13-15558

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-15558-BB

VITO J. FENELLO, JR., et al
Plaintiffs/Appellants, Pro Se

v.

BANK OF AMERICA N.A., et al
Defendants/Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
Case 1:11-CV-04139-WSD

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and the 11th Circuit Local Rule 26.1-1 and 26.1-2, Plaintiffs/Appellants certify that the following is a full and complete list of persons and entities having an interest in the outcome of this particular case:

Bank of America, N.A. (Appellee)

Bank of New York Mellon (Appellee)

Baverman, Alan J. (Magistrate Court Judge)

Duffy, William S. Jr. (District Court Judge)

Fenello, Beverly H. (Appellant)

Fenello, Vito J. Jr. (Appellant)

McGuireWoods LLP (Law firm of attorneys for Appellees)

Mendel, Jarrod S. (Attorney for Appellees)

Phillips, Andrew G. (Attorney for Appellees)

Reinhold, Laura Elizabeth (Attorney for Appellees)

Respectfully submitted this 14th day of January, 2014.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants believe the factual and legal arguments are presented adequately in the briefs and record, and the decisional process would not be aided significantly by oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Federal

State

Rules

Cases

Secondary Sources

Record

JURISDICTIONAL STATEMENT

The original complaint contained at least three causes of action that arose under federal law. See (Doc. 1-1 at pp. 11-14, ¶¶ 43-57). The Trial Court had subject matter jurisdiction over these claims pursuant to 28 U.S.C. § 1331. (The Trial Court also exercised federal question jurisdiction over Cont 8 of the original complaint. See (Doc. 24 at p. 21); (Doc. 1-1 at ¶¶ 64-67). The Trial Court exercised supplemental jurisdiction over the remaining state law claims pursuant to 28 U.S.C. § 1367. See (Doc. 24 at pp. 23-26).

This Court has jurisdiction to hear Appellants' appeal from the order and judgment of the Trial Court fully and finally dismissing Appellants' complaint with prejudice, (Doc. 34, 35), pursuant to 28 U.S.C. § 1291. (Appeal from the initial order dismissing all but one claim in Appellants' original complaint, (Doc. 24), is fairly included within the appeal from the order appearing at (Doc. 34), because the order appearing at (Doc. 24) was not a "final judgment," and could have been amended or vacated by the trial court at any time prior to the entry of final judgment. See Fed. R. Civ. P. 54(b).) This Court has jurisdiction to hear Appellants' appeal from the order of the Trial Court denying Appellants' motion to reconsider, (Doc. 39). See Tranzact Techs., Inc. v. 1Source Worldsite, 406 F.3d 851, 854 (7th Cir. 2005).

The underlying judgment appealed from (Doc. 35) was filed on February 15, 2013. Appellants filed a Rule 60 motion to reconsider the order (Doc. 34) and judgment (Doc. 35) on March 15, 2013 – the twenty-eighth day from the entry of judgment. (Doc. 36). The order denying Appellants' motion to reconsider was entered November 8, 2013. (Doc. 39). Pursuant to FRAP 4(a)(1)(A), (a)(4)(A)(vi), the time for filing a notice of appeal ran on December 9, 2013. Appellants' Notice of Appeal was filed on December 4, 2013 (Doc. 40), and consequently was timely.

The appeal is from a final order and judgment that disposes of all parties' claims (Doc. 34, 35); as well as from a post-judgment order that finally resolves the issues presented therein, see Tranzact Techs., Inc. v. 1Source Worldsite, 406 F.3d 851, 854 (7th Cir. 2005).

STATEMENT OF THE CASE

There's something rotten in the Eleventh Circuit. Specifically, that pro se litigants are unable to get fair judicial action when they are up against large corporate entities with unlimited legal budgets. The evidence is the outcome in this case. With numerous uncontested factual allegations, the judge in this case dismissed 12 of 13 causes of action with prejudice and no right to amend, stating that they were "implausible, unfounded, without merit, and amendment would be futile."

This is despite the fact the Bank of America (BANA) had been publicly known to have perpetrated these illegal and unethical tactics in millions of home foreclosures across the country. This is despite the fact that the Plaintiffs' factual allegations mirrored those of the Nevada attorney general's lawsuit against BANA. This is despite the fact that the Plaintiffs' factual allegations were confirmed by sworn affidavits of numerous employees who worked the modification files for BANA, in two separate whistle-blower lawsuits. This is despite the fact that BANA has paid an estimated $26 BILLION to settle claims like these to date.

Then, the one cause of action remaining was dismissed when the Court found that BANA was not a debt collector under the Fair Debt Collections Practices Act (FDCPA). This is despite the uncontested fact that BANA told the Plaintiffs (in writing) that they WERE a debt collector under the act. Then, when

the Plaintiffs sued to enforce the rules that BANA had stated they were following, the court ruled that BANA didn't have to follow those rules.

The Plaintiffs filed this lawsuit to protect their home and their homestead, expecting to find justice through the courts. The believed that the Courts would treat their pro se claims fairly, and find justice despite an inartfull pleading:

> *"The Federal Rules rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Justice Black in Conley v. Gibson, 355 Us. 41 at 48 (1957)*

Further, if they had made technical errors in their original filings, they believed they would be afforded the opportunity to fix any deficiencies in their quest for justice:

> *"the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. " Bonner v. Circuit Court of St. Louis, 526 F2d 1331, 1334 (8th Cir. 1975) (quoting Bramlet v. Wilson, 495 F2d 714,716 (8th Cir. 1974))*

What follows are numerous examples of how the Court has not dispensed justice in this case.

PROCEEDINGS IN THE COURT BELOW

Plaintiffs filed their original complaint in Cherokee County Superior Court on October 21st, 2011. It was then removed to U.S. District Court for the Northern District of Georgia on November 30th, 2011 by the Defendants.

After a flurry of motions, including a request by the Plaintiffs that the Judges involved recuse themselves due to the appearance of a conflict of interest, the first ruling was issued on July 17th, 2012 whereby 12 of 13 causes of action were dismissed with prejudice and no right to amend.

Plaintiffs filed their First Amended Complaint on August 2nd, 2012. Another flurry of motions ensued, resulting in the case being dismissed on February 15th, 2013.

Plaintiffs filed a Motion to Reconsider on March 15th, 2013, which was denied on November 8th, 2013. Plaintiffs then filed their Notice of Appeal on December 14th, 2013.

STATEMENT OF FACTS

This Action concerns the events leading up to, including, and subsequent to the attempted wrongful foreclosure of the Plaintiffs' home, which was purchased on January 30, 2007, and financed in part by an Interest Only Fixed Rate Note issued by Pulte Mortgage, LLC.

In early 2010, after experiencing a precipitous drop in their income in the prior years, after depleting their savings to keep their mortgage current, Plaintiffs contacted Bank of America (the apparent loan servicer at the time) seeking relief (as instructed by the Obama administration), informing them that they were experiencing financial distress, and inquiring about options available to them including a mortgage modification, a short sale, and a deed in lieu of foreclosure.

Bank of America responded that no options or relief would be available until Plaintiffs had missed at least two monthly payments. Plaintiffs then skipped the next two monthly payments and promptly applied for relief under HAMP, as instructed by the Bank, on April 24, 2010.

Because two of the options discussed would have resulted in the Plaintiffs losing their home, and because Plaintiffs had been led to believe that a prompt decision from the Bank would be forthcoming, Plaintiffs decided to make no further payments until a decision was rendered.

Instead of a prompt decision as expected, after more than 15 months of attempting to work with Bank of America, after skipping contractual obligations on the advice of the Bank, after submitting no less than 4 complete applications, after submitting many more supplementary documents, after calling the Bank weekly/monthly, after being subjected to misinformation, harassment, and other forms of abuse, after coming within 24 hours of foreclosure, after asking for options including deed in lieu of foreclosure, a short sale, or a modification, Plaintiffs finally received a modification offer on June 13, 2011, an offer that provided no relief, an offer that would have more than doubled their original monthly payment. (Exhibit #6)

It was during this extended period that Plaintiffs first began to suspect that Bank of America was not being truthful in their exchanges, was not playing fair, was being deceptive, and was taking advantage of their clients.

It was also during this time that Plaintiffs first learned that Bank of America was being investigated by numerous state and federal agencies, and had signed a Consent Order with the Comptroller of the Currency on April 13, 2011 (Exhibit #25) whereby they had agreed to stop many of the egregious practices that the Plaintiffs had experienced to date.

It was during this time that Plaintiffs first began to suspect that Bank of America was servicing a debt from a purported note holder, who likely had no legal authority to collect on the Promissory Note.

As a result of these suspicions, the Plaintiffs sent their first certified letter disputing the debt on April 25, 2011, where they asked for "written documentation that CWALT, Inc. is indeed the current beneficiary, that it is indeed the Holder in Due Course, and that it has Standing to pursue collections and/or foreclosure in this matter." (Exhibit #2)

In the subsequent months, the Plaintiffs continued to work in good faith to resolve the outstanding dispute with the Bank, to no avail. To date, no proof has ever been offered showing that CWALT, Inc has any interest in and/or is entitled to collect on the Promissory Note.

