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THIRD COURT OF APPEALS
AUSTIN, TEXAS
13 November 14 P5:27
Jeffrey D. Kyle
CLERK

No. 03-12-00007-CV

In the

THIRD Court of APPEALS AT AUSTIN Texas

ALVIE CAMPBELL

Appellant,

v.

WELLS FARGO BANK, N.A.

Appellee,

On appeal from

County Court at Law, Precinct No. 4, Williamson County, Texas
as 11-1472-CC4

APPELLANTS VERIFIED MEMORANDUM IN SUPPORT OF APPELLANT BRIEF and REPLY BRIEF OF APPELLANT

Alvie Campbell
250 PR 947
Taylor, Texas, 76574
(512) 796-6397
Alvie@Ourlemon.com

IDENTITY OF PARTIES AND COUNSEL

Appellant provides the following complete list of all parties and the name and address of all counsel;

Appellant	**Representing Counsel:**
ALVIE CAMPBELL AND ALL OTHER OCCUPANTS OF 250 PR 947, TAYLOR TEXAS 76574	Pro se 250 Private Road 947 Taylor, Texas 76574 (512) 796-6397
Appellee WELLS FARGO BANK, N.A.	**Representing Counsel:** Mark D. Hopkins State Bar No. 00793975 Hopkins & Williams, PLLC 12117 Bee Caves Rd. Suite 250 Austin, Texas, 78738 Tel. (512) 600-4320 Fax: (512) 600-4326

Now Comes Appellants', Alvie Campbell and all other occupants of 250 PR 947, Taylor, Texas, and files this Memorandum in Support of Appellant Brief and Reply Brief of Appellant merits and in support hereof, shows the court the following:

SUBJECT

(1) "Book entry system" means a national book entry system for registering a beneficial interest in a security instrument that acts as a nominee for the grantee, beneficiary, owner, or holder of the security instrument and its successors and assigns.

THE QUESTION BEFORE THE COURT

Can a "book entry system" deprive a citizen of Texas, or Texas law enforcement; the right to depose, the right to request admissions, the right to request interrogatories, a right to production, the right to interrogate, the right to prosecute, the right to electronic discovery, or any other equal rights a citizen of Texas; or Texas law enforcement may have?

INTRODUCTION

MERSCORP Holdings, Inc. owns and operates the MERS system, a national electronic registry system, being a computer software program. and an electronic agent for MERS members, thus defined as a "book entry system". This memorandum aims to show that the existing principles employed by counsel(s) of MERS Members deceive the courts by MERS Members use of a transferable record which is defined in § 322.016 Texas and to rely upon UETA to make a claim to real property with those MERS electronic records and lacks statutory authority. Originally, the MERS system was purported to identify and track electronic promissory notes[1], today MERS claims to track interests in mortgage loans. *e*Mortgages are not real estate mortgages.

[1] The concept of a National eNote Registry (National Registry) has evolved out of the need to track and identify electronic promissory notes (eNotes) in an evolving industry infrastructure for electronic mortgages (eMortgages). – See attached Exhibit 1, National eNote Registry requirements.

In addition, this memorandum analyzes the obscure development of Constitutional violations caused by this new set of rules. Electronic commerce may be defined as the ability to conduct business via electronic network and to use the internet as a commercial medium.[2] It is true technology has been developed that enables individuals to use electronic agents to make purchases or to conclude agreements, as this ability is an integral part of Texas UETA. However, electronic agents are not a natural person. Corporations, by their very nature, cannot function without human agents. As a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts. *Holloway v. Skinner* 898 SW 2d 793 - Tex Supreme Court 1995

The term "agent" suggests application of the law applies to agents and principal(s), but the law of agent(s) and principal(s) do not govern the requirements between computer users and their electronic agents or electronic agents and real estate mortgage loan borrowers. Many assumptions are taken when the word "agent" arises if a party has not disclosed the party was using an electronic agent, which is a violation for not disclosing such information according to the laws governing the electronic agent[3], federal rules of discovery, and electronic discovery, state rules of discovery, and electronic discovery, and the Texas Constitution. It is apparent that MERS electronic agency relationship was never disclosed to the courts, seemingly and willfully withheld from courts by MERS members, and their counsels. Appellants, supposes the courts should also question how a prosecutor could prosecute or convict an electronic agent for committing crimes?

Many definitions of electronic agents have been given, and many assumptions are taken when the word "agent" arises, but whether a party disclosed it is using an electronic agent could be a violation for not disclosing such information according to the laws governing the electronic agent.

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[2] Electronic commerce: structures and Issues (1996), by Vladimir Zwass, International Journal of Electronic Commerce

[3] See E-SIGN, 15 U.S.C. 7001(c) attached as exhibit 2, and incorporated herein.

Electronic Agreement

According to a filed U.S. Patent # US20050177389 in 2005, furthered in 2013, Paperless Process For Mortgage Closings And Other Applications, the patent provides an example "electronic agreement" for the use of electronic signatures.[4]

Appellant does not argue that electronic contracts are not valid. Appellants alleges that the use of an electronic Note in a real property transaction is not supported by any known law, state or federal. A security interest cannot be created in a deed of trust after it is signed. See *Property Interests Are Protected By State Law*[5]. Most eNotes registered in MERS system purportedly claiming to be real estate mortgages were allegedly registered after the real estate mortgage loan borrower signed the paper promissory Note and a deed of trust, a lien to secure that paper Note, not an eNote. This could be the reason why electronic consent forms are not provided. Nevertheless, as in the Campbell's instance, it appears the Campbell's Note was purportedly sold to Ginnie Mae[6] prior to the Campbell's closing of such mortgage loan on October 29, 2004.

The purpose of the Statute of Frauds is to remove uncertainty, prevent fraudulent claims, and reduce litigation. *Givens v. Dougherty*, 671 SW 2d 877 - Tex: Supreme Court 1984

Electronic Agent

Appellant believes the state of Texas is not aware of an apparent Constitutional issue with Texas Discovery Rules[7] and a "book entry system" defined in the Texas Property Code, or issues with Texas Penal laws.

There is no single definition of an electronic agent. Beyond the basic recognition that an electronic agent is a "software thing".[8] Nonetheless, it is possible to find a

[4] Attached as Exhibit 3, electronic agreement; Also, see attached Exhibit 4, Patent for full discloser of electronic mortgage eClosing system
[5] Page 8 of this memorandum.
[6] See Affidavit of Joseph R. Esquivel, Jr. attached as exhibit 5 and incorporated herein.
[7] Appellants note that there are other areas of Texas statutes affected also by the electronic agent.
[8] Contracts and Electronic Agents, Sabrina Kis, University of Georgia School of Law

common understanding and agreed-upon characteristics that shape a technical definition of an electronic agent. In Texas, it is simple enough to find the definition in chapter 322, Texas Business and Commerce Code. See section § 322.002(6)

> (6) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

Anyone researching electronic agents can find most information about electronic agents as "robots" or "bots", such as "knowbots", "softbots", "taskbots", autonomous agents or other intelligent agents. All these types of electronic agents accomplish such tasks as searching the web and gathering information needed by users, or indexing millions of web pages for users, and many other types of robots too long to mention[9]. Nevertheless, the "book entry system" under Texas law affects real estate mortgage loans which has affect upon real property. MERS does not meet any definition in Texas law[10] other than an "electronic agent" as defined in E-SIGN and Texas UETA. MERS as an electronic agent runs counter to real property law, as such an electronic agent, be a "book entry system", "mortgagee", "holder of a security instrument", "assignee", "assignor", "nominee", or "beneficiary" of a paper real estate mortgage loan contract according to existing tangible Texas law should be seen as in violation of laws previously noted.

Texas UETA

According to an executive summary[11], "The 77th Legislature passed UETA in 2001 to help establish a legal framework for the growing use of internet transactions between state and local government and citizens." The Act deals with electronic

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[9] See Electronic Agents and the Formation of Contracts, Emily M. Weitzenboeck, LL.M. (Southampton), LL.D. (Malta); Senior Research Fellow at the Norwegian Research Centre for Computers and Law, Faculty of Law, University of Oslo, P.O. Box 6706 St Olavs plass, N-0130 Oslo, Norway;

[10] Even though "book entry system" is a definition in section §51.0001, the "book entry system" is a computer, an electronic agent according to the laws that govern the electronic agent. See Texas UETA.

[11] See - Figure: 13 TAC §6.97(a), Guidelines for the Management of Electronic Transactions and Signed Records, Prepared by the UETA Task Force of the Department of Information Resources and the Texas State Library and Archives Commission, September 2002

signatures and electronic contracts, electronic agents, automated transactions, and transactions between parties when both parties have agreed to conduct transactions by electronic means. The Act creates a set of rules that apply to electronic agents. Nevertheless, entities like Wells Fargo Bank, N.A. and its counsels have continuously abused a perfectly good law for the enforcement of electronic contracts and electronic signatures, and also failing to disclose their electronic agent, unfortunately defined as a "book entry system", to the courts of Texas.

Wells Fargo Bank, N.A. has never mentioned section § 322.007 or Wells Fargo Bank, N.A.'s ability to enforce the electronic contract registered in the MERS system, because this would tip off the courts to become aware that Wells Fargo Bank, N.A. had conducted many criminal acts and is in violation of law.

Wells Fargo Bank, N.A. has never denied Appellants claim that Wells Fargo Bank, N.A. was not the holder of the Campbell's paper promissory Note. In support, Appellants attached exhibit 5, a chain of title analysis, conducted by a Texas licensed Investigator to support Appellants claims.

Laws now exist[12] for the formation of electronic contracts using electronic agents, and those laws provide that electronic contracts may also be formed by multiple electronic agents[13], or between an electronic agent and an individual. Just as a court would be provided the task of determining whether those electronic contracts created a lawful form of contract, the Court would need to look at common law principles in order to determine whether there was formation of a contract using an "electronic agent" as a nominee, beneficiary, or mortgagee of a paper contract titled deed of trust, a lien on title to real property which is not an electronic contract., but an "in writing" contract involving the sale or transfer of land, as governed by Statute of Frauds.

[12] See E-SIGN; Texas UETA
[13] See §322.014

Wells Fargo Bank, N.A. and its counsel have mislead the court by arguing transferable record laws instead of real property laws, and arguing in this context could be seen as a constitutional violation.

Moreover, Wells Fargo Bank, N.A. and its counsel Mark D. Hopkins are seemingly in contempt of court by providing evidence, though it may appear on its face as admissible, is unrelated to the Campbell's real estate mortgage loan originated by America Mortgage network, Inc. dba AMNET mortgage. Wells Fargo Bank, N.A. and its counsel Mark D. Hopkins are seemingly in contempt of court by violating the Texas Constitution, causing harm to the Campbell's right to a fair and just trial.

Wells Fargo Bank, N.A. and its counsel Mark D. Hopkins are seemingly in contempt of court by not disclosing the electronic agent used by Wells Fargo Bank, N.A. and represented by its counsel Mark D. Hopkins.

Wells Fargo Bank, N.A. and its counsel Mark D. Hopkins whom are seemingly in contempt of court have not disclosed the transferable record which they are attempting to use. Mark D. Hopkins continued use of fraudulent courts continues today, as Hopkins attempts to remind the court of his success in *Campbell v. MERS*[14]. "... the right to file a lawsuit pro se is one of the most important rights under the constitution and laws." *Elmore v. McCammon* (1986) 640 F. Supp. 905

Wells Fargo Bank, N.A. and its counsel Mark D. Hopkins have seemingly swayed the court in previous Appellant cases using a transferable record, an electronic agent, and an electronic image of promissory Note Wells Fargo Bank, N.A. utilized from a transferable record, of which, the court failed to see as "order paper", and not bearer paper. In support, Appellants evidence introduced to the 368th trial courts previously is attached as Exhibit 6 and is herein incorporated. All the court would need to do is re-review the copy of the electronic image of the alleged Note, as a

[14] Alvie Campbell and Julie Campbell v. Mortgage Electronic Registration Systems, Inc., as Nominee for Lender and Lender's Successors and Assigns; Wells Fargo Bank, N.A.; Stephen C. Porter; David Seybold; Ryan Bourgeois; Matthew Cunningham, and John Doe 1-100, 03-11-00429-CV

special indorsment was obvious, but with question[15], along with a subsequent "pay to the order of" to a blank endorsee by Wells Fargo Bank, N.A. This "blank" endorsement as a mystery party, reveals something terribly wrong with further negotiations. In support, the chain of title analysis of the Campbell's real estate mortgage loan is attached as Exhibit 5 and is herein incorporated. Also in support, the information Campbell's provided for the analysis, which most evidence is already existing in court record, is attached as Exhibit 7, and additional information for Mr. Esquivel in Exhibit 8, and is herein incorporated.

Non-UCC

Appellant provided his arguments in both his Appellant Brief and his Reply Brief of Appellant. To further support Appellants merits, Appellant requested a chain of title analysis from a Texas License Private Investigate that would further explain the non Article 3 note, an intangible obligation, that is not directly related to Appellants real estate mortgage loan as defendant and its counsel have led the court to believe. See exhibit 5. These continuous seemingly criminal actions by Appellee and their counsels violates Appellants rights which obstructs and prevents Appellants true justice. Actions by counsels of a "book entry system", "nominee", "beneficiary" and its members are causing great harm to Texas and in contempt of court while committing crimes against the public.

Appellants realize this Court understands real estate mortgage loan transactions conducted by anyone, whether a MERS member or not, are governed by Texas real property laws for a lien, and possibly Chapter 3 of the Texas Business and Commerce Code for negotiations of an Article 3 Note, and not Chapter 9. Chapter 9 only provides enforcement for goods and services. Liens, or the creation or transfer of an interest in or lien on real property are not governed by Chapter 9. See section § 9.109(d)(2); § 9.109(d)(11)

[15] According to MERS, Fannie Mae, Freddie Mac, GSE's eMortgage requirements, each require the original paper promissory Note to be indorsed "in blank" and submitted to MERS, or Fannie Mae, or Freddie Mac, or Ginnie Mae, GSE's.

Appellants remind this Court that electronic transactions by MERS members are governed by E-SIGN and Texas UETA. This is the simplest way to understand what MERS members did not do; they failed to follow the laws related to a real estate mortgage loans, and instead these entities used a "clearinghouse" as this court called it, which actually tracks "interests" in a transferable record as defined in 15 U.S.C. 7021(1), 15 U.S.C. 7021(2), and section § 322.016(a)(1), § 322.016 (a)(2). Texas UETA, and the clearinghouse does not track paper promissory Notes.

PROPERTY INTERESTS ARE PROTECTED BY STATE LAW

Property interests are created and defined by state law. See *Butner v. United States* at 55, 440 US 48 - Supreme Court 1979

Generally, the test for creation of a security interest is whether the transaction was intended to have the effect as security, because parties must have intended that their transaction fall within the scope of article 9 of the UCC. See *Superior Packing, Inc. v. Worldwide Leasing & Financing, Inc.*, 880 SW 2d 67 - Tex: Court of Appeals (1994)

A "security interest" in personal property means an interest which secures payment or performance of an obligation. Sec. 1.201(37). "Security Agreement" is defined in Section 9.105(a)(8) as being the bargain of the parties in fact. The requirement that there must be an agreement, not only in connection with Sec. 1.201(3), but also in connection with Sec. 9.203(a)(2) which requires that security agreements be written. See *Mosley v. Dallas Entertainment Company, Inc.*, 496 SW 2d 237 - Tex: Court of Civil Appeals, 12th (1973)

"The code makes no provision for a naked financing statement to be enforced as a security agreement. It merely gives notice of the existence of a security interest but in itself does not create a security interest". *Anderson, Uniform Commercial Code*, 2d Ed. sec. 9-402:4. See *Mosley v. Dallas Entertainment Company, Inc.*, 496 SW 2d 237 - Tex: Court of Civil Appeals, 12th (1973)

Where there is a debt secured by a note, in turn secured by a lien, the note and the lien constitute separate obligations so that suit may be had on the note to obtain a personal judgment, and later suit may be had on the lien if the personal judgment is not satisfied. *Taylor v. Rigby*, 574 S.W.2d 833 (Tex.Civ.App.-Tyler 1978, writ ref'd n.r.e.).

"It is well established in Texas that the rules of construction governing contracts are applicable to notes, and a note must be constructed as a whole.", *Mathis v. DCR MORTG. III SUB I, LLC*, 389 SW 3d 494 - Tex: Court of Appeals, 8th Dist. 2012, citing *Edlund v. Bounds*, 842 SW 2d 719 - Tex: Court of Appeals, 5th Dist. 1992, citing *Coker v. Coker*, 650 SW 2d 391 - Tex: Supreme Court 1983

Real estate contracts are not governed by the UCC. See *Wesley Eugene Perkins v. Chase Manhattan Mortgage Corporation*--Appeal from 261st District Court of Travis County16 (2006). The security no longer existed would be no defense to the note. The existence of the collateral would be immaterial to a suit for judgment on the debt. *Garza v. Allied Finance Co.*, 566 S.W.2d 57, 62 (Tex.Civ.App.-Corpus Christi 1978, no writ). Texas follows the lien theory of mortgages. Under this theory the mortgagee is not the owner of the property and is not entitled to its possession, rentals or profits. See *Taylor v. Brennan*, 621 SW 2d 592 - Tex: Supreme Court 1981 A lien is not an instrument. *Max Duncan Family Investments, Ltd. v. NTFN INC.*, 267 SW 3d 447 - Tex: Court of Appeals, 5th

Chapter 9 of the UCC does not apply to creation or transfer or interest in or lien on real property. See 9.109(d)(11), See *Wesley Eugene Perkins v. Chase Manhattan Mortgage Corporation*--Appeal from 261st District Court of Travis County

Conversion is the wrongful exercise of dominion and control over another's property in denial of or inconsistent with the property owner's rights. Edlund v. Bounds, 842

SW 2d 719 - Tex: Court of Appeals, 5th Dist. 1992, citing *Tripp Village Joint Venture v. MBank Lincoln Centre, NA*, 774 SW 2d 746 - Tex: Court of Appeals

"And, courts will not enforce an illegal contract, even if the parties don't object. Id. Enforcement of an illegal contract violates public policy". *Komet v. Graves*, 40 SW 3d 596 - Tex: Court of Appeals, 4th Dist. 2001.

A mortgage is governed by the same rules of interpretation which apply to contracts. See generally *55 Am.Jur.2d Mortgages* § 175 (1971). Thus, the issue of the validity of the clause before the court should be resolved by an application of contract principles. Such an approach recognizes the parties' right to contract with regard to their property as they see fit, so long as the contract does not offend public policy and is not illegal. *Sonny Arnold, Inc. v. Sentry Sav. Ass'n,* 633 SW 2d 811 - Tex: Supreme Court 1982 citing; Curlee v. Walker, 244 SW 497 – (1922)

CONSTITUTIONAL ISSUE

"There can be no sanction or penalty imposed upon one because of his exercise of constitutional rights." *Sherar v. Cullen*, 481 F. 2d 946 (1973). "The claim and exercise of a Constitution right cannot be converted into a crime"... "a denial of them would be a denial of due process of law". *Simmons v. United States*, 390 U.S. 377 (1968)

In *Boyd v. United*, 116 U.S. 616 at 635 (1886), Justice Bradley,stated "It may be that it is the obnoxious thing in its mildest form; but illegitimate and unconstitutional practices get their first footing in that way; namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the Courts to be watchful for the Constitutional Rights of the Citizens, and against any stealthy encroachments thereon. Their motto should be Obsta Principiis."

The importance of this matter regards conflicting opinions in various courts, conflicting opinions of laws, regarding statutes, codes, and the Texas Constitution which these entities by failing to comply with Texas Property Code and relative statutes are creating confusion in Texas courts and the Texas real property records using the electronic agent, Mortgage Electronic Registration System (MERS), which Wells Fargo Bank, N.A. is a member, along with various government-sponsored enterprises (GSE's). These entities whether MERS members, or GSE investors are misleading the Courts and the State of Texas. Appellant does not believe the courts in Texas are corrupt, just seemingly misled. Eleventh Amendment does not protect state officials from claims for prospective relief when it is alleged that state officials acted in violation of federal law. *Warnock v. Pecos County, Texas*., 88 F3d 341 (5th Cir. 1996)

"It will be an evil day for American Liberty if the theory of a government outside supreme law finds lodgement in our constitutional jurisprudence. No higher duty rests upon this Court than to exert its full authority to prevent all violations of the principles of the Constitution." *Downs v. Bidwell*, 182 U.S. 244 (1901)

Appellants believe the Texas Legislature's intent was to protect property rights across Texas, and similar statutes have been enacted in most of the United States to ensure this protection. The Texas Legislature's apparent intent in 2003 to amend Chapter 51, Texas Property Code was purportedly intended to allow a mortgage servicer to administer foreclosure of property on behalf of a mortgagee. Appellants' do not believe the Legislature's intent was to create a Constitutional violation against the citizens of Texas by depriving such citizens a right to confrontation, a right to discover, or a right to protect real property from invading foreign entities such as a "book entry system", an electronic agent[17] that cannot be deposed, submit admissions, submit interrogatories, write, or speak, or provide a request for production, nor can the electronic agent intelligently instruct counsel or confront an

[17] See section § 322.002(6)

opposing party.[18] This is a serious issue concerning Texas Discovery Rules, confrontation, and agents whom are not human, a natural person. Through this understanding it becomes apparent that counsels for electronic agent are producing hearsay evidence unless counsels could produce some type of evidence to show how counsels communicated with a computer, an electronic agent, and the electronic agent provided its answers or instructions to counsel. The only possible or logical means of communicating with an electronic agent, would be using some type of C++ type programming or by means of computer source code tools originally used by EDS to create the national eNote registry, "electronic agent". Through this understanding is becomes apparent that most affidavits attached to a trustees deed recorded in a county clerks records, pursuant to a MERS action is nothing more than mere hearsay of hearsay. Even more importantly, the court should question how a prosecutor could convict an electronic agent for committing crimes?

To further the implications of the "book entry system", the Court is directed to section § 12.017, Title Insurance Company Affidavit As Release Of Lien; Civil Penalty, Texas Property Code which also defines "mortgagee", but omits the "book entry system" from the definition in section § 12.017(a)(2). The state would need to determine how a "book entry system" could accomplish the task in section § 12.017(d), Affidavit as Release of Lien because according to 51.0001(4), MERS is a "mortgagee", yet a computer, an electronic agent defined in eSign, Texas UETA and so noted by MERS members tracking agreements, and as an electronic agent, it cannot speak linguistics, type, instruct, or comprehend. An electronic agent could not pass a competency test.

The additional importance of this matter also regards the various counsels of these MERS members, GSE investor who are seemingly in contempt of court by obstructing the proper administration of justice, and committing crimes by creating fraudulent records and courts. The essence of contempt is that the conduct obstructs, or

[18] Appellants' also questions the ability of an electronic agent to create or acknowledge a power of Attorney to a natural person, usually an attorney allegedly representing the electronic agent. In other words, how does an ATM machine provide a power of attorney to anyone?

tends to obstruct, the proper administration of justice, *Ex parte Salfen*, 618 SW 2d 766 - Tex: Court of Criminal Appeals 1981 at 770.

The State of Texas must realize the magnitude of what a simple change to chapter 51 in essence violated any litigants ability to utilize the discovery rules against MERS the purported "holder of a security instrument", also known as a "book entry system"[19], because a computer system cannot physically write, answer or sign a complaint, motion, instrument, document, admission, interrogatory, or request for production. Only counsels whom are in contempt of court file such items that did not result from the electronic agent itself.

As reference, Appellants, previously, requested and received purported "discovery rule" items from the alleged representative of the electronic agent called MERS, a.k.a. Mortgage Electronic Registration Systems, Inc., but the answers did not come from the electronic agent, the alleged answers were provided as hearsay from an attorney committing contempt of court answering for the electronic agent without a power of attorney from the electronic agent. This certain counsel was also Wells Fargo Bank, N.A. counsel. In support, see Exhibits 9, 10, 11, discovery items from alleged representative of electronic agent. This contempt of court violated discovery rules, however Appellants were deprived from noticing the court of this violation due to unfair tactics by defendants and their counsels. After reviewing such referenced "discovery rule" items, the court must ask how the electronic agent objected to Appellants request because all the electronic agent was designed to do was to send, receive or store electronic data.

Additionally, Appellants ask the court how can an electronic agent foreclose real property or even provide a power of attorney to accomplish such an act? These are serious issues the State of Texas should be aware of, and correct them before Texas real estate becomes a cesspool of clouded titles.

[19] See section § 51.0001(1), Texas Property Code

And lastly, Appellants ask the court how could a judgment be granted to an electronic agent? Or, how did the electronic agent request a judgment from the court, when in fact, it is a computer, an electronic agent as defined by its own electronic governing laws.

CONTEMPT OF COURT

"No man [or woman] in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it." *Butz v. Economou*, 98 S. Ct. 2894 (1978); *United States v. Lee*, 106 U.S. at 220, 1 S. Ct. at 261 (1882). Acts in excess of judicial authority constitutes misconduct, particularly where a judge deliberately disregards the requirements of fairness and due process. *Cannon v. Commission on Judicial Qualifications*, (1975) 14 Cal. 3d 678, 694

"Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstad v. United States*, (1928) 277 U.S. 438

This court should begin to see, if it has not already, that Wells Fargo Bank, N.A.'s counsel, Mark D. Hopkins and other previous Wells Fargo counsels have misled this court and previous courts which he/they were involved in since 2008 whether it was trail or appellate back when Wells Fargo Home Mortgage was claiming they had the Campbell's real estate mortgage loan, including the Note which the Campbell's compelled evidence of in the 277th case with Judge Ken Anderson[20], the Note then was never produced. And even though the court reporters record would reflect, then judge, Anderson telling the banks counsel they looked like they lost, the Campbell's lost simply due to either the judge's ignorance or his corruption. Nevertheless, the Campbell's are being unfairly placed into a harmful situation of losing something

[20] *Alvie Campbell, Julia Campbell vs. Wells Fargo Home Mortgage* e.t.a.l And Barrett Daffin Frappier Turner & Engel, LLP e.t.a.l and Ryan Bourgeois, ESQ. and John Doe 1 throught 100 e.t.a.l. , Independently - CASE NO. 09-636-C277

that lawfully belongs to them, just like many other unfortunate Texans whom fell victims to this eMortgage crime.

Appellees' counsel Mark D. Hopkins, may or may not have an agreement with Wells Fargo Bank, N.A. as its counsel. According to the Bankruptcy Court in 2007[21], it is apparent "The Court recognizes that it has been the practice of creditors' counsel practicing statewide to reduce travel expenses and legal fees by arranging for participation by local counsel". In support, the *In Re: James Patrick Allen*, Case No: 06-60121, is attached as Exhibit 12 and is herein incorporated. Appellee originally filed its petition in JP court with the banking law firm, Barrett Daffin Frappier Turner & Engel, LLP, ("Barrett Daffin") an off take of Barrett Burke Wilson Castle Daffin & Frappier, L.L.P., which was sanctioned for wrongdoing in that particular case of a debtor. The Court must recognize the conduct by Mark D. Hopkins, and it may ultimately find Barrett Daffin is Hopkins client, instead of Well Fargo Bank, N.A. being Hopkins client. Barrett Daffin's computer system for handling cases and filing pleadings is not equipped to answer for American Mortgage Network, Inc. DBA AMNET mortgage, whom would be the only entity that could possibly be directly related to Alvie Campbell and Julia Campbell's real estate mortgage loan. Mark D. Hopkins appears to be conducting Wells Fargo Bank N.A. eSign and UETA actions related to a transferable record to commit a crime in Texas, by misleading the state and the courts with a non-related, non Article 3 Note while claiming to be a holder of a security instrument.

Appellant is aware the courts rely on attorney's honesty, truthfulness, ethical and professional conduct because they play an important role in the justice system, and they are suppose to be a pillar of the community, however, Appellee and its counsels use the courts to create the case law they need to further this seemingly criminal activity. Appellees' counsel, Mark D. Hopkins has fabricated court cases to fit his needs. This court could go all the way back to 2008 when the Campbell's first filed a

[21] *In Re: James Patrick Allen*, Case No: 06-60121, United States Bankruptcy Court For The Southern District Of Texas Victoria Division

suit in *Campbell v. Wells Fargo Home Mortgage* to find altered court quotes from Mark. D. Hopkins. Each case won by Hopkins misquotes allowed him to use the same misquotes again and again for his favor, along with affidavits that are not admissible. This can simply be proven by looking at existing court records from *Campbell v. MERS*, where Hopkins was committing such acts for criminal gain, of which, the Campbell's have suffered in both mental and financial capacities.

Appellant also makes the court aware of Mark D. Hopkins, purported counsel for Wells Fargo Bank, N.A. seemingly makes up or alters previous court quotes, whether ever so slightly, such as the court quote from *Williams v. Bank of New York Mellon*, which the court may find immaterial, or to a point adding many words. For instance, in *Martin v. Trevino*, Hopkins added an additional complete sentence consisting of thirty two (32) words,

> "[T]hird parties should not be able to disturb the legal advice rendered to adverse parties by filing lawsuits for fraud and conspiracy against their adversaries' lawyers regardless of the likelihood of litigation."

In support, the reference is attached as Exhibit 13 for reference and is herein incorporated. Seemingly, this would appear to be in violation of Texas Disciplinary Rules of Professional Conduct, Rule 3.03.

Wells Fargo Bank, N.A. counsel, Mark D. Hopkins completely altered and misrepresented *Taco Bell Corp. v. Cracken*, 939 F.Supp. 528, 532 (N.D. Tex. 1996).

> "Based on an overriding public policy, Texas courts have consistently held that an opposing party "does not have a right of recovery, under any cause of action, against another attorney arising from the discharge of his duties in representing a party ... " See, Taco Bell Corp. v. Cracken, 939 F.Supp. 528, 532 (N.D. Tex. 1996)

If the court were to query two words in the first sentence, (1)Texas, and (2)courts, together, no matches will be found in the opinion for "Texas courts".

Wells Fargo Bank, N.A. counsel, Mark D. Hopkins misrepresented *Kruegel v. Murphy*, 126 S.W. 343 (Tex. Civ. App.-Dallas 1910, writ ref d)."

> "Attorneys have an absolute right to "practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages." See, Kruegel v. Murphy, 126 S.W. 343 (Tex. Civ. App.-Dallas 1910, writ ref d)."

If the court were to query the court opinion, misrepresentation could be found.

Wells Fargo Bank, N.A. counsel, Mark D. Hopkins misrepresented Lewis v. Am. Exploration Co., 4 F.Supp.2d 673 (S.D. Tex. 1998)

> "Texas law is clear; attorneys are immune from claims like those advanced by the Plaintiffs and must remain immune in the interest of the orderly administration of the civil justice system."

If the court were to query the court opinion, misrepresentation could be found.

Wells Fargo Bank, N.A. counsel, Mark D. Hopkins provided many purported business records or affidavits that according to Texas rules of evidence and past court cases are ineligible for admission as evidence, such as the affidavit of Matthew Cunningham, which according to *Ryland Group, Inc. v. Hood*, 924 SW 2d 120 - Tex: Supreme Court 1996, Cunningham's number five (5) "To the best of my knowledge and belief", disqualifies the seemingly fraudulent document attempting to support another fraudulent document, a purported Trustee's deed. See also, *Hoagland v. Butcher*, Tex: Court of Appeals, 14th Dist. 2013

Appellants also show the court that the counsels of Barrett Daffin Frappier Turner & Engel, whether it is Mark D Hopkins or not, these attorneys seemingly use the same types of misquoted court opinions even in Federal court to argue attorney immunity in *Smith et al v. National City Mortgage et al*. See Exhibit 14.

Wells Fargo Bank, N.A. counsel, Mark D. Hopkins is in violation of Texas Government Code, section § 82.037, oath of attorney, an oath attorneys are supposed to carry around that is endorsed upon their license.

Wells Fargo Bank, N.A. counsel, Mark D. Hopkins is eligible for Texas Government Code, section § 82.061, misbehavior or contempt; and section § 82.062 disbarment.

Wells Fargo Bank, N.A. counsel, Mark D. Hopkins is bound to Texas Government Code, Chapter 81, State Bar, subchapter E, Discipline.

Wells Fargo Bank, N.A. counsel, Mark D. Hopkins is in violation of Texas Rules of Professional Conduct.

TEXAS IS AFFECTED

Appellant contends the utmost respect to the Court and holds Texas dear as being a descendant of a Texian whom began the Campbell generations to come, and this is why it is important to Appellant to stress to the Court that no matter what the outcome of this case may be, especially if in favor of Wells Fargo Bank, N.A. it is not just a Campbell whom will be deprived, it will be many Texans whom have lost defending a cause that holds merit and deprived by corporations and their counsels whom lied, cheated and stole for their ill gotten gains. Texas is affected.

Section §192.007, Texas Local Government Code govern perfection of a lien. This is similar to Texas Certificate of Title Act for the perfection of lien on automobile titles. This similarity can be deduced from *In re Clark Contracting*[22]. As the Clark case recognizes the Certificate of Title Act as the law that govern the perfection of a line on a car title, Wells Fargo Equipment Finance, relied on the Uniform Commercial Code to support its perfection claims. The similarity to Clark is that Texas Local Government Code, specifically, Chapter 192, § section 007, governs the perfection for title to real property, whereas MERS and Wells Fargo relied on the Uniform Commercial Code to govern perfection of a deed of trust lien. The problem with that theory is liens are excluded from the UCC. See § 9.109(d)(2)

As if the court is not aware, Appellants' direct the courts attention to recent issues taking place with various counties involvement in the serious problem in Texas

[22] See Exhibit 15- *In re Clark Contracting Services*, Inc, 399 B.R. 789 (2008)

public land records. A recent interlocutory opinion in *Nueces County v. Mortgage Electronic Registration Systems, Inc., Bank of America*, Civil Action No. 2:12-CV-00131, the court simply stated "*This court cannot simply bend the laws of Texas to fit the MERS system, no matter how ubiquitous it has become.", and further on in the opinion, cited the case In Re Agard, 444 B.R. 231 (E.D.N.Y. 2011) "This Court does not accept the argument that because MERS may be involved with 50% of all residential mortgage in the country, that is reason enough for this Court to turn a blind eye to the fact that this process does not comply with the law*". In support, the Nueces Court opinion is attached as Exhibit 16 and incorporated by reference.

Appellants' also brings to the Courts attention of the *U.S. v. Wells Fargo Bank NA*, U.S. District Court, Southern District of New York, No. 12-07527, in which Wells Fargo Bank, N.A. failed to persuade the court to grant its motion to dismiss against HUD's FIRRREA claim, the Financial Institutions Reform, Recovery and Enforcement Act of 1989, a law adopted after the 1980's savings-and-loan crisis that lets the government sue for fraud affecting a federally-insured financial institution. In support, the September 24, 2013 Rueters[23] news article is attached as exhibit 17 and incorporated by reference. HUD's key federal claim is that Wells Fargo lied about the quality of mortgages it submitted to a government insurance program, costing hundreds of millions of dollars over roughly a decade. This "decade" claim would place plaintiffs secured mortgage loan origination within that particular timeframe of their application for an FHA/HUD mortgage loan, and Wells Fargo did allege a claim that it purportedly held plaintiffs' promissory note in 2004, even though Wells Fargo's own records reflect in 2008, Ginnie Mae as the holder of an interest in a transferable record.

Appellants' again urge the Court to recognize the laws of Texas governing real property. Appellants' again urge the Court to recognize that MERS members are falsely representing themselves, their electronic agent, and that these continuous

[23] http://www.reuters.com/article/2013/09/24/us-wellsfargo-lawsuit-mortgage-fraud-idUSBRE98N0WT20130924

misrepresentations are made with the intent to allude that their alleged deed of trusts with an electronic agent named in it and their purported "assignment of note and deed of trust" could be given legal effect when, by law, it cannot.

CONCLUSION

Very little case law, if any, can be provided for this electronic agent real property fiasco. Texas case law citing back to *Carpenter v. Longan*, only refers to the mortgage follows the note theory, not the mortgage follows the intangible Note theory as the courts seem to misunderstand. This MERS thing is akin to new uncharted territory that is being newly discovered.

Because of fraudulent actions, Wells Fargo Bank, N.A. could not prove any negotiation of the Campbell's Note according to section §3.203(d), simply because the interest was stripped away from the paper promissory Note causing the Note not to be eligible for negotiation.

The false claims act provides liability for any person (i) who "knowlingly presents, or cause to be presented, a false or fraudulent claim for payment or approval", or (ii) who "knowingly make, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim". 31 U.S.C. § 3729(a)(1)(A)-(B). Generally, an act is false, misleading, or deceptive if it has the capacity to deceive an "ignorant, unthinking, or credulous person." *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 SW 2d 472 - Tex: Supreme Court 1995; citing *Spradling v. Williams*, 566 SW 2d 561 - Tex: Supreme Court 1978

Appellants' title to real property is in dispute, and the only instrument closely resembling a colorable claim recorded with the Clerk of Public Records which is not in dispute is a special warranty deed with vendor's lien evidencing Plaintiffs' names, not Wells Fargo Bank, N.A. In support, a copy of the special warranty deed with vendor's lien is attached as Exhibit 18 and incorporated by reference.

MERS members such as Wells Fargo Bank, N.A. conduct commercial transactions using electronic agents and electronic promissory notes, unequivocal to a Chapter 3 negotiable instrument, but as an intangible obligation between a UCC Creditor and Account Debtor, or according to electronic law, between an electronic obligor and a Controller. See § 322.016. Whether Wells Fargo Bank, N.A. conducts electronic transactions, entities like Wells Fargo Bank, N.A. as a MERS member are required to track the paper promissory Note, as MERS does not track them.

Actions related to a residential mortgage loan require strict attention to the process of negotiation of a negotiable instrument and further actions are required to perfect the security instrument purportedly attached to the paper promissory note, per Texas Local Government Code chapter 192, section.007.

Such actions related to the secured real estate mortgage failed to take place for the secured debt to meet those strict requirements for perfection of the paper promissory note and the subsequent eligible recordation's to meet the strict requirements of section § 192.007.

Any action to enforce an indebtedness is an action in equity, as any action to enforce a deed of trust is an action in law. An action to enforce the note without proof a claimant met burden for the requirements for perfection of the deed of trust, the claimant cannot use a court of equity.

PRAYER

Appellant moves the Court to reverse the trial courts decisions and dismiss Wells Fargo Bank, N.A. forcible detainer case for lack of jurisdiction. He also asks for all further relief that the court deems proper and appropriate. He also asks for any such fines, sanctions, or reports of criminal activity to law enforcement, which the court deems proper and appropriate.

Respectfully submitted
By: /s/ Alvie Campbell
Alvie Campbell
c/o 250 PR 947
Taylor, Texas 76574

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2013, a true and correct copy of Appellants Verified Memorandum in Support of Appellant Brief and Reply Brief of Appellant was delivered to representing counsel of this case listed below by Pro Doc eService and U.S. mail.

Mark D. Hopkins, Hopkins & Williams Law, P.L.L.C., United States mail.
12117 FM 2244, Bldg 3, Suite 260
Austin, Texas 78738
Counsel for Wells Fargo Bank, N.A. (Case No. 03-12-00007-CV)

By: /s/ Alvie Campbell
Alvie Campbell
c/o 250 PR 947
Taylor, Texas 76574

CERTIFICATE OF COMPLIANCE

I hereby certify that according to the word-count feature of the Microsoft Word 2003, which has been applied specifically to include all text, including headings, footnotes, and quotations, the [VERIFIED] MEMORANDUM IN SUPPORT OF APPELLANT BRIEF AND REPLY BRIEF OF APPELANT consists of a cumulative total of 7439 words.

By: /s/ Alvie Campbell Alvie Campbell
c/o 250 PR 947, Taylor, Texas 76574

VERIFICATION

STATE OF TEXAS

COUNTY OF WILLIAMSON

BEFORE ME personally appeared Alvie Campbell who, being by me first duly sworn and identified in accordance with Texas law, deposes and says:

My name is Alvie Campbell, Appellant herein.

I have read and understood the attached foregoing Verified Appellants Memorandum in Support of Appellant Brief and Reply Brief of Appellant and each fact alleged therein is true and correct of my own personal knowledge.

I have read and understood the attached foregoing Affidavit of Joseph R. Esquivel Jr., a chain of title analysis and Joseph R. Esquivel Jr. alleged each fact therein as true and correct. And through my own personal knowledge Mr. Esquivel delivered such chain of title analysis to me, Alvie Campbell.

FURTHER THE AFFIANT SAYETH NAUGHT.

_____

Alvie Campbell, Affiant

SWORN TO and subscribed before me this 14th day of November, 2013.

_____

Notary Public

My commission expires:_____

VERIFICATION

STATE OF TEXAS

COUNTY OF WILLIAMSON

BEFORE ME personally appeared Alvie Campbell who, being by me first duly sworn and identified in accordance with Texas law, deposes and says:

My name is Alvie Campbell, Appellant herein.

I have read and understood the attached foregoing Verified Appellants Memorandum in Support of Appellant Brief and Reply Brief of Appellant and each fact alleged therein is true and correct of my own personal knowledge.

I have read and understood the attached foregoing Affidavit of Joseph R. Esquivel Jr., a chain of title analysis and Joseph R. Esquivel Jr. alleged each fact therein as true and correct. And through my own personal knowledge Mr. Esquivel delivered such chain of title analysis to me, Alvie Campbell.

FURTHER THE AFFIANT SAYETH NAUGHT.

Alvie Campbell, Affiant

SWORN TO and subscribed before me this 14th day of November, 2013.

JANIE CZIMSKEY
Notary Public
STATE OF TEXAS
My Comm. Exp. July 28, 2014

Notary Public

My commission expires: 7-28-14

National eNote Registry
Requirements Document

Version 1.0

Mar 7, 2003

1. Introduction

a. This paper defines the concepts of operation, key assumptions and terms, and high level business requirements for a National eNote Registry.

2. Concept Overview

a. The National eNote Registry is a compliance vehicle to satisfy certain requirements imposed by the Uniform Electronic Transactions Act (UETA) and the federal Electronic Signatures in Global and National Commerce Act (E-SIGN) so that the owner of an eNote (the Controller) would have legal rights similar to those that a "Holder in Due Course" has with a paper negotiable promissory note. An eNote issued in compliance with Section 16 of UETA or Title II of E-SIGN is called a Transferable Record (TR). Specifically, Section 16 of UETA and Title II of E-SIGN require that the party in control of the Authoritative Copy (AC) of the TR at any given point in the life cycle of an eNote can be readily identified.

b. The concept of a National eNote Registry (National Registry) has evolved out of the need to track and identify electronic promissory notes (eNotes) in an evolving industry infrastructure for electronic mortgages (eMortgages). This need assumes that:
   i. Proprietary electronic custodial repositories (eCustodians or eVaults) will exist to store eNotes
   ii. When an eNote is sold, the electronic file may be transferred from the seller's eVault to the buyer's (or it may remain in place, if the buyer and seller have a business relationship that allows for that).
   iii. Any electronic copy of an eNote is identical to any other – since they are simply bit-for-bit copies of computer files, no one copy of an eNote can contain data that would identify it as the Authoritative Copy (the electronic equivalent of the paper copy with the wet ink signatures)

c. Therefore, some external mechanism is required to resolve the question of which of the (potentially many) copies of an eNote is the Authoritative Copy, and thus identify ownership of the eNote.

d. The assurance of this external mechanism will be required by secondary market investors for them to accept delivery of eNotes.

e. Based on this need, the National Registry will allow eNotes to be registered and uniquely identified for tracking and verification. It will store information on the controller and location of the Authoritative Copy of the eNote.

f. The National Registry will not store the actual eNote, but only identifying information about it.

3. Scope

This document defines high-level business requirements for the National Registry; it is not intended to define the necessary business infrastructure to operate the National Registry.

4. Explanation of Key Terms

A number of terms have become commonly used in the development of the National Registry requirements, assumptions, and process flows. The Glossary section of this document contains a complete listing of terms and definitions. This section attempts to explain a few of the key terms in plain language, and bridge the gap between today's (paper-based) mortgage world and the new electronic mortgage world.

a. Authoritative Copy: The copy of an eNote or other electronic transferable record over which Control can be identified and asserted by the Controller (or owner) of the eNote. Roughly equivalent to an original paper note with wet ink signatures, where physical possession is the analog of "control."
b. Controller: The electronic equivalent of the Owner of a paper Note – the entity that is in Control of the Authoritative Copy of the eNote.
c. eCustodian: A legal fiduciary designated by a Controller to administer the Controllers' eNotes on its behalf in an eVault.
d. eVault: A secure electronic repository for eNotes. May be operated by an eCustodian or by a lender or investor to store their own eNotes. Similar to a paper vault run by the Document Custodian industry today.
e. Transferable Record: An **eNote** issued in accordance with the provisions of Section 16 of the **UETA** and Title II of **E-SIGN**

5. Key Assumptions

The National eNote Registry Task Force developed a number of key assumptions that help to frame and drive the business requirements. These assumptions attempt to provide a real-world view of the National Registry's operational and business environment.

a. Electronic notes registered with the National Registry must contain language, which refers to the National Registry to identify their Controller.
This language provides the "closed loop" of relationships and responsibility, which ensure that the eNote, Controller, eVault, and National Registry all work together to satisfy the Safe Harbor provision of UETA Section 16.
b. All parties interacting with the National Registry must have executed membership agreements with the National Registry.
c. The authority of the National Registry would extend from specific investor requirements for its use.
d. The National Registry is expected to evolve over time to continue to meet industry needs.
e. The National Registry functionality is limited to electronic notes, and not paper notes.
The National Registry is intended to satisfy the requirements of UETA and ESIGN for electronic notes only. Attempting to provide functionality for paper note tracking would greatly complicate the design and implementation of the National Registry.
f. The National Registry will communicate with member organizations using industry-standard XML messages.
g. The National Registry is intended to track and maintain information on eNotes that have been created using the industry-standard MISMO SMART Document format.
h. The Business Partner agreement between the National Registry and participants will define the hash algorithm to be used on the eNote for registration purposes.
i. The National Registry will not store eNotes or copies of eNotes.
The responsibility for ensuring the validity of an eNote and its hash value rests with the Controller and its eVault. This responsibility should be clearly delineated in the business agreements that National Registry participants must enter into in order to transact with the National Registry.
j. A single neutral industry-wide eVault will not be a viable business solution.
Although it would solve many of the business, technical, and functional challenges that we face in this new industry paradigm, it is clear that individual vendors will provide eVaulting services to lenders just as Document Custodians provide similar services in the paper world today. It also seems likely that larger

lenders and secondary market investors will not allow their eNotes to be stored by a third-party utility such as a national eVault.

k. Multiple proprietary eVaults will be created to satisfy the specific electronic storage requirements of eNotes for various investors.
This is the corollary to (j) above – some of these exist already.

l. The National Registry is not involved in the transfer of funds (it is not a book entry system).
The National Registry would not be involved in the entry, forwarding, or tracking of good funds associated with the closing of the electronic mortgage or the transfer of the eNote.

m. Endorsements of eNotes are not required; transfers of control in the National Registry are the legal equivalent of a paper endorsement.
The National Registry will track all transfers of control and other events in the life of the eNote in its audit logs.

6. Business Requirements

This section states the core, high-level requirements that the National Registry must fulfill to provide the legal rights described above, as defined by Section 16 of UETA and Title II of E-SIGN. The National Registry will:

a. Perform initial registrations of eNotes:
    i. Confirm valid sender
        1. Organization is member of National Registry
        2. User is valid
        3. Check that the organization that control is being asserted for is valid for that requester
        4. Authenticate organizations
    ii. Confirm that the registration dataset is complete
        1. Controller
        2. Location
        3. Primary ID – Mortgage Identification Number (MIN)
        4. PKI hash value of eNote
        5. Other optional data (Servicer, etc)
    iii. Confirm that the eNote is not already registered
        1. The MIN (Mortgage Identification Number) and the PKI hash value for the eNote will be the primary means of uniquely identifying eNotes in the National Registry
    iv. Create a registration record with provided dataset and additional data such as date/time stamps
    v. Send confirmation to sender of completed registration (or error message if needed)

b. Perform transfers of control of eNotes:
    i. Use a positive confirmation model – the transferee must confirm their acceptance within a specified time or the pending transfer is dropped
    ii. Validate both transferor and transferee:
        1. Organizations are members of the National Registry
        2. Users are valid
        3. Check that the organization for which control is being asserted is valid for that requester (for example, if a Controller's delegate makes a request to the National Registry on behalf of that Controller)
        4. Authenticate organizations
    iii. Compare the PKI hash value stored at the National Registry with the hash value submitted by the transferor as part of the transfer request *(the*

hash values must be identical, providing strong assurance, within the framework of the National Registry member agreements, that the eNote being transferred is an identical copy of the eNote that was originally registered by the Controller)

c. Provide functionality for handling modifications to an eNote
d. Provide functionality for liquidation of an eNote:
    i. Change eNote to "Paid Off" status, for example (after two-step confirmation from controller)
    ii. Allow reversal of "paid off" status in case of errors
e. Store information concerning the location of an eNote
f. Provide a Controller (or its delegate) with access to Registry data records on the Controller's own eNotes.
g. Accept changes to the data record of an eNote record from its Controller, for example:
    i. Location information (required field)
    ii. Other optional fields that may be desired for National Registry operation
h. Provide a mechanism for the Controller to delegate some level of authority to another organization, such as a Servicer, to initiate transactions or query the National Registry on their behalf
i. Provide functionality to indicate that an eNote was de-registered and converted into a paper original.
j. Maintain an audit trail of events and changes to each National Registry entry

7. Process Flows

The National Registry must support a number of detail process flows, such as the examples noted in the previous section (initial registration, transfer of control, liquidation). Figure 7-1 below shows an example of the high-level process flow that would occur when an eNote is created, initially registered, and subsequently transferred to different controllers. More detailed process flows will be developed as part of the detailed or technical requirements document.

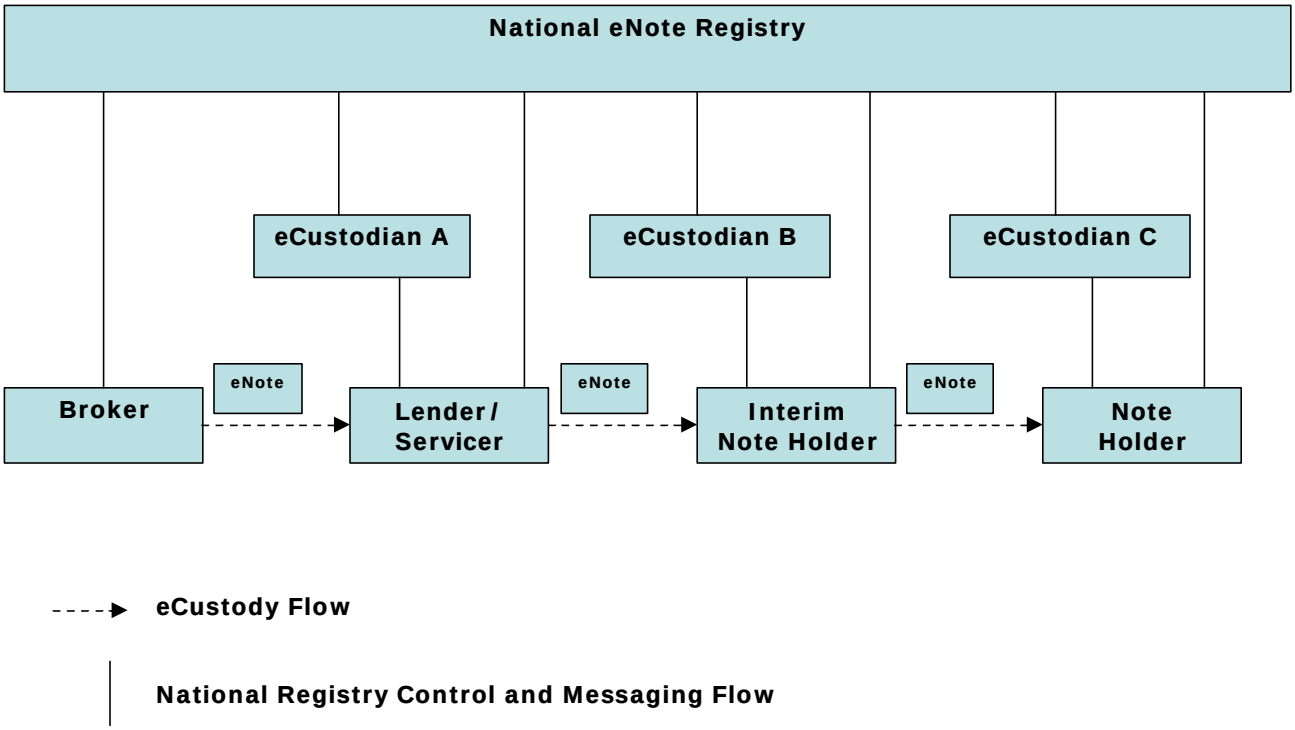


Figure 7-1: High-level eNote process flow

8. Infrastructure Requirements

The provider of the National Registry should ensure that the following infrastructure capabilities are

a. Online Inquiry Availability
    i. Monday through Sunday, 24 hours (with the exception of a scheduled maintenance window on Sunday)
b. Real Time Inquiry and System-to-System Processing Availability
    i. Monday through Saturday, 8:00 AM to 10:00 PM EST
c. Transaction Processing Requirements
    i. Registration: within one business day (24 hours) *(Note: this is a recommendation only, the National Registry cannot mandate this as a requirement)*
    ii. Transfers: within three business days
    iii. Note: Transactions may be effective-dated, but only within the three business day standard.
d. File Formats Supported
    i. The file formats supported by the National Registry will be industry standard (e.g., MISMO XML)
e. Help Desk Availability
    i. Monday through Friday, 8:00 AM to 8:00 PM EST with 30-minute emergency callback response during off hours
f. Non-Processing Days
    i. New Year's Day, Martin Luther King's Birthday, President's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day
g. Processing Environment
    i. Servers would be maintained on a high availability basis
h. Disaster Recovery
    i. Full recovery from the last daily backup within 24 hours of a declared event
i. Ad Hoc Reporting Capability
    i. Participants would have ad hoc reporting access to information on registered records in which they have an interest
j. System Integration Support
    i. Provide documentation, integration assistance, and test environment to certify technology provider system interface requirements and to recertify future technology provider and/or National Registry system modifications
k. Safeguarding Customer Information
    i. Would satisfy Interagency Guidelines Establishing Standards for Safeguarding Customer information
l. Data Processing Environment
    i. Would maintain ISO 9000 compliance for midrange computing and web hosting

9. Glossary of Terms

Authenticate: The process of identifying an individual or entity usually based on a user name and password, but can also require the use of a token. In the case of the **eNote**, authentication is accomplished by validating a unique loan level identifier combined with certain cross-referencing data (e.g. Note Amount, Borrower Name, Street Address, etc. Authentication in systems is distinct from authorization, which grants individuals or entities access to system objects based on their identity.

Authoritative Copy (AC): The unique, identifiable and mostly unalterable version of the **eNote** that (1) identifies the person asserting control as *the* person to which the **Transferable Record** was issued or most recently transferred, (2) ensures that "each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy" and (3) any revision of the AC is readily identifiable as authorized or unauthorized

Authorized Industry Participant: An entity that has signed a member agreement and has been granted security access to the **National Registry**

API (Application Program Interface): A set of routines, protocols, and tools for building software applications

Beneficial Rights: Ownership rights to the future cash flows of the **eNote**; the transfer of control of the TR evidences transfer of beneficial rights

Certificate Authority (CA): A trusted third-party organization or company approved by the investor that issues **Digital Certificates** used to create digital signatures and public-private key pairs. The role of the CA in this process is to guarantee that the individual granted the unique certificate is, in fact, who he or she claims to be. Usually, this means that the CA has an arrangement with a financial institution, such as a mortgage company, which provides it with information to confirm an individual's claimed identity.

Confirm: To give approval to by a confirmation transaction. The key distinction with **Verify** is that the event is not finalized until the recipient initiates and the **National Registry** accepts the confirmation transaction to make the event final.

Control: With **eNotes**, control over the **Transferable Record** replaces the notion of possession and endorsement in the paper analog for purposes of establishing the "holder in due course" status.

Digital Certificate: An attachment to an electronic message (or signature), that for security purposes verifies that a user sending a message or applying a signature is who she/he claims to be and is used to provide the receiver with the means to encode a reply or subsequent acceptance of the signature

DTD (Document Type Definition): A DTD states what tags and attributes are used to describe content in an XML document, where each tag is allowed, and which tags can appear within other tags

eCustodian: A legal fiduciary designated by a Controller to administer the Controllers' eNotes on its behalf in an eVault.

E-SIGN: Electronic Signatures in Global and National Commerce Act

eNote: The electronic promissory note. For this eNote to be negotiable and transferable, it must be clearly labeled the **Authoritative Copy** of the electronic promissory note.

eNote Hash: The hash value (or simply *hash*) is a number generated from the text of the **eNote**. The hash is substantially smaller than the text itself, and is generated by a formula in such a way that it is extremely unlikely that some other **eNote** text will produce the same hash value.

eVault: A secure electronic repository for eNotes. May be operated by an eCustodian or by a lender or investor to store their own eNotes. Similar to a paper vault run by the Document Custodian industry today.

Interim Note Holder: The investor or institution that holds (i.e. controls) the **eNote** for a temporary time period pending its transfer to the final **Note Holder**. An example might be in a loan closing where the originator has made a forward sale to an investor (GSE, large bank, etc.) but involves a warehouse lender to fund the closing. A warehouse lender could be the Interim Note Holder until the investor purchases the loan and releases the funds.

MIN (Mortgage Identification Number): The industry standard, unique loan numbering system maintained by Mortgage Electronic Registration Systems, Inc. (MERS).

Note Holder: The investor or institution that is intended to be the permanent holder (i.e. controller) of the **eNote**

Originator/Seller: The organization that originates an **eNote** and sells it to the **Interim Note Holder** or **Note Holder**

Paid-Off: Payor has satisfied all of his or her contractual obligations under the **eNote**

PKI (Public/Private Key Infrastructure): A system of **Digital Certificates**, **Certificate Authorities**, and other registration authorities that verify and authenticate the validity of each party involved in an Internet transaction

Public Key Encryption: An encryption method requiring two unique software keys for decrypting data, one public and one private. Data is encrypted using the published public keys, and the unpublished private keys are used to decrypt the data.

Protocol: Rules governing transmitting and receiving of data

Registrar: An entity that submits an **eNote** to the **National Registry** to be registered

Servicer: The party with contractual responsibility to collect payments on behalf of the **Note Holder**

Servicing Rights: The contractual rights that can be sold in the secondary market to collect payments on behalf of the **Note Holder**

Transferor: The entity that initiates a transfer to another entity

Transferee: The entity that receives a transfer from another entity

Transferable Record (TR): An **eNote** issued in accordance with the provisions of Section 16 of the **UETA** and Title II of **E-SIGN**

Trusted Third Party: An entity other than the **Note Holder** or **Servicer** that is in the business of providing services intended to enhance (i) the trustworthiness of the process for signing electronic records using an electronic signature, or (ii) the integrity and reliability of the signed electronic records

UETA: Uniform Electronic Transactions Act

Verify: A notice from the **National Registry** that an event occurred. The key distinction with **Confirm** is that the completion of the event is not dependent on the generation or receipt of a verification transaction.

X12: A data standard for the transfer of data between different companies using networks sanctioned by the American National Standards Institute

XML (Extensible Markup Language): A simple, very flexible text format derived from SGML. It is essentially a set of rules or a convention for putting structured data in a text file. It is platform independent and therefore allows the computer to generate or read files easily. XML uses tags to delimit pieces of data, but leavers the interpretation of the data up to the application (hence the need for standardized DTDs in the mortgage industry to seamlessly exchange quality financial data).

(3) $15,000,000 for fiscal year 2002; and
(4) $15,000,000 for fiscal year 2003.

(Pub. L. 103–325, title I, §180, as added Pub. L. 106–102, title VII, §725, Nov. 12, 1999, 113 Stat. 1474.)

REFERENCES IN TEXT

This title, referred to in text, is title I of Pub. L. 103–325, Sept. 23, 1994, 108 Stat. 2163. Subtitle A (§§101–121) of title I, known as the Community Development Banking and Financial Institutions Act of 1994, is classified principally to subchapter I (§4701 et seq.) of chapter 47 of Title 12, Banks and Banking. Subtitle B (§§151–158) of title I, known as the Home Ownership and Equity Protection Act of 1994, enacted sections 1639 and 1648 of this title, amended sections 1602, 1604, 1610, 1640, 1641, and 1647 of this title, and enacted provisions set out as notes under sections 1601 and 1602 of this title. Subtitle C (§§171–181) of title I, known as the Program for Investment in Microentrepreneurs Act of 1999 or PRIME Act, is classified generally to this chapter. For complete classification of title I of Pub. L. 103–325 to the Code, see Tables.

§ 6910. Implementation

The Administrator shall, by regulation, establish such requirements as may be necessary to carry out this chapter.

(Pub. L. 103–325, title I, §181, as added Pub. L. 106–102, title VII, §725, Nov. 12, 1999, 113 Stat. 1475.)

CHAPTER 96—ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE

SUBCHAPTER I—ELECTRONIC RECORDS AND SIGNATURES IN COMMERCE

SUBCHAPTER II—TRANSFERABLE RECORDS

SUBCHAPTER III—PROMOTION OF INTERNATIONAL ELECTRONIC COMMERCE

SUBCHAPTER I—ELECTRONIC RECORDS AND SIGNATURES IN COMMERCE

§ 7001. General rule of validity

(a) In general

Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce—

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

(b) Preservation of rights and obligations

This subchapter does not—

(1) limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law other than a requirement that contracts or other records be written, signed, or in nonelectronic form; or

(2) require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party.

(c) Consumer disclosures

(1) Consent to electronic records

Notwithstanding subsection (a) of this section, if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if—

(A) the consumer has affirmatively consented to such use and has not withdrawn such consent;

(B) the consumer, prior to consenting, is provided with a clear and conspicuous statement—

(i) informing the consumer of (I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and (II) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal;

(ii) informing the consumer of whether the consent applies (I) only to the particular transaction which gave rise to the obligation to provide the record, or (II) to identified categories of records that may be provided or made available during the course of the parties' relationship;

(iii) describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact the consumer electronically; and

(iv) informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy;

(C) the consumer—

(i) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and

(ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in

the electronic form that will be used to provide the information that is the subject of the consent; and

(D) after the consent of a consumer in accordance with subparagraph (A), if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the person providing the electronic record—

(i) provides the consumer with a statement of (I) the revised hardware and software requirements for access to and retention of the electronic records, and (II) the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed under subparagraph (B)(i); and

(ii) again complies with subparagraph (C).

(2) Other rights

(A) Preservation of consumer protections

Nothing in this subchapter affects the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law.

(B) Verification or acknowledgment

If a law that was enacted prior to this chapter expressly requires a record to be provided or made available by a specified method that requires verification or acknowledgment of receipt, the record may be provided or made available electronically only if the method used provides verification or acknowledgment of receipt (whichever is required).

(3) Effect of failure to obtain electronic consent or confirmation of consent

The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer in accordance with paragraph (1)(C)(ii).

(4) Prospective effect

Withdrawal of consent by a consumer shall not affect the legal effectiveness, validity, or enforceability of electronic records provided or made available to that consumer in accordance with paragraph (1) prior to implementation of the consumer's withdrawal of consent. A consumer's withdrawal of consent shall be effective within a reasonable period of time after receipt of the withdrawal by the provider of the record. Failure to comply with paragraph (1)(D) may, at the election of the consumer, be treated as a withdrawal of consent for purposes of this paragraph.

(5) Prior consent

This subsection does not apply to any records that are provided or made available to a consumer who has consented prior to the effective date of this subchapter to receive such records in electronic form as permitted by any statute, regulation, or other rule of law.

(6) Oral communications

An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this subsection except as otherwise provided under applicable law.

(d) Retention of contracts and records

(1) Accuracy and accessibility

If a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be retained, that requirement is met by retaining an electronic record of the information in the contract or other record that—

(A) accurately reflects the information set forth in the contract or other record; and

(B) remains accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise.

(2) Exception

A requirement to retain a contract or other record in accordance with paragraph (1) does not apply to any information whose sole purpose is to enable the contract or other record to be sent, communicated, or received.

(3) Originals

If a statute, regulation, or other rule of law requires a contract or other record relating to a transaction in or affecting interstate or foreign commerce to be provided, available, or retained in its original form, or provides consequences if the contract or other record is not provided, available, or retained in its original form, that statute, regulation, or rule of law is satisfied by an electronic record that complies with paragraph (1).

(4) Checks

If a statute, regulation, or other rule of law requires the retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with paragraph (1).

(e) Accuracy and ability to retain contracts and other records

Notwithstanding subsection (a) of this section, if a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.

(f) Proximity

Nothing in this subchapter affects the proximity required by any statute, regulation, or other

rule of law with respect to any warning, notice, disclosure, or other record required to be posted, displayed, or publicly affixed.

(g) Notarization and acknowledgment

If a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.

(h) Electronic agents

A contract or other record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents so long as the action of any such electronic agent is legally attributable to the person to be bound.

(i) Insurance

It is the specific intent of the Congress that this subchapter and subchapter II of this chapter apply to the business of insurance.

(j) Insurance agents and brokers

An insurance agent or broker acting under the direction of a party that enters into a contract by means of an electronic record or electronic signature may not be held liable for any deficiency in the electronic procedures agreed to by the parties under that contract if—

(1) the agent or broker has not engaged in negligent, reckless, or intentional tortious conduct;

(2) the agent or broker was not involved in the development or establishment of such electronic procedures; and

(3) the agent or broker did not deviate from such procedures.

(Pub. L. 106–229, title I, §101, June 30, 2000, 114 Stat. 464.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (c)(2)(B), was in the original ''this Act'', meaning Pub. L. 106–229, June 30, 2000, 114 Stat. 464, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note below and Tables.

For the effective date of this subchapter, referred to in subsec. (c)(5), see Effective Date note below.

EFFECTIVE DATE

Pub. L. 106–229, title I, §107, June 30, 2000, 114 Stat. 473, provided that:

''(a) IN GENERAL.—Except as provided in subsection (b), this title [enacting this subchapter] shall be effective on October 1, 2000.

''(b) EXCEPTIONS.—

''(1) RECORD RETENTION.—

''(A) IN GENERAL.—Subject to subparagraph (B), this title [enacting this subchapter] shall be effective on March 1, 2001, with respect to a requirement that a record be retained imposed by—

''(i) a Federal statute, regulation, or other rule of law, or

''(ii) a State statute, regulation, or other rule of law administered or promulgated by a State regulatory agency.

''(B) DELAYED EFFECT FOR PENDING RULEMAKINGS.—If on March 1, 2001, a Federal regulatory agency or State regulatory agency has announced, proposed, or initiated, but not completed, a rulemaking proceeding to prescribe a regulation under section 104(b)(3) [15 U.S.C. 7004(b)(3)] with respect to a requirement described in subparagraph (A), this title shall be effective on June 1, 2001, with respect to such requirement.

''(2) CERTAIN GUARANTEED AND INSURED LOANS.—With regard to any transaction involving a loan guarantee or loan guarantee commitment (as those terms are defined in section 502 of the Federal Credit Reform Act of 1990 [2 U.S.C. 661a]), or involving a program listed in the Federal Credit Supplement, Budget of the United States, FY 2001, this title applies only to such transactions entered into, and to any loan or mortgage made, insured, or guaranteed by the United States Government thereunder, on and after one year after the date of enactment of this Act [June 30, 2000].

''(3) STUDENT LOANS.—With respect to any records that are provided or made available to a consumer pursuant to an application for a loan, or a loan made, pursuant to title IV of the Higher Education Act of 1965 [20 U.S.C. 1070 et seq., 42 U.S.C. 2751 et seq.], section 101(c) of this Act [15 U.S.C. 7001(c)] shall not apply until the earlier of—

''(A) such time as the Secretary of Education publishes revised promissory notes under section 432(m) of the Higher Education Act of 1965 [20 U.S.C. 1082(m)]; or

''(B) one year after the date of enactment of this Act [June 30, 2000].''

SHORT TITLE

Pub. L. 106–229, §1, June 30, 2000, 114 Stat. 464, provided that: ''This Act [enacting this chapter and amending provisions set out as a note under section 231 of Title 47, Telegraphs, Telephones, and Radiotelegraphs] may be cited as the 'Electronic Signatures in Global and National Commerce Act'.''

§ 7002. Exemption to preemption

(a) In general

A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 7001 of this title with respect to State law only if such statute, regulation, or rule of law—

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this subchapter or subchapter II of this chapter, or would not be permitted under paragraph (2)(A)(ii) of this subsection; or

(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if—

(i) such alternative procedures or requirements are consistent with this subchapter and subchapter II of this chapter; and

(ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the func-

AGREEMENT ALLOWING FOR THE USE OF ELECTRONIC SIGNATURES

This Agreement is between <DPS CUSTOMER NAME> hereinafter referred to as "<SHORT CUSTOMER NAME>"and <CONSUMER>hereinafter referred to as "You" and "Your".

THE PARTIES AGREE TO THE FOLLOWING:

Description of Transaction
This Agreement covers the electronic signing of your entire residential loan closing package for the property located at <INSERT PROPERTY ADDRESS HERE>.

Affirmative Consent for Electronic Signatures
You consent to use an electronic signature for the transaction described above in place of your handwritten signature for the electronic signing of your residential loan closing documents presented to you electronically. Your consent to sign electronically covers all electronic documents in your residential loan closing package. You agree to use your hand written signature on the mortgage, any riders to the mortgage, and any other documents relating to your residential loan closing documents that are presented to you in paper form by the title company.

Copies of the electronic records signed electronically
You will receive a paper copy of all the electronic records you have electronically signed after the electronic signing process has been completed. You agree, while you are using an electronic signature to sign your residential loan closing package, all information required to be provided to you in writing will be provided to you in writing.

