchase of WaMu’s assets from the FDIC, explaining:

Section 2.5 of the [P&A] Agreement clearly establishes that any borrower claims ‘related in *any* way to *any* loan’ made by WaMu prior to September 25, 2008, were not assumed by Chase when it purchased the assets of WaMu from the FDIC Receiver. The Loans were made prior to September 25, 2008, so any claims arising from the Loans may not be maintained against Chase. Chase is not a successor to WaMu for liabilities related to the loan to Plaintiff, and there is no reasonable probability that Plaintiff will be able to muster factual support for a claim that Chase is a legitimate successor. The Court will, therefore, grant Chase’s Motion to Dismiss.

*Grealish v. Washington Mutual Bank*, Case No. 2:08-cv-763-TS, 2009 WL 2170044 (D. Utah July 20, 2009) (emphasis in original).

D. Third Claim: Mortgage Fraud Barred for Failure to Plead with Particularity

In his Third Claim, Plaintiff alleges in vague allegations that the lenders committed mortgage fraud. (Complaint ¶¶ 49-54.) At oral argument, Plaintiff conceded that these vague fraud allegations did not meet the specificity requirements of Utah R. Civ. P. 9(b), which requires: “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be state with particularity.” Because Plaintiff admits that he does not meet these Rule 9(b) requirements, his Third Claim for mortgage fraud is dismissed without prejudice. *See, e.g., Coroles v. Sabey*, 2003 UT App 339, ¶¶ 25-30, 79 P.3d 974 (affirming dismissal of fraud allegations that did not satisfy Utah R. Civ. P. 9(b)).

E. First Claim: Declaratory Judgment based upon Arguments regarding Note-Proving, All-Beneficiaries, and Fraud/Mistake

In his First Claim, Plaintiff seeks a declaratory judgment that the trustee “Bates lacks authority to foreclose on Plaintiff’s Property.” (Complaint ¶ 40.) Plaintiff bases this on three arguments: first, a “show me the note” or “prove the transaction” argument (*id.* ¶¶ 33-39); second, an “all beneficiaries” argument (*id.* ¶¶ 31-32); and third, an argument that the underlying Notice of Assignment and Substitution of Trustee are void because they were the product of fraud or mistake (*id.* ¶¶ 13-18, 21-23, 25-26 & 32).

1. “Show me the note” or “prove the transaction” claims

In paragraphs 33-39 of the Complaint, Plaintiff alleges the “show me the note” or “prove the transaction” argument, which has often been rejected under Utah law. He alleges (a) that “the right to enforce a mortgage promissory note requires delivery of the instrument itself to the transferee” (*id.* ¶ 33); (b) that to be a holder of a note, “one must possess the note *and* the note must be payable to the person in possession of the note, or to bearer” (*id.* ¶ 34 (emphasis in original)); (c) that BofA is not the holder of the note (*id.* ¶ 35); (d) that nonholders “must ‘prove the transaction’ by which they acquired the note” (*id.* ¶ 36); and (e) that the lenders “cannot ‘prove the transaction’ by which [they] acquired the Note and Trust Deed” (*id.* ¶¶ 38-39).

The Court is not persuaded by Plaintiffs’ argument that the Lenders must “prove the transaction” by which they purportedly acquired the Note in order to enforce the rights of the original Note holder. Section 22 of the Trust Deed given by Plaintiff provides in relevant part: “The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower.” (Complaint, Exhibit 3 at p. 13 of 24.) Whether held for the original lender WaMu or a party like Chase or BofA that purchased the Note, a trustee’s sale is not an auction to enforce a note, but rather it is the exercise of a power of sale exercisable upon default available to the lender or its successors pursuant to Section 22 of the Trust Deed, as governed by Utah Code Ann. §§ 57-1-19 through 57-1-36. (*Id.*) To carry out a valid trustee’s sale, the trustee and lender (or lender’s successor) must comply with Utah Code Ann. §§ 57-1-19 through 57-1-36, which nowhere require the lender, the trustee, or their agents to “prove the transactions” by which a successor to the original lender obtained rights under the trust deed. Nowhere do these sections require the recording of the actual assignment agreement. Rather, for example, Section 57-1-24 requires the trustee to give notice of default, and Section 57-1-15 requires the trustee to give notice of the sale. But nowhere do these provisions require the beneficiary or trustee to “prove” any underlying assignment transactions between the original lender and a successor. Thus, because the Utah statutes governing trustee’s sales do not require the trustee, lender, or successors to the lender to prove the transaction, this Court rejects Plaintiff’s argument that Chase and BofA cannot move forward with the trustee’s sale in the instant case for want of “proof.” See *Marty v. Mortgage Elec. Registration Sys.*, No. 1:10-cv-00033-CW, 2010 U.S. Dist. LEXIS 111209, at \*18-20 & n.42 (D. Utah Oct. 19, 2010) (rejecting “show me the note” argument); *Maxa v. Countrywide Loans, Inc.*, No. CV10-8076-PCT-NVW, 2010 U.S. Dist. LEXIS 72521, at \*9-14 (D. Ariz. July 16, 2010) (same).

