UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
ADVANTA CORP., *et al.*,	:	Case No. 09-13931 (KJC)
Debtors.[1]	:	(Jointly Administered)
	:	**Hearing Date: November 2, 2011 @ 2:00 p.m. ET**
	:	**Response Deadline: October 11, 2011 @ 4:00 p.m. ET**
	:	**Re: Docket Nos. 1254, 1299, 1300**

TRUSTEE'S (A) OBJECTION TO MOTION OF CLASS CLAIMANTS FOR (I) ABSTENTION, AND (II) MODIFICATION OF THE PLAN INJUNCTION TO LITIGATE CLASS CLAIMS AND (B) CROSS-MOTION TO ESTIMATE CLASS CLAIMS

FTI Consulting, Inc., in its capacity as Trustee of the AMCUSA Trust[2] (the "Trustee"), by and through its attorneys, Latham & Watkins LLP and Drinker Biddle & Reath LLP, in the above-referenced chapter 11 cases of Advanta Corp. and its affiliated debtors and debtors-in-possession (collectively, the "Debtors"), hereby files this (i) response to the *Motion of Class Claimants for (I) Abstention, and (II) Modification of the Plan Injunction to Litigate Class Claims* [D.I. 1300] (the "Class Motion") against Advanta Mortgage Corp. USA ("AMCUSA") and (ii) cross-motion for an order estimating the Class Claimants' claims against AMCUSA at

[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 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 *Joint Plan Under Chapter 11 of the Bankruptcy Code* (as modified on February 28, 2011, the "Plan") [Docket No. 1185].

$0.00 for purposes of establishing reserves and making distributions under the Plan (together, the "Objection and Cross-Motion"). In support of this Objection and Cross-Motion, the Trustee respectfully represents as follows:

PRELIMINARY STATEMENT

1. The Gilmor and Baker Class Actions (as defined in the Class Motion) have been pending in the Missouri courts for almost twelve years, with no end in sight to the litigations. During the pendency of the Debtors' Chapter 11 Cases, Class Claimants (as defined in the Class Motion) filed proofs of claim and affirmatively voted in favor of confirmation of the Debtors' Plan, which expressly requires their claims to be adjudicated in this Court. Moreover, at no point in these Chapter 11 Cases did the Class Claimants request the automatic stay be lifted to prosecute the Gilmor and Baker Class Actions against AMCUSA or object to the Plan's injunction or retention of jurisdiction provisions. It was not until nearly five (5) months after the Effective Date, and in the face of an objection to the Class Claims brought by the Trustee, that the Class Claimants have belatedly changed their litigation tactics to argue that the Plan should be modified and the injunction lifted to allow the Class Claimants to continue their litigation against AMCUSA in the Missouri courts. This untimely and unwarranted request should not be honored. The Class Claimants seek to modify the terms of the confirmed Plan that they voted for so that the Trustee will be forced to spend considerable time and funds defending against meritless claims to the detriment of all the Debtors' creditors.[3]

[3] The Trustee filed the Omnibus Objection (as defined below) [D.I. 1254] setting forth its arguments regarding the underlying merits of the Class Claims. The Trustee will also file with this Court a reply to the Class Claimants' response to the Omnibus Objection in advance of the hearing on the Omnibus Objection, which will further demonstrate that there is no legal basis to hold AMCUSA liable for any damages, no less $11 million plus punitive damages and attorney fees, in connection with its duties as an independent, arms'-length loan servicer.

2. Stated simply, the Class Motion should be denied because it is barred by *res judicata* as the Debtors have already confirmed the Plan that establishes a claims allowance process and permanently enjoins the continuation of the Gilmor and Baker Class Actions in the Missouri state and federal district courts against AMCUSA and the Trustee. It is undisputed that the Class Claimants received proper notice of the Confirmation Hearing, the Disclosure Statement and the Plan with these provisions and **voted overwhelmingly to accept the Plan**. The issues raised in the Class Motion could have been raised as objections to the Plan at confirmation, but were not, and now the Plan has been substantially consummated and cannot be modified pursuant to section 1127(b) of the Bankruptcy Code. The Class Claimants cannot and do not contest the *res judicata* effect of the Confirmation Order or the Plan's jurisdictional and injunctive relief and should not be permitted to circumvent the express terms of the Plan and the Confirmation Order, the Bankruptcy Code's restrictions on plan modification or this Court's final judgment through abstention because the Plan they voted to accept no longer fits their litigation strategy.

3. The Class Claims present a discrete issue between the Class Claimants and the Trustee which can be resolved based on the pleadings that are and will be before this Court in connection with the Trustee's Omnibus Objection. Adjudication of the Class Claims is a core proceeding and should be completed pursuant to the Plan's claims allowance process. The Class Claimants assert no compelling reason for this Court to deviate from the confirmed Plan and grant abstention other than it being more advantageous to their litigation strategy. Granting the Class Motion, however, would create an unnecessary and expensive burden on the Trustee by requiring it to litigate two substantively identical complaints in both state and federal district court in Missouri on two completely different time tables over the next decade and also to retain

additional professionals to assist in its defense. Abstention is further obviated by the Class Claimants' own pleadings before this Court that set forth the alleged basis of their claims against AMCUSA and even narrow the issue underlying AMCUSA's alleged liability, neither of which has been done in the Missouri courts and will not likely be done for a significant amount of time; therefore, this Court is best positioned to adjudicate the Class Claims most efficiently.

4. For these reasons and other reasons discussed below, the Class Motion should be denied and the Trustee's Cross-Motion for estimation should be granted.

JURISDICTION AND VENUE

5. 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.

BACKGROUND

6. The Class Claimants filed proofs of claim with this Court (the "Class Claims") that stem from two separate class action litigations: the Baker Class Action and the Gilmor Class Action (each as defined in the Class Motion). The Gilmor and Baker Class Actions are premised on the same provisions of the Missouri Second Mortgage Loan Act (the "MSMLA") and the substance of the complaints filed in each case is "virtually identical." Class Response, at 5-6; Class Motion, at ¶ 8. The Class Claims were listed as contingent, unliquidated and disputed claims on the Debtors' Schedules.

7. The Gilmor Class Action was originally filed on June 27, 2000 in the Clay County Circuit Court, Missouri and is now pending in the United States District Court for the Western District of Missouri. The Baker Class Action was originally filed on June 28, 2000 in Clay County Circuit Court, Missouri, and after removal several times to the United States

District Court for the Western District of Missouri, is now pending in the Circuit Court of Clay County. AMCUSA made no filings in connection with the removal proceedings.

8. AMCUSA was added as a defendant to the Baker Class Action in February 2004 and to the Gilmor Class Action in June 2004. AMCUSA filed motions to dismiss in each action for lack of personal jurisdiction in February 2005 and January 2006, respectively. The motion to dismiss in the Gilmor Class Action was recently denied in January 2011, and the motion to dismiss in the Baker Class Action is still pending.

9. The Gilmor Class Action plaintiffs served discovery demands on AMCUSA in April 2006. AMCUSA served written objections and responses in June 2006 and produced documents in August 2006. In response to letters in 2008 from Class Claimants' counsel requesting certain follow-up information, AMCUSA supplemented its production and responses on April 30, 2008, July 11, 2008 and December 12, 2008.

10. The Baker Class Action plaintiffs served discovery demands on AMCUSA in March 2005. AMCUSA served written objections and responses in June 2005. In response to letters in 2008 from Class Claimants' counsel requesting certain follow-up information, AMCUSA supplemented its production on April 30, 2008. Since providing supplemental productions in 2008, no further discovery requests have been made to AMCUSA with respect to the Gilmor and Baker Class Actions.

11. On February 11, 2011, this Court confirmed the Plan by the Confirmation Order [D.I. 1173] and the Plan became effective on February 28, 2011 (the "Effective Date").

12. On May 6, 2011, the Trustee filed the *Seventh Omnibus Objection (Substantive) to Claims Against Advanta Mortgage Corp. USA Based on Certain Class Action Litigation*

Claims (the "Omnibus Objection") [D.I. 1254]. Each of the Class Claimants that filed a proof of claim in the Debtors' Chapter 11 Cases received notice of the Omnibus Objection.

13. On June 27, 2011, the Class Claimants, by and through their counsel, filed the *Class Claimants' Response to Seventh Omnibus Objection (Substantive) to Claims Against Advanta Mortgage Corp. USA Based on Certain Class Action Litigation Claims* [D.I. 1299] (the "Class Response"). On the same day, the Class Claimants also filed the Class Motion requesting that this Court (i) abstain from exercising its jurisdiction over the Class Claims pursuant to 28 U.S.C. § 1334(c)(1) and (ii) modify the injunction contained in the Plan to allow the Class Claims to be adjudicated in both state court and federal district court in Missouri. *See* Class Motion, at 7.

14. On August 9, 2011, the Class Claimants filed *Supplemental Authority Relating to Class Claimants' Response to Seventh Omnibus Objection (Substantive) to Claims Against Advanta Mortgage Corp. USA Based on Certain Class Action Litigation and Class Claimants' Motion for Abstention and Modification of the Plan Injunction to Litigate Class Claims* [D.I. 1307] (the "Class Supplemental Authority").

ARGUMENT

I. The Debtors' Plan and Confirmation Order are *Res Judicata* as to the Class Motion and Require its Denial.

15. The Class Motion should be denied as barred by *res judicata* because the Plan, which establishes a claims adjudication process and permanently enjoins the Class Claimants from continuing their litigation against AMCUSA in state court and federal district court in Missouri, has been confirmed and is a final, non-appealable order of this Court. Plan, at § 10.3; Confirmation Order, at ¶ 29; *see also In re Amtrol Holdings Inc.*, 384 B.R. 686, 694-95 (Bankr. D. Del. 2008) (even though plaintiffs could satisfy 10 of the 12 factors for permissive abstention,

abstention was denied because the confirmation order was final on all issues raised in support of abstention).

16. The Disclosure Statement and Plan, which each Class Claimant received and had timely notice of, clearly describe the claims adjudication process and what would happen to Claims and Causes of Action against the Debtors, including the Gilmor and Baker Class Actions, after the Effective Date. Specifically, the Plan provides in pertinent part:

> [A]ll Persons who have held, hold or may hold Claims . . . are **permanently enjoined, from and after the Effective Date, from (i) commencing or continuing in any manner any action** or other proceeding of any kind (whether directly, derivatively or otherwise) **against the Debtors** related to a Claim . . . . Such injunction shall extend to any successors of the Debtors and their respective properties and interest in properties . . . .

Plan, at § 10.3(a) (emphasis added); and further,

> **All Causes of Action** against the Debtors that are not otherwise released under the Plan . . . **shall be channeled to the applicable Liquidating Trusts** and be **subject to the jurisdiction of the Bankruptcy Court**. **Any Cause of Action brought against any Trust or any Trustee may only be brought before and heard by the Bankruptcy Court**.

Plan, at § 10.3(b) (emphasis added).

17. Pursuant to the Plan and the AMCUSA Trust Agreement, AMCUSA was dissolved on the Effective Date and the Trustee became the successor-in-interest to AMCUSA and also the party-in-interest as to all matters over which the Bankruptcy Court has jurisdiction or retains jurisdiction under the Plan. Plan, at § 5.3; AMCUSA Trust Agreement, at § 1.2(d). Therefore, it is clear from the Plan and the AMCUSA Trust Agreement that the Trustee is now the successor-in-interest to AMCUSA in the Gilmor and Baker Class Actions and those actions, as they pertain to the Class Claims asserted against AMCUSA, may **only** be brought and adjudicated before this Court.

18. Indeed, the effect of these provisions was clear enough to other creditors — specifically certain plaintiffs in the ERISA Litigation who objected to confirmation of the Plan and negotiated with the Debtors provisions that would preserve their rights to seek this Court's permission to prosecute and liquidate their claims against the Debtors in another forum with any judgment to be satisfied solely from applicable insurance proceeds. *See* Plan, at § 10.3(c). Here, the Class Claimants knew their claims were disputed by reference to the Debtors' Schedules and were deemed "Unresolved Claims" in the Plan as described in the Disclosure Statement. The Class Claimants, therefore, had every reason to expect the Trustee would object to the Class Claims and that the objection would be adjudicated by this Court and treated in accordance with the Plan, yet the Class Claimants took no steps to object to such treatment and in contrast voted to accept the Plan.[4]

19. This Court has previously denied a motion of creditors for permissive abstention to permit the continuation of a prepetition state court litigation against reorganized debtors where the confirmed plan contained claims adjudication procedures and a permanent injunction. *See Amtrol Holdings Inc*., 384 B.R. 686. In *Amtrol*, this Court denied the creditors' motion on the basis of *res judicata* despite the fact that it was "fully convinced" that the movant-creditors had demonstrated many factors weighing in favor of abstention, and held that "the facts and procedural setting will not permit this Court to grant the Motion." *Amtrol,* 384 B.R. at 694. This Court reasoned:

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[4] Notably, on May 4, 2011, the Class Claimants in the Gilmor Class Action filed a "consent motion" in the federal district court in Missouri dismissing a particular defendant from that case and acknowledging that "even though claims against Advanta cannot be further pursued in this case, Class Counsel has already filed claims against Advanta in the chapter 11 liquidating bankruptcy estate" and therefore "dismissal of [the defendant] will not affect the affected Class Members rights as against Advanta." *See* Plaintiff's Response to Federal Deposit Insurance Corporation's Motion to Dismiss Plaintiffs' Sixth Amended Petition as to the Federal Deposit Insurance Corporation and Unopposed Motion for Order Approving Voluntary Dismissal of the Federal Deposit Insurance Corporation, Gilmor v. Preferred Credit Corp., et al., No. 10-0189 (W.D. Mo. May 4, 2011), attached hereto as Exhibit B. Therefore, the Class Claimants were and are fully aware that they submitted the Class Claims to this Court's jurisdiction for adjudication and expressly understood the effect of the Plan they voted to accept.

> The [movants] cannot and do not contest the *res judicata* impact of the Confirmation Order and the injunction. Clearly, the Confirmation Order is a final judgment, they were parties and in the Abstention Motion the [movants] raise issues they could have raised as objections to the Plan. The requirements for *res judicata* are fully satisfied. *CoreStates Bank, N.A. v. Huls AM., Inc.*, 176 F.3d 187, 194 (3d Cir. 1999*); Donaldson v. Bernstein*, 104 F.3d 547 (3rd Cir. 1997) (confirmation order is *res judicata* as to all issues decided or which could have been decided). This Court concludes that the [movants] are enjoined from proceeding with the State Court Action and the [movants'] Claims are now before this Court.

Id. at 695.

20. This Court in *Amtrol* held that the *res judicata* effect of a confirmed plan, which established a claims adjudication process and an injunction against continuation of prepetition litigation, made analysis of the traditional factors weighing for or against abstention irrelevant and required this Court to adjudicate the movants' proofs of claim. As in *Amtrol*, the Class Claimants here had full and fair notice of the Plan and its treatment of the Class Claims and could have objected to the Plan by raising the arguments in the Class Motion, but chose not to do so. Moreover, even beyond *Amtrol*, the Class Claimants here affirmatively voted for the Plan, which included the very injunction and jurisdiction provisions that the Class Claimants complain of now.

