21-517

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

MARQUES (Petitioner)

v.

JP MORGAN CHASE, N.A. (Respondent)

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

QUESTIONS

1. Was Chase, a nonparty and nonagent to a residential note, authorized to declare default and foreclose? Alternatively, does a party that is not a secured creditor to a residential debt, nor an agent thereof, have the right to declare a default and foreclose? If yes, does it need permission from the note owner, and should there be clear guidelines as to what constitutes default and substantial proof this event occurred?

2. Could petitioner's secured debt be transferred independent of the note?

3. What is the definition of "secured creditor?" Alternatively, can Chase, a nonparty to petitioner's residential note, be called "secured creditor?"

4. Were petitioner's due process rights under the 14th Amendment infringed on by non-judicial foreclosure, resulting in wrongful deprivation of residential property?

5. Was petitioner denied due process under the 5th Amendment by the District Court, resulting in wrongful deprivation of residential property?

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Basis for Jurisdiction

The 11th Circuit Court of Appeals decided the case on February 20, 2020, and denied timely petition for rehearing on July 14, 2020. Jurisdiction is not currently challenged. The statutory provisions which confer on this Court jurisdiction to review the judgment on writ, are Rule 10 of the Supreme Court, and Amendments 5 and 14 to the U.S. Constitution.

Constitutional & Statutory Provisions

Full texts are detailed in Appendix

1. Amendment 5 of the *U.S. Constitution*
2. Amendment 14 of the *U.S. Constitution*

3. Fed. R. Evidence ("FRE") 301
4. Supreme Court Rule 10

Statement of the Case

The 11th Circuit Court of Appeals affirmed summary judgment and case dismissal of the U.S. District Court for Northern District of Georgia (Atlanta Division), under diversity jurisdiction, finding Chase, as holder of the subject deed, had authority to publish foreclosure notices, and the invasion of privacy *false light* claim was time barred.

Other claims were dismissed without leave to amend, and plea for injunctive relief regarding invasion of privacy violations went unaddressed.

Background

Plaintiff/Appellant ("Petitioner") sought a loan modification from JPMorgan Chase N.A. ("Chase"), who claimed it was her new servicer since 2008 when prior servicer, Washington Mutual ("WaMu"), closed.

She was instead placed into temporary forbearance, and while there was never a payment lapse, began receiving foreclosure threat letters for the first time, and witnessing agents taking pictures of her

home on a regular basis. These acts constitute a practice known as *dual tracking*, now banned under RESPA.[1]

When the forbearance ended, she made modification trial payments in good faith, as the Modification Agreement which was supposed to be presented up front,[2] was unexplainably delayed until all trial payments were made. When she received it four months later, it neglected to specify what "all costs and expenses" she was expected to pay.

After inquiring about the specifics of the undisclosed fees, the modification was denied two weeks later along with a simultaneous intent to foreclose letter. Petitioner was still current, confirmed by Chase's supplied payment records which show no lapse.

The Court didn't address the allegation that Chase's failure to provide fee disclosures was a violation of the *Truth in Lending Act*, and basic contract law mandating a 'meeting of the minds.'[5]

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[1] Real Estate Settlement Procedures Act

[2] The letter regarding trial payments falsely indicated the Modification Agreement was attached.

[5] While maybe outside the scope of this petition, in 2017 the U.S. District Court for the Northern District of Illinois Eastern Division decided at the MTD stage that TILA does not apply to modifications because they are not new extensions of credit requiring new disclosures (*Sultan v. M&T Bank*). However in this case, as the note was not transferred to Chase, and Chase stated it is a "lender" on the modification, petitioner argues she was owed fee disclosures under TILA, since it was essentially a new loan disguised as a modification of a prior loan.

Petitioner challenged Chase's alleged default claim. And argued the alleged predatory modification led directly to wrongful foreclosure notices. And that Chase had no authority to foreclose, as it is not the owner of the note, nor an agent thereof, nor is there confirmation it is the lawful deed owner.

Although Chase stated it is a *lender* on the Modification Agreement, in response to two qualified written requests, it stated the note is owned by a public security, which has never been identified. Therefore, its authority to even modify the loan is unconfirmed.

A few months before Chase presented the Modification Agreement to petitioner, it filed an *Assignment of Security Deed* ("Assignment"), stating WaMu transferred the deed to it in 2008. The timing seemed suspicious, especially since Chase subsequently denied the modification without disclosing the nature and amount of the unspecified fees.

Due to the above-mentioned, the allegedly fraudulent *Assignment*, plus additional injurious acts, petitioner filed suit in April 2016, seeking damages and injunctive relief. In February 2019 the two claims allowed to proceed[6] were dismissed with prejudice.

[6] wrongful attempted foreclosure and invasion of privacy (false light)

The District Court granted summary judgment to Chase, after overruling petitioner's objections to the U.S. Magistrate Judge's Final Report. Petitioner concurrently sought to vacate/alter the final judgment and vacate the order denying leave to amend. Those efforts being denied brought the case to the 11th Circuit.

It dismissed appeal of the final judgment as untimely, although it noted that petitioner "relied on the district court,"[7] and erroneously thought the appeal notice was tolled until disposition of the post-judgment motions. (*Opinion*,Doc132,p.2,fn#1). This error wasn't forgiven, although she requested such due to *excusable neglect* under FRAP 4[8], and also because the District Court had granted an appeal extension.

However, it "allow[ed] the appeal to proceed as to the denial of post-judgment motions." (*Id.*) After reviewing for *abuse of discretion*, it affirmed the ruling and denied timely rehearing.

