

MAR 21 2016

Santa Fe, Rio Arriba &  
Los Alamos Counties  
PO Box 2268  
Santa Fe, NM 87504-2268

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

NO. D-101-CV-2015-02177

U.S. BANK, NATIONAL ASSOCIATION, AS  
TRUSTEE FOR C-BASS 2007-SP1 TRUST,  
MORTGAGE LOAN ASSET-BACKED  
CERTIFICATES, SERIES 2007-SP1,

Plaintiff,

v.

MUKHTIAR S. KHALSA, GURNAM K. KHALSA,  
JPMORGAN CHASE BANK, N.A. AND UNKNOWN  
TENANTS, REAL NAMES UNKNOWN,

Defendants.

**MOTION TO DISMISS**  
**UNDER AN UNCONSCIONABLE CONTRACT**

COMES NOW, Defendant, Mukhtiar S. Khalsa, by and through his own counsel, and for  
this Motion to Dismiss under an unconscionable contract states;

**FACTS**

1. On October 1, 2015 Plaintiff filed its Complaint for Foreclosure in this subject action.
2. On January 15, 2016 Plaintiff filed its Amended Complaint.
3. The allegations in both the Complaint and the Amended complaint depend on the terms of the contract of the mortgage loan which are in some part expressed by the subject mortgage (herein aka "Mortgage").
4. "Uniform Covenant 16" of the Mortgage states: "*All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law.*"

5. “Definition (H)” of the Mortgage states: *Applicable Law*” means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.”

6. “Uniform Covenant 20” of the Mortgage states: *Sale of Note; The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower.*”

### ARGUMENTS AND AUTHORITIES

Even though it is required for a mortgage foreclosure plaintiff to show injury, it is acknowledged discovering or showing injury for a mortgage foreclosure plaintiff is virtually impossible

7. The Supreme Court of the State of New Mexico (“NMSC”) has very recently taken judicial notice that; in a mortgage foreclosure action, there is jurisdictional necessity on the part of a plaintiff for (1) injury in fact, (2) causation, and (3) redressability.<sup>1</sup>

8. The NMSC has very recently taken judicial notice that; given the current policies and procedures in use in modern mortgage loan financing, it is nonsensical to place any burden<sup>2</sup> on a mortgage foreclosure defendant to know if the party seeking foreclosure is actually entitled to do so through injury in fact, causation, and redressability.

9. The NMSC has very recently taken judicial notice that; given the current policies and procedures in use in modern mortgage loan financing, not even foreclosing plaintiffs can truly be

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<sup>1</sup> *ACLU of N.M.*, 2008-NMSC-045, ¶ 10.” “Thus, at least as a matter of judicial policy if not of jurisdictional necessity, our courts have generally required that a litigant demonstrate (1) injury in fact, (2) causation, and (3) redressability to invoke the court’s authority to decide the merits of a case.” *Deutsche Bank v Johnston* NMSC No. S-1-SC-34726 (March 3, 2016) Pg 9 line 18 and Pg 10 line 01-03

<sup>2</sup> Moreover, it would be nonsensical to place any burden on a foreclosure defendant to know whether the party seeking foreclosure is actually entitled to do so. *Deutsche Bank v Johnston* NMSC No. S-1-SC-34726 (March 3, 2016) Pg 15 line 09-10

sure if they actually own the notes they seek to enforce,<sup>3</sup> so it may be impossible for a plaintiff to know, let alone show, injury in fact, causation, and redressability through their documentation on hand.

The UCC only, but does, guide the determination of whether the plaintiff can show injury

10. The NMSC has very recently taken judicial notice that; mortgage foreclosure plaintiffs must show proper documentation before filing suit.

11. The NMSC has very recently taken judicial notice that; although the Uniform Commercial Code's ("UCC") definition of who may enforce a note does not necessarily create a jurisdictional prerequisite, UCC does guide the determination of whether a plaintiff can articulate a direct injury that the cause of action is intended to address.<sup>4</sup>

The injury of a mortgage foreclosure plaintiff is rooted in the contract

12. The NMSC has very recently taken judicial notice that; an action to foreclose on real property is separate and distinct from an action to recover on an underlying promissory note.<sup>5</sup>

13. The NMSC has very recently resolved that actions on mortgage promissory notes are rooted in the common law of contracts,<sup>6</sup> and so for a mortgage foreclosure plaintiff's capacity to invoke

