No. ________

In the

SUPREME COURT OF THE UNITED STATES

JOHN A. DAVIS, Petitioner,

v.

DEUTSCHE BANK NATIONAL TRUST CO., AS TRUSTEE FOR GSAA HOME EQUITY TRUST, ASSET-BACKED CERTIFICATES, SERIES 2007-5; CYNTHIA D. MARES, ARAPAHOE COUNTY PUBLIC TRUSTEE (NOMINAL DEFENDANT); JUDGE ELIZABETH WEISHAUPL; LAWRENCE E. CASTLE (corporate and individual capacity); ROBERT J. HOPP(corporate capacity); ROBERT J. HOPP (individual capacity); CHRISTINA WHITMER, PUBLIC TRUSTEE OF GRAND COUNTY (NOMINAL DEFENDANT); DOES 1-10, Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court held in *Fuentes v. Shevin*, 407 U.S. 67 (1982), that statutes allowing recovery provisions after a temporary, non-final deprivation of non-essential personal property, were nonetheless "deprivations" in terms of the 14th Amendment, and that before a state takes a person's property, a fair hearing must be held. Theoretically, the homeowner may dispute the creditor's entitlement to foreclose as holder in due course under Colorado's Rule 120(c). However, Rule 120(c) was effectively disabled by conclusive presumptions embedded in 2006 legislation drafted by two creditor attorneys. Mortgage trusts can now acquire promissory notes after the Trust's closing date without proof they paid value, or proof that they are the real party in interest and without rebuttal. A judge issues a non-final Order Authorizing Sale in Colorado's nonjudicial foreclosure limited to reasonable probability of a default and whether the homeowner is subject to the Service Members' Civil Relief Act and compels a public trustee to auction the property with a confirmation deed followed by an eviction prior to a fair hearing. The questions presented are:

1. Whether foreclosure and eviction of homeowners, by virtue of statutory conclusive presumptions that allow courts to deem a creditor's ownership without proof or a homeowner's ability to dispute an alleged creditor's standing, and property to be taken in a limited summary judgment proceeding based on reasonable probability of default, deprive homeowners of due process.

2. Whether an agreement to act in concert by two foreclosure attorneys, benefitting themselves and creditors, is implied when they become de facto legislative staff attorneys who act to statutorily eliminate alleged creditors' burden of proof.

3. Whether violations of clearly established constitutional law and Colorado's foreclosure practice as non-adjudicative, non-adversarial, and a limited eviction proceeding, renders judges and public trustees without judicial and qualified immunity and therefore subject to §1983 damages along with other defendants.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, John A. Davis, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

The Tenth Circuit Court's decision is contrary to the Supreme Court's holding in *Fuentes v. Shevin*, 407 U.S. 67 (1972) and deprived Mr. Davis of his due process rights prior to being evicted from his home. The lower court's decision paves the way for creditors to continue to trample consumer rights across the country.

In 2008, the financial crisis caused by mortgage trusts known as Real Estate Mortgage Investment Conduits like the trust herein, spawned nationwide defaulting, undervalued sub-prime collateral. Investors sued mortgage originators and their sponsors who misled them by claiming the trusts were sound investments. The underwriting practices of the mortgage originators contributed to the collapse of the real estate market, and resulted in hardship for thousands of Americans like Mr. Davis. Hundreds of mortgage originators declared bankruptcy overnight, leaving promissory notes lost in the chaos. These orphaned notes became targets of opportunity to mitigate the damage to the trusts, who claimed them as their own years after their closing date, without proof of ownership. See, e.g., Glaski v. Bank of America, 218 Cal. App. 4th 1079 (5th Dist. Cal., 2013).

Efforts by two private foreclosure attorneys, who became de facto staff attorneys of the Colorado legislature by re-writing the foreclosure statute to favor their creditor-clients, were pivotal in allowing alleged creditors to acquire the collateralized notes for which they had no legitimate claim. The legislation drafted by the two defendant attorneys in 2006, to amend the Colorado foreclosure statute § 38-38-101, allowed courts to deem standing, holder, and holder in due course and, therefore, real party in interest, through conclusive presumptions instead of rebuttable presumptions. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049 (Colo. 1995); cf. *Myrick v. Garcia,* 332 Colo. 900, 903 (1958) (holding that if rebutted, submission of the note was prima facie evidence of holder in due course, and ownership must be proven at trial). This allowed confiscation of homeowners' property prior to a fair hearing, a practice that continues today.

After passage of the amendments to § 38-38-101, the alleged creditor only needed copies of a deed of trust and promissory note, and an unsworn Statement of Qualified Holder from the alleged creditor or the attorney, stating that the creditor was the real party in interest, or submission of a purported original note, and the court would deem the original and, by statute, conclusively establish standing, holder, holder in due course and therefore the real party in interest, eliminating homeowners' ability to dispute a creditor's entitlement to foreclose. Colo. R. Civ. P. 120(c). The eviction that followed was a proceeding to further enforce the Rule 120 to remove the homeowner before

the aggrieved homeowner could pursue a lawsuit in a court of competent jurisdiction. *Cf.*, Colo. R. Civ. P. 120(d).

Petitioner's section 1983 suit arises out of defendant foreclosure attorneys' interference with Mr. Davis's due process in the Rule 120 foreclosure, which was part of a broad and ongoing conspiracy to deprive Mr. Davis, and similarly situated homeowners, of due process in order to advance the creditors' and their attorneys' financial interests.

This case raises significant questions of due process, including whether Colorado can deprive homeowners of property by allowing statutory conclusive presumptions regarding the authenticity of promissory notes. This case tests whether copies of a deed of trust and promissory note, and an unsworn Statement of Qualified Holder, or possession of the promissory note alone, is sufficient to deem ownership, establishing conclusive presumptions without proof and a fair hearing. The current process allows attorneys and their creditor-clients, who may have illegally obtained the notes, to wrongfully deprive consumers of their homes.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 2018 WL 2676893 (10th Cir. 2018). The Opinion of the District Court is reported at 2016 WL 8670507 (D. Colo. 2016). These rulings are reprinted in the accompanying Appendix.

JURISDICTION

The judgment and order of the Tenth Circuit Court of Appeals was entered on June 5, 2018. On or about August 10, 2018, this Court granted an extension of time within which to file a petition for a writ of certiorari to and including November 1, 2018. The jurisdiction of this Court rests on 28 U.S.C.
§1254(1).

CONSTITUTIONAL AMENDMENTS, AND STATUTES INVOLVED

Relevant parts of Amendment XIV of the U.S. Constitution, 42 U.S.C. § 1983, Colorado Statute § 3838-101 and Colorado Rule 120 are reprinted in the accompanying Appendix.

STATEMENT OF THE CASE

Mr. Davis filed a § 1983 complaint in 2016 as an owner of the property through a 2009 quitclaim deed under which his wife, Valorie Briggs, transferred ownership to Davis (as well as allodial title through a land patent issued by the Bureau of Land Management, and a recorded Lis Pendens warning prospective purchasers of the pending lawsuit for declaratory, injunctive and other relief, and his status as the adverse possessor (via, e.g., payment of taxes on the property for eight years). Mr. Davis sought relief from the unconstitutional amendment and application of Colorado's foreclosure law in a manner that denied him due process rights.

His complaint alleged that the creditor favoring amendments to the Colorado foreclosure statute drafted by two private creditor attorneys were part of a conspiracy to deny due process to homeowners, and that the trust had knowledge that it was subjecting Mr. Davis to a constitutionally defective foreclosure. The complaint also asserted that Colorado had voluntarily and impliedly waived sovereign immunity by enactment of the foreclosure Rule. The District Court dismissed his complaint for failure to state a claim and the Tenth Circuit Court affirmed the dismissal.

During the eviction proceedings, the court dismissed Mr. Davis's claim that the bank must show that value was paid in exchange for the Note because the trust was a "qualified holder" of the debt instrument. The court allowed the trust to evict Mr. Davis without the trust having to prove valid ownership of the debt. Possession of the note was deemed sufficient. There was no opportunity for Mr. Davis to present his constitutional challenge. Thus, opportunists now have the ability to steal notes, foreclose and acquire homeowners' properties without due process. Evicted homeowners have been filing cases, largely pro se because of their poor financial conditions, attempting to challenge these unconstitutional takings, to no avail.

