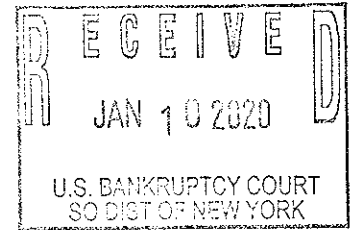


Alberto Rodriguez and  
Maria Rodriguez  
Plaintiffs,  
1232 Wissmann Drive  
Ballwin, Missouri republic  
near [63011]



IN THE US BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: Residential Capital, LLC,	)	
Debtor	)	Case No.: 12-12020mg
	)	
	)	
	)	
	)	Adversarial Proceeding Case No.
	)	
	)	<u>19-01320 (MG)</u>
Alberto Rodriguez and Maria Rodriguez	)	
Plaintiffs, Claimants at law,	)	PLAINTIFF'S SUR REPLY
	)	TO THE DEFENDANT RES
Aggrieved Parties	)	CAP LIQUIDATING TRUST'S
	)	RESPONSIVE BRIEF
	)	
v.	)	
	)	
Residential Capital, LLC, Homecomings	)	
Financial, LLC, FKA Homecomings	)	
Financial Network, Inc., OCWEN LOAN	)	
SERVICING, LLC, DOES 1 through 15,	)	
inclusive,	)	
Defendants	)	

**A. COMPLIANCE WITH THE AP PROCEEDURAL REQUIREMENTS**

1. We, the Plaintiffs, hereby notify the court that we met and conferred with the Attorneys representing the Defendants Residential, Capital, LLC, hereinafter



RESCAP, and Homecomings Financial, LLC, hereinafter RES CAP

LIQUIDATING TRUST on August 29, 2019 at 6:00PM Central time, and we wish to summarize the conference for the court. The Defendants filed a Responsive Brief in Late December, 2019, stating that we filed a Motion in violation of the AP Procedures Order. We have a situation that is critical now, because of events that occurred since we filed the Adversary Proceeding. OCWEN LOAN SERVICING, LLP was acquired by PHH Mortgage, and then the servicing rights were apparently sold to Bayview Loan Servicing, LLC.

2. Bayview Loan Servicing, LLC is bearing down at breakneck speed to engage in a foreclosure action in spite of the fact that there is no proper chain of title from HOMECOMMINGS FINANCIAL, LLC to OCWEN LOAN SERVICING, LLC and in spite of the fact that the alleged transfer occurred at a time when this case had been filed and was pending in this court and said transfer is a violation of Title 11, US Code, Sections 362 and 363, and the Federal Rules of Bankruptcy Procedure Sections 4001 and 6004.

3. As the alleged successor in interest to the claimed interest that Ocwen Loan Servicing, LLC states that they have in the Alberto and Maria Rodriguez loan, both PHH Mortgage and Bayview Loan Servicing are violating the above sections of Title 11 US Code and FRBP §§ 4001 and 6004.

4. Our motion to add these two corporations as Defendants was in the

interest of judicial economy and to protect our interests in the residential property that is identified as collateral in the Homecomings Financial, LLC Deed of Trust. This is an emergency measure to protect our property from mortgage foreclosure from a party without standing and capacity.

5. Although the attorneys who represent the RES CAP LIQUIDATING TRUST cannot demonstrate that they have any potential economic loss from this Adversary Proceeding because we have only asked for declaratory relief they have pressed ahead in a vigorous effort to get this Adversary Proceeding dismissed. They will not be prejudiced at all by what we have filed, and claim no interest in the Rodriguez note and deed of trust.

6. In addition, we have responded to erroneous statements from the RES CAP LIQUIDATION TRUST attorneys that the transfer of the servicing rights from GMAC Mortgage to Ocwen Loan Servicing, LLC was a transfer of the actual underlying loan. After we objected to their mischaracterization of the nature of the transfer of the servicing rights that occurred as a transfer of the underlying note and deed of trust, they were forced to admit that the servicing rights did not include a transfer of the underlying notes and deed of trust.

