Case No. CV-11-0115-PR; CV-11-0132-PR (CONSOLIDATED)

In the Supreme Court

*for the*

State of Arizona

JOHN F. HOGAN,

Plaintiffs-Appellants,

v.

WASHINGTON MUTUAL BANK, et. al.

Defendants-Appellees.

# AMICUS CURIAE BRIEF OF FORECLOSURE STRATEGISTS GROUP

DANIEL J. McCAULEY III (AZ 015183)
Attorney-at-Law
6638 E. Ashler Hills Drive
Cave Creek, Arizona 85331
602-595-1378

Donald O. Loeb (AZ 001959)
Campana, Vieh, & Loeb, PLC
4422 North Civic Center Plaza
Suite 101
Scottsdale, Arizona 85251

Beth K. Findsen (AZ 023205)
BETH K. FINDSEN, PLLC
7279 E. Adobe Dr., Suite D-120
Scottsdale, Arizona 85255

Attorneys for Foreclosure Strategists

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

## STATEMENT OF INTEREST

Foreclosure Strategists is a group assisting distressed homeowners in Arizona. For this decision, Foreclosure Strategists seeks to illuminate the plight of countless homeowners facing non-judicial foreclosure by unidentified parties, and of homeowners simply trying to modify a loan, or to pay off a loan to an authorized party.

## INTRODUCTION

The issue as framed by the appeal is:

Can a claimed lender (servicer) foreclose its deed of trust without owning the note which the deed of trust secures?

Under Arizona law, and as a matter of common sense, the answer is no, especially when it is contested that the note was breached, and the power of sale was not triggered by a rightful beneficiary.

## ARGUMENT

Appellees use legal sleight of hand to make several misleading claims in their briefing to this Court. They state "[H]e argued, both in the trial court and the Court of Appeals, a simple show me the note case." (Article I, C, page 8). They also state "Hogan has offered no authority to suggest that a non-judicial foreclosure of a deed of trust must comply with the UCC or that

the trustee or beneficiary must provide evidence of possession of the note or other proffer of being the holder of the note." (Article I, C, page 9). Appellees then argue to this Court that foreclosure in Arizona is statutory, a contract matter, and the UCC does not apply. As more fully outlined below, this position flies in the face of nationally recognized authority on the UCC, and on the principles and assumptions upon which the non-judicial foreclosure statutory scheme rests. Further, Hogan's Deeds of Trusts (hereinafter "DoT") concede that there must be compliance with all "applicable law." (Section (I) of both Deeds of Trust.) The UCC is that "applicable law" in the contract, as are real property principles, common law agency, and all other lending laws, disclosure law, and common law tort law.

Appellees continue their attempt to confuse the Court by alleging that the question as phrased by Appellant is "not susceptible to a single or simple answer." (Article III, A, page 12). Nonsense. The question is clear, concise, to the point and properly frames the heart of this dispute.

Further, Appellees ask the Court to sever the symbiotic relationship between a note and deed of trust, flying in the face of black letter real property law. Appellees urge that this Court just divorce the promise to pay from the instrument designed to secure that promise to pay. Appellees direct the Court to just myopically look at the deed of trust. If it is successful in misdirecting

the Court, then, in Arizona, any claimed bank need only call itself the Lender—or Beneficiary---to skip to the middle of the non-judicial foreclosure statute, and enjoy all of its benefits to take away the real property of Arizona families.

Incorrectly, Appellee suggests to this Court that in Arizona, the note secured by the deed of trust is not material to foreclosure, there need be no established default to a Lender under the contract (the note), whose performance is supposedly secured by the deed of trust. Appellees want this Court to establish, as a matter of law in Arizona, that the note's payment or non-payment or the identity of the real party in interest--the true owner of the note secured by the trust deed--does not matter, and that anyone can simply march forward and make a claim of right to foreclose under the auspices of the deed of trust.