REASON FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision Directly Conflicts With This Court's Decision in Fuentes by Allowing an Eviction Via Application of a Foreclosure Statute That Eliminates Defenses and Deprives Homeowners of Homes Without a Fair and Meaningful Hearing.

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), this Court ruled that two state's replevin provisions, which allowed for temporary deprivation of personal property without due process of law by denying the right to a prior opportunity to be heard, were invalid under the Fourteenth Amendment. Id. at 68, 80-93. Here, a homeowner was deprived of his real property without a prior opportunity to be heard. The summary proceedings, in which conclusive presumptions were allowed to establish ownership of the debt, violated Mr. Davis's constitutional rights in an even more significant way, as his home is a necessity. See also Goldberg v. Kelly, 397 U.S. 254 (1970). As a result of this unconscionable foreclosure and eviction, Mr. Davis's home became his car. The same fate has befallen many other consumers whose home has been foreclosed upon and have been evicted through the constitutionally deficient foreclosure and eviction procedure Colorado presently employs. Colo. R. Civ. P. 120.

The Fourteenth Amendment's due process clause provides that no State may "deprive any person of life, liberty, or property, without due process of law." U.S.

Const. Amend XIV, § 1. "Under the Due Process Clause's requirements, procedural due process ensures the state will not deprive a party of property without engaging fair procedures to reach a decision, while substantive due process ensures the state will not deprive a party of property for an arbitrary reason." Pater v. City of Casper, 646 F.3d 1290, 1293 (10th Cir. 2011) (internal quotation marks omitted).

This Court has been a steadfast guardian of due process rights when what is at stake is a person's right "to maintain control over [his] home" because loss of one's home is such a great deprivation. United States v. James Daniel Good Real Property, 510 U.S. 43, 5354 (1993). Courts have held that even "a small bank account" is sufficient to trigger due process protections. See Nat'l Council of Resistance of Iran v. Dept. of State, 251 F.3d 192, 202-205 (D.C. Cir. 2001) (citing Russian Volunteer Fleet v. U.S., 282 U.S. 481, 489-92 (1931)).

Yet, under Colorado law, as amended by the two attorney Respondents, Colorado's non-judicial foreclosures are based only on a reasonable probability that there is a default and that the homeowner is not subject to the Service Members' Civil Relief Act. The eviction is presided over by a judge who determines only possession. C.R.S.A. § 3838-101. There is no prior or post deprivation hearing provided.

Respondents were not required to produce the original debt documents. Two private creditor attorneys, who are among the Respondents, had

lobbied the Colorado Legislature to modify the foreclosure procedure, which was accomplished in 2006. The amendments drafted by these attorneys allow, "in lieu of the original evidence of debt," a copy of the evidence of debt with "a certification signed and properly acknowledged by a holder of an evidence of debt . . . or a statement signed by the attorney for such holder" under specified conditions. C.R.S.A. § 38-38101(1)(b)(II) (2006).

Under this statute, the homeowner is given no opportunity to question such evidence, even if the creditor produces purportedly original home loan documents. Rather, the judge below relied on Deutsche Bank's production of an indorsed original note. Mr. Davis was not given the opportunity to question Deutsche Bank's witness regarding the veracity of the note or its endorsement.

Mr. Davis also contended that Deutsche Bank was required to prove that it paid value for the note. However, the court ruled that Colorado foreclosure law provides that a "person in possession of a negotiable instrument evidencing a debt, which has been ...indorsed in blank," is *presumed* to be the holder of the evidence of debt. § 3838-100.3(10) (c) (2015) (emphasis added). The court noted that "Colorado law does not limit enforcement of an Obligation to a holder who received the instrument through negotiation. A note may also be enforced by a *transferee*." *Miller v. Deutsche Bank Nat'l Trust Co. (In re Miller)*, 666 F.3d 1255, 1264 (10th Cir. 2012). Mr. Davis was given no opportunity to dispute the transfer. It is possible that the note was obtained through unlawful means. Allowing evictions based on as conclusive presumptions as found in the amended Colorado

statutes in summary proceedings against homeowners violates due process rights.

Prior to the amendment changing the Colorado foreclosure process to favor the creditors, in 1989, the Colorado Supreme Court, in response to due process concerns, explicitly required that the real party in interest be considered prior to foreclosure and eviction. *Goodwin v. Dist. Ct.,* 779 P.2d 837 (1989).
According to the Court:

> The message of *Moreland* [v. *Marwich, Ltd.,* 665 P.2d. 613, 617-618 (Colo. 1983) (en banc)] is clear. The due process protections contemplated by Rule 120 will be satisfied only when a court conducting a Rule 120 proceeding considers all relevant evidence in determining whether there is a reasonable probability of a default or other circumstance authorizing the exercise of the power of sale under the terms of the instrument described in the Rule 120 motion. The court's resolution of the Rule 120 motion, therefore, should necessarily encompass consideration not only of the evidence offered by the creditor seeking the order of sale but also of any evidence offered by the debtor to controvert the moving party's evidence or to support a legitimate defense to the motion. A court's refusal to consider such properly offered evidence in resolving the issue of default adversely to the debtor is tantamount to the taking of property in a summary fashion without any hearing at all—a deprivation clearly violative of due process of law.

Id. at 842. Colorado Rule of Civil Procedure 17(a) requires that "every action "*shall* be prosecuted in the name of the real party in interest." The real party in interest is that party who, by virtue of substantive law, has the right to invoke the aid of the court in order to vindicate the legal interest in question. That inquiry is no longer allowed by the Colorado foreclosure and eviction process.

The Colorado Supreme Court observed that Colorado Rule 120(a) authorizes "any interested person" to file a motion for an order of sale, and Rule 120(c) permits the debtor to dispute the moving party's entitlement to the order.

> Implicit in Rule 120 is the requirement that the party seeking an order of sale have a valid interest in the property allegedly subject to the power of sale. Unless the "real party in interest" defense is considered at a Rule 120 hearing, any order for sale might well result in the sale of property in favor of a party who has no legitimate claim to the property at all. Once a debtor in a Rule 120 proceeding raises the "real party in interest" defense, therefore, the burden should devolve upon the party seeking the order of sale to show that he or she is indeed the real party in interest.

Id. at 843-844 (emphasis added). If the mortgagor asserts a "real party in interest" defense whereby he or she asserts that the party seeking to sell the property "has no legitimate claim to the property at all, . . . the burden should devolve upon the party seeking the order of sale to show that he or she is indeed the real party in interest." Id. at 843; *Mbaku v. Bank of America*, 628 Fed. Appx. 968, 973 (10th Cir. 2015) (quoting *Goodwin v. Dist. Ct.*, 779 P.2d at 843).

While requiring plaintiffs in foreclosure actions to prove legal ownership of the underlying note and mortgage would create an administrative burden, it is a burden that is basic to all civil litigation – standing to sue. See *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (standing "is [a] threshold question in every federal case, determining the power of the court to entertain the suit"); *Alpine Associates, Inc. v. KP&R, Inc.*, 802 P.2d 1119 (Colo. 1990) (it is necessary for the plaintiff to prove, in addition to the basic elements of its case, its status as an assignee). The proper burden of proving standing is ignored under the present Colorado foreclosure process.

Mr. Davis asserted that the trust was not the real party in interest. He maintains, for instance, that there was a failure to pay value for the note. See *Baker v. Wood*, 157 U.S. 212 (1895) (holding in a Colorado assignment that the holder in possession of the negotiable instrument "…cannot have judgment unless it appears affirmatively from all the evidence, whether produced by the one side or the other, that he in fact purchased for value); *Deutsche Bank v. Samora,* 321

P.3d 590 (Colo. Ct. App. 2013) ("for Samora to prevail, she must show that Deutsche Bank as trustee is not advancing a claim by the Trust as a holder in due course of the Note and Deed of Trust"). In this case, Deutsche Bank as trustee "is not advancing the claim of the Trust as a holder in due course of the Note and Deed of Trust" which requires the Trust to have paid value for the note. "If the person seeking enforcement of the instrument does not have rights of a holder in due course and the [mortgagor] proves that the instrument is a lost or stolen instrument," a mortgagor has a valid defense to payment and foreclosure. *Mbaku v. Bank of America*, 628 Fed. Appx. at 973; U.C.C. § 4–3–305(c). The court ignored this claim.[1] Mr. Davis was wrongfully denied his right to raise this defense. Thus, the conclusive presumptions applied under Rule 120, as amended, violate due process rights.

