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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-1208
(D.C. No. 1:14-CV-00784-CMA-BNB)
(D. Colo.)

[Filed March 18, 2019]

VIVIAN L. RADER; STEVEN R. RADER,
Plaintiffs - Appellants,

v.

CITIBANK, N.A., as Successor Trustee to U.S. Bank National Association as Successor to Wachovia Bank National Association as Trustee for the Certificate holders of Mastr Alternative Loan Trust 2004-1 Mortgage Pass through Certificates Series 2004-1; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; UBS WARBURG REAL ESTATE SECURITIES, INC.; OCWEN LOAN SERVICING, LLC, and Does 1-10,
Defendants - Appellees.

ORDER AND JUDGMENT*

Before **BRISCOE**, **BACHARACH**, and **MORITZ**, Circuit Judges.

Vivian and Steven Rader defaulted on a promissory note secured by a deed of trust on their Colorado home. They filed separate lawsuits to try to avert and then to undo foreclosure—first seeking declaratory and injunctive relief to quiet title and to prevent foreclosure, and later seeking to rescind the loan documents due to alleged violations of the Truth in Lending Act ("TILA"). In both cases, the district court dismissed their claims under Federal Rule of Civil Procedure 12(b)(6), and this court affirmed. Several years later, the Raders again attempted to undo the foreclosure proceedings, this time by filing a motion under Federal Rule of Civil Procedure 60(d)(3), which alleged fraud on the court and asked the district court to reopen the first lawsuit and to vacate the final judgment against them. That motion was denied. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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. 32.1 and 10th Cir. R. 32.1.

Background

In 2003, Steven Rader borrowed $630,000 from GreenPoint Mortgage Funding, Inc. The promissory note was secured by a properly recorded deed of trust on real property that Steven owned with his wife, Vivian, at 47 Bennett Court, Pagosa Springs, Colorado. In 2008, the Raders stopped making payments because of alleged billing errors, causing the loan to go into default.

U.S. Bank, which held the note at that time, initiated foreclosure proceedings in Colorado state court in 2012. U.S. Bank later moved to substitute Citibank as the petitioner in the foreclosure action, stating that it had transferred its interest in the note to Citibank. At the foreclosure hearing in April 2014, Citibank's attorney appeared with the note, and the state court granted the motion to substitute. The state court also entered an order authorizing the sale of the property.

Before the foreclosure sale occurred, the Raders sued Citibank and other entities connected to the loan in federal court in July 2014, seeking declaratory and injunctive relief to quiet title and to prevent foreclosure. They alleged that Citibank was not entitled to enforce the note because U.S. Bank had not lawfully transferred it to Citibank. Citibank filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), which was granted. The district court held that Citibank was the possessor and holder of the promissory note, which was endorsed in blank, and it did not matter how it became

the holder under Colorado law;[1] accordingly, Citibank had standing to enforce the note and to pursue the foreclosure. The district court entered final judgment on October 15, 2014. This court affirmed the judgment in *Rader v. Citibank, N.A.*, 616 F. App'x 383, 384 (10th Cir. 2015) ("*Rader I*").

The property was sold at a foreclosure sale in August 2015, but the Raders did not move out of the property. Instead, they filed an action against Citibank and Ocwen Loan Servicing, LLC ("Ocwen"), the loan servicer, in late 2015, alleging TILA violations and seeking to rescind the promissory note and deed of trust. The district court found the rescission claim to be untimely and dismissed it under Rule 12(b)(6). Again, this court affirmed. *See Rader v. Citibank N.A.*, 700 F. App'x 817, 818 (10th Cir. 2017) ("*Rader II*").

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[1] As the district court explained in the underlying order, a promissory note is a negotiable instrument that is freely assignable under Colorado law. Aplt. App. at 211 (citing Colo. Rev. Stat. § 4-3-104). In keeping with this principle, the note here provided: "I understand that the Lender may transfer this note. The Lender or anyone who takes this note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" *Id.* at 211 n.6.

Colorado law allows "a holder of evidence of a debt to foreclose upon breach of the terms of the deed of trust." *Id.* at 211. The term "holder" includes a "person in possession of a negotiable instrument evidencing a debt which has been . . . [e]ndorsed in blank," Colo. Rev. Stat. § 38-38-100.3(10)(c). An instrument payable to an identified person or entity may become payable to its bearer if it is endorsed in blank pursuant to Colo. Rev. Stat. §§ 4-3-109(c) and -205(b). *See In re Miller*, 666 F.3d 1255, 1263 (10th Cir. 2012). A note with a blank endorsement, like the one here, may be negotiated solely by transfer of possession. *Id.*

Still, the Raders refused to leave the property. They next filed a lawsuit in Colorado state court, which was consolidated with an eviction proceeding. Within that consolidated action, they deposed Katherine Ortwerth, an Ocwen employee who appeared as Citibank's representative, in October 2017. Ms. Ortwerth was not involved with the loan when U.S. Bank filed the motion to substitute Citibank as the petitioner in the foreclosure action; nevertheless, she opined that Citibank's substitution was erroneous because Ocwen's servicing notes still list U.S. Bank as the holder of the note and Citibank never had an interest in the Raders' loan.

In February 2018, the Raders filed a motion under Rule 60(d)(3), asking the district court to reopen the lawsuit and to vacate the judgment that was affirmed in *Rader I*. Citing Ms. Ortwerth's testimony, they argued that Citibank perpetrated a fraud on the court by misrepresenting it had lawfully succeeded to the interest in the promissory note and the deed of trust. The district court found that these assertions did not meet the standard for fraud on the court and denied the motion. The Raders filed this timely appeal and are now before this court for the third time in four years.

Analysis

We review the denial of the Raders' Rule 60(d)(3) motion for an abuse of discretion. *See United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002).[2] Under this

[2] In *Buck*, we pronounced this standard in the context of a Rule 60(b)(6) motion seeking relief grounded in fraud on the court. 281 F.3d at 1341-42; *see also Switzer v. Coan*, 261 F.3d 985, 988 (10th

standard, "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (internal quotation marks omitted). A district court abuses its discretion "if it base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence," *FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1998) (internal quotation marks omitted), or if it "fails to consider the applicable legal standard," *Clyma v. Sunoco, Inc.*, 594 F.3d 777, 783 (10th Cir. 2010) (internal quotation marks omitted).

The Raders contend the district court abused its discretion by failing to properly assess the facts and totality of the circumstances. They search Ms. Ortwerth's deposition testimony for statements that Citibank did not have an interest in the Raders' loan and characterize Citibank's failure to correct its "admitted misrepresentations" as exemplifying fraud and an intention to continue wrongful conduct. Aplt. Br. at 11. They also contend the district court abused its discretion by misapplying the law and not exercising its inherent power to vacate the judgment. Citibank responds that, at most, it made a mistake about its

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Cir. 2001) ("We review the disposition of a Rule 60(b) action for fraud on the court under an abuse of discretion standard."). But Rule 60(b)'s structure was revised in 2007, with some of its contents—including the provision at issue in this case—moving to Rule 60(d). Because those changes were "intended to be stylistic only," Fed. R. Civ. P. 60 advisory committee's note to 2007 amendment, we continue to apply an abuse of discretion standard.

interest in the loan—a mistake that was legally irrelevant to Citibank's right to enforce the note because it possessed the note. Citibank further responds that this type of error does not constitute a deliberate scheme to defraud the court under the relevant standard (even in filings by attorneys) and that the Raders did not present clear and convincing evidence of fraud, as required.

Having carefully reviewed the record and applicable law, we discern no abuse of discretion here. Rule 60(d), which was termed a "savings clause" in its previous iteration, *see Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005), provides that Rule 60 "does not limit a court's power to . . . set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3). We have made clear that fraud on the court encompasses "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated." *Buck*, 281 F.3d at 1342 (internal quotation marks omitted). It requires "a showing that one has acted with an intent to deceive or defraud the court," that is, "conscious wrongdoing." *Id.* (internal quotation marks omitted). "Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court." *Id.* (internal quotation marks omitted).

