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Financial Services Litigation Report

June 2012 Volume 4, Issue #4

Convicted Ponzi Schemer Stanford Sentenced To 110 Years In Federal Prison

HOUSTON — The federal judge in Texas overseeing the criminal case of convicted Ponzi scheme mastermind R. Allen Stanford on June 14 sentenced Stanford to 110 years in federal prison. **SEE PAGE 5.**

Bear Stearns, Former Executives Agree To $275M Settlement Of Securities Claims

NEW YORK — The Bear Stearns Cos. Inc. and certain of its former officers and directors have agreed to pay $275 million to settle claims that they misrepresented the investment quality and risk profile of mortgage-backed securities they issued to investors in violation of federal securities laws, according to documents filed June 6 in New York federal court. **SEE PAGE 6.**

Former Bear Stearns Auditor To Pay Nearly $20M To Settle Securities Law Claims

NEW YORK — The former independent outside auditor for The Bear Stearns Cos. Inc. agreed June 11 to pay nearly $20 million to settle shareholder claims that it failed to accurately monitor the financial giant's internal controls with regard to Bear Stearns' issuance of risky subprime mortgage-backed securities in violation of federal securities law. **SEE PAGE 6.**

Judge Approves $90M Settlement With Lehman Officers, Directors

NEW YORK — A federal judge in New York on May 24 approved a $90 million settlement between former Lehman Brothers Holdings Inc. directors and officers and a proposed class of Lehman investors, settling claims that the executives misled the investors about Lehman's true exposure to subprime mortgages before its 2008 collapse. **SEE PAGE 9.**

Greenberg Traurig Agrees To Pay $61M To Settle Ponzi Claims

PHOENIX — The law firm Greenberg Traurig LLP agreed June 20 to pay $61 million to settle a suit in the U.S. District Court for the District of Arizona alleging that it aided an alleged Ponzi scheme that bankrupted two companies and led to $900 million in losses. **SEE PAGE 10.**

Freddie Mac, Wells Fargo Settle Telephone Consumer Protection Act Suits

SAN DIEGO — The Federal Home Loan Mortgage Corp. (Freddie Mac) and Wells Fargo Auto Finance Inc. have agreed to pay $17 million to settle two putative class actions alleging that they illegally contacted customers on their cell phones in violation of the Telephone Consumer Protection Act (TCPA), according to a June 18 filing in a California federal court. **SEE PAGE 16.**

Supreme Court Will Hear Appeal Of Dismissal Of Debt Collection Suit

WASHINGTON, D.C. — The U.S. Supreme Court on May 29 agreed to hear an appeal of a ruling that a collection agency did not violate the Fair Debt Collection Practices Act (FDCPA) when it contacted a debtor's employer to verify her employment status. **SEE PAGE 20.**

Divided 2nd Circuit: No En Banc Rehearing Of Validity Of AmEx Arbitration Clause

NEW YORK — The Second Circuit U.S. Court of Appeals on May 29 in a divided ruling denied rehearing *en banc* of its Feb. 1 opinion affirming its prior holding that a mandatory class action waiver clause in American Express Co.'s (AmEx) standardized service contract violated the Federal Arbitration Act (FAA). **SEE PAGE 32.**

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News

Convicted Ponzi Schemer Stanford Sentenced To 110 Years In Federal Prison

HOUSTON — The federal judge in Texas overseeing the criminal case of convicted Ponzi scheme mastermind R. Allen Stanford on June 14 sentenced Stanford to 110 years in federal prison (United States of America v. Robert Allen Stanford, No. 09-342, S.D. Texas; See March 2012, Page 5).

(**Judgment in Section A.** Document #88-120625-021X.)

U.S. Judge David Hittner of the Southern District of Texas' judgment of 1,320 months, or 110 years, came after a jury on March 6 found Stanford guilty of 13 of 14 counts of wire fraud, mail fraud, conspiracy to commit wire fraud and mail fraud, conspiracy to obstruct a Securities and Exchange Commission proceeding and obstruction of an SEC proceeding. He was found not guilty on one charge of wire fraud.

Stanford received 240 months, or 20 years, in prison for his convictions on the wire fraud and conspiracy to commit wire fraud and mail fraud counts; 60 months each on the conspiracy to obstruct an SEC investigation and obstruction of an SEC investigation counts, to be served consecutively; and another 240 months each for five counts of mail fraud and a count of conspiracy to commit money laundering, to be served concurrently with each other and with the previous counts.

Judge Hittner recommended to the Bureau of Prisons (BOP) that Stanford be "imprisoned in the most secure facility that the BOP finds is commensurate with his security needs up to and including a U.S. Penitentiary" and remanded Stanford to the custody of U.S. marshals.

Criminal Proceeding

The verdict brought to an end a criminal proceeding that took nearly three years to bring to trial due to a number of issues.

After a federal grand jury in the District Court issued a 21-count indictment charging Stanford with conspiring to commit securities fraud and money laundering and conspiring to obstruct and obstructing an investigation of the SEC in connection with his alleged operation of the Ponzi scheme, the court granted the government's motion for revocation of release and committed Stanford to pretrial detention on June 30, 2009, concluding that he was a flight risk.

On Jan. 26, 2011, Judge Hittner granted in part and denied in part Stanford's motion for relief and medical treatment after Stanford suffered a head injury during an altercation with another inmate and had surgery to repair facial fractures. Stanford was committed to the custody of the U.S. attorney general after Judge Hittner heard testimony from three psychiatrists who cited a number of contributing factors that could have led to Stanford's mental condition as a result of the injuries.

Expert Testimony

Then, on June 21, 2011, Judge Hittner issued an order delaying the start of Stanford's criminal trial, which was slated to begin Sept. 12, until January 2012. Stanford moved for a continuance on Dec. 28, which Judge Hittner denied as "unwarranted," and in a Jan. 5 order, the judge refused to strike certain expert testimony finding Stanford competent to stand trial and ordered Stanford's defense team to prepare for trial.

On March 8, the jury returned a special verdict requiring Stanford to forfeit $330 million held in 29 financial institutions abroad, and on March 20, Stanford moved for a new trial, claiming that he was deprived of his Sixth Amendment right to a fair trial. Judge Hittner denied the motion on March 22.

Stanford appealed his conviction to the Fifth Circuit U.S. Court of Appeals on June 14.

Counsel

Stanford is represented by Robert A. Scardino Jr. and Ali R. Fazel of Scardino Fazel in Houston and Lee H. Shidlofsky of Visser Shidlofsky in Austin, Texas.

The U.S. government is represented by U.S. Attorney Kenneth Magidson in Houston, Assistant U.S. Attorney Gregg Costa in Houston and William Stellmach and Andrew H. Warran of the U.S. Department of Justice in Washington, D.C.

(Additional documents available: **Verdict.** Document #88-120326-074V. **Jury instructions.** Document #88-120326-075X.) ■

Bear Stearns, Former Executives Agree To $275M Settlement Of Securities Claims

NEW YORK — The Bear Stearns Cos. Inc. and certain of its former officers and directors have agreed to pay $275 million to settle claims that they misrepresented the investment quality and risk profile of mortgage-backed securities they issued to investors in violation of federal securities laws, according to documents filed June 6 in New York federal court (In re Bear Stearns Companies Inc. Securities, Derivative, and ERISA Litigation, MDL No. 08-md-1963, No. 08-2793, S.D. N.Y.; See February 2011, Page 11).

(**Motion for preliminary approval of settlement.** Document #57-120611-080B. **Stipulation of settlement.** Document #57-120611-079X.)

Lead plaintiff State of Michigan Retirement System filed both a motion for preliminary approval of settlement and stipulation of settlement in the U.S. District Court for the Southern District of New York.

Under the terms of the settlement, which are subject to court approval and benefit plaintiffs in five securities class actions that were transferred to the District Court by the Judicial Panel on Multidistrict Litigation in 2008, in exchange for the $275 million payment, claims for violation of Sections 10(b), 20(a) and 20A of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 will be dropped against The Bear Stearns Cos. and former officers and directors James E. Cayne, Alan D. Schwartz, Warren J. Spector, Alan C. Greenberg, Samuel L. Molinaro Jr., Michael Alix and Jeffrey M. Farber.

JPMDL Transfer Order

After the JPMDL issued its Aug. 18, 2008, order transferring a number of securities class action, shareholder derivative and *Employee Retirement Income Security Act* (ERISA) lawsuits to the District Court, the retirement system was named lead plaintiff and filed a consolidated amended class action complaint on behalf of all purchasers of Bearn Stearns common stock purchasers from Dec. 14, 2006, to March 14, 2008.

On Jan. 19, 2011, Judge Robert W. Sweet denied the defendants' motion to dismiss the amended complaint; soon after, the parties began settlement discussions.

The retirement system is represented by Jeffrey C. Block, Patrick T. Egan and Justin Saif of Berman DeValerio in Boston, Joseph J. Tabacco Jr. and Julie J. Bai of Berman DeValerio in San Francisco and Thomas A. Dubbs, James W. Johnson and Michael W. Stocker of Labaton Sucharow in New York.

The defendants are represented by Eric S. Goldstein, Brad S. Karp, Lewis R. Clayton and Douglas M. Pravda of Paul, Weiss, Rifkind, Wharton & Garrison in New York and Paul J. Ondrasik and F. Michael Kail of Steptoe & Johnson in Washington, D.C.

(Additional document available. **Amended complaint.** Document #57-120611-081C.) ■

Former Bear Stearns Auditor To Pay Nearly $20M To Settle Securities Law Claims

NEW YORK — The former independent outside auditor for The Bear Stearns Cos. Inc. agreed June 11 to pay nearly $20 million to settle shareholder claims that it failed to accurately monitor the financial giant's internal controls with regard to Bear Stearns' issuance of risky subprime mortgage-backed securities in violation of federal securities law (In re Bear Stearns Companies Inc. Securities, Derivative, and ERISA Litigation, MDL No. 08-md-1963, No. 08-2793, S.D. N.Y.; See February 2011, Page 11, and related story in this issue).

(**Motion for preliminary approval of settlement available.** Document #88-120625-007B.)

Lead plaintiff State of Michigan Retirement System filed the motion for preliminary approval of settlement in the U.S. District Court for the Southern District of New York.

The proposed settlement comes less than a week after the other defendants in the multidistrict litigation, Bear Stearns and certain of its former executive officers and directors, agreed to pay $275 million to settle all claims against them.

Both proposed settlements are subject to court approval.

Actions Transferred

After the JPMDL issued its Aug. 18, 2008, order transferring a number of securities class action, shareholder derivative and Employee Retirement Income Security Act lawsuits to the District Court, the retirement system was named lead plaintiff and filed a consolidated amended class action complaint on behalf of all purchasers of Bearn Stearns common stock from Dec. 14, 2006, to March 14, 2008.

The retirement system alleges that the defendants violated Sections 10(b), 20(a) and 20A of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 by misrepresenting the investment quality and risk profile of mortgage-backed securities Bear Stearns issued to investors.

On Jan. 19, 2011, Judge Robert W. Sweet denied the defendants' motion to dismiss the amended complaint, and, soon after, the parties began settlement discussions.

Counsel

The retirement system is represented by Jeffrey C. Block, Patrick T. Egan and Justin Saif of Berman DeValerio in Boston, Joseph J. Tabacco Jr. and Julie J. Bai of Berman DeValerio in San Francisco and Thomas A. Dubbs, James W. Johnson and Michael W. Stocker of Labaton Sucharow in New York.

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Deloitte & Touche is represented by Antony L. Ryan, Max R. Shulman, Rachel G. Skaistis and Thomas G. Rafferty of Cravath, Swaine & Moore in New York.

(Additional document available. **Amended complaint.** Document #57-120611-081C.) ■

Judge Dismisses AIG's Claims Targeting Countrywide Mortgage-Backed Securities

LOS ANGELES — A federal judge in California on May 23 dismissed American International Group Inc.'s (AIG) federal claims in its suit targeting the underwriting practices at Bank of America Corp. unit Countrywide Financial Corp. Inc., agreeing with Countrywide that AIG filed the claims too late (American International Group, Inc., et al. v. Countrywide Financial Corporation, Inc., et al., No. 11-10549, C.D. Calif.).

(**Order available.** Document #88-120625-206R.)

U.S. Judge Mariana R. Pfaelzer of the Central District of California partially granted Countrywide's motion to dismiss the suit AIG filed against it and several other financial institutions.

AIG and other plaintiffs initially brought the suit on Aug. 8, 2011, in the New York County Supreme Court in connection with its purchase of residential mortgage-backed securities (RBMS) originated and/or issued by Countrywide. Between 2005 and 2007, AIG allegedly purchased $28 billion worth of RMBS certificates. AIG says Countrywide is liable because the certificates' offering documents contain various misrepresentations. Countrywide removed the suit to the District Court on Sept. 6, 2011, and filed its motion to dismiss on Feb. 27, 2012.

Time-Barred

In dismissing with prejudice AIG's federal claims, Judge Pfaelzer found that the claims for violations of the Securities Act of 1933 are barred by a three-year statute of repose that began to toll when the security was offered to the public. According to the judge, AIG filed its August 2011 complaint more than three years

after Countrywide issued the certificates to the public and AIG purchased them.

The judge also agreed with Countrywide that AIG's common law claims are barred under New York's borrowing statute. Eight of the 22 plaintiffs in the suit have their primary places of business in Arizona, California, Tennessee and Texas. Judge Pfaelzer noted that Arizona and California have a three-year statute of limitations for fraud and a two-year statute of limitations for negligent misrepresentation.

Judge Pfaelzer allowed the claims that were part of an agreement to toll claims between Jan. 13, 2011, and Aug. 5, 2011, to remain.

"Plaintiffs concede that the Arizona plaintiff's negligent misrepresentation claim and all of the Arizona, California and Tennessee plaintiffs' common law claims that are not subject to the tolling agreement are time-barred," Judge Pfaelzer said. "The California plaintiff's negligent misrepresentation claim is subject to a two-year statute of limitations and is time-barred also, applying the two-year statute of limitations to California negligent misrepresentation claim."

Attorneys

AIG is represented by James R. Asperger of Quinn, Emanuel, Urquhart & Sullivan in Los Angeles and Michael B. Carlinsky and Maria Ginzburg of Quinn Emanuel in New York.

Countrywide is represented by James L. Sanders and David M. Halbreich of Reed Smith in Los Angeles and Amy J. Greer and Jennifer L. Achilles of Reed Smith in New York.

(Additional documents available. **Motion to dismiss.** Document #88-120625-207M. **Opposition to motion to dismiss.** Document #88-120625-208B. **Reply in support of motion to dismiss.** Document #88-120625-209B.) ■

Barclays Bank Sued By Bank Over Mortgage-Backed Securities Losses

NEW YORK — A German bank on June 11 sued Barclays Bank PLC and certain of its subsidiaries in New York state court, alleging that the defendants misrepresented the investment quality of mortgage-backed securities (MBS) they sold to the bank (Landesbank Baden-Württemberg v. Barclays Bank PLC, et al., No. 652030/2012, N.Y. Sup., New York Co.).

(**Summons available.** Document #88-120625-065X.)

German bank Landesbank Baden-Württemberg filed the summons in the New York County Supreme Court, alleging that Barclays Bank, Barclays Capital Inc., Sutton Funding LLC and BCAP LLC issued a series of false and misleading statements in the offering documents for the $55,273,000 in MBS "regarding the legal validity of assignments of the mortgage loans to trusts formed to hold the pooled loans and to collect interest and principal payments due on the loans, and the legal validity of the trusts and their legal entitlement to receive interest and principal payments on the loans."

"Each of the Defendants knew, or at a minimum was negligent in not knowing, that its representations and omissions were false and/or misleading at the time they were made. Each Defendant made the false and/or misleading statements with the intent for Plaintiff to rely upon those statements," Landesbank says.

Claims Made

Landesbank states claims against the defendants for common-law fraud, fraudulent inducement, negligent misrepresentation, aiding and abetting fraud and declaratory judgment, as well as contract claims for rescission, restitution and mutual mistake.

Landesbank is represented by Joel H. Bernstein of Labaton Sucharow in New York. ■

German Bank Hits Capital One, Others With Lawsuit Over Securities Losses

NEW YORK — An investor sued Capital One Financial Corp. and others in New York state court on June 11, alleging that the defendants issued a series of false and misleading statements regarding the investment quality of nearly $32 million in mortgage-backed

securities they sold to the investor (Landesbank Baden-Württemberg v. Capital One Financial Corp., et al., No. 652029/2012, N.Y. Sup., New York Co.).

(**Summons available.** Document #88-120625-066X.)

Investor Landesbank Baden-Württemberg filed a summons in the New York County Supreme Court, alleging that Capital One Financial; Capital One N.A., as successor-in-interest to Chevy Chase Bank F.S.B.; Chevy Chase Funding LLC and Credit Suisse Securities (USA) LLC issued a series of misrepresentations in the offering documents for the securities "regarding the legal validity of assignments of the mortgage loans to trusts formed to hold the pooled loans and to collect interest and principal payments due on the loans, and the legal validity of the trusts and their legal entitlement to receive interest and principal payments on the loans."

"Each of the Defendants knew, or at a minimum was negligent in not knowing, that its representations and omissions were false and/or misleading at the time they were made. Each Defendant made the false and/or misleading statements with the intent for Plaintiff to rely upon those statements," Landesbank says.

Claims Made

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Landesbank is represented by Joel H. Bernstein of Labaton Sucharow in New York. ■

Judge Approves $90M Settlement With Lehman Officers, Directors

NEW YORK — A federal judge in New York on May 24 approved a $90 million settlement between former Lehman Brothers Holdings Inc. directors and officers and a proposed class of Lehman investors, settling claims that the executives misled the investors about Lehman's true exposure to subprime mortgages before its 2008 collapse (In re: Lehman Brothers Securities and ERISA Litigation, MDL No. 09-2017, [In re: Lehman Brothers Equity/Debt Securities Litigation, No. 08-5523], S.D. N.Y.; See December 2011, Page 5).

(**Order available.** Document #57-120611-020R.)

U.S. Judge Lewis A. Kaplan of the Southern District of New York approved the settlement.

The settling defendants are former Lehman Brothers CEO Richard S. Fuld Jr., former Chief Financial Officers Christopher M. O'Meara, Erin Callan and Ian Lowitt and former Chief Operating Officer Joseph M. Gregory, as well as nine former members of the Lehman Brothers board of directors: Michael Ainslie, John F. Akers, Roger S. Berlind, Thomas H. Cruikshank, Marsha Johnson Evans, Sir Christopher Gent, Roland A. Hernandez, Henry Kaufman and John D. Macomber.

The lead plaintiffs represent a class of pension funds, companies and individual investors who purchased Lehman securities pursuant to offering materials that they allege contained misleading statements and omissions. They sued former Lehman directors and officers, as well as certain underwriters and auditors of Lehman securities, alleging that they issued a series of false and misleading statements in the offering documents concealing Lehman Brothers' true business and financial condition in violation of Sections 10(b), 20(a) and 20A of the Securities Exchange Act of 1934, Securities and Exchange Commission Rule 10b-5 and Sections 11, 12(a)(2) and 15 of the Securities Act of 1933.

Fair, Reasonable

Judge Kaplan noted that the lead plaintiffs said that they could recover a judgment of "many billions of dollars" from the former directors and officers at trial but nevertheless proposed to settle the claims for $90 million to be paid by Lehman's insurance policies without contribution from any of the former directors and officers. At an April 12 settlement hearing, Judge Kaplan expressed concern about the proposed settlement and requested information concerning lead counsel's ability to accurately assess the settlement offer without knowledge of the former directors and officers' personal assets and the adequacy and reasonableness of the settlement in light of the former directors and officers' allegedly enormous possible exposure and their personal assets, both liquid and nonliquid.

After receiving submissions from the officer defendants in compliance with his request, Judge Kaplan approved the settlement, finding that it is substantively fair, reasonable and adequate.

'Bird In The Hand'

"Additionally, the parties and the Court are in agreement that proceeding to trial in this case would involve great expenditures of time and money," Judge Kaplan said. "Lead Counsel correctly argue that the class would face considerable 'risks in establishing liability and damages against the [Director and Officer] defendants,' all of whom already have succeeded in having certain of the claims brought against them dismissed.

"Furthermore, if the Court did not approve the D&O Settlement, the $90 million in Lehman insurance money currently on offer quickly would be depleted or consumed entirely. This would leave only the former directors and officers' own resources in the event the class were successful at trial."

Judge Kaplan went on to address potential concerns regarding the fact that the director and officer defendants will not be contributing to the settlement.

"While some may be concerned at the lack of any contribution by the former director and officer defendants to the settlement, Lead Counsel's judgment that the $90 million bird in the hand is worth at least as much as whatever is in the bush, discounted for the risk of an unsuccessful outcome of the case, is reasonable."

Attorneys

The lead plaintiffs are represented by Max W. Berger and Steven B. Singer of Bernstein Litowitz Berger & Grossmann in New York, David R. Stickney, Brett Middleton and Jon F. Worm of Bernstein Litowitz in San Diego and David Kessler, John A. Kehoe and Jennifer L. Enck of Barroway Topaz Kessler Meltzer & Check in Radnor, Pa.

Fuld is represented by Patricia M. Hynes, Andrew Rhys Davies and Todd Steven Fishman of Allen & Overy in New York. O'Meara is represented by Guy Petrillo and Joshua Klein of Petrillo Klein. Callan is represented by Dietrich L. Snell, Mark Edward Davidson and Seth D. Fier of Proskauer Rose. Lowitt is represented by Martin Joel Auerbach. Gregory is represented by Audrey Strauss and Israel David of Fried, Frank, Harris, Shriver & Jacobson. All are in New York.

The director defendants are represented by Adam J. Wasserman, Andrew J. Levander and Kathleen N. Massey of Dechert in New York.

(Additional documents available. **Motion to approve settlement.** Document #57-120611-021M. **Brief in support of motion to approve settlement.** Document #57-120611-022B.) ■

Greenberg Traurig Agrees To Pay $61M To Settle Ponzi Claims

PHOENIX — The law firm Greenberg Traurig LLP agreed June 20 to pay $61 million to settle a suit in the U.S. District Court for the District of Arizona alleging that it aided an alleged Ponzi scheme that bankrupted two companies and led to $900 million in losses (Robert Facciola, et al., v. Greenberg Traurig LLP, et al., No. 10-1025, D. Ariz.).

(**Motion for preliminary approval of settlement in Section B.** Document #88-120625-336M.)

The firm moved for preliminary approval of settlement in the U.S. District Court for the District of Arizona. Also yesterday, U.S. Judge Frederick J. Martone of the District of Arizona granted preliminary approval of Quarles & Brady LLP's $26.5 million settlement of similar claims in the same suit.

According to lead plaintiff Robert Facciola, Mortgages Ltd. created a Ponzi scheme to conceal its insolvency and stay in business. The plaintiff claims that the scheme entailed finding investors to buy into Radical Bunny LLC, which provided funds to conceal Mortgages' debt. Mortgages and Radical Bunny subsequently filed for bankruptcy.

'Facade Of Legitimacy'

Mortgages was represented by Greenberg Traurig, and Radical Bunny was represented by Quarles & Brady.

The plaintiffs allege that the law firms helped "create a facade of legitimacy" through their representation of the companies that enabled the Ponzi scheme and illegal securities sales to continue.

The Greenberg Traurig settlement consists of two classes: the Mortgages class, which includes 975 investors who invested $600 million, and the Radical Bunny class, which includes 770 individuals who invested $197 million.

The Quarles settlement was proposed May 18 and also includes a Mortgages class and a Radical Bunny class.

Attorneys

Facciola is represented by Andrew S. Friedman of Bonnett Fairbourn Friedman & Balint and Jeremy James Christian and Richard Glenn Himelrick of Tiffany & Bosco, all in Phoenix.

Greenberg Traurig is represented by Kenneth C. Smurzynski, Colette Tyrell Connor, Ellen E. Oberwetter, Grace O. Aduroja, Kevin M. Downey and Patrick Joseph Houlihan of Williams & Connolly in Washington, D.C., and Martin Richard Galbut and Michaile Janae Berg of Galbut & Galbut in Phoenix.

Quarles & Brady is represented by Floyd P. Bienstock and Michella Kras of Steptoe & Johnson in Phoenix and Heather Condon, Jared S. Kirkwood, Robert E. Gooding Jr., Scott Garner and Shawn M. Kennedy of Morgan Lewis & Bockius in Irvine, Calif.

(Additional documents available: **Order approving Quarles settlement.** Document #88-120625-337R. **Notice of Quarles settlement.** Document #88-120625-338X.) ■

10th Circuit Affirms Ruling In Favor Of Receiver In Ponzi-Related Action

DENVER — The 10th Circuit U.S. Court of Appeals on June 6 affirmed a district court's grant of summary judgment in favor of a corporation's receiver, who brought a suit seeking to void allegedly fraudulent transfers the defendants received from the corporation, which was used to operate a Ponzi scheme (Robert G. Wing v. Bruce J. Dockstader, et al., No. 11-4006, 10th Cir.; 2012 U.S. App. LEXIS 11390).

(**Unpublished opinion available.** Document #88-120625-262Z.)

In an unpublished opinion, the 10th Circuit panel of Circuit Judges Michael R. Murphy, William J. Holloway Jr. and Neil Gorsuch affirmed the ruling of the U.S. District Court for the District of Utah in the suit Robert G. Wing, as court-appointed receiver for Vescor Inc., filed against Bruce J. Dockstader, Marilyn Dockstader, Dockstader Family Trust dtd 4/24/91 and Dockstader Family Truet dtd 5/8/91 (collectively, the Dockstaders).

Wing's suit, which he brought under Utah's Uniform Fraudulent Transfer Act (UFTA), sought to void certain transfers the Dockstaders received from Vescor, a now-defunct company controlled by Val Southwick, in the course of the Dockstaders' dealing with the company.

In 2008, Southwick pleaded guilty to nine felony counts of securities fraud in connection with a Ponzi scheme he ran through a complex network of corporations and limited liability companies. The Securities and Exchange Commission sued Southwick and Vescor, the principal entity through which Southwick orchestrated his scheme, on Feb. 6, 2008, and on May 5, 2007, the District Court appointed Wing as receiver for Vescor. In the suit brought by Wing, the District Court granted summary judgment in his favor on Dec. 3, 2010. The judgment against the Dockstaders totaled $671,702.66. They appealed to the 10th Circuit.

Statute Of Limitations

The Dockstaders argued that the UFTA does not create any remedies for receivers and that the receivership did not empower Wing to bring claims on behalf of the creditors or investors of Vescor. The panel disagreed, agreeing with the District Court, which cited Scholes v. Lehmann (56 F.3d 750, 753-55 [7th Cir. 1995]), which held that a receiver of an entity that was used to perpetrate a Ponzi scheme has standing to recover fraudulent transfers as though the receiver was a creditor of the scheme.

The Dockstaders also argued that the statute of limitations has run on any of Wing's claims regarding transactions that occurred before Oct. 6, 2004, four years prior to the date he filed the suit. The UFTA provides: "A claim for relief or cause of action regarding a fraudulent transfer or obligation under this chapter is extinguished unless action is brought: (1) under Subsection 25-6-5(1)(a), within four years after the transfer was

made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." The Dockstaders further argued that Section 25-6-10 is a statute of repose, which is not subject to equitable tolling. Thus, they argued that the receiver's right to enforce fraudulent transfer claims runs from the time each transfer took place, not the date of his appointment.

The panel said that the one-year tolling period in Section 25-6-10 refers to when a transfer could reasonably have been discovered "by the claimant." The District Court concluded that Wing's action was timely filed because he could not reasonably have discovered any fraudulent transfer prior to his appointment. Because Wing was appointed May 5, 2008, and filed the action just more than five months later, the District Court concluded that his claims were timely brought. The District Court also concluded that Utah would likely adopt the "adverse domination" theory for purposes of computing the statute of limitations.

The panel agreed, saying that a contrary rule would perversely foreclose from recovery of early transfers in a Ponzi scheme that is successfully run for a long period of time. Applying the adverse domination theory to this case, all available evidence established that Southwick used Vescor in a coordinated scheme to defraud investors, the panel said. Vescor could not reasonably have been expected to bring claims against itself, and the District Court appropriately concluded that Wing's claims were brought within the applicable statute of limitations, the panel determined.

Tax Offsets

The Dockstaders further contended that they should be entitled to offset from the judgment any taxes they paid on the money they received from Vescor, citing no authority to support the argument. The panel agreed with the District Court, which concluded that allowing offsets would frustrate the purposes of the UFTA because there is no principle by which they could be limited, it would introduce difficult problems of proof and tracing into each case and any amount offset would necessarily come at the expense of other investors.

The District Court's judgment against the Dockstaders included amounts Bruce Dockstader received in exchange for referring new investors to Vescor. The Dockstaders argued that these payments, which totaled $146,140, are not voidable under the UFTA because they were made in good faith in exchange for reasonably equivalent value. They argued that their good faith was established because there has been no allegation that they were aware that Vescor was operating as a Ponzi scheme. They further argued that by providing investors to Vescor, Bruce Dockstader provided the company with an economic benefit for which he is entitled to retain his 5 percent referral fee.

The Dockstaders relied on several bankruptcy cases for the proposition that the determination of whether reasonably equivalent value was given should not take into account the impact the services had on perpetuating the fraudulent scheme.

The panel noted that the Dockstaders did not give any reason why to apply the bankruptcy cases in the context of a receivership action under the UFTA. The panel explained that outside the bankruptcy context, other circuits have rejected the Dockstaders' position, including the Fifth Circuit, which in Warfield v. Byron (436 F.3d 551, 560 [5th Cir. 2006]), said: "It takes cheek to contend that in exchange for the payments he received, the . . . Ponzi scheme benefited from his efforts to extend the fraud by securing new investments."

Wing is represented by M. David Eckersley, Jennifer R. Korb, Sally B. McMinimee and Jared N. Parrish of Prince, Yeates & Geldzahler in Salt Lake City. The Dockstaders are represented by Shawn Terry Farris of Farris & Utley in Saint George, Utah.

(Additional documents available: **Appellant brief.** Document #88-120625-263B. **Appellee brief.** Document #88-120625-264B. **Appellant reply brief.** Document #88-120625-265B.) ■

Wells Fargo, BNY Mellon To Pay $106M In MedCap Ponzi Settlement

SANTA ANA, Calif. — The receiver for Medical Capital Holdings Inc. (MedCap) said June 11 that he had reached a $106 million settlement with Wells Fargo Bank NA and Bank of New York Mellon (BNY Mellon), resolving allegations that the banks were complicit

in MedCap's alleged Ponzi scheme (Securities and Exchange Commission v. Medical Capital Holdings Inc., et al., No. 09-00818, C.D. Calif.).

(**Settlement available.** Document #88-120625-274M. **Trustee's declaration in support of motion for approval of settlement available.** Document #88-120625-275X.)

In a declaration in support of his motion for approval of the settlement filed in the U.S. District Court for the Central District of California, MedCap trustee Thomas A. Seaman said Wells Fargo agreed to pay $49 million and BNY Mellon agreed to pay $57 million.

Litigation Costs, Risks

MedCap raised money by setting up special purpose corporations, known as medical provider funding corporations (MPFCs), which sold notes to investors. In July 2008, the U.S. Securities and Exchange Commission sued MedCap, its entities and principals Sydney Field and Joseph Lampariello, alleging that Field and Lampariello engaged in a Ponzi scheme to defraud investors in the MPFCs.

The banks served as indenture trustees for the MPFCs. The banks were alleged to have breached the noteholder issuance and security agreements, which outlined their control and disbursement of funds. On Oct. 12, 2010, the District Court issued an order authorizing Seaman to file claims against the banks if Seaman deemed proper. He then entered settlement discussions with the banks. Seaman said he opted for a settlement because he was concerned about the costs and risks of litigation against the banks.

"In [the] worst case scenario, if the Trustees prevailed (or if this Settlement is not consummated and the Trustees prevail in the future), the Receivership Estate would recover nothing, and would face indemnity claims that could well exceed $50 million, wiping out half of the Receivership Estate," Seaman said.

Related Actions

Seaman also said the settlement is the best option in light of related class and mass actions against the banks.

"The net benefit of the Settlement is significantly greater than $104 million, as it eliminates the risk to the Receivership Estate of having to pay the Trustees' legal fees should the Class Action or Mass Actions ultimately fail — an indemnity claim that I estimate currently exceeds $25 million, and would likely exceed $50 million if those cases are tried," he said.

Seaman is represented by Ronald Hayes Malone and Frank A. Cialone of Shartsis Friese in San Francisco. Wells Fargo is represented by Edward T. Wahl, Stephen M. Mertz and Theresa H. Dykoschak of Faegre & Benson in Minneapolis, Jesse S. Finlayson of Finlayson Williams Toffer Roosevelt & Lilly in Irvine, Calif., and Timothy William Loose of Gibson Dunn & Crutcher in Los Angeles. Counsel information for BNY Mellon was not available. ■

5th Circuit Affirms Denial Of Stanford Receiver's Injunction Request

NEW ORLEANS — The Fifth Circuit U.S. Court of Appeals on June 13 upheld the denial of a request made by the receiver for The Stanford International Bank Ltd. (SIB) to preliminarily enjoin Libyan investment funds from dissipating more than $54 million in funds that he says they received via fraudulent transfers as part of their alleged role in the R. Allen Stanford Ponzi scheme, agreeing with the defendants that the Foreign Sovereign Immunities Act (FSIA) prohibits such injunctions (Ralph S. Janvey, in his capacity as court-appointed receiver for The Stanford International Bank, Ltd., et al. v. Libyan Investment Authority and Libyan Foreign Investment Co., No. 12-10240, 5th Cir.; 2012 U.S. App. LEXIS 11961).

(**Unpublished opinion available.** Document #88-120625-290Z.)

In an unpublished opinion, the Fifth Circuit panel of Circuit Judges E. Grady Jolly, Harold R. DeMoss Jr. and Carl E. Stewart affirmed the U.S. District Court for the Northern District of Texas' ruling in the suit filed by Ralph S. Janvey, the receiver, against the Libyan Investment Authority (LIA) and the Libyan Foreign Investment Co. (LFICO) (collectively, the Libyan investment funds).

Janvey sued the Libyan investment funds on June 3, 2011. Along with his complaint, Janvey moved for

preliminary injunction enjoining the defendants from dissipating $54,823,740.83 in funds that Janvey says the defendants received via fraudulent transfers. Janvey alleges that the Libyan investment funds received more than $54.8 million in fraudulently transferred certificates of deposit (CD) proceeds as part of their role in the $7 billion Stanford Ponzi scheme. Janvey seeks a ruling that the CD proceeds received by the defendants were fraudulent transfers under the Texas Uniform Fraudulent Transfer Act (UFTA) or that the proceeds unjustly enriched the defendants. Janvey also seeks disgorgement of the proceeds and a temporary restraining order and preliminary injunction against the defendants and their accounts.

Immunity

On Feb. 29, the District Court denied Janvey's motion for preliminary injunction, and Janvey filed an interlocutory appeal of the denial with the Fifth Circuit on March 2.

The Fifth Circuit panel affirmed, agreeing with the defendants that the FSIA prevents the entry of such an injunction. According to the FSIA (28 U.S. Code Section 1609), "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except was provided in sections 1610 and 1611 of this chapter."

Janvey did not dispute that the LIA, an agency of the Libyan government, has not explicitly waived its immunity from attachment before a judgment on the merits in this case. Instead, he contended that Section 1610(d) is inapplicable to the circumstances because the preliminary injunction he seeks is not functionally equivalent to an attachment and the LIA does not hold legal or equitable title to any funds fraudulently transferred from SIB to LFICO for the "benefit" of the LIA.

Attachment

The panel rejected both arguments. The panel said the preliminary injunction sought would effectively freeze the funds belonging to the LIA pending the District Court's resolution of the case. Accordingly, a preliminary injunction would serve the same purpose as an attachment, the panel said, citing Atwood Turnkey Drilling Inc. v. Petroleo Brasileiro S.A. (875 F.2d 1174, 1177 [5th Cir. 1989]). For this reason, the FSIA's prohibition on "attachments" of property belonging to a foreign sovereign prevented the District Court from entering a preliminary injunction in Janvey's favor, the panel said.

