PLEASE CAREFULLY REVIEW THIS OBJECTION AND THE ATTACHMENTS HERETO TO DETERMINE WHETHER THIS OBJECTION AFFECTS YOUR CLAIM.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
ADVANTA CORP., *et al.*,[1]	:	Case No. 09-13931 (KJC)
Debtors.	:	(Jointly Administered)

Hearing Date: June 7, 2011 10:00 a.m.
Objection Deadline: May 23, 2011 4:00 p.m.

SEVENTH OMNIBUS OBJECTION (SUBSTANTIVE) TO CLAIMS AGAINST ADVANTA MORTGAGE CORP. USA BASED ON CERTAIN CLASS ACTION LITIGATION CLAIMS

FTI Consulting, Inc., in its capacity as Trustee of the AMCUSA Trust (the "***Trustee***"), by and through its attorneys, Latham & Watkins LLP and Drinker Biddle & Reath LLP, hereby files this seventh substantive omnibus objection (the "***Omnibus Objection***") to certain claims asserted against the estate of the Debtor Advanta Mortgage Corp. USA ("***AMCUSA***") in the above-referenced chapter 11 cases of Advanta Corp. and its affiliated debtors and debtors-in-possession (collectively, the "***Debtors***"), that are listed on ***Exhibit A*** attached hereto (collectively, the "***Seventh Omnibus Claims***"). In support of this Omnibus Objection, the Trustee respectfully represents as follows:

[1] The Debtors in these jointly administered chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, were Advanta Corp. (2070) ("Advanta"), Advanta Investment Corp. (5627), Advanta Business Services Holding Corp. (4047), Advanta Business Services Corp. (3786), Advanta Shared Services Corp. (7074), Advanta Service Corp. (5625), Advanta Advertising Inc. (0186), Advantennis Corp. (2355), Advanta Mortgage Holding Company (5221), Advanta Auto Finance Corporation (6077), Advanta Mortgage Corp. USA (2654), Advanta Finance Corp. (8991), Advanta Ventures Inc. (5127), BE Corp. (8960), ideablob Corp. (0726), Advanta Credit Card Receivables Corp. (7955), Great Expectations International Inc. (0440), Great Expectations Franchise Corp. (3326), and Great Expectations Management Corp. (3328).

BACKGROUND

1. On November 8, 2009 the majority of Debtors[2] filed their petitions under chapter 11 of title 11 of the United States Code (the "***Bankruptcy Code***"). On November 20, 2009, the remaining Debtors[3] filed their chapter 11 cases.

2. On April 7, 2010, the Court entered an order (the "***Bar Date Order***") [Docket No. 399] establishing, among other things, May 14, 2010 at 5:00 p.m. (Eastern Daylight Time) (the "***Bar Date***") as the deadline to file proofs of claim against the Debtors (each a "***Proof of Claim***," and, collectively, the "***Proofs of Claim***").

3. Pursuant to the Bar Date Order, The Garden City Group, Inc., the court-appointed claims and noticing agent in these cases ("***The Garden City Group***"), mailed notice of the Bar Date (the "***Bar Date Notice***") to approximately 19,500 parties in interest. In addition to mailing the Bar Date Notices, the Debtors gave notice to potential creditors by publishing the Bar Date Notice in both *The Wall Street Journal* and *The Philadelphia Inquirer*. The mailing and publishing of the Bar Date Notice in newspapers of general circulation provided potential creditors with adequate and sufficient notice of the Bar Date.

4. On May 10, 2010, the Claimants (as defined below) filed a *Motion to Extend the Time Within Which Proofs of Claim May Be Filed by Creditors Michael and Shellie Gilmor, Michael and Lois Harris, Ted and Raye Ann Varns, and Leo Parvin, and Creditors James and Jill Baker, Jeffrey and Michelle Cox, and William and Michelle Springer* [Docket No. 494] (the "***Motion to Extend the Bar Date***"). The Debtors agreed to extend the Bar Date by 45 days to

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[2] Advanta Corp. ("Advanta"), Advanta Investment Corp., Advanta Business Services Holding Corp., Advanta Business Services Corp., Advanta Shared Services Corp., Advanta Service Corp., Advanta Advertising Inc., Advantennis Corp., Advanta Mortgage Holding Company, Advanta Auto Finance Corporation, Advanta Mortgage Corp. USA, Advanta Finance Corp., Great Expectations International Inc., Great Expectations Franchise Corp., and Great Expectations Management Corp.

[3] Advanta Ventures Inc., BE Corp., ideablob Corp. and Advanta Credit Card Receivables Corp.

allow the Claimants to file their Proofs of Claim. The Claimants filed the Seventh Omnibus Claims on June 28, 2010. The Trustee has reviewed each of the Seventh Omnibus Claims and has concluded that each such claim is appropriately objected to for the reasons set forth in this Omnibus Objection.

5. On November 2, 2010, the Debtors filed (i) the *Joint Plan Under Chapter 11 of the Bankruptcy Code* (as modified on February 28, 2011, the "***Plan***") [Docket No. 1185] and (ii) *Disclosure Statement for Debtors' Joint Plan Under Chapter 11 of the Bankruptcy Code* (as modified on December 17, 2010, the "***Disclosure Statement***") [Docket No. 1038].

6. On December 17, 2010, the Court entered the *Order (I) Approving the Disclosure Statement, (II) Approving Notice and Objection Procedures for the Disclosure Statement Hearing, (III) Establishing Solicitation and Voting Procedures, (IV) Scheduling a Confirmation Hearing, and (V) Establishing Notice and Objection Procedures for Confirmation of the Proposed Plan* [Docket No. 1042].

7. On or about February 11, 2011, this Court entered the *Order Confirming Debtors' Joint Plan Under Chapter 11 of the Bankruptcy Code, As Modified* ("***Confirmation Order***") [Docket No. 1173]. The effective date of the Plan was February 28, 2010. On March 1, 2011 a notice of the effective date of the Plan was filed with the Bankruptcy Court [Docket No. 1191].

8. Pursuant to Section 5.4 of the Plan, the AMCUSA Trust was established with the sole purpose of liquidating and distributing the assets of the AMCUSA Trust in accordance with applicable law, with no objective to continue or engage in the conduct of a trade or business. Plan, at § 5.4(b).

9. Section 5.4(g) of the Plan specifically provides that included among the rights, powers and duties of the Trustee is the right, "in [the Trustee's] reasonable business judgment, to

reconcile and object to Claims against the Debtors or the applicable Liquidating Trust,[4] and manage, control, prosecute and/or settle on behalf of the applicable Estate and/or Liquidating Trust[,] objections to Claims on account of which the [Trustee] (as Disbursing Agent) will be responsible (if Allowed) for making distributions under the Plan." Plan, at § 5.4(g).

JURISDICTION AND VENUE

10. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

11. By way of this Omnibus Objection, pursuant to sections 502 and 506 of the Bankruptcy Code, Rule 3007(d) of the Federal Rules of Bankruptcy Procedure ("***Bankruptcy Rule***"), and Bankruptcy Rule 3007-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "***Local Rules***"), the Trustee requests the entry of an order substantially in the form attached hereto as ***Exhibit F*** (the "***Order***") disallowing each of the Seventh Omnibus Claims as described in the exhibits attached hereto.

OBJECTION

A. Background.

12. On or about June 27, 2000, Michael P. Gilmor and Shellie Gilmor (collectively, "***Gilmor***") brought a class action in Missouri state court, titled *Gilmor et al. v. Preferred Credit Corp. et al.*, Circuit Court, Clay County, Missouri, Case No. CV-100-4263-CC (the "***Gilmor***

[4] The Plan defines the term "Liquidating Trusts" to include the AMCUSA Trust. Plan, at §1.143.

Class Action"). The Gilmors sued individually and as representatives on behalf of a class of homeowners in Missouri who received second mortgage loans originated by Preferred Credit Corporation ("***Preferred***"). The Gilmors subsequently added approximately 100 other defendants, including AMCUSA, who allegedly purchased, owned or held such loans, or were trustees, assignees and/or agents of those who purchased, owned or held such loans.

13. On or about June 28, 2000, the same law firm for the class plaintiffs in the Gilmor Class Action filed on behalf of James and Jill Baker (collectively "***Baker***") a similar class action in Missouri state court, titled *Baker et al. v. Century Fin. Group, Inc., et al.*, Circuit Court, Clay County Missouri, Case No. CV-100-4294-CC (the "***Baker Class Action***"). The Bakers sued individually and as representatives on behalf of a class of homeowners in Missouri who received second mortgage loans originated by Century Financial Group, Inc. ("***Century***"). They subsequently added approximately 100 other defendants, including AMCUSA, who allegedly purchased, owned or held such loans, or were trustees, assignees and/or agents of those who purchased, owned or held such loans.

14. The Gilmor Class Action and the Baker Class Action were each certified by the Missouri state court as class actions (together, the "***Class Actions***") on January 2, 2003.

15. Certain of the class plaintiffs in the Gilmor Class Action filed Proofs of Claim Nos. 2586 through 2608 and 2612 through 2882. Only one of the class plaintiffs in the Baker Class Action filed a Proof of Claim, which was assigned Claim No. 2610. The class plaintiffs' attorneys (together, with the class plaintiffs in the Baker Class Action and the class plaintiffs in the Gilmor Class Action, the "***Claimants***") filed Proofs of Claim Nos. 2609 and 2611. The

foregoing Proofs of Claim are collectively referred to herein as the "***POCs***." The POCs allege claims related to the Class Actions, including claims for attorneys' fees and punitive damages.[5]

16. The most recent amended complaints filed by the plaintiffs in the Class Actions are referenced in the applicable POCs as Omnibus Exhibit No. 3. The most recent amended complaint in the Gilmor Class Action is the Sixth Amended Petition ("***SAP***"), and the most recent amended complaint in the Baker Class Action is the Fourth Amended Petition ("***FAP***," and, collectively, together with the SAP, the "***Class Complaints***").

17. The gravamen of the Class Complaints is that, at the closing of the second mortgage loan transactions, Preferred and Century allegedly charged the homeowner plaintiffs certain closing costs and fees that were unlawful under Missouri's Second Mortgage Loan Act (Missouri Revised Statutes (1997) ("***Mo. Rev. Stat***.") § 408.231 *et. seq.*) ("***SMLA***").

18. The SMLA creates liability for "directly or indirectly charg[ing], contract[ing] for or receiv[ing]" unlawful charges "in connection with any second mortgage loan." SMLA § 408.233.1.

19. Significantly, it is undisputed that AMCUSA was not involved in any way in the origination of the subject second mortgage loans or the closings of the subject second mortgage loan transactions—and never purchased, owned or held any of the subject second mortgage loans. Instead, AMCUSA's only involvement with such loans was that it acted solely as a loan servicer **after** the closings, pursuant to a loan servicing agreement dated as of March 8, 1996, between Preferred, as Owner, and AMCUSA, as Servicer, as amended ("***Servicing Agreement***")

[5] Certain of the POCs appear to be duplicative and are identified as such in Exhibit A. Furthermore, to the extent Proofs of Claim Nos. 2609 and 2611 filed by the class plaintiffs' attorneys seek a recovery for Claimants in the Gilmor Class Action and the Baker Class Action, as applicable, that is duplicative of the other Claimants' POCs, then such other Claimant's Proofs of Claim are duplicative. To the extent this Court were to find that the Claimants' claims against AMCUSA should be allowed because they have been correctly asserted against AMCUSA under the SMLA (which they have not been), then the Trustee asks that any duplicative claims be disallowed under Bankruptcy Rule 3007(d) and the Trustee reserves all rights with respect to such claims.

(***Exhibit B*** hereto at § 2.2(a)).[6] Therefore, the second mortgage loans had originated and closed, and the allegedly violative closing fees already had been imposed by the lender, before AMCUSA was tasked to service such loans.

20. The Servicing Agreement defines the term "Owner" as "Preferred Mortgage Corporation" and defines the term "Servicer" as "Advanta Mortgage Corporation USA." Servicing Agreement, *Ex. B* at § 1.1.

21. Pursuant to § 3.2 of the Servicing Agreement, Preferred, as Owner, represented and warranted its ownership of the second mortgage loans and their proceeds:

> (a) Owner owns, without limitation, (i) all right, title and interest in the Mortgage Loans . . . and (iii) all proceeds derived from any of the foregoing.

22. Preferred only assigned the servicing functions to AMCUSA:

> (g) Owner holds legal right, title and interest to the Mortgage Loans and no other party has the right to collect payments with respect thereto and the Owner has the full power and authority to assign the servicing functions to Servicer.
>
> Servicing Agreement, *Ex. B*. at § 3.2.

23. Pursuant to the Servicing Agreement, AMCUSA's servicing functions required it to collect the borrowers' payments due on the second mortgage loans and place them in a "Collection Account . . . in trust for the Owner." Servicing Agreement, *Ex. B* at § 4.4(a).

24. Attorneys for the class plaintiffs have explicitly acknowledged that servicers such as AMCUSA had no ownership interest in the loans: "The Servicer has no independent right to collect on the mortgages." (Plaintiffs' Joint Suggestions in Opposition to Defendants' Motions to Dismiss for Lack of Personal Jurisdiction dated 3/19/08 filed in the Baker Class Action) (the

[6] Century assigned to Preferred the second mortgage loan it had made to the class action plaintiff in the Baker Class Action prior to AMCUSA performing servicing.

"***Plaintiffs' Joint Suggestions***") (***Exhibit C*** hereto at 22) (emphasis added). To be clear: "The payments did not belong to the Servicers." *Id.* at 61 (emphasis added).

25. Instead, in exchange for providing loan servicing, AMCUSA received a set fee of 0.55% per annum of the amount of a borrower's second mortgage loan (the "***Servicing Compensation***"). Servicing Agreement, *Ex. B* at § 4.10(a). The Servicing Compensation was independently negotiated between Preferred and AMCUSA in connection with the loan services to be provided and the amount agreed upon was entirely unrelated to any costs or fees that had been charged to the borrowers at the closing of their second mortgage loans.

26. AMCUSA's Servicing Compensation in connection with Claimants' second mortgage loans totaled $80,726.22.[7]

27. Yet the Claimants' POCs seek to recover more than $11 million—plus punitive damages and attorneys' fees—from the AMCUSA Trust.

B. The Class Complaints Do Not Establish that AMCUSA Violated the SMLA.

28. According to the Class Complaints, Century and Preferred violated section 408.233.1 of the SMLA with respect to the Claimants' second mortgage loans by "[c]harging, contracting for, and/or receiving, either directly or indirectly," costs and fees that violated the SMLA. SAP ¶¶ 110-11 (pp. 40-41);[8] FAP ¶¶ 155-56.

29. In support of the claim that AMCUSA is liable for the asserted statutory violations of Preferred and Century, the Class Complaints improperly attempt to mischaracterize AMCUSA as a so-called "Investor Defendant." SAP ¶ 26; FAP ¶ 15. The Class Complaints

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[7] See Gilmor Ex. 5 to POCs at tab "YOD1_11" which sets forth the total service fees AMCUSA collected not only from each Claimant, but also from each class member, many of whom did not file a POC.

[8] The SAP is incorrectly numbered after ¶ 121 (p.37), by jumping out of sequence back to ¶ 101. The Omnibus Objection provides page number references for duplicated paragraph numbers.

allege that an "Investor Defendant" is an entity who "purchased and/or is or was an owner, assignee (holder) of, and/or the trustee and/or agent of an entity, trust, fund or pool owning and/or holding the Second Mortgage Loans made to Plaintiffs and the members of the Plaintiff Class, which Second Mortgage Loans were originated and/or made by [Preferred and Century] (or a finder or broker on its behalf). . . ." SAP ¶ 71; FAP ¶ 103.

30. However, AMCUSA was not an "Investor Defendant"—AMCUSA did not purchase the second mortgage loans and was not a subsequent owner, holder, trustee or agent. On the contrary, AMCUSA did not undertake any obligation under the Servicing Agreement other than to perform loan servicing. Servicing Agreement, *Ex. B* at §§ 2.2; 4.1.

31. The Class Complaints further allege that AMCUSA—by virtue of its purported status as an "Investor Defendant"—also qualifies as a so-called "Assignee Defendant." SAP ¶ 73; FAP ¶ 105. Again, the Class Complaints improperly mischaracterize AMCUSA as an "Assignee Defendant" that:

> purchased the Second Mortgage Loans that [Preferred and Century] made to Plaintiffs and the Plaintiff Class pursuant to one or more standing agreements and/or a course of business dealing with [Preferred and Century] . . . and used the Second Mortgage Loans and the money streams they generated as for purposes of investment [sic], including use of the loans and money streams as collateral for notes that certain Assignee Defendants and their trustees and agents sold to the public.
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> SAP ¶ 74; FAP ¶ 106 (emphasis added).

32. Claimants' theory is unsupportable because it is undisputed that AMCUSA did not purchase any of the subject second mortgage loans.

33. Nevertheless, without any basis, the Class Complaints allege that AMCUSA, as a so-called "Assignee Defendant," is allegedly liable "just as" Preferred and Century are liable:

> in that (a) the Assignee Defendants are the assignees, directly or indirectly of [Preferred and Century], and stand in the shoes of

> [Preferred and Century]; (b) the Assignee Defendants charged and received (and continue to charge and receive) illegal fees and costs on the loans, together with resulting illegal interest charges; and (c) the points and fees and/or Annual Percentage Rates (APRs) for the loans is such that the Assignee Defendants . . . are liable to Plaintiffs . . . just as [Preferred and Century] [are] liable.
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> SAP ¶ 114 (pp. 41-42); FAP ¶ 159.

34. The Claimants' conclusory theory of "assignee liability" is groundless because it is undisputed that AMCUSA only serviced the Claimants' second mortgage loans.

* * *

35. As demonstrated below, there is no set of facts nor any viable legal theory under which AMCUSA can be held liable for Century's and Preferred's statutory violations. Accordingly, the Claimants' POCs should be disallowed in their entirety.

C. It Is Undisputed that AMCUSA Itself Did Not Violate the SMLA.

36. Claimants do not and cannot allege that AMCUSA itself engaged in any conduct that violated the SMLA. It is undisputed that:

- AMCUSA did not make or originate, or participate in the making or origination of, the Claimants' second mortgage loans;
- AMCUSA did not close, or participate in the closing of, any of the Claimants' second mortgage loans; and
- AMCUSA did not contract for, charge or receive any fees in connection with the making or closing of Claimants' second mortgage loans.

37. In its limited capacity as a post-closing servicer, AMCUSA did nothing to violate the SMLA. Simply put, "[n]othing in the plain text of the []SMLA imposes liability on third-parties, such as loan servicers, who perform administrative tasks on loans." *Mayo v. GMAC Mortgage, LLC*, No. 08-00568-CV-W-DGK, 2011 U.S. Dist. LEXIS 3349, at *43-44 (W.D. Mo. Jan. 13, 2011) (finding non-loan holder servicers have no liability under SMLA) (unpublished opinion attached hereto as ***Exhibit D***). In *Mayo*, as here, the loan servicers "did not have any

ownership interest in the Loan such that they were entitled to any interest or principal from it, [and thus have not] directly or indirectly charged, contracted for or received any illegal fees in violation of § 408.233.1(3)." *Id.* at *42. In *Mayo*, as here, the loan servicer acted "in a custodial capacity only" and "did not retain any loan payments or interest." *Id.* (emphasis added). "Most importantly, unlike the Assignee Defendants, [the loan servicers] never acquired any ownership interest in the Loan such that they were entitled to the actual payments." *Id.* at 43.

38. The conclusion reached in *Mayo* is fully applicable here: AMCUSA did not directly or indirectly charge, contract or receive any illegal fees in violation of the SMLA because AMCUSA never acquired any ownership interest in the second mortgage loans such that it was entitled, as a loan servicer, to the loan payments. On the contrary, as Claimants admitted, the "payments did not belong to the Servicers." Plaintiffs' Joint Suggestions, *Ex. C* at 61.

D. AMCUSA Is Not Liable for Preferred's and Century's Statutory Violations Under an Agency Theory.

39. To the extent Claimants are relying on an agency theory to hold AMCUSA liable (SAP ¶ 71; FAP ¶ 103), Missouri law is well-settled that "the agent of a disclosed principal does not . . . assume any of the principal's duties simply because of their role as agent; therefore, the agent is not liable to a third party unless the agent of a disclosed principal agrees or undertakes the obligations." *Citizens Nat'l Bank v. Maries County Bank*, 244 S.W.3d 266, 271 (Mo. Ct. App. 2008) (citation omitted). Of course, AMCUSA did not undertake any obligation under the Servicing Agreement other than to "service and administer" the second mortgage loans on Preferred's behalf:

> Servicer agrees to service and administer the Mortgage Loans on the Owner's behalf, in accordance with the terms of this Agreement, the Mortgage Loans and Accepted Servicing Practices, giving due consideration to customary and usual standards of practice of prudent institutional residential mortgage loan servicers of comparable Mortgage Loans and with a view to the

> maximization of timely recovery of principal and interest on the Mortgage Loans, but without regard to: (i) any relationship that Servicer or any of its affiliates may have with any Borrower or affiliate or manager thereof, (ii) Servicer's obligations to make advances or to incur servicing expenses with respect to the Mortgage Loans, or (iii) Servicer's right to receive compensation for its services hereunder.
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> Servicing Agreement, *Ex. B* at § 2.2

Indeed, AMCUSA's agreement was to perform customary mortgage loan services for the benefit of Preferred. Nothing in the Servicing Agreement indicates an intention to assume the obligations of Preferred. Therefore, AMCUSA is not liable for Preferred's or Century's statutory violations under an agency theory.

E. AMCUSA Does Not Have Assignee Liability for the Statutory Violations of Preferred or Century.

40. Nor is there any basis for holding AMCUSA, in its capacity as a servicer, derivatively liable for the asserted statutory violations committed by Preferred or Century before AMCUSA even began servicing the second mortgage loans.

41. Under the theory asserted in the POCs, a loan servicer, such as AMCUSA, would be subject to the same liability under the SMLA as Preferred and Century, and their successors and assignees. *E.g.*, Basis for Claim, POCs Ex. 2; SAP ¶¶ 86-88, 114 (pp. 41-42); FAP ¶¶ 117-19, 159. As discussed below, this groundless theory has been soundly rejected by the Missouri courts and should be rejected here.

1. *There Is No Assignee Liability for AMCUSA Under Common Law.*

42. Claimants are barred from imposing assignee liability against AMCUSA under Missouri common law. *Mitchell v. Residential Funding*, No. WD70210, 2010 Mo. App. LEXIS 1593, at *60 (Mo. App. Ct. Nov. 23, 2010) (rejecting common-law assignee liability: "we do not agree with Plaintiffs that there is a 'common-law assignee liability' that would hold Assignee

Defendants liable for [the originator's] acts in originating the loans, absent some affirmative act of their own") (unpublished opinion attached hereto as ***Exhibit E***). Absent an express assumption by the assignee of all rights and duties under a contract, an assignee is not derivatively liable for the statutory violations (or otherwise) by the assignor under common law. *See* 29 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 74:35 (4th ed. 2003) (in order to be liable under an assigned contract, assignee must "expressly assume the obligations of the assignor" or, at the very least, "impliedly promise[] to perform the duties under the contract.").

43. Here, there is no contention—much less any evidence—that AMCUSA, as a loan servicer, expressly or impliedly assumed the obligations of Preferred or Century. Quite the opposite: Preferred and Century already had advanced the funds to the borrowers at the closings of the second mortgage loans and the conduct that allegedly constituted the SMLA violation—the imposition of closing charges—also had already taken place at such closings between each borrower and lender. AMCUSA neither imposed nor received those charges and the Servicing Agreement between AMCUSA and Preferred does not refer to any such charges. Accordingly, AMCUSA cannot, under common law, stand derivatively liable for statutory violations allegedly committed by Preferred and Century.

2. *There Is No Assignee Liability for AMCUSA Under Federal Law.*

44. Missouri courts have held that while common law does not support holding assignees derivatively liable for the actions of the assignor, a second mortgage lender's assignee may be held derivatively liable for unlawful loans through 15 U.S.C. § 1641(d) (the federal Home Ownership Equity Protection Act or "***HOEPA***"). *Mitchell*, 2010 Mo. App. LEXIS 1593 at *64 (rejecting borrowers' common-law assignee liability arguments and considering their arguments seeking to impose derivative assignee liability under HOEPA). As discussed below,

while HOEPA may serve as a basis for borrowers to assert derivative claims against assignees, HOEPA explicitly exempts non-loan owner servicers such as AMCUSA from such derivative liability.

45. HOEPA establishes, as federal law, that "[a]ny person who purchases or is otherwise assigned a [high cost mortgage as defined in the statute] shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the [originator] of the mortgage . . . ." 15 U.S.C. § 1641(d)(1). While HOEPA does not create an independent basis for liability, it does provide for assignee liability by negating the holder in due course defense. *See, e.g.*, *Dash v. FirstPlus Home Loan Trust 1996-2*, 248 F. Supp. 2d 489, 506 (M.D.N.C. 2003) (HOEPA merely eliminates holder in due course defense and "is not intended to bestow any rights upon the borrower nor constitute an independent basis of liability.") (citations omitted); *Mitchell*, 2010 Mo. App. LEXIS 1593, at *64 (while there is no common-law assignee liability, HOEPA provides for assignee liability); *Schwartz v. Bann-Cor Mortgage*, 197 S.W.3d 168, 179 (Mo. Ct. App. 2006) (finding assignee loan holders were derivatively liable for SMLA violations as a result of HOEPA; "[i]n view of the provisions of [HOEPA] . . . "the Borrowers can assert derivative claims against the current holders . . . .") (emphasis added).

46. Critically however, HOEPA does not extend assignee liability to loan servicers who, like AMCUSA, did not own the loans. On the contrary, section 1641(f)(1) of HOEPA—the section governing servicers—exempts servicers from such derivative liability:

> A servicer of a consumer obligation arising from a consumer credit transaction *shall not be treated as an assignee of such obligation* . . . unless the servicer is or was the owner of the obligation.
>
> 15 U.S.C. § 1641(f)(1) (emphasis added).

47. Because AMCUSA did not own any of the Claimants' second mortgage loans, it is undisputed that it is immune from liability under HOEPA. *See Harris v. Option One*

Mortgage Corp., 261 F.R.D. 98, 105 (D.S.C. 2009) (dismissing claims under the Truth In Lending Act (15 U.S.C. §§ 1601-1667f, "***TILA***")[9] against non-loan holder servicer pursuant to HOEPA); *In re Ameriquest Mortgage Co. Mortgage Lending Practices Litig.*, No. 1715, 2008 WL 5100909, at *4 (N.D. Ill. Dec. 2, 2008) (dismissing common law fraud claims against non-loan owner servicer based on HOEPA; "[A] mortgage servicer has no liability for an assignor's actions under TILA."); *Short v. Wells Fargo Minnesota, N.A.*, 401 F. Supp. 2d 549, 563 (S.D. W. Va. 2005) (servicer cannot be held liable for claims stemming from the origination of a loan pursuant to HOEPA); *Jackson v. US Bank Nat'l Ass'n Trustee* (*In re Jackson*), 245 B.R. 23, 25 (Bankr. E.D. Pa. 2000) (TILA "has no provision for liability for servicing agents, as the statute has for original lenders and their assigns. No specific facts or statutory bases for rendering [the servicer] liable appears, since there is no evidence that its duties as a servicing agent have anything to do with the facts which render" the lender and its assignees liable).

48. Therefore, Claimants cannot rely on HOEPA to hold a servicer such as AMCUSA derivatively liable for prior asserted statutory violations by Preferred and Century. In fact, there is no basis to hold AMCUSA derivatively liable for an asserted SMLA violation. Accordingly, the POCs against AMCUSA based on asserted statutory violations by Preferred and Century should be denied.

F. Even if the SMLA Was Violated by Preferred and Century, the Claimants Are Not Entitled to the Claimed Measure of Damages from AMCUSA.

49. Even if the interest paid by the borrowers was unlawful under the SMLA, the Claimants are not entitled to recover as damages from the AMCUSA Trust the interest they paid

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[9] Congress enacted TILA in 1968 to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). The HOEPA amendment to TILA was passed in 1994 in response to "increasing reports of abusive practices in home mortgage lending." *Cooper v. First Gov't Mortgage and Investors Corp*., 238 F. Supp. 2d 50, 54 (D.D.C. 2002) (citations omitted).

to Preferred and Century, because AMCUSA only collected the amounts the Claimants paid on their second mortgage loans in a collection account *in trust* for Century and Preferred. Servicing Agreement at § 4.4. Again, the Claimants admit that the "payments did not belong to the Servicers." Plaintiffs' Joint Suggestions, *Ex. C* at 61.

50. The Claimants likewise are not entitled to recover as damages from the AMCUSA Trust the amounts allegedly overcharged by Preferred and Century. The Claimants erroneously rely on Mo. Rev. Stat. section 408.562 in support of their claim for "any amounts that the borrower was overcharged."[10] POCs Ex. 2. But section 408.562 merely authorizes an SMLA plaintiff "who suffers any loss of money . . . as a result of any act . . . in violation of [the SMLA]" to sue "to recover actual damages." Here, in contrast, it was Preferred's and Century's closing charges and fees that were the alleged "act[s] . . . in violation of [the SMLA]"—not AMCUSA's Servicing Compensation nor its collection of payments owed to Preferred on Preferred's behalf (after the closing of the second mortgage loans) in accordance with customary loan serving standards. Preferred's and Century's improper closing charges and fees—not AMCUSA's Servicing Compensation—is the alleged violative act. Moreover, the Claimants do not allege that the Servicing Compensation violated the SMLA. *See, e.g.*, POCs Ex. 2; SAP ¶¶ 92, 100, 108 (p. 34), 116 (p. 36) and FAP ¶¶ 118, 124, 132, 140 (in each case, specifically identifying the alleged unlawful fees charged by Preferred).[11] Furthermore, the SMLA does not restrict a second mortgage lender, like Preferred or Century, from entering into a loan servicing

[10] Mo. Rev. Stat. § 408.562 provides in pertinent part, "[i]n addition to any other civil remedies or penalties provided for by law, any person who suffers any loss of money or property as a result of any act, method or practice in violation of the provisions of sections 408.100 to 408.561 may bring an action . . . to recover actual damages . . . [and] [t]he court may, in its discretion, award punitive damages and may award to the prevailing party in such action attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary and proper." Mo. Rev. Stat. § 408.562.

[11] See SMLA § 408.233.1 (enumerating permissible closing fees); Gilmor Ex. 6 to POCs (enumerating alleged violative closing fees without citing servicing fees); Baker Ex. 5 to POCs (same).

agreement nor does the SMLA dictate what a loan servicer can charge for its services or how its compensation is to be paid. Accordingly, the Claimants are not entitled to recover from the AMCUSA Trust the amounts they allegedly were overcharged by Preferred and Century simply because AMCUSA serviced the loans.

G. Punitive Damages and Attorneys' Fees Should Not Be Awarded.

51. Pursuant to Mo. Rev. Stat. section 408.562, the Claimants are seeking an estimated minimum of $3,667,843.33 for attorneys' fees, as set forth in Proof of Claim Nos. 2609 and 2611, and an unliquidated amount for punitive damages. As discussed above, the Claimants have not established that AMCUSA charged or received illegal costs in violation of the SMLA or that AMCUSA committed any other violation that would entitle the Claimants to an award of actual damages, attorneys' fees or punitive damages under the SMLA. Thus, their claims should be disallowed in their entirety. However, if this Court were to find that the Claimants' claims against AMCUSA should be allowed because they have been correctly asserted against AMCUSA under the SMLA (which they have not been), then by the terms of the Plan and the Bankruptcy Code this Court should (i) disallow any portion of such claims that relate to postpetition attorneys' fees and (ii) subordinate any portion of such claims that relate to punitive damages.

1. Claimants Are Not Entitled to Postpetition Attorneys' Fees.

52. The Claimants do not cite any authority in the Bankruptcy Code or bankruptcy case law for their alleged entitlement to postpetition attorneys' fees. Nevertheless, this Court follows the majority of courts that have held that unsecured creditors are not entitled to recover postpetition fees and costs on their claims after the filing of a bankruptcy petition. *See, e.g.*, *Finova Group, Inc. v. BNP Paribas* (*In re Finova Group, Inc.*), 304 B.R. 630, 638 (D. Del. 2004) (holding that postpetition claims for attorneys' fees and expenses are not recoverable); *In re*

Loewen Group, Int'l, Inc., 274 B.R. 427, 444 (Bankr. D. Del. 2002) (citations omitted) (holding that "post-petition fees and costs may only be recovered by creditors to the extent their claims are oversecured"); *In re Elec. Mach. Enters.*, 371 B.R. 549, 554 (Bankr. M.D. Fla. 2007) (holding that "an unsecured creditor is not entitled to include attorneys' fees, costs or similar charges incurred after the commencement of a bankruptcy case as part of an allowed unsecured claim."); *see also United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 372-73, (1988) (Since [section 506(b)] permits postpetition interest to be paid only out of the "security cushion," the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest."); *In re Kindred Healthcare, Inc.*, No. 99-3199 (MFW), 2003 Bankr. LEXIS 969, at *12-13 (Bankr. D. Del. Aug. 18, 2003) (finding that "by providing specifically for the payment of attorneys' fees to secured creditors . . . Congress did evince an intent to disallow attorneys' fees to unsecured creditors."); *In re Woodmere Investors Ltd. Partnership*, 178 B.R. 346, 356) (Bankr. S.D.N.Y. 1995) (following *Timbers* and the majority of courts that hold that section 506(b) of the Bankruptcy Code does not permit a creditor to recover post-petition attorneys' fees unless the creditor is an over-secured creditor.). Accordingly, the Claimants' claims for postpetition attorneys' fees should not be allowed. [12]

2. *Claimants' Claims Attributable to Asserted Punitive Damages Should be Subordinated By the Terms of the Plan and the Bankruptcy Code.*

53. The Claimants also assert claims in an unliquidated amount for punitive damages pursuant to Mo. Rev. Stat. section 408.562. While the Claimants assert that section 408.562

[12] The Claimants fail to specify the portion of Proof of Claim Nos. 2609 and 2611 that is for prepetition attorneys' fees and the portion that is for postpetition attorneys' fees, respectively. To the extent that this Court allows the Claimants' claims for either prepetition or postpetition attorneys' fees, then any amount claimed for such fees should be treated as unsecured claims related to the Claimants' overall allowed prepetition claim and treated accordingly under the Plan. *See, e.g.*, *In re Kindred Healthcare, Inc.*, 2003 Bankr. LEXIS 969, at *12 ("To the extent a claimant is entitled to attorneys' fees that accrued pre-petition (by contract or otherwise), it is simply part of the claim . . . .").

supports their claims for punitive damages, the Bankruptcy Code governs the treatment of punitive damages in a debtor's bankruptcy case and permits the bankruptcy court to subordinate, disallow or limit punitive damages. *See, e.g.*, *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 601 (Bankr. D. Del. 2001) (holding that bankruptcy courts have the equitable power to limit or disallow punitive damages claims); *In re FF Holdings Corp.*, No. 98-37/38-JFF, 1998 U.S. Dist. LEXIS 10741, at *22 (D. Del. Feb. 17, 1998) (same); *see also Keene Corp. v. Acstar Ins. Co.* (*In re Keene Corp.*), 162 B.R. 935, 947 (Bankr. S.D.N.Y. 1994) ("a bankruptcy court can subordinate, disallow or limit punitive damage claims.") (citation omitted); *In re Bicoastal Corp.*, 134 B.R. 50, 54 (Bankr. M.D. Fla. 1991) ("It is clear that even though Chapter 11 of the Bankruptcy Code does not specifically provide for the treatment of claims based on a fine, penalty, or punitive damages, the Code traditionally has not favored such claims."); *In re Celotex Corp.*, 128 B.R. 478, 484 n.12 (Bankr. M.D. Fla. 1991) ("Although Section 726(a)(4) is inapplicable to Chapter 11 reorganizations . . . it is well-established that bankruptcy courts have inherent equitable power to disallow, limit, or subordinate claims for punitive damages in Chapter 11 reorganizations.") (citations omitted); *In re Allegheny Int'l, Inc.*, 106 B.R. 75, 79 (Bankr. W.D. Pa. 1989) (stating that a bankruptcy court's equitable powers allow it to eliminate, subordinate, or limit claims for punitive damages); *In re Colin*, 44 B.R. 806, 810 (Bankr. S.D.N.Y. 1984) (subordinating a claim for punitive damages pursuant to section 510(c) despite a lack of creditor misconduct because a failure to do so would harm innocent creditors).

54. Under Section 1.151 of the Plan, a "Punitive Damage Claim" is defined as "any Claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, to the extent that such fine, penalty, forfeiture or damages is not compensation for actual pecuniary loss suffered by the holder of such Claim." Moreover, under

Section 1.163 of the Plan, a Punitive Damage Claim, to the extent it is allowed, is classified as a "Subordinated Claim" such that it will be "subject to subordination under section 510 of the Bankruptcy Code or otherwise." As such, pursuant to the Plan, any Punitive Damage Claims against AMCUSA, to the extent they are allowed, will be classified as Subordinated Claims. Holders of Subordinated Claims will receive certain beneficial interests in the AMCUSA Trust and the Advanta Trust entitling them to a *pro rata* share of distributions from the applicable trust if and only if all claims senior to the Subordinated Claims are paid in full. Plan, at § 4.11. The Plan and its classifications of claims were approved by the Court pursuant to the Confirmation Order.

55. The Confirmation Order found that the Plan and its classification scheme complied with the Bankruptcy Code and that the classifications of claims for purposes of making distributions under the Plan shall be governed solely by the terms of the Plan. Confirmation Order, at ¶ 6. The Claimants were served with a copy of the Plan, the Disclosure Statement and the other Solicitation Materials (as defined in the Confirmation Order) and all but one of the Claimants voted to accept the Plan. None of the Claimants filed an objection to confirmation of the Plan and none of the Claimants made an appearance at the confirmation hearing in person or by counsel. Furthermore, no party sought appellate review of the Confirmation Order and the Confirmation Order became a final order on February 25, 2011.

56. It is well established that a confirmation order "'satisfies the requirements of a judgment that can be given preclusive effect.'" *See, e.g.*, *Finova Capital Corp. v. Larson Pharmacy Inc.*, 425 F.3d 1294, 1300 (11th Cir. 2005) (quoting *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990)). Therefore, if any Claimant objected to the terms of the Plan, particularly the classification of punitive damage claims as Subordinated Claims, it was

incumbent upon the Claimants to file pleadings to raise the issue at confirmation where ambiguities could be corrected, objections ruled upon and final action taken. *In re Friedman's, Inc.*, 356 B.R. 766, 773 (Bankr. S.D. Ga. 2006) (subordinating claim of creditor pursuant to the terms of the debtors' plan and finding that "[a]ll parties are bound by the definition of what constitutes a Subordinated Claim . . . ."). The Claimants are now bound by the definition of "Subordinated Claims," and the treatment thereof, in the Plan and any allowed punitive damage claims against AMCUSA should be treated accordingly. Therefore, to the extent the Court were to allow the Claimants' claims against AMCUSA based on their theory of liability under the SMLA, any portion of such claims attributable to punitive damages should be subordinated pursuant to the Plan.

CONCLUSION

57. Based on the foregoing, all of the Claimants' claims set forth in the POCs should be disallowed in their entirety, as such claims cannot be asserted against AMCUSA. Alternatively, and at a minimum, the Claimants' claims for postpetition attorneys' fees and punitive damages should be disallowed in their entirety. In support of the foregoing, the Trustee relies on the Declaration of Andrew Scruton Pursuant to Local Rule 3007-1 in Support of the Seventh Omnibus Objection to Claims (the "***Scruton Declaration***"), dated as of the date hereof and attached hereto as ***Exhibit G***.

NOTICE

58. Notice of this Omnibus Objection will be provided to (i) the Office of the United States Trustee for the District of Delaware; (ii) the reorganized Debtors, Attn: Andrew Scruton; (iii) Bank of New York Mellon as trustee under the Investment Note Indenture (as defined in the Plan) (iv) Law Debenture Trust Company of New York as trustee under the 8.99% Indenture (as

defined in the Plan); (v) each holder of a Seventh Omnibus Claim at the address for notices set forth in each party's Proof of Claim; and (vi) those parties who have requested notice pursuant to Bankruptcy Rule 2002 (collectively, the "***Notice Parties***"). The Trustee respectfully submits that no further notice of this Omnibus Objection is required.

59. Pursuant to Bankruptcy Rule 3007, the Debtors have provided all Claimants affected by this Omnibus Objection with at least thirty days notice of the hearing to consider this Omnibus Objection.

NO PRIOR REQUEST

60. No previous request for the relief sought herein has been made to this or any other court.

STATEMENT OF COMPLIANCE WITH LOCAL RULE 3007-1

61. The undersigned representative of Drinker Biddle & Reath LLP certifies that he has reviewed the requirements of Local Rule 3007-1 and that the Omnibus Objection substantially complies with that Local Rule. To the extent that the Omnibus Objection does not comply in all respects with the requirements of Local Rule 3007-1, Drinker Biddle & Reath LLP believes such deviations are not material and respectfully requests that any such requirement be waived.

SEPARATE CONTESTED MATTERS

62. To the extent that a response is filed regarding any Seventh Omnibus Claim listed in this Omnibus Objection and the Trustee is unable to resolve the response, each such Seventh Omnibus Claim, and the objection by the Trustee to each such Seventh Omnibus Claim asserted herein, shall constitute a separate contested matter as contemplated by Bankruptcy Rule 9014.

Any order entered by the Court regarding an objection asserted in the Omnibus Objection shall be deemed a separate order with respect to each Claim.

RESPONSES TO OMNIBUS OBJECTION

63. To contest the relief requested in this Omnibus Objection, a Claimant must file and serve a written response to this Objection (a "***Response***") so that it is received no later than May 23, 2011 at 4:00 p.m. (EDT) (the "***Response Deadline***"). Every Response must be filed with the Office of the Clerk of the United States Bankruptcy Court for the District of Delaware: 824 North Market Street, Wilmington, Delaware 19801, and served upon the following parties, so that the Response is received no later than the Response Deadline, at the following addresses:

DRINKER BIDDLE & REATH LLP
1100 North Market Street, Suite 1000
Wilmington, DE 19801
Telephone: (302) 467-4200
Facsimile: (302) 467-4201
Attn: Howard A. Cohen

- and -

LATHAM & WATKINS LLP
885 Third Avenue
New York, NY 10022-4834
Telephone: (212) 906-1200
Attn: Roger G. Schwartz and Catherine M. Martin

64. Every Response to this Omnibus Objection must contain at a minimum the following information:

(a) a caption setting forth the name of the Court, the name of the Debtor, the case number, and the title of the Objection to which the Response is directed;

(b) the name of the Claimant, his/her/its claim number, and a description of the basis for the amount of the Proof of Claim;

(c) the specific factual basis and supporting legal argument upon which the party will rely in opposing this Omnibus Objection;

(d) any supporting documentation, to the extent it was not included with the Proof of Claim previously filed with the clerk or claims agent, upon which the party will rely to support the basis for and amounts asserted in the Proof of Claim; and

(e) the name, address, telephone number, and fax number of the person(s) (which may be the Claimant or the Claimant's legal representative) with whom counsel for the Trustee should communicate with respect to the claim or the Omnibus Objection and who possesses authority to reconcile, settle or otherwise resolve the objection to the disputed claim on behalf of the Claimant.

65. If a Claimant fails to file and serve a timely Response by the Response Deadline, the Trustee may present to the Court an appropriate order disallowing such Claimant's claim, without further notice to the Claimant or a hearing.

66. Consistent with Local Rule 9006-1(d), the Trustee may, at his option, file and serve a reply to a Response no later than 4:00 p.m. (Eastern Time) one day prior to the deadline for filing the agenda on any hearing to consider the Omnibus Objection.

RESERVATION OF RIGHTS

67. The Trustee hereby reserves the right to object in the future to any of the Proofs of Claim listed in this Omnibus Objection or on the exhibits attached hereto on any ground, and to amend, modify and/or supplement this Omnibus Objection, including, without limitation, to object to amended or newly-filed claims. Separate notice and hearing may be scheduled for any such objection.

68. Notwithstanding anything contained in this Omnibus Objection or the attached exhibits, nothing herein shall be construed as a waiver of any rights that the Trustee may have: (a) to bring avoidance actions under the applicable sections of the Bankruptcy Code against the holders of claims subject to the Omnibus Objection; or (b) to exercise his rights of setoff against the holders of such claims relating to such avoidance actions.

WHEREFORE the Trustee respectfully requests entry of the Order granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: May 6, 2011
Wilmington, Delaware

DRINKER BIDDLE & REATH LLP

/s/ Howard A. Cohen
Howard A. Cohen (DE 4082)
1100 North Market Street, Suite 1000
Wilmington, DE 19801
Telephone: (302) 467-4200
Facsimile: (302) 467-4201

- and -

Robert K. Malone (*pro hac vice*)
Marita S. Erbeck (*pro hac vice pending*)
500 Campus Drive
Florham Park, NJ 07932-1047
Telephone: (973) 549-7000

- and -

Roger G. Schwartz (*pro hac vice*)
Aaron M. Singer (*pro hac vice*)
Catherine M. Martin (*pro hac vice*)
LATHAM & WATKINS LLP
885 Third Avenue
New York, NY 10022-4834
Telephone: (212) 906-1200

Counsel to FTI Consulting, Inc., in its capacity as Trustee of the AMCUSA Trust

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
ADVANTA CORP., *et al.*,[1]	:	Case No. 09-13931 (KJC)
Debtors.	:	(Jointly Administered)

Hearing Date: June 7, 2011 10:00 a.m.
Objection Deadline: May 23, 2011 4:00 p.m.

NOTICE OF SEVENTH OMNIBUS OBJECTION (SUBSTANTIVE) TO CLAIMS AGAINST ADVANTA MORTGAGE CORP. USA BASED ON CERTAIN CLASS ACTION LITIGATION CLAIMS

PLEASE TAKE NOTICE that on May 6, 2011, FTI Consulting, Inc., in its capacity as Trustee of the AMCUSA Trust (the "***Trustee***"), by and through its attorneys, Latham & Watkins LLP and Drinker Biddle & Reath LLP, filed their Seventh Omnibus Objection (Substantive) to Claims Against Advanta Mortgage Corp. USA Based on Certain Class Action Litigation Claims (the "***Objection***") with the United States Bankruptcy Court for the District of Delaware (the "***Court***").

PLEASE TAKE FURTHER NOTICE that each claimant that has filed a claim that is affected by the Objection is receiving a copy of the Objection and this Notice. Each claimant should read the Objection and review the Exhibits attached thereto, which list all of the claims that are subject to the Objection and the grounds for each objection.

[1] The Debtors in these jointly administered chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, were Advanta Corp. (2070) ("Advanta"), Advanta Investment Corp. (5627), Advanta Business Services Holding Corp. (4047), Advanta Business Services Corp. (3786), Advanta Shared Services Corp. (7074), Advanta Service Corp. (5625), Advanta Advertising Inc. (0186), Advantennis Corp. (2355), Advanta Mortgage Holding Company (5221), Advanta Auto Finance Corporation (6077), Advanta Mortgage Corp. USA (2654), Advanta Finance Corp. (8991), Advanta Ventures Inc. (5127), BE Corp. (8960), ideablob Corp. (0726), Advanta Credit Card Receivables Corp. (7955), Great Expectations International Inc. (0440), Great Expectations Franchise Corp. (3326), and Great Expectations Management Corp. (3328).

PLEASE TAKE FURTHER NOTICE that a hearing on the Objection shall be held before the Honorable Kevin J. Carey, Chief United States Bankruptcy Judge, on **June 7, 2011 at 10:00 a.m. (Prevailing Eastern Time)** at the United States Bankruptcy Court, 824 Market Street, 5th Floor, Courtroom 5, Wilmington, Delaware 19801.

PLEASE TAKE FURTHER NOTICE that any party wishing to oppose the relief requested in the Objection must file a written response with the Clerk of the Bankruptcy Court for the United States Bankruptcy Court for the District of Delaware at 824 Market Street, Wilmington, Delaware 19801, and serve it so as to be received by the undersigned counsel by **May 23, 2011 at 4:00 p.m. (Prevailing Eastern Time)** (the "***Response Deadline***").

PLEASE TAKE FURTHER NOTICE that any response filed with the Court must contain, at a minimum, the following:

(a) a caption setting forth the name of the Court, the name of the Debtors, the case number, and the title of the Objection to which the Response is directed;

(b) the name of the Claimant, his/her/its claim number, and a description of the basis for the amount of the Proof of Claim;

(c) the specific factual basis and supporting legal argument upon which the party will rely in opposing this Omnibus Objection;

(d) all documentation or other evidence in support of the claim, to the extent not included with the Proof of Claim previously filed with the Bankruptcy Court, upon which the claimant will rely in opposing the Objection at the hearing; and

(e) the name, address, telephone number, and fax number of the person(s) (which may be the Claimant or the Claimant's legal representative) with whom counsel for the Trustee should communicate with respect to the claim or the Omnibus Objection and who possesses authority to reconcile, settle, or otherwise resolve the objection to the disputed claim on behalf of the Claimant.

PLEASE TAKE FURTHER NOTICE that if you file a response to the Objection, you should be prepared to argue that response at the Hearing. You need not appear at (or participate in) the Hearing if you do not object to the relief requested in the Objection.

PLEASE TAKE FURTHER NOTICE that consistent with Local Rule 9006-1(d), the Trustee may, at his option, file and serve a reply to a Response no later than 4:00 p.m. (Prevailing Eastern Time) one day prior to the deadline for filing the agenda on any hearing to consider the Omnibus Objection.

PLEASE TAKE FURTHER NOTICE that if you do not timely file and serve a response to the Objection, the relief requested in the Objection may be granted without further notice to you.

PLEASE TAKE FURTHER NOTICE that the Hearing may be continued from time to time upon written notice to you or as declared orally at the Hearing.

PLEASE TAKE FURTHER NOTICE that the Trustee reserve the right to object in the future to any of the claims that are the subject of this Objection on any further or additional grounds. Separate notice will be provided and a separate hearing will be scheduled for any such objection.