Applying this logic to non-judicial trustees' sales, all one needs to do is claim to be the "beneficiary" or the agent of the "beneficiary" under the DoT by off record transfers--that need not be evidenced--- and claim a default of the note. All the while the party to whom payments discharge the obligation is never identified, nor are the payments to that party accounted for. In this vein, nothing would be required to trigger the power of sale by such a self-proclaimed "beneficiary." If a borrower attempted to challenge the standing

or authority of any such claimant in court, the borrower could not even state a claim because nothing other than the assertions of counsel claiming to represent a "beneficiary" is required. Indeed, these requirements are indifferent to the language of the Note and Deed of Trust ("DoT"), drafted by the Lender, and against whose favor the terms and the non-judicial foreclosure statutes are to be construed. As a result of Appellee's construction of the law, any Plaintiff who cannot prove a negative—that the "beneficiary" is not authorized---and with it being irrelevant that there is no default of the note to a party entitled to enforce it required to trigger the power of sale to begin with--- must simply let a party claiming to be a beneficiary take his home. These propositions, as asserted by Appellee are not the state of the law in Arizona.

Indeed, while Arizona's non-judicial foreclosure statutes undoubtedly govern the process for an authorized non-judicial foreclosure, it is not the only applicable law, as the Appellees stridently assert. Rather, all contract, tort, and property law (*See* section (I) on page two of *Hogan's* DOTs for a list of applicable law) is always relevant, as are the federal lending laws. It has always been a precept of basic contract law, to the extent a contract is more strict, it governs. This is especially true for an adhesion contract such as the common form note and deed of trust for a consumer's home in our State.

But, if Appellees convince this Court that the statutory trustee's sale

process is basically contract law, they are still not entitled to foreclose. The material contract in this matter as alleged by Appellees, the DoT, stipulates that only the "Lender" can exercise the power of sale. (DoT ¶22). Therefore, as a matter of contract law, Appellees have no right to exercise such power since there is no document establishing such a right. The meaning of an unambiguous contract can only be determined from the four corners of the document which cannot reasonably be construed in more than one sense thus the court must give effect to the language of the agreement. *See Associated Students of University of Arizona v. Arizona Board of Regents*, 120 Ariz. 100, 584 P.2d 564 (App.1978), *cert. denied*, 440 U.S. 913, 99 S.Ct. 1226, 59 L.Ed.2d 462 (1979); *Hofmann Co. v. Meisner*, 17 Ariz.App. 263, 497 P.2d 83 (1972). The mere fact that the Appellees disagree as to the meaning of language contained in the agreement is not sufficient to create an ambiguity allowing this Court to intervene. *Giovanelli v. First Federal Savings and Loan Ass'n*, 120 Ariz. 577, 587 P.2d 763 (App.1978). Associated Students, supra. Only when the meaning of the contract remains uncertain after application of the primary standards of interpretation may the court intervene. *See Phelps Dodge Corp. v. Brown*, 112 Ariz. 179, 540 P.2d 651 (1975); *Polk v. Koerner*, 111 Ariz. 493, 533 P.2d 660 (1975); 1 Restatement of Contracts § 236(d) at 328 (1932).

## I. NON-JUDICIAL FORECLOSURE SALE IS UNLAWFUL IF THE PARTIES ARE UNAUTHORIZED.

### *A. Parties Cannot Foreclose Under Arizona's Deed of Trust Statute if They Do Not Meet Any Definition Thereunder; and Default is a Prerequisite under ARS 33-801, and the Terms of the Deed of Trust.*

Appellees argue, contrary to the express terms of the DoT—almost always an adhesion contract drafted by the Lender---that Arizona law does not require that a foreclosing "Lender" or a valid successor in interest respond to a trustor's claim of no default. But of course, by the express terms of even the most standard Deed of Trust, the power of sale cannot be triggered by anyone other than the person or entity the Deed of Trust refers to as the "Lender" and the non-judicial foreclosure statute refers to as the "beneficiary." One does not get to the starting gate—or enter the rubric of the statute--- without a verifiable default, and a Lender's consequent following of the explicit strictures of the Deed of Trust and the applicable non-judicial foreclosure statute provisions.