With respect to Janvey's second argument, the panel concluded that no evidence has been presented that in these specific circumstances the LIA received any "benefit" that would make the funds belonging to the LIA subject to relief under the Texas UFTA. Therefore, the receiver failed to demonstrate that the LIA does not hold legal or equitable title to the funds he seeks, the panel said. In other words, the panel explained, Janvey's argument that the funds are not "property of a foreign state" for purposes of Section 1610(d) has no merit because there is no evidence that the funds at issue have ever been the subject of a fraudulent transfer by the SIB.

Janvey is represented by Kevin M. Sadler, Scott D. Powers and David T. Arlington of Baker Botts in Austin, Texas. The defendants are represented by Joseph M. Cox of Patton Boggs in Dallas, Henry Weisburg and Brian H. Polovoy of Shearman & Sterling in New York and Stephen James Marzen of Shearman & Sterling in Washington, D.C.

(Additional documents available. **Appellant brief.** Document #57-120514-507B. **Appellee brief.** Document #57-120514-508B. **Appellant reply brief.** Document #57-120514-509B.) ■

Judge: Receiver Can't Void Commissions On Properties Sold To Ponzi Operator

SALT LAKE CITY — In a suit in which the receiver for a company that was operated as an alleged Ponzi scheme sued to recover commissions on real estate transactions related to the alleged scheme, a federal judge in Utah on June 11 granted summary judgment in favor of the defendants, ruling that the Texas Uniform Fraudulent Transfers Act (TUFTA) does not give the receiver the right to seek a judgment that would result in retention of value above what was initially contemplated by the transactions (Roger J. McConkie v. Rice Properties, et al., No. 09-00275, D. Utah; 2012 U.S. Dist. LEXIS 80902).

(**Opinion available.** Document #88-120625-276Z.)

Ponzi, SEC Action

U.S. Judge Clark Waddoups of the District of Utah made the ruling in the suit Roger J. McConkie, as receiver for Madison Real Estate Group LLC and its related entities (collectively, Madison), filed against real estate brokerage firm Rice Properties.

According to the parties, from 2005 to 2007, Madison was operated as part of a Ponzi scheme. On March 28, 2008, the Securities and Exchange Commission filed a complaint against Madison and its principals to shut down the operation of Madison and stop the Ponzi scheme. On the same date, the District Court appointed McConkie as receiver for Madison.

The instant action arose regarding two transactions in which Madison was the buyer: the sale of an apartment complex near Lubbock, Texas, called Aspen Village and the sale of another apartment complex near Lubbock called The Preserve at Prairie Point. Rice Properties represented the sellers in each transaction and earned a commission. McConkie filed his complaint to recover the commission received by Rice Properties after it was on inquiry notice of Madison's scheme pursuant to TUFTA. McConkie and the defendants each moved for summary judgment.

Section 24.009(a)

Because Madison was operating as a Ponzi scheme, any transfer made by Madison would be a fraudulent transfer under TUFTA, and when a transfer is fraudulent under TUFTA, creditors who are harmed by the transfer are entitled to obtain, among other remedies, an avoidance of the transfer in the absence of certain defenses specified by the statute, Judge Waddoups said. Therefore, McConkie is entitled to obtain an avoidance of the transfer of funds for the purchase of the properties in question in the absence of a legitimate defense from Rice Properties.

Rice Properties argued that Texas Business and Commercial Code Annotated Section 24.009(a) must be read to create two separate defenses: first, that a fraudulent transfer is not voidable if it is made to "a person who took in good faith and for a reasonably equivalent value," and second, that a fraudulent transfer is not voidable if it is made to "any subsequent transferee or oblige." Rice Properties claims to be a subsequent transferee that is entitled to an absolute defense against this action. Jude Waddoups said that Rice Properties is correct that Section 24.009(a) creates two separate defenses but that it incorrectly identifies the scope of the subsequent transferee defense. The judge said that for Rice Properties to take advantage of Section 24.009(a)'s subsequent transferee defense, it must prove that it is a subsequent transferee and that it took from an initial transferee "in good faith and for a reasonably equivalent value."

Subsequent Transferee

Judge Waddoups agreed with Rice Properties that it is a subsequent transferee of the sellers, saying he finds both Hooker Atlanta Corp. v. Hocker (In re Hooker Inv. Inc.) (155 B.R. 332 [Bankr. S.D. N.Y. 1993]) and McCarty v. Richard James Enter. Inc. (In re Presidential Corp.) (180 B.R. 233, 239 [B.A.P. 9th Cir. 1995]) persuasive.

Once all the conditions of transfer of the properties were accomplished, the funds that had been placed in escrow to purchase the properties immediately came under the dominion and control of the sellers, he said. At that point, the escrow agent, who had physical possession of the funds, became the sole agent of the sellers, and it was only at the direction of the sellers that funds were then transferred to Rice Properties by the escrow agent, he said. The fact that the sellers' directions to the escrow agent were memorialized in a contract made irrevocable without the consent of Rice Properties does not negate the status of the sellers as initial transferees, and therefore, Rice Properties is a subsequent transferee of the sellers, Judge Waddoups determined.

Judge Waddoups further determined that the sellers of the properties took the sale proceeds from Madison in good faith and for value. There is no evidence in the record that the Alpine Village and The Preserve transactions were executed pursuant to a secret agreement with Madison, he said. The transactions appear to be the result of arms-length negotiations between the parties, and there is no indication that the properties were sold above or below the market price.

As a subsequent transferee of the sellers, Rice Properties is entitled to an absolute defense to the plaintiff's avoidance action pursuant to Section 24.009(a) regardless of whether they should have known of Madison's fraud, Judge Waddoups ruled, denying McConkie's motion

for summary judgment and granting Rice Properties' motion for summary judgment.

Attorneys

McConkie is represented by himself, James W. McConkie III and James C. Bergstedt of Prince Yeates & Geldzahler in Salt Lake City.

Rice Properties is represented by Ronnie L. Agnew of The Agnew Law Firm in Lubbock and Isaac D. Paxman of Stepan Lewis & Paxman in Sandy, Utah.

(Additional documents available: **Plaintiff's motion for summary judgment.** Document #88-120625-277M. **Brief in support of plaintiff's motion for summary judgment.** Document #88-120625-278B. **Defendant's motion for summary judgment.** Document #88-120625-279M. **Brief in support of defendant's motion for summary judgment.** Document #88-120625-280B. **Opposition to defendant's motion for summary judgment.** Document #88-120625-281B.) ■

Freddie Mac, Wells Fargo Settle Telephone Consumer Protection Act Suits

SAN DIEGO — The Federal Home Loan Mortgage Corp. (Freddie Mac) and Wells Fargo Auto Finance Inc. have agreed to pay $17 million to settle two putative class actions alleging that they illegally contacted customers on their cell phones in violation of the Telephone Consumer Protection Act (TCPA), according to a June 18 filing in a California federal court (Alberto Malta v. The Federal Home Loan Mortgage Corp., et al., No. 10-1290, S.D. Calif.; Danny Allen Jr. v. Wells Fargo Auto Finance Inc., No. 10-2657, S.D. Calif.).

(**Motion for settlement.** Document #88-120625-312M.)

The settlement would resolve the suit Albert Malta, individually and on behalf of all others similarly situated, filed against Freddie Mac, and the suit Danny Allen Jr., individually and on behalf of all others similarly situated, filed against Wells Fargo. The motion for settlement was filed by Malta and Allen and unopposed by the defendants. Both actions are in the U.S. District Court for the Southern District of California.

According to the complaints, both filed in 2010, Wells Fargo violated the TCPA by contacting account holders on their cell phones without prior express consent, using an automatic telephone-dialing system and using a prerecorded voice. Wells Fargo made the alleged phone calls to provide account services for its own home mortgages, auto loans and Freddie Mac home mortgages, according to the plaintiffs. According to the complaints, the calls caused potential class members to incur cell phone charges or reduced their prepaid cell phone time.

'Fair And Reasonable'

The settlement includes two subclasses. One includes the residential mortgage customers, and the other includes the auto finance customers.

As part of the settlement, the defendants do not admit any wrongdoing.

"Because of the costs, risks to both sides, and delays of continued litigation, the settlement presents a fair and reasonable alternative to continuing to pursue the litigation as a class action for alleged violations of the TCPA," the plaintiffs say in their motion.

While the "Plaintiffs are confident of a favorable determination on the merits," the settlement "provides significant benefits to the Class Members and is in the best interests of the Settlement Class," they say.

The plaintiffs are represented by Joshua B. Swigart and Robert L. Hyde of Hyde & Swigart and Douglas J. Campion of the Law Offices of Douglas J. Campion, all in San Diego, and Abbas Kazerounian of the Kazerounian Law Group in Santa Ana, Calif. The defendants are represented by Eric J. Troutman in Irvine, Calif., and Mark D. Lonergan in San Francisco, both of Severson and Werson. ■

Federal Judge Refuses To Remand Consumer Protect Act Suit From MDL

SAN DIEGO — In a multidistrict litigation in which a debt recovery firm is alleged to have violated the Telephone Consumer Protection Act (TCPA) by making unauthorized phone calls to collect credit card debt, a

federal judge in California on May 24 denied one set of plaintiffs' request to remand, disagreeing with their contention that their case does not benefit from inclusion in the MDL and the only issues remaining to be decided in their case are case-specific (In re: Portfolio Recovery Associates, LLC, Telephone Consumer Protection Act Litigation, No. 11-md-02295, S.D. Calif.; 2012 U.S. Dist. LEXIS 72833).

(**Order available.** Document #88-120625-219R.)

U.S. Judge John A. Houston of the Southern District of California made the ruling in the MDL against Portfolio Recovery Associates LLC (PRA), denying the motion filed by Christine and Carlos Suarez.

The MDL consists of five consolidated putative class actions and one "tag-along" action, each seeking relief from the defendant based on allegations that the defendant violated the TCPA by calling cell phone numbers with an automatic telephone dialing system (ATDS) without prior express consent. On April 12, the Suarez plaintiffs filed their motion to remand their case to the Southern District of Florida, where they originally filed their complaint, and on May 11, PRA filed its opposition brief.

'Overarching Questions'

The Suarez plaintiffs say that "[d]efendant's own call logs indicate calls made with an [ATDS] . . . [and] that [defendant] obtained [p]laintiff's cellular number through contacts [d]efendants initiated with [p]laintiff's mother." This, according to the Suarez plaintiffs, no issues of material fact regarding the defendant's liability remain to be resolved in this cause such that it is now ripe for a case-specific summary judgment motion.

PRA responds that there are overarching questions that must be answered in all of the member actions, such as whether the defendant used an ATDS to call the plaintiffs; whether any such calls were made to a cell phone number without prior consent; whether any purported violations of the TCPA were willful and knowing; and whether recovery for the plaintiffs under the TCPA would violate PRA's constitutional rights. The defendant disputes the Suarez plaintiffs' suggestion that further discovery and trial in their case would be limited to case-specific issues, noting that the plaintiffs admit that the corporate deposition has not yet taken place.

PRA claims that the Suarez plaintiffs' argument that PRA's call logs are sufficient evidence to prove the use of an ATDS is "nonsensical," pointing out that the Suarez plaintiffs' "referenced, but unattached, purported discovery does not establish or even address the technology used by PRA to make telephone calls, let alone establish or address the questions of whether PRA ever used a dialer with the requisite capacity as defined in the TCPA." PRA adds that the Suarez plaintiffs will benefit from further coordinated proceedings as part of the MDL, including the avoidance of duplicative discovery, conservation of judicial and party resources and prevention of inconsistent rulings.

PRA further points out that the Suarez plaintiffs had the opportunity to oppose the MDL panel's conditional transfer order but did not do so, essentially acquiescing to the MDL panel's determination that the Suarez case shares common facts with the transfer faces. The defendant says there is no reason to abandon the MDL panel's determination regarding common facts, noting that such requests are generally denied.

Remand Not Proper

The Suarez plaintiffs reply that they have demonstrated good cause to remand because there is no evidence in the record to contradict the fact that the telephone number at issue was a number assigned to a cell phone owned by the Suarez plaintiffs and that PRA placed calls to that number using an ATDS or prerecorded voice.]They say the issue of whether the defendant placed such calls without prior consent is still unproven and wholly dependent on facts common only to their case. They say PRA is incorrect in stating that their claim is dependent on proving an ATDS was implemented. Even if the case were dependent on the use of an ATDS, the Suarez plaintiffs contend that the evidence in the record answers the question affirmatively, pointing to PRA's registration of its ATDS with the State of Texas Public Utility Commission.

Judge Houston said he is unconvinced that the evidence presented by the Suarez plaintiffs conclusively demonstrates that PRA used an ATDS, as defined by the TCPA, when it called them. He agreed with PRA that all of the cases transferred to the District Court by the MDL panel have common questions of fact that have yet to be answered and find there is more to be resolved in the Suarez case than only case-specific issues. He said the Suarez plaintiffs' case will benefit from

further coordinated proceedings, including the corporate deposition, and he said he "sees no reason to disturb the MDL Panel's initial determination that this case is appropriate for transfer to these coordinated proceedings."

The Suarezes are represented by Scott David Owens of Hallandale, Fla. PRA is represented by Edward D. Lodgen and Julia V. Lee of Robins, Kaplan, Miller & Ciresi in Los Angeles and Christopher W. Madel and Jennifer M. Robbins of Robins, Kaplan in Minneapolis.

(Additional documents available: **Motion to remand.** Document #88-120625-220M. **Response to motion to remand.** Document #88-120625-221B. **Reply in support of motion to remand.** Document #88-120625-222B.) ■

Federal Judge: Act Doesn't Let Consumers Revoke Consent to Contact

SCRANTON, Pa. — A federal judge in Pennsylvania on May 29 dismissed a Telephone Consumer Protection Act (TCPA) complaint alleging that a creditor contacted a plaintiff via her mobile telephone after she sent a letter asking the creditor to stop calling, explaining that the TCPA does not authorize consumers to revoke consent to contact after they initially grant consent (Ashley Gager v. Dell Financial Services, LLC, No. 11-02115, M.D. Pa.; 2012 U.S. Dist. LEXIS 73752).

(**Opinion available.** Document #88-120625-230Z.)

U.S. Judge Robert D. Mariani of the Middle District of Pennsylvania granted Dell Financial Services LLC's (DFS) motion to dismiss the suit Ashley Gager filed against it.

Gager secured a line of credit with the DFS in December 2007 to purchase computer equipment. When she prepared her credit application with DFS, she completed an Internet form that asked applicants to provide a "house phone" number. Gager did not have a land-line telephone, so she provided her mobile phone number instead. She became delinquent in her payments to the defendant, and the defendant began calling her mobile phone with prerecorded messages regarding the debt. In December 2010, Gager sent DFS a letter asking it to stop calling her. A copy of the letter attached to Gager's complaint does not inform DFS that the number it was using to contact her was connected to a mobile device. Gager asserts that the letter "revoked her consent that she had previously given to the Defendant to place calls to her cellular telephone number." She says DFS nonetheless continued to place an additional 40 calls to her cell phone in less than three weeks.

Starkey

Judge Mariani noted that Gager admits that she provided consent for DFS to call her cell phone when she listed that number of a credit application. Thus, the question of consent to contact is undisputed, leaving Gager's claim to turn on whether, as a matter of law, she was able to revoke consent with her letter to DFS, the judge said.

Gager provides several out-of-circuit district court cases for the proposition that withdrawal of consent to contact after the consummation of a credit contract is permissible under the TCPA, but the cases discuss only the methods of revocation (written notice versus sufficiency of oral revocation) and do not address the propriety of revocation itself or when such revocation may be permitted, the judge said. The cases Gager cites all concerned circumstances requiring the application of the TCPA in conjunction with the Fair Debt Collection Practices Act (FDCPA) or assume, without support, that a revocation of consent to contact under the TCPA is authorized by the statute and its implementing regulations, Judge Mariani said. These cases initiated under both the TCPA and FDCA, where the defendants were debt collectors under the FDCPA, have no application here, the judge explained, because DFS is a creditor and not a debt collector.

In one of these cases, Starkey v. Firstsource Advantage, LLC (W.D. N.Y. [2010]), the Western District of New York "essentially infused the written withdrawal requirement of the FDCPA into the TCPA because the debt collector in that case was subject to both statutes," Judge Mariani explained.

Adamcik, Gutierrez

In Adamcik v. Credit Control Services, Inc. (W.D. Texas [2011]), the Western District of Texas criticized

the Starkey line of cases and held that the TCPA and the FDCPA are two independent statutes whose provisions should not be read into one another, Judge Mariani explained. While Adamcik repudiated the Starkey court's writing of FDCPA requirements into the TCPA, "it still found, without any statutory or FCC support, that revocation of consent was possible, and need only be given orally, after such consent was given during the formation of a debt contract," Judge Mariani said.

Judge Mariani went on to note that in Gutierrez v. Barclays Group (S.D. Calif. [2011]), the Southern District of California also broke with Starkey and held that oral revocation of consent to contact under the TCPA was sufficient. The Gutierrez court recognized that revocation of consent was still possible after the consummation of a credit contract, Judge Mariani said.

"We do not find the statutory construction and reasoning in *Starkey, Adamcik*, or *Gutierrez*, to be persuasive, and expressly decline to hold that the TCPA, or any FCC regulation or advisory opinion construing the statute, contains any provision permitting this Court to find post-formation revocation of consent authorized under the provisions of the TCPA," Judge Mariani said. "While the *Starkey* line might have applicability if Defendant were subject to the FDCPA, under the prevailing law of the Third Circuit, Defendant is not a 'debt collector' as defined by that statute; thus, the right to withdraw consent provisions enacted under the FDCPA do not apply to Defendant and we do not find any TCPA provision allowing revocation, so that Plaintiff's claims that her rights were violated under the TCPA, assuming all of the facts in her Amended Complaint as true, do not state a cause of action."

Gager is represented by Brett M. Freeman of the Sabatini Law Firm in Dunmore, Pa. DFS is represented by Anthony L. Gallia of Duane Morris in Philadelphia.

(Additional documents available: **Motion to dismiss.** Document #88-120625-231M. **Brief in support of motion to dismiss.** Document #88-120625-232B. **Opposition to motion to dismiss.** Document #88-120625-233B. **Reply brief in support of motion to dismiss.** Document #88-120625-234B. **Plaintiff's sur-reply brief.** Document #88-120625-235B.) ■

Federal Judge: Telephone Consumer Protection Act Claim Falls Short

LAS VEGAS — A federal judge in Nevada on June 14 dismissed a Telephone Consumer Protection Act (TCPA) complaint, ruling that the plaintiff failed to allege that the defendant used an automatic telephone dialing system or an artificial or prerecorded voice in calling his cell phone (Timothy P. Harris v. American General Financial Services LLC, No. 10-1662, D. Nev.; 2012 U.S. Dist. LEXIS 83192).

(**Order available.** Document #88-120625-308R.)

U.S. Judge Gloria M. Navarro of the District of Nevada granted American General Financial Services LLC's motion to dismiss the suit Timothy P. Harris filed against it. Judge Navarro dismissed the complaint with prejudice, closing the case.

Harris filed the suit based on American General's reports of his delinquent accounts to national credit bureaus. On Sept. 28, 2011, Judge Navarro granted American General's motion to dismiss, permitting him to amend his claim under Count III, which alleged TCPA violations. Harris filed an amended complaint, alleging five claims against American General for violation of the Fair Credit Reporting Act (FCRA) and one claim under the TCPA. He explains that "upon appeal the courts will side with the Plaintiff [regarding Plaintiff's FCRA claims] and this case will be sent back to this court for further proceedings."

Section 227(b)

Because Judge Navarro gave Harris leave to amend his claim only under the TCPA, she limited her analysis to the TCPA claim. She acknowledged that Harris may appeal the dismissal of the FCRA claims.

Judge Navarro said that Harris appears to invoke 47 U.S. Code Section 227(b), which prohibits the use of "any automatic telephone dialing system or an artificial or prerecorded voice" to make a call to emergency telephone lines, hospital and health care facility guest rooms or to any telephone number for which the called party is charged for the call, other than for emergency purposes or with the prior express consent of the called party. Section 227(b) also prohibits the initiation of "any telephone call to any residential telephone

line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party."

The judge found that the Harris failed to allege that American General used an automatic telephone dialing system or an artificial or prerecorded voice in calling his cell phone. In fact, Judge Navarro said, the plaintiff appears to allege specific people who called his phone by listing the first names of people alleged to have made each call. Harris' allegation that American General had no permissible purpose or permission to make these calls therefore fails to state a under Section 227(b) Section 227(d), she said.

Harris, of North Las Vegas, Nev., appears *pro se*. American General is represented by Laurel E. Davis of Fennemore Craig in Las Vegas.

(Additional documents available: **Motion to dismiss.** Document #88-120625-309M. **Response to motion to dismiss.** Document #88-120625-310B. **Reply in support of motion to dismiss.** Document #88-120625-311B.) ■

Supreme Court Will Hear Appeal Of Dismissal Of Debt Collection Suit

WASHINGTON, D.C. — The U.S. Supreme Court on May 29 agreed to hear an appeal of a ruling that a collection agency did not violate the Fair Debt Collection Practices Act (FDCPA) when it contacted a debtor's employer to verify her employment status (Olivea Marx v. General Revenue Corporation and Kevin Cobb, No. 11-1175, U.S. Sup.; See January 2012, Page 28).

On Dec. 21, the 10th Circuit U.S. Court of Appeals affirmed the U.S. District Court for the District of Colorado's dismissal of the suit filed by Olivea Marx against General Revenue Corp. (GRC) and Kevin Cobb. Marx filed her petition for writ of *certiorari* on March 23.

The question presented is: "Whether a prevailing defendant in a Fair Debt Collection Practices Act (FDCPA) case may be awarded costs for a lawsuit that was not 'brought in bad faith and for the purpose of harassment,' when the FDCPA provides that '[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs' and Federal Rule of Civil Procedure 54(d) provides that '[u]nless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party.' "

Fax Not 'Communication'

After Marx defaulted on her student loan, her guarantor, EdFund, a division of the California Student Aid Commission, hired GRC to collect on the account. In 2008, she sued GRC in the District Court, alleging abusive and threatening phone calls in violation of the FDCPA. She amended her complaint to add a claim that GRC violated the FDCPA by sending a fax to her workplace that requested information about her employment status. The District Court found that the challenged debt collection practices were not abusive and threatening.

On appeal to the 10th Circuit, Marx contested the District Court's finding that GRC did not violate the FDCPA's provision against debt-collector communications with their parties. She argued that the District Court erred in finding that a fax sent by GRC did not constitute a "communication" under the FDCPA, awarding GRC costs pursuant to Federal Rule of Civil Procedure 54(d) and permitting, in the alternative, an award of costs following GRC's offer of judgment pursuant to Federal Rule of Civil Procedure 68.

The 10th Circuit agreed with the District Court that the fax in question is not a "communication" under the FDCPA. A "communication" under the FDCPA must indicate to the recipient that the message relates to the collection of debt. The panel said the fax cannot be construed as "conveying" information "regarding a debt" because the fax does not reference debt and speaks only of verifying employment.

The 10th Circuit also found that the District Court properly awarded costs to GRC.

Attorneys

Marx is represented by Allison M. Zieve of the Public Citizen Litigation Group in Washington.

GRC is represented by Adam Loyd Plotkin of Denver. ■

3rd Circuit: Consumer Failed To Show Debt Collection Letter Was Misleading

PHILADELPHIA — A consumer has failed to show that a debt collector's letters seeking payment on a debt was either false or misleading, a Third Circuit U.S. Court of Appeals panel ruled June 11 in affirming dismissal of the consumer's Fair Debt Collection Practices Act (FDCPA) claim (Norman Morse, administrator of the estate of Nancy Morse, v. Paula G. Kaplan, et al., No. 11-2562, 3rd Cir.; 2012 U.S. App. LEXIS 11749).

(**Opinion available.** Document #88-120625-013Z.)

Norman Morse, as administrator of the estate of Nancy Morse, sued debt collector Paula G. Kaplan and Sara A. Younger in the U.S. District Court for the District of New Jersey.

Morse alleges that two debt collection letters sent by Kaplan to Morse's wife were misleading and, thus, violated the FDCPA.

Summary Judgment

The District Court granted Kaplan's motion for summary judgment, and Morse appealed to the Third Circuit, which affirmed.

The panel held that, applying the least sophisticated debtor standard to the instant action, Kaplan's debt collection letters provided key information to Morse about the debt in a nonconfusing manner.

"*Section 1692(a)(3)* [of the FDCPA] mandates that collectors provide notice that the debtor has 'thirty days after receipt of the notice' to 'dispute the validity of the debt.' In this case, the letter clearly tracked the requirements of the FDCPA — informing Morse that within 30 days of her receipt of the notice, if Morse disputed the debt in writing, Kaplan would provide evidence, and if Morse did not respond within 30 days, the debt would be assumed valid," the panel said.

Least Sophisticated Debtor

The panel also rejected Morse's contentions that the least sophisticated debtor would not understand whether the dispute of validity would be acceptable 30 days within the date of the letter or 30 days within the receipt of the letter, and that it is unclear who would assume that the debt is valid after 30 days, calling the arguments "meritless."

Moreover, the panel disagreed with Morse's assertion that Kaplan violated Section 1692g(a)(5) of the FDCPA, which requires that the letter inform the debtor with the name and address of the original creditor, if different from the current creditor.

"Kaplan's letter does not have this language. However, Kaplan was collecting the debt for JFK [Johnson Rehabilitation Institute], the original creditor, so inclusion of such language would be confusing. It would make little sense to differentiate between the original and current creditor in this case as they are the same entity. Because Kaplan was collecting on behalf of the original creditor, Morse's argument that Kaplan violated *§ 1692(a)(5)* is meritless," the panel said.

Section 1692e(10)

"Lastly, Morse alleges that due to the above alleged violations, Kaplan's letter was false and misleading, in violation of § 1692e(10). However, as we have explained above, there are no violations and no part of the letter was misleading, so this argument must also fail."

Senior Circuit Judge Richard D. Cudahy of the Seventh Circuit U.S. Court of Appeals, who was sitting by designation, wrote the panel's opinion and was joined by Circuit Judges Thomas I. Vanaskie and Maryanne Trump Barry.

Morse is represented by Joseph K. Jones of Fairfield, N.J.

Kaplan and Younger are represented by Dante C. Rohr and John L. Slimm of Marshall, Dennehey, Warner, Coleman & Goggin in Cherry Hill, N.J.

(Additional documents available: **Appellant brief.** Document #88-120625-014B. **Appellee brief.** Document #88-120625-015B. **Reply brief.** Document #88-120625-016B.) ■

9th Circuit Upholds Attorney Fees Award In Debt Collection Suit

SAN FRANCISCO — The Ninth Circuit U.S. Court of Appeals on May 30 affirmed a district court's award of attorney fees to the defendants in a Fair Debt Collection Practices Act (FDCPA) suit, ruling that the district court did not err in finding that the plaintiff's FDCPA action was brought in bad faith and for the purpose of harassment (Christopher Ceresko v. LVNV Funding, LLC, et al., No. 11-15456, 9th Cir.; 2012 U.S. App. LEXIS 10859).

(**Unpublished opinion available.** Document #88-120625-236Z.)

The Ninth Circuit panel majority of Circuit Judges Richard B. Clifton and N. Randy Smith upheld the U.S. District Court for the District of Arizona's award of attorney fees to LVNV Funding LLC, Gurstel, Staloch & Chargo PA and Ruth A. Fischetti in the suit Christopher Ceresko filed against them. Circuit Judge Stephen Reinhardt dissented.

Bad Faith Finding

Ceresko filed his complaint in the District Court on March 10, 2009, alleging that the defendants violated the FDCPA by asserting in their collection action against him in the Estrella Mountain Justice Court in Maricopa County, Ariz., that court costs as incurred are chargeable to him. He contended that the defendants' allegation is a false representation in connection with the collection of a debt. The District Court found that the allegation is not a false representation in connection with the collection of a debt and, thus, not a violation of the FDCPA. On July 30, 2010, the District Court granted the defendants' motion for summary judgment.

On Jan. 19, 2011, the District Court ordered Ceresko to pay the defendants $10,467 in attorney fees. The FDCPA at 15 U.S. Code Section 1692k(a)(3) provides that "[o]n a finding by the court that an action under this section was brought under bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs."

The District Court found that Ceresko's FDCPA action was brought in bad faith and for the purpose of harassment for three reasons: The District Court had previously concluded that Ceresko's allegations failed to establish a violation of the FDCPA in the state court action; Ceresko's counsel "suffered the same result in three previous lawsuits . . . involving different plaintiffs making the same claim: that an allegation or prayer for relief for costs and fees in a state court collection action is a false statement in violation of the FDCPA"; and Ceresko "failed to provide a single citation to a case anywhere in the country where this particular claim had been successful."

No Clear Error

Ceresko moved for reconsideration, which the District Court denied, and he appealed the ruling to the Ninth Circuit. The panel majority said the District Court did not clearly err in finding that Ceresko's FDCPA action was brought in bad faith and for the purpose of harassment. The District Court had previously concluded that Ceresko had failed to establish a violation of the FDCPA, and he did not appeal or otherwise dispute the District Court's conclusion that the action was meritless, the panel majority said. The panel majority pointed out that the District Court decided in the related cases filed by Ceresko's counsel that an allegation or prayer for relief for costs and attorney fees in a state court collection complaint did not violate the FDCPA. Ceresko's claim centered on essentially the same argument his counsel unsuccessfully made in those cases, the majority said.

The majority also agreed with the District Court that Ceresko did not identify any favorable legal authorities applicable to his claim. Ceresko's precedent instead involved cases where attorney fees and costs demands were sent to plaintiffs before the start of judicial proceedings, it said.

The majority said that even if it were to disagree with the District Court, it cannot conclude that the District Court's findings were "illogical, implausible, or without support in the record," quoting United States v. Spangle (626 F.3d 488, 497 [9th Cir. 2010]). Additionally, the District Court did not abuse its discretion in awarding attorney fees, the majority determined. The District Court identified and applied the correct legal rule from Section 1692k(a)(3), and the District Court's decision did not result "from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record," the majority

said, quoting United States v. Hinkson (585 F.3d 1247, 1263 [9th Cir. 2009]).

Dissent

Dissenting, Circuit Judge Reinhardt said the "least sophisticated debtor," which is the standard for establishing a violation of the FDCPA, likely would have been misled by the inclusion of two separate paragraphs in the state court collection complaint, one stating that "the prevailing party will be entitled to an award of all costs" and another stating that "Court costs as actually incurred are chargeable to [the debtor]." The complaint provided no information that the second paragraph was true only if the creditor was the "prevailing party," Circuit Judge Reinhardt said. Ceresko therefore presented a "minimally colorable" claim, and the District Court clearly erred in finding that his FDCPA action was brought in bad faith and for the purpose of harassment.

The District Court also clearly erred in finding that Ceresko's counsel "suffered the same result in three previous lawsuits involving different plaintiffs making the same claim," Circuit Judge Reinhardt said. Two of the cases cited by the District Court to support this holding, Cisneros v. Neuheisel Law Firm (D. Ariz. [Jan. 3, 2008]) and Winn v. Unified CCR Partners (D. Ariz. [March 30, 2007]), involved claims that a request for a specific sum of attorney fees in the prayer for relief was a request for liquidated attorney fees, which plaintiffs alleged violated the FDCPA because only reasonably attorney fees, not liquidated fees, were recoverable under the agreements, he said. Ceresko, however, claimed the statement in the body of the state court complaint regarding court costs being allocated to the debtor was misleading because it was represented as a fact although there had been no determination that the creditor was the prevailing party, Circuit Judge Reinhardt said.

Cisneros and Winn, therefore, presented entirely different claims than Ceresko's, Circuit Judge Reinhardt said. The third case the District Court cited, Thompson v. Crown Asset Management, LLC (D. Ariz. [Sept. 23, 2009]), presented the same claim as Ceresko's, but it was not decided until six months after Ceresko filed his complaint, so neither Ceresko nor his counsel could have known that the claim would be rejected at the time he brought his claim, Circuit Judge Reinhardt said.

Further, the District Court ignored the cases Ceresko cited in support of his FDCPA claim, Circuit Judge Reinhardt said. "Although those cases involved demand letters rather than a complaint in a collection case, the underlying claims are similar to the one here: that a demand for fees or costs by a creditor when there has been no determination that the creditor is the prevailing party, is misleading," he said. Because the District Court's findings were based on clear errors and its analysis of the controlling cases consisted of repeated errors of law, its award of attorney fees and costs against Ceresko was clearly erroneous and constituted an abuse of discretion, Circuit Judge Reinhardt said.

Attorneys

Ceresko is represented by Richard Nel Groves of the Law Offices of Richard N. Groves in Phoenix.

The defendants are represented by Tomio Buck Narita of Simmonds & Narita in San Francisco and Michael Richard Sneberger in Tempe, Ariz., Bridget Ann Sullivan in Garden Valley, Minn., and Jennifer Wiedle in Scottsdale, Ariz., all of Gurstel Staloch & Chargo.

(Additional documents available. **Appellant brief.** Document #88-120625-237B. **Appellee brief.** Document #88-120625-238B.) ■

Notice Did Not Violate Debt Collection Act, 9th Circuit Affirms

SAN FRANCISCO — A letter sent by a debt-collecting law firm does not violate the Fair Debt Collection Practices Act (FDCPA) because it does not expressly require a debtor to contest her debt in writing, the Ninth Circuit U.S. Court of Appeals ruled June 8, affirming a district court's granting of summary judgment in favor of the firm (Joann Riggs v. Prober & Raphael, A Law Corp., et al., No. 10-17220, 9th Cir.; 2012 U.S. App. LEXIS 11631).

(**Opinion available.** Document #88-120625-266Z.)

The panel of Circuit Judges J. Clifford Wallace, Consuelo M. Callahan and Carlos T. Bea affirmed the U.S.

District Court for the Northern District of California ruling in the suit Joann Josephine Riggs filed against the law firm Prober & Raphael and attorney Dean Prober (collectively, Prober).

Riggs filed the action in the District Court after Prober sought to collect a debt Riggs owed to Prober's client, Fireside Bank. She alleged that Prober's debt-collection letter did not comply with the FDCPA or its California equivalent, the Rosenthal Fair Debt Collection Practices Act, because it impermissibly required her to dispute her debt in writing and, as a result, misrepresented her rights to dispute her debt. The District Court granted Prober summary judgment, holding that Prober's validation notice did not impermissibly require Riggs to dispute her debt in writing and did not falsely misrepresent her rights to dispute the debt. Riggs appealed.

Expressly Vs. Implicitly

The panel noted that the Ninth Circuit previously held that a collection letter violates Section 1692g(a)(3) of the FDCPA "insofar as it state[s] that [the debtor's] disputes must be made in writing," quoting Camacho v. Bridgeport Fin., Inc. (430 F.3d 1078, 1082 [9th Cir. 2005]). The primary issue in the instant case is whether Prober's validation notice runs afoul of this rule, the panel said.

Here, in contrast to the validation notice in Camacho, Prober's validation notice did not expressly require Riggs to dispute her debt in writing, the panel noted. Instead, Riggs argues that the notice implicitly required her to do so.

"We assume, without deciding, that the least sophisticated consumer could understand Prober's validation notice to imply that any dispute of her debt must be in writing," the panel said. "Nevertheless, we conclude that the notice does not violate the FDCPA. As we have explained, *Camacho* held only that debt collectors may not expressly require that disputes be in writing; *Camacho* did not decide whether the FDCPA also prohibits debt collectors from *implicitly* requiring that disputes be in writing.

"We do not believe the FDCPA can support such a prohibition. Subsections (a)(4) and (a)(5) of § 1692g prominently require a consumer to do certain things in writing, including 'notif[y] the debt collector in writing . . . that the debt, or any portion thereof, is disputed' in order to obtain verification, while subsection (a)(3) is silent as to what form a general dispute of an alleged debt must take. When these subsections are read together, they could be read to imply that a debtor must dispute her debt in writing. Court decisions applying these provisions do nothing to dispel this implication."

Not Unlawful

If the FDCPA itself can be read to imply that consumer must dispute an alleged debt in writing, a validation notice like Prober's, which more or less simply reverses the order of the Section 1692g(a)(3)-(5) advisories, cannot be unlawful merely because it allows for the same implication, the panel said. Any confusion over what a consumer must do in writing, versus what she may do in writing, "stems at least in part from the FDCPA itself," the panel said, adding that "it would be untenable to read the FDCPA to prohibit validation notices that simply mimic the statute's own shortcomings."