The district court evaluated the alleged conduct within the framework articulated in *Buck* and *Weese v. Schukman*, 98 F.3d 542, 552-53 (10th Cir. 1996), and correctly concluded the assertions do not rise to the

level of fraud on the court as contemplated by Rule 60(d)(3). We affirm for the reasons stated in its order dated May 4, 2018.

Conclusion

The district court's denial of the Raders' Rule 60(d)(3) motion is affirmed.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 14-cv-00784-CMA-BNB

[Filed May 4, 2018]

VIVIAN L. RADER, and STEVEN R. RADER,
Plaintiffs,

v.

CITIBANK, N.A. as Successor Trustee to U.S. Bank National Association, as Successor to Wachovia Bank National Association as Trustee for the Certificate Holders of Mastr Alternative Loan Trust 2004-1 Mortgage Pass Through Certificates Series 2004-1, MORTGAGE REGISTRATION SYSTEMS, INC., UBS WARBURG REAL ESTATE SECURITIES, INC., OCWEN LOAN SERVICING LLC, and DOES 1-10,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO RE-OPEN CASE

This matter is before the Court on Plaintiffs Vivian L. Rader and Steven R. Rader's Motion to Re-open Case

(Doc. # 33), wherein they argue that Defendant Citibank perpetrated a fraud upon the Court that warrants vacating the Court's final order and judgment and re-commencing this litigation. Defendants Citibank; Mortgage Electronic Registration Systems, Inc.; UBS Warburg Real Estate Securities, Inc.; and Ocwen Loan Servicing, LLC (Defendants) responded to the motion and objected to Plaintiffs' request. For the following reasons, the Court denies Plaintiffs' motion.

Plaintiffs move to re-open this case under Federal Rule of Civil Procure 63(d)(3). Rule 60(d) motions that assert "fraud on the court" are not time-limited and can be brought at any time. "Fraud on the court," however, is narrowly construed. *United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002). "Fraud upon the court" consists of "only the most egregious conduct, such as bribery of a judge" or the "fabrication of evidence by a party in which an attorney is implicated." *Id.* It is fraud "directed to the judicial machinery itself . . . where the impartial functions of the court have been directly corrupted." *Id.* Less egregious conduct such as "nondisclosure of [pertinent] facts . . . will not ordinarily rise to the level of fraud on the court." *Id.* Nor will "fraud between the parties or fraudulent documents, false statements[,] or perjury" meet the requirements of Rule 60(d)(3). Moreover, "intent to defraud is an absolute prerequisite," *Weese v. Schukman*, 98 F.3d 542, 553 (10th Cir. 1996), and proof of fraud must be by clear and convincing evidence. *Id.* at 552.

Plaintiff's assertion of fraud does not rise to the level of fraud on the court as contemplated by Rule

60(d)(3), nor has Plaintiff satisfied the clear and convincing evidentiary standard. Simply put, Plaintiff argues that Defendant Citibank misrepresented facts to the Court. Even if true, Defendant's misrepresentations are insufficiently egregious to support reopening this case. Plaintiff does not adequately contend that Defendant Citibank's attorney was involved, that the impartial functions of this Court were corrupted, or even that Defendant Citibank acted with fraudulent intent.

The Court therefore DENIES Plaintiff's Motion to Re-open this case. (Doc. # 33.)

BY THE COURT:

/s/ Christine M. Arguello
CHRISTINE M. ARGUELLO
United States District Judge

DATED: May 4, 2018

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-1472
(D.C. No. 1:14-CV-00784-CMA-BNB)
(D. Colo.)

[Filed October 13, 2015]

VIVIAN L. RADER; STEVEN R. RADER,
Plaintiffs - Appellants,

v.

CITIBANK, N.A., as Successor Trustee to U.S. Bank National Association as Successor to Wachovia Bank National Association as Trustee for the Certificateholder of Mastr Alternative Loan Trust 2004-1 Mortgage Pass through Certificates Series 2004-1; MORTGAGE REGISTRATION SYSTEMS, INC.; UBS WARBURG REAL ESTATE SECURITIES, INC.; OCWEN LOAN SERVICING LLC, and Does 1-10,
Defendants - Appellees.

ORDER AND JUDGMENT*

Before **HARTZ**, **PHILLIPS**, and **McHUGH**, Circuit Judges.

Vivian L. Rader and Steven R. Rader (Raders) appeal from the district court's judgment dismissing their claims against the defendants with prejudice. In their amended complaint (the Complaint) the Raders sought declaratory and injunctive relief to prevent the defendants from foreclosing on a mortgage securing Mr. Rader's promissory note, and a decree quieting title and extinguishing all the defendants' claims to the mortgaged property. The district court considered the exhibits offered by the defendants in support of their motion to dismiss. It then determined that Citibank was the possessor and holder of the promissory note, which had been endorsed in blank, and that (contrary to the Raders' primary argument) it was legally irrelevant how it became the holder. Hence, Citibank had standing to enforce the note and pursue foreclosure proceedings. The court concluded that the Raders' claims failed as a matter of law and that it would be futile to grant them leave to amend the Complaint. We affirm.

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* 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. 32.1 and 10th Cir. R. 32.1.

The Raders' challenges to the district court's reasoning are unpersuasive. They complain that the district court should not have considered the defendants' exhibits on a motion to dismiss, and that consideration of the exhibits converted the proceeding to one for summary judgment without adequate notice to them. But the district court explained why the documents could be considered under our precedent in *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). And it observed that the Raders did not dispute the authenticity of the exhibits submitted by the defendants, but only disagreed about the legal conclusions that could be drawn from them.

In their opening brief on appeal, the Raders present no analysis concerning why *Gee* does not apply except to note that this court in *Gee* rejected the use of some of the documents in that case, on which the district court had "improperly relied . . . to refute [the plaintiff's] factual assertions and effectively convert the motion to one for summary judgment without notice." *Id*. at 1187. Here, however, although the Raders claim that the district court used the documents submitted by the defendants to make determinations on disputed material issues of fact, they point to no such factual findings in their brief.[1] Indeed, the brief accurately

[1] The closest they come is their reference to the sentence in the district court's opinion referring to the state court's approval of the substitution of Citibank for U.S. Bank as the party seeking foreclosure. But this terse reference to that sentence does not preserve a legal issue, *see Bronson v. Swensen*, 500 F.3d 1099, 1104-05 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are . . . inadequately presented . . . in an appellant's opening brief. . . . . [C]ursory statements, without

describes the true dispute when it states that "[the Raders] disagreed about the *legal conclusions* that could be drawn from the documents submitted by Appellees." Aplt. Opening Br. at 21 (emphasis added).

The Raders also complain that the district court entirely failed to address two of their arguments. First, they argued that in the chain of title for their promissory note was a trust that could not accept a transfer of the note if the loan was in default or in danger of going into default, or if the transfer was after the closing date specified in the trust. But they did not plead any facts showing when, if ever, any of these conditions existed; and, as previously noted, Citibank can foreclose without showing how it became the holder of the note. Second, they argue that the note may have been paid down or even paid off. But, again, they pleaded no facts showing that any such payment was ever made.

Finally, although they assert that the Complaint states a valid claim for relief, the Raders argue that we should reverse and remand so they can seek leave to file an amended version of the Complaint. Their conclusory request for leave to amend does not entitle the Raders to amend their complaint or to avoid the dismissal with prejudice. *Cf. In re Gold Resource Corp. Securities Litigation*, 776 F.3d 1103, 1118-19 (10th Cir. 2015) ("The district court did not abuse its discretion in

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supporting analysis and case law, fail to constitute the kind of briefing that is necessary."), and the point is legally irrelevant because under Colorado law it does not matter who Citibank's predecessors were or how Citibank became the holder.

dismissing the complaint with prejudice where plaintiff's memorandum contained only one sentence at the very end of his brief alternatively requesting leave to amend in the event the district court should decide to dismiss his complaint.").

CONCLUSION

The judgment of the district court is affirmed.

Entered for the Court

Harris L Hartz
Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 14-cv-00784-CMA-BNB

[Filed October 14, 2014]

VIVIAN L. RADER, and STEVEN R. RADER,
Plaintiffs,

v.