Dated: May 6, 2011
Wilmington, Delaware

DRINKER BIDDLE & REATH LLP

/s/ Howard A. Cohen
Howard A. Cohen (DE 4082)
1100 North Market Street, Suite 1000
Wilmington, DE 19801
Telephone: (302) 467-4200
Facsimile: (302) 467-4201

Counsel to FTI Consulting, Inc., in its capacity as Trustee of the AMCUSA Trust

Exhibit A

The Seventh Omnibus Claims

Name of Claimant	Claim Number	Claim Amount	Reason for Disallowance
Abbott, Brian & Kimberly	2608	$27,934.64	Per Omnibus Objection, no liability under SMLA
Abel, Rodney E	2607	$41,044.79	Per Omnibus Objection, no liability under SMLA
Addison, Robert L & Gwendolyn T	2606	$19,313.00	Per Omnibus Objection, no liability under SMLA
Aldag, Chris & Linda	2605	$22,391.62	Per Omnibus Objection, no liability under SMLA
Armstrong, James B Jr & Connie S	2604	$18,512.01	Per Omnibus Objection, no liability under SMLA
Bagwell, David M & Dawn R	2603	$12,103.75	Per Omnibus Objection, no liability under SMLA
Bailiff, John	2602	$23,263.37	Per Omnibus Objection, no liability under SMLA
Baker, Alvin D and Lillian (Deceased)	2601	$15,582.63	Per Omnibus Objection, no liability under SMLA
Barbier, James A & Judith A	2600	$39,436.41	Per Omnibus Objection, no liability under SMLA
Barley, Juanita K	2599	$23,586.76	Per Omnibus Objection, no liability under SMLA
Barnett, James & Cheryl	2598	$22,751.43	Per Omnibus Objection, no liability under SMLA
Beebe, Brad & Lynn	2597	$12,640.20	Per Omnibus Objection, no liability under SMLA
Bell, Everett & Gloria	2596	$21,189.12	Per Omnibus Objection, no liability under SMLA
Black, Joseph F & Amy L	2595	$19,383.81	Per Omnibus Objection, no liability under SMLA
Bobbitt, William R & Martha A	2594	$31,857.38	Per Omnibus Objection, no liability under SMLA
Boden, Richard L & Laurie A	2593	$35,478.69	Per Omnibus Objection, no liability under SMLA
Boushie, Betty	2591	$32,553.18	Per Omnibus Objection, no liability under SMLA
Bowman, Donald K and Nancy C	2590	$23,167.36	Per Omnibus Objection, no liability under SMLA
Boyd, Daniel K & Kathleen A (Boyd) Murphy	2589	$21,832.07	Per Omnibus Objection, no liability under SMLA
Brandt, Michael S	2588	$53,407.66	Per Omnibus Objection, no liability under SMLA
Brock, Terry G and Vickie D	2587	$28,688.20	Per Omnibus Objection, no liability under SMLA
Brown, Diana L	2839	$21,540.45	Per Omnibus Objection, no liability under SMLA
Brown, Steven H and Gerrie A	2586	$29,059.79	Per Omnibus Objection, no liability under SMLA
Brown, Yvonne L	2670	$11,675.78	Per Omnibus Objection, no liability under SMLA
Brungardt, William A & Joyce I	2669	$24,738.78	Per Omnibus Objection, no liability under SMLA
Budde, Robert P & Tamela J (Budde) Black	2639	$16,173.59	Per Omnibus Objection, no liability under SMLA
Burkhart, Larry & Linda (Burkhart) Payne	2638	$28,732.49	Per Omnibus Objection, no liability under SMLA
Budd, James & Sherry	2640	$52,880.75	Per Omnibus Objection, no liability under SMLA
Burlile, Thomas A & Lisa J	2637	$39,369.88	Per Omnibus Objection, no liability under SMLA
Burton, Richard L & Sandra M (F/K/A Burto	2636	$43,949.17	Per Omnibus Objection, no liability under SMLA

Bushong, Keith & Robin	2635	$6,024.86	Per Omnibus Objection, no liability under SMLA
Campbell, Edward & Angela	2634	$35,801.82	Per Omnibus Objection, no liability under SMLA
Capps, Kimberly L	2633	$22,510.37	Per Omnibus Objection, no liability under SMLA
Carroll, Kenneth D & Kim E	2632	$17,200.58	Per Omnibus Objection, no liability under SMLA
Casals, Michael & Maureen	2631	$21,980.91	Per Omnibus Objection, no liability under SMLA
Casimere, Anthony & Lisa	2630	$30,686.92	Per Omnibus Objection, no liability under SMLA
Caton, Charles R (Deceased) and Virgini	2629	$33,995.42	Per Omnibus Objection, no liability under SMLA
Cauthon, Beverly I	2628	$37,251.56	Per Omnibus Objection, no liability under SMLA
Chase, Carl R and Teresa A	2627	$6,669.06	Per Omnibus Objection, no liability under SMLA
Chiesa, Joseph T & Patricia R	2626	$43,737.94	Per Omnibus Objection, no liability under SMLA
Chilcutt, Thomas J & Lalise Y	2625	$43,041.42	Per Omnibus Objection, no liability under SMLA
Christianson, Victor O & Diane	2624	$24,786.46	Per Omnibus Objection, no liability under SMLA
Cohen, Constance M	2623	$17,558.90	Per Omnibus Objection, no liability under SMLA
Colbert, Quintin & Brenda S	2622	$23,852.30	Per Omnibus Objection, no liability under SMLA
Coleman, Gregory M	2621	$17,234.63	Per Omnibus Objection, no liability under SMLA
Collier, Daniel L & Cynthia l	2620	$37,220.38	Per Omnibus Objection, no liability under SMLA
Conrad, Larry S & Irene	2619	$25,283.99	Per Omnibus Objection, no liability under SMLA
Coons, Judith A	2618	$28,215.10	Per Omnibus Objection, no liability under SMLA
Cotter, Mark & Ann	2617	$15,844.05	Per Omnibus Objection, no liability under SMLA
Covarrubias, Catherine M (F/K/A Bogle)	2592	$23,653.21	Per Omnibus Objection, no liability under SMLA
Cowell, David & Judith	2616	$52,066.42	Per Omnibus Objection, no liability under SMLA
Cox, Bradley L & Josie B	2615	$23,933.87	Per Omnibus Objection, no liability under SMLA
Dada, Sam & Dorcas	2614	$13,604.92	Per Omnibus Objection, no liability under SMLA
Dahl, Thomas L & Amalia	2612	$141,670.07	Per Omnibus Objection, no liability under SMLA
Daiber, Patrick & Sandra	2613	$22,189.20	Per Omnibus Objection, no liability under SMLA
Danchus, Robert & Kathleen R	2668	$29,020.04	Per Omnibus Objection, no liability under SMLA
Davidson, Judy M	2667	$25,554.90	Per Omnibus Objection, no liability under SMLA
Decker, Raymond D (Deceased) & Susan L	2665	$19,267.40	Per Omnibus Objection, no liability under SMLA
Dee, Todd & Kimberly	2666	$4,606.92	Per Omnibus Objection, no liability under SMLA
Dennis, Michael J & Maureen	2664	$40,223.26	Per Omnibus Objection, no liability under SMLA
Deusinger, Robert H & Susan S	2663	$35,303.22	Per Omnibus Objection, no liability under SMLA
Dickerhoff, Timothy R	2662	$41,653.78	Per Omnibus Objection, no liability under SMLA

Dilworth, Danny	2661	$12,413.35	Per Omnibus Objection, no liability under SMLA
Dohm, William & Bridget	2660	$70,571.85	Per Omnibus Objection, no liability under SMLA
Donner, Robert N & Oleta M	2659	$30,254.25	Per Omnibus Objection, no liability under SMLA
Duck, Randal D & Sandra E	2658	$13,294.05	Per Omnibus Objection, no liability under SMLA
Dumey, Mark & Laura	2657	$40,397.97	Per Omnibus Objection, no liability under SMLA
Dunham, Donald & Susan	2656	$33,295.13	Per Omnibus Objection, no liability under SMLA
Dunn, James D & Shelly J	2655	$30,599.11	Per Omnibus Objection, no liability under SMLA
Eads, Michael	2654	$10,196.84	Per Omnibus Objection, no liability under SMLA
Eaton, Marcella	2652	$22,173.60	Per Omnibus Objection, no liability under SMLA
Ebert, Stephen J & Phyllis H	2653	$34,242.29	Per Omnibus Objection, no liability under SMLA
Edwards, R David & Carol E	2651	$52,346.57	Per Omnibus Objection, no liability under SMLA
Eilers, Jeanette M	2650	$28,703.56	Per Omnibus Objection, no liability under SMLA
Eisler, Kenneth B & Mary	2649	$24,591.58	Per Omnibus Objection, no liability under SMLA
Eller, Michael J & Lori L	2648	$26,979.62	Per Omnibus Objection, no liability under SMLA
Ends, Lyndell	2647	$18,964.64	Per Omnibus Objection, no liability under SMLA
Engelken, Regina	2645	$51,511.91	Per Omnibus Objection, no liability under SMLA
Evans, William	2840	$19,189.93	Per Omnibus Objection, no liability under SMLA
Ewart, John	2646	$25,702.60	Per Omnibus Objection, no liability under SMLA
Flippin, Dorothy	2842	$11,790.72	Per Omnibus Objection, no liability under SMLA
Floyd, Steven W & Carolyn S	2644	$19,489.50	Per Omnibus Objection, no liability under SMLA
Frazier, John D & Dyonna	2643	$18,759.20	Per Omnibus Objection, no liability under SMLA
Freeman, Lea Ann	2642	$9,567.93	Per Omnibus Objection, no liability under SMLA
Frye, Richard S & Judy A	2641	$20,929.41	Per Omnibus Objection, no liability under SMLA
Gaddie, Beverly	2700	$5,317.29	Per Omnibus Objection, no liability under SMLA
Gardner, Carolyn S	2699	$21,319.45	Per Omnibus Objection, no liability under SMLA
Gentry, Steven C & Deborah K	2698	$21,171.98	Per Omnibus Objection, no liability under SMLA
Gentry, Steven C and Deborah K[1]	2843	$21,171.98	Per Omnibus Objection, no liability under SMLA
Gerwitz, Janice (Metzler)	2728	$12,507.78	Per Omnibus Objection, no liability under SMLA
Giaconia, Angelo & Phyllis C	2881	$30,673.40	Per Omnibus Objection, no liability under SMLA
Gilbert, Robert G	2697	$13,827.61	Per Omnibus Objection, no liability under SMLA

[1] This Proof of Claim appears to be duplicative of claim number 2698.

Gilmor, Michael P & Shellie	2696	$25,593.82	Per Omnibus Objection, no liability under SMLA
Gooch, Dale & Augustine	2695	$23,390.24	Per Omnibus Objection, no liability under SMLA
Graf, John A & Paula J	2694	$18,286.15	Per Omnibus Objection, no liability under SMLA
Green, James L & Linda F	2693	$8,812.56	Per Omnibus Objection, no liability under SMLA
Green, Larry R & Nancy L	2692	$28,155.19	Per Omnibus Objection, no liability under SMLA
Grzybinski, Todd	2691	$17,789.62	Per Omnibus Objection, no liability under SMLA
Gunn, Pamela (Fendelman)	2841	$32,363.86	Per Omnibus Objection, no liability under SMLA
Hagen, Chris R & Dawn	2690	$8,650.85	Per Omnibus Objection, no liability under SMLA
Halbasch, Harry L	2689	$17,399.19	Per Omnibus Objection, no liability under SMLA
Hall Jr, Gary D & Hall, Nancy J	2688	$26,154.70	Per Omnibus Objection, no liability under SMLA
Hanley, William and Geniene (Fka Hanley)	2687	$32,072.66	Per Omnibus Objection, no liability under SMLA
Hanrahan, Denise M	2686	$69,059.79	Per Omnibus Objection, no liability under SMLA
Hargett, John E & Brenda K	2685	$29,455.70	Per Omnibus Objection, no liability under SMLA
Harman Sr, Wayne J & Harman, Christina P	2683	$45,684.21	Per Omnibus Objection, no liability under SMLA
Harrell, Darlene D	2684	$1,855.95	Per Omnibus Objection, no liability under SMLA
Harris, Michael E & Lois	2681	$33,590.23	Per Omnibus Objection, no liability under SMLA
Hauck, Wayne & Dorothy	2682	$28,001.31	Per Omnibus Objection, no liability under SMLA
Hedin, Larry J & Chieko	2679	$13,943.40	Per Omnibus Objection, no liability under SMLA
Heet, James J & Brenda J	2680	$15,902.78	Per Omnibus Objection, no liability under SMLA
Henthorn, Michael A & Cecelia	2677	$22,512.67	Per Omnibus Objection, no liability under SMLA
Herberger, Kelly A	2678	$13,356.29	Per Omnibus Objection, no liability under SMLA
Hileman, Donna	2676	$22,269.05	Per Omnibus Objection, no liability under SMLA
Hilliard, Gregory & Jeanette	2673	$15,747.10	Per Omnibus Objection, no liability under SMLA
Hilliard, Gregory & Jeanette[2]	2675	$15,747.10	Per Omnibus Objection, no liability under SMLA
Hobbs, Dennis R & Sandy	2674	$17,345.52	Per Omnibus Objection, no liability under SMLA
Holbert, Lisa C	2672	$24,305.71	Per Omnibus Objection, no liability under SMLA
Holley, Julie L (F/K/A Rice and Sneed)	2799	$23,953.89	Per Omnibus Objection, no liability under SMLA
Holtkamp, Jon R & Tricia	2671	$9,871.60	Per Omnibus Objection, no liability under SMLA
Hoover, Mervin R & Mary A	2877	$21,458.48	Per Omnibus Objection, no liability under SMLA
Howard, Thomas R & Mary A	2876	$52,484.78	Per Omnibus Objection, no liability under SMLA

[2] This Proof of Claim appears to be duplicative of claim number 2673.

Hudson, Ossie & Sharoddi	2875	$46,661.60	Per Omnibus Objection, no liability under SMLA
Hudson, William R and Carole E	2874	$30,716.93	Per Omnibus Objection, no liability under SMLA
Huesemann, Eric N and Deborah Phillips (Huesemann)	2873	$44,840.72	Per Omnibus Objection, no liability under SMLA
Hughley, Teresa	2872	$26,247.06	Per Omnibus Objection, no liability under SMLA
Hunt, William J and Evelyn L	2871	$14,967.88	Per Omnibus Objection, no liability under SMLA
Hurst, Theresa A	2870	$35,957.16	Per Omnibus Objection, no liability under SMLA
James, Bruce & Mary A	2869	$26,687.94	Per Omnibus Objection, no liability under SMLA
Jenkins, James T	2868	$25,636.36	Per Omnibus Objection, no liability under SMLA
Johns, Billie E & Catherine S	2866	$51,717.43	Per Omnibus Objection, no liability under SMLA
Jones, Kenneth D & Valrie K	2867	$22,632.62	Per Omnibus Objection, no liability under SMLA
Jones, Michael	2864	$20,399.90	Per Omnibus Objection, no liability under SMLA
Jones, Nina G	2865	$17,673.71	Per Omnibus Objection, no liability under SMLA
Jones, William T & Marion C	2863	$20,993.22	Per Omnibus Objection, no liability under SMLA
Jordan, Paul W & Rose A	2862	$28,363.68	Per Omnibus Objection, no liability under SMLA
Kearney, Timothy J & Lisa M	2880	$15,242.99	Per Omnibus Objection, no liability under SMLA
Keelin, Sandra K	2860	$8,286.38	Per Omnibus Objection, no liability under SMLA
Keeney, Patricia A	2861	$24,380.39	Per Omnibus Objection, no liability under SMLA
Kellenberger, John R & Debra	2858	$34,370.20	Per Omnibus Objection, no liability under SMLA
Kemp, Kim J & Elizabeth G	2859	$37,847.99	Per Omnibus Objection, no liability under SMLA
Kent, Carol L	2857	$12,643.29	Per Omnibus Objection, no liability under SMLA
Ketcherside, Cliff & Christy	2856	$21,911.75	Per Omnibus Objection, no liability under SMLA
Klein, Nelson (Deceased)	2855	$32,193.79	Per Omnibus Objection, no liability under SMLA
Knirr, James and Erin	2854	$31,327.84	Per Omnibus Objection, no liability under SMLA
Krejci, William G and Susan L	2853	$27,117.99	Per Omnibus Objection, no liability under SMLA
Krupnik, Antony	2852	$21,627.11	Per Omnibus Objection, no liability under SMLA
Kunkelman, Kevin and Deborah A	2850	$40,087.91	Per Omnibus Objection, no liability under SMLA
Laber, D Michael & Valinda S	2851	$12,481.01	Per Omnibus Objection, no liability under SMLA
Lagrone, Bartholomew	2848	$18,718.07	Per Omnibus Objection, no liability under SMLA
Lanzendorf, James & Deanna	2846	$33,057.81	Per Omnibus Objection, no liability under SMLA
Lattrace, Gregory M & Ruth A	2879	$30,338.43	Per Omnibus Objection, no liability under SMLA
Lawson, Robert L and Diana V	2847	$17,041.58	Per Omnibus Objection, no liability under SMLA

Lay, Gary and Shirley	2845	$20,241.22	Per Omnibus Objection, no liability under SMLA
Leasck, Pamela S	2844	$26,917.95	Per Omnibus Objection, no liability under SMLA
Lewis, Terrence and Teresa	2701	$21,787.50	Per Omnibus Objection, no liability under SMLA
Lisle, William K & Renee M	2702	$19,943.95	Per Omnibus Objection, no liability under SMLA
Llewellyn, Keith A & Anita M	2703	$30,936.16	Per Omnibus Objection, no liability under SMLA
Lockhart, Charles D & Ruth E	2704	$22,252.69	Per Omnibus Objection, no liability under SMLA
Loesche, Daniel A & Kathleen D	2705	$36,178.73	Per Omnibus Objection, no liability under SMLA
Lohman, John A & Grace L	2706	$20,920.96	Per Omnibus Objection, no liability under SMLA
Lohse, Glenn H	2707	$53,545.55	Per Omnibus Objection, no liability under SMLA
Luetkemeyer, Craig & Luetkemeyer D Ellen	2708	$27,878.88	Per Omnibus Objection, no liability under SMLA
Lunatto, Matt	2709	$29,739.31	Per Omnibus Objection, no liability under SMLA
Lyons, William S & Maryilyn D	2711	$25,522.34	Per Omnibus Objection, no liability under SMLA
Mankey, Joann	2712	$48,500.33	Per Omnibus Objection, no liability under SMLA
Marchetti, John F & Terri Y	2713	$14,601.15	Per Omnibus Objection, no liability under SMLA
Marcos, Scott L	2714	$17,137.86	Per Omnibus Objection, no liability under SMLA
Marion, Joel & Carolyn	2718	$27,716.31	Per Omnibus Objection, no liability under SMLA
Martin, Ronnie & Belinda	2715	$4,910.53	Per Omnibus Objection, no liability under SMLA
Maxwell, Gary L & Maxwell-Orth, Leslie A	2716	$57,808.47	Per Omnibus Objection, no liability under SMLA
Mcandrew, Terrance G & Gina M	2878	$77,620.61	Per Omnibus Objection, no liability under SMLA
Mccartney, Kevin & Erica	2717	$47,985.01	Per Omnibus Objection, no liability under SMLA
Mcculloch, Paul & Theresa	2722	$26,017.87	Per Omnibus Objection, no liability under SMLA
Mcdonnell, Jeffrey S & Julie A	2720	$27,561.40	Per Omnibus Objection, no liability under SMLA
Mcdonnell, Jeffrey S & Julie A[3]	2723	$27,561.40	Per Omnibus Objection, no liability under SMLA
Mcgrail, Charles K & Cynthia A	2719	$63,554.25	Per Omnibus Objection, no liability under SMLA
Mcgrail, Charles K & Cynthia A[4]	2724	$63,554.25	Per Omnibus Objection, no liability under SMLA
Mcvehil, Jeff & Carrie	2721	$28,286.93	Per Omnibus Objection, no liability under SMLA
Mcvehil, Jeff & Carrie[5]	2725	$28,286.93	Per Omnibus Objection, no liability under SMLA

[3] This Proof of Claim appears to be duplicative of claim number 2720.

[4] This Proof of Claim appears to be duplicative of claim number 2719.

[5] This Proof of Claim appears to be duplicative of claim number 2721.

Mellon, Gary and Betsy	2726	$17,612.00	Per Omnibus Objection, no liability under SMLA
Merrick, Steven R and Kathy L	2727	$3,294.79	Per Omnibus Objection, no liability under SMLA
Meyer, David D and Marsha M	2729	$23,625.78	Per Omnibus Objection, no liability under SMLA
Meyer, Leo	2731	$2,310.84	Per Omnibus Objection, no liability under SMLA
Meyer, Thomas H	2730	$34,590.87	Per Omnibus Objection, no liability under SMLA
Miller, Johnny M and Rebecca J	2732	$9,373.61	Per Omnibus Objection, no liability under SMLA
Miller, Richard and Dana	2733	$17,988.74	Per Omnibus Objection, no liability under SMLA
Miller, Thomas E and Patricia A	2734	$34,645.18	Per Omnibus Objection, no liability under SMLA
Mooney, Debra A	2735	$20,343.16	Per Omnibus Objection, no liability under SMLA
Moravcik, Brunilda	2736	$43,788.00	Per Omnibus Objection, no liability under SMLA
Morgan, Marilyn	2737	$17,496.41	Per Omnibus Objection, no liability under SMLA
Mori, Richard L and Virtes M	2738	$22,825.59	Per Omnibus Objection, no liability under SMLA
Mosby, Kim A and Eileen S	2739	$66,056.71	Per Omnibus Objection, no liability under SMLA
Mueller, Keith L and Deborah S	2741	$27,326.93	Per Omnibus Objection, no liability under SMLA
Mueller, Michael B(Deceased) & Heather L	2740	$26,242.45	Per Omnibus Objection, no liability under SMLA
Murray, Rochelle	2742	$12,735.87	Per Omnibus Objection, no liability under SMLA
Murray, William J and Cynthia L	2743	$24,509.16	Per Omnibus Objection, no liability under SMLA
Nagel, Gary L	2744	$24,553.98	Per Omnibus Objection, no liability under SMLA
Nanier, Michael W and Cheryl L	2849	$24,646.81	Per Omnibus Objection, no liability under SMLA
Neal, Janice	2745	$6,454.06	Per Omnibus Objection, no liability under SMLA
Newman, Kevin W & Kathy (Deceased)	2746	$20,207.25	Per Omnibus Objection, no liability under SMLA
Noonan, Daniel J and Ilene Noonan	2747	$26,041.35	Per Omnibus Objection, no liability under SMLA
Norde, Derek and Dedre	2748	$62,456.71	Per Omnibus Objection, no liability under SMLA
O'grady, Vincent T and Dorothy K	2749	$11,353.53	Per Omnibus Objection, no liability under SMLA
Ottiger, Otto J and Barbara J	2750	$18,059.85	Per Omnibus Objection, no liability under SMLA
Owens, David B & Deborah L	2751	$27,687.73	Per Omnibus Objection, no liability under SMLA
Panzica, Dominic and Tonya L	2752	$10,064.15	Per Omnibus Objection, no liability under SMLA
Parker, Timothy D and Sue A	2753	$73,213.55	Per Omnibus Objection, no liability under SMLA
Parvin, Leo E Jr	2754	$12,834.11	Per Omnibus Objection, no liability under SMLA
Persinger, Thurman	2755	$29,093.79	Per Omnibus Objection, no liability under SMLA
Peters, Daniel (Decd), Lavergne (Mother), Noreen, (Sister), Robert Peters, Richard Peters,	2756	$22,649.26	Per Omnibus Objection, no liability under SMLA

Thomas Peters (Brothers)			
Peterson, Fred R	2757	$20,762.39	Per Omnibus Objection, no liability under SMLA
Peterson, Troy W and Jacquelyn M	2758	$28,389.67	Per Omnibus Objection, no liability under SMLA
Phipps, James K and Judy G	2759	$32,556.60	Per Omnibus Objection, no liability under SMLA
Phipps, Mark & Jane	2760	$32,556.60	Per Omnibus Objection, no liability under SMLA
Piburn, Brad & Ladona (Piburn) Cooley	2761	$26,567.69	Per Omnibus Objection, no liability under SMLA
Poole, Paul T II and Linda R	2762	$8,817.98	Per Omnibus Objection, no liability under SMLA
Pratt, Randy T & Angela L	2882	$18,785.63	Per Omnibus Objection, no liability under SMLA
Priest, Donald R and Jeannette L	2763	$36,332.66	Per Omnibus Objection, no liability under SMLA
Radcliffe, Timothy D and Mary L	2764	$23,882.80	Per Omnibus Objection, no liability under SMLA
Rash, Michael and Tammy	2765	$18,490.75	Per Omnibus Objection, no liability under SMLA
Ray, James A and Charlotte L	2766	$22,889.85	Per Omnibus Objection, no liability under SMLA
Raynor, Guy and Jeri (Raynor) Cain	2767	$21,050.00	Per Omnibus Objection, no liability under SMLA
Reeves, Robert & Susan	2768	$26,397.80	Per Omnibus Objection, no liability under SMLA
Reinberg, Greg and Linda	2769	$31,636.31	Per Omnibus Objection, no liability under SMLA
Richenberger, Randy and Rebecca	2770	$31,520.13	Per Omnibus Objection, no liability under SMLA
Richter, Ronald E and Janet F	2771	$32,632.85	Per Omnibus Objection, no liability under SMLA
Riedl, Linda L and Helen Lucille	2772	$23,942.93	Per Omnibus Objection, no liability under SMLA
Rigot, Thomas S Sr & Rigot, Sharon L	2773	$13,594.91	Per Omnibus Objection, no liability under SMLA
Rinck, Mark W and Patricia J	2774	$38,063.51	Per Omnibus Objection, no liability under SMLA
Robbins, Michael P and Robbins, Sharon	2775	$18,542.96	Per Omnibus Objection, no liability under SMLA
Robertson, William L	2776	$5,732.21	Per Omnibus Objection, no liability under SMLA
Robinson, Danny L and Taynia Y	2777	$40,258.16	Per Omnibus Objection, no liability under SMLA
Rockett, Derrick and Alethia Y	2778	$24,024.39	Per Omnibus Objection, no liability under SMLA
Rolfe, Steven P and Melissa A	2779	$22,995.03	Per Omnibus Objection, no liability under SMLA
Royer, Scott	2780	$29,621.75	Per Omnibus Objection, no liability under SMLA
Ruble, Clinton W and Nicole L	2781	$7,750.85	Per Omnibus Objection, no liability under SMLA
Rumans, John R and Jeanne E	2782	$51,689.04	Per Omnibus Objection, no liability under SMLA
Russell, Erna M and Faraon (deceased)	2783	$41,487.13	Per Omnibus Objection, no liability under SMLA
Russo, Thomas J and Barbara J	2784	$14,357.21	Per Omnibus Objection, no liability under SMLA
Sage, Michael D	2785	$31,479.22	Per Omnibus Objection, no liability under SMLA
Sandstedt, Renee	2786	$19,284.77	Per Omnibus Objection, no liability under SMLA

Sandstedt, Wayne	2787	$17,196.08	Per Omnibus Objection, no liability under SMLA
Santiago, Luis and Carol	2788	$37,516.54	Per Omnibus Objection, no liability under SMLA
Santulli, Paul Jr & Santulli Hipsher, Dana	2789	$31,254.48	Per Omnibus Objection, no liability under SMLA
Scarfino, Dan	2790	$21,937.54	Per Omnibus Objection, no liability under SMLA
Schmitz, Michael L & Karen M	2791	$21,497.24	Per Omnibus Objection, no liability under SMLA
Schwartz, Donald L and Rose M	2792	$20,634.70	Per Omnibus Objection, no liability under SMLA
Shannon Sr, Steven J	2793	$27,926.73	Per Omnibus Objection, no liability under SMLA
Shekar, Chandra and Meera	2794	$25,848.47	Per Omnibus Objection, no liability under SMLA
Smith, Arthur and Linda	2795	$16,281.58	Per Omnibus Objection, no liability under SMLA
Smith, Glenda F	2796	$20,857.28	Per Omnibus Objection, no liability under SMLA
Smith, Jeff	2797	$15,875.01	Per Omnibus Objection, no liability under SMLA
Smith, Robert C and Shirley L	2798	$1,722.33	Per Omnibus Objection, no liability under SMLA
Stewart, Phillip and Pamela	2800	$17,758.60	Per Omnibus Objection, no liability under SMLA
Stice, James and Susan	2801	$57,050.01	Per Omnibus Objection, no liability under SMLA
Stracener, Doyce L and Vicki (Deceased)	2802	$31,003.96	Per Omnibus Objection, no liability under SMLA
Strauss, Debra	2803	$57,112.18	Per Omnibus Objection, no liability under SMLA
Syljuberget, Juanita (Fka Winegar)	2832	$18,792.47	Per Omnibus Objection, no liability under SMLA
Taylor, Michael and Yong H	2804	$16,730.99	Per Omnibus Objection, no liability under SMLA
Teacutter, Laura Fay	2805	$20,153.92	Per Omnibus Objection, no liability under SMLA
Thomas, Edwin D and Barbara A	2806	$20,153.92	Per Omnibus Objection, no liability under SMLA
Thomas, J Ross and Gayla K	2807	$51,410.94	Per Omnibus Objection, no liability under SMLA
Todd, Michael A and Marilyn R	2808	$39,596.49	Per Omnibus Objection, no liability under SMLA
Tohill, Ken and Theresa	2809	$20,241.49	Per Omnibus Objection, no liability under SMLA
Truman, Gilbert L and Diane A	2810	$33,567.50	Per Omnibus Objection, no liability under SMLA
Tuffli, Peter W	2811	$21,192.77	Per Omnibus Objection, no liability under SMLA
Uminn, Christine	2812	$17,668.71	Per Omnibus Objection, no liability under SMLA
Underwood, Ashley H & Eutona L	2813	$29,415.04	Per Omnibus Objection, no liability under SMLA
Unger, James C & Melissa A	2814	$19,593.88	Per Omnibus Objection, no liability under SMLA
Varns, Raye Ann	2815	$25,916.29	Per Omnibus Objection, no liability under SMLA
Venyard,James M & Deborah Sue(Deceased)	2816	$20,468.36	Per Omnibus Objection, no liability under SMLA
Villarreal, Richard A & Deanna	2817	$85,047.69	Per Omnibus Objection, no liability under SMLA
Vorbeck, David A and Lori S	2818	$25,711.95	Per Omnibus Objection, no liability under SMLA

Waddle, Christine Lynch	2710	$26,265.91	Per Omnibus Objection, no liability under SMLA
Wade, Ronald E and Wilma P	2819	$15,963.10	Per Omnibus Objection, no liability under SMLA
Wagaman, Marion L & Lorilei D	2820	$13,672.90	Per Omnibus Objection, no liability under SMLA
Walter, Stephen F	2821	$79,481.10	Per Omnibus Objection, no liability under SMLA
Walters Bender Strohbehn & Vaughan Pc	2611	$3,655,277.52	Per Omnibus Objection, no liability under SMLA
Walters Bender Strohbehn & Vaughan, Pc	2609	$12,565.81	Per Omnibus Objection, no liability under SMLA
Wargo, Donna L	2822	$45,684.99	Per Omnibus Objection, no liability under SMLA
Warkentien, David L & Nicole L	2823	$76,409.99	Per Omnibus Objection, no liability under SMLA
Watson, Aric	2610	$31,414.51	Per Omnibus Objection, no liability under SMLA
Weathersby, Jeff	2824	$33,232.49	Per Omnibus Objection, no liability under SMLA
Weible, Terry A	2825	$19,219.17	Per Omnibus Objection, no liability under SMLA
Wendt, Brian K and Michelle L	2826	$64,253.88	Per Omnibus Objection, no liability under SMLA
White, Marlene	2827	$30,271.77	Per Omnibus Objection, no liability under SMLA
Wibbenmeyer, Harold G and Shirley J	2828	$28,508.52	Per Omnibus Objection, no liability under SMLA
Williams, Raymond M and Carol A	2829	$38,737.15	Per Omnibus Objection, no liability under SMLA
Wilson, Donnell J Jr & Rhonda K	2830	$31,990.72	Per Omnibus Objection, no liability under SMLA
Wilson, Gene & Carol L (Deceased)	2831	$13,630.02	Per Omnibus Objection, no liability under SMLA
Woodard, Andre and Tammi	2833	$5,223.93	Per Omnibus Objection, no liability under SMLA
Worth, Terry G	2834	$22,975.06	Per Omnibus Objection, no liability under SMLA
Worthy, Patricia	2835	$19,943.69	Per Omnibus Objection, no liability under SMLA
Zarvos, Theresa K	2836	$21,972.16	Per Omnibus Objection, no liability under SMLA
Zeller, Don R	2837	$11,042.00	Per Omnibus Objection, no liability under SMLA
Zeller, Mary A	2838	$24,907.48	Per Omnibus Objection, no liability under SMLA

Exhibit B

The Servicing Agreement

Preferred Mortgage Corporation

OWNER

and

Advanta Mortgage Corp. USA

SERVICER

LOAN SERVICING AGREEMENT

Dated as of

March 8, 1996

Fixed and Adjustable Rate Non-Conforming Mortgage Loans

TABLE OF CONTENTS

This Servicing Agreement, dated as of March 8, 1996, is entered into by and between Preferred Mortgage Corporation, as owner of the Mortgage Loans that are referred to herein (the "Owner") and Advanta Mortgage Corp. USA, as Servicer (together with its permitted successors and assigns, the "Servicer").

WHEREAS, the Owner is the owner of certain first and second lien, fixed and adjustable rate, non-conforming residential mortgage loans; and

WHEREAS, the Owner desires to deliver to Servicer certain Mortgage Loans, from time to time, to be serviced by Servicer in accordance with the terms and conditions of the Mortgage Loans and this Agreement; and

WHEREAS, it is the intent of the parties that certain Mortgage Loans, described in Exhibit A attached hereto, are to be delivered for servicing concurrent with this Agreement and thereafter Owner may deliver additional Mortgage Loans for Servicing pursuant to the terms hereof; and

NOW, THEREFORE, in consideration of the foregoing and mutual agreements contained herein, the parties hereby agree as follows:

ARTICLE I

DEFINITIONS

Section 1.1 Definition of Terms

Whenever used herein, the following words and phrases, unless the context otherwise requires, shall have the following meanings:

"Accepted Servicing Practices": Procedures and practices (including collection procedures) that the Servicer customarily employs and exercises in servicing and administering mortgage loans for its own account.

"Additional Servicing Compensation": Incidental fees or charges provided for in the applicable Note and/or Mortgage that are customarily charged by the Servicer in the ordinary course of performing its obligations herein including but not limited to late payment charges, prepayment charges/penalties, assumption processing charges and assumption fees, modification charges, demand fees, insufficient funds fees and reconveyance charges.

"Agreement": This Servicing Agreement, including all exhibits hereto, and all amendments hereof and supplements hereto.

"Borrower": The individual or individuals obligated to repay the Mortgage Loan.

"Business Day": Any day other than (i) a Saturday or Sunday, or (ii) a day in which banking or savings and loan institutions in San Diego, California or Wilmington, Delaware are authorized or obligated by law or executive order to be closed.

"Collection Account": The trust account or accounts which are created and maintained by Servicer specifically for the collection of principal and interest, Insurance Proceeds, Liquidation Proceeds and other amounts received with respect to the Mortgage Loans.

"Errors and Omissions Policy": An insurance policy insuring against losses caused by errors and omissions of the Servicer and its personnel, including, but not limited to, losses caused by the failure to pay insurance premiums or taxes to record or perfect liens, or to properly service Mortgage Loans in accordance with this Agreement.

"Escrow Account": For each Mortgage Loan, an account maintained by the Servicer specifically for the payment of real estate tax assessments and insurance premiums against Mortgaged Property.

"Escrow Payments": All funds collected by the Servicer to cover expenses of the Borrower required to be paid under the Mortgage Loan Documents, including Hazard Insurance and Flood Insurance, tax assessments and Mortgage Insurance Premiums.

"Event of Default": Any one of the conditions or circumstances enumerated in Sections 6.4 and 6.5.

"Fidelity Bond": An insurance policy insuring against losses caused by negligent or unlawful acts of the Servicer's personnel.

"Flood Insurance Policy": An insurance policy insuring against flood damage to a Mortgaged Premises, required by loan originators for Mortgaged Premises located in "flood hazard" areas identified by the Secretary of HUD or the Director of the Federal Emergency Management Agency.

"Flood Zone Service Contract": A transferable contract maintained for the Mortgaged Property with a nationally recognized flood zone service provider for the purpose of obtaining the current flood zone status relating to such Mortgaged Property.

"Hazard Insurance Policy": A fire and casualty extended coverage insurance policy insuring against loss or damage from fire and other perils covered within the scope of standard extended hazard coverage, together with all riders and endorsements thereto.

"Insurance Policy": Any insurance policy for a Mortgage Loan referred to in this Agreement, including Mortgage Insurance Policy, Hazard Insurance Policy, Flood Insurance Policy, and Title Insurance Policy, including all riders and endorsements thereto.

"Liquidation Proceeds": Cash received in connection with the liquidation of a defaulted Mortgage Loan, whether through the sale or assignment of the Mortgage Loan, trustee's sale, foreclosure sale, sale of the Mortgaged Property or otherwise.

"Collection Account": The trust account or accounts which are created and maintained by Servicer specifically for the collection of principal and interest, Insurance Proceeds, Liquidation Proceeds and other amounts received with respect to the Mortgage Loans.

"Errors and Omissions Policy": An insurance policy insuring against losses caused by errors and omissions of the Servicer and its personnel, including, but not limited to, losses caused by the failure to pay insurance premiums or taxes to record or perfect liens, or to properly service Mortgage Loans in accordance with this Agreement.

"Escrow Account": For each Mortgage Loan, an account maintained by the Servicer specifically for the payment of real estate tax assessments and insurance premiums against Mortgaged Property.

"Escrow Payments": All funds collected by the Servicer to cover expenses of the Borrower required to be paid under the Mortgage Loan Documents, including Hazard Insurance and Flood Insurance, tax assessments and Mortgage Insurance Premiums.

"Event of Default": Any one of the conditions or circumstances enumerated in Sections 6.4 and 6.5.

"Fidelity Bond": An insurance policy insuring against losses caused by negligent or unlawful acts of the Servicer's personnel.

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"Flood Zone Service Contract": A transferable contract maintained for the Mortgaged Property with a nationally recognized flood zone service provider for the purpose of obtaining the current flood zone status relating to such Mortgaged Property.

"Hazard Insurance Policy": A fire and casualty extended coverage insurance policy insuring against loss or damage from fire and other perils covered within the scope of standard extended hazard coverage, together with all riders and endorsements thereto.

"Insurance Policy": Any insurance policy for a Mortgage Loan referred to in this Agreement, including Mortgage Insurance Policy, Hazard Insurance Policy, Flood Insurance Policy, and Title Insurance Policy, including all riders and endorsements thereto.

"Liquidation Proceeds": Cash received in connection with the liquidation of a defaulted Mortgage Loan, whether through the sale or assignment of the Mortgage Loan, trustee's sale, foreclosure sale, sale of the Mortgaged Property or otherwise.

"Mortgage Insurance Policy": Insurance which insures the holder of the Note against covered losses in the event the Borrower defaults under the Note or the Security Instrument, including all riders and endorsements thereto.

"Mortgage Insurer": A mortgage guaranty insurance company that has issued a Mortgage Insurance Policy in respect of a Mortgage Loan.

"Mortgage Loan Documents": Any and all documents related to a Mortgage Loan, including the Note, Security Instrument and insurance policies.

"Mortgage Loan Schedule": The schedule of Mortgage Loans in the form of Exhibit A, attached hereto, delivered to Servicer on each Transfer Date, such schedule setting forth the information as to each Mortgage Loan in form and substance agreed to by the Servicer and the Owner.

"Mortgage Loan": The individual mortgage loan which is the subject of this Agreement delivered from time to time being identified by a Mortgage Loan Schedule. To the extent applicable and as the context so permits; any and all references to "Mortgage Loan" or "Mortgage Loans" herein shall be deemed to include any Mortgage Loan that has become an REO Property.

"Mortgaged Property": The property securing a Note and subject to the lien of the related Security Instrument, which property consists of a single parcel of real property on which is located a one-to four-family detached residential dwelling, condominium or attached townhouse or rowhouse.

"Nonrecoverable Advance": Any previously made or proposed servicing advance, in the Servicer's good faith determination, that will not or would not be ultimately recoverable from the related insurance proceeds or Liquidation Proceeds.

"Note": A manually executed written instrument evidencing the Borrower's promise to repay a stated sum of money, plus interest, to the noteholder by a specific date according to a schedule of principal and interest payments.

"Owner": Preferred Mortgage Corporation.

"Permitted Investments": Any one or more of the investments detailed on Exhibit B attached hereto.

"Principal Prepayment": Any payment or other recovery of principal on a Mortgage Loan which is received in advance of its scheduled due date, net of any prepayment penalty or premium thereon which is retained by the Servicer, and is not accompanied by an amount of interest representing scheduled interest due on any date or dates in any month or months subsequent to the month of prepayment.

"Remittance Date": The date each month on which Servicer distributes to the Owner the Owner's portion of the collections on the Mortgage Loans. The Remittance Date shall be the twenty-fifth (25th) day of each calendar month, or the next succeeding Business Day if the twenty-fifth (25th) day of the month is not a Business Day.

"Remittance Reports": Those monthly reports specified in Section 4.9.

"REO Property": Mortgaged Premises the title to which is acquired on behalf of the Owner through foreclosure or deed-in-lieu of foreclosure.

"Security Instrument": A written instrument creating a valid lien on the Mortgaged Premises. A Security Instrument may be in the form of a mortgage, deed of trust, deed to secure debt or security deed, including any riders and addenda thereto.

"Servicer": Advanta Mortgage Corp. USA, or its successor in interest to the Servicer under this Agreement.

"Servicing Advance": All customary, reasonable and necessary "out of pocket" costs and expenses incurred in the performance by the Servicer of its servicing obligations and not part of the Servicer's general and administrative expenses, including but not limited to, the cost of (a) the preservation, restoration and protection of the Mortgaged Property, (b) any enforcement or judicial proceedings, including foreclosures, relating to Mortgage Loans or Mortgaged Properties (c) the management and liquidation of the Mortgaged Property if the Mortgaged Property is acquired in satisfaction of the Mortgage, and (d) the maintenance of hazard insurance, payment of property taxes (including tax penalties) or mortgage insurance premiums.

"Servicing Fee": For each Mortgage Loan, the compensation due the Servicer each month.

"Servicing File": With respect to each Mortgage Loan, documents delivered to the Servicer, including photocopies of the Note and Security Instrument and any other documents necessary for the Servicer to service the Mortgage Loans in accordance with the terms of this Agreement.

"Tax Service Contract": A transferable contract maintained for the Mortgaged Property with a tax servicer provider for the purpose of obtaining current information from local taxing authorities relating to such Mortgaged Property.

"Title Insurance Policy": An American Land Title Association (ALTA) mortgage loan title policy form 1970, or other form of lender's title insurance policy, insuring the lien priority of the Security Instrument on the Mortgaged Premises.

"Transfer Date": For each Mortgage Loan, the date on which such Mortgage Loan is delivered to Servicer for servicing hereunder.

ARTICLE II

DELIVERY OF MORTGAGE LOAN FILES SERVICING STANDARDS

Section 2.1 Transfer of Mortgage Loan Files (Reserved for Future Use)

Section 2.2 Agreement to Service Mortgage Loans

(a) Servicer agrees to service and administer the Mortgage Loans on the Owner's behalf, in accordance with the terms of this Agreement, the Mortgage Loans and Accepted Servicing Practices, giving due consideration to customary and usual standards of practice of prudent institutional residential mortgage loan servicers of comparable Mortgage Loans and with a view to the maximization of timely recovery of principal and interest on the Mortgage Loans, but without regard to: (i) any relationship that Servicer or any of its affiliates may have with any Borrower or affiliate or manager thereof, (ii) Servicer's obligations to make advances or to incur servicing expenses with respect to the Mortgage Loans, or (iii) Servicer's right to receive compensation for its services hereunder.

(b) Subject to the provisions of Section 2.2(a), above, Servicer shall have full power and authority to do or cause to be done any and all things in connection with such servicing and administration which Servicer may deem necessary or desirable. In accordance with this Agreement, the Owner will provide Servicer upon request with any powers of attorney necessary to undertake the duties of Servicer. Servicer agrees to use its best efforts to service and administer the Mortgage Loans in accordance with applicable state and federal law.

(c) Without limiting the generality of the foregoing, the Servicer shall and is hereby authorized and empowered by the Owner to: (i) execute and deliver, on behalf of the Owner, any and all instruments of satisfaction or cancellation, or of partial or full release or discharge, with respect to the Mortgage Loans and with respect to the related Mortgaged Property, (ii) consent to any modification of the terms of the Note if the effect of any such modification will not materially or adversely affect the security afforded by the related Mortgaged Property, (iii) institute foreclosure proceedings or obtain a deed-in-lieu of foreclosure on behalf of the Owner, and (iv) take title in the name of the Owner to any Mortgaged Property upon such foreclosure or delivery of deed in lieu of foreclosure.

Section 2.3 Sub-Servicers

The Servicer may, with prior written approval from Preferred Mortgage Corporation, perform its servicing responsibilities through agents or independent contractors acting as sub-servicers, but shall not thereby be released from any of its responsibilities hereunder, and the Servicer shall diligently pursue all of its rights against such sub-servicer. Notwithstanding any agreement with a sub-servicer, any of the provisions of this Agreement relating to agreements or arrangements between the Servicer and a sub-servicer or reference to actions taken through a sub-servicer or otherwise, the Servicer shall remain obligated and liable to the Owner for the servicing and administering of the Mortgage Loans in accordance with the provisions of this Agreement without diminution of such obligation or liability by virtue of such Sub-Servicing Agreements or arrangements or by virtue of indemnification from the sub-servicer for any acts and omissions and to the same extent and under the same terms and conditions as if the Servicer alone were servicing and administering the Mortgage Loans and any other transactions or services relating to the Mortgage Loans involving the sub-servicer shall be deemed to be between the sub-servicer and the Servicer alone and the Owner shall have no obligations, duties or liabilities with respect to the sub-servicer including no obligation, duty or liability of the Owner to pay sub-servicer's fees and expenses. For purposes of this Agreement, the Servicer shall be deemed to have received payments on Mortgage Loans when the sub-servicer has received such payments. The Servicer shall pay all fees and expenses of the sub-servicer from its own funds, the Servicing Fee or other amounts permitted to be retained by or reimbursed to the Servicer hereunder.

ARTICLE III

REPRESENTATIONS AND WARRANTIES

Section 3.1 Representations and Warranties of the Servicer

Servicer represents and warrants to, and covenants with, the Owner that:

(a) Servicer is, and throughout the term of this Agreement will remain (i) a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and (ii) duly qualified and in good standing to transact any and all of its business, including the duties under this Agreement;

(b) The execution, delivery and performance of this Agreement have been duly authorized by all necessary corporate action and the execution and delivery of this Agreement by Servicer in the manner contemplated and the performance of and compliance with the terms will not violate, contravene or create a default under any applicable federal, state or local laws, licenses or permits;

(c) The execution and delivery of this Agreement by Servicer and the performance of and compliance with its obligations and covenants do not require the consent or approval of any governmental authority or, if such consent or approval is required, it has been or will be obtained prior to such becoming required;

(d) Assuming the due authorization and valid execution and delivery of this Agreement by Owner, this Agreement, when executed and delivered by Servicer, will constitute a valid, legal and binding obligation of Servicer, enforceable against Servicer in accordance with its terms, except as the enforcement thereof may be limited by applicable debtor relief laws and except as certain equitable remedies may not be available regardless of whether enforcement is sought in equity or law; and

(e) There is no litigation pending or, to Servicer's knowledge threatened, which, if determined adversely to Servicer, would adversely affect the execution, delivery or enforceability of this Agreement or Servicer's ability to perform its obligations hereunder.

Section 3.2 Representations and Warranties of the Owner

As of the date of this Agreement and each Transfer Date, Owner represents and warrants to, and covenants with, the Servicer that:

(a) The Owner owns, without limitation, (i) all right, title and interest in the Mortgage Loans (including, without limitation, the security interest created thereby), (ii) all the rights as a lender under any Insurance Policy relating to a Mortgaged Property securing a Mortgage Loan for the benefit of the owner of such Mortgage Loan, and (iii) all proceeds derived from any of the foregoing;

(b) Owner is, and throughout the term of this Agreement will remain (i) a corporation duly organized, validly existing and in good standing under the laws of the state of its incorporations and (ii) duly qualified and in good standing to transact any and all of its business;

(c) The execution, delivery and performance of this Agreement have been duly authorized by all necessary corporate action and the execution and delivery of this Agreement by Owner in the manner contemplated and the performance of and compliance with the terms hereof by it will not violate, contravene or create a default under any charter document or bylaw of the Owner or any contract, agreement, or instrument to which the Owner is a party or by which Owner or any of its property is bound;

(d) The execution and delivery of this Agreement by Owner and the performance of and compliance with its obligations and covenants do not require the consent or approval of any governmental authority or, if such consent or approval is required, it has been or will be obtained prior to such becoming required;

(e) Assuming the due authorization and valid execution and delivery of this Agreement by Servicer, this Agreement, when executed and delivered by Owner, will constitute a valid, legal and binding obligation of Owner, enforceable against Owner in accordance with its terms, except as the enforcement may be limited by applicable debtor relief laws and except as certain equitable remedies may not be available regardless of whether enforcement is sought in equity or law;

(f) There is no litigation pending or, to Owner's knowledge, threatened, which, if determined adversely by Owner, would adversely affect the execution, delivery or enforceability of this Agreement or Owner's ability to perform its obligations;

(g) Owner holds legal right, title and interest to the Mortgage Loans and no other party has the right to collect payments with respect thereto and the Owner has the full power and authority to assign the servicing functions to Servicer;

(h) All information provided to Servicer by Owners, including any copies of Mortgage Loan Documents, information relating to the origination of such Mortgage Loan, the prior servicing experience and any and all of the Mortgage Loan balances and identification of any litigation affecting a contract or the servicing thereof is true, correct and complete in all material respects;

(i) The information set forth in each Mortgage Loan Schedule is true and correct in all material respects as of each Transfer Date;

(j) Each Security Instrument is a valid lien on the related Mortgaged Property;

(k) To the Owner's best knowledge, no Mortgage Loan is subject to any offset, defense or counterclaim;

(l) To the Owner's best knowledge, the physical property subject to each Security Instrument is free of material damage;

(m) Each Mortgage Loan at the time it was made complied in all material respects with applicable state and federal laws and regulations, including, without limitation, usury, equal credit opportunity and disclosure laws and regulations;

(n) The Owner has not received a written notice of default of any senior mortgage loan related to a Mortgage Loan which has not been cured by a party other than such Owner;

(o) To the Owner's best knowledge, no Mortgage Loan is subject to (i) any mechanics lien or claim for work, labor or material of which the Owner has received written notice and that is or may be a lien prior to, or equal or coordinate with, the lien of the related Security Instrument, (ii) any delinquent tax or assessment lien against the related Mortgage Loan;

(p) A lender's title insurance policy or binder, or title report in case of second mortgage loans or other assurance of title customary in the relevant jurisdiction, is in full force and effect with respect to each Mortgage Loan;

(q) Each Mortgage Loan is covered by appropriate Hazard Insurance.

ARTICLE IV

ACCOUNTING AND REPORTING

Section 4.1 Collection of Mortgage Loan Payments

(a) Continuously from the date hereof until the principal and interest on the Mortgage Loans is paid in full, Servicer agrees to proceed diligently to collect all payments called for under the terms and provisions of the Mortgage Loans, and shall follow such collection procedures with respect to mortgage loans comparable to the Mortgage Loans held in its own portfolio, to the extent such procedures are consistent with this Agreement and the terms of any Insurance Policy and in accordance with Accepted Servicing Practices.

(b) The Servicer may in its sole discretion (i) waive late payment charges, assumption fees, charges for checks returned insufficient funds or other fees which may be collected in the ordinary course of servicing the Mortgage Loans, (ii) if a Borrower is in default (as defined in the Mortgage Loan), arrange with the Borrower a schedule for the payment of delinquent payments due on the related Mortgage Loan.

Section 4.2 Interest Calculations

Monthly interest calculations for periods of a full month must be based on a 30-day month and 360-day year, if permitted by the Note or by the law. Interest calculations for periods of less than a full month (such as for a Liquidation) must be calculated on the basis of actual days elapsed in a month and a 365-day year unless otherwise provided by applicable federal or state law.

Section 4.3 Application of Mortgage Loan Payments

A payment from the Borrower will normally consist of interest, principal, deposits for insurance and taxes and late charges, if applicable. Payments received from Borrowers shall be applied in the following order unless otherwise required by, the Mortgage Loan Documents, applicable state and federal requirements or by a Mortgage Insurer:

(a) Deposits for taxes and insurance; and

(b) Required monthly interest; and

(c) Required monthly principal; and

(d) All other fees or penalties.

Section 4.4 Establishment of Collection Account; Deposits in Collection Account

(a) The Servicer shall establish and maintain a Collection Account, (the "Collection Account"), in the form of a time deposit or demand account, which may be interest bearing, titled "Advanta Mortgage Corp. USA" in trust for the Owner. Such Collection Account shall be established with a commercial bank, a savings bank or a savings and loan association by the Servicer.

(b) The Servicer shall deposit in the Collection Account within two (2) Business Days of receipt, and retain therein the following payments and collections received or made with respect to the Mortgage Loans:

(i) all principal collections, including Principal Prepayments;

(ii) all interest collections;

(iii) all Liquidation Proceeds net of expenses;

(iv) all proceeds received by the Servicer under any Insurance Policy, other than proceeds to be held in the Escrow Account and applied to the restoration or repair of the Mortgaged Property or released to the Borrower in accordance with Accepted Servicing Procedures; and

(v) all awards or settlements in respect of condemnation proceedings or eminent domain affecting any Mortgaged Property which are not released to the Borrower in accordance with Accepted Servicing Practices.

(c) The Servicer may invest all or a portion of the funds in the Collection Account in Permitted Investments in the name of the Servicer. The Servicer shall receive as Additional Servicing Compensation all income and gain realized from any such Permitted Investment. If any principal losses are incurred in respect of any Permitted Investments, Servicer shall reimburse and restore to the Collection Account the amount of any such principal losses out of Servicer's own funds immediately as realized. Notwithstanding the foregoing, Servicer's right to invest funds in the Collection Account shall in no way limit the rights of Servicer to be compensated for its services as provided in this Agreement.