On appeal, Riggs argued for the first time that Prober's validation notice does not comply with other purported requirements of Section 1692g(a)(3): that she be informed that she could dispute the validity of her debt, that she could dispute only a portion of her debt, and that she could make a dispute within 30 days of receiving the notice. The panel found that these arguments are barred because Riggs did not raise them in her complaint, which alleges as the only violation of Section 1692g that Prober "required that disputes be in writing to prevent [Prober] from considering the debt valid, in violation of § 1692g(a)(3)." A plaintiff may not try to amend her complaint through her arguments on appeal, the panel said, citing Vincent v. Trend W. Technical Corp. (828 F.2d 563, 570 [9th Cir. 1987]).

Riggs is represented by Fred W. Schwinn of the Consumer Law Center in San Jose, Calif. Prober is represented by Jonathan Matthew Blute and Timothy Halloran of Murphy, Pearson, Bradley & Feeney in San Francisco.

(Additional documents available: **Appellant brief.** Document #88-120625-267B. **Appellee brief.** Document #88-120625-268B. **Appellant reply brief.** Document #88-120625-269B.) ■

Panel: Consumer Failed To Provide Evidence Of Debt Collection Law Violation

NEW YORK — A federal district court did not err in granting a law firm's motion for summary judgment in a Fair Debt Collection Practices lawsuit because the consumer who filed the suit failed to provide any evidence of a violation of the statute, a Second Circuit U.S. Court of Appeals panel ruled June 18 (Kara A. Tzanetis v. Weinstein & Riley, P.S., No. 11-3169, 2nd Cir.; 2012 U.S. App. LEXIS 12262).

(**Summary order available.** Document #88-120625-056R.)

Consumer Kara A. Tzanetis sued the law firm of Weinstein & Riley in the U.S. District Court for the District of Connecticut, alleging that a demand letter the law firm sent her violated provisions of the Fair Debt Collection Practices Act (FDCPA) and various Connecticut debt collection statutes.

On Nov. 1, 2010, the District Court granted the law firm's motion for summary judgment and denied Tzanetis' motion for summary judgment.

Reconsideration

Tzanetis then moved for reconsideration, and on July 26, 2011, the District Court denied her motion. She then appealed to the Second Circuit, which affirmed.

In holding that the District Court properly granted the law firm's motion for summary judgment, the panel explained that "[t]he factual evidence before the District Court consisted of two demand letters. Tzanetis declined to submit additional evidence."

"The letters contained passages that merely indicated the possibility that other lawful charges might accrue at a later date, and do not establish a violation of the FDCPA," the panel said.

Without Merit

"We have considered all of Tzanetis's arguments on appeal and find them to be without merit."

Circuit Judges Guido Calabresi, José A. Cabranes and Raymond J. Lohier Jr. joined in the opinion.

Tzanetis is represented by Joanne S. Faulkner of New Haven, Conn. The law firm is represented by Kenneth S. Jannette of Weinstein & Riley in New York.

(Additional documents available: **Appellant brief.** Document #88-120625-057B. **Appellee brief.** Document #88-120625-058B. **July 26, 2011 order.** Document #88-120625-059R. **Nov. 1, 2010 order.** Document #88-120625-060R.) ■

Letter Not A Debt Collection Demand Letter, Federal Judge Rules

TAMPA, Fla. — A debt owner's letter to a consumer letting her know that it was the current owner of her credit card debt did not violate the Fair Debt Collection Practices Act (FDCPA) because the letter was not a demand letter seeking payment, a federal judge in Florida ruled June 15 (Belinda Parker v. Midland Credit Management Inc., No. 12-110, M.D. Fla.; 2012 U.S. Dist. LEXIS 83296).

(**Order available.** Document #88-120625-051R.)

Consumer Belinda Parker filed an amended class action complaint in the U.S. District Court for the Middle District of Florida. She alleges that Midland Credit Management Inc. (MCM) violated Sections 1692e (11) and 1692g(a) of the FDCPA by sending her a letter acknowledging that it was the current owner of Parker's Capital One credit card debt but failing to provide her with her "mini-Miranda" rights under Section 1692e(11).

Parker also avers that MCM violated Section 1692g(a) by failing to notify her of her complete validation rights in the letter or in a subsequent written communication sent to her within five days of the letter.

FCCPA

MCM moved to dismiss, arguing that it did not violate the FDCPA because it was required to send the letter pursuant to the Florida Consumer Collection Practices Act (FCCPA), and Judge James S. Moody Jr. granted the motion.

In particular, Judge Moody held that dismissal is proper because the letter "is not a communication in connection with debt collection."

"The letter did not demand payment or discuss specifics of the underlying debt. And the purpose of the letter was to inform Plaintiff of the assignment of the account to Defendant. Indeed, the letter even states that 'this is not an attempt to collect a debt.' And, although the balance of the debt is stated, the letter does not include terms of payment or deadlines. On its face, it is clearly informational; it informs Plaintiff that her account has been assigned to Defendant and includes the new account number and Defendant's contact information," Judge Moody said.

No Debt Collection

"In sum, these facts, taken from the amended complaint and the letter itself, demonstrate, as a matter of law, that the letter was not sent in connection with collection of a debt. Any other conclusion would defy logic and place debt collectors in an untenable position, where they are subjected to lawsuits, despite their best efforts."

Judge Moody further stated that "[t]he Court would like to see a bright-line rule adopted by the Circuits on this issue, so that cases like the instant case are prevented in the future."

"A letter, such as the one at issue here, that merely informs a debtor of the assignment of her debt, provides the debtor with the new information, and clearly states that the letter is not an attempt to collect a debt should stand as an example of a letter that does not constitute a communication in connection with the collection of a debt in violation of the FDCPA," Judge Moody explained.

Counsel

Parker is represented by Christopher C. Casper and Nicole C. Mayer of James, Hoyer, Newcomer & Smiljanich in Tampa, Christopher C. Nash and Ian R. Leavengood of Leavengood Nash Dauval & Boyle in St. Petersburg, Fla., and Heather M. Fleming of Marone Law Group in St. Petersburg.

MCM is represented by James Beckett Thompson Jr. of Thompson, Goodis, Thompson, Groseclose & Richardson in St. Petersburg and John A. Love of King & Spalding in Atlanta.

(Additional documents available: **Motion to dismiss.** Document #88-120625-052B. **Opposition brief.** Document #88-120625-053B. **Reply brief.** Document #88-120625-054B. **Amended complaint.** Document #88-120625-055C.) ■

Debt Collector Failed To Provide Required Disclosures, Federal Judge Rules

CHICAGO — A consumer has properly shown that numerous voice mail messages left for her by a debt collector violated provisions of the Fair Debt Collection Practices Act (FDCPA) because the debt collector failed to provide the required disclosures, a federal judge in Illinois ruled June 14 (Anna Pawelczak v. Nations Recovery Center Inc., No. 11-3700, N.D. Ill.; 2012 U.S. Dist. LEXIS 82916).

(**Opinion available.** Document #88-120625-039Z.)

Consumer Anna Pawelczak sued debt collector Nations Recovery Center Inc. (NRC) in the U.S. District Court for the Northern District of Illinois. Pawelczak alleges that NRC violated Sections 1692d(6) and 1692e(11) of the FDCPA by leaving several live and recorded messages for her on her voice mail system without providing the necessary disclosures.

Both Pawelczak and NRC moved for summary judgment, and Judge Charles P. Kocoras granted Pawelczak's motion and denied NRC's motion.

Transcripts

In particular, Judge Kocoras held that Pawelczak's admission of transcripts of the voice mail messages into evidence is proper because it is not hearsay and because "Pawelczak is competent to testify as to the content of the voice mail messages."

The testimony of NRC CEO Paul Bataillon is not admissible, though, Judge Kocoras found, because his statement regarding the effectiveness of a dialing connection system that is supposed to hang up if a live person does not answer the phone "is based on unidentified statistics that he had obtained from an unknown source at some unidentified time in the past."

"Bataillon's assertion is based on speculation, and does not provide the necessary factual support for NRC's

claim that the Dial Connect system is as successful as it claims it to be. We therefore accord Bataillon's statement, and the conclusion that the Dial Connect system is 98-99% successful at distinguishing between a live and automated voice, no weight," Judge Kocoras said.

Section 1692e(11) Claim

Moreover, Judge Kocoras ruled that Pawelczak is entitled to summary judgment on her Section 1692e(11) claim because "Pawelczak has offered uncontested testimony that in NRC's initial December 11th, 2010 voice mail message, its employee did not disclose that he or she was calling to collect a debt, nor that he or she would use any information to collect that debt."

"There is no disagreement that NRC, through its employees, failed to identify itself as a debt collector in each of its subsequent voice mail messages to Pawelczak. NRC only argues that a voice mail message is not a 'communication' under the FDCPA," Judge Kocoras stated.

"Here, each of the live and recorded voice messages left a callback number, several of the live voice messages requested that Pawelczak call back to discuss the 'matter,' and that it was 'important' that Pawelczak call back 'soon,' or 'today.' These messages at least indirectly convey information regarding a debt — namely, calling Pawelczak's attention to a matter of importance, and leaving a phone number that Pawelczak should call to further discuss the matter. There is no dispute that Pawelczak is 'any person' under the Act, or that contacting her by telephone constitutes 'through any medium.' We therefore hold that the voice mail messages are 'communications' under the *§ 1692a(2)*. Other courts in this district have reached the same conclusion on this issue."

Necessary Disclosures

Judge Kocoras further rejected NRC's argument that making the necessary disclosures under Section 1692e(11) on a voice mail message exposes itself to liability under 15 U.S. Code Section 1692c(b), finding it to be "unavailing for two reasons."

"First, NRC presents no argument that a debtor's voice mail service should be construed as a 'third party' under the Act. Furthermore, NRC's argument that they should not be penalized for seeking to protect Pawelczak's privacy is severely undermined by its own internal memorandum dated January 28, 2011, which indicated that NRC had some procedures in place for employees to leave FDCPA-compliant voice mail messages. In any event, if NRC was actually uncertain as to what constituted an FDCPA-compliant voice mail, refraining from leaving a message at all would ensure compliance with the Act. As NRC has failed to provide any evidence to the contrary, we find that NRC's voice mail messages did not comply with *Section 1692e(11)* as a matter of law," Judge Kocoras explained.

Pawelczak is also entitled to summary judgment on her Section 1692d(6) claim, Judge Kocoras held, because "[t]here is no genuine dispute that in three of the live voice messages and all of the recorded messages left for Pawelczak, NRC employees failed to disclose NRC's identity."

"Furthermore, none of NRC's live or recorded voice mail messages stated that the purpose of the phone call was to collect a debt. These facts sufficiently establish that NRC failed to provide Pawelczak 'meaningful disclosure' of its identity, and that it therefore violated *§ 1692d(6)* as a matter of law," Judge Kocoras stated.

Bona Fide Error Defense

Judge Kocoras also found that NRC is not entitled to a "bona fide error" defense because "[w]hen weighing this evidence, we cannot conclude that as a matter of law NRC's procedures were reasonably adapted to prevent the FDCPA violations of which Pawelczak now complains. Nor do we find that a triable issue of fact exists, as any claim that NRC's procedures were reasonably adapted to prevent its employees from leaving non-FDCPA compliant voice mail messages is foreclosed by the fact that Pawelczak received eight illegal calls from four different NRC employees in little over two months."

"We also find that NRC's procedures with respect to the Dial Connect system were not reasonably adapted to avoid FDCPA violations. NRC's contention is based on the premise that the Dial Connect system is 98-99% effective at distinguishing live from automated responses. For the reasons discussed above, NRC has provided no admissible evidence to substantiate its defense. In any event, Pawelczak received thirteen recorded voice messages in just over three months, suggesting that the Dial Connect system is not nearly as effective as NRC claims. While we are aware that the

maintenance of reasonably adapted procedures 'does not require debt collectors to take every conceivable precaution to avoid errors . . . it only requires reasonable precaution,' NRC presents no evidence for this Court to conclude that the Dial Connect system meets that threshold. As NRC has failed to provide sufficient evidence to create a triable issue of material fact, Pawelczak's motion for summary judgment is granted. Accordingly, NRC's motion for summary judgment is denied," Judge Kocoras explained.

Pawelczak is represented by William F. Horn of Fresh Meadows, N.Y., and Cathleen M. Combs, Daniel A. Edelman, Francis R. Greene and James O. Latturner of Edelman, Combs, Latturner & Goodwin in Chicago.

NRC is represented by David M. Schultz, Corinne Cantwell Heggie and Nicholas D. O'Conner of Hinshaw & Culbertson in Chicago.

(Additional documents available: **NRC motion for summary judgment.** Document #88-120625-040B. **Opposition to NRC motion for summary judgment.** Document #88-120625-041B. **Pawelczak motion for summary judgment.** Document #88-120625-042B. **Opposition to Pawelczak motion for summary judgment.** Document #88-120625-043B. **Complaint.** Document #88-120625-044C.) ■

Judge: Attorney Fees Sought In Debt Collection Case Are Reasonable

SAN DIEGO — A federal judge in California on June 15 granted a consumer's motion for attorney fees in a Fair Debt Collection Practices Act (FDCPA) lawsuit against a debt collector and others, ruling that counsel for the consumer has requested fees that are reasonable and in line with what has been approved in other cases similar to the instant action (Donald R. Williams v. Midland Funding LLC, et al., No. 11-2539, S.D. Calif.; 2012 U.S. Dist. LEXIS 83490).

(**Order available.** Document #88-120625-045R.)

Consumer Donald R. Williams sued Midland Funding LLC, Midland Credit Management Inc. and Encore Capital Group Inc. in the U.S. District Court for the Southern District of California. He alleges that Midland violated the FDCPA and California's Rosenthal Fair Debt Collection Practices Act by contacting him several times in an attempt to collect on a debt for an individual unknown to Williams, even though Williams stated numerous times that the Midland representative had the wrong number.

After an early neutral evaluation conference, the defendants made an offer of judgment pursuant to Federal Rule of Civil Procedure 68 of $1,001, plus "reasonable attorneys' fees incurred and costs accrued" to the date of the offer. Williams accepted the offer, but the parties failed to agree on the appropriate amount of attorney fees.

No Unnecessary Work

In granting Williams' motion for attorney fees, Judge Jeffrey T. Miller rejected the defendants' argument that Williams' counsel performed unnecessary work because they failed to inform him in the middle of January of a settlement offer that was made.

"Defendants' argument asks the court to assume that Plaintiff's counsel completely failed to perform their duty to inform Plaintiff of the settlement offer. While it is true that Plaintiff's counsel's billing does not specifically reflect a conversation concerning the settlement offer, the court declines to accept Defendants' assumption that the offer was never conveyed, causing unnecessary litigation. Defendants' further argument — that relaying the settlement offer to Plaintiff would have hastened settlement because it would have alerted Defendants to their statutory violations — must fail as well as it is predicated upon speculation," Judge Miller said.

Judge Miller also disagreed with the defendants' assertion that Williams' counsel overbilled for the work done because multiple attorneys and/or paralegals billed for work on the same documents or for speaking to each other, finding that "[w]hile Defendants are clearly correct that unnecessary work should not be billed, Defendants provide little or no legal support for their arguments concerning specific instances of billing."

Trivial Amounts Of Time

"Many of Defendants' arguments arise from disputes over trivial amounts of time, sometimes as little as one-tenth of one hour. It is virtually impossible to reasonably determine whether each tenth of an hour billed by Plaintiff's counsel is accurate; however, each entry

appears to be reasonable, and the overall amount of time spent on the case certainly falls well within the range of reasonableness. Moreover, Defendants have not provided any reasoning behind their implicit theory that multiple attorneys should not be allowed to bill for work on the same document. Similarly, they do not support their argument that two attorneys are not allowed to each bill time for speaking with one another about the case. Without legal support, the court declines to reduce the time billed in the amount requested by Defendants," Judge Miller stated.

Moreover, Judge Miller ruled that the rate charged by attorney Amy Bennecoff of $278 an hour is reasonable and in line with what other courts have found to be reasonable.

Williams is represented by Bennecoff of Kimmel & Silverman in Ambler, Pa.

The defendants are represented by Thomas F. Landers and Leah S. Strickland of Solomon Ward Seidenwurm & Smith in San Diego.

(Additional documents available: **Motion for attorney fees.** Document #88-120625-046B. **Opposition brief.** Document #88-120625-047B. **Reply brief.** Document #88-120625-048B. **Complaint.** Document #88-120625-049C. **Offer of judgment.** Document #88-120625-050B.) ■

Judge: Consumers Met Specificity Requirements In Debt Collection Suit

KANSAS CITY, Kan. — Dismissal of consumers' Fair Debt Collection Practices Act (FDCPA) claim against a debt collector is not proper because the consumers have properly met the "factual specificity required by" two U.S. Supreme Court rulings, a federal judge in Kansas ruled June 20 (David Webb, et al. v. Premiere Credit of North America LLC, No. 12-2001, D. Kan.; 2012 U.S. Dist. LEXIS 85075).

(**Opinion available.** Document #88-120625-067Z.)

Consumers David and Melissa Webb sued debt collector Premiere Credit of North America LLC in the U.S. District Court for the District of Kansas. The Webbs allege that Premiere violated the FDCPA by calling them on "continuous days" and on multiple occasions six times per day.

They seek statutory and actual damages, including emotional distress.

Leave To Amend

In granting the Webbs' motion for leave to amend their complaint and denying Premiere's motion to dismiss, Judge Julie A. Robinson held that leave to amend is proper because "Plaintiffs included a request for leave to file an amended complaint in their Response to Defendant's Motion to Dismiss, as well as the title and prayer of the same document."

"And although Plaintiffs did not separately file a memorandum in support of their motion to amend, the Court may relieve Plaintiffs of complying with that requirement. Plaintiffs are advised to review [District of Kansas Local] Rules 7.1 and 7.6; however, this Court must construe rules of procedure liberally to facilitate decisions on the merits rather than procedural technicalities. Because Plaintiffs substantially complied with [District of Kansas Local] Rule 15.1 by attaching their proposed Amended Complaint, Plaintiffs' Motion to File Amended Complaint is granted. The Court will thus evaluate the Amended Complaint under [Federal Rule of Civil Procedure] Rule 12(b)(6)," Judge Robinson said.

Judge Robinson also found that dismissal of the FDCPA claim is not proper because the amended complaint "meets the factual specificity required" by Bell Atlantic Corp. v. Twombly (550 U.S. 544 [2007]; 2007 U.S. LEXIS 5901) and Ashcroft v. Iqbal (556 U.S. 662 [2009]; 2009 U.S. LEXIS 3472).

Collection Calls

"First, Plaintiffs' factual allegations concerning the frequency of Defendant's collection calls are entitled to an assumption of truth. While the original Complaint's 'near[ly] verbatim recitation of the statutory language' consists entirely of conclusory allegations, the Amended Complaint asserts specific facts: that Defendant placed daily or near daily collection calls to Plaintiffs, at a rate of up to six calls per day, demanding payment on a specific account number. Such allegations distinguish this claim from a 'cookie-cutter filin[g],' and provide

sufficient factual content to give Defendant fair notice of what Plaintiffs are claiming. Because these allegations surpass mere legal conclusions, the Court assumes them to be true," Judge Robinson stated.

"Assuming the truth of Plaintiffs' factual allegations, the Court finds the claim to be facially plausible."

Moreover, Judge Robinson ruled that the Webbs are entitled to emotional distress damages, agreeing with the findings of three other district courts within the 10th Circuit U.S. Court of Appeals, which determined that "the FDCPA does not require a plaintiff to satisfy state tort law standards to prove emotional distress damages."

"Yet, even if Plaintiffs were required to satisfy state tort law standards, it is not unreasonable to infer that six calls per day, depending on the circumstances, might cause extreme emotional distress. Accordingly, the Court finds Plaintiffs' claim for emotional distress damages under [15 U.S. Code] *§ 1692d(5)* to be sufficiently stated," Judge Robinson explained.

Counsel

The Webbs are represented by J. Mark Meinhardt of Leawood, Kan.

Premiere is represented by Louis J. Wade and Mikki L. Copeland of McDowell, Rice, Smith & Buchanan in Kansas City, Mo.

(Additional documents available: **Motion to dismiss.** Document #88-120625-068B. **Opposition to motion to dismiss and motion for leave to amend.** Document #88-120625-069B. **Opposition to motion for leave to amend.** Document #88-120625-070B. **Amended complaint.** Document #88-120625-071C.) ■

Settlement Earns Partial Approval In Debt Collection Suit

FORT PIERCE, Fla. — A federal judge in Florida on May 23 certified a class and preliminarily granted partial approval of a settlement in a suit in which a defendant was alleged to have violated the Fair Debt Collection Practices Act (FDCPA) in its attempt to collect a debt purportedly owed to a third-party mortgage receiver, but he rejected the proposed settlement's requirement for class members to submit claim forms (Malka Andes v. G. Moss and Associates, LLP, No. 11-14295, S.D. Fla.; 2012 U.S. Dist. LEXIS 71661).

(**Order available.** Document #88-120625-216R.)

U.S. Judge K. Michael Moore of the Southern District of Florida made the rulings in the suit Malka Andes filed, individually and behalf of all others similarly situated, against debt collector G. Moss and Associates LLP.

Andes alleges that on Aug. 17, 2010, the defendant sent her two letters in an attempt to collect the purported debt. Andes says the letters violated the FDCPA by "failing to properly inform the consumer as to the consumer's rights for debt verification in a manner which was not reasonably calculated to confuse or frustrate the least sophisticated consumer" in violation of 15 U.S. Code Section 1692g. Andes alleges that the defendant sent similar letters to thousands of Florida residents.

Class Meets Requirements

The parties negotiated the claims and finalized a class action settlement. On May 10, 2012, the parties filed the joint motion to certify class and approve settlement. The proposed settlement calls for the defendant to establish a $30,000 fund and would require the defendant to pay a *pro rata* share of the fund to each class member who timely returns a claim form and does not opt out of the settlement. It also requires the defendant to pay $1,000 to Andes as class representative for her role in the litigation.

In certifying the class, Judge Moore found that the Federal Rule of Civil Procedure 23(a) requirements of numerosity, commonality, typicality, adequacy, predominance and superiority have been satisfied.

In preliminarily approving the settlement in part, Judge Moore determined that the settlement is fair, reasonable and adequate to the parties. He found that based on the defendant's representations of net worth, settlement for $30,000 constitutes an amount in excess of maximum available statutory damages recoverable by a class under the FDCPA and is therefore fair and reasonable. He also determined that a $1,000 payment to Andes for damages and her role in the litigation is fair and reasonable, as is a separate payment to settlement

class counsel for reasonable fees and costs to be determined at the time of final approval of the settlement. The payment to settlement class counsel is not to be taken from any recovery to the settlement class, Judge Moore noted.

No Claim Forms

However, Judge Moore said he does not approve of the settlement's provision requiring class members to timely submit claim forms to receive their share of the settlement funds.

"A pro-rata share of the Settlement Fund shall be distributed to each Class Member who does not timely opt-out of the Class," Judge Moore concluded.

Andes is represented by Robert William Murphy in Fort Lauderdale, Fla. The defendant is represented by David Palmer Hartnett of Hinshaw & Culbertson in Miami.

(Additional documents available. **Motion to certify class, approve settlement.** Document #88-120625-217M. **Brief in support of motion to certify class, approve settlement.** Document #88-120625-218B.) ■

Nonjudicial Foreclosures Are Not Debt Collection, Federal Judge Rules

RENO, Nev. — A federal judge in Nevada on May 31 dismissed a debt collection action because, in part, nonjudicial foreclosures are not an attempt to collect a debt under the Fair Debt Collection Practices Act (FDCPA) (Craig A. Whitney and Aubree S. Whitney v. CTX Mortgage Co. LLC, et al., No. 11-00037, D. Nev.; 2012 U.S. Dist. LEXIS 75221).

(**Order available.** Document #88-120625-239R.)

U.S. Judge Larry R. Hicks of the District of Nevada granted the motion for judgment on the pleadings filed by JPMorgan Chase Bank N.A., as successor by merger to defendant Chase Home Finance LLC, in the suit brought by Craig A. Whitney and Aubree S. Whitney.

In 2006, the Whitneys refinanced real property through a mortgage note and deed of trust originated by CTX Mortgage Co. LLC. In 2009, beneficial interest under the deed of trust was assigned to Chase. The Whitneys defaulted on the mortgage note and JPMorgan initiated nonjudicial foreclosure proceedings. The Whitneys' amended complaint alleges causes of action for debt collection violations, violations of the Nevada Unfair and Deceptive Trade Practices Act (Nevada Revised Statute 598.0923) and NRS 107.080, quiet title, slander of title and abuse of process.

No FDCPA Violation

Judge Hicks noted that pursuant to NRS 649, it is a violation of state law to violate any provision of the FDCPA. Here, the Whitneys alleged that JPMorgan violated the FDCPA by initiating a nonjudicial foreclosure without following the proper procedures for attempting to collect a debt. Judge Hicks said it is well-established that nonjudicial foreclosures are not an attempt to collect a debt under the FDCPA and similar state statutes, pointing to Hulse v. Ocwen Fed. Bank FSB (195 F. Supp. 2d 1188 [D. Ore. 2002]) and Charov v. Perry (D. Nev. 2010), which held that recording a notice of default is not an attempt to collect a debt because the borrower already consented to allow the foreclosure trustee to record the notice upon default. Judge Hicks found that the Whitneys failed to state a claim for violation of the FDCPA and thereby failed to state a claim under Section 649.

The Whitneys allege that JPMorgan violated the Nevada Unfair and Deceptive Trade Practices Act by recording the notice of default without having a state business license. However, it is undisputed that JPMorgan took no action in recording the notice of default. Because the bank took no action in causing the notice of default to be recorded, it cannot have violated the Nevada Unfair and Deceptive Trade Practices Act as a matter of law, the judge said.

The Whitneys allege that the defendants improperly foreclosed on their property because the promissory note was served from the deed of trust and none of the defendants hold the original mortgage note, in violation of NRS 107.080. At the time of the foreclosure, Nevada law did not require the production of the original note before one of the statutorily enumerated parties initiates a nonjudicial foreclosure; therefore, the Whitneys fail to allege a claim upon which relief can be granted, Judge Hicks said.

Remaining Claims

Judge Hicks noted that under NRS 40.010, a quiet title action may be brought by someone who claims an adverse interest in property. Here, JPMorgan does not claim any interest in the property adverse to the Whitneys' interest in the property; therefore, they have no grounds to quiet title against JPMorgan, he found.

The judge said that a claim for slander of title "involves false and malicious communications, disparaging to one's title in land, and causing special damages," pursuant to Executive Mgmt. Ltd. v. Ticor Title Co. (963 P.2d 465, 478 [Nev. 1998]). Here, the recorded notice of default and notice of trustee's sale are not false and malicious communications disparaging the Whitneys' title, Judge Hicks said. First, the Whitneys concede that they were in default of their loan; thus, the notice of default does not make a false statement about the title to property, Judge Hicks said. Second, it is not false that the property was to be sold at a trustee's sale, he said. Therefore, he found that the Whitneys have failed to state a claim for slander of title.

To establish a claim for abuse of process, a party must show that an opposing party had an ulterior purpose for bringing a legal action other than resolving a legal dispute and that the opposing party used the legal process in a way that is not proper in the regular conduct of the proceeding, Judge Hicks said, citing Las Vegas Fetish and Fantasy Halloween Ball Inc. v. Ahern Rentals (182 P.3d 764, 767 [Nev. 2008]) and Georgiou Studio Inc. v. Boulevard Interest LLC (663 F. Supp. 2d 973, 982 [D. Nev. 2009]). Judge Hicks found that the Whitneys have failed to allege any facts demonstrating that JPMorgan had an ulterior motive in initiating nonjudicial foreclosure proceedings other than the resolution on the default on the mortgage note. Further, the process at issue is a nonjudicial foreclosure, which is not the characteristic legal action contemplated by an abuse of process claim, he said, citing Smith v. Wachovia Mortgage Corp. (N.D. Calif. 2009). Therefore, he found that the Whitneys have failed to state a claim for abuse of process.

The Whitneys are represented by Rick Lawton of the Law Office of Rick Lawton in Fernley, N.V. JPMorgan is represented by Kent F. Larsen and Joseph T. Prete of Smith Larsen & Wixom in Las Vegas.

(Additional documents available: **Motion for judgment on the pleadings.** Document #88-120625-240M. **Response to motion for judgment on the pleadings.** Document #88-120625-241B.) ■

Divided 2nd Circuit: No En Banc Rehearing Of Validity Of AmEx Arbitration Clause

NEW YORK — The Second Circuit U.S. Court of Appeals on May 29 in a divided ruling denied rehearing *en banc* of its Feb. 1 opinion affirming its prior holding that a mandatory class action waiver clause in American Express Co.'s (AmEx) standardized service contract violated the Federal Arbitration Act (FAA) (In re: American Express Merchants' Litigation [Italian Colors Restaurant, et al. v. American Express Travel Related Services Company, et al.], No. 06-1871-cv, 2nd Cir.; 2012 U.S. App. LEXIS 10815).

(**Order available.** Document #81-120628-002R.)

In its Feb. 1 opinion, the Second Circuit panel said that its original analysis was unaffected by AT&T Mobility LLC v. Concepcion (131 S.Ct. 1740 [2011]), in which the Supreme Court held that the FAA preempted a California law barring the enforcement of class action waivers in consumer contracts.

Circuit Judge Rosemary S. Pooler, who was a member of the panels issuing the two previous decisions, concurred by opinion in the denial of rehearing *en banc*. Chief Judge Dennis Jacobs and Judges Jose A. Cabranes, Debra Ann Livingston, Reena Raggi and Richard C. Wesley dissented by opinion.

Judge Jacobs, with whom Judges Cabranes and Livingston joined, argued that the panel opinion relied on dicta that was "pulled out of context and distorted" and "is a broad ruling that, in the hands of class action lawyers, can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver—and other arbitration agreements with such a clause." Judge Cabranes also commented that "the issue at hand is indisputably important, creates a circuit split, and surely deserves further appellate review."

Judge Raggi, with whom Judge Wesley joined, said that because the panel's decision to hold a class-action waiver unenforceable results in a circuit split, he

"think[s] it would be useful to have the issues explored further by the full court in the adversarial context of an en banc argument."

Merchant Fees

Italian Colors Restaurant and other merchants sued AmEx over AmEx's service contract, which allegedly contained an "honor all cards agreement" whereby merchants were forced to pay supracompetitive fees on AmEx's mass-marketed products or lose a significant portion of sales from businesses, travelers and affluent customers who are traditional users of AmEx cards. The agreement precluded merchants from accepting some AmEx cards and denying others in violation of the Sherman Act, the merchants said.

The merchants further alleged that as a condition of accepting AmEx's cards, they were required to sign a "card acceptance agreement" that contained a mandatory arbitration clause and prohibited the merchants from bringing a class action lawsuit in court and from having any claim arbitrated on anything other than an individual basis. The merchants contended that the agreement violated the FAA.

The U.S. District Court for the Southern District of New York granted AmEx's motion to compel arbitration of the merchants' antitrust claims and the question of whether the class action waivers were enforceable, and the District Court dismissed their cases.

On Jan. 30, 2009, the Second Circuit reversed, finding that the merchants had adequately demonstrated that the class action waiver provision was not enforceable because enforcement of the waiver would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs and "would grant AMEX de facto immunity from antitrust liability." According to the appeals panel, the merchants demonstrated that "the size of the recovery received by any individual plaintiff will be too small to justify the expenditure of bringing an individual action."

The panel found that Section 2 of the FAA provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The panel held that because a valid ground exists for the revocation of the class action waiver, it cannot be enforced under the FAA.

Stolt-Nielsen And Concepcion

On May 3, 2010, the Supreme Court granted AmEx's petition for a writ of *certiorari*, vacated the Second Circuit's decision and remanded in light of Stolt-Nielsen S.A., et al. v. AnimalFeeds Int'l Corp (130 S.Ct. 1758 [2010]), in which the Supreme Court, in a 5-3 decision on April 27, 2010, held that an arbitration panel exceeded its authority under the FAA by construing an arbitration clause to permit class arbitration of antitrust claims when the clause was silent on that issue.

On remand, the Second Circuit on March 8, 2011, said that "*Stolt-Nielsen* states that parties cannot be forced to engage in a class arbitration absent a contractual agreement to do so. It does not follow, as Amex urges, that a contractual clause barring class arbitration is *per se* enforceable. Indeed, our prior holding focused not on whether the plaintiffs' contract provides for class arbitration, but on whether the class action waiver is enforceable when it would effectively strip plaintiffs of their ability to prosecute alleged antitrust violations."

The appeals panel found that the affidavit of an economist "establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws."

The Supreme Court subsequently issued its decision in Concepcion.

Open Question

In its Feb. 1 opinion, the Second Circuit said that neither Stolt-Nielsen nor Concepcion "addresses the issue presented here: whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights."

The specific preemption question addressed by the Supreme Court in *Concepcion* was "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures," the appeals panel said.

"*Concepcion* and *Stolt-Nielsen*, taken together, stand squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration unless

the parties agree to class action arbitration," the Second Circuit said, adding that "[w]hat *Stolt-Nielsen* and *Concepcion* do not do is require that all class-action waivers be deemed per se enforceable. That leaves open the question presented on this appeal: whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims."

Fact-Specific Inquiry

The Second Circuit reiterated that "[t]he evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws."

Therefore, the Second Circuit remanded to the District Court with the instruction to deny AmEx's motion to compel arbitration.

The panel commented that "each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA 'is a congressional declaration of a liberal federal policy favoring arbitration agreements.' "

The merchants are represented by Gary B. Friedman, Tracey Kitzman, Aaron Patton and Warren Parrino of Friedman Law Group in New York.

AmEx is represented by Bruce H. Schneider of Strook & Strook & Lavan in New York, Julia B. Strickland and Stephen J. Newman of Stroock & Stroock & Lavan in Los Angeles and Michael K. Kellogg and Derek T. Ho of Kellogg, Huber, Hansen, Todd, Evans & Figel in Washington, D.C. ■

Judge Says Bank Did Not Show That Cardholder Agreed To Arbitration Agreement

ST. PAUL, Minn. — In a suit in which a plaintiff says Credit One Bank NA and a collection agency violated the Fair Debt Collection Practices Act in their attempts to collect his credit card debt, a federal judge in Minnesota on May 22 denied the bank and agency's motion to dismiss and compel arbitration, explaining that the record at this point is insufficient to make a showing that the plaintiff entered into a valid agreement to arbitrate with Credit One (Galen Traylor v. I.C. System Inc., et al., No. 11-02968, D. Minn.; 2012 U.S. Dist. LEXIS 70850).

(**Opinion available.** Document #88-120625-201Z.)

U.S. Judge Donovan W. Frank of the District of Minnesota made the ruling in the suit filed by Galen Traylor, individually and on behalf of all others similarly situated, against the bank and I.C. System Inc.

The unpaid balance on Traylor's Credit One credit card account is $905.48, and she has not made payments on the account since May 5, 2010. Traylor says the debt she owed on her Credit One credit card was transferred to I.C. System for collection. She alleges that the defendants called her numerous times on her home and cell phones to collect the debt. Traylor further contends that her caller identification identified the caller as I.C. System, but when she called the identified numbers back, the persons answering identified themselves as being from Credit One. She says Credit One used the false name of I.C. System to deceive customers into believing that someone other than Credit One was calling.

'Very Limited Discovery'

Traylor's complaint asserts a single count for a violation of the FDCPA against both defendants. The defendants moved to compel arbitration and dismiss and submitted a copy of Traylor's cardholder agreement, which includes an arbitration agreement they claim governs the account and relationship between Traylor and Credit One. The arbitration agreement provides that "[a]ny questions about what Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced."

The defendants assert that when Traylor opened her account with Credit One, she executed the agreement and thereby agreed to submit all disputes arising under the agreement to arbitrate. Traylor argues that Credit One provides no facts in support of mutual assent to the alleged arbitration agreement. In particular, she says the defendants have not alleged facts showing when the agreement was written; when, how or even if the

terms of the agreement were communicated to her; or when, how or even if Traylor assented to the terms. The defendants, in a reply brief and the supplemental affidavit of Credit One Vice President of Collections-Operations David Guy, respond that because Traylor applied for credit online, she could not have completed the application and obtained credit without first expressly accepting the terms of the agreement.