The Court also notes that Plaintiff has failed to demonstrate that the Trust Deed falls under the statutory definition of a negotiable instrument, such that Utah Code Ann. § 70A-3-101, *et seq.*, would apply. The Utah Court of Appeals has held that “trust deeds are not regulated by the Uniform Commercial Code but instead are regulated by *Utah Code sections 57-1-1 through 57-1-44.*” *Bevan v. Boyce*, 2006 UT App 31, 2006 Utah App. LEXIS 45 (unpublished), *accord*

Utah Code Ann. § 70A-9a-109(4)(k) (stating that secured transaction provisions do not apply to transfers of interest or liens on real property).

2. “All of the beneficiaries” argument

In his First Claim, Plaintiff also argues that the Substitution of Trustee is invalid because “[n]either BofA nor any recorded beneficiary by assignment executed, acknowledged or recorded the SOT [substitution of trustee] in favor of Bates.” (Complaint ¶ 32.) He argues that every beneficiary involved in each transfer of the Note and Trust Deed must execute the substitution of trustee. In paragraph 33 of his Complaint, Plaintiff quotes Utah Code Ann. § 57-1-22(2)(d), which states that the substitution shall “be executed and acknowledged by all of the beneficiaries under the trust deed or their successors in interest.”

The Court rejects Plaintiff’s argument that Section 57-1-22(2)(d) requires a substitution of trustee to be signed by every beneficiary who may have been in the chain of title to a particular trust deed. Subpart (2)(d) of Section 57-1-22 should be read in conjunction with Subpart (1)(a), which states that “[t]he *beneficiary* may appoint a successor trustee.” (Emphasis added.) The trust deed statute provides: “‘Beneficiary’ means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest.” Utah Code Ann. § 57-1-19(1) (1988). Once a note and trust deed is transferred from one lender to another, the prior lender ceases to be the current beneficiary of the trust deed, since the transferee receives the benefits of the trust deed. Consistent with this analysis, Section 57-1-22(2)(d) expressly permits the “successors in interest” to prior beneficiaries to execute the substitution of trustee.

Subpart (2)(d) of Section 57-1-22 is properly interpreted to provide that, if there are two or more simultaneous beneficiaries or two or more simultaneous successors under a trust deed, then each of those co-beneficiaries shall sign the substitution of trustee. It does not require the signature of original beneficiary who no longer holds rights under the trust deed. It further does not require the signature of a transferee from original beneficiary who no longer holds rights under the trust deed because of a subsequent transfer. When a trust deed and note are transferred from the original beneficiary to a successor, Section 57-1-22(2)(d) requires the signature of the entity (or the agent for the entity) that then holds rights under the note and trust deed. If there is more than one successor beneficiary simultaneously for a trust deed, then both successor beneficiaries must sign the substitution of trustee Section 57-1-22(2)(d). But if only one successor beneficiary then holds rights under the note and trust deed, then only that single successor beneficiary (or its agent) is required to sign the substitution of trustee.

While the Court’s analysis is based upon the plain language of Utah Code Ann. §§ 57-1-22 & 57-1-19(1), the facts of this case illustrate why Plaintiff’s all-beneficiaries argument does not make practical sense. Here, Plaintiff has alleged (a) that he borrowed \$2.8 million from

WaMu (Complaint ¶¶ 8-9.); (b) that he gave WaMu a valid Trust Deed in connection with the transaction, even attaching the actual Note and Trust Deed (*id.* ¶ 10.); and (c) that Chase is the “purchaser of the loans and other assets of Washington Mutual Bank . . . from the Federal Deposit Insurance Company (‘FDIC’)” (*id.* ¶ 2.). Thus, it is undisputed that the FDIC put WaMu into receivership, and took control of WaMu’s assets – including WaMu’s rights as beneficiary under the Plaintiff’s Trust Deed. As a result, it would be difficult, if not impossible, to obtain a signature from WaMu on a substitution of trustee under Utah Code Ann. § 57-1-22, since WaMu is no longer in business. Thus, Section 57-1-22 is consistent with common sense, which requires only the current beneficiary or beneficiaries of a trust deed (or their agent) to execute the substitution of trustee.

3. Argument based upon fraudulent/mistaken Substitution of Trustee and Notice of Assignment

In his First Claim, Plaintiff further alleges: “Neither BofA nor any recorded beneficiary executed, acknowledged or recorded the SOT [Substitution of Trustee] in favor of [Substitute Trustee] Bates. Therefore, the SOT and the NOD [Notice of Default] are void as a matter of law.” (Complaint ¶ 32.) This argument is based upon the following facts alleged in the Complaint:

13. [Plaintiff] Cohen made the payments on the Note up to the March 1, 2010 payment.

14. On June 23, 2010 a Notice of Default (“NOD”) under the Trust Deed was filed by Bates, the purported successor trustee under the Trust Deed. *See* NOD, attached as Exhibit 4.