7. We also pointed out that the actions taken by Ocwen Loan Servicing, LLC when they recorded the Assignment of the Deed of Trust violates Title 15 US Code Section 1641(f), the statute that prohibits the loan servicer from functioning as a

lender for administrative convenience. In addition, the recording of the Assignment of the Deed of Trust without the authority to transfer the note has been deemed to be an unlawful transfer under Missouri law, see *Bellistri v. Ocwen Loan Servicing, LLC*, 284 SW 3d 619 (2009), which states as follows:

Typically, the same person holds both the note and the deed of trust. In the event that the note and the deed of trust are split, the note, as a practical matter becomes unsecured. Restatement (Third) of Property (Mortgages) § 5.4. Comment. The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. *Id.* Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. *Id.* The mortgage loan became ineffectual when the note holder did not also hold the deed of trust.

When the holder of the promissory note assigns or transfers the note, the deed of trust is also transferred. *George v. Surkamp*, 336 Mo. 1, 76 S.W.2d 368, 371 (1934). An assignment of the deed of trust separate from the note has no "force." *Id.* Effectively, the 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." *St. Louis Mut. Life Ins. Co. v. Walter*, 329 Mo. 715, 46 S.W.2d 166, 170 (1931).

When it assigned the deed of trust, MERS attempted to transfer to **Ocwen** the deed of trust "together with any and all notes and obligations therein described or referred to, the debt respectively secured thereby and all sums of money due and to become due." The record reflects that BNC was the holder of the promissory note. There

is no evidence in the record or the pleadings that MERS held the promissory note or that BNC gave MERS the authority to transfer the promissory note. MERS could not transfer the promissory note; therefore the language in the assignment of the deed of trust purporting to transfer the promissory note is ineffective. Black v. Adrian, 80 S.W.3d 909, 914-15 (Mo.App. S.D.2002) ("[A]ssignee of a deed of trust or a promissory note is vested with all interests, rights and powers possessed by the assignor in the mortgaged property"). MERS never held the promissory note, thus its assignment of the deed of trust to **Ocwen** separate from the note had no force. See *George*, 76 S.W.2d at 371. *St. Louis Mut. Life Ins. Co.*, 46 S.W.2d at 170.

8. We would like to schedule the hearing for the Pre-trial Status Conference as soon as possible in order to be able to move ahead on our emergency motion to add the new Defendants as discussed. The Events that occurred that triggered our need to add new Defendants took us by surprise and could not have been anticipated. The adversary proceeding statutes and rules provide for seeking injunctive relief. Often times injunctive relief is sought in a timely way in order to prevent irreparable harm that could come about from a Defendants actions in violation of the Plaintiff's rights and the legal requirements.

#### ***B. THE COURTS JURISDICTION***

9. The Attorneys mentioned above immediately asserted that the court has no jurisdiction to hear the matter, while completely ignoring and refusing to address many of the core issues of the case, especially, the fact that the Attorneys

representing RESCAP and Homecomings never filed a Motion for Relief from the Automatic Stay or any other motion asking the judge for permission to assign the Alberto Rodriguez Note and Deed of Trust. These attorneys did not explain why we, as Plaintiff's have no right to enforce our rights with respect to the failure of RESCAP and Homecomings to ask for permission from the bankruptcy Judge to Assign the Rodriguez loan as required pursuant to Federal Rules of Bankruptcy § 4001, 6004, Title 11, US Code §§ 362, 363. *We have identified FRCP, Rule 4001(d) as a particular section of the Rules that imposes a specific requirement to obtain a court order before assigning the Rodriguez loan documents. Without this and with a proper assignment in accordance with the terms and conditions of this Rule, the identity of the person or entity with a property interest in the Rodriguez note and Deed of Trust cannot be determined. It is reasonable to seek out and determine the identity and capacity and standing of any party who has a documented, enforceable interest in the Rodriguez note and Deed of Trust, see Adams v. Madison Realty & Dev. Inc., 853 F 2d 166 (3<sup>rd</sup> Cir, 1988), which states:*