Instead, the Bank has attempted to foreclose on the Plaintiffs twice, and CWALT, Inc. continues to pursue these actions without showing any evidence that they have any right to collect the outstanding debt.

In an effort to seek justice and prevent the wrongful foreclosure of their home, Plaintiffs decided to file their original lawsuit in state court on October 21st, 2011. Since they couldn't afford to hire an attorney, they proceeded pro se, relying on their Constitutionally guaranteed rights to property, due process, and justice in the courts.

STANDARD OF REVIEW

The Trial Court's orders granting Appellees' motions to dismiss (Docs. 24, 34) are subject to *de novo* review. Van Taylor v. McSwain, 335 Fed. Appx. 32, 33 (11th Cir. 2009). The Trial Court's order denying Appellants' motion to reconsider under Fed. R. Civ. P. 60 (Doc. 39) is subject to review for abuse of discretion. Chapman v. AI Transp , 229 F.3d 1012, 1023-1024 (11th Cir. 2000); Cavaliere v. Allstate Ins. Co., 996 F.2d 1111, 1115 (11th Cir. 1993). The Trial Court's refusal to grant Appellants leave to amend (Doc. 24), and it denials of Appellants' motions for leave to amend (Doc. 34) is subject to review for abuse of discretion. See Van Taylor v. McSwain, 335 Fed. Appx. 32, 33 (11th Cir. 2009).

SUMMARY OF ARGUMENT

Can pro se litigants find justice in the Eleventh Circuit of the Federal Courts? Can banks lie to their clients with impunity? Can they send letters that say one thing, then argue the opposite in court and get away with it? Can banks unjustly enrich themselves, by recovering more than their potential losses through insurance policies, legal settlements, and Federal incentives, tax breaks, shared-loss agreements, etc.?

Can the banks take a person's home, even when their right to do so is challenged, without providing any evidence that they have standing?

That's what this appeal is about. Plaintiffs pray that this Court will correct these wrongs, and find for the Plaintiffs in this case.

STATEMENT OF ISSUES

1. Whether the Court erred in (a) finding that Appellants were in default under the mortgage, and (b) holding that this default barred Appellants from contesting the validity of a future foreclosure.

2. Whether the Court erred in holding that Appellants lacked standing to predicate a petition for equitable relief on errors in a written assignment of a security deed.

3. Whether the Court erred in holding that an unrecordable assignment has no bearing on the validity of a non-judicial foreclosure.

4. Whether the Court erred in holding that Appellants could not obtain injunctive relief.

5. Whether the Court erred in holding (a) that ownership of the promissory note has no bearing on non-judicial foreclosure, and (b) that a borrower lacks standing to challenge a party's purported ownership interest in a promissory note.

6. Whether the Court erred in holding that Appellants could not predicate relief on the "one satisfaction rule."

7. Whether the Court erred in dismissing Appellants' claim for fraud.

8. Whether the Court erred in dismissing Appellants' claim for "equitable estoppel."

9. Whether the Court erred in dismissing Appellants' claim under the Fair Debt Collection Practices Act ("FDCPA").

10. (a) Whether the Court erred in holding that Appellants failed to plausibly allege sufficient facts to support the claims in its original complaint; and (b) if this holding was not erroneous, (i) whether the Court erred by only granting Appellants leave to amend one claim, and (ii) whether the Court erred by prohibiting Appellants from raising additional claims in their amended complaint.

11. Whether the Court erred by denying Appellants' Motion to Reconsider.

ARGUMENT AND CITATION TO AUTHORITY

I. The Court Erred when it (a) Found that Appellants Were in Default Under the Mortgage, and (b) Held that this Default barred Appellants from Contesting the Validity of a Future Foreclosure.

a. Appellants were not "in Default" on the Mortgage.

In its two Orders on Defendants' Motions to Dismiss (Doc. 24, Doc. 34), as well as in its Order denying Appellants' Motion for Reconsideration (Doc. 39), the Court repeatedly states that the Appellants are "in default" on the mortgage in question (see e.g. Doc. 24 at pp. 31, 33, 44; Doc. 34 at pp. 22, 24; Doc. 39 at pp. 1, 7, 8, 9, 14; Doc. 39 at p. 8 ("[t]he Court found that Appellants had defaulted on their loan obligations in April 2010…")); and uses this factual finding as justification for several of its conclusions of law. However, the Court erred by finding that Appellants were in default under the terms of the Note and the Security Deed, because (1) a "quasi-new agreement" was formed between Appellants and the creditor, and (2) Appellants were not given proper notice of the creditor's intention to strictly enforce the agreement, nor were they given and a reasonable opportunity to cure any deviations from the exact terms of the Note.[1]

[1] To the extent that Appellants' Amended Complaint asserts that the Note is in default (Doc. 26, ¶ 54), this assertion is only made for the purpose of alleging that

The parties to a contract may agree to depart from the written terms of the agreement, in which case the portion of the written agreement that is departed from is suspended while the parties are performing under the "quasi-new agreement." O.C.G.A. § 13-4-4; Eaves & Collins v. Cherokee Iron Co., 73 Ga. 459, 470 (1884). "[Such a] mutual departure requires the receipt or payment of money or some other sufficient consideration, however slight, to support a departure from the contractual terms." (Emphasis added.) AAF-McQuay, Inc. v. Willis, 308 Ga. App. 203, 220 (2011) (citing O.C.G.A. § 13-4-4 and several cases). See also Southern Life Ins. Co. v. Citizens Bank of Nashville, 91 Ga. App. 534, 538 (1955). An oral promise to accept a late or irregular payment without invoking the default provisions of the contract (a form of forbearance) is a sufficient consideration. See Curl v. Federal Sav. & Loan Asso., 241 Ga. 29, 29-30 (1978); O.C.G.A. § 13-3-44(a); Atlanta Dwelling Homes v. Wright, 272 Ga. 231, 233-234 (527 S.E.2d 854, 856) (2000) (cited in Doc. 24 at 49 & n.18).[2] Forbearing from taking action to protect one's rights in reliance on such an oral agreement is also a sufficient consideration. See O.C.G.A. § 13-3-44(a). After such a quasi-new agreement is

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Bank of America, N.A. ("BANA") is a "debt collector" under the FDCPA. Such an allegation is not properly construed as an "admission" given that a Appellant may plead in the alternative, even if the alternatively pleaded claims appear to be inconsistent. Fed. R. Civ. P. 8(d)(2), (d)(3).

[2] "If there is any question as to the construction of a deed to secure debt either by virtue of its original terms **or a course of conduct which waives strict performance,** a question for the jury is presented." (Emphasis added.) Atlanta Dwelling Homes, 272 Ga. at 233 (527 S.E.2d at 856).

entered into, the term of the contract that is the subject of the quasi-new agreement is suspended *unless and until* the party seeking to enforce the strict terms of the agreement (1) gives notice to the other party of such intention, O.C.G.A. § 13-4-4; and (2) provides the other party with a *reasonable* opportunity to cure any deviations from the exact terms of the agreement, Curl, 241 Ga. at 30.[3]

Here, BANA encouraged Appellants to miss two payments and apply for a loan mod; and BANA gave no instructions regarding recommencing payment while the loan mod was being processed. (Doc. 1-1- at pp. 6-7, ¶¶ 17-21).[4] Appellants forebore from making two payments in explicit reliance on BANA's representation that Appellants would be considered for a loan modification ("loan mod") after missing two payments.[5] (Doc. 1-1, ¶¶ 16-18; Doc. 26, ¶¶ 9-11). Thus,

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[3]

> Reasonable notice requires more than the assertion of an acceleration clause, for the other party must be given a reasonable opportunity to cure any deviations from the exact terms before foreclosure can be commenced due to defaults which were tolerated under the quasi new agreement.

Curl, 241 Ga. at 30.

[4] There is nothing in the record that indicates that Appellants had ever missed a payment before they missed the two payments in reliance of BANA's representation. See (Doc. 1-1 at p. 46). Further, the Court's inference that Appellants sat around and did nothing after turning in the first loan mod form in April of 2010 (Doc. 24 at p. 31) is not warranted, as Appellants literally hounded BANA for 15 months regarding the modification (Doc. 1-1- at p. 7, ¶¶ 20-21).

[5] Pursuant to O.C.G.A. § 10-6-56, both BANA and the creditor (whoever it was) was bound by this representation made by BANA's employee. Whether this statement was or was not made by the BANA employee within the scope of his/her employment is a question of fact. See O.C.G.A. § 10-6-61; contra Gomez v. Great

a valid quasi-new agreement was entered into. Further, notice and a *reasonable* opportunity to cure was never given to Appellants. By consequence, the payment provision of the contract never ceased being suspended, and Appellants could not be found to be in default based on being in arrears.