15. On July 15, 2010, a Notice of Assignment of [Deed of] Trust and Note (“Assignment”) was recorded as having been executed for Chase, as purchaser of the loans and other assets of WaMu from the FDIC, acting as receiver for WaMu. *See* Assignment, attached as Exhibit 5.

16. The Assignment was signed by “Rus[m]ir Causevic, Foreclosure Officer” of Chase. *Id.* The Assignment states that Rusm[i]r Causevic “acknowledged before [notary public Florina C. Munoz] on July 10, 2010” the Assignment instrument in the county of Duval, State of Florida. *Id.*

17. *Upon information and belief*, Rusmir Causevic did not personally appear before notary Flori[n]a Munoz to execute the Assignment and/or SOT.

18. *Upon information and belief*, Rusmir Causevic did not properly and thoroughly review the Assignment and/or SOT document(s) he executed.

\* \* \*

21. The Assignment gives notice that Chase has assigned all beneficial interest under the Trust Deed together with the Note and the money due and to become due ther[e]on with interest, and all rights accrued or or [sic] to be accrued under Trust Deed to

BofA, as successor by merger to LaSalle bank NA as Trustee for Washington Mutual Mortgage Pass-Through Certificates WaMu Series 2007-0A4. *See* Assignment, *supra*.

22. On July 10, 2010, a Substitution of Trustee (“SOT”) was was [sic] recorded as having been executed for BofA, Trustee for Washington Mutual Mortgage Pass-Through Certificates WaMu Series 2007-0A4, as BofA’s attorney in fact, by Rus[m]ir Causevic, foreclosure officer of Chase. *See* SOT, attached as Exhibit 8.

23. The SOT recites that Bates “is hereby appointed successor t[r]ustee” under the Trust Deed and ratifies and confirms all actions taken on the beneficiary’s behalf. *Id.*

\* \* \*

25. The SOT pu[r]ports to be executed by BofA by Chase, as BofA’s attorney in fact, by Rus[m]ir Causevic, Foreclosure Officer of Chase. *See* SOT, *supra*.

26. *Upon information and belief*, there was no power of attorney and/or corporate resolution form in existence establishing Causevic’s authorization to execute the SOT on behalf of BofA.

(Complaint ¶¶ 13-18, 21-23 & 25-26 (emphasis added).)

Thus, Plaintiff alleges *upon information and belief* that two key documents recorded on July 15, 2010 – the Notice of Assignment and Substitution of Trustee – are invalid because (a) Rusmir Causevic did not actually appear and sign those documents before a notary; (b) he did not review those documents; and (c) he had no authority to sign those documents on behalf of BofA. Effectively, Plaintiff is alleging *upon information and belief* that the Notice and Assignment and Substitution of Trustee were fraudulently or, at a minimum, mistakenly recorded. Thus, based on this fraud or mistake, he claims that the Notice of Default is invalid, because no proper Substitution of Trustee was recorded giving Bates authority to record the Notice of Default.

The basis for Plaintiff’s “information and belief” that Mr. Causevic committed fraud or mistake appears in paragraphs 19 & 20 of the Complaint. There, Plaintiff refers to news articles stating (a) that major lenders, including BofA have falsely sworn that “they physically possessed note obligations entitling them to foreclose when, in fact, they lacked or could not prove possession of the instruments,” (Complaint ¶ 19); and (b) that the same “major lenders and servicing institutions have in recent weeks halted foreclosures on the additional basis of deposition testimony of employee ‘robo-signatories’: persons who signed thousands of title documents per day without even so much as a cursory review of the documents’ contents so as to make their signature an unverified affidavit,” (*Id.* ¶ 20). In opposition to the Lenders’ Motion to Dismiss, Plaintiff asks the Court to take judicial notice of additional news reports consistent with these allegations, and the Court has taken notice of those additional reports.

Nowhere, however, does Plaintiff make any particular allegation that he has any information that Rusmir Causevic or those notarizing his signatures committed fraud or made a

mistake in signing and recording the Substitution of Trustee and Notice of Assignment. He merely cites information and belief from general news articles. In effect, by only alleging *upon information and belief* that the Notice of Assignment and Substitution of Trustee were fraudulently signed and recorded, Plaintiff appears to acknowledge that he has no particular information that they were the product of fraud or mistake.

Lack of particularity in pleading fraud and mistake as required by Rule 9(b) is a basis for dismissing such claims. *See, e.g., Brown v. Wanlass*, 2001 UTApp 30, ¶ 10, 18 P.3d 1137 (affirming summary judgment dismissing fraud claim where the claimant “failed to allege specific facts that would support a claim of fraud”). In particular, dismissal under Rule 9(b) is appropriate where the plaintiff fails to allege facts in its complaint supporting its claim that the defendant personally committed fraud. *See, e.g., Armed Forces Insurance Exchange v. Harrison*, 2003 UT 14, ¶ 21, 70 P.3d 35.