In most foreclosure cases, the authority of the Lender and the existence of the default are not challenged, thus, any Lender's concern about reducing the speediness of the foreclosure machine is allayed. Moreover, the policy is never to create an atmosphere conducive to unauthorized foreclosure sales. When a borrower takes the trouble to inquire into the status of her payments

pursuant to federal law and the contract terms, and then files a lawsuit in an attempt to protect her interests, as explicitly authorized by paragraph 22 of the form DOT,[1] the defendant is obligated to provide evidence of its valid interest in the contract at issue. This is especially true when the obligation has been transferred from one entity to another numerous times, and the transfers directly contradict the foreclosing entity's claims of interest.

What is more, the "inexpensiveness and speediness" of a non-judicial foreclosure sale are not the sole objectives of our statutory scheme. Since court supervision in this process is minimal (without affirmative action by the homeowner), the importance of requiring that the statutes are strictly followed is key to the homeowner's proper due process and to effectuate transfer of clear title. *See Patton v. First Fed. Sav. & Loan,* 118 Ariz. 473, 477, 578 P.2d 152, 156 (1978). The quid pro quo for allowing lenders to use Arizona's quick and inexpensive trustee's sale process is that lenders must strictly follow the statutory requirements. *See, e.g., Patton,* 118 Ariz. at 477, 578 P.2d at 156 (holding that the statutory requirements for non-judicial foreclosure must be strictly complied with). Careless practices in documenting ownership and noticing trustee's sales are not an excuse for

[1] The form DoT, and Hogan's DoT advises that the Lender must give notice to the Borrower of the numerous rights including the Borrower's "right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale." DoT ¶22.

failing to follow the law.[2]

### *B. The Deed of Trust Secures the Note; the Deed of Trust is Unenforceable if Held By One With No Right to Enforce the Security Instrument.*

Arizona law requires a beneficiary under a deed of trust to have the right to enforce the secured obligation in order to foreclose on a deed of trust. A "mortgage may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation that the mortgage secures." Restatement (3d) of Property (Mortgages) §5.4 The Note and Deed of Trust should not be separated. They have long been regarded as having a symbiotic relationship with the Note as host and the DoT a parasite. *Carpenter v. Longan*, 83 U.S. 271, 274, 21 L.Ed. 313 (1872)(stating that "[t]he Note and mortgage are inseparable; the former as essential, the latter as an incident" and "[a]n assignment of the note carries the mortgage with it, while the assignment of the latter is a nullity"); *In re Leisure Time Sports, Inc.*, 194 B.R. 859, 861 (9th Cir. 1996) (stating that "[a] security interest cannot exist, much less be transferred, independent from the obligation it secures" and that, "[i]f the debt

[2] The Arizona Attorney General articulated this policy, "Lenders and servicers must be required to strictly comply with the law governing non-judicial foreclosures, must ensure they have the legal right to foreclose before noticing a trustee's sale, and must ensure that the chain of title is properly ascertainable from the public record." Brief of the Attorney General for Arizona, at p. 25, *In re Vasquez*, No. No. CV-11-0091-CQ.

is not transferred, neither is the security interest."). *See also* Restatement (3rd) of Property (Mortgages) §5.4 (stating that "[a] mortgage may be enforced only by, or on behalf of, the person who is entitled to enforce the obligation that the mortgage secures.")

The power of sale in a DoT, the security interest, is not triggered unless there is first a showing the Note is in default which by definition requires an examination of the chain of custody of the Note, a negotiable instrument. *In re Veal, 450 B.R.* 897, 920 (B.A.P. 9th Cir. June 10, 2011); *See also* Permanent Editorial Board of the UCC, Final Report, UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of Those Notes and the Mortgages Securing Them.

Appellees suggest this Court make it the legal standard in Arizona to disregard this relationship between the Note and DoT that secures the Note. But the reason for not upsetting this generally accepted rule is clear. If the beneficiary of the DoT does not have the right to enforce the promissory note, then it cannot suffer a default, and it is the default of the underlying note that gives rise to the right to foreclose on the security. A.R.S. §33-807(A)(power of sale is conferred on trustee after a breach of the contract for which the trust deed is conveyed as security); A.R.S. §33-805 (deeds of trust may be executed as security for performance of a contract).