The purpose of a Colorado Rule 120 hearing in a foreclosure action is to subject the creditor's claim of default to judicial scrutiny to protect the debtor from egregious ex parte foreclosures. *Kirchner v. Sanchez,* 661 P.2d 1161, 1163-1164 (Colo. 1983) (citing Valley *Dev. at Vail v. Warder,* 192 Colo. 316, 557 P.2d 1180 (1976)). The consumer protection goal of Colorado

[1] Moreover, the order granting or denying the motion is not appealable, see Rule 120(d), but "parties aggrieved by the Rule 120 court's decision may seek injunctive or other relief in a court of competent jurisdiction," *Plymouth Capital Co. v. District Court*, 955 P.2d 1014, 1017 (Colo. 1998). This relief was denied in this case.

foreclosures was gutted by the amendments drafted by the creditor attorney Respondents.

The 14th Amendment's guarantee of procedural due process is meant to protect persons not from deprivation, but from the mistaken or unjustified deprivation of life, liberty or property. The Court repeatedly has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth finding process." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Such rules "minimize substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests." Id. The requirement that governments must generally provide a fair process before confiscating property is a rule, not a suggestion. Colorado's foreclosures and evictions process, as amended in 2006, conflict with decades of Supreme Court precedent and core constitutional protection. *Id.*; *compare Moreland v. Marwich, Ltd.,* 665 P.2d. 613, 617-618 (Colo. 1983) (en banc) (Colorado's foreclosure rule "has been expanded in scope for the purpose of according debtor due process protections against summary foreclosure actions consistent with those protections against deprivations of property without a prior judicial hearing that have received recognition in a line of modern decisions of the United States Supreme Court. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601 (1975) (procedures for prejudgment garnishment of bank accounts violate due process); *Fuentes v. Shevin, supra* (prejudgment replevin procedures violate due process);

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (prejudgment garnishment procedures relating to wages violate due process); *cf. Mitchell v. W.T. Grant Co.,* 416 U.S. 600 (1974) (procedure for writ of sequestration in advance of judgment consistent with due process).

The Supreme Court's *Mathew's* analysis requires consideration of: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and (3) the Government's interest, including the administrative burden that additional procedural requirements would impose. The Court determined that the importance of the private interests at risk and the absence of countervailing governmental needs presented in the context of seizure of real property in a civil forfeiture was not one of those extraordinary instances that justify an exception to the general rule requiring predeprivation notice and a meaningful hearing. *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 52 (1993) (citing *Mathews*). "The right [of an individual] to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance." *Id.* at 53-54.

Despite clear Supreme Court precedent, thousands of homeowners are divested each year of available remedies to dispute creditors' entitlement to foreclose by statutory conclusive presumptions that courts substitute for

proof.[2] Merely allowing, as Colorado does, an unsworn statement to attest to the authenticity of loan document copies is constitutionally deficient. "Statutes creating permanent irrebuttable presumptions, which are neither necessarily nor universally true, are disfavored under both the Fifth and Fourteenth Amendments, because they preclude individualized determination of the facts upon which substantial rights or obligations may depend." *Vlandis v. Kline*, 412 U.S. 441, 448 (1973); see also *Valley Dev. at Vail v. Warder*, 192 Colo. 316, 557 P.2d 1180 (1976) (reaffirming *Princeville Corp. v. Brooks*, 533 P.2d 916 (1975)'s holding that C.R.C.P. 120 entitles debtor and subordinating creditor to a due process hearing on issue of foreclosure or accumulated indebtedness alleged to be in default).

Creditors are relieved from having to prove entitlement, despite Supreme Court precedent to the contrary. There is little regard given to consumers' property rights. The Supreme Court must settle this important question of federal law, lest corruption of foreclosure proceedings in Colorado will continue, unchallenged.

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[2] A conclusive presumption may be defeated where its application would impair a party's constitutionally-protected liberty or property interests. In such cases, conclusive presumptions have been held to violate a party's due process and equal protection rights. *Vlandis v. Kline*, 412 U.S. 441, 449 (1973); *Stanley v Illinois*, 405 U.S. 645, 656 (1972) (presumption under Illinois law that unmarried are unfit fathers violates due process). *Rutter's Practice Guide-Fed. Civil Trials and Evidence*, ¶ 8:4993 at 8K34.

II. Two Foreclosure Attorneys' Agreement to Act in Concert to Benefit Themselves and Their Creditor Clients Is Implied When They Became De Facto Legislative Staff Attorneys Who Acted With Legislators to Statutorily Eliminate Creditors' Burden of Proof in Foreclosure Actions.

"Broadly described, the intent of section 1983 was to create a civil remedy for persons who prove that one acting under color of state law has illegally deprived them of rights guaranteed by the federal constitution or by federal law." *Espinoza v. O'Dell*, 633 P.2d 455, 460 (Colo. 1981). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. The actions of Respondents in this case squarely fall within the parameters of this statute.

Between 2002 and 2006, the Public Trustee Association sought to streamline the foreclosure process in the Rule 120 foreclosure process and asked the Colorado State Bar to refer an attorney to make

suggestions. The State Bar referred Lawrence E. Castle and Robert J. Hopp, who were foreclosure attorneys at that time, to the association. This began an intimate relationship between the foreclosure attorneys and the legislators, who are state officials.

Castle and Hopp, private foreclosure attorneys who work on behalf of creditors, became de facto staff attorneys of the legislature. They were given free rein to draft amendments to Colorado statute section 3838-101 that wrongly favored their creditor clients and deprived homeowners of their due process rights. Their actions were by no means mere "lobbying," as the District Court characterized their participation in the statutory amendment process. These creditor attorneys willfully participated with legislators to usurp and corrupt official power. By their design, there was a surrender of judicial power to private creditors such that the independence of enforcing officers was compromised in the judicial process, rendering homeowners defenseless in the non-judicial Rule 120 foreclosures.

These creditor attorneys acted with state legislators to deprive homeowners of due process rights. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) ("the private party's joint participation with a state official in a conspiracy to discriminate would constitute both 'state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights' and action 'under color' of law for purposes of the statute."); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995) ("State action is . . . present if a private party is a willful participant in joint action with

the State or its agents.”) (internal quotation marks omitted). They are thus subject to liability under section 1983. Id.

These attorneys drafted the 2006 amendments to favor themselves and their creditor clients. The legislators rubber-stamped their drafts. Castle and Hopp assisted the State in depriving homeowners of their due process rights, as set forth above.

III. Violations of Established Constitutional Law by Colorado's Non-Adjudicative, Non-Adversarial Limited Foreclosure and Eviction Proceeding Renders Judges and Public Trustees Without Judicial and Qualified Immunity and Subject to Section 1983 Actions.

Section 1983 provides a remedy for deprivation of constitutional rights when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage" of a State. 42 U.S.C. § 1983. In *Lugar v. Edmondson Oil Co., Inc.*, The Supreme Court considered the relationship between the requirement of "state action" to establish a violation of the Fourteenth Amendment and the requirement of action "under color of state law" to establish a right to recovery. 57 U.S. 922 (1982). In *Lugar,* the Court said:

> The statutory scheme obviously is the product of state action, and a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the

> Fourteenth Amendment. Respondents were, therefore, acting under color of state law in participating in the deprivation of petitioner's property.

Id. at 939-942.