Lack of pleading with particularity regarding that this particular Notice of Assignment and Substitution of Trustee are fraudulent or mistaken is significant in light of Utah Code Ann. § 54-4a-4, creates a presumption that those two recorded documents are valid and effective, as follows:

- (1) *A recorded document creates the following presumptions regarding title to the real property affected:*
  - (a) *the document is genuine and was executed voluntarily by the person purporting to execute it;*
  - (b) *the person executing the document and the person on whose behalf it is executed are the persons they purport to be;*
  - (c) *the person executing the document was neither incompetent nor a minor at any relevant time;*
  - (d) *delivery occurred notwithstanding any lapse of time between dates on the document and the date of recording;*
  - (e) *any necessary consideration was given;*
  - (f) *the grantee, transferee, or beneficiary of an interest created or described by the document acted in good faith at all relevant times;*
  - (g) *a person executing a document as an agent, attorney in fact, officer of an organization, or in a fiduciary or official capacity:*
    - (i) *held the position he purported to hold and acted within the scope of his authority;*
    - (ii) *in the case of an officer of an organization, was authorized under all applicable laws to act on behalf of the organization; and*
    - (iii) *in the case of an agent, his agency was not revoked, and he acted for a principal who was neither incompetent nor a minor at any relevant time;*
  - (h) *a person executing the document as an individual:*
    - (i) *was unmarried on the effective date of the document; or*

(ii) if it otherwise appears from the document that the person was married on the effective date of the document, the grantee was a bona fide purchaser and the grantor received adequate and full consideration in money or money's worth so that the joinder of the nonexecuting spouse was not required under Sections 75-2-201 through 75-2-207;

(i) if the document purports to be executed pursuant to or to be a final determination in a judicial or administrative proceeding, or to be executed pursuant to a power of eminent domain, the court, official body, or condemnor acted within its jurisdiction and all steps required for the execution of the document were taken; and

(j) *recitals and other statements of fact in a document*, including without limitation recitals concerning mergers or name changes of organizations, *are true*.

(2) The presumptions stated in Subsection (1) arise even though the document purports only to release a claim or to convey any right, title, or interest of the person executing it or the person on whose behalf it is executed.

(Emphasis added.)

At the same time, Plaintiff's Complaint alleges that he is in default under his Note that is secured by his Trust Deed, admitting that Plaintiff "made the payments on the Note up to the March 1, 2010 payment." (Complaint ¶ 13.) Thus, his own allegations that he was in default undermine the suggestion that the beneficiary of his Trust Deed acted improperly in recording the Substitution of Trustee ratifying the earlier Notice of Default recorded by Bates.

Thus, in this case, the Court is faced with (a) claims about the fraudulent or mistaken recording of the Notice of Assignment and Substitution of Trustee that are not pleaded with particularity as required by Rule 9(b); (b) a statutory presumption under Utah Code Ann. § 57-4a-4 that the recorded Notice of Assignment and Substitution of Trustee are valid; and (c) allegations in the Complaint supporting the appropriateness of the actions of the beneficiary of Plaintiff's Trust Deed in recording the Notice of Assignment and Substitution of Trustee. Under these circumstances, the Court holds that Plaintiff's claim that the Notice of Assignment and Substitution of Trustee are invalid should be dismissed without prejudice.

#### F. Conclusion: Dismissal of Plaintiff's Claims

Based upon the foregoing, all of Plaintiff's claims should be dismissed. In particular, the dismissal should be entered as follows:

In his First Claim, the following sub-claims should be dismissed with prejudice: (a) Plaintiff's sub-claim that the Lenders must prove the underlying transaction in order to allow the trustee's sale to go forward (*id.* ¶¶ 33-39); and (b) that the Substitution of Trustee is invalid because it was not signed by all of the former and current beneficiaries (*id.* ¶ 31). In his First Claim, the following sub-claim should be dismissed without prejudice based upon a failure to

plead with particularity: Plaintiff's claims of fraud and/or mistake related to the Notice of Assignment and Substitution of Trustee (*id.* ¶¶ 13-18, 21-23, 25-26 & 32).

Plaintiff's Second Claim, should be dismissed with prejudice because it is a claim for negligent misrepresentation based upon statements, actions, and procedures of WaMu at the time Plaintiff originally borrowed \$2.8 million from WaMu, and such claims against Chase and its successor BofA are barred by the P&A Agreement as a matter of law. (*Id.* ¶¶ 42-48.)

Plaintiff's Third Claim should be dismissed without prejudice based upon Plaintiff's failure to plead mortgage fraud with particularity. (*Id.* ¶¶ 50-54.)

Plaintiff's Fourth Claim, Plaintiff claim alleging that the Trust Deed is invalidated because it has been "split" from the Note is dismissed with prejudice.

#### **IV. TRUSTEE'S MOTION TO DISMISS**

Plaintiff joins the trustee Bates on the claims made against the Lenders. Because each of those claims is being dismissed as discussed above, this Court concludes that all Plaintiff's claims against Bates should be dismissed.

#### **V. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Based on the dismissal of all of Plaintiff's claims as discussed above, this Court denies Plaintiff's Motion for Summary Judgment.