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[7] The District Court granted extension of post-judgment motions, although Fed.R.Civ.P. 6(b)(2) prohibits it. As requested in the Pet. for Rehearing, the granted appeal extension motion could've potentially allowed the tardy appeal, under *excusable neglect* (FRAP 4).

[8] FRAP 4(a): "The district court may extend the time to file a notice of appeal if: regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause."

Undisputable Facts [9]

1. Chase does not own the subject note. It declared default starting in January 2013, while petitioner was current.

2. Chase has shown no proof of agency with the unidentified note owner.

3. Chase alleges WaMu transferred the subject deed to it (via the FDIC) in September 2008 by an Assignment drafted and filed in June 2013. There is no confirmation WaMu owned the subject deed or note in September 2008.

4. There is no documentation in the Chase-submitted 2008 *Purchase and Assumption Agreement* (hereafter "P&A") indicating the subject deed or note was transferred to Chase.

5. The subject Deed Agreement under stipulation #20 on p.12 indicates the deed travels with the note:

> "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower."

6. The District Court decided Chase holds/owns the subject deed.

[9] To avoid repetition, some of these were not included in, but are part of *Statement of the Case.*

7. The District Court implied Chase didn't need to hold/own the subject note to foreclose, citing a 2013 Georgia Supreme Court decision.

8. Chase scheduled foreclosure sales for November 2014 and January 2020. It sold the property in January 2020, while the appellate court decision was pending.[10]

9. Chase published foreclosure notices stating petitioner owed it a debt and it was therefore foreclosing on the security.

10. The same month it attempted foreclosure in Nov. 2014, Chase failed to verify petitioner owes it a debt under a Fair Debt Collections Practices Act request.

Argument

This Court's supervisory power is sought under Rule 10 of the Supreme Court because the U.S. 11th Circuit sanctioned a District Court ruling, apparently based on a Georgia Supreme Court ruling, which is contradictory to this Court, other state courts and other U.S. appeals courts dealing with the same subject matter. This is further explained under the *Conflicts* section.

[10] Chase didn't comply with state law requirements and this act is allegedly unlawful.

Additionally, the District Court dismissing some claims prematurely and denying the *pro se* petitioner opportunity to amend the complaint, overlooking standard summary judgment protocol, along with harmful procedural irregularities – later condoned or unaddressed by the 11th Circuit – arguably departs from the "accepted and usual course of judicial proceedings" under Rule 10.

Lastly, petitioner contends she was deprived of homestead property by the federal courts and by state nonjudicial foreclosure procedure without proper due process, impinging upon 5th and 14th Amendment rights, arguably requiring settlement by this Court under Rule 10.

Note: The word "deed" (*security deed*) can be interchanged with "mortgage" or "deed of trust" in this document.[11]

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[11] Georgia Code defines mortgage:*"'Mortgage' means a mortgage, deed to secure debt, deed of trust, or other instrument conveying a lien upon or security title to property."* (GA Code § 44-3-221).

These different terms are used depending upon whether a state is "title" or "lien" theory. Georgia is a *title* theory state.
Source: "https://www.prepagent.com/article/lien-theory-vs-title-theory-by-state"

QUESTION 1

Was Chase, a nonparty and nonagent to a residential note, authorized to declare default and foreclose? Alternatively, does a party that is not a secured creditor to a residential debt, nor an agent thereof, have the right to declare a default and foreclose? If yes, does it need permission from the note owner, and should there be clear guidelines as to what constitutes default and substantial proof this event occurred?

Conflicts

This petition doesn't aim to pick a side of the *note deed split* conflict and presumes the respective courts had good reason to come to their decisions. It does attempt to highlight in this case the District Court implied the subject deed and note were separated, which is precluded by the Deed Agreement itself. And that even if the alleged split were lawful, Chase presented no proof of agency with the noteowner, and had no connection to the debt.

The District Court decision that the subject deed could be transferred to Chase independent of the note,[12] affirmed by the 11th Circuit, is "in conflict with the decision of another United States court of appeals on the same important matter" (Rule 10 of this Court).

It is inconsistent with decisions by the U.S. Supreme Court (*Carpenter v. Longan*), New York Supreme Court (*Wells Fargo Bank,*

[12] This was indirect, as the Court initially decided the loan, note and deed were transferred to Chase (Doc25,p.15). Later, Chase stated it didn't own the Note (Doc94,p.5).

N.A. v. Perry), California Supreme Court (*Yvanova v. New Century Mortgage)*, the U.S. 8th and 9th Circuit Courts of Appeals (*Lackey v. Wells Fargo Bank, Cervantes v. Countrywide),* and other appeals courts, which hold transfer of a deed without the note is a nullity.

In paraphrase of *Edelstein v. Bank of New York Mellon:* [13]

> The Court noted that because the deed of trust does not convey title so as to allow the beneficiary to obtain the property without foreclosure and sale,[3] [14] in order to pursue nonjudicial foreclosure and sale, "[t]he deed and note must be held together because the holder of the note is only entitled to repayment, and does not have the right under the deed to use the property as a means of satisfying repayment.[4] [15]

Summary of Edelstein v. Bank of New York Mellon, p.4. Jamie Stilz-Outlaw. William S. Boyd School of Law.

Although Georgia is a nonjudicial state, the same considerations apply as to judicial states.

> While plenty of uncertainty existed, one concept clearly emerged from litigation during the 2008-2012 period: in order to foreclose a mortgage by judicial action, one had to have the right to enforce the debt that the mortgage secured. It is hard to imagine how this notion could be controversial. (Whitman & Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note* (2013) 66 Ark. L.Rev. 21, 23, fn. omitted.)