21. Significantly, at no point in the Class Motion do the Class Claimants explain to the Trustee or to this Court why they voted for the Plan with these provisions or why they did not object to the Plan at confirmation if they did not want to be bound by the injunction and jurisdiction provisions of the Plan. Moreover, they do not explain to the Trustee or to this Court why they should not be bound by the Plan they voted for and that this Court confirmed. Rather, the Class Claimants simply ignore the fact that their requested relief seeks modification to the Plan and Confirmation Order that is not available under the Bankruptcy Code or controlling precedent. Thus, the Class Motion should be denied.

II. The Plan Cannot Be Modified Under the Bankruptcy Code.

22. It is undisputed that the Class Claimants received appropriate notice of the Disclosure Statement, the Plan, the Plan voting deadline and the Confirmation Hearing. Indeed, the Class Claimants voted to accept the Plan. The Plan was confirmed and pursuant to the terms of the Confirmation Order it was deemed substantially consummated on the Effective Date. Confirmation Order, at ¶ 45. The Confirmation Order is now a final, non-appealable order and the Class Claimants are thus bound by the terms of the Plan and Confirmation Order.

23. Notwithstanding the above, the Class Claimants are now asking this Court many months after substantial consummation to modify the Plan without offering any explanation as to why they should not be bound by the express terms of the Plan and this Court's confirmation of the Plan. Moreover, the Class Claimants completely ignore the restrictions on modification of a confirmed plan set forth in section 1127(b) of the Bankruptcy Code. *See*, *e.g.*, *In re Northfield Laboratories Inc*., 2010 Bankr. LEXIS 2635 (Bankr. D. Del. 2010) (holding that section 1127(b) was no basis for this Court to modify a confirmed plan where requirements of section 1127(b) were not met); *Almeroth v. Innovative Clinical Solutions, Ltd.* (*In re Innovative Clinical Solutions, Ltd*), 302 B.R. 136, 144 (Bankr. D. Del. 2003) (section "1127(b) provides the sole means for modifying a confirmed plan . . . ."); *In re Planet Hollywood Int'l*, 274 B.R. 391, 399-400 (Bankr. D. Del. 2001) (confirmed plan could only be modified pursuant to Bankruptcy Code section 1127(b)); *In re Rickel & Assocs., Inc.*, 260 B.R. 673, 678 (Bankr. S.D.N.Y. 2001) (movant could not bypass the requirements of section 1127(b) for modification of a confirmed plan); *see also Antiquities of Nevada, Inc. v. Bala Cynwyd Corp.* (*In re Antiquities of Nevada*), 173 B.R. 926, 928 (B.A.P. 9th Cir. 1994) (noting that in enacting section 1127(b), Congress intended to "safeguard the finality of plan confirmation").

24. Under section 1127(b), "only a plan proponent or the reorganized debtor may modify a confirmed plan." *Planet Hollywood*, 274 B.R. at 400 (emphasis added); *see also In re Innovative Clinical Solutions, Ltd*, 302 B.R. at 144 (denying motion to modify plan because plan was substantially consummated and party seeking modification was not plan proponent or reorganized debtor). Here, the Class Claimants are not the plan proponent and, therefore, lack standing to seek modification of the Plan. *In re Vencor, Inc*., 284 B.R. 79, 85 (Bankr. D. Del. 2005) (finding movant-creditors lacked standing to seek modification of a confirmed plan); *Planet Hollywood*, 274 B.R. at 400 (same).

25. Even if the Class Claimants had standing to modify the Plan, which they do not, the Plan was substantially consummated on the Effective Date and cannot be modified under the Bankruptcy Code. *See Plan Comm. of Nw. Corp. v. Nw. Corp.* (*In re Nw. Corp*.), 362 B.R. 131, 134 (D. Del. 2007) (modification of a plan "is prohibited by Section 1127(b) of the Bankruptcy Code because the Plan has been confirmed and substantially consummated"). Indeed, the Confirmation Order provides that "[o]n the Effective Date, the Plan shall be deemed substantially consummated under sections 1101 and 1127(b) of the Bankruptcy Code." Confirmation Order, at ¶ 45. The Class Claimants simply do not have standing to seek modification of the Plan they voted for and cannot ask for relief inconsistent therewith or disregard the specific commands of the Bankruptcy Code.

26. The Class Claimants nonetheless assert that this Court can modify the injunctive relief contained in the Plan at their request and cite as authority inapposite cases in other jurisdictions that have held a court can modify a discharge injunction it issues under section 524 of the Bankruptcy Code for good cause to allow a creditor to proceed against a chapter 7 debtor as a nominal defendant to recover from the debtor's insurance company. *See* Class Motion at, 18

citing *Hendrix v. Page*, 986 F.2d 195, 199 (7th Cir. 1993) (which affirms lower court's judgment to lift section 524 injunction to allow plaintiff to proceed nominally against debtor to prove insurer's liability and notes that "the injunction, as modified, will still protect [debtor] against any effort by the [plaintiff] to collect the judgment in that suit . . . from [the debtor]"), and *In re Schultz*, 251 B.R. 823, 829 (Bankr. E.D. Tex. 2000) (where court approved modification of discharge injunction to allow determination of insurer's liability).[5] However, these cases do not support modification of the injunction and jurisdiction provisions contained in the confirmed and substantially consummated Plan in these Chapter 11 Cases.

27. As an initial matter, the Debtors did not receive a section 524 discharge injunction under the Plan in these Chapter 11 Cases. The Class Claims were not discharged; rather, the Plan injunction only enjoins the Class Claimants from continuing their litigation in the Missouri state and federal district courts and requires the Class Claims to be heard by this Court, which expressly retained jurisdiction to adjudicate them under the terms of the Plan. Second, unlike the creditors in *Hendrix* and *Schultz*, the Class Claimants are not seeking to continue the Gilmor and Baker Class Actions in the Missouri state and federal district courts for purposes of recovering from the Debtors' insurance proceeds (which is what the ERISA Plaintiffs requested to do in these Chapter 11 Cases), rather, they are seeking to pursue their claims in the Missouri state and federal district courts for purposes of recovering on claims being asserted directly against the AMCUSA Trust assets. Under such circumstances, the cases cited are inapposite and do not provide authority for the Class Claimants' requested relief.

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[5] The Class Claimants also cite to a case holding that claims by the State of New York against a chapter 7 debtor related to securities violations were not dischargeable under section 524 and further that the State's action against the debtor is excepted from the section 524 discharge injunction by virtue of the police and regulatory exception. *See* Class Motion, at 17 citing *In re Fucilo*, 2002 WL 1008935, *1 (Bankr. S.D.N.Y. 2002). This case is simply inapplicable to whether this Court should modify the injunction and jurisdiction provisions contained in the Plan in these Chapter 11 Cases.

28. The Bankruptcy Code is clear on how and when a confirmed chapter 11 plan can be modified and under the circumstances of these Chapter 11 Cases such relief is not available. The Class Claimants have not provided this Court with any legal basis to grant their request and override the express terms of the Plan and the Confirmation Order and the substantive provisions of the Bankruptcy Code; therefore, the Class Claimants are bound by the Plan and its treatment of the Class Claims.

III. Permissive Abstention is Unwarranted.

29. As discussed above, the Trustee submits that the Class Claimants' request for abstention is barred by *res judicata*; however, assuming for the sake of argument it is not, the request for permissive abstention is unwarranted.

30. Permissive abstention is extraordinary relief. "Courts must be sparing in their exercise of permissive abstention, . . . and may abstain only for a few extraordinary and narrow exceptions." *CCM Pathfinder Pompano Bay, LLC v. Compass Fin. Partners LLC*, 396 B.R. 602, 607 (S.D.N.Y. 2008) (quotations and citations omitted); *see also Gwynedd Properties, Inc. v. Lower Gwynedd Township*, 970 F.2d 1195, 1199 (3d Cir. 1992) (mandating that "abstention rarely should be invoked"). This jurisdiction has set out a multi-factor test for determining when permissive abstention is appropriate: "(1) the effect or lack thereof on the efficient administration of the estate; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than section 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of an asserted 'core' proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be

entered in state court with enforcement left to the bankruptcy court; (9) the burden of this Court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of the right to a jury trial; and (12) the presence of non-debtor parties." *Crown Vill. Farm, LLC v. ARL, L.L.C.* (*In re Crown Vill. Farm, LLC*), 415 B.R. 86, 95-96 (Bankr. D. Del. 2009).

31. However, "analysis of permissive abstention is not merely a mathematical exercise," *Trans World Airlines, Inc. v. Karabu Corp*., 196 B.R. 711, 715 (Bankr. D. Del. 1996), and the decision is ultimately "'left up to the broad discretion of the bankruptcy court.'" *Republic Underwriters Ins. Co. v. DBSI Republic, LLC* (*In re DBSI, Inc.*), 409 B.R. 720, 729 (Bankr. D. Del. 2009) (citing *In re Encompass Servs*. 337 B.R. 864, 877 (Bankr. S.D. Tex. 2006)). Application of the foregoing factors and other relevant considerations clearly weigh against granting permissive abstention.

Factor 1 – This Court Can Adjudicate the Class Claims More Quickly and Efficiently Than Missouri State and Federal District Courts.

32. Resolution of the Class Claims ultimately involves the allowance or disallowance of Claims against AMCUSA and, therefore, will have a direct effect on the administration of the Trusts and implementation of the Plan. The Plan purposefully contains claims adjudication provisions to resolve the Class Claims in this Court in a coordinated manner and the Class Claimants were on notice as to how the claims adjudication process would work under the Plan. The Class Claimants expressly agreed to litigate their Class Claims against AMCUSA and/or the AMCUSA Trust before this Court pursuant to the Plan, but now they want to revisit that agreement because they believe it would be more favorable to them to litigate in the Missouri state and federal district courts. Deviating from the claims adjudication process set forth in the Plan, however, and forcing the Trustee to litigate two class actions in two different forums is

unreasonable when a streamlined and workable claims adjudication process, which has been approved by the Debtors' creditors and this Court, is available here.

33. The Class Claimants decided to change their litigation tactic nearly five months after confirmation because they apparently believe it would be better for them to return to the protracted litigation in the Missouri courts to pursue their claims against AMCUSA. This about-face is inappropriate given the Class Claimants knew their claims were disputed and still voted for the Plan. The Class Claimants essentially seek to undo their vote and obfuscate the issue before this Court by alluding to contentious discovery disputes and other pre-trial matters, which they contend are "directly relevant to the Class Claims," involving numerous defendants. *See* Class Motion, at 10. Suggesting that resolution of discovery disputes between the Class Claimants and other defendants will impact the Class Claims is a red herring; AMCUSA is not involved in any discovery disputes or motion practice concerning pre-trial matters (other than AMCUSA's motion to dismiss for lack of personal jurisdiction pending since 2005). The dispute underlying the Class Claims is between the Trustee and the Class Claimants and is not dependent on determining discovery disputes and/or the rights and liabilities of other defendants.[6]

34. Nonetheless, the Class Claimants assert that litigating the Class Claims in state and federal district courts in Missouri will be less expensive and more efficient for the Trustee because it can essentially 'ride the coattails' of the other class defendants and let them defend

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[6] The Class Claimants also make the argument that this Court would have to separately adjudicate each of the Class Claims and that the parties would have to "re-do" the discovery already completed in the Gilmor and Baker Class Actions and also "re-litigate some of the same discovery disputes and other pre-trial issues which have been resolved by the Missouri courts." Class Motion, at 11. This is simply not true and the Class Claimants provide no basis for these assertions. The Class Claimants are parties to two class actions that are premised on the same legal theory. Counsel for the Class Claimants filed one global response for all Class Claimants to the Omnibus Objection thus this Court need only make one determination on AMCUSA's liability with respect to the Class Claims. More fundamentally, the Class Claims can be adjudicated based on the pleadings that are and will be before this Court in connection with the Omnibus Objection.

against the claims asserted in the Gilmor and Baker Class Actions. *See* Class Motion, at 11. This suggested approach to dealing with multi-million dollar Claims asserted against AMCUSA when AMCUSA is entirely differently situated from the other class defendants is illogical, particularly where the outcome will impact administration of the Liquidating Trusts and distributions to creditors. If this Court grants the relief requested in the Class Motion, the Trustee will have to employ additional professionals, including a local law firm in Missouri, and expend considerable time and money preparing two motions for summary judgment on identical grounds and litigate the exact same issue in two separate forums on two completely different timetables. Having this Court adjudicate the Class Claims in a single forum now, **as was expressly contemplated by the injunction and jurisdiction provisions in the Plan and agreed to by the Class Claimants by their affirmative vote for the Plan**, will save the Trustee considerable time and expense and keep its attention focused on the expeditious liquidation of the Trust Assets and the ultimate dissolution of the AMCUSA Trust.

35. In reality, the state and federal district courts in Missouri do not have any further developed understanding of the legal theory underlying the Class Claims than this Court does because the complaints in each action do not set forth a cognizable theory of liability against AMCUSA. Instead, the complaints make conclusory statements and use "and/or" phraseology lumping all of the class defendants together under the same defined terms, which makes it impossible to determine what legal theories are being alleged against any particular defendant.[7] However, in the Class Response, the Class Claimants have changed their theory of liability and

[7] In fact, counsel for the Class Claimants filed a similar complaint in another case in the United States District Court for the Western District of Missouri alleging MSMLA violations against multiple defendants and that court found that the "use of 'and/or' phraseology and lumping of all defendants together in one category results in the reader being unable to determine the exact theory of liability as to each separate defendant" and required the plaintiffs to amend their complaint. *See Wong v. Bann-Cor Mortgage*, 2011 U.S. Dist LEXIS 61548, *40-41 (W.D. Mo. June 9, 2011), attached hereto as Exhibit C.

now assert that AMCUSA did not purchase the second mortgage loans and is not derivatively liable for violations of the MSMLA, but rather, AMCUSA is directly liable under the MSMLA for its own conduct as a loan servicer. Class Response, at 20- 21. By this seeming change in position by the Class Claimants on their theory of alleged liability against AMCUSA, it appears that the allegations contained in the complaints filed in the Gilmor and Baker Class Actions no longer accurately depict the Class Claimants' theories in that each alleges AMCUSA purchased the second mortgage loans and is derivatively liable under the MSMLA for the acts of the originating second mortgage lender.[8] By narrowing the issue in the Class Response, this Court is now better positioned to adjudicate the Class Claimants' theory of alleged liability against AMCUSA than any alternative forum.