#### **VI. ORDER BASED UPON THE FOREGOING RULINGS**

Based upon the foregoing, IT IS HEREBY ORDERED that all of Plaintiff's claims are dismissed. In particular, the dismissal is hereby entered as follows:

In Plaintiff's First Claim, the following sub-claims are hereby dismissed *with* prejudice: (a) Plaintiff's sub-claim that the Lenders must prove the underlying transaction in order to allow the trustee's sale to go forward (*id.* ¶¶ 33-39); and (b) that the Substitution of Trustee is invalid because it was not signed by all of the former and current beneficiaries (*id.* ¶ 31). In Plaintiff's First Claim, the following sub-claim is hereby dismissed *without* prejudice based upon a failure to plead with particularity: Plaintiff's claims fraud and/or mistake related to the Notice of Assignment and Substitution of Trustee (*id.* ¶¶ 13-18, 21-23, 25-26 & 32).

Plaintiff's Second Claim is hereby dismissed *with* prejudice. (*Id.* ¶¶ 42-48.)

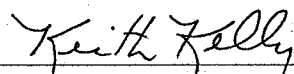
Plaintiff's Third Claim is hereby dismissed *without* prejudice. (*Id.* ¶¶ 50-54.)

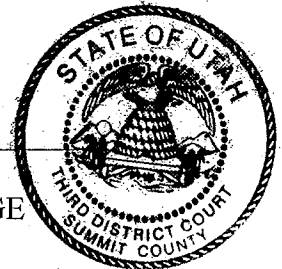
Plaintiff's Fourth Claim alleging that the Trust Deed is invalidated because it has been "split" from the Note is hereby dismissed *with* prejudice.

Based upon these orders, IT IS HEREBY FURTHER ORDERED that the Lenders shall submit a form of final judgment of dismissal for entry by the Court, with blanks for entry of potential amounts for attorney fees and costs for the Lenders, and separate blanks for such amounts for the Trustee Bates. The Lenders and Bates are granted leave to submit a motion for an award of their attorney fees and costs, pursuant to the provisions of the Note and Trust Deed, along with briefing supporting the legal basis for any such award and supporting affidavits in compliance with Utah R. Civ. P. 73(b). In addition, Lenders and Bates are granted leave for submission of any order that may be necessary to remove any *lis pendens* that may have been filed by Plaintiff or his representatives in connection with this litigation. The Court will consider the form of judgment, any orders, and any requests for attorney fees or costs only after appropriate time is permitted for Plaintiff to file any objections and opposing memoranda as permitted under Utah R. Civ. P. 7.

DATED this 25<sup>th</sup> day of May, 2011.

BY THE COURT:

  
\_\_\_\_\_  
KEITH A. KELLY  
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100500889 by the method and on the date specified.

MAIL: ABRAHAM C BATES 4525 WASATCH BLVD STE 300 SALT LAKE CITY, UT 84124

MAIL: JESSE TAYLER FOX 10 E SOUTH TEMPLE SUITE 900 SALT LAKE CITY UT 84133

MAIL: JAMES D GILSON 10 E SOUTH TEMPLE STE 900 SALT LAKE CITY UT 84133

MAIL: JOSEPH A SKINNER 15 W S TEMPLE STE 600 SALT LAKE CITY UT 84101

Date: May 25, 2011

Debbie K. Faust

Deputy Court Clerk

FILED DISTRICT COURT  
Third Judicial District

MAR 10 2011

SALT LAKE COUNTY

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SCOTT R. EVANS and TERESA  
MARIE EVANS,

Plaintiffs,

vs.

INTERMOUNTAIN MORTGAGE COMPANY,  
AURORA LOAN SERVICES, L.L.C.,  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS ("MERS"), JAMES H.  
WOODALL and DOES 1-6,

Defendants.

ORDER

CASE NO. 100923044

DATE: March , 2011

JUDGE: ANTHONY B. QUINN

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The above matter came before the Court on Aurora Loan Service's and MERS' ("Defendants") Motion to Dismiss filed on December 21, 2010. The Court, having carefully considered the Motion and relevant law, hereby rules as follows:

Summary

Defendants move this Court to dismiss Plaintiffs' action pursuant to Utah R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Specifically, Defendants argue that Plaintiffs' Complaint should be dismissed on the grounds

that: (1) Plaintiffs' claims for quiet title and slander of title are based on the erroneous allegation that the promissory note has been split from the deed of trust and title should therefore pass free and clear of any encumbrances to Plaintiffs; and (2) Plaintiffs' claims for a declaratory judgment and breach of trustee's duty incorrectly allege that MERS and Aurora Loan Services, LLC do not have the authority to foreclose on the subject property. This Motion comes before the Court unopposed.

#### Standard of Review

A Rule 12(b)(6) dismissal is appropriate only where the Court concludes that the plaintiff has failed to state a claim upon which relief can be granted; where it appears beyond a doubt that the plaintiff can prove no facts to support its claim that would entitle it to relief. See *Tuttle v. Olds*, 2007 UT App 10, 14, 155 P.3d 893 (2007). The Court must accept all factual allegations made in the complaint as true and draw all reasonable inferences in a light most favorable to the plaintiff. *Munteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991) (internal citation omitted).