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[13] *Edelstein v. Bank of New York Mellon*, 286 P. 3d 249 - Nev: Supreme Court 2012

[14] Ref. to 3: "*Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 298-99, 183 P.3d 895, 901-02 (2008); *Orr v. Ulyatt*, 23 Nev. 134, 140, 43 P. 916, 917-18 (1896)."

[15] Ref. to 4: "*Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011)"

Yvanova v. New Century Mortgage Corp., 365 P. 3d 845 - Cal: Supreme Court 2016 at 928

In this case, the District Court implied Chase didn't need an interest in the note or debt to publish foreclosure notices:

> [A]s discussed at length in previous orders, the Georgia Supreme Court has made clear that "the holder of a deed to a secure debt is authorized to exercise the power of sale in accordance with the terms of the deed even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed." Dkt. No. [25] at 17-18 (citing *You v. JP Morgan Chase Bank*, 743 S.E.2d 428, 433 (Ga. 2013)

Order denying post-judgment motions, Doc 125 p.4

In 2013, Hon. Justice Graves Jr. of the 5th Circuit expressing some "concerns," cited *Cadle* and *Carpenter*, stating, "in order to foreclose, the party seeking to enforce the note must show it is the owner and holder of the note." And, "longstanding United States Supreme Court and Texas precedent *requires* that a foreclosing party be the holder of the promissory note in order to foreclose."

Reinagel v. Deutsche Bank Nat. Trust Co., 735 F. 3d 220 - Court of Appeals, 5th Circuit 2013 at 229, citing *Cadle Co. v. Regency Homes, Inc.*, 21 SW 3d 670 - Tex: Court of Appeals, 3rd Dist. 2000

Similarly, in California and other states, it seems one must have an interest in the debt to foreclose.

> In itself, the principle that only the entity currently entitled to enforce a debt may foreclose on the mortgage or deed of trust securing that debt is not, or at least should not be, controversial. It is a "straightforward application of well-established commercial and real-property law: a party cannot foreclose on a mortgage unless it is the mortgagee (or its

agent)." (Levitin. *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title* (2013) 63 Duke L.J. 637, 640.)

Yvanova v. New Century Mortgage Corp., 365 P. 3d 845 - Cal: Supreme Court 2016 at 928

Although in *You*, the Court in contrast held the deedholder need *not* "have any beneficial interest in the debt obligation underlying the deed," it also referenced this may be problematic:

> We recognize that some legal scholars take the position that because the debt is the principal obligation and the security is incidental to the debt, see *Weems v. Coker*, 70 Ga. 746, 747(1) (1883), the deed holder should not be authorized to exercise the power of sale unless it also holds the note. See Alexander, *Georgia Real Estate Finance and Foreclosure Law*, § 5:3(b) (noting that "problems may arise" when the note and deed are transferred to different transferees).
>
> Indeed, under the Third Restatement of Property, "[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures." Restatement (Third) of Property: Mortgages, § 5.4(c). The comments note the section's "essential premise . . . that it is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same person." Id. at § 5.4, cmt. a. While this approach may indeed be sensible, it is not the approach our General Assembly has adopted.

You v. JP Morgan Chase Bank, 743 S.E.2d 428, 433 (Ga. 2013, at 433

Some state and federal courts, including this one, recognize:

> The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. . . . All the authorities agree that the debt is the principal thing and the mortgage an accessory.

Carpenter v. Longan, 83 U.S. 271, 274, 275, 16 Wall. 271, 21 L.Ed. 313 (1872) at 274,275. Also see *Wells Fargo Bank, N.A. v. Perry*, 23 Misc.3d 827, 875 N.Y.S.2d 853, 856 (N.Y.Sup.Ct.2009), *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158, 167 (2009), *Martins v. BAC Home Loans Servicing, LP*, 722 F. 3d 249 - Court of Appeals, 5th Circuit 2013, *Cervantes v. Countrywide Home Loans*, Inc., 656 F. 3d 1034 - Court of Appeals, 9th Circuit 2011.

In this instance, the District Court cited *You v. JPMorgan* in granting summary judgment to the (assumed) deedholder although it doesn't own the note. This decision conflicts with the above-mentioned cases, which mainly agree that a deed is security for a debt, and must be transferred with the note in order for the deed to be valid.

The decision that Chase could foreclose on a debt without connection to the note also apparently contradicts *West's* definition of *promissory note* which indicates the note must be *presented.*[17] Petitioner argues the note was not owned by Chase, and therefore could not be presented.

> "Texas courts have held that a non-party to a contract cannot enforce the contract unless she is an intended third-party beneficiary,[6] occasionally couching this principle in terms of "standing.[7]"" [6] *See, e.g., South Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306 (Tex.2007). [7] *See, e.g., Neal v. SMC Corp.*, 99 S.W.3d 813, 817 (Tex.Ct.App.2003).

Reinagel v. Deutsche Bank Nat. Trust Co., 735 F. 3d 220 - Court of Appeals, 5th Circuit 2013 at 224-225

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[17] "Promissory Note: It contains an unconditional promise to pay a certain sum to the order of a specifically named person or to bearer — that is, to any individual presenting the note."

Who has legal authority to foreclose?

The 5th Circuit, in addition to at least two Georgia appellate courts,[18] holds that if the note and deed are separated, the deedholder must have authorization from the noteowner to foreclose. There appears to be no conflict regarding this concept within the higher courts, to petitioner's knowledge.