(d) The requirements in this Section 4.4 for deposit in the Collection Account shall be exclusive, it being understood and agreed that, without limiting the generality of the foregoing, payments in the nature of late payment charges, assumption processing charges, modification charges, demand fees, insufficient funds fees and reconveyance fees need not be deposited by the Servicer in the Collection Account.

Section 4.5 Withdrawals from the Collection Account

The Servicer shall, from time to time, withdraw funds from the Collection Account for the following purposes:

(a) to reimburse itself for unreimbursed Servicing Advances, and for accrued and unpaid Servicing Fees, the Servicer's right to reimburse itself pursuant to this subclause (a) with respect to any Mortgage Loan being limited to related Liquidation Proceeds, condemnation proceeds, REO Disposition Proceeds, amounts representing proceeds of any Insurance Policy related to a Mortgage Loan and such other amounts as may be collected by the Servicer from the Borrower or otherwise relating to the Mortgage Loan, it being understood that, in the case of any such reimbursement, the Servicer's right thereto shall be prior to the rights of Owner;

(b) to reimburse itself for expenses incurred by and reimbursable to it pursuant to Sections 4.10 and 6.7;

(c) to pay to itself any interest earned on funds deposited in the Collection Account;

(d) to withdraw any amounts inadvertently deposited in the Collection Account or not required to be deposited therein;

(e) to make payments to the Owner in the amounts and in the manner provided herein; and

(f) to clear and terminate the Collection Account upon the termination of this Agreement.

If after receipt and application of Liquidation Proceeds in accordance with the foregoing, the Servicer has sustained an unrecovered loss in connection with a Servicing Advance, the amount of unrecovered loss shall be reimbursed to the Servicer, first, from amounts in the Collection Account, or if such funds are insufficient, by payment to the Servicer by the Owner within ten (10) Business Days of the receipt of notice by such Owner of such amount.

The Servicer shall distribute that portion of collections on the Mortgage Loans due to the Owner in the amounts and in the manner provided herein on each Remittance Date.

Section 4.6 Establishment of Escrow Account; Deposits in Escrow Account

(a) The Servicer shall establish and maintain an Escrow Account, in the form of a time deposit or demand account, which may be interest bearing, titled, with respect to Escrow

Payments actually held by the Servicer, "Advanta Mortgage Corp. USA in trust for Borrower's Escrow Payments". Such Escrow Account shall be established with a commercial bank, a savings bank or a savings and loan association. The Escrow Account shall be drawable upon by the Servicer as provided herein.

(b) The Servicer shall deposit in the Escrow Account within two (2) Business Days of receipt or earlier if so required by law and retain therein: (i) all Escrow Payments collected on account of the Mortgage Loans, for the purpose of effecting timely payment of any such items as required under the terms of this Agreement, and (ii) all amounts representing proceeds of any Insurance Policy which are to be applied to the restoration or repair of any Mortgaged Property. To the extent required by law, the Servicer shall pay interest on escrowed funds to the Borrower notwithstanding that the Escrow Account may not bear interest.

(c) The Servicer may invest the funds in an Escrow Account in Permitted Investments which shall be in the name of the Servicer in the trust capacity in which the related Escrow Account is held or its nominee. The Servicer shall receive as Additional Servicing Compensation an amount equal to all income and gain realized from any such Permitted Investment, but only to the extent such gain to Servicer is (i) not prohibited by applicable law and (ii) in excess of amounts necessary to make any interest payments required by the Mortgage Loan Documents or applicable law to be made to the applicable Borrower. If any losses are incurred in respect of any Permitted Investments, Servicer shall immediately reimburse and restore to the applicable Escrow Account the amount of any such losses out of Servicer's own funds as realized. Notwithstanding the foregoing, Servicer's right to invest funds in the Collection Account shall in no way limit the rights of Servicer to be compensated for its services as provided in this Agreement.

Section 4.7 Withdrawals From Escrow Account

Withdrawals from the Escrow Account shall be made by the Servicer, only

(a) to effect timely payment of taxes, mortgage insurance premiums, flood, fire and hazard insurance premiums or other items constituting Escrow Payments for the related Mortgage Loan;

(b) to reimburse the Servicer for any Servicing Advance made by the Servicer to effect the payment of taxes or insurance required under the terms of the related Mortgage Loan, but only from amounts received on the related Mortgage Loan which represent late payments or collections of Escrow Payments thereunder;

(c) to refund to any Borrower any funds found to be in excess of the amounts required under the terms of the related Mortgage Loan;

(d) for application to restoration or repair of the Mortgaged Property;

(e) to pay to the Borrower, to the extent required by law, any interest paid on the funds deposited in the Escrow Account;

(f) to pay to itself any interest earned on funds deposited in the Escrow Account;

(g) to remove any deposits made in error; or

(h) to clear and terminate the Escrow Account upon termination of this Agreement.

Section 4.8 Servicing Advances

As required, Servicer agrees to make Servicing Advances for the preservation of any Mortgaged Property, including the payment of accrued and unpaid taxes, forced placed hazard insurance, repayment of senior liens. It is understood that Servicer's obligation to make such Servicing Advances shall continue until (i) the payment in full of the Mortgage Loan or (ii) the date on which the Mortgaged Property is liquidated; provided however, Servicer shall have no obligation to make Servicing Advances if, in the sole determination of Servicer, such Servicing Advance would constitute a Nonrecoverable Advance.

Section 4.9 Monthly Remittance Reports

(a) The Servicer shall service the Mortgage Loans on an actual/actual remittance basis with the accounting cutoff with respect to each Remittance Date of the last day of the month immediately preceding such Remittance Date.

(b) Not later than the fifteenth (15th) day of each calendar month, or the succeeding business day should the fifteenth not be a business day, the Servicer shall prepare and deliver the following reports with respect to activity for the most recently ended prior calendar month:

(i) a trial balance report including all Mortgage Loans;

(ii) a monthly remittance report, including an itemization of any fee withholdings and/or recoveries of servicing advances from the related remittance;

(iii) a report setting forth any Mortgage Loans added or deleted;

(iv) a report setting forth curtailment or prepayments; and

(v) reports setting forth delinquency detail (including bankruptcy, foreclosure and REO status.

Section 4.10 Servicing Compensation

(a) As compensation for its activities hereunder, the Servicer shall be entitled to retain as to each Mortgage Loan, a Servicing Fee of .55% (55 basis points) per annum which shall be retained by Servicer from the interest portion of the Mortgage Loan payments as received from a Borrower and from Liquidation Proceeds, as applicable.

(b) Servicer shall be entitled to retain the Additional Servicing Compensation.

(c) In addition, Owner shall pay Servicer a set-up fee of $15.00 per Mortgage Loan for each Mortgage Loan transferred to Servicer and serviced hereunder. Additionally, not later than the twenty-fifth (25) day of each calendar month or the succeeding business day should the twenty-fifth not be a business day, the Servicer shall deliver a bank statement reconciliation of the Collection Account for the related remittance period.

ARTICLE V

ADMINISTRATION AND SERVICING OF MORTGAGE LOANS

Section 5.1 Enforcement of Due-On-Sale Clause; Assumption

The Servicer is required to enforce any due-on-sale clause in the Note or Security Instrument to the extent permitted by applicable law upon the transfer of title to the Mortgaged Property unless (i) the Mortgage Loan Documents, including riders or addenda permit such a transfer or (ii) enforcement of the due-on-sale clause will jeopardize the Mortgage Insurance coverage, if any, on such Mortgage Loan. In all circumstances of unapproved transfer initiated by the Borrower, the Servicer is required to promptly notify the Mortgage Insurer of such transfer and obtain written approval from the Mortgage Insurer (if required under the applicable Mortgage Insurance Policy) before initiating enforcement proceedings.

Notwithstanding the preceding paragraph, Owner authorizes Servicer, to waive, in the sole discretion of Servicer, the enforcement of a due-on-sale clause on any Mortgage Loan and permit the assumption of such Mortgage Loan, subject to the following conditions:

(a) No material term of the Note, including, but not limited to, the rate of interest on the Note and the remaining term to maturity, may be changed in connection with such assumption, provided however, such limitation shall not apply to interest rate, payment or amortization changes otherwise provided for under the terms of the Note, such as in the case of an adjustable rate mortgage;

(b) The Servicer has performed a credit review of the new borrower and determined that the new borrower is a prudent credit risk in the sole opinion of the Servicer. Owner hereby authorizes, Servicer to apply more liberal credit standards and underwriting in connection with a request for an assumption of a Mortgage Loan than Servicer would apply for comparable new loans which Servicer's is then originating for its own account, if Servicer in its sole discretion, reasonably believes there is a risk of foreclosure on the Mortgage Loan in the event the assumption is denied;

(c) The Mortgage Insurer has approved in writing the assumption of the Mortgage Loan by the new borrower and such Mortgage Loan will continue to be insured by such Mortgage Insurer;

(d) The new borrower executes documents assuming all the obligations of the Borrower under the Mortgage Loan Documents;

(e) The Mortgage Loan will continue to be secured, and insured with a Title Insurance Policy, if any, by a valid security interest upon the Mortgaged Property of the same lien priority as existed immediately prior to such assumption; provided however, if Servicer has not been delivered a Title Insurance Policy on the Transfer Date for any such Mortgage Loan, Servicer shall have no obligation to inquire into or obtain any title insurance in connection with any assumption of such a Mortgage Loan; and

(f) The Servicer has determined that the estimated net realizable value of the Mortgaged Property, in the sole judgment of the Servicer, is less than the then unpaid principal balance of the related Note, plus accrued interest to the estimated date of the closing of the sale of Mortgaged Property to the new borrower.

(g) The Servicer shall provide the Owner the original assumption agreement following execution thereof.

Subject to the terms of the Note and Security Instrument, and applicable law or regulation, the Servicer may charge a reasonable and customary assumption fee, and the Servicer may retain such fee as Additional Servicing Compensation.

Section 5.2 Maintenance of Insurance

(a) The Servicer shall cause to be maintained with respect to each Mortgage Loan a Hazard Insurance Policy with a generally acceptable carrier that provides for fire and extended coverage, and for a recovery of any insurance proceeds relating to such Mortgage Loan by the Servicer on behalf of the Owner.

(b) If the Mortgage Loan relates to a Mortgaged Property identified at origination in the Federal Register by the Federal Emergency Management Agency as having a special flood hazard, the Servicer will cause to be maintained with respect thereto a Flood Insurance Policy with a generally acceptable carrier which provides for a recovery of any insurance proceeds relating to such Mortgage Loan by the Servicer on behalf of the Owner.

(c) With respect to each Mortgage Loan that provides for the collection of escrow funds for the payment of fire and hazard insurance or flood insurance, the Servicer shall effect the payment thereof prior to the applicable policy termination date employing for such purpose deposits in the Escrow Account which shall have been estimated and accumulated by the Servicer in the amounts sufficient for such purposes. To the extent a Mortgage Loan does not provide for escrow payments and the Borrower fails to maintain any required insurance coverage, the Servicer shall by a Servicing Advance make the payment required to effect the applicable in-force policy for the related Mortgaged Property.

(d) Notwithstanding the proceeding paragraphs, the Servicer at its option may obtain and maintain, with respect to all or any portion of the Mortgage Loans a blanket insurance policy with extended coverage insuring against fire, hazard and flood, as applicable. The Servicer shall be deemed conclusively to have satisfied its obligations with respect to Hazard Insurance and Flood Insurance coverage under this Section if such blanket policy names the Servicer as "Loss Payee" and provides coverage in an amount equal to the aggregate unpaid principal balance of the Mortgage Loans without co-insurance.

Section 5.3 Cancellation of Mortgage Insurance

If a Borrower requests cancellation of the Mortgage Insurance Policy, the Servicer shall ensure that the FNMA guidelines governing cancellation are followed in connection with any cancellation.

Section 5.4 Reserved For Future Use

Section 5.5 Liquidation of Defaulted Mortgage Loans

(a) The Servicer, on behalf of the Owner, shall foreclose upon or otherwise take title, in the name of Owner, to Mortgaged Property (such as by a deed in lieu of foreclosure) for any Mortgage Loan which is in default and as to which no satisfactory arrangements, in the sole reasonable opinion of Servicer, can be made for collection of delinquent payments. In connection with such foreclosure or other transfer of title, the Servicer shall exercise the rights and powers vested in it hereunder, and use the same degree of care and skill in such exercise or use, as prudent servicers would exercise or use under similar circumstances in the conduct of their own affairs, including, but not limited to, making Servicing Advances for the payment of taxes, amounts due with respect to senior liens, and insurance premiums.

(b) In determining whether or not to foreclose upon or otherwise comparably transfer title to such Mortgaged Property, the Servicer shall take into account the existence of any condition upon or impacting the Mortgaged Property in the nature of hazardous substances, hazardous wastes, infectious waste, toxic substance, solid wastes and so forth, as such terms now or in the future are defined or listed in, or otherwise classified pursuant to, or regulated by, any applicable Environmental Laws, including but not limited to all present and future federal, state or local laws, ordinances, rules, regulations, decisions and other requirements of governmental authorities relating to the environment or to any Hazardous Substance.

Section 5.6 Deed-in-Lieu of Foreclosure

If the Owner and, if applicable, the Mortgage Insurer have approved the liquidation of a Mortgage Loan by accepting a deed-in-lieu of foreclosure, the Servicer may accept such deed provided that:

(a) Marketable title, as evidenced by a Title Insurance Policy, can be conveyed to and acquired by the Owner or its designee;

(b) The transaction complies with all requirements of each Mortgage Insurer, if any, and does not and will not violate or contravene any restriction or prohibition of any Mortgage Insurance Policy, if any, or otherwise result in any loss of or reduction in the coverage of benefits under such policies;

(c) No cash consideration is paid to the Borrower;

(d) The Mortgaged Properties are vacant at the time of the Borrower's conveyance thereof, unless occupancy has been approved by each Mortgage Insurer, if any; and

(e) The Servicer has obtained from the Borrower a written acknowledgment that the deed is being accepted as an accommodation to the Borrower and on the condition that the Mortgaged Properties will be transferred to the Owner that owns such Mortgage Loan free and clear of all claims, liens, encumbrances, attachments, reservations or restrictions except for those to which the Mortgaged Properties were subject at the time the Mortgaged Properties became subject to the lien of the Security Instrument.

Upon acquisition of the Mortgaged Properties, the Servicer shall promptly advise the Owner and each Mortgage Insurer by letter, indicating the details of the transaction and reasons for the conveyance and providing such other information as is required by each Mortgage Insurer. Title shall be conveyed directly from the Borrower to the Owner, or to such other Person designated by the Owner.

Section 5.7 Real Estate Owned

Title, Management and Disposition of REO Property. In the event that title to the Mortgaged Property is acquired in foreclosure or by deed in lieu of foreclosure, the deed or certificate of sale shall be taken in the name of the Owner. The Owner agrees to cooperate with Servicer and take such actions as shall be necessary for the Servicer to take title to the Mortgaged Property in the name of the Owner.

Notwithstanding the generality of the foregoing provisions, the Servicer shall manage, conserve, protect and operate each REO Property for the Owners solely for the purpose of its prompt disposition and sale. Pursuant to its efforts to sell such REO Property, the Servicer shall either itself or through an agent selected by the Servicer protect and conserve such REO Property in the same manner and to such extent as is customary in the locality where such REO Property is located and may, but shall not be obligated to, incident to its conservation and protection of the interests of the Owners, rent the same, or any part thereof, as the Servicer deems to be in the best interests of the Owners for the period prior to the sale of such REO Property. The Servicer shall attempt to sell the same on such terms and conditions as the Servicer deems to be in the best interest of the Owner.

The Servicer shall cause to be deposited within two (2) Business Days of receipt in the Collection Account all revenues received with respect to the conservation and disposition of each REO Property and shall be permitted to retain from such revenues funds necessary for the proper operation, management and maintenance of the REO Property, including reimbursement for its Servicing Advances and fees of any managing agent acting on behalf of the Servicer.

Possession of Mortgage Files by Servicer. From time to time in connection with the servicing of the Mortgage Loans hereunder, the Servicer may take possession of all or a portion of the documents relating to the Mortgage Loans as may be held by the Owner or the Custodian. Such documents shall be held in trust by the Servicer for the benefit of the Owner as the owner thereof and the Servicer's possession of such document or documents is at the will of the Owner for the sole purpose of servicing the related Mortgage Loan, and such retention and possession by the Servicer is in a custodial capacity only.

ARTICLE VI

MISCELLANEOUS PROVISIONS

Section 6.1 Owner to Cooperate

From time to time and as appropriate in the servicing of any Mortgage Loan, including without limitation, the payment in full of any Mortgage Loan, notification that payment in full will be escrowed, foreclosure or other comparable conversion of a Mortgage or collection under any applicable Insurance Policy, the Owner, upon request of the Servicer shall release or cause the release and delivery of the related Mortgage Loan Documents to the Servicer.

Section 6.2 Assignment of Agreement

Servicer agrees not to sell, transfer, pledge or otherwise dispose of its right to receive all or any portion of the Servicing Fees, and any such attempted sale, transfer, pledge or disposition shall be void, unless such transfer is made to a successor servicer with the prior written consent of the Owner.

Section 6.3 Access to Certain Documentation Regarding the Loans

Upon reasonable advance notice, Servicer shall provide reasonable access during normal business hours at its offices to the Owner, or any agents or representatives thereof, to any reports and to information and documentation regarding the Mortgage Loans.

Section 6.4 Default By Servicer

Owner may terminate this Agreement upon the happening of any one or more of the following events:

(a) Falsity in any material respect of any representation of warranty of Servicer contained in this Agreement and failure of Servicer to cure the condition or event causing any such representation or warranty to be false within sixty (60) days after the Servicer's receipt of written notice from Owner specifying such falsity and requesting that it be cured or corrected;

(b) Failure of Servicer to duly observe or perform in any material respect any other covenant, condition, or agreement in this Agreement for a period of sixty (60) days after receipt of written notice by Servicer from Owner, specifying such failure and requesting that it be remedied; provided, however, if the failure stated in the notice cannot be corrected within the applicable period, Owner and Servicer shall mutually agree to a reasonable extension of time if corrective action is instituted by Servicer within the applicable period and is diligently pursued until corrected;

(c) Decree or order of a court, agency or supervisory authority having jurisdiction in the premises appointing a trustee, conservator, receiver or liquidator in any insolvency, readjustment of debt, marshaling of assets and liabilities or similar proceeding affecting Servicer or any of its properties utilized in connection with the performance of servicing, or for resolving the liquidation of the affairs of Servicer, if such decree or order shall have remained in force undischarged or unstayed for a period of ninety (90) days;

(d) Commencement by Servicer as debtor of any case or proceeding under any bankruptcy, insolvency, reorganization, liquidation, dissolution or similar law;

(e) Consent by Servicer to the appointment of a trustee, conservator, receiver or liquidator in any insolvency, readjustment of debt, marshaling of assets and liabilities, or similar proceeding affecting Servicer or substantially all of its properties; or

(f) Admission in writing by Servicer of its inability to pay debts generally as they mature, or the making of an assignment for the benefit of creditors.

If any of the events specified in (c) through (f) above shall occur, Servicer shall give written notice of such occurrence to Owner within ten (10) days of the happening of such event. Any such termination shall be effective as of the date stated in a written notice delivered to Servicer.

Section 6.5 Default by Owner

Servicer may terminate this Agreement upon the happening of any one or more of the following events:

(a) Falsity in any material respect of any representation or warranty of Owner contained in this Agreement and failure of Owner to cure the condition or event causing such representation or warranty to be false within sixty (60) days after Owner's receipt of written notice from Servicer specifying such falsity and requesting that it be cured or corrected;

(b) Such other breach of this Agreement by Owner which materially and adversely affects Servicer, which breach shall continue for a period of sixty (60) days after receipt of written notice by Owner from Servicer, specifying such breach and requesting that it be remedied; provided, however, if the breach stated in the notice cannot be remedied within the applicable period, Servicer shall consent to a reasonable extension of time if corrective action is instituted by Owner within the applicable period and is diligently pursued until corrected;

(c) Decree or order of a court, agency or supervisory authority having jurisdiction in the premises appointing a trustee, conservator, receiver or liquidator in any insolvency, readjustment of debt, marshaling of assets and liabilities or similar proceeding affecting Owner or any of its properties utilized in connection with the performance of Servicer's duties hereunder, or the winding up or liquidation of the affairs of Owner, if such decree or order shall have remained in force undischarged or unstayed for a period of ninety (90) days;

(d) Commencement by Owner as debtor of any case of proceeding under any bankruptcy, insolvency, reorganization, liquidation, dissolution or similar law;

(e) Consent by Owner to the appointment of a trustee, conservator, receiver or liquidator in any insolvency, readjustment of debt, marshaling of assets and liabilities, or similar proceeding affecting Owner or substantially all of its properties; or

(f) Admission in writing by Owner of its inability to pay debts generally as they mature, or the making of an assignment for the benefit of creditors.

If any of the events specified in (c) through (f) above shall occur, Owner shall give written notice of such occurrence to Servicer within ten (10) days of the happening of such event. Any such termination shall be effective as of the date stated in a written notice delivered to Owner.

Section 6.6 Reserved for Future Use

Section 6.7 Indemnification By Owner

Owner shall indemnify and hold Servicer harmless from and shall reimburse Servicer for any losses, damages, deficiencies, claims, penalties, forfeitures, causes of action or expenses of any nature (including reasonable attorneys' fees) incurred by Servicer which arise out of or result from:

(a) The inaccuracy of any representation of Owner contained in this Agreement or material breach of any warranty, covenant or agreement made or to be performed by Owner pursuant to this Agreement;

(b) the failure of the originator of any Mortgage Loan to originate such Mortgage Loan in accordance with applicable law;

(c) the failure of any prior servicer to service the Mortgage Loan in accordance with any applicable law;

(d) any matters that occurred prior to the Transfer Date for the Mortgage Loan involved or any incomplete or incorrect Mortgage Loan data, records or information provided in connection with the origination or prior servicing of any Mortgage Loan;

(e) Owner's failure to fulfill the Servicing responsibilities not assumed by Servicer of otherwise result from Owner preventing, hampering or impeding Servicer's performance of its duties and responsibilities under this Agreement; or

(f) Any litigation or claim with respect to the Mortgage Loans not arising out of, or resulting from, Servicer's failure to observe the terms and covenants of the Mortgage Loans or this Agreement including specifically any litigation relating to ARM Loans.

The Servicer shall promptly notify the Owner if a claim is made by a third party with respect to this Agreement or the Mortgage Loans, and the Servicer at its option may assume the defense of any such claim. The Owner shall, within ten (10) Business Days of receiving a statement of amounts advanced by the Servicer in connection with the defense of any such claim, reimburse the Servicer for all amounts advanced by it pursuant to this Section 6.7, except to the extent that such claim is not caused by the Servicer's failure to service the Mortgage Loans in compliance with the terms of this Agreement.

Section 6.8 Fidelity Bond and Errors Omissions

Servicer agrees to obtain and maintain at its expense and shall keep in full force and effect throughout the term of this Agreement, a blanket fidelity bond and an errors and omissions insurance policy covering its officers and employees and other persons acting on its behalf in connection with the servicing activities hereunder. The amount of coverage shall be at least equal to the coverage that prudent mortgage loan servicers having servicing portfolios of a similar size. In the event that any such bond or policy ceases to be in effect, Servicer agrees to obtain a comparable replacement bond or policy with equivalent coverage. No provision of this Section shall operate to diminish or restrict or otherwise impair the Servicer's responsibilities and obligations set forth in this Agreement.

Section 6.9 Indemnification by Servicer

Servicer shall indemnify and hold Owner harmless from and shall reimburse Owner for any losses, damages, deficiencies, claims, causes of action or expenses of any nature (including reasonable attorneys' fees) incurred by Owner which arise out of or result from:

(a) The inaccuracy of any representation of Servicer contained in this Agreement or material breach of any warranty, covenant or agreement made or to be performed by Servicer pursuant to this Agreement;

(b) Any litigation or claim arising out of, or resulting from, Servicer's failure to observe the terms and covenants of this Agreement.

(c) The failure of the Servicer to service such Mortgage Loan in accordance with applicable law.

Section 6.10 Amendment

This Agreement may be amended from time to time by the Owner and the Servicer by written Agreement signed by the Owner and the Servicer.

Section 6.11 Governing Law

This Agreement shall be construed in accordance with the laws of the State of California, without regard to the conflict of laws or rules thereof, and the obligations, rights and remedies of the parties hereunder shall be determined in accordance with such laws.

Section 6.12 Notices

(a) All demands, notices and communications hereunder shall be in writing and shall be deemed to have been duly given if personally delivered at or mailed by registered mail, postage prepaid, to (i) in case of the Servicer, Advanta Mortgage Corp. USA, 16875 West Bernardo

Drive, San Diego, California 92127, Attention: SVP Loan Servicing and (ii) in the case of the Owner, Preferred Mortgage Corporation, 19782 MacArthur Boulevard, Suite 250, Irvine, CA 92715, Attention: Li-Lin Ko, CFO, or such other addressee as the Owner or the Servicer may hereafter furnish.

(b) Any party may alter the address to which communications or copies are to be sent by giving notice of such change of address in conformity with the provisions of this Paragraph for giving of notice.

Section 6.13 Severability of Provisions

If any one or more of the covenants, agreements, provision or terms of this Agreement shall be held invalid for any reason whatsoever, then such covenants, agreements, provisions or terms shall be deemed severable from the remaining covenants, agreements, provisions and terms of this Agreement and shall in no way affect the validity or enforceability of the provisions of this Agreement.

Section 6.14 Document Deficiencies

The Servicer shall have no obligations to (i) address or any deficiencies in Mortgage Loan documents transferred to it, (ii) seek any document missing from any assignments relating to the transfer of any Mortgage Loan to or from the Owner. The Servicer's responsibility is solely limited to notifying the Owner as to any missing or document deficiency it becomes aware of.

Section 6.15 Termination

(a) The obligations and responsibilities of the Servicer shall terminate upon the latter of (i) the final payment or other liquidation of the last Mortgage Loan or (ii) the disposition of all property acquired upon possession of any Mortgage Loan and the remittance of all funds due thereunder.

(b) Either Owner or Servicer may, at any time and in its sole discretion, terminate this Agreement upon at least 90 days prior written notice to other party; provided if the Owner terminates this Agreement, Owner shall pay the Servicer a termination fee of 1% of the aggregate principal balances of the Mortgage Loans as of the last day of the related remittance period. If Servicer terminates this Agreement it shall be liable to pay all reasonable costs associated with the transfer of Mortgage Loans to Successor Servicer. Such termination fee shall not be payable as to any Mortgage Loan transferred into a securitization trust provided Servicer continues to service any such loan.

(c) If Owner transfers servicing of any amount of the Mortgage Loans to another servicer within six months of the applicable Transfer Date of any such Mortgage Loan, Owner shall pay to Servicer $100.00 per Mortgage Loan transferred.

Section 6.16 Attorneys' Fees

In the event any party hereto brings an action to enforce any of the provisions of this Agreement, the party against whom judgment is rendered in such action shall be liable to the others for reimbursement of their costs, expenses and attorneys' fees, including such costs, expenses and fees as may be incurred on appeal.

Section 6.17 No Solicitation

Unless specifically permitted by the Owner in advance, the Servicer agrees not to use Servicer's records to specifically solicit any Borrower with respect to the refinancing of a Mortgage Loan, insurance or otherwise.

Section 6.18 Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their respective officers, all as of the day and year first above mentioned.

Advanta Mortgage Corp. USA

By: _____
Name: William P. Garland
Title: Senior Vice President

Preferred Mortgage Corporation

By: _____
Name: Todd Rodriguez
Title: CEO

EXHIBIT A

Mortgage Loan Schedule

Loan No	Borrower	Original Principal Amt	Current Principal Balance	Interest Rate	Interest Paid to Date	Next Due Date	Monthly Payment Amount	Escrow Account	

As of the below designated Transfer Date, the undersigned, Owner,

(a) hereby certifies that the information concerning each Mortgage Loan on the within Mortgage Loan Schedule is true, accurate and complete, and

(b) hereby reaffirms all of its warranties and representations contained in that certain Loan Servicing Agreement dated as of _____, 19____, by and between the undersigned Owner and Advanta Mortgage Corp. USA, such representations and warranties are incorporated herein by this reference.

Owner:___[insert name]_____

Transfer Date:_____

_____

By:_____

Title:_____

EXHIBIT B

Permitted Investments

(a) Direct general obligations of the United States or the obligation of any agency or instrumentality of the United States fully and unconditionally guaranteed, the timely payment or the guarantee of which constitutes a full faith and credit obligation of the United States.

(b) Federal Housing Administration debentures.

(c) FHLMC participation certificates and senior debt obligations.

(d) Federal Home Loan Banks consolidated senior debt obligations.

(e) FNMA mortgage-backed securities (other than stripped mortgage securities which are valued greater than par on the portion of unpaid principal) and senior debt obligations.

(f) Federal funds, certificates of deposit, time and demand deposits, and bankers acceptances (having original maturities of not more than 365 days) of any domestic bank, the short-term debt obligations of which have been rated A-1 or better by SP and P-1 by Moody s.

(g) Investment agreements approved by the Owner provided:

(i) The agreement is with a bank or insurance Owner which has an unsecured, uninsured and unguaranteed obligation (or claims-paying ability) rated Aa2 or better by Moody s and AA or better by SP, or is the lead bank of a parent bank holding Owner with an uninsured, unsecured and unguaranteed obligation meeting such rating requirements, and

(ii). Moneys invested thereunder may be withdrawn without any penalty, premium or charge upon not more than one day s notice (provided such notice may be amended or canceled at any time prior to the withdrawal date), and

(iii) The agreement is not subordinated to any other obligations of such insurance Owner or bank, and

(iv) The same guaranteed interest rate will be paid on any future deposits made pursuant to such agreement, and

(v) The Owner receives an opinion of counsel that such agreement is an enforceable obligation of such insurance Owner or bank.

(h) Commercial paper (having original maturities of not more than 365 days) rated A-1 or better by SP and P-1 or better by Moody s.

(i) Investments in money market funds rated AAAm or AAAm-G by SP and P-1 by Moody s.

(j) Investments approved in writing by the Owner.

Provided that no instrument described above is permitted to evidence either the right to receive (a) only interest with respect to obligations underlying such instrument or (b) both principal and interest payments derived from obligations underlying such instrument and the interest and principal payments with respect to such instrument provided a yield to maturity at par greater than 120% of the yield to maturity at par of the underlying obligations; and provided further, that no instrument described above may be purchased at a price greater than par if such instrument may be prepaid or called at a price less than its purchase price prior to stated maturity.

ADVANTA

Advanta
Mortgage
P.O. Box 509011
San Diego, CA 92150-9011

16875 West Bernardo Drive
San Diego, CA 92127
(619) 674-1800

June 26, 1996

Mr. Jon Bauman
Preferred Mortgage Corporation
19782 MacArthur Boulevard, Suite 250
Irvine, CA 927115

Re: The Use of Credit Reports in Servicing Mortgage Loans on Behalf of Preferred Mortgage Corporation.

Dear Jon,

Advanta Mortgage Corp. USA ("Advanta") currently services mortgage loans on behalf of Preferred Mortgage Corporation. In future efforts to increase servicing effectiveness, Advanta may with respect to loans serviced on your behalf, employ the use of FICO Scores to set collection strategies and prioritize collection queues.

Section 604 of the Fair Credit Reporting Act permits the use of a consumer report (which includes FICO Scores) for the review or collection of an institution's customer or account. Technically, the Preferred Mortgage loans are not considered an Advanta customer or account. Consequently, we feel it would be prudent to obtain the written permission of Preferred Mortgage prior to pulling FICO Scores relating to the mortgage loans owned by Preferred.

By signing and returning one (1) copy of this letter, you grant Advanta the authority, as your servicer, to obtain FICO Scores on the mortgage loans being serviced by Advanta on your behalf for any lawful purpose, including account review and collection.

We appreciate your cooperation in this regard. Should you have any questions, please feel free to contact me directly at (619) 674-3339.

Sincerely,

Cindy Dunks

Cindy Dunks
Transactions Manager

ACKNOWLEDGE AND AGREED:

Preferred Mortgage Corporation

By: _____ **Date:** 6-28-96

Title: C.E.O

CLD\dlh

First Amendment to Loan Servicing Agreement

This First Amendment to Loan Servicing Agreement ("Amendment") dated May 28, 1997 is entered into by and between Preferred Credit Corporation, formerly known as Preferred Mortgage Corporation ("Owner") and Advanta Mortgage Corp. USA ("Servicer").

WHEREAS, Owner and Servicer (collectively, the "Parties") executed that certain Loan Servicing Agreement dated March 8, 1996 (the "Servicing Agreement").

WHEREAS, the Servicing Agreement provides that the Servicer is entitled to Additional Servicing Compensation (as defined in the Servicing Agreement) including, but not limited to, prepayment charges/penalties.

WHEREAS, Owner desires to retain Additional Servicing Compensation which represents prepayment charges/penalties.

WHEREAS, Owner desires to no longer require or monitor the acquisition or maintenance of hazard insurance by the borrowers.

WHEREAS, the Servicer agrees to cooperate with Owner in Owner's efforts to securitize the Mortgage Loans (as defined in the Servicing Agreement) and Owner agrees to pay Servicer's out-of-pocket expenses incurred in connection with such securitizations.

WHEREAS, the Servicing Agreement provides that Owner shall pay Servicer $100.00 per Mortgage Loan transferred within six months of the Transfer Date.

WHEREAS, the Parties have agreed to change the transfer fee with respect to a portion of the Mortgage Loans transferred.

THEREFORE, in consideration of the foregoing, the Parties hereby agree as follows:

1. Effective May 1, 1997, the definition of "Additional Servicing Compensation" is hereby amended to read as follows:

> "Additional Servicing Compensation": Incidental fees or charges provided for in the applicable Note and/or Mortgage that are customarily charged by the Servicer in the ordinary course of performing its obligations herein including but not limited to late payment charges, assumption processing charges and assumption fees, modification charges, demand fees, insufficient funds fees and reconveyance charges. Additional Servicing Compensation shall not refer to prepayment charges/penalties.

2. Effective May 1, 1997, Section 5.2, "Maintenance of Insurance," is deleted in its entirety and replaced with the following:

Section 5.2 No Duty to Maintain Insurance

(a) Notwithstanding anything to the contrary in this Agreement, Servicer shall have no duty to:

(i) obtain or maintain fire, flood or any other type of hazard insurance, including "force placed" insurance, on any Mortgaged Property; or

(ii) monitor the maintenance of any insurance referenced above by the Borrower; or

(iii) name Owner as "Loss Payee" on any blanket insurance policy.

(b) Owner shall indemnify and hold harmless Servicer from any loss or cost, including reasonable attorneys' fees, resulting directly or indirectly from an uninsured loss to a Mortgaged Property.

3. Effective May 28, 1997, Section 6.6, "Reserved for Future Use," is hereby amended to read as follows:

Section 6.6 Continued Cooperation

Servicer shall cooperate with Owner in Owner's future efforts to pool the Mortgage Loans for securitization pursuant to which Servicer will be engaged as a master servicer. Such cooperation shall include the Servicer's execution and delivery of the appropriate pooling and servicing agreement. Owner shall bear all out-of pocket expenses, not to exceed fifteen thousand dollars ($15,000.00) per transaction, including legal/professional expenses and all other reasonable internal costs of the Servicer for any services requested under this Section which are significantly in excess of other services which the Servicer has agreed to provide in the Agreement, incurred by Servicer in connection with such securitizations. Servicer shall have the right to withdraw from the Collection Account all costs described in this Section 6.6.

4. Effective May 28, 1997, Section 6.15 (c), "Termination," is hereby amended to read as follows:

> (c) If Owner transfers servicing of any Mortgage Loan to another servicer within six months of the applicable Transfer Date of such Mortgage Loan, Owner shall pay to Servicer $100.00 per Mortgage Loan transferred; provided, however, no termination fee shall be payable with respect to Mortgage Loans transferred during any calendar month which represent ten percent (10%) or less of Owner's prior month-ending portfolio balance.

Except as amended by this Amendment, the Servicing Agreement shall remain in full force and effect.

Advanta Mortgage Corp. USA

By: _____
Name: William P. Garland
Title: Senior Vice President

Preferred Credit Corporation

By: _____
Name: Todd Rodriquez
Title: Chief Executive Officer

Date: _____, 1997

CS First Boston Mortgage Capital Corp. hereby consents to the amendments set forth in this First Amendment to Loan Servicing Agreement.

By: _____
Name: _____
Title: _____

4. Effective May 28, 1997, Section 6.15 (c), "Termination," is hereby amended to read as follows:

> (c) If Owner transfers servicing of any Mortgage Loan to another servicer within six months of the applicable Transfer Date of such Mortgage Loan, Owner shall pay to Servicer $100.00 per Mortgage Loan transferred; provided, however, no termination fee shall be payable with respect to Mortgage Loans transferred during any calendar month which represent ten percent (10%) or less of Owner's prior month-ending portfolio balance.

Except as amended by this Amendment, the Servicing Agreement shall remain in full force and effect.

Advanta Mortgage Corp. USA

By: _____
Name: William P. Garland
Title: Senior Vice President

Preferred Credit Corporation

By: _____
Name: Todd Rodriquez
Title: Chief Executive Officer

Date: _____, 1997

CS First Boston Mortgage Capital Corp. hereby consents to the amendments set forth in this First Amendment to Loan Servicing Agreement.

By: _____
Name: _____
Title: _____

Exhibit C

Plaintiffs' Joint Suggestions

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
AT LIBERTY

JAMES AND JILL BAKER, et al., Plaintiffs, v. CENTURY FINANCIAL GROUP, INC. et al., Defendants.	Case No. CV100-4294 CC Division 3

JOINT SUGGESTIONS IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Respectfully submitted by,

WALTERS BENDER STROHBEHN & VAUGHAN, P.C.

R. Frederick Walters Mo. Bar #25069
J. Michael Vaughan Mo. Bar #24989
Kip D. Richards Mo. Bar 39743
David M. Skeens Mo. Bar #35728
Garrett M. Hodes Mo. Bar #50221
Bruce V. Nguyen, Mo. Bar. #52893

2500 City Center Square
1200 Main Street
P.O. Box 26188
Kansas City, MO 64196
(816) 421-6620
(816) 421-4747 (Facsimile)

ATTORNEYS FOR PLAINTIFFS AND CLASS COUNSEL

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I. INTRODUCTION

This is a certified class action lawsuit wherein the Plaintiffs and approximately 500 class members allege that a mortgage lender, Century Financial Group, Inc. ("CFG"), made second mortgage loans to them in violation of Missouri's Second Mortgage Loans Act, §§ 408.231, et seq. RSMo ("SMLA"). The "Investor" or "Assignee Defendants" identified in the *Fourth Amended Petition* purchased and/or were assigned the loans from CFG and are derivatively liable for CFG's violations of the SMLA and directly liable for their own violations of the SMLA. *See generally* Fourth Amended Petition ["4AP"], at ¶¶1-2, 6-108).

Thirty-six (36) of the Assignee Defendants claim that the Court lacks personal jurisdiction over them.[1] Twenty-five (25) of these 36 defendants are trusts which obtained the loans by assignment, seven (7) are the trustees of the various trusts, two (2) are "intervening" assignees (Residential Funding Mortgage Securities II and Advanta Mortgage Conduit Services, Inc.) that acquired loans and then conveyed them to one or more of the trusts for the purpose of "securitizing" the loans, one (1) is the master servicer (Advanta Mortgage Corporation USA) for one of the trusts, and one (1) is a servicer of some of the loans in question (Nationwide Mortgage Plan and Trust (hereinafter "NMPT")). For convenience, Plaintiffs collectively refer to the movants simply as the "Trusts."

The Trusts have filed 8 separate motions to dismiss.[2] The 8 motions addressed by these Suggestions are identified in the attached Exhibit 1. As a general matter, the points and

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[1] Four of the Defendants (Home Loan Trust 1997-HI3, Empire Funding Home Loan Owner Trusts 1997-1, Irwin Home Equity Loan Trust 1999-3, and Irwin Home Equity Loan Trust 2001-2) that have joined in the motions have been or will be dismissed without prejudice.

[2] Throughout *Plaintiffs' Joint Suggestions in Opposition to Defendants' Motion to Dismiss for Lack of Personal Jurisdiction*, Plaintiffs have cited to the respective motions, suggestions, or exhibits filed by the defendants. For convenience, Plaintiffs use the following abbreviations to identify the respective motions filed by these Defendant groups:

authorities that the Trusts have made in their suggestions are substantially the same. Accordingly, Plaintiffs are filing a joint response to these motions after having had an opportunity to conduct discovery.

One trust's (Master Financial Asset Securitization Trust 1998-1) motion for lack of personal jurisdiction has actually been before this Court in this action. (Ex. 3) The Court denied its motion to dismiss on July 31, 2002. Apparently undeterred by the Court's ruling it moves again for dismissal.

Other similarly situated trusts have also been before this Court in Couch v. SMC Lending, CV100-4332 CC (Ex. 2 and Ex. 2A-2D) on substantively identical motions to dismiss. Couch is also a certified class action raising claims for violations of the SMLA. In Couch, this Court determined that a number of moving parties had sufficient contacts with Missouri to support the exercise of personal jurisdiction and subsequently denied the motions on March 21, 2005.[3] (Ex. 2) The Court should deny the instant motions as well.[4]

RFC	Defendants Home Loan Trusts 1997-HI3, 1999-HI1, 1999 HI-6, 1999-HI8, 2000-HI1, 2000-HI2, 2000-HI3, 2000-HI4, 2001-HI1, 2001-HI2, Wilmington Trust Company, JPMorgan Chase Bank
EF	Defendants Empire Funding Home Loan Owner Trusts 1997-1, 1997-2, 1997-3, 1997-4, 1997-5, 1998-1, 1998-2, 1998-3, 1999-1, Empire Funding Grantor Trust 1998-3, Republic Bank Home Loan Owner Trust 1997-1 and 1998-1, U.S. Bank National Association, Wilmington Trust Company, Wachovia Trust Company
MF	Defendants Master Financial Asset Securitization Trusts 1997-1, 1998-1, 1998-2
Irwin	Defendants Irwin Home Equity Loan Trust 1999-3, 2001-1, 2001-2
Advanta	Defendants Advanta Revolving Home Equity Loan Trust 1999-A, Wilmington Trust Company, Deutsche Bank National Trust Company
RFMSII	Residential Funding Mortgage Securities II, Inc.
Advanta Mort.	Advanta Mortgage Corporation USA and Advanta Mortgage Conduit Services
NMPT	Nationwide Mortgage Plan and Trust's Motion to Dismiss for Lack of Personal Jurisdiction

Plaintiffs additionally note that one defendant, Nikko Financial, also filed a motion to dismiss for lack of personal jurisdiction (the ninth overall). Nikko Financial has since been dismissed from this lawsuit and as such its motion is not addressed in this response.

[3] Notably, several of the defendants that had moved to dismiss for lack of personal jurisdiction in Couch are also attempting to assert lack of personal jurisdiction in this case. These defendants include: Defendants Home Loan Trusts 1999-HI1, 1999 HI-6, 1999-HI8, 2000-HI1, 2000-HI2, 2000-HI3, 2004-HI4, Wilmington Trust Company, JPMorgan Chase Bank, and Defendant RFMSII (which served as an "intervening" assignee for these trusts), see Ex. 2A, and Defendant Empire Funding Home Loan Owner Trust 1998-3, U.S. Bank, NA, and Wilmington Trust Co, see Ex. 2C.

The Trusts cannot legitimately complain about having to defend themselves in a Missouri court. Like the moving parties in Couch, each of the Trusts is subject to the general jurisdiction of this court given their systematic and continuous contacts with the state of Missouri (*i.e.*, each "directly or indirectly" billed and received literally thousands of mortgage payments from the residents of this state with respect to Missouri loans each month), their very substantial investment in Missouri loans (over $170 million) and their agents which are present in the State of Missouri and are necessary to the operation of their businesses. Each is also subject to the specific jurisdiction of this Court given that each violated the MSMLA with respect to the CFG-originated loans in this case and the class members' claims against Defendants directly arise from Defendants' contacts with this jurisdiction. Further, and equally as important, the statutory claims that Plaintiffs and the Class are asserting against CFG and the Trusts pursuant to the Missouri Second Mortgage Loans Act ("SMLA") directly concern the legality of, and the obligations of the Trusts to repay the sums they received on the Missouri real estate loans they acquired.

The Trusts are properly before the Court and their respective motions to dismiss for lack of personal jurisdiction should be denied.

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[4] Moreover, the trust defendants in Milburn v. Rosslare Funding, Inc., No. 98-106(B) (Ark. Cir. Ct., Sept. 25, 2003) (Ex. 4), Westell v. FirstPlus Home Loan Owner Trust 1998-4 (Pa. Ct. C.P., Aug. 5, 2002) (Ex. 5), and Vinke v. Bann-Cor Mortgage, No. 01CV6313 (Colo. Dist. Ct., Mar. 18, 2003) (Ex. 6), three other second mortgage cases similar to this one, filed motions to dismiss that were substantially the same as the Trusts' motions here. The courts in Westell, Milburn, and Vinke, in addition to this Court in Couch and previously in this case, all denied the motions to dismiss concluding that the contacts of the trusts before them were sufficient to support the exercise of personal jurisdiction. (Ex.'s 2-6) The decision in this case should be the same. The contacts and activities of the Trusts in this case certainly are no less than those of the Trusts in the Couch, Westell, Milburn, and Vinke cases.

II. FACTUAL OVERVIEW

This class action lawsuit is based on the residential second mortgage loans that Defendant Century Financial Group, Inc. ("CFG") made to the Plaintiffs and the members of the certified Plaintiff Class in violation of the Missouri Second Mortgage Loan Act, §§ 408.231 RSMo et seq. ("SMLA").

A. The Plaintiffs and Their Claims

The class representative Plaintiffs in the case are James and Jill Baker, Jeffrey and Michelle Cox, and Bill and Linda Springer. Plaintiffs are Missouri homeowners who, like hundreds of other Missouri residents, were charged and paid excessive loan origination fees and other unauthorized closing costs in connection with a residential second mortgage loan. Like each of the members of the certified Class they represent, Plaintiffs obtained their second mortgage loans from the same second mortgage lender, CFG. Plaintiffs' claims, and the claims of the Class, arise from the same set of facts: a second mortgage loan that CFG made in violation of the SMLA, specifically § 408.233.1, using the same or similar loan documents, in the same or similar way.

Plaintiffs allege that their loans, like the other 500+ Missouri loans that CFG made to the other members of the Class, violated § 408.233.1 of the SMLA in the same or similar way. Section 408.233.1 provides:

> 1. No charge other than that permitted by section 408.232 [which allows a lender to charge interest at a rate greater than the Missouri usury rate] shall be directly or indirectly charged, contracted for or received in connection with any second mortgage loan, except ...
>
> * * *
>
> (3) Bona Fide closing costs paid to third parties, which shall include:
>
> (a) Fees or premiums for title examination, title insurance, or similar purposes including survey;

(b) Fees for preparation of a deed, settlement statement, or other documents;

(c) Fees for notarizing deeds and other documents;

(d) Appraisal fees; and

(e) Fees for credit reports;

* * *

(5) A nonrefundable origination fee not to exceed two [after August 28, 1998 five] percent of the principal.

§ 408.233.1 RSMo. (emphasis added)

Plaintiffs allege that CFG violated § 408.233.1 RSMo in the course of making their loans by "charging, contracting for and/or receiving" loan origination fees in excess of the allowed amounts – up to 10% of the total loan amount –as well as a number of other settlement charges which are clearly prohibited by § 408.233.1 (e.g., "funding," document "signing," and document preparation fees). (4AP, ¶¶113-144) As the Court already determined, Plaintiffs' situation was not unique, but typical of the loans that CFG systematically originated in Missouri in violation of § 408.233.1 after June 28, 1994. See *Order Certifying Plaintiff Class*, dated January 2, 2003.

Plaintiffs have sued (1) CFG, the originating lender – the lender in common for all of the unlawful second mortgage loans at issue in this case; and (2) all of CFG's "downstream" assignees (the "Assignee Defendants"), including the Trusts, which voluntarily purchased and were assigned the illegal loans on a "secondary market" from CFG or an intervening assignee shortly after the loans were made. Plaintiffs allege that both CFG and the Assignee Defendants violated the MSMLA and are liable to them and the class members as a result.

B. The Common Lender, Century Financial Group, Inc.

CFG, a California mortgage lender, originally made all of the second mortgage loans to Plaintiffs and the Class. After making them, CFG sold and assigned the loans to a certain investor entities (e.g., Residential Funding Corporation, Empire Funding Corporation, Master Financial, Inc., etc.), which at all relevant times were registered to do business in Missouri, thereby subjecting them to jurisdiction here. (Ex. 8)

The loan sales were made by CFG pursuant to standing agreements, commitments to purchase and/or an established course of dealing with the investor entities. The commitments to purchase the loans enabled the investors to obtain thousands of Missouri second mortgage loans from a variety of lenders and hundreds of Missouri loans directly from CFG, all of which were placed into bundles or pools. (4AP, ¶¶105-108) Once the loans had been purchased and pooled, the investor entities sold and assigned the loans in bundles to certain "business trusts" (often via one or more "special purpose vehicles" or entities). The trusts held the residential real estate loans like those made by CFG for purposes of investment. In essence, the trusts use the loans and the monthly money payment streams they generate as security for "notes" that the trusts, through their bank trustees market and sell to the public. This is why these types of trusts are sometimes called "asset securitization pools."

C. The Trusts and their Substantial Investment in Missouri Loans

Each of the Trusts is a "trust."[5] As such, the Trusts have no offices or employees of their own – anywhere! Instead, the Trusts, like any trust, are unincorporated associations that must act through others. See 12 Del. C. § 3801(a)("'business trust' means an unincorporated association

[5] As noted, however, some of the Trusts are not actually trusts, but were intervening investment entities that transferred ownership of the loans to other entities as part of a securitization transaction.

... under which property is or will be held, managed, administered, controlled, invested, reinvested and/or operated ... by a trustee or trustees"); § 3806 ("the business and affairs of a business trust shall be managed by or under the direction of its trustees"). The trust documents and affidavits of the Trusts seem to acknowledge that they must act through others.[6] In this case, the Trusts act primarily through their trustees and "loan servicing" companies, who collect and receive and process the borrowers' loan payments.

The Trustees of the Trusts include Wilmington Trust Company, U.S. Bank N.A., JPMorgan Chase Bank, Bank of New York, Wells Fargo Bank, Wachovia Trust Company, and Deutsche Bank National Trust Corporation. Some of the "servicers" for the Trusts include Residential Funding Corporation n/k/a Residential Funding Company LLC, GMAC Mortgage Corporation, Master Financial, Inc., Homecomings Financial Network, Inc. n/k/a Homecomings Financial LLC, Empire Funding Corporation, Irwin Union Bank and Trust Company, and Irwin Home Equity Loan Corporation (collectively, the "Servicers"). A number of the loan Servicers for the trusts and their trustees were and are authorized and registered to do business in Missouri and are subject to jurisdiction in Missouri. (Ex. 8).

Not surprisingly, each of the Trusts holds property, specifically high cost consumer second mortgage home loans, and the income and other financial benefits that arise from owning

[6] RFC Ex.'s A-2, B-2, C-2, D-2, E-2, F-2, G-2, H-2, I-2, J-2 ("RFC Trust Agreements"), at § 2.01 ("the [trustee] may conduct the business of the Trust, make and execute contracts and other instruments on behalf of the Trust and sue and be sued."); Ex. 21, at Preliminary Statement, Interrogatories 1, 3, 6, 7, 9, 10, 11 ("The Empire Funding Home Loan Owner Trusts have acted through U.S. Bank National Association, as Indenture Trustee and Co-Owner Trustee."); see also RFC Ex.'s A-2, B-2, C-2, D-2, E-2, F-2, G-2, H-2, I-2, J-2, at §§ 2.02, 2.09; RFC Ex.'s A-4, B-4, C-4, D-4, E-4, F-4, G-4, H-4, I-4, J-4 ("RFC Servicing Agreements"), at Art. III ("Administration and Servicing of Home Loans"); EF Ex. A (Wieder Affidavit), at ¶¶4, 21, 25, 26; EF Ex. B (Wieder Affidavit), at ¶¶4, 20, 24, 25; Ex.'s 65, 68, 71, 74, 77, 80, 83, 86, at §§ 2.1, 2.2, 2.7; Ex.'s 89, at §§ 2.1, 2.2, 2.8; Ex. 92, at (II)(A) on p. 5, (II)(B) on p. 5, (II)(H) on p. 7; Ex.'s 98, 101, at §§ 2.01, 2.02, 2.08; Ex. 104, at §§ 2.1, 2.2, 2.7; Ex's 100, 103, 106, at Art. IV; Ex. 110 at §§ 2.01, 2.02, 2.07; Irwin Ex.'s A, B, C (Maney Affidavits), at ¶¶8, 20, 21, 24, 27, 28; Advanta Ex. A-2, at §§ 2.1, 2.2, 2.9; Advanta Ex. A-4, at Art. IV.

such loans.[7] That is the purpose of the Trusts. The purpose and function of the Trusts are to hold second mortgage loans, receive the income from the second mortgage loans, and distribute the payments received from the Servicer to the beneficiaries.[8] The Trusts cannot deny that they hold, own and receive the benefits arising from the subject home loans, including each of 500+ loans at issue in this case.

