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March 30, 2009

Hon. William C. Todd, III, P.J. Ch.
Atlantic County Court House
Superior Court of New Jersey
1201 Bacharach Boulevard
Atlantic City, NJ 08401-6700

Re: Bank of N.Y. as Trustee for the Certificate Holders
CWABS, Inc. Asset-Based Certificates, Series 2005-AB3
v. Ukpe, Docket No.: F-10209-08
April 20, 2009 Plenary Hearing

Dear Judge Todd,

Defendants' motion to dismiss the complaint is pending before the Court. The Court has scheduled a plenary hearing for April 20, 2009 to address issues arising out of discovery related to Defendants' motion. Please accept this letter brief in lieu of a more formal brief discussing these issues.

Preliminary Statement

The evidence will show that Plaintiff's foreclosure complaint is based on a fraudulent assignment of a mortgage and note from Mortgage Electronic Registration Systems, Inc. ("MERS") to the Plaintiff Bank of New York as Trustee for the Certificate Holders CWABS, Inc. Asset-Based Certificates, Series 2005-AB3 ("Bank of New York as Trustee" or "Plaintiff"). The evidence will also show that the law firm's conduct injured Defendants, other homeowners in foreclosure lawsuits brought by the firm, and

investors in mortgage securities in whose name trustees represented by the law firm acted.

Francis S. Hallinan ("Hallinan"), a named partner in the firm of Phelan, Hallinan & Schmieg, PC ("PHS"), executed the assignment in his capacity as a MERS officer. PHS is a vendor to the assignor, MERS. PHS also represents the Plaintiff in this foreclosure action. PHS also represents the mortgage servicer, Countrywide Home Loans Servicing, LP, the entity that instructed the law firm to bring the foreclosure action against Defendants and pays PHS legal fees and costs.

Thomas P. Strain ("Strain") is an employee of a business, Full Spectrum Legal Services, Inc. ("FSLS"), owned by the three named PHS partners.[1] Strain falsely acknowledged the assignment. Strain's deposition testimony established that over the past three years he has falsely acknowledged tens of thousands of other mortgage assignments for PHS.[2]

The dissemination and recording of thousands of falsely acknowledged mortgage assignments and the multiple roles played by the law firm in creating and using the assignments give rise to issues involving conflicts of interest issues and an appropriate remedy.

PHS maintains offices in Mt. Laurel, NJ and Philadelphia, PA.[3] In 2008, PHS handled an estimated 24,000 to 26,000 foreclosure matters in New Jersey and Pennsylvania.[4] The PHS named partners' ancillary business, FSLS, provides title search and foreclosure support services, including service of process, to PHS and to mortgage

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[1] The law firm partners own Full Spectrum Holdings which is comprised of, at least, FSLS and "Land Title Services," which provides "title-related services to the law firm." March 3, 2009 Hallinan deposition, pp. 10-13 ("Hallinan deposition I"). Hallinan's deposition started on March 3, 2009 and continued on March 17, 2009. The March 3, 2009 deposition is cited as Hallinan deposition I and the March 17, 2009 deposition is cited as Hallinan deposition II.

[2] Strain deposition, p. 23. Strain, the in-house notary for FSLS testified he acknowledged an average of 50 assignments a day without the maker of the assignment appearing before him to acknowledge the act. As of December 2008, Strain worked for FSLS for approximately three and one half years. Strain deposition, p. 7. Conservatively, the number of defective assignments prepared for the Phelan law firm is in the tens of thousands.

[3] Phelan Hallinan and Schmieg LLP is a limited liability partnership operating in Pennsylvania. Phelan Hallinan and Schmieg PC is a corporation doing business in New Jersey. Hallinan deposition II, p. 34.

[4] Hallinan deposition II, p. 52. Hallinan estimated that approximately 40% to 50% of these matters involved New Jersey foreclosures. Hallinan deposition II, pp. 60-61.

servicers. FSLS started with one employee in 2004 and now has approximately seventy employees.[5]

Hallinan is PHS's administrative partner. He oversees the law firm's day-to-day business operations in both New Jersey and Pennsylvania.[6] He is also FSLS's President.[7]

Procedural History

March 13, 2008, PHS filed a foreclosure complaint seeking a determination of the amount due on a promissory note executed by Defendants along with possession of the property securing payment of the note. Mr. and Mrs. Ukpe, through South Jersey Legal Services ("SJLS"), timely filed a contesting answer and later, with leave of Court, filed a counterclaim and third party complaint alleging that the loan was predatory and violated the Consumer Fraud Act. Defendants alleged that they were victims of actual fraud and that the counterclaim and third party defendants acted in concert. Discovery ensued.

However, plaintiff provided insufficient discovery through the discovery end date in October 2008 at which time it moved for summary judgment to strike the Ukpe's contesting answer. Defendants opposed the Plaintiff's motion for summary judgment and submitted a certification in support of their opposition upon which they continue to rely. In addition, SJLS raised jurisdictional defects related to the alleged assignment of the mortgage that on its face occurred after the complaint was filed.

Your Honor denied the Plaintiff's summary judgment motion and directed the Ukpe's to bring a Motion to Dismiss for lack of jurisdiction pursuant to R. 4:6-2(a). Plaintiff opposed the motion and cross-moved for summary judgment without presenting any competent evidence to the court. Plaintiff's counsel did present an unexecuted, draft Pooling and Servicing Agreement in connection with this motion. The Ukpes opposed

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[5] Hallinan deposition II, p. 19 and Exhibit 11.

[6] Hallinan deposition I, pp. 77-78. The Phelan, Hallinan & Schmieg law firm's website says Hallinan oversees the firm's day-to-day operations, and he is the "behind the scenes" manager who ensures that the job gets done. http://www.fedphe.com/pages/FSH.htm

[7] March 3, 2009 Hallinan deposition, pp. 10-13 ("Hallinan deposition"). FSLS comprises two divisions. The Land Title Services division provides title-related services to the law firm and other clients. 90% of its business is with the law firm. Full Spectrum Legal Services provides ancillary services necessary to perform a foreclosure in PA & NJ. Id. at 13-14.

the cross motion in part based upon Strain's deposition testimony as to the improperly notarized assignment. At the hearing on these cross motions, Your Honor directed that additional discovery be made and set in motion the procedures leading up to the Plenary Hearing.

Issues in the Plenary Hearing

In calling for the plenary hearing, the Court voiced concern about the potential conflicting roles of a PHS lawyer simultaneously representing both the assignor and the assignee in the assignment of the mortgage and note upon which this foreclosure action is based. The assignment falsely states that Hallinan acknowledged before a Pennsylvania notary public that his acts were authorized by the corporation and were the corporation's acts. The assignment is the used by PHS to initiate a foreclosure lawsuit in which the PHS represents the assignee. The Court said it was interested in getting to the bottom of the matter as it involved issues going beyond this particular foreclosure litigation.[8]

Discovery shows the law firm was representing three entities when the assignment was executed: the Plaintiff with whom it has no retainer agreement, the mortgage servicer with whom it does have a retainer agreement, and MERS with whom it has a contractual agreement that authorized the firm to assign MERS's interest in mortgages, but not promissory notes. Although presently there is no evidence that a securitized trust owns the note in this litigation, if a securitized trust is the real plaintiff, an argument can be made that the interests of the investors - - the plaintiffs in foreclosure actions involving securitized trusts - - are not aligned with the mortgage servicers and law firms who purportedly represent the investors.

To illuminate the potential conflicts, an exploration of the economics of foreclosure and the relationships of the key players is needed. How does PHS bill for its services and those of its ancillary business, FSLS? Does the law firm collect legal fees and costs from the servicer pursuant to a retainer agreement? Does the law firm also collect legal fees and costs from the homeowner pursuant to court order? Does the law firm also collect legal fees and costs from title insurance companies pursuant to an

[8] January 16, 2009 telephone conference among Judge Todd, Brian Blake, Esq., and Abigail Sullivan, Esq.

insurance claim? Does the law firm share these fees with anyone, for example the mortgage servicer? Does the mortgage servicer compensate the named PHS partners through agreements with ancillary businesses, such as FSLS?

Answers to these questions are necessary to determine whether the lawyer's fee is reasonable, RPC 1.5, and whether the lawyer has a conflict of interest. R.P.C. 1.7 and 1.8. In particular, R.P.C. 1.8(f) prohibits a lawyer from accepting compensation for representing a client from someone other than the client unless the client gives informed consent and there is no interference with the lawyer's independent judgment. Has the required disclosure been made to Plaintiff, MERS and other clients and did these clients give informed consent?

The integrated business run by PHS's named partners combines legal and support services under one roof through related corporate entities. The business is likely profitable. Are any of the profits obtained unfairly at the expense of the plaintiffs and defendants in the foreclosure actions? Does the law firm make disclosure to the plaintiffs of its interest in the ancillary business and does it share with the plaintiffs any recovery of legal fees and costs obtained by court order or settlement of title insurance claims? Does the law firm bill for unnecessary and duplicative services? Did the law firm fulfill its professional obligation to ensure the notary's conduct was compatible with the law firm's professional obligations? R.P.C. 5.3.

Published reports show that the mortgage servicing business remains an important profit center for the investment banks that financed the predatory lending mortgage-lending business.[9] To the extent predatory loans are made to homeowners, and then securitized and sold to investors, the homeowners and investors are victimized twice. First the homeowners are victimized when they are placed into predatory loans. The investors are securities fraud victims having been falsely told in the prospectuses and pooling and servicing agreements that there are no predatory loans in the trust corpus that collateralizes their investment.[10] At the other end of a predictable predatory lending cycle - - foreclosure - - the homeowners are victimized by fraudulent assignments used to

[9] www.housingfinance.org/pdfstorage/hfi/8702_Mor.pdf; "Foreclosure 'Tsunami' Hits Mortgage-Servicing Firms" http://online.wsj.com/article/SB123431311043370779.html

[10] P.S.A. Section 2.03 (b)(68, 69, 75) (Representations, Warranties and Covenants of the Master Servicer and the Sellers.) Relevant portions of the PSA will be included in Defendants' Plenary Hearing Exhibits as Plenary Exhibit 2.

attempt to collect a debt and by excessive legal fees and costs. Investors are victimized by the alliance of the servicer and the law firm driving the foreclosure process and effectively churning the investors' accounts. An analysis of data through November 2008 shows that after foreclosure, the investor is left with 45 cents on the dollar of the mortgage note purchased by the investor.[11]

In the present case and thousands of others, a PHS lawyer, acting as a MERS assistant vice president and corporate secretary, assigns the mortgage and note from MERS to the plaintiff, an alleged securitized trust. The same law firm files the foreclosure complaint. The mortgage servicer and the law firm have a retainer agreement, not the plaintiff and the law firm. The law firm uses a false notarization to record the assignment with the county clerk or other county authority. The false notarization permits the assignment to be used as a self-authenticating document in court proceedings. The law firm bills the servicer for legal fees and filing fees in connection with creating and recording the assignment, filing a lis pendens and pursuing the foreclosure lawsuit. Ultimately, the bill gets passed on to the investors if there is a bona fide securitized trust in the picture and to homeowners in an attorney's fees application to the court.

Are the Assignments Fraudulent Documents?