*From the maker's standpoint, therefore, it becomes essential that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of title. Consequently, plaintiffs here, as makers of the notes, may properly press defendant to establish its holder status.*

10. The alleged assignee OCWEN LOAN SERVICING, LLC has attempted to avoid the consequences of the Federal Rules of Bankruptcy, Rule 4001, and Title 11, US Code § 363, because the original lender was in bankruptcy throughout the time when the Defendant OCWEN LOAN SERVICING, LLC was actively claiming to be a creditor and the lawful assignee in violation of the above statutes and court rules.

**11. There is a current assignment recorded in the county real estate records in St Louis County, but it is signed about one year after Homecomings Financial, LLC and their parent company filed a bankruptcy petition.** This violates the Federal Rules of Bankruptcy, wherein assets of a bankruptcy estate cannot be assigned or sold when there is a bankruptcy in process. In addition, it appears that the Deed of Trust was Assigned to Freddie Mac based upon the claims to ownership of the Rodriguez loan is on their website. THE ABOVE ASSIGNMENT WAS MADE IN VIOLATION OF THE FEDERAL RULES OF BANKRUPTCY AND It is important to note that the Rodriguez Note and Deed of Trust, is an asset of the bankruptcy estate of Residential Funding Company, LLC, the Parent Company of the original lender, and said loan cannot be assigned without permission from the bankruptcy Judge. Any claim that we do not have a right to litigate this matter is a violation of the due process clause of the Fourteenth

Amendment. Given the level of controversy regarding the actual identity of the creditor we clearly have a right to seek resolution of these issues under the law that governs adversary proceedings, see Federal Rules Of Bankruptcy Procedure Rule 7001, Subsections (2), (3), and (9).

12. The attorneys attempted to claim that we do not have a remedy in violation of the doctrine established by the US Supreme Court in *Bell v. Hood*, 327 US 678, which stated:

**“[I]t is established practice for [the Supreme] Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.” *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).**

**.....“injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); see also 5 U.S.C. § 702 (stating that under the Administrative Procedure Act, any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof” and may seek injunctive relief). [Emphasis added.]**

13. We. The Plaintiffs, discovered further that the US Supreme Court has affirmed the rights under the Seventh Amendment apply in matters such



as these when they stated in *Granfinanciera, S.A. v Nordberg*, 492 U.S. 33, at 42.

“The phrase ‘Suits at common law’ has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not.” *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 449 (1977) (citing *Parsons v. Bedford*, 3 Pet. 433, 7 L.Ed. 732 (1830)). **“[T]he Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.”** *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (citing *Curtis v. Loether*, 415 U.S. 189, 193 (1974)).

The form of [the Court’s] analysis is familiar. “First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.” *Tull v. United States*, 481 U.S. 412, 417–418 (1987) (citations omitted). The second stage of this analysis is more important than the first. *Id.*, at 421. If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder.

*Granfinanciera*, 492 U.S. at 42.

14. We explained to the Attorneys that there are several competing claims to ownership of the Alberto Rodriguez loan, Ocwen Loan Servicing, LLC and Freddie Mac are both claiming to be the holder-in-due-course of the Alberto Rodriguez loan. This creates double liability for the Plaintiff's which is unlawful. In addition, the loan was assigned about a year after the bankruptcy as stated above. This means that presumably Homecomings or RESCAP can claim to own the Rodriguez loan. We cannot be held liable to three different creditors for the same debt. We would like this matter resolved.

15. As we can see Ocwen Loan Servicing, LLC cannot function as if they are the assignee without violating the terms of Title 15 US Code, Section 1641 Subsection (f) which states that they cannot be treated as the owner of the loan for administrative convenience. They have also refused to identify the assignee when asked in writing.

