

# Recent Federal Court Rulings Against Wells Fargo (and other predatory Trustees and Servicers)

By Cyrus Rafizadeh

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The gig is up for Kovacevich and Miyauchi...

## **Honorable Christopher A. Boyko:**

“On October 10, 2007, this Court issued an Order requiring Plaintiff-Lenders in a number of pending foreclosure cases to file a copy of the executed Assignment demonstrating Plaintiff was the holder and owner of the Note and Mortgage *as of the date the Complaint was filed*, or the Court would enter a dismissal.” And,

”A party seeking to bring a case into federal court on grounds of diversity carries the burden of establishing diversity jurisdiction. *Coyne v. American Tobacco Company*, 183 F. 3d 488 (6<sup>th</sup> Cir. 1999). Further, the plaintiff “bears the burden of demonstrating standing and must plead its components with specificity.” *Coyne*, 183 F. 3d at 494; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). The minimum constitutional requirements for standing are: proof of injury in fact, causation, and redressability. *Valley Forge*, 454 U.S. at 472. In addition, “the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted.” *Coyne*, 183 F. 3d at 494 (quoting *Pesttrak v. Ohio Elections Comm’n*, 926 F. 2d 573, 576 (6<sup>th</sup> Cir. 1991)). To satisfy the requirements of Article III of the United States Constitution, the plaintiff must show he has *personally suffered some actual injury* as a result of the illegal conduct of the defendant. (Emphasis added). *Coyne*, 183 F. 3d at 494; *Valley Forge*, 454 U.S. at 472. In each of the above-captioned Complaints, the named Plaintiff alleges it is the holder and owner of the Note and Mortgage. However, the attached Note and Mortgage identify the mortgagee and promisee as the original lending institution — one other than the named Plaintiff.”

As federal courts decipher the various rackets invented by predatory lenders, the liabilities of predatory Servicers such as Wells Fargo and ORIX have skyrocketed for all the unlawful seizures, foreclosures and auction of borrower assets that they have engineered.

Recently, Wells Fargo Bank was handed the most humiliating defeat and verdict ever by a federal court in Southern District of Ohio. This ruling clearly demonstrates the frustration of the judicial system with the predatory banks, *especially* Wells Fargo, the #1 largest “subprime” lender and trustee of asset-backed securities trusts, and their agents who continued to steam roll borrowers

“Mortgagee” or “Note Holder”, stealing billions from investors in the process, whom they are hired to serve.

This Southern District of Ohio ruling was based on the brilliant opinion authored by Northern District of Ohio, Eastern Division Judge, the incomparable Honorable Christopher A. Boyko who is proven well-qualified to seat as Chief Justice of Supreme Court of United States in my opinion. This opinion is also commented on Lexus as a significant ruling in favor of the Borrowers consistent with Constitution of United States.

These rulings, in addition to rulings in LA and VA relating to Wells Fargo’s dismissals and “remandments” (for the lack of a better word) for Nullifications spell big trouble for MLMI and other REMIC trusts for which it acts as Trustee and fully supports predatory actions of the Servicers such as ORIX. It will be interesting to watch and see what the future holds!

Exhibits attached include,

1. Southern District Ohio Ruling
2. Northern District Ohio Ruling
3. LA Federal Court Remand
4. VA Federal Court Remand

These new remarkable court opinions expose the Achilles’ heel of Kovacevich's scams that had never been discovered till now. The scams that fundamentally undermine and abuse the laws and courts to legitimize bad acts and wrongful conducts;

- Financial institutions default (thanks to past court complacencies) powers can be considered to be far greater than that of United States Government, as they ***violate people’s privacy and property rights with no consequence***. For example, taking over people's homes and kicking them out which not even the Government can exercise unilaterally (Ex-Parte) which is in violation of the Constitution.
- ***A conduit can never "suffer a loss" or "be injured"*** as it must immediately pass gains or losses to Investors who are (if there are to be any at all) the true injured party -- not the Servicer, not the Trustee and not the Pass-Through Trust itself!
- The injustice in the financial institutions of uncontested and ***Ex-Parte*** access to the courts to legitimize their financial destruction, theft, rape and pillaging of borrowers and investors.

# Exhibit 1

Southern District of Ohio Ruling

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

**IN RE FORECLOSURE CASES**

**CASE NO. 3:07CV043**

**07CV049**

**07CV085**

**07CV138**

**07CV237**

**07CV240**

**07CV246**

**07CV248**

**07CV257**

**07CV286**

**07CV304**

**07CV312**

**07CV317**

**07CV343**

**07CV353**

**07CV360**

**07CV386**

**07CV389**

**07CV390**

**07CV433**

**JUDGE THOMAS M. ROSE**

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**OPINION AND ORDER**

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The first private foreclosure action based upon federal diversity jurisdiction was filed in this Court on February 9, 2007. Since then, twenty-six (26) additional complaints for foreclosure based upon federal diversity jurisdiction have been filed.

**STANDING AND SUBJECT MATTER JURISDICTION**

While each of the complaints for foreclosure pleads standing and jurisdiction, evidence submitted either with the complaint or later in the case indicates that standing and/or subject matter jurisdiction may not have existed at the time certain of the foreclosure complaints were

filed. Further, only one of these foreclosure complaints thus far was filed in compliance with this Court's General Order 07-03 captioned "Procedures for Foreclosure Actions Based On Diversity Jurisdiction.