The answer to this question turns on an analysis of the assignments and their intended uses. Hallinan executed the assignment of MERS's claim in Defendants' mortgage and note to Plaintiff Bank of New York as Trustee.[12] The language in the

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[11] Alan M. White, "Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications," Conn. L. Rev. (2009). The article is available for download at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1325534– Professor White's article is scheduled for publication in the Spring 2009 Symposium Issue of the University of Connecticut Law School Law Review. The article available for download at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1325534

[12] Hallinan deposition I, p. 28 and Exhibit 3. In order for mortgage documents to be enforceable, they must be properly executed and delivered. Generally, under New Jersey's Statute of Frauds, any transaction intended to transfer an "interest in real estate" shall not be effective unless the identities of the transferor and the transferee are established in writing signed by or on behalf of the transferor. N.J.S.A. 25:1-11(a)(1). Tross, *New Jersey Foreclosure Law and Practice*, § 1-3 (2001 p. 4-5). The Statute of Frauds was amended to permit a present transfer of property rights, such as a mortgage, that does not otherwise satisfy the Statute of Frauds to be enforced as "an agreement" to transfer under N.J.S.A. 25:1-13(b). Tross, *New Jersey Foreclosure Law and Practice*, § 1-3 (Supplement 2007/2008 p. 2).

assignment document is from a standard form used by the firm.[13] The assignment identifies Hallinan as an "Assistant Secretary and Vice President of Mortgage Electronic Registration Systems, Inc. as nominee for America's Home Lender, its successors and assigns." The relevant portions of the assignment read:

> FOR VALUE RECEIVED Mortgage Electronic Registration Systems Inc as a nominee for America's Wholesale Lender its successors and assigns, the undersigned, . . . hereby grants, conveys, assigns and transfers unto BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATE HOLDER CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2005-AB3 . . . all beneficial interest under that certain Mortgage dated July 29, 2005. Said Mortgage is recorded in the State of New Jersey, County of Atlantic.
> * * * * *
> TOGETHER with the Bond, Note or other Obligation therein described, and the money due and to grow due thereon, with the interest.
> TO HAVE AND TO HOLD the same unto the said Assignee its successors and assigns . . .. (Emphasis added).[14]

Hallinan's corporate actions on behalf of MERS were acknowledged by Strain, the FSLS in-house New Jersey employee. Strain used a Pennsylvania notary seal. The acknowledgment stated that on March 14, 2008 Hallinan personally appeared before Strain in Philadelphia, Pennsylvania. Strain stated that Hallinan proved:

> on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in her authorized capacity and that by her signature on the instrument, the entity upon behalf of which the person acted executed the instrument. (Emphasis added).[15]

The evidence will show that Hallinan knowingly executed the false assignment. Although Hallinan claimed he was authorized by MERS to assign the Ukpes' note to Plaintiff, he was not authorized by MERS to assign the note and MERS never had an interest in the note. Also Hallinan never appeared before

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[13] Hallinan said an attorney in the firm would have created the form, but he did not know who. He did not recall if he had a role in creating the form. Hallinan deposition I, p. 96.
[14] There is no recitation in the assignment of any consideration given. Hallinan did not know what the "value received" was. Hallinan deposition I, p.84 and Hallinan Exhibit 3. Although he assigned MERS's beneficial interest in the Ukpe's mortgage, Hallinan did not know what the phrase beneficial interest meant. Hallinan deposition II, p. 40 and Exhibit 13, ¶ 6, MERS Terms and Conditions.
[15] Hallinan Exhibit 3.

Strain and proved to Strain that he was authorized to assign the note. And nothing involving the acknowledgment occurred in Philadelphia, Pennsylvania. Strain was sitting in FSLS's Mt. Laurel, NJ office when he signed the false acknowledgment. Strain is not a New Jersey notary.

Summary of Evidence Showing Assignments Are Fraudulent Documents

The false assignments were an essential component of PHS's foreclosure process. Through these false assignments the firm created its clients' claim to the note and mortgage. The assignments were the basis for starting the lawsuits and generating fees for the named partners through the law firm and the partners' ancillary business, FSLS. The evidence produced at the Plenary Hearing will show the assignments were deliberately deceptive. PHS lawyers knew the law firm was not authorized by MERS to assign the Ukpe's or anyone else's note to a PHS foreclosure plaintiff.

PHS lawyers intended others to rely upon the false assignments. PHS lawyers knew the assignments would be accepted as self-authenticating documents in court proceedings and relied upon by home owners, adversaries, the Office of Foreclosure within the Administrative Office of the Courts, chancery court judges and law clerks, county clerks, county sheriffs, property purchasers, insurers, their own clients and title insurance companies.[16]

PHS lawyers knew the false assignments would become part of the official mortgage records filed with county clerks throughout the state. PHS showed reckless disregard for compliance with legal standards governing the conduct of notaries, the use of self- authenticating documents in court proceedings, and the recording of mortgage assignments. The evidence will establish a prima facie case that in connection with

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[16] N.J.S.A. 2A:82□17 Certificates of Acknowledgment Or Proof of Instruments as Evidence of Execution Thereof

If any instrument heretofore made and executed or hereafter to be made and executed shall have been acknowledged, by any party who shall have executed it, or the execution thereof by such party shall have been proved by one or more of the subscribing witnesses to such instrument, in the manner and before one of the officers provided and required by law for the acknowledgment or proof of instruments in order to entitle them to be recorded, and, when a certificate of such acknowledgment or proof shall be written upon or under, or be annexed to such instrument and signed by such officer in the manner prescribed by law, such certificate of acknowledgment or proof shall be and constitute prima facie evidence of the due execution of such instrument by such party. Such instrument shall be received in evidence in any court or proceeding in this state in the same manner and to the same effect as though the execution of such instrument by such party had been proved by other evidence.

recording the assignments with county clerks and filing the assignments with the court system, PHS lawyers were involved in:

- Falsifying or Tampering with Records, N.J.S.A. 2C:21-4a.[17]
- Tampering with Public Records or Information (Making, Presenting or Filing a False Document, Record or Thing), N.J.S.A. 2C:28-7a(2).[18]
- Tampering with Public Records or Information (False Entry or Alteration), N.J.S.A. 2C:28-7a(1).[19]
- Fraud on the court[20]
- Consumer Fraud Act violations
- Common law fraud
- Violation of the Fair Debt Collection Practices Act, 15 U.S.C. §1692 et. seq. ("FDCPA").[21]

Hallinan Was Not Authorized to Assign the Note

A MERS signing authority agreement and corporate resolution authorized Hallinan to assign the mortgage, but not the note. The evidence will show that Hallinan knowingly acted without authorization in assigning the note. The evidence includes documents that have been produced pursuant to Court order. The evidence will also include inferences to be drawn from Plaintiff's failure to produce documents in discovery.

On October 23, 2007, PHS entered into an "Agreement For Signing Authority" with "MERSCORP, Inc. ('MERS') and its subsidiary, Mortgage Electronic Registrations Systems, Inc., [and] Countrywide Financial Corporation ('Member')" ("Signing

[17] Quote from Model Jury Charge, approved 3-22-09:
[18] Quote from Model Jury Charge, approved 5-22-00:
[19] Quote from Model Jury Charge, approved 5-22-00:
[20] Triffin v. ADP, Inc., 394 N.J. Super. 237, 251-53 (App. Div. 2007). Also see RPC 3.3 - - Candor Toward the Tribunal.
[21] The gist of the FDCPA violation is the law firm used a false statement to try to collect a debt. On March 14, 2009, PHS created an assignment that falsely claimed MERS was assigning its interest in both the note and the mortgage to Plaintiff. On March 20, 2008, PHS caused to be served on Defendants a copy of the March13, 2009 foreclosure complaint falsely claiming that Plaintiff was entitled to payment of the debt on the note by virtue of the assignment from MERS. The foreclosure complaint had attached to it a "Notice Required by the Fair Debt Collection Practices Act, 15 U.S.C. section 1601 as Amended." ("FDCPA Notice"). The FDCPA Notice was from PHS. The FDCPA Notice advised Defendants that the "Plaintiff who is named in the attached Summons and Complaint is the Creditor to whom the debt is owed." Defendants have alleged in a Second Amended Complaint, filed on March 20, 2009 and naming PHS as a defendant, that these actions violate the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et. seq.* Recording the assignments with the county clerks is part of PHS's debt collection activities on behalf of its clients. According to Hallinan, the assignment is recorded "to put the public on notice that the obligation has been transferred from one entity to another entity. The obligation continues to exist; that the debt due on the lien must now be paid to the entity that's put on record." Hallinan deposition I, p. 40.

Authority Agreement"). The Signing Authority Agreement defined the rights and obligations of the parties when PHS, identified as the "Vendor," performed duties described in an accompanying corporate resolution relating to mortgage loans registered on the MERS system and serviced by the Member, Countrywide Financial Corporation.[22]

According to the Signing Authority Agreement, Countrywide Financial Corporation signed a separate agreement with MERS that was incorporated by reference into the Signing Authority Agreement.[23] Countrywide Financial Corporation also entered into a separate contract with PHS to perform services for Countrywide Financial Corporation.[24]

In order for PHS to perform its contractual duties to Countrywide Financial Corporation, MERS agreed to grant to PHS, by corporate resolution, limited authority to act on MERS behalf to perform certain duties. The corporate resolution is made part of the Agreement.[25]

The Signing Authority Agreement obligates Countrywide Financial Corporation to provide all necessary information and instructions to PHS where MERS acts as the mortgagee of record. All parties agreed that MERS would not be responsible for any information provided by Countrywide Financial Corporation to PHS.[26]

The accompanying corporate resolution, also dated October 23, 2007, appointed eight-named lawyers in PHS as MERS assistant secretaries and vice presidents with limited authority to assign or release "the lien of any mortgage loan registered on the MERS System that is shown to be registered to Countrywide Financial Corporation or its designee."[27] PHS General Counsel informed Hallinan he had the authority to sign assignments on behalf of MERS to expedite foreclosure actions and expedite the filing of assignments.[28]

As a MERS officer, Hallinan had "limited authority on behalf of MERS to execute Assignments when the last holder of the mortgage is MERS."[29] Hallinan did not

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[22] Agreement, ¶ 1. Hallinan deposition I pp. 16 -17 and Exhibit 1.
[23] Agreement, ¶ 2. Hallinan deposition Exhibit 1.
[24] Agreement, ¶ 2. Hallinan deposition Exhibit 1.
[25] Agreement, ¶ 3. Hallinan deposition Exhibit 1.
[26] Agreement, ¶ 4. Hallinan deposition Exhibit 1.
[27] MERS Corporate Resolution. Hallinan deposition I, pp. 34, 36 and Exhibit 2.
[28] Hallinan deposition I, p. 33.
[29] Hallinan deposition I, p. 26.

report to anyone at MERS.[30] Although appointed as a MERS Assistant Secretary and Vice President, he did not know who was the corporate secretary. He did not report to the MERS corporate Secretary or anyone else at MERS.[31] He is not a MERS employee, and he receives no compensation from MERS.[32]

Hallinan conceded that if a loan were not registered on the MERS system to Countrywide Financial Corporation or its designee, Hallinan would not be authorized under the Agreement to assign anything.[33] Nothing in the Signing Authority Agreement or the corporate resolution identified America's Wholesale Lender, the lender named in the Ukpe's mortgage, as a designee of Countrywide Financial Corporation. Hallinan was not aware of any documentation by Countrywide Financial Corporation designating America's Wholesale Lender pursuant to the MERS corporate resolution.[34]

Hallinan's justification for exercising his MERS' authority in the present case was vague. When asked about the relationship between his firm's client, Countrywide Home Loans Servicing LP and the lender identified in the Ukpe's mortgage, America's Wholesale Lender, he said he believed they were the same company. He believed America's Wholesale Lender did business as Countrywide Financial.[35] As to a relationship between the lender identified in the Ukpe's promissory note, Countrywide Home Loans, America's Wholesale Lender, he did not know with any degree of specificity what the relationship was. But he did know there is a relationship between the two and he was the appropriate authority to sign the assignment on their behalf.[36] Hallinan claimed PHS had an internal list of the different companies showing these relationships.[37]

MERS Has No Claim to the Note

Hallinan admitted he did not know if MERS ever acquired any interest in the note.[38] In his view, having the mortgage without the note was sufficient to bring a

[30] Hallinan deposition I, pp. 26-27.
[31] Hallinan deposition I, pp. 29-30.
[32] Hallinan deposition I, pp. 30-31.
[33] Hallinan deposition I, p. 39.
[34] Hallinan deposition I, pp. 20 – 25.
[35] Hallinan deposition I, p. 55.
[36] Hallinan deposition I, pp. 59-60.
[37] Hallinan deposition I, pp. 55-56.
[38] Hallinan deposition I, pp. 89-90.

foreclosure action.[39] Hallinan's view, however, is contrary to New Jersey law. Where the mortgage alone is assigned without the underlying promissory note, the assignee cannot institute a foreclosure action.[40] Hence the need to assign the mortgage and the note if the foreclosure action is to be based on an assignment from MERS, even though assigning the note was an unauthorized act.