#### Discussion

Although not explicitly addressed in Utah, recently the federal courts, including the 10th circuit, have been faced with a plethora of cases addressing the same issues raised by

Plaintiffs in their Complaint, namely that: (1) the promissory note has been split from the deed of trust and title should therefore pass free and clear of any encumbrances to Plaintiffs; and (2) MERS and Aurora Loan Services, LLC do not have the authority to foreclose on the subject property. The Court finds these cases persuasive, instructive and will discuss each with respect to Plaintiffs' causes of action and Defendants' Motion.

In *Marty v. Mortgage Elec. Registration Sys.* the Plaintiff argued that when a note securing a deed of trust was allegedly securitized, there was necessarily a separation of the note from the trust deed securing the property. *Marty v. Mortgage Elec. Registration Sys.*, No. 1:10-cv-00033-CW, 2010 U.S. Dist. LEXIS 111209, at \*12-18 (D. Utah Oct. 19, 2010). The effect of this securitization, according to Plaintiff, was to strip the trust deed from its holder and any authority to appoint the substitute trustee. *Id.* at \*15-16. Thus, the foreclosure process conducted by the substitute trustee was improper. The district court disagreed finding that Plaintiff had offered "no evidence or legal argument that MERS cannot contract for the right and power of foreclosure regardless of who holds the note, or the beneficial interest under the trust deed. *Id.* at \*20-21. Nor does Plaintiff demonstrate that such rights are actually 'lost by transfer of the debt.'" The court explicitly rejected the argument that under Utah Code Ann. § 57-1-35 the transfer of the

note for securitization necessarily resulted in the loss of possession of the trust deed and the authority to foreclose. *Id.* The Court also rejected the argument that the "splitting" of the note and the trust deed destroys the power to appoint a trustee and foreclose, on the grounds that such an argument was erroneously based upon an inapposite line of case law interpreting dissimilar statutory law from other jurisdictions.<sup>1</sup> *Id.* at \*14-18.

Finally, the district court noted that it was inappropriate to rely upon cases where the treatment of trust deeds and mortgages was identical, since under Utah law, the two instruments are distinctive and therefore cases interpreting mortgage law do not necessarily result in the interpretation of trust deed law in a similar fashion. *Id.* For that reason, this Court rejects Defendants' reliance on Utah case law addressing the issue of the mortgage following the note as a matter of law.

Additionally, in *Burnett v. Mortg. Elec. Registration Sys.* the district court found that where, under the terms of the initial transaction, there was an express acknowledgment that MERS retained the right to exercise all interests as nominee for Lender's successors and assigns, including the right to foreclose and/or sell the property, such contractual language gives MERS

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<sup>1</sup>In *Rodeback v. Utah Financial, et al.*, 2010 U.S. Dist. LEXIS 69821, this argument was expressly rejected, the Court holding that Utah Code Ann. § 57-1-35 expressly prevents the note being split from the deed of trust, regardless of whether the note changed ownership.

the right and power of foreclosure "regardless of who holds the note or the beneficial interest under the trust deed." *Burnett v. Mortg. Elec. Registration Sys.*, No. 1:09CV00069DAK, 2009 U.S. Dist. LEXIS 100409, \*10-11 (D. Utah Oct. 26, 2009). Here, as correctly noted by Defendants, the trust deed contains virtually identical language, namely:

Borrower understands and agrees that MERS only holds legal title to the interests granted by the Borrower in the Deed of Trust; but if necessary to comply with laws or customs, MERS (as nominee for Lender and Lender's successors and assigns), has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing or canceling this Deed of Trust.

Thus, Plaintiffs' argument that MERS lacks the authority to sue fails as a matter of law by virtue of the clear contractual language to the contrary.<sup>2</sup>

Additionally, the Court notes that Plaintiff has failed to respond to the instant Motion and the Court sees no reason why the well-reasoned decision by the 10th circuit in *Burnett* should not be persuasive to this Court when the factual similarities are so profound. This is particularly true where, as here, Plaintiffs do not deny that they are in default under the terms of the original note, but are challenging the right by MERS to

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<sup>2</sup>Additionally, the Court adopts the holding in *Burnett* with respect to Plaintiff's First Cause of Action for Quiet Title, again on the grounds that the argument put forth by Plaintiffs is identical to that in *Burnett* and that Plaintiffs have failed to prevail upon its own strength of its own claim to title and not the weakness of Defendants' title or even its total lack of title.

enforce the terms of the note. Adopting Plaintiffs' arguments would lead to the untenable result of allowing Defendants' security interest under the promissory note to potentially become unsecured and allow Plaintiffs' property to be free and clear of any claim by Defendants, despite Plaintiffs' default. This is fundamentally unfair as it allows Plaintiff a windfall and to simply walk away from its own breach. This the Court will not conscience.