Although there are numerous "end" Trusts that currently hold the real estate loans at issue in this case, the Trusts actually belong to one of six main "securitization groups." These groups received the Missouri loans that CFG made. The six securitization groups, which are discussed in more detail below, are denominated as:

(1) the RFC Group;

(2) the Empire Funding Group;

(3) the Republic Bank Group;

(4) the Master Financial Group;

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[7] Ex. 34, "The Home Loan Pool" at S5, "Description of the Home Loan Pool" at S12, "Loan Rates" at S14; Ex. 35, "The Home Loan Pool" at S5, "Description of the Home Loan Pool" at S13, "Loan Rates" at S15; Ex. 36, "The Home Loan Pool" at S4, "Description of the Home Loan Pool" at S13, "Loan Rates" at S15; Ex. 37, "The Home Loan Pool" at S5, "Description of the Home Loan Pool" at S12, "Loan Rates" at S14; Ex. 38, "The Home Loan Pool" at S5, "Description of the Home Loan Pool" at S12, "Loan Rates" at S15; Ex. 39, "The Home Loan Pool" at S5, "Description of the Home Loan Pool" at S12, "Loan Rates" at S14; Ex. 40, "The Home Loan Pool" at S6, "Description of the Home Loan Pool" at S14, "Loan Rates" at S17; Ex. 41, "The Home Loan Pool" at S5, "Description of the Home Loan Pool" at S13, "Loan Rates" at S17; Ex. 42, "The Home Loan Pool" at S5, "Description of the Home Loan Pool" at S13, "Loan Rates" at S19; Ex. 44, "Assets of the Trust" at S7-S8, "Loans" at S8, "Loan Rates" at S24; Ex. 45, "Assets of the Trust" at S8, "Loans" at S8, "Loan Rates" at S24; Ex. 46, "Assets of the Trust" at S9-S10, "Loans" at S10, "Loan Rates" at S26; Ex. 47, "Assets of the Issuer" at S10, "Assets of the Grantor Trust" at S10-S11, "Loans" at S11-S12, "Loan Rates" at S29; Ex. 48, "Assets of the Issuer" at S10, "Assets of the Grantor Trust" at S10-S11, "Loans" at S11, "Loan Rates" at S29; Ex. 49, "Assets of the Issuer" at S12, "Assets of the Grantor Trust" at S12-S13, "Loans" at S13; Ex. 50, "Assets of the Issuer" at S6, "Loan Rates" at S21; Ex. 51, "Assets of the Issuer" at S8; Ex. 53, at 8-9, 23, 30, 34; Ex. 55, "Assets of the Trust" at S3-S4, "Home Loan Pool" at S4, "Home Loan Rates" at S17; Ex. 56, "Assets of the Trust" at S4, "Home Loans" at S4, "Home Loan Rates" at S19; Ex. 57, "Assets of the Issuer" at S11, "Assets of the Grantor Trust" S11-S12, "Loans" at S12-S13, "Loan Rates" at S32; Ex. 59, at S6-S8, S25, S32, 14-16, Ex. 61, "Assets of the Trust" at S5, "Loan Interest Rates" at S21.

[8] RFC Ex.'s A-J (Maney Affidavits), at ¶6; EF Ex. A (Wieder Affidavit), ¶5; EF Ex. B (Wieder Affidavit), at ¶5; MF Ex. A (Maney Affidavit), at ¶13; Irwin Ex.'s A, B, C (Maney Affidavits), at ¶4; Advanta Ex. A (Wolhar Affidavit), at ¶6.

(5) the Irwin Group; and

(6) the Advanta Group.

Although they may be different, the various securitization groups all operate in substantially the same way, pursuant to similar trust documents. The Trusts also share common agents, servicers and trustees, and the relationships are such that CFG and the Trusts can be fairly deemed to be one and the same. As Judge David Russell (who became familiar with how the lenders and the trusts in these second mortgage cases operate) observed in this case:

> And, in essence, I guess that's where the hang-up is because the plaintiffs argue derivative and you say there's no way it's derivative, but it appears to me that it's all tied together. You can use the word derivative if you want to, and maybe derivative is not even an appropriate word, but there are loans that exist that were made by a moneyed corporation and your client as well as a number of other trusts - - we're dealing with dozens of them in these various cases. Each trust is set up to handle these mortgages. They're almost a department within this big organization that's going on. * * *
>
> This is almost like one entity. Century, Master, trusts, whatever it might be. For purposes of argument * * *
>
> The companies I'm dealing with in this case and the other cases that are before me right now are corporations that are set up for the purpose of dealing with money. * * *
>
> The bottom line purpose of all of these companies is to handle money and to handle money by loans and to handle loans. There may be corporate shells all up and down the line here, and there may be technical severance of obligations and boards and purposes which try to deal with statutes and states and usury laws and whatever else it might be, but they're all set up for one purpose, and that is to work hand in hand for the handling of loans and money, loans to people on second mortgages, the collection of that money, the distribution of that money.

Ex. 115.

Under the terms of the trust agreements, the Trusts delegated the duties that they were "required to perform" with respect to the loans to their respective trustees and Servicers, which

agreed to perform those duties on the Trusts' behalf.[9] In addition, the agreements make clear that the Trusts are obligated to preserve, protect and exploit the "collateral" (the "trust estate" or loans); but the Indenture provides that the "[the Trusts] may contract with ... other persons [e.g., the Servicer] to assist [the Trusts] in performing [their] duties under the Indenture, and [that] any performance of such duties [by, e.g., the Servicer] ... shall be deemed to be an action taken by the Issuer [the Trusts]."[10] Consistent with this obligation and ability to delegate, the trust Indentures provide that the Trusts must ensure that the Servicer sends out the bills and collects the money, which the Servicer is then obligated to pay to the trustee of the Trust.[11]

Although they attempt to downplay the magnitude of their investment and activities within Missouri, the Trusts do in fact hold and legally "own" a significant number of second mortgage loans, secured by Missouri real estate.[12] When the Trusts were formed, they collectively purchased over 5,000 mortgage loans, secured by Missouri homes, having a principal balance of over $170 million to include in their portfolios. (Ex. 7).

Altogether, the moving Trusts purchased and were assigned, and violated the MSMLA, with respect to no less than 292 second mortgage loans made by CFG (Ex. 7). Several Trusts

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[9] See n.7, supra; see generally RFC Ex.'s A-J (Maney Affidavits), ¶¶5, 21-23; EF Ex. A (Wieder Affidavit), at ¶¶4, 21, 25, 26; EF Ex. B (Wieder Affidavit), at ¶¶4, 20, 24, 25; MF Ex. A (Maney Affidavit), ¶¶6, 20; Irwin Ex. A, B, C (Maney Affidavits), at ¶¶20-22, 24, 27, 28; Advanta Ex. A (Wolhar Affidavit), ¶¶5, 23, 24, 26; see also, e.g., Advanta Ex. A-2, at Art. VI ("Authorities and Duties of Owner Trustee"); RFC Ex.'s A-4, B-4, C-4, D-4, E-4, F-4, G-4, H-4, I-4, J-4, at §§ 6.02, 6.05 (subservicing agreements, delegation of duties).

[10] RFC Ex. A-3, B-3, C-3, D-3, E-3, F-3, G-3, H-3, I-3, J-3 ("RFC Indenture Agreements"), at § 3.08(b); Ex.'s 66, 69, 72, 75, 78, 81, 84, 87, at § 3.07(b), respectively; Ex. 90, at § 3.7(b); Ex. 93, at (III)(G)(b) on p. 21; Ex.'s 99, 102, 105, at § 3.07(b); Ex. 111 at § 3.08(b); Advanta Ex. A-3, at § 3.7(b).

[11] See RFC Ex.'s A-J (Maney Affidavits), ¶¶21-23; EF Ex. A (Wieder Affidavit), at ¶¶21, 25, 26; EF Ex. B (Wieder Affidavit), at ¶¶20, 24, 25; Irwin Ex.'s A, B, C (Maney Affidavits), at ¶¶ 20, 21, 24, 27, 28; Advanta Ex. A (Wolhar Affidavit), at ¶¶23, 24, 26; see also RFC Ex.'s A-4, B-4, C-4, D-4, E-4, F-4, G-4, H-4, I-4, J-4, at § 3.02; Ex. 55 at S11; Ex. 56 at S13; Ex. 57 at S26 ("Servicer to adequately and timely perform its servicing obligations and remit to the [Trustee] the funds from the payments of principal and interest received on the [Loans].").

[12] Although "legal title to the property of a business trust may ... be held in the name of any trustee of the business trust," the trustee holds the property "with the same effect as if such property were held in the name of the business trust." 12 Del. C. § 3805(f).

refused to disclose their respective loan holdings.[13] Furthermore, although they have admitted that they hold over 5,000 Missouri second mortgage loans, many of the Trusts have thus far refused to provide the particulars for the loans, and have not disclosed whether they acquired still more Missouri loans after the trusts were initially funded.[14] Nor have the bulk of the Trusts disclosed whether they have invoked Missouri law and/or used Missouri's courts to enforce their rights as holders of these thousands of Missouri loans. This latter point cannot be argued, especially since the trusts themselves admit that they must act through others.

D. The Securitization Groups

The securitization groups are comprised as follows:

The RFC Group:

- Each of the RFC Group Trusts acquired its Missouri Second Mortgage Loans through their "Depositor," ***Residential Funding Mortgage Securities II, Inc.*** (hereinafter "RFMSII"). RFMSII, Ex. A (White Affidavit), at ¶¶ 2, 7, 10; see Ex.'s 34-42, "Summary" at S3 (identifying Depositor).
- ***Home Loan Trust 1999-HI1.*** This Trust acquired 298 Missouri second mortgage loans having an aggregate value of $9,421,085 to complement and diversify its loan portfolio. The Trust has admitted that 3 of these loans were originated by CFG. See Ex. 7; Ex. 34 at S18; Ex. 12 at Interrogatory 1, 6.
- ***Home Loan Trust 1999-HI6.*** This Trust acquired 462 Missouri second mortgage

[13] Neither Advanta Revolving Home Equity Loan Trust 1999-A, nor Empire Funding Home Loan Owner Trust 1998-3 have responded to Plaintiffs' discovery requests. Master Financial Asset Securitization Trusts 1998-1 has admitted that it holds the loans of the named plaintiffs but has refused to disclose whether it holds any other loans originated by CFG. Likewise, Master Financial Asset Securitization Trusts 1997-1 and 1998-2 refuses to disclose the same.

[14] See Ex. 44 at S17; Ex. 45 at 22; Ex. 46 at S29; Ex. 47 at S21; Ex. 48 at S20; Ex. 49 at 19-20; Ex. 50 at 19-20; Ex. 51 at 19-20; Ex. 53, at 8-9, 18; Ex. 55 at 16-17; Ex. 56 at S9; Ex. 57 at S22-S23; Ex. 59, at S20, S47 (provisions referencing *initial* loans and acquisition of *subsequent* loans); Ex. 61 at 10 (all referencing acquisition of subsequent loans).

loans having an aggregate value of $14,858,431 to complement and diversify its loan portfolio. The Trust has admitted that 4 of these loans were originated by CFG. See Ex. 7; Ex. 35 at S18; Ex. 13 at Interrogatory 1, 6.

- ***Home Loan Trust 1999-HI8.*** This Trust acquired 323 Missouri second mortgage loans having an aggregate value of $10,319,780 to complement and diversify its loan portfolio. The Trust has admitted that 4 of these loans were originated by CFG. See Ex. 7; Ex. 36 at S18; Ex. 14 at Interrogatory 1, 6.
- ***Home Loan Trust 2000-HI1.*** This Trust acquired 356 Missouri second mortgage loans having an aggregate value of $11,496,721 to complement and diversify its loan portfolio. The Trust has admitted that 1 of these loans was originated by CFG. See Ex. 7; Ex. 37 at S17; Ex. 15 at Interrogatory 1, 6.
- ***Home Loan Trust 2000-HI2.*** This Trust acquired 332 Missouri second mortgage loans having an aggregate value of $10,684,818 to complement and diversify its loan portfolio. The Trust has admitted that 4 of these loans were originated by CFG. See Ex. 7; Ex. 38 at S17; Ex. 16 at Interrogatory 1, 6.
- ***Home Loan Trust 2000-HI3.*** This Trust acquired 441 Missouri second mortgage loans having an aggregate value of $15,312,498 to complement and diversify its loan portfolio. The Trust has admitted that 1 of these loans was originated by CFG. See Ex. 7; Ex. 39 at S18; Ex. 17 at Interrogatory 1, 6.
- ***Home Loan Trust 2000-HI4.*** This Trust acquired 422 Missouri second mortgage loans having an aggregate value of $14,225,871 to complement and diversify its loan portfolio. The Trust has admitted that 4 of these loans were originated by CFG. See Ex. 7; Ex. 40 at S21; Ex. 18 at Interrogatory 1, 6.

- ***Home Loan Trust 2001-HI1.*** This Trust acquired 183 Missouri second mortgage loans having an aggregate value of $6,507,467 to complement and diversify its loan portfolio. The Trust has admitted that 2 of these loans were originated by CFG. See Ex. 7; Ex. 41 at S20; Ex. 19 at Interrogatory 1, 6.
- ***Home Loan Trust 2001-HI2.*** This Trust acquired 155 Missouri second mortgage loans having an aggregate value of $5,362,304 to complement and diversify its loan portfolio. The Trust has admitted that 2 of these loans were originated by CFG. See Ex. 7; Ex. 42 at S23; Ex. 20 at Interrogatory 1, 6.
- The RFC Group shares common trustees in ***Wilmington Trust Company*** and ***JPMorgan Chase Bank.*** (RFC Ex.'s A-J (Maney Affidavits), at ¶¶5, 23).
- To service its loans, the RFC Group retained ***Residential Funding Corporation*** as its Master Servicer (RFC Ex.'s A-J (Maney Affidavits), at ¶22) and either ***GMAC Mortgage Corp., Homecomings Financial Network,*** or ***Master Financial, Inc.,*** to act as the loan sub-servicer and to act on the Trusts' behalf. Ex. 34 at S21; Ex. 35 at S52; Ex. 36 at S51; Ex. 37 at S48; Ex. 38 at S46; Ex. 39 at S49; Ex. 40 at S51; Ex. 41 at S43; Ex. 42 at S55; Ex.'s 12-20 at Interrogatory 3.
- Altogether, the evidence shows that the RFC Group holds no less than 2,972 Missouri loans having an approximate aggregate value of at least $98 million. At least 25 of these loans were originated by CFG Lending.

The Empire Funding Group:[15]

- ***Empire Funding Home Loan Owner Trust 1997-2.*** This Trust acquired 36 Missouri second mortgage loans having an aggregate value of $790,215.47 to complement and diversify its loan portfolio. The Trust has admitted that 2 of these loans were originated by CFG. See Ex. 7; Ex. 44 at S23; Ex. 21 at Interrogatory 45.
- ***Empire Funding Home Loan Owner Trust 1997-3.*** This Trust acquired 162 Missouri second mortgage loans having an aggregate value of $4,303,035 to complement and diversify its loan portfolio. The Trust has admitted that 8 of these loans were originated by CFG. See Ex. 7; Ex. 45 at S23; Ex. 21 at Interrogatory 45.
- ***Empire Funding Home Loan Owner Trust 1997-4.*** This Trust acquired 319 Missouri second mortgage loans having an aggregate value of $9,106,668 to complement and diversify its loan portfolio. The Trust has admitted that 2 of these loans were originated by CFG. See Ex. 7; Ex. 46 at S25; Ex. 21 at Interrogatory 45.
- ***Empire Funding Home Loan Owner Trust 1997-5.*** This Trust acquired 306 Missouri second mortgage loans having an aggregate value of $8,748,968 to complement and diversify its loan portfolio. The Trust has admitted that 3 of these loans were originated by CFG. See Ex. 7; Ex. 47 at S28; Ex. 21 at Interrogatory 45.
- ***Empire Funding Home Loan Owner Trust 1998-1.*** This Trust acquired 170 Missouri second mortgage loans having an aggregate value of $6,338,120 to complement and diversify its loan portfolio. The Trust has admitted that 5 of these loans were originated by CFG. See Ex. 7; Ex. 48 at S28; Ex. 21 at Interrogatory 45;

[15] A number of the Empire Funding Group Trusts do not actually hold legal title to the second mortgage loans in question; rather, they hold the respective Owner Trust Estate, which consists of, *inter alia*, the rights to the payments collected from the second mortgage loans. However, for purposes of this motion, the distinction is irrelevant as they are still receiving payments from the borrowers on the loans.

Ex. 22 at Interrogatory 45.

- ***Empire Funding Home Loan Owner Trust 1998-2.*** This Trust acquired 621 Missouri second mortgage loans having an aggregate value of $19,522,312 to complement and diversify its loan portfolio. The Trust has admitted that 37 of these loans were originated by CFG. See Ex. 7; Ex. 49 at S30; Ex. 21 at Interrogatory 45 and 46; Ex. 22 at Interrogatory 45 and 46.
- ***Empire Funding Grantor Trust 1998-3*** and ***Empire Funding Home Loan Owner Trust 1998-3.***[16] These Trusts acquired 317 Missouri second mortgage loans having an aggregate value of $9,346,562 to complement and diversify its loan portfolio. Ex. 50 at S20. Many of these loans were originated and made by CFG. Although these Trusts have refused to disclose the total number of CFG loans they purchased and held, the loan files and documents that were produced in the case reveal that these Trusts purchased and held as assignee 3 CFG-originated second mortgage loans. Affidavit of Counsel, attached as Ex. A, at ¶ 5.
- ***Empire Funding Home Loan Owner Trust 1999-1.*** This Trust has admitted that it held 1 second mortgage loan originated by CFG. See Ex. 7; Ex. 22 at Interrogatory 45.
- The Empire Funding Group shares common trustees in ***Wilmington Trust Company*** **and** ***U.S. Bank, N.A.*** EF Ex. A (Wieder Affidavit), at ¶2, 4.
- To service its loans, the Empire Funding Group retained ***Empire Funding Corporation*** to act as the loan "Servicer" and to act on the Trusts' behalf. Ex. 44 at S4, Ex. 45 at S4 ("Summary"), Ex. 46 at S6 ("Summary"), Ex. 47 at S6

[16] Empire Funding Home Loan Owner Trust 1998-3 holds the rights to payment collected from the second mortgage loans held by Empire Funding Grantor Trust 1998-3. Consequently, for purposes of this motion, the two trusts should be considered one and the same.

("Summary"), Ex. 48 at S6 ("Summary"), Ex. 49 at S7 ("Summary"), Ex. 50 at S5 ("Summary"), Ex. 51 at S5 ("Summary"). The loans are currently being serviced by ***Ocwen Loan Servicing***. EF Ex. A (Wieder Affidavit), at ¶25, 26.

- Altogether, the evidence shows that the Empire Funding Group holds no less than 1,931 Missouri loans having an approximate aggregate value of at least $39 million. At least 61 of these loans were originated by CFG Lending, and all were serviced by Empire Funding Corporation or Ocwen.

The Republic Bank Group:

- ***Republic Bank Home Loan Owner Trust 1997-1***. This Trust admitted that it held 1 second mortgage loan originated by CFG. While the trust asserts that it only held 1 Missouri second mortgage loan, the court should note that this is true at the trust's inception; the trust does not indicate whether it subsequently acquired any additional Missouri second mortgage loans. See Ex. 7; Ex. 23 at Interrogatory 1 and 6; Ex. 24 at Interrogatory 45; Ex. 25 at Interrogatory 45.
- ***Republic Bank Home Loan Owner Trust 1998-1***. This Trust admitted that it held 9 second mortgage loans acquired by CFG. While the trust asserts that it only held 17 Missouri second mortgage loan, the court should note that this is true at the trust's inception; the trust does not indicate whether it subsequently acquired any additional Missouri second mortgage loans. See Ex. 7; Ex. 23 at Interrogatory 1 and 6; Ex. 24 at Interrogatory 45; Ex. 25 at Interrogatory 45; Ex. 53 at 31.
- The Republic Bank Group shares common trustees in ***Wachovia Trust Company*** and ***U.S. Bank, N.A.*** EF Ex. B (Wieder Affidavit), at ¶¶2, 4.
- To service its loans, the Republic Bank Group initially retained Republic Bank as its

servicer. Ex. 23 at Interrogatory 3. Currently, the loans are being serviced by Ocwen Federal Bank. Id.

- Altogether, the evidence shows that the Republic Bank Group holds at least 10 second mortgage loans originated by CFG.

The Master Financial Group:

- ***Master Financial Asset Securitization Trust 1997-1.*** This Trust acquired 213 Missouri second mortgage loans having an aggregate value of $7,424,981.33 to complement and diversify its portfolio. Ex. 55 at S19. Many of these loans were originated and made by CFG. Although this Trust has refused to disclose the total number of CFG loans it purchased and held, Ex. 26 at Interrogatory 1 and 2 (only responding that it does not hold the loans of the named plaintiffs), the loan files and documents that were produced in the case reveal that this Trust purchased and held as assignee between 63 and 117 CFG-originated second mortgage loans. See Affidavit of Counsel, attached as Ex. A, at ¶ 5.
- ***Master Financial Asset Securitization Trust 1998-1.*** This Trust holds the loans of the 3 named plaintiffs. Ex. 27 at Interrogatory 1. This Trust acquired 131 Missouri second mortgage loans having an aggregate value of $4,447,300.18 to complement and diversify its portfolio. Ex. 56 at S21. In addition to the loans of the 3 named plaintiffs, many of these loans were originated and made by CFG. Although this Trust has refused to disclose the total number of CFG loans it purchased and held, Ex. 27 at Interrogatory 1 and 2 (only responding that it holds the loans of the named plaintiffs), the loan files and documents that were produced in the case reveal that this Trust purchased and held as assignee between 60 and 114 CFG-originated

second mortgage loans. See Affidavit of Counsel, attached as Ex. A, at ¶ 5.

- ***Master Financial Asset Securitization Trust 1998-2.*** This Trust acquired 77 Missouri second mortgage loans having an aggregate value of $2,578,788 to complement and diversify its portfolio. Ex. 57 at S31. Many of these loans were originated and made by CFG. Although this Trust has refused to disclose the total number of CFG loans it purchased and held, Ex. 28 at Interrogatory 1 and 2 (only responding that it does not hold the loans of the named plaintiffs), the loan files and documents that were produced in the case reveal that this Trust purchased and held as assignee between 15 and 69 CFG-originated second mortgage loans. See Affidavit of Counsel, attached as Ex. A, at ¶ 5.
- The Master Financial Group shares common trustees in ***Wilmington Trust Company*** and ***the Bank of New York***. MF Ex. A (Maney Affidavit), at ¶6.
- To service its loans, the Master Financial Group retained ***Master Financial*** as its Servicer. Ex. 55 at S1, Ex, 56 at S1, Ex. 57 at S7.
- Altogether, the Master Financial Group holds 421 Missouri loans having an approximate aggregate value of $14 million. 3 of these loans are those of the named plaintiffs. Although these Trusts has refused to disclose the total number of CFG loans they purchased and held, the loan files and documents that were produced in the case reveal that these Trusts purchased and held as assignee at least 192 CFG-originated second mortgage loans.

The Irwin Group:

- ***Irwin Home Equity Loan Trust 2001-1.*** This Trust admitted that it held 2 second mortgage loans originated by CFG. See Ex. 7; Ex. 30 at Interrogatory 1.
- The Trust has appointed ***Wilmington Trust Company*** and ***Wells Fargo Bank*** as its trustees. Irwin Ex. B (Maney Affidavit), at ¶¶2, 5.
- To service its loans, the Irwin Group retained ***Irwin Union Bank and Trust Company*** as Master Servicer and ***Irwin Home Equity Corporation*** to act as the Sub-Servicer and to act on the Trusts' behalf. Irwin Ex. B (Maney Affidavit), ¶20, 27.

The Advanta Group:

- ***Advanta Revolving Home Equity Loan Trust 1999-A.*** Although this Trust has refused to disclose the total number of CFG loans it purchased and held, the loan files and documents that were produced in the case reveal that this Trust purchased and held as assignee 2 CFG-originated second mortgage loans. See Affidavit of Counsel, attached as Ex. A, at ¶ 5.
- This trust acquired its Missouri Second Mortgage Loans through Sponsor ***Advanta Mortgage Conduit Systems*** (hereinafter "AMCS"). Ex. 61 at S4; see generally Advanta, A-1-A-4 (identifying AMCS as "Sponsor").
- ***Advanta Revolving Home Equity Loan Trust 1999-A*** uses ***Wilmington Trust Company*** and the ***Deutsche Bank National Trust Company*** as its trustees. Advanta Ex. A (Wolhar Affidavit), at ¶3, 24.
- To service its loans, the Trust retained ***Advanta Mortgage Corporation USA*** (hereinafter "AMCUSA")[17] as its Master Servicer. See Advanta Ex. A-4, at § 4.1.

[17] AMCUSA also moves to dismiss for lack of personal jurisdiction. AMCUSA, however, has failed to offer any evidence other than its blanket assertions that it does not have sufficient contacts with the State of Missouri.

Summary

For the Court's convenience, Plaintiffs have prepared a chart summarizing this information, which is separately attached as Exhibit 7 and reproduced below:

Trust	*Missouri Loans*	*Century Loans*	*Investment in Missouri Loans*
Advanta Trust 1999-A	Unknown	2	Unknown
Empire Trust 1997-2	36	2	$790,215
Empire Trust 1997-3	162	8	$4,303,035
Empire Trust 1997-4	319	2	$9,106,668
Empire Trust 1997-5	306	3	$8,748,968
Empire Trust 1998-1	170	5	$6,338,120
Empire Trust 1998-2	621	37	$19,522,312
Empire Trust 1998-3	317	3	$9,346,562
Empire Trust 1999-1	Unknown	1	Unknown
HL Trust 99-HI1	298	3	$9,421,085
HL Trust 99-HI6	462	4	$14,858,431
HL Trust 99-HI8	323	4	$10,319,780
HL Trust 2000-HI1	356	1	$11,496,721
HL Trust 2000-HI2	332	4	$10,684,818
HL Trust 2000-HI3	441	1	$15,312,498
HL Trust 2000-HI4	422	4	$14,225,871
HL Trust 2001-HI1	183	2	$6,507,467
HL Trust 2001-HI2	155	2	$5,362,304
Irwin Trust 2001-1	Unknown	2	Unknown
MF Trust 1997-1	213	Between 63 and 117	$7,424,981
MF Trust 1998-1	131	Between 60 and 114	$4,447,300
MF Trust 1998-2	77	Between 15 and 69	$2,578,788
Republic Trust 1997-1	At least 1	1	Unknown
Republic Trust 1998-1	At least 17	9	Unknown
TOTAL	***At least 5,342***	***At least 292***	***At least $170,841,525***

Accordingly, its motions should be denied outright. In any event, the trust documents and prospectus indicate that AMCUSA is the master servicer for Advanta Revolving Home Equity Loan Trust 1999-A. See generally Advanta, Ex. A-1-A-4 and Ex. 61 (identifying AMCUSA as "Master Servicer"). The duties that AMCUSA has as master servicer include, but are not limited to: sending bill statements to borrowers, collecting payments from borrowers, and initiating foreclosure proceedings against delinquent borrowers (Ex. 61, "Servicing of the HELOCS" at S16; also see Advanta, Ex. A (Wolhar Affidavit), at ¶23). Necessarily, AMCUSA would perform the same duties with regard to the Missouri loans held by the Trust. As such, it is difficult to understand how AMCUSA can claim that it does not have sufficient contacts with Missouri. Furthermore, AMCUSA has admitted that it services at least four (4) class loans. Ex. 114 at Interrogatory 1.

E. Loan Servicing

The Servicers in many cases initially received and conveyed the loans to the Trusts, but maintained the right and agreed to "administer and service" the loans as an agent on behalf of the Trusts. The powers and authority for the Servicers to act for the Trusts are typically memorialized by a Sale and Servicing Agreement. Under the Sale and Servicing Agreements, the "Servicer" has "full power and authority ... to do any and all things in connection with such servicing and administration which [it] may deem necessary or desirable...." EF Ex. A (Wieder Affidavit), at ¶21; EF Ex. B (Wieder Affidavit), at ¶20; MF Ex. A (Maney Affidavit), at ¶20; Irwin Ex.'s A, B, C (Maney Affidavits), at ¶21; Advanta Ex. A (Wolhar Affidavit), at ¶26; see also RFC Ex.'s A-4, B-4, C-4, D-4, E-4, F-4, G-4, H-4, I-4, J-4, at § 3.01(a).

For example, the Servicer is empowered by the Trusts to take various actions with regard to the loans. These actions may include being able to foreclose, in the event of default; to waive late fees; to permit a loan modification; to permit a borrower to substitute a new house as collateral for the loan; file deeds of release; sell any "liquidated" home loans and "conserve, protect and operate" property that is foreclosed upon. See generally RFC Ex.'s A-4, B-4, C-4, D-4, E-4, F-4, G-4, H-4, I-4, J-4, at Art. III; Ex.'s 67, 70, 73, 76, 79, 82, 85, 88, at Art. IV; Ex.'s 67A, 70A, 73A, 79A (amendment to §§ 4.01A, 4.07); Ex. 82A (amendment to §§ 4.02, 4.07); Ex.'s 91, 94, at Art. IV; Ex.'s 100, 103, 106, at § 4.01-.04; Ex. 112 at Art. III, § 3.03-3.09; Advanta Ex. A-4, at Art. IV.

In addition, and by contract, the Trusts delegated to the Servicer their duties of servicing the loans and collecting the monthly mortgage payments due. The Servicer for the Trusts sends the monthly mortgage statements, or bills, to the Missouri homeowner-borrowers whose loans the Trusts elected to purchase, including Plaintiffs and the members of the Class in this particular

case. See RFC Ex.'s A-J (Maney Affidavits), at ¶¶21-23; EF Ex. A (Wieder Affidavit), at ¶¶21, 25, 26; EF Ex. B (Wieder Affidavit), at ¶¶20, 24, 25; MF Ex. A (Maney Affidavit), at ¶20; Irwin Ex.'s A, B, C (Maney Affidavits), at ¶¶ 20, 21, 24, 27, 28; Advanta Ex. A (Wolhar Affidavit), at ¶¶23, 24, 26; see also RFC Ex.'s A-4, B-4, C-4, D-4, E-4, F-4, G-4, H-4, I-4, J-4, at §§ 3.01, 3.02.

The Servicer also collects the mortgage payments from the Missouri homeowner-borrowers pursuant to terms and conditions of each second mortgage loan and pays those amounts over to the Trusts. See id. Upon receipt, the Trusts through their Trustees, distribute the mortgage payments to the holders of notes and certificates of benefit and interest in the Trusts (*i.e.*, the "investors"). See, e.g., RFC Ex. A-3, B-3, C-3, D-3, E-3, F-3, G-3, H-3, I-3, J-3, at §§ 3.01, 3.05, 8.01, 8.02; Ex.'s 66, 69, 72, 75, 78, 81, 84, 87, at § 3.01, 3.03, 8.01, 8.02; Ex. 67 70, 73, 76, 79, 82, 85, at § 5.01(d)-(e); Ex. 90, at 8.1, 8.2; Ex. 93, at VIII(A)-(B), on p. 42-43; Ex.'s 99, at §§ 3.01, 3.03, 8.01, 8.02; Ex. 102, at §§ 8.01, 8.02; Ex. 105, at §§ 3.01, 3.03, 8.01, 8.02; Ex.'s 100, 103, at § 5.01(c); Ex. 106, at § 5.01(d)-(e); Ex. 111 at § 3.05; Ex. 112 at § 5.06; Advanta Ex. A-3, at § 8.6; Ex. 61, "Distribution of the Notes" at S-31.

Although the Trusts urge the Court to find that the Servicer acts on its own, and is not their agent, that simply is not true as a matter of fact and common sense. The Trusts have appointed the Servicer to fulfill their duties with respect to the loans and to collect the money and enforce the loans on the Trusts' behalf. The Servicer has no independent right to collect on the mortgages. The Trusts also agreed to ensure that the Servicer complied with its delegated duties to collect, enforce and generally protect the loan obligations and mortgage interests held by the Trusts; and the acts of the Servicer are deemed to be the acts of the Trusts. See RFC Ex. A-3, B-3, C-3, D-3, E-3, F-3, G-3, H-3, I-3, J-3, at § 3.08(b); Ex.'s 66, 69, 72, 75, 78, 81, 84, 87,

at § 3.07(b); Ex. 90, at § 3.7(b); Ex. 93, at (III)(G)(b) on p. 21; Ex. 99, 102, 105, at § 3.07(b); Ex. 111 at § 3.08(b); Advanta Ex.A-3, at § 3.7(b). By definition, then, the acts of the Servicer cannot be "independent" of the Trusts. Clearly, the Servicers act as the "agents" of the Trusts.

Significantly, the Servicers for the Trusts cannot unilaterally resign from their respective positions and can only do so with the consent of the Trusts.[18] Furthermore, if a Servicer fails "duly to observe or perform. . . [its] obligations or agreements...," then the Trusts through their Trustees, have the power to terminate the Servicer and appoint a new one. See RFC Ex.'s A-4, B-4, C-4, D-4, E-4, F-4, G-4, H-4, I-4, J-4, at §§ 7.01, 7.02; Ex's 76, 85, 88, at §§ 10.01, 10.02; Ex.'s 67A, 70A, 73A, 79A, 82A (amendment to §§ 10.01, 10.02); Ex.'s 91, 94, at §§ 10.1, 10.2; Ex.'s 100, 103, 106, at §§ 10.01, 10.02; Ex. 112 at §§ 7.01, 7.02; Advanta Ex. A-4, at § 5.1.

Beyond any doubt, the Servicers act as an agent with respect to the loans notwithstanding the Trusts' self-serving attempt to escape such a finding by labeling the Servicer as an "independent contractor." See RFC Ex.'s A-J (Maney Affidavits), at ¶24; EF Ex. A (Wieder Affidavit), at ¶21; EF Ex. B (Wieder Affidavit), at ¶20; MF Ex. A (Maney Affidavit), ¶21; Irwin Ex.'s A, B, C (Maney Affidavits), ¶23; Advanta Ex. A (Wolhar Affidavit), at ¶ 25; Dupuis v. FHLMC, 879 F.Supp. 139, 143 (D. Mc. 1995)(entity that "serviced" note and mortgage on behalf of holder was "agent" of the holder notwithstanding holder's argument that servicer was independent contractor rather than agent under provision in servicing agreement); Northern v. McGraw-Edison Co., 542 F.2d 1336, 1343 n.7 (8th Cir. 1976)("[i]f the surrounding facts evidence an agency relationship, however 'artfully disguised,' the parties cannot negate its existence by representing

[18] Advanta Ex. A-4, at § 4.20 (The Servicer cannot "resign from the obligation and duties . . . imposed on it except by mutual written consent of the Sponsor, the Master Servicer, the Insurer and the Indenture Trustee."); see also RFC Ex.'s A-4, B-4, C-4, D-4, E-4, F-4, G-4, H-4, I-4, J-4, at § 6.04 (resignation available only if, *inter alia*, servicer has proposed successor that is acceptable to the Trust and the indenture trustee); Ex.'s 76, 85, 88, at § 9.04; Ex.'s 67A, 70A, 73A, 79A, 82A (amendment to § 9.04); Ex.'s 91, 94, at § 9.4 (cannot resign without consent of indenture trustee); Ex.'s 100, 103, 106, at § 9.04 (cannot resign without consent of indenture and grantor trustee); Ex. 112 at § 6.04.

that it is something other than an agency relationship"); Westell, Ex. 5, at 9 (characterization of Servicer as "independent contractor" constituted "self-serving attempt to elevate form over substance"); Milburn, Ex. 4, at 5.

F. The Trusts Knew that the Missouri Loans they Acquired Could Bring Them into a Missouri Courtroom.

The Court should be skeptical of the Trusts' self-serving arguments where they assert that they could not reasonably foresee being haled into court in Missouri. The Trusts utilized Missouri law to protect their interests in each of their Missouri loans by taking affirmative action in the state to record those interests in the county recorder of deeds offices. And, apart from the fact that they deliberately purchased and received by assignment thousands of Missouri loans to balance out their loans portfolio, the Trusts, when they acquired the loans, received written notice of the fact that:

> **Purchasers or assignees of [the] mortgage[s] could be liable for all claims and defenses with respect to the [m]ortgage[s] that the borrower could assert against the creditor [assignor].**

Ex.'s 9-11; see 15 U.S.C. § 1641(d))[19]

In recognition of this rule of "assignee liability," the entities that formed the Trusts warned their potential investors that the Trusts were buying high cost loans, and that the "assignees" of such loans (i.e., the Trusts, themselves) will ***"generally be subject to all claims ... that the [borrower] could assert against the [lender]."*** Ex. 44 at 14; Ex. 45 at 19; Ex. 46 at 17; Ex. 47 at 17; Ex. 48 at 17; Ex. 49 at 17; Ex. 50 at 17; Ex. 51 at 17; see Ex. 34 at 64; Ex. 35 at 59; Ex. 36 at 59; Ex. 37 at 59; Ex. 38 at 59; Ex. 39 at 80; Ex. 40 at 80; Ex. 41 at 80; Ex. 42 at 80; Ex. 53, at 22; Ex. 55 at S10; Ex. 56 at S11; Ex. 57 at 17, respectively; Ex. 59, at 6.

[19] The enactment provides: "Any person who purchases or is otherwise assigned a [high cost] mortgage ... shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the creditor of the mortgage."

The entities that formed the Trusts similarly warned and advised their investors that the high cost loans were also consumer loans and that the consumer protection laws of different states would apply. For example, the Trusts warned their investors:

> Applicable state laws generally regulate interest rates and other charges, [and] require certain disclosures, . . . In addition, most states have other laws, public policy and general principles of equity relating to the protection of consumers, unfair and deceptive practices and practices which may apply to the origination, servicing and collection of the Loans.

Ex. 44, at 13 (emphasis added).

> Numerous federal and state consumer protection laws impose substantive requirements upon mortgage lenders in connection with the origination, servicing and enforcement of loans secured by Single Family Properties. These laws include the federal Truth-in-Lending Act, Real Estate Settlement Procedures Act, Equal Credit Opportunity Act, Fair Credit Billing Act, Fair Credit Reporting Act and related statutes and regulations. These federal and state laws impose specific statutory liabilities upon lenders who fail to comply with the provisions of the law. In some cases, this liability may affect assignees of the loans or contracts.

Ex. 44, at 59 (emphasis added).

> [The] provisions [of HOEPA] impose additional disclosure and other requirements on creditors with respect to non-purchase money mortgage loans with high interest rates or high up-front fees and charges. The provisions of [HOEPA] apply on a mandatory basis to all mortgage loans originated on or after October 1, 1995. These provisions can impose specific statutory liabilities upon creditors who fail to comply with their provisions and may affect the enforceability of the related loans. In addition, any assignee of the creditor would generally be subject to all claims and defenses that the consumer could assert against the creditor, including, without limitation, the right to rescind the mortgage loan.

Ex. 44, at 14 (emphasis added). Similar warnings appear in the prospectuses for the other trusts.[20]

[20] Here, plaintiffs refer to the Trusts' prospectuses to include both the "prospectus supplement" and the "prospectus." Typically, the prospectus provides general information regarding the securities to be issued as part of the securitization of loans and is filed with the SEC to register the securities. A prospectus supplement is prepared at a later date and provides specific information related to the pool of loans and their characteristics. See Ex. 34 at S9, 64; Ex. 35 at S9, 59; Ex. 36 at S9, 59; Ex. 37 at S9, 59; Ex. 38 at S9, 59; Ex. 39 at S9, 80; Ex. 40 at S10, 80; Ex. 41 at S9, 80; Ex. 42 at S9, 80; Ex. 45 at S19, 18-19; Ex. 46 at S21, 16, 17; Ex. 47 at S24, 16, 17; Ex. 48 at S23, 16,

Given these warnings and the implicit recognition that state law claims precisely like those that Plaintiffs are asserting would likely cause the Trusts to have to defend a Missouri lawsuit, and given the magnitude of their more than $170 million dollar investment in Missouri, and the fact that the Trusts held and/or hold the named Plaintiffs' second mortgage loans and the 500+ other high cost Missouri consumer loans at issue in the case, the Court can and should exercise jurisdiction over the Trusts. The Trusts deliberately acquired a significant interest in Missouri real estate, "serviced" that Missouri interest through agents registered to do business within Missouri, received and distributed the monthly payments made on the Missouri loans, and undeniably knew that they would likely be haled into a Missouri court if CFG (the mortgage lender) violated Missouri law when it made the loans. Under circumstances such as these, it would not be unfair for the Court to hold that the Trusts must remain as defendants in Missouri.

III. POINTS AND LEGAL AUTHORITIES

The Court should deny the Trusts' motions to dismiss. The Court should hold that it can exercise general and/or specific personal jurisdiction over each of the Trusts (as it did in Couch) given their substantial involvement with the loans of the Class and their substantial contacts with the state of Missouri.

A. APPLICABLE STANDARD

Plaintiffs' burden of proof in responding to a motion to dismiss for lack of personal jurisdiction is not an onerous one. It requires only that Plaintiffs establish a *prima facie* showing of the existence of one of the bases for jurisdiction. See Conway Royalite Plastics, Ltd., 12 S.W.3d 314, 318 (Mo. banc 2000); Wilson Tool & Die, Inc. v. TBDN-Tennessee Co., 237 S.W.3d 611, 614 (Mo. Ct. App. 2007); Shouse v. RFB Construction Co., 10 S.W.3d 189 (Mo. Ct. App. 1999).

17; Ex. 49 at S26, 16, 17; Ex. 50 at S16, 16, 17; Ex. 51 at 16, 17; Ex. 53, at 21-22, 82, 87-88; Ex. 55 at S10, S12, 17; Ex. 56 at S11, S14, 17; Ex. 57 at S26, 16, 17; Ex. 59, at 6, 48; Ex. 61 at 17-18.

Plaintiffs need only allege facts sufficient to "support a reasonable inference that Defendant can be subjected to jurisdiction in this state." Landoll by Landoll v. Dovell, 779 S.W.2d 621, 625 (Mo. Ct. App. 1989). Without a doubt, Plaintiffs have satisfied their burden here. Cf. Shouse, 10 S.W.3d at 193-94 (petition that alleged the defendant "conducts business" in Missouri was sufficient); Laser Vision Centers, Inc. v. Laser Vision Centers Inter., SpA, 930 S.W.2d 29, 31 (Mo. Ct. App. 1996) (petition that alleged "Defendant transacted business within Missouri and made a contract in Missouri, and Plaintiff's claims arise out of same" alleged sufficient facts to invoke long-arm jurisdiction).

The allegations within Plaintiffs' amended petition are specific and more than adequately aver the facts necessary for the Court to find that it can permissibly exercise general and/or specific jurisdiction over the Trusts, given their contacts with Missouri, including their receipt of Missouri mortgage payments in violation of § 408.233.1 RSMo, their use of Missouri real estate, the commission of tortious and unlawful acts, and the transaction of business in Missouri.

For the convenience of the Court and counsel, Plaintiffs restate the pertinent jurisdictional allegations from their amended petition. The Court must accept these allegations as true for purposes of the Trusts' pending motions:

> 105. Each of the [Moving Defendants] is named as a Defendant both individually, in its capacity as an owner and/or assignee (holder) of, and/or the trustee and/or agent (including agent servicer) of an entity, trust, fund or pool owning or holding, the Second Mortgage Loans, and as a member and representative of every other member of the Defendant Class (as hereinafter defined), which includes the remaining owners and assignees (holders) of, and trustees and/or agents (including agent servicers) of the entities, trusts, funds and pools owning and/or holding, said Second Mortgage Loans.
>
> 106. The [Moving Defendants], individually and/or through their bank trustees or other trustees and/or agents, purchased the Second Mortgage Loans that CENTURY FINANCIAL made to PLAINTIFFS and the Plaintiff Class pursuant to one or more standing agreements and/or a course of business dealing with CENTURY FINANCIAL and/or on a "secondary market" comprised of

businesses like said [Moving Defendants] and used the Second Mortgage Loans and the money streams they generated as for purposes of investment, including use of the loans and money streams as collateral for notes that certain [Moving Defendants] and their trustees and agents sold to the public.

107. The existence of these agreements, course of dealing and "secondary market," and the capital that the [Moving Defendants] provided to CENTURY FINANCIAL by agreeing to repurchase the loans that it originated and made, enabled CENTURY FINANCIAL to make the second mortgage home loans it was making in the first place, including the Missouri Second Mortgage Loans at issue.

* * *

109. This Court has jurisdiction over CENTURY FINANCIAL [and the Moving Defendants] since each transacted business, made a contract, committed a tort and/or are or were assignees, trustees and/or agents of such entities and/or of the Second Mortgage Loans, and/or used or possessed an interest in real estate located within the state of Missouri, all as is herein alleged.

* * *

111. Each of the [Moving Defendants] is subject to the jurisdiction of this Court, either having a registered agent in and/or a continuous and systematic presence in or contacts with the state of Missouri, and/or pursuant to the provisions of § 506.500 Mo. Rev. Stat., having further, individually and/or through one or more trustees and/or agents:

(a) Transacted business within this state individually and/or by virtue of being an assignee (holder) or the trustee and/or agent of an assignee of the Second Mortgage Loans (as hereinafter defined) of CENTURY FINANCIAL, and/or by virtue of it being a holder of and/or a trustee and/or agent of a holder of said Second Mortgage Loans and collecting and/or attempting to collect the benefits of and amounts due under said Second Mortgage Loans from and/or within this state;

(b) Made contracts within this state individually and/or by virtue of being an assignee (holder) or the trustee and/or agent of an assignee of CENTURY FINANCIAL and/or said Second Mortgage Loans;

(c) Committed tortious acts within this state individually and/or by virtue of being an assignee (holder) or the trustee and/or agent of an assignee of CENTURY FINANCIAL and/or the Second Mortgage Loans, and/or by virtue of its continuing to charge and receive illegal costs and fees in violation of Missouri law and in their receipt of illegal interest from PLAINTIFFS and the Plaintiff Class, all as is more specifically set forth below; and

(d) Used real estate situated in this state to secure the Second Mortgage Loans individually and/or by virtue of being an assignee (holder) or the trustee and/or agent of an assignee of CENTURY FINANCIAL and/or the Second Mortgage Loans, and/or by virtue of its continuing capacity as the beneficiary of the deeds of trust and mortgages, or the trustee and/or agent for such beneficiaries, that secure the Second Mortgage Loans.

* * *

118. In connection with these Second Mortgage Loans CENTURY FINANCIAL contracted for, charged and received, and the [Moving Defendants] charged and received fees and costs that violated Missouri's Second Mortgage Loans Act. In particular, CENTURY FINANCIAL contracted for, and CENTURY FINANCIAL and the [Moving Defendants] charged and received, Origination Fees (or finder's fees or broker's fees) that were either wholly prohibited by or in excess of that allowed by Missouri's Second Mortgage Loans Act, § 408.233.1(5) Mo. Rev. Stat. In addition, CENTURY FINANCIAL contracted for and CENTURY FINANCIAL and [Moving Defendants] charged and received other closing costs that were either not paid to third parties of the lender or were not permitted by or were in excess of those permitted by Missouri's Second Mortgage Loans Act, § 408.233.1(3) Mo. Rev. Stat.

119. These unlawful closing costs and other fees were payable at the time that the loans were funded and were added to the principal balance of the Second Mortgage Loan notes and on which amounts interest was charged, as it was charged on the entire principal balance of the notes.

120. Since acquiring the loans, the [Moving Defendants], individually and/or through their bank trustees or other trustees and/or agents, have and "charged" and/or "received" (and continue to collect, "charge" and "receive") payments of interest on the loans, as well as a portion of the pre-paid origination fees and closing costs that were financed as a part of the loan amounts.

* * *

159. As the purchasers and/or assignees and holders or as the trustees and/or agents for the assignees and holders of the notes and deeds of trust given under the Second Mortgage Loans by PLAINTIFFS and the members of the SECOND MORTGAGE CLASS, the [Moving Defendants] (individually, and as a defendant class, as hereinafter defined) are liable to PLAINTIFFS and the SECOND MORTGAGE CLASS, just as CENTURY FINANCIAL is liable to PLAINTIFFS and the SECOND MORTGAGE CLASS in that (a) the [Moving Defendants] are the assignees, directly or indirectly of CENTURY FINANCIAL, and stand in the shoes of CENTURY FINANCIAL; (b) the [Moving Defendants] charged and received (and continue to charge and receive) illegal fees and costs on the loans, together with the resulting illegal interest charges; and (c) the points and fees

> and/or Annual Percentage Rates (APRs) for the loans is such that the [Moving Defendants] (individually, and as a defendant class) are liable to PLAINTIFFS and the SECOND MORTGAGE CLASS, just as CENTURY FIANACIAL is liable.
>
> 160. CENTURY FINANCIAL and the [Moving Defendants] (individually, and as a defendant class, as hereinafter defined) are derivatively and/or jointly and severally liable to PLAINTIFFS and the SECOND MORTGAGE CLASS for all of the unlawful closing costs and fees and interest they have charged and/or received (or hereinafter charge or receive) under the Second Mortgage Loans, and any such costs, fees and interest collected after the date of the filing of this action shall be additional evidence of the willful and malicious nature of and conscious disregard of the acts of CENTURY FINANCIAL and the [Moving Defendants] (individually, and as a defendant class, as hereinafter defined).

(4AP) (emphasis added).

The evidence that the parties have put before the Court supports Plaintiffs' express allegations. First, the record shows that the Trusts have submitted themselves to the *general jurisdiction* of Missouri's courts through their own acts and the acts of their "agents" (including the loan "Servicers") which Plaintiffs allege to have been "continuous and systematic." Second, and if not through general jurisdiction, the allegations and evidence show that the Trusts are subject to *specific jurisdiction* under Missouri's long-arm statute. The Trusts, individually and through their agents, used Missouri real estate, and committed tortious and unlawful acts and transacted business within this state, all of which results in the Class members' MSMLA claims.

In either instance, due process is satisfied if a defendant has such "minimum contacts" with the forum state that the exercise of jurisdiction over it does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). The inquiry is whether the defendant's conduct and connection with the forum are such that the defendant should reasonably anticipate being haled into court there. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980). The criteria is satisfied if the defendant purposefully directs its activities to forum state residents and "purposefully avails itself of the privilege of conducting

activities within the forum state, thus invoking the benefits and protection of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). Here, the activities of the Trusts, and their recognition of the fact that Missouri consumer protection and finance laws controlled over 5,000 Missouri loans that they collectively acquired, more than satisfy the minimum contacts necessary for due process.

B. THE COURT CAN EXERCISE GENERAL JURISDICTION OVER THE TRUSTS

"[G]eneral jurisdiction refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose." Bell Paper Box, Inc. v. U.S. Kids, Inc., 22 F.3d 816, 819 (8th Cir. 1994). General jurisdiction over a nonresident defendant exists where the defendant has "substantial and continuous" business contacts with the forum state. State ex rel. K-Mart Corp. v. Holliger, 986 S.W.2d 165, 167-69 (Mo. banc 1999); Shouse, 10 S.W.3d at 193. As Plaintiffs have expressly alleged in their petition, the substantial and continuous business of the Trusts within Missouri renders them subject to jurisdiction generally, given the Trusts' continued and systematic presence in the state via their considerable interest in Missouri real estate and the monthly contacts of the agents through which the Trusts, by definition, must act.