Chase showed no proof of this permission, and petitioner presented this fact in numerous pleadings to no avail.[19] How could Chase reasonably send agents to her home, claim default, threaten foreclosure, and ultimately follow through with it, when the note owner hadn't granted this authority ... or even been identified? This appears to be clear violation of consumer-protection laws. And federal courts condoning this behavior appears to breach the 5th Amendment. The fact such acts can routinely occur with little oversight is deeply disturbing.

> A "mortgage servicer" may administer a foreclosure on behalf of a mortgagee if "the mortgage servicer and the mortgagee *have*

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[18] *Martins v. BAC Home Loans Servicing, LP, 722 F. 3d 249 - Court of Appeals, 5th Circuit 2013* at 255, *White v. First Nat'l Bank of Claxton,* 174 Ga. 281(4), 162 S.E. 701 (1932) at 293(4), *Shumate v. McLendon,* 120 Ga. 396(10), 48 S.E. 10 (1904) at 397(10), 48 S.E. 10

[19] Doc 92 attach#1 pp.3-4, Doc 93 p.5,#8, Doc 94 p.5 #18, Doc 120 p.8 #5, Pet. for Rehearing pp.8-9

> *entered into an agreement granting the current mortgage servicer authority* to service the mortgage," proper notice is given, and notice discloses that the mortgage servicer represents the mortgagee. TEX. PROP.CODE § 51.0025

Martins v. BAC Home Loans Servicing, LP, 722 F. 3d 249 at 255 - Court of Appeals, 5th Circuit 2013, (emphasis added)

In this case, it could potentially be presumed Chase acquired servicing rights.[20] But it failed to produce proof of agency with the noteowner/mortgagee under Discovery and other request.

Georgia courts have indicated if the note is separated from the deed, the deedholder should hold the deed on behalf of the noteholder.

> The grantee in a security deed holds the legal title for the benefit of the owner of the debt.

White v. First Nat'l Bank of Claxton, 174 Ga. 281(4), 162 S.E. 701 (1932) at 293(4)

> If secured debt is assigned but deed is not, deed holder holds legal title to property for benefit of note holder.

Shumate v. McLendon, 120 Ga. 396(10), 48 S.E. 10 (1904) at 397(10), 48 S.E. 10

The Court in *You*:

> recognize[d] that some legal scholars take the position that because the debt is the principal obligation and the security is incidental to the debt, see *Weems v. Coker*, 70 Ga. 746, 747(1) (1883), the deed holder should *not* be authorized to exercise the power of sale unless it also holds the note.

You at 433, (emphasis added).

[20] There is no documentation in this instance showing WaMu transferred servicing rights to Chase.

There is no evidence Chase is allegedly holding the deed on behalf of the note holder. As Chase has no interest in the debt, what right did it have to sell the property in order to pay the debt, as it claimed was its aim in the foreclosure notices?

As Chase failed to identify the noteowner, this entity could not be contacted by petitioner to negotiate terms regarding the loan,[21] thereby depriving her of a viable avenue of resolution.

> The scant statutory law that does exist in this area has evolved as a means of providing limited consumer protection while preserving in large measure the traditional freedom of the contracting parties to negotiate the terms of their arrangement. See *Law v. United States Dep't of Agriculture,* 366 F.Supp. 1233, 1238 (N.D.Ga.1973).

You v. JP Morgan Chase Bank, 743 SE 2d 428 - Ga: Supreme Court 2013 at 430

> Nor is it correct that the borrower has no cognizable interest in the identity of the party enforcing his or her debt. Though the borrower is not entitled to object to an assignment of the promissory note, he or she is obligated to pay the debt, or suffer loss of the security, only to a person or entity that has actually been assigned the debt.

Yvanova v. New Century Mortgage Corp., 365 P. 3d 845 - Cal: Supreme Court 2016 at 938

The last time petitioner pointed out the fact Chase provided no proof of authority from the noteowner was in the denied appellate petition for rehearing.

[21] Additionally to verify her payments were being properly transferred by Chase and accurately credited.

> [A] homeowner who has been foreclosed on by one with no right to do so – by those facts alone – sustains prejudice or harm sufficient to constitute a cause of action for wrongful foreclosure. When a non-debt holder forecloses, a homeowner is harmed by losing her home to an entity with no legal right to take it. Therefore under those circumstances, the void assignment is the proximate cause of actual injury and all that is required to be alleged to satisfy the element of prejudice or harm in a wrongful foreclosure cause of action.

Sciarratta v. U.S. Bank National Assn., 247 Cal. App. 4th 552 - Cal: Court of Appeal, 4th Appellate Dist., 1st Div. 2016 at 555

According to a 2019 unpublished opinion in the New York State Supreme Court:

> Where a plaintiff is not the original lender, it must show that the obligation was transferred to it either by a written assignment of the underlying note or the physical delivery of the note. Because the mortgage automatically passes with the debt as an inseparable incident, a plaintiff must generally prove its standing to foreclose on the mortgage through either of these means, *rather than by assignment of the mortgage*.

US Bank NA v. Cannella, 64 Misc. 3d 410 - NY: Supreme Court, Rockland 2019 at 414 (emphasis supplied)

This holding apparently echoes the idea the note and debt are passed together along with the deed. And assignment of the deed alone is insufficient to transfer debt.

Restated, as the note was not transferred to Chase, certain courts outside of Georgia may conclude it had no permission to modify the loan, no right to declare default even if payments were missed, and no lawful authority to publish foreclosure notices. These rights would belong to another party.