State action occurred when the legislature introduced and passed section 38-38-101 with the willful participation of Respondent attorneys and the other Respondents, involving significant state participation by judges, Public Trustees and sheriffs. *Id.* at 941; *Brentwood Academy v. Tennessee Secondary School Athletic Assoc.*, 531 U.S. 288, 296 (2001). Private persons, jointly engaged with state officials in a challenged action, are acting "under color" of law for purposes of 1983 actions. *Dennis v. Sparks,* 449 U.S. 24, 25-29 (1980); *see Lugar v. Edmundson Oil*, 457 U.S. 922, 939-942 (1982) (insofar as petitioner's complaint challenged the state statute as being procedurally defecting under the Due Process Clause, he did present a valid cause of action under § 1983).

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), this Court held that the use of a court to enforce a restrictive covenant could be state action because the court was essentially participating in the discrimination by enforcing the facially discriminatory covenant. Similarly, in *Doehr,* the Court recognized that although prejudgment remedy statutes ordinarily involve disputes between private parties, there is significant governmental assistance by state officials and through state procedures. Specifically, the Court acknowledged

that prejudgment remedy statutes "are designed to enable one of the parties to 'make use of state procedures with the overt, significant assistance of state officials,' and they undoubtedly involve state action 'substantial enough to implicate the Due Process Clause.' " *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (quoting *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 486 (1988)); see also *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930); *Dieffenbach v. Attorney General*, 604 F.2d 187, 194 (2d Cir. 1979) (finding that the use of Vermont's strict foreclosure statute, which required the mortgagee to go to court to obtain a foreclosure, granted the court discretionary power to change the statutory period of redemption, obligated the creditor to obtain a writ of possession after the redemption period expired, and generally "directly engage[d] the state's judicial power in effectuating foreclosure," was enough to show that there was state action in the foreclosure process); *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975); *Valley Dev. at Vail v. Warder*, 192 Colo. 316, 557 P.2d 1180 (Colo. 1976); *New Destiny Dev. Corp. v. Piccione*, 802 F. Supp. 692 (D. Conn. 1992).

Judges enjoy absolute immunity from liability in damages for their judicial or adjudicatory acts, primarily in order to protect judicial independence by insulating judges from vexatious actions by disgruntled litigants. Truly judicial acts, however, must be distinguished from the administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform. It is the nature of the function performed--adjudication--rather than the

identity of the actor who performed it --a judge--that determines whether absolute immunity attaches to the act. *Forrester v. White*, 484 U.S. 219, 225-229 (1988). Qualified immunity is a powerful tool that shields individual officials who are performing discretionary activities unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982).

The Colorado foreclosure proceedings are nonfinal, non-adversarial and non-adjudicative. The court in a Rule 120 proceeding accepts conclusory allegations to support the creditor's entitlement to foreclose, as well as conclusive presumptions without proof. [3] Mere possession of the note is deemed sufficient to conclude the creditor's standing, holder, holder in due course, and therefore the real party in interest, shutting the door to the right of the homeowner to dispute the creditor's entitlement to foreclose. The right of due process is a constitutional right of which a reasonable person should know, as here, specially all Respondents in this case. When actions of judges are not adjudicative, as here, judges are liable for section 1983 claims. *Forrester*, 484 U.S. at 223-230.

[3] Application of conclusive presumptions that has become standard practice in Colorado foreclosures and evictions has been routinely adopted by federal courts from the state foreclosure and eviction proceedings, to thwart due process rights of homeowners who seek "injunctive or other relief without prejudice to any right or remedy of the moving party." Colo. R. Civ. P. 120(d).

Even if the homeowner raises the real party in interest defense supposedly allowed under Rule 120(c), the judge would not require the creditor to prove entitlement to foreclose as a holder in due course, nor does it require, despite the court's rules, the alleged holder to identify the real party in interest, which is the owner. Rule 17(a) requires that "[e]very action ***shall*** be initiated in the name of the Real Party in Interest." Colo. R. Civ. P. 17(a) (emphasis added). Proof of ownership is ignored in these proceedings.

A person acting under color of state law who "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. Deutsche Bank was a state actor subjecting it to liability under section 1983 because it utilized constitutionally deficient state law to foreclose on Mr. Davis's property and received significant aid from Respondents Judge Weishaupl and Public Trustee Mares, both of whom are public officials. Respondent Deutsche Bank acted jointly with a state judge and a public trustee. "State action is . . . present if a private party is a willful participant in joint action with the State or its agents." Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1453 (10th Cir. 1995). All Respondents acted together to deprive Mr. Davis and multiple other homeowners of due process and their homes.

Deutsche Bank, Castle and Hopp conspired together and with state officials to pass the legislation modifying

the Colorado foreclosure procedure to favor creditors. The amended complaint alleged that Castle and Hopp drafted the legislative bill and "engag[ed] with" a state elected representative who sponsored the bill. All Respondents are subject to liability pursuant to section 1983.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted. The lower court's interpretation and application of the foreclosure and eviction rules is a perversion of Rule 120's purported mandate of protecting homeowners. If Rule 120 and the Fuentes decision are to provide the important consumer protections that have been evaded by multiple creditors like those in this case, certiorari must be granted. Likewise, the State actors who manipulated the legislation to change the foreclosure procedure to favor creditors must be held liable for their actions in depriving multiple homeowners of their due process rights.

Respectfully submitted,

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APPENDIX TO PETITION

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OPINIONS BELOW

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED United States Court of Appeals Tenth Circuit June 5, 2018
Elisabeth A. Shumaker
Clerk of Court

JOHN DAVIS,

Plaintiff / Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as trustee for GSAA Home Equity Trust 2007-5, Asset-Back Certificates, Series 2007-5; CYNTHIA D. MARES, Arapahoe County Public Trustee (Nominal Defendant); JUDGE ELIZABETH WEISHAUPL, (Nominal Defendant); LAWRENCE E. CASTLE, in his corporate and individual capacity; ROBERT J. HOPP, in his corporate and individual capacity; CHRISTINA WHITMER, Public Trustee of Grand County (Nominal Defendant); DOES 1-10

Defendants / Appellees
____________________./

No. 17-1362 (D.C. No. 1:16-CV-02245-PAB-KLM)
(D. Colo.)

ORDER AND JUDGMENT

(Before **BRISCOE**, **HOLMES**, and **PHILLIPS**).

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially

assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App.P.32.1and10thCir.R.32.1.

Pro se appellant John Davis appeals the dismissal of his amended complaint based on the foreclosure of the mortgage on real property in which he claimed an interest. He asserted claims under 42 U.S.C.§1983 for violation of his Fourteenth Amendment rights to procedural due process and equal protection, as well as several state-law claims. He also argued that the Foreclosure procedure under Colo. R. Civ. P. 120 is unconstitutional. The district court adopted the report and recommendation of a magistrate judge and dismissed the amended complaint under Fed. R. Civ. P. 12(b)(6). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I. BACKGROUND

In January 2007 non-party Valorie Briggs obtained a mortgage loan in the amount of $214,000 from Freedom Mortgage Corp. on residential property in Arapahoe County, Colorado. Freedom Mortgage later assigned the mortgage note to defendant Deutsche Bank National Trust Co. (Deutsche Bank). After Ms. Briggs stopped making payments on the mortgage, in 2016 Deutsche Bank initiated state-court foreclosure proceedings under Rule 120. Pursuant to Rule 120, foreclosure of a deed of trust by public trustee's sale is available where the deed of trust "names the county's public trustee as trustee." ***Mayotte v. U.S. Bank Nat'l Ass'n***, 880 F.3d 1169, 1172 (10th Cir. 2018). "The creditor, or owner of the evidence of debt secured by the deed of trust, must obtain an order authorizing the public trustee to conduct the sale. Rule 120 governs the very specialized civil proceeding [for obtaining an] order authorizing sale . . . ." ***Plymouth Capital Co. v. Dist. Ct.***, 955 P.2d 1014, 1015 (Colo. 1998) (citation omitted). After the sale is conducted,