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<sup>3</sup> ("[T]he failure to deliver the original notes with proper indorsements [to assignees], the routine creation of unnecessary lost note affidavits, the destruction of the original notes, and the falsification of necessary indorsements . . . is widespread."). Under these circumstances, not even the plaintiffs may be sure if they actually own the notes they seek to enforce. *Deutsche Bank v Johnston* NMSC No. S-1-SC-34726 (March 3, 2016) Pg 17 line 17,18 and Pg 18 line 01-03

<sup>4</sup> Although the UCC's definition of who may enforce a note does not create a jurisdictional prerequisite in this case, it nonetheless guides our determination of whether the plaintiff can articulate a direct injury that the cause of action is intended to address. *Deutsche Bank v Johnston* NMSC No. S-1-SC-34726 (March 3, 2016) Pg 11 line 18 and Pg 12 line 01-03

<sup>5</sup> See *Kepler v. Slade*, 1995-NMSC-035, ¶ 14, 119 N.M. 802, 896 P.2d 482 ("Under the common law rule, an action to foreclose on real property is separate and distinct from an action to recover on an underlying promissory note."); *Deutsche Bank v Johnston* NMSC No. S-1-SC-34726 (March 3, 2016) Pg 8 line 7-9

<sup>6</sup> See *Males v. W.E. Gates & Assocs.*, 504 N.E.2d 494, 495 (Ohio Misc. 2d 1985) "[A]ctions on promissory notes are rooted in the common law of contracts. *Deutsche Bank v Johnston* NMSC No. S-1-SC-34726 (March 3, 2016) Pg 8 line 16-17

the Court's jurisdiction of the subject matter of their action to exist, that capacity must be created through the entire contract of the mortgage loan.

All the rights of a mortgage loan must remain complete

14. A mortgage loan is an entire bundle of rights which must remain complete. The NMSC has very recently taken judicial notice that; liberalization of the rules involving those rights creates unearned windfall for mortgagees<sup>7</sup> and unearned windfall cannot have a place in equity.

15. No bifurcation of the bundle of rights which is the mortgage loan is allowable under the guidance from the Supreme Court of the United States found in *Carpenter v. Longan*<sup>8</sup> or under the very recent judicial notice of the NMSC found in *Deutsche Bank v Johnston*.<sup>9</sup>

16. No bifurcation of the instrument evidencing the debt at the root of the bundle of rights which is the mortgage loan is allowable under UCC, the statutory law that guides the determination of whether a plaintiff can articulate a direct injury that the cause of action is intended to address.<sup>10</sup>

The Mortgage contract obliges acceptance of a bifurcation of the mortgage loan rights

17. Under Uniform Covenant 16 and Definition (H) of the Mortgage, all the rights and obligation of the subject mortgage loan are, by the terms of the contract of the mortgage loan, subject to any requirements and limitations of Applicable Law.

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<sup>7</sup> See Levitin, *supra*, at 650-51 ("A mortgage loan involves a bundle of rights, including procedural rights. These procedural rights are not merely notional; they are explicitly priced by the market. Mortgage finance availability and pricing is statistically correlated with variations in procedural protections for borrowers. Retroactively liberalizing the rules for mortgage enforcement creates an unearned windfall for mortgagees." (footnote omitted)). *Deutsche Bank v Johnston* NMSC No. S-1-SC-34726 (March 3, 2016) Pg 20 line 02-07

<sup>8</sup> "The mortgage can have no separate existence. . . . It cannot survive for a moment [without] the debt which the note represents. This dependent and incidental relation is the controlling consideration . . ." *Carpenter v. Longan* 16 Wall 271,83 U.S. 271, 274, 21 L.Ed. 313 (1872)

<sup>9</sup> "possession clarifies title because there can be only one possessor at a time," *Deutsche Bank v Johnston* NMSC No. S-1-SC-34726 (March 3, 2016) Pg 18 line 09-10

<sup>10</sup> "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." *NMSA 1978 § 55-3-203(d)*.

18. Uniform Covenant 20 of the Mortgage, however, allows the bifurcation of bundle of rights which is the subject mortgage loan, by mandating; “*The Note or a partial interest in the Note . . . . . can be sold one or more times without prior notice to Borrower.*”

The terms of the Mortgage contract are self-contradictory

19. Because under the terms of the Mortgage in Uniform Covenant 20, the option for bifurcation is obligatory, and under Uniform Covenant 16 the submission to applicable law is mandatory, the terms of the Mortgage contract are self-contradictory and so the Mortgage contract is incongruous and unconscionable.