### Standing

Federal courts have only the power authorized by Article III of the United States Constitution and the statutes enacted by Congress pursuant thereto. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). As a result, a plaintiff must have constitutional standing in order for a federal court to have jurisdiction. *Id.*

Plaintiffs have the burden of establishing standing. *Loren v. Blue Cross & Blue Shield of Michigan*, No. 06-2090, 2007 WL 2726704 at \*7 (6th Cir. Sept. 20, 2007). If they cannot do so, their claims must be dismissed for lack of subject matter jurisdiction. *Id.* (citing *Central States Southeast & Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care*, 433 F.3d 181, 199 (2d Cir. 2005)).

Because standing involves the federal court's subject matter jurisdiction, it can be raised sua sponte. *Id.* (citing *Central States*, 433 F.3d at 198). Further, standing is determined as of the time the complaint is filed. *Cleveland Branch, NAACP v. City of Parma, Ohio*, 263 F.3d 513, 524 (6th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002). Finally, while a determination of standing is generally based upon allegations in the complaint, when standing is questioned, courts may consider evidence thereof. *See NAACP*, 263 F.3d at 523-30; *Senter v. General Motors*, 532 F.2d 511 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976).

To satisfy Article III's standing requirements, a plaintiff must show: (1) it has suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or

hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Loren*, 2007 WL 2726704 at \*7.

To show standing, then, in a foreclosure action, the plaintiff must show that it is the holder of the note and the mortgage at the time the complaint was filed. The foreclosure plaintiff must also show, at the time the foreclosure action is filed, that the holder of the note and mortgage is harmed, usually by not having received payments on the note.

#### Diversity Jurisdiction

In addition to standing, a court may address the issue of subject matter jurisdiction at any time, with or without the issue being raised by a party to the action. *Community Health Plan of Ohio v. Mosser*, 347 F.3d 619, 622 (6th Cir. 2003). Further, as with standing, the plaintiff must show that the federal court has subject matter jurisdiction over the foreclosure action at the time the foreclosure action was filed. *Coyne v. American Tobacco Company*, 183 F.3d 488, 492-93 (6th Cir. 1999). Also as with standing, a federal court is required to assure itself that it has subject matter jurisdiction and the burden is on the plaintiff to show that subject matter jurisdiction existed at the time the complaint was filed. *Id.* Finally, if subject matter jurisdiction is questioned by the court, the plaintiff cannot rely solely upon the allegations in the complaint and must bring forward relevant, adequate proof that establishes subject matter jurisdiction. *Nelson Construction Co. v. U.S.*, No. 05-1205C, 2007 WL 3299161 at \*3 (Fed. Cl., Oct. 29, 2007) (citing *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178 (1936)); *see also Nichols v. Muskingum College*, 318 F.3d 674, (6th Cir. 2003) (“in reviewing a 12(b)(1) motion, the court may consider evidence outside the pleadings to resolve factual disputes

concerning jurisdiction...”).

The foreclosure actions are brought to federal court based upon the federal court having jurisdiction pursuant to 28 U.S.C. § 1332, termed diversity jurisdiction. To invoke diversity jurisdiction, the plaintiff must show that there is complete diversity of citizenship of the parties and that the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332.

#### Conclusion

While the plaintiffs in each of the above-captioned cases have pled that they have standing and that this Court has subject matter jurisdiction, they have submitted evidence that indicates that they may not have had standing at the time the foreclosure complaint was filed and that subject matter jurisdiction may not have existed when the foreclosure complaint was filed. Further, this Court has the responsibility to assure itself that the foreclosure plaintiffs have standing and that subject-matter-jurisdiction requirements are met at the time the complaint is filed. Even without the concerns raised by the documents the plaintiffs have filed, there is reason to question the existence of standing and the jurisdictional amount. *See* Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims* 3-4 (November 6, 2007), University of Iowa College of Law Legal Studies Research Paper Series Available at SSRN: <http://ssrn.com/abstract-1027961> (“[H]ome mortgage lenders often disobey the law and overreach in calculating the mortgage obligations of consumers. ... Many of the overcharges and unreliable calculations... raise the specter of poor recordkeeping, failure to comply with consumer protection laws, and massive, consistent overcharging.”)

Therefore, plaintiffs are given until not later than thirty days following entry of this order to submit evidence showing that they had standing in the above-captioned cases **when the**

**complaint was filed** and that this Court had diversity jurisdiction **when the complaint was filed**. Failure to do so will result in dismissal without prejudice to refile if and when the plaintiff acquires standing and the diversity jurisdiction requirements are met. *See In re Foreclosure Cases*, No. 1:07CV2282, et al., slip op. (N.D. Ohio Oct. 31, 2007) (Boyko, J.)

**COMPLIANCE WITH GENERAL ORDER 07-03**

Federal Rule of Civil Procedure 83(a)(2) provides that a “local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.” Fed. R. Civ. P. 83(a)(2). The Court recognizes that a local rule concerning what documents are to be filed with a certain type of complaint is a rule of form. *Hicks v. Miller Brewing Company*, 2002 WL 663703 (5th Cir. 2002). However, a party may be denied rights as a sanction if failure to comply with such a local rule is willful. *Id.*

General Order 07-03 provides procedures for foreclosure actions that are based upon diversity jurisdiction. Included in this General Order is a list of items that must accompany the Complaint.<sup>1</sup> Among the items listed are: a Preliminary Judicial Report; a written payment history verified by the plaintiff’s affidavit that the amount in controversy exceeds \$75,000; a legible copy of the promissory note and any loan modifications, a recorded copy of the mortgage; any applicable assignments of the mortgage, an affidavit documenting that the named plaintiff is the owner and holder of the note and mortgage; and a corporate disclosure statement. In general, it is from these items and the foreclosure complaint that the Court can confirm standing and the

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<sup>1</sup>The Court views the statement “the complaint must be accompanied by the following” to mean that the items listed must be filed with the complaint and not at some time later that is more convenient for the plaintiff.

existence of diversity jurisdiction at the time the foreclosure complaint is filed.