The evidence will show that MERS claims it has no interest in the promissory notes homeowners sign when they enter into a mortgage transaction. Whether MERS prohibits PHS and its members from claiming to assign these promissory notes is presently unknown because PHS has failed to produce at least two documents the Court ordered it to turn over.[41] They are:

- A separate contract" Countrywide Financial entered into with the firm of Phelan, Hallinan & Schmieg, as cited in paragraph 2 of the "Agreement for Signing Authority."
- An agreement between MERS and Countrywide Financial Corporation that is incorporated by reference into the "Agreement for Signing Authority."

Plaintiff's counsel represents they have not been able to locate these documents.[42] Additionally, Plaintiff's counsel submitted for the Court's in camera examination a third

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[39] Hallinan deposition I, p. 95.

[40] An assignment of the mortgage alone without transfer of the underlying obligation is ineffective. "[W]ithout the assignment of the debt, which is but evidence thereof, the assignment of the security confers no rights." Johnson v. Clarke, 28 A. 558 (Ch. 1894). But since the secured obligation is the principal thing and the mortgage that secures it is only "an incident which follows and attends the principal," an assignment of the bond or note evidencing the secured obligation operates as an assignment of the mortgage "in equity." Weinstein, Law of Mortgages, 29 N.J. Prac., § 11.2 (2d ed.) (emphasis added) citing, inter alia, Stevenson v. Black, 1 N.J. Eq. 338, 343 (Ch. 1831); Morris Canal & Banking Co. v. Fisher, 9 N.J. Eq. 667, 696-97, 700, (E & A 1855); Dimon v. Dimon, 10 N.J.L. 156, 158 (Sup. Ct. 1828); Sayre v. Fredericks, 16 N.J. Eq. 205, 206 (Ch. 1863); Blue v. Everett, 56 N.J. Eq. 455, 458 (E & A 1897); Federal Reserve Bank of Phila. v. Welch, 122 N.J. 90, 92 (Ch. 1937). Accord, Gotlib v. Gotlib, 399 N.J. Super. 295 (App. Div. 2008), "If there is a note or other obligation that the mortgage secures then 'an attempted assignment of a mortgage, apart from the debt, is a nullity, a mortgage by itself not being a fit subject for assignment.' 55 Am.Jur.2d Mortgages § 1002 (2007). This is so, because a mortgage secures a debt and the mortgagee before foreclosure has no interest in the mortgaged property that he can convey, unless he simultaneously transfers the debt the mortgage secures."

[41] March 4, 2009 Order, ¶ 6. See March 11, 2009 letter from Abigail Sullivan, Esq., paragraphs 1 and 2, providing a more complete description of the documents covered by the March 4, 2009 Order. Plaintiff's do not dispute that Ms. Sullivan's letter accurately describes the documents Defendants requested and Plaintiff agreed to provide.

[42] March 2, 2009 D. Wellington, Esq. email to A. Sullivan, Esq. stating that "neither Plaintiff nor Phelan have in their possession copies, or currently have access to these agreements."

document purportedly responsive to another document disclosure ordered by the Court for:

- All compensation agreements between Countrywide Financial Corporation or any other entity and the law firm for preparation and recording of assignments, including the assignment in the Ukpe case.[43]

This third document is named "The Countrywide Home Loans, Inc. and Countrywide Home Loan Servicing LP Attorney/Trustee Agreement for Handling Foreclosure and Bankruptcies" ("Agreement").[44] Whether this is the retainer agreement referenced in the Hallinan deposition is not known.[45] If it is not, then there is another missing document, the retainer agreement between PHS and Countrywide Home Loans Servicing, LP.

Documents posted on MERS's website and a 2005 Nebraska Supreme Court decision shed some light on the content of one of the missing documents, namely the agreement between MERS and Countrywide Financial Corporation incorporated by reference into PHS's "Agreement for Signing Authority." The MERS's website contains a document captioned "TERMS AND CONDITIONS" and states that MERS and its members shall abide by the Terms and Conditions and the "Rules and Procedures (collectively, the 'Governing Documents')." According to MERS, the Governing Documents shall be made a part of the terms and conditions of every transaction that a Member may have or make with MERS either directly or through a third party.[46]

The MERS Terms and Conditions are posted on MERS' website. The document contains several provisions relevant to the issue whether Hallinan was authorized by MERS to assign the Ukpe's note to Plaintiff:

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[43] March 4, 2009 Order, ¶ 6. See March 11, 2009 letter from Abigail Sullivan, Esq., paragraph 7, providing a more complete description of the documents covered by the March 4, 2009 Order. Plaintiff's do not dispute that Ms. Sullivan's letter accurately describes the documents Defendants requested and Plaintiff agreed to provide.

[44] Ms. Wellington's March 10, 2009 letter to the Court.

[45] Hallinan deposition I, pp. 23-24. In a March 24, 2009 letter the Court said it was satisfied this Agreement, with one exception, need not be disclosed to Defendants. In an accompanying Order the Court ordered Plaintiff to disclose portions of the document disclosing the Agreement's caption and the acknowledgment page.

[46] MERS TERMS AND CONDITIONS, Hallinan deposition Exhibit 13. A search of the MERS' website did not disclose a document entitled "Rules of Procedure." Instead, a document captioned "MERSCORP, INC RULES OF MEMBERSHIP" was identified. Hallinan deposition Exhibit 14.

> MERS shall have no rights whatsoever to any payments[47] made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans. MERS agrees not to assert any rights (other than rights specified in the Governing Documents) with respect to such mortgage loans or mortgaged properties.[48]
>
> MERS shall at all times comply with the instructions of the holder of mortgage loan promissory notes. In the absence of contrary instructions from the note holder, MERS shall comply with instructions from the Servicer shown on the MERS® System in accordance with the Rules and Procedures of MERS.[49]
>
> MERS and the Member agree that: (i) the MERS® System is not a vehicle for creating or transferring beneficial interests in mortgage loans.[50]

In Mortgage Electronic Registration Systems, Inc. v. Nebraska Department of Banking and Finance, 704 N.W.2d 784, 788 (Neb. 2005) MERS successfully persuaded the Nebraska Supreme Court that it was not a mortgage banker subject to the license and registration requirements of Nebraska's mortgage banking act. In reversing a district court decision affirming the Department of Banking's finding declaring MERS a mortgage banker under the act, the Supreme Court noted that the district court accurately characterized MERS services based on an analysis of the contract between MERS and its members. The district court specifically referenced a MERS document entitled "Terms and Conditions" that stated in part:

> The Member, at its own expense, shall promptly, or as soon as practicable, cause MERS to appear in the appropriate public records as the mortgagee of record with respect to each mortgage loan that the Member registers on the MERS® System. MERS shall serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time. MERS shall have no rights whatsoever to any payments

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[47] Although Hallinan said he was not familiar with the MERS Terms and Conditions, he was aware of MERS' position that it was not entitled to any payments on mortgage loans when he signed the assignment in this case. Hallinan deposition II, pp. 34-37.

[48] MERS TERMS AND CONDITIONS, ¶ 2, Hallinan deposition Exhibit 13.

[49] MERS TERMS AND CONDITIONS, ¶ 3, Hallinan deposition Exhibit 13.

[50] MERS TERMS AND CONDITIONS, ¶ 6, Hallinan deposition Exhibit 13. This restriction appears to be violated by the express terms of the March 14, 2008 Assignment of Mortgage executed by Hallinan where he assigned to Plaintiff "all the beneficial interests" in the Ukpes' mortgage. Hallinan deposition I Exhibit 3.

> made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans. MERS agrees not to assert any rights (other than rights specified in the Governing Documents) with respect to such mortgage loans or mortgaged properties. Id. at 786-787.

The "Terms and Conditions" also stated that "MERS shall at all times comply with the instructions of the beneficial owner of mortgage loans as shown on the MERS® System." Id. at 787. MERS argued that it only held legal title to members' mortgages in a nominee capacity, and its contract prohibited MERS from exercising any rights with respect to the mortgages (i.e., foreclosure) without the member's authorization. MERS also argued it did not own the promissory notes secured by the mortgages and had no right to payments made on the notes. Id.[51]

In reversing the district court, the Nebraska Supreme Court concluded:

> Although we agree with the district court's characterization of the services provided by MERS and its contractual relationship with its members, we conclude that such services are not equivalent to acquiring mortgage loans, as defined by the Act. In other words, through its services to its members as characterized by the district court, MERS does not acquire "any loan or extension of credit secured by a lien on real property." MERS does not itself extend credit or acquire rights to receive payments on mortgage loans. Rather, the lenders retain the promissory notes and servicing rights to the mortgage, while MERS acquires legal title to the mortgage for recordation purposes.
> Id. at 788.

Hallinan understood the MERS system was a national electronic registry established to track beneficial ownership interests and servicing rights in mortgage loans.[52] He did not know what it meant to track beneficial ownership interests.[53] Perhaps

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[51] Contrary to the position MERS publicly takes on its website and in pleadings submitted in the Nebraska litigation, Hallinan claims MERS had a right to collect the money from the Ukpes, and to assign this right to Plaintiff. Hallinan deposition I, pp. 85-87, 92, 99-101.

[52] Hallinan deposition II, p. 55. Also see Hallinan deposition II, Exhibit 16, affidavit of William C. Hultman in Jackson v. MERS et al., Docket No. 08-CV-305 JNE/JJG, U.S. District Court Minnesota, ¶ 2. Mr. Hultman is a MERS senior vice president of MERSCORP, Inc. and the Secretary and Treasurer of MERS. According to Hultman, MERS serves as the "common nominee or disclosed agent for approximately 3,100 mortgage lenders in the United States." Hultman affidavit, ¶ 2. Hallinan did not know how many of the 3100 MERS mortgage lenders his firm represented. Hallinan deposition II, p. 67. Hultman views a nominee as the equivalent of an agent. Hultman affidavit, ¶ 31. When Hallinan was asked his understanding of a nominee, he answered, "I understand MERS is the designee for purposes of recording a mortgage. . . . "In this instance, it's a designee for the mortgage holder for simple - - actually to

the best description of MERS limited role in the mortgage lending process is found in the mortgage documents provided to the Ukpes when they borrowed money to purchase their home. A "Disclosure Statement About MERS" says:

> MERS is a company separate from your lender that operates an electronic tracking system for mortgage rights. MERS is not your lender; it is a company that provides an alternative means of registering the mortgage lien in the public records. MERS maintains a database of all the loans registered with it, including the name of the lender on each loan. Your Lender has elected to name MERS as the mortgagee in a nominee capacity and record the mortgage in the public records to protect its lien against your property.
>
> Naming MERS as the mortgagee and registering the mortgage on the MERS electronic tracking system does not affect your obligation to your Lender under the Promissory Note.[54]

MERS Did Not Have an Assignable Interest in the Note

Hallinan's attempted assignment of the promissory note is also ineffective because there is no evidence in the record that MERS ever had an interest in the promissory note. The promissory note contains no endorsement by the payee, Countrywide Home Loans, to MERS or anyone else.[55] Unlike the Defendants' mortgage, the promissory note contains no reference to MERS as a nominee for the lender.[56] Based on the content of the promissory note, and on information posted on MERS's public website, MERS was never in possession of the promissory note Hallinan assigned to Plaintiff. MERS does not handle paper documents, i.e., negotiable instruments, including mortgage notes, governed by the Uniform Commercial Code ("UCC").[57]

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simply record the mortgage document and to track the mortgage document." Hallinan deposition II, pp. 56-58.

[53] Hallinan deposition II, pp. 55-56.

[54] A true copy of the "Disclosure Statement About MERS" from the Ukpe loan file was attached as Exhibit F to Plaintiff Statement of Undisputed Facts Submitted in support of Plaintiff's motion for summary judgment returnable on November 21, 2008. Defendants will include a copy of this Disclosure Statement in their exhibits to the Plenary Hearing as Plenary Exhibit 1.