Also, although not expressly addressed in either *Marty* or *Burnett*, Plaintiff's reliance upon Utah's Uniform Commercial Code, codified at Utah Code Ann. § 70A-3-101 et seq. is misplaced where, as previously discussed, MERS was expressly granted the right to foreclose or enforce other rights as the nominee of the Lender and Lender's successors and assigns. The Court also notes that Plaintiff has failed to demonstrate that either the note or deed of trust falls under the statutory definition of a negotiable instrument, such that 70A-3-101 et seq. would apply.<sup>3</sup>

Finally, the Court finds Plaintiffs' argument that MERS must "'prove the transaction' by which they purportedly acquired the Note" in order to "enforce the rights of the original Note holder" unpersuasive. In *Rhodes v. Aurora* the district court

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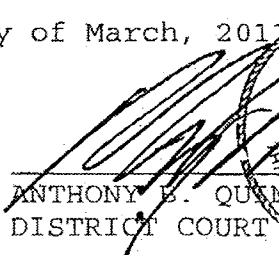
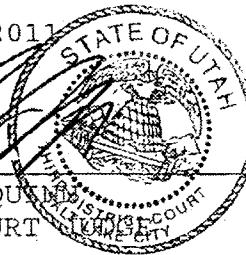
<sup>3</sup>See *Bevan v. Boyce* holding that "trust deeds are not regulated by the Uniform Commercial Code but instead are regulated by *Utah Code sections 57-1-1 through 57-1-44.*" 2006 UT App 31, 2006 Utah App. LEXIS 45 (unpublished), Utah Code Ann. § 70A-9a-109(4)(k) (stating that secured transaction provisions do not apply to transfers of interest or liens on real property).

found that where MERS had contractual authority under the trust deed to foreclose upon the note on behalf of the lender, MERS need not possess the note in order to appoint a trustee on behalf of the lender who does hold the note, noting that nothing in Utah foreclosure law requires that the beneficiary produce the actual note in order to authorize the trustee to foreclose on the property secured by the note. *Rhodes v. Aurora*, No. 2:10-cv-00230-TC, 2010 U.S. Dist. LEXIS 83133, \*6-7 (D. Utah Aug. 13, 2010). As noted above, MERS has the contractual authority to foreclose upon the note on behalf of the lender, and Plaintiffs' argument fails as a matter of law.

Therefore, Defendants' Motion to Dismiss is granted and Plaintiffs' action is dismissed with prejudice in accordance with the above noted Order.

This is the Order of the Court and no other order is required.

Dated this 10<sup>th</sup> day of March, 2011

  
ANTHONY E. QUINN  
DISTRICT COURT  


MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of  
the foregoing Order to the following, this 10 day of March,  
2011:

Philip D. Dracht  
Felicia B. Canfield  
FABIAN & CLENDENIN, P.C.  
215 South State, Ste. 1200  
Salt Lake City, UT 84111

Walter T. Keane  
WALTER T. KEANE, P.C.  
2825 Cottonwood Pkwy., Ste. 500  
Salt Lake City, UT 84121

Peter J. Salmon  
Spencer MacDonald  
PITE DUNCAN, LLP  
4375 Jutland Dr., Ste. 200  
PO Box 17935  
San Diego, CA 92177



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2011 UT S.B. 261 (NS)  
 2011 Utah Senate Bill No. 261, Utah Fifty-Ninth Legislature - 2011 General  
 Session

Page 1

## UTAH BILL TEXT

TITLE: Wrongful Foreclosure Act

VERSION: Amended/Substituted

March 03, 2011  
 Sen. Bramble, C.

<Image in PDF format not available via Offline Print. View on westlaw.com.>

SUMMARY: This bill modifies provisions relating to trust deed foreclosures.

## TEXT:

First Substitute S.B. 261

Senator Curtis S. Bramble proposes the following substitute bill:

CHANGES TO TRUST DEED FORECLOSURE PROVISIONS 2011 GENERAL SESSION STATE OF UTAH  
 Chief Sponsor: Curtis S. Bramble House Sponsor: \_\_\_\_\_ LONG TITLE General Description:

This bill modifies provisions relating to trust deed foreclosures.

Highlighted Provisions:

This bill:

- . provides a civil penalty for a person who violates specified trustee provisions;
- . provides that a trustee who conspires or schemes to defraud a trustor is guilty of a class B misdemeanor;
- . requires a notice of default to include a brief description of the foreclosure process; and
- . requires a beneficiary or the beneficiary's agent to provide notice to a trustor on a residential property if the beneficiary or agent does not intend to instruct a trustee to defer a notice of sale despite negotiations between the beneficiary or agent and trustor or a temporary reduced payment arrangement.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

2011 UT S.B. 261 (NS)  
 2011 Utah Senate Bill No. 261, Utah Fifty-Ninth Legislature - 2011 General  
 Session

Page 2

57-1-21, as last amended by Laws of Utah 2008, Chapter 250

57-1-24, as last amended by Laws of Utah 2001, Chapter 236

ENACTS:

57-1-24.5, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 57-1-21 is amended to read:  
 57-1-21. Trustees of trust deeds -- Qualifications.