36. The Trustee submits that it would be much more efficient for the parties to convey their respective positions on this issue to this Court in a single forum — as has already been done in connection with the pleadings before this Court and the Trustee's soon to be filed reply to the Class Response — and have this Court determine in connection with the Omnibus Objection whether the Class Claims should be allowed or disallowed against the AMCUSA Trust. Moreover, this Court is much more likely to make such determination well in advance of the date by which the AMCUSA Trust will dissolve because it is one forum dealing solely with the issue of whether AMCUSA's performance of its duties under its arms'-length servicing agreement violated the MSMLA. *See CCM Pathfinder Pompano Bay*, 396 B.R. 607 ("certain efficiencies inevitably will result from having one court decide identical or similar issues involving the same

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[8] Each complaint describes AMCUSA as an "Investor Defendant" and each "Investor Defendant" is defined to be an "Assignee Defendant" and each of the "Assignee Defendants" allegedly "purchased the Second Mortgage Loans that Century Financial made to Plaintiffs" and each is allegedly liable "as the purchaser and/or assignee and holder or as the trustee and/or agent for the assignees and holders . . . [of the second mortgage loans] . . . just as Century Financial is liable" in that the Assignee Defendants "stand in the shoes of Century Financial . . . and charged and received (and continue to charge and receive) illegal fees and costs . . . ." *See*, *e.g.*, Exhibit 3 to Class Claims, Fourth Amended Petition filed in the Baker Class Action, at ¶¶ 15, 105, 106 159.

parties"). Therefore, because this Court is better positioned to resolve the Class Claims in a timely and efficient manner, this factor weighs against granting abstention.

Factors 2 & 3 – The State Law Issue is Straightforward and Does Not Warrant Abstention.

37. This Court has previously held with respect to these factors, "[m]ost claim proceedings require that the Bankruptcy Court apply state law to determine if the claim is allowable; nonetheless, Congress has determined that the Bankruptcy Court has core jurisdiction over allowance of claims in bankruptcy cases . . . . Therefore, we conclude that while this factor favors abstention, it is not dispositive." *HQ Global Workplaces, Inc., v. The Bank of Nova Scotia* (*In re HQ Global Holdings, Inc*.), 293 B.R. 839, 845 (Bankr. D. Del. 2003) (denying motion to abstain from adjudicating claims filed against debtors based solely on state law). In this case, there are no novel, complex or idiosyncratic issues of state law that would warrant abstention.

38. The Class Claimants' theory essentially alleges that AMCUSA "charged," "contracted for" or "received" unauthorized closing fees in connection with the Class Claimants' second mortgage loans when it collected payments from the borrowers in its capacity as servicer for the second mortgage lender. Class Motion, at 11. This is not a complex issue. AMCUSA either did or did not charge, contract for or receive the payments it collected as a servicer on the second mortgage lender's behalf. While the terms "charged," "contracted for" and "received" are not defined in the MSMLA, Missouri case law holds that if courts cannot determine the meaning of a term from the MSMLA itself or case law interpreting the term in context of the MSMLA, they can look to the dictionary to derive the plain ordinary meaning of the term. *Avila v. Cmty. Bank of Va*., 143 S.W.3d 1, 5 (Mo. App. 2003) (using Merriam Webster's Collegiate Dictionary to define undefined words used in the MSMLA); *State v. Harris*, 156 S.W.3d 817,

823 (Mo. App. 2005) (using Webster's New World College Dictionary to define terms in the absence of a statutory definition).

39. The Trustee asserts that by looking at the terms of the arms'-length servicing agreement and considering the plain meaning of the words "charged," "contracted for" and "received," this Court can determine if AMCUSA, through performance of its arms'-length servicing duties, did in fact "charge," "contract for" or "receive" the fees charged to the borrowers at closing and owing to the second mortgage lenders. As set forth at length in the Omnibus Objection, the Trustee asserts that AMCUSA did not.

40. Moreover, as set forth in the Omnibus Objection, the United States District Court for the Western District of Missouri, where the Gilmor Class Action is pending, has already decided this issue and found that servicers in that case (i) did not own the second mortgage loans, (ii) were not entitled to the actual payments they collected as servicers and (iii) were not "related to, controlled by, or affiliated (other than [their contractual] business relationships) with the [second mortgage lenders]" and, therefore, held that the servicers "neither directly or indirectly charged, contracted for, or received any of the illegal fees imposed at the closing." *Mayo v. GMAC Mortgage LLC*, 2011 U.S. Dist. LEXIS 3349, **43 (W.D. Mo. Jan. 13, 2011). Similarly, it is undisputed that AMCUSA (i) did not own the second mortgage loans it serviced, (ii) was not entitled to keep the loan payments it collected and (iii) was not related to, controlled by or affiliated with any second mortgage lender. Furthermore, the plaintiffs in *Mayo*, represented by the same counsel representing the Class Claimants here, made the same arguments regarding servicer liability as set forth in the Class Response in a motion for reconsideration of the January 13, 2011 decision. *Mayo v. GMAC Mortgage LLC*, 2011 U.S. Dist. LEXIS 13066 (W.D. Mo. Feb. 9, 2011). The *Mayo* court denied that motion. *Id*. at *11. Given the existence of such clear

Missouri precedent, it is beyond dispute that this Court can easily apply such precedent and adjudicate the Class Claims in this forum.

41. The Class Response and the Class Supplemental Reply suggest that the *Mayo* decision with respect to servicer liability was essentially overruled by both *Mitchell v. Residential Funding*, 334 S.W.3d 477 (Mo. App. 2010) and *Washington v. Countrywide Home Loans, Inc.*, 2011 WL 3189435 (8th Cir. July 28, 2011), but the Class Claimants are incorrect in each instance. This Court can see plainly from reading the *Mitchell* decision that it decides 11 substantive issues on appeal and none of these issues deal with the question of whether a servicer is liable under the MSMLA for charging, contracting for or receiving unauthorized loan fees — that finding was only made with respect to certain second mortgage *lenders*, not servicers. *See Mitchell*, 334 S.W.3d. at 502 (finding that the "Assignee Defendants [such term is defined to include only the originating second mortgage lender and three assignee lenders] 'indirectly charged, contracted for or received' an unauthorized charge 'in connection with' these second mortgage loans"). Further, *Mitchell* did not involve a servicer like AMCUSA that was unrelated to the second mortgage lenders; rather, the servicer in *Mitchell* was a subsidiary of one of the second mortgage lenders. *Id*. at 485. In a footnote, the *Mitchell* court indicated the jury assessed certain damages against the subsidiary-servicer but gave no explanation as to the legal basis for doing so. *Id*. at 486 n.5. Therefore, *Mitchell* does not apply to the facts of this situation. Additionally, *Washington* did not discuss servicer liability or recognize a conflict between the *Mitchell* and *Mayo* courts on that issue; rather, it dealt with a $60 document processing/delivery fee and the court followed *Mitchell* "to resolve whether the $60 document/processing fee was an authorized charge," ultimately finding that it was not. *Washington*, 2011 WL 3189435, at *7. Therefore, *Washington* does not apply to the instant circumstances either, and the efforts of the

Class Claimants to obfuscate and complicate the clear Missouri precedent concerning servicer liability under the MSMLA should not be countenanced. [9]

42. Ultimately, this Court can consider the already existing relevant and determinative precedent on the issue, review the terms of the arms'-length servicing agreement and determine the plain meaning of the words "charge," "contract for" and "receive" to adjudicate the Class Claims. The parties do not need to return to the Missouri courts to resolve this issue. Therefore, while an issue of state law is involved, these factors are not dispositive and do not weigh in favor of granting abstention.

Factor 5 – There is a Separate Basis for Federal Court Jurisdiction

43. As noted above, the Gilmor Class Action is currently pending in federal district court and the Baker Class Action has been transferred to federal district court from time to time, establishing in each case that a federal court has original, diversity jurisdiction to hear the cases. *See also* 28 U.S.C. § 1332 (AMCUSA was a Delaware corporation, the Class Claimants are Missouri residents, and the amount in controversy exceeds $75,000). Furthermore, the Plan provides for this Court's retention of jurisdiction over the Class Claims. Plan, at § 10.3(a), (b). Therefore, this factor weighs against granting abstention.

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[9] On July 26, 2011, the *Mayo* court ordered re-briefing regarding whether any of its previous holdings are inconsistent with *Mitchell* and how it should proceed forward given the *Washington* decision. *See* Order Requesting Briefing in Light of Washington v. Countrywide Home Loans, Inc. at 3, Mayo v. UBS Real Estate Securities, Inc., et al., No. 08-00568 (W.D. Mo. July 29, 2011), attached hereto as Exhibit D. As described herein and to be more fully described in the Trustee's reply to the Class Response, since neither the *Mitchell* nor *Washington* decisions expressly addressed the issue of servicer liability, it is highly unlikely that any subsequent ruling from the *Mayo* court resulting from the requested re-briefing will change the *Mayo* court's existing decision concerning servicer liability – i.e., a non-loan holding loan servicer that is not related to, controlled by, or affiliated with the second mortgage lender is not liable under the MSMLA for directly or indirectly charging, contracting for, or receiving unauthorized fees imposed at closing. Notwithstanding, if the *Mayo* court does revisit its January 13, 2011 decision with respect to the issue of servicer liability, this Court is fully capable of considering any further insight the *Mayo* court provides on the issues of servicer liability under the MSMLA at such time.

Factor 6 – The Class Claims Are Related to the Bankruptcy Case.

44. The Class Claimants filed proofs claim in this Court seeking recovery against the Debtors — now the AMCUSA Trust — and these claims must be adjudicated in connection with the administration and ultimate dissolution of the Trusts created under the Plan. Determining the allowance of the Class Claims against AMCUSA is directly related to the bankruptcy and is a core matter. *Great American Ins. Co. v. Mobile Tool Int'l, Inc*. (*In re Mobile Tool Int'l*), 320 B.R. 552, 558 (Bankr. D. Del. 2005) (a dispute involving the "potential liabilities of the Estate [is] the very essence of a bankruptcy case"). In addition, the Class Claims include attorneys' fees and punitive damages and, as set forth in the Omnibus Objection, the right to the former is governed by the Bankruptcy Code, which does not allow unsecured creditors to recover post-petition attorneys' fees, and any claims with respect to the latter are subordinated under the Plan and applicable precedent. Therefore, this factor weighs against granting abstention.

Factor 7 – The Substance of the Dispute is a "Core Proceeding."

45. The substance of the dispute before this Court is the allowance of the Class Claims, which is a "core proceeding" by definition under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(B) (defining "allowance or disallowance of claims against the estate" as a "core proceeding"); *In re S.G. Phillips Constructors, Inc*., 45 F.3d 702, 705 (2d Cir. 1995) ("when a creditor files a proof of claim, the bankruptcy court has core jurisdiction to determine the claim"); *Amtrol*, 384 B.R. at 690 ("The allowance or disallowance of claims is a core function of bankruptcy); *In re BKW Sys. Inc.*, 66 B.R. 546, 548 (Bankr. D. N.H. 1986) ("[N]othing is more directly at the core of bankruptcy administration . . . than the quantification of all liabilities of the debtor"). Therefore, this factor weighs against granting abstention.

Factor 8 – Feasibility of Severing State Law from Core Bankruptcy Matters Does Not Favor Abstention.

46. The Class Claimants have not demonstrated that it would be possible to sever the state law issue from the core bankruptcy matter because determining the allowance or disallowance of the Class Claims necessarily involves adjudication of the state law issue. Therefore, this factor weighs against granting abstention.

Factor 9 – It Appears the Missouri Courts' Dockets are Equally If Not More Burdened Than This Court.

47. The Gilmor and Baker Class Actions have been pending nearly 12 years in the Missouri courts. AMCUSA's 2006 motion to dismiss in the Gilmor Class Action was just decided this year, five years after it was filed, and its 2005 motion to dismiss in the Baker Class Action is still pending. Based on the foregoing, it is more than likely that if this Court were to grant the Class Motion forcing the Trustee to prepare and file motions for summary judgment in the state and federal district courts in Missouri, those motions would sit on the courts' respective dockets for the indefinite future. The protracted nature of these cases alone suggests that these Missouri courts are heavily burdened. While this Court's docket may also be heavily burdened, it is a single docket free of the unrelated disputes involving other class defendants that have been filed, are currently pending or will be filed in the Gilmor and Baker Class Actions. This Court is the most efficient forum to quickly resolve the Class Claims; thus, this factor weighs against granting abstention.

Factor 10 – The Debtors Were Not Forum Shopping in Filing Their Bankruptcy Cases in This Court.

48. This factor is absent here as the Debtors' decision to file for bankruptcy had nothing to do with the Gilmor and Baker Class Actions. Moreover, the Class Claimants do not

allege that forum shopping motivated the Debtors to file bankruptcy in this Court. Therefore, this factor weighs against granting abstention.

Factor 11 – The Class Claimants Do Not Have a Right to a Jury Trial Regarding the Class Claims.

49. "It is beyond cavil that by filing a claim against a bankruptcy estate, a creditor submits that claim to the bankruptcy court's jurisdiction and even subordinates any right to a jury trial outside bankruptcy." *Amtrol*, 384 B.R. at 690 (citing *Langenkamp v. Culp*, 498 U.S. 42 (1990)). As the Class Claimants submitted the Class Claims to this Court, any right to a jury trial regarding the Class Claims is no longer relevant. Moreover, the Class Claimants assert that a right to a jury trial is "not the reason they seek abstention by this Court." Class Motion, at 17. Therefore, this factor weighs against granting abstention.

Factor 12 – The Class Claims Can Be Adjudicated By This Court Without Adversely Affecting the Rights of Non-Debtor Parties.

50. As discussed above, the Class Claimants' legal theory of alleged liability against AMCUSA is one of "direct" liability under the MSMLA. Whether AMCUSA did or did not "charge," "contract for" or "receive" unauthorized closing fees, and how much, is an issue between the Class Claimants and the Trustee. Moreover, AMCUSA is differently situated from the other class defendants in the Gilmor and Baker Class Actions — AMCUSA did not make second mortgage loans to the Class Claimants; AMCUSA did not own the Class Claimants' second mortgage loans; and AMCUSA was not related to, controlled by, or affiliated with the other class defendants. AMCUSA was merely an independent servicer that acted in accordance with *its* arms'-length servicing agreement and the issue in dispute is whether AMCUSA's conduct pursuant to the terms of *its* arms'-length servicing agreement constituted "charging, contracting for or receiving" unauthorized closing fees. Such determination will not have any

impact on whether other non-debtor parties did or did not directly charge, contract for or receive unauthorized closing fees based on their particular facts and circumstances; this disputed issue between the Trustee and the Class Claimants can be easily decided by this Court, therefore, this factor weighs against granting abstention.

51. In sum, even if the Class Claimants' request for permissive abstention was not barred by *res judicata* — which it is — a weighing of the various factors relevant to this Court's determination of whether to grant the extraordinary relief of permissive abstention makes it clear that permissive abstention is not remotely warranted in these circumstances. Indeed, as demonstrated above, virtually all of the factors, eleven of the twelve, are in favor of denying abstention and accordingly, this Court should deny the Class Motion.

IV. The Class Claims Should be Estimated at Zero for Purposes of Establishing Reserves and Making Distributions Under the Plan.

52. Notwithstanding the arguments above, in the event this Court is inclined to either abstain or not decide the Omnibus Objection at this time, the Trustee respectfully requests, pursuant to sections 105(a) and 502(c) of the Bankruptcy Code, that this Court estimate the Class Claims at zero ($0.00), unless and until they are liquidated and Allowed, for purposes of establishing any Unresolved Claims Reserve and for purposes of making the Initial Distribution and any subsequent distribution under the Plan.