I have read and understand the terms contained in the agreement above, and I agree to be bound by them. I acknowledge receipt of a copy of this agreement.

_____ BY:_____
Consumer Date Company Authorized Agent Date

_____
Title

Figure 14

US 20050177389A1

(19) United States

(12) Patent Application Publication (10) Pub. No.: US 2005/0177389 A1

Rakowicz et al. (43) Pub. Date: Aug. 11, 2005

(54) PAPERLESS PROCESS FOR MORTGAGE CLOSINGS AND OTHER APPLICATIONS

(75) Inventors: **Paul Rakowicz**, Highland, MI (US); **Robert Shanahan**, Canton, MI (US)

Correspondence Address:
KOHN & ASSOCIATES PLLC
30500 NORTHWESTERN HWY
STE 410
FARMINGTON HILLS, MI 48334 (US)

(73) Assignee: **DOCUMENT PROCESSING SYSTEMS, INC.**

(21) Appl. No.: **11/037,505**

(22) Filed: **Jan. 18, 2005**

Related U.S. Application Data

(60) Provisional application No. 60/543,148, filed on Feb. 10, 2004.

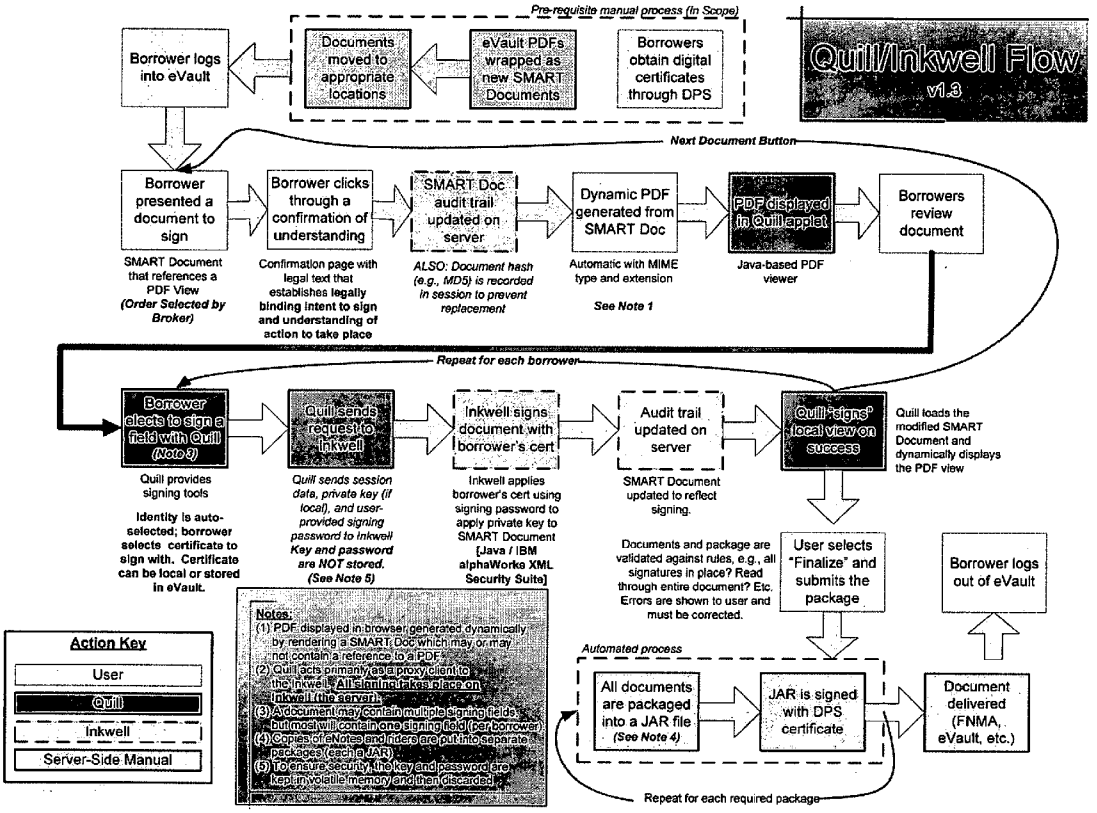
Publication Classification

(51) **Int. Cl.**[7] **G06F 17/60**

(52) **U.S. Cl.** **705/1**; 713/157

(57) ABSTRACT

According to the present invention, there is provided an electronic document processing system and method including an electronic document generation mechanism, an encrypted digital certificate generator, a tool for coordinating the processing of electronic documents, a packaging mechanism for finalizing and authenticating electronic documents, a tracking log for recording relevant electronic document information, and a transferring protocol for transferring the ownership of electronic documents. The present invention also provides an electronic authentication system including an electronic document authentication watermark seal or signature line for confirming a document's signing within the view. Preferably, the present invention is directed towards a system, software program, and method for generating electronic documents, coordinating the signing of said electronic documents, digitally authenticating and certifying said electronic documents, and organizing said electronic documents for retrieval and transfer in the mortgage closing/financial services field.



Process Flow

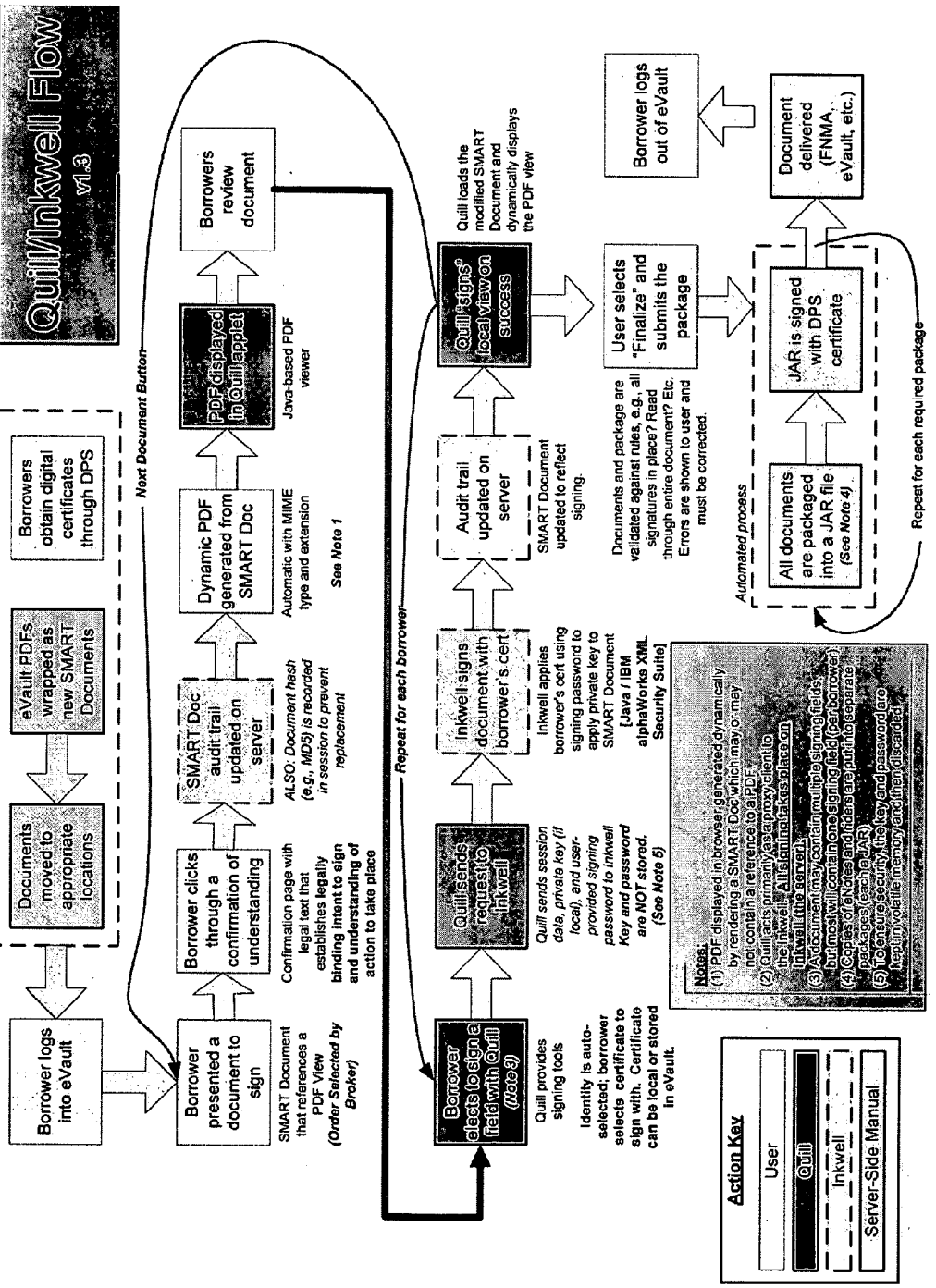


Figure 1 Process Flow

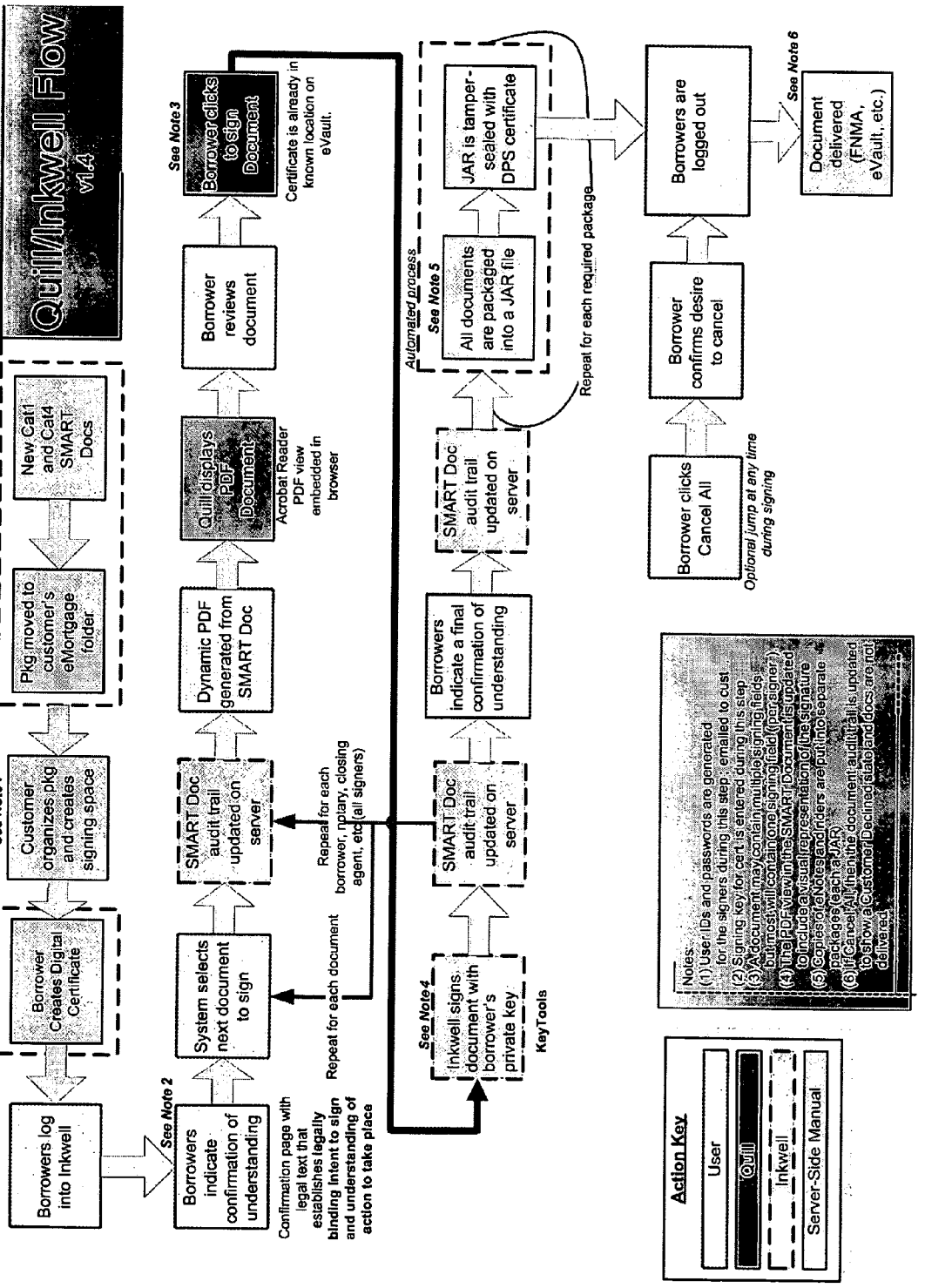


Figure 1a Process Flow

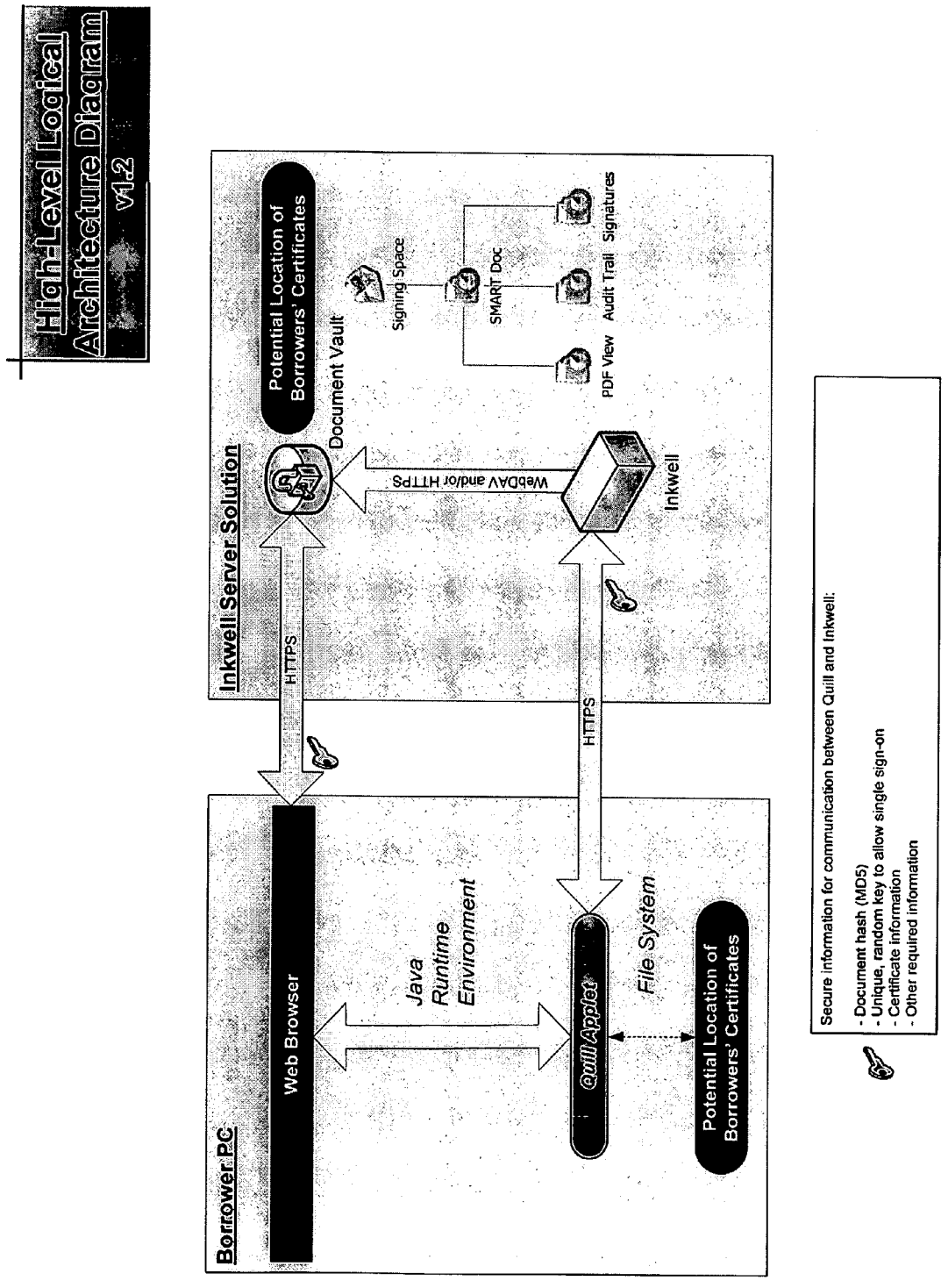


Figure 2 Logical Architecture

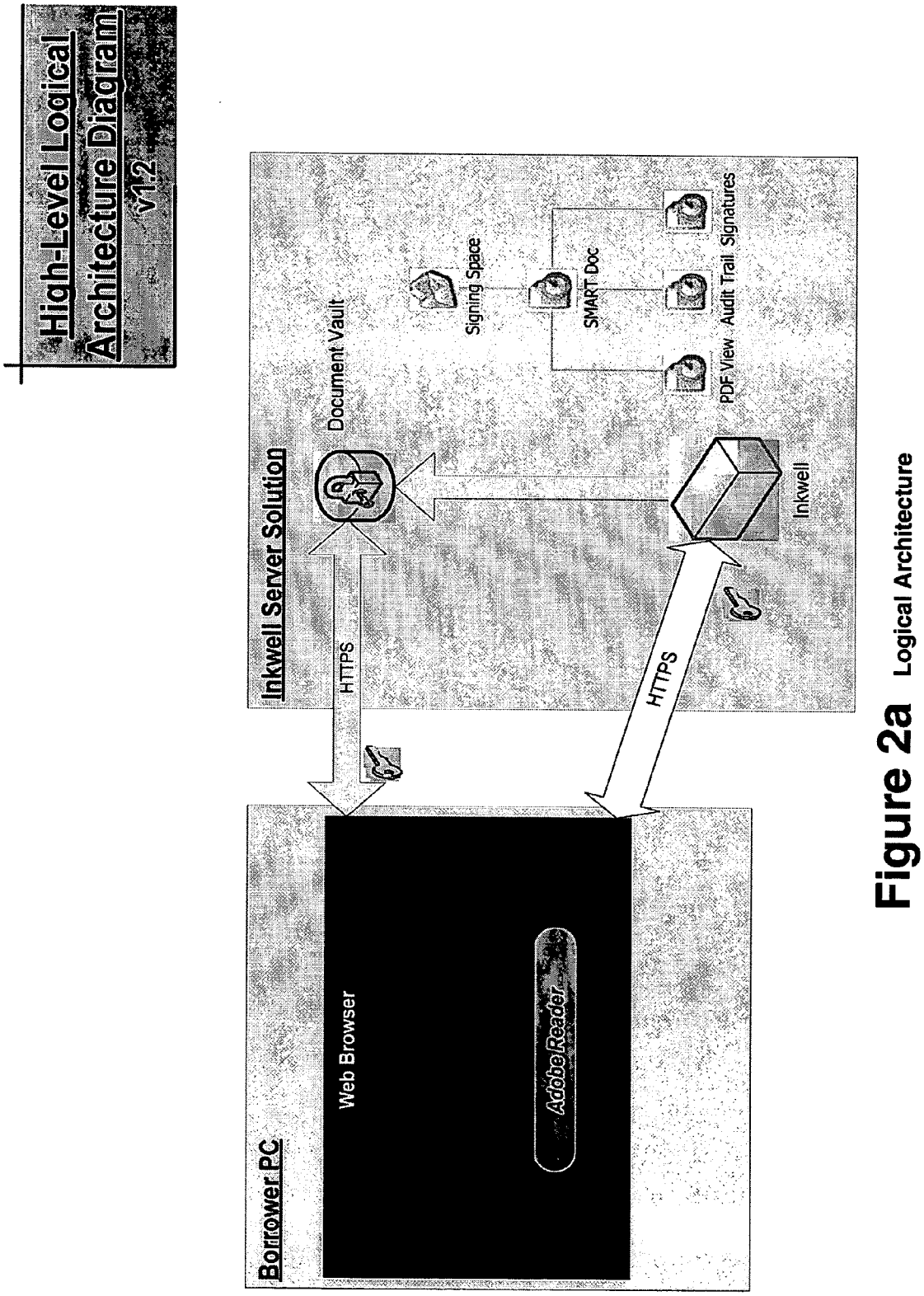


Figure 2a Logical Architecture

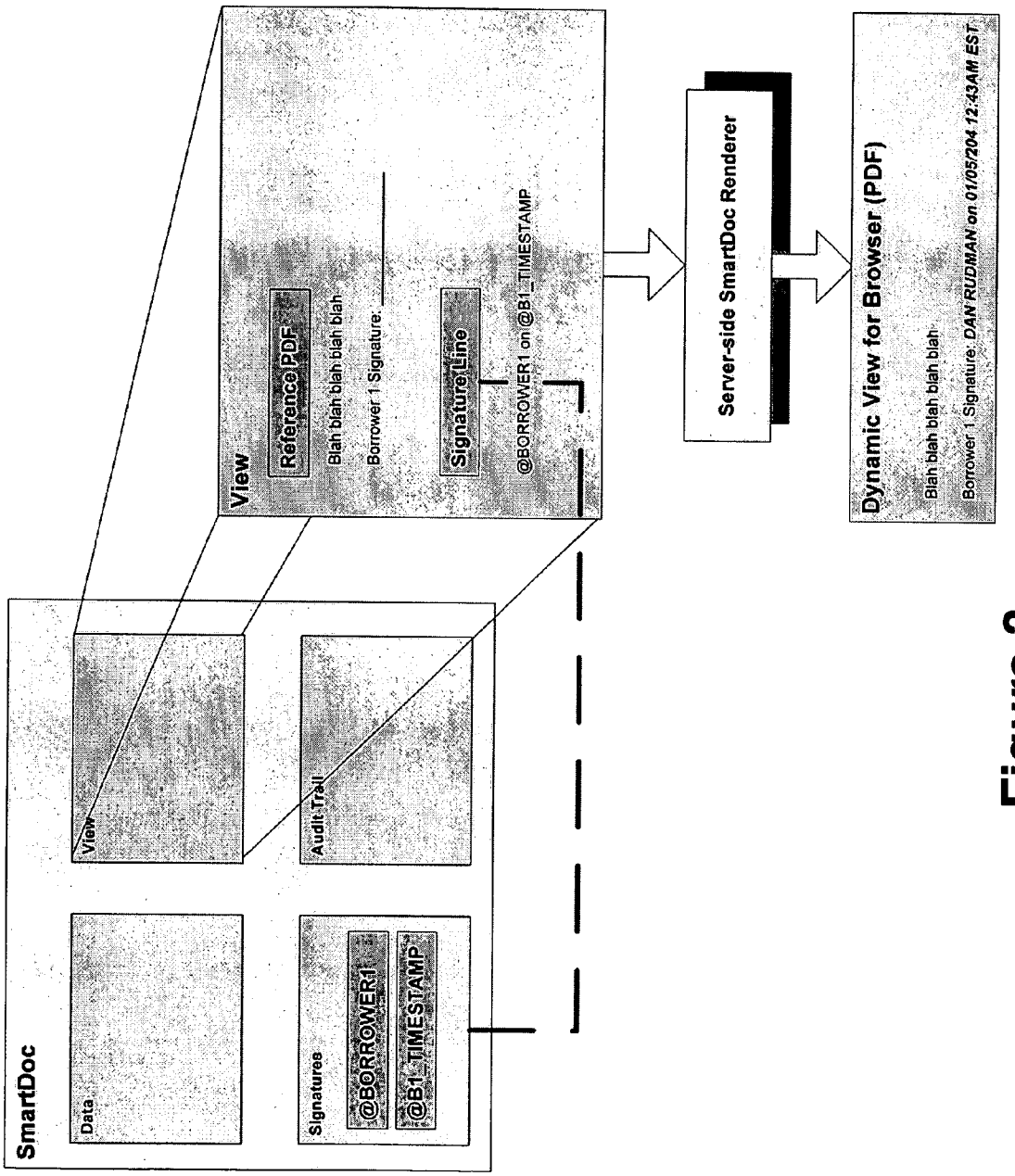


Figure 3 Dynamic View

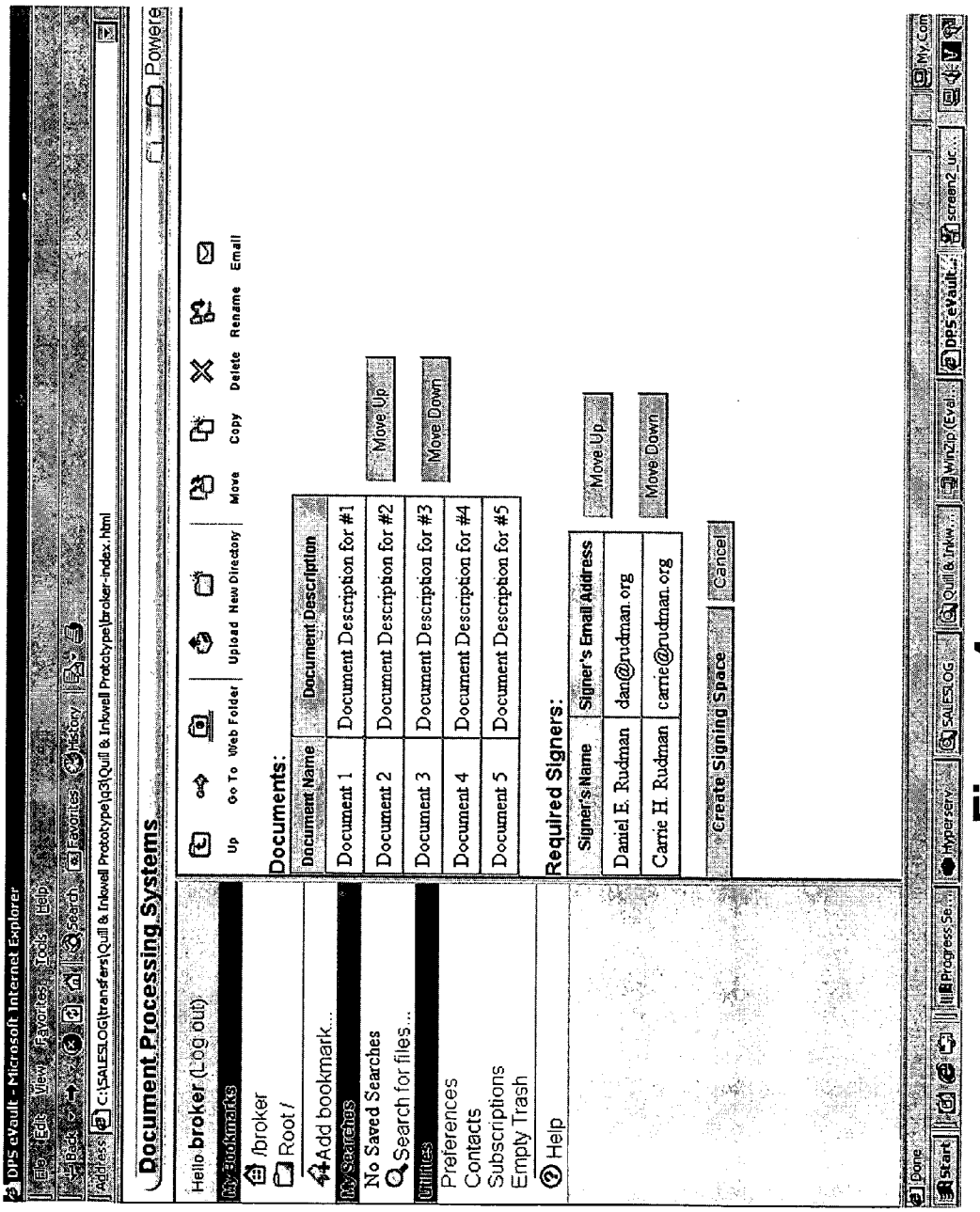
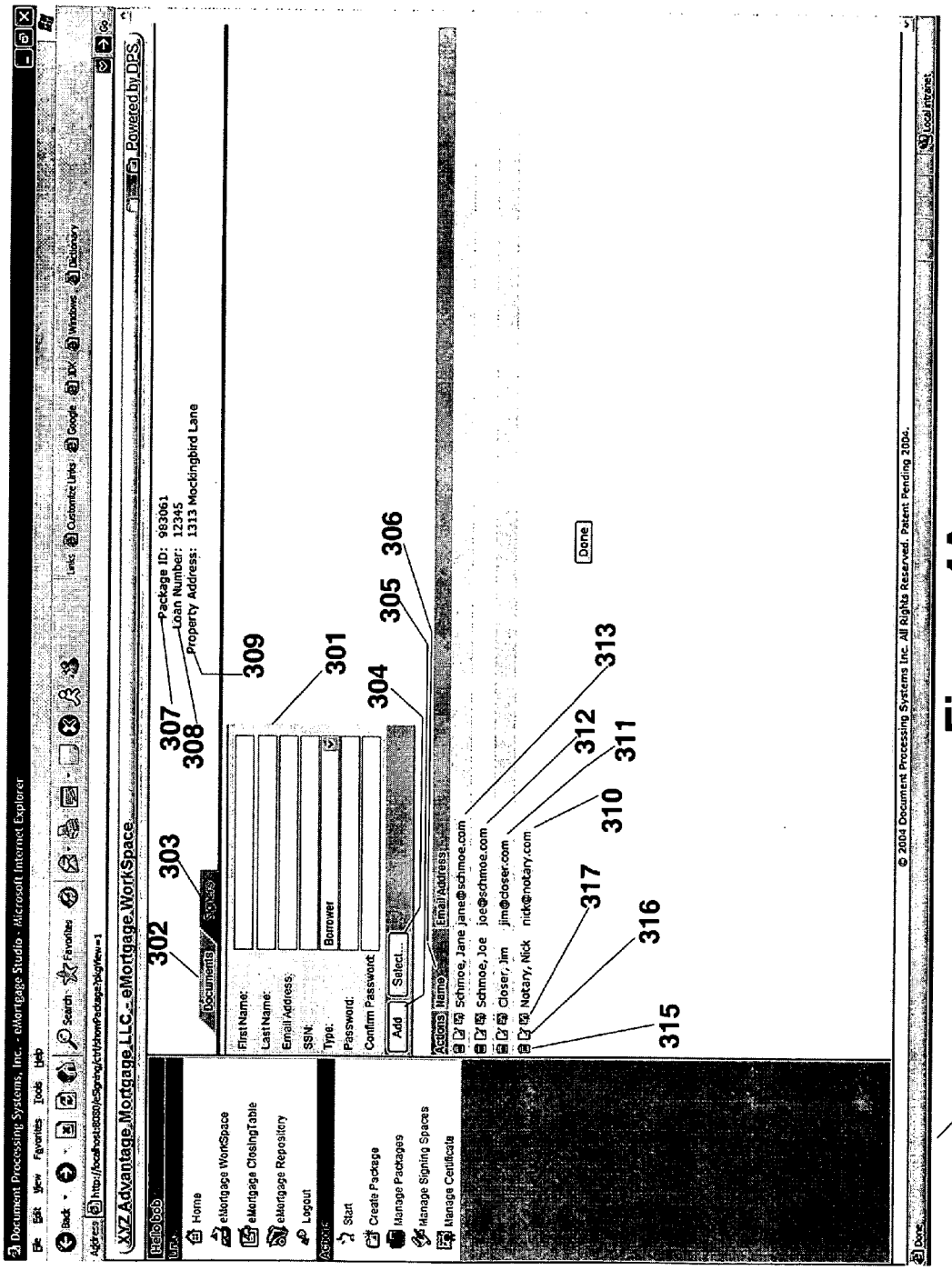


Figure 4 Create Signing Space


Document Processing Systems, Inc. - eMortgage Studio - Microsoft Internet Explorer
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eMortgage ClosingTable
eMortgage Repository
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Manage Signing Spaces
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Documents
Signers
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Last Name:
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Password:
Confirm Password:
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Name
Email Address
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Schmoe, Joe joe@schmoe.com
Closer, Jim jim@closer.com
Notary, Nick nick@notary.com
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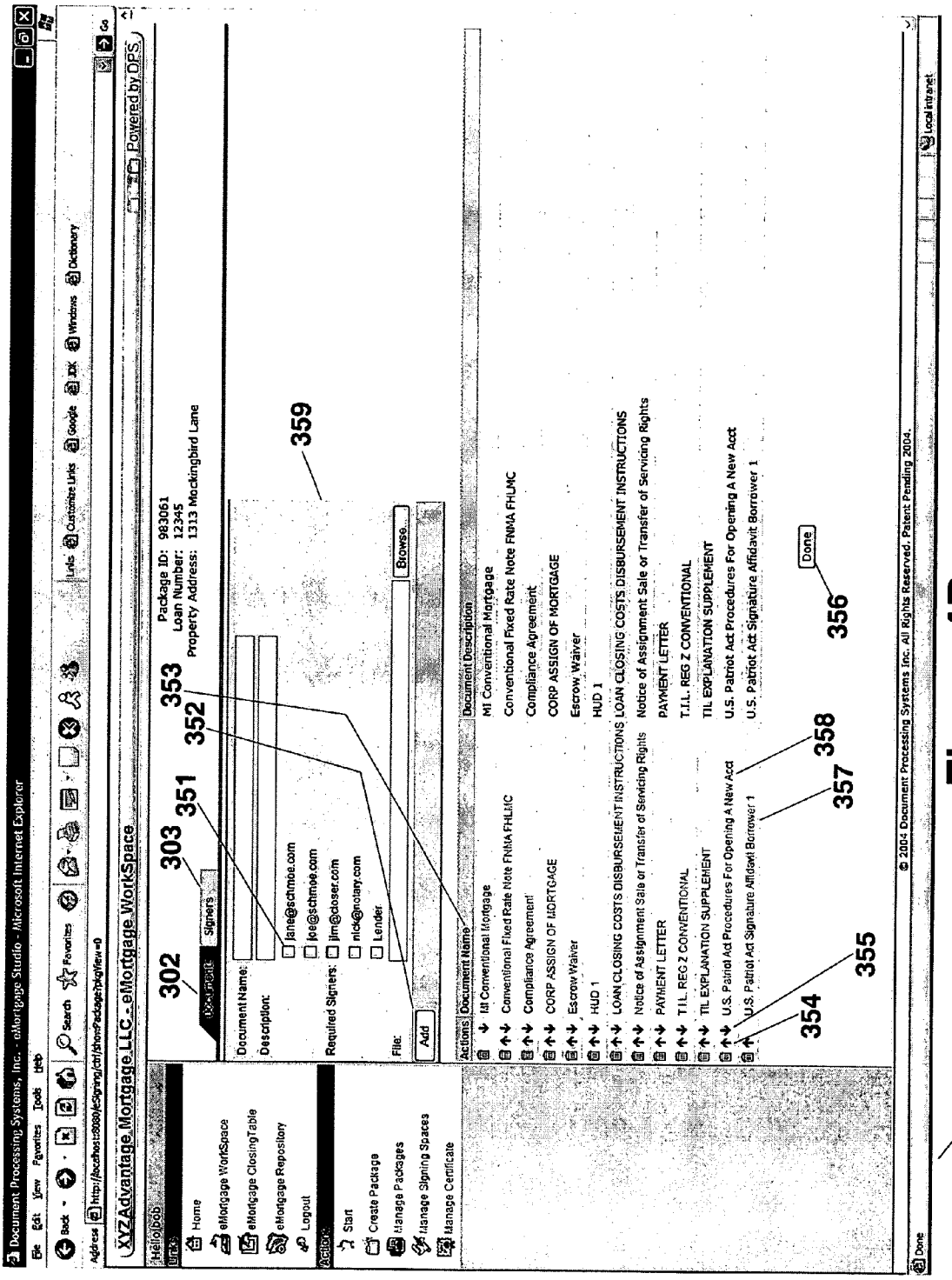
Figure 4A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Manage Signing Spaces
Manage Certificate
Package ID: 983061
Loan Number: 12345
Property Address: 1313 Mockingbird Lane
Loan Profile
Signers
Document Name:
Description:
jane@schmoe.com
joe@schmoe.com
Required Signers:
jim@closer.com
mick@notary.com
Lender
File:
Browse...
Add
Actions
Document Name
Document Description
MI Conventional Mortgage
Conventional Fixed Rate Note FNMA FHLMC
Compliance Agreement
CORP ASSIGN OF MORTGAGE
Escrow Waiver
HUD 1
LOAN CLOSING COSTS DISBURSEMENT INSTRUCTIONS
Notice of Assignment Sale or Transfer of Servicing Rights
PAYMENT LETTER
T.I.L. REG Z CONVENTIONAL
TIL EXPLANATION SUPPLEMENT
U.S. Patriot Act Procedures For Opening A New Acct
U.S. Patriot Act Signature Affidavit Borrower 1
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Figure 4B

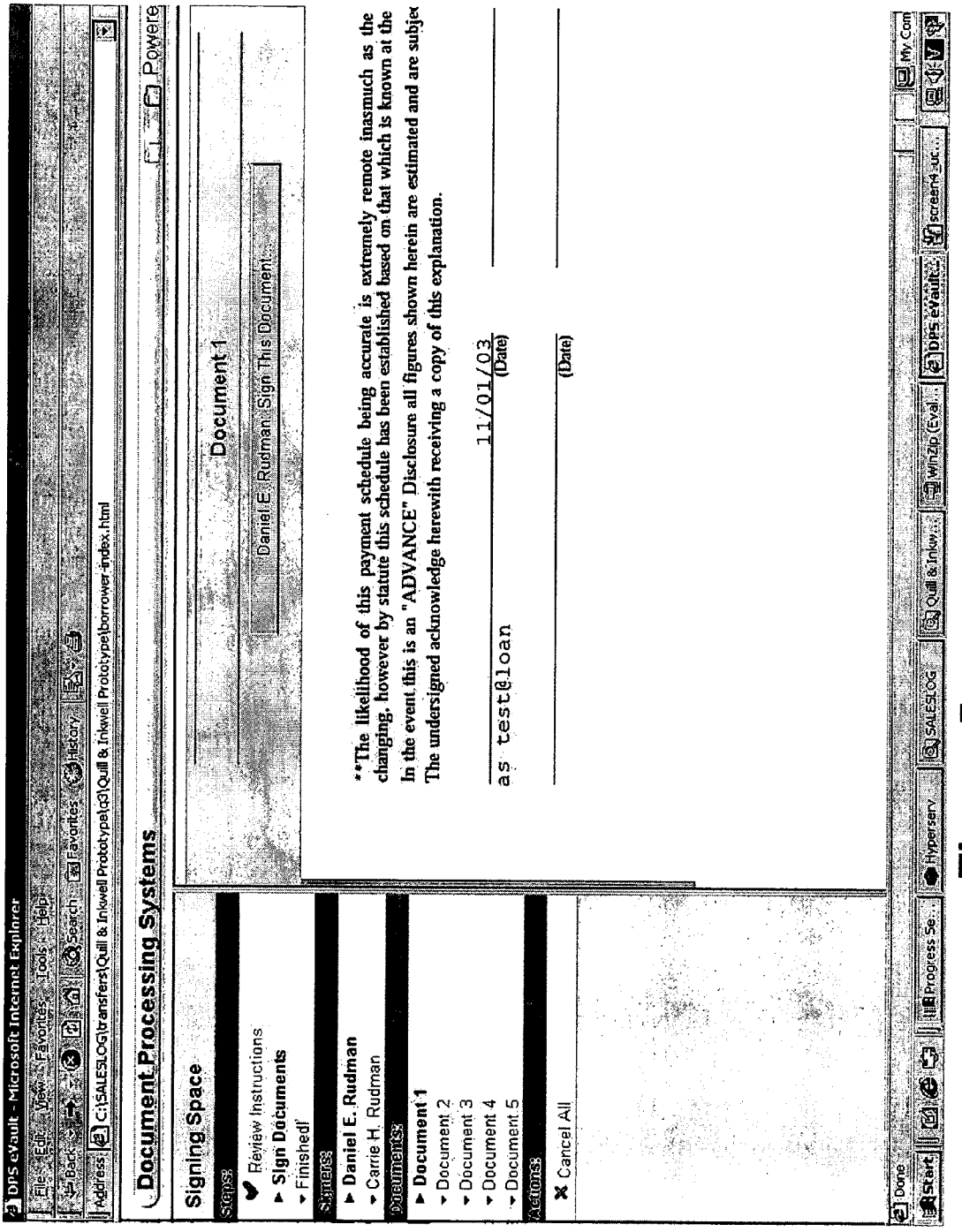
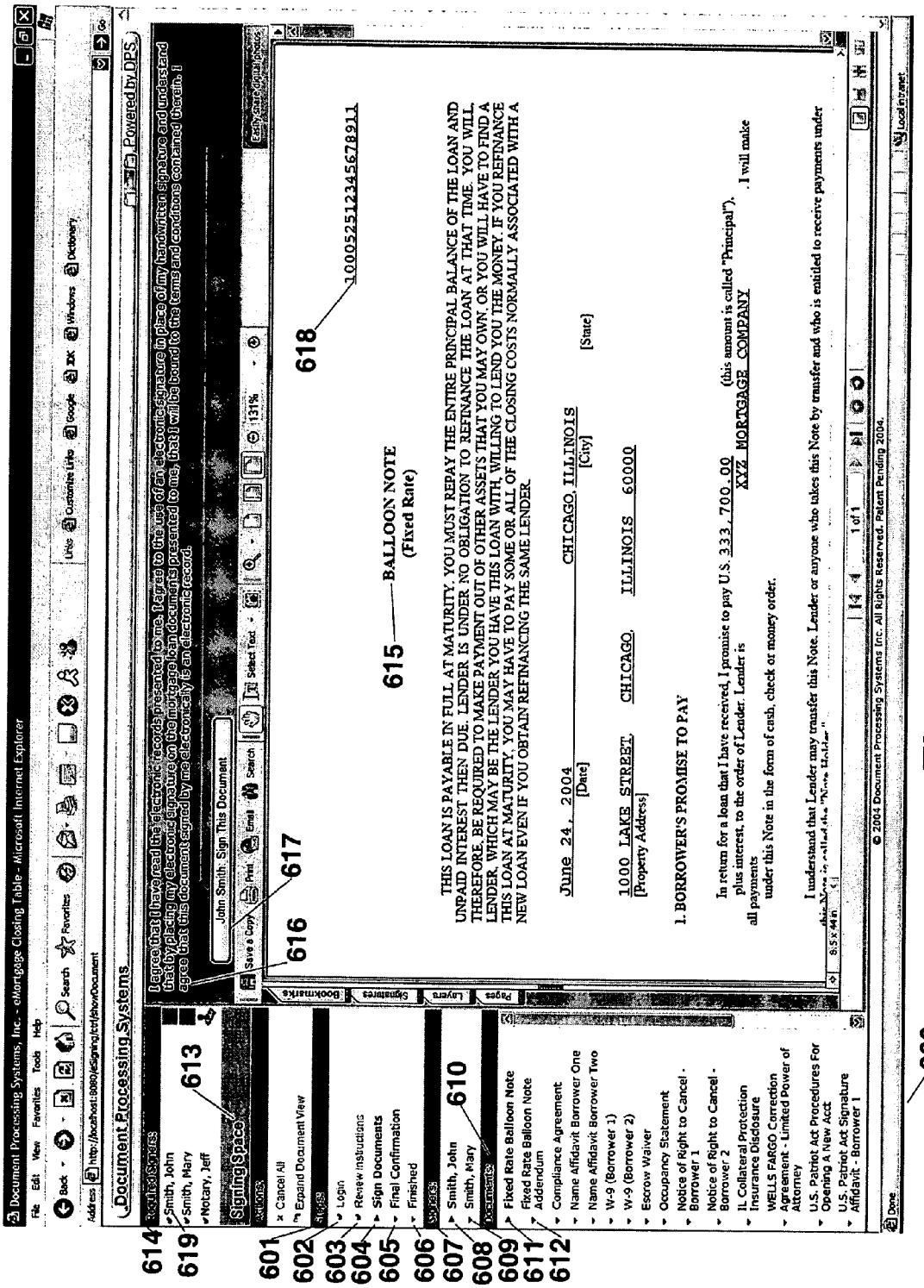


Figure 5 Signing Space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Smith, John
Smith, Mary
Notary, Jeff
Actions
Cancel All
Expand Document View
Steps
Login
Review Instructions
Sign Documents
Final Confirmation
Finished
Documents
Fixed Rate Balloon Note
Fixed Rate Balloon Note Addendum
Compliance Agreement
Name Affidavit Borrower One
Name Affidavit Borrower Two
W-9 (Borrower 1)
W-9 (Borrower 2)
Escrow Waiver
Occupancy Statement
Notice of Right to Cancel - Borrower 1
Notice of Right to Cancel - Borrower 2
IL Collateral Protection Insurance Disclosure
WELLS FARGO Correction Agreement - Limited Power of Attorney
U.S. Patriot Act Procedures For Opening A New Acct
U.S. Patriot Act Signature Affidavit - Borrower 1
John Smith: Sign This Document
I agree that I have read the electronic records presented to me, I agree to the use of an electronic signature in place of my handwritten signature and understand that by placing my electronic signature on the mortgage loan documents presented to me, that I will be bound to the terms and conditions contained therein. I agree that this document signed by me electronically is an electronic record.
BALLOON NOTE
(Fixed Rate)
1000525123456789 11
THIS LOAN IS PAYABLE IN FULL AT MATURITY. YOU MUST REPAY THE ENTIRE PRINCIPAL BALANCE OF THE LOAN AND UNPAID INTEREST THEN DUE. LENDER IS UNDER NO OBLIGATION TO REFINANCE THE LOAN AT THAT TIME. YOU WILL THEREFORE BE REQUIRED TO MAKE PAYMENT OUT OF OTHER ASSETS THAT YOU MAY OWN, OR YOU WILL HAVE TO FIND A LENDER, WHICH MAY BE THE LENDER YOU HAVE THIS LOAN WITH, WILLING TO LEND YOU THE MONEY. IF YOU REFINANCE THIS LOAN AT MATURITY, YOU MAY HAVE TO PAY SOME OR ALL OF THE CLOSING COSTS NORMALLY ASSOCIATED WITH A NEW LOAN EVEN IF YOU OBTAIN REFINANCING THE SAME LENDER.
June 24, 2004 [Date]
CHICAGO, ILLINOIS [City] [State]
1000 LAKE STREET, CHICAGO, ILLINOIS 60000 [Property Address]
1. BORROWER'S PROMISE TO PAY
In return for a loan that I have received, I promise to pay U.S. 333,700.00 (this amount is called "Principal"), plus interest, to the order of Lender. Lender is XYZ MORTGAGE COMPANY. I will make all payments under this Note in the form of cash, check or money order.
I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under
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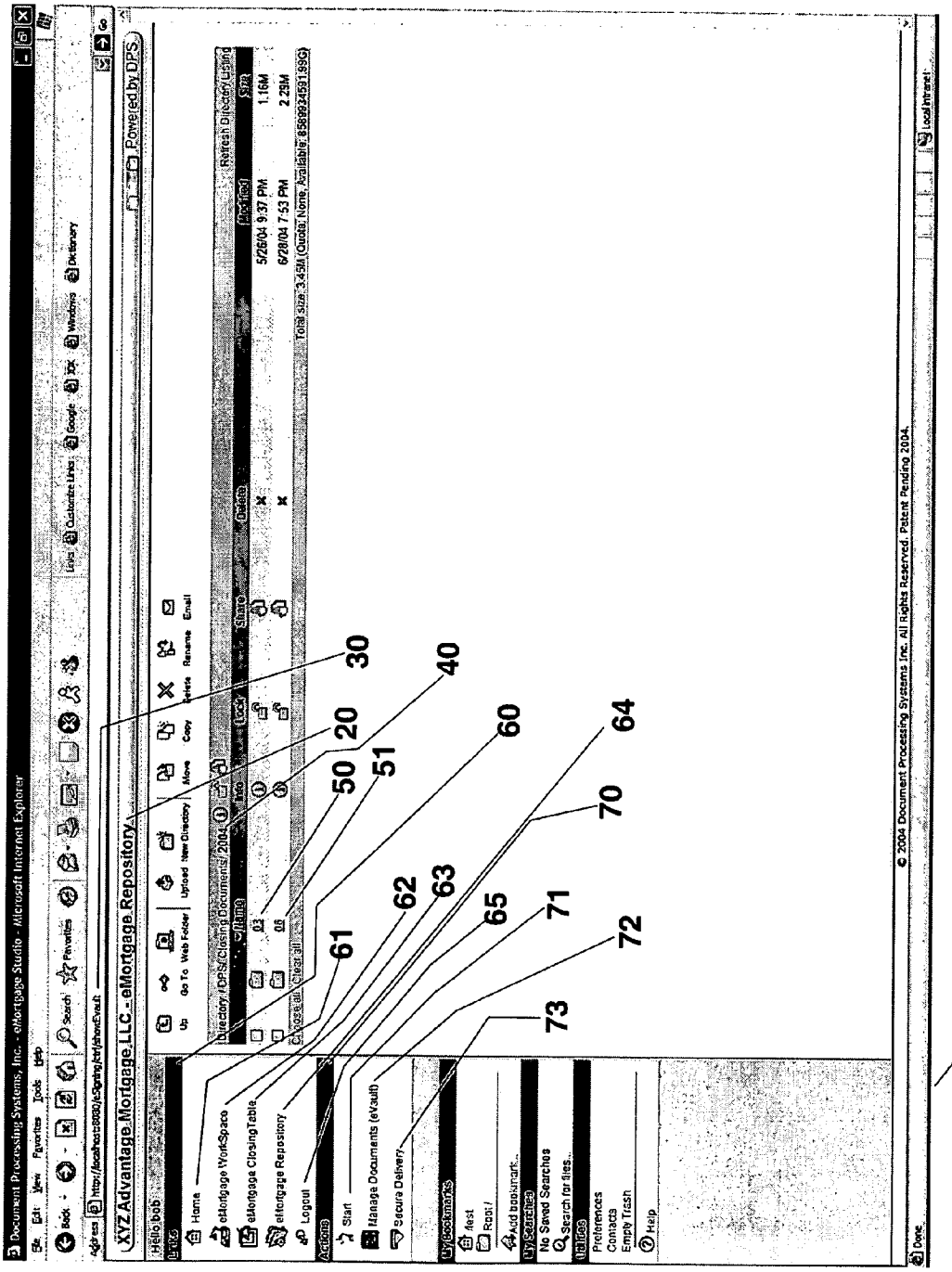
Figure 5A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Manage Documents (eVault)
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Search for files...
Utilities
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Contacts
Empty Trash
Help
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Go To
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Upload
New Directory
Move
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Rename
Email
Directory /OPS/Closing Documents/ 2004
Refresh Directory Listing
Name
Size
Modified
Share
Delete
5/26/04 9:37 PM
1.16M
6/28/04 7:53 PM
2.29M
Total size: 3.45M (Quota: None, Available: 8589934591.99G)
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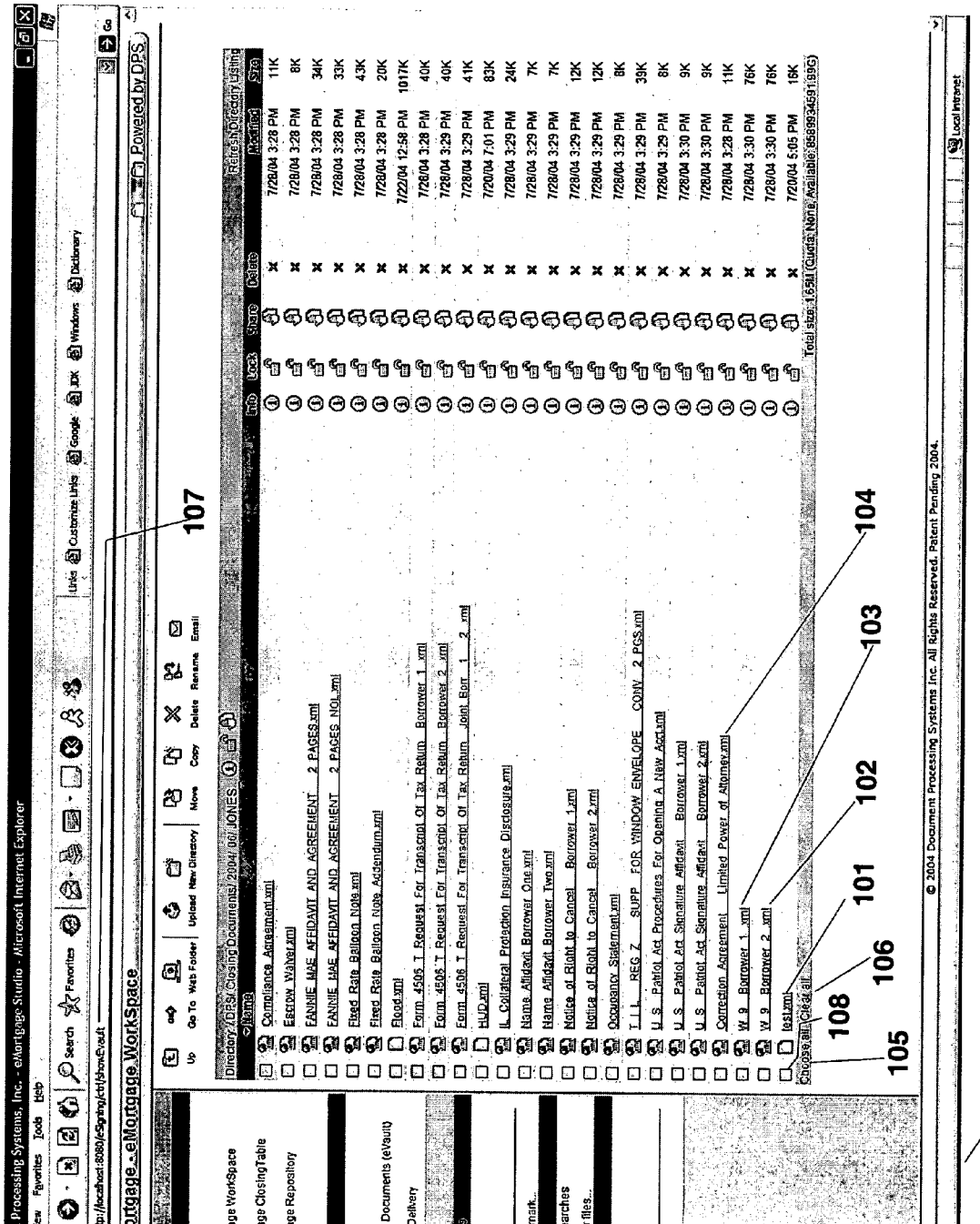
Figure 6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My Bookmarks
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Root /
Add bookmark...
My Searches
No Saved Searches
Search for files...
Utilities
Preferences
Contacts
Empty Trash
Help
Up
Go To
Web Folder
Upload
New Directory
Move
Copy
Delete
Rename
Email
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Share
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Fixed_Rate_Balloon_Note.xml 7/28/04 3:28 PM 43K
Fixed_Rate_Balloon_Note_Addendum.xml 7/28/04 3:28 PM 20K
Flood.xml 7/22/04 12:58 PM 1017K
Form_4506_T_Request_For_Transcript_Of_Tax_Return_Borrower_1.xml 7/28/04 3:28 PM 40K
Form_4506_T_Request_For_Transcript_Of_Tax_Return_Borrower_2.xml 7/28/04 3:29 PM 40K
Form_4506_T_Request_For_Transcript_Of_Tax_Return_Joint_Borr_1_2.xml 7/28/04 3:29 PM 41K
HUD.xml 7/20/04 7:01 PM 83K
IL_Collateral_Protection_Insurance_Disclosure.xml 7/28/04 3:29 PM 24K
Name_Affidavit_Borrower_One.xml 7/28/04 3:29 PM 7K
Name_Affidavit_Borrower_Two.xml 7/28/04 3:29 PM 7K
Notice_of_Right_to_Cancel_Borrower_1.xml 7/28/04 3:29 PM 12K
Notice_of_Right_to_Cancel_Borrower_2.xml 7/28/04 3:29 PM 12K
Occupancy_Statement.xml 7/28/04 3:29 PM 8K
T.I.L._REG_Z_SUPP._FOR_WINDOW_ENVELOPE_CONV_2_PGS.xml 7/28/04 3:29 PM 39K
U.S._Patriot_Act_Procedures_For_Opening_A_New_Acct.xml 7/28/04 3:29 PM 8K
U.S._Patriot_Act_Signature_Affidavit_Borrower_1.xml 7/28/04 3:30 PM 9K
U.S._Patriot_Act_Signature_Affidavit_Borrower_2.xml 7/28/04 3:30 PM 9K
Correction_Agreement_Limited_Power_of_Attorney.xml 7/28/04 3:28 PM 11K
W-9_Borrower_1.xml 7/28/04 3:30 PM 76K
W-9_Borrower_2.xml 7/28/04 3:30 PM 76K
test.xml 7/20/04 5:05 PM 16K
Choose file
Total size: 1.65M (Quota: None Available: 8589934591.99G)
© 2004 Document Processing Systems Inc. All Rights Reserved. Patent Pending 2004.
Local Intranet
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Figure 7

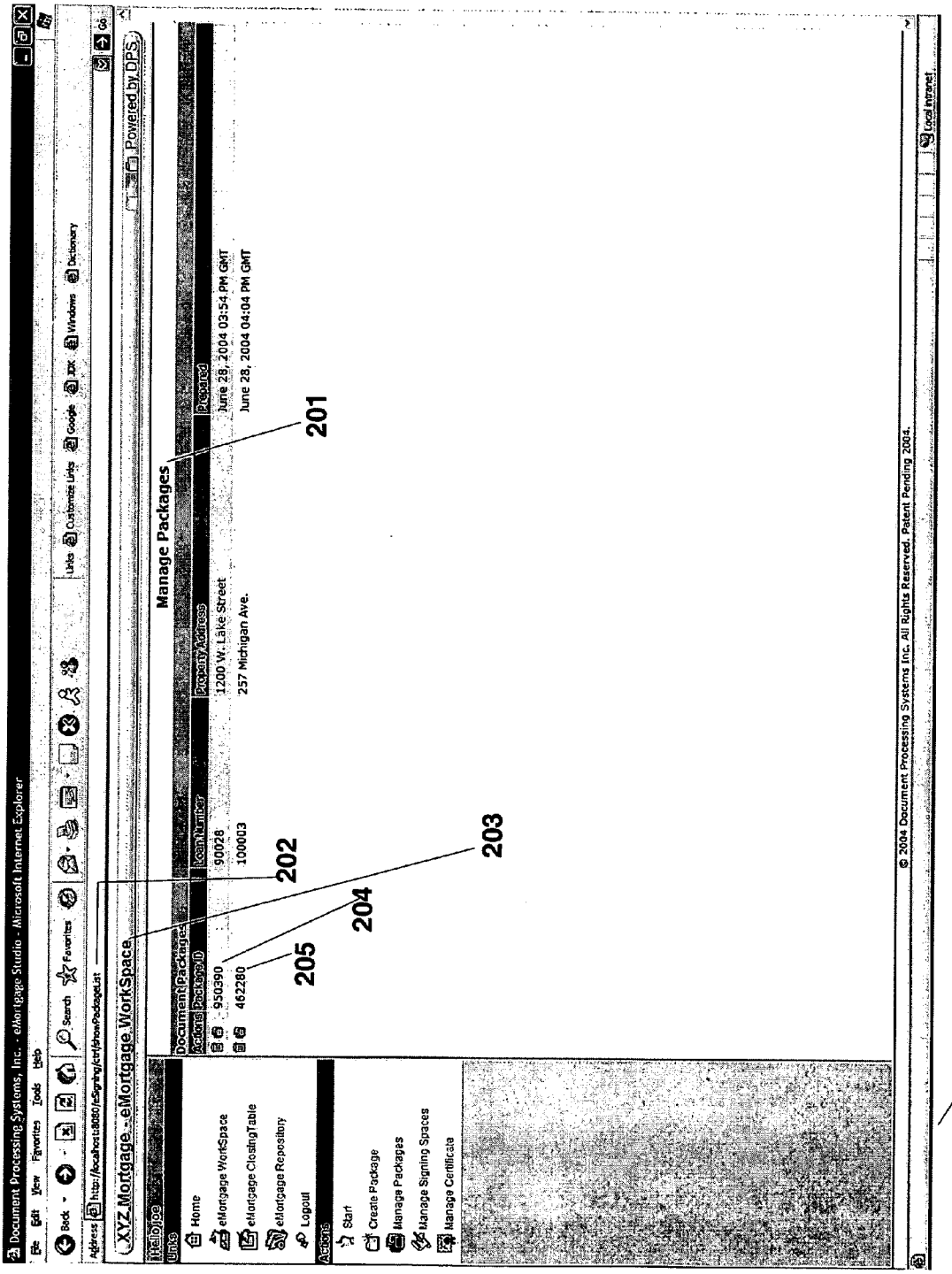
Document Processing Systems, Inc. - eMortgage Studio - Microsoft Internet Explorer
XYZ Mortgage - eMortgage WorkSpace
Powered by DPS
Manage Packages
Document Package
Loan Number
Property Address
Prepared
950390
90028
1200 W. Lake Street
June 28, 2004 03:54 PM GMT
462280
100003
257 Michigan Ave.
June 28, 2004 04:04 PM GMT
Links
Home
eMortgage WorkSpace
eMortgage ClosingTable
eMortgage Repository
Logout
Actions
Start
Create Package
Manage Packages
Manage Signing Spaces
Manage Certificate
© 2004 Document Processing Systems Inc. All Rights Reserved. Patent Pending 2004.
200
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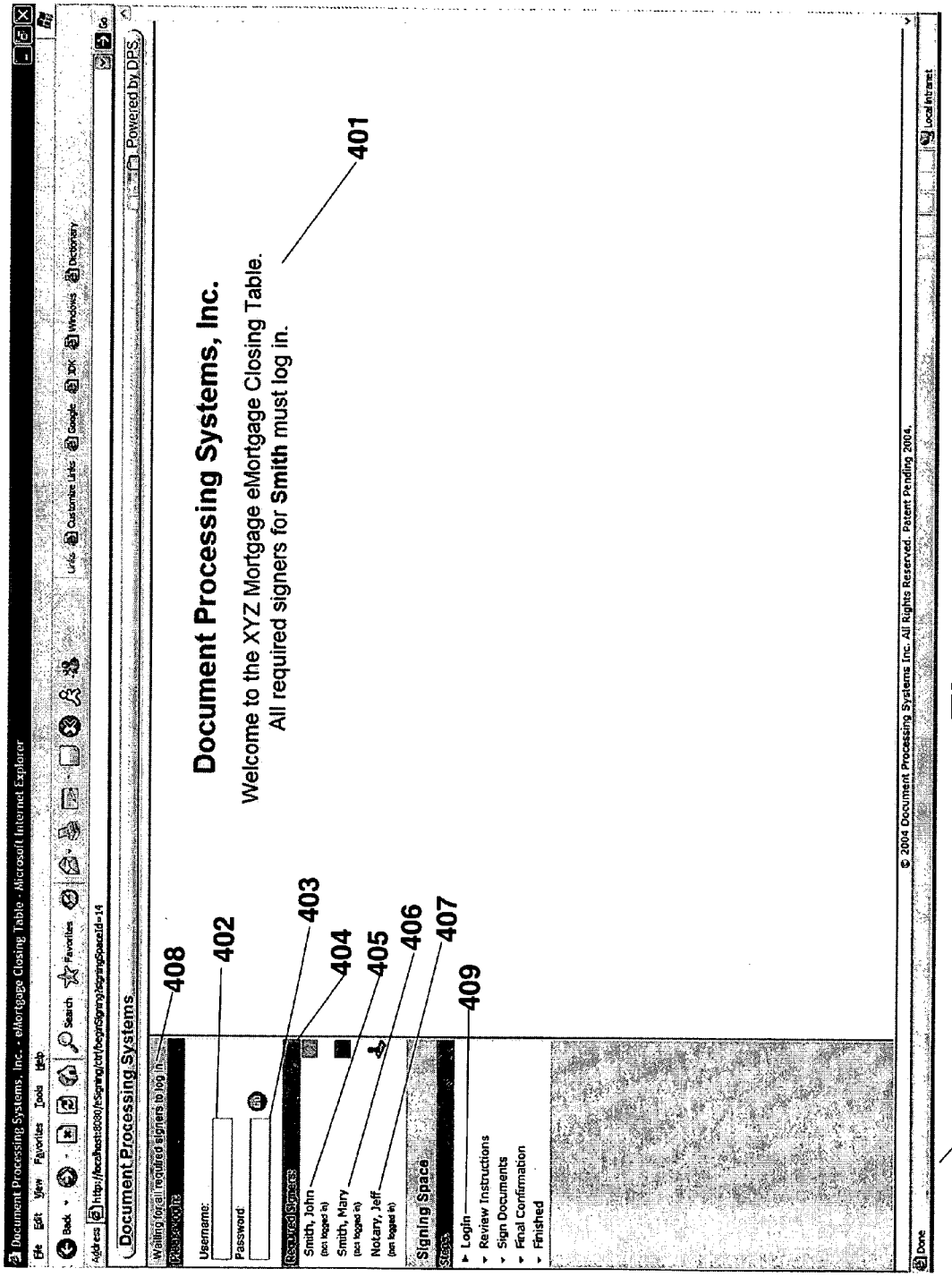
Figure 8


Document Processing Systems, Inc. - eMortgage Closing Table - Microsoft Internet Explorer
Document Processing Systems
Waiting for all required signers to log in.
Please Log In
Username:
Password:
Document Processing Systems, Inc.
Welcome to the XYZ Mortgage eMortgage Closing Table.
All required signers for Smith must log in.
Powered by DPS
Required Signers
Smith, John
(not logged in)
Smith, Mary
(not logged in)
Notary, Jeff
(not logged in)
Signing Space
Steps
Login
Review Instructions
Sign Documents
Final Confirmation
Finished
© 2004 Document Processing Systems Inc. All Rights Reserved. Patent Pending 2004.
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Local intranet
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Figure 9