[55] Interest Only Adjustable Rate Note, Hallinan deposition I, Exhibit 4.

[56] Interest Only Adjustable Rate Note, Hallinan deposition I, Exhibit 4.

[57] Source: MERS eRegistry Membership Kit:

www.mersinc.org/Membership/WinZip/MERSeRegistryMembershipKit.pdf An October 21, 2004 Covington & Burling legal opinion letter ("Opinion Letter"), included in the MERS eRegistry Membership Kit, addresses the validity of MERSCORP's eRegistry system for registering certain transferable records – namely, electronic mortgage notes ("eNotes"). The Opinion Letter states that the statutes governing the

The Foreclosure Complaint and the Fraudulent Assignment

When PHS sent the false assignment into the stream of commerce, the assignment became a fraudulent document because others were asked to rely on its integrity. The journey started with the foreclosure complaint based on Plaintiff's claim that the assignment gave it ownership of both the promissory note and the mortgage.[58]

On its face, the false document appears legitimate having been executed by a MERS corporate officer and acknowledged by a Pennsylvania notary in Philadelphia, PA. In reality, the acknowledgement was prepared in Mount Laurel, New Jersey at a business owned by the three-named PHS partners. Their employee, Strain, was never an officer authorized to take acknowledgments in New Jersey. Hallinan never appeared before Strain to acknowledge he signed the document in his authorized capacity on behalf of MERS. Hallinan did not have authority to assign the note.

Strain's Deposition Testimony

As FSLS's in-house notary, Strain's duties included acknowledging assignments for PHS.[59] Strain acknowledged an average of 50 assignments a day.[60] Strain was not a New Jersey notary. Instead, he was licensed in Pennsylvania.[61]

Strain's standard practice for acknowledging assignments was to review the documents only to make sure that he was familiar with the signature of the person signing the document.[62] He did not read the assignments before notarizing them.[63] If he were familiar with the signature, he would notarize it. The persons who signed the assignments, i.e., the makers who are PHS lawyers, did not appear before Strain when

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transfer of electronic documents do not apply to negotiable instruments, which are governed by Article 3 of the U.C.C. "Under the U.C.C., a 'negotiable instrument' is a 'written' instruction or undertaking to pay money to another under certain conditions. See U.C.C. §§ 3-102(a), 3-103(a)(6), 3-103(a)(9), 3-104(a)." Opinion Letter page 3, n.7. December 18, 2009 Certification of Abigail Sullivan, ¶¶ 19-28.
Source: MERS eRegistry Membership Kit:
http://www.mersinc.org/files/filedownload.aspx?id=303&table=ProductFile

[58] On March 13, 2009, PHS also filed a factually false complaint because it alleged that its claim was based on an assignment of a promissory note and mortgage a day before the March 14, 2009 assignment existed.

[59] Strain deposition, p. 23.

[60] (See Exhibit "A", December 18, 2008 Deposition of Thomas P. Strain ("Strain deposition"), pp. 7-9.)

[61] Strain deposition, p. 10.

[62] Strain deposition, pp. 12, 14, 16, 24-25.

[63] Strain deposition, pp. 14, 24-25.

Strain acknowledged their signatures.[64] Strain did not know who prepared the assignments.[65]

When shown a copy of the March 14, 2008 assignment of the Ukpe's note and mortgage executed by Hallinan, Strain did not recall the particular assignment.[66] He knew it was Hallinan's signature on the document.[67] When asked the basis for his knowing that Hallinan was a MERS Assistant Secretary and Vice President, Strain answered, "I do not know."[68] He had heard that Hallinan held these MERS positions, but he did not remember who told him.[69]

Strain admitted that his employer, Hallinan, is a male. When asked why, knowing Hallinan was male, he acknowledged an assignment stating that Hallinan had "executed the same in *her* authorized capacity and that by *her* signature on the instrument the entity upon behalf of which the person acted executed the instrument," Strain answered, "I do not know."[70] As to the assignments bearing Hallinan's signature, Strain did not recall if Hallinan ever personally appeared before him.[71]

Strain only notarized documents for attorneys at the Phelan firm. In his capacity as a notary, he said he was aware that certain attorneys at the firm were authorized to sign mortgage assignments. He relied on that knowledge when notarizing the assignments. But when pressed to identify who was authorized to sign the assignments, he replied, "I do not know."[72]

Strain was not aware of the requirements for taking an acknowledgment in either New Jersey or Pennsylvania. He did not notice whether any kind of corporate action was occurring in the assignments he acknowledged.[73]

Hallinan's Deposition Testimony

Hallinan did not know New Jersey's requirements for recording corporate

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[64] Strain deposition, pp. 21-22.
[65] Strain deposition, p. 14.
[66] Strain deposition, pp. 19-20.
[67] Strain deposition, pp. 22-23.
[68] Strain deposition, p. 24.
[69] Strain deposition, pp. 23-24.
[70] Strain deposition, p. 25.
[71] Strain deposition, pp. 27-28.
[72] Strain deposition, pp. 30-31.
[73] Strain deposition, p. 18.

assignments.[74] He professed ignorance about whether New Jersey had any requirements governing the conduct of notaries acknowledging corporate assignments.[75] He was not familiar with the New Jersey Notary Public Manual ("Notary Manual").[76] He never provided Strain with a copy of the Notary Manual.[77] When procedures were being set up for how PHS and FSLS would process foreclosure paperwork, Hallinan was not aware if anyone from PHS made an effort to determine what rules governed the conduct of notaries in New Jersey.[78]

Hallinan did not dispute the accuracy of Strain's account,[79] including Strain's testimony that Strain notarized up to 50 assignments a day without the MERS Assistant Secretary and Vice President present.[80] Strain was the only notary working in the New Jersey office.[81] Approximately ten notaries worked in Pennsylvania.[82] Hallinan had no specific knowledge that Strain was ever told Hallinan had authority to execute assignments on MERS' behalf.[83] Hallinan did not see a problem with Strain using his Pennsylvania Notary seal to notarize documents when Strain was physically present in New Jersey.[84]

The Notary Manual and the Recording Act

New Jersey has explicit standards governing notaries in acknowledging corporate assignments of real property interests. The Notary Manual published by the New Jersey Department of Treasury provides guidance on the purpose of an acknowledgment and the requirements for taking one.

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[74] Hallinan deposition I, p. 117.
[75] Hallinan deposition I, p. 114.
[76] Hallinan deposition II, pp. 44-48. Hallinan Exhibit 15 is a copy of the Notary Manual. The manual is available online at http://www.state.nj.us/treasury/revenue/dcr/geninfo/notarymanual.htm
[77] Hallinan deposition I, p. 117.
[78] Hallinan deposition II, p. 47.
[79] Hallinan deposition I, pp. 83-84.
[80] Hallinan deposition I, pp. 107-108.
[81] Hallinan deposition I, pp. 80, 102. When later asked if all of the assignments for New Jersey foreclosures went through Strain, Hallinan said he was not aware of that and he believed they had other notaries in New Jersey. Hallinan deposition II, p. 49. Additionally, if Hallinan were sitting in his Philadelphia office on a day a New Jersey foreclosure assignment was given to him, he would execute it and could give it to one of the notaries in the Pennsylvania office. Hallinan deposition II, pp. 50-51. Pennsylvania foreclosures, however, were exclusively notarized in Pennsylvania. Hallinan deposition II, p. 51.
[82] Hallinan deposition II, p. 51.
[83] Hallinan deposition I, pp. 109-110.
[84] Hallinan deposition I, p 115.

According to the Notary Manual, a notary public is a New Jersey public officer who serves as an impartial witness to the signing of documents and to the acknowledgement of signatures on documents.[85] Title 52, "State Government, Departments and Officers" governs the appointment of New Jersey notaries. Notaries are appointed by New Jersey's Secretary of State and hold their offices for a five-year term. N.J.S.A. 52:7-10 to 52:7-21. A duly appointed New Jersey Notary Public is authorized to perform notary services throughout the State of New Jersey. N.J.S.A. 52:7-15.

A Pennsylvania notary is not authorized to take acknowledgments in New Jersey. N.J.S.A. 46:14-6.1(a) describes the officers of this State who are authorized to take acknowledgments in New Jersey. Only specified New Jersey officers are authorized to take acknowledgments in New Jersey. One of these specified New Jersey officers is a notary public.

The Notary Manual says an acknowledgment formally documents the following: "That the signer of a document appeared before the Notary, that the Notary positively identified the signer, and that the signer both acknowledged the signature as his/hers, and that the signature was made willingly."[86] The notary should:

- Ensure that the signer appears before him/her and presents at least one form of identification (ID) that provides a physical description of the signer-- e.g., driver's license. Note: Identification documents are not required if: 1) the signer is personally known to the Notary, or 2) a credible witness, known to both the signer and Notary, swears to the identity of the signer.
- Review the document presented for completeness. This is not a formal legal review, such as would be performed by an accountant or an attorney. Rather, it is a review to ensure that there are no blanks in the document. Should blanks be discovered, the signer must either fill them in or strike them out by drawing a line or "X" through them.
- Ensure that the signer understands the title of the document and is signing freely and willingly. By obtaining positive ID and asking brief questions as to the title and basic substance of the document, the Notary can make these determinations.

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[85] New Jersey Notary Public Manual, revised March 21, 2003, p. 2, Hallinan deposition II, Exhibit 15. Commercial Union Insurance Co. v. Burt Thomas Aitken Construction Co., 49 N.J. 389, 392-393 (1967). The manual is posted at the Department of Treasury's website: http://www.state.nj.us/treasury/revenue/dcr/geninfo/notarymanual.htm. The manual and N.J.S.A. 52:7-10 to 52:7-21 are at odds as to whether the Secretary of State or the State Treasurer appoints notaries.

[86] New Jersey Notary Public Manual, revised March 21, 2003, p. 4, Hallinan deposition II, Exhibit 15.

- Sign, date, and stamp an acknowledgment certificate (see illustrations). The ink stamp should include the date on which the Notary's commission expires. The stamp should be placed next to, but not over, the Notary's signature. (If the Notary does not have an ink stamp, his/her name and commission expiration date must be printed or typed on the certificate as indicated.)
- Make a journal entry. The journal entry provides evidence and an audit trail thereby protecting both the Notary and the general public. Required information includes: 1) date and time of notary act, 2) type of act (i.e., acknowledgment), 3) title of document, 4) date document was signed, 5) signature; printed name and address of each signer, and if applicable, each witness, and 6) form of ID -- e.g. identification document, personal knowledge, or credible witness. Note: Journals should be bound to prevent tampering. Journals may be obtained from stationers or professional associations.
- Charge only the statutory fee ($2.50).[87]

An opinion by the Committee on the Unauthorized Practice of Law instructs members of the bar on the functions of notaries and the contents of the Notary Manual.

> When a person in New Jersey is commissioned as a notary public, he or she is given a copy of the *New Jersey Notary Public Manual* (New Jersey Division of Revenue). This manual explains the function of a notary and states that a notary is authorized to: administer oaths and affirmations; take acknowledgments; execute jurats for affidavits and other verifications; take proof of deeds; execute protests for non-payment or non-acceptance. The manual cites the statutory requirement that a notary be 18 years of age or older. A person desiring such appointment must make application on a form prescribed by the State Treasurer who authorizes such appointments. The notary public manual states specifically that a notary public may not prepare a legal document, give advice on legal matters, or appear as a representative of another person in a legal proceeding. Notary fees are set by the regulations and are relatively modest.[88]

New Jersey's Recording Act, N.J.S.A., 46:15-1.1 to 46:26-1, identifies specific requirements the PHS lawyers and Strain had to follow in preparing and recording mortgage assignments. A prerequisite to recording by a county recording officer is that the document be acknowledged. N.J.S.A. 46:15-1.1(a)(3). Mortgages on New Jersey real estate are assignable by writing. N.J.S.A. 46:9-9. A valid assignment can be recorded. N.J.S.A. 46:18-4. Weighty policy considerations involving land title

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[87] New Jersey Notary Public Manual, revised March 21, 2003, p. 4, Hallinan deposition II, Exhibit 15.
[88] Committee on the Unauthorized Practice of Law Appointed by the New Jersey Supreme Court, Opinion No. 41, Notaries Public and the Unauthorized Practice of Law.

recordation underlie the notary's elementary duty in acknowledging the assignment of a mortgage and note.[89]

N.J.S.A. 46:14-2.1(a) governs the duties of Hallinan, as the maker of the corporate assignment, in acknowledging the assignment.[90] To acknowledge a corporate assignment, "the maker shall appear before an officer specified in [N.J.S.A.] 46:14-6.1 and state that the maker was authorized to execute the instrument on behalf of the entity and that the maker executed the instrument as the act of the entity."[91] The statute required Hallinan to appear before Strain and declare he was authorized by MERS to execute the assignment and that he signed the assignment as an act of MERS. None of this ever happened, as Hallinan never appeared before Strain.