"While it appears likely that Defendants will be able to demonstrate, upon a more complete factual record, that Plaintiff entered into a valid agreement to arbitrate with Credit One, the record at this point is insufficient to make such a showing," Judge Frank said. "Plaintiff does not deny that she entered into a contractual relationship with Credit One, accepted and benefitted from the extension of credit under the Account, and failed to repay amounts due and owing. However, as pointed out by Plaintiff, the Guy Affidavit does not describe or set forth the process by which Plaintiff would be required to 'expressly accept' the terms of the Arbitration Agreement (such as how the terms of the arbitration agreement would be displayed or made known to Plaintiff), or otherwise detail the foundational elements of the online application process."

Judge Frank found that the parties should engage in "very limited discovery" to gather information necessary for the District Court to determine whether Traylor agreed to the arbitration provision via the online application. He said he will then entertain a revised motion to compel arbitration after the discovery is concluded "and Defendants are able to provide sufficient factual support of the contention that Plaintiff is bound by the terms of the Agreement."

Within Scope Of Agreement

Judge Frank also found that Traylor's FDCPA claim against Credit One is within the scope of the agreement, explaining that the claim implicates the operation and handling of the account and involves both communications and collection matters that relate to the account. Traylor argues that even if the agreement covers her claims against Credit One, it does not govern her claims against I.C. System because there is no assertion that I.C. System was a party to the agreement. Traylor says I.C. System has not offered a theory as to how an agreement to arbitrate between Traylor and Credit One would apply to it as a third party.

Judge Frank disagreed with Traylor, first noting that the agreement provides that claims subject to arbitration include "[c]laims for which [Credit One] may be directly or indirectly liable."

"Here, I.C. System became involved in the servicing of Plaintiff's Account when it engaged in collection efforts," Judge Frank explained. "Plaintiff's FDCPA claim against I.C. System directly relates to Credit One, as Plaintiff alleges that her calls to telephone numbers owned by I.C. System were answered by individuals who identified themselves as Credit One representatives. Because Plaintiff has pled a single cause of action against both Defendants, based on an alleged scheme devised between the two, it appears that this claim is one for which Credit One may be directly or indirectly liable. As such, the claim against I.C. System will also be subject to arbitration if Defendants can establish that Plaintiff accepted the terms of the Arbitration Agreement at the time she opened her Account."

Traylor is represented by Mark L. Vavreck of Martineau, Gonko & Vavreck in Minneapolis and Thomas J. Lyons of the Lyons Law Firm in Vadnais Heights, Minn. The defendants are represented by Michelle Kreidler Dove of Bassford Remele in Minneapolis.

(Additional documents available. **Motion to dismiss and compel arbitration.** Document #88-120625-202M. **Brief in support of motion to dismiss and compel arbitration.** Document #88-120625-203B. **Opposition to motion to dismiss and compel arbitration.** Document #88-120625-204B. **Reply in support of motion to dismiss and compel arbitration.** Document #88-120625-205B.) ■

Class Certified In Military Credit Card Overcharge Action

SAN FRANCISCO — A federal judge in California on June 20 granted a motion for class certification in a suit in which a plaintiff alleges overcharges on military credit cards (Taylor Russell v. United States of America, No. 09-03239, N.D. Calif.; 2012 U.S. Dist. LEXIS 85614; See April 2012, Page 30).

(**Order available.** Document #88-120625-343Z.)

Taylor Russell, who served in the U.S. Army on active duty from April 1997 until July 2000, opened his Army and Air Force Exchange Service (AAFES) credit card account in 1998 and made required payments until the time of his separation from service in 2000. The account became delinquent shortly after he left service and remained delinquent until the outstanding balance was paid through offsets in his federal tax refunds. He claims that the interest charged was in excess of that allowed in the credit agreement. The agreement provided that the interest would not exceed bank prime rate plus 4.75 percent, with a minimum of 12 percent per year. When his debt was transferred to AAFES collections, his balance was $940. This balance was assessed at 14.25 percent, which exceeds the amount in the agreement.

Remand

In February 2010, the AAFES adjusted 46,851 accounts with the same contractual terms as Russell's by reducing the interest rate to the 12 percent minimum allowed under the agreements. A week later, the AAFES sent Russell a refund of $150 for all interest above 12 percent paid on his balance. An AAFE voluntary audit continued after the U.S. District Court for the Northern District of California dismissed Russell's individual claim as moot. In May 2010, a second audit identified the interest overcharges on additional accounts and resulted in adjustments of an additional 103,320 accounts, of which 69,198 received refunds. In total, the AAFES has adjusted 149,781 accounts and issued 101,432 refunds.

Russell filed his complaint in 2009. By March 2010, his final claim of interest overcharges was dismissed as moot because he had been issued the $150 refund check. In the dismissal order, the District Court held that his class claim was also moot because he received a full refund on his individual claim before moving for class certification. The court found that his refund came as part of a voluntary audit of thousands of accounts "outside the aegis of this lawsuit [and that] this scenario does not invoke the policy concerns of a defendant targeting only the named plaintiffs to prevent a suit and frustrate the objective of a class action." The District Court allowed Russell's counsel an opportunity to find a substitute named plaintiff with a live claim to represent the proposed class. On June 22, 2010, the District Court entered final judgment after possible intervenors were considered and rejected. Russell appealed the dismissal of the interest-overcharge claim to the Federal Circuit U.S. Court of Appeals.

The Federal Circuit affirmed that Russell's individual claim had been fully satisfied by the refund despite purported claims for attorney fees and costs. However, based on its interpretation of an intervening Ninth Circuit decision in Pitts v. Terrible Herbst (653 F.3d 1081, 1091-92 [9th Cir. 2011]), the Federal Circuit disagreed that mooting Russell's individual claim warranted dismissing the class claim as moot. The Federal Circuit remanded the case to the District Court, instructing the District Court to determine whether, upon further factual development, the class claim has been mooted by the AAFES's voluntary account adjustment and refunds.

Rule 23(a) Satisfied

In a renewed motion for class certification, Russell asked the District Court to certify only a class of approximately 15,000 people who would not have received refund checks (15 percent of the 101,432 accounts sent refunds). On March 22, Judge William Alsup declined to rule on the renewed motion. He said Russell's estimate of 15,000 class members is "largely speculative." The judge said no discovery has been taken on the issue and the AAFES has not provided sufficient information to determine what percent of refunds were not received. "More precision is needed before adjudicating the . . . renewed motion for class certification herein," the judge said.

On May 17, Russell filed an amended renewed motion for class certification. He proposed a class including: "All natural persons (1) from whom AAFES has collected, after July 16, 2003 and through the present date, debt incurred pursuant to an AAFES Credit Agreement; (2) from whom the amount collected exceeded the principal amount of account purchases in all categories plus finance charges permitted by the applicable AAFES Credit Agreement and allowable penalties and administrative fees and; (3) were not sent or have not cashed refund check(s) for the full amount of the interest overcharge(s)." "The class does not include persons with claims that exceed $10,000 unless such persons waive their claim above $10,000," according to the motion.

In granting the amended motion, Judge Alsup found that the proposed class satisfies Federal Rule of Civil

Procedure 23(a)'s requirements regarding numerosity of class, common questions of law or fact, typicality and the ability of the represented parties to fairly and adequately protect the interest of the class.

"As stated, Russell's proposed class definition foregoes an independent recalculation to determine appropriate refunds, if any, of all 149,781 delinquent accounts, and instead adopts the AAFES's finding of 60,557 accounts that are owed refunds but where refund checks are still uncashed or were returned as undeliverable," Judge Alsup said. "Russell admits that persons who have already had their accounts adjusted by AAFES and cashed refund checks are not part of his class definition. This order agrees and finds that the AAFES's methodology of account adjustment and determination of refunds appears correct."

Attorneys

Russell is represented by Deepak Gupta of Public Citizen Litigation Group in Washington, D.C., Marie Noel Appel of Consumer Law Office of Marie Noel Appel in San Francisco and S. Chandler Visher of Law Offices of S. Chandler Visher in San Francisco.

The United States is represented by Alicia M. Hunt and Michael J. Quinn of the U.S. Department of Justice in Washington.

(Additional documents available: **Motion for class certification.** Document #88-120625-344M. **Response to motion for class certification.** Document #88-120625-345B. **Reply in support of motion for class certification.** Document #88-120625-346B.) ■

1st Circuit Affirms Dismissal Of Corruption Suit Against Puerto Rico Bank

BOSTON — The First Circuit U.S. Court of Appeals on June 4 affirmed dismissal of a suit in which a plaintiff alleges that a bank in Puerto Rico that has since failed kept funds from an escrow account held in the plaintiff's interest in violation of the Racketeer Influenced and Corrupt Organizations Act and Puerto Rico laws (Fabricia de Muebles J.J. Alvarez, Inc. v. Inversiones Mendoza, Inc., et al., No. 11-1985, 1st Cir.; 2012 U.S. App. LEXIS 11240).

(**Opinion available.** Document #88-120625-248Z.)

The First Circuit panel of Chief Judge Sandra L. Lynch and Circuit Judges Michael Boudin and Kermit V. Lipez affirmed the ruling of the U.S. District Court for the District of Puerto Rico in the suit Fabricia de Muebles J.J. Alvarez Inc. (Alvarez) filed against Westernbank de Puerto Rico, whose successor in interest is Banco Popular de Puerto Rico (BPPR). The First Circuit also affirmed the District Court's denial of Alvarez's two motions for reconsideration of its dismissal ruling.

The suit arose from Alvarez's agreement to sell a furniture business to Inversiones Mendoza Inc. (Mendoza). Westernbank agreed to finance the transaction. On Aug. 29, 2004, the parties opened what Alvarez says was an escrow account at Westernbank. Alvarez says Westernbank daily swept and kept money from the escrow account in partial satisfaction of the debts owed to it by Mendoza. Mendoza eventually filed for Chapter 11 bankruptcy protection.

No Stipulation Filed

On June 19, 2009, Alvarez filed its complaint in the District Court against Westernbank and various John Doe employees and insurance companies. The complaint included five causes of action: civil law fraud, breach of fiduciary duty and lender's liability; violation of RICO; civil fraud under commonwealth law; recovery of funds or property; and foreclosure of mortgage. As to the RICO claims, Alvarez pleaded violations under subsections (a), (c) and (d) of 18 U.S. Code Section 1692. On Sept. 28, 2009, Westernbank moved to dismiss for failure to state a claim, and the District Court partially granted the motion, allowing only the Section 1692 RICO claim and the remaining state law claims to survive.

On April 30, 2010, the commissioner of financial institutions of Puerto Rico closed Westernbank and appointed the Federal Deposit Insurance Corp. as its receiver to liquidate the bank. On the same date, the FDIC sold most of the bank's assets to BPPR. On May 12, 2010, BPPR replaced Westernbank in the instant case.

At a March 18, 2011, settlement conference, Alvarez agreed to dismiss three of the five causes of action: the civil law fraud and breach of fiduciary duty claim, the remaining RICO claim and the claim of civil fraud

under Puerto Rico law. The District Court ordered the parties to file, pursuant to the settlement agreement, a stipulation dismissing the three causes of action. Meanwhile, Alvarez also said it recently identified insurance companies that had issued policies that would cover the damages in the case. The District Court granted the plaintiff's motion to amend its complaint by substituting those insurance companies for the fictitious insurers it had named in the initial complaint.

On March 28, 2011, after the stipulation deadline had passed, BPPR moved to dismiss the causes of action that Alvarez had agreed to dismiss, stating that Alvarez had failed to cooperate or comply with any of BPPR's requests to help prepare the stipulation. The District Court granted the motion. On June 28, the District Court ordered Alvarez to show cause as to why the remaining claims, which the District Court characterized as state laws claims, should not be dismissed for lack of subject matter jurisdiction. Alvarez did not respond to the show-cause order within the time directed by the District Court. On July 5, the District Court determined that only state claims for mortgage foreclosure and recovery of funds remained at issue and declined to exercise supplemental jurisdiction over those claims.

Reconsideration Denied

On the same date, Alvarez moved for reconsideration, contending that the case involved questions of bankruptcy law that the District Court was more competent to handle than state courts. On July 6, the District Court denied the motion, and on July 21, the plaintiff filed another motion for reconsideration, asserting for the first time that the District Court should retain jurisdiction because the plaintiff had RICO claims against Westernbank employees that had never been dismissed. The District Court denied the motion on Aug. 3.

Alvarez appealed to the First Circuit on Aug. 4. The defendant appellees are Mendoza, former Westernbank officers and directors Frank C. Stipes Garcia, William M. Vidal-Carvajal and Miguel A. Vazquez Seijo, former Westernbank in-house counsel Rosa Vicens Diaz, XL Specialty Insurance Co., Liberty Mutual Insurance Co., ACE Insurance Co. and Chartis Insurance Corp. of Puerto Rico.

Alvarez argued that the District Court abused its discretion in denying the second motion for reconsideration because although Alvarez agreed to the dismissal of the RICO claims against BPPR, it never agreed to the dismissal of its RICO claims against the Westernbank employees.

'Reasonable' View

"The short answer is that it was reasonable for the district court, after settlement, to have viewed the dismissal order as encompassing all the RICO claims," the panel reasoned. "And plaintiff, when given the opportunity to present a different view, utterly failed to do so."

As to the Westernbank employees, the complaint pleads only the "control of influence" element of a RICO claim, the panel said. The remainder of the RICO claim discusses only the actions of Westernbank and makes no mention of its employees, and it is basic law that RICO claims against employees must be separate and distinct from those against the employer, the panel said, citing Bessette v. Avco Fin. Servs., Inc. (230 F.3d 439, 449 [1st Cir. 200]).

The panel added that no individuals had been named or served as defendants when the claims were reported settled; although the parties were ordered to file a stipulation of settlement, the plaintiff failed to cooperate; and the plaintiff did not assert that it had RICO claims remaining.

No Abuse Of Discretion

Further, the District Court did not abuse its discretion in denying Alvarez's first motion for reconsideration, the panel said. The District Court correctly held that the mere fact that the settlement agreements arose in the context of a bankruptcy proceeding is not a standalone basis for federal jurisdiction, the panel said.

Alvarez also argues that the District Court erred in dismissing the case after the show-cause order because the complaint should have been read as asserting federal claims beyond the RICO claims. On its face, the complaint supported several federal causes of action besides those under RICO, including causes under Sarbanes-Oxley, the Transportation of Stolen Property Act, statutes regulating the relationship between the FDIC and the bank and various federal securities laws, the plaintiff argues. The panel disagreed, saying the complaint's reference to these statutes "does not come close to meeting the pleading requirements" of Ashcroft v. Iqbal (556 U.S. 662 [2009]).

Attorneys

Alvarez is represented by Rafael Gonzalez-Velez of San Juan, Puerto Rico.

Mendoza is represented by Nelly Mendoza of Mendoza in Cayey, Puerto Rico.

Stipes Garcia and Vidal-Carvajal are represented by Gary H. Montilla-Brogan in San Juan. Vazquez Seijo is represented by Roberto Buso-Aboy in San Juan. Vicens Diaz is represented by Berenice B. Bellotti and Roberto Santana-Aparicio of Del Toro & Santana in San Juan.

XL is represented by Benjamin Cairns Eggert of Wiley Rein in Washington, D.C., and Manuel Antonio Pietrantoni of Casellas Alcover & Burgos in San Juan. Liberty Mutual is represented by Eric Perez-Ochoa of Adsuar Muniz Goyco Seda & Perez-Ochoa in San Juan. ACE is represented by Francisco E. Colon-Ramirez of Colon, Colon & Martinez in San Juan. Chartis is represented by Jeannette Lopez de Victoria of Pinto-Lugo, Oliveras & Ortiz in San Juan.

(Additional documents available. **Appellant brief.** Document #88-120625-249B. **Vazquez Seijo's appellee brief.** Document #88-120625-250B. **XL's appellee brief.** Document #88-120625-251B. **Appellant reply brief.** Document #88-120625-252B.) ■

10th Circuit Affirms Dismissal Of Suit Alleging Wrongful Foreclosure

DENVER — The 10th Circuit U.S. Court of Appeals on June 11 affirmed the dismissal of a suit in which a plaintiff accused OneWest Bank, which had acquired his loan after the failure of IndyMac Bank, of wrongfully foreclosing on his home, ruling that OneWest was "a holder of an evidence of debt" under Colorado law (Bruce C. McDonald v. OneWest Bank, No. 11-1071, 10th Cir.; 2012 U.S. App. LEXIS 11801).

(**Opinion available.** Document #88-120625-270Z.)

The 10th Circuit panel of Senior Circuit Judge Wade Brorby and Circuit Judges Paul J. Kelly Jr. and Terrence L. O'Brien affirmed the U.S. District Court for the District of Colorado's ruling in the suit Bruce C. McDonald filed against OneWest.

McDonald in 2003 took out a $198,000 loan secured by a deed of trust on Colorado real property in favor of the lender, IndyMac. He made payments on the loan until April 2008, including while IndyMac was operated in receivership by the Federal Deposit Insurance Corp. When the FDIC sold IndyMac to OneWest, McDonald says he stopped making payments because OneWest "did not provide [him] with the instrument or reasonable evidence of authority to make such a presentment" in accordance with his demands for the original note. OneWest then provided him with a copy of the note and deed of trust.

'Meritless' Argument

OneWest foreclosed on the property and obtained an order under Colorado Rule of Civil Procedure 120 authorizing the sale of the property. McDonald twice sought reconsideration of the sale order, which was denied. On March 24, 2010, the property was sold and OneWest purchased it, later assigning its interest in the property to the Federal Home Loan Mortgage Corp. (Freddie Mac). On the day before the sale, McDonald filed a suit in the state court claiming that OneWest was not entitled to payment on the note and the order of sale was void. Freddie Mac filed a forcible entry and detainer action against McDonald seeking to evict him. McDonald obtained a stay pending resolution of the state court action. He amended his state court complaint to join Freddie Mac and include a quiet title action. Neither defendant answered, and the state court granted a default judgment quieting title. The case is on appeal.

On July 22, 2010, McDonald filed the District Court action against One West, alleging a violation of the Racketeer Influenced and Corrupt Organizations Act, a pattern of racketeering activities, violation of the Fair Debt Collection Practices Act, fraud and violation of the Colorado Consumer Protection Act. He sought damages for the loss of his home, mental anguish, pain and suffering and attorney fees and costs. The District Court dismissed the suit on the basis of McDonald's failure to state a claim. The District Court denied McDonald's motion for reconsideration, and he appealed to the 10th Circuit.

On appeal, McDonald asserts that OneWest was not entitled to foreclose because it was not "a holder in due course" and did not own the underling note. The panel said the attempt to graft "holder in course" requirements onto this process, "though obvious in its purpose, is meritless and clearly distorts the law."

'Holder In Due Course'

The panel said that in Colorado, nonjudicial foreclosure based upon a violation of a deed of trust provision can be accomplished by "a holder of an evidence of debt," quoting Colorado Revised Statute Section 38-38-101(1). The "holder of an evidence of debt" includes a "person entitled to enforce an evidence of debt" and presumptively includes "the person in possession of a negotiable instrument evidencing a debt, which has been duly negotiated to such person or to bearer or indorsed in blank," according to the statute.

"As the commercial code makes clear, a person entitled to enforce an instrument may be a holder, and need not be an owner, of the instrument," the panel said. "Contrary to Mr. McDonald's position, nothing in the law states that 'holder in due course' status is required."

The panel noted that at oral argument, McDonald's counsel said the note presented to the state court was not the original note and, therefore, it was not valid. McDonald's counsel said the argument was raised in a motion he filed under Federal Rule of Civil Procedure 60 with the District Court, although that is not apparent, the panel said. His counsel also admitted that the issue was not covered by the notice of appeal, which only specifies the order of dismissal and denial of reconsideration, the panel said. The Rule 60 motion was not filed until nearly six months after the notice of appeal was filed, and no new notice of appeal has been entered on the issue, the panel said. Therefore, the panel said, it is unable to consider these claims on appeal.

McDonald is represented by Gary D. Fielder of the Law Office of Gary Fielder in Arvada, Colo. OneWest is represented by Victoria Edwards of Akerman Senterfitt in Denver.

(Additional documents available. **Appellant brief.** Document #88-120625-271B. **Appellee brief.** Document #88-120625-272B. **Appellant reply brief.** Document #88-120625-273B.) ■

Bank Earns Partial Summary Judgment In Loan Participation Dispute

ST. LOUIS — A federal magistrate judge in Missouri on June 13 ruled that Beal Bank USA is entitled to a declaratory judgment that it is a "participating bank" under a loan participation agreement with a failed bank but that that Beal is not entitled to summary judgment on future payments or prejudgment interest (Beal Bank USA v. The Business Bank of St. Louis, No. 11-0561, E.D. Mo.; 2012 U.S. Dist. LEXIS 81801).

(**Opinion available.** Document #88-120625-296Z.)

U.S. Magistrate Judge David D. Noce of the Eastern District of Missouri made the ruling in the suit in which Beal alleges that The Business Bank of St. Louis (BBSL) has not paid to Beal proceeds due to it under the participation agreement with failed Champion Bank.

Beal alleges that the Federal Deposit Insurance Corp., as the receiver of Champion, transferred to Beal an interest in certain loan proceeds and that BBSL, the contractual promissory, has not paid to Beal all the proceeds due to it under the participating agreement to which Champion had been a party. BBSL previously tried, and failed, to buy Champion from the FDIC.

Participation Agreement

Effective Sept. 6, 2007, BBSL entered into the participation agreement with Champion, whereby BBSL sold to Champion an undivided 82 percent interest in a $4.9 million loan BBSL made to Matthew J. Ratteree and Toni Ratteree. On April 30, 2010, the Missouri Division of Finance closed Champion and appointed the FDIC as receiver of Champion's assets, including Champion's participation in the Ratteree loan repayments. BBSL offered to repurchase the Champion participation, but the FDIC rejected the offer. The FDIC then attempted to sell the participation via a bidding process, and on Dec. 3, 2010, the FDIC agreed to sell the participation to Beal.

On Jan. 11, 2011, the FDIC sent a letter advising it of the transfer of the Champion participation to Beal, and Beal instructed BBSL to send all payments due to it under the participation agreement to CLMG Corp., Beal's servicer. BBSL responded Jan. 17, 2011, sending a letter to CLMG arguing that the FDIC's repudiation

of its right of first refusal requires the payment of damages for tortious interference with BBSL's state law contractual rights under the participation agreement. BBSL also made these complaints to the FDIC, which responded that BBSL has the right to file an administrative claim against it as receiver, but BBSL has not filed any such claim.

Beal sought a declaratory judgment that it is the "participating bank" under the participation agreement, as well as payment of all past, unpaid payments; prejudgment interest on those payments; and an order directing BBSL to make all future payments owed under the participation agreement. BBSL argued that the issues are moot because in an attempt to resolve the litigation, it has paid what it owes to Beal under the participation agreement.

'Participating Bank'

Magistrate Judge Noce concluded that BBSL has conceded that Beal is the "participating bank" under the participation agreement. Moreover, he said, any challenges to Beal being the "participating bank" are effectually challenges to the FDIC assignment, an issue not before the District Court.

The magistrate judge also found that Beal is the identifiable third-party creditor beneficiary because of the FDIC assignment and that BBSL cannot currently challenge the FDIC assignment. Therefore, he said, Beal may be entitled to judgment for unpaid proceeds at the Champion participation.

"As previously noted, the parties dispute whether BBSL has paid to Beal Bank all the monies that it would be entitled to under the Participation Agreement," Magistrate Judge Noce said. "Therefore, the factual issue of full payment remains to be tried. Affected by this factual issue are Beal Bank's claims to prejudgment interest and other relief."

Attorney Fees

Beal also argues that is entitled to attorney fees, costs and post-judgment interest under the participation agreement. On Beal's claim for payment of loan proceeds under the participation agreement, Beal is the "prevailing party" and BBSL is the "unsuccessful party" under Section 14 of the participation agreement because BBSL has impliedly agreed that Beal is entitled to the proceeds from the Champion participation in the Ratteree loan payments, Magistrate Judge Noce found. Beal also previously prevailed on its motion to dismiss BBSL's counterclaims. Therefore, Beal is entitled to court costs and "reasonable attorneys' fees" under Section 14, he said. Because further litigation is needed to decide what amount, if any, Beal is entitled to under the participation, a final determination of reasonable attorney fees for Beal as the prevailing party is premature, the magistrate judge said.

Beal is represented by Nicholas J. Zluticky and Mark A. Shaiken of Stinson and Morrison in Kansas City, Mo. BBSL is represented by Jayme Major, John M. Hessel and Larry E. Parres of Lewis Rice in St. Louis.

(Additional documents available: **Motion for summary judgment.** Document #88-120625-297M. **Brief in support of motion for summary judgment.** Document #88-120625-298B. **Response to motion for summary judgment.** Document #88-120625-299B. **Reply in support of motion for summary judgment.** Document #88-120625-300B.) ■

Judge: Investor Failed To Plead Subjective Falsity In Failed Bank Suit

SANTA ANA, Calif. — Dismissal of federal securities law claims against the former outside auditor of a failed bank is proper because a shareholder failed to properly plead subjective falsity, a federal judge in California ruled June 7 (Buttonwood Tree Value Partners LP, et al. v. Jack A. Sweeney, et al., No. 10-00537, C.D. Calif.; 2012 U.S. Dist. LEXIS 80118).

(**Opinion available.** Document #88-120625-008Z.)

Shareholder Buttonwood Tree Value Partners LP filed a second amended class action complaint in the U.S. District Court for the Central District of California on behalf of all purchasers of First Regional Bank (FRB) common stock from Jan. 1, 2007, to Jan. 29, 2010.

Buttonwood alleges that several former FRB executive officers and directors violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 by issuing a series of false and misleading statements regarding

FRB's capitalization, the quality of its underwriting, the amounts reserved for loan losses, the quality of its loan portfolio and the mental competency of FRB CEO Jack Sweeney.

Audit Reports

Buttonwood also contends that FRB's outside auditor, Deloitte & Touche LLP, violated Section 10(b) and Rule 10b-5 by fraudulently stating in its audit reports that FRB was in compliance with generally accepted accounting principles (GAAP) in preparing its financial statements and that Deloitte was compliant with generally accepted auditing standards (GAAS).

In granting Deloitte's motion to dismiss, Judge Cormac J. Carney held that "[w]ith respect to the misrepresentation element of Plaintiffs' claim, Plaintiffs have failed to allege subjective falsity with respect to the alleged misrepresentations made in Deloitte's audit reports."

"Where a plaintiff challenges an opinion statement under the securities law, the plaintiff must allege with particularity that the defendant believes his or her opinion was false. An auditor's report is a statement of professional opinion, not fact. This Court concludes that, unlike the Tenth Circuit [U.S. Court of Appeals], both the GAAS assertion and GAAP assertions are matters of opinion, because both GAAS and GAAP are a collection of broad standards that are 'couched in rather general and in some cases inherently subjective terms . . . requir[ing] for example, that the auditor plan the audit engagement properly, use "due professional care," exercise "professional skepticism," and "assess the risk of material misstatement due to fraud all matters as to which reasonable professionals planning or conducting an audit reasonably and frequently could disagree,' " " Judge Carney said, citing <u>In re Lehman Bros. Securities & ERISA Litigation</u> (799 F. Supp. 2d 258, 300-03 [S.D.N.Y. 2011]).

GAAS

"Determining whether Deloitte complied with GAAS would not be easily answerable as true or false, but would likely instead require reference to the opinions of other auditors familiar with GAAS. Because they are statements of opinion, Plaintiffs must allege subjective falsity, that Deloitte did not believe, or had no reasonable basis to believe, that it complied with GAAS and that FRB complied with GAAP. The SAC [second amended complaint] does not sufficiently allege such beliefs and thus fails to adequately plead the first element of a claim for securities fraud," Judge Carney explained.

Buttonwood is represented by Jon Tostrud of Cuneo Gilbert & LaDuca in Los Angeles.

Deloitte is represented by James J. Farrell of Latham & Watkins in Los Angeles and Peter A. Wald of Latham & Watkins in San Francisco. ■

Federal Judge Bars Suit Against Bank Due To Plaintiff's Intent To Mislead

GAINESVILLE, Ga. — In a suit in which a plaintiff asserted negligence and breach of contract claims against a bank regarding a loan, a federal judge in Georgia on May 23 granted the motion to dismiss filed by the Federal Deposit Insurance Corp., as receiver of the failed bank, ruling that the claims are barred by judicial estoppel because the plaintiff intended to mislead a bankruptcy court by not listing the potential value of the instant litigation (<u>Sonya Rose Lopez v. Federal Deposit Insurance Corporation</u>, No. 10-00158, N.D. Ga.; 2012 U.S. Dist. LEXIS 71743).

(**Order available.** Document #88-120625-210R.)

U.S. Judge Richard W. Story of the Northern District of Georgia granted the FDIC's motion in the suit filed by Sonya Rose Lopez.

Lopez initially sued the Bank of Hiawassee on July 15, 2009, in the Towns County, Ga., Superior Court, asserting claims of negligence and breach of contract arising from a loan she obtained from the bank to construct a hotel. On March 19, 2010, the Georgia Department of Banking and Finance closed the bank and appointed the FDIC as receiver. The state court granted the bank's motion to substitute the FDIC as defendant, and the FDIC removed the suit to the District Court on Aug. 19, 2010.

Judicial Estoppel

On Sept. 21, 2011, Lopez filed for Chapter 7 bankruptcy in the U.S. Bankruptcy Court for the Northern

District of Georgia. In her initial statement of financial affairs and amended schedules, Lopez did not disclose her participation the instant case or list her claim as a potential asset. On Feb. 3, 2012, the FDIC moved to dismiss the instant suit on the grounds that the District Court lacks subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) because of Lopez's failure to timely file a proof of claim or comply with the procedures for judicial review of a disallowed claim and her lack of standing to prosecute an unscheduled cause of action after filing for Chapter 7 bankruptcy. Alternatively, the FDIC moved that the case should be dismissed because of Lopez's failure to list the litigation "as having any value on her bankruptcy schedules."

Judge Story noted that the doctrine of judicial estoppel precludes a plaintiff from asserting a claim in a judicial proceeding that contradicts the position taken under oath in a prior proceeding, pursuant to Parker v. Wendy's Int'l Inc. (365 F.3d 1268, 1271 [11th Cir. 2004]). He said the 11th Circuit U.S. Court of Appeals in Burnes v. Pemco Aeroplex (291 F.3d [11th Cir. 2002]) adopted a two-prong test for determining whether judicial estoppel should bar a given claim. First, the prior inconsistent position must be asserted under oath, and second, the court decides whether the inconsistent statements amount to a manipulation of the judicial system.

The judge said there is no debate that Lopez's financial disclosure forms were submitted under oath to the Bankruptcy Court. He went on to find that the record supports an inference that Lopez intentionally manipulated the judicial system. Specifically, she did not disclose her claim or her status as a party to this case in her initial schedules and asset filings with the Bankruptcy Court, and she again failed to disclose her claim and the instant litigation in a set of amended schedules filed more than a month later, Judge Story said. Additionally, there are no facts in the record from which to surmise that Lopez was unaware that her claim was pending in the District Court when she filed for bankruptcy, he said.

'Intent To Mislead'

Assuming that a claim value Lopez filed with the FDIC is reasonably accurate, the value of the present litigation was double the value of her listed assets and would triple the available asset pool from which creditors could satisfy their claims, Judge Story said.

"Given these undisputed facts, the Court finds that Plaintiff had the requisite intent to mislead the bankruptcy court," Judge Story said.

Judge Story dismissed Lopez's claims with prejudice and declined to further consider whether the District Court lacks subject matter jurisdiction over Lopez's claims.

Lopez is represented by Neil Louis Wilcove of Freeman, Mathis & Gary in Atlanta. The FDIC is represented by Irene B. Vander Els, Kristen A. Yadlosky and Samuel Robinson Arden of Hartman, Simons & Wood in Atlanta.

(Additional document available. **Motion to dismiss.** Document #88-120625-211M.) ■

FDIC Can Intervene In Suit Against Failed Banks' Former Officers

INDIANAPOLIS — A federal magistrate judge in Indiana on June 1 granted the Federal Deposit Insurance Corp.'s motion to intervene in a suit in which the Chapter 7 trustee of a failed bank alleges that the bank's former senior officers breached their fiduciary duties (Elliott D. Levin v. William I. Miller, et al., No. 11-01264, S.D. Ind.; 2012 U.S. Dist. LEXIS 76231).

(**Order available.** Document #88-120625-242R.)

U.S. Magistrate Judge Tim A. Baker of the Southern District of Indiana granted the FDIC's motion to intervene in the suit Eliott D. Levin, the Chapter 7 trustee for failed bank Irwin Financial Corp. (IFC), filed against the bank's former CEO William I. Miller, former Chief Financial Officer and Senior Vice President Gregory F. Ehlinger and former CFO, Senior Vice President and Executive Vice President Thomas D. Washburn.

IFC filed for bankruptcy protection on Sept. 18, 2009, after regulators closed its banks and appointed the FDIC as receiver. The trustee filed the suit on Sept. 16, 2011, bringing counts for breach of duty of care and breach of duty of loyalty. On Dec. 7, the

defendants moved to dismiss, arguing that the trustee lacks standing because his claims belong exclusively to the FDIC pursuant to 12 U.S. Code Section 1821. On March 28, the FDIC moved to intervene as a party, asserting that it has exclusive ownership of the trustee's claims.

Motion Was Timely

Pursuant to Federal Rule of Civil Procedure 24(a)(2), the party seeking intervention of right must show that the motion was timely, that the party possesses an interest related to the subject matter of the action, that disposition of the action threatens to impair that interest and that existing parties to the action fail to represent that interest adequately, the magistrate judge said, citing United States v. BDO Seidman (337 F.3d 802, 808 [7th Cir. 2003]).

The trustee argued that the motion was not prompt because the FDIC's counsel was present at the bankruptcy proceedings that were conducted prior to the trustee filing the complaint and thus "was well aware that this action was in prospect." However, an action "in prospect," is not the same as a lawsuit in progress, the magistrate judge said. The defendants' motion to dismiss first placed the FDIC's interest at issue, and the FDIC moved to intervene only 15 days after the trustee filed a sur-reply to the motion to dismiss, the magistrate judge said. The motion is timely because the FDIC promptly moved to intervene, intervention presents minimal prejudice to the existing parties and denying the motion could result in substantial prejudice to the intervener, the magistrate judge determined.

The magistrate judge also found that the FDIC has a legitimate interest in the subject matter of the litigation, agreeing with the FDIC's argument that under the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA), the trustee's claims are derivative and belong exclusively to the FDIC.

'Not Adequately Represented'

The magistrate judge further found that the FDIC's ability to protect its interest may be impaired if it is not permitted to intervene. Impairment depends on "whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding," he said, quoting City of L.A. v. United Air Lines (No. 06-1084, N.D. Ill. [July 7, 2006]). Because the FIRREA allocates exclusive rights to the FDIC, a ruling regarding the FIRREA's impact on the trustee's claims potentially could impact the FDIC's ability to bring a claim and may otherwise adversely affect the FDIC, the magistrate judge said.

The FDIC's rights are not adequately represented by an existing party, the magistrate judge also found.

"A party seeking intervention as of right must only make a showing that the representation may be inadequate and the burden of making that showing should be treated as minimal," he said, quoting Ligas ex rel. Foster v. Maram (478 F.3d 771, 774 [7th Cir. 2007]). The FDIC argued that if permitted to intervene, it will file a motion to dismiss based on the reasons articulated in the defendants' motion to dismiss. The trustee argued that because the FDIC bases its proposed motion to dismiss on arguments already advanced in the defendants' motion to dismiss, the defendants adequately represent the FDIC's interests.

"However, the FDIC seeks dismissal of Plaintiff's claims precisely so that it may bring the same claims against Defendants," the magistrate judge said. "The FDIC is thus adverse to Plaintiff and Defendants. Consequently, the FDIC's interest in this litigation is not adequately represented by the existing parties."