53. Pursuant to Article 11 of the Plan and Paragraph 34 of the Confirmation Order, this Court retains jurisdiction to hear and determine requests for estimation of Unresolved Claims, which include the Class Claims. Plan, at Art. 11; Confirmation Order, at ¶ 34. Moreover, case law in this jurisdiction holds that this Court has complete discretion to set that amount, including setting it at zero. *See, e.g., JPMorgan Chase Bank v. U.S. Nat'l Bank Ass'n (In re Oakwood Homes*, 329 B.R. 19, 22 (D. Del. 2005) (affirming the court's conclusion based

on the facts and circumstances of the case, including the claimant's likelihood of success on appeal, that the reserve amount should be set at zero).

54. Bankruptcy courts may estimate contingent or unliquidated claims under section 502(c) of the Bankruptcy Code to (i) avoid the need to await the resolution of outside lawsuits to determine issues of liability or amounts owed by means of anticipating and estimating the likely outcome of these actions, and (ii) promote fair distribution to creditors through a realistic assessment of uncertain claims. *In re Continental Airlines*, 981 F.2d 1450, 1461 (5th Cir. 1993); *Bittner v. Borne Chemical Co*., 691 F.2d 134, 136 (3d Cir. 1982) ("Section 502(c)(1) of the Code embodies Congress' determination that the bankruptcy courts are better equipped to evaluate the evidence supporting a particular claim within the context of a particular bankruptcy proceeding"). In addition, estimation of a claim under section 502(c) is appropriate if liquidation of a claim "will take too long and unduly delay the distribution of the estate's assets." *In re New York Medical Group, P.C*., 265 B.R. 408, 415 (Bankr. S.D.N.Y. 2001); *In re Federal Mogul, Inc*., 330 B.R. 133, 154 (D. Del. 2005) ("[e]stimation helps the court 'avoid the need to await the resolution of outside lawsuits to determine issues of liability or amount owed by means of anticipating and estimating the likely outcome of these actions'").

55. The seminal case in the Third Circuit regarding estimation is *Bittner v. Borne Chemical Co*., 691 F.2d 134 (3d Cir. 1982). In *Bittner*, the Third Circuit found that the bankruptcy court correctly valued certain creditors' contingent and unliquidated claims at zero and temporarily disallowed such claims until final resolution of the underlying state court action where it determined that the creditors' chances of ultimately succeeding in their state court action were "uncertain at best." *Id*. at 137.

56. As stated in the Omnibus Objection and to be further demonstrated in the Trustee's reply to the Class Response, the Class Claims are ultimately meritless. Through conclusory statements, the Class Claimants assert that acting as an arms'-length, independent servicer and collecting payments from borrowers on behalf of a second mortgage lender (which is not affiliated with or otherwise related to AMCUSA) renders AMCUSA liable under the MSMLA for charging, contracting for and receiving unauthorized closing fees on the Class Claimants' second mortgage loans. Class Response, at 19. However, it is undisputed that AMCUSA's sole connection to the Class Claimants was through its role as an arms'-length, independent servicer for the Class Claimants' second mortgage lender. AMCUSA did not originate or own the Class Claimants' loans and was not entitled to keep loan payments it collected on behalf of the second mortgage lender. Indeed, the Class Claimants have already conceded that AMCUSA did not have an independent right to collect on the mortgages. *See* Omnibus Objection, at ¶ 24 (citing 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 attached as Exhibit C thereto). Instead, in exchange for providing arms'-length servicing duties to an unaffiliated second mortgage lender, AMCUSA received certain compensation from the second mortgage lender that was independently negotiated between AMCUSA and the second mortgage lender. Being compensated by a lender for acting as an arms'-length loan servicer is not prohibited under the MSMLA. Through its role as an independent arms'-length loan servicer, AMCUSA's compensation in connection with servicing the Class Claimants' loans totaled approximately $80,000. *Id*. at ¶ 26.

57. Notwithstanding the clear and undisputed facts, the Class Claimants assert more than $11 million in damages against AMCUSA, not including punitive damages and attorneys'

fees, and have not provided any legal authority to support such theories of recovery. Under currently existing Missouri precedent, there is no basis for finding AMCUSA liable under the MSMLA and, therefore, the chances of the Class Claimants ultimately succeeding in their Missouri state and federal court actions — or in this Court — with any recovery against AMCUSA is highly unlikely at best. Therefore, this Court should not require the Trustee to delay the administration and ultimate dissolution of the AMCUSA Trust and the other Liquidating Trusts created under the Plan, to postpone future distributions to Trust Beneficiaries or reserve funds for the indefinite future on account of the meritless Class Claims.

CONCLUSION

58. Based on the foregoing, the Trustee respectfully requests that this Court (i) deny the Class Motion, (ii) estimate the Class Claims at zero ($0.00), unless and until they are liquidated and Allowed, for purposes of establishing any Unresolved Claims Reserve and for purposes of making the Initial Distribution and any subsequent distribution under the Plan and (iii) grant such other relief as is appropriate and just. The Trustee reserves all of its rights to amend or supplement this Objection and Cross-Motion prior to or in connection with any hearing before this Court with respect to the Class Motion.

(Remainder of this page intentionally left blank)

WHEREFORE the Trustee respectfully requests that this Court (i) deny the Class Motion, (ii) estimate the Class Claims at zero ($0.00), unless and until they are liquidated and Allowed, for purposes of establishing any Unresolved Claims Reserve and for purposes of making the Initial Distribution and any subsequent distribution under the Plan and (iii) grant such other relief as is appropriate and just.

Dated: September 22, 2011
Wilmington, Delaware

DRINKER BIDDLE & REATH LLP

/s/ Howard A. Cohen

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Attorneys for FTI Consulting, Inc., Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
ADVANTA CORP., *et al.*,	:	Case No. 09-13931 (KJC)
Debtors.[1]	:	(Jointly Administered)
	:	**Hearing Date: November 2, 2011 @ 2:00 p.m. EDT**
	:	**Response Deadline: October 11, 2011 @ 4:00 p.m. EDT**
	:	**Re: Docket Nos. 1254, 1299, 1300**

NOTICE OF CROSS-MOTION

PLEASE TAKE NOTICE that on September 22, 2011, FTI Consulting, Inc. as the Trustee for the trusts established under the confirmed Plan of Reorganization of Advanta Corp., et al. (the "Trustee") filed the Trustee's (A) Objection to Motion of Class Claimants for (I) Abstention, and (II) Modification of the Plan Injunction to Litigate Class Claims and (B) Cross-Motion to Estimate Class Claims (the "Cross-Motion") with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801 (the "Bankruptcy Court").

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Cross-Motion must be in writing, filed with the Clerk of the Bankruptcy Court and served upon and received by the undersigned co-counsel for the Trustee at or before **4:00 p.m. (Eastern Time)**

[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 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).

on October 11, 2011.

PLEASE TAKE FURTHER NOTICE that if an objection is timely filed, served and received and such objection is not otherwise timely resolved, a hearing to consider such objection and the Cross-Motion will be held before The Honorable Kevin J. Carey at the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 5th Floor, Courtroom No. 5, Wilmington, Delaware 19801 on **November 2, 2011 at 2:00 p.m. (Eastern Time)**.

IF NO OBJECTIONS TO THE CROSS-MOTION ARE TIMELY FILED, SERVED AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE CROSS-MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: September 22, 2011
Wilmington, Delaware

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EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

ORDER (I) DENYING CLASS MOTION FOR ABSTENTION AND MODIFICATION OF PLAN INJUNCTION AND (II) GRANTING TRUSTEE'S MOTION TO ESTIMATE CLASS CLAIMS AT ZERO FOR PURPOSES OF ESTABLISHING RESERVES AND MAKING DISTRIBUTIONS UNDER THE PLAN

Upon the (i) objection (the "Objection") to the *Motion of Class Claimants for (I) Abstention, and (II) Modification of the Plan Injunction to Litigate Class Claims* [D.I. 1300] (the "Class Motion") and (ii) cross-motion (the "Cross-Motion" and together with the Objection, the "Objection and Cross-Motion") for an order estimating the Class Claimants' claims against AMCUSA[2] at $0.00 for purposes of establishing reserves and making distributions under the Plan, of FTI Consulting, Inc., in its capacity as Trustee of the AMCUSA Trust (the **"**Trustee"), all as more fully described in the Objection and Cross-Motion; and this Court having jurisdiction to consider the Objection and Cross-Motion and the relief therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Objection and Cross-Motion and the relief requested therein

---

[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 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 Objection and Cross-Motion.

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 Objection and Cross-Motion having been provided to those parties identified therein, and no other or further notice being required; and sufficient cause appearing therefore; it is hereby ORDERED that:

1. The Class Motion is DENIED in its entirety;

2. The Cross-Motion is GRANTED in its entirety;

3. The Class Claims shall be estimated at zero ($0.00), unless and until they are liquidated and Allowed, for purposes of establishing any Unresolved Claims Reserve and for purposes of making the Initial Distribution and any subsequent distribution under the Plan;

4. The rights of the Trustee to object to and defend against the Class Claims are fully preserved; and

5. This Court shall retain jurisdiction to hear and determine all matters arising from and or related to the implementation, interpretation, or enforcement of this Order.

Dated: Wilmington, Delaware
November [ ], 2011

_____
The Honorable Kevin J. Carey
United States Bankruptcy Judge

EXHIBIT B

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

MICHAEL AND SHELLIE GILMOR, et al.,	
Plaintiffs,	Case No. 4:10-cv-00189-ODS
vs.	
PREFERRED CREDIT CORPORATION, et al.,	
Defendants.	

PLAINTIFFS' RESPONSE TO
FEDERAL DEPOSIT INSURANCE CORPORATION'S
MOTION TO DISMISS PLAINTIFFS' SIXTH AMENDED PETITION AS TO THE FEDERAL DEPOSIT INSURANCE CORPORATION

AND

UNOPPOSED MOTION FOR ORDER APPROVING VOLUNTARY DISMISSAL OF THE FEDERAL DEPOSIT INSURANCE CORPORATION

The Federal Deposit Insurance Corporation, as receiver for Corus Bank, N.A., ("FDIC") has filed a motion to dismiss (Doc. 216, 218) that asserts that the Court lacks subject matter jurisdiction over it because Plaintiffs failed to participate in a "mandatory" claims administration process governed by various provisions of the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA"). For their response to the FDIC's Motion to Dismiss, Plaintiffs seek the Court's Order allowing them to voluntarily dismiss the FDIC from this lawsuit without prejudice pursuant to Rules 23(e) and 41(a)(1)(A), with each side to bear its own costs, pursuant to the agreement of the Plaintiffs and the FDIC.[1]

Rule 23(e) governs the instant matter. It states, in pertinent part:

[1] Plaintiffs do not contend that their voluntary dismissal of the FDIC from this lawsuit affects this Court's jurisdiction or justifies remanding this case. *See Order and Opinion Denying Plaintiffs' Motion to Remand* (Doc. 48), at p.5 & n.2.

> The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

Fed.R.Civ.P. 23(e).[2]

The parties have confirmed that there are **6** Class loans with **11** total Class members that were at one time held or acquired by Corus Bank and that are implicated by the FDIC's motion. Therefore, there are 11 Class members as to 6 Class loans who will be "bound by the proposal" to dismiss the FDIC from this lawsuit. Under the circumstances, the proposed dismissal of the FDIC from this lawsuit without prejudice and with each side to bear its own costs is "fair, reasonable and adequate" as Rule 23(e)(2) requires.

Plaintiffs note that the dismissal will not negatively affect these Class Members' recovery. Importantly, it does not appear that there was at the time of the origination of the receivership, is now, or will ever be, any money to recover from the Corus Bank receivership. Notably, as of December 31, 2009, the FDIC reported that the Corus Bank receivership had a *deficit* of $1,161,439,000 with respect to the receivership assets remaining to pay any liabilities

[2] Rule 41(a)(1)(A) generally governs the voluntary dismissal of an action without a Court Order. That Rule is specifically subject to "Rule 23(e)," which thus governs in this situation.

Rule 23(e)(4) states: "If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." Rule 23(e)(5) states: "Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval." Neither Rule 23(e)(4) nor (e)(5) appear applicable to the proposed dismissal before the Court.

that are higher in priority than the priority of any liability that would be created as a result of this lawsuit. *See* **Ex. 1.** Specifically, a judgment against the FDIC would be treated as "other general or senior liability of the institution" or a "Priority 3" type of claim. "Priority 1" claims are the "administrative expenses of the receiver." "Priority 2" claims are "any deposit liability of the institution." *See* 12 U.S.C. §1821(d)(11)(A). A "Priority 3" claim is paid only *after* the Priority 1 and 2 claims have been paid. *See* 12 U.S.C. §1821(d)(11)(A). By December 31, 2010, the deficit in assets remaining to pay Priority 1 and 2 claims grew to $1,209,556,000. *See* **Ex. 2**. A judgment in this lawsuit would not be recoverable from the FDIC because any judgment would be lower in priority than the limited and insufficient assets that are remaining to pay claims against the receivership. It makes little sense for Plaintiffs to expend time and money to litigate a Priority 3 claim against the FDIC when no monies will ever be recoverable from the FDIC.

Second, there are other Defendants remaining in this case against whom these 11 affected Class members as to 6 loans still have viable claims for complete relief. Those currently known Defendants are Impac Funding Corporation ("Impac") and the liquidating Chapter 11 bankruptcy estate of Advanta. All 11 affected Class Members have a viable claim against Impac as a purchaser/assignee who was prior in time to Corus Bank. Impac's liability is joint and several with that of Corus Bank and dismissal of Corus Bank will not affect their right of recovery in any way. As concerns Advanta, the servicer for the affected Class Members, the litigation is stayed because of the automatic bankruptcy stay. Thus dismissal of Corus Bank will not affect the affected Class Members rights as against Advanta as pursued in the litigation.[3] In sum, the

[3] Even though claims against Advanta cannot be further pursued in this case, Class Counsel has already filed claims against Advanta in the chapter 11 liquidating bankruptcy estate for 4 of the 6 affected Class loans for the Class members who returned the powers of attorney necessary to file their individual claims. Class Counsel could not file claims for 2 of the affected Class loans because the Class Members for those 2 loans did not return the requisite power of attorney although it was requested multiple times.

affected Class Members as to the 6 loans still have a reasonable likelihood of full recovery against these 2 remaining entities.

Therefore, given that the affected Class members are not likely to obtain any relief from the FDIC, but are likely to recover against existing Defendants, Plaintiffs believe that the proposed dismissal of the FDIC from this lawsuit is "fair, reasonable, and adequate" as Rule 23(e)(2) requires and will not result in any undue prejudice or burden to these 11 affected Class members as to the 6 Class loans.

The procedural requirements for the proposed dismissal of the FDIC from this lawsuit as set forth in Rule 23(e) are also satisfied. Rule 23(e)(1) states: "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." In its *Order and Opinion Denying Plaintiffs' Motion to Remand*, the Court addressed this requirement:

> The rule's purpose (as is the case with the Federal Rule's counterpart) is to insure adequate representation. The class members, having been advised as to the nature of the claims asserted on their behalf, should not have those claims dismissed at the insistence of a few class members. In a sense, the class representatives and class counsel have decided to settle the claims against Corus Bank for nothing. This is not the sort of decision that can be made unilaterally and without court approval.