### Conclusion

To date, twenty-six (26) of the twenty-seven (27) foreclosure actions based upon diversity jurisdiction pending before this Court were filed by the same attorney. One of the twenty-six (26) foreclosure actions was filed in compliance with General Order 07-03. The remainder were not.<sup>2</sup> Also, many of these foreclosure complaints are notated on the docket to indicate that they are not in compliance. Finally, the attorney who has filed the twenty-six (26) foreclosure complaints has informed the Court on the record that he knows and can comply with the filing requirements found in General Order 07-03.

Therefore, since the attorney who has filed twenty-six (26) of the twenty-seven (27) foreclosure actions based upon diversity jurisdiction that are currently before this Court is well aware of the requirements of General Order 07-03 and can comply with the General Order's filing requirements, failure in the future by this attorney to comply with the filing requirements of General Order 07-03 may only be considered to be willful. Also, due to the extensive discussions and argument that has taken place, failure to comply with the requirements of the General Order beyond the filing requirements by this attorney may also be considered to be willful.

A willful failure to comply with General Order 07-03 in the future by the attorney who filed the twenty-six foreclosure actions now pending may result in immediate dismissal of the

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<sup>2</sup>The Sixth Circuit may look to an attorney's actions in other cases to determine the extent of his or her good faith in a particular action. See *Capital Indemnity Corp. v. Jellinick*, 75 F. App'x 999, 1002 (6th Cir. 2003). Further, the law holds a plaintiff "accountable for the acts and omissions of [its] chosen counsel." *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 397 (1993).

foreclosure action. Further, the attorney who filed the twenty-seventh foreclosure action is hereby put on notice that failure to comply with General Order 07-03 in the future may result in immediate dismissal of the foreclosure action.

This Court is well aware that entities who hold valid notes are entitled to receive timely payments in accordance with the notes. And, if they do not receive timely payments, the entities have the right to seek foreclosure on the accompanying mortgages. However, with regard the enforcement of standing and other jurisdictional requirements pertaining to foreclosure actions, this Court is in full agreement with Judge Christopher A Boyko of the United States District Court for the Northern District of Ohio who recently stressed that the judicial integrity of the United States District Court is “**Priceless.**”

**DONE** and **ORDERED** in Dayton, Ohio, this Fifteenth day of November, 2007.

**s/Thomas M. Rose**

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THOMAS M. ROSE  
UNITED STATES DISTRICT JUDGE

Copies provided:

Counsel of Record

# Exhibit 2

Northern District of Ohio Ruling

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE FORECLOSURE CASES	)	CASE NO. NO.1:07CV2282
	)	07CV2532
	)	07CV2560
	)	07CV2602
	)	07CV2631
	)	07CV2638
	)	07CV2681
	)	07CV2695
	)	07CV2920
	)	07CV2930
	)	07CV2949
	)	07CV2950
	)	07CV3000
	)	07CV3029
	)	
	)	<b>JUDGE CHRISTOPHER A. BOYKO</b>
	)	
	)	
	)	<b><u>OPINION AND ORDER</u></b>
	)	
	)	

**CHRISTOPHER A. BOYKO, J.:**

On October 10, 2007, this Court issued an Order requiring Plaintiff-Lenders in a number of pending foreclosure cases to file a copy of the executed Assignment demonstrating Plaintiff was the holder and owner of the Note and Mortgage *as of the date the Complaint was filed*, or the Court would enter a dismissal. After considering the submissions, along with all the documents filed of record, the Court dismisses the captioned cases without prejudice. The Court has reached today's determination after a thorough review of all the relevant law and the briefs and arguments recently presented by the parties, including oral

arguments heard on Plaintiff Deutsche Bank's Motion for Reconsideration. The decision, therefore, is applicable from this date forward, and shall not have retroactive effect.

### LAW AND ANALYSIS

A party seeking to bring a case into federal court on grounds of diversity carries the burden of establishing diversity jurisdiction. *Coyne v. American Tobacco Company*, 183 F. 3d 488 (6<sup>th</sup> Cir. 1999). Further, the plaintiff "bears the burden of demonstrating standing and must plead its components with specificity." *Coyne*, 183 F. 3d at 494; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). The minimum constitutional requirements for standing are: proof of injury in fact, causation, and redressability. *Valley Forge*, 454 U.S. at 472. In addition, "the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted." *Coyne*, 183 F. 3d at 494 (quoting *Pestak v. Ohio Elections Comm'n*, 926 F. 2d 573, 576 (6<sup>th</sup> Cir. 1991)). To satisfy the requirements of Article III of the United States Constitution, the plaintiff must show he has *personally suffered some actual injury* as a result of the illegal conduct of the defendant. (Emphasis added). *Coyne*, 183 F. 3d at 494; *Valley Forge*, 454 U.S. at 472.

In each of the above-captioned Complaints, the named Plaintiff alleges it is the holder and owner of the Note and Mortgage. However, the attached Note and Mortgage identify the mortgagee and promisee as the original lending institution — one other than the named Plaintiff. Further, the Preliminary Judicial Report attached as an exhibit to the Complaint makes no reference to the named Plaintiff in the recorded chain of title/interest. The Court's Amended General Order No. 2006-16 requires Plaintiff to submit an affidavit along with the Complaint, which identifies Plaintiff either as the original mortgage holder, or as an assignee,

trustee or successor-in-interest. Once again, the affidavits submitted in all these cases recite the averment that Plaintiff is the owner of the Note and Mortgage, without any mention of an assignment or trust or successor interest. Consequently, the very filings and submissions of the Plaintiff create a conflict. In every instance, then, Plaintiff has not satisfied its burden of demonstrating standing at the time of the filing of the Complaint.