1. The Trusts Engaged in Substantial and Continuous Activities Within Missouri.

The selection of Missouri loans was no accident. Each of the Trusts purposefully set out to and did in fact purchase Missouri second mortgage home loans worth over $170 million to include in their collective loan portfolios. (Ex. 7) The Trusts did so knowing that Missouri law "generally regulate[d]" the loans, protected the borrowers, and that the Trusts "could be liable for all claims ... that the borrower[s] could assert against the [mortgage lender]." (Ex.'s 9-11 [Section 32 Notices]; supra Section II.F.). Possessing this knowledge, the Trusts purchased and took the loans by

assignment and became the beneficiaries of the deeds of trust securing the same. As to each loan it purchased and/or was assigned, the Trusts were required to under § 443.035 RSMo, and did, record that assignment in the county records and they paid monies to the county to ensure that it was properly recorded.

Since that time, the Trusts have "systematically" caused numerous bills to be sent to Missouri homeowners each month for receipt of the monthly mortgage payments due for the over 5,000 Missouri loans they hold. (Ex. 7) And each month the Trusts, through agreements with their "Servicers," received these Missouri mortgage payments. The fact that the Trusts did not perform these acts "directly" is inconsequential. The Trusts are "trusts" and must, by definition, act through others such as Residential Funding Corporation, Master Financial, Inc., Irwin Home Equity Corporation, and Empire Funding Corporation, all corporations irrefutably subject to jurisdiction in Missouri.[21]

Under circumstances such as these, the Court can assume general jurisdiction over the Trusts. The fact that the Trusts, themselves, are not actually present in Missouri is not necessary for finding general jurisdiction. The Trusts purposefully and systematically acquired significant interests in Missouri real estate and have directed continuous and repeated activities within this state. The purchasing of at least 292 CFG loans, and over 5,000 others, and the ownership of over 5,000 Missouri notes, and the holding of over 5,000 Missouri deeds of trust, and the charging and the receiving of the Missouri mortgage payments all are part and parcel of the Trusts' business. These activities constitute the very reason for the Trusts' existence. The Trusts

[21] See Ex. 8. Discovery in the case may also reveal that the Trusts, through their Servicers, actually foreclosed upon Missouri property and/or took other actions consistent with their possession and use of their Missouri investment. The Trusts cannot deny the roles of the Servicers in this regard. Plaintiffs and the members of the Class received their mortgage statements from and made their mortgage payments to the Servicers. (4AP, ¶¶120, 127-28, 135-36, 143-44). Notably, however, the Trusts have refused to answer the discovery requests which asked them to describe their activities in Missouri. (See generally Ex.'s 12-28, 30).

expected to receive payments on loans having an anticipated collective principal value of over $170 million from the residents of this state. (Ex. 7) Without a doubt, the Trusts have deliberately injected themselves into Missouri commerce and cannot now be heard to complain about the exercise of jurisdiction over them. There are numerous cases to support Plaintiffs' point.

In Lakin v. Prudential Securities, Inc., 348 F.3d 704 (8th Cir. 2003), the Eighth Circuit applying Missouri law held that Prudential Savings, a federally chartered savings bank, was subject to general jurisdiction in Missouri.[22] The claims for which Prudential had been sued were filed by the receiverships for several insolvent insurance companies relating to Prudential's allegedly improper release of $69 million dollars that eventually found its way to the Swiss bank account of Martin Frankel. Prudential sought dismissal claiming that the Missouri court had neither specific nor general jurisdiction over it as Prudential's only office was in Georgia. Prudential also argued that it had virtually no contacts with Missouri. The district court agreed with Prudential and dismissed it from the case. On appeal, the Eighth Circuit reversed, holding that, while there was no specific jurisdiction, Prudential could be subject to general jurisdiction. The court remanded the case so that discovery on the issues of general jurisdiction could be completed.

Notably, one aspect of general jurisdiction discussed at length by the Court in Lakin was Prudential's holding of home equity loans and lines of credit to Missouri residents. The court noted that the terms of such loans are "typically measured in months and years-creating continuous long-term contacts with the State of Missouri." Id. at 708. The plaintiffs contended

[22] Because the case was originally filed in a Missouri state court and was removed to federal court on diversity grounds, the personal jurisdiction analysis by the federal courts was "whether the State of Missouri would accept jurisdiction under the facts of this case" and, just as a Missouri court would determine, "whether the exercise of jurisdiction comports with Constitutional Due Process restrictions." Lakin, 348 F.3d at 707.

that because such loans totaled nearly $10 million dollars, the contacts with Missouri were substantial. Id. Prudential countered, as do the Trusts here, that the total percentage of its Missouri interests was very small in comparison to its overall loan portfolio thereby supporting a finding that its contacts with Missouri were insubstantial. Id. The Eight Circuit rejected this approach, holding that the percentage of a company's business in a given state is generally irrelevant. Rather, the proper focus is "on whether the company's contacts are substantial for the *forum*." Id. at 709 (emphasis in original).

In this regard, the Eighth Circuit went on to note that $10 million in loans could represent loans to hundreds if not thousands of Missouri citizens, that the loans were central to the business of Prudential and that to the extent such loans were secured by Missouri property, Prudential held liens on Missouri real property and it would have to use Missouri courts to enforce its lien rights. Id. at 709-710. Thus, the Eighth Circuit sent the case back to the district court to allow discovery on these issues. Importantly, in regard to due process considerations, the court instructed that if discovery established the existence of such contacts, due process would be satisfied. Id. at 713.

In this case, the discovery completed to date shows that the Trusts' contacts with Missouri are more substantial than those that the Court in Lakin stated would be sufficient to establish general jurisdiction. The parties know that the Trusts acquired over 5,000 Missouri loans with a total loan value of in excess of $170 million. (Ex. 7) Without question, holding such loans is central to the business of the Trusts -- in fact, it is the business of the Trusts. The Trusts' loans are all mortgage loans and thus, by definition, such loans represent an interest in real property and the Trusts must employ the powers and procedures of Missouri law and Missouri courts in connection with enforcing their mortgage interests here in Missouri. Thus,

under the direction of the Eighth Circuit in Lakin, the Court should find that the Trusts are subject to general jurisdiction here.

Similarly, in Provident National Bank v. California Savings and Loan Association, 819 F.2d 434, 438 (3rd Cir. 1987), the plaintiff sued CSLA, a California bank, in Pennsylvania. CSLA did not maintain any Pennsylvania office, employees, agents, mailing address or telephone numbers, had not applied to do business in Pennsylvania, did not advertise in Pennsylvania, and did not pay taxes there. Three Pennsylvania financial institutions, however, serviced $10.2 million of loans for CSLA. Id. at 436. In addition, the bank "purchased mortgages in the secondary market, and these mortgages could be secured by property located in Pennsylvania." Id. CSLA's "activities relating to Pennsylvania, the borrowing and lending of money, [were deemed to be] the bread and butter of its daily business." Id. at 438. And CSLA's acquisition of Pennsylvania mortgages could reasonably be considered continuous business activity within Pennsylvania. On the basis of these facts, the district court held that CSLA was subject to general jurisdiction in Pennsylvania. Id. at 438. The result in this case should be the same. See also, e.g., Colonial Mortgage Service Company v. Aerenson, 603 F.Supp. 323 (D. Del. 1985) (Pennsylvania bank subject to general jurisdiction in Delaware on the basis of 200 mortgages, each of which secured loans with property located in Delaware); MAK Automation, Inc. v. G.C. Evans Sales & Mfg. Co., Inc., 2008 WL 185787, at *5 (E.D.Mo. Jan. 18, 2008)(Arkansas corporation subject to general jurisdiction in Missouri on the basis of sales of equipment and spare parts in Missouri); Delta Systems v. Indak Manufacturing Corp., 2001 WL 103518, at *3 (Fed. Cir. 2001)(regular sale of products to Ohio consumers, which resulted in "millions of dollars in" annual revenue might "alone be sufficient to satisfy the requirements for the exercise of general jurisdiction").

As noted above, in Couch (Ex. 2 and Ex. 2A-2D), this Court rejected arguments

substantially the same as those which the Trusts offer here and denied the trust defendants' motions to dismiss. In support of their respective motions, the trusts in Couch provided, *inter alia*, affidavits from Roseline Mancy, Vice President of Wilmington Trust Company, and Pamela Wieder, Vice President of U.S. Bank National Association, the same Roseline Maney and Pamela Wieder whose affidavits are submitted here. (RFC Ex.'s A-J; MF Ex. A; Irwin Ex.'s A-C; EF Ex. A; EF Ex. B). Notably, several of the trusts for which Ms. Maney executed affidavits in Couch are also named as defendants in this action.[23] Despite this Court's ruling in Couch, the trusts again attempt to assert that there is a lack of personal jurisdiction.

As they do here, Ms. Maney and Ms. Wieder advised the Court in Couch that their respective trusts did not engage in any business in Missouri, had no contacts in Missouri, maintained no offices or bank accounts in Missouri, and had no employees here. See generally Ex. 2B and 2D. As she does here, Ms. Maney further stated in her affidavits for each Trust that "The Trust does not own, lease, or use real estate in the State of Missouri, but rather holds certain second mortgage notes secured by real property in Missouri." (Ex. 2B, at ¶ 15) Likewise, Ms. Wieder made a similar assertion in her affidavits. (Ex. 2D, at ¶ 15) The plaintiffs in Couch opposed the motion and offered evidence establishing that the various trusts had in fact acquired a significant number of loans secured by Missouri real estate worth millions of dollars. The plaintiffs further showed that the various trusts serviced those mortgage loans through a "master servicer," which billed and received the monthly mortgage payments for the trust. In making its arguments, the trusts relied on Pilcher v. Direct Equity Funding, the same case that the Trusts cite here. The Court in Couch denied the motion to dismiss on March 21, 2005. (Ex. 2) Since the Missouri contacts of the Trusts are substantially the same as the trust defendants in Couch, the Court should similarly

[23] Defendants Home Loan Trusts 1999-HI1, 1999 HI-6, 1999-HI8, 2000-HI1, 2000-HI2, 2000-HI3, 2004-HI4, and Empire Funding Home Loan Owner Trust 1998-3 were named defendants in Couch; see n.4 *supra*.

deny the Trusts' motions here.

The opinion in Westell v. FirstPlus Home Loan Owner Trust 1998-4 (Ex. 5) is also directly on point. In that case, the court also addressed a motion to dismiss that was substantially the same as the motions filed here. The trust in Westell submitted an affidavit from Pamela Wieder in support of its motion (Ex. 5). Again, this is the same Pamela Wieder whose affidavits are submitted here. In denying the motion, the court in Westell saw through the careful wording of Ms. Wieder's affidavit, and the subtle admission that the trust did not "directly" do anything with regard to the second mortgage loan. The court then concluded, on the basis of evidence even less convincing than that presented here, that it could properly exercise jurisdiction over the trust:

> Viewing the above evidence collectively, it appears that there is no dispute that FirstPlus Trust has an "interest in real property" in this Commonwealth as a function of the fact that it owns security interests that encumber the homes of Plaintiffs. See Wieder Affidavit at ¶25. Further, it is uncontroverted that the Servicer collects interest and fees from Plaintiffs on behalf of the Trust. See Wieder Affidavit at ¶'s 26, 27.
>
> . . . .
>
> Noting all of the above, the Court believes that it has personal jurisdiction over FirstPlus Trust. Undeniably, FirstPlus Trust has an "interest" in Pennsylvania real property. Further, the Servicer to this day continues to collect interest and fees from Plaintiffs on behalf of FirstPlus Trust. The premise of Plaintiffs' Second Amended Complaint is that the interest and fees being collected are illegal under Pennsylvania law. The Court can see no credible argument denying that FirstPlus Trust to this day transacts business in the Commonwealth and said business is directly related to the claims here at issue.
>
> While the Wieder Affidavit does not seem to reference this point directly, the Court does note that the Sale and Servicing agreement purports to characterize the Servicer as being an "independent contractor," and not an "agent" of FirstPlus Trust. See Exhibit C Wieder Affidavit at ¶9.05. The Court views this assertion as being a self-serving attempt to elevate form over substance and agrees with the authority cited by Plaintiffs that the label attached by the parties does not necessarily define the legal status of a given relationship. See, Board of Trade v. City of Chicago v. Hammond Elevator Company, 198 U.S. 424 (1905); Northern v. McGraw-Edison Company, 542 F.2d 1336 (8th Cir. 1976).

Ex. 5 at 7, 8 (emphasis added).

Westell is directly on point. In reaching its decision, the court saw through the Trusts' subtle attempts to avoid jurisdiction, construed the language of the trust agreements, including the indenture, and correctly noted that the Pilcher case was clearly distinguishable since "the court in Pilcher did not have the benefit of all the operative documents defining the structure of the trust in this case." (Ex. 5 at 9) This Court also considered the Pilcher case and, like Judge Hargos in Westell, properly rejected it. (Ex. 2)[24]

Also on point is Milburn v. Rosslare Funding, Inc. (Ex. 4). Milburn involved usury claims under Arkansas law filed against trusts that had acquired second mortgage loans from an originating lender, just like the Trusts in this case. The trust defendants in Milburn raised the same arguments to challenge jurisdiction that the Trusts raise here. The Court rejected them. Specifically, the Court found that general jurisdiction existed as to the defendant trusts because the trusts "own, or have owned, 103 Arkansas loans, with a total value of $3,382,861.00 ..., [and] through servicers, regularly receive payments of principal and interest from Arkansas residents." (Ex. 4 at 3). The court also found that there was specific jurisdiction over the defendant trusts because the ownership of mortgage loans constitutes the "use" of real property and therefore subjects the defendant trusts to jurisdiction under Arkansas' long-arm statute. (Ex. 4 at 1-2).

In regard to both specific and general jurisdiction, the court in Milburn found that due process was satisfied given the quantity of the contacts with Arkansas, including the ownership of 103 Arkansas loans valued at $3 million, and the loan servicing contacts with Arkansas, which the court described as "routine and numerous." (Ex. 4 at 3). Notably, the court observed that the

[24] The Trusts also rely heavily on two nearly identical orders from the City of St. Louis entered by the same judge in Jackson v. American Home Funding, Inc. and Burgess v. Samboy Financial, Inc. In both of these cases, the judge relied on Pilcher finding it to be "instructive.") The particular problems with and the points that render Jackson and Burgess unpersuasive are discussed below in Section V.

due process considerations should not be viewed only from the perspective of the defendant trusts: "...the standard of 'fair play and substantial justice' is not to be utilized solely for the benefit of nonresident defendants, but rather it is an equal guarantee to consumer-plaintiffs of a just, convenient and reasonable forum in which to try their suit." (Ex. 4 at 4) (quoting Int'l Harvester Co. v. Hendrickson Mfg. Co., 459 S.W.2d 62 (Ark. 1970)). Likewise, in the instant case, Missouri is the just and proper forum for Plaintiffs to assert claims relating to loans on their Missouri homes. It would indeed be a perversion of justice to hold that such individual homeowners must travel to Delaware or some other distant forum to bring claims against the Trusts.

Finally, in Vinke et al. v. Bann-Cor Mortgage, et al. (Ex. 6), the court considered a personal jurisdiction argument by a number of entities that had acquired second mortgage loans secured by property in Colorado. The court's holding was brief and to the point:

> Various of the Defendants assert that this Court does not have personal jurisdiction over them, due to a lack of minimum contacts. **That position is absurd.** All of these Defendants purchased mortgages encumbering Colorado properties owned by Colorado citizens, mortgages that were entered into, at least in part, through transactions and the doing of business by the original lender in Colorado. **Should any of these defendants wish to foreclose on those mortgages, they would have to resort to a Colorado court for such foreclosure. I find that the minimum contacts necessary for the exercise of personal jurisdiction over all of the Defendants is well established.** Any motion to dismiss claiming lack of personal jurisdiction is DENIED. [emphasis added]

Ex. 6.

Given the numerous and substantial contacts that the Defendants Trusts have with Missouri, their contention that this Court cannot exercise jurisdiction over them is without merit, if not absurd.

2. The Exercise of General Jurisdiction Over the Trusts Does Not Violate Due Process.

In addition to the significant, multi-million dollar interest that the Trusts, themselves, have in Missouri, the continued and systematic activities of their agent servicers for the Trusts are also such that the Trusts can be sued in Missouri. An agent's actions with a forum state are imputable to the principal for purposes of finding general jurisdiction. See Morrow v. Caloric Appliance Corporation, 372 S.W.2d 41, 45-46 (Mo. banc 1963)(foreign corporation's "presence" in Missouri for purposes of personal jurisdiction determined by reference to its agent's Missouri contacts); Provident National, 819 F.2d at 436 (bank maintained agents in the forum state, which was factor militating in favor of general jurisdiction); Welinsky v. Resort of the World, 839 F.2d 928, 930 (2nd Cir. 1988)(fact that hotel in Northern Antilles used New York City reservations agent was sufficient to establish *prima facie* showing that it was engaged in "continuous and systematic" course of business in New York and could be considered "present" in New York). This is true regardless of whether the "agent" is designated as an "independent contractor."

Because the Trusts used the Servicers, each a business over which the Court undeniably has jurisdiction, to administer and service the Trusts' interests in Missouri, the exercise of general jurisdiction over the Trusts is absolutely proper. See, e.g., Dupuis, 879 F.Supp. at 143 (entity that "serviced" note and mortgage on behalf of holder was an "agent" of the holder notwithstanding the holder's argument that, consistent with provision of the servicing agreement, servicer was an "independent contractor" rather than agent). "A principal independent contractor relationship is to be distinguished from a master/servant relationship, but an independent contractor can still be an agent." Id. (using a lawyer appearing in court on behalf of a client as "the classic example"); cf. Amway Corp., Inc. v. Director of Revenue, 794 S.W.2d 666, 670 (Mo. banc 1990) ("independent" distributors were clearly authorized to act on behalf of Amway,

notwithstanding disclaimer of agency); Westell, Ex. 5 at 9 ("There is little doubt that FirstPlus Trust has gone to great lengths in an attempt to insulate itself from being sued in any forum other than in its state of formation ... but this Court believes that FirstPlus Trust both owns substantial property interests in [Pennsylvania], and, through its agent (the Servicer), regularly transacts business in [Pennsylvania]"); Milburn, Ex. 4 at 5 (trust indenture agreement provided that performance of duties by Servicer shall be deemed as action taken by Trust, thereby negating suggestion that actions of Servicers were "independent" from those of Trust).[25]

The Trusts' reliance on Purdue Research Foundation v. Sanofi-Sythelabo, 338 F.3d 773 (7th Cir. 2003) is misplaced. The discussion in Purdue actually supports Plaintiffs' point that the Trusts, as the assignees of the high cost loans that CFG made, are, in effect, "continuations" of CFG and are therefore subject to jurisdiction in Missouri pursuant to the line of cases which "[recognize] that the jurisdictional contacts of a predecessor corporation, may be imputed to its successor without offending due process." Id. at 783. As the court in Purdue noted, when a successor corporation "stands in the shoes" of the predecessor, the jurisdictional contacts of one are the jurisdictional contacts of the other for purposes of due process analysis. Id. at 783-84 (citing cases).

Although the Trusts are referred to as the "Assignee Defendants" in this case, they are much more than the standard assignee that SSBO France, the French corporation in Purdue, claimed it was. Plaintiffs in this case specifically allege that the Trusts are the assignees of high costs loans, which, under HOEPA, § 1641(d), places the assignees "in the shoes" of CFG and makes them derivatively liable for the acts of CFG. (4AP, ¶159)

HOEPA, at 15 U.S.C. § 1641(d), provides:

[25] Each of the Trusts' indenture agreements in this case contains a similar provision. (RFC Ex. A-3, B-3, C-3, D-3, E-3, F-3, G-3, H-3, I-3, J-3, at § 3.08(b); Ex.'s 66, 69, 72, 75, 78, 81, 84, 87, at § 3.07(b); Ex. 90, at § 3.7(b); Ex. 93, at (III)(G)(b) on p. 21; Ex. 99, 102, 105, at § 3.07(b); Ex. 111 at § 3.08(b); Advanta Ex. A-3, at § 3.7(b)).

> **"any person who purchases or is otherwise assigned a ["tainted"] mortgage ... shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the [original lender]."**

15 U.S.C. § 1641(d)(1); see also Schwartz v. Bann-Cor Mortg., 197 S.W.3d 168, 179 (Mo. Ct. App. 2006)("Title 15 U.S.C. section 1641(d)(the Home Ownership Equity Protection Act) provides that assignees of mortgage loans are subject to all claims and defenses under any law that a borrower could have asserted against the original lender. ... The assignee is jointly and severally liable with the original lender. Section 1641(d) eliminates any 'holder in due course' defense to the defendants. ... The assignee defendants are derivatively liable under state law as well as under federal law.")(internal citation omitted); Bryant v. Mortgage Capital Resource Corp., 197 F. Supp.2d 1357, 1364-65 (N.D. Ga. 2002)(consumers had affirmative right to assert claims against assignee based solely upon mortgage lender's independent violations of state law in connection with issuance of loans).

Plaintiffs also allege that the Trusts "stand in the shoes" of CFG pursuant to principles of state law, *e.g.*, Doss v. EPIC Healthcare Mgmt., 901 S.W.2d 216, 222 (Mo. Ct. App. 1995) (assignees stand in the shoes of the assignor, and are subject to the same claims and defenses as the assignor unless the assignee is a holder in due course). "[These] general rules of assignee liability provide that the assignee defendants can be derivatively liable to plaintiffs." Schwartz v. Bann-Cor Mortgage, No. 03-0922, slip op. at 4 (W.D. Mo. June 14, 2004)(Ex. 116). The relationship among CFG and the Trusts is readily distinguishable from that of SSBO France and Purdue.

Moreover, even if the Court were to analyze due process in terms of a standard assignor-assignee relationship, the outcome would be the same. Unlike SSBO France in Purdue, the Trusts unquestionably did have "the expectation of that [they] could be haled into a court

situated in [Missouri] with respect to [the] property rights [they acquired]." Purdue, 338 F.3d at 785; see Baker, Westell, Milburn, and Vinke, supra. The Trusts' prospectuses and the HOEPA "Section 32" Notices say as much. (Ex. 9-11) In purchasing the loans from CFG, the Trusts acknowledged that they could be sued in Missouri; they also knew that they had to come to Missouri to enforce their rights to the loans. Unlike SSBO France, the Trusts anticipated litigation in Missouri. Moreover, the court in Purdue emphasized that its finding against jurisdiction was based "*on the record [the plaintiff] made in this case.*" 338 F.3d at 785 (italics in original). The plaintiff failed to show that SSBO France's contacts with the forum were "continuous and systematic." Id. at 788 (contacts limited to execution of confidentiality agreements with single Indiana-based corporation). The Trusts' contacts with Missouri are vastly different. In fact, each of the over 5,000 loans collectively held by the trusts constitutes a contact with Missouri.

In sum, the Seventh Circuit's opinion in Purdue does not support the Trusts' argument, but does explain why the decisions to exercise jurisdiction over the trusts defendants in Couch, Westell, Milburn, and Vinke was absolutely proper. Jurisdiction over the Trusts is proper in Missouri since the Court has jurisdiction over CFG, and the Trusts "stand in the shoes" of CFG as a matter of law. If the Court determined otherwise, then the Trusts could simply avoid the consumer protection laws of jurisdictions like Missouri merely by organizing themselves in a foreign state (or country) and appointing a self-proclaimed "independent contractor" to act on their behalf in every jurisdiction. The Court will not be violating the Trusts' right to due process by keeping them in this lawsuit.[26]

[26] The same analysis applies to the two "intervening" assignees, which are not business trusts. Their acquisition of the Missouri loans and the act of passing them along should be sufficient to subject them to the Court's jurisdiction.

C. THE COURT CAN EXERCISE SPECIFIC JURISDICTION OVER THE TRUSTS.

When a state exercises jurisdiction over a nonresident defendant in a suit "arising out of or related to" the defendant's contacts with the forum state, the forum state is exercising specific jurisdiction over the defendant. Shouse; 10 S.W.3d at 193. Thus, even if the Court determines that the Trusts are not subject to general jurisdiction, there can be no question that the Trusts are subject to the Court's specific jurisdiction. The Trusts have themselves and through their agents used Missouri real estate, committed tortious and unlawful acts, and/or transacted business within the meaning of Missouri's long-arm statute, § 506.500.1 RSMo. Because those activities serve as the basis of Plaintiffs' Missouri law claims, this Court should hold that it has specific personal jurisdiction over the Trusts as well.

RFMSII admits that it acted as "Depositor" for the various RFC Group Trusts, transferred the loans that ended up in those trusts, and prior to such transfer, had taken ownership of those loans from the secondary market. (Suggestions in Support of RFMSII's Motion to Dismiss for Lack of Personal Jurisdiction, Ex. A (White Affidavit), at ¶¶2, 7, 10). At least 2,972 of those loans were Missouri loans, valued at approximately $98 million. The master servicer of these loans was Residential Funding Corporation; the sub-servicers for the various loans were GMAC Mortgage Corporation, Homecomings Financial Network, and/or Master Financial – none of which are challenging the jurisdiction of the court here as they are all registered to do business in Missouri. Ex. 8.

As for *AMCS*, it has failed to offer any evidence other than its blanket assertions that it does not have sufficient contacts with the State of Missouri. Accordingly, its motions should be denied outright. Moreover, an examination of various trust documents actually indicate that AMCS served as "sponsor" for Advanta Revolving Home Equity Loan Trust 1999-A. Ex. 61, at S-4; see generally Advanta, A-1-A-4 (identifying AMCS as "Sponsor"). As "Sponsor," AMCS acquired, sold, and transferred the loans that ultimately came to be held by the Trust. Initially, AMCS acquired these loans and transferred them to the Advanta Holding Trust 1999-A (Advanta Ex. A-4, at §§ 1.1, 2.1). The purpose of the Advanta Holding Trust 1999-A was to transfer these loans, which comprised the Owner Trust Estate, to the Advanta Revolving Home Equity Loan Trust 1999-A (Advanta Ex. A-1, at §§ 1.1, 2.3) Necessarily, the loans sold by AMCS included those originated by CFG, and the other loans secured by Missouri real estate, held by the Trust.

As for *Nationwide Mortgage Plan and Trust* (hereinafter "NMPT"), it freely admits that it "purchases and hold certain loans on which it anticipates collecting payments." Ex. 113, at Answer to Interrogatory 15. NMPT further admits that it acquired three loans that were originated by CFG from three separate Empire Funding trusts. Ex. 113, at Answer to Interrogatory 2. These loans were serviced by either REACT or Security Trust on behalf of NMPT. Ex. 113, at Answer to Interrogatory 4. Neither REACT nor Security Trust is alleging that it is not subject to personal jurisdiction in Missouri. NMPT also admits that it, or the servicer acting on its behalf, sent written notices to the obligors of the three CFG loans that it held. Ex. 113, at Answer to Interrogatory 12. Moreover, NMPT has failed to disclose any other loans that it holds secured by Missouri real estate and any actions related to such holdings. Ex. 113, at Answer to Interrogatory 6. Accordingly, NMPT, like the other trust defendants in this action, should be bound by its actions and the actions of its agents, REACT and Security Trust.

1. The Trusts Used Real Property Situated in Missouri.

One of the trusts has expressly admitted that its interests in second mortgage loans does, in fact, constitute the use or possession of Missouri real estate securing such loans. (See Irwin Ex.'s A, B, C (Maney Affidavits), at ¶15: "The Trust does not own, lease, or use real estate in the State of Missouri except in connection with its ownership of second mortgage notes.") The other trusts, however, have attempted to convince the Court that they do not use Missouri real estate for purposes of the long arm statute by manipulating the language of their denials. For example, the Master Financial Group Trusts have submitted affidavits, stating that "The [Trusts] do not own, lease or use real estate in the State of Missouri, but rather holds certain second mortgage notes secured by real property.[27]

Interestingly enough, Master Financial Asset Securitization Trust 1998-1 filed a prior motion to dismiss this case against it, again asserting lack of personal jurisdiction. (See Ex. 3) In support of its motion, the Trust attached Ms. Maney's affidavit, which stated "The Trust does not own, lease, or use real estate in the State of Missouri except in connection with its ownership of second mortgage notes." (Id. at Ex. 1, ¶12) Because this Court denied the motion to dismiss, it would appear that the wording of the affidavit supporting the prior motion has since been altered for this motion in order to superficially deny that the Trust is "using" Missouri real estate for purposes of the long-arm statute. However, it is clear that the trusts are using Missouri real estate despite their denials. See Milburn (Ex. 4 at 2); Vinke, Ex. 6 at 1; see also Lakin, 348 F.3d at 709-710.

Section 506.500.1(4) RSMo confers jurisdiction over a non-resident defendant through its "ownership, use or possession" of real estate situated in Missouri. These activities are stated in the

[27] MF Ex. A (Maney Affidavit), at ¶15. The other trust defendants also make similar statements. RFC Ex.'s A-J (Maney Affidavits), at ¶15; Advanta Ex. A (Wolhar Affidavit), at ¶15; see also EF Ex. A (Wieder Affidavit), at ¶15; EF Ex. B (Wieder Affidavit), at ¶14 (denying the ownership, use, or possession of Missouri real estate but stating that the loans held are secured by Missouri real estate).

disjunctive. "The primary rule of statutory construction is to determine the legislature's intent by considering the plain and ordinary meaning of the words used in the statute and by giving each word, clause, sentence, and section of the statute meaning." Neske v. City of St. Louis, 218 S.W.3d 417, 424 (Mo. banc 2007); see also Winfrey v. State, 242 S.W.3d 723, 725 (Mo. banc 2008)("Each word or phrase in a statute must be given meaning if possible."); State ex rel. Smith v. Atterbury, 270 S.W.2d 399, 404 (Mo. 1954) "[I]n construing a statute, significance and effect should, if possible, be attributed to every word, every phrase, sentence and part thereof."). It is presumed that the legislature gives significance to each word used, and did not enact meaningless provisions. See, e.g., State v. Moore, 952 S.W.2d 812, 813 (Mo. Ct. App. 1997). Giving significance to each of the words used in § 506.500.1(4), the legislature clearly intended personal jurisdiction to lie over a non-resident defendant who does something other than "own" or "possess" real estate. If this were not the case, the statue would not include the word "use."

The plain and ordinary meaning of the word "use" is: "to put into action or service" Merriam-Webster's Online (visited March 10, 2008).[28] Applying this ordinary meaning, it is evident that the Trusts *use* Missouri property. The Trusts put into service, or "use," the named Plaintiffs' property, and the property of others like them, to generate proceeds through mortgage payments, which are then applied to satisfy and to secure the Trusts' own obligations to their investors. The Trusts also "use" the named Plaintiffs' property and the property of other similarly situated Missouri borrowers, to secure the promissory notes for the second mortgage loans that each of them holds, and as a "guarantee" that Plaintiffs and the other mortgagors will repay their loans as agreed.

[28] In determining legislative intent, courts look to the plain and ordinary meaning of the words employed. See Neske, 218 S.W.3d at 424, State v. Rosseau, 34 S.W.3d 254, 259 (Mo. Ct. App. 2000); State ex rel. William Doorack v. Lewis, 439 S.W.2d 541, 543 (Mo. Ct. App. 1969); Murray v. Missouri Highway and Transportation Commission, 37 S.W.3d 228, 233 (Mo. banc 2001).

"Uses" of this sort have been found sufficient for purposes of long-arm jurisdiction. In Newman v. 1st 1440 Investment, Inc., 1990 WL 125369 (N.D. Ill. 1990),[29] USB, a resident of Virginia, was sued in federal court in Illinois for indemnification regarding the plaintiffs' Truth in Lending suit regarding their mortgage. The Court found that "[b]y holding and selling the mortgage, USB reaped or would have reaped financial benefits from its acts with this property, which looks very much like use to this Court." Id. at *1 (citation and internal quotation marks and bracket omitted). Moreover, "a party who holds a mortgage agreement with an Illinois resident on Illinois property is on notice that he might be sued in Illinois." Id. at *2. Thus, USB was subject to Illinois jurisdiction.

The same result was reached by the Court in Fidelity Financial Services, Inc v. West, 640 N.E.2d 394, 397-99 (Ind. App. 1994), holding that a second mortgage constituted an "interest in real property" sufficient to establish personal jurisdiction over a lender with no other Indiana contacts save ownership of the mortgage. See also Patrick v. Firstsouth Federal Savings and Loan Association, 512 So.2d 1328, 1330 (Ala. 1987) (ownership of mortgage constitute "interest" in real property for purposes of long arm jurisdiction); Westell, Ex. 5 at 7 ("there is no dispute that FirstPlus Trust has an 'interest in real property'. . . [since] it owns security interests that encumber the homes of Plaintiffs"); Milburn, Ex. 4 at 2 ("ownership of mortgage loans, and the collection of interest pursuant to the mortgage loans, constitutes the "use" of a real property interest"); Vinke, Ex. 6 at 1 (personal jurisdiction over defendant that purchases mortgages encumbering forum property is "well established").

In United Federal Savings Bank v. McLean, 694 F.Supp. 529, 537 (C.D. Ill. 1988), the

[29] Missouri's long arm statute is derived from the Illinois long arm. See K-Mart Corp., 986 S.W.2d 165, 167 (Mo. banc. 1999). Consequently, this Court may look to Illinois cases when interpreting Section 506.500. State ex rel. Newport v. Wiesman, 627 S.W.2d 874, 876-877 (Mo. banc. 1982); State ex rel. Deere and Company v. Pinnell, 454 S.W.2d 889, 891-93 (Mo. banc 1970).

defendant neither owned nor was in possession of real estate located in the forum state of Illinois. He was merely a loan guarantor. The defendant did, however, take personal tax deductions on the property. The Court found that because the defendant "reaped or would have reaped financial benefits from the property," he "used" it for purposes of the long arm statute. Id. at 537. Similarly, in Welburn v. Eighth Judicial District Court of the State of Nevada, 806 P.2d 1045, 1046-47 (Nev. 1991), the defendants executed a note secured by a deed of trust to real property in Las Vegas, Nevada. The note and deed of trust were given to the plaintiffs. Both the plaintiffs and the defendant were residents of California. The plaintiffs filed a deficiency action against the defendants in Nevada after they had foreclosed on the property. The defendants moved to dismiss the case for lack of jurisdiction. On appeal, the Nevada Supreme Court found that the use of Nevada property to secure a debt was sufficient to establish personal jurisdiction over the defendants under the Nevada long arm statute.

2. The Trusts Committed Tortious and Unlawful Acts in Missouri

Each of the Trusts has also committed a tort in Missouri within the meaning of § 500.506.1(3) RSMo. Whether the Trusts have a physical presence in Missouri is again of no consequence. The relevant inquiry is whether the Trusts' extraterritorial acts have tortious consequences in Missouri. See, e.g., State ex rel. William Ranni Associates, Inc. v. Hartenbach, 742 S.W.2d 134, 139 (Mo. banc 1987); Longshore v. Norville, 93 S.W.3d 746, 751 (Mo. Ct. App. 2002); Peabody Holding Co. v. Costain Group PLC v. Costain Group PLC, 808 F.Supp. 1425, 1434 (E.D. Mo. 1992); Schwartz and Associates v. Elite Line, Inc., 751 F.Supp. 1366, 1369 (E.D. Mo. 1990).

A cause of action premised upon the breach of a duty "imposed by law" sounds in tort. See Davidson v. Hess, 673 S.W.2d 111, 112-13 (Mo. Ct. App. 1984). Here, the duty imposed by law is

based on Missouri's Second Mortgage Loans Act and § 408.562 RSMo. The arguments of the Trusts against "tortious acts" jurisdiction under § 506.500.1(3) RSMo boil down to two essential propositions: (1) the Trusts did not originate the loans and thus committed no wrongdoing; and (2) the Trusts themselves do not "directly" charge, collect or receive the loan proceeds. Both propositions are misplaced.

Plaintiffs' claims are based in the violation of the SMLA. That enactment prohibits more than just charging unlawful fees and costs when a loan is made. Through § 408.233.1, the SMLA provides that it is unlawful for anyone, including the Trusts, to "directly or indirectly" charge, contract for or receive charges not permitted by the SMLA. § 408.233.1 RSMo.

The Trusts, themselves, violated the SMLA by facilitating the making of the Class members' loans, and by receiving those loans by means of an assignment. By facilitating the making of CFG's Missouri loans, and by receiving those loans, the Trusts "*indirectly*" charged, contracted for and received the same illegal settlement charges that CFG "*directly*" charged, contracted for and received.

The plain language of § 408.233.1 RSMo provided at all relevant times that "[n]o charge other than that permitted by section 408.232 shall be *directly or indirectly* charged, contracted for or received in connection with any second mortgage loan, except as provided in [that] section..." § 408.233.1 RSMo 1994 & Supp. 1998 (emphasis added). In construing § 408.233.1, the Court must give effect to the words "directly" and "indirectly" in the context of how the particular loan fee at issue can be "charged, contracted for or received in connection with [a] second mortgage loan." Fields v. Henrich, 208 S.W.3d 353, 358 (Mo. Ct. App. 2006) ("[s]tatutory construction requires that every word of the statute be given meaning and effect, and no words are treated as surplusage"). According to Merriam-Webster, "indirectly" means

"deviating from a direct line or course; roundabout." Merriam-Webster Online (visited March 10, 2008); *cf. Rust v. Missouri Dental Board*, 155 S.W.2d 80, 83 (Mo. Ct. App. 1941)("'indirectly,' as used in the expression 'advertising, directly or indirectly,' has its usual and, in fact, primary meaning, not directly; obliquely; in a roundabout manner; dishonestly")(citing Webster's Dictionary). Plaintiffs submit that, at an appropriate time, the Court and/or jury will be able to reasonably conclude that the Trusts, in an "indirect" or "roundabout" way did precisely what CFG did "directly" – they charged, contracted for or received illegal loan fees from the Class members. By acquiring the class members' loans and their promises to repay the illegal loans fees by assignment, the Trusts stepped into the shoes of CFG and thereby "indirectly" "contracted for" and "received" the illegal fees that CFG "directly" charged, contracted for or received. The principal amount of the loans to which the Trusts became entitled to receive included all of the illegal loans fees since the Class members paid the fees by financing them. By "*indirectly*" charging, contracting for and receiving the same illegal settlement charges that CFG "*directly*" charged, contracted for and received, the Trusts, like CFG, violated § 408.233.1 RSMo and are subject the Court's jurisdiction.

The Trusts further violated the SMLA, §§ 408.233.1 and 408.232.1 RSMo by charging and receiving interest in connection with the second mortgage loans that they admit they purchased and were assigned to them. The SMLA, at § 408.236 RSMo, forbids the collection of any interest on loans originated or made in violation of the SMLA. Here, the Trusts individually and as the derivatively liable assignees of CFG, "*indirectly*" charged, contracted for and received loan fees that were clearly excessive and in violation of § 408.233.1 RSMo. Those violations of the statute, as committed by CFG ***and*** by the Trusts, themselves, precluded the Trusts from collecting or receiving any interest on the loans. §§ 408.233.1, 408.232.1, 408.236 RSMo. The

billing and receipt of interest also violated the SMLA. The Trusts, without question, charged and received interest on the Class members' loans.

The plain language of § 408.236 RSMo incorporates § 408.232 RSMo as one of the statutes covered. Section 408.233.1 RSMo provides that "[n]o charge, *other than that permitted by section 408.232* shall be directly or indirectly charged, contracted for or received in connection with a second mortgage loan except as provided in [that statute]." If interest cannot be collected via § 408.236 RSMo, then the collection of interest violates § 408.232.1 and § 408.233.1. In other words, the provisions of the SMLA, at §§ 408.232, 408.233 and 408.236 RSMo, together provide a form of assignee liability that likewise brings the Trusts within our long-arm statute.

Plaintiffs have alleged, and the Trusts do not dispute, that the charges, fees and costs originally imposed by CFG were "financed" as a part of the Plaintiffs' total indebtedness on the second mortgage loans. (4AP, ¶¶113-120) The Trusts cannot deny that they purchased and were assigned these loans. The Trusts must further concede that they receive or have received the monthly payments that the Servicers collected on the loans on the Trusts' behalf.[30] Hence, each time a Missouri homeowner made a mortgage payment and one of the Trusts received it, including each of the class members' payments, part of the charge and part of the payment included a portion of the unlawful amounts levied at origination and illegal interests amount that the Trusts were not entitled to. As a result, the Trusts directly or indirectly charged and/or "received" these unlawful amounts and interest in violation of the SMLA and Missouri law.

The act of charging, collecting and/or receiving these unlawful fees and interest each month undeniably produces tortious consequences within the state of Missouri. Missouri is the place

[30] See RFC Ex.'s A-J (Maney Affidavits), at ¶¶21-23; EF Ex. A (Wieder Affidavit), at ¶¶21, 25, 26; EF Ex. B (Wieder Affidavit), at ¶¶20, 24, 25; Ex.'s 100, 103, 106, at § 4.01; Irwin Ex.'s A, B, C (Maney Affidavits), at ¶¶ 20, 21, 24, 27, 28; Advanta Ex. A (Wolhar Affidavit), at ¶¶23, 24, 26.

where the charges and interest are imposed and paid and where the injuries are being inflicting on Missouri residents in violation of Missouri law. See Longshore, 93 S.W.3d at 751; Peabody, 808 F.Supp. at 1434. Thus, by "receiving" the unlawful charges and interest each month, the Trusts, themselves committed a tortious act with actionable consequences in Missouri.

3. The Trusts "Transacted Business" in Missouri

The phrase "transaction of business" has not been formally defined, but Missouri courts have repeatedly recognized that the phrase must be broadly construed. See, e.g., State ex rel. Metal Service Center of Georgia, Inc. v. Gaertner, 677 S.W.2d 325, 327 (Mo. banc 1984); Wilson Tool & Die, Inc., 237 S.W.3d at 615; Shouse, 10 S.W.3d at 193-94.

The courts of this state have held that the "business" activity giving rise to jurisdiction over a foreign defendant may consist of a single transaction if, as here, the transaction is the one being sued upon. Id.; State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828, 834 (Mo. Ct. App. 2000). In addition, Missouri courts have found that foreign associations, like the Trust defendants here, may be subject to long-arm jurisdiction even though they are not registered or required to be registered as a foreign corporation with the Secretary of State. Metal Service Center, 677 S.W.2d at 327; State ex rel. Newport v. Wiessman, 627 S.W.2d 874, 877-78 (Mo. banc 1982); Health Related Services, Inc. v. Golden Plains Convalescent Center, Inc., 705 S.W.2d 499, 507 (Mo. Ct. App. 1985).

Without a doubt, the Trusts have "transacted" business in Missouri for purposes of § 506.500.1(1) RSMo. For a number of years during the Class Period, the Trusts deliberately selected numerous Missouri loans to include in their investment portfolios, including each of the named Plaintiffs' loans. With each and every acquisition of a mortgage loan, the Trusts transacted business in Missouri – they caused to be filed an assignment in the county recorder of deeds offices for which they paid money. The Trusts acquired the loans knowing that they were regulated by the

Missouri's consumer protection laws, and realizing, too, that the anticipated value of the loans was more than $170 million. The Trusts then arranged for the Servicers to administer and service the loans on their behalf so that the Trusts could meet their obligations to the investors. With facts such as these, the Trusts cannot in good faith deny that they have each transacted and continued to transact business within the state. Cf. Gaertner, 677 S.W.2d 325 (jurisdiction over Georgia corporation even though contract at issue was made in Georgia); Shouse, 10 S.W.3d at 193-94 ("conducts business in Missouri" means that the defendant "manages and directs its economic activities to earn a livelihood by handling and maneuvering those affairs toward a desired result, and that [its] economic activity occurs in Missouri"); First Nat'l Bank of Kansas City v. Ward, 380 F.Supp. 782 (W.D. Mo. 1974) (execution of promissory note in Missouri fell within ambit of long-arm statute).

In addition, the Court should note that, contrary to their arguments, the Trusts did in effect "loan" money to Plaintiffs. But for investment vehicles like the Trusts, and the willingness of such trusts to re-purchase second mortgage loans, mortgage lenders like CFG would not have been originating the unlawful loans that they originated in the first place. (4AP, ¶107) See HOEPA's legislative history, at S.Rep. No. 169, 103d Cong., 2d Sess. 5 (1994) *reprinted in* 1994 U.S.C.C.A.N. 1881, 1912. Plaintiffs' position is not farfetched. The situation here is precisely why Congress required the secondary market (i.e., trusts like the Trusts) to "police" itself, and did so through the rule of "assignee liability" discussed above, which renders the assignees of high interest second mortgage loans like those at issue here derivatively liable for the mortgage lender's unlawful acts. Schwartz, 197 S.W.3d at 179 (the "purposes of the federal Home Ownership Equity Protection Act are clearly served by placing the assignee defendants in the same position as [the lender]"); 15 U.S.C. § 1641(d).

Congress put it this way:

> By imposing assignee liability, the Committee seeks to ensure that the High Cost Mortgage market polices itself. Unscrupulous lenders were limited in the past by their own capital resources. Today, however, with loans sold on a regular basis, an unscrupulous player can create havoc in a community by selling loans as fast as they are originated. Providing assignee liability will halt the flow of capital to such lenders.

S.Rep. No. 169, 103d Cong., 2d Sess. 5 (1994) *reprinted in* 1994 U.S.C.C.A.N. 1881, 1912 (emphasis added).

The Court can therefore legitimately conclude that the Trusts transacted business in Missouri. Since the Trusts effectively provided the capital that CFG used in making each of the second mortgage loans at issue (4AP, ¶107), the Trusts in effect "loaned" the Class money for purposes of jurisdiction.

D. THE EXERCISE OF SPECIFIC JURISDICTION OVER THE TRUSTS WILL NOT VIOLATE DUE PROCESS.

To determine whether a foreign defendant has sufficient "minimum contacts" for a Missouri court to acquire personal jurisdiction, five factors are considered:

(1) the nature and the quality of the contacts;

(2) the quantity of the contacts with the forum state;

(3) the relation of the cause of action to the contacts;

(4) the interest of the forum in providing a forum for its residents; and

(5) the convenience of the parties.

Conway, 12 S.W.3d at 318; Wilson Tool & Die, Inc., 237 S.W.3d at 616; Davis v. Baylor University, 976 S.W.2d 5, 9 (Mo. Ct. App. 1998); Watlow Elec. Mfg. Co. v. Sam Dick Industries, Inc., 734 S.W.2d 295, 297 (Mo. Ct. App. 1987).

"The first three factors are of primary importance, while the last two are of secondary importance." Davis, 976 S.W.2d at 9. The Court should consider these factors in conjunction with the principle that, as the name implies, long-arm statutes are "intended to expand the reach of the law of the state to authorize jurisdiction over foreign corporations that are not necessarily authorized to do business in the state but whose activities justify personal jurisdiction." See K-Mart Corp., 986 S.W.2d at 168.

Reviewing these five (5) factors in light of the Trusts' numerous and substantial contacts with the state of Missouri, which totaled over 5,000 loans valued at more than $170 million, with 292 of those being loans made by CFG, shows, conclusively, that bringing the Trusts to Missouri to defend the charges being made against them will not violate the Trusts' rights to Due Process at all.[31] Cf. Couch, Westell, Milburn and Vinke (exercise of jurisdiction over the defendant trusts was consistent with Due Process).

1. The Nature and Quality of the Trusts' Contacts with Missouri are Sufficient to Warrant Jurisdiction

The Trusts' contacts with Missouri were not random, fortuitous or attenuated. The Trusts were formed for the purpose of acquiring second mortgage home loans and the proceeds thereof. From their inception, the Trusts knew of and selected Missouri second mortgage loans to be part of their loan portfolios. Contrary to what the trustee representatives for the Trusts now say, the acquisition of the Missouri loans was no accident. Had they desired, the Trusts could have elected

[31] Some appellate courts have considered several "additional" factors once they determined that the defendant had purposefully established minimum contacts with the forum state. See, e.g., Dillaplain v. Lite Industries, Inc., 788 S.W.2d 530, 535 (Mo. Ct. App. 1990). These additional factors include: (1) the burden of the defendant; (2) the interest of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial systems interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. Id. (citing Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 114-15 (1987)). "[T]hese considerations . . . serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." Id. (citing Burger King Corp.) Counsel has found no Missouri Supreme Court case that has applied these additional factors in its due process analysis. But see Conway, 12 S.W.3d at 318 (additional factors not discussed).

not to purchase any Missouri loans, but they did. The Trusts initially funded themselves with over 5,000 Missouri second mortgage loans valued more than $170 million dollars. (Ex. 7) No fewer than 292 of those loans were loans made by CFG. (Id.) The Trusts used the proceeds from the loans to pay their investors and deliberately selected the Missouri loans in order to diversify their loan portfolios.

Not only did the Trusts plan to purchase a significant number of Missouri second mortgage home loans, they did so with the full knowledge that the loans were subject to Missouri law and that the violations of those laws, by the Trusts or the lender, could likely subject the Trusts to a lawsuit here, particularly since the deeds of trust contain a Missouri choice of law provision.[32] Moreover, the Prospectuses for the Trusts expressly warned their investors that:

> [t]he underwriting, origination, servicing and collection of the Loans are subject to a variety of state and Federal laws, public policies and principles of equity. Depending on the provisions of applicable law and the specific facts and circumstances involved, violations of these laws, policies or principles may limit the ability of the Servicer to collect all or part of the principal or interest on the Loans, may entitle the Obligors to a refund of amounts previously paid . . .

Ex. 44 at S19, Ex. 45 at S19, Ex. 46 at S21, Ex. 47 at S24, Ex. 48 at S23, Ex. 49 at S26 respectively; see also Ex. 50, at S16; Ex. 51, at 16; Ex. 53, at 21-22; Ex. 55 at S12, Ex. 56 at S14, Ex. 57 at S26, respectively; Ex. 59, at 6; Ex. 61, at 17.

Once they acquired their interests in Missouri real estate, each of the Trusts continued with their activities. The contacts were not occasional or casual. The Trustees came to Missouri; and through the Servicers, the Trusts charged and received monthly payments on these Missouri mortgage notes by means of thousands bills sent into Missouri each month. (4AP, ¶¶ 111, 116-120, 128, 136, 144) The Trusts cannot legitimately dispute these established facts. Clearly, the Trusts

[32] This fact, too, supports the extension of long-arm jurisdiction over the Trusts. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (choice of law provision while not sufficient in itself to confer jurisdiction may reinforce a defendant's affiliation with the form state and foreseeability of litigation there).

regularly, systematically and purposefully reaped substantial economic benefits from these activities in Missouri. Contacts of this magnitude are sufficient for the Trusts to foresee being haled into court here.

In its evaluation of whether a defendant has established minimum contacts with Missouri, the Court should also look to the "contemplated future consequences" surrounding the subject second mortgage loan transactions. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479 (1985). Future consequences in regard to taking a mortgage interest include the distinct possibility that the lender will come to the state in which the property is located to foreclose upon its security interest. Cf. Lakin, 348 F.3d 740 (lending relationships as in Missouri residents secured by Missouri residents' property can present sufficient nexus to satisfy due process); Fidelity Financial Services, Inc. v. West, 640 N.E.2d 394, 399 (Ind. App. 1994)(fact that lender took numerous mortgage interests in forum-state property is alone sufficient to support a finding that it purposefully availed itself to the protections of the forum state and must reasonably expect to be haled into court here); Westell, Ex. 5 at 9 ("There is little doubt that [the Trust] has gone to great lengths in an attempt to insulate itself from being sued in any forum other than in its state of formation (Delaware), but this Court believes that [the Trust] both owns substantial property interests in [Pennsylvania], and, through its agent (the Servicer), regularly transacts business in [Pennsylvania]); Milburn, Ex. 4 at 3-4 (103 loans worth $3.3 million was sufficient to satisfy due process).

As in Couch, Westell, Milburn and Vinke, there can be no doubt that the actions of the Trusts, in acquiring and then servicing over 5,000 Missouri high cost consumer loans, were purposeful and such that the Trusts knew they could likely be sued here. The Supreme Court has emphasized that, in the context of interstate contractual obligations, parties who "reach out

beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other state for the consequences of their activities. Burger King, 471 U.S. at 473 (upholding jurisdiction over Michigan franchisee in Florida where he had purposefully availed himself of the forum state and "deliberately" engaged in significant activities within the forum state). The decision by the Trusts to acquire a significant interest in Missouri real estate and the monthly payment streams was just such a purposeful and deliberate act. In light of the Trusts' voluntary acceptance of the loans, "the 'quality and nature'" of the Trusts' relationship to the Plaintiffs can in no legitimate way be viewed as "random," "fortuitous" or "attenuated."