The record indicates that a reasonable opportunity to cure was never given. For example, in a letter dated April 25, 2011, BANA (through the foreclosure firm it retained) declared that the debt was in default. (Doc. 1-1 at p. 40). However, a reasonable opportunity to cure was not provided in that letter, as the entire balance was declared due and payable. (Id.). Further, more than 15 months after first contacting BANA regarding a loan mod, BANA offered Appellants an opportunity to repay the arrearage by (1) paying $1,594.05 *in addition to* the normal monthly payment for three months (the payments being due on July 1, 2011, August 1, 2011, and September 1, 2011, and (2) to pay the remaining $15,127.90 on or before October 1, 2011. (Doc. 1-1 at pp. 43,46). This repayment offer was not reasonable either.

Atlantic & Pacific Tea Co., 48 Ga. App. 398, 399-400 (1934); In Re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation, CA No. 1:10-md-02193-RWZ (D. Mass.) (Zobel, J.), Docs. 210-1, 210-2, 210-3, 210-4, 210-5, 210-6, 210-7 (filed 06/07/13).

In summary, Appellants are not, and have never been, "in default," because O.C.G.A. § 13-4-4 has never been complied with.[6]

b. Even if Appellants were "in Default," that Would not Bar them from Challenging Foreclosure.

Further, even if Appellants were in default, that fact would not bar them from challenging foreclosure; and the Court (and the Northern District opinions that it cites to) have misstated Georgia law in this regard. In Georgia, "[a] claim for wrongful [foreclosure] can be asserted even though a debt is in default." Brown v. Freedman, 222 Ga. App. 213, 215 (1996). Any assertion to the contrary is grounded in the misguided notion that "but for" means "sole cause." This is not the case. In this regard, Barrett v. Mayor, etc., of Savannah, 9 Ga. App. 642, 645(3) (1911), is highly instructive:

> To make the [defendant] liable for an injury caused by a defect..., the defect need not have been the sole cause of the injury, but that if, besides such defect, there was another cause, not attributable to the negligence of the injured person, and which contributed directly to the result, the [defendant] might still be liable, provided the injury would not have been sustained but for the defect...

In the foreclosure context, when a wrongful foreclosure claim based on lack of

[6] "In general, the interpretation of contractual language is a question of law for the court, unless it is so ambiguous that the ambiguity cannot be resolved by the ordinary rules of construction." Manzi v. Cotton States Mut. Ins. Co., 243 Ga. App. 277, 279 (2000). "[W]here terms of a written agreement are ambiguous, the meaning should be left to the jury." Stinson v. Artistic Pools, Inc., 236 Ga. App. 768, 769 (1999).

standing to foreclose is brought (i.e., when the debtor asserts that the foreclosing entity does not have the legal right to foreclose), a claimant can definitely establish but-for causation *as to the particular defendant* that foreclosed without the legal right to do so. Here, Appellants asserted that Bank of New York Mellon ("BONYM") and its agents lacked standing to foreclose because BONYM could not prove that it was the owner of the Note. (Doc. 1-1 at ¶¶ 80-81).[7] Thus, it was error for the Court to dismiss Appellants' claims or to predicate any of its legal conclusions on a purported lack of causation.

II. The Court Erred in Holding that Appellants Lacked Standing to Predicate a Petition for Equitable Relief on Errors in a Written Assignment of a Security Deed.

The Court erred in holding that Appellants lacked standing to predicate a petition for equitable relief on errors in an assignment. Appellants have standing in the context of an equity or a tort action to predicate relief on errors in the chain of title (which includes assignments). Larose v. Bank of Am., NA, 740 S.E.2d 882, 884 (Ga. Ct. App. Mar. 29, 2013), and Montgomery v. Bank of America, 740 S.E.2d 434, 438 (Ga. Ct. App. Mar. 29, 2013), are two recent binding opinions that have stated that a borrower cannot challenge the validity of the assignment of a security deed. However, despite this recent caselaw, O.C.G.A. § 23-2-34 is a "standing" provision that explicitly allows privies in law, fact, or estate to seek

[7] As Appellants note infra at Part V, the identity of the purported note owner still matters post-You v. JPMorgan Chase Bank (743 S.E.2d 428, 433 (Ga. 2013)).

equitable relief against parties that are not bona fide purchasers (a) for value, and (b) without notice. A request to cancel an assignment is a petition for "equitable relief." Volunteer State Life Ins. Co. v. Powell-White Co., 187 Ga. 705, 706-707 (1939).[8] Pursuant to the "statutes trump cases" maxim espoused in Couch v. Red Roof Inns, Inc., 291 Ga. 359, 364 (2012),[9] the statute must control if it applies.[10]

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[8] Volunteer State Life Ins. Co. clearly states that parties with standing to sue under O.C.G.A. § 23-2-34 may seek any type of equitable relief, not just reformation. 187 Ga. at 706-707.

[9] "Courts like to preserve the law they and their predecessors have made in deciding cases. But as long as legislation does not violate the Constitution, when the Legislature says something clearly — or even just implies it — statutes trump cases." Couch v. Red Roof Inns, Inc., 291 Ga. 359, 364 (2012).

[10] It does not appear that O.C.G.A. § 23-2-34 was brought to the attention of the Courts in Larose and Montgomery. Additionally, Montgomery's rationale at 740 S.E.2d 438 (which is that a borrower cannot attack an assignment because an assignment is "a contract" to which a borrower is not a party) is not well taken. First, an assignment of a security deed is *itself* a "deed," given that (1) a security deed is a deed absolute, O.C.G.A. § 44-14-60; and given that (2) an assignment of a security deed (a) conveys legal title, and (b) must be executed with the same formalities as deeds, O.C.G.A. § 44-14-64(a). Second, **every** deed is a "contract," and O.C.G.A. § 23-2-34 allows deeds to be attacked in equity even if no contractual privity exists. Montgomery's rationale essentially renders O.C.G.A. § 23-2-34's "in fact, or in estate" language meaningless; yet Georgia Courts are required to avoid making holdings that render statutory language meaningless (unless the holding is declaring the statute unconstitutional). See O'Neal v. State, 288 Ga. 219, 220-21 (2010); Webb v. Echols, 211 Ga. 724, 726 (1955); Couch, 291 Ga. at 364.

Further, Larose, 740 S.E.2d at 884, cites three Northern District of Georgia cases in support of the same proposition espoused in Montgomery. Invariably, all of the Northern District of Georgia cases holding that a borrower has no standing to attack an assignment of a Security Deed cite to two Georgia appellate court decisions—Breus v. McGriff, 202 Ga. App. 216 (1991), and Haldi v. Piedmont Nephrology Assoc., P.C., 283 Ga. App. 321 (2007).

Here, O.C.G.A. § 23-2-34 applies because (a) BONYM has both actual and constructive notice of the Appellants' interest in the Property (i.e., the equity of

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The oft-cited language from Breus is that "[a]ppellants are strangers to the assignment contract . . . and thus have no standing to challenge its validity." 202 Ga. App. at 216. However, that language is limited to the particular facts of that case, which involved a challenge to the transfer of a *note* by assignment, and therefore did not implicate O.C.G.A. § 23-2-34's provisions regarding standing pursuant to privity in fact or in estate. In fact, the *holding* of Breus appears in the very next sentence: "[i]t is no defense by the maker of a note that the transfer of the note by the payee to the transferee is without consideration" (quoting Thompson v. Wright, 53 Ga. App. 875, 876 (1936)). In other words, the *holding* of Breus is that the maker of a note cannot challenge the validity of the assignment of a note *based on lack of consideration* given from the transferee to the transferor. This holding has nothing to do with standing to challenge the assignment of a security deed (which is itself a deed) in equity by a party that is a privy in law, fact, or estate with the assignor and the assignee.

(In fact, Austell Bank v. National Bondholders Corp., 188 Ga. 757, 758 (1939), which was decided three years after Thompson v. Wright (which is cited in Breus in support of its holding), stands for the proposition that a party who is having a note enforced against him *does* have standing to inquire into the enforcing party's title to the note (and, by extension, into the enforcing party's ability to enforce the note), thereby further constraining Breus specifically to its particular holding. See also O.C.G.A. §§ 11-3-303(b), 11-3-305, 11-3-308.)

Likewise, Haldi is entirely inapplicable to a borrower's challenge of an assignment of a security deed *in equity*, as the principles it espouses apply specifically to actions sounding *in contract* under O.C.G.A. § 9-2-20. See Haldi, 283 Ga. App. at 322-323; see also Sutton v. Bank of Am., N.A., 2012 U.S. Dist. LEXIS 90240, at *13-*15 (N.D. Ga. 2012). Further, Haldi would not apply to an action in tort either. Generally, no privity of contract is required to support a tort action in Georgia unless the duty that has been breached was a private duty that explicitly arose from the terms of a contract. See O.C.G.A. § 51-1-11(a). (Here, the duties being breached are either statutory duties, or are duties arising from the terms of the Security Deed, to which Plaintiffs are a party.) Thus, because the caselaw underpinning the Northern District decisions that Larose cites to do not support the proposition that a borrower has no standing to challenge the assignment of a security deed in equity or in tort, Larose's rationale is not well taken. In short, O.C.G.A. § 23-2-34 must trump both Montgomery and Larose when the statute is applicable.

redemption and right of possession[11]); and (b) (i) Appellants are "privies in estate"[12] as to the grantee on the Security Deed (MERS) (see Doc. 39 at 2), and as to every assignee of the Security Deed. Thus, O.C.G.A. § 23-2-34 must trump Larose and Montgomery in this matter. By consequence, Appellants have standing to attack the assignment, and the Court erred in holding that they did not.