Understandably, the Court requested clarification by requiring each Plaintiff to submit a copy of the Assignment of the Note and Mortgage, executed as of the date of the Foreclosure Complaint. In the above-captioned cases, *none* of the Assignments show the named Plaintiff to be the owner of the rights, title and interest under the Mortgage at issue as of the date of the Foreclosure Complaint. The Assignments, in every instance, express a present intent to convey all rights, title and interest in the Mortgage and the accompanying Note to the Plaintiff named in the caption of the Foreclosure Complaint upon receipt of sufficient consideration on the date the Assignment was signed and notarized. Further, the Assignment documents are all prepared by counsel for the named Plaintiffs. These proffered documents belie Plaintiffs' assertion they own the Note and Mortgage by means of a purchase which pre-dated the Complaint by days, months or years.

Plaintiff-Lenders shall take note, furthermore, that prior to the issuance of its October 10, 2007 Order, the Court considered the principles of "real party in interest," and examined Fed. R. Civ. P. 17 — "Parties Plaintiff and Defendant; Capacity" and its associated Commentary. The Rule is not *apropos* to the situation raised by these Foreclosure Complaints. The Rule's Commentary offers this explanation: "The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the

proper party to sue is difficult or when an understandable mistake has been made. ... It is, in cases of this sort, intended to insure against forfeiture and injustice ...” Plaintiff-Lenders do not allege mistake or that a party cannot be identified. Nor will Plaintiff-Lenders suffer forfeiture or injustice by the dismissal of these defective complaints otherwise than on the merits.

Moreover, this Court is obligated to carefully scrutinize all filings and pleadings in foreclosure actions, since the unique nature of real property requires contracts and transactions concerning real property to be in writing. R.C. § 1335.04. Ohio law holds that when a mortgage is assigned, moreover, the assignment is subject to the recording requirements of R.C. § 5301.25. *Creager v. Anderson* (1934), 16 Ohio Law Abs. 400 (interpreting the former statute, G.C. § 8543). “Thus, with regards to real property, before an entity assigned an interest in that property would be entitled to receive a distribution from the sale of the property, their interest therein must have been recorded in accordance with Ohio law.” *In re Ochmanek*, 266 B.R. 114, 120 (Bkrtcy.N.D. Ohio 2000) (citing *Pinney v. Merchants’ National Bank of Defiance*, 71 Ohio St. 173, 177 (1904)).<sup>1</sup>

This Court acknowledges the right of banks, holding valid mortgages, to receive timely payments. And, if they do not receive timely payments, banks have the right to properly file actions on the defaulted notes — seeking foreclosure on the property securing the notes. Yet, this Court possesses the independent obligations to preserve the judicial integrity of the federal court and to jealously guard federal jurisdiction. Neither the fluidity of

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<sup>1</sup> Astoundingly, counsel at oral argument stated that his client, the purchaser from the original mortgagee, acquired complete legal and equitable interest in land when money changed hands, even before the purchase agreement, let alone a proper assignment, made its way into his client’s possession.

the secondary mortgage market, nor monetary or economic considerations of the parties, nor the convenience of the litigants supersede those obligations.

Despite Plaintiffs' counsel's belief that "there appears to be some level of disagreement and/or misunderstanding amongst professionals, borrowers, attorneys and members of the judiciary," the Court does not require instruction and is not operating under any misapprehension. The "real party in interest" rule, to which the Plaintiff-Lenders continually refer in their responses or motions, is clearly comprehended by the Court and is not intended to assist banks in avoiding traditional federal diversity requirements.<sup>2</sup> Unlike Ohio State law and procedure, as Plaintiffs perceive it, the federal judicial system need not, and will not, be "forgiving in this regard."<sup>3</sup>

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Plaintiff's reliance on Ohio's "real party in interest rule" (ORCP 17) and on any Ohio case citations is misplaced. Although Ohio law guides federal courts on substantive issues, state procedural law cannot be used to explain, modify or contradict a federal rule of procedure, which purpose is clearly spelled out in the Commentary. "In federal diversity actions, state law governs substantive issues and federal law governs procedural issues." *Erie R.R. Co. v. Tompkins*, 304 U.S. 63 (1938); *Legg v. Chopra*, 286 F. 3d 286, 289 (6<sup>th</sup> Cir. 2002); *Gafford v. General Electric Company*, 997 F. 2d 150, 165-6 (6<sup>th</sup> Cir. 1993).

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Plaintiff's, "Judge, you just don't understand how things work," argument reveals a condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process. Typically, the homeowner who finds himself/herself in financial straits, fails to make the required mortgage payments and faces a foreclosure suit, is not interested in testing state or federal jurisdictional requirements, either *pro se* or through counsel. Their focus is either, "how do I save my home," or "if I have to give it up, I'll simply leave and find somewhere else to live."

In the meantime, the financial institutions or successors/assignees rush to foreclose, obtain a default judgment and then sit on the deed, avoiding responsibility for maintaining the property while reaping the financial benefits of interest running on a judgment. The financial institutions know the law charges the one with title (still the homeowner) with maintaining the property.

There is no doubt every decision made by a financial institution in the foreclosure process is driven by money. And the legal work which flows from winning the financial institution's favor is highly lucrative. There is nothing improper or wrong with financial institutions or law firms making a profit — to the contrary, they should be rewarded for sound business and legal practices. However, unchallenged by underfinanced opponents, the institutions worry less about jurisdictional requirements and more about maximizing returns. Unlike the focus of financial institutions, the federal courts must act as gatekeepers, assuring that only those who meet diversity and standing requirements are allowed to pass through. Counsel for the institutions are not without legal argument to support their position, but their arguments fall woefully short of justifying their premature filings, and utterly fail to satisfy their standing

**CONCLUSION**

For all the foregoing reasons, the above-captioned Foreclosure Complaints are dismissed without prejudice.