2. The Quantity of the Trusts' Contacts with Missouri are Sufficient to Warrant Jurisdiction

The *quantity* of the Trusts' contacts with the state of Missouri also justifies the exercise of jurisdiction. The Trusts were initially funded with over 5,000 Missouri second mortgage loans having an aggregate principal balance of more than $170 million dollars. No fewer than 292 of these second mortgage loans are the very loans at issue in this case. The Trusts used the proceeds from these Missouri loans to pay their investors; and the Trusts' willingness to buy the loans was the impetus for CFG to make the loans in the first place. Contacts as pervasive as these show a substantial connection with Missouri. When they were formed, the Trusts purposefully selected over 5,000 high cost consumer Missouri loans to include in their portfolios. The number and value of the loans are substantial. The magnitude of the Trusts' investment in Missouri is not lessened by the fact that they may hold relatively larger interests from other states. See Lakin, 348 F.3d at 709. The Trusts' interests in Missouri are undeniably considerable and are more than sufficient to satisfy this factor since Plaintiffs' claims arise directly from the loans (as noted below). See Couch,

Westell, Milburn, and Vinke.[33]

3. Plaintiffs' Causes of Action Arise from the Trusts' Contacts with Missouri

There is no question that the third due process factor also supports jurisdiction over the Trusts. The contacts of the Trusts and the state of Missouri relate to the residential second mortgage home loans that the Trusts acquired and held, including each of the named Plaintiffs' loans. The Class members' claims arise from CFG's and the Trusts' violations of Missouri law. And as the Trusts recognized, the transactions giving rise to the loans could likely be subject to state law damages claims in the various states, including Missouri. (Ex.'s 9-11; supra p. 24-26) Such has come to pass. The claims that the named Plaintiffs are asserting for themselves and for all other borrowers similarly aggrieved by a violation of the SMLA directly concern the legality of, and the obligations of the Trusts to repay the sums collected on, the second mortgage loans that the Trusts acquired. Thus, Plaintiffs' claims arise out of the Trusts' activities in Missouri.

4. The "Contacts" of the Trusts Need not be "Direct"

The Trusts make much of the fact that they have never "directly collected payments from [the] obligors of [the] second mortgage loans..." and "do not undertake direct collection of payments from or direct enforcement of rights against consumers arising from second mortgage loans..."[34] Such arguments are incontestably flawed. As a "trust," each of the Trusts must act through others and cannot "directly" do anything. This is the nature of a "trust." Trusts hold property and act through others. Accordingly, the Court must consider the "contacts" of those

[33] Given the overall involvement of each Trust with Missouri generally, the fact that some of the Trusts may hold only a few of CFG's Missouri loans does not preclude a finding of specific jurisdiction. See Gaertner, 677 S.W.2d at 327 ("transaction of any business) must be construed broadly ... [and] business may consist of a single transaction ...").

[34] See EF Ex. A (Wieder Affidavit), ¶¶22, 27; EF Ex. B (Wieder Affidavit), at ¶¶21, 26; see also RFC Ex.'s A-J (Maney Affidavits), at ¶20; MF Ex. A (Mancy Affidavit), at ¶¶19, 22; Irwin Ex.'s A, B, C (Maney Affidavits), at ¶12; Advanta Ex. A (Wolhar Affidavit), at ¶20. (emphasis added)

through which the Trusts act and have acted, together with the fact that the Trusts use and/or "possess" a considerable interest in Missouri real estate in determining whether to exercise jurisdiction. Cf. Dupuis, 879 F.Supp. at 143 (entity that "serviced" note and mortgage on behalf of holder was an "agent" of the holder); Westell, Ex. 5 at 8; Milburn, Ex. 4 at 5.

In Missouri, the fact that the Trusts are the assignees of CFG, all entities over which the Court irrefutably has jurisdiction, is sufficient to invoke jurisdiction over the trusts. See Stavrides v. Zerjav, 848 S.W.2d 523, 528-29 (Mo. Ct. App. 1993)(court did not have personal jurisdiction over non-resident defendant because plaintiff failed to show that defendant was assignee of assignor over whom court had personal jurisdiction). Moreover, the Servicers are the attorneys in fact and "agents" of the Trusts for purposes of determining personal jurisdiction. An agent is someone who acts for the benefit and under the control of a principal and has the power to alter the legal relations between the principal and third parties. See, e.g., Constance v. B.B.C. Development Co., 25 S.W.3d 571, 587 (Mo. Ct. App. 2000)("a party is acting for or is representing another by the latter's authority"); Wieland v. Ticor Title Ins. Co., 755 S.W.2d 659, 664 (Mo. Ct. App. 1998) (one authorized by another to act for its benefit in dealings with third persons).

As noted above, pursuant to the Servicing Agreements, the Servicer is empowered by the Trusts to take various actions, which may include being able to do such things as waive, modify and vary the provisions of the home loans and take other actions, including foreclosure, in the event of default; to waive late fees; permit a borrower to substitute a new house as collateral for the loan; file deeds of release; to permit loan modification, to sell any "liquidated" home loans and "conserve, protect and operate" property that is foreclosed upon.[35] By contract, the Trusts

[35] See generally RFC Ex.'s A-4, B-4, C-4, D-4, E-4, F-4, G-4, H-4, I-4, J-4, at Art. III; Ex.'s 67, 70, 73, 76, 79, 82, 85, 88, at Art. IV; Ex.'s 67A, 70A, 73A, 79A (amendment to §§ 4.01A, 4.07); Ex. 82A (amendment to §§ 4.02,

delegated to their Servicers the tasks of servicing the loans and collecting the payments. The Servicer's duties and authority are defined by the contract, under which the Trusts have the right to control the Servicers' conduct, including a right to terminate the Servicers if they fail to "duly ... observe or perform" its obligations.[36] Clearly, the Servicers act as the "agents" for each of the Trusts they represent for purposes of jurisdiction, notwithstanding the attempt to label the Servicers as an "independent contractor." As a result, the Court may properly consider the activities of the Servicers in Missouri and impute them to the Trusts for purposes of specific jurisdiction. See § 506.500.1 RSMo. ("Any person or firm,... who in person or through an agent...") Plaintiffs have expressly alleged as much. (4AP ¶¶109, 111.)

The activities of the Servicers, as undertaken for the benefit of the respective Trusts, are more than sufficient to subject the Trusts to the Court's specific jurisdiction, particularly if the Court considers the activities of these entities in conjunction with the Trusts' own direct use of Missouri real estate. Many of the servicers were registered to conduct business in the state of Missouri (Ex. 8) (which explains why they have not joined in the motions to dismiss), and they continuously and systematically conducted business in Missouri for the Trusts. Pursuant to the respective Sales and Servicing Agreement, the Servicers sent thousands of mortgage bills demanding payment on the second mortgage loans to Missouri homeowners each and every month, and also collected the payments.[37] The payments did not belong to the Servicers. The

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4.07); Ex.'s 91, 94, at Art. IV; Ex.'s 100, 103, 106, at § 4.01-.04; Ex. 112 at Art. III, § 3.03-3.09; Advanta Ex. A-4, at Art. IV.

[36] See RFC Ex.'s A-4, B-4, C-4, D-4, E-4, F-4, G-4, H-4, I-4, J-4, at §§ 7.01, 7.02; Ex's 76, 85, 88, at §§ 10.01, 10.02; Ex.'s 67A, 70A, 73A, 79A, 82A (amendment to §§ 10.01, 10.02); Ex.'s 91, 94, at §§ 10.1, 10.2; Ex.'s 100, 103, 106, at §§ 10.01, 10.02; Ex. 112 at §§ 7.01, 7.02; Advanta Ex. A-4, at § 5.1.

[37] RFC Ex.'s A-J (Maney Affidavits), ¶¶21-23; EF Ex. A (Wieder Affidavit), at ¶¶21, 25, 26; EF Ex. B (Wieder Affidavit), at ¶¶20, 24, 25; Irwin Ex.'s A, B, C (Maney Affidavits), at ¶¶ 20, 21, 24, 27, 28; Advanta Ex. A (Wolhar Affidavit), at ¶¶23, 24, 26; see also RFC Ex.'s A-4, B-4, C-4, D-4, E-4, F-4, G-4, H-4, I-4, J-4, at § 3.02; Ex.'s 55-57 at S11, S13, S26, respectively ("Servicer to adequately and timely perform its servicing obligations and remit to the [Trustee] the funds from the payments of principal and interest received on the [Loans].").

money belonged to the Trusts for which they acted. Accordingly, the allegations and proof of the Servicers activities as agents of the Trusts are more than sufficient to subject the Trusts to jurisdiction in Missouri for purposes of either specific or general jurisdiction. See Couch,[38] Westell, Milburn, and Vinke.

The Seventh Circuit's opinion in Purdue Research Foundation, should not persuade the Court otherwise. Again, the discussion in Purdue actually supports Plaintiffs' point that the Trusts, as the assignees of the high cost loans that CFG made, are, in effect, "continuations" of CFG and are therefore subject to jurisdiction in Missouri pursuant to the line of cases which "[recognize] that the jurisdictional contacts of a predecessor corporation, may be imputed to its successor without offending due process." 338 F.3d at 783. The Trusts "stand in the shoes" of CFG and are liable to Plaintiffs and the Class just as CFG is liable. Hence, the jurisdictional contacts of CFG are the jurisdictional contacts of the Trusts for purposes of due process analysis. Id. at 783-84 (citing cases).

Also, unlike SSBO France in Purdue, the Trusts unquestionably established repeated contacts with Missouri through the monthly billings and collection of mortgage payments after the Trusts received the loans. The loan agreements here had not been "substantially performed" when the Trusts received them, as was the case in Purdue. Id. The money from Missouri kept flowing. The Trusts also certainly had "the expectation that [they] could be haled into a court situated in [Missouri] with respect to [the] property rights [they acquired]." Purdue, 338 F.3d at 785-87. The situation here is more akin to that in Couch, Westell, Milburn, and Vinke, supra. Those decisions should guide the Court.

[38] Although no memorandum decision was issued, the Court had to reach this conclusion in denying the various trusts' motions to dismiss in the Couch case.

5. The Interests of Missouri in Providing a Forum for its Residents and the Convenience of the Parties also Justify Jurisdiction over the Trusts in Missouri

The final two factors, the interest of Missouri in having the case tried here and the convenience of the parties, also support the assertion of jurisdiction over the Trusts. Due to the unlawful acts of CFG and the Trusts, Plaintiffs and other Missouri homeowners have been harmed right here in Missouri. The harms for which Plaintiffs seek redress are also the subject of Missouri legislation, the SMLA -- an enactment specifically designed to keep CFG and the Trusts from doing what they did in this case. There can be no question that Missouri courts have an interest in providing a forum to their residents for the purpose of construing the SMLA and resolving Plaintiffs' claims. Cf. High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493 (Mo. banc 1992) (Missouri had important state interest in protecting its licensed liquor distributors); Beckers, supra, 14 S.W.3d at 143 ("Missouri is obviously interested in providing a forum for its residents under harassing and stalking statutes"). This includes an interest in resolving Plaintiffs' claims against each of the Trusts.

Missouri's interest in asserting jurisdiction over the claims asserted in this case is beyond question. The deeds of trust expressly provide that Missouri law applies. The SMLA was designed to protect Missouri citizens. As clearly, the SMLA applies to all those that not only directly, but also indirectly, violate its provisions. Plaintiffs were injured through the payment of unlawful charges and fees in Missouri. Real estate located in Missouri secures those payments. In this regard, one court has noted:

> By requiring the execution of a deed to California real estate, the partnership was looking to the laws of California to secure its right to payment under its contract with Sher. The execution of the deed contemplated significant future consequences in California; perfection of the partnership's security interest would require filing in the California recorder's office; judgment on the deed would require the application of California law; enforcement of such a judgment would require the action of a

California court.

Sher v. Johnson, 911 F.2d 1357, 1363 (9th Cir. 1990); see also Fidelity Financial Services, Inc. v. West, 640 N.E.2d 394, 399 (Ind. Ct. App. 1994)(second mortgage on Indiana real property "contemplated future consequences in Indiana," including use of its courts in event of loan default; lender could thus reasonably anticipate being haled into court in Indiana). The same reasoning applies here. It would indeed be a perversion of Due Process to require a Missouri borrower in a transaction governed by Missouri law regarding Missouri real estate and payments made from Missouri to be required to go to a distant forum to assert that it was victimized under a Missouri statute designed specifically to protect Missouri borrowers. Indeed, as the holders of deeds of trust on Missouri real property, the only place in the world in which the Trusts can exercise their rights under the deeds is a Missouri court. There is no doubt that the Trusts reasonably anticipated being haled into a Missouri court.

The convenience of the parties' factor also weighs in favor of jurisdiction. While the Trusts may claim that it is a burden to defend an action in Missouri, whatever inconvenience the Trusts may have is vastly surpassed by the inconvenience that Plaintiffs would experience by being forced to try this case in Delaware or New York. Moreover, the expense of travel does not appear to be a great concern to the Trusts, as they have hired both out of state and local counsel to defend them in this case. On the other hand, requiring Plaintiffs and their counsel to travel to Delaware or New York to sue the Trusts would be a tremendous hardship, which is obviously why the Trusts are structured the way they are.

In sum, requiring the Trusts to defend their actions in relation to the Missouri second mortgage loans that they voluntarily acquired in no way offends traditional notions of "fair play and substantial justice." The Trusts unquestionably "reached out beyond" the states of Delaware and

New York and into the state of Missouri in order to acquire Missouri real estate loans and thereby create a continuing and financially beneficial relationship with Plaintiffs, the Class and thousands of other Missouri residents. Accordingly, the Court should find that the Trusts purposefully availed themselves to a business relationship with Plaintiffs and the Class and are subject to the jurisdiction of this Court.[39]

E. THE CASES ON WHICH THE TRUSTS RELY ARE NEITHER PERSUASIVE NOR CONTROLLING.

1. Pilcher v. Direct Equity Lending

Like the trust defendants in Couch, the Trusts here rely heavily on the opinion in Pilcher v. Direct Equity Lending, 189 F.Supp.2d 1198 (D. Kan. 2002), which involved second mortgage loans. In Pilcher, the Kansas federal district court concluded that it was "without jurisdiction" to hear the named plaintiffs' claims against two Delaware business trusts since the trust defendants had no employees in Kansas, held a number of loans secured by property in states other than Kansas, acquired the plaintiffs' loans from an intervening assignee as a "holder in due course," did not solicit, negotiate, or contract with the plaintiffs directly, had not actually exercised any foreclosure rights, and used an "independent contractor" to collect the monies owed on the loans they held. Id. Although the opinion in Pilcher may at first glance appear to be worthy of consideration, it isn't. This Court in Couch considered Pilcher and rejected it. That decision was correct. There are numerous reasons why the Pilcher case is neither persuasive nor on point. Westell, Ex. 5 at 8-9.

[39] If necessary, the Court should also find that the nature and quality of the Trusts' acts in light of the facts and the five factors discussed above, "serve to establish the reasonableness of the jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." Burger King, 471 U.S. at 477. All five of the additional factors that some Missouri courts have emphasized are "obvious interests" to the state of Missouri and Plaintiffs' claims and requests for relief that they seek to assert both for themselves and on behalf of the putative class, demonstrates their interest in obtaining relief. (See n. 32 supra)

a. The Barry and Rogers Opinions

First, the court in Pilcher misconstrued and/or misapplied the two opinions on which it based its decision that it was "without jurisdiction" to hear the plaintiffs' claims against the business trusts before it. 189 F.Supp.2d at 1209. Neither Barry v. Mortgage Servicing Acquisition Corporation, 909 F. Supp. 65 (D.R.I. 1995) nor Rogers v. 5-Star Management, Inc., 946 F.Supp. 907 (D.N.M. 1996) was on point. The facts of those two cases are completely different from those before the court in Pilcher. The facts of those two cases are also completely different from those at issue here. The differences are material. Neither case undermines the Plaintiffs' position.

Barry v. Mortgage Servicing Acquisition Corp.

In Barry v. Mortgage Servicing Acquisition Corporation, the plaintiff representative was a Massachusetts resident bringing suit in a *Rhode Island* court with respect to property located not in Rhode Island, but in Massachusetts. The Rhode Island court dismissed the case as against a Texas corporation ("TBC") that had allegedly acquired "an interest" in the Massachusetts property under a "Custodial Agreement" with the plaintiffs' original lender and its assignees. Notwithstanding the fact that the parties "hotly" disputed whether TBC actually "owned" an interest in the plaintiffs' mortgages, the district court applied the Rhode Island long-arm statute and concluded that it could not assume specific or general jurisdiction over the Texas custodian. 909 F.Supp. at 74.

The Rhode Island court found no basis for specific jurisdiction since the mortgaged property on which the plaintiff brought his claims was located in Massachusetts, not Rhode Island. "Thus, any ownership interest that TBC may arguably have in this property is not a contact with Rhode Island [the forum] and therefore cannot provide the basis for specific *in*

personam jurisdiction over TBC in this forum." Id. In addition, the Rhode Island court noted that, while the subject mortgage may have "originated" in the forum, that fact alone would not give rise to specific jurisdiction. "[T]here was no evidence to suggest" that TBC or someone on its behalf had anything to do with the origination of the plaintiff's loan. See id. (citing Burger King Corp., 471 U.S. at 474).

The court in Barry also found that there was no basis for assuming general jurisdiction over TBC. Although it had some contacts with the forum state (Rhode Island), the contacts were not sufficient to support general jurisdiction. Id. at 74-76. Significantly, the court noted that, while TBC may have held 138 mortgages secured by Rhode Island real estate, the ownership of a Rhode Island mortgage, as opposed to a Massachusetts mortgage, was not at issue in this case. The plaintiff's claim arose from a mortgage secured by Massachusetts realty; hence, TBC' s ownership of Rhode Island property could not, in and of itself, give rise to general jurisdiction. Id. at 74 ("[w]here the property is completely unrelated to the plaintiff's cause of action, the presence of the defendant's property in the forum will not alone support the exercise of jurisdiction").

Thus, while the opinion in Barry might arguably have some force if Plaintiffs here had filed their suit in Kansas and/or sought damages in a Kansas court for CFG's failure to disclose certain facts when it originated these loans in Missouri, Barry has no direct application here. However, Barry does support inferentially Plaintiffs' position that this Court can and should assert jurisdiction over the Trusts since, unlike the situation in Barry, the named Plaintiffs' mortgages are all Missouri mortgages and the mortgages are all irrefutably held and/or owned by some trusts that purposefully selected and included the Missouri loans as a part of their loan portfolios. Since Plaintiffs' claims arise from the legality of at least 292 of those nearly 5,000

loans, and since this case is pending in Missouri, the exercise of jurisdiction over the Trusts is appropriate.

Rogers v. 5-Star Management, Inc.

The facts before the court in Rogers v. 5-Star Management, Inc., 946 F.Supp. 907 (D.N.M. 1996) are even more dissimilar. In Rogers, the plaintiff sued a Texas corporation in New Mexico. The plaintiff's claim in New Mexico was whether the Texas defendant could foreclose a New York mortgage. Id. at 911. The defendant's only connection with the New Mexico forum was that it owned a deed of trust for a single piece of New Mexico property. Id. at 909. The defendant had acquired the deed at an RTC auction in Kansas City, Missouri. Id. The plaintiff's claim in Rogers did not concern whether the defendant could foreclose the New Mexico lien. Id. at 911. Hence, the court concluded that the defendant could not be subject to personal jurisdiction on the basis of the New Mexico lien. Id. It is difficult to see how the court in Pilcher could have found this case persuasive. Plaintiffs also find it interesting that the Trusts even rely on the case since it too recognizes that, at least in Missouri, the activities of an assignor are imputed to the assignee for purposes of determining personal jurisdiction. Id. at 914 (citing Stavrides, supra).

b. The Trusts Must Act Through Others

The Court in Pilcher failed to give proper deference to the fact that a trust, particularly a business trust without any employees, by necessity must act through others (*e.g.*, a servicer), and that the contacts of those through which the trust acts must be considered when analyzing personal jurisdiction. Indeed, it would be a gross injustice to allow a trust to avoid consumer protection suits in jurisdictions like Missouri merely by incorporating itself in a foreign state, if not a foreign country, and requiring the consumers to sue the trust "at home." The contacts of

the trustees and servicers of the Trusts in this case must be considered. The Court in Pilcher failed to address this point. Cf. Westell, Ex. 5 at 9 ("While Pilcher is superficially similar to this case, it is obvious upon closer scrutiny that the court in Pilcher did not have the benefit of all of the operative documents defining the structure of the trust defendant in that case"). So, too, did the court in Burgess and Jackson.

Also, in Dupuis v. FHLMC, 879 F.Supp. 139, 143 (D. Me. 1995), the district court concluded that a servicer was in fact an agent, even though the servicing agreement, as here, provided otherwise. The court in Pilcher did not discuss the Dupuis opinion, but instead placed undue emphasis on the fact that the servicing agreement before it labeled the Servicer as an "independent contractor" rather than an "agent." As noted above, the label in the agreement is not controlling. Couch, Ex. 1; Westell, Ex. 5 at 8; Milburn, Ex. 4 at 5; Northern v. McGraw-Edison Co., 542 F.2d 1336, 1343 n.7 (8th Cir. 1976)("If the surrounding facts evidence an agency relationship, however "artfully disguised," the parties cannot negate its existence by representing that it is something other than an agency relationship"). Moreover, an independent contractor can also be an agent; and the Servicers of the Trusts in this case were certainly "agents" of the Trusts. Just as it did in Couch, the Court should reach a conclusion different from that reached in Pilcher. Cf. Amway Corp., Inc. v. Director of Revenue, 794 S.W.2d 666, 670 (Mo. banc 1990) ("independent" distributors were clearly authorized to act on behalf of Amway, notwithstanding disclaimer of agency); Westell, Ex. 5 at 8-9; Milburn, Ex. 4 at 5.

c. The Liability of the Trusts as "Assignees"

The Pilcher court also failed to consider the fact that, as the assignees of the high cost mortgages before it, the trust defendants could be derivatively liable for the unlawful acts of the original lender, in this case CFG. Although such liability arguably may not have been at issue in

Pilcher, since there is no discussion of 15 U.S.C. § 1641(d), the rule of assignee liability is most certainly at issue here. (4AP, ¶159) As the assignees of CFG, the Defendant Trusts are liable for the Plaintiff's claims even though the Trusts may not have ever dealt directly with the named Plaintiffs. 15 U.S.C. § 1641(d); Schwartz, 197 S.W.3d at 179; Bryant, 197 F.Supp.2d 1357 (consumers had affirmative right to assert claims against assignee based solely upon mortgage lender's independent violations of state law in connection with issuance of loans).

In Missouri, such assignee liability is sufficient to confer personal jurisdiction. See Stravides, 848 S.W.2d at 528 (court did not have personal jurisdiction over non-resident defendant because plaintiff failed to show that defendant was assignee of assignor over whom court had personal jurisdiction); Rogers, 946 F.Supp. at 914 (citing Stravrides for this principle).

d. The Trusts "Foresaw" Being Haled into Court Here

Apparently unlike the trusts before the court in Pilcher, the Trusts here irrefutably "foresaw" the possibility of being haled into court in Missouri, or any other state whose consumer protection laws were violated. This was a "risk" that the Trusts knew and appreciated; it was also a "risk" about which they warned their investors. (See supra, p. 24-26) This is yet another reason why the Pilcher opinion is inapposite. Without a doubt, the Trusts in this case reasonably foresaw the possibility of being haled into a Missouri court to face the very claims that Plaintiffs are asserting.

2. Jackson and Burgess

The Trusts also rely heavily on two nearly identical orders from the City of St. Louis entered by the same judge in Jackson v. American Home Funding, Inc. and Burgess v. Samboy Financial, Inc. In both of these cases, the judge relied on Pilcher and on Rogers v. 5-Star Mgmt. and Barry v. Mortgage Serv. Acquisition Corp. (finding the opinion in Pilcher to be

"instructive"). The court also oversimplified the issues and, like Pilcher, failed to consider that a "trust," by definition, must act through others, that the trusts before it "stood in the shoes" of the mortgage lenders, and that the plaintiffs' claims against the trusts sought to recover back the amounts that the trusts collected on the Missouri notes they admittedly held. Moreover, the court in both cases determined the motions based on the defendants' affidavits. The prospectuses were not before the court; nor were there express allegations like those that plaintiffs have stated in this case. For each of these reasons, Jackson and Burgess should not be followed either.

3. The String Cite of Cases

The Trusts also rely on a number of opinions from other jurisdictions wherein the courts granted a trust assignee's motion to dismiss for lack of personal jurisdiction. The Court should not be guided by any of these cases. Each involved allegations and evidence different from that presented here. Moreover, many of the cases resolved the issues before them by relying on Pilcher.

For example, the Trusts cite to a number of cookie-cut opinions from the Western District of Tennessee, the first six of which were authored by the same judge, viz., Street v. PSB Lending Corp. (W.D. Tenn. 2002), Berry v. GMAC-Residential Funding (W.D. Tenn. 2002), Williams v. FirstPlus Home Loan Trust (W.D. Tenn. 2002), Mull v. Alliance Mortgage Bank Corp. (W.D. Tenn. 2002), Brooks v. Terra Funding, Inc., (W.D. Tenn. 2002), and Frazier v. Preferred Credit, (W.D. Tenn. 2002) and Williams v. FirstPlus Home Loan Trust (W.D. Tenn. 2004). In each of these nearly identical opinions, the court relied on Barry v. Mortgage Servicing Acquisition Corp. and found that opinion "compelling." The court then went on to conclude that it could not exercise general jurisdiction over the trusts. In doing so, the court, like the court in Pilcher, failed to appreciate the fact that a trust must act through others and that, both in fairness and

common sense a loan servicer must be deemed an agent whose acts are attributable to the trust for purposes of personal jurisdiction -- even if the servicer-agent is also an "independent contractor." Moreover, the court concluded that it could not exercise specific jurisdiction over the trusts before it because the plaintiffs had not alleged which, if any, defendants actually held their second mortgage loans ("[t]his court does not have specific personal jurisdiction over any defendant that does not allegedly hold [the] named plaintiffs' loans"). That is not the case here. The Trusts here must concede that they do in fact hold or act as a trustee or agent for one or more of the allegedly unlawful loans at issue. The situation in this case is vastly different from that in the Tennessee cases.

The Trusts also cite to three cookie-cut opinions from the Eastern District of Michigan, all of which were authored by the same judge, viz., Mazur v. Empire Funding Home Loan Trust (E.D. Mich. 2004), Berry v. Empire Funding Home Loan Trust (E.D. Mich. 2004), and Hill v. FirstPlus Home Loan Owner Trust (E.D. Mich. 2004). In each of these cases, the Michigan court noted that "[t]he only evidence before [it] describing defendant's business contracts in Michigan are the affidavits submitted by officials from defendant and its Owner Trustee, Wilmington Trust Company." That is not the case here. Plaintiffs in this case offer substantial, credible evidence that more than adequately supports a prima facie case for personal jurisdiction over the Trusts. The court in the Michigan cases also analyzed the sufficiency of the defendants' contracts in terms of percentages of the defendants' total business, an approach that the Court in Lakin, 348 F.3d 704, rejected. The Court also relied on the decision by the Tennessee court in Mull and on Pilcher.

Finally, the Trusts cite to Alexander v. PSB Lending Corp. (Ind. Cir. Ct. 2002) and Skinner v. Preferred Credit (N.C. Sup. Ct. 2004). Neither case is helpful. All that is offered are

two unexplained orders granting motions to dismiss. The courts did not discuss, describe or analyze the reasoning for their decisions or recite the allegations on which the dismissals were based. The Court should reject these cases for the same reasons it should again reject Pilcher. It would indeed be a perversion of due process for the Trusts to avoid being sued in the forum from which they receive significant and continuous monetary benefits simply because they labeled their agent and attorney in fact as an "independent contractor" in their own trust agreements. This is particularly true since the Trusts, formed by some of the world's most sophisticated financial institutions, expressly realized and warned their investors that they could be sued in Missouri if the loans they received from CFG were "bad." Such has come to pass.

IV. CONCLUSION

For the foregoing reasons the Court should deny the Trusts' motions to dismiss. Given the magnitude of their respective investments in Missouri, and given their express recognition that state law claims precisely like those that Plaintiffs are asserting would likely bring the Trusts to Missouri, the Court can and should exercise jurisdiction over each of the Trusts in this case. The Trusts acquired a significant interest in Missouri real estate, and then continuously and systematically "serviced" that "interest" in Missouri through trustees and loan servicers, all of them agents that were, themselves, registered to do business in Missouri. Through their trustees and agents, the Trusts received thousands of monthly mortgage payments on the Missouri loans each and every month, distributed the money to their note holders, and undeniably knew that they could and likely would likely be haled into a Missouri court if CFG, the originating mortgage lender, violated Missouri's consumer protection laws when it made the loans. With undisputed allegations and facts such as these, it would not be in any way unfair for this Court to follow Couch, Westell, Milburn and Vinke and hold that each of the Trusts must continue on as a

defendant in Missouri.

Dated: March 19, 2008

Respectfully submitted,

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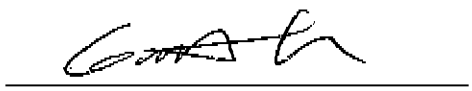


Exhibit D

Mayo v. GMAC Mortgage, LLC

LEXSEE 2011 U.S. DIST. LEXIS 3349

Analysis
As of: May 05, 2011

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

No. 08-00568-CV-W-DGK

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

2011 U.S. Dist. LEXIS 3349

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

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

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

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

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

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

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

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

JUDGES: GREG KAYS, JUDGE.

OPINION BY: GREG KAYS

OPINION

SUMMARY JUDGMENT ORDER

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

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

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

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

Summary Judgment Standard

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

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

Facts

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

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

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

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

The Loan at issue in this case.

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

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

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

The challenged settlement charges.

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

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

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

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

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

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

2 Specifically, Capital Title gathered information about the property in order to determine whether title to the property was marketable. Capital Title also prepared a preliminary title commitment which it sent to Option One. After

the conditions identified in the preliminary commitment were met, Capital Title ensured that the conditions imposed by the lender were also satisfied. Then, Capital Title completed the settlement statement and other documents related to the loan and prepared the disbursements to be made from the loan proceeds. Capital Title also assembled documents prepared by Option One and other service providers. Once the documents were ready, Capital Title scheduled the closing of the loan, met with the Mayos, and obtained signatures on the loan documents. Capital Title remitted copies of those documents to Option One immediately after the closing, so that the loan could be approved on the next day. Option One also made copies of those documents for the Mayos. Capital Title ensured that the holder of the first mortgage [*10] was notified of the second mortgage. Capital Title then updated its investigation of the encumbrances on the Mayos' property. Finally, Capital Title submitted the documents for the Loan to be recorded. This process, from the title examination to the recording of the new documents, required several hours to complete.

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

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

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

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

The Loan, post settlement.

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

UBS subsequently purchased the Loan.

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

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

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

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

Pursuant to the terms of the servicing agreement, GMAC Mortgage and its successor GMACM serviced certain mortgage loans on behalf of UBS. The agreement

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

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

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

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

> 5 Pursuant to the terms of the Servicing Agreement, GMACM primarily performed the following activities related to the servicing of mortgage loans such as the loan at issue here:
>
> a) maintaining a servicing file, "in a custodial capacity only," of documents necessary to service each mortgage loan;
> b) delivering monthly statements [*16] or invoices to borrowers;
> c) collecting all payments due under each mortgage loan;
> d) segregating and holding all payments in "custodial accounts" apart from its own funds and general assets to be invested for the benefit of UBS;
> e) remitting to UBS all amounts in the custodial account and any monthly payments collected;
> f) segregating and holding all escrow funds in "escrow accounts" apart from its own funds and general assets for the payment of property taxes and insurance by borrowers;
> g) furnishing reports to UBS as required by the Servicing Agreement;
> h) ensuring timely payment of rents, taxes, assessments, water rates, insurance payments and other charges on each mortgage loan;
> i) ensuring maintenance of insurance;
> j) responding to borrower inquiries;
> k) counseling and working with delinquent borrowers; and
> l) supervising foreclosure and property dispositions.

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

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

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

fendant Deutsche Bank National Trust Company ("DBNTC"). **RFC then became the master servicer**.

Pursuant to the terms of the PSA and the related March 1, 2007 Assignment, Assumption and Recognition Agreement ("AARA"), Defendant Residential Funding Company, LLC ("RFC") acted as the Master Servicer/Trust Administrator for the pool of mortgage loans transferred to theMASTR Trust, including the Loan. As Master Servicer/Trust Administrator for the MASTR Trust, RFC primarily performed monitoring and reporting activities regarding the Trust's mortgage loans. [6] RFC acted on behalf of the MASTR Trust in performing these activities and reported to DBNTC, the Trustee, regarding its master servicing obligations.

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

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

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

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

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

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

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

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

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

Discussion

The sole count of the First Amended Complaint (doc. 32) alleges that each of the Defendants violated *§*

408.233.1 of the Missouri Second Mortgage Loan Act ("MSMLA") with respect to Plaintiffs' loans by "directly or indirectly charging, contracting for, and/or receiving" settlement charges not allowed, or in excess of what were allowed, under the MSMLA, or by receiving interest on loans which violated the MSMLA.

I. The MSMLA.

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

The MSMLA defines a "second mortgage loan" as

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

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

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

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

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

> *Any person violating* the provisions of *sections 408.231 to 408.241 shall be*

> *barred from recovery of any interest on the contract*, except where such violations occurred either:
>
> (1) As a result of an accidental and bona fide error of computation; or
>
> (2) As a result of any acts done or omitted in reliance on a written interpretation of the provisions of sections 408.231 to 408.241 by the division of finance.

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

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

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

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

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

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

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

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

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

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

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

A piggyback loan is a common financing [*28] option whereby two loans are made to the borrower to finance more than 80% of the purchase price of a home

without paying private mortgage insurance. *See Rendler v. Corus Bank, 272 F.3d 992, 996 (7th Cir. 2001)*. The first loan is typically made for 80% of the purchase price, and the second, or "piggyback," loan is a second-lien loan drawn to cover the down-payment requirement of the first-lien loan. *See Espinoza v. Recontrust Co., N.A., No. 09-CV-1687-IEG (RBB), 2010 U.S. Dist. LEXIS 38484, 2010 WL 1568551, at *1 n.1 (S.D. Cal. April 19, 2010)*. The Loan at issue here, a second-lien loan which funded the 20% of the purchase price that the Wells Fargo loan did not, is a classic "piggyback" loan.

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

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

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

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

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

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

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

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

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

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

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

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

plain language of the statute." *State ex rel. Burns v. Whittington, 219 S.W.3d 224, 225 (Mo. 2007)*.

As a threshold matter the Court finds there is no ambiguity and that the plain and ordinary meaning of *§ 408.233.1(3)* is that the enumerated fees are simply examples, not an exclusive list. *Contra Mitchell v. Residential Funding Corp., ___ S.W.3d ___, 2010 Mo. App. LEXIS 1593, 2010 WL 4720755, at *12-13 (Mo. Ct. App. Nov. 23, 2010)* (holding the list is "deliberate and exclusive.") As used in the statute this Court finds that "which shall include" is inclusive. This finding is confirmed by the controlling caselaw. As the Missouri Supreme Court has observed, "[t]he meaning of the word 'include' may vary according to its context. Ordinarily it is not a word of limitation, but rather of enlargement." *St. Louis County v. State Highway Comm'n, 409 S.W.2d 149, 153 (Mo. 1966)*. [*33] In *St. Louis County* voters had approved a bond issuance for "the construction of highways," "said highways to include those commonly known as the Mark Twain and Daniel Boone Expressways and Ozark Expressway with Route 61 connection, and an outer belt expressway running generally north and south and connecting with highways and expressways running generally east and west" in the county, but the bond proceeds were used on other highways in the county. Overturning the trial court the Missouri Supreme Court ruled the bond language did not prohibit the proceeds from being spent on other highways in the county. The Supreme Court held, "[w]hen used in connection with a number of specified objects [the word 'include'] implies that there may be others which are not mentioned." Similarly, in the present case, the Court reads "include" in *§ 408.233.1(3)* as implying that there are other permissible fees which are not mentioned.

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

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

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

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

The Court declines to follow this small portion of *Mitchell* for two reasons. First, while *Estes* may be dis-

tinguishable, *St. Louis County* is analogous, and because it is an analogous decision by the state's highest court its holding should control in interpreting *§ 408.233.1(3)*. Second, although this Court reads *§ 408.233.1(3)* as unambiguously [*37] providing a non-exclusive list of fees, assuming for the sake of argument that the language is ambiguous, an inclusive reading best embraces the General Assembly's intent. The Court finds the MSMLA is a usury law. The General Assembly's intent was to prevent lenders who were already charging high-interest rates on second mortgage loans from also lining their pockets with fees for questionable services. *See Thomas v. U.S. Bank Nat. Ass'n ND, 575 F.3d 794, 796 n.1 (8th Cir. 2009)* ("The limits on closing costs and fee provided for in the MSMLA act as a trade-off for allowing lenders to charge a higher interest rate on second mortgage loans."). Section *§ 408.233.1(3)* does this by preventing the imposition of anything other than bona fide closing costs paid to third parties. But interpreting the subsection exclusively, that is, as allowing fees for the bona fide closing costs explicitly mentioned, but not others, would be arbitrary and do nothing to advance the statute's purpose. A bone fide $25 "document preparation fee" paid to a third-party is no worse than a bone fide $25 "courier fee" paid to a third-party. Both are costs of business passed on to the consumer. Reading the language [*38] as allowing fees for any bona fide closing cost so long as it is paid to a third party best effectuates the statute's purpose.

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

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

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

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

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

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

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

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

Plaintiffs assert three theories of liability against Defendants. Plaintiffs contend that (1) because the money used to pay the illegal fees at closing was financed and rolled into the principal, Defendants received or col-

lected a small amount of illegal fees each time a monthly payment was made on the Loan, thus Defendants *independently* violated the MSMLA by *indirectly* receiving illegal loan fees each month; (2) Defendants are *derivatively* liable as the originating lender's assignees under Missouri law, because by assuming the loans they assumed Option One's liability; and (3) Plaintiffs have a cause of action against DBNTC as trustee of the MASTR Trust and UBS (jointly "the Assignee Defendants") to recover interest paid on the Loan, because once Option One charged an illegal fee the loan became tainted so that assignees of the Loan were barred from collecting any interest on it.

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

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

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

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

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

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

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

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

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

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

In response, Defendants contend that construing "indirectly charged" as encompassing financing payments on illegal fees charged at closing casts an absurdly wide net of liability. Defendants note that several courts have held for purposes of determining when a cause of action accrues under a statute of limitation that an illegal fee is charged once, at closing, not every time a payment is made. *Miller v. Pac. Shore Funding, 92 Fed. Appx. 933, 937 (4th Cir. Jan. 28, 2004)* (holding plaintiff's claims accrued at closing when he paid the disputed fees, even though the fees were paid by a promissory note); *Shepard v. Ocwen Fed. Bank, FSB, 172 N.C. App. 475, 617 S.E.2d 61, 65 (N.C. Ct. App. 2005)* (holding that although periodic payments were made toward the loan, the fee was paid at closing, observing plaintiffs were not

required to finance the loan origination fee, they could have paid it by cash, check, or credit card). Finally, [*46] Defendants contend that "indirectly charged" as used in *§ 408.233.1* means a fee charged in a misleading or deceitful way at closing, not a fee received at some later time by a downstream assignee who indirectly finances the closing costs.

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

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

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

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

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

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

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

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

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

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

Stat. § 400-3.305 (2005). A holder in due course does not take free of any "real" defenses, such as the illegality of underlying transaction. *Transcon., 299 S.W.3d at 659*; *Mo. Rev. Stat. § 400-3.305* (2005).

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

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

V. Remedies

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

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

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

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

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

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

Under Missouri law,

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

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

Conclusion

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

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

IT IS SO ORDERED.

DATE: January 13, 2011

/s/ Greg Kays

GREG KAYS, JUDGE

UNITED STATES DISTRICT COURT

Exhibit E

Mitchell v. Residential Funding

LEXSEE 2010 MO. APP. LEXIS 1593

Caution
As of: May 05, 2011

STEVEN AND RUTH MITCHELL, ET AL., Appellant-Respondents, v. RESIDENTIAL FUNDING CORP, ET AL., Respondent-Appellants.

DOCKET NUMBERS WD70210, WD70227, WD70244, and WD70263

COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT, DIVISION THREE

2010 Mo. App. LEXIS 1593

November 23, 2010, Opinion Filed

NOTICE:

NOT FINAL UNTIL EXPIRATION OF THE REHEARING PERIOD.

SUBSEQUENT HISTORY: As Amended February 8, 2011.
As Amended December 21, 2010.

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of Jackson County, Missouri. Honorable Justine Elisa Del Muro, Judge.

DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: In a class action lawsuit, defendant lenders appealed a judgment of the Circuit Court of Jackson County, Missouri, that awarded compensatory and punitive damages to plaintiff borrowers. The borrowers filed a cross-appeal, challenging the circuit court's denial of prejudgment interest on past interest payments.

OVERVIEW: On review, the court held that the borrowers were entitled to prevail on their cause of action because the lenders violated the Missouri Second Mortgage Loan Act (MSMLA), *Mo. Rev. Stat. § 408.231 through § 408.242*, by charging excessive closing costs related to second mortgages. The MSMLA offered a trade-off; it allowed lenders to charge interest rates that would otherwise constitute usury while prescribing the fees that lenders could legitimately charge. The lenders had the choice to avoid the fee proscriptions because, under *Mo. Rev. Stat. § 408.232.4*, if the loan rate itself was not usurious, i.e. otherwise lawful, then the limitations of the MSMLA would not apply. The lenders had the choice of charging higher interest rates but limited closing fees or lower interest rates and greater closing fees. Because the lenders chose to charge higher rates of interest and failed to comply with the fee limitation provisions of MSMLA, the violated the provisions of the MSMLA and were liable to the borrowers.

OUTCOME: The judgment as to compensatory damages was affirmed, but the award of punitive damages was reversed for instructional error, and the case was remanded for a new trial on punitive damages. Further, that portion of the judgment that denied prejudgment interest on the borrowers' interest payments was reversed, and the case was remanded for further proceedings on that issue.

LexisNexis(R) Headnotes

Banking Law > National Banks > Interest & Usury > Interest
Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages
[HN1] Absent an exception, the maximum annual interest rate that a lender may charge in Missouri is 10 percent or the market rate, which is calculated according to long-term U.S. government bond yields. *Mo. Rev. Stat. § 408.030*. A loan that charges more than the maximum interest rate is usurious. Usury is the taking or exacting of interest at a rate in excess of that allowed by law for the loan or use of money. The Missouri Second Mortgage Loan Act (MSMLA), *Mo. Rev. Stat. § 408.231 through § 408.242*, creates an exception to this normal rule. Enacted in 1979, the MSMLA is a consumer protection measure designed to regulate the business of making high interest second mortgage loans on residential real estate. Although Missouri law prohibits lenders from charging interest of more than 10 percent or the market rate, under the MSMLA, lenders can bypass this restriction for second mortgage loans, provided they otherwise comply with its restrictions.

Banking Law > National Banks > Interest & Usury > Interest
Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages
[HN2] The Missouri Second Mortgage Loan Act (MSMLA), *Mo. Rev. Stat. § 408.231 through § 408.242*, permits lenders to charge rates agreed to by the parties on second mortgage loans provided the loans otherwise comply with its restrictions. The Act thus allows lenders to charge interest rates on second mortgages that exceed Missouri's statutorily prescribed usury rate, but the limits on closing costs and fees act as a trade-off. If a second mortgage loan does not comply with the restrictions of the MSMLA, it does not benefit from the MSMLA's provisions permitting it to charge a 20.04 percent interest rate prior to 1998 or any rates agreed to by the parties after 1998. *Mo. Rev. Stat. § 408.232*. The lender is subject to civil and criminal penalty for charging fees not authorized by the Act.

Civil Procedure > Justiciability > Standing > Personal Stake
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Jurisdiction
[HN3] In Missouri, subject matter jurisdiction derives directly from *Mo. Const. art. V, § 14*, which states that circuit courts shall have original jurisdiction over all cases and matters. Standing is related to the rule that a court may not issue advisory opinions. It is used to ascertain if a party is sufficiently affected by the conduct complained of in the suit, so as to insure that a justifiable controversy is before the court. In its essence, standing requires that the parties seeking relief must have some personal interest at stake in the dispute, even if that interest is attenuated, slight, or remote.

Civil Procedure > Justiciability > Standing > Personal Stake
[HN4] Whether the standing requirement is met is determined from the petition. The requirement is satisfied by the plaintiffs' allegation of an actual or threatened injury.

Civil Procedure > Justiciability > Standing > General Overview
Civil Procedure > Class Actions > Certification
[HN5] The class certification issue to be antecedent to the standing issue. Issues of class certification are properly analyzed prior to standing because they are logically antecedent to U.S. Const. art. III concerns and pertain to statutory standing, which may properly be treated before Article III standing.

Civil Procedure > Class Actions > Appellate Review
Civil Procedure > Class Actions > Certification
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN6] An appellate court reviews a trial court's decision to certify a class under an abuse of discretion standard. The trial court abuses its discretion in certifying a class action only if its ruling is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. A court abuses its discretion if the class certification is based on an erroneous application of the law or the evidence provides no rational basis for certifying the class. For purposes of reviewing class certification, the appellate court accepts the named plaintiffs' allegations as true.

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN7] *Mo. Sup. Ct. R. 52.08* provides four prerequisites to a class certification, commonly referred to as numerosity, commonality, typicality, and adequacy.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN8] See *Mo. Sup. Ct. R. 52.08(a)*.

Civil Procedure > Class Actions > Prerequisites > Typicality

[HN9] The typicality prerequisite is met despite factual variances if (1) the named representatives' and the class members' claims arise from the same event or course of conduct by the defendant; (2) the conduct and facts give rise to same legal theory; and (3) the underlying facts are not markedly different.

Civil Procedure > Trials > Jury Trials > Jurors > Misconduct

[HN10] A juror's nondisclosure may be intentional or unintentional. If the disclosure is intentional, prejudice will be presumed, thereby requiring a new trial. Intentional nondisclosure occurs: (1) where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror and (2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable. If a person could reasonably be confused, the question is not sufficiently clear to warrant further inquiry into the alleged nondisclosure.

Civil Procedure > Trials > Jury Trials > Jurors > Misconduct
Civil Procedure > Trials > Jury Trials > Jurors > Selection > Voir Dire
Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN11] An appellate court reviews the clarity of a question posed during voir dire under a de novo standard. It is only after it is objectively determined that the question was reasonably clear in context that the appellate court considers, under an abuse of discretion standard, whether the trial court abused its discretion in deciding whether a juror's nondisclosure was intentional. The burden of showing that a question was clear and unambiguous, thereby triggering a venire person's duty to disclose, is on the party seeking a new trial.

Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages

[HN12] After its 1998 amendment and prior to being revised in 2004, *Mo. Rev. Stat. § 408.232.4* provided that *Mo. Rev. Stat. §§ 408.231 to 408.241* shall not apply to any loans on which the rate of interest charged is lawful without regard to the rates permitted in *Mo. Rev. Stat. § 408.232.4(1)*. It thus provided that the fee limitations were only applicable to second mortgage loans on which an unlawful rate of interest is charged.

Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages

[HN13] See *Mo. Rev. Stat. § 408.233.1* (1994).

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts
Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN14] A trial court generally may not direct a verdict in favor of the party who carries the burden of proof. However, there are exceptions to the rule where the opponent admits the truth of the basic facts upon which the claim of the proponent rests or the proof of the facts is altogether of a documentary nature. If the facts are shown by documents, the documents' correctness and authenticity are not questioned, impeached, or contradicted, and the documents establish facts beyond all doubt showing that the proponent is entitled to relief as a matter of law, then the trial court may direct a verdict in favor of the proponent. 'This is upon the theory that there is no question of fact left in the case and that upon the questions of law involved the jury has no right to pass. When the grant of a directed verdict is based upon a conclusion of law, the appellate court reviews the trial court's decision de novo.

Evidence > Documentary Evidence > Writings > General Overview

[HN15] A writing may be said to be conclusive in respect to the truth of what it contains if it is an instrument or a record having legal effect and the person to be bound by its truth was a party to it, vouched for its truth, or is otherwise estopped from denying its truth.

Civil Procedure > Appeals > Standards of Review > De Novo Review
Governments > Legislation > Interpretation

[HN16] Statutory interpretation is a question of law that an appellate court reviews de novo. The appellate court's role in interpreting a statute is to determine the legislature's intent from the language it used and to give effect to that intent.

Banking Law > National Banks > Interest & Usury > Interest
Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages
[HN17] The Missouri Second Mortgage Loan Act (MSMLA), *Mo. Rev. Stat. § 408.231 through § 408.242*, is a comprehensive scheme. It offers a trade-off for lenders of second mortgage loans. It allows lenders to charge interest rates that would otherwise constitute usury, while prescribing the fees that a lender may legitimately charge. Lenders have the choice to avoid the fee proscriptions; *Mo. Rev. Stat. § 408.232.4* provides that, if the loan rate itself is not usurious, i.e. otherwise lawful, then the limitations of the MSMLA do not apply. The obvious intent is to allow high-interest rate second mortgage loans in order to open the flow of credit to higher-risk consumers but to prohibit lenders of these loans from tacking on additional charges that prevent consumers from accurately comparing the real costs of competing loans.

Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages
[HN18] The Missouri Second Mortgage Loan Act (MSMLA), *Mo. Rev. Stat. § 408.231 through § 408.242*, does not permit a lender to charge a consumer unlimited interest and fees for any service the lender purports to pay a third party. The fees that *Mo. Rev. Stat. § 408.233* excepts are those traditionally considered to be outside the context of usury. Some closing costs paid to third parties are excepted because an otherwise legal loan does not become usurious by the fact that the transaction requires the borrower to pay an additional sum of money to a third person, provided that the lender in no way profits from such payment.

Governments > Legislation > Interpretation
[HN19] Expressio unis est exclusio alterius; the express mention of one thing implies the exclusion of another.

Governments > Legislation > Interpretation
[HN20] When statutory exceptions are plainly expressed, courts cannot add to the exceptions or exclusions beyond those explicitly provided.

Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages
[HN21] The voluntary payment doctrine is not available as a defense to a claim under the Missouri Second Mortgage Loan Act (MSMLA), *Mo. Rev. Stat. § 408.231 through § 408.242*.

Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages
[HN22] See *Mo. Rev. Stat. § 408.233.1*.

Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence
[HN23] An appellate court reviews the evidence in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict. The appellate court does not reverse the jury's findings absent a complete lack of probative fact to support its conclusion.

Governments > Legislation > Interpretation
[HN24] Courts presume that the legislature included every word of a statute for a purpose and that every word has meaning.

Banking Law > National Banks > Interest & Usury > Usury Litigation
[HN25] In the context of usury, the law will not tolerate any camouflage disguising a transaction to make it seem innocent. The law looks at the nature and substance of the transaction and not to the color or form that the parties in their ingenuity have given it.

Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages
[HN26] *Mo. Rev. Stat. § 408.236* provides that any person violating the provisions of *Mo. Rev. Stat. § 408.231 to § 408.241* shall be barred from recovery of any interest on the contract.

Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages
[HN27] See *Mo. Rev. Stat. § 408.236*.

Civil Procedure > Appeals > Standards of Review > De Novo Review
Governments > Legislation > Interpretation
[HN28] Statutory interpretation is a question of law reviewed de novo. A court's primary rule in construing statutes is to determine the legislature's intent through the language used. The court looks to the plain and ordinary meaning of words and phrases and looks beyond such meaning only when the resulting interpretation is absurd.

Governments > Legislation > Interpretation
Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages
[HN29] The Missouri Second Mortgage Loan Act (MSMLA), *Mo. Rev. Stat. § 408.231 through § 408.242*, is a remedial statute. Remedial statutes are liberally construed so as to meet the cases that are clearly within the spirit or reason of the law.

Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages
[HN30] See *Mo. Rev. Stat. § 408.562*.