CITIBANK, N.A. as Successor Trustee to U.S. Bank National Association, as Successor to Wachovia Bank National Association as Trustee for the Certificate Holders of Mastr Alternative Loan Trust 2004-1 Mortgage Pass Through Certificates Series 2004-1, MORTGAGE REGISTRATION SYSTEMS, INC., UBS WARBURG REAL ESTATE SECURITIES, INC., OCWEN LOAN SERVICING LLC, and DOES 1-10,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on Defendants'[1] Motion to Dismiss (Doc. # 17), filed on August 27, 2014. For the following reasons, the Court grants the motion.

I. BACKGROUND

In October of 2003, Steven Rader signed a promissory note ("the Note") in favor of Greenpoint Mortgage Funding Inc., in the principal amount of $630,000. (Doc. # 17-10.) The Note was secured by a Deed of Trust on his primary residence, located at 47 Bennett Court, Pagosa Springs, Colorado 81147 ("the Property.") (*Id.; see also* Doc. #17-1 at 1.)[2] In late 2008, the Raders stopped making payments on this Note. (Doc. # 17-1.) At some point thereafter, U.S. Bank National Association, N.A. ("U.S. Bank") assumed the servicing rights on the Raders' loan. (Doc. # 17-2 at 2.)

This matter has been on two litigation tracks – one in state court, and one in federal. As for the state court action, in September of 2012, U.S. Bank initiated

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[1] Defendants include Citibank, N.A., as Successor Trustee to Wachovia Bank National Association as Trustee for the Certificate holders of Mastr Alternative Loan Trust 2004-1 Mortgage Pass Through Certificates Series 2004-1, Mortgage Electronic Registration Systems, Inc., UBS Warburg Real Estate Securities, Inc., and Ocwen Loan Servicing LLC. Hereinafter, these parties shall be collectively referred to as "Defendants."

[2] Although Vivian Rader did not indorse the Note, she is a party to this action. Consequently, the Court refers to the Plaintiffs as "the Raders."

foreclosure proceedings on the Property, pursuant to Rule 120 of the Colorado Rules of Civil Procedure. (Doc. # 17-2.) Specifically, U.S. Bank filed a copy of the original Note and a "Statement by Attorney for Qualified Holder" with the Archuleta district court ("the Rule 120 court"), pursuant to Colo. Rev. Stat. § 38-8-101(1)(b). (Doc. # 17-9.) In March of 2014, U.S. Bank filed a Motion to Substitute Petitioner after the mortgage was transferred to Citibank. (Doc. # 17-5.) At a hearing regarding the Motion to Substitute, Citibank presented an original Note bearing a blank indorsement, as well as evidence of the Raders' payment history. (Doc. # 17-6 at 21, 30.) After this hearing, the court granted the motion, finding that Citibank was the real party in interest and that the Raders had defaulted on the note. (*Id.* at 46-47.) The Raders appealed the Rule 120 court's order, and the Colorado Court of Appeals affirmed the lower court's findings.[3] (Doc. # 18 at 2.) On July 28, 2014, the state court entered an order authorizing the sale of the Property.[4] (Doc. # 17-8.)

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[3] Plaintiffs inform the Court that they have petitioned the Colorado Supreme Court to grant *certiorari* on this matter. This Court, however, does not rely on the state court's findings in granting the Motion to Dismiss.

[4] The significant delay between the initiation of foreclosure proceedings and the order authorizing sale seems to have been at least partly attributable to the fact that the Raders engaged in a variety of procedural tactics – including an attempted removal of their foreclosure proceeding to federal court and two separate motions to disqualify the state judges assigned to their case. (*See* Doc. ## 17-4, 17-5.)

The Raders commenced their federal action in March of 2014 by filing a Complaint against U.S. Bank. (Doc. # 1.) The Complaint is relatively simple, and contains two counts -- one claim for declaratory and injunctive relief, and one for quiet title. (Id. at 9-12.) Specifically, it alleges that the Note on the Property was not properly transferred through various mortgager entities, such that no entity has proven that it has standing to initiate foreclosure proceedings. (*Id.* at 9.)

Defendants move to dismiss Plaintiffs' Complaint, arguing that as a qualified holder of the original Note, they have standing to enforce that Note and foreclose on the Property.[5] (Doc. # 17.)

II. STANDARD OF REVIEW

Rule 12(b)(6) provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). In

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[5] Defendants note that there is some case law supporting the proposition that the *Rooker-Feldman* doctrine precludes this Court from exercising subject matter jurisdiction over Plaintiffs' claims in the first instance. *See, e.g., Diskell v. Thompson*, 971 F. Supp. 2d 1050, 1063 (D. Colo. 2013). However, because the Tenth Circuit has explicitly held that *Rooker-Feldman* does not apply when a foreclosure proceeding is still **pending**, *In re Miller*, 666 F.3d 1255, 1262 (10th Cir. 2012), and because it is not clear to the Court whether the foreclosure sale in the instant case has yet occurred, *Rooker-Feldman* cannot fully resolve this case. *Compare Dillard v. Bank of New York*, 476 F. App'x 690, 692 (10th Cir. 2012) (holding that *Rooker-Feldman* did apply when a plaintiff had already been foreclosed upon and evicted from her home, and was "attempting to completely undo the foreclosure and eviction proceedings, which were both final before she ever initiated this suit.")

deciding a motion under Rule 12(b)(6), the Court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (*quoting Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). However, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

To withstand a motion to dismiss, a complaint must contain sufficient allegations of fact to state a claim for relief that is not merely conceivable, but is also "plausible on its face." *Id.* at 570. As the Tenth Circuit explained in *Ridge at Red Hawk, L.L.C. v. Schneider*, "the mere metaphysical possibility that **some** plaintiff could prove **some** set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that **this** plaintiff has a reasonable likelihood of mustering factual support for **these** claims." 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original). It is the plaintiff's burden to frame a complaint with enough factual matter – taken as true – to suggest that he or she is entitled to relief. *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). Ultimately, the Court has a duty to determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed. *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007). "[F]actual allegations that contradict . . . a properly considered document are not well-pleaded facts that the court must accept as true." *GFF*

Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1385 (10th Cir. 1997); *see also Rapoport v. Asia Electronics Holding Co.*, Inc., 88 F. Supp. 2d 179, 184 (S.D.N.Y.2000) ("If [the] documents contradict the allegations of the . . . complaint, the documents control and [the] court need not accept as true the allegations in the . . . complaint.")

Generally, a court considers only the contents of the complaint when ruling on a Rule 12(b)(6) motion. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Nevertheless, a court may consider materials in addition to the pleadings in certain circumstances. For example, it may consider documents attached to the complaint, or documents referred to in and central to the complaint, when no party disputes their authenticity. *Id.* The Court may also consider "matters of which a court may take judicial notice." *Id.* (*quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). In particular, if a plaintiff does not incorporate by reference or attach a document to his or her complaint, a defendant may submit an undisputably authentic copy which may be considered in ruling on a motion to dismiss. *GFF Corp.*, 130 F.3d at 1384; *see also Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1253–54 (10th Cir. 2005) (noting that a document which is "central to the plaintiff's claim and referred to in the complaint may be considered in resolving a motion to dismiss, at least where the document's authenticity is not in dispute."). The Court may take judicial notice of a fact which is not subject to reasonable dispute, a requirement that is satisfied if the fact is "capable of accurate and ready determination by resort to sources whose accuracy

cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

Defendants offered ten exhibits in support of their Motion to Dismiss and three in support of their Reply. Plaintiffs appended no exhibits either to their Complaint or to their Response to Defendants' Motion to Dismiss. In their Response, Plaintiffs do not dispute the authenticity of any of these exhibits in and of themselves, but rather, disagree with the Defendants about the legal conclusions that can be drawn from these exhibits; they allege, for example, that "there is a conflict in claimed ownership of the [N]ote," but do not allege the Note itself is fraudulent or inauthentic in any way. (Doc. # 18 at 4.) Accordingly, this Court may consider the public records attached as exhibits to Defendants' Motion, including the documents filed in Archuleta County case number 2012-cv-000143, without converting the pending Motion to Dismiss into a motion for summary judgment. *See Pacheco*, 627 F.3d at 1186; *GFF Corp.*, 130 F.3d at 1384.