**IT IS SO ORDERED.**

**DATE: October 31, 2007**

**S/Christopher A. Boyko**  
**CHRISTOPHER A. BOYKO**  
**United States District Judge**

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and jurisdictional burdens. The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate.

The Court will illustrate in simple terms its decision: “Fluidity of the market” — “X” dollars, “contractual arrangements between institutions and counsel” — “X” dollars, “purchasing mortgages in bulk and securitizing” — “X” dollars, “rush to file, slow to record after judgment” — “X” dollars, “the jurisdictional integrity of United States District Court” — “Priceless.”

# Exhibit 3

LA Federal Court Denies Wells Fargo

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

MONDONA RAFIZADEH, ET AL

CIVIL ACTION

VERSUS

NO. 07-5194

WELLS FARGO BANK, N.A., ET  
AL

SECTION "J" (4)

ORDER AND REASONS

Before the Court is Plaintiff Mondona Rafizadeh's **Motion for New Trial Under Rule 59 of Federal Rules of Civil Procedure and Rule 60 of Federal Rules of Civil Procedure with Regards to Decision Rendered by this Court on November 13, 2007 Dismissing Plaintiff's Petition (Rec. Doc. 45)**. This motion, which is opposed, was set for hearing on January 9, 2008 on the briefs.

Also before the Court is Rodney D. Tow, Chapter 7 Trustee's (the "Trustee") **Motion to Intervene (Rec. Doc. 41)** and the Trustee's **Motion for New Trial and/or for Reconsideration of Judgment (Rec. Doc. 42)**. Both motions were set for hearing on January 9, 2008 on the briefs; however, only the Motion for New Trial is opposed.

For the reasons that follow, the Court finds that Plaintiff's and the Trustee's motions should be granted, and this matter remanded.

### Background Facts and Procedural History

On December 23, 2004, after a four-day trial, the 24th Judicial District for the Parish of Jefferson entered judgment for Plaintiff Wells Fargo Bank, by and through its Master and Special Servicer, ORIX Capital Markets (hereinafter "Orix") for approximately \$10.8 million against debtors Mondona Rafizadeh, Cyrus II Partnership, and Bahar Development (hereinafter "Debtors"). The judgment entered was based upon certain events of default by Debtors (coupled with fraud), which warranted Orix's foreclosure. The litigation is now on appeal before the State Fifth Circuit in Gretna, Louisiana.

In June 2005, Debtors filed for Chapter 7 bankruptcy relief in the United States Bankruptcy Court for the Southern District of Texas. Orix filed a proof of claim and reached a settlement agreement with the Bankruptcy Trustee on March 29, 2006. By October 2006, through discovery in the bankruptcy proceedings, Debtors claim they learned of certain information integral to the 2004 litigation, which was not disclosed despite discovery requests in the earlier action. Thus, Debtors filed a counterclaim against Orix in the bankruptcy proceeding. On January 5, 2007, the Bankruptcy Court dismissed the counterclaim, holding that Debtors had no standing to attack Orix's claim against the bankruptcy estate.

Then on August 14, 2007, Rafizadeh alone filed the current action in the 24th Judicial District, asking that court to annul

its 2004 judgment. On August 29, 2007, the now Defendant Orix filed a notice of removal with the intent to transfer the case to the United States District Court for the Southern District of Texas for referral to the Bankruptcy Court. Plaintiff then filed a motion to remand to the 24th Judicial District. Defendant contemporaneously filed a 12(b) motion to transfer and/or dismiss. This Court dismissed the claim based on the preclusive effect of the bankruptcy court's earlier ruling.

On November 29, 2007, Rafizadeh filed a motion for a new trial, which is now before this Court. The Chapter 7 Trustee Rodney Tow ("Trustee") also filed a motion for a new trial in addition to a motion to intervene.

#### **The Parties' Arguments**

In support of the motion for a new trial, Plaintiff argues that this Court misinterpreted the bankruptcy court's earlier ruling. Plaintiff argues that the bankruptcy court's refusal to hold Plaintiff in contempt for filing this action and the bankruptcy court's recommendation that the Trustee join the current action, implies that the bankruptcy court did not see its previous rulings as having barred this nullity action. Plaintiff relies in support on the bankruptcy court's later clarification of its ruling in which that court denies claim preclusive effect.

The Trustee supports Plaintiff's argument, adding that the parties' bankruptcy settlement agreement includes a reservation of rights and the bankruptcy court has stated that it has not

ruled on the merits of Plaintiff's nullity action. Furthermore, upon motion for clarification by the Trustee, on December 26, 2007, the bankruptcy court stated that "no prior Order of this Court precludes Mondona Rafizadeh or the Trustee from asserting the Nullity Action within a Louisiana State Court or Federal Court to which such action has been removed or to take such action within such court as to preserve the Nullity Action as a basis for an objection to the claim or ORIX within this court."

In addition to supporting Plaintiff's argument regarding the non-preclusive effect of the bankruptcy court's ruling, the Trustee further asserts additional arguments for a new trial, specifically attacking federal jurisdiction over the matter. First, the Trustee argues that under the Rooker-Feldman doctrine, federal district courts lack subject matter jurisdiction to entertain collateral attacks on state court judgments. The Trustee acknowledges that the applicability of this doctrine to this action is unclear as the action originated in state court. However, the Trustee contends that in dismissing this action, under Rooker-Feldman the parties may be unable to commence suit in bankruptcy court. Alternatively, the Trustee argues that this Court did not have subject matter jurisdiction over the nullity action when it dismissed based on res judicata. The Trustee cites a number of cases following Barrow v. Hunton, 99 U.S. 80 (1878), where a federal court remanded a nullity action to state court.