Order and Opinion Denying Plaintiffs' Motion to Remand (Doc. 48), at p.4-5; *see also Ollier v. Sweetwater Union High Sch. Dist.*, 2010 WL 2756556, *1 (S.D. Cal. 2010)("although the Court has significant latitude to determine what type and the extent of notice that would be reasonable for voluntary dismissal of a claim, some form of notice to all class members who would be bound by the proposal is necessary.").

Here, the proposed dismissal of the FDIC is a product of "adequate representation" and was not made "unilaterally" or "at the insistence of a few class members." Specifically, the undersigned Counsel has communicated in writing with each of the Class members concerning the proposed dismissal of the FDIC from this lawsuit. In addition, Counsel for the Plaintiffs, R.

Frederick Walters, personally spoke with the borrowers as to 4 of the 6 Class loans. Therefore, the decision to dismiss the FDIC from this lawsuit is an informed decision made by the affected Class Members after consultation with the undersigned counsel.

Rule 23(e)(1) requires the Court to "direct notice" "in a reasonable manner" to the Class members "who would be bound by the proposal." The Rule is broadly written so as to include the "proposal" to "voluntarily dismiss" the Class members' claims as against the FDIC. The Rule does not address the *form* of notice required. In this regard, Plaintiffs respectfully suggest that, under the circumstances, their counsel's written and oral communications with the affected Class members are a reasonable means of providing "notice" to the affected Class members.[4]

Rule 23(e)(2) states: "If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." As noted above, in its *Order and Opinion Denying Plaintiffs' Motion to Remand* the Court indicated that the dismissal of Corus Bank from the lawsuit would require "court approval."[5]

Rule 23(e)(3) states: "The parties seeking approval must file a statement identifying any agreement made in connection with the proposal." The parties have orally agreed as of today's date to the proposed dismissal of the FDIC from this lawsuit without prejudice, with each party to bear their own costs. Thus, this motion is not opposed by the FDIC.

For all of these reasons, Plaintiffs respectfully suggest that their request to voluntarily dismiss the FDIC from this lawsuit without prejudice be approved with each side to bear its own costs.

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[4] Because those communications are protected by the attorney-client privilege, Plaintiffs do not suggest that the communications should be disseminated to the entire Class or made available to the Defendants. Instead, Plaintiffs suggest that, if the Court deems it necessary or appropriate to review the communications to decide the present motion, Plaintiffs request leave to provide the Court with copies of those written communications *in camera*.

[5] Because Rule 23(e)(2) also requires "a hearing," Plaintiffs also request the Court to set the matter to be heard in the manner it deems appropriate.

Date: May 4, 2011

Respectfully submitted,

WALTERS BENDER STROHBEHN
& VAUGHAN, P.C.

By: */s/ R. Frederick Walters*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 4th day of May, 2011, I electronically filed the above and foregoing document with the Clerk of Court of the Western District of Missouri using the Court's ECF system, which will send notification of said filing to all counsel of record who are ECF participants.

/s/ *R. Frederick Walters*

EXHIBIT C

*2011 U.S. Dist. LEXIS 61548, **

JAMES G. WONG, DANIEL R. AND WANDA D. JENSEN, and TERRY M. LOVETT (f/k/a TERRY M. BROOKS), individually and on behalf of all those similarly situated, Plaintiffs, v. BANN-COR MORTGAGE, et al., Defendants.

No. 10-1038-CV-W-FJG

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

2011 U.S. Dist. LEXIS 61548

June 9, 2011, Decided
June 9, 2011, Filed

PRIOR HISTORY: Wong v. Bann-Cor Mortg., 2011 U.S. Dist. LEXIS 41568 (W.D. Mo., Apr. 18, 2011)

CORE TERMS: personal jurisdiction, assignee, mortgage, mortgage loan, preemption, home loans, servicer, forum state's, servicing, leave to file, real estate, definite, lending, sur-reply, national bank, residents, funding, entities, origination, preempted, long-arm, class members, cause of action, involvement, secondary, preempt, reply, state laws, monthly payments, securitization

COUNSEL: **[*1]** For James G Wong, Daniel R. Jensen, Wanda D. Jensen, Terry Lovett, formerly known as, Plaintiffs: David M. Skeens, Garrett Mark Hodes, LEAD ATTORNEYS, Walters Bender Strohbehn & Vaughan, Kansas City, MO; J. Michael Vaughan, Kip D. Richards, Matthew Robert Crimmins, R. Frederick Walters, LEAD ATTORNEYS, Bruce V. Nguyen, Karen Wedel Renwick, Walters Bender Strohbehn & Vaughan P.C., Kansas City, MO.

For Wells Fargo Bank N.A., formerly and/or as successor to Norwest Bank Minnesota, NA, First Union National Bank and/or First Union Trust Company, Defendant: Brian Lamping, Maria G. Zschoche, LEAD ATTORNEYS, W. David Wells, Thompson Coburn, LLP, St. Louis, MO.

For US Bank NA, US Bank NA ND, Cityscape Home Equity Loan Trust Series 1997 B, Cityscape Home Equity Loan Trust Series 1997 C, Defendants: Mark A. Olthoff, LEAD ATTORNEY, Polsinelli Shughart PC, Kansas City, MO; Paul R. Dieseth, PRO HAC VICE, Peter W. Carter, PRO HAC VICE, Dorsey & Whitney LLP, Minneapolis, MN.

For Wilmington Trust Company, Firstplus Home Loan Owner Trust 1997-1, Firstplus Home Loan Owner Trust 1997-2, Firstplus Home Loan Owner Trust 1997-3, Firstplus Home Loan Owner Trust 1997-4, Firstplus Home Loan Owner Trust 1998-1, **[*2]** Firstplus Home Loan Owner Trust 1998-2, Firstplus Home Loan Owner Trust 1998-3, Firstplus Home Loan Owner Trust 1998-4, Firstplus Home Loan Owner Trust 1998-5, Empire Funding Home Loan Owner Trust 1997-1, Empire Funding Home Loan Owner Trust 1997-2, Empire Funding Home Loan Owner Trust 1997-3, Empire Funding Home Loan Owner Trust 1997-4, Empire Funding Home Loan Owner Trust 1998-1, Empire Funding Home Loan Owner Trust 1998-2, Empire Funding Home Loan Owner Trust 1998-3, Empire Funding Home Loan Owner Trust 1999-1, Countrywide Home Loans, Inc., Cityscape Home Loan Owner Trust 1997-2, Cityscape Home Loan Owner Trust 1997-3, Cityscape Home Loan Owner Trust 1997-4, Ocwen Loan Servicing, LLC, Defendants: Mark A. Olthoff, LEAD ATTORNEY, Polsinelli Shughart PC, Kansas City, MO.

For Countrywide Home Loan Trust 2001-HLV1, Defendant: Brian Lamping, Maria G. Zschoche,

W. David Wells, LEAD ATTORNEYS, Thompson Coburn, LLP, St. Louis, MO.

For PSB Lending Corporation, JPMorgan Chase Bank, N.A., as successor by merger to Banc One Financial Services, Inc., Defendants: Daniel L. McClain, LEAD ATTORNEY, Michele F. Sutton, Scharnhorst, Ast & Kennard, PC, Kansas City, MO.

For PSB Lending Home Loan Owner Trust **[*3]** 1997-3, PSB Lending Home Loan Owner Trust 1997-4, Defendant:s W. David Wells, LEAD ATTORNEY, Brian Lamping, Maria G. Zschoche, Thompson Coburn, LLP, St. Louis, MO.

For Residential Funding Company, LLC, GMAC Mortgage, LLC, J.P. Morgan Chase Bank, NA, individually and/or formerly or as successor to BANK ONE, NA and CHASE MANHATTAN BANK, Defendants: Catesby Ann Major, LEAD ATTORNEY, Bryan Cave, LLP-KCMO, Kansas City, MO; Craig S. O'Dear, Irvin Victor Belzer, LEAD ATTORNEYS, Bryan Cave LLP, Kansas City, MO.

For The Bank of New York Mellon Corporation, formerly known as The Bank of New York, Defendant: W. Perry Brandt, LEAD ATTORNEY, Catesby Ann Major, Bryan Cave, LLP-KCMO, Kansas City, MO.

For Citimortgage, Inc., Defendant: Jennifer A. Donnelli, LEAD ATTORNEY, Bryan Cave, LLP-KCMO, Kansas City, MO; Louis F. Bonacorsi, LEAD ATTORNEY, Bryan Cave-StL, St. Louis, MO.

For Franklin Credit Management Company, Defendant: Scott Greenberg, LEAD ATTORNEY, Sandberg Phoenix & von Gontard, St. Louis, MO; Andrew R. Kasnetz, PRO HAC VICE, St. Louis, MO; Natalie J. Kussart, PRO HAC VICE, St. Louis, MO.

For Old Republic Financial Acceptance Corporation, Defendant: J. Loyd Gattis , III, Leslie A. Greathouse, **[*4]** LEAD ATTORNEYS, Spencer Fane Britt & Browne LLP-KCMO, Kansas City, MO; Lara Pabst, LEAD ATTORNEY, Spencer, Fane, Britt & Browne, Kansas City, MO.

For Realtime Resolutions, Inc., Defendant: Leslie A. Greathouse, LEAD ATTORNEY, J. Loyd Gattis , III, Spencer Fane Britt & Browne LLP-KCMO, Kansas City, MO; Lara Pabst, LEAD ATTORNEY, Spencer, Fane, Britt & Browne, Kansas City, MO.

For Sovereign Bank, Defendant: Anthony S Newman, LEAD ATTORNEY, PRO HAC VICE, Pittsburgh, PA; Randolph G. Willis, LEAD ATTORNEY, Rasmussen, Willis, Dickey & Moore, LLC, Kansas City, MO; Roy Arnold, Thomas L. Allen, LEAD ATTORNEYS, PRO HAC VICE, Reed Smith, LLP-PA, Pittsburgh, PA.

JUDGES: Fernando J. Gaitan, Jr., Chief United States District Judge.

OPINION BY: Fernando J. Gaitan, Jr.

OPINION

ORDER

Pending before the Court are (1) Defendants' Motion to Dismiss Plaintiffs' Complaint for Lack of Personal Jurisdiction (Doc. No. 31); (2) Plaintiffs' Motion for Leave to File Sur-Reply to Motion to Dismiss for Lack of Personal Jurisdiction (Doc. No. 163); (3) Various Defendants' Motions to Dismiss for Lack of Standing (Doc. Nos 12, 124, 142, and 172), together with the joinders of many other defendants (Doc. Nos. 28, 33, 51, 116, 129, 130, 137, 148, 149, **[*5]** 155, 235 and 243); (4) Plaintiffs' Motion for Extension of Time to File a Response to Doc. No. 235 (Doc. No. 245); (5) Defendant Sovereign Bank's Motion to Dismiss Plaintiffs' Complaint as Preempted by Federal Law (Doc. No. 14); (6) Plaintiffs' Motion for Leave to File Sur-Reply to Motion to Dismiss Based on Preemption (Doc. No. 161); (7) Defendant U.S. Bank National Association's

Motion to Dismiss Plaintiffs' Complaint (Doc. No. 29), together with the joinders of other defendants (Doc. No. 51); (8) Defendant JPMorgan Chase Bank, N.A., as Former Trustee's Alternative Motion for More Definite Statement (Doc. No. 149); (9) Wilmington Trust Company's Motion to Dismiss (Doc. No. 178); (10) The Moving FirstPlus Trusts' Motion to Dismiss Plaintiffs' Petition for Lack of Personal Jurisdiction (Doc. No. 239); (11) The Moving Empire Funding Trusts' Motion to Dismiss Plaintiffs' Petition for Lack of Personal Jurisdiction (Doc. No. 241); and (12) Cityscape Home Loan Owner Trusts' and Trustee's Motion to Dismiss Plaintiffs' Complaint for Lack of Jurisdiction (Doc. No. 246).

I. Background

Plaintiffs John and Jeannette Schwartz and James G. Wong filed their original petition in this matter on October **[*6]** 31, 2000. See Doc. No. 47, Ex. 1. [1] The original petition brought claims under the Missouri Second Mortgage Loan Act ("MSMLA"), RSMo. §§ 408.231 et seq., alleging their subordinate lien loans originated by Bann-Cor Mortgage ("Bann-Cor") and secured by Missouri real estate violate the MSMLA. Plaintiffs assert they are all Missouri homeowners who were charged and paid excessive loan origination and other unauthorized fees in connection with a residential second mortgage loan that they obtained from Bann-Cor. (Doc. No. 1, Ex. 1). Plaintiffs allege that Bann-Cor violated the MSMLA, § 408.233.1 in the course of making its Missouri loans by "charging, contracting for and/or receiving" loan origination fees in excess of the applicable 2% or 5% cap, in addition to charging a number of other fees that the MSMLA, § 408.233.1, prohibited. (Doc. No. 1, Ex. 1, ¶¶ 69-75, 114-116). Named plaintiffs assert they were charged illegal fees that were wrapped up into their loan principal for the loans they entered into, using their Missouri residences for collateral. Plaintiffs assert these loans were then sold or assigned to other entities, and each of the plaintiffs received monthly mortgage statements **[*7]** in Missouri, and made monthly payments out of Missouri bank accounts.

FOOTNOTES

1 The Schwartz plaintiffs settled their claims against certain defendants in 2009, and are no longer parties to the case. See Doc. No. 1, p. 3, n. 1.

Plaintiffs are suing (1) Bann-Cor, the originating lender (and the lender in common for all the second mortgage loans at issue in this case); and (2) all of Bann-Cor's "downstream" assignees which purchased the loans on the "secondary market" from Bann-Cor, or an intervening assignee, shortly after Bann-Cor made the loans. Plaintiffs seek to recover all of the interest paid in connection with the loans and damages for the losses resulting from the violations of the MSMLA pursuant to RSMo. § 408.236 and/or § 408.562.

On March 25, 2008, Judge John M. Torrance of the Circuit Court of Jackson County, Missouri, entered an order certifying a plaintiff class, which was defined as "All individuals who, on or after October 31, 1994, obtained a 'Second Mortgage Loan' as defined by § 408.231.1 RSMo, from Bann-Cor Mortgage, secured by real property located in Missouri." Doc. No. 47, Ex. 2, p. 19. Additionally, on May 9, 2009, plaintiffs obtained a grant of partial summary judgment **[*8]** on certain liability issues against Bann-Cor (among others). See Doc. No. 95, Exs. 2 and 3.