the title to the property vests in the purchaser, but is subject to rights of redemption. *See* Colo. Rev. Stat. § 38-38-501(1) (2012). Mr. Davis claimed an interest in the property as Ms. Briggs's husband and adoptive father, as well as under a power of attorney Ms. Briggs executed in his favor. The state court permitted Mr. Davis to intervene in the foreclosure proceedings. Ms. Briggs and Mr. Davis contested the foreclosure, asserting, among other grounds, that Deutsche Bank was not the real party in interest because it was not the holder in due course of the note. Following a hearing, defendant Judge Weishaupl, a Colorado district court judge, determined that Deutsche Bank had presented the original note indorsed to Deutsche Bank, so it was the real party in 4 interest entitled to foreclose the mortgage. Therefore, the court issued an order authorizing the sale. While the state foreclosure proceedings were pending, Mr. Davis filed the underlying lawsuit in federal court. He named as defendants Deutsche Bank; Judge Weishaupl; Ms. Mares and Ms. Whitmer, the Public Trustees for Arapahoe and Grand Counties, respectively; and Mr. Castle and Mr. Hopp, two private attorneys who had lobbied the Colorado Legislature to modify the foreclosure procedure, which was accomplished in 2006. The amendments allow, "in lieu of the original evidence of debt," a copy of the evidence of debt with "a certification signed and properly acknowledged by a holder of an evidence of debt . . . or a statement signed by the attorney for such holder" under specified conditions. Colo. Rev. Stat. § 38-38-101(1)(b)(II) (2006); *see also id.* § 38-38-101(c) (allowing a copy of the deed of trust under specified conditions). Mr. Davis challenged the constitutionality of the Colorado foreclosure procedure and sought injunctive relief. He also asserted that the defendants violated his

constitutional rights and the federal Fair Debt Collection Practices Act (FDCPA). He further alleged various state-law claims. The district court denied injunctive relief. All defendants moved to dismiss. The magistrate judge recommended that the amended complaint be dismissed and, after considering Mr. Davis's objections, the district court adopted the recommendation. The court dismissed the claims against Judge Weishaupl based on judicial immunity, and dismissed the remaining federal claims for failure to state a plausible claim for relief. The court declined to exercise jurisdiction over the state-law claims and dismissed them without prejudice. Mr. Davis does not appeal the dismissal of the state law and FDCPA claims, the denial of injunctive relief, or the dismissal of the Doe defendants.

II. STANDARDS OF REVIEW

"We review a Rule 12(b) (6) dismissal de novo." ***Nixon v. City & Cty. Of Denver***, 784 F.3d 1364, 1368 (10th Cir. 2015) (internal quotation marks omitted). In doing so, "[w]e accept all the well-pleaded allegations of the complaint as true and construe them in the light most favorable to [Mr. Davis]." *Id.* (ellipsis and internal quotation marks omitted). To withstand dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." ***Ashcroft v. Iqbal***, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). Moreover, "[t]threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are

not sufficient to state a claim for relief. *Id.* We liberally construe Mr. Davis's pro se filings. ***See Garrett v. Selby Connor Maddux & Janer***, 425 F.3d 836, 840 (10th Cir. 2005). We do not, however, "take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Id.* Moreover, "pro se parties [must] follow the same rules of procedure that govern other litigants." *Id.* (internal quotation marks omitted).

III. JUDGE WEISHAUPL

The district court determined that Judge Weishaupl was entitled to judicial immunity. On appeal, Mr. Davis argues that in enacting Rule 120, the State of Colorado impliedly waived sovereign immunity and therefore Judge Weishaupl was not entitled to judicial immunity. Even if a state's waiver of its sovereign immunity also waives judicial immunity of the state's judicial officers, "[a] State's consent to suit must be unequivocally expressed in the text of the relevant statute. . . . Waiver may not be implied." ***Sossamon v. Texas,*** 563 U.S. 277, 284 (2011) (citations and internal quotation marks omitted). Therefore, Mr. Davis's implied-waiver argument fails. We affirm the dismissal of the claims against Judge Weishaupl.

IV. PUBLIC TRUSTEES

The district court dismissed the public trustees, Ms. Mares and Ms. Whitmer, because the amended complaint provided only a formulaic recitation of elements of a cause of action that were insufficient to state a plausible claim for relief. We do not review this ruling because Mr. Davis does not challenge it in his

opening brief. An appellant's opening brief must identify "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). "Consistent with this requirement, we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." ***Bronson v. Swensen***, 500 F.3d 1099, 1104 (10th Cir. 2007).

V. DEUTSCHE BANK, MR. CASTLE, AND MR. HOPP

A. Color of State Law

A person acting under color of state law who "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. Mr. Davis argues that Deutsche Bank was a state actor subjecting it to liability under § 1983 because it utilized state law to foreclose on his property and received significant aid from Judge Weishaupl and Public Trustee Mares, both of whom are public officials.

Generally, private parties are not state actors subject to liability under § 1983. ***See Brokers' Choice of Am., Inc. v. NBC Universal, Inc.***, 757 F.3d 1125, 1143 (10th Cir. 2014) (Observing that "§ 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful" (internal quotation marks omitted)). Nevertheless, Mr. Davis alleges that Deutsche Bank acted jointly with a state judge and a public trustee. "State action is . . . present if a private

party is a willful participant in joint action with the State or its agents." ***Gallagher v. Neil Young Freedom Concert***, 49 F.3d 1442, 1453 (10th Cir. 1995) (internal quotation marks omitted). But Deutsche Bank's "mere invocation" of the Rule 120 procedure did not constitute joint action by the bank and the state officials. ***See Johnson v. Rodrigues***, 8 293 F.3d 1196, 1205 (10th Cir. 2002) ("[A] private party's mere invocation of state legal procedures does not constitute joint participation or conspiracy with state officials satisfying the § 1983 requirement of action under color of law." (brackets and internal quotation marks omitted)). Therefore, Mr. Davis did not allege a plausible claim of state action against Deutsche Bank under the joint action test. Mr. Davis asserted that Mr. Castle and Mr. Hopp were state actors because they were involved with the state legislature to modify the foreclosure statute and drafted proposed legislation. "[L]obbying activities [that are] actions of a private individual or corporation [seeking] to tell lawmakers what it wants or needs from government, . . . whether an aid or a hindrance to good governance, are not „state action‟ implicating individual constitutional rights." ***Single Moms, Inc. v. Mont. Power Co***., 331 F.3d 743, 749 (9th Cir. 2003); ***cf. Sable v. Myers***, 563 F.3d 1120, 1123 (10th Cir. 2009) ("Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity." (internal quotation marks omitted)). The amended complaint thus failed to state a plausible claim of state action by Mr. Castle and Mr. Hopp.

B. Conspiracy

Mr. Davis asserted that Deutsche Bank, Mr. Castle, and Mr. Hopp conspired together and with state officials to pass the legislation modifying the Rule 120 procedure. The amended complaint alleged that Mr. Castle and Mr. Hopp drafted the legislative bill and "engag[ed] with" a state elected representative who sponsored the bill. 9 R. Vol. 1 at 213; *see also id.* at 206 (amended complaint alleging "defendant attorneys committed the **first overt act** in the conspiracy . . . when they drafted HB06-1387"). The only other allegations of a conspiracy were that the attorneys violated their oaths to support the Constitution and used the law for their own financial enrichment. *Id.* at 214. Mr. Davis did not "allege specific facts showing an agreement and concerted action amongst the defendants," ***Tonkovich v. Kan. Bd. of Regents***, 159 F.3d 504, 533 (10th Cir. 1998). "Conclusory allegations of conspiracy are insufficient to state a valid § 1983 claim." *Id.* (internal quotation marks omitted).[1]

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1 We need not address Mr. Davis's argument that the continuing violation doctrine applies to his claims against Mr. Castle and Mr. Hopp because we determine that Mr. Davis failed to state a claim against those defendants.