III. The Court Erred in Holding that an Unrecordable Assignment has no Bearing on the Validity of a Non-Judicial Foreclosure.

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[11] McCarter v. Bankers Trust Co., 247 Ga. App. 129, 132 (2000) (for the proposition that a borrower maintains the equity of redemption to, and right of possession of, the property after executing a security deed).

[12] Cf. Rawson v. Brosnan, 187 Ga. 624, 628 (Feb. 23, 1939); Amin v. Guruom, Inc., 280 Ga. 873, 874-875 (2006); Gregorakos v. Wells Fargo Nat'l Ass'n, 285 Ga. App. 744, 746 (2007); Garlington v. Blount, 146 Ga. 527, 527 (1917); Yeazel v. Burger King Corp., 241 Ga. App. 90, 95 (1999) (for the proposition that the grantor on the underlying security deed is in privity of estate with the assignees of the security deed).

In fact, the case of Amin v. Guruom, Inc., 280 Ga. 873, 874-875 (2006), is most analogous to the current situation.

> In [] [*Amin*], the original grantor conveyed a portion of property to one party, who subsequently sold that property to a third entity. At the time of the original conveyance, the deed mistakenly conveyed the entire property. In *Amin*, the Supreme Court recognized that the original grantor — although not involved in the immediate transaction conveying the property to the third entity — could seek reformation of the deed against such third party. This is so because the third party, having taken successive interests in the same property, is in privity with the original grantor.

(Footnotes omitted.) Gregorakos v. Wells Fargo Nat'l Ass'n, 285 Ga. App. 744, 746-747 (2007).

The trial Court further erred in holding that recordation has no effect on a creditor's ability to non-judicially foreclose. (Doc. 24 at p. 38). O.C.G.A. § 44-14-162(b) states that "[t]he security instrument or assignment thereof vesting the secured creditor with title to the security instrument shall be filed prior to the time of sale in the office of the clerk of the superior court of the county in which the real property is located." This statute presupposes that the "security deed or assignment thereof" is valid and recordeable; and an invalid or unrecordeable instrument would violate this statute, thereby rendering void any non-judicial foreclosure performed while title was in that condition. See Duke Galish, LLC v. SouthCrest Bank, 314 Ga. App. 801, 802-804 (2012) (for the proposition that a foreclosure performed in violation of O.C.G.A. § 44-14-162(b) is void).

Here, Appellants alleged that the Assignment was improperly acknowledged, and consequently was not recordeable and subject to cancellation. (Doc. 1-1 at 15-16). This is was a correct assessment. An assignment must be witnessed in the same manner as required for deeds. O.C.G.A. § 44-14-64(a). A deed to ands must be (1) in writing, (2) signed by the maker, and (3) attested by at least two witnesses, one of which must be one of the public officers listed in O.C.G.A. § 44-2-15. O.C.G.A. §§ 44-5-30, 44-2-14(a). An attestation by one witness and a subsequent acknowledgement by one of the officers listed in O.C.G.A. § 44-2-15 is also acceptable. O.C.G.A. § 44-2-16. A deed that is not

properly attested or acknowledged, though valid as between the parties, is not recordable. See Z & Y Corp. v. Indore C. Stores, Inc., 282 Ga. App. 163, 173 (2006); Wells Fargo Bank, N.A. v. Gordon, 292 Ga. 474, 476-477, 477 (Feb. 18, 2013). If recorded, such a deed is subject to cancellation under either O.C.G.A. § 23-3-40 et seq. or 23-2-34. Thus, the Court erred by holding that recordability had no bearing on non-judicial foreclosure.

Here, as Appellants noted in their original complaint, the individual who signed on behalf of MERS is not the same individual who appeared before the notary to have the assignment acknowledged. (Doc. 1-1 at p. 15, ¶ 61, pp. 65-66). This facial irregularity serves as compelling evidence that the assignment was not properly acknowledged, and that the assignment to is subject cancellation. Thus, the Court erred by holding otherwise.

IV. The Court Erred in Holding that Appellants Could not Obtain Injunctive Relief.

The District Court erred in holding that Appellants could not obtain injunctive relief because the debt was "in default." First, for the reasons set forth supra in Part I, Appellants were not in default. Second, Appellants did not need to tender in order to obtain the equitable relief they sought (cancellation and an injunction permanently prohibiting BONYM and its agents from foreclosing), because (a) they were seeking cancellation of an assignment for which they

received nothing of value, and (b) they had plausibly alleged that BONYM was not their creditor, and BONYM had not established that it was the owner of the Note.[13]

While it is true that Appellants would have needed to tender in order to have the *Security Deed* cancelled, (a) they would only need to tender to a party that first *established its right to receive payment* (which is the very issue under contest here, see (Doc. 1-1 at 81);[14] and (b) they would *not* need to tender in order to have the *assignment* cancelled, because *they received nothing of value for the assignment.*[15]

When an entity that has no legal right to foreclose does so anyway, the foreclosure is wrongful as a matter of law. See DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 448-49 (2008).[16] Such a void foreclosure, being unlawful,

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[13] See Part V, infra.

[14] See Taylor, Bean, & Whitaker Mortg. Corp. v. Brown, 276 Ga. 848, 850 (2003) (stating that "plaintiff can not come into equity without first paying or tendering any amount *admitted to be due*" (quotation and citation omitted; emphasis added); Williamson v. Bank of Am., N.A., 2011 U.S. Dist. LEXIS 155582, *13-*14 (N.D. Ga. 2011) (citing Everson v. Franklin Discount Co., 248 Ga. 811, 813 (1982); Sapp v. ABC Credit & Inv. Co., 243 Ga. 151, 158 (1979); and Davis v. Atlanta Finance Co., 160 Ga. 784, 785 (1925), for the proposition that the duty to tender the loan sums evidenced by the note does not arise unless and until the defendant establishes that it is entitled to receive payments under the note).

[15] See Taylor, Bean, & Whitaker Mortg. Corp. v. Brown, 276 Ga. 848, 850 (2003) (stating that "equity will not decree the cancellation of an instrument *where anything of value has been received* until repayment is either made or tendered, or the defendant has stated that, should a tender be made, it would be refused" (quotation and citation omitted; emphasis added)).

[16] Generally speaking, there are two broad categories of foreclosure sales that can give rise to a wrongful foreclosure claim: (1) "void sales," i.e., foreclosure sales that are void as a matter of law; and (2) "voidable sales," i.e., otherwise valid sales where circumstances or defects surrounding the sale serve to chill the bidding,

may be set aside "at the instance of the borrower" *without the need to tender the amount owing*. Duke Galish, LLC v. SouthCrest Bank, 314 Ga. App. 801, 803 (2012); see id. at 803-804; Coates v. Jones, 142 Ga. 237, 239 (1914); Culver v. Lambert, 132 Ga. 296, 297 (1909) (cited approvingly in Duke Galish, LLC, 314 Ga. App. at 803); Benedict v. Gammon Theological Seminary, 122 Ga. 412, 416 (1905) (cited in Culver, 132 Ga. at 297; Coates, 142 Ga. at 239).[17] See also

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thereby causing a grossly inadequate sales price, and subjecting the sale to being set aside in equity. See Racette v. Bank of Am., N.A., 318 Ga. App. 171, 175 (2012).

[17] In Benedict, the Supreme Court of Georgia stated as follows:

> Here was an illegal and void sale brought about by the [defendant]. It caused the land to be levied upon and sold contrary to law. The sale amounted to no more, in the eyes of the law, than if the officers of the [defendant] had gone upon the land and with force and arms ousted [plaintiff] from his possession. Both acts are illegal, and it would be a singular doctrine to hold that a lender of money secured by a deed to land can illegally oust the borrower, or grantor, and require the grantor to pay the debt before he can obtain any redress. Such a doctrine would encourage the lender to take possession of the land in any way that he might, and then quietly inform the borrower, "You have no right to set aside my act, illegal though it be, until you pay me the borrowed money." The lender, in such a case, could await his opportunity when the grantor and his family were away from home, as attending church on Sunday, and in his absence forcibly take possession of the premises. Upon the grantor's return he would be confronted with this statement from the lender: "I have taken possession of this house, because you owe me money. I have your security deed and you cannot enter until you pay me the whole amount due." This would be no worse than to allow the lender, through an illegal act of the sheriff, to turn the debtor out and require him to pay the whole amount of the debt before he be allowed to enter again. Equity believes in good conscience, honesty, and morality; it will not sanction oppression or extortion demanded by a party because

Williamson v. Bank of Am., N.A., 2011 U.S. Dist. LEXIS 155582, *13-*14 (N.D. Ga. 2011) (citing Everson v. Franklin Discount Co., 248 Ga. 811, 813 (285 S.E.2d 530, 533) (1982); Sapp v. ABC Credit & Inv. Co., 243 Ga. 151, 158 (253 S.E.2d 82, 87) (1979); Davis v. Atlanta Finance Co., 160 Ga. 784, 785 (129 S.E. 51, 52) (1925)).