Attorneys

Levin, Elizabeth M. Lally and John C. Hoard of Rubin & Levin in Indianapolis and Alfred S. Lurey, Angela N. Frazier, Susan A. Cahoon and Todd C. Meyers of Kilpatrick Townsend & Stockton in Atlanta represent Levin.

The defendants are represented by David E. Wright, James A. Knauer, Kevin Dale Koons and Steven E. Runyan of Kroger Gardis & Regas in Indianapolis.

The FDIC is represented by Byron E. Leet and John W. Woodard Jr. in Louisville, Ky., and Douglas A. Black and Robert Edgar Craddock Jr. in Memphis, Tenn., all of Wyatt Tarrant & Combs.

(Additional documents available. **Motion to intervene.** Document #88-120625-243M. **Opposition to motion to intervene.** Document #88-120625-244B.) ■

Chase Did Not Assume Liability From WaMu, Federal Judge Rules

CHARLOTTE, N.C. — A federal judge in North Carolina on June 13 granted JPMorgan Chase & Co. Inc.'s (Chase) motion to dismiss a suit arising from a loan Chase acquired from Washington Mutual Inc. (WaMu), ruling that Chase did not assume any of WaMu's liability when it purchased certain WaMu assets from the Federal Deposit Insurance Corp. (Justus A. Oketch v. JPMorgan Chase & Co. Inc., No. 12-0102, W.D. N.C.; 2012 U.S. Dist. LEXIS 81606).

(**Order available.** Document #88-120625-291R.)

U.S. Judge Graham C. Mullen of the Western District of North Carolina made the ruling in the suit Justus A. Oketch filed against Chase, dismissing the suit with prejudice.

Oketch says he bought real estate in 1981 with a $38,050 loan from the North Carolina Federal Savings and Loan Association (North Carolina Federal), extending a promissory note and a deed of trust in favor of North Carolina Federal. He says Fleet Mortgage Corp. "took over the loan," then WaMu became successor in interest as a result of its merger with Fleet. His loan was referred to a foreclosure as a result of an arrearage.

Allegations Lacking

WaMu obtained a default judgment against Oketch in 2005, in which the Mecklenburg County Superior Court found that he defaulted on the note. The plaintiff says WaMu bought his property at a Dec. 29, 2005, foreclosure sale, obtained an order of writ of possession against him on Feb. 16, 2006, and conveyed the property to the U.S. Department of Housing and Urban Development, which had partially subsidized Oketch's loan payments through the National Housing Act. HUD then sold the property to Terry Albert Smith on Oct. 6, 2006, Oketch says.

On Jan. 11, Oketch filed suit in the state court, alleging claims against Chase for breach of contract, fraud, breach of common law and statutory duties of good faith and violations of North Carolina's Unfair and Deceptive Trade Practices Act (UDTPA). Chase removed the suit to the District Court and moved to dismiss.

Judge Mullen found that Oketch's complaint lacks factual allegations demonstrating any conduct attributable to Chase, noting that a single sentence in the complaint connects Chase to the action ("For the purposes of this Complaint, all acts and omissions against Defendant's Predecessors in Interest are imputed against Defendant, and any reference to Defendant's acts or omissions is intended to include the acts and omissions of Defendant's Predecessors in Interest."). There are no allegations in the complaint that Chase engaged in any of the actions and omissions, and there are no factual allegations that would allow the District Court to find that Chase should be held liable for the actions and omissions of its predecessors, the judge said.

Res Judicata

The purchase and assumption agreement through which Chase purchased certain assets of WaMu "makes it clear that Defendant did not assume any liability that would support the instant lawsuit," Judge Mullen explained. He said courts have relied on Section 2.5 of the agreement to dismiss claims against Chase that were based on the pre-sale actions and omissions of WaMu and that he finds the reliance of other courts on Section 2.5 to be instructive.

Even if Chase was the successor in interest to North Carolina Federal, Fleet and WaMu regarding Oketch's note and deed of trust, his claims would still be barred because of the entry of judgment against him in the state court because of the doctrine of *res judicata*, Judge Mullen concluded.

Regarding the claims for breach of the covenant of good faith and violation of the UDTPA, Judge Mullen said the plaintiff alleges no additional facts to support the claims; therefore, the District Court must rely on the factual allegations to support the claims. Because the facts supporting the claims were resolved by the state court judgment and cannot be relitigated in the District Court, the claims are barred by *res judicata*.

Oketch is represented by John Francis Hanzel of Cornelius, N.C. Chase is represented by Julia Bright Hartley and Thomas G. Hooper of Nelson, Mullins, Riley & Scarborough in Charlotte.

(Additional documents available. **Motion to dismiss.** Document #88-120625-292M. **Brief in support of motion to dismiss.** Document #88-120625-293B. **Opposition to motion to dismiss.** Document #88-120625-294B. **Reply in support of motion to dismiss.** Document #88-120625-295B.) ■

Federal Judge Dismisses Most Of Suit Arising From Home Foreclosure

SAN FRANCISCO — A federal judge in California on June 18 dismissed several counts from a suit against several banks and other defendants arising from a home foreclosure because the complaint lacks sufficient specificity, among other reasons (John P. McGough v. Wells Fargo Bank NA, et al., No. 12-0050, N.D. Calif.; 2012 U.S. Dist. LEXIS 84327).

(**Order available.** Document #88-120625-317R.)

U.S. Judge Thelton E. Henderson of the Northern District of California partially granted the motions to dismiss filed by Wells Fargo Bank NA, OneWest Bank, U.S. Bank and Meridian Foreclosure Service in the suit brought by John P. McGough.

McGough borrowed $960,000 from First Federal Bank of California in 2006, and the loan was secured by a deed of trust on McGough's property in Danville, Calif. Originally, the beneficiary under the deed of trust was First Federal, and the trustee was Seaside Financial Corp. McGough alleges that at some point, his loan was securitized, with the note not being properly transferred to U.S. Bank, whom McGough alleges was the trustee for the securitized trust. In 2009, the Office of Thrift Supervision closed First Federal, and the Federal Deposit Insurance Corp. was named receiver. The FDIC then assigned its interest in the note and deed of trust to OneWest.

Debtor Files Suit

A notice of default was recorded Oct. 20, 2010, by Meridian, and Meridian was substituted for Seaside as trustee on Jan. 24, 2011, the same day a notice of trustee's sale was received by the Contra Costa County Recorder's Office. The property was sold Feb. 14, 2011, at a trustee's sale.

On Feb. 23, 2011, Miah Callahan and J. Rost Realty approached McGough with a "cash for keys" agreement, in which McGough would vacate the apartment by March 4, 2011, in exchange for an $8,000 payment. When McGough arrived to sign the contract and move out, he says, he was presented with a contract that replaced the last term before the signature line with a release of liability. McGough signed the contract and received an $8,000 check.

In his complaint, McGough brought 12 claims, six of which are at issue in the instant motions to dismiss: lack of standing, breach of contract, violation of the Truth in Lending Act (TILA), violation of California's unfair competition law (California Business and Professions Code Section 17200) and penal code Sections 115 and 532(f)(a)(4), intentional infliction of emotional distress and equitable estoppel.

Wells Fargo, U.S. Bank

In dismissing without prejudice all of McGough's claims against Wells Fargo, Judge Henderson noted that Wells Fargo argues that it is referenced individually only once in the 40-page complaint, where McGough asserts that Wells Fargo is the purported servicer of the mortgage. In making that contention, McGough references documents that do not make reference to Wells Fargo, Judge Henderson said, and Wells Fargo denies presently being, or ever having been, the servicer of the mortgage. Therefore, the judge said, the complaint as to Wells Fargo lacks sufficient specificity.

Similarly, Judge Henderson dismissed without prejudice the claims against U.S. Bank because of a lack of sufficient specificity. The complaint does not clearly allege how U.S. Bank specifically, and not as a member of a group of defendants but as an individual entity, was involved in the conduct underlying McGough's claims or even what the wrongful conduct of U.S. Bank might have been, the judge explained.

Against all the defendants, McGough alleges improper securitization, arguing that the pooling and service agreement (PSA) governing the securitized trust was violated. Therefore, the note was never properly securitized, and the defendants are not properly the beneficiaries of the securitized trust and have no enforceable rights as to the property, he argues. Judge Henderson

agreed with the defendants, who responded that McGough lacks standing to challenge any violations of the PSA. When a plaintiff is not an investor in the PSA, courts have held that the plaintiff has no standing to challenge violations of the PSA's terms, Judge Henderson said, dismissing the claims with prejudice.

Breach Of Contract

The judge went on to dismiss without prejudice the plaintiff's breach of contract claims. McGough seeks to allege breach of contract by claiming that securitization constituted an improper transfer of the note separate from its security instrument, but Judge Henderson agreed with OneWest, which pointed out that the note itself provides that it may be transferred, and furthermore, securitization is not a valid basis for bringing this cause of action.

In dismissing without prejudice McGough's cause of action for violation of the TILA, the judge agreed with the defendants' argument that McGough exceeded the applicable one-year statute of limitations to file the claim. Judge Henderson also dismissed without prejudice the plaintiff's Section 17200 claim. Because the claim sounds in fraud, it is held to the higher pleading standard of Federal Rule of Civil Procedure 9(b), the judge said. The complaint makes many specific allegations about the mortgage industry generally and makes specific allegations regarding some individuals, the judge said. "However, without linking these specifics to the conduct of OneWest and Meridian (and even Wells Fargo or U.S. Bank, if such a link can be made) the complaint fails to meet the requirements of Rule 9(b)," he said.

Judge Henderson declined dismissal of McGough's claims for intentional infliction of emotional distress, explaining that the complaint "clearly alleges conduct in bad faith, with reckless disregard for Plaintiff's potential emotional distress, as well as alleging a causative connection between the conduct involved and the effects of the distress, including lack of sleep, anxiety, depression, lack of appetite, and loss of productivity at work."

Finally, Judge Henderson denied as moot Meridian's motion to dismiss the claims specific to it.

Attorneys

McGough is represented by Patricia Renee Rodriguez of the Law Offices of Patricia Rodriguez in Pasadena, Calif. Wells Fargo is represented by Robert Arthur Bailey of Anglin, Flewelling, Rasmussen, Campbell & Trytten in Pasadena.

OneWest and U.S. Bank are represented by Anton LeBlanc Hasenkampf and Nicholas Bennett Waranoff of Allen Matkins Leck Gamble Mallory & Natsis in San Francisco.

Meridian is represented by Michael W. Burnett of Burnett in Newport Beach, Calif.

(Additional documents available: **Meridian's motion to dismiss.** Document #88-120625-318M. **Response to Meridian's motion to dismiss.** Document #88-120625-319B. **Reply in support of Meridian's motion to dismiss.** Document #88-120625-320B. **OneWest and U.S. Bank's motion to dismiss.** Document #88-120625-321M. **Response to OneWest and U.S. Bank's motion to dismiss.** Document #88-120625-322B. **Reply in support or OneWest and U.S. Bank's motion to dismiss.** Document #88-120625-323B. **Wells Fargo's motion to dismiss.** Document #88-120625-324M. **Response to Wells Fargo's motion to dismiss.** Document #88-120625-325B. **Reply in support of Wells Fargo's motion to dismiss.** Document #88-120625-326B.) ■

Federal Judge Dismisses Complaint Arising From WaMu's Pre-Failure Conduct

NEW HAVEN, Conn. — A federal judge in Connecticut on June 20 granted JPMorgan Chase Bank NA's motion to dismiss a suit in connection with a note and mortgage originally issued by Washington Mutual Bank (WaMu) because the plaintiff's claims arise from WaMu's pre-failure conduct (Harry T. Constas v. JPMorgan Chase Bank NA, No. 11-0032, D. Conn.; 2012 U.S. Dist. LEXIS 85339).

(**Order available.** Document #88-120625-333R.)

U.S. Judge Vanessa L. Bryant of the District of Connecticut granted Chase's motion to dismiss the suit Harry T. Constas filed against it.

Constas claims breach of the implied covenant of good faith and fair dealing, negligent infliction of emotional

distress, unfair trade practices, tortious interference with contractual relations and a violation of the Connecticut Unfair Trade Practices Act (CUPTA) in connection with a note and mortgage originally issued by WaMu and later sold to Chase.

Pre-Failure Conduct

Constas initially sued WaMu in the State Superior Court for the Judicial District of Stamford/Norwalk in Connecticut, and the Federal Deposit Insurance Corp., as receiver for WaMu, removed it to the District Court. On Sept. 25, 2008, the FDIC was appointed as receiver for WaMu and most of WaMu's assets and certain liabilities were transferred to Chase, including Constas' mortgage loan. The liabilities transferred to Chase expressly did not include any monetary claims arising from WaMu's pre-failure lending.

The FDIC moved to dismiss, and the District Court granted the FDIC's motion without prejudice. Constas filed an amended complaint, adding Chase as an additional defendant, and the FDIC again moved to dismiss based on lack of jurisdiction as a result of Constas' failure to properly exhaust the claims process under the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA). The District Court terminated the FDIC as a defendant and allowed the plaintiff to file another amended complaint. He filed his second amended complaint, and Chase moved to dismiss.

Chase argued that because all of Constas' claims stem from WaMu's pre-failure conduct, the claims should be asserted against the FDIC as receiver, not Chase. Chase contended that because Constas has failed to timely exhaust the administrative claims process, the District Court lacks subject matter jurisdiction.

No 'End-Around' Allowed

Judge Bryant said it is "abundantly clear" that Constas' claims arise from WaMu's pre-failure conduct of purportedly forging his mortgage and are therefore properly asserted against the FDIC, not Chase, and subject to the FIRREA's mandatory administrative claims process.

"Constas may not try to evade FIRREA's requirements by alleging that Chase should be liable for WAMU's prefailure conduct based on a conclusory allegation that Chase was made aware of WAMU's pre-failure conduct allegedly discovered after it acquired the subject loan. . . . To allow a plaintiff to do so would create an end-run around the very purpose of FIRREA's administrative claims exhaustion requirement," Judge Bryant explained.

In the alternative, Chase argued that the complaint should be dismissed under Federal Rule of Civil Procedure 9(b) for failure to plead fraud with particularity. Assuming *arguendo* that Constas' claims were not barred by the FIRREA, he has also failed to plead with particularity the circumstances constituting the alleged fraud that forms the basis of his claims, the judge said.

Constas of Greenwich, Conn., appears *pro se*. Chase is represented by Mary Elizabeth Holland and Nicole L. Barber of Hunt Leibert Jacobson in Hartford, Conn.

(Additional documents available: **Motion to dismiss.** Document #88-120625-334M. **Opposition to motion to dismiss.** Document #88-120625-335B.) ■

In Reversal, 6th Circuit Orders Return Of Forfeited Funds To Bank

CINCINNATI — Reversing a district court decision, the Sixth Circuit U.S. Court of Appeals on June 14 ruled that a bank is entitled to the proceeds of a deposit account that were seized by the government as part of a criminal forfeiture proceeding (United States of America v. Huntington National Bank, No. 10-2071, 6th Cir.; 2012 U.S. App. LEXIS 12040).

(**Opinion available.** Document #88-120625-301Z.)

The Sixth Circuit panel of Circuit Judges Eric L. Clay and Julia Smith Gibbons and U.S. Judge Edward R. Korman of the Eastern District of New York, sitting by designation, reversed the U.S. District Court for the Western District of Michigan's ruling in the suit the U.S. government filed against Huntington National Bank.

The proceeding arises out of the activities of a business, known variously as Cybernet Engineering, Cyberco Holdings and CyberNET (collectively, Cyberco),

whose principals engaged in a complex scheme to defraud dozens of lending institutions out of more than $100 million in loans and lines of credit. In 2002, Huntington granted Cyberco a multimillion dollar line of credit, and in exchange, Cyberco granted Huntington "a continuing security interest and lien" in all of Cyberco's tangible and intangible personal property and rights, including "deposit accounts." In November 2004, after discovering the fraud, the government seized approximately $4 million in Cyberco assets, including $705,168.60 from its account with Huntington (the Cyberco account).

Bank's Appeals

Several Cyberco principals were indicted on bank fraud, mail fraud and money-laundering charges. In their plea agreements, Cyberco principals Krista L. Kotlarz Watson and Paul Nathan Wright agreed to forfeit to the United States any interest identified in Count 10 of the indictment. The District Court entered a preliminary order of forfeiture on Sept. 24, 2007, with regard to the assets, including the Cyberco account.

Huntington filed a verified petition of claim, asserting that it had a right to, and a direct ownership interest in, the funds in the Cyberco account. It claimed that at the time it filed the petition, Cyberco was indebted to the bank for $926,162.57, that Cyberco had defaulted on its obligations by providing Huntington with fraudulent financial statements and by failing to make required payments and that Huntington was entitled to the funds in the account pursuant to the security agreement between the parties. The District Court found that Huntington did not have a legal right, title or interest that rendered the order of forfeiture invalid in whole or partially under 21 U.S. Code Section 852(n)(6)(A).

The bank filed a motion to alter or amend the judgment, arguing that it was entitled to relief under Section 853(n)(6)(B) because it was a *bona fide* purchaser for value (BFP) of its security interest in the funds in the Cyberco account. The District Court denied the motion, finding that Huntington waived its BFP argument by failing to raise it earlier. Huntington appealed to the Sixth Circuit, which found that Huntington had not waived his argument and remanded the issue to the District Court so it could consider the merits of Huntington's claim. The District Court again denied the bank's claim, finding that the term "*bona fide* purchasers" was a legal term of art that should not be given an unnatural meaning for the purpose of Section 853(n)(6)(B). It held that Huntington was not a BFP of the Cyberco account and reaffirmed the final order of forfeiture.

Huntington then filed the instant appeal with the Sixth Circuit, arguing that because it purchased a valid security interest in all of Cyberco's assets by extending a line of credit and loans to Cyberco and because it was unaware of Cyberco's fraud until the funds in the account were seized, Huntington is a BFP of the security interest in the account under Section 853(n)(6)(B). The bank asserts that is therefore entitled to the return of the forfeited proceeds from the account.

Bona Fide Purchaser

The panel noted that the criminal forfeiture statute, Section 853(c), provides that all right, title and interest in property subject to forfeiture "vests in the United States upon the commission of the act giving rise to forfeiture under the section." At issue in this case is the second exception to Section 853(c), which in Section 853(n)(6)(b) provides that property cannot be forfeited if "the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section."

The panel said that Huntington is correct that it is well established that one who takes a security interest in property in exchange for antecedent debt, as the bank did, can be a BFP of that property interest. The panel said that the government's position that creditors cannot be BFPs under the BFP exception is without merit. Because Huntington through its security agreement with Cyberco had a secured interest in the forfeited property and not simply a common-law or statutory right of setoff, Huntington is eligible to claim protection under the BFP exception, the panel said.

After finding that Huntington is able to claim protection under the BFP exception, the panel turned to the question of whether Huntington actually qualifies as a BFP for value under Section 853(n)(6)(B). Huntington asserts that it purchased its security interest in the Cyberco account and was ignorant of the potential forfeiture of the account. Therefore, Huntington contends that it is a BFP of its security interest in the

account, and because Cyberco owed Huntington more than the value of the account, Huntington's interest attached to the entire proceeds of the account. The panel agreed.

The panel directed the District Court to amend the order of forfeiture in accordance with the panel's analysis.

Attorneys

The United States is represented by Assistant U.S. Attorneys Matthew G. Borgula and Joel S. Fauson of the U.S. Attorney's Office in Grand Rapids, Mich.

Huntington is represented by Jeffrey O. Birkhold and Gaetan E. Gerville-Reache of Warner, Norcross & Judd in Grand Rapids, Mich.

(Additional documents available: **Appellant brief.** Document #88-120625-302B. **Appellee brief.** Document #88-120625-303B. **Appellant reply brief.** Document #88-120625-304B.) ■

Citibank Escapes Suit Arising From Rejection Of Loan Application

GREENBELT, Md. — A federal judge in Maryland on June 21 dismissed a suit in which a plaintiff asks for $7 million in damages from Citibank NA for alleged violations related to the bank's rejection of his loan application, finding that the plaintiff's allegations for fraud and negligence do not meet the relevant pleading standards (Daniel Ford v. Citibank NA, No. 11-3578, D. Md.; 2012 U.S. Dist. LEXIS 86199).

(**Opinion available.** Document #88-120625-339Z.)

U.S. Judge Roger W. Titus of the District of Maryland granted Citibank's motion to dismiss the suit Daniel Ford filed against the bank.

Ford alleges that he is a personal, business and merchant services customer of Citibank. He says that in July 2011, he applied for a $100,000 line of credit with Citibank. He says Citibank banker Juan Valdez made numerous false statements concerning the status of the loan before denying the loan. Ford alleges that Citibank branch manager Michael Freeman informed him on Aug. 29, 2011, that Freeman "threw the application in the basket to be shredded." The plaintiff also says he filed a second application that day, to which he has not received a response.

Deficient Fraud Pleading

Ford filed a *pro se* complaint, contending that he is entitled to damages because Citibank acted fraudulently and negligently during the loan application process. He also claims that the bank violated unspecified federal laws. He says he is owed $7 million in damages. Citibank moved to dismiss for failure to state a claim upon which relief can be granted, contending that Ford's one-paragraph complaint fails to supply the requisite supporting detail needed to satisfy the heightened pleading standard for fraud under Federal Rule of Civil Procedure 9(b). The bank also argued that Ford offered no detail to support the elements of a negligence claim and failed to reference the federal law Citibank allegedly violated. Ford filed a response, offering new factual details, exhibits and legal arguments. The bank filed a reply, saying the new allegations are outside the pleadings and can't cure the defects of the complaint.

Judge Titus noted that Ford alleges that Valdez made "numerous false statements regarding the status of [the] loan" and told Ford that the loan was denied when it was actually discarded. Beyond these allegations, Ford fails to offer any factual allegations relating to his reliance on Valdez's statements, nor has Ford alleged that Valdez's statements were made with the purpose of defrauding Ford, Judge Titus determined. Additionally, Ford does not allege any details to suggest that Valdez knew that the statements were false or that Valdez was recklessly indifferent to the truth, the judge said. Further, Ford offered no allegations relating to how the statements resulted in damages beyond claiming that the bank's acts "cost me years of damages as well as damages to many of my business partners." Thus, the plaintiff has failed to meet the Rule 9(b) pleading standard for fraud.

No Fiduciary Duty

The judge went on to dismiss Ford's negligence claim pursuant to Rule 12(b)(6). Under Maryland law, a bank does not owe a fiduciary duty to a customer, absent an

agreement to the contrary, Judge Titus said, citing Kuechler v. Peoples Bank (602 F. Supp. 2d 625, 633-34 [D. Md. 2009]).

Ford failed to plead that the bank breached or even owed a duty to him, the judge said. The parties were not in a contractual relationship; Ford was only applying for a line of credit, Judge Titus noted. Citibank was under no duty to give Ford a loan, and thus the negligence claim cannot be cured by amendment, the judge said, adding that Ford also failed to allege any details regarding how the bank's conduct proximately caused his losses.

Judge Titus also dismissed the federal law claim, saying that "[b]eyond [the] bald assertion" that the bank's disposal of his loan application was a violation of federal law, the complaint does not identify what law Citibank has violated, nor has Ford alleged how he has been damaged by Citibank's supposed violation. Such allegations, "wholly lacking in factual or legal support," fail to meet the pleading standard under Rule 12(b)(6).

Leave To Amend

Judge Titus said he recognizes that *pro se* plaintiffs should be afforded greater leeway in pleading matters, but because it is clear that Ford cannot cure his claims of fraud and negligence by amending the complaint, he granted Citibank's motion to dismiss for failure to state a claim with prejudice. However, he said Ford's federal law claim "is not so facially inapplicable that an amended complaint would futile" and granted the motion to dismiss this claim without prejudice.

The judge also denied Ford's motion to appoint counsel, saying Ford "has demonstrated the wherewithal to either articulate the legal facts and factual basis of his claims himself or secure meaningful assistance in doing so," noting that the pending issues "are not unduly complicated and no hearing is necessary to the disposition of this case."

Ford of Riverdale, Md., appears *pro se*. Citibank is represented by Virginia Wood Barnhart of Treanor Pope and Hughes in Towson, Md.

(Additional documents available: **Motion to dismiss.** Document #88-120625-340M. **Response to motion to dismiss.** Document #88-120625-341B. **Reply in support of motion to dismiss.** Document #88-120625-342B.) ■

4th Circuit Remands Student Loan Suit For 'State Agency' Analysis

RICHMOND, Va. — The Fourth Circuit U.S. Court of Appeals on June 18 vacated and remanded the dismissal of a complaint alleging that state-created student loan corporations defrauded the U.S. Department of Education, explaining that a district court did not employ the proper analysis to determine whether each of the defendants is a state agency subject to suit under the False Claims Act (FCA) (United States of America ex rel. Jon H. Oberg v. Kentucky Higher Education Student Loan Corp., et al., No. 10-2320, 4th Cir.; 2012 U.S. App. LEXIS 12290).

(**Opinion available.** Document #88-120625-313Z.)

The Fourth Circuit panel of Chief Judge William B. Traxler Jr. and Circuit Judges Diana Gribbon Motz and Barbara Milano Keenan reversed and remanded the U.S. District Court for the Eastern District of Virginia in the suit filed by Dr. Jon H. Oberg.

On behalf of the United States, Oberg sued the Kentucky Higher Education Student Loan Corp., Pennsylvania Higher Education Assistance Agency, Vermont Student Assistance Corp. and Arkansas Student Loan Authority (the appellees), as well as other defendants not parties to the appeal, under the FCA. Each appellee was created by its respective state and operates with varying degrees of control by and support from its respective state.

'Persons' Under FCA

Oberg asserts that the appellees knowingly made fraudulent claims to the Department of Education by engaging in various noneconomic transactions to inflate their loan portfolios eligible for special allowance payments (SAP), a federal student loan interest subsidy. As a result, the Department of Education overpaid millions of dollars of SAP to the appellees, according to Oberg. Each appellee moved to dismiss the complaint contending that it was a "state agency," and thus, under Vermont Agency of Natural Resources v. United States ex rel. Stevens (529 U.S., 787-88 [2000]), was not a "person" that could be sued under the FCA. The District Court agreed, dismissing the complaint. The District Court did not apply any stated legal test and instead primarily looked to state statutory provisions,

which, in the District Court's view, demonstrated each entity's status as a "state agency," the panel said. Oberg appealed to the Fourth Circuit.

The panel said the appeal presents the questions of whether each of the appellees constitutes a "person" subject to liability under the FCA. The FCA provides a cause of action against "any person" who undertakes certain fraudulent behavior, including "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval" to an officer, employee or agent of the United States.

The relevant provisions of the FCA do not define the term "person," but the U.S. Supreme Court "has provided helpful guidance on this question," the panel said. In Stevens, the Supreme Court concluded that the Vermont Agency of Natural Resources, a state agency, could not be sued under the FCA, holding that "the False Claims Act does not subject a State (or state agency) to liability." In Stevens, the Supreme Court noted that "the presumption with regard to corporations is just the opposite of the one governing here" and explained that corporations "are presumptively covered by the term 'person.' " Three years later, in Cook County v. United States ex rel. Chandler (538 U.S. 119 [2003]), the Supreme Court held that unlike states and state agencies, municipal corporations are "persons" subject to *qui tam* suits under the FCA.

Arguments On Appeal

On appeal, Oberg, relying on Chandler, argued that any corporation, regardless of its association with a state, is "a legal personality independent of 'the State' " and, therefore, a "person" for purposes of the FCA. Because each appellee is a corporation, Oberg argued that each is a proper FCA defendant. "Such a broad rule—rendering every corporation, no matter how close its relationship to a state, a 'person' for FCA purposes—appears inconsistent with *Stevens*' express holding that the term 'person' in the FCA does *not* include any state or state agency," the panel reasoned.

The appellees argued that under Stevens, they are not FCA defendants because they are state agencies. They said Chandler "concluded only that local governments, unlike States and State agencies, are persons under the FCA," and because they are not local government entities, Chandler does not apply to them.

"But nothing in *Stevens* suggests that the fact that a state legislature or a state court labels a corporation a state agency immunizes that corporation from suit under the FCA," the panel said. "Nor is *Chandler* as narrow as appellees suggest. Although a municipal corporation was sued there, the Court's discussion of the personhood of corporations makes clear the historical significance of corporate status."

Proper Analysis

To determine if the appellees are subject to suit under the FCA, the critical inquiry is neither whether they are corporations with "independent legal personalities," as Oberg contends, nor whether they have been denominated "state agencies" by legislatures or courts, as the appellees appear to contend, the panel said. Rather, the critical inquiry is whether the appellees are truly subject to sufficient state control to render them a part of the state, and not a "person," for FCA purposes.

The panel said that several of its sister courts have recognized that the arm-of-the-state analysis used in the 11th Amendment context provides the appropriate legal framework for this inquiry. This is the case because, although the question of whether an entity is a proper FCA defendant is one of statutory rather than constitutional interpretation, there is a "virtual coincidence of scope" between the statutory inquiry under the FCA and the 11th Amendment sovereign immunity inquiry, the panel said. Therefore, a court should employ the 11th Amendment arm-of-the-state analysis in determining if an entity is properly regarded as the state or an agency of the state and, as a result, not subject to suit under the FCA, the panel said.

Attorneys

Oberg is represented by Christopher Michael Mills in McLean, Va., and Brendan John Morrissey, Bert Walter Rein and Michael Lee Sturm in Washington, D.C., all of Wiley Rein.

The Kentucky Higher Education Student Loan Corp. is represented by Thomas Leo Appler and Rocklan William King III of Wilson, Elser, Moskowitz, Edelman & Dicker in McLean.

The Pennsylvania Higher Education Assistance Agency is represented by Jason Lee Swartley of the Pennsylvania Higher Education Assistance Agency in Harrisburg, Pa., Joseph Paul Esposito in Washington and Jill Marie

deGraffenreid in McLean, both of Hunton and Williams, and Daniel B. Huyett in Reading, Pa., and Neil Coleman Schur in Philadelphia, both of Stevens & Lee.

The Vermont Student Assistance Corp. is represented by Megan Conway Rahman and John Stone West of Troutman Sanders in Richmond.

The Arkansas Student Loan Authority is represented by N. Thomas Connally III and Thomas Michael Trucksess of Hogan Lovells in McLean and Dennis R. Hansen, Dustin McDaniel and Mark Nicholas Ohrenberger of the Arkansas Office of the Attorney General in Little Rock, Ark.

(Additional documents available. **Appellant brief.** Document #88-120625-314B. **Appellee brief.** Document #88-120625-315B. **Appellant reply brief.** Document #88-120625-316B.) ■

Wells Fargo's Counterclaim Survives In Student Loan Bond Remarketing Suit

ST. LOUIS — A federal judge in Missouri on June 19 denied dismissal of Wells Fargo Bank NA's counterclaim in a suit in which a student loan servicer says the bank, as the trustee of bonds the loan servicer issued to finance student loans, caused it to pay excessive interest on the remarketed bonds (Higher Education Loan Authority of the State of Missouri v. Wells Fargo Bank NA, No. 10-1230, E.D. Mo.; 2012 U.S. Dist. LEXIS 84578).

(**Opinion available.** Document #88-120625-327Z.)

U.S. Judge John A. Ross of the Eastern District of Missouri denied the bank's counterclaim in the suit Higher Education Loan Authority of the State of Missouri (MOHELA) filed against it.

In 2005 and 2006, MOHELA issued $383 million of variable rate demand bonds to finance and purchase student loans, and the bonds and related assets were placed in a trust (the 2005 trust), with Wells Fargo being named trustee. The bonds were secured by a bond insurance policy issued by the MBIA Insurance Corp. and a "liquidity facility" provided by Depfa Bank, and bonds tendered by investors would then be held by Depfa as "liquidity provider bonds" and resold by designated remarketing agents.

Sale Of Remarketed Bonds

When the financial and credit crisis began in late 2007, investors began to tender their bonds for repurchase, and by July 2008, Depfa had purchased all of the bonds and held them as liquidity provider bonds. On Feb. 18, 2009, MBIA's rating was downgraded, which, according to Depfa, was an event of default and an automatic termination of its liquidity facility. MOHELA says that as a trustee, Wells Fargo knew or should have known about the downgrading of MBIA. In April 2009, MOHELA learned that a Wachovia remarketing agent was remarketing $40 million of the bonds at 8.08 percent, while other remarketing agents set their interest rate for MOHELA bonds considerably lower. MOHELA alleges that neither Wells Fargo nor the Wachovia remarketing agent sought to verify whether the liquidity facility was in place at this time.

Over MOHELA's objection, the sale of the remarketed bonds closed April 13, 2009, and Wells Fargo released the liquidity provider bonds it held in the 2005 trust to an unnamed purchaser. MOHELA claims that as a result of Wells Fargo's actions, it was damaged by having to pay excessive interest on the remarketed bonds as well as delays in efforts to refinance the 2005 trust. Wells Fargo counterclaimed based on certain indemnification provisions of the 2005 trust, alleging that if it is found liable for any loss, liability or expense in connection with this lawsuit incurred within negligence, willful misconduct or bad faith, it is entitled to payment and/or reimbursement.

In its motion to dismiss Wells Fargo's counterclaim, MOHELA argues that the counterclaim must be dismissed because the 2005 trust does not expressly require MOHELA to indemnify Wells Fargo for its wrongful conduct as alleged in the amended complaint and because Wells Fargo has failed to allege compliance with the notice requirements of the indemnification provisions.

Plausible Claim

Judge Ross found that Wells Fargo has stated a plausible claim for indemnification given the plain language of the indemnification provisions. Contrary to MOHELA's argument, Wells Fargo is not seeking indemnification for its own negligence, the judge said.

"At this stage of the litigation, without more development of the facts, the Court cannot find Wells Fargo's contractual indemnification claim is precluded as a matter of law," Judge Ross said. "The issue of proof is not before the Court at this time and the Court's review is limited to the sufficiency of the allegations. Wells Fargo's pleadings, viewed in a light most favorable to Wells Fargo, show it has pled a plausible contractual indemnification claim."

MOHELA is represented by Kevin Anthony Sullivan and John Gianoulakis of Kohn and Shands in St. Louis. Wells Fargo is represented by Adam S. Hochschild and Jeffrey J. Kalinowski of Bryan Cave in St. Louis and Mili Joseph of Tabet Divito & Rothstein in Chicago.

(Additional documents available: **Counterclaim.** Document #88-120625-328C. **Motion to dismiss counterclaim.** Document #88-120625-329M. **Brief in support of motion to dismiss counterclaim.** Document #88-120625-330B. **Opposition to motion to dismiss counterclaim.** Document #88-120625-331B. **Reply in support of motion to dismiss counterclaim.** Document #88-120625-332B.) ■

Federal Judge Vacates Summary Judgment In Student Loan Suit

SAN ANTONIO — In a suit in which the United States sued a defendant to recover a student loan debt, a federal judge in Texas on June 1 granted the defendant's motion to vacate a summary judgment that was granted in favor of the government, ruling that the defendant's failure to respond to the motion was excusable neglect (United States of America v. David P. Schafer, No. 11-00802, W.D. Texas; 2012 U.S. Dist. LEXIS 76334).

(**Order available.** Document #88-120625-245R.)

U.S. Judge Xavier Rodriguez of the Western District of Texas granted David P. Schafer's motion in the suit the government filed against him.

The United States sued Schafer on Sept. 27 to recover money he owed under federally guaranteed student loans. On Jan. 10, with Schafer's written consent, the government filed an amended complaint; Schafer did not file an answer. The government filed a motion for summary judgment on April 2; Schafer's response was due April 16. Schafer did not file a response, and Judge Rodriguez granted the motion for summary judgment on April 19.

Motion To Vacate

On April 18, Schafer filed the motion to set aside the judgment. His counsel states that he knew about the due date but that a miscommunication with his assistant led to the date being improperly calendared for April 20, causing Schafer to fail to file a timely response. Additionally, Judge Rodriguez said the docket clerk inadvertently originally docketed the order as denying the motion but later corrected it. Schafer says he did not learn that the motion had been granted until April 25.

To be entitled to an order vacating summary judgment and permitting the defendant to respond to the plaintiff's motion for summary judgment, the defendant must offer evidence that would create a question of material fact, Judge Rodriguez said. Because the District Court, in granting the motion for summary judgment, previously found that the government met its burden in establishing that there was no genuine issue of material fact, Schafer must "go beyond the pleadings" and designate "specific facts" in the record "showing that there is a genuine issue for trial," the judge said, quoting Adams v. Travelers Indem. Co. (465 F.3d 156, 164 [5th Cir. 2006]).