VI. **CONSTITUTIONALITY OF RULE 120 PROCEDURE**

Mr. Davis contends that the Rule 120 procedure is unconstitutional because it does not provide for a full and fair hearing or a right to appellate review, and because it permits the lender to provide only a copy of the evidence of debt, rather than the original, to the state court. He further asserts that a lender must prove it paid value for the note; otherwise a thief could

be a holder in due course based solely on possession of an indorsed-in-blank promissory note.3 The Due Process Clause provides for procedural due process, which "ensures the state will not deprive a party of property without engaging fair procedures

2 To the extent Mr. Davis seeks relief that would require setting aside the foreclosure sale, those claims are barred by the ***Rooker-Feldman*** doctrine. ***See ExxonMobil Corp. v. Saudi Basic Indus. Corp.***, 544 U.S. 280, 284 (2005) (holding barred claims are those "complaining of injuries caused by state-court judgments"). But he seeks title to the real property and damages, which are not barred by ***Rooker-Feldman***. *See* ***Mayotte***, 880 F.3d at 1175-76 (stating a challenge to the Rule 120 procedure that included the relief of damages and obtaining title to the plaintiff's home, while "inconsistent with the Rule 120 order approving sale," was not barred by ***Rooker-Feldman***).

3 Mr. Davis also contends that the Rule 120 procedure violates equal protection but the allegations in the amended complaint are mere conclusory statements insufficient to state a claim for relief. *See Iqbal*, 556 U.S. at 678. On appeal, he argues that Rule 120 parties, as distinguished from other litigants, are denied the rights to a jury trial, counterclaims, and appeal, but he has not attempted to make the required "threshold showing that [Rule 120 parties] were treated differently from others who were similarly situated to them," ***Brown v. Montoya***, 662 F.3d 1152, 1172-73 (10th Cir. 2011) (internal quotation marks omitted). In addition, to the extent Mr. Davis challenges the constitutionality of the forcible entry and detainer action used to evict him from his property, he has not identified where he presented this claim to the district court, and our review of the amended complaint indicates it was not presented. Therefore, because this claim was raised for the first time on appeal, we do not consider it. ***See Davis v. Clifford***, 825 F.3d 1131, 1137 n.3 (10th Cir. 2016).

to reach a decision." *Pater v. City of Casper*, 646 F.3d 1290, 1293 (10th Cir. 2011) (internal quotation marks omitted).

In a Rule 120 proceeding, an interested party, such as the mortgagor, may file a response to the motion

seeking an order authorizing sale. Rule 120(c) (1). If a response is filed, the state district court must hold a hearing. "[T]he scope and purpose of a Rule 120 hearing is very narrow: the trial court must determine whether there is a reasonable probability "of a default or other Circumstances **11** authorizing exercise of a power of sale has occurred." *Plymouth Capital Co.*, 955 P.2d at 1017. In determining whether there is a reasonable probability of default, "[i]t is . . . incumbent upon the Rule 120 court to consider any evidence the Debtors present on the issue of whether a default has occurred." *Id.* In addition, if the mortgagor asserts a "real party in interest" defense whereby he or she asserts that the party seeking to sell the property "has no legitimate claim to the property at all, . . . the burden should devolve upon the party seeking the order of sale to show that he or she is indeed the real party in interest." ***Goodwin v. Dist. Ct.*****,** 779 P.2d 837, 843 (Colo. 1989). The order granting or denying the motion is not appealable, *see* Rule 120(d), but "parties aggrieved by the Rule 120 court's decision may seek injunctive or other relief in a court of competent jurisdiction**,"** ***Plymouth Capital Co***., 955 P.2d at 1017. Judge Weishaupl held a hearing to address Mr. Davis's challenges to the foreclosure. She did not rely on the presumption that evidence of debt may be established based on a qualified holder's certification or an attorney's statement. *See*§ 38-38101(b)(II). Rather, Judge Weishaupl relied on Deutsche Bank's production of the duly-indorsed original note. We conclude that procedural due process was satisfied here. ***See Jones v. Flowers***, 547 U.S. 220, 223 (2006) (stating that due process requires "notice and opportunity for hearing *appropriate to the nature of the case*" (emphasis added) (internal quotation marks omitted)). Mr. Davis further argues that the Rule 120

procedure is unconstitutional because the lender is not required to produce the original note. "A litigant has standing to 12 challenge the constitutionality of a statute only insofar as it adversely affects his own rights." ***Clements v. Fashing***, 457 U.S. 957, 966 n.3 (1982). It is undisputed that Deutsche Bank produced the original note indorsed to Deutsche Bank. Mr. Davis does not have standing to challenge this provision of the Rule 120 procedure because it was not applied to him. Mr. Davis also contends that Deutsche Bank was required to prove that it paid value for the note. But Colorado foreclosure law provides that a "person in possession of a negotiable instrument evidencing a debt, which has been . . . indorsed in blank," is presumed to be the holder of the evidence of debt. § 38-38-100.3(10) (c) (2015). "Colorado law does not limit enforcement of an Obligation to a holder who received the instrument through negotiation. A note may also be enforced by a ***transferee.*" *Miller v. Deutsche Bank Nat'l Trust Co. (In re Miller)*,** 666 F.3d 1255, 1264 (10th Cir 2012); *id.* (explaining that "[t]ransfer of an instrument . . . vests in the transferee any right of the transferor to enforce the instrument." (internal quotation marks omitted)). The district court correctly dismissed the constitutional challenges to the Rule 120 procedure.

VII. CONCLUSION

We affirm the district court's judgment. Entered for the Court Mary Beck Briscoe Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Judge Philip A. Brimmer

Civil Action No. 16-cv-02245-PAB-KLM

JOHN DAVIS, *pro se*,

Plaintiff,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as trustee for GSAA Home Equity Trust 2007-5, Asset-Back Certificates, Series 2007-5,
CYNTHIA D. MARES, Arapahoe County Public Trustee (Nominal Defendant),
JUDGE ELIZABETH WEISHAUPL (Nominal Defendant),
LAWRENCE E. CASTLE, in his corporate capacity,
LAWRENCE E. CASTLE, in his individual capacity,
ROBERT J. HOPP, in his corporate capacity,
ROBERT J. HOPP, in his individual capacity,
CHRISTINA WHITMER, Public Trustee of Grand County (Nominal Defendant), and DOES 1-10,

Defendants.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge (the Recommendation) [Docket No. 105] filed on July 5, 2017.

The magistrate judge recommends that the Court grant Defendant Lawrence E. Castle's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) [Docket No. 29], Defendant Judge Weishaupl's Motion to Dismiss the First Amended Complaint [Docket No. 33], defendant Deutsche Bank National Trust Company's Motion to Dismiss Plaintiff's First Amended Verified Complaint [Docket No. 35], Defendant Christina Whitmer's Motions [sic] to Dismiss the First Amended Complaint (Doc. 26 10/18/16) Pursuant to F.R.Civ.P. 12(b)(6) [Docket No. 40], Response of Defendant Robert J. Hopp Joining in the Castle Motion to Dismiss Plaintiff's First Amended Complaint [Docket No. 43]; and defendant Cynthia Mares's Motion to Dismiss First Amended Complaint [Docket No. 58]. Docket No. 105 at 24. The magistrate judge also recommends that the Court deny Plaintiff's Motion to Withdraw Judge Weishaupl's [sic] Status as Nominal Defendant for Cause [Docket No. 66] and dismiss without prejudice all of plaintiff's state law claims and claims against the Doe defendants. Docket No. 105 at 22-24. On July 10, 2017, plaintiff filed an objection to the Recommendation. Docket No. 106. In light of plaintiff's pro se status, the Court construes his filings liberally. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 & n.3 (10th Cir. 1991).

The background of this case and the nature of plaintiff's motions are discussed in the Recommendation and this Court's order denying a temporary restraining order and will not be repeated here. *See* Docket Nos. 64 at 2, 105 at 3-4.

The Court will determine de novo any part of the magistrate judge's disposition that has been properly objected to@ by plaintiff. Fed. R. Civ. P. 72(b)(3). A[A]

party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court . . . . *United States v. One Parcel of Real Property Known As 2121 East 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996). To be sufficiently specific, an objection must enable [] the district judge to focus attention on those issues factual and legal that are at the heart of the parties' dispute *See id.* at 1059 (quoting *Thomas v. Arn*, 474 U.S. 140, 147 (1985)).