III. DISCUSSION

Colorado foreclosure law allows a holder of evidence of a debt to foreclose upon breach of the terms of the deed of trust. Under Colorado law, a promissory note is a negotiable instrument that is freely assignable, Colo. Rev. Stat. § 4-3-104,[6] and if an instrument is payable to the bearer, it may be negotiated to a holder by transfer

[6] Indeed, the Note itself specifically provides that "I understand that the Lender may transfer this note. The Lender or anyone who takes this note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" (Doc. # 17-10 at 1.)

of possession alone, Colo. Rev. Stat. § 4-3-201. The term "holder" also includes a "person in possession of a negotiable instrument evidencing a debt, which has been duly negotiated to such person or to bearer or indorsed in blank." *Id.* § 38–38–100.3(10)(c).

The Note was executed on Plaintiff's behalf payable to the original lender, GreenPoint Mortgage Funding, Inc. (Doc. # 17-10.) The Note is endorsed in blank, and Defendants have possession of the note. (*See id.; see also* Doc. # 17-6 at 21.) Accordingly, the Defendants are the holder of the Note.

In order to properly foreclose on a property, the holder of an evidence of debt must file:

> The original evidence of debt . . . together with the original indorsement or assignment thereof, if any, to the holder . . . or, in lieu of the original evidence of debt . . . 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.

§ 38-38-101(1)(b), (1)(b)(II). Here, U.S. Bank, the prior holder of the Note, fulfilled this requirement by filing a Verified Motion for Order Authorizing Sale, which included a "Statement by Attorney for Qualified Holder" indicating that U.S. Bank was a qualified holder of the Note pursuant to 38-38-100.3(20)(j). (Doc. ## 17-2, 17-9.) Accordingly, upon U.S. Bank's subsequent assignment of the note to Citibank, and the Rule 120 court's approval of the Motion to Substitute

Petitioner, Citibank stood in the shoes of U.S. Bank – as a matter of law – and had standing to enforce the Note.

Plaintiffs' primary argument in opposition to the instant motion is that Defendants have not shown precisely **how** they came to be the holders of the Note, as the Note was transferred through multiple loan servicer entities. *See* (Doc. # 18 at 5.) (referencing alleged conflicts of ownership of the Note due to "the alleged transfers of the loan from the original lender to Wachovia, then from Wachovia to the Countywide entity, from that entity to the non-existent Deutsche Wachonia Bank, and then to [U.S. Bank]."). Nevertheless, the Plaintiffs present no allegation that **another party** (other than Citibank) is actually the holder of the Note; rather, their argument is that it is impossible to tell which party is the actual holder of the Note. As discussed above, however, this argument misses the mark: a plain reading of the documents show that Defendants are the holders of the Note, by virtue of their possession of the Note and its blank indorsement. Under Colorado law, a party need not prove how it was in possession of a promissory note to enforce it, and can establish standing to foreclose simply by complying with the requirements of Colo. Rev. Stat 38-38-101(1)(b)(II) – just as Defendants have done here. *Mbaku v. Bank of Am.*, No. 12-CV-00190-PAB-KLM, 2014 WL 4099313, at *7 (D. Colo. Aug. 20, 2014) (noting that, under Colorado law, "physical possession of a promissory note endorsed in blank is itself sufficient to establish a right to enforcement") (citing *In re Miller*, 666 F.3d 1255, 1263 (10th Cir. 2012)).

In sum, because Defendants have shown that they have standing to foreclose on the Property,[7] Plaintiffs' claim to declaratory relief fails as a matter of law. Because the viability of their second claim for quiet title is inextricably linked with that of their declaratory relief claim, the quiet title claim also fails as a matter of law Additionally, an amendment to the complaint would be futile and the Court dismisses this action with prejudice. *See Grossman v. Novell, Inc.*, 120 F.3d 1112, 1126 (10th Cir. 1997) (A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile).

IV. CONCLUSION

Having carefully reviewed the Complaint, the arguments advanced by the parties, and permissible evidence, the Court concludes the Plaintiffs fail to state a claim upon which relief may be granted, and the Clerk of the Court shall enter judgment in favor of Defendant and against Plaintiff. Pursuant to D.C. Colo. L Civ. R. 54.1, Defendant may thereafter have its costs by filing a bill of costs within 14 days of the date of that order. Accordingly, it is

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[7] Citing *Plymouth Capital Co.., Inc. v. District Court of Elbert County*, 955 P.2d 1014, 1017 (Colo. 1998), the Plaintiffs argue that the Rule 120 court's finding that Citibank had standing to enforce the Note is not binding upon this Court. This Court need not decide this issue, however; its own careful, independent review of the court filings in that case, the facts alleged in the Complaint, and Colorado foreclosure law, led it to the same conclusion as the Archuleta district court.

ORDERED that Defendants' Motion to Dismiss (Doc. # 17) is GRANTED. It is

FURTHER ORDERED that Plaintiffs' claims are DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that this case is dismissed in its entirety.

DATED: October 14, 2014

BY THE COURT:

/s/ Christine M. Arguello
CHRISTINE M. ARGUELLO
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-00784-CMA-BNB

[Filed October 15, 2014]

VIVIAN L. RADER, and STEVEN R. RADER,
Plaintiffs,

v.

CITIBANK, N.A. as Successor Trustee to U.S. Bank National Association, as Successor to Wachovia Bank National Association as Trustee for the Certificate Holders of Mastr Alternative Loan Trust 2004-1 Mortgage Pass Through Certificates Series 2004-1, MORTGAGE REGISTRATION SYSTEMS, INC., UBS WARBURG REAL ESTATE SECURITIES, INC., OCWEN LOAN SERVICING LLC, and DOES 1-10,
Defendants.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order Granting Defendants' Motion to Dismiss of Judge Christine M. Arguello entered on October 14, 2014 it is

ORDERED that Defendants' Motion to Dismiss (Doc. No. 17) is GRANTED. It is

FURTHER ORDERED that Plaintiffs' claims are DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that this case is dismissed in its entirety. It is

FURTHER ORDERED that final judgment is hereby entered in favor of Defendant and against Plaintiff. It is

FURTHER ORDERED Pursuant to D.C. Colo. L Civ. R. 54.1, Defendant may thereafter have its costs by filing a bill of costs within 14 days of the date of that order.

Dated at Denver, Colorado this 15th day of October, 2014.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ A. Thomas
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 18-1208

[Filed April 15, 2019]

VIVIAN L. RADER, et al., Plaintiffs - Appellants,	)
v.	)
CITIBANK, N.A., as Successor Trustee to U.S. Bank National Association as Successor to Wachovia Bank National Association as Trustee for the Certificate holders of Mastr Alternative Loan Trust 2004-1 Mortgage Pass through Certificates Series 2004-1, et al., Defendants - Appellees.	)

ORDER

Before **BRISCOE**, **BACHARACH**, and **MORITZ**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge

in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX G

U.S. Const. Amend. XIV, Sec. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

Colorado Rev. Stat. § 38-38-101

Colorado Revised Statutes Title 38 Property Real and Personal § 38-38-101 Holder of evidence of debt may elect to foreclose

(1) **Documents required.** 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:

(a) A notice of election and demand signed and acknowledged by the holder of the evidence of debt or signed by the attorney for the holder;

(b) The original evidence of debt, including any modifications to the original evidence of debt, together with the original indorsement or assignment thereof, if any, to the holder of the evidence of debt or other proper indorsement or assignment in accordance with subsection (6) of this section or, in lieu of the original evidence of debt, one of the following:

(I) A corporate surety bond in the amount of one and one-half times the face amount of the original evidence of debt;

(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 and that the use of the copy is subject to the conditions described in paragraph (a) of subsection (2) of this section; or

(III) A certified copy of a monetary judgment entered by a court of competent jurisdiction;

(c) The original recorded deed of trust securing the evidence of debt and any original recorded modifications of the deed of trust or any recorded partial releases of the deed of trust, or in lieu thereof, one of the following:

(I) Certified copies of the recorded deed of trust and any recorded modifications of the deed of trust or recorded partial releases of the deed of trust; or