Here, a foreclosure given the current state of title would have violated O.C.G.A. § 44-14-162(b) for the reasons set forth supra in Section III, and would have been void as a matter of law. Further, Appellants were able to plausibly allege that none of the Defendants have standing to foreclose for the reasons set forth infra in Part V. Thus, the Court erred in holding that Appellants could not obtain equitable relief.[18]

> of his own illegal act. If he demands his pound of flesh, he must take it without the letting of blood. **A party who violates the law knowingly and willfully, and thereby injures another, can not demand of the latter party to 'do equity' before he can establish his right and place himself in status quo...**
> ... The sale not having been made according to law, [the defendants] can not insist, as a condition precedent to setting it aside, that [the plaintiffs] be compelled to comply with conditions before [plaintiffs] can take advantage of the misconduct of the [defendants]. **In other words, the foreclosure at their election being void, they have a right to treat the proceedings as though no foreclosure had ever been had"...**

(Emphasis added.) Benedict v. Gammon Theological Seminary, 122 Ga. 412, 415, 416 (1905).

[18] Tybrisa Co. v. Tybeeland, Inc., 220 Ga. 442, 445 (139 S.E.2d 302, 305) (1964) (which the Court cited for the proposition that injunctive relief is improper when a debt is in default, (Doc. 24 at 49 n.18)) is inapposite here because (1) the

V. The Court Erred in Holding (a) that Ownership of the Promissory Note has no Bearing on Non-Judicial Foreclosure, and (b) that a Borrower Lacks Standing to Challenge a Party's Purported Ownership Interest in a Promissory Note.

In their Complaint, Appellants asserted that BONYM as Trustee has no standing to foreclose because it is not the owner of the beneficial interest in the Note.[19] (Doc. 1-1 at p. 20, ¶ 81); see also (Doc. 24 at p. 27) (quoting Pl.'s Resp. to

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debt is not in default; (2) there was a "mutual agreement to depart from the writing" that "waived strict performance" (see Part I, supra); and (3) asumming *arguendo* that there was a default, it was caused due to justifiable reliance upon the statements and conduct of BANA (see Tybrisa, 220 Ga. at 305, 306 (139 S.E.2d 445, 446); Part VIII, infra).

The Court further erred to the extent that it applied the standard for obtaining interlocutory injunctions in federal to Appellants' petition for permanent injunctive relief. (Doc. 24 at p. 48); (Doc. 1-1 p. 22). This is a substantive remedy for which Georgia substantive law applies—*not* Federal law. See Port of New York Authority v. Eastern Air Lines, Inc., 259 F. Supp. 745, 753 (1966); contra, Ferrero v. Associated Materials, Inc., 923 F.2d 1441, 1448 (11th Cir. 1991) (stating that the court applies federal law when determining whether to issue a *preliminary* injunction, which is a procedural remedy).

In Georgia, a permanent injunction may be issued by final decree after a hearing on the merits when the issuance of such an injunction is necessary to protect or enforce the legal rights of the petitioner. See OCGA 9-2-3. To obtain a permanent injunction under Georgia law, a petitioner must demonstrate that (1) he is being or will be harmed by one of the acts enumerated in OCGA 9-5-1; and (2) he has no adequate remedy at law to make him whole (OCGA 9-5-1). In addition, he must actually succeed on the merits at a hearing on the merits. OCGA 9-5-10. Thus, where a petitioner establishes the first two criteria and actually succeeds on the merits, and where "the grant or denial of equitable relief is merely ancillary to underlying issues of law, or would have been a matter of routine once the underlying issues of law were resolved" (Harris v. Gilmore, 265 Ga. App. 841, 842 (2004) (footnote omitted)), it is proper for a court to issue a permanent injunction under Georgia law.

[19] Appellants also alleged that BONYM as Trustee was not a "holder in due course" (as that term is defined in O.C.G.A. § 11-3-302(a)). (Doc. 1-1 at p. 20, ¶

Defs.' Mot. to Dismiss (Doc. 9) at 3-4). This argument initially appeared to be supported by Reese v. Provident Funding Assocs., LLP, 317 Ga. App. 353 (730 S.E.2d 551) (2012) (see (Doc. 36-1 at p. 9)), but that case was overturned last year by You v. JPMorgan Chase, 293 Ga. 67 (743 S.E.2d 428) (2013). Thus, in its Order denying Appellants' motion to reconsider, the Court stated that

> Plaintiffs contend that CWALT lacks authority to foreclose on the Property because it is not the holder of Plaintiffs' loan or their secured creditor. The Supreme Court of Georgia has expressly rejected this argument and held that "the holder of a deed to secure debt is authorized to exercise the power of sale in accordance with the terms of the deed even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed." You v. JP Morgan Chase Bank, 743 S.E.2d 428, 433 (Ga. 2013); see also Harris v. Chase Home Fin., LLC, No. 12-10406, 2013 WL 3940000 (11th Cir. July 31, 2013) (applying You). Plaintiffs have not, and cannot, state a claim for wrongful foreclosure based on their assertion that CWALT lacks standing to foreclose on Plaintiffs' property.

(Footnote omitted.) (Doc. 39 at p. 11-12).

However, the Court erred by holding that Plaintiffs could not state a claim for wrongful foreclosure based on lack of standing as a matter of law. You's holding is constrained to the question presented, i.e., whether a party that is the

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81). (A "holder" is a party who (1) is entitled to enforce a note under O.C.G.A. § 11-3-301(i), and (2) who obtained that entitlement by virtue of a "negotiation." See Bank of Danielsville v. Seagraves, 167 Ga. App. 135, 139 (305 S.E.2d 790, 794) (1983) ("'...[o]nly a negotiation, not an assignment, can constitute a transferee a "holder" of a negotiable instrument.' 11 AmJur2d 337, Bills & Notes, § 312. 'Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery.' Code Ann. § 109A-3 -- 202 (1) (O.C.G.A. § 11-3-202(1)).") Whether BONYM is or is not a "holder in due course" is not relevant to the argument set forth infra.

holder of a security deed can be the "secured creditor" of O.C.G.A. §§ 44-14-162(b), 44-14-162.2(a), if said party does not (1) hold the note, and/or (2) have any beneficial interest in the note.[20] In other words, You held that a party could be the "secured creditor" under O.C.G.A. §§ 44-14-162(b), 44-14-162.2(a), and could foreclose in its own name, even if said party was not authorized to enforce the note per O.C.G.A. § 11-3-301, and/or did not own the beneficial interest in the note per O.C.G.A. § 10-3-1. You did *not* hold that the identity of the note's owner is *entirely* irrelevant with regard to non-judicial foreclosure. Rather, because state agency law applies to transfers of real property,[21] and because "a security deed is an interest in real property subject to all of the incidents and requirements of real

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[20] For these reasons, we answer the first certified question in the affirmative. Under current Georgia law, the holder of a deed to secure debt is authorized to exercise the power of sale in accordance with the terms of the deed even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed.
You, 293 Ga. at 74 (743 S.E.2d at 433). See also id., 293 Ga. at 69 (743 S.E.2d at 430) ("(1) Can the holder of a security deed be considered a secured creditor, such that the deed holder can initiate foreclosure proceedings on residential property even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed?")

[21] See e.g. Turnipseed v. Jaje, 267 Ga. 320, 322 (477 S.E.2d 101, 103) (1996); O.C.G.A. § 23-2-114 ("Unless the instrument creating the power specifically provides to the contrary, **a personal representative**, heir, heirs, legatee, devisee, or successor of the grantee in a mortgage, deed of trust, deed to secure debt, bill of sale to secure debt, or other like instrument, or an assignee thereof, **or his personal representative,** heir, heirs, legatee, devisee, or successor may exercise any power therein contained…" (emphasis added)).

property transfers under Georgia law,"[22] the identity of the note's owner *can and does* matter for the following reasons:

(1) Pursuant to Georgia law, the "Lender" in the Security Deed is the "owner" of the Note;

(2) Pursuant to the terms of the Security Deed, the "Lender" is the only party with contractual authority to accelerate the debt and invoke the power of sale (though the agent of the "Lender" can **exercise** the power of sale **on behalf of** the Lender, You, 293 Ga. at 74 (743 S.E.2d at 433);

(3) Pursuant to the terms of the Security Deed, the debt cannot be accelerated and the power of sale cannot be invoked unless and until the "Lender" experiences a default;

(4) Pursuant to Georgia law, the "Lender" can only experience a default if it holds an enforceable interest in the note;

(5) Pursuant to Georgia law, when the "Lender" is a trustee, the trustee's failure to take title to the note in compliance with the terms of the trust instrument by which said trustee is governed may render the trustee's asserted interest in the note unenforceable as a matter of law (depending on the law of the jurisdiction governing the construction of the trust instrument);

(6) If the "Lender's" interest in the note is unenforceable, it cannot experience a default, and consequently cannot invoke the power of sale under the Security Deed;

(7) State agency law applies in the context of transfers of real property, including transfers on foreclosure;

(8) The maxim that "an agent can do no more than what its principal could have done" is a foundational rule of state agency law; and

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[22] (Internal brackets and quotes omitted.) You, 293 Ga. at 73 (743 S.E.2d at 433).