DUE PROCESS AND THE RULE 120 HEARING

Plaintiff argues that, at the Colo. R. Civ. P. 120 (A Rule 120) hearing in the underlying state eviction proceedings, Judge Elizabeth Weishaupl incorrectly made a conclusive presumption@ that defendant Deutsche Bank National Trust Company (Deutsche Bank had possession of the original deed of Trust and therefore were [sic] holders in due course and the Real Parties [sic] in Interest entitled to foreclose.@ Docket No. 106 at 3. Plaintiff claims that his due process rights were violated because Deutsche Bank was not required to prove that it legally acquired possession of the note on plaintiff's former residence and because plaintiff was not able to raise a real party in interest defense at the Rule 120 hearing. *Id.* at 21-23. Plaintiff's apparent theory, which he claims he was denied the opportunity to present, is that Deutsche Bank stole the note, instead of acquiring it legally, and therefore was not a holder in due course with standing to foreclose. *Id.* at 22 (A thief would qualify as a party who has no legitimate claim to the property at all.

Plaintiff's argument is contrary to the record of the Rule 120 proceedings, which shows that Judge Weishaupl did not rely on the presumption available under Colo. Rev. Stat. ' 38-38-101(6)(b) that deems evidence of debt properly endorsed and assigned based on a qualified holder's certification or as attorney's statement. Instead, at the Rule 120 hearing, Deutsche Bank produced the duly-endorsed original note. *In re Deutsche Bank National Trust Company*, No. 2016CV31190, slip op. at 5 (Colo. Dist. Ct., Arapahoe Cty. Aug. 18, 2016).[1] It is clear from the record in the Rule 120 proceedings that Judge Weishaupl considered plaintiff's arguments that Deutsche Bank was not a holder in due course or a real party in interest and rejected them. Docket No. 62 at 27, && 8-9 (Plaintiff's wife] argued that the Bank was not the real party in interest to these proceedings because it was not the holder in due course of the note. The Court disagrees. . . Here the Bank established that it had taken possession of the Note, a negotiable instrument, by virtue of possession of the original note and its endorsement without recourse from Freedom Mortgage to the Bank. Thus, the Court finds that the Bank is a real party in interest and is also a holder in due course entitled to seek foreclosure under [Rule] 120.). If [judicially noticed] documents contradict the allegations of the . . . complaint, the documents control and [the] court need not accept as true the allegations in the . . . complaint. *Cunningham v. Bank of Am., N.A.*, No. 12-cv-03316-MSK-GPG, 2013 WL
2455945, at *3 (D. Colo. June 6, 2013) (quoting *Rapoport v. Asia Electronics Holding Co.*, 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000)). Moreover, plaintiff's complaint contains no well-pleaded factual allegations that would support a claim that his arguments at the Rule 120

[1] As it did before, the Court takes judicial notice of the record in the Rule 120 hearing and the foreclosure proceedings, which are referenced in plaintiff's amended complaint and are essential to his claims. *See* Docket No. 64 at 5 (citing *St. Louis Baptist Temple, Inc. v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979)).
hearing were not considered, plaintiff does not present evidence to support such a claim, and such a claim is implausible in the face of Deutsche Bank's presentation of the duly-endorsed original note at the Rule 120

Additionally, plaintiff attached copies of records from these proceedings to his motions and responses. *See, e.g.*, Docket No. 62 at 20-30 (order authorizing sale and order following Rule 120 hearing); *see also GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1385 (10th Cir. 1997) (holding that the district court properly considered documents outside the pleadings referred to by a party in considering a motion to dismiss without converting it to a motion for summary judgment).

hearing and Judge Weishaupl's reliance on that evidence. As the Court has previously stated, A plaintiff's conclusory assertion that [the presentation of the duly-endorsed original note] did not occur is not enough to overcome the findings in the Rule 120 order.

Docket No. 77 at 5. Accordingly, plaintiff's allegations do not state a plausible claim that he was harmed by denial of his due process rights at the Rule 120 hearing. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged but it has not shown that the pleader is entitled to relief. (internal quotes, citations and alterations omitted)).

STATE ACTION

Plaintiff argues that certain defendants conduct related to the passage of the amendments modifying Colorado's foreclosure regime and related to plaintiff's Rule 120 proceedings was state action because it was carried out under state law. Docket No. 106 at 16 (Clearly, when a state enacts a statute, whether a foreclosure or unlawful detainer statute that limits a litigant's rights, state action is involved.@). In addition to public trustee defendants Whitmer and Mares, plaintiff claims Deutsche Bank, defendant Castle, and defendant Hopp are subject to liability as state actors because of their involvement with the amendment and application of Rule 120. *Id.* at 12-18, 23-29. In this context, plaintiff presses the same claims that he was deprived of due process at the Rule 120 hearing because the burden of proof under Colo. Rev. Stat. ' 38-38101(6)(b) caused facts to be presumed true in the absence of proof. *Id.* at 15. However, as explained

above, Judge Weishaupl did not rely on a presumption in Colo. Rev. Stat. ' 38-38-101(6)(b) to find that Deutsche Bank was the holder in due course of the note on plaintiff's former property, but rather relied on unrebutted evidence in the form of the duly-endorsed original note. *See also* Docket No. 64 at 4. Such evidence is original evidence of debt . . . together with the original indorsement or assignment thereof@ that would have sufficed to allow Deutsche Bank to seek an order authorizing the sale of plaintiff's former property even in the absence of the statutory amendments that plaintiff alleges were the state action leading to the deprivation of his due process rights. Colo. Rev. Stat. ' 38-38-101(1)(b); *see also* 2009 Colo. Legis. Serv. Ch. 164 (H.B. 09B1207). Even if plaintiff is correct that defendants' actions could be considered state action, plaintiff has not alleged any plausible injury to himself resulting from the provisions of Colo. Rev. Stat. ' 38-38101(6)(b) or its application.2 Thus, plaintiff's claims under 42 U.S.C. ' 1983 fail to state a plausible claims for relief and must be dismissed. *See Iqbal*, 556 U.S. at 679 (O]nly a complaint that states a plausible claim for relief survives a motion to dismiss).[4]

JUDICIAL IMMUNITY

The Recommendation explains that Judge Weishaupl is entitled to Eleventh Amendment immunity from official capacity claims against her and recommends dismissing such claims without prejudice due to lack

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[4] Because this resolves the ' 1983 claims at issue, the Court does not address plaintiff's objection that the Rooker-Feldman doctrine does not bar his claims seeking to undo the foreclosure process.

of subject matter jurisdiction. Docket No. 105 at 7. With respect to the individual capacity claims, the Recommendation instead recommends dismissal with prejudice under the doctrine of judicial immunity. *Id.* at 9. Plaintiff clarifies that Judge Weishaupl is only being sued in her individual capacity, not in her official capacity. Docket No. 106 at 23. He argues that the State of Colorado waived sovereign immunity when it enacted Rule 120 and, therefore, Judge Weishaupl lacks judicial immunity. *Id.* at 9-10.

Even assuming for the sake of argument that plaintiff is correct that the State of Colorado waived its sovereign immunity in enacting Rule 120, plaintiff provides no argument and cites no authority for the proposition that a state's waiver of its sovereign immunity also waives the judicial immunity of the state's judicial officers. Sovereign immunity is distinct from judicial immunity. The magistrate judge correctly determined that Judge Weishaupl is entitled to judicial immunity from plaintiff's individual capacity claims because they relate to actions taken in her official capacity. Docket No. 105 at 8 (citing *Brackhahn v. Eder*, No. 13-cv-00141-CMA-KMT, 2013 WL 2394980, at *5 (D. Colo. May 31, 2013)). Because plaintiff claims he only brings individual capacity claims against Judge Weishaupl, which are barred by judicial immunity, all claims against her will be dismissed with prejudice.