(II) Copies of the recorded deed of trust and any recorded modifications of the deed of trust or recorded partial releases of the deed of trust and a certification signed and properly acknowledged by a holder of an evidence of debt acting for itself or as an agent, nominee, or trustee under subsection (2) of this section or a signed

statement 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 copies of the recorded deed of trust and any recorded modifications of the deed of trust or recorded partial releases of the deed of trust are true and correct and that the use of the copies is subject to the conditions described in paragraph (a) of subsection (2) of this section;

(d) A combined notice pursuant to section 38-38-103; except that the combined notice may be omitted with the prior approval of the officer because the officer will supply the combined notice;

(e) A mailing list:

(f) Any affidavit recorded pursuant to section 38-35-109(5) affecting the deed of trust described in paragraph (c) of this subsection (1), which affidavit shall be accepted by the public trustee as modifying the deed of trust for all purposes under this article only if the affidavit is filed with the public trustee at the same time as the other documents required under this subsection (1);

(f.5) If there is a loan servicer of the evidence of debt described in the notice of election and demand and the loan servicer is not the holder, a statement executed by the holder of the evidence of debt or the attorney for such holder, identifying, to the best of such person's knowledge, the name of the loan servicer;

(g) A statement executed by the holder of an evidence of debt, or the attorney for such holder, identifying, to the best knowledge of the person executing such statement, the name and address of the current owner of the property described in the notice of election and demand; and

(h) Repealed by Laws 2016, Ch. 210, § 102, eff. June 6, 2016.

(2) **Foreclosure by qualified holder without original evidence of debt, original or certified copy of deed of trust, or proper indorsement.**

(a) A qualified holder, whether acting for itself or as agent, nominee, or trustee under section 38-38-100.3(20), that elects to foreclose without the original evidence of debt pursuant to subparagraph (II) of paragraph (b) of subsection (1) of this section, or without the original recorded deed of trust or a certified copy thereof pursuant to subparagraph (II) of paragraph (c) of subsection (1) of this section, or without the proper indorsement or assignment of an evidence of debt under paragraph (b) of subsection (1) of this section shall, by operation of law, be deemed to have agreed to indemnify and defend any person liable for repayment of any portion of the original evidence of debt in the event that the original evidence of debt is presented for payment to the extent of any amount, other than the amount of a deficiency remaining under the evidence of debt after deducting the amount bid at sale, and any person who sustains a loss due to any title defect that results from reliance upon a sale at which the original evidence of debt was not presented. The

indemnity granted by this subsection (2) shall be limited to actual economic loss suffered together with any court costs and reasonable attorney fees and costs incurred in defending a claim brought as a direct and proximate cause of the failure to produce the original evidence of debt, but such indemnity shall not include, and no claimant shall be entitled to, any special, incidental, consequential, reliance, expectation, or punitive damages of any kind. A qualified holder acting as agent, nominee, or trustee shall be liable for the indemnity pursuant to this subsection (2).

(b) In the event that a qualified holder or the attorney for the holder commences a foreclosure without production of the original evidence of debt, proper indorsement or assignment, or the original recorded deed of trust or a certified copy thereof, the qualified holder or the attorney for the holder may submit the original evidence of debt, proper indorsement or assignment, or the original recorded deed of trust or a certified copy thereof to the officer prior to the sale. In such event, the sale shall be conducted and administered as if the original evidence of debt, proper indorsement or assignment, or the original recorded deed of trust or a certified copy thereof had been submitted at the time of commencement of such proceeding, and any indemnities deemed to have been given by the qualified holder under paragraph (a) of this subsection (2) shall be null and void as to the instrument produced under this paragraph (b).

(c) In the event that a foreclosure is conducted where the original evidence of debt, proper indorsement or assignment, or original recorded deed of trust or certified copy thereof has not been produced, the only claims shall be against the indemnitor as provided in paragraph (a) of this subsection (2) and not against the foreclosed property or the attorney for the holder of the evidence of debt. Nothing in this section shall preclude a person liable for repayment of the evidence of debt from pursuing remedies allowed by law.

(3) **Foreclosure on a portion of property.** A holder of an evidence of debt may elect to foreclose a deed of trust under this article against a portion of the property encumbered by the deed of trust only if such portion is encumbered as a separate and distinct parcel or lot by the original or an amended deed of trust. Any foreclosure conducted by a public trustee against less than all of the property then encumbered by the deed of trust shall not affect the lien or the power of sale contained therein as to the remaining property. The amount bid at a sale of less than all of the property shall be deemed to have satisfied the secured indebtedness to the extent of the amount of the bid.

(4) **Notice of election and demand.** A notice of election and demand filed with the public trustee pursuant to this section shall contain the following:

(a) The names of the original grantors of the deed of trust being foreclosed and the original beneficiaries or grantees thereof;

(b) The name of the holder of the evidence of debt;

(c) The date of the deed of trust being foreclosed;

(d) The recording date, county, book, and page or reception number of the recording of the deed of trust being foreclosed;

(e) The amount of the original principal balance of the secured indebtedness;

(f) The amount of the outstanding principal balance of the secured indebtedness as of the date of the notice of election and demand;

(g) A legal description of the property to be foreclosed as set forth in the documents to be provided to the public trustee pursuant to paragraph (c) of subsection (1) of this section;

(h) A statement of whether the property described in the notice of election and demand is all or only a portion of the property then encumbered by the deed of trust being foreclosed;

(i) A statement of the violation of the covenant of the evidence of debt or deed of trust being foreclosed upon which the foreclosure is based, which statement shall not constitute a waiver of any right accruing on account of any violation of any covenant of the evidence of debt or deed of trust other than the violation specified in the notice of election and demand;

(j) The name, address, business telephone number, and bar registration number of the attorney for the holder of the evidence of debt, which may be

indicated in the signature block of the notice of election and demand; and

(k) A description of any changes to the deed of trust described in the notice of election and demand that are based on an affidavit filed with the public trustee under paragraph (f) of subsection (1) of this section, together with the recording date and reception number or book and page number of the recording of that affidavit in the records.

(5) **Error in notice.** In the event that the amount of the outstanding principal balance due and owing upon the secured indebtedness is erroneously set forth in the notice of election and demand or the combined notice, the error shall not affect the validity of the notice of election and demand, the combined notice, the publication, the sale, the certificate of purchase described in section 38-38-401, or any other document executed in connection therewith.

(6) **Indorsement or assignment.**

(a) Proper indorsement or assignment of an evidence of debt shall include the original indorsement or assignment or a certified copy of an indorsement or assignment recorded in the county where the property being foreclosed is located.

(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.

(7) **Multiple instruments.** If the evidence of debt consists of multiple instruments, such as notes or bonds, the holder of the evidence of debt may elect to foreclose with respect to fewer than all of such instruments or documents by identifying in the notice of election and demand and the combined notice only those to be satisfied in whole or in part, in which case the requirements of this section shall apply only as to those instruments or documents.

(8) Assignment or transfer of debt during foreclosure. (a) The holder of the evidence of debt may assign or transfer the secured indebtedness at any time during the pendency of a foreclosure action without affecting the validity of the secured indebtedness. Upon receipt of written notice signed by the holder who commenced the foreclosure action or the attorney for the holder stating that the evidence of debt has been assigned and transferred and identifying the assignee or transferee, the public trustee shall complete the foreclosure as directed by the assignee or transferee or the attorney for the assignee or transferee. No holder of an evidence of debt, certificate of purchase, or certificate of redemption shall be liable to any third party for the acts or omissions of any assignee or transferee that occur after the date of the assignment or transfer.

(b) The assignment or transfer of the secured indebtedness during the pendency of a foreclosure shall be deemed made without recourse unless otherwise agreed in a written statement signed by the assignor or transferor. The holder of the evidence of debt, certificate of purchase, or certificate of redemption making the assignment or transfer and the attorney for the holder shall have no duty, obligation, or liability to the assignee or transferee or to any third party for any act or omission with respect to the foreclosure or the loan servicing of the secured indebtedness after the assignment or transfer. If an assignment or transfer is made by a qualified holder that commenced the foreclosure pursuant to subsection (2) of this section, the qualified holder's indemnity under said subsection (2) shall remain in effect with respect to all parties except to the assignee or transferee, unless otherwise agreed in a writing signed by the assignee or transferee if the assignee or transferee is a qualified holder.