On September 21, 2010, plaintiffs requested leave to file a Sixth Amended Petition, which was granted on September 22, 2010. The Sixth Amended Petition added as a named plaintiff Terry M. Lovett (f/k/a Terry M. Brooks). Plaintiffs also named the following defendants, besides the ones listed in the Fifth Amended Petition: US Bank, NA; US Bank, NA N.D.; Wilmington Trust Company; Firstplus Home Loan Owner Trusts 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, and 1998-5; Empire Funding Home Loan Owner Trusts 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, and 1999-1; Countrywide Home Loans, Inc.; Countrywide Home Loan Trust 2001-HLV1; Cityscape Home Loan Owner Trusts 1997-2, 1997-3, and 1997-4; Cityscape Home Equity Loan Trusts Series 1997 B and 1997 C; US Bank Trust,

N.A.; PSB Lending Corporation; PSB Lending Home Loan Owner Trusts 1997-3 and 1997-4; Residential Funding Company, LLC; GMAC Mortgage, LLC; J.P. Morgan Chase Bank, NA, individually and/or formerly or as successor to Banc One, NA and Chase Manhattan Bank; Home Loan Trust 1997-HI3; Amaximis Company, LLC; Amaximis **[*9]** Lending, LP; The Bank of New York Mellon Corporation (f/k/a The Bank of New York); Citimortgage, Inc.; Comstar Mortgage Corporation f/k/a Accubanc Mortgage Corp.; Franklin Credit Management Company; Ocwen Loan Servicing, LLC; Old Republic Financial Acceptance Corporation; Realtime Resolutions Inc.; Sovereign Bank; Wells Fargo Bank, N.A., formerly and/or as successor to Norwest Bank Minnesota, NA, First Union National Bank and/or First Union Trust Company; and Does 47 - 100.

On October 22, 2010, defendant Wells Fargo removed the action pursuant to the Class Action Fairness Act ("CAFA"). Now, various defendants' motions to dismiss are before the Court, which will consider each in turn.

II. Defendants' Motion to Dismiss Plaintiffs' Complaint for Lack of Personal Jurisdiction (Doc. No. 31) and Plaintiffs' Motion for Leave to File Sur-Reply to Motion to Dismiss for Lack of Personal Jurisdiction (Doc. No. 163)

As an initial matter, the Court will **DENY** plaintiffs' motion for leave to file a sur-reply (Doc. No. 163), as the Court finds it has sufficient information before it to make a decision on this issue.

Defendants Cityscape Home Equity Loan Trust Series 1997B and 1997C ("Cityscape Home Equity **[*10]** Trusts") and U.S. Bank National Association, in its capacity as Co-Owner Trustee and Indenture Trustee for the Cityscape Home Equity Trusts (collectively, "Moving Trusts") argue they should be dismissed because this Court lacks personal jurisdiction over them.

A. Background

According to defendants, the Moving Trusts are each express trusts created under New York law. See Affidavit of Pamela Weider ¶ 5 (attached as Ex. 1 to Doc. No. 31). Defendants Cityscape Home Equity Trust Series 1997-B and 1997-C are "real estate mortgage investment conduits" ("REMICs"), created to hold pools of mortgage loans and served as conduits of payments from Missouri borrowers to their investors. Doc. No. 88, Ex. K-1, at 3; Ex. L-1, at 3. The Moving Trusts do not have any offices or bank accounts in Missouri. Ex. 1 to Doc. No. 31, ¶¶ 6, 7. Payments received by the Moving Trusts are received outside of Missouri and any payments made by the Moving Trusts are made outside of Missouri. See id. ¶ 26. The Moving Trusts have no employees or agents in Missouri and no employee or agent of the Moving Trusts has traveled to Missouri on behalf of the Moving Trusts. See id. ¶ 8. The Moving Trusts are each limited to certain **[*11]** specified activities described in their respective Pooling & Servicing Agreements. See id. ¶ 9. [2] The Moving Trusts assert they do not have power or authority to engage in the "direct" collection of mortgage loans or the "direct" enforcement of rights under mortgages. See id. ¶¶ 17, 20. [3]

FOOTNOTES

[2] The Moving Trusts do not attach their Pooling and Servicing Agreements to their motion or suggestions in support; they only attach the affidavit of Pamela Weider, who asserts the contents of same.

[3] The Moving Trusts do not explain what they mean by "direct" collection or enforcement of rights; the Court finds it likely that they engage in "indirect" actions in Missouri at the very least, which are likely controlled by agents or others working on their behalf.

The Moving Trusts assert they do not transact any business in Missouri, nor do they own, lease or "use" [4] real estate in Missouri. See id. ¶¶ 10, 11. Each of the Moving Trusts holds several thousand second mortgage loans or owner trust estates secured by real property throughout the

United States. However, defendants assert only a small percentage of loans have Missouri borrowers. See, e.g., id. ¶ 11. [5] The Moving Trusts assert they have not made **[*12]** any contracts within Missouri, have not entered into second mortgage loans in Missouri, and have not loaned money to the Named Plaintiffs or class members. See id. ¶¶ 12, 14. The Moving Trusts assert that a loan servicer services the loans held by the Moving Trusts under provisions of the Pooling & Servicing Agreements which afford the servicers the "full power and authority, acting alone and/or through Sub-Servicers as provided in Section 3.02 hereof, to do or cause to be done any and all things in connection with such servicing and administration which it may deem necessary or desirable" and which direct the servicer "to collect all payments called for under the terms and provisions" of the mortgage loans. See id. ¶ 16. In this case, the Moving Defendants' "servicer" was initially their affiliate or parent, Cityscape Corp. Plaintiffs argue that this servicer, in sending out mortgage statements to Missouri residents, receiving payments from Missouri residents (immediately remitted to the trusts), and in many cases likely taking collection and foreclosure actions against Missouri residents was (by the parties' express agreement) acting at all times "in accordance with the instructions **[*13]** of the Trustee [Defendant U.S. Bank]" on behalf of the Defendant trusts. (Doc. No. 88, Ex. K-3, at III-2, Ex. L-4 at 66). The servicer, Cityscape Corp., was registered to do business in the State of Missouri (Doc. No. 88, Ex. N), which was a specific requirement of the Moving Defendants so that it could act in the State on their behalf. See Doc. No. 88, Ex. K-3 at II-22; Ex. L-4, at 58.

FOOTNOTES

[4] As will be seen below, plaintiffs argue that Moving Trusts' holding of their second mortgage loans constitutes a "use" of real estate sufficient to come within Missouri's long-arm statute.

[5] When one more closely examines defendants' documents, however, a different picture emerges. The Moving Trusts admit that they initially held 201 Missouri loans (representing 127 loans held by Series 1997-B and 74 Missouri loans held by Series 1997-C)(Doc. No. 31, Ex. 1, ¶ 11). The prospectus documents for the moving trust defendants disclose that the aggregate principal value of defendants' Missouri loan holdings totaled $3,693,438.47 and $2,795,177.66 for the 1997-B and 1997-C trusts, respectively. Doc. No. 88, Ex. K-1 at 23, 27; Ex. L-1, at 24, 29.

Physical custody of the notes is with a third-party custodian located **[*14]** outside of Missouri. See Doc. No. 31, Ex. 1 ¶ 20. The Moving Trusts assert they have not directly collected payments, fees or commissions from any Missouri consumers-including the named plaintiffs and putative class members. See id. ¶ 21. The Moving Trusts assert that no one on their behalf intentionally sought out loans from Missouri for inclusion in the trusts, nor did anyone on behalf of the Moving Trusts ever travel to Missouri in connection with loans held in trust. See id. ¶ 24. The Moving Trusts assert they do not advertise in Missouri, solicit customers or business in Missouri, or have a telephone listing or an address in Missouri, nor do they have a registered agent (or any agent) in the state of Missouri. See id. ¶¶ 25, 26. The Moving Trusts assert they did not negotiate any of the underlying loans to the Named Plaintiffs or class members, are not a signatory to any of the underlying loan documentation, had no involvement in setting any of the fees or other charges that are alleged to have been excessive and violate the Missouri Second Mortgage Loan Act or had any other involvement in connection with the making of the loans or the setting of their terms. See id. ¶¶ 28-31. **[*15]** The Moving Trusts further assert that, as the named plaintiffs do not allege specifically that the trustee (U.S. Bank, N.A.) holds any loans in its individual capacity, it follows that the trustee is likewise entitled to dismissal.

B. Standard

The party seeking to invoke the jurisdiction of a federal court bears the burden of establishing that jurisdiction exists. Mountaire Feeds, Inc. v. Agro Impex, S.A., 677 F.2d 651, 653 n. 3 (8th Cir. 1982)(citations omitted). "The allegations in the Complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting

affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party." Cantrell v. Extradition Corp. of Am., 789 F. Supp. 306, 308-09 (W.D. Mo. 1992). "To survive a motion to dismiss for lack of personal jurisdiction, the nonmoving party 'need only make a prima facie showing of jurisdiction.'" Bell Paper Box, Inc. v. U.S. Kids Inc., 22 F.3d 816, 818 (8th Cir. 1994) (quoting Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1387 (8th Cir. 1991)). **[*16]** "[T]here must . . . be some evidence upon which a prima facie showing of jurisdiction may be found to exist, thereby casting the burden on the moving party to demonstrate a lack of personal jurisdiction. Once jurisdiction has been controverted or denied, (the plaintiff has) the burden of proving such facts." Aaron Ferer & Sons Co. v. Diversified Metals Corp., 564 F.2d 1211, 1215 (8th Cir. 1977) (internal quotation marks omitted).

A federal court may assume jurisdiction over a foreign defendant only to the extent permitted by the forum state's long-arm statute and the Due Process Clause of the Constitution. Pecoraro v. Sky Ranch For Boys, Inc., 340 F.3d 558, 561 (8th Cir. 2003). Because Missouri's long-arm statute has been construed to permit jurisdiction to the fullest extent permitted by the Due Process Clause, see Porter v. Berall, 293 F.3d 1073, 1075 (8th Cir. 2002), the Court will "turn immediately to the question of whether the assertion of personal jurisdiction would violate due process." Id.

A state may exercise personal jurisdiction over a nonresident defendant consistent with due process when the defendant has "certain minimum contacts with [the forum state] such that the maintenance **[*17]** of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)(quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)). The defendant's contact with the forum state must be purposeful and such that defendant "should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). A party may anticipate being haled into court in a particular jurisdiction if it "purposefully directed" its activities at residents of the forum, and the litigation results from alleged injuries that "arise out of or relate to" those activities. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). Furthermore, the contacts with the forum state must be more than random, fortuitous or attenuated. Id. at 475. In addition, the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." Id. at 474, citing Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

With these principles in mind, the Court looks at five factors: (1) the nature and quality of the defendant's contacts with **[*18]** the forum state; (2) the quantity of contacts; (3) the relationship between the cause of action and the contacts; (4) the forum state's interest in providing a forum for its residents; and (5) the convenience of the parties. Pecoraro, 340 F.3d at 562. The first three factors are closely related and are of primary importance, while the last two factors are secondary. Id.

Two types of personal jurisdiction exist: general and specific. If the exercise of jurisdiction does not depend on the relationship between the cause of action and the defendant's contacts with the forum state, the exercise of personal jurisdiction is one of general jurisdiction. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 n.9, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). General jurisdiction is only applicable if the defendants' contacts with the forum state are continuous and systematic. Id. at 414. If, on the other hand, the cause of action arises out of or is related to a defendant's contacts with the forum state, the exercise of personal jurisdiction is one of specific jurisdiction. Id. at 414 n.8.

3. Analysis

Defendants allege that even if plaintiffs were permitted to rest on the allegations in the sixth amended petition, the **[*19]** sixth amended petition fails to include a single allegation as to the Moving Trusts' particular contacts with the state of Missouri, and is thus insufficient under

Twombly. Instead, plaintiffs have made generalized allegations as to all assignee defendants, not specific allegations as to each defendant. The Court finds that this problem can be cured by granting plaintiffs leave to amend their complaint, as will be discussed later in this Order in relation to the various parties' motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The Court will now turn to the issue of whether plaintiffs' assertion of jurisdiction violates due process. With respect to the five-factor test, defendant Moving Trusts assert that the nature, quantity and relationship between the cause of action and their contacts with Missouri are tenuous at best, as Moving Trusts did not impose the allegedly excessive origination fees, closing costs, or other settlement charges, and Moving Trusts did not make any loans to the plaintiff class, did not solicit class members to be borrowers, did not negotiate or sign any of the underlying loans, and had no involvement in setting the fees giving **[*20]** rise to plaintiffs' claims; instead, plaintiffs' claims against them are in their assignee capacity only, and plaintiffs cannot rely on defendant Bann-Cor's conduct as a means of subjecting other defendants to this Court's jurisdiction, because "it is hornbook law that [e]ach defendants' contact with the forum State must be assessed individually." Calder, 465 U.S. at 790. [6] Further, defendant Moving Trusts argue that their relationship to the forum state should be evaluated in relation to the small percentage of Missouri real estate loans assigned to the Moving Trusts, as Moving Trusts did not seek out loans from Missouri for inclusion in the securitizations, nor did they travel to Missouri in connection with same. Additionally, they argue that the nature of the security interest reflected in the real estate is insufficient to create a contact as Missouri is a state in which the law requires deeds of trust, and the mortgage holder has no beneficial interest in the real estate, and rather holds only a debt instrument (Fincher v. Miles Homes of Mo., Inc., 549 S.W.2d 848 (Mo. 1977); R.L. Sweet Lumber Co. v. E.L. Lane, Inc., 513 S.W.2d 365 (Mo. 1974)). Moving Trust defendants further argue **[*21]** that as the interest of Missouri in providing a forum for its residence and the convenience of the parties are only secondary considerations, personal jurisdiction should be found to be lacking.

FOOTNOTES

[6] In response, plaintiffs argue that Schwartz v. Bann-Cor Mortgage, 197 S.W.3d 168, 178 (Mo. App. 2006) found that plaintiffs' "claims against the assignee defendants are not foreclosed by any legal provision," and thus if Missouri courts have jurisdiction over Bann-Cor, they also have jurisdiction over assignees like the Moving Defendants. The Court concurs with Judge Smith, who found in Gilmor v. Preferred Credit Corp., 2011 U.S. Dist. LEXIS 3338, 2011 WL 111238, *3 (W.D. Mo. Jan. 13, 2011), that each defendant's contacts must be assessed separately. Plaintiffs also attempt to use alter ego or predecessor/successor liability theories to impute jurisdiction on the Moving Trust defendants; however, it does not appear from the record that these defendants are alter egos of or successors to Bann-Cor, and thus the Court rejects this theory.

Plaintiffs argue in response that the loan servicers ought to be considered agents of the moving defendants. The Court concurs with Judge Smith's well-reasoned opinion in Gilmor v. Preferred Credit Corp., 2011 U.S. Dist. LEXIS 3338, 2011 WL 111238, *3 (W.D. Mo. Jan. 13, 2011), **[*22]** in which Judge Smith found in a similar factual setting that the servicers could be found to be agents of trusts, finding:

> The servicing agents did not collect loan payments and keep them: they collected loan payments, kept a portion as payment for their services, and remitted the balance to the trusts. Thus, whether on their own or through others acting on their behalf, the trusts have purposely directed activity into Missouri to collect and enforce the loans. The nature of the loans as second mortgages is also significant, as the trusts (on their own or through others designated to act for them) would reasonably expect to be involved in litigation in Missouri to enforce their rights.