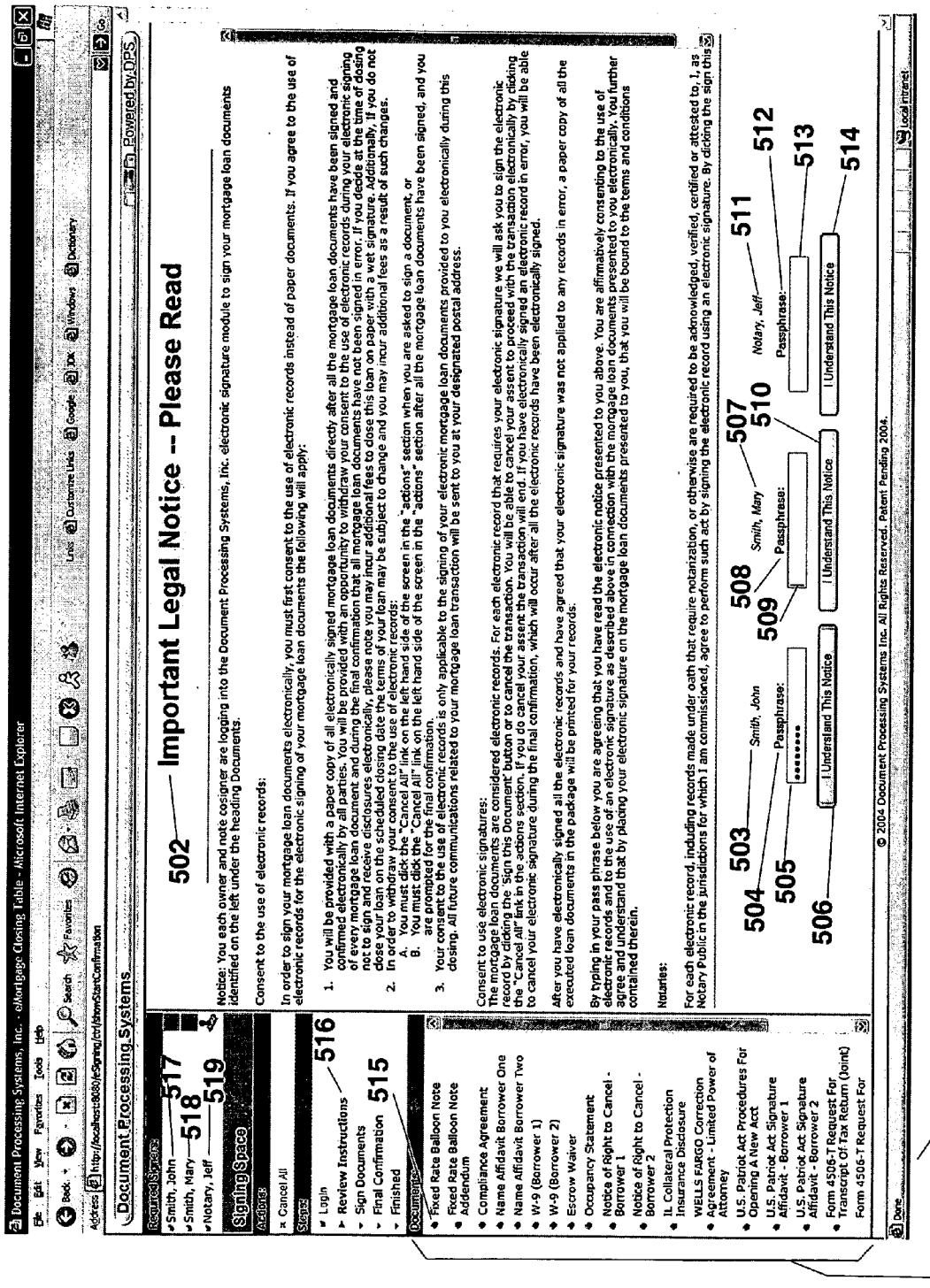
Document Processing Systems, Inc. - eMortgage Closing Table - Microsoft Internet Explorer
Document Processing Systems
Required Signers
Smith, John
Smith, Mary
Notary, Jeff
Signing Space
Assistance
Cancel All
Steps
Login
Review Instructions
Sign Documents
Final Confirmation
Finished
Documents
Fixed Rate Balloon Note
Fixed Rate Balloon Note Addendum
Compliance Agreement
Name Affidavit Borrower One
Name Affidavit Borrower Two
W-9 (Borrower 1)
W-9 (Borrower 2)
Escrow Waiver
Occupancy Statement
Notice of Right to Cancel - Borrower 1
Notice of Right to Cancel - Borrower 2
IL Collateral Protection Insurance Disclosure
WELLS FARGO Correction Agreement - Limited Power of Attorney
U.S. Patriot Act Procedures For Opening A New Acct
U.S. Patriot Act Signature Affidavit - Borrower 1
U.S. Patriot Act Signature Affidavit - Borrower 2
Form 4506-T Request For Transcript Of Tax Return (Joint)
Form 4506-T Request For
Powered by DPS
Important Legal Notice -- Please Read
Notice: You each owner and note cosigner are logging into the Document Processing Systems, Inc. electronic signature module to sign your mortgage loan documents identified on the left under the heading Documents.
Consent to the use of electronic records:
In order to sign your mortgage loan documents electronically, you must first consent to the use of electronic records instead of paper documents. If you agree to the use of electronic records for the electronic signing of your mortgage loan documents the following will apply:
1. You will be provided with a paper copy of all electronically signed mortgage loan documents directly after all the mortgage loan documents have been signed and confirmed electronically by all parties. You will be provided with an opportunity to withdraw your consent to the use of electronic records during your electronic signing of every mortgage loan document and during the final confirmation that all mortgage loan documents have not been signed in error. If you decide at the time of closing not to sign and receive disclosures electronically, please note you may incur additional fees to close this loan on paper with a wet signature. Additionally, If you do not close your loan on the scheduled closing date the terms of your loan may be subject to change and you may incur additional fees as a result of such changes.
2. In order to withdraw your consent to the use of electronic records:
A. You must click the "Cancel All" link on the left hand side of the screen in the "actions" section when you are asked to sign a document, or
B. You must click the "Cancel All" link on the left hand side of the screen in the "actions" section after all the mortgage loan documents have been signed, and you are prompted for the final confirmation.
3. Your consent to the use of electronic records is only applicable to the signing of your electronic mortgage loan documents provided to you electronically during this closing. All future communications related to your mortgage loan transaction will be sent to you at your designated postal address.
Consent to use electronic signatures:
The mortgage loan documents are considered electronic records. For each electronic record that requires your electronic signature we will ask you to sign the electronic record by clicking the "Sign this Document" button or to cancel the transaction. You will be able to cancel your assent to proceed with the transaction electronically by clicking the "Cancel All" link in the actions section. If you do cancel your assent the transaction will end. If you have electronically signed an electronic record in error, you will be able to cancel your electronic signature during the final confirmation, which will occur after all the electronic records have been electronically signed.
After you have electronically signed all the electronic records and have agreed that your electronic signature was not applied to any records in error, a paper copy of all the executed loan documents in the package will be printed for your records.
By typing in your pass phrase below you are agreeing that you have read the electronic notice presented to you above. You are affirmatively consenting to the use of electronic records and to the use of an electronic signature as described above in connection with the mortgage loan documents presented to you electronically. You further agree and understand that by placing your electronic signature on the mortgage loan documents presented to you, that you will be bound to the terms and conditions contained therein.
Notaries:
For each electronic record, including records made under oath that require notarization, or otherwise are required to be acknowledged, verified, certified or attested to, I, as Notary Public in the jurisdictions for which I am commissioned, agree to perform such act by signing the electronic record using an electronic signature. By clicking the sign this
Smith, John
Passphrase:
I Understand This Notice
Smith, Mary
Passphrase:
I Understand This Notice
Notary, Jeff
Passphrase:
I Understand This Notice
© 2004 Document Processing Systems Inc. All Rights Reserved. Patent Pending 2004.
Done
Local intranet
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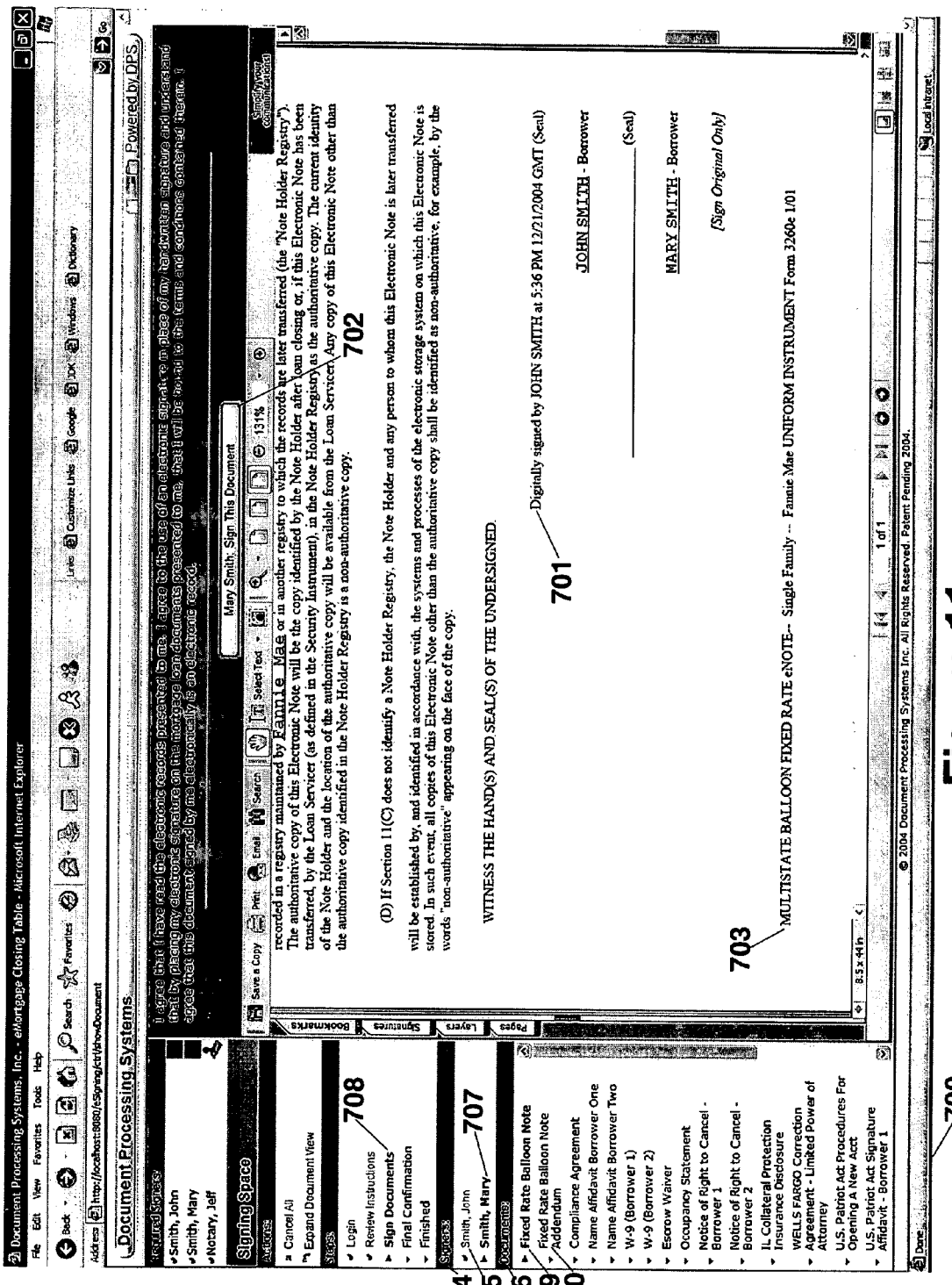
Figure 10


Document Processing Systems, Inc. - eMortgage Closing Table - Microsoft Internet Explorer
Document Processing Systems
Powered by DPS
Required Signers
Smith, John
Smith, Mary
Notary, Jeff
Signing Space
Actions
Cancel All
Expand Document View
Steps
Login
Review Instructions
Sign Documents
Final Confirmation
Finished
Signers
Smith, John
Smith, Mary
Documents
Fixed Rate Balloon Note
Fixed Rate Balloon Note Addendum
Compliance Agreement
Name Affidavit Borrower One
Name Affidavit Borrower Two
W-9 (Borrower 1)
W-9 (Borrower 2)
Escrow Waiver
Occupancy Statement
Notice of Right to Cancel - Borrower 1
Notice of Right to Cancel - Borrower 2
IL Collateral Protection Insurance Disclosure
WELLS FARGO Correction Agreement - Limited Power of Attorney
U.S. Patriot Act Procedures For Opening A New Acct
U.S. Patriot Act Signature Affidavit - Borrower 1
I agree that I have read the electronic records presented to me. I agree to the use of an electronic signature in place of my handwritten signature and understand that by placing my electronic signature on the mortgage loan documents presented to me, that I will be bound to the terms and conditions therein. I agree that this document signed by me electronically is an electronic record.
Mary Smith, Sign This Document
Simplify view controls
recorded in a registry maintained by Fannie Mae or in another registry to which the records are later transferred (the "Note Holder Registry"). The authoritative copy of this Electronic Note will be the copy identified by the Note Holder after loan closing or, if this Electronic Note has been transferred, by the Loan Servicer (as defined in the Security Instrument), in the Note Holder Registry as the authoritative copy. The current identity of the Note Holder and the location of the authoritative copy will be available from the Loan Servicer. Any copy of this Electronic Note other than the authoritative copy identified in the Note Holder Registry is a non-authoritative copy.
(D) If Section 11(C) does not identify a Note Holder Registry, the Note Holder and any person to whom this Electronic Note is later transferred will be established by, and identified in accordance with, the systems and processes of the electronic storage system on which this Electronic Note is stored. In such event, all copies of this Electronic Note other than the authoritative copy shall be identified as non-authoritative, for example, by the words "non-authoritative" appearing on the face of the copy.
WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.
Digitally signed by JOHN SMITH at 5:36 PM 12/21/2004 GMT (Seal)
JOHN SMITH - Borrower
(Seal)
MARY SMITH - Borrower
[Sign Original Only]
MULTISTATE BALLOON FIXED RATE eNOTE-- Single Family -- Fannie Mae UNIFORM INSTRUMENT Form 3260e 1/01
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Local intranet
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Figure 11

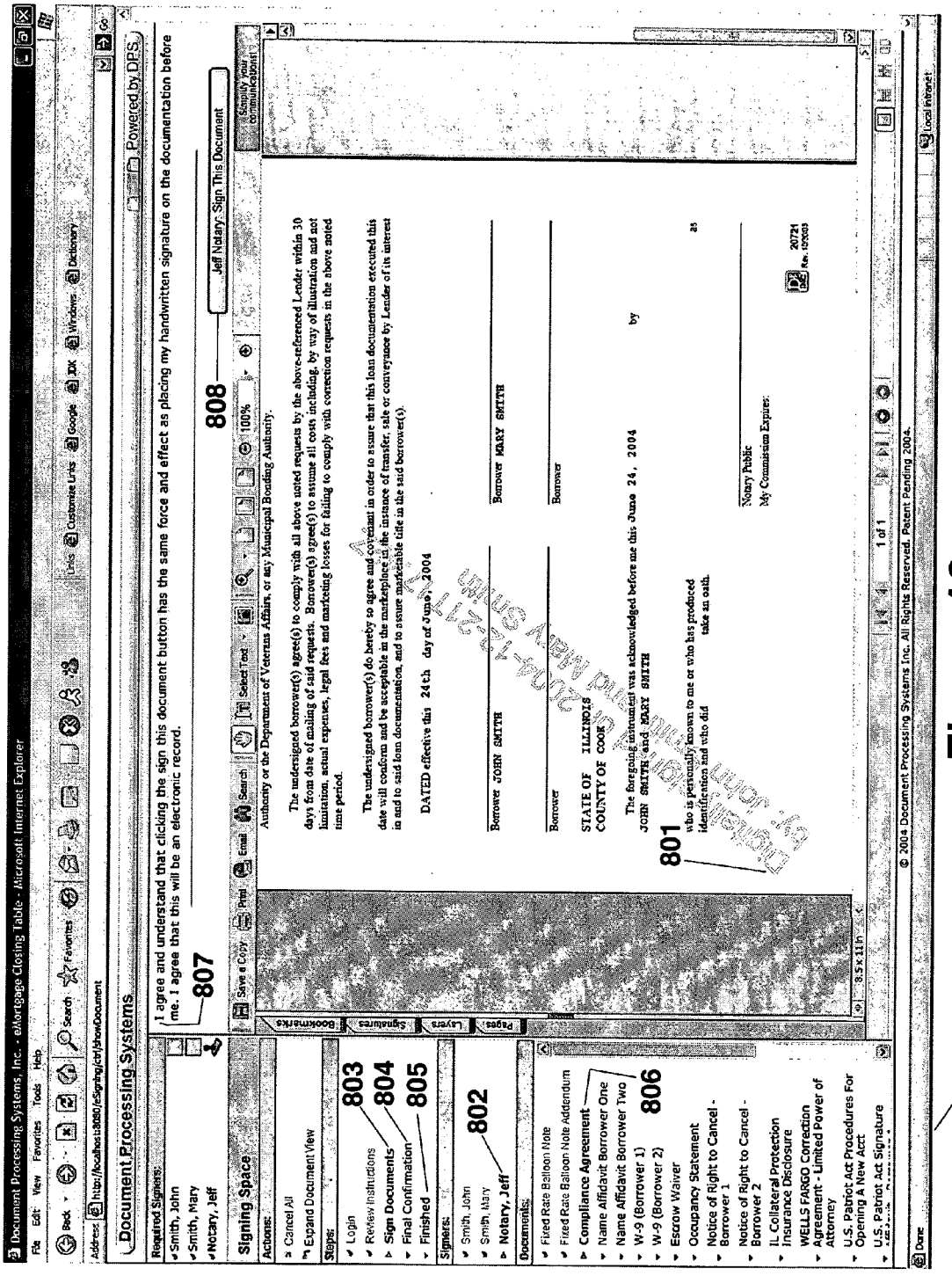
Document Processing Systems, Inc. - eMortgage Closing Table - Microsoft Internet Explorer
Document Processing Systems
Powered by DPS
Required Signers:
Smith, John
Smith, Mary
Notary, Jeff
I agree and understand that clicking the sign this document button has the same force and effect as placing my handwritten signature on the documentation before me. I agree that this will be an electronic record.
807
808
Jeff Notary, Sign This Document
Signing Space
Actions:
Cancel All
Expand Document View
Steps:
Login
Review Instructions
Sign Documents
Final Confirmation
Finished
803
804
805
Signers:
Smith, John
Smith, Mary
Notary, Jeff
802
Documents:
Fixed Rate Balloon Note
Fixed Rate Balloon Note Addendum
Compliance Agreement
Name Affidavit Borrower One
Name Affidavit Borrower Two
W-9 (Borrower 1)
W-9 (Borrower 2)
806
Escrow Waiver
Occupancy Statement
Notice of Right to Cancel - Borrower 1
Notice of Right to Cancel - Borrower 2
IL Collateral Protection Insurance Disclosure
WELLS FARGO Correction Agreement - Limited Power of Attorney
U.S. Patriot Act Procedures For Opening A New Acct
U.S. Patriot Act Signature
Authority or the Department of Veterans Affairs, or any Municipal Bonding Authority.
The undersigned borrower(s) agree(s) to comply with all above noted requests by the above-referenced Lender within 30 days from date of mailing of said requests. Borrower(s) agree(s) to assume all costs including, by way of illustration and not limitation, actual expenses, legal fees and marketing losses for failing to comply with correction requests in the above noted time period.
The undersigned borrower(s) do hereby so agree and covenant in order to assure that this loan documentation executed this date will conform and be acceptable in the marketplace in the instance of transfer, sale or conveyance by Lender of its interest in and to said loan documentation, and to assure marketable title in the said borrower(s).
DATED effective this 24th day of June, 2004
Borrower JOHN SMITH
Borrower MARY SMITH
Borrower
Borrower
STATE OF ILLINOIS
COUNTY OF COOK
The foregoing instrument was acknowledged before me this June 24, 2004 by
JOHN SMITH and MARY SMITH
801
who is personally known to me or who has produced identification and who did take an oath.
Notary Public
My Commission Expires:
20721
© 2004 Document Processing Systems Inc. All Rights Reserved. Patent Pending 2004.
800

Figure 12

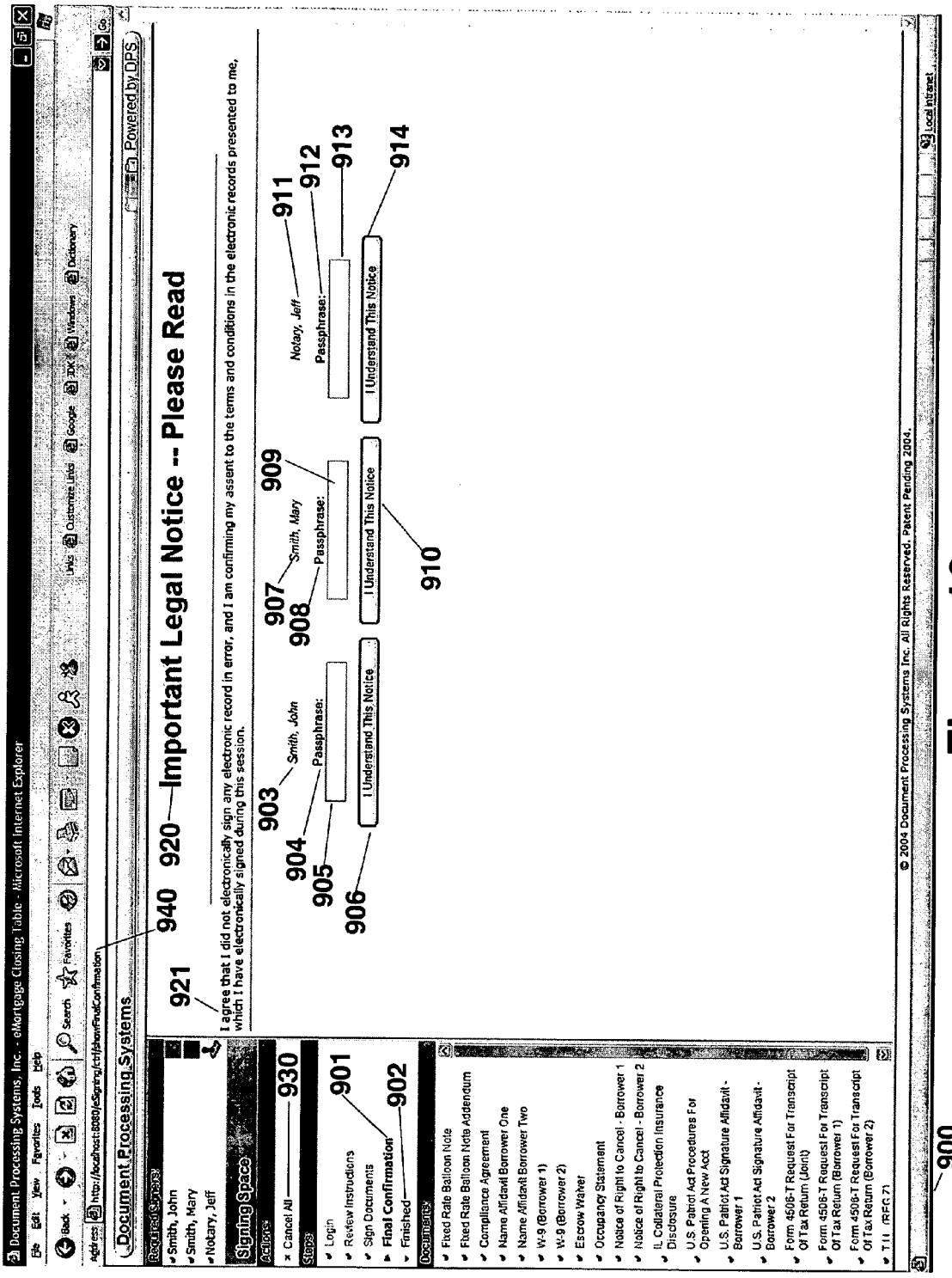
Document Processing Systems, Inc. - eMortgage Closing Table - Microsoft Internet Explorer
Document Processing Systems
Signing Space
Actions
Cancel All
Steps
Login
Review Instructions
Sign Documents
Final Confirmation
Finished
Documents
Fixed Rate Balloon Note
Fixed Rate Balloon Note Addendum
Compliance Agreement
Name Affidavit Borrower One
Name Affidavit Borrower Two
W-9 (Borrower 1)
W-9 (Borrower 2)
Escrow Waiver
Occupancy Statement
Notice of Right to Cancel - Borrower 1
Notice of Right to Cancel - Borrower 2
IL Collateral Protection Insurance Disclosure
U.S. Patriot Act Procedures For Opening A New Acct
U.S. Patriot Act Signature Affidavit - Borrower 1
U.S. Patriot Act Signature Affidavit - Borrower 2
Form 4506-T Request For Transcript Of Tax Return (Joint)
Form 4506-T Request For Transcript Of Tax Return (Borrower 1)
Form 4506-T Request For Transcript Of Tax Return (Borrower 2)
Smith, John
Smith, Mary
Notary, Jeff
Important Legal Notice -- Please Read
I agree that I did not electronically sign any electronic record in error, and I am confirming my assent to the terms and conditions in the electronic records presented to me, which I have electronically signed during this session.
Smith, John
Passphrase:
I Understand This Notice
Smith, Mary
Passphrase:
I Understand This Notice
Notary, Jeff
Passphrase:
I Understand This Notice
© 2004 Document Processing Systems Inc. All Rights Reserved. Patent Pending 2004.
Local intranet
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Figure 13

AGREEMENT ALLOWING FOR THE USE OF ELECTRONIC SIGNATURES

This Agreement is between <DPS CUSTOMER NAME> hereinafter referred to as "<SHORT CUSTOMER NAME>"and <CONSUMER>hereinafter referred to as "You" and "Your".

THE PARTIES AGREE TO THE FOLLOWING:

Description of Transaction
This Agreement covers the electronic signing of your entire residential loan closing package for the property located at <INSERT PROPERTY ADDRESS HERE>.

Affirmative Consent for Electronic Signatures
You consent to use an electronic signature for the transaction described above in place of your handwritten signature for the electronic signing of your residential loan closing documents presented to you electronically. Your consent to sign electronically covers all electronic documents in your residential loan closing package. You agree to use your hand written signature on the mortgage, any riders to the mortgage, and any other documents relating to your residential loan closing documents that are presented to you in paper form by the title company.

Copies of the electronic records signed electronically
You will receive a paper copy of all the electronic records you have electronically signed after the electronic signing process has been completed. You agree, while you are using an electronic signature to sign your residential loan closing package, all information required to be provided to you in writing will be provided to you in writing.

I have read and understand the terms contained in the agreement above, and I agree to be bound by them. I acknowledge receipt of a copy of this agreement.

_____ BY:_____
Consumer Date Company Authorized Agent Date

_____
Title

Figure 14

PAPERLESS PROCESS FOR MORTGAGE CLOSINGS AND OTHER APPLICATIONS

CROSS-RELATED REFERENCE SECTION

[0001] This application claims the benefit of priority under 35 U.S.C. Section 119(*e*) of U.S. Provisional Patent Application No. 60/543,148, filed Feb. 10, 2004, which is incorporated herein by reference.

FIELD OF THE INVENTION

[0002] The invention relates to paperless transactions and the mortgage industry in particular, and more specifically to the closing, registration and custody of electronic mortgages. This invention generally relates to the field of electronic document processing systems. Specifically, the invention relates to a system used for generating electronic documents, signing of the documents, and digitally authenticating and certifying the documents.

BACKGROUND OF THE INVENTION

[0003] The mortgage closing process is traditionally very paper intensive and tedious. Borrowers must affix wet signatures to many, many documents and lenders subsequently must physically copy, distribute, register and store the signed documents.

[0004] The Mortgage Industry Standards Maintenance Organization (MISMO) has laid the foundation for paperless, electronic mortgages by defining the SMART Document specification. SMART is an acronym for Securable, Manageable, Archivable, Retrievable, and Transferable. The specification, based on XML, is a general-purpose, flexible technology that can be used to implement any paper document in electronic format. It binds together the data, page view, audit trail and signature(s) into a single electronic file. The page view may be XHTML or PDF.

[0005] Other enabling/foundational industry breakthroughs include eSignatures and the eNote Registry. The National eNote Registry is an electronic mechanism for identifying, tracking and verifying electronic promissory notes (eNotes) in a manner compliant with requirements imposed by the Uniform Electronic Transactions Act (UETA) and the federal Electronic Signatures in Global and National Commerce Act (ESIGN). UETA and ESIGN stipulate that the owner of an eNote (the Controller) has legal rights similar to those that a "Holder in Due Course" has with a paper negotiable promissory note. Moreover, ESIGN stipulates that eSignatures bear the same weight legally as wet signatures. Rounding out the eNote Registry are eCustodians or eVaults. Since the eNote Registry does not actually store the eNotes, proprietary electronic custodial repositories must exist to store and manage eNotes.

[0006] The mortgage closing process and other such financial transactions are traditionally paper intensive and tedious. Parties to the transaction must affix wet signatures to many documents, and these documents must subsequently be copied, distributed, registered, and securely stored.

[0007] The tedious nature of financial transactions opens the possibility for errors and discrepancies to occur. The necessity for each party to a transaction to sign multiple documents allows for differences in the signatures, which can give rise to dispute. For instance, a single party can sign one document 'John Smith,' another document 'John A. Smith,' another document 'J. Smith,' and yet another document 'J.S.' Because there is no way to ensure the uniformity of signatures or the terms of paper documents, the validity of these documents can be subject to question.

[0008] Furthermore, developments in digital imaging, photography, and image capture have created new opportunities for document tampering and counterfeiting. Paper documents can now be manipulated and tampered with, and such modifications are often difficult, if impossible, to detect. Signature forgery has also become widespread, further calling into question the validity of paper documents. Because such tampering is possible, an alternative to paper documents and wet signatures is preferred, to provide a more secure and efficient method of preparing, signing, and certifying documents.

[0009] The authenticity of hard documents can also be called into question when these documents have changed hands a number of times. Banks and other lending institutions frequently buy and sell mortgage agreements, and the value of these agreements can only be guaranteed inasmuch as the agreements can be shown to be authentic documents. A tracking system is therefore necessary, which securely tracks the ownership of a document from the moment it is signed.

[0010] Kishore, Nanda (United States Patent Publication No. 20040049445) teaches a financial services automation system for automating financial transactions. However, Kishore does not impose a time limit on the signing process. Kishore does not allow for the scanning of outside documents, their conversion into digital format, and the insertion of digital signature lines. Additionally, Kishore does not allow for a second authentication and certification step at the culmination of the signing process, and the destruction of the documents if the process is not completed. Lastly, Kishore does not teach a watermark imprint or signature line that appears on all certified documents, confirming their signing.

SUMMARY OF THE INVENTION

[0011] The invention coordinates and manages the mortgage closing process, facilitates digital signing of documents, packages the electronic documents and automatically registers the signed documents electronically with the Mortgage Electronic Registration System. The invention comprises processes, computer systems and software for performing the paperless closing process. The invention may work in concert with a pre-existing eVault. Although the disclosed example relates specifically to lender-borrower relationships, it will be apparent to those of skill in the art that the invention is applicable to other transactions and contract situations, including other types of loans for other types of purchases, settlement negotiations, and other agreements, particularly those benefiting from a sequential signature process.

[0012] According to the present invention, there is provided an electronic document processing system including electronic document generation means, means for generating digital certificates, organization means for coordinating the processing of digital documents, packaging means for finalizing and authenticating digital documents, tracking means for recording relevant document information, and transferring means for transferring the ownership of digital

documents. Preferably, the present invention is directed towards a secure system, software program, and method for generating electronic documents, coordinating the secure signing of said documents, digitally authenticating and certifying said documents, and organizing said documents for secure retrieval and transfer in the mortgage closing/financial services field.

[0013] The present invention also provides a method for document processing including the steps of: generating documents, generating digital certificates, organizing and managing digital certificates, organizing and coordinating the processing of documents, packaging and authenticating documents, logging relevant document information, and transferring the ownership of documents.

BRIEF DESCRIPTION OF THE DRAWINGS

[0014] **FIG. 1** is a flow diagram that describes the electronic closing process;

[0015] **FIG. 1***a* is a flow diagram that describes the electronic closing process;

[0016] **FIG. 2** is a block diagram that describes the logical application architecture, the software components and their relationships;

[0017] **FIG. 2***a* is a block diagram that describes the logical application architecture, the software components and their relationships;

[0018] **FIG. 3** is a block diagram that describes how the document views are rendered;

[0019] **FIG. 4** is a graphical representation of the 'Create Signing Space;'

[0020] **FIG. 4A** shows a computer screen of the Signer Manager;

[0021] **FIG. 4B** shows a computer screen of the Document Manager;

[0022] **FIG. 5** is a graphical representation of the 'Signing Space;'

[0023] **FIG. 5A** shows a computer screen of Document Signing;

[0024] **FIG. 6** shows a computer screen of the Document Repository Manager;

[0025] **FIG. 7** shows a computer screen of an example of a library of document sets to choose from the Document Repository Manager;

[0026] **FIG. 8** shows a computer screen of the Package Manager;

[0027] **FIG. 9** shows a computer screen of the Signing Space Login;

[0028] **FIG. 10** shows a computer screen of the Legal Notice and Confidentiality Page;

[0029] **FIG. 11** shows a computer screen of Document Signing with one digital signature in place represented in normal text;

[0030] **FIG. 12** shows a computer screen of Document Signing with one digital signature in place represented with a watermark;

[0031] **FIG. 13** shows one of the last screens of the example where all users must agree that everything is correct in all documents and must include their pass phrase; and

[0032] **FIG. 14** shows an example of an Affidavit used to allow electronic disclosure and to allow a signer to sign an electronic record.

DETAILED DESCRIPTION OF THE INVENTION

[0033] **FIG. 1** describes a process in which a paperless closing will occur with the software-based invention. Participants in the process include borrower(s), lender/broker and closing agent.

[0034] Prior to executing the signing process, borrower(s) obtain digital certificate(s), necessary for certifying identity, from a certificate authority, such as Verisign®. The certificates may optionally be obtained automatically by the invention, on behalf of the borrower(s). The lender/broker prepares closing electronic documents (note and mortgage) and stores them on the eVault where they are converted to SMART Doc format. The lender/broker then creates a signing environment for the electronic documents, where the electronic document signing order is established and signing accounts are created for borrower(s) and closing agent. See **FIG. 4**. A borrower's digital certificate and encrypted private key, whether obtained by the borrower or by the invention, are stored on the eVault with respective electronic documents.

[0035] Throughout the signing phase of the process, two software components, Quill and Inkwell, collaborate to perform the electronic document signings. In computer software architecture terms, Quill is the client and Inkwell is the server.

[0036] Borrower(s) log into the signing environment with credentials established and provided by the lender/broker. If there is more than one borrower, each borrower plus the closing agent must log in before the electronic document signing environment is activated and presented. Participants of the closing need not be at the same computer or location.

[0037] Upon activation of the signing environment, borrower(s) acknowledge understanding of the legally binding nature of actions to take place, then each borrower in turn types pass phrase for respective private key, which is used to sign each electronic document.

[0038] The signing environment visually conveys state throughout the process, as shown in **FIG. 5**. State consists of active participant, active electronic document, signed state of each electronic document and currently available actions.

[0039] Each borrower, in turn, signs the active electronic document by clicking his respective signing button. The borrower may not sign the electronic document until all pages have been viewed. Once all pages are viewed, the electronic document hash is computed and encrypted with the borrower's private key (the signature). Inkwell applies the borrower's signature to the SMART Doc and updates the audit trail when a borrower signs an electronic document. Quill presents the next electronic document to be signed only after all borrowers have signed the active electronic document. Quill updates the view of signed electronic documents to convey the fact that they have been signed.

[0040] After all electronic documents have been signed, each borrower confirms acceptance of the transaction and the closing agent acknowledges participation with an electronic signature, thus concluding the signing session. Thereafter, Inkwell packages SMART Docs into an archive file and signs the archive with the private key of a server digital certificate. Finally, Inkwell registers the eNote with the eRegistry.

[0041] As depicted in **FIG. 2**, the logical software architecture of the invention consists of a client component, Quill, and two server components, Inkwell and eVault. Implicit in the architecture are the hosting computer platforms for the components of the invention. On the client side a computer system equipped with a web browser is used. Examples are Microsoft Windows XP Professional with Internet Explorer 6.0 and Mandrake Linux 9.2 with Konqueror 3.0. The web browser should support extensibility to allow proper functioning of Quill. While **FIG. 2** suggests Java applet technology for Quill implementation, other technologies, such as Microsoft's ActiveX technology could be used, although ActiveX currently limits the client platform to Windows and Internet Explorer. The web browser should also support SSL to ensure the security and integrity of the signing session. Server platform considerations, in the context of contemporary server technology, would likely focus on performance, capacity and scalability. Beyond basic server operating system features, minimum requirements include an off-the-shelf HTTP server that supports SSL and extensibility via CGI or other mechanism. **FIG. 2** implies that Inkwell and eVault are resident on a single server, although it is not necessary. Example server platforms include Linux with Apache 2.0 web; Microsoft Windows 2000 Server with IIS 6.0.

[0042] The client side user interface, aside from Quill, is implemented with any standard web development technology that produces standard HTML or XHTML output for web browser rendering. Potential implementations are plain HTML, CGI, PHP and Java Servlets.

[0043] Quill, as a separate client side component, is introduced to manage the PDF view of SMART Docs, potentially create digital signatures and optionally manage uploading of borrower digital certificates. Maintaining the SMART Doc view as PDF is preferred since a) electronic documents begin as PDF (electronic document preparation stage, not covered by this invention) b) PDF does not convert to HTML well and c) HTML is not consistently displayed across browsers. Quill also communicates directly with Inkwell to appropriately convey the state of the SMART Doc to application users and to apply signatures to electronic documents. The preferred embodiment of Quill is Java Applet technology, which imposes few limitations on the choice of client platform and provides the most control over the presentation of the SMART Doc PDF view. Commercial and open source Java libraries for managing PDF files are widely available. Alternative embodiments for Quill include Microsoft's ActiveX technology and Adobe's Acrobat Reader Plug-in technology. The former imposes platform limitations. The latter limits control over the PDF and communication with Inkwell.

[0044] Through the browser based user interface, the lender/broker creates and manages the signing environment (see **FIG. 4**) and borrowers review and sign electronic documents (see **FIG. 5**). However, besides the PDF view, all application views are controlled by the server component, Inkwell. As such, multiple browser instances may participate in a single signing session, hence participants need not be co-located.

[0045] Inkwell's responsibilities include: creating and deleting signing environments, managing the signing environment state, controlling the signing environment view, controlling access to the signing environment, retrieving electronic documents from eVault, managing borrower digital certificates, applying signatures to SMART Docs, maintaining SMART Doc audit trails, maintaining SMART Doc state, collaborating with Quill, packaging signed electronic documents and registering SMART Docs with the eNote Registry. Inkwell's preferred embodiment is a combination of Java JSPs, servlets and POJO (plain old java objects).

[0046] The eVault component provides a secure repository for SMART Docs and digital certificates, although it is not part of this invention. Preferably it conforms to open communication protocols, such as WebDAV, to facilitate and simplify interfacing with external systems and web browsers. Inkwell's integration with eVault via WebDAV offers the greatest flexibility in terms of how and where eVault is implemented and deployed, although alternatives could include a) Java APIs assuming eVault is implemented with Java and runs in the same JVM as Inkwell b) Java RMI, again assuming that eVault is implemented with Java and c) web services or other implementation agnostic RPC.

[0047] In collaborating with Quill, Inkwell responds to requests for electronic documents and communicates electronic document state changes to Quill. Moreover, Inkwell responds to requests from Quill to apply signatures. If Quill and Inkwell are both implemented with Java (preferred embodiment), they communicate via RMI tunneled over HTTPS; alternatives include HTTP GET, HTTP POST and web services.

[0048] The invention depends on Public Key Infrastructure (PKI) technology for creating the digital signatures; therefore a borrower's digital certificate will include a separate private key. The private key and digital certificate (CA signed public key) are stored in the eVault along with the electronic documents. The private key is password protected. Two alternatives exist for creating electronic document signatures. In one embodiment, Quill computes the electronic document hash and encrypts it with the borrower's private key and then sends the signature to Inkwell to apply to the SMART Doc. In this fashion, Inkwell need never have possession of the private key password and there is no question of trust. Quill, however, will require additional code libraries and will be much larger thus requiring additional time to download to the client. Alternatively, Quill sends the private key password to Inkwell and Inkwell computes the electronic document hash, encrypts with the private key and applies to the SMART Doc.

[0049] Once electronic documents are signed, Inkwell registers them with the eNote Registry. Integration with the MERS eNote Registry requires firewall-to-firewall VPN over the Internet or a dedicated frame relay circuit to MERS. The detailed requirements and specifications for registering eNotes with MERS are covered in the 'External Systems Impact Analysis' electronic document, which is available from the MERS web site: http://www.mersinc.orq/download/ereg_impact.pdf.

[0050] Generally, the present invention provides a method and system for generating electronic documents that can be authenticated throughout the process, organizing and coordinating the secure review and processing of the electronic documents into packages that can be managed, organizing and coordinating the management of signers for a given signing space, organizing and coordinating the secure process for signer review of electronic documents, organizing and coordinating the secure creation and management of signing spaces, organizing and coordinating the issuing and management of digital certificates, organizing and coordinating the legally compliant signing of said electronic documents, digitally authenticating and certifying said electronic documents, automated registration and recordation of said electronic documents, means for secure delivery of said electronic documents, and organizing said electronic documents for storage and retrieval and transfer.

[0051] The present invention includes generating electronic documents that can be authenticated throughout the process.

[0052] The present invention includes organizing and coordinating the secure review and processing of the electronic documents into packages that can be managed.

[0053] The present invention includes organizing and coordinating the management of signers for a given signing space.

[0054] The present invention includes organizing and coordinating the secure process for signer review of electronic documents.

[0055] The present invention includes organizing and coordinating the secure creation and management of signing spaces.

[0056] The present invention includes organizing and coordinating the issuing and management of digital certificates.

[0057] The present invention includes organizing and coordinating the legally compliant signing of said electronic documents.

[0058] The present invention includes digitally authenticating and certifying said electronic documents.

[0059] The present invention includes automated registration and recordation of said electronic documents.

[0060] The present invention includes means for secure delivery of said electronic documents.

[0061] The present invention includes means for organizing said electronic documents for secure storage and retrieval and transfer.

[0062] The present invention is utilized for numerous reasons and in numerous settings. The present invention relates to various processes that include, but are not limited to, electronic document scanning, electronic document generation, generation of secure digital certificates, coordination of electronic document signing processes, digital certification and authentication of electronic documents, packaging of electronic documents, maintenance and transfer of electronic documents, and any other process that relates to electronic document generation, coordination, and authentication. Preferably though, the present invention is well suited for use with regard to a mortgage closing process, which integrates electronic document generation, secure coordination of the signing process for said electronic documents, and the certification and authentication of said electronic documents at the culmination of the closing process. The process hides the complexity of digital signature and other complex technologies rendering them invisible to the user and in so doing makes the process practical and implement-able.

[0063] The preferred embodiment of the present invention is for use in the mortgage industry/financial services field, although the present invention is operable in fields including, but not limited to, law, health care, business, and any other fields needing the electronic document generation, coordination, and authentication systems and methods as described herein. In particular, the present invention is well suited in fields requiring multiple identical signatures by multiple parties at multiple locations on multiple electronic documents, fields requiring secure digital authentication of electronic documents, and fields requiring the tracking and electronic documentation of an electronic document's signing parties, as well as parties to its ownership, for future reference.

[0064] The present invention generally operates through the use of a digital interface, which allows for presentation of digital electronic documents, organization and coordination of the signing of said electronic documents, elicitation of responses and signatures, and communication with systems at other locations. The present invention is also fully customizable and thus is adaptable for a variety of electronic document types, number of parties/signers and signing sequences. Moreover, the present invention is fully expandable for use in settings requiring large numbers of electronic documents and signatures including, but not limited to, mortgages, complex business transactions, contracts, and any other similar electronic document signing process.

[0065] The present invention is accessible through any device possessing the appropriate hardware capable of operating the system of the present invention. Appropriate devices include, but are not limited to personal computers (PC's), portable computers, hand-held devices, wireless devices, web-based technology systems, touch screen devices, typing devices, and any other similar electronic device capable of operating a web browser (i.e., Microsoft Internet Explorer, Netscape Navigator, etc.) and equipped with Adobe Acrobat (pdf), or any other such electronic document reader. Alternatively, the system can operate through proprietary software. Entry of information occurs through input devices including, but not limited to, mouse/pointing devices, keyboards, electronic pens together with handwriting recognition software, mouse devices, touch-screen devices, scanners, biometric devices and any other similar electronic input devices known to those of skill in the art.

[0066] The present invention works in unison with other networked devices, and also works independently on a single device, although operation on a single device limits functionality, especially with respect to multiple simultaneous users and communications with other systems. Thus, wired or wireless transmission from the device to a common server is possible. The data is stored on the device itself, a local server, a central server via the Internet, or a central data warehouse outside of a facility. The present invention allows for simultaneous, multiple users.

[0067] Other functions and aspects of the electronic document processing system of the present invention include, but are not limited to, mechanisms for scanning hard electronic documents and converting them into digital electronic documents, interfaces for presenting digital electronic documents, mechanisms for receiving user information and issuing digital certificates, storage mechanisms for storing and retrieving digital electronic documents, and organization mechanisms for coordinating the signing of digital electronic documents across multiple locations. Additionally, the present invention includes a packaging mechanism that stores the certified electronic document together with the relevant signature and audit information, and secures the entire electronic document package with a tamper-evident electronic seal.

[0068] The present invention can include a software program for all of the functions of the electronic document processing system, including electronic document generation and conversion, coordination of the electronic document signing process, generation of digital certificates, authentication and packaging of the electronic document, and managing of the ownership and transfer of digital electronic documents.

[0069] The software program is accessible through communication systems including, but not limited to, the Internet, Intranet, Extranet, and any other similar electronic mechanism know to those of skill in the art. Additionally, the software can be interfaced and integrated with currently existing software programs such as Microsoft Office, Microsoft Outlook, and other such business software programs, as well as existing electronic document storage systems. In operation, the electronic document processing system involves a method including the steps of: generating the electronic documents necessary for a given transaction, organizing the electronic documents and parties to the transaction, generating secure digital certificates for said parties, coordinating the secure signing of the digital electronic documents by said parties, and digitally certifying and packaging the electronic documents.

[0070] The electronic document processing method generally includes navigating through various screens or pages containing electronic documents or relating to the organization, sequence, conversion, or processing of electronic documents. The user or administrator interacts with these screens or pages in order to input the relevant information. For example, a mortgage closing officer uses the system to select the electronic documents to be included in a specific mortgage signing, or a borrower clicks on a signature button to indicate his acceptance of the terms of the given electronic document. All parties to a given transaction log on to the system, and the system coordinates the signing process over a communications network such as the Internet, Intranet, Extranet, wireless network and other such communications networks known to those of skill in the art. By connecting multiple parties to a transaction over a communication network, the system allows a secure transaction to take place without the parties being present at one physical location. The system then saves all inputted information (electronic documents, signatures, etc.) as well as information relating to the electronic document signing process (which could include the date, time, location, and identity of the parties to the transaction) on a central server.

[0071] Once all of the steps of the signing process have been completed, the system reconfirms the acceptance of all parties to the transaction. When this confirmation is received, the system applies a digital tamper-evident seal to the electronic documents. The date, time, location, and identity of all parties to the transaction are recorded and stored together with the electronic document package. The electronic document is then forwarded to the appropriate electronic document registry for registration and indexing.

[0072] Although there are numerous embodiments of the present invention, the preferred embodiment is directed towards improved accuracy, efficiency, authenticity, and security of electronic document intensive transactions, electronic document signing processes, and electronic document management.

[0073] **FIG. 1A** represents a process flow diagram of the preferred embodiment. The process begins with the system retrieving existing electronic documents from a data server, importing external electronic documents from another source, or generating new electronic documents by scanning and converting hard electronic documents **(1)**. Hard electronic documents are scanned into the system with a flat-bed or form-fed scanner, digital camera, or other such image capture device, known to those of skill in the art. Electronic documents are converted to MISMO SMART Electronic document format and prepared for application of digital signatures.

[0074] The administrator of the transaction then selects and organizes the relevant electronic documents **(2)**. The administrator of the transaction identifies the parties to the transaction, the electronic documents to be signed, the time and date of the signing, the sequence in which the parties will sign the electronic documents, and other such settings relevant to the execution of the signing, thereby creating an electronic signing space **(3)**. At this point, the other parties to the transaction, (i.e., borrowers, sellers, notaries, closing agents, and other electronic document signers) are prompted (via email, fax, phone, or any other notification means) to log onto the system to obtain a digital certificate and private key, if not done so already, which will be used to compute digital signatures during the electronic signing process **(4)**. Each signing party's private key is encrypted with a pass phrase known only to the signing party. The signing parties to the transaction can then log onto the system (either via a secured web page, or proprietary software installed on a PC).

[0075] The signing process begins when all parties to the transaction log onto the electronic document processing system **(5)**, either via secured web page, or proprietary software operating on a PC. All users are connected via the Internet, or any other such communications network. If all parties to the transaction (as established by the administrator at **(3)**) are not logged onto the system, the signing space will not be activated. Activation of the signing space also depends on each signing party having a valid digital certificate. Once the signing space is activated, each signer is presented a confirmation page describing the legally binding nature of the electronic signing process **(6)**. Each signing party indicates acceptance of the terms of the electronic signing process by submitting the private key pass phrase established when the signing party obtained the digital certificate. If any signing party rejects the terms, the signing will not proceed.

[0076] Once all signing parties have confirmed acceptance, the system presents the first electronic document to be reviewed and signed (based on the electronic document signing settings established at (3)) (7). The system then updates the audit trail information stored on the server (8), recording that the present electronic document has now begun the signing process. The system generates a PDF view (9) based on the electronic document stored on the server. This electronic document view is then presented to all parties of the transaction for review (10). The parties to the transaction review the electronic document (11), and then click a signing button (12) in the signing sequence established at (3), indicating their acceptance of the terms described by the electronic document. When each party to the transaction clicks his respective signing button, the information is communicated to the server, which applies a digital signature to the present electronic document using the private key associated with the current signer's digital certificate (13). This signature is stored in the MISMO SMART electronic document as a W3C XML digital signature and reflected in the electronic document in the form of either a watermark (e.g. categories 3 & 4 MIMSO SMART electronic document) or a signature line (e.g. categories 1 & 2 MISMO SMART electronic document). The audit trail is then updated on the server (14), recording information such as the time, date, and location of the signing, as well as the identity of the party. Each party to the transaction proceeds through this signing process (beginning at (8)) for each electronic document to be signed. When all parties to the transaction have completed the signing of one electronic document, the system selects the next electronic document to be signed (7), based on the electronic document signing sequence established at (3). The system operates in this fashion until all electronic documents in the signing sequence have been signed by all parties. Alternatively, the system can be configured to allow for a "one-click" signing process, whereby the parties to a given transaction can digitally sign a series of electronic documents with one digital signature click.

[0077] The system does not operate unless all parties have signed all relevant electronic documents in sequence. Thus, a given party cannot proceed to sign the next electronic document until all parties have signed the current electronic document. If one or more parties to an electronic document do not sign an electronic document within the given time (as established at (3)), the entire signing process (or, alternatively, the signing of that specific electronic document) is cancelled and the electronic documents destroyed.

[0078] After all parties to the transaction have signed all of the electronic documents in the signing process, the system prompts each signer to confirm again his/her understanding and acceptance of all the terms of the transaction (15). Each signer indicates final confirmation by submitting the private key pass phrase established when the digital certificate was issued. (15). The process will not complete unless all signing parties accept final confirmation.

[0079] After final confirmation by all signing parties, the transaction is then automatically registered with the appropriate local, state, federal, or other registry (20) vian electronic registration, email, fax, or other such correspondence, thereby completing the process. Moreover, authoritative electronic document copies are registered and maintained by the system until such time that they are transferred to another party.

[0080] At any point during the process, any party to the transaction may elect to cancel the entire transaction. The party clicks on a cancel button (21), indicating the party's desire to cancel the transaction. The party is then presented with a request for confirmation (22), in which the party can elect to confirm the cancellation, or to return to the transaction. If the user confirms the cancellation, the entire signing process is terminated, and all electronic documents in the process (signed and unsigned) are destroyed. If the user elects to return to the transaction, the user is returned to the most recently viewed electronic document screen.

[0081] The logical architecture of the present invention is set forth in FIG. 2A. The parties to the transaction interact with the system via remote PC's, which connect to a server via the Internet, Intranet, or other such communications network. Each remote PC interacts with the server via a web browser (i.e., Microsoft Internet Explorer, Netscape Navigator, etc.) and a digital electronic document viewer (i.e., Adobe Acrobat Reader, etc.) for viewing and interacting with electronic documents. Alternatively, the system could display the electronic documents using XML, HTML, or any other such electronic document format, thereby eliminating the need for Adobe Acrobat Reader. Additionally, the system can also operate over a proprietary software program, thereby eliminating the need for a web browser altogether.

[0082] The remote PC's interact with the server via secure network connections. Example server platforms include Linux with Apache 2.0 web, Microsoft Windows 2000 Server with IIS 6.0, or other such server platforms known to those of skill in the art. The server contains the electronic document signing space, which includes the electronic document package, as well as the settings established for the electronic document signing. The electronic document package contains the dynamic (PDF) view of the electronic documents, the audit trail (containing the relevant electronic document history) and the digital signature certificates.

[0083] FIG. 3 represents the logical composition of an electronic document. The electronic document includes the relevant electronic document and transaction data associated with the electronic document, the digital signature certificates associated with the electronic document, the audit trail containing the recorded history of the electronic document, and the electronic document view. The electronic document view contains the reference PDF file, representing the template of the electronic document, populated with the appropriate information relevant to the present transaction. The electronic document view also contains a signature line that conveys the relevant digital signature certificates associated with the electronic document. When viewed through an electronic document viewer (i.e., Adobe Acrobat), the electronic document is rendered as a visual representation of the present electronic document, complete with a visual representation of the relevant parties' signatures, and the time and date of the signing.

[0084] FIG. 4B represents the customization tool for managing the electronic document signing process. The administrator of the transaction (typically a mortgage closing agent) utilizes this tool to manage the parties to a given transaction, the electronic documents to a given transaction,

and the specific settings relating to a given transaction. The administrator can add, delete, and modify parties to a transaction, select which electronic documents are to be signed during a given signing process, and modify the sequencing of the electronic documents to be signed and the parties to sign them.

[0085] The actual electronic document signing space is depicted in **FIG. 5A**. All parties to a transaction interact with this screen during the signing process. The signing space contains the dynamic view of the electronic document to be signed, as well as a menu bar containing information relevant to the electronic document signing process. The menu bar contains a list of the required signers to the electronic document, and indicates the status of each signer (i.e., has not signed, awaiting signature, already signed, etc.). The menu bar further reflects the steps of the signing process (i.e., login, read instructions, sign electronic documents, etc.), and indicates the current state of the signing process, as well as which electronic documents have been signed, and which remain to be signed. Also included in the menu bar is an action menu, which includes the relevant executable actions on the present electronic document, such as expand electronic document view, and cancel all electronic documents. The signing space further includes a signing button that conveys the state of the given parties signing of the given electronic document (i.e., has not signed, awaiting signature, already signed, etc.), and prompts the user to click the signing button, if applicable.

[0086] Automated Fool-Proof Process for Signing Electronic Documents

[0087] The invention coordinates and manages the mortgage closing process, facilitates digital signing of electronic documents, packages the electronic documents and automatically registers the signed electronic documents electronically with the Mortgage Electronic Registration System. The invention comprises processes, computer systems and software for performing the paperless closing process. The invention may work in concert with a pre-existing eVault or other registration systems and governmental agencies for electronic recordation. Although the disclosed example relates specifically to residential mortgage loan relationships, it will be apparent to those of skill in the art that the invention is applicable to other transactions and contract situations, including other types of loans for other types of purchases, settlement negotiations, and other agreements, particularly those benefiting from a sequential signature process.

[0088] One preferred embodiment of this invention uses automation in allowing the Software Application to control the majority of the process and preferably control the entire process. With this embodiment of the process, the system or a person sets up or configures the entire process in advance to make the process idiot-proof. For example, prior to a closing session, all electronic documents are pre-loaded in the software. The order of electronic documents is predetermined in the configuration before any party goes to a closing table. Once the process is configured in advance, the entire process is automated, to minimize errors, to prevent omitted electronic documents, to generate ONLY A COMPLETE ELECTRONIC DOCUMENT SET. Quality control can be assured by using the process of this embodiment. Quality control assures that 1) Electronic documents are signed in specified order; 2) Each electronic document is signed by all appropriate parties with appropriate signature; 3) All electronic documents are signed; 4) A notary observes the entire closing; and 5) Backdating and other such nonsense is prevented. Additionally, all electronic documents to be signed are included in a list on the screen. As the process progresses, the location of the electronic document presently in process of being signed is highlighted or otherwise displayed different from the other electronic documents in the list on the screen so that it is always known with what electronic document in the process you are at. All electronic documents that have been signed can be viewed throughout the continuation of the signing process.

[0089] Electronic documents are presented during the process in the order specified by the system or person that configures the process. This embodiment is geared so that it is much less likely in a normal operating environment to make errors or to generate an electronic document set that is missing an electronic document. Although it is possible that the configuration person could make a mistake, which could happen on very rare occasions, it is less likely with this process and method. For example, the configuration person, who would generally do this process often, would use the same or similar list of electronic document types for each type of electronic document set. There may be several combinations of electronic documents used together. The configuration preparer can take advantage of these sets of combinations. This can also be automated so electronic document combinations can be verified through computer comparisons to help eliminate error possibilities.

[0090] With this embodiment of the process, it is preferably set up so that no step may be left out and if any party misses a step, takes too long or otherwise does not complete the process, the process terminates and may delete any and all electronic documents that were electronically signed in the session. Although the process may have variations and parts of it may be omitted in other types of applications and uses, the following list of steps may be included in the residential mortgage industry.

[0091] Steps of the Process

[0092] 1. Generating Appropriate Data to Make an Electronic Document Package and a Workspace.

[0093] The Broker/Lender must order an electronic document set. This electronic document set would then be uploaded to an electronic workspace wherein additional processing would occur in a secure yet collaborative environment. These electronic documents that are uploaded would automatically identify the appropriate signers for each electronic document.

[0094] 2. Finalizing the Electronic Document Package With Additional Processing

[0095] The electronic documents, having been originally uploaded to a secure, collaborative workspace, are then made available to appropriate parties for inspection and verification. These parties would include, for example, the Lender, the Broker, the Title Company, and the closing agent. Each of these parties would review the electronic documents placed into the workspace and add any additional electronic documents needed for the closing. This can be done manually through a user interface or automatically through an interface. These electronic documents can be

Title Company electronic documents like the Title Insurance and/or Lender electronic documents like the original **1003** (URLA —Universal Residential Loan Application). There may also be electronic documents that were placed in the workspace during the original electronic document selection that would be removed, for instance an electronic document like the closing instructions might have been included so that the closing agent has appropriate instructions for performing the closing, but it is an electronic document that the borrower is not meant to sign. Thus closing agents might copy or print electronic documents for their own use, then delete from the workspace so it would not be included in the closing. There may be some back and forth electronic document changes and discussions between the Lender and the Broker and the Title Company and the Closing Agent. The upload process during this stage of adding electronic documents would include a step to either automatically or manually identify the appropriate signers for each electronic document being added.

[0096] 3. Appropriate Parties Certifying that Electronic documents are Correct and thereby Create A Signing Space

[0097] Once the Lender and/or Broker and/or Title Company and/or Closing Agent and/or Notary are in agreement that the all electronic documents are present, complete, in correct form, have correct parameters, are error-free, in the correct order and ready for processing, then one or more of them sign off on it which will then create an appropriate Signing Space. This approval process can be done in a number of ways. For example: one or more parties digitally sign screen-text that specifies their approval of the package to proceed to closing, with this sign-off stored within the Repository. Alternatively, each page of each electronic document can have a marking as a header, footer or anywhere in between indicating that all parties at the signing approve of wording. This marking can be a logo of each, or an alphanumeric phrase or combination of each. A small watermark may be used. With this mark on each electronic document, the borrowers are assured that the electronic documents that they are viewing are approved electronic documents. The agreed upon electronic documents may be stored in a vault with electronic signatures or accompanied with an Affidavit stating that the electronic documents are to be used in an electronic document signing session and that both Lender and Closing Agent agree. Alternately, the computer can make two of each electronic document, one with the Lender's and Closing Agent's electronic signatures and/or watermarks and a duplicate may be automatically generated in the process that is to be used by the signers. Any combination of the above may be used and other ways of performing this step of the process may be used so long as it is clear that the agreed upon appropriate party/parties confirms that the appropriate electronic documents are included.

[0098] 4. Signers Preparing for Signing Space by Having the Identification and Authentication of Signers Prepared by the Registration Authority and Signers Get Issued Digital Certificates if They Do Not Already Have One

[0099] During the process of Electronic document Selection and Processing, all appropriate signers to the Electronic documents were confirmed to exist in the Workspace, or were added so that they existed within the Workspace. Generally, the Notary and Closing Agent involved in any closing will make certain they have a digital certificate for signing purposes prior to the Signing Space being completed. In order for them to create digital certificates, they will go through the Identification and Authentication process handled by an approved Registration Authority, usually the Registrations Authority for a Notary or Closing Agent will be a Title Company or Lender.

[0100] For other signers, for example the borrower or seller, digital certificates will be created at the time of the actual closing. This can be done either over the phone, online, or face-to-face depending of the level of certificate needed for the electronic documents to be signed. In a residential mortgage loan closing, a face-to-face meeting will occur wherein the Registration Authority will confirm the Identity of the signer, Authenticate the signer, and then cause the signer to obtain for themselves a digital certificate.

[0101] The preferred embodiment facilitates the process of issuing digital certificates, which traditionally requires a subject/applicant to seek out a certificate authority (CA) and purchase a digital certificate of the appropriate type. In the preferred embodiment, each signer is issued a digital certificate, at no cost to the signer, by a self contained CA server and public key infrastructure. Following signer authentication, each signer logs into a certificate creation station using credentials supplied by the lender/closing agent/notary. The signer is presented the certificate subject distinguished name, which is defined using information about the signer. Notaries must include commission or "seal" information including commission expiration and county of issuance. The signer verifies the subject distinguished name and then supplies a confidential pass phrase (known only to the signer); the pass phrase is used to encrypt the certificate private key. The encrypted private key and the certificate are stored in the application's database. Certificates issued by the self-contained CA server are not usable in a context outside of the invention.

[0102] The validity periods of signer certificates may be configured according to signer type. For example, borrower and seller certificates can be configured to be valid for 30 days or even 24 hours. It is desirable, however to configure notary and closing agent certificates to be valid for a period of 6 months or more since notaries and closing agents participate in the signing process on a regular basis.

[0103] 5. All Signing Parties Authenticating Themselves Into the Software and Use Their Pass-Phrase or Other Means of Authentication to Sign Off on Consent Then All Signing Parties Proceed to Sign Electronic documents Using the Pre-Configured Features Built Into the Software

[0104] The closing table(s) is/are prepared in the following way. There can be more than one closing table as this process can be performed simultaneously in many locations, cities, states, countries, from sea above or below water, from a vehicle, from an airplane, spaceship, (from another planet, from an asteroid, or a moon). This process can simply be performed from any location that can physically connect to the other computers through the internet, phone, radio, cable, wire, fiber optics, cell phone or other means of communication. In the best form of this embodiment, a notary public would be present at each closing table. Often, the Closing Agent may be a notary public. In preparation for closing, a lender/broker will require that the signers sign an Affidavit or Declaration in wet ink stating that they consent to use electronic records and electronic signatures in place of

paper electronic documents. Some of the legal forms, such as the Affidavit help bind this process together and are shown in tables and Figures as examples.

[0105] All signers are present at the closing table, with the exception of possibly the lender, and preferably with a notary present at each closing table. Although the process could be completed without the notary at the closing table, having a notary at each closing table provides the greatest assurance that the process is done properly. One notary may be present at multiple locations by using a video phone or other device. At the closing table, the process is automated using the setup configuration certified in step **3**. As stated, oftentimes it is efficient and cost effective to use the same person for the Closing Agent and Notary.

[0106] At the closing table, the application is initialized with the signing space that corresponds with the electronic document package to be signed. However, the signing space will not be activated until all required signers login to the signing space. Immediately following login, signers, including borrowers, sellers, notaries and closing agents, are presented with a legal notice describing the signing process and its legally binding nature. Each signer indicates assent to the legal notice by entering the digital certificate private key pass phrase established when the certificate was issued (per step **4**). The pass phrase is used to decrypt the signer's private key, which is used to digitally sign electronic documents. The process will not continue until all signers successfully indicate assent.

[0107] Continuing the process, the software application, already configured, chooses electronic documents to display in the order that was already specified in advance. For every signature, there is a place where the user clicks. The signature may be done in alternate ways that do not deviate from the invention. Just to name some examples, one may use a pointing device such as a mouse, electronic pen, other pointing device, the enter key, any key on the keyboard (for example the key of the first or last name of a signer, or each signer can be assigned a different key of a keyboard, a palm-print reader, a thumb-print reader, a foot-pedal, a voice-recognition sound generated by the voice-print of each signer, an eye-scan, a wireless generated signal, any variation of these ideas, or any device not mentioned in existence or ones that are not yet in existence at the time of this writing. There could be a special device made for such a signing involving switches, mice, push-buttons. It could even be that each signer is given their own mouse or other device to avoid error or any possibility that signers can get mixed up. In this case, it could even be made where only the mouse of the person whose turn it is to sign is active at any given time. One can use a Fingerprint Reader such as that sold by Microsoft used for logging on without requiring passwords or pass phrases, however, instead of using the fingerprint to log on, to use the fingerprint to indicate an electronic signature, or to replace a pass phrase. Another way that is a new innovation of this invention is that a different color is shown on the screen for each signer with or without their name on the screen as seen as reference numerals **506**, **510** and **514** in **FIG. 10**. It is difficult to show as color Figures may not be used in patents, so it can be stated that each occurrence when it is time for a signer to sign, the screen may have a big box or other shape on the screen to be clicked by the appropriate signer, and it is this box or shape that can preferably have a different color for each signer as well as spelling out the signer's name in each box to be clicked. In fact, not only will each box be a different color for each signer, but each user will have a unique signature button box color to click throughout the session. In this example, the notary may always use the color white.

[0108] Lenders typically are not present at the closing table, but are required to sign various electronic documents. Part of the package configuration may include issuance of a digital certificate to a lender representative. Where necessary, a digital signature will be applied on behalf of the lender representative, by the invention, to appropriate electronic documents after all other signatures are applied.

[0109] Although the signers may be given advance copies of each electronic document, the process should be such that any signer can view any signed electronic document at any time during the process.

[0110] If any signers leave the process, then the process ends and must be started over another time. Alternately, it could be made to have a continuation, for example after lunch break or other break. The process could be frozen to be re-activated later, for example, where each signer uses his or her pass-phrase or other code used to reactivate after lunch or break. Some electronic document signing sessions may have a very large number of electronic documents and may take a full day or more than one day. Such sessions reinitialize only after all parties successfully enter their pass-phrases when prompted.

[0111] After all signers have signed all of the electronic documents in the electronic document package, the system prompts each signer to confirm again his/her understanding and acceptance of all the terms of the transaction. Each signer indicates final confirmation by again submitting the private key pass phrase established when the digital certificate was issued. The process will not complete unless all signing parties accept final confirmation.

[0112] 6. Distributing Signed Electronic Documents

[0113] Following final confirmation, the transaction is then automatically registered with the appropriate local, state, federal, or other registry vian electronic registration, email, fax, or other such correspondence, thereby completing the process. Moreover, authoritative electronic document copies are registered and maintained by the system until such time that they are transferred to another party.

[0114] The preferred embodiment already has been described as a process with various steps. To clarify the process, **FIGS. 4 through 13** illustrate the steps of the process.

Examples of Screens of the Preferred Embodiment

[0115] There are various screens that can be used in the preferred embodiment shown in **FIGS. 4 through 13**. These screens of this embodiment may have variations and are not limited to what is shown in the screens as variations may be used in the invention. The purpose of the screens is to show how the software functions. It is the intention of the invention that the end-users will know where they are in the software at any time to make the software user-friendly and every attempt has been made to accomplish this as seen in the screens. It would have been nice if larger representations

of the screens could be shown in the patent application to make the print larger and more read-able, however, due to the size requirements of the U.S. Patent Office, the screens and the print are about as large as is permitted.

[0116] Electronic Document Repository Manager

[0117] **FIG. 6** shows a computer screen of the Electronic document Repository Manager indicated by reference numeral **10**. Reference **20** refers to the title of the XYZ Advantage Mortgage LLC eMortgage repository where electronic documents are electronically stored as displayed on the screen. This may be done, for example, in a place where data is stored. However, for extra security so that the data will survive catastrophe and acts of God, data may be stored in a location inside a mountain in a remote area. Such data storage may cost more money; however, it is worth the extra cost as these are important electronic documents. Reference numeral **30** shows how the web address where the data is stored is displayed on the screen. Reference numeral **40** indicates what file directory is being represented on the screen. Reference numerals **50** and **51** show two of the available directories, in this example named "03" and "06." Reference numeral **60** is darkened and says "links," and the links are listed below, for example reference numeral **61** is home, reference numeral **62** is "eMortgage WorkSpace," reference numeral **63** is "eMortgage Closing Table," reference numeral **64** is "eMortgage Repository" and reference numeral **65** is "Logout." Reference numeral **70** is the darkened area "Actions" which include reference numeral **71** is "Start," reference numeral **72** is "Manage Electronic documents (eVault)" and reference numeral **73** is "Secure Delivery."

[0118] If one is to click directory "06" of **FIG. 6** represented by reference numeral **51**, a chosen directory therein is shown in **FIG. 7**. The Electronic document Repository Manager screen **100** is shown in **FIG. 7**. Reference numeral **101** shows an electronic document set "test.xml," reference numeral **102** shows the electronic document set "W 9 Borrower 2.XML," reference numeral **103** shows the electronic document set "W 9 Borrower 1.XML," reference numeral **104** shows the electronic document set "Correction Agreement Limited Power of Attorney.XML," reference numeral **105** shows "Choose All" and reference numeral **106** shows "Clear All." Reference numeral **107** shows the web site address. Reference numeral **108** is a box next to the line "test.xml," reference numeral **101**. If one looks at the screen **100**, one can see that each electronic document set has a box next to it. One of the features of this invention that makes it user-friendly is how easy it is to use and understand how the software operates for a person using it. These boxes, which are used to choose one or more electronic document sets, show a good example of how the software is used. With a click of the mouse or other pointer device, an "X" or check-mark is placed in the box to indicate chosen electronic document sets. Once the end-user chooses the electronic document set(s) he then has to click to choose those electronic document sets.

[0119] Managing Packages

[0120] **FIG. 8** shows a computer screen, **200** of the Package Manager. Reference numeral **201** shows that this screen is used to "Manage Packages." This is where packages are chosen for use, edited or otherwise managed. Reference numeral **202** shows the address of the packages being managed, reference numeral **203** shows "XYZ Mortgage—eMortgage WorkSpace," reference numeral **204** shows package ID 950390 representing loan number 90028 at 1200 W. Lake Street that was prepared on Jun. 28, 2004 and the time is shown. Reference numeral **205** shows package ID 462280 representing loan number 100003 at 257 Michigan Ave. that was prepared on Jun. 28, 2004 and the time is shown.

[0121] The Signer Manager

[0122] **FIG. 4A** shows screen **300** of the Signer Manager. The Signer Manager is used to add signers for loans or other electronic document signing. Reference numeral **301** shows the box where data entry is done on signers to be added. The signing window has two tabs, **302** for electronic documents as chosen in **FIGS. 4B and 303** for Signers as chosen in this electronic document as can be seen as the tab **303** is darker than the tab **302** in **FIG. 4A**. To add a signer, simply fill in the data in the box **301** and then click the add button, **305**. To edit a signer select one from the list of signers **310-313** and click the "edit icon", **316**. Each signer, **310** through **313** has its own "trash can icon,""edit icon" and "view certificate icon." For example, for signer Notary Nick, **310**, there is an associated "trash can icon"**315**, "edit icon"**316** and "view certificate icon", **317**. To select an existing signer, click the select button, **304**. The names of the signers are below name, **306**. Also shown on the screen **300** are the package ID **307**, the Loan Number **308** and the Property Address **309**. Just as with most of the other parts of the package, with a minor amount of modification, the signer manager may be used with many electronic document signing applications besides loans and mortgages and are described for use in loans and mortgages as an example.

[0123] The Electronic Document Manager

[0124] The Electronic document Manager, **350** is shown in **FIG. 4B**. The signer box **359** lists all signer names with a box, **351** next to each name. This way, since not every signer will sign every electronic document, the preparer will configure in advance of signing who will sign each electronic document. This is done by clicking the electronic document to be configured, then clicking whichever boxes **351** signify the appropriate signers for that specific electronic document. However, many electronic documents are pre-set and are signed only by certain parties all the time as is the case of many electronic documents from the library of electronic documents. However, new electronic documents that are added are configurable as to who signs them. Even the pre-set electronic documents can be made configurable, if desired. The browse button may be clicked to find more electronic documents and then the add button, **352** is clicked to choose a given electronic document. Reference numeral **353** is a header for Electronic document Name and all the electronic document names of the electronic document set are listed below it. As more electronic documents are added the list grows accordingly. Also the order of electronic document signing at the closing table is configured in this screen **350**. The list of electronic document names **353** are shown in sequential order. The order may be changed, however. Each electronic document name **353** has an up-arrow **354** and a down-arrow, **355**. To move an electronic document higher in the order, click the up-arrow of the electronic document. To move an electronic document lower in the order, click the down-arrow of the electronic docu-

ment. As an example for two electronic documents in screen **350**, reference numeral **357** shows the electronic document titled "U.S. Patriot Act Signature Affidavit Borrower 1" and reference numeral **358** shows the electronic document entitled "U.S. Patriot Act Procedures for Opening a New Acct". After the preparer has finished configuring and choosing electronic documents, he clicks the done button, **356**.