(c) If an assignment or transfer is made to a holder of an evidence of debt other than a qualified holder, the holder must file with the officer the original evidence of debt and the original recorded deed of trust or, in lieu thereof, the documents required in paragraphs (b) and (c) of subsection (1) of this section. An assignee or transferee shall be presumed to not be a qualified holder, and as such, shall be subject to the provisions of this paragraph (c), unless a signed statement by the attorney for such assignee or transferee that cites the paragraph of section 38-38-100.3(20) under which the assignee

or transferee claims to be a qualified holder is filed with the officer.

(9) **Partial release from deed of trust.** At any time after the recording of the notice of election and demand but prior to the sale, a portion of the property may be released from the deed of trust being foreclosed pursuant to section 38-39-102 or as otherwise provided by order of a court of competent jurisdiction recorded in the county where the property being released is located. Upon recording of the release or court order, the holder of the evidence of debt or the attorney for the holder shall pay the fee described in section 38-37-104(1)(b)(IX), amend the combined notice, and, in the case of a public trustee foreclosure, amend the notice of election and demand to describe the property that continues to be secured by the deed of trust or other lien being foreclosed as of the effective date of the release or court order. The public trustee shall record the amended notice of election and demand upon receipt. Upon receipt of the amended combined notice, the public trustee shall republish and mail the amended combined notice in the manner set forth in section 38-38-109(1)(b).

(10) **Deposit.** (a) The public trustee may require the holder or servicer to make a deposit of up to six hundred fifty dollars or the amount of the fee permitted pursuant to section 38-37-104(1)(b)(I), whichever is greater, at the time the notice of election and demand is filed, to be applied against the fees and costs of the public trustee.

(b) The public trustee may allow the attorney for the holder or servicer or the holder or servicer, if

not represented by an attorney, to establish with the public trustee one or more accounts, from which the public trustee may pay the fees and costs of the public trustee in any foreclosure filed by the holder or the attorney for the holder and through which the public trustee may transmit refunds or cures, overbids, or redemption proceeds.

APPENDIX I

Colorado Rule 120 (with changes tracked between 2016 and the 2018 amendment)

Rule 120. Orders Authorizing Foreclosure Sales Under Powers in a Deed of Trust to the Public Trustee

(a) Motion for Order Authorizing Sale; ~~Contents~~. When~~ever~~ an order of court is desired authorizing a foreclosure sale under a power of sale contained in ~~an instrument~~ a deed of trust to a public trustee, any ~~interested~~ person entitled to enforce the deed of trust ~~or someone on such person's behalf~~ may file a verified motion in a district court seeking such order. The motion shall be captioned: "Verified Motion for Order Authorizing a Foreclosure Sale under C.R.C.P. 120," and shall be verified by a person with ~~direct~~ knowledge of the contents of the motion who is competent to testify regarding the facts stated in the motion.

(1) Contents of Motion. The motion shall include a copy of the evidence of debt, the deed of trust containing the power of sale, and any subsequent modifications of these documents. The motion ~~accompanied by a copy of the instrument containing the power of sale,~~ shall describe the property to be sold~~, and~~ shall specify the ~~default or other~~ facts giving rise to the default, and may include documents relevant to the claim of a default ~~claimed by the moving party to justify invocation of the power of sale~~.

(A) When the property to be sold is personal property, the motion shall state the names and last known addresses, as shown by the records of the moving party, of all persons known or believed by the moving party to have an interest in such property which may be materially affected or extinguished by such sale.

(B) When the property to be sold is real property and the power of sale is contained in a deed of trust to a public trustee, the motion shall state the name and last known address, as shown by the real property records of the clerk and recorder of the county where the property or any portion thereof is located and the records of the moving party, of:

(i) the grantor of ~~such~~ the deed of trust;~~,~~

(ii) ~~of~~ the current record owner of the property to be sold;~~,~~ ~~and of~~

(iii) all~~ny~~ persons known or believed by the moving party to be personally liable ~~upon the indebtedness~~ for the debt secured by the deed of trust;~~, and~~

(iv) ~~as well as the names and addresses of~~ those persons who appear to have an ~~acquired a record~~ interest in such real property that is evidenced by a document recorded after~~, subsequent to~~ the recording of the ~~such~~ deed of trust and before ~~prior to~~ the recording of the notice of election and demand for sale~~, or that is otherwise subordinate to the lien of the deed of trust~~

~~whether by deed, mortgage, judgment or any other instrument of record.~~; and

(v) those persons whose interest in the real property may otherwise be affected by the foreclosure.

(C) In describing and giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address ~~which~~ that is given in the recorded instrument evidencing such person's interest.~~, except that i~~If such recorded instrument does not give an address or if only the county and state are given as the address of such person, no address need be stated for such person in the motion.

(2) Setting of Response Deadline; Hearing Date. On receipt of the motion, t~~T~~he clerk shall set a deadline by which any response to the motion must be filed. The deadline shall be ~~fix a time~~ not less than 21 nor more than 35 days after the filing of the motion ~~and a place for the hearing of such motion~~. For purposes of any statutory reference to the date of a hearing under C.R.C.P. 120, the response deadline set by the clerk shall be regarded as the scheduled hearing date unless a later hearing date is set by the court pursuant to section (c)(2) below.

(b) Notice of Response Deadline; ~~Contents;~~ Service of Notice. The moving party shall issue a notice stating:

(1) a description~~bing~~ of the deed of trust~~the instrument~~ containing the power of sale, the property sought to be sold~~ thereunder~~ at foreclosure, and the ~~default or other~~ facts asserted in the motion to support the claim of a default;

(2) ~~upon which the power of sale is invoked. The notice shall also state the time and place set for the hearing and shall refer to~~ the right of any interested person to file and serve a response~~s~~ as provided in section (c), including ~~a reference to the last day for filing such responses and~~ the addresses at which such response~~s~~ must be filed and served and the deadline set by the clerk for filing a response;~~.~~

(3) ~~The notice shall contain~~ the following advisement: "If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed~~Your request may be made as a part of your response or any paper you file~~ with the court at least 7 days before the date of the hearing unless the request was included in your response."; and

(4) ~~The notice shall contain~~ the mailing ~~return~~ address of the moving party and, if different, the name and address of any authorized servicer for the loan secured by the deed of trust. If the moving party or authorized servicer, if different, is not authorized to modify the evidence of the debt, the notice shall state in addition the name, mailing address, and telephone number of ~~the person~~

~~authorized to modify the evidence of debt~~ a representative authorized to address loss mitigation requests. A copy of C.R.C.P. 120 shall be included with or attached to the notice. The ~~Such~~ notice shall be served by the moving party not less than 14 days prior to the response deadline set by the clerk,~~date set for the hearing~~, by:

(A~~1~~) mailing a true copy ~~thereof~~ of the notice to each person named in the motion (other than any person~~s~~ for whom no address is stated) at that~~the~~ person's address or addresses stated in the motion;

(B~~2~~) ~~and by~~ filing a copy with the clerk ~~and by delivering a second copy to the clerk~~ for posting by the clerk in the courthouse in which the motion is pending; and

(C~~3~~) if the property to be sold is a residential property as defined by statute, by posting a true copy of the notice in a conspicuous place on the subject property as required by statute. Proof of ~~Such~~ mailing and delivery of the notice to the clerk for posting in the courthouse, and proof of posting of the notice on the residential property, ~~posting~~ shall be ~~evidenced by~~ set forth in the certificate of the moving party or moving party's agent. For the purpose of this section, posting by the clerk may be electronic on the court's public website so long as the electronic address for the posting is displayed conspicuously at the courthouse.

(c) Response Stating Objection to Motion for Order Authorizing Sale; ~~Contents;~~ Filing and Service.

(1) Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's right ~~entitlement~~ to an order authorizing sale may file and serve a response to the motion.~~, verified by the oath of such person, setting forth t~~The response must describe the facts the respondent relies ~~up~~on in objecting to the issuance of an order authorizing sale, and may include ~~which he relies and attaching~~ copies of ~~all~~ documents which support ~~his~~ the respondent's position. The response shall be filed and served not ~~less~~ later than the response deadline set by the clerk. The response shall include contact information for the respondent including name, mailing address, telephone number, and, if applicable, an e-mail address. ~~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 the ~~such~~ response ~~up~~on 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).~~

(2) If a response is filed stating grounds for opposition to the motion within the scope of this

Rule as provided for in section (d), the court shall set the matter for hearing at a later date. The clerk shall clear available hearing dates with the parties and counsel, if practical, and shall give notice to counsel and any self-represented parties who have appeared in the matter, in accordance with the rules applicable to e-filing, no less than 14 days prior to the new hearing date.