16. Under Missouri law the Deed of Trust must be assigned and the assignment must be recorded in the county recorder's office, see RSMO § 443.350. The Loan Servicer cannot function as the assigner for administrative convenience, see Title 15 US Code, Section 1641(f). We mentioned the fact that the Defendant Ocwen Loan Servicing, LLC lacked standing to enforce the note and deed of trust

in the Adversary proceeding. This is also true of PHH Mortgage, and Bayview  
Loan Servicing, LLC.

DATED: January 3rd, 2020

By Alberto Rodriguez

Alberto Rodriguez

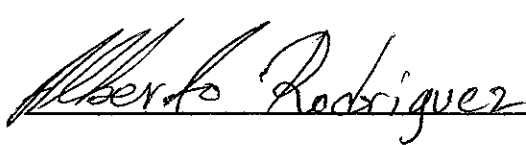
By: Maria Rodriguez

Maria Rodriguez

### VERIFICATION

We have read the **PLAINTIFF'S SUR REPLY TO THE DEFENDANT RES  
CAP LIQUIDATING TRUST'S RESPONSIVE BRIEF** and know the contents  
thereof to be true; and the same is true of our own knowledge, except to the  
matters, which are therein stated on our information and belief, and as to those  
matters, we believe them to be true. The foregoing is true, correct, complete and  
not misleading to the best of our knowledge.

Sealed by the voluntary act of our own hand on this 3rd Day of January  
2020 (date).



Alberto Rodriguez



Maria Rodriguez

PROOF OF SERVICE BY MAIL

I David Lopez, now certify that I am domiciled in the Saint Louis -county, I am over the age of eighteen years and I did in fact serve as follows: On the 3rd day of January, 2020 date, I served by mail a true copy of **PLAINTIFF'S SUR REPLY TO THE DEFENDANT RES CAP LIQUIDATING TRUST'S RESPONSIVE BRIEF**, by placing said document in an envelope postage prepaid and placing the envelope in the US mail for Case No. 19-01320 (MG) in The US BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, upon the agent of the Defendants RESIDENTIAL CAPITAL, LLC AND HOMECOMINGS FINANCIAL, LLC, located at;

MORRISON & FOERSTER, LLC  
250 WEST 55<sup>TH</sup> Street  
New York, New York 10019

7019 1120 0001 6642 6178

My mailing location is:

733 Riderwood Drive, Hazelwood Missouri, 63042

VERIFICATION

I hereby affirm all facts stated in this Proof of Service are true of my own knowledge except for those facts, which are stated upon information and belief, and as to those such matters, I believe them to be also true. On the 3rd day of January, 2020 (date).

David Lopez

NOTICE TO THE AGENT IS NOTICE TO THE PRINCIPAL NOTICE TO THE PRINCIPAL IS  
NOTICE TO THE AGENT

PROOF OF SERVICE BY MAIL

I David Lopez, now certify that I am domiciled in the Saint Louis-county, I am over the age of eighteen years and I did in fact serve as follows: On the 3rd day of January, 2020 date, **PLAINTIFF'S PROGRESS REPORT RE THE CONFERENCE BETWEEN THE PLAINTIFFS AND DEFENDANTS RESIDENTIAL CAPITAL, LLC AND HOMECOMINGS FINANCIAL, LLC, by placing said document in an envelope postage prepaid and placing the envelope in the US mail for Case No. 19-01320 (MG) in The US BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, upon the agent of the Defendants OCWEN LOAN SERVICING, LLC, located at;**

OCWEN LOAN SERVICING, LLC  
1661 Worthington Road  
West Palm Beach, Florida  
33409 7019 1120 0001 6642 6161

My mailing location is:

733 Ridewood Drive, Hazelwood Missouri, 63042

VERIFICATION

I hereby affirm all facts stated in this Proof of Service are true of my own knowledge except for those facts, which are stated upon information and belief, and as to those such matters, I believe them to be also true. On the 3rd day of January, 2020 (date).

David Lopez

NOTICE TO THE AGENT IS NOTICE TO THE PRINCIPAL NOTICE TO THE PRINCIPAL IS  
NOTICE TO THE AGENT