> [I]n general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation. For example, assume that the original mortgagee transfers the mortgage alone to A and the promissory note that it secures to B. Since the obligation is not enforceable by A, A can never suffer a default and hence cannot foreclose the mortgage. B, as holder of the note, can suffer a default. However, in the absence of some additional facts creating authority in A to enforce the mortgage for B, B cannot cause the mortgage to be foreclosed since B does not own the mortgage.

Restatement (3d) of Property (Mortgages) §5.4 cmt. 3; *see also Krohn v. Sweetheart Properties, Ltd*., 203 Ariz. 205, 214; 52 P.3d 774, 783 (2002)(en banc)(adopting Restatement (3d) of Property (Mortgages) §8.3 in absence of prior decisional or statutory law).

Arizona law also holds that the deed of trust is presumed to follow the note it secures, if it is a valid "security interest," thus the identity and the authority of the party entitled to enforce the note is highly relevant. *See Vasquez v. Saxon Mortgage, Inc.*, No. CV-11-0091-CQ, 2011 WL 559944 (Ariz. Nov. 18, 2011)(citing A.R.S. 33-818 for this proposition of law where the party entitled to enforce the note was known, and received an assignment of the beneficial interest in the deed of trust, albeit unrecorded). While

ordinary non-judicial foreclosure law[3] does not require physical presentation of the note prior to foreclosure to evidence an interest, it does require an interest in the note or an agency relationship between the note holder and the party attempting to enforce the note through the foreclosure process. As the Arizona Supreme Court has since intuited, the deed of trust may be presumed to follow a note, ***if the note was validly transferred and indorsed*** under A.R.S. §33-817; *Vasquez* 2011 WL 5599440 at *2 (conceded in the certified question was the notion that the assignee held a promissory note payable to bearer). If this is so, then the note holder's identity and authority is highly relevant in cases where the status of the note and its holder is unknown, or presented by questionable evidence.

Cases—with thoughtful, lengthy opinions--- upholding the "show me your ***authority to enforce the note*** and consequently, your ***authority to order the exercise of the power of sale in the DoT*** theory" are legion and include all of the following: *In re Veal, 450 B.R.* 897, 920 (9th Cir. B.A.P. 2011); *U.S. Bank National Ass'n v. Ibanez*, 458 Mass. 637, 650-51, 941 N.E.2d 40, 52 (2011); *In re Weisband*, 427 B.R. 13, 18–19 (Bankr.D.Ariz.2010)(cited by

[3]Often forgotten, other applicable law still governs, along with Arizona's non-judicial foreclosure statute, including the contractual terms of the specific note and deed of trust, as well as common law principles of agency, tort, and contract, and applicable federal law such as Truth in Lending Act, Real Estate Settlement Procedures Act, Fair Debt Collection Practices Act, and Fair Credit Reporting Act, etc. In other words, stricter law may govern a given issue.

*Veal*, 450 B.R. at 920); *In re Ferrel L. Agard,* , Case No. 810-77338 (Bankr. ED NY 2010); *In re Kemp*, 440 B.R. 624 (Bankr. D. N.J. 2010); *Bank of New York v. Raftogianis*, ___N.J. Super. ___, 2010 N.J. Super. LEXIS 2316 (N.J. Super. Ct. Ch. Div. June 29, 2010); *Verizzo v. Bank of New York*, 35 Fla. L. Weekly D494a( Fla. 2d DCA, March 3, 2010)(where the court held that where nothing in the record reflected an assignment or endorsement of the note by JP Morgan Chase Bank to Bank of New York or to MERS, there was a genuine issue of material fact as to whether the Bank of New York owned and held the Note and had standing to foreclose, barring entry of summary judgment in favor of the Bank of New York); *Javaheri v. JP Morgan Chase Bank, N.A.*, No 10-cv-08185-ODW, 2011 WL 1131518 at *2 (C.D. Cal. 2011)("Coupled with Plaintiff's allegation that JPMorgan never properly recorded its claim of ownership in the Subject Property, the abovementioned facts regarding the transfer of Plaintiff's Note prior to JPMorgan's acquisition of WaMu's assets raise Plaintiff's right to relief above a speculative level. Furthermore, in the face of these specific factual allegations, JPMorgan's assertion that the P&A Agreement suffices to establish their ownership of the Note is no longer viable."); *Vogan v. Wells Fargo Bank, N.A.* No. 11-CV-02098, 2011 WL 5826016 (E.D. Cal. Nov. 17, 2011)(denying motion to dismiss on lender and servicer's failure to properly disclose owner of note under Truth in Lending