[**0125**] Although the Electronic document Manager screen, **350** shows an example of how to use the process of the invention to configure what electronic documents are used and who the signers are of each electronic document, this process can have other methods of configuration, for example, drag and drop, highlighted boxes, tables, a split-screen system, a multi-screen system, just so long as the configuration is done in advance of the closing table.

[**0126**] The Signing Space Login

[**0127**] **FIG. 9** shows the screen **400** that shows the Signing Space Login. This screen shows the company name and welcomes parties to the closing table in the message **401**. At this point the username **402** and password **403** are entered, typically by the closing agent. The required signers block **404** is highlighted on the screen and the actual required signers are listed below as reference numbers **405**, **406** and **407**. As the required signers are listed, it is clear that the data are already configured. Note that the word Login, **409** has darker letters indicating that this is the current step.

[**0128**] Legal Notice and Confidentiality Page

[**0129**] The Legal Notice and Confidentiality Page, **500** is a legal notice that should be read by all users prior to going further in the software. The list of electronic documents for the closing table are listed at reference numeral **501**, however, there is a slide bar in the software, as not all electronic documents are shown in the visible portion of the screen **501**. The legal notice, **502** is posted. Reference numerals **503**, **507** and **511** list the signers. Reference numerals **504**, **508** and **512** show the word "Passphrase:" and below are the boxes **505**, **509** and **513** where each signer at the closing table enters a Passphrase. The boxes **506**, **510** and **514** are to be clicked by each signer. It is preferable to have a notary present to witness the signing. Each electronic document in the list **501** has a mark, **515** that indicates it is not done yet. After each electronic document is digitally signed, the mark **515** changes to a different mark. The "Review Instructions" bar **516** is in darker print as this is the current step. Also, note that the signers for this closing table, **517-519** are listed in the upper left.

[**0130**] Electronic Document Signing

[**0131**] **FIG. 5A** shows a screen, **600** an electronic document. Reference numeral **601** is a darkened bar saying "steps". The steps below, Login and Review Instructions have marks **602** and **603** to the left, indicating that these steps have been completed. The step Sign Electronic documents is in darkened or bold letters to indicate that this is the current step. Also, the mark **604** indicates that this is the current step. Markings **605** and **606** indicate that the last two steps have not yet been complete. Reference numeral **607** says "Signers" in a gray box and below it is a list of signers. Smith, John is in darker letters indicating that he is the current signer and also has a marking **608** also indicating that he is the current signer. Smith, Mary is marked lighter, thus indicating that Mary Smith is not the current signer and also the marking **609** next to Mary Smith also indicates that she is not the current signer. The word Electronic documents is in a gray box, **610** and below the box **610** is a list of electronic documents to be used at the closing table. The top item on the list, "Fixed Rate Balloon Note" is in darker letters and thus is indicated as the current electronic document. Furthermore, it is known that this is the current electronic document because marking **611** indicates that this is the current electronic document. Marking **612**, is the kind of marking used for an electronic document that is not the current electronic document. Reference numeral **613** indicates Signing Space as current. Reference numeral **614** is a box that says "required Signers" and these required signers are listed below starting with signer **619**. Reference numeral **615** lists the title of the electronic document, "balloon note". Reference numeral **616** is a statement that the signer has read the electronic records and will use it in place of a handwritten signature and will be bound by it when he clicks the box **617** below it. Reference numeral **618** is a number associated with the electronic document. This electronic document is ready for being digitally signed.

[**0132**] **FIG. 11** shows a digitally signed electronic document, **700**. Reference numeral **701** shows that this electronic document has been digitally signed by John Smith. Reference numeral **702** shows that this electronic document is waiting to be digitally signed by Mary Smith. Line **703** is part of the electronic document. Reference numeral **704** is above the names of the signers. Reference numeral **705** shows John Smith in light characters indicating that he is not the current signer while reference numeral **707** shows Mary Smith in darker characters indicating that she is the current signer. Reference numeral **708** shows "Sign Electronic documents" in darker characters indicating that this is the current step. Reference numeral **709** shows "Fixed Rate Balloon Note" in darker characters, indicating that this is the current electronic document. Reference numeral **710** shows the next electronic document that is not the current electronic document as it is displayed in lighter characters. The digital signatures are not done here in watermark, thus indicating that the electronic document is category 1 SMARTDOC.

[**0133**] **FIG. 12** shows a digitally signed electronic document, **800**. The watermark, **801** represents that a digital signature has been made, thus indicating that the electronic document is a type **3** or **4** SMART electronic document. Reference numeral **802** indicates that Notary, Jeff is the current signer and box **808** is to be clicked by him to be digitally signed by him. Reference numeral **803** indicates that "Sign Electronic documents" is the current step as it is in the darkest characters whereas **804** and **805** are in lighter characters and thus are not the current step. Reference numeral **806** indicates that "Compliance Agreement" is the current electronic document. Reference numeral **807** is the statement indicating that the signer agrees that by clicking the box **808** that he has digitally signed the electronic document.

[**0134**] **FIG. 13** shows one of the final screens **900** of the preferred embodiment of the invention. This screen, **900** shows a legal notice **920** with legal text **921** for the final confirmation **901** that each signer willingly consents to the electronic disclosure and application of electronic signatures to electronic records. After this step, the process is finished

902. The address **940** is displayed on the screen **900**. On this screen, **900**, all signers **903**, **907** and **911** are required to read the legal notice **920** and **921** to confirm that the process has been acceptable. If everything has been acceptable, then each signer separately, one at a time, enters his/her Passphrase **904**, **908** and **912** in the boxes **905**, **909** and **913**, respectively. If the closing session is not acceptable to any signer for any reason, he/she may click the "cancel all", **930** to cancel the entire closing and all electronic documents that have been digitally signed. After this final confirmation step, **901** has been completed, the next step, "finished", **902** is next, after which the process closes, in this example.

[**0135**] How the Software Example Works

[**0136**] The Electronic Documents

[**0137**] SMART Electronic Documents

[**0138**] The invention leverages the MISMO (Mortgage Industry Maintenance Organization) SMART Electronic document specification. SMART is an acronym for Securable, Manageable, Archive-able, Retrievable, and Transferable. The specification, based on XML, is a general-purpose, flexible technology that can be used to implement any paper electronic document in electronic format. It binds together the data, page view, audit trail and signature(s) into a single electronic file. There are 5 distinct SMART Electronic document categories.

[**0139**] At a minimum, all SMART Electronic documents in the eMortgage Studio have header, signature and audit sections. Each category is distinguished by data and view sections. At the time of this patent application, the five distinct SMART Electronic documents are as follows.

[**0140**] Besides the minimum, category 1 SMART Electronic documents have both data and view sections. Data section elements are ARC'd to elements in the view section. An XML ARC is a link or reference from one electronic document element to another. The view section of the cat 1 is defined with XHTML.

[**0141**] Besides the minimum, category 2 SMART Electronic documents have only a view section. The view is defined with XHTML.

[**0142**] Besides the minimum, category 3 SMART Electronic documents have both data and view sections, although data are not ARC'd to the view. The view of a cat 3 is base64 encoded PDF, TIFF, JPEG, GIF or any other file format that can be used to represent an electronic document.

[**0143**] Besides the minimum, category 4 SMART Electronic documents have only a view section. The view of a cat 4 is defined the same as cat 3—base64 encoded such as PDF or TIFF. Other examples of formats are PSD, PDD, BMP, RLE, DIB, CRW, WEF, RAF, ORF, CIN, SDPX, DPX, FIDD, GIF, EPS, PS, FLM, JPG, JPEG, JPE, PSB, PDP, PCX, PCD, RAW, PCT, PICT, PXR, PNG, SCT, TGA, VDA, ICB, VST, WBMP and WBM. There may be other formats available that exist now or in the future that may be used with this invention.

[**0144**] Besides the minimum, category 5 SMART Electronic documents only have a data section and are typically used for transmitting loan information to loan servicing systems. Clearly cat 5 electronic documents would never be used where a view is necessary.

[**0145**] For the sake of presenting a consistent view regardless of SMART Electronic document category, all views are presented to signers in PDF format. Category 3 and 4 SMART Electronic documents, in the current embodiment, have base64 encoded PDF views that are base64 decoded on the fly and streamed to the Adobe Reader browser plug-in when the view is requested. Category 1 and 2 SMART Electronic documents have XHTML views that are converted to PDF on the fly using the Apache Software Foundation's FOP (Formatting Objects Processor) library.

[**0146**] Electronic Document Preparation System

[**0147**] Applicant's company had previously developed an electronic DOCUMENT PREPARATION SYSTEM (DOCPREP) which is a software package used for input of electronic document information with a regular library of electronic documents. DOCPREP includes several electronic document templates for electronic documents that are to be used frequently. These often-used electronic documents are generally fixed, although they can be modified in some circumstances. DOCPREP acts as a mail-merge for electronic documents involving data entry of fields such as names, addresses, loan information, and other variables specific to the parties and to the loan. Although DOCPREP is used by Applicant, there are similar data entry packages that may be used for data entry, however, DOCPREP will be used as an example for this invention.

[**0148**] DOCPREP may be used for data entry of electronic documents. When electronic documents are generated this way, digital signatures may be conveyed within the electronic document in a normal print, in a convenient location for category 1 SMART Electronic documents as seen in **701** of **FIG. 11**. This is the most robust way of entering data and printing electronic documents using the software of the invention. However, this convenience is not always possible with category 3 and 4 SMART Electronic documents, which use graphic or proprietary electronic document file formats as opposed to XHTML. Consequently, for such electronic documents, a watermark is used to indicate that a digital signature has been executed as seen in reference numeral **801** of **FIG. 12**. However, in a set of electronic documents for a closing, there can be a mixture of various category electronic documents in the set. The software of the invention is programmed specifically for each category. Just as DOCPREP is a prior art tool used in this invention, watermarks are also a prior art tool used in this invention.

[**0149**] Electronic Signatures

[**0150**] Electronic document signatures are industry standard W3C XML digital signatures that are typically computed over data and/or view sections, but can include other electronic document sections as well, including other signatures. According to the SMART Electronic document specification, category 1 and 2 signatures are explicitly conveyed in the SIGNATURE_SECTION subsection of the XHTML view. The views of category 3 and 4 electronic documents cannot be altered, however, as doing so would invalidate any previously computed digital signatures. The signatures of category 3 and 4 electronic documents are conveyed with a watermark that is applied on the fly when the electronic document view is requested. See **FIG. 12**. Watermarks are applied to cat 3 and **4** docs using the iText PDF library. Watermark text that identifies signers is based on the subject DN of signer certificates.

[0151] EMORTGAGE STUDIO™ SOFTWARE

[0152] Applicant has developed a software package called EMORTGAGE STUDIO™ SOFTWARE which will be used as an example of use of this invention. HYPERTEXT is a markup language. HTML is a standard web language. HTML is a subset of SGML, the standard general markup language. Markup is a special code that describes how text should be represented or processed.

[0153] XML (extensible Markup Language) is a subset of SGML. XML is more practical and robust than HTML and Applicant believes that a type of XML known as XHTML will eventually replace HTML.

[0154] How EMORTGAGE STUDIO™ SOFTWARE Works

[0155] EMORTGAGE STUDIO™ SOFTWARE is written mostly in JAVA, which is not only a computer language, but an architecture/environment. EMORTGAGE STUDIO™ SOFTWARE uses SMARTDOCS which, in this example, are generated by ELECTRONIC DOCUMENT PREPARATION SYSTEM or DOCPREP developed by the company of the Applicant. ELECTRONIC DOCUMENT PREPARATION SYSTEM is used for data entry of information used in SMARTDOCS. Category 1 SMARTDOCS may use a template from FANNIE MAE in some cases. DOCPREP has an electronic document generator to generate PDF files, files that were originally associated with ADOBE ACROBAT and now are commonly generated with other software. The DOCPREP PDF files are converted to SMARTDOCS by base64 encoding the PDF file and storing the result in the view section of category 3 and 4 SMARTDOCS. The most robust way of preparing digital electronic documents for the EMORTGAGE STUDIO™ SOFTWARE is to use DOCPREP for electronic document preparation because it includes a data entry interface for maintaining buyer and seller information.

[0156] Actually, there are two types of PDF files, those that can be read as text and those that can only be read normally as graphic images. Obviously, those that can be read as text are easier to work with. DOCPREP generates PDF files. JAVA is used to manipulate files to become SMARTDOCS. Base64 code is known to one skilled in the art and is used to represent binary data using common, printable characters including punctuation and keyboard characters. In JAVA, to present a base64 encoded PDF view on a screen, one would "base64 de-code" it, or translate it from base64 code to binary code. Base64 encoding/decoding is used for Category 3 and 4 SMARTDOCS. In JAVA, to show these on a screen, the program would contain <view> base **64** encoded character strings </view>. Thus, the above would be used to show a PDF file, a TIFF file or other graphic file on the screen. Category 5 SMARTDOCS have no view and is used for transmitting data.

[0157] W3C XML Digital Signatures

[0158] W3C is the Worldwide Web Consortium where W3 is short for the term www. W3C is an international group that maintains Internet standards, which are published currently at http://w3c.org/. One standard that W3C defined is the standard requirements representing a digital signature using XML.

[0159] DOCPREP used in EMORTGAGE STUDIO™ SOFTWARE

[0160] With DOCPREP, electronic documents may be prepared with an automatic electronic document system such as DPS DIRECT-DOCS® made by Applicant's company. Alternately, the preparer may upload electronic documents. Currently PDF is supported, however, it is not limited to PDF electronic documents. Other formats that may be used include TIFF, PSD, PDD, BMP, RLE, DIB, CRW, WEF, RAF, ORF, CIN, SDPX, DPX, FIDD, GIF, EPS, PS, FLM, JPG, JPEG, JPE, PSB, PDP, PCX, PCD, RAW, PCT, PCT, PXR, PNG, SCT, TGA, VDA, ICB, VST, WBMP and WBM. Future formats that do not exist at the time of this writing may also be used.

[0161] Digital Certificates

[0162] Digital certificates are used in PKI or Public Key Infrastructure and are based on asymmetric key pairs. One key is private and the other key is public. The key pairs are mathematically related such that one key encrypts data that only the other key can decrypt. So, when you digitally sign, you verify that 1) someone has the public key and 2) if you can decipher, then by definition, the private key is correct and the person has legitimate access.

[0163] To digitally sign a block of data, one must compute a "hash" of the data and then encrypt the hash with the private key of a digital certificate. A hash is a compressed numerical representation of data. Verifying a signature requires decrypting the encrypted hash with the digital certificate's public key, computing the hash of the data and comparing the 2 hash values.

[0164] Part of the W3C specification for XML digital signatures (at the time of this writing) requires storage of both the digital signature, computed using the private key of a digital certificate, and also the digital certificate containing the public key corresponding to the private key of the certificate. In this fashion one can verify the stored signature without concern for finding the public key—it is self contained. The EMORTGAGE STUDIO™ SOFTWARE automatically verifies digital signatures.

[0165] Other Variations of the Invention and Unlimited Possibilities

[0166] Of course, there are other screens that could have been made that do the same thing as the screens shown in this process. Each screen could have been slightly different, for example, the list of electronic documents and steps that has been shown on the left could have been instead placed on the right, or in the middle, or in a different window on a second computer screen. Then the electronic documents can be shown in larger view on one computer screen while the indicators can be shown on another screen. A big screen could be used, for example that of a very large monitor or a big screen TV so that the electronic document signing can be viewed clearly by all parties. The big screen could have multiple windows or multiple big screens could be used. There is no limit on how this process can be implemented. Although the screens have been developed in a user-friendly and organized fashion, with the look and feel shown in **FIGS. 4-13**, the process of this invention can also be done with screens that are less user-friendly and less organized without taking away from the spirit and scope of the invention. There are infinite possibilities on how the process of this invention can be done. One of the key features is the automation. Another is the advance configuration of the

electronic document signing table that allows the automation to be done and thus errors are minimized and precious time of all parties is saved, which also results in cost savings. Although digital signatures have been done before, it is the package, the pre-configuration, the automation, the process and the hiding of the complexities and impracticalities of PKI based digital signatures that make it a pioneer patent. The screens help the user(s) navigate through the process with little difficulty and this is an enhancement, especially with regard to the simple, easy to use digital certificates. As a result of this invention, many hours of time can and will be saved over the years, resulting in great savings in costs for electronic document signing for closing of loans, contracts that involve multiple electronic documents, peace treaties, international agreements, real estate transactions, legislation and any multiple electronic document transaction whatsoever.

[0167] The Future of this Invention

[0168] In the future, there will be new kinds of pointing devices that do not exist at the time of this patent application that may be incorporated into this invention. A wink of the eye can have the same effect as clicking a mouse, as in some current devices made for the disabled. All the technology for the disabled now and in the future may also be used with this invention. In the future, new kinds of screen devices, monitors, TVs will be available, and larger screens will be available at a lower price than at the time of this writing, thus making it more practical to project a larger image for multiple signers. Image projectors have currently become more affordable now than two years ago so that images can even be projected on a wall and this technology is also advancing. At the time of this writing, WINDOWS XP is a popular operating system for a microcomputer. However, in time, new operating systems will replace WINDOWS XP, with more features and power so that the process of this invention can be made to work better and faster. Faster computer CPUs, chipsets and memory chips have been developed for better speed of both computers and of computer graphic adapters. Newer CPUs will have more instructions that will be taken advantage of by future operating systems and languages. Although, Java is a popular language used on the internet today, new hybrids of Java will develop and even completely new languages may be developed that can be used. Computer language is not a limitation with this invention as any computer language may be used, present, past and future languages when practical. Although it is not known what new developments of hardware and software will be available in the future, these all may be incorporated with this invention. Thus, as technology marches forward, this invention will also improve in time and not become obsolete. All these new devices and things are to be incorporated in this invention so that the invention can be used with some of the hardware, software and operating systems of the future and this invention is not limited by the choices of computer hardware, software and operating systems available at the time of this writing. In this invention, any thing mentioned anywhere in this application may be combined with anything else of this invention. The future of this invention has no limits or bounds except for the limits imposed in the legal standards of electronic signatures which may also change in the future. This invention should be able to function within any such legal standards of the future both nationally and internationally.

[0169] Throughout this application, various publications, including United States patents, are referenced by author and year and patents by number. Full citations for the publications are listed below. The disclosures of these publications and patents in their entireties are hereby incorporated by reference into this application in order to more fully describe the state of the art to which this invention pertains.

[0170] The invention has been described in an illustrative manner, and it is to be understood that the terminology used is intended to be in the nature of words of description rather than of limitation. Obviously, many modifications and variations of the present invention are possible in light of the above teachings. It is, therefore, to be understood that within the scope of the appended claims, the invention may be practiced otherwise than as specifically described.

What is claimed is:

1. A paperless transaction method, comprising the steps of:

verifying the identity of one or more signers;

digitally signing one or more electronic documents associated with the transaction;

registering the digitally signed electronic documents.

2. The method of claim 1, wherein the transaction is a mortgage closing.

3. The method of claim 2, wherein the digitally signed electronic documents are registered with the Mortgage Electronic Registration System.

4. A mortgage closing process, comprising the steps of:

certifying the identity of one or more borrowers;

digitally signing, by the borrowers, one or more electronic mortgage-related electronic documents; and

packaging and automatically registering the signed electronic documents.

5. The method of claim 4, wherein each borrower is certified using a digital certificate.

6. The method of claim 4, wherein the mortgage-related electronic documents are stored in an electronic vault along with an encryption key.

7. The method of claim 4, wherein the electronic documents are arranged in a signing order.

8. The method of claim 4, further including the step of creating accounts for each borrower and a closing agent, and a notary.

9. The method of claim 4, wherein the participants of the closing need not be at the same computer or the same location.

10. The method of claim 4, wherein, after all of the electronic documents have been signed, each borrower confirms acceptance of the transaction and a notary acknowledges participation with an electronic signature, thereby concluding the signing session.

11. The method of claim 10, wherein the digitally signed electronic documents are registered with the Mortgage Electronic Registration System.

12. An electronic document processing system comprising electronic document generation means, generation means for generating digital certificates (signatures), organization means for coordinating the processing of electronic documents, packaging means for finalizing and authenticating electronic documents, tracking means for recording

relevant electronic document information, and transferring means for transferring the ownership of electronic documents.

13. The system of claim 12, wherein said generation means is defined as an electronic document creation system for creating electronic documents based on corresponding hard electronic documents.

14. The system of claim 13, wherein said electronic document creation system includes a server containing electronic documents, a server containing information relating to the content of the electronic documents, and a software program for populating the electronic documents with the relevant information.

15. The system of claim 13, wherein said electronic document creation system includes an input device for inputting hard electronic documents, and a software program for converting hard electronic documents into electronic documents.

16. The system of claim 15 wherein said input device is selected from the group consisting essentially of flat-bed scanners, form-fed scanners, digital cameras, and other such image capturing devices.

17. The system of claim 13, wherein said electronic document creation system includes a software program for importing existing electronic documents.

18. The system of claim 13, wherein said electronic document creation system includes a software program for creating new electronic documents.

19. The system of claim 12, wherein said generation means is further defined as means for inserting a digital signature capability for digital signature authentication.

20. The system of claim 1, wherein said means for generating digital certificates includes a certificate generation system for generating said certificates.

21. The system of claim 20, wherein said certificates generation system comprises input means for inputting personal information, computation means for digitally encrypting the information, and approval means for enabling the use of a digitally secure certificate.

22. The system of claim 12, wherein said organization means includes an organization system for connecting relevant parties to an electronic document, presenting electronic documents to the relevant parties, and coordinating the signing and authenticating of said electronic documents.

23. The organization system of claim 22, wherein said organization system is operatively connected to a communication network including the Internet, intranet, local area network, wired network, wireless network, and other such communication networks.

24. The organization system of claim 22, further including a customization tool for editing and modifying the content, sequence, operation, requirements, and other such variables associated with the operation of the system.

25. The organization system of claim 22, further including a security mechanism for restricting and allowing access to specific elements of the system to specific persons related to the electronic documents.

26. The system of claim 12, wherein said packaging means is defined as a software program for digitally encoding and encrypting the signing and authentication of electronic documents.

27. The system of claim 12, wherein said packaging means is further defined as a software program for determining whether the signing and authenticating process has been completed by all parties, and certifying the electronic documents accordingly.

28. The system of claim 12, wherein said packaging means is further defined as storing the electronic document, the digital signatures, and the digital authentication, together.

29. The system of claim 12, wherein said tracking means includes a software program for recording the identity, location, time, date, duration, and other such information relating to an electronic document signing.

30. The system of claim 29 wherein said software program further includes means for storing the relevant signing and authenticating information with the electronic document.

31. The system of claim 12, wherein said transferring means includes a software program for recording the identity, location, time, and date of the owner of an electronic document.

32. The system of claim 31, wherein said software program further includes means for transferring the ownership of an electronic document to a new owner.

33. An electronic authentication system comprising electronic document authentication indication means for validating and certifying an agreement between parties, dependent upon the culmination of a signing process.

34. The system of claim 33, wherein said indication means includes recording the time, date, and location of the electronic document authentication.

35. The system of claim 33, wherein said indication means includes a tamper-evident seal and a watermark imprint or signature line that is represented in the view on the digitally signed electronic document.

36. The system of claim 33, wherein said authentication system is further dependant upon the culmination of a signing process within an established period of time.

37. The system of claim 33, wherein said authentication system is further dependant on the constant detection of user activity within an established period of time.

38. An electronic document processing method comprising the steps of: generating electronic documents; generating digital certificates; organizing and coordinating the processing of electronic documents; packaging, finalizing, and authenticating electronic documents; tracking and recording relevant electronic document information; and transferring the ownership of electronic documents.

39. The electronic document processing method of claim 39, wherein said electronic document generating step is defined as creating electronic documents based on corresponding hard or electronic documents.

40. The electronic document processing method of claim 38, wherein said electronic document generating step is further defined as inserting a digital signature capability for digital signature authentication.

41. The electronic document processing method of claim 38, wherein said certificate generating step is defined as inputting personal information, computing and encrypting the information, and outputting a digitally secure signature certificate.

42. The electronic document processing method of claim 38, wherein said organizing step is defined as connecting relevant parties to an electronic document, presenting electronic documents to the relevant parties, and coordinating the signing and authenticating said electronic documents.

43. The electronic document processing method of claim 38, wherein said organizing step is further defined as the optional editing and modifying of the content, sequence, operation, requirements, and other such variables associated with electronic document processing.

44. The electronic document processing method of claim 38, wherein said organizing step is further defined as restricting and allowing access to specific elements of the electronic documents to specific persons related to the electronic documents.

45. The electronic document processing method of claim 38, wherein said packaging step is defined as encoding and encrypting the signing and authentication of electronic documents, and sealing them with a tamper-evident seal.

46. The electronic document processing method of claim 38, wherein said packaging step is further defined as determining whether the signing and authenticating process has been completed by all parties, and certifying the electronic documents accordingly.

47. The electronic document processing method of claim 38, wherein said packaging step is further defined as storing the electronic document, the signatures, and the authentication, together.

48. The electronic document processing method of claim 38, wherein said tracking step is defined as recording the identity, location, time, date, duration, and other such information relating to an electronic document signing.

49. The electronic document processing method of claim 38, wherein said tracking step is further defined as storing the relevant signing and authenticating information with the electronic document.

50. The electronic document processing method of claim 38, wherein said transferring step is defined as recording the identity, location, time, and date of the owner of an electronic document.

51. The electronic document processing method of claim 38, wherein said transferring step is further defined as transferring the ownership of an electronic document to a new owner.

52. A process comprising the steps of:

(1) generating appropriate data to make an electronic document package and a workspace;

(2) finalizing the electronic document package with additional processing;

(3) appropriate parties certifying that electronic documents are correct and thereby create a signing space;

(4) signers preparing for signing space by having the identification and authentication of signers prepared by the registration authority and signers get issued digital certificates if they do not already have one;

(5) all signing parties authenticating themselves into the software and use their pass-phrase or other means of authentication to sign off on consent then all signing parties proceed to sign electronic documents using the pre-configured features built into the software; and

(6) distributing signed electronic documents.

53. A process as in claim 52, step **1**, including connecting software to DOCPREP in such a way that other DOCPREP engines can also be connected.

54. A process as in claim 52, step **1**, including scanning data and storing scanned electronic documents in files.

55. A process as in claim 52, step **1**, wherein data-entry software is used to enter data.

56. A process as in claim 52, step **1**, including transferring data between systems.

57. A process as in claim 52, step **2**, including uploading additional electronic documents to the secure collaborative workspace either manually or through an interface.

58. A process as in claim 52, step **2**, including removing electronic documents from the workspace.

59. A process as in claim 52, step **2**, including adjusting electronic documents to correct any errors.

60. A process as in claim 52, step **2**, including making electronic documents available to appropriate parties for inspection and verification and review.

61. A process as in claim 60, wherein the parties include at least one of the following: lender, broker, title company and/or closing agent.

62. A process as in claim 52, step **3**, including the parties signing off that the electronic documents are correct.

63. A process as in claim 52, step **4** including issuing each signer a subject distinguished name and each signer enters a confidential pass phrase if he/she does not already have a pass phrase.

64. A process as in claim 52, step **4**, wherein a closing agent or notary public already has a pass phrase from a valid digital certificate generated by the system.

65. A process as in claim 52, step **4**, wherein validation period of signer(s) certificate has a time duration configured by the closing agent or other person.

66. A process as in claim 52, step **5**, wherein more than one signer is in a signing space, at the same time from different locations.

67. A process as in claim 52, step **5**, including a notary public viewing the closing table.

68. A process as in claim 52, step **5**, wherein the signing space will not be activated until all signers configured to be at the closing table log in to the signing space.

69. A process as in claim 52, step **5**, wherein immediately following login, signers are presented with a legal notice describing the signing process and its legally binding nature.

70. A process as in claim 52, step **5**, including each signer indicating assent to legal notice by entering the digital certificate private key pass phrase; and the process will not continue until all designated signers successfully indicate assent to the legal notice.

71. A process as in claim 52, step **5**, including using a pass phrase to decrypt each signer private key, which is used to digitally sign electronic documents.

72. A process as in claim 52, step **5**, including each signer choosing a signature box with a pointing device such as a mouse, or other indicating device to thereby assent to and apply a digital signature.

73. A process as in claim 52, step **5**, wherein an alternate method other than a mouse-click is used to indicate a signature by a signer to thereby assent to and apply a digital signature.

74. A process as in claim 52, step **5**, wherein each signer has his/her own graphic representation used to indicate when to sign; and wherein the graphic representation of the person to sign at any given time is accentuated in some way to indicate whose turn it is to sign.

75. A process as in claim 52, step **5**; including preventing a signer from proceeding to the next electronic document for signing until all signers at the closing table have signed and assented to the current electronic document.

76. A process as in claim 52, step **5**, wherein the lender or another party through an agreement can be configured to apply a signature for a party not present which can be arranged in advance.

77. A process as in claim 52, step **5**, including representing a digital signature on a screen image with a watermark.

78. A process as in claim 52, step **5**, including representing a digital signature on a screen using text to indicate that a digital signature has been made.

79. A process as in claim 52, step **6**, including automatically or manually registering the electronic documents in an eVault, a system, the appropriate local, state, federal or other regulators by electronic registration, email, fax, electronic file transfer, file copy or other correspondence, thus completing the process.

80. A process as in claim 52, wherein the software comprises a signer manager.

81. A process as in claim 52, wherein the software comprises an electronic document manager.

82. A process as in claim 52, wherein the software comprises an electronic document repository manager.

83. A process as in claim 52, wherein the software comprises a package manager.

84. A process as in claim 52, wherein the software uses a screen used for creating signing space.

85. A process as in claim 52, wherein the software uses a screen used for agreeing with legal notices.

86. A process as in claim 52, wherein the software uses a screen used for electronic document signing.

87. A process as in claim 52, wherein the software uses a screen used for a signing space login.

88. A process as in claim 52, wherein the software uses an Affidavit indicating that each signer grants permission to use electronic disclosure and to allow a signer to sign an electronic record.

89. A process that legally creates an electronic transferable record using digital certificates.

90. A method of executing a paperless closing including the steps of:

obtaining a digital certificate to certify identity of a borrower;

storing the certificate and encrypted private key with respective electronic documents; and

creating a signing environment for the electronic documents.

91. A method as set forth in claim 52, wherein said step of creating a signing environment is further defined as establishing a signing order and creating signing accounts for the borrower and closing agent and notary.

92. A method as set forth in claim 53, including the further step of activating the signing environment with credentials established.

93. A method as set forth in claim 54, wherein the signing environment conveys state throughout the signing process, state including an active participant, active electronic document, signed state of each electronic document, and currently available actions to be taken.

94. A method as set forth in claim 55, wherein the borrower signs an active electronic document by activating a respective signing indicia.

95. A method as set forth in claim 56, wherein a borrower can only sign an electronic document after viewing all pages of the electronic document.

96. A method as set forth in claim 57, further including the steps of applying the borrower's signature to all documents viewed while updating an audit trail once the signatures are applied.

97. A method as set forth in claim 58, further including the steps of only presenting a new electronic document for review and signatures after the preceding active electronic document has been signed.

98. A method as set forth in claim 59, including the further steps of confirming acceptance by the borrowers after all electronic documents have been signed and acknowledging participation by the closing agent in order to close the signing session.

99. A method as set froth in claim 60, including the further steps of packaging the signed electronic documents into a file and signing the file with a digital certificate.

100. A method of executing a paperless agreement using public key infrastructure by creating a borrower's digital certificate including a private key, the public key and certificate being stored with related signed electronic documents.

101. A method as set forth in claim 62, wherein the private key is password protected.

102. A method of executing an electronic document by activating a signature key on a computer screen while utilizing public key infrastructure.

103. A method of executing an electronic document by ensuring that an electronic document changed from step to step during the execution process utilizing a hash or other equivalent means.

104. A method as set forth in claim 103, wherein the electronic document is not changed from step to step until it is tamper-evident sealed.

105. A method of executing an electronic document by utilizing an electronic agent or a software agent to automatically sign an electronic document for a third party.

* * * * *

Alvie and Julia Campbell

Real Property Located:
250 PR 947, Taylor
Taylor, TX 76574

AFFIDAVIT OF

JOSEPH R.ESQUIVEL JR

I, Joseph R. Esquivel Jr., declare as follows:

1. I am over the age of 18 years and qualified to make this Affidavit. I am a licensed private investigator of the State of Texas, License #A18306, and make this affidavit based on my own personal knowledge. I have no direct or indirect interest in the outcome of this case for which I am offering observations, analysis, opinions and testimony.

2. I perform my research through the viewing of actual business records and Corporate/Trust Documents. I use specialty licensed software ABS Net and other professional resources to view these records and documents. I have the training, knowledge and experience to perform these searches and understand the meaning of these records and documents with very reliable accuracy. I am available for court appearances, in person or via telephone for further clarification or explanation of the information provided herein, or for cross examination if necessary. I have examined the following documents;

A. Complaint filed into District Court Williamson County, Texas on Case NO. 10-11093-C368
B. Copy of document purporting to be the Note of Alvie and Julia Campbell in the amount of $137,837
C. Deed of Trust pertaining to the Note of Alvie and Julia Campbell in the amount of $137,837 made payable to American Mortgage Network, Inc. DBA Amnet Mortgage
D. A document purported to be an "Assignment of Note and Deed of Trust " dated September 20, 2008 pertaining to Alvie and Julia Campbell
E. Documents filed into court record pertaining to Security Instrument that is detached from Note in the amount of $137,837 pertaining to Alvie and Julia Campbell

F. Voluntary Lien Search pertaining to the Transaction Details for 250 PR 947, Taylor, TX 76574 which includes all publicly recorded documents filed at the Williamson County Recorder Office.

G. Ginnie Mae May 2012 Selling Guide

H. Ginnie Mae Manual Requirements For Document Custodians Version 6.0

3. I have personal knowledge in the topic areas related to the securitization of mortgage loans, derivative securities, the securities industry, real property law, Uniform Commercial Code practices, predatory lending practices, Truth in Lending Act requirements, loan origination and underwriting, accounting in the context of securitization and pooling and servicing of securitized loans, assignment and assumption of securitized loans, creation of trusts under deeds of trust, pooling and agreements, and issuance of asset backed securities and specifically mortgage-backed securities by special purpose vehicles in which an entity is named as trustee for holders of certificates of mortgage backed securities, the economics of securitized residential mortgages during the period of 2001-2008, appraisal fraud, and its effect on APR disclosure, usury, exceeding the legal limit for interest charged, foreclosure of securitized, non-securitized residential mortgages.

4. From many hours of study and research and formal training and reviewing thousands of mortgage documents, I learned that one procedure for funding is via mortgage securitization where such pools solicit funds from investors by means of a Prospectus which was used to explain the Mortgage Backed Security (MBS). The Pooling and Servicing Agreement, (PSA) is the governing document for the MBS pool which was typically established as a Trust. State trust laws uniformly demand that the governing documents of the Trust be strictly adhered to compliance with the United States Internal Revenue Service (IRS) taxing guidelines.

A General Overview of Secured Transactions of a Note and a Deed of Trust

5. Of the three transferable linked parts of every Mortgage Loan, the Intangible Obligation, the Note and the Deed of Trust, two of those transferable parts are tangible instruments, the

Note and the Deed of Trust. The Note is a negotiable instrument that evidences the Tangible Obligation. The Deed of Trust, seen as a Real Property Lien, is a contract listing alternatives for collecting payment due under the Tangible Obligation evidenced by the Note. The third part, the Intangible Obligation is dependent upon the Tangible Note properly secured by a Deed of Trust,

Transfer of an Intangible Obligation

6. Ownership of the intangible payment stream created and collected from a Mortgage Loan can be bought, sold and transferred. This transfer of the rights to the Intangible Obligation is evidenced through the swap for the certificate funded by payment stream(s) received from payments made upon **what will be defined within this document as the "Intangible Obligation"**. Ownership of the Intangible Obligation via buying and selling the certificates (intangible payment stream) is allowable under the governance of Uniform Commercial Code (UCC) Article 9, as a Transferable Record. Transferred ownership can be seen though the financial record of the distributed payment stream. Transfer of ownership through certificates is an actual transfer of a partial ownership of a beneficial interest in the intangible payment stream of the Intangible Obligation.

Separation of an Intangible Obligation

7. In Commercial Money Ctr., Inc. bankruptcy, the Ninth Circuit Appellate Court had no difficulty concluding that the rights to intangible payment stream can be stripped from the records that evidence them.

> From Commercial Money Ctr., Inc., 350 B.R. 465, 473-79 (B.A.P. 9th Cir. 2006), rev'g, 56 U.C.C. Rep. Serv. (West) 54 (Bankr. S.D. Cal. Jan. 27, 2005).
> *"This language on its face defines chattel paper to mean the records that "evidence" certain things, including monetary obligations. Payment streams stripped from the underlying leases are not records that evidence monetary obligations they are monetary obligations. Therefore, we agree with NetBank that the payment streams are not chattel paper."*

8. The initial and subsequent certificate transactions involving divided intangible payment stream of the Intangible Obligation do not transfer the rights to the Tangible Note or the Deed of Trust to the owners of the intangible payment stream. To be compliant with laws of negotiation, transfer of ownership and rights to enforce the Tangible Note secured by a Deed of Trust require that a true sale of Note and the Deed of Trust be executed prior to the stripping of partial interest in the tangible instruments. A true sale of Note and the Deed of Trust to all and each of the potential multiple owners of the certificates must be compliant with the local laws of jurisdiction and such division is a legal impossibility. That described transfer lacks supporting tangible law thus would be impossible, as the rights to the Note and Deed of Trust can only be to one party. To create the appearance that the transfer of the tangible has been accomplished in accordance to law, the transfer of the Intangible Obligation (partial interest derived from the tangible instruments) is made to a common Trustee and the tangible instruments are conveyed to same Trustee as a simple mechanical act which does not transfer tangible rights. Any owner of the Intangible Obligation as a transferable record of the payment stream which has stripped the Tangible value away from the Note prior to tangible Note negotiation may obtain simple possession of the Note less rights by a simple conveyance of personal property which is not in compliance to the trust documents.

Transfer of a Note

9. Each Note associated with a Deed of Trust is created to be a negotiable instrument to allow for future sale. When a Note is treated as a negotiable instrument, such Note falls under the governance of UCC Article 3 or a states adopted equivalence. Enforcement rights to the Note can be transferred by indorsing in blank to create a bearer Note or by means of special indorsement. A blank indorsement is defined by the UCC as being a signature by Indorser alone, with nothing else creating a bearer instrument payable to bearer. A special indorsement requires the payee as Indorsee to be identified. The UCC allows any party to complete an incomplete special indorsement, making that party entitled to enforcement rights upon that negotiable instrument. However, a subsequent owner of a Note, while negotiating rights to a Note must also use caution involving the security securing a Note, care must be exercised so as to avoid loss of secured

party status in the negotiation of a Note by becoming an unidentified party whose unknown identity cannot be perfected of record as a tangible secured creditor.

10. When a subsequent owner of a Note fails to permanently perfect (whether required by law or not) the rights to the associated Deed of Trust into their name, in purchasing a Note and rights to the security securing, such lack of action renders a Secured Note into an Unsecured Note. Ownership of Note, not joined with ownership of a Real Property Lien (the Deed of Trust) in accordance to law, negates the Tangible Obligation from reaching and enforcing the Power of Sale. The UCC and no state law provide statutory means to retroactively to re-establish an unsecured negotiable instrument back into a secured negotiable instrument. Secured status and Unsecured status is dependent upon ownership of a rights properly negotiated and possession of a Note properly secured by a Deed of Trust in compliance with local laws of jurisdiction.

Transfer of a Deed of Trust

11. A Note transferred in interstate commerce is a negotiable instrument and therefore falls under the governance of UCC Article 3 and states adopted equivalence. Any party who possesses a valid ownership in a Note can only transfer that interest by way of negotiation through indorsement. Whereas an intangible ownership interest in the payment stream being a transferable record can be bought and sold under governance of UCC Article 9 and a states adopted equivalence. However, because real estate ownership rights are concerned, perfection of transfer of the Deed of Trust, a contract involving real estate, securing the Note, falls within governance of Laws of Jurisdiction where the real property resides. Even, within its own language, the Deed of Trust contains notice that Federal Statutes and/or the Laws of Local Jurisdiction are governing law, therefore attempts to apply UCC Article 9 as governing the transfer of the Deed of Trust would be misplaced. Subsequently, any party who possesses a valid beneficial interest in a Deed of Trust can only transfer that interest by way of properly recorded assignment of that interest noting identity to be a secured party of record. Transfer of beneficial interest in a Mortgage, without properly recorded assignment, would place anyone doing so in jeopardy of violating Federal Statutes and/or Local Laws of the applicable Jurisdiction and potentially the common law Statutes of Fraud. Where a subsequent purchaser of a Note elects to

not file of record oneself as a secured creditor, such action must be seen as intentional and such party in failure must assume the responsibility for their own choice of action.

Separation of a Note and a Deed of Trust

12. A properly recorded assignment of the Deed of Trust memorializes the Note's negotiation, but does not cause the Note's transfer. For a Note to change ownership and remain secured through the Deed of Trust each and every transfer of the Note, by indorsement or negotiation, must be performed with a parallel assignment to remain as a secured party of record. If a Note is indorsed and negotiated to one party while the Deed of Trust is assigned to another party, a separation between the Ownership of the Note evidencing the Tangible Obligation and the Ownership of the Conditions which secure the Intangible Obligation to Real Property occurs and such is a legal impossibility. As such bifurcation is impossible, there is no lawful mechanism to allow for a security securing a Note to follow an Intangible Payment Stream to allow an Intangible owner to be a party perfected of record to the Note.

13. For a Party with ownership of a Note to be a Holder in Due Course with the rights and power of foreclosure, the "Power of Sale", the Note must remain secured to real property. When a separation of ownership of the Intangible Obligation and the rights to the Note which secure the Intangible Obligation occurs by failing to follow mandated law, the Intangible is no longer secured by a security secured by real property. When the Mortgage Loan is no longer secured by real property, there can be no Holder in Due Course of a Secured Note. Such Holder of the Note has lost the right to seek alternate payment through the use of a now invalid security instrument. Therefore, any Party seeking to bring a claim, against real estate title in a foreclosure, as Holder in Due Course of a Secured Mortgage Loan, must demonstrate an unbroken chain of properly recorded assignments of the Deed of Trust and a parallel unbroken chain of completed Note indorsements. Making a claim of beneficial interest in a Mortgage Loan without an unbroken chain of properly recorded assignments of the Deed of Trust and a parallel unbroken chain of completed Note indorsements would place anyone doing so in jeopardy of violating Federal Statutes and/or Local Laws of Jurisdiction. Where such alternate collection method has been dissolved by failure to follow law, the owner of the Note does (did)

have equitable remedy by seeking recovery of the debt by filing suit in a jurisdictional court of equity. The paradox, is, where such a holder has pledged a Mortgage Loan (Secured Package) as collateral, knowing that such was not a Secured Package, would present such a pledgor with unclean hands.

A Deed of Trust as a Contract

14. It is an ancient and long held concept within United States Law, that when the rights to the Note and the rights to the Deed of Trust are separated, the Deed of Trust, because it can have no separate existence, can not survive and becomes a nullity.

> In Carpenter v. Longan 16 Wall 271,83 U.S. 271, 274, 21 L.Ed. 313 (1872), *the U.S. Supreme Court stated "The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while assignment of the latter alone is a nullity.. . . . The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration . . . ."*

In other words, just because a separation of the rights to an Intangible Obligation from the rights to a Note and a separation of the rights to a Note from a Deed of Trust can occur, does not erase or avoid the consequences of those separations. The major and central consequence of the rights to an Intangible Obligation being stripped away from the beneficial interests of a Note is that the rights to a Note no longer includes the rights to the Intangible Obligation. Ownership of a Note without the rights to the Intangible Obligation leaves that Note without an obligation or debt to represent or evidence. A Deed of Trust can only enforce its conditions over the debt through the Note's representation or evidence of, specifically, the attached Intangible Obligation. When ownership or possession of a Note does not include the rights to the specific attached Intangible Obligation, a Deed of Trust can not survive a moment as an enforceable contract.

15. The Deed of Trust is a contract between the borrower (Payor) and the parties spelled out on the face of the document. A separation between the rights to the Note and the rights to the Deed of Trust would be a violation of the terms of that contract. Under long existing contract

law, if the terms of a contract are violated, affecting the conditions under which the Payor is obligated, without the properly evidenced consent of the Payor, that contract is void and cannot be returned to without the consent of the Payor. Without this legal concept a contract would be changeable at the will of the Payee, allowing an infinitely expandable obligation on the part of the Payor.

MBS Trusts are Governed by Trust Documents

16. Sometimes a Mortgage Loan is sold into Mortgage Backed Securities (MBS) Trust. A MBS Trust is governed by a Pooling and Servicing Agreement (PSA) filed with the United States Securities and Exchange Commission (SEC). When a Mortgage Loan is sold into MBS Trust all the well-established Real Estate and Contract Law explained above still applies. For a MBS Trust to be Holder in Due Course of a Secured Mortgage Loan, properly recorded assignments of the Deed of Trust, as well as completed parallel indorsements of the Note to match, are required not only by well-established Real Estate and Contract Law, but also by the PSA and or Real Estate Mortgage Instrument Conduit (REMIC) Master Trust Agreement which governs the MBS Trust in question.

An Examination of the Alvie and Julia Campbell Mortgage Loan

The Campbell Intangible Obligation was sold to the Government National Mortgage Association on Loan Date

17. On October 28, 2013 I researched Alvie and Julia Campbell whose property address is 250 PR 947, Taylor, TX 76574. Alvie and Julia Campbell had allegedly signed a Note in favor of American Mortgage Network, Inc. DBA Amnet Mortgage on October 9, 2004. This loan was identified in Government National Mortgage Association The loan is being serviced by Wells Fargo, N.A.

18. The rights to the Campbell Intangible Obligation has been conveyed as a Transferable Record to the Government National Mortgage Association. For rights to the Campbell Intangible Obligation not to have been stripped away from the rights to the Campbell Note by that conveyance, rights to the Campbell Note must have also been transferred to the Government National Mortgage Association.

19. Even though the Campbell Intangible Obligation is owned by the Government National Mortgage Association It can only be determined if the original Campbell Note had been physically delivered to the Government National Mortgage Association Trust by checking with the custodian of documents. Until then, there is no evidence the Government National Mortgage Association possessed in any manner the Campbell Note before rights to the Campbell Intangible Obligation was stripped away.

20. The rights to the Campbell Intangible Obligation has been conveyed as a Transferable Record to the Government National Mortgage Association. For the conditions of Campbell Deed of Trust over the Campbell Intangible Obligation not to have been stripped away by that conveyance, rights to the Campbell Deed of Trust must have also been acquired to the Government National Mortgage Association.

21. The beneficial interest (ownership) of the Campbell Deed of Trust has been recorded in the Official records of Williamson County Registry as being in the name of American Mortgage Network, Inc. DBA Amnet Mortgage of the loan on dated October 9, 2004. However, it is clear that American Mortgage Network, Inc. DBA Amnet Mortgage as recorded as the original lender on the Campbell Deed of Trust sold all ownership interest, in the Campbell Intangible Obligation to the Government National Mortgage Association shortly after signing. Interest in the Campbell Intangible Obligation is held in the Government National Mortgage Association and the payments under the Campbell Intangible Obligation are disbursed to the investors of the Government National Mortgage Association who hold certificates to the investment classes into which payments under the Campbell Intangible Obligation are scheduled to flow. Therefore the transfer of beneficial interest in the Campbell Deed of Trust by American Mortgage Network, Inc. DBA Amnet Mortgage might be accomplished, but that beneficial interest is no longer attached to rights to the Campbell Intangible Obligation.

As the Government National Mortgage Association have an Interest in the Campbell Intangible Obligation the Government National Mortgage Association Are Required to Have Interest in the Campbell Note and the Interest in the Campbell Deed of Trust

22. Ginnie Mae has purchased an interest in the Campbell Mortgage Loan and delivered that interest in the Campbell Mortgage Loan into Government National Mortgage Association and claims to have control of the Campbell Note and the Campbell Deed of Trust.

> *Government National Mortgage Association Document Custodian Manual Appendix V-1 Chapter 1 Page*
>
> *The document custodian is required to certify to Ginnie Mae that the loans constituting the pools of mortgages (as collateral for Ginnie Mae securities) are represented by the documents placed in the document custodian's control. The document custodian performs this function through a process of pool certifications and re certifications.*

23 By the Government National Mortgage Association purchasing the Campbell Intangible Obligation and doing with it whatever was done, the Government National Mortgage Association was exercising rights of ownership over the Campbell Mortgage Loan and the payment stream. By exercising rights of ownership over the Campbell Mortgage Loan multiple classes the of Government National Mortgage Association made a claim of rights to all three parts of the Campbell Mortgage Loan.

24. The Campbell Mortgage Loan only exists through the tangible instruments creating it, the Campbell Note and the Campbell Deed of Trust . The sale of the Campbell Intangible Obligation to the Government National Mortgage Association without stripping away the rights to the Campbell Intangible Obligation from the rights to the Campbell Note, could only be accomplished with the accompanying negotiation of the Campbell Note and the accompanying assignment of the Campbell Deed of Trust .

25. the Government National Mortgage Association own the Campbell Intangible Obligation, and exercises that claim. To exercise the claim of rights to the Campbell Intangible Obligation, an assignment of the Campbell Deed of Trust should have to have been accomplished. the Government National Mortgage Association are acting as if an assignment of the Campbell Deed of Trust has been accomplished.

26. The negotiation of the Campbell Note to Government National Mortgage Association is required both by Government National Mortgage Association 's own requirements Texas State Law. From Ginnie Mae own document:

Ginnie M

> *CHAPTER 3: SINGLE-FAMILY POOLS page 3-2 3-3*
>
> *(2) Document Custodian Procedures – Initial Certifications*
>
> *(c) Promissory Note (or other evidence of indebtedness)*
>
> *iii. Verify that a complete chain of endorsements exists from the loan originator to the pooling issuer. Ginnie Mae requires that the chain of endorsements from the loan originator to the pooling issuer be complete.*

The Government National Mortgage Association

Can Not Claim Interest in Either

the Campbell Note or the Campbell Deed of Trust

27. The Government National Mortgage Association own the Campbell Intangible Obligation. However the transfer of rights to either of the two tangible parts of the security instrument that evidence the Campbell Intangible Obligation from American Mortgage Network, Inc. DBA Amnet Mortgage to the Government National Mortgage Association is not memorialized in the Williamson County Record.

28. Under the Consumer Credit Protection Act Title 15 USC Chapter 41 § 1641(g) any transfers of the Campbell Mortgage Loan to the Government National Mortgage Association would be in violation of Federal Statute, if those transfers had not been recorded in the

Williamson County Record within 30 days along with notification of Alvie and Julia Campbell that the transfers had occurred. As there are no recorded assignments of the Campbell Deed of Trust to the Government National Mortgage Association within 30 days of October 9, 2004 , either there has been a violation of Federal Law or the Government National Mortgage Association , who are the owners of the Campbell Intangible Obligation, are not the owners of either the Campbell Note or the Campbell Deed of Trust .

Title 15 USC Chapter 41 § 1641(g)

> *(g)* ***Notice of new creditor***
> *(1)* ***In general***
> *In addition to other disclosures required by this subchapter, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including—*
> *(A) the identity, address, telephone number of the new creditor;*
> *(B) the date of transfer;*
> *(C) how to reach an agent or party having authority to act on behalf of the new creditor;*
> *(D) the location of the place where transfer of interest in the debt is recorded; and*
> *(E) any other relevant information regarding the new creditor.*

29. Government National Mortgage Association certifies that an assignment of the Campbell Deed of Trust has been accomplished by selling certificates of as shares of the Government National Mortgage Association , to investors based on the placement of the Campbell Mortgage Loan. There is no assignment of the Campbell Deed of Trust to Government National Mortgage Association in the Williamson County Record. Government National Mortgage Association appears to have violated Title 18 USC chapter 47 §1021.

> *Ginnie Mae Document Custodian Manual 5500.3 Rev 1*
>
> *Appendix V-1 Chapter 3: page 3*

> *If the issuer did not originate the loan, all recorded intervening assignment(s) in the loan file must document a complete chain of title from the originating mortgagee to the issuer.*
> *Intervening assignments must be recorded if jurisdictional law requires such recordation.*

30. Any electronic transfers of the Campbell Deed of Trust that may have been executed without recording within the Williamson County Record are void under Uniform Electronic Transactions Act (UETA) Title 15 USC Chapter 96 § 1-7003.

> *Title 15 USC Chapter 96 § 1-7003*
>
> *(a) Excepted requirements*
>
> *The provisions of section 7001 of this title shall not apply to a contract or other record to the extent it is governed by —*
>
> *(3) the Uniform Commercial Code, as in effect in any State, other than sections 1–107 and 1–206 and Articles 2 and 2A.*

31. The Government National Mortgage Association is the owner of the Campbell Intangible Obligation, however, according to Texas State Law, the Government National Mortgage Association can only be entitled to enforce the Campbell Deed of Trust if they took the Campbell Deed of Trust by way of assignments pursuant to TEX BC. Code ANN *§ 192.007*

> *§ 192.007. RECORDS OF RELEASES AND OTHER ACTIONS. (a) To release, transfer,*
>
> *assign, or take another action relating to an instrument that is filed, registered, or recorded in the office of the county clerk, a person must file, register, or record another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded.*
>
> *(b) An entry, including a marginal entry, may not be made on a previously made record or index to indicate the new action.*

> *TEX. PROP. CODE ANN. §13.001(a). The Recording Statute provides: (a) A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a [lien] creditor or to a subsequent purchaser for valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed of record as required by law.*

32. A duly recorded assignment of the Campbell Deed of Trust constitutes constructive notice while an unrecorded assignment of the Campbell Deed of Trust is notice only to immediate parties. With constructive notice, all persons attempting to acquire rights in the Campbell Property are deemed to have notice of the recorded instrument. In this way, the Recording Statute is intended to expose the chain of title of the Campbell Deed of Trust to inspection by examination of real property records, protecting innocent junior purchasers and lenders from secret titles and the subsequent fraud attendant to such titles.

33. As explained previously in ¶5 thru ¶12 assignments of the Campbell Deed of Trust must be accompanied by parallel endorsements of the Campbell Note for the Campbell Mortgage Loan to remain secured by the Campbell Property. No evidence is available to evidence negotiations of the Campbell Note to the Government National Mortgage Association This would have required indorsements and proper negotiations of the Campbell Note from American Mortgage Network, Inc. DBA Amnet Mortgage to the Government National Mortgage Association , including any intervening claims of ownership. Of course for the Campbell Mortgage Loan to remain a secured loan, there would have been assignments and transfers of the beneficial interest of the Campbell Deed of Trust , concurrent to negotiations of the Campbell Note and those transfers of the Campbell Deed of Trust would have to be entered into public record at the Williamson County Record.

34. Importantly, mere presentment of the Campbell Note (even if shown to be the original), is not in itself proof of an equitable transfer of the Campbell Loan along with its Security Instrument. This demonstration of possession may be sufficient to enforce the Campbell Note, but carries no indicia of ownership or intent to transfer the Campbell Mortgage Loan. The Uniform Commercial Code ("UCC") consecrates a preference in commercial transactions for simple possession of indorsed instruments over proof of actual ownership, an exception in the law that was intended to foster free trade of commercial paper.

35. The concept that a noteholder, even one who is not legitimate, may nevertheless bring an action on the Campbell Note, is entrenched in commercial law and commonly summarized by the axiom "even a thief may enforce a note." However, the taking of the Campbell Home by

foreclosure is an equitable remedy, and equity does not allow a "thief" to use a stolen Campbell Note to foreclose on the Campbell Mortgage lien.

36. The claim that "the mortgage follows the note" is incorrect as under Texas Law the Lien follows the Secured Party of record. That equitable right must be proven with evidence of a delivery. Intention does not override the requirements of law.

37. the Government National Mortgage Association , who own the Campbell Intangible Obligation, can not show that accompanied negotiations of the rights to the Campbell Note and accompanied transfers of the rights to the Campbell Deed of Trust has occurred. The rights to the Campbell Intangible Obligation has been stripped from the rights to the Campbell Note and the rights to the Campbell Deed of Trust .

The document purporting to be an "American Mortgage Network, Inc. DBA Amnet Mortgage " dated Assignment Date is Invalid as an American Mortgage Network, Inc. DBA Amnet Mortgage

> *Black's Law Dictionary defines the term valid as "having legal strength or force, executed with proper formalities, incapable of being rightfully overthrown or sent aside… Founded on trust of fact; capable of being justified; supported, or defended; not weak or defective… of binding force; legally sufficient or efficacious; authorized by law… as distinguished from that which exists or took place in fact or appearance, but has not the requisites to enable it to be recognized and enforced by law."(See Black's Law Dictionary, Sixth Edition, 1990, page 1550)*

38. There is a document purporting to be a "Assignment of Note and Deed of Trust " dated September 10, 2008 recorded September 30, 2008 in the Official Records of Williamson County, Texas as ins# 2008075222 signed by David Deybold, as Assistant Secretary and notarized September 10, 2008 by Suzanne Stanley, TX where Mortgage Electronic Registration

Systems, Inc., as Nominee grants, assigns, and transfers to Wells Fargo Bank, N.A. all beneficial interest under a Deed of Trust dated October 9, 2004

39. First and most importantly the original lender, American Mortgage Network, Inc. DBA Amnet Mortgage gave up all rights to the Campbell Intangible Obligation to the Government National Mortgage Association , shortly after signing . Once American Mortgage Network, Inc. DBA Amnet Mortgage had given up the rights t**o the** Campbell Intangible Obligation, the rights to the Campbell Intangible Obligation was stripped away from the rights to the Campbell Note and the rights to the Campbell Deed of Trust . American Mortgage Network, Inc. DBA Amnet Mortgage could transfer beneficial rights to the Campbell Note or Deed of Trust , however, that beneficial interest would not include rights to the Campbell Intangible Obligation.

40. The consequences of the rights to the Campbell Intangible Obligation being stripped away from the beneficial interests of the Campbell Note and Deed of Trust means the Campbell Note is without an Intangible Obligation to evidence and the Campbell Deed of Trust is without an Intangible Obligation to enforce conditions against.

41. American Mortgage Network, Inc. DBA Amnet Mortgage or their nominee MERS can assign beneficial interest in the Campbell Deed of Trust , albeit with no rights to the Campbell Intangible Obligation, to whomever they please. In order for this document purporting to be an "American Mortgage Network, Inc. DBA Amnet Mortgage " to be valid as an American Mortgage Network, Inc. DBA Amnet Mortgage however, it would have to determined if a transfer could be made to the assignee. I will explain how transfer to the assignee named could not have been accomplished by this document purporting to be an "American Mortgage Network, Inc. DBA Amnet Mortgage ".

42. Wells Fargo Bank, N.A. , the assignee, is the servicer of the Campbell Intangible Obligation for the Government National Mortgage Association . Under the Consumer Credit Protection Act Title 15 USC Chapter 41 § 1641(f) any treatment of the Servicer of the Campbell Intangible Obligation as an Owner of the Campbell Intangible Obligation would be in violation of Federal Statute. As this assignment to Wells Fargo Bank, N.A. would be in violation of Federal Statute, if Wells Fargo Bank, N.A. was not the Owner of the Campbell Intangible

Obligation Wells Fargo Bank, N.A. claim of rights to the Campbell Intangible Obligation is either a fraudulent claim or the Wells Fargo Bank, N.A. actions under the claim of ownership are in violation of Federal Law.

> 15 USC Chapter 41 § 1641(f) ***Treatment of servicer***
> *(1)* ***In general***
> *A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for purposes of this section unless the servicer is or was the owner of the obligation.*
> *(2)****Servicer not treated as owner***
> ***on basis of assignment for administrative convenience***
> *A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as the owner of the obligation for purposes of this section on the basis of an assignment of the obligation from the creditor or another assignee to the servicer solely for the administrative convenience of the servicer in servicing the obligation. Upon written request by the obligor, the servicer shall provide the obligor, to the best knowledge of the servicer, with the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation.*

43. In the document purporting to be an "American Mortgage Network, Inc. DBA Amnet Mortgage " dated Assignment Date MERS is the entity granting, assigning, and transferring all beneficial interest in the Campbell Deed of Trust to Wells Fargo, N.A.

44. As explained earlier the beneficial interest of American Mortgage Network, Inc. DBA Amnet Mortgage did not include rights to the Campbell Intangible Obligation shortly after Loan Date. Certainly MERS as nominee for American Mortgage Network, Inc. DBA Amnet Mortgage can only assign the beneficial interest of American Mortgage Network, Inc. DBA Amnet Mortgage and no more.

45. MERS can not act on its own behalf as party of rights to the Campbell Deed of Trust .

46. MERS is named completely contradictorily on the Campbell Deed of Trust as both solely nominee and as beneficiary on the face of the Campbell Deed of Trust .

47. MERS never had any interest at all in the Campbell Note evidencing the Campbell Intangible Obligation. MERS has no financial or other rights to whether or not the loan is repaid.

48. MERS is not the owner of the Campbell Note secured by the Campbell Deed of Trust and has no rights to the payments made by Alvie and Julia Campbell on the Campbell Note.... MERS is not the owner of the servicing rights relating to the Campbell Intangible Obligation and MERS does not service any loans, ever. The beneficial interest in the mortgage (or the person or entity whose interest is secured by the mortgage) runs to the owner and holder of the Campbell Note which must evidence the Campbell Intangible Obligation. In essence, MERS merely and only immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur.

49. As explained previously, any electronic transfers of the Campbell Deed of Trust that may have been executed without recording within the Official records of Williamson County Record are void under Uniform Electronic Transactions Act (UETA) USC § 15-96-1-7003.

> *USC § 15-96-1-7003*
>
> *(a) Excepted requirements*
>
> *The provisions of section 7001 of this title shall not apply to a contract or other record to the extent it is governed by—*
>
> > *(3) the Uniform Commercial Code, as in effect in any State, other than sections 1–107 and 1–206 and Articles 2 and 2A.*

Additionally, United States Code considers that anyone certifying that a real estate instrument has been assigned when in fact it has not, is guilty of a felonious criminal act.

> *Title 18 USC chapter 47 § 1021*
> *Whoever, being an officer or other person authorized by any law of the United States to record a conveyance of real property or any other instrument which by such law may be recorded, knowingly certifies falsely that such conveyance or instrument has or has not been recorded, shall be fined under this title or imprisoned not more than five years, or both.*

50. MERS has emphatically stated under its own agreement with its mortgage- lender members, that MERS "cannot exercise, and is contractually prohibited from exercising, any of the rights or interests in the mortgages or other security documents" and that MERS has "no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage

loans *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Bnkng and Fin.,* 704 N.W.2d 784 (Neb. 2005), Brief of Appellant at 11-12.

Interest in the Campbell Intangible Obligation Can Not be Rejoined to Interest in the Campbell Note or the Campbell Deed of Trust

51. Government National Mortgage Association have rights to the Campbell Intangible Obligation. the Government National Mortgage Association have yet to all and each be named as payee on the Campbell Note and do not now have rights to the Campbell Note. For the Government National Mortgage Association to gain rights to the Campbell Note, the Government National Mortgage Association would have to all and each be named payee.

52. There is no possible way for the Campbell Note to be transfered to all and each multiple class of the Government National Mortgage Association for the partial rights to the Campbell Intangible Obligation that each owns. Interest in the Campbell Intangible Obligation and rights to the Campbell Note will remain separate.

53. Because rights to the Campbell Deed of Trust was separated from rights to the Campbell Intangible Obligation, and will remain separate the Campbell Deed of Trust , is left with no way to enforce its conditions over the obligation which should be evidenced by the Campbell Note, making the Campbell Deed of Trust an unenforceable contract.

No One Can Claim the Right to Enforce the Campbell Note

54. The Campbell Note has been indorsed by Original Lender the original lender. The indorsement states "Pay to the Order of Wells Fargo Bank, N.A. without Recourse". This constitutes a negotiation under UCC concerning negotiable instruments. With the payee named, clearly Original Lender, has released all interest in the Campbell Note to Payee #1.

V.T.C.A., Bus. & C. § 7.501
§ 7.501. Form of Negotiation and Requirements of Due Negotiation
(a) The following rules apply to a negotiable tangible document of title:
(1) If the document's original terms run to the order of a named person, the document is negotiated by the named person's indorsement and delivery. After the named person's indorsement in blank or to bearer, any person may negotiate the document by delivery alone.

55. The Campbell Note has also been signed by Wells Fargo Bank, N.A. The instructions preceding the signature states "Pay to the Order of _____ without Recourse". With the instructions of the signer incomplete, this signature does not constitute a negotiation under UCC Article 3 and is not an indorsement in blank. With no payee is yet named, no transfer has occurred through which rights could be acquired.

56. Wells Fargo Bank, N.A. along with signing away all rights to the Campbell Note wrote instructions that made its intention of negotiation of the Campbell Note clear. The clear intention was the Wells Fargo Bank, N.A. negotiation of the Campbell Note will only be complete when the payee is named. The Campbell Note with an as of yet unnamed payee is not and can not be treated as, a "bearer" instrument as no person will acquire any right to the Campbell Note until a payee is named.

UCC article *§ 3-110. Identification of person to whom instrument is payable.*

(a) The person to whom an instrument is initially payable is determined by the intent of the person, whether or not authorized, signing as, or in the name or behalf of, the issuer of the instrument. The instrument is payable to the person intended by the signer even if that person is identified in the instrument by a name or other identification that is not that of the intended person.....

57. Under UCC article 3 § 203(a) a transfer of the Campbell Note through which rights can be acquired by a transferee is defined as a delivery from one person to another person.

UCC article 3 § 203(a) *Transfer of instrument; rights acquired by transfer.*

(a)An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

58. When Wells Fargo Bank, N.A. signed away all rights to the Campbell Note to an as of yet to be named payee, Wells Fargo Bank, N.A. did not deliver the Campbell Note to another person as required of a transfer through which rights can be acquired.

59. Ignoring that all rights were released upon signature, or that the signing away of all rights did not accomplish a negotiation of the Campbell Note, Wells Fargo Bank, N.A. no longer has the entire rights to the Campbell Note. Wells Fargo Bank, N.A. must have an entire interest in the Campbell Note for a negotiation to occur. The intangible interest in the Campbell Note has been transferred to multiple classes of the MBS Name Trust Agency Trust Name. Wells Fargo Bank, N.A. 3 can no longer claim the entire rights to the Campbell Note. Wells Fargo Bank, N.A. can not accomplish a negotiation of the Campbell Note.

60 Under V.T.C.A., Bus. & C. § 7.501 , Wells Fargo Bank, N.A. is now the only party that can accomplish a negotiation of the Campbell Note. Under V.T.C.A., Bus. & C. § 3.203 (d) a negotiation of the Campbell Note can not occur until Wells Fargo Bank, N.A. regains an entire interest in the Campbell Note. Wells Fargo Bank, N.A. can not accomplish a negotiation of the Campbell Note because Wells Fargo Bank, N.A. can no longer claim the entire rights to the Campbell Note . MBS Name Trust Agency Trust Name a negotiation of the Campbell Note can not occur until Wells Fargo Bank, N.A. regains the entire rights to the Campbell Note.

V.T.C.A., Bus. & C. § 3.203(d)
(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this article and has only the rights of a partial assignee.

61. Wells Fargo Bank, N.A. transferred the rights to the Campbell Intangible Obligation to multiple classes of the MBS Name Trust Agency Trust Name and released the rights to the Campbell Note without naming a transferee. The rights to the Campbell Obligation were transferred to Government National Mortgage Association so the Campbell Note will travel on

without the rights to the Campbell Obligation. Whoever becomes the transferee of the Campbell Note, through being named payee, will not acquire the right to enforce the Campbell Note .

The Terms of the Campbell Deed of Trust have been Violated and the Campbell Deed of Trust is Unenforceable

62. Wells Fargo Bank, N.A. has released all interest in the Campbell Note to an as of yet unnamed payee. The Campbell Deed of Trust as a contract can only enforce its contractual terms against the Campbell Intangible Obligation while the Campbell Intangible Obligation evidenced by the Campbell Note..

63. The Campbell Deed of Trust is governed by Texas State Law and Federal Law recognizes and requires properly recordation of assignment to transfer the rights to the Campbell Deed of Trust .

It has been explained earlier, how it is not possible for ownership of the Campbell Deed of Trust to have been assigned to Assignee.

64. There is an assignment of the Campbell Deed of Trust recorded in the Williamson County Record, with Original Lender releasing the rights to the Campbell Deed of Trust intending that transfer to be to Assignee. However, Wells Fargo Bank, N.A. released, through signature, the rights to the Campbell Note, evidencing the obligation, to however wishes to fill in the payee line. Assignee, may now attempt to claim rights to the Campbell Deed of Trust but those rights would have nothing to enforce the Campbell Deed of Trust contractual terms against. The Campbell Deed of Trust is an unenforceable contract.

65. The rights to the Campbell Deed of Trust are no longer with Original Lender, yet no one else has any authority to enforce its terms, while the Campbell Note is waiting for someone to acquire rights. The Campbell Deed of Trust is an unenforceable contract, no longer being tied to an obligation to enforce its contractual terms over.