Id. Plaintiffs further argue quite persuasively that Lakin v. Prudential Sec., Inc., 348 F.3d 704, 709 (8th Cir. 2003), directs a different approach to assessing the amount of defendants' involvement in the state of Missouri; instead of considering the percentage of a company's business or assets in the given state, the proper "focus is on whether the defendant's activity in the forum state is continuous and systematic," considering the value of the loans in Missouri, the duration of the relationship, **[*23]** and the fact that the trusts have liens on real property. Id. at 709-10 (cited in Gilmor, 2011 U.S. Dist. LEXIS 3338, 2011 WL 111238, *3). Here, plaintiffs note that moving defendants initially held 201 Missouri loans, in the aggregate amounts of $3,693,438.47 for Series 1997-B and $2,795,177.66 for Series 1997-C. The Court considers these to be significant contacts with the state of Missouri, that are not random or fortuitous.

Therefore, the Court finds (1) the nature and quality of the defendants' contacts with the forum state are significant, as defendants (through their servicers acting in what appears to be an agent capacity) billed and accepted payments from Missouri residents on Missouri mortgages on a routine basis; (2) the quantity of contacts is sufficient to satisfy due process concerns; (3) the lawsuit is directly related to those contacts with the state of Missouri, as plaintiffs seek a return of interest paid on their loans; (4) Missouri has an interest in providing a forum for its residents; and (5) Missouri is a convenient location for plaintiffs (if not for defendants). See Pecoraro, 340 F.3d at 562. [7] The Moving Trusts' motion to dismiss for lack of personal jurisdiction (Doc. No. 31) will be **[*24] DENIED.**

FOOTNOTES

[7] If the Court were required to fit defendant's activities into Missouri's long-arm statute, that can be accomplished as well. Plaintiffs assert that defendants "used" real property under the Missouri long-arm statute, RSMo § 506.500.1(4), as defendants use the Missouri real estate to generate proceeds through mortgage payments, as well as use plaintiffs' property to secure the promissory notes for the second mortgage loans that they hold, and as a guarantee that plaintiffs will repay their loans as agreed. The Court concurs that the Moving Trust defendants' activities fall within Missouri's long-arm statute, as they constitute a "use . . . of any real estate situated in this state." See Gilmor, 2011 U.S. Dist. LEXIS 3338, 2011 WL 111238, *2, n.4.

III. Motions to Dismiss for Lack of Standing (Doc. Nos. 12, 124, 142, and 172) and Motion for Extension of Time (Doc. No. 245)

As an initial matter, plaintiffs' motion for extension of time (Doc. No. 245) will be **GRANTED**, and plaintiffs' response (Doc. No. 282) will be considered timely-filed.

To have Article III standing, plaintiffs must show (1) they have suffered an actual, concrete and particularized injury in fact; (2) there is a causal connection between the **[*25]** plaintiffs' injury and the particular defendant's alleged wrongful conduct; and (3) a likelihood that the named plaintiff's injury will be redressed by a favorable decision against the defendant. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); Hodak v. City of St. Peters, 535 F.3d 899, 903 (8th Cir. 2008).

Many defendants [8] have moved to dismiss for lack of standing, as they assert that they did not have any connection to the named plaintiffs' loans. In particular, defendants assert that they have not had any involvement in the origination or closing of the second mortgage loans to named plaintiffs, that they never purchased or held any of the named plaintiffs' loans, and that they never retained any interest, principal, or fees from the named plaintiffs in connection with their loans. See Doc. No. 12. The various defendants, therefore, assert that the named plaintiffs do not have Article III standing to sue them.

FOOTNOTES

[8] See Doc. Nos. 12, 28, 33, 51, 116, 124, 129, 130, 137, 142, 148, 149, 155, 172, 235, and 243. The Court will not undertake to discuss the various distinctions between the many defendants, as it would not make a difference as to the outcome of this Order.

Plaintiffs **[*26]** respond that defendants' arguments do not take into account that on March 25, 2008, the Circuit Court of Jackson County, Missouri certified a plaintiff class. Plaintiffs indicate that this suit is against one originating second mortgage lender (Bann-Cor Mortgage), and the entities that acquired Bann-Cor's tainted loans. Recently, another judge in this district rejected standing arguments virtually identical to those raised in these motions. See Gilmor v. Preferred Credit Corp., 2011 U.S. Dist. LEXIS 3338, 2011 WL 111238 (W.D. Mo. Jan. 13, 2011)(J. Smith). In that case, Judge Smith found that once a class had been certified, Article III's standing requirements "must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs." 2011 U.S. Dist. LEXIS 3338, [WL] at *6. Judge Smith further found that numerous federal courts of appeal have approved class actions where the claims stemmed from a common origin, but where some of the defendants did not interact with all named plaintiffs. 2011 U.S. Dist. LEXIS 3338, [WL] at *7 (citing Payton v. County of Kane, 308 F.3d 673, 675-76 (7th Cir. 2002); Moore v. Comfed Sav. Bank, 908 F.2d 834, 836 (11th Cir. 1990); Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 423-24 (6th Cir. 1998); **[*27]** Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993)). Judge Smith, however, deemed it prudent for plaintiffs to be allowed to designate additional class representatives to help ensure the requirements of Rule 23 were met. Id.

This Court concurs with Judge Smith's well-reasoned opinion. Accordingly, defendants' motions to dismiss for lack of standing (Doc. Nos. 12, 124, 142, and 172) will be **DENIED.** Plaintiffs shall file a motion for leave to file an amended complaint designating additional class representatives on or before **June 30, 2011.**

IV. Motion to Dismiss Due to HOLA Preemption (Doc. No. 14) and Motion for Leave to File Sur-Reply to same (Doc. No. 161)

As an initial matter, the Court will **DENY** plaintiffs' motion for leave to file a sur-reply (Doc. No. 161), as the Court finds it has sufficient information before it to make a decision on this issue.

Defendant Sovereign Bank moves for an Order dismissing plaintiff's Sixth Amended Petition due to Home Owners' Loan Act (12 U.S.C. § 1461, *et seq.*, hereafter "HOLA") preemption. Defendant Sovereign Bank asserts that it is a federally-chartered savings association (hereafter "FSA"), [9] and as such Sovereign Bank is governed by **[*28]** HOLA. Defendant argues that plaintiffs' state law claims are preempted by HOLA and corresponding regulations promulgated by the Department of the Treasury, Office of Thrift Supervision ("OTS"). Defendant argues that HOLA and the OTS regulations occupy the field of regulation for lending, servicing and investment activities for federal savings associations. Defendant notes that the Supreme Court has held that OTS regulations have the same preemptive effect as federal statutes. See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). Defendant cites 12 C.F.R. § 560.2, which by its terms "occup[ies] the entire field of lending regulation for [FSAs]." 12 C.F.R. § 560.2(a). Section 560.2(b) preempts state laws concerning the following: the "terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan"; "Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, **[*29]** servicing fees, and over limit fees"; "Processing, origination, servicing, sale or purchase of, or investment or participation in mortgages"; and "Usury and interest rate ceilings to the extent provided in . . . 12 U.S.C. § 1463(g)." § 560.2(b) (4), (5), (10), and (12). Defendant further notes that under the federal regulations it is authorized to purchase home loans. 12

C.F.R. § 560.30.

FOOTNOTES

9 Plaintiffs concede this in their Sixth Amended Petition, Doc. No. 1, Ex. 1, ¶ 57.

Defendant Sovereign argues that plaintiffs' sixth amended petition seeks to hold it liable under three theories: (1) Sovereign is an assignee-purchaser of Bann-Cor loans made to absent putative class members (Compl. ¶¶ 57, 59, 120); (2) Sovereign charged, collected, and received certain challenged fees in connection with those loans (Comp. ¶¶ 57, 59, 73-74, 120); and (3) Sovereign charged, collected, and received interest in connection with those loans (Compl. ¶¶ 57, 59, 73-74, 120). Defendant asserts that these claims fall squarely within the activities preempted by HOLA and the OTS regulations.

In response, plaintiffs note that this Court has previously rejected similar arguments made in relation to National Bank Act **[*30]** ("NBA") preemption. As stated previously by this Court:

> As all parties agree, defendant Bann-Cor actually made the loans that are the subject of this dispute. Plaintiffs' claims against all other defendants appear to be based upon assignee liability. See, e.g., 15 U.S.C. §1641(d) . . . . Because Bann-Cor is not a national bank, state law usury claims can be brought against it, and the general rules of assignee liability provide that the assignee defendants can be derivatively liable to plaintiffs.
>
> The Court agrees with plaintiffs that NBA §§ 85 and 86 do not apply to the derivatively liable assignees of loans.

Schwartz v. Bann-Cor Mortgage, Case No. 03-0922, Doc. No. 76 (W.D. Mo., June 14, 2004). Other divisions of this Court have concurred with this conclusion as to NBA preemption. Baker v. Century Financial Group, Inc., Case No. 04-0201, Doc. No. 185 (W.D. Mo. December 15, 2004) (Sachs, J.); Gilmor v. Preferred Credit Corp., Case No. 04-0255, 2005 U.S. Dist. LEXIS 39995, Doc. No. 206 (W.D. Mo. December 20, 2005) (Smith, J.). More recently, the Eighth Circuit found that the NBA does not preempt claims made against national banks that did not originate the loans at issue, but rather were assignee banks that subsequently **[*31]** purchased the loans. Thomas v. U.S. Bank Nat. Ass'n ND, 575 F.3d 794, 800- 01 (8th Cir. 2009). As discussed in Thomas, "[t]o hold otherwise would allow an originating bank to cleanse an otherwise illegal loan merely by assigning it to a national bank." Id. at 801. Instead, the Eighth Circuit applied the HOEPA rule of liability (as did this Court in considering NBA preemption in 2004), 15 U.S.C. § 1641(d), which provides "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 creditor of the mortgage . . . ."

Furthermore, another division of this Court recently found that HOLA and the OTS regulations do not preempt claims made against FSAs. See Gilmor v. Preferred Credit Corp., 2011 U.S. Dist. LEXIS 3338, 2011 WL 111238, *8-9 (W.D. Mo. Jan. 13, 2011)(Smith, J.); Gilmor v. Preferred Credit Corp., 2011 U.S. Dist. LEXIS 64720, 2011 WL 806014, * 1 (W.D. Mo. March 1, 2011). Judge Smith found that the same reasoning applies to both NBA and HOLA preemption; where the national banks or FSAs had not been the originator of the loans in question, the federal statutes and/or regulations do not preempt the MSMLA. 2011 U.S. Dist. LEXIS 3338, 2011 WL 111238 at *9. **[*32]** As Sovereign (defendant both in the present matter and in Gilmor) had not made the loans in question nor did it extend credit, Judge Smith found that the claims made against it were not preempted by HOLA (noting that 12 C.F.R. § 560.2(a) applies only to "lending activities").

Although in reply defendant argues that Casey v. F.D.I.C., 583 F.3d 586 (8th Cir. 2009)

compels this Court to find the MSMLA to be preempted, this Court cannot agree. The Court in Casey did not consider assignee liability at all, as the defendant in that matter was the loan originator and extended credit or refinancing on purchases of property. Id. at 589. Additionally, defendant argues that the NBA preemption cases are distinguishable as HOLA is analyzed as field preemption whereas NBA is analyzed as conflict preemption. See Munoz v. Financial Freedom Senior Funding Corp., 567 F.Supp.2d 1156, 1162 (C.D. Cal. 2008). This Court is not convinced that this distinction makes a difference in this matter, as it appears that the OTS regulations cited by defendant preempt the field of lending regulation, whereas it appears plaintiffs seek to hold defendant Sovereign liable not for its lending activity, but under the rules **[*33]** of assignee liability. [10]

FOOTNOTES

[10] The Court is also somewhat reticent to distinguish HOLA from the NBA on the basis of field preemption because Congress has recently enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), HR 4173, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010). The amendments affecting HOLA and NBA preemption become effective effective as of July 21, 2011. *See* Dodd-Frank Act §§ 1048; Bureau of Consumer Financial Protection, Designated Transfer Date, 75 Fed. Reg. 57,252 (Sept. 20, 2010). As of that date, HOLA and OTS preemption determinations will be made in accordance with the same standards as applicable to national banks. Further, the Dodd-Frank Act specifically states that "Notwithstanding the authorities granted under section 4 and 5, [HOLA] does not occupy the field in any area of State law," effectively eliminating the field preemptive effect of HOLA and the OTS regulations. The Court finds that the legal uncertainty created by this impending change in the law favors denial of defendant's motion.

Accordingly, defendant Sovereign's motion to dismiss based on HOLA preemption (Doc. No. 14) will be **DENIED.**

V. U.S. Bank National Association's [*34] Motion to Dismiss Plaintiffs' Complaint (Doc. No. 29) and Defendant JPMorgan Chase Bank, N.A., as Former Trustee's Alternative Motion for More Definite Statement (Doc. No. 149)

Defendant U.S. Bank National Association moves to dismiss plaintiffs' sixth amended petition under Rule 12(b)(6) because plaintiffs' allegations against it are generic and conclusory.

A. Standard

Pursuant to Federal Rule of Civil Procedure 8(a)(2), a complaint must present "a short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of a short and plain statement is to provide defendants with "fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)(citation omitted). To satisfy this standard, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)(quoting Twombly, 550 U.S. at 570). A complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . Factual allegations must be enough to raise a right to relief **[*35]** above the speculative level." Twombly, 550 U.S. at 555 (internal quotations omitted). On a motion to dismiss, a court's evaluation of a plaintiff's complaint is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 129 S.Ct. at 1950.

Fed.R.Civ.P. 12(e) states in part, "A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response."

B. Analysis

Defendant U.S. Bank National Association cites to Mayo v. GMAC Mortgage, LLC, No. 08-00568-CV-W-DGK, 2010 U.S. Dist. LEXIS 51517 (March 1, 2010, Doc. No. 160), wherein Judge Greg Kays found that "Asserting a list of legal conclusions that have been fused together with a disjunctive conjunction and brought against a collection of defendants . . . is not enough to state a claim for relief that is plausible on its face under Ashcroft." 2010 U.S. Dist. LEXIS 51517 at *8 (citing Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Defendant U.S. Bank National Association argues that, similar to Mayo, plaintiffs here have lumped it together with all of the other "Assignee Defendants" and have made a meaningless series **[*36]** of general allegations (such as Sixth Amended Petition ¶ 62, "Assignee Defendants, individually and/or through their bank trustees or other trustees and/or agents, purchased the Second Mortgage Loans that Bann-Cor made to Plaintiffs and the Plaintiff Class pursuant to one or more standing agreements and/or a course of business dealing with Bann-Cor and/or on a 'secondary market' . . . ."; ¶ 64, "The ASSIGNEE DEFENDANTS, upon information and belief, were partners with and/or principals or agents of BANN-COR and/or one or more other entities and/or ASSIGNEE DEFENDANTS acting in concert with BANN-COR, including among others, FirstPlus Financial, Inc. and/or Master Financial, Inc., and/or were engaged in a joint venture and enterprise with BANN-COR and/or said other entities, and/or a conspiracy with BANN-COR and/or said other entities, to originate, exchange and exploit second mortgage loans from BANN-COR's Missouri borrowers with our [sic] regard to state law and applicable state law fee limitations, in that, among other things, the ASSIGNEE DEFENDANTS bound themselves by commitments and agreements and established relationships with BANN-COR and/or the other entities in terms of origination **[*37]** and underwriting criteria, loan terms and fees, and funding arrangements, and/or were otherwise so closely connected that they are jointly and severally liable for the losses arising from the unlawful loans."). Defendant U.S. Bank, therefore, requests the court dismiss all claims alleged individually against it as a result of plaintiffs' failure to meet the pleading standards of Iqbal and Twombly.