Act, § 1641(g) as shown by discrepancies in securitization timeline and documents recorded); *Sacchi v. MERS*, No. CV 11-1658 AHM (C.D. Cal. June 24, 2011)( "the availability of a non-judicial foreclosure process [does not] somehow exempt[s] lenders, trustees, beneficiaries, servicers and the numerous other (sometimes ephemeral) entities involved in dealing with Plaintiffs from following the law."). In other words, when a borrower brings a lawsuit to challenge a claimed beneficiary, the court cannot simply presume that the note's terms were breached, and the power of sale in the deed of trust activated in favor of the self-proclaimed "beneficiary," especially when the note's ownership or breach is unevidenced.

**c. Applicability of the UCC to the Non-Judicial Foreclosure Analysis**

In *Veal*, the above-cited, recent Opinion of the United States Bankruptcy Appellate Panel of the Ninth Circuit, based on an appeal of a District of Arizona Bankruptcy Court case, the panel did an extensive analysis of deed of trust/promissory notes and the UCC. *In re Veal*, 450 B.R. 897, 920 (B.A.P. 9th Cir. June 10, 2011). While the Opinion addresses the federal court concept of "standing", the case is relevant because standing is a similar principle to that of the real party in interest under our A.R.C.P. 17. As a result of a thorough analysis of the UCC, both in Arizona and nationally, the *Veal*

court determined that the prerequisites of the UCC apply to entities attempting to foreclose. Any such entity must prove under the UCC that it is the proper party to collect payments, let alone initiate a foreclosure, if the homeowner exercises his explicit contractual "right to bring a court action."[4]

No such proof was provided in this case, not even an affidavit. In fact, the only record at the Yavapai County Recorder's Office, clearly establishes the Appellees have not demonstrated that they are proper parties under Rule 17. In *Veal*, the Court looked at Assignments and determined :"...the purported assignment from Option One to Wells Fargo does not contain language effecting an assignment of the Note." *Veal*, 450 B.R. at 920. As Appellant contends, there is "no language" in the record "effecting an assignment of the note" to the current owner, the Pass Through Certificate Trust Certificate Holders. And if the transfer did occur, it must have occurred by a party who had an ownership interest to transfer. One cannot transfer what one does not own.

Regarding the applicability of the UCC to notes like we have in this case the *Veal* panel determined notes do indeed matter. It stated:

[4] Paragraph 22 of Hogan's DOT specifies the required notice from a Lender "shall further infonn Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale."

> "...the rules that determine who is entitled to enforce a note are concerned primarily with the maker of the note. They are designed to provide for the maker a relatively simple way of determining to whom the obligation is owed and, thus, whom the maker must pay in order to avoid defaulting on the obligation. UCC § 3-602(a),( c). By contrast, the rules concerning transfer of ownership and other interests in a note identify who, among competing claimants, is entitled to the note's economic value (that is, the value of the maker's promise to pay). Under established rules, the maker should be indifferent as to who owns or has an interest in the note so long as it does not affect the maker's ability to make payments on the note. Or, to put this statement in the context of this case, the Veals should not care who actually owns the Note – and it is thus irrelevant whether the Note has been fractionalized or securitized – so long as they do know who they should pay. Returning to the patois of Article 3, so long as they know the identity of the "person entitled to enforce" the Note, the Veals should be content.

Initially, a note is owned by the payee to whom it was made payable, that is, it transfers a note in a manner not contemplated by Article 3. Article 9 explicitly incorporates definitions found in Article 1. UCC § 9-102(c).. If that payee seeks either to use the note as collateral or sell the note outright to a third party in a manner not within Article 3, Article 9 of the UCC governs that sale or loan transaction and determines whether the purchaser of the note or creditor of the payee obtains a property interest in the note. *See* UCC § 9-109(a)(3).