66. Under long existing contract law, if the terms of a contract are violated, affecting the conditions under which the Payor is obligated, without the properly evidenced consent of the Payor, that contract is void and cannot be returned to without the consent of the Payor. Even if the rights to the Campbell Note and the Campbell Deed of Trust , could be rejoined, the Campbell Mortgage, as a now unenforceable contract, no longer being tied to an obligation to enforce its contractual terms over, can not be returned to being an enforceable contract without

With Interest in the Campbell Intangible Obligation
Stripped Away and No Way to Enforce the Conditions
Under the Campbell Deed of Trust
the Campbell Mortgage Contract is a Nullity

67.. The ownership Campbell Intangible Obligation was separated from the rights to the Campbell Note and the rights to the Campbell Deed of Trust , leaving the Campbell Note no Intangible Obligation to evidence and Campbell Deed of Trust no Intangible Obligation to enforce conditions over.

68. American Mortgage Network, Inc. DBA Amnet Mortgage retained no beneficial interest in the Campbell Intangible Obligation after selling the Campbell Intangible Obligation to the Government National Mortgage Association shortly after signing. No acceptable assignments of the Campbell Deed of Trust to all and each multiple class of the Government National Mortgage Association have been recorded into the Williamson County Recorder's Office. There is no evidence of negotiations of the Campbell Note to all and each multiple class of the Government National Mortgage Association . With no properly recorded owner of the Campbell Deed of Trust there is no one to enforce the conditions over the Campbell Intangible Obligation which is no longer evidenced by the Campbell Note. The Campbell Intangible Obligation is no longer secured by the Campbell Property.

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56. With no specific properly secured owner of the limited beneficial interest of the Campbell Note there is no way to enforce the stripped away Campbell Intangible Obligation through the Campbell Note.

I, Joseph R. Esquivel Jr., am not an Attorney and nothing within this Affidavit should be construed as Legal Opinion or Legal Advice as it is not.

I, Joseph R. Esquivel Jr., declare, verify and state under penalty of perjury that the foregoing is true and correct.

By _____ Executed on _____

Joseph R Esquivel, Jr.
Private Investigator License # A18306
Mortgage Compliance Investigators

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

Subscribed and sworn to (or affirmed) before me, _____,

Notary Public, on this _____ day of _____, 2013 by

_____, Proved to me on the basis of satisfactory evidence
To be the person(s) who appeared before me. WITNESS my hand and official seal.

_____
Notary Public

Exhibit 2

Chain of Negotiation of Plaintiffs alleged Note

From Discovery Request with references to filename.

Investor

05/29/09 10:31:40 KZV INVESTOR: GNMA II WELLS FARGO BANK
INVESTOR #: 550-854

Reference WF-000723

Note

2961237

Multistate

NOTE

FHA Case No.
495-7111138-703

MIN: 1001310-2040769205-0

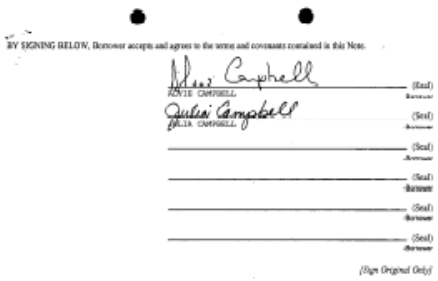
OCTOBER 29, 2004
[Date]

250 PR 947, TAYLOR, TX 76574
[Property Address]

1. PARTIES
"Borrower" means each person signing at the end of this Note, and the person's successors and assigns. "Lender" means AMERICAN MORTGAGE NETWORK, INC. DBA AMNET MORTGAGE

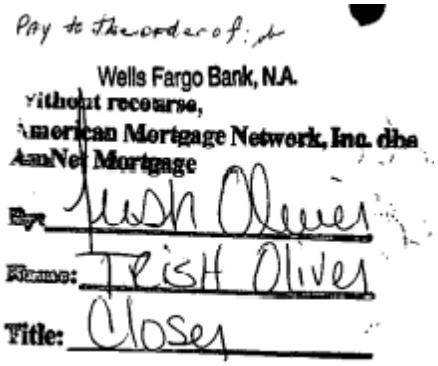
Reference WF-000171

Note – No Indorsements



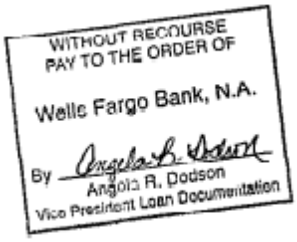
Reference WF-000173

Allonge - Indorsement 1



Reference WF-000826

Allonge - Indorsement 2 (In Blank)



Reference WF-000826

09
366114

DT 2004086763
9 PGS

After recording, please mail to:
AMERICAN MORTGAGE NETWORK, INC.

ATTN: POST CLOSING
P.O. BOX 85463
SAN DIEGO, CA 92186

Prepared by:
SHANKS, BUTLER & ASSOCIATES, P.C.
ATTORNEYS AT LAW
1455 WEST LOOP SOUTH, SUITE 200
HOUSTON, TX 77027

Parcel Identification Number: R-383383

25

After Recording Return To:
First American Title
3811 Bee Caves Road, Ste. 105
Austin, TX 78746

[Space Above This Line For Recording Data]

State of Texas

DEED OF TRUST

FHA Case Number
495-7111138-703

MIN: 1001310-2040769205-0

Notice of Confidentiality Rights: If you are a natural person, you may remove or strike any of the following information from this instrument before it is filed for record in the public records: Your social security number or your driver's license number.

THIS DEED OF TRUST ("Security Instrument") is made on OCTOBER 29, 2004 . The Grantor is ALVIE CAMPBELL, AND JULIA CAMPBELL, HUSBAND AND WIFE.

("Borrower"). The trustee is GEORGE M. SHANKS, JR.
1455 WEST LOOP SOUTH, SUITE 200, HOUSTON, TX 77027
("Trustee"). The beneficiary is Mortgage Electronic Registration Systems, Inc. ("MERS"), a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is organized and existing under the laws of Delaware and has an address and telephone number of P. O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS; and
AMERICAN MORTGAGE NETWORK, INC. DBA AMNET MORTGAGE

which is organized and existing under the laws of DELAWARE , and whose address is P.O. BOX 85463
SAN DIEGO, CA 92186
("Lender"). Borrower owes Lender the principal sum of
ONE HUNDRED THIRTY-SEVEN THOUSAND EIGHT HUNDRED THIRTY-SEVEN AND 00/100
Dollars (U.S. $ 137,837.00).
This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on NOVEMBER 01, 2024. This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower

irrevocably grants and conveys to the Trustee, in trust, with power of sale, the following described property located in WILLIAMSON County, Texas:

LOT 3, DOVE MEADOW NORTH, ACCORDING TO MAP OR PLAT THEREOF RECORDED IN CABINET X, SLIDE 293, OF THE PLAT RECORDS OF WILLIAMSON COUNTY, TEXAS.

which has the address of 250 PR 947
TAYLOR [Street, City],
Texas 76574 [Zip Code] ("Property Address");

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

Borrower and Lender covenant and agree as follows:

UNIFORM COVENANTS.

1. Payment of Principal, Interest and Late Charge. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and late charges due under the Note.

2. Monthly Payment of Taxes, Insurance and Other Charges. Borrower shall include in each monthly payment, together with the principal and interest as set forth in the Note and any late charges, a sum for (a) taxes and special assessments levied or to be levied against the Property, (b) leasehold payments or ground rents on the Property, and (c) premiums for insurance required under paragraph 4. In any year in which the Lender must pay a mortgage insurance premium to the Secretary of Housing and Urban Development ("Secretary"), or in any year in which such premium would have been required if Lender still held the Security Instrument, each monthly payment shall also include either: (i) a sum for the annual mortgage insurance premium to be paid by Lender to the Secretary, or (ii) a monthly charge instead of a mortgage insurance premium if this Security Instrument is held by the Secretary, in a reasonable amount to be determined by the Secretary. Except for the monthly charge by the Secretary, these items are called "Escrow Items" and the sums paid to Lender are called "Escrow Funds".

Lender may, at any time, collect and hold amounts for Escrow Items in an aggregate amount not to exceed the maximum amount that may be required for Borrower's escrow account under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. Section 2601 *et seq.* and implementing regulations, 24 CFR Part 3500, as they may be amended from time to time ("RESPA"), except that the cushion or reserve permitted by RESPA for unanticipated disbursements or disbursements before the Borrower's payments are available in the account may not be based on amounts due for the mortgage insurance premium.

If the amounts held by Lender for Escrow Items exceed the amounts permitted to be held by RESPA, Lender shall account to Borrower for the excess funds as required by RESPA. If the amounts of funds held by Lender at any time are not sufficient to pay the Escrow Items when due, Lender may notify the Borrower and require Borrower to make up the shortage as permitted by RESPA.

The Escrow Funds are pledged as additional security for all sums secured by this Security Instrument. If Borrower tenders to Lender the full payment of all such sums, Borrower's account shall be credited with the balance remaining for all installment items (a), (b), and (c) and any mortgage insurance premium installment that Lender has not become obligated to pay to the Secretary, and Lender shall promptly refund any excess funds to Borrower. Immediately prior to a foreclosure sale of the Property or its acquisition by Lender, Borrower's account shall be credited with any balance remaining for all installments for items (a), (b), and (c).

3. Application of Payments. All payments under paragraphs 1 and 2 shall be applied by Lender as follows:

First, to the mortgage insurance premium to be paid by Lender to the Secretary or to the monthly charge by the Secretary instead of the monthly mortgage insurance premium;

Second, to any taxes, special assessments, leasehold payments or ground rents, and fire, flood and other hazard insurance premiums, as required;

Third, to interest due under the Note;

Fourth, to amortization of the principal of the Note; and

Fifth, to late charges due under the Note.

4. Fire, Flood and Other Hazard Insurance. Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and contingencies, including fire, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. Borrower shall also insure all improvements on the Property, whether now in existence or subsequently erected, against loss by floods to the extent required by the Secretary. All insurance shall be carried with companies approved by Lender. The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to Lender.

In the event of loss, Borrower shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly. All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order in paragraph 3, and then to prepayment of principal, or (b) to the restoration or repair of the damaged Property. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments which are referred to in paragraph 2, or change the amount of such payments. Any excess insurance proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

In the event of foreclosure of this Security Instrument or other transfer of title to the Property that extinguishes the indebtedness, all right, title and interest of Borrower in and to insurance policies in force shall pass to the purchaser.

5. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument (or within sixty days of a later sale or transfer of the Property) and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender determines this requirement will cause undue hardship for Borrower, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall notify Lender of any extenuating circumstances. Borrower shall not commit waste or destroy, damage or substantially change the Property or allow the Property to deteriorate, reasonable wear and tear excepted. Lender may inspect the Property if the Property is vacant or abandoned or the loan is in default. Lender may take reasonable action to protect and preserve such vacant or abandoned Property. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to

provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and fee title shall not be merged unless Lender agrees to the merger in writing.

6. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in place of condemnation, are hereby assigned and shall be paid to Lender to the extent of the full amount of the indebtedness that remains unpaid under the Note and this Security Instrument. Lender shall apply such proceeds to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order provided in paragraph 3, and then to prepayment of principal. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments, which are referred to in paragraph 2, or change the amount of such payments. Any excess proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

7. Charges to Borrower and Protection of Lender's Rights in the Property. Borrower shall pay all governmental or municipal charges, fines and impositions that are not included in paragraph 2. Borrower shall pay these obligations on time directly to the entity which is owed the payment. If failure to pay would adversely affect Lender's interest in the Property, upon Lender's request Borrower shall promptly furnish to Lender receipts evidencing these payments.

If Borrower fails to make these payments or the payments required by paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in paragraph 2.

Any amounts disbursed by Lender under this paragraph shall become an additional debt of Borrower and be secured by this Security Instrument. These amounts shall bear interest from the date of disbursement, at the Note rate, and at the option of Lender shall be immediately due and payable.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to the Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

8. Fees. Lender may collect fees and charges authorized by the Secretary.

9. Grounds for Acceleration of Debt.

(a) Default. Lender may, except as limited by regulations issued by the Secretary, in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument if:

(i) Borrower defaults by failing to pay in full any monthly payment required by this Security Instrument prior to or on the due date of the next monthly payment, or

(ii) Borrower defaults by failing, for a period of thirty days, to perform any other obligations contained in this Security Instrument.

(b) Sale Without Credit Approval. Lender shall, if permitted by applicable law (including Section 341(d) of the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. 1701j-3(d)) and with the prior approval of the Secretary, require immediate payment in full of all sums secured by this Security Instrument if:

(i) All or part of the Property, or a beneficial interest in a trust owning all or part of the Property, is sold or otherwise transferred (other than by devise or descent), and

(ii) The Property is not occupied by the purchaser or grantee as his or her principal residence, or the purchaser or grantee does so occupy the Property but his or her credit has not been approved in accordance with the requirements of the Secretary.

(c) No Waiver. If circumstances occur that would permit Lender to require immediate payment in full, but Lender does not require such payments, Lender does not waive its rights with respect to subsequent events.

(d) Regulations of HUD Secretary. In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.

(e) Mortgage Not Insured. Borrower agrees that if this Security Instrument and the Note are not determined to be eligible for insurance under the National Housing Act within sixty days from the date hereof, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. A written statement of any authorized agent of the Secretary dated subsequent to sixty days from the date hereof, declining to insure this Security Instrument and the Note, shall be deemed conclusive proof of such ineligibility. Notwithstanding the foregoing, this option may not be exercised by Lender when the unavailability of insurance is solely due to Lender's failure to remit a mortgage insurance premium to the Secretary.

10. Reinstatement. Borrower has a right to be reinstated if Lender has required immediate payment in full because of Borrower's failure to pay an amount due under the Note or this Security Instrument. This right applies even after foreclosure proceedings are instituted. To reinstate the Security Instrument, Borrower shall tender in a lump sum all amounts required to bring Borrower's account current including, to the extent they are obligations of Borrower under this Security Instrument, foreclosure costs and reasonable and customary attorneys' fees and expenses properly associated with the foreclosure proceeding. Upon reinstatement by Borrower, this Security Instrument and the obligations that it secures shall remain in effect as if Lender had not required immediate payment in full. However, Lender is not required to permit reinstatement if: (i) Lender has accepted reinstatement after the commencement of foreclosure proceedings within two years immediately preceding the commencement of a current foreclosure proceeding, (ii) reinstatement will preclude foreclosure on different grounds in the future, or (iii) reinstatement will adversely affect the priority of the lien created by this Security Instrument.

11. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time of payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower or Borrower's successor in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. Successors and Assigns Bound; Joint and Several Liability; Co-Signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 9(b). Borrower's covenants and agreements shall be joint and several. Any

Borrower who co-signs this Security Instrument but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower may agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

13. Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

14. Governing Law; Severability. This Security Instrument shall be governed by Federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

15. Borrower's Copy. Borrower shall be given one conformed copy of the Note and of this Security Instrument.

16. Hazardous Substances. Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 16, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 16, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

17. Assignment of Rents. Borrower unconditionally assigns and transfers to Lender all the rents and revenues of the Property. Borrower authorizes Lender or Lender's agents to collect the rents and revenues and hereby directs each tenant of the Property to pay the rents to Lender or Lender's agents. However, prior to Lender's notice to Borrower of Borrower's breach of any covenant or agreement in the Security Instrument, Borrower shall collect and receive all rents and revenues of the Property as trustee for the benefit of Lender and Borrower. This assignment of rents constitutes an absolute assignment and not an assignment for additional security only.

If Lender gives notice of breach to Borrower: (a) all rents received by Borrower shall be held by Borrower as trustee for benefit of Lender only, to be applied to the sums secured by the Security Instrument; (b) Lender shall be entitled to collect and receive all of the rents of the Property; and (c) each tenant of the Property

shall pay all rents due and unpaid to Lender or Lender's agent on Lender's written demand to the tenant.

Borrower has not executed any prior assignment of the rents and has not and will not perform any act that would prevent Lender from exercising its rights under this paragraph 17.

Lender shall not be required to enter upon, take control of or maintain the Property before or after giving notice of breach to Borrower. However, Lender or a judicially appointed receiver may do so at any time there is a breach. Any application of rents shall not cure or waive any default or invalidate any other right or remedy of Lender. This assignment of rents of the Property shall terminate when the debt secured by the Security Instrument is paid in full.

18. Foreclosure Procedure. If Lender requires immediate payment in full under paragraph 9, Lender may invoke the power of sale and any other remedies permitted by applicable law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 18, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender or Trustee shall give notice of the time, place and terms of sale by posting and recording the notice at least 21 days prior to sale as provided by applicable law. Lender shall mail a copy of the notice of sale to Borrower in the manner prescribed by applicable law. Sale shall be made at public venue between the hours of 10 a.m. and 4 p.m. on the first Tuesday of the month. Borrower authorizes Trustee to sell the Property to the highest bidder for cash in one or more parcels and in any order Trustee determines. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying indefeasible title to the Property with covenants of general warranty. Borrower covenants and agrees to defend generally the purchaser's title to the Property against all claims and demands. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

If the Property is sold pursuant to this paragraph 18, Borrower or any person holding possession of the Property through Borrower shall immediately surrender possession of the Property to the purchaser at that sale. If possession is not surrendered, Borrower or such person shall be a tenant at sufferance and may be removed by writ of possession.

If the Lender's interest in this Security Instrument is held by the Secretary and the Secretary requires immediate payment in full under paragraph 9, the Secretary may invoke the nonjudicial power of sale provided in the Single Family Mortgage Foreclosure Act of 1994 ("Act") (12 U.S.C. 3751 *et seq.*) by requesting a foreclosure commissioner designated under the Act to commence foreclosure and to sell the Property as provided in the Act. Nothing in the preceding sentence shall deprive the Secretary of any rights otherwise available to a Lender under this paragraph 18 or applicable law.

19. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release this Security Instrument without charge to Borrower. Borrower shall pay any recordation costs.

20. Substitute Trustee. Lender, at its option and with or without cause, may from time to time remove Trustee and appoint, by power of attorney or otherwise, a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by applicable law.

21. Subrogation. Any of the proceeds of the Note used to take up outstanding liens against all or any part of the Property have been advanced by Lender at Borrower's request and upon Borrower's representation that such amounts are due and are secured by valid liens against the Property. Lender shall be subrogated to any and

all rights, superior titles, liens and equities owned or claimed by any owner or holder of any outstanding liens and debts, regardless of whether said liens or debts are acquired by Lender by assignment or are released by the holder thereof upon payment.

22. Partial Invalidity. In the event any portion of the sums intended to be secured by this Security Instrument cannot be lawfully secured hereby, payments in reduction of such sums shall be applied first to those portions not secured hereby.

23. Riders to this Security Instrument. If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument.

[Check applicable box(es)]

- ☐ Condominium Rider
- ☐ Graduated Payment Rider
- ☐ Other(s) [specify]
- ☐ Growing Equity Rider
- ☐ Planned Unit Development Rider

24. Purchase Money; Vendor's Lien; Renewal and Extension. [Complete as appropriate]

The funds advanced to Borrower under the Note were used to pay all or part of the purchase price of the Property. The Note also is primarily secured by the vendor's lien retained in the deed of even date with this Security Instrument conveying the Property to Borrower, which vendor's lien has been assigned to Lender, this Security Instrument being additional security for such vendor's lien.

BY SIGNING BELOW, Borrower accepts and agrees to the terms contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

Alvie Campbell (Seal)
ALVIE CAMPBELL -Borrower

Julia Campbell (Seal)
JULIA CAMPBELL -Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

INDIVIDUAL ACKNOWLEDGMENT

STATE OF TEXAS)
) SS
COUNTY OF TRAVIS)

This instrument was acknowledged before me on October 29, 2004, by ALVIE CAMPBELL, JULIA CAMPBELL

(name or names of person or persons acknowledging)

Signature of Officer

(Seal)

PHIL OTTERBINE
Notary Public, State of Texas
My Commission Expires
NOVEMBER 2, 2005

Phil Otterbine
Printed Name

Notary Public
Title of Officer

My Commission Expires:

Loan Number: 204-769205

FILED AND RECORDED
OFFICIAL PUBLIC RECORDS 2004086763
Nancy E. Rister
11/05/2004 01:07 PM
MILLER $30.00
NANCY E. RISTER, COUNTY CLERK
WILLIAMSON COUNTY, TEXAS

2961237

Multistate

NOTE

FHA Case No.
495-7111138-703

MIN: 1001310-2040769205-0

OCTOBER 29, 2004
[Date]

250 PR 947, TAYLOR, TX 76574
[Property Address]

1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns. "Lender" means AMERICAN MORTGAGE NETWORK, INC. DBA AMNET MORTGAGE

and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of ONE HUNDRED THIRTY-SEVEN THOUSAND EIGHT HUNDRED THIRTY-SEVEN AND 00/100 Dollars (U.S. $ 137,837.00), plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of Six and One-Quarter percent (6.250 %) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on DECEMBER , 2004 Any principal and interest remaining on the first day of NOVEMBER , 2024 , will be due on that date, which is called the "Maturity Date."

(B) Place

Payment shall be made at
PO BOX 85462, SAN DIEGO, CA 92186

or at such place as Lender may designate in writing by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. $ 1,007.49 . This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

(D) Allonge to this Note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. [Check applicable box]

☐ Graduated Payment Allonge ☐ Growing Equity Allonge ☐ Other [specify]

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that Borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payment unless Lender agrees in writing to those changes.

Initials:

6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of Four percent (4.000 %) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address.

Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

Initials: _____

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Note.

ALVIE CAMPBELL _____ (Seal)
-Borrower

JULIA CAMPBELL _____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

[Sign Original Only]

Pay to the order of:

Wells Fargo Bank, N.A.
Without recourse,
American Mortgage Network, Inc. dba
AmNet Mortgage

By: Trish Oliver

Name: TRISH OLIVER

Title: Closer

WITHOUT RECOURSE
PAY TO THE ORDER OF

Wells Fargo Bank, N.A.

By Angela R. Dodson
Angela R. Dodson
Vice President Loan Documentation

TEXAS MORTGAGEE POLICY OF TITLE INSURANCE

SCHEDULE A

Issued simultaneous with Policy No. R366114

Policy No. M366114

GF No. TX04-366114-AU95

Amount of Insurance $137,837.00
Premium $125.00

DATE OF POLICY 11/05/2004 at PM

1. Name of Insured:

   "MERS" (solely as nominee for Lender) the Lender being American Mortgage Network, Inc. dba Amnet Mortgage, and/or THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT, WASHINGTON, D.C., and each successor in ownership of the indebtedness secured by the insured mortgage, except a successor who is an obligor under the provisions of Section 12{c} of the Conditions and Stipulations.

2. The estate or interest in the land that is insured as encumbered by the insured mortgage is:

   Fee Simple

3. Title to the estate or interest in the land is insured as vested in:

   Alvie Campbell & Julia Campbell

4. The insured mortgage and assignments thereof, if any, are described as follows:

   Vendor's Lien retained in Deed:

Grantor:	967, Ltd., a Texas Limited Partnership
Grantee:	Alvie Campbell & Julia Campbell
Dated:	10/29/2004
Recorded:	11/05/2004, County Clerk's File Number 2004086762, of the Official records, of Williamson County, Texas.

   Additionally secured by Deed of Trust:

Grantor:	Alvie Campbell, and Julia Campbell, husband and wife
Trustee:	George M. Shanks, Jr.
Dated:	10/29/2004
Amount:	$137,837.00
Beneficiary:	"MERS" (solely as nominee for Lender) the Lender being American Mortgage Network, Inc. dba Amnet Mortgage
Recorded:	11/05/2004, County Clerk's File Number 2004086763, of the Official records, of Williamson County, Texas.

5. The land referred to in this policy is described as follows:

Lot 3, DOVE MEADOW NORTH, according to map or plat thereof recorded in Cabinet X, Slide 293, of the Plat Records of Williamson County, Texas.

First American Title Insurance Company

SCHEDULE B

GF No. TX04-366114-AU95 Policy No. M366114

This policy does not insure against loss or damage (and the Company will not pay costs, attorney's fees or expenses) that arise by reason of the terms and conditions of the leases or easements insured, if any, shown in Schedule A and the following matters:

1. The following restrictive covenants of record itemized below, but the Company insures that any such restrictive covenants have not been violated so as to affect, and that a future violation thereof will not affect, the validity or priority of the mortgage hereby insured (insert specific recording data or delete this exception):

   See Item 5 (a) below.

2. Item No. 2 of Schedule B hereof is amended to read as follows: "shortages in area."

3. Standby fees, taxes and assessments by taxing authority for the year 2005 and subsequent years; but not those taxes or assessments for prior years because of an exemption granted to a previous owner of the property under Section 11.13, *Texas Tax Code*, or because of improvements not assessed for a previous tax year. Company insures that standby fees, taxes and assessments by any taxing authority for the year 2005 are not yet due and payable.

4. Liens and leases that affect the title to the estate or interest, but that are subordinate to the lien of the insured mortgage.

5. Insert here all other specific exceptions as to superior liens, easements, outstanding mineral and royalty interests, etc.

   a. Any covenants, conditions or restrictions indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin are hereby deleted to the extent such covenants, conditions or restrictions violate 42 USC 3604 {c}. Document # 9809410 and Document # 9825304, Official Records, Cabinet X, Slide 293, Plat Records, Williamson County, Texas.

   b. Easement:

To:	public
Recorded:	in Document No. 9809410, of the Official Records records, of Williamson County, Texas.
Purpose:	drainage and/or utility lines
Location:	20 feet along the front and 15 feet along each side and rear lot line

   c. A 200 or 125 foot building setback line along the front property line as recorded in Document No. 9809410, Official Records, Williamson County, Texas..

   d. A 20 foot building setback line along the rear property line as recorded in Document No. 9809410, Official Records, Williamson County, Texas..

e. Terms, Conditions, and Stipulations in the Agreement by and between:
Parties: 967, Ltd.
Recorded: in Document No. 9833714 and Document No. 9833715, of the Official records, of Williamson County, Texas.
Type: joint access easement

f. Oil, Gas and Mineral Lease, and all terms, conditions and stipulations therein:
Recorded: in Volume 358, Page 573, of the Deed records, of Williamson County, Texas.
Lessor: Bessie E. Coupland, et al
Lessee: W.M. Jarrell
Title to said interest has not been investigated subsequent to the date of the aforesaid instrument.

g. Easement as shown on the recorded plat and dedication:
Purpose: public utility
Location: 30 feet along the north and west lot lines

h. Easement as shown on the recorded plat and dedication:
Purpose: access and public utility
Location: 30 feet traversing the entire easterly extension of lot

i. The liability insofar as coverage of the manufactured home is only effective as long as the manufactured home remains affixed to the realty described in Schedule A hereof.

j. Easement as shown on the recorded plat and dedication:
Purpose: common ingress/egress driveway
Location: 50 feet in width for Lots 1 through 5

k. Any and all easements, building lines, and conditions, covenants, and restrictions as set forth in plat recorded under Cabinet X, Slide 293 of the map records of Williamson County, Texas.

l. Terms, Conditions, provisions, easements, restrictions, reservations and other matters:
Document: Private Driveway Maintenance and Use Covenants
Recorded: in Document No. 2003123357, of the Official Public records, of Williamson County, Texas.

m. Maintenance Charge/Assessments as provided for in instrument(s) recorded in Document No. 2003123357, of the Official Public Records of Williamson County, Texas. Subordination to purchase money and/or improvement liens contained therein.

n. Notice Regarding: On Site Sewage Facility
Recorded in: Document No. 2004033754, Official Public Records, Williamson County, Texas

o. Section 13 of the Conditions and Stipulations of this policy is hereby deleted.

First American Title Insurance Company

By: 

Authorized Countersignature (/ad14)

ENDORSEMENT

Issued By
First American Title Insurance Company

Attached to Policy No. M366114

G.F. No. **TX04-366114-AU95**
Premium: **$25.00**

The insurance afforded by this endorsement is only effective if the land is used or is to be used primarily for residential purposes.

The Company insures the insured against loss or damage sustained by reason of lack of priority of the lien of the insured mortgage over:

(a) any environmental protection lien which, at the Date of Policy, is recorded in those records established under state statutes at the Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge, or filed in the records of the clerk of the United States district court for the district in which the land is located, except as set forth in Schedule B; or

(b) any environmental protection lien provided for by any state statute in effect at the Date of Policy, except environmental protection liens provided for by the following state statutes:

TEX. HEALTH & SAFETY CODE SEC. 361.194
TEX. HEALTH & SAFETY CODE SEC. 342.007
TEX. LOCAL GOV'T CODE SEC. 214.0015 (b), (d) and (e)
TEX. NAT. RES. SEC. 134.150, if applicable
TEX. LOCAL GOV'T CODE SEC. 214.001
TEX. HEALTH & SAFETY CODE SEC. 342.008

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

First American Title Insurance Company

BY Gary L Kerwood PRESIDENT

ATTEST Mark R Arnsen SECRETARY

FIRST AMERICAN TITLE INSURANCE COMPANY INCORPORATED SEPTEMBER 24, 1968 CALIFORNIA

COUNTERSIGNED:

Authorized Signature

MANUFACTURED HOUSING ENDORSEMENT

Issued By

First American Title Insurance Company

G.F. No. TX04-366114-AU95
Premium $20.00

Attached to and made a part of First American Title Insurance Company Mortgagee Policy No. M366114, dated the 5th day of November, 2004 .

The first sentence of Section 1 (d) of the Conditions and Stipulations of said policy is hereby amended to read as follows:
(d) "Land": The land described specifically, or by reference, in Schedule A and improvements affixed thereto which by law constitute real property, including specifically a manufactured housing unit, bearing serial number CAVTXS20002030 A & B .

This Endorsement, when countersigned below by an Authorized Countersignature is made a part of said policy and is subject to the Schedules, Conditions and Stipulations and Exclusions from Coverage therein, except as modified by the provisions hereof. This Endorsement neither modifies any other terms of the policy and any prior endorsement, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

First American Title Insurance Company

BY Gary L. Kerwood PRESIDENT

ATTEST Mark L. Arnsen SECRETARY

FIRST AMERICAN TITLE INSURANCE COMPANY INCORPORATED SEPTEMBER 24, 1918 CALIFORNIA

COUNTERSIGNED:

Authorized Signature

SUPPLEMENTAL COVERAGE MANUFACTURED HOUSING UNIT ENDORSEMENT (T-31.1)
ATTACHED TO AND MADE A PART OF POLICY OF TITLE INSURANCE
SERIAL NUMBER M366114

G.F. No. TX04-366114-AU95
PREMIUM $50.00

Issued By

First American Title Insurance Company
HEREIN CALLED THE COMPANY

The Company insures the insured against loss, if any, sustained by the insured under the terms of the policy if, AT DATE OF POLICY:

1. A manufactured housing unit is not located on the land.
2. The manufactured housing unit located on the land is not real property.
3. The owner of the land as insured in the policy is not the owner of the manufactured housing unit.
4. Any lien for personal property taxes has attached to the manufactured housing unit.
5. Any federal tax lien, financing statement or other personal property lien has attached to the manufactured housing unit.
6. Any mortgage insured in Schedule A is not a valid lien against the manufactured housing unit (mortgagee title policy only).

The term "land" as defined in this policy includes the manufactured housing unit located on the land at Date of Policy.

This endorsement when countersigned below by an Authorized Countersignature, is made a part of said policy. Except as expressly modified by the provisions hereof, this endorsement is subject to the following policy matters: (i) Insuring Provisions; (ii) Exclusions from Coverage; (iii) Schedule "B" Exceptions; (iv) the Conditions and Stipulations; and, (v) any prior endorsements. Except as stated herein, this endorsement does not: (i) extend the effective date of the policy and/or any prior endorsements; or (ii) increase the face amount of the policy.

First American Title Insurance Company

BY _____ PRESIDENT

ATTEST _____ SECRETARY

FIRST AMERICAN TITLE INSURANCE COMPANY INCORPORATED SEPTEMBER 24, 1968 CALIFORNIA

COUNTERSIGNED:

Authorized Signature

ENDORSEMENT
Attached to No. M366114

G.F. No. TX04-366114-AU95
PREMIUM $54.00

ISSUED BY

First American Title Insurance Company

The Company insures the owner of the indebtedness secured by the insured mortgage against loss or damage sustained by reason of:

1. The existence at Date of Policy of any of the following:
   (a) Covenants, conditions or restrictions under which the lien of the mortgage referred to in Schedule A can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.
   (b) Unless expressly excepted in Schedule B:
      (1) Present violations on the land of any enforceable covenants, conditions or restrictions, and any existing improvements on the land which violate any building setback lines shown on a plat of subdivision recorded or filed in the public records.
      (2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land which, in addition, (i) establishes an easement on the land; (ii) provides a lien for liquidated damages; (iii) provides for a private charge or assessment; (iv) provides for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.
      (3) Any encroachment of existing improvements located on the land onto adjoining land, or any encroachment onto the land of existing improvements located on adjoining land.
      (4) Any encroachment of existing improvements located on the land onto that portion of the land subject to any easement excepted in Schedule B.
      (5) Any notices of violation of covenants, conditions and restrictions relating to environmental protection recorded or filed in the public records.

2. Any future violation on the land of any existing covenants, conditions or restrictions occurring prior to the acquisition of title to the estate or interest in the land by the Insured, provided the violation results in:
   (a) Invalidity, loss of priority, or unenforceability of the lien of the insured mortgage; or
   (b) loss of title to the estate or interest in the land if the Insured shall acquire title in satisfaction of the indebtedness secured by the insured mortgage.

3. Damage to existing improvements, including lawns, shrubbery or trees:
   (a) which are located on or encroach upon that portion of the land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved;
   (b) resulting from the future exercise of any right to use the surface of the land for the extraction or development of minerals excepted from the description of the land or excepted in Schedule B.

4. Any final court order or judgment requiring the removal from any land adjoining the land of any encroachment excepted in Schedule B.

5. Any final court order or judgment denying the right to maintain any existing improvements on the land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the public records.

Wherever in this endorsement the words "covenants, conditions, or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or limitations contained in an instrument creating a lease.

As used in paragraphs 1(b)(1) and 5, the words "covenants, conditions or restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

Signed under seal for the Company, but this endorsement is to be valid only when it bears an authorized countersignature.

First American Title Insurance Company

BY Gary L. Kerwood PRESIDENT

ATTEST Mark A. Arnson SECRETARY

FIRST AMERICAN TITLE INSURANCE COMPANY INCORPORATED SEPTEMBER 24, 1980 CALIFORNIA

COUNTERSIGNED:

Authorized Signature

First American Title Insurance Company

M366114

MORTGAGEE POLICY OF TITLE INSURANCE

Issued by

FIRST AMERICAN TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Lack of a right of access to and from the land;
4. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
5. The priority of any lien or encumbrance over the lien of the insured mortgage;
6. Lack of priority of the lien of the insured mortgage over any statutory or constitutional mechanic's, contractor's, or materialman's lien for labor or material having its inception on or before Date of Policy;
7. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens;
8. Lack of good and indefeasible title.

The Company also will pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

IN WITNESS HEREOF, the FIRST AMERICAN TITLE INSURANCE COMPANY has caused this policy to be executed by its President under the seal of the Company, but this policy is to be valid only when it bears an authorized countersignature, as of the date set forth in Schedule A.

First American Title Insurance Company

BY _____ PRESIDENT

ATTEST _____ SECRETARY

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses that arise by reason of:

1. (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy

   (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking that has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge
3. Defects, liens, encumbrances, adverse claims or other matters:
   (a) created, suffered, assumed or agreed to by the insured claimant;
   (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;
   (c) resulting in no loss or damage to the insured claimant;
   (d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material); or
   (e) resulting in loss or damage that would not have been sustained if the insured claimant had paid value for the insured mortgage.
4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated.
5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.
6. Any statutory or constitutional mechanic's, contractor's, or materialman's lien for labor or material having its inception subsequent to Date of Policy
7. The refusal of any person to purchase, lease or lend money on the estate or interest covered hereby in the land described in Schedule A because of unmarketability of the title.
8. Any claim which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or other state or federal creditors' rights laws that is based on either (i) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer or a voidable distribution or voidable dividend, (ii) the subordination or recharacterization of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination or (iii) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure of the Company or its issuing agent to timely file for record the instrument of transfer to the insured after delivery or the failure of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

1. DEFINITION OF TERMS.

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A. The term "insured" also includes:

(i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land);

(ii) any governmental agency or governmental instrumentality that is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage, or any part thereof, whether named as an insured herein or not;

(iii) the parties designated in Section 2(a) of these Conditions and Stipulations.

(b) "insured claimant": an insured claiming loss or damage.

(c) "knowledge" or "known": actual knowledge, not constructive knowledge or notice that may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

(d) "land": the land described or referred to in Schedule A, and improvements affixed thereto that by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

(g) "access": legal right of access to the land and not the physical condition of access. The coverage provided as to access does not assure the adequacy of access for the use intended.

2. CONTINUATION OF INSURANCE.

(a) After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality that acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

(b) After Conveyance of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

(c) Amount of Insurance. The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of:

(i) the Amount of Insurance stated in Schedule A;

(ii) the amount of the principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made; or

(iii) the amount paid by any governmental agency or governmental instrumentality, if the agency or instrumentality is the insured claimant, in the acquisition of the estate or interest in satisfaction of its insurance contract or guaranty.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, or (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest that is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

Subject to the provisions of the policy, upon acquisition of all or any part of the estate or interest in the land pursuant to the provisions of Section 2 of these Conditions and Stipulations, when, after the date of the policy, the insured notifies the Company as required herein of a lien, encumbrance, adverse claim or other defect in title to the estate or interest in the land insured by this policy that is not excluded or excepted from the coverage of this policy, the Company shall promptly investigate the charge to determine whether the lien, encumbrance, adverse claim or defect is valid and not barred by law or statute. The Company shall notify the insured in writing, within a reasonable time, of its determination as to the validity or invalidity of the insured's claim or charge under the policy. If the Company concludes that the lien, encumbrance, adverse claim or defect is not covered by this policy, or was otherwise addressed in the closing of the transaction in connection with which this policy was issued, the Company shall specifically advise the insured of the reasons for its determination. If the Company concludes that the lien, encumbrance, adverse claim or defect is valid, the Company shall take one of the following actions: (i) institute the necessary proceedings to clear the lien, encumbrance, adverse claim or defect from the title to the estate as insured; (ii) indemnify the insured as provided in this policy; (iii) upon payment of appropriate premium and charges therefore, issue to the insured claimant or to a subsequent owner, mortgagee or holder of the estate or interest in the land insured by this policy, a policy of title insurance without exception for the lien, encumbrance, adverse claim or defect, said policy to be in an amount equal to the current value of the property or, if a mortgagee policy, the amount of the loan; (iv) indemnify another title insurance company in connection with its issuance of a policy(ies) of title insurance without exception for the lien, encumbrance, adverse claim or defect; (v) secure a release or other document discharging the lien, encumbrance, adverse claim or defect; or (vi) undertake a combination of (i) through (v) herein.

4. DEFENSE AND PROSECUTION OF ACTIONS: DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof

of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 91 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

(i) to pay or tender payment of the amount of insurance under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay; or

(ii) to purchase the indebtedness secured by the insured mortgage for the amount owing thereon together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company up to the time of purchase and which the Company is obligated to pay.

If the Company offers to purchase the indebtedness as herein provided, the owner of the indebtedness shall transfer, assign, and convey the indebtedness and the insured mortgage together with any collateral security, to the Company upon payment therefore.

Upon the exercise by the Company of either of the options provided for in paragraphs a(i) or (ii), all liability and obligations to the insured under this policy, other than to make the payment required in those paragraphs, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs b(i) or (ii) the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. *DETERMINATION AND EXTENT OF LIABILITY.*

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A, or, if applicable the amount of insurance as defined in Section 2 (c) of these Conditions and Stipulations;

(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy at the date the insured Claimant is required to furnish to Company a proof of loss or damage in accordance with Section 5 of these Conditions and Stipulations.

(b) In the event the insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has conveyed the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.

(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. LIMITATION OF LIABILITY.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or otherwise establishes the lien of the insured mortgage, all as insured, or takes action in accordance with Section 3 or Section 6, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title or to the lien of the insured mortgage, as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

(d) The Company shall not be liable for: (i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or (ii) construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land, which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy.

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

(a) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. However, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of the insurance afforded under this policy except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon, provided in no event shall the amount of insurance be greater than the Amount of Insurance stated in Schedule A.

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

10. LIABILITY NONCUMULATIVE.

If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

11. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

12. SUBROGATION UPON PAYMENT OR SETTLEMENT.

(a) The Company's Right of Subrogation.

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies that the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal, interest, and costs of collection.

(b) The Insured's Rights and Limitations.

Notwithstanding the foregoing, the owner of the indebtedness secured by the insured mortgage, provided the priority of the lien of the insured mortgage or its enforceability is not affected, may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

When the permitted acts of the insured claimant occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of the insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy that shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(c) The Company's Rights Against Non-insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments that provide for subrogation rights by reason of this policy.

The Company's right of subrogation shall not be avoided by acquisition of the insured mortgage by an obligor (except an obligor described in Section 1(a)(u) of these Conditions and Stipulations) who acquires the insured mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond and the obligor will not be an insured under this policy, notwithstanding Section 1(a)(i) of these Conditions and Stipulations.

13. ARBITRATION.

Unless prohibited by applicable law or unless this arbitration section is deleted by specific provision in Schedule B of this policy, either the Company or the Insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this Policy, and service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less SHALL BE arbitrated at the request of either the Company or the Insured, unless the insured is an individual person (as distinguished from a corporation, trust, partnership, association or other legal entity). All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this Policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at the Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The Law of the situs of the land shall apply to any arbitration under the Title Insurance Arbitration Rules.

A Copy of the Rules may be obtained from the Company upon request.

14. LIABILITY LIMITED TO THIS POLICY: POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

15. SEVERABILITY.

In the event any provision of this policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

16. NOTICES, WHERE SENT.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at: First American Title Insurance Company, 1500 S. Dairy Ashford, Suite 300, Houston, TX 77077.

If a dispute arise about your premium or about a claim that you have filed, contact the agent or write to the Company that issued the policy. If the problem is not resolved, you also may write the Texas Department of Insurance, P. O. Box 149091, Austin, TX 78714-9091, Fax No. (512) 475-1771. This notice of complaint procedure is for information only and does not become a part or condition of this policy.

Mortgagee Policy

ISSUED BY:

First American Title Insurance Company
1500 South Dairy Ashford, Suite 300
Houston, Texas (77077)
(281) 588-2200
Texas State Wats Line:
1-800-347-7826

FOR INFORMATION, OR TO MAKE A COMPLAINT, CALL:
1-800-347-7826

The following pages were provided to me, Alvie Campbell from Wells Fargo Bank, N.A. through a Request for Production in 2012. Wells Fargo Bank N.A. provided six (6) file images on CD to Alvie Campbell. Each electronic record received from WF were categorized as WF, consisting of WF 000001-000291, WF 000290-000409, WF 000410-000813, WF 000814-000841, WF 000842-000843, WF 000843-000930.

The following files are partial information from submitted files by Wells Fargo Bank, N.A.

1. WF 000042-000043 – Wiring Instructions
    a. This is from source: WF 000001-000290
2. WF 000408 - 000409.pdf – Purported loan modification
    a. This is from source: WF 000291-000410
3. WF 000721_WF 000723.pdf – Purported Ginnie Mae as investor.
    a. This is from source: WF 000410-000813
4. Exhibit 1 – document submitted to trial court reflecting certain images reflected from Wells Fargo discovery by request for production.

Note that these filed were submitted by Brown & McCarroll, Austin Texas.

WIRE TRANSFER REQUEST

WIRE DATE 11/01/04

LOAN NO 204-769205

AUTHORIZED SIGNATURE _____

BRANCH # 750 PHONE (713) 972-0200

BRANCH NAME HOUSTON, TX

MORTGAGOR'S NAME CAMPBELL, ALVIE

NET WIRE REQUESTED 139,392.48

PROCEEDS PAYEE INFORMATION

NAME	FIRST AMERICAN TITLE		
CONTACT NAME	PHIL	PHONE	(512) 328-9655
ADDRESS	3811 BEE CAVE RD., #105		
CITY, STATE	AUSTIN, TEXAS	ZIP	78746
REFERENCE #	RE ORDER # TX04-366114AU95 NET PROCEEDS		

WIRE TRANSFER BANK INFORMATION

BANK ABA/ID #	113000609		
BANK ACCOUNT #	08806367544		
BANK NAME	JPMORGAN CHASE BANK		
BANK ADDRESS	712 MAIN STREET		
BANK CITY, STATE	HOUSTON, TEXAS	ZIP	77002

FIRST AMERICAN TITLE INSURANCE COMPANY
3811 Bee Cave Road, Suite 105, Austin, TX 78746
Phone (512) 328-9655 - Fax (512) 328-9511

WIRING INSTRUCTIONS

TO	JPMORGAN CHASE BANK 712 MAIN STREET HOUSTON, TEXAS 77002
	ABA NO.: 113000609
CREDIT TO:	First American Title Insurance Company
	ESCROW ACCOUNT NO.: 08806367544
REFERENCE:	GF NUMBER: TX04-366114-AU95
	NAME: Alvie Campbell and Julie Campbell

****NOTE: IF YOU ARE A MORTGAGE BROKER OR LOAN PROCESSOR/OFFICER, PLEASE FORWARD THESE INSTRUCTIONS TO YOUR CLOSING/FUNDING DEPARTMENT.

NEGOTIATOR CHECKLIST

CLIENT 708 **LOAN NUMBER** 0195808399

- Financial Worksheet ☐
- Non-Wells Fargo F/W ☐
- Mortgagor Income ☐
- Co-Mortgagor Income ☐
- Paycheck Calculator ☐
- Additional Income ☐
- Profit and Loss ☐
- Tax Returns ☐
- W2 and 1099 Form ☐
- Credit Report ☐
- Bank Statements ☐
- Listing Agreement ☐
- Listing Addendum ☐
- Net Sheet ☐
- Purchase Contract ☐
- Sale Contract Addendum ☐
- Copy of Proceeds Check ☐
- DLQ3 Screen Print ☐
- BPO/ Appraisal ☐
- Title ☐
- Truth in Lending ☐
- Approval Letter ☐
- Letter from Insurer/Investor ☐
- Corresp. From Borrower ☐
- Hardship Letter ☐
- Divorce Decree ☐
- Death Certificate ☐
- Marriage Certificate ☐
- Power of Attorney ☐
- Auth. To Speak to 3rd Pty ☐
- Corresp. From Attorney ☐
- Liquidation Review ☐
- Executed RPP ☐
- Loan Mod Transmittal ☐
- Executed Mod Agreement ☐
- Modification Agreement ☐
- HUD1 Settlement ☐
- Written LMP03 ☐
- RPP/Mod Worksheet ☐
- Workout Presentation ☐
- FHLMC Business Plan ☐
- Quit Claim Deed ☐
- Check Processing Sheet ☐
- Exception Form ☐
- Correction/Compliance Agreement ☐

Workout Attachments
A☐ B☐ C☐ D☐ E☐ F☐ G☐

VA Documents
- Cost Analysis ☐
- Refund Accept. Ltr ☐
- 567 Form ☐
- VA Corresp. ☐
- NOE ☐ NOI ☐
- DOI ☐ BID ☐

- Recorded DIL ☐
- DIL Questionnaire ☐
- DIL Document ☐
- Partial Claim Note ☐
- LMT3 Sheet ☐
- Warranty Deed ☐
- F/C Payoff Quote ☐
- Bankruptcy Docs ☐
- Check Processing Sheet ☐
- Executed Partial Claim ☐
- MISC ☑ prep sheet

02-07-06 P04:47 OUT

Negotiator: Shanna Sanders

Date: 02-03-08

Settlement: _____

Date: _____

LOAN MODIFICATION/PARTIAL CLAIM
Preparation Sheet
FHA Loss Mitigation Unit

Negotiator Name: **SHANNA SANDERS** Date Prepped: 02-05-08

MODIFICATION DATA: ☐ MANUAL MOD ☐ PC ☑ MOD

Mortgager Name: Campbell Loan Number: 0195808399

Client#: 708 Property Report:

Investor: GNMA Investor Code: 550-834

New Interest Rate: 3.6667% ☑ Adjustable Rate Mortgage (ARM)

New Term: 360 Check work Rules? ☑ YES ☐ NO

Loan Age: 3y 4m

Maturity Date:

BANKRUPTCY INFORMATION: ☐ YES ☑ NO

Chapter:

Date Filed:

Date Discharged:

Contribution Data	Amount
Late Charged:	207.02
Bad Check Fees:	
RECO:	
Attorney Fees:	
Property Report Fees	
Foreclosure Costs:	
Other Fees:	120.00
TOTAL FEES	$327.02
Suspense Account:	$190.98

☐ Do not cap escrow amount.

Escrow Amount $

Plus Total Fees: $

Less Suspense $

Contribution $136.04

Previous Partial Claim? ☐ YES ☑ NO

EXCEPTION LETTER REQUIRED: ☐ YES ☑ NO

Date/RFD Code:

Previous Modification? ☐ YES ☑ NO

Date/RFD Code:

Current RFD Code: 0116

Long Notes: unemployment

CAIVRS:

Date Obtained: 02-05-08

Borrower 1: D0364304466

Borrower 2: A0365308851

PROPERTY INFORMATION:

Condition: Good / Fair / Unknown

Owner Occupied: ☑ YES ☐ NO

CREDIT BUREAU:

Has there been a request with reference number for credit bureau? ☐ YES ☐ NO

Date 9-17-07 ☑ CBR Failed

MTGR FINANCIAL INFORMATION:

Income: $2,600.00

Expenses: $2,134.86

Surplus: $465.14

Old Payment: $1,353.86

Est. New Payment: $1071.06

WELLS FARGO HOME MORTGAGE

Wells Fargo Home Mortgage
MAC X2302-02J
1 Home Campus
Des Moines, IA 50328-0001

Alvie Campbell
Julia Campbell
FHA Number: 495-7111138
Loan Number 708-0195808399

LOSS MITIGATION LOAN NOTES

Wells Fargo Home Mortgage
is a division of Wells Fargo Bank, N.A.

021609 112408 082608 102507
05/29/09 10:31:40 KZV INVESTOR: GNMA II WELLS FARGO BANK
INVESTOR #: 550-854
05/29/09 10:31:39 KZV EXPENSES ON DLQ3 INCLUDE EXPENSES FROM ANY
NON-OBLIGATORS LIVING IN THE PROPERTY.
05/29/09 10:31:38 KZV # OF PEOPLE IN PROP: 2
FOOD NAT'L AVG:$ 340
UTIL NAT'L AVG:$ 275
TRANS NAT'L AVG:$ 275
05/29/09 10:31:33 KZV B1 MONTHLY NET INCOME:$ 2,400.00 (MONTHLY)
B2 MONTHLY NET INCOME:$ 1,600.00 (MONTHLY)
ALL REGULAR/OVERTIME PAY CONSISTANT ALL DEDUCTIONS
ARE STANDARD. NONE ARE INCOME BWR GETS BACK.
RFD: TEMP LOSS OF INCOME
05/29/09 10:31:22 KZV 1ST/2ND MORTGAGE 1,353.86
PYMTS:INSTALL/CARS 409.00
05/29/09 10:31:21 KZV FOOD 400.00
UTILITIES 375.00
TRANSPORTATION 410.00
PERSONAL LNS/TUITION 105.00
MEDICAL/INS EXP 140.00
CABLE,INTERNET,ENT 300.00
ASSOC FEES OR DUES 3.33
CLOTHING/OTHER MISC 160.00
05/29/09 10:31:19 KZV INCOME: $ 4,000.00
EXPENSES: $ 3,656.19
SURPLUS/DEFICIT(-): $ 343.81
05/29/09 10:31:18 KZV REV'D CBR / AND EXPENSES. DLQ3 UPDATED WITH
VERBAL, & CBR INFO. ALL DEBTS/EXPENSES
THAT BWR PAYS ARE LISTED ON DLQ3. THERE ARE NO
OTHER DEBTS/EXPENSES OTHER THAN WHAT IS
STATED ON DLQ3. BWR NOT PAYING ON CHARGE
OFFS/COLLECTIONS. RESIDENTIAL PROPERTY, OWNER
OCCUPIED BY BWR, REV'D CBR ALERT MESSAGES,
FRAUD ALERT ON CBR, NO BANKRUPTCY'S,
NO BUSINESSES ON CBR
05/29/09 10:28:13 KZV PER NOTS ON LMTN ON 5/28/09 BY REP (OSM)STTS .....
****
3RD PRTY STATES BRW LIVIONG IN PROP W/ INTENT TO K
EEEP. DLQ3 IS CORRECT
05/29/09 10:23:53 KZV AT THIS TIME MORT NEED TO MAKE 3PYMTS. 3REG PYMT
OF$1353.86 AND HAVE A BALLOON PYMT OF $30,02455
TO BE REVWED FOR A LOAN MOD.....
05/29/09 10:23:53 KZV AT THIS TIME MORT NEED TO MAKE 3PYMTS. 3REG PYMT
OF$1353.86 AND HAVE A BALLOON PYMT OF $30,02455
TO BE REVWED FOR A LOAN MOD.....
05/29/09 10:21:47 KZV EMAIL ATTNY TO PLACE A HOLD ON FORECLOSURE SALE
CONTACT ATTNY FOR OUTSTANDING FEES AND COST GOOD
THRU 6/27/09 $930.22

Exhibit 2

Chain of Negotiation of Plaintiffs alleged Note

From Discovery Request with references to filename.

Investor

05/29/09 10:31:40 KZV INVESTOR: GNMA II WELLS FARGO BANK
INVESTOR #: 550-854

Reference WF-000723

Note

2961237

Multistate

NOTE

FHA Case No.
495-7111138-703

MIN: 1001310-2040769205-0

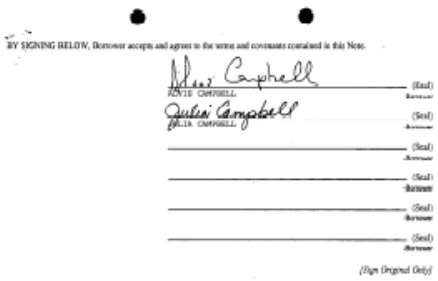
OCTOBER 29, 2004
[Date]

250 PR 947, TAYLOR, TX 76574
[Property Address]

1. PARTIES
"Borrower" means each person signing at the end of this Note, and the person's successors and assigns. "Lender" means AMERICAN MORTGAGE NETWORK, INC. DBA AMNET MORTGAGE

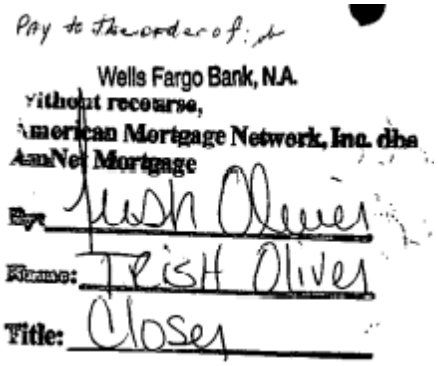
Reference WF-000171

Note – No Indorsements



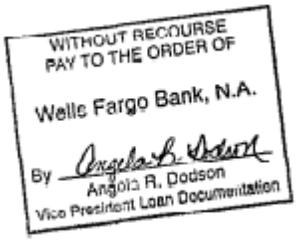
Reference WF-000173

Allonge - Indorsement 1



Reference WF-000826

Allonge - Indorsement 2 (In Blank)



Reference WF-000826

CAUSE NO. 10-1093-C368

ALVIE CAMPBELL AND JULIE CAMPBELL, *Plaintiffs*, v. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR LENDER AND LENDER'S SUCCESSORS AND ASSIGNS, AND WELLS FARGO BANK, N.A. AND STEPHEN C. PORTER, AND DAVID SEYBOLD, AND RYAN BOURGEOIS, AND MATTHEW CUNNINGHAM, AND JOHN DOE 1-100 *Defendants.*	§ § § § § § § § § § § § § § §	IN THE DISTRICT COURT OF WILLIAMSON COUNTY, TEXAS 368TH JUDICIAL DISTRICT

DEFENDANT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S OBJECTIONS AND ANSWERS TO PLAINTIFFS' FIRST REQUEST FOR ADMISSIONS TO DEFENDANT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS")

TO: Plaintiffs Alvie Campbell and Julie Campbell, *Pro Se,* 250 Private Road 947, Taylor, Texas 76574.

Mortgage Electronic Registration Systems, Inc. ("MERS"), a Defendant in the above styled and number cause, serves this its Objections and Answers to Plaintiffs' First Requests for Admissions to Defendant Mortgage Electronic Registration Systems, Inc. in accordance with the Texas Rules of Civil Procedure.

Respectfully submitted,

BROWN MCCARROLL, L.L.P.

By: _____

Richard A. Illmer
State Bar No. 10388350
John C. Pegram
State Bar No. 24056116

2001 Ross Avenue, Suite 2000
Dallas, Texas 75201
(214) 999-6100
(214) 999-6170 *facsimile*

ATTORNEYS FOR WELLS FARGO BANK, N.A. AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was delivered to all counsel of record as shown below:

___X___ Mail by certified mail, return receipt requested, postage prepaid, in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service;

_____ Mail by U.S. Mail, , postage prepaid, in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service;

_____ Forwarded by next day receipted delivery service;

_____ Communicated by telephonic document transfer to the recipient's current telecopier number;

TO:

Alvie Campbell
Julie Campbell
250 Private Road 947
Taylor, Texas 76574

Mark D. Hopkins
Hopkins & Williams, PLLC
3821 Juniper Trace, Suite 107
Austin, TX 78738

on this 2nd day of March, 2011.

John C. Pegram

GENERAL OBJECTIONS

1. MERS objects that the definition of "you", "your" and "Defendants" is overbroad and improper because it includes persons and entities acting or purporting to act for or on behalf of MERS without authorization from MERS.

OBJECTION KEY

The following key shall be used to make objections to the various requests. When an objection is made, it shall be identified by the corresponding number which appears below:

1. The request seeks information which is not reasonably calculated to lead to the discovery of admissible evidence;

2. The request is overbroad, vague and ambiguous;

3. The request is not limited as to time or scope;

4. The request is unduly burdensome and is designed to incur such unnecessary expense as to be characterized harassing in nature;

5. The request seeks information which is confidential, proprietary and a trade secret;

6. The request seeks disclosure of information protected by the attorney-client privilege and the work product exemption; and

An objection identified by the number set forth above shall be treated as if the objection were set forth in its entirety verbatim. Any response following an objection is made subject to the objection without waiving such objection.

ADMISSIONS

REQUEST NO. 1: Admit Mortgage Electronic Registration Systems, Inc. was never a lender to the negotiable instrument subject of this suit.

OBJECTION: MERS objects that this Request is ambiguous as to what is meant by "was never a lender to the negotiable instrument subject of this suit." Further, MERS objects that this Request calls for a legal conclusion.

ANSWER: Subject to the foregoing objections and without waiving same, MERS responds as follows: If the Request is interpreted to mean that MERS did not lend any money to the Plaintiffs, then the Request is admitted.

REQUEST NO. 2: Admit Mortgage Electronic Registration Systems, Inc. was never "Holder" of the negotiable instrument as defined by the Texas Business and Commerce Code subject of this suit with rights to enforce.

OBJECTION: MERS objects that this Request is vague, ambiguous and misleading. Next, MERS objects that this Request is not limited as to time. MERS also objects that this Request calls for a legal conclusion. Further, MERS objects to this Request because it requests admissions to more than one matter which must be requested separately.

REQUEST NO. 3: Admit the True and Correct copy of the negotiable instrument on its face contains no indorsements.

OBJECTION: MERS objects that this Request is ambiguous as to what is meant by "True and Correct copy of the negotiable instrument." Indeed, Plaintiffs failed to attach a copy of the negotiable instrument which is the subject of this lawsuit to the petition served on MERS and/or to their First Request for Admissions.

REQUEST NO. 4: Admit Mortgage Electronic Registration Systems, Inc. was never an Indorsee that could be identified on the face of the negotiable instrument.

OBJECTION: MERS objects that this Request is ambiguous as to what is meant by "Indorsee." Further, MERS objects that this Request calls for a legal conclusion.

REQUEST NO. 5: Admit Wells Fargo Bank, N.A. was never an Indorsee that could be identified on the face of the negotiable instrument.

OBJECTION: MERS objects that this Request is ambiguous as to what is meant by "Indorsee." Further, MERS objects that this Request calls for a legal conclusion.

ANSWER: Subject to the foregoing objections and without waving same, MERS responds as follows: Denied.

REQUEST NO. 6: Admit that Williamson County Public Records contains a Notice of Assignment of Note and Deed of Trust identified as Instrument #2008075222.

ANSWER: Admit.

REQUEST NO. 7: Admit that Williamson County Public Records filed Instrument #2008075222 identifies the Investor as FHA "Federal Housing Administration".

ANSWER: Denied.

REQUEST NO. 8: Admit that Mortgage Electronic Registration Systems, Inc. has no monetary interests in the promissory note or any future interest payments.

OBJECTION: MERS objects that this Request is ambiguous as to what is meant by "monetary interests in the promissory note or any future interest payments." Further, this Request assumes facts, specifically that the Plaintiffs will continue making payments on the promissory note, even though the promissory note has already been accelerated and the property which secures the promissory note has already been sold at a non-judicial foreclosure sale.

REQUEST NO. 9: Admit that Mortgage Electronic Registration Systems, Inc. "MERS" claims only a "Security Interest" in the "Deed of Trust" as nominee for any identified successors and assigns.

OBJECTION: MERS objects that this Request is not limited as to time. Next, MERS objects that this is vague and ambiguous as to what is meant by "claims."

ANSWER: Subject to the foregoing objections and without waiving same, MERS responds as follows: Denied.

REQUEST NO. 10: Admit that the offered "True and Correct" copy of the negotiable instrument does not identify and successors or assigns by indorsement.

OBJECTION: MERS objects that this Request is ambiguous as to what is meant by "the offered True and Correct copy of the negotiable instrument." Indeed, Plaintiffs failed to attach a copy of the negotiable instrument which is the subject of this lawsuit to the petition served on MERS and/or to their First Request for Admissions.

REQUEST NO. 11: Admit that no indorsement appears on the face of the negotiable instrument showing negotiation of the negotiable instrument to the FHA "Federal Housing Administration".

ANSWER: Admit.

REQUEST NO. 12: Admit that Williamson County Public Records filed Instrument #2008075222 identifies Mortgage Electronic Registration Systems, Inc., "MERS" as nominee being the assignor.

ANSWER: Denied.

REQUEST NO. 13: Admit the Federal Housing Administration "FHA" at one time was the owner of the negotiable instrument.

ANSWER: Denied.

REQUEST NO. 14: Admit the negotiable instrument was never negotiated to the Federal Housing Administration "FHA".

ANSWER: Admit.

REQUEST NO. 15: Admit Mortgage Electronic Registration Systems, Inc. "MERS" could negotiate the negotiable instrument.

OBJECTION: MERS objects that this Request is overbroad, vague and ambiguous. Further, MERS objects to this Request because it asks MERS to admit a purely legal contention. MERS also objects to this Request because it is vague as to time.

REQUEST NO. 16: Admit that the offered "True and Correct" copy of the negotiable instrument does not identify and subsequent Indorsee's.

OBJECTION: MERS objects that this Request is ambiguous as to what is meant by "the offered 'True and Correct' copy of the negotiable instrument." Indeed, Plaintiffs failed to attach a copy of the negotiable instrument which is the subject of this lawsuit to the petition served on MERS and/or to their First Request for Admissions.

ANSWER: Subject to the foregoing objections and without waiving same, MERS responds as follows: Denied.

REQUEST NO. 17: Admit Mortgage Electronic Registration Systems, Inc. "MERS" cannot act as nominee or an agent for an unknown "Person".

OBJECTION: MERS objects that this Request is overbroad, vague and ambiguous. Further, MERS objects to this Request because it asks MERS to admit a purely legal contention. MERS also objects that this Request assumes facts, specifically that MERS was acting as agent for an unknown "Person."

ANSWER: Subject to and without waiving the foregoing objections, MERS responds as follows: If this Request is interpreted to mean that MERS cannot act as nominee for the lender and lender's successors and assigns, then the Request is denied.

CAUSE NO. 10-1093-C368

ALVIE CAMPBELL AND JULIE CAMPBELL, *Plaintiffs*, v. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR LENDER AND LENDER'S SUCCESSORS AND ASSIGNS, AND WELLS FARGO BANK, N.A. AND STEPHEN C. PORTER, AND DAVID SEYBOLD, AND RYAN BOURGEOIS, AND MATTHEW CUNNINGHAM, AND JOHN DOE 1-100 *Defendants.*	§ § § § § § § § § § § § § § §	IN THE DISTRICT COURT OF WILLIAMSON COUNTY, TEXAS 368TH JUDICIAL DISTRICT

DEFENDANT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S OBJECTIONS AND ANSWERS TO PLAINTIFFS' FIRST REQUEST FOR INTERROGATORIES

TO: Plaintiffs Alvie Campbell and Julie Campbell, *Pro Se,* 250 Private Road 947, Taylor, Texas 76574.

Pursuant to Rule 197 of the TEXAS RULES OF CIVIL PROCEDURE, Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") serves this its objections and answers to Alvie and Julie Campbell's First Set of Interrogatories.

Respectfully submitted,

BROWN MCCARROLL, L.L.P.

By: _____

Richard A. Illmer
State Bar No. 10388350
John C. Pegram
State Bar No. 24056116

2001 Ross Avenue, Suite 2000
Dallas, Texas 75201
(214) 999-6100
(214) 999-6170 *facsimile*

ATTORNEYS FOR WELLS FARGO BANK, N.A. AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was delivered to all counsel of record as shown below:

___X___ Mail by certified mail, return receipt requested, postage prepaid, in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service;

_____ Mail by U.S. Mail, , postage prepaid, in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service;

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TO:

Alvie Campbell
Julie Campbell
250 Private Road 947
Taylor, Texas 76574

Mark D. Hopkins
Hopkins & Williams, PLLC
3821 Juniper Trace, Suite 107
Austin, TX 78738

on this 2nd day of March, 2011.

John C. Pegram

GENERAL OBJECTIONS

1. MERS objects that the definition of "you", "your" and "Defendants" is overbroad and improper because it includes persons and entities acting or purporting to act for or on behalf of MERS without authorization from MERS.

OBJECTION KEY

The following key shall be used to make objections to the various requests. When an objection is made, it shall be identified by the corresponding number which appears below:

1. The request seeks information which is not reasonably calculated to lead to the discovery of admissible evidence;

2. The request is overbroad, vague and ambiguous;

3. The request is not limited as to time or scope;

4. The request is unduly burdensome and is designed to incur such unnecessary expense as to be characterized harassing in nature;

5. The request seeks information which is confidential, proprietary and a trade secret;

6. The request seeks disclosure of information protected by the attorney-client privilege and the work product exemption; and

An objection identified by the number set forth above shall be treated as if the objection were set forth in its entirety verbatim. Any response following an objection is made subject to the objection without waiving such objection.

INTERROGATORIES

INTERROGATORY NO. 1: If you denied Request for Admission No. 1, please list all facts on which you base your denial.

OBJECTION: MERS incorporates its objections to Request for Admission No. 1 as if fully set forth herein.

ANSWER: Subject to and without waiving the foregoing objections, Request for Admission No. 1 was admitted.

INTERROGATORY NO. 2: If you denied Request for Admission No. 2, please list all facts on which you base your denial.

OBJECTION: MERS incorporates its objections to Request for Admission No. 2 as if fully set forth herein.

INTERROGATORY NO. 3: If you denied Request for Admission No. 3, please list all facts on which you base your denial.

OBJECTION: MERS incorporates its objections to Request for Admission No. 3 as if fully set forth herein.

INTERROGATORY NO. 4: If you denied Request for Admission No. 4, please list all facts on which you base your denial.

OBJECTION: MERS incorporates its objections to Request for Admission No. 4 as if fully set forth herein.

ANSWER: Subject to the foregoing objections and without waiving same, Request for Admission No. 4 was admitted.

INTERROGATORY NO. 5: If you denied Request for Admission No. 5, please list all facts on which you base your denial.

OBJECTION: MERS incorporates its objections to Request for Admission No. 5 as if fully set forth herein.

ANSWER: Subject to and without waiving the foregoing objections, the Note made the subject of this suit includes an indorsement from American Mortgage Network, Inc., dba AmNet Mortgage to Wells Fargo Bank, N.A..

INTERROGATORY NO. 6: If you denied Request for Admission No. 6, please list all facts on which you base your denial.

ANSWER: Request for Admission No. 6 was admitted.

INTERROGATORY NO. 7: If you denied Request for Admission No. 7, please list all facts on which you base your denial.

ANSWER: The Assignment of Note and Deed of Trust, recorded as Document No. 2008075222 in the Real Property Records of Williamson County, Texas, identifies the loan type as "FHA."

INTERROGATORY NO. 8: If you denied Request for Admission No. 8, please list all facts on which you base your denial.

OBJECTION: MERS incorporates its objections to Request for Admission No. 8 as if fully set forth herein.

INTERROGATORY NO. 9: If you denied Request for Admission No. 9, please list all facts on which you base your denial.

OBJECTION: MERS incorporates its objections to Request for Admission No. 9 as if fully set forth herein.

ANSWER: Subject to and without waiving the foregoing objections, the Deed of Trust made the subject of this lawsuit identifies the beneficiary as MERS, a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns.

INTERROGATORY NO. 10: If you denied Request for Admission No. 10, please list all facts on which you base your denial.

OBJECTION: MERS incorporates its objections to Request for Admission No. 10 as if fully set forth herein.

INTERROGATORY NO. 11: If you denied Request for Admission No. 11, please list all facts on which you base your denial.

ANSWER: Request for Admission No. 11 was admitted.

INTERROGATORY NO. 12: If you denied Request for Admission No. 12, please list all facts on which you base your denial.

ANSWER: The Assignment of Note and Deed of Trust, recorded as Document No. 2008075222 in the Real Property Records of Williamson County, Texas, identifies the Assignor as, "MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR LENDER AND LENDERS SUCCESSORS AND ASSIGNS."