In 2013, the 5th Circuit acknowledged discrepancies in federal courts regarding the practice of splitting the note and deed.[22]

> In order to foreclose, the theory goes, a party must hold both the note and the deed of trust. The federal district courts have reached conflicting results on precisely what is required. The minority of district courts have held that the note and deed of trust must both be held by the foreclosing entity.[6] [23] Others have held that, under Texas law, foreclosure does not require possession of the note.
>
> There are few sources in Texas law that support the "split-the-note" theory. Two courts have held that a party must hold the note in order to execute on a lien. In *Shepard v. Boone*, 99 S.W.3d 263, 266 (Tex.App.-Eastland 2003, no pet.), the court held that summary judgment was properly granted against the creditor where the foreclosing party had adduced no evidence that it was the owner and holder of the underlying note.
>
> The weight of Texas authority, however, suggests just the opposite.

Martins v. BAC Home Loans Servicing, LP, 722 F. 3d 249 - Court of Appeals, 5th Circuit 2013 at 254 and 255

The following year, in 2014, the 8th Circuit concluded the reverse:

> [T]he note and the deed of trust are inseparable, and when the promissory note is transferred, it vests in the transferee `all the interest, rights, powers and security conferred by the deed of trust upon the beneficiary therein and the payee in the notes.'" *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623 (Mo.Ct.App. 2009) (quoting *St. Louis Mut. Life Ins. Co. v. Walter*, 329 Mo. 715, 46 S.W.2d 166, 170 (1931)); see also *U.S.*

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[22] It ultimately decided note ownership was not essential for foreclosure.

[23] Reference for [6]: "*See, e.g., McCarthy v. Bank of Am., NA* ("If the holder of the deed of trust does not own or hold the note, the deed of trust serves no purpose, is impotent, and cannot be a vehicle for depriving the grantor of the deed of trust of ownership of the property described in the deed of trust.")"

Bank Nat'l Ass'n v. Burns, 406 S.W.3d 495, 497 (Mo.Ct.App. 2013)

Lackey v. Wells Fargo Bank, NA, 747 F. 3d 1033 - Court of Appeals, 8th Circuit 2014 at 1037

The Subject Deed Agreement

The subject Deed Agreement provision #20 on p.12, also indicates the deed cannot be transferred independent of the note.[25] Yet the Court decided it was.

By disregarding the terms of the deed contract, the District Court arguably abused its discretion. This Court is respectfully asked to reverse the ruling granting summary judgment to Chase.

Does a nonparty to a residential debt have the right to declare a default? Alternatively, does a party that is not a secured creditor to a residential debt nor its agent have the right to declare a default?

> The borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security.

Yvanova v. New Century Mortgage Corp., 365 P. 3d 845 - Cal: Supreme Court 2016, Id. at 93.

Chase implied no debt was owed to it, stating it did not own the subject note. And if this was unclear, its failure to validate the debt in

[25] "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower."

Nov. 2014 provided clarity. Yet, it declared default numerous times – without authority nor merit, and while petitioner was current.

But Chase's *default* claim, no matter how inaccurate, is irrelevant if it has no connection to the debt. By definition, a default involves a breach of contract.[26] Although the note isn't owned by Chase, the District Court stated petitioner was "in default as early as November 2, 2012." (Doc111,¶1,p.8).

Petitioner's objections and claim she was current when default was reported, were all overruled, although Chase's supplied payment history supports it. (Doc109,#5,pp.12-13).

Furthermore, if there was a debt owed to Chase, it likely would have verified it, instead of ignoring petitioner's request. Since the 11th Circuit didn't address this, this Court is respectfully asked to review the trial court's opinion that default occurred (on an unverified debt), as it appears abuse of discretion. The decision cost petitioner the loss of her home as well as much emotional distress.

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[26] Definition of *default* according to *Black's Law Dictionary*:

> *The omission or failure to fulfill a duty, observe a promise, discharge an obligation, or perform an agreement. State v. Moores,* 52 Neb. 770, 73 N. W. 299; *Osborn v. Rogers,* 49 Hun, 245, 1 N. Y. Supp. 623; *Mason v. Aldrich,* 36 Minn. 283, 30N. W. SS4

Source: "http://thelawdictionary.org/default/"

QUESTION 2

Could petitioner's secured debt be transferred independent of the note?

For argument's sake, even if the subject deed was validly assigned to Chase, in this case, there is no documentation of an accompanying debt transfer. The alleged *Assignment of Security Deed* makes no reference to a debt. It refers to "all interest secured thereby," but doesn't specify a sum of money owed.

"All the authorities agree that the debt is the principal thing and the mortgage an accessory." (*Carpenter).* And, "the holder of the note is only entitled to repayment." (*Edelstein).* Following this logic, was Chase entitled to foreclose on a debt not owed to it? And how could it own the debt without being a party to the note?

According to *West's Encyclopedia of American Law*, the definition of *promissory note* indicates the note must be present to be enforced. Its definition of mortgage states the debt is "evidenced by a mortgage note." By definition, it appears the debt is transferred with the note. This Court will hopefully choose to provide clarity.

Promissory Note:

> It contains an unconditional promise to pay a certain sum to the order of a specifically named person or to bearer — that is, to any individual presenting the note. A promissory note can be either payable on demand or at a specific time.

Mortgage:

A legal document by which the owner (i.e., the buyer) transfers to the lender an interest in real estate to secure the repayment of a debt, evidenced by a mortgage note.

West's Encyclopedia of American Law, edition 2. Copyright 2008: The Gale Group, Inc. All rights reserved.