(1) (a) The trustee of a trust deed shall be:

(i) any active member of the Utah State Bar who maintains a place within the state where the trustor or other interested parties may meet with the trustee to:

(A) request information about what is required to reinstate or payoff the obligation secured by the trust deed;

(B) deliver written communications to the lender as required by both the trust deed and by law;

(C) deliver funds to reinstate or payoff the loan secured by the trust deed; or

(D) deliver funds by a bidder at a foreclosure sale to pay for the purchase of the property secured by the trust deed;

(ii) any depository institution as defined in Section 7-1-103 , or insurance company authorized to do business and actually doing business in Utah under the laws of Utah or the United States;

(iii) any corporation authorized to conduct a trust business and actually conducting a trust business in Utah under the laws of Utah or the United States;

(iv) any title insurance company or agency that:

(A) holds a certificate of authority or license under Title 31A, Insurance Code, to conduct insurance business in the state;

(B) is actually doing business in the state; and

(C) maintains a bona fide office in the state;

(v) any agency of the United States government; or

(vi) any association or corporation that is licensed, chartered, or regulated by the Farm Credit Administration or its successor.

(b) For purposes of this Subsection (1), a person maintains a bona fide office within the state if that person maintains a physical office in the state:

- (i) that is open to the public;
- (ii) that is staffed during regular business hours on regular business days; and
- (iii) at which a trustor of a trust deed may in person:
  - (A) request information regarding a trust deed; or
  - (B) deliver funds, including reinstatement or payoff funds.

**(c) (i) A person who violates Subsection (1)(a) is subject to a civil penalty in the amount of \$2,000.**

**(ii) In an action to impose a civil penalty under Subsection (1)(c)(i), the court shall require a person found to violate Subsection (1)(a) to pay the plaintiff's costs and attorney fees.**

~~[(c)]~~ **(d)** This Subsection (1) is not applicable to a trustee of a trust deed existing prior to May 14, 1963, nor to any agreement that is supplemental to that trust deed.

~~[(d)]~~ **(e)** The amendments in Laws of Utah 2002, Chapter 209, to this Subsection (1) apply only to a trustee that is appointed on or after May 6, 2002.

(2) The trustee of a trust deed may not be the beneficiary of the trust deed, unless the beneficiary is qualified to be a trustee under Subsection (1)(a)(ii), (iii), (v), or (vi).

(3) The power of sale conferred by Section 57-1-23 may only be exercised by the trustee of a trust deed if the trustee is qualified under Subsection (1)(a)(i) or (iv).

(4) A trust deed with an unqualified trustee or without a trustee shall be effective to create a lien on the trust property, but the power of sale and other trustee powers under the trust deed may be exercised only if the beneficiary has appointed a qualified successor trustee under

Section 57-1-22 .

**(5) A trustee who conspires or schemes to defraud a trustor is guilty of a class B misdemeanor.**

Section 2. Section **57-1-24** is amended to read:  
 57-1-24. Sale of trust property by trustee -- Notice of default.

**(1)** The power of sale conferred upon the trustee who is qualified under Subsection 57-1-21 (1)(a)(i) or (iv) may not be exercised until:

~~[(1)]~~ **(a)** the trustee first files for record, in the office of the recorder of each county where the trust property or some part or parcel of the trust property is situated, a notice of default, identifying the trust deed by stating the name of the trustor named in the trust deed and giving the book and page, or the recorder's entry number, where the trust deed is recorded and a legal description of the trust property, and containing a statement that a breach of an obligation for which the trust property was conveyed as security has occurred, and setting forth the nature of that breach and of the trustee's election to sell or cause to be sold the property to satisfy the obligation;

~~[(2)]~~ **(b)** not less than three months has elapsed from the time the trustee filed for record under Subsection (1);

and

~~(c)~~ (c) after the lapse of at least three months the trustee shall give notice of sale as provided in Sections 57-1-25 and 57-1-26 .

**(2) A notice of default under Subsection (1)(a) shall include a brief description of the foreclosure process.**

Section 3. Section 57-1-24.5 is enacted to read:  
**57-1-24.5.** Notice to trustor of intent not to defer notice of sale.

**(1) A beneficiary, or the beneficiary's authorized agent, shall provide written notice to a trustor as provided under Subsection (2) if:**

**(a) the trust property is residential property;**

**(b) a notice of default is filed with respect to the trust property under Section 57-1-24 ;**

**(c) during the three-month period described in Subsection 57-1-24 (1)(c), the beneficiary or agent:**

**(i) enters negotiations with the trustor regarding a loan modification or foreclosure relief; or**

**(ii) agrees to accept reduced payments from the trustor on a temporary basis; and**

**(d) notwithstanding the negotiations or reduced payment arrangement, the beneficiary or agent does not intend to instruct the trustee to defer giving notice of sale under Section 57-1-25 later than the earliest time allowed under Subsection 57-1-24 (1)(c).**

**(2) A written notice under Subsection (1) shall inform the trustor that, despite the negotiations between the beneficiary or agent and trustor or the reduced payment arrangement, the beneficiary or agent does not intend to instruct the trustee to defer giving notice of sale under Section 57-1-25 later than the earliest time allowed Subsection 57-1-24 (1)(c).**

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