INTERROGATORY NO. 13: If you denied Request for Admission No. 13, please list all facts on which you base your denial.

ANSWER: FHA never owned the Note made the subject of this lawsuit.

INTERROGATORY NO. 14: If you denied Request for Admission No. 14, please list all facts on which you base your denial.

ANSWER: Request for Admission No. 14 was admitted.

INTERROGATORY NO. 15: If you denied Request for Admission No. 15, please list all facts on which you base your denial.

OBJECTION: MERS incorporates its objections to Request for Admission No. 15 as if fully set forth herein.

INTERROGATORY NO. 16: If you denied Request for Admission No. 16, please list all facts on which you base your denial.

OBJECTION: MERS incorporates its objections to Request for Admission No. 16 as if fully set forth herein.

ANSWER: Subject to and without waiving the foregoing objections, the Note made the subject of this suit includes an indorsement from American Mortgage Network, Inc., dba AmNet Mortgage to Wells Fargo Bank, N.A..

INTERROGATORY NO. 17: If you denied Request for Admission No. 17, please list all facts on which you base your denial.

OBJECTION: MERS incorporates its objections to Request for Admission No. 17 as if fully set forth herein.

ANSWER: Subject to and without waiving the foregoing objections, the Deed of Trust made the subject of this lawsuit identifies the beneficiary as MERS, a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns.

INTERROGATORY NO. 1: Please state the full name, address, job title, and present employer of each person answering and assisting in answering these Interrogatories on behalf of Defendant.

OBJECTION: 6.

ANSWER: Subject to and without waiving the foregoing objection:

Richard A. Illmer
John C. Pegram
Brown McCarroll, L.L.P.
2001 Ross Ave, Suite 2000
Dallas, Texas 75201

John A. Murphy
Counsel
Mortgage Electronic Registration Systems, Inc.
c/o Brown McCarroll, L.L.P.
2001 Ross Ave, Suite 2000
Dallas, Texas 75201

INTERROGATORY NO. 2: Please state whether you have a copy of any statement that the Plaintiff's has previously made concerning the action or its subject matter and that is in your possession, custody, or control. For the purpose of this questions, a statement previously made includes: (1) a written statement signed or otherwise adopted or approved by the person making it; or (2) a stenographic, mechanical, electrical, or other recording, or any transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

OBJECTION: 2, 3, and 4.

ANSWER: Subject to the foregoing objections and without waiving same, please see documents produced in response to Plaintiffs' First Request for Production including, but not limited to, pleadings filed by Plaintiffs in a previous lawsuit styled *Alvie Campbell and Julie Campbell v. Wells Fargo Home Mortgage, et. al.*, Cause No. 09-636-C277, 227th Judicial District, Williamson County, Texas, and the appeal thereof, styled *Alvie Campbell and Julie Campbell, Appellants v. Wells Fargo Home Mortgage, et. al., Appellees*, No. 03-10-00481-CV, Texas Court of Appeals, Third District, at Austin.

INTERROGATORY NO. 3: Please describe fully any and all investigations of the incident made the basis of this lawsuit (other than those that are privileged by law) including who conducted the investigation, when the investigation was conducted, and the results, findings, or conclusions of said investigations. If you are claiming privilege as to any investigation based on its allegedly being done in anticipation of litigation, describe specifically what you are relying on to establish that you had reason to believe the litigation would ensue, including what overt acts or statements were made by Plaintiff's or someone acting on behalf of Plaintiff's.

OBJECTION: 2, 3 and 4. This Interrogatory is ambiguous as to what is meant by "investigations" and "the incident made the basis of this lawsuit."

ANSWER: Subject to the foregoing objections and without waiving same, none that aren't privileged.

INTERROGATORY NO. 4: Do you contend that the Plaintiff's has done anything or failed to do anything that constitutes a failure to mitigate damages? If so, please describe what your contention is based on and what evidence exists to support same.

ANSWER: No.

INTERROGATORY NO. 5: Please state your full and correct title and position within the organizational structure of the entity identified in the answers to the following questions, at the present.

OBJECTION: MERS objects that this Interrogatory is vague, ambiguous and nonsensical.

INTERROGATORY NO. 6: Do you do business as a corporation, limited liability company, partnership, limited liability partnership, sole proprietorship, or joint venture?

ANSWER: Corporation.

INTERROGATORY NO. 7: Please state completely and fully all representations, statements, declarations, or admissions made by this party or agents, servants, or employees of this party that you might attempt to make known to the judge in the trial of this lawsuit.

OBJECTION: 2, 3 and 4.

ANSWER: Subject to the foregoing objections, see documents produced in response to Plaintiffs' First Request for Production including, but not limited to, pleadings filed by Plaintiffs in a previous lawsuit styled *Alvie Campbell and Julie Campbell v. Wells Fargo Home Mortgage, et. al.*, Cause No. 09-636-C277, 227th Judicial District, Williamson County, Texas, and the appeal thereof, styled *Alvie Campbell and Julie Campbell, Appellants v. Wells Fargo Home Mortgage, et. al., Appellees*, No. 03-10-00481-CV, Texas Court of Appeals, Third District, at Austin.

INTERROGATORY NO. 8: If Defendant, Defendant's corporate representative, employee, or agent has given a statement to anyone other than Defendant's attorney with respect to the occurrence in questions, please state the name, address, and telephone number of the person to whom such statement was given, the date on which the statement was given, the substance of such statement and whether such statement was written or an oral statement.

OBJECTION: 2, 3 and 4.

ANSWER: Subject to the foregoing objections and without waiving same, none.

INTERROGATORY NO. 9: Has Defendant entered into any agreements or contracts, oral or written, with Plaintiff's? If so, state the nature of such agreements and corporations with which you have negotiated.

OBJECTION: MERS objects to this Interrogatory because the total number of Interrogatories served by Plaintiffs on MERS exceeds twenty five (25). Further, this Interrogatory is overbroad, vague and ambiguous to the extent it seeks the identity of "corporations with which you have negotiated."

ANSWER: Subject to and without waiving the foregoing objection, Plaintiffs executed the Deed of Trust which identifies the beneficiary as MERS, a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns.

INTERROGATORY NO. 10: As provided for by Texas Rules of Civil Procedure 192.3(d), identify each person (name, address and telephone number) who is expected to be called to testify at trial.

OBJECTION: MERS objects to this Interrogatory because the total number of Interrogatories served by Plaintiffs on MERS exceeds twenty five (25). Further, MERS objects to this Interrogatory as premature, as MERS has not yet identified its trial witnesses. MERS will disclose its trial witnesses in accordance with the Texas Rules of Civil Procedure and any applicable scheduling order in this lawsuit. Further, MERS objects to this Interrogatory because it seeks attorney work product and is privileged.

ANSWER: Subject to and without waiving the foregoing objections, Alvie Campbell and Julie Campbell.

INTERROGATORY NO. 11: If you have used any expert for consultation who is not expected to be called as a witness, and if such expert's opinions or impressions have been viewed by any expert who may be called as a witness, state:

a) The identity and location of each such consulting expert;

b) The subject matter on which each such consulting expert was consulted;

c) The mental impressions and opinions held by each such consulting expert;

d) The facts known to each such consulting expert that relate to or form the basis of any mental impressions and opinions held by that expert;

e) A description of all documents and other tangible things used by, prepared by, prepared for, or furnished to each such consulting expert, including all tests, calculations, reports, models, data, and compilations that form the basis of the consulting expert's opinion or impression; and

f) The financial arrangements you have with such consulting expert, including an itemization of all amounts billed by the expert and an itemization of all amounts paid to the expert.

OBJECTION: MERS objects to this Interrogatory because the total number of Interrogatories served by Plaintiffs on MERS exceeds twenty five (25). Further, MERS objects to this Interrogatory as premature, as MERS has not yet identified its experts. MERS will disclose its experts, if any, in accordance with the Texas Rules of Civil Procedure and any applicable scheduling order in this lawsuit. Further, MERS objects to this Interrogatory because it seeks attorney work product and is privileged.

INTERROGATORY NO. 12: If you contend that you are in possession of the Original Promissory Note please state the exact location of the said Note.

OBJECTION: MERS objects to this Interrogatory because the total number of Interrogatories served by Plaintiffs on MERS exceeds twenty five (25).

ANSWER: Subject to the foregoing objection and without waiving same, MERS is not in possession of the original Note made the subject of this dispute.

INTERROGATORY NO. 13: If you contend that you are in possession of the Original Promissory Note, please state the Name, Address, and telephone number of the Official Custodian of the records who would have "Personal Knowledge" of the Original Promissory Note.

OBJECTION: MERS objects to this Interrogatory because the total number of Interrogatories served by Plaintiffs on MERS exceeds twenty five (25).

ANSWER: Subject to and without waiving the foregoing objection, see MERS' Answer to Interrogatory No. 12.

CAUSE NO. 10-1093-C368

ALVIE CAMPBELL AND JULIE CAMPBELL, *Plaintiffs*, v. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR LENDER AND LENDER'S SUCCESSORS AND ASSIGNS, AND WELLS FARGO BANK, N.A. AND STEPHEN C. PORTER, AND DAVID SEYBOLD, AND RYAN BOURGEOIS, AND MATTHEW CUNNINGHAM, AND JOHN DOE 1-100 *Defendants.*	§ § § § § § § § § § § § § § §	IN THE DISTRICT COURT OF WILLIAMSON COUNTY, TEXAS 368TH JUDICIAL DISTRICT

DEFENDANT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST REQUEST FOR PRODUCTION

TO: Plaintiffs Alvie Campbell and Julie Campbell, *Pro Se,* 250 Private Road 947, Taylor, Texas 76574.

Pursuant to the TEXAS RULES OF CIVIL PROCEDURE, Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") serves this its objections and responses to Alvie and Julie Campbell's First Request for Production.

Respectfully submitted,

BROWN MCCARROLL, L.L.P.

By: _____

Richard A. Illmer
State Bar No. 10388350
John C. Pegram
State Bar No. 24056116

2001 Ross Avenue, Suite 2000
Dallas, Texas 75201
(214) 999-6100
(214) 999-6170 *facsimile*

ATTORNEYS FOR WELLS FARGO BANK, N.A. AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was delivered to all counsel of record as shown below:

__X__ Mail by certified mail, return receipt requested, postage prepaid, in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service;

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TO:

Alvie Campbell
Julie Campbell
250 Private Road 947
Taylor, Texas 76574

Mark D. Hopkins
Hopkins & Williams, PLLC
3821 Juniper Trace, Suite 107
Austin, TX 78738

on this 2nd day of March, 2011.

_____
John C. Pegram

GENERAL OBJECTIONS

1. MERS objects that the definition of "you", "your" and "Defendants" is overbroad and improper because it includes persons and entities acting or purporting to act for or on behalf of Wells Fargo without Wells Fargo's authorization.

2. MERS objects to the date and place of production proposed by Plaintiffs. Any documents produced will be made available for inspection and copying at the offices of Brown McCarroll, L.L.P, 2001 Ross Avenue, Suite 2000, Dallas, Texas, 75201 or, alternatively, copies of responsive documents will be provided to Plaintiffs.

OBJECTION KEY

The following key shall be used to make objections to the various requests. When an objection is made, it shall be identified by the corresponding number which appears below:

1. The request seeks information which is not reasonably calculated to lead to the discovery of admissible evidence;

2. The request is overbroad, vague and ambiguous;

3. The request is not limited as to time or scope;

4. The request is unduly burdensome and is designed to incur such unnecessary expense as to be characterized harassing in nature;

5. The request seeks information which is confidential, proprietary and a trade secret;

6. The request seeks disclosure of information protected by the attorney-client privilege and the work product exemption; and

An objection identified by the number set forth above shall be treated as if the objection were set forth in its entirety verbatim. Any response following an objection is made subject to the objection without waiving such objection.

REQUESTS FOR PRODUCTION

REQUEST NO. 1: True and correct copy(s) of any and all Custodial Reports reflecting who was in possession and custody of the negotiable instrument.

OBJECTION(S): 2 and 3.

RESPONSE: Subject to and without waiving the foregoing objection(s), non-privileged responsive documents which are reasonably related to the scope of this request will be produced.

REQUEST NO. 2: True and correct copy(s) of any and all Bailee Letters' or electronic equivalence reflecting negotiation of the negotiable instrument.

OBJECTION(S): 2 and 3. Further, this request calls for a legal conclusion.

RESPONSE: Subject to and without waiving the foregoing objection(s), non-privileged responsive documents which are reasonably related to the scope of this request will be produced.

REQUEST NO. 3: True and correct copy(s) of a Mortgage Electronic Registration Systems, Inc. "MERS" audit trail showing the transaction history of "transfer of beneficial interests" and "transfers of servicing" as maintained on Mortgage Electronic Registration Systems (MERS) for loan identified by MIN number 1001310-2040769205-0.

OBJECTION(S): 2 and 3. Further, this Request is ambiguous as to what is meant by a "Mortgage Electronic Registration Systems, Inc. "MERS" audit trail."

RESPONSE: Subject to and without waiving the foregoing objection(s), non-privileged responsive documents which are reasonably related to the scope of this request will be produced.

REQUEST NO. 4: True and correct copy(s) of all servicing contracts with servicers and the trustee for the owner/holder of the note.

OBJECTION(S): 2, 3 and 4. Further, this Request calls for a legal conclusion.

REQUEST NO. 5: True and correct copy(s) of notice by servicing agent to mortgage insurance carrier that the note is in foreclosure.

OBJECTION(S): 2, 3 and 4. Further, this Request calls for a legal conclusion.

REQUEST NO. 6: True and correct copy(s) of notice by servicing agent to GSE's that note is in foreclosure.

OBJECTION(S): 1, 2 and 3.

REQUEST NO. 7: True and correct copy(s) servicing contract with the bank and servicer.

OBJECTION(S): 1, 2 and 3.

REQUEST NO. 8: True and correct copy(s) of any and all title policies affecting such security instrument subject to this suit.

OBJECTION(S): 1, 2 and 3.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

IN RE:	§	
JAMES PATRICK ALLEN	§	CASE NO: 06-60121
Debtor(s)	§	
	§	CHAPTER 13

MEMORANDUM OPINION
REGARDING SANCTION OF CREDITOR'S ATTORNEYS

I. BACKGROUND

James Allen ("Debtor") signed a note and deed of trust on November 24, 2004, in the amount of $115,290. The note was eventually assigned to Countrywide Home Loans ("Countrywide"). In a related deed of trust, Debtor gave Countrywide a lien on land located at 513 Danforth Road, Goliad TX (the "Danforth Road Property") to secure the note.

Debtor filed a petition under chapter 13 of the Bankruptcy Code commencing this case on August 1, 2006. On August 15, 2006, Debtor filed bankruptcy schedules (docket # 8) and a chapter 13 plan (docket # 9). The bankruptcy schedules disclose ownership of the Danforth Road Property and disclose Countrywide's lien. The schedules include the following additional information regarding the Danforth Road Property:

> This is not the residence of the debtor. He rents the property to his brother for a monthly fee. Please see the Rental Agreement in debtor's file.

Debtor's chapter 13 plan values Countrywide's collateral at $58,000 and proposes to pay Countrywide 57 payments of $1,128.08 per month for a total of $67,865 to satisfy Countrywide's lien. That stream of payments includes interest at 6.25%.[1]

On August 18, 2006, Countrywide filed proof of claim # 4, valuing its collateral at $58,000 and asserting that the balance due on the loan on the bankruptcy petition date was $127,328.22, of which $12,479.21 was prepetition arrearage. The proof of claim was filed by Countrywide's counsel, Barrett Burke Wilson Castle Daffin & Frappier, L.L.P. ("Barrett Burke").

A. Objection to Confirmation

On September 15, 2006, Countrywide (through counsel Barrett Burke) filed an objection to confirmation of Debtor's chapter 13 plan (docket # 27). The objection is grossly erroneous, and to anyone familiar with bankruptcy law, the objection is clearly legal nonsense.

[1] Debtor's plan was confirmed December 20, 2006.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

1. The objection incorrectly alleges that Linda Joy Hamm executed the note. This is obviously incorrect because Ms. Hamm is Debtor's attorney. Debtor signed the note, not his attorney.
2. The objection alleges that the plan proposes not to pay Countrywide its alleged pre-petition arrearages. This objection does not make sense in the context of this case. Debtor's plan proposes to pay the secured claim as determined under Bankruptcy Code § 506(a)(1). Under that provision, the relevant issue is the value of the collateral and the interest rate. Prepetition and postpetition arrearages are irrelevant.[2]
3. The objection alleges that the collateral is Debtor's principal residence. Based on that allegation, Countrywide objects to plan confirmation on the basis that residential loans cannot be modified by a chapter 13 plan.[3]
4. The objection then makes allegations which on the face of the document are at best boilerplate and at worst are simply incomprehensible or baseless in the context of this case. The objection alleges
    a. That the plan fails to provide for payment of Countrywide's secured claim;
    b. That the plan creates an "artificial post petition default";
    c. That the plan shifts the risk of nonpayment to Countrywide by proposing to pay other creditors first;
    d. That Countrywide's "administrative claim" is deferred over more than 36 months;[4]
    e. That the plan impermissibly proposes to pay interest on Countrywide's nondischargeable unsecured claim;[5] and
    f. That the plan does not provide for all disposable income to be paid to the unsecured creditors.[6]

On September 27 (docket # 32) the chapter 13 trustee recommended confirmation of the chapter 13 plan. In doing so, the trustee represented to the Court that, in his opinion, the plan met the requirements for plan confirmation.

On September 28 Debtor responded to Countrywide's objection. Included in that response was a statement that Countrywide had notice "several months prior to the filing of this case" that the collateral was not Debtor's residence. The response also set out the deficiencies that are noted by the Court, above.

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[2] This objection would make sense if the collateral were Debtor's principal residence. But Countrywide knew, or had reason to know, that the collateral was not Debtor's principal residence.

[3] While that legal assertion is valid if the fact allegation is supported by evidence, (Bankruptcy Code §§ 506, 1322(b)(2)) it is clear that the allegation was made at a time when Countrywide and Barrett Burke knew, or had reason to know, the fact allegation was false.

[4] Countrywide has never asserted an administrative claim.

[5] Countrywide has never asserted that it has a nondischargeable unsecured claim.

[6] While this objection is at least comprehensible, there is no indication that Countrywide's counsel reviewed the bankruptcy schedules or plan or that counsel did any other investigation before filing the objection. There is no indication that the objection was made in good faith after reasonable investigation. Despite three opportunities, Countrywide has failed to present any evidence in support of the objection, or even argue its validity.

B. October 3 Hearing

On October 3, 2006, the Court held a hearing on confirmation of Debtor's chapter 13 plan. Countrywide was represented by Mr. Richard Chapman, local counsel, who was not prepared to prosecute Countrywide's objections to confirmation.

Mr. Chapman did argue that the plan could not be confirmed because it purported to modify the rights of a creditor whose collateral allegedly was Debtor's principal residence. Despite the bankruptcy schedules and despite Debtor's response that alleged that Countrywide had notice that the collateral was not Debtor's principal residence, Countrywide continued to assert that contention. In the courtroom, Debtor's counsel responded orally with the same information that she had stated in her pleading: *i.e.* that Countrywide had known for months that the collateral was not Debtor's principal residence. When Debtor's counsel made this statement in open court, local counsel replied that he had been instructed by Barrett Burke to ask for a continuance if Debtor made that contention. Mr. Chapman asked for a continuance to allow Countrywide to get an appraisal of the collateral.

Based on all the facts and circumstances, the Court concludes that Countrywide and Barrett Burke never had a reasonable basis for asserting that the collateral was Debtor's principal residence. While the deed of trust requires Debtor to use the property as his principal residence for the initial loan period, it clearly contemplates alternative use of the property after 1 year, and even sooner if Countrywide agreed otherwise or if there were extenuating circumstances. Debtor contends that Countrywide knew, prior to the filing of the bankruptcy case, that the property was not Debtor's principal residence. Countrywide has never disputed that allegation. And although she did not testify that she knew that the collateral was not Debtor's principal residence, Barrett Burke's representative later testified (as set out more fully below) that the "principal residence" objection was filed by mistake. In short, the Court finds that the "principal residence" allegation in Countrywide's objection was a violation of Rule 9011.

As clear as that violation is, it is even more egregious that Countrywide continued to advocate that position in open court on October 3, notwithstanding Debtor's written response on September 28. Countrywide obviously had considered Debtor's response, knew that the argument had no validity, and was prepared to abandon the argument by asking for a continuance to implement "Plan B", which apparently had not yet been devised. (Since Countrywide had previously filed a proof of claim accepting Debtor's valuation of the collateral, and since Countrywide has never obtained a true appraisal, and since Countrywide subsequently "discovered" that it had an assignment of rents and completely changed its legal theory to rely on that argument instead of actually seeking an appraisal, the Court believes that the request for a continuance was not made in good faith but was intended simply for delay.)

Orally, on the record, the Court stated that Countrywide should scrutinize its position in this case since; if Debtor's allegations were true, it appeared that Countrywide had violated FRBP 9011. The Court gave Countrywide and Barrett Burke clear warning and opportunity to fix what was apparently broken. The Court continued the confirmation hearing to November 14, 2006, for an evidentiary hearing if Countrywide wished to pursue the contention that the collateral was Debtor's principal residence or to present its appraisal evidence. The Court also

advised Debtor's counsel that if she sought Rule 9011 sanctions, she should take appropriate measures to demand withdrawal of the pleading or other amicable resolution.

C. Withdrawal of Objection in Response to FRBP 9011

In response to a demand letter from Debtor's counsel, Countrywide withdrew its objection to confirmation (docket # 37 withdrawing docket # 27) on October 25. The Notice of Withdrawal does not recognize that the prior objection was completely wrong; it merely says that the objection is withdrawn because "Debtor amended the Chapter 13 Plan to allow the full amount of $12,479.21 to be paid to Creditor for pre-petition arrearages." That statement is simply false. Debtor has never filed an amended plan.

On November 8, 2006, over a month after the October 3 hearing on plan confirmation (and over a month after the Court's order of continuance to hear Countrywide's evidence or amended position) and only 4 business days prior to the second hearing, Countrywide filed two pleadings. Those pleadings abandoned all prior contentions, announced that Countrywide and Barrett Burke had "discovered" Countrywide's assignment of rents, and completely changed Countrywide's and Barrett Burke's approach to the case. In docket # 38, Countrywide asked for an accounting and turnover of rents, taking the position that the assignment of rents in the deed of trust was an absolute assignment and not a collateral interest. In that pleading, Countrywide alleged that it reviewed the file after the prior hearing and "discovered" that there was an assignment of rents. Second, in docket # 39, Countrywide asserts that since the rents belong to Countrywide, Debtor is not allowed to use them to fund the chapter 13 plan. Both were filed untimely.

D. November 14 Hearing

At the continued hearing on November 14, Countrywide again appeared through local Counsel. Countrywide completely abandoned all arguments made in the first objection to confirmation. Local counsel now argued that the rents had been absolutely assigned, not as a security interest but as an absolute present assignment, and therefore Debtor could not use the rents to fund a chapter 13 plan. Countrywide had filed its amended objection to plan confirmation only 4 business days before the continued confirmation hearing. Local rules require an objection to be filed at least 5 business days prior to confirmation. Countrywide had filed no memoranda of authorities and was prepared with no witnesses at the hearing. The Court continued the matter to December 13 because Debtor's counsel had simply not had time to prepare a response.

Countrywide made no attempt to address the Court's concerns addressed orally on the record at the October 3 hearing. The Court issued an order (docket # 48) requiring local counsel Richard Chapman and counsel for Barrett Burke Wilson Castle Daffin & Frappier, LLP to appear on December 13 and show cause why sanctions should not be issued. The Court's order (docket # 48) set out the preceding facts and articulated the issues to which Barrett Burke should respond.

E. December 13 Hearing

The Court received evidence and considered memoranda on the plan confirmation issues. The Court has separately ruled that the "absolute assignment" objection has no merit and the Court issued a memorandum opinion and order confirming the plan. (Docket ## 54, 55.) With respect to the Court's order to show cause why sanctions should not be issued, Ms. Marilee Madan (an attorney with Barrett Burke) appeared and presented the following case:

Ms. Madan admitted that Barrett Burke's pleadings and initial legal positions are completely at odds with the facts of this case and the files available to Barrett Burke. The essence of the defense was that Barrett Burke strives for efficiency by using computer generated form pleadings and that those computerized procedures caused the problems.

Ms. Madan admitted that Barrett Burke should have been present at the November 14 hearing.

1. Ms. Sanov's Testimony

Felicia Sanov was the attorney with Barrett Burke who was responsible for filing the initial pleadings. She testified that when she received the case she reviewed the file and recognized that the collateral was non-homestead property. Her focus at that time was to determine why the value of the property had dropped so precipitously between the time that the loan was made and the time that the bankruptcy case was filed (approximately 2 years).

a. Barrett Burke's system for handling cases and filing pleadings

Files received from clients are "set up", meaning that certain data is entered into the Barrett Burke computer system. The system recognizes certain codes, and from those codes the computer generates legal pleadings. Ms. Sanov testified that someone else in her office simply entered the wrong data in the wrong places and "checked the wrong boxes" in this case; she also testified that she did not correct the errors when she reviewed the file.

There was no testimony that anyone at Barrett Burke reviews the computer-generated pleadings (with the level of care required by FRBP 9011) before they are filed. It was the Court's sense of the testimony that either there is no review, or else the review is so superficial that it is meaningless.

b. Barrett Burke's Response to Discovery of the Errors

Ms. Sanov testified that local counsel contacted her about the Court's concerns articulated at the first hearing. She testified that she reviewed the pleadings and the file and "could not believe the document that was filed under [her] password."

Ms. Sanov testified that she performed the requisite computer commands to cause the computer to generate a withdrawal of the objection, but that "because the system was set up incorrectly, when [she] filed the withdrawal it was done incorrectly." She testified that under the Barrett Burke system, the pleading effecting the withdrawal of the objection was predicated upon what was already in the computer system, which was erroneous. As noted above, the pleading withdrawing the objection was simply false; it stated that Debtor had filed an amended plan that satisfied Countrywide's objection.

Ms. Sanov did not testify whether or not she had read the pleading withdrawing the objection before it was filed under her name. It was the Court's sense of the testimony that either there is no review, or else the review is so superficial that it is meaningless. And there was no hint in this pleading withdrawing the objection that Countrywide intended to file a subsequent objection to confirmation based on an entirely new theory.

The confusing pleading withdrawing the objection to confirmation was the only response to the Court's October 3 concerns (on the record) regarding Barrett Burke's compliance with Rule 9011. Neither Barrett Burke nor Countrywide sought to repair the damage that they had caused, except to file the withdrawal.

2. Mr. Thurmond's Testimony regarding his failure to appear

Mr. Walter Thurmond is a senior, supervisory attorney at Barrett Burke. He testified that he became aware of the Rule 9011 issue because he was in Ms. Sanov's office when Ms. Sanov received a letter from Debtor's counsel demanding withdrawal of the first objection to confirmation. Mr. Thurmond told Ms. Sanov he would look into it. Mr. Thurmond contacted Ms. Hamm and discussed the assignment of rents and cash collateral issue and told her that he would withdraw the objection. Mr. Thurmond testified that he thought the withdrawal of the objection settled the 9011 problem. He did not explain why the allegations in the withdrawal of the initial objection were simply false, why the subsequent objection was filed late, or why Countrywide and Barrett Burke were totally unprepared to prosecute the second objection when it first came on for hearing.

II. SANCTIONS FOR VIOLATION OF RULE 9011

A. Finding of Sanctionable Conduct

Countrywide's first objection to confirmation was gibberish. It had no basis in fact or law and was materially disruptive to the efficient and effective operation of this Court. Countrywide continued (albeit merely by a very brief statement in open court) to prosecute that objection even after receiving Debtor's response which clearly called Barrett Burke's attention to the error. When confronted with the facts, Barrett Burke, through local counsel, asked for a continuance to allow it to get an appraisal, a strategy that was abandoned immediately after the request was granted. Countrywide then filed a pleading that withdrew its objection to confirmation, which pleading included allegations that were simply false. Barrett Burke attorneys either did not read

the computer generated pleadings that they filed with the Court, or else the efforts in that regard were so minimal that they were meaningless.

Under Bankruptcy Rule 9011(b)(1), an attorney who signs, files, or submits to the Court a pleading is certifying that to the best of that attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the pleading is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Further, under Bankruptcy Rule 9011(b)(3), an attorney who signs, files, or submits to the Court a pleading is certifying that to the best of that attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the allegations and other factual contentions in the pleading have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Barrett Burke is not adequately investigating the facts that it alleges before it files pleadings. Barrett Burke has also become over reliant on the computer system that generates its pleadings, and its attorneys are allowing their signatures to become affixed to pleadings that they have not adequately reviewed. This did not happen once, but twice, and the second time was after warning from the Court. After the original errors were discovered and the objection had to be withdrawn, yet another pleading was filed without first being reviewed for its accuracy. That is inexcusable.

Barrett Burke has not fulfilled the requirements of Rule 9011 by performing adequate inquiry prior to filing the pleadings and by assuring that the pleadings that it filed were warranted in fact and in law.

In addition, local counsel appeared at hearings when local counsel was not fully informed and when local counsel was not prepared to bind the client or to prosecute the client's case. Bankruptcy Local Rule 1001(b) states that "In addition to these rules, the Local Rules of the District Court, the Administrative Procedures for CM/ECF, and the standing and general orders govern practice in the bankruptcy court." District Local Rule 11.2 states that "The attorney-in-charge is responsible in that action for the party. That individual attorney shall attend all court hearing or send a fully informed attorney with authority to bind the client."

B. Consideration of the Proper Sanction With Respect to Barrett Burke

On three prior occasions, Barrett Burke has been required to address problems that seem to have similar foundations.

The undersigned judge, within the past two years, required Ms. Mary Daffin to review all files and to report to the Court concerning quality control issues. At the hearing, Ms. Daffin expressed great regret and promised closer control. The Court declined to impose sanctions based on that representation.

In *In re Anderson* , 330 B.R. 180 (Bankr. S.D. Tex. 2005), Judge Bohm criticized Barrett Burke for failing to appear at a hearing and failing to introduce evidence in support of its legal

positions.

In *In re Porcheddu* , 338 B.R. 729 (Bankr. S.D. Tex. 2006), Judge Isgur found that Barrett Burke engaged in a systematic effort to mislead the United States Bankruptcy Court for the Southern District of Texas to shift fees from Barrett Burke's clients to consumer debtors. Here too, Barrett Burke used the empty head and pure heart defense and professed its sincere regret. Judge Isgur ultimately concluded that a sanction of $65,000 was appropriate to deter Barrett Burke's conduct.

Rule 9011(c)(2) states that a sanction must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Although the Court has concluded that there is sanctionable conduct, after two warnings and a $65,000 monetary sanction the Court is at a loss to determine the appropriate sanction in this case. If the prior warnings and sanction have not worked, what would? To determine that question, the Court will hold a hearing on March 22, 2007, at 9:30 AM in courtroom 400, 515 Rusk, Houston, Texas. Ms. Mary Daffin, managing attorney of the Houston Barrett Burke office, is ordered to appear and to report to the Court what sanctions would deter future repetition of this conduct.

The hearing is held in Houston, instead of Victoria, for the convenience of the Court. Any party in interest who wishes to participate from Victoria may do so by arranging for telephonic or video appearance. Instructions for doing so are available on the Court's website or by calling the Court's courtroom deputy.

C. Consideration of the Proper Sanction With Respect to Richard Chapman

Mr. Chapman appeared merely as local counsel for Barrett Burke. The Court recognizes that it has been the practice of creditors' counsel practicing statewide to reduce travel expenses and legal fees by arranging for participation by local counsel. The Court does not want to increase litigation expenses but will insist that local counsel be fully informed and prepared at any hearing at which local counsel appears. Local counsel must comply with district court local rule 11.2.

Because the requirement for full participation has not been strictly enforced before, and because the Court hopes that Mr. Chapman now has a much greater appreciation of his responsibilities to the Court, the Court sees no need to impose other sanctions.

SIGNED 01/09/2007.

Wesley W. Steen

WESLEY W STEEN
United States Bankruptcy Judge

HOPKINS & WILLIAMS
P.L.L.C.

JENNA FULLERTON
jenna@hopkinswilliams.com

June 17, 2011

Via U.S. First Class Mail
Lisa David
Williamson County District Clerk
P.O. Box 24
Georgetown, Texas 78627

RE: MOTION TO DISMISS and NOTICE OF HEARING
Cause No. 10-1093-C368; *Alvie Campbell and Julie Campbell v. MERS, et al*; In the 368th Judicial District Court of Williamson County, Texas

Dear Ms. David:

Enclosed for filing in the above-referenced cause please find the following:

1. Defendants Stephen C. Porter, David Seybold, Ryan Bourgeois, and Matthew Cunningham's Motion to Dismiss; and
2. Notice of Hearing on Defendants' Motion to Dismiss.

I have included the originals and one copy of each to be file-stamped and returned in the envelope provided.

Thank you for your usual courtesy. Please feel free to contact me if you have any questions or concerns.

Sincerely,

Jenna Fullerton, Legal Assistant to
MARK D. HOPKINS

Enclosures

Cc:

Via Certified Mail: # 70110470000160423244
And Regular U.S. Mail
Alvie Campbell
Julie Campbell
250 Private Road 947
Taylor, Texas 76574

Via Facsimile: (214) 999-6170
Richard A. Illmer
John C. Pegram
Brown McCarroll, LLP
2001 Ross Avenue, Suite 2000
Dallas, Texas 75201

CAUSE NO. 10-1093-C368

ALVIE CAMPBELL AND JULIE CAMPBELL	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	
	§	
v.	§	**368th JUDICIAL DISTRICT**
	§	
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR LENDER AND LENDER'S SUCCESSORS AND ASSIGNS, AND WELLS FARGO BANK, N.A., AND STEPHEN C. PORTER, AND DAVID SEYBOLD, AND RYAN BOURGEOIS, AND MATTHEW CUNNINGHAM, AND JOHN DOE 1-100	§	
Defendants.	§	**WILLIAMSON COUNTY, TEXAS**

DEFENDANTS STEPHEN C. PORTER, DAVID SEYBOLD, RYAN BOURGEOIS, AND MATTHEW CUNNINGHAM'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Stephen C. Porter, Ryan Bourgeois, David Seybold, and Mathew Cunningham (referred to collectively as "Attorney Defendants"), Defendants in the above-styled and numbered cause, and file this their Motion to Dismiss Plaintiffs' Verified Original Petition for lack of standing. In support of the foregoing, Attorney Defendants would respectfully show unto the court as follows:

I. INTRODUCTION

1. Defendant, Wells Fargo Bank, N.A. ("Wells Fargo") is a lending institution doing business in the State of Texas.

2. Barrett Daffin Frappier Turner & Engel, LLP ("BDFTE") was retained by Defendant Wells Fargo to assist in the foreclosure of certain real property owned by Plaintiffs Alvie Campbell and Julie Campbell ("Plaintiffs") due to Plaintiffs' failure to pay their residential

mortgage as contractually agreed. *See,* Affidavit of Stephen C. Porter, attached hereto as **Exhibit "A"** and incorporated as if fully set out herein.

3. Attorney Defendants are licensed attorneys in the State of Texas and are employed by BDFTE to provide legal services on behalf of the firm to its clients. *Id.*

4. Plaintiffs have failed and refused to pay their mortgage as contractually agreed and have brought this suit in an effort to delay their eviction.

5. No claims have been asserted against Attorney Defendants that arise out of any conduct other than the Attorney Defendants' legal representation of their client, Wells Fargo, in protecting Wells Fargo's interests vis-à-vis the Plaintiffs.

II.
ARGUMENT AND AUTHORITIES

6. Plaintiffs' suit against Attorney Defendants should be dismissed as a result of Plaintiffs' lack of standing to sue Attorney Defendants. As an element of subject-matter jurisdiction, standing is an issue that can be raised at any time. *See, In re H.C.S.,* 219 S.W.3d 33, 34 (Tex. App. – San Antonio 2006, no pet.). Standing is a question of law for determination by the court. *See, Doncer v. Dickerson*, 81 S.W.3d 349, 358 (Tex. App. – El Paso 2002, no pet.).

7. Attorney Defendants were retained by Wells Fargo to assist Wells Fargo in the protection of its rights under a certain Note (of which Wells Fargo is the holder) and Deed of Trust (of which Wells Fargo is a beneficiary thereunder) to which Plaintiffs are the mortgagor. *See*, Affidavit of Stephen C. Porter, previously attached hereto as **Exhibit "A"**. Save and except through the legal representation of Wells Fargo, Attorney Defendants have had no contact or relationship with Plaintiffs. *Id.* The sole contact Attorney Defendants have had with Plaintiffs is in the capacity as legal counsel for Wells Fargo. *Id.* Plaintiffs are now attempting to bring claims against Attorney Defendants claiming wrongdoing by Attorney Defendants. However, given

that attorneys are immune from suit by a client's adversary for providing legal services to a client, Attorney Defendants move this court to dismiss with prejudice all of Plaintiffs' claims against them.

8. Based on an overriding public policy, Texas courts have consistently held that an opposing party "does not have a right of recovery, ***under any cause of action***, against another attorney arising from the discharge of his duties in representing a party..." *See, Taco Bell Corp. v. Cracken*, 939 F.Supp. 528, 532 (N.D. Tex. 1996) (emphasis in original). Attorneys have an absolute right to "practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages." *See, Kruegel v. Murphy*, 126 S.W. 343 (Tex. Civ. App.—Dallas 1910, writ ref'd). To have any other rule or standard would "act as a severe and crippling deterrent to the ends of justice for the reason that a litigant might be denied a full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled." *See, Bradt v. West*, 892 S.W.2d 56, 71 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

9. Attorney immunity applies whether the attorney is providing his services within the context of litigation, or simply in a business transaction; the immunity extends to non-litigation conduct as well as litigation conduct. *See, Martin v. Trevino*, 578 S.W.2d 763, 771 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). As set out in *Martin*,

> [A]n attorney is exempt from liability to any party other than his client for damages resulting in the performance of service which engages and requires the office or the professional training, skill and authority of an attorney because an attorney deals at arm's length with adverse parties, and that he is not liable to such adverse parties for his actions, as an attorney on behalf o his client. The primary duty the attorney owes is to his client so long as it is compatible with his professional responsibility. If he violates this responsibility, the remedy is public, not private. ... [T]hird parties should not be able to disturb the legal advice

rendered to adverse parties by filing lawsuits for fraud and conspiracy against their adversaries' lawyers regardless of the likelihood of litigation.

10. Texas law is clear; attorneys are immune from claims like those advanced by the Plaintiffs and must remain immune in the interest of the orderly administration of the civil justice system. *See, Lewis v. Am. Exploration Co.*, 4 F.Supp.2d 673 (S.D. Tex. 1998). Given the aforementioned immunity, Plaintiffs' claims against Attorney Defendants must fail for lack of standing and therefore be dismissed.

III.
CONCLUSION AND PRAYER

11. WHEREFORE, Attorney Defendants pray that upon the hearing of this matter, Plaintiffs' claims against them be dismissed with prejudice, as Plaintiffs have no standing to pursue their claims against Attorney Defendants. Movants further pray for such other relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully Submitted,

HOPKINS & WILLIAMS, PLLC

By: M D Hop

MARK D. HOPKINS
State Bar No. 00793975
12117 Bee Caves Rd., Suite 260
Austin, Texas 78738
(512) 600-4320
(512) 600-4326 Fax

ATTORNEYS FOR STEPHEN C. PORTER, DAVID SEYBOLD, RYAN BOURGEOIS AND MATTHEW CUNNINGHAM

CERTIFICATE OF SERVICE

Pursuant to Texas Rules of Civil Procedure 21 and 21a, a true and correct copy of the foregoing has been served upon all parties as indicated below, on this the 17th day of June 2011 as follows:

Via Certified Mail: # 70110470000160423244
And Regular U.S. Mail
Alvie Campbell
Julie Campbell
250 Private Road 947
Taylor, Texas 76574

Via Facsimile: (214) 999-6170
Richard A. Illmer
John C. Pegram
Brown McCarroll, LLP
2001 Ross Avenue, Suite 2000
Dallas, Texas 75201

Mark D. Hopkins

CAUSE NO. 10-1093-C368

ALVIE CAMPBELL AND JULIE CAMPBELL	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	
	§	
v.	§	**368th JUDICIAL DISTRICT**
	§	
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR LENDER AND LENDER'S SUCCESSORS AND ASSIGNS, AND WELLS FARGO BANK, N.A., AND STEPHEN C. PORTER, AND DAVID SEYBOLD, AND RYAN BOURGEOIS, AND MATTHEW CUNNINGHAM, AND JOHN DOE 1-100	§	
Defendants.	§	**WILLIAMSON COUNTY, TEXAS**

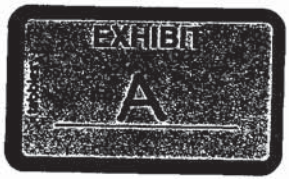
AFFIDAVIT OF STEPHEN C. PORTER

STATE OF TEXAS §
§
COUNTY OF DALLAS §

Before me, the undersigned Notary Public on this day personally appeared Stephen C. Porter, being duly sworn stated under oath, as follows:

"My name is Stephen C. Porter. I am over the age of eighteen years and competent to make this affidavit. I am an attorney licensed to practice law in the State of Texas, and I am Chief Litigation Counsel with the law firm of Barrett Daffin Frappier Turner & Engel, LLP ('BDFTE'). With respect to my work for BDFTE, I am familiar with the firm's client list, as well as the scope of work performed for the firm's clients. I am also personally familiar with BDFTE's past legal representation of Wells Fargo Bank, N.A. ('Wells Fargo') with respect to the foreclosure proceedings forming the basis of the above-styled suit.

BDFTE, its attorneys, including myself and Defendants David Seybold, Ryan Bourgeois, and its representative Matthew Cunningham, were retained by Wells Fargo as foreclosure counsel to commence foreclosure proceedings to enforce the mortgagee's lien against the Property secured by the Note; and to provide Wells Fargo with legal representation in protecting its interests against those of Alvie Campbell and Julie Campbell. To the extent BDFTE or any of its attorneys or representatives mentioned herein had any contact or communication with Alvie Campbell and Julie Campbell, that contact or communication was conducted by BDFTE solely in our capacity as counsel for Wells Fargo. At no time has BDTFE or its attorneys or representatives had contact or communication with Alvie



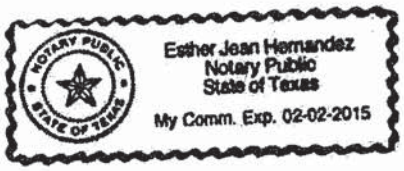
Campbell and Julie Campbell other than in the capacity as 'legal counsel for Wells Fargo in an adverse relationship with Alvie Campbell and Julie Campbell.' "

Further affiant sayeth not.

Stephen C. Porter

SWORN AND SUBSCRIBED before me this the 16th day of June 2011.

Notary Public In and For The State of Texas



CAUSE NO. 10-1093-C368

ALVIE CAMPBELL AND JULIE CAMPBELL	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	
	§	
v.	§	**368th JUDICIAL DISTRICT**
	§	
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR LENDER AND LENDER'S SUCCESSORS AND ASSIGNS, AND WELLS FARGO BANK, N.A., AND STEPHEN C. PORTER, AND DAVID SEYBOLD, AND RYAN BOURGEOIS, AND MATTHEW CUNNINGHAM, AND JOHN DOE 1-100	§	
Defendants.	§	**WILLIAMSON COUNTY, TEXAS**

NOTICE OF HEARING

Please take notice that a hearing on Defendants Stephen C. Porter, David Seybold, Ryan Bourgeois, and Matthew Cunningham's Motion to Dismiss has been scheduled for Thursday, June 23, 2011 at 9:00 a.m. in the above-referenced Court.

Respectfully Submitted,

HOPKINS & WILLIAMS, PLLC

By: M D Hopkins

MARK D. HOPKINS
State Bar No. 00793975
12117 Bee Caves Rd., Suite 260
Austin, Texas 78738
(512) 600-4320
(512) 600-4326 Fax

ATTORNEYS FOR STEPHEN C. PORTER, DAVID SEYBOLD, RYAN BOURGEOIS AND MATTHEW CUNNINGHAM

Smith et al v. National City Mortgage et al Doc. 72

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

OWEN M. SMITH AND DANA N. SMITH	§	
	§	
	§	
V.	§	**A-09-CV-881 LY**
	§	
	§	
NATIONAL CITY MORTGAGE, USA MORTGAGE D/B/A LAKEWAY MORTGAGE, BAC HOME LOANS SERVICING, L.P., BARRETT DAFFIN FRAPPIER TURNER & ENGEL, L.L.P. AND JOHN DOES 1 THROUGH 100	§	

INTERIM REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Before the Court are: Defendant Barrett Daffin Frappier Turner & Engel, LLP's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim or, in the Alternative, Rule 12(e) Motion for a More Definite Statement (Clerk's Docket No. 32); Defendant BAC Home Loans Servicing, L.P.'s 12(b)(6) Motion to Dismiss (Clerk's Docket No. 36); Defendant National City Mortgage's Amended Motion to Dismiss Amended Complaint pursuant to Rule 12(b)(6) (Clerk's Docket No. 47); Plaintiffs' Motion to Order Mortgage Interest and/or Note Fraudulent (Clerk's Docket No. 48); Defendant USA Mortgage's Motion to Strike Plaintiffs' Notice of Admitted Facts (Clerk's Docket No. 52); Defendant BAC Home Loans Servicing, L.P.'s Motion to Strike Plaintiffs' Notice of Admitted Facts and Motion for Sanctions (Clerk's Docket No. 58); Defendant Barrett Daffin Frappier Turner & Engel, LLP's Motion to Strike Plaintiffs' Notice of Admitted Facts and Motion

Dockets.Justia.com

to Strike Plaintiffs' Request for Admissions (Clerk's Docket Nos. 62 & 69); and the Parties Response and Reply Briefs.

The Magistrate Court submits this Report and Recommendation to the United States District Court pursuant to 28 U.S.C. § 636(b), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

I. GENERAL BACKGROUND

On January 28, 1998, Plaintiffs Owen and Dana Smith ("Plaintiffs") purchased a residential home located at 3 Waterfall Drive, Austin, Texas ("Property"). Plaintiffs financed the purchase of the Property by obtaining a first mortgage through National Mortgagelink, Ltd. and a second mortgage through Guaranty Federal Bank, F.S.B.[1] In January 2004, Plaintiffs refinanced the mortgages on their Property, paid off their previous mortgages and obtained a new mortgage with National City Mortgage Co. ("National City"). In December 2007, Plaintiffs again refinanced their mortgage on their Property this time by paying off their mortgage to National City and obtaining a new mortgage with Countrywide Home Loans, Inc. ("Countrywide"). In December 2008, Countrywide sold Plaintiffs' mortgage to Bank of America, N.A. Shortly thereafter, Plaintiffs stopped making payments on their mortgage to Bank of America, thereby defaulting on their home mortgage.

[1]Plaintiff did not name these entities as defendants in the case.

Accordingly, on August 19, 2009, BAC Home Loan Servicing, L.P., an operating subsidiary of Bank of America,[2] filed a home equity foreclosure proceeding against Plaintiffs, pursuant to Texas Rule of Civil Procedure 736, in the 200th Judicial District of Travis County, Texas. *See* Cause No. D-1-GN-09-002702. However, on December 8, 2009, the foreclosure proceeding was abated due to the filing of the instant lawsuit. See Tex. R. Civ. Pro. 736(10).

Plaintiffs' lawsuit alleges that National City Mortgage, Countrywide Bank, Mortgage Electronic Registration System, USA Mortgage d/b/a Lakeway Mortgage, BAC Home Loans Servicing, L.P., and John Does 1 through 100 were involved in a "predatory lending enterprise in a scheme to obtain illegal fees and profits at Plaintiffs' expense," sold counterfeit securities and attempted to evict Plaintiffs from their home "in an attempt to disguise the fraud once the fraud was discovered." Plaintiffs' Amended Complaint at p. 3. Plaintiffs' Amended Complaint alleges a plethora of claims against the Defendants including claims under the Truth in Lending Act, the Home Ownership Equity Protection Act, the Racketeering and Influenced Corrupt Organization Act, the Fair Credit Reporting Act, as well as claims for counterfeit securities, fraud, breach of contract, fair credit reporting act, unjust enrichment, and breach of good faith and fair dealing, as well as claims for injunctive relief. However, it is not clear which claims are being asserted against which defendants in the case. Plaintiffs have also named Barrett Daffin Frappier Turner & Engel, LLP, attorneys of record for Defendant BAC Home Loans Servicing, L.P., as a defendant in the case based upon the law firm's representation of Defendant BAC in the foreclosure proceeding against Plaintiffs.

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[2]In April 2009, Countrywide Financial Corporation and all of its related entities merged with Bank of America. At that time, Countrywide Home Loans Servicing L.P. changed its name to BAC Home Loans Servicing, L.P., which is an operating subsidiary of Bank of America, N.A.

Defendants contend that Plaintiffs filed this lawsuit solely in an attempt to delay the foreclosure proceeding against them. Defendants Barrett Daffin Frappier Turner & Engel, LLP's, BAC Home Loans Servicing, L.P., and National City Mortgage have all filed Motions to Dismiss which the Court will address below.[3]

II. MOTIONS TO STRIKE

In April 2010, Plaintiffs served Requests for Admission on Defendants USA Mortgage ("USAM"), BAC Home Loans Servicing, L.P. ("BAC"), and Barrett Daffin Frappier Turner & Engel, LLP ("BDFTE"). On June 3, 2010, Plaintiffs filed "Notices of Admitted Facts" asserting that the Court should take "judicial notice of those facts" pursuant to Rule 36(a)(2) since Defendants USAM, BAC and BDFTE failed to timely respond to their Requests for Admission. In response, the Defendants have each filed Motions to Strike Plaintiffs' Notices of Admitted Facts (Clerk's Docket Nos. 52, 58 and 62).

Under Federal Rule of Civil Procedure 26(d)(1), "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order." FED. R. CIV. P. 26(d)(1). It is undisputed that the parties have not yet conferred in this case as is required by Rule 26(f). Because this proceeding is not exempt under Rule 26 and the Court has not issued an expedited discovery order, it is premature for the Plaintiffs to seek discovery in this case since they have not yet had the required Rule 26(f) conference. Accordingly, Plaintiffs' Notices of Admitted Facts are premature and, therefore, Defendants' Motions to Strike (Clerk's

[3]On March 26, 2010, the District Court granted Defendants Countrywide Home Loans, Inc.'s and Mortgage Electronic Registration System, Inc.'s 12(b)(6) Motion to Dismiss. *See* Clerk's Docket No. 16.

Docket Nos. 52, 58, and 62)[4] are HEREBY GRANTED. The Clerk is ORDERED to STRIKE Plaintiffs' Notices of Admitted Facts (Clerk's Docket Nos. 49, 50 and 51) from the record in this case.

The Court FURTHER GRANTS BDFTE's Motion to Strike Plaintiffs' Second Request for Admissions (Clerk's Docket No. 69) since it is duplicative of Plaintiffs' First Request for Admissions and BDFTE already answered the Requests. Accordingly, the Clerk is ORDERED to STRIKE Plaintiffs' Second Request for Admissions from the record in this case.

III. STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must consider the allegations of a *pro se* plaintiff's complaint liberally. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Haines v. Kerner*, 404 U.S. 519, 520 (1972). However, "[p]ro se status does not give plaintiff a prerogative to file meritless claims." *Olstad v. Collier*, No. 06-50099, 2006 WL 3687108 at *1 (5th Cir. 2006) (citing *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986)). In other words, *pro se* status does not offer the plaintiff an "impenetrable shield, for one acting pro se has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." *Farguson*, 808 F.2d at 359.

In reviewing the motion, the court is to take all of the well-pleaded facts in the complaint as true, viewing them in the light most favorable to the plaintiff. *Martin K. Eby Constr. Co. v. Dallas*

[4] Because the Court agrees that the Notices should be struck from the record based on the Plaintiffs' failure to abide by the discovery rules, the Court need not address the alternative arguments in the Motions to Strike. However, the Court **DENIES** BAC's Request for Sanctions at this time.

Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004). For years, the long-standing rule had been that a court may not dismiss a case under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court articulated the standard differently, stating instead that the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," and that "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." 550 U.S. at 570 & 555. Subsequently, the Supreme Court has clarified that this new standard applies to all case, not just to antitrust cases such as *Twombly*. *See Ashcroft v. Iqbal*, – U.S. – , 129 S.Ct. 1937, 1953 (2009).

IV. ANALYSIS

A. BDFTE's Motion to Dismiss

As noted above, Plaintiffs have named Barrett Daffin Frappier Turner & Engel, LLP ("BDFTE"), attorneys of record for Defendant BAC Home Loans Servicing, L.P. ("BAC"), as a defendant in the case based upon the law firm's representation of BAC in the foreclosure proceeding against Plaintiffs. Specifically, Plaintiffs allege that BDFTE "became a party to the fraud [presumably the fraud allegedly perpetrated by Defendants in financing Plaintiffs' home] when they handled the foreclosure proceedings and knowingly failed to investigate the legitimacy of the claims, only interested in collecting fees from a foreclosure proceeding they knew or should have known to be fraudulent from its inception." Plaintiffs' Amended Complaint at ¶ 2. In defense, BDFTE emphasizes that it had no involvement in the origination and servicing of Plaintiffs' loan agreements and that its only involvement with Plaintiffs was as a law firm representing its client, BAC, in a

foreclosure proceeding. Thus, BDFTE argues that it is "qualifiedly immune" from Plaintiffs' lawsuit.

The public has an interest in "loyal, faithful and aggressive representation by the legal profession." *Bradt v. West*, 892 S.W.2d 56, 71 (Tex. App.-Houston [1st Dist.] 1994, writ denied). Thus, an attorney is charged with the duty of zealously representing his clients within the bounds of the law. *Id.* In fulfilling this duty, an attorney "has the right to interpose any defense or supposed defense and make use of any right in behalf of such client or clients as [the attorney] deem[s] proper and necessary, without making himself subject to liability in damages." *Id.* (internal quotations and citations omitted). To promote zealous representation, state and federal courts in Texas have held that an attorney has "qualified immunity" from civil liability, with respect to nonclients, for actions taken in connection with representing a client in litigation. *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.-Houston [1st Dist.] 2005, pet. denied). *See also, Taco Bell Corp. v. R.W. Cracken*, 939 F. Supp. 528, 532-33 (N.D. Tex. 1996) (finding that Texas would bar claims by one party against the opposing party's attorney); *Guthrie v. Buckley*, 2003 WL 22455394 at * 1 (5th Cir. Oct. 29, 2003) ("An attorney or an opposing party may seek sanctions for the opposition's allegedly meritless or malicious acts, 'but the law does not provide a cause of action'"). This immunity rule focuses "on the kind of conduct engaged in, not on whether the conduct was meritorious in the context of the underlying lawsuit." *Id.* at 72. Thus, a third party non-client has no right of recovery against an attorney for filing various motions in a lawsuit, regardless of whether the motions were meritless or even frivolous "because making motions is conduct an attorney engages in as part of the discharge of his duties in representing a party in a lawsuit." *Id.*

In the instant case, Plaintiffs allege that BDFTE became a party to "the fraud" when "they handled the foreclosure proceedings and knowingly failed to investigate the legitimacy of the claims." Plaintiffs' Amended Complaint at ¶ 2. Representing a mortgage company and filing a foreclosure action against homeowners who have defaulted on their loan is clearly the kind of "conduct an attorney engages in as part of the discharge of his duties in representing a party in a lawsuit." *Id. See also, Renfroe v. Jones & Assoc.,* 947 S.W.2d 285, 288 (Tex. App.– Fort Worth 1997, writ denied) (holding that plaintiff had no cause of action against attorney for his participation in filing writ of garnishment with inaccurate facts); *Graham v. Turcotte,* 628 S.W.2d 182, 184 (Tex. App.– Corpus Christi 1982, no writ) (holding that because no privity of contract existed between mortgagors and attorney of mortgagee, mortgagors could not sue attorney directly alleging that excessive attorney's fees were exacted upon foreclosure); *Berkley v. Unell*, 1995 WL 500275 (Tex. App. – Dallas 1995, writ denied) (affirming trial court's ruling that law firm owed no duty to non-client plaintiff whose property was foreclosed on). Moreover, "[l]abeling the conduct as fraudulent does not automatically make it actionable and the attorneys liable." *Dixon Financial Services, LTD v. Greenberg, Peden, Siegmyer & Oshman, P.C.,* 2008 WL 746548 at * 11 (Tex. App.– Houston [1st Dist.] March 20, 2008, pet. denied). *See also*, *McCampbell v. KPMG Peat Marwick*, 982 F. Supp. 445, 448 (N.D. Tex. 1997) (holding that plaintiff could not recover against attorney representing opposing party in previous suit based on attorney's allegedly false statements in affidavit and motion for new trial filed in that suit). Because Plaintiffs have failed to allege any facts which would overcome BDFTE's qualified immunity with regard to Plaintiffs' claims, BDFTE's Motion to Dismiss should be granted and Plaintiffs' claims against BDFTE should be dismissed from this lawsuit.

B. BAC and National City's Motions to Dismiss

Although it is not clear which claims are being asserted against which defendants in this case, Plaintiffs' Amended Complaint alleges claims under the Truth in Lending Act, the Home Ownership Equity Protection Act, the Racketeering and Influenced Corrupt Organization Act, the Fair Credit Reporting Act, as well as claims for counterfeit securities, fraud, breach of contract, unjust enrichment, breach of good faith and fair dealing and claims for injunctive relief. Defendants BAC Home Loans Servicing, L.P. ("BAC") and National City Mortgage (collectively "Defendants") have filed the instant Motions to Dismiss pursuant to Rule 12(b)(6) arguing that all of Plaintiffs' claims should be dismissed from this lawsuit. Because Plaintiffs have failed to clarify which claims are being asserted against which Defendants in the case, the Court will address each claim independently to determine whether the claim should be dismissed under Rule 12(b)(6).

1. 18 U.S.C. §§ 4 and 513

Plaintiffs' Amended Complaint alleges that "the Defendants" in this case engaged in misprision of a felony and the sale of counterfeit securities, in violation of 18 U.S.C. § 4 and § 513. However, 18 U.S.C. § 4 and 18 U.S.C. § 513 are federal criminal statutes which do not provide for a private right of action. "[A] private party may not enforce criminal statutes through a civil action." *Florence v. Buchmeyer*, 500 F. Supp.2d 618, 635 (N.D. Tex. 2007). Decisions whether to prosecute or file criminal charges are generally within the prosecutor's discretion, and, as private citizens, Plaintiffs have no standing to institute a federal criminal prosecution and no power to enforce a criminal statute. *See Gill v. Texas*, 2005 WL 2868257 at * 1 (5th Cir. Nov. 1, 2005) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *United States v. Batchelder*, 442 U.S. 114, 124 (1979); and *Hanna v. Home Ins. Co.*, 281 F.2d 298, 303 (5th Cir. 1960), *cert. denied*, 365 U.S. 838 (1961)).

Accordingly, Plaintiffs' claims under 18 U.S.C. § 4 and § 513 must be dismissed from this lawsuit because they are not legally cognizable.

2. RICO

Defendants argue that Plaintiffs' claims under the Racketeering and Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962, *et seq.*, should be dismissed because Plaintiffs have failed to state any specific factual allegations to support their claim.

Plaintiffs' Amended Complaint alleges that the Defendants "conspired to participate in the affairs of the enterprise through a pattern of racketeering activity and collection of unlawful debt in violation of 18 U.S.C. § 1962(d)" by: (1) fraudulently misrepresenting their right to collect fees from Plaintiffs; (2) fraudulently misrepresenting the true cost of Plaintiffs' loan payments and by misrepresenting the terms of the various loans; (3) fraudulently backdating documents; (4) failing to maintain for inspection the original blue ink signature of the mortgage; and (5) failing to properly record transfers of the note with the County. Plaintiffs' Amended Complaint at 11-12. Plaintiffs further contend that the Defendants used the United States mail "in furtherance of said pattern of racketeering activity and collection of unlawful debt and to otherwise defraud Plaintiffs" by obtaining credit information, receiving payments by mail and mailing collection letters. *Id.*

RICO creates a civil cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962." *Beck v. Prupis*, 529 U.S. 494, 495 (2000) (quoting 18 U.S.C. § 1964(c)). In order to state a *prima facie* claim under RICO, a plaintiff must allege that there is (1) a person who engages in (2) a pattern of racketeering activity (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 439 (5th Cir. 2000) (citing *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242

(5th Cir. 1988), 489 U.S. 1079 (1989). If the Plaintiffs fail to satisfy any one of the three prerequisites, the Court need not analyze the substantive requirements of the respective RICO subsections. *Tipton v. Northrop Grumman Corp.*, 2009 WL 3160163 at * 6 (E.D. La. Sept. 29, 2009).

As noted above, a plaintiff alleging a RICO claim must assert the existence of an enterprise. *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 748 (5th Cir. 1989). "Enterprise" is defined as including "any individual, partnership, corporation, association . . .or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Thus, a RICO enterprise can be either a legal entity or an association-in-fact enterprise. *In re Burzynski,* 989 F.2d 733, 743 (5th Cir. 1993). An "association-in-fact" enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a *continuing unit* as shown by a hierarchical or consensual decision making structure. *Delta Truck*, 855 F.2d at 243 (citing *United States v. Turkette*, 452 U.S. 576, 583 (1981)). Thus, the enterprise must not be one that briefly flourishes and fades. It must be one that, in the words of the Supreme Court, "functions as a continuing unit." *Id.* "Importantly, a plaintiff must also establish that the association exists for purposes other than simply to commit the predicate acts." *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 427 (5th Cir. 1987). In addition, a proximate causal relationship must exist between the RICO predicate acts and the plaintiff's damages. *Old Time Enterprises, Inc. v. Int'l Coffee Corp.*, 862 F.2d 1213, 1218 (5th Cir. 1989). If the defendant is a legal entity, the plaintiffs must do more than merely establish that the corporation, through its agents, committed the predicate acts in the conduct of its own business. *Id.* at 1217. The fact that officers or employees of a corporation, in the course of their employment, associate to commit predicate acts

does not establish an association-in-fact enterprise distinct from the corporation. *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). Finally, a plaintiff must plead specific facts, not merely conclusory allegations, which establish the existence of an enterprise. *Montesano,* 818 F.2d at 427.

Plaintiffs' Amended Complaint alleges that "Defendants are entities capable of holding a legal or beneficial interest in property and as such are enterprises as defined by 18 U.S.C. § 1961(4)." Amended Complaint at ¶ 26. Plaintiffs have failed to plead specific facts showing that Defendants were an association-in-fact enterprise under RICO. Specifically, Plaintiffs fail to allege that Defendants functioned as a "continuing unit over time through a hierarchical or consensual decision-making structure." *Elliott*, 867 F.2d at 881. *See also, Delta Truck*, 855 F.2d at 244 (holding that plaintiff failed to state a RICO claim "because the pleadings do not assert that the corporate defendants posed a continuous threat as RICO persons"). Plaintiffs have also failed to allege that the alleged association exists for purposes "other than simply to commit the predicate acts." *Montesano*, 818 F.2d at 427. Plaintiffs have also failed to allege sufficient facts showing the requisite nexus between the RICO claim and the alleged damages. *See Old Time Enterprises*, 862 F.2d at 1219 (finding that district court properly dismissed complaint where plaintiff failed to allege facts showing the nexus between the claimed RICO violations and plaintiff's claimed damages). Based upon the foregoing, Plaintiffs have failed to allege an association-in-fact enterprise as to any of the Defendants in the case. Because the existence of an enterprise "is an essential element of a RICO claim under 18 U.S.C. § 1962(c)," Plaintiffs' RICO claims should be dismissed. *Montesano*, 818 F.2d at 426.

3. TILA and HOEPA

Plaintiffs' Amended Complaint also asserts claims under the Truth In Lending Act ("TILA"),15 U.S.C. § 1601, *et seq.,* and the Home Ownership Equity Protection Act ("HOEPA"), 15 U.S.C. § 1639. The TILA "has the broad purpose of promoting 'the informed use of credit' by assuring 'meaningful disclosure of credit terms' to consumers." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-60 (1980) (citing 15 U.S.C. § 1601). TILA requires creditors to disclose to borrowers the terms and conditions of the loan such as the amount financed, the finance charges, the number of payments scheduled to repay the loan, as well as the borrower's right to rescind the loan. 15 U.S.C. §§ 1635(a) & 1638(a); *Castrillo v. American Home Mortgage Servicing, Inc.*, 670 F. Supp.2d 516, 527 (E.D. La. 2009). Plaintiffs assert two different claims under the TILA. First, Plaintiffs assert a rescission claim based on the allegation that "the Defendants" failed to disclose to the Plaintiffs that they had a right to rescind the mortgage loan, in violation of 15 U.S.C. § 1635(a). Second, Plaintiffs assert a damages claim based on the Defendants' alleged failure to fully disclose the amount financed, the finance charges, the total amount of payments required, the number, amount and due dates of the payments and that a security interest was taken in the subject property, as is required by 15 U.S.C. § 1638(a).

Congress passed the HOEPA as an amendment to TILA in order to heighten the disclosure requirements for certain types of loans made at higher interest rates or with excessive costs or fees. 15 U .S.C. 1602(aa)(1); *In re Community Bank of N. Va.*, 418 F.3d 277, 304 (3d Cir. 2005). Plaintiffs allege that the Defendants violated HOEPA by failing to provide Plaintiffs with the additional disclosures referenced in § 1639(a)(1). Plaintiffs seek monetary damages under § 1640 and assert a statutory right to rescind the loan transaction under § 1640. Because the applicability

of the various provisions of the TILA and HOEPA differ with regard to each Defendant in this case, the Court will address Plaintiffs' claims separately with regard to each of the Defendants.

a. Claims against National City

The only loan transaction between Plaintiffs and National City which would have triggered the notice and disclosure requirements under the TILA and HOEPA occurred in January 2004, when Plaintiffs refinanced their mortgage and obtained a new mortgage from National City. *See* Amended Complaint at ¶ 21.

The TILA contains a one year statute of limitations for damages claims[5] and a three year statute of limitations for rescission claims.[6] Thus, Plaintiffs were required to file their damages claims against National City by January 2005, and any rescission claim by January 2007. Plaintiffs have not demonstrated that they are entitled to have the statute of limitations tolled in this case under the doctrine of equitable tolling. *See Bitte v. EMC Mortgage Corp.*, 2009 WL 1950911 at * 2 (E.D. La. July 1, 2009) (holding that statute of limitations barred Plaintiff's TILA claims where plaintiffs had at least five years to uncover any alleged violations of TILA). Because Plaintiffs did not file their claims against National City until December 2009, their claims under the TILA and HOEPA are time-barred. *See Lynch,* 588 F. Supp.2d at 1259 (holding that TILA damages claim was time barred where lawsuit was filed more than one year after the loan documents were signed).

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[5]See 15 U.S.C. § 1640(e)("any action under this section may be brought in any United States district court . . .within one year from the date of the occurrence of the violation"*).* "The date of the violation refers to the date 'the loan documents were signed." *Lynch v. RKS Mortgage Inc.,* 588 F. Supp.2d 1254, 1259 (E.D. Ca. 2008) (quoting *Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 902 (9th Cir. 2003)).

[6]See 15 U.S.C. § 1635(f) (The right of rescission pursuant to TILA "shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first. . .").

Plaintiffs' HOEPA claims against National City are also time-barred since claims under the HOEPA are subject to the TILA's statute of limitations. *See Lechner v. Citimortgage, Inc.*, 2009 WL 2356142 at * 4 (N.D. Tex. 2009). Accordingly, Plaintiffs' rescission and damages claims under the TILA and HOEPA against National City are time barred and must be dismissed.

b. Claims against BAC

The only loan transaction between Plaintiffs and BAC which would have triggered the notice and disclosure requirements under the TILA and HOEPA occurred in December 2007, when Plaintiffs negotiated with Countrywide Home Loans, Inc.[7] to refinance their mortgage. *See* Plaintiffs' Amended Complaint at ¶ 22. As previously noted, Countrywide Home Loans Servicing, L.P. changed its name to BAC Home Loans Servicing, L.P. in 2009.

As discussed above, the TILA contains a one year statute of limitations for damages claims and a three year statute of limitations for rescission claims. 15 U.S.C. § 1640(e) and § 1635(f). While Plaintiffs' rescission claim against BAC is timely since it was filed within the three year statute of limitations, Plaintiffs were required to file any damages claim against BAC by December 2008. Because Plaintiffs did not file this lawsuit until December 2009, their damages claim under § 1638(a) against BAC is time-barred and must be dismissed.

Although Plaintiffs' rescission claim against BAC is not time barred, BAC argues that it should nevertheless be dismissed because "residential mortgage transactions are specifically excluded from the consumer's right to rescind." Motion to Dismiss at p. 7. While BAC is correct

[7]BAC does not dispute that Plaintiffs' TILA and HOEPA claims against it arise from the 2007 refinancing transaction with Countrywide. See BAC's Motion to Dismiss at p. 7.

that the statute excludes certain residential mortgage transactions from the consumer's right to rescind, those exclusions are more narrowly drawn than BAC implies.