QUESTION 3

What is the definition of "secured creditor?" Alternatively, can Chase, a nonparty to petitioner's residential note, be called a "secured creditor?"

Chase represented itself as a *secured creditor* when it attempted foreclosure in 2014. Its notices to petitioner and publication in the local paper indicated its aim was to collect on a debt owed to *it* and not a different party. Confusion ensued because Chase also claimed it did not own the note,[27] and Georgia law does not define the term. In *You v. JPMorgan* (at 431-432) the Court noted:

> [T]he term "secured creditor," which is used to signify the foreclosing party, is not defined in the statute, an omission particularly notable given the statute's explicit definition of the term "debtor." See OCGA § 44-14-162.1. The term "secured creditor" was introduced into the statute in 1981 when the provisions requiring notice to the debtor were first enacted. See Ga. L. 1981, p. 834. At that time, our common law appears to have allowed for the possibility of a non-judicial foreclosure conducted by one who held legal title to the property but not the underlying note. See *White v. First Nat'l Bank of Claxton*, 174 Ga. 281(4), 162 S.E. 701 (1932) (affirming validity of non-judicial foreclosure sale conducted by party who held title to property but not underlying promissory note). See

[27] Privately, in response to qualified written requests.

> also *Shumate v. McLendon*, 120 Ga. 396(10), 48 S.E. 10 (1904) (recognizing possibility that grantee in security deed may transfer debt without transferring title to property). Thus, while the phenomenon of "splitting" ownership of the note from ownership of the deed may not have been prevalent until relatively recently, this practice was not expressly prohibited prior to the enactment of the modern non-judicial foreclosure statute in 1981.[5] [28]
>
> In introducing the term "secured creditor" without defining it, the 1981 statute appears to have made no change in this regard. Tellingly, the legislature plainly stated that the notice provisions it was then enacting were "procedural and remedial in purpose." Ga. L. 1981, pp. 834, 836, § 5(a).

Although the Court in *You* held the "holder of a security deed" could be "considered a secured creditor" ... "even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed," (at 430) as the term is undefined in Georgia law, it's unclear how this can be possible. Especially in this case, where Chase isn't an agent of the note owner.

Had this term been clearly defined, would the Court or jury have likely concluded that Chase erroneously claimed the title in its foreclosure and other notices? And/or that Chase had no authority to foreclose?

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[28] Reference to [5]: "Neither *Sammons v. Nabers*, 184 Ga. 269, 191 S.E. 124 (1937), nor *Weems v. Coker*, 70 Ga. 746 (1883), leads us to conclude otherwise, for the simple reason that both of these cases involved judicial foreclosures, in which competent evidence of the underlying debt is required to establish one's cause of action. See Alan M. White, *Losing the Paper*, 24 Loy. Consumer L.Rev. at 480 (2012) (distinguishing judicial from non-judicial foreclosures in that "[i]n a judicial foreclosure, as the plaintiff, ***the foreclosing party must come forward with evidence that it is the proper transferee of the note***")." (emphasis added)

QUESTION 4

Were petitioner's due process rights under the 14th Amendment infringed on by non-judicial foreclosure, resulting in wrongful deprivation of residential property?

According to the National Constitution Center, "the Court has determined that due process requires, at a minimum: (1) notice; (2) an opportunity to be heard; and (3) an impartial tribunal. *Mullane v. Central Hanover Bank* (1950)." [29]

Although the state itself didn't pursue foreclosure in this instance, its legislated process for such allowed and approved this act to occur without judicial oversight, thereby depriving petitioner of "property, without due process of law" under Section 1 of the 14th Amendment. This is asked to be "settled by this Court."

It's common knowledge that a home loan is often a borrower's largest personal debt. Thus a default frequently results in monumental consequences. This can be exceptionally egregious if the default is inaccurate. It's alleged a false default was reported callously and carelessly in this case, to the detriment of petitioner's credit rating, and emotional and mental health.

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[29] "https://constitutioncenter.org/interactive-constitution/amendment/amendment-xiv" citing: *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306 - Supreme Court 1950

It is reasoned the 14th Amendment was created to protect society from such unfair acts, in particular when it comes to potentially depriving a person of homestead property. And that non-judicial foreclosure opposes 14th Amendment rights.

As petitioner lives in a non-judicial state, she had a disadvantage compared with homeowners in judicial states, as her home was scheduled for sale without opportunity "to be heard" nor "an impartial tribunal," and was therefore denied opportunity to challenge the default (without filing suit), and to request proof that Chase had rights and reason to foreclose.

Filing suit was not something she was familiar with, and it is often difficult to procure foreclosure-related counsel, as she was ultimately unable to.[30] And with limited time available between notice and the sale (approximately 30 days), it simply might not be possible to timely file a lawsuit to stop a wrongful foreclosure. This situation is not unique to petitioner, and gives the foreclosing party a huge advantage and less incentive to correct accounting errors or other mistakes.

And even if a homeowner files suit, they are often still at a supreme disadvantage, faced with lack of opportunity to challenge

[30] Many lawyers refrain from taking these cases, forcing self-representation or loss by default.

documents due to courts' view they lack *standing*, precisely what occurred here, as the District Court ruled "Plaintiff does not have standing to challenge" contracts she is not a party to.[31] (Doc 25: *U.S. Magistrate's Non-Final Report*, p.19, also see *Appellant Opening Brief*, p.13).