Defendant Franklin Credit Management Corporation filed a joinder in this motion to dismiss (Doc. No. 51). Defendant Franklin Credit Management asserts that, as to it, the Sixth Amended Petition alleges plaintiff Brooks "made all of the monthly payments due under her second mortgage loan, paying the same to BANN-COR and/or to any one or more of the ASSIGNEE DEFENDANTS that purchased and/or acquired the loan, and/or that serviced and handled the loan as an agent on behalf of others including, without limitation, the MASTER FINANCIAL DEFENDANTS and/or FRANKLIN." Sixth Amended Petition, ¶ 102. Further, plaintiffs state "BROOKS continued to make monthly payments on his loan until on or about January 30, 2007, when she paid it off, and the ASSIGNEE DEFENDANTS that purchased and/or acquired the loan, **[*38]** and/or that serviced and handled the loan as an agent on behalf of others, including among others FRANKLIN, continued to charge and receive monthly payments through that date." Sixth Amended Petition, ¶ 103. Other than those two specific allegations (which defendant Franklin argues are vague in that the use of "and/or" means they could or could not include Franklin), plaintiffs have made no further specific allegations against Franklin. Defendant Franklin, therefore, argues that the generic factual allegations and legal conclusions made against all defendants collectively are insufficient under Iqbal and Twombly.

In a related motion, defendant JPMorgan Chase Bank, N.A., as Former Trustee ("Chase") argues that plaintiffs' Sixth Amended Petition is so vague that defendant Chase cannot respond to the allegations raised therein, given that defendant Chase had thousands of trusts for which it served as trustee, and plaintiffs have provided no indication as to which trusts allegedly held plaintiffs' loans.

Plaintiffs assert that they have sufficiently put defendants on notice of the claims against them, and that their allegations are sufficient to state a plausible claim against U.S. Bank. **[*39]** Plaintiffs suggest that the use of the "and/or" statements in their sixth amended petition have spared both the parties and the Court from having to review and respond to more than 50 separate sets of allegations as to each of the defendants. Plaintiffs further suggest that this would be unnecessary given the nature of defendants' business, due to the "convoluted nature

of the securitization business in which U.S. Bank and the other Assignee Defendants are (or were) engaged, the oftentimes overlapping and affiliated capacities of the loan trustees, servicers, master servicers, and other participants in the mortgage securitization industries, the use of nominees and servicers for administrative convenience, such as MERS, the free flow of the loans on the secondary market . . . ." See Doc. No. 90, p. 10. Further, with respect to the motion for more definite statement, plaintiffs assert that defendant Chase is in possession of the information needed to respond to the Sixth Amended Petition, and plaintiffs do not need to provide further specific information.

In reply, defendant U.S. Bank notes that the frequent "and/or" phrases in plaintiffs' sixth amended petition make it impossible to **[*40]** determine what is being alleged against any particular defendant. Defendant U.S. Bank further notes that the "convoluted nature of the securitization business" is no excuse for failing to meet the pleading standards articulated in Iqbal and Twombly. Further, in reply to its motion for more definite statement, defendant Chase asserts that it sold its Trustee business operation effective October 1, 2006, and transferred most of its records at that time. Chase further notes that plaintiffs appear to have information regarding the specific loans in their possession (noting that at Doc. No. 237, p. 5, n. 4, plaintiffs indicate their belief that Chase was named as a grantee of at least 18 class loans and that Chase filed releases for 15 of these loans). Defendant Chase indicates that, at a minimum, plaintiffs should identify the 18 class loans for which plaintiffs believe Chase was named as a grantee so that Chase could adequately prepare its responses and defenses.

The Court agrees with defendants that plaintiffs' sixth amended petition is not pled with sufficient particularity. The use of "and/or" phraseology and lumping of all defendants together into one category results in the reader **[*41]** being unable to determine the exact theory of liability as to each separate defendant. Although plaintiffs complain that they would have to assert 50 separate sets of allegations as to each defendant, the Court believes that this may be necessary under the facts of this case.

Instead of granting the motion to dismiss, however, the Court finds the better course of action would be to allow plaintiffs to file a motion for leave to file an amended complaint, setting out in specific detail (in compliance with Iqbal and Twombly) their theory of the case as to each defendant. Defendant U.S. Bank National Association's motion to dismiss (Doc. No. 29) will be **DENIED WITHOUT PREJUDICE** to its reassertion if plaintiffs' are unable to meet the pleading standards of Iqbal and Twombly. Defendant Chase's Motion for More Definite Statement (Doc. No. 149) will be **GRANTED.** Plaintiffs' motion for leave to file an amended complaint shall be filed on or before **JUNE 30, 2011.**

VI. Wilmington Trust Company's Motion to Dismiss (Doc. No. 178), The Moving FirstPlus Trusts' Motion to Dismiss Plaintiffs' Petition for Lack of Personal Jurisdiction (Doc. No. 239), The Moving Empire Funding Trusts' Motion to Dismiss [*42] Plaintiffs' Petition for Lack of Personal Jurisdiction (Doc. No. 241), and Cityscape Home Loan Owner Trusts' and Trustee's Motion to Dismiss Plaintiffs' Complaint for Lack of Jurisdiction (Doc. No. 246)

These four pending motions raise nearly identical issues, and the plaintiffs filed one omnibus response to all four (see Doc. No. 256). Defendants filed one omnibus reply (see Doc. No. 287). The Court will also consider the issues raised in all four motions together.

A. Standing (Doc. Nos. 178 and 246)

For the same reasons as discussed previously in relation to its analysis of the other defendants' motions to dismiss for lack of standing (Doc. Nos. 12, 124, 142, and 172), defendants' motions (Doc. Nos. 178 and 246) will be **DENIED** on this ground. As discussed previously, plaintiffs shall file a motion for leave to file an amended complaint designating additional class representatives on or before **June 30, 2011.**

B. Iqbal/Twombly Pleading Standards (Doc. Nos. 178 and 246)

For the same reasons as discussed previously in relation to its analysis of the other defendants' motions to dismiss and/or for more definite statement (Doc. Nos. 29 and 149), these motions (Doc. Nos. 178 and 246) will be **DENIED [*43] WITHOUT PREJUDICE** to their reassertion if plaintiffs' are unable to meet the pleading standards of Iqbal and Twombly. Plaintiffs' motion for leave to file an amended complaint shall be filed on or before **JUNE 30, 2011.**

C. Personal Jurisdiction (Doc. Nos. 178, 239, 241, and 246)

All moving defendants assert that they are not subject to personal jurisdiction in this Court, primarily for the same reasons as the Defendant Moving Trusts (see Doc. No. 31 and Order regarding same, above). The Court finds that the differences between the moving defendants as set out in their motions and the affidavits attached to same (Doc. No. 178, Ex. 1; Doc. No. 239, Ex. 1; Doc. No. 241 Ex. 1, and Doc. No. 246, Ex. 1) do not mandate a different result than the Court's analysis of personal jurisdiction in relation to the defendant Moving Trusts, above. Although defendants assert that their servicers are independent contractors rather than agents, this Court concurs with Judge Smith that the label used in the parties' agreements with one another is not determinative of the legal relationship between the entities. See Gilmor, 2011 U.S. Dist. LEXIS 3338, 2011 WL 111238, *4. For the same reasons as stated earlier in relation to its analysis **[*44]** of the Moving Trusts' motion to dismiss (Doc. No. 31), the Court will **DENY** the pending motions to dismiss for lack of personal jurisdiction (Doc. Nos. 178, 239, 241, and 246).

D. Insufficiency of Service (Doc. No. 178)

Defendant Wilmington Trust Company ("Wilmington") argues that plaintiffs failed to allege whether it was being sued in its individual or trustee capacity. Defendant Wilmington further argues that the summons and return of service are not specific as to the capacity in which Wilmington was served. Defendant Wilmington, therefore, argues that plaintiffs' sixth amended petition should be dismissed for insufficient service pursuant to Fed. R. Civ. P. 12(b)(4) and (5). In response (Doc. No. 256), plaintiffs indicate that since the filing of the motion to dismiss, defendant Wilmington has now been served in its capacity as Trustee for the Empire Funding Home Loan Owner Trusts, the Cityscape Home Loan Owner Trusts, and the FirstPlus Home Loan Owner Trusts, making this part of Wilmington's motion to dismiss moot. Defendant Wilmington did not file reply suggestions to this motion.

Accordingly, for the reasons stated by plaintiffs, defendant Wilmington's motion to dismiss for insufficiency **[*45]** of service (Doc. No. 178) is **DENIED AS MOOT.**

VII. Conclusion

Therefore, for the foregoing reasons,

(1) Defendants' Motion to Dismiss Plaintiffs' Complaint for Lack of Personal Jurisdiction (Doc. No. 31) is **DENIED**;

(2) Plaintiffs' Motion for Leave to File Sur-Reply to Motion to Dismiss for Lack of Personal Jurisdiction (Doc. No. 163) is **DENIED**;

(3) Various Defendants' Motions to Dismiss for Lack of Standing (Doc. Nos 12, 124, 142, and 172) are **DENIED**;

(4) Plaintiffs' Motion for Extension of Time to File a Response to Doc. No. 235 (Doc. No. 245) is **GRANTED**;

(5) Defendant Sovereign Bank's Motion to Dismiss Plaintiffs' Complaint as Preempted by Federal Law (Doc. No. 14) is **DENIED**;

(6) Plaintiffs' Motion for Leave to File Sur-Reply to Motion to Dismiss Based on Preemption (Doc. No. 161) is **DENIED**;

(7) Defendant U.S. Bank National Association's Motion to Dismiss Plaintiffs' Complaint (Doc. No. 29) is **DENIED WITHOUT PREJUDICE** to its reassertion upon the filing of an amended complaint;

(8) Defendant JPMorgan Chase Bank, N.A., as Former Trustee's Alternative Motion for More Definite Statement (Doc. No. 149) is **GRANTED**;

(9) Wilmington Trust Company's Motion to Dismiss (Doc. No. 178) is **DENIED IN PART, [*46] DENIED WITHOUT PREJUDICE IN PART, AND DENIED AS MOOT IN PART**;

(10) The Moving FirstPlus Trusts' Motion to Dismiss Plaintiffs' Petition for Lack of Personal Jurisdiction (Doc. No. 239) is **DENIED**;

(11) The Moving Empire Funding Trusts' Motion to Dismiss Plaintiffs' Petition for Lack of Personal Jurisdiction (Doc. No. 241) is **DENIED**;

(12) Cityscape Home Loan Owner Trusts' and Trustee's Motion to Dismiss Plaintiffs' Complaint for Lack of Jurisdiction (Doc. No. 246) is **DENIED IN PART** and **DENIED WITHOUT PREJUDICE IN PART**; and

(13) Plaintiffs are directed to file a motion for leave to file an amended complaint on or before **JUNE 30, 2011**, addressing the concerns outlined in this Order.

IT IS SO ORDERED.

Dated: 06/09/11
Kansas City, Missouri

/s/ FERNANDO J. GAITAN, JR.

Fernando J. Gaitan, Jr.

Chief United States District Judge

In

EXHIBIT D

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

MICHAEL D. MAYO, Plaintiff, v. UBS REAL ESTATE SECURITIES, INC. and DEUTSCHE BANK NATIONAL TRUST COMPANY (in its capacity as trustee of the MASTR SPECIALIZED LOAN TRUST 2007-01), Defendants.	)	No. 08-00568-CV-W-DGK

ORDER REQUESTING BRIEFING IN LIGHT OF WASHINGTON v. COUNTRYWIDE HOME LOANS, INC.

This case is a putative class action brought under the Missouri Second Mortgage Loan Act ("MSMLA"). Plaintiff Michael Mayo alleges he was charged illegal fees at the closing of his residential second mortgage loan. He is suing various entities who acquired, received, or collected interest on his loan after closing.

On January 13, 2011, this Court issued its order granting in part Defendants' motion for summary judgment. Among other things, the Court held that the words "which shall include" as used in § 408.233.1(3) should be read inclusively, thus the list of authorized fees in § 408.233.1(3) was not an exclusive list. The Court also held that a post-closing, non-loan holding loan servicer could not be liable under the MSMLA. These holdings were contrary to, or at the very least, arguably contrary to, the holdings of an intermediate state court in *Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477 (Mo. App. 2010). Although the Court followed the Mitchell decision with respect to several other holdings, it declined to follow *Mitchell* on these two points because the Court believed that on these points the decision was not soundly reasoned and should not be

followed. As the Eighth Circuit noted,

> In applying state law, we are bound to apply the law of the state as articulated by the state's highest court. When the state's highest court has not spoken, our job is to predict how the state's high court would resolve the issue. We may look to decisions of the state's intermediate courts to the extent they contain sound reasoning, and such decisions may often serve as "the best evidence" of how the highest court would rule. We, however, are not bound by the decisions of a state's intermediate courts.

Travelers Prop. Cas. Ins. Co. of Am. v. Nat'l Union Ins. Co. of Pittsburgh, 621 F.3d 697, 707 (8th Cir. 2010) (citations omitted).

This morning the Eighth Circuit Court of Appeals released its decision in *Washington v. Countrywide Home Loans, Inc.*, another putative class-action lawsuit concerning the MSMLA. In that decision the Eighth Circuit stated, "In a diversity case, the law declared by the state's highest court is binding. The Missouri Supreme Court allowed the *Mitchell* opinion to stand as authority, by denying transfer of the case from the court of appeals. The *Mitchell* case is, thus, the best evidence of Missouri law." No. 10-1340, slip op. at 5 (8th Cir. July 28, 2011) (citation omitted). The Court of Appeals then adopted the Mitchell holding that the list of authorized fees in § 408.233.1(3) is an exclusive list.

Given that the Eighth Circuit has embraced the *Mitchell* decision, the Court believes it should re-visit portions of its January 13, 2011 summary judgment ruling and July 1, 2011 order denying class certification as overbroad. (Obviously, if the list of authorized fees in § 408.233.1(3) is an exclusive list, then Plaintiff's proposed class might not be overbroad.) Accordingly, the Court orders Plaintiff and the Defendants collectively, including previously dismissed Defendants Residential Funding Company, LLC and GMAC Mortgage LLC, to file a brief, not to exceed fifteen pages, identifying any issues in the Court's previous orders it believes should be re-addressed in

light of the *Washington* decision. This brief shall be filed on or before August 15. Each party will be permitted a single reply brief, not to exceed ten pages. Any reply brief should be submitted on or before August 22.

These briefs should not address the merits of the Court's previous orders, but only discuss how the holdings in the Court's previous orders are inconsistent with the *Mitchell* court's holdings, and how this Court should proceed given the *Washington* decision. After reviewing these submissions the Court will likely issue a revised scheduling order directing more detailed briefing on certain topics.

IT IS SO ORDERED.

DATE: July 26, 2011

/s/ Greg Kays
GREG KAYS, JUDGE
UNITED STATES DISTRICT COURT