Civil Procedure > Judgments > Relief From Judgment > Additurs & Remittiturs > Additurs
[HN31] A plaintiff must be fully compensated for past or present injuries caused by the defendant when the injuries have been proven by a preponderance of the evidence. A court may increase the size of a jury's verdict if it finds the award inadequate because it is less than fair and reasonable compensation for the plaintiff's injuries and damages.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
[HN32] An appellate court reviews a jury instruction in its entirety, rather than in its parts.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN33] The statutory right to prejudgment interest pursuant to *Mo. Rev. Stat. § 408.020* is reviewed de novo. Determination of the right to prejudgment interest is reviewed de novo because it is primarily a question of statutory interpretation and its application to undisputed facts. The appellate court reviews the trial court's failure to award prejudgment interest under equitable principals for abuse of discretion.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
[HN34] *Mo. Rev. Stat. § 408.020* requires an award of prejudgment interest when a claim is either liquidated or ascertainable by computation or recognizable standards. Awards of prejudgment interest are not discretionary; if the statute applies, the court must award prejudgment interest.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
[HN35] See *Mo. Rev. Stat. § 408.020*.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
[HN36] When *Mo. Rev. Stat. § 408.020* is applicable, an award of prejudgment interest is not discretionary; it is compelled.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest
[HN37] The purpose of prejudgment interest is to fully compensate the plaintiffs for the time-value of money. Prejudgment interest also serves to promote settlement and deter unnecessary delay in litigation. Interest is awarded for the obligor's failure to pay money when payment is due, even though the obligor refuses payment because the obligor questions legal liability for all or portions of the claim. If the failure to pay money when due results in liability for prejudgment interest, it logically follows that interest is due on monies wrongfully collected.

Civil Procedure > Remedies > Damages > Punitive Damages
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN38] Whether the evidence was sufficient to submit a punitive damages claim to the jury is an issue that an appellate court reviews de novo. A submissible case for punitive damages is made if the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity-that is, that it was highly probable-that the defendant's conduct was outrageous because of evil motive or reckless indifference. An appellate court views the evidence in the light most favorable to the plaintiff, drawing all reasonable inferences in favor of submission and disregarding contrary evidence and inferences. It is only where there is a complete absence of probative fact to support the jury's conclusion that the appellate court will decide that plaintiff did not make a submissible case.

Civil Procedure > Remedies > Damages > Punitive Damages

[HN39] Fair notice of proscribed conduct is required for punitive damages. This is because due process requires a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.

Real Property Law > Financing > Secondary Financing > Residential Secondary Mortgages
[HN40] *Mo. Rev. Stat. § 408.240* provides for criminal penalty for violating the provisions of the Missouri Second Mortgage Loan Act (MSMLA), *Mo. Rev. Stat. § 408.231 through § 408.242*. *Mo. Rev. Stat. § 408.562* plainly authorizes a private right of action for violation of these provisions and punitive damages in addition to any other civil remedies or penalties provided by law.

Civil Procedure > Remedies > Damages > Punitive Damages
[HN41] The purpose of punitive damages is to punish the defendant for outrageous conduct and to deter others from similar conduct.

Civil Procedure > Remedies > Damages > Punitive Damages
[HN42] While a statute may impose a penalty, this is not synonymous with the imposition of punitive damages. Punitive damages differ in that they are extraordinary and harsh. Moreover, punitive damages require a showing that the defendant acted wantonly, willfully, or with a reckless disregard for the consequences such that a culpable mental state may be inferred.

Civil Procedure > Remedies > Damages > Punitive Damages
[HN43] The Missouri Legislature has wide latitude to decide the severity of civil penalties for violations of law. The legislature is consequently free to allow or disallow punitive damages.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
[HN44] Where the jury is instructed in the alternative or the disjunctive on two grounds of liability, there must be a submissible case for both submissions.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards
[HN45] Under *Mo. Rev. Stat. § 408.562*, a trial court may, in its discretion, award to the prevailing party attorney fees based on the amount of time reasonably expended. The prevailing party is the party who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of its original contention.

COUNSEL: For Appellant-Respondents: Roy F. Walters, Kansas City, MO, Kip D. Richards, Kansas City, MO, David M. Skeens, Kansas City, MO, J. Michael Vaughan, Kansas City, MO, Garrett M. Hodes, Kansas City, MO.

For Respondent-Appellants: Gene C. Schaerr, Pro Hac Vice; Kenneth L. Marshall, Jefferson City, MO, Randolph G. Willis, Kansas City, MO, Robert T. Adams, Kansas City, MO, Todd W. Ruskamp, Kansas City, MO, Michael K. Underhill, Kansas City, MO, Robert K. Sellers, Kansas City, MO, Jennifer M. McAdam, Kansas City, MO.

JUDGES: Before Thomas H. Newton, P.J., Gary D. Witt, J. and Stephen K. Willcox, Sp. J. Witt, J., and Willcox, Sp. J. concur.

OPINION BY: Thomas H. Newton

OPINION

Residential Funding Company, LLC (Residential), Homecomings Financial, LLC (Homecomings), Household Finance Corp III (Household), and Wachovia Equity Servicing (Wachovia) (collectively, "Defendants") appeal from a judgment awarding approximately $ 104,000,000 in compensatory and punitive damages to a class of consumers (Plaintiffs). Plaintiffs cross appeal, contesting issues of damages. We affirm the trial court's entry of judgment as [*2] to compensatory damages; reverse and remand its denial of prejudgment interest on Plaintiffs' past interest payments; reverse the punitive damages award for instructional error, and remand for a new trial as to punitive damages. Plaintiffs' motion for attorney fees on appeal is granted and remanded to the trial court to determine a reasonable amount.

Factual and Procedural Background

[1]

1 The record in this case consisted of fifty-four volumes of legal files, over 21,000 pages, many volumes of which were filed under seal. The trial transcript was over 4,000 pages. Briefing on appeal topped 900 pages. As such, we present only a factual overview.

In November 1999, Steven and Ruth Mitchell acquired a second mortgage loan from Mortgage Capital

Resource Corporation (MCR). Prior to closing on the loan, MCR mailed the Mitchells a number of documents, including: (1) a Truth-In-Lending-Act (TILA) disclosure statement, which stated the proposed loan amount and the interest rates; (2) a Good Faith Estimate of Settlement Charges, which listed an estimate of the closing fees; and (3) a Home Ownership and Equity Protection Act (HOEPA) disclosure statement, which stated that the loan would be subject [*3] to HOEPA. The Mitchells signed and returned the TILA and HOEPA disclosure statements. MCR sent the Mitchells a closing package, which included a United States Department of Housing and Urban Development Settlement Statement ("HUD-1A"). The HUD-1A statement provided that the Mitchells would be required to pay $ 3,433 in closing costs for thirteen different fees. The Mitchells signed the closing documents and returned them to MCR. The principal amount of the Mitchells' loan was $ 21,000 with an interest rate of 10.85%. The Mitchells financed the $ 3,433 in closing costs as part of the principal. MCR assessed similar types of fees for more than 300 other Missouri loans from 1998 to 2000, and in each case, the loan settlement fees were rolled into the principal.

Residential purchased the Mitchells' loan, acquiring all rights, title, and interest in the real estate deed of trust and promissory note executed by the Mitchells. Residential then conveyed the Mitchell's deed of trust and note to a trust. [2] Homecomings, a subsidiary of Residential, collected and processed the Mitchells' loan payments, as well as the other relevant payments for loans Residential purchased from MCR. Household and [*4] Wachovia entered into similar agreements with MCR on Plaintiffs' loans.

> 2 This process is commonly known as securitization. The mortgages are pooled and "pass-through securities [are issued] to investors that represent interests in the cash flow due under the mortgages . . . a business with a pool of mortgages transfers these mortgages to an unrelated entity, either a corporation or trust. The entity issues securities and the proceeds of the mortgages are used to pay the investors." 1 John P. McNearney, *Real Estate Financing*, MO. REAL ESTATE PRACTICE § 9.76 (MoBar Cum. Supp. 2006).

The contract between Residential and MCR for the Mitchells' loan consisted of a Seller Contract and a Master Commitment Letter. The Seller Contract and Master Commitment Letter each referenced Residential's Client Guide, which set forth the terms and conditions for Residential's loan purchase requirements. The Client Guide stated that the client must comply with all state and federal laws and regulations and that Residential would purchase loans in reliance on the client's representations and compliance with the Client Guide. Residential did not independently investigate if the loans it purchased complied with [*5] state law. In their loan purchases from MCR, Wachovia and Household also did not verify whether the loans complied with state law. MCR subsequently filed for bankruptcy.

In July 2003, the Mitchells filed suit against Defendants, seeking to certify a class and claiming that MCR charged closing fees to Missouri consumers that were prohibited by Missouri's Second Mortgage Loan Act, *§§ 408.231-232* ("MSMLA"). [3] The Mitchells alleged that Defendants were liable under the MSMLA for "[c]harging and/or receiving, either directly or indirectly" unlawful fees prohibited by *section 408.233*, that Defendants were barred from collecting interest on the loans and were liable for all interest collected on the loans, and that Defendants were liable for MCR's actions as the loans' assignees. The trial court certified a class including all individuals who obtained a second mortgage loan on Missouri real property from MCR on or after July 29, 1997. Out of the relevant loans that MCR originated, Residential purchased 248, Household purchased 31, [4] and Wachovia purchased 23.

> 3 Missouri statutory references are to RSMo 2000 and the Cumulative Supplement 2008 unless otherwise indicated.
>
> 4 The jury was presented [*6] with 34 loans, however, it was determined that the suit was inapplicable to three of these loans. Judgment was reduced to reflect the correct number of loans.

Trial was held from December 3, 2007, through January 4, 2008. The trial was bifurcated--the first stage addressed liability for compensatory and punitive damages, and the second stage addressed the amount of punitive damages. At the close of Plaintiffs' case, the trial court directed a partial verdict for Plaintiffs, holding that: (1) MCR violated the MSMLA by charging illegal closing fees; and (2) Residential, Household, and Wachovia ("Assignee Defendants") were liable for MCR's violations. At the close of the liability phase, the jury found in favor of Plaintiffs and against Defendants. It awarded Plaintiffs $ 5,421, 706 in compensatory damages, which included compensation for the challenged fees, past interest paid on the loans, and future interest on the loans. [5] In the second phase of the trial, the jury awarded $ 99,000,000 in punitive damages--$ 92,000,000 against Residential, $ 4,500,000 against Household, and $ 2,500,000 against Wachovia. [6] All parties raised post-trial motions. The trial court subsequently reduced compensatory [*7] damages against Household, awarded the Mitchells an incentive payment from the common fund, awarded statutory attorney fees against Residential,

Household, and Wachovia, and granted Plaintiffs' application for prejudgment interest on the challenged fees but denied their request for prejudgment interest on the past interest. Defendants appeal, raising fifty-three points [7] and Plaintiffs cross-appeal, raising two points.

5 Homecomings was held liable only for past and future interest.

6 The jury was not asked to make a finding on punitive damages against Homecomings.

7 Homecomings joined in Residential's brief, and Household and Wachovia each filed separate briefs. Because Defendants each raise many of the same arguments, we have combined the overlapping points we address into "issues."

Legal Background

[HN1] Absent an exception, the maximum annual interest rate that a lender may charge in Missouri is ten percent or the "market rate," which is calculated according to long-term U.S. government bond yields. *§ 408.030*. A loan that charges more than the maximum interest rate is usurious. "[U]sury is [*8] the taking or exacting of interest at a rate in excess of that allowed by law for the loan or use of money." *Redd v. Household Fin. Corp., 622 S.W.2d 255, 257 (Mo. App. E.D. 1981)*. [8]

8 It is apparently not disputed that the interest rates charged in the instant case exceeded Missouri's usury rate absent the MSMLA. In 1999, Missouri's "market rate" was at all times below 9.1%.

The MSMLA creates an exception to this normal rule. "Enacted in 1979, the [M]SMLA is a consumer-protection measure designed to regulate the business of making high interest second mortgage loans on residential real estate." *Avila v. Cmty. Bank of Va., 143 S.W.3d 1, 4 (Mo. App. W.D. 2003)* (internal quotation marks and citation omitted). Although Missouri law prohibits lenders from charging interest of more than ten percent or the market rate, under the MSMLA lenders can bypass this restriction for second mortgage loans, provided they otherwise comply with its restrictions. *See Thomas v. U.S. Bank Nat'l Ass'n ND, 575 F.3d 794, 796 n.1 (8th Cir. 2009)*. Prior to 1998, the MSMLA permitted lenders to charge up to 20.04% on these second mortgage loans, provided the loans otherwise complied with its restrictions. *Avila, 143 S.W.3d at 4*.

In [*9] 1998, the MSMLA was amended to remove the limit on interest rates, but the fee restrictions remained in place. [9] *Adkison v. First Plus Bank, 143 S.W.3d 29, 30 (Mo. App. W.D. 2004)*. [HN2] The MSMLA permits lenders to charge "rates agreed to by the parties" on these second mortgage loans provided the loans otherwise comply with its restrictions. *Id. at 32* (citing *§ 408.232*). The Act thus allows lenders to charge interest rates on second mortgages that exceed Missouri's statutorily prescribed usury rate, but "[t]he limits on closing costs and fees . . . act as a trade-off." *Thomas, 575 F.3d at 796 n.1*. If a second mortgage loan does not comply with the restrictions of the MSMLA, it does not benefit from the MSMLA's provisions permitting it to charge a 20.04% interest rate (prior to 1998) or any "rates agreed to by the parties" (after 1998). *See id.*; *§ 408.232*. The lender is subject to civil and criminal penalty for charging fees not authorized by the Act. *Avila, 143 S.W.3d at 4*.

9 Senate Bill No. 792, § A, in subsec. 1, substituted "rates agreed to by the parties" for "a rate which shall not exceed one and sixty-seven hundredths percent per month." 1998 Mo. Laws 1449, 1457.

Plaintiffs' claims [*10] of direct liability against Defendants were brought under the MSMLA. Plaintiffs also alleged that Assignee Defendants were derivatively liable for MCR's violations of the MSMLA through HOEPA and common law. In HOEPA, Congress created a means, under federal law, for a plaintiff to "seek relief from an assignee of a HOEPA loan for all claims (including state law claims) which the plaintiff could have brought against the original creditor." *Bryant v. Mortg. Capital Res. Corp., 197 F. Supp. 2d 1357, 1366 (N.D. Ga. 2002)*. It provides that assignees of HOEPA (high interest) loans "are derivatively liable" for the conduct of the assignor by eliminating any "holder in due course" defense for assignees of mortgage loans falling within its definitions. *Schwartz v. Bann-Cor Mortg., 197 S.W.3d 168, 179 (Mo. App. W.D. 2006)* (citing *15 U.S.C. § 1641(d)*). In enacting this provision, "Congress intended to place the increased burden of inquiring into the legitimacy of the lending practices engaged in by the original lender upon the assignees of HOEPA loans." *Bryant, 197 F. Supp. 2d at 1365*. This was intended to "encourage investors in the secondary market for HOEPA loans to more carefully scrutinize [*11] the backgrounds and qualifications of those with whom they choose to do business." *Id.* It also consequently "allocates to the assignee the cost associated with the misconduct of the original lender in such instances where the assignee fails to inquire into or otherwise discover the deceptive and unlawful practices engaged in by the original lender." *Id.* [10]

10 We note one commentator's opinion that

> this question -- should investors be required to monitor lenders for predatory practices - has become

> the most controversial and important question in the debate over substantive mortgage lending regulatory reform. . . . With the flood of over forty state and local predatory lending laws, no issue has proven to have more consequence for the protection of consumers and for the liability of secondary mortgage market than the potential liability of assignees under these statutes.
>
> Christopher L. Peterson, *Predatory Structured Finance*, *28 CARDOZO L. REV. 2185, 2190, 2243 (Apr. 2007)*.

Jurisdiction and Class Certification

Household and Wachovia: the Mitchells' Standing

In their first points, Household and Wachovia each argue that the trial court erred in denying their motions to dismiss because, they [*12] contend, the Mitchells had no standing to sue either entity. Because standing is an issue of law, our review is *de novo*. *Mo. State Med. Ass'n v. State, 256 S.W.3d 85, 87 (Mo. banc 2008)*.

[HN3] In Missouri, subject matter jurisdiction derives directly from *article V, section 14 of the Missouri Constitution*, which states that "circuit courts shall have original jurisdiction over all cases and matters." *Hayes v. State, 301 S.W.3d 542, 547 (Mo. App. W.D. 2009)*. Standing is related to the rule that a court may not issue advisory opinions. *State ex rel. Williams v. Marsh, 626 S.W.2d 223, 227 (Mo. banc 1982)*. It is "'used to ascertain if a party is sufficiently affected by the conduct complained of in the suit, so as to insure that a justifiable controversy is before the court.'" *City of Wellston v. SBC Commc'ns, Inc., 203 S.W.3d 189, 193 (Mo. banc 2006)* (quoting 15 MO. PRAC. CIVIL RULES PRACTICE § 52.01-2 (Mary Coffoy ed., 2d ed. 1997)). In its essence, standing requires "that the parties seeking relief must have some personal interest at stake in the dispute, even if that interest is attenuated, slight, or remote." *Adams v. Cossa, 294 S.W.3d 101, 104 (Mo. App. E.D. 2009)* (internal quotation marks [*13] and citation omitted); *see also Mo. State Med. Ass'n, 256 S.W.3d at 87*.

[HN4] Whether the standing requirement is met is determined from the petition. *Adams, 294 S.W.3d at 105*. The requirement is satisfied by the plaintiffs' allegation of an actual or threatened injury. *Id. at 104*. Here, Plaintiffs alleged they were injured by violations of the MSMLA committed by, *inter alia*, MCR, Residential, Household, and Wachovia. They contended MCR violated the MSMLA by charging illegal loan fees, that Assignee Defendants were liable for MCR's violation, and that Defendants independently violated the MSMLA with respect to Plaintiffs' loans and conspired to violate it. Plaintiffs further alleged they were injured by Defendants' charging and receiving interest on the illegal fees, which were financed into the loans purchased by Defendants. Their allegations were also asserted against Defendants as a class, and the petition further sought joinder of Defendants under *Rule 52.04(a)*.

Household and Wachovia, however, dispute that the Mitchells in particular suffered an injury in fact entitling them to bring suit against Household and Wachovia. They argue that because the Mitchells dealt only with MCR and Residential, [*14] any alleged injury to the Mitchells is attributable to MCR and Residential, and the Mitchells did not have standing to assert the claims of other class members against Household and Wachovia as assignees of MCR's loans.

This case presents a unique procedural question: can a named plaintiff in Missouri assert her MSMLA claim not just against the holder of her loan, but also against other assignees of the loan originator on behalf of a class? As noted by commentators, courts have conflicted as to whether this multi-defendant posture raises a question of standing, which is a jurisdictional question in Article III courts and in states with similar constitutional requirements, or a question of typicality, which is an issue of federal and state procedural rules for class certification. *See, e.g., Master Fin., Inc. v. Crowder, 409 Md. 51, 972 A.2d 864, 881 (Md. 2009)* (discussing cases addressing this issue); *Weld v. Glaxo Wellcome, Inc., 434 Mass. 81, 746 N.E.2d 522, 529 (Mass. 2001)* (finding that defendants might argue either that standing or typicality were lacking as such "related concepts" and opting as a state court to analyze the issue under typicality requirements); *see also* William D. Henderson, Comment, *Reconciling the Juridical Links Doctrine with the Federal Rules of Civil Procedure and Article III*, [*15] *67 U. CHI. L. REV. 1347, 1349 (Fall 2000)*.

Courts have also widely conflicted as to the jurisdictional and procedural propriety of such an action. *See, e.g., Moore v. Comfed Sav. Bank, 908 F.2d 834, 838-39 (11th Cir. 1990)* (finding permissive joinder of defendant loan holders proper on similar facts, though named plaintiffs had no direct dealings with them); *compare Master Fin., Inc. v. Crowder, 972 A.2d at 881* (finding that named plaintiffs could not "fairly and adequately protect the interests of those class members" whose loans were held by other defendants but noting standing analysis would lead to same result); *see also Easter v. Am. W. Fin., 381 F.3d 948, 962 (9th Cir. 2004)*; James Keenley, Comment, *How Many Injuries Does it Take? Article III Standing in the Class Action Context*, *95 CALIF. L. REV.*

849, 851-52 (June 2007). Those courts that have found the class action proper have largely done so under two theories. The first theory identifies the class as the party in interest who is required to allege injury in fact. Such courts find, for example, that:

> In class actions the requirement that the named representative plaintiff have a personal stake in the form of a direct injury [*16] is less compelling on jurisdictional grounds. In such cases, the *class* itself is the real party in interest. If the unnamed members of the class satisfy the requirements of standing, then a real controversy exists between the class and the defendant, which should be sufficient to invoke the court's jurisdiction.

Cedar Crest Funeral Home v. Lashley, 889 S.W.2d 325, 329 (Tex. Ct. App. 1993).

The second theory relies on the "juridical links doctrine," which is "a procedural device that permits collective adjudication of related claims." *Weld, 746 N.E.2d at 530*. The doctrine is found where there exists "a legal relationship among the defendants that permits a single resolution of the dispute [as] preferable to a multiplicity of similar actions." *Lashley, 889 S.W.2d at 332*. For example, in *Mull v. Alliance Mortgage Banking Corporation*, the district court discussed Sixth Circuit holdings that required a named plaintiff to have an injury against each defendant, but explained that this standing rule was subject to exceptions for conspiracy or concerted schemes and to "'[i]nstances in which all defendants are *juridically related* in a manner that suggests a single resolution of the dispute would [*17] be expeditious.'" *219 F.Supp.2d 895, 908 (W.D. Tenn. 2002)* (quoting *Thompson v. Bd. of Educ. of Romeo Cmty. Sch., 709 F.2d 1200, 1205 (6th Cir. 1983)*). The *Mull* Court ultimately rejected the plaintiffs' standing where the named plaintiffs failed to allege which, if any, of the defendant loan holders held their loans and no class had been certified. *219 F.Supp.2d at 909*. By contrast, the *Weld* Court identified the "juridical links" doctrine to be analogous to state rules governing permissive joinder. *746 N.E. 2d at 530*. A federal district court in Massachusetts, however, described the doctrine as a rule of *substance* answering the "question of whether two defendants are sufficiently linked so that a plaintiff with a cause of action against only defendant one can also sue the other defendant under the guise of class certification." *In re Eaton Vance Corp. Securities Litigation, 220 F.R.D. 162, 165 (D. Mass. 2004)*. Yet a federal court in Delaware recently stated that "the juridical link doctrine is inapplicable to issues of standing, and is appropriately considered in a class certification analysis." *Johnson v. Geico Cas. Co., 673 F.Supp.2d 244, 255 (D. Del. 2009)*.

To the best of our knowledge, [*18] the juridical link doctrine has not heretofore been adopted nor addressed by Missouri state courts. We believe both its application and its role within federal and state courts to be uncertain. Like the Seventh Circuit, "[w]e are skeptical that the use of this terminology is conducive to sound analysis of the kind of problem presented here." *Payton v. Cnty. of Kane, 308 F.3d 673, 679 (7th Cir. 2002)*.

We find the reasoning of those courts that hold [HN5] the class certification issue to be antecedent to the standing issue to be most persuasive. As noted by the *Payton* court, the United States Supreme Court has found issues of class certification to be properly analyzed prior to standing as they are "'logically antecedent to Article III concerns, and themselves pertain to statutory standing, which may properly be treated before Article III standing.'" *Id. at 680* (quoting *Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*; *see also § 507.070* (class action statute). We also find most judicially rational those courts finding that "once a class is properly certified . . . standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual [*19] named plaintiffs." *Payton, 308 F.3d at 680*.

We further find convincing that such an approach comports with the underlying goals of Missouri class actions. Permitting the multi-defendant allegations here promotes judicial efficiency, due process, and is in accord with the purposes behind allowing class actions, which is to provide an "economical means for disposing of similar lawsuits while simultaneously protecting defendants from inconsistent obligations and the due process rights of absentee class members." *State ex rel. Coca-Cola Co. v. Nixon, 249 S.W.3d 855, 860 (Mo. banc 2008)* (internal quotation marks and citation omitted).

Key to our finding is that this suit relied on common, essential factual and legal determinations as to the loan originator MCR, its lending practices in Missouri, and the liability of its assignees. *Compare Mayo. v. GMAC Mortg., LLC, No. 08-00568-CV-W-DGK, 2010 U.S. Dist. LEXIS 51517 (W.D. Mo. Mar. 1, 2010)* (finding no standing for putative class representatives for alleged MSMLA violations with no central loan originator and no allegations of a common scheme). MCR's liability for violation of the MSMLA was on trial; HOEPA provided for its assignees to hold [*20] that liability. *15 U.S.C. § 1641(d)*. To exclude MCR's other Missouri borrowers, and MCR's other Missouri loan holders, would create the inefficiency of multiple trials of these threshold issues and, further, could effectively preclude both plaintiff and defendant parties from litigating issues key

to a determination of their rights. *See, e.g., Spath v. Norris, 281 S.W.3d 346, 351 (Mo. App. W.D. 2009)* (discussing collateral estoppel concerns); *Moore, 908 F.2d at 839* (finding that through principles of *stare decisis*, failing to join defendant loan holders with whom named plaintiffs had no dealings to case against other loan holders could impair or impede other plaintiffs' ability to protect legal interests).

This is not a case of the named representatives seeking to "piggyback" on the injuries of the class. *See Payton, 308 F.3d at 682*. The named plaintiffs must be able to assert an injury in fact in the suit against the originator. More importantly, the named plaintiffs must also be able to meet the requirements of class certification, in particular "typicality." *See* discussion *infra*. Once the class is certified, the question then becomes whether the class properly has standing to assert [*21] its claim against each of the defendants. In this context, this insures that Missouri's jurisdictional requirement that the courts preside only over "cases and matters" is met. *See Mo. Const. art. 5, § 14*. Consequently, contrary to Household and Wachovia's argument, the Mitchells' alleged injury is sufficient to insure a justiciable controversy. Therefore, Household and Wachovia's first points are denied.

Household and Wachovia: the Mitchells' Class Representation

In their second points, Household and Wachovia relatedly argue that the trial court erred in certifying the class because the Mitchells had no claims against Wachovia or Household. [HN6] We review a trial court's decision to certify a class under an abuse of discretion standard. *Hale v. Wal-Mart Stores, Inc., 231 S.W.3d 215, 221 (Mo. App. W.D. 2007)*. "A court abuses its discretion [in certifying a class action] only if its ruling is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration." *Dale v. DaimlerChrysler Corp, 204 S.W.3d 151, 164 (Mo. App. W.D. 2006)* (internal quotation marks and citation omitted). A court abuses its discretion if the class certification is based on an [*22] erroneous application of the law or the evidence provides no rational basis for certifying the class. *Id.* For purposes of reviewing class certification, we accept the named plaintiffs' allegations as true. *Plubell v. Merck & Co., Inc., 289 S.W.3d 707, 710 n.2 (Mo. App. W.D. 2009)*.

[HN7] *Rule 52.08* provides four prerequisites to a class certification, "commonly referred to as numerosity, commonality, typicality, and adequacy." [11] *Id. at 712*. Household and Wachovia argue that because the Mitchells' MCR-originated loans were purchased by Residential, their claims were not typical of the class, which was defined as "[a]ll individuals who, on or after July 29, 1987, obtained a 'Second Mortgage Loan' as defined by *§ 408.231.1* from [MCR] on real property located in Missouri."

11 *Rule 52.08(a)* provides:

> [HN8] Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative [*23] parties will fairly and adequately protect the interests of the class.

[HN9] The typicality prerequisite is met despite factual variances if (1) the named representatives' "and the class members' claims arise from the same event or course of conduct by the defendant, (2) the conduct and facts give rise to same legal theory, and (3) the underlying facts are not markedly different." *Plubell, 289 S.W.3d at 715* (internal quotation marks and citation omitted). Typicality is not defeated by speculative variations in the claims, and no showing of the likelihood of an individual's success on the merits is required. *Id.*

Household and Wachovia contend that the typicality requirement was not met because the allegedly unlawful behavior was not common to all the putative class members and that there were "numerous individual questions of fact and law." They rely on *Canady v. Allstate Insurance Company, No. 96-0174-CV-W-2, 1997 U.S. Dist. LEXIS 24067 (W.D. Mo. June 19, 1997)*, [12] which found that representatives of a putative homeowner class failed to show typicality against defendant insurers because each claim in the case was separate and distinct: "no pattern or practice [was] sufficiently alleged." *Canady, 1997 U.S. Dist. LEXIS 24067, at *19*. [*24] The *Canady* court specifically noted that the plaintiffs had failed to allege any concerted action or conspiracy and held that "[a]bsent such an allegation, no class may be maintained against the defendants." *Id. at *16*. Here, however, Plaintiffs alleged that Defendants "individually and jointly participated in and acted in furtherance of" a "predatory and fraudulent lending scheme" by providing the financing to MCR to fund the scheme. They alleged that MCR violated the MSMLA, that Defendants violated the

MSMLA through their financing and loan purchasing arrangements with MCR, and that the wrongs alleged against Defendants and remedies sought were "identical, the only difference being the exact monetary amount" for which each Defendant was liable. This was sufficient to make the Mitchells' claims typical of the class. Household's and Wachovia's second points are denied.

12 Because *Rule 52.08* and *Fed. R. Civ. P. 23* are identical, Missouri state courts may consider federal interpretations of Federal *Rule 23* in interpreting *Rule 52.08*. *Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729, 735 n.5 (Mo. banc 2004)*.

Juror Nondisclosure

In its third point, Wachovia argues that the trial court [*25] erred in denying its motion for new trial because three jurors failed to disclose involvement in prior litigation during *voir dire*. During *voir dire*, Defense Counsel asked, "Let me go to the flip side. I've asked about people in the same position as the Mitchells. Let me ask you about people that are in the same position as the defendants are. Anybody here who has been a defendant in a lawsuit?" Wachovia argued that three jurors failed to disclose that they had been defendants in lawsuits. Juror Cameron had been subject to two collection actions--one involving an outstanding balance on a credit card, and the other involving an outstanding balance for dental services. Juror Ishmael [13] had been subject to three collection actions--two involving delinquent taxes, and another involving an outstanding balance on a credit card. Juror Moore had been a debtor in a bankruptcy case. Wachovia argues that the three jurors in question understood defense counsel's question, that the question triggered a duty to disclose, the jurors actually remembered or should have remembered the prior litigation, and that they intentionally failed to disclose the information. [14]

13 We note that Juror Ishmael was [*26] one of two jurors who did not return a verdict in favor of Plaintiffs.

14 *Voir dire* occurred on December 3 and December 4, 2007. The jury returned a verdict on January 4, 2008. Plaintiffs argue that the argument of jury misconduct was untimely and, therefore, waived, because Wachovia did not raise the issue before the jury rendered a verdict. They contend the jurors' case information was publicly available on Missouri's automated case record service, CaseNet, and that Wachovia should not be permitted to raise the issue post-trial. In *McBurney v. Cameron*, we noted in dicta that the issue of timeliness was before the Missouri Supreme Court in 1994, and that it rejected the argument that a failure to research juror experience amounted to a waiver. *248 S.W.3d 36, 42 (Mo. App. W.D. 2008)* (discussing *Harlan ex rel. Brines v. Cibis, 882 S.W.2d 138 (Mo. banc. 1994))*. However, with advancing technology since *Brines*, including CaseNet, the *McBurney* court cautioned that the result in *Brines* may have been different in 2008 had a party raised the waiver argument. *See id. at 41*. We also encouraged counsel to make challenges of juror misconduct before the submission of the case. *Id*.

[HN10] A juror's nondisclosure [*27] may be intentional or unintentional. *Wilford ex rel. Williams v. Barnes Hosp., 736 S.W.2d 33, 36 (Mo. banc 1987)*. If the disclosure is intentional, prejudice will be presumed, thereby requiring a new trial. *Id. at 37*. "Intentional nondisclosure occurs: 1) where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and 2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable." *Id. at 36*. Consequently, intentional nondisclosure can occur only if counsel's questions during *voir dire* were clear. *McBurney v. Cameron, 248 S.W.3d 36, 42 (Mo. App. W.D. 2008)*. "[I]f a person could reasonably be confused, the question is not sufficiently clear to warrant further inquiry into the alleged nondisclosure." *Id.*

[HN11] We review the clarity of a question posed during *voir dire* under a *de novo* standard. *McBurney, 248 S.W.3d at 42*. "It is only after it is objectively determined that the question was reasonably clear in context that we consider, under an abuse of discretion standard, whether the trial court abused its discretion in [*28] deciding whether a nondisclosure was intentional." *Id.* The burden of showing that a question was clear and unambiguous, thereby triggering a venire person's duty to disclose, is on the party seeking a new trial. *Id.*

While Defense Counsel's question in the current case, in context, might suggest a reasonable venire person *could* have understood that counsel meant the venire members to disclose all litigation, "it does not show that in the total context the question was so *clear* that every reasonable venire member *would* have believed that counsel wanted to know about all kinds of litigation." *McBurney, 248 S.W.3d at 45-46*. The phrase "people who are in the same position as the defendants are" preceded by "[a]nybody here who has been a defendant in a lawsuit" is arguably ambiguous. *Compare Johnson v. McCullough, 306 S.W.3d 551, 556 (Mo. banc 2010)* (finding intentional nondisclosure where the question posed was "Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit be-

fore?"). In the present case, a venire person could have interpreted the question broadly, as Wachovia argues, to be asking for disclosure of all previous litigation. Alternatively, a venire [*29] person could interpret the question more narrowly, as Plaintiffs argue, to include only lawsuits and lawsuits similar to the case at bar, i.e., "people who are in the same position as the defendants." As noted by Plaintiffs, "[t]he questions did not ask the panel members whether they had ever filed a bankruptcy . . . Nor did the questions ask if the panel members had ever been a defendant in a collection action or had ever been garnished." Because the venirepersons could reasonably have interpreted the question differently than Wachovia now argues, we hold the question was not so clear as to "warrant further inquiry." *See McBurney, 248 S.W.3d at 42*. Wachovia's third point is therefore denied.

Defendants' Liability

1: Missouri Law Applied to Plaintiffs' Loans

In the first substantive issue on appeal, Defendants argue that the fee restrictions of the MSMLA did not apply to Plaintiffs' loans and the trial court thus erred in directing a verdict that the loans violated the MSMLA. [HN12] After its 1998 amendment and prior to being revised in 2004, *subsection 408.232.4* provided that "[s]ections 408.231 to 408.241 shall not apply to any loans on which the rate of interest charged is lawful without [*30] regard to the rates permitted in subsection 1 of this section." [15] It thus provided that the fee limitations were "only applicable to second mortgage loans on which an unlawful rate of interest is charged." *Avila, 143 S.W.3d at 4*. Relying on *Adkison*, Defendants argue California law applies to the interest rate analysis because MCR was a California-licensed real estate broker and the interest rate was lawful in California, thus rendering the MSMLA inapplicable. *See Adkison, 143 S.W.3d 34-36*. Because Defendants raise an issue of law, our review is *de novo*. *Schwartz, 197 S.W.3d at 170*.

> 15 In 2004, *subsection 408.232.4* was amended to provide that "[s]ections 408.231 to 408.241 shall not apply to any loans on which the rate of interest and fees charged are lawful under Missouri law without regard to the rates permitted in subsection 1 of this section and the fees permitted in *section 408.233*."

In *Adkison*, we held that the MSMLA was inapplicable to the plaintiffs' claims that a state-chartered bank charged illegal fees because federal law permits federally insured state-chartered banks to export interest rates authorized under their home state's laws. *See 143 S.W.3d at 31*; *see also 12 U.S.C. § 1831d(a)*; [*31] *Thomas, 575 F.3d at 799*. The purpose of the federal provision is "to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates." *12 U.S.C. § 1831d(a)*; *see generally* Lynn M. Ewing, Jr. & Kendall R. Vickers, *Federal Preemption of State Usury Laws Affecting Real Estate Financing*, 47 MO. L. REV. 171, 171-76 (Spring 1982). Because the federally insured state-chartered bank in *Adkison* could export its interest rates, which were legal in California, the interest rate was "lawful" as defined in *subsection 408.232.4* and the MSMLA fee restrictions did not apply. *Adkison, 143 S.W.3d 35-36*. We concluded the MSMLA made "reasonable accommodation to interests of interstate regulation by the federal government." *Id. at 35*.

The reasoning of *Adkison* does not apply in this case. MCR was a California licensed real estate broker, not a "state-chartered insured depository institution." *See 12 U.S.C. § 1831d(a)*. Defendants have failed to point us to any source indicating that federal law requires us to apply a foreign state's laws regarding interest rates to real estate brokers. Nor [*32] have they explained how concerns with interstate regulation of banking come into play in the regulation of fees that may be charged by real estate brokers. Consequently, we do not agree that California interest rate regulation should be applied to MCR's loans made to these Missouri consumers in contravention of our traditional choice of law rules. Therefore, Residential and Homecomings' first point, Household's fourth point, and Wachovia's fourth point are denied.

2: The Loan Fees Violated the MSMLA

Defendants next argue that the trial court erred in directing a verdict that the loans violated the MSMLA because Defendants did not admit the challenged fees were unlawful and Plaintiffs did not show that the fees were unlawful. Subsection *408.233.1, RSMo 1994*, mandated as follows:

> [HN13] No charge other than that permitted by *section 408.232* [providing for interest charges] shall be directly or indirectly charged, contracted for or received in connection with any second mortgage loan, except as provided in this section:
>
> (1) Fees and charges prescribed by law actually and necessarily paid to public officials for perfecting, releasing, or satisfying a security interest related to the second mortgage [*33] loan;
>
> (2) Taxes;

(3) *Bona fide closing costs paid to third parties, which shall include*:

(a) Fees or premiums for title examination, title insurance, or similar purposes including survey;

(b) Fees for preparation of a deed, settlement statement, or other documents;

(c) Fees for notarizing deeds and other documents;

(d) Appraisal fees; and

(e) Fees for credit reports;

(4) Charges for insurance as described in subsection 2 of this section;

(5) A nonrefundable origination fee not to exceed two percent [16] of the principal;

(6) Any amounts paid to the lender by any person, corporation or entity, other than the borrower, to reduce the rate on a second mortgage loan or to assist the borrower in qualifying for the loan.

(Emphasis added.) Plaintiffs alleged that the challenged fees were either: (1) not authorized by *section 408.233.1* because they were not enumerated there; (2) not bona fide closing costs paid to third parties as authorized by *section 408.233.1(3)*; or (3) not amounts paid by someone other than the borrower as authorized by *section 408.233.1(5)*. After entering its partial directed verdict, the trial court instructed the jury that MCR violated the MSMLA by "charging, contracting for, or receiving [*34] each of the following settlement charges or fees in connection with the [Residential] loans":

- Loan discount;

- Credit Report Fee paid to [MCR];

- Custodial fee;

- Underwriting fee;

- Processing fee;

- Federal Express Fee;

- Document preparation fee paid to [MCR];

- Attorney's fees;

- Flood certification fee;

- Wire transfer fee;

- Administration fee;

- No Prepay Fee; and

- Two-Point Reduction Fee

16 Senate Bill No. 792, § A, in *subsection 1, subdivision (5) of section 408.233*, substituted "five percent" for "two percent" and inserted "which may be used by the lender to reduce the rate on a second mortgage loan." 1998 Mo. Laws 1449, 1457. It also added a *subdivision (7)* permitting the assessment of "[f]or revolving loans, an annual fee not to exceed fifty dollars." *Id.*

On appeal, Defendants contend that some of the contested fees could have been "bona fide fees closing costs paid to third parties," and thus lawful under subsection *408.233.1(3)*, because the enumerated list in *408.233.1(3)* is not exclusive and therefore permits other fees paid to third parties. Defendants further argue that they should have been permitted to introduce evidence that certain fees, although listed on the HUD-1As as "to [*35] [MCR]", were actually paid to third parties and were thus lawful. Finally, Defendants contend a "discount fee" was not actually a discount fee; it was "prepaid interest to buy down the interest rate" and lawful under subsection *408.233.1*.

[HN14] The trial court generally may not direct a verdict in favor of the party who carries the burden of proof. *Brandt v. Pelican, 856 S.W.2d 658, 664 (Mo. banc 1993)*. However, there are exceptions to the rule where the opponent admits the "'truth of the basic facts upon which the claim of the proponent rests'" or the proof of the facts "'is altogether of a documentary nature.'" *Id.* (quoting *Coleman v. Jackson Cnty., 349 Mo. 255, 160 S.W.2d 691, 693 (Mo. 1942))*. If the facts are shown by documents, the documents' correctness and authenticity are not questioned, impeached, or contradicted, and the documents establish facts beyond all doubt showing the proponent is entitled to relief as a matter of law, then the

trial court may direct a verdict in favor of the proponent. *Id.* "'This is upon the theory that there is no question of fact left in the case and that upon the questions of law involved the jury has no right to pass.'" *Id.* (quoting *Coleman, 160 S.W.2d at 693*); *see* [*36] *also Commerce Trust Co. v. Howard, 429 S.W.2d 702, 708 (Mo. 1968)*. When the grant of a directed verdict is based upon a conclusion of law, we review the trial court's decision *de novo*. *Ozark Emp't Specialists, Inc. v. Beeman, 80 S.W.3d 882, 889 (Mo. App. W.D. 2002)*.

In *Coleman*, the trial court directed a partial verdict in favor of the plaintiffs on their claims for underpayment of wages. *160 S.W.2d at 693*. The plaintiffs introduced records of the defendants showing the amount plaintiffs had been paid to demonstrate the payment was less than statutorily required. *Id. at 694*. The *Coleman* court found that if the evidence "as a matter of law showed . . . the assignors were entitled to pay in accordance with the statute schedule, then the plaintiff was properly granted peremptory instructions on the counts in question." *Id.* (emphasis added). [HN15] "[A] writing may be said to be conclusive in respect to the truth of what it contains," if it is an instrument or a record having legal effect, and the person to be bound by its truth was a party to it, vouched for its truth, or is otherwise estopped from denying its truth. *Johnson v. Mo. Ins. Co., 46 S.W.2d 959, 961 (Mo. App. 1932)*; *see also Bakelite Co. v. Miller, 372 S.W.2d 867, 871 (Mo. 1963)* [*37] (discussing the foregoing as the "conclusive documentary evidence" rule).

We find these rules applicable to the present case. The HUD-1As used to show the fees charged in the loans were MCR's own documents, produced in compliance with federal law, and listed the fees as being paid to MCR. *See 24 C.F.R. § 3500.8* (requiring HUD-1 or HUD-1A statements pursuant to *12 U.S.C. § 2603*). The HUD-1As' validity is not questioned, and the settlement statements conclusively showed the fees had been "directly or indirectly charged, contracted for or received in connection" with the loans. *See § 408.233*. *Section 408.233* provides that no fees shall be charged except those it permits. Consequently, unless the fees were excepted as provided for in *section 408.233*, they were unlawful. *Id.*

Defendants argue that subsection *408.233.1(3)* excepts additional fees, other than those specifically enumerated, provided they are "[b]ona fide closing costs paid to third parties." They contend that because subsection *408.233.1(3)* states bona fide closing costs "shall include," it does not limit those types of costs but, rather, illustrates through examples. They rely on our statement in *State ex rel. Nixon v. Estes* [*38] that "[w]hile the plain meaning of the word 'include' may vary according to its context in a statute, it is ordinarily used as a term of enlargement, rather than a term of limitation." *108 S.W.3d 795, 800 (Mo. App. W.D. 2003)*. They contend "shall include" was legislative shorthand because "it would be impossible to anticipate, and too burdensome to list, all of the legitimate charges that might be incurred." They thus argue that they should have been permitted to present evidence that fees listed on the HUD-1As, such as a "custodial fee" and a "wire transfer fee," could have been paid to third parties, and thus permissible under *section 408.233*, even though not enumerated therein as an exception.

We do not agree. [HN16] Statutory interpretation is a question of law we review *de novo*. *R.L. Polk & Co. v. Mo. Dep't of Revenue, 309 S.W.3d 881, 884 (Mo. App. W.D. 2010)*. Our role in interpreting a statute is to determine the legislature's intent from the language it used and to give effect to that intent. *Estes, 108 S.W.3d at 798*. Defendants' interpretation of *408.233(3)* defeats the statute's purpose. [HN17] The MSMLA is a "comprehensive scheme." *U.S. Life Title Ins. Co. v. Brents, 676 S.W.2d 839, 841 (Mo. App. W.D. 1984)*. [*39] It offers a trade-off for lenders of second mortgage loans. *Thomas, 575 F.3d at 796 n.1*. It allows lenders to charge interest rates that would otherwise constitute usury, while prescribing the fees that a lender may legitimately charge. *Id.* at n.1. Lenders have the choice to avoid the fee proscriptions; *section 408.232.4* provides that if the loan rate itself is not usurious, *i.e*. otherwise lawful, then the limitations of the MSMLA do not apply.

The obvious intent is to allow high-interest rate second mortgage loans in order to open the flow of credit to higher-risk consumers, but to prohibit lenders of these loans from tacking on additional charges that prevent consumers from accurately comparing the real costs of competing loans. Defendants' argument thwarts that trade-off. [HN18] The MSMLA does not permit a lender to charge a consumer unlimited interest *and* fees for any service the lender purports to pay a third party. The fees that *section 408.233* excepts are those traditionally considered to be outside the context of usury. Some closing costs paid to third parties are excepted because an otherwise legal loan "does not become usurious by the fact that the transaction requires the borrower [*40] to pay an additional sum of money to a third person, provided that the lender in no way profits from such payment." *See* 15 CORBIN ON CONTRACTS § 87.5 (2003). Similarly, *section 408.233* excepts "amounts paid to the lender by any person, corporation or entity, other than the borrower, to reduce the rate on a second mortgage loan." Traditionally, sums not paid by the borrower do not make the transaction usurious. *See id.* Likewise, an insurance fee has been made permissible: fees do not generally make a loan usurious where they are for a service other than the loan itself, such as insurance premi-

ums. *See id.* at § 87.6. We read the Missouri Legislature's list here as deliberate and exclusive. Further, where the legislature has intended to exclude *all* third-party fees, it has stated so clearly: *section 408.052.1* excludes "bona fide expenses paid by the lender to any other person or entity ... for services actually performed in connection with a [residential real estate] loan" *without* enumerating a list of which fees are permissible. [17]

> 17 Household argues in its reply brief that a recent case from the Western District of Missouri "flatly disproves Plaintiffs' theory that the legislature never [*41] allowed any fee not specified in particular terms." *See Washington v. Countrywide Home Loans, Inc., No. 08-00459-CV-W-FJG, 2010 U.S. Dist. LEXIS 2623 (W.D. Mo. Jan. 13, 2010)*. Household's statement artfully edges on a misrepresentation of that court's ruling. In that case the court found a document processing fee paid to a third-party for preparation of a settlement statement and other closing documents fell within *section 408.233.1(3)(b)*'s allowance for third-party "[f]ees for preparation of a deed, settlement statement, or other documents." The court explicitly stated that because the fee fell within *408.233.1(3)(b)* it was "unnecessary at [that] time to decide whether the enumerated list in *Section 408.233.1(3)* [was] exclusive." *Washington, 2010 U.S. Dist. LEXIS, at *11*.

Further, we read statutory language in its context. *See R.L. Polk & Co., 309 S.W.3d at 885*. The cases on which Defendants rely to argue that "shall include" is a term of enlargement deal with contextual language quite different from subsection *408.233.1(3)*. For example, in *Estes* we noted that although "include" is ordinarily a term of enlargement, its plain meaning varies according to its context. *Estes, 108 S.W.3d at 800*. [*42] We interpreted "include" as used in the Missouri Merchandizing Practices Act (MMPA) to evidence the legislature's intent that it be a term of enlargement because of the statute's wide scope and the broad definitions provided in the preceding sentence. *Id. at 800*. Consequently, we find *Estes* distinguishable.

Given the purposes of the MSMLA, we believe the appropriate canon to apply here is embodied in the maxim [HN19] *expressio unis est exclusio alterius*: the express mention of one thing implies the exclusion of another. *See, e.g., Tracy v. Klausmeyer, 305 S.W.2d 84, 88 (Mo. App. 1957)*. More specifically, [HN20] "[w]hen statutory exceptions are plainly expressed, courts cannot add to the exceptions or exclusions beyond those explicitly provided." *Smith v. Mo. Local Gov't Emps. Ret. Sys., 235 S.W.3d 578, 582 (Mo. App. W.D. 2007)*. Because the legislature expressly listed those five bona fide closing costs it wished to except from *section 408.233*'s prohibition, the phrase "shall include" is limited to those costs. [18]

> 18 In *Estes*, at issue was "include" as used in the definition of "trade" or "commerce" in the MMPA:
>
> > 'Trade' or 'commerce', the advertising, offering for sale, sale, or distribution, or any [*43] combination thereof, of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situated. The terms 'trade' and 'commerce' include any trade or commerce directly or indirectly affecting the people of this state.
>
> *108 S.W.3d at 800* (quoting *§ 407.010 (7)*).

Defendants next contend that the trial court erred in directing a verdict because they should have been permitted to present evidence that some of the fees paid by Plaintiffs, although listed on the HUD-1As as "to [MCR]," were actually paid to third parties and permitted under the specific enumerations of *408.233.1(3)*. For example, on the Mitchells' loan a "Document preparation to [MCR]" fee would have been permissible under *408.233.1(3)(b)* had it been a bona fide fee paid to a third party, instead of to MCR. Defendants contend they were entitled to present evidence that despite the HUD1-As listing MCR as the recipient, the fees were actually advanced or reimbursed to third parties.

We do not agree as a matter of law. MCR charged these fees and plaintiffs financed them into the loans, the notes of which were payable to MCR. This fact is not disputed. [*44] A "payment" is a "delivery of money or its equivalent in either specific property or services by one person from whom it is due to another person to whom it is due." BLACK'S LAW DICTIONARY 1129 (6th ed. 1990). MCR consequently was the recipient of the fees. We do not interpret the legislature's language to be superfluous. *Hyde Park Hous. P'ship v. Dir. of Revenue, 850 S.W.2d 82, 84 (Mo. banc 1993)*. We presume the legislature "intended that every word, clause, sentence, and provision of a statute have effect." *Id.* Were lenders allowed to "advance," "reimburse," or "pass through" fees in order to transform those fees listed as paid to the lender into fees the borrower "paid to third parties," we see no limit on the characterizations of payment that could conceivably be drawn within the

MSMLA's statutory exception. MCR's argument would render the statute's "paid to third parties" language meaningless, contrary to the fact that the Missouri Legislature specifically excepted and enumerated five permissible fees, provided they were paid *by the borrower* to third parties.

Third, federal law specifically provides that the HUD-1As "must separately itemize each third party charge." *24 C.F.R. § 3500.8(b)(1)*. [*45] On the HUD-1As, MCR itemized some charges as third party charges--Plaintiffs did not challenge those charges, provided they were enumerated under subsection *408.233.1(3)*--and MCR itemized some charges as "to [MCR]." In essence, Defendants argue that although MCR listed certain fees as paid to itself while complying with federal law, it should now be permitted to re-characterize those same fees as fees MCR merely collected for third parties, in order to now argue MCR complied with state law. However, the HUD-1As were documents *evidenced as a matter of law* and showed *as a matter of law* that these fees were not third party charges. *See Coleman, 160 S.W.2d at 694*. Defendants cannot have it both ways. Consequently, we find Defendants' HUD-1As showed that the contested fees were paid to MCR.

Finally, Defendants argue that they should have been entitled to argue that the "loan discount" fee paid by Plaintiffs to MCR was not really a "loan discount" fee but instead represented an "origination fee" permissible under *408.233.1(6)*. We reject this argument for the same reasons discussed above: the HUD-1As conclusively listed these fees as "loan discount" fees. A separate itemization was made for "origination [*46] fees." MCR charged the Mitchells, for example, a loan origination fee of 1.5% and a separate loan discount fee of 3.5%. The trial court was not required to allow Defendants to attempt to re-characterize the fees to the jury.

Because the HUD-1As showed the fees MCR charged and the trial court correctly determined, as a matter of law, that the challenged fees were unlawful under the MSMLA, the court did not err in directing a verdict for Plaintiffs on these issues. Residential and Homecomings' second point, Household's third point, and Wachovia's fifth point are denied.

3: Defendants Were Not Entitled to Present a Voluntary Payment Defense.

Defendants next argue that the trial court erred by not permitting them to set forth a voluntary payment defense. Plaintiffs moved *in limine* to preclude Defendants from presenting the defense, which the trial court granted. The "voluntary payment doctrine is well established . . . and ... provides that a person who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud and duress, cannot recover it back, though the payment is made without a sufficient consideration, and under protest." *Huch v. Charter Commc'ns, Inc., 290 S.W.3d 721, 726 (Mo. banc 2009)* [*47] (internal quotation marks and citation omitted).