Schafer argued that he has several meritorious defenses to liability for the student loans and that not granting the relief requested would deprive him of justice because he could be saddled with significant debt he says he does not owe. He said he has continuously maintained that he does not owe all or part of the debt claimed by the United States, arguing that $4,000 in payments that he made were not properly credited and that he was previously involved in a separate suit where the accounts claimed by the government were already paid.

Minimal Danger Of Prejudice

Because Schafer appears to have some summary judgment evidence that could raise an issue of material fact, Judge Rodriguez addressed whether the neglect in not timely responding was otherwise excusable as to justify relief under Federal Rule of Civil Procedure 60(b)(1). He turned to the excusable neglect test articulated in

Pioneer Inv. Servs. Company v. Brunswick Assoc. Ltd. P'ship (507 U.S. 380, 395 [1993]).

Regarding the danger of prejudice to the opposing party factor of the Pioneer test, Schafer argued that there would be no prejudice to the government from vacating the order because the judgment is only about a month old. Schafer further argued that the parties have substantially completed discovery and could be ready for trial quickly or the government could refile its motion for summary judgment. He further noted that a suit filed by the United States is exempt from scheduling orders and that no trial has been set, so no deadlines would have to be changed. The government responded that it would have to incur expense to file a release of its abstract of judgment and also that the current assistant U.S. attorney will soon be retiring and her replacement will have little time to get up to speed on the case.

Judge Rodriguez found that the danger of prejudice to the government from allowing Schafer to respond to the motion for summary judgment is "minimal." The judge said the District Court already found that the government met its burden in proving there was no genuine issue of material fact, and allowing Schafer an opportunity to present contradictory evidence will not cause prejudice. Also, the defendant can be ordered to pay the government's cost to release the abstract of judgment.

Good Faith

Regarding the second factor of the Pioneer test, Judge Rodriguez found that there was no undue delay in the case because Schafer filed the motion for relief from the judgment shortly after the government filed its abstract of judgment.

With respect to the third Pioneer factor, Schafer argued that he is not responsible for the delay because his attorney and assistant are responsible. The government responded that the assistant's error in calendaring the due date was a mistake but said Schafer's attorney also erred because he knew that the deadline should have been 14 days, regardless of the date entered on the calendar. The government said the case is analogous to United States v. Little (116 F.R.D., 152, 153-154 [W.D. N.C. 1987]), where the court did not find excusable neglect when a defendant failed to file a response due to being involved in a jury trial and having been called for jury duty. However, because the trial court is granted wide discretion in granting or denying Rule 60(b) motions and because the decision should be based on equitable considerations, Judge Rodriguez said, the reason for the delay here can constitute excusable neglect.

Regarding the final Pioneer factor, both parties agreed that the movant acted in good faith. "The Court agrees that Defendant appears to have acted in good faith," Judge Rodriguez said. "Defendant has been actively involved in the case, other than not responding to the Amended Complaint, and the failure to respond to the motion for summary judgment appears to be a simple human error."

Judge Rodriguez reinstated the government's motion for summary judgment as a pending motion and gave Schafer until June 13 to file a response.

Attorneys

The government is represented by Assistant U.S. Attorney Susan B. Biggs in San Antonio.

Schafer is represented by Brian T. Trenz of the Law Offices of David Schafer in San Antonio.

(Additional documents available. **Motion to set aside judgment.** Document #88-120625-246M. **Response to motion to set aside judgment.** Document #88-120625-247B.) ■

Student Loan Due Process Suit Against Government Survives

BALTIMORE — A federal judge in Maryland on June 1 allowed a suit to continue in which a *pro se* plaintiff says the U.S. Department of Education (DOE) violated his due process rights when it applied his federal income tax refunds to his student loan debt (Edward G. Shlikas v. United States Department of Education, No. 09-02806, D. Md.; Dist. LEXIS 76557).

(**Opinion available.** Document #88-120625-253Z.)

U.S. Judge William D. Quarles Jr. of the District of Maryland denied the DOE's motion for summary judgment in the suit Edward G. Shlikas filed against it.

Between January 1989 and December 1996, Shlikas obtained five student loans for a total of $29,125, which he has failed to pay. Sallie Mae Inc. (SLM) is the service agent for all of the loans. Three of the loans were guaranteed by United States Aid Funds (USAF), and the other two were granted by Great Lakes Higher Education Guarantee Corp. The DOE reinsured all of the loans. After Shlikas defaulted on the loans, USAF and Great Lakes sent him letters notifying him that the DOE would request that the Department of Treasury (DOT) offset his loan debt against any federal payments, including income tax refunds, that he was entitled to receive in the future. Both letters explained how to avoid offset by making payment arrangements and explained his rights to review documents about his loans, object to the amount or existence of the loan and have the guarantor review his objections. The letters also notified Shlikas about his right to request a hearing.

DOE Hearing

On April 10, 2008, Shlikas mailed Great Lakes and USAF an objection to any offset demands for an "in-person hearing and trial by jury" in "an Article III court," "a Maryland State Court" and "the Circuit Court for Baltimore County"; and a request to review documents about his loans and the guarantors' hearing procedures. Neither Great Lakes nor USAF responded. On May 8, 2008, the DOT notified Shlikas that it had applied his $600 2007 tax refund to his debt, and on April 24, 2009, the DOT notified him that the same had been done with his 2008 tax refund of $1,541.

Shlikas filed a complaint against SLM and the DOE in the Baltimore County District Court, alleging that the offsets violated his due process rights under the U.S. Constitution and the Maryland Declaration of Rights. The defendants removed the suit to the federal court. On Dec. 2, 2009, Great Lakes assigned Shlikas' accounts to the DOE. On Aug. 25, 2010, the federal court quashed service on SLM and denied the DOE's motion for summary judgment because Shlikas had attempted to serve it by delivering the summons and complaint to Sallie Mae's attorney and mailing them to a Sallie Mae office in Virginia. The federal court held that summary judgment was not appropriate because there was no evidence "that Shlikas's objections and requests for documents were considered or that he was advised of a decision on those matters."

In 2011, the DOE garnished 15 percent of Shlikas' wages to cover some of the debt. On Aug. 2, 2011, USAF assigned his loans to the DOE, and later that month, the DOE stopped garnishing Shlikas' wages, granted him a hearing and allowed him to file objections to the tax refund offsets. On Nov. 28, 2011, the DOE concluded that Shlikas' "evidence did not support [his] objection [to the tax refund offsets, and] this debt is enforceable by garnishment." However, because Shlikas was suing the DOE, the DOE did not resume garnishing his wages.

Right To Be Heard

On Dec. 13, 2011, the DOE moved for summary judgment, arguing that the Nov. 28 DOE decision satisfied the Administrative Procedure Act standard for setting aside unlawful agency actions. Shlikas opposed, arguing that there were disputes of material fact and that the Nov. 28 DOE decision did not address his due process claim and violated his right to procedural due process.

The DOE contended that, as a matter of law, it did not deprive Shlikas of property in 2007 because the guarantors, not the DOE, held the debt and instituted the Treasury Offset Program (TOP) referral. However, even if the DOE did not own the loans in 2007, it would not be entitled to summary judgment on that ground, Judge Quarles said. Only the DOE could refer Shlikas' debt to TOP, and the DOE was responsible for ensuring that Shlikas received the opportunity to be heard on the referral and for protecting his right to procedural due process as required by the regulations, the judge said. That the DOE acquired the debt after it was referred to TOP does not absolve it for complying with due process, he said.

The DOE further contended that the Nov. 28 DOE decision, as well as its March 2012 denial of reconsideration, afforded Shlikas all the procedural rights to which he was entitled and made up for any lost protections in 2007. Judge Quarles disagreed, noting that an after-the-fact hearing does not correct a deprivation of the right to be heard before property is taken.

Shlikas of Baltimore appears *pro se*. The DOE is represented by Larry D. Adams and Rod J. Rosenstein of the Office of the U.S. Attorney in Baltimore.

(Additional documents available. **Motion for summary judgment.** Document #88-120625-254M. **Response to motion for summary judgment.**

Document #88-120625-255B. **Reply in support of motion for summary judgment.** Document #88-120625-256B.) ■

Student Loan Debtor's Third-Party Complaint Against State Agency Fails

GREENBELT, Md. — A federal judge in Maryland on June 11 granted summary judgment in favor of the Pennsylvania Higher Education Assistance Agency (PHEAA) on a third-party complaint filed by a defendant student loan debtor who alleges that her loans are in default as a result of PHEAA's fraud and breach of contract (United States of America v. Cynthia Allen-Williams, No. 11-1001, D. Md.; 2012 U.S. Dist. LEXIS 80338).

(**Opinion available.** Document #88-120625-282Z.)

In addition to granting PHEAA's motion on Cynthia Allen-Williams' third-party complaint, U.S. Judge J. Frederick Motz of the District of Maryland also granted the federal government's motion for summary judgment in the suit it filed against her.

The government sued Allen-Williams on behalf of the U.S. Department of Health and Human Services (HHS) seeking repayment of federal Health Education Assistance Loans (HEAL) allegedly in default. She then filed a third-party claim against PHEAA.

Time-Barred Claims

HHS seeks $81,005.82 plus interest and filing fees. Allen-Williams seeks $708,000 in compensatory damages, plus interest and punitive damages, averring that damages arose in 2005 with the sale of her HEAL loans but that she was not made aware of the sale until meeting with HHS attorneys in 2010. She contends that PHEAA's sale of her loans was fraudulent because she had been granted forbearance and was therefore not in default. The sale of her loans constituted a breach of the forbearance agreement, she contends.

Ruling on PHEAA's motion for summary judgment, Judge Motz said that if Allen-Williams knew in 2005 that HHS held her loans because of alleged default, or if she was aware that transfer to HHS is a consequence of default, she would have been on notice of the default status of her loans, and her claims against PHEAA would now be time-barred. The judge said it is dispositive that Allen-Williams had actual or constructive notice of PHEAA's alleged fraud and breach of contract by 2006 at the latest, and she did not assert her claim until 2011. Her claims against PHEAA are therefore time-barred, he determined.

Regarding the United States' complaint, Allen-Williams argued that the United States should have to recover against PHEAA because PHEAA fraudulently sold her debt in violation of the alleged forbearance agreement. Judge Motz said that Allen-Williams had not proven that her affirmative defenses are legally sufficient to survive summary judgment, pursuant to United States v. Ogawa (No. 93-20375, N.D. Calif. [March 23, 1994]). It is undisputed that Allen-Williams signed the promissory notes and received the HEAL loans, and it is also clear that HHS held her loans as of January 2005 and that she has not repaid the debt, he said.

"Williams asserts that these loans were in forbearance and should therefore never have been transferred to the federal government, but the record reflects no evidence that Williams received a forbearance on her HEAL loans in 2004 or 2005," Judge Motz said. "Having failed to pay on loans for which she did not receive a forbearance, Williams' loans entered default status and, per the terms of the promissory notes she admits she signed, were transferred to the federal government for collections. Accordingly, Williams must repay HHS. The United States' motion for summary judgment is therefore granted."

Attorneys

The United States is represented by Thomas F. Corcoran and Rod J. Rosenstein of the Office of the U.S. Attorney in Baltimore. Allen-Williams of Upper Marlboro, Md., appears *pro se*.

PHEAA is represented by James John Jarecki of PHEAA in Harrisburg, Pa., and Thomas J. Sippel and William David Day of Gill Sippel and Gallagher in Rockville, Md.

(Additional documents available: **United States' motion for summary judgment.** Document #88-120625-283M. **Opposition to United States' motion**

for summary judgment. Document #88-120625-284B. **Reply brief in support of United States' motion for summary judgment.** Document #88-120625-289B. **PHEAA's motion for summary judgment.** Document #88-120625-285M. **Brief in support of PHEAA's motion for summary judgment.** Document #88-120625-286B. **Opposition to PHEAA's motion for summary judgment.** Document #88-120625-287B. **Reply brief in support of PHEAA's motion for summary judgment.** Document #88-120625-288B.) ■

Guaranty Agency Not Subject To Debt Collection Statute, Federal Judge Rules

BATON ROUGE, La. — A federal judge in Louisiana on June 14 dismissed a suit seeking damages from the Educational Credit Management Corp. (ECM) arising from its actions in attempting to collect student loan debt because the ECM is not a "debt collector" as defined by the Fair Debt Collection Practices Act (FDCPA) (Harold Lasserre Jr. v. Educational Credit Management Corp., No. 12-0091, M.D. La.; 2012 U.S. Dist. LEXIS 83043).

(**Opinion available.** Document #88-120625-305Z.)

U.S. Judge James T. Trimble Jr. of the Middle District of Louisiana granted the ECM's motion to dismiss the suit Harold Lasserre Jr. filed against it, dismissing the case with prejudice.

Lasserre asserts a claim for damages for ECM's alleged violations of the FDCPA, which prohibits debt collectors from engaging in abusive, deceptive and unfair practices. ECM is a fiduciary of the U.S. Department of Education which collects on defaulted student loans. Lasserre says that after defaulting on his loans, he agreed to pay $10 per month out of his bank account as part of a rehabilitation program, and in return ECM agreed that it would not seize his federal income tax refund. He says the ECM failed to make the second $10 withdrawal from his bank account, which resulted in a seizure of his tax refund. He asserts that ECM violated numerous FDCPA provisions and seeks damages for stress, humiliation, anxiety, extreme mental anguish and suffering and emotional distress.

Fiduciary Exception

ECM argued that it is not a debt collector as defined by the FDCPA and/or that it is specifically exempt from the FDCPA.

Judge Trimble agreed. He noted that the ECM is a nonprofit organization that has an agreement with the secretary of Education and helps to administer the Federal Family Education Loan Program (FFELP), under which student loans are guaranteed by either a state agency or nonprofit organization, such as guaranty organizations like the ECM. Additionally, the 11th and Ninth Circuits have recognized that the ECM is a guaranty agency, Judge Trimble said. Guaranty agencies acting in their fiduciary capacity to the Department of Education fall within the "fiduciary" exception of the FDCPA, the judge said.

"The principle purpose of a guaranty agency is to provide a guarantee to the lender and to assist in the administration of the FFELP," Judge Trimble explained. "[ECM] is a guaranty agency which operates pursuant to the regulations of the FFELP and is excepted form the FDCPA's definition of 'debt collector' because it is an entity attempting to collect on the debt of another under a bona fide fiduciary obligation."

Lasserre is represented by Garth Jonathan Ridge in Baton Rouge. ECM is represented by Paul N. DeBaillon of DeBaillon & Miley in Lafayette, La.

(Additional documents available: **Motion to dismiss.** Document #88-120625-306M. **Brief in support of motion to dismiss.** Document #88-120625-307B.) ■

9th Circuit Affirms Dismissal Of Suit Arising From Accessing Credit Report

SAN FRANCISCO — The Ninth Circuit U.S. Court of Appeals on May 24 affirmed the dismissal of a plaintiff's Fair Credit Reporting Act (FCRA) claims regarding her closed Kohl's Department Stores Inc. credit card account, finding that the defendants were not "objectively unreasonable" in accessing her credit report (Kamlesh Banga v. Experian Information Solutions, et al., No. 10-15913, 9th Cir.; 2012 U.S. App. LEXIS 10516).

(**Unpublished opinion available.** Document #88-120625-212Z.)

In an unpublished opinion, Circuit Judges William C. Canby Jr., Susan P. Graber and Milan D. Smith affirmed the U.S. District Court for the Northern District of California's granting of summary judgment in favor of Kohl's and Experian Information Solutions Inc. in the suit Kamlesh Banga filed against them.

Banga filed the suit in 2008. She said that on Jan. 28, 2007, she requested that Kohl's close her credit card account, and a few days later she received conformation from Kohl's that it had been closed. She alleged that Experian violated the FCRA when it sold her credit report to former creditors with whom she longer had an account for "account review." Experian further violated the FCRA when it repeatedly sold Banga's credit report for promotional purposes because her consumer file was permanently excluded from all preapproved credit offer mailing lists, she alleged. She also claimed that Kohl's violated the FCRA when it impermissibly accessed her credit report for account review purposes because no such account existed.

Proper Summary Judgment

On March 18, 2010, the District Court granted Experian's motion for summary judgment and closed the case. Banga appealed to the Ninth Circuit on April 20, 2010.

The panel said that the District Court properly granted summary judgment on Banga's claims for willful violations under Section 1681n of the FCRA because, as she conceded to the District Court, the defendants were not objectively unreasonable in accessing her credit report for account review purposes while she closed her Kohl's account. The panel noted that there is no willful violation of a defendant's interpretation if "less-than-pellucid" statutory text is "not objectively reasonable" and there is no guidance from courts or relevant agencies, quoting Safeco Ins. Co. of Am. v. Burr (551 U.S. 47, 69-70 & n. 20 [2007]).

The panel also ruled that the District Court properly granted summary judgment on the plaintiff's claims for negligent violations under Section 1681o of the FCRA because she failed to raise a triable dispute as to whether the defendants' conduct resulted in actual damages. The underlying court also properly granted summary judgment on issue preclusion grounds as to Banga's claim that Experian violated Section 1681r of the FCRA because she unsuccessfully litigated the issue in a prior lawsuit.

Award Of Costs

Additionally, the District Court did not abuse its discretion by awarding the defendants costs in connection with Banga's deposition, the panel held, pointing to Cherry v. Champion Int'l Corp. (186 F.3d 442, 448-449 [9th Cir. 1999]), which determined that costs of transcribing and videotaping deposition are recoverable if they are necessarily obtained for use in the case.

The panel also said that Banga's remaining contentions are unpersuasive and denied as moot her motion for appointment of counsel for purposes of oral argument on appeal.

Banga of Vallejo, Calif., appears *pro se*. Experian is represented by Meir Feder in New York and Eric John Hardeman and Angela M. Taylor in Irvine, Calif., all of Jones Day. Kohl's is represented by Gregory P. Dresser of Morrison & Foerster in San Francisco.

(Additional documents available. **Appellant brief.** Document #88-120625-213B. **Experian's appellee brief.** Document #88-120625-214B. **Kohl's appellee brief.** Document #88-120625-215B.) ■

Panel Reverses Ruling In Insurer's Favor In Coverage Suit Over $2.5M Settlement

NEW ORLEANS — The Fifth Circuit U.S. Court of Appeals on June 15 reversed and remanded a lower federal court's ruling in favor of a professional liability insurer in a finance company insured's lawsuit seeking indemnification for an underlying $2.5 million class action settlement (Flagship Credit Corp. v. Indian Harbor Insurance Co., No. 11-20408, 5th Cir.; 2012 U.S. App. LEXIS 12201).

(***Per curiam* opinion available.** Document #13-120621-017Z.)

Glynn Hartt filed a class action lawsuit against Flagship Credit Corp. after Flagship notified him that his

automobile was going to be repossessed because Hartt was delinquent on his automobile loan payments. Hartt alleged in a Pennsylvania state court that Flagship's notice did not conform to certain technical requirements of the Texas Business and Commerce Code, Sections 9.610-11, 9.613 and 9.614.

$2.5M Settlement

Flagship removed the action to the U.S. District Court for the Eastern District of Pennsylvania. The parties eventually reached a settlement that obligated Flagship to pay $2.5 million into a settlement fund.

Flagship requested coverage from its insurer, Indian Harbor Insurance Co., under a professional liability policy. Indian Harbor refused on the grounds that the statutory minimum damages sought in that action constitute "penalties," which the policy did not cover.

Flagship sued Indian Harbor for breach of contract and sought a declaration as to coverage. The parties cross-moved for summary judgment in the U.S. District Court for the Southern District of Texas.

The insured alleged that the statutory minimum damages paid in settling the underlying suit were covered losses. The insurer countered that the underlying suit's statutory minimum damages were a penalty that fell outside the scope of the professional liability insurance policy.

Judge Gray H. Miller sided with Indian Harbor, finding that the damages are "penalties" under the policy. Flagship appealed to the Fifth Circuit.

Canon Of Construction

The panel found that the District Court's analysis was not unreasonable.

"Where we disagree, though, is that by rejecting the canon of construction, the court allowed all the possible meanings of 'penalties' to apply. *Noscitur a sociis* is a traditional means of limiting statutory or contract words from being given every conceivable meaning. Instead, when a list of words contains some whose generally accepted meanings have a commonality, then those associate words should limit a single word that has more varied meanings. The canon is the equivalent, likely not invariably correct but a serviceable approach, of asking drafters which of the varied meanings of the doubtful word they intended," the panel said.

The panel reversed and remanded the District Court's ruling in favor of the insurer.

"Aided by the canon of construction, we conclude that the term 'penalties' within the phrase, 'fines, penalties or taxes' is limited to payments made to the government. Accordingly, the statutory-minimum-damages portion of the Hartt settlement is not a 'penalty,' " the panel explained.

Remaining Issues

Flagship further argued that the attorney fees are not "penalties" and, as a result, that the insurer has a duty to pay them.

Citing Benefit Recovery, Inc. v. Donelon (521 F.3d 326, 329 [5th Cir. 2008]), the panel determined that this argument is not properly before it on appeal.

"While Flagship made a passing reference to this argument before the district court, this is the first time Flagship has pressed the issue. Flagship's comments to the district court were not enough to afford the court an opportunity to rule on the issue," the panel said.

The panel also rejected Indian Harbor's assertion that Flagship abandoned its breach of contract claim by failing to present it to the lower court.

"Our review of the record shows that Flagship adequately identified its claim. Moreover, the district court dismissed the claim; so it clearly had the opportunity to rule on it," the panel said.

Chief Judge Edith H. Jones wrote the opinion, which was joined by Judges Edward C. Prado and Leslie H. Southwick.

Counsel

Flagship is represented by R. Ted Cruz, William S.W. Chang and Denise U. Scofield of Morgan Lewis & Bockius of Houston and Howard M. Radzely of the firm's Washington, D.C., office.

Indian Harbor is represented by David H. Topol and Charles C. Lemley of Wiley Rein in Washington and

Joseph Gilbert Thompson III of Watt Beckworth Thompson Henneman & Sullivan in Houston. ■

Insured Bank Can Recover Losses Arising From Fraudulent Collateral, Panel Affirms

NEW ORLEANS — The Fifth Circuit U.S. Court of Appeals on June 15 found that an insured bank can recover its losses arising from fraudulent collateral, affirming a lower court's ruling in favor of the insured (Peoples State Bank v. Progressive Casualty Insurance Company, No. 11-30731, 5th Cir.; 2012 U.S. App. LEXIS 12173).

(***Per curiam* opinion available.** Document #13-120621-018Z.)

Fraudulent Collateral

Peoples State Bank sought recovery for losses caused by three fraudulent loan packages presented as collateral for residential loans.

Progressive Casualty Insurance Co. denied coverage under a financial institution bond, arguing that Peoples did not review the submitted documents before issuing the loans.

Peoples sued Progressive in the 11th Judicial District Court, Parish of Sabine, La. The insurer removed the case to the U.S. District Court for the Western District of Louisiana, which granted summary judgment in favor of Peoples.

Progressive appealed to the Fifth Circuit. Peoples cross-appealed, contending that the District Court erred in denying its motion to alter or amend the judgment to allow it to claim statutory bad faith penalties.

Affirmed

The panel affirmed the District Court's ruling.

"The district court found that 'on its face the Bond requires only reliance and physical possession.' The district court also found that Peoples satisfied the 'on the faith of' reliance requirement because 'it is undisputed that Peoples extended credit . . . in exchange for a security interest in the loans and mortgages, thereby relying on the documents as collateral. . . . Peoples would not have extended credit . . . had it known the loan packages were counterfeit or forged.' It found no indication that either the Bond's 'reliance' or 'possession' requirements required review or verification of the documents, and it declined to 'read this heightened burden into the Bond where it is not stated.' We agree with the district court's interpretation of the disputed clause in the Bond," the panel explained.

The panel also rejected the insured's cross-appeal.

"Peoples had not requested penalties in its summary judgment motion. The district court denied Peoples' post-judgment motion requesting leave to present the issue for the first time. We find no abuse of discretion in this denial," the panel said.

Judges W. Eugene Davis, Jerry E. Smith and James L. Dennis comprised the panel.

Counsel

Lottie L. Bash of Gold, Weems, Bruser, Sues & Rundell in Alexandria, La., and Christopher M. Sylvia, in-house counsel for Peoples State Bank in Many, La., represent Peoples State Bank.

John Tucker Kalmbach, Elizabeth Mendell Carmody and Herschel E. Richard Jr. of Cook, Yancey, King & Galloway in Shreveport, La., and Archibald T. Reeves IV of McDowell Knight Roedder & Sledge in Mobile, Ala., represent Progressive. ■

6th Circuit: ERISA Bars Claims Against Bank Related To TPA's Embezzlement

CINCINNATI — A depository bank that allegedly facilitated a third-party administrator's (TPA's) embezzlement from plans governed by the Employee Retirement Income Security Act is not an ERISA fiduciary, and state-law claims against the bank are preempted by ERISA, the Sixth Circuit U.S. Court of Appeals ruled June 8 in a divided opinion (John C. McLemore, et al. v. Regions Bank, Nos. 10-5480, 10-5491, 6th Cir.; 2012 U.S. App. LEXIS 11600).

(**Opinion available.** Document #54-120613-076Z.)

Circuit Judge Gilbert S. Merritt dissented on the preemption ruling, saying that "[t]o foreclose unjust enrichment would leave those whom Congress intended to protect worse off than before ERISA was enacted."

Plan Assets Stolen

Barry Stokes, an investment adviser, was the sole owner and operator of 1Point Solutions LLC, which acted as a TPA of several employee-benefits plans, 401(k) retirement plans and cafeteria plans that are governed by ERISA.

1Point opened more than 58 fiduciary accounts with Regions Bank. In order to circumvent "know your customer" rules, which require banks to verify the identities of their customers, Regions insisted that 1Point open the accounts in its own name and provide them titles referencing the account's corresponding clients, rather than establish the accounts for each client under the client's tax identification numbers.

Because the accounts bore 1Point's name, Stokes was able to transfer money among and out of the accounts. Between 2002 and 2006, Stokes stole large sums from these accounts by transferring money from client accounts to his account at Regions, withdrawing money from the 1Point 401(k) account in the form of cashier's checks, using client accounts to fund 1Point's operating expenses and transferring transferred money between customer accounts to pay overdraft fees and conceal his theft.

In 2004, the U.S. Financial Crimes Enforcement Network assessed a $10 million fine against Regions for failing to comply with provisions of the Bank Secrecy Act, which required Regions to report large currency transactions, file suspicious-activity reports, verify the identities of those opening accounts and maintain automated computer monitoring of accounts.

ERISA, State-Law Claims

The embezzlement was discovered when Stokes and 1Point filed for bankruptcy protection in 2006.

John McLemore, Stokes's bankruptcy trustee, and EFS Inc. and other former clients of 1Point (collectively, EFS) claimed that Regions negligently and knowingly allowed Stokes to steal from the fiduciary accounts held at Regions. McLemore sued Regions under ERISA, and both McLemore and EFS sued Regions under state law, alleging recklessness, unjust enrichment, violation of the Tennessee Consumer Protection Act and aiding and abetting.

The U.S. District Court for the Middle District of Tennessee dismissed the ERISA breach of fiduciary duty claims under Federal Rule of Civil Procedure 12(b)(6), concluding that although the trustee had standing to sue on behalf of the defrauded plans, Regions was not an ERISA fiduciary. The District Court also dismissed the ERISA nonfiduciary claims and dismissed the state-law claims under Rule 12(c), finding that ERISA preempted the state-law claims.

Trustee's Standing

In addressing the trustee's ERISA claims, the Sixth Circuit agreed that the trustee had standing. Although a bankruptcy trustee lacks standing to bring a cause of action that does not belong to the debtor's estate, in the instant case, the trustee "brings this suit in his role as an ERISA fiduciary."

Acting as an ERISA fiduciary with control over ERISA-plan funds, the trustee is required "to remedy the known wrongs of a cofiduciary," and, therefore, had statutory authority to pursue claims that benefitted the trust beneficiaries, the court said.

Moreover, the fact that the trustee no longer controlled the assets stolen from the ERISA plans did not defeat the trustee's status as an ERISA fiduciary because "he has sufficiently pleaded his authority to manage or dispose of all assets belonging to the plans, notwithstanding his lack of control over the particular funds that Stokes stole from plan accounts," the court said.

The panel also rejected Regions' argument that the equitable doctrines of *in pari delicto* and unclean hands barred the trustee's claims because he stepped into the shoes of Stokes and 1Point and the equitable doctrines would have barred their claims.

"Any funds that the Trustee recovers as an ERISA fiduciary inure to the ERISA plans' benefit, rather than to the benefit of the estate's creditors. For the purposes of the Trustee's ERISA claim, therefore, he 'steps into the shoes' of the plans, rather than those of the criminal debtors," the court said.

Fiduciary Status

However, the Sixth Circuit ruled that Regions did not qualify as an ERISA fiduciary based on the bank's exertion of "authority or control respecting management of [plan] assets."

"In general, the complaint alleges that Regions maintained accounts for 1Point, received deposits to those accounts, and permitted Stokes and 1Point to transfer and withdraw money from these accounts. Stokes and 1Point maintained the accounts and directed all account activity. Regions merely held the funds on deposit. Custody of plan assets alone cannot establish control sufficient to confer fiduciary status," the court said.

Similarly, Regions' advising 1Point and Stokes as to how it ought to structure the accounts did not render Regions a fiduciary because "[a]ll control of the accounts remained with 1Point and Stokes."

Moreover, Regions' withdrawal of about a half million dollars in fees from 1Point plan accounts did not demonstrate control over plan assets, the court said.

Because only "appropriate equitable relief" is available against nonfiduciaries and the trustee sought only damages, the trustee's ERISA claims were properly dismissed.

Preemption

Turning to the state-law claims, the Sixth Circuit majority explained that Tennessee's Uniform Fiduciaries Act (UFA) barred claims that alleged mere negligence. Therefore, the trustee and EFS were limited to claims of knowing or bad faith conduct.

"What remains of plaintiffs' claims are allegations that Regions (1) acted with knowledge of Stokes's and 1Point's breach of fiduciary duty or (2) acted in bad faith because it knew facts obviously suggestive of their breach. Proving these allegations depends on a showing that Stokes and 1Point breached their fiduciary duty and requires an examination of Regions' knowledge of the breach.... [T]hese claims do not arise from an independent legal duty; rather, they derive from the ERISA violations committed by Stokes and 1Point. By seeking to impose liability on Regions for knowingly permitting Stokes and 1Point to breach their fiduciary duties, plaintiffs' state-law claims seek an 'alternative enforcement mechanism' for the legal duties imposed under ERISA," and therefore are preempted, the majority said.

The majority commented that it may have reached a difference conclusion if Tennessee's UFA did not bar claims that alleged mere negligence and the plaintiffs did not seek damages.

Circuit Judge Deborah L. Cook wrote the majority opinion and was joined by U.S. Judge Sean F. Cox of the Eastern District of Michigan, sitting by designation.

Dissent

Judge Merritt commented that "[t]he law on ERISA preemption is in a state of disarray, to say the least" but that he found "no similar cases preempting banking laws protecting from loss the deposits of customers, including ERISA customers, or regulating bank fees charged to such customers."

In dissenting, Judge Merritt said that "[t]he primary purpose of ERISA is to protect the individual who has a pension or health plan from certain kinds of losses.... It is not to protect a depository bank from general state laws concerning malfeasance in connection with the bank's handling of the bank accounts of participants. In this case, we have no idea whether the bank is liable for misfeasance under state law. The case against the bank has not been tried or the facts proved or the state law analyzed and applied."

The dissent also commented that "[o]ur court's idea that state law remedies fail because they add or provide only 'an alternative enforcement mechanism' is strange, indeed, when the federal ERISA law provides no 'enforcement mechanism' whatever for damages against the misfeasance of a depository bank that is not a fiduciary. There is nothing, no ERISA cause of action for damages for the state claims to be 'alternative' to. There is no ERISA purpose or policy served by withdrawing the protection of state laws of general application."

Counsel

McLemore is represented by Robert M. Garfinkle and Phillip G. Young Jr. of Garfinkle, McLemore & Young. EFS is represented by H. Naill Falls Jr. and John B. Veach III of Falls & Veach. All are in Nashville, Tenn.

Amicus curiae Secretary of Labor Hilda L. Solis supporting appellants is represented by Solicitor of Labor M.

Patricia Smith, Associate Solicitor for Plan Benefits Security Division Timothy D. Hauser, Counsel for Appellate and Special Litigation Nathaniel I. Spiller and Trial Attorney Leonard H. Gerson of the U.S. Department of Labor in Washington, D.C.

Regions is represented by John R. Wingo of Frost Brown in Nashville.

(Additional documents available: **McLemore's appellant brief.** Document #54-120613-077B. **Regions appellee brief.** Document #54-120613-078B. **McLemore's reply brief.** Document #54-120613-079B. **DOL's *amicus* brief.** Document #54-120613-080B. **EFS appellant brief.** Document #54-120613-081B. **Regions appellee brief.** Document #54-120613-082B. **EFS reply brief.** Document #54-120613-083B.) ■

Panel: Investors Failed To Plead Scienter In Securities Class Action Lawsuit

BOSTON — Dismissal of a shareholder class action lawsuit against Textron Inc. and certain of its executive officers was proper because the shareholders failed to plead a material misrepresentation or scienter in claiming that the defendants violated federal securities law, a First Circuit U.S. Court of Appeals panel ruled June 7 (Automotive Industries Pension Trust Fund v. Textron Inc., et al., No. 11-2106, 1st Cir.).

(**Opinion available.** Document #88-120625-003Z.)

Shareholders filed a second amended complaint in the U.S. District Court for the District of Rhode Island on behalf of all purchasers of Textron Inc. common stock from July 19, 2007, to Jan. 29, 2009.

The shareholders alleged that Textron and executive officers Lewis B. Campbell, Ted R. French, Buell J. Carter, Thomas F. Cullen, Douglas Wilburne and Angelo Butera issued a series of false and misleading statements concerning Textron's financial condition throughout the financial crisis in violation of Sections 11 and 15 of the Securities Act of 1933, Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5.

3rd Amended Complaint

The shareholders filed a third amended complaint after the Securities Act claims were dismissed by agreement, and the defendants moved to dismiss the remaining claims.

U.S. Judge Paul Barbadoro of the District of New Hampshire, who was sitting by designation, granted the motion, ruling that the shareholders failed to properly plead a material misrepresentation.

Shareholder Automotive Industries Pension Trust Fund then appealed to the First Circuit, which affirmed.

Close Call

The panel held that although the District Court did not err in dismissing the action for failure to plead a material misrepresentation, the materiality issue is a "close call."

"[A]s to materiality, this complaint may not be 'the kind of vague prelude to a fishing expedition that Congress sought to bar by imposing the clarity-and-basis requirement of the [Private Securities Litigation Reform Act of 1995] PSLRA.' Summary judgment is usually a more appropriate occasion to decide whether such details are of marginal interest or so important that Textron's statements were misleading without them," the panel said, citing the First Circuit's ruling in In re Stone & Webster Inc. Securities Litigation (414 F.3d 187, 198 [2005]).

The panel also found that dismissal is proper because the shareholders failed to properly plead scienter.

Not Recklessly Unaware

In particular, the panel ruled that "[n]othing in the complaint suggests that any of the named officers believed, or was recklessly unaware, that the backlog's significance had been undermined by weakened underwriting standards, sales to intermediates, or any of the other flaws on which the plaintiffs rely. And the questionable materiality of the practices, depending importantly on matters of degree and detail, deprives any inference of scienter of forward momentum that would be helpful to plaintiffs."

"Textron's top managers may have been negligent if they were not aware; surely French was extravagant in saying of the backlog that Textron had 'torn it apart.'

But negligence or puffing are not enough for scienter, and warnings by subordinates or expressions of concern by executives are notably absent, as is an unusually compelling case on materiality," the panel said, adding that "[t]he few counters offered by the Fund underscore the absence of such evidence."