(9) By consequence, an agent whose principal cannot accelerate the debt and invoke the power of sale has no ability to independently do so.

In other words, when a principal lacks capacity to invoke the power of sale and foreclose, its agent also lacks that power, even if title is vested in the name of the agent, *not* due to non-compliance with O.C.G.A. §§ 44-14-160 et seq., *nor* due to the fact that said agent is or is not entitled to *enforce* the note pursuant to O.C.G.A. § 11-3-301 (which were the two issues addressed in You), but simply because *the principal lacks the legal capacity to perform those acts.*

These are correct statements of Georgia law; and this is a correct interpretation of the terms of the Security Deed.[23] With regard to the first point, in Georgia, the "owner" of the note (i.e., the party with the beneficial interest in the note) is also the holder of the beneficial interest in the security instrument, even if said owner does not hold the legal title to the security instrument. OCGA 10-3-1 (quoted in You, 293 Ga. at 74); Van Pelt v. Hurt, 97 Ga. 660, 663 (1895). Here, the original payee on the Note (Pulte Mortgage LLC) (Doc. 1-1 at p. 58) is the same party named as the "Lender" on the Security Deed. (Doc. 6-1 at p. 3). Thus, according to Georgia law and the terms of the Security Deed, the party that (purportedly) *purchased* the Note for value from Pulte Mortgage LLC succeeded to

[23] Powers of sale in deeds to secure debt are to be strictly construed. OCGA 23-2-114. Here, the power of sale is contained within Paragraph 22 of the Security Deed. (Doc. 6-1 at p. 14, ¶ 22).

its rights as holder of the *beneficial interest* in the Security Deed, and became the party referred to in the Security Deed as the "Lender." (Given that the assignment expressly purports to transfer the indebtedness secured by the Security Deed (Doc. 1-1 at p. 65), the purported "Lender" is BONYM as Trustee.)

With regard to the second point, the plain language of the Security Deed (along with O.C.G.A. § 10-3-1 and the caselaw expounding on it) points to the conclusion that the owner of the Note is the "Lender" identified in the Subject Security Deed.[24] Critically, the Security Deed clearly states that the Security Deed **secures to the "Lender" the repayment of the Loan (i.e., of the debt evidenced by the Note)** (Doc. 6-1 at p. 4 (first sentence of section titled "Transfer of Rights in the Property")). This indicates that the "Lender" is the "owner" of the Note and the holder of the *beneficial* interest in the security instrument pursuant to O.C.G.A. § 10-3-1. Further, it is this *same* "Lender" who gives the borrower the notice of default, (Doc. 6-1 at p. 14, ¶ 22), who accelerates the debt, (Doc. 6-1 at p. 14, ¶

[24] "In general, the interpretation of contractual language is a question of law for the court, unless it is so ambiguous that the ambiguity cannot be resolved by the ordinary rules of construction." Manzi v. Cotton States Mut. Ins. Co., 243 Ga. App. 277, 279 (2000). "[W]here terms of a written agreement are ambiguous, the meaning should be left to the jury." Stinson v. Artistic Pools, Inc., 236 Ga. App. 768, 769 (1999).

22), and who invokes the power of sale, (Doc. 6-1 at p.14, ¶ 22).[25] Accordingly, it is clear that the Security Deed makes reference to the party with the purported ownership interest in the note at every place where the word "Lender" is used. Here, Appellants alleged that the "Lender" (BONYM as Trustee) is not the "current creditor/beneficiary," (Doc. 1-1 at p. 20, ¶ 81), that is, that is does not hold a legally enforceable beneficial interest in the Note, even though it is the purported owner of said Note.

With regard to the third point, the language of Paragraph 22 of the Security Deed indicates that, *prior* to accelerating the debt and invoking the power of sale, the "Lender" (i.e., the purported "owner" of the Note) must *first* experience a default. See (Doc. 6-1 at p. 14, ¶ 22); footnote 25, infra. With regard to the fourth point, if the purported owner of the Note has no enforceable interest in the Note, then it logically follows that the purported owner (i.e., the "Lender" per the terms of the Security Deed) *cannot* experience a default, and consequently *cannot* take any further action under Paragraph 22.

With regard to the fifth point, when the "Lender" is a trustee, the trustee's failure to take title to the note in compliance with the terms of the trust instrument by which said trustee is governed may render the trustee's asserted interest in the

[25] "Lender shall give notice to Borrower prior to acceleration following Borrower's breach…The notice shall specify[] the default…If the default is not cured…Lender at its option may require payment in full of all sums secured by this Security Instrument…and may invoke the power of sale…" (Doc. 6-1 at p. 14, ¶ 22).

note unenforceable as a matter of law (depending on the law of the jurisdiction governing the construction of the trust instrument). This is the case because, pursuant to the Georgia Trust Code (Chapter 12 of Title 53), a trust instrument has the force of law, and may vary the provisions of the Georgia Trust Code in all instances save for those specified in OCGA 53-12-7. See OCGA 53-12-7(a). Further, OCGA 53-12-7(a) does not prohibit a trust from governing itself by the laws of another state; nor does it prohibit a trust from setting special rules regarding the capacity of its trustee. (Thus, while OCGA 53-12-200 is the general rule regarding capacity of trustees under Georgia law, this rule may be modified by the terms of the trust instrument.) Consequently, a provision in a trust instrument stating that the trust is governed by the laws of New York would have the force of law; and a trust governed by New York law that did not take title to a note or to a security deed in compliance with the terms of its trust instrument would have no enforceable interest in the note or in the property in question. New York Estates, Powers and Trusts Law ("EPTL") § 7-2.4.[26]

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[26] EPTL § 7-2.4 states that, "[i]f the trust is expressed in an instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void." The plain language of that statute indicates that an act taken in contravention of the terms of a trust instrument governed by New York law is *void, not voidable*. See also Wells Fargo Bank, N.A. v. Erobobo (Apr. 29, 2013) 39 Misc.3d 1220(A), 2013 WL 1831799, slip opn. p. 8 (stating that, "[u]nder New York Trust Law, every sale, conveyance or other act of the trustee in contravention of the trust is void. EPTL § 7-2.4. Therefore, the acceptance of the

This is virtually identical to the *ultra vires* analysis applied to corporations.[27] However, the critical difference in Georgia is that, whereas only the parties listed in OCGA 14-2-304(b) have standing to assert that the act of a corporation is *ultra vires*, a trust is "peculiarly the subject of equity jurisdiction" (OCGA 53-12-6(a)),

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note and mortgage by the trustee after the date the trust closed, would be void."); Levitin & Twomey, Mortgage Servicing, 28 Yale J. on Reg. 1, 14 fn. 35 (2011) (stating that, under New York law, any transfer to the trust in contravention of the trust documents is void); In re Saldivar, 2013 WL 2452699, *4 (Bankr.S.D.Tex., Jun. 5, 2013, No. 11-10689) (relying on Erobobo and stating that, "under New York law, assignment of the [][claimant's] Note after the start up day is void *ab initio*. As such, none of the [][claimant's] claims will be dismissed for lack of standing."); Glaski v. Bank of America, 218 Cal. App. 4th 1079, 1083 (160 Cal. Rptr. 3d 449, 2013 Cal. App. LEXIS 633, 2013 WL 4037310) (Cal. App. 5th Dist.,2013) ("We conclude that a borrower may challenge the securitized trust's chain of ownership by alleging the attempts to transfer the deed of trust to the securitized trust (which was formed under N.Y. law) occurred after the trust's closing date. Transfers that violate the terms of the trust instrument are void under New York trust law, and borrowers have standing to challenge void assignments of their loans even though they are not a party to, or a third party beneficiary of, the assignment agreement."); id. at 1097 ("We conclude that [][claimant's] factual allegations regarding post-closing date attempts to transfer his deed of trust into the [] Securitized Trust are sufficient to state a basis for concluding the attempted transfers were void. As a result, [][claimant] has a stated cognizable claim for wrongful foreclosure..."); Adam J. Levitin, The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title, 63 Duke L.J. 637 (Dec. 2013) (providing a broad overview of the title problems created by securitization and by the MERS system); id. at 642 n.17 (collecting cases across the country where lender or servicer was prohibited from foreclosing due to lack of standing).