In *Huch*, the Missouri Supreme Court found that the trial court erred in applying the voluntary payment defense to plaintiffs' claim under the MMPA where the defendant cable company sent its customers channel guides unsolicited and then charged them for the guides. *Id. at 727*. In the case of statutes carrying heightened public policy considerations, the court stated, certain defenses are not available to defeat claims authorized by the act. *Id. at 725*. Because the purpose of the MMPA was to protect consumers, allowing Defendant to set forth a voluntary payment defense would nullify the legislature's intent and was therefore not valid. *Id. at 727*. Consequently, [HN21] the voluntary payment doctrine is not available as a defense to a claim under the MMPA. *Id.*

Likewise, allowing Defendants to present a voluntary payment defense would negate the MSMLA's provision for consumer protections. Borrowers could be charged illegal fees, and so long as Defendants listed those fees on closing documents, they would escape liability. This requires the borrower to investigate and inspect each fee before paying it, thereby shifting the burden of complying with [*48] the statute to the borrower. Such a reading is wholly inconsistent with the purposes of a consumer protection statute. As the Missouri Supreme Court stated in *Eisel v. Midwest BankCentre*, to allow a lender to present a voluntary payment defense to the customer's payment for an unlawful transaction would mean "that a customer, not a mortgage lender, would be burdened with the responsibility to recognize the [illegality] and be barred from recovery due to having made a voluntary payment." *230 S.W.3d 335, 339-40 (Mo. banc 2007)*. Such a result would be "illogical and inequitable." *Id. at 340*; *see also Carpenter v. Countrywide Home Loans, Inc., 250 S.W.3d 697, 703 (Mo. banc 2008)*. Residential and Homecomings' third point, Household's fifth point, and Wachovia's sixth point are denied.

4: The Jury Could Properly Find that Assignee Defendants Violated the MSMLA

In the fourth substantive issue, Assignee Defendants argue that the trial court erred in denying their motions for directed verdict or JNOV on Plaintiffs' claim that they violated the MSMLA by "directly or indirectly charg[ing], contract[ing] for, or receiv[ing] one or more" of the unlawful settlement charges or fees. In accord with *section 408.233.1*, [*49] the jury was instructed to find liability if it believed Residential, Household, and Wa-

chovia themselves "indirectly charged, contracted for, or received one or more" of the unlawful settlement charges or fees and Plaintiffs' class was thereby damaged.

Section 408.233.1 mandates:

> [HN22] No charge other than that permitted by *section 408.232* [19] shall be directly or indirectly charged, contracted for or received in connection with any second mortgage loan, except [the permitted fees]:

19 *Section 408.232* sets the allowable interest rates for complying loans.

[HN23] We review the evidence "in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." *Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758, 765 (Mo. banc 2007)* (internal quotation marks and citation omitted). We do not reverse the jury's findings absent "a complete lack of probative fact to support its conclusion." *Shobe v. Kelly, 279 S.W.3d 203, 209 (Mo. App. W.D. 2009)*

Assignee Defendants argue that the jury could not find that they indirectly charged, contracted for, or received the loan fees because, [*50] at most, Plaintiffs merely showed that they provided funds through their prior loan acquisitions from MCR and that the Missouri Legislature did not intend to "reach this type of activity." They further contend Plaintiffs' interpretation erroneously imposes "strict liability on any third party that provided funds the lender ultimately used in making a loan that violated the SMLA." We disagree.

[HN24] We presume "that the legislature included every word of a statute for a purpose, and that every word has meaning." *Robinson v. Advance Loans II, L.L.C., 290 S.W.3d 751, 755 (Mo. App. E.D. 2009)*. Defendants' arguments amount to a requirement that a defendant must have *directly* charged, contracted for, or received fees or interest in connection with the unlawful charges. The language of *section 408.233* is self-evident. Had the legislature intended to ascribe liability only if Defendants *directly* "charged, contracted for, or received," fees and unauthorized interest, it would not have ascribed liability where a defendant "directly *or indirectly*" engages in such conduct. We do not read the legislature's choice of language in a statute as surplusage. *Id.*

The legislature's intent to reach those loans [*51] that would otherwise escape liability through the secondary mortgage market is further evidenced by its broad choice of language: "charged, contracted for, *or* received." *§ 408.233.1* (emphasis added). Through the disjunctive, this language reaches even those entities that never received the fees or interest, never charged for them, or never contracted for them. Further, the legislature prohibited those charges merely made "in connection with" second mortgage loans. *See id.* This broad language additionally evidences the legislature's intent to cast a wide net over the market.

Nor do we agree that the most Plaintiffs showed was that Assignee Defendants provided funds through prior loan acquisitions. As Wachovia itself notes, "'indirectly' charging or receiving a fee most naturally means using a conduit or intermediary to charge or receive a fee on one's behalf." And, as noted [HN25] in the context of usury: "'The law will not tolerate any camouflage disguising a ... transaction to make it seem innocent." *Lucas v. Beco Homes, Inc., 494 S.W.2d 417, 422 (Mo. App. 1973)* (quoting *Webster v. Sterling Finance Co., 355 Mo. 193, 195 S.W.2d 509, 514-15 (Mo. 1946)*. "The law looks at the nature and substance of the transaction, [*52] and not to the color or form which the parties in their ingenuity have given it." *Id.* (*quoting Webster, 195 S.W.2d at 514-15*).

Plaintiffs argued that Assignee Defendants acted through MCR as their "correspondent" and introduced evidence that Assignee Defendants had significant control over the shape of the loans and the loan process. Plaintiffs presented Residential's "Master Commitment," in which Residential agreed to purchase loans from MCR complying with its "Client Guide"-a 500-plus page document setting forth loan terms. The Guide was incorporated into the sales contract between MCR and Residential and their agreement provided that: "All loans sold to Residential" would be governed by the agreement and the "Seller Guide." Household and MCR similarly entered into a "Bulk Continuing Loan Purchasing Agreement" in which Household set forth terms on which it would purchase MCR's loan portfolios, including the formula for the purchase price it would pay. Household's "Underwriting Guidelines" detailed criteria for the loans it would purchase in order to fulfill its goal of "providing a consistent secondary market for [the originator's] mortgage products." Its guidelines went so far as [*53] to include "Good-Bye Letters" for the loan originator to send to the borrowers when the loans were transferred. Plaintiffs also introduced Wachovia's "Sale & Purchase Agreement" with MCR that set forth its terms of purchase, as well as its "Home Improvement Correspondent Lending Correspondent/Lending Broadcast." This manual for correspondents set forth detailed lending criteria,

including worksheets for the correspondents and a phone audit script for correspondents to complete with the borrowers.

Plaintiffs argued that this control and the charging of the fees were essential to Assignee Defendants' business model. They contended that in order to securitize the loans, Assignee Defendants needed a large number of uniform loans; the originator needed a means to make a profit on its origination of the loans. By charging fees to the borrowers, the originator generated a profit and the Assignee Defendants were able to purchase the loans at a lower cost.

Although Defendants argue they were innocent of wrongdoing because they were not in privity with the borrowers until after the loans were acquired from MCR, the legislature clearly provided liability for "indirect" action in violating the MSMLA. [*54] Further, although Assignee Defendants argue they could not have "indirectly" acted through their role in MCR's loan originations, the jury was not required to believe them. Finally, the fees were rolled into the loan principal on which Defendants charged interest; this also supports a finding that Assignee Defendants "indirectly charged, contracted for or received" an unauthorized charge "in connection with" these second mortgage loans. We will not disturb the jury's verdict. Residential's fifth point, Household's seventh point, and Wachovia's eighth point are denied.

5: Defendants Were Barred from Recovering Interest on the Loans

In the fifth substantive issue on appeal, Defendants argue that the trial court erred in denying their motions for directed verdict or JNOV on Plaintiffs' claim that they violated *section 408.236* of the MSMLA by charging or collecting interest on the loans. The jury was instructed to find liability if it believed Defendants "directly or indirectly charged, contracted for, or received interest in connection with" the loans and Plaintiffs' class was thereby damaged.

[HN26] *Section 408.236* provides that "[a]ny person violating the provisions of *sections 408.231 to 408.241* [*55] shall be barred from recovery of any interest on the contract." [20] Defendants argue that the section only bars "recovery" of interest through legal process, thus prohibiting a violator from suing for the interest, rather than barring the lender from collecting the interest. They contend that Webster's Third New International Dictionary includes a definition of "recover," which is "to gain by legal process." They also point to Missouri statutes that authorize plaintiffs to "recover" certain monies in suits and provide for timelines within which such suits must be brought. *See § 408.030.2*; *§ 408.150*.

20 In its entirety, *section 408.236* provides:

> [HN27] Any person violating the provisions of *sections 408.231 to 408.241* shall be barred from recovery of any interest on the contract, except where such violations occurred either:
>
> (1) As a result of an accidental and bona fide error of computation; or
>
> (2) As a result of any acts done or omitted in reliance on a written interpretation of the provisions of *sections 408.231 to 408.241* by the division of finance.

[HN28] Statutory interpretation is a question of law we review *de novo*. *R.L. Polk & Co., 309 S.W.3d at 884*. Our primary rule in construing statutes is to [*56] determine the legislature's intent through the language used. *Schwartz, 197 S.W.3d at 172*. We look to the plain and ordinary meaning of words and phrases and look beyond such meaning only when the resulting interpretation is absurd. *Adkison, 143 S.W.3d at 33*.

Black's Law Dictionary offers both definitions of "recover" argued by the parties:

> 1. To get back or regain in full or in equivalence <<the landlord recovered higher operating costs by raising rent>.
>
> 2. To obtain by a judgment or other legal process <<the plaintiff recovered punitive damages in the lawsuit>.

BLACK'S LAW DICTIONARY 1389 (9th ed. 2009). "Recovery" is defined as:

> 1. The regaining or restoration of something lost or taken away.
>
> 2. The obtaining of a right to something (esp. damages) by a judgment or decree.

Id. Webster's similarly provides multiple definitions of "recover":

> 1. to get or win back . . .
>
> 2. to get well from . . .
>
> 3. to bring oneself back to normal balance or self-possession . . .
>
> 4. a: to make good the loss, injury, or cost of: make up for . . . b: to gain by legal process....

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1898 (1993). Webster's defines "recovery" as:

> 1. means of restoration: cure, remedy
>
> 2. a: the obtaining [*57] in a suit at law of a right to something by a verdict, decree, or judgment of court.

Id.

We believe "recover" and "recovery" have two meanings as relevant to the arguments here. The first, the plain definition, is to get or obtain something under a claim of right, to collect. The second, narrower, definition is to obtain through legal judgment.

[HN29] The MSMLA is a remedial statute. *See Schwartz, 197 S.W.3d at 178*. Remedial statutes are liberally construed "'so as' to meet the cases which are clearly within the spirit or reason of the law.'" *State ex rel. LeFevre v. Stubbs, 642 S.W.2d 103, 106 (Mo. banc 1982)* (quoting *State ex rel. Brown v. Bd. of Educ., 294 Mo. 106, 242 S.W. 85, 87 (Mo. banc 1922))*. Because the MSMLA is a remedial statute providing for criminal penalties, civil penalties, and "forfeiture," we find the broader definition of "recovery" to be applicable. As a result, we do not agree with Defendants that the section merely bars those who violate the MSMLA from suing for unpaid interest. Residential and Homecomings' sixth point and Wachovia's ninth point are therefore denied.

6: Assignee Defendants Were Not Derivatively Liable under Common Law

In the sixth substantive issue we address on appeal, [*58] Assignee Defendants argue the trial court erred in directing a verdict holding them liable under Missouri "common-law assignee liability" principles. [21] The trial court directed the jury that Assignee Defendants were liable to the class "for damages in this case based on [MCR's] violations of the [MSMLA]. Therefore . . . you must award plaintiffs' class compensatory damages." Although the record is somewhat ambiguous, it appears that in addition to HOEPA assignee liability, the partial directed verdict was also based on a "common law" assignee liability. [22] Because our review is of an issue of law, the standard of review is *de novo*. *Schwartz, 197 S.W.3d at 170*.

> 21 The parties do not dispute that HOEPA would hold them derivatively liable for MCR's violations of the MSMLA as MCR's assignees. *See Schwartz, 197 S.W.3d at 179*.
>
> 22 It is somewhat unclear from our review of the cited portions of the record whether the trial court accepted Plaintiffs' theory of common law assignee liability. Post-trial, the parties argued whether the directed verdict was also based on state law assignee liability. In a footnote to its judgment and order, the trial court corrected a relevant portion of the transcript. [*59] By virtue of their arguments, we find the parties concede on appeal that the trial court accepted the state-law assignee liability theory in addition to HOEPA assignee liability.

Assignee Defendants first contend that the mortgage loans are negotiable instruments [23] governed by Missouri's Commercial Code and that they could not be liable as assignees for the assignor's wrongdoing because the Code itself does not create such liability. While we agree that the promissory notes fall under Missouri's enactment of UCC Article 3, [24] we disagree with Assignee Defendants' resulting argument. The UCC does not act to the exclusion of the common law absent an express provision within the UCC. The Code itself provides that "[u]nless displaced by the particular provisions of this chapter, the principles of law and equity . . . shall supplement its provisions." *§ 400.1-103*; *see also Merz v. First Nat'l Bank of Franklin Cnty., 682 S.W.2d 500, 501 -02 (Mo. App. E.D. 1984)*. Thus, if there were a "common law" assignee-liability not displaced by the UCC, it would supplement the Code. [25]

> 23 Negotiable instruments are defined in *section 400.3-104*.
>
> 24 *See Merz v. First Nat'l Bank of Franklin Cnty., 682 S.W.2d 500, 501 -02 (Mo. App. E.D. 1984)*: [*60] "A promissory note is a written contract for the payment of money. When dealing with a promissory note, a court must first turn its attention to Article 3 of the Uniform Commercial Code." (internal citation omitted).
>
> 25 We also note that the section of the Code dealing with the Holder in Due Course doctrine provides that "it is subject to any law limiting status as a holder in due course in particular classes of transactions." *§ 400.3-302(g)*

However, we do not agree with Plaintiffs that there is a "common-law assignee liability" that would hold Assignee Defendants liable for MCR's acts in originating the loans, absent some affirmative act of their own. Plaintiffs rely on *Boulds v. Chase Auto Finance Corp., 266 S.W.3d 847, 850 (Mo. App. E.D. 2008)*, and *Lucas, 494 S.W.2d at 424*, to argue that a principle of "common law assignee liability" held Assignee Defendants liable for MCR's violation of the MSMLA. Neither case establishes such a proposition. In *Boulds*, the assignee of an automobile assignment contract was subject to the claims and defenses the buyer could assert against the original seller because of the Federal Trade Commission (FTC) holder rule, [26] which is not applicable to the [*61] present case. *266 S.W.3d at 852*. In *Lucas*, assignee liability was not asserted; the noteholder was a finance company directly involved in the making of the loan. *494 S.W.2d at 420-21*. Plaintiffs also rely on *Schwartz*. *See 197 S.W.3d at 179*. *Schwartz*, however, found that the assignee loan holders were derivatively liable as a result of HOEPA. *Id.*

> 26 The FTC holder rule preserves consumers' defenses against subsequent holders by requiring a contractual notice provision in relevant contracts that provides in part, **"[a]ny holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof**." *See 16 C.F.R. § 433.2*.

In fact, there is a dearth of authority advancing that "common law assignee liability" is a principle in Missouri or the idea that affirmative liability may be established merely through receiving assignment of loans violating consumer protection laws. Analogous authority points to the contrary. In *Anderson v. Curls* for example, decided prior to Missouri's adoption of the UCC, it was held that the sale of a usurious loan did not, by itself, vest a usurious [*62] loan in the purchaser; rather, bad faith on the part of the purchaser was required in order to render the loan subject to the defense of usury. *309 S.W.2d 692, 696 (Mo. App. 1958)*.

Although an assignee is said to "step into the shoes" of the assignor, this has generally been in accord with a principle of *nemo dat quod non habet* -one cannot transfer what one does not have-and thus it is said at common law that an assignee can acquire no greater right than the assignor held against the obligor. *See, e.g., Adams, 294 S.W.3d at 105*. It does not necessarily follow, however, that an assignment of a debt means that the assignee is subject to all of an obligor's causes of action against the assignor.

As noted by a district court in Pennsylvania: "affirmative claims of fraud and violations of consumer protection laws . . . are inappropriate to assert against an assignee where there are no allegations that the assignee had any contact with the mortgagor or made any representations to the mortgagor and the factual basis for the claims occurred prior to assignment of the mortgage loan." *Stoudt v. Alta Fin. Mortg., No. 08-CV-2643, 2009 U.S. Dist. LEXIS 19297, 2009 WL 661924, at *2 (E.D. Pa. Mar. 10, 2009)*. There are policy principles [*63] that support the concept of assignee liability in the secondary mortgage market in order to defeat the practice of laundering illegal loans. As noted by a Texas court:

> Assignees of home solicitation contracts must be held responsible for the acts of their assignors; otherwise, we are faced with the prospect of unscrupulous salesmen pressuring consumers into contracts, assigning the benefit of the contract for cash, and disappearing. The assignee would be able to collect without risk, when the assignor could not do so.

de la Fuente v. Home Sav. Ass'n, 669 S.W.2d 137, 146 (Tex. Ct. App. 1984), *overruled on other grounds by Home Sav. Ass'n v. Guerra, 733 S.W.2d 134, 136 (Tex. 1987)*. However, both Congress and the Missouri Legislature have addressed these concerns through HOEPA and the MSMLA. In HOEPA, Congress sought:

> to ensure that the High Cost Mortgage market polices itself. Unscrupulous lenders were limited in the past by their own capital resources. Today, however, with loans sold on a regular basis, one unscrupulous player can create havoc in a community by selling loans as fast as they are originated. Providing assignee liability will halt the flow of capital to such lenders.

S. Rep. [*64] No. 103-169, at 28 (1994) *reprinted in* 1994 U.S.C.C.A.N. 1881, 1912. It thus provided for assignee liability through HOEPA's negation of the holder in due course (HDC) defense. Likewise, the Missouri Legislature crafted a wide net, creating liability under the MSMLA for "directly or indirectly charg[ing], contract[ing] for or receiv[ing]" unlawful charges "in connection with any second mortgage loan." *§ 408.233.1*. While a lender may be held liable for directly or "indirectly" charging, contracting for, or receiving unlawful charges, "indirect" still implies the lender's liability for its own actions, not those of the loan originator.

Consequently, we believe the trial court erred to the extent it directed a partial verdict against Assignee Defendants based on a "common law assignee liability," holding them derivatively liable for MCR's conduct. Defendants' liability relied on either assignee liability for MCR's conduct through HOEPA or through their own violations of the MSMLA. [27] Therefore, Residential's fourth point, Household's fifth point, and Wachovia's seventh point are granted. [28]

27 Assignee Defendants further argue that they were entitled to use the "holder in due course" (HDC) [*65] defense to deflect derivatively liability for Plaintiffs' claims, except those claims springing from HOEPA. Because we have already determined that liability here required assignee liability through HOEPA or Defendants' own liability for violating the MSMLA, and HOEPA eliminates the HDC defense for loans subject to its provisions, Defendants' HDC issue is rendered moot. Consequently, Residential's seventh point, Household's eighth point, and Wachovia's tenth point are denied.

28 Because HOEPA provides for assignee liability and was an alternative basis for the partial directed verdict, our finding does not reverse the partial directed verdict.

Compensatory Damages

7: Plaintiffs Were Entitled to Recover Interest Paid

In the seventh issue, Defendants argue the trial court erred in denying their post-trial motions because, they contend, the MSMLA does not authorize interest to be recovered as compensatory damages. The trial court found as a matter of law that *section 408.236* "allows for the recovery of interest paid for violating the statute." Defendants, however, argue that the damages measure must be found within *section 408.562*.

Section 408.562 authorizes a private right of action for violation [*66] of the MSMLA and provides in relevant part:

> [HN30] In addition to any other civil remedies or penalties provided for by law, any person who suffers any loss of money or property as a result of any act, method or practice in violation of the provisions of *sections 408.100 to 408.561* may bring an action . . . to recover actual damages. The court may, in its discretion . . . provide such equitable relief as it deems necessary and proper.

Defendants contend that Plaintiffs did not pay interest "as a result of any act method or practice in violation" of the MSMLA and that, consequently, there was no causal connection allowing them to recover interest as damages under *section 408.562*.

The interest rate charged on the loans was made permissible by the MSMLA. Defendants were allowed to charge and collect interest exceeding Missouri's usury rate-so long as they complied with the MSMLA's fee restrictions. *See § 408.030*; *Thomas, 575 F.3d at 796 n.1*. However, Defendants did *not* comply with the MSMLA's fee restrictions; therefore, they were no longer excepted from compliance with Missouri's usury rate and the loans' interest rates became unlawful. *§ 408.030*. In absence of the MSMLA, usurious interest rates [*67] under *sections 408.050* and *408.030* would authorize Plaintiffs' damages at twice the amount of the excess interest. *See Affiliated Acceptance Corp. v. Boggs, 917 S.W.2d 652, 659 (Mo. App. W.D. 1996)*.

The MSMLA however, provides a specific remedy for a lender's violation of Missouri law governing second mortgages, in addition to the remedies provided by *section 408.562* for violating Missouri lending law. *Section 408.236* provides that by violating the MSMLA's fee limitations, Defendants were barred "from recovery of any interest on the contract." *Section 408.562* provides that as a default where Chapter 408 is violated, a person may seek actual damages "[*i*]*n addition to* any other civil remedies or penalties provided for by law." (emphasis added). Consequently, we reject Defendants' argument that *section 408.562* limited Plaintiffs' damages.

Moreover, Defendants' argument would limit Plaintiffs' recovery to the unlawful fees and the interest paid on those fees. This would allow a lender to retain its profit from charging a usurious interest rate, despite failing to comply with the MSMLA. We do not believe the legislature intended such a result. Consequently, the trial court did not err in [*68] finding Plaintiffs were entitled to the interest on their illegal loans as compensatory damages. Residential and Homecomings' ninth point, Household's ninth point, and Wachovia's twelfth point are denied.

P-1: Plaintiffs' Cross-Appeal; Past Interest Award Against Homecomings

In the first point of their cross-appeal, Plaintiffs argue the trial court erred in denying their motion for JNOV and alternative motion for additur in lieu of a new trial against Homecomings because, they contend, the jury's award of past interest against Homecomings should have been $ 3,414,962 rather than $ 682,992.

Plaintiffs' expert testified that total past interest on the loans was approximately $ 4 million. In their sum-

mary of damages, Plaintiffs attributed $ 3,414,962 in past interest to Residential, $ 319,219 in past interest to Household, and $ 309,550 in past interest to Wachovia. In pertinent part in Instruction 13, the jury was instructed that if it found against Residential:

> You must award plaintiffs' class such sum as you believe will fairly and justly compensate plaintiffs' class for any of the . . . damages that you believe plaintiffs' class sustained as a result of the conduct of [MCR] as instructed [*69] in [the partial directed verdict], or if you find in favor of plaintiffs' class under [the direct liability instruction]:
>
> . . . .
>
> The total amount of any interest paid by plaintiffs' class in connection with the [Residential] Loans[.]

In pertinent part in Instruction 18, the jury was instructed that if it found against Homecomings:

> You must award plaintiffs' class such sum as you believe will fairly and justly compensate plaintiffs' class for any of the . . . damages set forth below that you believe plaintiffs' class sustained as a result of the conduct of defendant [Homecomings]:
>
> . . . .
>
> The total amount of any interest paid by plaintiffs' class in connection with the [Residential] Loans[.]

In Verdict A, the jury awarded $ 3,414,962 of past interest against Residential. In Verdict B, the jury awarded $ 682,992 of past interest against Homecomings for the Residential Loans.

Plaintiffs argue that the undisputed evidence showed that $ 3,414,962 of interest had been paid in connection with the Residential loans. They contend that in addition to the $ 3,414,962 against Residential, they should receive $ 3,414,962 against Homecomings because Instruction 18 told the jury to "fairly and justly compensate [*70] plaintiff for the total amount of any interest paid in connection with the Residential loans."

[HN31] A plaintiff must be fully compensated for past or present injuries caused by the defendant when the injuries have been proven by a preponderance of the evidence. *Wiley v. Homfeld, 307 S.W.3d 145, 153 (Mo. App. W.D. 2009)*. A court may increase the size of a jury's verdict if it finds the award inadequate because it "is less than fair and reasonable compensation for the plaintiff's injuries and damages." *Massman Constr. Co. v. Mo. Highway & Transp. Comm'n, 914 S.W.2d 801, 802 (Mo. banc 1996)* (quoting *§ 537.068*).

In Instruction 18, the jury was required to compensate "plaintiffs' class for *any* of the damages . . . sustained *as a result of the conduct* of defendant Homecomings." (Emphasis added.) Plaintiffs misinterpret the word "any" to mean "all" and also circumvent the phrase "as a result of the conduct" of Homecomings. Verdict A and Verdict B assessed fault for different parties. [HN32] We review a jury instruction in its entirety, rather than in its parts. *McClintock v. Price, 294 S.W.2d 643, 645 (Mo. App. E.D. 1956)*. Viewing the instructions in their entirety, the jury was not required to enter the [*71] same award in Verdict B against Homecomings as it entered in Verdict A against Residential but, rather, the portion of the damages attributable to Homecomings' conduct.

Since "any" damages does not mean "all," the jury was entitled to award between $ 0 and $ 3,414,962, the full amount of the past interest on the Residential loans. As Plaintiffs' counsel argued to the jury: "Homecomings . . . didn't have anything to do with the fees. They just collected the interest." The jury assessed Homecomings' liability at twenty percent of $ 3,414,962, which was $ 682,992. [29] Consequently, the jury acted within its province. Plaintiffs' first point on cross-appeal is denied.

> 29 We note that during deliberation, the jury requested to know the percent Homecomings collected as its fees. The jury also awarded Plaintiffs twenty percent of the amount of future interest it assessed against Residential.

P-2: Plaintiffs' Cross-Appeal: Denial of Prejudgment Interest on Past Interest Paid

In their second point on cross-appeal, Plaintiffs contend that the trial court erred in denying prejudgment interest on their past interest award because they were entitled to such compensation under *section 408.020*. Relying [*72] on *Catron v. Columbia Mut. Ins. Co., 723 S.W.2d 5, 7 (Mo. banc 1987)*, under "principles of equity, fairness, and justice," the trial court awarded Plaintiffs prejudgment interest on the illegal fees assessed only, calculated from the date of the note. It denied Plaintiffs request for prejudgment interest on the interest paid on the loans, reasoning that Plaintiffs were awarded the interest and that the "principles of equity do not support an award of prejudgment interest on the past interest paid."

There are two theories under which Missouri courts award prejudgment interest. *Akers v. City of Oak Grove, 246 S.W.3d 916, 922 (Mo. banc 2008)*.

> One theory provides that an allowance of interest must be based upon either a statute or a contract, express or implied; except for actions in equity, in which case, it is a matter for the trial court's discretion. A second theory recognizes interest as an element of damages necessary to return plaintiffs to the status quo, compensating plaintiffs for the loss of use of money to which they were entitled.

Id. (internal citation omitted). The two theories are resolved "to some extent" by liberally interpreting the statutes that authorize recovery of prejudgment [*73] interest. *Id.*

We review [HN33] the statutory right to prejudgment interest pursuant to *section 408.020 de novo*. *Children Int'l. v. Ammon Painting Co., 215 S.W.3d 194, 202 (Mo. App. W.D. 2006)*. "Determination of the right to prejudgment interest is reviewed de novo because it is primarily a question of statutory interpretation and its application to undisputed facts." *Id.* We review the trial court's failure to award prejudgment interest under equitable principals for abuse of discretion. *See Carpenter, 250 S.W.3d at 704*.

[HN34] *Section 408.020* requires an award of prejudgment interest when a claim is either liquidated or ascertainable by computation or recognizable standards. *Children Int'l., 215 S.W.3d at 203*. "Awards of prejudgment interest are not discretionary; if the statute applies, the court must award prejudgment interest." *Id. Section 408.020* mandates that:

> *[HN35] Creditors shall be allowed to receive interest* at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's [*74] knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

(emphasis added).

Plaintiffs sought prejudgment interest on the illegal loan fees and past interest paid on the loans under, *inter alia*, the first provision of *section 408.020*: "for all moneys after they become due and payable, on written contracts." We agree that Plaintiffs claim for pre-judgment interest on the past interest paid was authorized by this provision. "The term 'creditor' . . . includes . . . every one having a . . . legal right to damages growing out of contract or tort." BLACK'S LAW DICTIONARY 368 (6th ed. 1990). *Section 408.236* barred Defendants from recovering interest on the loans; Plaintiffs consequently had a "legal right" to the unlawfully obtained interest as damages. [HN36] When *section 408.020* is applicable, an award of prejudgment interest is not discretionary; it is compelled. *Hawk Isolutions Group, Inc. v. Morris, 288 S.W.3d 758, 762 (Mo. App. E.D. 2009)*. Plaintiffs were consequently entitled to prejudgment interest on the interest paid.

Plaintiffs claim for pre-judgment interest is further buttressed by principles [*75] of equity and the policy behind prejudgment interest. [HN37] The purpose of prejudgment interest is to fully compensate the plaintiffs for the time-value of money. *Children Int'l., 215 S.W.3d at 203*. Prejudgment interest also serves to promote settlement and deter unnecessary delay in litigation. *Catron, 723 S.W.2d at 8*. Interest is awarded for the obligor's failure to pay money when payment is due, "even though the obligor refuses payment because the obligor questions legal liability for all or portions of the claim." *Midwest Division-OPRMC, LLC v. Department of Soc. Svcs., Div. of Med. Svcs., 241 S.W.3d 371, 384 (Mo. App. W.D. 2007)*. If the failure to pay money when due results in liability for prejudgment interest, it logically follows that interest is due on monies wrongfully collected. Defendants had use of the interest paid by plaintiffs, thereby denying plaintiffs the time-value of the money that *section 408.236* barred Defendants from collecting. To grant prejudgment interest on the unlawful fees and to deny prejudgment interest on the unlawful interest gave Plaintiffs an incomplete remedy. *Compare Carpenter, 250 S.W.3d at 704-05* (holding that because award of treble damages accomplished [*76] penalizing purpose of statute and plaintiffs recovered much more than their actual damages and interest on that amount, plaintiffs were not entitled to prejudgment interest on the treble damages).

Plaintiffs' second point on cross-appeal is granted. Plaintiffs are entitled to prejudgment interest on each of the interest payments from the date each payment was received by the Defendants. The parties offered conflicting calculations as to this amount and the apportionment between the Defendants; because the trial court denied prejudgment interest on the interest payments, the trial court made no factual findings on these issues. Therefore, we reverse the denial of prejudgment interest on Plaintiffs' interest payments and remand to the trial court for determination and judgment entered accordingly.

Submissibility of Punitive Damages

8: Plaintiffs Showed Culpability for Punitive Damages

In the eighth issue on appeal, Assignee Defendants argue that the trial court erred in denying their motions for directed verdict and JNOV because Plaintiffs failed to make a submissible case that Assignee Defendants' conduct reflected the culpability necessary to justify punitive damages.

[HN38] Whether the evidence [*77] was sufficient to submit a punitive damages claim to the jury is an issue we review *de novo*. *Rinehart v. Shelter Gen. Ins. Co., 261 S.W.3d 583, 595 (Mo. App. W.D. 2008)*. A submissible case for punitive damages is made if "the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity-that is, that it was highly probable-that the defendant's conduct was outrageous because of evil motive or reckless indifference." *Topper v. Midwest Div., Inc, 306 S.W.3d 117, 132 (Mo. App. W.D. 2010)* (internal quotation marks and citation omitted). We view the evidence in the light most favorable to the plaintiff, draw all reasonable inferences in favor of submission, and disregard contrary evidence and inferences. *Rinehart, 261 S.W.3d at 595*. "It is only where there is a complete absence of probative fact to support the jury's conclusion that this Court will decide the plaintiff did not make a submissible case." *Id.* (internal citation and quotations omitted).

Assignee Defendants contest the submission of punitive damages because, they argue, (1) Plaintiffs were not harmed by their failure to check for state [*78] law compliance because, had they checked, they simply would not have bought the loans, and (2) Plaintiffs adduced no evidence that Assignee Defendants acted with a culpable mental state in that they did not prove Defendants knew the loans violated state law. We do not agree with either proposition.

Plaintiffs' theory of punitive damages was that Defendants acted with reckless disregard for Plaintiffs' rights as Missouri consumers. In arguing for punitive damages, Plaintiffs contended that the Assignee Defendants' agreements with MCR gave them the right to require MCR to offer proof of state law compliance, yet Assignee Defendants never made that request. However, when Assignee Defendants' own interests were at stake, they diligently inspected the loans' compliance, refusing to rely on MCR's representations and warranties. For example, Assignee Defendants independently verified the loans' compliance with federal TILA disclosure requirements; failure to follow those requirements would have given the borrowers a right of rescission. Plaintiffs argued that it would have been a simple matter for Assignee Defendants to check the loans' compliance with state law and presented evidence that [*79] in the industry, a matrix of state laws on fees could be as short as a one-page spreadsheet. Plaintiffs also presented evidence to show that state law compliance by other lenders could be managed through quality control programs. Plaintiffs argued that, instead, Defendants turned a blind eye (1) "Because they didn't care. Because it didn't affect them" and (2) their business model benefitted from the illegal fees.

Plaintiffs were not required to prove Assignee Defendants "knew" the loans violated Missouri law. Rather, Plaintiffs' evidence and theory were sufficient for the jury to find Assignee Defendants acted with reckless disregard for Plaintiffs rights and to infer evil motive, i.e. a culpable mental state. *See id. at 132*. Consequently, Residential's tenth point, Household's twelfth point, and Wachovia's thirteenth point are denied.

9: Punitives: Defendants Had Notice of the MSMLA's Requirements

In the ninth issue, Assignee Defendants contend that the trial court erred in denying their motions for directed verdict and JNOV because they lacked notice that their conduct could subject them to punitive damages. They argue that the bases for their liability to Plaintiffs rested on "novel [*80] and unforeseeable" interpretations of Missouri law. They allege that no court had ever held that: (1) the charges in *section 408.233.1(3)* of the SMLA were exclusive; (2) HOEPA requires a lender to check loans it purchases for state law compliance; (3) *Adkinson* and *Avila* were inapplicable to Plaintiffs' loans; and (4) a lender could be liable for "indirectly" charging unlawful fees or recovering interest.

[HN39] Fair notice of proscribed conduct is required for punitive damages. *See Carpenter, 250 S.W.3d at 702*. This is because due process requires a person "receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)*.

We do not agree that Defendants lacked fair notice. First, *section 408.233* unambiguously allowed Defendants to charge otherwise usurious interest in exchange for following its prohibition against unauthorized fees. Defendants relied on this provision yet failed to check as to whether the fees complied with Missouri law. Their defense at trial was that it was industry practice to ignore the applicable law-yet on appeal Defendants argue that [*81] they lacked fair notice of that same law. "It will not be contended that ignorance of [a] statutory provision will excuse its violation . . ." *State v. Welch, 73 Mo. 284, 287 (1880)*. Moreover, we do not believe Defendants established that the statute failed to provide notice as to

its meaning. This is not a case, such as in *BMW*, where a defendant was relying on a reasonable interpretation of the law. Rather, Defendants were ignoring any responsibility to comply with Missouri law. Certainly, the conscious disregard of an obligation by the industry as a whole is not a defense.

Second, Assignee Defendants' liability as MCR's assignees under HOEPA is undisputed. It is disingenuous for Assignee Defendants to argue they were unaware they were obligated to check for state law compliance if they wished to protect themselves from liability for MCR's violations.

Third, we do not agree that "fair notice" required a court to hold *Adkinson* and *Avila* did not authorize Defendants to charge unlimited interest in Missouri. *Adkinson's* reasoning plainly depended on federal interstate banking law and could not reasonably be interpreted to allow a mortgage broker to charge unlimited interest and fees. *See* [*82] discussion of issue one, *supra*.

And fourth, the language of *section 408.233* plainly states, "[n]o charge other than that permitted by *section 408.232* shall be directly or indirectly charged, contracted for or received in connection with any second mortgage loan, except as provided in this section." *Section 408.236* directly states, "[a]ny person violating the provisions of *sections 408.231 to 408.241* shall be barred from recovery of any interest on the contract." *See, e.g.*, 1 Steven M. Geary, *Finance Law, Missouri*, CONSUMER LAW AND PRACTICE § 2.14 (MoBar Supp. 1995) (informing practitioners that *section 408.236* provides that "[a]n overcharge of interest or points results in a zero-interest contract unless the overcharge is a result of a bona fide error in computation.").

[HN40] *Section 408.240* provides for criminal penalty for violating these provisions. *Section 408.562* plainly authorizes a private right of action for violation of these provisions and punitive damages "[i]n addition to any other civil remedies or penalties provided by law." As the MSMLA states these terms in unambiguous language, Assignee Defendants have failed to show they lacked "fair notice" that they could be subjected to [*83] punitive damages for illegal loan practices. Residential and Homecomings' eleventh point, Household's fourteenth point, and Wachovia's fourteenth point are denied.

10: Punitive Damages Were Not Redundant

In the tenth issue, Assignee Defendants argue that a punitive damage award is "unfairly redundant and duplicative." [HN41] The purpose of punitive damages is to punish the defendant for outrageous conduct and to deter others from similar conduct. *Burnett v. Griffith, 769 S.W.2d 780, 787 (Mo. banc 1989)*. They argue that because Plaintiffs were awarded the past and future interest on their loans, sufficient penalty was already imposed to serve the purposes of punishment and deterrence.

We disagree. Plaintiffs' damages award of past and future interest was authorized by *section 408.236*, which provides that defendants who violate the SMLA's fee limitations are "barred from recovery of any interest on the contract." As discussed *supra*, this provision bans defendants from profiting from their unlawful acts by collecting interest on unlawful loans. By disallowing a defendant to collect interest on a loan with illegal terms, the section prevents the defendant from profiting by the illegal loan. In particular, [*84] it bars the defendant from collecting the otherwise unlawful interest. [HN42] While a statute may impose a penalty, this is not synonymous with the imposition of punitive damages. *Carpenter, 250 S.W.3d at 702*. Punitive damages differ in that they are "extraordinary and harsh." *Hess, 220 S.W.3d at 771* (internal quotation marks and citation omitted). Moreover, punitive damages require a showing that the defendant acted wantonly, willfully, or with a reckless disregard for the consequences, such that a culpable mental state may be inferred. *Burnett, 769 S.W.2d at 787*. *Section 408.236*'s ban does not require a culpable mental state. Consequently, we do not believe merely barring the defendant from recovering interest is duplicative of punitive damages.

Further, [HN43] the Missouri Legislature has "wide latitude to decide the severity of civil penalties for violations of law." *State v. Spilton, 315 S.W.3d 350, 358 (Mo. banc 2010)*. The legislature is consequently free to allow or disallow punitive damages. *Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140, 142 (Mo. banc 2005)*. In *section 408.562* the legislature authorized actual damages, punitive damages, attorney fees, and equitable relief "[i]n addition [*85] to any other civil remedies or penalties provided for by law." Because the damages are not duplicative and because the Missouri Legislature both barred lenders from recovering interest on illegal loans and expressly authorized punitive damages in addition to other remedies, Residential and Homecomings' twelfth point and Wachovia's fifteenth point are denied.

11: Punitives: the Disjunctive Instruction Was in Error.

In the eleventh issue on appeal, Assignee Defendants argue that they are entitled to remittitur because HOEPA caps the amount of damages that may be awarded in any action "made permissible" by HOEPA. *15 U.S.C. § 1641(d)(2)*. Although title *15 U.S.C. § 1641 (d)(1)* creates assignee liability for purchasers of HOEPA loans (with exceptions), the consumer's damages against the assignee are capped. [30] *See 15 U.S.C. § 1641(d)(2)*; *see also In re Murray, 239 B.R. 728, 735, 2239 B.R. 728 (Bankr. E.D. Pa. 1999)*. This functions "to prevent a con-

sumer's receiving [a] windfall due to the status of a violations victim." *In re Murray, 239 B.R. at 735*. The section "caps" the amount of damages a plaintiff may receive in an action "made permissible" by HOEPA to the total of the amount still owed by the plaintiff [*86] and the amount paid by the plaintiff "in connection with the transaction." *15 U.S.C. § 1641(d)(2)*. Assignee Defendants argue that Plaintiffs' punitive damages award was thus in error.

30 Title *15 U.S.C. § 1641(d)(2)* provides that:

> Notwithstanding any other provision of law, relief provided as a result of any action made permissible by paragraph (1) may not exceed--
>
> (A) with respect to actions based upon a violation of this subchapter, the amount specified in section 1640 of this title; and
>
> (B) with respect to all other causes of action, the sum of--
>
> (i) the amount of all remaining indebtedness; and
>
> (ii) the total amount paid by the consumer in connection with the transaction.

The trial court found that this provision did not cap damages because it states that the relief "may not exceed" rather than "shall not exceed." In the statutory context, we do not agree that the provision is permissive; the case law indicates otherwise.

[HN44] Where the jury is instructed in the alternative or the disjunctive on two grounds of liability, there must be a submissible case for both submissions. *Mabe ex rel. Magnuson v. Kelsey-Hayes Co., 844 S.W.2d 448, 456 (Mo. App. W.D. 1992)*; *see also Rakestraw v. Norris, 478 S.W.2d 409, 416 (Mo. App. 1972)*. [*87] This is because it is impossible to determine after the fact whether the jury's finding was made on the legally valid, or legally invalid, ground. The jury was instructed to award punitive damages: (1) if it believed the conduct of Assignee Defendants "as submitted in [the partial directed verdict] was outrageous because of [Assignee Defendants'] evil motive or reckless indifference to the rights of others"; or (2) if it found the same culpability for Assignee Defendants' own violations of the MSMLA. The mental state element in the first alternative is somewhat unclear as to whether the jury was to hold Assignee Defendants derivatively liable for MCR's culpable mental state or for their own mental state. Disregarding that ambiguity, we believe the jury was instructed in the alternative to award punitive damages either because: (1) Assignee Defendants were liable for MCR's conduct--which, because we have found no "common law assignee liability" applicable here would necessitate assignee liability through HOEPA; or (2) because Defendants were liable for their own culpability in their own acts violating the MSMLA.

Punitive damages for Assignee Defendants' own conduct could be submitted [*88] to the jury on independent state law grounds. HOEPA does not preempt state law claims. *See McCrae v. Com. Credit Corp., 892 F. Supp. 1385, 1386-87 (M.D. Ala. 1995)*. *15 U.S.C. § 1610(b)* provides that HOEPA "does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State." This includes, but is not limited to:

> laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply.

15 U.S.C. § 1610(b). Because Plaintiffs' theory that Defendants were directly liable for their own violations of state law relied on the MSMLA, rather than HOEPA assignee liability, it was not "made permissible" by HOEPA. Consequently, HOEPA would not "cap" a claim that Defendants themselves violated the MSMLA.

However, to the extent Defendants' liability depends on HOEPA assignee liability, it is subject to the cap within *15 U.S.C. § 1641(d)(2)*. Because we have found no "common law assignee liability" in Missouri [*89] for one who does no more than purchase a loan, if the jury awarded damages based on the partial directed verdict of assignee liability, it would necessarily be an ac-

tion "made permissible by HOEPA" and the "damages cap" in HOEPA would apply. *See 15 U.S.C. § 1641(d)(2)*. Consequently, the jury could not properly be instructed to award punitive damages based on assignee liability.

While the second theory of punitive damages on which the jury was instructed would support the verdict, [31] the first theory would not allow the verdict to stand. Here, it is impossible to ascertain whether the jury awarded punitive damages based on the erroneous theory of Assignee Defendants' common law liability for MCR's conduct, or the correct theory of Assignee Defendants' liability for their own conduct in violating the MSMLA. As a result, the punitive damages award must be reversed and remanded for retrial. Residential and Homecomings' eighth point, Household's sixteenth point, and Wachovia's eleventh point are granted. [32]

31 *Section 408.562* authorizes punitive damages for violation of the MSMLA.

32 We do not remit the [*90] award because punitive damages could properly be awarded on the second theory. Because we remand the punitive damages award for re-trial, we do not address Defendants' other points related to the punitive damages award.

Motions on Appeal

Plaintiffs request attorney fees incurred in the appeal [HN45] under *section 408.562*. That section provides in pertinent part: "The court may, in its discretion . . . award to the prevailing party in such action attorney's fees, based on the amount of time reasonably expended . . . ." *§ 408.562*. The "prevailing party" is the party "who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of its original contention." *Paradise v. Midwest Asphalt Coatings, Inc., 316 S.W.3d 327, 330 (Mo. App. W.D. 2010)* (internal quotation marks and citation omitted). Here, because we have affirmed Defendants' liability for compensatory damages, we find Plaintiffs are the prevailing party on appeal. In our discretion, we grant Plaintiffs' motion for attorney fees on appeal and remand to the trial court to determine an amount "based on the amount of time reasonably expended." [33]

33 Plaintiffs' [*91] other motions on appeal are denied.

Conclusion

We affirm the trial court's entry of judgment as to compensatory damages; reverse and remand its denial of prejudgment interest on Plaintiffs' past interest payments; reverse the punitive damages award for instructional error, and remand for a new trial as to punitive damages. Plaintiffs' motion for attorney fees on appeal is granted and remanded to the trial court to determine a reasonable amount.

Thomas H. Newton, Presiding Judge

Witt, J., and Willcox, Sp. J. concur.

Exhibit F

The Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
ADVANTA CORP., *et al.*,[1]	:	Case No. 09-13931 (KJC)
Debtors.	:	(Jointly Administered)
		Re: Docket No. _____

ORDER GRANTING SEVENTH OMNIBUS OBJECTION (SUBSTANTIVE) TO CLAIMS AGAINST ADVANTA MORTGAGE CORP. USA BASED ON CERTAIN CLASS ACTION LITIGATION CLAIMS

Upon the *Seventh Omnibus Objection (Substantive) to Claims Against Advanta Mortgage Corp. USA Based on Certain Class Action Litigation Claims*, dated May 6, 2011 (the "***Omnibus Objection***"), of FTI Consulting, Inc., in its capacity as Trustee of the AMCUSA Trust (the "***Trustee***"), the Trustee by and through its attorneys, Latham & Watkins LLP and Drinker Biddle & Reath LLP, is seeking entry of an order disallowing in their entirety the Seventh Omnibus Claims[2] asserted against the estate of Advanta Mortgage Corp., USA ("***AMCUSA***") in the above-referenced chapter 11 cases of Advanta Corp. and its affiliated debtors and debtors-in-possession (collectively, the "***Debtors***"), all as more fully set forth in the Omnibus Objection; and upon the Scruton Declaration, dated as of May 6, 2011; and this Court having jurisdiction to consider the Omnibus Objection and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and

[1] The Debtors in these jointly administered chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, were Advanta Corp. (2070) ("Advanta"), Advanta Investment Corp. (5627), Advanta Business Services Holding Corp. (4047), Advanta Business Services Corp. (3786), Advanta Shared Services Corp. (7074), Advanta Service Corp. (5625), Advanta Advertising Inc. (0186), Advantennis Corp. (2355), Advanta Mortgage Holding Company (5221), Advanta Auto Finance Corporation (6077), Advanta Mortgage Corp. USA (2654), Advanta Finance Corp. (8991), Advanta Ventures Inc. (5127), BE Corp. (8960), ideablob Corp. (0726), Advanta Credit Card Receivables Corp. (7955), Great Expectations International Inc. (0440), Great Expectations Franchise Corp. (3326), and Great Expectations Management Corp. (3328).

[2] Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Omnibus Objection.

consideration of the Omnibus Objection and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Omnibus Objection having been provided to the Notice Parties, and no other or further notice being required; and the Court having determined that the legal and factual bases set forth in the Omnibus Objection establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefore, it is

ORDERED that the Omnibus Objection is granted; and it is further

ORDERED that all objections and responses, if any, in opposition to the Omnibus Objection are overruled; and it is further

ORDERED that each POC listed on ***Exhibit 1*** attached hereto is hereby disallowed and expunged in its entirety; and it is further

ORDERED that the Debtors' claims agent, The Garden City Group, is authorized and directed to expunge the Seventh Omnibus Claims from the official claims registry pursuant to this Order and to make other changes to the official claims registry as necessary to reflect the terms of this Order; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from the interpretation and/or implementation of this Order.

Dated: June ____, 2011
Wilmington, Delaware

_____
THE HONORABLE KEVIN J. CAREY
CHIEF UNITED STATES BANKRUPTCY JUDGE

Exhibit G

Scruton Declaration

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
ADVANTA CORP., *et al.*,[1]	:	Case No. 09-13931 (KJC)
Debtors.	:	(Jointly Administered)

DECLARATION OF ANDREW SCRUTON PURSUANT TO 28 U.S.C. §1746 IN SUPPORT OF THE SEVENTH OMNIBUS OBJECTION (SUBSTANTIVE) TO CLAIMS AGAINST ADVANTA MORTGAGE CORP. USA BASED ON CERTAIN CLASS ACTION LITIGATION CLAIMS

ANDREW SCRUTON, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief:

1. I am a Senior Managing Director with FTI Consulting, Inc. ("***FTI***"). I am the duly appointed representative of FTI, the Trustee of the AMCUSA Trust (the "***Trustee***") pursuant to Section 5.4 of the Plan.[2] Unless otherwise stated in this Declaration, I have personal knowledge of the facts set forth herein.

2. The ongoing claims reconciliation process involves the collective effort of a team of the Trustee's professionals: FTI, Latham & Watkins LLP and Drinker Biddle & Reath LLP,

[1] The Debtors in these jointly administered chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, were Advanta Corp. (2070) ("Advanta"), Advanta Investment Corp. (5627), Advanta Business Services Holding Corp. (4047), Advanta Business Services Corp. (3786), Advanta Shared Services Corp. (7074), Advanta Service Corp. (5625), Advanta Advertising Inc. (0186), Advantennis Corp. (2355), Advanta Mortgage Holding Company (5221), Advanta Auto Finance Corporation (6077), Advanta Mortgage Corp. USA (2654), Advanta Finance Corp. (8991), Advanta Ventures Inc. (5127), BE Corp. (8960), ideablob Corp. (0726), Advanta Credit Card Receivables Corp. (7955), Great Expectations International Inc. (0440), Great Expectations Franchise Corp. (3326), and Great Expectations Management Corp. (3328).

[2] Capitalized terms used, but not otherwise defined in this Declaration, have the meaning ascribed to such terms in the Omnibus Objection.

and the Debtors' claims agent, The Garden City Group, Inc., to review proofs of claim filed against the Debtors (each, a "***Claim***," and collectively, the "***Claims***"). In preparation of the Trustee's *Seventh Omnibus Objection (Substantive) to Claims Against Advanta Mortgage Corp. USA Based on Certain Class Action Litigation Claims* (the "***Omnibus Objection***"), the Trustee's advisors and personnel who are familiar with the information contained herein have reviewed (i) the claims at issue in the Omnibus Objection that are listed on ***Exhibit A*** attached thereto, (ii) the Debtors' books and records, and (iii) the claims register. I have also personally reviewed the Omnibus Objection and the exhibits attached thereto. Accordingly, I am familiar with the information contained therein.

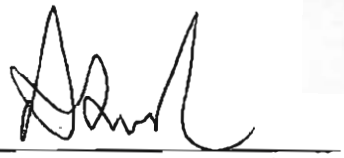
3. To the best of my knowledge, information and belief, the Seventh Omnibus Claims reflected in ***Exhibits A*** of the Omnibus Objection should be disallowed because they are based on claims in the Class Complaints which have been improperly asserted against AMCUSA. Therefore, the Seventh Omnibus Claims should be disallowed and expunged pursuant to sections 502 and 506 of the Bankruptcy Code, Rule 3007(d)(7) of the Bankruptcy Rules and Local Rule 3007-1(d)(v).

4. Based on the foregoing, and to the best of my knowledge, information and belief, the information contained in the Omnibus Objection and exhibit thereto is true and correct.

5. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

[Signature page to follow]

Executed on: May 6, 2011
Wilmington, Delaware

By: 

Andrew Scruton, on behalf
of FTI, the Trustee of the
AMCUSA Trust