"This leaves a plaintiff's counsel with a greater than usual burden of investigation before filing a securities fraud complaint. Yet where district judges face promising complaints that fall into an intermediate gray area, they have in practice some latitude to refuse to dismiss some or all counts and allow discovery, whether narrowly focused or in full. This complaint's scienter allegations were weaker than its materiality allegations and did not even arguably fall into a gray area encouraging further proceedings."

Circuit Judge Michael Boudin wrote the panel's opinion and was joined by Circuit Judge O. Rogeriee Thompson and retired U.S. Supreme Court Justice David H. Souter, who was sitting by designation.

Counsel

The shareholders are represented by Samuel R. Rudman of Robbins Geller Rudman & Dowd in Melville, N.Y., and David J. George of Robbins Geller in Boca Raton, Fla.

The defendants are represented by John A. Tarantino, Patricia K. Rocha and Nicole J. Dulude of Adler Pollock & Sheehan in Providence and Mitchell A. Karlan and Brian M. Lutz of Gibson, Dunn & Crutcher in New York.

(Additional documents available: **Appellant brief.** Document #88-120625-004B. **Appellee brief.** Document #88-120625-005B. **Reply brief.** Document #88-120625-006B. **District Court opinion.** Document #57-110912-016Z.) ■

ATM Fees Class Action Stayed Pending Outcome Of Supreme Court Case

OMAHA, Neb. — Pending the outcome of a U.S. Supreme Court case dealing with a similar standing issue, a federal judge in Nebraska on June 4 stayed a class action accusing a bank of violating the Electronic Fund Transfer Act by not posting a fee notice on an ATM (Jarek Charvat v. First National Bank of Wahoo, No. 12-00097, D. Neb.; 2012 U.S. Dist. LEXIS 77616).

(**Opinion available.** Document #88-120625-257Z.)

Chief U.S. Judge Laurie Smith Camp of the District of Nebraska made the determination while ruling on a motion to dismiss filed by First National Bank of Wahoo (FNBW) in a suit brought by Jarek Charvat, individually and on behalf of all others similarly situated.

"The issue before the Supreme Court in *First Am. Fin. Corp. v. Edwards*, 610 F.3d 514 (9th Cir. June 21, 2010), *cert. granted*, 131 S. Ct. 3022 (U.S. June 20, 2011) (No. 10-708) is similar to the standing issue presented here, and the Supreme Court's decision will be relevant to this motion," Judge Camp said. "It is possible that the pending decision of the Supreme Court in *First American* may alter this Court's understanding of the constitutional minimum requirement of standing. Therefore, it is in the best interest of Charvat that all further proceedings in this matter to be stayed pending the Supreme Court's decision."

Motion To Dismiss, Stay

Charvat made two electronic fund transfers (ETFs) from an FNBW ATM in Wahoo, Neb., on or about Jan. 22 and March 4. FNBW charged him a $2 fee with each transaction. At the time of the transactions, there was no notice posted "on or at" the ATM telling customers that a fee would be charged for the use of the ATM, Charvat says. He does not allege that he did not receive an on-screen notice that a fee would be charged. He filed his complaint on March 8, alleging EFTA violations and seeking statutory damages for himself and the members of the class as well as an award of costs and attorney fees. Judge Camp noted that the EFTA requires any ATM operator that imposes fees on customers in connection with EFTs to provide

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notice of the fact that a fee is being imposed and the amount of the fee, and the notice must be posted in two places: both "on or at" the ATM and on the screen of the ATM or, alternatively, on a paper notice issued before the transaction is completed.

On March 30, FNBW moved to dismiss for lack of subject matter jurisdiction, asserting that the District Court has no subject matter jurisdiction over Charvat because he has suffered no injury in fact and, therefore, does not have standing to bring the claim. Alternately, FNBW requested that the case be stayed pending the outcome in First American.

Three requirements constitute the "irreducible constitutional minimum" of standing, the first of which is "an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," Judge Camp said, quoting Lujan v. Defenders of Wildlife (504 U.S. 555, 560-561 [1992]). The requirement of injury in fact is a "hard floor of Article III jurisdiction that cannot be removed by statute," she said, quoting Summers v. Earth Island Inst. (555 U.S. 488, 497 [2009]).

"The issue then is whether FNBW's failure to give a notice to which Charvat was statutorily entitled in itself constitutes an injury in fact to Charvat," Judge Camp said. "This Court concludes it does not."

Injury In Fact

The judge noted that three district courts have held that when an ATM operator fails to provide a fee notice on the exterior of the ATM as required by the EFTA, the statutory violation is in itself an injury, regardless of whether the plaintiff had actual knowledge of the fee through the on-screen notice and affirmatively accepted it. However, she pointed out that these courts did not address the "hard floor" constitutional requirement of injury in fact.

"The Constitution requires more than mere injury in *law*," Judge Camp said. "A plaintiff must allege an injury in *fact* that was caused by the lack of an exterior fee notice on the ATM. This Court agrees that the EFTA should be construed broadly in favor of the consumer, but the provision for actual and statutory damages in the EFTA does not automatically mean that a litigant is entitled to damages when he has alleged no injury in fact. The authorization of statutory damages is unrelated to *injury*."

Charvat argued that if the District Court determines that a statutory violation of the notice requirements of the EFTA is not in itself an injury, the District Court would be stripping the statute of a requirement purposefully imposed by Congress. He noted that Congress may have discerned that one notification was not enough or that unscrupulous ATM operators should be prevented from luring customers under the false presumption that no transaction fee would be incurred. Judge Camp said she does not question Congress' purpose for imposing the notice requirements. Instead, she said, the District Court is respectful of the constitutional minimum requirement of standing that a plaintiff must have to proceed in an action before the court.

First American Has Bearing

In First American, the plaintiff sued title insurance underwriter First American Financial Corp. for failing to disclose a "kickback" to a title agency in which First American had an ownership interest. The plaintiff's claim is that she was injured because First American's ownership interest violated the mandatory disclosure requirements of the Real Estate Settlement Procedures Act (RESPA). She had no complaint about the price or quality of the title insurance and alleged no harm other than a statutory violation of RESPA. First American raised the question of "whether a plaintiff can establish standing to sue under RESPA merely by alleging a statutory violation, without any claim that the violation affected the settlement services rendered."

Charvat contended that First American has no bearing on the standing issue in the instant case because there is not a competitive market in Ohio for title insurance fees and the disclosure of the ownership interest in the title agency would not have affected the fee. He said the presence of a competitive market distinguishes the standing question in his case because the EFTA mandates the fee notice requirements so that consumers can make an informed choice of whether to make an EFTA.

Judge Camp disagreed.

"The presence of a competitive market does not change the relevance of the question presented in *First American* and its applicability to the standing issue here," she said. "In both *First American* and here, the question remains whether a violation of a statute, without an

alleged injury in fact, is in itself sufficient to create standing under Article III."

Attorneys

Charvat is represented by Michael Lewis of The Lewis Law Firm in Washington, D.C., and Tracy Hightower-Henne of Hightower Reff Law in Omaha.

FNBW is represented by Kenneth W. Hartman of Baird Holm in Omaha.

(Additional documents available: **Motion to dismiss.** Document #88-120625-258M. **Brief in support of motion to dismiss.** Document #88-120625-259B. **Response to motion to dismiss.** Document #88-120625-260B. **Reply in support of motion to dismiss.** Document #88-120625-261B.) ■

Federal Judge Denies Class Certification In ATM Fees Lawsuit

WASHINGTON, D.C. — A consumer has failed to meet the statutorily required findings of commonality, typicality or predominance in attempting to certify a class of consumers in an ATM fee lawsuit because he has failed to show that a class action is superior to other forms of adjudication, a federal judge in Washington ruled June 11 (Daniel E. Ballard v. Branch Banking and Trust Co., No. 11-1327, D. D.C.; 2012 U.S. Dist. LEXIS 80109).

(**Opinion available.** Document #88-120625-009Z.)

Consumer Daniel E. Ballard filed an amended class action complaint in the U.S. District Court for the District of Columbia. He alleges that Branch Banking and Trust Co. (BBT), which operates an ATM in Washington, violated the Electronic Funds Transfer Act (EFTA) because its ATM did not have an on-machine fee notice.

Ballard moved to certify a class of all consumers who were charged a late fee for withdrawing money from the ATM from March 1, 2011, to July 21, 2011.

Putative Class Members

In denying Ballard's motion, Judge Ellen Segal Huvelle held that the motion for class certification fails even although Ballard has agreed to limit the class to "consumers" who are covered by the EFTA. Judge Huvelle also rejected BBT's argument that because putative class members used the ATM on different dates, the court will need to conduct "a case-by-case inquiry into whether the fee notice was on the machine," finding that the argument does not preclude a finding of commonality, typicality or predominance, as required by Federal Rule of Civil Procedure 23(a), but found that BBT's contention "poses a more serious challenge to the predominance inquiry."

"Initially, Ballard sought to certify a class of 'all persons who, in the twelve (12) months prior to the filing of Plaintiff's complaint, made an EFT [electronic funds transfer] at one of Defendant's ATMs located at 614 H Street, N.W., Washington, DC 20001, and were charged a "terminal owner fee" in connection with the transaction.' Plaintiff has since narrowed this definition to include only those who used the ATM between March 1, 2011 and July 21, 2011, since he concedes that he cannot controvert defendant's evidence that the bank was compliant during the February/March 2011 time period and that he has no evidence that defendant was out of compliance prior to February 2011. However, given this concession, the use of the March 1, 2011, start date also appears to have no factual basis," Judge Huvelle said, adding that "[m]oreover, the unclear timeline for the alleged EFTA violation distinguishes this suit from other fee-notices cases (the majority of which certify a class for settlement purposes only), since common proof may not resolve the factual issues on a classwide basis here."

Judge Huvelle also found that class treatment in the instant action is not superior to other methods of adjudication because "[t]o adjudicate this case, it is absolutely essential to communicate with the individuals who used the ATM. In order to determine if an ATM-user is a 'consumer' and therefore within the putative class, the Court must make certain limited individualized inquiries of each class member. If this cannot be done, the Court will not know if the ATM-user was a 'consumer' and therefore cannot ascertain the size of the class. In addition, without this information, it cannot determine statutory damages."

Not Feasible

"Clearly, it is not feasible to individually identify class members," Judge Huvelle explained.

Moreover, Judge Huvelle ruled that "[w]hile the many courts that have grappled with the EFTA cases have arrived at different conclusions about whether a class action is superior, they did not confront the myriad difficulties presented here. The majority of certifications were for settlement purposes only and involved a definite time period for the violation. As the court in *Pfeffer* [v. HSA Retail, Inc. (No. 11-cv-959, W.D. Texas; 2012 U.S. Dist. LEXIS 73083 [May 24, 2012])] pointed out in denying class certification, the few courts that have certified classes prior to settlement have yet to resolve the practical problems presented in a case such as this."

"Ballard's response is that all ATMs are used for both types of accounts and so the inability to identify 'consumers' within ATM-users cannot be a bar to certification because it would conflict with the statute's provision for class actions. However, he offers no authority for the suggestion that Congress intended the EFTA to authorize class actions that do not satisfy the superiority requirement of *Rule 23(b)(3)*.

"Given plaintiff's concession that notice by publication is the only practical means for finding class members and since he recognizes that class members will need to be quizzed as to whether they engaged in a consumer transaction at a time when there was no notice on the machine (as opposed to the screen), it is highly likely that the class could, at best, consist of a handful of consumers, or at worst, be a class of one — plaintiff. Moreover, it is undisputed that each of the prospective class members proceeded with the transaction despite having received the required notice on the screen and that the potential class recovery will be *de minimus*, especially in comparison to the petition for fees and costs that will ultimately be filed after lengthy and costly litigation. Given these substantial difficulties, the Court concludes that plaintiff has failed to satisfy *Rule 23(b)* and class certification is denied," Judge Huvelle said.

Counsel

Ballard is represented by Trey Mayfield and Michael Lewis of the Lewis Law Firm in Washington.

BBT is represented by James P. Head of Williams Mullen in McLean, Va.

(Additional documents available: **Motion for class certification.** Document #88-120625-010B. **Reply brief.** Document #88-120625-011B. **Amended complaint.** Document #88-120625-012C.) ■

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Judge Certifies Class In Regions Financial Securities Class Action Lawsuit

BIRMINGHAM, Ala. — A federal judge in Alabama on June 14 certified a class of investors in a class action lawsuit against Regions Financial Corp. and certain current and former executive officers for alleged violations of federal securities law, ruling that the investors have met the statutory requirements for certification (Local 703, I.B. of T. Grocery and Food Employees Welfare Fund v. Regions Financial Corp., et al., No. 10-2847, N.D. Ala.; 2012 U.S. Dist. LEXIS 82135; See September 2011, Page 29).

(**Opinion available.** Document #88-120625-022Z.)

Lead plaintiffs District No. 9 I.A. of M. & A.W. Pension Trust and the Employees Retirement System of the Government of the Virgin Islands filed an amended complaint in the U.S. District Court for the Northern District of Alabama on behalf of all purchasers of Regions common stock from Feb. 27, 2008, to Jan. 19, 2009.

The lead plaintiffs contend that Regions, CEO C. Dowd Ritter, Chief Financial Officer (CFO) Irene M. Esteves and former CFO Alton D. Yother violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 by issuing a series of false and misleading statements concerning AmSouth Bancorporation's underwriting of, among other things, adjustable-rate mortgages (ARMs) before Regions' purchase of AmSouth in November 2006.

Interlocutory Appeal

Judge Inge Prytz Johnson denied the defendants' motion to dismiss, and the defendants moved for reconsideration and/or for interlocutory appeal pursuant to the U.S. Supreme Court's ruling in Janus Capital Group, Inc. v. First Derivative Traders (131 S. Ct. 2296 [2011; 2011 U.S. LEXIS 4380]).

In denying the motion, Judge Johnson held that reversal of her June 7 ruling is not proper because the defendants "are in ultimate authority over their statements."

The lead plaintiffs then moved for class certification, which Judge Johnson granted.

Rule 23(a) Requirements

Judge Johnson held that the lead plaintiffs properly met the Federal Rule of Civil Procedure 23(a) requirements for numerosity, commonality, typicality and adequacy of representation.

Judge Johnson also found that the lead plaintiffs properly met the Rule 23(b) requirement for predominance, rejecting the defendants' claims that the lead plaintiffs cannot establish the predominance requirement because they have not successfully invoked the fraud-on-the-market presumption for classwide proof of reliance and that even if they have done so, Regions has successfully rebutted it.

Moreover, Judge Johnson ruled that the lead plaintiffs have properly met the Rule 23(b) requirement for superiority, stating that "a class action for the pursuit of these claims is superior to potentially thousands of individual claims against Regions, each of which will require extensive expert testimony and discovery concerning the effects of the alleged misrepresentations on the value of the stock at different points in time."

"In fact, should any plaintiff prove the impact of the alleged misrepresentations on the value of a share in Regions, then calculating damages for every single stockholder becomes a mere mathematical exercise, in need of no further evidence. The court agrees with plaintiffs that the sheer number of potential plaintiffs numbers in at least the thousands," Judge Johnson said.

Counsel

The lead plaintiffs are represented by Andrew J. Brown of Robbins Geller Rudman & Dowd in San Diego.

Regions is represented by John N. Bolus and Maibeth J. Porter of Maynard Cooper & Gale in Birmingham.

The individual defendants are represented by Betsy P. Collins, Kim Nesmith and Victor L. Hayslip of Burr & Forman in Atlanta.

(Additional documents available: **Motion to certify class.** Document #88-120625-029B. **Reply in support of motion to certify class.** Document #88-120625-030B. **Defendants' sur-reply brief.** Document #88-120625-031B. **Lead plaintiffs sur-reply brief.** Document #88-120625-032B. **Defendants' motion for class certification hearing.** Document #88-120625-033B.) ■

Federal Judge Allows Subprime Action Against Freddie Mac To Continue

YOUNGSTOWN, Ohio — A federal judge in Ohio on May 25 declined to dismiss a putative securities class action complaint alleging that the Federal Home Loan Mortgage Corp. (Freddie Mac) failed to disclose its true subprime exposure, ruling that the plaintiff properly state its claim (Ohio Public Employees Retirement System v. Federal Home Loan Mortgage Corp., et al., No. 08-00160, N.D. Ohio).

(**Order available.** Document #88-120625-223R.)

U.S. Judge John R. Adams of the Northern District of Ohio made the ruling in the suit filed by the Ohio Public Employees Retirement System (OPERS) against Freddie Mac, its former president and Chief Operating Officer Eugene M. McQuade and former executive

vice president and Chief Financial Officer Anthony S. Piszel.

The proposed class consists of investors who bought Freddie Mac stock from Aug. 1, 2006, to Nov. 20, 2007. OPERS alleges that during the class period, the defendants made a series of materially false and misleading public statements relating to its exposure to or risk of loss from subprime mortgage loans and other nontraditional, high-risk mortgages. OPERS also alleges that the defendants made false or misleading public statements about Freddie Mac's underwriting polices and adherence to those policies, its loan analysis and fraud detection systems, its risk management and capital position. According to OPERS, as a result, there was a multibillion dollar loss for hundreds of thousands of OPERS members. Freddie Mac, McQuade and Piszel each moved to dismiss.

Motions To Dismiss

Freddie Mac argued that the losses about which OPERS complains were not the result of fraud by anyone at Freddie Mac. McQuade said he has never been targeted by the U.S. Securities and Exchange Commission or been named in any other private lawsuits regarding Freddie Mac's actions with relation to the housing crisis. He said he "had no responsibility, nor even arguably culpably participated in, the subprime issues at the core of any of these cases, including this one."

"Mr. McQuade did not sign or certify any public financial disclosures during the class period at issue in this lawsuit, nor was he a member of any of the board committees that allegedly addressed Freddie Mac's subprime exposure," McQuade's counsel wrote in the motion to dismiss.

Piszel argued that the Securities Exchange Act of 1934 does not apply to OPERS's claims because Freddie Mac is a type of entity excluded by the act. Even if the District Court found that the act applied to Freddie Mac, the claim against Piszel would fail because OPERS did not plead that he acted with the intent or knowledge of wrongdoing.

"The court remains convinced that discovery needs to take place in this matter, and that discovery requests would necessarily be propounded upon each of the moving defendants regardless of whether each remains a party," Judge Adams said. He did not elaborate on his reasons for denying the motions to dismiss.

Attorneys

OPERS is represented by Jean M. Geoppinger, Stanley M. Chesley, Christopher D. Stock, James R. Cummins, Joseph T. Deters, Melanie S. Corwin, Renee A. Infante, Terrence L. Goodman and Wilbert B. Markovits in Cincinnati, Darren T. Kaplan, Gregory E. Keller and John F. Harnes of Chitwood Harley Harnes in New York, James M. Wilson, Krissi T. Gore and Martin D. Chitwood of Chitwood Harley Harnes in Atlanta and Michael J. Hall and Richard Michael DeWine of the Office of the Attorney General in Columbus, Ohio.

Freddie Mac is represented by Jason D. Frank and Jordan D. Hershman of Bingham McCutchen in Boston and Hugh E. McKay and Paul R. Matia of Porter, Wright, Morris & Arthur in Cleveland.

McQuade is represented by Andrew J. Levander of Dechert in New York and Cheryl A. Krause and David T. Jones of Dechert in Philadelphia.

Piszel is represented by Joseph P. Rodgers and Saber W. VanDetta of Squire Sanders in Cleveland, William E. Donnelly and Jerry A. Isenberg of Murphy & McGonigle in Washington, D.C., and James K. Goldfarb and Jonathan S. Bashi of Murphy & McGonigle in New York.

(Additional documents available: **McQuade's motion to dismiss.** Document #88-120625-224M. **Brief in support of McQuade's motion to dismiss.** Document #88-120625-225B. **Freddie Mac's motion to dismiss.** Document #88-120625-226M. **Brief in support of Freddie Mac's motion to dismiss.** Document #88-120625-227B. **Piszel's motion to dismiss.** Document #88-120625-228M. **Brief in support of Piszel's motion to dismiss.** Document #88-120625-229B.) ■

Judge: Consumer Fails To State Debt Collection Claims Against Credit Union

GREENBELT, Md. — A consumer has failed to plead his federal debt collection law claims, as well as a

number of other claims made against a credit union, because he has failed to show that the credit union is a debt collector as required under the Fair Debt Collection Practices Act, a federal judge in Maryland ruled June 14 (Isaiah Nichols v. Navy Federal Credit Union, No. 12-790, D. Md.; 2012 U.S. Dist. LEXIS 82724).

(**Opinion available.** Document #88-120625-034Z.)

Consumer Isaiah Nichols sued Navy Federal Credit Union in the Prince George's County, Md., Circuit Court, alleging that Navy Federal violated six provisions of the Fair Debt Collection Practices Act, as well as 12 other federal laws in attempting to collection on a debt Nichols incurred with the credit union.

In particular, Nichols disputes the debt and claims that he is a victim of identity theft.

Navy Federal removed the action to the U.S. District Court for the District of Maryland and moved to dismiss, contending that Nichols' *pro se* complaint failed to state a claim for relief, and U.S. Judge J. Frederick Motz granted the motion.

DeSantis v. Computer Credit

Citing the Second Circuit U.S. Court of Appeals' ruling in DeSantis v. Computer Credit, Inc. (269 F.3d 159, 161 [2001]), Judge Motz held that dismissal is proper because "[t]o the extent that plaintiff is asserting a claim under the Fair Debt Collection Practices Act, it is not cognizable against defendant because there are no facts alleged to suggest that defendant acted as a 'professional debt collector,' as is required under the Federal Debt Collection Practices Act."

Judge Motz also found that dismissal is proper because "[t]o the extent that plaintiff is asserting a claim based upon an alleged contract with defendant, there are no facts alleged that give rise to the inference that any such agreement existed."

"Plaintiff's assertions are based entirely upon the fact that he unilaterally submitted to defendant a series of documents upon which he now bases a contract claim," Judge Motz said.

Moreover, Judge Motz ruled that dismissal is proper because "to the extent that plaintiff alleges that defendant 'attempted to fraud' him, he has not made any allegations setting forth with any particularity, as required by *Fed. R. Civ. P. 9* [Federal Rule of Civil Procedure 9], that any fraud was committed."

Counsel

Nichols of Fort Washington, Md., appeared *pro se*.

Navy Federal is represented by Amy S. Owen and Kristin Anne Martin Zach of Cochran and Owen in Vienna, Va.

(Additional documents available: **Motion to dismiss.** Document #88-120625-035B. **Opposition brief.** Document #88-120625-036B. **Reply brief.** Document #88-120625-037B. **Complaint.** Document #88-120625-038C.) ■

Judge: Court Has Subject Matter Jurisdiction Over Debt Collection Suit

CLEVELAND — Remand of a credit card holder's lawsuit against a debt collector and credit card issuer is not proper, a federal judge in Ohio ruled June 14, because the court has subject matter jurisdiction over the claims (Theresa M. Passmore v. Discover Bank, et al., No. 11-1347, N.D. Ohio; 2012 U.S. Dist. LEXIS 82331; See November 2011, Page 8).

(**Opinion available.** Document #88-120625-023Z.)

Discover Bank sued credit card holder Theresa M. Passmore in the Lake County, Ohio, Court of Common Pleas, seeking to collect on a debt Passmore incurred on a credit card she had received from Discover Bank. Discover Bank brought claims of breach of contract and unjust enrichment.

Passmore answered and counterclaimed against Discover Bank and joined as counterclaim defendants Yale Levy and debt collector Levy & Associates (collectively, Levy defendants). Passmore sought to represent a class of similarly situated individuals and brought claims for violation of the Fair Debt Collection Practices Act (FDCPA) and the Ohio Consumer Protection Act, fraud, abuse of process, defamation and civil conspiracy.

Realignment

Discover Bank dismissed its claims, and the Levy defendants moved to realign the parties. The state court then realigned Passmore to make her the plaintiff in the action.

Discover Bank moved to compel arbitration of Passmore's claims pursuant to Discover Bank's cardholder agreement and moved to stay the litigation pending a ruling on the motion to compel arbitration, and Passmore moved to strike a declaration submitted to support the motion to compel arbitration.

The state court denied the defendants' motions to compel arbitration, refused to consider the declaration of director of Discover Bank's credit card servicing affiliate, Jeff Naami, because it was not notarized, and found that the attached copies of Discover Bank's credit card agreement were therefore unauthenticated and failed to establish a binding arbitration agreement between Discover Bank and Passmore.

Arbitration

The defendants removed the action to the U.S. District Court for the Northern District of Ohio. The Levy defendants moved to compel arbitration and to stay the proceedings, and Passmore moved to strike.

Judge James S. Gwin granted the Levy defendants' motion, and Passmore moved to remand and to vacate Judge Gwin's order.

In denying her motions, Judge Gwin held that Passmore's argument that the District Court lacks subject matter jurisdiction over the instant action because she never filed an amended complaint in state court before the case was removed, leaving the District Court without a complaint upon which to test its jurisdiction, fails.

"When a state court realigns parties, the realigned defendant can properly remove an action to federal court. The Court explained as much in its earlier Order. Passmore all but ignored Hrivnak [the Northern District of Ohio's ruling in Hrivnak v. NCO Portfolio Management (723 F. Supp. 2d 1020, 1028 [2010])] in her earlier motion papers. Now she makes Hrivnak the centerpiece of her motion, saying that the case carries no weight because she, unlike the removal plaintiff in Hrivnak, never actually filed a redesignated complaint in state court. But Passmore's failure to refile her counterclaims on a recaptioned document hardly renders her claims suddenly unknowable, and certainly does not render the action unremovable," Judge Gwin said.

FDCPA Claims

Judge Gwin also rejected Passmore's argument that even if removal of the FDCPA claims was proper, her state law claims should be severed, finding that "all of her claims arise from the same set of facts and the Court properly exercises supplemental jurisdiction here."

Passmore is represented by Anand N. Misra of Beachwood, Ohio, and Robert S. Belovich of Parma, Ohio.

Discover Bank is represented by Burt M. Rublin and Nathan W. Catchpole of Ballard Spahr Andrews & Ingersoll in Philadelphia and Saber W. VanDetta and Steven A. Friedman of Squire, Sanders & Dempsey in Cleveland.

Levy and Levy Associates are represented by I. James Hackenberg of Baker, Hackenberg & Hennig in Painesville, Ohio, and Boyd W. Gentry of Surdyk, Dowd & Truner in Miamisburg, Ohio.

(Additional documents available: **Motion to remand.** Document #88-120625-024B. **Opposition to motion to remand.** Document #88-120625-025B. **Reply in support of motion to remand.** Document #88-120625-026B. **Motion to vacate.** Document #88-120625-027B. **Opposition to motion to vacate.** Document #88-120625-028B. **Oct. 26 order.** Document #88-111128-012R.) ■

Preliminary Approval Granted To Settlement In Municipal Derivatives Antitrust Action

NEW YORK — The federal judge in New York overseeing the multidistrict litigation involving allegations by purchasers of municipal derivatives that financial services companies engaged in price fixing, bid rigging and market manipulation in violation of Section 1 of the Sherman Act on June 4 granted preliminary approval to a $45 million settlement between JP Morgan Chase & Co. and a class of purchasers (In re Municipal Derivatives Antitrust Litigation, No. 08 MDL No. 1950, Master No. 08-02516, S.D. N.Y.).

(**Order available.** Document #81-120628-014R. **Motion for preliminary approval available.** Document #81-120628-015B.)

Pursuant to the settlement agreement, JPMorgan Chase & Co., J.P. Morgan Securities and Bear Stearns & Co. (collectively, JPMC) agreed to pay $44.57 million or, with a potential opt-out reduction, $42.57 million and to provide reasonable cooperation, including discovery cooperation, to class plaintiffs' counsel. The proposed settlement is in addition to out-of-court opt-in settlements negotiated by states attorneys general — $62.5 million with Bank of America N.A. (BOA), $63.3 million with UBS AG and $65.5 million with JPMC.

The instant settlement follows a $4.5 million settlement with Morgan Stanley and a settlement with Wachovia Bank N.A., now known as Wells Fargo Bank, N.A., and Wells Fargo & Co. (collectively, Wachovia), pursuant to which Wachovia agreed to pay the greater of $37 million or 65 percent of the total amount that Wachovia agreed to pay as restitution as part of the settlement agreement with the states attorneys general.

Multiple Lawsuits

Multiple civil antitrust actions against various financial services companies were filed by municipalities and other purchasers of municipal derivatives across the country alleging violations of Section 1 arising from bidding on municipal derivatives offerings. The Judicial Panel on Multidistrict Litigation transferred all the actions to the U.S. District Court for the Southern District of New York.

A consolidated class action complaint was filed Aug. 22, 2008, against more than 40 defendants, and a second consolidated amended complaint (SCAC) was filed June 18, 2009, against 16 defendants — Morgan Stanley; Wachovia; JPMC; BOA; National Westminster Bank PLC; Piper Jaffray & Co.; Société Générale SA; UBS; Wachovia; Natixis Funding Corp.; Investment Management Advisory Group Inc.; CDR Financial Products; Winters & Co. Advisors LLC; George K. Baum & Co; and Sound Capital Management Corp.

In addition, four California municipalities, including the City of Oakland, brought a separate class action complaint (referred to as the JSAC) on Dec. 15, 2009, alleging that the 16 SCAC defendants violated California's Cartwright Act, and 11 municipalities, including the City of Los Angeles, asserted Section 1 and Cartwright Act claims similar to those in the SCAC and JSAC against the SCAC defendants and 31 additional defendants not named in the SCAC or JSAC action.

Settlement Class

Judge Victor Marrero conditionally certified the class for purposes of the settlement. The class is defined as "[a]ll state, local and municipal government entities, independent government agencies, quasi-government, non-profit and private entities that (i) purchased by negotiation, competitive bidding or auction Municipal Derivative Transactions with Defendant or any Alleged Provider Defendant or Alleged Provider Co-Conspirator, or (ii) purchased by negotiation, competitive bidding or auction Municipal Derivative Transactions brokered by any Alleged Broker Defendant or Alleged Broker Co-Conspirator, at any time from January 1, 1992 through August 18, 2011, in the United States." The class excludes "any entity that provides Defendant with a release of claims it may have against Defendant as a result of opting into the State AG Settlement."

The City of Baltimore, the University of Mississippi Medical Center, the University of Southern Mississippi, the Mississippi Department of Transportation, the University of Mississippi, the Central Bucks School District in Pennsylvania and the Bucks County Water & Sewer Authority in Pennsylvania were named class representatives for purposes of the settlement.

The settlement provides that the settlement amount may be funded by any amount remaining in the states attorneys general escrow fund after all payments pursuant to that settlement are made.

In addition, the settlement agreement permits JPMC to rescind the agreement if the number of class members who elect to opt out of the settlement class exceeds an agreed-upon number.

The plaintiffs' co-lead interim class counsel are Michael D. Hausfeld and Megan E. Jones of Hausfeld in Washington, D.C.; Arun S. Subrahmanian, William Christopher Carmody and Seth D. Ard of Susman Godfrey in New York; Marc M. Seltzer of Susman

Godfrey in Los Angeles; and William A. Isaacson, Tanya Chutkan and Jonathan Shaw of Boies, Schiller & Flexner in Washington. JPMC is represented by Thomas C. Rice of Simpson Thacher & Bartlett in New York. ■

Judge Dismisses Federal Securities Law Claims Against Madoff Feeder Fund

NEW YORK — Shareholders in a securities class action lawsuit against a feeder fund of Bernard L. Madoff Investment Securities LLC (BLMIS) have failed to show that their federal securities law claims satisfy the standard set forth in Absolute Activist Value Master Fund, Ltd. v. Ficeto, a federal judge in New York ruled June 4 (In re Optimal U.S. Litigation, No 10-4095, S.D. N.Y.; 2012 U.S. Dist. LEXIS 77311; See October 2011, Page 15).

(**Opinion available.** Document #57-120611-056Z.)

Shareholders, 56 non-U.S. people or entities that invested in Optimal Strategic U.S. Equity Fund (Pioneer), a BLMIS feeder fund (collectively, the Pioneer plaintiffs), as well as the three non-U.S. citizen investors who held their Pioneer investments with SBT (the Santander plaintiffs) filed a fourth amended complaint in the U.S. District Court for the Southern District of New York on behalf of a class of those similarly situated.

The shareholders allege that Banco Santander S.A., Optimal Investment Management Services S.A. (OIS), Banco Santander International (Santander U.S.) and OIS and Santander Investment Securities Inc. employee Jonathan Clark failed to conduct adequate diligence regarding BLMIS, ignored "red flags" that should have alerted them to Bernard L. Madoff's fraud and issued a series of false and misleading statements in connection with the sale of Pioneer shares in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5.

Additional Claims

Additional claims for common-law fraud, negligent misrepresentation, gross negligence, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, third-party beneficiary breach of contract and unjust enrichment also were made.

The defendants moved to dismiss the federal securities fraud claims in light of the U.S. Supreme Court's ruling in Janus Capital Group, Inc. v. First Derivative Traders (131 S. Ct. 2296 [2011; 2011 U.S. LEXIS 4380]), and Judge Shira A. Scheindlin granted the motion in part and denied it in part.

Judge Scheindlin then issued an order to show cause why the federal securities law claims should not be dismissed in light of the Second Circuit U.S. Court of Appeals' decision in Absolute Activist Value Master Fund, Ltd. v. Ficeto (677 F.3d 60 [2012]).

In Connection With

In a May 17 letter, the shareholders withdrew their "allegations that the purchases or sales of Optimal U.S. shares took place in the United States." Instead, they claim that the Exchange Act reaches their claims for two reasons: plaintiffs' purchase of U.S. Optimal shares was "in connection with" Madoff's purported trades in the United States, and the "economic reality" of plaintiffs' Optimal U.S. investments consisted of Madoff's purported transactions in the United States.

In dismissing the shareholders' claims, Judge Scheindlin rejected their assertion that under a textual reading of the U.S. Supreme Court's ruling in Morrison v. National Australia Bank, Ltd. (130 S. Ct. 2869 [2010]), the purchase of Optimal U.S. shares was "in connection with" Madoff's purported purchases and sales of New York Stock Exchange-listed stocks.

"In short, this argument fails because plaintiffs rely on opinions construing 'in connection with' outside of the *Morrison* context, which thereby ignores the presumption against applying securities laws extraterritorially," Judge Scheindlin said.

Economic Reality

Judge Scheindlin also disagreed with the shareholders' argument that the "economic reality" of their purchase of Optimal U.S. shares was essentially an investment in the NYSE, finding that "Without determining the viability of the 'economic reality' test, which the Second Circuit will consider in due course, I conclude that such

a test would not sustain plaintiffs' federal securities law claims here for two reasons.

"First, the economic reality test was applied in *Elliot* [the District Court's ruling in Elliott Associates v. Porsche Automobile Holding (759 F. Supp. 2d 469 [2010])] based on *Morrison*'s presumption against extraterritorial application of the Exchange Act," Judge Scheindlin stated.

"Second, *Valentini* [v. Citigroup, Inc. (No. 11 Civ. 1355, [S.D.N.Y. Dec. 27, 2011])] and *Elliot* are distinguishable on the grounds that they involve securities that had a direct, one-to-one relationship with the U.S. security referenced, and the security at issue in those cases fluctuated in value in direct correlation with the value of the U.S. security.

"The issue of the extent to which the Exchange Act may reach foreign instruments referencing U.S. stock is an issue that many district courts have grappled with and which requires further guidance from appellate courts. However, given that plaintiffs' federal securities law claims fail to satisfy the standard in *Absolute Activist* and their extremely tenuous and speculative connection to securities listed on a U.S. stock exchange, plaintiffs have failed to overcome the presumption against the extraterritorial reach of the Exchange Act," Judge Scheindlin explained.

Counsel

The shareholders are represented by Edward W. Miller of New York and Alan I. Ellman, Javier Bleichmar and Joel H. Bernstein of Labaton Sucharow in New York.

The defendants are represented by Gustavo J. Membeila and Samuel A. Danon of Hunton & Williams in Miami and Paulo R. Lima and Shawn P. Regan of Hunton & Williams in New York. ■

Madoff Customers' Claims Barred By Injunction, Automatic Stay, Judge Rules

NEW YORK — Customers of Bernard L. Madoff Investment Securities LLC (BLMIS) are not entitled to bring a securities class action lawsuit against the estate of a former BLMIS investor that is subject to a $7.2 billion settlement agreement with BLMIS's liquidation trustee because class action claims are prohibited by a permanent injunction and an automatic stay on customer claims, a federal bankruptcy judge in New York ruled June 20 (Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC, [In re Bernard L. Madoff], No. 08-1789, S.D. N.Y. Bkcy.; See December 2010, Page 4).