The TILA defines a "residential mortgage transaction" as "a transaction in which a mortgage . . . is created or retained against the consumer's dwelling to finance *the acquisition or initial construction* of such dwelling." 15 U.S.C. § 1602(w) (emphasis added). Thus, the TILA does not provide for a right to rescind with respect to the *original* loan transaction. The statute also excludes the right to rescind a loan transaction involving a *refinancing* by the *same* creditor. *See* 15 U.S.C. § 1635(e)(2); 12 C.F.R. § 226.23(f)(2) ("The right to rescind does not apply to. . .[a] refinancing. . .by the same creditor..."). However, the statute does not exclude a right to rescind with respect to a refinancing of a residential mortgage by *a different creditor* or with respect to a variable-rate adjustment to a residential mortgage. *See* 12 C.F.R. § 226.23(f)(2); *see also*, *Castrillo,* 670 F. Supp.2d at 527 (citing Official Staff Interpretation, Supp. I to 12 C.F.R. § 226.20(f), ¶ 4 ("The exemption in § 226.23(f)(2) applies only to refinancings. . .by the original creditor.")). Because Plaintiffs' claims against BAC stem from the *refinancing* of their mortgage with Countrywide in 2007 – which was not Plaintiffs' *original creditor* – the exclusion contained in §1635(e)(1) does not apply to Plaintiffs' rescission claim against BAC. *See Frazile v. EMC Mortgage Corp.*, 2010 WL 2331429 at * 3 (11th Cir. June 11, 2010) (holding that §1635(e)(1) exemption did not apply to plaintiff's rescission claim where transaction at issue was a refinancing for the mortgage); *Zuniga v. HSBC Mortgage Corp.*, 2010 WL 292723 at * 2 (N.D. Cal. Jan. 19, 2010) (finding that TILA residential home exemption did not apply to right to rescind where mortgage at issue was a refinancing of an existing mortgage). Accordingly, BAC's exclusion argument is misplaced.

While Plaintiffs' rescission claim is not precluded under §1635(e)(1), it must nevertheless be dismissed because Plaintiffs have failed to allege sufficient facts to show that their loan agreement with BAC was subject to TILA's rescission provisions. For a refinancing with a *different creditor* to give rise to a right of rescission, the existing obligation must be "satisfied and replaced by a new obligation." 12 C.F.R. § 226.20(a). The "new obligation must completely replace the prior one." Official Staff Interpretation, Supp. I to 12 C.F.R. § 226.20(a), ¶ 1. "Thus, mere changes to the terms of an existing obligation do not give rise to a right of rescission unless accomplished by the cancellation of that obligation and the substitution of a new obligation." *Castrillo,* 670 F. Supp.2d at 527. Plaintiffs have failed to allege any facts showing that their refinancing with BAC satisfied their existing obligation and was replaced by a new obligation. *See Id.* (holding that plaintiff's rescission claim failed to allege sufficient fact s to show that the agreement was subject to the TILA rescission provisions); *Sheppard v. GMAC Mortgage Corp.*, 299 B.R. 753, 762 (E.D. Pa. 2003) (dismissing plaintiffs' rescission claim where they failed to show that the loan modification satisfied the original loan). Accordingly, Plaintiffs have failed to state a claim for rescission under § 1635(a) of the TILA against BAC.

The Court also finds that Plaintiffs' HOEPA claim against BAC should also be dismissed. In order to be subject to the protections afforded by HOEPA, a plaintiff must demonstrate that either the annual percentage rate of the loan at consummation exceeded by more than 10 percent the applicable yield on treasury securities, or the total points and fees payable by the consumer at or before closing was greater than 8 percent of the total loan amount, or $400.00. 15 U.S.C. § 1602(aa)(1) & (3); 12 C.F.R. § 226.32(a)(1); *Lynch,* 588 F. Supp.2d at 1260. Plaintiffs' Amended Complaint does not allege any particular facts showing that the percentage threshold for HOEPA

protection was actually crossed in this case. "That failure alone subjects the claim to dismissal." *Lynch,* 588 F. Supp.2d at 1260. *See also*, *Marks v. Chicoine*, 2007 WL 160992 at *8 (N.D. Cal. 2007) (court dismissed claim for violation of HOEPA where plaintiff failed to allege facts that would support a conclusion that HOEPA applied to the loan at issue); *Justice v. Countrywide Home Loans, Inc.*, 2006 WL 141746 at *2 (E.D. Tenn. 2006) (where complaint alleged that excessive fees were charged in violation of HOEPA but failed to specify such fees, dismissal was appropriate, since "the bare incantation of statutory terms, without corresponding allegations to support recovery, does not state a claim."). Accordingly, Plaintiffs have failed to demonstrate that they are subject to the terms of HOEPA and thus their HOEPA claim against BAC must therefore be dismissed.

4. Fraud

Plaintiffs allege that the Defendants falsely represented to Plaintiffs that "[P]laintiffs would obtain the loan as previously and verbally discussed prior to the underwriting process." Amended Complaint at ¶ 48. To establish fraud under Texas law, Plaintiffs must show: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009).

In addition, Federal Rule of Civil Procedure 9(b) imposes a heightened pleading requirement on plaintiffs alleging fraud. Under Rule 9(b), the claim must "state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). Courts interpret Rule 9(b) strictly, requiring a plaintiff pleading fraud to specify the statements contended to be fraudulent, identify the

speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 339 (5th Cir. 2008) (quoting *Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 564-65 (5th Cir. 2002)). Thus, Rule 9(b) requires that plaintiffs plead enough facts to illustrate "the 'who, what, when, where, and how' of the alleged fraud." *Williams v. Bell Helicopter Textron, Inc*., 417 F.3d 450, 453 (5th Cir. 2005) (quoting *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997)). "[G]eneral allegations, which do not state with particularity what representations each defendant made, do not meet this requirement." *Unimobil 84, Inc. v. Spurney*, 797 F.2d 214, 217 (5th Cir. 1986).

In their bare-bones fraud allegation, Plaintiffs merely allege that Defendants falsely represented to Plaintiffs that they would obtain "the loan" as previously discussed and that their FICA score was strong enough to qualify for a lower interest rate "regardless of the down payment." Amended Complaint at ¶ 48-49. Plaintiffs fail to specifically identify any person, place time or specific statement maybe by either National City or BAC that was false. Accordingly, Plaintiffs have failed to plead sufficient facts to illustrate the "who, what, when, where, and how" of the alleged fraud committed by the Defendants. *See Grant-Brooks v. WMC Mortgage Corp.*, 2003 WL 23119157 at * 5 (N.D. Tex. Dec. 9, 2003) (dismissing fraud claim where Plaintiff "failed to identify which 'Defendant' perpetrated a fraud against her with respect to the loan agreement she entered into."); *Askanase v. Fatjo*, 148 F.R.D. 570, 574 (S.D. Tex.1993) ("The allegations should allege the nature of the fraud, some details, a brief sketch of how the fraudulent scheme operated, when and where it occurred, and the participants."). Accordingly, Plaintiffs' fraud claims should be dismissed.

Plaintiffs' fraud claim against National City also appears to be barred by the four-year statute of limitations contained in Tex. Civ. Prac. & Rem Code 16.004(a)(4). See *Gibson v. Houston Launch Pad*, 2010 WL 1923364 at * 2 (5th Cir. May 26, 2010) ("In Texas, common law fraud claims are subject to a four-year statute of limitations."). Because Plaintiffs did not assert their fraud claim against National City until December 2009 – five years after the alleged fraud took place – their claim is also time-barred under §16.004(a)(4).

5. Breach of Contract

Although the heightened pleading requirements of Rule 9(b) do not apply to Plaintiffs' breach of contract claims, the Court nevertheless finds that Plaintiffs have failed to plead sufficient facts to state a breach of contract claim under Texas law that is plausible on its face as required by Rule 8(a) of the Federal Rules of Civil Procedure. *Twombly*, 550 U.S. at 570.

Under Texas law, the essential elements of a breach of contract action are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach. *Smith Int'l, Inc. v. Egle Group, LLC*, 490 F.3d 380, 387 (5th Cir. 2007) (quoting *Valero Mktg. & Supply Co. v. Kalama Int'l, L.L.C.*, 51 S.W.3d 345, 351 (Tex. App.– Houston [1st Dist.] 2001, no pet.)). With regard to their breach of contract claim, Plaintiffs' allege that the Defendants entered into the loan transactions with "no intention of performing, in particular but not limited to the promise to obtain a loan that did not include a three year pre payment penalty." Amended Complaint at ¶ 52. Plaintiffs further allege that "[a]s a result of Defendants' negligence in failing to do good faith dealings, failing to give proper disclosure as outlined herein, and causing the home to go into foreclosure, Defendants have breached the contract." *Id.* Plaintiffs once again fail to specify which

defendant they are asserting their claim against. See *Powell v. Residential Mortg. Capital*, 2010 WL 2133011 at * 7 (N.D. Cal. May 24, 2010) (finding that plaintiff failed to allege breach of contract claim against lender where plaintiff failed "to specify with which Defendant he contracted and to which obligation the agreement pertains."). In addition, Plaintiffs do not specify what provision or for that matter what contract was allegedly breached. Plaintiffs fail to specify where"the promise to obtain a loan that did not include a three year pre payment penalty" was memorialized in the loan documents. *See Mae v. U.S. Property Solutions,* 2009 WL 1172711 (S.D. Tex. April 28, 2009) (dismissing breach of contract claim where property owner failed to assert which provision of the loan was allegedly breached); *L.L.C., Powell v. Residential Mortg. Capital*, 2010 WL 2133011 at * 7 (N.D. Cal. May 24, 2010) (holding that plaintiff's allegation that "Defendants promised to provide Plaintiff with an affordable loan" was vague, did not allege where such a promise was memorialized or what consideration was given for such a promise, and thus failed to show the existence of a contract). Moreover, Plaintiffs have conceded in their Amended Complaint that they have stopped making payments on their loan. "It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance." *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004).

Because Plaintiffs have merely made conclusory allegations that "Defendants have breached the contract" without providing the Court with anything more specific to support their claims, Plaintiffs have failed to allege sufficient facts to withstand a right to relief for breach of contract "above the speculative level." *Flynn v. CIT Group*, 2008 WL 4375928 at * 2 (5th Cir. Sept. 26, 2008); *see also*, *Lehman Bros. Holdings, Inc. v. Cornerstone Mortgage Co.*, 2009 WL 2900740 at

*5 (S.D. Tex. Aug. 31, 2009) (holding that the defendant's counterclaim alleging that "Plaintiff breached the contract" failed to meet Rule 8(a) standards since the "bare-bones allegation neither provides fair notice of the claim nor of the grounds on which it rests").

Plaintiffs' breach of contract claim against National City is also barred by the four-year statute of limitations contained in Tex. Civ. Prac. & Rem Code §16.004(a)(3) and § 16.051. *See Smith Intern., Inc. v. Egle Group*, LLC, 490 F.3d 380, 386 (5th Cir. 2007) ("Under Texas law, indemnity and breach of contract claims are subject to a four-year statute of limitations") (citing *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 206, 210-11 (Tex. 1999)). Because Plaintiffs did not assert their breach of contract claim against National City until December 2009, it is time barred.

6. Breach of Good Faith and Fair Dealing

Next, Plaintiffs allege that the Defendants breached their duty to act in good faith and deal fairly "in executing their obligations under the Note, Mortgage, and Deed of Trust at issue in this litigation." Amended Complaint at ¶ 58-59. Plaintiffs' claim is precluded under Texas law.

The Texas Supreme Court has consistently held "that a duty of good faith is not imposed in every contract but only in *special relationships* marked by shared trust or an imbalance in bargaining power." *Federal Deposit Ins. Corp. v. Coleman*, 795 S.W.2d 706, 708-09 (Tex. 1990) (emphasis added). Regarding Plaintiffs' claim, Texas courts have held that the "special relationship" necessary to create a common-law duty to act in good faith does not apply to the relationship of mortgagor-mortgagee, *Lovell v. Western National Life Insurance Co.*, 754 S.W.2d 298, 303 (Tex. App.–Amarillo 1988, writ denied), creditor-guarantor, *Coleman*, 795 S.W.2d at 709, or lender-borrower, *Nance v. Resolution Trust Corp.*, 803 S.W.2d 323, 333 (Tex. App.– San Antonio

1990, writ denied). See also, *F.D.I.C. v. Myers*, 955 F.2d 348, 350 (5th Cir. 1992) (holding that trustee owed neither fiduciary duty nor duty of good faith and fair dealing to mortgagor under Texas law); *Hinton v. Federal Nat. Mortg. Ass'n*, 945 F. Supp. 1052 (S.D. Tex. 1996) (holding same). Plaintiffs have failed to even assert a special relationship with any of the Defendants that would give rise to the duty of good faith and fair dealing. Based upon the foregoing, Plaintiffs' breach of good faith and fair dealing claim must be dismissed.

7. Predatory Lending

Plaintiffs allege that the Defendants "engaged in predatory lending" by failing "to put the actual agreement with plaintiffs in one concise true document without inconsistencies, altered signatures, missing signatures and initials in violation of the state and federal Constitutions." Amended Complaint at ¶ 54. Once again, Plaintiffs' "predatory lending" claim fails to comply with even the liberal pleading standards of the Federal Rules of Civil Procedure. Plaintiffs fail to specify which constitutional provision or statute Defendants have violated by their alleged predatory lending. *See Hambrick v. Bear Stearns Residential Mortg.*, 2008 WL 5132047 at * 2 (N.D. Miss. Dec. 5, 2008) (dismissing predatory lending claim where "plaintiffs have not cited any Mississippi or applicable federal law, precedential or statutory, creating a cause of action for 'predatory lending'"). Moreover, Plaintiffs conclusory allegations fail to allege sufficient facts to support their claim for "predatory lending." *See Franklin v. GMAC Mortg.*, 2010 WL 1063378 at * 2 (N.D. Tex. March 21, 2010) (dismissing *pro se* complaint under Rule 12(b)(6) where plaintiff's allegation that defendants "in an arbitrary and capricious way" denied him "the opportunity to own and refinance his home because of predatory lending policies" failed to allege any facts to support his claim). Accordingly, Plaintiffs' predatory lending claim must be dismissed pursuant to Rule 12(b)(6).

8. Wrongful Foreclosure and Request for Injunction

Plaintiffs allege that their property has been "wrongfully set for foreclosure by Defendants without giving appropriate notice to the Plaintiffs" and seek compensatory and punitive damages for the wrongful foreclosure. Amended Complaint at ¶ 56. Defendants argue that Plaintiffs' claim for wrongful foreclosure must be dismissed because Plaintiffs are still in possession of the Property.

The elements of a wrongful foreclosure claim under Texas law are: (1) a defect in the foreclosure sale proceedings;[8] (2) a grossly inadequate selling price; and (3) a causal connection between the defect and the grossly inadequate selling price. *Sauceda v. GMAC Mortg. Corp.,* 268 S.W.3d 135, 139 (Tex. App.– Corpus Christi 2008, no pet.) (citing *Charter Nat'l Bank-Houston v. Stevens*, 781 S.W.2d 368, 371 (Tex. App.– Houston [14th Dist.] 1989, writ denied)). *See also*, *Rodriguez v. Ocwen Loan Servicing, Inc.*, 2008 WL 239652 at * 2 (S.D. Tex. Jan. 29, 2008) ("Under Texas law, wrongful foreclosure occurs when a foreclosure sale is improperly conducted and results in recovery of an inadequate price for the foreclosed property"). The party seeking relief must also show that the party suffered harm as a result of the wrongful disclosure. *Baker v. Countrywide Home Loans, Inc.*, 2009 WL 1810336 at * 4 (N.D. Tex. June 24, 2009).

Plaintiffs have failed to allege the essential elements for a wrongful foreclosure claim under Texas law. *See Overton v. JPMC Chase Bank*, 2010 WL 1141417 at * 2 (S.D. Tex. March 20, 2010) (dismissing wrongful foreclosure claim where plaintiff failed to plead any facts supporting the required elements for the claim). First, Plaintiffs cannot show that there was a "grossly inadequate selling price" because their was no sale of their house since the foreclosure proceedings were

[8]Texas Property Code § 51.002 establishes certain requirements governing foreclosure sales.

dismissed when Plaintiffs filed this lawsuit, pursuant to Tex. R. Civ. P. 736(10). Secondly, Plaintiffs cannot show that they suffered any damages for the alleged wrongful disclosure since they are still in *possession* of their house. As the Northern District of Texas explained recently:

> In a wrongful foreclosure suit the measure of damages is the difference between the value of the property in question at the date of the foreclosure and the remaining balance due on the indebtedness. This measure of damages is based upon a tort theory of recovery to compensate the aggrieved for his lost possession of the property. Because recovery is premised upon one's lack of possession of real property, individuals never losing possession of the property cannot recover on a theory of wrongful foreclosure. As such, courts in Texas do not recognize an action for *attempted* wrongful foreclosure.

Baker, 2009 WL 1810336 at * 4 (internal citations and quotations omitted) (emphasis added). Because Plaintiffs have not lost possession of their home, "they seek damages for an *attempted* wrongful disclosure—an action not recognized in Texas." *Id.* Accordingly, Plaintiffs' wrongful foreclosure claim must be dismissed as well as their request for injunctive relief based on this claim.

9. Fair Credit Reporting Act

Plaintiffs allege that the Defendants as "providers of information" violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681s-2, by "report[ing] negative marks against Plaintiffs" to unidentified credit reporting agencies. Amended Complaint at ¶ 62. Before addressing the merits of Plaintiffs' claim, the Court will first address whether the FCRA provides for a private right of action to enforce its provisions.

The FCRA governs the distribution of credit reports and "was crafted to protect an individual from inaccurate or arbitrary information . . . in a consumer report and to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner." *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 883 (5th Cir. 1989) (internal

quotations and citations omitted). *See also*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007) ("Congress enacted the FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy"). While the FCRA primarily regulates consumer credit reporting agencies, the statute also creates various obligations on "furnishers of information" to provide accurate information to consumer credit reporting agencies. *Davis v. World Financial Network Nat. Bank*, 2009 WL 4059202 at * 2 (N.D. Tex. Nov. 20, 2009). While the FCRA does not explicitly define "furnisher of information," courts have defined the term broadly to mean "an entity which transmits information concerning a particular debt owed by a consumer to a consumer reporting agency." *Alam v. Sky Recovery Services, Ltd.*, 2009 WL 693170 at * 4 (S.D. Tex. 2009) (quoting *Thomasson v. Bank One*, 137 F. Supp.2d 721, 722 (E.D. La. 2001)). Thus, the Defendants could be considered "furnishers of information" under the Act.

Under § 1681s-2(a), furnishers of information may not knowingly provide inaccurate information to consumer reporting agencies. 15 U.S.C. § 1681s-2(a). However, there is no private cause of action under § 1681s-2(a). See *Davis v. Sallie Mae, Inc.*, 2009 WL 2525303 (N.D. Tex. Aug. 18, 2009) (holding that there is no private right of action under section 1681s-2(a)) (quoting *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1059-60 (9th Cir. 2002)). Thus, to the extent that Plaintiffs are alleging a claim for a violation of § 1681s-2(a), such a claim fails. However, Plaintiffs may pursue a private cause of action under § 1681s-2*(b)* of the FCRA, which details the duties of furnishers of information once they have been notified of a dispute with regard to the accuracy of information provided to a consumer reporting agency.

In *Young v. Equifax Credit Info. Services*, 294 F.3d 631, 639 (5th Cir. 2002), the Fifth Circuit declined to address whether a private right of action exists under §1681s-2(b), but nevertheless noted

that the "plain language of FCRA . . . appears to impose civil liability on 'any person' violating a FCRA duty unless some exception applies." While the Fifth Circuit has not ruled on the issue, numerous district courts within this circuit, as well as other circuit courts, have held that there is a private right of action for individuals asserting violations of §1681s-2(b).[9] Thus, Plaintiffs have a right to bring a private right of action under § 1681s-2(b) of FCRA. Plaintiffs' Complaint, however, fails to state a claim for relief against the Defendants under this subdivision.

Pursuant to § 1681i of FCRA, if a consumer disputes the accuracy of any information contained in the consumer's credit report, the consumer must notify the consumer reporting agency of the dispute. 15 U.S.C. § 1681i(a)(1).[10] Once notified, the consumer reporting agency is required to conduct a "reinvestigation" within 30 days of being notified to determine whether the disputed information is inaccurate. *Id.* In addition, the agency must notify the *furnisher* of the information being disputed of the dispute within five business days of being notified by the consumer. 15 U.S.C. § 1681i(a)(2). Once the furnisher of information is notified of the dispute pursuant to § 1681i(a)(2), the furnisher must conduct its own investigation with respect to the disputed information, correct any

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[9]*See e.g., Nelson*, 282 F.3d at 1059-60 (holding that § 1681s-2(b) creates a cause of action for a consumer against a furnisher of credit information). *See also, Chiang v. Verizon New England Inc.*, 595 F.3d 26, 36 (1st Cir. 2010) ("We join the vast majority of courts to have considered this issue in holding that a plain reading of the FCRA's text indicates that a private cause of action exists for individuals seeking remedies for furnishers' violations of § 1681s-2(b)"); *Saunders v. Branch Banking And Trust Co. of VA*, 526 F.3d 142, 149 (4th Cir. 2008) (finding that consumers can still bring private suits for violations of § 1681s-2(b)); *Davis*, 2009 WL 2525303 at * 4 (same); *Davis v. Farm Bureau Bank, FSB*, 2008 WL 1924247 at * 3 n. 5 (W.D. Tex. April 30, 2008) (same); *Carlson v. Trans Union LLC*, 259 F. Supp.2d 517, 519-20 (N.D. Tex. 2003) (same); *Mendoza v. Experian Info. Solutions, Inc*., 2003 WL 2005832 at * 4 (S.D. Tex. March 25, 2003) (same).

[10]To establish a claim for a violation of 1681i (which Plaintiffs have not alleged in this case), the consumer must show that he or she *notified* the consumer reporting agency directly of a dispute within the relevant time for the case under the statute of limitations. *Reeves v. Equifax Information Services, LLC*, 2010 WL 2036661 at * 12 (S.D. Miss. May 20, 2010).

inaccurate information and notify the consumer reporting agency of the results of the investigation. 15 U.S.C. § 1681s-2(b).

Thus, in order to maintain a private right of action against the Defendants under § 1681s-2(b), Plaintiffs must demonstrate that: (1) they notified a consumer reporting agency of inaccurate information; (2) the consumer reporting agency *notified the Defendants* of the dispute; (3) the Defendants failed to conduct an investigation, correct any inaccuracies and failed to notify the consumer reporting agency of the results of the investigation. See *Id.* Instead of alleging sufficient facts to show that Plaintiffs complied with the above-statutory requirements to bring a claim under § 1681s-2, Plaintiffs' Amended Complaint simply alleges that the Defendants, as "providers of information," violated § 1681s-2 by "report[ing] negative marks against Plaintiffs." Plaintiffs fail to allege who made the "negative marks" and fail to allege that the negative marks were actually *inaccurate*. Moreover, Plaintiffs fail to allege that they ever notified a consumer reporting agency of a dispute with their credit report and, most importantly, that the Defendants were ever notified of said dispute. "Such notice is necessary to trigger the furnisher's duties under Section 1681s-2(b)." *Young*, 294 F.3d at 639. As the Fifth Circuit declared in *Young*, "any private right of action [Plaintiffs] may have under § 1681s-2(b) would require proof that a consumer reporting agency . . . had notified [Defendant] pursuant to § 1681i(a)(2). 294 F.3d at 639. Because Plaintiffs' Amended Complaint fails to allege that the Defendants were ever notified of any inaccurate information contained in Plaintiffs' consumer credit report and failed to correct any alleged errors, Plaintiffs fail to state a viable claim under § 1681s-2(b). *See e.g., Young*, 294 F.3d at 639 (holding that defendant could not be held liable for violation of FCRA where plaintiff failed to show that store had received notice of a dispute from a consumer reporting agency); *Davis*, 2009 WL 2525303 at * 4 (dismissing

FCRA claim for failure to state a claim where plaintiff failed to allege any facts showing that Sallie Mae was ever notified of any allegedly erroneous information).

10. Unjust Enrichment

Plaintiffs contend that they had "an implied contract" with the Defendants "to insure that Plaintiffs understood all fees to be paid to all parties herein to obtain credit on their behalf and not charge any fees that were not related to the settlement of the alleged loan entered into, and with full disclosure to Plaintiffs." Amended Complaint at ¶ 64.

In Texas, a plaintiff may recover under an unjust enrichment theory where a person has "obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). Unjust enrichment is a quasi-contractual claim that is based on *the absence* of an express agreement. *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000); *First Union Nat'l Bank v. Richmont Cap. Partners I, L.P.*, 168 S.W.3d 917, 931 (Tex. App.-Dallas 2005, no pet.). "Generally, when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory because parties should be bound by their express agreements*." Id*. (citing *Fortune*, 52 S.W.3d at 683). Moreover, whether a plaintiff has a meritorious claim for breach of contract does not govern whether that remedy precludes a claim for unjust enrichment; rather, "the mere existence of potential contract claim bars the unjust enrichment remedy." *In re Myles*, 395 B. R. 599, 605 (Bkrtcy. M.D. La. 2008).

Because Plaintiffs' allegations are governed by the loan agreements between Plaintiffs and Defendants at issue in this case, their unjust enrichment claims must be dismissed. See *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004) (holding that farmers failed to state claim for unjust

enrichment under Arkansas law against bank and agri-business, where farmers had a written contract with bank and agri-business for property and for poultry production businesses); *In re Myles*, 395 B. R. 599 at 605 (dismissing plaintiffs' unjust enrichment claim that defendant improperly handled plaintiffs' mortgage payments where claim was covered by the plaintiffs' breach of contract claims). Accordingly, Defendants' Motions to Dismiss should be granted with regard to Plaintiffs' unjust enrichment claim.

Based upon the foregoing, the Court finds that Defendants' Motions to Dismiss should be GRANTED and all of Plaintiffs' claims against these Defendants should be dismissed.

C. John Doe Defendants

In addition to naming the above-Defendants, Plaintiffs' Amended Complaint also names "John Does 1 through 100." Amended Complaint at ¶ 11. The Federal Rules of Civil Procedure "do not provide any authority for the joining of fictitious defendants." *Taylor v. Federal Home Loan Bank Bd.*, 661 F. Supp. 1341, 1350 (N.D. Tex. 1986). Federal Rule of Civil Procedure 10(a) provides in relevant part: "Caption; Names of Parties. Every pleading must have a caption . . . . The title of the complaint must name all of the parties." FED. R. CIV. P. 10(a). "Plaintiffs, even those proceeding *in forma pauperis*, have a duty to provide information sufficient to identify the defendants." *King v. Forest*, 2008 WL 4951049 (N.D. Tex. Nov. 14, 2008). The Court finds that Plaintiffs have failed to provide the Court with sufficient facts to show that it has jurisdiction over the "John Does 1 through 100" and thus they should be dismissed from this lawsuit. *See Id.* (finding that unidentified defendants must be dismissed because courts lack personal jurisdiction over such defendants).

Plaintiffs' claims against the John Doe defendants should also be dismissed for the same reasons discussed above in reference to the identified Defendants in this case. Since Plaintiffs' claims against the identified Defendants have been found to be without merit, it is clear that the claims against the John Doe defendants also fail.

D. Conclusion

Based upon the foregoing, the Court finds that Plaintiffs have failed to allege "enough facts to state a claim to relief that is plausible on its face" against any of the Defendants in this case. Because Plaintiffs have already been given one opportunity to amend their complaint, the Court can see no reason to afford them yet another bite at the apple. *See Goldstein v. MCI WorldCom*, 340 F.3d 238, 254-55 (5th Cir. 2003). Accordingly, the Court RECOMMENDS that the District Court GRANT the Defendants' Motions to Dismiss.[11]

V. RECOMMENDATION

The Magistrate Judge **HEREBY RECOMMENDS** that the District Court **GRANT** Defendant Barrett Daffin Frappier Turner & Engel, LLP's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim (Clerk's Docket No. 32), Defendant BAC Home Loans Servicing, L.P.'s 12(b)(6) Motion to Dismiss (Clerk's Docket No. 36) and Defendant National City Mortgage's Amended Motion to Dismiss Amended Complaint pursuant to Rule 12(b)(6) (Clerk's Docket No. 47). The Magistrate **FURTHER RECOMMENDS** that the District Court **DISMISS** Defendants

[11]Defendant USA Mortgage d/b/a Lakeway Mortgage has not filed a Motion to Dismiss in this case and, thus, if this Report & Recommendation is accepted by the District Court, USA Mortgage d/b/a Lakeway Mortgage will be the only remaining defendant in this case.

John Does 1 through 100 for lack of personal jurisdiction unless the Plaintiffs properly identify the John Doe Defendants before the District Court accepts this Report & Recommendation.

VI. WARNINGS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from *de novo* review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 472-74 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc). To the extent that a party has not been served by the Clerk with this Report & Recommendation electronically pursuant to the CM/ECF procedures of this District, the Clerk is directed to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED this 23rd day of August, 2010.

ANDREW W. AUSTIN
UNITED STATES MAGISTRATE JUDGE

SIGNED this 28th day of November, 2008.

LEIF M. CLARK
UNITED STATES BANKRUPTCY JUDGE

United States Bankruptcy Court

Western District of Texas
San Antonio Division

IN RE	BANKR. CASE NO.
CLARK CONTRACTING SERVICES, INC.	08-50046-LMC
DEBTOR	CHAPTER 11
CLARK CONTRACTING SERVICES, INC.	
PLAINTIFF	
V.	ADV. NO. 08-5045-LMC
WELLS FARGO EQUIPMENT FINANCE	
DEFENDANT	

MEMORANDUM OPINION REGARDING
THE PARTIES' RESPECTIVE MOTIONS FOR SUMMARY JUDGMENT

Before the court are the defendant's motion for partial summary judgment and the plaintiff's response and cross-motion for summary judgment. The facts are not in material dispute. The only question of law raised by the two motions is what, if anything, chapter 501 of the Texas

Transportation Code (hereinafter the "Certificate of Title Act")[1] requires of a lienholder in order to perfect an assigned lien. The issue is relevant because the debtor-in-possession ("debtor"), exercising the strong arm powers in section 544(a), seeks to avoid the liens of Wells Fargo Equipment Finance ("Wells Fargo") on certain vehicles, liens that Wells Fargo obtained by assignment from CIT Group/Equipment Financing, Inc. ("CIT"). For the reasons that follow, the court will deny the defendant's motion and grant partial summary judgment in favor of the plaintiff, holding that, to be effective against a hypothetical judgment creditor, the assignee of a lien on vehicles governed by the Texas Certificate of Title Act must take the affirmative steps set out in that enactment to have their identity as lienholder reflected on the certificates of title. .

I. BACKGROUND

Clark Contracting Services, Inc. is a construction company that provides contracting services related to the clearing and paving of land and pad sites for commercial developments. Facing potential foreclosure actions by a number of creditors, the Clark Contracting commenced a chapter 11 bankruptcy case on January 9, 2008, becoming a debtor-in-possession. Then, on April 1, 2008, the debtor-in-possession filed this adversary proceeding seeking to avoid several liens held by defendant Wells Fargo Equipment Finance ("Wells Fargo"), using the strong-arm powers of section 544(a) of the Bankruptcy Code.[2] The debtor contends that Wells Fargo failed to perfect many of these liens under applicable state law in a manner sufficient to prevail over a hypothetical judgment lien creditor with a returned execution as of the date of the commencement of the case. No one disputes that CIT was noted on the certificates of title as lienholder as of that date, and that Wells

[1] *See* TEX. TRANSP. CODE §§ 501.001 et Seq. (2008).

[2] *See* 11 U.S.C. § 544(a) (2008).

Fargo was not.

Wells Fargo is seeking partial summary judgment that six of the disputed liens are valid, enforceable, and not avoidable under section 544(a). Wells Fargo explains that it acquired these six duly perfected liens by assignment from CIT Group/Equipment Financing, Inc. ("CIT"), and that it did not need to take any further action to maintain that perfection, because the UCC does not require assignees to take any additional steps to perfect liens that were already duly perfected by the assignor prior to assignment.

The debtor originally granted the six liens to CIT in 2005 by executing a Master Security Agreement through which CIT agreed to finance several of the debtor's future purchases of construction equipment for use in the debtor's business. On December 4, 2006, CIT advanced funds to the debtor under the Master Security Agreement for the purchase of a Rosco Maximizer 3 asphalt distributor mounted on a 2007 IHC Model 7300 truck (the "Asphalt Truck"). CIT filed a UCC-1 financing statement for that transaction with the Secretary of State on the same date, and, shortly thereafter, CIT applied for and obtained a certificate of title listing its lien on the certificate of title for the Asphalt Truck.

On January 30, 2007, CIT advanced additional funds under the Master Security Agreement. This second loan financed the debtor's purchase of five 2007 Ford F750 trucks with Ledwell 2000 gallon water tanks (the "Water Trucks"). As in the first transaction, CIT filed a UCC-1 financing statement with the Secretary of State. Also, as in the first transaction, CIT applied for and obtained certificates of title, listing CIT's liens on the titles for each vehicle. Neither party disputes the validity or the perfection of CIT's liens on the Asphalt Truck or the five Water Trucks.

On June 21, 2007, Wells Fargo purchased CIT's notes and security interests with respect to

the six motor vehicles described above.[3] The debtor does not dispute the validity or enforceability of that assignment transaction. The debtor does challenge Wells Fargo's claim that its liens are sufficiently perfected under applicable state law so as to prevail over the competing claim of a judgment creditor who obtains execution of its judgment *i.e.* a "judgment lien creditor"). If they are not so perfected, then, under section 544(a), the liens may be avoided. Thus, for purposes of this dispute, perfection is the whole ball game.

II. THE ARGUMENTS OF THE PARTIES

The crux of the debtor's argument is simple. According to the debtor, the UCC defers to the Texas Certificate of Title Act on matters such as perfection, and the latter enactment requires an affirmative act by an assignee to maintain lien perfection.[4]

Wells Fargo acknowledges that its liens are subject to the Certificate of Title Act, but argues that the Certificate of Title Act does not expressly require recordation of *assigned* liens. When Wells Fargo acquired the liens from CIT in 2007, Wells Fargo elected not to record the assignment (though it could have done so pursuant to provisions for the recordation of assignments in the Certificate of Title Act).[5] Wells Fargo instead chose to simply hold the existing certificates that reflect CIT as the

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[3] *See* Wells Fargo's Motion for Summary Judgment, Adv. Proc. No. 08-5045-lmc, Dkt. No. 9, Exs. M-9, M-10, M-11.

[4] *See* TEX. TRANSP. CODE §§ 501.001 et Seq. (2008); *see also* TEX. BUS. & COMM. CODE §§ 9.101 et Seq. (2008). More specifically, subchapter F of the Certificate of Title Act contains the statutory scheme for creditors to obtain and perfect liens on motor vehicles not held by the debtor as inventory. The Certificate of Title Act is important in light of section 9.311(a)&(b) of the Texas Business and Commerce Code (or more commonly known as the UCC). For ease of reference in this opinion, references to any provision of the UCC shall be construed as a reference to the Texas Business and Commerce Code. Likewise, references to the Certificate of Title Act shall mean chapter 501 of the Texas Transportation Code.

[5] *See* TEX. TRANSP. CODE, § 501.114 (Vernon 2007). Had it followed the procedure laid out in section 501.114, Wells Fargo would have received new certificates of title reflecting Wells Fargo as the lienholder, in place of CIT. *See id.*, at §§ 501.114(d)(2), 501.027. All agree that, had such a procedure been followed, Wells Fargo's lien position *vis-a-vis* judgment lien creditors holding executed returns would have been unassailable, and Wells Fargo would thus have had no exposure to liability under section 544(a).

lienholder, relying on the more general rule stated in section 9.310(c) of the Texas version of the UCC that assignees need take no further action to enjoy the perfected status of their assignors. As a result of this choice, however, the Texas Department of Transportation was not (and would not have been) aware of the existence of Wells Fargo as alienholder – its records would still reflect CIT as the lienholder with respect to these vehicles.[6] Wells Fargo did file amendments to the existing UCC-1 financing statements as precautionary matter, but maintains that even that action was not necessary. Wells Fargo contends that the provision for recordation of assignments found in section 501.114 of the Certificate of Title Act is permitted, but not required. Indeed, says Wells Fargo, this provision of the Certificate of Title Act actually conflicts with section 9.310(c) of the UCC, and the UCC must control.[7]

The debtor counters that section 9.310(c) of the UCC is the wrong place to look. That section, says the debtor, is only a general rule regarding assignment of ordinary liens. The right place to look is section 9.311 of the UCC, says the debtor, which refers holders of liens on vehicles to the Texas Certificate of Title Act. There, says the debtor, the lienholder will be instructed that liens on motor vehicles can be perfected *only by* recording the lien *on the certificate of title* in *some* fashion described by the Act. *See id.* § 501.111(a) (emphasis added). The debtor then points out that, because of this unique procedure for recordation (as opposed to a public records filing that can be easily inspected by third parties), the Certificate of Title Act also instructs lienholders on how to properly assign perfected liens on motor vehicles in a way that will maintain that perfection,

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[6] *See* TEX. TRANSP. CODE, § 501.114(d) (stating that the Department of Transportation, on receipt of an application for assignment of lien, may amend its records "to substitute the subsequent lienholder for the previous lienholder").

[7] *See* TEX. TRANSP. CODE § 501.005 ("Chapters 1-9, Business & Commerce Code, control over a conflicting provision of this chapter").

including a specific procedure for making sure that the assignee is properly identified as the current holder of the lien by notation on a newly issued certificate of title. The debtor claims that the Act is clear, unambiguous, and in fact does *not* conflict with the UCC. Nor, says the debtor, can the provisions of the Certificate of Title Act be viewed as permissive. Wells Fargo, says the debtor, chose to ignore the procedures in the Certificate of Title for notating its assigned liens on the certificates of title for these vehicles, and so was left unperfected on the petition date – because Wells Fargo was not shown as the current lienholder on the certificates of title for these vehicles, nor was it known to the Department of Transportation as the lienholder of right. Thus, says the debtor, Wells Fargo would lose in a contest with a judgment lien creditor. As such, concludes the debtor, the liens must be avoidable under section 544(a).[8]

The dispute thus turns on how the UCC and the Certificate of Title Act interact with respect to the assigned liens on motor vehicles. Both parties acknowledge the lack of Texas case law interpreting the relevant provisions of the Certificate of Title Act. The court's own research has turned up few helpful opinions in Texas on the issue. Nonetheless, a careful application of the rules of statutory construction leads this court to conclude that the Certificate of Title Act was enacted specifically to ensure that assigned liens on vehicles subject to the Certificate of Title Act must be reflected on the certificates of title as a condition to continuous perfection. Failure to comply with the Act may result in a lien becoming unperfected as against a third party judgment lien creditor following the assignment of that lien. Wells Fargo's liens were unperfected as of January 9, 2008 (the date of the debtor's petition) because they were nowhere notated on the certificates of title.

[8] The debtor is acting as a debtor-in-possession, *see* 11 U.S.C. § 1107, and so has the same strong-arm powers the trustee has under section 544(a). *See Gandy v. Gandy (Matter of Gandy),* 299 F.3d 489, 497 (5th Cir. 2002) (citing *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. (In re Nat'l Gypsum Co.),* 118 F.3d 1056, 1068 (5th Cir. 1997)).

They are thus avoidable under section 544(a) of the Bankruptcy Code. Summary judgment will be granted in favor of the plaintiff-debtor, and Wells Fargo's motion should be denied.[9]

II. JURISDICTION

This matter arises under a provision of title 11 of the United States Code, and thus falls within the subject matter jurisdiction conferred by section 1334(b) of title 28. While the court looks to state law to resolve the issue of perfection under the Certificate of Title Act and the UCC, the debtor's avoidance power arises under the Bankruptcy Code, and this type of dispute could arise only in the context of a bankruptcy case. *See In re Gandy*, 299 F.3d at 497. Accordingly, subject matter jurisdiction is proper under section 1334(b) of title 28. *See* 28 U.S.C. § 1334(b); *see also Geruschat v. Ernst & Young, LLP (In re Seven Fields Dev. Corp.)*, 505 F.3d 237, 263 (3d Cir. 2007). Furthermore, because jurisdiction exists under these narrower categories of bankruptcy jurisdiction, involving an exercise of a trustee's chapter 5 powers and a subordinate determination of the extent, validity, and priority of Wells Fargo's liens, this is a core proceeding for which this court may hear and make final determinations. *See id.*; *see also* 28 U.S.C. §§ 157(b)(1)&(b)(2)(K). Finally, venue is proper under section 1409(a) of title 28.

[9] It is appropriate to note here that the court granted Wells Fargo relief from the automatic stay on April 30, 2008, to allow Wells Fargo to foreclose on these vehicles. This relief was granted *not* based on the validity of Wells Fargo's liens, but instead based on the court's understanding that the debtor could not provide any sort of adequate protection *and* the understanding that the debtor could always recover the vehicles or the value of the vehicles if it was successful in this litigation. *See* 11 U.S.C. § 550(a). During a recent hearing, counsel for the debtor informed the court that Wells Fargo may have sold the vehicles through foreclosure proceedings. Based on this court's ruling on the cross-motions for summary judgment, the debtor is free to use its remedies for recovering the value of these vehicles. That issue, however, is not yet before the court.

III. DISCUSSION

A. Avoidance Under Section 544(a)

The Bankruptcy Code provides a trustee with certain "strong-arm" powers to avoid unperfected pre-petition transfers made by the debtor of interests in property. *See* 11 U.S.C. §§ 544(a), 1107. To do this, section 544(a) grants to the trustee the powers of a hypothetical judgment lien creditor deemed to be perfected on the date of petition. *See* 11 U.S.C. § 544(a)(1). Thus, any lien that would be vulnerable or subordinate to such a hypothetical judgment lien creditor, such as, by way of example, a lien that is not perfected as of the petition date, is avoidable under section 544(a)(1). The debtor-in-possession (DIP) in a chapter 11 case can exercise this trustee power. *See NetBank, FSB v. Kipperman (In re Comm. Money Center, Inc.)*, 350 B.R. 465, 474 (9th Cir. B.A.P. 2006); *see also* 11 U.S.C. § 1107.

In the present case, the debtor contends that six of the liens held by Wells Fargo were not perfected as against a perfected judgment creditor as of the petition date. Wells Fargo contends that its liens are and have always been sufficiently perfected since CIT first perfected its liens in accordance with the Certificate of Title Act. The facts are not in dispute, and the law regarding a trustee's power to avoid unperfected security interests is well-settled, the only issue for this court to determine is whether Wells Fargo's liens were perfected as against a hypothetical judgment creditor with a fully perfected judgment lien as of January 9, 2008, the date the debtor commenced the related bankruptcy case. For that determination, we turn to applicable state law.

B. Perfection of Security Interests in Motor Vehicles Under Texas Law

As a general rule, a security interest in most types of personal property is perfected by filing a financing statement with the Secretary of State. *See* TEX. BUS. & COMM. CODE § 9.310(a). Also

generally speaking, the assignment of a duly perfected security interest does not affect the perfection status of that security interest. *See id.* § 9.310(c). If a financing statement was filed by the assignor, for example, the assignee would enjoy the benefit of that lien remaining continuously perfected through the assignment without any additional filing requirements. *See id.* These general rules, however, are not without exception. No filing is necessary to perfect certain types of collateral, such as certain certificated securities, documents, goods, instruments, deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights. *See, e.g.*, *id.* § 9.310(b)(5), (b)(8), (b)(9).[10]

Where the collateral is a motor vehicle, the UCC prescribes a completely different set of rules for perfection. *See id.* §§ 9.310(b)(3), 9.311(a). The filing of a financing statement for perfection of liens on certificated motor vehicles is wholly ineffective. *Id.* The perfection of security interests in such collateral is governed by the Texas Certificate of Title Act. *See id.*; *see also* TEX. TRANSP. CODE §§ 501.111-.116. The Act requires a separate certificate of title for each vehicle, reflecting the Department of Transportation's records. The certificate must list, among other things, the name and address of each party asserting lien rights in the vehicle, listed chronologically according to the date on which each lien was first recorded. *See* TEX. TRANSP. CODE § 501.021(b).

The rules for perfecting a motor vehicle lien under the Act are quite unlike the general perfection rules under the UCC. Rather than relying on a generally searchable database, the perfection scheme relies on physical notation of security interests on the very document required to

[10]The logic of this scheme of perfection is straightforward. A recording system searchable by the public is, for most types of personal property collateral, both reliable and inexpensive. A subsequent lender or buyer need only search those records, under the name of the grantor of the security interest to determine whether a pre-existing interest might prime the interest the lender or buyer is about to acquire. Special rules protect buyers of certain kinds of items, such as consumers buying goods in the ordinary course of business. Special rules also apply to certain kinds of collateral whose nature is such possession is a surer, more logical, and less expensive means of perfection. With respect to certain unique types of collateral, however, special rules might come into play, in service to other public policy interests. The perfection of certain interests in intellectual property is one such example. As we shall see later in this opinion, the perfection of interests in certificated motor vehicles is another. *See generally*

legally transfer a motor vehicle. This scheme reflects the Act's larger purpose to assure the ability to sell vehicles without the need of enforced disclosure to the purchaser of the existence of a lien on the vehicle. *See* Tex. Transp. Code, § 501.003.[11] Adds a recent commentator, with regard to the difference in approaches between the UCC and the Certificate of Title Act:

> Article 9 was intended in large part to wire around the historical aversion to non-possessory security interests in personal property--the secret lien problem. [citing 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 9.1 (1965)]. [Certificate of Title] laws were intended to prevent the theft of certain personal property that, because of its peculiar nature (ease of movement between jurisdictions), was especially vulnerable to theft. [citing *inter alia* Fairfax Leary, Jr., *Horse and Buggy Lien Law and Migratory Automobiles*, 96 U. PA. L. REV. 455 (1948)]. Because the property subject to certificate of title acts was also a common form of collateral in secured financing, conflicts were inevitable.

Larry T. Bates, *Certificates of Title in Texas Under Revised Article 9*, 53 BAYLOR L. REV. 735, 736 (Fall 2001). Professor Bates notes that a plea was made to expressly preempt state certificate of title laws when revised article 9 was under consideration, but that that plea was rejected. *Id.*, at 740.[12] In

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[11] Says the statute:

> This chapter shall be liberally construed to lessen and prevent:
> (1) the theft of motor vehicles;
> (2) the importation into this state of and traffic in motor vehicles that are stolen; and
> (3) the sale of an encumbered motor vehicle without the enforced disclosure to the purchaser of a lien secured by the vehicle.

TEX. TRANSP. CODE, § 501.003 (Vernon 2007).

[12] Explains Prof. Bates:

> Of course this was no more acceptable in 1994 than it would have been when original Article 9 was conceived. 24 The PEB [Permanent Editorial Board] and its drafting committees had to accept the existence of competing systems for titled collateral and find a way to integrate the COT [Certificate of Title] acts into Revised Article 9 with minimal displacement of creditors' expectations-at least under Article 9.
>
> Revised Article 9 simplifies the choice of law rule for titled collateral by making the location of collateral, the movement of collateral, the registration of collateral, and the surrender of certificates not relevant to the choice of law determination. Revised Article 9 also modifies the substantive rules that affect perfection and priority when the choice of law rule requires a change in the law governing titled collateral. In Texas, the effect of these changes to Article 9 on transactions that involve titled

short, only notation on the certificate of title will count for purposes of notifying third parties – be they purchasers, lenders, or judgment creditors – of the existence and identity of a given lienholder. Professor Bates in fact explains that, when a vehicle is converted into money or other proceeds, the lienholder will not enjoy "continued perfection" in proceeds without further action that it otherwise does not have to take with respect to types of collateral that are perfected under the provisions of the UCC itself:

> ... [E]quating notation on a certificate of title with filing a financing statement will cause proceeds to remain perfected for more than twenty days only if a financing statement covering the proceeds would be filed in the same office as the financing statement covering the original collateral. But since no financial statement was actually filed [with respect to certificated motor vehicles], a filing covering the proceeds would necessarily be filed in a different office. And even if the proceeds were titled collateral, a financing statement would not be sufficient to perfect a security interest in such collateral. Thus, the hypothetical filing would not be effective to perfect the security interest in the proceeds even if we reversed the fiction and equated the hypothetical financing statement with notation on the original COT. The original COT would be effective only to cover the original car since certificates of title are vehicle specific. Thus, a security interest in the proceeds of titled collateral will not be perfected for more than twenty days unless the secured party takes whatever action is necessary to perfect a security interest in the proceeds themselves.

Bates, at 751-752. A failure to notate a continuing security interest correctly on the certificate of title can thus be fatal to perfection for a secured creditor. By the same token, the level of diligence imposed on innocent third parties is low – they are entitled to rely on what appears on the certificate

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> collateral will depend on which COT Act applies to the collateral because the Texas COT Acts differ in their requirements and their scope. These differences within the state of Texas itself illustrate some of the difficulties that result on the national level from the non-uniformity of COT acts generally.

Bates, at 740-741 Of special note here is that Revised Article 9 limited its incursion into Certificate of Title statutes to situations in which choice of law problems might be created as between different states. The assignment of a security interest with respect to vehicles which themselves have not moved outside the state of Texas raises no choice of law issues. Later in his article, after an extended discussion of what might happen to a vehicle that starts in Texas and ends in Oklahoma (and the impact that changes in Revised Article 9 might have on various permutations of that move), the author says, "Putting the pieces together, we can see that generally perfection of a security interest in goods subject to a COT statute can only be accomplished by complying with the terms of the applicable COT statute." Bates, at 749.

of title, and need look no further. Indeed, there is nowhere else *to* look because a searchable databases of filings is not publicly available.

The Act expressly states that notation on the certificate of title equals perfection of the lien, and the method of achieving that notation is specifically laid out in the Act. *See id.* §§ 501.113, 501.111(a). In the ordinary case, a lien may be perfected by notifying the county assessor-collector of the lien. *Id.* Once the assessor-collector receives verification of the lien (and a filing fee), it forwards the information to the Department of Transportation, which records the lien and issues a new certificate of title on which the lienholder is specifically identified, by name and address, on the face of the certificate itself. with that lien listed on the certificate. *Id.*

Our unique problem arises not with the original perfection of a lien, but with its *continued* perfection once it has been assigned. However, the basic principles that underlay the scheme of perfection (and thereby notice to third parties) in the special context of motor vehicles points strongly to the conclusion that assignments too must be notated on the certificate of title if the lienholder's claim is to be effective against innocent third parties such as judgment creditors. What is more, the public filing system used for the perfection of most other kinds of collateral makes the general rule in 9.310(c) a sensible one for that context – but also strongly suggests that the same general rule would have limited utility in a notational system like that used for motor vehicles, where there is no publicly searchable database on which parties are directed to rely.

The Certificate of Title Act lays out a specific procedure for how to handle the assignment of lien interests in motor vehicles. That procedure includes a mechanism for notating the identity of the assignee on the certificate of title. *See id.* § 501.114.[13] It is worth recalling here, that physical

[13] Here is the provision in its entirety:

(a) A lienholder may assign a lien recorded under Section 501.113 by:

notation on the face of the certificate of title is the Act's selected mode for notifying third parties of the existence of a prior lien, so a procedure that specifically spells out how to make sure that the assignee is reflected as the correct lienholder on the face of the title is consistent with the larger scheme of perfection adopted in the Certificate of Title Act. The original lienholder, we are told may[14] assign a lien that has been recorded in accordance with the Act's procedures for notating liens on certificates of title.[15] To do that, the assigning lienholder must (1) notify the debtor of the

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(1) applying to the county assessor-collector for the assignment of the lien; and

(2) notifying the debtor of the assignment.

(b) A lienholder's failure to notify a debtor of an assignment does not create a cause of action against the lienholder.

(c) An application under Subsection (a) must be:

(1) signed by the person to whom the lien is assigned; and

(2) accompanied by:

(A) the applicable fee;

(B) a copy of the assignment agreement executed by the parties; and

(C) the certificate of title on which the lien to be assigned is recorded.

(d) On receipt of the completed application and fee, the department:

(1) may amend the department's records to substitute the subsequent lienholder for the previous lienholder; and

(2) shall issue a new certificate of title as provided by Section 501.027.

(e) The issuance of a certificate of title under Subsection (d) is recordation of the assignment. The time of recordation of a lien assigned under this section is considered to be the time the lien was recorded under Section 501.113.

Id. § 501.114. While the drafting of this provision, like most pieces of legislation, could always have been improved, its meaning remains clear — especially when the section is read from end-to-beginning, *i.e.*, starting with subsection (e) and reading back up, following the subsection references within the statute.

[14]*See* TEX. TRANSP. CODE, § 501.114(a). Wells Fargo argues that the use of the word "may" here means that the procedure laid out in this section is merely optional. However, as discussed *infra*, the permission here granted can equally be read as granted to the *assignor*. That is, lienholders are allowed to assign their liens, *provided* they follow the procedures set out in this section. If Wells Fargo's argument were valid, then the "perfection option" laid out here (if we were to treat it as such) would be expected to have been granted to the *assignee*, rather than the *assignor*. After all, it is the *assignee*, not the assignor, that has the vested interest in continued perfection of the lien position that it is acquiring by assignment. However, the statute does not apply "may" to the assignee – it applies "may" to the assignor.

[15]The Act lays out the procedures for notating (or "recording") a lien in the immediately previous section, section 501.113. *See* Tex. Transp. Code, § 501.113.

assignment[16] and (2) submit an application for recordation with the county assessor collector once again. *Id.* The application submitted to the assessor-collector must be signed *by the person to whom the lien is assigned – i.e.*, the assignee must sign the application. A copy of the executed assignment agreement must also be submitted, proof that the lien currently recorded on the records of the Department of Transportation will no longer be owned by the lienholder there originally reflected. The original of the certificate of title (which should be in the possession of the assignor) must also be submitted to the Department. *See id.* § 501.114(c). Once the completed application is remitted to the Department of Transportation, the Department then issues a new certificate of title, showing the assignee as the new current lienholder of record. *See id.* § 501.114(d). The new certificate of title is sent to the first lienholder disclosed on the application – namely, the assignee. *See id.* §§ 501.114(d)(2); 501.027(b). At this point then, the assignee should be in possession of the newly issued original certificate of title, now reflecting the assignee as first lienholder. Also, at this point, the assignee's lien is now perfected because, in the language of the statute, the certificate of title issued under subsection (d) of section 501.114 "is recordation of the assignment." *See id.*, § 501.114(e). In addition, the assignee now enjoys the benefit of a "relation-back" perfection, because "the time of the recordation of a lien assigned under this section[17] is considered to be the time the lien[18] was recorded under Section 501.113." *See id.* Section 501.113, it will be recalled, tells us that "recordation of a lien under [the Certificate of Title Act] is considered to occur when the county

[16]Interestingly, the statute tells us that, if the assigning lienholder fails to tell the debtor about the assignment, the debtor does not have a cause of action back against the assignor for not telling him or her about the assignment. *See* TEX. TRANSP. CODE, § 501.114(b). The statute says nothing about any duty, one way or another, to notify third party purchasers, subsequent lenders, or judgment creditors of the assignment.

[17]In this case, that would be the first lien originally granted to CIT.

[18]Again, that would be CIT's lien, now assigned to Wells Fargo.

assessor-collector is presented with an application for a certificate of title that discloses the lien." *See id.* § 501.113(a)(1). What is more, the time of recording a lien in this fashion "is considered to be the time of filing the security interest" for purposes of Article 9 of the UCC. *See id.*, § 501.113(b).

Read *in pari materia*, then, the intent of the Certificate of Title Act seems clear. An assignee who wants to be assured that its lien will "relate back" to the recordation date of the original lien by the assignor needs to follow the procedures set out in this section. What is more, only by following this procedure will the Department of Transportation know that the assignee is the current holder of the first lien. Otherwise, the assignee will find itself holding the original certificate of title, but that certificate will not show the assignee as the record lienholder. The only recognized means of perfection in the Act, namely notation on the face of the title of the name and address of the current lienholder, seems fairly obviously to imply that an assignee who wants to be able to stand in the shoes of its assignor with continued perfection needs to be make sure that the assignee is shown on the face of the certificate of title, with a proper name and address. There is no other means of perfection available under the Act, and none other is even implied. *See id.*, §§ 501.021(a)(7)(B), 501.003(3).[19] Perfection of security interests in certificated motor vehicles imposes no particular due diligence on a third party, because the mechanism for warning innocent third party purchasers of a pre-existing security interest hinges entirely on what's on the certificate of title itself. *See id.* §§ 501.021(b)(7); § 501.113(a). Thus, just a cursory examination of the statute's structure alone

[19]The statutes says that a motor vehicle certificate of title is an instrument issued by the Department of Transportation that includes, *inter alia*, a statement "of the *name and address of each lienholder* and the date of each lien on the vehicle." *Id.* If the lien is assigned without compliance with section 501.114, then the certificate will no longer accurately reflect "the name and address" of the lienholder. This might not matter but for the fact that, for purposes of *perfection* of liens on motor vehicles, the sole method of perfection is proper notation on the certificate of title. *See* TEX. BUS. & COMM. CODE § 9.311(b).

supports the conclusion that, for an assignee to enjoy its assignor's lien position, it needs to follow the procedure laid out in section 501.114 of the Act.[20]

Because of the importance of the correctness of the information on the certificate of title itself to innocent third parties acquiring the vehicle, the statute may be understood as an *authorization* to assign liens, *provided that* the parties to the assignment follow the procedures laid out there. The statute expressly states "a lienholder may assign a lien ...." *See id.*, § 501.114(a). The authorization is given to the *assignor*. If the statute were to mean what Wells Fargo suggests (*i.e.*, that "may" means that the assignee has the option of not complying with these procedures, the option of doing nothing), then the statute would apply the permissive "may" not to the assignor but to the *assignee*, the party who expects to be the beneficiary of its assignor's perfection. What is more, the word "may" would not authorize assignment as such but rather a means of recording the assignment. It might, for example, read something like this: "The assignee of a lienholder whose lien is recorded under section 501.113 may record its assignment by:"

Instead, the statute says that the *assignor* is allowed to assign its lien, then spells out the procedure for doing so. The procedures in the statute are all aimed at the same problem – assuring that the certificate of title contains the correct information about who currently holds liens against the vehicle, information essential in a scheme that relies on the certificate of title itself for purposes of transferring an interest in the vehicle to third parties. *See id.*, § 501.003. The assignor and assignee need to furnish proof to the Department of Transportation that the lien has in fact been

[20]It bears repeating that, for motor vehicles, there is no publicly searchable database for liens. For other kinds of goods and equipment, of course, the UCC *does* have such a system, and a rule that says an assignee need take no further steps to perfect makes sense when a third party is required to consult that public filing system to check for competing claims. A third party acquiring a motor vehicle, by contrast, has no apparent further duty of inquiry beyond relying on what the face of the certificate of title says (or beyond following other procedures set out in the Act, which are discussed below).

assigned. *Id.*, § 501.114(c)(B). The assignor needs to surrender the original of the certificate of title to the Department of Transportation, so that a new certificate reflecting the assignee's name and address as lienholder can be prepared. *Id.*, § 501.114(c)(C), (d)(2). Once a new certificate is issued, the assignee is rewarded with a statutory assurance that its perfection will relate back to the perfection date of its assignor's lien. *Id.*, § 501.114(e). Taken together, the procedures confirm the clear intent of the statute – a lien holder wanting to enjoy the benefits of recordation of its lien on the certificate of title needs to be sure that the information on the certificate of title is accurate, and that duty equally applies to assignees of liens. *See Nashua Mfg. Co. v. Hooper Trailer Sales, Inc.*, 445 F.2d 1321, 1222-23 (9th Cir. 1971) (ruling on a similar assignment recordation issue involving accounts receivable under Idaho law).[21]

C. Perfection of Liens in Motor Vehicles as against Judgment Creditors

We next take up how the contest between a notated consensual lienholder and a judgment creditor seeking to execute on a motor vehicle plays out. When a judgment creditor executes its judgment, it obtains a writ of execution which is delivered to the sheriff, who in turn seeks out property of the debtor to sell.[22] When the sheriff encounters a motor vehicle, he may or may not be able to acquire the certificate of title – there is no guarantee that the debtor will cooperate, or that the debtor's representative would even know where the title to the vehicle is located. It is almost certainly not in the vehicle. The Certificate of Title Act anticipates these realities, as it lays out a procedure for the sheriff to obtain a new title. *See id.*, § 501.074(a)(5). The sheriff must first have

[21]Said the court: "We do not find appellant's arguments particularly persuasive. ... the Act is not a mere 'validation' statute ... Rather, although it does use the permissive word 'may,' it appears to set up a complete scheme under which assignees, by recording, can obtain protection against both bona fide purchasers and creditors. The clear implication would seem to be that, if an assignee wants such protection, he should follow the Act." *Id.*

[22]The debtor in this case is a company, not an individual, so special problems that might crop up when a claim of exemption is made do not arise in this context and will not be examined here.

a bill of sale in hand (reflecting the fact of a sale and the identity of the new purchaser). Thus, we know that the sheriff conducting a sheriff's sale is expected to sell the vehicle *without* a certificate of title in hand. In fact, the sheriff cannot even *apply* to the Department of Transportation for a new title until *after* the sale has been conducted. The sheriff has no practical or legal way of knowing of the existence of a prior security interest in the vehicle prior to selling, and apparently no need to know either. We also know that the purchaser at a sheriff's sale must know that it will get a new, clean and clear certificate (*i.e.*, one without lien notations), because it has no way of knowing whether there are any security interests against the vehicle at the time of sale (unless the sheriff happens to have the vehicle certificate in hand). The purchaser would otherwise be unable to make an intelligible offer for the vehicle (it would not know how to price for undisclosed liens). The statute in fact states that a new certificate of title is issued in the name of the new purchaser, with no mention of notation of prior security interests on the new title. *See id.*[23] Thus, the purchaser likely takes free of the consensual and properly notated lien.[24]

But what of the judicial lienholder? The sheriff turns over the proceeds of sale to the judicial

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[23]Compare to other parts of the Act, in which such prior interests *are* routinely noted, such as, for example, when someone claims the certificate has been lost and seeks a replacement. *See* TEX. TRANSP. CODE, § 501.134.

[24]We say "likely" because there is at least one case that suggests otherwise. *See General Motors Acceptance Corporation v. Byrd, Sheriff of Dallas County*, 707 S.W.2d 292, 296 (Tex.App. – Ft. Worth 1986, no writ). There, GMAC was the secured creditor. The sheriff repossessed a mobile home to satisfy a judgment lien creditor's claim, and apparently retrieved the title as well. It was thus aware of the existence of GMAC and gave it notice of the sale. GMAC appeared at the sale, and was the successful bidder. The title was transferred to GMAC but the proceeds were held by the sheriff, to be turned over to the judgment creditor. GMAC sought to enjoin the sheriff from paying the judgment creditor, but the court declined its request for injunctive relief, because it believed that it had a sufficient at-law remedy. It concluded that its lien continued in either the vehicle in the hands of a subsequent purchaser because, "GMAC could have foreclosed its interests and sold the motor home pursuant to sec. 9.504." *Id.* The case did not discuss the Texas Certificate of Title Act, which now provides that "in the event of a conflict between this section [*i.e.*, the section that governs sheriffs' sales of motor vehicles] and other law, this section controls." TEX. TRANS. CODE, § 501.074(d). Thus, the current version of the Texas Certificate of Title Act would appear to overrule this already questionable precedent. *See also Williams v. Cawthorn*, 237 S.W.2d 652 (Tex.Civ.App. – Amarillo 1950 no writ) (noting that the purposes of the Certificate of Title Act, first enacted in the 1930's was to cover the whole field of sales and liens on motor vehicles), *citing Motor Inv. Co. v. City of Hamlin*, 142 Tex. 486, 179 S.W.2d 278 (1944).

lien creditor, of course. None of these parties would necessarily know of the identity of *any* lienholders noted on the certificate of title, because it is not required that the sheriff have the certificate of title in hand as a precondition to repossessing and selling the vehicle. Indeed, it is precisely because the sheriff will in all likelihood *not* have the original certificate of title that this statute has to be in place. Otherwise, the sheriff would be at the mercy of the debtor, who could simply refuse to turn over the certificate of title (a judgment lien, after all, is not a search warrant).

The procedures laid out here are not appreciably different from what might occur with respect to the repossession and sale of other kinds of personal property. Certainly the sheriff would have no duty to review the Secretary of State filing records before repossessing and selling collateral. But there are differences both with respect to purchasers at a sheriff's sale and the judgment creditor. In the case of other kinds of property, for which a publicly searchable database of recorded security interests is available, a purchaser can (and in some jurisdictions would be expected to) review those records in order to price the property, taking into account lienholders of record.[25] There is no searchable database for lienholders on certificated vehicles, and arguably, therefore, no duty of inquiry that could be imposed on a purchaser of a vehicle at a sheriff's sale. The procedures for how a new certificate is issued in the sheriff's sale context buttress that conclusion.

But again what of the judgment lien creditor? Here again, a judgment lien creditor is presumed to be aware of prior perfected security interests in most other kinds of personalty, due to the public filing database. If that creditor nonetheless asks the sheriff to execute on an item of personalty so encumbered, then that creditor would then, at the least, have a duty to assure that the

[25]*See* Note, *Secured Creditors Holding Lien Creditors Hostage: Have a Little Faith in Revised Article 9*, 81 IND. L.J. 733, 735 (Spring 2006) (noting that, in some jurisdictions, the sale of property subject to the perfection rules in Revised Article 9 is deemed "subject to" perfected lien claims).

proceeds from the sale be applied first to the satisfaction of those duly perfected interests, on pain of conversion.[26]

The point to be made here, however, is that the *original* lienholder faces the same practical difficulties but has an advantage that the assignee who has not followed the rules does not. The lienholder's remedy would appear to be an action against the judgment lien creditor (once it is discovered that the vehicle has been sold), for conversion. In such an action, the properly notated original lienholder should have little difficulty prevailing, because it would have in hand the certificate of title showing it as the lienholder. The assignee, however, while it would hold the certificate of title, would not be reflected on the certificate as the lienholder of record. Perhaps the assignee would argue, in such an action (as Wells Fargo has argued here), that it is in fact the "true" holder of the lien, and that it need not have recorded its assignment because the UCC excuses it from doing so and the Certificate of Title Act makes recordation of the assignment merely optional. The problem for such an assignee (and for Wells Fargo here) is that Texas' Certificate of Title Act has a comprehensive and clear scheme for recordation of an assignment, one that makes it express that only by following that procedure will the assignee then succeed to its assignor's lien priority position relative to intervening creditors. *See* TEX. TRANS. CODE, § 501.114(e) ("The issuance of a certificate of title under Subsection (d) is recordation of the assignment. The time of the recordation of a lien assigned *under this section* is considered to be the time the lien was recorded under Section 501.113") (emphasis added).

This brings us to Wells Fargo's reliance on the commentary offered by the Permanent Editorial Board with regard to this issue. In 1994, the PEB issued Commentary No. 12, regarding

[26]*See generally* Russell J. Hakes, *A Quest for Justice in the Conversion of Security Interests*, 82 Ky. L.J. 837 (1993/1994) (discussing the difficulties of applying the conversion remedy as a means of enforcing relative rights between senior and junior creditors, including judgment lien creditors, under Article 9).

Section 9-302, the prior incarnation of section 9.310(c) of Revised Article 9. *See* PEB Commentary on the Uniform Commercial Code, Commentary No. 12 (American Law Institute 1994). The Board states that its commentaries are issued under the authority of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, to offer guidance in interpreting and resolving issues raised by the UCC and its Official Comments. Wells Fargo says that Commentary No. 12 demonstrates the intention of the drafters of the UCC that, when perfection is governed by a certificate of title enactment, that enactment should only be read to apply to perfection issues, not assignment of perfected security interests. \

Wells Fargo has adequately stated the general thrust of this Commentary. However, Wells Fargo overstates its application to the law as it stands in Texas. Indeed, says the Commentary, to determine whether the "no filing" rule of the UCC relating to assignments applies to certificated vehicles,

> It is first necessary to ascertain whether the certificate of title statute applicable to the particular transaction contains provisions concerning an assignment of a security interest and, if so, whether such provisions relate to perfection.

PEB Commentary No. 12, at 6. The Commentary then discusses a variety of situations in which the state's certificate of title enactment might be ambiguous regarding assignment, or might not tie the assignment of a security interest to its perfection. While there is a strongly expressed policy in favor of continued perfection, there is also a recognition that, when a given state *has* been specific about tying assignment to perfection, the state enactment must be respected. *See* PEB Commentary No. 12, at 9. Texas did not enact the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act cited in the PEB Commentary. It did not enact § 22(b) of that uniform enactment either, which makes perfection of an assignment a mere option. Instead, Texas enacted a specific statute that makes

assignments optional *as to the assignor*, but is explicit in noting that, for the assignee to enjoy the perfected status of its assignor, it needs to comply with the procedures in section 501.114. *See* TEX. TRANSP. CODE, § 501.114(e).

Thus, in a contest between a judgment creditor with a judicial lien on a motor vehicle and an assignee who has failed to comply with the recordation procedures in section 501.114 of the Texas Transportation Code, this court concludes that the judicial lien creditor would prevail. As such the trustee in bankruptcy in an action under section 544(a)(1), who enjoys that hypothetical status, also prevails.

D. Other States' Statutes

As a final note, the court declines Wells Fargo's invitation to consider other similar statutes from different states.[27] With respect to those states' legislators (and the courts that have attempted

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[27] Specifically, Wells Fargo refers the court to statutes from Florida, Georgia, Michigan, Missouri, and New York. Those statutes are as follows:

> If the original lienholder sells and assigns his or her lien to some other person and *if such assignee desires to have his or her name substituted on the certificate of title as the holder of the lien,* the assignee *may,* after delivering the original certificate of title to the department and providing a sworn statement of the assignment, have his or her name substituted as the lienholder. . . .

FLA. STAT. ANN. § 319.27(6)(d) (2008) (emphasis added);

> The assignee *may, but need not to perfect the assignment,* have the certificate of title endorsed or issued with the assignee named as holder of a security interest or lien . . . .