> To challenge a nonjudicial foreclosure, a homeowner necessarily becomes the plaintiff in a lawsuit. But in a state that requires judicial foreclosure, the homeowner would become the defendant in a foreclosure lawsuit. Because a defendant need not establish standing, a homeowner in a judicial foreclosure state could defend against a foreclosure by asserting the exact same claim—invalid assignment. . . Thus, a ridiculous result occurs if a homeowner's ability to assert the foreclosing entity's lack of authority to foreclose depends entirely on whether the property is situated in a state that allows nonjudicial foreclosure.

Standing On The Sidelines: How Nonjudicial Foreclosure Laws Prevent Homeowner Challenges To Foreclosures—And How Judges And Legislators Should Respond, (2014-2015), p.768, Thomas S. Markey, Boston University School of Law (J.D. 2015).

[31] Petitioner wasn't "challenging" the P&A, simply pointing out public information on the FDIC website noting it is missing *Schedule 3.1a* (of transferred assets), and therefore Chase lacks evidence of the alleged subject deed transfer. (Doc 96: pp.2-3). Yet motion to judicially notice the public website was denied.

QUESTION 5

Was petitioner denied due process under the 5th Amendment by the District Court, resulting in wrongful deprivation of residential property?

We all know housing or shelter is a basic human need. Many feel it should be a human right.[32] Although the Fifth Amendment offers safeguard of this essential, petitioner asserts she was denied due process protection by the district court. This being sanctioned by the 11th Circuit debatably deserves to be "settled by this Court" under Rule 10. Cases involving residential property are distinct in that they deal with foundational life issues such as health, wellbeing, and societal stability.

As the Georgia Supreme Court put it in 2013, "the continued ease with which foreclosures may proceed in this State gives us pause, in light of the grave consequences foreclosures pose for individuals, families, neighborhoods, and society in general." (*You v. JPMorgan*, at 434)

The issues mentioned briefly below were alleged in the Complaint, although not in detail, as the claims primarily hinged upon Chase's lack of connection to petitioner's note, deed and loan. They create a backdrop of unfair practices, aggravating Chase's

[32] "Polling indicates that three-quarters of Americans believe that adequate housing is a human right." *Housing as a Human Right*, p.1, Eric Tars, Senior Attorney, National Law Center on Homelessness & Poverty.

allegedly injurious acts, causing petitioner emotional distress, mental anguish, and the loss of a budding business.

Just "the *threat* of losing your home is stressful enough to make you ill," according to a 2011 article in the *Wall Street Journal.*[33] Losing it unfairly or without thorough due process, can be extraordinarily devastating for a family.

This may also involve civil rights, defined as "guarantees of equal social opportunities and equal protection under the law, regardless of race, religion, or other personal characteristics," according to *Brittanica.* This particular act of intentional displacement (wrongful foreclosure), can be considered to infringe on civil rights because minority neighborhoods, such as the location of petitioner's home, are disproportionately ravaged with foreclosure, many of them unchallenged and wrongful.

> We have estimated that two million families have lost their primary homes and that African American and Latino borrowers have borne and will continue to disproportionately bear the burden of foreclosures. Our estimates were generated by calculating foreclosure rates in a large proprietary dataset and applying them to origination data, including information about borrowers' demographic profiles.

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[33] *Tying Health Problems to Rise in Home Foreclosures*
"https://www.wsj.com/articles/SB10001424053111904199404576538293771870006"

Foreclosures by Race and Ethnicity: The Demographics of a Crisis, CRL Research Report, Debbie Gruenstein Bocian, Wei Li, and Keith S. Ernst, June 18, 2010, p.18

It bears mentioning, "[p]redatory lending aimed at racially segregated minority neighborhoods led to mass foreclosures that fueled the U.S. housing crisis, according to a new study published in the American Sociological Review."[34] (*Reuters*, Oct. 3, 2010). And that the Complaint in this case notes petitioner receiving both a risky 80/20 loan (instead of a sought fixed-rate), and an allegedly predatory modification, despite a good credit rating and other positive factors.

If a party, such as a corporation, can at any time – without legal authority – displace another party, in particular a family, such breach of civil liberties will have far reaching negative effects on society, especially children.

Petitioner contends due process was infringed on in ways which depart from the "accepted and usual course of judicial proceedings" under Rule 10: (1) by the District Court's bypassing the summary judgment standard in companion with denying judicial notice, and (2) by the Court disallowing requests to amend.

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[34] "Predatory lending typically refers to loans that carry unreasonable fees, interest rates and payment requirements." (*Reuters*, 10/3/2010)

"https://www.reuters.com/article/us-usa-foreclosures-race/racial-predatory-loans-fueled-u-s-housing-crisis-study-idUSTRE6930K520101004"

Lastly, it is argued that procedural errors on the part of both petitioner and the Court, *were given more focus than the evidence*, and since this case involves homestead property, was an unjust imbalance. Due process was impacted by the courts' allegedly biased procedural decisions and/or concentration more on procedure than substance.

As isolated incidents these acts may not necessarily be significant. But overall, gave the appearance Chase was given latitude denied to petitioner, ultimately causing loss of homestead property. Because they were discussed at length in the post-judgment motions, and for the sake of brevity, specific examples other than these footnoted won't be included.[35]

Summary Judgment Standard

Had the court looked at the evidence "in the light most favorable to the non-moving party,"[36] the outcome would likely have been different. Because "whether a fair-minded jury could return a

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[35] The 11th Circuit stated, "it was within the court's discretion to consider [Chase's] belated response," to post-judgments motions. Yet the district court allegedly erroneously deemed these same motions tardy (for which reason the 59(e) was denied) although petitioner mailed them on the due date – and had an order allowing such permission (Opinion-Doc 132 p.6. Also see Appellant Opening Brief pp.28-30, and Pet. for Rehearing p.2).