[27] See Georgia Casualty & Surety Co. v. Seaboard Surety Co., 210 F. Supp. 644, 652 (N.D. Ga. 1962) (quoting Hornady v. Goodman, 167 Ga. 555, 572 (1928)) (stating that "'[a] by-law...may be said to be a legislative act of the corporation'"); Halacy v. Wells Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 165651, *10 (D. Mass. November 21, 2013) (quoting Bank of Am. Nat'l Ass'n v. Bassman FBT, L.L.C., 981 N.E.2d 1, 9 (Ill. App. Ct. 2d Dist.,2012), which refers to acts for which a trustee lacks capacity to perform as "*ultra vires* acts").

which means that the standing provision governing cases arising in equity (i.e., OCGA 23-2-34) applies to equity cases in which a trust or a trustee is named as a respondent. A claim by a borrower seeking to enjoin a trustee from acting or asserting that a trustee cannot act due to lack of capacity is precisely such a claim.

With regard to the sixth point, if the "Lender's" interest in the note is unenforceable, it cannot experience a default, and consequently cannot invoke the power of sale under the Security Deed. Like the fourth point, this is a logical and inescapable conclusion based on the language of the Security Deed.

With regard to the final three points, state agency law applies to all real estate transfers, including transfers performed pursuant to a power of sale. See Turnipseed v. Jaje, 267 Ga. 320, 322 (477 S.E.2d 101, 103); OCGA 23-2-114 (second sentence). In that regard, *state agency law is crystal clear that an agent can do no more than what its principal could have done.* See Godley Park Homeowners Ass'n v. Bowen, 286 Ga. App. 21, 22 (649 S.E.2d 308, 310) (2007) (stating that "[a]n agent…may do no more than his or her principal"); O.C.G.A. § 10-6-5; 10-6-20; 10-6-25; Tippins v. Cobb County Parking Auth., 213 Ga. 685, 688 (100 S.E.2d 893, 895) (1957) (stating that "there can be conferred upon an agent no greater power than that possessed by the principal"); McCalla v. C.I.T. Fin. Servs., 235 Ga. App. 95, 97 (508 S.E.2d 471, 472) (1998) (stating that "[o]ne cannot do indirectly what the law does not allow to be done directly" (internal

quotes and citation omitted)). Thus, a principal whose servicing agent is in compliance with all of the foreclosure statutes, but who lacks power to foreclose due to some other reason (e.g., lack of capacity pursuant to the terms of a trust instrument), has no capacity to foreclose, and cannot escape this result by attempting to foreclose through its servicing agent. The corollary to this proposition is that a servicing agent that is a "secured creditor" pursuant to O.C.G.A. § 44-14-162(b) and You cannot foreclose when its principal lacks power to foreclose, not due to "lack of standing" under the foreclosure statutes, but because *the agent cannot do what the principal cannot do.*

In summary, given that BANA, BONYM, and its agents never established that BONYM was the "current creditor/beneficiary" in response to Appellants' multiple debt validation letters, (Doc. 1-1 at p. 11-13, ¶¶ 43-53), see also (Doc. 9 at p. 4), Appellants were justified in bringing a claim that challenged BONYM's capacity to foreclose. Therefore, construing the facts in the light most favorable to Appellants, it was error for the Court to dismiss this claim.[28]

VI. The Court erred in Holding that Appellants Could not Predicate Relief on the "One Satisfaction Rule."

[28] Further, to the extent the Court held that Appellants did not have standing to challenge BONYM's title to the Note, this holding was erroneous. See Austell Bank v. National Bondholders Corp., 188 Ga. 757, 758 (1939) (quoted in 685 Penn, LLC v. Stabilis Fund I, L.P., 316 Ga. App. 210, 211 (2012)), which stands for the proposition that the current obligor on a note has standing to challenge an enforcing party's title to and/or right to enforce the note.

The Court erred by holding that Appellants could not predicate relief on the "one satisfaction rule." See (Doc. 24 at p. 41). Appellants asserted that, assuming BONYM did own the Note, the Note had already been paid of through some form of insurance or overcollateralization. (Doc. 1-1 at p. 18-20, ¶¶ 71-79). In support of this assertion, they cite the common law maxim of "one satisfaction," which states that "[w]hen the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages." Lovejoy v. Murray, 70 U.S. 1, 17, (18 L.Ed. 129, 134) (1865). This maxim is still controlling law in Georgia, appearing in the doctrines of discharge and equitable subrogation. See O.C.G.A. § 11-3-602(a)(i) (stating that a debt is discharged as to a particular payee to the extent it is paid off by or *on behalf of* the obligor); Bank of Danielsville v. Seagraves, 167 Ga. App. 135, 140 (305 S.E.2d 790, 795) (1983) (discussing equitable subrogation).[29] In other words, per the "one

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[29] "'Subrogation is the substitution of another person in the place of the creditor, so that the person in whose favor it is exercised succeeds to all the rights of the creditor. It is of equitable origin, being founded upon the dictates of refined justice, and its basis is the doing of complete, essential, and perfect justice between the parties, and its object is the prevention of injustice . . . Legal subrogation takes place as a matter of equity, **without any agreement to that effect made with the person paying the debt**, and **is independent of both creditor and debtor.**'" *Southern R. Co. v. Overnite Transp. Co.*, 223 Ga. 825, 830 (6) (158 SE2d 387). "A surety who has paid the debt of his principal shall be subrogated, both at law and in equity,*to all the*

satisfaction rule," the entity that paid off the Note on behalf of Appellants is subrogated to BONYM's rights in the Note (if any), and would be the new creditor/beneficiary on the Note. This would mean that BONYM would not be owed anything else on the Note, and could not take any further effort to collect the moneys owed under the Note through either note enforcement *or* foreclosure. Thus, the Court erred in stating that Appellants could not predicate relief on the "one satisfaction rule."

VII. The Court Erred in Dismissing Appellants' Claim for Fraud.

The Court erred in dismissing Appellants' fraud claim. The Court dismissed this claim because (1) "[][Appellants] cannot show that any damage they suffered was proximately caused by BANA's representations," (Doc. 24 at p. 30) and because (2) "Plaintiffs' default beyond the initial two months of missed payments caused their alleged damages," (Doc. 24 at p. 31). This holding was erroneous. Causation is a fact question in all cases except for those that are "palpably clear and indisputable." Crankshaw v. Piedmont Driving Club, Inc., 115 Ga. App. 820,

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> *rights* of the creditor . . ." (Emphasis supplied.) Code Ann. § 103-501 (Code § 103-501; O.C.G.A. § 10-7-56). Hence, legal subrogation arises as a matter of equity without any agreement to that effect, and conventional subrogation depends upon contract, and **upon payment of the debt of another one is entitled to the securities and rights of the creditor so paid.**

(Emphasis added.) Bank of Danielsville, 167 Ga. App. at 140 (305 S.E.2d at 795) (1983).

821 (1967). This was *not* a "palpably clear and indisputable" case. BANA never gave Appellants instructions to recommence paying after skipping two payments, and Appellants literally hounded BANA for fifteen months regarding the loan mod after skipping the first two payments. (Doc. 1-1 at p. 7, ¶ 21). This conclusion (i.e., that proximate cause is not indisputable) is supported by the recent affidavits of former BANA employees submitted in the case styled as In Re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation, CA No. 1:10-md-02193-RWZ (D. Mass.) (Zobel, J.), wherein these employees swear under oath that BANA instructed them to induce borrowers to default by encouraging them to skip payments so that they could purportedly be reviewed for loan mods, when in fact BANA had no intention of approving them for loan mods, and lured them into default in order to foreclose. See footnote 5, supra. This would amount to inceptive fraud if true; and this is precisely what Appellants assert happened to them.[30, 31] Thus, the Court's ruling on Appellants' fraud claim must be reversed.

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[30] "When the failure to perform the promised act is coupled with the present intention not to perform, fraud, in the legal sense, is present. This is known as inceptive fraud, and is sufficient to support an action for cancellation of a written instrument." (Punctuation omitted.) Cone Mills Corp. v. A. G. Estes, Inc., 399 F. Supp. 938, 944 (N.D. Ga. 1975) (quoting Hinson v. Hinson, 221 Ga. 291, 292 (144 S.E.2d 381, 383) (1965).