GA. CODE ANN. §40-3-55(b) (2008) (emphasis added);

> The assignee *may* have the certificate of title indorsed with the assignee named as the holder of the security interest by providing the department with a copy of the assignment instrument *but the failure of the assignee to do so shall not affect the validity of the security interest of the assignment thereof.*

MICH. COMP. LAWS ANN. §257.238(b)(2) (2008) (emphasis added);

> An assignee under subsection 1 of this section *may, but need not to perfect*

to interpret each respective statute), this court finds it a dangerous and unnecessary exercise of statutory construction to use interpretations of other states' statutes to import meaning into *this* state's statutes. The Texas Certificate of Title Act is not an enactment of a uniform code, as is the Uniform Commercial Code. These other statutes contain materially different language and may potentially serve materially diverse interests. Such an exercise of statutory construction would only serve to create an ambiguity that, to the extent it exists, is fully reconcilable without resorting to these external sources. This court has no evidence that these states' legislative enactments had any effect on the enactment of the Texas Certificate of Title Act. For these reasons, the court declines Wells Fargo's invitation to consider other state statutes.

V. CONCLUSION

Summary judgment in favor of the plaintiff is granted, for the reasons stated herein. Motion for summary judgment in favor of the defendant is denied, for the reasons stated. A separate form of order shall be furnished by the plaintiff trustee.

# # #

> *the assignment*, have the certificate of title issued with the assignee named as lienholder . . . .

MO. ANN. STAT. §700.365(2) (2008) (emphasis added); and

> The assignee *may, but need not to perfect the assignment*, have the certificate of title endorsed or issued with the assignee named as lienholder . . . .

N.Y. VEH. & TRAF. LAW § 2120(b) (McKinney 2008) (emphasis added).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

NUECES COUNTY, TEXAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 2:12-CV-00131**
	§	
MERSCORP HOLDINGS, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., and BANK OF AMERICA, N.A.,	§	
	§	
Defendants.	§	

ORDER

Before the Court is Defendants' motion to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, Defendants' memorandum in support, and Defendants' supplemental memorandum. (D.E. 26, 27, 48.) The Court held a hearing on the motion to dismiss and heard oral arguments from attorneys for both sides on February 8, 2013. For the reasons set forth below, Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART.

The Court concludes that Plaintiff alleged sufficient facts to give rise to a plausible claim for relief with regard to Plaintiff's causes of action alleging violations of Section 12.002 of the TEX. CIV. PRAC. & REM. CODE, unjust enrichment, and fraudulent misrepresentation. The Court retains these causes of actions. Plaintiff's remaining causes of action are dismissed for failure to state a claim upon which relief may be granted. With regard to Plaintiff's conspiracy cause of action, the Court grants Plaintiff leave to file an amended complaint asserting additional

allegations demonstrating a conspiracy among Defendants within fourteen (14) days from the filing of this Order.

BACKGROUND

The Court's analysis is based on the factual allegations set forth in Plaintiff's First Amended Complaint (FAC). (D.E. 39.) The following is a brief summary of the relevant facts from the FAC, which for purposes of this motion must be accepted as true and viewed in the light most favorable to Plaintiff.

This lawsuit was brought by Nueces County, Texas (County) and seeks monetary damages and injunctive relief against Defendants in order to "clean up the mess" Defendants have created in the County's real property records. Defendants MERSCORP Holdings, Inc. (MERSCORP) and Mortgage Electronic Registration Systems, Inc. (MERS) own and operate the MERS system. MERS is a wholly-owned subsidiary of MERSCORP. The MERS electronic mortgage tracking system was created by members of the mortgage banking industry, including Defendant Bank of America, N.A. (BANA), to facilitate the rapid transfer of mortgage loans between members of the mortgage industry and to avoid the need to record these transfers in the county property records. Under the MERS system, transfers between MERS members are tracked electronically by MERS, and this information is made available to MERS members through the MERS website. Plaintiff alleges that the MERS system is full of inaccuracies and that Plaintiff has been injured by being deprived of millions of dollars in recording fees and by the damage done to the integrity of the County's real property records.

Under the MERS system, when a lender who is a MERS member makes a mortgage loan, the title company is instructed to list MERS as the "mortgagee" or the "beneficiary" on the instrument securing the loan. This causes MERS to be listed as the "grantee" when the security

instrument (deed of trust) is recorded in the county property records. MERS members have agreed amongst themselves that any subsequent transfers of the mortgages between MERS members will not be recorded in the county property records but tracked instead on the MERS system. As long as the mortgages are held by a MERS member, MERS continues to be listed as the grantee of the security interest in the county's property records. Thus, despite the fact that a mortgage may be transferred many times between MERS members, there is no record of these transfers in the county property records.

MERS is not the servicer of the loans, it does not have any right to receive payments on the loans, and it has no financial stake in whether the loans are repaid. In the event of default by the borrower, MERS may have the right to foreclose on the property as an agent or nominee of the lender under the terms of the security agreement; however, MERS has no interest in any proceeds from a foreclosure sale. Accordingly, MERS has no beneficial interest in the loans registered on the MERS system, and its relationship to the borrowers and lenders is merely that of an agent or nominee of the MERS members.

LEGAL STANDARD

On a Rule 12(b)(6) motion to dismiss, the Court must examine the complaint in the light most favorable to Plaintiff, accepting all allegations as true and drawing all reasonable inferences in favor of Plaintiff. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982); *Piotrowski v. City of Houston*, 51 F.3d 512, 514 (5th Cir. 1995). The Court need not, however, accept as true legal conclusions masquerading as factual allegations, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiff must allege sufficient facts in support of its legal conclusions to give rise to a reasonable inference that

Defendants are liable. *Id*.; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The factual allegations must raise Plaintiff's claim for relief above the level of mere speculation. *Twombly*, 550 U.S. at 555. As long as the complaint, taken as a whole, gives rise to a plausible inference of actionable conduct, Plaintiff's claims should not be dismissed. *Id*. at 555–56. This test of pleadings under Rule 12(b)(6) is devised to balance Plaintiff's right to redress against the interests of the parties and the courts in minimizing expenditures of time, money, and resources. *Id*. at 557–58.

ANALYSIS

A. Standing

Defendants argue that Plaintiff lacks Article III standing to assert its claims because it has failed to demonstrate an injury-in-fact. (D.E. 27 at 32.) In addition to lost filing fees, Plaintiff alleges the County has suffered a degradation in its property records as a result of Defendants' actions. (FAC ¶¶ 3, 30, 31, 42, 50.) These allegations demonstrate a concrete and particularized injury, that is actual or imminent, and that is likely to be redressed by a decision in Plaintiff's favor. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("the irreducible constitutional minimum of standing contains three elements"). At this stage of the litigation, Plaintiff's allegations are sufficient to establish standing. *See El Paso Cty. v. Bank of New York Mellon*, No. A-12-CA-705-SS, 2013 WL 285705, at *2 (W.D. Tex. Jan. 22, 2013); *Jackson Cty. v. Merscorp, Inc.*, --- F.Supp.2d ----, 2013 WL 142882, at *3 (W.D. Mo. Jan. 14, 2013); *Fuller v. Mortgage Electronic Registration Systems, Inc.*, No. 3:11-cv-1153-J-20MCR, D.E. 34 at 12–13 (M.D. Fl. June 2, 2012); *Christian Cty. Clerk v. Mortgage Electronic Registration System, Inc.*, No. 5:11-CV-00072-M, 2012 WL 566807, at *2 (W.D. Ky. Feb. 21, 2012).

B. Texas Civil Practice and Remedies Code § 12.002

Plaintiff alleges in FAC ¶¶ 40–44 that Defendants violated Section 12.002 of the Texas Civil Practice and Remedies Code which prohibits the filing of fraudulent liens or claims against real property. To establish a claim under Section 12.002, Plaintiff must show that Defendants (1) made, presented, or used a document with knowledge that it was a fraudulent claim against real property; (2) intended the document be given legal effect; and (3) intended to cause a person financial injury. *Gray v. Entis Mech. Servs., L.L.C.*, 343 S.W.3d 527, 529–30 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *Walker & Assoc. Surveying, Inc. v. Roberts*, 306 S.W.3d 839, 848 (Tex. App.—Texarkana 2010, no pet.). Defendants argue that Plaintiff's Section 12.002 claim fails to satisfy the above elements. (D.E. 27 at 26–32.)

Plaintiff asserts that Defendants filed or caused to be filed security instruments in the County property records which falsely represent that MERS has an interest in certain real property as a grantee, grantor, beneficiary, lender, the holder of notes and liens, and/or the legal and equitable owner and holder of promissory notes and deeds of trust. (FAC ¶ 42.) Plaintiff alleges that these instruments falsely represented MERS's role or status, and that these false statements resulted in MERS being incorrectly indexed as a grantee and/or grantor in the County's real property records. (*Id*.) Plaintiff alleges that Defendants knew the instruments were false at the time of filing and that Defendants filed the instruments with the intent they be given the same legal effect as instruments evidencing a valid lien or claim against real property. (*Id*.) Plaintiff alleges that these instruments were filed with the intent to financially injure Plaintiff, as Defendants intended that these false filings would make subsequent filings of releases, transfers, and assignments unnecessary and deprive the County of the filing fees associated with these recordings. (*Id*.) Plaintiff additionally alleges that the County's property records have been

damaged by Defendants' actions and that this has created confusion amongst those who rely on these records. (FAC ¶¶ 3, 30, 31, 42, 50.)

1. TEX. PROP. CODE § 51.0001

Defendants argue that dismissal of Plaintiff's Section 12.002 claim is warranted because any filings listing MERS as a beneficiary or mortgagee were not fraudulent as Section 51.0001 of the Texas Property Code permits a book entry system, such as MERS, to serve as the record beneficiary of a deed of trust in county property records in Texas. (D.E. 27 at 20–26; D.E. 54 at 10–17.) Plaintiff responds that Section 51.0001 designates who may undertake a non-judicial foreclosure, but has no bearing on the recording of deeds of trust or whether MERS may serve as the beneficiary of a deed of trust. (D.E. 46 at 17–20.)

The Court's objective in construing a statute should be to determine and give effect to the Legislature's intent. *Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999). To determine intent, the Court must first look to the plain language of the statute. *Id.* The statute's terms should be viewed in the context of the surrounding words and provisions. *Id.* Regardless of whether or not the statute is ambiguous, the Court may additionally look to the object sought to be obtained by the enactment of the statute; the circumstances under which the statute was enacted; the legislative history of the statute; common law provisions, former statutory provisions, or laws on the same or similar subjects; the consequences of interpreting the statute in a particular way; the administrative construction of the statute; and the title, preamble, and emergency provision. TEX. GOV'T CODE ANN. § 311.023 (West 2005).

Section 51.0001 provides the following definitions of "book entry system" and "mortgagee":

> (1) "Book entry system" means a national book entry system for registering a beneficial interest in a security instrument that acts as a nominee for the grantee, beneficiary, owner, or holder of the security instrument and its successors and assigns.
> . . .
> (4) "Mortgagee" means:
>
> (A) the grantee, beneficiary, owner, or holder of a security instrument;
> (B) a book entry system; or
> (C) if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record.

TEX. PROP. CODE ANN. § 51.0001(1) and (4) (West 2007). Plaintiff acknowledges that MERS constitutes a book entry system under the statute, and furthermore, that it is the only national book entry system currently in operation. (D.E. 46 at 18.) Accordingly, it is undisputed that the above definitions refer to MERS. *See Campbell v. Mortgage Elec. Registration Sys.*, No. 03-11-00429-CV, 2012 WL 1839357, at *4 (Tex. App.—Austin May 18, 2012, pet. den.) (mem. op.) ("MERS is a recognized 'book entry system.' ").

A plain reading of Section 51.0001(4) demonstrates that the Texas Legislature intended to permit lenders to designate MERS as the mortgagee in a deed of trust so that MERS could serve as the nominee or agent of the lender and its successors and assigns. Numerous Texas courts have also recognized that naming MERS as the mortgagee in a deed of trust so that it may serve as the nominee or agent of the lender and its successors and assigns is permissible under Texas law. *See, e.g.*, *Bexar Cnty. v. Merscorp, Inc.*, No. 5:12-cv-00586-FB, D.E. 36 at 14 (W.D. Tex. Feb. 25, 2013) (M&R issued by Magistrate Judge); *Swim v. Bank of America*, No. 3:11-CV-1240-M, 2012 WL 170758, at *3 n. 25 (N.D. Tex. Jan. 20, 2012) (collecting cases); *Hornbuckle v. Countrywide Home Loans, Inc.*, No. 02-09-00330-CV, 2011 WL 1901975, at *4 (Tex. App.—Fort Worth, May 19, 2011) ("A book entry system such as MERS is included within the definition of 'mortgagee' under Texas law."). Accordingly, the Court concludes that, under Texas law, it is not fraudulent for lenders to designate MERS as the mortgagee in a deed of trust

for the purpose of MERS serving as the agent or nominee of the lender and its successors and assigns.

However, Plaintiff alleges that Defendants went beyond merely designating MERS as a mortgagee to act as an agent or nominee of its members. Plaintiff alleges that Defendants additionally filed deeds of trust naming MERS as a beneficiary, grantor, grantee, lender, and holder or owner of promissory notes and deeds of trust for the purpose of MERS being designated as the grantee/grantor on thousands of mortgages in the County's real property records. (FAC ¶¶ 29 and 42.) Defendants argue that these filings were not fraudulent because Section 51.0001 of the Texas Property Code permits MERS to be listed as the grantee/grantor in the County's real property records. (D.E. 27 at 20–26; D.E. 54 at 10–17.) Nothing in the plain language of the statute, however, permits MERS to designate itself as a grantee/grantor of record on behalf of its members in the real property records, and there is no indication that this was the Legislature's intent in enacting Section 51.0001(4).

MERS is not a lender, and it does not have the rights of a lender, note holder, or note owner to enforce a promissory note and seek a judgment against a debtor for the repayment of loans. MERS is merely an agent or nominee of its members, who are banks, lenders, and other financial institutions that hold and trade promissory notes secured by deeds of trust naming them as the lenders and MERS as the beneficiary. Under the MERS system, member banks and lenders grant MERS certain rights under the deeds of trust, such as the right to conduct a foreclosure sale for properties in default, or to appoint a substitute trustee to conduct a foreclosure. However, MERS is not entitled to seek personal judgments against the debtors for the repayment of the loans, and MERS has no right to foreclose or take any other actions with respect to the mortgaged properties beyond those specifically permitted in the deeds of trust and

under Texas law. *See Resolution Trust Corp. v. Camp*, 965 F.2d 25, 29–30 (5th Cir. 1992); *Miller v. Homecomings Financial, LLC*, No. 4:11-cv-04416, 2012 WL 3206237, at *3 (S.D. Tex. Aug. 8, 2012); *Millet v. J.P. Morgan Chase, N.A.*, No. SA-11-CV-1031-XR, 2012 WL 1029497, at *2 (W.D. Tex. Mar. 26, 2012).

In 2003, the Texas Legislature amended Chapter 51 of the Texas Property Code to provide a broader definition of mortgagee and expand the list of those who could conduct foreclosure sales on behalf of lenders. Over the years, lenders had developed many practices to manage the foreclosure process that were not specifically authorized by statute. While many of these practices were not inconsistent with Chapter 51 of the Property Code, they were also not expressly authorized by the Code. Accordingly, the Legislature sought to amend Chapter 51 to provide more certainty in the foreclosure process. *See* Legislative History and Text of House Bill 1493, including Committee Reports, HB 1493, Leg. Sess. 78(R) (2003), *available at* http://www.legis.state.tx.us/BillLookup/BillNumber.aspx. Specifically, the Legislature sought to give mortgage servicers and other agents or nominees statutory authority to administer the foreclosure process. *Id*.

"Under the Texas Property Code, the only party with standing to initiate a non-judicial foreclosure sale is the mortgagee, or the mortgage servicer acting on behalf of the current mortgagee." *Miller v. Homecomings Financial, LLC*, No. 4:11 cv 04416, 2012 WL 3206237, at *2 (S.D. Tex. Aug. 8, 2012) (citing Tex. Prop. Code §§ 51.0001(3), 51.0001(4), and 51.0025). The term "mortgagee" is broadly defined under Section 51.0001(4), and there are several ways in which an entity can acquire mortgagee status, and consequently, the power to foreclose. *Id*. at n. 4. By including MERS in the definition of "mortgagee," this permitted MERS to act on behalf of its members to conduct foreclosure sales, to authorize mortgage servicers to conduct

foreclosure sales, to appoint substitute trustees to conduct foreclosure sales, and to authorize mortgage servicers to appoint substitute trustees. *See* TEX. PROP. CODE §§ 51.0025, 51.0075. All of this greatly expanded the role that MERS, as an agent and nominee of the lender, could play in the foreclosure process.

While it is unquestionable that the Legislature intended to permit MERS to serve as an agent and nominee for lenders so that it could oversee and conduct foreclosures on behalf of its members, nowhere in the 2003 amendments or the legislative history for House Bill 1493 is there any indication that the Legislature sought with this enactment to overturn centuries of legal history and precedent requiring creditors wishing to perfect their interests in land to duly record those interests with the county where the property is located, so that they may be publicly identified in the county's records to all wishing to make an inquiry.[1] MERS' argument is that by defining MERS as a "mortgagee" in the 2003 amendments to Chapter 51, it was the intention of the Legislature to permit MERS to serve as a substitute grantee or grantee of record in the Texas property records for its members. The plain language of the statute does not indicate this intent, and there is no evidence elsewhere in the legislative history to support this theory.

In its definition of a book entry system, Chapter 51 specifically limits MERS to acting as a registry and nominee for those with a beneficial interest in a security instrument:

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[1] The adoption of recording acts began in early Colonial America prompted by the need for a system to protect innocent purchasers and creditors from defective titles or a lack of notice concerning prior claims against a property by third parties. *See* POWELL ON REAL PROPERTY § 82.01 (Lexis 2013) (discussing the origins of recording acts in Colonial America). The Texas recording statute, TEX. PROP. CODE § 13.001, similarly aims to protect innocent purchasers and creditors against prior deeds, mortgages, and encumbrances on a property which were not properly recorded and to prevent these innocent purchasers from being injured or prejudiced by their lack of knowledge of competing claims. *Noble Mortg. & Investments, LLC v. D & M Vision Investments, LLC*, 340 S.W.3d 65, 79 (Tex.App.—Houston [1 Dist.] 2011, no pet.) ("the rule voiding unrecorded interests as against subsequent bona fide creditors and purchasers has been around since before Texas was a state"); *Prowse v. Walters*, 941 S.W.2d 223, 228 (Tex. App.—Corpus Christi 1996, writ denied); *Cox v. Clay*, 237 S.W.2d 798, 804 (Tex. Civ. App.—Amarillo 1950, writ ref'd n.r.e.) ("The object of the recording acts is to protect innocent purchasers and incumbrancers against previous deeds, mortgages or the like, which are not recorded and to deprive the holder of prior unregistered conveyances or mortgages of the right which his priority would have given him under the common law.").

> "Book entry system" means a national book entry system for registering a beneficial interest in a security instrument that ***acts as a nominee*** for the grantee, beneficiary, owner, or holder of the security instrument and its successors and assigns.

TEX. PROP. CODE § 51.0001(1) (emphasis added). This paragraph clearly limits MERS' role as a national registry and a nominee for the grantees, beneficiaries, owners, and holders of the promissory notes and deeds of trust, directly contravening the expansive interpretation that Defendants propose the Court give Section 51.0001(4).

Under Section 51.0001(4)(A), a mortgagee may be a grantee, beneficiary, owner, or holder of a security instrument. This fits with the traditional use of the term mortgagee. Under Section 51.0001(4)(B), a mortgagee may also be a book entry system such as MERS. This section was added as part of the 2003 amendments to Chapter 51 so that MERS could act on behalf of its members to conduct foreclosure sales, to authorize mortgage servicers to conduct foreclosure sales, to appoint substitute trustees to conduct foreclosure sales, and to authorize mortgage servicers to appoint substitute trustees. However, just because a beneficiary of a security instrument qualifies as a mortgagee under Section 51.0001(4)(A) and MERS qualifies as a mortgagee under Section 51.0001(4)(B), does not mean that MERS is a beneficiary of the security instrument. MERS may be a mortgagee of record for purposes of foreclosure, but not every mortgagee is a beneficiary.[2]

Section 51.0001(4) does not redefine MERS as a grantee, beneficiary, owner, or holder of a security instrument as urged by Defendants; nor does it indicate an intent on the part of the Legislature to permit MERS to be indexed as a substitute grantee in the county property records

[2] In the Terms and Conditions MERS provides to its members, MERS identifies itself as a "mortgagee of record," not an actual mortgagee. (D.E. 52-1 at 14.) Furthermore, MERS is careful to state that it is a nominee and serves only in an administrative capacity for the beneficial owner or owners of the mortgages. (*Id.* at 14.) Yet, in the attached sample deed of trust prepared by MERS for its members, MERS designates itself as the beneficiary of the security instrument. (*Id.* at 17.)

on behalf of its members. Defendants' interpretation is inconsistent with the plain language of Section 51.0001(4); it is inconsistent with the Court's interpretation of Section 51.0001(4) in the larger context of Chapter 51; and it is inconsistent with the legislative history of the 2003 amendment to Chapter 51. This Court cannot simply bend the laws of Texas to fit the MERS system, no matter how ubiquitous it has become. *See Gov't Personnel Mut. Life Ins. Co. v. Wear*, 251 S.W.2d 525, 529 (Tex. 1952) ("the duty of courts [is] to construe a law as written . . . and not look for extraneous reasons to be used as a basis for reading into a law an intention not expressed nor intended to be expressed therein"); *In Re Agard*, 444 B.R. 231 (E.D.N.Y. 2011) ("This Court does not accept the argument that because MERS may be involved with 50% of all residential mortgages in the country, that is reason enough for this Court to turn a blind eye to the fact that this process does not comply with the law."). The Court concludes that, for purposes of Chapter 51 of the Texas Property Code, MERS is not a lender, grantee, beneficiary, owner, or holder of security instruments; it is merely the nominee of the MERS members who serve in those capacities. Accordingly, Section 51.0001 of the Texas Property Code does not shield Defendants from liability.

2. Allegations Demonstrate That Deeds of Trust Are Fraudulent Liens or Claims Against Real Property or an Interest in Real Property

Defendants assert that MERS is a valid mortgagee or beneficiary, and therefore, Plaintiff's cause of action under Section 12.002 of the Texas Civil Practice and Remedies Code must be dismissed because the MERS security instruments filed with the County do not constitute a "fraudulent lien or claim against real or personal property." (D.E. 27 at 28.) Plaintiff responds that the recorded security instruments constituted a fraudulent claim against real property because MERS never acquired a security interest in the mortgaged properties, and

therefore, the recordings denominating MERS as a beneficiary of the security instruments are fraudulent. (D.E. 46 at 27–29.)

In Texas, the county clerks are charged with the recording of real property interests and maintaining an alphabetical index of grantors and grantees for all recorded deeds, powers of attorney, mortgages, and other instruments relating to real property. TEX. LOCAL GOV'T CODE § 193.003. When a document evidencing an interest in property is presented for recordation, the county clerk is required to index it according to the grantor and grantee. For instance, a deed of trust is indexed based upon the person granting a security interest in the property (the grantor) and the person granted a security interest in the property (the grantee). It is standard practice in Texas for county clerks to list as grantee the person or entity designated as the beneficiary of the security interest in the deed of trust. (FAC ¶ 16.) The deeds of trust filed by MERS with the Nueces County Clerk listed MERS as the "beneficiary under this Security Instrument." (*See* FAC ¶ 27 and Pls.' Exs. 1, 2, and 3 to the FAC.)

Plaintiff alleges that by falsely representing to the County that MERS was the beneficiary of the security instruments, Defendants caused MERS to be publicly listed as the grantee and/or grantor in the County's real property records. (FAC ¶¶ 25, 29, 30, and 42.) Plaintiff alleges that MERS never acquired a lien in the subject properties; that MERS falsely represented that it was a beneficiary, grantee, grantor, lender, or the holder or owner of the security instruments for the properties; and that these misrepresentations were made with the intent that the recorded deeds of trust be given legal effect and cause MERS to be indexed as the grantee and/or grantor for the liens. (FAC ¶¶ 15–33, 42, 44.)

As previously discussed, Chapter 51 of the Texas Property Code defines a mortgagee to include a book entry system such as MERS. TEX. PROP. CODE § 51.0001(4). Under Chapter 51,

"mortgagee" is a term of art primarily used to designate someone with certain rights in the administration of the foreclosure process. *See, e.g.*, TEX. PROP. CODE §§ 51.0025, 51.0075. This may be the actual lienholder, or a book entry system such as MERS. There is no dispute that MERS is a mortgagee, as that term is used in Chapter 51, with the right to act as an agent or nominee of the grantee, beneficiary, owner, or holder of a security instrument in the case of foreclosure. *See* TEX. PROP. CODE § 51.0001(1). MERS does not, however, hold any beneficial interest in the deeds of trust, and it is not a beneficiary of the deeds of trust. It is merely an agent or nominee of the beneficiary.

The false assertion of a legal right in property where none exists may constitute a fraudulent lien or claim against real estate in violation of Section 12.002 of the Texas Civil Practice and Remedies Code. *See Casstevens v. Smith*, 269 S.W.3d 222, 234 (Tex. App.—Texarkana, 2008, pet. denied). By having itself designated as the "beneficiary under the security instrument" in the deeds of trust presented to the County Clerk for recordation in the County's property records, knowing that it would be listed as the grantee of the security interest in the property, it appears that MERS asserted a legal right in the properties. The Court concludes that, viewing the FAC's allegations in the light most favorable to Plaintiff, one could plausibly infer that the recorded deeds of trust constituted fraudulent liens or claims against real property or an interest in real property.

3. Plaintiff's Allegations Demonstrate an Intent to Cause Financial Harm

To state a claim under Section 12.002, Plaintiff must allege Defendants acted with the intent to cause financial injury. TEX. CIV. PRAC. & REM. CODE § 12.002(a)(3)(B). Defendants argue that Plaintiff's cause of action under Section 12.002 must be dismissed because the FAC fails to allege sufficient facts demonstrating intent. (D.E. 27 at 27–28.) Defendants argue that any failure to file a deed of trust does not trigger a financial injury to the County because the

recording of documents is permissive, and the County does not collect its fees until a document is filed; therefore, if MERS members never presented the deeds of trust for filing, the County is not due any filing fees. (D.E. 27 at 30–31.)

Plaintiff alleges that MERS was established so that its members could avoid recording mortgage assignments with the County and paying the associated filing fees (FAC ¶¶ 2, 3, 17); that to accomplish this, MERS members agreed amongst themselves to list MERS as the beneficiary in their deeds of trust when originating a loan (FAC ¶¶ 19, 20); that this caused MERS to be indexed as the grantee for the mortgages in the property records and enabled subsequent transfers between MERS members to be tracked electronically using the MERS system (FAC ¶¶ 19, 20, 27, 30); and that the result of Defendants' actions has been a dramatic reduction in filings and the collapse of the real property recording system in Nueces County (FAC ¶¶ 30, 31, 33).

If the MERS system did not exist, MERS members would re-file their deeds of trust with the proper county each time the security instruments are transferred in order to remain perfected. Furthermore, as discussed in Subsection D-1, *infra*, once a security instrument is recorded with the county clerk, Section 192.007 of the Texas Local Government Code requires the re-recording of the security instrument each time there is a release, transfer, assignment, or some other action related to the instrument. Thus, one could reasonably infer from the FAC that the MERS system has caused a reduction in filing fees collected by the County and that the County's property records have been degraded as a result of MERS' activities. (FAC ¶¶ 3, 15–33, 42, 44.)

To establish the intent element of Section 12.002, Plaintiff need only show that Defendants were aware of the potentially harmful effects the filing of the allegedly fraudulent liens would have on the County, not that they actually sought to cause harm to the County

through their actions. *Kingman Holdings, LLC v. BAC Home Loans Servicing, LP*, 2011 WL 1882269, at *5 (E.D. Tex. Apr. 21, 2011); *Hernandez v. Vanderbilt Mortg. and Finance, Inc.*, 2010 WL 3359559, at *4 (S.D. Tex. Aug. 25, 2010) ("Texas courts have interpreted the 'intent' element to require only that the person filing the fraudulent lien be aware of the harmful effect that filing such a lien could have") (citing *Taylor Elec. Services, Inc. v. Armstrong Elec. Supply Co.*, 167 S.W.3d 522, 531–32 (Tex.App.—Ft. Worth 2005, no pet.)). While Defendants may not have acted with the actual purpose or motive to cause harm to the County, the FAC alleges that through their creation of MERS, Defendants intended to establish their own recording system in order to avoid having to record transfers or assignments with the County and paying the associated filing fees. (FAC ¶¶ 2, 3, 17.) Accordingly, one can reasonably infer from the allegations set forth in the FAC that Defendants were aware of the harmful effects the fraudulent liens would have on the County. That is sufficient to establish intent.

4. Section 12.002 Does Not Require County to Allege a Specific Injury

Next, Defendants argue that the Court should dismiss Plaintiff's claim because Plaintiff failed to allege facts demonstrating that it is an injured person under Section 12.002(b) . (D.E. 27 at 30–31.) Defendants assert that Plaintiff has not and cannot demonstrate a cognizable and compensable injury of which the alleged violation is the proximate cause because the County is prohibited from receiving fees for services it did not perform, and all Plaintiff has alleged is an abstract violation of the statute. (*Id*.) Plaintiff counters that, by its plain terms, the statute does not require the County to suffer any actual monetary injury, as Section 12.002(b)(1) provides for statutory damages, and Section 12.003 permits a county attorney to bring an action to enjoin a violation of the statute without seeking any damages whatsoever. (D.E. 46 at 29–30.)

By its plain terms, Section 12.002 does not require a person to have suffered any actual, compensable injuries. Section 12.002(a)(3) requires an intent to cause either physical injury, financial injury, or mental anguish or emotional distress; however, there is no requirement of present injury. A defendant found to have violated the statute may be liable for actual damages, or statutory damages of $10,000 per violation may be imposed, whichever is greater. TEX. CIV. PRAC. & REM. CODE § 12.002(b)(1). The Court already determined that Plaintiff alleged an injury-in-fact for purposes of Article III. (See analysis set forth in Subsection A, *supra*.) Section 12.002 does not require any additional allegations of injury to bring an action asserting a violation of the statute.

5. County Possesses a Right of Action Under Section 12.002

Defendants argue that, pursuant to Section 12.003, only the obligor, the debtor, or a person who owns an interest in the real property may bring an action for the presentment of a fraudulent lien or claim against real property under Section 12.002. (D.E. 27 at 31–32.) The Court disagrees and concludes that the County has a right of action under Section 12.002.

Section 12.003 of the Texas Civil Practice and Remedies Code empowers the following to bring an action to enjoin a violation or to recover damages under Section 12.002:

> (1) the attorney general;
> (2) a district attorney;
> (3) a criminal district attorney;
> (4) a county attorney with felony responsibilities;
> (5) a county attorney;
> (6) a municipal attorney;
> (7) in the case of a fraudulent judgment lien, the person against whom the judgment is rendered; and
> (8) in the case of a fraudulent lien or claim against real or personal property or an interest in real or personal property, the obligor or debtor, or a person who owns an interest in the real or personal property.

TEX. CIV. PRAC. & REM. CODE § 12.003(a)(1)–(8). The Court does not find any ambiguity in Section 12.003, and must therefore give the statute its plain and common meaning. *See Taylor*

Elec. Services, Inc. v. Armstrong Elec. Supply Co., 167 S.W.3d 522, 530 (Tex.App.—Fort Worth 2005, no pet).

The Court finds that the phrase "in the case of a fraudulent lien or claim against real or personal property or an interest in real or personal property" in subsection 8 does not in any way limit the ability of a county, district, or municipal attorney from bringing an action to enjoin a violation or to recover damages for a violation of Section 12.002. Rather, these words limit when an obligor or debtor, or a person who owns an interest in real or personal property may bring an action. For instance, an obligor or debtor may not bring an action to enjoin or seeking damages for the filing of a fraudulent court record; only in the case of a fraudulent lien or claim does an obligor or debtor have standing to bring a cause of action on his own behalf. *See Vanderbilt Mortg. & Finance, Inc. v. Flores*, 692 F.3d 358, 370 (5th Cir. 2012); *Centurion Planning Corp., Inc. v. Seabrook Venture II*, 176 S.W.3d 498, 505 (Tex.App.—Houston [1 Dist.] 2004, no pet.). Under the plain language of the statute, a county, district, or municipal attorney, however, may seek an injunction or damages in all cases where there has been a violation of Section 12.002.

Moreover, to the extent that Defendants argue the present action must be dismissed because it was filed on behalf of the County by a private attorney employed by the County, the Court finds this argument unavailing. A county, municipal, or district attorney is never named as the plaintiff in an action brought to enforce a local ordinance or state statute. Rather, the action is brought on behalf of the municipality, the county, or the state by a designated government attorney. Thus, when there has been a violation of a law, a right of action accrues to the government, not the individual attorney. Section 12.003 clearly vests the counties with the

power to enforce violations of Section 12.002. The Court therefore concludes that the County possesses a right of action under Section 12.002.

6. County Stated Section 12.002 Claims with Sufficient Particularity

Finally, Defendants argue that Plaintiff failed to plead its claims under Section 12.002 of the Texas Civil Practice and Remedies Code with the particularity required for fraud claims under FED. R. CIV. P. 9(b). (D.E. 27 at 32; D.E. 54 at 20–21.) Defendants argue that the specifics of the alleged scheme are missing, especially with regard to Defendant BANA. (*Id*.) Defendants point out that none of the allegedly fraudulent deeds of trust attached to the FAC were filed with the County by BANA. (See Pls.' Exs. 1–5 attached to FAC.)

Plaintiff alleges throughout the FAC that Defendants, including BANA, falsely named MERS as a beneficiary, grantor, grantee, holder of legal title in the security interests, lender, holder of the note and lien, and/or the legal and equitable owner and holder of the promissory notes in deeds of trust filed with the County over a span of several years. (FAC ¶¶ 21, 26–29, 32, 35, 42.) The Court must accept these allegations as true. Taken together, these allegations establish the who, what, where, when, and how of a scheme to circumvent Texas recording law, which resulted in the alleged fraudulent filing of hundreds or potentially thousands of documents or records with the County over the past several years. The FAC does not identify each instance Defendants allegedly filed a fraudulent deed of trust with the County; however, this level of detail is not required by the federal rules.

The purpose of the heightened pleading standard for fraud is to apprise Defendants of the nature of the claim and the statements relied upon by Plaintiff as constituting the fraud. Rule 9(b) must, however, be interpreted in conjunction with the Federal Rules of Civil Procedure general pleading standard set forth in Rule 8, which requires only a "short and plain statement of the claim" and "simple, concise, and direct" allegations. *See Corwin v. Marney, Orton*

Investments, 788 F.2d 1063, 1068 n. 4 (5th Cir. 1986). To require Plaintiff to plead specifics for each of the alleged fraudulent filings in the case at hand would obliterate the federal rules basic pleading philosophy. *See id*. (citing 5C WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1298 at 406–16 (1969)). Plaintiff has stated sufficient facts upon which Defendants can prepare an effective response and defense to all Plaintiff's allegations. *See Frith v. Guardian Life Ins. Co. of Am.*, 9 F. Supp. 2d 734, 743 (S.D. Tex. 1998). Nothing more is required at this stage of the litigation. The Court thus finds that the FAC stated Plaintiff's Section 12.002 claims with sufficient particularity, and Defendants' motion to dismiss is denied with regard to Plaintiff's Section 12.002 cause of action.

C. Fraudulent Misrepresentation

To state a claim for fraudulent misrepresentation, Plaintiff must show the following elements: (1) Defendants made a misrepresentation to Plaintiff about a material fact; (2) Defendants knew the representation was false when it was made, or Defendants made the representation recklessly without any knowledge of its truth; (3) Defendants made the representation with the intent that Plaintiff act upon it, or with the intent to induce the Plaintiff's reliance on the representation; (4) Plaintiff relied on the misrepresentation; (5) Plaintiff's reliance was justifiable; and (6) Plaintiff suffered an injury as a result of the misrepresentation. *Coach, Inc. v. Angela's Boutique*, Civ. No. H-10-1108, 2011 WL 2446387, at *4 (S.D. Tex. June 15, 2011); *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 217 (Tex. 2011); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex. 1992). Defendants do not contest the knowing element. (D.E. 48.) Defendants' other arguments are considered below.

1. Allegations Sufficient to Plausibly Infer Defendants Made False Statements

Defendants argue that Plaintiff's fraudulent misrepresentation claim must be dismissed because Plaintiff failed to allege any false statements. (D.E. 48 at 2–3.) The FAC alleges that Defendants filed or caused to be filed security instruments in the County property records which falsely represent that MERS has an interest in certain parcels of real property as a grantee, grantor, beneficiary, lender, and holder or owner of notes and liens. (FAC ¶ 42.) Defendants argue, however, that these alleged statements were not false because (a) Section 51.0001(4) of the Texas Property Code permits MERS to serve as a secured party; (b) the borrowers agreed in the deeds of trust that MERS was a beneficiary; and (c) MERS holds a lien on the properties secured by the deeds of trust. (D.E. 48 at 2–3.)

Plaintiff responds that Defendants' interpretation of Section 51.0001 is incorrect and that, by its own admission, MERS has "no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans." (MERS Terms and Conditions for Members, App. 1 to Pl.'s Supp. Resp., D.E. 52-1 at 14.) Therefore, Plaintiff argues that MERS never acquired a lien in any of the properties, and naming itself as the beneficiary of the security instruments was fraudulent. (D.E. 52 at 2.)

The Court must first consider whether Section 51.0001(4) permits MERS to serve as a secured party (i.e., the grantee) for a mortgage. In Subsection B-1, *supra*, the Court concluded that, for purposes of Chapter 51 of the Texas Property Code, MERS is not a lender, grantee, beneficiary, owner, or holder of the security instruments; it is merely the nominee of the MERS members that serve in those capacities. Accordingly, the Court rejects Defendants' argument that they are shielded from liability by Section 51.0001(4) of the Texas Property Code. Under

Section 51.0001, MERS may serve as the nominee of the beneficiary, but this does not make MERS a secured party. The security instruments secure the repayment of the loans to the lenders, not to MERS. (*See, e.g.*, D.E. 39-1 at 2.) MERS has no right to enforce the promissory notes or seek judgments against borrowers in default. MERS is simply the nominee of the beneficiaries of the security instruments with the right to foreclose on behalf of the secured parties under the deeds of trust. In sum, neither Texas law, nor the allegations set forth in the FAC, support Defendants' argument that MERS may serve as a secured party or lienholder.

The Court additionally rejects Defendants' other arguments that there were no false statements because the borrowers agreed in the deeds of trust that MERS was a beneficiary, and MERS holds a lien on the properties secured by the deeds of trust. These arguments directly conflict with the language of the deeds of trust, as well as Section 51.0001(1), which state that MERS serves solely as the nominee for the secured party. MERS is not a lienholder, grantee, secured party, or beneficiary. Accordingly, the Court concludes that the FAC sets forth sufficient facts to give rise to a plausible inference that Defendants made false statements to the County regarding their rights under the deeds of trust and their relationships to the borrowers in the mortgages issued by MERS members.

2. Allegations Sufficient to Plausibly Infer That Alleged Misrepresentations Concerned Material Facts

Next, Defendants argue that Plaintiff's fraudulent misrepresentation claim must be dismissed because Defendants' allegedly false statements concerning MERS' legal status were legal *opinions*, not misrepresentations of material *facts*. (D.E. 48 at 3.) The Court disagrees with this distinction.

Plaintiff must demonstrate that Defendants made the statements with the intent to deceive. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48

(Tex. 1998). Moreover, Plaintiff "must show that each representation complained of concerned a material fact as distinguished from a mere matter of opinion, judgment, probability, or expectation." *Stephanz v. Laird*, 846 S.W.2d 895, 903 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

Plaintiff alleges that Defendants represented in official documents filed with the County that MERS was a grantee, grantor, beneficiary, lender, and holder or owner of notes and liens. (FAC ¶¶ 23, 25, 27, 29, and 42.) These statements were not qualified legal opinions, but they were statements of fact made with the knowledge and intent they would have a particular legal effect. (FAC ¶¶ 26, 36, and 37.) The alleged misrepresentations caused the County to index the deeds of trust in a particular way and resulted in MERS being publicly identified through the County records as having a security interest in the properties. Accordingly, viewing the allegations of the FAC in the light most favorable to Plaintiff, the Court concludes that one could plausibly infer that Defendants made material misrepresentations of fact to Plaintiff in the deeds of trust presented to the County for filing.

3. Allegations Sufficient to Plausibly Infer that County Suffered an Injury

Defendants assert that Plaintiff's fraudulent misrepresentation claim must be dismissed because the FAC fails to allege a pecuniary loss. (D.E. 48 at 3–4.) Defendants argue that the County is not entitled to any filing fees for documents not presented for filing and that the County has not been injured by the allegedly false filings because the County's duty is purely mechanical—to file the deeds of trust as presented and maintain an index of those instruments. (*Id*. at 4.) Moreover, Defendants contend that Plaintiff is not even within the class of persons the recording statutes are designed to protect; therefore, any inaccuracies in the records do not injure Plaintiff in a legally cognizable manner. (*Id*.) The Court disagrees.

Defendants argument concerning a lack of pecuniary losses by the County is premised on the provisions set forth in TEX. CONST. ART. I, § 3 and TEX. GOV'T CODE §§ 118.002 and 118.011(a). (See Defendants' argument regarding standing, D.E. 27 at 33.) Defendants argue that these provisions provide that the County is not permitted to charge a fee for services unless those services have been rendered. (*Id*.) Yet, the County is not suing to recover unpaid filing fees, but statutory and compensatory damages resulting from Defendants' allegedly unlawful activities that caused a reduction in filing fees and the degradation of the County's property records. The distinction is subtle, but important. "Damages are the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong." BLACK'S LAW DICTIONARY 445 (9th ed. 2009) (quoting Frank Gahan, *The Law of Damages* 1 (1936)). One measure of Plaintiff's damages could be the filing fees that the County would have received but for Defendants' activities. This is not the same as Plaintiff suing to recover unpaid fees for services rendered. Plaintiff asserts lost filing fees merely as a measure of damages, not as a cause of action.

In addition to the lost filing fees, the FAC alleges that the County suffered an injury due to the degradation and corruption of its property records as a result of Defendants' false filings. (FAC ¶ 38.) The Court recognizes that the maintenance of accurate property records is a matter of public concern. *See* TEX. LOCAL GOV'T CODE § 201.002 ("recognizing the central importance of local government records in the lives of all citizens") *Vanderbilt Mortgage & Finance, Inc. v. Flores*, No. 11-40602, 2012 WL 3600853, at *11 (5th Cir. Aug. 23, 2012) ("The filing of fraudulent liens undermines the reliability of the public records system on which so many rely, including landowners, purchasers, local governments, title companies, insurers, and realtors."). Defendants' filings of inaccurate or fraudulent property records is alleged to be so widespread

and pervasive as to have damaged the integrity of Texas' real property records and to have all but collapsed the real property recording system in the County. (FAC ¶¶ 3, 30, 31.) If these assertions are correct, the County has been harmed, first, because it relies on accurate property records in conducting its own business and, second, because the value of this essential public service and the County's value as an institution has been damaged if people and businesses can no longer rely on the accuracy of the property records it maintains.

The Court therefore concludes that the FAC sets forth sufficient facts to give rise to a plausible inference that the County suffered an injury as a result of Defendants' alleged misrepresentations.

4. Allegations Sufficient to Plausibly Infer that County Justifiably Relied on Defendants' Alleged Misrepresentations

Defendants argue that Plaintiff's fraudulent misrepresentation claim must be dismissed because the FAC fails to allege that the County justifiably relied on any misrepresentations by Defendants. (D.E. 48 at 4–5.) Defendants argue that Plaintiff never changed its position in reliance on the real property record filings because the County Clerk is required by statute to simply record the documents presented to it, and this legal obligation does not constitute reliance. (*Id*.) Plaintiff responds that the County reasonably and justifiably relies upon the party denominations on a deed of trust in determining whether and how to designate a party in the grantee-grantor index. (D.E. 52 at 3.)

"An essential element of a common-law fraud action is a plaintiff's reasonable or justifiable reliance upon the defendant's alleged misrepresentation, which reliance induced action or inaction on the plaintiff's part . . . ." *TCA Bldg. Co. v. Entech, Inc.*, 86 S.W.3d 667, 674 (Tex. App.—Austin 2002, no pet.). The Texas recording statute is permissive. Texas does not require businesses or individuals to record their interests in property, nor does it require counties

to independently investigate the truthfulness and accuracy of the deeds of trusts, liens, security instruments, and mortgages submitted for recordation. To maintain its property records, the County instead relies on those filing a lien or security interest with the County to truthfully and accurately represent the parties' interests. The FAC alleges that it has been the convention in Texas for well over 150 years to index as the grantee in the property records the person designated as the beneficiary in the deed of trust, and that Defendants exploited this practice in creating the MERS system. (FAC ¶¶ 16, 26, 27, and 28.) Moreover, a security instrument, lien, mortgage, or deed of trust is a legal document, and the words used therein generally have very specific meanings and legal consequences for the parties to the agreements. The County and others rely on the truth and accuracy of these legal documents in conducting their business.

Although the County Clerk may file and index security instruments presented for recordation in a certain manner—whether by statute, policy, or custom—the County still relies on the truthfulness and accuracy of the documents presented for filing to perform its duties. Accordingly, considering the allegations of the FAC in the light most favorable to Plaintiff, the Court concludes that the FAC sets forth sufficient facts from which one could plausibly infer that Plaintiff justifiably and reasonably relied on Defendants' alleged misrepresentations.

5. Allegations Sufficient to Plausibly Infer that Defendants Made the Alleged Misrepresentations with the Intent and Purpose to Induce Reliance

Defendants argue that Plaintiff's fraudulent misrepresentation claim must fail because MERS did not make the alleged misrepresentations with the intent and purpose to deceive as the County is not within the class of individuals the recording statutes are designed to protect. (D.E. 48 at 5–6.)

The FAC alleges that MERS was established so that its members could avoid recording subsequent mortgage transfers or assignments with the County and paying the associated filing

fees once a mortgage was recorded on the MERS system (FAC ¶¶ 2, 17, 37); that, to accomplish this, MERS members agreed amongst themselves to list MERS as the beneficiary in their deeds of trust when originating a loan (FAC ¶¶ 19, 20); and that this caused MERS to be indexed as the grantee for the mortgages in the property records and permitted any subsequent transfers of the mortgages between MERS members to be tracked electronically in the MERS system (FAC ¶¶ 19, 20, 27, 30).

Based on the above allegations, the Court concludes that the FAC sets forth sufficient facts to give rise to a plausible inference that Defendants acted with the intent and purpose to induce the County Clerk to rely on Defendants' false statements regarding MERS' status with respect to the security instruments so that MERS would be recorded as the grantee in the County's property records, and Defendants could avoid recording subsequent mortgage assignments and transfers with the County. Consequently, Defendants' motion to dismiss is denied with regard to Plaintiff's fraudulent misrepresentation cause of action.

D. Texas Local Government Code § 192.007

Plaintiff alleges that Defendants violated Section 192.007(a) of the Texas Local Government Code by failing to record all releases, transfers, assignments, and other actions relating to the deeds of trusts Defendants recorded or caused to be recorded in the real property records of the County. (FAC ¶¶ 45–50.) Defendants argue that this cause of action must be dismissed with prejudice, first, because there is no duty to record assignments under Texas law; second, because there is no right of action under Section 192.007; and third, because the transfer of a promissory note from one MERS member to another does not require the re-recording of the security instrument as MERS continues to hold legal title to the deed of trust. (D.E. 27 at 34.)

1. Section 192.007 Imposes a Duty to Record Releases, Assignments, and Transfers of Previously Recorded Instruments

Defendants argue that, under Texas law, the filing of property records is always permissive, and Section 192.007 imposes no duty to record or re-record assignments, or any other documents evidencing an interest in property. (D.E. 27 at 34–39.) Defendants argue that Section 192.007 only relates to the *manner* in which a document releasing, transferring, assigning, or taking some other action with regard to an instrument filed, registered, or recorded in the office of the county clerk must be recorded, but a person is never *required* to record an instrument. (*Id*. at 37.) Plaintiff responds that the plain language of the statute requires recording with the County any assignment, release, or transfer related to a previously recorded instrument. (D.E. 46 at 36.)

Defendants are correct that the Texas Property Code is generally permissive with regard to the recording of a mortgage or deed of trust concerning real property located within the State. TEX. PROP. CODE § 12.001 ("An instrument concerning real or personal property *may* be recorded"); § 12.003 ("written evidence of title to land . . . *may* be recorded"); § 12.004 ("written evidence *may* be recorded"); § 12.009 ("A master form of a mortgage or deed of trust *may* be recorded.") (emphasis added). However, these sections do not address the duties of a lienholder once an interest in property has been recorded with the County, and whether the lienholder has a duty to update the property records if its status with regard to a recorded security instrument has changed.

The Court considers the plain language of the statute. Section 192.007(a) of the Texas Local Government Code provides:

> To release, transfer, assign, or take another action relating to an instrument that is filed, registered, or recorded in the office of the county clerk, a person must file, register, or record another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded.

TEX. LOC. GOV'T CODE ANN. § 192.007(a). Based on the plain language of Section 192.007, the Court concludes that the statute requires the re-filing of an instrument each time there is a release, transfer, assignment, or some other action relating to an instrument filed with the county clerk. This interpretation is consistent with this Court's previous interpretation of this statute. *See Miller v. Homecomings Financial, LLC*, 881 F. Supp. 2d 825, 830 (S.D. Tex. 2012) ("Texas statute declares that any transfer or assignment of a recorded mortgage must also be recorded in the office of the county clerk"). There are no recorded cases of Texas state courts interpreting Section 192.007.

2. Trading of Promissory Notes Between MERS Members Constitutes Releases, Transfers, Assignments, or Other Actions with Regard to Security Instruments That Requires Re-Recording

Next, Defendants argue that transfers or assignments of promissory notes between MERS members do not result in the assignment or transfer of the deeds of trust under the MERS system because MERS holds legal title to the deeds of trust and serves as the beneficiary of record. (D.E. 27 at 41–42.) Defendants argue that the promissory notes and the deeds of trust constitute two different instruments, that MERS serves as the legal title holder of the deed of trust, and that, under the MERS system, MERS members can freely trade the promissory notes between themselves without there ever being any transfer or assignment of the deeds of trust. (*Id.*) The Court disagrees.

It is well established under Texas and federal law that a promissory note and the deed of trust securing that note are inseparable, and an assignment or transfer of ownership of the note carries the deed of trust with it. *See Carpenter v. Longan*, 83 U.S. 271, 274 (1872) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."); *McCarthy v. Bank of America, NA*, No. 4:11-cv-356-A, 2011 WL 6754064, at *3 (N.D. Tex.

Dec. 22, 2011); *West v. First Baptist Church*, 71 S.W.2d 1090, 1099 (Tex. 1934); *Pope v. Beauchamp*, 219 S.W. 447, 449 (Tex. 1920) ("well settled that the assignment of the debt . . . draws after it the mortgage as appurtenant to the debt"); *Solinsky v. Fourth Nat'l Bank*, 17 S.W. 1050, 1051 (Tex. 1891); *Perkins v. Stern*, 23 Tex. 563 (1859); *Campbell v. Mortgage Elec. Registration Sys.*, No. 03-11-00429-CV, 2012 WL 1839357, at *4 (Tex. App.—Austin May 18, 2012, pet. den.) (mem. op.) ("When a mortgage note is transferred, the mortgage or deed of trust is also automatically transferred to the note holder by virtue of the common-law rule that 'the mortgage follows the note.' ").

The instrument securing the note is transferred every time the promissory note is sold. MERS can serve as an agent or nominee of the lienholder with rights under the deed of trust; however, whenever there is a transfer of the promissory note, there is also a transfer of the deed of trust, and Section 192.007(a) requires that this transfer be recorded in the Texas property records.

3. No Private Right of Action

Finally, Defendants argue that, even if there exists a recording requirement for previously recorded security instruments, the Court should dismiss Plaintiff's claim because Section 192.007 does not provide the County with a private right of action. (D.E. 27 at 39–41.) Plaintiff argues that the Court may derive a private right of action from the language and purpose of Section 192.007. (D.E. 46 at 34–37.)

In determining whether a statute provides for a private right of action, the Court must look to the drafters' intent. *See Brown v. De La Cruz*, 156 S.W.3d 560, 563 (Tex. 2004); *Davis v. Hendrick Autoguard, Inc.*, 294 S.W.3d 835, 838 (Tex. App.—Dallas 2009, no pet.). Nothing in the plain language of section 192.007 indicates that the Texas Legislature intended to create a

private right of action for enforcement of the statute; nor is there anything in the legislative history to suggest such an intent. Plaintiff argues that the Legislature is not presumed to do a useless act and that the law does not permit a wrong without a remedy. (D.E. 46 at 36.) Standing alone, however, this does not provide strong evidence of a private right of action. Moreover, the law does provide a remedy against those who fail to record their interests in real property. Rather than imposing statutory damages against those who fail to record, the recording of interests in real property is encouraged by granting perfected status to those who record against subsequent creditors and purchasers. The Texas Property Code provides that when a person fails to record his or her interest in property, that interest "is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice." TEX. PROP. CODE ANN. § 13.001.

The Court therefore concludes that Texas Local Government Code Section 192.007 does not provide for a private enforcement action. *See El Paso Cty. v. Bank of New York Mellon*, No. A-12-CA-705-SS, 2013 WL 285705, at *3, n. 3 (W.D. Tex. Jan. 22, 2013) ("Court finds the Texas recording statutes provide no private right of action for Plaintiffs"). Accordingly, Plaintiff's cause of action under Section 192.007 of the Texas Property Code is DISMISSED pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

E. Texas Government Code § 51.901

Plaintiff asserts a claim for declaratory judgment requesting judicial declarations (1) that Defendants' filings of deeds of trust identifying MERS as a mortgagee, beneficiary, grantor, lender, holder of notes and liens, and the legal and equitable owner and holder of promissory notes constitute a violation of Section 51.901 of the Texas Government Code; and (2) that each Defendant is liable for having failed to properly record all releases, transfers, assignments, or

other actions relating to instruments Defendants filed or caused to be filed, registered, or recorded in the County property records. (FAC ¶¶ 55–57.)

Section 51.901(a) instructs the County Clerk what to do in the event there arises a reasonable basis to believe in good faith that an instrument recorded or submitted for filing in the County's property records is fraudulent. The statute does not, however, prohibit the filing of fraudulent instruments, nor does it provide a penalty for those who file fraudulent instruments. The Court cannot enter a declaratory judgment stating that Defendants' actions violated Section 51.901 because the statute does not require Defendants to take, or refrain from taking, any action. Therefore, Defendants cause of action for a declaratory judgment under Section 51.901 of the Texas Government Code is DISMISSED pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

F. Unjust Enrichment

Defendant BANA argues that Plaintiff's unjust enrichment claim should be dismissed because it is merely an attempt by Plaintiff to do an end run around the lack of a private cause of action under Texas Local Government Code Section 192.007, and because unjust enrichment is a theory of recovery, not a separate cause of action. (D.E. 27 at 42–43.) In a separate brief, Defendants MERS and MERSCORP argue that Plaintiff's unjust enrichment claim should be dismissed because the FAC fails to allege that the fees charged by MERS members were obtained from the County; and therefore, MERS did not receive any benefit from Plaintiff. (D.E. 51 at 2.)

Plaintiff responds that unjust enrichment is an independent cause of action, and Plaintiff has conferred a benefit upon MERS and its members by providing a public recording system that MERS takes advantage of to perfect its members' property liens; MERS then usurps the role of

the County in recording future transfers and assignments by inserting itself into the County property records as a substitute grantee for its members; and Defendants then become unjustly enriched by charging fees to their members to record transfers and assignments of the mortgage. (D.E. 46 at 42.) In contrast, a grantee operating outside the MERS system is required to pay a filing fee to the County each time a mortgage is transferred or assigned to maintain a lien's perfected status. (*Id*.)

Texas law permits a plaintiff to seek recovery under a theory of unjust enrichment when a party has obtained a benefit from the plaintiff by fraud, duress, or the taking of an undue advantage, or when a person wrongfully secures or passively receives a benefit which it would be unconscionable to retain. *Douglass v. Beakley*, 900 F. Supp. 2d 736, 752 (N.D. Tex. 2012); *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992); *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet. denied). Unjust enrichment may be both an equitable right asserted as its own cause of action, or a theory of recovery. *See Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 550 (5th Cir. 2010); *Douglass v. Beakley*, 900 F. Supp. 2d 736, 752 n. 18 (N.D. Tex. 2012); *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 870 (Tex. 2007); *Pepi Corp. v. Galliford*, 254 S.W.3d 457, 460 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) ("Unjust enrichment is an independent cause of action."). In the case at hand, Plaintiff asserts it as an independent cause of action. (D.E. 46 at 42.) To recover, Plaintiff must show that Defendants profited at the County's expense. *See HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 891 (Tex. 1998).

The crux of Plaintiff's claim is that Defendants received an essential service virtually free of charge from the County and then resold that service to its members. There is nothing that prohibits MERS from independently registering and tracking mortgages as a book entry system

or from serving as an agent and nominee and providing foreclosure and registration services for lenders. The MERS system, however, allegedly goes beyond this limited function by usurping the role of the County as a public registry of real property interests. MERS is not a public registry, but a confidential, electronic registry of mortgages available to lenders, servicers, and other players in the mortgage industry to track the ownership and servicing rights for mortgages traded amongst MERS members.

The object of recording statutes is to protect innocent purchasers and creditors against prior interests in real property which were not properly recorded, so as to prevent them from being injured or prejudiced by their lack of knowledge of competing claims. *Noble Mortg. & Investments, LLC*, 340 S.W.3d at 79. The modern property recording system relies on voluntary recordation of liens and other interests in public property records. In exchange for recording their interests, lienholders are granted priority status over subsequent purchasers or lienholders. Plaintiff alleges that Defendants have filed thousands of fraudulent deeds of trust naming MERS as the beneficiary in order to circumvent Texas recording laws and establish a parallel recording system which purports to provide the same protections as the County's recording system; that Defendants MERS and MERSCORP have been unjustly enriched by the recording fees they have collected from their members; and that BANA has been unjustly enriched by avoiding the payment of filing fees to the County. (FAC ¶¶ 1–4, 13–31, 51–54.)

Based on the allegations set forth in the FAC, one could plausibly infer that Defendants obtained a benefit from Plaintiff through fraud and/or by taking undue advantage of the County's policies regarding recording property liens; that in order to confer upon its members the benefits of perfected lienholder status, MERS was required to accurately record and update the security instruments with the proper grantor and grantee under TEX. LOC. GOV'T CODE § 192.007; that

this would have required MERS to pay the County filing fees each time a mortgage was transferred; and that equity demands Defendants reimburse the County for the benefits they received. Accordingly, with regard to Plaintiff's unjust enrichment cause of action, Defendants' motion to dismiss is denied.

G. Conspiracy

Finally, Defendants argue that Plaintiff's conspiracy claim must be dismissed because Plaintiff merely parrots the elements of a civil conspiracy, and such conclusory allegations are insufficient to state a claim for relief. (D.E. 27 at 49.) Plaintiff responds that, while the paragraph alleging conspiracy does not set forth this cause of action in detail, or set out each act by Defendants in furtherance of the conspiracy, the FAC sets forth the underlying facts upon which Plaintiff's conspiracy cause of action is based in sufficient detail to survive the present motion to dismiss. (D.E. 46 at 46–47.)

A common law civil conspiracy is frequently alleged as a derivative cause of action based upon the defendants' participation in some underlying tort. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). To state a claim for civil conspiracy under Texas law, a plaintiff must allege an agreement between "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result." *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005). The allegations must demonstrate that "the particular defendant agreed with one or more of the other conspirators on the claimed illegal object of the conspiracy and intended to have it brought about." *Goldstein v. Mortensen*, 113 S.W.3d 769, 779 (Tex. App.—Austin 2003, no pet.) (citing *Zervas v. Faulkner*, 861 F.2d 823, 836 (5th Cir. 1988)). "[P]roof that an individual had some collateral involvement in a transaction, and had good reason to believe that there existed a

conspiracy among other parties to it, is insufficient of itself to establish that the defendant was a conspirator." *Id*. (citing *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 928 (Tex.1979)).

Plaintiff acknowledges that the paragraph alleging conspiracy (FAC ¶ 61) is insufficient to state a cause of action; however, Plaintiff points to specific conduct alleged throughout the FAC. The Court concludes, however, that there are insufficient allegations demonstrating an agreement between the Defendants to misrepresent MERS as the beneficiary in order to defraud the County regarding the identity of the secured parties. Plaintiff's general allegations that BANA was a shareholder in MERSCORP, that it participated in the formation of MERS, and that Wall Street, including BANA, decided to write its own rules are insufficient to demonstrate a conspiracy. (FAC ¶¶ 10, 18, 19, 20, 21, 27.) The allegations demonstrate Defendants were collaterally involved in the development of the MERS system as investors, but this falls short of the type of coordinated plan of action necessary to show conspiracy. Accordingly, Plaintiff's conspiracy cause of action is DISMISSED pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Nevertheless, the Court grants Plaintiff leave to amend the FAC to provide additional factual allegations with regard to its conspiracy claim. *See United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010) (" 'A district court should 'freely give leave' to amend a complaint 'when justice so requires.' " (quoting FED. R. CIV. P. 15(a)(2))).

V. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss (D.E. 26) is GRANTED IN PART and DENIED IN PART. The Court concludes that Plaintiff alleged sufficient facts to give rise to a plausible inference of liability with regard to Plaintiff's causes of action alleging violations of Section 12.002 of the TEX. CIV. PRAC. & REM. CODE, unjust enrichment, and

fraudulent misrepresentation. The Court retains these causes of actions. Plaintiff's remaining causes of action are dismissed for failure to state a claim upon which relief may be granted. Plaintiff is granted leave to file an amended complaint asserting additional allegations supporting its conspiracy cause of action within fourteen (14) days from the filing of this Order.

ORDERED this 3rd day of July 2013.

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

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Wells Fargo fails to end U.S. mortgage fraud lawsuit

Tue, Sep 24 2013

By Jonathan Stempel and Aruna Viswanatha

NEW YORK/WASHINGTON (Reuters) - A federal judge has rejected Wells Fargo & Co's bid to dismiss a U.S. government lawsuit accusing the nation's largest mortgage lender of fraud, a victory for federal investigators pursuing cases tied to the recent housing and financial crises.

U.S. District Judge Jesse Furman in Manhattan said on Tuesday that the government may pursue its key federal claims that Wells Fargo lied about the quality of mortgages it submitted to a government insurance program, costing hundreds of millions of dollars over roughly a decade.

In particular, Furman sided with the U.S. Department of Justice's interpretation of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, a law adopted after the 1980s savings-and-loan crisis that lets the government sue for fraud affecting a federally-insured financial institution.

Wells Fargo said the FIRREA claim should be tossed because the only institution affected by its conduct was itself.

But Furman concluded otherwise, following the lead of two colleagues on the Manhattan federal court, Jed Rakoff and Lewis Kaplan, in cases against Bank of America Corp and Bank of New York Mellon Corp, respectively

"The question considered by the courts in these cases was whether a financial institution, through its own misconduct, can affect itself within the meaning of FIRREA," Furman wrote in a 60-page decision. "Courts have repeatedly held that it can. There is no reason to deviate from that interpretation here."

Furman also dismissed some claims against San Francisco-based Wells Fargo, which is also the fourth-largest U.S. bank, including claims of negligence and unjust enrichment. He said this was because the government brought them too late, or had been aware of Wells Fargo's misconduct at the time they arose.

The October 2012 lawsuit accused Wells Fargo of misleading the U.S. Department of Housing and Urban Development into believing its loans qualified for insurance from HUD's Federal Housing Administration.

As in many of the government's major financial crisis-era cases, no individuals were named as defendants. The Justice Department is also seeking civil penalties as well as damages.

"We are disappointed with the court's ruling, but we look forward to presenting facts to vigorously defend against this action," Wells Fargo spokesman Ancel Martinez said. "Wells Fargo denies the allegations and believes it acted in good faith and in compliance with Federal Housing Administration and Department of Housing and Urban Development rules."

In afternoon trading, the bank's shares were down 51 cents at $41.80 on the New York Stock Exchange.

LONG STATUTE OF LIMITATIONS

The lawsuit is one of several filed by the government seeking to hold financial companies liable under FIRREA, the federal False Claims Act, or both for shoddy mortgage loans that helped fuel the U.S. housing and financial crises.

FIRREA has become a favorite tool to address alleged mortgage fraud because of its 10-year statute of limitations, twice the length than allowed under other federal securities laws.

The lawsuit against Wells Fargo alleges that the FHA paid hundreds of millions of dollars on insurance claims on thousands of defaulted mortgages as a result of false certifications by Wells Fargo. The bank was sued under both FIRREA and the False Claims Act.

According to the government, Wells certified more than 100,000 loans for FHA insurance despite knowing that borrowers' ability to make payments had not been properly vetted.

The government also said that from 2002 to 2010, Wells Fargo identified 6,558 loans as having materially violated HUD requirements, but reported only 238 of them.

U.S. Attorney Preet Bharara in Manhattan, at the time he brought the case, faulted Wells Fargo's alleged "longstanding and reckless trifecta of deficient training, deficient underwriting and deficient disclosure, all while relying on the convenient backstop of government insurance."

Furman rejected Wells Fargo's argument that it need not face the lawsuit because it had joined a $25 billion federal settlement in April 2012 with several banks over alleged foreclosure abuses. The judge supervising that accord, U.S. District Judge Rosemary Collyer in Washington, D.C., in February rejected a similar claim by the bank.

Trial began on Tuesday in the Bank of America case before Judge Rakoff. There, the government accuses the second-largest U.S. bank of violating FIRREA through the fraudulent sale of risky loans to Fannie Mae and Freddie Mac.

In 2012, the government settled False Claims Act mortgage cases for $1 billion with Bank of America, $202.3 million with Deutsche Bank AG, $158.3 million with Citigroup Inc and $132.8 million with Flagstar Bancorp Inc.

The case is U.S. v. Wells Fargo Bank NA, U.S. District Court, Southern District of New York, No. 12-07527.

(Editing by Lisa Von Ahn and Carol Bishopric)

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SPECIAL WARRANTY DEED WITH VENDOR'S LIEN

DATE: OCTOBER 29, 2004

GRANTOR: 967, LTD., a Texas limited partnership

GRANTOR'S MAILING ADDRESS: 1301 South IH 35, Suite 200
Austin, Travis County, Texas 78741-1169

GRANTEE: ALVIE CAMPBELL & JULIA CAMPBELL **********

GRANTEE'S MAILING ADDRESS: 505 KAROLYN DRIVE
ROUND ROCK, TX 78664

CONSIDERATION: Ten and No/100 Dollars ($10.00) and Grantee's execution of first-lien note of even date herewith in the principal sum of ****** ONE HUNDRED THIRTY-SEVEN THOUSAND EIGHT HUNDRED THIRTY-SEVEN AND NO/100 ****** DOLLARS ($137,837.00) executed by Grantee and payable to the order of AMERICAN MORTGAGE NETWORK INC., dba AMNET MORTGAGE. The note is secured by a vendor's lien in this deed and by a Deed of Trust of even date from Grantee to GEORGE SHANKS JR., Trustee.

PROPERTY (including any improvements):

Lot 3, DOVE MEADOW NORTH, a subdivision in Williamson County, Texas, as shown in the plat recorded in Plat Cabinet X, Slide 293-295, Williamson County, Texas (the Property)

RESERVATIONS FROM AND EXCEPTIONS TO CONVEYANCE AND WARRANTY:

(1) This conveyance is made, delivered and accepted subject to the payment of ad valorem taxes and standby fees assessed against the property conveyed for the current year; all restrictions, covenants, any outstanding royalty and mineral reservations, conditions and easements of record affecting said property; and any and all zoning laws, regulations and ordinances of municipal and/or other governmental authorities affecting the property conveyed.

(2) Grantor makes no warranty, express or implied, concerning any existing or future environmental condition on the property, including but not limited to, exposure to electric or magnetic fields, present or future pollution of the air, water, or soil in, on or adjacent to the property conveyed herein, or the presence of endangered species or habitat therefore.

Grantor, for the consideration and subject to the reservations from and exceptions to conveyance and warranty, grants, sells, and conveys to Grantee the property, together with all and singular the rights and appurtenances thereto in any wise belonging, to have and hold it to Grantee, Grantee's heirs, executors, administrators, and successors forever. Grantor binds Grantor and Grantor's heirs, executors, administrators,

successors and assigns to warrant and forever defend all and singular the property to Grantee and Grantee's heirs, executors, administrators, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the reservations from and exceptions to conveyance and warranty, when the claim is by through or under Grantor, but not otherwise.

The vendor's lien against and superior title to the property are retained until the note described is fully paid according to its terms, at which time this deed shall become absolute.

AMERICAN MORTGAGE NETWORK INC., dba AMNET MORTGAGE, at Grantee's request, has paid in cash to Grantor that portion of the purchase price of the property that is evidenced by the note described. The vendor's lien and superior title to the property are retained for the benefit of AMERICAN MORTGAGE NETWORK INC., dba AMNET MORTGAGE, and are transferred to that party without recourse on Grantor.

When the context requires, singular nouns and pronouns include the plural.

967, LTD., a Texas limited partnership
By: Cottonwood Enterprises, Inc., a Texas corporation, General Partner

BY: _____
DOUGLAS D. LEWIS, Vice-President

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

This instrument was acknowledged before me this 29TH day of OCTOBER, 2004, by DOUGLAS D. LEWIS, Vice-President of Cottonwood Enterprises, Inc., General Partner of 967, LTD., a Texas limited partnership.

STEPHANIE PERKINS
MY COMMISSION EXPIRES
September 19, 2006

_____
Notary Public, State of Texas

AFTER RECORDING RETURN TO:

After Recording Return To:
First American Title
3811 Bee Caves Road, Ste. 105
Austin, TX 78746

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WILLIAMSON COUNTY, TEXAS

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