(d) ~~Hearing~~; Scope of Issues at the Hearing; Order Authorizing Foreclosure Sale; Effect of Order. ~~At the time and place set for the hearing or to which the hearing may have been continued,~~ T~~t~~he court shall examine the motion and ~~the responses, if~~ any responses.

(1) If the matter is set for hearing, t~~T~~he scope of inquiry at the ~~such~~ hearing shall not extend beyond

(A) the existence of a default ~~or other circumstances~~ authorizing exercise of a power of sale~~,~~ under the terms of the ~~instrument~~ deed of trust described in the motion;~~,~~

(B) consideration by the court of the requirements of~~exercise of a power of sale contained therein, and such other issues required by~~ the Service~~members~~ ~~Member~~ Civil Relief Act ~~(SCRA)~~, 50 U.S.C. § 3931 ~~520~~, as amended;~~.~~

(C) whether the moving party is the real party in interest; and

(D) whether the status of any request for a loan modification agreement bars a foreclosure sale as a matter of law.

The court shall determine whether there is a reasonable probability that a ~~such~~ default justifying the sale ~~or other circumstance~~ has occurred, ~~and~~ whether an order authorizing sale is otherwise proper under the Servicemembers ~~said Service Member~~ Civil Relief Act, whether the moving party is the real party in interest, and, if each of those matters is determined in favor of the moving party, whether evidence presented in support of defenses raised by the respondent and within the scope of this Rule prevents the court from finding that there is a reasonable probability that the moving party is entitled to an order authorizing a foreclosure sale. The court shall ~~summarily~~ grant or deny the motion in accordance with such determination. For good cause shown, the court may continue a hearing.

(2) If no response has been filed by the response deadline set by the clerk, and if the court is satisfied that venue is proper and the moving party is entitled to an order authorizing sale, the court shall forthwith enter an order authorizing sale.

(3) Any order authorizing sale shall recite the date the hearing was completed, if a hearing was held, or, if no response was filed and no hearing was held, shall recite the response deadline set by the clerk as the date a hearing was scheduled, but that no hearing occurred.

(4)~~Neither the granting nor the denial of a motion~~ An order granting or denying a motion filed under this Rule shall not constitute an appealable order or final judgment. The granting of ~~any such~~ a motion authorizing a foreclosure 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 other right or remedy of the moving party.

(e) 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.

~~(e) Hearing Dispensed with if no Response Filed. If no response has been filed within the time permitted by section (c), the court shall examine the motion and, if satisfied that venue is proper and the moving party is entitled to an order authorizing sale upon the facts stated therein, the court shall dispense with the hearing and forthwith enter an order authorizing sale.~~

(f) Venue. For the purposes of this section, a consumer obligation is any obligation

(1) ~~**i)**~~ as to which the obligor is a natural person, and

(2) ~~**ii)**~~ is incurred primarily for a personal, family, or household purpose.

Any proceeding under this Rule involving a consumer obligation shall be brought in and heard in the county

in which such consumer signed the obligation or in which the property or a substantial part of the property ~~thereof~~ is located. Any proceeding under this Rule ~~which~~ that does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is timely filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

(g) Return of Sale. The court shall require a return of ~~such~~ sale to be made to the court.~~, and i~~If it appears ~~there~~from the return that ~~such~~ the sale was conducted in conformity with the order authorizing the sale, the court shall ~~thereupon~~ enter an order approving the sale. This order is not appealable and shall not have preclusive effect in any other action or proceeding~~shall not have preclusive effect on the parties in any action for a deficiency judgment or in a civil action challenging the right of the moving party to foreclosure or seeking to set aside the foreclosure sale~~.

(h) Docket Fee. A docket fee in the amount specified by law shall be paid by the person filing the~~such~~ motion. Unless the court shall otherwise order, any person filing a response to the motion shall pay, at the time of the filing of such response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1)(d), C.R.S.

~~COMMITTEE~~ COMMENTS

1989

[1] The 1989 amendment to C.R.C.P. 120 (Sales Under Powers) is a composite of changes necessary to update the Rule and make it more workable. The amendment was developed by a special committee made up of practitioners and judges having expertise in that area of practice, with both creditor and debtor interests represented.

[2] The changes are in three categories. There are changes that permit court clerks to perform many of the tasks that were previously required to be accomplished by the Court and thus save valuable Court time. There are changes to venue provisions of the Rule for compliance with the Federal Fair Debt Collection Practices Act. There are also a number of editorial changes to improve the language of the Rule.

[3] There was considerable debate concerning whether the Federal "Fair Debt Collection Practices Act" is applicable to a C.R.C.P. 120 proceeding. Rather than attempting to mandate compliance with that federal statute by specific rule provision, the Committee recommends that a person acting as a debt collector in a matter covered by the provisions of the Federal "Fair Debt Collection Practices Act" be aware of the potential applicability of the Act and comply with it, notwithstanding any provision of this Rule.

Rule 120. Orders Authorizing Foreclosure Sale Under Power in a Deed of Trust to the Public Trustee

(a) Motion for Order Authorizing Sale. When an order of court is desired authorizing a foreclosure sale under a power of sale contained in a deed of trust to a public trustee, any person entitled to enforce the deed of trust may file a verified motion in a district court seeking such order. The motion shall be captioned: "Verified Motion for Order Authorizing a Foreclosure Sale under C.R.C.P. 120," and shall be verified by a person with knowledge of the contents of the motion who is competent to testify regarding the facts stated in the motion.

(1) Contents of Motion. The motion shall include a copy of the evidence of debt, the deed of trust containing the power of sale, and any subsequent modifications of these documents. The motion shall describe the property to be sold, shall specify the facts giving rise to the default, and may include documents relevant to the claim of a default.

(A) When the property to be sold is personal property, the motion shall state the names and last known addresses, as shown by the records of the moving party, of all persons known or believed by the moving party to have an interest in such property which may be materially affected or extinguished by such sale.

(B) When the prope1iy to be sold is real property and the power of sale is contained in a deed of trust to a public trustee, the motion shall state

the name and last known address, as shown by the real property records of the clerk and recorder of the county where the property or any portion thereof is located and the records of the moving party, of:

(i) the grantor of the deed of trust;

(ii) the current record owner of the property to be sold;

(iii) all persons known or believed by the moving party to be personally liable for the debt secured by the deed of trust;

(iv) those persons who appear to have an interest in such real property that is evidenced by a document recorded after the recording of the deed of trust and before the recording of the notice of election and demand for sale; and

(v) those persons whose interest in the real property may otherwise be affected by the foreclosure.

(C) In describing and giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address that is given in the recorded instrument evidencing such person's interest. If such recorded instrument does not give an address or if only the county and state are given as the address of such person, no address need be stated for such person in the motion.

(2) Setting of Response Deadline; Hearing Date. On receipt of the motion, the clerk shall set a deadline by which any response to the motion must be filed. The deadline shall be not less than 21 nor more than 35 days after the filing of the motion. For purposes of any statutory reference to the date of a hearing under C.R.C.P. 120, the response deadline set by the clerk shall be regarded as the scheduled hearing date unless a later hearing date is set by the court pursuant to section (c)(2) below.