With very few exceptions, the same rules that apply to transactions in

which a payment right serves as collateral for an obligation also apply to transactions in which a payment right is sold outright. *See* UCC § 9-203.

When the *Veal* court ruled on standing, the Panel stated "...to show a colorable claim against the Property, Wells Fargo had to show that it had some interest in the Note, either as a holder, as some other "person entitled to enforce," or that it was someone who held some ownership or other interest in the Note. *See In re Hwang,* 438 B.R. 661, 665 (C.D. Cal. 2010) (finding that holder of note has real party in interest status). None of the exhibits attached to Wells Fargo's papers, however, establish its status as the holder, as a "person entitled to enforce," or as an entity with any ownership or other interest in the Note. (*Id.).*

Moreover, Permanent Editorial Board of the Uniform Commercial Code, in a very recent Final Report, published on November 14, 2011, and in a Draft Report published on March 29, 2011, have weighed into the controversy surrounding UCC application to notes like one involved in this action and the Board states they fall squarely under the UCC. The Draft Report effectively endorses the analysis of the *Veal* panel. Since this Final Report was finalized and not available to the lower court, based on its import and relevance to the matter at hand, this Court must take judicial notice of the Final Report.

In all of the above cases, the courts have uniformly held that unless the entity attempting to judicially or non-judicially foreclose had ownership of the note with the right to enforce the note and could prove a transfer of the note to the entity seeking to foreclose, the foreclosure effort could not go forward and the party seeking to foreclose lacked standing to foreclose.

Conversely, if the Arizona Supreme Court was to adopt the reasoning contained in the many erroneous decisions rendered by Judges on the United States District Court for the District of Arizona, including the *Mansour* and *Diessner* cases[5] cited by Appellees, holding that what they have deemed "show me the Note" cases, with ill-defined parameters, do not state a cognizable claim for relief, and that the securitization process cannot be considered by courts at all in determining whether a purported successor lender/beneficiary has standing to non-judicially foreclose, such a ruling would have catastrophic consequences to families all over the country as well as consequences to the lending industry itself.

Those consequences would include giving the right to non-judicially foreclose to falsely self- appointed "beneficiaries" like MERS or to the Trustee for the Investors in purported Residential Mortgage Backed Securities

[5] *Mansour v. Cal-Western Reconveyance Corp*., 618 F. Supp. 2d 1178 (D. Ariz. 2009); *Diessner v. Mortgage Electronic Registration Sys., Inc.*, 618 F. Supp. 2d 1184 (D. Ariz. 2009).

falsely claiming the right and entitlement to non-judicially foreclose deeds of trust purporting to secure promissory notes signed by home mortgage loan borrowers.

Such unauthorized foreclosing entities would thereafter be free to continue taking homes away from such borrowers forever with no right or entitlement whatsoever to do so.

### *D. Neither a Non-Note Holder Entitled to Enforce the Note, Nor an Agent of a Party NOT in Interest Can Be a True Party in Interest.*

As the Nevada Supreme Court has explicitly recognized in trying to facilitate meaningful mediations between "servicers" and homeowners, a "beneficiary" who has no connection to a note holder entitled to enforce the note is not a true beneficiary, nor is it a decision-maker. Two Nevada Supreme Court cases[6], decided in mid-July 2011, are especially instructive both as to standard bank foreclosures procedures in a neighboring state - with similar non-judicial foreclosure statutes and a similar foreclosure crisis - and as to why the actual Lender must be involved in the negotiation process apparently envisioned by Arizona's attempt to require negotiation with the

[6]*Pasillas v. HSBC Bank USA, as Trustee for Luminent Mortgage Trust*, No. 56392, 127 Nev. 39 (July 7, 2011)(en banc)(advance opinion); *Levya v. National Default Servicing Corp*., No. 55216, 127 Nev. 40 (July 7, 2011)(advance opinion).

actual Lender in A.R.S. § 33-807.01. This statute requiring the actual lender to contact the homeowner to negotiate has apparently never appeared in the District Court Orders.