As for Strain's duties as the notary, the statutory duties of a notary public taking a corporate acknowledgment are equally clear. As the statutory officer taking Hallinan's acknowledgment, Strain was required to sign a certificate stating:

(1) that the maker, Hallinan, personally appeared before him;

(2) that Strain was satisfied that Hallinan, who made the acknowledgment, was also the maker of the instrument;

(3) the jurisdiction in which the acknowledgment was taken;

(4) Strain's name and title; and

(5) the date on which the acknowledgment was taken.

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[89] In Palamarg Realty Co. v. Rehac, 80 N.J. 446, 453-454 (1979), the Court said: "An historical study of the [Recording] Act, as well as an analysis of the cases interpreting it, leads to the conclusion that it was designed to compel the recording of instruments affecting title, for the ultimate purpose of permitting purchasers to rely upon the record title and to purchase and hold title to lands within this state with confidence. The means by which the compulsion to record is accomplished is by favoring a recording purchaser, both by empowering him to divest a former non-recording title owner and by preventing a subsequent purchaser from divesting him of title. This ability to deprive a prior and bona fide purchaser for value of his property shows a genuine favoritism toward a recording purchaser. It is a clear mandate that the recording purchaser be given every consideration permitted by the law, including all favorable presumptions of law and fact. It is likewise a clear expression that a purchaser be able to rely upon the record title. Jones, The New Jersey Recording Act -- A Study of its Policy, 12 Rutgers L. Rev. 328, 329-30 (1957)." Accord, New Jersey Bank v. Azco Realty Co., 148 N.J. Super. 159, 167 (App. Div. 1977).

[90] N.J.S.A. 46:14-2.1. "Acknowledgment and proof. a. . . . To acknowledge a deed or other instrument made on behalf of a corporation or other entity, the maker shall appear before an officer specified in R.S.46:14-6.1 and state that the maker was authorized to execute the instrument on behalf of the entity and that the maker executed the instrument as the act of the entity."

[91] N.J.S.A. 46:14-2.1(a).

N.J.S.A. 46:14-2.1(c).[92]

Strain violated the most elementary duties imposed by New Jersey's Recording Act on the notary who takes the acknowledgement.

> In acknowledging an assignment for recording with the county clerk's office, the elementary duty of an officer specified in the statute is to have the assignment's maker personally appear before the officer and state that the maker is authorized to execute the assignment on behalf of the corporation and further state that the maker executed the assignment as an act of the corporation.
> New Jersey Bank v. Azco Realty Co., 148 N.J. Super. 159, 167 (App. Div. 1977).

On its face, Strain's certificate evidencing his taking of Hallinan's acknowledgment appears complete and correct. However, it is false and misleading in that three of the five statutory requirements governing Strain's conduct were breached. Hallinan did not appear before Strain to acknowledge his actions and authority. Because Hallinan did not appear and acknowledge his actions as acts of the corporation, Strain could not have satisfied himself that the person who made the acknowledgment was also the maker of the instrument. Strain could not truthfully state the jurisdiction where the acknowledgment was taken, because none was taken in either New Jersey or Pennsylvania.[93]

Nevertheless, the acknowledgment falsely bears the notation "State of Pennsylvania, County of Philadelphia" and is stamped with Strain's Commonwealth of Pennsylvania notary seal. Had the document accurately recounted Strain's limited actions regarding the acknowledgment physically occurred in Mount Laurel, NJ, and Hallinan had not appeared before Strain, it would have been immediately apparent to a county clerk responsible for recording the assignment that the document was defective and should not have been recorded.

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[92] N.J.S.A. 46:14-2.1(c) Acknowledgment and proof. "The officer taking an acknowledgment or proof shall sign a certificate stating that acknowledgment or proof. The certificate shall also state:
(1) that the maker or the witness personally appeared before the officer;
(2) that the officer was satisfied that the person who made the acknowledgment or proof was the maker of or the witness to the instrument;
(3) the jurisdiction in which the acknowledgment or proof was taken;
(4) the officer's name and title;
(5) the date on which the acknowledgment was taken."

[93] Strain also failed to keep and maintain the notary journal required by the Notary Manual.

Did PHS' Conduct Violate Conflict of Interest Standards?

PHS represents three clients in this and other foreclosure proceedings. Potential conflicts of interest arise from the simultaneous representation of the mortgage loan servicer, MERS, and Plaintiff Bank of New York as Trustee. In the course of representing these three clients PHS does the bidding of and generates income for the first client, the mortgage servicer. PHS strips the second client, MERS, of whatever interest it has in the mortgage loan while exposing MERS to claims arising from the unauthorized assignment of a mortgage note. For the third client, the foreclosure plaintiff, PHS creates a cause of action via the fraudulent assignment, thereby exposing this client to unnecessary legal fees. These multiple representations and the ensuing litigation present profitable business opportunities for the firm's owners and their ancillary business.

Further discovery and testimony at the evidentiary hearing is needed to illuminate the financial relationships and conflicts between PHS and its various clients in foreclosure litigation. In the plenary hearing, Defendants' counsel will explore whether the law firm is engaging in a scheme to overcharge Plaintiffs and other homeowners in foreclosure for ancillary business services and is failing to disclose its total fee income to the courts and all of its clients.

PHS's Clients

The Mortgage Servicer

The mortgage servicer, Countrywide Home Loans Servicing LP ("CHL Servicing"), is the client running the show and directing the law firm's activities.[94] CHL Servicing has a retainer agreement with PHS and pays the firm for its services.[95] CHL Servicing is also the Master Servicer under and signatory to the September 1, 2005 Pooling and Servicing Agreement ("PSA") creating the securitized trust represented by the named Plaintiff in this foreclosure action. PHS uses the mortgage servicer's address, not Plaintiff's address, as the address for Plaintiff listed in the complaint.[96]

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[94] Hallinan deposition I, pp. 24 – 25.

[95] Hallinan deposition I, pp. 19-20, 23 – 24.

[96] The complaint lists the Plaintiff's address as 7105 Corporate Drive, Plano, Texas 75024. This is not Plaintiff's address, but it is the address of the principal executive offices of another of the firm's clients in

Where the original lender, Countrywide Home Loans, has engaged in predatory lending, the mortgage servicer, CHL Servicing, as a signatory to the PSA, is a participant in fraudulently representing to investors that none of the loans included in the trust corpus are predatory loans. Additionally, there are inherent conflicts in the mortgage servicer's drive to maximize its own income and the servicer's duty to the investors represented by the investor trust.[97]

Plaintiff Bank of New York as Trustee

PHS does not have a retainer agreement with the Plaintiff. Plaintiff does not compensate the firm for its services.[98] The Plaintiff is also one of two trustees named in the PSA and is a PSA signatory.[99] However, the Plaintiff named in the complaint, i.e., Bank of New York as Trustee, is not the trustee with custody of the mortgage and note that PHS attempted to assign from MERS to Plaintiff. According to the PSA, The Bank of New York Trust Company, N.A., another signatory to the PSA, has custody of whatever notes and mortgages comprise the trust corpus.[100]

MERS

MERS is a PHS client in its role as a nominee for the lender on the mortgage document, America's Wholesale Lender ("AWL"), and is identified in the mortgage document as the mortgagee. PHS provides free legal services to MERS in creating the assignment of property allegedly controlled by MERS for the benefit of AWL and transferring it to the Plaintiff Bank of New York as Trustee. MERS provides the law firm with limited authority to transfer whatever property interest MERS' has in the

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this litigation, Countrywide Home Loan Servicing, LP. Complaint, introductory paragraph, Hallinan I, Exhibit 8. The address of the client named in the complaint, Plaintiff Bank of New York as Trustee for the Certificate Holders CWABS, Inc. Asset-Backed Certificates, Series 2005-AB3, is 101 Barclay Street, New York, New York 10286 (P.S.A. Section 10.05 Notices, p.150).

[97] Alan M.White, "Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications," Conn. L. Rev. (2009), supra, n. 11.

[98] PHS does not enter into a retainer agreement with the party the Servicer instructs PHS to name as Plaintiff. Hallinan deposition I, pp.130-131.

[99] The two trustees are The Bank of New York, Trustee and the Bank of New York Trust Company, N.A., Co-Trustee. The Bank of New York is not a MERS member. The Bank of New York Trust Company, N.A. is a MERS member.

[100] PSA, section 2.01 (g).

mortgage and turns a blind eye to the law firm exceeding that authority by assigning the note. PHS does not have a retainer agreement with MERS.[101]

PHS's Foreclosure Process

Hallinan's deposition testimony describes the process PHS follows in initiating foreclosures and the firm's billing practices from the foreclosure complaint through judgment and a foreclosure sale. The testimony reveals an area of potential billing irregularity involving fees for unnecessary and duplicative title searches.[102] It is important to note that the PSA requires a title policy insuring that the loan is a first lien on the subject property.[103] That title policy must accompany that loan into the trust. Therefore, the title search need encompass only the period following closing of the loan.

As PHS's administrative partner, Hallinan oversees the process of receiving referrals from clients, opening client files, inputting the referral information onto PHS's computer system, retaining the necessary ancillary services in order to process the foreclosure action, ordering and reviewing a snapshot title report, reviewing a full title search report, preparing the first draft of the lawsuit and getting the complaint filed.[104]

The Full Title Search Ordered by the Servicer

Even before making a referral of the Ukpe foreclosure to PHS, the mortgage servicer, CHL Servicing, ordered a full title search report from a Countrywide Home Loans, Inc. subsidiary, Landsafe, Inc.[105] The mortgage servicer incurred this expense even though the servicer is aware that a fellow MERS member and signatory to the PSA

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[101] Hallinan deposition I, p. 19. Hallinan was not aware of any compensation agreement between law firm and MERS.

[102] R. 4:64-1 requires that "[p]rior to filing an action to foreclose a mortgage, the plaintiff shall receive and review a title search of the public record for the purpose of identifying any lienholder or other persons and entities with an interest in the property that is subject to foreclosure and shall annex to the complaint a certification of compliance with the title search requirements of this rule." The mortgage servicer already has access to the full title search report done when the loan was made. This report can be updated at a modest cost. Ordering both a full title report and a Quick Report after the homeowner has defaulted is wasteful and duplicative. Knowingly billing homeowners and investors for duplicative and wasteful title work would be fraudulent.

[103] PSA, Article II. Conveyance of Mortgage Loans; Representations and Warranties, Section 2.01 Conveyance of Mortgage Loans. p. 54; Section 2.02 Acceptance by Trustee of the Mortgage Loans. p. 61; Schedule G2, Form of Interim Certification of Trustee, Schedule H, Form of Final Certification of Trustee. Plaintiff's Exhibit I in discovery. Relevant excerpts will be included the Plenary Hearing exhibits as Plenary Exhibit 2.

[104] Hallinan deposition I, pp. 10, 77-78.