Finally, the Trustee argues that this case should be remanded under principles of abstention. The Trustee states that it would be inequitable for him to comply with the bankruptcy court's directive that he join the current action, only for it to be dismissed based on res judicata. Also under the doctrines of Rooker-Feldman and Barrow, this Court or the bankruptcy court may be unable to exercise jurisdiction, leaving the Trustee without a remedy.

In opposition to Plaintiff's and the Trustee's motions, Defendant argues that the Court was correct in determining that the suit is barred under res judicata. The claims in the current action should have been alleged in the dischargeability suit dismissed by the bankruptcy court. The bankruptcy court's denial of Plaintiff's motion to amend does not alter the claim preclusive effect. Defendant then likens the bankruptcy court's clarification order to an impermissible advisory opinion, arguing that the bankruptcy court does not have the authority to determine the effect of its own judgments.

Regarding the Trustee's jurisdictional claims, Defendant argues that Rooker-Feldman does not apply because Plaintiff is not asserting any legal wrong. Plaintiff's claim is not based upon an error of the court, but rather on the harm caused by Defendant's actions.

In reply, the Trustee argues that the bankruptcy court's earlier order does not preclude the present action because the

prior judgment was not final and on the merits. The bankruptcy court dismissed Plaintiff's counterclaim for lack of standing.<sup>1</sup> Lack of standing evidences a lack of subject matter jurisdiction, and thus the dismissal is not considered a ruling on the merits of the claim. Also, the Trustee refutes Orix's characterization of the bankruptcy court's clarification order as an advisory opinion. The Trustee likens the clarification order to an exception to the common law doctrine of *functus officio*. The exception provides that when an arbiter's award is incomplete or ambiguous, a federal court may seek clarification from the arbiter.

### Discussion

#### **A. New Trial**

Determining whether to grant a new trial depends on the res judicata effect of the bankruptcy court's earlier order. In its November 13, 2007 Order and Reasons, this Court dismissed Plaintiff's claims because the bankruptcy court's January 5, 2007 order both denied Plaintiff's motion to amend her counterclaim, an amendment that is similar in substance to the current action, and also subsequently dismissed Plaintiff's claims against Defendants.

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<sup>1</sup> Despite arguing that this Court's previous order dismissing Plaintiff's claim was likely the result of access to an incomplete bankruptcy court record, no party has yet furnished to this Court the bankruptcy court's January 5, 2007 order dismissing Plaintiff's counterclaim.

Both Plaintiff and the Trustee argue that the bankruptcy court did not consider its denial of Plaintiff's counterclaim to be res judicata as to the validity of this action. Specifically, the bankruptcy court's January 5, 2007 order, which dismissed Plaintiff's motion to amend her counterclaim to include the charges of fraud present in this action, did not rule on the merits of the proposed amendment. The Trustee argues that these earlier orders of the bankruptcy court do not bar the current action as they were not final and on the merits.

A bankruptcy judgment bars a subsequent suit if:

- (1) both cases involve the same parties;
- (2) the prior judgment was rendered by a court of competent jurisdiction;
- (3) the prior decision was a final judgment on the merits;
- and
- (4) the same cause of action is at issue in both cases.

In re Baudoin, 981 F.2d 736, 740 (5th Cir. 1993). Plaintiff's bankruptcy counterclaim against Orix, which attempted to assert the same issues as the current action, was dismissed for lack of standing. Therefore, because dismissal on jurisdictional grounds<sup>2</sup> is not considered a dismissal "on the merits," it does not serve as res judicata on the substance of the claim.<sup>3</sup> Boone

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<sup>2</sup> "It is well settled that unless a plaintiff has standing, a federal district court lacks subject matter jurisdiction to address the merits of the case." Minvielle, L.L.C. v. Atlantic Refining Co., No. 05-1312, 2007 WL 2668715, \*4 (W.D. La.).

<sup>3</sup> However, the January 2007 judgment does have res judicata effect to the extent of the determination of standing; that is, Plaintiff cannot seek to relitigate the same jurisdictional claims. See Minvielle, 2007 WL 2668715, at \*5. Despite this

v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980).

Therefore, because the bankruptcy court's January 2007 order was not "a final judgment on the merits," the current action is not barred under res judicata. As a result, this Court now turns to the merits of Plaintiff's Motion to Remand (Rec. Doc. 11) and Defendant's Consolidated 12(b) Motion to Transfer and/or Dismiss (Rec. Doc. 21).

#### **B. Remand or Transfer**

After finding that dismissal is not appropriate, this Court must now determine whether to remand the case to state court or transfer to the Southern District of Texas for referral to the bankruptcy court.

The United States Supreme Court has held that where a nullity action to set aside a state court judgment is "a supplementary proceeding so connected with the original suit as to form an incident to it," the federal district court may decline removal jurisdiction. Barrow v. Hunton, 99 U.S. 80, 82 (1879). In Our Lady of the Lake Hospital, Inc. v. Carboline Co., the plaintiff brought an action in state court to have an earlier judgment declared null due to the fraudulent practices of the defendant, specifically the withholding of documents during an earlier trial. 847 F.Supp. 452, 452 (M.D. La. 1994); see also

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Court's earlier determination of Plaintiff's standing, though, because the Trustee now seeks to intervene in the matter, there is no longer a dispute regarding standing.