(**Opinion available.** Document #88-120625-064Z.)

Irving H. Picard, the liquidation trustee for Bernard L. Madoff Investment Securities LLC (BLMIS), sued the estate of former BLMIS investor Jeffrey M. Picower in the U.S. Bankruptcy Court for the Southern District of New York. He sought to recover more than $7.2 billion that Picower received as part of his role in Madoff's Ponzi scheme.

In February 2010, BLMIS investor Adele Fox sued Picower's estate in the U.S. District Court for the Southern District of Florida, seeking to recover losses sustained as part of Picower's role in the Ponzi scheme, but the Bankruptcy Court enjoined Fox's action (Fox I). Fox appealed to the Southern District of New York, which upheld the District Court's order in a March 26, 2012, ruling.

Settlement Agreement

In the meantime, on Dec. 17, 2010, Picard entered into a settlement agreement with Picower's estate, which required the estate to forfeit and repay approximately $7.2 billion, of which $5 billion was to be paid to Picard as BLMIS trustee.

Fox appealed the settlement order to the Southern District of New York, but the District Court upheld the settlement agreement on March 26, 2012.

On Dec. 13, BLMIS investors A&G Goldman Partnership and Pamela Goldman (collectively, class action plaintiffs) moved for a determination that neither the Bankruptcy Court's Jan. 13, 2011, injunction nor the automatic stay provision of Section 362 of Title 11 of the U.S. Code bar, prohibit, restrict or prevent them from commencing and prosecuting a securities law class action against Picower's estate and related defendants in the Southern District of Florida.

Standing

In denying that motion, Judge Burton R. Lifland rejected the class action plaintiffs' assertions that the

Bankruptcy Court "should not enjoin their 'federal securities law claims' because they belong to the *shareholders* and not the estate" and that Picard lacks standing to bring those claims and the Bankruptcy Court lacks jurisdiction to adjudicate them in light of the Second Circuit U.S. Court of Appeals' ruling in Travelers Casualty and Surety Co. v. Chubb Indemnity Co. [In re Johns-Manville Corp.] (517 F.3d 52 [2008]).

"The Class Action Plaintiffs . . . have simply repeated, repackaged, and relabeled the wrongs alleged by the Trustee in an attempt to create independent claims where none exist. In fact, they re-iterate allegations almost verbatim of not only the Trustee's Complaint, but also of the complaints their same counsel set forth in *Fox I*. As such, the Court rejects the Plaintiffs' arguments and denies the Motion," Judge Lifland said.

The class action plaintiffs are represented by Joshua J. Angel and Frederick E. Schmidt Jr. of Herrick Feinstein in New York.

Picard is represented by David J. Sheehan, Deborah H. Renner, Tracy L. Cole, Keith R. Murphy, Marc Skapof, Amy E. Vanderwal, Matthew J. Moody and George Klidonas of Baker & Hostetler in New York. ■

Judge Dismisses Investor Suit Against Merrill Lynch, Pierce, Fenner & Smith

NEW YORK — A shareholder has failed to plead any of its state or federal law claims against Merrill Lynch, Pierce, Fenner & Smith Inc. for alleged securities law violations in connection with the sale of auction-rate securities, a federal judge in New York ruled June 4 in dismissing the complaint (In re Merrill Lynch Auction-Rate Securities Litigation, No. 09-md-2030, [Iconix Brand Group Inc. v. Merrill Lynch, Pierce, Fenner & Smith Inc., No. 10-0124], S.D. N.Y.; 2012 U.S. Dist. LEXIS 77331).

(**Opinion available.** Document #57-120611-057Z.)

Investor Iconix Brand Group Inc. sued Merrill in the U.S. District Court for the Southern District of New York. Iconix alleges that Merrill fraudulently induced it into purchasing more than $100 million in auction-rate securities — the Anchorage Finance Sub-Trusts I-IV ARS — in violation of Section 10(b) of the Securities Exchange Act of 1934, Securities and Exchange Commission Rule 10b-5 and Section 12(a)(1) of the Securities Act of 1933.

Additional claims for common-law fraud and negligent misrepresentation were also made.

Section 10(b)

In granting Merrill's motion to dismiss, Judge Loretta A. Preska held that dismissal of the Section 10(b) and Rule 10b-5 claims is proper because Iconix made its purchase after Merrill produced its website disclosure and the SEC issued a 2006 order.

"This Court has held squarely in this Multidistrict Litigation that these same disclosures 'relieve [Merrill's] liability on Plaintiff's misstatement and market manipulation claims based on purchases made after the Website Disclosure.' The claims in Merrill IV [In re Merrill Lynch Auction-Rate Securities Litigation (No. 09-md-2030; 09-9887, S.D. N.Y. [Feb. 15, 2012])] that Merrill (and, to a lesser extent, Money Market One Institutional Investment Dealer) made material misstatements or omissions are, in substance, analogous in all material legal respects to the same aims advanced here. Plaintiff makes no new argument about the sufficiency of those disclosures. Nor does Plaintiff make new arguments with respect to scienter, reliance, or loss causation," Judge Preska said.

Judge Preska also found that because Iconix's claims "were not harassing or frivolous, and Merrill did not affirmatively allege any improper conduct or move for sanctions," neither Iconix nor its counsel violated Rule 11 of the Private Securities Litigation Reform Act.

Common-Law Fraud

Moreover, Judge Preska ruled that dismissal of Iconix's common-law fraud claim is proper because "the elements of common law fraud essentially mirror those involved in the section 10(b) claims."

Judge Preska further dismissed Iconix's Section 12(a)(1) claim, holding that in addition to Iconix's claim being time-barred, it also has failed to state a claim for relief.

Dismissal of the negligent misrepresentation claim is also proper, Judge Preska found, because the claim is preempted by New York's Martin Act.

Counsel

Iconix is represented by Marc E. Kasowitz and Charles M. Miller of Kasowitz, Benson, Torres & Friedman in New York.

Merrill is represented by Timothy P. Burke of Bingham McCutchen in Boston and Mary G. Gearns of Bingham McCutchen in New York.

(Additional documents available: **Motion to dismiss.** Document #57-120611-058B. **Opposition brief.** Document #57-120611-059B. **Reply brief.** Document #57-120611-060B. **Complaint.** Document #57-120611-061C.) ■

Facebook, Underwriters, Stock Exchange Hit With Class Actions After IPO

Two putative class action complaints were filed May 22 in response to Facebook's initial public offering: a suit in a California state court against the company, its officers and underwriters, including Morgan Stanley, alleging that underwriters tipped off clients that they cut earnings projections ahead of the IPO, and a suit in New York federal court against Nasdaq, accusing the stock exchange of mishandling orders for Facebook shares and causing investor loss.

Facebook shareholder Darryl Lazar brought the suit against the company in the San Mateo County Superior Court, individually and on behalf of all others similarly situated (Darryl Lazar v. Facebook Inc., et al., Calif. Sup., San Mateo Co.).

(**Complaint available.** Document #57-120611-501C.)

According to Lazar, Morgan Stanley, J.P. Morgan Securities LLC and Goldman Sachs & Co. cut their earnings forecasts before the IPO but failed to tell the public. Lazar says this caused investors to buy Facebook stock based on misleading statements and omitted material information in the social networking company's registration statement and prospectus in violation of Sections 11 and 15 of the Securities Act of 1933.

Misleading Statements Alleged

Lazar says that under applicable Securities and Exchange Commission rules and regulations, the registration statement was required to disclose known trends, events or uncertainties that were having, and were reasonably likely to have, an impact on Facebook's continuing operations.

"However, the Registration Statement failed to disclose that during the IPO roadshow, the lead underwriters, including, Defendants Morgan Stanley, J.P. Morgan, and Goldman Sachs, all cut their earnings forecasts and that news of the estimate cut was passed on only to a handful of large investor clients, not to the public," according to the complaint. "Therefore, the Registration Statement was negligently prepared and, as a result, contained untrue statements of material facts or omitted to state other facts necessary to make the statements made not misleading, and was not prepared in accordance with the rules and regulations governing their preparation."

In the Southern District of New York action, investor Phillip Goldberg sued Nasdaq OMX Group Inc. and the Nasdaq Stock Market LLC (collectively, Nasdaq), individually and behalf of all others similarly situated (Phillip Goldberg v. Nasdaq OMX Group Inc., et al., No. 12-4054, S.D. N.Y.).

(**Complaint available.** Document #57-120611-502C.)

Goldberg says Facebook's IPO was "hotly anticipated" and many investors, both retail and institutional, sought to purchase shares in the IPO. However, because of Nasdaq's negligence, that IPO was "badly mishandled," according to the complaint.

Promptly, Efficiently

"Because NASDAQ failed to process Facebook trades promptly and efficiently, parties attempting to purchase Facebook shares were unable to determine if they had properly done so," Goldberg says. "Indeed, NASDAQ failed to process some trade orders for hours on end, and failed to cancel other orders despite customer requests to do so."

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—Raymond T. Nimmer, Dean & Leonard H. Childs Professor of Law, University of Houston Law Center

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—Dr. Larry Ponemon, Chairman and Founder, Ponemon Institute

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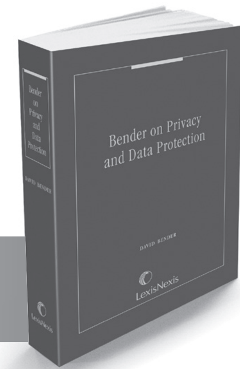

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According to the complaint, this damaged the plaintiff and class members in a variety of ways. Some class members placed buy orders and then placed timely cancellations of those orders when the market price declined, according to the complaint. These class members were damaged when the cancellations were not promptly and correctly executed by Nasdaq, and instead the buy orders were executed after Facebook prices had declined in value, meaning those class members overpaid for their shares, according the complaint. Other class members were unable to determine if their buy orders had been executed and did not know whether they owned Facebook shares, or at what price, and were accordingly unable to timely sell those shares, suffering losses, according to the complaint.

Lazar is represented by Lionel Z. Glancy, Michael Goldberg, Robert V. Prongay and Casey E. Sadler of Glancy Binkow & Goldberg in Los Angeles.

Goldberg is represented by Douglas G. Thompson Jr., Michael G. McLellan and Robert O. Wilson of Finkelstein Thompson in Washington, D.C., and Christopher Lovell, Victor E. Stewart and Fred T. Isquith Jr. of Lovell, Stewart, Halebain, Jacobson in New York. ■

Judge: Consumer Entitled To More Than $2,000 In Damages In Lending Law Suit

LYNCHBURG, Va. — A consumer is entitled to more than $2,000 in statutory damages under state and federal law for an automobile dealer's failure to properly disclose requisite disclosures regarding the interest rate on an automobile loan, a federal judge in Virginia ruled June 19 (Michael J. Hummel v. David W. Hall, t/a Country Motor Sales, No. 11-0012, W.D. Va.; 2012 U.S. Dist. LEXIS 84305).

(**Opinion available.** Document #88-120625-061Z.)

Consumer Michael J. Hummel sued David W. Hall in the U.S. District Court for the Western District of Virginia, alleging that Hall violated the Truth in Lending Act (TILA) with regard to his sale of an automobile to Hummel.

In particular, Hummel contends that Hall failed to provide requisite disclosures in violation of TILA with regard to the interest rate charged on Hummel's purchase of a used car from a dealership Hall owned, Country Motor Sales, and violated Virginia law by charging Hummel a usurious interest rate.

Default Judgment

Hall failed to respond to the complaint's allegations, and Hummel moved for default judgment.

Judge Norman K. Moon granted the motion and held that Hummel is not entitled to the $2,000 in statutory damages under TILA that he is claiming, but is entitled to $1,000, because Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which increased the ceiling in TILA's civil liability provision from $1,000 to $2,000, did not take effect before the applied effective date of Section 1400(c)(3) of the Dodd-Frank Act.

Judge Moon also found that "ultimately, in light of the consistency with which previous iterations of the Dodd-Frank Act addressed the effective date of provisions under what eventually came to be Title XIV of the Act, and because of the explicit statement of the conferees' intent as related in the Congressional Record, I conclude that, contrary to Plaintiff's contention, and despite the ambiguity of section 1400(c)'s plain language, the increase in TILA's civil liability cap did *not* become effective on July 22, 2010."

"Accordingly, Plaintiff is entitled to $1,000, as opposed to $2,000, in statutory damages under TILA," Judge Moon stated.

Usury Damages

Moreover, Judge Moon ruled that under Virginia's usury law, Hummel is entitled to "a subtotal usury damages amount of $2,876.45."

"However, I will subtract from this amount the remaining principal balance that Plaintiff owes on the car, which is $1,693.78, as well as the interest that has accrued since September 2011, which is calculated to be $76.23. Thus, the total usury damages to which Plaintiff is entitled is $1,106.44," Judge Moon explained.

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Judge Moon further agreed with Hummel's assertion that because he never signed a security agreement for the purchase of the automobile, Hall has "no enforceable security interest in the car."

"[W]ithout such a security interest, it was improper for Defendant to place a lien on the title to the car. Accordingly, I will enter an order declaring Defendant's security interest in the car void and unenforceable. Further, that order will direct Defendant to release the lien, to give the car's title back to Plaintiff, and to return to Plaintiff any keys to the vehicle that he is holding," Judge Moon said.

Hummel is represented by Jeremy P. White of the Virginia Legal Aid Society in Lynchburg.

(Additional documents available: **Motion for default judgment.** Document #88-120625-062B. **Complaint.** Document #88-120625-063C.) ■

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Documents

USA v. STANFORD: JUDGMENT

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AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Houston

UNITED STATES OF AMERICA
V.
ROBERT ALLEN STANFORD
A/K/A Sir Allen Stanford, Allen Stanford

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: **4:09CR00342-001**
USM NUMBER: 35017-183

☐ See Additional Aliases.

Ali R. Fazel
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) ________

☐ pleaded nolo contendere to count(s) ________ which was accepted by the court.

☒ was found guilty on count(s) 1S, and 3S through 14S on March 6, 2012, after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 1341, 1343, and 1349	Conspiracy to commit wire fraud and mail fraud	03/03/2009	1S
18 U.S.C. §§ 1343 and 2	Wire fraud, aid and abet	04/24/2009	3S
18 U.S.C. §§ 1343 and 2	Wire fraud, aid and abet	12/24/2008	4S
18 U.S.C. §§ 1343 and 2	Wire Fraud, aid and abet	01/05/2009	5S

☒ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 2S.

☐ Count(s) ________ ☐ is ☐ are dismissed on the motion of the .

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 14, 2012
Date of Imposition of Judgment

David Hittner
Signature of Judge

DAVID HITTNER
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

6/14/12
Date

HEM MRO

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AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 1A

Judgment -- Page 2 of 7

DEFENDANT: **ROBERT ALLEN STANFORD**
CASE NUMBER: **4:09CR00342-001**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 1343 and 2	Wire fraud, aid and abet	02/28/2009	6S
18 U.S.C. §§ 1341 and 2	Mail fraud, aid and abet	02/28/2008	7S
18 U.S.C. §§ 1341 and 2	Mail fraud, aid and abet	08/13/2008	8S
18 U.S.C. §§ 1341 and 2	Mail fraud, aid and abet	09/18/2008	9S
18 U.S.C. §§ 1341 and 2	Mail fraud, aid and abet	10/16/2008	10S
18 U.S.C. §§ 1341 and 2	Mail fraud, aid and abet	12/16/2008	11S
18 U.S.C. §§ 1505 and 371	Conspiracy to obstruct United States Securities and Exchange Commission (SEC) investigation	02/28/2009	12S
18 U.S.C. §§ 1505 and 2	Obstruction of SEC investigation, aid and abet	02/28/2009	13S
18 U.S.C. § 1956(h)	Conspiracy to commit money laundering	02/17/2009	14S

☐ See Additional Counts of Conviction.

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AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 2 -- Imprisonment

Judgment -- Page 3 of 7

DEFENDANT: **ROBERT ALLEN STANFORD**
CASE NUMBER: **4:09CR00342-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 1,320 months.
This term consists of TWO HUNDRED FORTY (240) MONTHS as to each of Counts 1S, 3S, 4S, 5S and 6S, SIXTY (60) MONTHS as to each of Counts 12S and 13S, all such terms to be served consecutively; and TWO HUNDRED FORTY (240) MONTHS as to each of Counts 7S, 8S, 9S, 10S, 11S, and 14S, to be served concurrently with each other and with Counts 1S, 3S, 4S, 5S, 6S, 12S, and 13S, for a total term of ONE THOUSAND THREE HUNDRED AND TWENTY (1,320) MONTHS.

☐ See Additional Imprisonment Terms.

☒ The court makes the following recommendations to the Bureau of Prisons:
Mr. Stanford is to be imprisoned in the most secure facility that the BOP finds is commensurate with his security needs up to and including a U.S. Penitentiary.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at ________ ☐ a.m. ☐ p.m. on ________ .
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on ________ .
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ________ to ________

at ________, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By ________
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 3 -- Supervised Release

Judgment -- Page 4 of 7

DEFENDANT: **ROBERT ALLEN STANFORD**
CASE NUMBER: **4:09CR00342-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years.
This term consists of THREE (3) YEARS as to each of Counts 1S, and 3S through 14S, to run concurrently, for a total of THREE (3) YEARS.

☐ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. *(for offenses committed on or after September 13, 1994)*

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state registration in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 3C -- Supervised Release

Judgment -- Page 5 of 7

DEFENDANT: **ROBERT ALLEN STANFORD**
CASE NUMBER: **4:09CR00342-001**

SPECIAL CONDITIONS OF SUPERVISION

The defendant is prohibited from employment or acting in a fiduciary role during the term of supervision.

☐ See Additional Special Conditions of Supervision.

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 5 -- Criminal Monetary Penalties

Judgment -- Page 6 of 7

DEFENDANT: **ROBERT ALLEN STANFORD**
CASE NUMBER: **4:09CR00342-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$1,300.00		

A $100 special assessment is ordered as to each of Counts 1S, and 3S-14S, for a total of $1,300.

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until ______________. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
☐ See Additional Restitution Payees.			
TOTALS	$0.00	$0.00	

☐ Restitution amount ordered pursuant to plea agreement $ ______________

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 6 -- Schedule of Payments

Judgment -- Page 7 of 7

DEFENDANT: **ROBERT ALLEN STANFORD**
CASE NUMBER: **4:09CR00342-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $1,300.00 ________ due immediately, balance due

☐ not later than ____________________, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal ________ installments of __________ over a period of __________, to commence ____ days after the date of this judgment; or

D ☐ Payment in equal ________ installments of __________ over a period of __________, to commence ____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ______ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court
Attn: Finance
P.O. Box 61010
Houston, TX 77208

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

5.9 Billion in the form of a personal money judgment; and as stated in the Amended Order of Forfeiture entered June 1, 2012 (Document # 862).

☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

FACCIOLA v. GREENBERG TRAURIG MOTION

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ROBERT FACCIOLA, et al., Plaintiffs, vs. GREENBERG TRAURIG, LLP, a New York limited liability partnership, et al., Defendants.	Case No. 2:10-cv-01025-FJM **LEAD PLAINTIFFS' MOTION FOR** **(1) PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT WITH DEFENDANT GREENBERG TRAURIG LLP, AND** **(2) PRELIMINARYCERTIFICATION OF SETTLEMENT CLASSES**

I. INTRODUCTION

ML Lead Plaintiffs-Class Representatives and RB Lead Plaintiffs-Class Representatives (collectively "Class Plaintiffs") have reached a proposed class settlement with Defendant Greenberg Traurig LLP ("Greenberg") which, if approved, will resolve all claims alleged against Greenberg in this action. Greenberg has agreed to pay $61,017,740.00 in settlement of all claims that were asserted, or could have been asserted, by the ML Settlement Class and the RB Settlement Class against Greenberg arising from the collapse of Mortgages Ltd. ("ML") and Radical Bunny LLC ("RB"). The terms of the proposed class settlement with Greenberg ("the GT Settlement") are set forth in the Stipulation of Settlement filed concurrently with this motion.[1] Class Plaintiffs respectfully request that the Court grant preliminary approval of the GT Settlement because it provides substantial and immediate economic benefits to more than 1,700 investors across the country who suffered losses in the alleged securities scheme that ended with the collapse of both ML and RB in 2008.

The GT Settlement was reached through a separate mediation and separate negotiations conducted independently from the negotiations underlying the recently submitted proposed settlement with Defendant Quarles & Brady LLP ("the QB Settlement"). *See* "Lead Plaintiffs' Motion for (1) Preliminary Approval of Class Action Settlements with Defendants Quarles & Brady, etc." (Doc. # 407) ("QB Motion"). Like the QB Settlement, however, the GT Settlement is part of a global resolution of not only the Class Plaintiffs' claims against Greenberg, but also, pursuant to separate agreements, claims asserted by other investor groups. The result is a second global settlement among the investor groups that preserves the fundamental principle that all victimized investors share in the recovery on an essentially *pro rata* basis.

The GT Settlement accomplishes this through certification of the same two settlement classes proposed in connection with the QB Settlement: (1) the ML Settlement

[1] Capitalized terms generally have the same definitions as set forth in the concurrently filed Stipulation of Settlement (Doc. # 415).

Class and (2) the RB Settlement Class (collectively, "the Settlement Classes"). The proposed Settlement Classes readily satisfy all of the requirements for certification under Fed. R. Civ. P. Rule 23. *See* Doc. # 407, at 11:20-15:3.

At the preliminary approval stage, the Court reviews the proposed settlement to determine that it is not collusive and, "taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Doc. # 407, at 2:2-11. The proposed GT Settlement meets this standard. The $61 million common fund established by the GT Settlement represents a very favorable outcome for the investor class members in light of the risks and costs attendant to continued litigation, the insurance coverage available to pay investor claims against Greenberg (which continued litigation would further erode) and the difficulties inherent in successfully prosecuting and collecting class claims against a law firm defendant. The GT Settlement results from indisputably arm's length negotiations before one of the most respected and sought after mediators, David Geronemus of JAMS, following more than two years of hard-fought litigation before this Court.

Class Plaintiffs therefore respectfully request that the Court enter the [Proposed] Preliminary Approval Order, which: (1) preliminarily approves the GT Settlement; (2) certifies the ML Settlement Class and the RB Settlement Class; (3) establishes a coordinated notice program for the proposed GT and QB Settlements; and (4) schedules a hearing date (the "Final Approval Hearing") to consider the final approval of the GT Settlement, the proposed Plan of Allocation, and Class Counsel's application for attorneys' fees and expenses. The schedule proposed by Class Plaintiffs, which Greenberg supports, will allow the settlement approval process to be coordinated with the approval process for the proposed class settlement with QB on a timetable that strictly complies with the Court's recent order (Doc. # 413).

II. SUMMARY OF THE CLAIMS AND DEFENSES RELATING TO GREENBERG

A. Class Plaintiffs' Contentions

ML Lead Plaintiffs contend that Greenberg is either primarily or secondarily liable under the Arizona Securities Act ("ASA") in connection with securities violations committed by RB and ML. The RB Lead Plaintiffs assert secondary liability claims against Greenberg for the same alleged securities violations. As the principal form of relief for their claims against Greenberg, Class Plaintiffs seek statutory rescission under A.R.S. § 44-2001(A).

The factual and legal bases for Class Plaintiffs' claims against Greenberg and the law firm's defenses are comprehensively detailed in a series of motions filed over the course of the litigation, including:

- Greenberg's First Motion to Dismiss Complaint. *See* Briefing at Docs. #104, 105, 135.
- Lead Plaintiffs' Motion to Amend Complaint. *See* Briefing at Docs. #216, 231, 245.
- Lead Plaintiffs' Motion to Certify Investor Classes. *See* Briefing at Docs. #256, 261, 269.
- Greenberg' Second Motion to Dismiss Complaint. *See* Briefing at Docs. #299, 302, 307.
- Greenberg' Motion for Summary Judgment. *See* Doc. #381.
- Lead Plaintiffs' Motion for Summary Judgment. *See* Doc. #378.

Class Plaintiffs contend that Greenberg cannot genuinely dispute its knowledge of the primary securities violations; Greenberg itself contends that it ***told*** ML that the manner in which RB was raising funds from investors for use by ML was unlawful. Despite this knowledge of RB's misconduct, Greenberg continued to represent ML as securities counsel and to generate new ML POM's used to raise money from ML investors without disclosing the past illegality while RB continued to raise tens of millions of dollars

illegally from the RB investors. Class Plaintiffs also allege that Greenberg's actions substantially assisted RB's ongoing fraudulent securities sales to the RB Settlement Class by facilitating the flow of tainted funds necessary to keep ML afloat.

The ASA is remedial in nature and, as this Court has recognized, provides investors with protections and remedies broader than those available under federal law. *See* Doc. # 407, at 4:12-19 (and citations therein). The analysis and report of Class Plaintiffs' damages expert, Dr. Gordon Rausser, established Greenberg's exposure to a rescission award as high as $499 million if found liable. *Id.*

B. Greenberg' Primary Contentions

Greenberg denies that it engaged in, or aided or abetted, any securities fraud or fraudulent scheme. Among other things, Greenberg filed a motion for summary judgment asserting that, based on what it contends to be the undisputed material facts, it is entitled to judgment in its favor (Doc. # 381). Greenberg contends that there is no evidence that Greenberg "participated in or induced" sales made by Mortgages Ltd. and Radical Bunny to their investors, knowingly engaged in or assisted the alleged fraudulent activity or provided substantial assistance to the alleged fraudulent activity. Greenberg also asserts that statutory rescission is not available to the Lead Plaintiffs, and that investor losses were caused by an economic downturn unrelated to the alleged misconduct. Fundamentally, Greenberg contends that its knowledge of securities registration issues at Radical Bunny, which Greenberg endeavored to cause its client and Radical Bunny to remedy, cannot form the basis of a securities fraud claim against it. Greenberg further disputes that Arizona continues to recognize a cause of action for aiding and abetting securities fraud. Finally, while for purposes of the Stipulation of Settlement, Greenberg consents to the certification of the Settlement Classes, it contends that no litigation class could be properly certified here.

C. Procedural Posture of the Case as of the GT Settlement

This action is in a prime procedural position for settlement of the class claims

against Greenberg. Tangential claims have been dismissed by the Court or by Class Plaintiffs' voluntary winnowing. Discovery has been exhaustive and is complete. Expert initial and rebuttal reports have been prepared and exchanged and the parties' respective experts have been deposed. Litigation classes have been certified. Cross-motions for summary judgment have been filed and, in the case of Class Plaintiffs' claims against Greenberg, fully briefed. In short, the claims against Greenberg have been thoroughly presented and vetted, allowing all sides to conduct a clear-eyed and informed evaluation of the respective strengths and weaknesses of their claims and defenses.

D. Mediation and Negotiation of the GT Settlement

In addition to its exposure as a defendant in this action, Greenberg faces additional lawsuits by three other camps of investors who have filed individual "group" actions against Greenberg. Given the structure of the available insurance coverage and Greenberg' understandable desire for a comprehensive resolution, all of the interested parties participated in a global mediation in New York before mediator Geronemus. As a prelude to the global Greenberg mediation, weeks of negotiations and preliminary mediation sessions were conducted to resolve allocation issues as among the multiple plaintiff groups.

The proposed Settlement ultimately was forged through this extensive and prolonged process of arm's length negotiation and mediation. All parties recognized that time was of the essence in reaching settlement in light of the impending deadlines in this litigation and the self-consuming nature of the available insurance coverage.

III. SUMMARY OF THE GT SETTLEMENT

A. The Proposed Settlement Classes

The proposed Settlement Classes are the same ML Settlement Class and RB Settlement Class proposed in the QB Settlement (Doc. # 407, at 6:15-28). Exclusions from the Settlement Classes are set out in the Stipulation.

B. Economic Value of the Settlement to Class Members

Under the Settlement, Greenberg will pay $61,017,740 for the benefit of the RB Settlement Class and the ML Settlement Class. The costs of settlement notice and administration and court-approved attorneys' fees and costs payable to Class Counsel will be paid from the Settlement Fund. The remaining amount, the "Net Settlement Fund," will be distributed to members of the ML Settlement Class and the RB Settlement Class under the proposed Plan of Allocation (Doc. # 416-1).

The analysis conducted by Class Plaintiffs' damages expert determined that the ML Settlement Class incurred 65% of the total net principal amount investor losses and the RB Settlement Class incurred 35% of those losses. In recognition of the relative strength of the claims against Greenberg held by the ML Settlement Class and the RB Settlement Class, the Class Plaintiffs propose to allocate an enhanced share of the Net Settlement Fund to the ML Settlement Class (Doc. # 416-1). The amount of the Net Settlement Fund allocated to the ML Settlement Class and the amount allocated to the RB Settlement Class will then be distributed to members of each of the settlement classes based on their relative pro rata shares of the aggregate investor losses as of the close of the Class Period on June 3, 2008. *Id.*

C. Release

In return for the benefits of the Settlement, of the Settlement Classes agree to release all claims against Greenberg arising out of Greenberg' representation of ML.

D. Appointment of the Class Representative and Class Counsel and Payment of Attorneys' Fees and Costs

As with the QB Settlement (Doc. # 407 at 7:23-8:4), the GT Settlement contemplates that the Court designate the Class Plaintiffs as Class Representatives of the respective Settlement Classes and that: (1) Tiffany & Bosco LLP be appointed as class counsel for the ML Settlement Class; (2) Bonnett, Fairbourn, Friedman & Balint, P.C. be appointed as Class Counsel for the RB Settlement Class; and (3) these proposed appointments be expressly determined to satisfy Rule 23(g).

IV. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

A. The Settlement Is Fair, Reasonable and Adequate, and Well-Within the Range of Possible Approval.

Strong judicial policy favors settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA (JCS), 2008 WL 5382544, at *2 (N.D. Cal. Dec. 22, 2008). Settlements are particularly favored "in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *NVIDIA*, 2008 WL 5382544, at *2 (quotation omitted)); *accord Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 966 (9th Cir. 2009).

At this stage, the Court's review of the GT Settlement is "limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625; *accord Hanlon v Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). This is a low threshold. *Young v. Polo Retail, LLC*, No. C-02-4546 (VRW), 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25, 2006) (citations and quotations omitted). The proposed GT Settlement readily satisfies these requirements for preliminary approval.

1. The GT Settlement Is the Product of Serious, Informed and Non-Collusive Negotiations.

This Court is familiar with the long, intensely adversarial history of this case. Through extensive discovery each side has unquestionably amassed substantial factual and expert testimony in support of their positions and the Court has already addressed several key issues in its multiple rulings on successive motions to dismiss and for class certification (Doc. # 407, at 9:14-23). Class Plaintiffs have had ample opportunity to evaluate the respective strengths and weaknesses in their case as well as the extent of available insurance coverage and defenses to coverage. Armed with this information, Class Plaintiffs entered mediation with the assistance of able and experienced Mediator Geronemus.

2. The Proposed GT Settlement Has "No Obvious Deficiencies."

The proposed Settlement "has no obvious deficiencies." *Young*, 2006 WL 3050861, at *5. To the contrary, the GT Settlement provides a straightforward cash common Settlement Fund for the benefit of all Settlement Classes members, designed to maximize an immediate recovery from Greenberg in the face of "self-consuming" insurance coverage that would have rapidly diminished the available assets out of which even a favorable judgment after trial could be satisfied.

3. The Proposed Relief Does Not "Grant Preferential Treatment to Class Representatives."

The Lead Plaintiffs are treated the same under the Settlement as every other member of the Settlement Classes and do not ask for incentive or service awards, which are commonly awarded in class litigation. *Rodriguez*, 563 F.3d at 958-59 ("Incentive *awards* are fairly typical in class action cases") (emphasis in original). And again Class Counsel contemplate a fee application of only 15% based upon their pre-litigation agreement with the Lead Plaintiffs, far below the Ninth Circuit's 25% starting point (or "benchmark") for determining class action fees (Doc. # 407, at 10:14-22).

4. The Proposed Relief Is Within the "Range of Possible Approval."

The proposed GT Settlement falls well within the "range of possible approval," as it provides substantial economic benefit to the investor class members without the risk and delays of continued litigation, trial and appeal, and without the exhaustion of insurance proceeds through further defense of this action and of the parallel actions brought by other investor groups (Doc. # 407, at 10:24-11:19). Because Greenberg is a law firm having few tangible assets other than its current and prospective client billings, Class Counsel necessarily took into account the real prospect that a jury verdict of the magnitude sought by Class Plaintiffs (or the mere threat of this existential exposure) would trigger a mass exodus of partners leaving the class members with a largely uncollectable paper judgment. *Id.*

B. The Court Should Certify the Settlement Classes.

The ML Settlement Class and the RB Settlement Class should be certified for the same reasons set forth in connection with the QB Settlement (Doc. # 407, at 11:20-14:23) (incorporated herein by reference), and in connection with the Court's certification of the litigation classes (Doc. # 346).

C. The Court Should Again Appoint Lead Counsel as Counsel for the Settlement Classes

Rule 23(g)(1) requires the Court to appoint counsel to represent the interests of the class. This the Court has already done for the litigation classes. Doc. # 346, at 14. For the same reasons, the law firms of Tiffany & Bosco P.A. and Bonnett, Fairbourn, Friedman & Balint, P.C. and are "well equipped" to vigorously, competently and efficiently represent the respective Settlement Classes.

V. PROPOSED CLASS NOTICE

Lead Plaintiffs propose to give interested parties notice by first-class mail, addressed to each member of the Settlement Classes using the highly reliable ML and RB bankruptcy proceeding records (Doc. # 407, at 15:5-16) (and authorities cited therein). Notice to the Settlement Classes in the form proposed (Exhibit B to the Stipulation, Doc. # 415-2, attached as Exhibit 1 to the proposed Preliminary Approval Order) fulfills all Due Process requirements, complies with the Federal Rules of Civil Procedure, and satisfies the requirements of A.R.S. § 44-2081. Id., at 15:17-16:5. The Class Notice and Cover Page will, when mailed as suggested, fairly apprise members of the Settlement Classes of the GT Settlement and their options with respect thereto.

VI. PROPOSED SCHEDULE

To avoid any inconvenience to the Court or confusion among the Settlement Classes Members, the parties respectfully request the Court to adopt a schedule for consideration of the proposed Greenberg settlement that tracks the schedule established by the Court in connection with the Quarles settlement. Accordingly, the parties request that the final approval hearing regarding the Greenberg settlement also be scheduled for

September 14, 2012, the same day as the Quarles final approval hearing. This proposed schedule complies with the Class Action Fairness Act ("CAFA"), which provides that "[a]n order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b)." 28 U.S.C. § 1715(d). Consistent with the plain language of this provision, the final approval hearing may be held prior to the expiration of the ninety-day period, so long as the order is not entered until the expiration of the ninety-day period. *See, e.g.*, *Beaty v. Cont'l Auto. Sys. U.S., Inc.*, No. CV-11-S-890-NE, 2012 WL 1886134, at *5, 9 (N.D. Ala. May 21, 2012); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG)(VVP), 2011 WL 2909162, at *1 n.8 (E.D.N.Y. July 15, 2011). The CAFA notice in this matter will be served on June 20, 2012, and thus an order giving final approval that complies with CAFA may be entered on or after September 18, 2012.

Consistent with the foregoing, the parties respectfully request the Court to adopt the following schedule for consideration of the Greenberg proposed settlement:

- Entry of the Preliminary Approval Order— on or before June 29, 2012.
- Deadline for mailing of Class Notice— within 5 days after entry of the Order approving the Class Notice.
- Deadline for service of CAFA Notice—June 20, 2012.
- Deadline for Exclusion Requests— August 13, 2012.
- Deadline for Objections to Settlement – August 24, 2012.
- Final Approval Hearing— September 14, 2012

VII. CONCLUSION

For the reasons set forth above, Class Plaintiffs respectfully request that the Court certify the ML Settlement Class and the RB Settlement Class, appoint counsel for the Settlement Classes and enter the proposed Preliminary Approval Order.

DATED: June 20, 2012.

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Certificate of Service

I hereby certify that on June 20, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail notice list, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice list.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Nancy Varner
Legal Secretary

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