[105] Hallinan deposition II, pp. 25-26. The Landsafe Title "Foreclosure Title Search Report" was ordered on February 25, 2008, nearly two weeks before the mortgage servicer referred the Ukpe foreclosure to HS. Hallinan deposition II, Exhibit 12.

agreement - - Bank of New York Trust Company, N.S. - - has a full title search report current as of the date of the mortgage closing, July 29, 2005. Apparently no effort is made to update the title report provided to the trust by Countrywide Home Loans, the lender on the Ukpe's note and another signatory to the PSA. Updating the existing report through the title insurer, rather than ordering a new title report, would seem to be an inexpensive alternative to ordering a full title search report.

In turn, the Countrywide Home Loan subsidiary, Landsafe, contracts with the PHS partners' business, FSLS, to provide the title work.[106] As a vendor for Landsafe, FSLS would issue an invoice to Landsafe for the title work.[107] Nevertheless, apparently neither FSLS nor the mortgage servicer contemporaneously shares the results of this full title search with PHS. At a later date, Countrywide either forwards the full title report along with the referral to PHS or it sends the full title report after the referral is made.

On March 10, 2008, the mortgage servicer made a referral to PHS to start foreclosure proceedings against the Ukpes.[108] The referral instructed the law firm who to name as the Plaintiff. Hallinan said he had no idea what the mortgage servicer's basis was for telling the law firm who the Plaintiff should be.[109] PHS does nothing to confirm the accuracy of the information in the referral.[110] At this point in the foreclosure process, Hallinan said the law firm had no idea whether MERS was involved.[111] The mortgage servicer, however, knew of MERS involvement and so did FSLS by virtue of its recent title search work for Landsafe Title.

The Quick Title Search Ordered by PHS

Upon receipt of the Ukpe foreclosure referral, the law firm would open a file and order some quick title work, called a "Quick Search" title report, from FSLS.[112] In this

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106 Hallinan deposition II, pp. 26-28.
107 Hallinan deposition II, pp. 27-29.
108 Hallinan deposition I, p. 42. A Referral Account Detail Report indicates Countrywide Home Loans is the loan servicer. Id. at 45. Hallinan deposition Exhibit 4 is a group of documents relating to the process leading up to the preparation of an assignment in this case. Id. at 43 - 44. The last two pages of Exhibit 4 contain the referral from the client setting forth mortgagor's name, property address, default information, county where property is located and the name of the party in whose name the client wants the action brought. Id. at 44-45. The referral occurred on March 10, 2008. Hallinan deposition II, pp. 68-69 and Hallinan Exhibit 19.
109 Hallinan deposition I, p. 130.
110 Hallinan deposition I, p. 46; Hallinan deposition II, pp. 62-63.
111 Hallinan deposition I, p. 46.
112 Hallinan deposition I, pp. 42-43.

case, a division of FSLS, Foreclosure Review Services, retained an independent vendor, Searchtec, Inc., to prepare the Quick Search on behalf of Foreclosure Review Services.[113] An FSLS employee receives the order and requests an abstractor to abstract the title and respond back with a Quick Search and/or title report of the property that is to be foreclosed. FSLS would bill a separate fee for this work.[114] Title fees range from $200 to possibly $350.[115]

Searchtec generally charges Foreclosure Review Services $60 to $75 for a Quick Search. It is not a full title report. It is simply a title snapshot.[116] The law firm makes a profit on this abstracting work.[117] Hallinan said there is a standard rate for this initial title work, but he did not know what it is.[118]

FSLS returned the Quick Search information to the law firm to analyze and compare to the referral.[119] PHS would look at who was the last mortgagee of record as reflected in the Quick Search report and compare that information to the instructions from the mortgage servicer about who the Plaintiff should be in the foreclosure action. In the present matter, analysis of the Quick Search title work indicated the last holder of the mortgage was MERS as nominee for America's Wholesale Lender.[120] Therefore, an Assignment out of America's Wholesale Lender into Bank of New York as Trustee needed to be prepared.[121] Hallinan explained that an assignment is needed because when the foreclosure action is over they wanted title in the name of the holder who would then convey it to a third party.[122]

A legal assistant in the PHS's Assignment Department went onto the MERS electronic Servicer Identification System to confirm the MIN (mortgage identification number) that indicates a loan is part of the MERS system.[123] The legal assistant would

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[113] Hallinan deposition I, pp. 53-53.
[114] Hallinan deposition I, pp. 48-49.
[115] Hallinan deposition I, p. 49.
[116] Hallinan deposition I, pp. 52-53.
[117] Hallinan deposition I, pp. 51.
[118] Hallinan deposition II, pp. 28-29.
[119] Hallinan deposition I, pp. 54 and Exhibit 4, pp. 6-7.
[120] Hallinan deposition I, p. 43, and Hallinan Exhibit 4.
[121] Hallinan deposition I, pp. 54-55; Hallinan deposition II, pp. 42-43.
[122] Hallinan deposition II, pp. 42-43.
[123] Hallinan deposition I, pp. 68-69, 130. A MERS document captioned "MERS Servicer Identification System – Results," is obtained from the MERS Servicer Identification System. Hallinan deposition I, pp. 69-70 and Exhibit 5.

also ascertain if PHS had authority to execute the Assignment.[124] Hallinan did nothing as a MERS officer to confirm with MERS the accuracy of the information provided by the mortgage servicer.[125]

Someone in the PHS Assignment Department then prepared the assignment assigning rights in the mortgage and note from MERS into Bank of New York as Trustee and presented it to Hallinan for execution.[126] Preparation of assignments from MERS to plaintiffs in foreclosure actions is one of the services provided by PHS pursuant to the Agreement For Signing Authority. PHS charges one fee for the preliminary title work, preparation, execution, acknowledgment and recording of an assignment. The fee ranges from $50 to $125.[127]

The Full Title Search Is Used by PHS

In the present case, Countrywide Home Loan Servicing ordered and received a Landsafe title report before referring the matter to PHS for foreclosure. However, the servicer apparently did not provide the Landsafe title report to PHS until after referring the matter to PHS, by which time PHS had already ordered a Quick Search report.[128]

Before preparing and executing the assignment, PHS personnel would review the mortgage document for information about the recorded date of the mortgage, the mortgagors' names, the full name of the mortgagee, the dollar amount borrowed and the legal description.[129] In addition to the mortgage document, a full copy of the title report would also be used.[130] Hallinan said the title snapshot would not be sufficient to prepare an assignment.[131] Hallinan explained the Landsafe title report gives a more detailed analysis of the public record for the property that is the subject of the foreclosure than

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[124] Hallinan deposition I, p. 70.
[125] Hallinan deposition I, p. 129.
[126] Hallinan deposition I, pp. 43, 65-66, 96.
[127] Hallinan deposition I, pp. 21 – 22.
[128] Hallinan deposition II, pp. 26-27. A date on a faxed document included in the title report reflects title work was being performed on or before February 27, 2008 by an FSLS abstractor. Elsewhere the Landsafe title report had an entry for the date the request was received of February 5, 2008. Id. at 33.
[129] Hallinan deposition I, pp. 71 – 72, 74.
[130] Hallinan identified a report by Landsafe Title as the report on the Ukpe's property. Hallinan deposition II, pp. 22 – 24 and Exhibit 12.
[131] Hallinan deposition I, p. 72. "There are times when a search report is ordered and there are times when a title report is ordered and there are times when both items are ordered in order to compare the two to assure accuracy in the pleadings." Hallinan deposition II, p. 80.

does the Quick Search report.[132] No one at PHS looked at the borrowers' note prior to preparing the assignment.[133]

PHS Billings

Hallinan described three billing cycles the firm goes through during the life of foreclosure litigation. The first covered the period up through when the complaint was filed. The invoices ranged from $400 to $600. The second cycle covered the period up through when a judgment is entered, and again the invoices ranged from $400 to $600. The third cycle covered through the sheriff's sale and the recording of a deed into the name of the foreclosing mortgagee or into a third party purchaser.[134] For the third cycle, the invoices ranged from $350 to $400. Any out of pocket expenses would be an additional billing item.[135]

Earlier in the litigation Plaintiff provided a payment loan history from the mortgage servicer.[136] The payment history, however, does not give all the fees charged against the Ukpe's mortgage loan account. More recently, can be found in the response to Defendants received a response to a Qualified Written Request to the mortgage servicer for relevant documents.[137] The response contains evidence of a foreclosure practice's profitability and possible overcharges by the law firm and the mortgage servicer. For example, fees not shown on the payment loan history but revealed in the response to the Qualified Written Request include these fees total $2430.00.

1. return payment fees of $40.00;
2. inspection fees of $375.00;
3. court costs of $25.00;
4. process server fee of $460.00;
5. recording fees of $230.00;
6. attorney/trustee/foreclosure fees of $910.00;
7. skip trace fee of $15.00;

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[132] Hallinan deposition II, pp. 25-26, 29.
[133] Hallinan deposition I, p. 75.
[134] Hallinan deposition II, pp. 64-65. The law firm's billing includes reimbursement for fees paid to record the mortgage assignment. In the present case, PHS billed Countrywide Home Loans $50 to record the assignment. Hallinan deposition II, pp. 63-64, and Hallinan Exhibit 18.
[135] Hallinan deposition II, pp. 65-66.
[136] Plaintiff's Statement of Undisputed Facts, dated October 24, 2008, submitted in support of its Motion for Summary Judgment, Exhibit G, showing a "payment history for the loan" (paragraph 12).
[137] Letter dated March 12, 2009 from Jonathan K. Moore representing Countrywide Home Loans. A copy of the letter will be included in Defendants' Plenary Hearing Exhibits as Plenary Exhibit 3.

8. title fees of $175.00; and
9. filing fees of $200.00.

Defendants will explore in the Plenary Hearing the basis for the process server fee of $460.00, the recording fees of $230.00 and the attorney/trustee/foreclosure fees of $910.00.

Rules of Professional Conduct Issues

If the law firm is collecting attorney's fees and costs pursuant to its retainer agreement with the loan servicer and separately is collecting court awarded attorney's fees and costs pursuant to R. 4:42-9(a)(4), must the law firm make full disclosure to the client? Should disclosure be made to the court or the homeowner? If disclosure is not made, is it a violation of the Rules of Professional Conduct?

Other RPC issues include whether the use of the assignments in litigation violate RPC 3.1 prohibiting a lawyer from bringing a proceeding or asserting an issue unless the lawyer knows or reasonably believes there is a basis in law and fact for doing so. The knowing use of a false assignment would also contravene RPC 3.4's requirement of fairness to opposing parties and counsel. Lastly, the preparation and use of false assignments to defraud litigants and others implicates RPC 8.4 prohibitions on professional misconduct, including commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and conduct prejudicial to administration of justice.

Because the three named PHS partners own FSLS, and FSLS provided notary services exclusively for the law firm, lawyer disciplinary decisions concerning the taking of acknowledgments are instructive. In re Coughlin, 91 N.J. 374, 376-377 (1982), the Court, quoting the disciplinary review board's findings, wrote:

> The Supreme Court has, in recent years, given clear notice of the importance of observing specific requirements in the execution of jurats and taking of acknowledgments. In re Conti, 75 N.J. 114 (1977); In re Surgent, 79 N.J. 529 (1979); In re Rinaldo, 86 N.J. 640 (1981); In re Barrett, 88 N.J. 450, 443 (1982).

* * *

> The failure of the respondent in the case at hand to insist upon the presence of the grantor when the jurat was executed and the acknowledgment was taken was thus more than an error in judgment: it was a blatant misrepresentation in violation of DR 1-102(A)(4), as well as a knowingly made false statement of fact in violation of DR 7-102(A)(5). To be considered in respondent's favor is the fact that his actions were not grounded on any intent of self-benefit, nor was anyone harmed as a result of his actions.

Unlike the situation in Coughlin, Hallinan and his partners' actions are grounded on profit motives and others have been harmed by their actions.

The Court in In re Surgent, 79 N.J. 529, 531-532 (1979), took the "opportunity to disabuse the bar of any lingering notion that the plain and unmistakable requirements regarding the execution of jurats and taking of acknowledgements need not be met in all respects." The integrity of acknowledgments taken by notaries and attorneys is vital to the New Jersey's land recording system. In Island Venture Associates v. New Jersey Department of Environmental Protection, 359 N.J.Super. 391, 396 (App.Div. 2003), the court observed: "Our case law is replete with concerns for the 'integrity of record title and the stability of the recording system.' Sonderman v. Remington Const. Co., 127 N.J. 96, 112 (1992); accord Cox v. RKA Corp., 164 N.J. 487, 497 (2000); Lincoln Fed. Sav. & Loan Ass'n v. Platt Homes, Inc., 185 N.J. Super. 457, 466 (Ch. Div. 1982)."