The terms of the Mortgage contract are unfair to the borrower

20. Additionally, because under the terms of the Mortgage in Uniform Covenant 20, the borrower need not be noticed prior to sale, the Defendant cannot know whether a party seeking foreclosure is actually entitled to foreclose, which under *Johnston* is nonsensical and so the contract in this regard is also unconscionable.

The terms of the Mortgage contract do not comport to statute

21. Additionally, because the terms of the Mortgage in Uniform Covenant 20 allow; “*a partial interest in the Note can be sold*” and NMSA 1978 § 55-3-203(d) requires that; “*If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights...*”. UCC does guide the determination of whether a plaintiff can articulate a direct injury that the cause of action is intended to address,<sup>11</sup> and so the UCC, as statutory law, is germane. The “*partial interest*” sale allowed by the contract cannot occur under

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<sup>11</sup> Although the UCC’s definition of who may enforce a note does not create a jurisdictional prerequisite in this case, it nonetheless guides our determination of whether the plaintiff can articulate a direct injury that the cause of action is intended to address. *Deutsche Bank v Johnston* NMSC No. S-1-SC-34726 (March 3, 2016) Pg 11 line 18 and Pg 12 line 01-03

the germane statutes of the UCC, so the terms of this Mortgage contract do not comport to relevant statute and the Mortgage contract is also incongruous and unconscionable in this regard.

The terms of the Mortgage make this Mortgage an unconscionable contract

22. These particular terms of this Mortgage contract do no comport to relevant statutory law.

The “*partial interest*” sale allowed by the terms of this Mortgage contract cannot happen under NMSA 1978 § 55-3-203(d). Substantive unconscionability concerns the legality and fairness of the contract terms themselves.<sup>12</sup> Because the terms of this Mortgage contract do not comport to statutory law, this Mortgage contract is substantively unconscionable.

23. These particular terms of this Mortgage contract do not allow the borrower, at all, to know who has a right enforce the Mortgage and who does not. These particular terms of this Mortgage contract are meant to allow the mortgagee the right to prosecute, but not meant to allow the mortgagor an effective means to challenge the mortgagee’s right to prosecute. When the terms of a contract unreasonably benefit one party over another, that contract is substantively unconscionable.<sup>13</sup> Because these particular terms of this Mortgage contract unreasonably benefit the Plaintiff over the Defendant this Mortgage contract is substantively unconscionable.

24. These particular terms of this standard mortgage contract, prepared for the Defendant’s acceptance, exist in nearly all mortgage contracts that are obtainable in the modern marketplace.

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<sup>12</sup> Substantive unconscionability concerns the legality and fairness of the contract terms themselves. *See id.* (“Substantive unconscionability relates to the content of the contract terms and whether they are illegal, contrary to public policy, or grossly unfair.”). The substantive analysis focuses on such issues as whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns. *Cordova v. World Finance Corp. of NM*, 208 P. 3d 901 ¶ 22- NM: Supreme Court (2009) citing *Guthmann*, 103 N.M. at 511, 709 P.2d at 680 ¶ 22

<sup>13</sup> Contract provisions that unreasonably benefit one party over another are substantively unconscionable. *Cordova v. World Finance Corp. of NM*, 208 P. 3d 901)¶ 25- NM: Supreme Court (2009).

In order to obtain this or any other mortgage the Defendant could not avoid these particular contractual terms. The three elements that define an adhesion contract are;<sup>14</sup>

- a. the agreement must occur in the form of a standardized contract prepared or adopted by one party for the acceptance of the other,
- b. the party proffering the standardized contract must enjoy a superior bargaining position because the weaker party virtually cannot avoid doing business under the particular contract terms,
- c. the contract must be offered to the weaker party on a take-it-or-leave-it basis, without opportunity for bargaining,

These particular terms of this Mortgage contract meet all three elements that define an adhesion contract. Because these particular terms of this Mortgage contract meet all those three elements this Mortgage contract is an adhesion contract and is unconscionable.<sup>15</sup>