"[T]he Court didn't strike Defendant's untimely objections to requests for admissions," which hurt her case. And "didn't compel upon request answers to the only three interrogatories." (60(b) Mot.,p.7).

[36] *McCabe v. Sharrett*, 12 F.3d 1558, 1560 (11th Cir.1994), *Holifield v. Reno*, 115 F. 3d 1555 - Court of Appeals, 11th Circuit 1997

verdict for the plaintiff on the evidence presented,"[37] as the Court quoted in the U.S. Magistrate's Final Report (p.3), was unfairly or erroneously decided. Chase had virtually no support for its claims. There is lack of proof of the subject deed transfer,[38] no agency with the noteowner; and the deed agreement precludes separation of the note and deed.

Also, the following decision, adopted in the final judgment, was made early in the case before Discovery and without petitioner having opportunity to present evidence: "The Court previously concluded that the original promissory note and security deed . . . were assigned to Defendant on June 14, 2013." (*Id.* p.7). However it was later contradicted by Chase's witness declaration, and Discovery admissions it did not own the note (and did not when it attempted foreclosure) – yet remained uncorrected.

So petitioner lost a home apparently due to errors of fact, errors of law, abuse of discretion, or all the above, which the appeals court didn't rectify. This perhaps warrants this Court's supervisory power.

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[37] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)

[38] Irrelevant to standing, as petitioner wasn't challenging the P&A, simply highlighting this fact. However she also argued "It is possible that a debtor could have standing to challenge the validity of an assignment indirectly, if an invalid assignment violated a statutory protection and thereby injured the debtor." *Ames v. JP Morgan Chase Bank*, NA, 783 SE 2d 614 - Ga: Supreme Court 2016 at 621. (See *Appellate Opening Brief*, p.13)

Did The Court Wrongfully Deny Judicial Notice?

It denied petitioner's judicial notice motion stating, "the purposes for which Plaintiff wishes the Court to take judicial notice are irrelevant to the remaining claims," because "Defendant argued ... Plaintiff only asks for judicial notice to support arguments–concerning the validity of the underlying Loan documents and Defendant's right to foreclose–that are no longer before the Court." (Doc 106 pp.6-7)

But as mentioned, those issues were prematurely disposed of in the Magistrate's Non-Final Report, before Discovery, and without evidence. This arguably requires review under Rule 10, as it defies the "accepted and usual course of judicial proceedings." And debatably violates FRE 301 in not following "usual rules of evidence."

Since the P&A lacks reference of the subject deed transfer to Chase, the Court, in deciding this act occurred, apparently relied on an unsubstantiated claim or presumption.

This put the onus on petitioner to rebut such under FRE 301.[39] Yet the Court denied a *Motion to Take Judicial Notice* of the fact the

[39] "In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption."

P&A shows no such event, nor that WaMu owned the deed in order to be able to transfer it.[40]

And declined to notice the FDIC website hosting the P&A, which states Article III of the document contains a "scrivener's error," and that "there is no Schedule 3.1a" containing transferred assets.

> Whenever evidence contradicting the presumption is offered, the latter disappears entirely and the triers of the fact are bound to follow the usual rules of evidence in reaching their ultimate conclusions of fact.

McCann v. State, 306 SE 2d 681 at 369 - Ga: Court of Appeals 1983 at 369

Denial of Request to Amend

In reference to "whether the court should have granted leave to amend," The 11th Circuit stated:

> "[W]e lack jurisdiction to review that judgment. And an appeal from the denial of a Rule 60(b) motion "does not bring up the underlying judgment for review." *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993) (quotation marks omitted)." (Doc132, p.6)

The 60(b) motion requested "relief from the Order denying amending of the complaint" (Doc121,p.2). Therefore, it appears the 11th Circuit *did* have jurisdiction.

[40] The P&A does not show the subject deed was included in WaMu's assets. Additionally, Chase ignored Discovery request to provide proof that WaMu held the subject deed at the time of the alleged transfer.

And although "the claimant is entitled to offer evidence to support the claims," (*Scheuer v. Rhodes,* 416 US 232 - Supreme Court 1974*)* motion to amend was denied after Discovery, and the District Court declined to reconsider.

The denied 60(b) motion stated:

> "[N]ew and compelling developments (information obtained in discovery) ... should ideally allow [for] amending." (p.19)

Disallowing at least one chance to amend, prevented the presentation of new evidence gleaned or confirmed in Discovery. And barred correction of any pleading deficiencies in likely valid claims.

The most significant of the prematurely-dismissed claims being invasion of privacy *intrusion,* as the Court decided "the security deed permitted Defendant to enter the Property to inspect the exterior." (Doc 25, p.31). What the Court missed is even if Chase owned the deed, the alleged 'inspector's' actions were intrusive, invasive, and terrifying, and caused much emotional distress.

Petitioner contends the early dismissal of certain claims was erroneous and remained uncorrected even after the filing of post-judgment motions.

The 11th Circuit stated petitioner "has not shown any compelling justification that required relief from the judgment." (Doc 132,p.5). This petition respectfully challenges the opinion.

Conclusion

In conclusion, according to George Washington, *the due administration of justice is the firmest pillar of good government.* Petitioner prays this Honorable Court will consider one or more of these questions and grant this petition. Not only for the sake of justice in this case, but for clarity on issues that impinge on life, liberty, and the pursuit of happiness for all. It is deeply thanked for its time and consideration.

/s/ A. Marques, *pro se*

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