STATE LAW CLAIMS

Plaintiff argues that his state-law claims should not be dismissed and that the

Recommendation did not address and dismiss his seventh claim, to quiet title by adverse possession. Docket No. 106 at 2-3, 29-30. Plaintiff is mistaken; the Recommendation addresses plaintiff's seventh claim and recommends that the Court decline to exercise supplemental jurisdiction over it – and plaintiff's other state law claims – if plaintiff's federal claims are dismissed. Docket No. 105 at 22-23, 25. Dismissal without prejudice is the correct course of action for plaintiff's state law claims if plaintiff's federal claims are dismissed. *See Brooks v. Gaenzle*, 614 F.3d 1213, 1230 (10th Cir. 2010) (quoting *Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995)) (reversing the entry of summary judgment on state law claims and remanding with instructions to dismiss); *Endris v. Sheridan Cty. Police Dep't*, 415 F. App'x 34, 36 (10th Cir. 2011) (any state-law claims for assault and battery or mental and emotional injury were inappropriate subjects for the exercise of pendent jurisdiction where all federal claims had been dismissed@) (unpublished). *But see Henderson v. Nat'l R.R. Passenger Corp.*, 412 F. App'x 74, 79 (10th Cir. 2011) (finding no abuse of discretion in trial court's decision to retain jurisdiction over state law claims after plaintiff voluntarily dismissed claims arising under federal law) (unpublished). Because plaintiff's federal claims will be dismissed, the Court will dismiss plaintiff's state-law claims without prejudice. *See Thompson v. City of Shawnee*, 464 F. App'x 720, 726 (10th Cir. 2012) (holding that, when declining to exercise supplemental jurisdiction over state-law claims, court had discretion either to remand the claims to the state court or to dismiss them@) (unpublished); *cf.* Colo. Rev. Stat. ' 13-80-111

(permitting claims properly commenced within the statute of limitations to be re-filed if involuntarily dismissed because of lack of jurisdiction); *Dalal v. Alliant Techsystems, Inc.*, 934 P.2d 830, 834 (Colo. App. 1996) (interpreting 28 U.S.C. ' 1367(d) as tolling the statute of limitations while claim is pending in federal court); *but see Artis v. District of Columbia,* 135 A.3d 334 (D.C. 2016) (holding that litigants have a 30day grace period to re-file claims otherwise barred by the expiration of a limitations period)*, cert. granted*, -- U.S. ----, 2017 WL 737818 (Feb. 27, 2017).

CONCLUSION

In this matter, the Court has reviewed the portions of the Recommendation to which plaintiff does not object to satisfy itself that there is no clear error on the face of the record.[5] Fed. R. Civ. P. 72(b), Advisory Committee Notes. The Court finds no clear error with respect to the magistrate judge's other recommendations and will adopt them.

For the foregoing reasons, it is **ORDERED** that the Recommendation of United States Magistrate Judge [Docket No. 105] is **ACCEPTED** in part. It is further **ORDERED** that Defendant Lawrence E. Castle's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) [Docket No. 29] is **GRANTED**. It is further **ORDERED** that Defendant Judge Weishaupl's Motion to Dismiss the First Amended Complaint [Docket No. 33] is

[5] This standard of review is something less than a clearly erroneous or contrary to law@ standard of review, Fed. R. Civ. P. 72(a), which in turn is less than a de novo review. Fed. R. Civ. P. 72(b).

GRANTED. It is further **ORDERED** that defendant Deutsche Bank National Trust Company's Motion to Dismiss Plaintiff's First Amended Verified Complaint [Docket No. 35] is **GRANTED**. It is further **ORDERED** that Defendant Christina Whitmer's Motions [sic] to Dismiss the First Amended Complaint (Doc. 26 10/18/16) Pursuant to F.R.Civ.P. 12(b)(6) [Docket No. 40] is **GRANTED**. It is further **ORDERED** that the Response of Defendant Robert J. Hopp Joining in the Castle Motion to Dismiss Plaintiff's First Amended Complaint [Docket No. 43] is **GRANTED**. It is further **ORDERED** that defendant Cynthia Mares' Motion to Dismiss First Amended Complaint [Docket No. 58] is **GRANTED**. It is further **ORDERED** that Plaintiff's Motion to Withdraw Judge Weishaupl's [sic] Status as Nominal Defendant for Cause [Docket No. 66] is **DENIED**. It is further **ORDERED** that plaintiff's claims against Defendant Weishaupl are dismissed with prejudice on the basis of judicial immunity. It is further **ORDERED** that plaintiff's claims One, Two, Five, and Six, to the extent that plaintiff brings the claim under federal law, are dismissed with prejudice. It is further **ORDERED** that plaintiff 's claims Three, Four, Six, to the extent that plaintiff brings the claim under state law, Seven, and Eight are dismissed without prejudice. It is further **ORDERED** that this case is dismissed in its entirety. It is further **ORDERED** that, within 14 days after entry of judgment, defendants may have their costs by filing a Bill of Costs with the Clerk of the Court.

DATED August 8, 2017. BY THE COURT:
s/Philip A. Brimmer PHILIP A. BRIMMER
United States District Judge

RELEVANT PORTIONS OF STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

U.C.C. § 4–3–301 and 305(c)

U.C.C. § 3-301. PERSON ENTITLED TO ENFORCE INSTRUMENT

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument

U.C.C. § 305(c)

(c). An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and

the obligor proves that the instrument is a lost or stolen instrument. *See* § 38-38-100.3(10) (c)

Colorado Statute § 38-38-101

(II) …. Whenever a holder of an evidence of debt declares a violation of a covenant of a deed of trust and elects to publish all or a portion of the property therein described for sale, the holder or the attorney for the holder shall file the following with the public trustee of the county where the property is located:

…

(II) A copy of the evidence of debt and a certification signed and properly acknowledged by a holder of an evidence of debt acting for itself or as agent, nominee, or trustee under subsection (2) of this section or a statement signed by the attorney for such holder, citing the paragraph of section 38-38-100.3(20) under which the holder claims to be a qualified holder and certifying or stating that the copy of the evidence of debt is true and correct.

…

(III)(b) Notwithstanding the provisions of paragraph (a) of this subsection (6), the original evidence of debt or a copy thereof without proper indorsement or assignment shall be deemed to be properly indorsed or assigned if a qualified holder presents the original evidence of debt or a copy thereof to the officer together with a statement in the certification of the qualified holder or in the statement of the attorney for the qualified holder pursuant to subparagraph (II) of paragraph (b) of subsection (1) of this section that the party on whose behalf the foreclosure was commenced is the holder of the evidence of debt.

Colorado Rule 120

Rule 120(c) Response; Contents; Filing and Service. Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's entitlement to an order authorizing sale may file and serve a response to the motion, verified by the oath of such person, setting forth the facts upon which he relies and attaching copies of all documents which support his position. The response shall be filed and served not less than 7 days prior to the date set for the hearing, said interval including intermediate Saturdays, Sundays, and legal holidays, C.R.C.P. 6(a) notwithstanding, unless the last day of the period so computed is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next succeeding day which is not a Saturday, Sunday or a legal holiday. Service of such response upon the moving party shall be made in accordance with C.R.C.P. 5(b). C.R.C.P. 6(e) shall not apply to computation of time periods under this section (c).

Rule 120 (d) Hearing; Scope of Issues; Order; Effect. At the time and place set for the hearing or to which the hearing may have been continued, the court shall examine the motion and the responses, if any. The scope of inquiry at such hearing shall not extend beyond the existence of a default or other circumstances authorizing, under the terms of the instrument described in the motion, exercise of a power of sale contained therein, and such other issues required by the Service Member Civil Relief Act (SCRA), 50 U.S.C. § 520, as amended. The court shall determine whether there is a reasonable probability that such default or other circumstance has occurred, and whether an order

authorizing sale is otherwise proper under said Service Member Civil Relief Act, and shall summarily grant or deny the motion in accordance with such determination. Neither the granting nor the denial of a motion under this Rule shall constitute an appealable order or judgment. The granting of any such motion shall be without prejudice to the right of any person aggrieved to seek injunctive or other relief in any court of competent jurisdiction, and the denial of any such motion shall be without prejudice to any right or remedy of the moving party. The court shall not require the appointment of an attorney to represent any interested person as a condition of granting such motion, unless it appears from the motion or other papers filed with the court that there is a reasonable probability that the interested person is in the military service.

RELEVANT PORTIONS OF CONSTITUTIONAL AMENDMENT

Amendment XIV, Section 1

The Fourteenth Amendment to the Constitution provides in relevant part: “No state shall make or enforce any law… [That] shall deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...