Taylor v. Taylor, No. 01-1886, 2001 WL 1491026, \*1 (E.D. La. Nov. 21, 2001). The defendant removed the action to the Middle District of Louisiana; however, the court subsequently granted the plaintiff's motion to remand. Id. at 453. Applying Barrow, the court held that the nullity action was so connected with the original state suit as to form a continuation of the earlier litigation. Id.

In this case, Plaintiff effectively seeks to overturn the state court's earlier judgment based on Orix's non-compliance with the discovery orders in that suit. Like in Our Lady of the Lake Hospital, this action forms a continuation of the earlier state suit. Plaintiff's proposed remedy would serve to overturn the state court judgment, in effect allowing this Court to exercise appellate jurisdiction. See Taylor, 2001 WL 1491026, at \*1. Therefore, this case should be remanded. Accordingly,

**IT IS ORDERED** that Plaintiff's **Motion for New Trial Under Rule 59 of Federal Rules of Civil Procedure and Rule 60 of Federal Rules of Civil Procedure with Regards to Decision Rendered by this Court on November 13, 2007 Dismissing Plaintiff's Petition (Rec. Doc. 45)** is hereby **GRANTED**.


**IT IS FURTHER ORDERED** that the Trustee's **Motion to Intervene (Rec. Doc. 41)** is hereby **GRANTED**.

**IT IS FURTHER ORDERED** that the Trustee's **Motion for New Trial and/or for Reconsideration of Judgment (Rec. Doc. 42)** is hereby **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's **Motion to Remand** (Rec. Doc. 11) is hereby **GRANTED**; the above-captioned action is hereby **REMANDED** to the court from which it was removed.

IT IS FURTHER ORDERED that Defendant ORIX's **Consolidated 12(b) Motion to Transfer and/or Dismiss** (Rec. Doc. 21) is hereby **DENIED**.

New Orleans, Louisiana, this 22nd day of January, 2008.

  
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CARL J. BARBIER  
UNITED STATES DISTRICT JUDGE

# Exhibit 4

VA Federal Court Denies Wells Fargo

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division

AVRAM CIMERRING,

Plaintiff,

v.

Civil Action Number 3:07CV703

WELLS FARGO MINNESOTA NATIONAL  
ASSOCIATION,

Defendant.

**ORDER**  
**REMANDING THIS MATTER TO**  
**THE CIRCUIT COURT FOR THE CITY OF PETERSBURG**

This matter is before the Court for initial review, following removal from the Circuit Court for the City of Petersburg by defendant Wells Fargo Minnesota National Association. The Court has reviewed the pleadings and makes the following findings.

On October 12, 2007, the plaintiff, Avram Cimerring (“plaintiff” or “Cimerring”), filed a complaint in the Circuit Court for the City of Petersburg against defendant Wells Fargo Minnesota National Association (“Wells Fargo”). The case was designated as Case No. CL07-716. The complaint includes three counts – (1) declaratory judgment pursuant to Virginia Code § 8.01-184; (2) estoppel; and (3) waiver. On November 9, 2007, Wells Fargo filed a demurrer and a special plea in bar of *res judicata* and collateral estoppel (“special plea”). On the same date, Wells Fargo filed a notice of removal to this Court.

The special plea filed in Case No. CL07-716 describes the case as “another in a long line

of attempts [by plaintiff] to avoid enforcement of the \$6,619,005.86 judgment entered against him by this Court [the Circuit Court for the City of Petersburg] on February 18, 2003 (the ‘Judgment’).” The Judgment was entered in Case No. CL01-192. In the case that was removed to this Court, Case No. CL07-716, Cimerring (1) seeks a declaration that the Judgment is satisfied, (2) alleges that the defendant is “estopped from collecting those same damages a second time pursuant to the Judgment,” and (3) alleges that the defendant has “waived its right to collect the Judgment against Mr. Cimerring.”

The special plea states that the “plaintiff has litigated these very claims and issues on no less than four occasions in four separate forums.” It describes in detail the previous actions. First, what defendant refers to as the “First Virginia Action” (Case No. CH05-294) was, according to the defendant, filed in November 2005. It involved the same plaintiff and the same defendant as in the present action, Cimerring and Wells Fargo. According to the defendant, a demurrer to the bill of complaint was sustained by the Circuit Court for the City of Petersburg in May 2006, an appeal to the Supreme Court of Virginia followed and, on September 14, 2007, the Supreme Court of Virginia upheld the order of the Circuit Court for the City of Petersburg. Next, what the defendant refers to as the “second action” or the “Israeli Action” was an interlocutory action filed in connection with efforts to collect the Judgment against the plaintiff in Israel. The Jerusalem District Court made findings and ruled against the plaintiff, Cimerring, and in favor of the defendant, Wells Fargo, on May 30, 2006. Next, there was an action in Caddo Parish, Louisiana, *Wells Fargo v. Avram Cimerring*, called the “Louisiana State Action.” Cimerring, the defendant in that case, filed a counterclaim against Wells Fargo and others and sought discovery. This action is now stayed as a result of bankruptcy proceedings. The fourth

action in which this issue has been raised is *In re Canoco, Inc.*, United States Bankruptcy Court, Western District of Louisiana, Case No. 06-11262, called the “Louisiana Federal Action.” This list of four other cases does not include the initial case filed against Cimerring, No. CL01-192, that resulted in the Judgment entered against Cimerring on February 18, 2003.