The Story of the Pooling and Servicing Agreement ("PSA")

In an argument presented to the Court, Plaintiff makes an alternative claim that it acquired the Ukpe's note and mortgage in connection with the creation of a pool of mortgage loans in September 2005 and a related sale of mortgage-backed securities to investors. The March 2008 complaint does not recite the PSA. Plaintiff has never sought to amend its complaint to assert ownership through the PSA as an alternative to its ownership claim through the bogus assignment.[138]

[138] Hallinan claimed he was unaware of the factual basis for his firm's position that the assignment reflects what has already happened earlier, namely the mortgage and note had passed into the trust represented by Plaintiff. Hallinan deposition II, pp. 46-47. Hallinan also said he was not aware of the pooling and servicing agreement at issue in this case. Nor was Hallinan generally aware that pooling and servicing agreements provide for the creation of trust property. Hallinan deposition II, pp. 58-60.

To date, no evidence has been presented establishing the Ukpe's note and mortgage were part of the pool.[139] The PSA story has largely been a smokescreen to divert attention from fatal defects in the mortgage assignment created by Plaintiff's law firm. However, if the PSA story is true, it will expose the mortgage servicer and PHS to claims that investors and homeowners have been billed for unnecessary services provided by PHS and FSLS.

The PSA story first appears in an argument made by Plaintiff's counsel in November 2008. Plaintiff filed a summary judgment motion on October 24, 2008 that relied upon Hallinan's assignment. Defendants' response noted that the assignment was created the day after the complaint was filed.[140] In a November 18, 2008 letter to the Court, Plaintiff's counsel first raised the PSA, arguing that the September 1, 2005 PSA "clearly shows that the Plaintiff is the trustee for the subject loan, ..."[141] Plaintiff's counsel attached excerpts from a draft, unexecuted PSA document as an exhibit. The draft PSA contained no reference to Defendants' note and mortgage.[142]

Since then, Plaintiff has produced an "Execution Copy" of the PSA with notarized signatures dated September 27, 2005.[143] The Execution Copy contains no reference to Defendants' note and mortgage. The Execution Copy reflects that contemporaneous schedules of "Mortgage Loans" were delivered to the Trustee at closing and are on file with the Trustee.[144] These schedules have not been produced in discovery.[145]

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[139] Evidence that the Ukpe's mortgage has been assigned to the trust must satisfy Statute of Frauds requirements governing proper execution and delivery of the mortgage. N.J.S.A. 25:1-11(a)(1). Evidence that the Ukpe's note is the trust's property must satisfy UCC requirements governing the negotiation and transfer of negotiable instruments. N.J.S.A. 12A:3-101 et seq. The propensity of law firms to use assignments to establish standing in foreclosure cases may reflect a desire to avoid the costs and difficulties of satisfying New Jersey's evidence requirements for proving mortgage assignments and transfers of negotiable instruments.

[140] Defendants' November 13, 2008 Response to Plaintiff's Statement of Undisputed Facts in Support of Response to Motion for Summary Judgment, ¶ 3.

[141] Plaintiff's November 18, 2008 letter memorandum, pp. 1-2.

[142] Plaintiff's November 18, 2008 letter memorandum, Exhibit H to Plaintiff's letter memorandum.

[143] Plaintiff's February 13, 2009 letter transmitting a full copy of the September 1, 2005 Pooling and Servicing Agreement, Exhibit I to Plaintiff's prior document production.

[144] Mortgage Loan schedules, Exhibits F-1 and F-2, to the September 1, 2005 Pooling and Servicing Agreement, which is Exhibit I to Plaintiff's February 13, 2009 letter.

[145] Plaintiff's February 13, 2009 transmittal letter says the full copy of the PSA includes Exhibits and schedules, but none of the Exhibits and schedules is complete. See Exhibit I to Plaintiff's February 13, 2009 letter. Relevant excerpts from the PSA will be included in Defendants' Plenary Hearing Exhibits as Plenary Exhibit 2.

However, copies of the two promissory notes produced to date belie Plaintiff's claim to ownership as trustee for a pool of securitized mortgages. Neither note bears the endorsements required by the PSA and neither note establishes Plaintiff, in its capacity as trustee, is the note's owner. The first copy of the note was produced as Exhibit A to Plaintiff's October 24, 2008 summary judgment motion. The note bore no endorsements and apparently is a copy of the original note executed by the Ukpes to Countrywide Home Loans on July 29, 2005.[146]

The second copy of the note produced in discovery was received on March 17, 2009 from Plaintiff's new co-counsel, Wilentz Goldman & Spitzer ("Wilentz").[147] This copy of the note contains a single, undated, intervening blank endorsement by a managing director of Countrywide Home Loans, the note's originator. Notably absent is an endorsement from the PSA's depositor, CWABS, Inc.,[148] to the custodial trustee, Bank

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[146] A true copy of the note without any endorsements is included as an Exhibit to the March 3, 2009 Hallinan deposition as Exhibit 7. The copy of this note was first produced in the course of Plaintiff's October 24, 2008 motion for summary judgment. See Plaintiff's October 24, 2008 "Statement of Undisputed Facts in Support of Plaintiff's Motion for Summary Judgment," Exhibit A.

[147] March 17, 2009 hand delivered letter from D. Wellington, Esq. This second, endorsed copy of the note was contained in a group of documents marked as Exhibit 9 to the March 17, 2009 continuation of the Hallinan deposition. The three-page note bears the unique bates stamp numbers BONY 40 – BONY 42. A March 17, 2009 cover letter from Wilentz says the copies are from the Bank of New York, but no affidavit or certification from a Bank of New York representative is included. Presumably Bank of New York is an entity separate from the Bank of New York Trust Company, N.A. identified as the "Co-Trustee" in the PSA. Article I. Definitions, Section 1.01 Defined Terms, p. 17, "Co-Trustee." The Bank of New York is identified as the "Trustee." Id. at 48. The distinction is relevant to the Court's interest in what happened to the note after it was executed. The Court directed Plaintiff's counsel to produce the original note for the April 20, 2009 hearing. March 13, 2009 letter from Judge Todd to Dashika Wellington, Esq. and Abigail Sullivan, Esq., p. 2. According to the PSA, the note should have been endorsed into the trust and deposited with the Co-Trustee Bank of New York Trust Company, N.A. and not with the Bank of New York. Moreover, when the trust accepted the mortgage loan files the Co-Trustee acknowledged receipt of the mortgage loans, PSA Section 2.02, which loans were individually identified in a Schedule of Mortgage Loans delivered to the Trustee at closing, identified in the PSA as Exhibits F-1 and F-2. Additionally in a series of certifications attached to the PSA, the Trustee, Bank of New York, certified that the Co-Trustee had possession of the mortgage loans. In the "Initial Certification" the trustee certified that the Co-Trustee initially received the original mortgage note endorsed in blank and a duly executed assignment, Exhibit G-1. In an "Interim Certification" the Trustee certified that the Co-Trustee had received the original mortgage note endorsed in blank "with all intervening endorsements that show a complete chain of endorsement from the originator to the Person Endorsing the Mortgage Note" and the original recorded assignment of the mortgage "together with all interim recorded assignments of such Mortgage," Exhibit G-2. However, in a "Final Certification" the Trustee certified that the Trustee (not the Co-Trustee) had received the original mortgage note endorsed in blank "with all intervening endorsements that show a complete chain of endorsement from the originator to the Person Endorsing the Mortgage Note" and the original recorded assignment of the mortgage "together with all interim recorded assignments of such Mortgage," Exhibit G-H. None of these Exhibits has been produced in discovery despite a Court Order to produce them.

[148] The Depositor owned the trust fund before conveying it to the Trustee. The PSA's "Preliminary Statement" recites: "The Depositor is the owner of the Trust Fund that is hereby conveyed to the Trustee in

of New York Trust Company, N.A, that is essential to Plaintiff proving its PSA-based claim to ownership of the Ukpe's promissory note and mortgage. The PSA depositor's endorsement of the note into the trust may also be essential to Plaintiff proving its assertion that it is a holder in due course of the note.[149]

Ironically, proof that the note and mortgage made their way into the possession of the Plaintiff Trustee would raise significant issues involving unnecessary, wasteful and fraudulent billing by the mortgage servicer and the law firm. If the Trust already owns the note and mortgage, what is the justification for the mortgage servicer and the law firm providing costly and unnecessary services to assign to a co-trustee, Bank of New York, what the trust already owns.

For example, the co-trustee, Bank of New York Trust Company, N.A., already has custody of a complete title report.[150] If an update could be obtained for a fraction of the cost that the servicer, PHS and FSLS charge for their title services work, the billings could be viewed as improper and excessive.

Put in perspective, the fraudulent billing would complete a cycle of defrauding borrowers and investors. Where the lender has engaged in predatory lending, both the borrower and the investors are victimized. The first time is when the borrower is duped into taking on a predatory loan and the investors are sold securities backed by the mortgage loans after falsely being told no predatory loans are included in the trust collateral.[151] The second victimization is during the foreclosure process. The homeowner gets charged for unnecessary legal fees and cost. For the investors in mortgage-backed securities, the foreclosure process results in their receiving less than half the value of their investment.[152]

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return for the Certificates." September 1, 2005 Pooling and Servicing Agreement, p. 1, Plaintiff's Exhibit I in document production. Relevant excerpts to the PSA will be included Defendants' exhibits to the Plenary Hearing as Exhibit Plenary Exhibit 2.

[149] An endorsement from CWABS, Inc., the Depositor, is missing from the note. Hallinan Deposition II, Exhibit 9, (Bates stamped BONY 40 – BONY 42). See March 17, 2009 hand delivered letter from D. Wellington, Esq. attaching a copy of the three-page note bates stamped BONY 40 – BONY 42.

[150] PSA, Article II, section 2.01(g)(vi) advises investors that the Depositor has delivered to the Co-Trustee "the original or duplicate original lender's title policy or a printout of the electronic equivalent . . . ."

[151] PSA, Article II. Conveyance of Mortgage Loans; Representations and Warranties, Section 2.01 Conveyance of Mortgage Loans. Exhibit I in discovery. Relevant excerpts will be included the Plenary Hearing exhibits as Plenary Exhibit 2.

[152] Alan M.White, "Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications," Conn. L. Rev. (2009), supra, n. 11.

Ultimately, the homeowners and investors pay the law firm's fees. The homeowners pay when a court awards the law firm attorney's fees and costs in the foreclosure litigation.[153] The investors pay when the servicer presents them with the bill for the law firm's legal services and another bill for the foreclosure related services provided by the named partners' ancillary business and a final bill for the mortgage servicer's work in overseeing the title work and foreclosure process.

The PSA story takes us back to the threshold question about Hallinan's authority to assign the note. Hallinan has no authority from MERS to assign beneficial interests owned by Bank of New York Trust Company, NA, the alleged custodian of the Ukpe's note and mortgage.[154]

What Should Be Done About the Missing Documents?

On March 4, 2009, the Court ordered Plaintiff to produce the following documents relevant to the Plenary Hearing,[155] which documents have not been produced:

1. The contract between PHS and Countrywide Financial Corporation for PHS to perform services for Countrywide Financial Corporation. This contract is specifically referenced in the Agreement for Signing Authority entered into by PHS, MERS and Countrywide Financial Corporation.[156] Plaintiff's counsel advises they have not located this contract.[157]
2. The agreement of membership between MERS and Countrywide Financial Corporation. This agreement is specifically referenced in the Agreement for Signing Authority entered into by PHS, MERS and Countrywide Financial

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[153] N.J. Court Rule 4:42-8 and 4:42-9.