25. It doesn't matter that the Defendant was either a madman or a fool to agree to these particular terms of this Mortgage contract.<sup>16</sup>

#### No New Mexico Court can enforce this Mortgage

26. As established above, these particular terms of this Mortgage contract define this Mortgage as an unconscionable contract. The NMSC has mandated that no New Mexico Court can be used to enforce any unconscionable contract.<sup>17</sup>

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<sup>14</sup> Three elements must be satisfied before an adhesion contract may be found. First, the agreement must occur in the form of a standardized contract prepared or adopted by one party for the acceptance of the other. Second, the party proffering the standardized contract must enjoy a superior bargaining position because the weaker party virtually cannot avoid doing business under the particular contract terms. Finally, the contract must be offered to the weaker party on a take-it-or-leave-it basis, without opportunity for bargaining. *Cordova v. World Finance Corp. of NM*, 208 P. 3d 901 ) ¶ 33- NM: Supreme Court (2009)

<sup>15</sup>We do not find it necessary to make a formal determination that these were contracts of adhesion, which will not be enforced when the terms are patently unfair to the weaker party, although they certainly appear to have all the characteristics. *Cordova v. World Finance Corp. of NM*, 208 P. 3d 901 ) ¶ 33- NM: Supreme Court (2009)

<sup>16</sup> Our law has never really required that a person seeking relief from an unconscionable contract must first establish that he or she actually had to have been a madman or a fool to sign it. It is sufficient if the provision is grossly unreasonable and against our public policy under the circumstances *Cordova v. World Finance Corp. of NM*, 208 P. 3d 901 ) ¶ 31- NM: Supreme Court (2009)

27. The mandate of NMSC in *Cordova v. World Finance Corp. of NM* deprives all New Mexico Courts of jurisdiction over subject matter created by a contract which is unconscionable. Under this mandate of the NMSC this Court must dismiss this action.

### CONCLUSION

The Court has no jurisdiction to enforce a void and unconscionable contract. The terms of the Mortgage contract destroy for the Plaintiff any ability to show it can actually fully own the rights it seeks to enforce and also destroys for the Defendant any ability to effectively challenge the rights of anyone or anything coming to foreclose. Because the adhesion contract controlling this action is self-contradictory, incongruous and unconscionable, this Court must dismiss this action and take measures to prevent further actions under this and other unconscionable contracts. To do anything else capriciously and retroactively liberalizes the rules for mortgage enforcement and creates an unearned windfall for this Plaintiff and other Plaintiffs.

### PRAYER FOR RELIEF

WHEREFORE, Defendant, Mukhtiar S. Khalsa, respectfully requests that the Court enter an Order with the following particulars:

- a. That this Court take judicial notice that, as explained above, these particular terms of this mortgage contract define this mortgage as an unconscionable contract
- b. That this Court take judicial notice that Plaintiff's action is an improperly attempted collection of a debt under an unconscionable contract, and is in violation of the New Mexico Unfair Practices Act, NMSA 1978, Section 57-12-1 et seq.;

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<sup>17</sup>We will not allow our courts to be used to enforce unconscionable arbitration clauses any more than we will allow them to be used to enforce any other unconscionable contract in New Mexico. *Cordova v. World Finance Corp. of NM*, 208 P. 3d 901 ) ¶ 37- NM: Supreme Court (2009)



- c. That this Court take judicial notice that under and allowed by New Mexico Unfair Practices Act, NMSA 1978, Section 57-12-1 et seq. Defendants are entitled to costs for defense of the unfair practice of improper debt collection by debt collectors;
- d. That this Court take judicial notice that under and allowed by New Mexico Unfair Practices Act, NMSA 1978, Section 57-12-1 et seq. Defendants are entitled, from each of the debt collectors, treble the \$258,974.06 which is improperly and unlawfully attempted to be collected;
- e. That this Court Dismiss, with prejudice, Plaintiff's claim as an improper Collection of a Debt under an unconscionable contract;
- f. For such further relief as the Court deems just.

Or in the alternative, certify this issue for interlocutory appeal.


Respectfully submitted:



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Mukhtiar S. Khalsa  
P.O. Box 593  
Santa Cruz, NM 87567  
505-450-2802

I hereby certify that a true and correct copy of the foregoing pleading was mailed on this 21<sup>st</sup> day of March, 2016 to opposing counsel.



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Mukhtiar S. Khalsa

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