[31] The Court states that its reasoning on the fraud claim "tracks" Georgia wrongful foreclosure analysis, wherein "[f]ailure to make the proper loan payments defeats any wrongful-foreclosure claim," (Doc. 24 at p. 31 & n.15). This is an incorrect statement of Georgia law. See Part I.b, supra. Further, the controlling Georgia cases stating or implying that a wrongful foreclosure claimant must bid at the sale

VIII. The Court Erred in Dismissing Appellants' Claim for Equitable Estoppel.

The Court should not have dismissed Appellants' claim for equitable estoppel. The Court dismissed Appellants' equitable estoppel claim on the same ground as the fraud claim – namely, it found that Appellants did not detrimentally rely on BANA's representations and that their failure to recommence payment proximately caused their damages. (Doc. 24 at p. 35). This was an issue that should have been left to a jury to decide. Crankshaw v. Piedmont Driving Club, Inc., 115 Ga. App. 820, 821 (1967); Gca Strategic Inv. Fund v. Joseph Charles & Assocs., 245 Ga. App. 460, 465 (2000) (cited in Catrett v. Landmark Dodge, 253 Ga. App. 639, 641 & n.7 (2002)) ("[q]uestions of fraud, the truth and materiality of

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or cure the default in order to establish causation (1) make such statements in *dicta*, and (2) only apply when the claimant alleges that the bid was chilled at a *lawful* sale. See e.g. Heritage Creek Dev. Corp. v. Colonial Bank, 268 Ga. App. 369, 372 (2004). These cases do not apply when the sale is *void* and *invalid* as a matter of law. Once it is clear that all conditions precedent to conducting a valid foreclosure sale have not been complied with, every act performed after that time in furtherance of that foreclosure sale is invalid and unlawful. This includes the crying of the foreclosure sale. There is no law in Georgia stating that a plaintiff cannot establish causation unless he participates in an unlawful act in order to prevent himself from incurring a particular harm. In fact, Georgia law has held to the contrary for over 100 years. See Benedict v. Gammon Theological Seminary, 122 Ga. 412, 415-416 (1905). Failure to participate in an illegal act simply cannot be deemed a preponderating cause in causing an injury. See OCGA 51-12-8. Further, no reasonable person would find that failure to participate in an unlawful act, or to fail to bid at an unlawful sale, constituted ordinary negligence (see OCGA 51-1-2).

representations made by a defendant, and whether the plaintiff could have protected himself by the exercise of proper diligence are, except in plain and indisputable cases, questions for the jury").[32]

IX. The Court Erred in Dismissing Appellants' Claim Under the Fair Debt Collection Practices Act ("FDCPA").

The Court erred in dismissing Appellants' FDCPA claim. The Court's grounds for doing so was that (1) Appellants did not establish that BANA was a "debt collector," (Doc. 34 at pp. 14-18), and (2) Appellants did not establish that BANA was engaged in "debt collection activity," (Doc. 34 at pp. 18-19). This ruling is erroneous.

First, the court held that Appellants could not rely on BANA's own representation in its letters that it is a debt collector. (Doc. 34 at p. 17 & n.9). This rule severely disadvantages borrowers and pro se litigants, who would expect BANA to perform the acts required by it under the FDCPA given that it held itself out to be a "debt collector." would sue in order to seek relief under the FDCPA. and would have their FDCPA claim summarily dismissed upon the Court's ruling that BANA is *not* in fact a debt collector. For this reason. BANA should be estopped from coming into court and arguing that it is *not* a debt collector when it

[32] The controlling case for equitable estoppel under Georgia law is Tybrisa Co. v. Tybeeland, Inc., 220 Ga. 442 (1964).

had already admitted to being on in letters sent to the borrower. See e.g. Bourff v. Rubin Lublin, LLC, 674 F.3d 1238 (11th Cir. 2012) (where foreclosure firm's status as a "debt collector" was assumed by the Court given that the foreclosure firm admitted to being a debt collector in the dunning letters sent to the borrower).

Second, the Court held that BANA had a "present right to possession" of the Property, and therefore that it did not violate 15 U.S.C. § 1692f(6). (Doc. 34 at pp. 17-18). However, this is a question of fact, as BANA's agent's "present right to possession" was legitimately placed in dispute by Appellants. See Part V, supra. Thus, the FCPA claim could not have been dismissed at the motion to dismiss stage on this basis.

X. The Court Erred in (a) Holding that Appellants Failed to plausibly Allege Sufficient Facts to Support the Claims in Their Original complaint; and by (b)(i) Only Granting Appellants Leave to Amend One Claim, and (ii) Prohibiting Appellants from Raising Additional Claims in their Amended Complaint.

The Court erred in holding that Appellants failed to plausibly allege sufficient facts to support their claims. It is well settled that the complaint is required to contain "only enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007). "Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence [that supports the plaintiff's claim]." Twombly, 550

U.S. at 556. Here, Appellants' original complaint contained enough facts to state claims for relief, even though they were inartfully pleaded. See S.E.C. v. Elliott, 953 F2d 1560, 1582 (11th Cir. 1992) ("[w]hen interpreting pro se papers, the Court should use common sense to determine what relief the party desires"). The Court failed to do follow this mandate, and consequently ended up dismissing several viable claims.

Further, the Court's allowance of one effort to amend was illusory, because it only allowed Appellants to amend one claim, which it was going to dismiss anyways as a matter of law by holding that BANA had a "present right to possession" in the Property. See (Doc. 34 at pp. 17-18). Since the Court dismissed the claim as a matter of law, alleging more facts would not have helped Appellants. It thus appears that Appellants were granted leave to amend the FDCPA count solely in order to give the appearance of leniency toward *pro se* filings, when in reality Appellants' major claims had already been dismissed with prejudice with no leave to amend being granted. As the Court itself noted, it is error to dismiss a complaint by a *pro se* litigant with prejudice without first giving the plaintiff an opportunity to amend the complaint if a more carefully drafted complaint might state a claim. See Van Taylor v. McSwain, 335 F. App'x 32, 33 (11th Cir. 2009) (Doc. 24 at p. 50). This opportunity to amend should be *sincere* and should allow a *pro se* litigant to state a viable claim relative to the relief desired. Here, Appellants

were primarily concerned with saving their home from foreclosure, and/or with seeking damages for being fraudulently lured into default. The fact that the Court did not allow Appellants to amend in a manner that adequately addressed the relief that they were seeking constituted error.[33]

XI. The Court Erred by Denying Appellants' Motion to Reconsider.

The Court erred by denying Appellants' motion to reconsider.

> Under the Local Rules [], "[m]otions for reconsideration shall not be filed as a matter of routine practice[.]" but rather, only when "absolutely necessary." LR 7.2(E), NDGa. Such absolute necessity arises where there is "(1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact." Bryan v. Murphy, 246 F. Supp. 2d 1256, 1258-59 (N.D. Ga. 2003). However, a motion for reconsideration may not be used "to present the court with arguments already heard and dismissed or to repackage familiar arguments to test whether the court will change its mind." Id. at 1259. Furthermore, "[a] motion for reconsideration is not an opportunity for the moving party . . . to instruct the court on how the court 'could have done it better' the first time." Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995), aff'd, 87 F.3d 1242 (11th Cir. 1996).

Jackman v. Hasty, 2011 U.S. Dist. LEXIS 131911, *9 (N.D. Ga. 2011). Additionally, new legal theories and evidence may be presented in a motion to reconsider if "a reason is given for failing to raise the issue at an earlier stage in the litigation." See Adler v. Wallace Computer Servs., Inc., 202 F.R.D. 666, 675 (N.D.

[33] For this same reason, the Court should have allowed Appellants to amend Count 2 of their original complaint ("bad faith") at least once, given that, *at minimum*, it appears to assert a viable claim under the Telephone Consumer Protection Act (47 USC 227 et seq.) at ¶ 38(d) (Doc. 1-1 at 10).

Ga. 2001) (Story, J.) (citing O'Neal v. Kennamer, 958 F.2d 1044, 1047 (11th Cir. 1992)).

Here, Appellants attempted to correct clear legal and factual errors in their motion to reconsider (Doc. 36-1) related to fraud, lack of standing, the "one satisfaction rule," and the FDCPA. The Court should have taken cognizance of the arguments raised by Appellants in their Motion to Reconsider, and should have granted the Motion.

CONCLUSION

For all of the foregoing reasons, Appellants pray that this Honorable Court grant relief as follows:

(1) That it REVERSE the Trial Court's judgment on Count 1 of Appellants' Original Complaint;

(2) That it REVERSE the Trial Court's judgment on Count II of Appellants' Original Complaint and instruct the Trial Court to allow Appellants to REPLEAD;

(3) That it REVERSE the Trial Court's judgment on Count III of Appellants' Original Complaint;

(4) That it REVERSE the Trial Court's judgment on Count IV of Appellants' Original Complaint;

(5) That it REVERSE the Trial Court's judgment on Count VII of Appellants' Original Complaint;

(6) That it REVERSE the Trial Court's judgment on Count IX of Appellants' Original Complaint;

(7) That it REVERSE the Trial Court's judgment on Count X of Appellants' Original Complaint;

(8) That it instruct the Trial Court to REPLAD in order to state any additional factually plausible claim related to the relief desired.

Respectfully submitted this 14th day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I have filed this BRIEF OF APPELLANTS with the U.S. Court of Appeals for the Eleventh Circuit, and served a true and correct copy of same on Defendants' Attorneys via First-Class Mail, postage prepaid, addressed to:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 8.962 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii)

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