The Court considers first whether the actions the defendant took in state court constitute a waiver of the right to removal. The law in the Fourth Circuit is that “a defendant may waive the right to remove by taking some such substantial defensive action in the state court before petitioning for removal.” Aqualon Co. v. MAC Equipment, Inc., 149 F.3d 262, 264 (4th Cir. 1998). See also Wolfe v. Wal-Mart Corp., 133 F. Supp. 2d 889, 892 (N.D.W.Va. 2001) (“[R]emoval may still be improper if [the defendant] manifested an intent to litigate in state court, thereby waiving its right to remove. A defendant may waive its right to remove a state court action to federal court if it submits to the state court’s jurisdiction, such as by seeking some form of affirmative relief from the state court when it is not compelled to take such action.”); Baldwin v. Perdue, 451 F. Supp. 373 (E.D. Va. 1978) (holding that defendant’s filing of cross-claim in state court constituted a waiver of the right to remove); Sood v. Advanced Computer Techniques Corp., 308 F. Supp. 239 (E.D. Va. 1969) (finding that defendant waived right to remove by filing voluntary counterclaim in state court).

In the present action, the defendant filed a demurrer and a special plea. These pleadings show that the defendant was taking substantial defensive action in the state court and “seeking [a] form of affirmative relief from the state court when [it was] not compelled to take such action.” For these reasons, the Court finds that the defendant demonstrated an intent to litigate in state court and waived its right to remove the matter to this Court. Accordingly, this matter must

be remanded.

Further, this case must be remanded based on the Rooker-Feldman doctrine. In Holliday Amusement Co. v. South Carolina, 401 F.2d 534, 537 (4th Cir. 2005), the Fourth Circuit discussed the doctrine, explaining that it is a “jurisdictional rule providing that lower federal courts generally cannot review state court decisions; rather, jurisdiction ‘lies exclusively with superior state courts, and, ultimately, the United States Supreme Court.’” In Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005), the United States Supreme Court clarified the scope of the doctrine, holding that it “is confined to cases . . . brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” This case does not present a typical Rooker-Feldman situation in which a state-court loser files a federal court action complaining of the injuries caused by the state-court judgment since, in this case, the plaintiff, who would be in effect the “state-court loser,” did not file a federal court action but instead filed another state court action that was then removed to federal court. Nevertheless, in this procedural posture, having been removed to this Court, it falls within the narrow scope of the doctrine, because Cimerring is challenging the state-court decisions rendered by both the Circuit Court of the City of Petersburg and the Supreme Court of Virginia. This Court is precluded from exercising jurisdiction in this matter because to do so would require this Court to review those state court decisions. See also Davani v. Virginia Dept. of Transportation, 434 F.3d 712, 718-19 (4th Cir. 2006).

Next, even if the Rooker-Feldman doctrine did not come into play, the pleadings are insufficient to establish subject matter jurisdiction in this case. The Notice of Removal states

that this Court has jurisdiction “based upon diversity of citizenship between the parties.” It states in paragraph 2 that “the plaintiff is a resident of the State of New Jersey and is a dual citizen of the United States and Israel.” It states in paragraph 3 that the defendant “is a national banking association with its principle corporate offices in Minneapolis, Minnesota.” Title 28, United States Code, Section 1348 states that “[a]ll national banking associations shall . . . be deemed citizens of the States in which they are respectively located.”

“Federal courts are courts of limited jurisdiction and the ‘threshold requirement in every federal case is jurisdiction.’” Barclay Square Properties v. Midwest Fed. Sav. & Loan Ass’n, 893 F.2d 968, 969 (8th Cir. 1990) (quoting Sanders v. Clemco Indus., 823 F.2d 214, 216 (8th Cir. 1987)). “When jurisdiction is based on diversity of citizenship, *the pleadings, to establish diversity, must set forth with specificity the citizenship of the parties.*” Id. (emphasis added).

For several years, there were two lines of cases that evolved interpreting the citizenship of national banking associations for purposes of diversity. Compare Wachovia Bank v. Schmidt, 388 F.3d 414 (4th Cir. 2004) (concluding that a national bank association is a citizen of any state in which it maintains a branch office) with Firststar Bank, N.A. v. Faul, 253 F.3d 982 (7th Cir. 2001) (holding that a national bank is a citizen of the state of its principal place of business and the state listed in its organization certificate). Finally, in 2006, the Supreme Court resolved the circuit split and held that for purposes of diversity jurisdiction, a bank is located “in the State designated in its articles of association as its main office.” Wachovia Bank v. Schmidt, 546 U.S. 303, 318 (2006). In the present case, however, the notice of removal does not set forth with specificity as required which state is “designated in its articles of association as its main office,” but instead only states that the defendant is a national banking association “with its

principle corporate offices in Minneapolis, Minnesota.”

“We are obligated to construe jurisdiction strictly because of the significant federalism concerns implicated. Therefore, if federal jurisdiction is doubtful, a remand to state court is necessary.” General Technology Applications, Inc. v. Exro LTDA, 388 F.3d 114, 118 (4th Cir. 2004) (citing Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 816 (4th Cir. 2004) (*en banc*) (internal citations and original alterations omitted)). The notice of removal does not allege the citizenship of defendant Wells Fargo properly pursuant to Wachovia Bank v. Schmidt. Accordingly, the pleadings are insufficient to establish diversity jurisdiction.

Finally, even if this Court had jurisdiction to consider this matter, it would abstain from exercising its jurisdiction, on grounds of federalism and judicial economy. The Circuit Court for the City of Petersburg is quite familiar with this matter, these parties, and these issues, since the same parties have litigated the same issues on at least two previous occasions – Case No. CL01-192 and CH05-294.

Accordingly, the Court REMANDS this matter to the Circuit Court for the City of Petersburg.

November 20, 2007  
DATE

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/s/  
RICHARD L. WILLIAMS  
SENIOR UNITED STATES DISTRICT JUDGE