Nevada's analysis illustrates a practical effect of the problem with the bank servicer's dogged refusal to name a real decision making party with authority under the note. Often, a servicing agent claiming to be an agent for the owner of the note and deed of trust is the homeowner's only contact, both in this case, and in most cases. This "agent" necessarily represents a party to Hogan's note and deed of trust. As a claimed agent of the owner, a loan servicer like the Appellee Chase had an obligation to follow the contracts, and had no greater authority than its principal, who it refused to name.

Like many form Notes and Deeds of Trust, Hogan's Note specified that payments be applied to the "Lender." The form DoT reserves all valuable rights to the "Lender," specifying the Lender as the only party authorized to accelerate the note, declare a default and substitute a trustee. See, e.g. Hogan DoT ¶22.

As the B.A.P. for this Circuit recently explained,

> "[i]f, however, the maker pays someone other than a "person entitled to enforce"—even if that person physically possesses the note the maker signed—the payment generally has no effect on the obligations under the note. The maker still owes the money to the "person entitled to enforce," and, at best, has only an action in

> restitution to recover the mistaken payment. *See* UCC § 3–418(b)."

*Veal v. Am. Home Mtg. Servicing, Inc (In re Veal*), 450 B.R. 897, 906 (9th Cir. B.A.P. 2011)

Case and point, the deed of trust emphasizes the use of the term "Lender"[7] to explain almost ***all*** duties, and procedures under the contract. However, the name of the true "Lender" is left anonymous and continually changes without notice, prior[8] or otherwise. A homeowner's attempts to enforce the contract are paralyzed by Lender's anonymity that diminishes or completely extinguishes any benefit provided under the contract.

## CONCLUSION

For all of the reasons argued, the Court must hold that a beneficiary without the authority to enforce the note lacks the power to non-judicially foreclose under all applicable Arizona law, including Arizona's non-judicial foreclosure statutes, which presume that the utilizing parties fit the definitions and capacities defined therein. Further, the lower court's ruling abrogates established borrower rights to challenge a claimed Lender's authority to

[7]The Deed of Trust specifies "Loan Servicer" when that term is meant, in paragraph 19, and nowhere else.

[8]The Deed of Trust states that it can be transferred without ***prior*** written notice, indicating that eventual notice will be necessary. (DoT ¶20).

foreclose, the opinion should be reversed and remanded, or, at the least, depublished.

RESPECTFULLY SUBMITTED this 17th day of January 2012,

By: _/s/Daniel J. McCauley III
DANIEL J. McCAULEY III (AZ 015183)
Attorney-at-Law
6638 E. Ashler Hills Drive
Cave Creek, Arizona 85331
602-595-1378

By: /s/Donald O. Loeb
Donald O. Loeb (AZ 001959)
Campana, Vieh, & Loeb, PLC
4422 North Civic Center Plaza
Suite 101
Scottsdale, Arizona 85251

By: /s/Beth K. Findsen
Beth K. Findsen (AZ 023205)
7279 E. Adobe Dr., Suite D-120
Scottsdale, Arizona 85255
480-584-6664
866-701-9272 (fax)
beth@findsenlaw.com

Attorneys for *Amici* Foreclosure Strategists

## CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 16 (b)(2), I certify that the above brief used proportionately spaced type of 14 points or more and is double spaced using Times New Roman font and contains no more than 5,551 words.

By: /s/ Daniel J. McCauley III

o

## CERTIFICATE OF SERVICE

ORIGINAL and seven (7) copies of the foregoing Brief filed January 17, 2012 with

Clerk of the Court
Supreme Court of Arizona
1501 West Washington Street
Phoenix, Arizona 85007

And two (2) copies of the foregoing Amicus Curiae Brief and Motion for Leave to File Amicus Curiae Brief served via first class mail on January 17, 2012 to:

LAW OFFICE DOUGLAS C. FITZPATRICK
DOUGLAS C. FITZPATRICK
49 BELL ROCK PLAZA
SEDONA, ARIZONA 86351-6804

Attorneys for Appellant
MAYNARD CRONIN ERICKSON CURRAN & REITER, P.L.C.
Douglas C. Erickson
Jennifer A. Reiter
Michael D. Curran
3200 N. Central Ave., Ste. 1800
Phoenix, Arizona 85012
Attorneys for Appellees

__/s/Daniel J. McCauley III