[154] Agreement for Signing Authority, Hallinan deposition I, Exhibit 1. A search of MERS' website shows that the Plaintiff Bank of New York as Trustee is not a MERS member while the Co-Trustee, Bank of New York Trust Company, NA, is a member.

[155] A copy of the Court's March 4, 2009 Order will be attached to Defendants' Plenary Hearing Exhibits as Plenary Exhibit 4. See March 11, 2009 letter to the Court from Defendants' counsel identifying with greater specificity the items covered in the Court's March 4, 2009 Order. A copy of this letter will be attached to Defendants' Plenary Hearing Exhibits as Plenary Exhibit 5.

[156] The Agreement for Signing Authority, ¶ 2 states "Member has entered into a separate contract with Vendor to perform certain services for Member." Hallinan deposition Exhibit 1. Hallinan said he was not aware of any such agreement between the law firm and Countrywide Financial Corporation. Hallinan deposition I, p. 18.

[157] March 2, 2009 D. Wellington, Esq. email to A. Sullivan, Esq. stating that "neither Plaintiff nor Phelan have in their possession copies, or currently have access to these agreements."

Corporation.[158] Plaintiff's counsel advises they have not located this membership agreement.[159]

3. Originals or true copies of all assignments of the Ukpe's mortgage into the Plaintiff Trust as described in the Pooling and Servicing Agreement.[160] Defendants have not been provided these assignments.
4. Originals or true copies of the note with all endorsements negotiated into the Plaintiff Trust as described in the Pooling and Servicing Agreement previously provided.[161] Defendants have not been provided the endorsed note into the trust.
5. All compensation agreements between Countrywide Financial Corporation or any other entity and the law firm for preparation and recording of assignments, including the assignment in the Ukpe case. No such compensation agreements have been produced for Defendants. Plaintiff has submitted for the Court's in camera review a document identified as the "Countrywide Home Loans, Inc. and Countrywide Home Loan Servicing Attorney/Trustee Agreement for Handling Foreclosure and Bankruptcies."[162]
6. Additionally, on January 21, 2009, the Court ordered Plaintiff to produce the notary log kept by Strain. Plaintiff's counsel advises that Mr. Strain did not keep a log.[163]

If these documents are still missing at the Plenary Hearing or it turns out they should have been kept but were never created, as in the case of the notary log, or they have been destroyed, the Court in its fact finder role can resort to certain evidentiary presumptions and draw adverse inferences, including inferences that arise when a party has engaged in spoliation of evidence. Some of the possible inferences are suggested below. Whether or not it is appropriate to apply any of them will turn on what happens in the Plenary Hearing.

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[158] The Agreement for Signing Authority, ¶ 2 states "Countrywide Financial Corporation is a member of MERS and has signed an agreement of membership that is incorporated by reference." Hallinan deposition Exhibit 1. Hallinan said he was not aware of any such membership agreement between MERS and Countrywide Financial Corporation. Hallinan deposition I, p. 26.

[159] March 2, 2009 D. Wellington, Esq. email to A. Sullivan, Esq. stating that "neither Plaintiff nor Phelan have in their possession copies, or currently have access to these agreements."

[160] Exhibit I, Article II - - Conveyance of Mortgage Loans; Representations and Warranties, § 2.01(g)(iv). Excerpts from PSA will be included in Defendants' exhibits to the Plenary Hearing, as Plenary Exhibit 2. If Plaintiff intends to prove standing based on the PSA story it will have to satisfy Statute of Frauds requirements showing the mortgage assignments were executed and delivered to the trust. N.J.S.A. 25:1-11(a)(1).

[161] [Exhibit I, Article II - - Conveyance of Mortgage Loans; Representations and Warranties, § 2.01(g)(i). Excerpts from PSA will be included in Defendants' exhibits to the Plenary Hearing, as Plenary Exhibit 2. . If Plaintiff intends to prove standing based on the PSA story it will have to satisfy UCC requirements showing the note was negotiated and transferred from the originator to the depositor and then into the trust. N.J.S.A. 12A:3-101 et seq.

[162] Plaintiff's March 10, 2009 letter to the Court, p. 1.

[163] March 17, 2009 oral communication from Daniel Bernheim, Esq.

1. Failure to produce the contract between PHS and Countrywide Financial Corporation for PHS to perform services for Countrywide Financial Corporation: Inference - - PHS was not authorized to assign notes from MERS.

2. Failure to produce the agreement of membership between MERS and Countrywide Financial Corporation: Inference - - PHS was not authorized to assign notes from MERS.

3. Failure to produce evidence of the chain of assignments of the mortgage and evidence of the negotiations and transfers of the note described in the PSA: Inferences - -
   - PHS assertion that Plaintiff's claim based on PSA is bogus.
   - Plaintiff does not own mortgage and note as a result of an acquisition by the PSA trust in September 2005.
   - Plaintiff's PSA argument represents an attempt to paper over a number of deceptions and misrepresentations involving the assignment.
   - PHS engaged in a deliberate deception of Court and adversaries in claiming the assignment memorialized the transfers of the mortgage and note from the original lender to the trust.
   - If Plaintiff is a note holder, it may not be a holder in due course.

4. Failure to produce compensation agreements between Countrywide Financial Corporation or any other entity and the law firm for preparation and recording of assignments, including the assignment in the Ukpe case: Inference - - PHS is concealing details of its financial relationship with the mortgage servicer and concealing actual or potential conflicts in representation of multiple clients.

5. Failure to maintain notary log: Inference - - assignments were not properly acknowledged and cannot serve as self-authenticating documents and cannot be recorded. The assignments represent an attempt to short circuit the proof requirements that arise if an ownership claim is based on the PSA.

What Are the Appropriate Remedies?

An appropriate remedy must await the outcome of the Plenary Hearing. The remedy should consider the intended uses for the false assignments when PHS placed them in the stream of commerce. The intended recipients included homeowners, adversaries, court personnel, the Superior Court of New Jersey's mortgage foreclosure unit, chancery judges and law clerks, county sheriffs and county clerks.

Key questions at the hearing will be: Did PHS expect the intended recipients to rely on the assignments as some point in the foreclosure process? Did the recipients rely on the assignments? If there was reliance, were the recipients injured? Did the law firm

profit from its conduct? If yes, how much of the gain is the ill-gotten fruit of wrongful conduct?

Potential remedies will span the spectrum of dismissal of the complaint in this case, imposition of sanctions, awarding attorney fees for frivolous litigation,[164] possible notification to homeowners including those with pending actions and those whose homes have been foreclosed on and sold, adversaries, court personnel, the foreclosure unit, chancery judges and law clerks, county clerks, prosecuting authorities, ethics committees, and professional licensing boards. PHS's conflicts of interest, status as a potential witness, new status as defendant in the Defendants' amended third party complaint, and misconduct warrant disqualification as counsel in this case. In other cases involving similar fact patterns disqualification may be an appropriate remedy.

County clerks should be notified because the assignments should not have been recorded with the false acknowledgments.[165] The courts should be notified because the complaints based the ownership claims flowing from the assignments are fraudulent and the documents are not self-authenticating. If the complaints were improperly filed, then the related lis pendens should not have been filed pursuant to N.J.S.A. 2-15-A7.[166]

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[164] On December 11, 2008, Defendants' counsel wrote to Plaintiff's counsel advising the complaint was frivolous, in part, because the mortgage assignment recited in the complaint was bogus. The frivolous litigation letter asserted that MERS had never been in possession of the mortgage note it claimed to have assigned. Hallinan deposition II, Exhibit 17.

[165] Significant consequences attach to the notary's disregard of the elementary duty imposed by the acknowledgment statute, N.J.S.A. 46:14-2.1(a). The Recording Act requires that an instrument be properly acknowledged or proved before it can be recorded. N.J.S.A. 46:15-1. "If an instrument is inadvertently recorded with a defective acknowledgment or proof, that recording does not serve as constructive notice to a subsequent purchaser or encumbrancer. Longley v. Sperry, 72 N.J. Eq. 537, 548-50 (Ch. 1907); Brinton v. Scull, 55 N.J. Eq. 747, 756 (Ch. 1897)." New Jersey Bank v. Azco Realty Co., supra, at 164-165. The immediate consequences for the present litigation are: (1) the recorded assignment should be voided and stricken from the County land recording records, (2) Plaintiff's complaint, grounded solely on the recorded assignment, should be dismissed, and (3) the lis pendens filed by Plaintiff should be discharged and removed from the land records.

[166] Lis Pendens – N.J.S.A. 2-15-A7. Real Estate Affected By Notice a. In action to enforce or declare rights in, or concerning, or for partition of real estate, wherein plaintiff's claim arises out of a written instrument, which instrument either is executed by defendant and identifies such real estate or appears of record with respect to the title thereto, from and after the filing of a notice of lis pendens, any person claiming title to, interest in or lien upon the real estate described in the notice through any defendant in the action as to which the notice is filed shall be deemed to have acquired the same with knowledge of the pendency of the action, and shall be bound by any judgment entered therein, as though he had been made a party thereto and duly served with process therein.

An improperly filed Notice of Lis Pendens can create hardships for the owners of real estate and impair the ability of the property holder to convey marketable title. The filing of a Notice of Lis Pendens constitutes a taking of property and implicates due process considerations. In Spyco v. Demenus, 226 NJ

Other homeowners who have been victimized by the use of fraudulent assignments should be notified. They, like the Ukpes, may have significant claims for damages against PHS under the Consumer Fraud Act, the FDCPA and for common law fraud.

Additionally, sanctions are appropriate to punish the use of a false acknowledgement in this and other cases by Plaintiff's counsel and to deter the future use of such false documents. Courts have sanctioned counsel where alleged mortgagors and note holders have played fast and loose with rules regarding certified documents. The court in In re Rivera, 342 B.R. 435 (Bankruptcy 2006) assessed $125,000 in sanctions against servicer's counsel.[167]

The Court may consider referring the matter to a master upon a showing of extraordinary circumstances. R. 4:41 et. seq. Extraordinary circumstances are present in this case because of the pervasive use of fraudulent mortgage assignments, the thousands of victims and the pollution of the public records. Unwinding the harm done will first require an assessment of the harm's scope, the victims' damages and the law firm's and servicer's unjust enrichment. The master could be compensated from a fund in court. R. 4:41-2, R. 4:42-9(a)(2). Potential sources of money going into the fund could come from the disallowance of attorney's fees and costs previously awarded pursuant to R. 4:42-9(a)(4) either because the foreclosure has been based on the fraudulent assignment or because the master concludes the fees and costs were excessive, duplicative or fraudulent.

Conclusion

Super. 482 (App. Div. 1988), the court said an improperly filed Notice of Lis Pendens can create "a hardship on the owners of real estate where the alleged interest in the property is uncertain or problematical . . . [T]he very filing of a notice of lis pendens destroys the ability of the property holder to convey marketable title if the litigant has any possibility of success." Fravega v. Security S & L Ass'n,192 N.J. Super. 213, 218 (Ch.Div.1983). Because the very filing of a Notice of Lis Pendens constitutes a "taking of property" in the constitutional sense, Chrysler Corp. v. Fedders Corp.,519 F. Supp. 1252 (D.N.J.1981), rev'd on other grounds, 670 F.2d 1316 (3d Cir.1982), due process concepts are implicated. Trus Joist Corp. v. Treetop Associates Inc., 97 N.J. 22, 32 (1984).

[167] In Rivera, Judge Stern sanctioned a lender and law firm $125,000 in connection with its shoddy foreclosure practice of not accounting properly for mortgage payments and of using false certifications. In applying sanctions, the court observed: "Apparently, high volume, production oriented law firms, their clients and intermediaries [...] need reminding of the solemnity of the undertaking to declare facts true and correct." 342 B.R. at 467.

If after carefully weighing the evidence presented at the Plenary Hearing, the Court concurs with the preliminary conclusions presented in the letter brief, the Court should fashion appropriate relief and consider implementing the remedies outlined above. These remedies are consistent with, and necessary to protect, the integrity of the judicial foreclosure process and the reliable recording and transfer of title to real property.

Respectfully submitted,

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By: _____

Dated: March 30, 2009

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