(b) Notice of Response Deadline; Service of Notice. The moving party shall issue a notice stating:

(1) a description of the deed of trust containing the power of sale, the property sought to be sold at foreclosure, and the facts asserted in the motion to support the claim of a default;

(2) the right of any interested person to file and serve a response as provided in section (c), including the addresses at which such response must be filed and served and the deadline set by the clerk for filing a response;

(3) the following advisement: "If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed with the court at least 7 days before the date of the hearing unless the request was included in your response."; and

(4) the mailing address of the moving party and, if different, the name and address of any authorized servicer for the loan secured by the deed of trust. If the moving party or authorized servicer, if different, is not authorized to modify the evidence of the debt, the notice shall state in addition the name, mailing address, and telephone number of a representative authorized to address loss mitigation requests. A copy of C.R.C.P. 120 shall be included with or attached to the notice. The notice shall be served by the moving party not less than 14 days prior to the response deadline set by the clerk, by:

(A) mailing a true copy of the notice to each person named in the motion (other than any person for whom no address is stated) at that person's address or addresses stated in the motion;

(B) filing a copy with the clerk for posting by the clerk in the courthouse in which the motion is pending; and

(C) if the property to be sold is a residential property as defined by statute, by posting a true copy of the notice in a conspicuous place on the subject property as required by statute. Proof of mailing and delivery of the notice to the clerk for posting in the courthouse, and proof of posting of the notice on the residential property, shall be set forth in the certificate of the moving party or moving party's agent. For the purpose of this section, posting by the clerk may be electronic on the court's public website so long as the

electronic address for the posting is displayed conspicuously at the courthouse.

(c) Response Stating Objection to Motion for Order Authorizing Sale; Filing and Service.

(1) Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's right to an order authorizing sale may file and serve a response to the motion. The response must describe the facts the respondent relies on in objecting to the issuance of an order authorizing sale, and may include copies of documents which support the respondent's position. The response shall be filed and served not later than the response deadline set by the clerk. The response shall include contact information for the respondent including name, mailing address, telephone number, and, if applicable, an e-mail address. Service of the response on the moving party shall be made in accordance with C.R.C.P. 5(b).

(2) If a response is filed stating grounds for opposition to the motion within the scope of this Rule as provided for in section (d), the court shall set the matter for hearing at a later date. The clerk shall clear available hearing dates with the parties and counsel, if practical, and shall give notice to counsel and any self-represented parties who have appeared in the matter, in accordance with the rules applicable to e-filing, no less than 14 days prior to the new hearing date.

(d) Scope of Issues at the Hearing; Order Authorizing Foreclosure Sale; Effect of Order. The court shall examine the motion and any responses.

(1) If the matter is set for hearing, the scope of inquiry at the hearing shall not extend beyond

(A) the existence of a default authorizing exercise of a power of sale under the terms of the deed of trust described in the motion;

(B) consideration by the court of the requirements of the Servicemembers Civil Relief Act, 50 U.S.C. § 3931, as amended;

(C) whether the moving party is the real party in interest; and

(D) whether the status of any request for a loan modification agreement bars a foreclosure sale as a matter of law.

The court shall determine whether there is a reasonable probability that a default justifying the sale has occurred, whether an order authorizing sale is otherwise proper under the Servicemembers Civil Relief Act, whether the moving party is the real party in interest, and, if each of those matters is determined in favor of the moving party, whether evidence presented in support of defenses raised by the respondent and within the scope of this Rule prevents the court from finding that there is a reasonable probability that the moving party is entitled to an order authorizing a foreclosure sale. The court shall grant or deny the motion in

accordance with such determination. For good cause shown, the court may continue a hearing.

(2) If no response has been filed by the response deadline set by the clerk, and if the court is satisfied that venue is proper and the moving party is entitled to an order authorizing sale, the court shall forthwith enter an order authorizing sale.

(3) Any order authorizing sale shall recite the date the hearing was completed, if a hearing was held, or, if no response was filed and no hearing was held, shall recite the response deadline set by the clerk as the date a hearing was scheduled, but that no hearing occurred.

(4) An order granting or denying a motion filed under this Rule shall not constitute an appealable order or final judgment. The granting of a motion authorizing a foreclosure 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 other right or remedy of the moving party.

(e) 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.

(f) Venue. For the purposes of this section, a consumer obligation is any obligation

(1) as to which the obligor is a natural person, and

(2) is incurred primarily for a personal, family, or household purpose.

Any proceeding under this Rule involving a consumer obligation shall be brought in and heard in the county in which such consumer signed the obligation or in which the property or a substantial part of the property is located. Any proceeding under this Rule that does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is timely filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

(g) Return of Sale. The court shall require a return of sale to be made to the court. If it appears from the return that the sale was conducted in conformity with the order authorizing the sale, the court shall enter an order approving the sale. This order is not appealable and shall not have preclusive effect in any other action or proceeding.

(h) Docket Fee. A docket fee in the amount specified by law shall be paid by the person filing the motion. Unless the court shall otherwise order, any person filing a response to the motion shall pay, at the time of the filing of such response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1)(d), C.R.S.

COMMENTS

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[3] There was considerable debate concerning whether the Federal "Fair Debt Collection Practices Act" is applicable to a C.R.C.P. 120 proceeding. Rather than attempting to mandate compliance with that federal statute by specific rule provision, the Committee recommends that a person acting as a debt collector in a matter covered by the provisions of the Federal "Fair Debt Collection Practices Act" be aware of the potential applicability of the Act and comply with it, notwithstanding any provision of this Rule.

Amended and Adopted by the Court, En Banc, December 7, 2017, effective as stated.

By the Court:

Richard L. Gabriel
Justice, Colorado Supreme Court

APPENDIX J

17th Judicial District

IMPORTANT CONSIDERATIONS BEFORE FILING A RESPONSE TOA RULE 120 ACTION

There are only two defenses to a Rule 120 action:

1) The money is not due, or

2) the action is barred under the Service Member Civil Relief Act

Timeline for filing a Response:

The Response must be filed with the court and served on the Petitioner at least five days prior to the date set for the Rule 120 hearing.

Response fee: $158.00

If you attempt to file a Response less than five days prior to the hearing, the clerks are not permitted to accept your Response.

PLEASE READ THE ATTACHED PAGES FOR MORE SPECIFIC INFORMATION.

PLEASE NOTE: By law, the Court is not permitted to give you legal advice. This handout is intended to provide clarification and guidance to *pro se* litigants. If you require additional information, please contact an attorney.

17th Judicial District

Colorado Rule of Civil Procedure 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 five days prior to the date set for the hearing** . . . .

(e) **Hearing Dispensed with if no Response Filed.** If **no response** has been **filed within the time permitted** by section (c), the court shall examine the motion and, if satisfied that venue is proper and the moving party is entitled to an order authorizing sale upon the facts stated therein, the **court shall dispense with the hearing and forthwith enter an order authorizing sale.**

If you are scheduled to appear in court today and you wish to file a Response today, please proceed upstairs to courtroom 507.

If you are here to file your Response five or more days prior to the date you are scheduled to appear in court, please first consider the following:

1. Please be aware that under Rule 120 the Court's review is very limited. The Court is limited to determining whether there is a reasonable

probability of default and whether the Service Member Civil Relief Act bars this action.

2. The Court can **only** consider a **verified response,** in order to be verified, the response **must be "verified by oath" and notarized.**

3. Are you, or anyone else on the mortgage, currently in the military?

   If yes, you may be protected under the Service Member's Civil Relief Act, and the Court should be notified in a Response.

4. Are you working on a Loan Modification?

   If so, the modifications are generally between you and the bank/mortgage company, and the Court cannot intervene unless the modification is complete and has final approval.

5. Have you filed for bankruptcy?

   If so, consult your bankruptcy attorney, as federal law may bar this proceeding from going forward.

6. If you have filed a verified Response, and the filing fee has been paid or has been waived, you should plan to appear at the date and time set for your hearing in Courtroom 507 unless otherwise notified by the Court.

Resources

Adams County Housing Authority

- 7190 Colorado Blvd. 6th Floor
  Commerce City, CO 80022
- 303-227-2075
  303-227-2098 fax
- http://www.adamscountyhousing.com/content/achahome.aspx
  Housingcounseling@achaco.com
- Counseling Services include Foreclosure Intervention - Mediation assistance, money management and budgeting, negotiating skills, refinancing assistance, and loss mitigation options for all types of mortgages including: FHA, VA, Conventional, and sub-prime. Loss mitigation efforts include: repayment plans, forbearance plans, loan modifications, short-sale options and deed in lieu of foreclosure.

Adams County Public Trustee

- 1000 Judicial Center Drive #200
  Brighton, CO 80601
- 303-835-5700
  303-835-5711 fax
- www.co.adams.co.us
- Intent to Cure

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updated 5/10